No.

In the Supreme Court of the United States

STATE OF CALIFORNIA, *Petitioner,*

v.

BALDOMERO GUTIERREZ, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

"Due process requires prosecutors to 'avoi[d] . . . an unfair trial' by making available 'upon request' evidence 'favorable to an accused . . . where the evidence is material either to guilt or to punishment.'" *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002) (alterations in original) (quoting *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963)).

The question presented is:

Does this due process obligation require prosecutors to provide exculpatory evidence to a criminal defendant before a preliminary hearing at which a magistrate determines whether sufficient cause exists to require the defendant to stand trial?

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PETITION FOR WRIT OF CERTIORARI

The State of California petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, First Appellate District.

OPINIONS BELOW

The opinion of the California Court of Appeal, issued on March 12, 2013 and modified on April 9, 2013, is reported at 214 Cal. App. 4th 343, 153 Cal. Rptr. 3d 832 (2013). The original opinion is attached in the Appendix (App.) at 1a, and the modification is at 21a.

JURISDICTION

The California Supreme Court denied review on June 19, 2013, App. 24a, at which time the judgment of the court of appeal became final for all purposes. Cal. R. Ct. 8.366(b), 8.532(b)(2)(A). This Court's jurisdiction is timely invoked under 28 U.S.C. § 1257(a) and Supreme Court rule 13.1.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

On May 30, 2002, the State filed a felony complaint charging respondent Gutierrez with two counts of committing lewd acts on a child under age 14 in violation of Cal. Penal Code § 288(a), one count involving Jane Doe 1 and the other involving Jane Doe 2. An arrest warrant issued that day, but Gutierrez was not apprehended until May 27, 2011. App. 2a.

An adversarial preliminary hearing was held in July 2011 to determine the existence "of probable cause to believe that the defendant . . . committed a felony." Cal. Penal Code § 866(b); see also *id.* § 872(b) (probable cause may be shown by hearsay testimony of a qualified peace officer). The State presented testimony by a police officer who interviewed Jane Doe 1 and Jane Doe 2 in November 2001, at which time both were 11 years old and resided in Gutierrez's home as foster children. Jane Doe 1 told the officer that, on the previous day, Gutierrez pulled her onto his bed, tried to kiss her, and touched her vaginal area over her pants. Jane Doe 2 told the officer that, about a year earlier, Gutierrez put his arm over her shoulder in a friendly way and rubbed her buttocks over her clothes. The magistrate found probable cause for both counts and ordered Gutierrez to stand trial. App. 2a-3a.

Following the preliminary hearing, Gutierrez filed a motion in the juvenile court pursuant to California law to inspect any relevant court records relating to Jane Doe 1. See App. 32a-34a; Cal. Welf. & Inst. Code § 827. In response, the juvenile court provided petitioner with two police reports disclosing that Jane Doe 1 had made unsubstantiated allegations that she had been molested on prior occasions. App. 3a.

One report reflected that, in 1996, Jane Doe 1 stated that her mother's boyfriend had sexually assaulted her with a screwdriver. The report indicated that the case was closed because a medical examination revealed no evidence of trauma and because Jane Doe 1's older sister admitted making similar false accusations against the boyfriend under threats from her mother. App. 3a-4a.

The second report indicated that, in 1999, Jane Doe 1 had told police that her mother's boyfriend molested her. That case had been presented to a deputy district attorney, who decided not to file charges in view of Jane Doe 1's unsubstantiated 1996 allegation and verification of the boyfriend's alibi in the 1999 incident. Later, when the police spoke to Jane Doe 1 again, she nodded her head when the officer suggested she might have accused the boyfriend under threats from her mother, just as her older sister had. App. 4a.

In the superior court, Gutierrez moved to dismiss the charges, arguing that the prosecution had breached its duty under *Brady* v. *Maryland*, 373 U.S. 83, by failing to disclose the 1996 and 1999 police reports before the preliminary hearing. App. 4a. At the hearing on Gutierrez's motion, the prosecutor argued *inter alia* "*Brady* is inapplicable because . . . there can be no violation of *Brady* unless the government's nondisclosure infringes upon the defendant's right to a fair trial." App. 28a-29a. The superior court found a *Brady* violation and dismissed the charges against Gutierrez, concluding that it was "reasonably probable the outcome of the preliminary hearing would have been different if the exculpatory evidence had been produced." App. 4a-5a.

The State appealed, challenging the superior court's ruling only on the "pure issue of law regarding *Brady*'s application" at a preliminary hearing. App.

22a. The California Court of Appeal rejected that challenge on the merits. It first surveyed intermediate court decisions in California, concluding that they held "the prosecution's *Brady* obligation extends to the preliminary hearing stage of criminal proceedings." App. 7a. The court disagreed with the State's argument that these decisions had been abrogated by an intervening state initiative measure known as Proposition 115, which regulates discovery of exculpatory evidence in criminal cases except as otherwise "mandated by the Constitution of the United States." See Cal. Pen. Code § 1054(e). Having concluded that *Brady* disclosures are mandated at the preliminary hearing, App. 7a, 17a n.5, the court found that the initiative could not "supersede the prosecution's *Brady* obligation under the United States Constitution." App. 8a; see also App. 10a ("Propositon 115 could not alter the prosecution's *Brady* obligation"). Finally, in view of the California authorities, the court rejected authority from other jurisdictions reflecting that "*Brady* disclosures are not required for preliminary hearings." App. 16a.

The court emphasized that, because it had concluded "that defendants have a due process right under the United States Constitution to *Brady* disclosures in connection with preliminary hearings," it need not address whether independent state grounds warranted the disclosures. App. 17a n.5. Having found that the nondisclosure of the reports constituted a *Brady* violation, the court affirmed the order of dismissal. App. 19a. The California Supreme Court subsequently denied the State's petition for review. App. 24a.

REASONS FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER DUE PROCESS REQUIRES DISCLOSURE OF *BRADY* MATERIAL AT THE PRELIMINARY HEARING

The State acknowledges that the two police reports include relevant impeachment information that would fall within the ambit of "material evidence" under *Brady* and its progeny. The only question in this case is *when* the Constitution would require the material to be disclosed.

Gutierrez obtained the police reports before trial. He has never contended that the disclosure came too late to allow him to prepare a trial defense. Instead, his sole claim is that he was entitled to receive that discovery at or before the preliminary hearing as a matter of constitutional imperative. This view was endorsed by the California Court of Appeal, which concluded that "defendants have a due process right under the United States Constitution to *Brady* disclosures in connection with preliminary hearings . . . ." App. 17a n.5.

The decision by the court of appeal is inconsistent with this Court's *Brady* jurisprudence and squarely at odds with decisions of other States on the fundamental question of the due process right of defendants to *Brady* material before a magistrate decides probable cause. The state court of appeal has announced a novel interpretation of *Brady* that would work a "radical a change in the criminal justice process," *United States* v. *Ruiz*, 536 U.S. at 632, transforming *Brady* from what has heretofore been universally recognized as a trial right into one that would apply at the earliest stages of the criminal process. The issue deserves the Court's plenary consideration.

1. This Court's *Brady* jurisprudence consistently characterizes the required disclosures of exculpatory and impeachment information as "trial-related rights." *United States* v. *Ruiz*, 536 U.S. at 631. *Brady* itself identified the Due Process interest at stake as the "avoidance of an unfair trial to the accused." 373 U.S. at 87. In *United States* v. *Agurs*, 427 U.S. 97, 108 (1976), the Court stated that "unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose." In *United States* v. *Bagley*, 473 U.S. 667, 678 (1985), the Court reiterated that "suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. . . . [A] constitutional error occurs, and the conviction must be reversed, only if the suppression undermines confidence in the outcome of the trial." In *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999), the Court stated that "there is never a real '*Brady* violation' unless . . . the suppressed evidence would have produced a different verdict." Most recently, in *United States* v. *Ruiz*, 536 U.S. at 628, the Court declared that disclosure of *Brady* evidence is "a right that the Constitution provides as part of its basic 'fair trial' guarantee." Accordingly, in *Ruiz* the Court rejected the notion that the Constitution requires disclosure of impeachment information before a guilty plea. *Id.* at 629.

2. Although the Court "'has never pinpointed the time at which the disclosure [under *Brady*] must be made,'" *United States* v. *Anderson*, 481 F.2d 685, 690 n.2 (4th Cir. 1973), *aff'd sub nom. Anderson* v. *United States*, 417 U.S. 211 (1974); see also *United States* v. *Beckford*, 962 F. Supp. 780, 785 (E.D. Va. 1997), the federal circuits agree that "no due process

violation occurs as long as *Brady* material is disclosed to a defendant in time for its effective use at trial." *United States* v. *Smith Grading and Paving, Inc.*, 760 F.2d 527, 532 (4th Cir. 1985); accord, *United States* v. *Coppa*, 267 F.3d 132, 142 (2nd Cir. 2001) ("[W]e have never interpreted due process of law as requiring more than that *Brady* material must be disclosed in time for its effective use at trial"); *United States* v. *O'Keefe*, 128 F.3d 885, 898-99 (5th Cir. 1997) ("When evidence is disclosed at trial in time for it to be put to effective use, a new trial will not be granted 'simply because it [the *Brady* evidence] was not disclosed as early as it might have and, indeed, should have been'"); *United States* v. *Higgins*, 75 F.3d 332, 335 (7th Cir. 1996); *United States* v. *Knight*, 867 F.2d 1285, 1289 (11th Cir. 1989); *United States* v. *Holloway*, 740 F.2d 1373, 1380-81 (6th Cir. 1984); *United States* v. *Peters*, 732 F.2d 1004, 1009 (1st Cir. 1984) (*Brady* violation warrants reversal "only if nondisclosure 'might have affected the outcome of the trial'"); *United States* v. *Warhop*, 732 F.2d 775, 777 (10th Cir. 1984); *United States* v. *Starusko*, 729 F.2d 256, 262 (3d Cir. 1984); *United States* v. *Olson*, 697 F.2d 273, 275 (8th Cir. 1983) ("We recognize that *Brady* v. *Maryland* and *United States* v. *Agurs* do not require the pre-trial disclosure of material evidence as long as the ultimate disclosure is made before it is too late for the defendant to make use of the evidence"); *United States* v. *Shelton*, 588 F.2d 1242, 1247 (9th Cir. 1978) ("delay in disclosing [*Brady* material] only requires reversal if 'the lateness of the disclosure so prejudiced appellant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial'"). The approach endorsed by the circuits is consonant with this Court's *Brady* jurisprudence.

3. Given that the federal criminal process typically proceeds by way of grand jury indictment, the circuit courts have had no occasion to determine *Brady*'s application in the context of preliminary hearings. But several state courts have. The Wisconsin Supreme Court, recognizing that "the constitutional source of the defendants' right to exculpatory material is in the right to a fair *trial* guaranteed by the fifth and fourteenth amendments to the United States Constitution," has held that exculpatory material generally need not be furnished at the preliminary hearing in the absence of a showing of particularized need. *State ex rel Lynch* v. *County Court, Branch III*, 82 Wis. 2d 454, 465, 467-68, 262 N.W.2d 773 (1978). Likewise, the Oklahoma Court of Criminal Appeals has ruled that *Brady* material need not be furnished to a defendant at a preliminary hearing. *Stafford* v. *District Court*, 595 P.2d 797, 799 (Okla. Crim. App. 1979).

4. The California Court of Appeal has charted a different course, concluding that "defendants have a due process right under the United States Constitution to *Brady* disclosures in connection with preliminary hearings . . . ." App. 17a n.5. Under the California approach, post-preliminary hearing disclosure of *Brady* material is constitutionally defective even if the disclosure is sufficiently in advance of trial to permit its effective use as a defense to the charge. And materiality is not measured by its impact on the defendant's *trial* or *verdict*, as in *Brady*, *Agurs*, *Bagley*, *Strickler*, and *Ruiz*, but by its impact on the magistrate's probable cause determination at the preliminary hearing. App. 5a, 18a; see also *Bridgeforth* v. *Superior Court*, 214 Cal. App. 4th 1074, 1087, 154 Cal. Rptr. 3d 528, 539 (2013) ("the standard of materiality is whether there is a reasonable probability that disclosure of the

exculpatory or impeaching evidence would have altered the magistrate's probable cause determination"). When this standard is met, according to the state court of appeal, the prosecution must suffer a pretrial dismissal and start anew (if it can) as a matter of constitutional imperative under *Brady*. App. 18a.

The state court of appeal's conclusion that criminal defendants have a due process right to *Brady* disclosures at the preliminary hearing sets California apart from the federal and state authority discussed above. The court's suggestion that its holding merely follows an established line of intermediate-court California authority, App. 1a, is mistaken. The cited troika of cases—*Merrill* v. *Superior Court*, 27 Cal. App. 4th 1586, 33 Cal. Rptr. 2d 515 (1994); *Currie* v. *Superior Court*, 230 Cal. App. 3d 83, 281 Cal. Rptr. 250 (1991); *Stanton* v. *Superior Court*, 193 Cal. App. 3d 265, 239 Cal. Rptr. 328 (1987)—concerned whether, under California criminal procedure, the defendant had been deprived of a "substantial right" at the preliminary hearing by the withholding of certain evidence. *Merrill* at 1594-95; *Currie* at 98; *Stanton* at 270. *Currie* and *Stanton* do not cite *Brady*, and *Merrill* does so only in passing.

Because these decisions relied on the state-law "substantial rights" doctrine, the State argued they had been abrogated by the intervening initiative measure, Proposition 115. In response, the court of appeal invoked a truism—that "nothing in Proposition 115 could supersede the prosecution's *Brady* obligation under the United States Constitution." App. 8a. Its holding effectively allowed it to avoid the State's Proposition 115 argument by making respondent's "substantial rights" under state law synonymous with and dependent upon the timing of the federal constitutional *Brady* obligation of

disclosure at trial. App. 18a ("Breach of the prosecution's *Brady* obligation must therefore be deemed to violate a substantial right"). Indeed, the court of appeal cited in support of its ruling the California Supreme Court's decision in *People* v. *Ruthford*, 14 Cal. 3d 399, 534 P.2d 1341, 121 Cal. Rptr. 261 (1975), App. 5a-7a, a decision involving the failure to provide impeachment material at trial, not at a preliminary hearing.

In sum, the court of appeal newly interpreted prior state law decisions as reflecting an unequivocal federal constitutional rule that "the prosecution's *Brady* obligation extends to the preliminary hearing stage of criminal proceedings." App. 7a. The decision has already been joined by another California appellate court. See *Bridgeforth* v. *Superior Court*, 214 Cal. App. 4th at 1084, 154 Cal. Rptr. 3d at 536.

California thus stands in direct conflict with at least two sister states on the precise question of whether *Brady* applies at a preliminary hearing. The California approach also conflicts with this Court's consistent characterization of the *Brady* rule as a trial right.

5. If the California Court of Appeal is correct that the prosecution must disclose *Brady* material at or prior to a preliminary hearing, this Court's holding in *Ruiz* that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant," 536 U.S. at 633, would be eviscerated. The impact will be overwhelming, potentially affecting hundreds of thousands of cases in California alone. In fiscal year 2011-2012, felony dispositions in California totaled 227,124 cases. Judicial Council of Cal., *2012 Court Statistics Report, Statewide Caseload Trends, 2001-2002 through 2010-2011,* xv, 48,

http://www.courts.ca.gov/12941.htm#id7495 (follow "Full Report" hyperlink). Of these, only 6,511 were resolved as a result of a jury or court trial. *Id.* Of the 220,613 felony cases disposed of before trial, sixty-nine percent resulted in felony convictions. *Id.* In practical terms, this means that more than 150,000 felony convictions were obtained by guilty or no contest plea in California in fiscal year 2011-2012. Though *Ruiz* holds that *Brady* disclosures do not have to be made in anticipation of a plea, the California Court of Appeal holds that such disclosures are nevertheless constitutionally compelled in any case which proceeds to preliminary hearing. Applying *Brady* in this fashion would advance the required disclosures to the earliest stages of the criminal process and effectively nullify *Ruiz*. In simple math, the opinion of the state court of appeal has expanded *Brady*'s reach in California felony cases more than 20 fold, from some 6,500 trial cases to potentially 150,000 cases that result in pleas short of trial.

Not only would the California court's approach to *Brady* impose a crushing burden on prosecutors in terms of the number of cases for which early *Brady* disclosures would now be constitutionally compelled, it would create a nearly impossible burden in terms of timing. California defendants may insist upon a preliminary hearing within 10 days of arraignment on a felony complaint. See Cal. Penal Code § 859b. Quite simply, this is an inadequate period of time to gather all of the exculpatory material that may be in possession of some member of the prosecution team. See *Kyles* v. *Whitley*, 514 U.S. 419, 438 (1994) ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police").

With its decision, the California Court of Appeal has dramatically changed the *Brady* landscape and dramatically increased the burdens on prosecutors. In *Ruiz*, this Court rejected a *Brady*-type disclosure rule at the plea bargaining stage given that it would "demand[] so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit." 536 U.S. at 632. The change wrought by the decision of the California Court of Appeal in this case is no less astounding and the constitutional benefit is likewise negligible.

6. Finally, it must be emphasized that the question in this case is only whether the United States Constitution requires disclosure of *Brady* trial material at the preliminary hearing. To answer that question in the negative does not imply that no safeguards attend a preliminary hearing. Basic rules of professional conduct require prosecutors to deal fairly and openly with criminal defendants at every stage of the proceeding. See, *e.g.*, Cal. R. of Professional Conduct 5-110 ("A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause"). Certainly, as a matter of best prosecutorial practices, the California Attorney General endorses the early disclosure of exculpatory evidence and the development of discovery policies which are designed to bring all such materials to light at an early stage. See, *e.g.*, David W. Ogden, *Guidance for Prosecutors Regarding Criminal Discovery*, U.S. Dept. of Justice Mem. (Jan. 4, 2010), http://www.justice.gov/dag/discovery-guidance.html ("Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases"). But, it is quite a different matter to conclude that the

Constitution compels disclosure of evidence at the preliminary hearing, as the California Court of Appeal has done.

The state court's decision places California at odds with decisions in other states and conflicts with this Court's *Brady* jurisprudence. Making the constitutional validity of California felony prosecutions depend on disclosure of exculpatory and impeachment evidence not only in time for its effective use at trial, but in time for its effective use at a preliminary hearing, places an enormous burden on prosecutors and law enforcement agencies while achieving no perceptible benefit in terms of the reliability and fairness of the trial process. *Brady*'s application should be uniform across state and federal jurisdictions. The California court's profound error under the Constitution requires this Court's intervention.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted

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Dated: September 16, 2013

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APPENDIX

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Court of Appeal First Appellate District
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Diana Herbert, Clerk
DEPUTY

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION THREE

THE PEOPLE,
Plaintiff and Appellant,

v.

BALDOMERO GONZALEZ GUTIERREZ,
Defendant and Respondent.

No. A134695
Contra Costa County Super. Ct. No. 05-111195-4

The People appeal from an order dismissing charges brought against defendant Baldomero Gonzalez Gutierrez. The appeal asks us to depart from longstanding precedents—*Stanton v. Superior Court* (1987) 193 Cal.App.3d 265 (*Stanton*), *Currie v. Superior Court* (1991) 230 Cal.App.3d 83 (*Currie*), and *Merrill v. Superior Court* (1994) 27 Cal.App.4th 1586 (*Merrill*)—that hold the prosecution's duty to disclose exculpatory evidence under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) applies to preliminary hearings. The principal contention is that over 20 years ago the passage of Proposition 115

"legislatively overruled" these precedents. However, neither Proposition 115 nor the cases and commentaries that have construed it support the People's position. *Izazaga v. Superior Court* (1991) 54 Cal.3d 356 (*Izazaga*) held that Proposition 115 could not limit a defendant's due process rights under *Brady,* and *People v. Jenkins* (2000) 22 Cal.4th 900 (*Jenkins*) suggests that *Brady* applies in connection with preliminary hearings. The People's other arguments against *Brady*'s application at a preliminary hearing also lack merit. We therefore affirm.

BACKGROUND

On May 30, 2002, a complaint was filed charging Gutierrez with two counts of lewd acts with a child under age 14 (Pen.Code, § 288, subd. (a)),[1] one against Jane Doe One (JD1) and the other against Jane Doe Two (JD2). An arrest warrant was issued on May 30, 2002, but Gutierrez was not arrested until May 27, 2011.

At the preliminary hearing in July 2011, a Concord police detective testified that he was dispatched to an elementary school on November 5, 2001, to investigate a report of child abuse. At the time, JD1 and JD2 were 11–year old foster children who lived with Gutierrez, his wife and stepdaughter.

JD1 told the officer that she and Gutierrez were alone in the home the previous day when he asked her to come into his bedroom. He pulled her onto the bed and tried to kiss her on the lips but she turned away. He then put his hand on her vaginal area over her pants. She got up quickly and went outside the house. Gutierrez followed and warned her not to say

[1] Subsequent statutory references are to the Penal Code.

anything or they would both get in trouble. That night JD1 asked JD2 if something similar had happened to her.

After speaking with JD1, the officer went to the home and spoke with JD2 who said that, about a year earlier, Gutierrez put his arm over her shoulder in a friendly way and then rubbed her buttocks over her clothes. She stepped away because she was uncomfortable and frightened. Gutierrez told her not to say anything, and she had been too embarrassed and afraid to report the incident.

The other witness at the hearing was a senior inspector with the district attorney's office who obtained a statement from Gutierrez's stepdaughter that JD1 and JD2 lived with her and Gutierrez in November 2001.

Gutierrez argued unsuccessfully that he should not be held to answer on the charges, stating, among other things, that investigators for the parties had not been able to locate JD1 or JD2.

After the preliminary hearing, the defense obtained from juvenile court police reports showing that JD1 had made accusations of molestations in 1996 and 1999 that were determined to have been unfounded.

In 1996, JD1 told a Pleasant Hill police sergeant that her mother's boyfriend had touched her vagina, put a screwdriver in her vagina, and kissed her buttocks. But a sexual assault examination revealed no trauma. When the sergeant discussed the examination with JD1's mother, she accused him of conspiring with the doctor to protect her boyfriend. JD1's six-year-old sister, who was in foster care, told her therapist that the boyfriend had also molested her. The sister made the report shortly after talking with her mother, and the sister's therapist and foster parent were shocked by the charges because the

sister exhibited no signs of abuse. JD1's 10–year–old sister admitted falsely accusing the boyfriend of molesting her because "she was afraid her mother would beat her if she said [the boyfriend] did not touch her. She said her mother was always saying [the boyfriend] touched them." During the investigation, the mother kept calling the sergeant, yelling at him, and hanging up. The sergeant recommended that JD1 be taken into protective custody because of the mother's "irrational behavior," and closed the case against the boyfriend.

In 1999, JD1 reported to the Contra Costa Sheriff's Department that her mother's boyfriend put his finger in her vagina, and had her touch his penis, while she was in his car. A detective obtained the 1996 police report, and information from child protective services (CPS) that the mother "was mentally ill and projected her own molest onto the children. All of the CPS investigations were determined to be unfounded." Given this history, and proof of the boyfriend's whereabouts on the day of the alleged molestation, the detective and a deputy district attorney decided that no charges would be filed. JD1 later admitted that she had "lied because [the boyfriend] had done things to her in the past and he did not go to jail." The detective wrote: "I asked if she was referring to the incident that occurred in Pleasant Hill. She said she was. I explained that I knew her older sister ... had said that [the boyfriend] had done things to her because she thought she would get into trouble if she did not say ... what [the mother] wanted her to say. I told her I thought that might be happening here. [JD1] did not respond, but nodded her head."

After receiving these reports, Gutierrez moved to dismiss the charges. He argued that the prosecution breached its duties under *Brady* by

failing to disclose the 1996 and 1999 police reports before the preliminary hearing. He supported his motion with an informal discovery request he propounded prior to the preliminary hearing, that sought "any ... potential impeachment information of any witness or alleged victim and the related police report." The prosecution filed no written opposition to the motion, but opposed it orally at the hearing. The court found a "*Brady* violation," and that it was reasonably probable the outcome of the preliminary hearing would have been different if the exculpatory evidence had been produced. The motion to dismiss was granted and this appeal ensued.

DISCUSSION

I. The *Brady* Obligation and *Stanton*, *Currie*, and *Merrill*

"The prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant ... [¶] ... [that is] both favorable to the defendant and material on either guilt or punishment.... [¶] Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses. [Citation.] [¶] Evidence is 'material' '... if there is a reasonable probability that, had [it] been disclosed to the defense, the result ... would have been different.'" (*In re Sassounian* (1995) 9 Cal.4th 535, 543–544, fn. omitted; see *Brady, supra,* 373 U.S. at p. 87; *People v. Ruthford* (1975) 14 Cal.3d 399, 406 (*Ruthford*), disapproved on another point in *In re Sassounian, supra,* at p. 545, fn. 7.) ""The suppression of substantial material evidence bearing on the credibility of a key prosecution witness is a denial of due process within the meaning of the Fourteenth

Amendment.'" (*Stanton, supra,* 193 Cal.App.3d at p. 269, quoting *Ruthford, supra,* at p. 408.)

Stanton held that the prosecution's duty to disclose material evidence that is favorable to the defense (hereafter the *Brady* obligation) applies to preliminary hearings. (*Stanton, supra,* 193 Cal.App.3d at p. 267 [striking an element of the charged offense because of "the prosecution's failure to disclose evidence material to defense cross-examination of eyewitnesses at a preliminary hearing"]; *id.* at p. 269, quoting *Ruthford.*) Breach of the prosecution's *Brady* obligation in connection with a preliminary hearing can be raised by the defendant in a nonstatutory motion to dismiss. (*Id.* at pp. 269–270 [distinguishing § 995 motions, which are confined solely to the record at the preliminary hearing].) "'Although no clear California statutory authority provides for such a pretrial motion to dismiss, we have no doubt in light of the *constitutional* nature of the issue as to the trial court's authority to entertain such a claim.'" (*Stanton, supra,* at p. 271, italics added.) "'It is settled that denial of a substantial right at the preliminary examination renders the ensuing commitment illegal and entitles a defendant to dismissal of the information on timely motion.'" (*Id.* at p. 270.)

Stanton stated: "Nondisclosure of evidence impeaching eyewitnesses on material issues is the deprivation of a substantial right" (*Stanton, supra,* 193 Cal.App.3d at p. 272), but *Currie* disagreed "[t]o the extent *Stanton* implie[d] that *any* cross-examination infringement... constitutes deprivation of a substantial right" (*Currie, supra,* 230 Cal.App.3d at p. 91, fn. 6). The motion to dismiss was properly denied in *Currie* where the "reasonable cause evidence was overwhelming," and "collateral"

impeachment of a prosecution witness with the nondisclosed information would have provided "no evidence of adverse bias, interest, or motive." (*Id.* at p. 100.) The *Merrill* court likewise found it necessary to determine "what effect [the nondisclosed information] had on the determination of probable cause." (*Merrill, supra,* 27 Cal.App.4th at p. 1596.) The motion to dismiss was properly denied by the trial court in *Merrill* upon a finding "there was not ... a reasonable probability the outcome would have been affected by the inclusion of [the exculpatory evidence]." (*Id.* at p. 1596, fn. 5.)

While *Currie* and *Merrill* confirmed that the withheld evidence must be material as well as exculpatory, those cases are consistent with *Stanton* in holding that the prosecution's *Brady* obligation extends to the preliminary hearing stage of criminal proceedings. (*Merrill, supra,* 27 Cal.App.4th at p. 1594 [failure to apprise the magistrate of material exculpatory evidence on the issue of guilt "violate[s] the mandates of *Ruthford* and *Brady*"]; *Currie, supra,* 230 Cal.App.3d at p. 96, quoting *Ruthford.*) The People's appeal challenges that basic premise.[2]

II. Proposition 115

The People argue that the holding in "*Stanton* was abrogated by the passage of Proposition 115" in 1990. Proposition 115 added article 1, section 30 to the California Constitution (1E West's Ann. Cal.

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[2] In the trial court, the prosecution argued only in passing that *Brady* was "inapplicable" because there was no infringement of the "right to a fair trial." The prosecution's main arguments against the motion to dismiss were that it did not possess the police reports, and that the reports would not have changed the outcome of the preliminary hearing. The People do not renew either of those contentions on appeal.

Const. (2012) p. 71), which authorizes the use of hearsay evidence at preliminary hearings and, to promote "fair and speedy trials," provides that "discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process." (Cal. Const., art. 1, § 30, subds. (b), (c).) The measure enacted section 1054 et seq. (the Criminal Discovery Statutes), and amended section 866 pertaining to preliminary hearings. (Pipes et al., Cal. Criminal Discovery (4th ed. 2008) § 2:13, p. 330 (Pipes).) Section 1054 states that "no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." (§ 1054, subd. (e).) Among the materials and information the prosecution must disclose to the defense is "[a]ny exculpatory evidence." (§ 1054.1, subd. (e).) The required disclosures "shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred." (§ 1054.7.) "The court shall not dismiss a charge [because of a discovery violation] unless required to do so by the Constitution of the United States." (§ 1054.5, subd. (c).) Section 866 as amended by the measure provides that the preliminary hearing "shall not be used for purposes of discovery." (§ 866, subd. (b).)

Contrary to the People's argument, nothing in Proposition 115 could supersede the prosecution's *Brady* obligation under the United States Constitution. This was made clear in *Izazaga, supra,* 54 Cal.3d 356, where the court rejected an argument that "the new discovery chapter violates the due process clause by failing to require the prosecutor to disclose all exculpatory evidence as mandated by the high court in *Brady*." (*Id.* at p. 377.) The court

concluded that the Criminal Discovery Statutes could not violate due process because the new statutes do not affect the defendant's constitutional rights under *Brady,* explaining: "The prosecutor's duties of disclosure under the due process clause are *wholly independent* of any statutory scheme of reciprocal discovery. The due process requirements are self-executing and need no statutory support to be effective.... The prosecutor is obligated to disclose such evidence *voluntarily*.... [¶] No statute can limit the foregoing due process rights of criminal defendants, and the new discovery chapter does not attempt to do so. On the contrary, the new discovery chapter contemplates disclosure *outside* the statutory scheme pursuant to constitutional requirements as enunciated in *Brady*...." (*Id.* at p. 378 [citing § 1054, subd. (e)'s provision for discovery as required by the federal Constitution].)

Izazaga is dispositive of the People's arguments that Proposition 115 altered the prosecution's *Brady* obligation. *Izazaga* addressed the Criminal Discovery Statutes, but its reasoning applies equally to the measure's amendment of the California Constitution and section 866. [3] The People contend that Proposition 115 "legislatively overruled" *Stanton,* and that *Merrill,* which was decided after Proposition 115 was effective, "failed to grasp that Proposition 115 abrogated the earlier right to receive impeachment evidence before the preliminary hearing." However,

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[3] *Izazaga* also precludes the People's attempted reliance on the Federal Magistrate's Act, authority related to that act, or cases applying the laws of other states (e.g., *People v. Coleman* (Ill.App. 1999) 718 N.E.2d 1074, 1077 [applying Illinois Supreme Court Rule 411]), to define the scope of the prosecution's *Brady* obligation.

Izazaga confirms that Proposition 115 could not alter the prosecution's *Brady* obligation, and we agree with the *Izazaga* court that, properly interpreted, the measure "does not attempt to do so." (*Izazaga, supra,* 54 Cal.3d at p. 378).

The People argue that under section 1054.7 the parties have no duty to provide discovery until 30 days before trial, and that requiring *Brady* disclosures for a preliminary hearing violates our state constitutional provision for reciprocal discovery (Cal. Const., art. 1, § 30, subd. (c)) because it requires the prosecution to disclose evidence at a stage when the defense has no similar obligation. However, as *Izazaga* correctly observes, the prosecution's *Brady* obligation exists entirely apart from state law provisions for reciprocal discovery, and would have effect even if there were no state discovery scheme. (*Izazaga, supra,* 54 Cal.3d at p. 377–378.) The concept of reciprocal discovery is inapposite because *Brady* disclosures are the prosecution's unilateral, not reciprocal, responsibility. (See also *Magallan v. Superior Court* (2011) 192 Cal.App.4th 1444, 1460 (*Magallan*) [§ 1054.7's provision for discovery "at least" 30 days before trial does not preclude a defendant from making a discovery motion in connection with a preliminary hearing].)

The People submit that *Brady* cannot be enforced at a preliminary hearing because the Criminal Discovery Statutes strip magistrates of the power to make discovery orders. (See § 1054.5, subd. (a) ["[n]o order requiring discovery shall be made in criminal cases except as provided in this chapter"]; § 1054.5, subd. (b) [providing for "court enforcement" of discovery obligations]; Pipes, *supra,* §§ 2:23–2:25, pp. 344–351.) But the prosecution's duty imposed by *Brady* is "self-executing." (*Izazaga, supra,* 54 Cal.3d at p. 378.) "A defense request or motion for 'all

exculpatory material,' or similar language is unnecessary. The prosecutor's duty to provide such evidence exists even without a court order, and the order technically adds nothing to the prosecutor's duty." (Pipes, *supra,* § 1:80, p. 260.) Moreover, the Criminal Discovery Statutes do not preclude magistrates from enforcing discovery obligations, such as *Brady* disclosures, under "other express statutory provisions, or as mandated by the Constitution of the United States." (§ 1054, subd. (e); see *Magallan, supra,* 192 Cal.App.4th at pp. 1444, 1450, 1457 [citing § 1054, subd. (e); [a magistrate can order the prosecution to provide discovery on a motion to suppress given the defendant's statutory right to litigate the motion at the preliminary hearing]; see also, Pipes, *supra,* § 2:25, pp. 349–351 [a magistrate's authority over discovery can constitutionally be limited, but *Brady* disclosures are constitutionally compelled].)

The People maintain that the trial court could not dismiss the charges in this case because section 1054.5, subdivision (c) states that a court cannot dismiss a charge for a discovery violation "unless required to do so by the Constitution of the United States." But this argument assumes that we would conclude, contrary to *Stanton, Currie,* and *Merrill,* that the federal Constitution does not require *Brady* disclosures in connection with preliminary hearings. The People point out that the Criminal Discovery Statutes make no provision for dismissal of charges against defendants who are prosecuted with a preliminary hearing like the provision pertaining to those who are indicted. As to indicted defendants, section 939.71, subdivision (a) states: "If the prosecutor is aware of exculpatory evidence, the prosecutor shall inform the grand jury of its nature and existence.... [A] failure to comply with the

provisions of this section [may] be grounds for dismissal...." But this statute is irrelevant. Section 1054.5, subdivision (c) preserves judicial power to dismiss charges for a *Brady* violation. (See *People v. Ashraf* (2007) 151 Cal.App.4th 1205 [since there was no *Brady* violation, the federal Constitution did not require dismissal of the case for the People's failure to disclose the evidence at issue].)

Section 866 as amended by Proposition 115 provides that defense testimony may be excluded at a preliminary hearing unless it is "reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness." (§ 866, subd. (a).) Section 866, subdivision (b) states: "It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony. The examination shall not be used for purposes of discovery."

The People cite treatises to support their argument that section 866 negates any *Brady* obligation in connection with a preliminary hearing. "The amendment to Penal Code section 866, which expressly limits the defendant's ability to use a preliminary examination as a discovery device, appears to indicate an intent on the part of the electorate that discovery is not a required part of pretrial proceedings prior to the time a case reaches the jurisdiction of the trial court." (Pipes, *supra,* § 2:13, p. 330; see also Simons, Cal. Preliminary Examinations and 995 Benchbook: Statutes and Notes (2012) § 2.1.7 (Simons) ["it appears that Proposition 115 has eliminated any general requirement that discovery be provided to the defense before the preliminary examination"].)

Neither of these commentaries support the People's position. "The defendant at the hearing still has the right to cross-examine prosecution witnesses ... as well as to call witnesses who can establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness.... To effectuate these rights, it seems necessary to provide defense counsel with ... exculpatory evidence ... pre-hearing." (Simons, *supra,* § 2.1.7, p. 2–10; see also Pipes, *supra,* 2:13, p. 331, discussing *Jenkins, supra,* 22 Cal.4th 900 ["except for exculpatory evidence, a defendant does not have a right prior to the preliminary examination to discovery"].)

In *Jenkins,* the defendant argued that the prosecution should have been sanctioned for failing to disclose inculpatory evidence—statements by a man named Carroll that the defendant had admitted the crime—until two months after the preliminary hearing. The court found no prejudice because the defendant had one and a half years after learning of it to challenge the evidence at trial. "At trial, defendant was able to confront and cross-examine Carroll, having had ample opportunity to investigate the basis for the witness's testimony and any affirmative defense suggested by it. The delay in disclosure did not implicate defendant's due process right to be informed of material evidence favorable to the accused...." (*Jenkins, supra,* 22 Cal.4th at p. 951, citing *Brady.*) The court's reference to the prosecution's *Brady* obligation in *Jenkins* was unnecessary if, as the People posit, the disclosure obligation is inapplicable to preliminary hearings.

Thus, no authority supports the People's reading of Proposition 115. The People attempt to

rely on *Jones v. Superior Court* (2004) 115 Cal.App.4th 48, but that reliance is misplaced.

The issue in *Jones* was whether the defense was required to disclose evidence to the prosecution for a probation revocation hearing, and the court held that the Criminal Discovery Statutes imposed no such duty. The court observed that "[m]ost of the discovery provisions set forth in the Criminal Discovery Statute[s] expressly apply to discovery in a trial setting." (*Jones, supra,* 115 Cal.App.4th at p. 57.) All of the discovery the defense is required to produce under section 1054.3 relates to evidence to be produced at trial, and half of the subdivisions of section 1054.1, which specifies discovery owed by the prosecution, refer to trial-related evidence. [4] The

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[4] Section 1054.3 provides: "The defendant and his or her attorney shall disclose to the prosecuting attorney: [¶] (a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses *at trial,* together with any relevant written or recorded statements of *those persons,* or reports of the statements of *those persons,* including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence *at the trial.* [¶] (b) Any real evidence which the defendant intends to offer in evidence *at the trial.*" (Italics added.)

Section 1054.1 provides: "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] (a) The names and addresses of persons the prosecutor intends to call as witnesses *at trial.* [¶] (b) Statements of all defendants. [¶] (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged. [¶] (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome *of the trial.* [¶] (e) Any exculpatory evidence. [¶] (f) Relevant written or recorded

(continued...)

Jones court also noted that section 1054.7 "generally mandates" that discovery be provided "before 'trial,'" and "some of the express purposes of the Criminal Discovery Statute[s] ... appear to limit the application of the statute to a pretrial setting." (*Jones, supra,* at pp. 58–59, fn. omitted; see § 1054, subds. (a), (c) [those statutes are intended, among other things, to "promote the ascertainment of truth in trials by requiring timely pretrial discovery," and to "save court time in trial and avoid the necessity for frequent interruptions and postponements"].) Since "a probation revocation proceeding is not a criminal trial within the meaning of section 1054.3," the probationer had no obligation under the Criminal Discovery Statutes to provide discovery to the prosecution at that hearing. (*Jones,* at pp. 50–51.)

Jones is inapposite. It concerned the discovery obligations of the defense, not the prosecution, and it involved a posttrial rather than pretrial hearing (see *Magallan, supra,* 192 Cal.App.4th at pp. 1458–1459, [*Jones*'s reasoning is confined to postconviction proceedings]). The *Jones* court's only reference to the prosecution's *Brady* obligation was to note that "*Brady* exculpatory evidence is the only substantive discovery mandated by the United States Constitution." (*Jones, supra,* 115 Cal.App.4th at p. 62.) Moreover, *Jones* undermines the People's position insofar as it focuses on the trial related

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(...continued)
statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call *at the trial,* including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence *at the trial.*" (Italics added.)

nature of most of the discovery described in the Criminal Discovery Statutes. The duty to disclose exculpatory evidence under section 1054.1, subdivision (e) is not circumscribed by any reference to trial, suggesting that the prosecution's *Brady* obligation is not limited in connection with preliminary hearings.

Accordingly, we reject the People's claim that the holdings in *Stanton, Currie,* and *Merrill* were supplanted by Proposition 115.

III. Authority Other Than Proposition 115

The People also support their argument by pointing to language in California and United States Supreme Court cases stating that the *Brady* obligation exists to ensure that the defendant receives a "fair trial." (E.g., *In re Brown* (1998) 17 Cal.4th 873, 884; *United States v. Ruiz* (2002) 536 U.S. 622, 628.) *Izazaga* also describes the *Brady* obligation in terms of the right to a "fair trial." (*Izazaga, supra,* 54 Cal.3d at p. 378.) But the People identify no case discussing whether defendants have a right to exculpatory evidence at preliminary hearings. Thus, the cited cases do not demonstrate that the *Brady* obligation does not extend to those hearings.

The People also cite cases in other states holding that *Brady* disclosures are not required for preliminary hearings. (*State v. Benson* (Okla.1983) 661 P.2d 908, 909; *State ex rel. Lynch v. County Court, Branch III* (Wis. 1978) 262 N.W.2d 773, 778–779, citing *United States v. King* (S.D.N.Y.1970) 49 F.R.D. 51, 53.) However, we will not follow them, and instead decline to look beyond the dictum in *Jenkins* that supports *Stanton's, Currie's,* and *Merrill's*

holdings to the contrary.[5] (*California Medical Assn. v. Brown* (2011) 193 Cal.App.4th 1449, 1458 ["Supreme Court dicta should generally be viewed as persuasive authority"].)

The People argue that *Brady* disclosures are not required for preliminary hearings because, under *United States v. Williams* (1992) 504 U.S. 36, 49–52, 112 S.Ct. 1735, 118 L.Ed.2d 352, prosecutors have no federal constitutional obligation to furnish exculpatory evidence to grand juries. (See *Berardi v. Superior Court* (2007) 149 Cal.App.4th 476, 492, fn. 9 [interpreting *Williams*].) However, the constitutional rights of individuals being investigated by grand juries are not the same as those of defendants at preliminary hearings. (*Williams, supra,* at p. 49 ["certain constitutional protections afforded defendants in criminal proceedings have no application before [a grand jury]"]; e.g., *People v. Brown* (1999) 75 Cal.App.4th 916, 931–932 [no right to counsel during grand jury proceedings]; *Coleman v. Alabama* (1970) 399 U.S. 1, 9–10 [right to counsel at a preliminary hearing].) Moreover, *Williams* reasoned that "requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body." (*Williams, supra,* at p. 51.) This articulation of the court's reasoning suggests that a right to disclosure of exculpatory evidence attaches in a criminal

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[5] Because we follow these cases in concluding that defendants have a due process right under the United States Constitution to *Brady* disclosures in connection with preliminary hearings, we need not address whether defendants also have that due process right under the California Constitution. (Cal. Const., art. 1, § 15.)

adjudication such as a preliminary hearing. (Compare *In re Geer* (1980) 108 Cal.App.3d 1002, 1008 [preliminary hearing determinations are adjudicatory] with *Brown, supra,* at p. 931 [grand jury proceedings are investigatory, not adjudicatory].) Thus, to the extent *Williams* has any application here, it hurts rather than helps the People's case.

The People assert that "[s]ince the federal constitution fails to endow criminal defendants with any rights whatsoever to a preliminary hearing, it hardly requires *Brady* disclosure before such a hearing." But just because a defendant has no federal constitutional right to a preliminary hearing (*Bowens v. Superior Court* (1991) 1 Cal.4th 36, 41) does not mean that a defendant who undergoes one has no such rights (e.g., *Coleman v. Alabama, supra,* 399 U.S. at pp. 9–10 [right to counsel]).

Finally, the People argue that "no substantial right entitles an accused to receive *Brady* disclosure before a preliminary hearing." However, since evidence is not material for *Brady* purposes unless it is reasonably probable that the evidence would have changed the outcome (*In re Sassounian, supra,* 9 Cal.4th at p. 544), *Brady* violations are, by definition, prejudicial (*id.* at p. 545, fn. 7). Breach of the prosecution's *Brady* obligation must therefore be deemed to violate a substantial right. (Compare *Jennings v. Superior Court* (1967) 66 Cal.2d 867, 874–875 [citing violations of substantial rights, such as allowing an unauthorized person to remain in the courtroom during the preliminary hearing, where the errors were not necessarily prejudicial].)

DISPOSITION

The order of dismissal is affirmed.

Siggins, J.

We concur:

McGuiness, P.J.

Pollak, J.

Trial Court:	Contra Costa County Superior Court
Trial Judge:	Honorable John Laettner
Counsel for Appellant:	Mark Peterson District Attorney Ryan Wagner Deputy District Attorney
Counsel for Respondent:	Stephanie Clarke under appointment by the Court of Appeal

Court of Appeal First Appellate District
FILED APRIL 9, 2013

Diana Herbert, Clerk
DEPUTY

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION THREE

THE PEOPLE,
Plaintiff and Appellant,

v.

BALDOMERO GONZALEZ GUTIERREZ,
Defendant and Respondent.

No. A134695
Contra Costa County Super. Ct. No. 05-111195-4

ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed March 12, 2013, be modified as follows:

The following paragraph is added to footnote 2 on page 6:

In their petition for rehearing, the People ask us to add facts to the opinion that bear on whether the prosecution possessed the police reports. We decline to do so. None of these facts were cited in the People's appellate brief, in which the People expressly made clear the were "not raising the issue of possession." The People chose instead to present this court with a pure issue of law regarding *Brady*'s application. In light of this tactical choice, they cannot belatedly advance arguments based on the facts of this particular case.

There is no change in the judgment. The petition for rehearing is denied.

/s/

Dated: APR – 9 2013 _____P.J.

Trial Court:	Contra Costa County Superior Court
Trial Judge:	Honorable John Laettner
Counsel for Appellant:	Mark Peterson District Attorney Ryan Wagner Deputy District Attorney
Counsel for Respondent:	Stephanie Clarke under appointment by the Court of Appeal

SUPREME COURT
FILED JUNE 19, 2013

Frank A. McGuire Clerk
DEPUTY

Court of Appeal, First Appellate District,
Division Three – No. A134695

S210101

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Appellant,

v.

BALDOMERO GONZALEZ GUTIERREZ,
Defendant and Respondent.

The Petition for review is denied.

Baxter, J., is of the opinion the petition should be granted.

/s/

Chief Justice

IN THE SUPERIOR COURT, STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA
BEFORE THE HONORABLE JOHN T. LAETTNER, JUDGE
DEPARTMENT NO. 25

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. BALDOMERO GUTIERREZ, Defendant.	No. 5-111195-4

REPORTER'S TRANSCRIPT ON PROCEEDINGS
THURSDAY, FEBRUARY 9, 2012
COURTHOUSE, MARTINEZ, CALIFORNIA

APPEARANCES:

For the People: MARK A. PETERSON
DISTRICT ATTORNEY
By: RYAN WAGNER
Deputy District Attorney
Contra Costa County

For the Defendant: ROBIN LIPETZKY
PUBLIC DEFENDER
BY: MELODY DEICHLER
Certified Law Clerk
SUPERVISED BY:
JERMEL THOMAS
Deputy Public Defender
Contra Costa County

REPORTED BY: JENNIFER A. LENT, RPR , CSR #11152

THURSDAY, FEBRUARY 9, 2012 AFTERNOON SESSION

JUDGE JOHN T. LAETTNER DEPARTMENT NO. 25

PROCEEDINGS

THE COURT: People versus Baldomero Gonzlez Gutierrez.

MR. WAGNER: Ryan Wagner for the People on behalf of the assigned attorney, Mary Blumberg.

MS. DEICHLER: Good afternoon, Your Honor. Melody Deichler for the defendant with Jermel Thomas.

THE COURT: Good afternoon.

THE CLERK: Can I get the spelling of your name?

MS. DEICHLER: Sure. D-e-i-c-h-l-e-r.

THE CLERK: Thank you.

THE COURT: This is the time and place set for defendant's motion to dismiss Counts One and Two. I've reviewed your—your motions. Ms. Thomas, do you wish to be heard?

MS. THOMAS: Yes.

defense never received a reply from the DA, so we would like to first argue that that's a concession on our motion?

THE COURT: All. Right. Mr. Wagner, I assume that the DA didn't—DA's office didn't file a reply, true?

MR. WAGNER: We did not file a reply. The preassigned attorney in this case is in trial.

THE COURT: All right.

MR. WAGNER: So, no, we're not conceding the motion.

THE COURT: All right. You may continue.

MS. DEICHLER: Okay. We would just like to reit—for the most part, we stand on the motion. We would like to reiterate just a few points from that motion.

Again, Mr. Gutierrez was denied his due process rights under the 14th Amendment because the prosecution had exculpatory evidence that was not provided at the preliminary examination despite an informal discovery request from counsel for defendant. This rendered the entire proceeding fundamentally unfair. It violated the *Brady* rule.

Also, according to the California Court of Appeal, in *Stanton,* that court directly held that where the prosecution fails to disclose exculpatory evidence at a preliminary hearing, as was the case here, a defendant's due process rights under the 14th Amendment are violated, and the proper remedy is a nonstatutory dismissal of the affected charges. This is based on, first, a denial of an adequate opportunity to cross-examine witnesses, and second, that that kind of evidence might affect the outcome of the proceeding as a whole.

Both are indicated in the case here. The prosecution, as stated in our motion, had evidence that one of the victims, Jane Doe I, had a history of making unreliable accusations of this nature, allegations that were deemed to be untrustworthy, and the DA at that time, had—was aware of these—of this propensity, and the charges against Mr. Gutierrez were based solely on the statements. So, you know, both the—the prosecution's witnesses, the defendant was denied an adequate opportunity to cross-examine them on the reliability of such statements. And also the outcome of the entire proceeding might have been different considering that the statements made by the victim was the only thing that was holding—that was used to hold Mr. Gutierrez over.

THE COURT: All right. Thank you.

MS. DEICHLER: Thank you.

THE COURT: All right. Mr. Wagner, the defense says that—that after the preliminary hearing but before trial—or at the time of the preliminary hearing, the District Attorney knew of this exculpatory evidence, but didn't turn it over.

MR. WAGNER: Correct.

THE COURT: What's the People's response?

MR. WAGNER: People's response is, first of all, 1054 is inapplicable because this is—1054 is discovery that is to be provided pretrial.

Brady is inapplicable because, according to *People versus Answorth*, 217 Cal.App.3d. quoted that there can be no violation of *Brady* unless the

government's nondisclosure infringes upon the defendant's right to a fair trial. So all we're left with is this *Stanton* nonstatutory motion to dismiss in this case.

I think the court needs to first take a look at what the defense is saying. The defense is saying that Mr. Sequeira reviewing a complaint or a police report in 1999 alleging complaints by Jane Doe I about potential sexual abuse, and that prosecutor's decision to not file that case, and his opinion about whether or not we could prove that case at trial is somehow exculpatory evidence. That's a—that can't possibly be the case. All the time, prosecutors' offices decide not to file charges in a criminal case based on a myriad of reasons. It could be because of the resources in our office. It could be because we don't have corroboration. But somehow, Paul Sequeira's comments about whether or not he thought these charges were worthy of being filed is exculpatory evidence. If that's the case, Your Honor, then every time a DA in my office comes up to me and tells me about the case they're in trial, and I say, oh, I don't like the sound of that, that somehow would amount to exculpatory *Brady* evidence that I would have to turn over to the defense.

THE COURT: I don't think that's what they're saying. That was the outcome. But they're saying that the facts that led him to believe that are what is *Brady*. Do you want to address those?

MR. WAGNER: Sure. The fact that the Jane Doe I made a complaint previously, that is *Brady*? I'm not sure how that would be *Brady*. Our decision to not file charges based upon those statements doesn't make those statements any more or less reliable. In fact, if the prosecutor had chosen to file

charges based upon the 1999 complaint, and that case went to trial, and that case—the defendant, in that case, based upon those complaints, was found not guilty, that still wouldn't render those previous statements to be unreliable or somehow some sort of information we would have to turn over because it doesn't prove that Jane Doe I was lying.

If Jane Doe I had come back in and said, I made all of that up, and those allegations that I said in the police report, all those are not true, then all of a sudden the People have statements about prior behavior on behalf of Victim I that showed that she's unreliable.

But part of the court's analysis in the *Curry* case, which followed *Stanton*, that's 230 Cal.App.3d 83, in that case, the court said you also have to determine is this evidence admissible? Well, how is Paul Sequeira's assessment or opinions about a case admissible evidence? I'm not sure how that his—his opinions based upon reading a police report somehow are evidence. And based upon the—the merest fact that Jane Doe has complained or made an allegation of sexual assault in the past is not exculpatory evidence.

In the *Curry* case, which is—well, first of all, the *Stanton* case that the defense relies on, in that case, there were several witnesses that witnessed a car collision, and it was a gross vehicular manslaughter case. And prior to the prelim, the DA in that case had information from a civil defense investigator that said that these witnesses actually made completely inconsistent statements than they're about to make at the preliminary examination, and the Court of Appeals said there that evidence is clearly depriving Mr. Stanton the right to cross-examine those witnesses at the preliminary hearing. Because the statements that

the DA had—was in possession of, were completely the opposite of the statements that he was putting on at the preliminary hearing.

In the *Curry* case, that DA had evidence that the victim of a robbery had pending charges for filing a false police report. And in that case, the Court of Appeal held even the fact that the DA had knowledge that there was a pending case, that that victim had lied, going on in his office, being filed by his office, that was not sufficient evidence to violate that defendant's substantial rights. That's a pretty extreme situation where the DA is in possession of actual evidence that bears directly on the credibility of the main victim in the case.

Here, we don't even have anything that amounts to that. We have mere speculation that Jane Doe I was somehow not telling the truth previously simply by the leap that charges were not filed in that case. And based upon that, I can't imagine that this world amount to admissible evidence in any preliminary examination.

If Mr. Sequeira's opinions about the lack of filing in a case are admissible, then the—the opposite is true. DA could come in and talk about how someone is probably guilty, in his opinion. But the opinions of a prosecutor are not admissible, relevant evidence. And this falls well short of what happened in *Curry*, and it did not deny the defendant a substantial right.

THE COURT: What the defense has said is that the District Attorney—the District Attorney had evidence in its file that tended to discredit the testimony and allegations made by the victim against Mr. Gutierrez. In particular, the evidence illustrated that the victim had a predisposition to make false allegations of this nature. And—and her credibility

was called into question, which supports their view that it wasn't disclosed, and it should have been disclosed that—that her credibility was called into question by the officer at the time, Detective Hubbard, and also the District Attorney at the time, which was Mr. Sequeira.

So they're alleging that—that the DA's Office had evidence of false statements or this—this tendency to make false statements, and—and—and then sat on it. So it's not that Mr. Sequeira decided that he had this opinion. It's those statements that they had in their possession that they didn't turn over, as I understand the argument. So that's the problem.

MR. WAGNER: And I don't have any evidence before me of those statements that somehow on their face this court could determine that somehow they should have been disclosed, other than the fact that Mr. Sequeira's comments in a police report that he didn't think that the case was worth filing or—or that the—these allegations were unfounded.

So I need some specifics from the defense about what statements the People have in their possession that should have been turned over, not just what Mr. Sequeira's opinion was based upon reading the victim's statement in a prior police report.

THE COURT: Well, how is it that you support your—your papers? Where do you get this statement from about the victim having this propensity to—to fabricate? Where did you get it?

MS. THOMAS: Your Honor, I filed a notice for—under Welfare & Institution Code 827. Prior to filing this motion, I filed an informal discovery request to the District Attorney's Office asking for any

impeachment evidence that they had regarding Jane Doe I and Jane Doe II.

I went forward with the preliminary hearing, having spoke to the District Attorney—

THE COURT: You're not answering my question.

MS. THOMAS: Okay. And I'm getting to that.

THE COURT: My question is, where did you get the evidence, and what is it?

MS. THOMAS: I got the evidence—I got the evidence—

THE COURT: Simple.

MS. THOMAS: I got the ev—my apologies, Your Honor. I got the evidence from a properly-noticed 827 petition where Judge Hiramoto disclosed the records to me. The records are police reports that I mentioned in the *Stanton* motion, and in a footnote in the *Stanton* motion, I mentioned that these records are confidential and privileged. However, these statements are contained in police reports that are public record. That was accessible to the District Attorney's Office, had they done some investigation or inquired as to the credibility of Jane Doe I or Jane Doe II.

So I have these statements. I have a copy of the police reports that I made for the court, and I'll be happy to share those police reports and a statement from Mr. Sequeira regarding, not just the—the fact that they chose not to file charges, but that charges were not determined to be filed because they

determined that the allegations were unfounded against one of the suspects.

So I have those in police reports. There are two separate police reports, where Jane Doe I made separate allegations against the person, and I have those, and I'll be happy to go in camera with the court if the court would like to review them.

MR. WAGNER: Your Honor, may I respond?

THE COURT: Yeah, you—you can, but in a second. So you have police reports that—that you got from the 827 file?

MS. THOMAS: Correct.

THE COURT: All right. And then you have a statement from Mr. Sequeira? Was that also from the 827 file?

MS. THOMAS: I have—it's not a statement from Mr. Sequeira. It's a summary of a police officer's report in which he presented the case to Mr. Sequeira, and based on what was presented, he states that no charges were filed, and the allegations were determined to be unfounded against the suspect.

Prior to going and speaking to Mr. Sequeira about whether or not they would file charges, there was a separate meeting with Mr. Sequeira from the District Attorney's Office regarding the evidence that had been investigated at that point. Mr. Sequeira told the officer to go out and investigate further, that as of the information that was currently before him, he didn't have enough information to determine whether or not they should file charges.

The officer then went out and did further investigation, and then later came back and presented it again to Mr. Sequeira, and Mr. Sequeira determined that the allegations were unfounded based on the past history of the victim and other—other things that they determined to be simply not true.

So I have—I have a copy of the police report for the court. I have a copy of the motion from the 827 court, Judge Hiramoto, which is an order that states that I can't disclose the record.

So I have both that I can present to the court, and I will be happy to do so in camera to show the court exactly where I'm saying that the District Attorney had knowledge that there's—the victim, Jane Doe I, had made similar allegations, not on one occasion, on two distinct occasions to different police agencies that the defense was never apprised of.

THE COURT: All right. So the reason that you're—you haven't—you haven't turned over the police reports to—to Mr. Wagner is because of Judge Hiramoto's order?

MS. THOMAS: That's correct.

THE COURT: All right.

MS. THOMAS: However, it is our contention that the District Attorney's Office, they have access to these records. This is an agency that they constructively or have actual possession of records where they could have easily listed Jane Doe I's name, and a search would have come up and would have listed all of the police reports in which she was a named suspect, a named victim. So we're

impugning that they had knowledge of these allegations that she made—

THE COURT: Well, I understand your position.

MS. THOMAS: —before—before my charge.

THE COURT: I understand your position.

But for this—for this motion, this District Attorney—that District Attorney is no longer with the office, as I understand it.

MS. THOMAS: That's correct.

THE COURT: So this District Attorney is in the dark as to—as to what the factual basis is for your motion.

So I'm going to order that you provide copies to the court of the materials that Judge Hiramoto previously sealed. I order them unsealed. And they can be turned over to Mr. Wagner and to the court, and we will continue this motion. And I want to review those materials as part of this motion to dismiss.

MS. THOMAS: I just want to make clear that it's my understanding in reading Welfare & Institution 827, that the criminal court cannot order that we disclose the records to the District Attorney's Office. And I—I'm not trying to disrespect the court at all, but I just want to make clear what the logistics is.

So what the court—from my review of it, we need to go back to the juvenile court, and the juvenile court, Judge Hiramoto, needs to make a determination that those records can now be disclosed to the prosecution agency.

THE COURT: Yeah, I—I've actually done this before, and my view is different from yours. That will be the court's order. So we'll continue this motion, then, for one week and you're to provide that forthwith—

MS. THOMAS: We're trailing in the trial department, and we are set to go back on Tuesday. So I was hoping that we could—is there any time that we can come back tomorrow?

THE COURT: Can you do it tomorrow afternoon?

MS. THOMAS: Yes.

THE COURT: All right. We'll try to do it tomorrow afternoon. I assume these—these reports are not very long?

MS. THOMAS: I'm sorry?

THE COURT: I assume these reports are not very long?

MS. THOMAS: No.

THE COURT: All right. Monday is a holiday.

MR. WAGNER: We'll make it work, Your Honor.

THE COURT: All right. So this will trail until tomorrow at 1:30.

MR. WAGNER: Yeah.

Can I just be heard, though, on one other issue I wanted to bring up in response to Ms. Thomas's comment?

THE COURT: All right. You may.

MR. WAGNER: I would implore the court to read the *Curry* case prior to its decision because I think it's—it's—it's pretty—it's the analysis as it relates to a DA's Office being in possession of evidence of someone lying who is a victim in a case didn't violate that person's substantial rights.

THE COURT: It sounds like a really odd case to me after what I know about *Brady* and *Giglio*, so I encourage you to read those, too.

MS. THOMAS: And, Your Honor, I do want to clear up a point. The District Attorney's Office did not respond, and it wasn't because the assigned Deputy District Attorney was in trial. The assigned Deputy District Attorney at the time that I filed the papers was not in trial.

It's my understanding that while she's been assigned to Department 13, Department 13 just went into session today, and the only thing that they was doing was motion in limines.

So it hasn't been the start of evidence that's begun. It hasn't been jury selection that has begun. So I don't think that the prosecution was crippled in any way from doing a reply brief. They certainly had the time to and could have done it, and it wasn't due to the assigned Deputy District Attorney, Mary Blumberg, being in—beginning a jury trial or in the middle of a jury trial.

So any additional argument that the District Attorney is making, our position is that argument is

moot, since they had the time, they had the notice to reply to our brief, and chose not to.

THE COURT: All right. I'm—I'm allowing them to respond orally. You can respond orally to a motion, if you choose to. Your objection is overruled. We'll see everybody back here tomorrow at 1:30.

MS. THOMAS: So can I make copies in the copy room of the police reports?

THE COURT: You have them with you right now?

MS. THOMAS: I do.

THE COURT: Is that a problem with you?

THE CLERK: What is it?

THE COURT: She wants to make copies back there of the police reports in this—

THE CLERK: Whatever. Yeah, you can make a copy.

THE COURT: Thank you.

MS. DEICHLER: Thank you, Your Honor.

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FRIDAY, FEBRUARY 10, 2012 AFTERNOON SESSION

JUDGE JOHN T. LAETTNER DEPARTMENT NO. 25

PROCEEDINGS

THE COURT: People versus Gutierrez.

MR. WAGNER: Good afternoon. Ryan Wagner for the People.

MS. THOMAS: Good afternoon. Jermel Thomas on behalf of Mr. Gutierrez. Mr. Gutierrez was not ordered to be here today.

MS. DEICHLER: Melody Deichler, certified law clerk, supervised by Ms. Thomas, for Mr. Gutierrez.

THE COURT: All right. Good afternoon, Counsel.

MS. THOMAS: Good afternoon.

MS. DEICHLER: Good afternoon.

THE COURT: In this matter, the court requested and has received the—the documents that form the basis for the defendant's motion, which include a police report by Officer Hubbard where—where he describes the history of the victim's mother with the defendant, as well as DA Sequeira's decision with regard to this case. Have you had the time to review those documents, Mr. Wagner?

MS. WAGNER: Yes, Your Honor.

THE COURT: All right.

MR. THOMAS: Your Honor, in addition to Detective Hubbard's police report, the court should have also received the Detective Shabazz's police report and there should have been an additional police report, I believe it was Detective Evans. So there should have been a total of three police reports.

THE COURT: Yes, I see—I see Evan's reports, and—

MS. THOMAS: Detective Shabazz's report is the Pleasant Hill Police Department cover page, and in the first paragraph, it lists Detective Shabazz as being the author, and that's regarding the 1996 allegation of sexual molest.

THE COURT: Okay.

MS. THOMAS: I just wanted to make sure that the court had all three reports.

THE COURT: Yeah, I do have those. I do have those, but . . .

Now that we're all on the same page, Ms. Thomas, do you want to describe to the court and counsel the—the significance of these reports?

MS. THOMAS: Your Honor, the significant of—the significance of the reports includes false allegations or similar allegations of Jane Doe I in 1996, as well as 1999, that include detailed acts of a perpetrator in one incident picking up Jane Doe I, describing the clothing of that perpetrator, describing where she was taken with that perpetrator,

describe—describing the sexual acts that occurred with that perpetrator, describing words that were told to her from that perpetrator, and in very detail what that perpetrator did to her.

I'm not sure how much the court would like me to go into the sexual nature that Jane Doe I described, but I could. But it's pretty detailed, this account that she has about this particular suspect, and later, it's determined that she lied. That she made up that allegation.

Similarly, in the 1996 report, she again goes through a very detailed account of this alleged sexual molest that occurred, with very vivid descriptions of what, in fact, happened. And the police officer who investigated that case again determined that it was without merit, and it was unfounded.

Significantly, in the 1999 report, her description of what happened to her, her recount of the sexual molest that she said occurred, the officer went to the District Attorney's Office, spoke to Mr. Sequeira at the time, who was a District Attorney—and Mr. Sequeira is a high-ranking member of the District Attorney's Office, was at that time—and the District Attorney told him to go back and verify the suspect's alibi evidence to either disprove or confirm what Jane Doe I had told him.

That investigator, in the 1999 report, in fact, did so, and was provided with receipts of where the suspect actually was. In addition, went and told the—went and spoke to a teacher where the suspect had been at a parent-teacher conference, and also confirmed that he, in fact, was at a parent-teacher conference.

Those reports and the significance of those reports go to the credibility of the witness in our case. In our case, the witness has made a statement two years after her last false allegation of sexual molest,

and the entire case that the District Attorney has before my client, Mr. Gutierrez, rests and falls on the credibility of Jane Doe I. There is no corroborating evidence to substantiate what she alleges my client did to her. There's no statement from my client. There is no physical evidence whatsoever. So their entire case rests upon what—what the integrity and credibility is of this particular witness, Jane Doe I.

The significance of these reports is that it gives light to her credibility. There is a Evidence Code instruction 1103(a), which says that a defendant charged with rape may be entitled to introduce evidence of prior false accusations by the victim under Evidence Code 1103(a).

So with those reports, and two separate, distinct allegations of child molest, that were, one, the victim herself said that she had lied, that she had made it up, the second one an officer had determined that it was unfounded, those separate reports are direct evidence of the victim's credibility in our case. Where, again, I don't want to sound repetitive, but there's no other corroborating evidence to substantiate what the victim—victim's claims are against my client.

So the reports are significant, and I—I would think that the trial judge would admit them because they are admissible under Evidence Code 1103(a).

THE COURT: Mr. Wagner?

MR. WAGNER: Your Honor, counsel is right as it relates to Evidence Code section 1103, but as applied via the *People versus Tidwell* case, 163 Cal.App.4th 1447, in that situation, the court said that it's not enough that a rape victim has made prior allegations of sexual assault because that would be excluded under 352 because then we would have to bring in every single witness in the prior rape

allegations to disprove that the rape actually took place.

What would be admissible is if there's evidence that the victim had actually recanted. And so as it relates to the victim saying that what I reported is not true, what I reported is a lie, that is discoverable evidence. And—

THE COURT: That was part of her proffer. She said with regard to the first instance that the victim did recant and admitted that she lied.

MS. THOMAS: And the court and the coun—District Attorney's Office should have a copy of that police report where her very statement to the detective is that she made the whole thing up.

MR. WAGNER: A it relates to the 1996 incident, the fact that a police officer finds that it's unfounded, that has no bearing in rendering evidence either exculpatory or somehow cast any—the People should not be placed on knowledge at that point that that allegation is somehow deemed false simply because a—a police officer finds it to be unfounded or not worthy of filing.

As it relates to the 1999 incident where she specifically at—at one point recants and says that she lied about it, that is discoverable evidence, Your Honor, and the People will concede that point as it relates to the 1999 allegations.

But Your Honor must make the next step in the analysis, and that is were the People in possession of this evidence at the time in which this preliminary hearing took place, and at the time in which Ms. Thomas directed her request for discovery on us. And as—I believe Ms. Thomas's argument is somehow that because this is a law enforcement agency, and

this report was submitted to my office, that somehow that knowledge of Mr. Sequeira or Detective Hubbard is imputed upon every District Attorney in our office and every other law enforcement agency.

But the prosecution team includes information that's possessed by the investigation—investigating agencies, not other agencies that are not involved in the investigation of this case. And this case was being investigated by the Concord Police Department, and the Concord Police Department and the District Attorney is not in possession of police reports that are the Pleasant Hill Police Department's property, that are the Contra Costa Sheriff's Office report.

And not to mention, in this case, these are privileged juvenile records. Ms. Thomas couldn't even obtain them without a court order. In fact, she refused to even give them over to me yesterday, yet in the same breath, seems to argue that I have constructive knowledge of them.

In this case, Concord Police Department is the investigating agency. We only keep NCF files of cases or files that we choose not to file for three to four years. And this request was not sent over until ten years after this report was brought to a DA.

And I think that the court would agree that probably the—the thing we can argue is clearly discoverable, the thing that is the best, most admissible evidence for impeachment, is what's included on the last page of Detective Hubbard's report, which is Jane Doe I stating that she lied, stating that she made up the allegations.

The problem is is that Detective Hubbard, two pages earlier, said that he went to review the case with Mr. Sequeira. After he took the case to Mr. Sequeira, he then called the victim's mother, and the victim's mother was upset that charges were not

going to be filed. And then he went and met with the victim, and the victim told him he lied. There's no evidence, based on this police report, that somehow Detective Hubbard went back to Mr. Sequeira and brought this evidence to him that Jane Doe I had lied. For all we know, Mr. Sequeira had said, I'm not filing charges. He went and told the mom, went and talked to the victim, and this case was never brought back to the DA's Office.

Unfortunately, for the purposes of this hearing, Ms. Thomas has not subpoenaed Detective Hubbard, has not brought in former Deputy District Attorney Paul Sequeira, and she's trying to say that, based upon this police report, it's certain that the prosecution team had knowledge of these prior allegations, or at least this prior statement from the victim that she made up the report.

I think that even if he did read the report, these files—these old police reports are not kept on file for ten years in our office. And it would be an unfair burden to say that every piece of information that was ever in Mr. Sequeira's mind is somehow constructively within the knowledge of every DA in our office. That's an unfair burden. That's not the burden that the law places on the People. And I think that it wasn't in our possession, this is an unrealistic standard that Ms. Thomas is setting forth, and—and also, the court should take a look—I'm willing to concede that if the victim lied, and admitted to lying, that's discoverable.

But it's—it's also important to note that at the beginning of the interview, the victim, who's a child, said she doesn't know the difference between a truth and a lie, and not—it's not until she's yelled at by her mother and called a, quote, fucking liar, that somehow she says, yeah, I lied. So we don't even know what the statement, I lied, means coming from

a child who can't even truth-qualify to testify in court.

I think the last part of the court's analysis is if the court finds that somehow this evidence is discoverable, and that the People violated their right—or violated the defendant's substantial rights, the court must then take a look at the entire record in the case, and determine whether or not, based upon this new information that would—that would have been admitted at the preliminary hearing, for the purposes of impeachment, the court now finds that the defendant's rights were so impaired such that a holding order should not have been held in this case.

And in the *Stanton* case, which the defense relies upon, in that case, based upon the three inconsistent statements of prior witnesses, the court only struck the gross negligence part of the vehicular manslaughter charge.

And in the *Curry* case that I cited the court yesterday, the court found that even though the prosecution had evidence that this victim in that robbery was lying, that would not have been sufficient to overturn the—the sufficient evidence that was presented for probable cause at that hearing.

And so I think that in this case, we have two separate victims saying that the defendant molested them, and pursuant to Evidence Code section 1108, that evidence is cross-admissible to corroborate each other.

In this situation, we don't have this mom that was pressuring Jane Doe I in the picture anymore. We have two victims that are corroborating each other pursuant to Evidence Code section 1108. And based upon that, there's clearly sufficient evidence in the record for a holding order, and I don't see how

this evidence, even if it was admissible at preliminary hearing, and even if it was constructively in the knowledge of our office, would somehow fundamentally deny the defendant his substantial rights such that a holding order would not have been obtained on all counts.

THE COURT: So one of your arguments is that the—the evidence from these molests includes two different people, and the impeachment would only go towards one?

MR. WAGNER: That's correct. And that the court would then need to take a look at this impeachment and review the entire record of the preliminary hearing and determine whether or not this impeachment is so serious such that it would change the mind of the magistrate, and, therefore, make the holding order no longer applicable.

THE COURT: All right. Do you believe that—that I could review the preliminary hearing transcript and—and retest, given that this impeachment evidence would be not only for Jane Doe No. 1, but also for the mother—because the reports indicated that the mother had motives and was influential on the children—do you think—do you really think that I could retest it? Wouldn't the whole dynamic of the preliminary hearing change?

MR. WAGNER: Well, this—this testimony and statements of Jane Doe I was admitted via Prop 115. So her statements were just read to the court so the prior court didn't have the opportunity to test demeanor or anything as it relates to that witness.

I think you can consider this potential impeachment information in light of the statements that were elicited at the preliminary hearing. I think

that's what both the *Curry* court and the *Stanton* court did.

But the reason why I bring up the second victims—and there's no evidence that this same mother that was pressuring or allegedly pressuring Jane Doe I back in the late—mid-to-late '90s was at all involved in Jane Doe I's life at the time that this happened. In fact, she was a foster child. So there's no evidence that this same mother, Debbie, was around.

And it—it's almost clear in the statement in which Jane Doe I says that she may have been lying about the prior incident. She corroborates the '96 incident and says, the reason I lied is because I was so upset that he didn't go to jail for the prior things he did to me.

THE COURT: All right. Ms. Thomas, anything further?

MS. DEICHLER: With respect to the possession, the defense would argue that clearly their office did have knowledge of it, seeing as DA Sequeira discussed the case with Detective Hubbard, and together they made the decision not to file.

Under *Kyles v. Whitley* 514 US 419, an individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.

Here, clearly, Detective Hubbard was working with or speaking with the DA Sequeira.

With respect to the unfair burden the prosecution claims that every piece of evidence—that they would have to know every piece of evidence in the mind of that particular DA, again, I would point to *Kyles v. Whitley*, which states that there exists procedures and regulations that can be established to

carry the prosecutor's burden and to insure that communication of all relevant information on each case to every lawyer who deals with it. So that burden is taken care of there.

Finally, with respect to the impeachment evidence that somehow the mother had a motive, and this motive is no longer present, again, that doesn't change the fact that the victim lied and she has a tendency to make allegations of this nature. Whether or not the mother's motive is or is not here, it doesn't change the fact that the victim lied and she has a tendency to do so.

THE COURT: You say the victim, but there were actually two victims. So are you—you're moving to dismiss Counts One and Two.

MS. DEICHLER: Right.

THE COURT: So if you have one victim who lied that wasn't disclosed, why should I dismiss Count Two?

MS. DEICHLER: To that, we would argue that their stories are intertwined. The allegations were made at the same time. They were discussed between—the two had discussed the allegations together, and sort of made the claims together. So we would argue that those stories are so intertwined that lack of credibility on behalf of Jane Doe II would be—or Jane Doe I, rather, would be imputed to Jane Doe II.

MS. THOMAS: Your Honor, in addition, I would also like to address the *Curry* case that the District Attorney has asked the court to consider.

In the *Curry* case, what happened is that there was the sole primary witness, the victim in that case, who had alleged these terrible things—a robbery, conspiracy for murder, assault—that all took place in his house.

What was not disclosed to the defense in that case was that the complaining witness, the victim, had a pending open misdemeanor case that the District Attorney's Office had filed that stated that he had filed a false police report.

The *Curry* case is distinguishable from our case because in the *Curry* case, while they found that the misdemeanor false complaint should have been disclosed, they found that it did not deny them of a substantial right to a preliminary hearing because in that case, the evidence was overwhelming. They had the no-mistaken-identification issue. They had other direct and corroborating evidence, such as blood in the bathroom. They found bruises around his arms. They found that he had Duct tape around his mouth. They found that his telephone wires had been cut. They found that he had handcuffs around him. They found a percipient witness who had saw that a suspect—after this robbery assault had tooken place, that percipient witness had saw suspects leaving. They saw that—there was evidence that one of the suspects told another to hurry up and let's go. And they saw that the *Curry*—defendant *Curry* was trying to take pictures of the complaining witness after the complaint had been filed.

So there was a lot of corroborating evidence, that despite them not having the impeachment evidence of this misdemeanor false report and charge, that there was still other significant corroborating evidence to meet the standard of proof and beat—meet the holding order for the court to hold that defendant to order.

In our case—and I, again, apologize for sounding repetitive—we have no such evidence. The only evidence that we have, and the District Attorney's case then rests and falls, on the credibility and integrity of Jane Doe I.

Jane Doe I is the only one that's making these statements against Mr. Gutierrez. We have no other evidence to corroborate or substantiate what her story is. Had we known that there were two police reports for Jane Doe I, where Jane Doe I has accused another guy of similar acts in great detail even before she met with her mother, this is Jane Doe I playing outside, riding a bicycle, and then comes inside of the home to her mother, and is making these unbelievable stories about her encounter with this perpetrator, this suspect, and her mother then calling the police officers to come and investigate that.

We have another incident where Jane Doe I describes that the perpetrator has inserted a screwdriver inside of her vagina. There was no evidence, no findings of trauma anywhere when the SART exam was conducted.

So we have two very distinct, very detailed allegations of false sexual molest that in both cases were determined to be unfounded.

There—and one of the incidents sort of suggests that Debbie Jose, because she herself was a molest victim, sort of—sort of put this on her daughter. There's no allegation in the 1999 report that she and her mother, Jane Doe I, sort of collaborated this great exaggeration of what had happened. This was all Jane Doe I's story that she recounted to her mother, and her mother contacted the police and went on with it.

When it was determined that Jane Doe I had lied about it, then we have Detective Hubbard's

police report where her mother is then interacting with her saying that, you are a liar, you lied about all of this, which is more evidence that this information should have been turned over prior to preliminary hearing. We had no such evidence of Jane Doe I making these allegations against a individual on two separate, distinct occasions.

And although she said in one of the police reports that she didn't know the difference between a truth and a lie, they gave her examples of it. Would—would this scenario be the truth. She said, yes, that would be the truth, and, in fact, that scenario wasn't the truth. Would this scenario be a lie? Yes, that would be a lie. What is the difference between a bad touch and a good touch. Jane Doe I was able to recount that. This is direct evidence of her credibility that, again, was never turned over to the District Attorney's Office.

And I don't think that it's an unfair burden to put this—the District Attorney in its position to actually go out and retrieve this evidence.

I had a client who was sitting in custody on these charges, and who else responsibility was it to go and get this evidence that was in their possession but the District Attorney's Office?

The defense, to this day, still have not been noticed of this discovery from the District Attorney's Office. Had it not been an 827 motion that the defense filed, we still would have not known about these allegations that Jane Doe I had—had sort of made up against this individual, and not on one occasion, on two occasions.

So I disagree with the District Attorney's representation that we're putting him in an unfair burden. Mr. Gutierrez, because he did not have a fair preliminary hearing, is certainly unburdened by the District Attorney's failure to go out and get this

evidence that certainly was in their constructive possession.

And I will submit.

THE COURT: All right. Thank you, Ms. Thomas. Anything further, Mr. Wagner?

MR. WAGNER: Yeah. I just don't understand how defense counsel makes a leap that somehow this evidence is in my possession or in the DA's Office possession simply based upon the fact that two agencies that are not part of the prosecution team have a police report.

Had she wanted to call Mr. Sequeira, she could have done that. If she wanted to call Detective Hubbard to find out what he told Mr. Sequeira, she could have done that. This is the time and place for this motion. She failed to meet her burden.

MR. THOMAS: If the court wants to entertain putting the defense in a position of subpoenaing Detective Hubbard, Detective Shabazz, and Detective Evans, those officers have already been under subpoena for the jury trial date.

And if the court would like to pass it so that we can come back next week so those officers can testify, we can do that; however, I don't think that that is our burden at this stage. I don't believe that the *Stanton* court envisioned that the defense is now under the burden to present evidence or witnesses. Those were impeachment evidence—impeachment witnesses, and as an officer of the court, I can assure you that having spoken to Detective Hubbard, Detective Evans, and Detective Shabazz, they still remember this case, despite the case that's happening 10, 12 years ago, and are prepared to testify exactly as they put in their police reports, that Jane Doe I had

credibility issues, and that they determined that the cases would not be charged because the allegations were unfounded.

So I'm not sure if the court—

THE COURT: That seems to be what the reports indicate. I don't—I really don't think there's an issue with regard to that.

We—what—what we have is a *Brady* violation, and we have the frustration of the District Attorney because the police knew of the *Brady* violation, and it was—it was at one time passed to another Deputy District Attorney years ago, and I'm sure he forgot about it years ago, and then the case resurfaced, and it slipped through the cracks.

And *Kyles versus Whitley*, the United State Supreme Court case that's cited by the defense, puts a tremendous burden on the People to—to find out that information. It—it is maybe a little bit unrealistic, but it—it's—it's the law. And it—it requires that the—the People do seek out this—this type of information, and that they are held in—to be in possession of the materials that their police agencies are in possession of.

And so I do find there is a *Brady* violation.

So the next question is whether or not the court should find that dismissal is warranted, and the cases discuss adding the impeachment evidence and retesting to see if the preliminary hearing would have been different.

The witnesses at the preliminary hearing would have been asked about Hubbard's report, about Jane Doe No. 1, and also the mother, and this influence, perhaps, that the mother had on the children, and her motivation to fabricate. All—all of—all of this information was known to Deputy DA Sequeira at one time, as the—the report by Hubbard indicates

that he was aware of the history of the parties involved in the case, and so I'm sure that would have included this—this information that's in the prior page that CPS felt that the mother was making the allegations to keep Arturo, the defendant, from going to Mexico.

So when you insert those—those items in that—that impeachment, and you try to retest, it makes it very difficult because the complete character of the preliminary hearing would have been different.

So I—I do conclude that there's a reasonable probability that the outcome of the preliminary hearing would have been affected by the inclusion of the exculpatory evidence. There is a reasonable probability of that.

And so I do dismiss Counts One and Two.

The 99—the nonstatutory motion is granted.

MS. THOMAS: Thank you, Your Honor.

(Whereupon, the proceedings concluded.)