IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-40577

United States Court of Appeals
Fifth Circuit
FILED
February 15, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

PAUL LYNN SCHLIEVE,

Defendant - Appellant

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:07-CV-293

Before REAVLEY, SMITH, and OWEN, Circuit Judges.

PER CURIAM:*

The judgment of the district court is affirmed for the certain reasons set forth in the magistrate judge's report of August 24, 2010.

The conviction of Schlieve was affirmed by this court in 2005, and then he filed a motion under § 2255 to vacate his sentence. The only point still pursued claims that defense counsel was misled by the prosecutor about evidence on a video that would have been *Brady* material and could have been

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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suppressed had not counsel been misled. The record fully obliterates that claim, because the defense counsel had possession of the video, as did the jury. No evidence stands to support it.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

PAUL LYNN SCHLIEVE, #10930-078	§	
VS.	§	CIVIL ACTION NO. 4:07cv293 CRIM. ACTION NO. 4:03cr84(22)
UNITED STATES OF AMERICA	§	

ORDER OF DISMISSAL

This case was referred to United States Magistrate Judge Don D. Bush, who issued a Report and Recommendation concluding that the motion to vacate, set aside, or correct sentence should be denied and dismissed with prejudice. Movant has filed objections.

The Report of the Magistrate Judge, which contains his proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. Having made a *de novo* review of the objections raised by Movant to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts the same as the findings and conclusions of the Court. It would be appropriate for Movant to bring his civil rights complaints concerning confiscated legal papers to the jurisdiction in which the papers were confiscated. The court notes that Movant has not shown any prejudice in this case based upon the missing papers. It is accordingly

ORDERED that the motion to vacate, set aside, or correct sentence is **DENIED** and Movant's case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. Finally, it is

ORDERED that all motions not previously ruled on are hereby **DENIED**.

SIGNED this the 27th day of March, 2014.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

Appendix B

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REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Movant Paul Lynn Schlieve, *pro se* prisoner, filed the above-styled and numbered motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. The motion was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

Background

Movant and his co-defendants were involved in the conspiracy to manufacture and distribute methamphetamine in the North Texas area from sometime in 2000, until the time of his indictment of May 15, 2003. In various motels, apartments, and sheds, he was involved in all actions concerning the manufacture and distribution of methamphetamine, including the use of firearms.

Movant was charged in Counts 1, 22, 24, and 25 of a superseding indictment – (1) conspiracy to manufacture, distribute, or possess with intent to manufacture, distribute, or dispense methamphetamine, in violation of 21 U.S.C. § 846; (22) possession with intent to distribute or

Appendix C

dispense methamphetamine, in violation of 21 U.S.C. § 846 (a)(1); (24) the use, carrying, and possession of a firearm during and in relation to, and in furtherance of a drug trafficking crime, in violation of 21 U.S.C. § 924(c) (1); and (25) possession of an unregistered firearm, in violation of 26 U.S.C. § 586(d). On January 23, 2004, a jury convicted Movant on each of the four counts. On August 12, 2004, he was sentenced to 160 months of imprisonment. The Fifth Circuit Court of Appeals affirmed his conviction on April 17, 2006.

In his original § 2255 motion, Movant asserted eighteen grounds of relief based on due process violations. He was denied relief. However, on appeal, the Government stated that one of Movant's issues had been misconstrued. Based on this, the Fifth Court of Appeals remanded for further consideration of the one issue. The issue remanded for consideration is whether a *Brady* violation occurred: specifically, whether the videotape from Officer Edland's vehicle was properly disclosed prior to the suppression hearing, whether Movant was aware of the substance of the videotape, and whether the videotape contained favorable and material evidence. The Government filed a Response, asserting that Movant's issue is without merit. Movant did not file a Reply.

Statement of Facts

The Fifth Circuit Court of Appeals summarized the relevant facts of the case in its opinion[1] dated March 22,2006:

> On May 19, 2003, Officer James Edland, an eleven-year veteran of the Pilot Point Police Department, waited near the house of Sherry Craver's stepfather to arrest Craver on a federal warrant for conspiracy to manufacture and possess with the intent to distribute methamphetamine. While waiting for Craver, Edland saw a green Dodge pickup truck pull into the driveway.

[1]The Fifth Circuit withdrew its first opinion, *United States v. Schlieve*, 159 Fed. Appx 538, 2005 WL 3105821 (5th Cir. 2005) (unpublished), and filed the opinion dated March 22, 2006, in its place.

About fifteen minutes later, Craver arrived and Edland arrested her before she entered the house. On her way to jail, Craver stated to Edland that the truck in the driveway belonged to Gary Don Franks. Edland recalled Whitesboro, Texas police officer David Scott saying earlier that day that Franks had been cooking large batches of drugs. Upon arriving at the Whitesboro Police Department, Edland contacted Pilot Point officer Joe Morgan and ordered him to observe the house and the truck.

Edland later returned to the house, relieved Morgan, and continued surveillance because he was concerned that Franks would be there with drugs. The truck left the house around 8:45PM, and Edland followed it. After observing the truck following too closely, failing to stop at a stop sign, and speeding, he stopped the truck around 8:50. Officer Morgan arrived a minute or two later. The defendant, Paul Schlieve, was driving with a passenger, Robbie Reynolds.

Schlieve gave Edland his driver's license and a concealed gun permit. Edland ordered Schlieve to step out of the truck. Schlieve volunteered that he had a gun in his pocket and that there were other guns behind the seat of the truck. Edland took possession of the gun in Schlieve's pocket. Edland then returned to his car and ran a check on Schlieve's driver's license, which took about five minutes.[2] The check revealed no outstanding warrants.

Edland returned to the truck – now about ten minutes into the stop – and asked Schlieve why he was driving the truck. Schlieve told Edland that Franks had asked him to drive his truck to the gas station because it was almost out of gas. Edland did not believe the story because Schlieve had just passed a gas station. After realizing that Edland did not believe his story, Schlieve stated that Franks had asked him to pick up the truck because Franks was afraid to leave his house after Craver's arrest. Schlieve also denied knowing about any drugs in the truck. Edland and Morgan testified that, during this questioning, Schlieve was nervous, sweating, avoiding eye contact, and stuttering.

About twenty-five minutes after the stop[3], Edland asked to search the truck.

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> The K-9 units arrived around 10:15 or 10:30, about twenty minutes after the gun check was completed. The dog alerted to the truck, and the officers found methamphetamine and a sawed-off shotgun. They arrested Schlieve.

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Federal Habeas Corpus Relief

As a preliminary matter, it should be noted that a § 2255 motion is "fundamentally different from a direct appeal." *United States v. Drobny*, 955 F.2d 990, 994 (5th Cir. 1992). A movant in a § 2255 proceeding may not bring a broad based attack challenging the legality of the conviction. The range of claims that may be raised in a § 2255 proceeding is narrow. A "distinction must be drawn

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between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other." *United States v. Pierce*, 959 F.2d 1297, 1300-1301 (5th Cir. 1992) (*citations omitted*). A collateral attack is limited to alleging errors of "constitutional or jurisdictional magnitude." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991).

Due Process Violations

Petitioner alleges that he is entitled to relief based on due process violations. The Due Process Clause provides the guarantee of fair procedure related to a constitutionally protected interest. *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983, 108 L. Ed.2d 100 (1990). Due process guarantees that a government actor cannot deprive a person of a constitutionally protected interest in life, liberty, or property without adequate procedural protections. *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S.532, 533, 105 S. Ct. 1487, 1489, 84 L. Ed.2d 494 (1985). The key to a procedural due process claim is whether the petitioner was afforded the quantity of process to which he was constitutionally entitled prior to the deprivation of a protected interest. *Id.*

Brady Violation

The only remaining issue to be discussed is Movant's *Brady* claim. In *Brady v. Maryland*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed.2d 215 (1963). The prosecution "need not disgorge every piece of evidence in its possession . . . [but] has an affirmative duty to disclose to the defense evidence that is favorable to the accused and material to guilty." *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997). In addressing a *Brady* claim, the Fifth Circuit has explained that a defendant must prove:

(1) the prosecution suppressed evidence;

(2) the suppressed evidence was favorable to the defense; and

(3) the suppressed evidence was material to the defense.

Derden v. McNeel, 938 F.2d 605, 617 (5th Cir. 1991). The test for materiality is whether there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* The materiality of the evidence is evaluated in light of the entire record. *See Lagrone v. State*, 942 S.W.2d 602, 615 (Tex. Crim. App. 1997). The Fifth Circuit also requires that a petitioner show that "discovery of the allegedly favorable evidence was not the result of a lack of due diligence." *Rector*,120 F.3d at 558. The state does not have a duty to disclose information that is available from other sources. *Id.* at 559. Additionally, the mere possibility that a piece of information might have helped the defense does not establish materiality in the constitutional sense. *Id.* at 562.

Movant claims that the Government violated his due process rights when it withheld a second videotape recording of the traffic stop. This second videotape was taken from Officer Edland's vehicle. However, Movant is mistaken in his assertion that the videotape was withheld. The videotape from Officer Edland's patrol car was not suppressed prior to the motion-to-suppress hearing or the trial. The record reveals that, prior to the hearing on Movant's motion to suppress, DEA Agent Vic Routh delivered initial discovery to Movant's trial counsel. At the discovery meeting, Routh informed counsel that the videotape from Edland's vehicle was available for viewing. Although a disagreement exists as to whether trial counsel viewed the videotape, trial counsel acknowledged that he had been made aware of its existence. Moreover, on January 8, 2004, two weeks before trial, a complete copy of the videotape was provided to trial counsel.

Consequently, the record shows that videotape was not suppressed or withheld, and Movant and his defense counsel had the opportunity to view it prior to the suppression hearing and prior to trial. As a result, Movant is unable to meet the *Brady* requirements. This issue is without merit.

Although the inquiry may end with the failure to meet the first prong of the *Brady* requirements, the court notes that Movant is unable to meet the remaining requirements as well. The videotape had been played for the jury. The jury assessed the testimony of witnesses, watched the videotape, and heard the remaining evidence presented, including the testimony of several co-conspirator witnesses. Yet, the jury found Movant guilty. Movant also has not shown that the evidence on the videotape was material. He has not shown that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Derden,* 938 F.2d at 617.

A review of the videotape shows that nothing material was contained on it. After initially stopping the truck, the officers had Movant get out of the truck and he was patted down. He then leaned against the truck while the officers disappeared from view. At some point, it appears that he was talking on his cell phone. Around ten minutes later, the officer returned into view and stood next to Movant at the back of the truck. Twenty-four minutes into the stop, the officer put the tailgate of the truck down, searched Movant's pockets on his pants and performed another pat down. Movant then sat on the tailgate. At this point, another person walking from the front of the truck sat on the tailgate as well. This person was presumably Movant's passenger from the truck. Movant then walked to the cab of the truck with an officer. A duffel bag was brought to the bed of the truck as well as several guns. Around thirty minutes into the stop, Movant left the view of the camera to the right of the truck. Movant's passenger had also disappeared from view to the right of the truck.

Two officers looked at the items on the bed of the truck. The officers left the view of the camera, approaching the patrol car. One officer returned, looking again at the items on the bed of the truck. Approximately one hour into the stop, the angle of the camera is adjusted to show the entire rear of the truck (prior to this, only the left side of the truck was visible). An officer walked to the right of the truck and appeared to be talking to someone out of view. After a minute or so, he crossed back in front of the patrol car, disappearing from the camera's view. Shadows show that someone was walking to the right of the vehicles at various times. At one point, the camera zoomed onto an object in the bed of the truck, then zoomed out again. Another patrol car arrived, parking in front of the truck. After the driver (wearing a shirt with the #4 on it) approached and talked to the original two officers, he brought a dog to the truck. After circling the truck, the dog eventually jumped into the bed of the truck and placed his front paws on the tool box that was attached across the front of the bed of the truck. A person appearing to be Movant's passenger then sat on the front of the patrol car, blocking the camera's view of the right side of the truck. The officers opened the tool box. They removed several items from the tool box. The dog was then returned to the bed of the truck and the tool box. After returning the dog to the patrol car, the original two officers searched further. The officers removed a bag from the tool box, along with several other items. The video ended at that time.

Movant has failed to show how this videotape is relevant or material to his defense or how it can assist him in obtaining habeas relief. More importantly, the videotape was disclosed – it was not withheld or suppressed. Movant has wholly failed to meet his *Brady* burden. This issue is without merit.

Conclusion

In conclusion, Movant has failed to show that his due process rights were violated. He has failed to show a *Brady* violation. Movant has failed to show a transgression of his constitutional rights or a miscarriage of justice. *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). His motion should be denied.

Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). Although Movant has not yet filed a notice of appeal, it is respectfully recommended that this Court, nonetheless, address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04, 146 L. Ed.2d 542 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). "When a

district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Movant's § 2255 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37, 123 S. Ct. 1029, 1039, 154 L. Ed.2d 931 (2003) (citing *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604). Accordingly, it is respectfully recommended that the Court find that Movant is not entitled to a certificate of appealability as to his claims.

Recommendation

It is accordingly recommended that Movant's motion for relief under 28 U.S.C. § 2255 be denied and the case dismissed with prejudice. It is further recommended that a certificate of appealability be denied.

Within fourteen (14) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations contained in the report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto Ass'n*, 79

F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 11th day of February, 2014.

Don D. Bush

DON D. BUSH
UNITED STATES MAGISTRATE JUDGE

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Derden v. McNeel, 938 F.2d 605, 617 (5th Cir. 1991). The test for materiality is whether there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* The materiality of the evidence is evaluated in light of the entire record. *See Lagrone v. State*, 942 S.W.2d 602, 615 (Tex. Crim. App. 1997). The Fifth Circuit also requires that a petitioner show that "discovery of the allegedly favorable evidence was not the result of a lack of due diligence." *Rector*,120 F.3d at 558. The state does not have a duty to disclose information that is available from other sources. *Id.* at 559. Additionally, the mere possibility that a piece of information might have helped the defense does not establish materiality in the constitutional sense. *Id.* at 562.

Movant claims that the Government violated his due process rights when it withheld a second videotape recording of the traffic stop. This second videotape was taken from Officer Edland's vehicle. However, Movant is mistaken in his assertion that the videotape was withheld. The videotape from Officer Edland's patrol car was not suppressed prior to the motion-to-suppress hearing or the trial. The record reveals that, prior to the hearing on Movant's motion to suppress, DEA Agent Vic Routh delivered initial discovery to Movant's trial counsel. At the discovery meeting, Routh informed counsel that the videotape from Edland's vehicle was available for viewing. Although a disagreement exists as to whether trial counsel viewed the videotape, trial counsel acknowledged that he had been made aware of its existence. Moreover, on January 8, 2004, two weeks before trial, a complete copy of the videotape was provided to trial counsel.

Consequently, the record shows that videotape was not suppressed or withheld, and Movant and his defense counsel had the opportunity to view it prior to the suppression hearing and prior to trial. As a result, Movant is unable to meet the *Brady* requirements. This issue is without merit.

Although the inquiry may end with the failure to meet the first prong of the *Brady* requirements, the court notes that Movant is unable to meet the remaining requirements as well. The videotape had been played for the jury. The jury assessed the testimony of witnesses, watched the videotape, and heard the remaining evidence presented, including the testimony of several co-conspirator witnesses. Yet, the jury found Movant guilty. Movant also has not shown that the evidence on the videotape was material. He has not shown that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Derden,* 938 F.2d at 617.

A review of the videotape shows that nothing material was contained on it. After initially stopping the truck, the officers had Movant get out of the truck and he was patted down. He then leaned against the truck while the officers disappeared from view. At some point, it appears that he was talking on his cell phone. Around ten minutes later, the officer returned into view and stood next to Movant at the back of the truck. Twenty-four minutes into the stop, the officer put the tailgate of the truck down, searched Movant's pockets on his pants and performed another pat down. Movant then sat on the tailgate. At this point, another person walking from the front of the truck sat on the tailgate as well. This person was presumably Movant's passenger from the truck. Movant then walked to the cab of the truck with an officer. A duffel bag was brought to the bed of the truck as well as several guns. Around thirty minutes into the stop, Movant left the view of the camera to the right of the truck. Movant's passenger had also disappeared from view to the right of the truck.

Two officers looked at the items on the bed of the truck. The officers left the view of the camera, approaching the patrol car. One officer returned, looking again at the items on the bed of the truck. Approximately one hour into the stop, the angle of the camera is adjusted to show the entire rear of the truck (prior to this, only the left side of the truck was visible). An officer walked to the right of the truck and appeared to be talking to someone out of view. After a minute or so, he crossed back in front of the patrol car, disappearing from the camera's view. Shadows show that someone was walking to the right of the vehicles at various times. At one point, the camera zoomed onto an object in the bed of the truck, then zoomed out again. Another patrol car arrived, parking in front of the truck. After the driver (wearing a shirt with the #4 on it) approached and talked to the original two officers, he brought a dog to the truck. After circling the truck, the dog eventually jumped into the bed of the truck and placed his front paws on the tool box that was attached across the front of the bed of the truck. A person appearing to be Movant's passenger then sat on the front of the patrol car, blocking the camera's view of the right side of the truck. The officers opened the tool box. They removed several items from the tool box. The dog was then returned to the bed of the truck and the tool box. After returning the dog to the patrol car, the original two officers searched further. The officers removed a bag from the tool box, along with several other items. The video ended at that time.

Movant has failed to show how this videotape is relevant or material to his defense or how it can assist him in obtaining habeas relief. More importantly, the videotape was disclosed – it was not withheld or suppressed. Movant has wholly failed to meet his *Brady* burden. This issue is without merit.

Conclusion

In conclusion, Movant has failed to show that his due process rights were violated. He has failed to show a *Brady* violation. Movant has failed to show a transgression of his constitutional rights or a miscarriage of justice. *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). His motion should be denied.

Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). Although Movant has not yet filed a notice of appeal, it is respectfully recommended that this Court, nonetheless, address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04, 146 L. Ed.2d 542 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). "When a

district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Movant's § 2255 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37, 123 S. Ct. 1029, 1039, 154 L. Ed.2d 931 (2003) (citing *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604). Accordingly, it is respectfully recommended that the Court find that Movant is not entitled to a certificate of appealability as to his claims.

Recommendation

It is accordingly recommended that Movant's motion for relief under 28 U.S.C. § 2255 be denied and the case dismissed with prejudice. It is further recommended that a certificate of appealability be denied.

Within fourteen (14) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations contained in the report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto Ass'n*, 79

F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 11th day of February, 2014.

Don D. Bush

DON D. BUSH
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-40577

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

PAUL LYNN SCHLIEVE,

Defendant - Appellant

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 2/15/18, 5 Cir., _____, _____ F.3d _____)

Before REAVLEY, SMITH, and OWEN, Circuit Judges.

PER CURIAM:

This court's decision says it follows the reasons of the magistrate judge of August 24, 2010. This is actually for the reasons of that magistrate judge on January 6, 2014.

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the

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court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Thomas M. Reavley

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
November 30, 2012
Lyle W. Cayce
Clerk

No. 10-41279
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

PAUL LYNN SCHLIEVE,

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:07-CV-293

Before JONES, DENNIS, and HAYNES, Circuit Judges.

PER CURIAM:*

Paul Lynn Schlieve, federal prisoner # 10930-078, appeals the district court's dismissal of his 28 U.S.C. § 2255 motion, which challenged his convictions for conspiracy to manufacture, distribute, or possess with intent to manufacture or distribute methamphetamine, for possession of methamphetamine with the intent to distribute, for using, carrying, or possessing a firearm during, in relation to, or in furtherance of a drug trafficking crime, and for possession of an unregistered firearm. We previously granted a certificate of appealability on the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix E

issue whether the district court erred by dismissing Schlieve's § 2255 claim that a videotape of his traffic stop had been suppressed in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). We review the district court's factual findings for clear error and its legal conclusions de novo. *See United States v. Cavitt,* 550 F.3d 430, 435 (5th Cir. 2008).

As the Government now concedes, the district court misconstrued Schlieve's *Brady* claim and erred by finding that it could not consider the claim because it had been raised and rejected on direct appeal. Therefore, the district court made no relevant factual findings and did not address the merits of Schlieve's actual claim. We have previously remanded § 2255 cases where the district court entered only a summary denial without providing required findings of fact and conclusions of law, if the record does not conclusively show that the movant was not entitled to relief. *See United States v. Edwards,* 711 F.2d 633, 633-34 (5th Cir. 1983). Although the instant case differs from *Edwards* in that the district court's failure to provide reasons resulted from its misunderstanding of the nature of this claim, our review remains hindered by a lack of factual findings and conclusions of law. We also note that the present record does not conclusively show that Schlieve is not entitled to relief on this claim. *See Edwards,* 711 F.2d at 633-34. We conclude that the district court is best equipped to resolve any relevant factual disputes, such as whether the videotape was properly disclosed prior to a suppression hearing and whether Schlieve was aware of the substance of the videotape because he was present during the search of the vehicle, and to decide whether the videotape contained favorable and material evidence.

Therefore, the district court's dismissal of Schlieve's § 2255 motion is VACATED IN PART and this case is REMANDED to the district court for further consideration of his claim that the videotape from Office Edland's vehicle was not properly disclosed prior to the suppression hearing in violation of *Brady*.

Also, Schlieve has filed several motions on appeal. Previously, we granted the Government's motion to supplement the record on appeal; however, we now GRANT Schlieve's motion for reconsideration and DENY the Government's motion to supplement the record on appeal. Additionally, we GRANT his motion to seal a pending bail motion. However, Schlieve's motions to recompute the time to file his reply brief, for sanctions against the Government, and for release on bail all are DENIED.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

PAUL LYNN SCHLIEVE, #10930-078	§	
VS.	§	CIVIL ACTION NO. 4:07cv293 CRIM. ACTION NO. 4:03cr84(22)
UNITED STATES OF AMERICA	§	

ORDER OF DISMISSAL

The above-entitled and numbered civil action was heretofore referred to United States Magistrate Judge Don D. Bush. The Report and Recommendation of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and no objections thereto having been timely filed, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct, and adopts the same as the findings and conclusions of the Court. It is therefore

ORDERED that the motion to vacate, set aside or correct sentence is **DENIED** and the case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. It is further

ORDERED that all motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this 13th day of September, 2010.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

PAUL LYNN SCHLIEVE, #10930-078	§	
VS.	§	CIVIL ACTION NO. 4:07cv293 CRIM. ACTION NO. 4:03cr84(22)
UNITED STATES OF AMERICA	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Movant Paul Lynn Schlieve, a former prisoner, proceeding *pro se*, filed the above-styled and numbered motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. The motion was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

Background

Movant and his co-defendants were involved in the conspiracy to manufacture and distribute methamphetamine in the North Texas area from sometime in 2000, until the time of his indictment of May 15, 2003. In various motels, apartments, and sheds, he was involved in all actions concerning the manufacture and distribution of methamphetamine, including the use of firearms.

Movant was charged in Counts 1, 22, 24, and 25 of a superseding indictment – (1) conspiracy to manufacture, distribute, or possess with intent to manufacture, distribute, or dispense methamphetamine, in violation of 21 U.S.C. § 846; (22) possession with intent to distribute or dispense methamphetamine, in violation of 21 U.S.C. § 846 (a)(1); (24) the use, carrying, and possession of a firearm during and in relation to, and in furtherance of a drug trafficking crime, in

Appendix G

violation of 21 U.S.C. § 924(c) (1); and (25) possession of an unregistered firearm, in violation of 26 U.S.C. § 586(d). On January 23, 2004, a jury convicted Movant on each of the four counts. On August 12, 2004, he was sentenced to 160 months of imprisonment. The Fifth Circuit Court of Appeals affirmed his conviction on April 17, 2006.

In his § 2255 motion, Movant asserts eighteen grounds of relief based on due process violations. Specifically, he claims he is entitled to relief because:

1. The Government failed to disclose the letter written to the Texas Parole Board on Gary Don Frank's behalf;
2. The Government failed to disclose the full extent of the assistance given to Sheila Franks for her cooperation;
3. The Government failed to disclose the full extent of the assistance given to Gary Dean Meek for his cooperation;
4. The Government failed to disclose the full extent of the assistance given to Robbie Reynolds for his cooperation;
5. The Government failed to disclose the full extent of the assistance given to Jason Weaver for his cooperation;
6. The Government failed to disclose the documents recording the inventory of the search of Gary Don Franks' truck;
7. The Government failed to produce the actual bags seized during the search of Franks' truck;
8. The Government failed to produce the actual glass jar of rock salt seized during the search of Franks' truck;

9. The Government failed to disclose the documents regarding the time of Rodney Crowley's release from the Cooke County Jail on or about May 19, 2003;

10. The Government failed to disclose the second videotape recording showing the traffic stop on Schlieve;

11. The Government failed to disclose exculpatory evidence before the pre-trial motion to suppress;

12. The Government used false testimony from Gary Don Franks;

13. The Government used false testimony from Sheila Franks;

14. The Government used false testimony from Jason Weaver;

15. The Government used testimony from Sheila Franks in Violation of *Giglio*;

16. The Government used testimony from Gary Dean Meek in Violation of *Giglio*; and

17. The Government committed fraud upon the Court by inducing Gary Don Franks and Sheila Franks to commit perjury;

In his last issue, Movant asserts that he was denied his right to a fair trial based on the cumulative errors during his trial. The Government filed a Response, asserting that Movant's issues are without merit. Movant filed a Reply to the Government's Response.

Statement of Facts

The Fifth Circuit Court of Appeals summarized the relevant facts of the case in its opinion[1] dated March 22,2006:

On May 19, 2003, Officer James Edland, an eleven-year veteran of the Pilot

[1]The Fifth Circuit withdrew its first opinion, *United States v. Schlieve*, 159 Fed. Appx 538, 2005 WL 3105821 (5th Cir. 2005) (unpublished), and filed the opinion dated March 22, 2006, in its place.

Point Police Department, waited near the house of Sherry Craver's stepfather to arrest Craver on a federal warrant for conspiracy to manufacture and possess with the intent to distribute methamphetamine. While waiting for Craver, Edland saw a green Dodge pickup truck pull into the driveway. About fifteen minutes later, Craver arrived and Edland arrested her before she entered the house. On her way to jail, Craver stated to Edland that the truck in the driveway belonged to Gary Don Franks. Edland recalled Whitesboro, Texas police officer David Scott saying earlier that day that Franks had been cooking large batches of drugs. Upon arriving at the Whitesboro Police Department, Edland contacted Pilot Point officer Joe Morgan and ordered him to observe the house and the truck.

Edland later returned to the house, relieved Morgan, and continued surveillance because he was concerned that Franks would be there with drugs. The truck left the house around 8:45PM, and Edland followed it. After observing the truck following too closely, failing to stop at a stop sign, and speeding, he stopped the truck around 8:50. Officer Morgan arrived a minute or two later. The defendant, Paul Schlieve, was driving with a passenger, Robbie Reynolds.

Schlieve gave Edland his driver's license and a concealed gun permit. Edland ordered Schlieve to step out of the truck. Schlieve volunteered that he had a gun in his pocket and that there were other guns behind the seat of the truck. Edland took possession of the gun in Schlieve's pocket. Edland then returned to his car and ran a check on Schlieve's driver's license, which took about five minutes.[2] The check revealed no outstanding warrants.

Edland returned to the truck – now about ten minutes into the stop – and asked Schlieve why he was driving the truck. Schlieve told Edland that Franks had asked him to drive his truck to the gas station because it was almost out of gas. Edland did not believe the story because Schlieve had just passed a gas station. After realizing that Edland did not believe his story, Schlieve stated that Franks had asked him to pick up the truck because Franks was afraid to leave his house after Craver's arrest. Schlieve also denied knowing about any drugs in the truck. Edland and Morgan testified that, during this questioning, Schlieve was nervous, sweating, avoiding eye contact, and stuttering.

[2]The evidence does not show that Edland returned Schlieve's license. This is irrelevant, however, as we assume that Schlieve was in custody throughout the stop.

> About twenty-five minutes after the stop[3], Edland asked to search the truck. Schlieve refused consent, after which Edland told him to wait while he located a K-9 unit.
>
> Because Pilot Point did not have its own K-9 unit, Edland called Denton County around 9:20, but the county was unable to provide one. Edland then called Scott at about 9:25; Scott called fellow Denton Police Officer Junior Torres, who immediately left a softball game some 25 miles away, went home, retrieved his dog, and began driving to the scene. Edland was told that the K-9 unit was on its way. Edland told Schlieve that the K-9 unit was coming, and Schlieve and Reynolds waited, sitting in a grassy area near the cars.
>
> While waiting, the officers asked Schlieve if they could check the other guns in the truck. Schlieve agreed and removed five pistols and a rifle. Morgan ran checks on these guns starting at about 9:30[4]. It took about twenty minutes to run the checks, which eventually showed that the guns were not stolen.
>
> The K-9 units arrived around 10:15 or 10:30, about twenty minutes after the gun check was completed. The dog alerted to the truck, and the officers found methamphetamine and a sawed-off shotgun. They arrested Schlieve.

United States v. Schlieve, No. 04-41112, slip op. at 1-4 (5th Cir. March 22, 2006) (unpublished).

Testimony at Trial

At Movant's trial, numerous witnesses testified concerning his guilt. Following are the

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[3]There is a discrepancy about the timing here. Officer Edland testified that he spoke to Schlieve for a "couple" of minutes, or "five or ten minutes." From the facts that are undisputed, it appears that he talked to Schlieve for about fifteen minutes, beginning ten minutes into the stop.

[4]Schlieve contends that Morgan began running the gun check around 9:15, which would lengthen the amount of time after the weapons check was completed and before the dog arrived. This increase in time is irrelevant, as we explain later.

summation of relevant trial testimony necessary to analyze Movant's claims.

Gary Don Franks

Gary Don Franks testified at Movant's trial that he had pleaded guilty to possession with intent to distribute and dispense methamphetamine and to being a felon in possession of a firearm. His plea agreement was entered into evidence as Government's Exhibit #6. He testified that he was hoping to get a reduced sentence for his testimony against Movant. Franks stated, however, that the Government had made no promises to him that his sentence would be any less, and he understood that it was within the Court's discretion to assess his sentence. Franks conceded that he had been convicted of multiple prior felonies, had served time in prison, and had used methamphetamine since he was fifteen years old. He stated that Movant was his best friend, and that he had moved in with him after being released from jail in 2001. Franks said it was at this time that he met his wife, Sheila. He testified that he, Sheila, and Movant moved into the P2P Ranch together. During this time, he and Movant were both using methamphetamine. Movant gave Franks money for living expenses and to obtain drugs on at least thirty instances. Franks testified that there were three methamphetamine cooks at the ranch, two of which Movant paid for the materials and helped in cooking the methamphetamine. He also testified that a jar found in co-defendant Robert Loftice's shed contained "bones"[5] from an earlier methamphetamine cook.

On cross-examination, Franks testified that he met Movant in the 1980's, and that when he moved in with Movant in 2001, they were partners in a horse business. He also admitted that after

[5]"Bones" are the residue from a methamphetamine cook that contain small amounts of methamphetamine.

they were both arrested, they discussed everything concerning their cases and he did nothing about which Movant did not know. When he began his cooperation with the Government, Franks was attempting to becoming a confidential informant, but continued to cooperate when he was denied permission. He stated that he did not recall anyone discussing with him a proposed sentence or estimating his guideline sentencing range. Franks said that he was aware that the Government made a recommendation for downward departure based on his cooperation, but that his counsel cautioned him that nothing was guaranteed.

Sheila Franks

Sheila Franks, married to Gary Don Franks, testified at Movant's trial that she did not have an immunity agreement with the Government, and the Government affirmed that she was testifying without the benefit of an agreement. She said that she had a prior criminal record for "chemical charges," and that she served jail time for possession of anhydrous ammonia. Sheila conceded that she knew how to cook methamphetamine, stating that she starting using it at the age of eighteen. She affirmed that she, her husband, and Movant moved to the P2P Ranch when Franks was released from prison. She helped with the horse business, but was not a paid employee. Sheila testified that Movant came to the ranch on weekends where she witnessed him, Franks, others use methamphetamine. She testified that, after Movant was arrested, he expressly told her not to cooperate with the police. Movant also tried to get Franks to take responsibility for all of their crimes.

On cross-examination, Sheila said that she was never present when Movant spoke to police, but knew that he had handed over numerous guns to the police after he was arrested. She also testified that Movant wanted to have a giant methamphetamine cook at the ranch, and was

purchasing pills and tools for that cook.

Gary Dean Meek

At Movant's trial, Gary Dean Meek testified that he had manufactured methamphetamine in the past, and had been paid $3,000 by Movant to buy pills for cooking methamphetamine. In front of Franks, Movant personally gave the money to Meek. He stated that he did not obtain the pills for the cook. Each time Meek saw Movant, Movant confronted him about the $3,000 for the pills. Meek also said that he had witnessed Franks injecting Movant with methamphetamine. Further, he testified that he had witnessed Movant doing methamphetamine when he had visited the P2P Ranch to confront Jason Weaver about stolen jewelry.

On cross-examination, Meek testified that he did not have an immunity agreement with the Government, and that he was not under indictment in the case. He said that the Government had not promised him that he would not be indicted. He admitted to prior convictions of assault and theft.

The Government entered into a plea agreement with Meek on a prior, unrelated offense, in which it agreed not to prosecute Meek "for any offense committed in the Eastern District of Texas arising from the facts and circumstances of the charges in that case and known to the United States Attorney or derived from information by him pursuant to the plea agreement, other than the offense described in paragraph 1 of this agreement." In that case, Meek pleaded guilty to being a felon in possession of a firearm.

Robbie Reynolds

At Movant's trial, Robbie Reynolds testified that he was currently serving time in jail on a state charge, and that he had served previous jail time for other state charges. He stated that he had no federal charges pending against him, and that he was not indicted in Movant's case. He testified

that he had used methamphetamine before, and that he was with Movant when Movant was arrested in Franks' truck. Reynolds said that he had been dropped off at Michael Tischler's house because he wanted to borrow some fishing poles. He said that he had fishing and camping gear with him because he had planned on camping at the lake for several days. He rode with Franks to Loftice's house in Franks' truck. Reynolds testified that Loftice and Franks talked about a methamphetamine cook that had occurred in Loftice's storage shed. He said that Franks went into the shed and then came out with a square tupperware container that contained some type of rock salt substance. Reynolds testified that both Franks and Loftice referred to the substance as "bones." Later, Franks asked Reynolds to bring the container into Loftice's house, where Loftice was washing items used in the cook to get rid of evidence. Reynolds brought the container into Loftice's house in a cloth bag. He testified that, eventually, Franks told Movant to leave in his truck and instructed Reynolds to go with him. Franks gave the cloth bag containing the jar to Reynolds to take with him. During the trial, Reynolds positively identified the container from Government's Exhibit #17.

Jason Weaver

Jason Weaver testified that he was currently serving jail time for distribution of methamphetamine and was named a co-conspirator in Movant's case. He stated that he pleaded guilty pursuant to a written plea agreement, and the agreement was admitted into evidence as Government's Exhibit #2.

Weaver testified that he met Movant through Franks, and that he was familiar with the methamphetamine cooking process, and had used methamphetamine on many occasions. He testified that he cooked methamphetamine at the P2P Ranch, and while doing so, Movant carried a weapon and kept a lookout. During this particular cook, some of the persons present, including

Movant, started discussing the idea of a large methamphetamine cook. Weaver said that he witnessed Franks inject Movant with methamphetamine. He admitted that he had been convicted of other crimes, had spent time in prison, and was hoping for a sentence reduction for his cooperation. He stated that no one had made promises to him, and he understood it was within the Court's discretion to decide his sentence.

On cross-examination, Weaver said that he knew it was possible that the Court could reduce his sentence based on his cooperation, and that he had discussed this possibility with his attorney. He testified that he had been sentenced to 120 months of imprisonment, and that no one had discussed the possibility of the Government filing a Rule 35 motion on his behalf. Weaver admitted that he also had several state charges pending against him.

Robert Loftice

At Movant's trial, Robert Loftice testified that he believed that Franks had found a glass jar with methamphetamine "bones" in his shed. He said that, although Franks promised that he would get rid of that evidence, he failed to do so.

Officer Edland

At Movant's trial, Officer Edland testified that, on May 19, 2003, he stopped Movant, who was driving Franks' truck. After Movant denied Edland permission to search the truck, Edland requested that a K-9 unit be sent to search for possible narcotics. Movant gave Edland permission to search a brown bag containing several firearms. Once the K-9 unit arrived, the dog alerted on the truck. Edland then searched the truck for narcotics and found a blue vinyl duffle bag with another plastic bag containing a large amount of methamphetamine. He also identified Government's Exhibits #16 and #17 – photographs of everything seized from Franks' truck on May 19, 2003. On

cross-examination, he reviewed the offense report labeled Defendant's Exhibit #2, and stated that the methamphetamine bag was found inside a red bag, which was inside the blue vinyl duffle bag.

Post-Trial Statements

Gary Don Franks

In a written statement dated January 20, 2006, Franks attempts to recant much of his sworn trial testimony. In this statement, Franks claims that much of the offense conduct in this case was the result of his cooperation with "dirty cops." He states that his cooperation with law enforcement was a scam so that he could get involved with other methamphetamine users that never would have associated with him otherwise. Franks says that he believed when the Prosecutor wrote the letter on his behalf to the Texas Parole Board, he would not have to go back to jail. He claims that he received no benefit from the $3400 paid to Sheila Franks by the FBI. Franks further states that he was prevented at Movant's trial from testifying that his and Movant's drug activity was actually part of a law enforcement effort to bust "dirty cops." He claims that his indictment in the federal drug case was really about the embarrassment of the drug task force over a murder case in which Franks was a suspect.

Sheila Franks

In a written statement dated September 30, 2006, Sheila Franks also attempts to recant her sworn trial testimony. She alleges that the Government told her that they would not prosecute her if she testified against Movant. She claims that, although she never received this agreement in writing, she understood it to be legally binding. She also claims that she was instructed by law enforcement not to testify to any cooperation given by Movant or she would not get the benefit of any agreements with the Government. Sheila also wrote a letter to United States District Judge

Richard A. Schell, dated December 12, 2005. In this letter, she states that she was paid $3400 by the Government for her testimony against Movant. She recants her sworn trial testimony by saying that she knew Movant had cooperated with law enforcement by providing labs, fugitives from justice, and guns that had been purchased by Movant. She also contradicts her sworn trial testimony by saying that Franks and Movant did not know any persons involved with methamphetamine. She claims that she was the only link between these persons involved with methamphetamine and Franks and Movant. She also contradicts her sworn trial testimony by claiming in another statement, dated February 20, 2007, that she was present when Franks and Movant met with law enforcement at the Ramada Inn in Gainesville, Texas, in June, 2003.

Jerry B. Davis

In a written statement dated June 26, 2006, Jerry Davis states that he is a private investigator retained by Movant. He says that he first became aware of the arrest of Rodney Lewis Crowley when Scott testified at a suppression hearing in Movant's trial held on November 25,2003. Davis states that Scott testified that he had received information from Crowley concerning Franks while transporting Crowley from Gainesville to Whitesboro, Texas. Davis states that he attempted to obtain the book-in and release times of Crowley in the Cooke County Jail. However, Davis claims that the Sheriff's Department indicated that DEA Agent Victor Routh prohibited them from divulging that information. Davis also contends he tried to obtain this information again in 2006, but that no record existed of Crowley being detained on May 19, 2003.

Federal Habeas Corpus Relief

As a preliminary matter, it should be noted that a § 2255 motion is "fundamentally different from a direct appeal." *United States v. Drobny*, 955 F.2d 990, 994 (5th Cir. 1992). A movant in a

§ 2255 proceeding may not bring a broad based attack challenging the legality of the conviction. The range of claims that may be raised in a § 2255 proceeding is narrow. A "distinction must be drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other." *United States v. Pierce*, 959 F.2d 1297, 1300-1301 (5th Cir. 1992) (*citations omitted*). A collateral attack is limited to alleging errors of "constitutional or jurisdictional magnitude." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991).

Due Process Violations

Petitioner alleges that he is entitled to relief based on numerous instances of due process violations. The Due Process Clause provides the guarantee of fair procedure related to a constitutionally protected interest. *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983, 108 L. Ed.2d 100 (1990). Due process guarantees that a government actor cannot deprive a person of a constitutionally protected interest in life, liberty, or property without adequate procedural protections. *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S.532, 533, 105 S. Ct. 1487, 1489, 84 L. Ed.2d 494 (1985). The key to a procedural due process claim is whether the petitioner was afforded the quantity of process to which he was constitutionally entitled prior to the deprivation of a protected interest. *Id.*

Brady Violations

In *Brady v. Maryland*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed.2d 215 (1963). The prosecution "need not disgorge every piece of evidence in its possession . . . [but] has an affirmative duty to disclose to the defense evidence that is favorable to the accused and material to

guilty." *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997). In addressing a *Brady* claim, the Fifth Circuit has explained that a defendant must prove:

(1) the prosecution suppressed evidence;

(2) the suppressed evidence was favorable to the defense; and

(3) the suppressed evidence was material to the defense.

Derden v. McNeel, 938 F.2d 605, 617 (5th Cir. 1991). The test for materiality is whether there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* The materiality of the evidence is evaluated in light of the entire record. *See Lagrone v. State*, 942 S.W.2d 602, 615 (Tex. Crim. App. 1997). The Fifth Circuit also requires that a petitioner show that "discovery of the allegedly favorable evidence was not the result of a lack of due diligence." *Rector*, 120 F.3d at 558. The state does not have a duty to disclose information that is available from other sources. *Id.* at 559. Additionally, the mere possibility that a piece of information might have helped the defense does not establish materiality in the constitutional sense. *Id.* at 562.

Undisclosed Letter to Texas Parole Board

The Prosecutor agreed to inform the Texas Parole Board of Gary Don Franks' cooperation, and did so. To be a *Brady* violation, Movant must show that the failure to disclose such letter was material to his case. Franks testified that he was a convicted felon, had been on methamphetamine since he was fifteen years old, and had served time in prison on various occasions. Next, Franks testified that he had a plea agreement with the Government and was hoping for a reduced sentenced based on his cooperation. This plea agreement was admitted into evidence, showing the jury that Franks had already received benefits from the plea because the agreement showed that the

Government agreed to dismiss Counts 1 and 25 against him if he cooperated. The fact that he was receiving an additional benefit for his cooperation would have had a marginal impact, at best, on his credibility. Moreover, the testimony given by Franks concerning Movant's guilt was corroborated by numerous other witnesses. In essence, Movant has not show that there was a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Derden*, 938 F.2d at 617. Thus, there is no Fifth Amendment violation to due process rights under *Brady* because the evidence allegedly withheld was not material to Franks' credibility. *Id.*

Undisclosed Cash Payments to Sheila Franks

Movant next contends that his rights to due process were violated under *Brady* because the Government failed to disclose its cash payments to Sheila Franks. The Assistant United States Attorney (AUSA) states that there were no payments made to Sheila Franks in connection with Movant's trial. FBI Special Agent Douglas Whitten submitted an affidavit stating that payment to Sheila Franks was made based on her cooperation that led to the arrest and prosecution of several different individuals, and was not made to her until several months following Movant's trial. She received a total of $3400 from the FBI for her assistance as a cooperating witness. Her first payment of $2400 was received in September, 2004, and her second payment of $1000 was received in August 2005. Movant's trial was conducted in January, 2004. Whitten attested that Sheila Franks "was opened as a cooperating witness on August 31, 2004." The payment to her was for services rendered between August 31, 2004, and September 8, 2004. It would not have been possible to disclose payments that had neither been made nor promised prior to Movant's trial. The evidence fails to show that promises of either payment or non-prosecution had been made to Sheila Franks

as it concerned Movant. He has failed to show that the prosecution suppressed material evidence favorable to his defense that was known to it prior to trial. *Derden*, 938 F.2d at 617. He has not shown that there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* Thus, there is no Fifth Amendment violation to due process rights under *Brady* because the evidence allegedly withheld was not disclosable prior to Movant's trial. " *Id.*

Failure to Disclose Assistance Given to Gary Dean Meek

Movant claims that his rights to due process were violated because the Government failed to disclose the true nature and extent of assistance given to Gary Dean Meek in exchange for his testimony at Movant's trial. Specifically, he asserts that Meek had a limited immunity agreement, the postponement of his trial was so that he could receive a downward adjustment pursuant to United States Sentence Guideline Manual (USSG) § 5K1, and the Government failed to correct false testimony given by Meek.

The Fifth Circuit has held that evidence is not suppressed for *Brady* purposes if the defendant knows or should know of the essential facts that would enable him to take advantage of it. *United States v. Runyan*, 290 F.3d 223, 244-45 (5th Cir. 2002). The Government is not required to facilitate the compilation of exculpatory evidence that, with some diligence, defense counsel could obtain on its own. *Id.* at 246. When information is fully available to a defendant at the time of his trial and his only reason for not obtaining and presenting the evidence to the court is his lack of reasonable diligence, the defendant has no *Brady* claim. *United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997).

In the instant case, it was a matter of public record that Meek had signed a plea agreement

in another case, in which he agreed to cooperate in return for the Government's agreement to request a reduction in his offense level. Movant could have accessed these records with some diligence. Movant has failed to show entitlement to a *Brady* claim. *Id.* Furthermore, Meek gave potentially incriminating evidence by stating that he was involved with Movant's plans to cook methamphetamine and admitting that he knew how to do so. He also testified that he had prior felony convictions. As a result, the information that he was cooperating pursuant to a plea agreement in a different case would have had only a marginal effect on the jury's credibility assessment. He has not shown that there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Derden*, 938 F.2d at 617. Thus, there is no Fifth Amendment violation to due process rights under *Brady* because the evidence allegedly withheld was not material to Meeks' credibility. *Id.*

Undisclosed Benefits Given to Robbie Reynolds

Movant claims that his rights to due process were violated by the non-disclosure of the true nature and extent of the benefits given to Robbie Reynolds for his cooperation. Specifically, Movant asserts that the Government failed to disclose that it agreed to drop the indictment against Reynolds in exchange for his cooperation.

At Movant's trial, Reynolds testified that he did not have any federal charges pending against him and that he was not indicted in Movant's case. Neither the indictment nor the superseding indictment listed Reynolds as a co-defendant. Movant presents no evidence in support of his claim that Reynolds had been indicted or that such indictment was dismissed based on his cooperation. Movant provides no evidence of an agreement between Reynolds and the Government. Furthermore, Movant has failed to show that the alleged suppressed evidence was material under *Brady*. When

the reliability of a government witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting the credibility of the government witness falls under *Brady*. *United States v. Williams*, 343 F.3d 423, 439 (5th Cir. 2003). In this case, the reliability of Reynolds would not be solely determinative of the guilt or innocence of Movant. The Government presented numerous witnesses that all gave evidence of Movant's guilt. Thus, Movant has not shown that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Derden*, 938 F.2d at 617.

Failure to Disclose Assistance Given to Jason Weaver

Movant claims that his rights to due process were violated because the Government withheld evidence that Jason Weaver had received a sentence reduction for his cooperation in Movant's case. However, he has provided no evidence that the Prosecution suppressed or withheld evidence that was both favorable and material to Movant's defense, in violation of *Brady*. *Jackson v. Johnson*, 194 F.3d 641, 648 (5th Cir. 1991). Weaver testified that he had a plea agreement with the Government, but that he had not been promised a sentence reduction in exchange for his cooperation. He also said he understood it was in the Court's discretion to determine his sentence. This testimony is consistent with Weaver's plea agreement wherein the Government agreed to file a motion for reduction of sentence of he cooperated. Weaver's plea was admitted into evidence at Movant's trial. He has failed to show that the Government suppressed *Brady* evidence. *Id.* He has also failed to show that any allegedly suppressed evidence was material. The jury was already aware that Weaver could receive a reduction in sentence for his cooperation. Thus, any evidence that he might have already benefitted would have had only a marginal effect on his credibility as a witness. Furthermore, his testimony was corroborated by numerous other witnesses. Consequently, any alleged suppression

concerning benefits receive by Weaver is not material. *Derden*, 938 F.2d at 617.

Failure to Disclose Inventory of Franks' Truck

Movant claims that his rights to due process were violated because the Government suppressed the inventory of items found in Franks' truck. Specifically, he claims the inventory list could have possibly been used to impeach Reynolds' credibility.

Movant first fails to show that the evidence was suppressed. *Jackson*, 194 F.3d at 648. The Government is not required to facilitate the compiling of exculpatory evidence that, had counsel engaged in some diligence, could have found on his own. *Runyan*, 290 F.3d at 246. Furthermore, the offense report containing the list of items seized from Franks' truck was given to Movant's counsel prior to trial. The offense report was admitted into evidence and used during cross-examination of Edland. Movant has failed to show that the evidence was suppressed for *Brady* purposes. Additionally, Reynolds testified to being incarcerated on state charges at the time of Movant's trial, having served time in jail for prior offenses, and to being a methamphetamine user. He also testified to having fishing and camping gear at Tischler's house and that he had planned on going camping when he was picked up by Franks and eventually taken to the Loftice house. Even if Movant would have presented evidence showing that no fishing or camping gear was in Franks' truck at the time of Movant's arrest, it would have been marginal to the jury's assessment of Reynold's credibility. Furthermore, the Government presented numerous witnesses who testified as to Movant's guilt. Thus, Movant has failed to show how the alleged suppressed evidence was material to a *Brady* claim. *Derden*, 938 F.2d at 617.

Non-Production of the Actual Bags Seized from Franks' Truck

Movant also asserts that his due process rights were violated when the Government failed

to produce the actual bags seized during the inventory search of Franks' truck. Under *Brady*, Movant must establish that the prosecution suppressed or withheld evidence that was favorable and material to his defense. *Jackson*, 194 F.3d at 648. This rule applies only to impeachment and exculpatory evidence. *United States v. Nixon*, 881 F.2d 1305, 1308 (5th Cir. 1989). Neutral or inculpatory evidence does not fall within the *Brady* rule. *Id.*

The Court has already noted that the Government provided Movant's counsel with the offense report, which listed the items seized from the truck. Accordingly, he fails in showing that any evidence was suppressed. He claims that, because the testimony concerning the color and size of the bags presented by several different witnesses was inconsistent, presentation of the actual bags would have assisted the jury in their assessment of the facts and could be used to discredit the testimony of witnesses. However, the jury was shown pictures of the bags as well as a description of the items. Having the actual bags presented in court would have merely been cumulative on the jury's credibility assessment of the various trial witnesses. *Id.* Movant has failed to show suppression or materiality. *Jackson*, 194 F.3d at 648; *Derden*, 938 F.2d at 617.

Non-Production of the Jar

Movant claims that his rights to due process were violated because the Government failed to produce during trial a jar that had been seized from Franks' truck. He asserts, specifically, that if the Government had produced the actual jar, it could have been used to impeach the testimony of Loftice, Reynolds, and Franks.

Again, Movant has failed to show that the Government withheld or suppressed evidence or that was favorable and material to his defense. *Jackson*, 194 F.3d at 648.The offense report, which listed everything seized from the truck, described the contents of the jar as rock salt. Thus, although

the actual jar was not presented at trial, Movant was on notice of the existence of the jar, and could have requested the jar be turned over to him. He also fails to show that the allegedly undisclosed evidence was material. Movant claims that, had the jar been turned over to him, he could have had it tested and would have been able to prove that it did not contain methamphetamine. Movant asserts that, with this jar, he would have been able to impeach Reynolds, Loftice, and Franks, who said that the jar contained the "bones" from a methamphetamine cook. As noted above, however, the Government is not required to facilitate the compiling of exculpatory evidence that, had counsel engaged in some diligence, could have obtained on his own. *Runyan*,290 F.3d at 246. However, the offense report describes the contents of the jar as rock salt, and the Government did not contest this at trial.

Moreover, testimony given by Loftice, Reynolds, and Franks, was not, by itself, determinative of Movant's guilt or innocence. When the reliability of a certain witness may be determinative of guilt or innocence, the nondisclosure of evidence that affects the credibility such witness falls under *Brady*. *Williams*, 343 F.3d at 439. Numerous other witnesses testified that Movant was guilty. Furthermore, the Government did not assert that the jar contained methamphetamine. The Government forensic chemist testified that she tested Government's Exhibits #13 and #14, which she had received in plastic bags – not in a jar. Edland testified that he found methamphetamine inside a plastic bag that was contained inside a blue vinyl duffle bag. Movant has failed to show how the alleged non-disclosure of the jar was material to the credibility of Reynolds, Loftice, and Franks. *Jackson*, 194 F.3d at 648; *Derden*, 938 F.2d at 617.

Non-Production of Documents Concerning Rodney Crowley's Release from Jail

Movant claims that his rights to due process were violated because the Government refused

to produce a record establishing the time and date that Rodney Crowley was released from the Cooke County Jail on May 19,2003. Specifically, Movant claims that he would have been able to impeach Edland at his suppression hearing by showing that Edland could not have received a tip from Scott concerning Franks' involvement with methamphetamine users because Crowley was still in custody.

Movant has failed to show that the Government withheld evidence in violation of *Brady*, that was both favorable and material to his defense. *Jackson*, 194 F.3d at 648. In support of his claim, Movant presented an unauthenticated and uncorroborated statement by Davis claiming that he was unable to obtain any information on Crowley's detention on May 19, 2003. However, this statement fails to show that the Government withheld such evidence. *Id.* After filing his federal § 2255 motion, Movant has since obtained the book-in and release report from Cooke County Jail concerning Crowley. The report shows that Crowley was booked in at 2:15pm and released to federal authority at 5:56pm on May 19, 2003.

The Fifth Circuit has held that a Fourth Amendment claim is barred on collateral review if a petitioner has had a full and fair opportunity to litigate his claim in pre-trial proceedings and on direct appeal. *United States v. Ishamel*, 343 F2.d 741, 742 (5th Cir. 2003). In Movant's direct appeal, the Fifth Circuit ruled that Edland had reasonable suspicion to continue his detention of Movant because of suspicious circumstances arising during the encounter. *Schlieve*, No. 04-41112, slip op. at 11. "Section 2255 may not be used to secure a second direct appeal. . . . [An issue] may not be resurrected and urged anew; it is a thing adjudged and definitively resolved" once disposed of on direct appeal. *United States v. McCollum*, 664 F.2d 56, 59 (5th Cir. 1981). Movant asserts that he would use the alleged withheld evidence to show whether Edland had reasonable suspicion to continue the traffic stop. Even if he could relitigate this claim, such evidence would have merely

been cumulative to the jury's assessment of Edland's credibility because numerous witnesses testified as to Movant's guilt. *Derden*, 938 F.2d at 617. Thus, the alleged withheld evidence is not material because it is not determinative of Movant's guilt or innocence. *Id.*

Non-Disclosure of the Video Tape Recording of the Traffic Stop

Movant claims that the Government violated his due process rights when it withheld the second video tape recording of the traffic stop. It is well-settled that an issue that has been decided on direct appeal cannot be raised again on collateral review. *McCollum*, 664 F.2d at 59. An issue may not be "resurrected and urged anew; it is a thing adjudged and definitively resolved" once disposed of on direct appeal. *Id.* The Fifth Circuit, in Movant's direct appeal, held that the loss or destruction of the alleged second video tape of the traffic stop did not violate the Jencks Act or *Brady*. *Schlieve*, No. 04-41112, slip op. at 12. Because this issue was raised on direct appeal and considered and ruled upon by the Fifth Circuit, it is barred from collateral review. *McCollum*, 664 F.2d at 59.

Failure to Disclose Brady Evidence Before the Motion to Suppress

Movant asserts that his rights to due process were violated when the Government did not disclose exculpatory evidence prior to his motion to suppress. Specifically, he claims that Edland could not have a received a tip from David Scott about Franks because the alleged withheld evidence and information from other sources show that Edland could not have overheard a conversation between Crowley and Scott in Whitesboro, Texas.

As discussed above, the Fifth Circuit, in Movant's direct appeal, held that Edland had reasonable suspicion to extend the traffic stop based on multiple factors – not just the tip Edland received about Franks. *Schlieve*, No. 04-41112, slip op. at 9-11. Because this issue was raised on

direct appeal and considered and ruled upon by the Fifth Circuit, it may not be raised again on collateral review. *McCollum*, 664 F.2d at 59.

Use of Perjured Testimony

The Fifth Circuit dealt with the issue of perjury in *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002). A petitioner must prove that the prosecution knowingly presented or failed to correct materially false testimony during trial. *Id.* at 337. Due process is not implicated by the prosecution's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured; it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements. *Id.* Perjury is not established by mere contradictory testimony from witnesses, inconsistencies within a witness' testimony and conflicts between reports, written statements, and the trial testimony of prosecution witnesses. *Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990). Furthermore, alleged perjured testimony must be material. *Carter v. Johnson*, 131 F.3d 452, 458 (5th Cir. 1997). To be material, a petitioner must show that there is a reasonable likelihood that the perjured testimony could have affected the jury. *Id.*

Use of Testimony from Gary Don Franks

Movant claims that Gary Don Franks provided false testimony when he stated that his plea agreement was not a motivating factor for him to testify at Movant's trial, and the Government failed to correct that testimony. However, Movant has not shown that Franks provided perjured testimony that the Government knew was false. Conclusory claims are insufficient to entitle a habeas corpus petitioner to relief. *United States v. Woods*, 870 F.2d 285, 288 (5th Cir. 1989); *Schlang v. Heard*, 691 F.2d 796, 7 99 (5th Cir. 1982). Even if Franks intentionally provided false testimony concerning the

letter to the Texas Board of Parole, the agreement was not material to his credibility. The introduction of a marginal additional benefit would not have had a reasonable likelihood to affect the jury's assessment of Franks' credibility given his testimony concerning his prior convictions, drug use, and revelation that he was hoping to receive a reduced sentence for his cooperation. Movant has failed to show that there is a reasonable likelihood that the alleged perjured testimony could have affected the jury. *Carter*, 131 F.3d at 458.

Use of Testimony from Sheila Franks

Movant asserts that Sheila Franks testified falsely when she did not state that Movant's sole purpose in being involved with methamphetamine was to cooperate with law enforcement and when she said that she was not present when Movant met with law enforcement. He also claims that she testified falsely concerning his plan to have a methamphetamine cook at the P2P Ranch.

Sheila Franks testified at trial that she was never present when Movant talked to police. She also testified that Movant told her not to cooperate with law enforcement. Formal declarations in open court carry with them a strong presumption of truth. *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629, 52 L. Ed.2d 136 (1977). In a written statement, dated February 20, 2007, Sheila Franks contradicted her sworn trial testimony by saying that she was present when Gary Don Franks and Movant met with law enforcement at the Ramada Inn in Gainesville, Texas in June, 2003. Movant provides only the Franks's unauthenticated and uncorroborated post-trial statements in support of his position. A strong presumption of verity is afforded statements made under oath in open court. *United States v. Lampazianie*, 251 F.3d 519, 524 (5th Cir. 2001). Even if this Court believed that she perjured herself at Movant's trial, Movant has not met his burden in showing that the Government knowingly used such perjured testimony. *Kutzner*, 303 F.3d at 337.

Movant also fails to provide evidence that he was acting as part of a cooperative team with law enforcement. Furthermore, many of the other witnesses testified that Movant wanted to organize a large methamphetamine cook. He has failed to meet his burden in showing that the Government knowingly used perjured testimony. *Id.*

Use of Testimony from Jason Weaver

Movant claims that his due process rights were violated because Jason Weaver falsely testified when he stated that he had no knowledge that the Government would file a Rule 35 motion on his behalf, and the Government failed to correct the false testimony.

Weaver testified that he had entered a plea of guilty pursuant to a written plea agreement. This agreement was admitted into evidence. The agreement detailed the fact that the Government agreed to file a Rule 35 motion for sentence reduction in Weaver's case if he cooperated. Weaver also admitted to being a convicted co-conspirator in Movant's case, to being a methamphetamine user, and to serving jail time for prior criminal convictions. While Weaver did not specifically say that he might receive a benefit for his testimony, the jury was aware of the plea agreement that stated he might receive a benefit. Movant has not shown that the prosecution knowingly allowed false testimony to be presented or that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Kutzner*, 303 F.3d at 337; *Derden*, 938 F.2d at 617.

Testimony from Sheila Franks Allegedly Violative of Giglio

Movant next claims that his right to due process were violated under *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed.2d 104 (1972), because Sheila Franks testified falsely that she did not have an immunity agreement with the Government, and the Government then failed to

correct her testimony.

The United States Supreme Court held that for a petitioner to prevail on a claim that the prosecution knowingly allowed false testimony to be presented at trial, the petitioner must prove that the statement was actually false and that the prosecution knew that it was false. *Id.*, 405 U.S. at 153-54, 92 S. Ct. at 766. Furthermore, where the Government's case depends almost entirely on the testimony of one witness who was not indicted, and without such testimony, there could have been no indictment and no evidence to carry the case to the jury, the credibility of that witness is material to the issues in the case, any understanding or agreement as to future prosecution would be relevant to the credibility of that witness. *Id*, 405 U.S. at 154, 92 S. Ct. at 766.

In the present case, Movant submits a contradictory post-trial statement by Sheila Franks that is unauthenticated and uncorroborated as support for his claim. At Movant's trial, both Sheila Franks and the Government stated that there was no agreement about which she could testify. Formal declarations in open court carry with them a strong presumption of truth. *Blackledge*, 431 U.S. at 74, 97 S. Ct. at 1629. Furthermore, the Fifth Circuit has held that even if a witness believed that she had immunity in exchange for her agreement to testify, the Government was under no duty to disclose this to the jury when there was no such immunity agreement. *See Hill v. Johnson*, 210 F.3d 481, 485-86 (5th Cir. 2000). Movant has failed to show that the Government allowed false testimony at trial. *Giglio*, 405 U.S. at 153-54, 92 S. Ct. at 766. Sheila Franks was only one of many witnesses who testified for the Government concerning Movant's guilt. The Government also presented extensive physical evidence such as methamphetamine and firearms found in Movant's possession upon his arrest. Accordingly, the testimony given by Sheila Franks does not meet the requirements established in *Giglio* that the indictment and the Government's case be almost entirely

dependent on her testimony. *Id.*

Testimony from Gary Dean Meek Allegedly Violative of Giglio

Movant also asserts that Gary Dean Meek testified falsely regarding an agreement to testify for the Government. As discussed above, *Giglio* requires a showing that the prosecution knowingly allowed false testimony to be presented at trial. *Id.* Movant has presented no evidence that Meek provided false testimony concerning an agreement with the Government. On cross-examination, Meek stated that he did not have an agreement with the Government to testify in Movant's case, that he had not been indicted in Movant's case, and that he had not been told that he would not be indicted in Movant's case. Formal declarations in open court carry with them a strong presumption of truth. *Blackledge*, 431 U.S. at 74, 97 S. Ct. at 1629. A review of Meek's plea agreement shows that the Government agreed not to prosecute Meek for any charge in the Eastern District of Texas arising from the case in which he was pleading guilty – a case not connected to Movant's case. Movant has failed to meet his burden showing that Meek's testimony was false. *Giglio*, 405 U.S. at 153-54, 92 S. Ct. at 766. Furthermore, the use of Meek's allegedly false testimony fails to meet the *Giglio* requirements as the Government's case did not rest solely on his testimony. *Id.*, 405 U.S. at 154, 92 S. Ct. at 766.

Movant also fails to show that the allegedly false testimony was material. Meek admitted to being involved in the conspiracy to manufacture methamphetamine at the P2P Ranch, having prior felony convictions, and knowing how to cook methamphetamine. The comparatively benign information concerning a plea agreement in an unrelated case would not have had a reasonable likelihood to affect a jury. *Derden*, 938 F.2d at 617. Movant has not shown that there was a "reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different." *Id.* The Government presented numerous witnesses testifying as to Movant's guilt. Thus, there is also no Fifth Amendment violation to due process rights under *Brady* because the evidence allegedly withheld was not material to Meeks' credibility. *Id.*

Prosecutor's Alleged Fraud Upon the Court

Movant claims that his due process rights were violated when the Prosecutor warned Sheila and Gary Don Franks that if they testified to the whole truth about the "dirty cops," she would not file a motion asking the trial court to grant a downward departure when sentencing Gary Don Franks.

To establish fraud on the court, a movant is required to show an "unconscionable scheme or plan [that] is designed to improperly influence the court in its discretion." *Fierro v. Johnson*, 197 F.3d 147, 154 (5th Cir. 1999). Generally, only the most egregious conduct will satisfy this standard. *Id.* Examples of egregious conduct include bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated. *Id.* Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not typically rise to the level required to be considered fraud on the court. *Id.*

The AUSA vehemently denies any fraud upon the Court. Moreover, Movant presents no evidence of such fraud other than unauthenticated and uncorroborated post-trial statements by Sheila and Gary Don Franks. These statements directly contradict their sworn trial testimonies given at Movant's trial. Formal declarations in open court carry with them a strong presumption of truth. *Blackledge*, 431 U.S. at 74, 97 S. Ct. at 1629. Movant has not shown that the Prosecutor bribed a judge or a member of the jury, or that he fabricated evidence. He has failed to show that the Prosecutor engaged in egregious conduct as described in *Fierro*. 197 F.3d at 154. As a result, even

if Movant's allegation was true, such an allegation would not constitute fraud on the Court. *Id.*

Cumulative Error

Movant finally asserts that the cumulative effect of his due process violations entitles him to a new trial. Federal relief is available only for cumulative errors that are of constitutional dimension. *Livingston v. Johnson*, 107 F.3d 297, 309 (5th Cir. 1997). This Court has considered each of Movant's claims, and found them to be without merit. Alleged errors that did not occur can have no cumulative effect. *United States v. Moye*, 951 F.2d 59, 63 n. 7 (5th Cir. 1997). Accordingly, a claim of cumulative error must fail in this case. *Id.*

Conclusion

In conclusion, Movant has failed to show that his due process rights were violated or that the cumulative effect of any alleged errors entitle him to a new trial. Movant has failed to show a transgression of his constitutional rights or a miscarriage of justice. *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). His motion should be denied.

Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). Although Movant has not yet filed a notice of appeal, it is respectfully recommended that this Court, nonetheless, address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues

the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04, 146 L. Ed.2d 542 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Movant's § 2255 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37, 123 S. Ct. 1029, 1039, 154 L. Ed.2d 931 (2003) (citing *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604). Accordingly, it is respectfully recommended that the Court find that Movant is not entitled to a certificate of appealability as to his claims.

Recommendation

It is accordingly recommended that Movant's motion for relief under 28 U.S.C. § 2255 be denied and the case dismissed with prejudice. It is further recommended that a certificate of

appealability be denied.

Within fourteen (14) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations contained in the report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United States Auto Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

Further, matters relating to the Franks' conduct should be referred to the United States Attorney to determine whether additional action is warranted against any party or witness to these proceedings.

SIGNED this 24th day of August, 2010.

Don D. Bush

DON D. BUSH
UNITED STATES MAGISTRATE JUDGE

United States Court of Appeals
Fifth Circuit
FILED
March 22, 2006
Charles R. Fulbruge III
Clerk

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-41112

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PAUL LYNN SCHLIEVE,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(USDC No. 4:03-CR-84-RAS-22)

Before HIGGINBOTHAM, WIENER, and DENNIS, Circuit Judges.

PER CURIAM:*

Paul Lynn Schlieve appeals his conviction on federal drug charges. We substitute this opinion for our original[1] and affirm.

I

A

On May 19, 2003, Officer James Edland, an eleven-year veteran of the Pilot Point Police Department, waited near the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] 2005 WL 3105821 (5th Cir. 2005).

Appendix H

house of Sherry Craver's stepfather to arrest Craver on a federal warrant for conspiracy to manufacture and possess with the intent to distribute methamphetamine. While waiting for Craver, Edland saw a green Dodge pickup truck pull into the driveway. About fifteen minutes later, Craver arrived and Edland arrested her before she entered the house. On her way to jail, Craver stated to Edland that the truck in the driveway belonged to Gary Don Franks. Edland recalled Whitesboro, Texas police officer David Scott saying earlier that day that Franks had been cooking large batches of drugs. Upon arriving at the Whitesboro Police Department, Edland contacted Pilot Point officer Joe Morgan and ordered him to observe the house and the truck.

Edland later returned to the house, relieved Morgan, and continued surveillance because he was concerned that Franks would be there with drugs. The truck left the house around 8:45PM, and Edland followed it. After observing the truck following too closely, failing to stop at a stop sign, and speeding, he stopped the truck around 8:50. Officer Morgan arrived a minute or two later. The defendant, Paul Schlieve, was driving with a passenger, Robbie Reynolds.

Schlieve gave Edland his driver's license and a concealed gun permit. Edland ordered Schlieve to step out of the truck. Schlieve volunteered that he had a gun in a his pocket and that

there were other guns behind the seat of the truck. Edland took possession of the gun in Schlieve's pocket. Edland then returned to his car and ran a check on Schlieve's drivers's license, which took about five minutes. The check revealed no outstanding warrants.[2]

Edland returned to the truck - now about ten minutes into the stop - and asked Schlieve why he was driving the truck. Schlieve told Edland that Franks had asked him to drive his truck to the gas station because it was almost out of gas. Edland did not believe the story because Schlieve had just passed a gas station. After realizing that Edland did not believe his story, Schlieve stated that Franks had asked him to pick up the truck because Franks was afraid to leave his house after Craver's arrest. Schlieve also denied knowing about any drugs in the truck. Edland and Morgan testified that, during this questioning, Schlieve was nervous, sweating, avoiding eye contact, and stuttering.

About twenty-five minutes after the stop,[3] Edland asked to search the truck. Schlieve refused consent, after which Edland

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[2] The evidence does not show that Edland returned Schlieve's license. This is irrelevant, however, as we assume that Schlieve was in custody throughout the stop.

[3] There is a discrepancy about the timing here. Officer Edland testified that he spoke to Schlieve for a "couple" of minutes, or "five or ten minutes." From the facts that are undisputed, it appears that he talked to Schlieve for about fifteen minutes, beginning ten minutes into the stop.

told him to wait while he located a K-9 unit.

Because Pilot Point did not have its own K-9 unit, Edland called Denton County around 9:20, but the county was unable to provide one. Edland then called Scott at about 9:25; Scott called fellow Denton Police Officer Junior Torres, who immediately left a softball game some 25 miles away, went home, retrieved his dog, and began driving to the scene. Edland was told that the K-9 unit was on its way. Edland told Schlieve that the K-9 was coming, and Schlieve and Reynolds waited, sitting in a grassy area near the cars.

While waiting, the officers asked Schlieve if they could check the other guns in the truck. Schlieve agreed and removed five pistols and a rifle. Morgan ran checks on these guns starting at about 9:30.[4] It took about twenty minutes to run the checks, which eventually showed that the guns were not stolen.

The K-9 unit arrived around 10:15 or 10:30, about twenty minutes after the gun check was completed. The dog alerted to the truck, and the officers found methamphetamine and a sawed-off shotgun. They arrested Schlieve.

B

An indictment charged Schlieve with possession with intent

[4] Schlieve contends that Morgan began running the gun check around 9:15, before calling for the dog. This discrepancy is irrelevant, as we explain later. *See infra* notes 22, 22.

to distribute, conspiracy to do the same, use of a firearm during a drug trafficking crime, and possession of an unregistered firearm. Prior to trial, Schlieve moved to suppress the drugs and guns seized during the traffic stop.

During the suppression hearing, Edland testified that he had arrested Craver before she entered her stepfather's house and that he had not heard Schlieve's name before stopping him. He never heard of Schlieve until he called Scott during the stop, when Scott told him that Schlieve was a close associate of Franks.

Morgan testified that he joined Edland of his own volition. Morgan talked to Reynolds, whom he had known previously for his criminal activity. He patted down Reynolds, and Reynolds told him that Schlieve had been trading weapons with the owner of the house.

Scott testified that after Edland called him to request a K-9 unit, it took him about ten minutes to locate Torres. He testified that Schlieve and Franks were "synonymous" because they were good friends and roommates. He had learned about Franks' participation in the methamphetamine cooking conspiracy from another co-conspirator, and he also knew that Franks had been involved in drug trafficking in the past.

Following the hearing, the district court denied the motion

to suppress. It estimated that the weapons check ended around 9:52 and that Torres arrived around 10:38, so that the "relevant" time period - "the length of detention beyond the purpose for the initial stop" - was this forty-six minutes. The court found that Edland knew that the truck was owned by Franks, that Franks was involved in manufacturing methamphetamine, that the truck was previously parked at a house where someone had just been arrested for a drug offense, that Schlieve was an associate of Franks, that Schlieve gave conflicting stories, and that Schlieve was nervous. The court concluded that the attempts to obtain a K-9 unit were "likely to quickly confirm or dispel" the suspicions of the police, that the police were diligent in obtaining the K-9 unit, that Schlieve did not feel free to leave during this time period and thus was seized, and that the forty-six minute detention was reasonable.

The jury convicted Schlieve on all four counts. He moved for a new trial, asserting among other things that the Government failed to turn over a second videotape, one from Morgan's car.[5] The district court denied that motion and sentenced him to 160 months imprisonment plus five years of supervised released.

[5] Schlieve contends that he did not learn of the alleged second videotape until Morgan testified at trial.

II

Schlieve first contends that the district court erred in denying his motion to suppress the evidence from the traffic stop. When reviewing a ruling on a motion to suppress, we review findings of fact for clear error and findings of law *de novo*.[6]

Schlieve concedes that Edland had the right to stop him in the first place on the basis of his traffic violations, but he maintains that once a check on his license revealed no violations, he should have been ticketed or allowed to leave. He contends that information known to the officer at that time was insufficient to establish reasonable suspicion under *Terry v. Ohio*[7] to support continued detention. He also argues that, even if there was reasonable suspicion at that time, the officers did not act diligently to confirm or dispel that suspicion.

In determining whether a search and seizure is reasonable under *Terry*, the court asks "'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in

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[6] *United States v. Shabazz*, 993 F.2d 431, 434 (5th Cir. 1993).

[7] 392 U.S. 1 (1968). *See United States v. Shabazz*, 993 F.2d 431, 434 (5th Cir. 1993) ("[S]earches and seizures of motorists who are merely suspected of criminal activity are to be analyzed under the framework established in *Terry*."). The Government does not argue that Schlieve could not complain about the detention because he did not own the truck; nor could it, under this court's holding in *United States v. Dortch*, 199 F.3d 193, 198 n.4 (5th Cir. 1999).

the first place.'"[8] "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."[9] In *United States v. Brigham*, this court held that a *Terry* stop may last as long as is reasonably necessary to effectuate the purposes of the stop, including the resolution of reasonable suspicion that emerges during the stop.[10] The government bears the burden of showing the reasonableness of a warrantless search or seizure.[11]

During a traffic stop, once a computer check is completed and the officer either issues a citation or determines that no citation should issue, the detention should end and the vehicle should be free to leave.[12] In order to continue a detention after this point, further reasonable suspicion must have emerged.[13] In addition, the length of an unreasonable detention is irrelevant - this court has held that a three-minute delay, *United States v. Jones*,[14] or a delay of "moments," *United States*

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[8] *Shabazz*, 993 F.2d at 435 (quoting *Terry*, 392 U.S. at 19).

[9] *Florida v. Royer*, 460 U.S. 491, 500 (1983).

[10] 382 F.3d 500, 507 (5th Cir. 2004).

[11] *United States v. Chavis*, 48 F.3d 871, 872 (5th Cir. 1995).

[12] *United States v. Dortch*, 199 F.3d 193, 198 (5th Cir.), *corrected on denial of reh'g*, 203 F.3d 883 (5th Cir. 2000).

[13] *United States v. Jones*, 234 F.3d 234, 241 (5th Cir. 2000).

[14] *Id.*

v. Dortch,[15] or a "trivial delay," *United States v. Ellis*,[16] between the completion of the computer check and a later search or dog sniff can be unreasonable.

We must first analyze whether reasonable suspicion existed at the moment after the license check came back clean. At this point, Edland knew that Schlieve had no outstanding warrants; furthermore, because Schlieve had a concealed gun permit, he knew that Schlieve was not an ex-felon.[17] But Edland knew that Schlieve was driving a truck owned by Gary Don Franks, a known, recently active drug dealer. Furthermore, the car had just come from a house where someone was arrested for a drug offense, and the passenger was a known criminal. This is sufficient for reasonable suspicion under *Terry*, and it distinguishes this case from those where we held that unknown people in unknown cars could not be detained after the license check came back clean.[18]

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[15] *Dortch*, 199 F.3d at 198.

[16] 330 F.3d 677, 681 (5th Cir. 2003).

[17] Under Texas law, ex-felons cannot receive concealed gun permits. And, as this court has held, "firearm ownership is not inherently evil or suspect." *United States v. Emerson*, 270 F.3d 203, 217 (5th Cir. 2002)

[18] *See United States v. Santiagio*, 310 F.3d 336, 340 (5th Cir. 2002) (holding that reasonable suspicion did not exist to detain the defendant after the computer check where, prior to the check, the officer noticed that the defendant was from out of state, that his hands were shaking, and that he and his fellow passengers gave conflicting stories about their travel plans); *Dortch*, 199 F.3d at 200 (same, where prior to the check the defendant was nervous and there was confusion as to the renter of the vehicle and inconsistent answers about travel plans); *Jones*, 234 F.3d at 241 (same, where prior to the check the defendant made inconsistent statements concerning his employment and had a drug-

The later suspicious information - Schlieve's changing stories and nervous behavior and Scott's information about Franks' relationship with Schlieve - was cumulative, so that reasonable suspicion existed throughout the stop.[19]

Our next inquiry is whether the police "diligently pursued a means of investigation likely to quickly confirm or dispel"[20] their reasonable suspicion about Schlieve possessing drugs. Right after the license check came back clean, Edland persistently questioned Schlieve about where he was going and what he was doing.[21] He then asked for consent to search the trunk, and immediately after Schlieve refused,[22] he began his

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related criminal history).

[19] Schlieve contests this evidence, claiming, for example, that he was not acting nervously, but this is irrelevant to our holding because the evidence is only cumulative.

[20] *United States v. Hare*, 150 F.3d 419, 427 (5th Cir. 1998) (quoting *United States v. Sharpe*, 470 U.S. 675, 683 n.3 (1985)).

[21] Edland was not obligated to call a dog right away; his questioning of Schlieve was a proper means of following up on his reasonable suspicion of drugs, at least initially. The situation is unlike that in *Dortch*, 199 F.3d at 200, where the court upheld the suppression of evidence when the police called for a drug dog 9-10 minutes into the stop, before the computer check came back negative. In *Dortch*, the court explicitly noted that there was never reasonable suspicion of drugs, so that when the computer check came back negative, before the dog arrived, there was no justification for continued detention. The court's dicta suggesting that police suspecting drugs should anticipate needing a drug dog right away is in apropos because the police in that case specialized in drug interdiction, and because the court never stated that probative questioning was an unreasonable means of initially following up on suspicion of drugs.

[22] Even if Schlieve is correct that the officers began the gun check before calling for the dog, the gun check was part of the officers' overall follow-up on their suspicion of drugs. Again, the officers were not obligated to call a dog as soon as they pulled Schlieve over.

search for a dog. His first unsuccessful call was promptly followed by his second call to Scott. Scott contacted Torres, who left his softball game at once to retrieve his dog and go to the scene. The police were not dilatory in following up on their suspicions, despite the fact that it was over an hour between the return of the license and the arrival of the dog.

For these reasons, we affirm the district court's denial of the motion to suppress.

III

Schlieve next argues that the loss or destruction of an alleged second videotape of the stop, which, unlike the tape seen at trial, supposedly contained audio, violated the Jencks Act[23] and *Brady v. Maryland*.[24] Even if this tape existed, and even if it contained a "statement by a witness" under the Jencks Act, in lost or destroyed evidence cases under both the Jencks Act and *Brady*, we perform a sort of harmless error analysis: we "'weigh the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial in order to come to a determination that will serve the ends of

[23] 18 U.S.C. § 3500 (2000).

[24] 373 U.S. 83 (1963).

justice.'"[25] Employing this test and reviewing the district court's findings of fact for clear error and findings of law *de novo*,[26] we affirm.

Although Schlieve has presented no evidence of bad faith, he argues that the police were at least negligent is losing the alleged tape. Even if that were so, the "evidence of guilt adduced at trial" was overwhelming and the "importance of the evidence lost" was negligible. Schlieve does not contend that he would have been acquitted had the alleged second tape been introduced at trial along with the evidence taken from the stop. Indeed, that seems unlikely given the Government's powerful case. Rather, he contends that the tape would have been useful in arguing his motion to suppress because it would have helped to establish the time-frame of the stop. But the officers testified during the suppression hearing as to the timing of events and Schlieve argues that their testimony differed in only one respect from what actually happened. And, as explained above, that difference is irrelevant.[27] Moreover, the alleged second tape was unnecessary to clarify the timing of events because the

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[25] *United States v. Ramirez*, 174 F.3d 584, 589 (5th Cir. 1999) (quoting *United States v. Bryant*, 439 F.2d 642, 653 (D.C. Cir. 1971)); *Johnston v. Pittman*, 731 F.2d 1231, 1234 (5th Cir. 1984).

[26] *United States v. Shabazz*, 993 F.2d 431, 434 (5th Cir. 1993).

[27] *See supra* notes 4, 21, 22.

silent tape was available and had a timer. Schlieve's argument that audio would have helped him to impeach Edland and Morgan during the hearing because it would have shown he was not nervous is immaterial because, as described above, Schlieve's alleged nervousness has no bearing on the relevant *Terry* questions of whether reasonable suspicion existed after the license check came back clean and whether the police diligently followed up on that suspicion.

IV

Finally, Schlieve argues that the Government denied him due process when it knowingly introduced at trial perjured testimony of Robbie Reynolds, the passenger in the truck. We disagree.

The Government violates a defendant's due process rights when it knowingly uses perjured testimony or allows false testimony to go uncorrected. "To prove a due process violation, the [defendant] must establish that (1) [the witness] testified falsely; (2) the government knew the testimony was false; and (3) the testimony was material."[28] When a defendant does not object to the testimony at trial, this court reviews for plain error,[29] meaning that this court can correct a forfeited error only when

[28] *United States v. Mason*, 293 F.3d 826, 828 (5th Cir. 2002) (citing *Giglio v. United States*, 405 U.S. 150 (1972)).

[29] FED. R. CRIM. P. 52(b); *United States v. Johnston*, 127 F.3d 380, 392 (5th Cir. 1997).

the appellant establishes: (1) that there is an error; (2) that the error is clear or obvious; and (3) that the error affects his substantial rights.[30] If these factors are established, then the decision to correct the error is within the court's sound discretion, which should not be exercised unless the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings.[31] Because Schlieve did not object to the error at trial, as he concedes, he must meet this stricter standard.

Schlieve argues that the Government knowingly offered perjured testimony on two topics: the drugs in the truck and an alleged statement by Schlieve to Reynolds.

During direct testimony, Reynolds testified that he and Franks had been at the home of Robert Loftice, the house where Craver was arrested. They entered a shed in the backyard which contained evidence of a methamphetamine "cook." Reynolds testified that he saw "a glass jar that had some kind of rock-salt-looking stuff in it." When asked what the substance was, he testified that it was "what they called bones, which is - I guess it's the stuff that's left over after you make methamphetamine." Later, Franks gave Reynolds a bag holding that jar and a small

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[30] *United States v. Olano*, 507 U.S. 725, 732 (1993).

[31] *Id.* at 736.

baggie. When Reynolds and Schlieve were in the truck, Reynolds opened the bag and pulled out the jar. On redirect, the Government asked Reynolds whether Schlieve told him to get out of the truck or get rid of the jar when Reynolds showed him "the container that you know had the bones in it that you know are drugs." Reynolds testified that Schlieve did not tell him to do so.

Schlieve argues that he had the jar tested after trial and that it contained rock salt, not methamphetamine. He argues that the Government knew (or should have known) this because it had possession of the jar before and during trial and never tested its contents. On appeal, the Government does not argue that the jar contained methamphetamine; rather, it argues that the DEA chemist testified at trial that the reddish-brown colored substance in the baggie next to the jar actually contained the bones. It argues that during closing argument, the Government contended that the baggie contained the bones and only mentioned the jar on rebuttal when the prosecutor reminded the jury that he had asked Reynolds what *he believed* the substance to be.

Schlieve has not shown plain error. First, there was no plain error because Reynolds' testimony cannot be called

"false."[32] Even if the jar did contain only rock salt (which the Government seems to concede), Reynolds' testimony was only about what he *thought* the jar contained,[33] which is relevant to what Schlieve thought the jar contained. And the Government argued in closing that the baggie contained the bones; it only mentioned the jar in reference to what Reynolds believed.

Second, even if the testimony were "false," there was no plain error because Schlieve has not shown that the Government knew the testimony was false. The Government was, at most, sloppy in its references to the drugs. The transcript does not show that the Government knowingly elicited false testimony or tried to mislead the jury.

Third, there was no plain error because even in the unlikely event that the testimony was *material*, it certainly does not pass the higher threshold of affecting the defendant's "substantial rights" - prejudice - required under plain error analysis. First, the jury was already aware that the jar may not have contained actual drugs because Franks testified that he could not

[32] Schlieve argues that this court has held that a due process violation does not require the evidence actually to be false where "the context in which the testimony was invoked, and the argument made by the prosecutor . . . [created] implications that were false." *Barrientes*, 221 F.3d at 753. However, the Government here simply did not create false implications.

[33] Given that Reynolds also testified that Franks had told Loftice that "he had enough in that jar to put him away for the rest of his life," Reynolds' belief seems certainly reasonable.

recall what was in the jar but thought it might be coffee filters used to strain the methamphetamine, or maybe rock salt. Second, Schlieve does not complain about Reynolds' and Franks' testimony that Franks told Schlieve that he would be "riding hot" and that there would be "guns and things" in the truck. Neither does he complain about Reynolds' testimony that Schlieve asked Reynolds, after Reynolds pulled the jar out of the bag while they were riding in the car, if there was powder in the bag; in fact, there was powder methamphetamine in the bag, which Schlieve does not dispute. And he does not complain about Franks' testimony that the plan was for Reynolds to grab the bags and run if Schlieve was pulled over by the police, in combination with Reynolds' testimony that when the police began to stop Schlieve, Schlieve asked Reynolds if he was going to run. Given all of this evidence, it seems clear that Reynolds' mistake as to the contents of the jar did not prejudice Schlieve - a jury easily could have concluded that Schlieve had knowledge of the drugs.

Finally, even if there were an error, in no way was it "clear or obvious;" and even if it were clear or obvious, the error did not "seriously affect[] the fairness, integrity, or public reputation of the judicial proceeding[]."[34] Schlieve has

[34] *Olano*, 507 U.S. at 732.

shown neither of these two things.

Schlieve also challenges Reynolds' testimony about a statement purportedly made by Schlieve during the "search" of the car by the K-9 unit. During direct examination, the prosecutor asked Reynolds whether he and Schlieve had a conversation after the dog arrived. Reynolds stated that, while sitting together in a ditch, he and Schlieve had wondered if the dog was finding anything; he also admitted previously stating that Schlieve had said at that time that he did not think the officers had found the dope in the truck. On cross-examination, Reynolds testified that they were talking about the dope because both he and Schlieve were aware that there were drugs in the truck.

Schlieve challenges this testimony, which shows his knowledge of the drugs, claiming that Edland's videotape shows that the conversation could not have occurred. Schlieve claims that the videotape shows that he and Reynolds were separated after the K-9 unit arrived, so that he could not have made this comment to Reynolds while the dog was searching the truck. A review of the tape, however, shows that Reynolds and Schlieve are not visible on the tape until after Torres and the dog had already conducted a preliminary examination of the truck, at which time they were separated. Therefore, because their location is not known when the dog first began searching the

truck, the videotape does not establish that Reynolds' testimony was false or that the Government knew of its falsity. (And, again, Schlieve cannot show that the testimony substantially affected his rights, or even was material, because of the overwhelming evidence, described above, that Schlieve knew of the drugs in the truck.)

V

For the foregoing reasons, Schlieve's conviction is AFFIRMED.