COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

SJC-13301

COMMONWEALTH OF MASSACHUSETTS, Appellee

v.

LINDSAY HALLINAN, Appellant

ON APPEAL FROM THE ORDERS OF THE DISTRICT COURT

REPLY BRIEF FOR APPELLANT LINDSAY HALLINAN

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I. EGREGIOUS MISCONDUCT IN THE DEFENDANT'S CASE

a. Missing failed worksheets

One reason why it is impossible to identify every individual defendant who has been impacted by OAT's misconduct is because OAT was never able to locate all failed worksheets[1] that it intentionally concealed. In its brief, the Commonwealth states that the "defendant's claim that there are additional withheld incomplete worksheets is unfounded." See Commonwealth's Brief ("C.Br.") 22, n. 24. Not true. In the Commonwealth's own filings in the Ananias litigation, Special Counsel Douglas Levine of the Executive Office of Public Safety and Security ("EOPSS")[2] confirmed to the Court that "there are approximately 24 incomplete worksheets that are not accounted for (i.e., they are indicated in the

[1] While the Commonwealth references the failed worksheets as "incomplete," this terminology was imposed by OAT only after the Ananias defense was able to uncover the failed calibrations. EOPSS Report, R.A. 117; EOPSS Interview Michelle Dumas, S.R.A. 170 ("that term turned into incomplete just a month or two" ago). Terminology matters, and the use of the term "incomplete" conceals what the machines were really doing — failing calibration.

[2] EOPSS Attorney Levine was tasked with investigating OAT after the consolidated defendants exposed the withheld failed worksheets.

database, but actual hardcopies of the worksheets do not exist within the instrument folders." Commonwealth v. Ananias: response by the Executive Office of Public Safety and Security to Defendants' Status Memorandum Regarding Discovery ("EOPSS Status Memo"), Supplemental Record Appendix ("S.R.A.") 4. Of these 24 missing failed worksheets, EOPSS found that some failed worksheets were created either during the firmware testing phase of the deployment of the machines or during repairs at Draeger. However, "approximately 13 worksheets have been misplaced without OAT's files and cannot be located."[3] EOPSS Status Memo, S.R.A. 4. As to that latter group, EOPSS was unable to determine when and under what circumstances the failures occurred. Thus, it is not simply Ms. Hallinan's "position" that OAT could not produce all the failed worksheets, it is a statement of fact admitted by the Commonwealth.

[3] Even if the Court were to take the smallest number of missing failed worksheets — 13 — that number could represent 13 different machines that failed calibration, where each machine could have individually produced hundreds and hundreds of breath test results just during its certification year alone, EOPSS Interview of Samantha Fisk, S.R.A. 75, which could total thousands of unknown and unidentifiable defendants.

Because the failed worksheets are gone, there is no way to know to which machine they applied. Consequently, the Commonwealth's claim that "[a]s of the date of the defendant's breath test, Alcotest 9510 Serial No. ARDB-0003 had never failed a calibration test" is baseless. C.Br. at 42, n. 47. Indeed, because the failed worksheets are gone, no defendant will ever be able to discover whether any of the missing failed worksheets impacted their case.

This Court should scrutinize the Commonwealth's effort to retreat from its admission that a number of failed worksheets are missing. They are, in fact, gone, and their absence constitutes yet another reason why OAT's misconduct belies reconstruction.

b. The scientific unreliability of OAT's calibration process renders all breath test results during the exclusion period invalid.

The Commonwealth claims that "the defendant has not shown that the lack of written protocols undermined the validity of her plea," C.Br. at 37, and that the "certification worksheet, coupled with an affidavit or testimony from the OAT scientist, could have been compared to the later-implemented written protocols to demonstrate whether the instrument was properly calibrated." C.Br. at 38, n. 43. This

argument ignores the Court's explicit finding that the calibration process applied in Ms. Hallinan's case (and in all cases during the Ananias I exclusion period) failed to meet minimal scientific standards.[4] Because "[i]n the absence of written protocols, it cannot be assumed that any particular calibrator understood or routinely applied the proper standards in calibrating a device[,]" the worksheet created in the absence of written protocols sheds no light on what process the chemist actually employed. The post-hoc application of scientific guidelines to an earlier unscientific process can hardly serve to validate its results.

Moreover, that the Commonwealth proposes this novel reconstruction procedure is problematic for reasons beyond its dubious scientific underpinnings. It is also problematic because it constitutes another breach of the Joint Agreement and Court's order, in which the Commonwealth conceded not only that the

[4] It also ignores the fact that the Commonwealth asks the Court to reconstruct the instance and extent of OAT's wrongdoing based only on documentation supplied by OAT – the very entity which concealed and distorted the evidence of its own wrongdoing. That the Commonwealth's only solution to the reconstruction problem relies on the truthfulness of the wrongdoing agency's assertions demonstrates the impossibility of reconstruction in this case.

breath test results were scientifically unreliable, but that it would not contend otherwise.

In the Joint Agreement, which was adopted in the Court's order in Ananias II, the Commonwealth agreed to the "Court's February 2017 Order," "that the defendants' Daubert motion be allowed as to any results produced by a device calibrated and certified between June of 2011 and September 14, 2014, subject to the possibility of a case-by-case demonstration of the reliability..." must not only be expanded in duration but applied conclusively. Ananias II, R.A. 217, 231-232, 238-239. By agreeing to its expansion, the Commonwealth conceded that the Daubert Order was premised on a finding of scientific unreliability. Its position that defendants must now individually show scientific unreliability of their specific calibration directly contradicts the explicit terms of the Joint Agreement and the Court's order.[5]

[5] This position is also irreconcilable with the notice the Commonwealth sent to approximately 27,000 individuals pursuant to its promise in the Joint Agreement. That notice conceded that breath test results were excluded "as a result of" a hearing on the "scientific reliability of breath test results[.]"Trial Court Ananias Notice to Lindsay Hallinan, R.A. 36; Joint Agreement, R.A. 239-40.

Finally, the Commonwealth's position is irreconcilable with the Court's orders in Ananias II and Ananias III, from which the Commonwealth did not appeal. There, the Court ordered conclusive exclusion of all breath test results from June of 2011 to April 17, 2019 based on the underlying Daubert-Lanigan findings of scientific unreliability in Ananias I as well as the Commonwealth's explicit concessions in the Joint Agreement.

What the Commonwealth fails to recognize is that the findings and orders in the Ananias litigation have already demonstrated the scientific unreliability of Ms. Hallinan's breath test result. As a result of OAT's egregious misconduct in withholding the failed worksheets, the consolidated defendants were deprived of the opportunity to have a full and fair Daubert-Lanigan hearing to determine whether the Draeger 9510 breath test results were scientifically reliable and calibrated in a scientifically reliable manner. The Court's findings and decision in Ananias I as to any scientific reliability of the calibration process as a whole, and thus the scientific reliability of the breath test results, became null and void as a result of the Constitutional due process

violations suffered. Hence, the Court's adoption of the expanded class of presumptively unreliable breath test results, and its imposition of a remedy of conclusive exclusion, "best ensures and restores confidence that OAT's methodology produces scientifically reliable breathalyzer results." Ananias II, R.A. 228.

Stated simply, where the Commonwealth agreed that failures in the scientific process rendered the breath test results inadmissible, and the Court ordered the same, the Commonwealth lacks a tenable basis for shouldering Ms. Hallinan and others with the burden of reconstructing its malfeasance in their specific case; much less so when the Commonwealth's only proposed means of reconstruction depends exclusively on records maintained by the agency at the center of the misconduct. To avail herself of a conclusive presumption of misconduct, Ms. Hallinan should not be required to show anything more than that her breath test result was produced by a Draeger 9510 machine whose calibration and certification date falls within the exclusionary window ordered by Judge Brennan.

II. THE BREATH TEST RESULT MATERIALLY INFLUENCED THE DEFENDANT'S DECISION TO TENDER A PLEA

The Commonwealth contends that because Ms. Hallinan resolved her case without seeking discovery on the scientific validity of her breath test, the breath test (and its failings) was immaterial to her decision to tender a plea. C.Br. 42-43. This argument lacks merit because it not only ignores the reality that prevailing law made challenges to the breath test futile, but it also fails to acknowledge that OAT's longstanding practice – only uncovered years later - was to conceal all evidence from which any meaningful challenge to its admission could be mounted.

Breath test results in Massachusetts are presumed reliable and admissible by statute. See Commonwealth v. Cochran, 25 Mass. App. Ct. 260, 262-263 (1988), citing Commonwealth v. Brooks, 366 Mass. 423 (1974); Commonwealth v. Bernier, 366 Mass. 717 (1975); Commonwealth v. Neal, 392 Mass. 1 (1984); Commonwealth v. Doyle, 392 Mass. 23 (1984); G.L. c. 90, § 24(1)(e); G.L. c. 90, § 24K. "Implicit in the assumption of reliability is that the device is working properly." Cochran, 25 Mass. App. Ct. at 263. Thus, so long as the breath test was "performed by a certified operator" the result was deemed valid under the

statute and "had the seal of scientific approval." Id. at 265 (emphasis added). In fact, at the time of Ms. Hallinan's plea, challenges to the scientific reliability of the Draeger 7110 and 9510 devices, both using new technology with infrared and electrochemical detection, were not permitted. The SJC's decision in Commonwealth v. Camblin, 471 Mass. 639 (2015), which opened the door to such challenges, was not decided until two years later. Thus, contrary to the Government's argument, Ms. Hallinan had little reason to seek discovery in furtherance of a legally futile challenge to her breath test result.

Moreover, because of the Government's own misconduct, Ms. Hallinan lacked any reason to doubt the validity of her breath test. This is so because, while her breath test was indeed vulnerable to challenge, the Commonwealth concealed that vulnerability by its dishonest discovery practices. As the Ananias litigation made clear, OAT not only "failed to produce responsive documents that were in [its] possession[,] it was 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." EOPSS Report, R.A. 98-99; 110.

While the Commonwealth endeavored to conceal the flaws in its breath test regime from the defendants, it did nothing to dispel the illusion that its results were unimpeachable. Thus left in the dark, defendants like Ms. Hallinan, facing the reality that "[b]reath tests ... [are] widely credited by juries," Birchfield v. North Dakota, 136 S. Ct. 2160, 2184 (2016), had no realistic option other than to tender a plea. As did virtually all lawyers, prosecutors, and judges, Ms. Hallinan reasonably relied on the results and their "seal of scientific approval." Cochran, 25 Mass. App. Ct. at 265.

Ms. Hallinan's decision to tender a plea without mounting a challenge to the breath test does not detract from the breath test's materiality to her plea. To the contrary, evidence of her plea so quickly after her arraignment is direct evidence of how material and impactful the breath test result was to her decision-making process. It reflects her recognition that the breath test would be the "cornerstone [of the] driving under the influence case" against her and the inevitability of her conviction at trial based on that evidence. Neal, 392

Mass. at 11; Cochran, 25 Mass. App. Ct. at 265 ("Compared to other evidence, the test was [] the most powerful. It was not merely cumulative."); Commonwealth v. Hourican, 85 Mass. App. Ct. 408, 416-417 (2014) (A breath test result is "a powerful determinant of guilt or innocence.")

At the time of Ms. Hallinan's plea, defense counsel had obtained the standard breath test discovery that accompanies an OUI police report, specifically the Massachusetts Office of Alcohol Testing Breath Test Report Form. OAT Breath Test Report Form, R.A. 12. In addition to the date and time of the test, the test sequence number, the calibration standard information, the details of the breath test readings, the calibration check and ultimate breath test result, and the certification of breath test operator, the Breath Test Report Form also shows the breathalyzer model number, serial number, and sets forth an affirmative statement that the "breath test instrument was certified at the time the breath test was administered," listing the date the certification begins and ends. Id. Based upon the data in these documents alone, the breath test result was unquestionably valid as a matter of law. Under the

statutory scheme, the machine was presumptively reliable and "[i]mplicit in the assumption of reliability is that the device is working properly." Cochran, 25 Mass. App. Ct. at 263. Ms. Hallinan's breath test had the "seal of scientific approval." Id. at 265.

While the Commonwealth claims that Ms. Hallinan's plea was rushed without defense counsel's review of the certification documents received by the Clerk's Office, those records were merely a perfunctory measure to comply with the business record exception to the hearsay rule for the admissibility of the breath test result at trial as required by G.L. c. 233, § 78 and Commonwealth v. Zeininger, 459 Mass. 775 (2011); EOPSS Report, R.A. 93-94. Moreover, since the packages substituted for the testimony of keeper of records, they amounted to "deceptive testimony," where OAT hid from the Court its unscientific calibration practice and culled the packages it submitted to the Court of failed worksheets. State v. Meza, 203 Ariz. 50, 58, 50 P.3d 407, 415 as amended (Aug. 15, 2002). Further, the Commonwealth's position that defense counsel was to somehow uncover OAT's egregious misconduct by awaiting those business

records[6] or filing discovery motions is confounding at best. "The Crime Lab made a sustained and willful effort to insulate breath test evidence from the challenge that would arise from the discovery of failed calibration tests." Id. Any such efforts by defense counsel would have been futile where the worksheets, maintenance, repair and accuracy records were the very documents that OAT was found to intentionally withhold from defendants, even in violation of court orders, as was its regular practice since the rollout of the Draeger 9510 machines. EOPSS Report, R.A. 133[7].

Where breath test evidence was improperly used to prosecute a defendant, a motion for new trial must be

[6] "Between 2012 and 2016, the number of cases in which breath test results were administered but no discovery packet was ever sent to court has consistently hovered between 40% and 50% of total cases." EOPSS Report, R.A. 108.

[7] "While OAT had provided [worksheets] in isolated cases in the past, these types of worksheets had not been subject to widespread disclosure. In an interview with EOPSS, one of the defense attorneys in the consolidated litigation indicated that in more than two decades of practice handling OUI cases in the Commonwealth, he had never seen a worksheet of this type before." EOPSS Report, R.A. 113. Further, interviews with OAT staff show that there was an unwritten policy not to provide the failed worksheets as "data not reported" since the rollout of the Draeger 9510 machines. EOPSS Interview of Michelle Dumas, S.R.A. 172; EOPSS Interview of Melissa O'Meara, S.R.A. 35-36.

granted even where other impairment evidence was "strong but not overwhelming." Commonwealth v. Hubert, 71 Mass. App. Ct. 661, 663 (2008); see also Cochran, 25 Mass. App. Ct. 265. Here, the evidence was certainly not overwhelming. "[T]he breathalyzer was the most inculpatory piece of evidence against the defendant," and "proof of her impairment otherwise was based upon a fairly brief interaction with troopers and her admission to three drinks" after being stopped by police at a roadblock. Decision on Defendant's Motion to Withdraw Admission to Sufficient Facts, R.A. 276.

Viewed from this lens, it cannot be seriously disputed that exclusion of the breath test result from evidence would have impacted not only defense counsel's advice about the ability to defend the case at trial, but Ms. Hallinan's decision to plead based upon defense counsel's advice.

The inadmissibility of the breath test result would have also detracted from the factual basis used to support the plea. The breath test result is necessary to sustain a per-se prosecution, and as to an impairment theory, just as "an affirmative misrepresentation on the drug certificate may have

undermined the very foundation of Scott's prosecution", an affirmative misrepresentation of the scientific reliability of the breath test result would have undermined the foundation of the prosecution of Ms. Hallinan. Scott, 467 Mass. at 348. As Judge Brennan succinctly observed, "[t]he absence of evidence of a breath test result that was nearly triple the legal limit certainly would have detracted from the facts used to support the plea." Decision on Defendant's Motion to Withdraw Admission to Sufficient Facts, R.A. 275.

Moreover, "it is reasonable to conclude that the value Hallinan likely would have received from the exclusion of a .23 BAC breath test result outweighed the benefit of the plea." Id. at 276. The Commonwealth states that Ms. Hallinan's plea was overwhelmingly beneficial to the point that it constituted an illegal disposition. That is not an accurate representation of Massachusetts law. G.L. c. 90, § 24(1)(a)(4) permits an alternative disposition to enter on the charge of OUI-Liquor, second offense, which does not foreclose continuation without a

finding ("CWOF") as an available disposition.[8] To

[8] The Commonwealth's misapprehension of the disposition in this case flows from its flawed characterization of subparagraph (1)(a)(1). That subparagraph provides, as relevant here, "[a] prosecution commenced under the provisions of this subparagraph shall not be placed on file or continued without a finding except for dispositions under section twenty-four D." (emphasis added). In its brief, the Commonwealth replaces the emphasized text with "[a] prosecution [for operating under the influence]." However, the CWOF prohibition in (1)(a)(1) applies only to "th[at] subparagraph" - viz., subparagraph (1)(a)(1), not OUI cases in general.

The Commonwealth ignores the fact that subparagraph (1)(a)(4) eliminates the requirements of (1)(a)(1). It does so by providing:

> Notwithstanding the provisions of subparagraphs (1) and (2), a judge, before imposing a sentence on a defendant who pleads guilty to or is found guilty of a violation of subparagraph (1) and who has [no more than one prior offense]... may ... place a defendant on probation for two years [with a condition of] confine[ment] for no less than fourteen days in a residential alcohol treatment program...

Because (1)(a)(4) operates "notwithstanding [] subparagraph[] (1)," the CWOF limitation in subparagraph (1) is inoperative.

This construction is further supported by subparagraph (2) which provides that "[e]xcept as provided in subparagraph (4) the provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person charged with a violation of subparagraph (1)[.]" That the statute explicitly permits final disposition of (a)(1)(4) cases without an admission of guilt, it would be nonsensical to read the statutory scheme as forbidding a CWOF disposition which does require the defendant to admit to sufficient facts. See Commonwealth v. Tim T., 437 Mass. 592, 596 (2002) (pretrial probation disposition authorized only with Commonwealth's consent).

suggest otherwise is simply not accurate.

Ms. Hallinan's plea was far from exceptional. She was placed on two years of probation, mandated to serve 14 days in a residential inpatient treatment program and comply with all aftercare outpatient counseling treatment requirements, and as a direct result of the tainted breath test result, she was forced to undergo a substance abuse evaluation pursuant to G.L. c. 90, § 24Q. Moreover, Ms. Hallinan's license was suspended for a period of two years followed by a five-year interlock restriction. Affidavit of Lindsay Hallinan, R.A. 34. This was no small hardship. Her interlock restriction became even more onerous flowing from the installation of a defective interlock device on her car. Id. The

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Finally, construction of (1)(a)(4) as permitting a CWOF is supported by the model criminal complaint language approved by the trial court, which provides, as it did in Ms. Hallinan's case, the following:

> Second alternative disposition (§ 24(1 (a)(4): If defendant eligible, after guilty findings or continuance without a finding, judge may allow as alternative: probation for 2 years with not less than 14 days in residential alcohol treatment program, plus participation in outpatient counseling program, plus ... license revoked for 2 years.

District Court Complaint Language Manual, Supplemental Addendum ("S.Add.") 128.

device defects required her to navigate a ponderous and labyrinthine bureaucratic process in her effort to get back on the road. Id.

Had she known that the breath test result could not have been used to prosecute her and had she been found not guilty after trial, no sentence would have been imposed and she would have never been subject to a lengthy license suspension or interlock restriction.

Based on the totality of the circumstances, "the defendant makes a strong case that she would not have tendered an admission had she known the breathalyzer result was not admissible..." Decision on Defendant's Motion to Withdraw Admission to Sufficient Facts, R.A. 277. Thus, there is a reasonable probability that Ms. Hallinan's decision to plead was materially influenced by the breath test result.

III. OAT'S MISCONDUCT WAS EGREGIOUS AND COMPOUNDED BY ATTORNEY MISCONDUCT

The Commonwealth attempts to minimize its misconduct by mischaracterizing it as a mere isolated discovery violation. But this was no mere discovery violation - the Commonwealth withheld evidence which would have rendered the breath test inadmissible. This was a purposeful Brady violation and thus one of

constitutional dimension. It was also not isolated: OAT made the systemic choice to categorize the failed worksheets as "data not reported" and hide it from defendants since the rollout of the Draeger 9510 machines in 2011. EOPSS Report, R.A. 122, 133.

The Commonwealth minimizes the impact of OAT's egregious misconduct by claiming that "there was no fabrication or manipulation of evidence," C.Br. 49, yet that is the exact nature of OAT's deliberate non-disclosure of the failed worksheets. By intentionally withholding the failed worksheets, "[t]he Crime Lab made a sustained and willful effort to insulate breath test evidence from the challenge that would arise from the discovery of failed calibration tests." Meza, 50 P.3d at 415. The failed worksheets showed a near-twenty percent calibration failure rate. By withholding the failed worksheets, OAT intentionally manipulated the evidence to create an illusion that the machines were scientifically reliable and admissible as evidence of a defendant's guilt. The manipulation continued through the statewide Daubert-Lanigan hearing in the Ananias litigation. By hiding the failed worksheets from defendants, and later Judge Brennan, OAT concealed an

array of scientific reliability issues, from larger questions of whether the calibration procedure itself was reliable,[9] to more individualized questions of whether the specific machine is reliable,[10] and whether the result is even valid and admissible under the requirements of G.L. c. 90, § 24(1)(e) and § 24K. Our jurisprudence is settled that "we must be concerned

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[9] As former Technical Leader of OAT Melissa O'Meara has stated:

> So if it has a failed certification ... you want to determine is this an operator error or is this, you know, a procedural error meaning there's something wrong with our procedure, and I'm sure if you had many, seen a lot the records you would see the .20 failed quite a bit on numerous occasion and it wasn't happening to just one certain individual and it was happening to us. So that's when we have to look at our procedure and say okay, what's going on with our procedure and how do we need to adjust? So it's not necessarily that there may be something with the instrument either, that's there's a whole host of different things.

EOPSS Interview of Melissa O'Meara, S.R.A. 30-31.

[10] OAT employees have stated that a failed calibration could indicate that an individual machine is experiencing "purge errors" resulting in the machine having "trouble taking away the ethanol air in the instrument out of the chamber," EOPSS Interview of Justin Kaliszewski, S.R.A. 159, that the fuel cell "needs to be replaced," EOPSS Interview of Melissa O'Meara, S.R.A. 30, defects mandating that the "IR [be] replaced," EOPSS Interview of Samantha Fisk, S.R.A. 84, that the machine is "leaking" where you "put the gas," EOPSS Interview of Alber Elian, S.R.A. 201, that the "calibration curve was not correct" EOPSS Interview of Daniel Renczkowski, S.R.A. 129, among other things.

with the gravity of a measure that, if admitted in evidence, will be a powerful determinant of guilt or innocence ... The reading therefore requires the assurance of accuracy." Hourican, 85 Mass. App. Ct. at 416-417.

The Commonwealth's position that OAT's decision to withhold the worksheets, and the failures they would have exposed, did not significantly prejudice defendants, ignores the reality that the undisclosed evidence would have likely led to exclusion of the breath test results, which results caused tens of thousands of defendants to waive their constitutional right to trial. The pure carnage the Commonwealth's deception worked on these individuals' appetite to exercise their constitutional right to trial is not only egregious, but unprecedented.

The Commonwealth further claims that OAT's misconduct was not compounded by the misconduct of prosecutors. Not so.

First, the Commonwealth's post-Ananias III effort to eliminate, in all practical respects, the benefits contemplated by the Joint Agreement and resulting court orders deeply compounds OAT's misconduct. Both below and now before this Court, a central premise of

the Government's argument is that the remedies contemplated by the Joint Agreement and resulting order were limited only to cases pending trial, and of that category, only consolidated cases and those stayed pending Ananias. See, e.g., Commonwealth's Opposition, R.A. 263, C.Br. 40, 63. Because the Joint Agreement and ensuing orders unambiguously applied to all cases, consolidated and unconsolidated, and did so regardless of the mechanism of disposition, the Commonwealth's argument is frivolous, in bad faith, and, for those reasons, aggravates the misconduct the agreement and orders sought to remedy.

The Joint Agreement and exclusion orders were not limited to cases pending trial.[11] Acknowledging that "[o]n February 16, 2017, [Judge Brennan] ordered that the defendants' Daubert motion be allowed 'as to any results produced by a device calibrated and certified between June of 2011 and September 14, 2014,' subject to the possibility of a case-by-case demonstration of the reliability of OAT's calibration of a particular device to a trial judge in the court in which the Commonwealth seeks to offer the result as evidence"

[11] Neither were they limited to consolidated and stayed cases only. See Appellant's brief at 51-52.

the Commonwealth "agree[d] to expand the period for which the instrument shall be deemed 'presumptively ... excluded[,]'" Ananias II, R.A. 238-239 (emphasis added), and in Ananias II and III, the Court expanded that period to April 17, 2019. Ananias III, Add. 80. The Commonwealth further relinquished its right to seek to overcome the presumption of exclusion "at trial." Ananias II, R.A. 239.

The Commonwealth's relinquishment of its right to overcome the presumption of exclusion prospectively does not somehow diminish the presumption of exclusion applicable "to any results produced by a device calibrated and certified between June of 2011 and September 14, 2014[.]" R.A. 238-9. That is to say, Ananias I ordered presumptive exclusion of all results within the Ananias timeframe, and the Joint Agreement and subsequent Ananias orders expanded that exclusion. Neither the initial order nor the expansion of it contemplated any limitation of its application to cases pending trial. Rather, the Commonwealth at one point possessed the right to seek to overcome the presumption "at trial," then forfeited that right in the Joint Agreement.

Beyond the plain language of the Joint Agreement and resulting orders, both the context of the agreement as well as the Commonwealth's actions following Ananias II demonstrates that the limitations the Commonwealth urges flow from bad faith.

As discussed in Ms. Hallinan's primary brief, at p. 52, the Commonwealth sent notice to approximately 27,000 people that "all breath test results administered in Massachusetts between June of 2011 and April 18, 2019 have been excluded from use in criminal prosecutions" (emphasis added) and that individuals who "were convicted or admitted to sufficient facts" (emphasis added) may have "an opportunity [] to challenge the disposition of [their] case." Trial Court Ananias Notice to Lindsay Hallinan, R.A. 36; Website: www.mass.gov/breathalyzer, R.A. 37.

If relief was limited only 1) to consolidated and stayed defendants 2) who were still pending trial, why notify every person who tendered a plea during the exclusion period that their breath test was excluded and were entitled to seek relief?

The Commonwealth's effort to render meaningless[12] the relief it offered to tens of thousands of individuals stands in sharp relief to its self-congratulatory description of its response to OAT's misconduct. See, e.g., C.Br. 40 ("The Commonwealth's agreement was a good faith effort to resolve the litigation, impose sanctions upon itself, and regain public trust[]"); 51-52 ("Given the Commonwealth's ... willingness to impose sanctions and notification requirements upon itself ... this Court should not create a conclusive presumption of egregious government misconduct").

Rather than showing its magnanimity, the Commonwealth's actions demonstrate that it has failed yet again to profit from past lessons. While the Commonwealth congratulates itself on self-imposed sanctions to gain public trust, it's notification to tens of thousands of individuals that they had an avenue for relief, when it now claims they did not, did little to advance that purpose.

[12] Even absent comprehensive disposition data, it is not a stretch to infer that the vast majority of the approximately 27,000 affected cases (most being years-old misdemeanors) were resolved by plea.

There was no "prospective" limitation to the exclusion; not in the Joint Agreement, not in any of the Ananias orders, and not in the notice sent to some 27,000 individuals. The Commonwealth's assertions to the contrary compound the misconduct in this case.

Second, attorneys for the Commonwealth acted to conceal OAT's misconduct from Judge Brennan, thus further compounding OAT's misconduct.

OAT's Massachusetts State Police Forensic Services Legal Counsel Kerry Collins, from the outset of the litigation, consistently inserted herself into the proceedings directly addressing Judge Brennan regarding issues relating to OAT discovery responses and the worksheets. Attorney Collins was an integral member of the prosecutorial team who fulfilled the discovery requests of the consolidated defendants in Ananias. EOPSS Report, R.A. 115. She appeared, argued and made representations throughout the litigation in Ananias as counsel for OAT and as an agent of the Commonwealth. Transcript of Re-Hearing on the Consolidated Defendants' Omnibus Discovery Motion, S.R.A. 246. Defendants and the Court relied upon her investigation and evaluation of what could be

produced by OAT in response to discovery and court orders.

During the EOPSS investigation of OAT, multiple OAT employees stated that Attorney Collins not only had knowledge of the existence of the failed worksheets and that she was included in the decision to deem failed worksheets as "data not reported," but that she was directly involved with the decision not to disclose the failed worksheets in response to the Court orders in Ananias. For the Commonwealth to now suggest that there was no such misconduct by an attorney for the Commonwealth forces the defense to expose the reality of the investigation.

When asked "[h]ow is the decision made to the incomplete worksheets are part of DNR [data not reported], who made that?", former OAT Technical Leader Melissa O'Meara responded, "[i]t was a collective decision between, you know we've had ongoing discussions with the QA department as well as with Kristen and myself. Carrie [sic] Collins had attended a few times and Albert Alien and Nancy Brooks and with the DNR data... " EOPSS Interview of Melissa O'Meara, S.R.A. 59.

Present OAT Technical Leader Daniel Renczkowski also confirmed that Attorney Collins was directly involved in deciding what discovery to provide "for the motions after [] Ananias":

> Doug Levine: In the case where you were asked for all worksheets and the decision was made to send all the successful certification worksheets but not to send the incomplete worksheets. Could you describe that conversation how that processed played out?
>
> Dan Renczkowski: I think it was just a general conversation between Melissa and [Attorney Collins] and myself of what a complete certification is and how the incomplete worksheet or the valid certification is not relevant to any breath test that have been done on the field.
>
> Doug Levine: Were you part of that conversation or that happened without you?
>
> Dan Renczkowski: No. I was there. I was present.

EOPSS Interview of Daniel Renzckowski, S.R.A. 126, 128.

OAT Forensic Scientist Samantha Fisk stated that she personally observed Attorney Collins copying worksheets to fulfill the Ananias discovery order, that she personally observed Ms. O'Meara and Attorney Collins discussing a failed worksheet, and that Ms. O'Meara informed Ms. Fisk that Attorney Collins was directly involved in the decision not to include the failed worksheets.

> Samantha Fisk: I watched [Carrie Collins] photocopy [the worksheets] and I asked her if she was all set.
>
> And afterwards, it was over the weekend type thing that they did the 1200 worksheets for that initial motion. [Melissa O'Meara] said to me directly, that her and Carrie worked together on the worksheets and that she was grateful that Carrie and her agreed that the incompletes should not be included.
>
> ...
>
> Doug Levine: And then what you learned on Monday from Melissa, you're saying is that Melissa told you that decision regarding to not copy or provide the incomplete worksheets was a decision between Melissa and Carrie?
>
> Samantha Fisk: Correct. (Emphasis added)
>
> ...
>
> Catherine Costanzo: [D]id you actually ever hear Melissa and Carrie talking about worksheets?
>
> Samantha Fisk: Yeah, I had walked by at one point and Melissa had the worksheet in front of Carrie, like an incomplete and they were discussing it, but I didn't hear the results of the discussion. I just was walking by as they were discussing it.

EOPSS Follow Up Interview of Samantha Fisk, S.R.A. 99-100, 102, 103.

Multiple OAT employees stated that Attorney Collins met regularly with Ms. O'Meara regarding OAT discovery and the Ananias litigation. Ms. Fisk stated that "Carrie Collins, Melissa O'Mara [sic] and Stacie Saranowski (ph), who used to be my direct supervisor at the time, they had meetings which are all

documented somewhere stating discussing the BT Consolidation Case and the motions and how to answer them." Id., S.R.A. 93. During her interview discussing the process of responding to the Ananias discovery motions, Ms. O'Meara recalled, "It was, 'Okay Melissa, do you have this signed motion from Judge Brenan? Let's sit down and talk about it what we can and cannot provide,' and that's what we did. Carrie and I spent hours ... in the conference room going through these discovery of what is we can and cannot provide..." EOPSS Interview of Melissa O'Meara, S.R.A. 44.

While there is no doubt that OAT employees were a part of the intentional decision to withhold court-ordered exculpatory evidence, that "misconduct was compounded by the wrongful actions" of Attorney Collins as part of her role in the prosecutorial team, whereby she participated in "deliberately withh[olding] information." Commonwealth v. Claudio, 484 Mass. 203, 207 (2020), citing Committee for Pub. Counsel Servs. v. Attorney Gen., 480 Mass. 700, 711-720 (2018). "Even if we assume that the Crime Lab's practices were well-intended and that the objective was only to [withhold] tests that

participating Crime Lab employees honestly believed were unreliable and might unnecessarily impugn the accuracy of the machines, this was not a judgment that was theirs to make." Meza, 50 P.3d at 413. Nor was it a judgment for Attorney Collins to make. "At bottom, they engaged in the secretion or attempted destruction of inconvenient evidence—evidence that should have been available for independent evaluation by prosecutors, criminal defendants, and the courts." Id.

Contrary to the Commonwealth's contention, the actions of Attorney Collins compounded the harm OAT's misconduct caused. Again, Attorney Collins was an integral member of the prosecutorial team who fulfilled the discovery requests of the consolidated defendants in Ananias. EOPSS Report, R.A. 115. In that role, she intentionally chose to conceal evidence of OAT's failings from the Court. Her representations to the Court can only be viewed as an effort to corrupt its inquiry regarding an issue of "system-wide impact." Decision on Defendant's Motion to Withdraw Admission to Sufficient Facts, R.A. 272. That OAT's suppression of evidence was not only condoned but furthered by an attorney who was an agent of the

prosecutorial team underscores the egregious nature of the misconduct and the need for a strong remedy.

IV. THE CONCLUSIVE PRESUMPTION WINDOW

The Commonwealth argues that any conclusive presumption of egregious misconduct "should be limited to defendants whose cases were adjudicated between February 16, 2017, and August 31, 2017, i.e., those defendants who relied on Judge Brennan's decision in Ananias I, prior to OAT's production of the withheld court-ordered discovery." C.Br. 52. The Commonwealth's argument overlooks that it has already "conceded in their Joint Stipulation with the consolidated defendants in Ananias that OAT's behavior was of a nature and breadth sufficiently serious that exclusion of Draeger 9510 breathalyzer results from criminal prosecutions since the machine's introductions in June of 2011 was an appropriate remedy." Decision on Defendant's Motion to Withdraw Admission to Sufficient Facts, R.A. 273. It also ignores that it conceded in the same stipulation that the exclusion of Draeger 9510 breathalyzer results from criminal prosecutions would extend to the date ordered by the Court, which was ultimately all Draeger 9510 machines last calibrated and certified through

April 17, 2019. Ananias II, R.A. 218, 239; Ananias III, Add. 80. Thus, the conclusive presumption must encompass all breath test results obtained from Draeger 9510 machines that were last calibrated and certified from June of 2011 through April 17, 2022.

To hold that OAT's misconduct was so egregious as to mandate suppression of breath test results calibrated from June of 2011 through April 17, 2019, but to otherwise limit a conclusive presumption to any narrower class of impacted defendants is inconsistent with its concessions and Judge Brennan's orders and certainly would not "account for the due process rights of defendants, the integrity of the criminal justice system, the efficient administration of justice in responding to such potentially broad-ranging misconduct, and the myriad public interests at stake." Scott, 467 Mass. at 532. Ms. Hallinan and similarly situated defendants were unfairly "prejudice[d] when the State placed [their] liberty in jeopardy" without providing them with the Brady and "court-ordered discovery that was significant to [their] defense." Meza, 50 P.3d at 415. The benefit of the Court's remedy must inure to defendants. Scott, 467 Mass. at 532. A "fitting

response" is the creation of a conclusive presumption of egregious misconduct in the defendant's case and "suppression of the evidence that the Crime Lab improperly sought to protect from scrutiny." Meza, 50 P.3d at 415.

CONCLUSION

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

Respectfully submitted,
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October 28, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify, under the penalties of perjury, that the Appellant's Reply 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 34 pages of non-excludable words.

/s/ Murat Erkan
Murat Erkan

/s/ Joseph D. Bernard
Joseph D. Bernard

October 28, 2022

CERTIFICATE OF SERVICE

Pursuant to Massachusetts Rule of Appellate Procedure 13(e), I hereby certify under the penalties of perjury, that on July 1, 2022, I have made service of the Appellant's Reply Brief, supplemental addendum and supplemental 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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October 28, 2022