

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA SUPREME COURT
FILED

FEB 2 2018

LEO BRIAN AVITIA,
Petitioner,

Jorge Navarrete Clerk

v.

Deputy

**THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE
COUNTY OF SAN JOAQUIN,**
Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,
Real party in interest.

From an Order of the San Joaquin Superior Court, Case No. GJ-2016-4112415:

Hon. Judge Brett H. Morgan
(Superior Court Judge-Denied motion to dismiss July 29, 2016)
Department 26 - (209) 468-2878

Hon. Judge Seth Hoyt
(Presided over issuance of indictment January 14, 2016)
Department 21 - (209) 468-2827

And From an Order of the Court of Appeals, Third District, Case No. C082859

(Petition for writ of mandate and/or prohibition denied April 18, 2017)

REPLY BRIEF

DAVID J. COHEN
State Bar No. 145748
300 Montgomery Street, Suite 660
San Francisco, CA 94104
Telephone Number (415) 398-3900
Fax Number (415) 398-7500
djcohen@bayareacrimlaw.com

ALEXANDER P. GUILMARTIN
State Bar No. 306767
300 Montgomery Street, Suite 660
San Francisco, CA 94104
Telephone Number (415) 398-3900
Fax Number (415) 398-7500
apguilmartin@bayareacrimlaw.com

Attorneys for Petitioner **Leo Brian Avitia**

TABLE OF CONTENTS

	Page
<u>TABLE OF AUTHORITIES</u>	3
I. <u>ARGUMENT</u>	7
A. <u>Mr. Avitia Was Denied a Substantial Due Process Right, Requiring Dismissal Without Any Showing of Prejudice</u>	8
1. <u>By Providing for Grand Jury Proceedings with Accompanying Procedural Requirements, the Legislature Established a Criminal Defendant’s Substantial Right to a Proceeding in Compliance with the Law</u>	8
2. <u>A Prosecutor’s Unlawful Dismissal of a Grand Juror in Violation of Cal.Pen. Code §939.5 Denies a Defendant a Substantial Right</u>	11
3. <u>The Third District Was Correct When it Changed its Position on Mr. Avitia’s Claim and Decided <i>Williams</i></u>	13
4. <u>The Reasoning of <i>Dustin</i> Remains Applicable to Mr. Avitia’s Case</u> ...	15
B. <u>The Prosecutor’s Error Was Structural</u>	17
C. <u>The Prosecutor’s Unlawful Usurping of the Grand Jury Foreperson’s Rule Violated the Separation of Powers Doctrine</u>	19
1. <u>A Prosecutor’s Conduct Can Violate the Separation of Powers by Intruding upon the Grand Jury’s Independence from the Executive Branch</u>	19
2. <u>The Separation of Powers Requires Maintaining the Grand Jury’s Independence</u>	20
3. <u>The Prosecutor’s Illegal Act Here Violated the Separation of Powers by Intruding upon the Grand Jury’s Independence</u>	21
D. <u>This Court Should Not Grant Respondent’s Request to Overturn Well-Established Law</u>	21
1. <u>Respondent Urges this Court Overturn Well-Established Law in Order to Immunize the State for Repercussions from its Errors</u>	22
2. <u>Respondent Has Presented No Good Reason to Overturn the Firm Principle That Encourages a Criminal Defendant to Raise His Challenges to a Charging Document Prior to Conviction</u>	24
E. <u>Whether this Court Determines That Cal. Pen. Code §995 Is the Appropriate Vehicle for a Due Process Challenge to an Indictment, Respondent Errs in Inferring Additional Requirements for Dismissal</u>	27
II. <u>CONCLUSION</u>	29
<u>CERTIFICATION OF WORD COUNT</u>	30
<u>PROOF OF SERVICE</u>	

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Ballard v. United States</i> (1946) 329 U.S. 187	7
<i>Beck v. Washington</i> (1962) 369 U.S. 541	6
<i>Chapman v. California</i> (1967) 386 U.S. 18	6
<i>Christie v. City of El Centro</i> (2006) 135 Cal.App.4th 767	6, <i>passim</i>
<i>City of Woodlake v. Tulare County Grand Jury</i> (2011) 197 Cal.App.4th 1293	17
<i>Costello v. United States</i> (1956) 350 U.S. 359	7
<i>Cummiskey v. Superior Court</i> (1992) 3 C4th 1018	6, <i>passim</i>
<i>Currie v. Superior Court</i> (1991) 230 Cal.App.3d 83	21
<i>Dustin v. Superior Court</i> (2002) 99 Cal.App. 4th 1311	12, <i>passim</i>
<i>Esteybar v. Municipal Court for Long Beach Judicial Dist.</i> (1971) 5 Cal.3d 119	17
<i>Harris v. Superior Court</i> (2014) 225 Cal.App.4th 1129	11, <i>passim</i>
<i>Herbert v. Superior Court</i> (1981) 117 Cal.App.3d 661	20
<i>Hewitt v. Helms</i> (1983) 459 U.S. 460	8
<i>McCarthy v. Superior Court</i> (1958) 162 Cal.App. 2d 755	17, <i>passim</i>
<i>McClatchy Newspapers v. Sup. Ct.</i> (1988) 44 Cal.3d 1162	17
<i>McGill v. Superior Court</i> (2011) 195 Cal.App.4th 1454	6, <i>passim</i>

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Moon v. Superior Court</i> (2005) 134 Cal. App. 4th 1521	17, <i>passim</i>
<i>Moradi-Shalal v. Fireman's Fund Ins. Companies</i> (1988) 46 Cal.3d 287	23
<i>Murgia v. Municipal Court</i> (1975) 15 Cal.3d 286	24
<i>Packer v. Superior Court</i> (2011) 201 Cal.App.4th 152	6, <i>passim</i>
<i>People v. Backus</i> (1979) 23 C3d 360	11, <i>passim</i>
<i>People v. Booker</i> (2011) 51 Cal.4th 141	19
<i>People v. Cahill</i> (1993) 5 Cal.4th 478	15
<i>People v. Duncan</i> (2000) 78 Cal.App.4th 765	24
<i>People v. Elliot</i> (1960) 54 Cal.2d 498	6, <i>passim</i>
<i>People v. Fujita</i> (1974) 43 CA3d 454	22
<i>People ex rel. Pierson v. Superior Court</i> (2017) 7 Cal.App.5th 402	17
<i>People v. Gnass</i> (2002) 101 Cal.App.4th 1271	6
<i>People v. Hellum</i> (1962) 205 Cal. App. 2d 150	15, <i>passim</i>
<i>People v. Houston</i> (1962) 205 Cal. App. 2d 150	20, <i>passim</i>
<i>People v. Jablonski</i> (2006) 37 Cal.4th 774	15, <i>passim</i>
<i>People v. Laney</i> (2002) 101 Cal.App.4th 1271	6, <i>passim</i>

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>People v. Naphaly</i> (1895) 105 Cal.641	17, <i>passim</i>
<i>People v. Phillips</i> (1964) 229 Cal.App. 2d 496	15, <i>passim</i>
<i>People v. Pompa-Ortiz</i> (1980) 27 Cal.3d 519	19, <i>passim</i>
<i>People v. Salas</i> (1926) 80 Cal.App. 318	17, <i>passim</i>
<i>People v. Stewart</i> (2004) 33 Cal.4th 425	19, <i>passim</i>
<i>People v. Superior Court (Mouchaourab)</i> (2000) 78 Cal.App.4th 403	6, <i>passim</i>
<i>People v. Superior Court (Tejeda)</i> (2016) 1 Cal.App.5th 892	17
<i>People v. Tenorio</i> (1970) 3 Cal.3d 89	17
<i>People v. Towler</i> (1982) 31 Cal.3d 105	12, <i>passim</i>
<i>Reilly v. Superior Court</i> (2013) 57 Cal.4th 641	11, <i>passim</i>
<i>Stanton v. Superior Court</i> (1987) 193 Cal.App.3de 265	24
<i>Stark v. Superior Court</i> (2011) 52 Cal.4th 368	6, <i>passim</i>
<i>Steiner v. Superior Court</i> (1996) 50 Cal.App.4th 1771	17
<i>Sullivan v. Louisiana</i> (1993) 508 U.S. 275	14
<i>United States v. Burke</i> (2d Cir. 1983) 700 F.2d 70	7
<i>United States v. Serubo</i> (3d Cir. 1979) 604 F.2d 807	7

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>United States v. Waldbaum, Inc.</i> (E.D.N.Y. 1984) 593 F.Supp. 967	7
<i>Vasquez v. Hillery</i> (1986) 474 U.S. 254	7
<i>Williams v. Superior Court</i> (2017) 15 Cal.App.5th 1049	10, <i>passim</i>

Statutes and Regulations

<i>California Code of Civil Procedure</i> § 204(b)	9
<i>California Penal Code</i>	
§ 925	9, <i>passim</i>
§ 934	9, <i>passim</i>
§ 935	18
§ 939.2	9, <i>passim</i>
§ 939.5	4, <i>passim</i>
§ 939.71	9, <i>passim</i>
§ 995(a)(1)(A)	25
§ 995(a)(1)(B)	24

I.

ARGUMENT

“In theory, the grand jury is a remarkable institution. Praised by some as the ‘protector of the citizenry against arbitrary prosecution,’ the grand jury involves ordinary citizens in the administration of criminal justice [But] well-designed institutions may be subject to abuse.” (Michael Vitiello & J. C. Kelso, *Reform of California’s Grand Jury System*, 35 Loy. L.A. L. Rev. 513, 513-514 (2002).) Undoubtedly, the state abused the grand jury system in its efforts to indict Mr. Avitia, violating the law in order to constitute a grand jury that the prosecutor, rather than the jury foreperson, deemed appropriate.

Reflecting its concern that Mr. Avitia will be granted the dismissal to which he is legally entitled, Respondent presents in its brief a number of new arguments it has never previously raised. All of these arguments amount to red herrings and distractions from the core dispute at issue in this case. The law has clearly established that, when a defendant challenges an indictment before trial, he is entitled to dismissal if he was denied a substantial right. Thus, Mr. Avitia has presented this Court with a simple question: **Did the prosecutor’s conceded error during grand jury proceedings serve to deny Mr. Avitia a substantial right?** If so, the remedy is dismissal of the indictment. Anything and everything Respondent has to say in its briefing that does not go to this core question is simply an attempt to divert attention away from the state’s violation of Mr. Avitia’s due process rights and the necessary result of its error.

In opposing Mr. Avitia’s petition, Respondent urges this Court to decide that a prosecutor’s violation of Cal. Pen. Code §939.5 does not violate a defendant’s due process rights nor the constitutional principle of the separation of powers, and that the error is not a structural one. But Respondent, not satisfied with merely arguing that Mr. Avitia is not entitled to dismissal as it did below, now goes farther, asserting that criminal defendants have no federal due process rights in state grand jury proceedings. And in a final twisting of the

knife, Respondent premises its arguments on its new request that this Court overturn no fewer than 20 decisions (several of which were rendered by this very Court) and decide that a showing of prejudice is *always* required to obtain a pretrial dismissal on the basis of a due process violation.

The legislature has statutorily crafted procedural and due process safeguards for a defendant facing grand jury indictment. This Court need not entertain Respondent's attempt to eliminate entirely any remedy for a denial of those rights. Although Respondent promises that the state will never again partake in the illegal conduct it has repeatedly enjoyed in the past, it simultaneously begs this Court to render that promise an empty one by decreeing that such action must go without punishment. Fearful of prosecutors' future indiscretions as much as their past ones, Respondent seeks this Court's assistance in ensuring that any district attorney who flouts the statutory commands governing a secret grand jury proceeding does so without condemnation, and that any defendant who suffers the violation of the rights the legislature guaranteed him is without recourse. This Court should deny Respondent's request for aid in its efforts and direct the granting of Mr. Avitia's petition.

A. **Mr. Avitia Was Denied a Substantial, Due Process Right, Requiring Dismissal Without Any Showing of Prejudice.**

If this Court denies Respondent's attempts to undo decades of law and affirms the principle that the denial of a substantial right, challenged pretrial, requires dismissal without a showing of prejudice, then the only question that remains is whether the prosecutor's unlawful dismissal of a grand juror effectuates a denial of a substantial right. This, the Court should answer in the affirmative, as such illegal conduct and flagrant disregard for the protections secured to a criminal defendant by the legislature must be treated as the due process violation it clearly is.

1. **By Providing for Grand Jury Proceedings with Accompanying Procedural Requirements, the Legislature Established a Criminal Defendant's Substantial Right to a Proceeding in Compliance with the Law.**

A criminal defendant has a due process right to a grand jury proceeding that does not

directly conflict with established law. Courts in this state have established this fundamental truth time and time again. (*See, e.g., Stark v. Superior Court* (2011) 52 Cal.4th 368, 417 [“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”]; *Packer v. Superior Court* (2011) 201 Cal.App.4th 152, 167 [same]; *McGill v. Superior Court* (2011) 195 Cal.App.4th 1454, 1508 [“the ‘manner’ by which a grand jury investigation is conducted may also invalidate a grand jury’s indictment”]; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1022, fn. 1 [“the manner in which the prosecutor conducted the grand jury proceedings ran afoul of her due process rights under the relevant statutory and common law principles”]; *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1307; *People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App.4th 403, 424-425; *People v. Elliot* (1960) 54 Cal.2d 498, 503; *Christie v. City of El Centro* (2006) 135 Cal. App. 4th 767, 777, fn. 3.)¹

Respondent attempts to muddy the waters by arguing a criminal defendant has no *federal* due process right to a grand jury proceeding that is conducted in accordance with the law (once the law provides for a grand jury proceeding).² The Supreme Court has in fact left that decision open, refusing to decide whether a state, once it has afforded a defendant a grand jury proceeding, must then comply with its own laws regarding the procedure of that hearing. (*See Beck v. Washington* (1962) 369 U.S. 541, 546 [declining to decide whether “the Due Process Clause of the Fourteenth Amendment requires the State, having once resorted to a grand jury procedure, to furnish an unbiased grand jury”].) Respondent can cite only

¹ Packer described as “unsettled” the specific question of whether a defendant has a due process right to an unbiased grand jury. The error in Mr. Avitia’s case takes a different form, denying him his substantial right to a jury that is composed in compliance with statutory requirements.

² This Respondent likely does out of concern it would never be able to show beyond a reasonable doubt that the error did not affect the outcome of the proceeding. (*See Chapman v. California* (1967) 386 U.S. 18, 24.)

cases establishing the fact that due process does not require the state to furnish a probable cause hearing in the first place, which has little bearing on the question of what the state may do or not do once it has decided to furnish that hearing.³

As Respondent fleetingly notes, the United States Supreme Court *has*, albeit when dealing with different errors in the selection of a grand jury, recognized the fundamental nature of the “structural integrity” that a grand jury must possess; discrimination in its selection “undermines the structural integrity of the criminal tribunal itself.” (*Vasquez v. Hillery* (1986) 474 U.S. 254, 263-264.) “When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm.” (*Id.* at 263.) After all, the “grand jury is not bound to indict in every case where a conviction can be obtained.” (*Ibid.*) And so an error in the way in which the grand jury is formulated invites dismissal because it “does not accord to the defendant the type of jury to which the law entitles him. It is an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to him.” (*Ballard v. United States* (1946) 329 U.S. 187, 195.) The injury that results from such an irregularity “is injury to the jury system [and] to the law as an institution.” (*Ibid.*) A grand jury that is improperly selected necessarily means “the indictment was not returned in accordance with the procedure established by Congress. Accordingly, the indictment must be dismissed.” (*Id.* at 196.)⁴

³ It is worth noting that federal courts have consistently upheld the importance of a “legally constituted and unbiased grand jury” as a prerequisite to a lawful indictment. (*Costello v. United States* (1956) 350 U. S. 359, 363; *see also United States v. Burke* (2d Cir. 1983) 700 F.2d 70; *United States v. Serubo* (3d Cir. 1979) 604 F.2d 807, 816; *United States v. Waldbaum, Inc.* (E.D.N.Y. 1984) 593 F.Supp. 967, 970 [“it is settled that the Fifth Amendment requires that an indictment be returned by a legally constituted and unbiased grand jury”] (collecting cases).)

⁴ In its brief, Respondent engages in a lengthy and unnecessary survey of cases it argues support the notion that the state procedural grand jury right to which Mr. Avitia was entitled

In any event, whether this Court decides Mr. Avitia's case by reliance upon federal or state due process rights, it is clear and uncontroverted that Mr. Avitia had a right to a grand jury proceeding in which the foreperson, and not the prosecutor, determined which members would be excused from service, just as it is clear that dismissals are appropriate where a defendant's due process rights at a grand jury proceeding are violated.

2. A Prosecutor's Unlawful Dismissal of a Grand Juror in Violation of Cal. Pen. Code §939.5 Denies a Defendant a Substantial Right.

In this case, the prosecutor violated Cal. Pen. Code §939.5 by dismissing a grand juror of his own volition, rather than permitting the foreperson to render that decision in accordance with the law. Thus, this case provides this Court an opportunity to determine for the first time that the error Mr. Avitia suffered rendered a denial of his substantial right, thereby requiring a dismissal of the indictment.

In so doing, this Court should look to its previous pronouncements, including its statement that "forms of procedure" for probable cause hearings establish substantial rights that must be honored. (*People v. Elliot* (1960) 54 Cal.2d 498, 503.) Notably, *Elliot*, the first case to condition dismissal on the denial of a "substantial right," was directly addressed by *Pompa-Ortiz*, in which this Court eliminated the automatic requirement of dismissal of the indictment on post-conviction appeal. (*Pompa-Ortiz, supra*, 27 Cal.3d at 529.) But it did not overturn *Elliot's* determination that Cal. Pen. Code §868's exclusion of unauthorized persons from a probable cause hearing created "not a mere insubstantial right," but a "fundamental safeguard." (*Elliot, supra*, 54 Cal.2d at 504.) So too does section 939.5 create a "fundamental

did not invoke federal due process. None of these cases involve procedural rights similar to the ones at issue here, nor even procedural rights involved in a grand jury hearing. The law on this issue is in fact more complex than Respondent pretends. (*See Hewitt v. Helms* (1983) 459 U.S. 460, 471-472 (recognizing due process protections where the state had mandated certain procedures and substantive predicates).) Because this Court need not decide the scope of a defendant's federal due process rights to particular grand jury procedures, and in the interest of compliance with Rules of Court regarding the length of briefs, Mr. Avitia does not attempt to match the breadth of Respondent's arguments on this issue.

safeguard,” ensuring a citizen is not criminally indicted by a grand jury composed on the whims of a zealous prosecutor, but rather, by a jury constructed by careful procedure that requires the jury to in fact construct itself.

This Court should also look to section 939.5 itself, a statute that could not be more clear in its requirement that the foreperson, rather than any prosecutor or agent of the executive branch, carry the responsibility of deciding which jurors should retire from service. Respondent’s ability to ascertain legislative intent from a complete absence of legislative history is its own alone; Mr. Avitia is not so gifted.⁵

Instead, Mr. Avitia looks to the statute itself, which specifically excludes from determinations of excusal the prosecutor. It entrusts the grand jury foreperson to make the ultimate decision of who should and should not serve on the jury. By contrast, §§ 934, 939.2, and 939.71 provide examples of circumstances in which the legislature deemed it appropriate for the prosecutor to have some influence: the giving of “advice,” the subpoenaing of witnesses, and the presentation of exculpatory evidence. In an attempt to be abundantly clear, §935 reiterates the prosecutor’s role in grand jury proceedings, explaining his task to give information and advice and interrogate witnesses; nowhere does it mention the prosecutor playing any role in determining the jurors who will serve, a task specifically reserved for the jury itself.

By the manner in which it has briefed this Court, Respondent has implicitly admitted that if this Court does not apply a prejudice test to Mr. Avitia’s claim, he is entitled to

⁵ Respondent surmises that because the language in §939.5 was introduced the same year that §925’s excusal of the judge from grand jury proceedings was instituted, the former must have come about as a happenstance result of the latter. Respondent neglects to note that at no point has the legislature *ever* deemed it appropriate for a prosecutor to determine who should and should not serve on the grand jury. That determination, even prior to 1911, has always been reserved for the judicial branch. This indicates, without any reliance on assumption or supposition, that the legislature has never deemed it appropriate for a prosecutor to engage in the conduct the prosecutor executed here.

dismissal. Respondent does not contend that a prosecutor's excusal of grand jurors *cannot* create a due process violation. Rather, it argues that *this* prosecutor's excusal of *this* grand juror did not create a due process violation because Mr. Avitia has not made a sufficient showing of his prejudice stemming from the act. But the law is clear that a prejudice test is not required in these circumstances. Thus, so long as this Court follows its own prior law regarding the lack of a prejudice test that applies to pretrial challenges to indictments, Respondent is stripped of its only argument against Mr. Avitia's requested dismissal.

3. The Third District Was Correct When it Changed its Position on Mr. Avitia's Claim and Decided *Williams*.

Respondent is not the only one to have made an implicit concession regarding the correctness of Mr. Avitia's position. The Third District, which denied Mr. Avitia's challenge below, has itself reversed course in an apparent acknowledgment that a prosecutor's unlawful dismissal of a grand juror requires dismissal. (*Williams v. Superior Court* (2017) 15 Cal.App.5th 1049.) As the court there explained, such an error should not be subjected to a prejudice analysis, but rather, involves an inherent denial of a substantial right due to the effect such conduct has on the grand jury's independence:

It is unclear from the limited record before us whether the superior court would have agreed that Juror No. 15 should have been excused for "undue hardship." (See Code Civ. Proc., § 204, subd. (b).) We will never know because the court never decided the issue. The fact that the excused juror was not replaced suggests the court was not made aware of what happened, effectively preventing the drawing of another grand juror who might have impacted deliberations. . . .

If this case involved a petit jury instead of a grand jury, we are confident these same facts would produce justifiable outrage by the court and opposing counsel. But here, the possibility of an objection was structurally foreclosed: The court was not present and grand jury proceedings necessarily exclude defense counsel. In denying petitioner's motion to dismiss the indictment, the superior court focused its analysis on the missing 19th juror, but our concern is with the impact the deputy district attorney's actions had on the grand jurors that remained.

(*Id.* at 1061-1062.)

The court went on to say that the prosecutor's improper excusal of a grand juror "may have contributed to [the jury's] determination that probable cause existed to accuse petitioner

of the charged crimes,” and so even absent any showing of prejudice, dismissal was required. (*Id.* at 1062.) The court appears to have relied in part on the language of *Reilly* and the case’s application of a showing that the error “reasonably might have affected the outcome” where it is unclear whether the right that was denied was substantial. (*Reilly v. Superior Court* (2013) 57 Cal.4th 641, 653; *see also Harris v. Superior Court* (2014) 225 Cal.App.4th 1129, 1146-1147.) The implication is that the Third District determined it was unable to decide whether the right at issue was substantial, but *was* able to determine that the denial of that right “reasonably might have” impinged on the grand jury’s independence.

The Third District was correct when it decided *Williams*, as it is surely the case that a prosecutor’s reconstruction of the membership of a grand jury “reasonably might” affect the decisions that jury ultimately renders. That, as Respondent admits, the grand jury was never told “about the terms of section 939.5” (AB 39), confirms that the grand jury had no way of knowing that the law guaranteed they would *not* be under the prosecutor’s direct control (so long, of course, as that law was followed). Perversely, Respondent attempts to justify the state’s statutory violation by citing its failure to disclose that violation, giving new meaning to the old turn of phrase, “what they don’t know can’t hurt them.”

Respondent urges this Court to participate in a guessing game and assume that the grand jury reached only innocent conclusions when faced with the undeniable evidence that the prosecutor had the discretion to dismiss any of them at any time. Mr. Avitia instead requests that this Court not speculate about what the grand jury thought when the prosecutor singlehandedly excused one of its members. Rather, this Court need simply assert that this excusal, in direct contradiction of the law, operated to deny Mr. Avitia his substantial right to a grand jury free of the prosecutor’s unlawful influences. By recognizing a criminal defendant’s substantial right to a grand jury composed in accordance with the law, this Court would merely be giving a minimal amount of life to a right the legislature has specifically crafted. Notably, it would also be providing some minimal assurance to the citizenry of the

state that they will not be indicted pursuant to a single prosecutor's zeal without the full procedural safeguards the legislature has afforded them.

One of the reasons Respondent cites for its desire to avoid an adverse ruling is its fear that, in future actions against other defendants, a dismissal may present a bar to future prosecutions. This fear acts as an acknowledgment that, contrary to Respondent's promises, it full expects prosecutors to commit this same error again. This Court must ensure Respondent does not have complete freedom to engage in unlawful conduct.

4. The Reasoning of *Dustin* Remains Applicable to Mr. Avitia's Case.

When faced with case law that dictates a test it believes it will lose, Respondent begs this Court overturn that law. When faced with case law that provides a reasoned, analogous analysis of comparable circumstances and clear prosecutorial error, Respondent begs this Court rely on meaningless distinctions in an effort to ignore one Court of Appeal's well-justified logic. This Court should not humor the latter effort any more than it should the former.

Mr. Avitia explained at length in his opening brief why *Dustin v. Superior Court* (2002) 99 Cal. App. 4th 1311 bears so directly on the issues he raises, and he strives not to rehash those arguments here. Instead, he addresses the two meager contentions raised by Respondent in its answering brief: (1) that *Dustin* is inapposite because it involved a death penalty case; and (2) that *Dustin* is inapposite because it involved an error for which it was difficult to show prejudice.

Respondent is correct that *Dustin* was a death penalty case. But it fails to explain why a prosecutor is not permitted to violate the law in such a circumstance while a prosecutor seeking a potential sentence of life imprisonment, as the state seeks for Mr. Avitia here, may freely engage in unlawful conduct. Indeed, the distinction Respondent draws is a dangerous one, as it suggests that, contrary to Respondent's promise that no prosecutor will again violate the law in this manner again, Respondent holds the state to different standards of

conduct on the basis of the perceived seriousness of the potential punishment.

Perhaps more importantly, Respondent denies the applicability of *Dustin's* characterization of the error in that case, a failure to record the prosecutor's opening and closing statements during grand jury proceedings, which it described as making it "difficult to imagine how a defendant could ever show prejudice." Respondent's argument to support its attempted drawing of a distinction would be elegant if not so inexplicable: "That is manifestly not the case here." (AB 55.) As Mr. Avitia has argued at length, that is *exactly* the case here, where Respondent would task a defendant with proving that a defendant whom the prosecutor singlehandedly struck from jury duty would have altered the course of the private deliberations.

Mr. Avitia, like this Court, knows nothing about the juror who was dismissed other than what the prosecutor deigned to put on the record. Were Mr. Avitia to argue that the evidence presented against him was prejudicial, this Court could decide whether that was true by looking to the record and determining whether the totality of the evidence, including any prejudicial effect, remained sufficient to support probable cause. Cases like *Backus* demonstrate such an endeavor.

But Mr. Avitia is not in such a situation. Instead, he argues that the prosecutor's admitted error denied him the service of a grand juror who otherwise might have served and might have influenced deliberations. No defendant faced with such an error would ever be able to prove the prejudice he suffered, just like a defendant faced with an incomplete record of proceedings (as in *Dustin*) was without a means of "effective review." (*Dustin, supra*, 99 Cal. App. 4th at 1323.)

Respondent would have this Court authorize prosecutors to freely dismiss grand jurors, in violation of the law, and without any meaningful review. The only record which a complaining defendant would have to rely upon would be one created by the prosecutor himself, without any possible judicial intervention and outside the defendant's presence

(likely without his knowledge). If the prosecutor chose not to ask questions that would shed a light on the subject juror's biases, the prosecutor could choose not to do so, and the record would contain no indications of whether the juror was in fact biased. The complaining defendant would have no way of showing prejudice, because the record could not possibly reflect a way in which he was prejudiced by the prosecutor's conduct. The prosecutor would be able to shape the jury entirely of his own volition, and would answer to no one for his actions.

This is not the procedure envisioned by the law; rather, it is one that the legislature specifically barred by passage of §939.5. The state wishes to rely on a claim that the record shows no prejudice; that is exactly the argument the court in *Dustin* rejected. Where the record does not show the effect of a prosecutor's illegal conduct, and where the record would almost certainly *never* show the effect of a prosecutor's illegal conduct, the result is not that the indictment is immunized from attack. Instead, as *Dustin* makes clear, such circumstances necessitate dismissal of the charging document, even though "we can only speculate what might have occurred in this case." (*Dustin, supra*, 99 Cal.App.4th at 1326.) No other result is sensible, and no other result pays sufficient respect to the realities of grand jury procedure.

B. The Prosecutor's Error Was Structural.

Because he was denied a substantial right, Mr. Avitia need not show anything more and this Court need not inquire further. Mr. Avitia notes, however, that at no point during any of these proceedings, including litigation below, has Respondent ever suggested a way in which a defendant who suffers this sort of error might be able to demonstrate that he was prejudiced by its commission. The reason for this is that the error in this case is unique because it is structural in form. The structural nature of the prosecutor's error provides an additional, separate basis for dismissal.

Of course, the error in this case need not be deemed structural in order to require dismissal. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [describing structural error

analysis as “[a]nother mode of analysis lead[ing] to the same conclusion that harmless-error analysis does not apply”).) But structural error analysis is helpful in identifying why a prejudice test is particularly unsuited to the error Mr. Avitia complains of here. This Court has recognized that no prejudice analysis is appropriate where “the error is of constitutional magnitude and the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair.” (*People v. Jablonski* (2006) 37 Cal.4th 774, 800.) This Court has also recognized that errors in the composition of the grand jury are structural defects despite the fact that they “may have no effect whatsoever on any part or aspect of the trial.” (*People v. Cahill* (1993) 5 Cal.4th 478, 548.)

Even if the prosecutor’s dismissal of Grand Juror No. 18 here had no effect on the indictment that was ultimately issued (something no one will ever be able to know), the mere fact that the prosecutor was permitted to execute that dismissal erodes confidence in the independence of the grand jury system. If this Court effectively sanctions the prosecutor’s conduct in this case, it will be announcing to the citizenry of the state that grand juries render independent decisions on the question of indictment only to the extent that the prosecutor allows them to; the perception is created that a grand jury, with all of its power, is comprised not of eligible citizens of the state, but of those individuals the District Attorney has picked out for purposes of obtaining arrests. Where the public perceives improper prosecutorial conduct or biased grand jury compositions, whether these perceptions are fully substantiated or not, the inevitable result is an undermining of the grand jury system’s integrity, as well as its usefulness to the public and its ability to carry out the duties historically entrusted to it.

While Respondent may find reassurance in the grand jury’s secrecy (AB 41), it is that very secrecy that makes it so difficult to ascertain the ultimate fairness of a grand jury proceeding when it is later discovered that the prosecutor played an unlawful hand in determining who would participate in that proceeding. The legislature has endeavored to reduce doubts in the objectivity of a grand jury’s decision to indict (or not to indict), and this

Court need merely preserve those efforts by condemning a prosecutor's violation of his statutory duties.

C. **The Prosecutor's Unlawful Usurping of the Grand Jury Foreperson's Rule Violated the Separation of Powers Doctrine.**

Mr. Avitia was clearly denied a substantial right and had his due process rights violated as a result. Consequently, this Court need not specifically belabor many of the alternative bases for a dismissal that Mr. Avitia has raised. But it is worth noting that the error at issue in this case is more profound than others that might be worthy of dismissal, particularly as it raises grave constitutional concerns separate and apart from due process considerations. One of these is the separation of powers, a sacred doctrine that the prosecutor in this case infringed by intruding into the grand jury's purview and replacing the foreperson in her role as arbiter of the jury's composition. It is fundamental "that courts should examine grand jury proceedings so as to ensure the grand jury's independence." (*McGill v. Superior Court* (2011) 195 Cal.App.4th 1454, 1498.)

1. **A Prosecutor's Conduct Can Violate the Separation of Powers by Intruding upon the Grand Jury's Independence from the Executive Branch.**

This Court has not provided any explicit guidance regarding circumstances in which an individual prosecutor's conduct (or the conduct of an entire District Attorney's office) infringes on the separation of powers created by article III, section 1 of the California Constitution. Seizing upon this absence of direct law, Respondent appears to argue that such conduct cannot violate the doctrine of separation of powers, claiming it is "generally" limited to "statutes, regulations, executive orders, and the like." (AB 56.) This is not, and cannot be, the case, as limiting this fundamental constitution tenet in such a way would effectively shield the executive branch from any review of its actions.

This Court *has* made clear that the judicial branch must operate free from the supervision of a district attorney, and a determination of probable cause to hold a defendant to answer on charges must be made independently of an individual prosecutor's desires.