SJC-12429

COMMONWEALTH vs. STEPHANIE A. FERNANDES.

Worcester. September 6, 2018. - September 4, 2019.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Homicide. Practice, Criminal, Dismissal, Indictment, Grand jury proceedings. Grand Jury. Evidence, Grand jury proceedings, Exculpatory, Self-defense. Self-Defense.

Indictments found and returned in the Superior Court Department on June 16, 2015.

A motion to dismiss was heard by Janet Kenton-Walker, J., and a motion for reconsideration was also heard by her.

The Supreme Judicial Court granted an application for direct appellate review.

Ellyn H. Lazar, Assistant District Attorney, for the Commonwealth.

Peter L. Ettenberg for the defendant.

Chauncey B. Wood, K. Neil Austin, Caroline S. Donovan, & Joanna McDonough, for Massachusetts Association of Criminal Defense Lawyers, amicus curiae, submitted a brief.

BUDD, J. Until recently, we provided only limited guidance regarding legal instructions furnished to grand juries. We had

held, for example, that "it is the duty of the district attorney in appropriate instances to advise [the grand jury] concerning the law," Attorney Gen. v. Pelletier, 240 Mass. 264, 307 (1922), and that an appropriate instance for such instructions is when the grand jury request them, Commonwealth v. Noble, 429 Mass. 44, 48 (1999). Then, in Commonwealth v. Walczak, 463 Mass. 808 (2012), we held that where the Commonwealth seeks to indict a juvenile for murder, and substantial evidence of mitigating circumstances or defenses (other than lack of criminal responsibility) is presented to a grand jury, the Commonwealth must instruct the grand jury on the elements of murder and on the legal significance of those mitigating circumstances or defenses. Id. at 810. We are called on in this case to determine whether the Commonwealth's failure to provide instructions to the grand jury regarding the significance of the mitigating evidence it presented requires dismissal of an indictment against an adult for murder in the first degree.

As reflected in this plurality opinion and in the separate opinions that follow, six Justices are of the view that it is generally advisable for prosecutors to instruct grand juries on the elements of lesser offenses and defenses whenever such

instructions would help the grand jury to understand the legal significance of mitigating circumstances and defenses.[1]

The Justices disagree, however, as to the consequences of failing to provide such instructions. The three Justices who subscribe to this plurality opinion would hold that the

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[1] In Commonwealth v. Grassie, 476 Mass. 202, 219 (2017), the court announced that it would convene a special committee to review "current practices employed by the various district attorneys and the Attorney General before considering an extension of the rule adopted in [Walczak, 463 Mass. 808,] to similar types of grand jury proceedings involving adults." The committee, which consisted of judges (both sitting and retired), prosecutors, defense lawyers, and a law school professor, submitted a report to the court. See Supreme Judicial Court Committee on Grand Jury Proceedings: Final Report to the Justices, at 37 (June 2018). The report summarized interviews with representatives from the Commonwealth's prosecutors' offices regarding grand jury practices, and proposed six "best practices" for prosecutors making grand jury presentments. Id. at 11-14, 32-36.

The committee found that practices varied among districts. Some interviewees reported that the assistant district attorneys in their offices instruct grand juries on affirmative defenses or mitigating circumstances only where required to do so under our case law; others go beyond the requirements we have established. Id. at 34.

One of the best practices that the committee proposed, no. 5(B), is to "consider instructing the grand jury [where the defendant is not a juvenile] 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 13. Although we decline to hold that the integrity of grand jury proceedings are impaired whenever substantial exculpatory evidence is unaccompanied by instructions, we strongly encourage district attorneys making grand jury presentments to adopt this and the other best practices outlined in the report.

integrity of a grand jury is impaired, and the dismissal of an indictment due to the lack of instructions is therefore appropriate, only when the instructions likely would have given effect to a complete defense -- in other words, only where the exculpatory evidence[2] presented to the grand jury was so compelling that giving instructions on that evidence probably would have resulted in the grand jury returning a no bill. Two Justices -- Chief Justice Gants and Justice Lenk -- would hold that a prosecutor's failure to give a grand jury appropriate instructions on mitigating circumstances and defenses ought to result in the dismissal of an indictment if the absence of instructions probably influenced the grand jury's decision to return an indictment for murder as opposed to manslaughter or a no bill. Two other Justices -- Justice Cypher and Justice Lowy -- would hold that the integrity of a grand jury is impaired by a prosecutor's failure to give instructions only in cases where there has been affirmative prosecutorial misconduct, i.e., only if and when the facts known to the prosecutor clearly establish that the instruction would result in a complete exoneration, yet the prosecutor withholds appropriate instructions.

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[2] The words "mitigating" and "exculpatory" appear throughout this opinion to distinguish between evidence that would reduce the gravity of an offense (mitigating evidence) and that which would exonerate a defendant altogether (exculpatory evidence).

Because this case fails to satisfy the standards for dismissal set forth in this plurality opinion and in Justice Cypher's concurring opinion, five Justices (those who subscribe to this opinion and Justice Cypher's opinion) agree that, here, the indictment should not have been dismissed.

Background. The evidence presented to the grand jury was as follows. On the evening of May 7, 2014, the defendant banged on her neighbors' door and asked for help. The neighbors followed the defendant to her home and discovered the victim (the defendant's fiancé) on the floor in the kitchen covered in blood. His carotid artery had been cut; efforts to resuscitate him failed. When asked what had happened, the defendant responded, "[H]e hit me, so I hit him."

Later that night, the defendant gave a recorded interview to police in which she stated that, on the night of the killing, both she and the victim had been drinking when he became "physical." The victim began choking and beating the defendant; he then pulled out "knives and guns." At one point it appears that both had knives, and that the victim was choking the defendant. When the defendant tried to protect herself, the victim told her that he had been stabbed and that he felt dizzy. The defendant observed the stab wound to the victim's neck. After being unable to find her cellular telephone (cell phone), she went to the neighbors' house for help. The detective who

interviewed the defendant stated that he could "see the bruises" on her.

Witnesses testified to seeing bruises on the defendant at various times during the relationship. The defendant told one witness that the victim had put a gun to the defendant's mouth on multiple occasions, and she told police that the victim had been abusive toward her.[3] The police seized the defendant's cell phone and recovered a text message from the victim in which he threatened to kill the defendant's former boyfriend; that message was accompanied by a photograph of the victim holding a gun.

There also was evidence of the defendant's history of violence, including against the victim. A neighbor had heard the defendant yelling at the victim two or three times per week. Another witness observed the defendant berating the victim and "throwing closed fist punches" at him. The defendant's former boyfriend testified that the defendant told him that she had anger issues and that when she gets upset she could "actually murder somebody." The defendant admitted to him that she had stabbed the victim on a previous occasion.[4] Moreover, during an

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[3] The grand jury were presented with evidence that the police found two firearms in the residence.

[4] On the victim's cellular telephone (cell phone), police discovered a photograph of the victim's arm with a stab wound.

argument with the former boyfriend, the defendant pulled a knife out, but he was able to knock it out of her hand.

Prior proceedings. The defendant initially was arraigned in the District Court on a charge of manslaughter. Over the course of a year, four different grand juries heard evidence pertaining to the homicide, the last of which issued indictments against the defendant charging her with murder and assault and battery with a dangerous weapon.[5] The defendant moved to dismiss the murder charge, arguing among other things that the Commonwealth had failed to provide the grand jury with instructions regarding the mitigating circumstances that it presented. A judge in the Superior Court allowed the motion, concluding that although there was probable cause to return an indictment for murder, the Commonwealth's failure to provide instructions on the mitigating factors impaired the integrity of the grand jury proceedings. After a motion for reconsideration was denied, the Commonwealth appealed. We granted the defendant's application for direct appellate review.

Discussion. 1. Standard. The grand jury are an investigatory body with a dual function: "determining whether

[5] The fourth grand jury received the evidence presented to the prior grand juries in the form of exhibits, including transcripts of the prior proceedings. After being presented with some additional evidence, the fourth grand jury voted to indict the defendant.

there is probable cause to believe that a crime has been committed and . . . protecting citizens against unfounded criminal prosecutions." Lataille v. District Court of E. Hampden, 366 Mass. 525, 532 (1974). See Jones v. Robbins, 8 Gray 329, 342, 350 (1857) (under art. 12 of Massachusetts Declaration of Rights, grand jury indictment is required for crimes punishable by term in State prison).

The role of a grand jury is vastly different from that of the petit jury. "[A] grand jury indictment depends only on the existence of evidence sufficient to warrant a finding of probable cause to arrest [the defendant]" (quotations omitted), Commonwealth v. Maggio, 414 Mass. 193, 198 (1993), quoting Commonwealth v. O'Dell, 392 Mass. 445, 451 (1984). "As the standard is most often formulated, probable cause exists where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense." Commonwealth v. Storey, 378 Mass. 312, 321 (1979), cert. denied, 446 U.S. 955 (1980), and cases cited. See Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992), quoting Commonwealth v. Rivera, 27 Mass. App. Ct. 41, 45 (1989) ("The officers must have entertained rationally 'more than a suspicion of criminal involvement, something definite and substantial, but not a prima facie case of the commission of a crime, let alone a

case beyond a reasonable doubt'"). Grand jury proceedings are secret and nonadversary in nature, and thus the person under investigation is not entitled to be represented by counsel, "to present witnesses, to cross-examine adverse witnesses, or even to be present." Commonwealth v. Gibson, 368 Mass. 518, 525 n.2 (1975), S.C., 377 Mass. 539 (1979) and 424 Mass. 242, cert. denied, 521 U.S. 1123 (1997), citing United States v. Calandra, 414 U.S. 338, 343-346 (1974).

"Because of . . . the availability of an unprejudiced petit jury at trial, the safeguards deemed necessary to protect an accused before a petit jury are not implicated to the same degree in grand jury proceedings." Commonwealth v. McLeod, 394 Mass. 727, 733 (1985). See Commonwealth v. Geagan, 339 Mass. 487, 499, cert. denied, 361 U.S. 895 (1959). That is, the dismissal of an indictment is not required "[a]s long as the evidence before the grand jury was sufficient to warrant a conclusion of probable cause and the integrity of the proceedings was unimpaired."[6] Noble, 429 Mass. at 48, citing Commonwealth v. Mayfield, 398 Mass. 615, 619-620 (1986). See

[6] Even where the integrity of the proceedings are determined to have been impaired, indictments are usually dismissed without prejudice unless the Commonwealth has engaged in willful misconduct. See Commonwealth v. O'Dell, 392 Mass. 445, 447 (1984). See also Commonwealth v. Manning, 373 Mass. 438, 439 (1977) (dismissal of indictment with prejudice is appropriate remedy where Federal officers and prosecutor willfully interfered with defendant's right to counsel).

Commonwealth v. McGahee, 393 Mass. 743, 746-747 (1985). See also Commonwealth v. O'Dell, 392 Mass. 445, 451 (1984) (standard for evidence in grand jury proceedings is "considerably less exacting than a requirement of sufficient evidence to warrant a guilty finding").

In considering the claim that the Commonwealth's failure to provide the grand jury with instructions on the legal significance of the mitigating evidence prevented that body from properly evaluating the evidence, the starting point is the general principle that "[t]he extent of the [prosecutor]'s obligation to instruct the [g]rand [j]ury . . . must be defined with reference to the role of that body," Walczak, 463 Mass. at 824 (Lenk, J., concurring), quoting People v. Valles, 62 N.Y.2d 36, 38 (1984); that is, "to protect the innocent, and bring to trial those who may be guilty," State v. Hogan, 336 N.J. Super. 319, 341 (2001). See Lataille, 366 Mass. at 532. As noted supra, the evidence required to indict is significantly less than that which is required to warrant a finding of guilt beyond a reasonable doubt. Commonwealth v. Moran, 453 Mass. 880, 883 (2009). Because the Commonwealth's burden of proof for indictment is relatively low, see Lataille, supra, "the defendant bears a heavy burden to show impairment of the grand jury proceeding," see Commonwealth v. LaVelle, 414 Mass. 146,

150 (1993), citing Commonwealth v. Shea, 401 Mass. 731, 734 (1988).

The treatment of exculpatory evidence withheld from the grand jury is particularly instructive in determining whether a prosecutor has an obligation to instruct the body on certain possible defenses. See Hogan, 336 N.J. Super. at 341 ("a prosecutor's obligation to instruct the grand jury on possible defenses is a corollary to his [or her] responsibility to present exculpatory evidence"). "Prosecutors are not required in every instance to reveal all exculpatory evidence to a grand jury." McGahee, 393 Mass. at 746, citing O'Dell, 392 Mass. at 447. Rather, the integrity of the grand jury proceedings has been impaired and dismissal is warranted where the omitted exculpatory evidence "would likely have affected the grand jury's decision to indict." Commonwealth v. Clemmey, 447 Mass. 121, 130 (2006). See Commonwealth v. Connor, 392 Mass. 838, 854 (1984) ("If the grand jury were not made aware of circumstances which undermine the credibility of evidence that is likely to have affected their decision to indict, then the appropriate remedy may be dismissal of the indictment"). See also O'Dell, supra at 447 ("the withholding of a portion of the defendant's statement distorted the portion that was repeated to the grand jury in a way that so seriously tainted the presentation to that body that the indictment should not have been allowed to

stand"). Similarly, the presentation of false or misleading evidence only requires the dismissal of an indictment where the evidence was presented with the knowledge that it was false, with the express purpose of obtaining an indictment, and "probably influenced the grand jury's determination to hand up an indictment." Mayfield, 398 Mass. at 621.

It stands to reason, then, that the same is true for instructions regarding exculpatory evidence; that is, the integrity of the grand jury proceedings would be impaired by the lack of instructions only where providing them "would likely have affected the grand jury's decision to indict." Clemmey, 447 Mass. at 130. The defendant must establish that such instructions likely would have given effect to a complete defense, resulting in a no bill. See Hogan, 336 N.J. Super. at 341-342 (adopting rule that prosecutors are required to instruct on possible defenses only where, if believed, defense would result in finding of no criminal liability). See also Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988), quoting United States v. Mechanik, 475 U.S. 66, 78 (1986) ("dismissal of [an] indictment is appropriate only 'if it is established that the [omission] substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such [omission]").

Any showing by the defendant that a grand jury might have determined that a lesser charge was more appropriate would not by itself render the entire prosecution unwarranted, nor does it negate probable cause for the offense as charged, see Moran, 453 Mass. at 883-884. Thus, this is not a basis for holding that the integrity of a grand jury proceeding was impaired.

This is so for two interrelated reasons. First, as discussed supra, the role of the grand jury is limited. They are no more than an investigatory and accusatory body. See Lataille, 366 Mass. at 532. Unlike the petit jury, who are tasked with determining whether a defendant is guilty beyond a reasonable doubt of the crime charged or of a lesser offense, the grand jury "cannot and do[] not determine guilt." Commonwealth v. Wilcox, 437 Mass. 33, 39 (2002), quoting Brunson v. Commonwealth, 369 Mass. 106, 120 (1975). See Commonwealth v. Colon-Cruz, 408 Mass. 533, 549 (1990) ("The grand jury . . . is not the appropriate forum for determining guilt or innocence"). Instead, the grand jury need only "hear sufficient evidence to establish the identity of the accused . . . and probable cause to arrest him" in order to indict (citations omitted). Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982).

Second, as a general rule, "[t]he Commonwealth is not required to present evidence of so-called defenses or otherwise disprove such matters before the grand jury." Commonwealth v.

Silva, 455 Mass. 503, 511 (2009). Nor is a prosecutor required to instruct the grand jury on the elements of any lesser included offenses. Noble, 429 Mass. at 48. Indeed, prosecutors are permitted to use the same indictment for charging the various degrees of homicide. See Commonwealth v. DePace, 442 Mass. 739, 743 (2004), cert. denied, 544 U.S. 980 (2005) (statutory form of indictment alleging murder is sufficient to charge murder under any theory and in any degree, as well as manslaughter). Indeed, the degree of murder is properly determined by the petit jury, not the grand jury. Noble, supra at 48. McLeod, 394 Mass. 733, quoting Brunson, 369 Mass. at 120; G. L. c. 265, § 1 ("The degree of murder shall be found by the [petit] jury"). As the defendant is neither entitled to have the grand jury instructed on the differences between the degrees of homicide, nor to have the lowest possible homicide charge returned, it follows that the defendant is not entitled to have the grand jury instructed on the significance of mitigating evidence presented that might cause the body to find probable cause for manslaughter rather than murder.

The dissent and Justice Cypher's concurrence represent very different views of the function of the grand jury and what it means for that function to be impaired. Those views -- which occupy different ends of the spectrum of possible resolutions to

this issue -- are unnecessarily extreme in comparison to the more moderate, and more appropriate, approach laid out supra.

In his dissent, Chief Justice Gants contends that the "relevant inquiry is . . . whether the grand jury's decision to return an indictment for murder, rather than manslaughter, was 'probably influenced' by the absence of legal guidance." Post at . Thus, in the dissent's view, the integrity of the process was impaired here because the omitted instructions on the excessive use of force in self-defense probably would have led to a charge of manslaughter. See post at . This view is flawed for a number of reasons.

First, and foremost, it does not comport with our case law. As explained supra, the conclusion that the grand jury process is impaired only if the omitted legal instructions likely would have resulted in a no bill is based on prior holdings of this court pertaining to withheld exculpatory evidence. And these prior decisions have held that the failure to present exculpatory evidence impairs the integrity of the process only where the omitted information "would likely have affected the grand jury's decision to indict," Clemmey, 447 Mass. at 130, not, as the dissent contends, if the omitted evidence might have caused the grand jury to indict for a lesser offense. See Mayfield, 398 Mass. at 621 (presentation of false or misleading evidence only impairs integrity of grand jury process if, among

other things, it "probably influenced the grand jury's determination to hand up an indictment").[7]

Citing to dicta in the concurring opinions in Walczak, the dissent reasons that "[b]ecause mitigating evidence tends to cast doubt on the Commonwealth's proof regarding an essential element of a crime for which the Commonwealth seeks an indictment, it is exculpatory as to that crime." Post at , citing Walczak at 822-823 (Lenk, J., concurring); id. at 839 (Gants, J., concurring). Granted, there are important consequences to the degree of the charge, but the court heretofore has held that the question for the purposes of the impairment analysis is whether withheld evidence "would likely have affected the grand jury's decision to indict," not whether they would have preferred to indict for a lesser version of the offense. Post at . See Clemmey, 447 Mass. at 130. See also Noble, 429 Mass. at 48. The dissent's reasoning is also directly contradicted by the practice in this Commonwealth of

[7] In his dissent, Chief Justice Gants quotes the phrase "probably influenced" from Mayfield, 398 Mass. at 621, multiple times to make his point that the failure to explain the legal relevance of the mitigating evidence presented to the grand jury led to an impairment of the proceedings. See post at , , , , . This use of the language is problematic, given the context in which the phrase is used in Mayfield. According to Mayfield, 398 Mass. at 621, the relevant inquiry is "whether, if a grand jury had been told the true facts, it probably would not have indicted the defendant" (emphasis added), not whether it would have indicted the defendant for a lesser offense.

using the statutory form murder indictment to charge both degrees of murder (unless otherwise specified) and also manslaughter as a lesser included offense, see DePace, 442 Mass. at 743, and then leaving to the petit jury questions of the actual degree of culpability, whether it be murder in the first or second degree, manslaughter, or not guilty. Noble, 429 Mass. at 48.

Moreover, the dissent relies on Walczak as support for its position that mitigating evidence should receive the same treatment as exculpatory evidence when determining impairment, post at , but this reliance is misplaced. The majority in Walczak, 463 Mass. at 809-810, held that this was true with respect to juvenile defendants, but did not hold it to be so for adult defendants. Only then Justice Gants and the two Justices who joined him in his concurrence would have applied this proposition to adult defendants. Id. at 841 (Gants, J., concurring). Justice Lenk's concurring opinion in that case, which was necessary to arrive at the holding of the majority, was firmly grounded in the unique consequences for juveniles facing indictments for murder rather than manslaughter; she did not subscribe to the view of Justice Gants in that case, that mitigating and exculpatory evidence should receive the same

treatment in all cases.[8] See id. at 822-823 (Lenk, J., concurring). It is therefore incorrect to claim that the holding in Walczak supports the proposition that grand jury proceedings for adult defendants are impaired where the omitted instructions relate to evidence that is merely mitigating and not wholly exculpatory.[9]

In addition, the dissent's view conflates the roles of the grand jury and the petit jury. The duty of the grand jury is to determine whether there is probable cause to believe the crime alleged in the indictment has been committed.[10] See McCarthy, 385 Mass. at 163. The petit jury, by contrast, uniquely are

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[8] Justice Lenk reasoned that because an indictment for murder has added significance for juveniles who would lose the protections attendant with proceeding in the Juvenile Court, juvenile defendants facing potential murder charges are entitled to extra safeguards at the grand jury stage. Commonwealth v. Walczak, 463 Mass. 808, 824, 832-833 (2012) (Lenk, J., concurring). Id. at 823 (Lenk, J., concurring) (juveniles are "a class of defendants long given special consideration").

[9] In his dissent, Chief Justice Gants cites to his own concurrence in Walczak as support for the proposition that mitigating and exculpatory evidence should receive the same treatment. See post at . However, as stated, the majority of the court in Walczak did not accept that proposition with respect to adult defendants; there was simply no majority consensus on that point, one way or the other, in that case. See Walczak, 463 Mass. at 809-810. Therefore, the proposition asserted in Walczak cannot be treated as if it were supported by binding precedent.

[10] Although the grand jury could return an indictment on a lesser (or greater) offense, see Vasquez v. Hillery, 474 U.S. 254, 263 (1986), it is nevertheless the Commonwealth that controls the charges presented to the grand jury.

responsible for making the determination whether the defendant is guilty of the crime charged in the indictment, of a lesser included offense, or not at all. See Noble, 429 Mass. at 48; Colon-Cruz, 408 Mass. at 549. Given this division of responsibility, the fact that a possible outcome of the grand jury process is that a defendant might be indicted for murder, only to be convicted of a lesser offense (e.g., manslaughter) at trial, does not call the integrity of that process into question.

Further, although the dissent purports to limit its rule to requiring instructions on mitigating evidence in murder cases, see post at , , where the failure to provide instructions might result in an indictment for murder rather than manslaughter, see post at , there exists no principled reason for such a restriction. Taken to its logical conclusion, the dissent's rule would appear also to require prosecutors to provide grand juries instructions for all lesser included offenses in all criminal cases to avoid impairing the integrity of the grand jury process. See Noble, 429 Mass. at 48 (excessive judicial regulation of grand jury "would add delay and complexity without serving any significant purpose").

The dissent agrees, as does Justice Lowy in his concurrence, that, as a matter of best practices, instructions on both defenses and mitigating circumstances should be provided

to grand juries, including instructions that might possibly affect the decision whether to indict for manslaughter as opposed to murder. See note 1, supra. However, the operative question on a motion to dismiss an indictment is whether the integrity of the grand jury proceedings has been impaired, not whether a prosecutor has conformed to the best practices, and the question whether the proceedings have been impaired is determined only by asking whether, had there been appropriate instructions, the grand jury would have returned no indictment at all. See, e.g., Mayfield, 398 Mass. at 621-622 (presentation of false or misleading evidence, even if intentional, by itself does not require dismissal; defendant also must show that presentation of such evidence probably influenced decision to indict). See also Clemmey, 447 Mass. at 130; McGahee, 393 Mass. at 746-747 (same).

At the other end of the spectrum from the dissent, the concurrence by Justice Cypher suggests that the integrity of the grand jury process should be considered impaired only where the prosecutor intentionally withholds instructions and providing them probably would result in a complete exoneration. Post at . This position, like that of the dissent, is not supported by our case law.

It is true that the intent of the prosecutor presenting the case to the grand jury is an important factor in determining

whether dismissal of an indictment is required in circumstances like this. In reviewing grand jury proceedings where false information was provided, or exculpatory evidence was withheld, we have required a showing that the conduct of the prosecutor was intentional and done for the purpose of obtaining an indictment. See Clemmey, 447 Mass. at 130, and cases cited; Mayfield, 398 Mass. at 621, and cases cited. In other words, the court must consider whether the prosecutor had actual possession or knowledge of the evidence, see Wilcox, 437 Mass. at 37, and, if so, whether the prosecutor withheld the evidence for valid reasons unrelated to the indictment. See LaVelle, 414 Mass. at 150 (1993) (disclosure would have revealed identity of police informant).

However, reviewing grand jury proceedings where instructions on the law have been withheld does not lend itself to an inquiry regarding intentionality. For example, in Walczak, 463 Mass. at 808, although we held that a prosecutor is obligated to provide instructions on the significance of any substantial mitigating evidence presented to the grand jury when seeking to indict a juvenile for murder, we did not require consideration whether the prosecutor committed misconduct in withholding such instructions. Instructions on the law, unlike exculpatory evidence, are always available to the prosecution, so there is no question to be raised regarding the prosecutor's

knowledge and intent. See Commonwealth v. Kelcourse, 404 Mass. 466, 468-469 (1989). See also Commonwealth v. Reddington, 395 Mass. 315, 319-320 (1985) (defendant failed to establish that law enforcement knew or should have known that evidence was false or inaccurate). Moreover, prosecutors should be prepared to furnish instructions if the grand jury request them. See Noble, 429 Mass. at 48.

Therefore, the relevant question is not whether the prosecution intentionally withheld the instructions, but instead whether the failure to give such instructions, regardless of intent, results in an indictment where otherwise the grand jury would have returned a no bill. It is the result of the omission of the instructions, not the motive behind it, that determines whether the process has been impaired to the point that a dismissal is necessary.

This approach does not, as Justice Cypher contends, "establish another mechanism to dismiss an indictment." Post at . Instead, it does no more (or less) here than to undergird the court's duty to review grand jury proceedings where there is a claim that the integrity of the proceedings has been impaired, Mayfield, 398 Mass. at 619-620, and determine, consonant with the court's case law, what constitutes an impairment requiring dismissal. Nor does this approach represent a "fundamental and significant change to grand jury practice in the Commonwealth."

Post at . To the contrary, it likely would change very little. The only cases affected by this approach will be those in which the exculpatory evidence is compelling enough that the absence of instructions on a complete defense probably would make a difference in the grand jury's decision to hand up an indictment; and as to those, one trusts that an indictment would not be sought -- at least it should not be sought -- in the first place.[11] Limiting judicial intervention to those indictments that enable "needless or unfounded" prosecutions is consonant with the role of the grand jury. Walczak, 463 Mass. at 849 (Spina, J., concurring in part and dissenting in part). See Lataille, 366 Mass. at 532. See also Hogan, 336 N.J. Super. at 341-342.

2. Application. In this case, the Commonwealth presented sufficient evidence to the grand jury for them to find probable

[11] Justice Lowy's concurring opinion misses the mark for essentially the same reasons. Moreover, his prediction that this approach will prove unwieldy and unworkable is unwarranted. Just as prosecutors are able to meet the various obligations that are currently imposed on them by cases such as O'Dell, Mayfield, Clemmey, and Walczak, prosecutors who present evidence before grand juries will be able to meet the fundamental and fairly straightforward obligations that this approach would require of them, namely, to discern where substantial exculpatory evidence they have presented gives rise to a defense that could reasonably result in a no bill, and to instruct the grand juries accordingly.

cause to believe that the defendant committed murder.[12] See McCarthy, 385 Mass. at 160, 163. That evidence included the fact that the victim was found with a fatal stab wound to the neck, that the defendant and the victim were fighting just prior to the stabbing, and that they were the only adults in the house at the time of the stabbing. The Commonwealth also presented substantial evidence that could have been seen as exculpatory, comprising testimony from witnesses who observed bruises on the defendant, including on the night of the killing; statements from the defendant regarding the victim's abusive behavior toward her during their relationship; and the defendant's statement that she acted in self-defense.

When coupled with instructions from the judge at trial, the evidence presented may result in a petit jury finding the defendant guilty only of voluntary manslaughter (or not guilty

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[12] Murder is the unlawful killing of a human being with malice aforethought. See Commonwealth v. Kane, 388 Mass. 128, 133 (1983), citing Commonwealth v. Webster, 5 Cush. 295, 303 (1850). To prove malice, the Commonwealth need not prove that the defendant intended to kill the victim; it also may prove malice by showing that the defendant intended to cause grievous bodily harm or that, in circumstances known to the defendant, the defendant intended an act creating a plain and strong likelihood that death would follow. See Commonwealth v. Azar, 435 Mass. 675, 682 (2002); S.C., 444 Mass. 72 (2005). Admittedly, not each of these prongs of malice is compatible with each of the three theories of murder in the first degree.

of any offense).[13] See McLeod, 394 Mass. at 733 (availability of unprejudiced petit jury at trial obviates need for in-depth appellate scrutiny of all aspects of grand jury process). See also Geagan, 339 Mass. at 499 (inadmissible evidence before grand jury can be remedied at petit jury stage). However, in order for the defendant to prevail on a claim that the integrity of the grand jury proceedings was impaired here, she must demonstrate that, had the Commonwealth provided instructions on the legal significance of the exculpatory evidence presented, it would have resulted in a "complete exoneration" by the issuance of a no bill. See Clemmey, 447 Mass. at 130. See also Hogan, 336 N.J. Super. at 342.

The requisite showing is particularly difficult to make here for at least two reasons. First, the exculpatory evidence was weakened substantially by the contrasting evidence of the defendant's violent temper and controlling behavior toward -- and physical abuse of -- the victim, including a prior occasion

[13] The defendant's assertion that she acted in self-defense does not necessarily absolve her from culpability. Although the use of self-defense negates the element of malice, see Connolly v. Commonwealth, 377 Mass. 527, 529 (1979), only the proper use of self-defense exonerates a defendant from all criminal liability. Commonwealth v. Carlino, 429 Mass. 692, 694 (1999), S.C., 449 Mass. 7 (2007). Excessive force in self-defense, on the other hand, constitutes manslaughter. Id.

in which the defendant stabbed the victim.[14] Second, a grand jury are required to find only that the evidence was sufficient "to establish the identity of the accused and probable cause to arrest [her]." See O'Dell, 392 Mass. at 451. "The mere existence of some evidence that could suggest self-defense does not negate probable cause . . . probable cause can well exist (and often does) even though ultimately, a jury is not persuaded that there is proof beyond a reasonable doubt." Yousefian v. Glendale, 779 F.3d 1010, 1014 (9th Cir.), cert. denied, 136 S. Ct. 135 (2015). See Morris v. Lexington, 748 F.3d 1316, 1325 (11th Cir. 2014) (evidence of self-defense does not negate probable cause to arrest for assault).

Contrary to the dissent's assertion, this approach does not necessarily ask prosecutors to "distinguish between evidence of lawful self-defense and evidence of excessive use of force in self-defense," post at . Prosecutors would be well advised to err on the side of presenting exculpatory and mitigating evidence, as well as instructions that give legal meaning to that evidence.[15] See note 1, supra. This is all the more so

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[14] In fact, the other indictment issued by this same grand jury was for the previous instance of the defendant's assault and battery of the victim with a knife.

[15] There is no merit to the dissent's concern that the rule announced today will likely have the unintended consequence of discouraging prosecutors from providing instructions because they will know there will rarely be consequences for failing to

because, as the dissent notes, evidence showing lawful self-defense overlaps with that showing excessive force. But an indictment should not be disturbed on the basis that, had the grand jury received instructions on the different types of homicide, they would have indicted the defendant for some lesser crime.

Given that the purpose of the grand jury is to determine probable cause and not guilt, the process here appears to have worked as designed. That is, the grand jury determined that there was sufficient evidence to establish probable cause to believe that the defendant committed the crime alleged in the indictment: murder. At trial, a petit jury will weigh the mitigating and exculpatory evidence, along with all the other evidence, to determine whether the defendant is guilty beyond a

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do so. Post at . First, the duty of the prosecution is "not that it shall win a case, but [instead, to see] that justice shall be done." Commonwealth v. Keo, 467 Mass. 25, 35 (2014), quoting Berger v. United States, 295 U.S. 78, 88 (1935). The Commonwealth's prosecutors can be trusted to operate in this spirit and to provide instructions in all appropriate instances. Further, as noted supra, prosecutors are required to provide instructions when so requested by the grand jury. See Commonwealth v. Noble, 429 Mass. 44, 48 (1999). Finally, to help ensure that grand juries are instructed appropriately, Superior Court judges are strongly encouraged to inform grand jurors at the outset of their service that they may request instructions on the elements of crimes alleged in the indictments presented to them, as well as instructions on lesser included offenses.

reasonable doubt of murder or voluntary manslaughter, or not guilty of any offense. See Colon-Cruz, 408 Mass. at 549.

Conclusion. Because the integrity of the grand jury process was not impaired, the order dismissing the indictment against the defendant must be vacated and the case remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

LOWY, J. (concurring). Although I join Justice Cypher's concurrence, I write separately for three reasons. First, in my view prosecutors should instruct a grand jury on affirmative defenses and on mitigation whenever the evidence supports such instructions. It is good practice to do so, and a number of district attorneys' offices follow this approach. I would not require such instructions, however, for the compelling reasons outlined in Justice Cypher's opinion.

Second, I believe that Justice Budd's conclusion is unwieldy at best, and perhaps even unworkable. I agree with the dissent that the grand jury in this case "heard substantial evidence . . . that the defendant acted in lawful self-defense." Post at . How then does a judge rule on what Justice Cypher is calling a "Fernandes motion," post at , where exculpatory evidence, if believed, would result in a no bill? Does the Commonwealth have to delay its grand jury presentation until the Commonwealth retains an expert on battered woman syndrome? What if the exculpatory evidence is a defendant's statement to police made during custodial interrogation? What if that statement cannot be reconciled with forensic and medical evidence? What if, in a rape case, there is overwhelming evidence that the alleged victim was too impaired to consent and the defendant's own statement, inconsistent with a video recording of the incident, is that he was too impaired to recognize the victim's

impairment? See Commonwealth v. Blache, 450 Mass. 583, 597 (2008) ("Commonwealth must prove that the defendant knew or reasonably should have known that the complainant's condition rendered her incapable of consenting"). Must a grand jury be instructed on Blache at the risk of a "Fernandes dismissal"? What if the defense is entrapment, accident, or selective prosecution? Does the result in these circumstances depend on a motion judge's determinations of credibility? That seems akin to adjudication.

Third, once this court intrudes on grand jury practice, absent insufficient evidence or impairment of the grand jury, we alter the function of the grand jury and detract from its historic role. The grand jury are not an adjudicatory body. The more the grand jury's vote becomes an adjudication, the less the grand jury act as an investigatory body and a shield.

CYPHER, J. (concurring in part and dissenting in part, with whom Lowy, J., joins). I agree with the court that the evidence presented to the grand jury supports the indictment for murder and that the lack of instruction on mitigating circumstances did not impair the integrity of the grand jury. I would, however, stop there and not establish another mechanism to dismiss an indictment. I do not agree with the dissent, which would hold that in all cases where the Commonwealth seeks an indictment for murder and there is substantial evidence of mitigating circumstances or defenses (except lack of criminal responsibility) the grand jury must be instructed on the effect of mitigating circumstances and defenses.[1] In my opinion, the usual instructions on the elements of a crime are all that need to be given.[2]

I write separately because I do not think that it is proper or necessary for the court to intrude further into grand jury practice. I am of the view that although it may be best practice to instruct grand juries on the elements of lesser

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[1] I agree with the distinction between mitigating and exculpatory evidence set forth in Justice Budd's opinion -- the former term refers to evidence that, if believed, could reduce the gravity of the offense, while the latter refers to evidence that, if believed, could absolve the defendant from guilt altogether. See ante at note 2.

[2] Unless, of course the grand jury request further instruction.

offenses and defenses, a new rule would result in delay, add nothing to the assurances of a fair trial, and be an encroachment on the traditional grand jury practice and function.

As the United States Supreme Court observed when discussing whether to adopt a change to grand jury practice to determine whether indictments were supported by competent evidence,

> "[n]o persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observation of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial."

Costello v. United States, 350 U.S. 359, 364 (1956). See Commonwealth v. Gibson, 368 Mass. 518, 524 (1975), S.C., 377 Mass. 539 (1979), and 424 Mass. 242, cert. denied, 521 U.S. 1123 (1997), quoting Costello, supra.

It has been long-settled law that the Commonwealth is not required to present evidence of so-called defenses or otherwise disprove such matters before the grand jury, Commonwealth v. Silva, 455 Mass. 503, 511 (2009); inform a grand jury of the differences between murder and manslaughter or the relevance of intoxication, Commonwealth v. Bousquet, 407 Mass. 854, 860 (1990); or inform grand jury as to a lesser included offense of

the crime for which it seeks indictment, unless requested, Commonwealth v. Noble, 429 Mass. 44, 48 (1999). See generally Commonwealth v. Walczak, 463 Mass. 808, 847 (2012) (Spina, J., concurring in part and dissenting in part).

The grand jury committee referenced in Justice Budd's opinion consisted of prosecutors and defense attorneys who worked diligently to review the grand jury practices of the various district attorneys and the Attorney General. Ante at note 1. The committee developed six proposed "best practices" for prosecutors when making grand jury presentments. See Supreme Judicial Court Committee on Grand Jury Proceedings: Final Report to the Justices, at 11-14 (June 2018). One of the best practices the committee proposed is no. 5(B), advising prosecutors to "consider instructing the grand jury [where the defendant is not a juvenile] 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 13. Best practices are, however, just that. After hundreds of years of grand jury practice, there is nothing in the record or in the report of the committee that indicates that there is a problem in the Commonwealth with instructions to the grand jury. See Walczak, supra at 844-856 (Spina, J., concurring in part and dissenting in part).

To better understand my position, it is helpful to review briefly some of the fundamental principles that have guided grand jury practice in Massachusetts. In his concurring opinion in Commonwealth v. Grassie, 476 Mass. 202 (2017), Justice Lowy wrote: "For the past 236 years the grand jury [have] been an investigatory and accusatory body in this Commonwealth." Id. at 221 (Lowy, J., concurring), citing Commonwealth v. Moran, 453 Mass. 880, 884 n.7 (2009). Justice Lowy correctly anticipated that the "convening of the study group [would] be but a first step in the erosion of that vital and historic function." Grassie, supra (Lowy, J., concurring).

The institution of the grand jury is one of the oldest in our criminal justice system, dating back to the rule of King Henry II in 1164. Simmons, Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?, 82 B.U. L. Rev. 1, 4 (2002). Years later, the concept of the grand jury was imported to the American colonies along with the rest of the common law. Id. at 10. The Massachusetts grand jury practice was established by art. 12 of the Massachusetts Declaration of Rights and occupies a unique place in our jurisprudence. See Jones v. Robbins, 8 Gray 329, 342 (1857). "Comprised of citizens who sit independently and in secrecy, the grand jury determine[] whether sufficient cause exists to justify requiring a person to undergo the 'public accusation of

crime, and . . . the trouble, expense and anxiety of a public trial before a jury of his peers.'" Commonwealth v. Riley, 73 Mass. App. Ct. 721, 726 (2009), quoting Jones, supra at 344. In Massachusetts, with respect to "crimes of great magnitude" the right to a grand jury is firmly rooted in and protected by art. 12. Commonwealth v. Stevenson, 474 Mass. 372, 375 (2016), quoting Jones, supra at 347.

Notwithstanding their historic and important role, the grand jury have a limited function -- they are an investigatory and accusatory body only. See Matter of R.I. Select Comm'n Subpoena, 415 Mass. 890, 895 (1993). A grand jury's purpose is not to adjudicate guilt or degrees of guilt. Moran, 453 Mass. at 884 n.7. See Walczak, 463 Mass. at 845 (Spina, J., concurring in part and dissenting in part), quoting Commonwealth v. Wilcox, 437 Mass. 33, 39 (2002). In order to indict, a grand jury need only hear sufficient evidence to establish the identity of the accused and to support a finding of probable cause to arrest the accused for the offense charged. Commonwealth v. Rex, 469 Mass. 36, 40 (2014). "The standard of sufficiency has been defined as whether the grand jury heard reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense" (quotation and citation omitted). Commonwealth v. Goldstein, 54 Mass. App. Ct. 863, 866 (2002).

A finding of probable cause, however, requires considerably less evidence than that which is required to support a finding of guilt by the petit jury. Commonwealth v. O'Dell, 392 Mass. 445, 451 (1984). See Commonwealth v. Murphy, 68 Mass. App. Ct. 152, 154 (2007) (evidence insufficient to overcome motion for required finding of not guilty may support probable cause for issuance of indictment). In fact, "[p]robable cause to sustain an indictment is a decidedly low standard." Commonwealth v. Hanright, 466 Mass. 303, 311 (2013), overruled on another ground by Commonwealth v. Brown, 477 Mass. 805 (2017). Not only is the standard for indictment low, but when reviewing the sufficiency of an indictment, the grand jury evidence must be viewed in the light most favorable to the Commonwealth. See Commonwealth v. Barbosa, 477 Mass. 658, 675 (2017), citing Moran, 453 Mass. at 885.

Grand jury proceedings are not conducted in accordance with the same standards applied to protect a defendant's rights at trial. Grand juries are not strictly bound by the rules of evidence. A grand jury may rely on hearsay in determining whether there is probable cause to indict, Commonwealth v. Washington W., 462 Mass. 204, 210 (2012), and "[i]naccurate testimony made in good faith does not require dismissal of an indictment," Silva, 455 Mass. at 509. There is no duty to

present all exculpatory evidence to a grand jury. Commonwealth v. McGahee, 393 Mass. 743, 746 (1985).

Traditionally, this court has maintained a limited role in reviewing grand jury proceedings. We have not, however, permitted the grand jury to become a mere arm of the prosecution. Although the general rule is that a court should not inquire into the adequacy or competency of the evidence upon which an indictment is based, we have held that "at the very least the grand jury must hear sufficient evidence to establish the identity of the accused . . . and probable cause to arrest him" (citation omitted). Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982).

We also have exercised a greater supervisory role -- on a case-by-case basis -- over the substance of grand jury proceedings in circumstances where the integrity of the grand jury has been impaired. Stevenson, 474 Mass. at 375-376. For example, a prosecutor 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. Clemmey, 447 Mass. 121, 130 (2006), quoting Wilcox, 437 Mass. at 37. The standard is stringent, and even when a prosecutor intentionally withholds evidence, the defendant must demonstrate that the

prosecutor's decision "likely affected the grand jury's decision to indict." Clemmey, supra at 131. See, e.g., Commonwealth v. Mayfield, 398 Mass. 615, 634 (1986) (integrity of grand jury proceeding would be impaired if defendant is "put to trial on an indictment which the Commonwealth knows is based in whole or in part on false testimony"); O'Dell, 392 Mass. at 446-447 (dismissing indictment where grand jury proceeding was impaired when grand jurors were presented with portion of statement attributed to defendant, seemingly inculpating him, without exculpatory portion of purported statement that had been excised). These protections are limited by the grand jury's independence, and the defendant bears a heavy burden to show impairment of the grand jury proceeding. Stevenson, 474 Mass. at 376.

As noted, the purpose of the grand jury is to determine probable cause, not guilt and degrees of guilt. See Rex, 469 Mass. at 40; Moran, 453 Mass. at 884 n.7. Requiring prosecutors to give instructions where appropriate invites "Fernandes motions" to dismiss indictments for failure to instruct the grand jury on the use and relevance of exculpatory evidence or defenses. See generally Commonwealth v. Perkins, 464 Mass. 92, 106-109 (2013) (Gants, J., concurring). Such a requirement would encourage prosecutors to introduce more evidence than necessary to establish probable cause and to rebut the

exculpatory evidence and anticipated defenses to avoid being challenged for impairing the integrity of the grand jury. This has the potential to create a "mini trial," which would defeat the purpose of a grand jury. Costello, 350 U.S. at 363–364.

A requirement that the grand jury be instructed on mitigation or defenses is "a significant departure from the historic and practical nature of the grand jury[;] it calls on the grand jury to perform more than an accusatory or investigative function, and it needlessly and unfairly burdens police and prosecutors to develop murder cases before learning about a defendant's case through reciprocal discovery. It is more consonant with public justice to sort out these issues at a subsequent trial." Walczak, 463 Mass. at 850–851 (Spina, J., concurring in part and dissenting in part). For the court to require such instruction represents a fundamental and significant change to grand jury practice in the Commonwealth.

This court has held consistently that any perceived error at the grand jury stage can be cured by the petit jury at trial. See Commonwealth v. McLeod, 394 Mass. 727, 733 (1984), cert. denied sub nom. Aiello v. Massachusetts, 474 U.S. 919 (1985) (availability of unprejudiced petit jury at trial obviates need for appellate review of grand jury); Commonwealth v. Geagan, 339 Mass. 487, 499, cert. denied, 361 U.S. 895 (1959) (inadmissible evidence before grand jury can be remedied at petit jury stage).

See also Clemmey, 447 Mass. at 131 ("Whether the question of the exemption's inapplicability [or invalidity] may appropriately reemerge at trial has little bearing on the prosecutor's obligation to present to the grand jury certain forms of exculpatory evidence [in his possession] the withholding of which would seriously taint or distort the proceedings"). With this remedy available, creating another layer of procedure at the grand jury stage adds nothing of value.

Much like the case in Walczak, the question here is not whether the integrity of the grand jury was impaired by prosecutorial misconduct that unfairly resulted in an indictment. Rather, the question is whether the failure to instruct the grand jury on potential mitigating factors in the adult defendant's killing of her boyfriend impaired the integrity of the grand jury. A petit jury, which determine guilt, normally would be instructed to return a verdict for the highest crime proved beyond a reasonable doubt against the defendant. See Commonwealth v. Dickerson, 372 Mass. 783, 797 (1977), overruled on another ground by Commonwealth v. Paulding, 438 Mass. 1 (2002). The grand jury, which are merely an accusatory body that does not determine guilt, do not have greater power than a petit jury in this regard. Walczak, 463 Mass. at 847–848 (Spina, J., concurring in part and dissenting in part).

Failing to instruct a grand jury about defenses or the impact of mitigating evidence, for which a prosecutor has no legal duty, has not and should not be analyzed under an impaired integrity standard. The impaired integrity standard suggests the presence of intentional prosecutorial misconduct that could result in sanctions. Commonwealth v. Salman, 387 Mass. 160, 167 (1982) (integrity impaired when prosecutor knowingly used false testimony to procure indictment). See Mayfield, 398 Mass. at 639 (Liacos, J., dissenting); O'Dell, 392 Mass. at 446-447. This standard should apply only "when the facts known to the prosecutor . . . clearly establish," see Walczak, 463 Mass. at 849 (Spina, J., concurring in part and dissenting in part), quoting State v. Hogan, 336 N.J. Super. 319, 343 (App. Div. 2001), that the instruction would result in "a complete exoneration," yet the prosecutor withholds the instruction, see Walczak, supra, quoting Hogan, supra at 342. The decision to further instruct a grand jury is, like the decision to call a particular witness or introduce more or less evidence, a judgment call determined by the unique circumstances presented at the moment.

Here, there is probable cause to support the defendant's indictment for murder and assault and battery with a deadly weapon. The evidence presented to the grand jury shows that the victim died of a stab wound to the neck. The defendant, who was

the last person with the victim, ran for help and said to a neighbor, "Well, he hit me, so I hit him." That same neighbor witnessed a clean knife in the kitchen sink. A witness testified that the defendant had admitted to stabbing the victim on a previous occasion. The Commonwealth also presented significant mitigating evidence, comprising testimony from witnesses who observed bruises on the defendant, including on the night of the killing; testimony from the defendant regarding the victim's abusive behavior toward her during their relationship; and the defendant's statement that she acted in self-defense.

"The only question for the grand jury should be whether the evidence was sufficient to support a decision to arrest for murder. Any inquiry and decision beyond that is in the nature of an adjudicatory decision and appropriately should be reserved for the petit jury." Walczak, 463 Mass. at 849 (Spina, J., concurring in part and dissenting in part).

GANTS, C.J. (dissenting, with whom Lenk, J., joins). The grand jury in this case heard substantial evidence that the defendant killed the victim in self-defense or used excessive force in self-defense. But the prosecutor provided the grand jury with no legal guidance that would have enabled them to understand the legal significance of this evidence in deciding whether to return an indictment for murder, an indictment for manslaughter, or no indictment at all. The plurality contends that the absence of any such instructions does not require the dismissal of the murder indictment without prejudice because instructions would likely not have resulted in the grand jury issuing a no bill. I believe that the relevant inquiry is not whether the omitted legal instructions likely would have resulted in a no bill, but whether the grand jury's decision to return an indictment for murder, rather than manslaughter, was "probably influenced" by the absence of legal guidance. Commonwealth v. Mayfield, 398 Mass. 615, 621 (1986). Because I conclude that the grand jury's decision to indict this defendant for murder was probably influenced by the lack of legal instructions concerning self-defense and the excessive use of force in self-defense, I believe that that the indictment should be dismissed without prejudice so that a properly instructed grand jury may consider the evidence. Therefore, I respectfully dissent.

Discussion. 1. The grand jury process. After presenting evidence to a grand jury, a prosecutor offers the grand jury a proposed indictment charging the defendant with a specific crime. The grand jury must then evaluate the presented evidence and decide whether there is probable cause to believe that the defendant committed the crime charged. In doing so, the grand jury must determine whether there is probable cause supporting each required element of the crime. See Commonwealth v. Moran, 453 Mass. 880, 884 (2009) (grand jury must be presented with evidence on each element of crime charged). See also Commonwealth v. Washington W., 462 Mass. 204, 212-213 (2012) (considering whether withheld evidence was material to grand jury's finding of probable cause as to one required element of crime). Where the grand jury so finds, they should return the proposed indictment charging that crime. Where they do not, the grand jury must return a no bill or an indictment charging a lesser crime for which they do find probable cause. Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982) ("A grand jury finding of probable cause is necessary if indictments are to fulfil their traditional function as an effective protection against unfounded criminal prosecutions" [quotation and citation omitted]).

Here, the prosecutor presented the grand jury with an indictment charging murder. The language of some indictments

sets forth all of the elements of the crime charged, and therefore provides the grand jury with legal guidance regarding the required elements for which probable cause must be found. Compare, e.g., G. L. c. 277, § 79 (form indictment for breaking and entering in nighttime with intent to commit felony) with Commonwealth v. Cabrera, 449 Mass. 825, 827 (2007) (describing elements of breaking and entering in nighttime with intent to commit felony). But the language of a murder indictment, as authorized by statute, does not. See G. L. c. 277, § 79. The indictment here simply alleged that the defendant, on May 7, 2014, "did assault and beat [the victim] with intent to murder him and by such assault and beating did kill and murder [the victim]." In the absence of legal guidance, a reasonable grand juror would understand this language to mean that the required elements of murder are: (1) that the defendant committed an assault and battery against the victim; (2) that, in doing so, the defendant intended to kill the victim; and (3) that the assault and battery caused the victim's death.

But this reasonable understanding, based on the language of the standard murder indictment, is legally incorrect: a required element of the crime of murder is that the defendant committed the killing with malice. See Commonwealth v. Sires, 413 Mass. 292, 296 (1992) ("malice is what makes an unlawful killing murder"). Malice may be proved by establishing any one

of three prongs: (1) that the defendant intended to kill the victim; (2) that the defendant intended to inflict grievous bodily harm on the victim; or (3) that the defendant intended "to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would follow" (citation omitted). Commonwealth v. Williams, 475 Mass. 705, 712 (2016). But a killing is not committed with malice where it is committed in the heat of passion on reasonable provocation, where it is induced by sudden combat, or where the defendant uses excessive force in self-defense. See Commonwealth v. Camacho, 472 Mass. 587, 602 (2015). Because a grand jury must be presented with evidence supporting a finding of probable cause with regard to each element of the crime charged, see Moran, 453 Mass. at 884, a grand jury may not return a murder indictment unless they find probable cause to believe that the defendant killed the victim with malice. If the grand jury were to conclude that the defendant intended to kill the victim but that there was not probable cause to believe that she did so with malice, either because she used excessive force in self-defense or because she acted in the heat of passion on reasonable provocation or in

sudden combat, they could indict the defendant for manslaughter but not for murder.[1]

Moreover, the language of the indictment does not inform the grand jury that lawful self-defense is a complete defense. This means that even if there is probable cause to believe (1) that the defendant committed an assault and battery against the victim; (2) that, in doing so, the defendant intended to kill the victim; and (3) that the assault and battery caused the victim's death, the defendant may not be indicted for any homicide offense if the grand jury conclude that the defendant committed the killing in lawful self-defense (or, more precisely, conclude that there is not probable cause to believe that the defendant was not acting in lawful self-defense when she killed the victim). See Commonwealth v. Little, 431 Mass.

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[1] I recognize, as does the plurality, see ante at , that the statutory form of an indictment for murder, G. L. c. 277, § 79, is sufficient to charge murder in the first degree under any theory, and "encompasses lesser included offenses such as murder in the second degree and manslaughter." Commonwealth v. DePace, 442 Mass. 739, 743 (2004), cert. denied, 544 U.S. 980 (2005). But that does not mean that the Legislature intended that a murder indictment be brought where there is probable cause only of manslaughter. There is a separate statutory form for a manslaughter indictment. See G. L. c. 277, § 79 ("That A.B. did assault and beat C.D., and by such assault and beating did kill C.D."). In fact, the statutory form of a murder indictment distinguishes between first- and second-degree murder, identifying additional language that may be used where the prosecutor seeks an indictment for murder in the second rather than in the first degree. Id. The language used in the indictment in this case charged murder in the first degree.

782, 787 (2000) ("self-defense, if warranted by the circumstances and carried out properly, constitutes a complete defense").

2. Exculpatory evidence. The grand jury in this case heard substantial evidence to support a finding that the defendant acted in lawful self-defense or, alternatively, that she used excessive force in self-defense. The grand jury learned that the defendant was engaged to be married to the victim, that she immediately reported the stabbing to her neighbors, that she appeared hysterical following the stabbing, and that, when asked what had happened, she told her neighbor that "he hit me, so I hit him." The grand jury further learned that the defendant, soon after the victim was stabbed, informed police officers that the victim had threatened her with a gun and choked her immediately prior to the stabbing. And the grand jury heard substantial evidence in support of this self-defense claim: police officers located a gun on the couch at the residence; an officer noticed fresh bruises on the defendant's face and arm; the defendant had previously disclosed that the victim was physically abusive and had placed a gun in her mouth on multiple occasions; and the victim, days before the killing, had sent text messages to the defendant saying "I'm going to fucking kill you" and "You're dead."

The significance of this exculpatory evidence is reflected in the fact that the Commonwealth, which was familiar with the circumstances of this case and with the law of murder and manslaughter, decided to charge the defendant with manslaughter in its complaint.

3. Impairment of the integrity of the grand jury. If the Commonwealth had sought an indictment for murder without disclosing any of the above-described surrounding circumstances to the grand jury (which, to the Commonwealth's credit, did not take place here), I believe there can be no doubt that the prosecutor would have impaired the integrity of the grand jury by failing to present to them exculpatory 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." See Commonwealth v. Clemmey, 447 Mass. 121, 130 (2006), quoting Commonwealth v. Wilcox, 437 Mass. 33, 37 (2002). See also Commonwealth v. O'Dell, 392 Mass. 445, 449 (1984) (dismissing indictment where failure to introduce exculpatory evidence impaired integrity of grand jury). Yet the plurality opinion concludes that even where the prosecutor sought an indictment for murder despite substantial evidence of self-defense and the excessive use of force in self-defense, the prosecutor had no obligation to provide the grand jury with any legal guidance regarding lawful self-defense or the excessive

use of force in self-defense, or regarding the required elements of the crime of murder.[2]

I believe that the prosecutor's obligation to furnish the grand jury with exculpatory evidence likely to affect the grand jury's decision includes the obligation to provide instructions enabling them to understand the legal significance of that evidence.[3] See Commonwealth v. Walczak, 463 Mass. 808, 839 (2012) (Gants, J., concurring) ("Evidence of mitigating circumstances . . . is meaningless to a grand jury that have not been provided with the guidance necessary to understand its legal significance"). In other words, I believe that if it would be an O'Dell violation for a prosecutor to conceal significant exculpatory evidence from the grand jury in a murder

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[2] The plurality does not address whether it would have impaired the integrity of the grand jury for the prosecutor in this case not to present the above-described evidence of the victim's abuse of the defendant. The plurality therefore implicitly assumes that legal instructions would not have been necessary even if the substantial evidence of self-defense and excessive use of force in self-defense was required to be presented to the grand jury.

[3] I note, as the court did in Commonwealth v. Walczak, 463 Mass. 808, 810 (2012), that the Commonwealth need not present grand juries with evidence or legal instructions concerning a defendant's mental impairment or lack of criminal responsibility. This is because a prosecutor during grand jury proceedings is unable to obtain a court order requiring the defendant to submit to a psychiatric examination. See id. at 842 n.4 (Gants, J., concurring), citing Mass. R. Crim. P. 14 (b) (2), as appearing in 442 Mass. 1518 (2004); Blaisdell v. Commonwealth, 372 Mass. 753, 765-766 (1977).

case, it should be a Fernandes violation for a prosecutor to fail to explain the legal significance of that evidence, and I believe that either violation warrants dismissal of the indictment without prejudice. I reach this conclusion because, where mitigating or exculpatory evidence is so significant that it must be introduced to avoid impairing the integrity of the grand jury proceedings, failure to explain the legal relevance of this evidence "probably influenced" the grand jury's decision to indict the defendant for murder and not manslaughter.[4] Mayfield, 398 Mass. at 621.

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[4] The plurality contends that the language in Commonwealth v. Mayfield, 398 Mass. 615, 621 (1986), which asks whether the grand jury's decision to indict was "probably influenced" by a prosecutor's actions, does not support my position because in that case, "the relevant inquiry [was] 'whether, if a grand jury had been told the true facts, it probably would not have indicted the defendant,' (emphasis added), not whether it would have indicted the defendant for a lesser offense." Ante at note 7, quoting Mayfield, supra. In Mayfield, supra at 619, however, there was no reason for the court to consider the possibility of indictment for a lesser offense -- Mayfield argued that the integrity of the grand jury was impaired by the presentation of false inculpatory evidence relevant to the question whether he killed the eleven year old victim; he did not claim to have acted in self-defense or under any mitigating circumstance. Therefore, an indictment for manslaughter would have been entirely unsupported by the evidence, and the defendant could show "probable prejudice in the grand jury proceedings" only by demonstrating the likelihood of a no bill. Id. at 622. Here, in contrast, there was abundant evidence before the grand jury that the defendant was responsible for the victim's death, but there was also considerable evidence that she acted in self-defense or used excessive force in self-defense. In light of that evidence, whether the grand jury's decision was "probably influenced" by the failure to present instructions, and

In reaching the contrary conclusion that instructions need to be provided only where they would likely result in a no bill, the plurality makes five errors.

a. Overstatement of existing case law. First, the plurality contends that my definition of what probably influences a grand jury's decision to indict "does not comport with our case law." Ante at . In fact, however, a majority of this court has never decided whether instructions on mitigating circumstances and defenses are necessary where the Commonwealth seeks to indict an adult defendant for murder and where there is substantial evidence that the defendant acted in self-defense or used excessive force in self-defense. See Commonwealth v. Grassie, 476 Mass. 202, 219 (2017) (declining to address this issue). As the plurality acknowledges, "we provided only limited guidance regarding legal instructions furnished to grand juries" prior to holding in Walczak, 463 Mass. at 810, that prosecutors are required to instruct the grand jury on the elements of murder and on the significance of mitigating circumstances and defenses where the Commonwealth seeks to indict a juvenile for murder despite substantial evidence of mitigating circumstances or defenses. Ante at .

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therefore whether the lack of instructions "probably made a difference" and resulted in "probable prejudice," depends not only on the possibility of a no bill, but also on the possibility of an indictment for manslaughter. Id. at 621-622.

The question presented here, therefore, cannot be answered simply by applying our existing case law. It is presumably for this reason that the plurality relies in large part on an out-of-state case, State v. Hogan, 336 N.J. Super. 319 (2001), decided by the Appellate Division of the New Jersey Superior Court, in arguing that instructions need be provided only when they would likely result in a no bill. See ante at , , .

b. Oversimplification of grand jury's decision. Second, the plurality treats the grand jury's decision as binary: whether to indict the defendant for a crime or to return a no bill. The indictment presented to a grand jury, however, does not charge a generic crime -- it charges a specific crime, with specific required elements. See Commonwealth v. Fryar, 414 Mass. 732, 744 (1993), S.C., 425 Mass. 237, cert. denied, 522 U.S. 1033 (1997) (Commonwealth must present grand jury with "enough evidence to establish probable cause to believe that the defendant committed the crime charged" [emphasis added]). It is therefore up to the grand jury to determine not only whether the defendant committed a crime, but which, if any, particular crime is supported by probable cause. See Vasquez v. Hillery, 474 U.S. 254, 263 (1986) ("In the hands of the grand jury lies the power to charge a greater offense or a lesser offense").

The plurality's oversimplified approach to the grand jury's role leads it to conclude that a lack of instructions "would

likely have affected the grand jury's decision to indict," Clemmey, 447 Mass. at 130, only where such instructions would have informed the grand jury of what likely would have been a complete defense. Ante at . This standard fails to recognize the immense difference between a manslaughter and a murder indictment where the grand jury finds that only the former is supported by probable cause. If convicted of murder, the defendant will be sentenced to life in prison and, if convicted of murder in the first degree, will have no possibility of parole. See G. L. c. 265, § 2 (a), (c). In contrast, if the defendant is convicted of manslaughter, she faces a maximum sentence of twenty years in prison, with no minimum mandatory sentence. See G. L. c. 265, § 13. Of course, a murder indictment will not necessarily result in a murder conviction. But the stark difference between murder and manslaughter may affect not only the defendant's sentence upon conviction, but also the defendant's decision whether to plead guilty or go to trial. Some defendants, even if they are not guilty, may be unwilling to risk a life sentence without the possibility of parole where the Commonwealth is willing to accept a guilty plea to murder in the second degree or manslaughter. They may be more willing to risk trial, however, where the grand jury indict them for manslaughter rather than murder.

Furthermore, an indictment for manslaughter as opposed to murder is likely to yield more favorable plea options for a defendant, as the Commonwealth will no longer possess the threat of a life sentence as a negotiating tool. "In today's criminal justice system," where "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant," Missouri v. Frye, 566 U.S. 134, 144 (2012), this calculus is critical. And importantly, it takes place before the petit jury enter the equation to "weigh the mitigating and exculpatory evidence" and "determine whether the defendant is guilty beyond a reasonable doubt of murder or voluntary manslaughter, or not guilty of any offense." Ante at . I therefore believe that the grand jury's decision to indict is affected not only where legal instructions likely would have resulted in a no bill, but also where the grand jury's decision to issue an indictment for murder (as opposed to manslaughter) was "probably influenced" by the lack of legal guidance. Mayfield, 398 Mass. at 621. This standard reflects the grand jury's responsibility to decide whether the particular crime charged is supported by probable cause. See Vasquez, 474 U.S. at 263.

c. Distinction between mitigating and exculpatory evidence. Third, the plurality contends that grand jury proceedings are not impaired where omitted instructions relate

to evidence that is "merely mitigating and not wholly exculpatory." Ante at . I agree with the plurality that mitigating evidence is evidence that might reduce the gravity of the offense, while exculpatory evidence is evidence that might absolve the defendant from guilt altogether. See ante at note 2. But when it comes to the Commonwealth's duty to disclose evidence to a grand jury considering an indictment for murder, I believe that this is a distinction without a meaningful difference.

Because mitigating evidence tends to cast doubt on the Commonwealth's proof regarding an essential element of a crime for which the Commonwealth seeks an indictment, it is exculpatory as to that crime, and may cause a grand jury to conclude that only a lesser crime is supported by probable cause.[5] See Walczak, 463 Mass. at 822-823 (Lenk, J., concurring)

[5] It is perhaps for this reason that we have always included mitigating evidence within the over-all rubric of exculpatory evidence, and imposed obligations on the prosecutor to reveal both. Cf. Commonwealth v. Bly, 448 Mass. 473, 485 (2007) (exculpatory evidence extends "beyond alibi and proof of innocence" to "all evidence that is of significant aid to [the defendant's] case, 'whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness'" [citations omitted]); Mass. R. Prof. C. 3.8 (d), as appearing in 473 Mass. 1301 (2016) (prosecutor in criminal case must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense"); Rule

(requirement that significant, probably influential mitigating or exculpatory evidence be presented to grand jury "assures that it can be considered by them in evaluating whether there is probable cause to return either the indictment sought or one for a lesser offense, or to return a no bill"); id. at 839 (Gants, J., concurring) ("A grand jury are entitled to hear such evidence where it is substantial and may be important to their decision whether to indict for murder or voluntary manslaughter"). Here, where the prosecutor presented a murder indictment to the grand jury, so-called mitigating evidence suggesting that the defendant did not commit the killing with malice because she acted in self-defense or used excessive force in self-defense is exculpatory as to the crime of murder. It must therefore be presented and explained to the grand jury where, as here, failure to do so probably influenced their decision to indict the defendant for murder.

d. Grand jury's role in the criminal process. Fourth, the plurality's opinion fails to honor the constitutional and statutory role of the grand jury. See Jones v. Robbins, 8 Gray 329, 342-349 (1857) (under art. 12 of Massachusetts Declaration

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116.2(a)(1) of the Local Rules of the United States District Court for the District of Massachusetts (eff. Feb. 1, 2012) ("Exculpatory information is information that is material and favorable to the accused and includes . . . information that tends to . . . cast doubt on defendant's guilt as to any essential element in any count in the indictment . . .").

of Rights, crimes punishable by term in State prison require grand jury indictment); G. L. c. 263, § 4. The plurality, of course, is correct that the grand jury determine only probable cause, leaving it to the petit jury to determine whether the evidence at trial proves the defendant guilty of the crime charged beyond a reasonable doubt. The plurality is also correct that a defendant is not entitled to have the grand jury return the lowest possible charge; rather, the Commonwealth may instruct the grand jury to return an indictment for the charge presented, provided they find that the required elements of that charge are supported by probable cause. See Walczak, 463 Mass. at 841 n.3 (Gants, J., concurring); id. at 847-848 (Spina, J., concurring in part and dissenting in part). And the plurality also is correct that, where the grand jury indict a defendant for murder, the petit jury may find the defendant not guilty of murder in the first degree but guilty of the lesser included crimes of murder in the second degree or manslaughter.

But the grand jury are not a mere rubber stamp required to approve any indictment brought by the Commonwealth. The prosecutor controls which indictment to present to the grand jury, but the grand jury control whether to return that indictment. See Vasquez, 474 U.S. at 263. Where they find that there is not probable cause to support a required element of a proposed charge, they should return a no bill or an indictment

for a lesser included offense. In the context of this case, this means that if the grand jury found that there was not probable cause to support a finding of malice because the defendant used excessive force in self-defense, the grand jury could return an indictment for manslaughter but not for murder.

The grand jury cannot perform their constitutional or statutory role of determining probable cause if they are deprived of important exculpatory evidence or of the legal guidance they need to understand that exculpatory evidence. "In contrast to a reviewing court's evaluation of the sufficiency of the evidence, which views the evidence in the light most favorable to the prosecution, a grand jury need not view the evidence in so favorable a light in deciding probable cause." Walczak, 463 Mass. at 841 n.3 (Gants, J., concurring). Even where the evidence is legally sufficient to support an indictment for murder, as it was here, the circumstances of the killing may cause a grand jury to conclude that the credible evidence is insufficient to support a finding of probable cause as to the element of malice. See id. Where they so find after being properly instructed, the highest crime supported by probable cause is voluntary manslaughter. See id. A grand jury cannot reasonably decide whether there is probable cause to support a finding of malice, however, where substantial exculpatory evidence is unaccompanied by instructions explaining

the elements of murder and, as relevant here, the legal consequences of acting in self-defense or using excessive force in self-defense.

It is true, as the plurality acknowledges, that prosecutors are required to provide the grand jury with legal instructions when the grand jury so requests. See ante at , citing Commonwealth v. Noble, 429 Mass. 44, 48 (1999). But there is no reason to expect grand jurors to recognize that the elements in the murder indictment are not the required elements of murder, or to know enough about the law of homicide to ask the prosecutor to explain the element of malice. "It . . . makes no sense for a prosecutor to owe a duty to provide such a legal instruction only where the grand jury know enough about the law of homicide to ask for such an instruction." Walczak, 463 Mass. at 839 (Gants, J., concurring). "The law of homicide," after all, "is too complex reasonably to expect a grand jury to know the legal significance of reasonable provocation or sudden combat [or excessive use of force in self-defense] without instruction by a prosecutor, or even to recognize that it may be an issue for which they should seek legal guidance." Id. at 839-840.

e. Exculpatory evidence related to self-defense. Fifth, the plurality acknowledges that there may be circumstances where "the absence of instructions on a complete defense would make a

difference in the grand jury's determination to hand up an indictment," and therefore where a prosecutor must instruct the grand jury on self-defense. Ante at . But the plurality goes on to determine that in this case, no instruction on self-defense was required because its absence likely did not make a difference in the grand jury's determination to return an indictment. This is troubling, first, because the grand jury heard substantial evidence of self-defense -- namely, that the victim had a history of physically abusing the defendant, that the victim had beaten the defendant leading up to the stabbing, and that the victim was stabbed only after he attacked the defendant with weapons. If this type of evidence does not suffice to require prosecutors to provide the grand jury with instructions on the issue of self-defense, it is not apparent what circumstances would.[6]

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[6] The plurality acknowledges that such evidence "could have been seen as exculpatory," but goes on to conclude that the grand jury's decision to indict the defendant was probably not affected by a lack of instructions because the "exculpatory evidence was weakened substantially by the contrasting evidence of the defendant's own violent temper and controlling behavior toward -- and physical abuse of -- the victim." Ante at , . Although evidence of the defendant's previous actions may have been relevant to the grand jury's probable cause determination, the evidence of self-defense presented to the grand jury was significant enough that the grand jury should have been allowed to evaluate it in light of the law governing self-defense.

Equally troubling is the fact that the plurality, by requiring instructions only on complete defenses, asks prosecutors to do the impossible: clearly distinguish between evidence of lawful self-defense and evidence of excessive use of force in self-defense. See ante at note 11 (prosecutors obligated "to discern where substantial exculpatory evidence they have presented gives rise to a defense that could reasonably result in a no bill, and to instruct the grand juries accordingly"). As the plurality acknowledges, however, exculpatory evidence showing that the defendant acted in lawful self-defense necessarily overlaps with exculpatory evidence showing that the defendant used excessive force while acting in self-defense. See Commonwealth v. Johnson, 412 Mass. 368, 372 (1992) ("self-defense is not an all or nothing proposition . . . once the issue of self-defense has been fairly raised, the jury should be instructed on the legal consequence of using manifestly disproportionate violence in the supposed exercise"

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The plurality also cites to out-of-State cases to argue that a complete exoneration was not likely here because "[t]he mere existence of some evidence that could suggest self-defense does not negate probable cause." Ante at , quoting Yousefian v. Glendale, 779 F.3d 1010, 1014 (9th Cir. 2015). Of course, I agree that the grand jury may find probable cause that the defendant committed murder even after hearing evidence of self-defense. This decision should be left for the grand jury to make, however, after they have been properly instructed.

of self-defense [quotations, citations, and alteration omitted]).

4. Implications of proposed standards. The plurality declares that, unless the defendant is a juvenile, prosecutors have no obligation to instruct the grand jury on the elements of the charged offense and lesser offenses even where there is powerful exculpatory evidence that likely would make a difference in the grand jury's determination to return an indictment for murder rather than manslaughter. Yet, the plurality then "strongly encourage[s] district attorneys making grand jury presentments" to 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." Ante at note 1, quoting Supreme Judicial Court Committee on Grand Jury Proceedings, Final Report to the Justices, at 13 (June 2018) (Grand Jury Report). I, too, strongly encourage district attorneys to provide these instructions, but I do so because I recognize that failing to provide instruction where there is substantial exculpatory evidence may impair the integrity of the grand jury.

The plurality's approach -- encouraging prosecutors to provide legal instructions where there is substantial exculpatory and mitigating evidence but not penalizing a failure

to do so unless instructions would likely have resulted in a no bill -- is unlikely to have its intended effect. Previously, we had left to another day the question whether an adult defendant indicted for murder could have his or her indictment dismissed due to a lack of legal instructions on mitigating circumstances and defenses. See Grassie, 476 Mass. at 219. A prudent prosecutor thus may have thought that providing instructions was the safer route. Now, however, prosecutors will know that there will rarely be consequences for failing to instruct on mitigating circumstances and defenses, even where substantial evidence of self-defense or excessive use of force in self-defense is presented. I am therefore skeptical that the number of prosecutors who choose to provide legal guidance without being requested to do so by the grand jury will increase, despite the plurality's suggested best practice.

Moreover, if prosecutors come to the grand jury unprepared to furnish legal instructions, grand jurors will be less able to fulfill their constitutional function, and the risk that a prosecutor will inadvertently misstate the law in answer to a grand juror's question will be greater. And that error itself creates a risk that the indictment will be dismissed. After our decision in Grassie, 476 Mass. at 220, the entirety of the grand jury proceeding apart from deliberations must "be recorded in a manner that permits reproduction and transcription." This

includes "any legal instructions provided to the grand jury by a judge or a prosecutor in connection with the proceeding." Id. If the prosecutor's legal instructions are substantially incorrect or misleading, the error might require dismissal of the indictment without prejudice upon review of the recorded proceeding. See Noble, 429 Mass. at 48 (where information was requested, "prosecutor should have provided the appropriate information" [emphasis added]); United States v. Stevens, 771 F. Supp. 2d 556, 567 (D. Md. 2011) ("where a prosecutor's legal instruction to the grand jury seriously misstates the applicable law, the indictment is subject to dismissal if the misstatement casts grave doubt that the decision to indict was free from the substantial influence of the erroneous instruction" [quotation and citation omitted]); United States v. Peralta, 763 F. Supp. 14, 21 (S.D.N.Y. 1991) (dismissing indictment where prosecutor, among other errors, presented grand jury with "misleading statements of law").

My conclusion that the integrity of the grand jury proceedings was impaired and that the murder indictment must therefore be dismissed does not mean that the Commonwealth may not again obtain a murder indictment. In the absence of egregious prosecutorial misconduct, which has not been alleged here, the remedy would be a dismissal without prejudice. See O'Dell, 392 Mass. at 447. This means that the Commonwealth,

which has already presented evidence in this case to multiple grand juries, could present the evidence and appropriate legal instructions to another grand jury, and then ask that grand jury to return a murder indictment.

The obligation to provide guidance regarding the legal significance of mitigating or exculpatory evidence imposes only a modest burden on prosecutors. See Walczak, 463 Mass. at 833 (Lenk, J., concurring) ("instructional requirement imposes scant burden on the Commonwealth"). It applies only where there exists exculpatory or mitigating evidence of such significance that withholding it from the grand jury would impair the proceeding's integrity. See id. at 822 (Lenk, J., concurring); id. at 839 (Gants, J., concurring). The Supreme Judicial Court Committee on Grand Jury Proceedings, which was created to help the court "gain[] a better understanding of current practices employed by the various district attorneys and the Attorney General" in grand jury proceedings, Grassie, 476 Mass. at 219, noted in its final report that "[m]any 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."[7] Grand Jury Report, supra at 28.

The burden on prosecutors is even less when one recognizes that a prosecutor should already be prepared to provide appropriate legal instructions if a grand juror were to ask about the legal significance of exculpatory or mitigating evidence. See Noble, 429 Mass. at 48. And the frequency of such grand juror questions may increase after the issuance of this opinion, because I join the plurality in their conclusion that Superior Court judges during the empanelment of grand juries can and should inform prospective grand jurors that they are entitled to ask prosecutors about the elements of the crime charged in each indictment, as well as to request guidance on lesser included crimes and defenses when they are presented by the evidence. See ante at note 15. If grand jurors' requests for instructions increase, the modest burden imposed by a

[7] According to the report, two out of twelve offices provide individual instructions as to the elements of the offense charged in every case. Supreme Judicial Court Committee on Grand Jury Proceedings, Final Report to the Justices, at 33 (June 2018) (Grand Jury Report). Four offices describe the elements of common crimes at the outset of the grand jury's term; two rely on the language of the indictment to describe the elements; two provide instructions only when required under Walczak, 463 Mass. at 810, or Commonwealth v. Noble, 429 Mass. 44, 48 (1999); and one has no set practice. Grand Jury Report, supra. The remaining office's practices are not described in the Grand Jury Report.

requirement that instructions be presented in certain limited circumstances would only decrease.

Furthermore, when presenting before the grand jury, the prosecutor need not provide legal guidance "with the same degree of precision that is required when a petit jury [are] instructed on the law" (citation omitted). Walczak, 463 Mass. at 835 (Lenk, J., concurring). Instead, "use of the Model Jury Instructions on Homicide, modified as appropriate for use before the grand jury, to define the elements of the crime charged and set out the legal requirements of defenses or mitigating circumstances raised by the evidence will ordinarily be sufficient." Id.

Nor can it fairly be said that imposing this obligation constitutes an unwarranted intrusion on the discretion of a prosecutor. The grand jury is "an integral part of the court," and 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" (citation omitted). Matter of Pappas, 358 Mass. 604, 613 (1971), aff'd sub nom. Branzburg v. Hayes, 408 U.S. 665 (1972). We have long recognized that a prosecutor does not have the discretion to conceal important exculpatory or mitigating evidence where doing so would impair the integrity of the grand jury. See Walczak, 463 Mass. at 822

(Lenk, J., concurring); Wilcox, 437 Mass. at 37; Mayfield, 398 Mass. at 620-621; O'Dell, 392 Mass. at 449. We recognized more recently that a prosecutor, at least in juvenile murder cases, does not have the discretion to impair the integrity of a grand jury by failing to provide legal instructions necessary for the grand jury to recognize the legal significance of such evidence. See Walczak, 463 Mass. at 810. "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.'" Grand Jury Report, supra at 22, quoting Wilcox, 437 Mass. at 34. I therefore do not believe that requiring prosecutors to provide legal instructions in the narrow circumstances described herein improperly encroaches on the Commonwealth's role in the indictment process.

There is little reason to fear that application of my proposed standard will yield a floodgate of motions to dismiss indictments, or will otherwise significantly burden Superior Court judges. No doubt, comparable fears were aired when this court allowed defendants to challenge the sufficiency of the evidence of probable cause in McCarthy, 385 Mass. at 162-163, and the concealment of exculpatory evidence in O'Dell, 392 Mass. at 449, and those fears ultimately proved groundless. There are

at least three reasons to believe that comparable fears will prove equally groundless here.

First, as already noted, a prosecutor's obligation to provide guidance regarding the legal significance of important exculpatory or mitigating evidence is triggered only in that fraction of cases where such evidence exists.

Second, such motions to dismiss are unlikely to prevail. So long as prosecutors provide the grand jury with proper legal guidance where necessary, there is little risk of error warranting dismissal of the indictment. In fact, the risk of error will be diminished if prosecutors initiate such legal instructions themselves rather than wait for a legal question from the grand jury, which they may be less prepared to answer.

Third, in the absence of egregious prosecutorial misconduct, the allowance of a motion to dismiss will result only in the dismissal of the indictment without prejudice; the Commonwealth may seek the same indictment from a different grand jury by presenting the same evidence and furnishing the required legal guidance. See O'Dell, 392 Mass. at 447. Consequently, unless there is a significant chance that a new grand jury will return a no bill or indict the defendant on a lesser charge if properly instructed, defendants will incur little benefit from bringing such a motion.

Finally, the Commonwealth contends that the Superior Court judge improperly relied on Walczak to dismiss the murder indictment because our decision in Walczak obligated the Commonwealth to provide legal instructions only in future juvenile murder cases where there was substantial evidence of mitigating circumstances or defenses presented to the grand jury. See Walczak, 463 Mass. at 810. This obligation, the Commonwealth argues, did not apply to cases such as this one, where the Commonwealth sought to indict an adult for murder.[8] In Walczak, however, we affirmed the judge's dismissal of the juvenile's murder indictment even though we applied the court's newly-created rule regarding required legal instructions only to future juvenile cases. Id. There would be nothing unfair about doing the same here with respect to an adult murder indictment.

In fact, the importance of such legal guidance to the interests of justice was demonstrated in the Walczak case.

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[8] I note that the argument in my concurring opinion in Walczak -- that legal instruction should be required where there is evidence of mitigating circumstances that is so substantial that its omission would impair the integrity of the grand jury, regardless of whether the defendant is a juvenile or an adult -- was joined by two other Justices, and that a fourth Justice, Justice Lenk, declined to address whether the holding in Walczak should extend to adult murder cases. Walczak, 463 Mass. at 837 (Gants, J., concurring, with whom Botsford and Duffly, JJ., joined). See id. at 833 (Lenk, J., concurring). In Commonwealth v. Grassie, 476 Mass. 202, 219 (2017), the court left to another time the question whether to expand the Walczak holding to adults.

Without legal instruction, the grand jury indicted the juvenile for murder. See Walczak, 463 Mass. at 809. After the indictment was dismissed without prejudice due to the absence of instructions on the law distinguishing murder from manslaughter, the grand jury indicted the juvenile for manslaughter. The defendant was subsequently found not guilty of this charge following a Juvenile Court jury trial.

Conclusion. I would hold that the integrity of the grand jury proceedings was impaired by the Commonwealth's failure to provide legal instructions concerning self-defense and the excessive use of force in self-defense. Because the grand jury's decision to return an indictment for murder was "probably influenced" by the absence of this legal guidance, see Mayfield, 398 Mass. at 621, I would dismiss the indictment without prejudice and allow a grand jury with proper legal instruction to decide whether the defendant should be indicted and, if so, whether the indictment should be for murder or manslaughter. For these reasons, I dissent.