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

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

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
RACHELLE A. NEWCOMB
Deputy Attorney General
CATHERINE CHATMAN
Supervising Deputy Attorney General
State Bar No. 213493
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7699
Fax: (916) 324-2960
Email: Catherine.Chatman@doj.ca.gov
Attorneys for Real Party in Interest

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

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 95[3]) and read the complaint (see exhs. at 87). The prosecutor then said, tracking the language of Penal Code[4] 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,*

195 Cal.App.4th at p. 1471, fn. 15.) Witnesses may be present only while testifying. (§ 939.) The district attorney, however, has an important role in grand jury proceedings in criminal cases. "The district attorney of the county may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by the grand jury, and may interrogate witnesses before the grand jury whenever he thinks it necessary." (§ 935.)

"The grand jury shall find an indictment when all the evidence before it, taken together, if unexplained or uncontradicted, would, in its judgment, warrant a conviction by a trial jury." (§ 939.8.) This standard is essentially the same as the standard used in preliminary hearings, and both require a finding of probable cause. (*Cummiskey*, *supra*, 3 Cal.4th at pp. 1027-1029, 1036-1037.) The grand jury's finding need not be unanimous. In a county the size of San Joaquin County,[7] at least 12 of 19 grand jurors must concur in finding an indictment. (§ 940.)

C. The Remedy for Flawed Informations and Indictments

California law provides a means to set aside an indictment or information, but only on specified grounds. For indictments, the two statutory grounds for dismissal are: "[w]here it is not found, endorsed, and presented as prescribed in this code" or when "the defendant has been indicted without reasonable or probable cause." (§ 995, subds. (a)(1)(A) & (B).) To perfect such challenges, once indicted, the defendant has a right to a complete transcript of the grand jury proceedings. (§ 938.1, subd. (a); *McGill*, *supra*, 195 Cal.App.4th at p. 1470.)

If unsuccessful in superior court, the defendant may file a petition for writ of mandate or prohibition before trial (*Jones v. Superior Court* (1979)

---

[7] The number of grand jurors serving on a grand jury varies according to the populations of the counties. (§ 888.2.)

96 Cal.App.3d 390, 393) or raise the issue on direct appeal after conviction (see *People v. Towler* (1982) 31 Cal.3d 105, 123). The grand jury, not the court, has the exclusive duty of determining whether to find an indictment. (*Stark v. Superior Court* (2011) 52 Cal.4th 368, 406 (*Stark*).) The reviewing court cannot reweigh the evidence "and must draw all reasonable inferences in favor of the indictment." (*Id.* at p. 407.)

II. DISMISSAL OF THE INDICTMENT IS NOT A REMEDY FOR THIS PROCEDURAL ERROR UNLESS A DEFENDANT ESTABLISHES A DUE PROCESS VIOLATION THAT AFFECTED THE PROBABLE CAUSE DETERMINATION UNDER SECTION 995

A. The Prosecutor's Error in Taking on the Task of Retiring a Grand Juror for Bias Is Not a Proper Ground for Dismissal of the Indictment Under Penal Code Section 995, subdivision (a)(1)(A)

The statutes governing grand jury proceedings broadly permit the district attorney to be present, advise the grand jury, and question witnesses. (§ 935.) But the statutes assign the task of inquiring about prejudice and, if necessary, directing grand jurors to retire, to the foreperson. (§ 939.5.) In the words of section 939.5:

> Before considering a charge against any person, the foreman of the grand jury shall state to those present the matter to be considered and the person to be charged with an offense in connection therewith. He shall direct any member of the grand jury who has a state of mind in reference to the case or to either party which will prevent him from acting impartially and without prejudice to the substantial rights of the party to retire. Any violation of this section by the foreman or any member of the grand jury is punishable by the court as a contempt.

The prosecutor should not have directed Grand Juror No. 18 to retire. The issue is the nature and effect, if any, of that statutory violation.

A departure from section 939.5's procedure, in and of itself, is not a ground for dismissal. The Legislature has enacted statutes to ensure that grand jury proceedings are fair to accused persons. It has also specified

remedies for violations of these statutes. Nowhere in this carefully constructed statutory scheme does one find the drastic remedy of dismissal for noncompliance with section 939.5.

Section 995, subdivision (a), provides for dismissal of an indictment on certain specified grounds:

> (a) Subject to subdivision (b) of Section 995a[8], the indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion, in either of the following cases:
>
> (1) If it is an indictment:
>
> (A) Where it is not found, endorsed, and presented as prescribed in this code.
>
> (B) That the defendant has been indicted without reasonable or probable cause.
>
> (2) If it is an information:
>
> (A) That before the filing thereof the defendant had not been legally committed by a magistrate.
>
> (B) That the defendant had been committed without reasonable or probable cause.

Avitia cannot prevail on the ground that the indictment was "not found, endorsed, and presented as prescribed in this code" (§ 995, subd. (a)(1)(A). (*Avitia, supra*, 2017 WL 1382115 at p. *5.) The finding, presentment, and endorsement of an indictment are events that occur *after* a panel is assembled and evidence is presented. (See §§ 939.8, 940, 943, 944.) According to this Court, section 995, subdivision (a)(1)(A)) "has been interpreted as applying only to those sections in part 2, title 5, chapter 1, of the Penal Code beginning with section 940." (*People v. Jefferson*

---

[8] This pertains only to informations.

(1956) 47 Cal.2d 438, 442[9]; accord, *Stark, supra,* 52 Cal.4th at p. 416, fn. 24.) The statutory requirements for an indictment that fall within section 995, subdivision (a)(1)(A) include concurrence in the indictment by the proper number of grand jurors, endorsement as "[a] true bill" and by a proper signature, inclusion of the names of witnesses on the document, presentment to the court by the foreperson in the presence of other grand jurors, and filing by the clerk. (*Cummiskey*, 3 Cal.4th at p. 1039 (conc. & dis. opn. of Kennard, J.).)

Indeed, this Court held long ago that noncompliance with former section 907 (now § 939.5) is not a basis for setting aside the indictment under section 995. (*People v. Kempley* (1928) 205 Cal. 441, 447.) This was no mere legislative oversight, because, as this Court pointed out, the section "contains within itself the penalty for the violation of its provisions" (*Kempley*, at p. 447): contempt. (§ 939.5.)[10]

Thus, this Court held in *People v. Jefferson, supra*, 47 Cal.2d at p. 442, that the grand jury foreperson's failure to comply with section 907 was not a cognizable ground for setting aside the indictment under section 995. (*People v. Jefferson, supra*, 47 Cal.2d at p. 442.) And an allegation that a

---

[9] At the time, and until 1959, current section 939.5 was numbered section 907. (See *Packer, supra*, 201 Cal.App.4th at p. 164.) It contained substantially the same language. (Compare *People v. Kempley, supra*, 205 Cal. at p. 447 to § 939.5.)

[10] The statutory scheme provides specific remedies outside of section 995 for violations of other statutes governing grand jury conduct, too. Grand jurors are forbidden from disclosing evidence, discussions, and votes. (§§ 911, 924.1, 924.2, 924.3.) Willful disclosures are punishable as misdemeanors. (§§ 924, 924.1.) And the district attorney must inform the grand jury of any exculpatory evidence that he or she knows about. (§ 939.71.) The remedy for a violation is contained within the statute: if the violation "results in substantial prejudice, it shall be grounds for dismissal of the portion of the indictment related to that evidence." (§ 939.71, subd. (a).)

foreperson should have directed a grand juror to retire pursuant to section 939.5 is not a ground for setting aside an indictment. (*Packer*, *supra*, 201 Cal.App.4th at p. 164 & cases cited.)

B. State Grand Jury Proceedings Do Not Implicate Fourteenth Amendment Due Process

Despite the Legislature's decision not to provide a statutory remedy for a violation of section 939.5, Avitia contends that dismissal is necessary because the error violates his right to due process. (OB 34, 36-39.) He does not specify whether he relies on the Fourteenth Amendment of the United States Constitution or on the California Constitution or both. Regardless, error in state grand jury proceedings does not violate the federal due process clause.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." (U.S. Const., 14th Amend.) Through the due process clause, most of the rights guaranteed by the Bill of Rights of the United States Constitution are fully applicable to the states. (*Obergefell v. Hodges* (2015) __ U.S. __, 135 S.Ct. 2584, 2597.) It is significant for our purposes that one of the "handful" (*McDonald v. City of Chicago* (2010) 561 U.S. 742, 765) of rights in the Bill of Rights that is *not* applicable to the states is the Fifth Amendment's right to indictment by a grand jury. (*Hurtado v. California* (1884) 110 U.S. 516, 538.) The states may "dispens[e] entirely" with the grand jury procedure. (*Beck v. Washington* (1962) 369 U.S. 541, 545.)

The federal due process clause protects "against government interference with certain fundamental rights and liberty interests" in addition to the rights specifically protected by the Bill of Rights. (*Washington v. Glucksberg* (1997) 521 U.S. 702, 720.) Yet, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." (*Dowling v. United States* (1990) 493 U.S.

342, 352.) Anyway, the United States Supreme Court has already determined that there is no fundamental right to a grand jury proceeding under the due process clause when it held that fundamental fairness does not require the states to secure a grand jury indictment before trial. (*Hurtado v. California*, *supra*, 110 U.S. at p. 538.) And the Court eliminated any fundamental right to any particular grand jury procedure when it held that there is no due process liberty interest in a probable cause hearing *of any kind* before trial. (*Albright v. Oliver* (1994) 510 U.S. 266, 268, 272-275; accord, *Gerstein v. Pugh* (1975) 420 U.S. 103, 118-119.)

So the United States Constitution creates no liberty interest in state grand jury procedures.[11] Though the United States Supreme Court once commented that Fourteenth Amendment due process may require a state that employs a grand jury procedure "to furnish an unbiased grand jury," the Court added that this was "a question upon which we do not remotely intimate any view. . . ." (*Beck v. Washington*, *supra*, 369 U.S. at p. 546.) As of this writing, the Court still hasn't.

Under certain circumstances state law can create a liberty interest that will be protected by the federal due process clause. (*Kentucky Dept. of Corrections v. Thompson* (1989) 490 U.S. 454, 460 (*Thompson*).) But a state creates a liberty interest only when it places "'substantive limitations on official discretion[,]'" such as "by establishing 'substantive predicates' to govern official decision-making and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." (*Id.*

---

[11] Racial discrimination in the composition of a grand jury does violate the Constitution, but under the equal protection clause. (*Vasquez v. Hillery* (1986) 474 U.S. 254, 260-264.) The reasoning and result in *Vasquez v. Hillery* "have little force outside the context of racial discrimination in the composition of the grand jury." (*United States v. Mechanik* (1986) 475 U.S. 66, 70–71, fn. 1; accord, *People v. Jablonski* (2006) 37 Cal.4th 774, 800.)

at p. 462, citations omitted.) Another hallmark of a statute that creates a liberty interest is "'explicitly mandatory language,' i.e., specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow. . . ." (*Id.* at p. 463.)

Section 939.5 creates no liberty interest. It does not even deal with "official decision-making." (*Thompson*, *supra*, 490 U.S. at p. 462.) Grand jurors are citizens, not government officers, and the decision entrusted to them in criminal cases is whether to return an indictment. (§§ 939.8, 939.9, 940.) "The grand jury shall find an indictment when all the evidence before it, taken together, if unexplained or uncontradicted, would, in its judgment, warrant a conviction by a trial jury." (§ 939.8.) This does not mandate any conclusion based on defined predicates, but leaves grand jurors plenty of discretion to evaluate witness credibility and weigh evidence. (See *Lorenson v. Superior Court* (1950) 35 Cal.2d 49, 58 [applying probable cause standard prior to enactment of § 939.8].)

Another convincing indication that California has created no liberty interest by enacting section 939.5 is that neither it nor any other part of the surrounding statutory scheme creates a remedy for noncompliance that can be claimed by accused persons. "[A]n individual claiming a protected interest must have a legitimate claim of entitlement to it." (*Thompson*, *supra*, 490 U.S. at p. 460.) In California, the remedies available to accused persons for violations of the grand jury process were deliberately limited by the Legislature. (§995.) For example, the Legislature limited the remedy for violations of section 939.5 to punishment, of the grand juror only, by contempt, which of course would be discretionary with the superior court. (*Packer*, *supra*, 201 Cal.App.4th at p. 172.)

All of this makes the error in implementing section 939.5 a most unlikely candidate for an appeal to federal due process. But that makes sense. After all, it is commonly accepted that the violation of a state law or

rule of procedure is generally *not* a violation of a right protected by the due process clause. (*Engle v. Isaac* (1982) 456 U.S. 107, 121, fn. 21; *Snowden v. Hughes* (1944) 321 U.S. 1, 11.) "If the contrary were true, then 'every erroneous decision by a state court on state law would come [to the United States Supreme Court] as a federal constitutional question.' [Citation.]" (*Engle v. Isaac*, *supra*, 456 U.S. at p. 121, fn. 21, bracketed material altered.) The Supreme Court has cautioned that the Constitution leaves it to the states to enact laws and rules of criminal procedure without the added burden of creating new due process rights. (See, e.g., *Medina v. California* (1992) 505 U.S. 437, 445 [state was free to allocate the burden of proof in a competency proceeding to the defendant]; *Sandin v. Connor* (1995) 515 U.S. 472, 482-483 [prison regulation did not create liberty interest].) Construing state laws as creating liberty interests does come with a cost. The prospect of additional challenges clothed in due process may very well "create[] disincentives for States" to promulgate otherwise salutary laws like the one at issue here. (*Sandin*, at p. 482.)

This Court should hold that neither the Constitution nor state law creates a liberty interest in the application of section 939.5 that is protected by the federal due process clause. To the extent that Avitia intended to argue a violation of the federal due process guarantee, that argument fails because he was not deprived of any federal constitutional right.

C. To Prove a Violation of Due Process Under the California Constitution, a Defendant Must Show That the Nature and Extent of an Error in a Grand Jury Proceeding Is Such That It May Have Compromised the Independence of the Grand Jury and Contributed to the Decision to Indict

The California Constitution has its own guarantee of due process. (Cal. Const., art. I, §15.) As a broad principle, the rights guaranteed by the California Constitution "are not dependent on those guaranteed by the

United States Constitution." (Cal. Const., art. I, §24; see *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 350-356.)

This Court has assumed in a few cases that "the manner in which the grand jury proceedings are conducted may result in a denial of a defendant's due process rights, requiring dismissal of the indictment." (*Stark, supra*, 52 Cal.4th at p. 417; see also *People v. Backus* (1979) 23 Cal.3d 360, 392-393 (*Backus*); *Cummiskey, supra*, 3 Cal.4th at pp. 1022, fn. 1, 1039 (conc. & dis. opn. of Kennard, J.).) In each case, this Court recognized the *possibility* of a due process violation in the context of allegations of some sort of prosecutorial impropriety: that the prosecutor suffered a disqualifying conflict of interest (*Stark*, at pp. 414-417); that the prosecutor interfered with the grand jury's attempt to exercise its statutory authority under section 939.7 to ask questions and obtain evidence, failed to instruct on lesser-included offenses, and failed to present exculpatory evidence (*Cummiskey*, at p. 1022); and that the prosecutor presented inadmissible evidence in violation of section 939.6 (*Backus*, at p. 393). (See *Packer, supra*, 201 Cal.App.4th at pp. 167-168 [noting the common thread of "prosecutorial impropriety"].) In none of these cases was a due process violation actually found. But several principles emerge.

According to this Court, due process requires that a prosecutor not undermine the grand jury's obligation to "reject charges which it may believe unfounded." (*Backus, supra*, 23 Cal.3d at p. 392, internal quotation marks and citation omitted.) For example, had "the extent of incompetent and irrelevant evidence" presented to the grand jury by the prosecutor in *Backus* been "such that, under the instructions and advice given by the prosecutor, it [would have been] unreasonable to expect that the grand jury could limit its consideration to the admissible, relevant evidence" the defendants could have been denied due process. (*Backus*, at p. 393.)

This Court has also made it clear it is defendant's burden to establish the due process violation. This "requires a demonstration" by the defendant that the prosecutor actually committed an act (*Stark, supra*, 52 Cal.4th at p. 417; see also *id.* at p. 378) that threatened the grand jury's ability to carry out its "obligation to act independently and to protect citizens from unfounded obligations" (*Backus, supra*, 23 Cal.3d at p. 393).

Finally, according to this Court, a defendant must establish that the due process violation resulted in prejudice. (*Backus, supra*, 23 Cal.3d at pp. 393-396.) It is not enough that a reviewing court may "condemn" the prosecutor's action. (*Id.* at p. 393.) "The nature and extent" of the error must be "such that it may have compromised the independence of the grand jury and contributed to the decision to indict." (*Ibid.*; accord, *People v. Superior Court* (*Mouchaourab*) (2000) 78 Cal.App.4th 403, 435 (*Mouchaourab*).) Requiring a showing that any error affected the decision to indict recognizes that the ultimate "function" of the grand jury is to "determine whether probable cause exists to accuse a defendant of a particular crime." (*Cummiskey, supra*, 3 Cal.4th at p. 1026.)

D. A Due Process Challenge to an Indictment Must Be Raised Under Section 995, subdivision (a)(1)(B)

This Court has never decided whether a due process claim may be raised in a motion to dismiss the indictment under section 995. Although Avitia raises this question, he does not take a position on whether section 995 provides the proper vehicle for his due process claim. (OB 35-36.) The People ask this Court to hold that a defendant must "enforce" the "due process right to a determination of probable cause by a grand jury acting independently and impartially" "through means of a challenge under section 995 to the probable cause determination underlying the indictment . . . ." (*Mouchaourab, supra*, 78 Cal.App.4th at p. 424.) That is, a cognizable due process claim will fall within section 995, subdivision

(a)(1)(B) as a claim "[t]hat the defendant had been committed without reasonable or probable cause." The People's proposed rule is consistent with what this Court said in *Backus*: a defendant asserting a due process violation in grand jury proceedings must demonstrate that "[t]he nature and extent" of the error was "such that it may have compromised the independence of the grand jury and contributed to the decision to indict." (*Backus*, *supra*, 23 Cal.3d at p. 435; see also *Mouchaourab*, at pp. 425, 435; accord, *Bank of Nova Scotia v. United States* (1988) 487 U.S. 250, 256 (*Bank of Nova Scotia*).)

The People oppose the use of a nonstatutory motion for this purpose. Certainly, this Court has recognized the possibility of a nonstatutory pretrial motion to dismiss for a case alleging discriminatory prosecution in violation of the right to equal protection. (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 294, fn. 4.) In that case, the defendants sought discovery to prove invidious discrimination. (*Id.* at p. 290.) Courts since *Murgia* have approved nonstatutory motions for claims that require evidence outside the record of the pretrial proceeding. (See, e.g., *Merrill v. Superior Court* (1994) 27 Cal.App.4th 1586, 1596 [claim that prosecution failed to disclose material evidence at preliminary hearing]; *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265, 270 [same].) A motion to dismiss the indictment under section 995, on the other hand, is decided "on the basis of the record made before the grand jury. . . ." (*People v. Crudgington* (1979) 88 Cal.App.3d 295, 299.) A claim that the prosecutor's conduct undermined the independence or impartiality of the grand jury will necessarily be decided on the record of the grand jury proceeding, for if it did not happen before the grand jury, how could it have affected their independence? Nonstatutory motions are not appropriate just because a claim inconveniently does not meet the strictures of section 995.

Requiring a showing that meets the requirement of section 995, subdivision (a)(1)(B), would respect the Legislature's role in enacting the statutes that govern grand jury procedure. (See *Daily Journal Corp, supra*, 20 Cal.4th at p. 1125, fn. 5; *Pierson, supra*, 7 Cal.App.5th at pp. 411-414.) The Legislature chose to "sharply" restrict "the supervisory role of the superior court" in grand jury proceedings. (*Daily Journal Corp.*, at p. 1128.) The Legislature also specified remedies for violations of these statutes, either within the statute or in section 995. Expanding relief under section 995 or allowing the use of nonstatutory motions evades these legislative decisions. It "would be supplying a dismissal remedy that the Legislature chose to omit." (*People v. Standish* (2006) 38 Cal.4th 858, 884 (*Standish*). "This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 59, internal quotation marks and citation omitted.)

The expansion of review of grand jury proceedings beyond the grounds in section 995 would also affect the state's interest in the orderly administration of justice. As *Packer, supra*, 201 Cal.App.4th at page 68, footnote 11, recognized, expanded review begets litigation. If permissible grounds for dismissal drift away from the mooring of section 995, already overworked superior courts would expend additional time and effort to decide more motions to dismiss indictments based on the "scarce and open-ended" "guideposts" of due process. (*District Attorney's Office for Third Judicial Dist. v. Osborne* (2009) 557 U.S. 52, 72; see also *People v. Uribe* (2011) 199 Cal.App.4th 836, 863.) More similarly ill-defined writ petitions would be filed in the appellate courts and would not be decided on defined criteria like that included in section 995 or on any specific right guaranteed by the California constitution. "'The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new

ground in this field.'" (*Uribe*, at p. 863, quoting *Collins v. City of Harker Heights* (1992) 503 U.S. 115, 125.) And dismissals may come with a high cost. It is true that, in this case, the prosecution can file again. (See OB 9-10.) But that will not be true in every case. Under the "two-dismissal rule," "'[a]n order terminating an action pursuant to this chapter, or Section 859b, 861, 871, or 995, is a bar to any other prosecution for the same offense if it is a felony . . . and the action has been previously terminated pursuant to this chapter, or Section 859b, 861, 871, or 995. . . .'" (§ 1387, subd. (a).)

Avitia contends that, unless the indictment against him is dismissed, section 939.5 is unenforceable and prosecutors in this state will continue to flout it without fear of consequences. (OB at 9, 40.) The People disagree. But more to the point, the United States Supreme Court also disagrees with Avitia. That Court has rejected an argument that federal district courts could use their supervisory power to dismiss an indictment for prosecutorial misconduct that did not result in prejudice. (*Bank of Nova Scotia v. United States*, *supra*, 487 U.S. at pp. 254-255.) The Court explained that "deterrence is an inappropriate basis for reversal where 'means more narrowly tailored to deter objectionable prosecutorial conduct are available.' [Citation.] . . . [A] court may not disregard the doctrine of harmless error simply 'in order to chastise what the court view[s] as prosecutorial overreaching.'" (*Id.* at pp. 255-256.) This is so whether or not the underlying error is constitutional. (*Id.* at p. 256.)

In this case, dismissal is not necessary to address any concern over the prosecutor's conduct. It is apparent that the prosecutor was simply unaware that section 939.5 forbade his involvement in excusing grand jurors for cause. (See exhs. at 198-199.) He believed that, in addition to the statutory authority granted the foreperson, the District Attorney's Office had a duty to "make sure the panel is fair" in the particular case before it. (Exhs. at

199.) After all, this Court has said that "the obligation of the prosecutor to assure independence, procedural regularity, and fairness in grand jury proceedings is compelled by due process. . . ." (*Backus*, 23 Cal.3d at p. 392.) And, again, the dismissed grand juror was biased in favor of the prosecution. "Being wrong on a legal point is not prosecutorial misconduct, it's just being wrong." (*McGill, supra*, 195 Cal.App.4th at p. 1465.) As a result of the proceedings in this case, the prosecutor understood that he had made a mistake. (See exhs. at 199-200, 210.) It is not necessary to resort to dismissal to make a point in this or future cases.

Section 939.5 will still be on the books, and, as this Court suggested in *Standish*, once this Court focuses prosecutors' attention to its requirements, there is no reason to assume that attorneys will not heed what this Court says. (See *Standish, supra*, 38 Cal.4th at pp. 886-887.) For grand jurors who violate section 939.5, the statute provides expressly provides a remedy short of dismissal: contempt.

III. THERE WAS NO VIOLATION OF DUE PROCESS NOR ANY OTHER PREJUDICIAL ERROR

A. Avitia Cannot Show That He Suffered a Violation of His Right to Due Process

Whatever the proper vehicle, Avitia's argument must ultimately rise or fall as a claim that the error in this case violated due process under the state constitution; that it actually "compromised the independence of the grand jury and contributed to the decision to indict." (*Backus, supra*, 23 Cal.3d at pp. 393-396; accord, *Mouchaourab, supra*, 78 Cal.App.4th at p. 435.) Avitia cannot show that the grand jurors in this case were aware of or affected by the error. The purpose of section 939.5 is to further impartiality, and that purpose was fulfilled. Having the foreperson inquire about bias and direct grand jurors to retire is not key to the independence of

the grand jury. Other statutes are crafted to and did maintain the grand jury's independence.

1. Avitia has not established the basic premise of a due process claim

Avitia has not shown that the error here actually affected the mindset of the grand jurors in any way, let alone that they felt that their independence was weakened. It is presumed that the grand jurors' official duty was regularly performed. (Evid. Code, § 664; *Packer*, *supra*, 201 Cal.App.4th at p. 171.) Avitia must show otherwise. (*Packer*, at p. 171; cf *Reilly v. Superior Court* (2013) 57 Cal.4th 653 ["petitioner for a writ of mandate [] bears the burden of pleading and proof"].) "Bias cannot be presumed" (*Packer*, at p. 169) – nor can any other improper influence on the grand jurors' minds. Courts should not presume that grand jurors are "so weak and so unmindful of their duty as to have been induced by the mere presence of the district attorney" to disregard the evidence and instructions in considering an indictment. (*United States v. Terry* (N.D. Cal. 1889) 39 F. 355, 361.)

Avitia must show unfairness "'not as a matter of speculation but as a demonstrable reality.'" (*Packer*, *supra*, 201 Cal.App.4th at p. 169, quoting *Beck v. Washington*, *supra*, 369 U.S. at p. 558.) Success on a claim that a flaw in grand jury proceedings violated due process requires "a demonstration" that the irregularity "substantially impaired the independence and impartiality of the grand jury." (*Stark*, *supra*, 52 Cal.4th at p. 417.) In the absence of any showing that the grand jurors were actually affected to the extent that their freedom to refuse to indict was compromised, a defendant cannot succeed. (*Cummiskey*, *supra*, 3 Cal.4th at pp. 1033-1034; *People v. Fujita* (1974) 43 Cal.App.3d 454, 475.)

Avitia has never been able to make this showing, as the superior court and the Court of Appeal found. As the superior court noted (exhs. at 88-

89), Grand Juror No. 18 was questioned and directed to retire outside the presence of the other grand jurors. (Exhs. at 96-99.) The other grand jurors heard only that Grand Juror No. 18 had "arrested people for 148" in response to the prosecutor's question about bias. (Exhs. at 97.) The superior court rejected, as "speculative and unsupported" Avitia's arguments that the grand jury somehow relinquished its independence and felt controlled by the prosecutor. (Exhs at 89.) The Court of Appeal agreed, emphasizing that Grand Juror No. 18 "was excused outside of the presence of the other grand jurors." (*Avitia, supra*, 2017 WL 1382115 at p. *7.)

The People add that the grand jurors had no expectation that the prosecutor should not have been inquiring about bias. When the superior court told them what to expect once the court released them to begin their work, the court told them the prosecutor would present evidence and provide legal instructions. (Exhs. at 173-175.) The court did not tell them about the terms of section 939.5. (See exhs. at 171-180.) To the extent that the grand jurors had any expectations about being questioned regarding bias, they would have been based on the common knowledge that prosecutors do ask questions about bias when jurors are selected for criminal trials, and they may also have been aware that prosecutors may excuse jurors themselves. They certainly knew Grand Juror No. 18 had spoken up in response to a question about bias and no doubt assumed that she left for that entirely proper and unsurprising reason. Moreover, the grand jurors heard Grand Juror No. 18 mention arresting people (exhs. at 97), so they likely thought — correctly — her bias favored the prosecution. Therefore, to the extent that the grand jurors thought about it at all, they would have thought the prosecutor's motive was only to preserve the impartiality of the grand jury, not to undermine it. Grand Juror No. 18's

departure could not have led the grand jurors to feel that they were under the prosecutor's thumb.

Significantly, "if the prosecutor's dismissal of Juror No. 18 had any impact on the grand jury, it leans in favor of having produced an unbiased and impartial grand jury." (Exhs. at 90-91.) "[Grand Juror No. 18] twice stated, under questioning, that she could not be fair to the defendant. . . . [Grand] Juror No. 18 needed to retire from the grand jury nevertheless." (Exhs. at 90.)

Avitia has failed to establish the basic premise of his due process claim. Speculation will not carry the day. (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 800.) Putting speculation aside, no actual adverse effect on the independence and impartiality can be found in or even inferred from the record.

2. Noncompliance with one statute did not violate Avitia's right to due process when considered in light of the comprehensive statutory scheme governing grand jury proceedings

The violation of one statute should not be viewed in artificial isolation, but must be viewed in light of the other statutes that were given effect before a court concludes that a grand jury proceeding was not fundamentally fair. (Cf. *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [instructional error must be considered in light of the entire charge and the rest of the record of the proceeding when considering a claimed due process violation].)

In grand jury proceedings, accused persons are protected by the grand jury's independence, impartiality, and secrecy. (*McGill*, *supra*, 195 Cal.App.4th at p. 1469; cf. *United States v. Navarro-Vargas* (9th Cir. 2005) 408 F.3d 1184, 1199-1202 [en banc] (*Navarro-Vargas*) [considering the Fifth Amendment Grand Jury Clause and the rules governing grand juries in federal courts].) A host of statutes make sure that this is so in California.

This statutory framework is sturdy enough to withstand errors and irregularities.

As we have already seen, section 939.5 requires grand jurors to be neutral. (§ 939.5.) This is but one way in which the Legislature maintains the impartiality and independence of the grand jury. (See *McGill, supra*, 195 Cal.App.4th at pp. 1467-1471.) Other statutes promote neutrality by ensuring balance and fairness in the presentation of evidence before the grand jury. The grand jury must receive only evidence that would be admissible at trial. (§ 939.6, subd. (b).) The prosecutor is required to inform the grand jury of any exculpatory evidence within his or her knowledge (§ 939.71, subd. (a)), and the grand jury can order evidence if it believes there could be evidence that "will explain away the charge" (§ 939.7).

One of the most important protections is secrecy. (*Navarro-Vargas, supra*, 408 F.3d at pp. 1199-1202; see also *McGill, supra*, 195 Cal.App.4th at p. 1469. "The grand jury's discretion—its independence—lies in two important characteristics: the absolute secrecy surrounding its deliberations and vote and the unreviewability of its decisions." (*Navarro-Vargas*, at p. 1200.) The California Legislature has made it clear that grand jurors are responsible for maintaining secrecy. Grand jurors are forbidden from disclosing evidence, discussions, and votes. (§§ 924.1, 924.2, 924.3.) Grand jurors not only swear an oath to that effect (§ 911), but certain willful disclosures are punishable as misdemeanors (§§ 924, 924.1.) No one may observe grand jury proceedings. (§ 939.) Witnesses may be present only while testifying. (§ 939.) Even the judge of the superior court may be present only if the grand jury seeks the judge's advice. (§ 934.)

The secrecy of the grand jury's proceedings also protects an accused for whom no indictment is found. "'[T]he innocent accused are protected from the harm to their reputations which might result from disclosure.'

[Citations.]" (*Daily Journal Corp., supra*, 20 Cal.4th at p. 1127.) Secrecy also encourages witnesses to be candid despite potential fears about the consequences of testifying regarding a crime. (*Id.* at pp. 1126-1127.)

The Legislature has also given the grand jury substantial authority that further ensures its independence. Grand juries choose their officers, except for the foreperson, and adopt their own rules of procedure. (§ 916.) A grand jury may inquire into possible crimes on its own initiative. (§ 917, subd. (a).) It may request that witnesses be subpoenaed (§ 939.2) or order that evidence be produced for its consideration (§ 939.7). It may request advice from the superior court judge, the district attorney, and the Attorney General. (§ 934.)

Here, the purpose of section 939.5 was not thwarted despite the error, and none of the other statutes were undermined. Section 939.5 is plainly directed at preserving the impartiality of the grand jurors by giving them the opportunity to retire after hearing the details of the case to be presented to them. That was accomplished. It has never been disputed that Grand Juror No. 18 stated a bias in favor of the prosecution that required her to retire.

The prosecutor's error affected a brief and self-contained proceeding that was preliminary to and separate from the actual consideration of the evidence and deliberations. Nothing indicates that the grand jurors somehow assumed from what little they saw of this single event that they no longer had the authority granted by other statutes that gave them independence, or that they thought they no longer had to deliberate in secret, or that they thought that a decision not to indict would have repercussions. As described above, they were thoroughly instructed that the district attorney's statements were not evidence and that it would be their responsibility to decide what the facts were based on the evidence presented. (Exhs. at 175.) Like petit jurors, grand jurors are presumed to

follow their instructions. (*Navarro-Vargas, supra*, 408 F.3d at p. 1202, fn. 23.)

The independence and impartiality of the grand jury, buttressed by a comprehensive statutory framework, was not so fragile that it collapsed as a result of one error in one part of one statute.

3. The role of the foreperson in section 939.5 is not critical to ensuring the grand jury's independence

Even viewed in isolation, the nature of the violation here does not implicate due process. The Legislature's assignment of the task of inquiring about bias to the foreperson is not critical to its goal of ensuring the grand jury's independence. Again, section 939.5 is directed at ensuring an *impartial* grand jury. (*McGill, supra*, 195 Cal.App.4th at p. 1471.) The history of the grand jury statutes suggests that the assignment of this task to the foreperson may have simply been a practical, not a policy, decision.

California law provided in 1851 that an individual grand juror could be challenged on the ground that "he has formed a decided opinion that the defendant is guilty . . . ." (Former § 183, subd. (6).) The challenge was tried by the court. (Former § 184.) In 1872, the Legislature renumbered the section and added to the grounds for challenges language similar to current section 939.5: "That a state of mind exists on his part in reference to the case, or to either party, which satisfies the Court that he cannot act impartially and without prejudice to the substantial rights of the party challenging." (Former § 896, subd. (7).) The Note to subdivision (7) explained that the new subdivision "stands upon the same footing of reason and justice as, and covers cases that may not fall within, Subdivision 6." In 1906, the language became: "That a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging, but no person shall be disqualified as a juror by reason of

having formed or expressed an opinion upon the matter or cause to submitted to the jury, founded upon public rumor, statements in public journals, or common notoriety, provided it satisfactorily appear to the court upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him." (Former § 896, subd. (6).)

Challenges to grand jurors' impartiality were permitted and decided by the superior court until 1911. (Former §§ 186, eff. 1851); former § 897, eff. 1872, 1906.) That year, the Legislature amended the statutes "relating to proceedings before the grand jury, the persons who may be present at the sessions of such jury, and the records of testimony taken at such sessions." (Stats. 1911, ch. 254, § 1, p. 434.) Section 925 was amended to provide that the court would no longer be present for grand jury sessions, and that the district attorney "may" appear: "The grand jury may, at all times, ask the advice of the court . . . or of the district attorney; but unless such advice is asked, *the judge . . . must not be present during the sessions of the grand jury. The district attorney of the county may at all times appear* before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them. . . ." (Former § 925, italics added.) The statutes permitting challenges for bias were repealed. (Stats. 1911, ch. 253, p. 434.) At the same time, a new section 907 was added, and for the first time it assigned the task of inquiring about bias to the foreperson, using the language that today appears in section 939.5.

This history suggests that the task of inquiring about bias was assigned to the foreperson because, after the 1911 changes, the superior court was no longer present when the grand jury considered specific matters. And the prosecutor "may" appear, but that was not certain. After all, section 918 permits the grand jurors to investigate offenses on their own initiative. That left the foreperson. Contrary to Avitia's assumptions, it is

far from clear that the assignment of carrying out the purpose of section 939.5 to the foreperson was intended to, or has the effect of, maintaining the grand jury's independence.

4. *Williams v. Superior Court* was wrongly decided

After Avitia filed his opening brief, the Court of Appeal decided that a prosecutor had violated an accused person's right to due process by granting a grand juror's request to retire for hardship. (*Williams v. Superior Court* (2017) 15 Cal.App.5th 1049, 2017 WL 4324952) (*Williams*).) The reasoning in *Williams* is flawed.

Williams recognized that this Court has held that the manner in which grand jury proceedings are conducted may violate due process. (*Williams, supra*, 2017 WL 4324952 at p. *6.) The court decided that the prosecutor had "supplanted the court's role" under section 909 and substantially impaired the grand jury's independence. (*Id.* at pp. *6-7.)

But the *Williams* court failed to consider whether the grand jurors had been affected by the prosecutor's actions. The opinion does not reflect that the grand jurors were ever told that it was the court's role to handle hardship requests that arose after they began considering cases. Indeed, section 909 itself is unclear on this point, as it gives the superior court authority to excuse a grand juror "*before* he is sworn." (Italics added.) After that, the grand jurors may seek the advice of the court *and* the prosecutor (§ 934, subd. (a).) Nor did the court consider the other protections in the statutory scheme, the instructions given the grand jurors, or that the incident was isolated from the presentation of evidence and deliberations. Instead, the court simply concluded, without factual support, that the prosecutor's action "may have contributed to its determination that probable cause existed . . . ." (*Williams, supra*, 2017 WL 4324952 at *6.) This falls far short of what should be required for an alleged due process violation to result in dismissal.

In conclusion, if Avitia's complaint is that his state due process rights were violated, it is unfounded. The violation of one aspect of section 939.5 neither impaired the grand jury's independence and impartiality nor contribute to its decision to indict. (See *Backus*, *supra*, 23 Cal.3d at pp. 392-393.)

B. Avitia Is Not Entitled to a Presumption of Prejudice Or Automatic Dismissal

This Court should hold that a defendant seeking relief from grand jury proceedings must show prejudice at any stage of a criminal proceeding. Relying heavily on dicta in *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519 (*Pompa-Ortiz*), Avitia argues that he need not show prejudice because his claim is being raised and decided before trial. (OB 16, 19.) Avitia maintains that because he was "denied a substantial right," prejudice is presumed (OB 14, 19, 25-26, 28-29), and "[a] prejudice analysis is only required when it becomes unclear whether Petitioner was denied a substantial right. . ." (OB 14). Avitia has it backwards. "[G]enerally a denial of substantial rights occurs *only* if the error 'reasonably might have affected the outcome.'" (*Standish*, *supra*, 38 Cal.4th at p. 882, quoting *People v. Konow* (2004) 32 Cal.4th 995, 1024-1025 (*Konow*), italics added.)

1. In California, a judgment generally will not be set aside without a showing of prejudice

The California constitution requires harmless error review under a miscarriage of justice standard. It says: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury . . . or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) This Court explained the state

constitutional requirement in *People v. Watson* (1956) 46 Cal.2d 818, 836: a defendant must persuade the court that "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

This principle appears throughout the Penal Code, too. Section 1258 explains that, on appeal, "the Court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties." Section 1404 provides: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." Regarding pleadings in particular, section 960 provides: "No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits."

These statutes are the source of the phrase "substantial right" that appears in the cases discussing preliminary hearings and other probable cause hearings. As can be seen, the phrase "substantial right" goes hand-in-hand with prejudice. Avitia misuses the term "substantial rights analysis" to mean applying a presumption of prejudice. (See OB 14, 19, 25-26, 28-29.)

"[I]rregularities in grand jury proceedings are generally subject to analysis for prejudice." (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 800 [unauthorized presence of prosecutors not presenting the case at grand jury proceeding]; accord, *People v. Booker* (2011) 51 Cal.4th 141, 156 [court's failure to swear in grand jurors until after they had heard some evidence]; *People v. Towler*, *supra*, 31 Cal.3d at p. 123 [unspecified errors at grand jury proceeding].) The same is true for irregularities in preliminary

hearings. (*People v. Stewart* (2004) 33 Cal.4th 425, 461-462 [allegation that prosecutor's failure to immediately disclose evidence necessitated a continuance and forced accused to waive his right to a continuous preliminary hearing]; *Pompa-Ortiz*, 27 Cal.3d at p. 529 [preliminary hearing was closed instead of public].)

2. Avitia was not denied a substantial right because the error did not result in prejudice

Avitia argues that, according to dicta in *Pompa-Ortiz*, he is entitled to a presumption of prejudice because his case is being decided before trial. (OB 16.) But this Court has clarified that dicta adversely to Avitia's position. While this Court has not yet squarely held that prejudice must be shown to obtain dismissal of an indictment *before* trial, all indications point that way. Avitia's position is untenable and would simply result in a windfall.

The *Pompa-Ortiz* dictum has muddied the waters slightly. In *Pompa-Ortiz*, a direct appeal, this Court overruled an earlier case to hold that "[h]enceforth irregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (*Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529.) But this Court then commented that "[t]he right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities." (*Ibid.*) This dictum might lead litigants to think, if they can show an error or irregularity in grand jury or preliminary hearing procedures before trial, they need not show prejudice to have the indictment or information set aside. This dictum is not the law.

This Court's more recent decisions in *Konow*, *Standish*, and *Reilly*—all cases decided before trial, like this one—show exactly why the *Pompa-*

Ortiz dictum does not establish that a violation of a substantial right can be shown without resulting prejudice. In *Konow*, the superior court set aside an information because the magistrate presiding over the preliminary hearing would have dismissed the complaint in furtherance of justice under section 1385, had he not erroneously believed he had no authority to do so. (*Konow*, *supra*, 32 Cal.4th at pp. 1009, 1011.) The People appealed the ruling (*id.* at p. 1012; see § 1238, subd. (a)(1)), and so the issue came to this Court before trial. This Court held that "a defendant is denied a substantial right affecting the legality of the commitment [[12]] *when he or she is subjected to prejudicial error*, that is, error that reasonably might have affected the outcome [citation]." (*Id.* at p. 1024; accord *Reilly*, *supra*, 57 Cal.4th at p. 653; *Standish*, *supra*, 38 Cal.4th at p. 882, italics added by the People.) This Court reasoned that its conclusion was consistent with "judicial practice in other areas of the law where, as in the context of plain error rules, a defendant is deemed to be denied a substantial right by exposure to prejudicial error." (*Konow*, at p. 1025, citing *Chapman v. California* (1967) 386 U.S. 18, 21–22; *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.) This Court went on to find prejudice, as the record was clear the magistrate would have dismissed the complaint pursuant to section 1385 if he had known he retained the authority to do so. (*Id.* at p. 1026.)

In *Standish*, *supra*, 38 Cal.4th 858, this Court followed *Konow* and also clarified the *Pompa-Ortiz* dictum. The Court considered whether the superior court must set aside an information (§ 995, subd. (a)(2)) where the magistrate refused to grant the defendant release on his own recognizance

---

[12] One of the statutory grounds for dismissal of an information (but not an indictment) is "[t]hat before the filing thereof the defendant had not been legally committed by a magistrate." (§ 995, subd. (a)(2)(A).)

pending the preliminary examination, in violation of section 859b. (*Standish*, at pp. 882-888.) *Standish* was also a People's appeal from the superior court's order dismissing an information pursuant to section 995, and was decided before trial. This Court said that *Pompa-Ortiz* did not entitle the defendant to dismissal without any showing of prejudice. (*Id.* at p. 885.) This Court explained that: "*Pompa-Ortiz* must not be read overbroadly" because it "did not establish that any and all irregularities that precede or bear some relationship to the preliminary examination require that the information be set aside pursuant to section 995; later decisions such as *People v. Konow*, *supra*, 32 Cal.4th 995, have made this clear." (*Standish*, at p. 885; accord, *Reilly*, 57 Cal.4th at pp. 653-654.) As in other areas of criminal law, reversal without any showing of prejudice is limited to a small category of "inherently prejudicial" errors (*Standish*, at p. 883) – in other words, structural errors (discussed *post*).

Although *Standish* and *Konow* involve informations, their reasoning applies equally where a defendant seeks to set aside an indictment before trial. Indeed, this Court relied on *Standish* and *Konow* in considering an error in the pretrial assessment protocol in a Sexually Violent Predators Act case. (*Reilly v. Superior Court*, *supra*, 57 Cal.4th at pp. 653-654.) This Court expressly disagreed that *Pompa-Ortiz* had created a rule that prejudice is presumed for errors in probable cause hearings that are raised and decided pretrial. (*Id.* at p. 653.) Rather, *Pompa-Ortiz*'s general rule "is that nonjurisdictional irregularities in preliminary hearing procedures should be reviewed for prejudice." (*Ibid.*, citing *Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529.) While *Pompa-Ortiz* applied the rule to a postconviction challenge, "it applies with equal force to a pretrial challenge that addresses an issue that a subsequent fact finder will reconsider." (*Reilly*, at p. 653.)

In federal court, too, a defendant's substantial rights are not affected in the absence of prejudice. (See 28 U.S.C. § 2111; Fed. Rules Crim. Proc.,

rule 52(a), 18 U.S.C.) Accordingly, the United States Supreme Court has held that "as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." (*Bank of Nova Scotia, supra*, 487 U.S. at p. 254.) And this is because rule 52(a) of Federal Rules of Criminal Procedure, similarly to California's sections 960, 1258, and 1404, provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." (*Id.* at pp. 254-255.)

In *Stark*, this Court examined, for harmlessness, an alleged instructional error arising before trial in a grand jury proceeding, though without expressly discussing whether or not harmless error review was appropriate. (*Stark, supra*, 52 Cal.4th at pp. 407-409.) This Court should now hold what is implicit in *Stark*, *Standish*, *Konow*, and *Reilly*: a defendant seeking relief based on an error in grand jury proceedings must show prejudice at any stage of the criminal proceedings. As in other areas of criminal law, the only exception should be the "rare" structural error requiring automatic reversal regardless of prejudice. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 282; *People v. Sivongxxay* (2017) 3 Cal.5th 151, 180.).

Avitia cannot show prejudice here. He does not argue that Grand Juror No. 18 was unbiased. And, as discussed, he has not shown that the error "may have compromised the independence of the grand jury and contributed to the decision to indict." (*Backus, supra*, 23 Cal.3d at p. 393.)

3. The error in this case was not structural error

In addition to interpreting a "substantial right" as incorporating a presumption of prejudice, Avitia attempts to characterize the error in his case as structural error. (OB 8-9, 14-16, 20, 22, 25, 28-30.) This argument misses the mark.

A structural error is an error that "'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" (*Weaver v. Massachusetts* (2017) __ U.S. __ [137 S.Ct. 1899, 1907] (*Weaver*), quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) A structural error simply "'def[ies] analysis by harmless error standards.' [Citation.]" (*Weaver*, at pp. 1907-1908.) A structural error results in "reversal without any inquiry into prejudice." (*Id.* at p. 1905.) Avitia asserts that a violation of section 995 is structural error (OB 14, 28, 29), even suggesting that a violation of a substantial right is necessarily structural error (OB 14).

Few errors in grand jury proceedings or preliminary hearings are structural, and they should not be treated as such just because they are decided pretrial. As this Court has said, "[c]ategorization of an error as structural represents 'the exception and not the rule.' [Citation.]" (*People v. Sivongxxay*, *supra*, 3 Cal.5th at p. 178.) "The fact that an error implicates important constitutional rights does not necessarily make it structural." (*Ibid.*) "'Many statutes . . . set out procedures designed to protect constitutional principles. Broadly construed, many of these procedural statutes may be said to protect due process and other constitutional safeguards. Nevertheless, most procedural shortcomings constitute trial error' and not structural error." (*Id.* at pp. 178-179, citation omitted.) There is "a difference between a failure to comply with a statutory requirement that may serve to protect a constitutional right, and a violation of the underlying constitutional right itself." (*Id.* at p. 184.)

The error in this case involved a rule of procedure that does not create a right but rather serves to protect the right to an impartial grand jury. "The error does not implicate a core right at the [grand jury proceeding] itself." (*Standish*, *supra*, 38 Cal.4th at p. 883.) Nor is the error "inherently prejudicial." (*Ibid.*) A violation of section 939.5 is not the type of error for

which the effects "are simply too hard to measure." (*Weaver*, *supra*, 137 S.Ct. at p. 1908.) This case is a perfect example. The record shows that the retirement of Grand Juror No. 18 preserved the impartiality of the grand jury, regardless of who excused her. The record also shows that what the other grand jurors observed of the event could not have undermined their sense of independence. For the same reason, noncompliance with section 939.5 will not "always result in fundamental unfairness," unlike the total deprivation of counsel. (See *Weaver*, at p. 1908.)

The dictum in *Pompa-Ortiz* is inconsistent not only with this Court's decisions in *Standish*, *Konow*, and *Reilly,* and the United States Supreme Court's decision in *Bank of Nova Scotia,* but to the extent it is understood to treat all errors in preliminary hearings and grand jury proceedings as structural errors, it is also inconsistent with the principles discussed above.

4. The *Pompa-Ortiz* dictum remains a problem

The holding the People request would bring welcome clarity to the law, because the *Pompa-Ortiz* dictum endures, though mostly as dicta, in other cases. For example, in *People v. Booker*, this Court commented, "*Pompa-Ortiz* did not require a showing of prejudice during a pretrial challenge to irregularities in the preliminary examination. . . . [T]he need for a showing of prejudice depends on the stage of the proceedings at which a defendant raises the claim in a reviewing court . . . ." (*People v. Booker*, *supra*, 51 Cal.4th at pp. 156-157.) The foregoing was dictum in *Booker* because this Court actually held: "because this is a posttrial challenge to grand jury proceedings, any irregularity in the proceedings requires reversal only if the defendant has been prejudiced." (*Id.* at pp. 157-158.) As another example, in *People v. Stewart*, this Court referenced *Pompa-Ortiz*: "when a defendant presents, by way of a pretrial writ petition, claims that establish irregularities in preliminary hearing procedures, the court will grant relief . . . 'without any showing of prejudice.' (*Id.*, at p. 529.)"

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 461, quoting *Pompa–Ortiz*, *supra*, 27 Cal.3d at p. 529.) The Court required Stewart to show prejudice because his claim had been presented for the first time on appeal. (*Id.* at pp. 461-462.) And the Court of Appeal in this case incorrectly stated that *Pompa-Ortiz* created a "presumption of prejudice" for pretrial challenges to informations. (*Avitia*, *supra*, 2017 WL 1382115 at p. *6.) Yet, it found "unclear whether a substantial rights analysis applies" to a pretrial due process challenge to an indictment. (*Id.* at p. *7.) In *Harris v. Superior Court*, the Court of Appeal actually applied a presumption of prejudice, reasoning that "[i]f the issue is raised before trial, the court reaffirmed in *Pompa-Ortiz*, 'prejudice is presumed and the information is dismissed' without any affirmative showing." (*Harris v. Superior Court* (2014) 225 Cal.App.4th 1129, 1147, quoting *Pompa-Ortiz*, at pp. 529-530.)

5. *Dustin* involves a death penalty statute and its reliance on *Pompa-Ortiz* was mistaken

Avitia strives to analogize his case to *Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311 (*Dustin*). (OB 22-23, 26, 33.) In that case, a capital case before the Court of Appeal on a pretrial writ petition, the court ordered that an indictment must be dismissed without a showing of prejudice where a defendant was deprived of his right to a complete transcript of grand jury proceedings. (*Dustin*, at pp. 1326, 1328.) To the extent that *Dustin* relied on the dicta in *Pompa-Ortiz* when it recited that prejudice is always presumed for pretrial challenges to indictments and informations, it does not accurately state the law. (See *id.* at p. 1325.) But *Dustin* is also very different from this case. For one thing, Dustin's right did not arise only from the grand jury statutes, but also from the death penalty statutes. (*Id.* at p. 1323.) For another, the court also said that the error "precluded any effective review" (*ibid.*) and that "it is difficult to imagine how a defendant could ever show prejudice" (*id.* at p. 1326) on the facts presented there.

That is manifestly not the case here. *Dustin* cannot compel dismissal for Avitia.

C. The Prosecutor's Error in Taking on the Task of Retiring a Grand Juror for Bias Did Not Violate the Separation of Powers Doctrine and Did Not Result in an Improperly Constituted Grand Jury

Finally, Avitia suggests that the prosecutor's error under section 939.5 violated the constitutional principle of separation of powers and resulted in an improperly constituted grand jury. The People cannot agree.

1. The grand jury was not improperly constituted

In arguing that the grand jury was improperly constituted, Avitia relies on *Bruner v. Superior Court* (1891) 92 Cal. 239 (*Bruner*). (OB 39.) In *Bruner*, the court appointed an "elisor" to summon persons to form a grand jury, completely outside of the statutory procedure for doing so. (*Bruner*, at p. 241.) This Court found that the superior court had no jurisdiction to appoint an elisor to this task, the resulting grand jury was not a "legal body," and the indictment was "void." (*Id.* at p. 252.) As the Court of Appeal explained (*Avitia*, *supra*, 2017 WL 1382115 at p. *8), this Court long ago limited *Bruner* to its facts. (*Fitts v. Superior Court* (1935) 4 Cal.2d 514, 520.) "Mere irregularities, as distinguished from jurisdictional defects, occurring in the formation of a grand jury, will not justify a court declaring an indictment a nullity." (*Id.* at p. 521.)

The irregularity in this case obviously did not adversely affect the composition of the grand jury. It would have violated section 939.5 for Grand Juror No. 18 to *stay* on the grand jury. It was necessary for her to retire, one way or another. Perfect compliance with section 939.5 would have resulted in exactly the same grand jury.

2. The principle of separation of powers was not implicated

Avitia's argument that the prosecutor infringed on the separation of powers fares no better. "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.)

Avitia does not direct this Court's attention to any case in which an individual's violation of a valid statute implicated the doctrine of separation of powers. Generally, the doctrine applies when statutes, regulations, executive orders, and the like are challenged. (See, e.g., *Pierson*, *supra*, 7 Cal.App.5th 402; and see generally, Witkin, Summary of Cal. Law (10th ed. 2005) Separation of Powers, §§ 137-176.)

In any event, the grand jury "belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people." (*United States v. Williams* (1992) 504 U.S. 36, 47; accord, *Pierson*, *supra*, 7 Cal.App.5th at p. 414.) A criminal grand jury's role is accusatory, not adjudicatory. (*Cummiskey*, *supra*, 3 Cal.4th at p. 1026.) The separation of powers doctrine accommodates relationships among the branches of government, and so it is with the grand jury and the prosecutor. They share a function, but the grand jury serves as a check on prosecutorial overreaching. (*Packer*, *supra*, 201 Cal.App.4th at p. 167.) So long as the grand jury retains its independence to decide whether to indict, the separation of powers is intact. (See *ibid.*) A violation of section 939.5 does not necessarily destroy the grand jury's independence, and certainly did not do so here.

CONCLUSION

The People respectfully request that the judgment be affirmed.

Dated: November 15, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
RACHELLE A. NEWCOMB
Deputy Attorney General

CATHERINE CHATMAN
Supervising Deputy Attorney General
Attorneys for Real Party in Interest

SA2017305817
33134669.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 13,353 words.

Dated: November 15, 2017

XAVIER BECERRA
Attorney General of California

CATHERINE CHATMAN
Supervising Deputy Attorney General
Attorneys for Real Party in Interest

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Avitia v. Superior Court** No.: **S242030**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 16, 2017, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

David J. Cohen
Bay Area Criminal Lawyers, PC
300 Montgomery Street, Suite 660
San Francisco, CA 94101
(Attorneys for Petitioner)
(2 copies)

Alexander P. Guilmartin
Attorney at Law
300 Montgomery Street, Suite 660
San Francisco, CA 94101
(Attorneys for Petitioner)
(2 copies)

Third Appellate District
914 Capitol Mall,
Sacramento, CA 95814
(served via this Court's TrueFiling system)

The Honorable Tori Verber Salazar
San Joaquin Co. District Attorney
P.O. Box 990
Stockton, CA 95202

Clerk of the Superior Court
San Joaquin County
180 E. Weber Avenue, Suite 202
Stockton, CA 95202

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 16, 2017, at Sacramento, California.

_____
Declarant

SA2017305817
33116680.docx