NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES RAY HOOPER

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

**APPENDIX**

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# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

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No. 18-10610

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UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES RAY HOOPER,

Defendant - Appellant

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

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**ON PETITION FOR REHEARING**

Before OWEN, Chief Judge, and HAYNES and COSTA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

# IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
**FILED**
November 5, 2019
Lyle W. Cayce
Clerk

No. 18-10610

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES RAY HOOPER,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:16-CV-756

Before OWEN, Chief Judge, and HAYNES and COSTA, Circuit Judges.

PER CURIAM:*

Charles Ray Hooper filed a motion for postconviction relief seeking to vacate his federal conviction for conspiring to deal methamphetamine. The district court denied the motion, concluding that the claims Hooper raised were the same claims he had unsuccessfully raised on direct appeal. This court granted Hooper a certificate of appealability (COA) on his claim that his plea was involuntary because the government failed to produce exculpatory

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

evidence. The COA stated that "reasonable jurists could debate whether the district court correctly concluded that this claim is procedurally barred." But in his subsequent brief, Hooper did not address the procedural bar, focusing only on the merits of this claim. Because Hooper failed to challenge the procedural bar ruling, and in any event that ruling was correct, we AFFIRM.

I.

Hooper pleaded guilty to the drug offense in May 2014. He admitted that he supplied drugs to, among others, Brittany Ann Barron and Jimmy Sparks. His presentence report calculated a drug quantity of 5.82 kilograms of methamphetamine, including ten ounces to Barron and 4.98 kilograms to Sparks. Those numbers came from a report summarizing a January 2014 interview with Barron. Hooper objected to the 4.98 kilograms associated with Sparks.

In August 2014, between Hooper's guilty plea and sentencing, his counsel sent Barron a letter asking about the 4.98 kilograms she purportedly said Hooper sold to Sparks. Barron replied that she told authorities she had seen Hooper sell Sparks only up to four ounces of methamphetamine and that she had purchased one ounce from him on five occasions. She also stated that officers re-interviewed her in May 2014, and during the interview she confirmed these lower quantities and disputed the higher ones.

At Hooper's sentencing two months later, he called Barron to testify. She repeated what she had told Hooper's lawyer: During her January and May interviews, she had never given the 4.98-kilogram figure. Barron contended that the authorities had accused her of changing her story in May and that they had recorded "something different than what was the truth" in the original summary of her interview. The government maintained that Barron's story had not changed and that it had never seen the letter she sent to defense counsel. The district court sustained Hooper's objection to the drug quantity

and sentenced him to 130 months based, in part, on reducing the drug quantity linked to Sparks.

Hooper appealed. He argued that his guilty plea was involuntary and unknowing under *Brady v. United States*, 397 U.S. 742 (1970), because the government failed to disclose that Barron, at her May interview, had disputed ever attributing higher drug quantities to Hooper. Hooper also asserted claims under *Brady v. Maryland*, 373 U.S. 83 (1963), *Strickland v. Washington*, 466 U.S. 668 (1984), and due process premised on the same alleged misconduct.[1] We affirmed Hooper's conviction.

Hooper then filed a section 2255 motion, raising the same arguments based on the failure to disclose exculpatory sentencing information plus an actual innocence claim. 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.

Our court's COA grant authorized an appeal on only the *Brady v. United States* claim concerning the plea's validity. The order recognized that Hooper had raised the claim on direct appeal but noted that "our opinion affirming his conviction did not [directly] address it." The COA grant thus concluded that reasonable jurists could debate the procedural bar ruling as well as the merits of the claim.

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[1] The fact that Hooper relied on two different "*Brady*" cases from the Supreme Court creates some confusion. Although there is some overlap between the issues (as Hooper recognized on direct appeal by conceding that our caselaw foreclosed both claims), Hooper treated them as distinct claims on both direct appeal and in his section 2255 motion. Hooper's *Brady v. United States* claim—the one before us—focuses on the voluntariness of the plea in light of the failure to disclose exculpatory evidence. Hooper's *Brady v. Maryland* claim was about a more general right to exculpatory evidence.

II.

Hooper's counsel-drafted brief does not acknowledge, let alone challenge, the procedural bar ruling. Hooper has thus abandoned this claim. *Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 732 (5th Cir. 2018) ("An appellant abandons all issues not raised and argued in [his] initial brief on appeal." (quotations omitted)). Failing to identify errors in the district court's analysis "is the same as if [Hooper] had not appealed th[e] judgment" at all. *See Brinkmann v. Dall. Cty. Deputy Sherriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

Even if Hooper had not abandoned his challenge to the procedural bar ruling, we would still reject his appeal. "[I]ssues raised and disposed of" on direct appeal "are not considered in § 2255 [m]otions." *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986). This longstanding rule prevents the federal postconviction review process from becoming "purposeless duplication" of the direct appeal. *Blackwell v. United States*, 429 F.2d 514, 516 (5th Cir. 1970) (per curiam). On direct appeal, Hooper argued that the government's failure to turn over exculpatory evidence about the drug quantity meant that his plea was not valid. That claim was "Issue One" in his principal brief, receiving more than eight pages of briefing; his reply brief also devoted more pages to the "*Brady v. United States*" issue than any other. Hooper conceded, however, that Fifth Circuit caselaw precluded his claim that "Pre-plea Misconduct Rendered Hooper's Plea Involuntary Under *Brady v. United States*." *See Matthew v. Johnson*, 201 F.3d 353 (5th Cir. 2000); *see also Alvarez v. City of Brownsville*, 904 F.3d 382, 392–94 (5th Cir. 2018) (en banc) (reaffirming the caselaw Hooper cited in his brief on direct appeal as the reason for the concession).

Although the panel that rejected Hooper's direct appeal did not cite *Brady v. United States*, it recognized Hooper's argument "that his guilty plea was unknowing and involuntary because the [g]overnment withheld

exculpatory sentencing evidence regarding the amount of methamphetamine for which he was accountable." *United States v. Hooper*, 621 F. App'x 770, 770 (5th Cir. 2015) (per curiam), *cert. denied*, 136 S. Ct. 894 (2016). The panel then acknowledged Hooper's concession that his "argument [wa]s foreclosed by circuit precedent." *Id.* In affirming his conviction, the direct appeal panel thus decided the claim Hooper is again raising—that the failure to turn over information about the drug quantity evidence renders his plea invalid.

* * *

The judgment is AFFIRMED.

# IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-10610

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES RAY HOOPER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas—Fort Worth
No. 4:16-cv-756

O R D E R:

Charles Ray Hooper, federal prisoner # 48082-177, seeks 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 the intent to distribute methamphetamine. Hooper requests a COA on the following issues: (1) whether an alleged *Brady v. Maryland* violation prior to his guilty plea rendered that plea involuntary; (2) whether the government's alleged misconduct prior to his guilty plea rendered the plea involuntary under *Brady v. United States*, 397 U.S. 742 (1970); (3) whether Hooper was denied effective assistance of counsel due to the alleged *Brady v. Maryland* violation; and (4) whether Hooper was "actually innocent" because he did not commit any criminal acts in furtherance of the conspiracy after early 2008.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires a showing that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A movant satisfies the COA standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where the district court has denied federal habeas relief on procedural grounds, the applicant must demonstrate that reasonable jurists would find it debatable whether the motion states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484.

"[I]ssues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 [m]otions." *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986). Because Hooper raised issues (1), (3), and (4) on direct appeal and this court disposed of them, Hooper is not entitled to relief under § 2255 on these issues. With respect to issue (2), however, Hooper raised this issue in his brief on direct appeal, but our opinion affirming his conviction did not address it. *See United States v. Hooper*, 621 F. App'x 770 (5th Cir. 2015).[1] Thus, reasonable jurists could debate whether the district court correctly concluded that this claim is procedurally barred. *See United States v. Smith*, 59 F.3d 1242, at *2 (5th Cir. 1995) (unpublished) (dismissing arguments made in § 2255 motion on alternative grounds after assuming this court did not dispose of them on direct appeal).

[1] While we addressed the related *Brady v. Maryland* issue, Hooper's *Brady v. United States* claim provides a separate basis for relief. *See Matthew v. Johnson*, 201 F.3d 353, 364–65 (5th Cir. 2000).

To grant a COA as to issue (2), we must also determine whether jurists of reason could debate whether Hooper has stated a valid claim of government misconduct in violation of *Brady v. United States*. That case stands for the proposition that government misconduct or misrepresentations can violate a defendant's due process rights and render his guilty plea involuntary. *United States v. Amaya*, 111 F.3d 386, 389 (5th Cir. 1997).

Case law in this and other circuits suggests that, while the government's failure to disclose exculpatory evidence alone may not violate *Brady v. United States*, a nondisclosure coupled with some misconduct by the prosecution prior to the defendant's guilty plea may render that plea involuntary. *Cf. Matthew v. Johnson*, 201 F.3d 353, 356–57, 365–66 (5th Cir. 2000) (rejecting a *Brady v. United States* challenge where the prosecution failed to disclose exculpatory evidence, but the defendant had not claimed that the state "threatened him" or "made and then broke promises made to him"); *see Ferrara v. United States*, 456 F.3d 278, 291–93 (1st Cir. 2006) (holding that a *Brady v. United States* violation occurred where the prosecution (1) failed to disclose that a witness had recanted; (2) manipulated the witness into reverting to his original testimony; and (3) affirmatively misrepresented that it had disclosed all exculpatory information); *Robertson v. Lucas*, 753 F.3d 606, 619–21 (6th Cir. 2014) (finding a guilty plea valid despite nondisclosure of exculpatory evidence because the prosecutor represented that he had no *knowledge* of exculpatory evidence, and "[t]here [was] no evidence that his statement was false").

In his motion, Hooper alleges a failure to disclose exculpatory evidence coupled with government misconduct and misrepresentations: the government failed to disclose that its key drug quantity witness, Brittany Barron, recanted testimony attributed to her before Hooper pleaded guilty; the government knew the testimony attributed to Barron was false and that the interviewing

agents' notes did not support these statements; and the government continued to represent that it had evidence to support the charged drug quantities after Barron recanted to induce Hooper to plead guilty.[2] Thus, reasonable jurists could debate whether Hooper has stated a valid constitutional claim.

Hooper's motion for a COA is GRANTED in part as to issue (2) and DENIED in part as to issues (1), (3), and (4).

/s/ Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

[2] During Hooper's sentencing proceedings, the district court reduced the drug quantity and offense level based on Barron's testimony refuting the prior statements attributed to her.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

| | | |
|---|---|---|
| **CHARLES RAY HOOPER (12),** | § | |
| | § | |
| **Movant,** | § | **Civil Action No. 4:16-cv-756-O** |
| **v.** | § | |
| | § | **(Criminal Action No. 4:14-cr-078-O)** |
| **UNITED STATES OF AMERICA,** | § | |
| | § | |
| **Respondent.** | § | |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This is a motion to vacate, set aside or correct the sentence filed pursuant to 28 U.S.C. § 2255.

On October 6, 2014, upon his plea of guilty to the charge of Conspiracy to Possess with Intent to Distribute a Controlled Substance, Charles Ray Hooper ("Hooper") was sentenced to 130 months in prison. *See United States v. Hooper*, No. 4:14-cr-078-O (N.D. Tex. 2014). The sentence is to be followed by four years of supervised release. *Id.* On June 29, 2015, Hooper's conviction was affirmed by the United States Court of Appeals for the Fifth Circuit. *Id.* at ECF No. 1489.

In support of the instant motion, Hooper presents the following grounds for relief:

1. 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;

2. the Government's misconduct and misrepresentation in withholding material, exculpatory evidence, in violation of *Brady v. United States*, 397 U.S. 742 (1970), prior to Hooper's guilty plea, denied Hooper due process of law and rendered his guilty plea involuntary, unknowing and invalid;

3. Hooper was denied effective assistance of counsel and was irreparably prejudiced in the defense of his case by the Government's act of withholding from his counsel, prior to entry of his guilty plea, material, exculpatory evidence which deprived counsel of his ability to effectively represent his client; and,

4. Hooper was "actually innocent" because he committed no criminal acts in furtherance of any conspiracy after his disavowal or withdrawal in early 2008.

Motion to Vacate, ECF No. 1 at 18-25.

28 U.S.C. § 2255 provides that a prisoner in custody under sentence of a federal court may file a motion to vacate, set aside or correct the sentence in the court which imposed the sentence. The statute states four grounds upon which such relief may be claimed:

1. that the sentence was imposed in violation of the Constitution or laws of the United States;

2. that the court was without jurisdiction to impose such sentence;

3. that the sentence was in excess of the maximum authorized by law, and;

4. that the sentence is otherwise subject to collateral attack.

28 U.S.C. § 2255(a); *Hill v. United States*, 368 U.S. 424, 426-27 (1962). Section 2255 does not mandate habeas relief to all who suffer trial errors. *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. Unit A 1981). It is limited to grounds of constitutional or jurisdictional magnitude, *Limon-Gonzalez v. United States*, 499 F.2d 936, 937 (5th Cir. 1974), and for the narrow spectrum of other injury which "could not have been raised on direct appeal and, would, if condoned, result in a complete miscarriage of justice." *Capua*, 656 F.2d at 1037.

When, as in the case at bar, a criminal defendant pleads guilty, he has entered more than a mere confession; a guilty plea is an admission that the defendant committed the charged offense. *North Carolina v. Alford*, 400 U.S. 25, 32 (1970); *Taylor v. Whitley*, 933 F.2d 325, 327 (5th Cir. 1991). Once a criminal defendant has entered a plea of guilty, all nonjurisdictional defects in the prior proceedings are waived except claims of ineffective assistance of counsel relating to the voluntariness of the guilty plea. *E.g., United States v. Daughenbaugh*, 549 F.3d 1010, 1012 (5th Cir. 2008); *Smith*

*v. Estelle*, 711 F.2d 677, 682 (5th Cir. 1983); *Barrientos v. United States*, 668 F.2d 838, 842 (5th Cir. 1982).

Each ground for relief presented in the instant motion was raised on direct appeal. *See United States v. Hooper*, No. 14-11153 (5th Cir. 2015). The Court of Appeals found that Hooper's guilty plea precluded him from raising a claim that the Government failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); that Hooper's claim of ineffective assistance of counsel arising out of the Government's failure to disclose exculpatory evidence did not demonstrate that counsel's performance "fell below an objective standard of reasonableness" as required under *Strickland v. Washington*, 466 U.S. 668, 687 (1984); and, that he was not entitled to a mitigating role reduction despite his claim that he was not involved in the conspiracy after 2008. *See United States v. Hooper*, No. 4:14-cr-078-O (N.D. Tex. 2014), Fifth Circuit's Opinion, ECF No. 1489. Although Hooper now casts his claim of no involvement after 2008 as an "actual innocence" claim, review of his appellate brief reflects that he raised the issue of non-involvement after 2008 on direct appeal. *See United States v. Hooper*, No. 14-11153 (5th Cir. 2015), Appellant's Brief at 38-39.

Because the Court of Appeals has already addressed the grounds for relief presented in the instant motion, Hooper is not entitled to Section 2255 relief. *See United States v. Rocha*, 109 F.3d 225, 230 (5th Cir. 1997) (finding claims decided on direct are appeal procedurally barred from collateral review); *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986) (stating that issues disposed of on direct appeal are not considered in § 2255 motions); *Blackwell v. United States*, 429 F.2d 514, 516 (5th Cir. 1970) (concluding that permitting a collateral attack on grounds already rejected by the appellate court "would merely result in the purposeless duplication of the review process").

Moreover, with regard to his "actual innocence" claim, the Court finds as follows:

A trial judge is required to ensure that a guilty plea is knowing and voluntary. *James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995). "Before the trial court may accept a guilty plea, the court must ensure that the defendant 'has a full understanding of what the plea connotes and of its consequence.'" *Taylor v. Whitley*, 933 F.2d 325, 329 (5th Cir.1991) (quoting *Boykin v. Alabama*, 395 U.S. 238, 244 (1969)). This constitutional inquiry focuses on three core concerns: (1) the absence of coercion; (2) an understanding of the charges, and; (3) a realistic understanding of the consequences of the guilty plea. *United States v. Bernal*, 861 F.2d 434, 436 (5th Cir. 1988). These core concerns are addressed by the admonishments contained in Rule 11 of the Federal Rules of Criminal Procedure. The Rule 11 admonishments provide "prophylactic protection for the constitutional rights involved in the entry of guilty pleas." *United States v. Gracia*, 983 F.2d 625, 627 (5th Cir. 1993).

The record in this case reflects that Charles Hooper freely and voluntarily entered a plea of guilty to the charge of conspiracy to possess with intent to distribute methamphetamine. *See United States v. Hooper*, No. 4:14-cr-078-O (N.D. Tex. 2014), Factual Resume, ECF No. 362, Transcript of Rearraignment, ECF No. 1180 at 29, 45-47. He was fully aware that he faced a sentence range of five to 40 years and that the Court would impose his sentence with no promises as to what that sentence would be. *Id.*, Transcript of Rearraignment, ECF No. 1180 at 12-13, 41. He stated that he read the factual resume and fully understood it. *Id.* at 46-47. He understood that the sentence would be determined after the presentence report was compete and that stipulated facts and also facts not mentioned in any stipulation could be taken into consideration in determining his sentence. *Id.* at 14. Hooper's constitutional and other rights were explained to him in detail. *Id.* at 11-15. Hooper stated under oath that he understood his rights as explained by the Court. *Id.* at 15. He testified that he was

pleading guilty to Count 1 of the indictment and he admitted to committing the offenses as charged. *Id.* at 28-29. He further stated that there were no promises or assurances made to cause him to plead guilty, that he discussed sentencing guidelines and the facts and circumstances surrounding the charges with counsel, and that he voluntarily entered his plea of guilty. *Id.* at 31, 33-34, 36.

"Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). "The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Id.* The record in this case reflects that Hooper was aware that he was charged with conspiracy to possess with intent to distribute methamphetamine and that he knowingly and voluntarily entered a plea of guilty. Hooper was also aware, at sentencing, of the "new evidence" relating to the exculpatory evidence allegedly withheld by the government. *See United States v. Hooper*, No. 4:14-cr-078-O (N.D. Tex. 2014), Transcript of Sentencing, Testimony of Brittany Barron, ECF No. 1152 at 3-22 (testifying that she never made certain statements attributed to her by the Government relating to Hooper's drug quantity and his dates of involvement in the conspiracy). In light of the record in this case, Hooper cannot prevail on a claim of actual innocence.

For the foregoing reasons the Section 2255 motion is **DENIED**.

**SO ORDERED** this **8th day** of **May, 2018.**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

| | | |
|---|---|---|
| **CHARLES RAY HOOPER (12),** | § | |
| | § | |
| **Movant,** | § | **Civil Action No. 4:16-cv-756-O** |
| **v.** | § | |
| | § | **(Criminal Action No. 4:14-cr-078-O)** |
| **UNITED STATES OF AMERICA,** | § | |
| | § | |
| **Respondent.** | § | |

**JUDGMENT**

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is **ORDERED**, **ADJUDGED**, and **DECREED** that the motion to vacate, correct, or set aside sentence is **DENIED**.

**SIGNED** this **8th day** of **May, 2018**.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

| | | |
|---|---|---|
| **CHARLES RAY HOOPER (12),** | § | |
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| **Movant,** | § | **Civil Action No. 4:16-cv-756-O** |
| **v.** | § | |
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| **UNITED STATES OF AMERICA,** | § | |
| | § | |
| **Respondent.** | § | |

**ORDER OF THE COURT ON**
**CERTIFICATE AS TO APPEALABILITY**

This is a motion to vacate correct or set aside sentence brought under 28 U.S.C. §2255. The Court has entered its decision and, pursuant to 28 U.S.C. §2253(c), a certificate of appealability is hereby **DENIED**.

**REASONS FOR DENIAL:** For the reasons stated in the Court's Findings of Fact and Conclusions of Law, which are hereby adopted and incorporated by reference, the Movant has failed to demonstrate that jurists of reason would find it debatable whether the motion states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether this Court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Morris v. Dretke* 379 F.3d 199, 204 (5th Cir. 2004).

**SO ORDERED** this **8th day** of **May, 2018**.

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
**FILED**
June 29, 2015
Lyle W. Cayce
Clerk

No. 14-11153
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CHARLES RAY HOOPER,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:14-CR-78-12

Before REAVLEY, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Charles Ray Hooper pleaded guilty to conspiracy to possess with the intent to distribute methamphetamine and was sentenced to 130 months of imprisonment, to be followed by four years of supervised release. He now appeals his conviction and sentence. Hooper argues that his guilty plea was unknowing and involuntary because the Government withheld exculpatory sentencing evidence regarding the amount of methamphetamine for which he

* 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.

was accountable. He contends that the Government's withholding of this evidence violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Hooper's guilty plea precludes him from raising a claim that the Government failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and his argument is foreclosed by circuit precedent. *See United States v. Conroy*, 567 F.3d 174, 178-79 (5th Cir. 2009); *see also Orman v. Cain*, 228 F.3d 616, 617 (5th Cir. 2000); *Matthew v. Johnson*, 201 F.3d 353, 361-62 (5th Cir. 2000). Hooper concedes this point and raises the issue solely to preserve it for further possible review.

Hooper also argues that the Government's failure to provide exculpatory sentencing information resulted in a denial of the effective assistance of counsel. To establish ineffective assistance, Hooper must show that his counsel's conduct was deficient and that it prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because Hooper does not show that counsel's performance "fell below an objective standard of reasonableness," he does not show that he was denied the effective assistance of counsel. *See id.* at 688.

Regarding the reasonableness of his sentence, Hooper challenges being held responsible for conduct occurring prior to the date alleged in the indictment. His argument fails. The district court determined that Hooper's relevant conduct includes acts dating from 2006. "Drug transactions occurring before the precise time frame of the conspiracy for which a defendant is convicted may be considered" as relevant conduct. *United States v. McCaskey*, 9 F.3d 368, 375 (5th Cir. 1993). Additionally, a district court's assessment of relevant conduct affects the calculation of a defendant's criminal history score, and the Guidelines explain that, for purposes of U.S.S.G. § 4A1.2(e)(2),

"commencement of the instant offense" includes any relevant conduct under U.S.S.G. §1B1.3. § 4A1.2, comment. (n.8).

Challenging the amount of drugs for which he was held responsible at sentencing, Hooper notes that the district court sustained his objections to the drug quantity as set forth in the PSR but contends that counsel made an error in calculation and that the appropriate offense level was two levels lower than that argued at sentencing and determined by the district court. The error of which Hooper complains regarding drug quantity was invited and should be reviewed only for manifest injustice. *See United States v. Rodriguez*, 602 F.3d 346, 350-51 (5th Cir. 2010). Hooper has failed to satisfy this burden.

Finally, Hooper argues that the district court erred in denying a reduction for having a minor role in the offense. He contends that he was not involved in the conspiracy after 2008, and therefore, he should have been granted a two-level reduction for having less involvement during the time frame covered by the indictment. The district court's denial of a reduction for a mitigating role is a factual finding reviewed for clear error. *United States v. Villanueva*, 408 F.3d 193, 203 (5th Cir. 2005). The determination of a defendant's role in the offense is made on the basis of all conduct within the scope of relevant conduct. U.S.S.G. Ch. 3, Pt. B, intro. comment. Hooper does not dispute that his actions during 2006-2007 would not qualify for a minor role reduction. Because the district court found that Hooper's relevant conduct included the conduct in 2006 and 2007, Hooper fails to show that the district court clearly erred in denying his request for a minor role adjustment. *See* U.S.S.G. § 3B1.2, comment. (n.5); *Villanueva,* 408 F.3d at 203.

The judgment of the district court is AFFIRMED.