

COMMONWEALTH OF MASSACHUSETTS  
Supreme Judicial Court

SJC-13301

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COMMONWEALTH OF MASSACHUSETTS, Appellee

v.

LINDSAY HALLINAN, Appellant

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ON APPEAL FROM THE ORDERS OF THE DISTRICT COURT

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BRIEF FOR APPELLANT LINDSAY HALLINAN

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## ISSUES

- I. Did the District Court err in denying a motion to withdraw a plea after finding that, by concealing exculpatory evidence for years, the Office of Alcohol testing ("OAT"), a state crime lab, engaged in egregious misconduct which directly impacts the integrity of the process and involves a lapse of systemic magnitude in the criminal justice system?
- II. Is a conclusive presumption of egregious misconduct required to address OAT's failure to employ minimally acceptable calibration standards, and its intentional concealment of its failure, which failure and concealment spanned a period of around eight years and affected approximately 27,000 individuals?
- III. Does a guilty plea or admission constitute a waiver of the right to seek a new trial on the grounds of either newly discovered evidence or prosecutorial nondisclosure?
- IV. Was the Commonwealth judicially estopped from claiming that a defendant was disentitled to relief where it signed an agreement which the



Judge adopted into a court order which provided, among other remedies, that it would be judicially estopped from taking a position contrary to its agreement to exclude thousands of breath tests? If so, does the Commonwealth's argument in direct contradiction of its agreement constitute further misconduct?

- V. May a defendant who successfully vacates their plea as a result of OAT's misconduct be exposed to a more serious charge than that for which they were initially convicted, and if convicted again, receive harsher punishment or be denied credit for punishment already served?

**STATEMENT OF THE CASE**

Lindsay Hallinan appeals the denial of her motion to withdraw her admission to sufficient facts.

On November 22, 2013, Ms. Hallinan admitted to sufficient facts in the Salem District Court on a single count of Operating a Motor Vehicle While Under the Influence of Liquor ("OUI"), 2<sup>nd</sup> Offense (G.L. ch. 90, §24(1)(a)(1). District Court Docket Sheet, R.A. 5. Pursuant to G.L. ch. 90, §24D, Judge Michael Lauranzano<sup>1</sup>

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<sup>1</sup> Judge Lauranzano passed away on November 20, 2015.

continued her case without a finding for two years, with conditions, fines, fees, and a statutory license suspension. District Court Docket Sheet, R.A. 5; Tender of Plea Form, R.A. 13.

Pursuant to consolidated litigation in Commonwealth v. Ananias, et. al, Concord District Court Docket No. 1248CR001075, Judge Robert Brennan excluded all breath tests from June 2011 forward because OAT failed to calibrate the machines in accordance with basic scientific standards and because OAT intentionally suppressed evidence of its failings. Ananias I<sup>2</sup>, R.A. 85-87; Ananias II, R.A. 231-232. On July 29, 2019, Judge Brennan permitted the use of breath tests to resume in cases arising on or after April 18, 2019. Ananias III, Add. 79.

Following the Ananias litigation, on June 14, 2021, Ms. Hallinan filed a motion to withdraw her admission to sufficient facts premised on two arguments. First, OAT's intentional misconduct and the Joint Agreement constituted newly discovered evidence that was not reasonably discoverable at the time she admitted to

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<sup>2</sup> Judge Brennan's three rulings are referenced as follows: Ananias [decision number].

sufficient facts. Combined Motion to Withdraw Admission to Sufficient Facts and Memorandum in Support Thereof (Ananias Litigation), ("Motion to Withdraw"), R.A. 15. Second, her admission was involuntarily induced by egregious intentional government misconduct which had only been recently discovered. Id.

On August 17, 2021, Judge Robert Brennan, the First Justice of the Salem District Court, and the judge whom the Chief Justice of the Trial Court specially assigned to the breath test litigation (Order of Assignment, Carey, C.J., Add. 70), conducted a hearing on Ms. Hallinan's motion. Transcript of Hearing on Defendant's Motion to Withdraw Admission to Sufficient Fact ("Transcript of Hearing"), R.A. 278. On October 4, 2021, Judge Brennan denied the motion. Memorandum of Decision on Defendant's Motion to Withdraw Admission to Sufficient Facts ("Hallinan Decision"), R.A. 266. In his ruling, Judge Brennan found "[t]he conclusion that OAT's behavior was egregiously impermissible [to be] inescapable" but was nevertheless constrained to deny the motion because "it is not within the authority of [the trial court] to create a conclusive presumption of egregious misconduct for all cases involving Draeger

9510 breathalyzer results."<sup>3</sup> Id., R.A. 272-73. On November 3, 2021, Ms. Hallinan timely filed her Notice of Appeal. District Court Notice of Appeal, R.A. 317. Ms. Hallinan applied for Direct Appellate Review, see DAR-28812, and the Supreme Judicial Court accepted her appeal on June 9, 2022.

#### STATEMENT OF FACTS

##### **I. Commonwealth v. Ananias et al: The Consolidated Draeger Alcotest 9510 Breath Test Litigation**

Prior to Commonwealth v. Camblin, 471 Mass. 639 (2015), defendants could not seek a Daubert-Lanigan inquiry into the reliability of a breath test machine since the "Legislature had expressly deemed evidence of a breath test conducted through use of such a device admissible," and "the scientific principle underlying the breathalyzer's premise [had] be[en] generally accepted." Id. at 647-648. However, in 2015 this Court clarified that because the machine at issue was a "'new generation' breathalyzer using methods of measuring

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<sup>3</sup> The Court found that Ms. Hallinan met the second prong of the Scott-Ferrara analysis - that is - she "establishe[d] a reasonable probability that she would not have tendered her admission to sufficient facts if she had known that the breathalyzer results would be excluded." Hallinan Decision, R.A. 276-77.

alcohol in a subject's breath different from previous machines that have been reviewed by our courts," it was "not insulated from challenge on grounds of reliability[.]" Id. at 644-645. The Court ordered a remand for a Lanigan hearing. Id. at 640.

In June of 2011, while Camblin was pending, OAT began using a new model – the Draeger Alcotest 9510. Ananias Consolidated Docket, ("Ananias Docket"), R.A. 50. The Chief Justices of the District Court and Boston Municipal Court issued orders of special assignment consolidating cases in which defendants challenged the scientific reliability of the Draeger 9510 machines. Order of Assignment, Botsford, J., Add. 64. On June 6, 2016, Justice Margot Botsford ordered consolidation of all cases in which defendants challenged the scientific reliability of the new Draeger 9510 machines. Id. Add. 64-65. A single Daubert-Lanigan hearing was to take place, the result of which would apply to all OUI cases tried in the District Court and Boston Municipal Court Departments thereafter.

On June 13, 2016, pursuant to G.L. c. 211B, § 9, the Chief Justice of the Trial Court specially assigned

Judge Robert Brennan to that task. Order of Assignment, Carey, C.J. Add. 70.

**a. Daubert-Lanigan Hearing Revealed OAT's Failure to Calibrate Draeger Alcotest 9510 Breath Test Machines in Accordance with Scientific Standards**

OAT, a branch of the Massachusetts State Police Crime Laboratory ("MSPCL"), is tasked with maintaining and calibrating breath test machines. G.L. c. 90, § 24K; 501 CMR 2.03-2.04. 501 CMR 2.06 directs OAT to certify that all breath test machines are maintained and working properly. 501 CMR 2.06 requires OAT, on a yearly basis, to calibrate breath test machines and certify that the calibration comports with scientific standards. Proof of a valid annual calibration and certification of a breath test machine is a foundational requirement for the admissibility of a breath test result as evidence in an OUI trial. G.L. c. 90, § 24K; G.L. c. 90, § 24(1)(e).

Pursuant to his special assignment, Judge Brennan convened a two-week Daubert-Lanigan hearing at which the defense and prosecution presented expert witnesses from around the world. Ananias I, R.A. 56. In a ruling dated February 16, 2017, Judge Brennan found that since the deployment of the Draeger 9510s in June of 2011, OAT represented that it had calibrated the machines in

accordance with basic scientific standards, when in fact OAT had failed to do so. Id., R.A. 84-85. The judge found that the "scientific community require[s] written protocols for accepting the presumptive reliability of calibration laboratories," and "[i]n the absence of written protocols, it cannot be assumed that any particular [OAT] calibrator understood or routinely applied the proper standards in calibrating a device." Id., R.A. 85. Consequently, Judge Brennan ruled "any Alcotest 9510 BAC [blood alcohol content] result from a device calibrated and last certified by OAT between June 201[1] and September 14, 2014 presumptively is excluded from use by the Commonwealth in any criminal prosecution."<sup>4</sup> <sup>5</sup> Id., R.A. 86. The judge, however, permitted the Commonwealth to "demonstrate ... on a case-by-case basis, that a particular Alcotest 9510 was calibrated and certified using scientifically reliable

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<sup>4</sup> Judge Brennan issued a "[c]orrection as to the factual findings of the Memorandum of Decision ... specifically correcting the date of deployment of the Alcotest 9510 breathalyzer to MA law enforcement agencies beginning June 2011 (and NOT June, 2012)." (emphasis in original). Ananias Docket, R.A. 50.

<sup>5</sup> OAT implemented a standard, written protocol for calibration of breath tests on September 14, 2014. Ananias I, R.A. 84.

methodology, and thus that a particular BAC is [admissible]." Id., R.A. 87.

**b. OAT's Intentional Withholding of Exculpatory Evidence**

During the travel of the Ananias litigation, Judge Brennan ordered OAT to produce records. In response, OAT submitted 1,976 worksheets, which it represented to be "all of the materials that the Court ordered produced." Ananias II, R.A. 219. Of those 1,976 worksheets, only eleven evidenced a failed calibration, representing a failure rate of less than one percent. Id., R.A. 219.

Doubting those results, the Ananias defendants uncovered 490 worksheets<sup>6</sup> which OAT concealed from the district court, each representing a failed annual calibration. Executive Office of Public Safety and Security Investigative Report: Discovery Practices at the Office of Alcohol Testing ("EOPSS Report"), R.A. 115, 122. OAT "intentionally withheld" these exculpatory worksheets which showed the rate of failed calibrations was close to twenty percent. Ananias II, R.A. 219. The discovery of the secret worksheets also

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<sup>6</sup> To date, OAT has only produced 436 of the 490 incomplete worksheets. Ananias II, R.A. 219.



revealed that OAT had been in the practice of concealing exculpatory evidence for years. EOPSS Report, R.A. 90, 98, 106, 133.

The Ananias defendants filed a motion for sanctions on August 19, 2017. Ananias II, R.A. 216. The motion led EOPSS to launch an investigation, which found OAT made:

serious errors of judgment in its responses to court-ordered discovery, errors which were enabled by a longstanding and insular institutional culture that was reflexively guarded, which frequently failed to seek out or take advantage of available legal resources, and which was inattentive to the legal obligations borne by those whose work facilitates criminal prosecutions.

EOPSS Report, R.A. 90.

The EOPSS investigation further revealed that since at least the deployment of the Draeger 9510 in June of 2011, OAT withheld exculpatory evidence and disobeyed discovery orders and that it had, during that time period, concealed evidence that its testing process was flawed. Id., R.A. 110-133. It found OAT had no "written policies regarding discovery," resulting in a discovery process that "was haphazard at best, and [] frequently failed to produce responsive documents that were in

OAT's possession." Id., R.A. 99; 110. It further found that OAT "has often been reluctant to volunteer more information than its personnel viewed as strictly necessary [and] declined to produce additional documents, even to prosecutors, in the absence of a court order," Id., R.A. 98, leaving "prosecutors in the position of unwittingly representing ... that the Commonwealth had complied with its discovery obligations, when in fact it had not." Id., R.A. 90.

Although every other branch of MSPCL handled discovery requests through the Case Management Unit ("CMU"), which maintained a written policy to respond to discovery requests, OAT handled its own discovery responses without assistance from CMU and had no "written policies regarding discovery." Id., R.A. 98.

EOPSS analyzed three particular categories of discovery "which should have been produced, and [were] not," including "hundreds of 'incomplete' certification worksheets, documentary evidence that breath testing instruments had failed to properly calibrate during OAT's certification process; OAT-generated records that reflected when breath test instruments were sent to their manufacturer for repair; and internal testing

records that would appear to fall squarely into the category of documents that had been ordered to be produced in pending criminal prosecutions." Id., R.A. 110; 90. EOPSS' "review also conclude[d] that these documents were not the only documents that OAT regularly failed to provide in response to requests from prosecutors and orders from courts because of its own unwritten policies." Id., R.A. 133.

Separately, in further response to the defense's motion for sanctions, the Commonwealth identified "over 50,000 documents [that] OAT intentionally withheld," "including exculpatory information on thousands of cases, involving both consolidated and non-consolidated defendants..." Hallinan Decision, R.A. 272.

Notwithstanding their audits, neither EOPSS, OAT, nor the Commonwealth was able to identify all the failed calibration records for the affected machines, as at least fifty-eight remain misplaced. EOPSS Report, R.A. 115 ("some 490 incomplete worksheets ... were not included in the paperwork that OAT collected for disclosure"); Ananias II, R.A. 219 (of those, "432 withheld worksheets were provided to the defendants' counsel on August 31, 2017"). As a result, the true

number of cases affected by failed calibrations, and to which cases those unaccounted-for worksheets pertained, is unknowable.

While the motion for sanctions was pending, the parties drafted the Parties' Joint Stipulation of Facts and Recommended Resolution to the Defendants' Motion for Sanctions ("Joint Agreement"). The Joint Agreement stipulated that OAT "intentionally withheld ... exculpatory materials." Joint Agreement, R.A. 235. It also adopted EOPSS' findings. Id., R.A. 236. The Commonwealth agreed that breath tests from June 2011 forward would be excluded, leaving the end date of the exclusion period to the judge. Id., R.A. 238-39. The Commonwealth agreed "not to seek to establish the reliability of OAT's calibration and certification on a case-by-case basis in this enlarged period at trial[.]"<sup>7</sup> Id., R.A. 239. The Commonwealth agreed to notify each affected defendant and pay for the notification. Id., R.A. 239-40. Finally, the parties agreed that they were judicially estopped from asserting any position contrary to the Joint Agreement. Id., R.A. 240. Every District

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<sup>7</sup> The agreement excluded certain aggravated OUI offenses including 5<sup>th</sup> or subsequent offenses and offenses involving serious injury or death.

Attorney in the Commonwealth signed the Joint Agreement. Id., R.A. 240-42.

Judge Brennan ruled on the motion for sanctions on January 9, 2019. Ananias II, R.A. 215, 232. The judge adopted the Joint Agreement in his order. Id., R.A. 218. In his ruling, Judge Brennan recognized not only that "OAT's misconduct impeded the consolidated defendants' ability to obtain a full, fair, and complete Daubert/Lanigan hearing," but that "the negative impact of EOPSS' findings regarding OAT's approach to exculpatory information on public trust and confidence in the fairness of the system and integrity of the process cannot be overstated." Id., R.A. 228 (citations omitted). Judge Brennan found that "[w]here, as here, the details of government misconduct have spread beyond the legal community, 'the court must also act, within the bounds of the law, to restore the public's faith in the integrity of the courts.'" Id., R.A. 229, quoting Bridgeman v. District Attorney of Suffolk County ("Bridgeman II"), 476 Mass. 298, 337 (2017) (Hines, J. dissenting). Judge Brennan described his mandate as twofold: "to fashion a remedy that not only address[ed] the particular wrong in this case, but that also best

ensures and restores confidence that OAT's methodology produces scientifically reliable breathalyzer results and that OAT is fully disclosing those instances where its ability to do so may be compromised." Ananias II, R.A. 228. "It is these harms in the aggregate that this ruling must remedy through the imposition of sanctions." Id., R.A. 228.

Judge Brennan held that "[i]n order to remedy the prejudice caused by OAT's misconduct against the consolidated defendants and the resulting damage to the criminal justice system, OAT must first demonstrate that its current methodology will produce scientifically reliable BAC results" by obtaining accreditation through the American National Standards Institute National Accreditation Board ("ANAB"). Id., R.A. 230.

Observing that "[t]he Commonwealth conceded ... that OAT's behavior was of a nature and breadth sufficiently serious that [broader] exclusion ... was an appropriate remedy," Hallinan Decision, R.A. 273, Judge Brennan ordered exclusion to continue until the Commonwealth demonstrated "that OAT has filed an application for accreditation with ANAB that is demonstrably substantially likely to succeed." Ananias

II, R.A. 231. He also ordered results from June 2011 forward categorically excluded. Id., R.A. 231-32.

Judge Brennan held that "OAT must also address the discovery practices that contributed to its misconduct." Id., R.A. 230-31. He mandated that OAT "promulgate formal discovery protocols" which "must include a definition of exculpatory evidence and an explanation of discovery obligations pursuant to such evidence." Id., R.A. 230. He ordered the Commonwealth to "certify that all OAT staff has been trained on the obligations relating to exculpatory evidence." Id., R.A. 230. He required OAT to upload its discovery protocol and discovery training materials onto its eDiscovery portal. Id., R.A. 231. He ordered that OAT publish on its eDiscovery portal its application for accreditation, the ANAB Accreditation Requirements manual, and updates at each stage of the accreditation process, confirming OAT's compliance. Id., R.A. 230-31. Judge Brennan determined these steps "will contribute to the restoration of confidence in the reliability of the scientific results produced by OAT, and thus further remedy the prejudice caused by OAT's violations of its obligations." Id., R.A. 231.

On July 29, 2019, Judge Brennan found that the Commonwealth complied with all aspects of its Order as of April 18, 2019. Ananias III, Add. 79.

The written notifications which the Commonwealth issued provide:

A statewide hearing was conducted to determine the scientific reliability of breath test results. As a result of that hearing, all breath test results administered in Massachusetts between June of 2011 and April 18, 2019 have been excluded from use in criminal prosecutions. This may provide an opportunity for you to challenge the disposition in your case.

Notice to Lindsay Hallinan, R.A. 36. The notice incorporates a link to [www.mass.gov/breathalyzer](http://www.mass.gov/breathalyzer) which expands upon the information contained in the written notice:

[A]n opportunity may exist for you to challenge the disposition in your case if a Draeger Alcotest 9510 breathalyzer machine was used in your case for which you were convicted or admitted to sufficient facts for Operating Under the Influence of Liquor (OUI).

Id., R.A. 37<sup>8</sup> (emphasis added).

**II. Commonwealth v. Lindsay Hallinan: Motion to**

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<sup>8</sup> The Mass.gov webpage, incorporated into the Ananias notices, is reproduced in the Record Appendix for the Court's convenience.



### **Withdraw Admission to Sufficient Facts**

On October 5, 2013, Ms. Hallinan was stopped at a Massachusetts State Police sobriety checkpoint. Arrest Report No. 2013-0A6-006610, R.A. 8. "[A]s with many cases involving roadblock [OUI] arrests, the breathalyzer was the most inculpatory piece of evidence used against [Ms. Hallinan]." Hallinan Decision, R.A. 276. "The proof of her impairment otherwise was based upon a fairly brief interaction with troopers and her admission to three drinks." Id., R.A. 276. The breath test device in her case was last certified on May 2, 2013. OAT Breath Test Report Form, R.A. 12.

On November 22, 2013, on counsel's advice that it would not be reasonable to take her case to trial given the breath test result of 0.23, Ms. Hallinan tendered a plea. Affidavit of Counsel, R.A. 32-33. The "breathalyzer result was part of the factual basis for the plea." Hallinan Decision, R.A. 275.

Ms. Hallinan's breath test fell into the class of presumptively excluded results established in Ananias I based on the reliability of that test, and the class of breath test results excluded as a result of OAT's withholding of exculpatory evidence in Ananias II. The

Commonwealth notified Ms. Hallinan pursuant to the Joint Agreement. Trial Court Ananias Notice to Lindsay Hallinan, R.A. 36. Ms. Hallinan retained her original counsel to prosecute a motion to withdraw her admission.

In her motion, Ms. Hallinan asserted that her attorney "would have advised [her] to take [her] case to trial if the breathalyzer result was excluded" and she "would have followed his advice." Affidavit of Lindsay Hallinan, R.A. 34-35. Her plea antedated the revelations that OAT kept its unscientific calibration process a secret, that OAT falsely certified that its process was scientific, and that OAT would later cover up its misconduct by culling the most damning evidence of its misconduct from its response to court orders.

Regarding the first prong of the Scott-Ferrara test, Judge Brennan found that "OAT intentionally withheld ... exculpatory information on thousands of cases, involving both consolidated and non-consolidated defendants," rendering "[th]e conclusion that OAT's behavior was egregiously impermissible [] inescapable." Hallinan Decision, R.A. 272. "No doubt, defendants [like Ms. Hallinan] who tendered pleas or admissions before the Ananias decision were victimized by OAT's

conduct in withholding exculpatory evidence." Id., R.A. 274. Nevertheless, the Court denied the motion because "it is not within the authority of [the trial court] to create a conclusive presumption of egregious misconduct for all cases involving Draeger 9510 breathalyzer results." Id., R.A. 273.

As to the second prong of the Ferrara-Scott test, Judge Brennan found "a reasonable probability that [Ms. Hallinan] would not have tendered her admission to sufficient facts if she had known that the breathalyzer results would be excluded." Id., R.A. 276-77.

On November 3, 2021, Ms. Hallinan timely filed her Notice of Appeal. Notice of Appeal, R.A. 317.

#### **SUMMARY OF ARGUMENT**

The latest of the Massachusetts lab scandals, this case arises from OAT's intentional concealment of evidence that its breath testing methodology failed to meet minimum scientific standards for a period of around eight years, affecting approximately 27,000 individuals. Hallinan Decision, R.A. 266-67. Nevertheless, the district court denied Ms. Hallinan's motion to vacate her admission because it was not "within the authority

of [the district court] to create a conclusive presumption of egregious misconduct[.]" Id., R.A. 273.

In Argument I, *infra* at 31-41, Ms. Hallinan argues that the district court erred in denying her motion to vacate her admission to sufficient facts where it found a "logical connection between the drug lab and breathalyzer cases: they are similar in scope, they involve evidence collected and analyzed by arms of the Massachusetts State Police Crime Laboratory, they directly impact the integrity of the process, and they involve a 'lapse of systemic magnitude in the criminal justice system[.]'" Id., R.A. 272; (citations omitted). Because "[t]he conclusion that OAT's behavior was egregiously impermissible is inescapable," Id., she was entitled to relief.

In Argument II, *infra* at 41-43, Ms. Hallinan argues that a conclusive presumption of egregious misconduct is warranted because OAT's insidious form of misconduct is a lapse of systemic magnitude in the criminal justice system which belies reconstruction.

In Argument III, *infra* at 43-49, Ms. Hallinan argues that the Court should hold that a guilty plea or admission does not constitute a waiver of the right to

seek a new trial on the grounds of either newly discovered evidence or prosecutorial nondisclosure. A holding to the contrary will only encourage systemic violations of this nature to persist, and the Art. 12 right to "all proofs favorable" supports this requirement.

Below, the Commonwealth argued that Ms. Hallinan was disentitled to relief because she failed to establish that misconduct specifically affected her case, she did not join the consolidated litigation, and her plea waived her claims of prosecutorial non-disclosure and newly discovered evidence. In Argument IV, *infra* at 49-55, Ms. Hallinan argues that the Commonwealth was judicially estopped from presenting these arguments. Under the circumstances, the Commonwealth's arguments constituted misconduct.

In Argument V, *infra* at 55-57, Ms. Hallinan argues that a defendant who successfully vacates their plea as a result of OAT's misconduct may not be exposed to a more serious charge than that for which they were initially convicted, and if convicted again, may not receive harsher punishment or be denied credit for punishment already served.

## ARGUMENT

### STANDARD OF REVIEW

A motion for a new trial pursuant to Mass. R. Crim. P. 30(b) is the proper vehicle by which to seek to vacate an admission to sufficient facts. Commonwealth v. Scott, 467 Mass. 336, 337, n.1 (2014), citing Luk v. Commonwealth, 421 Mass. 415, 418 n.6 (1995). A judge, in her sound discretion, may grant a Rule 30(b) motion any time it appears that justice may not have been done. Commonwealth v. Moore, 408 Mass. 117, 125 (1990). Commonwealth v. Stewart, 383 Mass. 253, 260 (1981). Under Rule 30(b), judges should make "such findings of fact as are necessary to resolve the defendant's allegations of error of law." The judge is the "final arbiter on matters of credibility," and her findings of fact are to be accepted if supported by the evidence. Commonwealth v. Schand, 420 Mass. 783, 787 (1995). This Court will review Rule 30(b) decisions to determine if the judge committed "a significant error of law or other abuse of discretion." Commonwealth v. Sherman, 451 Mass. 332, 334 (2008), quoting Commonwealth v. Martin, 427 Mass. 816, 817 (1998).

**1. THE DISTRICT COURT ERRED IN DENYING MS. HALLINAN POST-CONVICTION RELIEF WHERE OAT'S FAILURE TO EMPLOY MINIMALLY ACCEPTABLE CALIBRATION STANDARDS AND ITS DECISION TO WITHHOLD EVIDENCE OF ITS FAILURE CONSTITUTED "EGREGIOUSLY IMPERMISSIBLE" CONDUCT ANTEDATING MS. HALLINAN'S PLEA**

A plea may be vacated if "egregious" government misconduct "implicat[ing] due process" antedates it. Scott, 467 Mass. at 347. The misconduct must have materially influenced the decision to forego trial. Id.

**a. By the government**

To obtain relief, Ms. Hallinan must show that misconduct was "undertaken 'by government agents' prior to the entry of [her] plea." Scott, 467 Mass. at 348, quoting Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006).

Misconduct "by the government" includes state crime laboratories. Scott, 467 Mass. at 348; Martin, 427 Mass. at 822-824; see also Commonwealth v. Woodward, 427 Mass. 659, 679 (1998) (state medical examiner). OAT, a branch of the MSPCL, is designated to calibrate and certify breath test machines in Massachusetts. G.L. c. 90, § 24K; 501 CMR 2.03-2.04. OAT certifies that the calibration of breath test machines comports with scientific standards for the criminal justice system.

501 CMR 2.06. Because the "Legislature contemplated coordination of efforts between [OAT] and the district attorney," "[c]learly, [OAT] is an agent of the prosecution team and the behavior of its employees is state action." Scott, 467 Mass. at 349; Hallinan Decision, R.A. 272.

**b. Egregiously impermissible conduct**

Ms. Hallinan must next show "egregious ... misconduct was the source of [her] misapprehension of some aspect of [her] case." Scott, 467 Mass. at 347, quoting Ferrara, 456 F.3d at 291.

OAT's misconduct was "egregious": its failures as a calibration lab and intentional withholding of exculpatory evidence concerns the breath test result - the crown jewel of any OUI prosecution.

OAT's failure to adhere to basic scientific standards in its calibration process was egregious. Pre-Camblin case law foreclosed judicial inquiry into the reliability of the breath test, leaving OAT's calibration process the sole bulwark against erroneous convictions based on flawed test results. By eschewing any standard, written protocols, OAT abdicated that role. Without protocols, "it cannot be assumed that any



[OAT] calibrator understood or routinely applied the proper standards in calibrating a device." Ananias I, R.A. 85. These failings resulted in one in five machines failing calibration. Securing convictions against thousands of individuals, utilizing methods which failed one in five times, was unquestionably egregious.

OAT exacerbated its egregious failures in its role as a calibration lab by deciding to hide its lapses. In that regard, OAT's misconduct was not isolated; from at least June 2011 forward, the EOPSS investigation found, and Judge Brennan held, that OAT's misconduct was widespread and impacted an untold number of defendants throughout the Commonwealth. EOPSS Report, R.A. 133; Hallinan Decision, R.A. 270, 272, 274. OAT "made serious errors of judgment in its responses to Court ordered discovery, errors which were enabled by a long-standing culture that was reflexively guarded ... and which was inattentive to the legal obligations born by those whose work facilitates criminal prosecutions." EOPSS Report, R.A. 90.

Judges, prosecutors, and defense counsel relied on OAT discovery as being complete and accurate. Trials and pleas were conducted, prosecutors made

representations of discovery being complete, and defense counsel advised clients, all relying on OAT's assertions, only to later discover through Ananias that OAT's representations were intentionally inaccurate and incomplete since at least June of 2011. For years, OAT hid evidence that its testing failed to meet minimum scientific standards, rendering its results inadmissible. Thousands of individuals were convicted based on these false assurances. "The conclusion that OAT's behavior was egregiously impermissible is inescapable." Hallinan Decision, R.A. 272.

As Judge Brennan recognized, this point is not in genuine controversy: the Commonwealth's agreement to conclusively exclude all breath tests over a period of years, then pay to notify thousands of individuals that they could challenge their convictions or admissions as a result, "can only be construed as a concession that the government's conduct for the duration of the period was 'egregiously impermissible.'" Id., R.A. 273.

OAT's misconduct persisted through the Ananias litigation, leading to the ultimate discovery of the lab's "long-standing culture that was reflexively guarded ... and which was inattentive to the legal

obligations born by those whose work facilitates criminal prosecutions." EOPSS Report, R.A. 90. Although OAT's misconduct would only be discovered after Ms. Hallinan's admission, the magnitude of OAT's malfeasance can only be fully understood in the context of its conduct during the litigation ostensibly designed to uncover its wrongdoing: "It is these harms in the aggregate" which Judge Brennan's order sought to address. Ananias II, R.A. 228.

During the Ananias hearings, OAT doubled down on its culture of deception by "blatantly disregarding" Judge Brennan's discovery orders and intentionally distorting the evidence by culling from its response not only hundreds of failed calibrations but thousands of documents affecting consolidated and non-consolidated defendants. In so doing, OAT endeavored to conceal the scope and depth of its misconduct from the very court examining its statewide procedures. It presented records showing a less-than one percent failure rate to hide a failure rate approaching twenty percent. Its conduct during the Ananias hearings elevates this crisis to a level of systemic wrongdoing that eclipses the misconduct of the individual bad actors at the heart of

the Dookhan and Farak scandals and "cast[s yet another] shadow over the entire criminal justice system." Scott, 467 Mass. at 352. Only by calling the government's misconduct in this case exactly what it is - egregious - can this Court prevent that shadow from undermining the public's confidence in the fairness of the courts.

**c. In the defendant's case**

To obtain relief, a defendant "must demonstrate that the misconduct occurred in h[er] case." Scott, 467 Mass. at 350, citing Ferrara, 456 F.3d at 284.

Judge Brennan's finding that those who tendered pleas before OAT's malfeasance came to light "were victimized by OAT's conduct" shows a nexus between the government misconduct and Ms. Hallinan's case. Hallinan Decision, R.A. 274. The global remedy, which the Commonwealth conceded was necessary in all cases, establishes a nexus between OAT's misconduct and those cases. Judge Brennan's finding and the Joint Agreement satisfy the Scott-Ferrara nexus requirement. More is not required.

Beyond that nexus, the specific harm in any given case "belies reconstruction" because OAT obfuscated its own wrongdoing. By certifying that it had "calibrated"

each device, OAT falsely represented that it did so reliably. It then reinforced that false veneer by concealing evidence revealing that the machines had, in fact, failed calibration in a great many cases. Defendants were entitled to rely on the Commonwealth's representation that the machines were properly calibrated and certified, and the Commonwealth is in a poor position to argue that they should have taken its representations at anything but face value.<sup>9</sup>

Even after the fact of their convictions, consolidated and non-consolidated defendants would remain oblivious to OAT's misconduct because that misconduct came to light years later, only after the Ananias defendants and the district court caught OAT in the act of concealing it.

This case parallels the nexus problem in Scott. There, defendants could not show a nexus between their case and Ms. Dookhan's misconduct because she could not reliably identify affected cases. She "was the only witness to her misconduct in most instances" and "even

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<sup>9</sup> Attorneys, judges and the public reasonably rely on the truthfulness of a prosecutor's representations flowing from the special duty and trust inherent in that public position. See Mass. R. Sup. Jud. Ct. 3.8 comment [1].

if truthful," she could not "identify those cases that involved proper testing" and those that did not. Scott, 467 Mass. at 351-352. So too in this matter. The only evidence connecting any given case to misconduct is maintained and generated by OAT - the very agency whose response was to conceal its own wrongdoing - up to and including its choice to hide documents from the court charged with scrutinizing its misconduct.

Moreover, "even if truthful," OAT could not identify all compromised cases because it has failed to locate all identified failed worksheets. At least fifty-eight remain misplaced. EOPSS Report, R.A. 115 ("some 490 incomplete worksheets ... were not included in the paperwork that OAT collected for disclosure"); Ananias II, R.A. 219 (of those, "432 withheld worksheets were provided to the defendants' counsel on August 31, 2017"). Without production of all failed worksheets, even OAT cannot identify all of the machines that failed.

But even if OAT could produce every failed worksheet, those records would not suffice to ensure that any breath test in the exclusion period was reliable. This is so because of a core unanswered question: why were the machines failing to begin with?

The Commonwealth has not answered that question and has demonstrated little inclination to do so, even after the Ananias defendants uncovered records showing that one in five machines failed calibration. This failure rate suggests a serious flaw in OAT's calibration process. Ananias I, R.A. 85-86 ("if an instrument is not calibrated correctly annually, it will not work in the field.") (quoting testimony of Draeger representative Burkhard Stock, Phd.) Nevertheless, at no point in the Ananias litigation or thereafter did the Commonwealth seek to identify the root cause of the problem, despite the fact that OAT's own quality assurance protocol mandates an evaluation for such nonconformities. Quality Assurance Manual, R.A. 346-47.<sup>10</sup>

Where twenty percent of machines failed calibration for reasons OAT has shown no interest in identifying, OAT's own records that a given machine never failed its own flawed calibration process provide little confidence that a given test result was, in fact, reliable.

The systemic nature of OAT's deceptive practices thwarts other means of reconstruction. There are no

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<sup>10</sup> The Quality Assurance Manual, referenced in the Ananias II decision (R.A. 223), is included in the record appendix for the Court's convenience.

identifiable good faith actors within OAT against which one specific bad actor might be compared. Rather, due to its "unwritten policies," OAT chose to produce discovery hiding its unscientific methodology while concealing that which exposed it. Thus, the full impact of OAT's "longstanding insular institutional" practices and "intentional" misconduct will never be known. EOPSS report, R.A. 90, 133. Despite the obstacles in reconstructing the government's malfeasance, it is "reasonably certain ... that [OAT's] misconduct touched a great many cases." Scott, 467 Mass. at 352.

The only way to connect Ms. Dookhan's misconduct to a given case was her signature as analyst on the lab report. Id. Similarly, the only trustworthy basis to assess whether OAT's misconduct touched a given case is by seeing if the applicable Draeger 9510 certification falls within the exclusion period. OAT's misconduct is so inextricably tied to all breath test results that there is no other place to even begin to look. Because OAT's malfeasance is systemic and, at its core, worked to corrupt any record of its occurrence, there is no other reliable evidence that could make plain its misconduct in a specific case.



Given the magnitude of OAT's deception, which "belies reconstruction," it is "most appropriate that the benefit of [this Court's] remedy inure to defendants." Id. at 352.

**II. OAT'S MISCONDUCT CREATED A LAPSE OF SYSTEMIC MAGNITUDE WHICH CAN ONLY BE REMEDIED BY A CONCLUSIVE PRESUMPTION OF EGREGIOUS MISCONDUCT**

The "conclusive presumption" of egregious misconduct in Scott was a "sui generis" "special evidentiary rule" "intended to apply only to the narrow class of cases" involving Ms. Dookhan's misconduct. Id. at 353-354. This Court declined to apply that special evidentiary rule to the Farak matter because "only eight [affected] cases thus far [had] surfaced." Commonwealth v. Cotto, 471 Mass. 97, 111 (2015). But when a later investigation revealed that the Commonwealth had engaged in a cover-up of Ms. Farak's misconduct, this Court went beyond a conclusive presumption of misconduct by ordering a class of drug cases, including every case from the Amherst lab for a period of four years, dismissed with prejudice "regardless of who signed the certificate of analysis." Comm. for Pub. Counsel Servs. v. Attorney General, 480 Mass. 700, 735 (2018).

Whether the latter remedy will at some point become necessary remains to be seen. What is clear though is that this Court must exercise its superintendence powers to add cases impacted by OAT's misconduct to the "narrow class of cases" entitled to a conclusive presumption of misconduct. Scott, 467 Mass. at 352. Unlike in Cotto, OAT's misconduct did not involve only eight cases. 471 Mass. at 111. It involved approximately 27,000. Unlike in Cotto, where the factual record of Ms. Farak's conduct had not been developed, this case had the benefit of a judicial inquiry and an EOPSS investigation, the fruits of which revealed OAT's systemic suppression of exculpatory evidence and subsequent intentional production of grossly misleading information in response to court orders.

This Court "cannot expect defendants to bear the burden of a systemic lapse" such as occurred here. Bridgeman v. Dist. Attorney for the Suffolk Dist., 471 Mass. 465, 487 (2015) ("Bridgeman I"). Rather, "in the wake of government misconduct that has cast a shadow over the entire criminal justice system, it is most appropriate that the benefit of [its] remedy inure to defendants." Scott, 467 Mass. at 352. This Court can

only meaningfully dispel this shadow by creating a conclusive presumption of egregious misconduct.

**III. OAT'S UNSCIENTIFIC PRACTICES AND CONCEALMENT OF THE SAME SHOULD PERMIT AN IMPACTED DEFENDANT TO VACATE THEIR PLEA BASED ON A COMMON LAW CLAIM OF NEWLY DISCOVERED EVIDENCE OR CONSTITUTIONAL CLAIM OF PROSECUTORIAL NON-DISCLOSURE**

The common-law theory of newly discovered evidence provides a basis to vacate Ms. Hallinan's plea, Commonwealth v. Grace, 397 Mass. 303, 305 (1986) as does the constitutional theory of prosecutorial non-disclosure. Commonwealth v. Tucceri, 412 Mass. 401, 412 (1992). As suggested in Scott, in the context of a plea, the relevant inquiry is whether "there is a reasonable probability that, but for [the newly discovered or suppressed evidence], [the defendant] would not have pleaded guilty[.]" 467 Mass. at 361 (citations omitted).

The newly discovered / suppressed evidence of OAT's failure to meet minimum scientific standards in its calibration process, and concealment of the same, satisfies the "reasonable probability" standard because it undermined the breath test which was the centerpiece of the case against Ms. Hallinan; the remaining evidence against her was subjective and weak. Id. at 305.

OAT's misdeeds and failure to provide necessary discovery was not fully known - outside OAT - until years after Hallinan's admission; the evidence is thus "newly discovered." Grace, 397 Mass. at 306. Prosecutorial suppression of this evidence also violated due process. Martin, 427 Mass. at 823.

The Commonwealth was obliged to furnish evidence of OAT's malfeasance even in cases resolved with a plea. While the Supreme Court in U.S. v. Ruiz, 536 U.S. 622 (2002) held that prosecutors need not disclose impeachment evidence prior to a plea, its holding did not extend to exculpatory evidence. Id. at 625, 629.<sup>11</sup> Unlike in Ruiz, where court rules did not mandate disclosure of the contested information, 536 U.S. at 632, the Commonwealth was obliged to disclose OAT's incompetent procedures. Compare Mass. R. Crim. P. 14(a)(1)(a)(iii) (mandating "automatic discovery" of exculpatory evidence) with Ferrara, 456 F.3d at 292

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<sup>11</sup> Some courts interpret Ruiz as not foreclosing a challenge to a guilty plea when the prosecution failed to disclose exculpatory evidence. See U.S. v. Fisher, 711 F. 3d 460, 465 n. 2 (4th Cir. 2013); State v. Huebler, 275 p. 3d 91, 96-97 (Nev. 2012); Medel v. State, 184 P.3d 1226, 1234-35 (Utah 2008); McCann v. Mangialardi, 337 F.3d 782, 788 (7<sup>th</sup> Cir. 2003). Contrast U.S. v. Mathur, 624 F.3d 498, 507 (1<sup>st</sup> Cir. 2010); U.S. v. Conroy, 567 F.3d 174, 179 (5<sup>th</sup> Cir. 2009).

(given district of Massachusetts "automatic discovery" rules, "[t]he government's obligation to disclose ... can hardly be doubted").

The only remaining question is one left open in Scott - whether Ms. Hallinan's admission waived her claims. 467 Mass. at 359. In Commonwealth v. Fanelli, 412 Mass. 497 (1992), a non-Brady v. Maryland<sup>12</sup> case in which the defendant challenged his exclusion from a lobby conference, this Court opined that "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case [and] renders irrelevant those constitutional violations that are not logically inconsistent with the valid establishment of factual guilt[.]" Id. at 500-01 (citation / quotation marks omitted; emphasis in original) citing Commonwealth v. Stokes, 18 Mass. App. Ct. 637, 641 (1984), quoting Menna v. New York, 423 U.S. 61, 62-63 n.2 (1975). The reasoning underlying Fanelli does not extend to Ms. Hallinan's case. Unlike Fanelli, this case frames the issue in a Brady context; it concerns the government's suppression of evidence

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<sup>12</sup> 373 U.S. 83 (1963).

that called into question its central proof of impairment, which proof it relied upon in establishing the factual basis<sup>13</sup> for Ms. Hallinan's plea, and, presumably, every plea involving a Draeger 9510 machine last certified from June 2011 to April 17, 2019.

In Ms. Hallinan's case, and presumably every case during the exclusion period, the Commonwealth induced her to forego trial by presenting her guilt as a scientific fact - a fact conclusively proved by a breath test result which it held out as unimpeachable. It is not a stretch to infer that, of the total number of individuals who took a breath test, a great many did so because they believed they were not impaired and thus not guilty. As to those individuals, the Commonwealth's representation that their breath test unassailably proved their impairment worked to erode their own confidence in their innocence, causing people to plead guilty not because they were guilty, but because a machine said they were guilty. A plea induced by

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<sup>13</sup> Evidence of a breath test result may be used by the Commonwealth to support the factual basis for both the "per se" or "impairment" theories of the statute. Commonwealth v. Colturi, 448 Mass. 809, 818 (2007); Commonwealth v. Hubert, 71 Mass. App. Ct. 661, 663, aff'd, 453 Mass. 1109 (2009).

misrepresentations of guilt - representations as potent as they were false - hardly "removes the issue of factual guilt from the case," much less "quite validly" so. Id. at 500.

Consequently, this case shows why this Court should clarify that Brady principles require pre-plea disclosure of exculpatory information. Stated simply, the Commonwealth induced Ms. Hallinan and others to plead guilty by representing the breath test proved her guilt, when it did not. To permit the Commonwealth to extract pleas under false pretenses, then argue that the very plea so extracted bars challenge to its provenance, will only encourage systemic violations of this nature to persist. Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir.1995) ("if a defendant may not raise a Brady claim after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas").

Obliging the government to furnish exculpatory evidence before a plea, and granting relief when it does not, conforms to this Court's construction of Art. 12 as broader than the U.S. constitution when its wording or history supports it. See, e.g., Commonwealth v.

Mavredakis, 430 Mass. 848, 861 (2000) (broader language in art. 12 construed to create a "duty to inform a suspect of an attorney's efforts to provide legal advice"); Opinion of the Justices, 412 Mass. 1201 (1992) (contrary to federal law, under art. 12, evidence that a defendant refused a breath test is inadmissible); Commonwealth v. Perkins, 450 Mass. 834, 853 n.14 (2008) ("a defendant's right to conflict-free assistance of counsel is afforded greater protection" under art. 12 than under the Federal Constitution); Commonwealth v. Amirault, 424 Mass. 618, 631 (1997) (unlike the Federal Confrontation Clause's "brief and abstract terms," the specific language of Art. 12 mandates "face to face" confrontation).

Unlike the "brief and abstract terms" in the federal due process clause, Art. 12 guarantees a criminal defendant the specific "right to produce all proofs, that may be favorable to him[.]" The United States Constitution contains no comparable right. To the extent Ruiz, 536 U.S. at 633, may be construed to limit the right to favorable proofs, at least as relates to pre-plea discovery of impeachment evidence, the Art. 12 right to "all proofs ... favorable" forbids any such



limitation, much less the suppression of "proofs" undermining the centerpiece of the Commonwealth's case. Because Art. 12, on its face, mandates disclosure of exculpatory evidence, and does so without tying that right exclusively to cases that proceed to trial, it requires the pre-plea discovery of exculpatory evidence.

**iv. THE COMMONWEALTH IS JUDICIALLY ESTOPPED FROM ASSERTING THAT MS. HALLINAN WAS DISENTITLED TO RELIEF; ITS ATTEMPT TO BREACH ITS AGREEMENT CONSTITUTES MISCONDUCT**

Judicial estoppel is an equitable doctrine that prevents a party from asserting a position that contradicts a position the party previously asserted. Blanchette v. School Comm., 427 Mass. 176, 184 (1998) citing Fay v. Federal Nat'l Mtge. Ass'n, 419 Mass. 782, 787 (1995). Two core principles apply: 1) the party's current position directly contradicts their prior position, and 2) the prior position was accepted by the court. Id. citing Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 33 (2004).

After Ananias I, each District Attorney signed an agreement that all breath tests would be excluded, that the Commonwealth would not seek to establish the

reliability of any test, and that the Commonwealth would pay to notify every affected defendant and their attorney<sup>14</sup> that "as a result of" a hearing on the "scientific reliability of breath test results," their breath test was excluded.<sup>15</sup> Trial Court Ananias Notice to Lindsay Hallinan, R.A. 36; Joint Agreement, R.A. 239-40. The combination of these agreements "can only be construed as a concession that the government's conduct for the duration of the period [from June 2011 forward] was 'egregiously impermissible.'" Hallinan Decision, R.A. 273. The Commonwealth also agreed that judicial estoppel barred any position to the contrary. Joint Agreement, R.A. 240. The Commonwealth now seeks to renege on that agreement in three ways.

First, the Commonwealth below asserted that Ms. Hallinan was not entitled to a new trial because she failed to establish government wrongdoing specific to

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<sup>14</sup> The Commonwealth notified Ms. Hallinan but not her attorney that her breath test was excluded.

<sup>15</sup> Pursuant to the Joint Agreement, the Commonwealth was free to argue, as it did here, albeit unsuccessfully, that Ms. Hallinan failed the second prong of the Scott-Ferrara test, which required her to demonstrate a reasonable probability that she would not have pleaded guilty had she known of OAT's misconduct. Scott, 467 Mass. at 354-45 citing Ferrara, 456 F.3d at 290, 294. Commonwealth's Opposition, R.A. 260-61; Hallinan Decision, R.A. 276-77.

her case. Commonwealth's Opposition to the Defendant's Motion for New Trial ("Commonwealth's Opposition"), R.A. 259. The Commonwealth clarified its point during argument, saying "[the defendant has] to point out specific things about [their] test - [their] case and that specific machine, and that hasn't been done here[.]" Transcript of Hearing, R.A. 296-97. By arguing that defendants must prove a specific breath testing deficiency in their case, the Commonwealth takes a position which directly contradicts its earlier position that exclusion of all breath tests was necessary following the Court's finding that OAT failed to employ minimum scientific standards of reliability in its certification process and hid that failing from defendants and, later, from Judge Brennan.

Second, the Commonwealth argued that Ms. Hallinan is not entitled to the terms of the agreement because she "did not join the consolidated litigation." Commonwealth's Opposition, R.A. 263. However, the agreement unquestionably applied to all affected defendants. Justice Botsford ordered that the decisions in the Ananias litigation would "generally apply to all OUI cases tried in the District and Boston Municipal

Court Departments..." Order of Consolidation, Botsford, J., Add. 64, and, at least in the context of the Ananias litigation, the Commonwealth conformed its response to her ruling by agreeing to exclude all breath tests during the applicable period and agreed to notify all individuals who had been convicted in a case involving the Alcotest 9510. Joint Agreement, R.A. 238-39.<sup>16</sup> That the Commonwealth in its response to Ms. Hallinan's motion chose to ignore Judge Botsford's order and disregard the Joint Agreement bearing its own signature does not detract from its binding nature.

Third, the Commonwealth argued that Ms. Hallinan's admission constituted a waiver of her challenge, but "it [was] not necessary for the Court to address" that argument given the purported strength of its case against Ms. Hallinan. Commonwealth's Opposition, R.A. 263. This position also directly contradicts the Joint Agreement. The notice which the Commonwealth agreed to send out pursuant to the Joint Agreement explicitly incorporates by reference [www.mass.gov /breathalyzer](http://www.mass.gov/breathalyzer).

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<sup>16</sup> The doctrine of judicial estoppel is available to any party, not just those involved in the initial litigation. East Cambridge Sav. Bank v. Wheeler, 422 Mass. 621, 623 (1996).

R.A. 37. That web page describes individuals who "were convicted or admitted to sufficient facts" (emphasis added) as eligible to seek relief. R.A. 37.

Where the record shows irreconcilable positions, what remains is whether the court accepted those prior positions. It did. Ananias II, R.A. 218. Consequently, judicial estoppel precludes the positions the Commonwealth took below. And though judicial estoppel dispenses with the issue, the Commonwealth's bad faith efforts to deprive Ms. Hallinan of a remedy constitutes misconduct which should not be ignored. The Commonwealth acknowledged OAT's systemic misconduct by negotiating an agreement which - on paper - created a path to relief for thousands of individuals. However, the Commonwealth's current position suggests it either intended that path to be a dead end, or now endeavors to convert it into one. In either event, the Commonwealth's position demonstrates that lessons from the past may not have been learned.

As this Court pointed out in Bridgeman II, "where there is egregious misconduct attributable to the government in the investigation or prosecution of a criminal case, the government bears the burden of taking

reasonable steps to remedy that misconduct." 476 Mass. at 315. The Court underscored that responsibility again in Comm. for Pub. Counsel Servs., 480 Mass. at 723.

This case suggests that the Commonwealth has again cast aside that burden by creating a false impression of accountability for the misconduct of its agents. "We will not countenance that sleight-of-hand. As we have said, 'the government must turn square corners when it undertakes a criminal prosecution.'" United States v. Melvin, 730 F.3d 29, 38 (1st Cir. 2013) (citations omitted). At this point, it is not clear if the Commonwealth's response to Ms. Hallinan's motion represents a unified position among prosecutors in response to motions for new trial premised on the Ananias misconduct, or if the position taken below represents an aberrant response by only one prosecutor. Consequently, it is unclear if the "strong medicine" imposed in response to the Farak lapse will become necessary. Comm. for Pub. Counsel Servs., 480 Mass. at 702 (government "vastly understated the extent of Farak's misconduct" and "provid[ed] deceptive answers to [a] judge in order to conceal the failure to make mandatory disclosure to criminal defendants whose cases were affected by Farak's

misconduct.") But it is clear that, at least as relates to Ms. Hallinan's case, the Commonwealth breached the public trust in again bending those corners. That breach should not be ignored, lest the Commonwealth interpret this Court's response as an invitation to perpetuate it.

**v. A DEFENDANT WHO SUCCESSFULLY VACATES THEIR PLEA AS A RESULT OF OAT'S MISCONDUCT SHOULD NOT BE EXPOSED TO MORE SERIOUS CHARGES OR GREATER PUNISHMENT THAN ORIGINALLY IMPOSED**

Breath test defendants who challenge their OUI convictions as a result of OAT's misconduct should not be subject to harsher punishment than originally imposed. Bridgeman I, 471 Mass. at 472. Generally, "when a defendant withdraws his plea after sentencing, he may receive a harsher sentence than was originally imposed[.]" Commonwealth v. DeMarco, 387 Mass. 481, 486 (1982). "[A] defendant who files a motion to withdraw a guilty plea as a consequence of [egregious] misconduct is not doing so in the context of an ordinary criminal case," and a "return to the status quo ante would mean ignoring the egregious misconduct [] and disregarding its impact on criminal defendants[.]" Bridgeman I, 471 Mass. at 475. Given these considerations, Ms. Hallinan contends that "defendants who plead guilty to [OUI] offenses and subsequently are granted new trials based

on [OAT's] misconduct [] cannot (1) be charged with more serious offenses than those of which they initially were convicted; and (2) if convicted again, cannot be given sentences longer than those that originally were imposed." Id.

Also, Ms. Hallinan asserts that if she or other impacted defendants are convicted again, they must be fully credited for so much of their license suspension as they have already served. "[Double jeopardy guarantees are] violated when punishment already exacted for an offense is not fully 'credited' in imposing sentence upon a new conviction for the same offense." North Carolina v. Pearce, 395 U.S. 711, 718 (1969). While a license suspension has been considered non-punitive in other contexts, imposing a license suspension on a defendant who has already served the same suspension in whole, or denying credit for a suspension already served in part, can serve no purpose other than punishment. See United States v. Halper, 490 U.S. 435, 448-449 (1989) (A non-punitive sanction, in application, may be so divorced from any remedial goal that it constitutes "punishment" for the purpose of double jeopardy analysis). Currently, an impacted



defendant is required to serve the entirety of a license suspension again upon conviction, even if they had previously served all or part of that same suspension as a result of their initial plea. See G.L. c. 90, § 24(1)(c); DiGregorio v. Registrar of Motor Vehicles, 78 Mass. App. Ct. 775, 779-783 (2011) (license suspension period runs from the date of conviction). Not only are serial suspensions for the same offense unfair, the fear of serving the entirety of a license suspension again "has chilled the exercise of [OAT defendants'] post-conviction rights." Bridgeman I, 471 Mass. at 473. For these reasons, Ms. Hallinan requests that this Court hold that any license suspension previously served by an impacted defendant must be fully credited upon resentencing.

#### **CONCLUSION**

For all the foregoing reasons, Ms. Hallinan requests this Honorable Court reverse the district court's order denying her motion to vacate.

Respectfully submitted,  
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July 5, 2022

**CERTIFICATE OF COMPLIANCE**

I hereby certify, under the penalties of perjury, that the Appellant's brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

Rule 11(b) (applications for direct appellate review);

Rule 16(a)(13) (addendum);

Rule 16(e) (references to the record);

Rule 18 (appendix to the briefs);

Rule 20 (form and length of briefs, appendices, and other documents);

Rule 21 (redaction).

Specifically, this brief was written in Courier, 12-point monospace font, and created on MS Word. This brief contains 50 pages of non-excludable words.

/s/ Murat Erkan  
Murat Erkan

/s/ Joseph D. Bernard  
Joseph D. Bernard

July 5, 2022

**CERTIFICATE OF SERVICE**

Pursuant to Massachusetts Rule of Appellate Procedure 13(e), I hereby certify under the penalties of perjury, that on July 5, 2022, I have made service of the Appellant's brief, addendum and record appendix in the matter entitled Commonwealth v. Lindsay Hallinan, SJC-13301, currently pending in the Supreme Judicial Court via the Court's Electronic Filing System upon counsel for the Commonwealth:

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