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IN THE SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, STATE OF UTAH

ASHLEY MARIE FIELDING, Petitioner, vs. STATE OF UTAH, Respondent.	**STATE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT** Case No. 130700112 Judge John R. Morris

Respondent, State of Utah, through counsel Erin Riley, Assistant Attorney General, respectfully submits the following memorandum in support of its motion to dismiss or, alternatively, for summary judgment on the post-conviction petition filed in the above-entitled case.

The Court should dismiss the petition because Petitioner has not established that it was timely filed under the statute of limitations provision of the Post-Conviction

Remedies Act ("PCRA"). Alternatively, the Court should grant summary judgment in favor of the State because, based on the undisputed facts, she cannot show that her guilty plea was not knowingly and voluntarily entered and, therefore, the State is entitled to judgment as a matter of law on her post-conviction claims.

Statement of Relevant Undisputed Facts

1. On April 19, 2008, Petitioner was contacted by Trooper Steed on suspicion of a traffic violation. A warrant was discovered and she was arrested. Upon searching her person a baggie of methamphetamine was found (Exhibit A).

2. On April 21, 2008, Petitioner was charged with one count of possession or use of a controlled substance, a third degree felony, and one count of possession of drug paraphernalia, a class B misdemeanor (Exhibit A).

3. Petitioner requested that the Preliminary Examination be waived and that she be bound over to the District Court (Exhibit B).

4. On July 16, 2008, Petitioner entered a guilty plea in abeyance (Exhibit C). She pled guilty to one count of possession or use of a controlled substance, a third degree felony. *Id*. The misdemeanor charge was dismissed. *Id*.

5. Petitioner's guilty plea states: "On or about April 19, 2008 the Defendant was stopped on suspicion of a traffic violation. A warrant was discovered and she was arrested. Upon searching her person a baggie of methamphetamine was found." *Id*.

6. On August 21, 2008, Petitioner was found to have violated the terms of the plea in abeyance and therefore the guilty plea was entered (Exhibit D – docket, case no. 081700648).

7. Petitioner was sentenced on September 16, 2008 to 0 to 5 years in prison, but the prison term was suspended on certain conditions of probation. *Id*

8. On the same day as sentencing, Petitioner entered into a Drug Court Agreement (Exhibit E).

9. On January 20, 2009, Petitioner told the Court that she wanted to opt out of Drug Court and be sentenced as soon as possible. Petitioner was terminated from Drug Court (Exhibit D).

10. On March 5, 2009, Petitioner was sentence to 0 to 5 years in prison. The prison term was suspended on certain conditions, including that Petitioner serve 86 days. Petitioner was given credit for 86 days previously served (Exhibit D).

11. On March 11, 2010, in the case of *Salt Lake City v. Rick Lee Jackson*, the trial court granted the defendant's motion to suppress evidence because of credibility concerns with Trooper Steed's testimony. *See* Judge L.G. Cutler, Findings of Fact and Conclusions of Law, Order, case no. 091407252 at 3, attached as Exhibit F.

12. On May 5, 2010, in the case of *City of South Salt Lake v. Jeffrey Scott Nell*, the trial court denied the defendant's motions to suppress evidence, finding that Trooper

Steed's testimony was credible, but indicating concern that Trooper Steed did not follow UHP policies. *See* Judge Robert P. Faust, Ruling, case no. 105900080 at 5, attached as Exhibit G.

13. In a letter dated May 14, 2010, UHP Sergeant Robert Nixon informed Trooper Steed of his intent to recommend that she be disciplined for not following UHP policies and directives related to three separate incidents involving a failure to inform dispatch of a non-consensual blood draw, drawing blood roadside without assistance, and failing to advise dispatch that she was out of her patrol car. *See* First Notice of Intent to Recommend Discipline at 1-2, attached as Exhibit H.

14. In a memorandum dated May 14, 2010, Sergeant Nixon informed Lieutenant Winward that he had "looked into 20 of [Trooper Steed's] 2009 DUI-drug reports where the subject was allegedly impaired on marijuana." *See* Sergeant Nixon Memorandum at 1, attached as Exhibit I.

15. Eleven of these reports "showed no impairing drug in the [suspect's] system." *Id.*

16. Sergeant Nixon also indicated in his memorandum that on May 12, 2010, he assisted Trooper Steed with a blood draw and noted that in her report, Trooper Steed stated that the suspect had dilated pupils, which Sergeant Nixon believed was not the case, and that the suspect's hands were moving uncontrollably, although he was able to

sit calmly while having his blood drawn. *See id.*

17. Sergeant Nixon further stated that he recognizes that there are occasions where a suspect will not show signs of drugs in his or her system, but he feels Trooper Steed's actions show a pattern and that this must be addressed before her credibility is compromised. *Id.*

18. On June 1, 2010, Lieutenant Steve Winward notified Trooper Steed that she was being reprimanded for "issues related to noncompliance with section directives and workplace policies" as set forth in Sergeant Nixon's notice of intent to recommend discipline letter. *See* First Letter of Reprimand at 1, attached as Exhibit J.

19. On August 7, 2010, in a DUI investigation undertaken by Trooper Steed, an incident report and accompanying Intoxilyzer printout were created showing that the time of first contact was 10:28 p.m. and that the time the breath test was observed was 10:20 p.m. *See* Incident Report and Intoxilyzer Printout, attached as Exhibit K.

20. The Intoxilyzer test was performed between 10:36 and 10:38 p.m. *Id.*

21. The blood alcohol level reported in the incident report and in the Intoxilyzer printout were identical, namely, .017.

22. On September 8, 2010, in a cover story in City Weekly, author Stephen Dark reported problems with Trooper Steed's DUI investigations and that defense attorneys were aware of Trooper Steed's credibility problems. *See* City Weekly Cover Story,

"Utah Highway Patrol's DUI Super Trooper Lisa Steed," http://www.cityweekly.net/utah/article-12119-utah-highway-patrols-dui-super-trooper-lisa-steed.html, attached as Exhibit L.

23. In a letter dated November 3, 2010, Sergeant Nixon informed Trooper Steed of his intent to recommend that she be disciplined for a March 10, 2010 incident where she required the DUI suspect to perform a breath test prior to performing field sobriety tests, and because she removed her external microphone after her initial approach of the suspect's vehicle. *See* Second Notice of Intent to Recommend Discipline at 1-2, attached as Exhibit M.

24. On November 19, 2010, Lieutenant Winward reprimanded Trooper Steed for the reasons set forth in Sergeant Nixon's second notice of intent to recommend discipline. *See* Second Letter of Reprimand at 1, attached as Exhibit N.

25. On November 17, 2011, an attorney posted an article in an online blog stating that Utah judges are beginning to recognize credibility problems with Trooper Steed. *See* Glen Neeley, "Judges Find Trooper Lisa Steed Not Credible," http://www.utahduilawblog.com/2010/11/articles/field-sobriety-tests/judges-find-trooper-lisa-steed-not-credible/#comments, attached as Exhibit O.

26. On November 24, 2011, the investigation of Trooper Steed was the subject of a local television news broadcast. *See* KUTV Channel 2 News, "Utah Highway Patrol

Trooper Lisa Steed Under Investigation," http://youtu.be/Mw-7tdsdXp8.

27. On June 18, 2012, in the case of *State of Utah v. Stephanie Michele Nieder*, the trial court granted the defendant's motion to suppress evidence, finding that Trooper Steed's testimony was not credible. *See* Judge Robert Dale, Findings of Fact and Conclusions of Law, Order, case no. 111700161, attached as Exhibit P.

28. Petitioner filed her post-conviction petition and memorandum in support on February 4, 2013.

Petitioner's Claims

Claim 1: Petitioner argues that her due process rights were violated when the prosecutor failed to disclose impeachment and exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner asserts that she has only recently become aware of new evidence showing that in 2010 Trooper Steed was disciplined by her superiors at UHP, that Trooper Steed "observed signs of impairment that were not seen by another peace officer, routinely described physical conditions that were inconsistent with scientific laboratory results, and who habitually completed reports that were identical in content." Mem. in Supp. at 10.

According to Petitioner, this evidence establishes that Trooper Steed was falsifying evidence and that the prosecutor was using perjured testimony to obtain convictions. Had this evidence been disclosed by the prosecution, Petitioner argues that

there is a reasonable probability that the result of her proceeding would have been different. Therefore, her conviction should be vacated.[1]

Claim 2: Petitioner contends that the new evidence she now has in her possession constitutes "newly discovered evidence" as defined by the PCRA. She asserts that, when viewed with all the other evidence in the case, the new evidence "demonstrates that no reasonable trier of fact could have found [her] guilty of the offense or subject to the sentence received." Utah Code Ann. § 78B-9-104(e)(iv). Therefore, she argues, the Court should vacate her conviction.

Argument

I. Introduction

Petitioner bears the burden of pleading and proving by a preponderance of the evidence that she is entitled to post-conviction relief. When a post-conviction petition is filed, rule 65C requires that the "petition . . . state . . . in plain and concise terms, *all of the facts* that form the basis of the petitioner's claim to relief." Utah R. Civ. P. 65C(d)(3) (emphasis added). If available, the petitioner is required to "attach to the petition . . .

[1]Petitioner never states, either in her post-conviction petition or in her memorandum in support of the petition, that her plea was not knowingly and voluntarily entered. However, "a petitioner may collaterally attack a conviction arising from a guilty plea *only* by showing that his plea was entered involuntarily or unknowingly." *Medel v. State*, 2008 UT 32, ¶ 2, 184 P.3d 1226 (emphasis added). Although not directly stated, presumably Petitioner is arguing that the alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963) rendered her guilty plea either unknowing or involuntary.

affidavits, copies of records and other evidence in support of the allegations." Utah R. Civ. P. 65C(e)(1). *See also* Utah R. Civ. P. Form 47 (instructing petitioners in paragraph 19 to "[a]ttach a copy of the following documents to this petition or provide an explanation why you cannot provide copies [of any] . . . [a]ffidavits, records, or other documentary evidence that support your claim.").

As for burden of proof, after "one has been convicted of [a] crime the presumption of innocence and other protections afforded an accused no longer obtain. The presumptions then are in favor of the propriety of the proceedings and the judgment; and the burden of showing to the contrary is upon the plaintiff." *Price v. Turner*, 502 P.2d 121, 122 (1972). In a "case for post-conviction relief, the petitioner bears the burden of 'pointing to sufficient factual evidence or legal authority to support a conclusion of meritoriousness.'" *Bluemel v. State*, 2007 UT 90, ¶ 19, 173 P.3d 842 (quoting *Adams v. State*, 2005 UT 62, ¶ 20, 123 P.3d 400).

Under the PCRA, "[t]he petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle [her] to relief." Utah Code Ann. § 78B-9-105(1). *See also Lucero v. Kennard*, 2005 UT 79, ¶ 24, 125 P.3d 917 ("The petitioner bears the burden of overcoming [the] presumption [of regularity] by a preponderance of the evidence."). This burden also requires Petitioner to establish that her petition was timely filed. *See* Utah Code Ann. § 78B-9-105(2), -106(1)(e).

As noted, the State is requesting that the petition be dismissed because Petitioner has not carried her burden of establishing that her petition was timely filed. In the alternative, the State is requesting summary judgment. A trial court must grant summary judgment if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Utah R. Civ. Proc. 56(c). Summary judgment serves a "salutary purpose" by "eliminate[ing] the time, trouble and expense of a trial, when, upon the best showing the plaintiff can possibly make, he would not be entitled to a judgment." *Brandt v. Springville Banking Co.*, 353 P.2d 460, 462 (Utah 1960); *accord Amjacs Interwest, Inc. v. Design Assocs.*, 635 P.2d 53, 54 (Utah 1981).

Petitioner cannot defeat a summary judgment motion by simply pointing to any question of fact. Rather, a dispute of fact must be "genuine" to preclude relief. Utah R. Civ. Proc. 56(c). A genuine dispute of fact must also be "material to the applicable rule of law" to defeat a summary judgment motion. *Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983). Thus, the "mere existence of genuine issues of fact in the case as a whole does not preclude the entry of summary judgment if those issues are immaterial to resolution of the case." *Horgan v. Indus. Design Corp.*, 657 P.2d 751, 752 (Utah 1982).

II. Petitioner has not established that her petition was timely filed.

The PCRA requires that all challenges to a conviction or sentence be brought "within one year after the cause of action has accrued." Utah Code Ann. § 78B-9-107(1).

Ordinarily, when a petitioner chooses not to file an appeal, the cause of action accrues on "the last day for filing an appeal from the entry of the final judgment of conviction." *Id.* § 78B-9-107(2)(a). Petitioner did not appeal. Therefore, her post-conviction cause of action accrued on October 16, 2008 - 30 days from the date of her sentencing on September 16, 2008. *See* Utah R. App. P. 4(a). Petitioner then had until one year later—October 16, 2009—to file her petition for post-conviction relief. Her petition was not filed until more than three years later, on February 4, 2013. Thus, Petitioner's post-conviction petition is untimely unless she can show that her cause of action accrued no later than February 4, 2012.

Petitioner claims that she only recently learned about the new evidence she now has in her possession, and therefore her post-conviction cause of action accrued on "the date on which [she] knew or should have known, in the exercise of reasonable diligence, of [the] evidentiary facts on which [her] petition is based." *Id.* § 78B-9-107(2)(e). Although the documents her claims rely on were all created in 2010, Petitioner suggests that her post-conviction petition was nevertheless filed within one year from the date she became aware of this new information. This suggestion, however, is unsupported in her pleadings.

Instead of disclosing the date on which she learned of the new evidence, she merely states that "[i]t has recently been learned," Post-Conviction Pet. at 3, "this

information has just come to light," Mem. in Supp. at 11, and "[t]olling in our cases began when Ms Fielding learned about the Steed memo." Mem. in Supp. at 12. The closest she comes to actually disclosing when she learned of the new evidentiary facts is when she states that the "statute of limitations for post-conviction relief [began] to toll on the date the Steed memorandum was the [*sic*] released to the media." Mem. in Supp. at 12. But again, Petitioner never reveals what that date was nor, importantly, does she provide an argument that she could not have discovered the evidence sooner through the exercise of reasonable diligence.

Problems related to Trooper Steed were in public court documents, in the media, and on the internet at least since March 2010, almost three years prior to the date on which she filed her petition. *See* Judge L.G. Cutler, March 11, 2010 Findings of Fact and Conclusions of Law, Order, case no. 091407252; Judge Robert P. Faust, May 5, 2010 Ruling, case no. 105900080; September 8, 2010 City Weekly Cover Story, "Utah Highway Patrol's DUI Super Trooper Lisa Steed," http://www.cityweekly.net/utah/article-12119-utah-highway-patrols-dui-super-trooper-lisa-steed.html; November 17, 2011 Glen Neeley, "Judge Finds Trooper Steed Not Credible," http://www. utahduilawblog.com/2010/11/articles/field-sobriety-tests/judges-find-trooper-lisa-steednotcredible/#comments

Of particular importance, on November 24, 2011, the investigation of Trooper Steed was the subject of a local television news broadcast. *See* KUTV Channel 2 News,

"Utah Highway Patrol Trooper Lisa Steed Under Investigation," http://youtu.be/Mw-7tdsdXp8. Yet Petitioner did not file her post-conviction petition until more than a year later, on February 4, 2013.

Because Petitioner has not disclosed the date on which she became aware of the new evidence in her possession, nor provided any argument why she could not have discovered these evidentiary facts prior to one year before her post-conviction petition was filed, she has not shown that her petition was timely filed under the PCRA. The petition should therefore be dismissed because it is untimely.

III. Petitioner cannot show that her guilty plea was not knowingly and voluntarily entered and, therefore, summary judgment is warranted.

"Because the entry of a guilty plea constitutes a waiver of any pre-plea constitutional violations, a petitioner may collaterally attack a conviction arising from a guilty plea only by showing that [her] plea was entered involuntarily or unknowingly." *Medel v. State*, 2008 UT 32, ¶ 2, 184 P.3d 1226. In Petitioner's case, she cannot show that the new evidence she asserts should have been disclosed to her under *Brady* establishes that her guilty plea was not knowingly and voluntarily entered. Furthermore, the documents also do not satisfy the requirements for relief under the newly discovered evidence provision of the PCRA. Therefore, the State is entitled to summary judgment on Petitioner's post-conviction claims.

A. Petitioner's *Brady* claim fails as a matter of law.

"It is fundamental that the prosecution has a constitutional duty . . . to disclose material, exculpatory evidence to the defense. *State v. Bakalov*, 1999 UT 45, ¶ 30, 979 P.2d 799, 811. A prosecutor's failure to disclose favorable evidence "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*, 373 U.S. at 87. "This is true irrespective of whether the defense requests the favorable evidence or whether the evidence is substantively exculpatory or solely of impeachment value. *Bakalov*, 1999 UT 45, ¶ 30 (citations omitted).

According to Petitioner, the evidence she now has in her possession is not only impeachment evidence, but "[a]rguably, . . . it goes beyond impeachment and may be evidence of the use of perjured testimony." Mem. in Supp. at 4. *See also id.* at 5 ("However, it could be argued that the new information which was clearly withheld from counsel goes beyond impeachment and shows that Steed fabricated evidence."). Because, she argues, the prosecutor failed to disclose this evidence prior to the entry of her guilty plea, she claims that her due process rights under *Brady* were violated and therefore, that her conviction should be vacated. This claim is meritless.

1. No *Brady* violation occurred because the new evidence did not exist when Petitioner pleaded guilty.

All the new evidence Petitioner attaches to her post-conviction petition was created on or after March 11, 2010, the date on which Justice Court Judge L.G. Cutler granted a motion to suppress evidence in the case of *Salt Lake City v. Rick Jackson*, case no. 091407252. Petitioner pleaded guilty on July 16, 2008. Therefore, none of the evidence existed at the time she entered her guilty plea. The prosecutor cannot violate *Brady* for failing to disclose evidence that was not even in existence, and therefore could not have been known, when Petitioner pleaded guilty. For this reason alone, Petitioner cannot show that she is entitled to relief based on her *Brady* claim.

2. No *Brady* violation occurred because the new evidence only has impeachment value.

In any event, even assuming, for the sake of argument, that the evidence was in existence at the time Petitioner pleaded guilty, and that the prosecutor withheld it from Petitioner prior to her guilty plea, no *Brady* violation occurred. Although the prosecutor is required to disclose all exculpatory or impeachment evidence to a defendant prior to *trial*, "in cases where the defendant pleads guilty, thereby waiving his right to trial, his constitutional right to evidence is . . . more limited." *Medel*, 2008 UT 32, ¶ 25. Specifically, the United States Supreme Court has held "that there is no constitutional right to impeachment evidence or evidence regarding affirmative defenses during the plea

bargaining process." *Id.* (citing *United States v. Ruiz*, 536 U.S. 622, 629, 633 (2002)). In Petitioner's case, all of the evidence she attaches to her post-conviction petition is, at best, only impeachment evidence. None of the evidence is "directly related to the charges against [her]; it does not negate a specific element of the prosecution's case. Instead, the information . . . goes solely to the credibility of [Trooper Steed] and serves only to impeach her. It has no other use." *Wickham v. Galetka*, 2002 UT 72, ¶ 14, 61 P.3d 978.

First, none of the new evidence is directly related to the specific facts of Petitioner's case or Trooper Steed's conduct when she contacted Petitioner. Petitioner Fielding was arrested because she had an outstanding warrant. A search of her person upon arrest found a baggie of methamphetamine. Petitioner pleaded guilty to possession or use of a controlled substance. None of the new evidence is relevant to any of these facts.

Second, some of the evidence consists of court rulings from three separate cases all of which were entered long after Petitioner pleaded guilty. Two of these court rulings questioned whether the testimony Trooper Steed provided in those cases was credible. One of the court rulings found Trooper Steed's testimony to be credible, but expressed concern that she did not follow UHP policies. Overlooking the fact that these court rulings would constitute inadmissible hearsay at a trial, at best they only raise issues

related to Trooper Steed's credibility. They in no way relate to the charges against Petitioner and they do not negate a specific element of the State's case.

Third, the new evidence also consists of four UHP documents indicating that Trooper Steed was disciplined twice in 2010 for not following UHP policies and directives. Specifically, she was reprimanded for failing to inform dispatch of a non-consensual blood draw, drawing blood roadside without assistance, failing to advise dispatch that she was out of her patrol car, improperly requiring a suspect to perform a breath test prior to performing a field sobriety test, and removing her external microphone after her initial contact with the suspect's vehicle. *See* First Notice of Intent to Recommend Discipline at 1-2; Second Notice of Intent to Recommend Discipline at 1-2. These documents suggest that Trooper Steed failed on specific occasions to follow UHP policies such as not advising dispatch that she is drawing blood, not administering tests in the proper order, or improperly removing her microphone, all of which are merely peripheral procedural requirements to the actual administration of the tests and blood draws. At best, this evidence could be used to impeach Trooper Steed on cross-examination if she were to testify that she always follows UHP directives.

Fourth, in the May 14, 2010 memorandum from Sergeant Nixon to Lieutenant Winward, Sergeant Nixon indicates that he reviewed 20 of Trooper Steed's 2009 DUI reports where the subject was allegedly impaired on marijuana and found that in eleven

of those cases no impairing drugs were found in the suspect's system. *See* Sergeant Nixon Memorandum at 1. Sergeant Nixon also indicated that he assisted Trooper Steed on one occasion with a blood draw and noted that in her report, Trooper Steed stated that the suspect had dilated pupils, which Sergeant Nixon believed was not the case, and that the suspect's hands were moving uncontrollably, although the suspect was able to sit calmly while having his blood drawn. *See id.* But whether Trooper Steed accurately identifies the outward physical manifestations of impairment due to marijuana use is not directly relevant to cases such as Petitioner's where she was not charged with DUI and no marijuana use was involved. Petitioner was only charged with possession or use of a controlled substance (methamphetamine) and possession of drug paraphernalia.[2] At best, questions about whether Trooper Steed always made accurate assessments of whether a subject was impaired by marijuana is mere impeachment evidence.

Finally, included with the documents attached to the post-conviction petition is an

[2] Petitioner states that Trooper Steed had no reason to ask for her identification, no probable cause to issue field sobriety tests, and never advised her of her constitutional rights. Pet. at 2. But Petitioner waived these issues by pleading guilty**Error! Main Document Only.**. It is well settled that a voluntary guilty plea constitutes a waiver of all non-jurisdictional defects, including pre-plea constitutional violations. *See State v. Parsons*, 781 P.2d 1275, 1278 (Utah 1989); *State v. Sery*, 758 P.2d 935, 938 (Utah App. 1988). When "a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). The issue after a defendant pleads guilty is not the merits of pre-plea claims, but whether the guilty plea was made intelligently and voluntarily and with the advice of competent counsel. *Id*, at 265.

August 7, 2010 incident report and accompanying Intoxilyzer printout. The incident report, written by Trooper Steed, indicates that the time of first contact with a DUI suspect was 10:28 p.m. *See* Incident Report. The Intoxilyzer printout shows that the "time observed" was 10:20 p.m., eight minutes prior to Trooper Steed's initial contact with that suspect. *See* Intoxilyzer Printout. As Petitioner points out, there appears to be a timing inconsistency. It is noteworthy, however, that the actual time the breath test was performed—between 10:36 and 10:38 p.m.—is consistent with the timing of Trooper Steed's initial contact with the suspect. *See id.* And, despite the timing inconsistency, the actual result of the breath test was identical on both documents—.017. *Id.*

However, whether Trooper Steed accurately recorded the timing of events on these documents is not directly relevant to Petitioner's case, where she was not charged with a DUI and no breath test was administered. In any event, even if this evidence were relevant, at most it could be used to show that because Trooper Steed did not accurately record the timing of events on one occasion, that might be a reason to question the credibility of her account of the timing of events in Petitioner's case. Again, however, this is only impeachment evidence.

Because all of the new evidence attached to Petitioner's post-conviction petition has, at best, only impeachment value, had it been in existence at the time Petitioner pleaded guilty and had the prosecutor failed to disclose it, under established United States

Supreme Court precedent, any failure by the prosecutor to disclose it would not have violated Petitioner's due process rights. Nor, therefore, would it have affected the knowing and voluntary nature of her guilty plea.

3. No *Brady* violation occurred because the new evidence is not exculpatory.

a. The new evidence does not suggest factual innocence.

Although the failure to disclose impeachment evidence prior to a defendant pleading guilty does not affect the knowing and voluntary nature of a guilty plea, the Utah Supreme Court has nevertheless held "that there may be circumstances where undisclosed evidence may render a guilty plea involuntary." *Medel*, 2008 UT 32, ¶ 27. According to the Supreme Court, if the withheld evidence "suggests factual innocence [] or shakes [the Court's] confidence in the outcome of the proceedings," then failing to disclose it may violate a defendant's due process rights and cause the plea to be involuntary. *See id.* *See also id.* at ¶ 33 ("[I]n order for a guilty plea to be rendered involuntary based on the prosecution's failure to disclose evidence, a petitioner must establish that the evidence withheld by the prosecution was material exculpatory evidence."). Petitioner has not carried her burden of demonstrating that the new evidence is materially exculpatory evidence or that it suggests factual innocence.

As explained, the evidence is, at best, impeachment evidence that might be useful for attacking Trooper Steed's credibility and the veracity of her account of the events that

transpired at the time she contacted Petitioner. None of the evidence, however, suggests that Petitioner is factually innocent, i.e., that she did not engage in the conduct for which she pleaded guilty – possession or use of a controlled substance. This is so because none of the new evidence is directly related to the specific facts of Petitioner's case or Trooper Steed's conduct at the time she contacted Petitioner. For example, the new evidence does not include statements by Trooper Steed that she lied or falsified evidence in Petitioner's case. Nor is there any audio or video evidence contradicting Trooper Steed's account of how she acted and what transpired during her contact with Petitioner. Therefore, while the evidence may have impeachment value, it does not suggest that Petitioner is factually innocent of the crime to which she pleaded guilty.[3]

b. The new evidence does not undermine confidence in Petitioner's guilty plea.

The evidence also does not undermine confidence in the validity of Petitioner's guilty plea. The Utah Supreme Court has held that a "knowing and voluntary plea is one that has a factual basis for the plea and ensures that the defendant understands and waives his constitutional right against self-incrimination, the right to a jury trial, and the right to confront witnesses." *Nicholls v. State*, 2009 UT 12, ¶ 20, 203 P.3d 976. *See also McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("A defendant who enters . . . a

[3] It is at least noteworthy that Petitioner never asserts in her petition or in her memorandum in support, let alone in an affidavit, that she is innocent of the offense to which she pleaded guilty.

[guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.").

In Utah, "[r]ule 11 of the Utah Rules of Criminal Procedure is designed to protect an individual's rights when entering a guilty plea 'by ensuring that the defendant receives full notice of the charges, the elements, how the defendant's conduct amounts to a crime, the consequences of the plea, etc.'" *Bluemel v. State*, 2007 UT 90, ¶ 17, 173 P.3d 842 (quoting *Salazar v. Warden, Utah State Prison*, 852 P.2d 988, 991 (Utah 1993)). Thus, consistent with rule 11, a knowing and voluntary plea is one where the defendant understands the constitutional rights he is waiving, the nature, elements, factual basis, and maximum and minimum penalties of the offense to which he is pleading guilty, that the prosecutor bears the burden of proving the elements of the offense beyond a reasonable doubt, that a guilty plea is an admission of the elements of the offense, what the plea agreement with the prosecutor is, the time limits for filing a motion to withdraw his plea, and that the defendant's right to appeal is limited. *See* Utah R. Crim. P. 11(e).

Petitioner nowhere alleges in her petition that the trial court failed to conduct a proper rule 11 colloquy. And given the presumption of regularity that applies to her change-of-plea hearing, *see Price*, 502 P.2d at 122, it is presumed that the Court strictly complied with the mandates of rule 11. "Strict compliance with rule 11(e) creates a

presumption that the plea was voluntarily entered." *State v. Gamblin*, 2000 UT 44, ¶ 11 1 P.3d 1108. The fact alone that at the time Petitioner pleaded guilty she was not aware of the new evidence she now has in her possession, does not overcome the presumption that her plea was knowingly and voluntarily entered.

The Utah Supreme Court has held that even if undisclosed evidence would have convinced a defendant to reject the State's plea offer and go to trial had the defendant known about the evidence at the time of the guilty plea, if the evidence does not suggest factual innocence, then the failure to disclose it does not violate the defendant's constitutional rights. *See Medel*, 2008 UT 32, ¶ 41 (concluding that "even if the Report would have convinced [the petitioner] to go to trial, the State's failure to disclose the Report did not violate [the petitioner's] constitutional rights because the evidence in the Report does not suggest factual innocence."). Likewise, in Petitioner's case, even if she had been made aware of the new evidence at the time she pleaded guilty and even if this awareness would have caused her to reject the State's plea offer and insist on going to trial, because the new evidence does not suggest that she is factually innocent, any failure to disclose it could not have affected the knowing and voluntary nature of her guilty plea.

Furthermore, the United States Supreme Court has held 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." *Ruiz*, 536 U.S. at 630. In particular, a "defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case. *Brady v. United States*, 397 U.S. 742, 757 (1970). Thus, even if it were true that the failure to disclose the new evidence would have caused Petitioner to misapprehend the strength of the State's case or the viability of her own defense, this alone would not have affected the knowing and voluntary nature of her guilty plea.

Finally, as explained, the new evidence is, at best, solely impeachment evidence which Petitioner was not entitled to know about prior to entering her guilty plea. *See Ruiz*, 536 U.S. at 633 (the "Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."). If Petitioner was not constitutionally entitled to receive impeachment evidence prior to pleading guilty, it follows that any failure to disclose it could not have had an effect on whether she entered a knowing and voluntarily plea. Therefore, nothing about the new evidence Petitioner attaches to her post-conviction petition undermines confidence that Petitioner's guilty plea was knowingly and voluntarily made.

c. The new evidence is not "evidence of the use of perjured testimony."

Petitioner conjectures that the new evidence she has "goes beyond impeachment

and may be evidence of the use of perjured testimony." Mem. in Supp. at 4. But other than making this bare assertion, she nowhere explains how the evidence establishes that false testimony was used. Indeed, because Petitioner pleaded guilty, there was no trial and, therefore, no testimony, let alone perjured testimony, was used to obtain a conviction. Moreover, the evidence Petitioner now possesses does not show that Trooper Steed's account of the events was self-contradictory, incredibly dubious, absurd, inherently improbable, materially inconsistent, or could not possibly be true. The new evidence only suggests that there may be a reason to question the accuracy of Trooper Steed's account, which, as explained, is solely impeachment evidence, not exculpatory evidence.[4] The new evidence is not, therefore, evidence of the use of perjured testimony.

For all of the foregoing reasons, Petitioner has not carried her burden of demonstrating that her conviction should be vacated because the State failed to disclose available impeachment or exculpatory evidence prior to the entry of her guilty plea. Therefore, the Court should grant summary judgment in favor of the State on this post-conviction claim.

[4] Arguably, Petitioner does not disagree with this conclusion. For all her claims that the prosecutor used perjured testimony, which, as explained, he did not and could not have done, when addressing the connection between the new evidence and her claim of perjured testimony, the most she states is that "the Steed memorandum strongly *suggests* that [Trooper] Steed was falsifying evidence." *Id.* at 10 (emphasis added). In other words, it is evidence that could be used to undermine the believability of Trooper Steed's account, i.e., impeachment evidence.

B. Petitioner's newly discovered evidence claim fails as a matter of law.

Petitioner also argues that she "is eligible for post-conviction relief because the information alleged is newly discovered evidence under the PCRA." *Id.* at 11. To obtain relief on a claim of newly discovered evidence, Petitioner must demonstrate that:

> (i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;
> (ii) the material evidence is not merely cumulative of evidence that was known;
> (iii) the material evidence is not merely impeachment evidence; and
> (iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received; . . .

Utah Code Ann. § 78B-9-104(1)(e). Petitioner has not carried her burden of showing that she is entitled to relief based upon newly discovered evidence.

The State does not contest that neither Petitioner nor her counsel knew about the new evidence at the time Petitioner pleaded guilty. Nor could they have discovered it through the exercise of reasonable diligence. This concession, however, is not based on any failure by the prosecution to properly disclose evidence. Rather, as explained, it is based on the fact that none of the evidence Petitioner now relies on to argue for relief was even in existence at the time she pleaded guilty and, therefore, it could not have been known either by Petitioner or the prosecutor. Nevertheless, even though the new

evidence was not discoverable prior to the entry of Petitioner's guilty plea, it does not constitute newly discovered evidence that would warrant relief under the PCRA.

First, as explained, all of the new evidence Petitioner relies on is merely impeachment evidence. Had the new evidence been available for a trial in Petitioner's case, its sole purpose would have been to call into question the accuracy of Trooper Steed's account of her contact with Petitioner. "The evidence is not directly related to the charges against [her]; it does not negate a specific element of the prosecution's case. Instead, the information . . . goes solely to the credibility of [Trooper Steed] and serves only to impeach her. It has no other use." *Wickham*, 2002 UT 72, ¶ 14. Because the new evidence only has impeachment value, it does not qualify as newly discovered evidence warranting relief under the PCRA. *See* Utah Code Ann. § 78B-9-104(1)(e)(iii). *See also State v. Boyd*, 2001 UT 30, ¶ 28, 25 P.3d 985, 993 ("Newly discovered evidence does not warrant a new trial where its only use is impeachment.").

Second, although Petitioner acknowledges that under the PCRA's newly discovered evidence standard she must establish prejudice by showing that had the new evidence been available, no reasonable trier of fact could have found her guilty, she provides no argument showing that the prejudice requirement has been satisfied. The sum total of her efforts is the mere assertion that "[t]his standard is easily met as outlined

herein." Mem. in Supp. at 12. Such a conclusory statement is insufficient to show that the newly discovered evidence standard has been satisfied.

In any event, as "outlined" in her memorandum in support, Petitioner only addresses the prejudice element of a *Brady* claim, not a claim based on newly discovered evidence. In the *Brady* context, in order for "evidence to be prejudicial . . . , it must be material. Evidence is material if 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Tillman v. State*, 2005 UT 56, ¶ 29, 128 P.3d 1123 (quoting *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)). Showing a reasonable probability of a different outcome, however, is not the same as, and is decidedly less onerous than, showing that *no* reasonable juror *could* have found her guilty.

Under the *Brady* prejudice standard, all Petitioner must do is show a reasonable likelihood that the undisclosed evidence would have caused a *single* juror to vote for acquittal. Under the PCRA's newly discovered evidence prejudice standard on the other hand, Petitioner must show that the new evidence would have caused *all* the jurors to vote for acquittal. Nowhere in Petitioner's post-conviction petition or in her memorandum in support does she ever address the prejudice element of the newly discovered evidence standard.

Even if the new evidence Petitioner includes in her post-conviction petition had been available, it does not show that no reasonable trier of fact could have found her guilty. Petitioner admitted in her guilty plea statement that she was arrested because of a warrant and upon searching her person a baggie of methamphetamine was found (Exhibit C). None of the new evidence is directly relevant to these facts.

None of the new evidence Petitioner now has in her possession is directly relevant to the crimes for which Petitioner was charged or to which she pled guilty. Thus, the evidence would not have been particularly persuasive in challenging Trooper Steed's account of why Petitioner was arrested and charged with possession or use of a controlled substance. Even with the new evidence, a reasonable juror could have rejected Petitioner's challenge to Trooper Steed's credibility and concluded that Trooper Steed was telling the truth that Petitioner was arrested because of an outstanding warrant and methamphetamine was found on Petitioner. Petitioner has not demonstrated, therefore, that when viewed with all the other evidence, the newly discovered evidence shows that no reasonable trier of fact could have found her guilty of the offenses for which she was charged.

For all of the foregoing reasons, Petitioner has not carried her burden of showing that she is entitled to post-conviction relief based upon newly discovered evidence. Therefore, the State is entitled to summary judgment on this post-conviction claim.

Conclusion

Petitioner argues that her conviction that resulted from a guilty plea entered almost five years ago should be vacated because new evidence she now has in her possession was not disclosed by the prosecutor prior to her guilty plea, in violation of her due process rights, and because had the evidence been disclosed, it would have altered the outcome of her change-of-plea proceeding. Petitioner has not shown that her post-conviction petition was timely filed and, therefore, the Court should dismiss it as untimely.

Alternatively, Petitioner has not carried her burden of establishing that she is entitled to relief because (1) none of the new evidence was in existence at the time she pleaded guilty and, therefore, it could not have been known or disclosed by the prosecutor; (2) all the new evidence is impeachment evidence to which Petitioner was not entitled prior to entering her guilty plea; and (3) as impeachment evidence it does not qualify as newly discovered evidence for which relief may be granted under the PCRA. Therefore, the Court should enter summary judgment in favor of the State on Petitioner's post-conviction claims and deny the petition.

DATED May 29, 2013.

JOHN E. SWALLOW
UTAH ATTORNEY GENERAL

/s/ Erin Riley

ERIN RILEY
Assistant Attorney General
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2013, I electronically filed the foregoing STATE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT, with the Clerk of the Court by using the Utah Court's ECF electronic filing system which sent notification of the filing to the following:

Michael P. Studebaker
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Ogden, Utah 84401-3126

Attorney for Petitioner

/s/ Michelle Petersen

EXHIBIT LIST

Exhibit A.....Information

Exhibit B.....Bind-Over Order

Exhibit C.....Statement of Defendant in Support of Guilty Plea in Abeyance

Exhibit D.....docket, case no. 081700648

Exhibit E.....Davis County Drug Court Agreement

Exhibit F.....Judge L.G. Cutler, Findings of Fact and Conclusions of Law, Order, case no. 091407252

Exhibit G.....Judge Robert P. Faust, Ruling, case no. 105900080

Exhibit H.....First Notice of Intent to Recommend Discipline

Exhibit I.....Sergeant Nixon Memorandum

Exhibit J.....First Letter of Reprimand

Exhibit K.....Incident Report and Intoxilyzer Printout

Exhibit L.....City Weekly Cover Story, "Utah Highway Patrol's DUI Super Trooper Lisa Steed

Exhibit M.....Second Notice of Intent to Recommend Discipline

Exhibit N.....Second Letter of Reprimand

Exhibit O.....Glen Neeley, "Judges Find Trooper Lisa Steed Not Credible"

Exhibit P.....Judge Robert Dale, Findings of Fact and Conclusions of Law, Order, case no. 111700161