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Johnson v. Superior Court—The Future of the Grand Jury Indictment in California

Johnson v. Superior Court[1] presented the California Supreme Court with a challenge to the indicting function of the grand jury as presently constituted in California. This challenge arose from a juxtaposition of the grand jury procedure and the alternative preliminary hearing/information procedure authorized in Article 1, section 14 of the California Constitution.[2]

Lowell Ray Johnson, defendant and petitioner before the Court, was charged with the illegal transportation and sale of amphetamines[3] and with conspiracy.[4] The district attorney first sought to proceed by way of an information, and a preliminary hearing was held before the magistrate. At the preliminary hearing, the defendant testified in his own behalf; this testimony convinced the magistrate to dismiss the complaint.[5] The district attorney then took his case to the grand jury, and the grand jury returned an indictment against the defendant on the same charges as set forth in the previously dismissed complaint.

Petitioner challenged the indictment on the ground that the district attorney failed to inform the grand jury of the testimony at the preliminary hearing. He claimed that the district attorney was under an obligation to advise the grand jury as to the nature and

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

2. Article 1, section 14 of the California constitution provides: "Felonies shall be prosecuted as provided by law either by indictment or, after examination and commitment by a magistrate, by information."

3. CAL. HEALTH & SAFETY CODE § 11352 (West 1975).

4. CAL. PENAL CODE § 182 (West 1970).

5. 15 Cal. 3d at 250, 539 P.2d at 793, 124 Cal. Rptr. at 33.

existence of any exculpatory evidence known to him pursuant to Penal Code section 939.7.[6]

He also maintained that, in addition to failing to bring petitioner's preliminary hearing testimony to the attention of the grand jury, the district attorney fostered the implication that if called to testify before the grand jury the petitioner would refuse to do so and would invoke the privilege against self-incrimination.[7] He did this by recalling the arresting officer before the grand jury for the purpose of eliciting testimony from him to the effect that, after having been advised of his *Miranda* rights and on advice of counsel, the petitioner had refused to make a statement to the police. Petitioner further challenged the indictment on the constitutional ground that the grand jury proceedings constituted a denial of due process.

The Court chose to decide the case on the former ground, stating:

> . . . when a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obliged under section 939.7 to inform the grand jury of its nature and existence, so that the grand jury may exercise its power under the statute to order the evidence produced.[8]

Having decided the case on statutory grounds, the Court declined to review the petitioner's constitutional attack on the grand jury proceeding. Not all of the concurring justices[9] were so reticent, however, and their remarks clearly indicate they are willing to confront the constitutional issues.

In his concurring opinion, Justice Tobriner recognized the seriousness of the questions presented, but he was reluctant to address them in the present case. Tobriner stated:

> . . . the current application of the grand jury indictment function raises serious constitutional questions. In my view, however, a

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6. CAL. PENAL CODE § 939.7 (West 1970) provides: "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."

7. Under CAL. PENAL CODE § 939.7 the defendant has no right to be heard by the grand jury and may only testify if the jury calls him as a witness.

8. 15 Cal. 3d at 255, 539 P.2d at 796, 124 Cal. Rptr. at 36.

9. Justices Tobriner, McComb, Sullivan and Burke (Retired Associate Justice sitting under assignment by the Chairman of the Judicial Council) concurred in the majority opinion. Justice Mosk, joined by Chief Justice Wright, concurred in the result but would have reached the due process and equal protection issues.

> determination of such fundamental issues should properly await a case in which these questions have been directly raised and argued by the parties. Since that is not the case here, I express no opinion on the merits of these constitutional claims.[10]

Justice Mosk, joined in his concurring opinion by Chief Justice Wright, was willing to reach the due process argument made by petitioner as well as the equal protection issue raised and acknowledged by Justice Mosk in an earlier case.[11] Justice Mosk and Chief Justice Wright indicated that they were ready to hold that the indicting function of the grand jury as presently constituted and exercised in California does in fact violate both due process and equal protection standards. Justice Mosk's concurring opinion presents a significant break with tradition and holds important implications for the future of the grand jury in California.[12]

The due process challenge to the procedures for initiating a felony prosecution is not new. Ironically, early challenges were not directed at the indictment procedure. Instead, they were directed against the information. The argument was made at an early date that felonies were constitutionally required to be prosecuted only on indictment by a grand jury. It was urged that the Fifth Amendment mandated the grand jury procedure, and that the due process clause of the Fourteenth Amendment required this procedure to be followed by the states. The United States Supreme Court answered this claim by rejecting it in *Hurtado v. California*[13] in 1883.

Thus, the constitutionality of the information was established before the turn of the century.[14] Since that time, the informa-

10. 15 Cal. 3d at 270, 539 P.2d at 807, 124 Cal. Rptr. at 47.

11. People v. Uhlemann, 9 Cal. 3d 662, 511 P.2d 609, 108 Cal. Rptr. 657 (1973).

12. It is important to keep in mind that the challenge was only to the grand jury's indicting function and did not concern any of its other functions, e.g., the investigative and the so-called "watchdog" functions. *See*, 15 Cal. 3d at 256 n. 1, 539 P.2d at 797 n. 1, 124 Cal. Rptr. at 37 n. 1.

13. Hurtado v. California, 110 U.S. 516 (1883). In *Hurtado*, the Court stated that due process did not require the states to follow the same procedures as were specified for the federal system. The Court held that due process is satisfied when the state deals with individuals in a regular manner, according to prescribed forms, and in accordance with general rules for the protection of individual rights. Hurtado v. California, *supra* at 535-6.

14. In addition to the Fifth and Fourteenth Amendment due process ar-

tion procedure, in particular the preliminary hearing, has been imbued with an increasing number of safeguards.[15] The grand jury, however, has remained unchanged and has come under increasing criticism.[16] The separate development of these parallel procedures has resulted in two distinctly different methods of initiating a felony prosecution. Justice Mosk contrasts them as follows:

> If prosecution is begun by information the accused immediately becomes entitled to an impressive array of procedural rights, including a preliminary hearing before a neutral and legally knowledgeable magistrate, representation by retained or appointed counsel, the confrontation and cross-examination of hostile witnesses, and the opportunity to personally appear and affirmatively present exculpatory evidence. (citations)
>
> By contrast, the indictment procedure is distinctive because of its deliberate omission of even minimal safeguards. Penal Code section 939.7 captures the spirit of the proceeding by declaring forthrightly that "The grand jury is not required to hear evidence for the defendant . . ." Far from being allowed to be represented by counsel or to confront and cross-examine witnesses, the accused himself has no right to appear unless called by the prosecution and if he is called he is denied the presence of counsel. The proceedings are conducted in absolute secrecy, and in many cases the prospective indictee may not even be aware he is the subject to an inquiry . . .[17]

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gument, the argument was made that the right to a grand jury indictment was a privilege and/or immunity of citizenship protected under the Fourteenth Amendment. This contention was rejected by the United States Supreme Court in Maxwell v. Dow, 176 U.S. 581 (1899).

15. *See* CAL. PENAL CODE § 860 (magistrate must allow time for defendant to obtain counsel), § 865 (witnesses must be examined in presence of defendant and may be cross-examined), § 866 (defendant may present his own witnesses), and § 866.5 (defendant may not be examined unless represented by counsel or unless he waives right to counsel). (West 1970).

16. *See* Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 MICH. L. REV. 402 (1931) and Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101 (1931). Both of these studies grounded their criticism on prosecutorial abuse of the grand jury system and the inefficiency of the grand jury. They did not reach the constitutional problems. An earlier article, Miller, *Informations or Indictments in Felony Cases*, 8 MINN. L. REV. 379 (1924) had hinted at the constitutional issues, but again the primary concern was with the efficiency of the procedure. *But see* Dession, *From Indictment to Information—Implications of the Shift*, 42 YALE L.J. 163 (1932) and Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L.C. & P.S. 214 (1955).

17. 15 Cal. 3d at 256-7, 539 P.2d at 797, 124 Cal. Rptr. at 37. *See also* People v. Goldenson, 76 Cal. 328, 19 P. 161 (1888), where the defendant moved to strike the indictment as being invalid in that there had been (1) no examination by a magistrate prior to the filing of the indictment, (2) no opportunity to send for counsel, (3) no notice of the grand jury investigation, (4) no opportunity to confront the witnesses against him, and (5) no transcription of testimony before the grand jury. The California Supreme Court responded: "The defendant was not entitled to notice that the grand jury was investigating a charge against him, nor was he entitled to

Given the lower level of procedural safeguards which Justice Mosk attributes to the grand jury procedure, does a prosecution by indictment fail to meet due process standards? A series of California cases have dealt with the issue and resolved it in favor of the grand jury procedure.

In 1969, in the case of *People v. Flores*[18] the District Court of Appeal held that the purpose of the grand jury indictment was merely to inform the defendant of the charges which he was to meet at trial. If the defendant was made aware of the charges against him, "[t]here was no denial of his constitutional rights . . ."[19] *People v. Rojas*,[20] decided later the same year, also rejected the claim that the grand jury procedure denied the defendant due process, relying heavily on the historical prominence of the grand jury.[21]

People v. Newton[22] and *People v. Pearce*[23] followed in 1970. The *Newton* court refused to discuss the due process issue raised by the defendant, citing *Flores*, but reversed the conviction.[24] The

be heard or have witnesses sworn and examined by that body, unless it called for the same. [citations omitted] The objection that no examination was held before a committing magistrate does not apply in cases of indictment, although good in case of an information." People v. Goldenson, *supra* at 345, 19 P. at 169.

18. People v. Flores, 276 Cal. App. 2d 61, 81 Cal. Rptr. 197 (1969).

19. *Id.* at 66, 81 Cal. Rptr. at 200.

20. People v. Rojas, 2 Cal. App. 3d 767, 82 Cal. Rptr. 862 (1969). The primary issue in the *Rojas* case was whether or not the presence of a witness in the grand jury room other than the witness then being examined invalidated the indictment under CAL. PENAL CODE § 939. The court held that the indictment was valid.

21. The court stated: "It is true . . . the indictment procedure denies a defendant certain rights that have been recognized under the United States Constitution and the California Constitution. However, the courts have consistently approved the use of the grand jury indictment procedure to hold a defendant to answer. Historically, the procedure antedates the information and preliminary hearing." 2 Cal. App. 3d at 771, 82 Cal. Rptr. at 864.

22. People v. Newton, 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (1970).

23. People v. Pearce, 8 Cal. App. 3d 984, 87 Cal. Rptr. 814 (1970).

24. The conviction of Black Panther leader Huey P. Newton was reversed on the ground that allowing the prosecution to read testimony of a witness before the grand jury to the jury at trial when that same witness claimed at trial that he could not remember his previous testimony constituted a denial of the right to cross-examination. Thus the court was able to avoid condemning the grand jury procedure while acknowledging that the hearing did not provide ultimate protection of the defendant's due process rights.

response of the *Pearce* court, foreshadowed in the *Newton* result, was that the indicted defendant is not denied due process since all of the procedural safeguards attach at trial. The court implied that the defendant was more concerned for his discovery needs than for his constitutional rights.[25]

Notwithstanding *Flores*, *Rojas*, *Newton* and *Pearce*, the constitutional attack on the grand jury indictment was again mounted in 1971[26] and 1972.[27] In each case, the attack was rebuffed without discussion. The unwillingness of the courts in the above mentioned cases to analyze the grand jury procedure in light of modern due process requirements may indicate a reluctance to withdraw constitutional support for an institution having the age and stature of the grand jury.[28] It is the grand jury which is mentioned by name in the Bill of Rights.[29] There is no such mention of the preliminary hearing. However, age alone should not be enough to sustain, unchanged, an institution which no longer adequately serves its original purpose.[30]

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25. The implication and the court's attitude toward this possibility are found in the following language from the *Pearce* decision: ". . . the consideration incident to the return of an indictment is not a trial but an inquiry into whether the charge should be made at all [citation omitted] to say that this procedure prejudices an individual fails to balance the benefits derived through lack of public accusation with that of a confrontation of witnesses [citation omitted], prior to a trial." 8 Cal. App. 3d at 987, 87 Cal. Rptr. at 816.

26. *In re* Wells, 20 Cal. App. 3d 640, 98 Cal. Rptr. 1 (1971).

27. People v. Sirhan, 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972).

28. The United States Supreme Court indicated its reverence for the grand jury institution in the case of United States v. Dionisio, 410 U.S. 1 (1972).

That case involved the investigative function of the grand jury and while the Court upheld the broad scope of that function, it was forced to note, "The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor. . . ." United States v. Dionisio *supra* at 17. Justice Douglas, in dissent, was not so charitable. Quoting Judge William Campbell of the United States District Court in Chicago, Illinois, Douglas contended: "This institution of the past has long ceased to be a guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor—too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before a grand jury." United States v. Dionisio, *supra* at 23. The remarks of Justice Campbell are found in 55 F.R.D. 229, 253 (1972).

For a critical discussion of the relationship between the prosecutor and the grand jury see, Johnson, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L.C. & P.S. 157 (1974).

29. U.S. CONST. amend. V provides "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."

30. *See* Duff and Harrison, *The Grand Jury in Illinois: To Slaughter a Sacred Cow*, 1973 U. OF ILL. L.F. 635.

That a more thorough analysis is necessary was indicated by the court in *People v. Baker*.[31] Though the court in that case was reviewing a challenge to the preliminary hearing and information, its remarks foreshadowed the present conflict. The *Baker* court stated:

> Until *Hurtado v. California* is overruled, we deem such a proceeding more than adequate. In our opinion, proceeding by way of information and preliminary examination is more substantial due process than proceeding by way of indictment.[32]

The availability of a procedure which offers "more substantial due process" than the grand jury procedure[33] demands that challenges to the grand jury procedure be reviewed carefully. However, the closest the courts have come to providing a reason for their support of the grand jury system, other than the purely historical reason, has been in the *Newton* and *Pearce* cases. In those two cases, the courts relied on the fact that all of a defendant's procedural due process rights are always available to him at trial.[34] Pretrial procedures in no way alter these rights at trial.

Justice Mosk responds to this argument with an analysis of the decision of the United States Supreme Court in *Coleman v. Alabama*.[35] In that case, the Supreme Court held that the Alabama preliminary hearing was a "critical stage" of the criminal process and that the "guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against erroneous or improper prosecution."[36] The import of the decision and the rationale behind it are emphasized when it is noted that the preliminary hearing under consideration by the Court in *Coleman* had as its only function the determination of whether or not sufficient evidence existed to bring a case before the grand jury. Therefore, according to Justice Mosk, "[t]he conclusion is inescapable that if a *pre*indictment proceeding is a critical stage of the criminal justice process requiring due process safeguards, a fortiori the indictment proceeding itself is a critical stage."[37]

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31. People v. Baker, 231 Cal. App. 2d 301, 41 Cal. Rptr. 696 (1964).
32. *Id.* at 307, 41 Cal. Rptr. at 699-700.
33. *Id.*
34. People v. Pearce, 8 Cal. App. 3d 984, 87 Cal. Rptr. 814 (1970) and People v. Newton, 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (1970).
35. Coleman v. Alabama, 399 U.S. 1 (1970).
36. *Id.* at 9.
37. 15 Cal. 3d at 262, 539 P.2d at 801, 124 Cal. Rptr. at 41.

After reviewing the due process safeguards which have been required at other stages in the criminal process, e.g., at a line-up,[38] at parole revocation hearings[39] and at prison disciplinary hearings,[40] Justice Mosk concludes:

> The traditional counterargument that the grand jury merely inquires into whether there is probable cause to bind the defendant over for trial, thus avoiding any need for due process safeguards, can no longer be considered valid after *Coleman*, *Morrissey* and their progeny. As noted, in *Coleman* the Alabama preliminary hearing determined only whether there was probable cause to present the case to the grand jury—not even whether there was probable cause to bind the defendant over for trial. Nevertheless the Supreme Court held that the potential jeopardy to the defendant was significant enough to trigger the demands of due process.[41]

The equal protection argument arising from the alternate use of the grand jury indictment and the information procedure has been less thoroughly discussed by the courts in spite of the fact that the argument has normally been made in conjunction with the due process argument.[42] As far back as 1900, in the case of *State v. Tucker*,[43] the Supreme Court of Oregon was faced with the question of whether allowing the prosecutor the choice of proceeding by way of indictment or by way of information creates a denial of equal protection. The Oregon Court responded:

> A fault is attributed to the law, that it is left to the will and caprice of the court or prosecuting attorney whether to pursue the one or the other method of prosecution, and therefore that its operation will not be equal and uniform; that it will not affect all individuals alike, and therefore some may be deprived of the equal protection of the laws. . . . The manner of preferring the accusation is of preliminary import, and whether it shall be done by a grand jury or by a public prosecutor, or concurrently by both, has, whether wisely or not, been left to the wisdom of the legislature to determine.[44]

The California courts which have discussed the equal protection issue in the context of the grand jury and preliminary hearing procedures have chosen to deal with the issue more directly.

In *People v. Pearce*,[45] the court considered the issue and held that equal protection did not require absolute equality.[46] The

38. United States v. Wade, 388 U.S. 218 (1967).
39. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).
40. Wolff v. McDonnell, 418 U.S. 539 (1974).
41. 15 Cal. 3d at 263-4, 539 P.2d at 802, 124 Cal. Rptr. at 42.
42. *Flores*, *Rojas*, *Newton* and *Pearce* all presented equal protection arguments to the courts.
43. State v. Tucker, 36 Or. 291, 61 P. 894 (1900).
44. *Id.* at 301-2, 61 P. at 897.
45. 8 Cal. App. 3d 984, 87 Cal. Rptr. 814 (1970).
46. Quoting Norvell v. Illinois, 373 U.S. 420 (1963) the *Pearce* court

court in that case further stated: "Generally, such unequal enforcement must be accompanied by a malicious intent on the part of the prosecution before it constitutes a denial of equal protection. . . ."[47] This conclusion is highly questionable in light of the California Supreme Court's discussion of the requirements of equal protection in *In re Antazo*.[48] The Court in *Antazo* noted that even the fact that the difference in treatment was unintended would not preclude an attack on equal protection grounds.[49] According to the decision in *Antazo*, the requirements of equal protection demand that persons similarly situated must receive like treatment under the law.[50]

Justice Mosk notes the holding of *Antazo* and outlines the equal protection argument in the context of the grand jury and preliminary hearing in the following manner. To begin, Mosk acknowledges that there are at least two ways in which the constitutional requirement of equal protection may be applied:

> If "fundamental rights" are not involved the state may justify classifications if they are reasonably related to a letigimate state goal. If fundamental rights or "suspect classifications" are involved the state bears the heavy burden of demonstrating a "compelling" interest.[51]

After a further discussion of the above standards, the opinion continues:

> 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. . . . The two classes are . . . identical and indeed, as the instant case demonstrates, embrace not only the same crimes but occasionally the same individual.[52]

According to Mosk, the classification is not based on a legitimate state objective in that it

> . . . is grounded on the arbitrary goal of vesting in the People vast prosecutorial advantages which the grand jury system affords.

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stated: "Exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment." 8 Cal. App. 3d at 988, 87 Cal. Rptr. at 817.

47. 8 Cal. App. 3d at 988, 87 Cal. Rptr. at 817.
48. *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).
49. *Id.* at 109, 473 P.2d at 1004, 89 Cal. Rptr. at 260.
50. *Id.* at 110, 473 P.2d at 1005, 89 Cal. Rptr. at 261.
51. 15 Cal. 3d at 265, 539 P.2d at 803, 124 Cal. Rptr. at 43.
52. *Id.* at 265, 539 P.2d at 803, 124 Cal. Rptr. at 43.

> Moreover, these classifications . . . involve such fundamental rights as counsel, confrontation, the right to personally appear, the right to a hearing before a judicial officer, and the right to be free from unwarranted prosecution. These guarantees are expressly or impliedly grounded in both the state and federal Constitutions and must by any test be deemed "fundamental" . . . in order to justify such a selective denial of fundamental guarantees the state must show not only a compelling interest but also that the classifications are necessary to that end.[53]

As already indicated, Justice Mosk finds no legitimate state interest in denying the criminal defendant the right to a preliminary hearing. Furthermore, it is his position that even if a compelling state interest were found, it would not be necessary to that interest to deny the hearing before a magistrate. Justice Mosk summarizes his position by stating:

> For the foregoing reasons I am of the view that equal protection requires that all criminal defendants have the same opportunity to prove to a magistrate that there is no probable cause to bind them over for trial. . . . A proceeding of such significance cannot, consistent with the constitutional mandate of equal protection, be selectively denied.[54]

Thus, Justice Mosk believes that the present California grand jury indictment procedure necessarily results in a denial of due process and equal protection to the criminal defendant. If the views set out in Justice Mosk's concurring opinion in *Johnson* are accepted by a majority of the California Supreme Court, what are the prospects for the future of the California grand jury with regard to its indicting function? Can the grand jury procedure be altered to provide for the procedural safeguards now required at a preliminary hearing? Or will it be necessary to develop an additional procedure such as the postindictment preliminary hearing favored by Justice Mosk?[55]

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53. *Id.* at 265-6, 539 P.2d at 803-4, 124 Cal. Rptr. at 43-4.

54. *Id.* at 267, 539 P.2d at 805, 124 Cal. Rptr. at 45.

55. *See also* Note, *Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence*, 39 U. CHI. L. REV. 761 (1972). The author concentrates his criticism of the grand jury on the inherent conflict in the role of the prosecutor before the grand jury. Viewing the problem as arising from the fact that as a representative of the state it is the prosecutor's job to secure convictions while his duty before the grand jury is to advise the jurors in their determination of probable cause, he suggests that it is necessary to protect the grand jury from undue influence by the prosecutor. To accomplish this, he recommends that the jurors should be allowed to testify as to the acts of the district attorney in the grand jury hearings, and further that the realm within which the undue influence doctrine should be applied should be extended to reach the prosecutor's public statements with regard to the matters before the grand jury. This solution, however, totally ignores the due process and equal protection deficiencies attributed to the grand jury procedure.

It has been suggested that the constitutional deficiencies of the grand jury can be remedied by providing counsel for the defendant at the grand jury hearing.[56] Referring to the holding in *Coleman v. Alabama*, it has been argued that, "If the accused is in need of a lawyer to argue the probable cause issue before a judicial officer, the presence of counsel is even more indispensable when a body of laymen is called upon to apply this legal standard."[57] However, to provide defense counsel at the grand jury hearing would transform it into an adversary proceeding with little to distinguish it from the preliminary hearing. Even Justice Mosk does not appear to be willing to change the structure of the grand jury to such an extent. Recalling the *Sirhan* case, Mosk states, "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."[58]

Because the need for secrecy does not survive the indictment, Justice Mosk would provide the accused with the right to demand a postindictment preliminary hearing. Thus, the unique advantages of the grand jury are preserved, and the defendant is not prejudiced by being forced to trial under circumstances which deny him important constitutional rights. Justice Mosk notes that ". . . the facts of the instant case provide an excellent demonstration of the potential value of such a postindictment hearing."[59] Citing the district attorney's failure to inform the grand jury as to Johnson's preliminary hearing testimony and his attempt to dissuade the grand jury from calling Johnson to testify before it, Mosk supports his proposal, stating:

> It appears obvious that the district attorney was determined to initiate this prosecution in a forum that would preclude petitioner from testifying in his own behalf. If this tactic would be unavailing because of the defendant's right to a subsequent preliminary hearing, a prosecutor would have no incentive to engage in such devious gamesmanship.[60]

The postindictment preliminary hearing has already been re-

56. Dash, *The Indicting Grand Jury: A Critical Stage?* 10 AM. CRIM. L. REV. 807 (1972).
57. *Id.* at 815.
58. 15 Cal. 3d at 266 n.13, 539 P.2d at 804 n.13, 124 Cal. Rptr. at 44 n.13.
59. *Id.* at 268, 539 P.2d at 805, 124 Cal. Rptr. at 45.
60. *Id.*

quired in Michigan.[61] However, the status of this procedure in California remains uncertain. Judge Kenneth Andreen of the Fresno Superior Court ordered a postindictment hearing in a case involving five counts of murder. The attorney general, acting for the district attorney, appealed the ruling and obtained a stay from the Fifth District Court of Appeal. The matter was denied hearing by the California Supreme Court.[62] Similarly, Los Angeles Superior Court Judge Billy Mills ordered a postindictment preliminary hearing on November 6, 1975.[63] In the Los Angeles case, the district attorney dismissed the case before the hearing could be held. Most recently, the First District Court of Appeal issued a writ of prohibition restraining a superior court from sending a case to the municipal court for a postindictment preliminary hearing. The court further reprimanded the lower court judge for making the order appealed from.[64]

Meanwhile, the California Supreme Court appears to be willing to let the lower courts struggle with the issue of how to proceed in cases where the defendant challenges the grand jury indictment. Though the Court has been asked to hear several cases raising the due process and equal protection arguments outlined by Justice Mosk's concurring opinion in *Johnson*, a further hearing on the issues has not yet been granted.[65]

SUZANNE HAIGH

61. People v. Duncan, 388 Mich. 489, 201 N.W.2d 629 (1972).
62. People v. Superior Court (Garcia), 5 Civ. 2783 (Cal. Supreme Ct., hearing denied Feb. 11, 1976).
63. People v. Cox, A303925 (L.A. Superior Ct., Nov. 6, 1975).
64. People v. Superior Court (Persons), 55 Cal. App. 3d 191, 128 Cal. Rptr. 314 (1976).
65. Word v. Superior Court, 1 Civ. 37967 (Cal. Supreme Ct., hearing denied Dec. 10, 1975); People v. Clements, 4 Crim. 7147 (Cal. Supreme Ct., hearing denied Dec. 29, 1975).