APPENDIX A

THE SUPREME COURT OF OHIO

State of Ohio	:	Case No. 2017-1481
v.	:	E N T R Y
Dennis Riley	:	Filed 03/14/2018

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Washington County Court of Appeals;
No. 16CA000029)

/s/ Maureen O'Connor

Chief Justice

The Official Case Announcement can be found at http://www.supremecourt.ohio.gov/ROD/docs/

APPENDIX B

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 16CA29
vs.	:	Filed 09/05/2017
DENNIS RILEY,	:	ENTRY ON APPLICA-CATION FOR
Defendant-Appellant.	:	RECONSIDERATION

Appellant Dennis Riley filed an application that requests this court to reconsider its June 27, 2017 decision and judgment that affirmed the trial court's judgment denying appellant's "motion to dismiss." *State v. Riley*, 4th Dist. Washington No. 16CA29, 2017-Ohio-5819. Appellant's application presents three "issues of error" for reconsideration:

FIRST ISSUE:

"THE APPELLATE COURT ERRED IN DECLARING THAT *UNITED STATES V. RUIZ*, [526 U.S. 622, 628, AND 633, 122 S.CT. 2450, 153 L.ED.2D 586 (2002)], WAS DISPOSITIVE TO THE *RILEY*

CASE."

SECOND ISSUE:

"THE APPELLATE COURT ERRED BY OVERLOOKING THE CONTEXT OF THE MISBEHAVIOR BY THE ONLY L A W E N F O R C E M E N T OFFICER/WITNESS IN THE CASE."

THIRD ISSUE:

"THE APPELLATE COURT ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF APPELLANT'S EXPERT."

An appellate court ordinarily will not grant an App.R. 26(A) application for reconsideration unless the application calls to the court's attention "an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515 (10th Dist. 1987), paragraph one of the syllabus. *Accord State v. Wong*, 97 Ohio App.3d 244, 246, 646 N.E.2d 538 (4th Dist. 1994). "'An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court.'" *Columbus v. Dials*, 10th Dist. No. 04AP-1099, 2006-Ohio-227, ¶3, quoting *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th dist. 1996). *Accord Hampton v. Ahmed*, 7th Dist. No. 02BE66, 2005-Ohio-

1766, ¶16 ("An application for reconsideration may not be filed simply on the basis that a party disagrees with the prior appellate court decision."). Instead, the purpose of App.R. 26 is to "prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *Owens*, 112 Ohio App.3d at 336. As we explain below, we do not believe that appellant's suggested errors constitute obvious errors in our decision, or raise issues for consideration that we did not consider at all, or that we should have considered.

Appellant first maintains that we incorrectly concluded that *Ruiz* means that the state did not have a duty to disclose evidence pertaining to the investigating officer's communications and relationship with the victim. Appellant argues that *Ruiz* is factually distinguishable and, thus, does not apply to the facts in the case sub judice. While we recognize the factual distinctions between *Ruiz* and appellant's case, we do not find it obvious that *Ruiz* is limited to its facts. The *Ruiz* decision gives no indication that it is limited to its facts. Moreover, the Ohio Supreme Court has not indicated in any of its decisions that *Ruiz* is limited to its facts. Thus, we find no obvious error in our decision to apply *Ruiz* to appellant's case.

Appellant further asserts that we "erred by overlooking the context of the (investigating officer's) misbehavior." Appellant argues that defense counsel "would have used the existence of the investigations [sic] extremely effectively at trial to destroy the

credibility of the officer." Even if true, appellant chose to forego his right to a jury trial, which included his right to confront witnesses against him, and enter a guilty plea. Moreover, *Ruiz* indicates that the state did not have a pre-guilty plea duty to disclose the information concerning the officer's conduct. Our decision thus did not need to reach the issue appellant claims that we overlooked. Instead, we presumed, for the sake of argument, that the information concerning the officer constitutes material impeachment information. *Id.* at ¶30.

Appellant next claims that we obviously erred by "substituting [our] judgment for that of [his] expert." Appellant asserts that we "bless[ed] the texts as benign" and made a "subtle attack on his expert" by referring to the expert as a "'self-proclaimed' expert." We, however, do not find any obvious error in our discussion concerning appellant's expert. First, we have been unable to locate the phrase "self-proclaimed" in our decision. Our recitation of the facts states that appellant's expert is "a self-described 'expert in the area of police procedures.'" *Id.* at ¶11. We do not dispute that appellant submitted the witness's Curriculum Vitae to the trial court and that it indicates that the witness has "been practicing as an expert witness/consultant since 2001" and has "provided expert testimony on approximately 187 occasions." The Curriculum Vitae further recites that the witness's "expertise is in the area of use of force but [he has] provided testimony in the areas of proper investigative procedures and police supervision." While we do not dispute the witness' experience,

education, and accolades, it is not clear that the trial court in the case sub judice qualified the witness as an expert in all police procedures. Thus, our decision did not seek to "denigrate[]" the witness, as appellant claims. Rather, our decision reflects the ambiguity relating to whether the trial court qualified appellant's witness as an expert in certain police procedures.

Accordingly, based upon the foregoing reasons, we hereby deny appellant's application to reconsider.

Harsha, J. & Hoover, J.: Concur

FOR THE COURT,

/S/ Peter B. Abele, Judge

APPENDIX C

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 16CA29
vs.	:	Filed 06/27/2017
DENNIS RILEY,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

William L. Burton, Marietta, Ohio, and George J. Cosenza, Parkersburg, West Virginia, for appellant.

Kevin A. Rings, Washington County Prosecuting Attorney, and Jeremy B. Wolfe, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:
ABELE, J.

This is an appeal from a Washington County Common Pleas Court judgment that denied a "motion to dismiss" filed by Dennis Riley, defendant below and appellant herein. Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN APPROVING THE BEHAVIOR OF THE POLICE OFFICER IN THE CASE."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FINDING THE RELATIONSHIP CREATED BY ELLENWOOD WITH THE MINOR VICTIM AND OTHER BEHAVIOR BY ELLENWOOD CREATED EVIDENCE THAT WAS ". . .MARGINALLY, IF AT ALL, IMPEACHABLE."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY REFUSING TO FIND THAT THE BEHAVIOR OF THE OFFICER AND THE MINOR VICTIM WAS RELEVANT AND MATERIAL AND, THUS DISCOVERABLE."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FAILING TO ISSUE A RULING SUPPRESSING/ADDRESSING DEFENDANT'S CONVERSATION WITH COUNSEL."

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY USING EVIDENCE IN ITS DECISION UNKNOWN TO THE DEFENSE AND, APPARENTLY, GARNERED FROM THE TRIAL COURT'S IN-CAMERA INSPECTION OF NON-DISCOVERABLE EVIDENCE."

SIXTH ASSIGNMENT OF ERROR:[1]

"THE TRIAL COURT ERRED BY A PERSONAL ATTACK ON COUNSELS' POSITION, DESPITE THE FACT THAT THE POSITION WAS BASED UPON THE UNCONTROVERTED OPINION OF DOCTOR MICHAEL D. LYMAN."

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[1] Appellant designates his last two assignments of error as "6A" and "6B." We have re-designated them the sixth and seventh assignments of error.

SEVENTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY TAKING AN ABSURD, ILLEGAL, AND TRAGIC TACK THAT THE DEFENDANT'S ULTIMATE GUILTY PLEA CAN BE USED TO DETERMINE THE QUALITY OF THE INVASION OF HIS DUE PROCESS RIGHTS THAT OCCURRED BEFORE THE PLEA."

On January 29, 2016, a Washington County grand jury returned an indictment that charged appellant with three counts of sexual battery, in violation of R.C. 2907.03(A)(7). Appellant entered not guilty pleas.

On April 21, 2016, appellant filed a motion to suppress all recorded and unrecorded statements that the investigating officer, Robert Ellenwood, overheard between appellant and defense counsel while the officer was present in appellant's home.[2] Appellant alleged that the officer was not lawfully on appellant's premises and that the officer did not have the right to eavesdrop on or record a conversation between appellant and defense counsel.

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[2] The record does not reveal the content of the conversation that the officer overheard and recorded. The state's discovery materials, however, indicate that the recording contains inculpatory statements.

Appellant and the state subsequently reached a plea agreement, and appellant withdrew his motion to suppress Officer Ellenwood's statements. In particular, appellant agreed to plead guilty to one count of sexual battery, and the state agreed to dismiss the remaining two counts. The plea agreement recommended that appellant receive an 18-month prison term and that he be designated a Tier II Sex Offender.

The trial court held a change of plea hearing[3] and determined that appellant voluntarily, knowingly, and intelligently entered his guilty plea. The court subsequently found appellant guilty of sexual battery.

On July 1, 2016, the court held a sentencing hearing.[4] At the sentencing hearing, the court imposed the 18-month sentence recommended in the plea agreement.

After the sentencing hearing, and before the trial court filed its sentencing entry, appellant learned of a news article that reported that Officer Ellenwood had been charged with telephone harassment. The article also reported that Officer Ellenwood engaged in text messaging with the underage victim of a sex crime

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[3] The record does not include the plea hearing transcript.

[4] The record does not include the sentencing hearing transcript. We also note that the trial court did not file its judgment entry of sentence until August 18, 2016.

whose case he was investigating, but that the Marietta Police Department indicated that nothing criminal in nature existed about the texts.

Based upon this information, appellant filed a motion to stay execution of his sentence, a motion to dismiss, and a motion to issue subpoenas. In his motion to dismiss, appellant raised two basic arguments. First, appellant argued that the trial court should allow him to withdraw his guilty plea. Appellant asserted that the state failed to disclose evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and, thus, he could not have knowingly and intelligently entered his guilty plea. Appellant claimed that the state failed to disclose the existence of text messages between Officer Ellenwood and the victim. Appellant argued that the text messages contain evidence of an inappropriate, intimate relationship between Officer Ellenwood and the victim. Appellant asserted that the officer's conduct undermines his credibility as a witness, as well as the credibility of the information that he obtained from the victim. Appellant contended that the officer likely used the relationship "to dissuade (the victim) from recanting her accusations." Appellant thus argued that the evidence concerning Officer Ellenwood's conduct would have allowed hm to impeach the officer at trial and that the evidence constituted material evidence under *Brady*. Appellant argued that the state's failure to disclose the evidence concerning Officer Ellenwood entitled him to withdraw his guilty plea and have his sentence vacated.

Second, appellant contended that if the trial court permitted him to withdraw his guilty plea, the court then must dismiss the indictment. Appellant asserted that "the behavior of Officer Ellenwood was so insidious and poisonous, both he and the accuser in this case should be prohibited from testifying," thus making "a new trial * * * impossible." Appellant claimed that the officer's conduct tainted and rendered unreliable all of the state's evidence. Appellant therefore argued that the court must dismiss the indictment.

Among the documents appellant submitted to support his argument is a copy of a Marietta Police report regarding the alleged inappropriate relationship between Officer Ellenwood and the victim. The report indicates that Officer Ellenwood's wife contacted the Marietta Police Department and "reported several hundred text messages being exchanged between (Ellenwood) and (the victim)." The Marietta Police Chief requested the Sheriff's Office to investigate. Sheriff detectives then met with the victim and the victim's mother, and they permitted the detectives to analyze the victim's phone. The analysis of the victim's phone did not reveal any text messages that would lead anyone to believe she and Officer Ellenwood were in a relationship. Also, children services case worker interviewed the victim ,and the victim denied any type of inappropriate relationship with Ellenwood. Ellenwood also denied any type of inappropriate relationship. The sheriff's office closed the case as "unfounded."

Appellant also submitted the affidavit of Michael D. Lyman, a self-described "expert witness in the area of police procedures." Lyman opined that "at least 95% of the 517 text messages exchanged between * * * Ellenwood and the alleged 16-year-old victim * * * were unnecessary, inappropriate, and served no legitimate law enforcement of investigative purpose." He further opined that "because the investigation was ongoing during the time of the 517 text messages * * * it is likely that the overly-personal and inappropriate nature of the 517 text messages created an atmosphere whereby (the victim) was more subject to suggestion than she would have been had Officer Ellenwood maintained a proper, objective, and professional relationship with her. Thus, the reliability of any testimony provided by her should be viewed as highly questionable as it may have been improperly influenced by the police."

Subsequently, the trial court conducted an in camera inspection of the evidence regarding the investigation into the relationship between Officer Ellenwood and the victim to determine whether a *Brady* violation had occurred. After its review, the court overruled appellant's motions. The trial court found that the information relating to the investigation into the relationship between officer Ellenwood and the victim is not relevant or material evidence pertaining to the criminal charges against appellant. The court determined that "(a)ll of the behavior alleged by the defense to be inappropriate occurred after the investigation, arrest, indictment, and pre-trial offer" and that the communications

between the officer and the victim were not criminal. The court found that the text messages reveal that "the officer counseled the victim toward recovery from (appellant)'s behavior, encouraging her to read books, watch movies, go to church, make good choices, seek counseling to help her address what she was experiencing." The court did not find the material to contain any exculpatory evidence and that it contains "marginally, if at all, impeachable" evidence. The court thus determined that none of the information constitutes relevant, material, or discoverable evidence. The court concluded that the information failed to establish that a manifest injustice occurred so as to permit appellant to withdraw his guilty plea or so as to warrant a dismissal of the charges. This appeal followed.

I

Because appellant's first three assignments of error raise related issues, for ease of discussion we consider them together. In his first, second, and third assignments of error, appellant in essence, asserts that the trial court abused its discretion by denying his request to withdraw his guilty plea.[5] Appellant

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[5] Appellant framed his motion a "motion to dismiss." Within the text of that motion, however, appellant cited Crim.R. 32.1, the standard applicable to guilty pleas withdrawals. We thus construe appellant's "motion to dismiss" as a combined "motion to dismiss" and a motion to withdraw his guilty plea. Also, appellant's "motion to dismiss" cited Crim.R.33, which governs new trial motions. Crim.R. 33 new trial motions, however, are

basically asserts that the trial court erred by determining that the state's failure to disclose the investigation regarding Officer Ellenwood's relationship with the victim did not violate *Brady*. Appellant disagrees with the trial court's determinations that the officer did not engage in an improper relationship with the victim, and that the evidence concerning the relationship is not material impeachment evidence.

Initially, we note that a guilty plea constitutes "an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna v. New York*, 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), fn.2; Crim.R. 11(B)(1); *accord United States v. Broce*, 488 U.S. 563, 569, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) (explaining that a guilty plea and subsequent conviction "comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence"). Therefore, a guilty plea "renders irrelevant those constitutional violations not logically

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inapplicable when defendant pleads guilty. *See State v. Cooper*, 8th Dist. Cuyahoga No. 100537, 2014-Ohio-2404, ¶20 (stating that Crim.R. 33(B) has no application to cases in which the defendant entered a guilty plea"). We further recognize that neither party has claimed that appellant's "motion to dismiss" should be construed as an R.C. 2953.21 postconviction relief petition. *See State v. Redavide,* – N.E.3d –, 2016-Ohio-7804 (2nd Dist.); but see *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522. We therefore have no need to address the issue and express no opinion on its merits.

inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.'" *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶78, quoting *Menna*, 423 U.S. at 62, fn.2; *accord State v. Rogers,* 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶19. Consequently, a defendant who voluntarily, knowingly, and intelligently admits "in open court that he is in fact guilty of the offense with which he is charged * * * may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *Fitzpatrick* at ¶78. In other words, a voluntary, knowing, and intelligent guilty plea waives any alleged constitutional violations unrelated to the entry of the guilty plea and nonjurisdictional defects in the proceedings. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶105; *State v. Storms*, 4th Dist. Athens No. 05CA30, 2006-Ohio-3547, 2006 WL 1882428, ¶9. Consequently, a guilty plea '"effectively waives all appealable errors at trial unrelated to the entry of the plea."' *Ketterer* at ¶105, quoting *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991), paragraph two of the syllabus.

After the trial court imposes sentence, however, Crim.R. 32.1 gives a trial court discretion to allow a defendant to withdraw a guilty plea upon a showing of

manifest injustice.[6] *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E. 2d 355, ¶26; *State v. Caraballo*, 17 Ohio St.3d 66, 67, 477 N.E.2d 627 (1985). In general, a "manifest injustice" means "a clear and openly unjust act." *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998) (citation omitted). "Manifest injustice relates to some fundamental flaw in the proceedings which result(s) in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. Franklin No. 03AP-1214, 2004-Ohio-6123, ¶5. Accordingly, "a postsentence withdrawal motion is allowable only in extraordinary cases." *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977); *e.g., State v. Cassell*, – N.Ed.3d –, 2017-Ohio-769, 2017 WL 837074, ¶25; *State v. Yost*, 4th Dist. Meigs No. 03CA13, 2004-Ohio-4687, ¶7.

Trial courts possess discretion when reviewing postsentence motions to withdraw a guilty plea, "and the good faith, credibility and weight of the movant's

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In the case sub judice, appellant filed his motion after the trial court imposed sentence at the sentencing hearing, but before the trial court journalized its sentencing entry. Ohio courts generally treat motions to withdraw a guilty plea "made after the court's pronouncement of sentence but before the court's filing of the sentencing entry * * * as postsentence motions." *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, 2014 WL 7251568, ¶26 (citations omitted). We therefore construe appellant's motion as a postsentence motion to withdraw his guilty plea that requires a showing of manifest injustice. *Id.* at ¶32.

assertions in support of the motion are matters to be resolved by th[e trial] court." *Smith* at paragraph two of the syllabus; *accord Caraballo*, 17 Ohio St.3d at 67. Thus, appellate review of trial court decisions regarding postsentence Crim.R. 32.1 motions to withdraw a guilty plea is deferential. Consequently, a reviewing court should not disturb a trial court's ruling concerning a postsentence motion to withdraw a guilty plea unless the court abused its discretion. *Caraballo*, 17 Ohio St.3d at 67. An "abuse of discretion" means that the court acted in an "'unreasonable, arbitrary, or unconscionable'" manner or employed "'a view or action that no conscientious judge could honestly have taken.'" *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Oho-1966, 15 N.E.3d 818 ¶67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶23. Moreover, a trial court generally abuses its discretion when it fails to engage in a "'sound reasoning process.'" *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶14, quoting *AAAA Ents., Inc. V. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). Additionally, "[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶34.

In the case at bar, appellant asserts that the trial court abused its discretion by failing to determine that withdrawal of his plea is necessary to correct a manifest injustice. Appellant claims that allowing his plea to stand when the state failed to disclose what he

believes constitutes material impeachment evidence under *Brady* deprived him of the ability to entre a knowing and intelligent plea and demonstrates a manifest injustice.

Enforcing a plea that the defendant did not enter in a knowing, intelligent, and voluntary manner is "'unconstitutional under both the United States Constitution and the Ohio Constitution.'" *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶7, quoting *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Therefore, a defendant ordinarily may establish a manifest injustice within the context of Crim.R. 32.1 by showing that he did not enter a guilty plea in a knowing, intelligent, or voluntary manner. *State v. Fry*, 7th Dist. Mahoning No. 12MA156, 2013-Ohio-5865, 2013 WL 6918639, ¶12 ("A guilty plea that was not entered knowingly, intelligently, or voluntarily, creates a manifest injustice that would entitle a defendant to withdraw a guilty plea."); *State v. Brown*, 2d Dist. Montgomery Nos. 24520 and 24705, 2012-Ohio-199, ¶13 ("If a defendant's guilty plea is not knowing and voluntary, it has been obtained in violation of due process and is void."); *State v. Hall*, 4th Dist. Jackson No. 99CA847, *2 (Feb. 25, 2000) "(A trial court violates a defendant's due process rights, and hence may produce a manifest injustice, if it accepts a guilty plea that the defendant did not enter knowingly, intelligently, and voluntarily."); *accord State v. Salter*, 10th Dist. Franklin Nos. 15AP-968 and 15AP-970, 2016-Ohio-4772, 2016 WL 3574564, ¶14; *State v.*

Martinez, 10th Dist. Franklin No. 13AP-704, 2014-Ohio-2425, 2014 WL 2565890, ¶20; *State v. Bush*, 3d Dist. Union No. 14-2000-44, 2002-Ohio-6146, ¶11; *State v. Beck*, 1st Dist. Hamilton Nos. C-020432, C-020449, C-030062, 2003-Ohio-5838, ¶8.

An appellate court that is evaluating whether a defendant voluntarily, knowingly, and intelligently entered a guilty plea ordinarily begins its inquiry by independently reviewing the record to ensure that the trial court complied with the constitutional and procedural safeguards contained within Crim.R. 11(C)(2).[7] *State v. Spates*, 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (1995); *State v. Kelley*, 57 Ohio St.3d 127, 128, 566 N.E.2d 658 (1991) ("When a trial court or appellate court is reviewing a plea submitted by a defendant, its focus should be on whether the dictates of Crim.R. 11 have been followed."); *see State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶13 ("Before accepting a guilty or no-contest plea, the court must make the determinations and give the warnings required by Crim.R. 11(C)(2)(a) and (b) and notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c).") Crim.R. 11(C)(2) states:

> In felony cases the court may refuse to accept a plea of guilty or a plea

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[7] As an aside, we note that this plenary standard of review applicable to the entry of a guilty plea appears somewhat at odds with the discretionary standard of review that applies to Crim.R.32.1 postsentence motions to withdraw a guilty plea.

> of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
>
> (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
>
> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

Additionally, the United States Supreme Court has established various other principles that guide a

reviewing court's inquiry into the voluntary, intelligent, and knowing nature of a guilty plea. For instance, "[t]he rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." *Brady v. United States*, 397 U.S. 742, 757, 90 S.Ct. 1463, 25 L.Ed. 2d 747 (1970). Moreover, "[a] defendant is not entitled to withdraw his plea merely because he discovers * * * after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Id.* Consequently, the Constitution does not require that a defendant "be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought * * *." *Id.* Furthermore, "a counseled defendant may not make a collateral attack on a guilty plea on the allegation that he misjudged the admissibility of his confession." *Broce*, 488 U.S. at 572. Instead, "'[w]aiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts." *McMann*, 397 U.S. at 770.

In the case at bar, appellant does not argue that the trial court failed to comply with any particular aspect of Crim.R. 11(C)(2). Instead, appellant asserts that he did not voluntarily, knowingly, and intelligently enter his guilty plea due to the state's

failure to disclose allegedly favorable and material impeachment evidence. Appellant claims that he could not have entered his plea in a voluntary, knowing, or intelligent manner without complete knowledge of the information pertaining to Officer Ellenwood's relationship with the victim. Appellant argues that he could have used the information at trial to impeach both the officer and the victim. Appellant contends that because the material contained impeachment information, then under *Brady v. Maryland*, the state had a duty to disclose it to him before entering into plea negotiations. Appellant further claims that the state's failure to disclose the information deprived him of his due process right to a fair trial (or plea proceeding). We therefore must determine whether the *Brady* rule applies when a defendant waives his right to a fair trial under Crim.R. 11(C)(2).

In *Brady v. Maryland*, the court held that the prosecution's suppression of evidence that is favorable to an accused and that is material to either guilt or punishment violates a criminal defendant's due process right to a fair trial. *Accord Weary v. Cain*, – U.St. –, 136 S.Ct. 1002, 1006, 194 L.Ed2d 78 (2016); *Smith v. Cain*, 565 U.S. 73, 75, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012); *Untied States v. Bagley*, 473 U.S. 667, 674, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *State v. Johnston*, 39 Ohio St.3d 48, 60, 529 N.E.2d 898 (1988). To establish that the prosecution's failure to disclose evidence violated a defendant's due process right to a fair trial, the defendant must establish each of the following:

> (1) the evidence at issue is "favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) the [prosecution] suppressed the evidence, "either willfully or inadvertently" and (3) "prejudice * * * ensued."

Skinner v. Switzer, 562 U.S. 521, 536, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011), quoting *Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

Evidence that is favorable to an accused means evidence that "if disclosed and used effectively, * * * may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676. Favorable evidence to an accused includes both exculpatory and impeachment evidence. *Id.* At 676, citing *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend"). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* At 682; *Weary*, 136 S.Ct. at 1006. "The defendant has the burden to prove a *Brady* violation rising to the level of a due-process

violations." *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.Ed.3d 1023, 102.

The *Brady* rule exists principally to protect a criminal defendant's right to a fair trial. *Bagley*, 473 U.S. at 675-676, quoting *United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) ("For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose"); *United States v. Moussaoui,* 591 F.3d 264, 285 (4th Cir. 2010) ("The *Brady* right, however, is a trial right * * * and exists to preserve the fairness of a trial verdict and to minimize the chance that an innocent person would be found guilty.").

> The purpose of the *Brady* rule is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.

Bagley, 473 U.S. at 675 (footnotes omitted).

When a defendant pleads guilty, however, concerns regarding a defendant's right to a fair trial

"are almost completely eliminated because" the defendant admitted guilt. *Moussaoui*, 591 F.3d at 285 (citations omitted). Accordingly, "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *United States v. Ruiz*, 536 U.S. 622, 628 and 633, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002); *Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St.3d 415, 2010-Ohio-282, 923 N.E. 2d 125, ¶29 ("*Ruiz* plainly holds that the state is not required to disclose impeachment evidence to a defendant before the defendant pleads guilty.").

In *Ruiz*, the court considered whether a criminal defendant's guilty plea waives the right, encompassed with the right to a fair trial, to disclosure of material impeachment information. *Id.* at 628. The Ninth Circuit Court of Appeals "held that a guilty plea is not 'voluntary' (and that the defendant could not, by pleading guilty, waive her right to a fair trial) unless the prosecution first made the same disclosure of material impeachment information that the prosecutors would have had to make had the defendant insisted upon a trial." *Id.* at 629. The United States Supreme Court disagreed with the Ninth Circuit and concluded that the Constitution does not require "preguilty plea disclosure of impeachment information." *Id.* The court explained that the United States Constitution does not require "prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose 'impeachment information relating to any informants or other witnesses.'" *Id.* at 625.

In reaching its decision, the court first examined whether a criminal defendant's preguilty plea ignorance of impeachment information affects the voluntary nature of a guilty plea. The court recognized that a defendant who enters a guilty plea waives significant constitutional guarantees, such as the right to a fair trial, the privilege against self-incrimination, the right to confront one's accusers, and the right to trial by jury. *Id.* at 628-629. The court thus stated:

> Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is "voluntary" and that the defendant must make related waivers "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences."

Id. at 629, quoting *Brady v. United States*, 397 U.S. at 748.

The court determined that "impeachment information is special * * * not in respect to whether a plea is *voluntary* ('knowing,' 'intelligent,' and 'sufficient[ly] aware')," but instead, "in relation to the fairness of a trial." *Id.* (emphasis sic). The court agreed that "the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision will be." *Id.* The court found, however, that "the Constitution does not require the prosecutor to share

all useful information with the defendant." *Id.* (citation omitted). Instead, the court explained:

> [T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances-even if the defendant may not know the *specific detailed* consequences of invoking it. A defendant, for example, may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide. It is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant. The degree of help that impeachment information can provide will depend upon the defendant's own impeachment knowledge of the prosecution's potential case-a matter that the Constitution does not require prosecutors to disclose.

Id. at 629-630 (citation omitted) (emphasis sic). The court additionally observed that a plea does not become unknowing simply because a defendant does not have "complete knowledge of the relevant circumstances" or labors under "various forms of misapprehension." *Id.* at 630 (citations omitted).

The court further concluded that "due process considerations * * * argue against the existence of" a right to preguilty plea disclosure of impeachment information. *Id.* at 631. The court found that "a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice." *Id.* The court thus held "that the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *Id.* at 633.

We believe that *Ruiz* is dispositive of appellant's first, second, and third assignments of error. Although we may not fully agree with this particular view, *Ruiz* holds that appellant had no constitutional right to preguilty plea disclosure of material impeachment information (we presume, for the sake of argument, that the information regarding Officer Ellenwood constitutes material impeachment information). Thus, the state's failure to disclose the information before appellant entered his guilty plea did not deprive appellant of a fair trial and did not render his guilty

plea less than voluntary, knowing, and intelligent. Accordingly, the state's failure to disclose the alleged impeachment evidence does not demonstrate a manifest injustice. *See Ferra v. United States*, 456 F.3d 278, 291 (1st Cir. 2006) ("Even though [appellant] obviously would be interested in knowing all the strengths and weaknesses of the government's proof before deciding whether to plead guilty or risk a trial, the government's refusal to render the whole of its case transparent before a defendant makes that election does not, in the ordinary course, constitute the kind of severe misconduct that is needed to render a plea involuntary.").

We further observe that appellant did not allege that the evidence regarding Officer Ellenwood's relationship with the victim is exculpatory.[8] Rather,

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[8] In general, an "exculpatory statement or evidence," means:

> A statement or other evidence which tends to justify, excuse or clear the defendant from alleged fault or guilt. *State v. Cobb*, 2 Ariz.App. 71, 406 P.2d 421, 423. Declarations against declarant's interest which indicate that defendant is not responsible for crimes charged. *U.S. v. Riley*, C.A. Iowa, 657 F.2d 1377, 1385. Evidence which extrinsically tends to establish defendant's innocence of crimes charged as differentiated from that which although favorably, is merely collateral or impeaching. *Com. V. Jeter*, 273 Pa.Super. 83, 416 A.2d 1100, 1102, for purposes of rule constraining State from disposing of potentially exculpatory evidence, is evidence which clears or tends to clear accused person from alleged guilt. *Gibson v. State*, 110 Idaho 631, 718

appellant asserts that the evidence would have allowed him to impeach, or discredit, Officer Ellenwood and the victim. We therefore have no need to determine whether the *Ruiz* rule applies to both impeachment and exculpatory evidence, or if it is limited to impeachment evidence. See Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining,* 81 Fordham L. Rev. 3599, 3602 (2013) (noting conflicting opinions regarding this issue among United States Circuit Courts of Appeal).

Accordingly, based upon the foregoing reasons, we overrule appellant's first, second, and third assignments of error.

II

In his fourth assignment of error, appellant asserts that the trial court erred by failing to rule on his motion to suppress Officer Ellenwood's statements. Appellant, however, agreed to withdraw the motion when he entered his guilty plea. Moreover, his guilty plea waived the right to argue that a violation of his constitutional right occurred at a point in time before he entered his guilty plea. *E.g., Tollett*, 411 U.S. at 267; *State v. Sharpe*, 4th Dist. Hocking No. 14CA9, 2015-Ohio-2128, 2015 WL 3513337, ¶9; *State v.*

P.2d 283, 285.

State v. Davis, 2nd Dist. Montgomery No. 18172, 2001 WL 10037, *2-3, quoting Black's Law Dictionary, 6th Edition, 566.

Johnson, 4th Dist. Hocking No. 14CA16, 2015-Ohio-854, ¶¶5-6.

Accordingly, based upon the foregoing reasons, we overrule appellant's fourth assignment of error.

III

In his fifth assignment of error, appellant asserts that the trial court erred by relying upon evidence that it reviewed in camera when ruling upon appellant's motions. Appellant, however, cites no authority to support this proposition.

Under App.R. 16(A)(7), an appellant's brief shall include "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." Appellate courts do not have any duty "to root out" an argument in support of an assignment of error. *Prokos v. Hines*, 4th Dist. Athens Nos. 10CA51 and 10CA57, 2014-Ohio-1415, 2014 WL 1339676, ¶55; *Thomas v. Harmon*, 4th Dist. Lawrence No. 08CA17, 2009-Ohio-3299, ¶14; *State v. Carman*, 8th Dist. Cuyahoga No. 90512, 2008-Ohio-4368, ¶31. "It is not the function of this court to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal." *Cantanzarite v. Boswell*, 9th Dist. Summit No. 24184, 2009-Ohio-1211, ¶16, quoting *Kremer v. Cox*, 114 Ohio App.3d 41, 60, 682 N.E.2d

1006 (9th Dist. 1996). Appellate courts possess discretion to disregard any assignment of error that fails to include citations to the authorities in support. *Robinette v. Bryant*, 4th Dist. Lawrence No. 14CA28, 2015-Ohio-119, 2015 WL 223007, ¶33; *State v. Adkins*, 4th Dist. Lawrence No. 13CA17, 2014-Ohio-3389, ¶34, citing *Frye v. Holzer Clinic, Inc.*, 4th Dist. Gallia No. 07CA4, 2008-Ohio-2194, ¶12; App.R. 12(A)(2).

In the case sub judice, appellant failed to cite authority to support his fifth assignment of error. Consequently, we will not address this "undeveloped argument [] or assume [appellant]'s duty and formulate an argument for him."[9] *State v. Palmer*, 9th Dist. Summit No. 28303, 2017-Ohio-2639, 2017 WL 1749087.

Accordingly, based upon the foregoing reasons, we overrule appellant's fifth assignment of error.

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[9] We believe, however, than any error that the court may have arguably committed by conducting an in camera review of alleged *Brady* evidence constitutes harmless error. Assuming, arguendo, that the court erred by conducting an in camera review of alleged *Brady* material, appellant cannot show that the court's alleged error would render *Ruiz* inapplicable and would allow him to withdraw his guilty plea. *See* Crim.R. 52(A) discussion, *infra*.

IV

In his sixth and seventh assignments of error,[10] appellant challenges the following statement contained in the trial court's decision:

> In the context of this case and the allegations of sexual activity which have been admitted by the Defendant, the repeated allegations of an "inappropriate relationship" between Officer Ellenwood and the victim is in itself grossly inappropriate.

Appellant contends that his expert, and not the defense, characterized the relationship as "inappropriate." He also asserts that his guilty "plea cannot be used as a measuring stick to examine the behavior of the officer prior to [the] plea to see if it is material."

We, however, believe that our disposition of appellant's first, second and third assignments of error render his sixth and seventh assignments of error moot. We determined that pursuant to *Ruiz*, the state did not have any duty to disclose the alleged impeachment evidence before appellant entered his guilty plea. Thus, whether the trial court incorrectly

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[10] We again point out that we have re-designated appellant's assignments of error "6A" and "6B" as the sixth and seventh assignments of error, respectively.

determined that the evidence was not material impeachment information or contained evidence of an "inappropriate relationship" is no longer of consequence to our decision. Therefore, these arguments are moot and we need not address them. App.R. 12(A)(1)(c).

Moreover, assuming, arguendo, that the trial court improperly attributed the "inappropriate relationship" language to defense counsel, instead of appellant's expert, appellant has not shown that this alleged error would constitute reversible error. An appellate court may not correct an error unless the error affected the defendant's substantial rights, i.e., the error must have affected the outcome of the trial. *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶7; Crim.R. 52(A) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."). Appellant cannot show that any error the court may have committed by attributing the "inappropriate relationship" language to the defense affected the outcome of the court's decision to reject his request to withdraw his guilty plea.

Accordingly, based upon the foregoing reasons, we overrule appellant's sixth and seventh assignments of error and affirm the trial court's judgment.[11]

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[11] We observe that in the "conclusion" portion of appellant's brief, appellant suggests that if we do not reverse the trial court's decision rejecting his request to withdraw his guilty plea, we

JUDGMENT AFFIRMED.

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should at least remand for an evidentiary hearing. Appellant did not, however, frame this as an assigment of error. App.R. 12(A)(1)(b) states that an appellate court shall "[d]etermine the appeal on its merits on the assignments of error set forth in the briefs under App.R. 16." App.R. 12(A)(2) permits an appellate "court [to] disreghard an assignment of error presented for review if the party raising it * * * fails to argue the assignment separately in the brief, as requied under App.R. 16(A)." We also note that a trial court need not hold an evidentiary hearing regarding a postsentence withdrawal motion "if the facts alleged by the defendant, even if accepted as true, would not require the court to grant the motion to withdraw the guilty plea." *State v. Layne*, 4th Dist. Highland No. 11CA17, 2012-Ohio-1627, ¶5. As we previously indicated, *Ruiz* forecloses appellant's claim that the prosecution had a duty to disclose material impeachment evidence prior to entering plea negotiations. Thus, an evidentiary hearing would appear to be unnecessary. In his "conclusion," appellant further posits that if we do not agree that he should be entitled to withdraw his guilty plea, or at least receive a hearing, then we "could" dismiss "the entire case." Appellant has not formulated an assignment of error concerning this argument, and we therefore do not address it. App.R. 12(A)(1)(b) and (A)(2). We note, however, that the record presented on appeal does not contain any evidence to indicate that dismissal of the entire case is warranted.

Hoover, J., concurring in judgment and opinion in part and concurring in judgment only in part with opinion.

I concur in the judgment and opinion of the lead opinion a to Assignments of Error Four, Five, Six, and Seven. However, I respectfully concur in the judgment only as to Assignments of Error One, Two, and Three of the lead opinion. I write separately to note my misgivings with the application of *United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450, 153 L.E.2d 586 (2002) to this case.

The lead opinion relies upon *Ruiz*, *supra* at 628 and 633, for the proposition that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."

However, I have doubts as to the applicability of *Ruiz* to the facts of this case. I believe that the lead opinion's application of *Ruiz* may be too broad because *Ruiz* is distinguishable from the case sub judice. In *Ruiz*,

> Immigration agents found thirty kilograms of marijuana in Angela Ruiz's luggage, after which federal prosecutors offered her what is known in the Southern District of California as a "fast track" plea bargain. A "fast track" plea bargain asks a defendant to waive indictment, trial, and an appeal. In return, the government agrees to

recommend to the sentencing judge a two-level departure downward from the otherwise applicable United States Sentencing Guidelines sentence.

* * *

[Ruiz] did not make a written discovery demand for all "exculpatory" evidence. In fact, Ruiz did not make a discovery demand at all. Rather, the government's proposed "fast track" plea agreement required Ruiz to acknowledge that the government had turned over "any [known] information establishing the factual innocence of the defendant" and provide the government's acknowledgement that it has a continuing duty to provide such information. Ruiz refused to accept the "fast track" plea agreement because of its requirement that she also waive the right to receive "impeachment information relating to any informants or other witnesses." In its analysis, the Court considered it relevant that Ruiz was protected both by the provision in the federal "fast track" plea agreement requiring the government to provide her "any information establishing the factual innocence of the defendant," and by other guilty-plea safeguards contained in the federal rules.

(Citations omitted.) *State v. Harris*, 266 Wis.2d 200, 667 N.W.2d 813, ¶¶16 and 27 (Wis.App.2003).

In *Harris*, a Wisconsin appellate court found *Ruiz* to be inapplicable to the state proceeding. *Id.* at ¶¶15, 27-30. The appellate court found that the state had violated Harris's constitutional and statutory rights by failing to disclose potentially exculpatory evidence when Harris had demanded such evidence. *Id.* at ¶¶36, 46. Thus, the court found that a manifest injustice had occurred. *Id.* at ¶47.

Similar to the *Harris* case, Riley was prosecuted by a state court-Ohio-and not a federal court. Riley was likewise not protected by a specific provision such as that found in the federal "fast track" agreement offered to Ruiz. Furthermore, Riley was not protected by the guilty-plea safeguards contained in the Federal Rules of Criminal Procedure.

Moreover, in contrast to *Ruiz*, Riley made a motion for discovery which specifically requested "'[a]ny exculpatory material known or by the exercise of due diligence may become known to the attorney for the State." Riley thus invoked the State's constitutional obligation, as well as the obligation under the Rules of Criminal Procedure, to comply.

As a result of the basic difference set forth above, I believe that *Ruiz* does not apply to this case. Nonetheless, I must note that the Ohio Supreme Court has relied upon the *Ruiz* holding on two occasions. *See Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St.3d

415, 2010-Ohio-282, 923 N.E.2d 125, ¶29 ("*Ruiz* plainly holds that the state is not required to disclose impeachment evidence to a defendant before the defendant pleads guilty."); *State v. Ketterer*, 126 Ohio St.3d 448, 2018-Ohio-3831, 935 N.E.2d 9, ¶35 ("*Ruiz* supports the state's argument as it pertains to the disclosure of *impeachment* evidence.") (Emphasis sic.).

As the lead opinion states, although we may not fully agree with this particular view, we are bound to follow our highest court's precedent. Therefore, despite my doubts concerning the application of *Ruiz* to the case at bar, I still concur with the judgment of the lead opinion with respect to Assignments of Error One, Two, and Three. I concur in the judgment and opinion with respect to Assignments of Error Four, Five, Six, and Seven.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, J.; Concurs in Judgment & Opinion as to Assignments of Error 4, 5, 6 & 7; Concurs in Judgment Only as to Assignments of Error 1,2 & 3 with Concurring Opinion.

Harsha, J.; Concurs in Judgment Only.

For the Court

BY: /s/Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

APPENDIX D

IN THE COURT OF COMMON PLEAS
WASHINGTON COUNTY, OHIO

The State of Ohio, Plaintiff,	Case No. 16 CR 5
	Judge Randall G. Burnworth
v.	
	Filed 09/13/2016
Dennis Riley, Defendant.	DECISION

This case comes before the Court to address a Motion for Issuance of Court Ordered Subpoenas and a Motion to Dismiss filed August 10, 2016 by Defendant. The State responded August 16, 2016. Defendant filed a Reply covering the subpoena issued August 17, 2016. The State filed a clarification to the Defense Reply August 22, 2016. Finally, the Defendant filed a Further Reply to State Reponse (sic) August 26, 2016 supplemented August 29, 2016.

The Defendant, Dennis Riley, was arrested and charged January 5, 2016 with Sexual Battery in violation of RC 2907.03(A)(7). The charge alleges a sexual relationship between himself, a teacher at Marietta Senior High School, and a 16 year old female student occurring in December, 2015. On the date of the arrest, Marietta City Police were alerted to suicidal threats by the Defendant. Officers Ellenwood,

Linscott, and Warden responded with Officer Ellenwood entering the home. He overheard two men talking as he moved through the home. He made contact with the Defendant and Attorney William L. Burton, observed the butt of a gun under the couch, and arrested the Defendant.

Defendant waived a preliminary hearing January 8, 2016 and was Indicted January 29, 2016 charged with three (3) Counts of Sexual Battery. Defendant was arraigned February 3, 2016. A Pre-trial was held February 16, 2016. An offer was made by the State of Ohio and the Court was informed that the parties were attempting to resolve the case promptly. The trial scheduled for March 28, 2016 was continued on Defendant's Motion to May 11, 2016.

Defendant filed a Motion to Suppress April 21, 2016 seeking to suppress statements Officer Ellenwood heard January 5, 2016 responding to the Defendant's home. Defendant asserted that Officer Ellenwood was illegally in the home and that the conversation was subject to Attorney/Client privilege. The State filed a Response April 27, 2016 and the motion was set for hearing May 6, 2016. The issue of whether Officer Ellenwood was appropriately in the Defendant's home January 5, 2016 or whether the statements he overheard were an attorney/client conversation did not come before the Court as the parties continued negotiating and ultimately entered a Written Plea of Guilty in open Court to one (1) Count of Sexual Battery that day. Defendant withdrew the previously filed Motion to Suppress. The Defendant appeared

July 1, 2016 and was sentenced to the agreed disposition memorialized in the Written Plea of Guilty executed and filed May 6, 2016. Despite the inherent harm associated with the charge, for both the victim and the Defendant, there was nothing "extraordinary" about this case. Defendant was represented by experienced and capable attorneys who negotiated an appropriate resolution to the charges. The sentencing entry was filed August 18, 2016.

Subsequent to the sentencing, defense counsel became aware of issues involving Officer Ellenwood that had occurred earlier in the year and filed a Motion to Stay Execution of Sentence July 15, 2016. The stay was granted by Entry of August 18, 2016 ordering Defendant held in the Washington County Jail and not transported pending resolution of the pending motions. Defense counsel was provided with copies of text communications between Officer Ellenwood and the victim. The Court has made an in-camera inspection of recorded interviews by the Washington County Sheriff's Office of Officer Ellenwood and the victim and has reviewed all of the texts provided to the defense.

Officer Ellenwood confronted his wife about 52 texts he discovered on her phone between her and "Robbie" during one of his shifts. Marital discord ensued. She, in turn, looked at his phone and contacted Marietta City Police Chief Rodney Hupp about the hundreds of text messages between Officer Ellenwood and the victim in this case. Chief Hupp referred the matter to the Washington County Sheriff's

Office for an independent evaluation. The Sheriff's Office reviewed the texts, interviewed Officer Ellenwood and the victim and found no criminal behavior reporting that conclusion to Chief Hupp. Officer Ellenwood has also been charged with telecommunication harassment associated with allegedly continuing to contact his wife after being told to quit.

The defense has alleged prosecutorial misconduct in withholding the information of an investigation, the texts and the report from the defense having to do with the lead investigator on the case, Officer Ellenwood. The State argues that the foregoing was not material or relevant to the underlying case and thus, not discoverable. After having read 517 texts and listened to the interviews, the Court agrees with the State. All of the behavior alleged by the defense to be inappropriate occurred after the investigation, arrest, indictment, and pre-trial offer. Nothing in the communication between Officer Ellenwood and the victim, a 16 year old, was criminal. In a nutshell, the officer counseled the victim toward recovery from the Defendant's behavior, encouraging her to read books, watch movies, go to church, make good choices, and seek counseling to help her address what she was experiencing. In the context of this case and the allegations of sexual activity which have been admitted by the Defendant, the repeated allegations of an "inappropriate relationship" between Officer Ellenwood and the victim is in itself grossly inappropriate.

The Court finds that none of the behavior which the defense now tries to seize upon to turn the clock back is relevant, material or discoverable. It is not exculpatory in nature and marginally, if at all, impeachable. The case is not "extraordinary" and there is no manifest injustice to Defendant warranting the withdrawal of his plea entered May 6, 2016 or dismissal of the charges.

Defendant's Motion for Issuance of Court Ordered Subpoenas and Motion to Dismiss are denied.

Counsel for the State of Ohio to journalize.

Costs assessed to Defendant.

The Stay of Execution of Sentence issued August 18, 2016 is vacated.

A Praecipe for Transportation of Defendant to the Ohio Correctional Reception Center at Orient, Ohio, shall issue.

/s/Judge Randall G. Burnworth

c. Attys. Rings/Wolfe
Attys. Cosenza/Burton