COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12429

COMMONWEALTH OF MASSACHUSETTS,

PLAINTIFF – APPELLANT,

v.

STEPHANIE FERNANDES,

DEFENDANT – APPELLEE

ON APPEAL FROM THE GRANT OF THE MOTION TO DISMISS ENTERED IN THE WORCESTER DIVISION OF THE SUPERIOR COURT DEPARTMENT

AMICUS CURIAE BRIEF OF MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE DEFENDANT–APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Interest of Amicus Curiae

The Massachusetts Association of Criminal Defense Lawyers (MACDL), as *amicus curiae*, submits this brief in support of Defendant-Appellee Stephanie Fernandes. MACDL is an incorporated association of more than 1,000 trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense.

MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to correct, problems in the criminal justice system. It files *amicus curiae* briefs in cases raising questions of importance to the administration of justice.

This case presents an issue important to MACDL. MACDL has an interest in advocating its views on the extension of the Walczak rule to all murder defendants because clients represented by the attorneys who constitute MACDL's membership have been and will

continue to be directly affected by this doctrine. Furthermore, because MACDL is dedicated to promoting fairness and justice in the criminal justice system, it has an interest in ensuring that the basic principles of criminal jurisprudence are consistently applied and upheld.

Statement of Issues

As it relates to the interests of MACDL, this case raises the following issue:

> Whether, as with juvenile defendants, the failure to instruct a grand jury weighing an indictment for murder on the legal significance of mitigating evidence or affirmative defenses impairs the integrity of the proceedings, where there is substantial evidence of such mitigation or defenses?

Statement of the Case and Statement of the Facts

MACDL adopts the statement of the case and statement of the facts set forth in the brief of Defendant-Appellee Stephanie Fernandes. Appellee's Br. at 1-16. In pertinent part, MACDL reiterates the following: Ms. Fernandes suffered a long string of abuses and threats by her fiancé, including choking, punching, smacking, and menacing her with a gun. Id.

at 1. Ms. Fernandes' fiancé had previously threatened to kill her. Id. at 9; 14. On May 7, 2014, Ms. Fernandes' fiancé again attacked and abused her, hitting her, punching her in the head, and choking her. Id. at 3. At one point, he held a hand gun to her. Id. When he continued hitting and choking Ms. Fernandes, she believed that she was going to die. Id. That evening, he died from a stab wound to his neck. Id. at 2.

Ms. Fernandes ran to get help from her neighbors. Id. at 3. When Ms. Fernandes' neighbor asked Ms. Fernandes if she had stabbed her fiancé, she replied, "I don't know." Id. at 6. When Ms. Fernandes was taken to the police station, the questioning officer noticed bruises on many areas of her body. Id. at 2. He asked her about the bruising and stated his belief that "something terrible happened" to Ms. Fernandes. Id. Ms. Fernandes then disclosed that her fiancé had attacked her that night and described the long pattern of abuse by her fiancé. Id. at 3.

Ms. Fernandes was initially charged with manslaughter and assault and battery with a dangerous weapon. Id. at 3. After a long series of four grand jury proceedings, spanning a year, the final grand jury indicted Ms. Fernandes for murder on June 16, 2015. In

the course of those proceedings, the Commonwealth did not provide legal instruction to the grand jury regarding mitigation or affirmative defenses. Id. at 4-5.

Introduction and Summary of the Argument

This Court has long recognized that "the right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities of the innocent against hasty, malicious and oppressive public prosecutions." Jones v. Robbins, 74 Mass. 329, 344 (1857). That right is especially critical when an individual stands accused of murder, an offense for which public accusation carries particular negative consequences, and for which the punishment – life imprisonment – represents the maximum penalty imposed by law in Massachusetts.

Owing largely to these consequences, this Court has held that in any case in which the Commonwealth seeks to indict a juvenile for murder, the grand jury must be instructed by the prosecutor on the elements of murder, as well as any mitigating circumstances and defenses

(other than lack of criminal responsibility) raised by the evidence. Commonwealth v. Walczak, 463 Mass. 808, 809 (2012). While several justices of the Court have sought to apply this rule more broadly to any murder indictment – not just the indictment of a juvenile – the Court has thus far stopped short of a more systematic and broader application. In Commonwealth v. Grassie, however, the Court directed that a committee be formed ("the Committee") to survey the different prosecutors' offices in the Commonwealth to equip itself with information about current practices should the opportunity to extend Walczak beyond juveniles present itself in future cases. 476 Mass. 202 (2016).

This case presents that opportunity. After a series of four grand jury proceedings, the Defendant-Appellee was indicted for murder despite substantial evidence that she suffered a long string of abuses and threats by the decedent (her fiancé), including evidence that the decedent attacked her on the night of his death. Notwithstanding this evidence, the Commonwealth did not provide legal instruction to the grand jury regarding mitigation or affirmative defenses.

Following the Defendant-Appellee's conviction, the Committee established by the Court in Grassie released

its report ("the Report"), which includes a summary of interviews with prosecutors' offices and proposed best practices for use by prosecutors making presentments to the grand jury. The Committee's Report underscores the need to extend the holding of Walczak beyond juvenile defendants. The Report shows that prosecutors in the Commonwealth apply vastly different standards in instructing grand jurors on the law. The lack of a uniform standard is a troubling sign that the right of the accused "to be secure from open and public accusations of crime and from the trouble, expense and anxiety of a public trial" – a right enshrined in more than 160 years of jurisprudence – is enforced unequally, haphazardly, and insufficiently. Moreover, the Report shows that the burden of expanding the Walczak holding would not impose an undue burden on prosecutors because, in fact, almost half the prosecutors' offices in the Commonwealth already give instructions on mitigation or affirmative defenses beyond what is presently required.

MACDL respectfully urges this Court to reaffirm the crucial role of the grand jury to protect the rights of the accused and to strengthen the integrity of grand jury proceedings by expanding the safeguards of Walczak regardless of the age of the accused. Where there is

substantial evidence of mitigation or affirmative defenses, the Commonwealth should always instruct the grand jury weighing a murder indictment on the legal significance of such evidence.

Argument

I. THE SJC SHOULD TAKE THIS OPPORTUNITY TO EXTEND WALCZAK TO ALL MURDER DEFENDANTS WHERE THERE IS 'SUBSTANTIAL EVIDENCE' OF MITIGATION OR DEFENSES.

Given the historical significance of the grand jury and the precedents of this Court, the grand jury should be instructed on the legal significance of mitigating evidence or affirmative defenses in weighing an indictment for murder against an adult defendant, just as with a juvenile defendant.

A. The Grand Jury is a Historically Significant Safeguard for Defendants.

The grand jury is a vitally important and historic component of the Commonwealth's criminal justice system, endowing defendants with rights that have been long recognized under Massachusetts law. Under art. 12 of the Massachusetts Declaration of Rights and G.L. c. 263, § 4, a defendant may not be indicted for a felony unless a grand jury, based on sufficient evidence, finds probable cause to believe that the defendant committed the crime charged. This right, which in Massachusetts

has its origin at common law prior to the drafting of the federal Constitution, is enshrined in the state's criminal justice system as "one of the great securities of private right, handed down to us as among the liberties and privileges which our ancestors enjoyed at the time of their emigration, and claimed to hold and retain as their birthright." Jones, 74 Mass. at 342-345 .

Historically, the right to a grand jury in Massachusetts attached when a defendant was subject to "capital" or "infamous" punishments. See, e.g. Jones, 74 Mass. at 347-48 (distinguishing between "infamous" punishments and "correctional" punishments). Today, it is available to defendants who risk imprisonment in state prison. G.L. c. 263, § 4. Massachusetts defendants who are indicted for murder risk the greatest possible minimum sentence – life in prison.[1]

B. The Prosecution is Disproportionately Favored in Grand Jury Proceedings, Despite that the Grand Jury is Meant to be Responsive to Various Constituencies.

[1] Advisory Sentencing Guidelines, Massachusetts Sentencing Commission (November 2017), https://www.mass.gov/files/documents/2018/07/10/Final%20Advisory%20Sentencing%20Guidelines%2020180621.pdf

The grand jury is comprised of citizens of the state who serve as the "voice of the community" in calling forth defendants to answer for their alleged crimes. Barker v. Fox, 238 S.E.2d 235, 236 (W. Va. 1977). Its role is to "stand[] between the accuser and the accused." Wood v. Georgia, 370 U.S. 375, 390 (1962). In this sense, the grand jury intermediates between various groups in the criminal justice system, namely, but not exclusively, the potential defendant and the prosecution. Comprised of members of the Commonwealth, the grand jury also brings a public voice to bear on the proceedings and the determination of probable cause.

Chief among these various constituencies, prosecutors -- "the most powerful officials in the criminal justice system" -- possess wide latitude in presenting evidence before the grand jury.[2] The prosecutor alone puts on evidence. This evidence need not be admissible at trial; indeed, an indictment can be based solely on hearsay testimony. Commonwealth v.

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[2] Note, Restoring Legitimacy: The Grand Jury As The Prosecutor's Administrative Agency, Harvard L. R. Vol 130:1205, 1207 (2017) (quoting Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor 5 (2007)).

O'Dell, 392 Mass. 445, 450-51 (1982). One of the reasons prosecutors are given so much latitude at the grand jury is because of the promise of a full jury trial in which the rules of evidence, exclusionary rules, and other protections to the defendant will be provided.[3] Indeed, "[i]t can fairly be said that the prosecutor holds all the cards before the grand jury." Commonwealth v. Walczak, 463 Mass. 808, 833 (2012) (Lenk, J. concurring).

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[3] "The fundamental challenge in developing procedures to enhance the grand jury's screening function is to adapt these procedures to the preliminary stage at which the grand jury operates, and to its unique inquisitorial character. The adversarial trial is the most refined screening device developed in the United States legal system. Grand jury procedures cannot reasonably replicate all aspects of trial procedure, both because the grand jury is intended to be a preliminary screening device serving a different function than the trial, and because the secret inquisitorial character of the grand jury is its defining characteristic… On the other hand…it is no longer the case that most or all of the cases presented to the grand jury will be presented at trial, and receive full adversarial testing. This change may warrant some greater degree of scrutiny at the grand jury stage (or the addition of a requirement for a preliminary examination)." Constitutional Rights and the Grand Jury: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 106th Cong. 53 (2000) (statement of Sara Sun Beale, professor of law, Duke University School of Law).

Yet the grand jury is also charged with protecting citizens against unfounded criminal prosecutions. Lataille v. District Court of Eastern Hampden, 366 Mass. 525, 532 (1974). MACDL respectfully submits that this function has been too long eclipsed by the prosecutor's ability to obtain determinations of probable cause without providing the full set of instructions necessary for the grand jury to perform its function in safeguarding the rights of the accused. This important public function is amplified by the fact that the vast majority of criminal cases end in plea bargains, such that the grand jury proceeding is usually the only time the public has a voice in the criminal process.[4]

In recognition of the prosecution's outsized role, many have criticized the grand jury as an "arm of the Executive." Indeed, some of these criticisms come from the United States Supreme Court itself. See United

[4] U.S. Department of Justice, Felony Defendants in Large Urban Counties, 2009 – Statistical Tables, Table 21, available at https://www.bjs.gov/content/pub/pdf/fdluc09.pdf; E. Yoffe, Innocence is Irrelevant, The Atlantic, available at https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/; Susan W. Brenner, The Voice of the Community: A Case for Grand Jury Independence, 3 Va. J. Soc. Pol'y & L. 67, 97-97 (1995).

States v. Mara, 410 U.S. 19, 23-24 (1973) ("It is, indeed, common knowledge that the Grand Jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive")(Douglas, J. dissenting).

In response to these criticisms, many — including prosecutors — have advocated for reforms to the grand jury as an institution. Of particular relevance, the American Bar Association ("ABA") House of Delegates adopted a series of grand jury reform legislative principles, one of which states:

> "The grand jury shall be informed as to the elements of the crimes considered by it." [5]

This principle was later promulgated by the National Association of Criminal Defense Lawyers ("NACDL") as part of their Federal Grand Jury Reform Report and Bill of Rights in May 2000:

> "The federal grand jurors shall be given meaningful jury instructions, on the record, regarding their

[5] Legislative principle #27, approved by the ABA House of Delegates in August, 1980.

duties and powers as grand jurors, and the charges they are to consider."[6]

(emphasis added).

Notably, these efforts all focus on providing more information and guidance to the grand jury, including the elements and the charges before them.

C. Now Is The Time To Extend This Court's Holding In Walczak To All Criminal Defendants Accused of Murder.

Building on a string of precedents, some dating back nearly a century, this Court convened a committee to consider the potential applicability of Walczak to adults accused of murder. The results of that committee's work support the extension of these precedents beyond juveniles.

1. Longstanding Massachusetts Law Supports Instructing Juries on all Elements of a Charge.

Far from enacting a massive change in practice, instructing juries on all elements of a charge finds support in long established Massachusetts precedents. Thus in Attorney General v. Pelletier, this Court

[6] National Association of Criminal Defense Lawyers, Federal Grand Jury Bill of Rights, #9, available at https://www.nacdl.org/criminaldefense.aspx?id=10372.

determined that "it is the duty of the district attorney in appropriate instances to advise [the grand jury] concerning the law." 240 Mass. 264, 307 (1922). At a minimum, those circumstances include when the grand jury asks for that instruction. Commonwealth v. Noble, 429 Mass. 44, 48 (1999) ("If the grand jurors had asked for instructions . . . the prosecutor should have provided the appropriate information."). These cases proceed from the understanding that it is incumbent that the grand jury understand what the law is and that, accordingly, the law imposes a duty on prosecutors to provide that instruction.

2. Protecting Juveniles Accused of Murder with Additional Grand Jury Instructions: The Walczak Decision.

In Walczak, the Supreme Judicial Court of Massachusetts (SJC) extended these same principles in holding that in cases in which a prosecutor seeks an indictment for murder against a juvenile and where there is substantial mitigating evidence, the prosecutor must give legal instructions on the elements of murder and the legal significance of the mitigating circumstances to preserve the integrity of the proceedings. 463 Mass. at 809 (2012).

In Walczak, the grand jury heard evidence that the killing had occurred in the context of a "sudden combat" in which the victim approached the defendant with others, informed the defendant he intended to rob him, and exchanged a series of blows with the defendant before the defendant pulled a knife and killed the victim. Despite this evidence, which was substantial, the prosecution failed to instruct the jurors on the elements of common law murder in Massachusetts and did not explain that a killing prompted by reasonable provocation or sudden combat mitigates murder to voluntary manslaughter. See Commonwealth v. Acevedo, 427 Mass. 714, 716 (1998) ("[I]f a person kills another in the heat of passion, which is occasioned by adequate and reasonable provocation, or in sudden combat, then even though that person had an intent to kill, the killing is designated manslaughter and not murder because of the mitigating circumstances."). The grand jury thereafter returned an indictment for murder.

By its holding, Walczak applies expressly to juveniles facing murder indictments. Notably, the concurrence authored by then-Justice Gants and joined by Justices Botsford and Duffly urged a slightly broader holding that would apply the rule to both juveniles and

adults charged with murder. That opinion emphasized that without legal instruction, evidence of mitigating circumstances was rendered meaningless, particularly for the complex law of homicide, which may be difficult for jurors to intuit. Id. at 836, 839-840 (Gants, J., concurring). ("The law of homicide is too complex reasonably to expect a grand jury to know the legal significance of reasonable provocation or sudden combat without instruction by a prosecutor, or even to recognize that it may be an issue for which they should seek legal guidance.").

3. The Grassie Decision and the SJC Committee Report: Significant Inconsistencies among Prosecutorial Practices.

In Commonwealth v. Grassie, this Court was presented with an opportunity to evaluate the bounds of Walczak in a case involving an adult defendant. 476 Mass. 202 (2017). Declining to extend the Walczak rule retroactively, the Court relied in part on the fact that the defendant in Grassie was convicted after a full jury trial in which the jury was instructed on mitigation and self-defense. The SJC nonetheless directed that a committee be formed to survey the different prosecutors' offices in the Commonwealth to equip itself with

information about current practices should the opportunity to extend Walczak to all adults present itself in future cases.[7]

In June 2018, the Committee established in Grassie released the Report of the Supreme Judicial Court on Grand Jury Proceedings, which includes a Summary of Interviews with Prosecutors Offices ("Summary of Interviews") and Proposed Best Practices for Use by Prosecutors Making Presentments to the Grand Jury ("Best Practices"). See Exhibit 1.

Of relevance to the Court's consideration here, the Committee found that the twelve prosecutor offices surveyed (eleven District Attorney's Offices and the Office of the Attorney General) employ different standards in instructing grand jurors on the law. Ex. 1 at 33-35. Currently, six offices instruct the grand jury on affirmative defenses or mitigating circumstances only when required to do so. Id. at 34. Other offices already go beyond what Walczak requires, including that:

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[7] Notably, the Court also announced a rule establishing that the entire grand jury proceeding, except for deliberations, would be recorded in a manner that permits reproduction and transcription, a potentially important tool in judicial review of grand jury proceedings.

- One office provides instructions on affirmative defenses (primarily self-defense);
- One office instructs on affirmative defenses or mitigating circumstances when they "present[] [themselves]";
- One office always instructs on self-defense, defense of another, and provocation;
- One office stated they instructed on affirmative defenses or mitigating circumstances in murder cases; and
- One office has implemented the model jury instructions for homicide.

Id. at 34. Only one office reported that it never instructs on affirmative defenses or mitigating circumstances. Id. at 34.

In light of these findings, the Committee stated in Best Practice No. 5 that, in addition to providing legal instructions consistent with Walczak for juvenile defendants, in "any other circumstances, as a matter of discretion the prosecutor should consider instructing the grand jury on the elements of lesser offenses and/or defenses, where such instructions would be in the interest of justice or would assist the grand jurors to

understand the legal significance of mitigating circumstances and defenses." Id. at 26.

MACDL respectfully submits that in murder cases in which there is substantial evidence of mitigating circumstances or defenses, it is always in the interest of justice and helpful to grand jurors to provide instructions regarding the legal significance of mitigating circumstances and defenses. See infra, Section D(1).

D. The Walczak Rule Should Extend to All Murder Defendants Where There is "Substantial Evidence" of Mitigation of Affirmative Defenses

The Committee's report exposed vastly inconsistent practices between prosecutors' offices with respect to grand jury instruction on mitigation. While many offices do provide such instructions, others do not, and the result is an arbitrary system in which, by county, the grand jury is either fully instructed or only partially so. In these non-instructing counties, the detriment to the accused is clear, but there is also a public detriment, in that the proceedings are not as informed by law and the resulting decisions of the grand jury are potentially not as legitimate.

1. The Vast Discrepancies Exposed in the SJC Committee's Summary of Interviews Show that Due Process is Being Afforded Arbitrarily Across the Commonwealth.

The Committee's Summary of Interviews, Ex. 1 at 32-26, demonstrates that the expansion of Walczak to all murder defendants would streamline a process that is now vastly inconsistent across the Commonwealth. In about half the Commonwealth, murder defendants are currently deprived of the opportunity to have the grand jury consider the legal implications of substantial mitigating evidence, whereas in the other half, defendants are routinely granted that opportunity. Though the Report cautions that "[i]t is not intended to propose uniformity in grand jury proceedings across the Commonwealth," Ex. 1 at 36, the exposure of the inconsistencies across prosecutors' offices compels the conclusion that due process for murder defendants is being applied arbitrarily. See Commonwealth v. Buckley, 478 Mass. 861, 865 n.8 (2018) ("Article 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution are distinct sources of this right to be free from arbitrary government action.").

Even assuming, arguendo, that some crimes need not be uniformly instructed, murder is different. This is so especially where it implicates the greatest of possible penalties, penalties that themselves are uniform, as in the case of first-degree murder. In these circumstances, the process to find probable cause ought to be consistent, not disparate. See, e.g., Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that short of murder, no crime—not even child rape—could constitutionally result in the death penalty); Massachusetts Sentencing Guidelines (minimum sentence for murder is higher than for any other crime). Indeed, where first-degree murder in Massachusetts carries a mandatory life sentence without the possibility of parole, the thought to vary the required instructions at the grand jury and thus return different indictments based solely on the location of the grand jury is particularly offensive.

Partly based on these discrepancies between prosecutors' offices, the SJC Committee settled on certain best practices, including that prosecutors "consider instructing the grand jury on the elements of lesser offenses and/or defenses, where such instructions would be in the interest of justice or would assist the

grand jurors to understand the legal significance of mitigating circumstances and defenses." Ex. 1 at 26. The proposal is consistent with this Court's long-standing holding that a prosecutor has a duty to instruct a grand jury as to the law in "appropriate instances." Pelletier, 240 Mass. at 307. Here, the SJC Committee's proposal helps to define those appropriate instances. Importantly, and as made clear based on the practices of those offices that provide such instruction already, this merely extends the existing protocol for many prosecutors and requires those offices that do not provide instructions to adopt the practices of those offices that do.

The SJC Committee's proposed best practice necessarily supports the extension of Walczak to all murder defendants, because in *every* murder case where there is "substantial evidence" of mitigating factors or affirmative defenses, the grand jury would be assisted by an instruction explaining the significance of those factors and defenses. See Walczak at 839 (Gants, J. concurring) ("Evidence of mitigating circumstances, however, is meaningless to a grand jury that have not been provided with the guidance necessary to understand its legal significance."); see also Commonwealth v.

Coleman, 434 Mass. 165, 172 (2001) (The prosecutor owes a duty to the grand jury to "explain the meaning of the law.").

2. Requiring an Additional Grand Jury Instruction is a "Scant Burden" on Prosecutors Because Some Prosecutors Already Give the Instruction and All Prosecutors Must be Prepared to do so if the Grand Jury Requests it.

Requiring instruction in these circumstances will not effect a massive change in practice. Far from it. According to the Committee's Summary of Interviews, almost half of the prosecutors' offices in the Commonwealth already give instructions on mitigation or affirmative defenses to grand juries, beyond what is required.[8] Therefore, the expansion of the Walczak rule to all murder defendants would not even affect some prosecutors. Furthermore, the fact that almost half the prosecutors' offices in the state have voluntarily chosen to incorporate these instructions into their criminal cases before the grand jury suggests that a significant percentage of prosecutors find the

[8] See Ex. 1, supra at 33-34. Out of the twelve offices surveyed, five responded that they include instructions on mitigation or affirmative defenses in circumstances beyond those required by Walczak or Noble.

instructions to be valuable parts of their grand jury presentments, and not a "complex exercise that needlessly squanders dwindling resources." Walczak, 463 Mass. at 849 (Spina, J. dissenting).

Moreover, as articulated by Justice Lenk, even for the prosecutors who do not yet give instructions beyond those required by Walczak and Noble, the additional "instructional requirement [would impose] scant burden on the Commonwealth." Id. at 833 (Lenk, J. concurring). Justice Lenk's assessment of a "scant burden" on prosecutors is especially apt, given that prosecutors must already be prepared to give an additional instruction if the grand jury requests one. See Noble, 429 Mass. at 48 (citing Commonwealth v. Kelcourse, 404 Mass. 466, 468 (1989)).

E. The "Substantial Evidence" Test Is Well-Defined and Can be Presumed to be Satisfied in at Least Three Fact Patterns

In his concurrence in Walczak, then-Justice Gants advocated that prosecutors be required to instruct the grand jury on the significance of mitigation and affirmative defenses for all murder defendants when there was "substantial evidence" of such mitigation. See Walczak, 463 Mass. at 836 (Gants, Botsford, & Duffly, JJ., concurring). MACDL believes the "substantial

evidence" test is the right one, because it is well-defined, easily administrable, and balances the rights of the accused with prosecutors' discretion. Based on the analysis below, "substantial evidence" can be presumed in at least three fact patterns.

1. The "Substantial Evidence" Test is Well-Defined in Statutes, Regulations, and Case Law

Massachusetts statutes help to define the "substantial evidence" test and provide examples of its application in contexts beyond that of the grand jury. The Massachusetts Administrative Procedure Act ("APA") defines "substantial evidence" as "evidence as such a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30A § 1(6). And the test, as stated in the APA, allows a reviewing court to "set aside or modify the decision" if the agency decision is "unsupported by substantial evidence." G.L. c. 30A, § 14(7). The substantial evidence test from the APA has been cited in over 1,000 published decisions, including hundreds of times by this Court. Several other, less-frequently cited statutes also use a "substantial evidence" test. See, e.g., G.L c. 123, § 17(b) ("[I]f after hearing such petition the court finds a lack of substantial evidence to support a conviction it shall

dismiss the indictment or other charges. . . .") (emphasis added); G.L. c. 32, § 21A(c)(2) ("[S]ubstantial evidence" of willful non-compliance with various regulations may justify the imposition of debarment of a vendor).

The Code of Massachusetts Regulations also employs a "substantial evidence" test across a wide variety of subject matters, ranging from family law to gaming commission appeals to groundwater test invalidations. See 110 CMR 10.05(4); 205 CMR 101.04(12); 310 CMR 22.26(3)(d)(1)(b). A particularly relevant application of the "substantial evidence" test occurs in the context of the Department of Children and Families. Like a grand jury, which assesses probable cause before trial, the Department of Children and Families identifies alleged perpetrators "by substantial evidence" for reference to the District Attorney's Office. 110 CMR 10.02. Moreover, regulations from the Department of Elder Affairs offer a more broadly applicable definition of "substantial evidence" that could easily be used in the Walczak context. The definitions section of 651 CMR 1.00 defines substantial evidence as "any evidence on which a reasonable person might, but not necessarily must or

will, rely in making a decision or in coming to a conclusion." 651 CMR 1.04.

Finally, case law from Massachusetts and other states provides many examples of how to apply the "substantial evidence" test. As discussed above, Massachusetts courts have frequently cited to and interpreted the substantial evidence test, most frequently in the context of the APA. See, e.g., Lindsay v. Dep't of Soc. Servs., 439 Mass. 789, 797-800 (2003). Courts outside Massachusetts have also interpreted what constitutes "substantial evidence" in the context of criminal defenses. See, e.g., People v. Young, 105 P.3d 487, 518 (Cal. 2005) ("The trial court must give instructions on every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case."); State v. Westfall, 75 S.W.3d 278, 280-81 (Mo. 2002) ("[A]n instruction on self-defense must be given when substantial evidence is adduced to support it."). Overall, the "substantial evidence" test has been used in a wide array of contexts that will provide guidance for prosecutors and courts attempting to apply the test in the grand jury context if the Walczak rule is extended to all persons accused of murder in the Commonwealth.

2. There Are at Least Three Fact Patterns That Should Trigger a Presumption That There is "Substantial Evidence" of Mitigation or Affirmative Defenses, Such That the Prosecutor Should Give an Instruction to the Grand Jury.

Just as the "substantial evidence" test has been well-defined by statute, regulations, and case law, the test has also been widely applied, and prosecutors and courts may draw on its other applications to apply the test to the murder cases before them. One example is Walczak itself, which was decided six years ago. Since 2012, an absence of reported litigation concerning the "substantial evidence" in Walczak suggests that prosecutors and courts have not had difficulties administering the standard so far.[9]

MACDL believes there are at least three fact patterns that can guide the interpretation of the test and should trigger a presumption of "substantial evidence" of mitigation or affirmative defenses. These facts patterns are: 1) self-defense, 2) a pattern of violence, and 3) where a defendant is attacked in their home by the victim (the "Castle Doctrine").

[9] Based on an extensive search of publicly available cases to the date of this filing.

1) Self-Defense

Self-defense is probably the most recognizable of all the fact patterns. The Massachusetts Model Jury Instructions state simply, "A person is allowed to act in self-defense."[10] It originated as an affirmative defense at common law, and is one of the oldest recognized affirmative defenses.[11] The right to claim self-defense is considered so essential to the rights of defendants accused of murder that, in Massachusetts, when a defendant raises the defense, the burden shifts to the Commonwealth to prove that the defendant did *not* act in self-defense. See Commonwealth v. Harrington, 379 Mass. 446, 453-454 (1980). And at least one prosecutor's office already instructs the grand jury on self-defense in murder cases. Ex. 1 at 34.

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[10] Instruction 9.260, Self-Defense; Defense of Another, Defense of Property, available at https://www.mass.gov/files/documents/2016/08/xm/9260-defenses-self-defense.pdf.

[11] S. Cornell, Natural Rights, Common Law, and the English Right of Self-Defense, available at https://www.americanbar.org/publications/insights_on_law_andsociety/14/fall-2013/natural-rights--common-law--and-the-english-right-of-self-defens.html (referring to "the right to defend oneself as the first law of nature").

2) Pattern of Violence

Courts in Massachusetts have regularly determined that a pattern of violence by the defendant against the victim constitutes "substantial evidence" of affirmative defenses or mitigation. Prosecutors and court are well equipped to identify patterns of violence, such as the one prevalent in the case at bar. See Commonwealth v. Fernandes, Worcester Super. Ct. Crim. Action No. 2015-0416 at *10-11 (Nov. 3, 2016) (describing the prosecutor's presentation to the grand jury of "a litany" of threats from the victim against Fernandes and bruises covering Fernandes' body, which together constituted a pattern of violence); see also Adoption of Zak, 87 Mass. App. Ct. 540, 543 (2015) (finding a "pattern of violence" sufficient to terminate parental rights).[12]

[12] Giving additional grand jury instructions where there has been a pattern of violence would also bolster legislative efforts to protect the rights of survivors of domestic violence. For example, the Massachusetts Legislature explicitly authorized expert testimony about domestic violence, even though such evidence may already be admissible. In G.L. c. 233, § 23F,[12] the Legislature explicitly linked violence in abusive relationships to the affirmative defense of self-defense, and it authorized expert testimony regarding "the common pattern in abusive relationships" in criminal trials. G.L. c. 233, § 23F(b). The statute acknowledges that, even without

3) Defendant Attacked by Victim in Own Dwelling

Finally, where the defendant was attacked in his or her home and used deadly force against an unlawful intruder, the prosecutor should provide an instruction on the so-called "castle doctrine," codified at G. L. c. 278, § 8A. The SJC Committee itself suggested that such a scenario would likely present substantial evidence that would justify a jury instruction. Ex. 1 at 28. This fact pattern is particularly easy to discern and apply, since the defendant will always have been in his or her home at the time of the alleged murder. See, e.g., Commonwealth v. Gregory, 17 Mass. App. Ct. 651 (1984) (reversing and remanding murder conviction where judge failed to give proper instruction on rights of dwelling occupants against unlawful intruders).

The three fact patterns described in this section -- self-defense, a pattern of violence, and defendants attacked in their homes by victims -- will serve as useful guides for prosecutors employing the "substantial evidence" test. And, for any fact pattern that does not

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this provision, such testimony may already be admissible,[12] but nonetheless, the Legislature went out of its way to afford additional, explicit protections for domestic violence survivors.

fall within one of the clear categories discussed above, prosecutors will be encouraged to use their discretion in deciding whether there is substantial evidence of mitigation or affirmative defenses. Thus, the test achieves the ideal balance of administrable standards, preservation of prosecutorial discretion, and protections for the accused.

In sum, the "substantial evidence" test is both well-defined and easily administrable, and now is the appropriate time for this Court to extend the Walczak rule to all murder defendants in the Commonwealth.

Conclusion

For the foregoing reasons, *amicus* respectfully requests that this Court extend the Walczak rule to all murder defendants where there is substantial evidence of mitigation or defenses, and find in favor of the Defendant-Appellee.

Respectfully submitted,

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August 22, 2018

MASS R. APP. P. 16(K) CERTIFICATION

I hereby certify that this brief complies with the rules of the Court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6); Mass. R. App. P. 16(e); Mass. R. App. P. 16(f); Mass. R. App. P. 16(h); Mass. R. App. P. 18; and Mass. R. App. P. 20.

Caroline S. Donovan

MASS. R. APP. P. 13(D) CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that on August 22, 2018, I caused two copies of the Amicus Curiae Brief of the Massachusetts Association of Criminal Defense Lawyers (with Addendum) to be served by U.S. mail on the following counsel for Defendant-Appellee Stephanie Fernandes:

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Supreme Judicial Court
Committee on Grand Jury Proceedings

Final Report to the Justices

Submitted June 2018

Table of Contents

REPORT OF THE SUPREME JUDICIAL COURT COMMITTEE ON GRAND JURY PROCEEDINGS (JUNE 2018)

Preface

The Supreme Judicial Court announced its intention to create a grand jury committee in January 2017 through language in Commonwealth v. Grassie, 476 Mass. 202 (2017). In Grassie the Court had the opportunity to extend to adults its ruling in Commonwealth v. Walczak, 463 Mass. 808 (2012), a decision involving grand jury proceedings in murder cases against juveniles[1], and declined to reach the issue. In deciding not to reach the issue, the Court stated, "we will convene a committee to assist us in gaining a better understanding of current practices employed by the various district attorneys and the Attorney General before considering an extension of the rule adopted in the Walczak case to similar types of grand jury proceedings involving adults." 476 Mass. at 219. The Court further stated that it would ask the committee "to report on the range of practices employed by the various district attorneys' offices as well as the office of the Attorney General with respect to grand jury presentments; the reasons supporting the different practices; the substance of the instructions that grand juries receive from those district attorneys who currently provide them; and any recommended best practices." Id. at 220, n. 20.

In March 2017, the Court appointed a committee that included two sitting judges, two retired judges, five prosecutors, three defense lawyers, and one law school professor.[2]

[1] In Walczak, the Court held that "where the Commonwealth seeks to indict a juvenile for murder and where there is substantial evidence of mitigating circumstances or defenses (other than lack of criminal responsibility) presented to the grand jury, the prosecutor shall instruct the grand jury on the elements of murder and on the significance of the mitigating circumstances and defenses." 463 Mass. at 810 (per curiam).

[2] The names of the committee members are listed in Appendix A to this report.

Although the committee arose out of a decision about whether or not to extend one holding, the committee's mission statement reflected the broader role set forth in the above-quoted language from Grassie. Broadly speaking, the committee's mission had two separate components. First, the committee had to gather information about current grand jury practices at the 11 District Attorneys' offices and the Attorney General's office. Second, the committee had to decide whether it could identify "best practices" with respect to grand jury presentments.

The committee held its first meetings in the spring of 2017. Based on the committee's mission statement and discussions at these initial meetings, a consensus developed as to the scope of the committee's work. This consensus included the following:

First, with regard to the first part of its charge, the committee would gather information focusing on the presentation of evidence to the grand jury by prosecutors, and the instructions given to the grand jury by prosecutors when proposed indictments are presented;

Second, the committee would focus on, and include in the commentary, the case law and other authority supporting these practices, and not the reasons individual prosecutors might have for their practices;

Third, any "best practices" identified by the committee would be limited to current practices of one or more prosecutors' offices that the committee regarded as worthy of adoption by other prosecutors' offices; and

Fourth, the committee would consider at a later date whether or not to include in its report other "recommended practices" that were not current practices of any prosecutor's office.

In the spring of 2017, subgroups of committee members contacted representatives of the Commonwealth's 12 prosecutor offices and received information based on a list of questions that the committee had assembled. It became clear that, independent of the committee's work, the state's prosecutors are actively taking initiative in exploring new practices to ensure that grand jurors are adequately instructed and that the integrity of grand jury presentments is not impaired.

After the committee had gathered information from the Commonwealth's prosecutor offices and reviewed it, the committee began the task of attempting to identify best practices. As the committee's work progressed throughout the summer and fall of 2017, a sense of shared mission increasingly developed. The committee decided that it would not recommend any purported "best practice" that was not a current practice of any prosecutor's office or that lacked consensus support within the committee. The committee therefore took on the challenging work of finding common ground based on careful review of existing practices, respectful debate, and principled compromise. The result was a set of six best practices with extensive commentary that was published for public review and comment in March 2018. These best practices reflect a consensus of the views of representatives of the various segments of the Massachusetts criminal justice system.

The best practices published by the committee for comment and those ultimately adopted by the committee broadly fall into two categories. The first category includes

practices that committee members believe will enhance compliance with existing law, including the rules of criminal procedure applicable to grand juries, see e.g. Mass. R. Crim. P. 5, and the case law on preserving the integrity of the grand jury, see e.g. Commonwealth v O'Dell, 392 Mass. 445 (1984). Committee members concluded that any such practices would benefit prosecutors, grand jury targets, grand jury witnesses, and others,. The second category of best practices includes practices that committee members believe will result in better decision-making by grand juries. Several best practices fall into both categories.

In response to its request for public comment, the committee received 12 sets of comments. These included comments from seven District Attorneys, the Boston Bar Association, the Committee for Public Counsel Services, and three private attorneys.[3] Committee members discussed and carefully considered all of the comments, resulting in numerous substantive revisions to the best practices and commentary.

Of the seven District Attorneys who responded, six expressed broad concerns about the committee's work. The most fundamental concern was the belief that having a judicially-appointed committee assess prosecutors' grand jury practices constitutes an unconstitutional infringement on the separation of powers. These District Attorneys also expressed the views that there was no need to interfere with a system that works well, that the committee was unwisely attempting to "federalize" state grand jury practice through added regulation, and that existing case law is fully sufficient to ensure appropriate grand jury practice by prosecutors**.** Committee members discussed and seriously considered these arguments and revised several best practices to clarify the issues and address the concerns raised in the

[3] A list of those who submitted comments is attached as Appendix B to this report.

comments. But for the below reasons the arguments did not persuade the committee that it should not recommend the best practices set forth in this report.

With regard to separation of powers, as a starting point**,** committee members recognized that grand jury presentment is a prosecution function that the Supreme Judicial Court has described as subject to "limited judicial review." Commonwealth v. Noble, 429 Mass. 44, 48 (1999). However, committee members also recognized that the grand jury is "an integral part of the court," and that judges have a "duty to prevent interference with [grand jurors] in the performance of their proper functions, to give them appropriate instructions, and to assist them in the performance of their duties." In re Pappas, 358 Mass. 604, 613 (1971). Moreover, grand juries have the dual function of determining whether there is probable cause to believe a crime has been committed and of protecting citizens against unfounded criminal prosecutions." Lataille v. Dist. Court of E. Hampden, 366 Mass. 525, 532 (1974). The Supreme Judicial Court formed the committee to report and make recommendations to the Court regarding grand jury proceedings. The committee has no power to create new law or impose its best practices on any prosecutor's office. Moreover, as noted above, all of its recommended best practices are currently in use by one or more prosecutor's offices. They are intended to provide reliable guidance as to what is reasonable. They are not intended to give substantive or procedural rights to people accused or convicted of crimes or to serve as the basis for motions to dismiss indictments. The committee's work does not infringe in any way on the role of the executive branch in presentments and charging decisions.

With regard to the concern that the committee is needlessly interfering with a well-functioning grand jury system, committee members note that the Supreme Judicial Court did not create the committee to solve any particular problem. However, after reviewing many current practices of the Commonwealth's 12 prosecutors' offices, committee members concluded that some of these practices seemed especially worthy of consideration as means of achieving the above-noted goals of helping to ensure compliance with existing law and/or promoting better decision-making by grand juries.[4]

With regard to concerns about "federalizing" the grand jury, the committee noted that extensive citations in the commentary to federal grand jury practice may have inadvertently conveyed the impression that the committee wanted to import federal grand jury practice into the Commonwealth's grand jury system. The committee believes each of its recommended best practices is firmly grounded in Massachusetts grand jury law and practice, acknowledges that there are some fundamental differences between federal and state practice, and does not believe federal law and practice is always a useful guide. Accordingly, we have revised the commentary in several places to clarify that we are not recommending the federalization of Massachusetts grand jury practice.

With regard to the concern that existing law is sufficient to ensure appropriate grand jury practice by prosecutors, the committee has two responses, each of which relates to one of the two categories of best practices. As for those best practices intended to enhance

[4] With regard to better decision-making by grand juries, various legal commentators have expressed the view that grand juries throughout the United States have largely lost their function as a shield against unwarranted prosecutions. See Roger A. Fairfax, Jr., Grand Jury 2.0: Modern Perspectives on the Grand Jury at 261, and articles cited therein (Carolina Academic Press 2011). Best practices ensuring that grand juries have the evidence and legal instructions they need to make well-informed charging decisions enhance the grand jury's ability to serve that function.

compliance with existing law, the committee hopes their potential value will be self-evident. As for those best practices intended to enhance decision-making by grand juries, the committee notes that existing case law operates only after-the-fact to sanction prosecutors who misuse the grand jury. The best practices in this report will have beneficial effects by ensuring that grand juries are better informed about the facts relevant to probable cause, and by preventing ill-advised charges from being brought. Furthermore, these best practices will serve as a resource for prosecutors to address difficult or unexpected issues using practices developed by other Massachusetts prosecutors.

To state the obvious, the best practices in this report do not cover all of the important issues faced by prosecutors who make presentments to the grand jury. Much more work on best practices for grand jury presentments can be done. To note just one example of an unresolved issue, the committee discussed at length whether there is a preferred practice for the handling of voluminous evidence such as electronic records or years of jailhouse calls, but decided it did not have enough information to promulgate a best practice.

In closing, the committee wishes to thank those who took the time to study the draft recommendations that were published for comment and to respond in writing with suggestions. In particular, the committee acknowledges the cooperation we have received throughout this process from the elected District Attorneys and the Attorney General. While it is fair to say that many of the District Attorneys question the need for best practices for grand jury proceedings, and the role of a judicial committee in this area, they took the time to carefully examine these recommendations and to submit detailed comments, leading to significant improvements to the best practices and commentary set forth in this report.

The innovations of the District Attorneys' offices and the Attorney General's office identified by our committee as best practices are compelling evidence that best practices complement current law and practice, and do not impede the grand jury's ability to fulfill its dual role as both an "informing and accusing body," Lataille, 366 Mass. at 532, and as a bulwark "protecting citizens against unfounded criminal prosecutions." Ibid. The committee encourages the Commonwealth's prosecutors to continue this important endeavor, and stands ready to assist the Supreme Judicial Court if the Court wishes the committee to do further work.

Proposed Best Practices for Use by Prosecutors
Making Presentments to the Grand Jury

Best Practice No. 1

1. Target warnings

A. If, at the time a person appears to testify before a grand jury, the prosecutor has reason to believe that the witness either is a "target" or is likely to become one, the witness should be advised, before testifying, that

(1) the grand jury is conducting an investigation into certain facts and circumstances, including your own conduct, for possible violations of law;

(2) you have the right to speak with a lawyer before you testify and to have a lawyer present with you in the grand jury room;

(3) if you cannot afford a lawyer, and wish to speak with one before you enter the grand jury room, a judge will determine whether a lawyer will represent you at no charge to you;

(4) you may refuse to answer any question if a truthful answer would tend to incriminate you; and

(5) anything that you do say may be used against you in a later legal proceeding.

B. If a witness who has been given target warnings wishes to consult with counsel, the witness should be given a reasonable opportunity to do so.

C. If a witness is given target warnings and (1) informs the prosecutor that he or she intends to assert the privilege against self-incrimination, (2) invokes the privilege during testimony, or (3) requests to consult with counsel concerning the decision whether to testify, the prosecutor should not conduct any further examination of the witness before the grand jury without first giving the witness an opportunity to consult with retained counsel or bringing the matter to the attention of the presiding judge.

Best Practice No. 2

2. The Record of the Proceedings

The entire grand jury proceeding — with the exception of the grand jury's deliberations — is to be recorded in a manner that permits reproduction and transcription. This shall include any legal instructions and communications provided to the grand jury by a judge or a prosecutor during the proceeding, as well as a record of all those present during the proceeding, excluding the names of the grand jurors.

Best Practice No. 3

3. Prosecutor's Instructions on the Law

A. The prosecutor should advise the grand jury of the relevant law whenever required by law, requested by a grand juror or otherwise necessary to the grand jury's determination whether probable cause exists with regard to the charges under consideration.

B. The prosecutor should also ensure that the grand jurors understand that they have the right at any time to request to be instructed on the law concerning the charges being considered, including the essential elements of the offenses.

C. The prosecutor should respond to jurors' legal questions and may refer to the evidence, but should not express any opinion or views on issues of fact, participate in the deliberations or comment on or speculate concerning any matters outside the evidence.

Best Practice No. 4

4. The Presentation of Evidence

In presenting evidence to a grand jury, a prosecutor should:

A. Recognize that there is a preference for direct testimony and take

reasonable steps to ensure that when hearsay evidence is presented that may not be admissible at trial, it is reliable and not misleading or otherwise improper for the grand jury to consider.

B. Ensure that the grand jury is informed, either by the judge during empanelment or otherwise, that they have the right to request the production of additional witnesses or evidence if they find it material and pertinent to their consideration.

C. Recognize that testimony that consists of answers to leading questions may be treated as the "mere confirmation or denial" of an assertion posed by the questioner and thus limit any potential for the substantive use of such grand jury testimony at trial.

D. Avoid, for the purpose of securing an indictment, knowingly or recklessly presenting false, misleading or deceptive evidence to the grand jury or misleading the grand jury.

E. Present exculpatory evidence in the possession of the prosecution (1) that would greatly undermine the credibility of an important witness, (2) that would be likely to affect the grand jury's decision or (3) where withholding it would distort the meaning of the evidence presented or seriously taint the presentation.

Best Practice No. 5

5. Instructions on Lesser Offenses and/or Defenses

A. When the Commonwealth seeks to indict a juvenile for murder, the prosecutor should consider whether there is substantial evidence of mitigating circumstances or defenses (other than lack of criminal responsibility) that should be presented to the grand jury, in which case any such evidence known to the prosecutor should be presented, and the prosecutor must instruct the grand jury on the elements of murder and on the significance of the mitigating circumstances and defenses.

B. In any other circumstances, as a matter of discretion the prosecutor should consider instructing the grand jury on the elements of lesser offenses and/or defenses, where such instructions would be in the interest of justice or would assist the grand jurors to understand the legal significance of mitigating circumstances and defenses.

Best Practice No. 6

6. Issues Concerning Evidence

A. Non-Presentation and Redaction of Grand Jury Exhibits

The best practice is to present the grand jury with all documents and physical evidence that have been obtained through the use of a grand jury subpoena, unless the presentation of such evidence would impair the integrity of the proceeding.

Where the material received is (a) non-responsive to the subpoena, irrelevant or provided in error, (b) so inflammatory that its presentation might impair the integrity of the grand jury or (c) otherwise inappropriate for presentation to the grand jury, the prosecutor should exercise discretion whether to redact material that is inappropriate for grand jury presentment, provide a limiting instruction concerning the proper use of certain evidence or seek assistance from the Court.

When the prosecutor redacts material received pursuant to a grand jury subpoena, the best practice is for the prosecutor to retain custody of the original materials, except where the materials were not responsive to the subpoena, in order to prevent any claim of prejudice to the defendant or abuse of process by the prosecutor. In such a case, appropriate notice of the fact of the redaction should be given to the defendant.

The prosecutor should recognize that the Commonwealth has a continuing obligation to reveal any exculpatory evidence it obtains, by any means, to the defense, whether or not it is presented to the grand jury.

B. Viewing Exhibits

When the grand jury receives evidence in a form that requires the use of another device to access it, such as a CD or DVD, the grand jury should be provided with the means to access the evidence so provided and the prosecutor should state on the record that the grand jury has the means to review such evidence during their deliberations.

Comments on Proposed Best Practices for Use by Prosecutors Making Presentments to the Grand Jury

Best Practice No. 1

1. Target warnings

A. If, at the time a person appears to testify before a grand jury, the prosecutor has reason to believe that the witness either is a "target" or is likely to become one, the witness should be advised, before testifying, that

(1) the grand jury is conducting an investigation into certain facts and circumstances, including your own conduct, for possible violations of law;

(2) you have the right to speak with a lawyer before you testify and to have a lawyer present with you in the grand jury room;

(3) if you cannot afford a lawyer, and wish to speak with one before you enter the grand jury room, a judge will determine whether a lawyer will represent you at no charge to you;

(4) you may refuse to answer any question if a truthful answer would tend to incriminate you; and

(5) anything that you do say may be used against you in a later legal proceeding.

Comment

Under Commonwealth v. Woods, 466 Mass. 707, 719-720 (2014), the warnings to "targets" or "likely" targets must only include an advisement concerning the privilege against self-incrimination and that any statements given may be used against the witness. The *United States Attorneys' Manual*, (USAM) § 9–11.151 goes somewhat further, providing the additional advisement that a "target" should be warned that the witness's own conduct is being investigated. At least one District Attorney's office provides this more specific cautionary instruction. This proposed best practice suggests that prosecutors should consider giving, in substance, a more complete cautionary instruction.

A "target" of a grand jury investigation is defined as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and

who, in the judgment of the prosecutor, is a putative defendant." Id.; see Woods, 466 Mass. at 719 n.12 (2014) (adopting this definition of "target" from the USAM). A "putative" defendant could also, for example, include a person who has already been charged in District Court with crimes arising out of the same matter being investigated by the grand jury for possible indictment. However, such a witness is not considered a "target" if there is reason for the prosecutor to believe that, having obtained a grant of immunity, a non-prosecution agreement, or due to other circumstances, the witness is no longer a putative defendant.

In addition to "targets," warnings must be given to a person whom the prosecutor has reason to believe is "likely" to become a "target." Id. at 719-720 (instructing that, because grand jury testimony is "compelled," warnings should be provided both to "targets" and to any witness whom the prosecutor has reason to believe "is likely to become one").

The giving and receipt of these warnings to targets should be memorialized by the prosecutor in the presence of the witness, such as in a writing signed by the witness, by means of an audio recording or in some other appropriate manner, prior to the witness testifying before the grand jury.

As a general matter, the questioning of a witness in the grand jury, even a target, is not considered custodial questioning, which would require Miranda warnings. See Commonwealth v. Beauchamp, 49 Mass. App. Ct. 591, 607 (2000), quoting from United States v. Washington, 431 U.S. 181, 187-188 (1977) ("testimony given under oath pursuant to grand jury subpoena is not so coercively compelled"). However, in particular circumstances, grand jury testimony and statements in a pre-grand jury interview by a witness who has invoked his Miranda rights may be suppressed as involuntary. See Commonwealth v. Tewolde, 88 Mass. App. Ct. 423 (2015)[,] (Where police officers served grand jury subpoena on defendant after he invoked Miranda rights, defendant was under misimpression that he had to speak to police before his grand jury appearance, and defendant was told by judge he had to testify, after judge received erroneous information, defendant's interview statements and testimony before the grand jury must be suppressed as involuntary.)

The role of counsel to a witness testifying before the grand jury is limited by G. L. c. 277, § 14A. See Commonwealth v. Griffin, 404 Mass. 372, 373 (1989) ("The attorney who accompanies a client into the grand jury room has, by statute, a very limited role."). This statute affords a grand jury witness the "right to consult with counsel and to have counsel present at every step of any criminal proceeding at which such person is present, including the presentation of evidence, questioning, or examination before the grand jury . . . ." G. L. c. 277, § 14A. While counsel may "advise her client on privileges and can consult with her client upon reasonable request for the opportunity to do so, . . . [counsel] is not entitled to discovery and may not make 'objections or arguments or otherwise address the grand jury or

the district attorney.'" In re Grand Jury Investigation, 92 Mass. App. Ct. 531, 536 n.2 (2017), quoting G. L. c. 277, § 14A.

The statutory right in Massachusetts of a grand jury witness to have counsel physically "present" during "questioning" is different from federal practice, under which counsel may not enter the grand jury room during testimony. See Fed. R. Crim. P. 6 (d) (1) ("The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.").

This proposed best practice is otherwise consistent with nationally recognized standards. See American Bar Ass'n, *Criminal Justice Standards for the Prosecution Function*, Standard 3-4.6(g) (4th ed. 2015) ("Prior to taking a target's testimony, the prosecutor should advise the target of the privilege against self-incrimination and obtain a voluntary waiver of that right."); National Dist. Attorneys Ass'n, *National Prosecution Standards*, Standards 3-3.3 & 3-3.4 (3d ed. 2009) (recommending that prosecutors inform targets summoned to testify before grand jury of their "target" status before any grand jury appearance, and recommending that prosecutors provide these targets warnings concerning self-incrimination, the use of any testimony given, and the opportunity to consult with counsel).

In other circumstances not covered by the best practice, the prosecutor has discretion to provide a grand jury witness with "target" warnings even if such advisements are not legally required. See American Bar Association Criminal Justice Standards for the Prosecution Function (4th Edition), Standard 3-3.4 (g) (prosecutor may advise a witness "of his or her rights against self-incrimination and the right to independent counsel if the prosecutor reasonably believes the witness may provide self-incriminating information and the witness appears not to know his or her rights.").

B. If a witness who has been given target warnings wishes to consult with counsel, the witness should be given a reasonable opportunity to do so.

Comment

This principle expresses the prevailing practice that when a witness informs the prosecutor that he or she wishes to consult with counsel, a reasonable request for such consultation is normally granted by the prosecutor.

This principle does not detract from the vitality of Rule 5(c) of the Massachusetts Rules of Criminal Procedure or from G. L. c. 277, § 14A, which protect against a witness's obstruction of the grand jury's investigation through unreasonable delays. Instead, this

principle is consistent with the idea that no witness may refuse to appear because of the unavailability of that witness's counsel of choice on the date set for his or her grand jury testimony. See G. L. 277 c. § 14A ("No witness may refuse to appear for reason of unavailability of counsel for that witness"); see also Mass. R. Crim. P. 5 (c), as appearing in 442 Mass. 1505 (2004) (same).

This proposed best practice does not affect the settled law that a target, like any other witness before the grand jury, has a duty to answer questions unless the answers would violate the privilege against self-incrimination. See, e.g., Gamble v. Commonwealth, 355 Mass. 394, 397-398 (1969); Heard v. Pierce, 62 Mass. 338, 339-341 (1851). Nor does it affect the settled law that a target of a grand jury investigation may be subject to prosecution for perjury if the answers given by the target are knowingly false and material to the grand jury's investigation. See Commonwealth v. Brown, 55 Mass. App. Ct. 440, 445-446 (2002) ("[A] failure to give required warnings might be a basis for suppression of a witness's testimony in other contexts, but normally it is not a basis for suppression in a subsequent prosecution alleging that the testimony was perjured.").

C. If a witness is given target warnings and (1) informs the prosecutor that he or she intends to assert the privilege against self-incrimination, (2) invokes the privilege during testimony, or (3) requests to consult with counsel concerning the decision whether to testify, the prosecutor should not conduct any further examination of the witness before the grand jury without first giving the witness an opportunity to consult with retained counsel or bringing the matter to the attention of the presiding judge.

Comment

This recommended best practice is consistent with prevailing Massachusetts practice, where the supervising judge exercises the power to appoint counsel for grand jury witnesses/targets who may be indigent and state either that they want counsel or that they intend to invoke the privilege against self-incrimination. Its purpose is to protect against an inadvertent waiver of the privilege against self-incrimination by a witness who is not represented by counsel solely by reason of the witness's indigence. These situations present challenging legal issues. Witnesses who are given target warnings and who choose to testify without consulting with a lawyer are at risk of inadvertently waiving the privilege against self-incrimination and incriminating themselves.

In addition to being consistent with prevailing practice, this proposed best practice is consistent with the Superior Court's supervisory authority over the grand jury. See In re

Pappas, 358 Mass. 603, 613 (1971) ("In exercising supervision over the grand jury, the presiding judge has discretion (1) to act in aid of effective judicial administration and (2) to prevent excessive or unnecessary interference with the legitimate interests of witnesses. . ."). The question of a witness's indigence can always be brought before the presiding judge.

The Supreme Judicial Court has not addressed the issue of whether G.L. c. 277 § 14A confers a "statutory right" to appointed counsel, beyond observing that it "does not expressly or impliedly require the appointment of counsel for indigents. Neither does it forbid such an appointment." Opinion of the Justices, 373 Mass. 915, 921 (1977). One noted Massachusetts authority has stated that, in practice, "a witness who is indigent has the right to have counsel appointed to assist him or her as the witness testifies before the grand jury." E.B. Cypher, Criminal Practice and Procedure § 17:42 (4th ed. 2014), citing Commonwealth v. Gilliard, 36 Mass. App. Ct. 183, 186-187 (1994) (noting that prosecutor advised defendant-grand jury witness "of her right to have counsel appointed at no expense to her.") Cf. Commonwealth v. Fisher, 433 Mass. 340, 350 n.12 (2001) (at trial, when it is clear that a witness intends to exercise the privilege against self-incrimination, the witness should not be permitted to do so before the jury and the judge should conduct a *voir dire* outside the presence of the jury; the Court noted that where it appears that the witness may have some valid privilege, "counsel should be appointed to advise the witness with respect to any applicable privileges."). The function of counsel for a grand jury witness is to provide advice. See G. L. c. 277, §14A; S.S. Beale et al., Grand Jury Law and Practice § 6:26 (West 2d ed. Supp. 2013). Counsel for grand jury witnesses is not constitutionally mandated. See United States v. Washington, 431 U.S. 181, n.5 (1977) ("All Miranda's safeguards, which are designed to avoid the coercive atmosphere, rest on the overbearing compulsion which the Court thought was caused by isolation of a suspect in police custody.").

This recommended best practice also tends to facilitate inquiry by the Court into whether any claim of privilege is or is not valid, an inquiry in which it is understood that counsel for the witness may play a role. See, e.g., Commonwealth v. Martin, 423 Mass. 496, 504-505 (1996) (describing procedure under which judge may assess the validity of a grand jury witness's invocation of the privilege and, if appropriate, "discuss with the witness and the witness's counsel limits on the privilege against self-incrimination that may apply to the witness in the circumstances of the particular case"). Having counsel appointed to represent the witness before the supervisory judge tends to protect the integrity of the judicial system.

Best Practice No. 2

2. The Record of the Proceedings

The entire grand jury proceeding — with the exception of the grand jury's deliberations — is to be recorded in a manner that permits reproduction and transcription. This shall include any legal instructions and communications provided to the grand jury by a judge or a prosecutor during the proceeding, as well as a record of all those present during the proceeding, excluding the names of the grand jurors. [5]

Comment

This best practice is based upon Commonwealth v. Grassie, 476 Mass. 202, 220 (2017) ("[W]e decide today that the entire grand jury proceeding—with the exception of the grand jury's own deliberations—is to be recorded in a manner that permits reproduction and transcription. This shall include any legal instructions provided to the grand jury by a judge or a prosecutor in connection with the proceeding…."). It is consistent with nationally recognized standards. See American Bar Ass'n, *Criminal Justice Standards for the Prosecution Function*, Standard 3-4.5(d) (4th ed. 2015) ("The entirety of the proceedings occurring before a grand jury, including the prosecutor's communications with and presentations and instructions to the grand jury, should be recorded in some manner, and that record should be preserved. The prosecutor should avoid off-the-record communications with the grand jury and with individual grand jurors."); National Dist. Attorneys Ass'n, *National Prosecution Standards*, Standard 4-8.5 (3d ed. 2009) ("In jurisdictions where grand jury proceedings are recorded, a prosecutor's advice, recommendations, and other communications with the grand jurors should be of record except as otherwise provided by law.").

Grand jury proceedings should never go "off the record." E.B. Cypher, *Criminal Practice and Procedure* § 26.13 (4th ed. 2014); see Commonwealth v. Carpenter, 22 Mass. App. Ct. 911, 912913 (1986) (condemning as "a mistake scrupulously to be avoided in the future," certain off-the-record comments by the prosecutor that related to the manner of the presentation of evidence); see also Commonwealth v. Qualter, 19 Mass. App. Ct. 970, 971 (1985) (noting defendant had accused prosecutor of impairing the integrity of the grand jury proceedings during a recess by improperly urging grand jurors to curtail further questioning). The grand jury's own deliberations may not be recorded, but all questions posed by a prosecutor or a member of the grand jury, as well as any comment of the prosecutor or any instruction relating to a question of law, along with the testimony, should be recorded. See Grassie, 476 Mass. at 220.

[5] The committee is not addressing discovery matters that occur after the completion of the grand jury proceedings.

The *recording* of instructions is to be distinguished from the *production* of instructions to persons other than the prosecutor. See G.L. c. 221, § 86. See also Rule 63 of the Rules of the Superior Court ("Stenographic notes of all testimony given before any grand jury shall be taken by a court reporter, who shall be appointed by a justice of the superior court and who shall be sworn. Unless otherwise ordered by the court, the court reporter shall furnish transcripts of said notes only as required by the district attorney or attorney general.").

Best Practice No. 3

3. Prosecutor's Instructions on the Law

A. The prosecutor should advise the grand jury of the relevant law whenever required by law, requested by a grand juror or otherwise necessary to the grand jury's determination whether probable cause exists with regard to the charges under consideration.

B. The prosecutor should also ensure that the grand jurors understand that they have the right at any time to request to be instructed on the law concerning the charges being considered, including the essential elements of the offenses.

C. The prosecutor should respond to jurors' legal questions and may refer to the evidence, but should not express any opinion or views on issues of fact, participate in the deliberations or comment on or speculate concerning any matters outside the evidence.

Comment

This proposed best practice is based upon Commonwealth v. Coleman, 434 Mass. 165, 172 (2001) (stating that a prosecutor's duty "is to present the evidence, and explain the meaning of the law."). See E.B. Cypher, *Criminal Practice and Procedure* § 17.33 (4th ed. 2014) ("It is the duty of the District Attorney, in appropriate circumstances, to advise the Grand Jury of the relevant law.").

The prosecutor is not legally required to inform a grand jury of the elements of the offense (or of any lesser offenses) for which it seeks an indictment, Commonwealth v. Noble, 429 Mass. 44, 48 (1999), except in limited circumstances involving certain charges against juveniles, see Commonwealth v. Walczak, 463 Mass. 808, 809-810, 832-833 (2012), or

where there is a specific request from the grand jury, see Noble, 429 Mass. at 48. The prosecutor retains discretion to do so in all cases where the prosecutor deems it appropriate or proper, and many prosecutors in Massachusetts do instruct the grand jury on the elements of offenses from time to time. Commonwealth v. Kelcourse, 404 Mass. 466, 468 (1989), quoting Attorney Gen. v. Pelletier, 240 Mass. 264, 307 (1922) ("A prosecutor may advise a grand jury on the law 'in appropriate instances.'").

The prosecuting attorney is authorized by rule to be present during grand jury deliberations at their request, Mass. R. Crim. P. 5(g), and may provide legal instructions in the course of answering the grand jury's questions. Commonwealth v. Smith, 414 Mass. 437, 439-441 (1993) (approving, pursuant to Rule 5[g], "the prosecutor's presence at grand jury deliberations pursuant to the grand jury's request, to assist the grand jury with respect to questions they may have concerning the law.").

The traditional role of the prosecutor as the legal advisor to the grand jury is well-established not only in Massachusetts but in the vast majority of states. See generally A. Beale, et al., *Grand Jury Law and Practice*, § 4:15 at pp.4, 66-72 (West 2009 2d ed. & 2002 update). Whether the prosecutor making the presentation also serves as the grand jury's legal advisor or whether that is a responsibility assigned to another prosecutor is a matter for the District Attorney's discretion. Cf. American Bar Ass'n, *Criminal Justice Standards for the Prosecution Function*, Standard 3-4.5(b) (4th ed. 2015) ("Where the prosecutor is authorized to act as a legal advisor to the grand jury, the prosecutor should appropriately explain the law and may, if permitted by law, express an opinion on the legal significance of the evidence, but should give due deference to the grand jury as an independent legal body.").

This proposed best practice is also consistent with established Massachusetts law concerning the prosecutor's duty to protect the independence of the grand jury. By providing legal instructions the prosecutor enables the grand jury to meaningfully apply the facts to the law, thus assisting the grand jury to fulfill its role as a "bulwark of individual liberty and a fundamental protection against despotism and persecution." Commonwealth v. Wilcox, 437 Mass. 33, 34 (2002). See Commonwealth v. Beneficial Fin. Co., 360 Mass. 188, 209 (1971), quoting Commonwealth v. Favulli, 352 Mass. 95, 106 (1967) ("In presenting cases to the grand jury the prosecutor and his assistants must scrupulously refrain from words or conduct that will invade the province of the grand jury or tend to induce action other than that which the jurors in their uninfluenced judgment deem warranted on the evidence fairly presented before them."); Pelletier, 240 Mass. at 307-310 (explaining that a prosecutor present during grand jury deliberations "cannot participate in the deliberations or express opinions on questions of fact or attempt in any way to influence the action.").

It is also consistent with nationally recognized standards. See American Bar Ass'n, *Criminal Justice Standards for the Prosecution Function*, Standard 3-4.5(a) (4th ed. 2015) ("In presenting a matter to a criminal grand jury, and in light of its *ex parte* character, the prosecutor should respect the independence of the grand jury and should not preempt a function of the grand jury, mislead the grand jury, or abuse the processes of the grand jury."); National Dist. Attorneys Ass'n, *National Prosecution Standards*, Standard 4-8.3 (3d ed. 2009) ("A prosecutor should take no action and should make no statements that have the potential to improperly undermine the grand jury's independence.")

Best Practice No. 4

4. The Presentation of Evidence

In presenting evidence to a grand jury, a prosecutor should:

A. Recognize that there is a preference for direct testimony and take reasonable steps to ensure that when hearsay evidence is presented that may not be admissible at trial, it is reliable and not misleading or otherwise improper for the grand jury to consider.

B. Ensure that the grand jury is informed, either by the judge during empanelment or otherwise, that they have the right to request the production of additional witnesses or evidence if they find it material and pertinent to their consideration.

C. Recognize that testimony that consists of answers to leading questions may be treated as the "mere confirmation or denial" of an assertion posed by the questioner and thus limit any potential for the substantive use of such grand jury testimony at trial.

D. **Avoid, for the purpose of securing an indictment, knowingly or recklessly presenting false, misleading or deceptive evidence to the grand jury or misleading the grand jury.**

E. Present exculpatory evidence in the possession of the prosecution (1) that would greatly undermine the credibility of an important witness, (2) that would be likely to affect the grand jury's decision or (3) where withholding it would distort the meaning of the evidence presented or seriously taint the presentation.

Comment

Section A strikes a balance between the rule expressed in Mass. R. Crim. P. 4 (c) ("An

indictment shall not be dismissed on the grounds that ... hearsay evidence was presented before the grand jury.") and Commonwealth v. Stevenson, 474 Mass. 372, 377-380 & n.5 (2016) ("Our affirmation of the policy that allows for indictments before the grand jury to rely solely on hearsay evidence dates back more than a century") and the nuanced prescription expressed in Commonwealth v. St. Pierre, 377 Mass. 650, 656 (1979) ("[S]ound policy dictates a preference for the use of direct testimony before grand juries."). Accord, Commonwealth v. Walczak, 463 Mass. at 845 (2012) (Spina, J., concurring in part and dissenting in part); Commonwealth v. LaVelle, 414 Mass. 146, 149 (1993); Commonwealth v. O'Dell, 392 Mass. 445, 451 n.1 (1984); Commonwealth v. Lincoln, 368 Mass. 281, 285 n.2 (1975); Commonwealth v. Ortiz-Peguero, 51 Mass. App. Ct. 90, 96, n.9 (2001).

It is consistent with nationally recognized standards. See National District Attorney's Association, *National Prosecution Standards*, 3d ed. (2009). Standard 4-8.4 ("The prosecutor may present reliable hearsay evidence to the grand jury in accordance with applicable law or court rule. However, when hearsay evidence is presented, the grand jury should be informed that it is hearsay evidence."); USAM § 9-11.232 ("Each United States Attorney should be assured that hearsay evidence presented to the grand jury will be presented on its merits so that jurors are not misled into believing that the witness is giving his or her personal account.").

Massachusetts law specifically authorizes the prosecutor to decide what witnesses and evidence to subpoena to the grand jury. G.L. c. 277, § 68. See Commonwealth v. Odgren, 455 Mass. 171, 179 & n.18 (2009).

Section B however recognizes the well-established principle that grand jurors have the right to request the production of additional witnesses if they find it necessary to their full consideration of a case. This rule is based upon Commonwealth v. McNary, 246 Mass. 46, 51 (1923) (although as a general principle "the grand jury, in the regular discharge of their duty, cannot admit, or hear any testimony, but such as is properly produced to them in support of the prosecution," if it appears that there are witnesses other than those produced by the prosecutor and the grand jury is "convinced that their testimony may be material and pertinent, and of such a nature as would elucidate or explain the evidence for the government, and lead them to a more perfect knowledge of the merits of the case, it is said they may require the testimony of such witnesses.") and Stevenson, 474 Mass. at 380, n.9 ("It would be helpful if the Superior Court would craft a model instruction for use by judges who are empanelling grand jurors. Among other things, the instruction could inform them that they may request the production of additional witnesses if they find it necessary to their full consideration of a case presented to them by the prosecutor."). This is consistent with *American Bar Association Criminal Justice Standards for the Prosecution Function*, Standard 3-4.6(d) (2015) ("When a new grand jury is empanelled, a prosecutor should ensure

that the grand jurors are appropriately instructed, consistent with the law of the jurisdiction, on the grand jury's right and ability to seek evidence, ask questions, and hear directly from any available witnesses, including eyewitnesses.")

Section C is derived from Commonwealth v. Daye, 393 Mass. 55, 75 (1984), overruled on other grounds, and Commonwealth v. Le, 444 Mass. 431 (2005), where the court explained that a grand jury statement should be admitted in evidence only if it is clear "that the statement was that of the witness, rather than the interrogator" and that judges therefore have discretion to exclude "yes" or "no" answers to leading questions posed before the grand jury. See also Commonwealth v. DePina, 476 Mass. 614, 621-622 (2017) (grand jury testimony offered substantively where witness feigned lack of memory at trial); Commonwealth v. Maldonado, 466 Mass. 742, 754-756 (2014) (grand jury testimony offered substantively where witness gave inconsistent statement at trial).

Sections D and E address the related issues of avoiding the knowing or reckless presentation of false or misleading evidence, and requiring the presentation of exculpatory evidence when its absence would present a distorted view of the evidence. These principles are expressed in cases such as Commonwealth v. Clemmey, 447 Mass. 121, 130 (2006) ("While prosecutors are not required in every instance to reveal all exculpatory evidence to a grand jury, they must present exculpatory evidence that would greatly undermine either the credibility of an important witness or evidence likely to affect the grand jury's decision, as well as evidence the withholding of which would cause the presentation to be seriously tainted"); Commonwealth v. Arroyo, 442 Mass. 135, 143 (2004) ("[W]e require that prosecutors not 'distort the meaning' of the evidence that they present by withholding certain portions of it"); Commonwealth v. Good, 409 Mass. 612, 618-620 (1991) (It was improper for the prosecutor to present a "wanted poster" for the defendant to the grand jury; "in addition to being highly inflammatory, the poster was devoid of evidentiary value"); Commonwealth v. Reddington, 395 Mass. 315, 319 (1985) ("[T]he knowing use of false testimony by the Commonwealth or one of its agents may impair the integrity of grand jury proceedings and is a ground for dismissing the indictments"); O'Dell, 392 Mass. at 448-449 ("Our affirmance of the dismissal of the indictment results from our conclusion that the integrity of the grand jury proceeding was impaired by an unfair and misleading presentation to the grand jury of a portion of a statement attributed to the defendant without revealing that an exculpatory portion of the purported statement had been excised"); Commonwealth v. Hunt, 84 Mass. App. Ct. 643, 652-653 (2013) ("The deception inherent in the Commonwealth's failure to make a full disclosure of Fernanda's exculpatory statement was exacerbated by the prosecutor's careful scripting of Trooper Robertson's testimony to create the impression that Fernanda's identification was consistent and reliable"); and Commonwealth v. Callagy, 33 Mass. App. Ct. 85, 88 (1992) (improper for

the prosecutor to inform the grand jury that a suspect had invoked his right to remain silent when confronted by the police).

Although the defendant "bears a heavy burden" to show impairment of the grand jury proceeding, LaVelle, 414 Mass. at 150, and inaccurate testimony made in good faith does not require dismissal of an indictment, dismissal is appropriate where (1) the Commonwealth knowingly or recklessly presented false or deceptive evidence to the grand jury; (2) the evidence was presented for the purpose of obtaining an indictment; and (3) the evidence probably influenced the grand jury's decision to indict. Commonwealth v. Mayfield, 398 Mass. 615, 620– 622 (1986). See Commonwealth v. Silva, 455 Mass. 503, 509 (2009) (citing cases).

There are occasions when the integrity of the grand jury is not impaired by the presentation of evidence that the prosecutor believes to be false, for example, when a witness provides an alibi that the prosecutor knows to be contradicted by other reliable evidence. However, if a prosecutor subpoenas a witness with the intent to indict the witness for perjury or obstruction of justice based upon the witness's expected testimony, that witness is a "target" and must be given the warnings required under *Commonwealth v. Woods*, 466 Mass. 707, 719-720 (2014). It should be further noted that Best Practice No. 1 includes warnings that go beyond those legally required under Woods.

Best Practice No. 5

5. Instructions on Lesser Offenses and/or Defenses

A. When the Commonwealth seeks to indict a juvenile for murder, the prosecutor should consider whether there is substantial evidence of mitigating circumstances or defenses (other than lack of criminal responsibility) that should be presented to the grand jury, in which case any such evidence known to the prosecutor should be presented, and the prosecutor must instruct the grand jury on the elements of murder and on the significance of the mitigating circumstances and defenses.

B. In any other circumstances, as a matter of discretion the prosecutor should consider instructing the grand jury on the elements of lesser offenses and/or defenses, where such instructions would be in the interest of justice or would assist the grand jurors to understand the legal significance of mitigating circumstances and defenses.

Comment

The instruction contemplated in Section A is not required except where the prosecutor seeks to indict a juvenile for murder and where substantial evidence of mitigating circumstances or defenses (other than lack of criminal responsibility) has been presented to the grand jury. Walczak, 463 Mass. at 810.

Three Justices of the Supreme Judicial Court, concurring in the Walczak judgment, concluded that such instructions should be given in cases where the prosecutor seeks to indict an adult for murder as well. Id. at 837 (Gants, Botsford, & Duffly, JJ., concurring). These Justices reasoned that where the evidence of mitigating circumstances presented to the grand jury is so substantial that concealing it would impair the integrity of the grand jury, instructions on the elements of murder in the second degree and on the legal significance of the mitigating circumstances should be given. Such instructions must be given so that the grand jury can understand the legal significance of the evidence as it might pertain to the decision to indict. Id.

Conversely, three other Justices, also concurring with the judgment in Walczak but dissenting in part, rejected any requirement that the Commonwealth present evidence to the grand jury concerning mitigating circumstances or defenses. Id. at 844 (Spina, J., Ireland, C.J., & Cordy, J., concurring in part and dissenting in part). These Justices also rejected any requirement, even where a prosecutor seeks to indict a juvenile for murder, that the grand jury be instructed as to such mitigating circumstances or defenses absent a specific request from the grand jury. Id.

Section B provides that the prosecutor may instruct the grand jury on the elements of offenses that can be viewed as "lesser" than the offense for which the prosecutor seeks indictment. Section B also gives the prosecutor discretion to instruct on the significance of legal defenses that may be raised by the evidence. These proposed best practices relate to one of the core principles of constitutional separation of powers under which the prosecutor has broad discretion in deciding whether to prosecute. See Shepard v. Attorney Gen., 409 Mass. 398, 401 (1991), quoting Ames v. Attorney Gen., 332 Mass. 246, 253 (1955) ("Judicial review of decisions which are within the executive discretion of the [prosecutor] 'would constitute an intolerable interference by the judiciary in the executive department of the government and would be in violation of art. 30 of the Declaration of Rights.'"); see also Burlington v. District Attorney for the Northern Dist., 381 Mass. 717, 721 (1980) ("The virtual exclusion of judicial intervention to check or correct the district attorney [in choosing whether to prosecute] . . . follows from Part I, art. 30, of the Massachusetts Constitution declaring a separation of powers."); See also Commonwealth v. Dascalakis, 246 Mass. 12, 18 (1923) (overruled on other grounds) ("Power to enter a *nolle prosequi* is absolute in the prosecuting officer from the return of the indictment up to the beginning of trial, except possibly in instances of scandalous abuse of authority.").

This best practice proposed in Section B would encourage the exercise of prosecutorial discretion to provide instructions (such as the instructions required in Section A) in cases other than those involving juveniles, where substantial evidence of mitigating circumstances or defenses (other than lack of criminal responsibility) has been presented to the grand jury. It would also encourage the exercise of prosecutorial discretion in cases where there may be a viable defense, such as where the target of the grand jury investigation did not retreat from an unlawful intruder in his home before resorting to self-defense. See G. L. c. 278, § 8A ("In the prosecution of a person who is an occupant of a dwelling charged with killing or injuring one who was unlawfully in said dwelling, it shall be a defense that the occupant was in his dwelling at the time of the offense and that he acted in the reasonable belief that the person unlawfully in said dwelling was about to inflict great bodily injury or death upon said occupant or upon another person lawfully in said dwelling, and that said occupant used reasonable means to defend himself or such other person lawfully in said dwelling. There shall be no duty on said occupant to retreat from such person unlawfully in said dwelling."); contra Commonwealth v. Sosa, 79 Mass. App. Ct. 106, 115-116 (2011) ("A person may not use force in self-defense until he has availed himself of all proper means to avoid physical combat."). There might be many other circumstances in which a prosecutor, exercising discretion in the interest of justice, might instruct the grand jury on alternative charging options in light of "mitigating" evidence and this proposed best practice would encourage the exercise of such discretion. Additionally, although the prosecutor "is not required to inform the jury of the elements of the offense for which it seeks an indictment or of any lesser included offenses," Noble, 429 Mass. at 48, if the grand jury requests instructions, the prosecutor should provide appropriate and accurate instructions. Many District Attorney offices currently instruct the grand jury on the elements of the offense, especially where the elements are not apparent from the language of the indictment or are not offenses commonly presented to the grand jury.

For example, in some circumstances a prosecutor may believe that charging a lesser offense is more consonant with justice, in light of the facts of the individual case, the existence of mitigating or potentially exculpatory evidence, and any potential difficulty of proving an essential element of the offense at trial. In such a scenario, the prosecutor should consider whether to present a lesser offense, in lieu of or as an alternative to a more serious proposed charge (even if the prosecutor believes that the prospective defendant is guilty of the more serious charge).

This proposed best practice acknowledges that the prosecutor's discretion goes beyond the baseline ethical requirement for seeking an indictment in the Commonwealth of Massachusetts. See Mass. R. Prof. C. 3.8(a), as appearing in 473 Mass. 1301 (2016) ("The prosecutor in a criminal case shall . . . refrain from prosecuting where the prosecutor lacks a good faith belief that probable cause to support the charge exists."). The National District Attorney's Association has adopted a more stringent standard that charges should be brought

only if the charges "adequately encompass the accused's criminal activity and . . . [the prosecutor] reasonably believes [the charges] can be substantiated by admissible evidence at trial." National Dist. Attorneys Ass'n, *National Prosecution Standards*, Standard 4-2.2 (3d ed. 2009). Similarly, the *United States Attorneys' Manual* states that, to indict on any charge, the prosecutor must believe that the "admissible evidence will probably be sufficient to sustain a conviction." USAM § 927.220 (emphasis added). The manual further states that, while the most serious provable charges should generally be brought, "the decision to bring such charges always should reflect an individualized assessment and should fairly reflect the defendant's criminal conduct." USAM § 9-27.300.

Best Practice No. 6

6. Issues Concerning Evidence

A. Non-Presentation and Redaction of Grand Jury Exhibits

The best practice is to present the grand jury with all documents and physical evidence that have been obtained through the use of a grand jury subpoena, unless the presentation of such evidence would impair the integrity of the proceeding.

Where the material received is (a) non-responsive to the subpoena, irrelevant or provided in error, (b) so inflammatory that its presentation might impair the integrity of the grand jury or (c) otherwise inappropriate for presentation to the grand jury, the prosecutor should exercise discretion whether to redact material that is inappropriate for grand jury presentment, provide a limiting instruction concerning the proper use of certain evidence or seek assistance from the Court.

When the prosecutor redacts material received pursuant to a grand jury subpoena, the best practice is for the prosecutor to retain custody of the original materials, except where the materials were not responsive to the subpoena, in order to prevent any claim of prejudice to the defendant or abuse of process by the prosecutor. In such a case, appropriate notice of the fact of the redaction should be given to the defendant.

The prosecutor should recognize that the Commonwealth has a continuing obligation to reveal any exculpatory evidence it obtains, by any means, to the defense, whether or not it is presented to the grand jury.

Comment

The prosecutor is authorized by G.L. c. 277, § 68 to issue a grand jury subpoena duces tecum for the production of documents. Commonwealth v. Mitchell, 444 Mass. 786, 798 n.17

(2005). Ordinarily documents received pursuant to a grand jury subpoena should be returned to the grand jury. See Commonwealth v. Cote, 407 Mass. 827, 832 (1990) (prosecutor exceeded authority by not returning documents received pursuant to a grand jury subpoena to the grand jury, but rather presenting them at trial). Cf. Commonwealth v. Smallwood, 379 Mass. 878, 887 & n.3 (1980) (prosecutor exceeded authority by issuing grand jury subpoena to witness with no intention of placing the witness before the grand jury). Courts recognize that in modern practice the prosecutor must take a "leadership role" in assembling and presenting documentary evidence to the grand jury and allow prosecutors time to review documents produced pursuant to a grand jury subpoena for later presentation. Commonwealth v. Abbott, 21 Mass.L.Rptr. 588, 2006 WL 3268969, at *4-5 (proper for prosecutor to issue grand jury *subpoena* for documents to be produced to prosecutor's office for future presentation to a grand jury) (Billings, J.), citing United States v. Kleen Laundry & Cleaners, Inc., 381 F. Supp. 519, 520-523 (E.D.N.Y. 1974) (recognizing and approving this "common" practice).

Not everything that is produced in response to a grand jury subpoena should necessarily be presented to the grand jury, especially where the material is irrelevant and/or unduly prejudicial to the target of the investigation. The grand jury plays a "unique role" in our criminal justice system and possesses "broad powers and substantial discretion to 'inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred'." In the Matter of a Grand Jury Subpoena, 454 Mass. 685, 692 (2009), quoting Commonwealth v. Williams, 439 Mass. 678, 683 (2003), quoting Matter of a Grand Jury Investigation, 427 Mass. 221, 226, *cert. denied sub nom.* A.R. v. Massachusetts, 525 U.S. 873 (1998). However, the Supreme Judicial Court has recognized, for example, that reference to a defendant's criminal record before a grand jury is "undesirable." Commonwealth v. Champagne, 399 Mass. 80, 84 (1987). This can be the case even if such information is reasonably pertinent to the grand jury's inquiry on the question of credibility. Commonwealth v. Saya, 14 Mass. App. Ct. 509, 515 (1982). Similarly, questions of privilege sometimes arise which the prosecutor has discretion to consider, although many rules of privilege do not apply to grand jury investigations. See, e.g., In the Matter of a Grand Jury Subpoena, 447 Mass. 88, 99 (2006) (spousal privilege in general is not applicable before grand jury).

Recognizing this, prosecutors routinely use best efforts to shield the grand jury from knowledge that the target of a grand jury investigation has been convicted of other crimes and commonly limit a grand jury's consideration of evidence of unrelated misconduct to proper purposes, in order to prevent the grand jury from improperly indicting a person on the basis of a propensity to commit crime. See Commonwealth v. Vinnie, 428 Mass. 161, 175, *cert. denied* 525 U.S. 1007 (1998) (prosecutor elicited evidence of unrelated criminal conduct). Compare Commonwealth v. Freeman, 407 Mass. 279, 281-284 (1990) (evidence of the target's outstanding warrant for an unrelated rape charge came in response to a grand juror's question). To this end, the prosecutor may properly instruct a witness not to answer a question, properly instruct the grand jury to disregard irrelevant material that might be part of an exhibit or properly provide limiting instructions on the use of "prior bad act" evidence similar to such as may be found in the Massachusetts Superior Court Criminal Practice Jury Instructions, §7.7 (MCLE 2013).

Seeking judicial guidance regarding whether to present to the grand jury subpoenaed evidence that may be improper for the grand jury to consider is consistent with the court's supervisory role over the grand jury. See In re: Pappas, 358 Mass. at 613.

The Commonwealth always has the constitutional obligation to reveal any exculpatory evidence it obtains, by any means, to the defense. See Commonwealth v. Healey, 438 Mass. 672, 678-679 (2003), citing Brady v. Maryland, 373 U.S. 83, 87 (1963).

B. Viewing Exhibits

When the grand jury receives evidence in a form that requires the use of another device to access it, such as a CD or DVD, the grand jury should be provided with the means to access the evidence so provided and the prosecutor should state on the record that the grand jury has the means to review such evidence during their deliberations.

Comment

This best practice is based upon prevailing current practice and is not intended to direct the grand jury in its consideration of the evidence before it. Rather, it is only intended to make a record that the grand jury has the ability to review all of the evidence that has been presented.

Summary of Interviews with Prosecutors' Offices

As directed by the Supreme Judicial Court in Commonwealth v. Grassie, 476 Mass. 202 (2017), the committee collected information regarding grand jury practices currently employed by the eleven District Attorneys and the Office of the Attorney General. The focus of the committee's inquiry was on instructions to the grand jury and other prosecutors' interactions with the grand jury. The members drafted a questionnaire and conducted interviews, in small teams, with representatives of prosecutors' offices during June 2017.[6]

This summary provides an overview of the responses the committee received regarding current grand jury practices across the Commonwealth. All information gathered reflects post-Grassie practices. It notes areas of common practice, as well as areas where practices vary considerably among offices. [7]

I. Sittings of the grand jury: The overwhelming majority of the twelve offices reported that grand juries sit for three-month periods, with the number of sittings per week varying from five times a week to an "as needed" basis.

II. Recording of instructions to the grand jury: All twelve offices reported that they **record all instructions to the grand jury.** Ten offices **record introductory remarks to a new grand jury** [8]

III. Content of instructions:

[6] Most interviews were conducted in person; some offices submitted written responses to the committee's questions. The questions are listed in Appendix D.

[7] In analyzing their findings, members have noted that some variations from office to office may result, at least in part, from the particulars of the interviews and may not represent the practice of all prosecutors in that office.

[8] In nine offices, the grand jury coordinator or supervisor gives introductory remarks. In four offices the Judge participates, either by video or in person. In three, the District Attorney participates, either by video or in person.

- Eleven of the twelve offices **use model trial instructions adopted for the grand jury**; two offices added that they are creating model instructions for use in the grand jury.
- Eleven of the twelve offices **use special instructions for cases against juveniles.**[9] None of the offices **instruct grand jurors on adolescent brain development** in the context of criminal intent.
- In four offices, the **elements of common crimes are described** only at the outset of the grand jury's term. In two offices, the prosecutor provides individual instructions as to the elements of offenses in every case, regardless of whether the grand jury had been instructed on the offense in another case. Two rely on the indictment to describe the elements of offenses. One has "no set practice." In two counties, since Grassie, no instructions are given except when required under Commonwealth v. Walczak, 463 Mass. 808 (2012) or when requested by the grand jury.
- Asked whether they ever **instruct the grand jury on lesser offenses**, four offices said no, except when required by Walczak. Three other offices said no, with no qualification. Of those three offices, one rarely has cases involving juveniles; another has not had any juvenile murders since Walczak*;* and the third indicated in response to other questions that, if an affirmative defense or mitigating defense presents itself, it would be instructed upon. [10] Others indicated that their approach depended on the circumstances of the case, on the facts as established by testimony, or on whether the grand jury inquired. One said they gave such instructions only in murder cases and another said that they did so "sometimes", but not typically and not unless asked.

[9] Seven offices mentioned that they provide the elements for a youthful offender indictment where appropriate.

[10] Since Walczak requires an instruction on affirmative defenses or mitigating circumstances only in juvenile cases and only when there is substantial evidence of such defense or mitigation, this office's practice goes beyond what is mandated by Walczak because it applies to all cases.

- Six offices **instruct the grand jury on affirmative defenses or mitigating circumstances** only when required under Walczak or Noble. Other offices responded that:
    - They do provide instructions on affirmative defenses, primarily self-defense;
    - If an affirmative defense or mitigating circumstance presented itself, it would be instructed upon;
    - They would in murder cases;
    - It depends on the circumstances; they always instruct on self-defense, defense of another, and provocation.

  Only one office, which reports that it rarely has cases involving juveniles, responded "no" without qualification; they do not instruct on affirmative defenses or mitigating circumstances.
- There is no common practice regarding **instructions given at the end of the presentment**, right before the grand jury deliberates. Two offices instruct on the elements of offenses that are new to the grand jury. One instructs on the elements of the proposed charges and gives limiting instructions as necessary. Others simply read the indictment unless the grand jury asks for instructions or guidance on legal questions.
- There is no common practice with respect to **instructions regarding records and other exhibits**, although several offices indicated that they give limiting instructions when appropriate.
- Asked whether their **practices regarding instructions differ for murder presentments**, seven offices reported that they do not, except to comply with the requirements of Walczak. Two said there were no differences in their practices with respect to murder presentments and did not mention Walczak. One reported that a different ADA gave the instructions in murder presentments. Another noted that their office had adopted the model jury instructions for homicide. One office rarely has murder investigations arise.

- Eight offices follow no uniform practice with respect to whether individual prosecutors give an **initial description of the case** to the grand jury before testimony is taken.

IV. Provision of written instructions to the grand jurors: Ten offices reported that they **do not routinely provide written instructions** to the grand jury, but two of them added that they would do so if requested.

V. Practices when the grand jurors have factual or legal questions:

- Eleven of the twelve offices **record questions asked of, and answers given by, prosecutors during deliberations.**
- In nine offices, **if jurors have factual questions that a testifying witness is unable to answer**, prosecutors inform the grand jury that the question from the grand jury will be addressed in the testimony of a different witness who is expected to testify at a later time, if this is the case.
- When asked about their practices **when jurors have legal questions that the prosecutor is not able to answer**, nine offices reported simply that the prosecutor would find the answer and report back to the grand jury. Five of those offices specified that the answers would be put on the record. Two offices indicated that the situation (the prosecutor being unable to answer a legal question) had not arisen, but if it did, they would present the option of asking the Judge.[11]

VI. Target warnings: Eleven of twelve offices reported **that they give "target warnings**" when a target of an investigation testifies, pursuant to Commonwealth v. Woods, 466 Mass. 707 (2014). The remaining office has not had any occasion to present the grand jury testimony of a target of an investigation

[11] By contrast, another county specifically noted that the question would not be taken to the Judge.

VII. Prosecutor's presence in the grand jury room during deliberations: Seven offices report that the prosecutor is not present in the grand jury room during deliberations. Of the other five offices, three said that a vote is taken, or the grand jurors are polled, in every case to determine if they wish the prosecutor to remain in the room. Another said that the prosecutor is not present unless asked by the grand jurors to answer a legal question. In another county, the uniform practice is to ask the grand jury, at the beginning of the term, whether it wishes formally to request, pursuant to Mass. R. Crim. P. 5(g) and Commonwealth v. Smith, 414 Mass. 437, 440-441 (1993), that the prosecutor who is the grand jury director (or another designated prosecutor) be available from time to time to answer their legal questions. [12]

VIII. Written guidelines for prosecutors presenting cases to the grand jury:
None of the offices uses written guidelines for prosecutors presenting cases to the grand jury, although three refer to a Grand Jury Manual for guidance.

Conclusion:

This description of current practices provides a snapshot of grand jury proceedings in the Commonwealth during the post-Grassie era. It is not intended to propose uniformity in grand jury proceedings across the Commonwealth. It is intended to acknowledge both the common ground and the distinctive approaches utilized by different offices in their general handling of such proceedings, although each grand jury investigation is as different and unique as the suspects, witnesses, victims, and facts in each case.

[12] It is explained to the grand jury in a writing that is part of the clerk's records that this request may be revoked at any time without cause, at the grand jury's pleasure.

APPENDIX A

Committee Members

Honorable Robert L. Ullmann, Superior Court, Chair

Honorable Peter W. Agnes, Jr., Appeals Court

Janice Bassil, Esq., Bassil & Budreau, Boston

Berkshire County District Attorney Paul J. Caccaviello

Honorable Judd J. Carhart, Appeals Court (retired)

Assistant Attorney General David E. Clayton, Office of the Attorney General

Assistant District Attorney Kevin J. Curtin, Middlesex County District Attorney's Office

Randy Gioia, Esq., Committee for Public Counsel Services

Honorable Bertha Josephson, Superior Court (retired)

Clinical Professor Diane S. Juliar, Suffolk University Law School

Assistant District Attorney Mary E. Lee, Bristol County District Attorney's Office

Kevin M. Mitchell, Esq., Law Office of Kevin M. Mitchell, Chelsea

Assistant District Attorney Donna Jalbert Patalano, Suffolk County District Attorney's Office*

*prior to departure from district attorney's office page

APPENDIX B

The committee received public comments on the Proposed Best Practices for Use by Prosecutors Making Presentments to the Grand Jury from the following organizations and individuals:

- Boston Bar Association
- Committee for Public Counsel Services
- District Attorney Jonathan W. Blodgett
- District Attorney Daniel F. Conley
- District Attorney Timothy J. Cruz
- District Attorney Michael D. O'Keefe
- District Attorney Michael W. Morrissey
- District Attorney Marian T. Ryan
- District Attorney Thomas M. Quinn III
- John Hayes, CPCS Boston Superior Court Trial Unit (on his own behalf)
- Wendy Murphy, New England Law/Boston
- Theodore Riordan, Bates & Riordan, Quincy

APPENDIX C

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APPENDIX D

Questions for Prosecutors' Offices

A. General Background

1. How many grand juries typically sit at one time? For how long do they typically sit?

2. Who in your office gives the introductory remarks to a new grand jury? Are these remarks recorded or otherwise preserved?

3. Do you have written guidelines for prosecutors who present cases to the grand jury?

For the remaining questions, please let us know whether the practices you are describing are the uniform practice, the prevailing practice, or the practice of only some prosecutors in your office.

B. Instructions in General

4. Does your office use model grand jury instructions or model trial instructions adapted for the grand jury? If so, what instructions?

5. Does the prosecutor give an initial description of the case?

6. What instructions, if any, are given about records and other exhibits?

7. Does the prosecutor describe the elements of the proposed charges every time an indictment is sought, only the first time the grand jury considers a particular offense, or never?

8. What instructions, if any, are given when a target of an investigation testifies?

9. Are the instructions recorded? If only at times, under what circumstances?

10. Do you ever provide written instructions? If so, when?

11. Do you ever instruct the grand jury on lesser included offenses? If so, when?

12. Do you ever instruct the grand jury on affirmative defenses or mitigating circumstances? If so, when?

13. Do your practices differ in any way for murder presentments? If so, how?

14. What instructions do prosecutors give at the end of the presentment, right before the grand jury deliberates?

15. What is your practice when jurors have factual questions to witnesses that the witness is not able to answer?

16. What is your practice when jurors have legal questions for the prosecutor that the prosecutor is not able to answer?

C. Cases Against Juveniles

17. Do you use any special instructions for cases against juveniles?

18. Do you ever instruct jurors on adolescent brain development in the context of criminal intent? If so, under what circumstances, and what information do you provide?

D. Deliberations and Voting

19. Are prosecutors ever present in the grand jury room during deliberations? If so, is this done by vote at the beginning of the term, or on a case-by-case basis?

20. Is any record made of the questions asked of prosecutors during deliberations, and the answers?