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Criminal Law and Procedure - He Said, She Said: Grand Jury Indicts Based on Hearsay in Fourteen Year-Old Sexual Assault Case-Commonwealth v. Stevenson, 50 N.E.3D 184 (Mass. 2016)

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**CRIMINAL LAW AND PROCEDURE—HE SAID,
SHE SAID: GRAND JURY INDICTS BASED ON
HEARSAY IN FOURTEEN YEAR-OLD SEXUAL
ASSAULT CASE—COMMONWEALTH V.
STEVENSON, 50 N.E.3D 184 (MASS. 2016).**

Both the Supreme Court of the United States of America (“Supreme Court”) and the Massachusetts Supreme Judicial Court (“SJC”) have held that hearsay testimony does not constitute grounds for dismissal of an indictment, opining an indictment obtained using such testimony must stand.¹ In the context of an indictment, the grand jury process protects innocent citizens against unfounded criminal prosecutions by determining whether probable cause exists in order to indict the defendants.² In

¹ See, e.g., *Costello v. United States*, 350 U.S. 359, 364 (1956) (affirming indictment solely on hearsay evidence); *Commonwealth v. Woodward*, 32 N.E. 939, 940 (Mass. 1893) (noting Massachusetts reverence for sanctity of grand jury in line with common law); *Commonwealth v. Walsh*, 151 N.E. 300, 301 (Mass. 1926) (recognizing leeway granted to grand jury to interpret evidence); *Commonwealth v. Lammi*, 37 N.E.2d 250, 254-55 (Mass. 1941) (admitting testimony offered by co-defendants as sufficient to support indictment); *Commonwealth v. Gibson*, 333 N.E.2d 400, 404-06 (Mass. 1975) (upholding indictment based completely on hearsay); *Commonwealth v. McGahee*, 473 N.E.2d 1077, 1080 (Mass. 1985) (allowing police officers’ testimony of identification process in which defendant was selected); *Commonwealth v. Club Caravan*, 571 N.E.2d 405, 408 (Mass. App. Ct. 1991) (explaining minimum standards for upholding indictment based on hearsay); *Commonwealth v. Fort*, 597 N.E.2d 1056, 1059 (Mass. App. Ct. 1992) (asserting hearsay sufficient from grand jury indictment); see also MASS. R. CRIM. P. 4(c) (“Indictment Based Upon Secondary Evidence. An indictment shall not be dismissed on the grounds that the evidence presented before the grand jury consisted in whole or in part of the record from the defendant’s probable cause hearing or that other hearsay evidence was presented before the grand jury.”).

² See *Lataille v. Dist. Court of E. Hampden*, 320 N.E.2d 877, 882 (Mass. 1974) (explaining dual function of grand jury); see also *Commonwealth v. Levesque*, 766 N.E.2d 50, 58-59 (Mass. 2002) (rendering testimony sufficient evidence to sustain grand jury indictment); MASS. CONST. art. 12 (2016) (stating rights are firmly rooted and protected by Massachusetts Constitution).

[N]o subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall

Commonwealth v. Stevenson,³ the SJC decided whether a criminal defendant can be indicted in a grand jury proceeding based upon hearsay testimony detailing sexual assaults that occurred many years in the past.⁴ The SJC grappled with deciding whether obtaining an indictment using hearsay testimony was an “extraordinary circumstance[] . . . so pernicious [as to require] dismissal of the indictment.”⁵ Ultimately, the SJC held that the grand jury can hear all information available to law enforcement at the time of the proceedings concerning the sexual assaults in question, and therefore, the decision to indict the defendant on such information was warranted.⁶

not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Id. This document provides the fundamental rights for all Massachusetts citizens. *Id.* The Constitution of the Commonwealth of Massachusetts is the world’s oldest, functioning, written state constitution. See *John Addams & the Massachusetts Constitution: Why Study the Massachusetts Constitution*, MASS.GOV (2017) <http://www.mass.gov/courts/court-info/sjc/education-center/jn-adams/mass-constitution-1-gen.html> (last visited Jan. 26, 2016). The Constitution of the Commonwealth of Massachusetts served as a model for the United States Constitution that was written in 1787. *Id.*

³ 50 N.E.3d 184, 185 (Mass. 2016) (holding indictment brought years after alleged crimes not “extraordinary circumstance” requiring dismissal based solely upon hearsay).

⁴ See *id.* at 189 (holding indictment brought years after alleged crimes not “extraordinary circumstance” requiring dismissal based solely upon hearsay).

⁵ *Id.* at 188-90 (stating hearsay is acceptable unless it presents extraordinary circumstances). See, e.g., *Commonwealth v. St. Pierre*, 387 N.E.2d 1135, 1139 (Mass. 1979) (elaborating on extraordinary circumstances in cases); *Commonwealth v. McCarthy*, 430 N.E.2d 1195, 1196 n.5 (Mass. 1982) (establishing minimum sufficient evidence for grand jury to hear and determine probable cause); *Commonwealth v. Bishop*, 617 N.E.2d 992, 993 (Mass. 1993) (relating video testimony to hearsay which is acceptable to return indictments); *Commonwealth v. LaVelle*, 605 N.E.2d 852, 854 (Mass. 1993) (determining whether or not there was impairment of grand jury proceedings); *Commonwealth v. O’Dell*, 466 N.E.2d 828, 831 n.1 (Mass. 1984) (noting direct testimony is preferred but not required at grand jury proceedings).

⁶ See *Stevenson*, 50 N.E.3d at 190 (recognizing special characteristics of sexual assault charges). *Stevenson* was indicted with one count of aggravated rape of a child with force and five counts of indecent assault and battery on a child under the age of fourteen. *Id.* See generally MASS. GEN. LAWS ch. 265, § 22B (2008) (defining *Stevenson*’s one charge of aggravated rape of a child with force).

[W]hoever has sexual intercourse or unnatural sexual intercourse with a child under 16, and compels such a child to submit by force and against his will or compels such child to submit by threat of bodily injury and: (a) the sexual intercourse or unnatural sexual intercourse is committed during the commission or attempted commission of any of the following offenses: (1) armed burglary as set forth in section 14 of chapter 266; (2) unarmed burglary as set forth in section 15 of said chapter 266; (3) breaking and entering as set forth in section 16 of said chapter 266; (4) entering without breaking as set forth in section 17 of said chapter 266; (5) breaking and entering into a dwelling house as set forth in section 18 of said chapter 266; (6) kidnapping as set forth in section 26 of chapter 265; (7) armed robbery as set forth in section 17 of said chapter 265; (8) unarmed robbery as set forth in section 19 of said chapter 265; (9) assault and battery with a dangerous

On May 22, 2014, Detective Mark Santon of the Tisbury Police Department was contacted to investigate a sexual assault case involving a resident of West Tisbury, a small town in Massachusetts.⁷ Detective Santon interviewed the complainant, “Sarah,”⁸ about a series of sexual assaults that began when she was ten years old, which she alleged were committed by the

weapon or assault with a dangerous weapon as set forth in sections 15A and 15B of said chapter 265; (10) home invasion as set forth in section 18C of said chapter 265; or (11) posing or exhibiting child in state of nudity or sexual conduct as set forth in section 29A of chapter 272;

(b) the sexual intercourse or unnatural sexual intercourse results in, or is committed by means of an act or acts resulting in, substantial bodily injury as defined in section 13J;

(c) the sexual intercourse or unnatural sexual intercourse is committed while the victim is tied, bound or gagged;

(d) the sexual intercourse or unnatural sexual intercourse is committed after the defendant administered, or caused to be administered, alcohol or a controlled substance by injection, inhalation, ingestion, or any other means to the victim without the victim’s consent;

(e) the sexual intercourse or unnatural sexual intercourse is committed by a joint enterprise; or

(f) the sexual intercourse or unnatural sexual intercourse was committed in a manner in which the victim could contract a sexually transmitted disease or infection of which the defendant knew or should have known he was a carrier, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 15 years. The sentence imposed on such person shall not be reduced to less than 15 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 15 years of such sentence. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file.

Id.; See MASS. GEN. LAWS ch. 265, § 13B (2016) (explaining charge of indecent assault and battery on a child under age fourteen).

Whoever commits an indecent assault and battery on a child under the age of 14 shall be punished by imprisonment in the state prison for not more than 10 years, or by imprisonment in the house of correction for not more than 2½ years. A prosecution commenced under this section shall neither be continued without a finding nor placed on file.

In a prosecution under this section, a child under the age of 14 years shall be deemed incapable of consenting to any conduct of the defendant for which such defendant is being prosecuted.

Id.

⁷ See *Stevenson*, 50 N.E.3d at 186. Detective Santon was contacted by a lieutenant with the West Tisbury police department after the complainant’s boyfriend reported the complainant had been a victim of sexual assault years before his testimony. *Id.*

⁸ See Brief for Petitioner-Appellant at 4 n.1, *Commonwealth v. Stevenson*, 50 N.E.3d 184 (Mass. 2016) (No. SJC-11962). Due to specific identifying information being disclosed in this case, the Commonwealth referred to the victim as “Sarah” or “complainant,” which is not her real name, due to privacy concerns.

defendant.⁹ Sarah was hired by the defendant, Carlos Stevenson, and his wife to provide childcare for their two toddler boys, irrespective of whether the parents were home or not, from 2000 to 2003.¹⁰ Sarah reported instances of sexual assault, as well as harassment that occurred while babysitting for Stevenson, ranging from inappropriate comments to groping to forcible digital rape.¹¹ Sarah refrained from disclosing the alleged sexual assaults until 2009, when a fellow classmate handed out an “anonymous sexual assault on Martha’s Vineyard survey,” through which Sarah alleged she was “molested by a neighbor since she was nine, she sees him every day”¹² In 2013, upon experiencing a panic attack when seeing Stevenson while shopping with her then-boyfriend, Michael, Sarah finally revealed the sexual assaults to her mother and father.¹³

On October 6, 2014, a grand jury received the case and Detective Santon was the sole witness called to testify.¹⁴ Following Detective Santon’s testimony, the grand jury indicted Stevenson on one charge of aggravated rape of a child with force, and five charges of indecent assault and battery on a child under fourteen years old.¹⁵ Stevenson successfully filed a motion to

⁹ See *id.* (detailing Detective Santon’s interview of Sarah); see also *Stevenson*, 50 N.E.3d at 186 (discussing results of Detective Santon’s investigation).

¹⁰ See *Stevenson*, 50 N.E.3d at 186 (outlining employer-employee relationship between complainant and Stevenson). See also Brief for Petitioner-Appellant, *supra* note 8, at 5 (describing complainant’s duties while employed by Stevenson). Sarah was deemed the “mother’s helper” because she babysat when the family was in and out of the home. *Id.*

¹¹ See *Stevenson*, 50 N.E.3d at 186 (illustrating sexual assaults conducted on child at age ten); see also Brief for Petitioner-Appellant, *supra* note 8, at 6-11 (explaining details of interview conducted by Detective Santon). Complainant described to Detective Santon that Stevenson would follow her throughout the home, slide his hands between her thighs or grope her buttocks, touch her vagina over her clothes, and touch her undeveloped chest over her clothes on a regular basis at the age of ten. *Id.* at 6. In the fall of 2001, Stevenson first showed his erect penis, while masturbating, to Complainant and forced her to stroke his penis while his sons were in the next room. *Id.* Stevenson, on multiple occasions, forced the complainant to touch him by threatening her safety, or her family’s safety. *Id.* at 8. Complainant stated this type of assault persisted for so long that she could no longer account for the number of instances, and estimated that it could have been hundreds of times. *Id.*

¹² See *Stevenson*, 50 N.E.3d at 186 (revealing anonymous survey was first time complainant discussed sexual assault); see also Brief for Petitioner-Appellant, *supra* note 8, at 13-14 (noting when complainant first discussed her series of sexual assaults).

¹³ See Brief for Petitioner-Appellant, *supra* note 8, at 4 n.1. Due to specific identifying information being disclosed in this case, the Commonwealth referred to the victim’s boyfriend as “Michael.” *Id.* Sarah and Michael went inside a photo shop when Stevenson was standing comfortably behind a female clerk. *Id.* at 14. Sarah almost had a panic attack at the thought that there could be other victims, besides herself. *Id.* at 15. It was at that moment Sarah decided to tell her mother and father, and about a week later she told Detective Santon. *Id.*

¹⁴ See *Stevenson*, 50 N.E.3d at 186 (discussing evidence presented at grand jury proceedings).

¹⁵ See *id.* at 184-85 (detailing indictment of Stevenson’s charges and recognizing grand jury indictment). Stevenson was indicted with one charge of aggravated rape of a child with force and

dismiss the indictments after his arraignment on grounds that the case constituted an extraordinary circumstance, and that the indictment should not be based solely on hearsay.¹⁶ The Commonwealth appealed the dismissal, and the SJC granted Stevenson's application for direct appellate review to decide whether or not an "extraordinary circumstance" applies when sexual assault charges are brought many years after the alleged underlying crime was committed, such that hearsay testimony is an unacceptable substitute for

five charges of indecent assault and battery on a child under the age of fourteen. *Id.* See also MASS. GEN. LAWS ch. 265, § 22B (2016) ("Whoever has sexual intercourse or unnatural sexual intercourse with a child under 16, and compels such a child to submit by force and against his will or compels such child to submit by threat of bodily injury"); MASS. GEN. LAWS ch. 265, § 13B (2016) ("Whoever commits an indecent assault and battery on a child under the age of fourteen shall be punished by imprisonment in the state prison for not more than 10 years, or by imprisonment in the house of correction for not more than 2½ years").

¹⁶ See *Stevenson*, 50 N.E.3d at 185 (discussing judge's reasons for dismissing without prejudice). The motion judge concluded that while an indictment generally may be solely based on hearsay, this case constituted an "extraordinary circumstance." *Id.* Also, the judge ruled that,:

[I]n a case such as this, the exclusive use of hearsay in the presentation of the case to the grand jury destroys the historical function of the grand jury in assessing the likelihood of prosecutorial success and diminishes the protections that the grand jury is supposed to afford to the innocent.

Id. at 186. Lastly, the motion judge suggested that a higher standard of evidence ought to be required when charges of sexual assault arise because of the damage to one's reputation caused by an indictment of this nature. *Id.* at 189. See also RAININ, *Scope of the Problem: Statistics*, RAINN (2016), <https://www.rainn.org/statistics/scope-problem> (explaining that sexual assaults occur every two minutes). Compare Patrick Witt, *A Sexual Harassment Policy That Nearly Ruined My Life*, THE BOSTON GLOBE (Nov. 3, 2014), <https://www.bostonglobe.com/opinion/2014/11/03/sexual-harassment-policy-that-nearly-ruined-life/hY3XrZrOdXjvX2SSvuciPN/story.html> (noting that sexual harassment charges can ruin lives, creating a stigma); and Joe Gerard, *Fame, Fortune and Sexual Harassment: Don't Ruin Your Reputation*, I-SIGHT CUSTOMER EXPRESSIONS (2016), <http://i-sight.com/resources/fame-fortune-sexual-harassment/> (detailing all ways sexual assault charges ruin reputations); with Madison Pauly, *How the Stanford Sexual-Assault Case Could Change the Legal Definition of Rape*, MOTHER JONES (July 12, 2016) <http://www.motherjones.com/politics/2016/06/stanford-rape-case-political-backlash-explained> (clarifying that stigmas are attached to victims not just oppressors); and KGO-TV, *Brock Turner: Member of Congress Read Victim Letter in Stanford Sex Assault Case*, ABC 7 NEWS (June 15, 2016), <http://abc7news.com/news/members-of-congress-read-victim-letter-in-stanford-sex-assault-case/1387032/> (elaborating that heavy stigmas are attached to sexual assault cases leading to congressional action).

direct testimony.¹⁷ Following direct appellate review, the SJC reversed the order of the Superior Court, reinstating the charges against Stevenson.¹⁸

I. THE HISTORY AND FUNCTION OF THE GRAND JURY

A grand jury has the dual function of determining the existence of probable cause before a criminal defendant can be indicted with a crime and to protect citizens against meritless criminal prosecutions.¹⁹ Individuals have the right to be secure from “public accusation of crime.”²⁰ In the

¹⁷ See *Stevenson*, 50 N.E.3d at 185 (articulating reasons Stevenson filed motion to dismiss indictments). The SJC recognizes this problem may become more “salient now that the Legislature has eliminated the statute of limitations as to indictments and criminal complaints charging violations of the statutes at issue here.” *Id.* at 190; MASS. GEN. LAWS ch. 277, § 63 (2011) (lifting statute of limitations for indictments to twenty-seven years after date of commission of offense). The statute stating, in relevant part:

[A]n indictment for murder may be found at any time after the death of the person alleged to have been murdered. An indictment or complaint for an offense set forth in section 13B, 13B½, 13B¾, 13F, 13L, 22A, 22B, 22C, 23, 23A, 23B, 24B or subsection (b) of section 50 of chapter 265, for conspiracy to commit any of these offenses, as an accessory thereto, or any 1 or more of them may be found and filed at any time after the date of the commission of such offense; but any indictment or complaint found and filed more than 27 years after the date of commission of such offense shall be supported by independent evidence that corroborates the victim’s allegation. Such independent evidence shall be admissible during trial and shall not consist exclusively of the opinions of mental health professionals. An indictment for an offense set forth in sections 22, 24 or subsection (a) of section 50 of chapter 265, or for conspiracy to commit either of these offenses or as an accessory thereto or any 1 or more of them may be found and filed within 15 years of the date of commission of such offense. An indictment for an offense set forth in sections 17, 18, 19 and 21 of said chapter 265 or section 17 of chapter 272, for conspiracy to commit any such crime, as an accessory thereto, or any 1 or more of them may be found and filed within 10 years after the date of commission of such offense. An indictment for any other crime shall be found and filed within 6 years after such crime has been committed. Any period during which the defendant is not usually and publicly a resident within the commonwealth shall be excluded in determining the time limited. Notwithstanding the first paragraph, if a victim of a crime set forth in section 13B, 13F, 13H, 22, 22A, 23, 24B, 26A or 50 of chapter 265, or section 1, 2, 3, 4, 4A, 4B, 5, 6, 7, 8, 12, 13, 17, 26, 28, 29A, 29B, 33, 34, 35 or 35A of chapter 272 is under the age of 16 at the time the crime is committed, the period of limitation for prosecution shall not commence until the victim has reached the age of 16 or the violation is reported to a law enforcement agency, whichever occurs earlier.

Id.

¹⁸ See *Stevenson*, 50 N.E.3d at 191 (concluding hearsay testimony from investigating officers was enough to enforce grounds of grand jury indictments).

¹⁹ See *Lataille v. District Court of E. Hampden*, 320 N.E.2d 877, 882 (Mass. 1979) (defining constitutional authority of dual function of grand juries).

²⁰ *Jones v. Robbins*, 74 Mass. 329, 344 (1857). Lemuel Shaw, Chief Justice of the SJC noted:

Commonwealth of Massachusetts, grand jury proceedings operate with interference from a presiding judge; yet the right to a grand jury indictment for state crimes is not guaranteed by the United States Constitution.²¹ Furthermore, any evidence that is presented to a grand jury must be sufficient enough to establish probable cause that the defendant committed the alleged crime.²²

II. HEARSAY AND GRAND JURIES

Grand juries are given “broad powers to ‘inquire into all information that might possibly bear on [their] investigation.’”²³ This sweeping power is what enables the grand jury to request the presentation of additional evidence if it is uncertain about returning indictments based on hearsay testimony.²⁴ Further, grand juries can only hear evidence produced by the government.²⁵ It is well-established in Massachusetts that hearsay evidence alone may support an indictment in grand jury proceedings.²⁶ Rules like the

The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.

Id.

²¹ See *United States v. Williams*, 504 U.S. 36, 48 (1992) (defining functional independence of grand juries); *Commonwealth v. McCravy*, 723 N.E.2d 517, 520 (Mass. 2000) (explaining right to grand juries is not provided by United States Constitution); see also *Jones*, 74 Mass. at 342 (noting importance of grand juries and right to be free from public accusation of crimes). Although grand juries are not guaranteed by the United States Constitution, they are “one of the great securities of private right, handed down to us as among the liberties and privileges which our ancestors enjoyed at the time of their emigration, and claimed to hold and retain as their birthright.” *Id.*

²² See *Commonwealth v. Levesque*, 766 N.E.2d 50, 58-59 (clarifying sufficient evidence must be presented to establish defendant committed said crime). “Probable cause requires sufficient facts to warrant a person of reasonable caution in believing that an offense has been committed. . .” *Id.* at 59.

²³ *Commonwealth v. Williams*, 790 N.E.2d 662, 667 (Mass. 2003) (summarizing broad powers of grand juries to inquire all information pertaining to relevant investigation).

²⁴ See *Commonwealth v. McNary*, 140 N.E. 255, 256 (Mass. 1923) (clarifying abilities of grand juries to request additional evidence or information before reaching conclusions); see also *Williams*, 790 N.E.2d at 667 (stating ability of grand juries to request or inquire all information bearing on their investigation).

²⁵ See *McNary*, 140 N.E. at 256 (noting only government or prosecution brings about evidence in grand jury proceedings).

²⁶ See, e.g., *Commonwealth v. Walczak*, 979 N.E.2d 732, 760-61 (Mass. 2012) (Spina, J., concurring in part and dissenting in part) (discussing grand jury functions and proceedings); *Commonwealth v. Washington W.*, 967 N.E.2d 615, 621 (Mass. 2012) (citing *Commonwealth v.*

Massachusetts rule permitting the use of hearsay to obtain indictments appears to prevail in every state that has considered the issue, except in those states which possess specific statutory language dictates the forms of evidence that may be received in a grand jury proceeding.²⁷

Furthermore, hearsay testimony does not invalidate an indictment; rather, a defendant must show that the testimony was so deceptive or inaccurate that it affected the grand jury's deliberation on the indictment.²⁸

The Commonwealth relies exclusively on the use of hearsay testimony before grand juries because it can trigger grounds for dismissal of an indictment under extraordinary circumstances.²⁹ This means that

McGahee, 473 N.E.2d 1077, 1081 (Mass. 1985)) (“[A] grand jury may rely on hearsay in determining probable cause.”); Commonwealth v. O’Dell, 466 N.E.2d 828, 831 (Mass. 1984) (“[A]n indictment may be based solely on hearsay.”); Commonwealth v. St. Pierre, 387 N.E.2d 1135, 1139 (Mass. 1979) (“[A]n indictment may stand which is based in part or altogether on hearsay.”); Commonwealth v. Gibson, 333 N.E.2d 400, 404-06 (Mass. 1975) (affirming denial of motion to dismiss indictment because grand jury may indict based upon hearsay); Commonwealth v. Woodward, 32 N.E. 939, 940 (Mass. 1893) (“[I]n finding indictments, grand jurors may act upon their own knowledge, or upon the knowledge of one or more of their number.”). The policy allowing for grand jury indictments based solely upon hearsay evidence dates back more than a century in Massachusetts. *Id.* at 939. Moreover, federal grand jury proceedings permit the use of hearsay. *Id.* See Costello v. United States, 350 U.S. 359, 363-64 (1956) (holding criminal conviction can be sustained even if only hearsay evidence was presented to grand jury).

²⁷ See ALASKA R. CRIM. P. 6(r) (“Evidence which would be legally admissible at trial shall be admissible before the grand jury.”); CAL. PENAL CODE § 939.6(b) (1959) (“the grand jury shall not receive any evidence except that which would be admissible over objection at the trial of a criminal action”); LA. CODE CRIM. PROC. ANN. art. 442 (1928) (“A grand jury should receive only legal evidence and such as is given by witnesses produced, or furnished by documents and other physical evidence.”); MINN. R. CRIM. P. 18.05, SUBD. (2016) (“Hearsay evidence offered only to lay the foundation for [] admissibility.”); NEV. REV. STAT. § 172.135(2) (1967) (“grand jury can receive none but legal evidence . . . to the exclusion of hearsay”); N.M. STAT. ANN. § 31-6-11(A) (1953) (“The Rules of Evidence shall not apply to a grand jury proceeding.”); N.Y. CRIM. PROC. § 190.30(1) (1970) (“the provisions of article sixty, governing rules of evidence and related matters with respect to criminal proceedings in general, are, where appropriate, applicable to grand jury proceedings.”); OR. REV. STAT. § 132.320(1) (1973) (“for the purposes of indictment, the grand jury shall receive no other evidence than such as might be given on the trial of the person charged”); S.D. CODIFIED LAWS § 23A-5-15 (1939) (“the rules of evidence shall apply to proceedings before the grand jury.”).

²⁸ See *People v. Holmes*, 922 N.E.2d 1179, 1184 (Ill. App. Ct. 2010) (mentioning defendant must show detective testimony was inaccurate or deceptive). See also *Commonwealth v. Stevenson*, 50 N.E.3d 184, 190 (Mass. 2016) (explaining that jurors could ask Detective Santon questions throughout his testimony). The jurors inquired if they were presented with all the evidence before they deliberated, and queried whether Detective Santon had experience with interviewing victims who waited for a longer period of time before reporting. *Id.*

²⁹ See *Stevenson*, 50 N.E.3d at 185 (discussing Superior Court’s reliance on hearsay to dismiss indictments); see also *Commonwealth v. Gibson*, 333 N.E.2d 400, 405 (Mass. 1975) (quoting *United States v. Cruz*, 478 F.2d 408, 411 (5th Cir. 1973)) (“In the absence of some showing that the integrity of grand jury proceedings has been impaired, an indictment even if based exclusively on . . . [hearsay] testimony will not be overturned on appeal.”).

inadmissible evidence at trial is sufficient enough to support a grand jury indictment; as such, an indictment based upon hearsay will stand.³⁰ Although a minority of circumstances exists where the SJC prefers direct testimony before grand juries, indictments based on hearsay are widely accepted as the prevailing majority rule.³¹

In *Stevenson*, the judge granted the defendant's motion to dismiss and invalidated the indictment in question because testimony by the lead investigating officer was based on hearsay.³² Furthermore, the Superior Court suggested that a "higher standard of evidence ought to be required when charges of sexual assault are at issue because of the serious damage to one's reputation caused by such an indictment."³³ Paradoxically, the SJC reinstated the indictment from the grand jury upon appeal, opining that a grand jury must be "an informing and accusing body" whose charge is to determine whether probable cause and reason exist and where probable cause and reason support the notion that a crime was committed.³⁴

³⁰ See *Gibson*, 333 N.E.2d at 402 (clarifying evidence not competent at trial is sufficient for grand jury indictment despite hearsay evidence base); see also Brief for Petitioner-Appellant, *supra* note 8, at 17 (explaining SJC decision that hearsay is enough for grand jury indictment to be valid).

³¹ See, e.g., *Stevenson*, 50 N.E.3d at 188 (repeating admonition of sound policy for preference of direct testimony); *Pierre*, 387 N.E.2d at 1139 (stating hearsay is not enough to justify dismissal of indictment); *Commonwealth v. McCarthy*, 430 N.E.2d 1195, 1196 n.4 (Mass. 1982) (accepting hearsay when grand jury only heard officer's testimony about victim's statement); *Commonwealth v. Bishop*, 617 N.E.2d 992, 993 (Mass. 1993) (classifying videotaped evidence as hearsay is acceptable in grand jury proceedings); *Commonwealth v. LaVelle*, 605 N.E.2d 852, 854 (Mass. 1993) (reinforcing hearsay testimony is acceptable although better testimony is available for presentation to grand juries); *O'Dell*, 466 N.E.2d at 828 n.1 (emphasizing sound policy dictates preference for use of direct testimony before grand juries).

³² See Brief for Petitioner-Appellant, *supra* note 8, at 17-28 (arguing lack of extraordinary circumstances based on hearsay in *Stevenson*). The motion judge officially allowed the motion without prejudice, ruling:

[I]n a case such as this, the exclusive use of hearsay in the presentation of the case to the grand jury destroys the historical function of the grand jury in assessing the likelihood of prosecutorial success and diminishes the protections that the grand jury is supposed to afford the innocent.

Id. at 17.

³³ Memorandum of Decision on Defendant's Motion to Dismiss, *Commonwealth v. Stevenson*, No. DUCV2014-00007, at *6 (Mass. Super. Ct. May 19, 2015).

³⁴ *Stevenson*, 50 N.E.3d at 190 (suggesting stigmas are attached with sexual assault charges so higher standards should be used). The motion judge noted three reasons for his conclusion that the use of hearsay was so pernicious that: (1) the investigative officer was able to consistently articulate the facts "belying any potential contradictions or misstatements in the complainant's story"; (2) the grand jury was "unable to observe the complainant's demeanor. . ."; and (3) "presentation of the case through one witness denied the defendant his opportunity to obtain pretrial discovery . . ." thus allowing the Commonwealth to avoid the possibility of impeachment. *Id.* at 189. See also, RAINN, *supra* note 16 (explaining that sexual assaults occur every two minutes). Compare Witt,

The SJC concluded that the *Stevenson* case did not present any circumstances qualifying as extraordinary so as to impair the integrity of the grand jury proceedings, warranting a dismissal of the indictments.³⁵ The grand jury heard all information available to the police when the proceedings commenced, and was able to make an informed decision.³⁶ Furthermore, the members of the grand jury had the opportunity to request the presentation of further evidence if they were uncertain about the hearsay testimony on a case that was fourteen years old.³⁷

The SJC correctly reversed and remanded the indictment on the charges of “Aggravated Rape of a Child with Force” and five charges of “Indecent Assault and Battery on a Child under the Age of Fourteen” because indictments based upon hearsay are admissible.³⁸ The grand jury heard all available information at the time of the proceedings, and rendered a decision as such.³⁹ The grand jury’s broad powers allows its members to probe into all information bearing on the investigation for which they are charged in assisting.⁴⁰ If members of the grand jury were unclear in rendering a decision on a fourteen-year-old case, they had the capability to request further

supra note 17 (noting that sexual harassment charges can ruin lives, creating a stigma); and Gerard, *supra* note 16 (detailing all ways sexual assault charges ruin reputations); with Pauly, *supra* note 16 (clarifying stigmas are attached to victims not just oppressors); and KGO-TV, *supra* note 16 (elaborating that heavy stigmas are attached to sexual assault cases so Congress is taking action).

³⁵ See *Stevenson*, 50 N.E.3d at 185. See also Brief for Petitioner-Appellant, *supra* note 8, at 17 and accompanying text.

³⁶ See *Stevenson*, 50 N.E.3d at 190 (stating Detective Santon was able to respond to questions posed by jurors); *Commonwealth v. McGahee*, 473 N.E.2d 1077, 1080-81 (Mass. 1985) (reasoning that grand jurors received sufficient amount of evidence).

³⁷ See *Stevenson*, 50 N.E.3d at 190-91 (displaying broad powers of grand jury by noting they could request additional information); *Commonwealth v. McNary*, 140 N.E. 255, 256 (Mass. 1923) (explaining if appearance of more witnesses than those produced then grand jury may require testimony); see also *Commonwealth v. St. Pierre*, 387 N.E.2d 1135, 1139 (Mass. 1979) (providing indictment based on double hearsay testimony is permissible in grand jury proceedings); *Commonwealth v. Williams*, 790 N.E.2d 662, 667 (Mass. 2003) (stating grand juries may gather all information bearing on their investigation).

³⁸ See *Stevenson*, 50 N.E.3d at 190 (explaining defendant’s awareness of all hearsay against him and cannot require prosecution to call witnesses). The record does reflect that the grand jury asked extensive questions of Detective Santon and understood the limited nature of the evidence they were receiving. *Id.*

³⁹ See cases cited *supra* note 26; see also MASS. GEN. LAWS ch. 265, § 13B (2008) (punishing violators of assault and battery with prison time or sentencing in house of corrections); MASS. GEN. LAWS ch. 265, § 22B (2008) (forbidding rape of child during commission of certain offenses or by use of force).

⁴⁰ See *Stevenson*, 50 N.E.3d at 190 (deciding information bearing on investigation essential in cases fourteen years old).

evidence.⁴¹ The SJC noted that because the grand jury heard all evidence and rendered a decision, the indictment was confirmed under MASS. R. CRIM. P. 4(c).⁴² Lastly, the SJC recommended that the Superior Court craft a “model instruction for use by judges who are empaneling grand jurors” to guide future cases, which could be used for any court system.⁴³

However, the SJC erred in noting no stigma is associated with sexual assault charges.⁴⁴ The motion judge suggested that a higher standard of evidence is needed when charges of sexual assault are at issue due to the sensitivity and potential reputational damages associated with the subject.⁴⁵ With a sexual assault occurring almost every two minutes, stigma and reputational harm can be experienced by the accused and accuser; therefore, a higher standard of evidence ought to be implemented for sexual assault charges at grand jury proceedings.⁴⁶

Exclusive reliance on the use of hearsay testimony before the grand jury may be grounds for the dismissal of an indictment under extraordinary circumstances.⁴⁷ The *Stevenson* case tasked the courts with weighing whether an extraordinary circumstance can trigger an allegation and a subsequent charge or charges many years after the alleged crime was committed.⁴⁸ Due to the elimination of limitations for indictments, the

⁴¹ See *Williams*, 790 N.E.2d at 667 (defining grand jury powers as broad, allowing inquiries on their investigation); *McCravy*, 723 N.E.2d at 520 (explaining right to grand juries is not guaranteed by United States Constitution).

⁴² See *Stevenson*, 50 N.E.3d at 191 (recognizing broad powers of grand jury by noting it could request additional information); *McNary*, 140 N.E. at 256 (stipulating if other witnesses produced, grand jury may require testimony).

⁴³ See *Stevenson*, 50 N.E.3d at 190 n.7 (describing inquiries jurors had about receiving all evidence relevant to their investigation).

⁴⁴ See *Stevenson*, 50 N.E.3d at 191 n.9 (recommending that uniform instructions should be given to grand jurors at proceedings). The SJC further elaborated that the instructions should inform the grand jurors that they may request additional evidence or witnesses if they find it necessary when considering a case presented to them by the prosecutor. *McNary*, 140 N.E. at 256-57.

⁴⁵ See *Stevenson*, 50 N.E.3d at 190 n.8 (discussing “stigma associated with being charged with sexual assault violations”).

⁴⁶ See *Commonwealth v. Stevenson*, 50 N.E.3d 184, 189 (Mass. 2016) (discussing what factors Superior Court motion judge factored in making informed decision). “The judge credited one further factor that informed his decision, suggesting that a higher standard of evidence ought to be required when charges of sexual assault are at issue because of the serious damage to one’s reputation caused by such an indictment.” *Id.*

⁴⁷ See also *RAINN*, *supra* note 16 and accompanying text. Compare *Witt*, *supra* note 16 and accompanying text; and *Gerard*, *supra* note 16 and accompanying text, with *Pauly*, *supra* note 17 and accompanying text, and *KGO-TV*, *supra* note 17 and accompanying text.

⁴⁸ See *Stevenson*, 50 N.E.3d at 185 (explaining that reliance on extraordinary circumstances when reaching indictment is grounds for dismissal); see also *Commonwealth v. Gibson*, 333 N.E.2d

circumstance in question has since become more salient.⁴⁹ Merely filing charges fourteen years after the alleged committance of a crime does not constitute an “extraordinary circumstance,” especially where statutory language allows up to twenty-seven years to institute grand jury proceedings.⁵⁰

The court in *Commonwealth v. Stevenson* held that hearsay testimony, in the context of sexual assault charges filed many years after the alleged crime was committed, is not an “extraordinary circumstance.” The grand jury in question heard all available information at the time of the proceedings, and was able to render an informed decision. Members of the grand jury had the opportunity to request presentation of further evidence if they were uncertain about hearsay testimony because of the age of the case. Drawing on these conclusions, the SJC reinstated the grand jury indictment, stating that the role of the grand jury is to act as “an informing and accusing body” to determine whether there was probable cause for the existing crime. As such, the SJC struck down the Superior Court motion judge’s suggestion that a “higher standard of evidence ought to be required when charges of sexual assault are at issue because of the serious damage to one’s reputation caused by such an indictment,” considering there is no stigma associated with sexual assault charges and violations.⁵¹

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400, 405-06 (Mass. 1975) (citing *United States v. Cruz*, 478 F.2d 408, 411 (5th Cir. 1973)) (holding evidence not accepted at trial).

⁴⁹ See *Stevenson*, 50 N.E.3d at 189 (accepting charges within statute of limitations on indictments); see also MASS. GEN. LAWS ch. 277, § 63 (2011) (lifting statute of limitations as to indictments).

⁵⁰ See *Stevenson*, 50 N.E.3d at 190 (explaining sexual assault victim can now charge assaulter for crime years after it occurred). See also MASS. GEN. LAWS ch. 277, § 63 (2016) (allowing evidence of crime multiple years after it has occurred).

⁵¹ *Stevenson*, 50 N.E.3d at 189.