

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

JESSE FRIEDMAN,

Indictment Nos.
67104, 67430, 69783

Defendant.

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SUPPLEMENTAL MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO VACATE CONVICTION

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Dated: New York, New York
October 18, 2004

SUPPLEMENTAL MEMORANDUM OF LAW IN
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PRELIMINARY STATEMENT

This supplemental memorandum addresses the issue of whether a post-conviction claim pursuant to Brady v. Maryland, 373 U.S. 83 (1963) survives a guilty plea.

Movant has alleged two broad categories of Brady violations that induced his guilty plea. First, the prosecution failed to disclose evidence that the investigators who interrogated the child witnesses used a variety of improper, suggestive, and discredited interrogation techniques that rendered the accounts of the alleged victims unreliable. Second, the prosecution failed to disclose evidence that some students in the Friedman computer classes provided statements exculpating Jesse Friedman; that the events which made up the indictment did not take place and could not have taken place without their witnessing them. Thus, the prosecution withheld crucial impeachment evidence and evidence that the crimes alleged did not take place.

The New York Court of Appeals has never addressed the issue of whether a guilty plea extinguishes a Brady claim. Fifteen years ago, the Third and Second Departments decided the question in completely different ways. Recent decisions by the United States Court of Appeals for the Second Circuit have clearly established, as a matter of

federal Constitutional law, that Brady claims are one of the few claims that survive a guilty plea. For the reasons set forth below, this Court should follow the federal rulings.

ARGUMENT

A GUILTY PLEA DOES NOT EXTINGUISH A CLAIM FOR A BRADY VIOLATION.

In People v. Ortiz, 127 A.D.2d 305, 515 N.Y.S.2d 317 (3d Dep't. 1987), the Third Department held that, "based upon the analysis set forth by the Court of Appeals in People v. Pelchat ... a claim of a violation of Brady rights should not be deemed waived by a guilty plea." Id. at 308, 515 N.Y.S.2d at 319. The Ortiz Court went on to analyze the defendant's claim under traditional Brady standards.

In Pelchat, a marijuana possession case, the prosecutor elicited testimony from a police officer in the grand jury to the effect that he observed twenty-one people off-loading marijuana, and one of them was the defendant. 62 N.Y.2d at 97, 101, 476 N.Y.S.2d 79, 81 (1984). This was the only evidence provided to the grand jury that addressed Pelchat's guilt. Subsequent to the indictment, the police officer told the prosecutor that he had not actually observed Pelchat engaged in any criminal activity, and that

he had misunderstood the question. Id. The prosecutor did not inform the defense of this admission. The defendant entered a guilty plea.

Prior to Pelchat's sentencing, the police officer testified in a trial of a co-defendant, and admitted that he mis-spoke before the grand jury when he testified against Pelchat. Pelchat then moved to withdraw his guilty plea.

The Court of Appeals acknowledged that many rights are waived upon a plea of guilty, but a defendant retains the right to challenge an indictment "which is void because of the prosecutor's knowledge that the only evidence to support it is false." Id. at 85, 476 N.Y.S.2d at 108. The Court of Appeals based its decision on the strong policy and due process considerations that mandate a prosecutor to deal fairly with the accused and candidly with the court. Id. at 105, 476 N.Y.S. 2d at 83. These considerations, obviously, apply with equal force to Brady claims.

One year after Ortiz, the Second Department came to a different conclusion in People v. Day, 150 A.D.2d 595, 541 N.Y.S.2d 463 (2d Dep't. 1988), leave denied, 74 N.Y.2d 807, 546 N.Y.S.2d 565 (1989). Making no reference to Ortiz or Pelchat, the Second Department held that "the plea [of guilty] does signal an agreement not to litigate the factual elements of the crime charged." Id. at 600, 541 N.Y.S.2d at 467. Thus, Brady claims which went to the

question of factual guilt were extinguished by a guilty plea. Other Brady claims not encompassed by the defendant's admissions of factual guilt, such as the lawfulness of a search, would survive.¹

This legal landscape shifted dramatically and decisively in 1998, when the United States Court of Appeals for the Second Circuit decided United States v. Avellino, 136 F.3d 249 (2d Cir. 1998). In Avellino, the Second Circuit held:

The government's obligation to make such disclosures is pertinent not only to an accused's preparation for trial but also to his determination of whether or not to plead guilty. The defendant is entitled to make that decision with full awareness of favorable material evidence known to the government. . . . [T]he validity of the plea must be reassessed if it resulted from "impermissible conduct by state agents[.]" Impermissible conduct includes Brady violations. . . . Thus, we have noted that where prosecutors have withheld favorable material evidence, "even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge."

Id. at 255 (citations omitted). Avellino has been widely

¹The First Department declined to decide the issue in People v. Martin, 240 A.D.2d 5, 669 N.Y.S.2d 268 (1st Dep't.), leave denied, 92 N.Y.2d 856, 677 N.Y.S.2d 86 (1998), holding only that Brady claims raised post-plea should be decided on a case-by-case basis, regardless of whether they are related to a defendant's factual guilt. Id. at 9, 669 N.Y.S. 2d at 271. This holding logically must imply that, at least in some cases, Brady claims related to factual innocence do survive a plea of guilty. But the Martin Court expressly stated that it was not deciding that question. Id. at 17, 669 N.Y.S.2d at 274.

relied upon and followed. See, e.g. United States v. Persico, 164 F.3d 796 (2d Cir. 1999) ("The Government's obligation to disclose Brady materials is pertinent to the accused's decision to plead guilty; the defendant is entitled to make that decision with full awareness of favorable (exculpatory and impeachment) evidence known to the Government."); Brown v. Berbary, 2004 U.S. Dist. LEXIS 13598 (W.D.N.Y. 2004) (Unlike other claims, a Brady claim survives a guilty plea); United States v. Hudak, 2003 U.S. Dist. LEXIS 16443 (S.D.N.Y. 2003) (Where a Brady violation is established, the court must allow the guilty plea to be withdrawn).

The Second Department's holding in Day cannot survive the force of the Constitutional rulings in Avellino and its successors. Nor should it. Under Day, a palpably guilty defendant can benefit from a his post-plea discovery of a Brady violation, but a demonstrably innocent defendant cannot. A rule that only permits guilty defendants to go free, while excluding innocent defendants from being heard (precisely because they are innocent), strikes not just at the heart of the criminal justice system, but at its soul. See also, People v. Curry, 164 Misc. 2d 969, 627 N.Y.S. 2d 214 (Sup. Ct., N.Y. Cty., 1995) (Day fails to reflect the reality of plea agreements; adopts the Ortiz rule).

CONCLUSION

Movant is mindful of the odd place of federal habeas corpus jurisprudence in the development of State law, and acknowledges that Avellino does not, and cannot, "reverse" Day. Indeed, no New York Court has ever cited Avellino. Denying this motion based upon the preclusive effect of Day merely hastens the day when movant becomes a federal habeas corpus petitioner, and will have his claim considered in a federal forum governed by Avellino. When that day comes, it would be far better for the federal court to have the benefit of a full record, based upon discovery and evidentiary hearings, and credibility determinations made by this Court.

For the forgoing reasons, this Court should set forth a schedule for hearings.

Dated: New York, New York
October 18, 2004

Respectfully Submitted,

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