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COMMONWEALTH OF MASSACHUSETTS

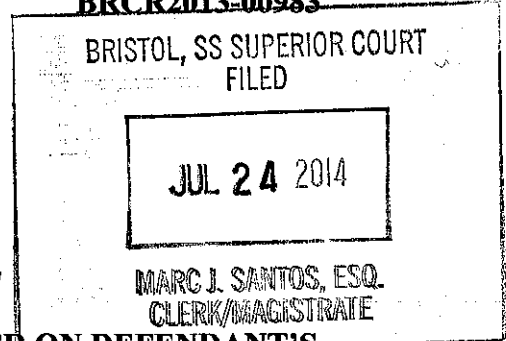
BRISTOL, ss.

**SUPERIOR COURT
CRIMINAL ACTION NO.
BRCR2013-00983**

COMMONWEALTH

vs.

AARON HERNANDEZ



**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S
MOTION TO DISMISS INDICTMENTS 983-01 AND 983-02**

INTRODUCTION

The defendant, Aaron Hernandez, is charged with one count of murder in violation of G.L. c. 265, § 1 in connection with the shooting of Odin Lloyd. He is also charged with one count of possession of a firearm without an FID card in violation of G.L. c. 269, § 10(a) and four other firearms offenses.¹ This matter is before the court on the defendant's motion to dismiss the murder indictment and the indictment for unlawful possession of the .45 caliber handgun alleged to be the murder weapon on the basis that probable cause to support those charges is lacking. Hernandez also moves to dismiss these indictments due to impairment of the integrity of the grand jury. For the reasons discussed below, the defendant's motion to dismiss is denied.

BACKGROUND

The grand jury received evidence on nineteen days, beginning on June 26, 2013 and ending on August 21, 2013, including the testimony of more than 60 witnesses and more than 70 exhibits. On August 22, 2013, the grand jury returned six indictments against Hernandez. In assessing the

¹ Indictments BRCR2013-00983-03 through 06 relate to a rifle, magazine, and ammunition seized from Hernandez's property. The defendant did not move to dismiss these indictments.

sufficiency of the indictments, this court must view the evidence in the light most favorable to the Commonwealth. Commonwealth v. Hanright, 466 Mass. 303, 305 (2013).

DISCUSSION

Probable Cause

In most cases, a court should not inquire into the sufficiency or competency of the evidence upon which an indictment is based. Commonwealth v. Moran, 453 Mass. 880, 883-884 (2009); Commonwealth v. Coonan, 428 Mass. 823, 825 (1999). Nonetheless, fundamental fairness requires that a court dismiss an indictment where the grand jury receives no evidence of criminality on the part of the accused. Commonwealth v. Moran, 453 Mass. at 884. In order for the grand jury to fulfil its traditional function as protection against unfounded criminal prosecutions, an indictment must be supported by at least enough evidence to establish both the identity of the accused and probable cause to arrest him for the crime charged. Commonwealth v. Hanright, 466 Mass. at 311; Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982).

Probable cause to arrest means reasonably trustworthy information sufficient to warrant a prudent person in believing that the defendant committed the charged offense. Commonwealth v. Hanright, 466 Mass. at 312; Commonwealth v. McCarthy, 385 Mass. at 163. It requires more than mere suspicion but considerably less than the evidence required to warrant a conviction beyond a reasonable doubt. Commonwealth v. Humberto H., 466 Mass. 562, 565 (2013). Evidence that is insufficient to support a guilty verdict may be more than sufficient to establish probable cause. Id. Probable cause to sustain an indictment is a decidedly low standard, but the grand jury must be presented with evidence on each element of the crimes charged. Commonwealth v. Hanright, 466 Mass. at 311-312.

First Degree Murder

To support the murder indictment, the Commonwealth was required to present the grand jury with evidence that Hernandez knowingly participated in Lloyd's shooting with the requisite mental state for first degree murder. *Id.* See Commonwealth v. Zanetti, 454 Mass. 449, 468 (2009). Mere presence during the commission of a crime, and even failure to take affirmative steps to prevent it, does not make a defendant criminally liable. Commonwealth v. Deane, 458 Mass. 43, 50 (2010); Commonwealth v. McCarthy, 385 Mass. at 163-164. Rather, in addition to evidence amounting to probable cause that Hernandez had or shared the intent required for murder in the first degree, the Commonwealth was required to introduce evidence that Hernandez intentionally participated in some meaningful way in the commission of the offense. Such participation may take any of several forms. It may take the form of personally shooting the victim or aiding or assisting another in that act. It may also take the form of asking or encouraging another person to commit the crime or helping to plan the commission of the crime. Alternatively, it may take the form of agreeing to stand by at, or near, the scene of the crime to act as a lookout or to provide aid or assistance in committing the crime or in escaping, if such help becomes necessary. Commonwealth v. Zanetti, 454 Mass. at 470. See also Commonwealth v. Hanright, 466 Mass. at 314; Commonwealth v. Deane, 458 Mass. at 51. Even at trial, to succeed on a joint venture theory, the Commonwealth need not prove the identity of the actual perpetrator and need not prove that someone other than the defendant was the actual perpetrator. Commonwealth v. Netto, 438 Mass. 686, 700-701 (2003). Thus, the Commonwealth was not required to present evidence before the grand jury as to exactly how Hernandez participated in the murder or as to who shot Lloyd given the strong evidence that Hernandez, Wallace, or Ortiz shot him. See Commonwealth v. Deane, 458 Mass. at 50-51;

Commonwealth v. Phillips, 452 Mass. 617, 634 (2008); Commonwealth v. Maynard, 436 Mass. 558, 564-565 (2002).

Hernandez argues that the evidence presented to the grand jury failed to demonstrate his intentional participation in Lloyd's death. He claims that the evidence demonstrated no more than his presence in the car with Ortiz, Wallace, and Lloyd shortly before Lloyd was shot to death. Hernandez emphasizes the absence of any eyewitness statements. However, it is well established that ~~probable cause, and indeed a defendant's guilt, may be established through circumstantial evidence,~~ and inferences drawn from the evidence need only be reasonable and possible, not necessary or inescapable. Commonwealth v. Humberto H., 466 Mass. at 566; Commonwealth v. Whitaker, 460 Mass. 409, 416 (2011); Commonwealth v. Deane, 458 Mass. at 51-52. Probable cause deals with probabilities, "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," and reasonable inferences, experience, and common sense are appropriate considerations in determining probable cause. Commonwealth v. Humberto H., 466 Mass. at 566; Commonwealth v. Kennedy, 426 Mass. 703, 707-708 (1998). Moreover, evidence of consciousness of guilt, when coupled with other probable inferences, is sufficient to prove guilt. See Commonwealth v. Porter, 384 Mass. 647, 653 (1981). Hernandez also emphasizes the absence of evidence before the grand jury of any motive to kill Lloyd. However, motive is not an element of the crime of murder, and the Commonwealth is not required to prove it. Commonwealth v. Whitaker, 460 Mass. at 418-419. Accordingly, the failure of the grand jury to hear evidence that would answer the questions "Who shot Lloyd – Hernandez, Wallace, or Ortiz?", "Why?" and "What happened in the minutes before he was shot?" does not require, as Hernandez argues, that the murder indictment be dismissed.

Viewed in the light most favorable to the Commonwealth, the grand jury heard sufficient evidence to establish probable cause that Hernandez intentionally participated in some meaningful way in the commission of the offense. Hernandez concedes that the evidence presented to the grand jury provided a substantial basis for the existence of the following facts: On Friday night, June 14, Hernandez and Lloyd went to a club in Boston. At some point during that night, Hernandez retrieved a firearm from his vehicle, a rental Suburban. They left the club after 2:00 a.m. and drove to Hernandez's apartment in Franklin, where they spent the night. The next morning, June 15, Hernandez and Lloyd returned to Hernandez's house, and Hernandez allowed Lloyd to keep the rented vehicle. On Sunday night, June 16, Wallace and Ortiz arrived at Hernandez's house. Hernandez had earlier that evening contacted Lloyd about "step[ping]" out for a while, as they had on Friday night. Around 2:30 a.m. on June 17, Hernandez, Wallace and Ortiz picked up Lloyd at his house in Dorchester, and the four of them drove in Hernandez's rented silver Altima to North Attleboro, ultimately stopping in an empty industrial area. At around 3:30 a.m., Lloyd was shot to death, and the other three men left the scene within minutes and went to Hernandez's house. On the day following this shooting, Hernandez asked his fiance, Shayanna, to dispose of unknown materials.²

In addition to these facts, the evidence presented to the grand jury provided a substantial basis for the existence of the following additional facts: Something happened at the club that caused Hernandez to arm himself. On Saturday morning, June 16, Hernandez texted Shayanna that he

² Hernandez argues that the grand jury heard no inculpatory statements by him. While there is no evidence that he made any direct admissions of guilt, there was evidence of several statements by Hernandez, including but not limited to his statement to Shayanna regarding disposal of materials, that constitute evidence of consciousness of guilt and, accordingly, are inculpatory.

“somehow told [Lloyd] about my other spot, and I just woke up bugging” Hernandez arranged for Wallace and Ortiz to come to North Attleboro, and he arranged to get together again with Lloyd. Hernandez, Wallace, and Ortiz left at about 1:00 a.m. to retrieve Lloyd. Shortly before their departure, Hernandez was holding an item that appears consistent with a firearm. The side view mirror on the driver’s side of the vehicle was still intact when the vehicle left Hernandez’s home. The grand jury could reasonably infer that, given the time of day that Lloyd was picked up, Hernandez did not intend to go clubbing with Lloyd. Only one car entered the industrial park in the direction of where the body was located at about the time of the killing, and that vehicle was consistent with the Altima. The driving distance from the site of the killing to Hernandez’s home is two to three minutes. Hernandez was driving the Altima when he returned to his home at approximately 3:30 a.m. on June 17. Shortly after the killing, while in his home, at the entrance to his basement, Hernandez was holding with what appears to be a firearm. Hernandez returned the silver Altima on June 17 at approximately 5:15 p.m. with Wallace and Ortiz; the driver’s side mirror was broken and the driver’s side of the vehicle was scratched. Hernandez purported to have no information about how the car was damaged, telling the rental company that “he just came out to it and it was like that.” Soil similar in color and appearance to the location where Lloyd’s body was found was on the tires and lower panels of the vehicle behind the tires and the tire treads appeared consistent with the tire tread marks left at the scene. Hernandez rented a Chrysler on June 17, which he allowed Wallace to drive; Wallace abandoned the vehicle in Connecticut. The spent casings and projectiles at the scene were .45 caliber. A .45 caliber spent shell casing located by police away from the crime scene can reasonably be inferred to be linked to Hernandez and that shell casing, in turn, was linked forensically to the shell casings at the scene. In the Franklin apartment rented by

Hernandez, the police found, among other items, .45 caliber ammunition. The grand jury heard about several statements made by Hernandez that reasonably appear designed to deflect suspicion from himself or that otherwise qualify as consciousness of guilt.³ For example, Hernandez told the police on June 17 that he last saw O in Boston on Sunday June 16. Hernandez sent Shayanna a text message that the grand jury could have concluded was a coded request for her to destroy the hard drive for the surveillance system. Hernandez phoned Shayanna on June 18 and asked her to get rid of a box in the basement. As requested, she disposed of the item. The box was large and heavy; it weighed about twenty-five pounds. A witness told the grand jury that he had once seen a gun in the basement of Hernandez's home in a lock box. The defendant argues that whether the box contained "drugs, firearms, or something else entirely was not shown," but, given the totality of the evidence presented to the grand jury, it would have been reasonable for the grand jury to infer that Hernandez arranged for the disposal of firearms, including the murder weapon.

In sum, there is evidence from which the grand jury could reasonably conclude that Hernandez organized the pickup of Lloyd, arranged for others to accompany him, rented the vehicle that picked up Lloyd in Boston and transported him to the scene of the shooting in North Attleboro, supplied the firearm used in the shooting, was present when Lloyd was shot, drove the car away from the scene with Wallace and Ortiz as his passengers to facilitate their escape, directed and aided in the concealment of evidence of the crime, assisted in Wallace's flight from the Commonwealth, and made false statements about when and where he last saw Lloyd and about his whereabouts at the time of the killing. The evidence, considered as a whole, establishes probable cause that Hernandez,

³ The recitation of evidence does not purport to be an exhaustive summary of all the examples of consciousness of guilt presented to the grand jury.

Wallace or Ortiz caused the death of Lloyd by shooting him and that Hernandez intentionally participated in some meaningful way in the commission of the offense.

To support an indictment of murder in the first degree on the theory of deliberate premeditation, the Commonwealth also was required to demonstrate probable cause that Hernandez had or shared the intent to kill Lloyd and that the killing was committed with deliberate premeditation. Alternatively, to support an indictment of murder in the first degree on the theory of extreme atrocity or cruelty, the Commonwealth was required to demonstrate probable cause that Hernandez had or shared the intent to kill Lloyd, the intent to cause grievous bodily harm to Lloyd, or the intent to do an act which, in the circumstances known to Hernandez, a reasonable person would have known created a plain and strong likelihood that death would result and that the killing was committed with extreme atrocity or cruelty. There is probable cause to support both theories of murder in the first degree.

To prove deliberate premeditation, the Commonwealth must establish probable cause that the defendant intended to kill Lloyd and that he decided to kill after a period of reflection, although no particular length of time is required. Commonwealth v. Whitaker, 460 Mass. at 418-419. Deliberate premeditation may be inferred from, among other matters, the nature and extent of the victim's injuries and the number of blows. Id. at 419. The evidence presented to the grand jury was sufficient for the grand jury to conclude that Hernandez picked up Lloyd intending to kill him and that, given the long drive back to the industrial park in North Attleboro, he had ample time to reflect before acting on his decision. Several shots were fired at Lloyd. Moreover, where a defendant brings a gun to the scene of the crime, the evidence is generally sufficient to support an inference of premeditation. Commonwealth v. Freeman, 442 Mass. 779, 783 (2004); Commonwealth v. Ruci, 409

Mass. 94, 96-97 (1991).

With respect to the alternate theory, the Commonwealth has established that there was probable cause that Hernandez intended to kill Lloyd or that, given the number of shots fired, he had or shared the intent to cause grievous bodily harm to Lloyd or the intent to do an act which, in the circumstances known to Hernandez, a reasonable person would have known created a plain and strong likelihood that death would result. Extreme atrocity or cruelty may be proven by evidence of one or more of the following factors: indifference to or taking pleasure in the victim's suffering, consciousness and degree of the victim's suffering, the extent of physical injuries, the number of blows, the manner and degree of force with which the blows were delivered, the instrument or weapon employed, and the disproportion between the means needed to cause death and those employed. Commonwealth v. Smith, 460 Mass. 318, 323 (2011); Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983). Even a single gunshot may be sufficient to establish extreme atrocity or cruelty where the victim is shot at close range and has some awareness of what is about to happen to him. Commonwealth v. Anderson, 445 Mass. 195, 201 (2005). Here, given the position of the body when at least some of the shots were fired and the number of shots fired, there was probable cause to return a first degree murder indictment based on extreme atrocity or cruelty.

Whether the Commonwealth ultimately can sustain its burden of proof beyond a reasonable doubt is a question to be resolved at trial. See Commonwealth v. Hanright, 466 Mass. at 314. The Commonwealth has satisfied its decidedly low burden of demonstrating probable cause to indict Hernandez for murder.

Unlawful Possession of a Firearm

To prove a violation of G.L. c. 269, § 10(a), the Commonwealth must demonstrate that the

defendant knowingly had a firearm in his possession outside his residence, or under his control in a vehicle, without having in effect a license to carry firearms. Commonwealth v. Horne, 466 Mass. 440, 452 (2013); Commonwealth v. Romero, 464 Mass. 648, 652 (2013). The Commonwealth must prove that the defendant actually or constructively and knowingly possessed the firearm. Commonwealth v. Romero, 464 Mass. at 652 (constructive possession requires knowledge coupled with ability and intention to exercise dominion and control). Possession of a firearm may be proved by circumstantial evidence and the inferences drawn therefrom. Id. at 653. The pictures of Hernandez holding what appears to be a gun immediately before leaving his house in the rental vehicle to pick up Lloyd and again upon his return to the house a few minutes after the shooting occurred, combined with the forensic evidence, viewed, along with all the other evidence, in the light most favorable to the Commonwealth, established probable cause to indict Hernandez for unlawful possession of a firearm, namely the .45 caliber murder weapon. This is not a case in which there were no outward signs that the firearm belonged to the defendant or no evidence of intent to control the firearm. Cf. Commonwealth v. Romero, 464 Mass. at 657-658 (evidence insufficient to show that defendant intended to exercise control over firearm simply because he owned and drove car in which front seat passenger held firearm in open view).

Grand Jury Impairment

Hernandez also asks this court to dismiss these two indictments based on impairment of the integrity of the grand jury. A defendant who proves that the Commonwealth knowingly or recklessly presented false or deceptive evidence for the purpose of obtaining an indictment and that the evidence probably influenced the grand jury's decision to indict is entitled to dismissal of the indictment. Commonwealth v. Carr, 464 Mass. 855, 867 (2013); Commonwealth v. Hunt, 84 Mass.

App. Ct. 643, 651 (2013), rev. den., 467 Mass. 1104 (2014). In addition, in presenting cases to the grand jury, the prosecutor must scrupulously refrain from words or conduct that tends to influence the return of an indictment on grounds other than the evidence fairly presented to the grand jury. Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 209 (1971), cert. den., 407 U.S. 910 (1972); Commonwealth v. Olsen, 35 Mass. App. Ct. 929, 930 (1993). Hernandez contends that “the Commonwealth bombarded the grand jury with a plethora of impermissible, unfairly prejudicial material designed to smear Hernandez’s character and depict him as an immoral person with a propensity for violence.”

References before a grand jury to a defendant’s criminal record or uncharged bad acts, if irrelevant, is clearly undesirable. Commonwealth v. Koney, 421 Mass. 295, 305 (1995); Commonwealth v. Freeman, 407 Mass. 279, 282 (1990). As at a trial, however, “bad act” evidence may be relevant in a grand jury presentation to show something other than propensity, such as a common scheme or course of conduct, a pattern of operation, intent, motive, or the absence of mistake or accident. Commonwealth v. McCowen, 458 Mass. 461, 478 (2010); Commonwealth v. Julien, 59 Mass. App. Ct. 679, 686 (2003), rev. den., 441 Mass. 1107 (2004).

Hernandez cites as improper propensity evidence the testimony of Alexander Bradley (“Bradley”) concerning Bradley’s February 2013 shooting, testimony about a Providence altercation in May of 2013, reference to a shooting in Florida in 2007 when he was in college, and a 2009 photograph of him holding a weapon. Bradley testified that, before he was shot, just four months before Lloyd’s shooting, he saw Hernandez in Florida with a Glock, a weapon that is consistent with the firearm used to kill Lloyd. The photograph, which was taken in Florida in 2009, depicts Hernandez holding a gun that appears to be a Glock. See Commonwealth v. Barbosa, 463 Mass. 116,

122 (2012) (weapon that could have been used during crime is admissible even without direct proof that particular weapon was in fact so used). Evidence that Hernandez probably actually used the Glock against Bradley arguably is relevant as some evidence of the defendant's familiarity with the use of a Glock. Cf. Commonwealth v. Tassinari, 466 Mass. 340, 353 (2013) (evidence of defendant's many firearms, ammunition, and firearms certification relevant to whether he premeditated wife's shooting or shot her in heat of passion).

Hernandez also objects to numerous references to his marijuana use and the testimony about an incident in which, after clubbing with Lloyd, he took two women to his Franklin apartment. The evidence of marijuana use was potentially relevant because there was evidence that Lloyd supplied Hernandez with marijuana and was asked to do so on the night of the murder. The presence of the women at the apartment where weapons and ammunition were later found is significant because Lloyd was there with Hernandez, observing all that transpired, and this was a mere two days before the murder. Together, this evidence demonstrated the nature of the relationship between Hernandez and Lloyd and revealed that Lloyd possessed negative personal information about Hernandez. Further, the testimony of the women helped establish that the apartment was used and controlled by Hernandez.

Hernandez further cites as improper the evidence that his loaned Toyota 4Runner was stored in Tanya Cummings' garage and vaguely linked to some other crime, and the testimony of several witnesses concerning Cummings' refusal to testify despite having been granted immunity. Given that Cummings was also under investigation as an accessory after-the-fact or a conspirator to commit that offense, this evidence was relevant to her relationship with Hernandez.

Even though the prejudicial impact of the disputed evidence may be deemed to outweigh its

probative value at trial and, therefore, some of this evidence may be excluded, it does not follow that the Commonwealth impaired the integrity of grand jury by presenting it. Significantly, the grand jury is a body with broad investigative power charged with determining whether or not a crime has been committed, and its function is to inquire into all information that might possibly bear on its investigation. In re Grand Jury Investigation, 427 Mass. 221, 226, cert. den., 525 U.S. 873 (1998). See also Commonwealth v. Moran, 453 Mass. at 884 n.7 (noting grand jury's historic function as both investigative and accusatory body). In this context, the fact that some of the evidence presented may ultimately have been shown to have little or even no relevance to the charges or that the court, in its discretion, may rule that the evidence should not be presented to the petit jury does not evince impairment of the integrity of the grand jury. It was evidence that "might possibly bear" on the grand jury's investigation. In re Grand Jury Investigation, 427 Mass. at 226.

Finally, Hernandez cites as improper and prejudicial Trooper Benson's testimony that Hernandez argued with police, told them to speak to his attorney, and slammed the door on them. Reference to a defendant's invocation of his right to silence and right to counsel implicates the integrity of the grand jury proceeding. Commonwealth v. Matthews, 450 Mass. 858, 874 (2008). It was improper to have informed the grand jury that the defendant invoked his right not to speak to police. Id.; Commonwealth v. Callagy, 33 Mass. App. Ct. 85, 88 (1992). Similarly, Hernandez's alleged act of slamming the door in response to the officer's statement that they were conducting a death investigation was also improperly put before the grand jury because that act occurred after he invoked his right to remain silent and immediately followed the provision of his attorney's card to

the police.⁴ The act was part and parcel of Hernandez's exercise of his Fifth Amendment right to silence. See Commonwealth v. Beneche, 458 Mass. 61, 74 (2010). Nevertheless, as with prejudicial, irrelevant evidence, in the absence of prejudice, the defendant is not entitled to dismissal of the indictment. Commonwealth v. Matthews, 450 Mass. at 874 ("we have never ordered the dismissal of an indictment for [prosecutorial] misconduct in the absence of prejudice); Commonwealth v. Kater, 432 Mass. 404, 412 (2000) ("an indictment need not be dismissed because the grand jury may have considered evidence that was later suppressed").

In any event, Hernandez has not met the heavy burden of showing that the disputed evidence, when viewed in the context of all the evidence presented to the grand jury, probably made a difference in the grand jury's decision to indict him. Commonwealth v. Matthews, 450 Mass. at 874-875. See Commonwealth v. Carr, 464 Mass. at 867; Commonwealth v. Hunt, 84 Mass. App. Ct. at 657-659 (prosecutor's unfair, imprudent, and reckless disregard for truth in presenting false identification testimony to grand jury and failure to disclose exculpatory evidence did not warrant dismissal of murder indictment in light of other evidence that was highly probative of guilt). Given the voluminous proper evidence that was highly probative of guilt, this Court cannot conclude that the grand jury would not have returned indictments had it not heard the disputed evidence. See Commonwealth v. Matthews, 450 Mass. at 874-875 (improper reference to defendant's invocation of his right to remain silent did not require dismissal of murder indictment where other evidence was more than sufficient to establish probable cause); Commonwealth v. Clemmey, 447 Mass. 121, 133

⁴ The defendant has not shown that the testifying officer knowingly or recklessly presented false or deceptive evidence when he reported that the defendant slammed the door. The grand jury had the video of the door closing. The video does not have sound. Examination of the video alone does not lead this court to find that false information was knowingly or recklessly presented to the grand jury.

(2006) (deliberate introduction of defendant's prior bad acts, "although probative of little more than a propensity to violate the Commonwealth's environmental laws," did not require dismissal of indictment for violating Wetlands Protection Act, where defendant did not prove that evidence made difference in decision to indict); Commonwealth v. Vinnie, 428 Mass. at 175 (deliberate introduction of defendant's prior criminal activity to grand jury did not require dismissal of indictment given that there were multiple witnesses and cumulative evidence against defendant was powerful); Commonwealth v. Olsen, 35 Mass. App. Ct. at 931 (despite "needless but dangerous overkill" in form of propensity evidence introduced to the grand jury for the purpose of securing an indictment, defendant failed to make a showing that such evidence probably made a difference); Commonwealth v. Callagy, 33 Mass. App. Ct. at 88 (informing grand jury that a suspect elected to exercise his right to remain silent did not impair integrity of grand jury where reference to his refusal probably did not influence the grand jury's decision to indict); Commonwealth v. Martinez, 2013 Mass. App. Unpub. LEXIS 247 at *2 (Rule 1:28) (presentation to grand jury of evidence of defendant's uncharged prior sexual assaults on victim's half-sister, even if improperly produced, did not require dismissal of indecent assault and battery indictment where uncontested evidence was more than adequate to meet probable cause burden).

Here, as well, the defendant did not meet his burden of showing that the evidence he claims should not have been heard by the grand jury probably made a difference in the grand jury's decision to indict him. After reading all the grand jury transcripts, the court has a firm belief that the grand jury would have returned the indictments it did even if the disputed items of evidence had not been presented. The uncontested evidence was more than adequate to meet the Commonwealth's burden of establishing probable cause. Thus, Hernandez is not entitled to dismissal of the indictments based

on impairment of the integrity of the grand jury.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Defendant's Motion to Dismiss Indictments 983-01 and 983-02 be **DENIED**.



E. Susan Garsh
E. Susan Garsh
Justice of the Superior Court

DATED: July 24, 2014