COMMONWEALTH OF MASSACHUSETTS

Commonwealth of Massachusetts	)	
v.	)	Docket Nos: 05-CR-0129-001-007 05-CR-0154-001-003
David Cohen	)	

DEFENDANT DAVID COHEN'S SECOND MOTION FOR RECONSIDERATION OF MOTION TO DISMISS

From its inception, this case has been rife with prosecutorial misconduct, and Defendant David Cohen has recently uncovered evidence showing that, once again, Special Prosecutor George Jabour crossed far over the line of ethical conduct. This new evidence, coupled with Cohen's previous Motion to Dismiss for Prosecutorial Misconduct and Abuse of the Grand Jury Process,[1] warrants a single result: dismissal.

In his initial motion to dismiss, Cohen highlighted numerous instances where the Special Prosecutor mistreated witnesses before the grand jury, told grand jurors his own opinions about the weight and sufficiency of the evidence, precluded a witness from giving exculpatory evidence, and gave blatantly wrong instructions on the law. In ruling upon Cohen's motion, this Court expressly noted the Special Prosecutor's improprieties. Specifically, in its Memorandum of Decision dated July 20, 2006 (at p. 26), this Court

[1] After that first motion, Cohen filed a Motion for Reconsideration of Motion to Dismiss, having learned that Special Prosecutor suppressed obviously exculpatory evidence which would have done great damage to the credibility of one of the Special Prosecutor's key witnesses. Even though that exculpatory evidence was in existence and known to the Norfolk District Attorney's Office at the time of the grand jury, the grand jurors were never given the opportunity to consider that exculpatory evidence in their deliberations. This Court denied that motion on October 23, 2006.

recognized that "**the defendant cites nearly 30 pages of questionable and improper conduct on the part of the Special Prosecutor**…." (emphasis added). Nevertheless, this Court denied the motion, reasoning "that the cited conduct did not make up a substantial enough part of the grand jury proceedings to prejudice the grand jury in such a way that would warrant dismissal." *Id.*

But in light of evidence recently uncovered by the defense – a sworn affidavit from a witness who testified before the grand jury – it is clear that the Special Prosecutor's misconduct **does** now make up a substantial enough part of the record to warrant dismissal. That is, the record now reveals unequivocal evidence that the Special Prosecutor's "questionable and improper" tactics probably influenced the grand jury's decision to indict Cohen. More specifically, and as demonstrated in more detail below, the Special Prosecutor knowingly and intentionally bullied and intimidated a witness into giving false and inculpatory evidence.

II. BACKGROUND[2]

David Cohen has been an officer in the Stoughton Police Department for more than seventeen years. In 1996, he was promoted to Sergeant, supervising Stoughton officers working the 4:00 p.m. to 12:00 a.m. shift. While employed as a full-time police officer, Cohen attended both college and law school in the evenings. He has been a member of the Massachusetts bar since 1997, and has a law practice in Stoughton which focuses almost exclusively on motor vehicle tort cases.

[2] Most of these "facts" are taken directly from the Commonwealth's Statements of the Case or from discovery produced by the Commonwealth. Cohen does not concede the accuracy of the Commonwealth's allegations, and submits these facts only for purposes of this Motion.

Cohen stands accused in two separate cases, one involving alleged victim Timothy Hills, the other involving alleged victim Gerard Viverito. Because the misconduct highlighted in this motion centers around the Viverito case, only that case is discussed in detail here. Cohen moves, however, to dismiss both cases in light of the severity and extent of the Special Prosecutor's prejudicial misconduct. Without a doubt, the Special Prosecutor's misconduct, and resulting prejudice, was so widespread that it poisoned the entire grand jury process.

The Viverito Case

In the Viverito case, Cohen is charged with kidnapping, assault and battery, and filing a false police report. The allegations giving rise to these charges are set forth below:

On December 15, 1999, Jessica Dustin paid a $1,000.00 cash deposit for a car to Gerard Viverito, at the Stoughton Motor Mart. A few weeks later, Dustin decided not to purchase the car, and asked Viverito to return her deposit. Viverito, however, did not return it. Dustin's boyfriend, Dennis Elia, contacted his attorney, Robert Schneiders (a friend of Cohen's), and asked what they could do to get Dustin's deposit returned. Schneiders – believing, as he testified before the grand jury, that a crime had been committed – in turn called Cohen, as the Stoughton Motor Mart was in Cohen's police jurisdiction.

After Schneiders' call, Cohen called Viverito. Viverito told Cohen that his failure to return the deposit was not a police matter, but a civil one, told him to "f--- off," and hung up the phone. The Commonwealth claims that, by this time, Viverito had already made arrangements with Dustin to return her deposit.

A short time later, Cohen, co-defendant Emmett Letendre and Officer Jay Owens officers arrived at Stoughton Motor Mart. They arrested Viverito for larceny and transported him to the police department. At the station, Edwin Little, the bail commissioner, set Viverito's bail at $1,000.00. The Commonwealth, however, alleges that Cohen himself set the amount of bail, while still at Stoughton Motor Mart.

The Stoughton Police Department maintained a file about the Dustin/Viverito dispute. In the file was a report which stated as follows:

> On January 29, 2000 at 5:00 pm Jessica Dustin and Dennis Elia came into the police station to report a theft. Jessica told me [co-defendant Emmett Letendre] that on December 15th 1999 she gave Jerry Viverito $1000. Dennis told me he was there during the transaction and witnessed Jessica give Jerry the cash. Jerry is a salesman at the Stoughton Motor Mart. She gave him the money as a down payment on a vehicle. Apparently the deal fell through and Jerry was unable to give Jessica the car she wanted. Jessica told me that Jerry accused her of lying about her credit history and refused to get her any vehicle. When she asked about her down payment he told her she would have to wait four weeks. After waiting the four weeks she inquired again as to when she would receive her refund. He told her she would have to sue him to get the money. Jessica said that Jerry represented himself as being the owner of the business.
>
> Sergeant Cohen called the Stoughton Motor Mart and spoke with Jerard Viverito. Viverito confirmed that he was the person who took Dustin's money and that she would have to wait to get it back. The sergeant asked if he would be refunding Jessica Dustin her money. Mr. Viverito told Sergeant Cohen it was a civil matter and the police shouldn't be involved. He told Sgt. Cohen that there was nothing he can do and began talking to someone else in the room and were joking amongst each other. Sgt. Cohen informed Viverito that he then said "What do you think I'm stupid, You're stupid, go fuck yourself" and hung up.
>
> Shortly after the conversation myself, Sergeant Cohen, and Officer Owens went to the Stoughton Motor

> Mart and placed Jerard Viverito under arrest for larceny over $250.00.
>
> Officer Owens is also charging the owner of the Stoughton Motor Mart, Leo Giandomenico, with larceny.

Exh. A.

Included in the Stoughton Police Department file were a copy of Dustin's driver's license and a copy of the Stoughton Motor Mart receipt for Dustin's $1,000.00 deposit. *See id.*

The basis for the false police report charge is that Elia and Dustin never went to the Stoughton Police Department to report Viverito's crime; Elia testified to such before the grand jury. The prosecution also alleges that the copies of Dustin's license and receipt were not originally in the police file, but were added later as part of a cover-up. Recently, however, Elia signed an affidavit, under oath and subject to the pains and penalties of perjury, which corroborates the truthfulness of the police report. That is, Elia now says, under oath, that he brought Dustin to the Stoughton Police Department to make a report, and that she provided her driver's license and receipt from the Stoughton Motor Mart.

In short, Elia's sworn statement is in direct contradiction to his testimony before the grand jury -- testimony which followed a coercive encounter with the Special Prosecutor and two police officers. Because the Special Prosecutor knowingly elicited false testimony from Elia, and engaged in other instances of egregious misconduct, the indictments should be dismissed.

III. **ARGUMENT**

By knowingly presenting false evidence – Elia's testimony – to the grand jury, the Special Prosector eviscerated the grand jury's role in our criminal justice system. Indeed, "the most valuable function of the grand jury [is] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused and to determine whether the charge [is] founded upon credible testimony or … dictated by malice or personal ill will." *Hale v. Henkel*, 201 U.S. 43, 59 (1906). "The members of the grand jury provide a check upon the aggressive tendencies of zealous government prosecutors. As Judge Friendly notes in *United States v. Doe*: an important aspect of the grand jury's function (is) that of acting as a protective buffer between the accused and the prosecution. The grand jury was regarded by the founders not as an instrument of oppression, but a safeguard of liberty...." *In re Grand Jury Proceedings*, 686 F.2d 135, 145 (3rd Cir. 1982) (citation omitted, parentheses in original).

It is essential for a prosecutor to ethically and properly present his case to the grand jury, something which the Special Prosecutor did not do here. He had "a duty of good faith to the Court, the grand jury, and the defendant." *United States v. Samango*, 607 F.2d 877, 884 (1979). That duty was clearly violated, and the Special Prosecutor precluded the grand jury from fulfilling its constitutional obligation.

"[A] line must be drawn beyond which a prosecutor's control over a cooperative grand jury may not extend." *Id.* at 881. This is so because, as a practical matter, the modern grand jury relies upon the prosecutor to present to it the evidence it must consider in order to perform its function. "Recognizing this increasing dependency...courts in recent years have become more sensitive to allegations of governmental misconduct

before the grand jury and have demonstrated greater willingness to curb prosecutorial abuse of such proceedings." *United States v. Udziela*, 671 F.2d 995, 998 (7th Cir. 1982). "Thus, in cases where over-zealous prosecutors have manipulated a grand jury by willfully misleading it or knowingly presenting false evidence, courts have not hesitated to exercise their power to dismiss indictments." *Id*.; *see also Samango*, 607 F.2d at 882 (explaining that the deliberate introduction of perjured testimony is the most flagrant example of prosecutorial abuse before the grand jury).

In the Commonwealth, a defendant cannot ordinarily challenge a grand jury's decision to indict. But there is an exception to that general rule - where a prosecutor impairs the integrity of the grand jury proceedings, such as by presenting false evidence. *See Commonwealth v. McCarthy*, 385 Mass. 160 (1982); *Commonwealth v. O'Dell*, 392 Mass. 445 (1984); *Commonwealth v. Connor*, 392 Mass. 838 (1984); *Commonwealth v. Salman*, 387 Mass. 160 (1982). To obtain a dismissal here, Cohen must satisfy three factors:

- First, he must show that the Special Prosecutor presented false or deceptive evidence to the grand jury. *See Commonwealth v. Mayfield*, 398 Mass. 615, 621 (1986).
- Second, he must show that the Special Prosecutor knowingly elicited false or deceptive evidence and that he did so for the purpose of securing an indictment. *Id.* Dismissal may also be warranted upon "a showing of the Commonweath's reckless disregard of the truth leading to the presentation of false or deceptive evidence..." *Id.*

- Third, he must "show that the presentation of the false or deceptive evidence probably influenced the grand jury's determination to hand up an indictment." *Id.* In other words, Cohen must show "not only that the evidence was material to the question of probable cause but that, on the entire grand jury record, the false or deceptive testimony probably made a difference." *Id.*

"[W]hen a defendant makes a substantial preliminary showing that false testimony was knowingly presented to the grand jury by the Commonwealth or one of its agents... he is entitled to an evidentiary hearing to resolve the matter." *Salman*, 387 Mass. at 166. Whether in fact the integrity of a grand jury proceeding has been impaired is to be decided on a case-by-case basis, and requires an assessment of all relevant circumstances. *Mayfield, supra* at 621.

A. Through Elia, Jabour Presented False and Deceptive Evidence to the Grand Jury.

Under *Mayfield,* Cohen must first demonstrate that the Special Prosecutor presented false evidence to the grand jury. This element is easily proved.

First, Elia's sworn statement makes clear that the Special Prosecutor, through Elia's testimony, presented false and deceptive evidence to the grand jury. Following a coercive and intimidating encounter with the Special Prosecutor and two police officers that is discussed below, Elia (falsely) denied that he and Dustin had gone to the Stoughton Police Department to report Viverito's failure to return Dustin's deposit. Specifically, he testified before the grand jury as follows:

Q: **Now, let me ask you this question, sir. Did you yourself ever go to the Stoughton Police Department and report anything to do with this deposit to any police officers?**

A: **No**, sir. It wasn't my money so –

Q: Okay. To your knowledge, **did Jessica ever go to the Stoughton Police Department?**

A: **No**.

Q: **Did you ever go into the police station** and speak to any of those officers about the $1000 deposit, anything at any time?

A: **No**, not to my recollection.

Q: **Are you sure of that?**

A: **Positive.**

****

Q: Well, it's not something you would forget. **You didn't go to the Stoughton Police Department and report this to any police officer, did you?**

A: **Positive. Did not.**

****

A: The only thing I may have done is given her a ride to the police department.

Q: But you're not sure of that?

A: I'm not a hundred percent sure.

Q: **But you didn't go in the police department and report a theft to them, did you?**

A: **No**. Like I said, it didn't involve me. It wasn't my money.

Q: So you didn't – it's a very specific question. **Did you personally go into the police station yourself?**

A: **No**.

Q: And you may have given her a ride but you're not even sure about that, right?

A: Yeah. Exactly.

Q: Is that what you're telling us on your oath?

A: Yes.

Exh. A.

As is now clear, Elia's grand jury testimony was false. To be sure, as Elia now says in his sworn statement, he and Dustin did in fact report Viverito's failure to return Dustin's deposit to the Stoughton Police. Moreover, Elia now corroborates not only what Schneiders said (discussed below), but also additional details in the allegedly false police report; namely, that Dustin provided Letendre with copies of her driver's license and the Stoughton Motor Mart receipt. Specifically, his affidavit explains that:

> Attorney Schneiders said that the first thing we [Elia and Dustin] should do is to file a complaint with the police department that had jurisdiction. **Jessica and I traveled to the Stoughton Police Department** and I drove. I remember that **I told Jessica to take the receipt from the Motor Mart with her to show the police**. I believe it was in the evening hours and may have been on the same day I spoke with the attorney. When we arrived at the police station we first spoke with the clerk at the front desk. After speaking with the clerk, I remember waiting for another officer who came from the back. To the best of my recollection the officer was white and about 5'10". I remember that we advised the officer of what had transpired. At some point they asked us for ID's. I did not feel they needed my ID, as Jessica was the victim. **Jessica produced her license and also a hand written receipt for the cash deposit. I believe they made copies at the police station and handed back Jessica's license and receipt**.

Exh. B (emphasis added).

Obviously, Elia made misrepresentations in his grand jury testimony. And there can be no serious doubt that his current sworn statement is truthful – it is almost entirely corroborated by the police report which the Special Prosecutor claims is false. In considering Elia's affidavit, it is important to note that Elia had absolutely no reason to lie to the defense investigators who took his statements. Unlike Jabour, they did not bully or intimidate him. Elia simply spoke the truth.

B. The Special Prosecutor Knowingly or at Least Recklessly Elicited Elia's False Testimony.

Next, Cohen must show that the Special Prosecutor knowingly, or at least recklessly, elicited Elia's false testimony. Plainly, his sworn affidavit establishes that Jabour knew, or should have known, that his bombastic approach to "prepping" witnesses for the grand jury would lead to the presentation of false testimony.

During his interview with the defense investigator, Elia described the coercive environment in which he found himself when he appeared for his grand jury testimony. He explained that, once he arrived at the grand jury, "it was literally myself, the prosecutor, and a couple of detectives in the room and they were asking me questions about what had happened and sort of finding out what I knew." Exh. C,[3] p. 8. Before he testified before the grand jury, he explicitly told the Special Prosecutor that he had a vague recollection of trying to retrieve Dustin's deposit. *Id*. at 8-9. In his sworn statement, Elia relates his belief that he told the Special Prosecutor that he believed he had taken Dustin to the Stoughton Police Department, but could not be 100% sure. Exh. B. The Special Prosecutor, clearly unhappy, gave a clearly inappropriate and unduly

[3] Exhibit C is a transcribed interview between defense investigators and Elia.

coercive response – he told Elia, in the presence of two police officers, "[t]hat [he] was going to sit down there and stay until [Elia] remembered what happened." Exh. C at 9.

Following this threat, Elia was understandably intimidated and frightened.[4] Elia explained:

> I was – it felt like, I don't want to say feeding me lines because that's too harsh of a word. **But it honestly felt like they weren't happy or satisfied with what I was telling them, and they weren't going to let me go until they hear what they wanted to hear, and that was honestly what it felt like to me.** I mean, if you call somebody to be a witness for your side, and I felt like they were trying to intimidate me into saying something I didn't know 100%."

Exh. C (emphasis added).

Elia further explained that, "[f]rom the beginning, I felt I was treated more like a criminal than a witness. Mr. Jabour was no longer the pleasant individual with whom I spoke over the phone. Mr. Jabour spoke in a very loud and intimidating voice as the two officers stared at me." Exh. B. Elia further goes on to relate that he "tried to answer [Mr. Jabour's] questions as best I could, but **when he did not get the response he was looking for, he would ask the question again in a loud and intimidating manner. I became nervous and confused. On more than one occasion Mr. Jabour became angry with me and stated that I would not be allowed to leave the room until I remember everything that he wanted to know. I felt threatened and that I would not be allowed to leave until I told him what he wanted to hear even if it was something I did not know or could not remember."** *Id.* Jabour's conduct got even worse: Elia "**also felt that he was making certain suggestions to try and make me say**

[4] It should not go unnoticed that the Special Prosecutor is a large man, well over six feet tall and has an imposing presence.

things that I was not sure of." *Id.* Indeed, Elia "believe[s] that [he] told [Mr. Jabour] prosecutor that Jessica and I went to the Stoughton PD to file a complaint against Viverito and the Stoughton Motor Mart, but I'm not sure." *Id.* The prolonged and antagonistic confrontation with the Special Prosecutor was so disruptive that Elia "was so confused by the time [he] testified that [he couldn't] even remember what [he] said to the grand jury." *Id.*

The Special Prosecutor's tactics were designed to pressure Elia into saying what the Special Prosecutor wanted to hear – testimony which implicated Cohen. The only logical inference to be drawn is that the Special Prosecutor knew that his actions and demeanor would have an impact on Elia, and as Elia makes clear, he told the Special Prosecutor what the Special Prosecutor wanted to hear. Surely Jabour knew – and definitely should have known – that such abusive techniques were not likely to elicit truthful responses. By Elia's accounts, the Special Prosecutor is an overzealous prosecutor who willfully misled the grand jury. His conduct – clearly intentional – crossed the line by far. Simply put, the Special Prosecutor deprived the grand jury of the opportunity to evaluate and weigh the true facts, a substantial right that cannot be taken from an accused. *See Samango*, 607 F.2d at 884. Under no circumstances should this Court condone the Special Prosecutor's reprehensible conduct and the deliberate presentation of false grand jury testimony.

Should this Court have any doubt whatsoever about the Special Prosecutor's intent, it need look no further than Cohen's initial motion, where he laid out multiple examples of the Special Prosecutor's over-the-top scare tactics. In this grand jury, intimidation was hardly an isolated incident. Numerous examples were set forth in

Cohen's first motion to dismiss. For example, when Schneiders had something exculpatory to say, the Special Prosecutor threatened, "**Okay, we'll take a vote whether to hold you in contempt after the questioning, sir**." Mot.Dis., p. 10. During his grand jury testimony, Peter Marinelli said, "**I didn't know I was going to get beat up,**" and "You're trying to treat me like I'm some criminal, I'm like a liar. I'm just being – I'm telling you what I know." *Id.* at 11. In an affidavit, Peter Marinelli describes his experience before the grand jury: "**[Jabour] questioned me in a rude and arrogant manner with condescending facial expressions and when the answers were not to his liking he told me to get out of the room.**" *Id.* Having had a similar experience, Edward Marinelli said in his affidavit that Jabour frequently raised his voice, and used intimidating tactics, such as slamming his fist on a desk. He said under oath that **Jabour's conduct before the grand jury made him "feel uncomfortable and intimidated…** [Jabour] made [him] feel as though [he] was a criminal, even though [he] was trying to assist in the investigation." *Id*. Edwin Little – the bail commissioner who set Viverito's bail – says in this affidavit that Jabour "**was continually arrogant, intimidating, and hostile toward me."** *Id*. In his affidavit, John Arico says, "**I feel there was an effort to intimidate me on the part of the prosecutor. He was arrogant and hostile toward me, raising his voice and continually repeating his questions in what I believe, an effort to change my answers.**" *Id*. at p.12.

The Special Prosecutor cannot credibly complain that this is a case where an innocent but inaccurate statement was made to the grand jury. *Compare, Commonwealth v. Reddington*, 395 Mass. 315, 320 (1985)(officer "merely repeating what some other experienced officer had told him…and in good faith.") Rather, his actions were part of a

deliberate and pervasive pattern of intimidation. Simply put, the Special Prosecutor's tactics were no mistake, there is no innocent explanation for the way he treated Elia, and there is no innocent explanation for the way he went about discovering (and altering) Elia's memory of the relevant events. "[D]eliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct…." *Samango*, 607 F.2d at 882. There is simply no room in our system of criminal justice for such abuse.

In light of this unequivocal record, this Court can reach but a single conclusion: the Special Prosecutor knew exactly what he was doing, and he knew exactly what the result would be.

C. The False and Deceptive Evidence Probably Made a Difference in the Grand Jury's Decision to Indict Cohen.

Lastly, Cohen must show that the Special Prosecutor's knowing use of false testimony "probably influenced" the grand jury's decision to indict. Given the misconduct's pervasiveness, this factor is easily satisfied.

In his initial motion, Cohen described many examples of how the Special Prosecutor improperly questioned witnesses and presented evidence to the grand jury. But this Court explained that it was denying Cohen's initial motion to dismiss because, even though it explicitly noted that the Special Prosecutor's conduct was inappropriate, it found that the record as a whole provided probable cause to believe Cohen committed the alleged offenses. In particular, this Court emphasized Dustin's testimony; she testified that she did not go to the Stoughton Police Department and did not provide the police with her driver's license or a copy of her receipt from the Stoughton Motor Mart. And as set forth above, Elia testified similarly. But now, Elia directly contradicts what he and Dustin told the grand jury, making a markedly different record than the one previously

considered by this Court. In light of the Special Prosecutor's treatment not just of Elia, but numerous other witnesses, Elia's sworn statement calls into question whether the Special Prosecutor intimidated Dustin as well. In any event, the grand jury, had it been told the truth, would have been faced with two conflicting accounts, making it probable that it would not have returned the indictments.

Moreover, this Court should not view Elia's false testimony in a vacuum, but also consider the spillover effect it had on the entire case against Cohen. In other words, it is not only Elia's testimony that factors into this Court's inquiry of whether the Special Prosecutor's intentional and improper conduct probably influenced the grand jury's decision to indict, particularly in the Viverito case. Jabour improperly questioned other witnesses on the Viverito matter, deceiving grand jurors through his use of intimidation, improper questioning, and commentaries on witnesses' credibility. The end result is that the Jabour's guerilla tactics probably had an impact on the grand jury's decision to indict.

For example, Schneiders' testimony – riddled with the Special Prosecutor's improper attacks and commentary -- was among the most crucial to the Viverito case. Schneiders' testimony, rid of Jabour's attacks and improper comments, establishes that Cohen did in fact have probable cause to arrest Viverito for larceny. This testimony was important and clearly material: If the grand jurors believed Schneiders, it could not have found probable cause to believe that Cohen had kidnapped or assaulted Viverito. The grand jury should have been permitted to independently evaluate Schneiders' testimony. But the Special Prosecutor did not let the record stand -- rather, in a clearly

unethical and improper move, he interjected his own opinion on the strength and weight of the evidence as to whether Viverito had committed larceny:

> Q: Now, let's get back to, sir, your definition of larceny since you haven't established, and I want to establish on this record if you even know the definition of larceny and the ways you can prove larceny, because if you can't prove to us that you did, sir, **then obviously your opinion is wrong about whether or not a crime was committed.** Isn't that true, sir? Let's get back down to larceny, sir. You're a lawyer and you're a cop, right?
>
> A: Correct.
>
> Q: Are we right about that so far?
>
> A: I think so.
>
> Q: That's a truthful statement, is it not, sir?
>
> A: Yes.
>
> Q: Now, why don't you tell these grand jurors the three theories of larceny, the ways you can commit larceny. Okay? Do you understand my question?
>
> A: You can commit it by fraud.
>
> Q: Right. That's number one.
>
> A: You can commit it by the intent to permanently deprive.
>
> Q: Sir, that's an element of all theories of larceny, is it not? You have to have that intent; otherwise there is no larceny, right? I'm asking you the three methods or the three ways that you can prove larceny. **Now, I'm going to conclude that you do not know the crime of larceny. And when you told Cohen that a crime was committed, you were wrong. Okay? That's the conclusion I'm going to make….**

Mot.Dismiss, pp. 23-24.

Whether Viverito committed larceny (and thus, whether Cohen had probable cause to arrest him), was a determination that belonged solely to the grand jury. Jabour's "conclusion" that Viverito had not committed larceny was simply not his to make. To be sure, "[t]he right to have the grand jury make the charge **on its own judgment** is a substantial right which cannot be taken away..." *Stirone v. United States*, 361 U.S. 212, 218-19 (1960) (emphasis added). "Neither by depriving the grand jury of its opportunity to evaluate the credibility of witnesses nor by making prejudicial remarks may the prosecutor deny the accused this substantial right." *Id*. But the Special Prosecutor deliberately interfered with the independence of the grand jury.

And Jabour's statement was not only highly prejudicial, but plainly unethical. Rule 3.8(i) of the Mass. Rules of Professional Conduct provides that a prosecutor should not assert a personal opinion about a witnesses' credibility or the guilt of an accused. Yet the Special Prosecutor paid no mind to his ethical obligations – he was determined to obtain indictments, no matter what it took.

The improprieties and resulting prejudice did not end there – they went on and on. In essence, the Special Prosecutor went out of his way to ridicule and embarrass Schneiders, doing his best to make sure that the grand jury did not believe a thing he said, much of which was exculpatory. When Schneiders said he was not sure what Jabour was asking, Jabour replied back, **"Of course you're sure. You just don't know the answer. Don't give me that. I'm asking you, and I'll ask you for probably the fourth time. The record will speak for itself. What are the three ways you can prove larceny? You're a lawyer, right, and you're a cop. Tell us the three ways you can prove larceny."** Mot.Dismiss, p.25. When Schneiders said, "larceny by false pretenses[,]"

Jabour sarcastically responded, “That’s number one. **You’ve said that five times already. You beat that dead horse pretty good**.” *Id*. Then, after Schneiders described three types of larceny, Jabour announced, “**Would it surprise you if you flunked? So do you still want to still tell these grand jurors, these good grand jurors, that you told Cohen that there was a crime committed here?**” *Id*.

In a further effort to destroy Schneiders' credibility, Jabour told the grand jury that Schneiders had improperly talked to Cohen about his grand jury appearance, flat out lying about the law. Mot.Dismiss, p.28. (“**Did you know you’re not supposed to be discussing grand jury testimony with somebody like David Cohen? … You were never told that? You’re an attorney…. you’re an attorney, and a police officer, and you tell us you don’t know that you’re not supposed to be discussing your testimony with David Cohen, is that right?”)** With this line of questioning, Jabour intended not only to undermine Schneiders, but also to portray Cohen in a negative light. And, to make matters even worse, he did so by deliberately misleading the grand jurors on the law.

Jabour’s unwarranted and improper attacks on Schneiders continued. He clearly conveyed to the grand jury his personal belief that Schneiders was not a credible witness by hammering home, time and time again that Schneiders and Cohen were "good friends that talked three times a day.” The references were constant throughout Schneiders’ testimony – more than thirty times -- and they clearly conveyed to the grand jurors the message that Schneiders was not to be believed simply because he was a friend of Cohen. Mot.Dismiss, pp. 29-33.

The record abounds with instances where the Special Prosecutor consistently harassed and ridiculed Schneiders, and went to great lengths to destroy his credibility, making remarks such as:

- "Sir, look it, **we're not stupid and I'd appreciate it if you wouldn't insult our intelligence.**"
- "**Is that your sworn testimony? …I'm going to ask you again on your oath.**"
- **"That's your sworn testimony. That's the truth right? Is that the truth? It's already on the record. I'm sure these people remembered it. You just stand there and give me a minute."**
- **"I'm not going to ask the question anymore because I think the point's been made, but I just want to get a truthful answer from you.**"
- **"You'd better jog your memory here a bit."**
- "**Why don't you tell us the truth, Mr. Schneiders?...What else did you forget about, Mr. Schneiders**?"
- **"Oh, by the way, you're not on any drugs or anything? You haven't ingested any alcohol, have you? You have no memory problems, organic or otherwise?"**

Id. at pp. 34-36.

In sum, the record unequivocally shows that the Special Prosecutor improperly insulted Schneiders and conveyed to the grand jury that Schneiders' exculpatory testimony was not to be believed. These types of prosecutorial tactics lead to dismissal. *See, e.g., Samango*, 607 F.2d at 883 (in dismissing indictments based on prosecutorial

misconduct, the court noted that "[t]he transcript was an impressive repertory of insults and insinuations.")

But for the Special Prosecutor's attacks, intimidation, and diatribes, the grand jury could have reasonably – and probably would have – concluded that the police report was truthful and that Cohen had probable cause to arrest Viverito. In other words, it probably would have concluded that there was no probable cause that Cohen had committed a crime and, therefore, probably would not have indicted.

D. Dismissal of Each Indictment Is Warranted.

This motion largely concerns the Special Prosecutor's presentation of the Viverito case to the grand jury. But a review of all relevant circumstances – including those discussed in Cohen's first motion to dismiss – reveals gross malfeasance of a sort rarely seen.

One need only review the grand jury transcripts to see how the Special Prosecutor's improprieties permeated the proceedings, poisoning the entire grand jury process. *See Samango*, 607 F.2d at 884 (dismissing indictments where "[t]he cumulative effect of the above errors and indiscretions, none of which alone might have been enough to tip the scales, operated to the defendant's prejudice by producing a biased grand jury."] As the Supreme Judicial Court put it, "[i]f … it is shown that a large percentage of the indictments were obtained through the knowing use of false testimony, it might not in some circumstances be an abuse of discretion to dismiss **all** the indictments on the ground that a presumption of invalidity has arisen or on the ground that prophylactic action is necessary." *Commonwealth v. Salman*, 387 Mass. 160, 167 (1982)(emphasis in original).

In this case, the Special Prosecutor knowingly presented false testimony to obtain indictments, and that misconduct was so widespread and far-reaching that dismissal for prophylactic reasons is required. Otherwise, there is nothing to stop prosecutors in the future from engaging in similarly coercive and intimidating ways in order to obtain indictments.

IV. CONCLUSION

For the foregoing reasons, Defendant David Cohen respectfully requests that this Court reconsider its ruling and grant Cohen's Motion to Dismiss for Prosecutorial Misconduct and Abuse of the Grand Jury Process.

Respectfully submitted,
David Cohen, Defendant,
By his attorneys,

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CERTIFICATE OF SERVICE

I, Patricia A. DeJuneas, do hereby certify that I caused a copy of the foregoing document to be served upon George R. Jabour, Esquire by overnight mail to 213 Hanover Street P.O. Box 130094 Boston, MA 02113-0002 and by fax to: (781) 326-8222 on this ____ day of January, 2007.

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Patricia A. DeJuneas