

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

LEO BRIAN AVITIA,
Petitioner,

v.

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

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

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

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

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

**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)

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

ALEXANDER P. GUILMARTIN
State Bar No. 306767
300 Montgomery Street, Suite 660
San Francisco, CA 94104
Telephone Number (415) 398-3900
Fax Number (415) 398-7500
apguilmartin@bayareacrimlaw.com

Attorneys for Petitioner **Leo Brian Avitia**

TABLE OF CONTENTS

	Page
<u>TABLE OF AUTHORITIES</u>	4
<u>ISSUES PRESENTED</u>	8
I. <u>INTRODUCTION</u>	9
II. <u>STATEMENT OF FACTS</u>	10
A. <u>Grand Jury Proceedings</u>	10
B. <u>Motion to Dismiss and Writ Petition</u>	11
C. <u>Third District Denial</u>	12
III. <u>STANDARDS GOVERNING PRE-TRIAL MOTIONS TO DISMISS</u>	13
IV. <u>ARGUMENT</u>	14
A. <u>All Parties Agree That in Dismissing a Grand Juror, the Prosecutor Violated CPC §939.5</u>	15
B. <u>Because the Prosecutor’s Violation of §939.5, Like the Error Committed in <i>Dustin</i>, Denied Petitioner a Substantial Right, Dismissal of the Indictment Is Required Without Any Showing of Prejudice</u>	16
1. <u>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</u>	16
a. History of Substantial Rights Analysis	16
b. Current Law on Substantial Rights	18
2. <u>Petitioner Was Denied a Substantial Right Here</u>	20
a. The Principles Espoused in <i>Dustin</i> Apply Here	22
b. The Denial to Petitioner of His Right to an Independent, Properly Constituted Grand Jury Effectuated a Denial of a Substantial Right	24
c. The Third District’s Holding That Petitioner Was Not Denied a Substantial Right Is Flawed	25
d. <i>Standish</i> Is Inapposite	26
3. <u>Petitioner Suffered a Structural Error Warranting Dismissal Without Any Showing of Prejudice</u>	29
4. <u>A Substantial Rights Analysis Applies to Pre-Trial Challenges to Indictments</u>	32
C. <u>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</u>	34

TABLE OF CONTENTS

	Page
1. <u>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</u>	35
2. <u>Petitioner Suffered a Due Process Violation Warranting Dismissal</u>	36
V. <u>CONCLUSION</u>	40
<u>CERTIFICATION OF WORD COUNT</u>	42

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Bruner v. Superior Court</i> (1891) 92 Cal.239	13, <i>passim</i>
<i>Buck v. Washington</i> (1962) 369 U.S. 541	39
<i>California School Boards Assn. v. California</i> (2009) 171 Cal.App.4th 1183	37
<i>Christie v. City of El Centro</i> (2006) 135 Cal.App.4th 767	21, <i>passim</i>
<i>Cummiskey v. Superior Court</i> (1992) 3 C4th 1018	13
<i>Dustin v. Superior Court</i> (2002) 99 Cal.App.4th 1311	14, <i>passim</i>
<i>Harris v. Superior Court</i> (2014) 225 Cal.App.4th 1129	14, <i>passim</i>
<i>H.D. Arnaiz, Ltd. v. County of San Joaquin</i> (2002) 96 Cal.App.4th 1357	13
<i>Herbert v. Superior Court</i> (1981) 117 Cal.App.3d 661	21
<i>Jennings v. Superior Court of Contra Costa County</i> (1967) 66 Cal.2d 867	17, <i>passim</i>
<i>Johnson v. Superior Court of San Joaquin County</i> (1975) 15 Cal.3d 248	24, <i>passim</i>
<i>Kalloch v. Superior Court</i> (1880) 56 Cal 229	38
<i>McCarthy v. Superior Court</i> (1958) 162 Cal.App.2d 755	17, <i>passim</i>
<i>McClatchy Newspapers v. Superior Court</i> (1988) 44 Cal.3d 1162	37
<i>McGill v. Superior Court</i> (2011) 195 Cal.App.4th 1454	24, <i>passim</i>
<i>Miller v. Superior Court</i> (2002) 101 Cal.App.4th 728	13

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Moon v. Superior Court</i> (2005) 134 Cal.App.4th 1521	20, <i>passim</i>
<i>Packer v. Superior Court</i> (2011) 201 Cal.App.4th 152	38
<i>Penney v. Superior Court</i> (1972) 28 CA3d 941	13
<i>People v. Backus</i> (1979) 23 C3d 360	13, <i>passim</i>
<i>People v. Booker</i> (2011) 51 Cal.4th 141	14, <i>passim</i>
<i>People v. Bucher</i> (1959) 175 Cal.App.2d 343	17
<i>People v. Elliot</i> (1960) 54 Cal.2d 498	17, <i>passim</i>
<i>People ex rel. Pierson v. Superior Court</i> (2017) 7 Cal.App.5th 402	37
<i>People v. Fujita</i> (1974) 43 CA3d 454	13
<i>People v. Gnass</i> (2002) 101 Cal.App.4th 1271	35
<i>People v. Hellum</i> (1962) 205 Cal.App.2d 150	17, <i>passim</i>
<i>People v. Jablonski</i> (2006) 37 Cal.4th 774	22
<i>People v. Konow</i> (2004) 323 Cal.4th 995	18
<i>People v. Laney</i> (1981) 115 Cal.App.3d 508	22, <i>passim</i>
<i>People v. Naphaly</i> (1895) 105 Cal. 641	17, <i>passim</i>
<i>People v. Phillips</i> (1964) 229 Cal.App.2d 496	17, <i>passim</i>

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>People v. Pompa-Ortiz</i> (1980) 27 Cal.3d 519	18, <i>passim</i>
<i>People v. Rojas</i> (1969) 2 CA3d 767	13
<i>People v. Salas</i> (1926) 80 Cal.App. 318	17, <i>passim</i>
<i>People v. Standish</i> (2006) 38 Cal.4th 858	20, <i>passim</i>
<i>People v. Stewart</i> (2004) 33 Cal.4th 425	14
<i>People v. Towler</i> (1982) 31 Cal.3d 105	22, <i>passim</i>
<i>People v. Williams</i> (1954) 124 Cal.App.2d 32	17, <i>passim</i>
<i>Plaut v. Spendthrift Farm, Inc.</i> (1995) 514 U.S. 211	30
<i>Reilly v. Superior Court</i> (2013) 57 Cal.4th 641	18, <i>passim</i>
<i>Stark v. Superior Court</i> (2011) 52 Cal.4th 368	32
<i>Weaver v. Massachusetts</i> (2017) __ U.S. __ 137 S.Ct. 1899	29
 <u>Statutes and Regulations</u>	
2017 Cal. App. Unpub. LEXIS 2618	12
2017 Cal. App. Unpub. LEXIS 2618 14	35
2017 Cal. App. Unpub. LEXIS 2618 19-20	32
2017 Cal. App. Unpub. LEXIS 2618 21-22	26
2017 Cal. App. Unpub. LEXIS 2618 25-26	15
2017 Cal. App. Unpub. LEXIS 2618 27	31
California Const. art. VI §§10-11	13

TABLE OF AUTHORITIES

Page(s)

Statutes and Regulations

California Code of Civil Procedure

§ 1085(a)	13
§ 1103a)	13

California Penal Code

§ 69	10
§ 148	10
§ 187	10
§ 191.5	10
§ 859b	27, <i>passim</i>
§ 861	27
§ 939.5	8, <i>passim</i>
§ 995	8, <i>passim</i>
§ 995(a)(1)	13
§ 995(a)(1)(A)	12, <i>passim</i>
§ 995(a)(1)(B)	35
§ 14601.2(a)	10
§ 23153(a)	10
§ 23153(b)	10

ISSUES PRESENTED¹

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?

¹ 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.)² 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.)³ The record indicates

² 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.

³ 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.

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.⁴ This Court granted review on June 21, 2017.

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 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

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. Helling* (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