COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

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No. 2016-P-1569

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COMMONWEALTH OF MASSACHUSETTS,
Appellee

V.

JUAN C. RODRIGUEZ,
Defendant-Appellant

_____

COMMONWEALTH'S BRIEF AND RECORD APPENDIX ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

_____

SUFFOLK COUNTY

_____

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ISSUE PRESENTED

I. Whether the judge properly ruled that the defendant had notice of a field test where he obtained grand jury minutes that contained evidence about the field test years before trial; and whether the judge properly allowed evidence about a field-test at trial where the defendant did not move to exclude it or request a hearing about its scientific reliability until the first day of trial; alternatively, whether the defendant was prejudiced by the admission of field test evidence where two separate laboratory tests identified the substance found as heroin.

II. Whether the judge acted within her discretion when she precluded the defendant from presenting evidence that Annie Doohkan had a key that opened an evidence safe where ample other evidence was presented that she improperly accessed the safe and tampered with drugs contained therein; and whether the judge acted within her discretion when she excluded seventeen indictments against Dookhan as evidence but permitted a transcript of a plea colloquy where Dookhan admitted to the facts underlying each indictment to be entered as an exhibit, as well as

evidence of specific instances of Dookhan's misconduct.

III. Whether the judge properly declined to find that the prosecutor engaged in a pattern of striking Hispanic people where the judge rejected the defendant's assertion that there were few Hispanic people in the venire and the prosecutor had only struck one person of Hispanic descent.

STATEMENT OF THE CASE

On August 5, 2009, a Suffolk County grand jury returned an indictment charging the defendant, Juan Rodriguez, with trafficking heroin, in violation of G.L. c. 94C, § 32E (CA.4).[1]

On May 15, 2015, the defendant's jury trial began before Judge Linda E. Giles (CA.9). On that day, the defendant filed a motion in limine to exclude evidence related to a field test performed by Boston Police Officer Robert England alleging the testing did not satisfy Daubert/Lanigan (CA.9, 12), and later that the defendant did not have notice that Officer England

[1] The defendant was also indicted for trafficking heroin in a school zone, in violation of G.L. c. 94C, § 32J (CA.4), but this charge was dismissed prior to trial (CA.9).

would be offering such testimony (Tr.2:20). The judge rejected both arguments (Tr.2:18-19; 20-21), calling defense counsel's notice argument disingenuous (Tr.2:22).

The same day, the Commonwealth filed a motion to preclude Massachusetts State Police Lieutenant Detective Robert Irwin, who had investigated Annie Dookhan related to her misconduct at the Hinton Laboratory and was on the defendant's witness list, from testifying (Tr.1:180). The Attorney General's Office had also filed a motion to quash (Tr.1:186; 2:5). After hearing argument from the Attorney General's Office, the judge denied the Commonwealth's motion and the motion to quash and permitted the defendant to call Lieutenant Detective Irwin to testify (Tr.2:14).

On May 20, 2015, the jury found the defendant guilty of trafficking heroin (CA.10; Tr.3:54). That same day, the judge sentenced the defendant to eight years to eight years and a day in prison (CA.10; Tr.3:57).

On May 26, 2015, the defendant filed a notice of appeal (CA.10).

STATEMENT OF FACTS

1. The Crime.

On April 27, 2009, members of the South Boston Drug Control Unit executed three search warrants, one for the defendant's body, one for his car, and one for his apartment (Tr.2:107; 190-191). At the same time the police executed the warrants, the defendant was taken into custody after he parked his car in front of 81 Orton-Marotta Way in South Boston (Tr.2:108, 210; 192). The police seized his keys and headed to his apartment, located at 30 Orton-Marotta Way (Tr.2:113).

Inside the apartment, in the defendant's locked bedroom, police found a digital scale, plastic baggies, nine "fingers" of heroin, and $13,270 in two different suit coats hanging in the closet (Tr.2:119, 122, 123, 130, 165, 166-167). A subsequent search of the defendant's person uncovered two additional "fingers" in the defendant's groin area (Tr.2:133).

Officer Robert England, who found the "fingers," described them as filled with a compressed substance that looked almost like sidewalk chalk (Tr.2:123).[2]

[2] Officer England's field test of these "fingers" will be discussed *infra*.

Sergeant Detective William Feeney provided expert testimony that drugs packaged like this are called "fingers" because drugs are put into the finger of a latex glove, the glove is tied off, and then the finger is cut from the glove (Tr.2:215). These "fingers" are usually filled with ten grams of compressed heroin and are usually trafficked between mid-level dealers (Tr.2:214). Sergeant Detective Feeney explained that the heroin in these "fingers" would be cut with a substance and then packaged in smaller plastic baggies in $20 and $40 increments (Tr.2:209, 216, 221, 223). He looked at photographs of the "fingers" found in the defendant's apartment and stated that based on color and texture, they were consistent with heroin (Tr.2:223). He also testified that, in his opinion, possessing eleven "fingers" was consistent with possessing them to distribute them (Tr.2:223). He further opined that the recovery of plastic baggies, a scale, and scissors, along with the "fingers" reinforced that opinion (Tr.2:223-224).

The "fingers" were originally tested in the Hinton Laboratory in 2009 (Tr.3:11). During that testing, Annie Dookhan was the primary chemist

(Tr.3:11), and Delia Saunders was the confirmatory chemist (Tr.3:9). Subsequently, Sarah Chalk, a chemist with the Massachusetts State Police (Tr.3:71), retested the items in 2013 and opined that each of the eleven "fingers" contained heroin (Tr.3:84, 88).

2. Field-Testing Evidence.

Prior to trial, the defendant moved to exclude evidence of a field test performed by Officer England (CA.12). The judge denied the defendant's motion, ruling that field test evidence admissible so long as the Commonwealth laid an adequate foundation that the person who performed the field test was qualified (Tr.2:19).

Officer England testified that he went to a Drug Enforcement Agency training where he was trained and certified to use the NarcoPouch, which is a field test made by a company called Safariland (Tr.2:140-141). He testified that he has since been recertified to use the NarcoPouch (Tr.2:141). In addition to the training, Officer England routinely used the NarcoPouch when he bought drugs in an undercover capacity and when he applied for search warrants (Tr.2:141). Officer England declined to put a number

on it, but commented, "I mean a thousand is a lot, but I'd say -- use [the NarcoPouch] all the time" (Tr.2:141).

Officer England also explained to the jury how the field testing in this case worked using the NarcoPouch 924 (Tr.2:140-142). The test used a small clear rubbery pouch with three glass vials inside (Tr.2:140). The pouch had a seal on the top of it (Tr.3:142). Officer England explained that to field test a substance, he would peel the seal off, put a small sample of the substance inside, close the pouch, break the vials inside the pouch, and watch for a reaction (Tr.3:140-142). The liquid inside the vials would react with the substance placed inside and cause the substance to turn a certain color, which would indicate whether the substance was a certain drug (Tr.3:142).

In this instance, after he seized the "fingers" and brought them back to the station, Officer England took a sample from one of the fingers and followed the steps above (Tr.2:143). When the substance came into contact with the liquid in the vials, it turned green,

which was a preliminary result that the substance was heroin (Tr.2:143).

3. Dookhan Evidence.

The defendant mounted a reasonable doubt defense based on Dookhan's involvement in the case, specifically arguing that there was a chance Dookhan contaminated the "fingers" in this case, so the Commonwealth could not prove that the "fingers" contained heroin (Tr.2:99; 4:7).

The judge allowed extensive evidence about Dookahn's misconduct to come in at trial. A transcript of Dookhan's plea colloquy was entered as an exhibit (Ex.35; CA.15-52).[3] During the colloquy an Assistant Attorney General recited the facts that would be proven if the case had gone to trial which included that Dookhan had improperly removed ninety drug samples from the evidence safe, that she had tampered with the testing of drug vials, that she forged initials, and that she had lied about her qualifications (CA.23-27). After hearing this

[3] A copy of Exhibit 35 has been reproduced in the Commonwealth's record appendix.

recitation, Dookhan admitted that the facts recited were true (CA.27).

Four witnesses who worked with Dookhan at the Hinton lab testified about working with Dookhan generally, and in 2009 (Tr.3:6, 11). Delia Saunders, a chemist, testified about her work with Dookhan (Tr.3:11), and about lab protocols at the Hinton laboratory. She explained that sometimes chemists had to work as evidence officers, handling the drug evidence in the evidence safe (Tr.3:19, 22-23). She further testified that every employee of the lab had a key to the lab and this key also opened the evidence safe (Tr.3:24).

Peter Piro, Nicole Medina, and Daniel Renczowski also testified about how they worked with Dookhan at the Hinton Lab (Tr.3:145, 167, 174). Each testified about specific instances of misconduct they had personally observed Dookhan engage in, including problems with how she tested and weighed drugs, times she forged their initials, and concerns about cross-contamination of samples on her lab bench (Tr.3:149, 157, 162, 169, 176, 179).

Finally, Lieutenant Detective Irwin testified at about his investigation of Dookan (Tr.3:102). On objection by the prosecutor, defense counsel was precluded from asking Lieutenant Detective Irwin questions about whether Dookhan had told him she had a key because it was hearsay and did not fall within the statement against penal interest hearsay exception (Tr.3:120). Defense counsel did not offer any other grounds for admissibility other than "it's another link in the chain of her criminal responsibility, and therefore it's against penal interest" (Tr.3:119). Defense counsel was permitted, however, to question Lieutenant Detective Irwin about Dookhan's misconduct, including instances of forgery, falsified reports, and contaminated samples (Tr.3:105, 107, 112, 121-122, 127, 130).

ARGUMENT

I. THE JUDGE DID NOT ABUSE HER DISCRETION IN RULING THAT THE DEFENDANT HAD NOTICE OF THE FIELD TEST AND THAT THE FIELD TEST ITSELF WAS ADMISSIBLE.

The defendant makes two separate arguments about Officer England's testimony regarding the field test that was performed in this case: first, that he had did not receive proper notice (D.Br.22); and second,

that the judge erred in declining to hold a hearing under *Commonwealth v. Lanigan*, 419 Mass. 15, 26 (1994) (D.Br.14). Neither of these claims has merit.

A. The Judge Did Not Err in Concluding Defendant Had Notice of this Testimony.

First, the judge did not abuse her discretion in ruling that the defendant had notice of the field test and that Officer England was going to testify about the field test. A judge's action based on an alleged discovery violation is reviewed for an abuse of discretion. *See Commonwealth v. Paiva*, 71 Mass. App. Ct. 411, 414-416 (2008). "Under the abuse of discretion standard, the issue is whether the judge's decision resulted from 'a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives.'" *Commonwealth v. Kolenovic*, 471 Mass. 664, 672 (2015). The judge did abuse her discretion.

When considering an alleged discovery violation the judge must first consider whether there was a violation, and if so, the appropriate remedy. *Paiva*, 71 Mass. App. Ct. at 414-416. Such a remedy must

balance the "need for an orderly trial process in conformity with pretrial rules and agreements," against avoiding prejudice and giving the defendant a right to defend himself against the charges. *Id.* "'[F]actors which must be taken into account in assessing such a balance . . . include: (1) prevention of surprise; (2) evidence of bad faith in the violation of the conference report; (3) prejudice to the other party caused by the testimony; (4) the effectiveness of less severe sanctions; and (5) the materiality of the testimony to the outcome of the case.'" *Id.* (quoting *Commonwealth v. Durning*, 406 Mass. 485, 496 (1990)).

Here, though true that the Commonwealth did not file a separate formal notice that Officer England was going to testify about the field test, the judge's finding that the defendant knew about this testimony before trial was not in error. Officer England testified about this field test before the grand jury on July 28, 2009 (I.CA.15-16), and the grand jury minutes were turned over to defense on October 13, 2009 (CA.13), which was almost six years before the trial. Indeed, the judge characterized defense

counsel's argument that he had no notice of this testimony as disingenuous (Tr.2:22). The timing of the defendant's discovery violation claim, made the second day of trial, after the defendant had filed a motion to exclude this testimony on other grounds, and after the judge indicated that she would allow this testimony (Tr.2:18-20), suggests the same. Very simply, the defendant has not shown that the judge abused her discretion on this issue.

B. The Judge Also Did Not Err in Allowing Officer England To Testify About the Field Test.

Similarly, the defendant has not shown that the judge abused her discretion in admitting this evidence. The defendant first maintains that the judge erred because she did not hold a separate hearing to determine the admissibility of this evidence. However, a hearing was not required. *See Commonwealth v. Williams*, 475 Mass. 705, 720 (2016); *Commonwealth v. Sliech-Brodeur*, 457 Mass. 300, 327 (2010); *Commonwealth v. Shanley*, 455 Mass. 752, 763 n.15 (2010). When a party files an objection to expert testimony under *Lanigan*, a judge must determine whether the process or theory underlying the expert's

opinion is reliable. *Id.* at 25. "The fact that it may be necessary for a judge -- at least on motion of one of the parties -- to determine whether the opinion testimony of a particular expert witness is sufficiently reliable to be presented at trial does not mean the judge must hold a separate evidentiary hearing." *Sliech-Brodeur*, 457 Mass. at 327. Indeed, a hearing is not necessary if the expert testimony is "of the same type and offered for the same purpose [that] has been accepted as reliable in the past in Massachusetts appellate cases." *Shanley*, 455 Mass. at 763 n.15.

Here, though the defendant takes pains to distinguish this case from *Commonwealth v. Fernandez*, 458 Mass. 137 (2010), the issue presented is largely the same. Like the defendant in *Fernandez*, the defendant here gave "short notice" to the Commonwealth and the Court. *See Fernandez*, 458 Mass. at 151 n.20. Despite having known of the field test for almost six years before the trial, the defendant waited until the first day of trial to request a *Lanigan* hearing (Tr.1:197). When he did, he did so in a barebones motion, simply stating: "this evidence is not

scientifically valid" (CA.12); he did not indicate whether the test itself was unreliable, the way the test was performed was unreliable, or the person who administered the test was unqualified (CA.12). Like the judge in *Fernandez*, the judge here looked at case law (including *Fernandez* itself) and ruled that the evidence would be admissible if the prosecutor laid the proper foundation (Tr.2:19). The defendant has not shown that the judge abused her discretion in proceeding in this manner due to the late challenge and the existent case law. Nor has he claimed that the prosecutor failed to lay the necessary foundation.

Moreover, while the Court in *Fernandez* noted that "to date, no appellate case from Massachusetts has accepted as reliable field test results, regardless of the purpose for which they are offered," 458 Mass. at 151 n.20, the Court, in *Commonwealth v. Vasquez*, 456 Mass. 350 (2010), the very same year as *Fernandez*, noted that controlled substances are typically subjected to a field test followed by a gas chromatography-mass spectrometry ("GCMS") test to identify their composition. 456 Mass. at 364 n.15. The report relied upon by the Court to make this

assertion, the National Research Council, Strengthening Forensic Science in the United States, A Path Forward, 134 (2009) (available at http://www.nap.edu/catalog/12589.html (lasted visited May 1, 2017), specifically states: "The analysis of controlled substances is a mature forensic science discipline and one of the areas with a strong scientific underpinning. The analytical methods used have been adopted from classical analytical chemistry, and there is broad agreement nationwide about best practices." The report went on to explain, "The chemical foundations for the analysis of controlled substances are sound, and there exists an adequate understanding of the uncertainties and potential errors." National Research Council, *supra*, at 135. The analytical methods, as noted by the Supreme Judicial Court in *Vasquez*, were to field test the substance and then analyze them further with a GCMS test. *Vasquez*, 456 Mass. at 364 n.15 (quoting National Research Council, *supra*, at 134-135). From this, there was a basis for the judge to conclude that the science underlying field testing as at least a presumptive test was reliable.

Additionally, where, as here, the police field tested the substance recovered and then ran two separate GCMS tests to identify the substance as heroin, in conformance with the procedure mentioned by the Supreme Judicial Court in *Vasquez*, there was no error in the admission of this testimony.

Regardless, even if the judge erred in admitting evidence about the field test, the defendant has not shown that he was prejudiced by the admission of this evidence. The defendant's entire claim of prejudice rests upon an assertion that Dookhan contaminated the actual items seized themselves and not just the vials that she tested (D.Br.21). The problem with this assertion, and the defendant's defense generally, is that there were never any facts uncovered in the investigation that Dookhan contaminated the individual packages of drugs themselves (Tr.3:123-133); she forged documents, lied about her credentials, and took known samples of drug and placed them in a vial, which she then tested (Tr.3:122-123). Indeed, the investigation revealed that she did not contaminate the actual packages of drugs themselves, as in six cases the drugs were retested and the original test

was found to be inaccurate (CA.25). If Dookhan had contaminated the package of drugs itself, as the defendant suggests, such inaccuracy would never be found.

Further, the argument overlooks the other direct and circumstantial evidence that the substance in the eleven fingers was heroin. First, Sgt. Det. Feeney looked at a photograph and testified that in his expert opinion the substance in the eleven fingers was consistent with heroin based on the color and texture of the substance (Tr.2:223). Saunders, who was the confirmatory chemist for the first lab test, testified that the eleven vials that she tested were positive for the presence of heroin (Tr.3:13). Sarah Clark, who performed the second laboratory test, also testified that she took a sample out of each of the eleven fingers, tested them, and concluded that each "finger" contained heroin (Tr.3:84, 88). Finally, the defendant displayed consciousness of guilt in hiding two of the "fingers" in his crotch area and fleeing from the country. *Commonwealth v. Cassidy*, 470 Mass. 201, 217 (2014) (evidence of flight is admissible as consciousness of guilt). Both suggest that the

substance the defendant possessed was heroin. Accordingly, in light of this overwhelming evidence, even if admission of the field testing was erroneous, the defendant has not shown he was prejudiced by the admission of the field testing evidence.

II. THE JUDGE DID NOT ABUSE HER DISCRETION IN EXCLUDING EVIDENCE THAT DOOKHAN'S KEY OPENED THE EVIDENCE SAFE OR SEVENTEEN INDICTMENTS AGAINST DOOKHAN.

The defendant also argues that the judge improperly excluded testimony from Captain Irwin that Dookhan had a key to the evidence safe and denied the defendant's request to introduce Dookhan's indictments (D.Br.26). Because the defendant objected to the exclusion of this evidence, this court will determine first whether the judge abused her discretion in excluding the evidence, and if so, whether the error prejudiced defendant. *See Commonwealth v. Corliss*, 470 Mass. 443, 456-57 (2015). The defendant's argument must fail because the judge did not err.

A. The Judge Properly Excluded Evidence that Captain Irwin Investigated Dookhan's Key.

First, the defendant's argument relies upon one report authored by Captain Irwin, but completely overlooks its timeframe. While true that Captain Irwin

investigated Dookhan's key, his investigation revealed only that Dookhan's key opened the lock to the evidence safe in 2011 (R.58-60), there was absolutely no evidence to suggest that Dookhan had a key that could open the evidence safe in July 2009 -- the time when the drugs in the defendant's case were tested.

Further, there was no evidence that Doohkan's possession of this key was misconduct. Captain Irwin's report does not make such a conclusion (*see* R.58-60), and Saunders testified that every employee had a key to enter the lab and that this same key opened the evidence safe (Tr.3:24). Either way, the jury heard Saunders' testimony and also heard other evidence that Dookhan had access to the evidence safe at the lab including: a transcript of Dookhan's plea colloquy which included that Dookhan "removed 90 drug samples from the evidence safe," and that "in the evidence logbook there was no indication that an evidence officer had signed the drug samples out" (CA.23-24); and testimony that such behavior was improper as there was testimony that chemists were not supposed to be taking samples out of the evidence safe and that the samples were supposed to be signed out by an evidence

officer (Tr.3:18-24, 148, 167). That Dookhan had a key which gave her access to the safe was cumulative of the evidence described above. "A trial judge has discretion to exclude evidence that would be merely cumulative of evidence already admitted." *Commonwealth v. Urrea*, 443 Mass. 530, 544 (2005). The defendant has not shown the judge abused her discretion here.

Moreover, the defendant has not shown how he was prejudiced by the exclusion of this evidence. As discussed above, the jury still heard that Dookhan had access to the evidence safe and improperly took samples out (Tr.3:18-24, 148, 167). Even absent the specific key evidence, defense counsel still argued in his closing that Dookhan had "access to that safe," and "she had an unlimited supply of heroin with which she could've used to tamper with the evidence in this case" (Tr.4:7). Accordingly, the defendant has not shown how he was prejudiced by the exclusion of this evidence. For this reason too, his claim must fail.

B. The Judge Properly Excluded Dookhan's Indictments.

The defendant also alleges that the judge erred in excluding seventeen of the twenty-seven indictments

against Dookhan as evidence (D.Br.33). He claims that these indictments provided a "strong temporal link" showing that Dookhan was engaged in misconduct at the time the defendant's drugs were tested (D.Br.33). This argument is refuted by the record. Of the seventeen indictments the defendant tried to introduce only three were from 2009 when the defendant's drugs were tested: one was for falsely claiming to hold a degree (CA.57); and the other two were for obstruction of justice (CA.61-62), which was related to testimony that Dookhan gave in those cases about her education (CA.27). Notably, none of the 2009 indictments alleged that Dookhan tampered with any evidence. The indictments themselves simply do not support the defendant's argument.

Moreover, the only probative value of this evidence was to show that Dookhan engaged in misconduct with relation to her position at the lab. This misconduct was thoroughly proved through other evidence. A transcript of the plea colloquy in which Dookhan admitted to the facts to the twenty-seven indictments was entered as evidence (Ex.35; CA.15-52). The defendant was permitted to present extensive

evidence about her misconduct including the testimony of Captain Irwin who investigated the case and three employees of the lab who witnessed misconduct (Tr.3:102, 149, 157, 162, 169, 176, 179). Additionally, Captain Irwin testified that Dookhan admitted to contaminating vials of drug samples and not doing the testing properly as early as 2008 and 2009 (Tr.3:130).

In light of all of this evidence, the judge did not abuse her discretion in concluding that the indictment themselves were cumulative, especially where the majority of the indictments were not from conduct that Dookhan engaged in around the time she tested the defendant's drugs. See *Urrea*, 443 Mass. at 544. Thus, this argument too must fail.

III. THE JUDGE DID NOT ABUSE HER DISCRETION IN DECLINING TO FIND A PATTERN IN THE PROSECUTOR'S USE OF PREEMPTORIES.

The defendant's final claim is that the judge erred in declining to find that the prosecutor was engaged in a pattern of excluding people of Hispanic descent from the jury (D.Br.34-40). This claim has no basis in the record.

It is presumed "'that peremptory challenges are properly made, but this presumption can be rebutted by a prima facie showing of either a pattern of challenges of members of the same discrete group, or, in certain circumstances, challenge of a single prospective juror within a protected class, where 'there is a likelihood that [a prospective juror is] being excluded from the jury solely on the basis of . . . group membership.'" *Commonwealth v. Prunty*, 462 Mass. 295, 306 (2012) (quoting *Commonwealth v. Burnett*, 418 Mass. 769, 770 (1994)) (internal citations omitted); *accord Commonwealth v. Souleymane Yacouba Issa*, 466 Mass. 1, 8 (2013). "The test, therefore, is twofold: first, a pattern, which in some circumstances may be a pattern of one; and second, a likelihood of group exclusion, which in some circumstances can be discerned solely from the strength of the pattern." *Souleymane Yacouba Issa*, 466 Mass. at 8-9.

While the defendant's burden of establishing a pattern is not particularly weighty, *Commonwealth v. Maldonado*, 439 Mass. 460, 463 n.4 (2003), a judge is not required to find a pattern every time a defendant

so alleges. *Souleymane Yacouba Issa*, 466 Mass. at 10 ("The issue on appeal, however, is not whether the judge was permitted to find that the presumption had been so rebutted, but whether [the judge] was required to have so found."). A judge's determination as to a pattern will not be disturbed absent a finding that this finding was an abuse of discretion. *Id.* When reviewing such a claim, the court considers "the totality of the circumstances presented to the judge, including the composition of the venire, the composition of the jury, the previous use of peremptory challenges, and other possible reasons that the juror could have been excluded." *Commonwealth v. Butler*, 90 Mass. App. Ct. 599, 601 (2016).

Here, the defendant has not shown that the judge abused her discretion in declining to find a pattern. The defendant's entire argument hinges on the assertion that the challenged juror was the only person of Hispanic descent in the venire (D.Br.34). However, the judge specifically rejected that contention. The judge explicitly ruled that the defendant had not met his burden because his "showing is, apparently, that you perceive somehow that there

are no Hispanics. I don't how you are doing that because there are people in the audience who could be Hispanic. I have no idea whether or not they are Hispanic" (Tr.1:120). The judge, as she was required to do, noted that no one had been seated on the jury yet and considered the parties peremptory challenges, declining to find a pattern in the Commonwealth's peremptory challenges to a white male, white female, and Hispanic male (Tr.1:120-121).[4] The judge was in the best "position to decide if a peremptory challenge appears improper and requires an explanation by the party exercising it." *Commonwealth v. LeClair*, 429 Mass. 313, 321 (1999). This Court "do[es] not substitute [its] judgment for that of the judge as to whether the presumption of proper peremptory challenge has been rebutted when there is support in the record for the judge's determination." *Butler*, 90 Mass. App. Ct. at 605. The defendant has not shown that this constituted an abuse of discretion. Accordingly, the court should deny his argument.

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[4] The judge commented that if anyone had engaged in a pattern, it was the defendant, as he had exercised peremptories on two black females and a white male (Tr.1:120-121).

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court affirm the defendant's convictions.

Respectfully submitted
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ADDENDUM

G.L. c. 94C, § 32E. Trafficking in marihuana, cocaine, heroin, morphine, opium, etc.; eligibility for parole.

(a) Any person who trafficks in marihuana by knowingly or intentionally manufacturing, distributing, dispensing, or cultivating or possessing with intent to manufacture, distribute, dispense, or cultivate, or by bringing into the commonwealth a net weight of fifty pounds or more of marihuana or a net weight of fifty pounds or more of any mixture containing marihuana shall, if the net weight of marihuana or any mixture thereof is:

(1) Fifty pounds or more, but less than one hundred pounds, be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than fifteen years or by imprisonment in a jail or house of correction for not less than one nor more than two and one-half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of one year and a fine of not less than five hundred nor more than ten thousand dollars may be imposed but not in lieu of the mandatory minimum one year term of imprisonment, as established herein.

(2) One hundred pounds or more, but less than two thousand pounds, be punished by a term of imprisonment in the state prison for not less than 2 nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of 2 years and a fine of not less than two thousand and five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(3) Two thousand pounds or more, but less than ten thousand pounds, be punished by a term of imprisonment in the state prison for not less than 31/2 nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a

mandatory minimum term of imprisonment of 31/2 years and a fine of not less than five thousand nor more than fifty thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(4) Ten thousand pounds or more, be punished by a term of imprisonment in the state prison for not less than 8 nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of 8 years and a fine of not less than twenty thousand nor more than two hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(b) Any person who trafficks in a controlled substance defined in clause (4) of paragraph (a), clause (2) of paragraph (c) or in clause (3) of paragraph (c) of Class B of section thirty-one by knowingly or intentionally manufacturing, distributing or dispensing or possessing with intent to manufacture, distribute or dispense or by bringing into the commonwealth a net weight of 18 grams or more of a controlled substance as so defined, or a net weight of 18 grams or more of any mixture containing a controlled substance as so defined shall, if the net weight of a controlled substance as so defined, or any mixture thereof is:

(1) Eighteen grams or more but less than 36 grams, be punished by a term of imprisonment in the state prison for not less than 2 nor more than 15 years. No sentence imposed under this clause shall be for less than a minimum term of imprisonment of 2 years, and a fine of not less $2,500 nor more than $25,000 may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(2) Thirty-six grams or more, but less than 100 grams, be punished by a term of imprisonment in the state prison for not less than 31/2 nor more than 20 years. No sentence imposed under this clause shall be for less than a mandatory minimum term of imprisonment of 31/2 years, and a fine of not less than $5,000 nor

more than $50,000 may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(3) One hundred grams or more, but less than two hundred grams, be punished by a term of imprisonment in the state prison for not less than 8 nor more than twenty years. No sentence imposed under the provisions of this clause shall be for less than a mandatory minimum term of imprisonment of 8 years and a fine of not less than ten thousand nor more than one hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(4) Two hundred grams or more, be punished by a term of imprisonment in the state prison for not less than 12 nor more than twenty years. No sentence imposed under the provisions of this clause shall be for less than a mandatory minimum term of imprisonment of 12 years and a fine of not less than fifty thousand nor more than five hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(c) Any person who trafficks in heroin or any salt thereof, morphine or any salt thereof, opium or any derivative thereof by knowingly or intentionally manufacturing, distributing or dispensing or possessing with intent to manufacture, distribute, or dispense or by bringing into the commonwealth a net weight of 18 grams or more of heroin or any salt thereof, morphine or any salt thereof, opium or any derivative thereof or a net weight of 18 grams or more of any mixture containing heroin or any salt thereof, morphine or any salt thereof, opium or any derivative thereof shall, if the net weight of heroin or any salt thereof, morphine or any salt thereof, opium or any derivative thereof or any mixture thereof is:--

(1) Eighteen grams or more but less than 36 grams, be punished by a term of imprisonment in the state prison for not less than 31/2 nor more than 30 years. No sentence imposed under this clause shall be for less than a mandatory minimum term of imprisonment of

31/2 years, and a fine of not less than $5,000 nor more than $50,000 may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(2) Thirty-six grams or more but less than 100 grams, be punished by a term of imprisonment in the state prison for not less than 5 nor more than 30 years. No sentence imposed under this clause shall be for less than a mandatory minimum term of imprisonment of 5 years, and a fine of not less than $5,000 nor more than $50,000 may be imposed, but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(3) One hundred grams or more but less than two hundred grams, be punished by a term of imprisonment in the state prison for not less than 8 nor more than 30 years. No sentence imposed under the provisions of this clause shall be for less than the mandatory minimum term of imprisonment of 8 years, and a fine of not less than ten thousand nor more than one hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established therein.

(4) Two hundred grams or more, be punished by a term of imprisonment in the state prison for not less than 12 nor more than 30 years. No sentence imposed under the provisions of this clause shall be for less than a mandatory minimum term of imprisonment of 12 years and a fine of not less than fifty thousand nor more than five hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established therein.

[Subsection (c1/2) inserted by 2015, 136 effective February 22, 2016.]

(c1/2) Any person who trafficks in fentanyl, by knowingly or intentionally manufacturing, distributing, dispensing or possessing with intent to manufacture, distribute or dispense or by bringing into the commonwealth a net weight of more than 10 grams of fentanyl shall be punished by a term of

imprisonment in state prison for not more than 20 years.

For purposes of this subsection, "fentanyl'' shall include any derivative of fentanyl and any mixture containing more than 10 grams of fentanyl or a derivative of fentanyl.

(d) Any person serving a mandatory minimum sentence for violating this section shall be eligible for parole after serving one-half of the maximum term of the sentence if the sentence is to the house of correction, except that such person shall not be eligible for parole upon a finding of any 1 of the following aggravating circumstances:

(i) the defendant used violence or threats of violence or possessed a firearm, rifle, shotgun, machine gun or a weapon described in paragraph (b) of section 10 of chapter 269, or induced another participant to do so, during the commission of the offense;

(ii) the defendant engaged in a course of conduct whereby he directed the activities of another others who committed any felony in violation of chapter 94C; or

(iii) the offense was committed during the commission or attempted commission of a violation of section 32F or section 32K of chapter 94C.

A condition of such parole may be enhanced supervision; provided, however, that such enhanced supervision may, at the discretion of the parole board, include, but shall not be limited to, the wearing of a global positioning satellite tracking device or any comparable device, which shall be administered by the board at all times for the length of the parole.

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k).

/s/ Cailin M. Campbell
Cailin M. Campbell
Assistant District Attorney

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COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

_____

COMMONWEALTH OF MASSACHUSETTS,
Appellee

V.

JUAN C. RODRIGUEZ,
Defendant-Appellant

_____

COMMONWEALTH'S BRIEF AND RECORD APPENDIX ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

_____

SUFFOLK COUNTY