COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

APPEALS COURT NO. 2016-P-1569

COMMONWEALTH

v.

JUAN CARLOS RODRIGUEZ

BRIEF AND RECORD APPENDIX FOR THE DEFENDANT ON APPEAL FROM THE SUFFOLK SUPERIOR COURT

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STATEMENT OF THE CASE

A Suffolk County grand jury indicted the defendant, Juan Carlos Rodriguez, and a co-defendant, Leydi Pimental, for trafficking in over 100 grams of heroin in a school zone.[1] (R. 1-4). On the eve of trial, the cases were severed and the Commonwealth dismissed the school zone charge against the defendant. (R. 15, 18). A jury trial was held over the course of three days. (R. 15-16). The jury found the defendant guilty of trafficking in over 100 grams of heroin. (R. 16). The judge sentenced the defendant to

[1] Reference to the record appendix will be cited by page number as (R. _).

eight years in state prison. (R. 16). The defendant filed a timely notice of appeal. (R. 19).

STATEMENT OF FACTS

The following facts are taken from the witness testimony and documentary evidence introduced at trial.

A. The Execution of the Search Warrants.

On April 27, 2009, a squad of police officers went to the D Street Housing Development in South Boston to execute three search warrants.[2] (Tr. II/106-108). The warrants were for the defendant's apartment, the defendant's person, and a Toyota Camry operated by the defendant. (Tr. II/106). When the officers arrived at the housing development, they observed the defendant driving the Toyota Camry. (Tr. II/108). He drove to a building in the housing development where tenants receive their mail and went inside. (Tr. II/108). An officer approached the defendant as he exited this building and informed him about the search warrants. (Tr. II/108). After detaining the defendant, the officers searched the Camry and seized a set of keys. (Tr. II/110). The officers proceeded to the

[2] The trial transcript will be cited by volume and page as (Tr. _/_).

defendant's apartment and used one of the keys found in the car to open the front door. (Tr. II/112).

The apartment consisted of a living room, a kitchen, a bathroom, and two bedrooms. (Tr. II/114). One of the bedrooms was locked and the officers used the set of seized keys to open the door. (Tr. II/115-116). Once inside, the officers searched throughout the bedroom. (Tr. II/115-116). They found a box of plastic sandwich bags and a shoebox in the closet. (Tr. II/118, 121). Inside the shoebox was a pair of shoes, a digital scale, and a small pouch containing nine individually wrapped bags of a substance believed to be heroin. (Tr. II/118-123). The officers also found personal papers of the defendant throughout the bedroom and $13,270 in cash in a men's suit in the closet. (Tr. II/127-130).

After completing their search of the bedroom, the officers returned to the living room where the defendant was detained. (Tr. II/131-132). One of the officers escorted the defendant to the bathroom and conducted a search of his person. (Tr. II/132). The officer recovered two additional packages of a substance believed to be heroin from the defendant's groin area. (Tr. II/132). These two packages were

consistent with the nine other packages located in the shoebox. (Tr. II/137). The defendant was subsequently placed under arrest. (Tr. II/147).

B. The Field Test.

An officer used an item called a "NarcoPouch" to field test the packages once they were taken into custody. (Tr. II/138-139). The NarcoPouch is a rubber pouch that contains three glass vials filled with a chemical compound. (Tr. II/141). To test a substance, one must open the pouch, insert a small amount of the substance, reseal the pouch, and then break open the vials inside the pouch. (Tr. II/139-142). If done correctly, the liquid inside the vials should leak out, interact with the substance, and turn a particular color. (Tr. II/141-142). The color indicates the nature of the substance. (Tr. II/142). In the instant case, the liquid turned green after interacting with the substance. (Tr. II/142). This color indicated the presence of heroin. (Tr. II/142).

C. The Lab Testing.

The eleven packages were sent to the Hinton Drug Laboratory for further testing. (Tr. III/8-9). The testing at the lab involved two steps: a primary test and a confirmatory test. (Tr. III/9-10). Primary

testing involved a process similar to the field-testing described above. (Tr. III/42-43). To start, the primary chemist would pour four different chemical compounds into separate wells on a ceramic plate. (Tr. III/42-43). The chemist would put a small amount of the substance to be tested into each one of these compounds. (Tr. III/43). The chemist would then watch for any color changes in the compounds. (Tr. III/43). If all went according to plan, the chemist would be able to determine the nature of the substance based on the color changes in the compounds. (Tr. III/43). Once the primary chemist reached a conclusion about the nature of the substance, she would pass a sample of the substance on to the confirmatory chemist along with a preliminary finding. (Tr. III/10). The confirmatory chemist would then take the sample and examine it using a machine called a mass spectrometer. (Tr. III/10). Using this device, the confirmatory chemist could study the molecular makeup of the substance and match it to the molecular makeup of a known narcotic. (Tr. III/10).

A chemist named Annie Dookhan performed the primary testing on the substance in the instant case. (Tr. III/11). Another chemist named Della Saunders

conducted the confirmatory testing. (Tr. III/9). At the end of the process, Dookhan and Saunders certified that both the substance found in the shoebox and the substance found on the defendant's person contained heroin. (Tr. III/14) (R. 21-22). They also certified that the nine bags recovered from the shoebox weighed 91.08 grams and that the two bags recovered from the defendant weighed 20.09 grams. (R. 21-22).

D. Dookhan's Criminal Misconduct.

After the aforementioned testing was complete, the State Police investigated Dookhan for criminal misconduct that took place at the lab. (Tr. III/102). During a police interview, Dookhan admitted that she only tested one out of every five substances when working as the primary chemist. (Tr. III/121). With respect to the untested substances, she would fabricate her findings so that they matched whatever the submitting police department believed the substance to be and then send the substance for confirmatory testing. (Tr. III/124). If the confirmatory chemist found the substance to be something different, they would return it to Dookhan. (Tr. III/123-124, 129-130). Dookhan would then add part of a known substance to the sample to ensure that

it matched her initial finding and send it back to the confirmatory chemist. (Tr. III/122, 129-130). As a result of the State Police's investigation, Dookhan was indicted on seventeen counts of obstruction of justice, eight counts of tampering with evidence, one count of perjury, and one count of falsely claiming to hold a degree.[3] (R. 25). She pleaded guilty to all of the indictments. (R. 25). In doing so, she admitted to tampering with samples as described above, falsely testifying about her qualifications, and forging the initials of an evidence officer. (R. 31-35).

After Dookhan's criminal misconduct came to light, the substance in the instant case was sent to a different laboratory for retesting. (Tr. III/82). A chemist at this lab tested the substance in a multi-step process. (Tr. III/74-76, 84). As a result of her testing, she concluded that the substance contained heroin and that the packages collectively weighed 110.64 grams. (Tr. III/84, 88, 93).

E. The Trial.

The main issue at trial was the chemical makeup of the substance. (Tr. II/99-102). Defense counsel

[3] A copy of the transcript of Dookhan's plea colloquy was admitted into evidence. (Tr. III/5). It is included in the record appendix as well. (R. 23-46).

argued that the Commonwealth could not meet its burden in proving that the substance was heroin because of Dookhan's involvement in the testing. (Tr. II/99-102). The Commonwealth sought to introduce the positive result of the NarcoPouch field test to combat any uncertainty raised by Dookhan's involvement. (Tr. II/138-154). Defense counsel filed a pretrial motion in limine to preclude the Commonwealth from introducing this evidence. (R. 19). Counsel argued that the field test evidence did not meet the standard of scientific reliability required by *Commonwealth v. Lanigan*, 419 Mass. 15 (1994), and requested a hearing on this point. (R. 19). The judge denied the defendant's motion and informed the prosecutor that the "only thing" she needed to do in order to introduce the field test evidence was to "provide an adequate foundation that the field tester is qualified to [conduct such a test]." (Tr. II/18). The Commonwealth introduced the field test evidence over defense counsel's vehement objection. (Tr. II/18-23, 125, 138-142).

The defendant's primary witness was Captain Robert Irwin of the State Police. (Tr. III/101). He headed the investigation into Dookhan's misconduct.

(Tr. III/102). Captain Irwin primarily testified about his interview of Dookhan. (Tr. III/103). During this interview, Dookhan described how she went about contaminating samples. (Tr. III/120-124). Though Dookhan's statements were hearsay, they were admissible as statements against her penal interest. (Tr. III/116). The defendant also sought to introduce evidence that Dookhan had a key to the evidence safe at the lab. (Tr. II/7, 9-13; Tr. III/97, 118). During the course of his investigation, Captain Irwin discovered that Dookhan's key worked on the door to the evidence safe by testing the key himself.[4] (R. 60). The Commonwealth argued that this discovery was inadmissible because it was not against Dookhan's penal interest. (Tr. III/118-120). The judge agreed and prohibited the defendant from asking Captain Irwin about Dookhan's key. (Tr. III/120). The defendant objected to the judge's ruling and nevertheless asked Captain Irwin about his investigation into the key. (Tr. III/130-131). The Commonwealth objected and the judge sustained the objection. (Tr. III/130-131).

[4] Captain Irwin's reports were offered as proof of his investigation into Dookhan's key. (Tr. III/117). Copies of these reports are included in the record appendix. (R. 47-60).

At the close of his case, the defendant attempted to introduce the indictments to which Dookhan pleaded guilty. (Tr. III/182-183). The defendant asserted that the indictments were relevant because they contained more specific information about the time frame of Dookhan's misconduct. (Tr. III/183). The Commonwealth objected and the judge sustained the objection. (Tr. III/183). The judge reasoned that it would not be fair to present the indictments as evidence of Dookhan's criminal misconduct because the Commonwealth could not use the indictments against the defendant as evidence of his criminal misconduct. (Tr. III/183). Defense counsel pointed out that the two situations were different because Dookhan had pleaded guilty to the indictments against her. (Tr. III/183). The judge dismissed counsel's argument and stated, "[W]hat's sauce for the goose is sauce for the gander." (Tr. III/183). The defendant objected to the judge's ruling. (Tr. III/183).

The jury found the defendant guilty at the end of the trial. (Tr. IV/54).

SUMMARY OF THE ARGUMENT

The judge should have held a *Daubert-Lanigan* hearing prior to allowing the Commonwealth to

introduce the result of the Narcopouch field test. The defendant filed a pretrial motion challenging the reliability of the test and requested a hearing on this subject. The judge nevertheless ruled that the Commonwealth simply had to prove that the officer who conducted the test was qualified to do so in order for the test to be admissible. The admission of the test result was prejudicial because it was the only evidence that the substance contained heroin prior to Dookhan's involvement. (Br. 13-22).

The judge alternatively should have excluded the field test evidence because of the Commonwealth's lack of notice. The Commonwealth only notified the defendant that it intended to introduce the field test evidence a few days prior to trial. The defendant objected to the lack of notice, but the judge incorrectly ruled that the defendant had sufficient notice because the field test evidence had been introduced in front of the grand jury. The Commonwealth's lack of notice prejudiced the defendant because it deprived him of an opportunity to retain an expert to challenge the reliability of the field test evidence. (Br. 22-25).

The judge should not have restricted the defendant from introducing (1) evidence about Dookhan's access to the evidence safe at the lab and (2) the indictments to which Dookhan already pleaded guilty. The judge prohibited the defendant from asking Captain Irwin about his investigation into Dookhan's key to the evidence safe because she incorrectly believed that his testimony would involve out-of-court statements made by Dookhan. With respect to the indictments, the defendant sought to introduce them to prove the timeframe of Dookhan's misconduct. The judge denied this request because she believed it would be unfair to Dookhan. These errors deprived the defendant of important contextual evidence regarding Dookhan's misconduct. (Br. 25-33).

The judge failed to respond appropriately after the defendant claimed that the prosecutor exercised a racially motivated peremptory challenge. The defendant made this claim after the prosecutor used a challenge on the only Hispanic juror in the voir dire. Instead of asking the prosecutor for a race-neutral explanation, the judge ruled that the defendant failed to make a prima facie showing of discrimination because no jurors had been seated on the jury yet.

This error robbed the defendant of his ability to guarantee that jury selection was free from racial bias. (Br. 34-39).

ARGUMENT

I. THE DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE THE JUDGE INCORRECTLY DENIED THE DEFENDANT'S REQUEST FOR A *DAUBERT-LANIGAN* HEARING WITH RESPECT TO THE FIELD TEST EVIDENCE.

The defendant's conviction must be overturned because the judge incorrectly allowed the Commonwealth to introduce the result of the NarcoPouch field test without having to establish its scientific reliability. The defendant followed all of the necessary procedures for challenging the reliability of scientific evidence and therefore the judge should have held a *Daubert-Lanigan* hearing prior to allowing the Commonwealth to introduce the result of the field test. Instead, the judge denied the defendant's challenge and ruled that the Commonwealth could introduce the field test evidence without having to establish its reliability. This error was prejudicial because it relieved the Commonwealth of having to prove the foundational requirements for scientific evidence and deprived the defendant of any ability to challenge the admissibility of the field test.

A. The Judge Should Have Required The Commonwealth To Prove The Scientific Reliability Of The Field Test Evidence.

When a party seeks to have an expert witness testify about scientific evidence, the "ultimate test" for admissibility is "the reliability of the theory or process underlying the expert's testimony." *Commonwealth v. Lanigan*, 419 Mass. 15, 24 (1994). The test for reliability can be satisfied "by [1] showing that the underlying scientific theory is generally accepted within the relevant scientific community, or [2] by showing that the theory is reliable or valid through other means." *Commonwealth v. Sands*, 424 Mass. 184, 185-186 (1997). To raise the issue of reliability, the party opposing the admission of scientific evidence must "file an appropriate pretrial motion stating the grounds for the objections and request a hearing in accordance with the principles set forth in *Canavan's Case*, 432 Mass. 304, 309-312 (2000), and *Commonwealth v. Lanigan*, 419 Mass. 15, 24-27 (1994)." *Commonwealth v. Sparks*, 433 Mass. 654, 659 (2001).

In the instant case, defense counsel filed a pretrial motion challenging the scientific reliability of the NarcoPouch field test. (R. 20). He specifically

asserted that the test "did not met the *Daubert-Lanigan* standard" and requested a hearing on this issue. (R. 20). The judge denied the defendant's motion and ruled that, instead of having to prove the scientific reliability of the field test, the Commonwealth simply had to prove that the witness was qualified to conduct a field test. (Tr. II/18).

The judge's decision to forgo a *Daubert-Lanigan* analysis has no support in the law. Neither the SJC nor the Appeals Court have ever employed a lowered standard of admissibility when dealing with field tests. In fact, the SJC has explicitly recognized that the reliability (and thus the admissibility) of field tests "must be evaluated according to one of the methods approved in *Lanigan.*" *Commonwealth v. Fernandez*, 458 Mass. 137, 151 n.20 (2010). Neither method was employed here. The judge did not consider whether field tests are generally accepted as reliable nor did she require the Commonwealth to otherwise prove their reliability. Furthermore, this was not a situation in which the judge could have foregone a *Daubert-Lanigan* analysis based on similar expert testimony having "been accepted as reliable in the past in Massachusetts appellate cases." *Commonwealth*

v. Shanley, 455 Mass. 752, 763 n.15 (2010). "[T]o date, no appellate case from Massachusetts has accepted as reliable field test results, regardless of the purpose for which they are offered." *Fernandez*, 458 Mass. at 151 n.20. See also *State v. Martinez*, 69 A.3d 975, 990-991 (Conn. App. 2013) (rejecting trial court's conclusion that the reliability of field tests is well established).

The judge's confusion about the admissibility of field test evidence appears to stem from a line of cases analyzing the prejudicial impact of a *Melendez-Diaz* error. In these cases, the question was whether evidence of a positive field test rendered the erroneous admission of a drug certificate harmless beyond a reasonable doubt. *Commonwealth v. Marte*, 84 Mass. App. Ct. 136, 140-142 (2013); *Commonwealth v. King*, 461 Mass. 354, 358-359 (2012); *Commonwealth v. Billings*, 461 Mass. 362, 364-365 (2012); *Commonwealth v. Sullivan*, 76 Mass. App. Ct. 864, 874-875 (2010). In answering this question, the courts recognized that the weight of a field test depends on the introduction of "background foundational evidence." *Marte*, 84 Mass. App. Ct. at 141. This foundational evidence includes "the experience of the officer conducting the test",

"the methodology of the testing", and "whether the testing officer had received training in drug investigations, particularly in field testing drugs." *Id.* at 141-142. If there is no such foundational evidence, "the field test yields no real offset to the constitutional error in the admission of the drug certificate of analysis." *Id.* at 141. Compare *King*, 461 Mass. at 359 (result of field test held little weight where no evidence that testing officer was trained to conduct such a test), with *Sullivan*, 76 Mass. App. Ct. at 874 (field test held significant weight where officer testified that he had been trained, tested, and certified to conduct field tests).

It appears the judge drew from these cases when she ruled that, to introduce the field test evidence, the Commonwealth only had "to provide an adequate foundation" about the field tester's qualifications. (Tr. II/18). The judge substituted the test for weighing the probative value of a field test in place of a proper *Daubert-Lanigan* analysis. The reliability of scientific evidence, whether it be a field test or some other process, cannot be established simply by proving the expert witness's qualifications. As noted

above, scientific reliability can only be proven "by establishing general acceptance in the scientific community or by showing that the evidence is reliable or valid through an alternate means." *Commonwealth v. Dicicco*, 470 Mass. 720, 729 (2015), quoting *Canavan's Case*, 432 Mass. at 310. The judge failed to apply this burden here and, as a result, the Commonwealth was allowed to introduce the field test evidence without having to first establish its reliability.

B. The Instant Case Is Easily Distinguishable From *Commonwealth v. Fernandez*, 458 Mass. 137 (2010).

Before addressing the prejudicial impact of the judge's error, the instant case must be distinguished from the situation in *Commonwealth v. Fernandez*, 458 Mass. 137 (2010). In *Fernandez*, the defendant "first argued for the necessity of a *Lanigan* hearing on the initial day of trial." *Id.* at 147. The judge "declined to hold a full evidentiary hearing to determine if the field tests, as offered, were reliable", but "did require the Commonwealth to provide 'some foundation' establishing the field tests' reliability before the presentation of the field test evidence to the jury." *Id.* at 148. In response, the Commonwealth introduced an appellate case and a regulation from New York that

discussed "the general acceptance of field tests (of the same brand used in the defendant's case) for obtaining presumptive results." *Id.* Based on these submissions, the judge concluded that the field tests were "sufficiently reliable" to be admitted. *Id.* On appeal, the defendant argued that the judge failed to conduct a proper *Daubert-Lanigan* analysis prior to admitting the field tests. *Id.* The SJC disagreed and held that the judge's abbreviated analysis was sufficient because the defendant waited "until the day of the trial to raise the issue." *Id.*

The situation here is like *Fernandez* in that the defendant filed his challenge to the field test evidence on the eve of trial. Despite this similarity, the instant case can easily be distinguished from *Fernandez*. The most significant difference is the lack of notice from the Commonwealth in the instant case. Unlike the situation in *Fernandez*, the Commonwealth only notified the defendant of its intent to introduce the field test evidence a few days before the trial was to begin. (Tr. II/21). In fact, the defendant alternatively moved to exclude the evidence based on

the Commonwealth's lack of notice.[5] (Tr. II/19-21). The defendant cannot be faulted for filing his *Daubert-Lanigan* challenge on the eve of trial when he only had a few days notice of the Commonwealth's intent to introduce the field test evidence. Furthermore, even if the defendant could be faulted for the timing of his challenge, the judge's response here did not match the response of the judge in *Fernandez*. The judge in *Fernandez* still applied a limited *Daubert-Lanigan* analysis prior to admitting the field test evidence. The judge here did no such thing. She never considered the reliability of the field test evidence and instead ruled that its admissibility depended solely on the qualifications of the officer who performed the tests.

C. The Field Test Evidence Was Critically Important To The Commonwealth's Case And Therefore Its Improper Admission Prejudiced The Defendant.

The defendant objected to the admission of the field test evidence and therefore the defendant is entitled to a new trial unless the Court can say that this evidence "did not influence the jury, or had but very slight effect." *Commonwealth v. Cruz*, 445 Mass. 589, 591 (2005), quoting *Commonwealth v. Flebotte*, 417

[5] The defendant's argument with respect to lack of notice is addressed in section II of this brief.

Mass. 348, 353 (1994). It is impossible to reach such a conclusion here. The field test evidence was critically important to the Commonwealth's case because it showed that the seized substance contained heroin before it was sent to Annie Dookhan. The defendant based his defense on the possibility that Dookhan may have contaminated the substance by adding heroin into it during the testing process at the lab. This possibility was supported by Dookhan's own admissions and therefore could have raised a reasonable doubt in the minds of the jurors. However, the field test evidence seriously undermined the likelihood of this having occurred, as it showed that the substance contained heroin before Dookhan became involved. Of course, Dookhan would have only contaminated the substance with heroin if it did not contain heroin in the first place. The field test evidence also strongly corroborated the result of the retesting that occurred after Dookhan's misconduct came to light. The retesting was irrelevant if Dookhan had already contaminated the substance. The field test evidence suggested that Dookhan did not contaminate the substance and thus imbued the retesting with significant probative value.

The prosecutor clearly recognized the significance of the field test evidence, as she relied upon it in both her opening and closing arguments. (Tr. II/96-97; Tr. IV/12-14). In her closing, the prosecutor repeatedly emphasized that the field test evidence established that the substance "was heroin on that day and it is heroin today." (Tr. II/96-97). This emphasis magnified the prejudicial impact of the field test evidence. Compare *Commonwealth v. Francis*, 432 Mass. 353, 365 (2000) (noting prosecutor's lack of reference to improperly admitted evidence in closing argument, in finding that error did not warrant new trial), with *Flebotte*, 417 Mass. at 353 (finding prejudicial error in part because prosecutor relied on improperly admitted evidence in closing argument). Looking at the evidence as a whole, it is impossible to conclude that the field test evidence had no influence on the jury.

II. THE COMMONWEALTH FAILED TO PROPERLY NOTIFY THE DEFENDANT THAT IT INTENDED TO INTRODUCE THE FIELD TEST EVIDENCE AT TRIAL.

The defendant also objected to the admission of the field test evidence based on lack of notice from the Commonwealth. (Tr. II/19). Defense counsel asserted that he only received notice that the

Commonwealth intended to introduce the field test evidence a few days prior to the trial date. (Tr. II/21). Counsel further claimed that he would have retained his own expert if he had known that the Commonwealth intended to offer the field test evidence. (Tr. II/21). The judge overruled counsel's objection and ruled that the defendant had adequate notice because the field test evidence had been introduced in front of the grand jury. (Tr. II/18-22).

Contrary to the judge's rationale, the inclusion of the field test evidence in the grand jury minutes was not sufficient notice of the Commonwealth's intent to introduce this evidence at trial. The Rules of Criminal Procedure require "an automatic exchange of discovery regarding intended expert opinion evidence." *Commonwealth v. Paiva*, 71 Mass. App. Ct. 411, 414 (2008), citing Mass. R. Crim. P. 14(a)(1)(A)(vi). None of the Commonwealth's notices of discovery referred to the field test evidence or suggested an intent to call the officer who performed the field test as an expert witness. In comparison, the Commonwealth specifically informed the defendant of the Commonwealth's intent to call expert witnesses to testify about (1) the retesting and (2) the nature of the drug trade. (R.

61-62). Considering the above, the defendant had no reason to believe that the Commonwealth intended to introduce the field test evidence.

The judge seemed to believe that the police officer who performed the field test was not otherwise involved in the case and that therefore the listing of this officer on the Commonwealth's list of witnesses was sufficient to notify the defendant about the Commonwealth's intent to introduce the field test evidence. (Tr. II/19-22). However, the judge's assumption was incorrect. The officer who performed the field test was the same officer who led the search of the defendant's apartment and thus his inclusion on the Commonwealth's witness list did not inherently suggest that the Commonwealth intended to introduce the field test evidence. The prosecutor informed the judge that her assumption was incorrect, but the judge refused to reconsider her ruling. (Tr. II/22-23).

Like her failure to hold a *Daubert-Lanigan* hearing, the judge's decision to excuse the Commonwealth's late notice prejudiced the defendant. As noted above, the field test evidence was critical to the Commonwealth's case because it showed that the substance was heroin before Dookhan became involved.

The lack of notice was particularly prejudicial because it prevented the defendant from retaining his own expert witness to poke holes in the reliability of the field test. Such an expert would not be difficult to locate, as forensic scientists have highlighted the questionable reliability of field tests like the Narcopouch. See *Martinez*, 69 A.3d at 990 ("[T]he leading treatises on scientific evidence offer no clear consensus on the reliability of field tests"). A. Harris, *A Test of a Different Color: The Limited Value of Presumptive Field Drug Tests and Why That Value Demands Their Exclusion From Trial*, 40 Sw. L. Rev. 531, 540-544 (2011) (describing how experts in the field of forensics have criticized the reliability of field tests). Even in the absence of a *Daubert-Lanigan* hearing, an expert witness could have been utilized to challenge the reliability of the field test evidence at trial. In sum, if the defendant had adequate notice of the Commonwealth's intent to introduce the field test evidence (or if the judge had properly excluded the evidence), the outcome of the trial may have been different.

III. THE JUDGE IMPROPERLY EXCLUDED EVIDENCE THAT WOULD HAVE PROVEN THE TIME FRAME OF DOOKHAN'S MISCONDUCT AND ESTABLISHED THAT SHE HAD ACCESS TO THE EVIDENCE SAFE.

While the judge was lenient when allowing the field test evidence, she took the opposite approach when the defendant sought to flesh out the details of Dookhan's misconduct at the lab. She refused to allow the defendant to introduce testimony indicating that Dookhan had a key to the evidence safe at the lab and denied the defendant's request to introduce the indictments of Dookhan. (Tr. III/118-121, 182-183). These limitations deprived the defendant of a fair opportunity to present his defense, as the excluded evidence provided valuable information about how Dookhan went about contaminating samples and the timing of her misconduct.

A. Captain Irwin Investigated Dookhan's Key Himself And Thus No Hearsay Exception Was Required For His Testimony.

Captain Irwin conducted his own investigation into whether Dookhan had a key to the evidence safe. (R. 58-60). He obtained Dookhan's key and tried it on the lock that was on the door to the evidence safe. (R. 60). The key opened the door. (R. 60). Captain Irwin subsequently secured the key and the lock in the

State Police evidence locker at the Attorney General's Office. (R. 60).

At the defendant's trial, defense counsel sought to question Captain Irwin about his investigation into Dookhan's key. (Tr. III/97, 130-131). Before defense counsel could inquire of Captain Irwin, an Assistant Attorney General (AAG) who had unsuccessfully moved to quash the subpoena against Captain Irwin, interjected and questioned how the evidence about the key was admissible as a statement against Dookhan's penal interest. (Tr. III/118). The judge considered the AAG's argument and concluded that the evidence about Dookhan's key was inadmissible because it was not a crime to possess a key to the evidence safe. (Tr. III/119-120).

In so ruling, the judge failed to realize that the evidence about Dookhan's key was not hearsay and thus did not need to fall into an exception to the hearsay rule. Captain Irwin discovered that Dookhan's key opened the lock on the evidence safe as a result of his own first-hand investigation. (R. 60). He tested the key on the lock himself. (R. 60). Thus, he could testify about Dookhan's key based on his own personal knowledge without resorting to out-of-court

statements. See *Commonwealth v. Silanskas*, 433 Mass 678, 693 (2001) ("Hearsay is an out-of-court statement offered to prove the truth of the matter asserted"). It appears that the judge and the AAG both believed that the evidence about the key was going to be introduced through an out-of-court statement made by Dookhan. This false assumption led to a ridiculous situation in which non-hearsay evidence was prohibited because it did not qualify under a hearsay exception. Of course, evidence must actually be hearsay before a hearsay exception need apply.

The judge's erroneous restriction on Captain Irwin's testimony is particularly troubling when one considers that it came about as a result of the AAG's suggestion. (Tr. III/118). The Attorney General's Office was the entity responsible for investigating and prosecuting Dookhan. The AAG therefore should have known that Captain Irwin tested Dookhan's key on the evidence safe himself. Instead, the AAG interjected into a criminal prosecution to which his office was not a party and confused the judge about the evidence that defense counsel sought to introduce. As a result, the judge misunderstood the evidence and incorrectly prohibited it as hearsay. The AAG should have

refrained from interfering in the trial once his motion to quash the subpoena against Captain Irwin was denied. (Tr. II/8-10). The AAG's interference, which defense counsel objected to, prompted the judge to issue an erroneous ruling against the defendant. (Tr. III/119). While the ruling itself is the actual error, the AAG's role in the creation of this error cannot be ignored.

B. The Judge Had No Reason To Exclude The Indictments Against Dookhan, As They Were Probative Of The Time Frame Of Dookhan's Misconduct And She Had Already Pleaded Guilty.

Defense counsel also sought to introduce copies of the indictments to which Dookhan pleaded guilty. (Tr III/182-183). Counsel sought to introduce the indictments because they established that Dookhan was engaged in misconduct from at least 2009 to 2012. (R. 63-76). Dookhan tested the substance at issue here in 2009. (R. 21-22). If the indictments had been admitted, they would have supported the defendant's theory that Dookhan may have tampered with the substance.

Though the indictments were clearly relevant to the defendant's theory, the judge nevertheless excluded them. (Tr. III/183). She reasoned that it

would be unfair to Dookhan to allow the jury to consider the indictments against her as evidence of her misconduct when the jury could not consider the indictments against the defendant as evidence of his crimes. (Tr. III/183). In response, defense counsel pointed out that the indictments against Dookhan should be treated differently because she pleaded guilty to the allegations contained therein. (Tr. III/183). Despite this fairly obvious distinction, the judge reasoned that counsel could get the same information from Dookhan's plea colloquy and concluded that, "[W]hat's sauce for the goose is sauce for the gander." (Tr. III/183).

The judge's ruling has no basis in logic or fact. It is well established that "the finding of an indictment by the grand jury is not to be regarded as a circumstance tending to criminate the defendant." *Commonwealth v. Boyd*, 367 Mass. 169, 188 (1975), quoting *Commonwealth v. DeFrancesco*, 248 Mass. 9, 13 (1924). However, the same principle does not apply once the defendant has pleaded guilty to the indictment. At that point, the defendant has admitted the allegations in the indictment and thus the indictment itself can be used as evidence of the

defendant's criminal activity. In the instant case, Dookhan had already pleaded guilty to the indictments that counsel sought to introduce. Thus, despite the judge's concern, it would not have been unfair to Dookhan if counsel were permitted to introduce the indictments to prove the specifics of her criminal conduct. The judge's concern for protecting Dookhan is also puzzling because it was the defendant, not Dookhan, who was on trial. The judge should have been more concerned with protecting the defendant's right to present a full defense than she was about protecting the rights of a person who had already pleaded guilty to the allegations against her.

The judge also asserted that the indictments were not necessary because the information about the time frame of Dookhan's misconduct was already introduced through the plea colloquy. (Tr. III/183). This assertion was simply inaccurate. The facts recited at the colloquy failed to specify the time frame of Dookhan's misconduct. (R. 31-35). In contrast, the indictments provided specific dates for Dookhan's misconduct. Defense counsel was wise to attempt to establish the time frame of Dookhan's misconduct through the indictments. Unfortunately, the judge's

misguided reasoning prevented the defendant from introducing these important pieces of documentary evidence.

C. The Judge's Decision To Exclude The Evidence About Dookhan's Key And The Indictments Weakened The Defendant's Case.

Because the defendant objected to the judge's rulings in each instance, his conviction can only be affirmed if the Court is "convinced" that the errors "did not influence" the jury's verdict. *Commonwealth v. Hatzigiannis*, 88 Mass. App. Ct. 395, 401 (2015), quoting *Flebotte*, 417 Mass. at 353. It is impossible to reach such a conclusion here. Like the improper introduction of the field test evidence, the improper exclusion of the evidence related to Dookhan significantly hampered the defendant's case. The evidence about Dookhan's key would have explained how she was able to access known substances for purposes of contamination. The jury knew that Dookhan mixed known substances with untested substances in order to cover up the fact that she was not performing the required testing as the primary chemist, yet they did know how she went about acquiring the known substances. The evidence about Dookhan's key would have answered this question. It also would have

demonstrated just how easy it was for Dookhan to access the known substances. See Mass. G. Evid. § 404(b)(2) (evidence admissible to show opportunity to commit crime).

The exclusion of the indictments was prejudicial because it deprived the defendant of the best evidence regarding the time frame of Dookhan's misconduct. The indictments would have established that Dookhan was engaged in misconduct as early as 2009, at around the same time that she tested the substance recovered from the defendant. (R. 21-22). The indictments therefore would have provided a strong temporal link between Dookhan's misconduct and the testing at issue in the defendant's case. Though the judge asserted that this same temporal link was established through the plea colloquy, this assertion was inaccurate. As noted above, the plea colloquy failed to establish a time frame for Dookhan's misconduct. In fact, the only instance of misconduct that was identified by date at the colloquy was from 2011. (R. 31). The jury may therefore have had doubts about whether Dookhan was engaged in misconduct as early as 2009. The indictments would have eliminated any such doubts.

In sum, the judge abused her discretion in excluding the aforementioned evidence. The judge made two "clear error[s] of judgment" when she (1) decided to exclude Captain Irwin's testimony about Dookhan's key as hearsay, and (2) decided to exclude the indictments against Dookhan even though she had already pleaded guilty to them. *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27 (2014). If not for these errors, the outcome of the trial may have been different. Reversal of the defendant's conviction is therefore required.

IV. THE TRIAL JUDGE ABUSED HER DISCRETION BY FAILING TO REQUIRE THE PROSECUTOR TO PROVIDE A RACE-NEUTRAL EXPLANATION AFTER SHE USED A PEREMPTORY CHALLENGE ON THE ONLY HISPANIC JUROR IN THE VENIRE.

The final error stems from the process of jury selection. During jury selection, the prosecutor used a peremptory challenge on a Hispanic juror from the Dominican Republic. (Tr. I/118). Defense counsel claimed that the challenge was racially motivated and noted that the juror appeared to be the only Hispanic juror in the venire. (Tr. I/118-120). The judge ruled that the defendant had failed to make a prima facie case of discrimination and thus did not require the prosecutor to provide a race-neutral reason for

challenging the juror. (Tr. I/120-121). The judge reasoned that the defendant could not prove a pattern of racial bias because no jurors had been seated yet. (Tr. I/119-120). In these circumstances, the judge should have required the prosecutor to supply a race-neutral reason for challenging the juror.

As a general matter, there is an "assumption that the exercise of a peremptory challenge is proper." *Commonwealth v. Curtiss*, 424 Mass. 78, 80 (1997). To rebut this presumption, the defendant must make a "prima facie showing of impropriety." *Commonwealth v. Burnett*, 418 Mass. 769, 771 (1994). The defendant can make such a showing by demonstrating "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 *Burnett*, 418 Mass. at 770. The defendant can satisfy the latter standard "simply by demonstrating that he is a member of a constitutionally protected, discrete community group, and that the only prospective juror of the same group

has been peremptorily challenged." *Commonwealth v. Harris*, 409 Mass. 461, 466 (1991). If the defendant makes a prima facie showing, "the burden shifts to the challenging party, who 'must provide, if possible, a neutral explanation establishing that the challenge is unrelated to the prospective juror's group affiliation.'" *Prunty*, 462 Mass. at 306, quoting Harris, 409 Mass. at 464.

In the instant case, the defendant made a prime facie showing, but the judge failed to ask the prosecutor to provide a race-neutral explanation for challenging the juror. As a Hispanic individual, the defendant is a member of a constitutionally protected class of citizens. See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 197 (1973) (recognizing that Hispanics are a protected class). Defense counsel observed that the challenged juror appeared to be the only Hispanic individual in the venire. (Tr. I/120). Because the prosecutor challenged the only Hispanic in the venire, the presumption of regularity was rebutted and the judge was required to ask the prosecutor to provide a race-neutral explanation for the challenge. See *Harris*, 409 Mass. at 467 ("The defendant made a prima facie showing that the challenge was improper by

pointing out that the challenged person was the only black person on the venire."); *Prunty*, 462 Mass. at 397 (prosecutor made prima face showing because defendant challenged only African-American in the venire); *Commonwealth v. Carvalho*, 88 Mass. App. Ct. 840, 842 (2016) (same as *Prunty*).

Instead of inquiring of the prosecutor, the judge ruled that the defendant failed to make a prima facie showing. (Tr. I/119-121). She reasoned that the defendant could not show a pattern of exclusion because nobody had been seated on the jury yet. (Tr. I/119). She further stated that she was not "ready to rule that the very first person impaneled, who happens to be of color, establishes a pattern." (Tr. I/121). This rationale contradicts the SJC's ruling in *Commonwealth v. Garrey*, 436 Mass. 422 (2002). In *Garrey*, the SJC recognized that a "pattern of improper exclusion" can be established by the use of a peremptory challenge to challenge a minority juror early in the process of jury selection. 436 Mass. at 429. The Court stated as follows:

> We recognize the difficulty a judge faces when trying to ascertain the existence of a pattern of improper exclusion after only one or two members of a discrete group have been challenged and the venire contains only a few members of the group.

> The practical reality is that, unless the judge is permitted to treat the early use of challenges in such circumstances as establishing a pattern, the venire may be substantially depleted of members of a group before a pattern can be identified by palpable evidence of improper exclusion.

Id.

Rather than following the above logic, the judge ruled that the defendant could not establish a pattern of improper exclusion so early in the process of jury selection. (Tr. I/119-120). As *Garrey* explains, this rationale is problematic because it leaves the defendant with no remedy if the venire solely contains one member of a protected group and that individual is the subject of an early peremptory challenge by the prosecutor. The instant case is a perfect example. Because there were no more Hispanics in the venire, the defendant never had another opportunity to raise the issue of improper exclusion. A potentially improper challenge was therefore immunized from review simply because it occurred early in the process of jury selection.

The judge's refusal to ask the prosecutor to supply a race-neutral explanation also goes against the SJC's stated preference for such an inquiry. The SJC has expressly stated that the burden of

establishing a prima facie case of improper exclusion "ought not be a terribly weighty one." *Carvalho*, 88 Mass. App. Ct. at 843, quoting *Commonwealth v. Maldonado*, 439 Mass. 460, 463 n.4 (2003). More recently, the SJC has recognized that it is better practice for judges to ask for a race-neutral explanation regardless of the judge's assessment of the defendant's showing. In *Commonwealth v. Issa*, 466 Mass. 1 (2013), the SJC advised trial judges as follows:

> [W]hen a defendant claims that a prosecutor's peremptory challenge of a prospective juror is motivated by discriminatory intent, we urge judges to think long and hard before they decide to require no explanation from the prosecutor for the challenge and make no findings of fact.

Id. at 11 n.14.

Despite the SJC's advisement, the judge did not ask the prosecutor for an explanation nor did she make any findings of fact. She instead concluded that it was impossible to make a prima facie showing before any jurors were seated. As noted above, this conclusion conflicts with the SJC's decision in *Garrey*.

"[T]rial judges possess broad discretion to decide questions regarding the use of peremptory challenges." *Harris*, 409 Mass. at 468. However, judges

abuse their considerable discretion when they make "a clear error of judgment in weighing the factors relevant to the decision." *Commonwealth v. Kolenovic*, 471 Mass. 664, 672 (2015), quoting *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27 (2014). That is precisely what happened here. The judge based her decision to bypass the defendant's claim of racial bias on an entirely irrelevant factor: the fact that nobody had been seated on the jury yet. This abuse of discretion cannot be excused, as it deprived the defendant of an opportunity to ensure his "constitutional right to jury selection free from discrimination." *Burnett*, 418 Mass. at 772.

CONCLUSION

For the above-stated reasons, the defendant requests that this Court vacate his conviction and remand this case for a new trial.

Respectfully Submitted,
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