Case No. S242030

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

SUPREME COURT
FILED
FEB 2 2018
Jorge Navarrete Clerk
Deputy

LEO BRIAN AVITIA,
Petitioner,

v.

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

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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

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[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]

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[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 F2d 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

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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

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[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. <u>The Prosecutor's Unlawful Usurping of the Grand Jury Foreperson's Rule Violated the Separation of Powers Doctrine.</u>

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. <u>A Prosecutor's Conduct Can Violate the Separation of Powers by Intruding upon the Grand Jury's Independence from the Executive Branch.</u>

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.

(*Esteybar v. Municipal Court for Long Beach Judicial Dist.* (1971) 5 Cal.3d 119, 127; *see also People v. Tenorio* (1970) 3 Cal.3d 89, 95.) And at least one appellate judge has recognized the specific and unremarkable notion that an individual prosecutor (or prosecutorial office) might violate the separation of powers by engaging in conduct that acts to improperly control the judicial branch. (*See People v. Superior Court* (*Tejeda*) (2016) 1 Cal.App.5th 892, 930-931 (J. Thompson, dissenting).) The separation of powers is no less violated by individual executive actors than it is by a broader executive policy, and both types of improper influence should be prohibited so as to preserve the critical balance between the branches of government.

2. The Separation of Powers Requires Maintaining the Grand Jury's Independence.

Respondent also advances the confused argument that the grand jury belongs to "no branch of the institutional government" and serves only an "accusatory" role, while still acknowledging that the separation of powers requires the grand jury "retain its independence". (AB 56.) To the extent Respondent is suggesting that a separation of powers challenge does not apply to grand jury procedures, it is wrong.

This Court has described the grand jury as a "judicial body that is part of the judicial branch of government." (*McClatchy Newspapers v. Sup. Ct.* (1988) 44 Cal.3d 1162, 1171-1172; *City of Woodlake v. Tulare County Grand Jury* (2011) 197 Cal.App.4th 1293, 1300.) Other branches have been prohibited from intruding on the grand jury's functions because the "concept" of the separation of powers applies to the grand jury. (*People ex rel. Pierson v. Superior Court* (2017) 7 Cal.App 5th 402, 414.) Even if the grand jury's function were to be considered "quasi-judicial," the doctrine of separation of powers would prohibit interference from non-judicial branches in the grand jury's quasi-judicial acts. (*See Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, 1785, fn. 18.)

The prosecutor's role is to charge. The grand jury's is to find probable cause. Where the prosecutor wields power over the grand jury's (or a magistrate's) probable cause

determination, it has crossed the sacred line separating the branches of our government, a line intended to insulate critical bureaucratic decisions from bodies that are not meant to have any say in those determinations.

3. <u>The Prosecutor's Illegal Act Here Violated the Separation of Powers by Intruding upon the Grand Jury's Independence.</u>

Respondent is also wrong when it contends that no violation of the separation of powers occurred here because the grand jury's independence was not infringed. The Third District's analysis in *Williams v. Superior Court* (2017) 15 Cal.App.5th 1049 is again instructive on this point. As it explained:

> By deciding that Juror No. 15 should be excused for hardship, the deputy district attorney used the authority of the judicial branch. . . .
> The prosecutor's actions supplanted the court's role in the proceedings and, because the excusal colloquy took place in front of the other jurors, allowed the remaining jurors to mistakenly believe the prosecutor had legal authority to approve a hardship request. Thus, the deputy district attorney expanded his power over the grand jury proceedings and the grand jurors themselves. Instead of merely providing information or advice (§ 935), he asserted actual control over them.

(*Id.* at 1061.)

If the grand jury is to act as the sword investigating criminal misconduct, it cannot simply be one that is wielded by the prosecutor. And if it is to maintain its integrity, it must forever also act as a shield against the state's unrestrained power. The executive branch must not have free rein to engineer situations in which criminal defendants are held to answer for untested charges.

D. <u>This Court Should Not Grant Respondent's Request to Overturn Well-Established Law.</u>

Sensing its defeat if this Court stands by the law it has previously established, Respondent attempts to avoid dismissal in this case by urging this Court to overturn all of that law and establish a new protection for the state where it violates the rights of a criminal defendant. Respondent asks this Court to declare, contrary to all of its previous decisions, that a defendant who raises a pretrial challenge on the basis of the denial of his substantial

rights should *never* be provided a dismissal unless he makes an affirmative showing of prejudice. In its arguments below, Respondent did not challenge the long line of prior cases with which it now takes issue. The fact that it now feels it necessary to launch its attack on current law indicates that Respondent does not believe it can prevail if this Court applies its established substantial rights analysis to this case. This Court should not bow to Respondent's efforts to dramatically reverse its course, and should not violate hallowed principles of stare decisis simply to immunize prosecutors from the consequences of their illegal conduct.

1. Respondent Urges this Court Overturn Well-Established Law in Order to Immunize the State for Repercussions from its Errors.

Faced with a mountain of case law establishing that the denial of a substantial right and a resultant dismissal may occur even where no prejudice results from the error, Respondent, recognizing the futility of any other position, urges this Court overturn no fewer than 20 cases that affirmed this legal tenet. Calling *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519 a "problem" (AB 53), Respondent specifically identifies six cases which it describes as containing incorrect holdings or dicta:

- Respondent characterizes *Pompa-Ortiz*'s treatment of pre-trial challenges as incorrect dictum, but fails to note the case's explicit and necessary holding that Pompa-Ortiz had been denied a substantial right and *was entitled to the granting of a §995 motion to dismiss*. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.)
- In *People v. Booker* (2011) 51 Cal.4th 141, 157, this Court clarified that the difference between a challenge requiring a showing of prejudice and one where prejudice is presumed hinges entirely on whether the challenge is brought before the reviewing court before or after a conviction is rendered.
- In *People v. Stewart* (2004) 33 Cal.4th 425, 461, this Court likewise held that a challenge brought by a pretrial writ petition requires reversal "without any showing of prejudice."
- Respondent is forced to acknowledge that in cases such as *Harris v. Superior Court* (2014) 225 Cal.App.4th 1129, 1147, the reviewing court actually granted reversal on the basis of the defendant's pre-trial challenge without first requiring any showing of prejudice.
- Similarly, Respondent seeks the overturning of *Dustin v. Superior Court*

(2002) 99 Cal.App.4th 1311, 1325, in which the court cited to *Pompa-Ortiz* and held that "here the People's decision to deny defendant a recordation of all the proceedings amounted to a denial of a substantial right . . . and prejudice is presumed." (*Id.* at 1328.)

- Finally, Respondent urges this Court to overturn the entirety of *Williams v. Superior Court* (2017) 15 Cal.App.5th 1049 because of its blanket assertion that "the reasoning in *Williams* is flawed." (AB 45.) *Williams* did not rely upon *Pompa-Ortiz* but instead determined that the prosecutor's improper dismissal of a grand juror, by its very nature, "substantially impaired the jury's independence and impartiality, and may have contributed to its determination that probable cause existed to accuse petitioner of the charged crimes." (*Id.* at 1062.)

Respondent strategically neglects to note that, in order to overturn the critical pre-or-post-trial distinction established in *Pompa-Ortiz*, this Court would also have to overturn at least fourteen other cases identified in Mr. Avitia's opening brief. This includes all of those cases in which courts recognized the principle that pre-trial challenges to informations or indictments require no showing of prejudice where a substantial right has been denied.[6] So too would this Court have to overturn those cases explicitly requiring reversal for errors affecting substantial rights in the absence of any prejudice.[7] Indeed, because *Pompa-Ortiz* did not create a new rule of law regarding pre-trial challenges, this Court would even have to overturn a long line of pre-*Pompa-Ortiz* cases that initially established the requirement of reversal in the face of fundamental errors in probable cause proceedings.[8]

And the litany of cases cited above only references those identified by Mr. Avitia in

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[6] *People v. Laney* (1981) 115 Cal.App.3d 508, 513; *People v. Towler* (1982) 31 Cal.3d 105, 123; *People v. Jablonski* (2006) 37 Cal.4th 774, 800; *People v. Houston* (2012) 54 Cal.4th 1186, 1205.

[7] *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1534; *Herbert v. Superior Court* (1981) 117 Cal.App.3d 661; *Christie v. City of El Centro* (2006) 135 Cal. App. 4th 767, 777, fn. 3.

[8] *McCarthy v. Superior Court* (1958) 162 Cal. App. 2d 755; *People v. Phillips* (1964) 229 Cal. App. 2d 496; *People v. Hellum* (1962) 205 Cal.App.2d 150; *People v. Salas* (1926) 80 Cal. App. 318; *People v. Napthaly* (1895) 105 Cal. 641.

his opening brief; undoubtedly, following Respondent's request would also require overturning a number of other cases citing or relying upon the reasoning of *Pompa-Ortiz*.[9]

2. 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.

Respondent urges all of this on the basis of its selective reading of a handful of cases and its inexplicable belief that the Court's language in those cases was intended to establish profound contradictions in the law. Respondent reads *Backus*, for example, as providing the *only* circumstance where dismissal is appropriate following prosecutorial error in grand jury proceedings, that is, where defendants attack the sufficiency of the evidence by showing they were prejudiced by the People's "presentation of incompetent and irrelevant evidence to the grand jury." (*People v. Backus*, 23 Cal. 3d 360, 393 (1979).) Respondent does so despite the fact that *Backus* predates *Pompa-Ortiz* and the development of the law on "substantial rights" that would follow.

Similarly, Respondent reads this Court's endorsement of *Backus* in *Stark* to affirm the notion that only one type of error will ever be deserving of redress:

> This court has recognized 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. (*Backus*, *supra*, 23 Cal.3d at pp. 392–393.) That showing requires a demonstration that the prosecutor suffered from a conflict of interest that substantially impaired the independence and impartiality of the grand jury. (*Backus*, at pp. 392–393.)

(*Stark v. Superior Court*, 52 Cal. 4th 368, 417 (2011).) *Stark*, again, neither cites *Pompa-Ortiz* nor ever refers in passing to the "substantial right" doctrine. Notably, although Respondent attempts to selectively read *Stark* to claim that dismissal always "requires a demonstration" of impairment, it fails to note that the sentence it draws that language from deals explicitly with "a conflict of interest," and thus cannot possibly apply to every type of

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[9] (*See, e.g.*, *Currie v. Superior Court* (1991) 230 Cal.App.3d 83, 98; *Stroud v. Superior Court* (2000) 23 Cal.4th 952, 963, fn. 4.)

error that might occur in grand jury proceedings.[10]

Throughout its brief, Respondent misleadingly cites distinguishable (and already distinguished) cases that it claims support its position that a defendant must always make a showing of prejudice before obtaining a dismissal. Each of these cases contains no such holding but instead merely serve as an inapposite example of a situation where a prejudice inquiry might be appropriate. These cases all deal with *post-conviction* challenges, and include *People v. Fujita*, 43 Cal. App. 3d 454, 476 (1974); *People v. Jablonski* (2006) 37 Cal. 4th 774; *People v. Booker* (2011) 51 Cal. 4th 141; *People v. Towler* (1982) 31 Cal. 3d 105. Respondent also cites to what has been the People's *raison d'être* throughout the proceedings below, *Packer*, despite the fact that *Packer*'s holding has always been, and continues to be, the relatively inconsequential declaration that asserting grand jury bias requires some actual bias. (*See Packer v. Superior Court*, 201 Cal. App. 4th 152, 156, (2011) ["we agree with the trial court's conclusion that Packer fails to demonstrate the bias of which he complains"].)

Where Respondent cites cases from this Court that address *pre*trial challenges, it ignores the fact that those cases also explicitly acknowledge the existence of errors requiring reversal even in the absence of any prejudice. This Court has explained the distinction between reasonable dismissals required by pretrial errors and those that would be unreasonable in the absence of some showing of prejudice. (*See People v. Standish*, 38 Cal.

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[10] Respondent's citations to *Cummiskey* and *Mouchaourab* are equally unavailing. *Cummiskey v. Superior Court*, 3 Cal. 4th 1018, 1037 (1992), like *Backus*, dealt with an argument regarding the sufficiency of the admissible evidence presented to the grand jury. *People v. Superior Court* (*Mouchaourab*), 78 Cal. App. 4th 403, 436-37 (2000) deal with the issue of the disclosure of grand jury proceedings that a court is required to make, determining that "A trial court does not abuse its discretion in compelling disclosure of nontestimonial portions of grand jury proceedings to assist defendant in preparing a statutory motion to dismiss the indictment."

4th 858, 885 (2006).)[11] *Standish*, decided by this Court, rejected any invitation to overrule *Pompa-Ortiz* and instead recognized the case's applicability to circumstances in which requiring a showing of prejudice would be unreasonable.

Respondent concedes that "this Court has not yet squarely held that prejudice must be shown to obtain dismissal of an indictment *before* trial," and yet acknowledges cases from this Court that unequivocally state prejudice need *not* be shown in such pretrial challenges. (*See, e.g.*, *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529; *People v. Booker* (2011) 51 Cal.4th 141, 157; *People v. Stewart* (2004) 33 Cal.4th 425, 461.) Even in this case, the Third District acknowledged that the law clearly established a "presumption of prejudice" for pretrial challenges to informations. Respondent has identified no law that is contrary to this Court's explicit statements, and instead asks this Court overturn a number of cases in order to obtain its desired result here.

What Respondent fails to note in its extraordinary request is that this Court's overruling of numerous lower court cases and several of its own prior decisions would constitute a flagrant and unnecessary violation of principles of stare decisis.

> It is, of course, a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, "is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 758, p. 726, and see cases cited.)

(*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296.) Such a "fundamental jurisprudential policy" should not be so easily disregarded, and certainly not in pursuit of protections for the state where it has violated the substantial rights of a criminal defendant in a secret, closed proceeding at which neither the defendant nor his counsel is able

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[11] Mr. Avitia included a more thorough analysis of *Standish*'s holding – and its inapplicability here – in his opening brief.

to be present.

E. 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.

In a final attempt to sidestep the core issue in this case, Respondent argues that the only appropriate vehicle by which Mr. Avitia could raise his challenge was a motion pursuant to Cal. Pen. Code §995(a)(1)(B), which requires dismissal where "the defendant had been committed without reasonable or probable cause." Respondent then proceeds to argue that Mr. Avitia was *not* committed without reasonable or probable cause. Respondent's methods are transparent, and should not be sanctioned.

As a preliminary matter, Mr. Avitia again notes that whether this Court deems his challenge as more properly raised by a nonstatutory motion to dismiss or a motion pursuant to §995, he has complied with the procedural requirements of both types of motion. This has never been disputed.

Contrary to Respondent's contention, it is not at all clear that §995 is the only appropriate vehicle by which a defendant could challenge the prosecutor's conduct during grand jury proceedings. It is well established that nonstatutory motions to dismiss are "accepted as an appropriate vehicle to raise a variety of defects" not subject to §995 challenges. *(See People v. Duncan* (2000) 78 Cal.App.4th 765, 772; *Murgia v. Municipal Court* (1975) 15 Cal. 3d 286, 294, fn. 4; *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265, 271 (gathering cases).) Pretrial challenges to probable cause hearings have been raised via nonstatutory motions to dismiss, and dismissals were granted without any showing of prejudice in those cases. (*See, e.g., Harris, supra*, 225 Cal.App.4th 1129.)

Even if this Court decides that §995 is the vehicle by which challenges to the prosecutor's illegal excusal of grand jurors should be raised, there is no law that suggests such a determination would impose upon Mr. Avitia any additional requirements in order to obtain dismissal. The reasoning of *Pompa-Ortiz*, requiring dismissal for pretrial challenges

without any showing of prejudice, has been held to clearly apply to grand jury proceedings. (*Towler*, *supra*, 31 Cal.3d at 123.) And many of the cases granting dismissal on the basis of grand jury irregularities did so despite the fact that the defendant raised his challenge via §995 motion; these courts did not conclude that the vehicle by which the defendant raised his challenge dictated whether some additional showing was required. (*See*, *e.g.*, *Dustin*, *supra*, 99 Cal.App.4th at 1320; *Williams*, *supra*, 15 Cal.App.5th at 1055; *Moon*, *supra*, 134 Cal.App.4th at 1524; *McCarthy*, *supra*, 162 Cal. App. 2d 755; *Phillips*, *supra*, 229 Cal. App. 2d 496.)

Whether Mr. Avitia's challenge should have been raised via §995 or a nonstatutory motion, the result is the same. If this Court determines that a prosecutor's unlawful dismissal of a grand juror results in a commitment "without reasonable or probable cause," then §995(a)(1)(B) would be the appropriate vehicle by which that challenge would be raised (at least so long as the record of the grand jury proceedings contain sufficient information regarding the dismissal). Likewise, if this Court determines that a prosecutor's unlawful dismissal of a grand juror results in an indictment "not found, endorsed, and presented as prescribed in this code," then §995(a)(1)(A) would provide the appropriate vehicle for Mr. Avitia's challenge. But neither determination is necessary for relief, and would only govern the procedural requirements for future challenges from other defendants on the same basis. Notably, neither provision seems an entirely suitable match to the type of due process challenge Mr. Avitia raises here, evidencing the fact that a nonstatutory motion to dismiss is likely the more appropriate framing device.

What is clear from the existing law is that the existence of section 995 does not create some additional, heretofore unrecognized hurdle for Mr. Avitia to clear. If the section does not apply to Mr. Avitia's challenge, then a nonstatutory motion would provide for dismissal as a result of the due process violation Mr. Avitia suffered. This Court should give no undue weight to Respondent's arguments regarding the applicability of §995, which have no effect

on the remedy to which Mr. Avitia is entitled.

II.

CONCLUSION

The reality of what transpired in this case should not be understated. A district attorney, overseeing the secret grand jury proceedings to indict a citizen of the state, violated the law, usurped the grand jury foreperson, and made his own personal decision about who he wished to see serve on that grand jury. Mr. Avitia need not impugn this particular prosecutor's motives. It is enough to say that permitting a prosecutor to pick and choose which citizens will comprise criminal grand juries would throw the integrity of the grand jury system into question, and would do so at a time when investigations of police misconduct have already sewn considerable public doubt into the honesty and impartiality of the procedure.

Mr. Avitia has a substantial right to a grand jury of unbiased citizens, ones who are selected in accordance with the law and who can be expected to carry out their duties in compliance with the scheme that has been legislatively fashioned for them. Where the state has wisely deigned it necessary to secure for its citizens such substantial rights, due process is violated when a prosecutor takes it upon himself to deny that right.

Mr. Avitia is not requesting this Court reverse its course, prevent the state from reinstating criminal proceedings against him, or create dramatic jurisprudence that will greatly expand the number of attacks that will be launched on grand jury proceedings. Mr. Avitia is only humbly and respectfully asking this Court respect the law as it has been written, affirm its own precedents, and declare that the prosecutorial error in this case effectuated a denial of a substantial right, requiring a first dismissal.

Respectfully submitted,

BAY AREA CRIMINAL LAWYERS, PC

Dated: February 2, 2018 By: ________________________

ALEXANDER P. GUILMARTIN, ESQ.

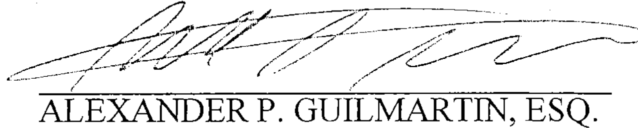
Attorneys for Petitioner **Leo Brian Avitia**

CERTIFICATION OF WORD COUNT

I, Alexander P. Guilmartin, Esq., hereby certify that Petitioner's Reply Brief is double-spaced, was typed using a proportioned typeface, Times New Roman (no more than 10 ½ characters per inch), is 8,365 words long and contains 673 lines.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: February 2, 2018



ALEXANDER P. GUILMARTIN, ESQ.

PROOF OF SERVICE

I, Tonia M. Sanchez, declare that I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action. My business address is Bay Area Criminal Lawyers, PC, 300 Montgomery Street, Suite 660, San Francisco, CA 94104.

On February 2, 2018, a copy of Petitioner's **REPLY BRIEF** in the case of *Avitia v. Superior Court of San Joaquin County*, Case no. S242030, was sent by United States mail by placing a true copy thereof enclosed to:

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I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 2, 2018 at San Francisco, California.

Tonia M. Sanchez
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