

In the Supreme Court of the State of California

LEO AVITIA,

Petitioner,

v.

**THE SUPERIOR COURT OF SAN
JOAQUIN COUNTY,**

Respondent,

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Real Party in Interest.

Case No. S242030

SUPREME COURT
FILED

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Deputy

Third Appellate District, Case No. C082859
San Joaquin County Superior Court, Case No. CJ20164112415
The Honorable Brett H. Morgan, Judge

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

1(a). As a remedy for a statutory violation during grand jury proceedings, may the court dismiss the indictment on due process grounds under Penal Code section 995, when section 995, which specifies the only grounds for dismissal of an indictment or information, does not provide dismissal as a remedy for that statutory error?

1(b). What is required to show a violation of due process in grand jury proceedings?

1(c). Should a due process claim be raised in a Penal Code section 995 motion to dismiss the indictment or a nonstatutory motion?

2(a). Has Avitia shown that the prosecutor violated his right to due process by excusing a biased grand juror when Penal Code section 939.5 assigns that task to the foreperson?

2(b). Is Avitia entitled to automatic dismissal of the indictment without any showing of prejudice?

2(c). Did the prosecutor's error in taking on the task of excusing the biased grand jury violate the separation of powers doctrine and result in an improperly constituted grand jury?

INTRODUCTION

After introducing Avitia's case to a grand jury, the prosecutor asked whether any grand jurors had a state of mind that would prevent them from acting impartially. One grand juror forthrightly disclosed that she could not be fair to the defense. The prosecutor directed her to retire.

Because the foreperson has the duty of directing a biased grand juror to retire, the prosecutor erred, but not to Avitia's prejudice. Avitia nevertheless seeks a ruling that this procedural error amounts to structural error, and should result in the drastic remedy of dismissal of the indictment without any showing of prejudice. Avitia's position would provide

defendants with a windfall while undermining the statutory scheme governing grand jury proceedings. And his reasoning is contrary to well-established law regarding harmless error.

The superior court and the Court of Appeal correctly declined to dismiss the indictment against Avitia.

STATEMENT OF THE CASE

A. The Grand Jury Hears Avitia's Case and Returns an Indictment

The San Joaquin County District Attorney's Office filed a complaint alleging that Avitia drove while intoxicated, causing Monte Bowens's death. (Exhibits [Exhs.] at 2-9.)¹

The superior court empaneled a criminal grand jury consisting of nineteen grand jurors and four alternate grand jurors. (*Avitia v. Superior Court* (Apr. 18, 2017, C082859) 2017 WL 1382115 at p. *1 [nonpub. opn] (*Avitia*)²; exhs. at 129-180.) The superior court explained to the grand jurors and alternates that district attorneys may ask citizens to decide whether "an individual suspected of a crime should be charged with that crime." (Exhs. at 173.) It also told them that the District Attorney's Office would present a case to them when they returned to court. (Exhs. at 172.)

¹ The exhibits referred to throughout this brief are those that Avitia filed in the appellate court with his petition for writ of mandate and/or prohibition (petition). The People refer to Avitia's exhibits by Bates-stamp pagination.

² The Court of Appeal's unpublished opinion in this case is relevant here because "it states reasons for a decision affecting the same defendant or respondent in another such action." (Cal. Rules of Court, rule 8.1115 (b)(2).) This Court "will accept the Court of Appeal opinion's statements of the issues and facts" unless Avitia called any alleged inaccuracies to the appellate court's attention in his petition for rehearing. (Cal. Rules of Court, rule 8.500(c)(2).)

The court also detailed the prosecutor's role. (Exhs. at 173-175.) The prosecutor would examine witnesses and present other evidence. (Exhs. at 174-175.) The defendant and his counsel would not be there, but the prosecutor would be required to present any evidence suggesting innocence. (Exhs. at 173-174.) The grand jurors were cautioned that the prosecutor's statements were not evidence. (Exhs. at 175.) At the conclusion of the evidence, the prosecutor would determine the appropriate instructions to give the grand jurors. (Exhs. at 175.)

The court then gave the grand jurors instructions on how to approach their work. (Exhs. at 172-178.) They could write questions to give to the prosecutor. (Exhs. at 173.) They would decide what the facts were based on the evidence presented and would use the instructions to apply the law to the facts. (Exhs. at 175.) The superior court advised that 12 of them must find probable cause before finding an indictment, explaining: "Probable cause means that each grand juror, voting to find an Indictment, is convinced of a state of facts as would lead a person of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion that a public offense has been committed and a strong suspicion of the guilt of an accused." (Exhs. at 176.) The court told the grand jurors they would not decide the ultimate question of the defendant's guilt or punishment. (Exhs. at 177.)

The court explained that a foreperson would "preside over all the sessions of the grand jury, administer all oaths, sign and date . . . any Indictments found to be true, and present the Indictment to the Court." (Exhs. at 177; see also exhs. at 174.) The court then selected a foreperson. (Exhs. at 178.)

On the next business day, a deputy district attorney appeared before the assembled grand jury (exhs. at 95³) and read the complaint (see exhs. at 87). The prosecutor then said, tracking the language of Penal Code⁴ section 939.5, “Any member of the Grand Jury who has the state of” (exhs. at 31) “mind in reference to this matter, or any of the parties involved, which will prevent him or her from acting impartially and without prejudice to the substantial rights of the parties will now retire” (exhs. at 96). The prosecutor continued, “So, basically, ladies and gentlemen, I’m asking if anybody here, after listening to the charges, or listening to the witnesses, has the state of mind which will prevent him or her from acting impartially and without prejudice to the substantial rights of parties.” (*Avitia, supra*, 2017 WL 1382115 at p. *1; exhs. at 96.) Grand Juror No. 6, who was the foreperson (exhs. at 87-88)⁵, and Grand Juror No. 18 responded. (*Avitia*, at p. *1; exhs. at 97-98.) Grand Juror No. 18 said, “I’ve arrested people for 148.” (*Avitia*, at p. *1; exhs. at 97.)

Grand Juror No. 18’s response was significant because she referred to a criminal offense, section 148, which is similar to a crime the grand jury would consider in *Avitia*’s case, section 69. (Exhs. at 7.) Section 148 makes it a crime to willfully resist, delay, or obstruct any peace officer discharging or attempting to discharge his or her duties. Section 69 similarly criminalizes obstructing executive officers.

³ Exhibit H is an incomplete transcript of the grand jury proceedings on January 11, 2016. (Exhs. at 95-99.) The parties agree as to what was said and done at that proceeding, and the missing parts are filled in from the other exhibits. The Court of Appeal accepted the facts as agreed on by the parties. (*Avitia, supra*, 2017 WL 1382115 at pp *1-2 & fn. 3.)

⁴ Subsequent section references are to the Penal Code unless otherwise specified.

⁵ Grand Juror No. 6 remained on the grand jury (*Avitia, supra*, 2017 WL 1382115 at p. *3; exhs. at 88), and *Avitia* raises no issue concerning that.

The prosecutor then questioned Grand Juror No. 18 outside the presence of all the other grand jurors and alternates (*Avitia, supra*, 2017 WL 1382115 at pp. *1, *7; exhs. at 97, 99; see also exhs. at 88):

Q. . . . Juror Number 18, you stated that you may have some issues?

A. [by Grand Juror No. 18] Correct. I am a peace officer. I work for the Department of Alcohol Beverage Control, and I have arrested subjects for 148 PC.

Q. Aren't you exempt from jury duty?

A. I'm not. I'm 830.2. We don't follow the exemption.

Q. The fact that you've arrested people for . . .

(Exhs. at 99.⁶)

Q. The fact that you arrested people for resisting arrest before, *do you think that's going to affect your impartiality in this case?"*

A. Yes.

Q. *You do?*

A. *I do*, in addition to the fact that I'm currently conducting an investigation that's very similar to these charges.

Q. *So you don't think you can be fair?*

A. *No, I don't think so.*

Q. *What I'm going to ask you to do is go down to the basement, let them know that you were excused.*

⁶ Exhibit H ends here, omitting the rest of the exchange between the prosecutor and Grand Juror No. 18. However, the rest of the exchange is included in the petition filed in the appellate court, at page 39. That account is consistent with the account provided by the prosecutor in his opposition to Avitia's motion to dismiss (exhs. at 32) and the account the superior court included in its written findings (exhs. at 87-88).

(Petition at 39, italics added.)

After Grand Juror No. 18 left, proceedings resumed before the other grand jurors. (*Avitia, supra*, 2017 WL 1382115 at p. *2; see exhs. at 32.) After hearing the evidence, the grand jury returned an indictment. (Exhs. at 11-18.) Avitia is charged with second degree murder (§ 187, subd. (a)), gross vehicular manslaughter while intoxicated (§ 191.5, subds. (b), (d)); driving under the influence causing bodily injury (Veh. Code, § 23153, subds. (a), (b)); resisting an executive officer (§ 69), and driving while his privilege was revoked or suspended (Veh. Code, § 14601.2, subd. (a)). (Exhs. at 2-9.) The indictment alleges that Avitia has two prior convictions for driving under the influence (Veh. Code, §23152, subd. (b)). (Exhs. at 4-6.)

B. The Superior Court Denies Avitia's Motion to Dismiss the Indictment

After Avitia entered pleas of not guilty, he filed a nonstatutory motion to dismiss the indictment. (*Avitia, supra*, 2017 WL 1382115 at p. *2; exhs. at 20-29.) Later, the court construed Avitia's motion as a motion to set aside the indictment pursuant to section 995. (Exhs. at 63.)

Avitia argued that section 939.5 allows only the grand jury foreperson to direct a grand juror who cannot act impartially to retire. (Exhs. at 23-24.) Avitia asserted that the prosecutor's action interfered with the grand jury's independence, deprived him of a substantial right, and required dismissal of the indictment even in the absence of prejudice. (Exhs. at 23-28, 190-191, 202.)

The superior court denied the motion to dismiss the indictment in a written ruling. (*Avitia, supra*, 2017 WL 1382115 at pp. *2-*4; exhs. at 87-93.) The superior court found that the facts did not support Avitia's claims that the prosecutor's action had affected the mindset of the grand jurors and had caused them to believe that the prosecutor controlled their operations.

(Exhs. at 89.) The superior court noted that, after the two grand jurors had raised concerns, the prosecutor questioned each of them out of the presence of the other grand jurors. “The other members did not witness the prosecutor instruct Juror No. 18 to retire. Thus, with one grand juror staying on the jury and another leaving, the remaining grand jurors reasonably would have concluded that Juror No. 18 needed to be excused due to a bias or impartiality.” (Exhs. at 89.) The superior court concluded that Avitia’s assertion regarding the effect on the grand jurors was “speculative and unsupported by the record.” (Exhs. at 89.)

C. The Court of Appeal Denies Avitia’s Writ Petition

Avitia filed a petition for writ of mandate and/or prohibition in the Court of Appeal. (*Avitia, supra*, 2017 WL 1382115 at p. *4.) The Court of Appeal agreed that the prosecutor erred (as did the People), but was not persuaded that the indictment should be dismissed. (*Id.* at pp. *1, *9.)

The Court of Appeal first found that the prosecutor’s violation of section 939.5 did not fall within the grounds for dismissal set out in section 995, subdivision (a)(1)(A). (*Avitia, supra*, 2017 WL 1382115 at p. *5.)

The court next rejected Avitia’s claim that the prosecutor’s action amounted to a violation of his right to due process. Like the superior court, the appellate court noted that Grand Juror No. 18 was dismissed outside the presence of the other grand jurors. (*Avitia, supra*, 2017 WL 1382115 at p. *7.) The court concluded that, contrary to Avitia’s argument, the “deputy district attorney’s actions did not ‘inevitably create[] and foster[] the false impression that the grand jury was operating under his scrutiny and control.’” (*Ibid.*)

Finally, the Court of Appeal held that having the foreperson excuse grand jurors for bias did not amount to a “core right.” (*Avitia, supra*, 2017 WL 1382115 at p. *7.) The error was neither “inherently prejudicial” (*ibid.*) nor an exceptional structural error not amenable to review for harmlessness

(*id.* at p. *8.) Avitia had made no showing of prejudice from the dismissal of “an admittedly biased grand juror” and so was not entitled to dismissal. (*Ibid.*)

The Court of Appeal denied Avitia’s petition for rehearing and request for publication.

SUMMARY OF THE ARGUMENT

1(a). The grounds for dismissal of an indictment are limited. (§995.) Noncompliance with section 939.5’s procedure for excusing a biased grand juror is not one of them. A violation of section 939.5, without more, is not a ground for dismissing an indictment.

Nor does an error in state grand jury proceedings implicate federal due process. There is no federal constitutional right to indictment by a grand jury or any sort of pretrial probable cause hearing. Nor has California created a liberty interest in grand jury proceedings that would be protected by the federal due process clause. California’s statutory scheme governing grand jury proceedings neither establishes substantive predicates governing the grand jury’s decision to indict nor requires any particular outcome based on certain criteria.

1(b). The California Constitution’s due process guarantee requires that a prosecutor not undermine the grand jury’s fundamental obligation to reject unfounded charges. Due process is violated only when a defendant shows that an error’s extent and nature might have compromised the grand jury’s independence and affected its decision to indict.

1(c). A defendant must present his due process challenge to grand jury proceedings in a motion under section 995, subdivision (a)(1)(B), by arguing that he was committed without probable cause. This respects the Legislature’s role in enacting the statutes that govern grand jury procedure. Permitting the use of nonstatutory motions would provide a remedy that the Legislature purposefully omitted.

2(a). Avitia cannot show a due process violation. First, the record does not suggest that the mindset of grand jurors was affected. They were never told the foreperson should direct grand jurors to retire for bias. The grand jurors would not otherwise have been troubled by the prosecutor's action, since it is common knowledge that prosecutors participate in jury selection in trials. The grand juror who was excused had volunteered her bias, so the other grand jurors surely thought it proper that she left.

Second, the error must be considered in light of the entire statutory scheme. The focus of section 939.5 is impartiality. That purpose was served. To the extent that the purpose of having the foreperson handle excusing grand jurors for bias is to maintain the independence of the grand jury, it is far from the only way that the statutory scheme preserves and protects the grand jury's independence.

Third, it is unclear whether the purpose of assigning the task of excusing grand jurors to the foreperson is to ensure the grand jury's independence. At one time, challenges for bias were permitted and the superior court decided them. Now, challenges for bias have been eliminated, and the court is absent when the grand jury begins to hear a case. It is also possible the prosecutor would be absent because a grand jury may investigate criminal cases on its own. It became more practical to designate the foreperson.

2(b). Avitia is not entitled to dismissal without any showing of prejudice. Generally, only an error that reasonably could have affected the result denies a defendant a substantial right. Avitia's argument relies on dicta that this Court has since clarified.

2(c). The grand jury in this case was not improperly constituted. Compliance with Penal Code section 939.5 would have resulted in the same grand jury. It would have violated section 939.5 for the foreperson not to ask the biased grand juror to retire.

The prosecutor's error did not implicate the separation of powers doctrine. The grand jury does not belong to any of the three branches of government. In criminal cases, its role is accusatory. It acts as a check on prosecutorial overreaching. So long as the grand jury retains its independence to decide whether to indict, the separation of powers is intact.

ARGUMENT

I. AN OVERVIEW OF GRAND JURY PROCEEDINGS IN CALIFORNIA

Because this case concerns the nature and effect of statutory error in grand jury proceedings, the People commence with an overview of the law governing grand jury proceedings. California district attorneys begin a prosecution either by filing an information after a preliminary hearing before a magistrate or by obtaining a grand jury indictment. (Cal. Const., art. I, § 14; § 949; *McGill v. Superior Court* (2011) 195 Cal.App.4th 1454, 1465-1466 (*McGill*.) Both types of proceedings protect an accused from undergoing a criminal trial unless there is probable cause to believe the accused is guilty of a crime (*Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1026-1027(*Cummiskey*), but in different ways.

A. How an Information Is Filed

At a preliminary hearing, the accused has the right to appear with counsel, present evidence, and cross-examine the prosecution's witnesses. (*McGill, supra*, 195 Cal.App.4th at p. 1467.) The hearing is "open and public." (§ 868.) A neutral magistrate conducts the hearing and decides whether witnesses are credible. (*McGill*, at pp. 1467-1468.) If the magistrate finds that "a public offense has been committed, and there is sufficient cause to believe that the defendant is guilty" (§ 872), the accused person is "held to answer" and the prosecutor files an information setting out the charges to be tried before a jury. (*McGill*, at pp. 1467-1468.)

B. How an Indictment Is Found

Grand juries are selected from the citizens of the county, and grand jurors serve for a year. (§§ 893, 899, 905; *McGill, supra*, 195 Cal.App.4th at p. 1468.) One duty of the grand jury is to investigate and report on county government, including its officers. (§ 925; *McGill*, at p. 1468.) That role is purely statutory. (*People ex. rel. Pierson v. The Superior Court of El Dorado County* (2017) 7 Cal.App.5th 402, 410 (*Pierson*)). The other duty of the grand jury, and the one relevant here, is its constitutional duty to consider and return indictments in criminal cases. (Cal. Const., art. I, § 14; see *McGill, supra*, 195 Cal.App.4th at p. 1469.) The state constitution left it to the Legislature to enact laws governing grand jury proceedings. (Cal. Const., art. I, § 14; *Daily Journal Corp. v. Superior Court* (1999) 20 Cal.4th 1117, 1125, fn. 5 (*Daily Journal Corp.*); *Pierson*, at pp. 411-414.)

The superior court is responsible for ensuring that grand jurors meet basic qualifications. (§§ 893, 896, subd. (a), 909, 910.) A grand juror must be an American citizen, at least 18 years old, able to speak and understand English, mentally competent, and have no convictions for felonies or “malfeasance in office.” (§ 893; *Packer v. Superior Court* (2011) 201 Cal.App.4th 152, 163 (*Packer*)). Section 910 provides: “No challenge shall be made or allowed to the panel from which the grand jury is drawn, nor to an individual grand juror, except when made by the court for want of qualification, as prescribed in Section 909.”

The superior court swears the grand jury in (see §§ 911, 914), selects a foreperson (§ 912), and gives the grand jurors any information that it finds necessary, including any criminal charges likely to come before them (§ 914). The superior court does not, however, conduct the grand jury proceedings. (*Daily Journal Corp., supra*, 20 Cal.4th at pp. 1128-1129.)

The grand jury works in private. (§ 939.) It may request the advice of the judge; otherwise the judge will not be present. (§ 934; *McGill, supra*,