No. 13-347

In The Supreme Court of the United States

CALIFORNIA,

Petitioner,

v.

BALDOMERO GUTIERREZ,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California First Appellate District

BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

MARK ZAHNER,
Chief Executive Officer
CALIFORNIA DISTRICT
ATTORNEYS ASSOCIATION
ALBERT C. LOCHER*
Assistant District Attorney
COUNTY OF SACRAMENTO
GARY W. SCHONS
Deputy District Attorney
COUNTY OF SAN DIEGO
921 Eleventh Street
Sacramento, CA 95814
(916) 443-2017
lochera@sacda.org

Attorneys for Amicus Curiae California District Attorneys Association

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Does the due process obligation of the prosecutor under *Brady v. Maryland*, 373 U.S. 83 (1963), to provide the defense with material evidence favorable to the accused in order to ensure the defendant receives a fair trial, extend to providing such evidence at or before a preliminary examination held before a magistrate well in advance of trial for the purpose of making a judicial determination whether there is sufficient cause to require the defendant to stand trial?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF INTEREST[1]

This brief is submitted by the California District Attorneys Association (CDAA), as amicus curiae in support of petitioner the state of California. CDAA is the statewide organization of California prosecutors. CDAA is a professional organization that has been in existence for over 90 years, and was incorporated as a nonprofit public benefit corporation in 1974. It has over 2500 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association presents prosecutor's views as amicus curiae in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

This case raises matters of concern to prosecutors and law enforcement professionals nationwide. The issue here relates to a fundamental point in the jurisprudence of this Court and lower courts concerning the obligation of prosecutors to disclose to the defense material evidence favorable to the accused in order to

---

[1] Pursuant to Rule 37.2(a), amicus gave counsel of record for each party written notice of the intention of amicus to file this brief at least 10 days in advance, and all parties have consented in writing to the filing of this brief. Pursuant to Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than amicus, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief.

ensure the defendant a fair trial, under *Brady v. Maryland,* 373 U.S. 83 (1963) – specifically the timing of the obligation, and thus the scope of how far that obligation extends. Lower courts have reached conflicting rulings, affecting how prosecutors process cases and meet their responsibilities under *Brady*. A decision by this Court will provide a uniform rule and clarification as to when prosecutors must make disclosure, a rule that will affect tens of thousands of prosecutions nationwide.

Amicus has expertise in the issues pending before the Court in this case, and believes this brief will be helpful to the Court in its consideration of these matters.

ARGUMENT

I. COURTS HAVE SPLIT ON WHETHER *BRADY* DISCLOSURE IS REQUIRED AT STAGES OF THE PROSECUTION BEFORE TRIAL

A. State Courts Have Split on Whether *Brady* Disclosure is Necessary Before or During a Probable Cause Preliminary Hearing to Bind a Defendant Over for Trial

The issue in this case is whether the prosecution's obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to provide the defense with evidence favorable to the accused extends to a pretrial adversarial

preliminary hearing[2] held to determine if there is probable cause to proceed to trial for the crimes charged. This is an issue on which the lower courts have split.

Wisconsin law provides for an adversarial preliminary hearing similar to California. Compare Wisconsin Statutes 970.03 and California Penal Code §§ 859b, 866(b), 872. In *State ex rel. Lynch v. County Court, Branch III,* 82 Wis.2d 454, 465, 467-468, 262 N.W.2d 773 (1978), a prosecution with seven defendants, during the preliminary hearing the court entered an order allowing counsel for each defendant to review the prosecutor's file as to that particular defendant. The prosecution sought review of the order in the Wisconsin Supreme Court. In deciding whether the order was proper, the Wisconsin Supreme Court considered whether it could be justified by either state law or the U.S. Constitution. With respect to the latter ground, the court stated:

> It is important to remember 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

[2] Depending on the jurisdiction, the proceeding goes by various names, most commonly "preliminary examination" or "preliminary hearing." In this brief, those terms are used synonymously.

> Constitution.[3] [citing *United States v. Agurs*, 427 U.S. 97 (1976), and *Brady*, supra.] A preliminary examination is not a trial. *Tell v. Wolke*, 21 Wis.2d 613, 617, 618, 124 N.W.2d 655 (1963).
>
> ———————
>
> [Footnote] 3. Disclosure at the present stage of the instant prosecution is in no way essential to the effective use of any exculpatory material by the defendants at trial. It is unnecessary to determine whether the right to a fair trial may, under certain circumstances, require pretrial – but post-bindover [post-preliminary examination] – disclosure to permit the effective use of particular evidence at trial.

State ex rel. Lynch, supra, 82 Wis.2d at 465 (emphasis in the original).

Finding neither state law nor *Brady* required disclosure to the defendant at the preliminary examination stage, the Wisconsin high court held the order of the preliminary examination judge was "without basis in the constitution or sound judicial policy." 82 Wis.2d at 468.

In *State v. Schaefer*, 308 Wis.2d 279, 746 N.W.2d 457 (2008), defendant issued a subpoena duces tecum for police investigation reports before his preliminary examination. After the county circuit court quashed the subpoena, defendant sought review in the Wisconsin Supreme Court. That court noted "[a] preliminary examination is not a trial," 308 Wis.2d at 293,

and concluded *Brady* did not provide a basis for the defendant to subpoena police records before the preliminary examination. 308 Wis.2d at 315.

In *Stafford v. District Court*, 595 P.2d 797 (Okl.Cr. 1979), the defendant sought pre-preliminary hearing discovery of various items, which was denied. On review, the Oklahoma Court of Criminal Appeals affirmed denial of the discovery request, stating if the defendant was bound over to stand trial, he would at that point be entitled to receive exculpating information prior to trial, citing *Brady*, but held that at preliminary hearing, such disclosure was not required.

In *State v. Benson*, 661 P.2d 908 (Okl.Cr. 1983), the defendant sought and the preliminary hearing magistrate granted an order the prosecution turn certain investigative reports over to the defense. On review, the Oklahoma Court of Criminal Appeals vacated the order, noting *Brady* material could be had before trial, but it was not necessary it be disclosed at the preliminary hearing stage.

In disagreement with those decisions, in *People v. Gutierrez*, 214 Cal.App.4th 343 (2013), the case at bar, the California Court of Appeal addressed whether "the prosecutor's duty to disclose exculpatory evidence under *Brady v. Maryland* . . . applies to the preliminary hearing." 214 Cal.App.4th at 346. After the preliminary hearing in a child molest case, the defendant had learned through researching juvenile records the complaining witness had made an allegation of molest against another person, which it had

later been decided was false. Because the prosecution had not located and disclosed this information before the preliminary hearing, the court granted the defendant's motion to dismiss for a *Brady* violation. On the prosecution's appeal, the Court of Appeal affirmed, specifically stating "we . . . conclud[e] . . . that defendants have a due process right under the United States Constitution to *Brady* disclosures in connection with preliminary hearings. . . ." 214 Cal.App.4th at 355, fn. 5. This holding is binding on trial level courts throughout California, not just in those courts falling within the First Appellate District. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (1962).

Given that a significant number of states employ the preliminary hearing procedure, the current split in authority can only increase. The distinct split in lower court authority on this fundamental point of *Brady* jurisprudence merits review and resolution by this Court.

B. *Gutierrez* Represents a Split in Case Authority Defining the *Brady* Disclosure Obligation as Related to Trial

In addition to marking a split in authority over the specific appellate cases addressing the applicability of *Brady* at preliminary hearings, *Gutierrez* also denotes a split with authority that relates the *Brady* obligation to trial, and not to other pre-trial stages apart from the preliminary hearing.

The First, Second, Third, Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits have each found under the Due Process Clause *Brady* disclosures are exclusively a trial right. Across the board, no *Brady* violation occurs so long as the exculpatory material evidence has been disclosed at a time when the defense may make effective use of it at trial.

- *United States v. Peters*, 732 F.2d 1004, 1009 (1st Cir. 1984) – disclosure delayed until mid-trial, defendant had two days to prepare for its use; held, no *Brady* violation.
- *United States v. Flaherty*, 668 F.2d 566, 586, 588-591 (1st Cir. 1981) – impeachment material disclosed mid-trial, but defense made effective use of it; held, no *Brady* or *Agurs*, supra, violation.
- *United States v. Coppa*, 267 F.3d 132, 135, 139-140, 142-144 (2d Cir. 2001) – a District Court order that the prosecution turn over exculpatory and impeachment evidence in advance of trial "immediately upon request by a defendant," even if that request is far in advance of trial, was improper; *Brady* only requires disclosure in time for effective use at trial.
- *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984) – when the prosecution failed to disclose before trial an FBI report of the statement of a government witness that was *Brady* material, the District Court could not as a sanction preclude the witness from testifying, because there was no *Brady* right for disclosure before trial.

- *United States v. Higgs*, 713 F.2d 39, 43-44 (3d Cir. 1983) – order of District Court that prosecution disclose leniency/immunity agreements with witnesses one week before their testimony reversed; disclosure of *Brady* impeachment evidence may be made as late as the day the witness testifies at trial.
- *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir. 1985) – impeachment evidence was disclosed during testimony of first witness at trial, and thus it was available for the entire trial thereafter; held, no *Brady* violation.
- *United States v. Holloway*, 740 F.2d 1373, 1380-1381 (6th Cir. 1984) – disclosure of inconsistent statements of government witnesses delayed until prosecutor's opening statement at trial; held, no *Brady* violation.
- *United States v. Allain*, 671 F.2d 248, 254-255 (7th Cir. 1982) – disclosure of impeaching evidence the day before trial began; held, no *Brady* violation.
- *United States v. Higgins*, 75 F.3d 332, 335 (7th Cir. 1996) – late examination of physical evidence by a government expert in circumstance that warranted its use as impeachment of the expert, disclosed six days before trial; held, no *Brady* violation.
- *United States v. Shelton*, 588 F.2d 1242, 1247 (9th Cir. 1978) – 500 pages of material, including impeachment material, turned over

to the defense the day before trial; held, no *Brady* violation.

- *United States v. Warhop*, 732 F.2d 775, 777 (10th Cir. 1984) – disclosure of impeaching statement by witness made at trial after witness testified on direct examination; held, no *Brady* violation.
- *United States v. Knight*, 867 F.2d 1285, 1289 (11th Cir. 1989) – inconsistent, impeaching statements disclosed after witness testified at trial; witness recalled, and subject to further direct and cross-examination; held, no *Brady* violation.

In each of these cases, disclosure of *Brady* material was made shortly before or during trial, or was ordered to occur well before trial. These cases all hold that since the *Brady* obligation arises from the due process right to a fair trial, it does not require disclosure at some stage well before trial. *Gutierrez* marks an implicit split with this authority by linking the *Brady* obligation not to a fair trial, but rather to an early stage probable cause determination, far in advance of trial. If *Brady* can indeed extend to an early stage of the proceedings, then lower court rulings limiting it to effective use at trial are incorrectly decided. But if the above federal circuit court rulings are correct, then a rule extending *Brady* to an early probable cause determination cannot be correct. In either event, prosecutors and lower courts are entitled to know which rule they should follow. This split merits the attention of this Court.

II. *GUTIERREZ* IS INCONSISTENT WITH THE CONSTITUTIONAL UNDERPINNINGS OF RULINGS OF THE SUPREME COURT

Gutierrez not only marks a split in the lower court rulings described above. It also is inconsistent with the constitutional underpinnings of significant cases from this Court – *Gerstein v. Pugh*, 420 U.S. 103 (1975); *United States v. Williams*, 504 U.S. 36 (1992); and *United States v. Ruiz*, 536 U.S. 622 (2002).

Gerstein addressed what type of judicial proceeding or determination was necessary under the Fourth Amendment as a prerequisite to extended restraint on liberty following arrest, in order to hold a defendant for trial. This Court held judicial oversight of the prosecution decision to charge a crime was not required; that after arrest, a judicial determination of probable cause was required; but an adversarial proceeding to reach that determination was not. 420 U.S. at 118-119, 126. Noting the required determination of probable cause deals only with probabilities, *Gerstein* stated:

> The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a

> reasonable belief in guilt. . . . This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.

420 U.S. at 121-122

Since under *Gerstein* the Constitution does not require an adversarial hearing or cross-examination for the judicial probable cause determination, it follows the Constitution does not require the defense to receive *Brady* impeachment evidence for use in cross-examination, or an affirmative defense showing, at the preliminary hearing. In terms of the analysis the high court employed in *Gerstein*, the value of such evidence would be slight in most cases, since the issue to be determined is simply probable cause, not guilt. Indeed, it is difficult to conceive how the value of disclosing impeachment or other *Brady* evidence could take on constitutional weight at a preliminary hearing, when the Constitution does not require an adversarial preliminary hearing, or cross-examination.

In *United States v. Williams*, supra, this Court considered whether the failure of the prosecutor in seeking an indictment to present to the grand jury exculpatory evidence in the prosecutor's possession was grounds for dismissal of the indictment. In

holding the prosecutor had no such obligation at the indictment stage, the Court noted "the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge." 504 U.S. at 51. Certainly the grand jury in certain ways is different from a magistrate sitting at a preliminary hearing, but this function – assessing whether there is adequate basis for a charge, but not determining guilt or innocence – is directly analogous to the determination a magistrate makes at a California preliminary hearing. See California Penal Code §§ 859b, 866(b), 872. If, as this Court held in *Williams*, there is no constitutional obligation to make a grand jury aware of *Brady* material when the grand jury makes its determination as to an adequate basis for a criminal charge, it is inconsistent to hold, as the *Gutierrez* court did, that the Constitution requires *Brady* material be disclosed at the preliminary hearing stage when the same type of determination is being made.

Finally, the *Gutierrez* holding is implicitly inconsistent with this Court's decision in *United States v. Ruiz*, supra. There, this Court considered a claim that absent the disclosure of material, exculpatory evidence as required by *Brady*, a guilty plea would not be knowingly and intelligently made – in other words, whether "the Constitution requires pre-guilty plea disclosure of impeachment information." 536 U.S. at 629. Notwithstanding the fact the vast majority of criminal cases in state and federal courts are resolved by way of pre-trial pleas of guilty, the Court

held pre-plea disclosure of *Brady* impeachment evidence was not required, so long as any evidence of factual innocence was disclosed. 536 U.S. at 632. Since *Ruiz* refused to extend the *Brady* obligation into a portion of the pre-trial process that leads to a determination of guilt in most criminal cases (i.e., a guilty plea), *Gutierrez* implicitly conflicts when it holds the *Brady* obligation as to impeachment evidence applies at the preliminary examination, an early stage of the proceedings not involving a determination of guilt.

While *Gerstein*, *Williams* and *Ruiz* did not involve the specific issue of *Brady* disclosure at a preliminary hearing, the underlying constitutional principles of those decisions are inconsistent with the holding of the Court of Appeals in *Gutierrez*.

III. POLICY CONSIDERATIONS OF CONSTITUTIONAL IMPORT WEIGH AGAINST EXTENDING THE *BRADY* OBLIGATION TO THE PRELIMINARY HEARING STAGE

Policy matters this Court has recognized as having constitutional weight in the balancing of interests on the necessity and timing of *Brady* disclosure are implicated by the rule adopted by the court below.

In *Ruiz*, supra, this Court noted that requiring disclosure of all *Brady* information at the plea bargaining stage could mean compromising investigations by the premature release of information relating to cooperating informants, undercover investigators,

or other prospective witnesses. 536 U.S. at 631-632. The same concerns arise with a rule requiring the prosecution to make *Brady* disclosures at the preliminary hearing stage.

Further, the Court noted such a rule would require the government to devote substantially more resources to trial preparation before plea bargaining. Id. at 632. Weighing these concerns, this Court concluded, "We cannot say that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit." Id. A rule applying full *Brady* disclosure requirements to the preliminary hearing stage raises similar concerns, since this Court has recognized preliminary hearings occur at "an early stage of the prosecution when the evidence ultimately gathered by the prosecution may not be complete." *Adams v. Illinois*, 405 U.S. 278, 282 (1972).

Under California law, a defendant charged with a felony offense, whether or not in custody, has a right to demand a preliminary examination within 10 court days of the date the defendant is arraigned or enters a plea. California Penal Code § 859b. Grafting a *Brady* obligation onto a proceeding with such short timelines will greatly burden prosecutions.

The circumstances of the case at bar illustrate the burdens that would be imposed. The instant prosecution arose from a child molest investigation by the Concord Police Department. The information claimed

to have been *Brady* material that should have been disclosed came from two earlier investigations involving the same victim, but reported to and investigated by two different police agencies – two years before by the Contra Costa Sheriff's Department and five years before by the Pleasant Hill Police Department. Each had a different suspect than the one in the case at bar. There were also Child Protective Services investigations involving the victim. The second of the two previous matters had been submitted to the District Attorney's Office and rejected for prosecution by a deputy D.A. (different than the one involved in the current case) two years before the instant investigation arose. Compliance with pre-preliminary hearing *Brady* disclosure rules would require searching records of multiple agency records, or for the District Attorney's Office to catalogue and index cases rejected not just by defendant, but also by witnesses who may have had suspect credibility.

This goes far beyond procedures relating to cooperating witnesses and informants (a relatively small group) who prosecutors must track under *Giglio v. United States*, 405 U.S. 150 (1972). Of course, nothing in *Giglio* suggested such data must be sought out and disclosed well in advance of trial. For the undertaking suggested by *Gutierrez*, the data entry alone would be great. The storage of the underlying case reports for all rejected cases for many years, the storage and comparison of witnesses in new cases with witnesses in closed, rejected or dismissed cases, the retrieval of the information when a new case with a flagged

witness arose, and the comparison of the information to evaluate materiality, would all have to be done in the early stages of case evaluation and preparation, according to the *Gutierrez* rule. The Contra Costa District Attorney's Office alone, serving a population of over one million, files over 16,000 cases per year, including over 3,800 felonies. California Department of Finance, "Population Estimates for Cities, Counties and the State, January 1, 2012 and 2013"; California Judicial Council, "Statewide Caseload Trends, 2002-2003 Through 2011-2012" p. 112, Table 7a. For agencies such as the Los Angeles District Attorney (serving a population of nearly 10 million, filing over 55,000 felony cases per year, id.) the expenditure of resources will be much greater. Other large counties, nationwide, must have comparable numbers, relative to population served. Requiring the prosecution to catalog, ferret out, assemble and disclose all manner of exculpatory evidence, including impeachment evidence, for disclosure at the very early stages of the case, will lead to substantial delays and increased litigation in criminal proceedings, and the dismissal of meritorious cases where such evidence cannot be found and disclosed.

The policy concerns above given constitutional weight in *Ruiz* are of particular note, because that case was a unanimous decision as to the result, with eight justices agreeing on the opinion of the Court.

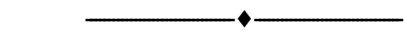
The rule adopted by the *Gutierrez* court will also burden the entire criminal justice system by adding layers of required discovery and potential pre-trial

litigation. This Court in *Williams*, supra, addressed such factors when it rejected the defendant's claim that the failure to require *Brady* disclosure at the indictment stage would lead to undue consumption of judicial resources in litigating unfounded cases that would eventually be dismissed. This Court observed any saving of judicial resources must be balanced against the consumption of judicial resources in litigating *Brady* claims made at the indictment stage. *Williams*, supra, 504 U.S. at 55. The *Williams* majority found the speculated savings in judicial resources by eliminating unfounded cases was not of sufficient constitutional weight to justify extending a disclosure requirement to the indictment stage. The same would be true for the rule respondent and the *Gutierrez* court would adopt with respect to enforcing a *Brady* obligation at the preliminary hearing stage. As the case is further investigated and discovery released to the defense, inevitably some defendants will seize on a piece of information that should arguably have been disclosed before the preliminary hearing under the *Brady* disclosure obligation respondent would impose. Courts will be required to deal with such claims, urging that *Brady* ought to apply to any number of proceedings within the criminal justice process far afield the trial itself.

The *Gutierrez* holding affects thousands of felony prosecutions pending and to be filed in the courts of California, and potentially other states should the split in judicial rulings on this issue widen.

Finally, in considering these policy issues, it is important to note a rule limiting *Brady* disclosure at the preliminary hearing stage does not leave defendants without protection. The ethical responsibilities of a prosecutor prohibit pursuing a case with improper motives or by means inconsistent with the truth. California Business & Professions Code § 6068(c); California Rules of Professional Conduct, Rule 5-110; see also *Imbler v. Pachtman*, 424 U.S. 409, 427 (fn. 25) (1976). A prosecutor holding evidence showing probable cause does not exist will be ethically required not to pursue the case.

The policy considerations this Court has in the past found to be good reasons for not extending the *Brady* obligation beyond the right to a fair trial provide a further cause for this Court to consider this case, and define the reach and limits of *Brady* on which the lower courts have disagreed.



CONCLUSION

While long established law applies the *Brady* obligation to trial, the split in authority that has developed over the applicability of the *Brady* obligation to the earlier preliminary hearing stage merits consideration and resolution by this Court. Amicus curiae

respectfully urges this Court to grant certiorari, and reverse the holding of the California Court of Appeal.

DATE: October 18, 2013 Respectfully submitted,

MARK ZAHNER
Chief Executive Officer
CALIFORNIA DISTRICT
ATTORNEYS ASSOCIATION
ALBERT C. LOCHER
Assistant District Attorney
COUNTY OF SACRAMENTO
GARY W. SCHONS
Deputy District Attorney
COUNTY OF SAN DIEGO

Attorneys for Amicus Curiae
California District
Attorneys Association