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Case Note

CRIMINAL PROCEDURE—GRAND JURY—CONSTITUTIONAL LAW—EQUAL PROTECTION—DUE PROCESS—PROSECUTOR’S DUTY TO EXPOSE EXCULPATORY EVIDENCE TO THE GRAND JURY

Johnson v. Superior Court,
15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975).

The Grand Jury, conceived as a bulwark between the power of the state and the vulnerable, accused citizen, has been increasingly criticized as the pliant tool of the prosecutor. The extent to which the grand jury’s traditional, protective function has passed into the hands of the prosecutor is clear from an examination of its modern processes: the grand jury, in practice, hears only cases the prosecutor chooses to present to it; it often hears only the prosecutor’s version of the case; the prosecutor generally selects and examines the grand jury’s witnesses; the accused is not allowed to be present or heard unless called as a witness; the accused is not represented by counsel; and the grand jury is composed of laymen who are likely to show considerable deference to the prosecutor’s expertise.

While some critics have advocated abolition of the indicting grand jury system, others have insisted that it should remain unchanged. Courts and

legislatures have moved cautiously between these extremes toward various reforms of the prosecutor's role in the grand jury system. The Supreme Court of California, in examining the conduct of the prosecutor before the grand jury, has moved to insure the procedural integrity of the probable cause determination. In Johnson v. Superior Court, the California court held that the prosecutor must apprise the grand jury of evidence tending to negate the guilt of the accused.

Lowell Ray Johnson was arrested on charges of conspiracy to transport and illegal transportation and sale of amphetamine tablets. A preliminary examination was held before a magistrate to determine whether or not there was sufficient cause to believe that the defendant was guilty. At the preliminary hearing, the accused was afforded a variety of procedural rights including the right to counsel, the right to confront and cross-examine hostile witnesses, and the opportunity to personally appear and affirmatively present exculpatory evidence.

The prosecution presented testimony associating Johnson with a large drug sale to federal undercover narcotics agents. Witnesses testified that Johnson was observed in Mexico negotiating the purchase of amphetamine tablets, that he agreed to sell the tablets to the agents, that he had conferred with one Sherman throughout this deal, and that the accused had led Sherman to the scene of the sale. When the agents questioned Sherman as to why he, rather than Johnson, was consummating the deal, Sherman told the agents that Johnson preferred not to be directly involved because of a prior drug conviction, but that Johnson was Sherman's "partner."

Although Johnson testified on his own behalf at the preliminary hearing, most of the prosecutor's testimony was undisputed. Johnson claimed, however, that he was acting as an informant for the Deputy District Attorney with whom he had agreed to cooperate in exchange for reduction of prior narcotics charges and lenient sentencing. According to Johnson this was a case of


10. 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975).

11. Id. at 250, 539 P.2d at 793, 124 Cal. Rptr. at 33.

12. Id. The California Constitution authorizes two methods for initiating a felony prosecution—information or indictment. A preliminary hearing is required only under the information procedure. CAL. CONST. art. 1, § 8; CAL. PENAL CODE § 737 (West 1970).


14. Id. § 865.

15. Id. § 866.

16. 15 Cal. 3d at 251-52, 539 P.2d at 794, 124 Cal. Rptr. at 34.
one undercover agent unknowingly capturing another undercover agent; Johnson asserted that he had intended to provide information for the arrest and prosecution of Sherman and the undercover agents.\textsuperscript{17}

The magistrate presiding over the preliminary hearing dismissed the charges against Johnson.\textsuperscript{18} Undeterred, the prosecutor presented the case to the grand jury where the procedural safeguards afforded the accused during the preliminary hearing evaporated.\textsuperscript{19} Neither Johnson nor his attorney was entitled to be present at the grand jury hearing.\textsuperscript{20} Furthermore, Johnson had no right to confront or cross-examine the witnesses,\textsuperscript{21} all of whom were selected by the prosecutor.

The district attorney presented to the grand jury only the evidence that implicated Johnson in the drug deal. The grand jury never heard Johnson's claim that he was acting as an informer under the auspices of the Deputy District Attorney or that the magistrate had refused to submit the case to trial.\textsuperscript{22} Furthermore, the prosecutor falsely implied to the grand jurors that Johnson was asserting his fifth amendment privilege against self-incrimination and would refuse to testify if called.\textsuperscript{23} In truth, Johnson would probably have welcomed the opportunity to present the same defense that had worked for him at the preliminary hearing.

Predictably, the grand jury returned an indictment.\textsuperscript{24} On Johnson's sub-

\textsuperscript{17} Id. at 252, 539 P.2d at 794, 124 Cal. Rptr. at 34.
\textsuperscript{18} Id., 539 P.2d at 794-95, 124 Cal. Rptr. at 34-35.
\textsuperscript{19} In California, a magistrate's dismissal of the complaint does not bar another prosecution for the same offense by grand jury indictment. People v. Uhlemann, 9 Cal. 3d 662, 511 P.2d 609, 108 Cal. Rptr. 657 (1973).
\textsuperscript{21} CAL. PENAL CODE § 939.7 (West 1970).
\textsuperscript{22} 15 Cal. 3d at 253, 539 P.2d at 795, 124 Cal. Rptr. at 35.
\textsuperscript{23} As the court noted and the Attorney General of California conceded, the prosecutor's reference to Johnson's invocation of the privilege against self-incrimination was clearly misconduct on the part of the prosecutor. \textit{Id.}; People v. Miller, 245 Cal. App. 2d 112, 53 Cal. Rptr. 720 (1966).
\textsuperscript{24} Empirical studies have revealed that grand juries rarely refuse to return an indictment in cases presented by the prosecutor. \textit{The Grand Jury: Powers, Procedures, and Problems}, 9 COLUM. J.L. & SOC. PROBS. 681, 701 (1973) (In New York, state grand juries have refused to return indictments in approximately 9% of the matters presented to them in recent years.); Note, \textit{Some Aspects of the California Grand Jury System}, 8 STAN. L. REV. 631, 653 table II (1956) (In California In 1955, 94.1% true bills were returned.; San Diego Bar Ass'n, \textit{Report of the Grand Jury Committee}, 9 SAN DIEGO L. REV. 145, 160-61 (1972) (98.5%, or 383 indictments were returned out of 389 cases presented in 1970.); Final Report on the Grand Jury System in Cuyahoga County, Nov. 3, 1975, at 82 (unpublished report of Case Western Reserve University Law School) (Cuyahoga County grand juries customarily return from 3 to 5% no bills out of all cases presented.). \textit{See also} Morse, \textit{A Survey of the Grand Jury System}, 10 ORE. L. REV. 101 (1931). In his classic study, Dean Morse found that in only 5.15% of the cases initiated by the prosecutor in which the prosecutor expressed an opinion was there a disagreement between the prosecutor's opinion and the grand jury's disposition. \textit{Id.} at 151.
sequent motion the California Court of Appeal restrained the superior court from proceeding to trial on the grand jury indictment. A writ of prohibition was issued on constitutional due process grounds: the prosecutor's withholding of evidence was fundamentally unfair; it deprived Johnson of his "constitutional entitlement to the grand jury's independent, unbiased decision." 25

The majority of the California Supreme Court agreed with the holding of the court of appeal, but they did not adopt the lower court's constitutional reasoning. Instead, the court chose the narrower path of statutory interpretation. Section 939.7 of the California Penal Code states:

The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses. 26

Prior interpretations of this statute placed the entire burden of seeking exculpatory evidence on the members of the grand jury. 27 It has been noted that, in practical application, this statute virtually assured the return of an indictment. 28

Perhaps recognizing this problem, the California Supreme Court decided that leaving the grand jury the entire burden of calling for exculpatory evidence was unreasonable. Instead, the court inferred an affirmative obligation from section 939.7: when seeking a grand jury indictment, the prosecuting district attorney must inform the grand jury of the nature and existence of evidence that tends to negate guilt. 29 As Justice Clark, the author of the Johnson majority opinion, stated: "The grand jury cannot be expected to call for evidence of which it is kept ignorant." 30

29. 15 Cal. 3d at 251, 539 P.2d at 794, 124 Cal. Rptr. at 34.
30. Id.
The decision of the majority is consistent with other recent California Supreme Court decisions which have demanded that the prosecuting district attorney be more than an advocate. For example, in 1971 the court announced that before trial the prosecution must disclose any substantial and material evidence that is favorable to the accused.\textsuperscript{31} In an even broader statement of policy, the court said: "The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial . . . ."\textsuperscript{32} In 1975 the California Supreme Court reiterated this attitude when it stated that there is "a duty on the part of the prosecution, even in the absence of a request therefor, to disclose all substantial material evidence favorable to an accused, whether such evidence relates directly to the question of guilt, to matters relevant to punishment, or to the credibility of a material witness."\textsuperscript{33} The extension of the requirement in \textit{Johnson} to the prosecutor appearing before the grand jury is the logical result of this view of the prosecutor's role.

In his concurring opinion Justice Mosk raised several objections to the majority's approach. He first pointed out that under the majority's rule the prosecutor need inform the grand jury only of the existence and nature of exculpatory evidence of which he is aware, thus by obvious implication excluding from the grand jury's consideration evidence solely in the defendant's possession which might adequately explain away the charge. In the present case, had there not been a prior preliminary hearing it is likely the district attorney would have been unaware of the petitioner's exculpatory evidence.\textsuperscript{34}

But even if the prosecutor knew of the exculpatory evidence, Justice Mosk questioned the enthusiasm that a prosecuting attorney would bring to a presentation of evidence favoring the accused.\textsuperscript{35} A basic tenet of the adversary system is that only a partisan advocate will be sufficiently motivated to discover all available exculpatory evidence and present it with conviction. Implicit in Justice Mosk's argument is the idea that the prosecutor, being in an adversary position, is not motivated to discover exculpatory evidence. Furthermore, the relationship between the police and the prosecution is often not conducive to a thorough and forceful presentation because the

\textsuperscript{31} \textit{In re} Ferguson, 5 Cal. 3d 525, 532-33, 487 P.2d 1234, 1239, 96 Cal. Rptr. 594, 599 (1971).
\textsuperscript{32} \textit{Id.} at 531, 487 P.2d at 1238, 96 Cal. Rptr. at 598.
\textsuperscript{33} People v. Ruthford, 14 Cal. 3d 399, 406, 534 P.2d 1341, 1346, 121 Cal. Rptr. 261, 266 (1975) (emphasis original).
\textsuperscript{34} 15 Cal. 3d at 268, 539 P.2d at 805, 124 Cal. Rptr. at 45 (emphasis original).
\textsuperscript{35} \textit{Id.} at 269, 539 P.2d at 806, 124 Cal. Rptr. at 46.
prosecutor often accepts the judgment of the police, and the police investigation becomes the prosecutor's investigation. 36

Justice Mosk's criticisms of the majority are generally valid. However, there are other considerations which temper his objections. While the California Supreme Court has not gone so far as to allow the accused to present his own evidence, Johnson and various other authorities provide additional protection for the accused. The legal concept of "prosecutor's knowledge” includes more than a prosecutor's personal knowledge. The prosecutor may not close his eyes to information available to him upon investigation. The United States Supreme Court has held the prosecutor responsible for knowledge of all information that is available to any member of his staff. In Giglio v. United States, 37 the Court observed that "[t]he prosecutor's office is an entity and as such it is the spokesman for the Government." 38 Therefore, one Assistant United States Attorney's promise not to prosecute a witness if the witness "cooperated" was attributed to his successor, who became responsible for knowledge of the promise and for its timely disclosure (even though he did not, in fact, know of it). Chief Justice Burger, writing for the Court in Giglio, noted that "[t]o the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it." 39

The California Supreme Court has acknowledged the soundness of the Giglio reasoning in People v. Ruthford. 40 It is doubtful, therefore, that the California state courts would allow the prosecutor to hide behind his own casual ignorance. The reasoning of Giglio and its progeny requires that the district attorney appearing before a grand jury know of any deal between

37. 405 U.S. 150 (1972).
38. Id. at 154.
39. Id.
40. 14 Cal. 3d 399, 406-10, 534 P.2d 1341, 1345-48, 121 Cal. Rptr. 261, 265-68 (1975). The recognition of Giglio in Ruthford was more specifically relevant to the prosecutor's obligation "to correct false or misleading testimony concerning inducements for incriminating testimony and the duty to disclose such inducements to the defense and to the jury." Id. at 406, 534 P.2d at 1346, 121 Cal. Rptr. at 266. However, the court indicated that the suppression of such evidence, "either willfully or through inadvertence" was constitutionally improper requiring reversal of conviction. Id. at 409-10, 534 P.2d at 1348, 121 Cal. Rptr. at 268 (emphasis added).

Since both the Ruthford and Johnson cases demand more than a partisan's role for the prosecutor, the California Supreme Court would presumably refuse to accept the prosecutor's plea of ignorance whether they were reviewing the validity of a conviction or an indictment. The prosecutor should be held accountable for knowledge of the facts of the case regardless of the particular stage in the proceedings.
Johnson and the Deputy District Attorney, and Johnson now requires that prosecutor to reveal evidence of which he had such constructive knowledge.

The prosecutor's pleas of ignorance or error should not suffice to sustain an indictment which might not have issued had the prosecutor sought out and competently presented the exculpatory evidence available to him or his staff. The prosecuting attorney may not be as vigorous in presenting exculpatory evidence as a partisan defense attorney, but he is responsible for a complete and careful preparation as well as a fair and balanced grand jury presentation. If he fails to meet his burden, a prosecutor faces the threat of losing an indictment.

Justice Mosk also found the majority approach unsatisfactory because it neither required the prosecutor to produce the available exculpatory evidence nor to inform the grand jury of its statutory right to order the evidence produced. Although it is unlikely that the usually passive grand jury will spring into action at the mere mention of the existence of other evidence, the prosecutor has broader ethical and statutory responsibilities.

41. See note 43 infra. The prosecutor has even been held to have constructive knowledge of facts known to the police. In Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964), the court noted: "The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure."


43. See United States v. Mandel, 415 F. Supp. 1033 (D. Md. 1976); United States v. Sweig, 316 F. Supp. 1148 (S.D.N.Y. 1970) (dictum acknowledged that prejudicial comments from the prosecutor could establish grounds for dismissing the indictment); United States v. DiGrazia, 213 F. Supp. 232 (N.D. Ill. 1963) (inflammatory questions asked a witness by the prosecutor in the grand jury hearing may void the indictment resulting therefrom); State v. Joao, 53 Hawaii 226, 491 F.2d 1059 (1971) (indictment dismissed because prosecutor's comments on the credibility of witnesses biased the grand jurors); State v. Houston, 209 N.W.2d 42, 47 (Iowa 1973) (suppression of exculpatory material by the prosecution is reversible error); State v. Hall, 235 N.W.2d 702, 731 (Iowa 1975) ("defendant should have been allowed an opportunity to ascertain if the grand jury transcripts disclosed suppression of exculpatory evidence"); Commonwealth v. Favalli, 352 Mass. 95, 224 N.E.2d 422 (1967) (prosecutor must refrain from words or conduct that will invade the province of the grand jury); Commonwealth v. Smart, 368 Pa. 630, 84 A.2d 782 (1951) (indictment can be challenged when prosecutor has acted improperly); Hammers v. State, 337 P.2d 1097 (Okla. Crim. App. 1959) (the county attorney's expressions of opinion as to the guilt of the persons under investigation and as to the weight of the evidence was highly prejudicial and constituted substantial error). But cf. Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecutor has absolute immunity from damage suits for violation of accused's civil rights resulting from initiation and pursuit of prosecution); Marlowe v. Coakley, 404 F.2d 70 (9th Cir. 1968), cert. denied, 395 U.S. 947 (1969) (district attorney in California is immune from civil suit for alleged act of suppressing exculpatory evidence within his knowledge from the grand jury); People ex. rel. Sears v. Romiti, 50 Ill. 2d 51, 277 N.E.2d 705 (1971), cert. denied, 406 U.S. 921 (1972) (secret proceedings of the grand jury cannot be exposed for the purpose of discovering demeanor of the prosecutor before the grand jury).

44. 15 Cal. 3d at 269, 539 P.2d at 806, 124 Cal. Rptr. at 46.

45. Cf. People v. McAlister, 54 Cal. App. 3d 918, 126 Cal. Rptr. 881 (1976). Discussing the Johnson decision, the McAlister court said:
The American Bar Association Standards oblige the prosecutor to disclose any exculpatory evidence to the grand jury.\(^4\) Notification of its nature and existence is not sufficient. In addition, a California prosecutor who allows a passive grand jury to overlook its legal powers has failed to fulfill his statutory responsibility. Under California law the district attorney acts as the grand jury's legal advisor.\(^4\) Consequently, a prosecutor could not properly remain mute while the grand jury overlooked its legal prerogative to call for important exculpatory evidence. The district attorney who does not fully apprise the grand jury of its statutory power to call for important defense evidence has failed his ethical and legal responsibility.\(^4\)

The more serious problem with the majority solution as noted by Justice Mosk is that it entrusts the fairness of the grand jury proceedings to the very person over whom the grand jury is expected to exert restraint—the prosecutor. If he is acting pursuant to his ethical obligation and in good faith, the prosecutor will personally screen out the unfounded charge, or he will present all exculpatory evidence to the grand jury thereby enabling it to adequately fulfill its protective function. However, the prosecutor who is determined to get an indictment regardless of the evidence will be largely unhampered by \textit{Johnson}. Because of the dependent nature of the grand jury, the unscrupulous prosecutor can by voice inflection or order of presentation effectively dismiss even significant defense evidence.

Moreover, the majority provided little relief for the victim of a malicious prosecutor who refuses to comply with the obligation that the court created. First, the prosecutor is insulated from a damage suit for the violation of the accused's civil rights that results from the initiation and pursuit of prosecution.\(^4\) The recourse for the indicted would be either the expensive and difficult procedure of obtaining a writ of prohibition from the court of appeal.

Once the district attorney has discharged his duty as defined by \textit{Johnson} (or the information has reached the grand jury by other means, such as defense counsel's letter), the grand jury may pursue further inquiry into the potential exculpatory evidence or not, as in its discretion seems proper (Pen. Code \S 939.7). Such discretion is not abused by the mere failure to subpoena the potential witnesses called to its attention.

\textit{Id.} at 926, 126 Cal. Rptr. at 886.

\(^4\) A.B.A. \textbf{STANDARDS, THE PROSECUTION FUNCTION} \S 3.6(b) (1971): “The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt.” Similarly, the A.B.A. \textbf{CODE OF PROFESSIONAL RESPONSIBILITY E.C.} 7-13 (1975) states: “The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”

\(^4\) CAL. \textbf{GOVT CODE} \S 26501 (West 1968) provides that the district attorney “shall attend before and give advice to the grand jury whenever cases are presented to it for consideration.”

\(^4\) In Attorney General v. Pelletier, 240 Mass. 264, 134 N.E. 407 (1922), the court held that the prosecutor could be removed from office for improper conduct before the grand jury. Arguably, a violation of the obligation to disclose exculpatory evidence would now qualify as such improper conduct.

or proceeding to trial. However, the right to a day in court is of little comfort to one who is unjustly charged in the first place. Furthermore, the grand jury indictment has been recognized as a valuable tool for the prosecutor seeking to harass citizens even if the charge should prove to be groundless at trial. There is considerable irony in the fact that the institu-

50. People v. Rojas, 2 Cal. App. 3d 767, 771, 82 Cal. Rptr. 862, 864 (1969). Because of the broad veil of secrecy surrounding grand jury proceedings, the imposition of a duty upon the prosecutor to disclose exculpatory evidence before the grand jury would be significant in only a few states. California provides the defendant access to a transcript of the grand jury testimony and, as of 1971, allows the transcript to be made public unless the court orders otherwise. CAL. PENAL CODE § 938.1 (West Supp. 1976), amending CAL. PENAL CODE § 938.1 (West 1970). See also IOWA CODE § 772.4 (1966); KY. R. CRIM. PRO. 5.24; MINN. R. CRIM. PRO. 18.05, which permit the defendant access to the grand jury transcript.

It should be noted that some courts have pierced the veil of grand jury secrecy by allowing testimony regarding grand jury proceedings to be taken from grand jurors. See United States v. Bruzzo, 373 F.2d 383 (3d Cir. 1967); United States v. Wells, 163 F. 313 (D. Idaho 1905); United States v. Kilpatrick, 16 F. 765 (W.D.N.C. 1883); United States v. Farrington, 5 F. 343 (N.D.N.Y. 1881); State v. Will, 97 Iowa 38, 65 N.W. 1010 (1896); State v. Kifer, 186 La. 674, 173 So. 169 (1937); Attorney General v. Pelletier, 240 Mass. 250, 134 N.E. 407 (1922); State v. Manney, 24 N.J. 571, 133 A.2d 313 (1957). See also FED. R. CRIM. P. 6 (e) providing in part: [A] juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss because of matters occurring before the grand jury.

51. As stated in Johnston, supra note 1, there is "a growing awareness that an indictment can have serious effects on the reputation of the accused, and force both the accused and the state to incur the considerable expenses associated with trial." Id. at 157. The bench has recognized the effect of an indictment as well. As one judge noted:

The government further argues that an indictment founded upon such illicit evidence will do the applicant no harm, since such evidence will not be admitted at the trial which follows the indictment. This is an astonishingly callous argument which ignores the obvious. For a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after acquittal. Prosecutors have an immense discretion in instituting criminal proceedings which may lastingly besmirch reputations . . . .

In re Fried, 161 F.2d 453, 458-59 (2d Cir. 1947) (Frank, J.). See also M. FREEDMAN, LAWYERS ETHICS IN AN ADVERSARY SYSTEM 84 (1975). But see United States v. Calandra, 414 U.S. 338, 349 (1974); People v. McAllister, 54 Cal. App. 3d 923, 126 Cal. Rptr. 881 (1976), where the court of appeal in narrowly applying the Johnson holding said:

The denial of the right to have the existence of potential defense evidence revealed at a grand jury hearing by the prosecution does not affect the ultimate integrity of the truth-determining process. The accused still has the full opportunity to present all of this evidence at trial and still needs only to raise a reasonable doubt as to his guilt in order to escape conviction.

Id. at 925, 126 Cal. Rptr. at 885.

tion conceived as the citizenry’s defense from government harassment\textsuperscript{53} has become a prime tool of harassment.

In \textit{Johnson}, the accused would have been forced to rely on the same prosecutor who ignored the findings of the magistrate, failed to investigate the facts of the case, misrepresented the accused’s desire to testify before the grand jury, and engaged in the admitted misconduct of referring to the accused’s invocation of his privilege against self-incrimination. It is difficult to believe that such a prosecutor would have adequately presented exculpatory evidence to the grand jury.

Nevertheless, the most significant failure of the majority opinion, as Justice Mosk stated, is that it never faced the basic constitutional problems: Does the California indictment/information procedure afford equal protection under the law and do the grand jury procedures afford due process to the accused?

First, Justice Mosk argued that the present California procedure of determining probable cause by either grand jury indictment or information\textsuperscript{54} at the discretion of the prosecutor violates the equal protection provisions of the California and United States Constitutions. He stated:

\begin{quote}
Under traditional equal protection analysis it has now become axiomatic that persons similarly situated must receive like treatment under the law.
\end{quote}

In all criminal cases the district attorney, and by extension the state, makes a distinction between those defendants who will be prosecuted by indictment and those who will be prosecuted by information. One class of defendants receives a preliminary hearing.


\textsuperscript{53} See 4 W. BLACKSTONE, COMMENTARIES \*306.

\textsuperscript{54} The following state statutes or constitutions provide for the alternative indictment/information procedure: ARIZ. R. CRIM. PRO. 2.1, 2.2 (1973); ARK. CONST. amend. XXI \(\S\) 1; CAL. PENAL CODE §§ 737, 738 (West 1970); COLO. REV. STAT. ANN. \(\S\) 16-5-101 & COLO. R. CRIM. PRO. 7(a)-(b) (1973); CONN. GEN. STAT. ANN. \(\S\) 54-46 (1958); FLA. STAT. ANN. \(\S\) 932.47 (1973) & FLA. R. CRIM. PRO. 3.140 (1970); IDAHO CODE \(\S\) 19.1301 (1948); ILL. ANN. STAT. Ch. 38, \(\S\) 111.2 (Smith-Hurd Supp. 1976); IND. ANN. STAT. \(\S\) 9-908 (Burns Supp. 1972); IOWA CODE ANN. \(\S\) 769.1 (1950); KAN. STAT. ANN. \(\S\) 22.3201 (1974); LA. CODE CRIM. PRO. ANN. art. 382 (West Supp. 1976); MD. RULES PRO. 708 (Supp. 1976); MICH. COMP. LAWS ANN. §§ 767.1, 767.42 (1968); MINN. R. CRIM. PRO. 17.01 (1976); MO. CONST. art. I \(\S\) 17 & MO. ANN. STAT. \(\S\) 545.010 (Vernon 1953); MONT. REV. CODES ANN. §§ 95-1501, 95-1502 (1969); NEB. REV. STAT. §§ 29-1601, 29-1501 (1965); NEV. REV. STAT. \(\S\) 172.015 (1973); N.M. CONST. art. 2, \(\S\) 14; N.D. CENT. CODE \(\S\) 29-09-02 (1974), as amended, \(\S\) 29-09-02 (Supp. 1975); OKLA. STATS. ANN. tit. 22 \(\S\) 301 (1969); ORE. CONST. art. VII \(\S\) 5; R.I. GEN. LAWS ANN. \(\S\) 12-12-1.2 (Supp. 1975); S.D. COMPILLED LAWS ANN. \(\S\) 23-2-5 (1969); UTAH CODE ANN. §§ 77-16-1 (1953), 77-17-1 (Supp. 1975); VT. R. CRIM. PRO. 7 (1974); WASH. REV. CODE ANN. §§ 10.37.015, 10.37.026 (1961); WIS. STAT. ANN. \(\S\) 967.05(1)(c), (2), (3) (1971); WYO. R. CRIM. PRO. 9 (1976).
with the attendant rights . . . while the other class receives no preliminary hearing and no procedural protections. The two classes are in all other respects identical . . . . The classification is not based on any state objective which may be considered legitimate, but rather is grounded on the arbitrary goal of vesting in the People vast prosecutorial advantages which the grand jury system affords.\textsuperscript{55}

The right to counsel, the right to confront and cross-examine witnesses, and the right to present evidence, all of which are denied the accused in a grand jury proceeding, are available in the preliminary hearing required when prosecution is by information.\textsuperscript{56} Accordingly the distinction between proceeding by indictment and by information affects the availability of fundamental rights. Therefore, Justice Mosk argued that strict judicial scrutiny, placing a heavy burden on the state to demonstrate a compelling reason for its choice, was appropriate.\textsuperscript{57} Under this test the state would bear "the burden of establishing not only that it has a \textit{compelling} interest which justifies the law but that the distinctions drawn by the law are \textit{necessary} to further its purpose." \textsuperscript{58}

Recognizing the significantly different treatment inherent in California's dual system, Justice Mosk found a violation of equal protection on the face of the California provision. His analysis, however, demands too much of equal protection. While Justice Mosk correctly states the equal protection axiom that persons similarly situated must receive like treatment under the law, he ignores the competing axiom that the equal protection clause does not require the state to act with absolute equality.\textsuperscript{59} The conflict between these axioms constitutes the traditional tension of the equal protection clause.\textsuperscript{60}

\textsuperscript{55} 15 Cal. 3d at 265, 539 P.2d at 803, 124 Cal. Rptr. at 43 (Mosk, J., concurring) (footnote omitted).
\textsuperscript{58} Serrano v. Priest, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971) (emphasis original).
\textsuperscript{59} San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) ("[T]he Equal Protection Clause does not require absolute equality or precisely equal advantages."); Rinaldi v. Yeager, 384 U.S. 305, 309 (1966) ("To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons."); Douglas v. California, 372 U.S. 353, 356 (1963) ("[A] State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an "invidious discrimination." ").
\textsuperscript{60} Tussman & tenBroek, \textit{The Equal Protection of the Law}, 37 CALIF. L. REV. 341 (1949), explaining:

Here then, is a paradox: The equal protection of the laws is a "pledge of the protection of equal laws." But laws may classify. And "the very idea of classification is that
The equal protection clause was designed to prohibit the state from legislating in a way that classifies people differently without adequate justification and to prohibit application of fair laws in an invidiously discriminatory manner. The equal protection clause is not properly applicable to the California provision that created the discretionary information/indictment system since the California provision does not define a class to which the law is to be applied; grand jury prosecution is not limited to an ascertainable class of defendants. This is true although the provisions contemplate the eventual existence of two groups of people—those prosecuted by indictment and those by information. Inequality, even inequality touching fundamental rights, does not create a constitutional equal protection violation where the operation of the law, rather than the law itself, defines the classes in question.61

Justice Mosk analyzes the problem as if the California provision violated equal protection on its face. The guarantee of equal protection could also be violated if a state discriminatorily enforced a statute which was fair on its face.62 Although the state is allowed a great deal of latitude in enforcing its laws, a violation of equal protection may still be proved by demonstrating that enforcement deliberately discriminated against a certain class of persons. Even in this situation, however, the courts look for an impermissible, purposeful classification existing independently of the enforcement procedures.63 If it could be shown that some class of persons, for example, el-

61. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 25 (1973): For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of “poor” people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms.

62. Yick Wo v. Hopkins, 118 U.S. 356 (1886): [T]he cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection ....

63. See Oyler v. Boles, 368 U.S. 448, 456 (1962): [T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

derly, aliens, or indigents, were disproportionately subjected to the less favorable grand jury proceedings because of intentional or purposeful discrimination by the prosecutor, the equal protection argument would be more likely to succeed. However, no deliberate classification is indicated by the prosecutor's choice of procedures for determining probable cause in *Johnson*.

Justice Mosk cites several cases to demonstrate how the court has repeatedly found violations of equal protection and applied strict scrutiny. However, careful examination of these cases reveals that all dealt with discrimination against a class existing independently of the allegedly offensive action of the state. Juveniles accused of violent crimes constituted the class in *In re Gary W.* The court in that case found no compelling reason to deny juveniles a jury trial to determine whether they would be detained in Youth Authority custody when other classes of persons subject to involuntary commitment were given the right to a jury trial. Similarly, the court in *In re Franklin* described as a class persons who were committed to a mental institution following an acquittal on a criminal charge by reason of insanity. The court determined that this class of mental patients, which existed prior to the action of the discriminatory law, could not be denied the right to a jury trial in a determination of their fitness for release. Finally, in *People v. Feagley*, persons who were committed under the mentally disordered sex offender law were held to constitute a class which had been denied the right to a unanimous jury verdict that was available to other classes. Although in each of these cases persons had been denied their fundamental right to a jury trial by the state procedures, the classes were identified in terms of other characteristics.

The equal protection argument espoused by Justice Mosk had been previously presented to the California Supreme Court as one of many arguments raised in the defense of Sirhan Bishara Sirhan, the assassin of Senator Robert Kennedy. The court specifically rejected the argument in an opinion with which Justice Mosk concurred. On this point, however, the *Sirhan* opinion is largely conclusory; the California cases cited for support build on one another without analysis. Nonetheless, it may have been the recogni-

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64. See id. See also the discussion of People v. Pearce, 8 Cal. App. 3d 984, 87 Cal. Rptr. 814 (1970), at note 69 infra. It may be possible to have invidious, purposeful discrimination against an individual—such an individual constituting a "class of one." See Moss v. Hornig, 314 F.2d 89, 93 (2d Cir. 1963).

65. 5 Cal. 3d 296, 486 P.2d 1201, 96 Cal. Rptr. 1 (1971).

66. 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972).


69. The court cites five cases for the proposition that the indictment process denies neither due process nor equal protection. Id. at 747, 497 P.2d at 1146, 102 Cal. Rptr. at 410. In *People v. Flores*, 276 Cal. App. 2d 61, 81 Cal. Rptr. 197 (1969), the court rejected the constitutional
tion that no clearly determinable class existed which led the court in *Sirhan* to state:

In support of his contention defendant relies upon cases in which it was held that constitutionally impermissible classifications were contained in the legislation or rule there in question (e.g., *McLaughlin v. Florida*, 379 U.S. 184 . . . [classification based on race]; *Douglas v. California*, 372 U.S. 353 . . . [classification based on indigency]; *Skinner v. Oklahoma*, 316 U.S. 535 . . . [classification requiring sterilization under certain circumstances of persons convicted of larceny but not of those convicted of embezzlement]). *The provisions which concern us here do not contain such a classification.*

Although it is tempting to apply equal protection analysis wherever the laws treat people differently, the equal protection clause was designed to

argument for several reasons. First, the court was reluctant to strike out on its own constitutional determination: "Defendant cites no authority for this proposition and we have found none." 276 Cal. App. 2d at 65, 81 Cal. Rptr. at 200. Second, the court felt compelled by tradition: "Despite sustained attacks on the grand jury system, it still remains as an established part of the federal and state systems of criminal administration." *Id.* And third, the court blanched at the thought of judicial activism: "Any change in this procedure, we feel is a task for the Legislature since we find no constitutional infirmity in the grand jury process." *Id.*

This judicial demureness was continued in *People v. Newton*, 8 Cal. App. 3d 359, 388, 87 Cal. Rptr. 394, 413 (1970), which rejected the constitutional question solely on the basis of *Flores*. The decision in *In re Wells*, 20 Cal. App. 3d 640, 649, 98 Cal. Rptr. 1, 5-6 (1971), compounded the situation by summarily rejecting the argument without presenting any reasoning except citation of precedent. In *People v. Rojas*, 2 Cal. App. 3d 767, 771, 82 Cal. Rptr. 862, 864 (1969), the court acknowledged that there were constitutional deficiencies in the California system but still rejected the constitutional argument because of the historic origins of the grand jury and past approvals of its procedures.

Only in *People v. Pearce*, 8 Cal. App. 3d 984, 87 Cal. Rptr. 814 (1970), did the court undertake a more probing analysis of the constitutional issue. That court rejected the equal protection contention because "[t]he defendant has not claimed or presented facts to support the inference that the indictment procedure was chosen in his case due to some arbitrary or purposeful act on the part of some state official." *Id.* at 989, 87 Cal. Rptr. at 817. This analysis correctly explicates the equal protection test as it applies to unequal enforcement of the laws. The court in *Pearce* apparently was unimpressed by the argument that the provision on its face violated equal protection. The argument was probably raised in that posture before the court since no evidence of purposeful discrimination was offered by the plaintiff.

In *People v. Apo*, 25 Cal. App. 3d 790, 797, 102 Cal. Rptr. 242, 247 (1972), which is not mentioned in *Sirhan*, the court also considered the constitutional issues raised by the indictment/information system. Again the "analysis" was restricted to a recitation of precedent. 70. 7 Cal. 3d at 747, 497 P.2d at 1146, 102 Cal. Rptr. at 410 (emphasis added) (brackets in original).

The court's citation of *Skinner*, a case applying strict scrutiny because of the involvement of fundamental rights, suggests that the court was searching for any class rather than specifically a suspect class.
insure fairness of classification rather than absolute fairness. Consequently, when people are denied fundamental rights such as the right to counsel, the right to confront witnesses, and the right to personally appear and present evidence, the constitutional guarantee of fundamental fairness is at issue, and a due process analysis is more appropriate.

It was the unnecessary use of equal protection analysis which led Justice Harlan to dissent from his colleagues in Griffin v. Illinois. The majority in Griffin held that due process and equal protection required the state to provide the indigent criminal defendant appealing his conviction with a trial transcript or its equivalent if necessary to ensure meaningful appellate review. Justice Harlan stated:

I submit that the basis for that holding is simply an unarticulated conclusion that it violates "fundamental fairness" for a State which provides for appellate review, and thus apparently considers such review necessary to assure justice, not to see to it that such appeals are in fact available to those it would imprison for serious crimes. That of course is the traditional language of due process,

71. Tussman & tenBroek, supra note 60, at 344-46.

Since both the indictment and information means of prosecution have been found to satisfy due process, an interesting argument might be made that there is adequate protection for the accused who is prosecuted under either system. Where there is no injury, there is no violation of equal protection. See Commonwealth v. Webster, 462 Pa. 125, 337 A.2d 914, 917 cert. denied, 423 U.S. 898 (1975). Cf. North v. Russell, 96 S.Ct. 2709 (1976) (Kentucky's two-tier court system providing for trials in certain sized cities to be conducted by nonlawyer judges and trials in other areas to be conducted by lawyer judges denies neither due process nor equal protection); Missouri v. Lewis, 101 U.S. 22 (1879) (as long as all people within the classified area are treated equally, each state may establish one system of courts for cities and another for rural districts); People v. McCullough, 57 Ill. 2d 440, 313 N.E.2d 462 (1974) (statutes which provide that a person may be charged with a greater or lesser offense for the same actions at prosecutor's discretion do not deny due process or equal protection); State v. Kanistanaux, 68 Wash. 2d 852, 414 P.2d 784 (1966) (there is no equal protection violation in a system which gives the prosecutor discretion in choosing whether to make a determination of probable cause himself or to submit the question to a justice of the peace); accord, People v. Hickman, 204 Cal. 470, 479-80, 268 P. 909, 913, appeal denied, 204 Cal. 484, 270 P. 1117 (1928) ("A state may make different procedure for trials of even the same class of offenses. The Fourteenth Amendment merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions . . . ."); In re Evans' Petition, 146 Mont. 405, 409 P.2d 456 (1965). See also Caldwell v. Texas, 137 U.S. 692, 697-98 (1891): "Law . . . is due process, and when secured by the law of the State, the constitutional requisition is satisfied. . . . No question of repugnancy to the Federal Constitution can be fairly said to arise when [the statutes authorizing the procedures] pursued are not obviously violative of the fundamental principles above adverted to."

72. Developments in the Law-Equal Protection, 82 Harv. L. Rev. 1065, 1132 (1969): Here the focus is on the injustice created by unwarranted state interference with a fundamental interest at least as strongly as on the injustice engendered by inequality. When an equal protection decision rests on this basis, it may be little more than a substantive due process decision decked out in the trappings of equal protection.

73. 351 U.S. 12 (1956).
see Betts v. Brady, 316 U.S. 455, 462, and I see no reason to import new substance into the concept of equal protection to dispose of the case, especially when to do so gives rise to the all-too-easy opportunity to ignore the real issue and solve the problem simply by labeling the Illinois practice as invidious "discrimination." 74

The fairness of a system in which a prosecutor can decide to forego an adversary hearing and prosecute via an ex parte proceeding is questionable. Consequently, the due process issues suggested by the California indictment/information procedure must be examined. Given that the determinations of the grand jury are significant in the criminal justice system, it is incumbent upon the courts to guarantee compliance with the due process mandate of fundamental fairness. If the grand jury procedure itself is insufficient to satisfy due process, the system in which it can occasionally be used is constitutionally infirm. Nevertheless, grand jury proceedings have remained largely unscrutinized for due process infirmities.

First, the grand jury has continued to use procedures ruled unconstitutional in other areas of the law. The district attorney is assigned the conflicting duties of presenting evidence to the grand jury and passing on the admissibility of that evidence. 75 California courts have held unconstitutional similar procedures in juvenile courts where the referee who presented the case and examined the witnesses then ruled on the admissibility of their testimony. 76

Second, the Supreme Courts of the United States and California have not questioned the grand jury procedures although those courts have subjected most other stages of the criminal process to rigorous due process

74. Id. at 36. Justice Harlan reiterated his view in his dissent in Shapiro v. Thompson, 394 U.S. 618, 661-62 (1969): "When the right affected is one assured by the Federal Constitution, any infringement can be dealt with under the Due Process Clause."

75. The statutes creating that conflict are: CAL. PENAL CODE § 939.6(b) (West 1970), "The grand jury shall receive none but evidence that would be admissible over objection at the trial of a criminal action . . . ."; CAL. GOV'T CODE § 26501 (West 1968), provides that the district attorney is the legal adviser to the grand jury; and CAL. PENAL CODE § 935 (West 1970) provides that the district attorney may present evidence to the grand jury.

One commentator has observed:
When the function of indictment . . . is mated with the responsibility of determining the character of the evidence that supports it, and with the right to exclude all evidence which could explain or contradict, the result is not proper. In short, it is both derogatory of the jury's basic purpose and devoid of fairness.


scrutiny and significant reforms. Chief Justice Burger pointed out this inconsistency in his dissent in Coleman v. Alabama. The Court in Coleman guaranteed the right to counsel at the Alabama preliminary examination, the purpose of which was to determine if there were sufficient evidence to justify bringing the accused before the grand jury for indictment. However, the preliminary examination is not mandatory in Alabama. The prosecutor could frustrate the benefit of counsel requirement by simply foregoing the preliminary examination and proceeding to the grand jury or by ignoring the findings of the preliminary examination as did the prosecutor in Johnson. In his dissent, Chief Justice Burger queried: "If the current mode of constitutional analysis subscribed to by this Court in recent cases requires that counsel be present at preliminary hearings, how can this be reconciled with the fact that the Constitution itself does not permit the assistance of counsel at the decidedly more 'critical' grand jury inquiry?"

The Supreme Court has announced that any person accused of a crime must have "the guiding hand of counsel at every step in the proceedings against him," but the Court has yet to apply this due process requirement to grand jury proceedings. If the presumption of innocence is to have any value, the accused's rights before the grand jury should be as carefully guarded as the rights of convicted prisoners and parolees. Although both state and federal courts have attached procedural due process requirements to parole violation hearings, disciplinary hearings for prisoners, and sentencing hearings, such protection has not yet been extended to the accused when he faces a grand jury indictment.

There are several possible explanations for the failure to scrutinize grand jury procedure. Among the most basic is the fact that the ex parte inquisitorial nature of the grand jury proceeding is firmly rooted in the traditional federal and state criminal systems. Although that tradition is strongly de-

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79. See Ala. Code tit. 15, §§ 139, 140, 151 (1959); Ex parte Campbell, 278 Ala. 114, 176 So. 2d 242 (1965).
fended, tradition alone cannot justify maintaining any part of the criminal
system that offends the right to fundamental fairness.87

The need for secret proceedings88 and the desire to avoid converting the
grand jury into a discovery device for the accused89 have also insulated the
grand jury from close scrutiny and reform. But because California has
statutorily provided for disclosure of most important grand jury proceed-
ings,90 the arguments that the grand jury should act in secrecy and that it
should not be used as a discovery device are unpersuasive. Even in states
without such disclosure provisions, the traditional arguments are question-
able.91 Professor Samuel Dash has argued convincingly that

since the Supreme Court concluded in Coleman that it is essential
that the accused obtain through counsel some discovery of the pro-
secutor's case against him in a preliminary hearing, there is no
possible rationalization for denying the accused his right to discov-

86. E.g., Brown, Ten Reasons Why the Grand Jury in New York Should be Retained and
Strengthened, 22 RECORD OF N.Y.C.B.A. 471 (1967); Wickersham, The Grand Jury; Weapon
Against Crime and Corruption, 51 A.B.A.J. 1157 (1965); remarks of Cuyahoga County Pro-
secutor John T. Corrigan, reported in The Cleveland Plain Dealer, Mar. 15, 1976, at 8, col. 1.

87. Other strong traditions have fallen in the face of constitutional challenge. A prison war-
den's traditional freedom to determine appropriate discipline for his prisoners was found uncon-
P.2d 1313, 105 Cal. Rptr. 305 (1973). The traditional right of a school principal to summarily
suspend a student was held offensive to due process. Goss v. Lopez, 419 U.S. 565 (1975).
Alabama's tradition of holding a preliminary hearing without participation by defense counsel
was also found to violate due process. Coleman v. Alabama, 399 U.S. 1 (1969).
88. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); Brown, supra note 86,
at 473; Wickersham, supra note 86, at 1160.
Cases: A Symposium at the Judicial Conference of the District of Columbia Circuit, 33 F.R.D.
47, 74 (1963) (remarks by T. Flannery, former Assistant United States Attorney for the District
of Columbia). But see Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455 (1965); Traynor,
90. CAL. PENAL CODE § 938.1 (West Supp. 1976), amending CAL. PENAL CODE § 938.1
(West 1970). The California legislature has recently extended its disclosure rule to include dis-
closure of grand jury proceedings in connection with subsequent or pending criminal proceed-
ings even when the jury did not return an indictment. CAL. PENAL CODE § 924.6 (West Supp.
1976).
91. Professor Samuel Dash outlines and refutes these arguments which he describes as
gossamer. Dash, supra note 80, at 819-22. See also Justice Mosk's concurrence in Johnson:
It may be argued, for example, that in certain cases there is an overwhelming need
for the secrecy which can be obtained only through the grand jury, either for the
protection of witnesses or, in rare instances, for the protection of the defendant
himself. (See People v. Sirhan (1972) 7 Cal.3d 710, [102 Cal. Rptr. 385, 497 P.2d
1121.]) However, once an indictment is returned these considerations can no longer
be considered operative, because whatever secrecy was achieved through the grand
jury will be forsaken when the defendant is brought to trial.
15 Cal. 3d at 266 n.13, 539 P.2d at 804 n.13, 124 Cal. Rptr. at 44 n.13.

Significantly, the traditional secrecy of the grand jury has been considerably eroded in the
federal system by Supreme Court decisions. Dennis v. United States, 384 U.S. 855 (1966);
There are, therefore, serious due process problems with the California grand jury procedures. Allowing the prosecutor to choose between two procedures—one of which is replete with the rights considered fundamental to a fair system of law, the other offering none of these protections—has created a system which violates the constitutional due process mandate. Since the constitutional provisions which allow use of the grand jury do not specify procedures, the courts could bring the grand jury into compliance with the standards set for other state institutions by demanding fundamentally fair procedures.

To remedy the constitutional infirmities of the grand jury, Justice Mosk proposed a postindictment preliminary hearing with all its attendant procedural protections. Since the prosecutor would have to face an independent magistrate, this hearing would diminish the harassment value of the indictment and would provide another screening device to protect the innocent accused.

However, the postindictment hearing proposed by Justice Mosk would have undesirable effects. First, if the grand jury issued an indictment, but the magistrate found no probable cause at the postindictment hearing, the judgment of the grand jury would become meaningless. Such a result is unacceptable because it would undermine one of the legitimate values of the grand jury: providing a means of citizen participation in the criminal system. The postindictment hearing would reduce the grand jury's role to that of an advisor and thus the role of the citizen in the criminal process would also be considerably reduced.

In People v. Uhlemann, a pre-Johnson case, the California Supreme Court held that if a magistrate found no probable cause, the prosecutor could subsequently refile the charges before another magistrate or the grand jury. In a vigorous dissent, Justice Mosk contended that the "result permitted by the majority tends to demean the very function of the preliminary hearing." Ironically, Justice Mosk's proposal would have the same effect on the relative status of the grand jury indictment since the postindictment magistrate would be free to reject the findings of the grand jury.

Second, since both the postindictment magistrate and the grand jury

92. Dash, supra note 91, at 815.
95. Id. at 674, 511 P.2d at 617, 108 Cal. Rptr. at 665.
would be making the same probable cause determination, a new element of delay would be introduced into the criminal system. Delay from multiple determinations of the same issue has been repeatedly attacked. Judge Macklin Fleming of the Court of Appeal of California is among the critics of such delay:

From the defendant's point of view multiple review serves several purposes. First, it delays proceedings interminably, and a defendant who does not wish to stand trial on the merits expects to profit from delay. Witnesses and evidence may be lost, and memories may grow dim. Second, while the case is at a standstill, there is always the possibility the law will be changed in defendant's favor, either by new legislation or by new interpretation of existing law from the courts. Third, the more steps involved in the litigation, the more possibilities of ultimate error. If in one of these multiple reviews a valid claim of error can be developed, then the thrust of the litigation can be changed from an accusation against the defendant to an accusation against the court, the district attorney, or some public official based on the latter's failure to grant the defendant his full legal and constitutional rights.

Although California prosecutors presently take very few cases to the grand jury, it is likely that even fewer cases would be initiated through indictment if the prosecutor were asked to interpose an unnecessary added step in the pretrial proceedings.

Finally, Justice Mosk's proposal ignores the essential problem—the grand jury itself. Justice Mosk dismissed the majority approach as "palliative," accusing the majority of offering "a mere analgesic to ease the procedural pain instead of probing the need for substantive corrective surgery." However, Justice Mosk himself ignored the extent to which the grand jury is ailing.

There seems to be a general consensus within the legal community that the grand jury is an embarrassment to the judicial system, but that con-

96. For example, Professor Lewis Katz and his coauthors have stated: "Mindful that each step in the judicial process consumes some time, whether it is worthwhile or not depends upon how much is accomplished at that stage. The grand jury proceeding, which accomplishes nothing and merely duplicates previous steps, certainly causes unwarranted delay." L. KATZ, L. LITWIN & R. BAMBERGER, JUSTICE IS THE CRIME 122 (1972) (footnotes omitted).


99. 15 Cal. 3d at 285, 539 P.2d at 797, 124 Cal. Rptr. at 37.

100. Even the Supreme Court of the United States acknowledged that: "The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary
institutional structure and tradition demand that it remain unchanged. The California Supreme Court in *Johnson v. Superior Court* has taken one small step toward restoring the dignity and independence of the grand jury. To continue this restoration and to fulfill the constitutional requirements of the fourteenth amendment, courts and legislatures should consider further action. Grand jurors should be fully educated regarding their rights, powers, and duties prior to the beginning of their terms. The on-the-job training presently given grand jurors by the prosecutor can only contribute to their dependence on him. The grand jury should be provided with special, independent counsel for advice on the myriad of legal matters that confront it. The defendant who faces indictment should be given the opportunity to appear and testify before the grand jury. When called to give testimony, the accused should be afforded the assistance of counsel. The courts or legislatures should delineate the circumstances in which indictments should or must be used. Finally, in the absence of new evidence or unusual circumstances, a finding of no probable cause by the grand jury or the magistrate should bar the prosecutor from further pursuit of an indictment.

citizen and an overzealous prosecutor. . . .” United States v. Dionisio, 410 U.S. 1, 17 (1973). Significantly, the states have not been required to institute the indictment as a condition precedent to a felony prosecution through incorporation under the due process clause of the fourteenth amendment. Hurtado v. California, 110 U.S. 516 (1884).

101. It should be noted, however, that neither the United States nor California constitutional provisions requiring grand jury indictments prescribe the procedures for that institution. Johnson v. Superior Court, 15 Cal. 3d 248, 261-62 n.10, 539 P.2d 792, 801 n.10, 124 Cal. Rptr. 32, 41 n.10 (1975) (Mosk, J., concurring).


103. See Braun, *The Grand Jury—Spirit of the Community?*, 15 ARIZ. L. REV. 893, 916 (1973); Bickner, supra note 102, at 737; San Diego Bar Ass’n, supra note 102, at 176.

104. Final Report on the Grand Jury System in Cuyahoga County, November 3, 1975, at 99 (unpublished report of Case Western Reserve University School of Law); San Diego Bar Ass’n, supra note 102, at 175.


The state of Arizona allows the accused to have an attorney present during testimony before the grand jury. ARIZ. REV. STATS. ANN. § 21-412. (1975).


Only through significant reforms can the indicting grand jury become the protector of the innocent accused. If constitutional integrity is to be achieved, the rejuvenation of the grand jury indictment procedure must become a judicial and legislative priority. As long as the grand jury remains the puppet of the prosecutor it can only degrade the criminal system.

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