No. 20-6190

IN THE SUPREME COURT OF THE UNITED STATES

BRADLEY R. FREEMAN,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether evidence of a potential entrapment defense is a ground for withdrawing a guilty plea when the trial court found that the defendant was aware of the essential facts supporting such a defense at the time he pleaded guilty.

ADDITIONAL RELATED PROCEEDING

United States District Court (D. N.M.):
Freeman v. State, No. 20-910 (Dec. 30, 2020)

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OPINIONS BELOW

The New Mexico Supreme Court order denying the petition for a writ of certiorari is unreported. Pet. App. E. Similarly, the New Mexico Supreme Court order accepting transfer and the New Mexico Court of Appeals' transfer order are unreported. Pet. App. D; Pet. App. C. The trial court order denying Petitioner's motion to withdraw his guilty plea is unreported. Pet. App. A.

JURISDICTION

For the reasons set forth below, this Court lacks jurisdiction because the federal question was not passed upon in the state courts.

The order of the state supreme court declining to review the petition for a writ of certiorari was entered on May 13, 2020. Pet. App. E. The motion for rehearing was denied on June 12, 2020. Pet. App. F. The petition for a writ of certiorari was filed on October 19, 2020.

INTRODUCTION

This case involves Petitioner's motion to withdraw his guilty plea to one count of distribution of a controlled substance. Approximately seven months after Petitioner entered his plea, the State of New Mexico dismissed numerous cases in which the deputy who filed the affidavit for the arrest warrant in Petitioner's case was a prime witness because of allegations that he engaged in objective entrapment in other cases. There is no evidence that the State withheld any evidence from Petitioner. He nonetheless sought to withdraw his guilty plea on the ground that his plea was not knowing or voluntary because he had an entrapment defense. At the

motion hearing the trial court found that Petitioner knew that he had an entrapment defense when he entered his plea because Petitioner knew that he used illicit substances with the deputy. This case, therefore, presents the question of whether evidence of a potential entrapment defense is a ground for withdrawing a guilty plea when the trial court found that the defendant was aware of the essential facts supporting such a defense at the time he pleaded guilty.

The petition for a writ of certiorari omits critical facts and points of law. It should be denied for four principal reasons. First, and immediately fatal to Petitioner's claim, this Court lacks jurisdiction because no state court passed on the federal question presented by the petition. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (refusing to consider federal constitutional issues not raised or passed upon in state courts). Rather, the trial court denied Petitioner relief on the basis of his failure to raise the entrapment defense prior to his plea in light of his concession that he knew of facts supporting that defense. Likewise, no state appellate court considered Petitioner's federal question and the state supreme court summarily dismissed his appeal without an opinion. Pet. App. E.

Second, the petition does not acknowledge that the trial court's one-and-half page non-precedential order denying Petitioner's motion to withdraw his guilty plea was based on the court's dispositive factual findings. Pet. App. A. Nor does the petition address the forfeiture of a non-jurisdictional entrapment claim by a knowing and voluntary guilty plea. *See Peretz v. United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are [] subject to waiver."). Any challenge to

the trial court's factbound decision does not warrant this Court's review. *See* Sup. Ct. R. 10.

Third, although the entire premise of Petitioner's argument is that the State withheld *Brady* material, the facts fail to establish that the State suppressed any evidence. *Strickler v. Greene*, 527 U.S. 263, 282 (1999) (stating that one of the components of a *Brady* claim is government suppression of evidence). Petitioner's trial counsel admitted that there was no allegation that the State withheld any evidence in this case and the record does not demonstrate that the State was aware of the deputy's conduct prior to Petitioner's plea. Ex. A at 17a. Further, Petitioner did not make any allegations of misconduct until he moved to withdraw his guilty plea, and conceded at the motion hearing that he knew of facts that would have permitted him to take advantage of an entrapment defense at the time he entered his plea. *See United States v. Agurs*, 427 U.S. 97, 103 (1976) (stating that the *Brady* rule applies to information known by the government but not the defense); *United States v. Cottage*, 307 F.3d 494, 499 (6th Cir. 2002) (stating that there is no *Brady* violation when a defendant knew or should have known of exculpatory facts, or the information was available to him through another source).

Fourth and finally, there is no meaningful circuit split on the question presented that would change the outcome of this case because of the trial court's outcome-determinative factual findings. The statements cited by Petitioner to support his argument are based either on *dicta* that are not essential to the courts' holdings, or distinguishable facts. *See infra* III. Even assuming for the sake of

argument that there is circuit disagreement, this case would come out the same way regardless of how any disagreement is resolved because there was no *Brady* violation. There is additionally no relevant split of lower court authority because courts consistently deem a non-jurisdictional defense, such as entrapment, to be waived by a knowing and voluntary guilty plea. Petitioner's assertion of circuit conflict, therefore, does not warrant further review in this case.

STATEMENT OF THE CASE

On May 12, 2017, Petitioner Bradley Freeman was indicted for one count of distribution of a controlled substance based on a criminal complaint filed by Deputy Joshua Marchand. On January 26, 2018, Petitioner pleaded guilty. R. at 1, 13, 71. He was granted a conditional discharge and placed on supervised probation for a term of three years and 95 days. *Id.* at 80.

Seven months after Petitioner's guilty plea, on August 13, 2018, the State dismissed a number of cases in which Deputy Marchand was a witness because of allegations that he used drugs with suspects during his employment with the Otero County Sheriff's Office (OCSO). In a letter explaining the dismissals, the State asserted that "the use of illicit narcotics by an undercover detective with a suspect would in all likelihood be considered objective entrapment under New Mexico law." Pet. App. B at 3.

The letter provided a timeline of events concerning inquiries into the allegations. On February 13, 2018, two-and-a-half weeks after Petitioner pleaded guilty, Deputy Marchand was confronted during a pretrial interview by a defense

attorney in another case. Deputy Marchand disclosed that he simulated drug use in front of that attorney's client. "This was the first time Deputy Marchand had revealed that he had simulated drug use during an undercover operation to the District Attorney's Office." *Id.* at 4.

As far as the State can tell, Deputy Marchand was under FBI investigation from as early as July 2017 because the FBI had served a federal grand jury subpoena to OCSO seeking disclosure of all law enforcement incident reports involving Deputy Marchand. The record does not establish that the FBI revealed the nature of any investigation to the State at that time, and the State is not aware of any resolution to the FBI's investigation. *See id.*

After the FBI provided reports to the State detailing numerous concerns about Deputy Marchand, the State contacted him in June 2018 to determine if he would submit to a polygraph examination. He did not respond to the State's request, and the State subsequently dismissed cases in which he was a prime witness. *Id.* at 6-8.

On October 12, 2018, the trial court revoked Petitioner's probation and conditional discharge pursuant to his plea of no contest to a probation violation. R. at 117-18. A week later, on October 19, 2018, Petitioner moved to withdraw his January 2018 guilty plea on the ground that "new information regarding the State's primary witness, Joshua Marchand was disclosed by the State on August 13, 2018[.]" Pet. App. B at 1.

On March 8, 2019, a motion hearing was held at which Petitioner did not present any witnesses but alleged that his guilty plea was not knowing, voluntary,

and intelligent because of the issues with Deputy Marchand, which Petitioner claimed was "newly-discovered evidence." R. at 126; Ex. A at 7a. Defense counsel acknowledged that the information about Deputy Marchand "bolstered some potential defenses" and proffered that, if Petitioner testified, he would admit that he was a drug addict and that he used drugs with Deputy Marchand. Ex. A at 10a, 16a. There is no evidence in the record showing that Petitioner alleged using drugs with Deputy Marchand prior to the hearing.

The trial court found that Petitioner's plea was knowing and voluntary because "he presumably knew that he used drugs with Marchand . . . and it was known at the time that he took the plea that Marchand was undercover and [] the source of these charges." Ex. A at 19a. In its written order denying Petitioner's motion to withdraw his guilty plea, the court found that Petitioner "knew he had a[n] entrapment defense to the charges" at the time he pleaded guilty. Pet. App. A at 1-2.

The court did not reach the federal question presented in the petition for a writ of certiorari of whether the State was required to "disclose favorable, material evidence of an affirmative defense" before entering into a plea agreement. In fact, at the motion hearing, defense counsel declared: "I'm not saying that the State was withholding evidence." Ex. A at 17a; *see* Pet. at i.

Petitioner appealed to the New Mexico Court of Appeals, which transferred the appeal to the New Mexico Supreme Court because it did not have jurisdiction under state law. Pet. App. C. The state supreme court accepted transfer and construed the

appeal as a petition for a writ of certiorari to the district court under Rule 12-501 NMRA regarding denial of a state habeas corpus petition. Pet. App. D.

After ordering a response from the State, the New Mexico Supreme Court summarily declined to review the petition, without issuing an opinion or stating the reason for its denial. Pet. App. E. Petitioner filed a motion for rehearing and brief in support in which he admitted that "he was aware of certain facts which would have supported an entrapment defense when he pled guilty[.]" Brief in support of motion for rehearing at 2. The court denied Petitioner's motion for rehearing without issuing an opinion. Pet. App. F.

Pursuant to Rule 15.2, the State notes an apparent misstatement of fact in the petition whereby Petitioner states that "the Sheriff's Department affirmatively withheld evidence of Officer Marchand's misconduct for over a year[.]" Pet. at 3. As noted above, although the State was not aware of the precise nature of the FBI's investigation, it did begin its own investigation in June 2018 after it was contacted by the FBI. Pet. App. B. at 6-8. Petitioner further states that "[t]he Otero County Sheriff's Department knew about Officer Marchand's misconduct and was in possession of the *Brady* materials well before [Petitioner's] guilty plea," Pet. at 3, but there is nothing in the record to support this assertion, particularly because Petitioner's trial counsel clarified at the March 8, 2019 motion hearing that there was no allegation that the State withheld any material. Ex. A at 17a.

Although there were accounts from law enforcement officers that raised concerns about Deputy Marchand's conduct, including his handling of evidence, chain

of custody problems, and possible alcohol intoxication while working undercover, the record does not show when those concerns arose. *See* Pet. App. B at 4-5. The State is likewise not aware of where facts supporting Petitioner's allegation that "reports of misconduct were withheld" exist in the record. *See* Pet. at 4. To be clear, the State's August 2018 letter notes irregularities in Deputy Marchand's employment history, including inconsistencies regarding his drug use, but it does not conclude that OCSO withheld information from the State or FBI. Pet. App. B. at 4-5.

The State also disputes Petitioner's statement that the trial court "held as a matter of law that the State's suppression during plea negotiations of material, exculpatory evidence of entrapment could not establish a legal basis for plea withdrawal." Pet. at 14. The court did not find that the State suppressed evidence. Nor did it consider whether evidence of an entrapment defense could establish a basis for plea withdrawal. Pet. App. A at 1-2.

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction.

It has long been the rule that this Court has "no jurisdiction unless a federal question was raised and decided in the state court below." *Cardinale*, 394 U.S. at 438. Although Petitioner presents the question as whether "the Constitution require[s], before entering into a binding plea agreement with a criminal defendant, that the prosecution disclose favorable, material evidence of an affirmative defense," Pet. at i, this federal question was not fairly passed upon by the state courts. Indeed, trial counsel acknowledged that there was no allegation that the State withheld evidence,

and there is no evidence that the State was aware of any *Brady* or *Giglio* material at the time Petitioner pleaded guilty in January 2018. Ex. A at 16a-17a; *see* Pet. App. B. at 6-8. As such, the trial did court did not base its decision on the federal question presented in the cert. petition. This Court accordingly lacks jurisdiction. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) ("[I]t is only in exceptional cases, and then only in cases coming from the federal courts, that [this Court] considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below.").

In addition, no state appellate court passed on the issue. The New Mexico Supreme Court declined to review the petition for a writ of certiorari and did not provide any basis for doing so. Pet. App. E. This Court has generally "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [it has] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Moreover, this Court has stated that "[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented[.]" *Id.*; *see* § 1257(a) (limiting this Court's jurisdiction to review state court decrees to the review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had").

Because the trial court did not consider the federal question as it is presented in the petition for a writ of certiorari, and the New Mexico Supreme Court was silent

on the issue, this Court is jurisdictionally barred from reviewing Petitioner's arguments.

To the extent that Petitioner contends that the Court has "jurisdiction to review the denial of state appellate review of a state habeas proceeding involving federal law claims," Pet. at 1, the case Petitioner cites for this argument is distinguishable because the Court considered only whether Article 36 Vienna Convention claims "may be subjected to the same [state] procedural default rules that apply generally to other federal-law claims." *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 342, 351, 360 (2006) (reviewing whether a petitioner's Vienna Convention claim was procedurally barred under state law because it was not raised at trial, when the state supreme court found 'no reversible error' in a habeas court's dismissal of the claim).

II. This Case Is An Exceptionally Poor Vehicle For Addressing The Question Presented.

This case presents an exceedingly poor vehicle for the Court to address the question presented because the Court lacks jurisdiction; the Court would have to revisit facts found by the trial court to squarely rule on the question presented; there is no appellate opinion for the Court to review; Petitioner seeks review of an unpublished, non-precedential decision by a trial court; and the courts below did not reach the question presented by Petitioner. Because Petitioner's arguments are jurisdictionally barred and fail to satisfy any of the traditional criteria for the Court's review, the petition for a writ of certiorari should be denied.

A. Under The Facts Found By The Trial Court And Conceded By Trial Counsel, This Case Does Not Implicate Any *Brady* Material.

The entire premise of Petitioner's argument is that the State withheld exculpatory evidence of an entrapment defense, but the record does not establish that there was a *Brady* violation. Pet. at 3. The trial court found that Petitioner was aware of a potential entrapment defense at the time he pleaded guilty, and his trial counsel acknowledged that the State did not withhold the "newly-discovered evidence" prior to the plea agreement. Ex. A at 7a. Further, as the record reveals, it was not until after Petitioner entered his plea that the State became aware of the allegations against Deputy Marchand. Accordingly, this case does not implicate any *Brady* material and is a poor vehicle for addressing Petitioner's question because it is based on a faulty premise.

Petitioner nonetheless maintains that his guilty plea was not knowing and intelligent because the State withheld material evidence of Deputy Marchand's misconduct, but he neglects to address the district court's dispositive finding that he knew that he had an entrapment defense at the time he pleaded guilty. Pet. at 9; Pet. App. A at 1. Despite this knowledge, he made a risk-benefit analysis and pleaded guilty to take advantage of a favorable plea agreement. Pet. App. A at 2. His guilty plea was therefore voluntary, knowing, and intelligent. Because a voluntary and unconditional guilty plea generally waives non-jurisdictional claims, Petitioner's untimely entrapment argument is barred. *See, e.g.*, *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution."); *United*

States v. Broce, 488 U.S. 563, 569 (1989) (holding that voluntary and counseled guilty pleas typically preclude collateral attack); *Cottage*, 307 F.3d at 499 ("A voluntary and unconditional guilty plea generally waives any non-jurisdictional claims that arose before the plea, including the defense of entrapment."); *United States v. Nunez*, 958 F.2d 196, 200 (7th Cir. 1992) (holding that the defendant's guilty plea waived an entrapment defense); *United States v. Riles*, 928 F.2d 339, 342 (10th Cir. 1991) ("By waiving the right to trial, a defendant waives non-jurisdictional defenses, including entrapment, a non-jurisdictional defense on the merits."); *United States v. Yater*, 756 F.2d 1058, 1063 (5th Cir. 1985) ("A guilty plea consequently *waives* the right to assert the defense."); *Eaton v. United States*, 458 F.2d 704, 707 (7th Cir. 1972) ("[I]t is well settled that a defendant's plea of guilty admits, in legal effect, the facts as charged and waives all non-jurisdictional defenses."); *State v. Simien*, 78 N.M. 709, 717, 437 P.2d 708, 716 (N.M. 1968) ("A claim of entrapment does not state a basis for post-conviction relief.").

Moreover, even assuming for the sake of argument that evidence of Deputy Marchand's misconduct was withheld, no *Brady* violation occurred because the trial court found that Petitioner knew of the essential facts permitting him to take advantage of an entrapment defense. *See, e.g.*, *Agurs*, 427 U.S. at 103 (stating that the *Brady* rule applies to "information which had been known to the prosecution but unknown to the defense"); *DiSimone v. Phillips*, 461 F.3d 181, 197 (2d Cir. 2006) ("Evidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence."

(internal quotation marks and citation omitted)); *Cottage*, 307 F.3d at 499-500 ("Because *Brady* is concerned only with cases in which the government possesses information that [a] defendant does not have, the government's failure to disclose potentially exculpatory information does not violate *Brady* where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information or where the evidence is available to defendant from another source." (internal quotation marks and citation omitted)); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) ("[T]he *Brady* rule does not apply if the evidence in question is available to the defendant from other sources."); *Lugo v. Munoz*, 682 F.2d 7, 9-10 (1st Cir. 1982) (holding that the government has no *Brady* obligation when the relevant facts are available to a diligent defense attorney).

Therefore, evidence of a potential entrapment defense is not a ground for Petitioner to withdraw his guilty plea because he knew at the time he pleaded guilty that Deputy Marchand used drugs with him in the course of the illicit transaction. The State did not suppress any evidence and there is no *Brady* material. To consider Petitioner's argument, the Court would have to depart from its traditional role and reject facts found by the trial court.

To the extent that Petitioner argues that the federal question presented relates to a matter of significant public importance, Pet. at 12, for the reasons discussed above this case does not implicate that question, and therefore it is an improper vehicle to address the matter, notwithstanding its alleged importance.

B. There Was No Appellate Opinion And Petitioner Seeks Review of a Non-precedential Decision By A Trial Court.

Petitioner further asks this Court to review an unpublished, non-precedential decision by the trial court, thus acting as a court of error correction. Because the New Mexico Court of Appeals transferred the case to the New Mexico Supreme Court under state law and, as Petitioner recognizes, "[t]he New Mexico Supreme Court declined to review [his] case," Pet. at 7, the only decision left for this Court's consideration is the trial court's one-and-a-half page order denying his motion to withdraw his guilty plea. *See* Pet. App. A. The Court, therefore, lacks the benefit of a fully reasoned appellate court decision or even full briefing of the issues or oral argument in an appellate court. *See Cutter v. Wilkinson*, 544 U.S. 709, 719 n. 7 (2005) ("[W]e are a court of review, not of first view[.]").

The trial court's order, furthermore, has no precedential value and correcting a purported error in the court's order does not warrant this Court's review. This is especially so because the trial court's factbound decision hinged on its finding that Petitioner "knew he had a[n] entrapment defense to the charges" at the time he pleaded guilty. Pet. App. A. As discussed above, *supra* II.A., Petitioner was precluded from withdrawing his plea on the basis of an entrapment defense.

Petitioner's trial counsel admitted that there was no allegation that the State withheld evidence and the record does not demonstrate that the State was aware of possible *Giglio* material until after Petitioner entered his plea. *See* Pet. App. B. The trial court's factually driven decision, therefore, was correct and is of no consequence

to future litigants because it did not create or modify any law. This case is accordingly an exceptionally poor vehicle for addressing Petitioner's question.

III. There Is No Circuit Split On The Dispositive Question Presented By This Case.

As noted above, the federal question presented by Petitioner is not fairly before this Court because no state court passed upon it and there was no *Brady* violation. Nonetheless, Petitioner maintains that this case implicates *Brady* material and further argues that the federal circuit courts and the state courts are split "on the question [of] whether a *Brady* violation constitutes a legally sufficient basis for a plea withdrawal." Pet. at 9-10.

The relevant issue based on the facts of this case, however, is more aptly presented as whether evidence of an entrapment defense serves as a basis for a plea withdrawal when the trial court found that the defendant knew of the essential facts supporting such a defense at the time he pleaded guilty. There is no split of authority on this issue. *See, e.g.*, *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 362 (3d Cir. 2016); *United States v. Bond*, 552 F.3d 1092, 1096-97 (9th Cir. 2009); *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009); *Pondexter v. Quarterman*, 537 F.3d 511, 526 (5th Cir. 2008); *Ellsworth v. Warden*, 333 F.3d 1, 6 (1st Cir. 2003); *United States v. Lockhart*, 956 F.2d 1418, 1425-26 (7th Cir.1992); *United States v. Clark*, 928 F.2d 733, 738 (6th Cir. 1991); *United States v. Gaggi*, 811 F.2d 47, 59 (2nd Cir.1987); *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986).

Even considering the question as presented by Petitioner, there is no conflict of authority that would change the result of this case because the aforementioned factual findings are outcome-determinative. Stated differently, even if there is division among the circuits on the question presented by Petitioner, it would not change the result of this case because, at the time Petitioner pleaded guilty, he knew that he used illicit drugs with Deputy Marchand and that the deputy's affidavit for an arrest warrant was the basis for the criminal charge. R. at 9-10; Pet. App. A. Because he knew of the facts that would allow him to take advantage of an affirmative defense, he is now barred from claiming that the State was required to disclose evidence of that affirmative defense.

Although Petitioner contends that the Seventh, Ninth, and Tenth Circuits have held that a "*Brady* violation constitutes a legally sufficient basis for plea withdrawal," Pet. at 9-10, the cited authority does not support his contention because, among other things, any *dicta* is not controlling and any difference in outcomes is based on different facts in the cases.

In *McCann v. Mangialardi*, the Seventh Circuit did not resolve the question because the defendant failed to present any evidence showing that the government knew about the potentially exculpatory evidence. 337 F.3d 782, 787 (7th Cir. 2003). The court merely stated in *dicta* that it is "highly likely" that this Court would find a Due Process Clause violation if government actors had knowledge of the defendant's actual innocence but failed to disclose it prior to a guilty plea. *Id.* at 788.

Similarly, in *Smith v. Baldwin*, the Ninth Circuit did not reach the question presented by Petitioner because it concluded that the purported *Brady* evidence was not admissible in the relevant state court and, therefore, was not material. 510 F.3d 1127, 1148 (9th Cir. 2007). The court did explain, however, in a statement not essential to its holding, that there was a different test for *Brady* materiality "[w]hen the accused enters a plea rather than proceed[s] to trial[.]" *Id.*

The pair of unpublished Tenth Circuit cases cited by Petitioner are unhelpful to his cause because the facts are distinguishable from this case. *See* Pet. at 10. In *United States v. Ohiri*, the Tenth Circuit explained that "under the unusual circumstances presented," the government knew about the exculpatory evidence before the defendant pleaded guilty, and noted that the government should have disclosed the evidence because jury selection was set to begin the day the plea agreement was executed. 133 F. App'x 555, 559, 562 (10th Cir. 2005). The Tenth Circuit emphasized that the "unusual" facts indicated that the government was in possession of exculpatory evidence that established the defendant's actual innocence, and thus, it was not simply a case concerning impeachment evidence. *Id.* at 562.

Likewise, in *United States v. Ellsbury*, the Tenth Circuit held that "the scope of the prosecution's disclosure obligations is circumscribed when a defendant waives his right to trial by pleading guilty." 528 F. App'x 856, 858 (10th Cir. 2013). Although the Tenth Circuit explained that, to raise a *Brady* claim, a movant challenging non-impeachment evidence must show that he or she would not have pleaded guilty if the evidence had been produced, the court held that the defendant did not establish

anything more than mere impeachment evidence. *Id.* at 859. The "prosecution had no obligation to disclose impeachment evidence" because "any evidence of police corruption would have been useful only to impeach police witnesses." Therefore, under the facts of the case, "no reasonable jurist would debate the propriety of enforcing the post-conviction relief waiver contained in the plea agreement." *Id.*

In this case, despite Petitioner's efforts to frame the facts to suggest his actual innocence, Pet. at 9, the State was not aware of any exculpatory evidence before he pleaded guilty. Petitioner does not point to any place in the record that demonstrates that the State knew Deputy Marchand used drugs with him at the time of the illicit transaction. Additionally, the State has not located any facts showing that he made any such allegations before the March 8, 2019 hearing. Thus, the facts relating to Deputy Marchand's misconduct in relation to other defendants are merely impeachment evidence and do not suggest Petitioner's actual innocence. *See Giglio v. United States*, 405 U.S. 150, 154 (1972). As noted elsewhere, the State was not aware of this evidence until after Petitioner pleaded guilty. But even assuming *arguendo* that the State was in possession of evidence related to Deputy Marchand's misconduct in other cases, "[t]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *United States v. Ruiz*, 536 U.S. 622, 633 (2002).

The additional cases cited by Petitioner do not establish any meaningful division among the circuits that would change the outcome of this case because, as in

the Tenth Circuit cases above, the holdings of these cases would not permit Petitioner to withdraw his guilty plea under the facts here. *See* Pet. at 10-11.

In *United States v. Conroy*, 567 F.3d 174, 178 (5th Cir. 2009), the Fifth Circuit held that the movant's guilty plea precluded her from making a *Brady* claim. The court noted also that she had not unequivocally asserted her innocence, thus implying that an actual innocence claim may have affected the court's determination, which is in line with the cases discussed above. *See id. at* 179; *Ohiri*, 133 F. App'x at 562; *Ellsbury*, 528 F. App'x at 859.

Furthermore, the First Circuit's opinion in *United States v. Mathur*, 624 F.3d 498, 502-05 (1st Cir. 2010), does not address the question presented here because the defendant never entered a plea and he was convicted after a lawful jury trial. Similarly, as Petitioner admits, the Second Circuit in *Friedman v. Rehal* declined to decide the question. 618 F.3d 142, 154 (2d Cir. 2010). Pet. at 11.

The Fourth Circuit did not squarely pass on the issue either. In *United States v. Moussaoui*, the court declined to resolve the question and concluded that the defendant did not show that his plea was unknowing. 591 F.3d 263, 286 (4th Cir. 2010), *as amended* (Feb. 9, 2010). The court explained that "the Government did not suppress favorable evidence from the defense, much less evidence of factual innocence." *Id.* at 287. And in *United States v. Fisher*, 711 F.3d 460, 467, 469 (4th Cir. 2013) the Fourth Circuit held that, under *Brady v. United States,* 397 U.S. 742, 755 (1970), government misconduct induced the defendant to plead guilty, but

declined to consider the alleged *Brady* material issue under *Brady v. Maryland*, 373 U.S. 83 (1963), which is at issue here.

Finally, Petitioner readily admits that "[t]he Sixth Circuit has stated that the obligation to disclose *Brady* material prior to a guilty plea is not clearly established." Pet. at 11.

Thus, based on the foregoing, there is no circuit split on the dispositive question presented that would change the outcome of this case.

To the extent that Petitioner contends that "[s]tate courts are similarly split," the State disputes that the cursory citation to a mere four cases can support such an assertion. Pet. at 12-13. *See Buffey v. Ballard*, 236 W. Va. 509, 782 S.E.2d 204 (W.V. 2015); *State v. Huebler*, 128 Nev. 192, 275 P.3d 91 (Nev. 2012); *Ex parte Palmberg*, 491 S.W.3d 804 (Tex. Crim. App. 2016); *Medel v. State*, 184 P.3d 1226 (Utah 2008).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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