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Not Just the Facts: Commonwealth v. Walczak Tells Prosecutors When to Instruct Grand Juries on the Law in Juvenile Murder Cases

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by Alex Philipson

Case Focus

In the mid-1920's, in one of America's most sensational cases of juvenile homicide, teenagers Nathan Leopold and Richard Loeb bludgeoned a neighbor to death in Chicago. At about the same time, a thousand miles away in Boston, the Supreme Judicial Court declared that a prosecutor seeking an indictment should, in appropriate instances, do more than present evidence to the grand jury; he should also give advice on the law. *See Attorney Gen. v. Pelletier*, 240 Mass. 264, 307 (1922). Nearly a century later, the concerns of these seemingly unrelated cases—juvenile murder and grand jury instructions—came together in ways never before seen in Massachusetts.

In ***Commonwealth v. Walczak*, 463 Mass. 808 (2012)**, in a plurality opinion, the SJC held that a prosecutor must instruct the grand jury on the law in any case where he or she seeks to indict a juvenile for murder, and where there is substantial evidence of mitigating circumstances or defenses

other than lack of criminal responsibility. Specifically, the prosecutor has a duty to inform the grand jury of the elements of murder and the significance of mitigating circumstances or defenses for reducing or eliminating the juvenile's criminal liability—using the model homicide instructions, modified for grand jury proceedings. In no other case had the SJC ever held that a prosecutor was required to instruct the grand jury on the law absent a request from the grand jury. *See Commonwealth v. Noble*, 429 Mass. 44, 48 (1999).

Unlike Leopold and Loeb, who set out to commit a thrill killing, Walczak had no intention of killing anyone when, embroiled in a fight with two other teenagers, he allegedly stabbed one of them to death. One night in August, 2010, Walczak, then sixteen years old, agreed to meet the victim and another youth on a street corner to sell them marijuana. The purported buyers had actually planned to rob Walczak of his drugs. When the three met, the victim and his friend told Walczak they were going to take his marijuana, and one poked him in the head. Punches were thrown and Walczak stabbed the victim several times in the neck and torso with a knife, killing him.

The Commonwealth sought and obtained an indictment for murder in the second degree. Walczak moved successfully to dismiss the indictment on grounds of insufficient evidence. *See Commonwealth v. McCarthy*, 385 Mass. 160 (1982). The judge ruled that the Commonwealth had failed to disprove that Walczak acted on reasonable provocation or sudden combat—mitigating circumstances that negate malice and reduce a homicide from murder to voluntary manslaughter—and that, as a matter of law, the evidence supported at most an indictment for manslaughter.

On appeal by the Commonwealth, the SJC unanimously held that the judge erred: the evidence was sufficient to show probable cause for murder in the second degree; the Commonwealth bore no burden to disprove mitigation in the circumstances; and the grand jury was free to believe or disbelieve the evidence of mitigation. Nothing about those conclusions was particularly surprising. The excitement began when the justices considered an alternative ground for affirming the dismissal of the indictment: the Commonwealth's failure to instruct the grand jury on the legal significance of the evidence of mitigation—i.e., that if someone kills another based on reasonable provocation or during sudden combat the offense would be manslaughter rather than murder. On the need for these instructions the justices differed markedly, but a plurality concluded that the Commonwealth should have given the instructions.

In dissent, Justice Spina, joined by Chief Justice Ireland and Justice Cordy, argued that, regardless whether mitigating circumstances surround a homicide, the Commonwealth has no obligation to instruct on mitigation absent a request from the grand jury. But according to the plurality opinion, at least where there is "substantial" evidence of mitigation—evidence "so strong" that "concealing it would impair the integrity of the grand jury" because the evidence concealed probably would have influenced the grand jury's decision about what charge, if any, to indict—the legal significance of that mitigating evidence must be explained. Presumably a reviewing court would examine the facts *de novo* to decide whether the evidence of mitigation was substantial enough to require the instructions, but *Walczak* is silent on this point.

Justice Gants, in his concurrence, joined by Justices Botsford and Duffly, thought the instructions should be given in all murder cases, juvenile and adult. For him, what made the instructions necessary were "due process" interests not limited to juveniles.

By contrast, Justice Lenk, who wrote her own concurrence, did not speak in terms of due process. Rather, she thought that what necessitated the instructions were "prudential" concerns arising from the special status of adolescents. For example, unlike an adult, a juvenile indicted for manslaughter rather than murder faces trial in Juvenile Court, which affords special protections for adolescents. That difference, and the generally reduced culpability of minors as compared to adults, were the reasons Justice Lenk thought the instructions were required in juvenile murder cases. But the instructions that Justice Lenk thought essential were those concerning such traditional mitigating circumstances as reasonable provocation and sudden combat; she did not say that a grand jury should also be instructed that a juvenile's youth itself constitutes a mitigating circumstance. (She did think that, in addition to instructions on mitigating circumstances, the grand jury should be told that a juvenile indicted for murder would be tried in Superior Court, but she was alone in that view.) For purposes of resolving Walczak's case, Justice Lenk, unlike Justice Gants, thought it unnecessary to go so far as to require mitigation instructions (on reasonable provocation and sudden combat) not only for juveniles but for adults too. As the narrower view—requiring the instructions only in juvenile cases—hers prevailed in the plurality opinion.

But this reader, at least, sees no reason why the instructions should not be given in both juvenile and adult cases, as Justice Gants suggested. Although Justice Lenk wanted to ensure that a grand jury would take into account a juvenile's *youth*, mitigation and self-defense are not concepts unique to adolescents. Adults can act out of reasonable provocation, sudden combat, or self-defense just as much as adolescents can. Thus, regardless whether the subject of a murder charge is a juvenile or an adult, it would seem fair in either case for the grand jury to be instructed on mitigating circumstances and self-defense, where the evidence warrants it. But the plurality concluded that the instructions are needed only in juvenile cases.

Besides instructions on mitigation and self-defense, Justice Gants suggested that the grand jury "may even be instructed that the prosecution is entitled to an indictment of the crime charged if it is supported by probable cause based on the credible evidence." *Walczak*, 463 Mass. at 841. In this way, he agreed with Justice Spina that the grand jury is not permitted simply to choose between murder and manslaughter if credible evidence of the greater offense has been presented. But, as Justice Gants explained, even if the evidence of malice is legally sufficient, the grand jury is still free to decide that the evidence of mitigation is more reliable and return an indictment for the lesser offense.

Questioning the wisdom of the plurality's view, Justice Spina pointed out that the decision did not address how one may pursue judicial review of a grand jury's "gatekeeper" decision (i.e., whether the juvenile will be tried in Superior or Juvenile Court) or the applicable standard of review. More fundamentally, Justice Spina saw the plurality's position as an "improper judicial exercise of the legislative function." He believed that where the Legislature, in the 1996 Youthful Offender Act, removed power from Juvenile Court judges to determine in which court a juvenile would be tried, it was not up to the SJC to give similar power to the grand jury. Any legislative response to *Walczak* remains to be seen.

A postscript to this story is worth telling. After the SJC affirmed the dismissal of Walczak's murder indictment, the Commonwealth returned to the grand jury to present the case again. This time, with the benefit of instructions on the legal significance of the mitigating circumstances, the grand jury indicted Walczak for voluntary manslaughter. As a result, Walczak will be treated as the juvenile he

was in August, 2010, when that botched robbery turned tragically into a fatal fight.

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