No. _____

In The
Supreme Court of the United States

_____ ∆ _____

MATTHEW HUDAK,

Petitioner,

v.

ILLINOIS,

Respondent.

_____ ∆ _____

Petition for a Writ of Certiorari to the Appellate Court of Illinois, Second District

_____ ∆ _____

PETITION FOR WRIT OF CERTIORARI

_____ ∆ _____

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QUESTIONS PRESENTED FOR REVIEW:

1. Whether the prosecution's *Brady* obligations allow the prosecution to deliberately suppress relevant impeachment or exculpatory material before a guilty plea, without a showing of a good faith basis for suppression?

2. Whether this Court's decision in *United States v. Ruiz* allows the prosecution to conceal exculpatory as well as impeachment material before a guilty plea?

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OPINION BELOW

The order of the Appellate Court of Illinois, Second District, (App.B) affirming the first stage dismissal of Matthew Hudak's post conviction petition is cited as *People v. Hudak*, 2019 IL App (2d) 180487-U, *appeal denied*, 2020 WL 474899(Table)(Ill. 2019) (App.C).

JURISDICTION

The Appellate Court of Illinois, Second District, entered its opinion October 1, 2019. The Supreme Court of Illinois denied the petition for leave to appeal on January 29, 2020.(App.A) This court has jurisdiction under 28 U.S.C. Sec. 1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amend. XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; 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 the laws.

STATEMENT OF THE CASE

On January 13, 2013, together with codefendants John J. Cichy and Terrance O'Brien, defendant Matthew Hudak was indicted for delivery of controlled substance, (R. C241, C252), armed violence (R. C242-43, C257), calculated criminal drug conspiracy (R. C244-45, C253), official misconduct (R. C246, C254-56), theft (R. C247) , and burglary (R. C248-50),

On February 1, 2013, Matthew Hudak, through counsel, filed a written motion for discovery. (R. C264). The motion included a request that the prosecution disclose to the defense "any material or information that tends to negate the guilt of the accused as the offense charged or would tend to reduce his punishment tberefor, including the names and addresses of any witnesses who may be favorable to the defense." (R. C264). The motion also included a request that the prosecution shall provide the "criminal

background of each and every witness listed or disclosed to the defense in the above captioned case. All reports of prior criminal convictions and juvenile adjudications, which may be used in impeachment of persons whom the State intends to call as witnesses at the hearing or trial." Finally, the motion provided that the "prosecution shall provide a list of any and all confidential informants and transactional confidential informants utilized by law enforcement agencies during the course of the actions for which the defendant is alleged to have violated the laws of the State of Illinois in the case before the Court as well as any and all incidents in which the confidential informant was directly involved with the defendant in the commission, planning, execution, or involvement of any crime alleged to have been committed by the defendant before this Court." (R. C266).

During the course of the next year of status dates, the prosecution made six disclosures to Matthew Hudak. (R. C314, C329, C334, C340, C345, C357). Matthew Hudak never answered discovery or listed an affirmative defense.

In their first disclosure, the prosecution represented that they had no exculpatory information in their possession. (R. C235). In all of the disclosures they recognized a

continuing duty to disclose discoverable material. (R. C235, C331, C337, C341, C347, C358).

In their last disclosure, dated February 18, 2014, the prosecution disclosed information with respect to a confidential informant. The disclosures included an SOI packet from the Carol Stream Police. It also included a statement that: "At no time did the informant sign any documents or contract agreements or have any written plea agreements, offers of consideration or oral representations of any benefits regarding this investigation; however, upon the Carol Stream Police Department locating the narcotics in the SOl's residence which began this investigation, the SOl was never and will not be charged with possession of those narcotics." (R. C357). Lastly, the prosecution disclosed that the:

> "The SOl has been previously convicted of or has pending the following offenses:
>
> a. Unlawful Possession of less than 30 grams of Cannabis, an ordinance violation, which is still pending;
>
> b. Unlawful Possession of a Controlled Substance (15-1 OOg), a class I felony wherein he was sentenced to 2 years

probation and 4 days jail, which was satisfactorily terminated;

c. Unlawful Possession of Anabolic Steroid, a class C misdemeanor, wherein he was sentenced to two months court supervision, which was satisfactorily terminated;

d. Unlawful Possession of less than 2.5 grams of Cannabis, a class C misdemeanor, wherein he was sentenced to one year court supervision, which was satisfactorily terminated."

(R. C358).

The prosecution did not make any other disclosures with respect to the confidential informant's criminal activities.

On April 29, 2014, Matthew Hudak pled guilty to armed violence, burglary, official misconduct, and delivery of controlled substance. (R. C392-96, C444-68). During the plea hearing, Hudak waived his right to a jury trial, his right to a bench trial, his right to present witnesses and his right to cross-examine the state's witnesses. (R. C451-52).

On March 6, 2018, Matthew Hudak, through counsel filed a petition for post conviction relief pursuant to 725 ILCS 5/122-1. The petition asserted that "at all times relevant prior to disposition of the case, the

defendant asserted that he was innocent of the crimes accused of by the State and claimed that he had been entrapped by the government's witness." (R. C484).

The petition further claimed that the prosecution violated the defendant's due process rights under the United States and Illinois constitutions because it withheld exculpatory evidence from Matthew Hudak and his counsel, despite written requests and court orders when it withheld from the defense the fact that the confidential informant was being investigated by the Carol Stream Police Department and by a former employee of the DuPage County States Attorney's Office for stealing a $3500 treadmill from the gym where he was employed. (R. C485-86).

The petition also claimed that the same former employee of the DuPage County States Attorney's Office was a licensed attorney and a prosecutor who controlled all discovery in the case against the defendant. (R. C486).

The petition further claimed that in May of 2013, over a year before Matthew Hudak pled guilty, the confidential informant was interviewed by members of the Carol Stream Police Department and confessed to the theft.

(R. C486-87). Law enforcement declined to prosecute the informant.

The petition further claimed that after May 1 of 2013, the informant was being actively investigated for wire fraud involving the informant's theft of credit card information of patrons of the gym where the informant was employed. This investigation included the issuance, on May 6, 2013, of a seizure warrant for the confidential informant's bank account at Chase Bank. (R. C487-88). Law enforcement also declined to prosecute the informant for this fraud. (R. C488).

In addition, the informant lied to law enforcement about both crimes, the theft (R. C486) and the wire fraud. (R. C487).

None of this information was disclosed to the defense until February 20, 2018, long after Matthew Hudak pled guilty. Following this disclosure, the prosecution dismissed charges against one of Matthew Hudak's codefendants. (R. C488).

The petition was supported by a redacted version of the discovery which the prosecution furnished on February 20, 2018. (R. C494-570).

The circuit court dismissed the petition in a written memorandum opinion. (R. C574). The court found that no cases provided for

withdrawal of a voluntary plea of guilty based upon a violation of the discovery rules. (R. C577). The court further found that, under *United States v. Ruiz,* 536 U.S. 622, 628-29 (2002), the failure to disclose impeachment evidence prior to a guilty plea does not violate the government's obligation to disclose exculpatory evidence under *Brady v. Maryland,* 373 U.S. 83, 87 (1963). (R. C577-78).

The circuit court conceded that the: "State arguably engaged in skullduggery when it failed to disclose the above evidence in violation of its continuing duty to disclose," but noted that no cases provided for withdrawal of a voluntary plea of guilty based upon a violation of the discovery rules. (R. C577).

In response to the argument that the evidence of the informant's criminality was exculpatory and not merely impeaching, the court responded:

"Initially the Court notes that no affirmative defense of entrapment was ever filed in this case and no affidavits or records filed set forth the basis for an entrapment defense.

"Furthermore, this Court's research has failed to disclose a single case suggesting

> that impeachment evidence of an entrapment informant is exculpatory for purposes of a *Brady/Ruiz* analysis. Nor would this necessary seem logical in the instant circumstance where the Defendant was uninvolved in the undisclosed criminal conduct of the informant and it occurred long after the interactions between the Defendant and the informant concluded. That having been said, even if impeachment evidence that relates to an affirmative defense were exculpatory, and thus not strictly governed by *Ruiz,* our appellate court noted in *People v. Gray,* 2016 IL App (2d) 100042 ~27, that the United States Supreme Court has consistently treated exculpatory and impeachment evidence in the same way in addressing *Brady* claims (citing with approval the Wisconsin Supreme Court in *State v. Harris,* 2004 WI 64 (2004)). Accordingly, in either event Defendant's pleas would seem to foreclose his post-conviction due process claims."
>
> (R. C579).

On appeal, the Appellate Court, Second District, also relied upon *United States v. Ruiz*, 536 U.S. 622, 625-26 (2002) and the

court's published opinion in *People v. Gray*, 2016 IL App (2d) 140002. The court interpreted *Ruiz* to mean that the prosecution never has a duty to disclose impeachment material before a guilty plea, 2019 IL App (2d) 160487-U, at ¶¶ 30-32. Relying upon *Gra*y, the court found that even if the undisclosed information was exculpatory, because it supported an entrapment defense, that would not matter because, under *Gray*, "'[E]ven were the evidence considered 'exculpatory' and not merely 'impeaching,' it would not help because 'the Supreme Court has consistently treated exculpatory and impeachment evidence in the same way' in addressing *Brady* claims.'" 2019 IL App (2d) 160487-U, at ¶¶ 34, *quoting Gray*, 2016 IL App (2d) 140002, at ¶¶ 27.

REASONS FOR GRANTING THE PETITION

This case presents two distinct, but intertwined reasons for granting the petition for writ of certiorari.

First, as the Illinois circuit court found, this was a case where impeachment material was suppressed as the result of prosecutorial

"skullduggery," but the defendant was still entitled to no relief because he had pled guilty and had no right to impeachment material. Therefore this case raises the issue of whether *Ruiz* allows the non-disclosure of impeachment material prior to a guilty plea where the prosecutor intentionally suppresses such material, in bad faith, in order to mislead the defense as to the strength of its case. This issue is particularly salient because *Wilde v. Wyoming*, 362 U.S. 607 (1960), a case which have never been challenged or overruled, held that the willful suppression of exculpatory evidence prior to a guilty plea violated due process. *Wilde* is consistent with a line of pre-*Brady* cases which focused on the prosecution's intent, willful behavior, or bad faith. This conflict between the decision below and decisions of this Court merits this Court's review.

Second, the decision below, consistent with the treatment of this issue in a published opinion of an Illinois appellate court, relied upon the proposition that *Ruiz* applies to both impeachment and exculpatory evidence, since, in general both forms of evidence are subject to Brady disclosure prior to trial. This is an issue upon which there is a deep, longstanding, and widening split in the lower

courts, with a majority of jurisdictions holding that *Ruiz* does not apply to the suppression of exculpatory evidence, and a minority of jurisdictions, like Illinois, hold otherwise. This split, which affects plea bargaining nationwide, merits this Court's review.

I.
THIS COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER A PROSECUTOR MAY WILLFULLY WITHOLD IMPEACHMENT EVIDENCE WHICH SIGNIFICANTLY DAMAGES ITS CASE PRIOR TO A GUILTY PLEA WITHOUT VIOLATING THE FOURTEENTH AMENDMENT

This court should grant the petition for certiorari to determine whether prosecutors may, prior to a guilty plea, willfully suppress impeachment evidence which significantly damages their case. The Illinois court below held that very significant impeachment evidence could be suppressed prior to a guilty plea despite the circuit court's finding that the evidence was suppressed due to "skullduggery."

This finding directly contradicts this Court's decision in *Wilde v. Wyoming*, 362 U.S. 607
(1960).

In *Wilde*, the defendant filed a petition for writ of habeas corpus with the Second Judicial District Court of the State of Wyoming and the Wyoming Supreme Court. In part, the petition claimed that the petitioner's guilty plea to second degree murder was improperly induced because the "prosecutor wilfully suppressed the testimony of two eyewitnesses to the alleged crime which would have exonerated the petitioner." 362 U.S. at 607. In a *per curiam* opinion, this Court determined that

> it did "not appear from the record that an adequate hearing on these allegations was held in the District Court, or any hearing of any nature in, or by direction of, the Supreme Court." Finding that there was nothing in "the record to justify the denial of hearing on these allegations," this Court remanded the case for an evidentiary hearing. 362 U.S. at 607.

The *Wilde* Court's remand in a guilty plea case was consistent with this Court's pre-Brady jurisprudence, which placed great

weight upon findings of willful misconduct by prosecutors, particularly where prosecutors presented perjured evidence at trial. *Mooney v. Holohan,* 294 U.S. 103, 112 (1935) (prosecutor's willful presentation of perjured testimony violated due process); *Pyle v. Kansas*, 317 U.S. 213 (1942), (remanding a petition for writ of habeas corpus for further proceedings based on allegations of willful suppression of evidence and suborned perjury). Later post-Brady cases, such as *United States v. Bagley*, 473 U.S. 667, 679 n. 8 (1985), recognized that *Pyle* "held that allegations that the prosecutor had deliberately suppressed evidence favorable to the accused and had knowingly used perjured testimony were sufficient to charge a due process violation."

It is true that in *Brady* itself, which examined due process disclosure in the trial and sentencing context, this Court shifted the focus from the prosecutor's intentions to the nature of the evidence which had not been disclosed: "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or

bad faith of the prosecution." *Brady v. Maryland,* 373 U.S. 83, 87 (1963).

But just because *Brady* did not require a finding of bad faith in the trial context does not mean that it excused prosecutors from the requirement of good faith inherent in the holdings of *Mooney*, *Pyle*, and *Wilde*, which *Wilde* applied to guilty pleas. In any event, if *Brady* and *Wilde* are in conflict, that conflict merits this Court's review.

The question of intentional or willful non-disclosure did not arise in *Ruiz*, because of the particular procedural context of that case.

The issue before the Court in *Ruiz* was "whether the Fifth and Sixth Amendments require federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose 'impeachment information relating to any informants or other witnesses.' " 536 U.S. at 625. 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. 536 U.S. at 625.

The prosecutors' proposed plea agreement contained a set of detailed terms. Among other things, it specified that "any [known] information establishing the factual innocence of the defendant" "has been turned over to the defendant," and it acknowledged the government's "continuing duty to provide such information." At the same time, it required that the defendant "waiv[e] the right" to receive "impeachment information relating to any informants or other witnesses" as well as the right to receive information supporting any affirmative defense the defendant raises if the case goes to trial. Because Ruiz would not agree to this waiver, the prosecutors withdrew their offer and indicted Ruiz for unlawful drug possession. 536 U.S. at 625. Despite the absence of any agreement, Ruiz ultimately pled guilty. 535 U.S. at 625-26.

At sentencing, Ruiz asked the judge to grant her the same two-level downward departure that the government would have recommended had she accepted the "fast track" agreement. The government opposed her request, and the district court denied it,

imposing a sentence within the standard guidelines. 535 U.S. at 626.

Ruiz appealed her sentence to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit vacated the district court's sentencing determination. The United States Supreme Court granted the government's petition. 535 U.S. at 626. The Court stated: "The constitutional question concerns a federal criminal defendant's waiver of the right to receive from prosecutors exculpatory impeachment material-a right that the Constitution provides as part of its basic 'fair trial' guarantee." 535 U.S. at 628. The question before the Court was whether the Constitution requires preguilty plea disclosure by the federal government of impeachment information. 535 U.S. at 629.

This Court offered three main considerations for its ultimate holding that the Constitution does not require the federal government to disclose material impeachment evidence prior to entering into a plea agreement with a criminal defendant. 535 U.S. at 629-33.

First, it stated that impeachment information is special in relation to the fairness of a trial, not in respect to whether a plea is voluntary (knowing, intelligent, and

sufficiently aware). 535 U.S. at 629. It noted that impeachment information is difficult to characterize 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. 535 U.S. at 630.

Second, the Court reiterated its previous case law holdings that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. It then specifically included a defendant's ignorance of grounds for impeachment of potential witnesses at a possible future trial as not barring a court from accepting that defendant's guilty plea. 536 U.S. at 630.

Third, this Court stated that "due process considerations, the very considerations that led [it] to find trial-related rights to exculpatory and impeachment information in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)] and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31

L.Ed.2d 104 (1972)4], argue against the existence of the 'right' that the Ninth Circuit found here." The Court pointed out that the added value of the Ninth Circuit's "right" to a defendant is often limited, for it depends upon the defendant's independent awareness of the details of the government's case. 536 U.S. at 631.

The Court then discussed the fact-specific way the case before it protected Ruiz's constitutional rights: "the proposed plea agreement at issue here specifies, the Government will provide 'any information establishing the factual innocence of the defendant.' " The Court emphasized that "[t]hat fact, along with other guilty-plea safeguards, see Fed. Rule Crim. Proc. 11, diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty." Ruiz, 536 U.S. at 631 (citing cf. *McCarthy v. United States*, 394 U.S. 459, 465-67, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) (discussing Rule 11's role in protecting a defendant's constitutional rights)).

This Court discussed its specific concerns with upholding the Ninth Circuit's rule. It stated that the Ninth Circuit's rule could "seriously interfere with the Government's

interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure efficient administration of justice." Ruiz, 536 U.S. at 631. It said that the rule risks premature disclosure of government witness information, which could disrupt ongoing investigations and expose prospective witnesses to serious harm. 536 U.S. at 631-32. It concluded that "[c]onsequently, the Ninth Circuit's requirement could force the Government to abandon its 'general practice' of not 'disclos[ing] to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses.' " The Court opined that the Ninth Circuit's rule could require the government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages or it could lead the government instead to abandon its heavy reliance upon plea bargaining in a vast number-90% or more-of federal criminal cases. 536 U.S. at 631-32.

This Court then specifically upheld the constitutionality of the "fast track" plea agreement's requirements that a defendant

(1) acknowledge that the government has turned over "any [known] information establishing the factual innocence of the defendant" (the "fast track" agreement also provided the government's acknowledgement that it has a continuing duty to provide such information), (2) waive the right to receive impeachment information relating to any informants or other witnesses, and (3) waive the right to receive information the government has regarding any "affirmative defense" he or she raises if the case goes to trial. 536 U.S. at 625, 632-33.

As this summary shows, *Ruiz* never touched a claim that the prosecution had acted in bad faith or had intentionally withheld impeachment material. The sole issue was whether the government could require waiver of Ruiz's trial right to receive impeachment material in exchange for a faster guilty plea and a more lenient sentence. None of the considerations which motivated the United States Supreme Court to reject Ruiz's claim apply here.

First, the constitutionality of a "fast track" procedure or a specific waiver of right to receive impeachment information are not at issue here. Unlike Ruiz, Matthew Hudak never waived, and was never asked to waive,

his right to receive *Brady* impeachment material. Instead he only waived his right to a jury trial, his right to a bench trial, and his right to cross-examine witnesses. (R. C451-52). Moreover, unlike Ruiz, Hudak made a specific discovery request not only for general exculpatory information but also for pertinent information about the confidential informant. And, unlike Ruiz, who was not affirmatively mislead by the government, Hudak was deceived by a specific prosecution disclosure, made two months before his plea, which deliberately omitted all mention of the informant's recent criminal conduct and the prosecution's inexplicable decision not to charge him for his conduct. (R. C357-58). At the very least, the new disclosures cast grave doubt upon the prosecution's representation that the informant had received no consideration for his participation in the government's scheme, other than an agreement not to charge him for the narcotics found when he was initially arrested. Nothing similar happened in Ruiz.

Moreover, the Court's concern for confidentiality of informants, expressed in *Ruiz* , has no bearing here, where the informant's identity was revealed before the

plea but the prosecution chose to lie about the informant's background.

Indeed, the entire course of events in Matthew Hudak's amply supports the circuit court's finding of "skullduggery" and bad faith and makes this case a good vehicle to examine this issue. Despite Matthew Hudak's requests for disclosures of confidential informants, criminal records of witnesses, and exculpatory material in general, the prosecution waited for almost a year to make any disclosure as to the confidential informant. In the meantime, the informant had committed a series of crimes, had lied about those crimes, and had received the prosecutors' assurance that he would not be prosecuted for those crimes. The prosecution's assurance that the informant had only received a free pass on the narcotics offenses he allegedly engaged in with the defendant was deliberately misleading, if not an outright lie.

And the seriousness of the prosecution's misconduct is demonstrated by the repercussions of the belated disclosure.

Following the belated disclosure, the responsible prosecutor was fired and the prosecution dropped its case against Matthew

Hudak's codefendant. The DuPage County States Attorney, Robert Berlin issued a statement. After detailing the procedures of his office for handling of confidential informants, he gave the following explanation for dropping the case against the codefendant:

> "Despite the policies implemented by my office, the Assistants assigned to present the trial on February 13, 2018, learned on the eve of trial of criminal activity by the informant which had not been previously disclosed. This activity was under investigation during the pendency of the case. While a former member of my office was made aware of on ongoing investigation regarding the informant's criminal activities, that information was not forwarded to the trial team. This evidence seriously compromised the credibility of the informant witness in this case."

The admitted misconduct in this case makes this case the perfect vehicle for an examination of the issue presented. This Court should grant the petition for writ of certiorari.

II.

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A LONG-STANDING AND DEEPENING CIRCUIT CONFLICT OVER WHETHER RUIZ APPLIES TO EXCULPATORY AS WELL AS IMPEACHMENT EVIDENCE

The Illinois case below, following published Illinois precedent held that even if the suppressed evidence was exculpatory, rather than impeaching, it could still be suppressed, because *Ruiz* applies not only to impeaching material, but also to exculpatory material. In doing so, the court below placed itself on the wrong side of a deepening split in the lower courts, which needs to be resolved by this court.

Before *Ruiz,* three circuits and a state supreme court held that the government must disclose exculpatory information pre-plea, while the Fifth Circuit rejected that position.

The Eighth Circuit was the first court of appeals to address the issue. In *White v. United States*, the court reasoned that when evidence is "unavailable to aid [the defendant] and his attorney in evaluating the chance for success at trial," a guilty plea may

be challenged as unknowing or involuntary. 858 F.2d 416, 422 (8th Cir. 1988). Thus, the Eighth Circuit concluded that this Court's precedent "does not preclude a collateral attack upon a guilty plea based on a claimed Brady violation." *White*, 858 F.2d at 422. Accord *Nguyen v. United States*, 114 F.3d 699, 705 (8th Cir. 1997).

The Tenth Circuit expressly agreed with the Eighth in *United States v. Wright*, holding that, "under certain limited circumstances, the prosecution's violation of *Brady* can render a defendant's plea involuntary." 43 F.3d 491, 495-96 (10th Cir. 1994) (citing *White*, 858 F.2d at 422). However, the court stopped short of defining these "limited circumstances." 43 F.3d at 496.

The Ninth Circuit thereafter squarely held in *Sanchez v. United States* that "a defendant challenging the voluntariness of a guilty plea may assert a *Brady* claim." 50 F.3d 1448, 1453 (9th Cir. 1995). The court reasoned that the decision to enter a guilty plea "cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution." internal quotation marks omitted). The court emphasized that, under a no-disclosure rule,

"prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas." 50 F.3d at 1453.

Three years later, the Second Circuit in *United States v. Avellino*, reached a similar conclusion, albeit for a slightly different reason. 136 F.3d 249, 255 (2d Cir. 1998). Rather than viewing the question as one of voluntariness, the court held that a preplea Brady violation constituted government misconduct serious enough to render a plea invalid. 136 F.3d at 255. *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988) (reasoning that *Brady* applies to s guilty plea and, for that reason, holding that it applies pre-insanity plea).

The South Carolina Supreme Court then expressly joined the Second, Eighth, and Ninth Circuits, holding in Gibson v. State that a defendant "may challenge the voluntary nature of his guilty plea . . . by asserting an alleged Brady violation." 514 S.E.2d 320, 523-24 (S.C. 1999).

The one dissenter to this formidable pre-*Ruiz* consensus was the Fifth Circuit. It expressly disagreed with its sister circuits in *Matthew v. Johnson*, 201 F.3d 353 (5th Cir. 2000). There, the court reasoned that because

"a *Brady* violation is defined in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt," "the failure of a prosecutor to disclose exculpatory information to an individual waiving his right to trial is not a constitutional violation." 201 F.3d at 362.

Following *Ruiz*, the Ninth Circuit, the Tenth Circuit, and the South Carolina Supreme Court all reaffirmed their position as to exculpatory evidence, see *Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007) (applying pre-*Ruiz* holding in *Sanchez*); *United States v. Dahl*, 597 Fed. Appx. 489, 490 (10th Cir. 2015) (reaffirming *Wright* in light of *Ruiz*); *United States v. Ohiri*, 133 Fed. Appx. 555, 562 (10th Cir. 2005 (distinguishing Ruiz and recognizing a preplea *Brady* right); *Hyman v. State*, 723 S.E.2d 375, 380 (S.C. 2012). For its part, the Second Circuit has questioned but declined to abrogate its pre-*Ruiz* decision in *Avellino*. See *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010). And three State Supreme Courts have joined the exculpatory camp. See *State v. Huebler*, 275 P.3d 91, 93, 96 (Nev. 2012); *Buffey v. Ballard*, 782 S.E.2d 204, 216 (W. Va. 2015); *Medel v. State*, 184 P.3d 1226, 1234 (Utah. 2008).

Several circuit courts have indicated leanings one or the other, without deciding the issue. See *United States v. Moussaoui*, 591 F.3d 263, 267, 285-86, 287 (4th Cir. 2010)(favoring the Fifth Circuit's approach); *McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003)(favoring the approach of the Second, Ninth and Tenth Circuits). The Sixth Circuit has recognized the disagreement but has taken no position. *Robertson v. Lucas*, 753 F.3d 606, 621-22 (6th Cir. 2014).

With three circuits and four state supreme courts on one side of the issue and one circuit on the other, this issue is ripe – not to say overripe for resolution.

Therefore, this court should grant the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

MATTHEW HUDAK

Dated: June 26, 2020

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF ILLINOIS

No. 125421

PEOPLE OF THE STATE OF ILLINOIS,
RESPONDENT

MATTHEW HUDAK, PETITIONER

[January 29, 2020]

Leave to appeal, Appellate Court, Second District. 2-18-0487

Opinion

Petition for Leave to Appeal Denied.

APPENDIX B

2019 IL App (2d) 180487-U

IN THE APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT

No. 2-18-0487

PEOPLE OF THE STATE OF ILLINOIS,
PLAINTIFF-APPELLEE

v.

MATTHEW HUDAK, DEFENDANT-
APPELLANT

[October 1, 2019]

ORDER

JUSTICE HUTCHINSON delivered the judgment of the court.

¶ 1 Held: The trial court did not err in dismissing defendant's post-conviction petition at the first stage as his petition has no arguable basis in law or fact. We affirm.

¶ 2 Defendant, Matthew Hudak, appeals from the first stage dismissal of his petition for post-conviction relief pursuant to 725 ILCS 5/122-1. Because there is no right in the United States or Illinois Constitutions to the disclosure of impeachment evidence prior to a guilty plea, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 13, 2013, defendant and two co-defendants were indicted for delivery of controlled substance, armed violence, calculated criminal drug conspiracy, official misconduct, theft, and burglary. On February 1, 2013, defendant filed a motion for discovery requesting that the State disclose:

> "[A]ny material or information that tends to negate the guilt of the accused as the offense charged or would tend to reduce his punishment therefore,

> including the names and addresses of any witnesses who may be favorable to the defense."

Additionally, defendant's motion included a request that the State provide:

"[T]he criminal background of each and every witness listed or disclosed to the defense. All reports of prior criminal convictions and juvenile adjudications, which may be used in impeachment of persons whom the State intends to call as witnesses at hearing or trial."

The motion also provided that the State

> "[S]hall provide a list of any and all confidential informants and transactional confidential informants utilized by law enforcement agencies during the course of the actions for which the defendant is alleged to have violated the laws of the State of Illinois in the case before the Court as well as any and all incidents in which the confidential informant was directly involved with the defendant in the commission, planning, execution,

> or involvement of any crime alleged to have been committed by the defendant before this Court."

¶ 5 On February 18, 2014, the State disclosed information regarding a confidential informant (CI) to defendant along with a source of information (SOI) packet from the Carol Stream Police Department. The State's disclosure stated that:

> "At no time did the informant sign any documents or contract agreements or have any written plea agreements, offers of consideration or oral representations of any benefits regarding this investigation; however, upon the Carol Stream Police Department locating the narcotics in the SOI's residence which began this investigation, the SOI was never and will not be charged with possession of those narcotics."

Further, regarding the confidential informant's criminal history, the State disclosed that:

> "The SOI has been previously convicted of the following offenses:

a. Unlawful Possession of less than 30 grams of Cannabis, an ordinance violation, which is still pending;
b. Unlawful Possession of a Controlled Substance (15-100g), a class 1 felony wherein he was sentenced to 2 years probation and 4 days jail, which was satisfactorily terminated;
c. Unlawful Possession of Anabolic Steroid, a class C misdemeanor, wherein he was sentenced to two months court supervision, which was satisfactorily terminated;
d. Unlawful Possession of less than 2.5 grams of Cannabis, a class C misdemeanor, wherein he was sentenced to one year court supervision, which was satisfactorily terminated."

The State made no further disclosures regarding the CI's criminal activities.

¶ 6 On April 29, 2014, defendant pled guilty to armed violence, burglary, official misconduct, and delivery of a controlled substance. Defendant indicated that he understood his guilty plea resulted in his giving up a right to a trial by jury, trial by judge, and

the right to call witnesses and question State's witnesses. The stipulated factual basis for each charge was then given to the court.

¶ 7 The stipulated factual basis recounted that, had the matter proceeded to trial, agents from the Carol Stream Police Department, the Du Page Metropolitan Enforcement Group, and the DEA would testify that on January 2, 2013, agents arrived at a location in Du Page County and recovered approximately 275 grams of cocaine in the storage locker of the CI's residence. The CI admitted to agents that he was involved in obtaining cocaine and other narcotics from several Schaumburg police officers, including defendant. The CI explained that he had met defendant and his co-defendants who had given him drugs to sell. This prompted the agents to conduct an approximately two-week investigation wherein the CI and his apartment were wired for both audio and video recording.

¶ 8 On January 3, 2013, the CI met with defendant inside the CI's apartment. The CI provided $1,000 in marked bills advanced by

the agents to defendant. On that same day, the CI and defendant discussed stealing money or drugs from a friend of the CI. They discussed setting upon the CI's friend, throwing him in a car, taking his keys, keeping him in the dark so as to keep him ignorant as to whether police were involved, and stealing his money or drugs. Defendant further admitted on recording that he had three to four ounces of cocaine for the CI to sell.

¶ 9 On January 8, 2013, inside the CI's apartment, the CI gave defendant $5,000. Defendant again asked informant whether he needed the three to four ounces of cocaine to sell and that he would be able to bring it to him in the near future. Agents overheard wiretaps between defendant and one of his co-defendants discussing how to retrieve the cocaine and give it to the CI. Defendant was then heard on calls discussing with the CI that he wanted to meet at a halfway point to justify his having to disappear for forty minutes while supposedly conducting his duty as a police officer.

¶ 10 Defendant was heard on a call with the

CI that he was coming to the CI's residence. He told the CI to run downstairs to the parking lot because he and his co-defendants were on duty wearing tactical vests and weapons. Defendant, along with one of his co-defendants, arrived at the CI's residence whereupon defendant reached inside his vest and handed the CI what turned out to be more than 100 grams but less than 400 grams of cocaine. On January 10, 2013, defendant met the CI whereupon defendant was given $5,000 in official marked funds. Defendant further discussed ripping off drugs from one of the CI's friends by feigning an FBI investigation. They discussed how they would obtain the drugs from the friend and keep them in a storage locker.

¶ 11 On January 13, 2013, defendant and the CI met again to discuss stealing the drugs from a storage locker. Defendant encouraged the CI to look for surveillance cameras on the property where the storage locker would be located. Defendant said that he and one of his co-defendants would be wearing hoods and have a fake Florida driver's license plate to cover the vehicle registration when arriving to steal the drugs from the storage locker.

Later that day, defendant and one of his co-defendants were heard on a call indicating that they preferred the stolen drugs to be stored at a facility in Roselle as it had no cameras. Defendant texted the address of the storage facility to the CI.

¶ 12 Agents had set up surveillance at the Roselle storage unit and observed defendant and his two co-defendants come to the storage locker where they opened the items and took everything from inside, left a piece of paper, closed the storage unit door and left. A short time later, agents observed defendant and his two co-defendants return to the storage locker, drop some items, and remove the piece of paper. Later, they returned and took everything and left again. Defendant texted the CI later that night indicating that he and his co-defendants had recovered $20,000 from the storage locker. The $20,000 was made up of official marked funds by the investigating agents.

¶ 13 On January 16, 2013, as a result of executed search warrants, agents recovered $5,000 of the marked funds from the storage locker at each of the co-defenants' residences.

The remaining $10,000 was recovered from defendant's residence as well as other items that were inside the storage locker. Defendant was taken into custody on that same day and admitted to FBI and DEA agents that he was involved in everything captured on audio and video including the taking of the marked $20,000. He further admitted that he had contacted the CI 18 months before his arrest in order to get the CI to work for him. Defendant admitted that he gave the CI $23,000 to purchase drugs from various individuals. Defendant said that he got a half brick of cocaine and 112 grams of heroin from a search warrant executed in Streamwood. He turned the heroin over to authorities but kept the most of the cocaine which he gave to the CI to sell and split the profits. He admitted that he did this while on duty as a Schaumburg police officer.

¶ 14 Defendant further admitted that on January 3, 2013, he received money from the CI while on duty. He admitted that on January 11, 2013, he executed a search warrant at a Wheeling address and recovered three grams of cocaine and five 8-pound bags of cannabis. He gave one gram of the cocaine

to the CI to sell while on duty. He admitted that he and his co-defendants had been involved in these actions for approximately six months.

¶ 15 Defendant was sentenced to 21 years for armed violence with a consecutive five year sentence for burglary and concurrent sentences on the remaining charges. Defendant did not file a direct appeal.

¶ 16 On March 5, 2018, defendant filed a petition for post-conviction relief pursuant to 725 ILCS 5/122-1. The petition alleged that the State violated defendant's due process under the United States and Illinois Constitution when it withheld exculpatory evidence from the defendant and his counsel despite written requests and the trial court's order for the State to comply with discovery. Specifically, defendant averred that the CI was being investigated for theft on March 12, 2013, for stealing a treadmill valued at $3,500 from the gym where he was employed and selling that treadmill to the target of another narcotics investigation. In May 2013, the CI admitted to the Carol Stream Police Department that he had stolen the treadmill

and sold it to the other person. The CI was not prosecuted for the theft and the investigation and information regarding the CI's actions were not tendered to the defense during the course of the prosecution until February 20, 2018.

¶ 17 Defendant's post-conviction petition further alleged that the CI was being investigated for wire fraud in May 2013. The CI had allegedly collected credit card information from members of the gym at which he was employed and set up false accounts with banking institutions and transferred money into his own accounts. The State declined prosecution of the CI for wire fraud. The information regarding the CI's alleged wire fraud was not tendered to the defense until February 20, 2018.

¶ 18 Defendant claimed in his post-conviction petition that this newly-discovered evidence regarding the undisclosed criminal acts of the CI "show that the defendant['s] claim of innocence[,] because of the entrapment defense[,] has merit." Defendant further claimed that he "did not have evidence at the time of the prosecution to demonstrate that

the CI was untruthful in the investigation and prosecution of the defendant."

¶ 19 The trial court dismissed defendant's petition at the first stage of post-conviction proceedings. In dismissing defendant's petition, the trial court found that under *U.S. v. Ruiz*, 536 U.S. 622, 628-29 (2002), "when a defendant knowingly and voluntarily pleads guilty, he waives the right to a fair trial and other constitutional rights. In *Ruiz*, the issue was whether the Constitution requires preguilty plea disclosure of impeachment information and the Court concluded that it did not. * * * [T]he [*Ruiz*] Court concluded that the failure to disclose otherwise required impeachment evidence before a plea did not run afoul of the due process clause."

¶ 20 The trial court went on to find that defendant's characterization of the CI's criminal history as "exculpatory" was of no event in articulating that:

"In the instant case Defendant seeks to escape the otherwise fatal application of *Ruiz* by characterizing the undisclosed informant evidence as exculpatory in nature: i.e.,

though it may be impeachment evidence, it is impeachment evidence that relates to the affirmative defense of entrapment such that it properly constitutes exculpatory evidence. Initially the Court notes that no affirmative defense of entrapment was ever filed in this case and no affidavits or records filed set forth the basis for an entrapment defense. Furthermore, this Court's research has failed to disclose a single case suggesting that impeachment evidence of an entrapment informant is exculpatory for purposes of a Brady/Ruiz analysis. Nor would this * * * seem logical in the instant circumstance where the Defendant was uninvolved in the undisclosed criminal conduct of the informant and it occurred long after the interactions between the Defendant and the informant concluded. That having been said, even if impeachment evidence that relates to an affirmative defense was exculpatory, and thus not strictly governed by *Ruiz*, our appellate court noted in *People v. Gray*, 2016 IL App (2d) 140002 ¶ 27, that the United States Supreme Court has consistently treated exculpatory and impeachment evidence in the same way in addressing *Brady* claims (citing with approval the

Wisconsin Supreme Court in *State v. Harris*, 2004 WI 64 (2004)). Accordingly, in either event Defendant's pleas would seem to foreclose his post conviction due process claims."

¶ 21 Defendant timely appealed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant raises two contentions. First, that the trial court erred in dismissing his post-conviction petition at the first stage because his federal right to due process was violated by the State's suppression of favorable exculpatory evidence. Second, defendant contends that the due process clause of the Illinois Constitution precludes the State from suppressing exculpatory evidence prior to a guilty plea.

¶ 24 As an initial matter, defendant argues that the trial court erred in dismissing his petition for failing to cite relevant authority concerning his allegation that the State's violation of the discovery rules prevented him from withdrawing his guilty plea. Defendant

takes issue with the trial court's finding that:

"While the State arguably engaged in skullduggery when it failed to disclose the * * * evidence in violation of its continuing duty to disclose (IL S.Ct. R. 415(b)), this Court has found no reported decision where a violation of our discovery rules, standing alone, would allow a defendant to withdraw an otherwise voluntary plea of guilty. Indeed, IL. S. Ct. R. 415(g), which authorized sanctions for our discovery rule violations, presumes a pending proceeding. Nor does the defendant cite to any cases holding otherwise."

Defendant argues that section 2 of the Post-Conviction Hearing Act (725 ILCS 5/122-2) provides that "[a]rgument and citations and discussion of authorities shall be omitted from the petition," and therefore the trial court's ruling should be reversed for that reason alone. We disagree.

¶ 25 The trial court's written order dismissing defendant's post-conviction petition was not based on defendant's failure to cite relevant authority supporting his claims of due process violations of the U.S.

and Illinois Constitutions. Although it's true that the trial court did point out defendant's lack of citation to cases in support of his arguments, the order finding that the petition lacks merit was based on an analysis of *Brady*, *Ruiz*, and this court's holding in *Gray*. Therefore, because the trial court's dismissal was not due to a lack of case citation, we will confine our analysis to whether the trial court erred in dismissing defendant's petition at first stage based on the due process claims raised in his petition.

¶ 26 The Post-Conviction Hearing Act creates a three-stage process for the adjudication of post-conviction petitions in non-capital cases. *People v. Harris*, 224 Ill. 2d 115, 125 (2007). At the first stage, the circuit court must review the petition within 90 days of its filing and determine whether it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016); see also *People v. Allen*, 2015 IL 113135, ¶ 24 (explaining that a first-stage dismissal is inappropriate if a petition alleges sufficient facts to state the "gist of a constitutional claim"). If the petition is not summarily dismissed at the first stage, it advances to the second stage, where an

indigent petitioner is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. 725 ILCS 5/122-4 (West 2012). At the second stage, the petitioner bears the burden of making a "substantial showing of a constitutional violation." *People v. Domagala*, 2013 IL 113688, ¶ 35. In other words, the petitioner must show that he would be entitled to relief if his well-pleaded allegations of a constitutional violation were proved true.

¶ 27 A petition will be dismissed at the first stage, as frivolous or patently without merit, if the petition has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 12 (2009). That is the case when a petition "is based on an indisputably meritless legal theory or a fanciful factual allegation." Id. at 16. When a post-conviction petition is dismissed without an evidentiary hearing, we apply a de novo standard of review. *People v. Sanders*, 2016 IL 118123, ¶ 31.

¶ 28 Defendant's first contention is that the trial court erred in dismissing his petition as the facts in *Ruiz* are distinguishable from the

present case and do not render his claim for a due process violation frivolous or patently without merit.

¶ 29 Before delving into our analysis on this contention we must point out that defendant attempts here to frame the State's failure to disclose the CI's criminal activities subsequent to defendant's arrest as exculpatory evidence. Further, defendant's petition alleges that the CI's undisclosed information was generally exculpatory for an affirmative defense of entrapment. This is wrong for two reasons. First, defendant never filed an affirmative defense of entrapment during the pendency of his criminal proceedings before ultimately pleading guilty. And even if the undisclosed subsequent criminal activities of the CI had been disclosed prior to his guilty plea, it would be irrelevant to any hypothetical entrapment defense as the only information relating to the drug offenses for which the CI was being investigated when he provided information about defendant and his co-defendants had been disclosed on February 18, 2014. Second, as the undisclosed CI information did not involve the facts of the present case or any

conduct in which defendant participated, the undisclosed evidence was impeaching and not otherwise exculpatory. See *People v. Gray*, 2016 Il App (2d) 140002, ¶ 28. Thus, defendant's due process claims made in his post-conviction petition must be analyzed under the constitutionality of the State's duty to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.

¶ 30 In *Ruiz*, the defendant was charged with a drug offense under which the government offered her a "fast track" plea bargain to which she would waive an indictment, trial, and appeal in exchange for a downward departure from otherwise applicable sentencing guidelines. The government also insisted that the defendant agree to waive her right to impeaching information related to informants or other witnesses. Defendant refused to agree to this waiver and the government's "fast track" offer was withdrawn. Defendant pleaded guilty and was sentenced under the standard guidelines and defendant appealed. *U.S. v. Ruiz*, 536 U.S. 622, 625-26 (2002). The Supreme Court, in finding the "fast track" agreement lawful,

noted that, when a defendant knowingly and voluntarily pleads guilty, he or she waives the right to a fair trial and other constitutional rights. *Ruiz*, 536 U.S. at 628-29. The Supreme Court analyzed the issue as "whether the Constitution requires preguilty plea disclosure of impeachment information." Id. The Court found that the U.S. Constitution does not require any such disclosure. Id.

¶ 31 The Supreme Court emphasized the difference between a trial, to which *Brady* applies, and a guilty plea. The Court found that *Brady* is concerned with the "fairness of a trial" which is not equivalent to "whether a plea is voluntary." Id. "[T]he Constitution does not require the prosecutor to share all useful information with the defendant." Id. Further, the Court explained that the Constitution "does not require complete knowledge of the relevant circumstances," and a defendant's ignorance of the possible grounds on which to impeach potential witnesses at a possible trial was "difficult to distinguish from many other "forms of misapprehension" that would not prevent him from entering a valid guilty plea. Id.

¶ 32 The Court found that due process considerations were not a conclusive factor in favor of recognizing a defendant's right to be told of potentially impeaching evidence before pleading guilty because the value of "a constitutional obligation to provide impeachment information during plea bargaining, prior to the entry of a guilty plea," would be limited and could interfere with the government's ability to a secure guilty plea that is factually justified, conducive to judicial efficiency, and desired by the defendant himself. *Id.* at 631. The Court went on to ultimately hold:

"These considerations, taken together, lead us to conclude 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.

¶ 33 This court adopted the *Ruiz* Court's holding in *Gray*. In *Gray*, the defendant was indicted for (1) possession of cocaine with intent to deliver; and (2) possession of cannabis with intent to deliver. People v.

Gray, 2016 IL App (2d) 140002 ¶ 2. The indicted offenses occurred when police executed a search warrant on defendant's apartment based on information received from a confidential informant. Id. Oddly, or perhaps ironically, the warrant was supported by a complaint by our present defendant, Matthew Hudak. Id. On August 2, 2012, following defendant's motions to quash his arrest and suppress evidence, the State entered an agreement with defendant under which defendant would plead guilty to a single amended count of possession of cocaine with intent to deliver in exchange for a recommended 12-year prison term. Id. at ¶ 6. Defendant pleaded guilty and did not file a direct appeal. *Id.*

¶ 34 On May 20, 2013, defendant filed a post-conviction petition alleging that he pleaded guilty despite his belief that his pretrial motions had a reasonable chance of success, because he thought the three police officers would be deemed more credible than he at trial. *Id.* at ¶ 8. Defendant alleged that he later discovered while serving his sentence that the three officers had each been indicted for the crimes detailed in the present case. Id.

Defendant's petition alleged that the officers "committed and/or were committing the * * * offenses during their investigation of [defendant]." *Id.* He further alleged that, had he been aware of these offenses, he would have moved forward with his pretrial motions and not pleaded guilty. *Id.*

¶ 35 In upholding the dismissal of defendant's post-conviction petition, this court held that: "under *Ruiz*, *Brady* does not require the disclosure of potential impeachment evidence before a defendant pleads guilty. Thus, with no *Brady* violation, defendant's plea was not tainted and the petition was insufficient." This court concluded that:

"*Ruiz* controls this case and defendant's *Brady* claim is legally baseless. Without a doubt, the evidence at issue was impeaching and not otherwise exculpatory: the alleged misdeeds of the three police officers did not involve the facts of this case or any conduct in which defendant participated. Defendant's attempt to limit *Ruiz* to the validity of a waiver of *Brady* rights as part of a plea bargain is unavailing * * *. Moreover, as we

read *Ruiz*, the primary reason that the Court saw no constitutional infirmity in requiring a waiver of the *Brady* right there was that the purported right did not really exist: *Brady* did not require the State to disclose the impeachment information at issue, so the alleged "waiver" was illusory." Id. at ¶ 28.

¶ 36 Defendant in the present appeal seems to be asking this court to reject our own reasoning in *Gray*. Defendant argues that the defendants in *Gray* and *Ruiz* limited their claims to the contention that the evidence should have been disclosed for impeachment evidence. Whereas here, the disclosure of CI's subsequent crimes were relevant for not only impeachment, but were generally exculpatory to establish an entrapment defense. We have already rejected this argument and will not belabor this point. See supra ¶ 29. However, even if we were to accept defendant's erroneous characterization of the undisclosed information as exculpatory, this court in *Gray* already foreclosed any success for that contention in holding:

"[E]ven were the evidence considered 'exculpatory' and not merely 'impeaching,' it

would not help * * * because 'the Supreme Court has consistently treated exculpatory and impeachment evidence in the same way' in addressing *Brady* claims.' " *Gray* at ¶ 27, quoting *Friedman v. Rehal*, 618 F. 3d 142, 154 (7th Cir. 2003).

As articulated above, the issue of whether defendant's federal right to due process was violated by the State's suppression of favorable exculpatory evidence has already been articulated by this court's application of *Ruiz* in *Gray*. The doctrine of stare decisis expresses the policy of courts to stand by precedent and to avoid disturbing settled points. *People v. Sharpe*, 216 Ill. 2d 481, 519 (2005). A question once examined and decided should be considered as settled and closed to further argument. *Wakulich v. Mraz*, 203 Ill. 2d 223, 230 (2003). Therefore, defendant's post-conviction contention on this issue has no arguable basis either in law or in fact, and its first stage dismissal was not in error.

¶ 37 Defendant's second contention in this appeal is that the due process clause of the Illinois Constitution precludes the State from suppressing exculpatory evidence prior to a

guilty plea. Defendant points this court to *People v. Washington*, 171 Ill. 2d 475 (1996), to support his argument that the due process clause of the Illinois Constitution compels reversal of the dismissal of his post-conviction petition.

¶ 38 In *Washington*, our supreme court held that the due process clause of the Illinois Constitution permitted a defendant to raise a free-standing claim of actual innocence, despite the U.S. Supreme Court's rejection of identical claims under the fourteenth amendment's due process clause in *Herrera v. Collins*, 506 U.S. 390 (1993). Our supreme court held "as a matter of Illinois constitutional jurisprudence that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process." *Washington*, 171 Ill. 2d at 489. The court went on to say that

"That only means, of course, that there is footing in the Illinois constitution for asserting freestanding innocence claims based upon newly discovered evidence under the Post-Conviction Hearing Act.

Procedurally, such claims should be resolved as any other brought under the Act. Substantively, relief has been held to require that the supporting evidence be new, material, noncumulative and, most importantly, of such conclusive character as would probably change the result on retrial." Id.

¶ 39 Constitutional jurisprudence under the Illinois Constitution follows the limited lock step doctrine. *People v. Caballes*, 221 Ill. 2d 282, 310 (2006). Under this approach, our supreme court will "look first to the federal constitution, and only if federal law provides no relief turn to the state constitution to determine whether a specific criterion-for example, unique state history or state experience-justifies departure from federal precedent. *Caballes*, 221 Ill. 2d at 309.

¶ 40 Defendant argues that the *Washington* holding applies to his due process claims in the instant appeal. But again, he frames his argument as one that applies to the State concealing exculpatory information from a criminal defendant prior to a guilty plea. Those are not the facts of this case. On February 18, 2014, the State disclosed all of

the CI's information relevant to his dealings with defendant as they pertain to the charges against him. See supra ¶ 5. The evidence the State failed to disclose to defendant prior to his guilty plea dealt entirely with activities the CI engaged in well after any dealings with defendant. The evidence was impeachment evidence. As noted above, this issue was decided by this court's application of *Ruiz* in *Gray*. We can find no unique state history or state experience that justifies a departure from that precedent nor does defendant offer an example as it pertains to the State's failure to disclose impeachment evidence prior his voluntary guilty plea.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 43 Affirmed.

Justices Schostok and Hudson concurred in the judgment.

All Citations

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180487-U, 2019 WL 4887189

APPENDIX C

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT,
DUPAGE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff

v.

MATTHEW HUDAK,
Defendant

No. 13-CF-85

MEMORANDUM OPINION

Jurisdictional Matters

Defendant, represented by counsel, filed his first Petition for Post-Conviction Relief on March 6, 2018. On March 19, 2018, the Court set the matter over to May 25, 2018, for first-stage review.

Procedural History

Faced with a seventeen-count indictment charging, inter alia, Delivery of a Controlled Substance, Armed Violence, Calculated Criminal Drug Conspiracy, Criminal Drug Conspiracy, Official Misconduct, Theft and Burglary, the Defendant ultimately entered agreed pleas before Judge Blanche Fawell on April 29, 2014, to the following counts: Count 1, a Super X Delivery of a Controlled Substance - 9 years IDOC; Count 6, a Class 3 Official Misconduct - 5 years IDOC; Count 8, a Class 2 Burglary - 5 years IDOC; and Count 17, a Class X Armed Violence - 21 years IDOC. The parties advised the Court that Counts 8 and 17 were mandatorily consecutive to each other and the Court's sentencing order so provides. Neither a post-

trial motion, nor an appeal was filed by the Defendant.

Pro se Post-Conviction Petition Claims

The Post Conviction Act provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. See 725 ILCS 5/122-1 et seq. (West 2018). Proceedings under the Act are commenced by the filing of a petition in the circuit court in which the original proceeding took place. *People v. Rivera*, 198 Ill.2d 364, 368 (Ill. 2001). Section 122-2 of the Act requires that a post-conviction petition must, among other things, "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2018). With regard to this requirement, a defendant at the first stage need only present a limited amount of detail in the petition. *People v. Delton*, 227 Ill.2d 247, 254 (Ill. 2008). The threshold for first-stage survival as low, i.e., only a "gist" of a constitutional claim is needed at this stage. *Id.*

However, the low first-stage threshold for

a "gist" nevertheless requires factual details and cognizable claims surrounding the alleged constitutional violations. For Section 122-2 provides that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2018). The purpose ofthe "affidavits, records, or other evidence" requirement is to establish that a petition's allegations are capable of objective or independent corroboration. *Delton*, 227 Ill.2d at 254.

At the first stage this court must, within 90 days of the petition's filing, independently review the petition, taking the allegations as true, and determine whether "the petition is frivolous or is patently without merit." *Edwards*, 197 Ill.2d at 244; 725 ILCS 5/122-2.1(a)(2) (West 2018).

If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2018). If the court does not dismiss the petition as frivolous or patently without merit, then the petition advances to the second stage and the

State is then allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2018)). A petition seeking post-conviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. Defendant's post-conviction petition asserts that the State violated his "due process rights under the United States and Illinois Constitution when it withheld exculpatory evidence[.]" In support Defendant points to recently tendered discovery by the State detailing that it was aware of and failed to disclose, prior to Defendant's plea agreement and sentence, two different uncharged felony offenses committed by the confidential informant that occurred after Defendant was charged with the instant

offenses. Defendant argues that this was exculpatory evidence because it could have

been used to impeach the confidential informant in support of its entrapment defense.

For the purposes of its first-stage review, this Court accepts as true that the State

knew of the confidential informant's criminal activity prior to Defendant's agreed plea and sentence, and failed to disclose the same. This Court also assumes, arguendo, that the evidence gathered as to the confidential informant's undisclosed crimes had reached a

quantum such that the facts surrounding the same and the decision not to charge should have been disclosed for impeachment purposes on an interest or bias theory pursuant to IL S. Ct. Rules 412(c) and 415(b) The Court further observes that the undisclosed crimes committed by the informant in no way involved the Defendant and occurred long after the informant's association with the Defendant concluded.

While the State arguably engaged in skullduggery when it failed to disclose the above evidence in violation of its continuing duty to disclose (IL S. Ct. R. 415(b)), this Court has found no reported decision where a violation of our discovery rules, standing alone, would allow a defendant to withdraw an otherwise voluntary plea of guilty. Indeed, IL. S. Ct. R. 415(g), which authorized sanctions for our discovery rule violations, presumes a pending proceeding. Nor does the

Defendant cite to any cases holding otherwise.

In support of his petition, the Defendant also resorts to the due process clauses of the U.S. and Illinois Constitutions, but does not cite to any cases in support of his argument. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), a post-conviction case, the United States Supreme Court made clear that "suppression by the prosecution of evidence favorable to an accused upon request violate due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." And the imperative in *Brady* applies equally to exculpatory and impeachment evidence. *Strickler v. Green*, 527 U.S. 263,281-82 (1999).

However, a review of the due process cases addressing discovery violations differentiates between cases that go to trial and cases where a defendant pleads guilty. While a *Brady* violation might, under certain circumstances, require a new trial, a different result obtains where a defendant enters an otherwise voluntary plea of guilty.

In *United States v. Ruiz*, 536 U.S. 622,

628-29 (2002), the United States Supreme Court noted that, when a defendant knowingly and voluntarily pleads guilty, he waives the right to a fair trial and other constitutional rights. In *Ruiz*, the issue was "whether the Constitution requires preguilty plea disclosure of impeachment information," and the Court concluded that it did not. *Id.* The Court first emphasized the differences between a trial, to which Brady undoubtedly applies, and a guilty plea, noting that the "fairness of a trial concern which underlies Brady does not apply to "whether a plea is voluntary." *Id.* Indeed, the Court held that "the Constitution does not require the prosecutor to share all useful information with the defendant." *Id.* Where a defendant pleads guilty, the constitution "does not require complete knowledge of the relevant circumstances," and "a defendant's ignorance of the possible grounds on which to impeach potential witnesses at a possible trial would not prevent him from entering a valid guilty plea." *Id.* Finally, the Supreme Court noted that, "a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Govern-

ment's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice." *Id.* at 631. Thus the Court concluded that the failure to disclose otherwise required impeachment evidence before a plea did not run afoul of the due process clause. In the instant case Defendant seeks to escape the otherwise fatal application of *Ruiz* by characterizing the undisclosed informant evidence as exculpatory in nature: i.e., though it may be impeachment evidence, it is impeachment evidence that relates to the affirmative defense of entrapment such that it properly constitutes exculpatory evidence. Initially the Court notes that no affirmative defense of entrapment was ever filed in this case and no affidavits or records filed set forth the basis for an entrapment defense. Furthermore, this Court's research has failed to disclose a single case suggesting that impeachment evidence of an entrapment informant is exculpatory for purposes of a *Brady/Ruiz* analysis. Nor would this necessary seem logical in the instant circumstance where the Defendant was uninvolved in the undisclosed criminal conduct of the informant and it occurred long

after the interactions between the Defendant and the informant concluded. That having been said, even if impeachment evidence that relates to an affirmative defense were exculpatory, and thus not strictly governed by *Ruiz*, our appellate court noted in *People v. Gray*, 2016 IL App (2d) ¶ 100042 27, that the United States Supreme Court has consistently treated exculpatory and impeachment evidence in the same way in addressing Brady claims (citing with approval the Wisconsin Supreme Court in *State v. Harris*, 2004 WI 64 (2004)). Accordingly, in either event Defendant's pleas would seem to foreclose his post-conviction due process claims.

Conclusion

For the reasons set forth above, Defendant's Post-Conviction Petition is hereby

DISMISSED as frivolous and patently without merit.

Liam C. Brennan

Circuit Judge