2009 WL 1614400 (Mass.App.Ct.) (Appellate Brief)
Appeals Court of Massachusetts.

COMMONWEALTH,
v.
Ronald L. BILLINGS.

No. 2009-P-0223.
May, 2009.

Appeal from a Judgment of the Superior Court of Plymouth County

Defendant's Brief and Record Appendix

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***i TABLE OF CONTENTS**

TABLE OF AUTHORITIES iii
ISSUES PRESENTED 1
STATEMENT OF THE CASE 1
STATEMENT OF THE FACTS 3
SUMMARY OF THE ARGUMENT 9
ARGUMENT
I. THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE JURY, OVER OBJECTION, THAT A PERCIPIENT POLICE WITNESS WAS AN EXPERT 12
The claim of error in the jury instruction is reviewable under the prejudicial error standard 12
Qualification of a witness as an "expert" by the judge should take place outside of the jury's presence to avoid a prejudicial effect on the jury 15
Jury instructions that label a witness as an "expert" have the same prejudicial effect on the jury 17
The trial judge's designation of the detective as an "expert" to the jury was erroneous and prejudicial 21
In the context of the trial, the judge's designation of the detective as an "expert" made a difference in the outcome of the case and a new trial is required 29
II. THE ADMISSION OF THE CERTIFICATE OF ANALYSIS OF THE SUBSTANCE ALLEGEDLY OBTAINED FROM THE DEFENDANT WITHOUT TESTIMONY FROM A LIVE AUTHENTICATING WITNESS VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION 33
**ii *The certificate of analysis of the substance alleged to be obtained from the defendant constituted testimonial evidence that was inadmissible under the constraints of the Sixth Amendment* 33
The standard of review for assessing the admission of the constitutionally proscribed evidence in the defendant's case is whether the error was harmless beyond a reasonable doubt 39
III. THE SUBMISSION TO THE JURY OF A DRUG CERTIFICATE OF ANALYSIS WITHOUT REDACTION OF THE DEFENDANT'S NAME CREATED A SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE, WARRANTING REVERSAL 42
CONCLUSION 46
CERTIFICATION OF COUNSEL 46
ADDENDUM 47
RECORD APPENDIX
Table of Contents 55

*iii *TABLE OF AUTHORITIES*

Massachusetts cases

Commonwealth v. Blache, 450 Mass. 583 (2008) 24
Commonwealth v. Brouillard, 40 Mass. App. Ct. 448 (1996) 25
Commonwealth v. Burgess, 450 Mass. 422 (2008) 39, 41
Commonwealth v. Cancel, 394 Mass. 567 (1985) 45
Commonwealth v. Caceres, 413 Mass. 749 (1992) 42
Commonwealth v. Chappee, 397 Mass. 508 (1986) 33
Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771 (2006) 22
Commonwealth v. Choeurn, 446 Mass. 510 (2006) 31
Commonwealth v. Cruz, 445 Mass. 589 (2005) 14
Commonwealth v. Curtis, 417 Mass. 619 (1994) 45
Commonwealth v. Dagraca, 447 Mass. 546 (2006) 41
Commonwealth v. Day, 42 Mass. App. Ct. 242 (1997) 43, 44, 45
Commonwealth v. Dayes, 49 Mass. App. Ct. 419 (2000) . 30, 31
Commonwealth v. Dessources, 2009 Mass. App. LEXIS 599 (May 9, 2009) 40
*iv *Commonwealth v. Diaz*, 453 Mass. 266, 277 (2009) 34, n.10
Commonwealth v. Federico, 425 Mass. 844, 852 (1997) .. 29
Commonwealth v. Foley, 445 Mass. 1001 (2005) 41-42
Commonwealth v. Foley, 12 Mass. App. Ct. 983 (1981) 42
Commonwealth v. Frangipane, 433 Mass. 527 (2001) 15
Commonwealth v. Galicia, 447 Mass. 737 (2006) 41
Commonwealth v. Grissett, 66 Mass. App. Ct. 454 (2006) 12, n.5, 26
Commonwealth v. Hanscomb, 367 Mass. 726 (1975) 23
Commonwealth v. Harbin, 435 Mass. 654 (2002) 22, 28
Commonwealth v. Hinds, 450 Mass. 1 (2007) 19, n.7
Commonwealth v. Johnson, 429 Mass. 745 (1999) 27-28
Commonwealth v. Lanigan, 419 Mass. 15 (1994) 20
Commonwealth v. Martin, 417 Mass. 187 (1994) 30
Commonwealth v. Maskell, 403 Mass. 111 (1988) 13-14
Commonwealth v. McCaffrey, 36 Mass. App. Ct. 583 (1994) 16
*v *Commonwealth v. Melendez-Diaz*, 69 Mass. App. Ct. 1114 (2007) 35
Commonwealth v. Miranda, 441 Mass. 783 (2004) 12
Commonwealth v. Monteiro, 51 Mass. App. Ct. 552 (2001) .. 14
Commonwealth v. Napolitano, 378 Mass. 599 (1979) 31
Commonwealth v. Ortiz, 50 Mass. App. Ct. 304 (2000) ... 26

Commonwealth v. Orton, 58 Mass. App. Ct. 209 (2003) 29
Commonwealth v. Randolph, 438 Mass. 290 (2002) 39
Commonwealth v. Reeder, 73 Mass. App. Ct. 750 (2009) 32, 40
Commonwealth v. Richardson, 423 Mass. 180 (1996) 12, 15, 21, 25, 28
Commonwealth v. Rivera, 425 Mass. 633 (1997 ..... 12, n.5, 25
Commonwealth v. Roberio, 428 Mass. 278 (1998) 28
Commonwealth v. Rodriguez, 437 Mass. 554 (2002) 21
Commonwealth v. Shelley, 411 Mass. 692 (1992) 27
Commonwealth v. Sheline, 391 Mass. 279 (1984) 43
Commonwealth v. Silanskas, 433 Mass. 678 (2001) 33, 34
***vi** *Commonwealth v. Slavski*, 245 Mass. 405 (1923) 35, n.11
Commonwealth v. Sneed, 376 Mass. 867 (1978) 32
Commonwealth v. Tanner, 45 Mass. App. Ct. 576 (1998) 26, 30, 31
Commonwealth v. Thayer, 39 Mass. App. Ct. 396 (1995) 44
Commonwealth v. Urban, 450 Mass. 608 (2008) 23
Commonwealth v. Verde, 444 Mass. 279 (2005) 34, 35, 36, 37, 39
Leibovich v. Antonellis, 410 Mass. 568 (1991) 19, 24, 28

State case from other jurisdiction

People v. Lamont, 800 N.Y.S. 2d 480 (2005) 16

Federal court cases

United States v. Bartley, 855 F.2d 547 (8th Cir. 1988) 15
United States v. Cruz, 363 F.3d 187 (2d Cir.2004) 27
United States v. Foster, 939 F.2d 445 (7th Cir. 1991) 27
United States v. Johnson, 488 F.3d 690 (6th Cir. 2007) 16

United States Supreme Court cases

Crawford v. Washington, 541 U.S. 36 (2004) ..... 34, 35, 36 & n.12, 37, 38
***vii** *Congress & Empire Spring Co. v. Edgar*, 99 U.S. 645 (1878) 28
Mattox v. United States, 156 U.S. 237, 242 (1895) 38
Melendez-Diaz v. Massachusetts, 128 S. Ct. 1647 (2008) ..... 35, 36 & n.12, 37, 40
Palmer v. Hoffman, 318 U.S. 109 (1943) 35, n.11, 38
Querica v. United States, 289 U.S. 466 (1933) 23
Strickland v. Washington, 466 U.S. 668 (1984) 45
Washington v. Davis, 547 U.S. 813 (2006) ..... 36 & n. 12, 37, 38
Webb v. Texas, 409 U.S. 95 (1972) 32

Procedural rules

Mass. R. Crim. P. 24 (b) 13, 14

Evidentiary rules

Federal Rules of Evidence Rule 702 ..... 20 & n.8, 25
Rule 702 Massachusetts Guide to Evidence (2008-2009 Edition) ..... 20 & n.8

Massachusetts statutes

G. L. c. 94C, §31, Class B (a) (4) 33

G. L. c. 94C, §32A (c) & (d) 1, 2
G. L. c. 94C, §32J 2
G. L. c. 111, §13 ..... 33, 37, 43
***viii Constitutional provisions**
United States Constitution Sixth Amendment ..... 1, 11, 33, 34 & n.10, 39, 42, 44
United States Constitution Fourteenth Amendment 32, 44
Massachusetts Declaration of Rights Article 12 ..... 32, 44
Other authority
ABA Civil Trial Practice Standard 17 (Feb. 1998) 16
Handbook of Massachusetts Evidence, (8th ed. 2007) 20
http://www.mass.gov/courts/admin/ots/timestandards.html ... 3, n.3
http://www.supremecourtus.gov/docket/07-591.htm 35, 40
Note, *The Admissibility of Ultimate Expert Testimony by Law Enforcement Officers in Criminal Trials,* 93 Colum. L. Rev. 231 (1993) 26
Irving Prager and Kevin Marshall, *Examination of Prior Expert Qualification and/or Disqualification-(Questionable Questions Under the Rules of Evidence)*, 24 Rev. Litig. 559 (2005) 17
Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" under the Federal Rules Evidence in Civil and Criminal Jury Trials,* 154 F.R.D. 537 (1994) 14, 16, 17, 20, 21, 23, 24, 25
Irving Younger, *A Practical Approach to the Use of Expert Testimony,* 31 Clev. St. L. Rev. 1 (1982) 17
***ix Model criminal jury instructions**
Criminal Model Jury Instructions for Use in the Massachusetts District Court, Instruction 3.640 (Revised 2009) ..... 18 & n.6, 19 & n.7
United States Court of Appeals for the Third Circuit Model Criminal Jury Instructions, §4.08 Opinion Testimony (2006) 19, 23, 25
United States Court of Appeals for the Fifth Circuit Model Criminal Jury Instructions, §1.17 Expert Witnesses (2001) .. 19, 23
United States Court of Appeals for the Sixth Circuit Model Criminal Jury Instructions, §7.03 Opinion Testimony (2007) 19
United States Court of Appeals for the Seventh Circuit Model Criminal Jury Instructions, §3.07, Weighing Expert Testimony (1998) 19
United States Court of Appeals for the Ninth Circuit Model Criminal Jury Instructions, §4.17 Opinion Evidence, Expert Witness (Rev. 3/2002) 19
United States Court of Appeals for the Tenth Circuit Model Criminal Jury Instructions, §1.17 Expert Witness (Updated February 2006) 19
United States Court of Appeals for the Eleventh Circuit Model Criminal Jury Instructions, §7 Expert Witnesses (2003) 20

1 *ISSUES PRESENTED

1. Whether the trial judge committed prejudicial error in instructing the jury, over objection, that a percipient police witness was an expert?

2. Whether the admission of a certificate of analysis of a substance handed to a police officer by a person alleged to be the defendant without the presentation at trial of testimony from a live authenticating witness violated the defendant's Sixth Amendment right of confrontation?

3. Whether the submission to the jury of a certificate of analysis without redaction of the defendant's name, even though the judge allowed the defendant's motion to strike his name from the certificate, created substantial risk of miscarriage of justice, warranting reversal?

STATEMENT OF THE CASE

On October 28, 2005, a Plymouth County grand jury returned an indictment charging the defendant, Ronald L. Billings, with one count of unlawful distribution of cocaine in violation of G. L. c. 94C, §32A (c), one count of unlawful distribution of cocaine, second or subsequent offense, in violation of G. L. c. 94C, §32A ***2** (d) and one count of a drug violation in a school zone in violation of G. L. c. 94C, §32J, (R.1-3).[1] On May 18, 2006, a motion judge denied the defendant's motion to dismiss the indictments (Walker, J.) (M.Tr.9). From August 9 through 10, 2006, the defendant was tried on the distribution charge and the school zone violation before a Plymouth County jury (Connor, J., presiding).

On August 10, 2006, the jury returned guilty verdicts on both charges (Tr.2/167-168). The defendant waived his right to a jury trial on the subsequent offense charge and was tried at a bench trial on August 11, 2006 (Connor, J. presiding). At the conclusion of the trial, the judge allowed the defendant's motion for a required finding of not guilty (Tr.2/169-175; Tr.3/33). Immediately thereafter, the defendant was sentenced to two and one-half to three years on the unlawful distribution charge and to a two-year House of Correction term on ***3** the school zone violation charge, from and after the sentence on the distribution charge (Tr.3/37-38).[2]

On August 11, 2006, the defendant filed a notice of appeal (R.19) and his case was entered on the docket of this Court on February 9, 2009.[3]

STATEMENT OF THE FACTS

The defendant was charged with distribution of cocaine after an undercover police officer identified him from a group of persons congregating outside a bar as the person who handed him a rock of cocaine in exchange for twenty dollars.

The Commonwealth's case

Two Brockton police detectives testified about the undercover drug buy and another police officer and ***4** a Brockton city employee provided testimony on the school zone charge.

On the night of July 23, 2005, Detective Robert Morrissey, a Brockton police officer for eleven years, was driving around Brockton, looking to make a narcotics purchase (Tr.2/25-26, 30-31). He was accompanied in a separate car by a surveillance unit of two detectives, who monitored the buy and conducted the arrest after the buy (Tr.2/30). Morrissey wore a hidden microphone so the surveillance unit could hear what he said (Tr.2/36). As Morrissey drove up Legion Parkway, a one-way street going east and west separated by a meridian, he saw a group of about five people hanging out in front of the Alamo Cafe (Tr.2/32-33, 34). He looked for someone who would make eye contact with him, which he characterized as "one of the signs of somebody who's moving street level narcotics" (Tr.2/33). After he made eye contact with a man, who nodded his head, Morrissey continued driving and advised the surveillance unit about the man he believed would sell him drugs and gave them a description of the man (Tr.2/33, 34, 36). After he consulted his police report, Morrissey recalled he had described the man as a "black gentleman, older, ***5** [wearing] black tee-shirt, black jeans [and] white sneakers", although he conceded that his report did not refer to the man's age (Tr.2/35-36;74). Morrissey said no one else outside the Alamo Cafe was wearing a black shirt and pants and white sneakers (Tr.2/48).

Morrissey made eye contact again with the same man as he pulled in front of the Alamo Cafe, (Tr.2/36, 38). He said the man walked over to the passenger side of his car, leaned in the window and asked what he was looking for (Tr.2/40). Morrissey testified he said he "was looking for a twenty of rock", explaining that "a twenty refers to .2 grams of crack cocaine" (Tr.2/41). The man asked for money, but Morrissey declined, saying he needed "to see the product" first (Tr.2/44). The man agreed to get "the rock" for Morrissey and returned to the group of people in front of the Alamo Cafe (Tr.2/45-46). Even though his view of the group was obstructed by a car parked alongside him, Morrissey said he saw the man talk to several different people (Tr.2/46, 47). After about four minutes, the man walked to the passenger window of his car, put his hand to his mouth, spit out something and handed it to Morrissey, who gave him twenty dollars ***6** (Tr.2/47). The man then returned to the group outside the Alamo Cafe (Tr.2/49).

Detective Morrissey testified that he had made "upwards of a thousand" narcotics arrests, worked undercover for five years and completed several federal and state training courses on narcotics crime. Over the defendant's objection, he was allowed to testify about how a runner functions in street-level drug sales (Tr.2/25-26, 27). He testified that a runner is "somebody who is between the person who holds the drugs" and the buyer, running the drugs back and forth (Tr.2/27-28). Morrissey said runners carry drugs on their person only when they are moving the drugs and the drugs are usually held by the person who provides the runner with the drugs (Tr.2/28). Typically, runners are paid in drugs, he said (Tr.2/28-29). The trial judge did not allow opinion testimony from Detective Thomas Keating, a non-percipient witness, ruling that his testimony would be cumulative of Morrissey's testimony and would be unfair and prejudicial (Tr.2/105-108).

Morrissey testified that after he received the substance from the man, he backed out of his parking spot, drove westerly to the top of Legion Parkway ***7** where he turned and then drove easterly down the Parkway where he parked at the end (Tr.2/49). He informed the surveillance unit that "it was a done deal" and told the unit to arrest a black male with a black shirt and jeans and white sneakers, although he said nothing about the man's height, weight or age (Tr.2/49-50; 68). From his vantage point, he saw the back-up unit approach the group of people outside the Alamo Cafe and then watched as the officers arrested the man he described (Tr.2/50). In court, Morrissey identified the defendant as the man in the black shirt and pants and white sneakers (Tr.2/52).

Brockton Detective David Delehoy was part of the surveillance unit assigned to Morrissey, and drove in an unmarked car, hearing Morrissey through a Kel listening device (Tr.2/79, 82-84, 99). Delehoy did not see Morrissey buy drugs from anyone, but heard him say "it was a done deal" and describe the individual to be arrested (Tr.2/97, 85). After Morrissey drove by and nodded his head toward a man, Delehoy arrested the man, who did not run from him or try to dispose of anything (Tr.2/90, 101). Delehoy identified the defendant in court as the person he arrested in front of the Alamo Cafe (Tr.2/87). But he admitted that no ***8** one else outside the Alamo Cafe was searched or questioned (Tr.2/95-96). Delehoy booked the defendant at the police station where he searched him, but found no money or drugs on him (Tr.2/92-93).

Morrissey testified that he field-tested the substance he obtained from the defendant, bagged and labeled it with the pertinent information and then placed the bag inside a locked mailbox at the police station (Tr.2/55). He testified that the evidence is sent to the state laboratory for testing and returned to the police station, accompanied by a "printed analysis of what [the lab] found" (Tr.2/56-57). Over the defendant's objection,[4] Morrissey read from the certificate of analysis that accompanied the bag containing the substance, stating that the substance was found to contain cocaine (Tr.2/58-59). The certificate was admitted as an exhibit (Tr.2/58; R.18). The laboratory technician who tested the substance did not testify and no other testing was performed on the substance (Tr.2/71). The judge allowed the defendant's motion to strike his name from the ***9** certificate of analysis (R.11). At trial, he reiterated that a portion of the certificate would be stricken (Tr.2/58). Before the jury retired, the judge and the prosecutor said the certificate would be sanitized before submission to the jury (Tr.2/163). Nonetheless, although the prosecutor and trial counsel were "satisfied" with the exhibits before they went to the jury room, the defendant's name was not redacted from the certificate (Tr.2/165-166; R.18).

Timothy Stanton, a Brockton detective, testified that he measured 757 feet between 49 Legion Parkway, in front of the Alamo Cafe, and the Keith School (Tr.2/108-109, 111, 113). Daniel Genatossio, supervisor of attendance for Brockton schools, testified that the Keith School is a Brockton public pre-school and kindergarten, serving students between the ages of five and seven years (Tr.2/115).

The defendant presented his case through cross-examination.

SUMMARY OF THE ARGUMENT

1. The trial judge committed prejudicial error when he instructed the jury, over objection, that a percipient police witness was an expert. The weight of authority supports the prohibition of any reference ***10** to the term "expert" in jury instructions because judicial labeling of a witness as an "expert" increases the likelihood that the jury will give inappropriate weight to the witness's testimony. The defendant was prejudiced by the judge's error in designating the police witness as an "expert" to the jury. The prejudice from the judicial designation was compounded by the police witness's testimony as both a percipient witness and an opinion witness, which created a danger that the jury blurred the lines between his fact and opinion testimony. The designation of the police witness as an "expert" also impermissibly enhanced the credibility of his fact and opinion testimony. The resulting prejudice was not cured by the judge's instructions on the evaluation of expert testimony. In the context of the trial, the jury's verdict was swayed by designation of the police witness as an "expert". As a result, the defendant's state and federal constitutional rights of due process were violated and reversal is required (pp. 12-32)

2. The Commonwealth introduced a certificate of analysis to prove that a substance allegedly obtained from the defendant was cocaine. The admission of the certificate in lieu of live testimony from the ***11** technician who tested the substance violated the defendant's Sixth Amendment right of confrontation. Although the defendant objected to admission of the certificate only on non-constitutional grounds, his failure to object on the basis of the Sixth Amendment violation should be excused because the United States Supreme Court had not yet agreed to review the issue at the time of his trial. If the Supreme Court rules that admission of drug certificates violates the Sixth Amendment, this Court should rule that admission of the certificate here was not harmless beyond a reasonable doubt. In any event, this Court should rule that constitutionally proscribed admission of the certificate created a substantial risk of miscarriage of justice, requiring reversal (pp. 33-42).

3. Although the judge allowed the defendant's motion to strike his name from the certificate of analysis, the defendant's name was not redacted from the copy of the certificate submitted to the jury as an exhibit, thereby prejudicing the defendant. Trial counsel's failure to ensure that the defendant's name was redacted from the certificate before submission to the jury deprived

the defendant of his state and federal rights of effective assistance of counsel. In ***12** combination with all of the errors, a substantial risk of a miscarriage of justice resulted, warranting reversal (pp. 42-45).

ARGUMENT

I. THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE JURY, OVER OBJECTION, THAT A PERCIPIENT POLICE WITNESS WAS AN EXPERT.

The claim of error in the jury instruction is reviewable under the prejudicial error standard.

At trial, Detective Morrissey was allowed to draw on his experience as a narcotics investigator to testify about the role of runners in street-level drug sales. See *Commonwealth v. Miranda*, 441 Mass. 783, 793-794 (2004). The trial judge did not qualify the detective as an expert before the jury.[5] See *Commonwealth v. Richardson*, 423 Mass. 180, 184 (1996) (judge need not qualify witness as expert before jury). Even though neither the defendant nor the prosecutor requested an instruction on the evaluation ***13** of expert testimony, the trial judge, in his final charge, instructed the jury as follows:

In this case also you heard a police officer testify as to some opinion as to what happened on the street. Ordinarily a witness cannot testify to his opinion, but sometimes we describe a person as an expert. In such a case we permit that person who has scientific background or specialized study or training or experience to give his or her opinions about issues in the case in order to assist you in your understanding in determining the facts at issues
But what do you do with those opinions? The fact that an expert, so to speak, has given an opinion does not mean that it is binding on you. No, you have the right to treat a so-called expert's opinion just as you do any other evidence in the case. It is solely up to whether you accept it or reject it. You should consider and you must consider the background that made this person an expert. But in the end the decision is yours and solely yours as to whether or not you accept any such testimony.

Tr.2/148-149 (emphasis added).

After the judge completed his charge and before the jury retired to deliberate, the defendant objected to the judge's instructions on an expert testifying, complaining about the judge's designation of the detective as an expert (Tr.2/163-164). The defendant's objection was sufficient to preserve this issue for appeal. See *Commonwealth v. Maskell*, 403 Mass. 111, 115 (1988) (Mass. R. Crim. P. 24 (b) requires party bring the matter to which he objects ***14** and grounds of his objection to the attention of the judge before the jury retires to preserve his objection). See also *Commonwealth v. Monteiro*, 51 Mass. App. Ct. 552, 559-560 (2001) (substantial compliance with rule 24(b) sufficient to preserve defendant's objection to judge's instructions).

The judicial acknowledgement of the status of a witness as an "expert" in jury instructions is fundamentally unfair because this "stamp of authority" increases the likelihood that the jury will give undue and prejudicial weight to the testimony. See Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" under the Federal Rules Evidence in Civil and Criminal Jury Trials,* 154 F.R.D. 537, 559 (1994). In this case, the trial judge erred when he instructed the jury, over objection, that Detective Morrissey, who also testified as a percipient witness, was an expert. Because the defendant preserved this issue for appellate review, this Court should review the judge's instruction for prejudicial error and should order reversal on the basis of this error. See *Commonwealth v. Cruz*, 445 Mass. 589, 591 (2005).

***15** *Qualification of a witness as an "expert" by the judge should take place outside the jury's presence to avoid a prejudicial effect on the jury.*

In qualifying a witness to testify as an expert, the better practice, as occurred in this case, is to qualify the witness outside of the hearing of the jury. See *Richardson*, 423 Mass. at 184. See also *Commonwealth v. Frangipane*, 433 Mass. 527, 530, n.4 (2001) (examination of witness about her qualification as expert should not have been conducted in presence of jury). This is because "[s]uch an offer and finding by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgement of the witnesses' expertise by the Court." *Richardson*, *id*., quoting *United States v. Bartley*, 855 F.2d 547, 552 (8th Cir. 1988). The qualification of an expert witness outside the hearing of the jury guards against the danger that an official designation by the judge of the witness as an expert which might cause the jury to ascribe additional significance to the witness's testimony or that designation of a witness as an expert might create the impression among the jury that they may not disbelieve the witness's testimony. *Richardson*, *id*. ***16** at 185, citing Richey, *supra*. See *Commonwealth v. McCaffrey*, 36 Mass. App. Ct. 583, 591 (1994) (citation and quotation omitted) ("[T]he influence of an expert opinion may threaten the independence of the jury's decision.").

For largely the same reasons, other courts and commentators disapprove of qualifying a witness as an expert in front of the jury. "When a court certifies that a witness is an expert, it lends a note of approval to the witness that inordinately enhances the witness's stature and detracts from the court's neutrality and detachment." *United States v. Johnson*, 488 F.3d 690, 697 (6th Cir. 2007). Thus, "...the court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so." *Id*. at 698, citing *ABA Civil Trial Practice Standard 17* (Feb. 1998). Another court warned that making a judicial declaration of a witness as an expert in front of the jury "improperly bolsters the witness and appears to grant the witness the imprimatur of the court." *People v. Lamont*, 800 N.Y.S. 2d 480, 484 (2005). One commentator emphasized the benefit from the judge qualifying a witness as an ***17** expert because "the judge's authority begins to be associated with [the] expert's authority". Irving Younger, *A Practical Approach to the Use of Expert Testimony,* 31 Clev. St. L. Rev. 1, 16 (1982). Another commentator noted that stating that someone is an "expert" to the jury not only speaks to his credentials, but also vouches for his credibility. See Richey, *supra* at 544. And, other commentators observed that although attorneys might be aware that the term "expert" may--as in this case where the "expert" is a police officer-- encompass modest circumstances, juries are more likely to have a more exalted view of the "expert" designation, making it more difficult for jurors to avoid deferring to an expert rather than exercising the independent judgment the law requires of them. See Irving Prager and Kevin Marshall, *Examination of Prior Expert Qualification and/or Disqualification-(Questionable Questions Under the Rules of Evidence)*, 24 Rev. Litig. 559, 575 (2005).

Jury instructions that label a witness as an "expert" have the same prejudicial effect on the jury.

Recognizing that prejudice inures not only from the judicial certification of an expert witness before ***18** the jury, but also from instructions that designate a witness as an "expert" to the jury, many courts have adopted jury instructions that avoid the use of the word "expert". For example, in the recently revised Criminal Model Jury Instructions for Use in the Massachusetts District Court, Instruction 3.640 on Expert Witnesses does not refer to the witness as an "expert". [6] In commentary to the instructions, the Committee on Criminal Proceedings said use of "the word 'expert' may prejudice the jury's ultimate responsibility to accept or reject the witness's expertise." Note to Model Criminal Jury Instruction ***19** 3.640 (Revised January 2009), citing *Leibovich v. Antonellis*, 410 Mass. 568, 573 (1991). [7]

A majority of the circuits of the United States Court of Appeals have also adopted model criminal jury instructions on expert or opinion testimony that avoid the use of the word "expert". See, e.g., Third Circuit, §4.08 Opinion Testimony (Expert Witnesses) (2006); Fifth Circuit, §1.17 Expert Witnesses (2001); Sixth Circuit, §7.03 Opinion Testimony (2007); Seventh Circuit, §3.07, Weighing Expert Testimony (1998); Ninth Circuit, §4.17 Opinion Evidence, Expert Witness (Rev. 3/2002); Tenth Circuit, §1.17 Expert Witness ***20** (Updated February 2006); Eleventh Circuit, §7 Expert Witnesses (2003).

Further support for deletion of the word "expert" from jury instructions is found in the commentary to the Federal Rules of Evidence. See generally *Commonwealth v. Lanigan*, 419 Mass. 15, 25 (1994) (courts look to similar federal rules for guidance, such as Fed. R. Evid. 702, which mirrors Rule 702 of Massachusetts Proposed Rules of Evidence). In commentary to the 2000 amendment to Rule 702, the Advisory Committee explained that continuation of the practice of referring to a qualified witness as an "expert" in the amended Rule was done "for continuity and to minimize change", but that the use of the term "expert" did not mean that a jury should actually be informed that a qualified witness is testifying as an "expert". Note to Fed. R. Evid. 702 (2000).[8] In fact, the Committee cautioned against instructing the jury that a witness is an "expert" and endorsed prohibition of "the term expert by both parties and the court at trial". *Id*., citing Richey, *supra* at 559.

***21** "One of the purposes of instructions on expert testimony is to remind the jury that they are the sole judges of credibility, and to guard against the possibility that designation of a witness as an expert might create the misimpression among the jury that they must defer to his opinion." *Commonwealth v. Rodriguez*, 437 Mass. 554, 561 (2002), citing Richardson, *supra* at 185. By avoiding use of the term "expert" in jury instructions as well as in open court when permitting a witness to offer expert testimony, a judge can neutralize the impact and prejudicial weight given to expert opinions. Richey, *supra* at 559. For the foregoing reasons, the trial judge erred when he instructed the jury, over objection, that the detective was an "expert".
The trial judge's designation of the detective as an "expert" to the jury was erroneous and prejudicial.

Unfortunately, the care that the trial judge took to avoid unfairly influencing the jury by implicitly qualifying Detective Morrissey outside of the jury's presence did not extend to his jury instruction on the evaluation of his opinion testimony wherein he referred to the detective as an "expert" three times. Indeed, it was paradoxical for the judge, on the one ***22** hand, to avoid acknowledging the detective's "expertise" by not qualifying him as an "expert" before the jury, but then, on the other hand, to label him as an "expert" in his final charge to the jury. For the reasons discussed herein, the judge's designation of the detective as an "expert" was error, especially where neither the defendant nor the prosecutor requested an instruction on expert witnesses. See R.13-17. Cf. *Commonwealth v. Harbin*, 435 Mass. 654, 659 (2002) (that judge chose not to comment specifically on jury's role in evaluating expert's testimony did not create substantial likelihood of miscarriage of justice, especially where he gave instructions to the same effect with regard to testimony in general); *Commonwealth v. Cheromcka*, 66 Mass. App. Ct. 771, 787 (2006) (standard jury instruction reminding jury that they are sole judges of credibility as to all witnesses was sufficient).

Review of the judge's instruction for prejudicial error requires a two-part analysis: 1) was there error; and (2) if so, was that error prejudicial. An error is not prejudicial if it did not influence the jury, or had but very slight effect; however, if the reviewing court cannot find with fair assurance, after ***23** pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, then it is prejudicial. *Commonwealth v. Urban*, 450 Mass. 608, 614 (2008) (citations and internal quotation omitted).

It is well recognized that "[t]he influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference and may prove controlling." *Commonwealth v. Hanscomb*, 367 Mass. 726, 732 (1975) (Hennessey, J., concurring), quoting *Querica v. United States*, 289 U.S. 466, 470 (1933). See Richey, *supra* at 555 (judicial declaration that witness is an "expert" may be an inappropriate judicial comment). Thus, when, as here, a court refers to a witness as an "expert", the jury may be inclined to give inappropriate weight to that witness's testimony. See Note to Fifth Circuit Pattern Criminal Jury Instruction §1.17. By labeling the witness as an "expert" to the jury, the judge, as in this case, puts his "stamp of authority" on a witness's opinion, thereby tipping the balance in favor of the party for whom the witness testifies. See Comment to Third Circuit Model Criminal Jury ***24** Instruction §2.09. Accordingly, the judge's designation of the detective as an "expert" to the jury, over defendant's objection, was error. And, as shown herein, the judge's error likely

affected the jury's verdict. See *Commonwealth v. Blache*, 450 Mass. 583, 597 (2008) (defendant entitled to new trial where errors in charge were prejudicial).

To be sure, the designation of the detective as an "expert" to the jury was unnecessary. The jury heard Morrissey testify about his experience and training and thus could independently evaluate that experience and knowledge in deciding whether or not to give credence to his opinion testimony. See Tr.2/25-27. See also *Leibovich*, 410 Mass. at 573 (jury may properly evaluate knowledge and experience in deciding what weight to give the opinion when reaching a final decision). The use of the term "expert" "merely duplicated factual evidence already in foundation for the opinion testimony." See Richey, *supra* at 553.

Regrettably, the judge's instruction designating the detective as an expert inserted prejudice into circumstances which might have otherwise been benign. "[The detective], while a qualified expert for purposes of [his] testimony, did not belong to one of ***25** the professions easily identified by jurors as those from whom expert opinions are typically drawn. For those reasons, there was little danger that the jury would ascribe additional significance to [his] testimony in the absence of an official designation by the judge as an "expert witness." *Richardson*, 423 Mass. at 185 (emphasis added). See also *Commonwealth v. Rivera*, 425 Mass. at 645. Cf. *Commonwealth v. Brouillard*, 40 Mass. App. Ct. 448, 453 & n.10 (1996) (clinical therapist likely perceived by jury as "especially qualified"). Without "an official designation by the judge", Morrissey was unlikely to have been perceived by the jury as an "expert". See *Richardson*, *id*. But with the judge's "stamp of authority", the detective's credibility was impermissibly enhanced and there was a likelihood that the jury would give inappropriate weight to his testimony. See Comment to Third Circuit Model Instruction §2.09, quoting from Richey, *supra* at 559 and citing Advisory Committee Note to Fed. R. Evid. 702.

Exacerbating the prejudice from the judicial designation of the detective as an "expert" was the fact that the detective testified as both a percipient ***26** witness and as an opinion witness. See *Commonwealth v. Tanner*, 45 Mass. App. Ct. 576, 579, 581 (1998) (likelihood for prejudice is great when a percipient police witness testifies as an expert). "[The] testimony of a combined expert/percipient witness has unique persuasive value". *Id*. at 582. While not categorically prohibited, such dual testimony is inadvisable. *Grissett*, 66 Mass. App. Ct. at 456, n.5. When, as here, a percipient police witness testifies as an expert witness, the danger is great that "the line between specific observations and expert generalizations [will] become blurred in these situations". *Tanner*, *supra* at 579. See *Commonwealth v. Ortiz*, 50 Mass. App. Ct. 304, 307 (2000); *Grissett*, *id*. See generally Note, *The Admissibility of Ultimate Expert Testimony by Law Enforcement Officers in Criminal Trials,* 93 Colum. L. Rev. 231, 245-246 (1993) (danger that juries may defer to police officer's opinion testimony is especially pronounced when officer testifies as fact and expert witness). In the circumstances of this case, the judge's designation of the detective as an "expert" was especially damaging because it unfairly enhanced the credibility of his opinion testimony about the function of "runners" as ***27** well as his percipient testimony about his identification of the defendant as the person who handed him the cocaine. See *United States v. Cruz*, 363 F.3d 187, 195 (2d Cir.2004) ("When a law enforcement official testifies about the facts of a case *and* offers expert opinions, a juror understandably will find it difficult to navigate the tangled thicket of expert and factual testimony from the single witness, thus impairing the juror's ability to evaluate credibility.") (internal quotation and citation omitted). Cf. *United States v. Foster*, 939 F.2d 445, 453 (7th Cir. 1991) (where law enforcement officer testified in dual role, there was no prejudice because court used "scrupulously neutral" terms that did not serve to overemphasize his role as expert).

Finally, the prejudice resulting from the judge's designation of the detective as an "expert" was not cured by his instruction on the evaluation of expert testimony. Cf. *Commonwealth v. Shelley*, 411 Mass. 692, 698, n.4 (1992) (judge's final charge cured

errors in challenged instructions); see also *Commonwealth v. Johnson*, 429 Mass. 745, 752 (1999) (any adverse inference created by judge's conduct was cured by his instructions). Quite the opposite, the judge's ***28** designation of the detective as an "expert" effectively undercut his instruction that the jury could decide to accept or reject the "expert" testimony. See Tr.2/148-149. See *Leibovich*, *supra* at 573. See also *Commonwealth v. Roberio*, 428 Mass. 278, 281 (1998) (credibility of expert's testimony was for jury, not the judge). In fact, such specialized instructions on the jury's role in evaluating "expert" testimony are not required. See *Harbin*, 435 Mass. at 658 (judge's general instructions that it was for jury to decide whether to accept or reject any parts of any witness's testimony were sufficient). Nevertheless, since it has long been within the prerogative of the jury to accept or reject "expert" testimony, judges often instruct a jury accordingly on its role in evaluating expert testimony. See *Congress & Empire Spring Co. v. Edgar*, 99 U.S. 645, 658 (1878). See also *Handbook of Massachusetts Evidence,* §7.4.3, p. 412 (8th ed. 2007). But where, as here, the judge himself labeled the detective *as* an "expert", any possible benefit from his instruction that the jury could accept or reject the detective's testimony would have dissipated. Cf. *Richardson*, *supra* at 184-185.

***29** *In the context of the trial, the judge's designation of the detective as an "expert" made a difference in the outcome of the case and a new trial is required.*

In determining whether an error amounts to prejudicial error, a reviewing court considers whether the error, in the circumstances, possibly would have made a difference in the case. *Commonwealth v. Orton*, 58 Mass. App. Ct. 209, 213 (2003) (quotation and citation omitted). Here, the judicial designation was significant in the context of the trial. See *id*. at 215. Where Morrissey's fact and opinion testimony constituted the key evidence against the defendant, it cannot be said with "fair assurance" that the judge's designation of him as an "expert" did not substantially sway the jury. See *Commonwealth v. Federico*, 425 Mass. 844, 852 (1997) (jury likely swayed by expert witness's opinion testimony).

As the record shows, Morrissey's opinion testimony on the function of runners in street-level drugs sales played a crucial role in the jury's determination, especially where the evidence at trial was that no drugs or monies were found on the defendant and that no one else at the scene was searched. See Tr.2/92-93, 95-96. As evidenced in the ***30** prosecutor's closing argument, Morrissey's opinion testimony on runners was essential for the prosecution to account for the absence of drugs or monies. [9] See *Tanner*, 66 Mass. App. Ct. at 440 (opinion testimony "filled a key gap in Commonwealth's proof"). See also *Commonwealth v. Martin*, 417 Mass. 187, 190 (1994) (error not harmless where prosecutor repeatedly stressed importance of erroneously admitted testimony during closing argument). Cf. ***31** *Commonwealth v. Dayes*, 49 Mass. App. Ct. 419, 423 (2000) (erroneous admission of irrelevant opinion testimony did not require reversal where, *inter alia*, prosecutor did not emphasize testimony in closing argument).

An important factor in determining whether an error is harmless is the overall strength of the case. *Tanner*, *supra* at 440-441. Here, the evidence against the defendant was not overwhelming. No drugs or monies were found on the defendant. No other persons at the scene were searched. And, while it is true that Morrissey made an in-court identification of the defendant as the person who handed him the cocaine, his identification must be regarded with skepticism, however, given the "suggestiveness [that] inheres in any identification of a suspect who is isolated in a court room". See *Commonwealth v. Choeurn*, 446 Mass. 510, 519 (2006), citing *Commonwealth v. Napolitano*, 378 Mass. 599, 604 (1979). See also Tr.2/131-132. Thus, in the context of the trial, the jury's verdict was likely swayed by the judge's designation of Morrissey as an expert, which enhanced his credibility as an opinion *and* a fact witness. Therefore, the error had a significant effect on the jury's verdict and was sufficiently prejudicial to warrant reversal. ***32** Compare with *Commonwealth v. Reeder*, 73 Mass. App. Ct. 750, 756 (2009) (no significant prejudice in view of overwhelming evidence of four hand-to-hand drug transactions between same undercover detective and the defendant, witnessed by another officer who knew the defendant).

Based on the foregoing, the jury instruction designating the detective as an "expert" unfairly prejudiced the defendant, thereby depriving him of his right to a fair trial and due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution and by article 12 of the Massachusetts Declaration of Rights. See *Webb v. Texas*, 409 U.S. 95, 98 (1972) (judge's remarks deprived defendant of his Fourteenth Amendment due process rights); *Commonwealth v. Sneed*, 376 Mass. 867, 871 (1978) (judge's remarks violated defendant's due process rights guaranteed by article 12). Thus, the defendant's convictions must be reversed and a new trial ordered.

*33 II. THE ADMISSION OF THE CERTIFICATE OF ANALYSIS OF THE SUBSTANCE ALLEGEDLY OBTAINED FROM THE DEFENDANT WITHOUT A LIVE AUTHENTICATING WITNESS VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION.

The certificate of analysis of the substance allegedly obtained from the defendant constituted testimonial evidence that was inadmissible under the constraints of the Sixth Amendment.

In order to convict the defendant of distribution of cocaine, the Commonwealth was required to prove beyond a reasonable doubt that the substance allegedly obtained from the defendant was a controlled substance. *Commonwealth v. Chappee*, 397 Mass. 508, 518-519 (1986). Instead of calling the laboratory technician who tested the substance as a witness, the Commonwealth introduced the certificate of analysis pursuant to G.L. c. 111, §13 to show that the substance was cocaine. (R.18; Tr.2/58). The defendant's objection to admission of the certificate on grounds of hearsay was overruled (Tr.2/57-58). The detective then read from the certificate, stating that the substance contained cocaine as defined in G.L. c. 94C, §31, Class B (Tr.2/57-59; R.18). The certificate of analysis was an out-of-court statement offered to prove the truth of the matter asserted and, as such, was plainly hearsay. See ***34** *Commonwealth v. Silanskas*, 433 Mass. 678, 693 (2001). The admission of the certificate without the testimony of a live authenticating witness to establish an essential element of the charged crimes denied the defendant his right to confront his accusers as guaranteed by the Sixth Amendment to the United States Constitution. [10]

The United States Supreme Court held in *Crawford v. Washington*, 541 U.S. 36, 51 (2004) that the Confrontation Clause prohibits the prosecution from introducing "testimonial" hearsay against a criminal defendant. The Court held that the Sixth Amendment required "[t]estimonial statements of witnesses absent from trial [be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59.

The following year, the Supreme Judicial Court in *Commonwealth v. Verde*, 444 Mass. 279, 282-284 (2005) considered the admission of drug analysis certificates in light of *Crawford*, ruling that admission of such ***35** certificates in the absence of testimony from the technician who tested the substance does not violate the Confrontation Clause because the certificate is a "public record" "akin to a business or official record" which *Crawford* had ruled was not testimonial. [11] Nevertheless, the continued vitality of *Verde* is questionable in light of the United States Supreme Court's review of *Commonwealth v. Melendez-Diaz*, 69 Mass. App. Ct. 1114 (2007).

In *Melendez-Diaz v. Massachusetts*, 128 S. Ct. 1647 (2008), the Supreme Court considered the question of "whether a state forensic technician's laboratory report prepared for use in a criminal prosecution is 'testimonial' evidence subject to the demands of the confrontation clause set forth in *Crawford*." See http://www.supremecourtus.gov/docket/07-591.htm ***36** (visited April 30, 2009) (R.25). Thus, the issue presented in *Melendez-Diaz* and in the present case is whether the drug certificate of analysis is "testimonial" evidence and thus inadmissible under the constraints of the confrontation clause as set forth in *Crawford*, *supra*

and in *Washington v. Davis*, 547 U.S. 813, 821 (2006), which further refined the definition of "testimonial" statements as those made when "the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution". [12]

The defendant respectfully states that *Verde* was wrongly decided and that *Crawford* and *Davis* dictate that formalized statements, such as the certificate of analysis in the present case, which have been made for prosecutorial purposes, constitute testimonial evidence. Although the defendant recognizes that this Court does not have the authority to overrule *Verde*, ***37** he presents this argument in order to preserve the issue pending the decision in *Melendez-Diaz*.

The drug certificate of analysis is a formal, sworn and signed statement, as required by G.L. c. 111, §13. The certificate is frankly a substitute for live testimony and is used to reduce court delays and the inconvenience of having to call a technician as a witness in each case. See *Verde*, 444 Mass. at 281, n.1. The certificate was essential to a finding of guilt on the charged offenses. Without the admission of the certificate, the Commonwealth's case against the defendant would have failed for lack of proof that the substance allegedly obtained from the defendant was cocaine. Therefore, the certificate of analysis was clearly prepared for the sole purpose of proving a fact relevant to an ongoing prosecution. As such, the certificate is a testimonial statement under *Crawford* and inadmissible in the absence of proof of the technician's unavailability and the opportunity for prior cross-examination. See *Davis v. Washington*, 547 U.S. at 821-822, 825.

In *Verde*, 444 Mass. at 283-284, the Court said, in discussing the applicability of *Crawford*, that the drug certificate of analysis was not "testimonial in ***38** nature" and fell under the "public record" or "business record" exception to the confrontation clause. To the contrary, the certificate of analysis is not a business record because the certificate was prepared and "calculated for use essentially in the court" and its "primary utility is in litigating". See *Palmer v. Hoffman*, 318 U.S. at 113-114 (records prepared for trial beyond business record exception to hearsay rule). The "business of preparing cases for trial" cannot bootstrap documents prepared in anticipation of litigation into business records admissible under the hearsay exception. See *id*. at 114. The confrontation clause is intended to prohibit the admission of *ex parte* affidavits in place of live testimony. See *Mattox v. United States*, 156 U.S. 237, 242 (1895). See also *Crawford*, 541 U.S. at 90 ("principal evil" at which confrontation clause directed was use of *ex parte* affidavits). To be sure, the certificates of analysis closely resemble such *ex parte* affidavits which the Confrontation Clause, as set forth in *Crawford* and *Davis*, prohibits admission as evidence at trial. Thus, the admission of the certificate of analysis, in lieu of live testimony from the technician who tested the substance, violated ***39** the defendant's Sixth Amendment right of confrontation.

The standard of review for assessing the admission of the constitutionally proscribed evidence in the defendant's case is whether the error was harmless beyond a reasonable doubt.

The defendant made a timely objection to admission of the certificate of analysis on hearsay grounds, but he did not object on the basis of constitutional grounds (Tr.2/57-59). Nonetheless, the defendant's failure to object on constitutional grounds will be excused where the failure to raise a constitutional issue at trial or on direct appeal when the constitutional theory on which the defendant relies was not sufficiently developed at the time of trial or direct appeal to afford the defendant a genuine opportunity to raise his claim at those junctures of the case. *Commonwealth v. Burgess*, 450 Mass. 422, 431 (2008). See *Commonwealth v. Randolph*, 438 Mass. 290, 295 (2002) (describing the "clairvoyance" exception). Under such circumstances, if constitutional error is found to have occurred, the conviction will be reversed unless the error is harmless beyond a reasonable doubt. *Id*. at 31-32. At the time of the defendant's trial in August of 2006, *Verde* was the ***40** settled law in Massachusetts. The petition for certiorari in *Melendez-Diaz* was not granted until March 17, 2008. See http:// www.supremecourtus.gov/docket/07-591.htm

(visited April 30, 2009) (R.21, 25). Therefore, the constitutional theory on which the defendant now relies was not sufficiently developed at the time of his trial and thus, the failure of his trial counsel to object on constitutional grounds--although an objection on non-constitutional grounds was properly made--should be excused. Contrast *Commonwealth v. Dessources*, 2009 Mass. App. LEXIS 599, 14-15, n.8 (May 9, 2009) (suggesting that even if a decision in *Melendez-Diaz* were to establish a new rule regarding applicability of confrontation clause to introduction of a drug analysis certificate, appellate challenge to admission of a drug certificate would not require reversal where a defendant, whose defense was personal use, did not object to certificate at trial and did not "contest that the substance was marijuana"); see also *Commonwealth v. Reeder*, 73 Mass. App. Ct. at 757 & n.9 (where defendant failed to object for any reason to admission of certificate at trial, no substantial risk of a miscarriage of justice was created).

***41** In the present case, the admission of the certificate of drug analysis in violation of the defendant's right of confrontation was not harmless beyond a reasonable doubt. See *Burgess*, 450 Mass. at 432. Without the admission of the certificate, the Commonwealth would have been unable to prove that the substance allegedly obtained from the defendant was cocaine and the defendant's convictions could not have been sustained. See *Commonwealth v. Dagraca*, 447 Mass. 546, 553 (2006) (error of constitutional dimension not harmless beyond a reasonable doubt where erroneously admitted evidence was not cumulative of other properly admitted evidence and was significant to the Commonwealth's case).

Even if this Court finds that the defendant's constitutional objection was not properly preserved, the claim of error will be reviewed to determine whether there was a substantial risk of a miscarriage of justice. See *Commonwealth v. Galicia*, 447 Mass. 737, 746 (2006). Without admission of the certificate of analysis, nothing in the record proves that the substance purportedly obtained from the defendant was cocaine, and his convictions could not be otherwise sustained. See ***42** *Commonwealth v. Foley*, 445 Mass. 1001, 1003 (2005) (substantial risk of miscarriage of justice created by admission of inadmissible testimonial statements where no other evidence supported allegations of assault). Thus, in the circumstances of this case, the admission of the certificate of analysis in violation of the defendant's Sixth Amendment right of confrontation created a substantial risk of a miscarriage of justice.

For the foregoing reasons, the defendant's convictions must be reversed and a new trial ordered.

III. THE SUBMISSION TO THE JURY OF A DRUG CERTIFICATE OF ANALYSIS WITHOUT REDACTION OF THE DEFENDANT'S NAME CREATED A SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE, WARRANTING REVERSAL.

Any reference to the defendant should be deleted from the drug analysis certificate. *Commonwealth v. Caceres*, 413 Mass. 749, 756, n.9 (1992), citing *Commonwealth v. Foley*, 12 Mass. App. Ct. 983, 984 (1981). In this case, the trial judge allowed the defendant's motion to strike his name from the certificate and during the trial, the judge agreed that the defendant's name would be redacted from the certificate (R.11-12, Tr.2/58). Before the jury retired, the judge said the "drug cert." would be ***43** properly sanitized before submission to the jury and the prosecutor agreed to do so (Tr.2/165-166). Nevertheless, the defendant's name was not redacted from the copy of the certificate that went to the jury room as an exhibit (R.18).

Where the judge allowed the defendant's motion to strike his name from the certificate and agreed that the certificate would be properly sanitized, it was error to submit the drug certificate without redaction to the jury. See R.11. See also *Commonwealth v. Day*, 42 Mass. App. Ct. 242, 246-247 (1997). Indeed, the listing of the defendant's name on the certificate was unnecessary to the integrity of the certificate. See *Commonwealth v. Sheline*, 391 Mass. 279, 286 (1984). Under G. L. c. 111, §13,

the certificate is admissible only to prove the composition and quantity of the substance analyzed. See *id*. (discussing former version of this statute). The statute, however, does not justify admission of the certificate to support an inference that the defendant was the person from whom the detective obtained the substance. Nevertheless, this is exactly what the defendant's name on the certificate suggested to the jury. The judge recognized that the defendant would be harmed by the ***44** admission of the certificate without redaction of his name and properly directed the certificate to be sanitized before it went to the jury. Unfortunately, that did not occur. See R.18.

To be sure, trial counsel had a duty to ensure that the copy of the certificate that went to the jury room was properly sanitized to avoid the resulting prejudice to the defendant. See *id*. See also *Commonwealth v. Thayer*, 39 Mass. App. Ct. 396, 399 (1995) (trial counsel should have objected to prejudicial information on back of inadequately sanitized photo). True, trial counsel properly sought to avoid prejudice to the defendant by moving to strike his name from the certificate and the judge and the prosecutor agreed to the redaction. But trial counsel was obliged to follow through to ensure that the defendant's name was redacted before the certificate went to the jury. Her failure to do so prejudiced the defendant and deprived him of his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by article 12 of the Massachusetts Declaration of Rights. See ***45** *Day*, *supra* at 246; *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

Even if trial counsel's oversight did not qualify as representation measurably below the performance expected from an ordinary fallible lawyer, trial counsel's failure to ensure that the defendant's name was redacted from the certificate before the exhibit went to the jury for their deliberations created a substantial risk of a miscarriage of justice. See *Day*, 42 Mass. App. Ct. at 245-246, citing *Commonwealth v. Curtis*, 417 Mass. 619, 624 n.4, (1994) (ineffectiveness of counsel is not significantly different from the standard of a substantial risk of a miscarriage of justice). Even if this error, standing alone, might not be sufficiently prejudicial to require reversal of the defendant's convictions, in combination with other errors discussed *infra*, the combined errors resulted in a substantial risk of a miscarriage of justice resulted. *Commonwealth v. Cancel*, 394 Mass. 567, 576 (1985). Therefore, reversal of the defendant's convictions is required and a new trial must be ordered.

46 *CONCLUSION

For the reasons stated herein, the defendant's appeal must be sustained and his convictions must be reversed.

Footnotes

1 The trial transcript is cited by volume and page as (Tr. ___). The transcript of the hearing on the defendant's motion to dismiss the indictments is cited as (M. Tr. ___). The defendant's record appendix is reproduced *post* and is cited as (R. ___).

2 On September 25, 2007, the trial judge amended the defendant's sentence on the school zone violation to a state prison term of two years to two years and one day, from and after the sentence on the distribution charge, *nunc pro tunc* to August 11, 2007 (R.9).

3 It should not escape notice that transcripts of the three-day trial and motion hearing took two and one-half years to complete, far in excess of the six-month time standard established by the Supreme Judicial Court for criminal transcripts ordered after July 1, 2006. See Office for Transcription Services, http://www.mass.gov/courts/admin/ots/timestandards.html. (visited April 7, 2009) (R.9-10, 20).

4 The defendant's objection to the admission of the certificate of analysis on hearsay grounds was overruled (Tr.2/57-58).

5 Though the detective was not expressly qualified by the trial judge as an expert witness, it was implicit that he testified as an expert. See Tr.2/27-28. See also *Commonwealth v. Rivera*, 425 Mass. 633, 644 (1997); *Commonwealth v. Grissett*, 66 Mass. App. Ct. 454, 459, n.10 (2006). Also, in addressing the defendant's objection to his designation of Morrissey as an "expert", the judge acknowledged that he provided expert testimony. See Tr.2/164.

6 Instruction 3.640 Expert Witness states:

When a case involves a technical issue, a person with special training or experience in that technical field is permitted to give his or her opinion about that technical issue, in order to help you as a jury.

Merely because a witness has expressed an opinion, however, does not mean that you must accept that opinion. In the same way as with any other witness, it is up to you to decide whether to rely on it. You may accept or reject it, and give it as much weight as you think it deserves. In making your assessment, you may consider this witness's education and experience, the reasons given for the opinion, and all other evidence in the case.

7 An alternate version of Instruction 3.640 uses the words "expert witness". See Mass. District Court Criminal Model Instructions (updated 1/23/09). This instruction, similar to what the judge instructed in this case, seems to be an abbreviated version of what was recommended in *Commonwealth v. Hinds*, 450 Mass. 1, 12, n.7 (2007). However, in *Hinds*, the Court was not asked to address--nor did it address--the prejudice inherent in the judicial labeling of a witness as an "expert" to the jury. Instead, the Court focused upon the possible prejudice from "the repeated use of the word 'true' and the concept it expresses, which is capable of different meanings," and opined that the word "true" might cause "jurors to speculate with respect to the standard of proof by which they determine that facts are 'true'." Id. This "better" instruction was set forth to address problems owing to the use of "true", not the use of the term "expert". *Id*. at 12 & n.7.

8 To compare Fed. R. Evid. 702 with Rule 702 in the Massachusetts Guide to Evidence (2008-2009 ed.), see 52-53, *infra*.

9 In his closing argument, the prosecutor said: "You heard the detective describe what a runner is. He went up to the car, he said to the detective what do you need? I need a twenty...He walked back over to that group of people who the detective described was there for about four minutes. Use your good judgment. What was he doing over there? There was another group of people. What is a runner? What was described to you today. A runner is someone who gets paid usually with a piece of crack at the end of the night for helping out. Four minutes. He mixes and mingles with the group. He comes back over. He spits out that piece of rock and hands it to the detective. The detective gives him the money. He walks back over to that group of people...That money was gone. That money went to the same person who gave [the defendant]... the drugs. That is where the money is."

...

"...No money found. That is because he gave it to the guy who gave him the drugs. He's a runner, ladies and gentleman. And I ask that you find him guilty on all counts..."

(Tr.2/134-136).

10 In cases like this one involving the hearsay rule and its exceptions, the protection provided by article 12 is coextensive with the guarantees of the Sixth Amendment. *Commonwealth v. Diaz*, 453 Mass. 266, 277, n.5 (2009)

11 Unlike traditional types of public records, such as maps, birth records and marriage records for which a hearsay exception has been recognized, see *Commonwealth v. Slavski*, 245 Mass. 405, 407-408 (1923), the certificate of analysis is not a record of objective facts routinely recorded pursuant to ministerial governmental operations. Instead, it is a record expressly produced at the request of the prosecution to be used in a criminal prosecution and attests to a fact that must be proved beyond a reasonable doubt. See *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943).

12 Following the Supreme Court's decisions in *Crawford*, *supra* and *Davis*, *supra*, a split of opinions developed among the federal courts of appeal and the state appellate courts, which appears to have contributed to the Supreme Court's grant of certiorari. Oral argument in *Melendez-Diaz* was held on November 10, 2008 (R.22).

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