

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Thomas A. Woods,
Petitioner,

v.

Massachusetts,
Respondent

On Petition for a Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the Fifth and Fourteenth Amendments prohibit the government from introducing evidence of a defendant's grand jury testimony which was taken when the defendant was a target or was likely to become a target of the grand jury investigation into the offense for which the defendant is on trial, the grand jury testimony was compelled by means of a government-issued summons, and the person was not advised of the right to refuse to answer any question at the grand jury if a truthful answer would tend to be self-incriminating.

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- 1) Oral Findings and Rulings by Trial Judge on Defendant's Motions in Limine, Commonwealth v. Woods, Docket No. PLCR2006-00498.
- 2) Opinion of the Massachusetts Supreme Judicial Court in Commonwealth v. Woods, 466 Mass 707, 1 N.E. 3d 762 (2014)(cert. denied, 134 S. Ct. 2855, 189 L. Ed. 2d 818 (2014)).
- 3) Memorandum and Decision on Defendant's Motion for New Trial, Commonwealth v. Woods, Docket No. 0683CR498.
- 4) Opinion of the Massachusetts Supreme Judicial Court in Commonwealth v. Woods, 480 Mass 231, 102 N.E. 3d 961 (2018).

JURISDICTION

The judgment sought to be reviewed is Commonwealth v. Woods, 480 Mass 231, 102 N.E.3d 961 (2018). It was entered August 7, 2018.

28 U.S.C. § 1257(a) is believed to be the statutory provision conferring jurisdiction in this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment - Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED INCLUDING HOW THE FEDERAL ISSUE WAS RAISED AND PASSED ON

This statement has six parts: Trial; Pre-trial; First Appeal to the SJC (Woods I); First Petition for Certiorari; Motion for New Trial; and Second Appeal to the SJC (Woods II).¹

¹ The following abbreviations are used in this petition: Pet.App. refers the Appendix attached to this Petition; Woods I refers to Commonwealth v. Woods, 466 Mass 707, 1 N.E.3d 762 (2014) - included in Pet.App. 15a; Woods I Brief refers to Woods' Brief in Woods I; Woods II refers to Commonwealth v. Woods, 480 Mass 231, 102 N.E.3d 961(2018) - included in Pet.App 1a; Woods II Brief refers to Woods' Brief in Woods II; TR refers to the Plymouth County Superior Court trial transcript PLCR2006-00498 including motions in limine; SJC refers

A. Trial.

Thomas A. Woods (Woods) was convicted of murder following a jury trial in Plymouth Superior Court in Massachusetts. PLCR2006-00498. The government's evidence at trial included Woods' testimony at the grand jury that investigated the murder for which Woods was convicted. Before reading in Woods' grand jury testimony, the government informed the jury that Woods had not pled the Fifth Amendment and that Woods had not asked for an attorney.

TR 6 (5/13): 106, 107.

The government's theory of the case was that Woods had intentionally set up the victim to be shot and killed. Therefore although not the shooter, Woods was equally guilty as a joint venturer.

At trial, there was no direct evidence that Woods had acted as a joint venturer or that he knew the killing would take place. Woods had not admitted to any culpability in the murder. But in response to questions at the grand jury, Woods admitted that he knew the victim, the victim had owed him money, and they had argued. TR6 - 122. He admitted that on the night of the murder, he had spoken with the victim by phone and knew in advance when the victim would be coming to meet him. TR-159-161. Woods admitted that when the victim arrived, he suggested that the victim sit by himself in Woods' car, and after the victim was shot, that Woods took the victim out of the car, put him on the ground and drove off without waiting for the police or for an ambulance. TR6-170-175. Finally, in response to questioning at the grand jury, Woods admitted that he did not attend the victim's funeral, and when asked "Why?" Woods said,

to the Supreme Judicial Court of Massachusetts.

because “they [the victim’s family] think I had – the reason he got killed was ‘cause of me.’” TR 6-194. During closing his argument, the prosecutor referenced Woods’ grand jury testimony on separate occasions. TR 9 - 48, 52, 69-70 and 70-71. All this came into evidence over defendant’s objection.

Woods received no advice or warning either orally or in writing that he could refuse to answer questions in the grand jury if the answer might tend to incriminate him. As the jury was told: when Woods arrived at the building where the grand jury was convened, he was met by a police lieutenant who told Woods “just to go into the grand jury and tell the truth... .” TR 6-105. Woods was unrepresented by counsel, placed under oath and answered all questions asked. He was not given warnings of any sort. TR 2-176.

B. Pre-Trial:

The summons that caused Woods to testify at the grand jury contains the following command: “*In the name of the Commonwealth, you are commanded to appear before the Plymouth County Grand Jury ... to testify... .*” It also contains the following admonition: “*Hereof fail not, as you will answer your default under the pains and penalties of the law.*” SJC-10793 (Woods I) Docket # 18. Pet.App. 37a.

Defense counsel moved in limine on involuntariness grounds to exclude Woods’ grand jury testimony. Woods I brief, Motion, pg. A-15. Woods’ affidavit in support stated (in part): “I was subpoenaed to testify before the grand jury that indicted me. ... I was not informed that I could exercise my privilege not to testify. ... I believed I had no choice but to testify. ...” Woods I brief, Affidavit, pg. A-18. Pet.App. 34a.

At the hearing on the motion, defense counsel argued a Fifth Amendment self-incrimination violation as follows:

I think ... [this] does give rise to a question as to whether or not ... that [Woods' grand jury] statement, a lay person, unrepresented by counsel, who's a target of the investigation, being brought into the grand jury and interrogated without being given any warnings that he didn't have to submit to that questioning or that he could assert his Fifth Amendment privilege, TR April 27, 2009, pg 12.

...it's rather unusual that a person who is the actual target of the investigation is brought in there to testify without being given warnings about his right to remain silent And I believe it implicates the question of whether or not you could say, as a threshold matter, that that's a voluntary statement that should be admitted in front of a jury. And I say it isn't. TR April 27, 2009, pg 13.

... the grand jury issue is really the one about whether or not the government was under any obligation to inform him ... that he had a Fifth Amendment privilege.

TR April 27, 2009, pg. 23.

The trial judge then asked the prosecutor when Woods had become a target:

THE COURT (Judge Troy):... Mr. Flanagan [ADA], let me ask you. At the time-- if you can say this, because it would change the whole way that I'd have to view this, in your opinion, was he a target of the investigation when you brought him to the grand jury?

TR April 24, 2009, pg. 24.

In response, the prosecutor told the judge that Woods was not a target when he testified.

The prosecutor said that, although Woods had made inconsistent statements and had failed to provide information he had, Woods had become a target only later after he had testified - when the government learned that Woods had threatened to kill the victim. TR April 27, 2009, pg. 24-29.

On the basis of the prosecutor's representation, the trial judge found that Woods was not yet a target at the time he testified, and the motion to exclude was denied. Oral Findings and Rulings by Trial Judge on Defendant's Motions in Limine. Pet.App 32a, 33a.

C) First Appeal to the SJC. SJC- 10793 (Woods I) Cite Pet Ap.

In his brief on direct appeal to the SJC, Woods presented the federal question as follows:

II. Where defendant's own grand jury testimony is introduced against him in a murder trial and where (a) the defendant had been a subject of the grand jury investigation, (b) the defendant's testimony was obtained by subpoena compelling him to appear and testify before the grand jury, c) the defendant was not represented by counsel, and d) the defendant was not informed either in writing or verbally that he was not required to answer questions where answering would tend to incriminate him:

(a) use of the grand jury testimony against him at his murder trial impermissibly infringed on defendant's 5th Amendment and art. 12 rights against compelled self-incrimination; and in the alternative, (b) in connection with a voluntariness determination, the motion judge should have taken into account and the jury should have been instructed that, as part of the "totality of the circumstances," a grand jury subpoena may serve to overcome defendant's will to remain silent.

Woods I Brief pgs. ii, ii and 38-44.

The SJC affirmed the conviction. The SJC found "no error in the judge's ruling that the defendant was not a target and that the prosecutor was not required to advise him of his Fifth Amendment rights before eliciting his testimony." Woods, 466 Mass 707, 716-17 (Pet.App. 22a). The SJC also held that the summons Woods received was "a form of compulsion," Id. at 719 (Pet.App. 24), and because of that, the SJC issued a prospective, non-constitutional rule that prosecutors must provide self-incrimination warnings to targets and to persons likely to become targets who are summonsed to the grand jury. Id. (Pet.App. 24). As for Woods, no relief was forthcoming. The SJC accepted the trial judge's finding that Woods was not target when he testified. (The SJC also noted that, even if he had been a target, Woods would have had no right to be warned of that status. But, Woods appeal was not based on a right to be warned of his

target status. There is no right to such notice, and neither in his SJC brief nor in oral argument did Woods claim that he should have been warned of his target status.²⁾ Woods moved for rehearing which was denied.

D) First Petition for Certiorari

Next, Woods petitioned this Court for writ of certiorari. No. - 10142. That petition raised the federal question as follows:

Was "express invocation" by unrepresented grand jury witness required in order to preserve his Fifth Amendment right to prevent the government from using his testimony against him at a subsequent criminal trial for murder, where the government had commanded him to appear and testify at the grand jury, he was a target or subject of that grand jury investigation, and the government had elected not to inform him of his right to remain silent?

The petition was denied. No. 13–10142; 143 S. Ct. 2855, 189 L.Ed. 818 (2014)

E) Motion for New Trial. PLCR2006-00498.

Woods then moved for new trial. The motion was based on claims of ineffective assistance of counsel and prosecutorial misconduct in relation to the handling of Woods' motion

² By stating that Woods had no right to be *warned of his target status*, the SJC created a straw man. In the SJC, Woods never claimed he had any right to be warned of his target status. This confusion continued in Woods II. In Woods II, Woods claimed he was entitled to relief because he was a target, compelled and unwarned of his self-incrimination rights. However, the Woods II the court claimed this was decided against him in Woods I where it held that "the Commonwealth was under no obligation to *inform him of that status*." Woods II, 480 at 235 (Pet.App. 4a). However, in Woods I, the SJC held only that a person was not entitled to be warned of his target status. Concerning an advisement of the right against self-incrimination, the Woods I court only said that *a person who was not a target was not entitled to a self-incrimination warning*. Woods I. Pet.App. 22a.

in limine to exclude his grand jury minutes. The trial judge was unavailable, and the motion was heard by a different Superior Court judge.

In support, Woods introduced documentary evidence in the form of transcripts of four witnesses who had testified in the grand jury before Woods testified. Two of those witnesses testified as to multiple threats by Woods to shoot or kill the victim. Based on this evidence, together with circumstantial evidence, Woods submitted that he was already a target when he testified. He claimed that his attorney had been ineffective for not bringing these transcripts to the judge's attention at the motion in limine; and he claimed the prosecutor engaged in misconduct by stating that Woods became a target when the government learned of Woods' threats and that the government had not learned that until after Woods already testified. Woods claimed that had it not been for ineffective assistance of counsel and prosecutorial misconduct, his Fifth Amendment right prohibiting use of a defendant's compelled statements against him would have been upheld, and his grand jury testimony would have been excluded. See, Woods II, Appendix, Vol. 1, pgs 31-37 (Motion for New Trial Motion and Memorandum).

After a hearing, the motion judge found, based on evidence submitted, that Woods was in fact a "target or a possible target" when he testified at the grand jury. But, the motion judge did not grant a new trial because, according to the motion judge, the same issue had already been decided against Woods in Woods I. Pet.App. 11a, 12a.

F) Second Appeal to the SJC.

Woods then appealed to the SJC from the denial of his motion for new trial. Woods II. In his brief on this appeal, he relied on a) the finding by the SJC in Woods I that his summons

was a form of compulsion and b) the motion judge's finding that Woods was a target when he testified. Woods he raised the federal issue as follows:

IV. Fifth Amendment and art. 12 rights were not waived and were violated by the government's objected-to use at trial of a target's grand jury testimony when that sworn testimony had been compelled and the person was not warned or advised as to his or her right against self-incrimination.

Woods II, Brief, Pgs. 1,2, 42-49

Woods claimed:

... since the use of Woods' compelled unwarmed (as to self-incrimination) grand jury testimony at trial violated his art. 12 and Fifth and Fourteenth Amendment rights, Woods' conviction should be overturned unless the government can show that use of his grand jury testimony was harmless beyond a reasonable doubt.

Woods II, Brief, pg. 34.

After argument, the SJC affirmed the decision denying Woods' motion for new trial.

Woods II. Pet.App. 1a. In its opinion, the SJC held that the ruling in Woods I did not depend on the status of the defendant at the time grand jury testimony was taken. Woods II, 480 Mass. 231, 237 (Pet.App. 5a). Further, it ruled that there was no reason to decide Woods ineffective and prosecutorial misconduct claims because had the trial judge done his research, he would have discovered that Woods had no right to exclude his un-warmed grand jury testimony even if he had been a target at the time Id. at FN10 (Pet.App. 6a). By virtue of these rulings, the SJC now holds that there is no constitutional prohibition (state or federal) that prevents the Commonwealth from using a defendant's compelled and completely un-warmed grand jury testimony against the defendant at trial - even if he or she had been a target of the investigation at the time the testimony was taken.

REASONS FOR GRANTING THE PETITION

There are four reasons for granting the writ: 1) There is direct conflict between states on the federal issue. 2) The federal question was expressly left open by prior decisions of this Court; and the issue is too central to our system of justice to leave open. 3) The state court's prospective, non-constitutional rule pursuant to supervisory powers is inadequate to protect federal constitutional rights either for Woods or for future defendants. 4) The state court's decision on the federal constitutional issue is incorrect, the current unsettled state of Supreme Court jurisprudence on the federal issue is an obstacle to habeas review, and this case presents a good opportunity to resolve the constitutional issue.

1. There is a direct conflict on the federal question between the Supreme Judicial Court of Massachusetts (SJC) and the Supreme Court of Indiana:

In Woods, Massachusetts decided that a defendant has no Fifth Amendment right to exclude his prior grand jury testimony from use at trial when: 1) at the time of his testimony, he was a target of the investigation or likely to become one, 2) he was compelled by summons to testify, and 3) he was not warned of his right to refuse to answer questions if the answer may be tend to incriminate him. In contrast, Indiana decided that a defendant does have a Fifth Amendment right to exclude his prior grand jury testimony where: 1) he was compelled to testify by summons, and 2) he was not warned of his right to refuse to answer questions if the answer may tend to incriminate him.

A. Massachusetts:

In Woods II, the SJC held that the Commonwealth had no obligation to advise the

defendant of his right against self-incrimination . Woods II, 480 Mass at 237. The SJC further stated: “We .. reject the claim .. that the [procedural] rule in Woods I is in fact constitutional. (this rule is not a new constitutional rule, but rather an exercise of our power of superintendence.)” Woods II. FN 8. (Pet.App. 6a)

Woods II accepted the finding of the motion for new trial judge that Woods had been “a target or likely to become a target of the investigation” at the time he testified. Woods II , 436. Woods II stated that the holding in Woods I “did not hinge on defendant’s status... [and therefore] we need not address the defendant’s related arguments that the trial judge’s finding that he was not a target was the product of ineffective assistance of counsel or prosecutorial misconduct or both.” Woods II, 480 Mass fn. 10. The SJC further held (without citing any authority) that had the trial judge researched the issue, he would have found that the “Commonwealth’s failure to provide the defendant with a ... [self-incrimination] warning did not preclude it from using that testimony trial.” Woods II, 40 Mass at 239 (emphasis added). In sum, in Woods II, the SJC squarely answered the federal question in the negative.

B. Indiana:

In State ex rel. Pollard v. Criminal Court of Marion Cty., Div. One, 263 Ind. 236, 258-59, 329 N.E.2d 573, 588-89 (1975), the Indiana Supreme Court held that the Self-Incrimination Clause of the Fifth Amendment (as well as an analogous provision of the state constitution) protects a defendant against the government’s use at trial of his or her unadvised grand jury testimony, as follows:

The constitutional privilege against self-incrimination accompanies all who appear before the grand jury. Counselman v. Hitchcock, (1892) 142 U.S. 547, 12

S. Ct. 195, 35 L. Ed. 1110. A meaningful decision to exercise that privilege requires certain knowledge on the part of the witness. First, the witness must know that the privilege exists, and how and when he may claim it. Second, a witness must know the general nature of the grand jury investigation

Due regard for the privilege against self-incrimination requires that each person appearing before the grand jury, after being sworn, but prior to any questioning, be advised of the privilege and instructed that he may claim it at any point in the proceeding if he determines that his answer may criminally implicate him. This warning must be given by the prosecutor, or in his absence, by the foreman of the grand jury. Only when the individual subpoenaed to testify before the grand jury is made aware of his right against self-incrimination may he then make the knowing and voluntary waiver of that right if he chooses to testify before the grand jury.

Id. 263 Ind. at 258-59, 329 N.E.2d at 588-89.

2. The federal question was expressly left open by prior decisions of this Court, and the question is too central to our system of justice to leave open.

In prior decisions of this Court, the federal issue was expressly left undecided as to non-perjury defendants. This was because in those cases, the grand jury target had received proper self-incrimination warnings, and no decision on the issue was required. See, United States v. Washington, 431 U.S. 181, 190, 97 S. Ct. 1814, 1820 (1977)(“fact that warnings were provided in this case to advise respondent of his Fifth Amendment privilege makes it unnecessary to consider whether any warning is required”); and United States v. Mandujano, 425 U.S. 564, 582 n.7, 96 S. Ct. 1768, 1779 (1976)(“that warnings were provided in this case to advise respondent of his Fifth Amendment privilege makes it unnecessary to consider whether any warning is required ...”).

No case has been decided by this Court in which the government had summonsed a target or a person likely to be target to testify before a grand jury, not advised that person of his or her right against self-incrimination, and then - over objection – used that testimony against the

person in the trial of the offense which was the subject of the grand jury investigation.

If the Court grants this petition, Woods would be the first such case.

What is at stake is “the preservation of the adversary system of justice.” As explained by Mr. Justice Powell speaking for the Court in Garner v. United States, 424 U.S. 648, 96 S. Ct. 1178 (1976):

Unless the Government seeks testimony that will subject its giver to criminal liability, the constitutional right to remain silent absent immunity does not arise. An individual therefore properly may be compelled to give testimony, for example, in a noncriminal investigation of himself. Unless a witness objects, a government ordinarily may assume that its compulsory processes are not eliciting testimony that he deems to be incriminating. Only the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled.

In addition, the rule that a witness must claim the privilege is consistent with the fundamental purpose of the Fifth Amendment -- the preservation of an adversary system of criminal justice. *That system is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures.* In areas where a government cannot be said to be compelling such information, however, there is no such circumvention of the constitutionally mandated policy of adversary criminal proceedings.

Id., 424 U.S. at 655-56, 96 S. Ct. at 1183 (internal citations omitted)(emphasis added).

3. The state court’s prospective, non-constitutional rule pursuant to supervisory powers is inadequate to protect federal constitutional rights either for Woods or for future defendants.

Pursuant to its supervisory powers, the SJC issued a prospective *non-constitutional* rule as follows:

...we adopt a rule that where, at the time a person appears to testify before a grand jury, the prosecutor has reason to believe that the witness is either a "target" or is likely to become one, the witness must be advised, before testifying, that (1) he or she may refuse to answer any question if a truthful answer would tend to incriminate the witness, and (2) anything that he or she does say may be used against the witness in a subsequent legal proceeding.

Woods, 466 Mass. at 719-720. Woods I.

The rule did nothing to protect Woods' constitutional rights. Even after it was determined that he had been a target, Woods was afforded no constitutional protection, and he was denied all relief. Woods II.

The SJC rule does not adequately protect the Fifth Amendment rights of future Massachusetts defendants because: a) the rule is expressly non-constitutional, and it does not provide for review based on the standard required for federal constitutional error, i.e., it does not provide that the government has the burden to prove the error was harmless beyond a reasonable doubt. See, Arizona v Fulminante, 499 U.S. 279, 295 (1991)(requiring harmless error review for constitutional error); and 2) failure by the Commonwealth to obey the rule is subject to review only in state court, and it is unlikely that an aggrieved defendant would be able to obtain federal habeas review from an adverse decision in state court. See, 28 U.S.C. § 2254(d)(1)(requiring that a petitioner must show that the state court decision "... was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").

Judicial statements (in contrast to express constitutional rules) about the need to provide grand jury targets with warnings are not sufficiently effective. United States v. Pacheco-Ortiz, 889 F.2d 301, 310 (1st Cir. 1989).

4. The state court's decision on the federal constitutional issue is incorrect, the current unsettled state of Supreme Court jurisprudence on the federal issue is an obstacle to habeas review, and this case presents a good opportunity to resolve the constitutional issue.

The SJC's decision in Woods II interprets the Fifth Amendment so as to allow the government to use a defendant's grand jury testimony obtained by summons at a time when the defendant was target without providing any self-incrimination warning. This rule removes Fifth Amendment protection from unrepresented persons who may not realize that - despite the summons - they still have the right to assert a Fifth Amendment privilege, and it creates a serious loophole in the constitutional protection guaranteed by the Fifth Amendment. See, Justice Powell's explanation in Garner, *supra* (fundamental purpose of the Fifth Amendment -- the preservation of an adversary system of criminal justice.. is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures); Green v. United States, 355 U.S. 184, 191-92, 78 S. Ct. 221, 225-26 (1957) ("Waiver" is a vague term used for a great variety of purposes... . In any normal sense ... it connotes some kind of voluntary knowing relinquishment of a right.), and United States v. Pacheco-Ortiz, *supra* at 308, (at least "some warning" of grand jury targets is "assumed" to be constitutionally required);

Unless this Court grants his petition, Woods will be unlikely to obtain any federal court review of his federal claim. That is because habeas jurisdiction is probably unavailable. See, 28 U.S.C. § 2254(d)(1)(requiring a violation of settled federal law). Until this Court rules on the federal issue raised in Woods' petition, no lower state court decision can be reviewed in federal

court under 28 U.S.C. § 2254(d)(1). This case presents a good opportunity to resolve the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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By his attorney,



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