COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2015-208,209,210

COMMONWEALTH

vs.

DEREK HOWARD
JOHN C. RAPOSO
GEORGE A. BILLADEAU

INTERIM MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

On April 30, 2014, a statewide grand jury convened by a special assistant attorney general returned six indictments charging the defendants, Derek Howard, John C. Raposo, and George A. Billadeau, with one count each of involuntary manslaughter, G. L. c. 265, § 13, and one count each of civil rights violations, G. L. c. 265, § 37. The indictments arise from the May 4, 2009 death of Bridgewater State Hospital patient Joshua K. Messier as he was being forcibly secured into four-point restraints by the defendants, correctional officers at the facility. The indictments follow a 2012 civil wrongful death action filed by Messier's family, wherein the defendants requested and received legal representation by the Attorney General's Office until the matter was brought to settlement.

The defendants now move to dismiss the indictments on multiple grounds. These include: (1) lack of statutory authority for the Attorney General to seek the indictments where the county District Attorney had already declined prosecution; (2) impermissible conflict of interest by the Attorney General who appointed the special prosecutor, due to the office's prior

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representation of the defendants in the civil suit; (3) transactional immunity arising from alleged assurances made to the defendants by particular assistant attorneys general during the civil representation; (4) use and derivative-use immunity for the defendants' civil depositions and answers to interrogatories, as well as their statements to a Department of Correction investigator during a 2014 internal investigation; (5) insufficient evidence before the grand jury to establish probable cause, under *McCarthy*; and (6) the special prosecutor's failure to present exculpatory evidence to the grand jury, under *O'Dell*. This interim order addresses all of these claims except that brought under *McCarthy*, which must be deferred until further proceedings have established what, if any, testimony presented to the grand jury should have be excluded under use and derivative-use immunity.

I. The Attorney General as Prosecutor

Before this court reaches the immunity claims, it will first consider the defendants' claims that the Attorney General had an impermissible conflict of interest that barred prosecution, and further lacked the requisite statutory authority to convene the statewide grand jury.

First, the defendants contend that the Attorney General's Office had a conflict of interest based on G. L. c. 12, § 30, which states that "[n]o prosecuting officer shall . . . be concerned as counsel or attorney for either party in a civil action depending on the same facts involved in such prosecution". The Commonwealth argues that this statute is satisfied by the Attorney General's appointment of a special prosecutor. Special Assistant Attorney General Martin F. Murphy is employed in private practice, and was appointed to independently conduct the investigation and prosecution without any communication between himself and the assistant attorneys general who represented the defendants in the prior civil suit. In the Commonwealth's view, the statute

applies only to the individual attorney serving as prosecutor, not the Attorney General's Office as a broader agency, or the Attorney General as its executive. However, the defendants argue that by merely referring the case to the special prosecutor for independent investigation, the Attorney General was impermissibly acting as a "prosecuting officer" for the purposes of Section 30. The defendants offer no case law in support of this interpretation, and it cannot be reconciled with the independent nature of the investigation: the special prosecutor had complete authority either to seek an indictment or to make a contrary determination that there was no basis for charges against the defendants. Accordingly, this court finds that G. L. c. 12, § 30 does not require the dismissal of the indictments, as independently prosecuted by Special Assistant Attorney General Murphy.

Second, the defendants argue that the Attorney General, and the special prosecutor acting under her authority, were only explicitly authorized by G. L. c. 38, § 8 to request and direct the inquest, while authority to convene a grand jury to obtain indictments after the inquest was implicitly reserved for the county District Attorney by G. L. c. 38, §§ 10, 11. Section 8 states that "[t]he attorney general or district attorney may . . . require an inquest to be held in case of any death", and outlines inquest procedures that may be conducted "by the attorney general or the district attorney . . .". However, Section 10 states that the district court's inquest transcript "shall be impounded until the district attorney files a certificate with the superior court indicating that he will not present the case to a grand jury, or files notice with the superior court that the grand jury has returned a true bill or a no bill after presentment by the district attorney." The defendants argue that because Section 10 mentions presentment only by the district attorney, it implicitly excludes the Attorney General's special prosecutor from convening a grand jury to seek indictments against them after he required an inquest to be held on Messier's death.

This interpretation misjudges the purpose of Section 10, which governs inquest transcript impoundment, and does not purport to directly grant or restrict post-inquest prosecutorial authority. The Attorney General has statewide prosecutorial authority under G. L. c. 12, §27, wholly separate from the inquest procedures, as "chief law officer" "to conduct and manage all criminal prosecutions". See *Commonwealth* v. *Koslowsky*, 238 Mass. 379, 389 (1921). Indeed, the Supreme Judicial Court upheld the Attorney General's discretion to decline to seek a post-inquest indictment, thereby implicit recognizing that the Attorney General has the authority to convene a grand jury after an inquest proceeding under Chapter 38. *Shepard* v. *Attorney General*, 409 Mass. 398, 403 (1991).

For these reasons, the court finds that the appointment of the Special Assistant Attorney General to conduct an independent investigation and prosecution of the defendants does not run afoul of G. L. c. 12, § 30, and that the special prosecutor had proper statutory authority to both require the district court to conduct an inquest, and thereafter to convene a grand jury to seek post-inquest indictments. Accordingly, dismissal of the indictments is not required on the grounds of prosecutorial conflict or lack of authority.

II. Transactional Immunity

The defendants raise several different theories under which they are entitled to transactional immunity, including due process, equitable estoppel, and article 12 of the Massachusetts Declaration of Rights.

A. Article 12

The defendants argue that they were granted informal transactional immunity by civil assistant attorneys general during the prior civil suit, under *Commonwealth v. Dormady*, 423 Mass. 190 (1996). Under *Dormady*, public employees are entitled to transactional immunity

under the article 12 right against self-incrimination when: (1) they are compelled to answer questions related to their job performance by an overt threat of discharge or disciplinary action, (2) they assert their privilege against self-incrimination, and (3) rely upon promises of immunity made by public officials, given with or without authority, to proceed with answering such questions. *Id.* at 198. Here, the defendants claim that they had informal transactional immunity from 2012 onwards, thus preventing the Attorney General from prosecuting the indictments in 2015.

i. Civil Suit

The defendants claim informal transactional immunity attached when they received what they characterize as assurances of immunity by the Attorney General's Office before answering interrogatories and giving depositions in the 2012-2013 civil suit. Specifically, the defendants claim, variously, that assistant attorneys general from the Government Bureau assured them that their statements would not "incriminate" them, and that they would not "get in trouble", because the Plymouth District Attorney had already decided that there was no probable cause to support criminal charges. *Billadeau Consolidated Motion to Dismiss*, Ex. C, D, E.

Assuming, *arguendo*, that such assurances constituted a specific promise that the defendants would not be prosecuted by the Attorney General, the defendants fail to establish informal transactional immunity under *Dormady* because the defendants have not shown that they were compelled by threat of termination or discipline to give statements pursuant to the Attorney General's civil defense of the wrongful death suit. Instead, the defendants *requested* representation by the Attorney General, and were informed that they were free to "obtain an attorney of [their] own choice and at [their] expense to represent [them] in this matter". *Howard and Billadeau Rule 17 Motion*, Ex. B "Request for Representation". The request for

representation form contained the defendants' acknowledgment of the Attorney General's "advice that [they] consult with [their] own attorney with respect to the contents of the complaint" and the nature of the consent they were giving to be bound by the Attorney General's decisions in the course of the representation. *Id.*

As such, the defendants have not shown under *Dormady* that they were *compelled* to answer interrogatories or give depositions in the civil suit, as their refusal to do so could only have resulted in the loss of the free civil defense counsel they had requested, not their jobs. The fact that the representation was conditioned on the requirement that the defendants not "fail to cooperate with the defense of the case" does not transform the defendants' voluntary election of state representation into an overt "threat of disciplinary sanctions" or employment termination. See *Dormady*, 423 Mass. at 198. Accordingly, the defendants have failed to demonstrate that informal transactional immunity pursuant to *Dormady* and article 12 attached at the time of 2012-2013 civil suit, regardless of the substance of any alleged promises of immunity by the assistant attorneys general assigned to defend them in the suit.

ii. Department of Correction Investigation

Finding that the defendants have failed to demonstrate that they acquired informal transactional immunity at the time of the civil representation, the court turns to the subsequent investigation by Department of Correction attorney Kevin Anahory. The parties agree that, at that time, the defendants specifically waived their article 12 rights. While "[n]o particular words are required to raise the privilege under art. 12", the defendants' specific waiver cannot be construed as an "objection to testifying absent a grant of transactional immunity". See *Dormady*, 423 Mass. at 195. Accordingly, the defendants have not established that they received informal transactional immunity under *Dormady* and article 12 at any time prior to the indictments.

B. Due Process

Next, the defendants urge this court to adopt a novel theory: that the alleged reassurances of non-prosecution by the civil-defending assistant attorneys general are functionally equivalent to a criminal plea agreement, which the Attorney General has now breached in violation of due process. See *Commonwealth* v. *Smith*, 384 Mass. 519, 523 (1981) (prosecutor's plea offer enforceable under due process when "the defendant had reasonable grounds for assuming his interpretation of the bargain and [] relied on that interpretation to his detriment") (internal quotations and citations omitted). In particular, the defendants provide affidavits stating that the assistant attorneys general from the Government Bureau, who represented the defendants in the civil suit, advised the defendants to answer civil deposition questions and interrogatories, assured them that their statements would not "incriminate" them, and told them that they would not "get in trouble" because the Plymouth District Attorney had already decided that there was no probable cause to support criminal charges. *Billadeau Consolidated Motion to Dismiss*, Ex. C, D, E. Drawing a comparison to *Smith*, the defendants argue that they reasonably interpreted the assistant attorneys general's statements that participating in the civil depositions would not incriminate them as a promise that they would not later be prosecuted by the Attorney General's Office. Where the defendants relied on that promise to give statements which were later used to their detriment in the grand jury proceedings, the defendants argue that the promise should be enforced.

The circumstances of this case are significantly different from those in *Smith*. Here, the statements that the defendants attribute to the assistant attorneys general did not explicitly reference any promise that the Attorney General's Office would not prosecute the defendants in return for their cooperation with the civil suit. To the contrary, the attributed statements refer to

the Plymouth District Attorney's decision not to bring charges against the defendants. The situation at bar, while unique, is too far removed from the overt plea offer by a criminal prosecutor that gave rise to the holding in *Smith* for this court to stretch that reasoning to fit these circumstances. In the absence of any precedent standing directly for the defendant's position, this court finds that the defendants have not demonstrated a due process violation which would require the dismissal of the indictments.

C. Equitable Estoppel

The defendants also briefly argue that the indictments should be dismissed with prejudice under the doctrine of equitable estoppel. Specifically, the defendants argue that the Commonwealth should be estopped from prosecuting the indictments due to the aforementioned assurances from the civil assistant attorneys general and their failure to expressly warn the defendants that they could still be prosecuted by the Attorney General's Office. The defendants concede that there were no explicit representations of transactional immunity made during the course of the civil representation. The defendants offer no case law in support of the proposition that vague assurances or a failure to explicitly warn constitutes a definite misrepresentation of fact sufficient to invoke the doctrine of equitable estoppel. Accordingly, the defendants have not demonstrated that the Commonwealth should be equitably estopped from prosecuting the indictments over the defendants' claims of *de facto* transactional immunity.

III. Use and Derivative Use Immunity

The defendants claim that the Fifth Amendment privilege against self-incrimination grants them use and derivative-use immunity for their statements during the civil suit and internal investigations. Thus, the defendants conclude, the use of these statements in the Inquest and grand jury proceeding tainted the proceeding such that the indictments must be dismissed.

Use and derivative use immunity bar not only the introduction of compelled statements at trial, but also the presentation of grand jury witness testimony which relies upon or integrates such statements. As the grand jury presentation in this case relied upon or integrated a variety of statements by the defendants, the court must, in the interest of justice, examine the merits of Fifth Amendment immunity as grounds for the dismissal of the indictments.

Under *Garrity v. New Jersey*, 385 U.S. 493 (1967), if an individual gives statements under a threat of job loss or disciplinary action, the Fifth Amendment automatically confers use and derivative use immunity on those statements, even if the individual purports to waive his self-incrimination rights to avoid termination. This immunity attaches regardless of whether a prosecutor has taken formal steps to immunize the individual. *Id.* at 498. If testimony is compelled, the individual must be given "immunity that puts him in 'substantially the same position as if [he] had claimed his privilege.'" *United States* v. *Slough*, 641 F.3d 544, 549 (D.C. Cir. 2011), quoting *Kastigar* v. *United States*, 406 U.S. 441, 458-459 (1972). Thus, "[i]n a later prosecution of the individual [that was required to testify], the government cannot use his immunized testimony itself or any evidence that was tainted—substantively derived, 'shaped, altered, or affected'—by exposure to the immunized testimony." *Slough*, 641 F.3d at 549, quoting *United States* v. *North*, 910 F.2d 843, 863 (D.C. Cir. 1990) (internal citation omitted).[1]

A. Threshold Showing of Immunity

The court first considers whether the defendants have established that use and derivative-use immunity attached to one or both of the categories of statements in question: civil suit

[1] In *Carney v. Springfield*, 403 Mass. 604 (1988), the Supreme Judicial Court addressed the use of compelled investigative statements under Article 12 of the Massachusetts Declaration of Rights. In Massachusetts, transactional immunity would apply unless the defendant has waived his rights against self-incrimination under the state Constitution. Here, all parties agree that the defendants signed the Department of Corrections investigation form purporting to waive state art. 12 protections while still preserving federal Fifth Amendment rights. Consequently, the court's analysis is drawn from Fifth Amendment principles only.

statements, including depositions and answers to interrogatories, and 2014 internal investigation interview statements to Anahory.

i. Civil Suit

As discussed above, there is no evidence that the defendants were under any threat of job loss or disciplinary action for failure to make statements during the civil suit. Instead, the evidence establishes that if the defendants had not cooperated with the instructions of the civil assistant attorneys general to participate in the depositions and answer the interrogatories, the defendants would merely have lost a requested privilege: free defense representation in the civil suit. There is a complete absence of evidence that the defendants would have suffered any adverse employment consequence if they had instead retained their own civil defense counsel, and refused to make any statements under the privilege against self-incrimination. Accordingly, the defendants have failed to establish the Fifth Amendment automatically conferred use and derivative-use immunity on any statements made during the civil suit

ii. 2014 Internal Investigation

The circumstances of the 2014 internal investigation are significantly different. The defendants argue that the 2014 internal investigation statements were made after a direct assertion of their Fifth Amendment rights via the "waiver" form. While no copies exist of the waiver form showing the defendants' signatures, the parties agree that the defendants each signed a copy of the standard form, Ex. A to 2nd Procaccini Aff., and marked a box identified as a waiver of art. 12 rights with a simultaneous assertion of Fifth Amendment rights, and purporting to grant use immunity for any subsequent statements. The Commonwealth asserts that, nevertheless, Fifth Amendment rights did not attach because the defendants were not forced by legal process to appear for the interviews, were not subject to adverse employment action if

they refused to be interviewed, and further, that Anahory and other D.O.C. staff present had no authority to formally grant immunity to the defendants.

The contents of the waiver form are determinative of the defendants' immunity claim. At the top of the form, it states "You are directed . . . to respond fully and promptly to any questions, written or oral, relative to an investigation being conducted by the Department of Correction. Invocation of your rights against self-incrimination under the 5th Amendment to the US Constitution and Article 12 of the Massachusetts Declaration of Rights is sufficient to comply with this directive. This may be accomplished by checking off the appropriate box at the bottom of this page. You cannot be disciplined for asserting your rights."

The Commonwealth interprets this warning as establishing that Fifth Amendment rights did not attach in this situation because the defendants were not under any threat of adverse employment action, placing emphasis on the statement that the defendants "cannot be disciplined for asserting [their] rights." This argument is largely circular. The Commonwealth cannot argue that a direct assertion of Fifth Amendment rights was illusory and without any real effect because the interview was voluntary, while also arguing that the defendants' ability to make that very same assertion of rights was what rendered the interview voluntary in the first place.

The form clearly states that the defendants are "directed . . . to respond fully and promptly", and that "[f]ailure to answer questions or submit a report relevant to the investigation, absent an assertion by you of your constitutional privilege(s), is considered failure to obey and comply with an order, which could result in disciplinary action, up to, and including, termination." The form then gives the defendants two options: 1) to check the first box, next to a statement saying "I wish to assert my constitutional rights under both the 5th Amendment of the US Constitution and Article 12 of the Massachusetts Declaration of Rights"; or 2) to check the

second box, next to a statement saying "I wish to assert my constitutional rights under the 5th Amendment of the US Constitution against self-incrimination but agree to waive my Article 12 privilege. I will answer questions and submit a report, but my responses and the contents of my report cannot be used against me in a criminal proceeding. I understand, however, that criminal proceedings can be instituted against me based upon evidence obtained from other sources."

Thus, by the options provided on the form by the defendants' employer, they could have either fully asserted both art. 12 and Fifth Amendment rights, and then terminated the interview without making any further statements to Anahory, or partially asserted only their Fifth Amendment rights and then answered Anahory's questions. Nowhere in the form is the option to assert Fifth Amendment rights and then refuse to make any further statements. Accordingly, any statements made after selecting the Fifth Amendment assertion provided by the form were only voluntary and free from the threat of termination to the extent that use immunity actually applied—the effect of the language purporting to grant use immunity was to automatically confer that immunity, even if Anahory or the other staffers offering the form had no power to formally grant immunity. See *Slough*, 641 F.3d at 548 (sworn statements by private military contractors to State Department officials "using a form that included a guarantee that the statement and the information or evidence derived therefrom would not be used in a criminal proceeding against the signer" were compelled and could not be derivatively used in grand jury proceedings). To find the contrary would be illogical.

For those reasons, the defendants have established that their statements to Anahory during the 2014 internal investigation were protected by Fifth Amendment use and derivative use immunity. See *Garrity,* 385 U.S. at 498; *Slough*, 641 F.3d at 548. The court now moves to the questions of whether such immunized statements were used or derivatively used in the grand jury

presentation, and whether any such use or derivative use tainted the proceeding such that dismissal of the indictments is required.

B. Use and Derivative Use of Immunized Statements in the Grand Jury Proceeding

Once a defendant has shown that Fifth Amendment use and derivative use immunity attached to his statements, the government has the "heavy burden" of proving that all of the evidence it uses to prosecute the case was "derived from legitimate independent sources." *Kastigar* v. *United States*, 406 U.S. 441, 461-462 (1972). This applies to both evidence presented to the grand jury, and evidence that the prosecutor proposes to offer at trial. See *Slough*, 641 F.3d at 549; *North*, 910 F.2d at 854.

Where, as here, the defendants have shown the existence of immunized statements, "[a] trial court must normally hold a hearing (a '*Kastigar* hearing') for the purpose of allowing the government to demonstrate that it obtained all of the evidence it proposes to use from sources independent of the compelled testimony." *North*, 910 F.2d at 854. "Most courts following *Kastigar* have imposed a 'preponderance of the evidence' evidentiary burden on the government." *Id.* The scope of a *Kastigar* hearing is extensive. The court "must make specific findings on the independent nature of this [] allegedly tainted evidence", *North*, 910 F.2d at 854-855, "pars[ing] the evidence witness-by-witness and if necessary, line-by-line and item-by-item, and to separate the wheat of the witnesses' unspoiled memory from the chaff of [the] immunized testimony." *Slough*, 641 F.3d at 550 (internal quotations and citations omitted). "This sifting is particularly important in cases where . . . a witness was exposed to a defendant's immunized statement but testifies to facts not included in that statement." *Id.* Importantly, if the court finds that "the tainted evidence was presented to the grand jury, the indictment will be dismissed" unless "the use is found to be harmless beyond a reasonable doubt." *North*, 910 F.2d at 854.

The record before the court contains the grand jury transcripts, the grand jury exhibits, the Inquest Report, the Commonwealth's Pre-Inquest Report to the Court, and a complete copy of only Raposo's answers to civil interrogatories. The record establishes that the grand jury received the judge's Inquest Report, and that the Inquest judge received exhibits containing all of the defendants' prior statements, including the immunized interviews, although these exhibits were not themselves submitted to the grand jury, and are not contained in the record before this court. The Inquest judge also received the Commonwealth's Pre-Inquest Report, which was not presented to the grand jury, but is contained in the record before this court.

The Inquest Report presented to the grand jury contains no explicit references to the defendants' immunized interviews; to the contrary, it explicitly references the defendants' depositions, answers to interrogatories, and statements to state police shortly after the victim's death, as sources for the court's findings along with the judge's viewing of the video recording. Thus, where the Inquest judge's findings at certain points contain some ambiguous references to "statements", and state that the judge's findings of non-medical evidence were based upon viewing the video and reviewing unspecified "officers' statements", it is reasonable to conclude that the Inquest judge relied only on those statements he explicitly referenced, which did not include any statements made to Anahory. (Ex. C(12) to First Procaccini Aff., 4, 7, 9, 10, 11, 12). Accordingly, the defendants have not shown that the Inquest Report later submitted to the grand jury was based on either direct or derivative use of any immunized statements.

However, other evidence presented to the grand jury does use immunized statements. Anahory provided extensive testimony before the grand jury, wherein he narrated his frame-by-frame interpretation of the events depicted in the security video, and repeatedly referenced and contrasted statements made by the defendants in the state police reports, his own interviews, and

other unspecified "testimony". (Ex. A to First Procaccini Aff., pp. 21-69, 104, 105, 107, 123, 127). It is clear that there was at least some direct use of the defendants' immunized statements in Anahory's grand jury testimony.[2] The record before the court contains only brief partial transcripts of the beginning portions of Anahory's 2014 interviews with all three defendants, and selected portions of only Raposo's civil deposition. The court does not have before it the complete transcripts of any of the defendants' immunized 2014 interviews with Anahory, the complete transcripts of any of the defendants' civil depositions, or Billadeau and Howard's answers to interrogatories. Accordingly, the court cannot, on the present record, determine the full extent of Anahory's direct use of the immunized statements, because, at times, his testimony does not distinguish which particular statements by the defendants he was referring to.[3] More importantly, this court cannot determine from the present record if Anahory's grand jury testimony made *derivative* use of the defendants' 2014 interview statements, including, but not limited to, in the formation of his interpretation of their actions on the video recording,[4] and/or in the formation of his opinion of the defendants' use of excessive force to restrain the victim.

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[2] See e.g. Ex. A, 104-105 (Anahory referring to his interviews with the defendants, "With respect to Officer Billadeau, he indicated that when they were transporting [Messier] from B-1 into the ITU, that he radioed ahead and asked that a bed be prepared as a contingency to medical. I discounted that testimony based on what I saw on the videotape as well as my knowledge of the unwritten practice at Bridgewater State Hospital at the time that staff put them in restraints first and then the assessment occurred after. So with respect to that, [Billadeau] did address it. I didn't find it to be credible. With respect to Officer Howard, I believe he could not recall what the procedures were. At least that's my recollection of his testimony to me. And with respect to Officer Raposo, there was indication that he was unclear as to what the procedures were for placing a patient in four-point restraints."); *id.* at 106-107 ("Did you ask for example Officer Howard whether he had pushed down on Mr. Messier and whether Mr. Messier had gone beyond 90 degrees . . . I did ask him that. If I recall correctly, [Howard] indicated that it was somewhat a little bit over the 90 degrees . . . [Raposo] indicated that he stood on the bed frame and then pushed down . . . And I don't want to put words in [Raposo's] mouth. He didn't say that he pushed down, but he did say that he assisted Officer Howard in maintaining the patient in that upright position. . . . [Billadeau] indicated he had no idea what Raposo was doing by getting on the bed. He remembered him saying that.").

[3] See e.g. Ex. A., 123 (Anahory referring to statements by unspecified defendants regarding use of force training, "So in some instances I think the testimony was, 'I learned how to do it by doing it with other seasoned officers who had experience doing it.'")

[4] See e.g. Ex. A, 44 (Anahory referring to events in the video recording, "And the patient is now – and this is consistent with the incident reports, the testimony to the state police, as well as the testimony to myself and what I can see in the video tape. What is going on now is the patient is pushing backwards."); *id.* at 54 (Anahory referring to events in the video recording, "It's difficult to tell, but based on the testimony, what they're doing right now is

Thus, the court invites the parties to submit arguments addressing whether the factual issue of use and derivative use of the defendants' immunized statements, through Anahory's testimony during the grand jury proceeding, can be resolved by way of pleadings and further written submissions, or whether an evidentiary hearing is required. By way of example, if the further submission of transcripts of the defendants' immunized interviews and the civil depositions, as well as the civil answers to interrogatories, would demonstrate that the defendants' immunized interviews were entirely duplicative of prior un-immunized testimony, it might be possible to resolve the taint issue without an evidentiary hearing. However, if the contents of the statements differ over time, with the immunized interviews possibly containing new incriminating information, an evidentiary hearing might be required to determine whether references to unspecified "statements" by Anahory were actually the immunized statements, and/or whether his opinion as to cause of death or the meaning of the video were substantively derived, shaped, altered, or affected by immunized statements. See *Slough*, 641 F.3d at 550; *North*, 910 F.2d at 854. In such a scenario, an evidentiary hearing would be a necessary prerequisite to this court's determination as a matter of law if the taint was harmless beyond a reasonable doubt. *Id.*

IV. ***McCarthy***

Having addressed the defendants' immunity issues to the extent possible at this stage in the proceeding, the court moves on to the defendants' remaining claims for dismissal of the indictments based on a claimed insufficiency of evidence, see *Commonwealth v. McCarthy*, 385 Mass. 160 (1982), or because the integrity of the proceeding was impaired, see *Commonwealth v. O'Dell*, 392 Mass. 445 (1984). Generally, a "court will not inquire into the competency or

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getting the wrist restraints secure. . . . No. I do not see any movement. The testimony is a little different from that. There's an indication from the individuals involved that the patient is breathing heavily and that his eyes are open. But the videotape does not show movement.").

sufficiency of the evidence before the grand jury." *Commonwealth v. Robinson*, 373 Mass. 591, 592 (1977) (internal quotations and citations omitted). However, the Supreme Judicial Court has previously identified two categories of "extraordinary circumstances where judicial inquiry is warranted": (1) "when it is unclear that sufficient evidence was presented to the grand jury to support a finding of probable cause to believe that the defendant committed the offense charged in the indictment" under *McCarthy*; and (2) "when the defendant contends that the integrity of the grand jury proceedings somehow has been impaired" under *O'Dell*. *Commonwealth v. Freeman*, 407 Mass. 279, 282 (1990).

The first type of extraordinary circumstance warranting dismissal of indictments exists where the evidence presented to a grand jury fails to establish probable cause to arrest the defendant for the crimes on which he was indicted. *Commonwealth v. McCarthy*, 385 Mass. 160, 161-164 (1982). Sufficient evidence to support a finding of probable cause exists if the grand jury is presented with "reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the defendant had committed . . . an offense." *Commonwealth v. O'Dell*, 392 Mass. 445, 450 (1984), quoting *Commonwealth v. Lester L*, 445 Mass. 250, 255-256 (2005). However, "probable cause is defined as more than a mere suspicion but something less than evidence sufficient to warrant a conviction." *Commonwealth v. Tam*, 49 Mass. App. Ct. 31, 37 (2000) (internal quotations omitted). The probable cause standard "offers no sure mechanical guide for assessing sufficiency, but it has been employed primarily to strike down indictments in cases where a grand jury has heard no evidence identifying the defendant as the perpetrator of an offense or where the grand jury has heard no evidence whatever that would support an inference of the defendant's involvement." *Commonwealth v. Club Caravan, Inc.*, 30 Mass. App. Ct. 561, 567 (1991).

Here, the court cannot determine whether the evidence properly before the grand jury was sufficient to support a finding of probable cause without first resolving whether any such evidence should have been excluded because it arose from the use or derivative use of the defendants' immunized statements under the Fifth Amendment. Accordingly, the court will not reach the defendants' *McCarthy* claim at this time.

V. *O'Dell*

The second extraordinary circumstance, the impairment of the integrity of the grand jury proceeding, can occur through the Commonwealth's presentation of evidence that is false, deceptive, or improperly prejudicial. While the "prosecutor is not required to present all possibly exculpatory evidence to a grand jury", he "cannot be permitted to subvert the integrity of grand jury proceedings by 'selling' the grand jury 'shoddy merchandise' without appropriate disclaimers." *Commonwealth v. Connor*, 392 Mass. 838, 854 (1984), quoting *Commonwealth v. St. Pierre,* 377 Mass. 650, 655 (1979). In particular, dismissal may be warranted where a prosecutor fails to present information that would greatly undermine the credibility of an important witness, or submits only the inculpatory portions of a defendant's statement while excluding exculpatory aspects of the same statements. *Id.*; *O'Dell*, 392 Mass. at 446-447.

Here, the defendants argue that by failing to present certain exculpatory evidence to the grand jury, the special prosecutor made a presentation that was misleading and distorted the probative value of the evidence therein. See *Commonwealth* v. *Levesque*, 436 Mass. 443, 447 (2000). First, the defendants claim that the special prosecutor had a duty to present contrary opinion testimony from multiple sources along with the Inquest Report's findings of causation and probable cause. This contrary testimony includes: (1) State Police Captain Scott Warmington's testimony that he did not feel there was sufficient evidence to prosecute the

defendants; (2) a May 10, 2010 Memorandum from Plymouth A.D.A. Thomas Flanagan to First A.D.A. Francis Middleton stating that there was no causal connection between the defendants' acts and Messier's death; and (3) opinions of the Plymouth and Essex County District Attorneys that there was insufficient evidence to prosecute the defendants.

The defendants argue that the submission of one or all of these sources of evidence would have "gravely undermined" a primary piece of evidence supporting probable cause: the Inquest judge's legal and factual conclusions regarding the cause of death and probable cause that a crime was committed. See *Commonwealth* v. *Biasiucci*, 60 Mass. App. Ct. 734, 738 (2004). Accordingly, the defendants argue, where the special prosecutor took the unusual step of presenting the Inquest Report to the grand jury, the presentation became impermissibly one-sided, distorted, and misleading by omitting these contrary findings by other prosecuting authorities and experts.

The Commonwealth asserts that the presentation of the Inquest Report was tempered by the special prosecutor's instruction to the grand jury that the report was "an exhibit for [their] consideration, . . . evidence just like other evidence that [they've] heard . . . it will be [their] own independent judgment that will control how [they] decide to act on this case." Further, the Commonwealth asserts, it had no duty to offer conflicting testimony by Captain Warmington, Captain Oliveria, or the county District Attorney's Offices, because such material is merely opinion testimony inadmissible at trial, and does not undermine the credibility of any witness holding a contrary opinion. See *Commonwealth* v. *Donnelly*, 33 Mass. App. Ct. 189, 200 (1992) (grand jury not improperly misled by presentation of "statements from witnesses that favored the Commonwealth's position while withholding statements of other witnesses that supported the defendant's version of events", because "[t]here was no misrepresentation or distortion of any

particular statement" and "[r]esolution of conflicting testimony from the witnesses is a matter more appropriately left to the petit jury."); Mass. Guide to Evid. §§ 701, 704.

This court agrees. The special prosecutor did not distort or misleadingly edit the witness testimony that was presented, and presented the Inquest judge's finding of probable cause with an instruction that the Inquest Report was only to be considered along with all other evidence in the grand jury's independent evaluation. See *Morrisette* v. *Commonwealth*, 380 Mass. 197, 200 (1980) (it is "appropriate for a grand jury to be told that probable cause has been found, so long as the grand jurors are instructed that such a finding must not interfere with their independent evaluation of the facts."). The defendants offer no case law that stands for the proposition that an inquest report, with its extensive and detailed findings supporting probable cause, is distinguished from the typical probable cause finding at the District Court level, which contains no reasoning or detail, such that the presentation of an inquest report necessarily overwhelms the grand jury's capacity for independent evaluation despite a limiting instruction that is otherwise adequate for a typical probable cause finding. Accordingly, this court finds that the grand jury was not misled by the special prosecutor's introduction of the Inquest Report without the contrary opinion testimony of Warmington, Oliveria, and the county prosecutors.

Second, the defendants claim that the presentation of expert use of force testimony by Department of Correction Director Ayala was misleading where the Commonwealth failed to also present Inquest testimony from Dr. Lion which could be construed to contradict Ayala's opinion. Ayala's grand jury testimony included, *inter alia*, the statement that Howard and Raposo "should have taken a break [in using force to restrain the victim] and probably reassessed what they were doing." (Ex. B to First Procaccini Aff., 12). Dr. Lion testified at the Inquest, stating, *inter alia*, that "you don't pause . . . [y]ou carry the restraint process to conclusion . . .

[a]nd then once the patient is in restraints, then you begin to determine whether he can be released but you don't pause midway." Even accepting the defendants' characterization of Dr. Lion's testimony as contrary to Ayala's, the resolution of this conflicting expert witness testimony is a matter for the petit jury. See *Donnelly*, 33 Mass. App. Ct. at 200. Where Ayala's particular statements were not themselves misrepresented or distorted, the choice to exclude Dr. Lion's putatively contrary opinion testimony did not impair the integrity of the grand jury proceeding. *Id.*

Similarly, the defendants claim that the presentation of testimony by Department of Correction Attorney Kevin Anahory as to the defendants' violation of an excessive force regulation, was misleading where the Commonwealth did not also present the Inquest testimony of Bridgewater Correctional Captain Augostinho Oliveria that he did not believe that the regulation applied at Bridgewater State Hospital. Anahory testified that the defendants violated the "Standard Operating Procedures Attachment to 103 Code Mass. Regs. 505" Section III(B), which sets out "guidelines" for the use of force "established to prevent in custody deaths due to restraining an inmate", specifically, the "potential for positional asphyxia". (Ex. C(3) to Second Procaccini Aff.; Ex. A to First Procaccini Aff., 82-83). Specifically, Section III(B)(2) states that "[i]f an inmate continues to struggle once restrained staff shall never sit or put their weight down on an inmate's back." *Id.* Oliveria testified at the Inquest that he did not believe that the use of force regulation, 103 Code Mass. Regs. 505, applied to the use of restraints at Bridgewater State Hospital. As above, presentation of a favorable witness's testimony is not misleading to the grand jury where contrary witness testimony has been excluded, absent misrepresentation or distortion of the particular statements of the favorable witness. See *Donnelly*, 33 Mass. App. Ct. at 200. Where the defendants have not alleged that Anahory's statements were themselves

misrepresented or distorted, the Commonwealth's failure to present Oliveria's opinion did not impair the integrity of the grand jury proceeding. *Id.*

Next, the defendants argue that the grand jury was misled by the Commonwealth's failure to present an offer of proof letter by a doctor opining that Nurse Whinery, who attended to the victim after he was restrained, committed malpractice by not resuscitating the victim in a timely manner. Even assuming, *arguendo*, that the nurse's alleged malpractice was a significant factor in the victim's death, the grand jury received substantial evidence that the defendants' actions in restraining the victim were also a significant cause of his death, including testimony from Dr. Hull, Dr. McDonough, and the Inquest Report. Again, the defendants do not argue that any of that evidence was itself distorted or misrepresented, only that the offer of proof letter would have provided a contrary opinion as to causation. As stated above, the Commonwealth's choice to present this undistorted testimony of favorable experts without including contrary causation opinion evidence does not impair the integrity of the proceeding. See *Donnelly*, 33 Mass. App. Ct. at 200.

Lastly, the defendants argue that the Commonwealth should have presented a September 2013 Internal Case Appraisal authored by the civil assistant attorneys general who represented the defendants in the wrongful death civil lawsuit. The Case Appraisal stated, *inter alia*, that the assistant attorneys general "believe[d] these officers did not know the potential consequences of their actions", along with many other statements substantially less favorable to the defendants. Even assuming for the purposes of argument that the Case Appraisal constitutes exculpatory evidence as to the defendants' state of mind, this evidence, like the other opinion testimony cited above, is merely contrary opinion testimony that the Commonwealth was under no obligation to present to the grand jury. *Id.*

Moreover, there is no evidence that the special prosecutor was aware of the Case Appraisal, or that the independent criminal investigation had any contact with the internal files of the civil assistant attorneys general who authored the document. Howard's motion papers even concede that the special prosecutor was unware of the document at the time of the grand jury proceedings. Accordingly, the defendants cannot show that the special prosecutor knowingly or recklessly misrepresented facts in relation to the Case Appraisal which could have distorted the grand jury process. See *Commonwealth v. Mayfield*, 398 Mass. 615, 621 (1986) ("To sustain a claim that the integrity of the grand jury proceeding has been impaired, not only must the evidence have been given with knowledge", or "reckless disregard of the truth", "that it was false or deceptive, but the false or deceptive evidence must probably have been significant in the view of the grand jury and must have been presented with the intention of obtaining an indictment.").

For those reasons, neither the failure to present the Case Appraisal, nor the failure to present the contrary opinion testimony requested by the defendants, requires the dismissal of the indictments under *O'Dell*.

INTERIM ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendants' motions to dismiss are **DENIED in part** as to the claims of transactional immunity, grand jury impairment under *O'Dell*, and inability of the Attorney General to prosecute the indictments due to the conflict of interest or inquest statutes. The court does not yet reach the claim that the indictments should be dismissed under *McCarthy*. The court finds that the defendants' 2014 internal investigation interviews are subject to use and derivative-use immunity under the Fifth Amendment. The parties are directed to produce briefs addressing whether an evidentiary hearing is necessary to establish the facts of use and derivative use of the immunized testimony in the grand jury presentation, or whether it can be resolved merely upon submission of further pleadings and documentary evidence, such as complete transcripts of the defendants' immunized interviews, civil depositions, and civil interrogatories. Once a factual determination as to the use or derivative use of the immunized testimony has been made, the court will reach the issue of whether the taint had an effect on the grand jury's decision to indict which was harmless beyond a reasonable doubt, and if necessary, reach the remaining *McCarthy* claim.

Jeffrey A. Locke
Justice of the Superior Court

Dated: January 13, 2017