

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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Thomas A. Woods,  
*Petitioner*,

v.

Nelson Alves, Superintendent,  
*Respondent*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals for the First Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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September 10, 2021

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## QUESTIONS PRESENTED

- 1) Where a target of a grand jury investigation is compelled under threat of the pains and penalties of the law to appear to testify at the grand jury and is placed under oath but not advised of his privilege against self-incrimination, does the Self-Incrimination Clause of the Fifth Amendment forbid the use of that person's incriminating grand jury testimony against himself at his criminal trial (other than a trial for perjury)?
  
- 2) The Massachusetts Supreme Judicial Court (SJC) failed to address Woods's claim that, in the absence of self-incrimination warnings, *the use at trial* of his grand jury testimony, given the means by which it was obtained, resulted in a violation of the Fifth Amendment. Instead, the SJC misconstrued Woods's claim as a claim that the government was constitutionally obliged to provide him with a self-incrimination warning before he testified at the grand jury. In this situation, did the SJC silently adjudicate Woods's actual claim on the merits, or is there "reason to think some other explanation for the state court's decision is more likely" under Harrington v. Richter, 562 U.S. 86, 99–100, 131 S.Ct. 770, 785 (2011), meaning that Woods is entitled to have his claim reviewed *de novo* in federal court?

## RELATED PROCEEDINGS

Plymouth County Superior Court, No. PLCR2006-00498, Commonwealth v. Woods (May 6, 2009).

Massachusetts Supreme Judicial Court, No. SJC-10793, Commonwealth v. Woods (Jan. 2, 2014).

Supreme Court of the United States, No. 13-10142, Woods v. Massachusetts (June 23, 2014).

Plymouth County Superior Court, No. 0683CR498, Commonwealth v. Woods (Nov. 17, 2016).

Massachusetts Supreme Judicial Court, No. SJC-12324, Commonwealth v. Woods (Aug. 7, 2018).

Supreme Court of the United States, No. 18-6552, Woods v. Massachusetts (Dec. 10, 2018).

United States District Court for the District of Massachusetts, No. 15-cv-13776-WGY, Woods v. Medeiros<sup>1</sup> (June 8, 2020).

United States Court of Appeals for the First Circuit, No. 20-1664, Woods v. Medeiros (Apr. 8, 2021) (petition for reh'g denied Apr. 26, 2021).

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<sup>1</sup> “Woods v. Medeiros” is the name in the case below. In the instant petition, the case name has been changed to “Woods v. Alves” in conformity with Sup. Ct. R. 35.3.

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## **JURISDICTION**

It is believed this Court has jurisdiction under 28 U.S.C. § 1254(1).

On May 20, 2009, Thomas A. Woods (Woods) was convicted of first-degree murder in the Plymouth County Superior Court and sentenced to life imprisonment. He has been in state custody since. On January 2, 2014, the Massachusetts Supreme Judicial Court (SJC) affirmed his conviction. He filed a petition for certiorari to the Supreme Court which was denied on June 23, 2014. On November 19, 2016, his motion for new trial in the Plymouth County Superior Court was denied. On August 7, 2018, his second appeal to the SJC was denied.

On November 5, 2015, Woods filed a habeas petition in the United States District Court for the District of Massachusetts. His petition was administratively closed with all statutes of limitations stayed. It was reopened and after further proceeding dismissed on June 8, 2020. Woods filed a notice of appeal on June 18, 2020 and was granted a certificate of appealability. He appealed to the First Circuit Court of Appeals which dismissed his petition on April 8, 2021. He moved for rehearing, which was denied on April 26, 2021. (Under this Court's Order regarding filing deadlines issued on July 19, 2021, his petition for certiorari is filed timely.)

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **U.S. Const. amend. V**

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.

### **U.S. Const. amend. XIV, § 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.

### **28 U.S.C. § 2254**

Relevant subsections a-e of 28 U.S.C. § 2254 are reproduced in the Appendix to this Petition at pages 85a–86a.

### **STATEMENT OF THE CASE**

On February 10, 2006, Thomas Woods appeared before a Plymouth County Grand Jury in response to a summons issued in the name of the Commonwealth of Massachusetts which “commanded” him to appear to testify and stated that his failure to obey would subject him to the pains and penalties of the law. Grand Jury Summons (Pet.App. 84a.)<sup>2</sup> At the grand jury, Woods

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<sup>2</sup> The following abbreviations will be used in this petition:

- “Pet.App.” refers to the Appendix to this Petition.

was sworn to tell the truth and answered all questions without objection. He was not represented by counsel. He was not advised he had a right not to incriminate himself. TR. 6-108–6-199.

The grand jury was investigating the murder of Paul Mullen who had been shot to death on December 2, 2005. Witnesses had said that Woods was nearby when the shooting took place and was not the shooter. The shooter was an unidentified masked man who approached on foot and shot Mullen while Mullen was sitting in a parked car. The identity of the shooter was never established.<sup>3</sup>

Ultimately, Woods was indicted for first degree murder as a joint venturer. He was determined to be indigent and appointed counsel. Prior to trial, Woods moved to exclude his grand jury testimony. He claimed the Fifth Amendment Self-Incrimination Clause should prohibit use of his grand jury statements at trial because he had been a target of the investigation and not advised of his right not to incriminate himself. He filed an affidavit in support of his

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- “TR.” refers to portions of the Plymouth County Superior Court trial transcript PLCR2006-00498, available at Appendix for Brief of Petitioner-Appellant at 10–108, Woods v. Medeiros, 993 F.3d 39 (1st Cir. 2021) (No. 20–1664). [The entire trial transcript is available at Doc. #39, Further Supplemental Answer Vols. I and II (No. 15-cv-13776-WGY); it is also an exhibit in Commonwealth v. Woods, 466 Mass. 707, 1 N.E.3d 762 (2014), cert. denied, 573 U.S. 937, 134 S.Ct. 2855 (2014) and Commonwealth v. Woods, 480 Mass. 231, 102 N.E.3d 961 (2018), cert. denied, 139 S.Ct. 649 (2018).]
- “Woods I” refers to Commonwealth v. Woods, 466 Mass. 707, 1 N.E.3d 762 (2014), cert. denied, 573 U.S. 937, 134 S.Ct. 2855 (2014), available at Pet.App. 65a.
- “Woods II” refers to Commonwealth v. Woods, 480 Mass. 231, 102 N.E.3d 961 (2018), cert. denied, 139 S.Ct. 649 (2018), available at Pet.App..51a.

<sup>3</sup> Generally, the historical facts of the case are set out in the Woods I opinion. (Pet.App. 65a.)

motion which stated that he believed he had no choice but to testify. Affidavit.<sup>4</sup>

At a hearing regarding whether to admit the grand jury testimony into evidence, the judge asked the prosecutor if Woods had been a target at the time he testified. The prosecutor said he was not a target at that time, and the judge allowed the testimony into evidence. Hearing Transcript, Doc. # 20, Supplemental Answer at 00026, Woods v. Medeiros (No. 15-cv-137776-WGY).

The government's theory of the case was that Woods had helped set up Mullen to be killed. Woods I, 466 Mass. at 712 (Pet.App. 70a). Woods's grand jury testimony established a number of facts known only to him and that were central to the case against him. For instance, Woods testified he had known when and where Mullen would arrive at the murder scene; Woods was the one to ask Mullen to sit in the car where Mullen was then shot; and both Woods and Mullen were in business selling drugs. Woods also admitted he previously made several incorrect statements to police officers about what happened at the murder scene. Woods acknowledged he did not attend Mullen's funeral, and when asked why not, said he understood that Mullen's family thought he may have been involved in Mullen's death. TR. 6-116, 6-160–63, 6-194–95. All this inculpatory testimony came into evidence. In all, approximately 90 pages of his grand jury transcript were read to the jury.

On May 20, 2009, the jury returned a guilty verdict. Woods was convicted of murder in the first degree and sentenced to life without parole.

Woods appealed his conviction to the Supreme Judicial Court (SJC) on the following

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<sup>4</sup> "Affidavit" refers to Affidavit in Support of Motion in Limine Regarding Statements of the Defendant to Law Enforcement, Commonwealth v. Woods (No. CRO6-00498), available at Supplemental Answer at 94–95, Woods v. Medeiros, 465 F.Supp.3d 1 (D. Mass. 2020) (No. 15-cv-13776-WGY).

grounds (among others):

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: 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[.]

Woods I Brief i–ii, 38–44.<sup>5</sup>

On January 2, 2014, the SJC affirmed Woods's conviction. In its opinion, the SJC claimed Woods's argument was that "because he was a 'target,' he was entitled to be advised of his right not to incriminate himself pursuant to the Fifth Amendment to the United States Constitution before he testified." Woods I, 466 Mass. at 708, 717, 719 (Pet.App 68a, 73a). This characterization was not accurate.

The SJC disagreed with Woods's claim he had been a target, relying on the lower court's ruling. The SJC then treated Woods as if he had been an ordinary grand jury witness—not a target—when he testified. Id. at 717 (Pet.App.73a). However, the SJC did agree that the summons was a form of compulsion, and the SJC ruled that persons who are targets and who are summonsed to the grand jury should be warned of their self-incrimination rights: "Because grand jury testimony is compelled, it ought to be ameliorated with an advisement of rights where there is a substantial likelihood that the witness may become an accused; that is, where the witness is a 'target' or is reasonably likely to become one." Id. at 719 (Pet.App. 74a).

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<sup>5</sup> "Woods I Brief" refers to Brief in Support of Petition for Writ of Certiorari, Commonwealth v. Woods, 466 Mass. 707, 1 N.E.3d 762 (2014) (No. SJC 10793), available at Doc. #20 Supplemental Answer at 21, Woods v. Medeiros, 465 F.Supp.3d 1 (D. Mass. 2020) (No. 15-cv-13776-WGY).

Woods petitioned this Court for a writ of certiorari, which was denied on June 23, 2014.

Woods v. Massachusetts, 573 U.S. 937, 134 S.Ct. 2855 (2014).

He moved for a new trial based on additional evidence regarding his target status. The original judge was not available, and the motion was heard by a different judge. The new motion judge held an evidentiary hearing and found that Woods *was* a target of the investigation when he testified. However, on November 17, 2016, the motion judge ruled that the Woods I opinion had foreclosed relief, and Woods's motion for new trial was denied. Memorandum (Pet.App. 64a).<sup>6</sup> Woods petitioned for leave to appeal from the denial of his motion for new trial. The petition was allowed, and he appealed to the SJC a second time.

The issue on Woods's second appeal to the SJC was stated as follows:

Fifth Amendment and Article XII 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 34.<sup>7</sup>

On August 7, 2018, in Commonwealth v. Woods, 480 Mass. 231, 102 N.E.3d 961 (2018), cert. denied, 139 S.Ct. 649 (2018) (Woods II), the SJC again ruled against Woods. In its opinion, the SJC stated that, at the time Woods testified, there was no rule that required a grand jury witness to have self-incrimination warnings, and that the Woods I decision had foreclosed

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<sup>6</sup> "Memorandum" refers to Memorandum of Decision and Order on Defendant's Motion for New Trial, Commonwealth v. Woods (No. 0683CR498), available at Pet.App. 57a.

<sup>7</sup> "Woods II Brief" refers to Brief in Support of Petition for Writ of Certiorari, Commonwealth v. Woods, 480 Mass. 231, 102 N.E.3d 961 (2018) (No. SJC-12324), available at Doc. # 20 Supplemental Answer at 183, Woods v. Medeiros, 465 F.Supp.3d 1 (D. Mass. 2020) (No. 15-cv-13776-WGY).

relief. Woods II, 480 Mass. at 235 (Pet.App. 54a).

Woods petitioned this Court for a writ of certiorari, which was denied December 10, 2018. Woods v. Massachusetts, 139 S.Ct. 649 (2018).

On November 5, 2015, acting *pro se*, Woods had filed a petition for habeas corpus under 28 U.S.C. § 2254 in the U.S. District Court for the District of Massachusetts. Due to pending proceedings in state court, on November 30, 2015, Woods's petition was administratively closed and statutes of limitations stayed by court order. No. 15-cv-13776-WGY.

On September 18, 2018, Woods's habeas petition was reopened. With assistance of counsel, Woods filed a Brief in Support of his petition, stating the constitutional issue as follows:

The Self-Incrimination Clause against use of compelled testimony was violated because the government introduced Woods' grand jury testimony against him at trial over objection, despite the fact that Woods was (1) a target of the investigation, (2) compelled to appear at the grand jury by summons for the purpose of testifying, (3) placed under oath, (4) unrepresented by counsel, and (5) not advised or informed of his right not to answer questions at the grand jury where the answers would tend to be self-incriminating.

Memorandum in Support, Doc. #33 (No. 15-cv-13776-WGY).

In his petition, Woods claimed his self-incrimination claim had never been adjudicated on the merits, and therefore he was entitled to *de novo* review. Id. On June 8, 2020, the district court disagreed, ruled the state court had adjudicated the issue on the merits adversely to Woods, and denied the petition. Woods v. Medeiros, 465 F.Supp.3d 1, 12–13, 18 (D. Mass. 2020) (Pet.App. 36a, 49a). A certificate of appealability was issued on June 11, 2020.

On July 14, 2020, Woods appealed to the First Circuit Court of Appeals, stating the constitutional issue as follows:

Was Woods' Fifth Amendment right against compelled self-incrimination violated when, over objection, the government introduced his inculpatory grand jury testimony against him at his trial for murder, where he had not been advised of his right to refuse to answer in the grand jury if the answers would tend to be self-

incriminating, he had been a target of the grand jury investigation, and his appearance and testimony at the grand jury had been compelled by summons? Appellant's Brief (No. 20-1664).

On April 8, 2021, the First Circuit Court of Appeals found Woods's issue had been adjudicated on the merits in state court and affirmed the denial of Woods's petition. Woods v. Medeiros, 993 F.3d 39, 44–45 (1st Cir. 2021) (Pet.App 12a–13a). On April 16, 2021, Woods moved for rehearing. That motion was denied by court order on April 26, 2021. Order of Court (Pet.App. 50a).

## REASONS FOR GRANTING THE WRIT

*The adversarial system of criminal justice is being undermined as a result of an apparent weakness in the law that allows compelled statements of grand jury targets to be used at trial.*

There are prosecutors like the one here who use at trial defendants' self-incriminating statements that the prosecutors obtained in the grand jury at a time when they knew the persons to be targets of the investigation, compelling them under penalty of law to appear at a grand jury to testify, requiring them to swear to answer and interrogating them, *without advising them of the availability of the privilege against self-incrimination.*

A hallmark of the inquisitorial system is the use of official machinery of government to compel persons likely to be charged for criminal offenses to appear alone in front of a prosecutor under the express threat of legal penalties and require the target to swear to answer questions so as to allow the government to use the target's anticipated self-incriminatory testimony to prove the person's guilt at trial. The inquisitorial system is a system the architects of this country sought to leave behind, and it is the antithesis of the adversarial system. Michigan v. Tucker, 417 U.S. 433, 439–44, 94 S.Ct. 2357, 2361–64 (1974). It is not reasonable to assume that a

target subjected to inquisitorial methods knows that the privilege against self-incrimination is available. Certainly, that assumption is not reasonable where, as here, the target was neither advised of his privilege against self-incrimination nor represented by counsel. Accordingly, permitting a prosecutor at trial to use a defendant's inculpatory statements that were obtained by such means undermines the protection of the Self-Incrimination Clause of the Fifth Amendment.

The Court should rule that the Self-Incrimination Clause of the Fifth Amendment is violated by the use of a grand jury witness's testimony at the person's criminal trial,<sup>8</sup> *if*, at the time of the testimony, the person was a target of the investigation, was summonsed to testify, and was placed under oath, but was not advised of his privilege against self-incrimination. The Due Process Clause of the Fourteenth Amendment is likewise violated in state cases under similar circumstances.

*This threat to the adversarial system is especially great because most grand jury targets are indigent and without access to legal advice.*

Unless an attorney is provided by the government, an indigent person typically has no access to legal advice in criminal matters. Thus, an indigent person will not be advised of the right against self-incrimination at a grand jury proceeding, unless that advice is provided by the prosecutor. In contrast, the threat is far less for grand jury witnesses who retain counsel because they would almost surely be advised that, notwithstanding an official compulsion to appear to testify and be sworn, they retain a right against self-incrimination. "Over 80% of felony defendants charged with a violent crime in the country's largest counties and 66% in U.S. district courts had publicly financed attorneys." Caroline Wolf Harlow, Bureau of Just. Stat., U.S. Dep't

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<sup>8</sup> other than for perjury

of Just., NCJ 179023, Defense Counsel in Criminal Cases (2000). From this it appears that the vast majority of defendants in serious criminal cases could not have hired counsel at the grand jury stage.

While the Court has not required that governments provide indigent persons with the same level of benefits as those who can afford to pay, the Court has protected the rights of indigent persons where an important right available to the more affluent would otherwise be at risk of becoming meaningless, which is the case here. See Douglas v. California, 372 U.S. 353, 355–58, 83 S.Ct. 814, 814–15 (1963) (if indigent defendant does not have counsel on appeal, right to appeal is meaningless). As things are, there are effectively two systems of justice: an adversarial system for the more affluent, an inquisitorial system for the less affluent.

The less affluent in the United States criminal justice system are far more likely to be Black than White and far less likely to be able to afford advice of counsel at the grand jury stage. In 2010 in the United States, 33% of adult Black males had a felony conviction compared to 13% for all adult males. Sarah K.S. Shannon et al., The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948 – 2010, 54 Demography 1795, 1807–08 (2017). According to a report based on Bureau of Justice Statistics 2015, “blacks are incarcerated at a rate that is 5.1 times that of whites.” Ashley Nellis, The Sent’g Project, The Color of Justice: Racial and Ethnic Disparity in State Prisons 4 (2016). The typical Black family does not have the money to retain counsel for a grand jury proceeding. According to a 2020 report by the Board of Governors of the Federal Reserve, “the typical White family has eight times the wealth of the typical Black family.” Neil Bhutta et al., Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances, FEDS Notes, Bd. of Governors of the Fed. Rsv. Sys. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities->

in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm.

According to the U.S. Bureau of Labor Statistics, as modified in July 2021, the unemployment rate of Black men over twenty-five years of age is approximately twice that of White men over twenty-five. Labor Force Statistics from the Current Population Survey, U.S. Bureau of Lab. Stat., [https://www.bls.gov/web/empsit/cpsee\\_e16.htm](https://www.bls.gov/web/empsit/cpsee_e16.htm) (last modified July 2, 2021). These statistics show that where prosecutors use grand jury testimony of unwarned targets at trial, unfair economic and racial disparities are a likely consequence.

*The fact that unrepresented targets are interrogated in a grand jury without being informed of their self-incrimination rights is easily hidden from view with serious consequences, as occurred here.*

Whether a grand jury witness is a target or just an ordinary witness is not a matter of public record. At the time of a grand jury summons, only the prosecutor, the police, and members of the grand jury know whether the person summonsed is a target. Further, as this Court has not yet established that a constitutional violation would occur if an unwarned target's grand jury testimony is used at trial, prosecutors may consider that they have no ethical or legal obligation to acknowledge the status of grand jury witnesses.

The problem of establishing target status is illustrated by Woods's case. Woods appeared at a grand jury after being served with a summons which stated in part: "In the name of the Commonwealth, you are commanded to appear before the . . . Grand Jury . . . to testify. . . . Hereof fail not, as you will answer your default under the pains and penalties of law." Grand Jury Summons (Pet.App. 84a). Woods was then sworn, and he testified without interposing any objections. He was not informed he had a right against self-incrimination either at the time of

service or after being sworn. Once indicted, found indigent, and appointed counsel, Woods moved to exclude his grand jury testimony from trial. At the motion hearing, the motion judge asked the prosecutor if Woods had been a target, and the prosecutor said that Woods *had not* been a target when he testified. Over objection, approximately 90 pages of Woods's incriminatory grand jury testimony was admitted at trial.<sup>9</sup> Woods was then convicted and sentenced to life without parole. His appeal on the grounds that his self-incrimination rights were violated was unavailing. The constitutional issue was not reached because at the time Woods was not considered to have been a target. In Commonwealth v. Woods, 466 Mass. 707, 1 N.E.3d 762 (2014) (Woods I) (the first of two state court appeals), cert. denied, 573 U.S. 937, 134 S.Ct. 2855 (2014), the state court issued a non-constitutional, prospective rule to the effect that future grand jury targets must be warned of their self-incrimination rights. According to the court's opinion, such a rule is needed for target witnesses in order to "ameliorate" the "compulsion" of the grand jury summons. Id. at 719–20 (Pet.App. 74a).

After Woods's conviction, a motion for new trial judge heard additional evidence concerning his target status. This time, despite the prosecutor's representations, the court found that Woods *had* been a target at the time he testified in the grand jury. Memorandum (Pet.App. 61a). Nonetheless, his motion for a new trial was denied, and his appeal from the denial of his motion was also denied. Commonwealth v. Woods, 480 Mass. 231, 102 N.E.3d 961 (2018) (Woods II), cert. denied, 139 S.Ct. 649 (2018) (referring to the court's first Woods decision in which the court established a non-constitutional rule requiring that *future* targets be advised of

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<sup>9</sup> The entire grand jury transcript as read to the jury is filed Appendix for Brief by Thomas Woods, Petitioner-Appellant at 10-108, Woods v. Medeiros, 993 F.3d 39 (1st Cir. 2021) (No. 20-1664).

their privilege against self-incrimination) (Pet.App. 51a). Woods remains in state custody, serving a life sentence.

*To date, the constitutional issue raised by Woods has not been adjudicated on the merits.*

When Woods attempted to have his constitutional issue reviewed *de novo* in federal court, both the district court and the federal appeals court ruled that the state court had already adjudicated the issue on the merits. Woods v. Medeiros, 993 F.3d 39, 44–45 (1st Cir. 2021), aff’g 465 F.Supp.3d 1 (D. Mass. 2020) (Pet.App. 12a–13a). If these rulings were correct, the Woods state case would stand for the proposition that there is no constitutional violation when the grand jury testimony of a target—compelled to testify by summons, sworn and not warned as to self-incrimination rights—is used against the target at trial. However, a review of Woods I and II shows that the constitutional issue raised by Woods was not adjudicated on the merits within the meaning of Harrington v. Richter, 562 U.S. 86, 99–100, 131 S.Ct. 770, 784–85 (2011). At most, it could be argued that Woods II decided that, at the time Woods testified in the grand jury, he was not entitled to be warned of his privilege against self-incrimination.

No federal court has yet reached the merits of Woods’s constitutional claim. The First Circuit Court should have, but did not review Woods’s constitutional issue *de novo*, and the issue is available for action by this Court.

*To maintain the integrity of the adversarial system, create a fair playing field for indigent persons, and diminish racial disparities, this problem needs the attention of the Supreme Court.*

In United States v. Washington, 431 U.S. 181, 186, 190–91, 97 S.Ct. 1814, 1818, 1820–21 (1977), and United States v. Mandujano, 425 U.S. 564, 582 n.7, 96 S.Ct. 1768, 1779 n.7

(1976) (both cases where self-incrimination warnings had been given), the Court indicated, without deciding, that, unless they had been warned of their self-incrimination rights at the grand jury, the use of target's grand jury testimony at trial may violate Fifth Amendment rights. Citing the uncertainty as to the law following Washington and Mandujano and the possibility that targets have a constitutional right to self-incrimination warnings, the federal prosecutors' manual provides that (1) target witnesses summonsed to a grand jury should be warned of their rights against self-incrimination, and (2) that rule is not enforceable. U.S. Dep't of Just., Just. Manual § 9-11.000 (2018). At least two federal courts expressed concern when faced with cases in which the manual's rule to provide targets with self-incrimination warnings was not honored but provided no remedy. United States v. Pacheco-Ortiz, 889 F.2d 301, 310 (1st Cir. 1989); United States v. Gillespie, 974 F.2d 796, 801 (7th Cir. 1992).

The State of Indiana expressly holds the Fifth Amendment Self-Incrimination Clause is violated by use at trial of unwarned grand jury testimony. State ex re. Pollard v. Crim. Ct. of Marion Cnty., Div. One, 263 Ind. 236, 257–60, 329 N.E.2d 573, 588–89 (1975). The states of Illinois and New Mexico have statutes or constitutional provisions that require grand jury targets to be given self-incrimination warnings. 725 Ill. Comp. Stat. 5/112-4(b) (2021); N.M. Stat. Ann. § 31-6-11 (2021). Kansas requires warnings for all grand jury witnesses, regardless of target status. Kan. Stat. Ann. § 22-3009 (2021).

Most germane are the laws of Colorado and Nebraska. Colorado and Nebraska give the prosecutor a choice whether or not to warn a target of his self-incrimination rights; however, unless the target is given self-incrimination warnings, the target may not be prosecuted and his testimony may not be used. Colo. Rev. Stat. Ann. § 16-5-204 (4)(a)–(b) (2021); Neb. Rev. Stat. § 29-1409 (2021).

In the absence of clear guidance from this Court, there has been an appropriate reluctance of courts to interfere with a prosecutor's conduct of grand jury proceedings. See United States v. Williams, 504 U.S. 36, 46–47, 112 S.Ct. 1735, 1741–42 (1992) (limits on supervisory powers to prescribe standards of prosecutorial conduct in grand jury). Moreover, some courts may have reasoned, incorrectly, that the absence of a rule that requires that targets receive self-incrimination warnings in the grand jury means that the failure to give such warnings has no impact on whether the target's grand jury testimony may be used against him at trial. The conflating of these two issues (one a rule concerning the conduct of grand jury proceedings, the other a rule concerning admissibility of evidence at trial) may account for the conclusion of the First Circuit Court of Appeals in the case below that these two issues are “two sides of the same coin.” 993 F.3d at 44 (Pet.App. 10a). As is shown by the laws of Colorado and Nebraska (cited above), prohibiting the use of unwarned target grand jury testimony at trial can be enforced directly, without also requiring that targets be warned in the grand jury. The evil to be avoided is the use of a target's compelled testimony at trial, not the failure to warn the target in the grand jury. (“The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. . . . [The] constitutional violation occurs only at trial.” United States v. Verdugo-Urquidez, 494 U.S. 259, 264, 110 S.Ct. 1056, 1060 (1990) (internal citations omitted).)

At present, unrepresented, indigent targets of criminal investigations such as Woods are subject to being tried and convicted through the use of an inquisitorial process which is allowed to infect the subsequent criminal trial. This is an injustice that strikes at the heart of the American justice system. The Court should issue a writ of certiorari, clarify the constitutional law, and close that loophole.

## CONCLUSION

This Court is urged to grant Woods's petition for a writ of certiorari to the First Circuit Court of Appeals on the two questions presented. Since Washington and Mandujano, an important aspect of Self-Incrimination law has been left unsettled. The court below ruled, incorrectly, that the Massachusetts courts adjudicated Woods's Self-Incrimination Clause issue on the merits. Issuing the writ will allow this Court to correct that error and alleviate the adverse effect of an inquisitorial practice that harmed Woods and prejudices indigent and Black grand jury target witnesses who are unlikely to have advice of counsel. Issuing the writ will allow the law to be clarified as follows:

In the absence of a self-incrimination warning for a grand jury target who is compelled by summons or subpoena to appear to testify and is placed under oath, the use of the target's grand jury testimony against him at his criminal trial (other than a trial for perjury) is forbidden by the Self-Incrimination Clause of the Fifth Amendment. (Whether a grand jury target witness is constitutionally entitled to a self-incrimination warning is not decided.)

Respectfully submitted,

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