

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

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**LEO BRIAN AVITIA,**  
*Petitioner,*

v.

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

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

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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

**SUPREME COURT  
FILED**

AUG 18 2017

Jorge Navarrete Clerk

Deputy

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)

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**OPENING BRIEF**

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

Attorneys for Petitioner **Leo Brian Avitia**

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## ISSUES PRESENTED<sup>1</sup>

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 pre-trial 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 pre-trial due process challenges to an indictment?

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<sup>1</sup> The Issues Presented here are quoted from the petition for review, in compliance with Rule 8.520(b)(2)(B) of the California Rules of Court.



I.

**INTRODUCTION**

It is indisputable, and undisputed, that the People violated a statutory directive over the course of Petitioner's grand jury proceedings. All parties, including the courts below, agree that the prosecutor unlawfully dismissed a juror from Petitioner's grand jury. This dismissal denied Petitioner the procedural right guaranteed to him by statute and altered the composition of the jury in a flawed manner. No matter the prosecutor's intent, his action infringed upon the grand jury's independence, one that is paramount to its successful operation.

What this Court is faced with deciding is whether the violation rises to the level of gravity necessary for dismissal of the indictment. The prosecutor in Petitioner's case illegally dismissed a grand juror from the jury that would go on to indict Petitioner for murder. That error denied Petitioner a substantial right. The law mandates that where, as here, a substantial right is denied, the only available remedy is dismissal. Accordingly, this Court should order Petitioner be provided the relief he seeks, and that the indictment against Petitioner be dismissed. If this Court does not order dismissal, it will make the right to a properly composed grand jury unenforceable.

This Court must so hold, not only to provide Petitioner the relief to which he is entitled, but to prevent this precise error from being perpetrated in future cases (just as it has been committed in multiple cases thus far). If dismissal is not ordered here, there will be no means by which a criminal defendant will be able to seek enforcement of the statute designed to protect him, and prosecutors will be free to continue to violate the law without fear of repercussion. Criminal grand juries have weathered increasing public derision and mistrust. Permitting the prosecutor's conduct in this case would further minimize grand juries as little more than tools of the prosecution and methods by which the prosecutor in any case can avoid the safeguards afforded by a preliminary hearing. A first dismissal in Petitioner's case

is a small price for Real Party to pay for maintaining the grand jury's integrity and independence across the state.

## II.

### 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)).

#### **A. Grand Jury Proceedings**

On January 11, 2016, Deputy District Attorney Frank Kooger commenced a grand jury proceeding to secure an indictment against Petitioner for his involvement in the accident. 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. 5-6.)<sup>2</sup> In response to the inquiry, both the grand jury foreperson and another grand juror each indicated that they had a potential issue. The foreperson expressed concerns based on his or her religion, but ultimately remained on the grand jury without incident. However, the prosecutor personally dismissed the other juror, 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. (1/11/16 TX, Pgs. 8-10.)<sup>3</sup> The record indicates

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<sup>2</sup> 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.

<sup>3</sup> As the Third District noted below, the latter part of this exchange was inadvertently omitted from the record submitted to the Court of Appeal. However, as the briefing in this case has

that it was DDA Kooger alone who dismissed Juror 18.

On January 14, 2016, the grand jury returned an indictment against Petitioner that mirrored the earlier complaint with one additional charge.

**B. Motion to Dismiss and Writ Petition**

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, the superior court issued a written order denying Petitioner's motion, which it presented to the parties on August 1, 2016.

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 personally 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 the Third District's order to show cause, Real Party filed a return by demurrer, admitting to all facts alleged in the petition.

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confirmed, all parties are in agreement regarding the events that transpired before the grand jury.

### C. Third District Denial

On April 18, 2017, the court filed an unpublished opinion denying the petition. (*See* 2017 Cal. App. Unpub. LEXIS 2618.)

In its opinion, the Third District held the following:

- The district attorney is statutorily forbidden from unilaterally excusing grand jurors, as he did in Petitioner's case. (*Id.* at \*12.)
- A challenge based on the prosecutor's error in dismissing a grand juror is not properly raised pursuant to CCP §995(a)(1)(A), but may be raised as a due process challenge pursuant to CCP §995 or a nonstatutory motion to dismiss the indictment. (*Id.* at \*14-15.) Petitioner's challenge was procedurally proper. (*Ibid.*)
- It is unclear whether a challenge to an information may be premised on a violation of a substantial right, rather than only an error that substantially impairs the independence and impartiality of a grand jury. (*Id.* at \*15-20.)
- No matter the standard applied, Petitioner should be denied relief. (*Id.* at \*20-26.)
- On the facts of the case, the error committed was not structural. (*Id.* at \*26-27.)
- Petitioner's grand jury was properly constituted, and so no jurisdictional defect resulted from the district attorney's error. (*Id.* at \*27-29.)

On May 3, 2017, Petitioner filed a petition for rehearing, and on May 11, 2017, the Third District denied the petition for rehearing.<sup>4</sup> This Court granted review on June 21, 2017.

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<sup>4</sup> 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 contended that the Third District should be required to stand by its novel application of previously undeveloped legal analysis, and

### III.

#### STANDARDS GOVERNING PRE-TRIAL MOTIONS 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 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 pre-trial writ petition arising out of irregularities in grand jury proceedings that

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that publication is the means by which that can be accomplished. Petitioner further contended that the core issue presented in his petition is of such importance that the Third District should not be permitted to avoid it through the issuance of unpublished conclusions, 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.

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 the error did not result in the denial of a substantial right, dismissal requires a showing of prejudice. (*Ibid.*)

#### IV.

#### ARGUMENT

The petition before this Court raises four separate issues of law, but one deserves the greatest attention from this Court, for it is the fundamental error that has denied Petitioner the protections the law attempts to afford him. The critical issue before this Court is whether the improper dismissal of grand jurors denies a criminal defendant his substantial right to a lawful grand jury proceeding. The error perpetrated in this case denied Petitioner that right, and that right qualifies as substantial. Because this is so, dismissal is required regardless of the level of prejudice Petitioner suffered or whether his due process rights were also violated by the prosecutor's conduct. The structural nature of the error makes questions of prejudice unnecessary.

The analysis employed by the Third District denying the petition is flawed, as it effectively disregards the substantial rights doctrine and nullifies the grand jury's independence. Rather than give vitality to an important right that was denied to Petitioner, the Third District treats the prosecutor's conduct as minor and Petitioner's right as unenforceable. The law is clear that a petitioner who has been denied a substantial right need

not make any showing of prejudice. Yet the panel instead suggested Petitioner was not denied a substantial right specifically because he could not make a showing of prejudice. This circular logic should be corrected by this Court.

This Court is additionally tasked with determining other issues that the Third District's opinion notes are unsettled in the current law, and Petitioner addresses them below. However it rules on these preliminary questions, the result is the same: dismissal is the only appropriate remedy for the error that has been perpetrated in this case.

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

The prosecutor in this case violated CPC §939.5 by dismissing a grand juror on his own accord. Section 939.5 explicitly states:

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.

There may be no doubt that it is the grand jury foreperson alone who maintains the authority to dismiss a grand juror pursuant to Section 939.5.

At every step of the proceedings, all parties have agreed that the prosecutor's conduct violated CPC §939.5 and that the error properly serves as the basis for Petitioner's claim. Real Party has acknowledged its error in its arguments below. 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.) Thus, the prosecutor, without any lawful authority, usurped the power to dismiss and assumed the roles of the court and the grand jury foreperson when he dismissed a grand juror in Petitioner's case.

**B. Because the Prosecutor's Violation of §939.5, Like the Error Committed in *Dustin*, Denied Petitioner a Substantial Right, Dismissal of the Indictment Is Required Without Any Showing of Prejudice.**

The People's actions over the course of a grand jury proceeding in this case tainted the nature of those proceedings. The prosecutor's conduct served to manipulate the grand jury so as to make them improperly constituted, and suggested to the jury that the prosecutor's function was in some sense authoritative. As a result, Petitioner's substantial rights were violated and the appropriate remedy is a dismissal of the resultant indictment with no showing of prejudice required. The courts below determined that the prosecutor's unlawful conduct did not effectuate a denial of Petitioner's substantial rights. Both courts erred.

1. Pre-Trial Challenges to an Accusatory Pleading Based on the Denial of a Substantial Right at the Probable Cause Hearing Require No Showing of Prejudice.

When a defendant has been denied a substantial right in a probable cause hearing and challenges that error pre-trial, dismissal is required even in the absence of any manifest prejudice. (*People v. Pompa-Ortiz* (1980) 27 Cal. 3d 519, 529.) The core issue in this case rests upon a determination what rights are considered substantial, and in Petitioner's case, only one answer is appropriate.

Notably, the doctrine of substantial rights did not develop in a focused way, and that has resulted in the ambiguity in its application that presently exists. Under any definition of substantial right, it is clear that Petitioner's right here was substantial. The Third District failed to recognize this in part because this Court has not yet provided a clear standard for determining what rights are and are not substantial.

a. History of Substantial Rights Analysis

Historically, whether a violated right was substantial was not an important determination for a reviewing court to make. Challenges to an information or indictment on the basis of an error or statutory violation at the probable cause proceeding were granted



without any showing of prejudice required regardless of the point in the proceedings at which the challenge was made, that is, regardless of whether the challenge was in a pretrial writ petition or a post-conviction appeal. (See, e.g., *People v. Naphaly* (1895) 105 Cal. 641; *People v. Salas* (1926) 80 Cal. App. 318; *People v. Williams* (1954) 124 Cal. App. 2d 32; *McCarthy v. Superior Court* (1958) 162 Cal. App. 2d 755; *People v. Bucher* (1959) 175 Cal. App. 2d 343.) Though *People v. Elliot* (1960) 54 Cal. 2d 498, 503 did not alter this course, it did introduce a new piece of language by describing dismissal as required by section 995 when “the defendant has been denied a *substantial right*” (emphasis added). For this reason, “substantial right” should not be considered talismanic language, but should be considered in the broader context of the error committed.

After *Elliot*, courts continued to order dismissals in the presence of errors at the probable cause hearing so long as a “substantial right” was violated, though they did not offer a standard definition of what is or is not 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].) What was clear throughout those cases, however, is that courts were willing to order dismissal where a defendant’s rights had been abridged, even where the effect of that violation was uncertain.

In *People v. Pompa-Ortiz* (1980) 27 Cal. 3d 519, the California Supreme Court made clear when a denial of a substantial right requires reversal, and when prejudice is necessary:

Henceforth irregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination. *The right to relief without any showing of prejudice will be limited to pretrial challenges*

*of irregularities*. . . . If the issue is raised before trial, however, prejudice is presumed and the information is dismissed.

(*Id.* at 529, emphasis added.) Importantly, however, *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.

In *People v. Konow* (2004) 32 Cal. 4th 995, 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.)

b. Current Law on Substantial Rights

Finally, in *Reilly v. Superior Court* (2013) 57 Cal. 4th 641, this Court addressed the interaction of *Pompa-Ortiz* and *Konow* and the confusing state of the law on the question of pretrial challenges to accusatory pleadings. 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. Irregularities in preliminary hearing procedures that do not deprive the defendant of a substantial right require a showing of prejudice to justify relief. (Citation.) And when it is unclear whether the right that was denied was substantial, the determination requires a showing that the error might reasonably have affected the hearing's outcome. (Citations.) . . . .

As *Pompa-Ortiz* makes clear, the rule requiring a showing of prejudice does not apply when the denial of a substantial right at the preliminary hearing stage of the proceedings is challenged before the defendant's trial and conviction. 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. If the issue is raised before trial, the court reaffirmed in *Pompa-Ortiz*, "prejudice is presumed and the information is dismissed" without any affirmative showing. (Citation.)

(*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 his own accord is, indeed, a substantial right, no prejudice analysis is required. That is the case here, as it must be said that a criminal defendant's right to an independent grand jury untainted by the prosecutor's interference is

a substantial one that must be protected by reviewing courts.

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 erred, holding that Petitioner's right to a legally constituted grand jury is not a substantial one. The error committed is analogous to those that have been held to require dismissal, and specifically, is comparable to the grand jury error committed in *Dustin v. Superior Court*, a case in which the Fifth District ordered dismissal of the indictment.

Although, a clear test for determining whether a right is "substantial" has never been set out, courts in this state have been clear that "[s]ome 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 only 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), the denial of counsel free of conflicts (*Harris v. Superior Court* (2014) 225 Cal. App. 4th 1129), and the denial of the right to confrontation at a preliminary hearing (*Herbert v. Superior Court* (1981) 117 Cal.App.3d 661, 672). 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.) The Court in *Moon* explained how errors such as the denial of the right to self-representation differs from other errors that might be committed over the course of a probable cause hearing:

But it is seldom easy to quantify prejudice from the denial of the right to self-representation because, as the United States Supreme Court explained in *Faretta*, such a denial strikes more at the perceived fairness of the proceedings and the defendant's freedom of choice than it does his ability to obtain a more favorable outcome. Indeed, “The purpose of the right is to protect the defendant's personal autonomy, not to promote the convenience or efficiency of the trial. [Citation.] Thus, a denial of the right automatically prejudices the defendant's freedom interest.” . . . . Moreover, “[a]pplication of harmless error analysis is particularly inappropriate to denial of the right to self-representation because a harmless error standard would, in practical effect, preclude vindication of the right.

(*Moon, supra*, 134 Cal. App. 4th at 1533.)

Even apart from obvious constitutional violations, this Court has also held that “forms of procedure required by law in preliminary examinations establish a substantial right vested in every person charged with crime and should not be lightly waved aside.” (*People v. Elliot* (1960) 54 Cal.2d 498, 503.) When the magistrate who should be disqualified from presiding over the preliminary hearing presides anyway, for example, dismissal is necessary. (*Christie v. City of El Centro* (2006) 135 Cal. App. 4th 767, 777, fn. 3.)

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 error perpetrated in this case is similar to those violations of law or policy that have been held to be denials of a defendant’s substantial right. It is an error compromising the very integrity of the proceedings, altering the composition of the grand jury and infringing on its independence from the prosecution.

Where the prosecutor acts as he did in this case, blatantly violating the statutory provisions that direct the procedure for the dismissal of biased grand jurors, he commits an error that “automatically prejudices the defendant’s freedom interest.” Requiring a showing of prejudice for the denial of the defendant’s right to have the grand jury constructed in accordance with the law would immunize the prosecutor from selecting the jury as he sees fit and “would, in practical effect, preclude vindication of the right.”

a. The Principles Espoused in *Dustin* Apply Here.

Many of the post-*Pompa-Ortiz* cases dealing with challenges to indictments stemming from errors in the grand jury proceedings have avoided dismissal on the grounds that the challenge was made post-conviction and the defendants had failed to make a sufficient showing of prejudice; the courts in these cases thus did not reach the question of whether the irregularities resulted in violations of substantial rights. (*See, e.g., People v. Laney* (1981) 115 Cal. App. 3d 508; *People v. Towler* (1982) 31 Cal. 3d 105; *People v. Jablonski* (2006) 37 Cal. 4th 774; *People v. Booker* (2011) 51 Cal. 4th 141.) However, *Dustin v. Superior Court* (2002) 99 Cal. App. 4th 1311, a case that deals with grand jury error in the context of a pre-trial challenge, is informative 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 has provided an unambiguous 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.

- b. The Denial to Petitioner of His Right to an Independent, Properly Constituted Grand Jury Effectuated a Denial of a Substantial Right.

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. 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.

c. The Third District's Holding That Petitioner Was Not Denied a Substantial Right Is Flawed.

Here, the Third District effectively determined that Petitioner was not denied a substantial right by holding that he was not prejudiced by the error committed. The court's analysis entirely circumvents the purpose of the substantial rights test. By focusing on Petitioner's failure to show prejudice, the court essentially reduced the substantial rights test to the very prejudice analysis it is intended to avoid. The result is that the court rendered the entire inquiry a nullity.

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 negates the substantial rights doctrine, 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. That is the correct course of action, and the Third District erred by doing otherwise.

d. *Standish* Is Inapposite.

In determining Petitioner was not denied a substantial right, the Third District also relied heavily on *People v. Standish* (2006) 38 Cal.4th 858, 883-884. In *Standish*, this Court held that the failure to grant OR release pending the continuance (for good cause) of a

preliminary examination in violation of section 859b does not constitute the denial of a substantial right, and so invokes an ordinary prejudice test. This Court explained why that is:

We believe that a failure to grant OR release 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 examination itself. In addition, the error is not one for which the pertinent statute itself calls for dismissal—unlike a delay in the preliminary examination beyond the 10-day period without good cause or for more than 60 days without a time waiver (§ 859b), or when the preliminary examination improperly is not conducted in a single session. (§ 861.) In enacting and amending section 859b, the Legislature elected not to require dismissal when there is good cause for a continuance, and it would be anomalous to require that the charges be set aside at the section 995 hearing when the preliminary examination was continued for good cause.

We certainly agree with defendant that, as a general proposition, liberty constitutes a fundamental right, but the specific right to liberty contemplated by section 859b's OR provision applies to the necessarily limited period between the order granting a continuance and the preliminary examination and ordinarily does not have any effect on the fairness or outcome of the proceedings at the preliminary examination. . . .

If the prosecutor can avoid OR release by obtaining a dismissal and refile the complaint, and a defendant who properly was released on OR after the prosecution secured a continuance for good cause can be remanded at the time of the probable cause determination, it would be out of proportion to the potential for impact upon the fairness of the preliminary examination to hold that a failure to grant OR release pending the preliminary examination necessarily gives the defendant a remedy that extends beyond the probable cause determination—a remedy that could be draconian from the perspective of the prosecution.

(*Ibid.*, emphasis in original.) The Court's full explanation reveals the ways in which the error here differs from that executed in *Standish*. This explanation reveals that *Standish's* conclusion is contingent on error that is both attenuated from the probable cause hearing and created by a statute that expressly provides a remedy (other than dismissal) for its violation. The error committed in this case cannot be described as either.

In the briefing below, Real Party asserted that the error committed in this case was not “inherently prejudicial,” nor did it “implicate a core right at the [probable cause hearing] itself.” Neither is correct. This is not a case, unlike *Standish*, dealing with a fundamental right entirely discrete from the proceeding challenged. *Standish* acknowledges that the denial

of liberty is the violation of a fundamental right, but pins its holding on the distinction between a right like that and a right that is core to the probable cause hearing itself. The prosecutor's violation of § 939.5 in this case resulted in the denial of not only a fundamental constitutional right, but also of a core right of a grand jury proceeding, to have the grand jury composed in the manner dictated by law. Between the absence of counsel, for which it is impossible to say how a proceeding would have transpired with counsel's presence, and an error in a defendant's custody status, for which a prejudice analysis can often be conducted, the dismissal by a prosecutor of a grand juror is far closer to the former. An error of the sort perpetrated in this case is inherently prejudicial in the sense that it can be regarded as structural. This is because it affects the composition of the fact-finder, and thereby the body which deliberates and determines the outcome of the proceeding, without providing a means by which a judge can determine the extent of that effect. The right to have a grand jury constructed in accordance with the law is a core right that is independent of the outcome of the probable cause hearing. This sort of right, and the error executed in violating it, is of the type *Standish* states would *not* require any prejudice analysis.

The Third District relied in part on *Standish's* reference to the fact that the violated statute did not itself call for dismissal, but ignored entirely the nuance of the *Standish* court's point. *Standish* looked to the fact that the statutory scheme explicitly laid out the situations in which dismissal was warranted and yet did not include the situation at play in that case as being one of those circumstances. It also relied on section 859b's express evasion of dismissal in the event of a continuance for good cause, finding that dismissal in that situation would be "anomalous" to the statute's decrees. By contrast, the statute violated in this case, §939.5, is not one that explains when dismissals are warranted and when they are not. Nor does it, unlike §859b, actually provide a remedy for an indictment found in contradiction to its demands.

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. But it is clear that this Court need not do so, because it is evident that Petitioner was denied a substantial right, and dismissal must follow.

3. Petitioner Suffered a Structural Error Warranting Dismissal Without Any Showing of Prejudice.

The error Petitioner suffered is not one capable of subjection to a prejudice analysis because it is structural in form. "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." (*Weaver v. Massachusetts* (2017) \_\_\_ U.S. \_\_\_ [137 S.Ct. 1899, 1907].) Why an error might not be amenable to a prejudice analysis can vary, including the fact that the error "is not designed to protect the defendant from erroneous conviction but instead protects some other interest" or "if the effects of the error are simply too hard to measure." (*Id.* at 1908.) "An error can count as structural even if the error does not lead to fundamental unfairness in every case." (*Ibid.*)

The error committed in this case is a structural one of the sort that has been described as "automatically prejudic[ing] the defendant's freedom interest." (*Moon v. Superior Court* (2005) 134 Cal. App. 4th 1521, 1533.) As the *Moon* court analyzed:

But it is seldom easy to quantify prejudice from the denial of the right to self-representation because, as the United States Supreme Court explained in *Faretta*, such a denial strikes more at the perceived fairness of the proceedings and the defendant's freedom of choice than it does his ability to obtain a more favorable outcome. Indeed, "The purpose of the right is to protect the defendant's personal autonomy, not to promote the convenience or efficiency of the trial. [Citation.] Thus, a denial of the right automatically prejudices the defendant's freedom interest." . . . . Moreover, "[a]pplication of harmless error analysis is particularly inappropriate to denial of the right to self-representation

because a harmless error standard would, in practical effect, preclude vindication of the right.

(*Moon v. Superior Court* (2005) 134 Cal. App. 4th 1521, 1533.) The error that was committed here, a statutory violation altering the method by which the grand jury is intended to be formulated, is not directed at “promoting the convenience or efficiency of the trial,” but rather, at preserving the independence and impartiality of the grand jury that issues the indictment. It is a structural error because that is the only means by which a denial of the right can be vindicated.

In dismissing grand jurors, the prosecutor, as an agent of the executive branch, usurped the power of the court and grand jury, agents of the independent judicial branch, by depriving the jury of its lawful authority pursuant to §939.5. The United States Supreme Court, in *Plaut v. Spendthrift Farm, Inc.*, stated, “the doctrine of separation of powers is a *structural* safeguard rather than a remedy to be applied only when specific harm, or risk of harm, can be identified.” (*Plaut v. Spendthrift, Inc.* (1995) 514 U.S. 211, 239 (*emphasis added*)). While the Supreme Court’s use of the word “structural” in *Plaut* related specifically to the structural nature of the governmental doctrine it described, it is no accident that the word is the same used in the phrase “structural error.” The Court’s meaning is evident: the preservation of the carefully crafted and rigorously maintained structure of the American government provides the crucial underpinning of the analyses undertaken in separation of powers cases, not the damage that may or may not result from blurred or erased lines. Similarly, the analysis that should be undertaken in the present case is one that acknowledges the inherent harm in allowing the District Attorney to wield power over the judicial process that it is not authorized to wield, and which in fact the legislature has specifically relegated to the grand jury. It is not a question of degrees or greys, but rather, one that addresses the intrinsic structural damage that results from an abridgement of the separation of powers that forms the basis for so many of our government institutions and philosophies.

Infringing on the separation of powers by intruding on the grand jury’s independence

must be deemed a structural error, not because it necessarily prejudices a defendant in every case, but because it impedes upon fundamental structural safeguards against overzealous prosecution and an unbridled executive branch. The effects of a prosecutor's shaping of a grand jury to suit his whims are impossible to measure, relating as they do to the private deliberations of the jury. The legislature has crafted §939.5 to ensure a minimal level of procedural integrity to a private proceeding at which the defendant lacks a voice or influence. When the prosecutor dismantles that structure, the error is not one whose effects can be readily assessed, but it is a structural error affecting a system that has been designed to afford a criminal defendant a certain level of protection and due process.

On the issue of structural error, the entirety of the Third District's specific argument, apart from its quotations from a case involving the presence of unauthorized individuals in a grand jury proceeding, arises from the following sentence: "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.'" 2017 Cal. App. Unpub. LEXIS 2618, \*27. The court did not provide any explanation for why a prosecutor's illegal conduct in re-constituting the grand jury on his own whim, thereby choosing which jurors he desired to have serve and which he did not, "did not render the proceedings fundamentally unfair." Nor did the court explain why the error was incomparable to the discriminatory selection of grand jurors, a process that would seem to have a mirror in the prosecutor's unlawful selection of grand jurors. The Third District repeatedly affirmed that the error committed in this case could have created a record showing prejudice, but that the record here is lacking any such showing. But, tellingly, the court failed to offer an example of how such a circumstance could arise, nor even characterize the type of prejudice that could conceivably flow from the dismissal of a purportedly biased juror. Undoubtedly, this is because such a circumstance is incredibly

unlikely, if not impossible. Petitioner, for his part, argued at length why there is no prejudice test that could logically apply to the type of error committed in his case. The Third District neglected to suggest what type of prejudice inquiry Petitioner had failed to address. This is because prejudice is not an appropriate inquiry in Petitioner's case, as he suffered a structural error requiring dismissal.

4. A Substantial Rights Analysis Applies to Pre-Trial Challenges to Indictments.

Despite the Third District's injection of further ambiguity into the issue, this Court should affirmatively hold that the same substantial rights analysis that applies in the context of preliminary hearings should also apply to challenges to indictments arising from grand jury proceedings. It is true that, although 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 pre-trial challenges to an *information*, no decision by this Court has yet applied that same standard to pretrial challenges to *indictments*. The Third District's opinion below 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 pre-trial challenges to indictments, stating:

Whether the substantial right analysis applies to petitioner's claim to potentially obviate the need for showing prejudice in his pre-trial 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].)

The Third District also noted that this Court has resolved a pre-trial 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.) However, the opinion in *Stark* does not suggest what the Third District believes it does. *Stark* involved a challenge premised on



the prosecutor's perceived conflict of interest in which the petitioner had failed to show a conflict even existed under the requisite statutory standard; the Court in *Stark* did not determine whether the petitioner would need to make any showing of prejudice if such a conflict had existed. (*Ibid.*) While the Third District has now taken the position that it is unclear whether a substantial rights analysis applies to indictments, other courts in the state have not been so hesitant. The Third District's position, for example, should be contrasted with that of the Fifth District, which *has* applied the substantial rights standard to a pre-trial challenge to an indictment. (*Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, 1325.) The Fifth District earlier made the comparison between informations and indictments explicit: "We conclude and hold that the rule announced in *People v. Pompa-Ortiz* (1980) 27 Cal. 3d 519, 529 [165 Cal. Rptr. 851, 612 P.2d 941], with regard to irregularities in preliminary examination procedures applies also to grand jury proceedings." (*People v. Laney* (1981) 115 Cal. App. 3d 508, 513.)

In all of the briefing before the courts below, both Petitioner and Real Party argued the issue under the assumption that a particular legal standard applies to the court's determinations. Both Petitioner and Real Party argued at length as to whether the error committed in this case effectuated a denial of a substantial right; they did not argue whether that question is even appropriate to answer. The reason for this agreement is that courts, like the Fifth District, have already applies the substantial rights standard to pre-trial challenges to indictments, and that *no* court has refused to so hold.

The Third District is technically correct when it states that this Court has never actually found itself in the position to affirmatively apply a substantial rights analysis to a pre-trial challenge to an indictment. But the fact that this Court has not yet authoritatively addressed the question does not render it unresolved. This Court's denial of review from *Dustin*, for example, suggests it approved of the Fifth District's substantial rights analysis in that pre-trial indictment case. The Third District's analysis of the subject also failed to note

that this Court *has* affirmed the application of *Pompa-Ortiz*, which established the fact that a showing of prejudice is not required for a substantial right denial raised pre-trial, to grand jury indictments. (See *People v. Towler* (1982) 31 Cal.3d 105, 123 [“The reasoning of *Pompa-Ortiz* applies with equal force in the grand jury context.”].) Although *Towler* involved a post-trial appellate challenge to an indictment, the force of its language applying *Pompa-Ortiz* in the grand jury context is important.

There is no convincing reason *not* to apply a substantial rights analysis to pre-trial challenges to indictments. The same standard has been used in *post*-trial challenges to indictments; a more onerous standard should not apply prior to conviction, and a petitioner should not be punished for immediately raising his challenge (rather than waiting to raise the issue on appeal). The same substantial rights standard has also been used in pre-trial challenges to *informations*; again, a more onerous standard should not apply in the context of grand juries, as the fact that a jury of citizens has signed off on an indictment should not present a greater challenge to a petitioner’s enforcement of his rights than the fact that a judge has signed off on an information.

This Court should resolve the ambiguity noted by the Third District and make explicit what it has heretofore only implied (and what the Third District itself has not yet held, although other Courts of Appeal have): that a substantial rights analysis applies to pre-trial challenges to indictments.

**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.**

The Third District below suggested that the remedy sought by Petitioner is, arguably, not a statutory one at all. Even if this is so, the statutory violation committed in this case is a fundamental one infringing on Petitioner’s constitutional due process rights, denying him a substantial right. Petitioner’s remedy may likewise be considered a constitutional one: a dismissal of the indictment found against him by an improperly constituted grand jury

formulated in violation of statutory commands.

1. This Court must Determine Whether a Challenge to an Indictment Based on the Prosecutor's Unlawful Dismissal of Grand Jurors Is Properly Raised Pursuant to §995 or as a Nonstatutory Motion Premised on a Due Process Violation.

This Court has never clearly decided what the appropriate vehicle for a challenge premised on the prosecutor's illegal dismissal of grand jurors is. Although Petitioner has satisfied the requirements of whatever vehicle this Court determines is appropriate, clarity on the issue should be afforded to future litigants. The Third District, for its part, appears divided on that question. 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 District simultaneously suggested that a nonstatutory due process motion to dismiss may be the proper vehicle for such a claim. (*Id.* at \*14-15.)

Petitioner originally filed a non-statutory motion to dismiss in the superior court. Pursuant to the Third District's order in *Ramos*, Petitioner re-filed his motion as a motion to dismiss pursuant to section 995. Indeed, in contrast to Cal. Pen. Code §995(a)(1)(B), which deals with indictment without probable cause, §995(a)(1)(A) provides for dismissal on procedural grounds; it applies "generally to rules of pleading and procedure." (*People v.*

*Gnass* (2002) 101 Cal.App.4th 1271, 1312.) Dismissal pursuant to § 995 is warranted where, for example, a prosecutor violates statutory procedural requirements by excluding the court reporter for a portion of the grand jury proceeding. (*Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, 1328.)

Ultimately, whether Petitioner's action in the superior court should have been construed as a non-statutory motion to dismiss or a motion to dismiss pursuant to section 995, the result is the same. Petitioner filed his motion within 60 days of his arraignment, and Real Party conceded below that Petitioner has satisfied the procedural timing requirements of section 1510 for the filing of his petition. This Court should resolve this legal question, but no resolution will result in a procedural bar to Petitioner's claim.

2. Petitioner Suffered a Due Process Violation Warranting Dismissal.

Regardless of how this Court answers both the question of the appropriate vehicle for Petitioner's challenge and the question of whether Petitioner was denied a substantial right, Petitioner should still prevail, as he has suffered a due process violation that itself warrants dismissal. The cases establishing the constitutional remedy of dismissal in the face of a due process violation are manifest. A due process analysis has been repeatedly employed where a due process right has been violated, including in cases where the defendant was denied counsel at the preliminary hearing (*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. Naphaly* (1895) 105 Cal. 641), was not advised of his right to counsel (*McCarthy v. Superior Court* (1958) 162 Cal. App. 2d 755), was denied a continuance necessary to secure counsel (*People v. Phillips* (1964) 229 Cal. App. 2d 496), was denied counsel free of conflicts (*Harris v. Superior Court* (2014) 225 Cal. App. 4th 1129), was subjected to a closed preliminary hearing (*even where no statute specifically provided for a public hearing*) (*Pompa-Ortiz, supra*, 27 Cal. 3d at 525-526), was denied the right to self-representation (*Moon v. Superior Court* (2005) 134 Cal. App. 4th 1521, 1534), was subjected to a failure

to recuse a judge who was disqualified from presiding over the probable cause hearing (*Christie v. City of El Centro* (2006) 135 Cal. App. 4th 767, 777, fn. 3), and was subjected to the error of excusing a court reporter from a portion of the grand jury proceedings (*Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311).

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 United 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 tripartite 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 from 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.

“[C]ourts should examine grand jury proceedings as to ensure the grand jury's independence.” (*McGill v. Sup. Ct.* (2011) 195 Cal.App.4th 1454, 1497-1498; *see also Kalloch v. Sup. Ct.* (1880) 56 Cal. 229; *Johnson v. Sup. Ct.* (1975) 15 Cal.3d 248.) The People, when they trample upon the grand jury's independence, also trample upon the only quality of grand jury proceedings that offers any assurance to criminal defendants facing indictment from such a jury. Criminal defendants must live with the exclusion and secrecy of the grand jury, but they must not be deprived of its fundamental independence. (*See McGill v. Sup. Ct.* (2011) 195 Cal.App.4th 1454.)

Petitioner was entitled to a preliminary hearing or a grand jury proceeding in connection to this case. When the People disregard the procedural safeguards in place during grand jury proceedings, particularly those meant to provide a structure for the formation of the independent grand jury that occurs in their very presence, the defendant's right to the proceeding is effectively denied, just as a trial in which the defendant cannot confront witnesses or present evidence results in a denial of the defendant's right to that trial. The People specifically elected to deny Petitioner a preliminary hearing, instead choosing to proceed via the grand jury. They were not permitted to make that decision and then fail to comply with the statutory requirements for a properly conducted grand jury proceeding, thereby robbing Petitioner of both a preliminary hearing *and* a lawful grand jury proceeding.

The manner in which grand juries are formed and grand jury proceedings are conducted implicates 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.)

In addressing whether the grand jury was properly constituted, the Third District's specific argument in its opinion below was reduced to a single sentence: "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." (*Id.* at \*28.) Again, the Court provided no elaboration on the conclusory statement, simply affirming without explanation that Petitioner's challenge does not warrant dismissal. From the face of Petitioner's claim, it would appear that the "grand jury that was formed" was indeed illegal, as it was missing members who had been illegally dismissed by a prosecutor without authority to do so. Though the Court of Appeal disagreed, it did not explain the source of its disagreement.

This, 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 remedy that failing.

V.

CONCLUSION

This Court should rule as Petitioner has requested not only to secure for Petitioner the relief to which he is entitled, but to correct a recurring legal error and remedy a prosecutorial practice that must be firmly prohibited. The issues Petitioner has raised have shown themselves to be recurring ones; Petitioner's counsel has personally encountered the same fundamental legal questions in two separate jurisdictions. Presently, this Court has granted review in *Ruiz-Martinez v. Superior Court*, case no. S241068; further action in that case is deferred pending disposition of this case. In *Ruiz-Martinez*, the prosecutor also illegally dismissed grand jurors in contradiction to the commands of CPC §939.5.

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 similar circumstances and fully expected the legal error committed by the prosecutor to be limited to Petitioner's case. 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.



For all of the above stated reasons, this Court should direct the granting of the petition for writ of mandate and/or prohibition and order the indictment against Petitioner be dismissed.

Respectfully submitted,

**BAY AREA CRIMINAL LAWYERS, PC**

Dated: August 18, 2017

By: David J. Cohen  
DAVID J. COHEN, ESQ.

Attorneys for Petitioner **Leo Brian Avitia**

CERTIFICATION OF WORD COUNT

I, David J. Cohen, Esq., hereby certify that Petitioner's Opening Brief and Memorandum of Points and Authorities in Support Thereof is double-spaced, was typed using a proportioned typeface, Times New Roman (no more than 10 ½ characters per inch), is 11,882 words long and contains 957 lines.

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

Executed: August 18, 2017

  
\_\_\_\_\_  
DAVID J. COHEN, ESQ.

**PROOF OF SERVICE**

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

On August 18, 2017, a copy of Appellant's **OPENING BRIEF** in the case of *Avitia v. Superior Court of San Joaquin County*, case no. S242030, was sent by United States mail by placing a true copy thereof enclosed to:

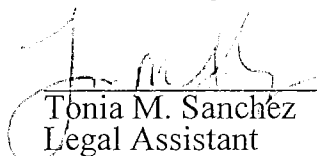
Catherine Chatman, Esq.  
Supervising Deputy Attorney General  
Office of the Attorney General  
1300 I Street, Suite 125  
P.O. Box 944255  
Sacramento, CA 94244-2550

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 August 18, 2017 at San Francisco, California.

  
Tonia M. Sanchez  
Legal Assistant