COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

APPEALS COURT NO. 2016-P-1569

COMMONWEALTH

v.

JUAN CARLOS RODRIGUEZ

REPLY BRIEF FOR THE DEFENDANT ON APPEAL FROM THE SUFFOLK SUPERIOR COURT

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MAY 2017

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I. THE GRAND JURY MINUTES DID NOT PROVIDE ADEQUATE NOTICE THAT THE COMMONWEALTH INTENDED TO INTRODUCE THE FIELD TEST EVIDENCE.

Like the judge, the Commonwealth reasons that the defendant had proper notice of the Commonwealth's intent to introduce the field test evidence because this evidence was introduced to the grand jury.[1] (Comm. Br. 15-17). This argument has no basis in law. As the defendant noted in his primary brief, 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). The Commonwealth itself is well aware of this rule as it specifically notified the defendant of its intent to call two other expert witnesses and provided the defendant with their resumes.[2] (R. 61-62).

There is not a single case, statute, or court rule suggesting that the introduction of expert testimony before the grand jury constitutes adequate notice of the Commonwealth's intent to introduce such

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[1] The Commonwealth's brief will be cited by page number as (Comm. Br. _).

[2] The defendant's record appendix will be cited by page number as (R. _).

evidence at trial. Such a rule would in fact make little sense because the rules of evidence do not apply before the grand jury. See *Commonwealth v. Walczak*, 463 Mass. 808, 833 n.30 (2012) (Lenk, J., concurring) ("The grand jury, unlike the petit jury, generally hear only inculpatory evidence introduced by the Commonwealth without witnesses being subject to cross-examination, the admission of evidence subject to the rules of either evidence or exclusion, or the proceedings constrained by the presence of a judge."). The Commonwealth need not follow any of the normal foundational requirements for expert testimony prior to introducing it to the grand jury. The defendant therefore cannot be expected to know the Commonwealth's intended expert testimony based simply on the grand jury minutes.

II. THE SJC'S DECISION IN *COMMONWEALTH V. VASQUEZ*, 456 MASS. 350 (2010), DOES NOT ESTABLISH THE RELIABILITY OF FIELD TESTS.

Notwithstanding the issue of notice, the Commonwealth argues that the field test evidence was properly admissible because the same type of evidence has been accepted by the SJC as reliable in the past. (Comm. Br. 18-19). To support this argument, the Commonwealth cites to a footnote contained in

Commonwealth v. Vasquez, 456 Mass. 350 (2010). This footnote reads as follows:

> But see National Research Council, Strengthening Forensic Science in the United States, A Path Forward, 134-135 (2009) ("Most controlled substances are subjected first to a field test for *presumptive identification*. This is followed by gas chromatography-mass spectrometry (GC-MS), in which chromatography separates the drug from any diluents or excipients, and then mass spectrometry is *used to identify the drug*" [emphases added]). See also *Callaham v. United States*, 937 A.2d 141, 147 (D.C. 2007) ("a positive field test, standing alone, [does not] prove beyond a reasonable doubt that the substance was cocaine").

Id. at 364 n.15.

Nothing in this footnote suggests that the SJC has accepted field test evidence as scientifically reliable. This was not even the issue under consideration in the *Vasquez* case.

The Commonwealth draws from the report cited in the footnote to support its argument that field test evidence is reliable. (Comm. Br. 20). However, the SJC's citation to this report does not mean that it adopted all of the findings contained in this report. The SJC cited to the report for one reason: to highlight the fact that field tests are used solely for presumptive identification. It did not cite to the report for its findings on the reliability of field

tests. If the Commonwealth wants to rely on the report to prove the reliability of field tests, then it can introduce the report once this case is remanded for a proper *Daubert-Lanigan* hearing.

III. THE COMMONWEALTH FAILS TO ADDRESS THE TWO MAIN DIFFERENCES BETWEEN THIS CASE AND *COMMONWEALTH V. FERNANDEZ*, 458 MASS. 137 (2010).

The Commonwealth argues that this case is indistinguishable from *Commonwealth v. Fernandez*, 458 Mass. 137 (2010), because the defendant did not file his motion to preclude the field test evidence until the first day of trial. (Comm. Br. 18-19). Yet the Commonwealth ignores the two main differences that the defendant pointed out in his primary brief.[3] (D. Br. 19-20). Unlike the defendant in *Fernandez*, the defendant here did not have notice of the Commonwealth's intent to introduce the field test evidence until a few days prior to trial.[4] (Tr. II/21). Thus, the defendant cannot be faulted for filing his motion to preclude the field test evidence on the first day of trial. Furthermore, unlike the judge in *Fernandez*, the judge here did not conduct even a

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[3] The defendant's primary brief will be cited by page number as (D. Br. _).

[4] The transcript of the trial will be cited by volume and page number as (Tr. _/_).

"limited" *Daubert-Lanigan* analysis. 458 Mass. at 148. The judge in *Fernandez* relied upon two authorities from New York that spoke to the reliability of field tests. *Id.* Though this analysis was limited, it at least focused on the threshold issue for admissibility: the scientific reliability of field tests. In the instant case, the judge conducted no such analysis. She ruled that the field test evidence was admissible as long as the Commonwealth could establish that the officer who performed the field test was qualified to do so. (Tr. II/18). The training of the officer did not speak to the acceptance of field tests in the scientific community or to the reliability of field tests in general. It cannot be said that the judge conducted even a limited *Daubert-Lanigan* analysis, as she did not consider the scientific reliability of field tests prior to admitting the field test evidence.

IV. THE EVIDENCE DOES NOT ESTABLISH THAT DOOKHAN NEVER TAMPERED WITH ANY ORIGINAL SUBSTANCES.

The Commonwealth argues that the defendant was not prejudiced by the introduction of the field test evidence because the defendant's entire defense was faulty. (Comm. Br. 21). The Commonwealth claims that

the results of the retesting were completely isolated from any potential contamination by Dookhan because she only admitted to contaminating the small samples that she sent to the confirmatory chemist. (Comm. Br. 21). Because Dookhan did not admit to contaminating any original substances, the Commonwealth reasons that the substance sent for retesting must have been free from contamination. (Comm. Br. 21-22). The problem with the Commonwealth's argument is that it relies upon the word of a convicted perjurer who admittedly obstructed justice in order to hide her malfeasance. Just because Dookhan only admitted to contaminating the small samples that went to the confirmatory chemist does not mean that she did not also contaminate original substances. She was willing to contaminate samples to cover up the fact that she was only testing one out of five substances when working as the primary chemist. It would not be a stretch to believe that she may have also contaminated the original substance in order to completely cover up her initial misconduct in case the substance were retested by a different chemist. In fact, this would be a completely reasonable inference considering the evidence.

The Commonwealth asserts that this could not have happened because Dookhan's plea colloquy reveals that, as a result of retesting, investigators were able to identify six specific instances where Dookhan contaminated a sample prior to sending it to the confirmatory chemist. (Comm. Br. 21). The Commonwealth claims that these instances would not have been discovered if Dookhan had contaminated the original substance. (Comm. Br. 22). This claim is pure speculation. The colloquy does not provide any specifics as to how these six instances were discovered. Moreover, even if Dookhan did not tamper with the original substance in these six instances, this does not mean that she did not tamper with the original substance in other instances. It is impossible to know if she ever tampered with the original substance because retesting would not identify such misconduct. The Commonwealth itself recognizes this fact, yet nevertheless concludes that Dookhan never tampered with the original substance. (Comm. Br. 22). The Commonwealth is essentially arguing that, because the investigators failed to discover misconduct that would be impossible to discover, such misconduct must not have occurred. This

is absurd logic. See *Denson v. United States*, 574 F.3d 1318, 1343 (11th Cir. 2009) ("[A]n absence of proof is not proof of absence.").

V. THE EVIDENCE ABOUT DOOKHAN'S KEY TO THE EVIDENCE SAFE WAS NEITHER IRRELEVANT NOR CUMULATIVE.

The Commonwealth raises two arguments to justify the judge's exclusion of the evidence that Dookhan possessed a key to the evidence safe. (Comm. Br. 24). First, the Commonwealth claims that Captain Irwin's testimony about Dookhan's possession of a key would not have been relevant because it simply established that Dookhan possessed a key in 2011 and the substance at issue here was tested in 2009. (Comm. Br. 23-24). This argument requires little discussion. The standard of relevancy simply requires that the evidence have "any tendency to make a fact more or less probable than it would be without the evidence." Mass. G. Evid. § 401. The fact that Dookhan possessed a key to the safe in 2011 certainly made it more probable that she possessed a key in 2009.

The Commonwealth next argues that the evidence related to the key was properly excluded because it was cumulative of other evidence. (Comm. Br. 24). The Commonwealth asserts that Dookhan's access to the

evidence safe was already established because Della Saunders testified that every employee had a key to the lab and that this key also opened the door to the evidence safe. (Comm. Br. 24, Tr. III/24). This is a misrepresentation of Saunders's testimony. She did not testify that every employee's key opened the door to the lab and the door to the evidence safe. She testified that her key granted such access. (Tr. III/24). Based on Saunders's testimony, it would be reasonable to infer that Dookhan's key opened the door to the evidence safe. However, Captain Irwin's testimony would have been much stronger proof of this fact. No inference would have been necessary. His testimony would have conclusively established that Dookhan's key opened the door to the evidence safe.

As a final point on this subject, it must be noted that the Commonwealth's proffered justifications for excluding the evidence related to the key do not match the judge's actual rationale. The judge excluded the evidence because she incorrectly believed that Captain Irwin's testimony would involve hearsay statements made by Dookhan. (Tr. III/118-120). However, 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). The Commonwealth makes no attempt to defend the judge's actual rationale and instead proffers alternative justifications for excluding the evidence about the key. The Commonwealth's resort to alternative justifications speaks to the flaw in the judge's actual rationale.

VI. THE INDICTMENTS WERE RELEVANT TO THE TIME FRAME OF DOOKHAN'S MISCONDUCT DESPITE THE FACT THAT NONE OF THE TAMPERING INDICTMENTS WERE FROM 2009.

The Commonwealth claims that the indictments were not relevant because none of the indictments for tampering with evidence were based on conduct that took place in 2009. (Comm. Br. 26). Again, the Commonwealth seems to misunderstand the standard of relevancy. The tampering indictments were based on conduct that took place in 2010 and 2011. (R. 68-74). However, this does not mean that indictments were irrelevant on the issue of whether Dookhan engaged in tampering in 2009. To the contrary, Dookhan's repeated instances of tampering throughout 2010 and 2011 made it more probable that she engaged in such conduct in 2009 as well. The indictments did not need to prove Dookhan tampered with evidence in 2009 in order to be

relevant. They simply needed to have "any tendency" to make that fact more probable. Mass. G. Evid. § 401.

VII. THE JUDGE DID NOT FIND THAT THE VENIRE CONTAINED OTHER HISPANIC JURORS.

The Commonwealth argues that the judge properly concluded that the defendant failed to make a prima facie showing of impropriety after he objected to the prosecutor's use of a peremptory challenge on a prospective juror who was Hispanic. (Comm. Br. 29). Defense counsel asserted that this individual appeared to be the only Hispanic person in the venire. (Tr. I/120). The Commonwealth asserts that the judge acted properly because she concluded that the juror was not the only Hispanic individual in the venire. (Comm. Br. 29). This is not quite accurate. The judge did not find that there were other Hispanic individuals in the venire. She concluded that there might be other people in the venire who were Hispanic. (Tr. I/120).

The possibility that other prospective jurors might be members of the protected class at issue is not a valid reason to reject a defendant's claim of discrimination. What if the possibility does not turn into reality and no other jurors from the protected class are part of the venire? The allegedly

discriminatory peremptory has been insulated from review simply because it occurred early in the process before the full composition of the venire could be ascertained. This is obviously not a fair outcome. In fact, this is precisely the type of outcome the SJC sought to avoid when it ruled that judges could find a pattern of discrimination based on the early use of a peremptory. See *Commonwealth v. Garrey*, 436 Mass. 422, 429 (2002) ("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.").

When a defendant is a member of a protected class and claims that the prosecutor has used a peremptory challenge on the only prospective juror in this class, the presumption of propriety is rebutted. The SJC clearly stated as much in *Commonwealth v. Harris*, 409 Mass. 461 (1991):

> [A] party contesting the use of a single peremptory challenge can make a prima facie showing rebutting the presumption that the challenge was properly used 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.

Id. at 466.

If the judge rejects the defendant's factual claim and finds that another member of the protected class is in the venire, then the judge has discretion to deny the defendant's challenge. However, if the judge is simply unsure as to whether there are other members of the protected class in the venire, then the judge must treat the presumption as rebutted and ask the prosecutor for a race-neutral explanation for the peremptory. This is the only way to ensure adequate review for allegedly discriminatory peremptories used early in the process of jury selection. It also aligns with the SJC's stated preference for requiring race-neutral explanations whenever a defendant raises a claim of discriminatory intent. See *Commonwealth v. Issa*, 466 Mass. 1 n.14 (2013) ("[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.").

Respectfully Submitted,
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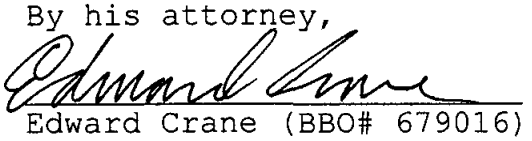
By his attorney,



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CERTIFICATE OF COMPLIANCE

I, Edward Crane, hereby certify, pursuant to Massachusetts Rule of Appellate Procedure 16(k), that this brief complies with all applicable rules of court pertaining to the filing of briefs.

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CERTIFICATE OF SERVICE

I hereby certify, under the pains and penalties of perjury, that I have served two copies of the defendant's brief and record appendix to Assistant District Attorney Cailin Campbell, Suffolk County District Attorney's Office, Appellate Unit, One Bulfinch Place, Boston, MA 02114. I have made service via mail.

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