

# **Supreme Judicial Court Committee on Grand Jury Proceedings**

## **Summary of Interviews with Prosecutor Offices**

As directed by the Supreme Judicial Court in *Grassie*, 476 Mass. 202, 219, the Committee collected information regarding grand jury practices currently employed by the eleven District Attorneys and the Office of the Attorney General. The focus of the Committee's inquiry was on instructions to the grand jury and other prosecutor interaction with the grand jury. The members drafted a questionnaire and conducted interviews, in small teams, with representatives of prosecutors' offices during June 2017.<sup>1</sup>

This summary provides an overview of the responses the Committee received regarding current grand jury practices across the Commonwealth. All information gathered reflects post-*Grassie* practices. It notes areas of common practice, as well as areas where practices vary considerably among offices.<sup>2</sup>

### **I. Sittings of the grand jury**

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

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<sup>1</sup> Most interviews were conducted in person; some offices submitted written responses to the Committee's questions. The questions are listed in Appendix A.

<sup>2</sup> In analyzing their findings, members have noted that some variations from office to office may result, at least in part, from the particulars of the interviews and may not represent the practice of all prosecutors in that office.

## II. Recording of instructions to the grand jury

All twelve offices reported that they **record all instructions to the grand jury**. Ten offices **record introductory remarks to a new grand jury** <sup>3</sup>

## III. Content of instructions

- Eleven of the twelve offices **use model trial instructions adopted for the grand jury**; two offices added that they are creating model instructions for use in the grand jury.
- Eleven of the twelve offices **use special instructions for cases against juveniles**. <sup>4</sup> None of the offices **instruct grand jurors on adolescent brain development** in the context of criminal intent.
- In four offices, the **elements of common crimes are described** only at the outset of the grand jury's term. In two offices, the prosecutor provides individual instructions as to the elements of offenses in every case, regardless of whether the grand jury had been instructed on the offense in another case. Two rely on the indictment to describe the elements of offenses. One has "no set practice." In two counties, since *Grassie*, no instructions are given except when required under *Walczak* or when requested by the grand jury.

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<sup>3</sup> In nine offices, the grand jury coordinator or supervisor gives introductory remarks. In four offices the Judge participates, either by video or in person. In three, the District Attorney participates, either by video or in person.

<sup>4</sup> Seven offices mentioned that they provide the elements for a youthful offender indictment where appropriate.

- Asked whether they ever **instruct the grand jury on lesser offenses**, four offices said no, except when required by *Walczak*. Three other offices said no, with no qualification. Of those three offices, one rarely has cases involving juveniles; another has not had any juvenile murders since *Walczak*; and the third indicated in response to other questions that, if an affirmative defense or mitigating defense presents itself, it would be instructed upon.<sup>5</sup> Others indicated that their approach depended on the circumstances of the case, on the facts as established by testimony, or on whether the grand jury inquired. One said they gave such instructions only in murder cases and another said that they did so “sometimes”, but not typically and not unless asked.
- Six offices **instruct the grand jury on affirmative defenses or mitigating circumstances** only when required under *Walczak* or *Noble*. Other offices responded that:
  - They do provide instructions on affirmative defenses, primarily self-defense;
  - If an affirmative defense or mitigating circumstance presented itself, it would be instructed upon;
  - They would in murder cases;

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<sup>5</sup> Since *Walczak* requires an instruction on affirmative defenses or mitigating circumstances only in juvenile cases and only when there is substantial evidence of such defense or mitigation, this office’s practice goes beyond what is mandated by *Walczak* because it applies to all cases.

- It depends on the circumstances; they always instruct on self-defense, defense of another, and provocation.

Only one office, which reports that it rarely has cases involving juveniles, responded “no” without qualification; they do not instruct on affirmative defenses or mitigating circumstances.

- There is no common practice regarding **instructions given at the end of the presentment**, right before the grand jury deliberates. Two offices instruct on the elements of offenses that are new to the grand jury. One instructs on the elements of the proposed charges and gives limiting instructions as necessary. Others simply read the indictment unless the grand jury asks for instructions or guidance on legal questions.
- There is no common practice with respect to **instructions regarding records and other exhibits**, although several offices indicated that they give limiting instructions when appropriate.
- Asked whether their **practices regarding instructions differ for murder presentments**, seven offices reported that they do not, except to comply with the requirements of *Walczak*. Two said there were no differences in their practices with respect to murder presentments and did not mention *Walczak*. One reported that a different ADA gave the instructions in murder presentments. Another noted that their office had adopted the model jury instructions for homicide. One office rarely has murder investigations arise.

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

#### **IV. Provision of written instructions to the grand jurors**

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

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

- Eleven of the twelve offices **record questions asked of, and answers given by, prosecutors during deliberations.**
- In nine offices, **if jurors have factual questions that a testifying witness is unable to answer**, prosecutors inform the grand jury that the question from the grand jury will be addressed in the testimony of a different witness who is expected to testify at a later time, if this is the case.
- When asked about their practices **when jurors have legal questions that the prosecutor is not able to answer**, nine offices reported simply that the prosecutor would find the answer and report back to the grand jury. Five of those offices specified that the answers would be put on the record. Two offices indicated that the situation (the prosecutor being unable to answer a legal question) had not arisen, but if it did, they would present the option of asking the Judge.<sup>6</sup>

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<sup>6</sup> By contrast, another county specifically noted that the question would not be taken to the Judge.

## **VI. Target warnings**

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

## **VII. Prosecutor’s presence in the grand jury room during deliberations**

Seven offices report that the prosecutor is not present in the grand jury room during deliberations. Of the other five offices, three said that a vote is taken, or the grand jurors are polled, in every case to determine if they wish the prosecutor to remain in the room. Another said that the prosecutor is not present unless asked by the grand jurors to answer a legal question. In another county, the uniform practice is to ask the grand jury, at the beginning of the term, whether it wishes formally to request, pursuant to Mass. R. Crim. P. 5(g) and *Commonwealth v. Smith*, 414 Mass. 437, 440-441 (1993), that the prosecutor who is the grand jury director (or another designated prosecutor) be available from time to time to answer their legal questions.<sup>7</sup>

## **VIII. Written guidelines for prosecutors presenting cases to the grand jury**

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

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<sup>7</sup> It is explained to the grand jury in a writing that is part of the clerk’s records that this request may be revoked at any time without cause, at the grand jury’s pleasure.

## **Conclusion**

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

March 1, 2018

## APPENDIX A

### SJC Committee on Grand Jury Proceedings Questions for Prosecutor Offices

#### A. General Background

1. How many grand juries typically sit at one time? For how long do they typically sit?
2. Who in your office gives the introductory remarks to a new grand jury? Are these remarks recorded or otherwise preserved?
3. Do you have written guidelines for prosecutors who present cases to the grand jury?

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

#### B. Instructions in General

4. Does your office use model grand jury instructions or model trial instructions adapted for the grand jury? If so, what instructions?
5. Does the prosecutor give an initial description of the case?
6. What instructions, if any, are given about records and other exhibits?
7. Does the prosecutor describe the elements of the proposed charges every time an indictment is sought, only the first time the grand jury considers a particular offense, or never?
8. What instructions, if any, are given when a target of an investigation testifies?
9. Are the instructions recorded? If only at times, under what circumstances?
10. Do you ever provide written instructions? If so, when?
11. Do you ever instruct the grand jury on lesser included offenses? If so, when?
12. Do you ever instruct the grand jury on affirmative defenses or mitigating circumstances? If so, when?
13. Do your practices differ in any way for murder presentments? If so, how?

14. What instructions do prosecutors give at the end of the presentment, right before the grand jury deliberates?
15. What is your practice when jurors have factual questions to witnesses that the witness is not able to answer?
16. What is your practice when jurors have legal questions for the prosecutor that the prosecutor is not able to answer?

C. Cases Against Juveniles

17. Do you use any special instructions for cases against juveniles?
18. Do you ever instruct jurors on adolescent brain development in the context of criminal intent? If so, under what circumstances, and what information do you provide?

D. Deliberations and Voting

19. Are prosecutors ever present in the grand jury room during deliberations? If so, is this done by vote at the beginning of the term, or on a case-by-case basis?
20. Is any record made of the questions asked of prosecutors during deliberations, and the answers?