

S242030

Case No. _____

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

SUPREME COURT
FILED

MAY 19 2017

LEO BRIAN AVITIA,
Petitioner,

Jorge Navarrete Clerk

v.

Deputy

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

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

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

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

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

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

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

**PETITION FOR REVIEW;
MEMORANDUM OF POINTS AND AUTHORITIES**

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

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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 District

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

³All 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 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 Cumiskey 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