No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
_____ Term, _____

DANIEL HOSTETLER

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Dan Hostetler, an Amish man, falsely confessed to killing Brandon Crain, who appears to have committed suicide. The Hart County Sheriff's Office had gas station surveillance video showing Crain walking towards the bridge that he jumped off, but even after the prosecution disclosed its existence to Dan and his defense attorney, it was never produced. The defense was told that it either no longer existed or had never existed. Dan then entered into a plea agreement with the prosecution. During a post-conviction proceeding, the video resurfaced. The Hart County Circuit Court vacated Dan's conviction for this *Brady* violation and set a trial date, but the Kentucky Court of Appeals reversed the trial court. The Court of Appeals ruled that Dan and his attorney's knowledge of the video and its contents defeated the suppression prong of *Brady v. Maryland*, 373 U.S. 83 (1963) and that this Court had not yet extended the *Brady* doctrine to guilty plea proceedings. The circuits are split on both issues. Thus, the specific questions presented are:

(1) Whether material exculpatory evidence is unconstitutionally suppressed when the defense is made aware its existence and its content, but is later incorrectly told that it either no longer existed or had never existed; and

(2) Whether the Constitution requires prosecutors to disclose material exculpatory evidence prior to entering a plea agreement with a criminal defendant.

LIST OF ALL PARTIES

Petitioner is Mr. Daniel Hostetler. Counsel for Mr. Hostetler is the Hon. Aaron Reed Baker, Assistant Public Advocate, Department of Public Advocacy, 5 Mill Creek Park, Suite 100, Frankfort, Kentucky 40601.

Respondent is the Commonwealth of Kentucky, represented by Hon. Bryan D. Morrow, Assistant Attorney General, and Hon. Andy Beshear, Attorney General of the Commonwealth of Kentucky, 1024 Capital Center Drive, P.O. Box 2000, Frankfort, Kentucky 40602-2000.

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The Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

CITATIONS TO OPINIONS BELOW

Following his guilty plea, the Petitioner filed a timely post-conviction motion under Kentucky Rules of Criminal Procedure 11.42 and Kentucky Rules of Civil Procedure 60.02. Following an evidentiary hearing, the Hart County Circuit Court entered an order on April 4, 2017, vacating the Petitioner's conviction on the basis of a violation of Petitioner's Due Process rights under the Fourteenth Amendment,

pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). That order is attached in Appendix B. The Commonwealth of Kentucky filed an appeal from this order to the Kentucky Court of Appeals. The Kentucky Court of Appeals, following briefing, issued an unpublished opinion on May 18, 2018, vacating the Hart Circuit Court's grant of relief. That opinion is attached in Appendix A. The Petitioner sought discretionary review from the Supreme Court of Kentucky by motion. That motion was denied on September 19, 2018. The order denying discretionary review is attached in Appendix C.

JURISDICTION

The Supreme Court of Kentucky's order denying discretionary review, which made the judgment of the Kentucky Court of Appeals final, was entered on September 19, 2018. Pursuant to United States Supreme Court Rule 13.1, the Petitioner has 90 days to seek a writ of certiorari, and this petition has been timely filed. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> …nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws….

STATEMENT OF THE CASE

Dan Hostetler falsely confessed to killing Brandon Crain, who had actually committed suicide. The Hart County Sheriff's Office had gas station surveillance video showing Crain walking towards the bridge that he jumped off, but after the prosecution disclosed its existence to Dan and his defense attorney, it was never produced. The defense was told that either never existed, or that it was lost.[1] Dan then entered into a plea agreement with the prosecution. During a post-conviction proceeding, the video resurfaced. The Hart County Circuit Court vacated Dan's conviction because of the *Brady* violation, but the Kentucky Court of Appeals reversed and the Kentucky Supreme Court denied discretionary review. Dan now seeks a writ of certiorari from this Court.

Underlying Facts

The Petitioner, Daniel ("Dan") Hostetler, is a young Amish man who had a sheltered upbringing in the cloistered Old Order Amish community in Fleming County, Kentucky. When he came of age, Dan left the Amish for a traditional period of exploration of the outside world, called "rumspringa." During this time, Dan lived away from the Amish community, and lived instead with former Amish people in Metcalfe County. Dan returned to the community for several visits, but seemed reluctant to return to an Amish way of life and join the church, as his family expected.

[1] The Petitioner testified at a post-conviction hearing that he was told that the evidence had never existed. However, given that it was referenced in an autopsy report, in grand jury testimony, and in a discovery response by the Commonwealth, it seems more likely that defense counsel was told instead that it no longer existed.

During one long phone call between Dan and his eldest brother, Jake, Dan told Jake that he had killed another man. Dan was living in Metcalfe County near the Barren County border at the time, while his brother lived across the state in Fleming County.[2] They spoke frequently by phone over several months in early 2013. Jake reported Dan's "confession" to his local Amish bishop, who then gave the information to a local Flemingsburg police officer, Josh Plank.

Officer Plank immediately engaged in some late-night internet sleuthing and decided that the victim must have been Brandon Crain, a suicide victim in Hart County who had gone missing a year before and whose body was not discovered for several months. Plank was the first person in law enforcement to connect Brandon Crain and Dan. Despite the fact that the information reported to Plank was that Dan had said he'd killed the man accidentally in a boxing match at his house in Glasgow, Barren County, Plank zeroed in on Hart County resident Crain as the victim. He first contacted the Kentucky State Police, who informed him that the case had been closed as a suicide. Undeterred, Plank then contacted a Hart County Sheriff's deputy, Jeff Wilson. After several days, Wilson enlisted the aid of Barren County Sheriff's deputy Aaron Bennett, who picked up Dan so that Wilson could interview him at the Barren County Sheriff's Office.[3]

Deputy Wilson interviewed Dan, who allegedly confessed to him that he was

[2] The distance can be traveled by car in approximately three hours, and the Amish such as Dan and his family often rely on ex-Amish or friends of the Amish for such rides.

[3] Deputy Bennett would later testify at the evidentiary hearing to an entirely different and inconsistent set of circumstances that led to him picking up Dan Hostetler, leading to an inescapable conclusion that one of the officers that testified at the hearing was lying.

told by his friend Joey Johnson to pick up Brandon Crain at the Dollar Store in Munfordville in the middle of the night and take him wherever he wanted to go.[4] Dan was supposedly driving a Mustang for this errand. Dan allegedly confessed that he then took Crain to a secluded area on Old Cut Road, where the two got into a fight and Dan hit Crain once "just right" in the neck. Crain fell down, and believing him to be dead, Dan is alleged to have taken him to the boat dock on the Green River in Munfordville, and either laid him on the boat dock or placed him directly in the river.

Wilson took Dan from the Barren County Sheriff's Office to the Hart County Sheriff's Office where he showed him a picture of Brandon Crain. Wilson was the first person to mention Crain's name to Dan, who was unable to name the victim before that time. Wilson also showed Dan a single picture after telling Dan that he was showing him a picture of Brandon Crain. Not surprisingly, Dan identified the picture as the man he'd confessed to killing. Wilson and Sheriff Boston Hensley took Dan for a ride around Munfordville, where Dan pointed out a pull-off on Old Cut Road where the fight was supposed to have happened, and then, after getting lost on the way to the boat dock, eventually pointed out to them where he said he disposed of Crain's body. At the evidentiary hearing, Dan testified that he had ingested Suboxone, marijuana and alcohol the morning before he was picked up, and remembers nothing of this alleged confession. According to law enforcement records, it was both a taped and written confession, but the deputies now claim it was never taped, making any

[4] This was the content of Dan's written confession, but despite several notations that the interrogation was "taped," the police now claim that it was not recorded. Further, because Dan's "confession" is discredited by the facts of this case, it is referred to herein as "alleged" to highlight that it was not a true confession.

analysis of the nature and circumstances of the confession impossible.[5]

Long before Dan was picked up and allegedly confessed to killing Brandon Crain, whose identity was supplied by Officer Plank to Deputy Wilson, Crain's missing person case had been investigated by the Hart County Sheriff's Office. They concluded that Crain had taken his own life. This was a reasonable explanation, given the facts of the last month of Crain's life.

Crain, who was 19 years old, had quit school at the age of 16 because he was bullied over other students' perception that he was gay. Crain suffered from depression. He had a group of friends who, his sister testified, did not treat him very nicely. Several weeks before he went missing, Crain had shot himself in the leg with a .22-caliber rifle, telling people that he'd wanted to see how it felt. He had recently begun taking Zoloft, an anti-depressant medication.

Crain had previously talked about jumping off the Green River Bridge in Munfordville. Crain left his mother's house at 2:00 a.m. on January 26, 2012. He did not take his wallet or his cellular phone with him. According to the medical examiner's report, a Hart County Sheriff's deputy said Crain was last seen on gas station surveillance video approaching the bridge over the Green River in Munfordville. Brandon Crain's body was recovered from the Green River in April 2012, down river from the bridge in Butler County.

Although Dan Hostetler made a dubious confession to killing Crain to sheriff's

[5] Oddly, Deputy Wilson could offer no explanation for why he would have made a note of "written and taped" statement in two different places if there was no taped statement and he did not even have the equipment to tape statements at that time.

deputies, Dan could not have actually killed Crain. Not only did Dan not know Crain at all, but testimony at the evidentiary hearing established that he had not yet met Joey Johnson—the person who supposedly told Dan to pick Crain up—when Crain went missing. Further, while Dan did *eventually* own a Mustang like the one he described using, he would not purchase that car until nine months *after* Crain's disappearance. Dan's confession to police, including the ride-around that they took him on, was the only evidence against him.

Besides the glaring holes in Dan's confession, Dan also had an alibi for the time that Crain went missing. He was on the other side of the state, at least three hours away in Fleming County, on the date that Crain went missing. He would not return to the Glasgow area until several days later. Dan did not have a driver's license or a car at the time, and relied on ex-Amish people for rides. He was staying with his Amish parents while in Fleming County, who would have noticed if he had been missing the day that Crain disappeared. His mother testified that Dan had not left Fleming County between January 17 and January 29, 2012. Her testimony is further supported by the diary of Dan's sister-in-law, which reflects the dates that he came to visit and left again.[6]

[6] The importance of these facts is that Dan Hostetler, whether he voluntarily confessed to killing Brandon Crain or not, and whether he entered a voluntary guilty plea to that crime or not, cannot have actually killed Brandon Crain. He is factually innocent. Dan's claims for relief, though based on a *Brady* violation, should be viewed in light of his actual innocence. As for why an innocent man would falsely confess, Dan has an IQ of 84, and received an 8th grade education in Amish schools. This Court has recognized that reduced mental capacity puts defendants at higher risk for false confessions. *See Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

Trial Court Proceedings

Dan was indicted for manslaughter in May 2013. Unfortunately for Dan, he was appointed a public defender who did not believe that he was innocent and did not investigate his alibi or any of the inconsistencies in his confession.[7]

The defense filed a motion for discovery on June 13, 2013. The discovery response was filed by the Commonwealth's Attorney on July 12, 2013. It noted that:

> [t]he Commonwealth has requested video from the Super Test Gas Station from the night the victim went missing. The undersigned believes Deputy Joey Cox with the Sheriff's Department has a copy of said video in his file and the Commonwealth agrees to provide defense counsel with a copy upon receipt.

This gas station surveillance video shows Brandon Crain walking towards the Green River Bridge on the night that he went missing. The exculpatory nature of this video is obvious: Crain's body was found in the river and he had threatened to jump off that bridge before. Moreover, this evidence did not match Dan's "confession" that he had picked Crain up at the Dollar Store, which lay several miles in the opposite direction. The video, however, was never turned over to the defense. Dan testified that when he asked Crystal Thompson about the video, she told him that the state police had lied on their report and that they never had a video.

Dan's case was scheduled for trial on Monday, August 26, 2013. His attorney was scheduled to be out of the office for the entire week of August 19 through August 23, 2013. Dan rejected a plea bargain at the final pretrial conference on August 16,

[7] Despite her failure to conduct any meaningful pretrial investigation, the Hart Circuit Court found that she had provided effective assistance of counsel to Dan. Instead, the court granted relief based on a discovery violation pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

2013. His attorney and her supervisor then visited Dan in jail the next day, a Saturday, and convinced him to accept the Commonwealth's plea offer.[8] Dan pled guilty on August 20, 2013 with stand-in counsel. At no point prior to the plea did the Commonwealth turn over the gas station video.

Post-Conviction Proceedings

Dan filed a motion for post-conviction relief on April 30, 2014 alleging a *Brady* violation for failure to turn over the video. It was only at that point that the video was finally produced on July 20, 2015. In a letter, the Assistant Commonwealth's Attorney alleged that the video had been retained by a family member of Crain and had only recently resurfaced after the post-conviction motion was filed.[9]

In recognition of the importance of this video, and the fact that the police testified that they had the video, the Hart Circuit Court found a *Brady* violation and granted Dan a new trial. Rather than simply proceed forward with a new trial based on whatever evidence the Commonwealth believed it had, the Commonwealth appealed the order granting a new trial, arguing that no *Brady* violation occurred.

That argument was successful in the Kentucky Court of Appeals, which

[8] Dan later tried to withdraw that plea on the basis that his attorney had coerced him into pleading by telling him that the Commonwealth could re-indict him for murder if he went to trial. The court held a plea withdrawal hearing and rejected Dan's attempt to withdraw his plea. Nevertheless, at the post-conviction evidentiary hearing, the trial attorney's supervisor did not deny that Dan had been told he could be re-indicted for murder, but admitted that the supervisor had never heard of a manslaughter case being re-indicted for murder on the eve of a trial.

[9] The Commonwealth's story was that the Hart County Sheriff's officers were unable to open the video themselves, and that Crain's sister brought her laptop in and played it for them. However, according to the testimony of Deputy Joey Cox, a copy of the video would have been retained in his investigative file, and not given away to Crain's sister.

reversed the Hart Circuit Court's grant of relief, holding in relevant part:

> Hostetler cannot show a *Brady* violation under the circumstances of this case for three reasons. First, the Commonwealth did not fail to disclose the existence of the purportedly exculpatory evidence to the defense. Hostetler's trial counsel testified specifically that she had been made aware of the contents of the video surveillance recording as a result of discovery. Her testimony is confirmed by the record. Hostetler also testified that he knew about the video surveillance recording and its contents before he agreed to plead guilty. Next, because Hostetler cannot show that any material was suppressed, he cannot show that he suffered any prejudice. Finally, the Supreme Court has not extended the *Brady* doctrine to apply to guilty plea proceedings. In fact, in *United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002), the Court specifically observed that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." Under the facts of this case, we need not decide whether Brady requires the Commonwealth to disclose material exculpatory evidence prior to entering a plea agreement with a criminal defendant.

Appendix B.

Although the Kentucky Court of Appeals provided "three reasons" why the Petitioner could not show a *Brady* violation, it actually cited only two.[10] First, because Dan and his counsel were aware of the existence of the video and its contents, there was no suppression by the Commonwealth. Suppression of the evidence, either willfully or inadvertently, is one of the three components of a *Brady* Due Process violation. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Second, this Court has not extended the *Brady* doctrine to the disclosure of material exculpatory evidence

[10] The court's purported second reason—that because no evidence was suppressed, Dan can show no prejudice—is merely a restatement of the conclusion that there was no suppression under *Brady*. Presumably, the inability of the defense to use video evidence of a suicidal teen walking toward a bridge—the same bridge he had threatened to jump off—was prejudicial to the defense and led to Dan's decision to plead guilty. The Kentucky Court of Appeals decision does not seriously suggest otherwise.

prior to guilty plea proceedings.[11] These two reasons for denial of relief provide the basis for the questions presented to this Court.

The Petitioner sought discretionary review from the Supreme Court of Kentucky by way of motion. That motion was denied on September 19, 2018.

The Petitioner now petitions this Court for relief.

REASONS FOR GRANTING THE PETITION

1. **The Kentucky Court of Appeals' ruling that mere knowledge of video surveillance evidence that was not given to the defense defeats the suppression prong of *Brady* conflicts with the rulings of the Second and Sixth Circuits. This Court should grant the petition to resolve this split and clarify that evidence is suppressed when there is no opportunity for use because the defense is misled into believing that material exculpatory evidence is no longer available.**

The first reason given by the Kentucky Court of Appeals that Dan could not prevail on a *Brady* claim was that Dan and his counsel were aware of the existence of the withheld surveillance video and its contents. Thus, the lower court concluded, there was no suppression by the Commonwealth. The Kentucky Court of Appeals applies a bright-line rule that knowledge of a piece of withheld evidence defeats the suppression prong of *Brady.*

Suppression is one of the three prongs of the test for a *Brady* violation. Suppression by the prosecution may be either willful or inadvertent. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The issue in this case is whether evidence is

[11] Although the court ultimately wrote that it need not decide whether *Brady* applies to guilty plea proceedings, the Kentucky Court of Appeals explicitly cited it as one of the reasons that Dan cannot show a *Brady* violation in this case.

suppressed when the defendant has knowledge of it, but has no opportunity to use it. The Kentucky Court of Appeals held that a defendant's awareness of the existence and content of material exculpatory evidence (in this case, surveillance video of the purported victim walking towards the Green River Bridge, which he had previously threatened to jump from) is sufficient to defeat the suppression prong. But mere knowledge of the existence and content of material exculpatory evidence is not sufficient to defeat the suppression prong where the evidence itself was never turned over, because the evidence itself is then unavailable for use at a trial. Without the benefit of the exculpatory evidence for use at trial in this case, Dan entered into a guilty plea.

The Kentucky Court of Appeals, in ruling that a *Brady* violation cannot be shown where the defendant and his attorney had knowledge of the existence and content of material exculpatory evidence, has decided an important federal question in a way that conflicts with decisions of the United States Court of Appeals for the Second and Sixth Circuits.

In *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001), the Second Circuit dealt with a late disclosure of a witness by the prosecution—three days before trial—coupled with actions by the prosecution that prevented the defense from interviewing the witness. The Second Circuit further noted that while the witness and his inability to identify the defendant had been disclosed, the full description of what the witness saw was not disclosed. *Id.* at 99. The witness was a police officer—and therefore had high credibility as a witness—and his observations called into question the

observations of the prosecution's other witnesses. *Id.* The Second Circuit cited the general rule that "evidence is not suppressed if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of the exculpatory evidence." *Id.* at 100 (citing *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982)). However, the Second Circuit went on to hold that:

> It is not feasible or desirable to specify the extent or timing of disclosure *Brady* and its progeny require, except in terms of sufficiency, under the circumstances, of **the defense's opportunity to use the evidence when disclosure is made**.

Id. at 100 (emphasis added). The decision of the Kentucky Court of Appeals fails to take into account this context-specific concept of "opportunity for use" recognized by the Second Circuit. Instead, the Kentucky court mechanically applied a bright-line rule that knowing about a piece of evidence means that it has not been suppressed.

The Kentucky Court of Appeals cited no specific authority in holding that the Petitioner's knowledge of the video and its contents meant that it was not suppressed. However, the Commonwealth's brief to the Kentucky Court of Appeals cites a Sixth Circuit case, *United States v. Clark*, 928 F.2d 733 (6th Cir. 1991). That case contains a citation to the same general rule cited by the Second Circuit: "No *Brady* violation exists where a defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information.'" *Id.* at 738 (quoting *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988)).

The Second Circuit's analysis in *Leka*, *supra*, illuminates the meaning of the latter portion of the quote. It is not enough for a defendant to simply know essential facts about the evidence—that knowledge must be sufficient to allow him to *take*

advantage of any exculpatory information. In the Petitioner's case, he and his counsel never received a copy of the video to use an exhibit during a jury trial.[12] In the words of the Second and Sixth Circuits, the Petitioner was not in possession of essential facts that would allow him to take advantage of the exculpatory information. He was in possession of facts about the surveillance video, but they were insufficient to allow him to use the evidence because the actions of the Commonwealth had robbed him of any opportunity for use.

It may be tempting to suggest that Dan's knowledge would have enabled him, during trial, to question the police officers who had previously viewed the video tape. However, the post-conviction evidentiary hearing in this case demonstrates why this would have been an insufficient way to present this exculpatory evidence to the jury. When asked about the surveillance video, Deputy Cox suddenly concocted a new theory that the video did not show Crain, but rather a mentally-handicapped town resident who is known for walking around at all hours. Deputy Cox based this new identification, in part, on the subject's limp. When reminded that Crain had shot himself in the leg earlier in the month that he went missing, Cox conceded that Crain would also have a limp. Thus, attempting to present this evidence through witnesses who had viewed the video before it went missing would have been insufficient—the

[12] Dan testified that his attorney told him that the police said the video never existed. His attorney testified that she did not recall what she was told, but she speculated that maybe the video had not been retained since some time had passed between the discovery of the body and Dan's alleged confession. Given that it was referenced in an autopsy report, in grand jury testimony by the investigating officer, and in a discovery response from the Commonwealth, it seems more likely that the Commonwealth had claimed to defense counsel that it had been lost or destroyed; it would have strained credulity for the Commonwealth to claim it never existed. Regardless, Dan and his attorney were told that it would not be produced, and it was not produced to defense counsel before Dan entered his plea on the eve of trial.

jury needed to view the video for itself to be able to conclude that the video shows Crain. It is certainly possible that there are types of evidence where mere knowledge of the existence and content of the evidence is all that is necessary to make use of the evidence at trial. That is not the case here. The error of the Kentucky Court of Appeals is that it applies a bright-line rule when a context-specific test is required.

The Second Circuit has recognized, in *Leka*, *supra*, that in order to defeat the suppression prong of *Brady*, it is not sufficient to simply show that the defendant knows about a piece of exculpatory evidence, but that he must have an opportunity to use it. If the actions of the government prevent the defendant from using a piece of exculpatory evidence, despite his knowledge of it, then that evidence has been suppressed within the meaning of *Brady*. The citation by the Sixth Circuit of the same language relied upon by the Second Circuit, "permitting him to take advantage of any exculpatory information," demonstrates a level of agreement among those federal courts.[13] Specifically, the federal courts agree that whether knowledge of the existence and content of material exculpatory evidence defeats the suppression prong of *Brady* depends upon a nuanced, fact-specific determination of whether the defendant was able to avail himself of the evidence.

The ruling by the Kentucky Court of Appeals directly contradicts those holdings. Had it undertaken the kind of context-specific determination required by

[13] In addition to the Second Circuit and the Sixth Circuit, both the First Circuit and the Fifth Circuit have cited this precise "allow him to take advantage" language. *See United States v. Therrien*, 847 F.3d 9, 16 (1st Cir. 2017); *United States v. Acosta-Colon*, 741 F.3d 179, 196 fn. 9 (1st Cir. 2013); *Ellsworth v. Warden*, 333 F.3d 1, 6 (1st Cir. 2003); *Rector v. Johnson*, 120 F.3d 551, 560 (5th Cir. 1997); *West v. Johnson*, 92 F.3d 1385, 1399 (5th Cir. 1996); *Lawrence v. Lensing*, 42 F.3d 255, 257 (5th Cir. 1994).

the federal courts, it would have recognized that the Commonwealth's newly-minted position that the video showed someone other than Crain, coupled with the inability of Dan to have a witness identify the person in the video as Crain for the jury, vitiated any real opportunity to benefit from his knowledge of the existence and contents of the video. Instead, the Kentucky court held that, where a defendant knows of the existence and content of material exculpatory evidence that has not itself been turned over, the evidence has, by definition, not been suppressed.

Thus, a state court of last resort has decided a federal question in a way that conflicts with the decision of a United States court of appeals, within the meaning of United States Supreme Court Rule 10(b). Although several federal appellate courts have made rulings relevant to this issue, this Court has not yet spoken on this aspect of the *Brady* doctrine. The Petitioner urges this Court to grant this writ in order to resolve this conflict and provide necessary guidance to prevent lower courts from denying *Brady* claims whenever a defendant has knowledge of a piece of evidence, even where there is no real opportunity to use that evidence.

2. There exists a split in the federal circuits on the question of whether material exculpatory evidence must be disclosed prior to the entry of a negotiated guilty plea. This case provides an opportunity for this Court to resolve that split, providing needed clarity and guidance for the lower courts.

The Kentucky Court of Appeals also held that Petitioner could not prove a *Brady* violation because this Court has not yet extended the *Brady* doctrine to the guilty plea context. Thus, this case squarely presents for this Court's review an issue that has caused a significant federal circuit split both prior to and following this

Court's ruling in *United States v. Ruiz*, 536 U.S. 622 (2002): whether material exculpatory evidence must be disclosed prior to the prosecution entering into a plea agreement with the defendant.

While *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny have established that a defendant has a right to pre-*trial* disclosure by the prosecution of material exculpatory evidence, the same right has not yet been recognized in the guilty plea context. This is an important open question for our system of justice, as this Court has previously recognized that "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). In fact, the statistics are heavily weighted towards plea bargains: "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

As early as 1985, the Sixth Circuit addressed the question of whether a defendant may raise a *Brady* challenge to a guilty plea.[14] In *Campbell v. Marshall*, 769 F.2d 314 (6th Cir. 1985), that court held that a *Brady* violation might negate the voluntary and knowing character of a guilty plea, but was merely one factor in the analysis, which also included the factual basis for the plea, the court procedures for accepting the plea, and the effectiveness of defense counsel. *Id.*

Several years later, the Eighth Circuit addressed the issue in *White v. United*

[14] For a more extensive discussion of the federal circuit split prior to and following *Ruiz*, *supra*, *see* Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 Fordham L. Rev. 3599 (2013). Undersigned counsel is grateful to Mr. Petegorsky for his research and thoughtful analysis on this issue.

States, 858 F.2d 416 (8th Cir. 1988), albeit in a case that dealt with *impeachment* evidence rather than the *exculpatory* evidence addressed in *Campbell*. Nevertheless, the Eighth Circuit in *White* expressly adopted the same framework of the Sixth Circuit in *Campbell*. *White* cited *Campbell* for the proposition that "the Supreme Court did not intend to insulate all misconduct of constitutional proportions from judicial scrutiny solely because that misconduct was followed by a plea which otherwise passes constitutional muster as knowing and intelligent." *White* at 422 (citing *Campbell* at 321). However, less than a year later, the Eighth Circuit departed from its own precedent, deciding in *Smith v. United States*, 876 F.2d 655 (8th Cir. 1989), that a guilty plea waives all challenges except as to jurisdiction, thus swinging its jurisprudence away from allowing *Brady* challenges in guilty pleas. *Smith* did not cite either *Campbell* or *White*, and offers no detailed analysis behind the new rule.

In 1988, the Second Circuit followed the Sixth Circuit's lead, deciding in *Miller v. Angliker*, 848 F.2d 1312 (2d Cir. 1988), that a defendant could challenge the validity of his guilty plea for the failure of the prosecution to turn over material exculpatory evidence. Its logic differed slightly from that of the Sixth Circuit, however. Rather than holding that the failure to disclose affected the voluntary and knowing nature of the plea, the Second Circuit found that the "intelligent and voluntary" test for the validity of a plea did not apply if there was misrepresentation or other impermissible conduct by state agents. *Id.*

When the Tenth Circuit addressed this question in 1994, it found in *United States v. Wright*, 43 F.3d 491 (10th Cir. 1994), that the defendant could challenge his

plea as not intelligently or voluntarily entered due to the claimed *Brady* violation. According to *Wright*, the failure to divulge Brady material is a misrepresentation with the potential to render a "guilty plea a constitutionally inadequate basis for imprisonment." *Id.*

The Ninth Circuit decided in *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995), that a guilty plea cannot be knowing and voluntary if it is made without the knowledge of material exculpatory evidence that is suppressed by the prosecution. The Ninth Circuit noted that "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case." *Id.* at 1453. It further noted a concern that preventing defendants from raising *Brady* claims to challenge a guilty plea would make it tempting for prosecutors to "deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas." *Id.*

The first federal circuit to offer a detailed dissenting opinion was the Fifth Circuit, in 2000. In *Matthew v. Johnson*, 201 F.3d 353 (5th Cir. 2000), that court held that a defendant could not challenge the validity of a guilty plea based on a *Brady* violation. The Fifth Circuit concluded that the government's duty to disclose material exculpatory evidence was based on the Due Process Clause, and it framed that due process right as a protection to ensure that *trials* are fair and proper determinations of guilt. *Id.* at 360-361.

Two years later, this Court decided *Ruiz*, *supra*. The facts of *Ruiz* limited its scope to material *impeachment* evidence, because the "fast track" deal offered to Ruiz specifically stated that "any [known] information establishing the factual innocence

of the defendant" had been disclosed, and that the defendant was waiving only the right "to receive impeachment information relating to any informants and other witnesses." *Id.* at 625. This Court concluded that the Constitution did not require "preguilty plea disclosure of impeachment information." *Id.* at 629. However, this Court's opinion did not decide the issue of whether the Constitution requires the disclosure of material *exculpatory* evidence prior to the entry of a guilty plea. The analysis purposely avoided that issue because the plea agreement's provision that the government would provide "any information establishing the factual innocence of the defendant," coupled with Fed. Rule Crim. Proc. 11's protections, diminished the concern that innocent individuals might plead guilty. *Id.* at 631.

This Court's decision in *Ruiz* left open the question raised by this case: whether the prosecution must disclose material exculpatory evidence prior to entering into a plea agreement with a defendant. Following *Ruiz*, there has continued to be a split in the federal circuits on the question of whether exculpatory evidence deserves different treatment than impeachment evidence in the guilty plea context.

The Seventh Circuit addressed the issue in *McCann v. Mangialardi*, 337 F.3d 782 (7th Cir. 2003). That court read this Court's opinion in *Ruiz* as implying that the government is required to disclose material exculpatory evidence prior to a guilty plea. *Id.* at 787. It noted that this Court's reasoning for not requiring disclosure of impeachment evidence was that it was not likely to be "critical information of which the defendant must always be aware prior to pleading guilty." *Id.* (quoting *Ruiz*, 536 U.S. at 630). The Seventh Circuit also noted that the plea agreement in *Ruiz* already

required disclosure of exculpatory evidence. *Id.* It ultimately concluded that:

> *Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence. Given this distinction, it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.

Id. at 788.

In *United States v. Ohiri*, 133 F.App'x 555 (10th Cir. 2005), the Tenth Circuit reached a similar conclusion. It drew a distinction between impeachment and exculpatory evidence, and concluded that exculpatory evidence is "critical information of which the defendant must always be aware prior to pleading guilty." *Id.* at 562 (quoting *United States v. Ruiz*, 536 U.S. 622, 630 (2002)). The Tenth Circuit also found that the duty to disclose material exculpatory evidence prior to entry of a guilty plea was supported by this Court's statement in *Ruiz* that the defendant's rights were protected by the plea agreement's stipulation that all material exculpatory evidence would be disclosed. *Id.* at 562 (citing *United States v. Ruiz*, 536 U.S. 622, 631 (2002)).[15]

In contrast to the Seventh Circuit and the Tenth Circuit, other courts have held that this Court's decision in *Ruiz* precludes **all** *Brady* challenges to guilty pleas. The Fifth Circuit in *United States v. Conroy*, 567 F.3d 174 (2009), held that both its earlier decision in *Matthew*, *supra*, and *Ruiz* precluded a *Brady* challenge in a guilty

[15] The Tenth Circuit also drew a distinction between a plea offer made before indictment and one made on the eve of a trial. *Ohiri* at 562. In the instant case, Dan was talked into accepting a plea agreement just a week prior to his scheduled trial date.

plea context. *Conroy*. at 178-179. Unlike the Seventh and Tenth Circuits, the Fifth Circuit did not see *Ruiz* as creating or recognizing any distinction between impeachment and exculpatory evidence. *Id.* The Second and Fourth Circuits have discussed this issue in opinions, but both have declined to decide the merits of the issue.[16]

Thus, there is a significant split in the federal circuits, both prior to and following this Court's decision in *Ruiz*, regarding whether material exculpatory evidence must be disclosed before the prosecution enters into a plea agreement with a defendant. The Seventh Circuit holds that *Ruiz* strongly implies that this Court would find a violation of Due Process if prosecutors fail to disclose evidence of factual innocence prior to a guilty plea. The Tenth Circuit agreed, holding that material exculpatory evidence is critical evidence of which a defendant must always be aware before he enters a guilty plea. By contrast, the Fifth Circuit held that *Ruiz* did not create any distinction between impeachment and exculpatory evidence. The Second and Fourth Circuits appear poised to follow the Fifth Circuit. In essence, there is significant disagreement among the federal circuits about whether this Court's ruling

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[16] The Fourth Circuit's treatment of this issue post-*Ruiz* occurs in *United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010). The court failed to reach the merits because the exculpatory material had not actually been suppressed. *Id.* at 287. The Fourth Circuit recognized that this Court's decision in *Ruiz* did not address the question of whether the *Brady* right to exculpatory information, in contrast to impeachment information, might be extended to the guilty plea context. *Id.* at 286. However, the Fourth Circuit also emphasized that the *Brady* right "is a *trial* right." *Id.* at 285. It would appear that the Fourth Circuit is inclined to follow the lead of the Fifth Circuit.

The Second Circuit discussed the state of the law following *Ruiz* in *Friedman v. Rehal*, 618 F.3d 142 (2d Cir. 2010). The court failed to reach the merits because Friedman's claim was not timely under AEDPA. *Id.* at 152. Further, the evidence in *Friedman* was impeachment material, not exculpatory. Notably, the Second Circuit recognized that prior to Ruiz, this Court had consistently treated exculpatory and impeachment evidence in the same way. *Id.* at 154. This tends to indicate that the Second Circuit would side with the Fifth Circuit if it were ultimately called upon to decide this issue.

in *Ruiz* implies a different outcome in a case where the withheld evidence is exculpatory. This Court should answer that question before further ink is spilled on this disagreement.

Reasons to Resolve This Open Question in This Case

The facts of this case provide an excellent test case upon which this Court can decide whether material exculpatory evidence must be disclosed prior to the entry of a guilty plea pursuant to a plea agreement. First, Dan Hostetler is innocent, and such high stakes make it all the more important for this Court to seize this opportunity to decide an open question that has confused the lower courts. Second, the plea agreement in this case was reached just a week before the schedule trial, making it the proverbial "eve of trial" plea. As a result, there is no argument that if the defendant had merely held out a little longer or proceeded to trial, the evidence would have materialized and the *Brady* issue would have been cured. Third, this is the rare case where the missing evidence has actually materialized after trial, rather than being lost forever. Its material and exculpatory nature is not just hypothetical, but an established matter of fact. It is always a hurdle for a litigant to actually discover that evidence was suppressed, but even for those litigants who can prove that evidence once existed but was not disclosed, a great many are defeated by the frustrating truth that it is often impossible to prove that missing evidence would have been exculpatory. This case presents no such difficulty.

Reasonable jurists might suppose that the right to disclosure of material exculpatory evidence is more vital in the context of a trial than in the context of guilty

plea proceedings, since innocent people are unlikely to accept a plea bargain. However, this supposition is not borne out by facts. Defendants plead guilty for a variety of motives, and knowledge of one's own innocence is not necessarily sufficient to override other considerations. Where the prosecution has a strong circumstantial case, and the proof of innocence—the material exculpatory evidence—is suppressed by the prosecution, an innocent defendant might despair of his ability to prevail at trial, and instead allow himself to be convinced that a lighter sentence offered in exchange for a guilty plea is the best compromise in a bad situation. This Court has previously recognized this truth. *See North Carolina v. Alford*, 400 U.S. 25 (1970).

For the sake of Dan Hostetler and defendants similarly situated, this Court must clarify for the lower courts that due process requires the prosecution to disclose material exculpatory evidence prior to the entry of a guilty plea pursuant to a plea agreement. In contrast with the Fifth Circuit's pronouncement that *Brady* is a trial right, this Court declined to apply that logic in *Ruiz*, treating impeachment and exculpatory evidence as different categories for the first time in its *Brady* line of cases. As *Ruiz* recognizes, impeachment evidence is only important in the context of a fair trial. By contrast, exculpatory information is that critical information of which a defendant must always be aware prior to pleading guilty. The waiver of a defendant's constitutional rights in a guilty plea cannot be knowing and voluntary if the prosecution has withheld evidence that demonstrates that the defendant is factually innocent.

The Petitioner prays that this Court grant review in this case, both to provide

him with relief as a court of last resort, and to provide much-needed guidance to the lower courts which are split on these significant constitutional issues.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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