

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

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The district court, in ruling on a 2255 motion, denied 2255 relief on a specific issue alleging that the conviction was involuntary because of egregious government misconduct, "because the Court of Appeals has already addressed the grounds for relief presented." The petitioner filed an Application for COA in the Court of Appeals describing in detail that the particular issue had not been addressed or decided by the Court of Appeals. After review by Judge Elrod, she issued an Order finding that the *Brady v. United States* claim had not be "addressed" or "disposed of" by the direct appeal panel and granted a certificate of appealability as to that issue. The panel which ruled on the 2255 collateral appeal affirmed the district court, saying that although the direct appeal panel "did not cite *Brady v. United States*," it "recognized" petitioner's argument that his guilty plea was unknowing and involuntary because the government withheld exculpatory sentencing evidence regarding the amount of methamphetamine for which he was accountable. No mention of government "misconduct" was made in the opinion, nor any indication that the *Brady v. United States* claim was a "separate basis for relief," as found by Judge Elrod, and was not a simple withholding or nondisclosure claim. The COA was granted as to that issue by a judge of the Court of Appeals, who issued an Order stating that petitioner had "raised this issue in his brief on direct appeal, but our opinion affirming his conviction did not address it" and issued a COA for the specific issue. Petitioner thereupon appealed that issue as defined in the Order.

THE QUESTIONS PRESENTED ARE:

1. Must a defendant who has been granted a Certificate of Appealability by the Court of Appeals continue to challenge a procedural bar ruling by the district court on the issue after the Court of Appeals has issued a COA to appeal that issue or risk "abandonment" of the claim, or may the petitioner appeal the issue as described in the COA without further argument as to a procedural bar?

2. Where the government has engaged in pre-plea misconduct and misrepresentations, including but not limited to withholding and concealment of material exculpatory evidence, is a defendant who pleaded guilty while unaware of such evidence, precluded by circuit precedent based on *Brady v. Maryland*, from claiming that his plea was unknowing, unintelligent and involuntary under *Brady v. United States*?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	6
I. The Decision Below Is an Erroneous Rule That Conflicts With the Decisions of Other Federal Courts of Appeal and State Courts of Last Resort	6
II. The Fifth Circuit Court of Appeals Has Decided an Important Question of Federal Law that Has Not Been, But Should Be Settled by this Court	10
III. The Questions Presented Significantly Impact the Administration of Criminal Justice Because of the High Percentage of Federal Criminal Cases Disposed of by Guilty Pleas.	17
CONCLUSION	17
APPENDIX	
Order of the Fifth Circuit Court of Appeals Denying Petition for Rehearing, No. 18-10610 (Dec. 6, 2019)	Pet. App. 1a
Opinion of the Fifth Circuit Court of Appeals, <i>United States v. Charles Ray Hooper</i> , Unpublished, No. 18-10610, (Nov. 5, 2019)	Pet. App.2a-6a

Order of Judge Jennifer Walker Elrod, Fifth Circuit Court of Appeals,
United States v. Charles Ray Hooper, 18-10610, (Jan. 7, 2019) Pet. App. 7a-10a

Findings of Fact and Conclusions of Law and Order Denying Motion
to Vacate, U.S. District Court, Northern District of Texas, May 8, 2018,
United States v. Charles Ray Hooper, No. 4:16-cv-756-O Pet. App. 11a-15a

Judgment, U.S. District Court, Northern District of Texas, May 8, 2018,
United States v. Charles Ray Hooper, No. 4:16-cv-756-O Pet. App. 16a

Order Denying Certificate of Appealability, U.S. District Court, N.D. TX,
May 8, 2018, United States v. Charles Ray Hooper, No. 4:16-cv-756-O . . Pet. App.17a

Opinion of the Fifth Circuit Court of Appeals, *United States v. Charles Ray Hooper*,
Unpublished, No. 14-11153 (June 29, 2015) (original direct appeal) . .Pet. App. 18a-20a

TABLE OF AUTHORITIES**Cases**

<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	passim
<i>Brady v. United States</i> , 397 U.S. 742 (1970)	passim
<i>Ferrara v. United States</i> , 456 F.3d 278 (1st Cir. 2006)	8, 10
<i>Matthew v. Johnson</i> , 201 F.3d 353 (5th Cir. 2000)	8, 9, 10, 16
<i>Orman v. Cain</i> , 228 F.3d 616 (5th Cir. 2000)	8
<i>Slack v. Daniel</i> , 429 U.S. 473 (2000)	13
<i>United States v. Fisher</i> , 711 F.3d 460 (4th Cir. 2013)	8, 10

Constitutional Provisions

U.S. Const. Amend. V	passim
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Statutes

21 U.S.C. § 841(a)(1) and (b)(1)(B)	2
21 U.S.C. § 846	2
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2253	2
28 U.S.C. § 2255	passim

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' opinion on the issues of (1) whether the Government's pre-plea misconduct and misrepresentations violated *Brady v. United States*, 397 U.S. 742 (1970) and rendered his guilty plea involuntary, unknowing and invalid and (2) whether a petitioner must continue to challenge a district court's procedural bar ruling after a Court of Appeals has granted a certificate of appealability as to a specific issue.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit, *United States v. Charles Ray Hooper*, No. 18-10610, is reproduced in the Appendix. (Pet.App.1a-5a).

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. 7a-10a).

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 the 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 almost entirely 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. This was not a recantation but a denial that she had ever made such statements. 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. 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." Barron repeated this under oath in her testimony at Hooper's sentencing hearing. It was not contradicted by the Government at that hearing. 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. 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. One such request was made on May 6, 2014, the day before the interview at which Barron

denied ever making the statements attributed to her. 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. It should be noted that this was not a "recantation" but a denial that she had ever said what was attributed to her in the earlier Government report. 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 egregious 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, petitioner's issue involving Government misconduct under *Brady v. United States*. In fact, the Fifth Circuit opinion never once mentioned either *Brady v. United States* or government misconduct.

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 all of 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 in her Order granting the COA that the opinion of the Fifth Circuit in Hooper's direct appeal did not address this issue.

Petitioner filed an appeal, as authorized by Judge Elrod's Order, on February 19, 2019, alleging that the government's pre-plea misconduct rendered petitioner's guilty plea involuntary under *Brady v. United States*. The misconduct, as described in petitioner's briefs, included withheld exculpatory evidence which petitioner had requested in writing at least twice prior to his plea; affirmative misrepresentations by continued use of the January 14, 2014 "false" Report of Investigation after the prosecution knew that it contained false information; and the use of coercion, pressure tactics and threats to induce the guilty plea. Petitioner and his counsel submitted affidavits that petitioner would not have pleaded guilty and would have gone to trial had they known the drug quantity information and the time periods of petitioner's acts as alleged in the government reports, were not true. On November 5, 2019 the Fifth Circuit affirmed the district court in denying petitioner's motion for postconviction relief, finding, among other things, that

the claim under *Brady v. United States*, "that his guilty plea was unknowing and involuntary because the government withheld exculpatory sentencing evidence regarding the amount of methamphetamine for which he was accountable," was decided by the previous direct appeal panel.

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, unintelligent and involuntary guilty plea as a result of government misconduct, misrepresentations and threats is an erroneous rule and is in conflict with the rule followed in most other federal circuits and highest courts of other states that have considered the question.

The Fifth Circuit Court of Appeals decision is in conflict with other federal courts of appeal and state high courts over whether a defendant who pleaded guilty is precluded from challenging his conviction because of a valid claim of government misconduct, including deliberate misrepresentations and coercion as well as the withholding of material exculpatory evidence in violation of *Brady v. Maryland*. 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 relate only to the *Brady v. Maryland* line of cases. As Judge Elrod noted in her Order, "[petitioner's] *Brady v. United States* claim provides a separate basis for relief." This Court should resolve this confusion and 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 Government Misconduct Prior to the Entry of the Plea Rendered His Plea Involuntary.

Brady v. United States stands for the proposition that government misconduct, misrepresentations or threats can violate a defendant's due process rights and render his plea involuntary. *Brady v. United States*, 397 U.S. 742 (1970). The essential components of a *Brady* violation are that (1) some egregiously impermissible government conduct occurred prior to the entry of the plea and, (2) the misconduct influenced the decision to plead guilty. *Brady v. United States*, 397 U.S. at 755.

1. Fifth Circuit Precedent Does Not Preclude a Defendant from Challenging a Guilty Plea as Involuntary Because of a *Brady v. United States* Violation.

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 "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 the misrepresentation of knowingly "false" information in the earlier inculpatory ROI as being true 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. This is true whether or not the rule announced in *Brady v. Maryland* was violated. *See, e.g., United States v. Fisher*, 711 F.3d 460, 464-65 (4th Cir. 2013); *Ferrara v. United States*, 456 F.3d 278, 290 (1st Cir. 2006). The Fifth Circuit "precedent" referred to in the collateral appeal opinion is based upon *Brady v. Maryland*, not *Brady v. United States*. There was no "precedent" that petitioner's counsel "conceded" precluded his *Brady v. United States* claim.

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 v. Maryland* 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 has 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). However, this precedent is not based on *Brady v. United States* and does not preclude petitioner's claim here, which is a *Brady v. United States* claim, and is "a separate basis for relief," as noted in Judge Elrod's Order granting the COA.

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. That misrepresentation, as well as others, violated *Brady v. United States*. A rule that precludes a defendant from raising a claim that egregious government misconduct prior to a plea induced him to enter a guilty plea which he would not have otherwise entered gives the Government a great incentive to quickly obtain a guilty plea through misrepresentations, 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.

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 government misconduct

and misrepresentations prior to entry of a plea induced his guilty plea.." *See United States v. Fisher*, 711 F.3d 460, 464-65 (4th Cir. 2013); *Ferrara v. United States*, 456 F.3d 278, 290 (1st Cir. 2006). *See also Matthew v. Johnson*, 201 F.3d 353, 358 (5th Cir. 2000).

II. The Fifth Circuit Court of Appeals Has Decided an Important Question of Federal Law that Has Not Been, But Should Be Settled by This Court.

The issue involved here is limited to a single issue in petitioner's 2255 Motion to Vacate as described in Judge Elrod's January 7, 2019 Order granting a Certificate of Appealability ("COA") to petitioner. The issue was raised in petitioner's direct appeal but the Fifth Circuit did not address this issue in its Opinion rendered on June 29, 2015 in the direct appeal, as stated by Judge Elrod in her Order granting the Certificate of Appealability as to this issue. The issue described in Judge Elrod's Order is the same issue as ruled upon by the district judge in his order denying petitioner's 2255 Motion to Vacate. The appeal filed as authorized by Judge Elrod's Order granting the right to appeal was limited to that one issue. The Fifth Circuit affirmed the district court's denial of relief "[b]ecause Hooper failed to challenge the procedural bar ruling, and in any event that ruling was correct, we AFFIRM."

Petitioner's Application for a COA, filed after the district court's denial of the 2255 motion and refusal to issue a certificate of appealability, "challenged" the procedural bar ruling in detail. There clearly was no "abandonment" of that claim or the *Brady v. United States* issue. Petitioner has fought since 2014 to get a ruling on the government misconduct issue, which has been frustrated by the procedural bar ruling, first by the

district court, and now by the argument that petitioner must continue to appeal the procedural bar issue in addition to pursue the right to appeal the issue of the *Brady v. United States* egregious government misconduct granted to petitioner by Judge Elrod's Order granting the COA as to that issue. The government did not file a brief in the case and did not respond to the arguments of petitioner and has not responded to the claims of government misconduct.

1. The Direct Appeal Panel Did Not Decide the Claim Petitioner Raised In His Direct Appeal of the COA Issue.

The Fifth Circuit's November 5, 2019 Opinion stated:

"The district court concluded that, except for the actual innocence claim, [e]ach ground for relief presented... was raised on direct appeal. As a result, the court held that the previously raised claims were procedurally barred."

The district court's holding that "previously raised claims were procedurally barred" was incorrect. The *Brady v. United States* claim was not procedurally barred because it was not ruled on.

The district court's ruling on the 2255 motion to vacate was wrong when it denied the motion "because the Court of Appeals has already addressed the grounds for relief presented in the instant motion." The Court of Appeals had not addressed that issue in its Opinion in the direct appeal and thus, it was not procedurally barred. Once Judge Elrod ruled that reasonable jurists could debate whether the district court correctly concluded this claim was procedurally barred, her ruling established that Hooper met the required showing to entitle him to appeal that issue. The sole reason put forward for the district court's denial of the 2255 motion and denial of a COA, as to that issue, was incorrect and

did not constitute a procedural bar.

The Fifth Circuit's decision further stated that "in any event that ruling [the district court's procedural bar ruling as to issue 2 in Hooper's 2255 motion] was correct." The ruling could not have been correct because the basis for it was that the issue had been addressed in the direct appeal and, in fact, that was incorrect.

2. Petitioner Challenged the District Court's Procedural Bar Ruling in His Application for a COA and in his Appeal under the COA as Granted.

Petitioner pressed his claim that there was no procedural bar, as the district court had ruled, in his Application for a COA, filed on May 22, 2018. The claim of misconduct and misrepresentations by the Government under *Brady v. United States* was pressed in pages 17 to 22 of the Application for COA. Petitioner clearly explained his claim as to this issue and why that claim was not procedurally barred:

"The district court stated that "because the Court of Appeals has already addressed the grounds for relief presented" in Hooper's 2255 motion, "Hooper is not entitled to Section 2255 relief." The Fifth Circuit did not rule on Hooper's claim based on Government misconduct in withholding material exculpatory evidence under *Brady v. United States*. In fact, neither *Brady v. United States* nor "misconduct" was mentioned in the Fifth Circuit opinion. The claim of Government misconduct was not "decided" on direct appeal and is not barred from collateral review. *Brady v. United States* says that a defendant who was fully aware of the direct consequences of the plea may set aside the plea as involuntary if he shows (1) some egregiously impermissible conduct antedated the entry of his plea and (2) the misconduct influenced his decision to plead guilty or was material to that choice. *Brady v. United States*, 397 U.S. at 755. Both of these showings were made by Hooper."

3. The Court's Action in Granting the COA as to the *Brady v. United States* Issue Obviated the Need for Petitioner to Continue to Challenge the Procedural Bar Ruling.

A court must deny a COA if the applicant fails to establish both (1) that jurists of reason would find debatable "whether the petition states a valid claim of the denial of a constitutional right" and (2) that those jurists "would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 429 U.S. 473, 484 (2000). Petitioner demonstrated those two prerequisites in his Application for a COA and Judge Elrod ruled that (1) "reasonable jurists could debate whether the district court correctly concluded that his claim is procedurally barred;" and (2) "reasonable jurists could debate whether Hooper has stated a valid constitutional claim," and then granted petitioner a certificate of appealability as to issue 2. Petitioner demonstrated the necessary prerequisites and was granted a COA. Judge Elrod ruled that petitioner was therefore entitled to appeal issue 2, which is what petitioner did. The issue as described in Judge Elrod's Order was exactly the issue appealed by petitioner. The question of a procedural bar of issue 2 was decided by Judge Elrod in petitioner's favor and he was authorized to pursue his appeal on that issue.

Once Judge Elrod ruled on the Application for a COA and ruled that issue 2, the issue concerning *Brady v. United States* and Government misconduct, was not addressed by the Fifth Circuit in the direct appeal, there could be no question that the district court's finding and conclusion that "the previously raised claims were procedurally barred" was incorrect. Claim 2 was not procedurally barred because it was never addressed and ruled upon.

Petitioner did not need to address the procedural bar because Judge Elrod found, in ruling on Hooper's Application for a COA, that the Fifth Circuit's ruling in the direct

appeal "did not address" issue 2. When Judge Elrod ruled that, as to issue 2, "reasonable jurists could debate whether the district court correctly concluded that this claim is procedurally barred" and that "reasonable jurists could debate whether Hooper has stated a valid constitutional claim" and granted Hooper's request for a COA as to issue 2, Hooper had met the prerequisites to appeal that issue and had only to file his appeal on that issue. Hooper did not need to again challenge the procedural bar ruling. The only issue Hooper needed to raise in the appeal was the one authorized by Judge Elrod's Order.

4. Petitioner's Claim Under *Brady v. United States* Is Not a "Failure to Disclose" Claim but a Claim of Affirmative Misrepresentation and Egregious Misconduct.

The significant difference in petitioner's *Brady v. United States* claim was not simply that the plea was unknowing and involuntary "because the government withheld exculpatory sentencing evidence" but that the Government engaged in misconduct and made affirmative misrepresentations and engaged in coercion and threats that induced the guilty plea. It was not simply a claim "that the failure to turn over information about the drug quantity evidence renders his plea invalid" but that deliberate, affirmative misrepresentations were made that induced the plea and constituted egregious misconduct by the Government. Petitioner's argument is that the Government deliberately misrepresented the statements of its chief potential witness against petitioner as to the time frame of petitioner's alleged activities, the amounts of drugs, and put forward false evidence even after they knew it was not true, by continuing to use the false narrative in response to petitioner's requests for any exculpatory evidence. This was not

simply a "failure to disclose" exculpatory evidence as stated in the footnote on page 3 of the Fifth Circuit's Opinion, but a claim of egregious misconduct and deliberate, affirmative misrepresentation of material, exculpatory evidence--a far different claim than a *Brady v. Maryland* nondisclosure claim--and a claim that has not been foreclosed by Fifth Circuit precedent.

5. Petitioner Did Not Abandon His Challenge to the Procedural Bar Ruling.

Petitioner did not "abandon" the claim after the district court's ruling on the procedural bar, nor before in his direct appeal. He filed an Application for a COA with the Fifth Circuit and Judge Elrod granted the COA limited to the issue dealing with government misconduct and misrepresentations in withholding material, exculpatory evidence prior to petitioner's guilty plea. At that point, petitioner did not need to again challenge the procedural bar ruling of the district court because Judge Elrod ruled that it *was* debatable whether the procedural ruling was correct. Petitioner was given the right to appeal the issue of misconduct and misrepresentation under *Brady v. United States* and the cases based thereon. Petitioner never abandoned that claim. Counsel stated in his brief only that he was "aware of existing Fifth Circuit precedent that states that a guilty plea precludes a defendant from asserting a *Brady v. Maryland* violation." Counsel further stated that he believed that the facts and circumstances of petitioner's case "are distinguishable from existing Fifth Circuit precedent." See, Application for COA, p. 16-17. Counsel's statements as to the Fifth Circuit precedent holding that a guilty plea precludes a defendant from asserting a *Brady* violation applied to *Brady v. Maryland*, not the *Brady v. United States* misconduct issue. The panel that rejected petitioner's direct

appeal was clearly speaking about *Brady v. Maryland* in its Opinion, because neither *Brady v. United States*, nor "misconduct" nor "misrepresentation" was ever mentioned in that Opinion.

Counsel for Hooper never abandoned the *Brady v. United States* claim nor "conceded" that Fifth Circuit caselaw precluded his claim under *Brady v. United States*. In fact, counsel cited cases in other circuits and from the highest appellate courts in states that have recently held that a defendant may challenge convictions on such grounds.

Counsel specifically noted the statement in *Matthew v. Johnson*, 201 F.3d 353, 364 n.15 (5th Cir. 2000) that "[e]ven if the nondisclosure is not a *Brady [v. Maryland]* violation," there may be situations in which the prosecution's failure to disclose evidence makes it "impossible for [a defendant] to enter a knowing and intelligent plea." Application for COA, p. 18-19. Hooper's Application for COA did not abandon the claim or concede that it was foreclosed by Fifth Circuit precedent, but stated "[t]he claim of Government misconduct was not 'decided' on direct appeal and is not barred from collateral review."

6. Petitioner Did Not Concede that Fifth Circuit Caselaw Precluded His Claim Under *Brady v. United States*.

Petitioner did not concede "that Fifth Circuit caselaw precluded his claim that "Pre-plea Misconduct Rendered Hooper's Plea Involuntary Under *Brady v. United States*." In fact, Hooper stated in his brief that "Counsel believes the facts and circumstances of this case are distinguishable from existing Fifth Circuit precedent." Brief at p. 17. And, in his Reply Brief, petitioner specifically captioned one of his arguments "The Claim Under *Brady v. United States* is Not Waived ..." Petitioner's statements in his brief as to "being aware" that "existing Fifth Circuit precedent holding that a guilty plea precludes a defendant from asserting a *Brady* violation" referred to *Brady v. Maryland*, not *Brady v. United States*. It was clear that petitioner was not conceding the argument, but was arguing that his case was distinguishable as to the

Brady v. Maryland lines of cases and that under *Brady v. United States*, his claim was not foreclosed where the plea was induced by egregious misconduct, threats or misrepresentations.

III. The Questions Presented Significantly Impact the Administration of Criminal Justice Because of the High Percentage of Federal Criminal Cases Disposed of by Guilty Pleas.

Approximately ninety-seven percent of federal convictions are the result of guilty pleas. The criminal justice system relies heavily upon the use of plea bargains and guilty pleas and the rules governing guilty pleas where the government has engaged in misconduct or withheld material exculpatory evidence prior to a defendant entering a guilty plea need to be consistently and fairly applied to insure due process and the integrity of the criminal system.

CONCLUSION

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

DATED: February 28, 2020

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