NO. _____

IN THE

Supreme Court of the United States

JEFFREY MCCLATCHY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

ALEXEY V. TARASOV, ESQ.
ATTORNEY FOR PETITIONER

5211 Reading Road
Rosenberg, Texas 77471
Tel.: 832-623-6250

QUESTIONS PRESENTED

1. RELEVANT ISSUES: *Brady v. Maryland*, 373 U.S. 83 (1963), enshrined the principle that the prosecution is obligated to provide a criminal defendant all material exculpatory evidence as a matter of due process. *United States v. Ruiz*, 536 U.S. 622 (2002), qualified that proposition, enunciating the rule that prosecutors are not required to furnish impeachment material to an accused entering a guilty plea.

> **QUESTION 1:** The central question in this case is whether due process entitles a defendant to exculpatory information pre-plea.

LIST OF PARTIES

Before this Honorable Court stands petitioner Jeffrey McClatchy. Jeffrey McClatchy seeks a writ of certiorari to the Texas Court of Criminal Appeals, which denied his habeas petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional provisions

U.S. Supreme Court decisions

Decisions of U.S. federal courts

State court decisions

Federal statutes

Legal commentary

News sources

Statistical material

[The remainder of this page has intentionally been left blank]

OPINIONS BELOW

On the verge of trial, Jeffrey McClatchy pleaded guilty to first-degree felony offense of aggravated sexual assault and the judge assessed his punishment at forty years' incarceration in the Texas Department of Criminal Justice, Institutional Division. Petitioner has not filed a direct appeal. Petitioner has not presented this case before a federal court in a federal writ of habeas corpus attacking a state conviction pursuant to 28 U.S.C. § 2254. On January 27, 2021, without any fact finding by the Texas lower court or input from the parties, the Texas Court of Criminal Appeals summarily dismissed petitioner's application for a writ of habeas corpus.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The opinion of the Court of Criminal Appeals is the final judgment rendered by the state court of last resort in Texas relative to petitioner's challenge to his conviction. In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court established the presumption that whenever a state court decision appears to rest primarily on federal law and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, the Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1040-1041. It is only when the state court decision expressly states that it is based on separate, adequate, and independent grounds that this Court will not review the decision. *Id.* at 1041. Here, the Court of Criminal Appeals provided no rationale for its denial

decision. The summary denial leads to the conclusion that the Texas Court of Criminal Appeals did not consider this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), to mandate the disclosure of exculpatory evidence pre-plea.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT TO THE U.S. CONSTITUTION:

> **No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.**
>
> **U.S. Const. amend. V.**

SIXTH AMENDMENT TO THE U.S. CONSTITUTION:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

FOURTEENTH AMENDMENT
TO THE U.S. CONSTITUTION:

The Fourteenth Amendment provides, in pertinent 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 the law . . .

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. Jeffrey McClatchy's upbringing and the underlying offense

The story behind this case is that of a Russian child deprived of childhood. It is also the story of a failed international adoptions framework that existed between Russia and the United States.[1] It is the story of how indifference, ignorance, and bias can blind people to flagrant child abuse. Most critically, it is the story of Jeffery McClatchy, born as Roman Bolshakov, who ran away from his adoptive mother and lived on the streets of Houston at age 19, in an abusive relationship with his former criminal defense attorney.

This story begs for the skills of a contemporary Fyodor Dostoevsky, with the literary talent to force us to look with a full heart upon those whom society would prefer to cast into darkness. This certiorari petition can do no more than focus on the fundamentally flawed proceeding that resulted in condemning Jeffery to a 40-year term of incarceration.

Jeffrey McClatchy was born with the name of Roman Bolshakov on June 12, 1993, in Pskov, Russia. (A39). Pskov is some 300 kilometers away from St. Petersburg. He had two older sisters, Angela and Valentina, and an older brother Alex. *Id.* The petitioner also has two younger sisters Elena and Katia. *Id.* In 2006, some years after the death of their mother, Roman and his younger sisters, as well as his older sister Valentina were transferred by the Russian guardianship

---

[1] *See* Kathryn Joyce, *Why adoption plays such a big, contentious role in U.S.-Russia relations* (July 22, 2017), available at https://www.vox.com/the-big-idea/2017/7/21/16005500/adoption-russia-us-orphans-abuse-trump (accessed June 20, 2021).

authorities for adoption to Houston, Texas. (A41). Once in the U.S., the children's names were changed to Jeffrey McClatchy (Roman), Haley McClatchy (Elena), Faith Nash (Valentina), and Hope Nash (Katia). *Id.* The petitioner's mother and father, Natasha and Ura, were alcoholics. (A43). Roman's father would beat his mother with his hands and choke her. (A39). At various times he assaulted her with an ax and a knife. *Id.* The Russian equivalent of Child Protective Services intervened in the family's life because of the parents' drinking. *Id.* As a result, all of the children were put in an orphanage, where they stayed for about six months before they were allowed to go home. *Id.* In the orphanage, the petitioner was picked on and made fun of. *Id.* He was also sexually abused on several occasions by three other boys. *Id.* Two years after the children were reunited with their parents, Roman's father killed his mother. *Id.*

After their mother's death, the children were split up and placed in two different orphanages. (A40). Roman and Valentina were placed in one orphanage, while the younger sisters were placed in another. *Id.* The children remained in the orphanages until they were adopted and brought to the United States. *Id.*

The petitioner's childhood in Russia was quite turbulent. *Id.* Except for the little sisters, Roman and the three older siblings began drinking and smoking at a very early age, perhaps at five or six years of age. *Id.* Growing up, the children would steal from their parents. *Id.* Roman would regularly go around town with his brother stealing metal and reselling it in order to make money. *Id.* The family was poor. *Id.*

When Roman was nine, he became aware that he and some of the other siblings might be adopted.

(A41). He and his sisters came to Houston to visit their prospective adoptive families. *Id.* After three weeks, the children returned to the orphanages in Russia. *Id.* About two years later, the two adoptive mothers came to Russia and paired an older child with a younger child. *Id.* Gena McClatchy took Roman/Jeffrey and Elena/Haley, while Sherry Nash took Valentina/Faith and Katia/Hope. *Id.*

Gena McClatchy, the petitioner's adoptive mother, was single. *Id.* She had a son named Taylor, with whom Jeffrey never got along. *Id.* Neither Gena nor Taylor spoke Russian, while Jeffrey had no English skills. *Id.* Jeffrey's relationship with Ms. McClatchy gradually worsened. *Id.* Jeffrey did not like the way the adoptive mother disciplined his sister, and he would get mad at her when she did that. *Id.* At some point, Ms. McClatchy placed Jeffrey in the Mental Health Clinic in Shiloh, Texas. (A42). When he completed his stay there, she did not pick him up. *Id.* At that point, Ms. Nash began caring for him. *Id.* Eventually, Jeffrey was taken from Ms. Nash's home and placed in a series of residential centers, group homes, and foster homes. *Id.* He did not adjust well to living in these facilities and often ran away or got into fights. *Id.*

When Jeffrey first came to America, he did not smoke, drink, or use any drugs. (A43). As he got older, these vices became a part of his life. *Id.* When Jeffrey was sixteen and living on the street, he met a Houston area attorney who introduced him to crack cocaine. *Id.* According to Jeffrey, that lawyer repeatedly made sexual advances towards Jeffrey that he did not want or encourage. *Id.*

In November 2012, the lawyer took Jeffrey to Austin. (A44). He bought Jeffrey some things in Austin and wanted to have sex. *Id.* Jeffrey attempted to call the police on him in Austin. *Id.* On the way back, he left Jeffrey at a liquor store in Cypress, Texas without any warning. *Id.* Jeffrey had never been in that part of town and had no place to go. *Id.* Then, he saw a lady go into the liquor store and when she came out, she started talking to Jeffrey and invited him to her apartment for drinks. *Id.* Her name was Heidi Carlisle. *Id.* Once inside her unit, she poured Jeffrey some Pátron Tequila from the bottle that she had bought. *Id.* She drank wine out of a larger bottle. *Id.* Within an hour, the two had consensual sex. *Id.* Afterward, the two continued talking and drinking. *Id.* At some point, Heidi wanted to get more to drink. *Id.* Jeffrey drove her back to the liquor store because she was too intoxicated to drive. *Id.* The clerk at the store would not sell anything to the two, so the pair went back to Heidi's apartment and continued talking and drinking. *Id.* The two discussed the possibility of Jeffrey's moving in with Heidi. *Id.*

Later that evening, the two drove to where Jeffrey had been living with a roommate named Kevin, so that Jeffrey could pick up his things to take to Heidi's apartment. *Id.* Jeffrey was the one to drive to Kevin's house because Heidi was still intoxicated. *Id.* Heidi had given Jeffrey some pills from a large bottle that she kept before they went to Kevin's. *Id.* She said that she sold the pills to other people and could get $1,500.00 a bottle for them. *Id.* Jeffrey used a red bag that Heidi gave him to put his things in. *Id.* Jeffrey introduced Heidi to Kevin, referring to her as his "new mom." *Id.*

When the two got back to Heidi's apartment, she put a mattress on the living room floor for Jeffrey to sleep on. *Id.* She slept on a mattress in her bedroom. *Id.* Throughout the night she went back and forth between her room and the bathroom because she was sick. *Id.* Sometime during the night, Jeffrey also began feeling sick. *Id.*

The following day, at around 3 P.M., the two began talking again. (A45). At this point Heidi said that Jeffrey could not move in with her in Houston and that he would have to wait until she moved back to her home state of Florida within a month. *Id.* She asked Jeffrey to write down his name and phone number so that she could contact him. *Id.* Jeffrey did as she instructed. *Id.* Heidi also gave Jeffrey some conditions that he had to live up to in order to be able to reside with her in Florida. *Id.* In the course of the conversation, Jeffrey showed her some of his documents and pictures of his sisters. *Id.*

Later on, Heidi and Jeffrey each went back to where they had been sleeping. *Id.* When Jeffrey asked her for some medicine, Heidi told him to go to the kitchen. *Id.* When he went into the kitchen, he could not find the medicine she was referring to. *Id.* Instead, he returned to her room. *Id.*

According to Heidi's statement to the police[2], Jeffrey asked her to show him where the medicine was. (A52). When Heidi opened the door, Jeffrey had a knife[3] in his hand and gained entrance into her room. *Id.* She stated that Jeffrey entered her room and threw the knife on the floor and pushed her to the bed.

---

[2] A Harris County investigator interviewed Heidi on scene.

[3] This account is based on Ms. Carlisle's statement. The knife was never found.

(A53). She said a short time later she woke up with Jeffrey on top of her. *Id.* Before the sex act, she was the first to tell Jeffrey that he could engage in sexual intercourse with her. (A55). Specifically, she said that if Jeffrey wanted to have sex with her, he did not have to be so forceful and that she would be glad to have sex with him because he was "good-looking." *Id.* Heidi advised the officer that Jeffrey turned her over to her stomach and tried to penetrate her anally. (A54). She said she felt pain and told him she never had anal sex before. (A56). Heidi next indicated to the police that Jeffrey turned her over and penetrated her vaginally; however, she did not remember if Jeffrey ejaculated inside her before he got up from the bed. *Id.* When Jeffrey got up from the bed, he began crying and apologizing to Heidi. *Id.*

After sex, Heidi comforted Jeffrey and said that he was a good person and that she would still help him. (A57). Jeffrey broke down and cried and expressed his apology to her. *Id.* The two eventually got dressed and went out on the balcony to smoke cigarettes. (A61). Heidi then asked Jeffrey to get her purse. (A59). It was then that she left and called the police. (A61). Jeffrey got the red bag that Heidi had given him to put his things in, packed it, and jumped off the balcony. (A45). Jeffrey was apprehended a short time later. *Id.*

After being detained, Jeffrey was interrogated and gave the police what amounted to a confession. During the ensuing legal proceeding, Jeffrey McClatchy was represented by a court-appointed attorney Kurt Wentz.[4] McClatchy recalls that at first

[4] The account of how Jeffrey McClatchy's criminal case progressed is based on counsel's interview with the petitioner.

Mr. Wentz brought to his consideration a plea offer that would entail a 20-year sentence. McClatchy repeatedly rejected that proposal, and the case was reset multiple times. Toward the end of 2013, Mr. Wentz told McClatchy that the DA's office was no longer offering a deal entailing 20 years in prison.

The jury trial in the case was set for December 2, 2013. McClatchy recalls that before appearing in court he had a conversation with Mr. Wentz, who told the petitioner that if he went to trial with a jury, he could be given a life sentence. McClatchy was then taken to the courtroom, where he remembers two female prosecutors talking to him. They told him that they would remove two of the three charges against him if he agreed to plead guilty. They also said that the maximum sentence would be 40 years in prison. McClatchy recalls that his lawyer assured him that this was only the maximum term, and that the judge would likely give him a lesser sentence. At that point, without hesitation, McClatchy signed the hand-filled documents and immediately appeared before the judge and pleaded guilty to aggravated sexual assault with a deadly weapon.

Jeffrey McClatchy's sentencing took place over the next two court appearances. Jeffrey's adoptive mother was called as the prosecution's witness, and she gave the Court a sharply negative impression of her adopted son. Heidi Carlisle did not appear for sentencing. The prosecution asked the judge for a 40-year sentence, and the Court proceeded to impose the punishment that the state sought. Jeffrey McClatchy, who

was arrested when he was barely 19 years old[5] in November of 2012 is set to be released in November 2055.

B. A book published by the victim reveals that the prosecution did not inform trial counsel that the first responding officer found the victim noncredible.

When the undersigned began conducting a search for newly discovered evidence in this matter, it became apparent that the name of the victim was misspelled in the trial court documents. The name "Heidi Carlilsle" should actually have been spelled as "Heidi Carlisle." In May 2016, writer Heidi Carlisle published a paperback book titled *Sexual Assault Watchdog: Survivor's Guide*,[6] which features an account of Ms. Carlisle's multiple experiences of being sexually assaulted,[7] interspersed with expressions of outright dissatisfaction with the "rape culture," which is the author's term for how rape victims are treated like second class citizens. *See* Book at 14. Statements made by Heidi Carlisle in her book on surviving sexual assault put into focus the fact that law enforcement found her account of being assaulted by McClatchy to be totally noncredible. Pertinent passages from Heidi Carlisle's book show that the law enforcement officers did not believe her story:

---

[5] The petitioner's date of birth is 07/12/1993. Victim Heidi Carlisle was 44 years old on the date of the offense.

[6] Available at https://www.scribd.com/book/308255915/Sexual-Assault-Watchdog-Survivor-s-Guide (last accessed June 25, 2021).

[7] In the book, Heidi Carlisle talks about being raped three times: one time near an open field, one time on a cruise boat where she was nearly thrown overboard, and the last time by Jeffrey McClatchy.

When I reported to the police that I had been sexually assaulted and almost murdered in my apartment, the lead investigator told me straight out that he didn't believe me. He also said that no jury would believe me either, while turning to another officer looking for affirmation. The investigator even laughed at me when I told him I had been sodomized by the rapist, like it was some kind of joke I was telling them. It is truly mind boggling and mentally abusive for police or anyone to react that way towards victims, and it perpetuates the rape culture.

***See* Book at 25.**

. . . .

After being attacked, I was in a weakened state of mind and the fact of "the second rape" caused by the investigator's telling me that he didn't believe me and laughing at my misery, itself made me lose as much sleep as being attacked by the rapist.

***See* Book at 30.**

. . . .

The lead investigator and his "side officer" came to my apartment shortly after my call. I believe the investigator misled me about his job description after entering my apartment by claiming he was an investigator from human trafficking and narcotics, rather than, as I was told much later, that he was from the Harris County, Sexual Assault Unit. He also told me I was stupid, accused me of having illegal drugs in my apartment (which I did not), told me that he didn't believe me, and no jury would believe me, and laughed at me when I told him I had been sodomized by the rapist.

The investigator's side officer put his nose within two inches of my rear-end and touched my ass while I was dressed and while he was supposedly looking for blood. I had already been examined by the paramedics in front of those two officers, and the paramedics were still on scene. I had to deal with yet another inappropriate cop that day. That officer also told me that I was weird.

The collection of evidence was also unprofessional, in my opinion, as if the investigating officer actually cared less about busting

> **a first-degree felony rapist, but more about intimidating me as a disbelieved victim. No crime scene unit arrived to collect evidence, which was surprising because it was major crime scene in a very large and populated county. I was also literally thrown into the ambulance by an officer, rather than him allowing me the time I needed to walk to the ambulance or allowing the paramedics the ability to assist or carry me onto the ambulance. My overall experience with law enforcement that day was not good, and I still view them as having been inexcusably rude and insulting to deal with as a sexual assault victim.**
>
> ***See* Book at 143.**

In her book, Ms. Carlisle also talked about her behavior towards Jeffrey McClatchy at the time of the purported rape:

> **I decided that the only way for me to survive was for me to try to befriend him and make him believe that I would help him with whatever he wanted. I was unbelievably scared, but tried very hard not to look nervous by aiming for an Oscar performance on that one. It actually saved my life, but**

> **he still raped me three times. I lived because he believed that I was somewhat of a companion who was going to help him with a few things that were important to him. I waited for the opportune time to escape by watching him closely and making sure that he was gaining trust in me. I asked him to do something for me in another room which distracted his attention from me.**
>
> ***See* Book at 140.**

There were a number of other passages in Ms. Carlisle's book relevant to McClatchy's prosecution. She heavily criticized the unavailability of compensation for rape victims in Texas. Importantly, the book also highlighted the fact that Harris County was pursuing an internal investigation relative to the officers involved with McClatchy's case. Ms. Carlisle's story then talked about her unwillingness to be a witness in the case unless her victim benefits were restored.

Altogether, the following general themes run through Heidi Carlisle's book as it pertains to Jeffrey McClatchy's case: (1) law enforcement agents did not believe her story, with an officer's saying "no jury would believe you"; (2) her behavior towards Jeffrey McClatchy during the sex act did not demonstrate resistance, rather she was striving for "an Oscar performance"; (3) Ms. Carlisle criticized the unavailability of compensation for rape victims in Texas and was unwilling to be a witness in the case, unless her benefits

got restored; (4) Harris County was pursuing an internal investigation regarding her complaints about the officers responding to the rape; (5) Ms. Carlisle would not have reported the rape to Texas authorities if she knew that she would not get any economic benefits.[8] None of that information was available to trial counsel. The prosecution did have most of this information in its possession, however. As disclosed by handwritten notes on an Interoffice Memorandum dated December 6, 2012, the state knew the victim complained that officers told her "a jury would never believe her." (A37).

C. Since trial counsel was not given the victim's correct name, he wasn't able to discover that the victim had a history of advancing sexual assault allegations through the court system.

After determining the fact that Heidi Carlisle's name was misspelled in the Harris County criminal proceeding, the undersigned conducted a search of case law for any mention of the victim's name. Surprisingly, it turned out that Ms. Carlisle was the prevailing plaintiff in a case that went up all the way to the Supreme Court of New Hampshire in 2005. The undersigned then traveled to Concord to physically study the case file of the old New Hampshire proceeding, of which Jeffrey McClatchy's trial attorney Kurt Wentz did not know. *See Carlisle v. Frisbie Memorial Hospital*, 152 N.H. 762 (2005). Some of the facts

[8] On page 155 of her book, she writes: "The last time I checked, the National Association of Crime Victim Compensation Boards calculated that the average maximum benefits a victim receives from a State is $25,000, period."

gleaned from the voluminous court records in that New Hampshire case would have been highly relevant – in fact, instrumental – to McClatchy's defense. (A28).

The New Hampshire civil case arose from Ms. Carlisle's arrest during a visit to a hospital. At the time of her detention in the early morning of May 6, 2000, Heidi Carlisle operated a childcare business and worked for a local fire department. (A28). She had a history of depression and alcohol abuse. *Id.* On May 5, 2000, she had five beers during the day and two mixed drinks for dinner. *Id.* After dinner, Ms. Carlisle decided to go to a hospital. *Id.* She chose Frisbie Memorial Hospital ("Frisbie") because it was nearby and because she had seen a poster there advertising comprehensive services on a prior visit. *Id.* She arrived between 11 P.M. and 12 A.M. *Id.* She had her blood pressure taken and then saw Dr. John Jackson, an emergency physician, who performed a brief exam. (A28-29). The exam was negative. (A29). She told him she had been drinking and had thoughts involving using a rope. *Id.* In filling out the medical intake form, under neuro/psych, Dr. Jackson circled depressed affect and suicidal ideation, and under clinical impression, ethanol intoxication and suicide ideation. *Id.* Dr. Jackson then left the examining area and told Ms. Carlisle he was going to get her some help. *Id.* When Dr. Jackson returned, he came with an officer from the Rochester Police Department who told Ms. Carlisle she was going to jail and put handcuffs on her. *Id.* Ms. Carlisle was then driven to the Strafford County jail in a police cruiser. Heidi Carlisle testified at trial that after her discharge from incarceration she began drinking more frequently and her depression worsened, which in turn affected the quality of her work. *Id.* She had to

resign her fire department position because she appeared at a call with alcohol on her breath. *Id.* In the end, Ms. Carlisle brought three causes of action against the defendants: (1) violation of the Emergency Medical Treatment & Labor Act against Frisbie; (2) professional negligence against Dr. Jackson; and (3) violation of the Patients' Bill of Rights against Frisbie. The jury found for the plaintiff on all three counts. At the conclusion of the proceeding, Heidi Carlisle won a $500,000 judgment against Frisbie Memorial Hospital.

What is important about Ms. Carlisle's earlier case is not only that it shows she had a positive experience of obtaining money by using the court system, but also – and more importantly – that she had a history of false sexual assault allegations and mental delusions about being sexually assaulted. As the New Hampshire Supreme Court said in its opinion:

> **When she drank alcohol, it often elicited feelings of depression and thoughts of a sexual assault that she experienced as a teenager.**
>
> ***See Carlisle*, 152 N.H. 762, at *2 (2005).**

The following statements were made during Heidi Carlisle's cross examination by the attorney for the hospital:

Q.: In fact, the evening that this occurred, the Frisbie incident occurred, you are aware that according to the Rochester police, you made a claim, at first, and later withdrew it, you first made a claim that you were sexually assaulted at the jail. Isn't that correct?

A.: Um, I didn't make a claim about being sexually assaulted at the jail here. I know that I have a history of having flashbacks to when I had been, um. As far as what the Rochester PD says, I can't – I can't account for what they're telling you. Whether or not I was possibly having a flashback at the moment that I was speaking with him, uh, whoever it is, I don't know.

***See* Tr. 239 (*see also* Counsel's Affirmation) (A29-30).**

. . . .

Q.: In fact, it was an exhibit at your deposition, but I'll show it to you. Written by an Officer Wayne Perrault, and he says, in part, that you advised him that you were sexually assaulted, correct?

A.: May I read it?

Q.: Sure. Absolutely.

***See* Tr. 240 (A30).**

. . . .

Q.: And you told to Dr. Hanna, did you not, and this would have been in April of 2003, just less than a year ago, that, quote, "I make accusations that I am being sexually abused by whoever is with me." Didn't you say that to Dr. Hanna?

A.: I believe that I presented it to him as if other people have made that, have made that claim, that I've talked about it. I was fishing from him, um – I know that when people have flashbacks they're not completely, you know, with it, their mind is someplace else. So, I believe that my conversation with him about that was ... pretty much to try to find out whether or not I was, um, experiencing flashbacks when I wasn't aware of it.

***See* Tr. 244 (A30).**

. . . .

Q.: The whole statement is, in quotes . . . . "I struggle with depression and all my therapists hate me. When I drink alcohol, I

have flashbacks of sexual abuse that happened when I was 18. I can't be alone. I make accusations that I'm being sexually abused by whoever is with me." . . . .

A.: I don't know what to say about that, actually. Um, I remember presenting it to him that – I know that through our deposition that that was something that you mentioned to me, and I did not have any recollection of that at all. Um, I know that I'm not the most, the best well-versed person when I'm with therapists, um, so I believe that I was attempting to find out from him whether or not, um, flashback occur when I'm not aware of them.

***See* Tr. 245 (A31).**

What Heidi Carlisle's trial testimony reveals about her is that she is not at all reliable when it comes to sexual assault allegations, especially when she is drinking. She had said to her psychiatrist that she accuses of sexual assault whoever she happens to be with when she drinks. Furthermore, Ms. Carlisle generally is someone who will at times accuse people. In the New Hampshire case, she accused the security guard at the hospital initially of sexual abuse, but then said that was just because of intoxication.[9] She also made a complaint against Strafford Guidance, a

[9] Transcripts of closing arguments in *Frisbie* at 3-4.

psychiatric facility that she was offered to go to in lieu of spending the night in jail. *Id.* She also considered filing a suit against her psychiatrist in Florida. *Id.* The bottom line is that Ms. Carlisle is someone who is quick to accuse people.

Because of the discrepancy in the spelling of Heidi Carlisle's last name in the Harris County prosecution, trial counsel could not have found out that Jeffrey McClatchy's victim has had this experience with the state court system. More importantly, trial counsel did not know that the court records in New Hampshire showed that the victim in the Harris County case had a propensity to make up stories of sexual assault whenever she was drunk. The prosecutors in Harris County certainly did not bring this up to Mr. Wentz's attention.

REASONS FOR GRANTING REVIEW

I. THE U.S. CONSTITUTION REQUIRES PRE-PLEA DISCLOSURE OF EXCULPATORY EVIDENCE.

Under *Brady*, the prosecution transgresses the defendant's due process protections when the state fails to disclose favorable evidence that is material to the guilt or punishment of the accused. *Brady*, 373 U.S. 83, 87 (1963). A defendant's right to receive favorable evidence is not predicated on whether the prosecutor suppresses the evidence intentionally or fails to disclose it through mere oversight. *Id.*

Ruiz v. United States, 536 U.S. 622 (2002), dealt with a situation where the defendant contested the

validity of a plea agreement waiving rights to impeachment information. *Id.* at 625. In refusing to establish the prosecution's pre-plea disclosure obligations, this Court constrained its holding in *Ruiz* to impeachment evidence only. *Id.* at 631. The Court did not decide if the state's withholding of exculpatory evidence at the plea-bargaining phase of the case compromises the constitutional rights of a defendant. *Id.* The rationale this Court used in *Ruiz* was that impeachment material was of only limited value to a defendant's decision to plead. The Court noted that since impeachment material pertains to a specific witness, it becomes valuable only to the extent that a defendant accurately predicts who the state actually summons to testify. Another justification for the ruling was the Court's concern for efficiency, as any benefit derived by the defendant from the disclosure of impeachment evidence had to be counterbalanced with the burden of prematurely disclosing government witnesses. *Id.* On that score, the Court acknowledged that disclosing witness information runs the risk of disrupting an investigation or endangering the witnesses. *Id.* at 631-32. Further, this Court opined that forcing the state to disclose impeachment evidence would make plea-bargaining less attractive by stripping it of its resource-saving advantages." *Id.* at 632.

A. Splits in the lower courts as to whether defendants are entitled to exculpatory evidence pre-plea existed before *Ruiz*.

Conflicts among the various federal appellate courts and state courts of last resort run deep on the issue of *Brady's* application in the guilty plea context. The federal appeals court for the Fifth Circuit where

this matter arose has held time and again that *Brady* mandates no disclosure of evidence pre-plea, whether exculpatory or impeaching.[10] Courts in different federal jurisdictions and other states have come to a different conclusion. The conflict among the jurisdictions has existed from the time before *Ruiz* was decided, and it has become exacerbated afterward. Prior to *Ruiz*, the Eighth[11], Tenth[12], and Ninth[13] Circuits, as well as the South Carolina Supreme Court[14] established that prosecutors were bound to provide exculpating material prior to a guilty plea because the plea would otherwise be made involuntarily. The Second Circuit reached a similar result under another rationale, holding that a *Brady* violation was serious misconduct compromising a guilty plea.[15] The notable outlier was the Fifth Circuit, which in *Matthew v. Johnson*, 201 F.3d 353 (5th Cir. 2000), concluded that

---

[10] Prior to the passage of the Michael Morton Act in 2013, "Texas law gave a defendant the right to no more discovery than due process requires." Gerald S. Reamey, *The Truth Might Set You Free: How the Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, Or Not*, 48 Tex. Tech. L. Rev. 893, 898 (2016).

[11] *White v. United States*, 858 F.2d 416, 422 (8th Cir. 1988) (noting that without the aid of exculpatory evidence, the accused and his counsel cannot evaluate their chances at trial, rendering the plea unknowing or involuntary).

[12] *United States v. Wright*, 43 F.3d 491, 495-96 (10th Cir. 1994) (observing that in certain circumstances, a *Brady* violation renders a plea involuntary).

[13] *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995) (holding that a guilty plea may not be voluntary and intelligent if the accused has no knowledge of material information that was withheld).

[14] *Gibson v. State*, 514 S.E.2d 320, 323-24 (S.C. 1999) (the accused can contest voluntariness of his plea through a *Brady* violation).

[15] *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998).

the state's failure to disclose exculpatory evidence pre-plea presents no constitutional violations, inasmuch as "a *Brady* violation is defined in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt." *Id.* at 362.

B. Following *Ruiz*, *the conflict* among the lower courts intensified.

In 2002, *Ruiz*, 536 U.S. 622 (2002), addressed only the question as to whether due process compels the prosecution to disclose impeachment evidence pre-plea. In nearly two decades since that ruling, lower courts have grown increasingly divided regarding the prosecution's obligation to disclose non-impeaching exculpatory evidence in a pre-plea setting. The Fifth Circuit, where the instant case arises, restated its earlier holding in *United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009). The Fifth Circuit construed *Ruiz* as not distinguishing between impeachment and exculpatory material. *Id.* at 179. The Ninth and Tenth Circuits have continued to adhere to their respective precedents predating *Ruiz*. *Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007); *United States v. Dahl*, 597 Fed. Appx. 489, 490 (10th Cir. 2015); *United States v. Ohiri*, 133 Fed. Appx. 555, 562 (10th Cir. 2005). While questioning its pre-*Ruiz* ruling in *Avellino*, the Second Circuit in *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010), did not overturn the earlier decision. For its part, the Supreme Court of South Carolina has persisted in holding that violations of *Brady* at a pre-plea stage can render the plea involuntary. *Hyman v. State*, 723 S.E.2d 375, 380 (S.C. 2012) (quoting *Gibson v. State*, 514 S.E.2d 320, 324 (S.C. 1999)). Subsequent to *Ruiz*, the split among

the jurisdictions has widened, leaving the Fifth Circuit in a clear minority.

Courts in Nevada[16], West Virginia[17], and Utah[18] ruled that the prosecution must disclose material exculpatory evidence to the defense before a guilty plea. Courts of appeals for the Fourth[19], Sixth[20], and Seventh[21] Circuits that have not directly ruled on preplea *Brady* disclosure requirements have nonetheless recognized the existence of a conflict. Lower federal courts have also taken sides in this split of authority.[22] After nearly twenty years since *Ruiz*, the Court should take up this matter and resolve the conflict among the various jurisdictions.

II. THE ISSUE PRESENTED IN THIS CASE IS OF GREAT IMPORTANCE TO THE ADMINISTRATION OF CRIMINAL JUSTICE.

Tectonic shifts in the way the system of criminal justice operates in the United States away from trial and toward plea-bargaining militate in favor of this

---

[16] *State v. Huebler*, 275 P.3d 91, 93, 96 (Nev. 2012) (citing *McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003)).
[17] *Buffey v. Ballard*, 782 S.E.2d 204, 216 (W. Va. 2015).
[18] *Medel v. State*, 184 P.3d 1226, 1234 (Utah 2008).
[19] *United States v. Moussaoui*, 591 F.3d 263, 267, 285-86, 287 (4th Cir. 2010) (The Supreme Court has not addressed whether *Brady* extends to the guilty plea context).
[20] *Robertson v. Lucas*, 753 F.3d 606, 621-22 (6th Cir. 2014).
[21] *McCann*, 337 F.3d 782, 787-88 (2003) (noting that *Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence).
[22] *United States v. Nelson*, 979 F. Supp. 2d 123, 130 (D.D.C. 2013) (ruling that the government violated its duty to disclose all exculpatory evidence and prejudiced the accused, who pleaded guilty).

Court's intervention. In 1980, almost 25 percent of federal cases found resolution by way of trial.[23] Nowadays, more than 98 percent of federal convictions result from guilty pleas, which means that only two percent of federal criminal proceedings are resolved at trial.[24]

The Court has acknowledged that due process guarantees apply at the pre-plea stage. *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (reaffirming the accused's right to effective assistance of counsel pre-plea); *see also Lafler v. Cooper*, 566 U.S. 156 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (defendants are entitled to accurate immigration advice prior to a plea); *Lee v. United States*, 137 S. Ct. 1958 (2017) (the only showing a defendant raising an ineffective assistance claim had to make is that accurate immigration advice would have altered the guilty plea calculus).

To allow the state to withhold potentially exonerating evidence pre-plea substantially magnifies the possibility that innocent people would plead guilty. Large caseloads and oftentimes difficult access to

---

[23] Ronald F. Wright, *Federal Criminal Workload, Guilty Pleas, and Acquittals: Statistical Background* (September 2005). Wake Forest Univ. Legal Studies Paper, available at SSRN: https://ssrn.com/abstract=809124 or http://dx.doi.org/10.2139/ssrn.809124 (last accessed June 25, 2021).

[24] *U.S. District Courts – Criminal Defendants Terminated, by Type of Disposition and Offense – During the 12-Month Period Ending June 30, 2020,* U.S. Cts.: Stat. Tables for the Fed. Judiciary (June 30, 2020), available at https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2020/06/30 (last accessed June 25, 2021).

prison facilities render defense counsel unable to investigate the facts of the case.[25] Where no required disclosure of exculpatory material is mandated, plea-bargaining occurs in an atmosphere of informational asymmetry. The state has all the power, much to the detriment of the accused. With the state's charging discretion, the deck is heavily stacked against defendants. Faced with a prospect of receiving a harsh sentence at trial, innocent individuals ultimately opt out in favor of a guilty plea and a lesser punishment. Last year, some 22 percent of exonerations (29 out of 129) where for people who pleaded guilty. Nat'l Registry of Exonerations, U.C. Irvine Newkirk Cent. for Science & Soc., *2020 Annual Report.*[26] The ability to obtain exculpatory information before a guilty plea is the only countervailing force that the accused would have against the prosecutor. Requiring the state to turn over exculpatory material pre-plea would also curtail the possibility of government misconduct: the incentive to compel a plea in the absence of disclosing exculpatory material would be at its highest when the prosecution's case is not strong.

III. THIS CASE IS SUITABLE FOR RESOLVING THE CONFLICT.

If this Court grants review and remands to the Texas Court of Criminal Appeals, petitioner's convic-

---

[25] Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. Books, available at https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ (last accessed June 25, 2021).

[26] Available at https://www.law.umich.edu/special/exoneration/Documents/2021AnnualReport.pdf (last accessed June 25, 2021).

tion would not survive scrutiny because the prosecution failed to provide trial counsel material, exculpatory information to the effect (1) that law enforcement officers did not believe the state's only eyewitness Heidi Carlisle and (2) that Ms. Carlisle had a history of making up false accusations of sexual assault when drinking. Three factors must be satisfied to establish a *Brady* violation: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the state, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). McClatchy has made a *prima facie* showing of all three factors. First, the evidence at issue to the effect that law enforcement found the victim non-credible and told the victim "no jury would believe her" is exculpatory. Second, the state suppressed the material. Finally, considering the evidence casting considerable doubt on the credibility of Heidi Carlisle and suggesting that she had a propensity to accuse the people she was drinking with of sexual assault, the petitioner has made the requisite showing that he can establish by clear and convincing evidence that he would not have pleaded guilty. *See In re Wogenstahl*, 902 F.3d 621, 629 (6th Cir. 2018) (listing prongs for a *Brady* error).

A. The officer's adverse credibility determination regarding the victim was exculpatory evidence.

Exculpatory material is evidence, the suppression of which would "undermine confidence in the [outcome]." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Exculpatory evidence includes "evidence affecting" witness "credibility," where the witness's "reliability" is

likely "determinative of guilt or innocence." *Giglio v. United States*, 405 U.S. 150, 154 (1972). In the present case, Heidi Carlisle was the victim and the only witness available to the state to establish the crime. Once it is established that Ms. Carlisle is not a reliable witness, the jury would be free to disregard her testimony. The officers involved in interviewing Heidi Carlisle had no motive to express disbelief relative to the complainant in a prosecution of an alleged rapist. Likewise, that a police officer would have testified in support of a man accused of raping a woman would have been powerful evidence to the jury. Evidence that a police officer, who had no incentive to protect Jeffrey McClatchy, would tell the victim that "no jury would believe her" is compelling evidence. The prosecution suppressed police assessments that contradicted Ms. Carlisle's complaint regarding the crime. Notes on an Interoffice Memorandum suggest that the state attorneys were cognizant regarding the reports reflecting an adverse credibility assessment. Information regarding these reports has never been provided to McClatchy's trial attorney. What's more, trial counsel did not have the accurate spelling of the victim's name, a rare circumstance that prevented the defense from researching the victim's repeated history of made-up sexual assault allegations.

B. The suppression of evidence was outcome determinative.

The evidence at issue is material and the result of the proceeding would have been different had McClatchy and his trial counsel known of these facts. Evidence is material if there is "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v.*

Bell, 556 U.S. 449, 469-70 (2009). At the plea-bargaining stage, the question is functionally identical: whether there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial. *Cf. Hill v. Lockhart*, 474 U.S. 52, 59 (1985).[27] Here, had McClatchy and his counsel known of the strong exculpatory evidence, the petitioner would not have entered a guilty plea.

If this Court rules that McClatchy had the right to get exculpatory material from the prosecution prior to entering a plea, the Court would remand to the Court of Criminal Appeals of Texas to finalize its adjudication of McClatchy's habeas petition.

IV. A Hearing Should Have Been Conducted.

The out-of-hand denial of the habeas petition by the Texas Court of Criminal Appeals was unwarranted. This Court has recognized that a hearing is required when there is pre-plea suppression of favorable substantive evidence. A pre-*Brady* decision *Wilde v. Wyoming*, 362 U.S. 607 (1960), dealt with a situation where the defendant's habeas petition filed in state court alleged that the petitioner's plea to a murder charge was invalid based on the prosecutor's suppression of exculpatory material. *Wilde*, 362 U.S. at 607.[3] The Court noted that there was no adequate hearing of the allegations – in fact, no hearing of any kind – undertaken at the state court level. *Id.* The

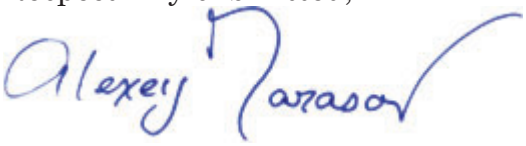
[27] This Court considers the materiality standard to be the same for claims of withheld evidence as for claims of ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Court thus remanded the case to conduct an evidentiary hearing. *Id.* Here, too, at the very least, Jeffrey McClatchy was entitled to an evidentiary proceeding.

CONCLUSION

This case is about the state's suppression of a critical credibility assessment regarding the sole witness to the crime. The victim was not given credence by the law enforcement personnel that interviewed her, who told her bluntly that "no jury would believe [her]." The prosecutors handling McClatchy's case had that information, and yet did not convey it to defense counsel. Further, trial counsel did not even have the correct spelling of Heidi Carlisle's name, preventing the defense from ever finding out the victim's history of baseless sexual assault allegations, as chronicled in the New Hampshire Supreme Court proceeding. The Court should take up this case to decide that the prosecution is dutybound to turn over all exculpatory material and evidence to the accused at a pre-plea stage of a criminal proceeding.

Dated this 25th day of June 2021.
Respectfully submitted,



Alexey V. Tarasov, Esq.
Attorney for Jeffery McClatchy

5211 Reading Road,
Rosenberg, Texas 77471
Tel.: 832-623-6250
Fax: 832-558-3540
E-mail: alexey@tarasovlaw.com