NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

CHARLES RAY HOOPER,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

_____

On Petition For a Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

RANDALL H. NUNN
Attorney at Law
P.O. Box 1525
Mineral Wells, Texas 76068
Telephone No. (940) 325-9120
rhnunn@sbcglobal.net
Attorney for Petitioner

QUESTION PRESENTED

1. Where an appellate court, in connection with an application for a Certificate of Appealability ("COA"), decides that circuit precedent precludes the use of a *Brady v. Maryland* violation occurring prior to a guilty plea to challenge the voluntariness of the plea, does the denial of a COA based on that determination constitute an adjudication on the merits, contrary to the requirements of 28 U.S.C. § 2253 and *Miller-El*?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Charles Ray Hooper, respectfully petitions for a writ of certiorari issue to review the Fifth Circuit Court of Appeals' denial of his application for a certificate of appealability ("COA") on the issue of whether the Government's violation of *Brady v. Maryland*, 373 U.S. 83 (1963) by withholding material, exculpatory evidence prior to Hooper's guilty plea rendered his guilty plea involuntary, unknowing and invalid.

OPINION BELOW

The Order of Judge Elrod of the United States Court of Appeals for the Fifth Circuit *United States v. Charles Ray Hooper*, No. 18-10610 (5th Cir., January 7, 2019), is reproduced in the Appendix. (Pet. App. la-4a).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States which provides that:

> "[no] person shall be…deprived of life, liberty, or property without due process of law."

2. This case also involves 28 U.S.C. § 2253 which provides, in pertinent part that:

> "(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> . . .

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of tghe denial of a constitutional right."

STATEMENT OF THE CASE

Charles Hooper was indicted on April 16, 2014 in the Northern District of Texas, Fort Worth Division on one count of Conspiracy to Possess With Intent to Distribute 50 Grams or more of a mixture containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §846 and 841(a)(1) and 841(b)(1)(B). On May 22, 2014, Hooper pleaded guilty to the offense. Hooper's sentence was driven primarily by the drug quantity attributable to him, based on Reports of Investigation ("ROI") from Government law enforcement officers. Hooper challenged the allegations of drug quantity and time periods of his alleged conduct, as detailed in the Presentence Report and at sentencing. The source of the allegations of the largest quantity of drugs was a co-defendant named Brittany Barron, who was alleged to have attributed a large quantity of drugs to Hooper in an interview with law enforcement agents in January 2014.

Unknown to Hooper or his counsel at the time he was induced to plead guilty, Brittany Barron had been "reinterviewed" by Government agents two weeks before Hooper's decision to plead guilty, at which time Government agents questioned her about Hooper. At that reinterview, Barron stated that she had never made such statements previously reported in the ROI and that they were not true. At this interview, Barron disputed the drug quantity amounts the Government had previously reported in a DEA-6 Report, purportedly reflecting earlier statements of Barron, as being applicable to

Hooper, as well as the dates of his involvement. Barron told the agents she had never made such statements. Pet. App. 3a-4a. When the agents, at the May 7 interview, said their notes would show such statements, she challenged them to show her. After two agents looked through their notes, they could not come up with any support and Barron told them "It's not there because I didn't say it." The amounts Ms. Barron described in the May 7 interview were significantly less than the amounts contained in the earlier DEA reports concerning her that had been provided to the defense in discovery. No report of this May 7 interview was ever prepared by the Government nor was any information about either the occurrence of the May 7 interview or the information provided thereat, or of the dispute with respect to Barron's earlier statements about drug quantities as stated in earlier reports, ever provided by the Government to the defense. The Government admitted in its direct appeal brief that the May 7, 2014 interview did occur and that no report of that interview was ever prepared. Gov't C.A. Br. 5. This was never reported to Hooper or his counsel, even though counsel had made at least two written requests for any exculpatory information prior to Hooper's guilty plea. Hooper's counsel discovered the withholding of this material, exculpatory evidence in August 2014, which was confirmed on October 6, 2014 when Brittany Barron testified at sentencing and confirmed that she had never made the statements attributed to her in the earlier ROI and that she confronted the agents in the reinterview, telling them that their reported information in the ROI was not true. Hooper's drug quantity was reduced substantially at the sentencing hearing and Hooper was sentenced to 130 months in prison.

In his direct appeal after his guilty plea conviction, Hooper objected to the withholding of material exculpatory evidence as a violation of *Brady v. Maryland*; the threats and misrepresentations and misconduct of the Government which induced the guilty plea, as violations of *Brady v. United States* which rendered his plea involuntary and unknowing; the withholding of material, exculpatory evidence from his counsel as a violation of Hooper's right to counsel by rendering counsel's assistance ineffective; and that Hooper was "actually innocent" of the conspiracy he was charged with.

The Fifth Circuit affirmed Hooper's conviction in an opinion which concluded that *Brady v. Maryland* was not available to a defendant who pleaded guilty. The Fifth Circuit did not address, in its opinion, Hooper's issue involving Government misconduct under *Brady v. United States*.

On August 14, 2016, Hooper filed a motion to vacate under 28 U.S.C. § 2255, raising the *Brady v. Maryland* issue and the *Brady v. United States* issue. On May 8, 2018, the district court denied the motion to vacate and denied a certificate of appealability ("COA"), on the grounds that the issues were already addressed by the Fifth Circuit and disposed of and Hooper was not entitled to 2255 relief.

On May 22, 2018, Hooper filed an Application for a Certificate of Appealability with the Fifth Circuit and on January 7, 2019, Judge Elrod granted the COA with respect to the claim under *Brady v. United States* that the plea was involuntary and unknowing, stating that the opinion of the Fifth Circuit in Hooper's direct appeal did not address this issue. Hooper requests a writ of certiorari to review the denial of his application for a COA on the issue of the voluntariness of his plea under *Brady v. Maryland*.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Court of Appeals rule that precludes a defendant who has pleaded guilty from asserting a claim of an unknowing and an unintelligent guilty plea as a result of the intentional withholding of material exculpatory evidence pertaining to guilt and punishment is an erroneous rule and is in conflict with the rule followed in most other federal circuits.

The Fifth Circuit Court of Appeals decision is in conflict with at least five federal courts of appeal and one state high court over whether a defendant who pleaded guilty is precluded from challenging his conviction because of the deliberate misrepresentation and withholding of material exculpatory evidence in violation of *Brady v. Maryland.* This rule is the "circuit precedent" claimed by the Fifth Circuit to preclude the granting of a Certificate of Appealability ("COA") to appeal the denial and dismissal of his 28 U.S.C. § 2255 motion challenging his conviction for conspiracy to possess with intent to distribute methamphetamine. This Court should resolve this conflict.

The Fifth Circuit's decision holding that a guilty plea precludes a challenge to a conviction based on the withholding by the Government of material exculpatory evidence in violation of *Brady v. Maryland* is incorrect. The Due Process Clause prohibits the prosecution from withholding such evidence prior to the entry of a guilty plea. A decision that permits the prosecution to withhold such exculpatory evidence before a plea is entered and thereafter bar challenges on a procedural ground encourages practices that bring disrepute to the fair administration of justice and make it impossible for a defendant to enter a knowing, intelligent and voluntary plea under such circumstances.

A. A Defendant Pleading Guilty Should Be Entitled to Challenge His Conviction on the Ground that the Government Failed to Disclose Material Exculpatory Evidence Prior to the Entry of the Plea.

Brady v. Maryland held that in a criminal trial suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. *Brady v. Maryland,* 373 U.S. 83 (1963). The essential components of a *Brady* violation are that (1) the evidence was favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed by the Government; and (3) the defendant suffered prejudice as a result. In determining whether the suppressed evidence caused prejudice to the defendant, the relevant question 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." *Pennsylvania v. Ritchie,* 480 U.S. 39, 57 (1987).

This Court addressed *Brady* in the context of a guilty plea in *United States v. Ruiz,* 536 U.S. 622 (2002), holding that the Constitution does not require the prosecution to disclose impeachment information related to informants or other witnesses before entering a plea agreement with defendant. *Ruiz,* 536 U.S. at 625. The *Ruiz* Court did not address the obligation to disclose material exculpatory information. Petitioner's case involves exculpatory evidence.

1. The Fifth Circuit Rule Precluding a Defendant from Challenging a Guilty Plea as Involuntary Because of a *Brady* Violation Is Erroneous.

Petitioner pleaded guilty on May 28, 2014, not knowing that the Government's primary witness against him in an interview with Government agents two weeks before petitioner's guilty plea, had disputed and challenged the Government's evidence of drug

quantities and dates of petitioner's involvement, as alleged to have been reported by her according to an earlier DEA ROI. The Government did not disclose this material exculpatory evidence to petitioner.

At the very time that petitioner's counsel was requesting from the Government's counsel any "exculpatory or inculpatory" information, specifically with respect to drug quantities and dates of involvement, the Government knew of the May 7 interview and knew that the information being used against petitioner to induce a guilty plea was, in the view of the key material witness, "false" information. Despite this knowledge on the part of the Government, the defense was never told of the May 7 interview or of the existence of the material exculpatory evidence. The materiality of the withheld evidence could not be more clear.

This withholding of information and what petitioner contends was knowingly "false" information in the earlier inculpatory ROI informed petitioner's decision to plead guilty. Petitioner's guilty plea was induced by misconduct and misrepresentation. A guilty plea induced in this manner cannot be voluntary or intelligent.

Fifth Circuit precedent precludes a defendant who pleads guilty from thereafter raising a claim that the intentional withholding by the Government of exculpatory evidence in violation of *Brady v. Maryland* rendered his guilty plea involuntary. This Fifth Circuit precedent is based primarily on the determination that *Brady* is a "trial right" and is not available to a defendant pleading guilty. *See Matthew v. Johnson*, 201 F.3d 353, 360-62 (5th Cir. 2000) and *Orman v. Cain*, 228 F.3d 616, 620-21 (5th Cir. 2000). However, the Fifth Circuit rule appears to have a *caveat*, admitting that there may be situations where

the prosecution's failure to disclose evidence makes it "impossible for [a defendant] to enter a knowing and intelligent plea." *Matthew v. Johnson*, 201 F.3d 353, 364 n. 15 (5th Cir. 2000). This is such a situation.

In *United States v. Weintraub*, 871 F.2d 1257, 1264-65 (5th Cir. 1989), the Fifth Circuit held that the Government violated *Brady v.Maryland*, by failing to disclose impeachment information concerning drug quantity and that such information was material as to punishment at a sentencing hearing. Here, the Government misrepresented a critical exculpatory fact by representing, after the May 7, 2014 interview, that the drug quantity was the much higher amount from an earlier DEA report of a previous interview, knowing that the witness denied ever making such an accusation. If undisclosed information of drug quantity is material as to punishment at a sentencing hearing, how can the same information, if withheld at the time of an unknowing guilty plea, not be material and not be permitted to support a *Brady* claim simply because petitioner has pleaded guilty? Such a rule gives the Government a great incentive to quickly obtain a guilty plea through pressure, threats and withholding exculpatory evidence, knowing that once the plea is in hand, a procedural bar then exists to any effort to show that the plea was involuntary when the *Brady* violation is discovered. Such a rule is erroneous, and results in a denial of due process at a critical stage.

2. The Fifth Circuit Rule Is in Conflict with the Rule in Other Circuits That Allow a Guilty Plea to be Challenged Where the Plea Has Been Induced by a *Brady* Violation.

In the years since *Brady v. Maryland*, at least five of the federal circuit courts of appeal have ruled that a defendant pleading guilty may challenge his conviction on the

ground that the Government failed to disclose material exculpatory evidence prior to the entry of a plea. *See,* e.g., *McCann v. Mangialardi,* 337 F.3d 782, 787-788 (7th Cir. 2003); *United States v. Avellino,* 136 F.3d 249, 254-62 (2d Cir. 1998); *Sanchez v. United States,* 50 F.3d 1448, 1453 (9th Cir. 1995); *United States v. Wright,* 43 F.3d 491, 496 (10th Cir. 1994); and *Campbell v. Marshall,* 769 F.2d 314, 321 (6th Cir. 1985).

Other circuits considering the issue of whether a guilty plea precludes a defendant from asserting a *Brady v. United States* violation have concluded that "a defendant pleading guilty may challenge his conviction on the ground that the State failed to disclose material exculpatory evidence prior to entry of a plea." *See United States v. Fisher,* 711 F.3d 460, 461 (4th Cir. 2013); *Ferrara v. United States,* 456 F.3d 278, 290 (lst Cir. 2006). *See also Matthew v. Johnson,* 201 F.3d 353, 358 (5th Cir. 2000).

II. The Fifth Circuit's rule that a COA may not be granted where circuit precedent forecloses a claim applies an incorrect standard that is in conflict with the standard articulated by this Court in *Miller-El* and *Buck*.

If circuit precedent requires a decision that jurists in that circuit can no longer find it "debatable" that a claim is a valid assertion of the denial of a constitutional right or that the district court's ruling was correct, then COA's can never be granted where there is circuit precedent that stands in the way. The Fifth Circuit judges who dissented in *Alvarez v. Brownsville*, 904 F.3d 382, 402-416 (5th Cir. 2018) disputed the rule that *Brady v. Maryland* precludes a claim that Government conduct prior to a guilty plea can render a plea involuntary. The dissenters in *Alvarez* were certainly saying that such a claim is "debatable" even though circuit precedent to the contrary existed. Yet Hooper's

claim is not entitled to the same debatability. If, by chance, this Court were to grant certiorari in the *Alvarez* case and determine that pre-plea conduct can render a plea involuntary under *Brady v. Maryland*, then the preclusion based on existing precedent will have failed and the claim will have been shown to have been "debatable." But Hooper is denied the right to ask that judges of the Fifth Circuit examine his claim to determine if it is "debatable" by reasonable jurists and worthy of further encouragement. The Fifth Circuit has, in effect, examined the merits of Hooper's claim and rationalized the denial of a COA on precedent, when such use of precedent is simply a "disguised" decision on the merits. "Reasonable minds" might disagree, but here they are not allowed to do so where precedent to the contrary can be found. This does not meet the procedure required by *Miller-El* and 28 U.S.C. § 2253.

"Reasonable minds" might initially determine that an applicant has made a substantial showing of the denial of a constitutional right only to find that circuit precendent exists denying such a claim where the claim was based on acts occurring prior to a guilty plea, thereby rendering the initial determination "unreasonable" because contrary to existing circuit precedent. The determination whether to grant a COA, however, requires that the threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A court of appeals should limit its examination at the COA stage to a threshold inquiry into the underlying merit of the claims and ask "only if the District Court's decision was debatable." *Miller-El*, 537 U.S. at 327 (quoted in *Buck v. Davis*, 137 S.Ct. 759, 774 __ U.S. __ (2017). As this Court said in *Buck v. Davis*, 137 S.Ct. 759, 774 (2017), "when a

reviewing court 'first decides the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,' it has placed too heavy a burden on the prisoner at the COA stage." *Buck v. Davis*, 137 S.Ct. at 774. "*Miller-El* flatly prohibits such a departure from the procedure prescribed by § 2253." *Buck v. Davis*, 137 S.Ct. at 774. If circuit precedent prohibits judges reviewing a request for a COA from differing with that precedent because to do so would be "unreasonable," then COA's can never be granted where such contrary precedent exists and the decision whether to grant or deny a COA becomes a decision on the merits, contrary to the requirements of *Miller-El* and *Buck*.

CONCLUSION

The Fifth Circuit has adopted a rule that, in effect, requires that COAs be adjudicated on the merits. Under the Fifth Circuit's rule, COAs may not be granted where circuit precedent forecloses a claim. *See United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986)("[I]ssues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 [m]otions.") The *Kalish* case was cited by Judge Elrod as the basis for rejecting a COA for the other three claims, including the *Brady v. Maryland* claim. The district court phrased its decision in Hooper's case using the proper terms, but reached its conclusion by essentially deciding the case on the merits, that Hooper would be unsuccessful because of circuit precedent such as *Kalish*. *See Buck,* 137 U.S. at 773. The Fifth Circuit's rule places too heavy a burden on movants at the COA stage. As this Court stated in *Buck*:

> "[W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable."

Buck, 137 U.S. at 774.

This Court stated in *Miller-El*, "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338. A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch v. United States*, 136 S.Ct. 1257, 1264 (2016). That is not the case here, since at least three members of the Fifth Circuit have written that the issue of whether *Brady v. Maryland* is applicable to pre-plea withholding of exculpatory evidence is debatable by their dissenting opinions in *Alvarez v. City of Brownsville*, 904 F.3d 382, 402-416 (5th Cir. 2018).

In the words of *Miller-El*, the issues here are "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. Jurists of reason could disagree with the district court's resolution of Hooper's constitutional claim but under the Fifth Circuit's rule, they are stymied by circuit precedent and unable to put that disagreement into use as contemplated by *Miller-El* and *Buck*.

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

DATED: April 8, 2019

Respectfully submitted,

s/Randall H. Nunn
Randall H. Nunn
Attorney at Law
P.O. Box 1525
Mineral Wells, Texas 76068
(940) 325-9120
Attorney for Petitioner

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CHARLES RAY HOOPER,

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VS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

RANDALL H. NUNN, a member of the Bar of the State of Texas and appointed under the Criminal Justice Act, certifies that, pursuant to Rule 29.5, he served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed In Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents by United States Postal Service mail, and addressed to:

The Honorable Noel Francisco
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Joseph Wyderko, Esq.
Deputy Chief Appellate Section
Criminal Division
U. S. Department of Justice
950 Pennsylvania Avenue, NW, Room 1264
Washington, D.C. 20530

James Wesley Hendrix, Esq.
Assistant U.S. Attorney
1100 Commerce Street
Third Floor
Dallas, Texas 75242

and further certifies that all were served on April 8, 2019.

s/Randall H. Nunn
Randall H. Nunn
Attorney for Petitioner