S242030

Case No. _____

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

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)

PETITION FOR REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES

-STAY REQUESTED-
All Trial Proceedings (See Page 29)

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

TABLE OF AUTHORITIES 3

ISSUE PRESENTED 7

NECESSITY FOR REVIEW 8

A. This Petition Raises Important, Unsettled Questions of Law 8
B. Review is Necessary to Secure Uniformity of Decision 9
C. The Issues Raised Are Recurring 11

MEMORANDUM OF POINTS AND AUTHORITIES 13

I. STATEMENT OF FACTS 13

II. STANDARDS GOVERNING MOTIONS TO DISMISS AND PRETRIAL WRITS AFTER DENIAL OF MOTION TO DISMISS ... 15

III. (ABBREVIATED) ARGUMENT 17

A. All Parties Agree That in Dismissing a Grand Juror, the Prosecutor Violated CPC § 939.5 17
B. Because Petitioner Was Denied a Substantial Right, Dismissal of the Indictment Is Required Without Any Showing of Prejudice 18

1. Pretrial challenges to an indictment based on the denial of a substantial right require no showing of prejudice 19
2. Petitioner was denied a substantial right here 21
3. There is no prejudice analysis that could be reasonably applied here 27

C. The Prosecutor's Misconduct Was Not Only a Violation of CPC § 939.5 Cognizable as a Section 995 Claim, but an Infringement upon the Separation of Powers and a Violation of Petitioner's Due Process Rights Requiring Dismissal of the Indictment 28

IV. REQUEST FOR STAY 29

V. CONCLUSION 30

CERTIFICATION OF WORD COUNT 31

TABLE OF AUTHORITIES

Cases	Page(s)
Ballard v. United States (1946) 329 U.S. 187	20
Bruner v. Superior Court (1891) 92 Cal. 239	11, *passim*
Buck v. Washington (1962) 369 U.S. 541	25
California School Boards Assn. v. California (2009) 171 Cal.App.4th 1183	24
Christie v. City of El Centro (2006) 135 Cal. App. 4th 767	18
Cummiskey v. Superior Court (1992) 3 C4th 1018	11
Dustin v. Superior Court (2002) 99 Cal.App.4th 1311	6, *passim*
Harris v. Superior Court (2014) 225 Cal.App.4th 1129	12, *passim*
H.D. Arnaiz, Ltd. v. County of San Joaquin (2002) 96 Cal.App.4th 1357	11
Jennings v. Superior Court of Contra Costa County (1967) 66 Cal.2d 867	15, *passim*
Johnson v. Superior Court (1975) 15 Cal.3d 248	21
McCarthy v. Superior Court (1958) 162 Cal.App. 2d 755	17
McClatchy Newspapers v. Superior Court (1988) 44 Cal.3d 1162	24
McGill v. Superior Court (2011) 195 Cal. App. 4th 1454	21
Miller v. Superior Court (2002) 101 Cal. App. 4th 728	11
Moon v. Superior Court (2005) 134 Cal. App. 4th 1521	17, *passim*

TABLE OF AUTHORITIES

Cases	Page(s)
Packer v. Superior Court (2011) 201 Cal. App. 4th 152	25
Penney v. Superior Court (1972) 28 CA3d 941	12
People v. Backus (1979) 23 C3d 360	11, *passim*
People v. Booker (2011) 51 Cal.4th 141	12, *passim*
People ex rel. Pierson v. Superior Court (2017) 7 Cal.App. 5th 402	24, 25
People v. Fujita (1974) 43 CA3d 454	11
People v. Hellum (1962) 205 Cal. App. 2d 150	15, *passim*
People v. Jablonski (2006) 37 Cal.4th 774	18
People v. Konow (2004) 32 Cal.4th 995	15
People v. Laney (1981) 115 Cal.App.3d 508	18
People v. Napthaly (1895) 105 Cal.641	17
People v. Phillips (1964) 229 Cal.App. 2d 496	15, *passim*
People v. Pompa-Ortiz (1980) 27 Cal.3d 519	5, *passim*
People v. Rojas (1969) 2 CA3d 767	12
People v. Salas (1926) 80 Cal.App. 318	17
People v. Standish (2006) 38 Cal.4th 858	17

TABLE OF AUTHORITIES

Cases — Page(s)

People v. Stewart
(2004) 33 Cal.4th 425 12

People v. Towler
(1982) 31 Cal.3d 105 ..... 12, *passim*

People v. Williams
(1954) 124 Cal.App. 2d 32 17

Reilly v. Superior Court
(2013) 57 Cal.4th 641 ..... 15, *passim*

Stark v. Superior Court
(2011) 52 Cal. 4th 368 ..... 6, *passim*

Vasquez v. Hillery
(1986) 474 U.S. 254 20

Statutes and Regulations

2017 Cal.App. Unpub. LEXIS
*1774, *3* 6
2618 10
*2618, *14* 6
*2618, *19-20* 6
*2618, *21-22* 22
*2618, *25-26* 13, 14

California Code of Civil Procedure
§ 1085(a) 11
§ 1103(a) 11

California Constitution art.
VI §§ 10-11 9

California Penal Code
§ 148 ..... 9, *passim*
§§ 187 ..... 9, *passim*
§§ 191.5 ..... 9, *passim*
§§ 939.5 ..... 3, *passim*
§§ 995 ..... 3, *passim*
§§ 995(a)(1)(B) 6
§§ 14601.2(a) ..... 9, *passim*
§§ 23153(a) ..... 9, *passim*
§ 23153(b) ..... 9, *passim*

TABLE OF AUTHORITIES

Statutes and Regulations — **Page(s)**

California Rule of Court
8.486(a)(7) 26
8.490(b)(2)) 11
8.500(b)(1) . . . . . 4, *passim*
8.500(e)(1) 11

Christiansen, Central California Appellate Program,
What Everyone Should Know About Preparing a Petition for Review (2016) 12

Judicial Council of California, Practices & Procedures (2016) 12

Robinson, Sixth District Appellate Program,
All You Will Ever Need to Know About Rehearing and Review Petitions (2016) 12

Wilcox & Keville,
After the Petition for Review: What to Expect in the California Supreme Court (2010) 12

ISSUES PRESENTED

1. Did the Court of Appeal err in concluding that the prosecutor's impermissible dismissal of a grand juror - and resultant violation of section 939.5's requirement that dismissals of grand jurors be conducted by the grand jury's foreperson - did not result in a denial of Petitioner's substantial right, a denial of which requires dismissal of the indictment where a pretrial challenge has been timely made?

2. Did the Court of Appeal err in concluding that Petitioner's due process rights were not violated by the prosecutor's illegal intrusion upon the grand jury, which functions as an arm of the court and is statutorily mandated to retain its independence from the prosecutor?

3. Did the Court of Appeal err in concluding that it is ambiguous whether a due process challenge to an indictment on the basis of the prosecutor's impermissible dismissal of a grand juror should be raised via a section 995 motion to dismiss or a nonstatutory motion to dismiss?

4. Did the Court of Appeal err in concluding that a substantial rights analysis does not necessarily apply to pretrial due process challenges to an indictment?

NECESSITY FOR REVIEW

A. This Petition Raises Important, Unsettled Questions of Law.

This Petition presents this Court with several important questions of law under Cal. Rules of Ct. 8.500(b)(1), all of which are interrelated and stem from the core issue at work in this case: whether a prosecutor is permitted to violate CPC § 939.5's mandate - that biased grand jurors be dismissed by the grand jury foreperson - by dismissing grand jurors on his own accord. In Petitioner's case, the issues raised all follow from this fundamental question, and from one another. These are questions neither this Court nor the appellate courts have ever directly addressed in a published opinion, and thus are of first impression.

Neither Real Party nor the Third District disputed Real Party's failure to comply with statute, as the prosecutor's dismissal of a grand juror is clear from the record (as is the statute's requirement that such dismissals be executed by the grand jury foreperson). What both Real Party and the Third District refuted is Petitioner's contention that this error necessitates a first dismissal of the indictment. As Petitioner has argued at length in his filings below, the prosecutor's impermissible dismissal of a grand juror acted to effectuate a denial of a substantial right. Because the denial of a substantial right in a probable cause hearing requires dismissal without a showing of prejudice, Petitioner contends that dismissal is the only appropriate remedy here.

Only if this Court disagrees that Petitioner was denied a substantial right need it look to Petitioner's subsequent contentions: (1) if it is unclear whether Petitioner was denied a substantial right, dismissal is required because the error committed could reasonably have affected the proceeding's outcome; (2) if Petitioner was not denied a substantial right, dismissal is required because Petitioner was prejudiced by the error; and (3) dismissal is required because Petitioner's due process rights were violated by an error that allowed the prosecutor to illegally intrude upon the grand jury and violated principles of the separation of powers.

All of these issues, discrete and largely independent of the specific facts in this case, relate to the core question raised in this Petition: is dismissal required where the prosecutor violates CPC § 939.5 by dismissing grand jurors? This question has not been answered by this Court, or by the courts below in any published decision. Only the unpublished opinion from the Third District in this case attempts to provide an answer, but does so in a manner that cannot provide direction to litigants. The question of law raised is an important one, reaching to the constitutional principles underpinning the grand jury's independence and the statutory tenets meant to preserve that independence. Without guidance from this Court, the status quo will be maintained, one that is rife with uncertainty and that permits prosecutors to treat the grand jury as a charging vehicle that operates under their exclusive control. That is not the system envisioned by the legislature, and by giving force to the rules penned by that body, this Court can satisfy its role as interpreters of the laws as intended.

B. Review is Necessary to Secure Uniformity of Decision.

In addition to the importance and novelty of the legal issues raised in the petition, review by this Court is necessary to "secure uniformity of decision" under Cal. Rules of Ct. 8.500(b)(1). While no court has ruled on the appropriate remedy for a violation of CPC § 939.5, the Third District's unpublished opinion additionally raised the separate point that two underlying legal issues related to the appropriate standard for assessment of such an error lack uniformity of application in the law.

Though this Court has clearly established, since *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, the substantial rights test as the appropriate test to apply to pretrial challenges to an *information*, no decision by this Court has yet applied that same standard to pretrial challenges to *indictments*. The Third District called attention to this absence of precedent, and suggested that it is not necessarily the case that such a standard should be applied in the context of pretrial challenges to indictments, stating:

> Whether the substantial right analysis applies to petitioner's claim to potentially obviate the need for showing prejudice in his pretrial challenge to

> his indictment is less settled than the parties assume. . . . Consequently, it is unclear whether a substantial rights analysis with a presumption of prejudice applies to—either instead of or alongside—the question of whether the deputy district attorney's error substantially impaired the independence and impartiality of the grand jury.

(*Avitia v. Superior Court* (Apr. 18, 2017, No. C082859) ___Cal.App.4th___ [2017 Cal. App. Unpub. LEXIS 2618, *19-20].) As it also noted, this Court has resolved a pretrial challenge to an indictment without referencing the substantial rights test used in other like circumstances. (*See Stark v. Superior Court* (2011) 52 Cal.4th 368, 417.) The Third District's position on the question of the applicability of a substantial rights analysis to this type of error should be contrasted with that of the Fifth District, which *has* applied the standard to a pretrial challenge to an indictment. (*Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, 1325.) The result is a split in authority on a crucial issue, one that inevitably affects the determination of every pretrial challenge to an indictment.

Similar to the inter-circuit split on the question of the substantial rights test is the intra-circuit split in the Third District regarding the appropriate procedural vehicle via which such a challenge should be raised. In the *Ramos* case discussed by the parties in the briefing, the Third District indicated that the petitioner's challenge could only properly be raised by a § 995 motion to dismiss the indictment, and indeed dismissed the petition for the petitioner's failure to comply with the timing requirements of § 995. (*See* Exhibit C to the Petition for Review.) In the unpublished opinion in that case, the concurring opinion by Justice Duarte reaffirmed this holding, clarifying that the petitioner's challenge should have been raised by a § 995 motion. (*Ramos v. Superior Court* (Mar. 15, 2017, No. C080687) ___Cal.App.4th___ [2017 Cal. App. Unpub. LEXIS 1774, *3].) In Petitioner's case, by apparent contrast, the Third District made clear that Petitioner's challenge could not be raised pursuant to § 995(a)(1)(A). (2017 Cal. App. Unpub. LEXIS 2618, *14.) And while acknowledging that "some courts have" permitted similar challenges to be made pursuant to the other dismissal of an indictment provision, § 995(a)(1)(B), the Third Distrct

simultaneously suggested that a nonstatutory due process motion to dismiss may be the proper vehicle for such a claim. (*Id.* at *14-15.) The contradiction between these two holdings is clear, and suggests this Court is divided on the issue as to the appropriate vehicle by which a challenge like the one Petitioner made here should be made.

Review by this Court is the only way to remedy the splits in authority that currently exist in the appellate courts. Petitioner's is surely only one of many pretrial challenges to an indictment that are regularly made, and litigators should not be deprived of definitive rulings from the state's highest Court on the often dispositive questions of what legal standard to apply and by which procedural vehicle the challenge should be made. That the Third District specifically noted in its opinion the lack of existing clarity on these issues (despite the fact that both parties argued their positions under the substantial rights test) confirms that the courts are well aware of the current inadequacy in decisional law. Review of this case is the procedure by which that inadequacy can be cured.

C. The Issues Raised Are Recurring.

Review in this case is especially critical because the issues raised have shown themselves to be recurring ones; Petitioner's counsel has encountered the same fundamental legal questions in two separate jurisdictions. Presently, there is a petition for review before this Court in *Ruiz-Martinez v. Superior Court*, case no. S241068. There, the prosecutor also illegally dismissed grand jurors in contradiction to the commands of CPC § 939.5. As Petitioner received only a summary denial from the Sixth District in that case, this Court directed Real Party to provide an answer to the petition for review.[1]

The very existence of this separate case indicates precisely the magnitude of the legal question at issue. It also directly contradicts the representations of Real Party at oral argument below, wherein Real Party informed the Third District that it knew not of any

[1] Real Party filed its Answer on April 19, 2017, and Petitioner filed its Reply on April 28, 2017. Further decision from the Supreme Court is pending.

similar circumstances and fully expected the legal error committed by the prosecutor to be limited to Petitioner's case.[2] Unable to cite uncitable authority (nor authority not previously filed with the panel as an "additional citation") at oral argument, Petitioner did not orally correct Real Party's statements. However, since the date of oral argument on March 2, 2017, the petition before the Sixth District has elevated in status to the form of a petition for review before this Court.

That this Court has ordered an answer to the petition in *Ruiz-Martinez* shows the credibility of the claims made by the petitioner therein, as well as the fact that, contrary to Real Party's oral assurances, the illegal conduct complained of by Petitioner is widespread. Petitioner's counsel alone now represents two different murder defendants who have both been subjected to the same error in grand jury proceedings. The repeatedly cited *Ramos* case (in which this Court also granted review) evidences a third instance of the very same error. There are likely numerous other similarly situated defendants who have encountered the same illegal conduct by the district attorney in proceedings at which they are not permitted to be present. This error is not an isolated incident, and has almost certainly occurred in more than the three instances which Petitioner's counsel alone is aware of. The violation of Cal. Pen. Code § 939.5 is likely to reoccur, and for that reason, should be more thoroughly condemned than the brief finger-wagging included in this case's unpublished opinion affirming the denial of the motion to dismiss. As such, direction from this Court is not only welcome, but necessary.

---

[2] REAL PARTY: If we're concerned about this particular District Attorney office - and I personally am not aware of this happening anywhere else. I just haven't - I haven't heard of - I think message received is the answer.
(Transcript of audio recording of 3/2/17 oral argument - *See* Exhibit A1.)

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

Petitioner, Leo Avitia, is a 23-year old resident of San Joaquin County. On July 9, 2014, Petitioner was involved in a serious automobile collision that resulted in the death of Monte A. Bowens, the driver of the other vehicle involved in the crash. In the original six-count complaint filed in this matter, Petitioner was charged with second degree murder (CPC § 187), gross vehicular manslaughter while intoxicated (CPC § 191.5), resisting an executive officer (CPC § 69), driving while privilege revoked or suspended (CPC § 14601.2(a)), and two counts of driving under the influence (CPC § 23153(a) and (b)). Petitioner has been in custody since the date of the collision in 2014.

On January 11, 2016, Deputy District Attorney Frank Kooger commenced a grand jury proceeding to secure an indictment against Petitioner. On the first day of the proceedings, DDA Kooger questioned the grand jury about any potential difficulties they might have fulfilling their duties as grand jurors. (Exhibit H, 1/11/16 Grand Jury TX, Pgs. 6-9.)[3] In response to the inquiry, Grand Jurors 9 and 18 each indicated that they had a potential issue. Grand Juror 9 expressed concerns based on his or her religion, but ultimately remained on the grand jury without incident. However, the prosecutor personally dismissed Grand Juror 18 after the juror indicated that he or she had arrested individuals for CPC § 148 violations and would consequently not be able to act as an impartial juror. (1/11/16 TX, Pg. 9.)

The record indicates that it was DDA Kooger alone who dismissed Juror 18. Specifically, following his discussion with Juror 18, the prosecutor stated, "What I'm going to ask you to do is go down to the basement, let them know you were excused." (1/11/16 TX, Pg. 9, lines 18-19; *see also* lines 24-28.) There is no indication in the record that either the

---

[3] All exhibits referenced herein have been previously submitted to the Third District and are a part of the record below, and consequently may be requested by this Court as necessary.

grand jury foreperson or the court commented on, took any part in, or was even aware of the private discussion with, and ultimate dismissal of, Juror 18.

On January 14, 2016, the grand jury returned an indictment against Petitioner that mirrored the earlier complaint with one additional charge. Petitioner was arraigned on the indictment on April 18, 2016. On May 3, 2016, Petitioner filed a nonstatutory motion to dismiss the indictment. On June 8, 2016, the superior court permitted Petitioner to re-file his motion as a motion to dismiss pursuant to CPC § 995, retaining the earlier effective date of May 3, 2016. (Exhibit F, 6/8/16 Hearing TX.)

On July 25, 2016, the superior court heard argument on the section 995 motion. During this argument, the People conceded their violation of CPC §939.5 and Petitioner brought the court's attention to another recently adjudicated Third District case, *Ramos v. the Superior Court of San Joaquin County*, Case No. C080687, in which the San Joaquin District Attorney's Office had also acknowledged their statutory violation and the Court of Appeal had ordered the office to cease their ongoing practice of dismissing grand jurors of their own accord. Nonetheless, on July 29, 2016, the superior court issued a written order denying Petitioner's motion. On August 1, 2016, the superior court presented its order to the parties.

On August 31, 2016, Petitioner filed a petition for writ of mandate and/or prohibition. Therein, he complained that, during grand jury proceedings, the prosecutor dismissed a grand juror for bias, and in so doing, violated Cal. Pen. Code § 939.5, which requires such dismissals be made by the grand jury foreperson. The petition argued that this error violated Petitioner's due process rights and effectuated a denial of a substantial right, requiring dismissal.

Following briefing by the parties, the Third District issued an order to show cause on October 13, 2016. Following the conclusion of briefing, the court heard oral argument on March 2, 2017. On April 18, 2017, the court filed an unpublished opinion denying the petition. (*See* 2017 Cal. App. Unpub. LEXIS 2618.)

On May 3, 2017, Petitioner filed a petition for rehearing, and on May 8, 2017, a request for publication of the Third District's unpublished opinion. On May 11, 2017, the Third District denied the petition for rehearing.[4]

The Third District's April 18, 2017 opinion became final on May 18, 2017 pursuant to Cal. Rules of Ct. 8.490(b)(2). Petitioner now makes this petition for review within 10 days of the date of finality as required by Cal. Rules of Ct. 8.500(e)(1).

II.

STANDARDS GOVERNING MOTIONS TO DISMISS AND PRETRIAL WRITS AFTER DENIAL OF MOTION TO DISMISS

An appellate court has jurisdiction to hear petitions for writs of mandate or prohibition challenging a superior court's order, as that court is a higher tribunal to the respondent superior court. (*See* Code Civ. Proc. §§ 1085(a), 1103(a); Cal. Const. art. VI §§ 10-11.) Writ review is appropriate where, as here, the erroneous superior court order would otherwise force the petitioner to proceed to an unnecessary trial. (*See H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1367.)

On writ proceedings stemming from the denial of a section 995 motion, the standard

---

[4] On May 8, 2017, Petitioner requested publication of the Third District's opinion. Petitioner did so out of recognition of the importance of the underlying legal issues, not in order to secure broader application of the Third District's analysis, but to provide much needed guidance for future litigants on an issue otherwise lacking precedent in the law. Petitioner also sought to effectuate the Third District's condemnation of the prosecution's unlawful conduct by committing it to published law. Petitioner contends that the Third District should be required to stand by its novel application of previously undeveloped legal analysis, and publication is the means by which that can be accomplished, and that this Court should issue a published opinion in line with Petitioner's arguments herein. Petitioner further contends that that the core issue presented in this Petition is of such importance that neither the Third District nor this Court should avoid it through the issuance of unpublished conclusions or the upholding of unpublished reasoning, as this would relegate both lower courts and practitioners to the same unacceptable state: one with no legal direction or guidance. The Third District denied Petitioner's request for publication on May 17, 2017. The request is now before this Court pursuant to Cal. Rules of Ct. 8.1120(b)(1).

the reviewing Court applies is the same as the one applied by the superior court. (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 740-741.) That standard is as follows: California Penal Code § 995 provides that an indictment shall be dismissed if either the indictment "is not found, endorsed, and presented as prescribed in this code" or "the defendant has been indicted without reasonable or probable cause." (Cal Pen. Code § 995(a)(1); *see also People v. Fujita* (1974) 43 CA3d 454 [indictment is not found as prescribed in the code where it was not concurred in by requisite number of grand jurors] Dismissal of the indictment and the granting of a writ petition challenging the trial court's denial of a motion to dismiss are also proper where the grand jury proceedings violate the defendant's due process rights. (*See Cummiskey v. Superior Court* (1992) 3 C4th 1018, 1022 n1; *People v. Backus* (1979) 23 C3d 360, 393; *Bruner v. Superior Court* (1891) 92 Cal. 239; *People v. Rojas* (1969) 2 CA3d 767; *Penney v. Sup. Ct.* (1972) 28 CA3d 941, 944.)

A pretrial writ petition arising out of irregularities in grand jury proceedings that result in violations of a defendant's substantial rights requires no showing of prejudice. (*See People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529; *People v. Towler* (1982) 31 Cal.3d 105, 123; *Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, 1328; *People v. Stewart* (2004) 33 Cal. 4th 425; *People v. Booker* (2011) 51 Cal.4th 141, 156; *Harris v. Superior Court* (2014) 225 Cal. App. 4th 1129.) A prejudice analysis is only required when it becomes unclear whether Petitioner was denied a substantial right; in such a situation, the Court should analyze whether the error "might reasonably have affected" the grand jury proceeding's outcome. (*Harris v. Superior Court* (2014) 225 Cal.App.4th 1129, 1146-1147.) Where, and only where, it is clear that no error resulted in the denial of a substantial right, dismissal requires a showing of prejudice. (*Ibid.*)

III.

(ABBREVIATED)[5] ARGUMENT

It is indisputable that the People violated a statutory directive over the course of Petitioner's grand jury proceedings. The question raised to the court below, and presently to this Court, is whether that violation rises to the level of gravity necessary for dismissal of the indictment. Petitioner maintains that the prosecutor's illegal conduct denied him a substantial right. The consequence of such a denial would necessarily be dismissal. If this Court agrees, it need not go farther in its analysis; questions regarding prejudice or speculation need not be asked. Petitioner prays this Court focus on the critical issue before it: whether the unlawful dismissal of grand jurors and usurping of the foreperson's role effectuates a fundamental error in the proceedings that denies a criminal defendant his substantial right to a grand jury proceeding in compliance with the statutory scheme the legislature has specifically designed for his protection. Whether the error perpetrated in this case qualifies as a substantial right is a question that has not been answered by any reviewing court in the state in a published opinion. It is thus ripe for determination by this Court.

The Third District's substantial right analysis employed in its unpublished opinion

---

[5] Petitioner presents an abbreviated rendition of his merits-based arguments in accordance with the general advice that a petition focus on the importance of review and save further argument for subsequent briefing. *See, e.g.*, Judicial Council of California, Practices & Procedures (2016) accessible at http://www.courts.ca.gov/2962.htm; Christiansen, Central California Appellate Program, *What Everyone Should Know About Preparing a Petition for Review* (2016) accessible at http://www.capcentral.org/procedures/petitions/p_review/pr_basics_prep.asp; Robinson, Sixth District Appellate Program, *All You Will Ever Need to Know About Rehearing and Review Petitions* (2016) accessible at http://www.sdap.org/downloads/research/criminal/rhgrev.pdf; Wilcox & Keville, *After the Petition for Review: What to Expect in the California Supreme Court* (2010) accessible at https://www.sfbar.org/forms/sfam/q12010/ca-supreme-court.pdf; *see also In re Rosenkrantz* (2002) 29 Cal.4th 616, 636 [distinguishing between petition for review and brief on the merits]; *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 658, fn. 9 [same].

rendered the doctrine of substantial rights a nullity. While determining whether a petitioner was denied a substantial right itself dictates whether he is required to show prejudice, the panel suggested Petitioner was not denied a substantial right because he could not make a showing of prejudice. This circular logic should be revisited, and corrected, by this Court.

A. All Parties Agree That in Dismissing a Grand Juror, the Prosecutor Violated CPC § 939.5.

In direct contradiction to the statutory mandates provided by the legislature according to which grand jury proceedings are required to be conducted, the prosecutor in this case dismissed a grand juror on his own accord. At every step of the proceedings, all parties have agreed that this act violated CPC § 939.5 and properly serves as the basis for Petitioner's claim. Real Party has acknowledged its error in its arguments before both the superior court and the Third District. As the Third District took care to note: "Notwithstanding our conclusion in this case, we are compelled to caution that the district attorney's actions were illegal and under different circumstances could substantially impair the grand jury's understanding of its independence and result in the violation of a substantial right." (2017 Cal. App. Unpub. LEXIS 2618, at *25-26.)

B. Because Petitioner Was Denied a Substantial Right, Dismissal of the Indictment Is Required Without Any Showing of Prejudice.

Where the People's actions over the course of a grand jury proceeding taint the nature of those proceedings by manipulating the grand jury so as to make them improperly constituted or by suggesting to the grand jury that the prosecutor's function is in any sense authoritative, the defendant's substantial rights are violated and the appropriate remedy is a dismissal of the resultant indictment with no showing of prejudice required. The superior court denied Petitioner's motion and the Third District denied his petition in part by determining that the prosecutor's multiple instances of unlawful conduct did not effectuate a denial of Petitioner's substantial rights. Both courts erred in so deciding.

1. Pretrial challenges to an indictment based on the denial of a substantial right require no showing of prejudice.

When a defendant has been denied a substantial right in a probable cause hearing and challenges that error pretrial, dismissal is required even in the absence of any prejudice stemming from the error. (*People v. Pompa-Ortiz* (1980) 27 Cal. 3d 519, 529.) But what qualifies as a substantial right, and what errors effectuate a denial thereof, is a question that has never been clearly answered. For its part, *Pompa-Ortiz* was concerned primarily with *when* the challenge is raised, and not *what* the challenge actually is. In that case, despite the absence of any statutory requirement of a public preliminary hearing, the Court's "historical review [persuaded them] that the Legislature at all times perceived there was a right to public preliminary examinations and drafted the statutes in light of that understanding." (*Id.* at 526.) Consequently, the defendant, whose preliminary hearing had been closed to the public, had a "substantial right" to a public preliminary hearing that had been violated. (*Ibid.*) The denial of his challenge was based solely on the fact that he was required to show prejudice on an appeal following his conviction.

Prior to *Pompa-Ortiz*, courts had ordered dismissals for denials of substantial rights without offering a definition of a "substantial right." (*See, e.g., People v. Hellum* (1962) 205 Cal. App. 2d 150 [dismissal required where counsel was absent from proceeding]; *People v. Phillips* (1964) 229 Cal. App. 2d 496 [dismissal required where a continuance that had been requested in order to facilitate securing counsel had been denied]; *Jennings v. Superior Court of Contra Costa County* (1967) 66 Cal. 2d 867 [dismissal required where sections 865 and 866 had been violated by denial of defendant's right to cross-examine witnesses and present affirmative defenses].)

That pattern continued until *People v. Konow* (2004) 32 Cal. 4th 995, in which the Court offered clarity on the question of when a violation denies a defendant a substantial right. The Court relied on *Jennings v. Superior Court of Contra Costa County* (1967) 66 Cal. 2d 867, a case that held that, in the context of the denial of cross-examination at a

preliminary hearing, whether the denial is a violation of a substantial right turns on the importance of the subject of the desired cross-examination. Extending that logic, the *Konow* Court held that *one* means by which a defendant is denied a substantial right is to subject him "to prejudicial error, that is, error that reasonably might have affected the outcome." (*Konow*, *supra*, 32 Cal. 4th at 1024.)

In *Reilly v. Superior Court* (2013) 57 Cal. 4th 641, the Court addressed the interaction of *Pompa-Ortiz* and *Konow*. It did not overrule either case, accepting that when the *Pompa-Ortiz* Court said "The right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities," it did not follow that *all* pretrial challenges are exempt from a prejudice requirement. Rather, only "in some circumstances" do pretrial challenges require no showing of prejudice at all. (*Reilly*, *supra*, 57 Cal. 4th at 653.) As the Second District explained:

> In *Reilly v. Superior Court* (citation), the court explained that the *Pompa-Ortiz* rule—though valid—does not mean that if the error is raised before trial, materiality is always presumed and dismissal of the information is always required. . . .
> When the challenge is made before the defendant's trial and conviction, the rule remains the information must be set aside without any affirmative showing of prejudice.

(*Harris v. Superior Court* (2014) 225 Cal.App.4th 1129, 1146-1147.) Thus, the critical inquiry, after *Pompa-Ortiz* and *Reilly*, is whether the pretrial challenge to the indictment is one alleging the violation of a substantial right, which requires no showing of prejudice, the violation of a right that is not substantial, which requires a showing of prejudice, or the violation of a right that may or may not be substantial, which requires the "light prejudice" showing of "might reasonably have affected the outcome." In effect, the following principles govern:

(1) Where the defendant has been denied a substantial right, prejudice is presumed and dismissal is proper. (*Harris v. Superior Court* (2014) 225 Cal.App.4th 1129, 1146-1147.)

(2) Where it is unclear whether defendant has been denied a substantial right, dismissal is required where an error occurred that might reasonably have affected the hearing's outcome. (*Ibid.*)

(3) Where an error has occurred but defendant has not been denied a substantial right, the error necessitates dismissal only if defendant can make a showing of prejudice. (*Ibid.*)

So long as Petitioner's right to a grand jury proceeding free from the prosecutor's independent dismissals of grand jurors on her own accord is, indeed, a substantial right, no prejudice analysis is required. But what rights are considered substantial, and which errors constitute denials of substantial rights, remains largely undetermined, particularly in the context of grand jury proceedings.

The Third District noted that this Court has never directly applied its *Pompa-Ortiz* substantial rights analysis to a pretrial challenge to an indictment. This Court even neglected to mention the test in resolving one particular pretrial challenge to an indictment. (*See Stark v. Superior Court* (2011) 52 Cal.4th 368, 417.) At the same time, this Court *has* affirmed the application of *Pompa-Ortiz* to challenges to grand jury indictments, albeit in the context of a case where petitioner was raising a post-trial challenge. (*People v. Towler* (1982) 31 Cal.3d 105, 123 ["The reasoning of *Pompa-Ortiz* applies with equal force in the grand jury context."].) And the Fifth District explicitly relied on a substantial rights analysis in vacating an indictment following a pretrial challenge. (*Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, 1325.) Review from this Court is necessary to affirm what has thus far been concretely stated only by an appellate court - that a pretrial challenge to an indictment, just like one to an information, warrants dismissal without any showing of prejudice where the defendant was denied a substantial right.

2. Petitioner was denied a substantial right here.

Petitioner's claim is not subject to a prejudice inquiry because he was denied a substantial right; the superior court and the Third District denied his claim by determining his right to a legally constituted grand jury is not a substantial one. "Some errors such as denial of the right to counsel by their nature constitute a denial of a substantial right." (*People v. Standish* (2006) 38 Cal. 4th 858, 882.) A prejudice analysis arises when the complained of error "is not inherently prejudicial" or "does not implicate a core right at the

[probable cause proceeding] itself." (*Id.* at 883.) On the other hand, even in *Jennings*, the Court recognized that certain errors were "unlawful per se," and thus do not require a prejudice inquiry. (*Moon v. Superior Court* (2005) 134 Cal. App. 4th 1521, 1534 (quoting *Jennings*, *supra*, 66 Cal. 2d at 874-875).) The present error, one in which Petitioner was denied his right to a grand jury formulated according to statute and not according to the whims of the District Attorney, is just such a substantial error requiring dismissal without any showing of prejudice.

Courts have recognized a number of situations in which the defendant was denied a substantial right in the absence of any prejudicial effect. In numerous cases, the denial of counsel at the preliminary hearing has been deemed a violation of a substantial right warranting dismissal. (*See, e.g.*, *People v. Hellum* (1962) 205 Cal. App. 2d 150; *People v. Williams* (1954) 124 Cal. App. 2d 32; *People v. Salas* (1926) 80 Cal. App. 318; *People v. Napthaly* (1895) 105 Cal. 641.) So too has been error in the failure to advise the defendant of his right to counsel (*McCarthy v. Superior Court* (1958) 162 Cal. App. 2d 755), the denial of a continuance necessary to secure counsel (*People v. Phillips* (1964) 229 Cal. App. 2d 496), and the denial of counsel free of conflicts *(Harris v. Superior Court* (2014) 225 Cal. App. 4th 1129).

In addition, *Pompa-Ortiz* itself recognized that the violation of a substantial right may occur even where no statute or constitutional mandate has been expressly violated. Though "no statute specifically provides that the defendant is entitled to a public preliminary examination," the right still existed, and was substantial, because "our historical review persuades us that the Legislature at all times perceived there was a right to public preliminary examinations and drafted the statutes in light of that understanding." (*Pompa-Ortiz*, *supra*, 27 Cal. 3d at 525-526.) Thus, the fact that the magistrate closed the preliminary hearing off from the public resulted in the denial of a substantial right. The denial of the right to self-representation has also been deemed the violation of a substantial right, as it "is rooted in the

historical underpinnings of our adversarial system of criminal justice." (*Moon, supra*, 134 Cal. App. 4th at 1534.) And when the magistrate who should be disqualified from presiding over the preliminary hearing presides anyway, dismissal is necessary. (*Christie v. City of El Centro* (2006) 135 Cal. App. 4th 767, 777, fn. 3.)

Dustin v. Superior Court (2002) 99 Cal. App. 4th 1311, the rare case to deal with grand jury error in the context of a pretrial challenge, is indicative of the way in which such an analysis should be conducted. In *Dustin*, when the prosecutor made his opening and closing statements to the grand jury, he excluded the court reporter from the proceedings pursuant to Penal Code sections 938 and 938.1 ("which essentially require the transcription of only testimony in grand jury proceedings") but "in direct contradiction to Penal Code section 190.9." (*Dustin, supra*, 99 Cal. App. 4th at 1314.) Despite the fact that there was no allegation of improper instruction and the record disclosed the entirety of the evidence produced to the grand jury, the court dismissed the indictment, as the exclusion of the court reporter was a violation of the defendant's substantial right. (*Id.* at 1328.) Prejudice was presumed because the prosecutor had violated a statutory "mandate"; additionally "[a]lthough we can only speculate what might have occurred in this case . . . suffice it to say that argument is a critical stage of the proceedings." (*Id.* at 1326.) The court, "unable to determine whether the advice given by the prosecutor compromised the ability of the grand jury to reach a determination independently and impartially," was left with no choice but to order dismissal. (*Id.* at 1328.)

Similarly, here there is no means by which to adduce exactly what influence the improperly dismissed juror may have had on deliberations and, ultimately, the issuance of the indictment. But that is precisely the point: the fact that the grand jury acts on its own as a judicial body is the reason the right to an independent and impartial grand jury free from statutorily prohibited prosecutorial influence is a substantial one. The Legislature, in its wisdom, has provided a means by which to accomplish that aim. Rather than allow grand

jurors to be dismissed whenever the District Attorney deems fit, the statute tasks the foreperson with making such determinations, allowing the foreperson to question the juror so as to make a proper inquiry into any potential bias and to rehabilitate the juror if possible. ADA Kooger did not commit to such rehabilitation, instead stealing that opportunity from the foreperson and exercising his own, unlawful authority.

Notably, it does not appear the grand jury foreperson was ever made away of his or her ability, and responsibility, to question, rehabilitate, or dismiss partial grand jurors. His or her role in dismissing biased jurors was never discussed anywhere on the record. When the ADA later proceeded to dismiss jurors on his own accord, the grand jury was left naturally to assume such decisions were under the prosecutor's purview. The independence they were intended to possess was therefore not one of which they knew, and therefore certainly not one they could have been expected to act upon.

California Courts have consistently acknowledged the immense importance of an independent, impartial, properly constituted grand jury. As the California Supreme Court has noted:

> [T]he obligation of the prosecutor to assure independence, procedural regularity, and fairness in grand jury proceedings is compelled by due process: "The grand jury's ability to safeguard accused persons against felony charges which it believes unfounded is an attribute of due process of law inherent in the grand jury proceeding; this attribute exists for the protection of persons accused of crime before the grand jury, which is to say that it is a 'constitutional right;' any prosecutorial manipulation which substantially impairs the grand jury's ability to reject charges which it may believe unfounded is an invasion of the defendant's constitutional right. Although self-restraint and fairness may be the rule, unrestraint and unfairness the exception, the inner core of due process must be effectively recognized when the exception occurs. When the prosecutor manipulates the array of evidence to the point of depriving the grand jury of independence and impartiality, the courts should not hesitate to vindicate the demands of due process."

(*People v. Backus* (1979) 23 Cal.3d 360, 392.) The grand jury is intended to be "a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." (*Johnson v. Superior Court of San Joaquin County* (1975) 15 Cal.3d 248, 253.) No matter the criticism that may be levied against the grand jury system as it exists, it is undeniable that

the Legislature has made efforts to enact "statutes which ameliorate any potential for injustice." (*McGill v. Superior Court* (2011) 195 Cal. App. 4th 1454, 1515.) That fine work must be given its due respect, as should an "idealistic view of grand juries . . . namely that grand juries are supposed to play a protective, buffer role . . . [and] that courts should examine grand jury proceedings so as to ensure the grand jury's independence." (*Id.* at 1498.) "[I]t is up to the courts to enforce those statutory protections" enacted by the Legislature (*Id.* at 1499), because if they do not, the protections operate merely as empty words.

Petitioner, like all criminal defendants facing indictment by a grand jury, must be afforded the protections the Legislature has specifically set out to provide him. His right to those protections is not some mere technicality; it is fundamental, and must be given the same weight the Legislature has given it. Acknowledging that a right to statutory compliance is a substantial one does nothing more than recognize the sacred nature of the grand jury's independence and prove that the promise of fairness in criminal proceedings is not a false one.

In finding that no prejudice analysis was required in *Dustin*, the court provided an explanation that applies with similar weight here:

> The prosecutor implores us to find there is no prejudice because this is a very strong prosecution case. If that is so, we cannot fathom why any prosecutor would want to inject error into a case that carries the potential of death, knowing that if there is a conviction, the error will follow the case for the rest of its appellate life. Now is the time to rectify the prosecutor's error while it is still relatively easy and economical to do so--not wait 20 years down the appellate road.

(*Dustin, supra*, 99 Cal. App. 4th at 1314.) Petitioner's substantial right was denied, and as such, no showing of prejudice is necessary.

Here, the Third District effectively determined that Petitioner was not denied a substantial right by determining that he was not prejudiced by the error committed. Such analysis entirely circumvents the purpose of the substantial rights test, rendering the entire inquiry a nullity by reducing it to the prejudice analysis it is intended to avoid requiring. To

properly conduct a substantial rights analysis, the Court should first ask whether the error is of the type that denies defendants their substantial rights. Here, that inquiry would take the following form: does a criminal defendant have a substantial right to a grand jury constituted, not of a body whose suitability is determined by the prosecutor, but of a body composed in accordance with the law and the determinations of the court and jury foreperson? If the answer to that question is yes, dismissal is required regardless of the factual circumstances and regardless of whether the error served to affect the proceeding or its outcome.

However, the Third District in this case did not ask that question. Rather than determine what substantial rights a criminal defendant has in the grand jury selection process, the Third District set out to determine whether Petitioner suffered prejudice from the selection process utilized in his case and its effects on his grand jury. For example, the Third District focused on the fact that the dismissal of the juror took place outside the presence of the remaining jury, deeming the fact "critical to our conclusion" and discussing it in its substantial right analysis. 2017 Cal. App. Unpub. LEXIS 2618, *21-22. And in discussing *Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311 (a primary case on which Petitioner relied to support his position that he, like the defendant therein, was denied a substantial right), the opinion explicitly asserted that because Petitioner could have made a showing of prejudice in different circumstances, his failure to do so is fatal to his challenge.

The analysis employed by the Third District effectively tasked Petitioner with making a showing of prejudice in order to qualify for a standard that does not require a showing of prejudice. That analysis renders the substantial rights doctrine a nullity, effectively announcing that a defendant challenging an indictment must always make a showing of prejudice no matter what error has been committed. Only if the correct standard, that of a substantial rights analysis, is determined to apply can its application then be analyzed with the proper attention not on prejudice, but on the nature of the right infringed. Review can accomplish that goal, and should be granted for that reason.

3. There is no prejudice analysis that could be reasonably applied here.

The statutory right violated by the prosecutor must be a substantial right that was denied to Petitioner, as this is the only way to give it any semblance of vitality; if the right is not deemed substantial, its denial will often be without remedy for many defendants. The illegal conduct perpetrated by the prosecutor in this case cannot be judged by a prejudice inquiry because any such inquiry would be nonsensical. To require a defendant alleging prosecutorial misconduct in a secret grand jury proceeding to prove the misconduct's effect on the minds of the unidentified jurors is to charge him with what will often be an impossible task. It is for this reason that the statutory requirement of section 939.5 exists in the first place, so as to prevent the People from exerting undue influence over the composition of the grand jury, rather than exercising their own discretion and requiring the defendant to feebly attempt to discern its impact. A grand juror was dismissed at the very outset of the proceedings, without an opportunity to participate in the deliberations that followed. What precise role he or she might have played in, or exact influence he or she might have had on, those proceedings is necessarily unknown. A prejudice inquiry requiring a defendant to prove the effect of a prosecutor's illegal dismissal of a grand juror creates a perverse incentive for all prosecutors, who will thereafter be motivated to conduct dismissals on their whims, asking for as little information as possible in so doing so as to provide a defendant no usable information with which to later challenge the dismissal. Grand jury proceedings are secret and conducted without the presence of the court or the defense; the only judicial body overseeing the District Attorney's conduct is the grand jury itself. Checks on a prosecutor's conduct during the course of those proceedings, therefore, cannot stem entirely from the record that the prosecutor herself singularly creates.

A defendant should not be held to an impossible standard in order to obtain a remedy for a legitimate claim of error in his probable cause proceeding. Where the Legislature specifically sets out the procedure by which probable cause should be found, and in so doing,

enacts a mandate that is unlikely to ever affect the outcome of the proceeding, that mandate should still be given effect. No prejudice inquiry is could reasonably be applied in the present case, further showing that Petitioner must have been denied a substantial right.

C. The Prosecutor's Misconduct Was Not Only a Violation of CPC § 939.5 Cognizable as a Section 995 Claim, but an Infringement upon the Separation of Powers and a Violation of Petitioner's Due Process Rights Requiring Dismissal of the Indictment.

In unlawfully dismissing a grand juror, the prosecutor denied Petitioner a properly constituted and formulated grand jury with the necessary independence and impartiality it must possess. An arm of the executive branch cannot be permitted to manipulate what is intended to be an independent judicial body, and for that reason, the People must be prohibited from conducting grand jury proceedings in whatever manner they deem fit, rather than the manner which has been deemed fit by the legislature.

The grand jury is a "judicial body that is part of the judicial branch of government," implicating the Unites States' cherished separation of powers as to the People, an arm of the executive branch. (*McClatchy Newspapers v. Sup. Ct.* (1988) 44 Cal.3d 1162, 1171-1172; *see also California School Boards Assn. v. California* (2009) 171 Cal.App.4th 1183.) Indeed, a strict interpretation of the grand jury's rule might lead to the appearance "that the doctrine of separation of powers would apply to a constitutional body outside our triptych form of government, but the concept would be the same." (*People ex rel. Pierson v. Superior Court* (2017) 7 Cal.App 5th 402, 414 [prohibiting a separate branch of government form impeding on the grand jury's independent function].) The People's interference with the grand jury's performance of its duties within the judicial branch presents an obvious and problematic issue, one which directly implicates constitutional safeguards and deeply-rooted American principles. It is not without good reason that the legislature and courts have gone to great lengths to ensure the independence and autonomy of the grand jury. The legislature and court's best efforts have not cured the ill effects of the secrecy and exclusion that accompany grand jury proceedings, but they have gone a long way to instill the independence necessary

to ensure that though the grand jury includes the People while excluding the defendant, it does so without blindly surrendering to the People's will. When the People circumvent those protections, they also circumvent the separation of powers that provides the vehicle by which any faith in the grand jury process might be had.

The manner in which grand juries are formed and grand jury proceedings are conducted implicate the indicted defendant's due process rights; improprieties and irregularities in those proceedings thus can result in violations of those rights. (*Packer v. Superior Court* (2011) 201 Cal.App.4th 152, 166.) The United States Supreme Court has assumed, without thus far deciding, the existence of a due process requirement of an independent and unbiased grand jury. (*Buck v. Washington* (1962) 369 U.S. 541, 545-546.)

Thus, unsurprisingly, this case would not be the first in which an unlawful formation of a grand jury resulted in a due process violation and, consequently, dismissal. In an early, and fundamental, case addressing the necessity of a properly constituted grand jury, *Bruner v. Sup. Ct.* (1891) 92 Cal.239, 240-242, the judge's improper appointment of a grand juror required dismissal of the indictment, even absent any prejudice, as an unlawfully formed grand jury is not a legal body and may not render a valid indictment. As evidenced by *Bruner*, even more than a hundred years ago, before the legislature stepped in to impose greater integrity into the grand jury system, the courts acknowledged that a lawful indictment may not result from an unlawfully formed grand jury. The People acted unlawfully when they dismissed three grand jurors. Thus, the very formation of the grand jury in this case is inextricably rooted in the People's error. The only proper course in this matter, pursuant to *Bruner*, is to dismiss the indictment. Because the courts below have refused to do so, this Court should order review and remedy that failing.

IV.

REQUEST FOR STAY

During the proceedings before the Third District, it stayed Petitioner's trial court

proceedings in a October 13, 2016 order. On April 18, 2017, that order was lifted when the Third District issued its opinion. Thereafter, in his petition for rehearing, Petitioner requested another stay of the trial court proceedings until the date of finality, May 18, when he would be able to petition for review from this Court. The Third District granted that temporary stay on May 11, 2017, and it expired on May 18.[6]

While Petitioner requests and awaits review from this Court, Petitioner should not be forced to proceed to trial, thus rendering moot his petition and denying him the opportunity to fully exhaust his options for writ review on this important issue of law. The trial court below denied Petitioner's request for a stay in the first instance on August 1, 2016. The present Court is the only body which may grant Petitioner his request for a stay and relieve him from the potential of facing trial without yet having exhausted his options for writ relief.

Consequently, Petitioner requests, in accordance with California Rule of Court 8.486(a)(7), a stay of proceedings in the trial court, which Petitioner anticipates will otherwise proceed. Petitioner requests that the present Court stay his trial proceedings pending the resolution of this petition.

V.

CONCLUSION

For all of the above stated reasons, this Court should grant this petition.

Respectfully submitted,

BAY AREA CRIMINAL LAWYERS, PC

Dated: May 18, 2017

By: _____
ALEXANDER P. GUILMARTIN, ESQ.
Attorneys for Petitioner **Leo Brian Avitia**

---

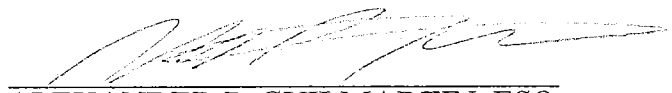
[6] Although permitted 10 days beyond the date of finality for filing, Petitioner has immediately petitioned for review on the first possible day in order to present his request for a stay to this Court as expeditiously as possible.

CERTIFICATION OF WORD COUNT

I, Alexander P. Guilmartin, Esq., hereby certify that Petitioner's Petition for Review and Memorandum of Points and Authorities in Support Thereof is double-spaced, was typed using a monospaced typeface, Times New Roman (no more than 10 ½ characters per inch), is 8,383 words long and contains 655 lines.

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

Executed: May 19, 2017



ALEXANDER P. GUILMARTIN, ESQ.

EXHIBIT A1

DECLARATION OF ALEXANDER P. GUILMARTIN, ESQ.

I, Alexander P. Guilmartin, Esq., declare as follows:

1. I am an attorney duly licensed to practice law before the courts of the State of California and am one of the attorneys retained to represent Leo Avitia, Petitioner herein.

2. Oral argument in this case occurred on March 2, 2017. On May 5, 2017, an audio recording of those arguments was provided to counsel by the clerk of the Court of Appeal.

3. I personally prepared the transcript of the portion of oral argument contained in the petition on page 12, and it accurately reflects statements made by counsel for Real Party during the course of oral argument.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Dated May 19, 2017 in San Francisco, CA.

Respectfully submitted,

ALEXANDER P. GUILMARTIN, ESQ.

EXHIBIT A2

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

LEO AVITIA, Petitioner, v. THE SUPERIOR COURT OF SAN JOAQUIN COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	C082859 (Super. Ct. No. STKCRFE2016881, GJ20164112415)

Petitioner Leo Avitia seeks extraordinary writ relief from the trial court's order denying his Penal Code section 995 motion to dismiss the indictment charging him with second degree murder and other offenses. [1] The motion was based on the deputy district

[1] Undesignated statutory references are to the Penal Code.

attorney's dismissal of a grand juror for bias outside of the presence of the other grand jurors. The People concede the deputy district attorney's dismissal of the grand juror was legal error. Therefore, the question presented by this petition is whether that error required the trial court to grant petitioner's motion to dismiss. On the record presented in this case, we conclude the deputy district attorney's error was not structural, and petitioner has failed to demonstrate he was denied a substantial right or that the error substantially impaired the independence and impartiality of the grand jury. Accordingly, while the prosecutor's violation of statutory requirements is troubling, the trial court's decision to deny petitioner's motion was not error, and we shall deny his petition for writ of mandate.

I. BACKGROUND

A. Grand Jury Proceedings

On July 22, 2014, the San Joaquin County District Attorney's Office filed a complaint charging petitioner with second degree murder; gross vehicular manslaughter while intoxicated; driving under the influence of alcohol and drugs and causing bodily injury; driving with 0.08 percent or more, by weight, of alcohol in his blood and causing bodily injury; resisting an executive officer; and driving while his license was revoked or suspended due to a driving under the influence conviction. The complaint also alleged that petitioner had suffered two prior convictions for driving with 0.08 percent or more, by weight, of alcohol in his blood on December 16, 2013, and March 25, 2014, respectively. The complaint further alleged infliction of great bodily injury.

On January 8, 2016, nineteen grand jurors and four alternate grand jurors were selected and sworn in by the superior court. On January 11, 2016, Deputy District Attorney Frank Kooger appeared before them. The partial transcript of these proceedings contained in the record reflects that the deputy district attorney asked the jurors about their ability to be impartial: "I'm asking if anybody here, after listening to the charges, or listening to the witnesses, has the state of mind which will prevent him or her from acting

impartially and without prejudice to the substantial rights of parties." The grand jury foreperson and Juror No. 18 both responded. Juror No. 18 said, "I've arrested people for [section] 148."[2]

The deputy district attorney then said, "everyone is going to get out of the jury room and we're going to talk to Juror Number 6, the jury foreman." After the foreman said he could follow the law despite his religious and moral opposition to drinking alcohol, the deputy district attorney asked the foreman to wait outside.

Then, the deputy district attorney had this exchange with Juror No. 18:

"BY MR. KOOGER: Q. You had—Juror Number 18, you stated that you may have some issues?

"A. Correct. I am a peace officer. I work for the Department of Alcohol Beverage Control, and I have arrested subjects for [section] 148[].

"Q. Aren't you exempt from jury duty?

"A. I'm not. I'm [section] 830.2. We don't follow the exemption.

"Q. The fact that you've arrested people for—the fact you've arrested people—hold on just one second.

"A. Sure."

The petition represents that the exchange continues as follows, but no corresponding record was provided:[3]

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

---

[2] Section 148 applies to individuals who willfully resist, delay or obstruct a public officer, peace officer or emergency medical technician.

[3] The People concede this account is consistent with the account provided by the deputy district attorney in his opposition to petitioner's motion to dismiss and respondent's factual summary in its ruling.

"A. Yes.

"Q. You do?

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

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

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

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

The proceedings apparently resumed before the remaining grand jurors and alternates. Three days later, the grand jury returned an indictment. The indictment included the offenses and allegations that appeared in the complaint, and also a charge of vehicular manslaughter while intoxicated based on ordinary negligence.

B. Motion to Dismiss the Indictment

After pleading not guilty as to all counts and denying all of the enhancement allegations, petitioner filed a nonstatutory motion to dismiss the indictment. The court later agreed to consider the motion as though it were made under section 995.

Petitioner argued the deputy district attorney's dismissal of a grand juror in violation of section 939.5 interfered with the jury's independence and resulted in an improperly constituted grand jury. Petitioner asserted that because he was denied an independent jury "free from prosecutorial bias and undue influence" from the outset of the proceedings, his substantial rights were violated and the indictment should be dismissed even in the absence of a showing of prejudice.

The trial court denied the motion to set aside the indictment in a written ruling filed on July 29, 2016. Given the relevance to the issues presented in this petition, we include a significant portion of the trial court's ruling. The court began by addressing petitioner's claims regarding the impact of the prosecutor's actions on the mindset of the panel:

"In *Packer v. Superior Court* (2011) 201 [Cal.App.4th] 152, at page 166 [(*Packer*)], the Court recited that federal law is unsettled on whether a defendant has a right to an unbiased grand jury under the due process clause of the federal Constitution. As for California law on that point, the Court wrote as follows:

> "Although California law is similarly unresolved, our Supreme 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. [Citation.]' [Citation.] The court has also stated that the determination whether a defendant's due process rights have been violated in this regard ultimately depends on whether the error at issue 'substantially impaired the independence and impartiality of the grand jury.' [Citation.] The court has also spoken of the need to ensure that the grand jury acts 'independently of the prosecutor or judge.' [Citation.] ([*Packer, supra*, 201 Cal.App.4th] at p. 167.)

"First, there is no evidence of defendant's assertions that the prosecutor's actions 'impacted the mindset of the panel' and led it 'to incorrectly believe that [the prosecutor's] judgment is ultimately what controls the operation and functions of the grand jury.' His arguments are speculative and unsupported by the record. They fall in the category of being theoretically possible, but nothing more. On this issue, the defendant concedes the point when he writes, 'There is no exact way to know how the grand jury was affected . . .' [Citation.]

"Moreover, the other grand jurors initially heard the foreperson (No. 6) and Juror No. 18 say that they may each have an issue regarding their abilities to be impartial. [Citation.] Thereafter, the prosecutor had all of the grand jurors leave the grand jury room except for the foreperson. After questioning the foreperson and essentially directing him to remain on the grand jury, the prosecutor questioned Juror No. 18 alone, and instructed her to retire. The remainder of the grand jurors did not see or hear either *voir dire* process, but they did eventually learn that the foreperson remained on the jury, but that Juror No. 18 did not. The other members did not witness the prosecutor instruct Juror No. 18 to retire. Thus, with one grand juror staying on the jury and another leaving,

the remaining grand jurors reasonably would have concluded that Juror No. 18 needed to be excused due to a bias or impartiality.

"Second, there is no California authority for the proposition that a violation of [section] 939.5 requires a per se finding of a due process violation. In [*Packer, supra,*] 201 [Cal.App.4th] at page 169, the Court wrote as follows:

> "Ultimately, we need not decide whether Packer had a due process right to an unbiased grand jury because he fails to demonstrate that Juror No. 2 was actually biased. [Citations.] Even those Courts that have recognized a defendant's due process right to challenge an indictment on the ground of grand juror bias have concluded that the defendant 'bears a heavy burden of showing actual bias and prejudice.' [Citations.] Bias cannot be presumed. [Citation.]

"In the instant case, as in *Packer*, the defendant has not met the heavy burden of showing actual bias and prejudice. Here the prosecutor instructed grand Juror No. 18 that she must retire because she twice stated, under questioning, that she could not be fair to the defendant. [Citation.] Though the foreperson should have been the one who instructed the grand juror to retire pursuant to [] section 939.5, a point the prosecutor readily and appropriately acknowledged during the hearing on the motion to dismiss, Juror No. 18 needed to retire from the grand jury nevertheless. . . . Accordingly, as in *Packer*, this court likewise need not decide whether the defendant had a due process right to an unbiased grand jury because the defendant fails to establish that any of the grand jurors was actually biased.

"What impact the prosecutor's dismissal of Juror No. 18 had, if any, on the remainder of the members is simply unknown. In that vein, and on the record in this case, 'absent a showing by defendant[] that the district attorney's activities in fact coerced the grand jurors or that they were in fact prejudiced, the [defendant's argument that the jurors were pressured to submit to the prosecutor's will] is unpersuasive.' [Citation.] This court will note, that if the prosecutor's dismissal of Juror No. 18 had any

impact on the grand jury, it leans in favor of having produced an unbiased and impartial grand jury.

"For the reasons set forth above, the court also concludes that the defendant has not shown that the prosecutor's dismissal of Juror No. 18 denied the defendant a substantial right. [Citation.] The defendant has not shown that the error reasonably might have affected the outcome of the grand jury proceedings."

The court also rejected petitioner's argument that dismissal was required because the separation of the judicial and executive branches of government was violated: "Here, the grand jury was properly constituted and had the jurisdiction and authority to issue its indictment. The prosecutor, though 'retiring' a grand juror when the foreperson should have done so, did not cause prejudice to the defendant. The prosecutor precluded a grand juror, who acknowledged she could not be fair in the matter, from influencing other grand jurors during deliberations and from voting on whether to indict the defendant. And, as concluded above, the court cannot on this record find that the prosecutor manipulated the grand jury in a way that deprived it of its independence and impartiality."

Petitioner sought review in this court by filing a petition for writ of mandate or prohibition and requesting a stay of his October 14, 2016, trial date.

On October 13, 2016, we issued an order to show cause why the relief prayed for in this proceeding should not be granted and issued a stay of all further proceedings, including the trial. The People filed a return by demurrer.

II. DISCUSSION

A. The Grand Jury Process

In the prosecution of a felony, the People may proceed either by indictment or information. (Cal. Const., art. I, § 14; §§ 682, 737.) "An indictment is an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense." (§ 889.) "Thus, under the statutory scheme, it is the grand jury's function to determine whether probable cause exists to accuse a defendant of a particular crime."

(*Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1026.) "Prior to the authorization of informations, the chief function of the grand jury was to hear evidence of felonies and to bring indictments." (4 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Introduction to Criminal Procedure, § 33, p. 58.) While this is no longer so, in determining whether probable cause exists to accuse a defendant of a particular crime, "[t]he grand jury's 'historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor' [citation] is as well-established in California as it is in the federal system." (*Johnson v. Superior Court* (1975) 15 Cal.3d 248, 253-254.)

"Although the grand jury was originally derived from the common law, the California Legislature has codified extensive rules defining it and governing its formation and proceedings, including provisions for implementing the long-established tradition of grand jury secrecy." (*Daily Journal Corp. v. Superior Court* (1999) 20 Cal.4th 1117, 1122.) "A grand jury is a body of the required number of persons returned from the citizens of the county before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county." (§ 888.) "Under the California Constitution, article I, section 23, 'One or more grand juries shall be drawn and summoned at least once a year in each county.' (See also §§ 904, 905.) After the names of the grand jury are drawn and the jury is summoned (§ 906), it is sworn pursuant to the oath contained in section 911, and then is 'charged by the court' (§ 914)."[4] (*Cummiskey v. Superior Court, supra*, 3 Cal.4th at p. 1024.) The court also appoints the foreman of the grand jury. (§ 912.)

Of particular relevance to this petition, the Penal Code expressly provides that the foreman of the grand jury is responsible for directing those that cannot be impartial to

---

[4] It appears this case involves the impanelment of an "additional grand jury" under section 904.6 specifically impaneled to hear criminal matters.

retire from jury service: "Before considering a charge against any person, the foreman of the grand jury shall state to those present the matter to be considered and the person to be charged with an offense in connection therewith. He shall direct any member of the grand jury who has a state of mind in reference to the case or to either party which will prevent him from acting impartially and without prejudice to the substantial rights of the party to retire. Any violation of this section by the foreman or any member of the grand jury is punishable by the court as a contempt." (§ 939.5.) The district attorney may appear before the grand jury to give "information or advice" (§ 935), but may not excuse jurors unilaterally: "No challenge shall be made or allowed to the panel from which the grand jury is drawn, nor to an individual grand juror, except when made by the court for want of qualification, as prescribed in Section 909." (§ 910.)

B. Grounds for Challenging an Indictment

1. Not Found, Endorsed, and Presented as Prescribed in the Penal Code

Petitioner contends the deputy district attorney's dismissal of Juror No. 18 resulted in an indictment that was "not found, endorsed, and presented as prescribed in" the Penal Code. (§ 995, subd. (a)(1)(A).) This language originates from section 995, subdivision (a), which sets forth the grounds for granting a motion to set aside an indictment or information. The grounds for setting aside an indictment and an information are not identical. They are:

"(1) If it is an indictment:

(A) Where it is not found, endorsed, and presented as prescribed in [the penal] code.

(B) That the defendant has been indicted without reasonable or probable cause.

(2) If it is an information:

(A) That before the filing thereof the defendant had not been legally committed by a magistrate.

(B) That the defendant had been committed without reasonable or probable cause." (§ 995, subd. (a)(1)-(2).)

Our Supreme Court has stated that the requirement that an indictment must be set aside " '[w]here it is not found, endorsed, and presented as prescribed in [the penal] code' " (*People v. Jefferson* (1956) 47 Cal.2d 438, 441) "has been interpreted as applying only to those sections in part 2, title 5, chapter 1, of the Penal Code beginning with section 940" (*id.* at p. 442; accord *Stark v. Superior Court* (2011) 52 Cal.4th 368, 416, fn. 24 (*Stark*)). This construction excludes the deputy district attorney's violations in this case of sections 910 and 939.5 as a basis for setting aside an indictment under section 995, subdivision (a)(1)(A). And based on this interpretation, it is settled law that the *foreperson's* failure to direct a biased or prejudiced juror to retire as required by section 939.5 is not a ground for setting aside an indictment. (*People v. Jefferson, supra,* at p. 442 [interpreting former § 907, now § 939.5].) We find no principled basis to conclude that a prosecutor's excusal of a juror for bias relates to whether an indictment was "found, endorsed, and presented as prescribed in this code" but a foreperson's failure to excuse a juror for bias does not. Therefore, section 995, subdivision (a)(1)(A) was not the proper vehicle for petitioner's claim.

2. Denial of Due Process Rights

Petitioner also asserts the dismissal of Juror No. 18 deprived him of an independent, properly constituted grand jury in violation of his due process rights. An indictment must be dismissed if the manner in which the grand jury proceedings were conducted resulted in a denial of the defendant's due process rights. (*Stark, supra,* 52 Cal.4th at p. 417.) And "due process rights might be violated if the grand jury proceedings are conducted in such a way as to compromise the grand jury's ability to act independently and impartially." (*People v. Thorbourn* (2004) 121 Cal.App.4th 1083, 1089.) When a defendant is indicted by a grand jury that was not acting independently and impartially, some courts have explained that the defendant may raise a challenge

under section 995, subdivision (a)(1)(B) "to the probable cause determination underlying the indictment, based on the nature and extent of the evidence and the manner in which the proceedings were conducted by the district attorney." (*People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App.4th 403, 424-425; accord *Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, 1320 (*Dustin*).) Regardless of whether due process challenges are raised under section 995 or through a nonstatutory motion, petitioner has properly raised a due process challenge to the indictment, and we will now turn to the question of whether it was correctly denied.

C. Evaluating a Due Process Challenge to an Indictment

At the outset, we must analyze the appropriate standard for reviewing the due process challenge raised by petitioner. Case law suggests two parallel standards: (1) Whether the error substantially impaired the independence and impartiality of the grand jury, or (2) whether the error constituted the denial of a substantial right.

1. Whether the Error Substantially Impaired the Independence and Impartiality of the Grand Jury

When a due process challenge is raised to the manner in which the grand jury proceedings were conducted, courts have explained that, "the determination whether a defendant's due process rights have been violated in this regard ultimately depends on whether the error at issue 'substantially impaired the independence and impartiality of the grand jury.' " (*Packer, supra,* 201 Cal.App.4th at p. 167; see also *Stark, supra,* 52 Cal.4th at p. 417 ["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"].) In *Packer*, the defendant sought extraordinary writ relief from the trial court's order denying his section 995 motion to dismiss an indictment on the ground of grand juror bias. (*Packer, supra,* at p. 156.) He alleged one of the grand jurors was inherently biased against him because of her employment and alleged membership in the prosecution team. (*Id.* at p. 158.) Petitioner claims *Packer* is inapplicable because he

does not allege the grand jury was biased. But petitioner overlooks the point that our Supreme Court has consistently analyzed the merits of a due process claim arising out of grand jury proceedings in terms of whether there was a substantial impairment: " '[A]ny prosecutorial manipulation which *substantially impairs* the grand jury's ability to reject charges which it may believe unfounded is an invasion of the defendant's constitutional right.' " (*People v. Backus* (1979) 23 Cal.3d 360, 392, italics added; see also *Stark, supra,* 52 Cal.4th at p. 417.) The trial court reasoned that it could not "on this record find that the prosecutor manipulated the grand jury in a way that deprived it of its independence and impartiality." Failure to show a substantial impairment of the jury's independence and impartiality was the primary basis for the trial court's denial of petitioner's motion.

2. Whether the Error Constituted the Violation of a Substantial Right

Petitioner seeks to avoid the question of whether there was a substantial impairment of the jury's independence and impartiality by making an argument borrowed from motions to set aside an *information.* Specifically, he asserts that because his pretrial writ petition arises from irregularities in the grand jury proceeding that resulted in a violation of his substantial rights, he did not need to demonstrate prejudice (or, implicitly, a substantial impairment of the independence or impartiality of the grand jury) to obtain dismissal of the indictment. The People argue petitioner was not denied a substantial right.

In the context of a motion to set aside an information under section 995, subdivision (a)(2)(A), on the ground that the defendant was not legally committed by the magistrate, "[i]t is settled that denial of a *substantial right* at the preliminary examination renders the ensuing commitment illegal and entitles a defendant to dismissal of the information on timely motion." (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 523 (*Pompa-Ortiz*), italics added.) In *Pompa-Ortiz*, the defendant moved to set aside an information on the ground that he had not been legally committed because he was denied

his right to a public preliminary examination. (*Id.* at pp. 522-523.) When the motion was denied, he did not seek review by extraordinary writ. (*Id.* at p. 523.) Our Supreme Court reviewed the issue on direct appeal, and affirmed the judgment because defendant made "no showing he was denied a fair trial or otherwise suffered prejudice from the closure of the preliminary examination." (*Id.* at p. 530.) The court held that "[t]he right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities." (*Id.* at p. 529.) Only when the issue is raised in a pretrial challenge is prejudice presumed and the information dismissed. (*Ibid.*) Petitioner attempts to invoke this presumption of prejudice on the basis that his challenge reaches us on an extraordinary writ.

This case, however, involves a grand jury indictment that is "governed by section 995, subdivision (a)(1), which omits the 'legally committed' language." (*Stark*, *supra*, 52 Cal.4th at p. 416.) Whether the substantial right analysis applies to petitioner's claim to potentially obviate the need for showing prejudice in his pretrial challenge to his indictment is less settled than the parties assume. After *Pompa-Ortiz*, our Supreme Court reviewed a due process challenge to an indictment in the context of a pre-trial petition for writ of mandate or prohibition with no mention of the substantial rights analysis. (*Stark*, *supra*, 52 Cal.4th at pp. 378-379, 417.) Instead, it held the petitioner failed to "demonstrat[e] that the prosecutor suffered from a conflict of interest that substantially impaired the independence and impartiality of the grand jury." (*Id.* at p. 417.)[5] Before and after this decision, the Supreme Court rejected *post*-conviction challenges to irregularities in grand jury proceedings that did not make a showing of prejudice as required under *Pompa-Ortiz*. (*People v. Houston* (2012) 54 Cal.4th 1186, 1205 [incomplete transcript of grand jury proceedings].) It has never addressed whether a presumption of prejudice may apply to a pretrial due process challenge to an indictment.

---

[5] Petitioner does not expressly attempt to distinguish *Stark*.

In fact, it has specifically declined to address whether an intermediate appellate court correctly applied a presumption of prejudice to a pretrial challenge to an indictment. (See *People v. Houston*, *supra*, at p. 1205 ["We need not address the Attorney General's concerns about *Dustin* because defendant's reliance on it is misplaced"].) Consequently, it is unclear whether a substantial rights analysis with a presumption of prejudice applies to—either instead of or alongside—the question of whether the deputy district attorney's error substantially impaired the independence and impartiality of the grand jury.

D. The Trial Court Properly Denied Petitioner's Motion to Dismiss

1. Petitioner Did Not Demonstrate Substantial Impairment of the Independence and Impartiality of the Grand Jury or Violation of a Substantial Right

Ultimately, we conclude it does not matter which analysis is used because, as we will discuss, neither standard was met. With respect to a substantial rights analysis, our Supreme Court has explained that, "Although some errors such as denial of the right to counsel by their nature constitute a denial of a substantial right, . . . generally a denial of substantial rights occurs only if the error 'reasonably might have affected the outcome.' " (*People v. Standish* (2006) 38 Cal.4th 858, 882 (*Standish*).)[6] We reject petitioner's claim that the deputy district attorney's conduct constituted the type of error that by its nature constitutes the denial of a substantial right. In *Standish*, the court held that a failure to grant the defendant release from custody on his own recognizance "pending the preliminary examination in violation of section 859b constitutes an error subject to the general test for prejudice because, unlike the absence of counsel, for example, the error is not inherently prejudicial. The error does not implicate a core right *at the preliminary*

---

[6] Our Supreme Court elaborated further: "By this language, we do not mean that the defendant must demonstrate that it is reasonably *probable* he or she would not have been held to answer in the absence of the error. Rather, the defendant's substantial rights are violated when the error is not minor but 'reasonably *might* have affected the outcome' in the particular case." (*Standish*, *supra*, 38 Cal.4th at pp. 882-883.)

examination itself. In addition, the error is not one for which the pertinent statute itself calls for dismissal . . . ." (*Id.* at p. 883.) Even assuming for discussion that the substantial rights analysis can be applied in a due process challenge to an indictment, these points are equally true here. A district attorney's dismissal of a biased juror outside the presence of the other jurors is, without more, not inherently prejudicial. While the foreman must dismiss biased jurors instead of the district attorney, this is not a core right analogous to the right to counsel. Lastly, neither section 910 nor 939.5 specifies any relief for a violation by the deputy district attorney, and section 995 does not list this as a ground for setting aside an indictment. We are not persuaded that the deputy district attorney's error here was one that constitutes a denial of a substantial right without any inquiry into whether it reasonably might have impacted the outcome of the proceedings.

Furthermore, we agree with the trial court's conclusion that petitioner neither satisfied this standard nor demonstrated that the error substantially impaired the independence and impartiality of the grand jury. The deputy district attorney's actions did not "inevitably create[] and foster[] the false impression that the grand jury was operating under his scrutiny and control." It is critical to our conclusion that Juror No. 18 was excused outside of the presence of the other grand jurors. Petitioner speculates that, if the correct procedure were followed, the foreperson may have attempted to rehabilitate the juror. Even if this were true, if the foreman was not successful, the juror's excusal would have remained mandatory. (§ 939.5.) There is no evidence the deputy district attorney's actions changed the composition of the jury in any manner other than that which was already inevitable. There is also no evidence the other jurors knew Juror No. 18 had been instructed to leave. They could only guess what the deputy district attorney said or did (if anything) that led to the disappearance of their fellow juror. On this record, the trial court did not err in concluding the prosecutor's actions did not deny petitioner a substantial right or substantially impair the independence and impartiality of the grand jury.

Unlike petitioner, we also find the error alleged in this case distinguishable from the one committed in *Dustin*, *supra*, 99 Cal.App.4th 1311. There, the court of appeal issued a preemptory writ of mandate directing the superior court to enter an order granting defendant's pretrial motion to dismiss an indictment despite no showing of prejudice. (*Id.* at p. 1328.) In this death penalty case, "the prosecutor affirmatively ordered the court reporter to leave while he made his opening and closing statements before the grand jurors. When asked why he did so, the prosecutor basically replied that this is how grand jury proceedings are conducted in Stanislaus County." (*Id.* at p. 1314.) Based on this irregularity, the defendant filed a section 995 motion on the ground that the prosecutor denied him due process; the trial court denied the motion. (*Dustin, supra,* at p. 1315.) The court of appeal issued an order to show cause to respondent court why petitioner was not entitled to a complete transcript of the grand jury proceeding, and if so, whether dismissal of the indictment was an appropriate remedy for a violation of the right. (*Id.* at p. 1318.) As to the first question, the court of appeal concluded the petitioner was entitled to a complete transcript of the entire grand jury proceeding. (*Id.* at p. 1323.) It explained that a challenge to an indictment under section 995 for lack of probable cause " 'could include a claim that the state of the evidence, "under the *instructions and advice given by the prosecutor*," compromised the grand jury's ability to reach a determination independently and impartially.' " (*Dustin, supra,* at p. 1320.) Therefore, the prosecutor's actions "not only violated defendant's rights under the statutory scheme, but also precluded any effective review of the prosecutor's comments by the trial court. It seems inescapable that the prosecutor's exclusion of the court reporter was done for the express purpose of precluding discovery by the defendant of his opening statement and closing argument." (*Id.* at p. 1323.) As to the question of the appropriate remedy, the People argued the error was subject to a harmless error analysis. (*Id.* at p. 1325.) The court of appeal disagreed: "This case is more analogous to a violation of a substantial right at a preliminary hearing." (*Ibid.*) It observed that, "[i]n

the absence of a transcript, coupled with the fact that no judge or defense representative was present, it is difficult to imagine how a defendant could ever show prejudice." (*Id.* at p. 1326.) Moreover, it explained "the intentional failure to record the proceedings as mandated by statute in death penalty cases resulted in the denial of 'a substantial right,' i.e., the ability to raise prosecutorial misconduct and to receive meaningful review of any alleged error." (*Ibid.*) As a result, prejudice was presumed under *Pompa-Ortiz*. (*Dustin, supra,* at p. 1326.) Here, petitioner asserts "there is no means by which to adduce what influence the improperly dismissed juror may have had on deliberations," and therefore we should dismiss the indictment without any showing of prejudice. We are not persuaded. Unlike the facts in *Dustin*, here the deputy district attorney's dismissal of an admittedly biased grand juror did not preclude petitioner from making a showing of prejudice, nor did it prevent this court from engaging in meaningful review. We will not presume prejudice where petitioner has failed to make any showing.

Notwithstanding our conclusion in this case, we are compelled to caution that the district attorney's actions were illegal and under different circumstances could substantially impair the grand jury's understanding of its independence and result in the violation of a substantial right.

2. No Structural Error

Petitioner similarly contends that even if he is required to show prejudice here, he satisfied the requirement because there was structural error. He relies on *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521 (*Moon*), in which the court of appeal issued a preemptory writ of mandate directing the superior court to enter a new order granting the petitioner's section 995 motion to set aside an information on the basis that the defendant was not legally committed by the magistrate who had erred in denying his request for self-representation. (*Moon, supra,* at pp. 1531, 1535.) We find this case distinguishable, and a more recent Supreme Court decision rejecting a claim of structural error instructive: "Under federal law, as under state law, irregularities in grand jury

proceedings are generally subject to analysis for prejudice. [Citation.] Nonetheless, the Supreme Court has acknowledged that there are 'isolated exceptions to the harmless error rule' involving cases 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, allowing the presumption of prejudice.' [Citation.] In *Vasquez* [*v. Hillery* (1986) 474 U.S. 254 [88 L.Ed.2d 598]], racial discrimination in the composition of the jury that indicted the defendant led the court to reverse his conviction without reference to prejudice." (*People v. Jablonski* (2006) 37 Cal.4th 774, 800.) Here, the deputy district attorney's actions did not render the proceedings fundamentally unfair or "have a structural impact on those proceedings comparable to that of discriminatory selection of grand jurors, nor is such error insusceptible of review for actual prejudice such that prejudice must be presumed." (*Id.* at p. 801.) Therefore, on the narrow factual record presented in this case, there was no structural error and the improper recusal of a biased grand juror by the deputy district attorney, rather than the foreman, does not necessitate the dismissal of the indictment.

3. The Grand Jury Was Properly Constituted

We also reject petitioner's assertion that the grand jury was not properly constituted. This case is distinguishable from *Bruner v. Superior Court* (1891) 92 Cal. 239 (*Bruner*) and other decisions in which an unauthorized individual selected the members of the grand jury. (See, e.g., *De Leon v. Hartley* (N.M. 2013) 316 P.3d 896, 899 [holding that permitting district attorney to take over the court's role of deciding who shall serve as grand jurors "is to sacrifice any perception that the grand jury is an entity distinct from the prosecutor that is capable of serving as a barrier against unwarranted accusations"].) In *Bruner*, the trial court improperly appointed an individual to summon grand jurors instead of the sheriff. (*Bruner, supra,* at pp. 241-242, 251.) The court held the grand jury was not a legal or valid one, and lacked jurisdiction. (*Id.* at p. 256.) Here, the fact the juror at issue was excused by the deputy district attorney instead of the jury

foreman does not make the grand jury that was formed illegal or the indictment that it returned void. (See *id.* at p. 252.) This distinction between jurisdictional defects and other errors was underscored in *Fitts v. Superior Court of Los Angeles County* (1935) 4 Cal.2d 514, in which certain indictments were claimed to be void because, among other allegations, the grand jury list was not prepared in substantial compliance with the law and the judges' bias denied the defendants equal protection of the laws and due process of law in violation of the state and federal constitutions. (*Id.* at pp. 517-518.) Our Supreme Court rejected these claims: "We are not to be understood as condoning or approving the above enumerated methods and practices alleged to have been resorted to in the impanelment of the grand jury. It is our view that such practices . . . would not affect the jurisdiction of the respondent court to try the petitioners thereon." (*Id.* at p. 520.) "Mere irregularities, as distinguished from jurisdictional defects, occurring in the formation of a grand jury will not justify a court declaring an indictment a nullity. [Citation.] The true distinction lies between the acts of a body having no semblance of authority to act, and of a body which, though not strictly regular in its organization, is, nevertheless, acting under a color of authority." (*Id.* at p. 521.) While the deputy district attorney's actions in this case violated the Penal Code, they did not—on the facts presented here—rise to the level of creating a jurisdictional defect.

III. DISPOSITION

Our prior stay of proceedings in the trial court is lifted. The petition for writ of mandate is denied.

RENNER, J.

We concur:

BUTZ, Acting P. J.

DUARTE, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Avitia v. The Superior Court of San Joaquin County
C082859
San Joaquin County
Nos. STKCRFE2016881, GJ20164112415

Copies of this document have been sent by mail to the parties checked below unless they were noticed electronically. If a party does not appear on the TrueFiling Servicing Notification and is not checked below, service was not required.

David J. Cohen
Bay Area Criminal Lawyers, PC
300 Montgomery Street, Suite 660
San Francisco, CA 94104

Catherine Chatman
Office of the State Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

✓ Honorable Brett H. Morgan
Judge of the San Joaquin County Superior Court - Main (Stockton Court 1)
PO Box 201022
Stockton, CA 95201

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 May 19, 2017, a copy of **Petition for Review; Memorandum of Points and Authorities** in the case of *Avitia v. Superior Court of San Joaquin County* was sent by United States mail by placing a true copy thereof enclosed to:

Catherine Chatman, Esq.
Supervising Deputy Attorney General
Office of the Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

Frank Kooger, Esq.
Deputy District Attorney
Office of the District Attorney
County of San Joaquin
222 E Weber Avenue
Stockton, CA 95202

Clerk of the Superior Court
Stockton Branch
San Joaquin County Superior Court
222 East Weber Avenue, Room 303
Stockton, CA 95202-2777

Third Appellate District
Court of Appeal of the State of California
914 Capitol Mall
Sacramento, CA 95814

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 19, 2017 at San Francisco, California.

Tonia M. Sanchez
Legal Assistant