No. 13-347

In the Supreme Court of the United States

CALIFORNIA, *Petitioner,*

v.

BALDOMERO GUTIERREZ, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

REPLY BRIEF FOR THE STATE OF CALIFORNIA

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REPLY BRIEF FOR THE STATE OF CALIFORNIA

CERTIORARI IS NEEDED TO DETERMINE WHETHER DUE PROCESS REQUIRES DISCLOSURE OF *BRADY* MATERIAL AT A PRELIMINARY HEARING

1. THE DECISION BELOW IS GROUNDED SOLELY ON THE FEDERAL DUE PROCESS CLAUSE, NOT AN INDEPENDENT STATE GROUND

Respondent principally opposes certiorari by claiming the decision below rests on independent

state grounds. See Brief in Opp. 1. The assertion is incorrect.

The state court of appeal could not have been clearer in stating that its judgment rested exclusively on the federal Constitution: "Because we . . . conclud[e] that defendants have a due process right under the United States Constitution to *Brady*[1] disclosures in connection with preliminary hearings, we need not address whether defendants also have that due process right under the California Constitution." Pet. App. 17a n.5. Respondent actually acknowledges the federal basis of the decision. *See* Brief in Opp. 2 ("it is true that the court's ruling was based on California's cases construing the scope of the *federal* right under *Brady*," italics added).

Respondent's opposition devolves to an assertion that the state court of appeal *could* have resolved the case on an independent state ground—but did not. Such a contention does not defeat this Court's jurisdiction. *See Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (the fact that the state court "might have, but did not, invoke state law does not foreclose jurisdiction here"); *United Air Lines* v. *Mahin*, 410 U.S. 623, 630-31 (1973) (the mere "possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question").

Unable to point to anything in *this* decision that rests on independent state grounds, respondent instead cites *Bridgeforth* v. *Superior Court*, 214 Cal. App. 4th 1047, 154 Cal. Rptr. 3d 528 (2013), a later

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[1] *Brady* v. *Maryland*, 373 U.S. 83 (1963).

decision from a different intermediate state court, which is discussed in the State's petition. Pet. 8, 10. As in the present case, the appellate court in *Bridgeforth* insisted that defendants have a federal due process right to disclosure of exculpatory and impeachment evidence "prior to the preliminary hearing." 214 Cal. App. 4th at 1081, 154 Cal. Rptr. 3d at 534. Unlike the decision below in the present case, *Bridgeforth* purports to base its holding not only on the United States Constitution, but also on the California Constitution. *Id.* But *Bridgeforth*'s bare incantation of the California Constitution does not preclude review of the federal question in the present case.[2]

First, *Bridgeforth*'s discussion of the timing of disclosures is completely dependent upon and interwoven with that court of appeal's understanding of *Brady* and its federal progeny. The defendant in *Bridgeforth* grounded a demand for "prepreliminary hearing production" of potentially exculpatory evidence on federal law. *Bridgeforth*, 214 Cal. App. 4th at 1081, 154 Cal. Rptr. 3d at 534. In response, the court of appeal repeatedly cited and analyzed this Court's authorities, particularly *Brady*, *United States* v. *Bagley*, 473 U.S. 667 (1985), and *United States* v. *Ruiz*, 536 U.S. 622 (2002), in discussing the scope

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[2] Ultimately, the court of appeal concluded that the evidence at issue was not material because its disclosure would not have changed the outcome of the preliminary hearing. *Bridgeforth*, 214 Cal. App. 4th at 1089, 154 Cal. Rptr. 3d at 540. The judgment in favor of the State in *Bridgeforth* effectively insulates that court's discussion of *Brady* from this Court's review. At the same time, however, the finding in *Bridgeforth* of neither federal nor state error, based on materiality, reveals that its gratuitous endorsement of compelled prepreliminary hearing discovery, either under *Brady* or the California Constitution, is dicta.

and timing of a defendant's right to receive exculpatory and impeachment material. The appellate court performed no independent analysis of state law; rather, it performed a uniform analysis focusing on this Court's *Brady* jurisprudence. See *Bridgeforth*, 214 Cal. App. 4th at 1083-87, 154 Cal. Rptr. 3d at 535-39.

In fact, *Bridgeforth* expressly purports to apply this Court's *Ruiz* decision, and, consequently, it invokes the California Constitution only by way of an afterthought: "Accordingly, applying the traditional three-factor due process analysis utilized in *Ruiz*, [536 U.S. at 631], we conclude that the established California authorities . . . are fully consistent with due process under the federal Constitution, as well as California Constitution, article I, sections 7, subdivision (a) and 15." *Bridgeforth*, 214 Cal. App. 4th at 1087, 154 Cal. Rptr. 3d at 538.

It is "well established . . . that this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law. . . . If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law." *Three Affiliated Tribes* v. *Wold Engineering*, 467 U.S. 138, 152 (1984); *see* also *Florida* v. *Powell*, 559 U.S. 50, 57 (2010) ("we have jurisdiction to entertain this case. Although invoking Florida's Constitution and precedent in addition to this Court's decisions, the Florida Supreme Court treated state and federal law as interchangeable and interwoven; the court at no point expressly asserted that state-law sources gave Powell rights distinct from, or broader than, those delineated in *Miranda* [v.

Arizona, 384 U.S. 346 (1966)]"); *Michigan* v. *Long*, 463 US. 1032, 1040-41 (1983) ("when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we 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").

Second, no decision of the California Supreme Court accords to a discussion like that in *Bridgeforth* the distinction of resolving an issue based on independent state grounds. Nor is it the practice of this Court to refuse plenary review of a case decided squarely and exclusively on federal constitutional grounds because another intermediate court of the State has endorsed a given result on state grounds in dicta. Declining to review the present case based on *Bridgeforth* would give the latter decision a status to which it is not entitled. Its view of the timing for disclosure of exculpatory evidence under state law cannot speak for the California Supreme Court, nor for any other intermediate California appellate court—including the court below. *See Auto Equity Sales, Inc.* v. *Superior Court*, 57 Cal. 2d 450, 455, 20 Cal. Rptr. 321 (1962).

Third, *Bridgeforth*'s purported reliance on the California Constitution must be read in light of the longstanding rule in this State that "'cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution.'" *Raven* v. *Deukmejian*, 52 Cal. 3d 336, 353, 276 Cal. Rptr. 326, 337 (1990). *Bridgeforth* nowhere purports to depart from this Court's

interpretations of the Due Process Clause. Rather, as that decision makes plain, the court of appeal believed that it was *following* precedents of this Court that compelled its own holding. For these reasons, *Bridgeforth*'s invocation of the state Constitution is insufficient to preclude resolution of the federal question in the present case

2. THE STATES ARE IN CLEAR CONFLICT REGARDING WHETHER *BRADY* REQUIRES PREPRELIMINARY HEARING DISCLOSURE

Respondent maintains "there is no conflict between the decision in this case and those issued by other state courts." Brief in Opp. 8. That assertion is belied by respondent's acknowledgement that Wisconsin and Oklahoma courts hold the federal Constitution does not compel *Brady* disclosures at a preliminary hearing. See Brief in Opp. 10-11 (describing Wisconsin rule as standing for the proposition that "discovery at the time of the preliminary hearing" is not "'constitutionally compelled'"), 11 (describing Oklahoma decision as "relying on *Brady*" in "refus[ing] to compel discovery of any potential exculpatory information . . . at the time of the preliminary hearing"). Indeed, as respondent candidly acknowledges, the Connecticut Supreme Court, like the court below, has held that the Due Process Clause mandates disclosure of exculpatory evidence at the preliminary hearing. Brief in Opp. 11-12, citing *State* v. *McPhail*, 213 Conn. 161, 166-67, 567 A.2d 812, 815-16 (1989).

Respondent argues this clear conflict in decisions by the States merely concerns the *remedy* "for alleged *Brady* error at the time of the preliminary hearing." Brief in Opp. 10. That suggestion merely begs the question; if *Brady* does not apply at that early stage of a criminal proceeding,

then no "error" exists to be remedied. For the same reason, the fact that several States have *statutory* rules requiring early disclosure of exculpatory materials, Brief in Opp. 12, says nothing about when the Constitution compels the prosecutor to make disclosures under *Brady*. The four States that have weighed in on the constitutional question to date are evenly split on the answer. Prosecutors throughout the Nation should not be left to await a split in authority even more pronounced and confounding before a definitive answer is forthcoming.

Respondent also unpersuasively downplays the inconsistency between the decision below and the decisions by this Court and federal circuit courts, regarding the scope of *Brady*. Respondent would have this Court ignore that inconsistency because federal prosecutions "are generally generated via grand jury indictment rather than by information." Brief in Opp. 7. Therefore, he maintains, "[t]here is no conflict between the holding in this case and federal circuit authority." *Id.* This argument ignores the overriding need for a uniform and workable rule regarding the scope and timing of *Brady* disclosures by the several States that routinely employ preliminary hearings, including California, the Nation's largest State. Failure to provide that answer only would encourage the abandonment of the preliminary hearing, which respondent lauds as providing "important" benefits to criminal defendants, Brief in Opp. 9, in favor of the grand jury, where, as respondent concedes, *Brady* does not apply, Brief in Opp. 7. The decision below is inconsistent with the many decisions of this Court that characterize *Brady* as the right of a defendant at trial, rather than as the right of a defendant hoping to avoid trial.

3. PRACTICAL CONSIDERATIONS FAVOR GRANTING THE PETITION

Respondent raises two additional objections. Neither deserves more than brief comment. First, he maintains that enforcing *Brady* at the preliminary hearing stage will not "work a substantial hardship on the prosecution function." Brief in Opp. 13. This argument urges that *Brady* ought to apply at preliminary hearings, not that the Court's consideration of the issue is unneeded or inappropriate. Suffice to say, the ruling of the court of appeal below threatens a massive reallocation of prosecution resources. If the decision goes unreviewed, what was heretofore a trial discovery obligation will be advanced to the early preliminary hearing stage in the vast majority of felony cases in California. In Los Angeles County alone, 30,636 felony cases proceeded to preliminary hearing between August 2011 and September 2013. Brief of Amicus Curiae Los Angeles County District Attorney 4. In nearly one-third of those cases, the preliminary hearing was held within two weeks of the filing of a felony complaint. *Id.* A clear majority of those cases will end in a guilty plea after the preliminary hearing and before trial. Even though the Constitution does not require prosecutors to disclose exculpatory and impeachment materials to aid the defendant in his or her decision to plead guilty, *United States* v. *Ruiz*, 536 U.S. 622, the court below has now required *Brady* disclosures at the earliest stage of the criminal proceeding. Respondent seems to suggest that prosecutors may gamble that undisclosed material will not be "material" enough to sustain a pretrial motion for dismissal based on a purported *Brady* violation. Brief in Opp. 15. The suggestion is ill-taken. No ethical prosecutor is free to disregard the holding below, which requires the disclosure of all

exculpatory, impeaching, and mitigating evidence potentially material to probable cause at the preliminary hearing.

Finally, respondent asserts that certiorari should be denied because the prosecution is "unlikely" to succeed at trial. Brief in Opp. 18. The argument is entirely speculative. That the prosecution showed probable cause through a police officer's hearsay testimony at the preliminary hearing—as permitted under state law—says nothing about its ability to produce compelling evidence of guilt (whether including testimony of the victims or otherwise) at trial. Opp. at 18-19. This prosecution is brought in the good-faith belief that the prosecution will be able to prove its case, and respondent does not contend otherwise. Respondent's speculation about the strength of the prosecution's case is no reason to deny the petition.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: October 31, 2013

Respectfully submitted

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