February 9, 2021

The Honorable Jorge E. Navarrete
Clerk, California Supreme Court
Supreme Court of California
455 Golden Gate Ave., Ground Floor
San Francisco, CA 94102

Re: People v. Koenig, S266413 (Court of Appeal Case No. C07441, Third Appellate District; Shasta County Superior Court No. 09F4140), cited below as People v. Koenig (2020) 58 Cal. App. 5th 771 for the convenience of the parties

LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW FILED BY JAMES KOENIG, PETITIONER (CALIFORNIA RULES OF COURT, RULE 8.500(g))

Dear Mr. Navarrete:

This letter is respectfully submitted by California Attorneys for Criminal Justice (hereafter “CACJ”) pursuant to the California Rules of Court, Rule 8.500(g), in support of the Petition for Review filed by James Koenig (hereafter referred to as “Petitioner”).

**Identification of Amicus Curiae**

CACJ is a non-profit California corporation, and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers, the largest organization of criminal defense lawyers in the United States. CACJ is administered by a Board of Directors, and its by-laws state a series of specific purposes including “to defend the rights of persons as guaranteed by the United States Constitution, the...
Constitution of the State of California, and other applicable law,” and the improvement of “the quality of the administration of criminal law.” (Article IV, CACJ By Laws.) CACJ’s membership consists of approximately 1,300 criminal defense lawyers from around the State of California and elsewhere, as well as members of affiliated professions. For more than 45 years, CACJ has appeared before this Court as an amicus curiae on matters of importance to the administration of justice and to its membership.1

**Interest of CACJ in this Matter**

CACJ counts among its members some of the most experienced trial and post conviction litigators in California. CACJ has appeared before this Court to present arguments on a number of matters that are involved in the protection of the rights of individuals charged with or convicted of crimes in California.

The Court of Appeal’s decision confuses the mental state required for general intent offenses. Departing from over a century of jurisprudence, the Court of Appeal held that the mental state of “willfulness” as that term is used in the Corporations Code can be satisfied by showing -- merely -- that the defendant was criminally negligent. Given the increased prosecutions of late involving alleged violations of the Corporations Code, CACJ fears its members’ clients will be severely impacted by the appellate court’s decision going forward.

Moreover, the appellate court’s decision in this case significantly expands the scope of criminal liability by allowing inchoate liability for crimes involving criminal negligence. Before this decision, no California court ever held that a defendant may aid and abet or conspire to commit a crime for which the mental

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1The undersigned certify by their signatures and as Officers of this Court that no compensation has been paid by any of the parties to this litigation, or by any interested party, other than by CACJ and/or by the undersigned, for any time spent in the research or production of this brief, or for any costs associated with it.
state is negligence. CACJ believes many of its members will soon be forced to contend with this sweeping change in California law.

Finally, the Court of Appeal’s decision risks confounding appellate courts and practitioners alike by permitting an appellate court to place itself in the shoes of the Attorney General and come up with its own arguments as to why a federal constitutional error can be deemed harmless, even when the state fails to address the issue in its opening brief. This Court has previously expressed an interest in this issue, but left the question open to be resolved another day. Today is that day.

For all of the reasons set forth above, CACJ has an interest in presenting its views to the Court about the need for review in this case.

ARGUMENT AND AUTHORITIES

I. The Court of Appeal’s Decision Risks Conflating Willfulness with Criminal Negligence.

CACJ begins its argument by underscoring that it is joining and seconding Petitioner in urging the Court to grant review in this case. Petitioner in this case was charged with the sale of securities by means of materially false representation in violation of Corporations Code section 25401. Corporations Code section 25540 requires violations to be “willful” before subjecting someone to criminal prosecution.

The question is what did the Legislature mean by using the term “willful.” Sometimes the Legislature uses the term willful to require actual knowledge on the defendant’s part. (See, e.g., Pen. Code, § 118 [perjury defined as “willfully” testifying contrary to oath]; see also People v. Von Tiedeman (1898) 120 Cal. 128, 136 [holding willfulness in perjury statute cannot be satisfied by negligence]) Sometimes the term does not require proof of such knowledge. (See, e.g., Pen. Code § 288, subd. (a) [prescribing “willfully” lewd acts on a minor]; see also
People v. Olsen (1984) 36 Cal.3d 638, 647 [actual knowledge of victim’s age not required].) So it is important to consider and apply principles of statutory construction to ensure that the legislative will is being furthered. That, after all, is the primary purposes of statutory construction. (DuBois v. Workers’ Comp. Appeals Bd. (1993) 5 Cal.4th 382, 387.)

Here, the appellate court interpreted “willful” to include criminal negligence without discussing any principles of statutory construction. From CACJ’s perspective, the danger in such an approach is manifest. Outside the context of the Penal Code -- where the Legislature provided a specific definition of the term -- the Legislature has used the term to limit penal liability in hundreds of provisions. Indeed, this case involved a Corporations Code prosecution, a code in which the Legislature uses the term “willful” a number of times. (See, e.g., Corp. Code, §§ 2251, 2292, 2900, subd. (d)(1)(D), 14400, 17709.02, subd. (a)(1)(D), 28706, 15910.3, subd. (b), 28705, subd. (c), 25500, 25505, 29544, 29550, 31300, 31410, 31411.)

By resolving the meaning of the term as used in this case without resort to even basic principles of statutory construction, not only is there no guarantee that the Legislature’s intent was implemented, but the appellate court’s opinion resulted in the term “willful” meaning one thing for section 25540 and another for sections 2251, 2292, 2900, 14400, 17709.02, 28706, 15910.3, 28705, 25500, 25505, 29544, 29550, 31300, 31410, and 31411. The appellate court’s approach to interpreting the term “willful” outside the context of the Penal Code -- apparently unmoored to the principles of statutory construction typically used to interpret statutes -- can only result in chaos in the lower courts.

That chaos is evident here. As petitioner points out, elsewhere in the Corporations Code -- for example in sections 23536 and 25400 -- the term “willful” has been held to require an “intent to defraud through a knowingly false statement” (California Amplifier Inc. v. RLI Ins. Co (2001) 94 Cal.App.4th 102, 112 [§ 25400]) or “guilty knowledge of the false or misleading nature of a representation . . . ” (People v. Martinez (2017) 10 Cal.App.5th 686, 710 [§
Precisely because the appellate court here elected not to employ principles of statutory construction, it interpreted section 25540 in a contrary manner, permitting the knowledge element to be satisfied with a showing of criminal negligence. But the court provided no explanation as to why the Legislature would have intended the term to have such different meanings in the same code. Review is proper.

II. No California Court Has Ever Allowed a Defendant to Be Convicted of a Crime Involving Criminal Negligence Based on Accomplice or Conspiracy Theories of Liability.

The appellate court in this case found that petitioner “did not personally sell the securities at issue . . . .” (People v. Koenig, supra, 58 Cal.App.5th at p. 779.) Because petitioner did not sell the securities, the state argued he was guilty based on either accomplice or conspiracy theories of liability. As noted, however, the jury was also instructed that the mental state element could be satisfied with mere criminal negligence.

As petitioner explains in more detail, California has never recognized inchoate liability for crimes containing a mental state of negligence. (See, e.g., People v. Bernhardt (1963) 222 Cal.App.2d 567, 586-587.) Nevertheless, the Court of Appeal set itself up as an island in a sea of contrary authority and held that, because only the scienter element required criminal negligence, nothing prohibited criminal liability for conspiring to commit -- or aiding and abetting -- an offense involving criminal negligence. (See People v. Koenig, supra, 58 Cal.App.5th at pp. 794-801.)

The appellate court’s decision threatens a gross expansion of criminal liability across the state. Numerous crimes have been held to require only a showing of criminal negligence. (See, e.g., People v. Valdez (2002) 27 Cal.4th 778, 788 [child endangerment]; Pen. Code, § 191.5 [gross vehicular manslaughter].) If the appellate court’s decision were upheld, it is not too difficult to imagine, for example, a barkeeper being charged with conspiracy to commit
vehicular manslaughter for serving drinks to someone who later got behind the
wheel; or a daycare operator or teacher being charged with aiding child
endangerment for sending a child home to parents she should have known would
not properly care for her. Any decision to substantially expand criminal liability in
this manner is in the province of the Legislature, not three unelected judges. The
appellate court’s novel expansion of inchoate liability for crimes involving
criminal negligence should not stand.

III. Given the Increased Frequency of Cases in Which the Attorney General
Fails to Address Harmless Error in its Briefing -- and Given the Extent
to Which Such Failures Compromise the Adversarial System of Justice
-- this Court Should Announce Clear Rules Going Forward.

In its principal brief in this case, the state failed to address prejudice from
the trial court’s failure to instruct on aiding and abetting in connection with the
section 25541 allegation in count 2. Nevertheless, after finding error, the Court of
Appeal here took it upon itself to find that error harmless beyond a reasonable
doubt based on reasons never advanced by the state and never responded to by
petitioner. (See People v. Koenig, supra, 58 Cal.App.5th at pp. 814-816.)

In People v. Grimes, supra, 1 Cal.5th at pp. 719-720, this Court left open
the question of the consequences of the Attorney General’s failure to address
prejudice in his principal brief. Five years after Grimes, this case shows the need
to resolve this issue once and for all.

Criminal defendants are subject to the rigid application of forfeiture rules.
When a defendant fails to raise an issue in his opening brief, that issue is forfeited.
(See, e.g., People v. Carroll (2014) 222 Cal.App.4th 1406, 1412 fn. 5.) When a
defendant raises an argument for the first time in his reply brief, that issue is
similarly forfeited. (See, e.g., People v. Adams (1990) 216 Cal.App.3d 1431,
1441.) And when a defendant raises an issue but fails to adequately support it with
argument, that issue will be deemed forfeited. (See, e.g., People v. Harris (1993)
19 Cal.App.4th 709, 713-714.) These rules remain true irrespective of the severe stakes faced by criminal defendants.

The forfeiture doctrine is grounded in sound policy reasons which reflect the commonsense notion that it is up to the parties -- not the reviewing court -- to prosecute their cases. Moreover, forfeiture respects the separation of powers and avoids the appearance of impropriety that may arise when a neutral arbiter must pause its neutrality and don the cap of an advocate. (See *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 910.)

As this case -- and *Grimes* before it -- makes clear, lower courts are simply not applying the forfeiture doctrine in an even-handed manner. The state faced utterly no consequences for its failure to address prejudice in this case. Such a one-sided application of the forfeiture doctrine cannot continue.

CACJ is unaware of any other jurisdiction which completely absolves the state of its failure to address harmless error. Generally, state and federal courts apply one of two rules in such situations. First, states such as Idaho and Nevada apply the same forfeiture rules to attorneys representing the state as they do to criminal defendants. (See, e.g., *State v. Almaraz* (Id. 2013) 301 P.3d 242, 256-257; *Polk v. State* (Nev. 2010) 233 P.3d 357, 359-361.) Second, virtually all federal circuit courts apply a less onerous forfeiture rule when the government fails to argue prejudice in its brief, affirming only when three criteria are met: (1) the record is relatively short such that the reviewing court can determine prejudice without input from the parties, (2) the prejudice question is beyond debate, and (3) a remand would be futile. (See, e.g., *United States v. Rodriguez Cortes* (1st Cir. 1991) 949 F.2d 532, 543; *United States v. Mclaughlin* (3rd Cir. 1997) 126 F.3d 130, 135; *United States v. Giovannetti* (7th Cir. 1991) 928 F.2d 225, 226-227; *United States v. Gonzales-Flores* (9th Cir. 2005) 418 F.3d 1093, 1100-1101.)

CACJ urges this Court to adopt the approach taken by the courts in Idaho and Nevada and apply the forfeiture doctrine to the state as it would apply the
forfeiture doctrine to a criminal defendant. Put simply, it is only fair that what is sauce for the goose be sauce for the gander.

But even the more moderate approach taken by federal courts would inject a level of fairness that is currently lacking. Doing so would balance both the interests of fairness and justice, as well as alleviate the separation of powers concerns. Ultimately, it is clear that this problem will continue without input from this Court.

CONCLUSION

For the foregoing reasons, CACJ respectfully urges this Court to grant review to address the issues framed by Petitioner in the Petition for Review and by CACJ here.

Respectfully submitted,
STEPHEN K. DUNKLE, Chair
JOHN T. PHILIPSBORN, Co-Chair
CACJ Amicus Curiae Committee

By: s/ Stephen K. Dunkle
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Counsel for CACJ
PROOF OF SERVICE

I, Stephen K. Dunkle, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 222 E. Carrillo St., Ste. 300, Santa Barbara, California 93101

On today’s date, I served the within document entitled:

LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW FILED BY JAMES KOENIG, PETITIONER (CALIFORNIA RULES OF COURT, RULE 8.500(g))

(X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Santa Barbara, CA, addressed as set forth below;

(X ) By electronically transmitting a true copy thereof;

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

Executed this 9th day February, 2021, at Santa Barbara, California.

Signed: s/ Stephen K. Dunkle
By: Stephen K. Dunkle