

**COMMONWEALTH OF MASSACHUSETTS  
Supreme Judicial Court**

**DAR-\_\_\_\_\_  
No. 2022-P-0285**

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**COMMONWEALTH OF MASSACHUSETTS, Appellee**

**v.**

**LINDSAY HALLINAN, Appellant**

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**Application for Direct Appellate Review**

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**REQUEST FOR DIRECT APPELLATE REVIEW**

Pursuant to Mass. R. App. P. Rule 11, Lindsay Hallinan applies for leave to obtain direct appellate review.

**STATEMENT OF PRIOR PROCEEDINGS**

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, 2nd Offense. Add. 196. The district court continued her case without a finding for two years, with conditions, fines, fees, and a statutory license suspension. Add. 196; 199.

On June 14, 2021, Ms. Hallinan filed a motion to withdraw her admission to sufficient facts premised on misconduct relating to the Office of Alcohol Testing's (OAT) failure to maintain breath test devices according to minimum scientific standards and systematic suppression of exculpatory evidence uncovered during consolidated litigation in Commonwealth v. Ananias, et. al., 1248CR1075. Add. 201.

On August 17, 2021, Judge Robert Brennan, the First Justice of the Salem District Court, and the judge whom this Court specially assigned to the Ananias breath test litigation, Add. 281; 290, conducted a hearing on Ms. Hallinan's motion. Add. 241. On October 4, 2021 Judge Brennan denied Ms. Hallinan's motion. Add. 183. On November 3, 2021 Ms. Hallinan timely filed her Notice of Appeal. Add. 280.

#### **STATEMENT OF FACTS RELEVANT TO APPEAL**

##### **A. Commonwealth v. Ananias & Others: The Consolidated Draeger Alcotest 9510 Breath Test Litigation**

Following this Court's decision in Commonwealth v. Camblin, 471 Mass. 639, 647-648 (2015) the Chief Justices of the District and Boston Municipal Courts

issued orders of special assignment consolidating cases in which defendants challenged the scientific reliability of Draeger Alcotest 9510 machines, which machines OAT first deployed in June, 2011. Add. 196.

On June 13, 2016, the Chief Justice of the Trial Court assigned Judge Robert Brennan to conduct a consolidated Daubert-Lanigan hearing, the outcome of which would apply to all OUI defendants prosecuted with a Draeger 9510 breath test result. Add. 199.

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

After a two-week Daubert-Lanigan hearing where the defense and prosecution presented expert witnesses from around the world, Judge Brennan issued a decision on February 16, 2017 (Ananias I) that made OAT's scientific failings publicly known for the first time. Add. 323. 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 utilize written protocols standardizing that process. Add. 322-325. Consequently, Judge Brennan found that because OAT did

not employ a "scientifically sound methodology," "any Alcotest 9510 BAC [] result from a device calibrated and last certified by OAT between June 201[1]<sup>1</sup> and September 14, 2014 presumptively is excluded from use by the Commonwealth in any criminal prosecution." Add. 325.

**ii. 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." Add. 33. Of those 1,976 worksheets, only 11 evidenced a failed calibration. Add. 33.

Doubting those results, the Ananias defendants uncovered 432 worksheets which OAT concealed from the Court, each of which represented a failed annual calibration beyond the 11 which OAT disclosed. Add. 33.

The Ananias defendants filed a motion for

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<sup>1</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). Add. 338.

sanctions on August 19, 2017. Add. 30. The motion led the Executive Office of Public Safety and Security (EOPSS) to launch an investigation, which found:

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.

Add. 58.

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 court orders pertaining to discovery and, most importantly, that it had, during that time period, misrepresented its testing process as scientific. Add. 58; 84-90. 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." Add. 67; 78. It further found that OAT "has often been reluctant to volunteer more information than its personnel viewed as strictly necessary ... declined to produce additional

documents, even to prosecutors, in the absence of a court order," Add. 66, leaving "prosecutors in the position of unwittingly representing ... that the Commonwealth had complied with its discovery obligations, when in fact it had not." Add. 58.

Separately, in response to the 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..." Add. 186. Neither EOPSS, OAT, nor the Commonwealth could identify all the failed calibration records for the affected machines, as a small number remain "misplaced." Add. 33.

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 contained stipulated facts as well as agreements for sanctions. Add. 48. Every District Attorney in the Commonwealth signed the agreement, Add. 54, and the Court adopted it as an Order on

November 5, 2018. Add. 32. The Joint Agreement acknowledged that OAT "intentionally withheld ... exculpatory materials." Add. 49. It also adopted EOPSS' findings. Add. 50.

Judge Brennan then Ordered an expansion of the exclusion period, observing that "[t]he Commonwealth conceded in [the Joint Agreement] ... that OAT's behavior was of a nature and breadth sufficiently serious that [broader] exclusion ... was an appropriate remedy." Add. 190.

"The Commonwealth agree[d] not to seek to establish the reliability of OAT's calibration and certification ... in this enlarged period" and the Court ordered the presumptively excluded results categorically excluded. Add. 52. Finally, the parties agreed, and Judge Brennan ordered the Commonwealth to provide written notice to affected defendants. The Commonwealth agreed to shoulder the cost of notification. Add. 53.

Ultimately, Judge Brennan excluded Draeger 9510 results from June, 2011 until the Commonwealth demonstrated "that OAT has filed an application for accreditation with ANAB that is demonstrably

substantially likely to succeed." Add. 45. The Court also Ordered that OAT overhaul its discovery practices and do so publicly. Add. 45.

On July 29, 2019, Judge Brennan found that as of April 18, 2019, the Commonwealth was in compliance with all aspects of its Order. Add. 348.

**B. Commonwealth v. Lindsay Hallinan: Motion to Withdraw Admission to Sufficient Facts**

On October 5, 2013, Ms. Hallinan was stopped at a Massachusetts State Police sobriety checkpoint. Add. 349. "[A]s with many cases involving roadblock Operating Under the Influence of Liquor arrests, the breathalyzer was the most inculpatory piece of evidence used against [Ms. Hallinan]." Add. 193. "The proof of her impairment otherwise was based upon a fairly brief interaction with troopers and her admission to three drinks." Add. 193. The breath test device in her case was last certified on May 2, 2013. Add. 353.

On November 22, 2013, on counsel's advice that it would not be reasonable to take this case to trial given the breath test result of 0.23, Ms. Hallinan tendered a plea. Add. 356. The "breathalyzer result was part of the factual basis for the plea." Add. 192.



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. Add. 358. Ms. Hallinan retained her original counsel to prosecute a motion for new trial.

**STATEMENT OF ISSUES WITH RESPECT TO WHICH  
MS. HALLINAN SEEKS DIRECT APPELLATE REVIEW**

The latest of the Massachusetts lab scandals, this case arises from the Office of Alcohol Testing's (OAT) intentional concealment of evidence that its breath testing methodology failed to meet minimal scientific standards for a period of around eight years, affecting approximately 27,000 individuals. Add. 187. The motion judge found that "there is 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[.]'" Add. 189 (citations omitted).

Nevertheless, the district court denied Ms. Hallinan's motion for a new trial because "it is not within the authority of [the district court] to create a conclusive presumption of egregious misconduct[.]"<sup>2</sup> Add. 190. The first question presented, then, is **(I)** whether OAT engaged in egregious misconduct and the second is **(II)** if so, whether a conclusive presumption of egregious misconduct is warranted.

The third question **(III)** presented is one left open in Commonwealth v. Scott, 467 Mass. 336, 361 (2014): whether a "guilty plea [or admission] constitutes a waiver of the right to seek a new trial on the grounds of either newly discovered evidence or prosecutorial nondisclosure."

After OAT's misconduct was revealed, the Commonwealth agreed that breath test results spanning several years would be excluded and the Commonwealth would pay to notify affected individuals. The

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<sup>2</sup> The Court otherwise 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," Add. 193-194, given her "strong argument that she would not have tendered her admission to sufficient facts if she had known the breathalyzer results would be excluded." Add. 194.

Commonwealth also agreed that judicial estoppel prevented any position to the contrary. However, in responding to Ms. Hallinan's motion, the Commonwealth argued that Ms. Hallinan was disentitled to relief for reasons including that she failed to establish that misconduct specifically affected her case and that her plea waived her claims of prosecutorial non-disclosure and newly discovered evidence. The fourth question, then, is **(IV)** whether the Commonwealth's position is precluded by judicial estoppel.

The final question is **(V)** whether a defendant who successfully vacates their plea as a result of OAT's misconduct may 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 exacted.

Ms. Hallinan properly raised and preserved before the District Court all questions except question **(V)**.

#### **BRIEF STATEMENT OF ARGUMENT**

#### **I. OAT'S DELIBERATE WITHHOLDING OF EXCULPATORY EVIDENCE AFFECTING THE ADMISSIBILITY OF BREATH TESTS CONSTITUTES "EGREGIOUSLY IMPERMISSIBLE" CONDUCT WHICH ANTEDATED 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 had a material influence on the decision to plead. Id. Because misconduct "by the government" includes state crime laboratories, "[OAT] is an agent of the prosecution team[.]" Id. at 349, Add. 189.

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. "The conclusion that OAT's behavior was egregiously impermissible is inescapable." Add. 189. The Commonwealth's entering into the Joint Agreement "can only be construed as a concession that the government's conduct for the duration of the period was 'egregiously impermissible.'" Add. 190. OAT's misconduct persisted in the Ananias litigation: it "blatantly disregard[ed]" court orders and distorted evidence by culling out almost every exculpatory document, elevating this case to a level of wrongdoing eclipsing that of the individual bad actors at the heart of the Dookhan and Farak scandals. OAT's conduct "cast[s yet another] shadow over the entire criminal justice system." Scott, 467 Mass. at 352.

Judge Brennan's finding "[n]o doubt" 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 her case. Add. 191. The global remedy applied to all cases, which the Commonwealth conceded was necessary, establishes the nexus between the misconduct and those cases.

Beyond that nexus, by virtue of OAT's concealment of its own wrongdoing, the specific harm in any given case "belies reconstruction." OAT's misconduct was unknowable because, by certifying to the Court that it had "calibrated" each device, OAT represented that it did so reliably. OAT reinforced that false veneer by concealing evidence revealing that the machines had, in fact, failed calibration in a great many cases.

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. Here, defendants cannot show a nexus because OAT concealed its misconduct over an expanse of years. Here as in Scott, despite the difficulty 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 available evidence connecting any given case to misconduct is maintained and generated by OAT - the very agency whose default response was to conceal its own wrongdoing - up to and including its choice to hide documents from the court charged with scrutinizing its own misconduct. As a result, where the only way to connect misconduct to a given case was Ms. Dookhan's signature as analyst on the lab report, the only trustworthy basis to assess whether OAT's misconduct touched a given case is by seeing if the applicable certification falls within the exclusion period.

The systemic nature of OAT's deceptive practices thwarts other means of reconstruction. There is no one bad actor - the misconduct resulted from a lab wide culture. Due to its "unwritten policies," OAT chose to produce discovery obfuscating its unscientific methodology and to conceal that which exposed it. Thus, the full impact of OAT's "longstanding insular institutional" practices and "intentional" misconduct will never be known. Add. 58;

101. Given the magnitude of OAT's deception, it is "most appropriate that the benefit of [this Court's] remedy inure to defendants." Scott, 467 Mass. at 352.

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

A sui generis evidentiary rule granting a conclusive presumption of egregious misconduct on a showing that an individual submitted to a breath test during the exclusion period is necessary. It is unreasonable to deny relief to those unable to point to OAT's specific misconduct in their own case, as it is OAT's own behavior that prevents them from doing so. "[W]e cannot expect defendants to bear the burden of a systemic lapse." Bridgeman v. Dist. Attorney for the Suffolk Dist., 471 Mass. 465, 487 (2015). This Court should "fashion a workable approach to motions to withdraw a guilty plea brought by defendants affected by this misconduct[.]" Scott, 467 Mass. at 352.

**III. OAT'S UNSCIENTIFIC PRACTICE 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**

Newly discovered evidence provides a common-law 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). 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[.]" Scott, 467 Mass. at 361 (citations omitted).

The newly discovered / suppressed evidence 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 failure to meet minimum scientific standards was unknowable prior to Ms. Hallinan's admission; the evidence is thus "newly discovered." Grace, 397 Mass. at 306. Suppression of this evidence violated due process. Commonwealth v. Martin, 427 Mass. 816, 823 (1998).

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>3</sup> 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 v. United States, 456 F.3d 278, 292 (1st Cir. 2006) (given "automatic discovery" rules, "The government's obligation to disclose ... can hardly be doubted").

The only remaining question is that left open in Scott - whether Ms. Hallinan's admission waived these claims. 467 Mass. at 359. In Commonwealth v. Fanelli, 412 Mass. 497 (1992), a non-Brady case, this Court opined that an admission obviates pre-plea violations that are "not logically inconsistent with the valid establishment of factual guilt[.]" Id. at 500-01 (citations omitted). Applying this reasoning in a Brady context, because the suppressed evidence

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<sup>3</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).

affected the breath test, it directly impacted the establishment of factual guilt. Thus, relief is not foreclosed by Fanelli.

This Court should clarify that Brady principles require pre-plea disclosure of exculpatory information. A holding to the contrary 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 conform to this Court's construction of Art. 12 as broader than the U.S. constitution when its wording supports it. See, e.g., Commonwealth v. Mavredakis, 430 Mass. 848 (2000). The Art. 12 right to "all proofs favorable" supports the requirement of pre-plea discovery of exculpatory evidence.

**IV. THE COMMONWEALTH IS JUDICIALLY ESTOPPED FROM ASSERTING THAT ANY BREATH TEST DURING THE EXCLUSION PERIOD WAS ADMISSIBLE.**

Judicial estoppel prevents a party from arguing in contradiction of a prior position, which prior position the court accepted. Blanchette v. School Comm., 427 Mass. 176, 184 (1998). Below, the Commonwealth advanced arguments which it was estopped from making. First, it contradicted its position that OAT's misconduct necessitated exclusion of all breath tests by asserting that Ms. Hallinan is not entitled to relief because she cannot show mischief specific to hers. Add. 226; 259-260 ("[the defendant has] to point out specific things about [the] specific machine, and that hasn't been done here..."). Second, it argued relief was precluded because Ms. Hallinan "did not join the consolidated litigation," Add. 230. in contrast with its agreement to exclude all 9510 breath tests and notify all those affected, including Ms. Hallinan. Add. 53.<sup>4</sup> Third, it argued that Ms. Hallinan's admission waived this challenge,<sup>5</sup> Add. 230, a position contradicted by the Commonwealth's notice

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<sup>4</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).

<sup>5</sup> The Commonwealth described this point as moot given the purported strength of its case.

that individuals who "admitted to sufficient facts" may seek relief.<sup>6</sup>

Where the record shows irreconcilable positions, what remains is whether the court accepted those prior positions. It did. See Ananias I; Ananias II.

Judicial estoppel disposes of the issue, but it fails to address the Commonwealth's conduct in creating a path to relief it either intended to be a dead end or now endeavors to turn into one. "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). The Commonwealth breached the public trust in again bending those corners as it did in Dookhan and Farak.

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

"[A] defendant who [withdraws] a guilty plea as a consequence of [OAT's] 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

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<sup>6</sup> The quoted language is in [www.mass.gov/breathalyzer](http://www.mass.gov/breathalyzer), which the notice incorporates by reference.

egregious misconduct of [OAT] and disregarding its impact on criminal defendants[.]" Bridgeman I, 471 Mass. at 472-473, 475. Given these considerations, "defendants who plead guilty to [OUI] offenses and subsequently are granted new trials based on [OAT's] misconduct [] (1) [should not] be charged with more serious offenses than those of which they initially were convicted; and (2) if convicted again, [should not] be given sentences longer than those that originally were imposed." Id. Further, "[[d]ouble jeopardy guarantees are] violated when punishment already exacted for an offense is not fully 'credited[.]'" North Carolina v. Pearce, 395 U.S. 711, 718 (1969). While a license loss may be non-punitive in other contexts, service of serial suspensions for the same offense is punitive. See, e.g., United States v. Halper, 490 U.S. 435, 448-449 (1989).

#### **WHY DIRECT APPELLATE REVIEW IS APPROPRIATE**

Direct appellate review is appropriate where an appeal presents (1) questions of first impression or novel questions of law; (2) state or federal constitutional questions; or (3) questions of

substantial public interest. See Mass. R. App. P. 11(a). This case presents all three.

First, this case presents questions of first impression. This Court has not dealt with the issues raised in the Ananias litigation and has consequently considered neither whether OAT engaged in "egregiously impermissible" government misconduct nor whether this Court should create a "conclusive presumption" of misconduct. This case also addresses the question this Court left open in Scott: "whether a voluntary guilty plea constitutes a waiver of the right to seek a new trial on the grounds of either newly discovered evidence or prosecutorial nondisclosure." Id. at 361. It also addresses issues of misconduct flowing from the Commonwealth's decision to make arguments which it agreed it was judicially estopped from making. Finally, this case asks whether an individual who obtains relief pursuant to Ananias may face more serious charges and, if convicted again, additional penalties.

Second, this case presents questions involving whether constitutional due process concerns furnish a basis for relief either because OAT's conduct was "particularly pernicious," see Ferrara, 456 F.3d at

290; Scott, 467 Mass. at 346, or amounted to prosecutorial non-disclosure or newly discovered evidence, see Brady, 373 U.S. at 87; Tucceri, 412 Mass. at 404-405.

Third, these questions are of public interest; the Court has excluded breath test results for almost an eight-year period, impacting approximately 27,000 individuals. Defendants across the state have filed motions following the Ananias Orders. The public has an interest in a uniform standard for resolving these motions, which standard will also alleviate a strain on judicial resources.

Because consideration of all three factors demonstrates a need for direct review, Ms. Hallinan respectfully requests that this Honorable Court allow her application.

Respectfully submitted,  
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**CERTIFICATE OF COMPLIANCE**

I hereby certify, under the penalties of perjury, that this 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 Google Docs and MS Word. The pages of non-excludable words contained in this argument section of the application for direct appellate review is 10 pages.

/s/ Murat Erkan  
Murat Erkan

/s/ Joseph D. Bernard  
Joseph D. Bernard

May 2, 2022

**CERTIFICATE OF SERVICE**

Pursuant to Massachusetts Rule of Appellate Procedure 13(e), I hereby certify under the penalties of perjury, that on May 2, 2022, I have made service of this Application for Direct Appellate Review filed in the matter entitled Commonwealth v. Lindsay Hallinan, 2022-P-0285, currently pending in the Appeals Court via the Court's Electronic Filing System upon counsel for the Commonwealth:

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May 2, 2022

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**COMMONWEALTH OF MASSACHUSETTS  
MIDDLESEX, SS. BOSTON MUNICIPAL AND  
DISTRICT COURT DEPARTMENTS  
DOCKET NOS. 1248 CR 1075,  
1201 CR 3898, and others**

**COMMONWEALTH**

**v.**

**EVANDO ANANIAS, CHRISTIAN FIGUEROA, AND OTHERS**

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**MEMORANDUM OF DECISION ON CONSOLIDATED DEFENDANTS'  
MOTION TO COMPEL AND IMPOSE SANCTIONS**

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On February 16, 2017, this Court issued a Memorandum of Decision denying in part and allowing in part a motion filed by defendants of the Boston Municipal Court and District Court Departments charged with Operating a Motor Vehicle while Under the Influence of Intoxicating Liquor seeking, in limine, to exclude breath test results produced by the Alcotest 9510, a breathalyzer instrument developed by Draeger Safety Diagnostics, Inc. (Draeger). In sum, the Court determined that (1) the Alcotest 9510 breathalyzer device operates in a manner that produces scientifically reliable blood alcohol content (BAC) results; (2) the source code underlying the Alcotest 9510 breathalyzer device was developed and implemented in a manner that produces scientifically reliable BAC results; (3) the theory of blood-to-breath ratio underlying the algorithmic functions used by the Alcotest 9510 to produce BAC results remains sound science; (4) the methodology employed by the Massachusetts State Police Office of Alcohol Testing (OAT) from September 14, 2014 to the present produces scientifically reliable BAC results; and (5) the annual calibration and certification methodology employed by OAT

from June 2011 to September 14, 2014 did not produce scientifically reliable BAC results, but the Commonwealth could demonstrate to the trial judge, on a case-by-case basis, that a particular Alcotest 9510 was calibrated and certified using scientifically reliable methodology, and thus that a particular BAC result is scientifically reliable. *Commonwealth v. Ananias, et. al*, 1248 CR 1075 (February 16, 2017). Following this decision, District and Boston Municipal Court trial judges held hearings with respect to the calibration and certification methodology employed by OAT where the Commonwealth sought to introduce evidence of breath test results that were produced between June 2011 and September 14, 2014. On August 2, 2017, during one such hearing at Taunton District Court, the Court (Brennan, M., J.) determined that OAT had failed to disclose exculpatory worksheets demonstrating that the particular Alcotest 9510 at issue had failed certain calibration tests. *Commonwealth v. Harvey* (1431 CR 2259); *Commonwealth v. Derochers* (1431 CR 1085); and *Commonwealth v. Simmons* (1431 CR 2722). This confirmed the consolidated defendants' suspicion, based upon their comparison of the number of worksheets produced during the *Ananias* litigation to the significantly larger number of the same type of documents provided in response to a subsequent Freedom of Information Act (FOIA) request, that OAT had failed to produce hundreds of similar exculpatory documents.

On August 19, 2017, the consolidated defendants filed this Motion to Compel and Impose Sanctions. The Commonwealth filed a Notice of Discovery on August 31, 2018, and produced the materials identified by the defendants as having been withheld. In a series of additional filings, the Commonwealth asserted that OAT had not made them aware of these documents, despite prosecutors' best efforts to obtain all required discovery. On August 31, 2017, Secretary of Public Safety Daniel J. Bennett directed the Executive Office of Public Safety and Security (EOPSS) to investigate OAT's discovery practices. In an extensive report dated October 16,

2017, EOPSS identified various instances of intentional withholding of exculpatory evidence, blatant disregard of court orders, and other errors, all underscored by “a longstanding and insular institutional culture that was reflexively guarded” at OAT. *Exhibit 28*. In conjunction with this report, by letter to Colonel Richard McKeon of the Massachusetts State Police, Secretary Bennett directed the State Police to take certain actions with respect to the management and operation of OAT, with particular focus on its discovery practices. Meanwhile, and over the course of the ensuing year, tens of thousands of documents not previously provided to the consolidated defendants were turned over by prosecutors. During this time, the parties also engaged in negotiations to resolve the issues raised by the defendants’ Motion for Sanctions. The parties reached a tentative agreement on the majority of these issues, and on August 14, 2018 presented a Joint Stipulation of Facts and Recommended Resolution to the Defendants’ Motion for Sanctions for the Court’s approval. As part of this Stipulation, the parties agreed (1) to expand the period for which Alcotest 9510 BAC results are presumptively excluded from use by the Commonwealth at trial; (2) that the Commonwealth will not seek to admit such results at trial for this enlarged period in any offense alleging a violation of G.L. c. 90 or 90B, except in cases alleging motor vehicle homicide by operation under the influence, operating under the influence causing serious bodily injury, and operating under the influence of liquor, 5<sup>th</sup> offense or greater; and (3) that the period of presumptive exclusion would be enlarged, dating back to June 2011, when the Alcotest 9510 was first introduced in Massachusetts. The parties could not agree on the end-date of this enlarged period: the Commonwealth contends that it should correspond with the defendants’ receipt of all failed or incomplete worksheets on August 31, 2017, whereas the defendants assert that it should extend until OAT obtains accreditation from the ANSI-ASQ

National Accreditation Board (ANAB). To resolve this dispute, the parties agreed to submit the issue to the Court and to be bound by its decision.

As part of this agreement, the parties also sought to notify any person who may have received an adverse criminal disposition as a result of a breath test administered on the Alcotest 9510 during the applicable time period. Although the proposed Stipulation was widely reported and available on both print and electronic media, this formal notification process proved to be more complicated than anticipated. Ultimately, all consolidated defendants who were represented by counsel with valid email addresses were afforded an opportunity to comment on the Stipulation. The Court received two responses. *Exhibits 2 and 3*. On November 5, 2018, the Court formally approved the parties' Joint Stipulation of Facts and Recommended Resolution to the Defendants' Motion for Sanctions. On the unresolved issue, the Court heard testimony and received thirty-two exhibits into evidence during a three day hearing in November 2018 at the Salem District Court. The Court also was given access to view OAT's eDiscovery portal. The hearing concluded on November 26, 2018. At the defendants' request, the parties were given until December 10, 2018 to file additional memoranda.

### **Findings of Fact**

#### *A. Stipulated Facts*

The Parties' Joint Stipulation of Relevant facts and Recommended Resolution to the Defendants' Motion for Sanctions contains the following Stipulation of Relevant Facts, which the Court incorporates into this decision:<sup>1</sup>

1. The Office of Alcohol Testing (OAT) is a unit within Massachusetts State Police Crime Laboratory.

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<sup>1</sup> For the sake of clarity, the Court has redacted footnotes and exhibit references contained in the original document.



2. At several hearings, Melissa O'Meara and Kerry Collins represented to the Court that the certification/calibration worksheets were synonymous with the written protocols, prior to the promulgation of version 1.0 of the annual certification/calibration written protocols.

3. The Court ordered OAT to produce a copy of all of the annual certification/calibration worksheets used to perform the annual calibration of 9510 units.

4. The OAT produced 1,976 worksheets as single-page PDF documents, and represented that these were all of the materials that the court ordered produced.

5. The 1,976 worksheets documents included 11 instances of a failed annual calibration, also referred to as "incomplete worksheets".

6. There were an additional 432 worksheets that represented failures of the annual calibration process.

7. The 432 failed worksheet were intentionally withheld by the OAT.

8. The OAT did not inform Ananias prosecutors, the Ananias defense attorneys, or the Court that they were withholding the 432 worksheets.

9. The withheld failing annual calibration worksheets were exculpatory materials.

10. The 432 withheld worksheets were provided to the defendants' counsel on August 31, 2017 – along with approximately 10,000 other documents.

11. In addition, in response to the consolidated defendants' motion, the Commonwealth provided "curve data" on October 24, 2017.

12. The OAT further provided approximately 30,000 additional documents on December 17, 2017.

13. The production of documents on August 31, 2017 included the production of the pages that were attached to each worksheet by either a paper clip or a staple, as was noted in the February 2017 *Ananias* decision.

14. The technical leader of the OAT, Melissa O'Meara was a witness for the Commonwealth in the *Ananias* matter, and was terminated by EOPPS in October 2017, within days of the release of the EOPPS report on Discovery irregularities at OAT.

15. The OAT section of the Massachusetts State Police Crime Laboratory will apply for accreditation by the ANSI-ASQ National Accreditation Board (ANAB) by August 1, 2019.

16. OAT has a mechanism to provide some of the information maintained in the OAT 9510 database, and that mechanism is referred to as the eDiscovery Portal.

17. The eDiscovery Portal was first available to the public on August 16, 2016, and notification was made on October 7, 2016 by the State Police Crime Laboratory to the Massachusetts District Attorneys' Association and the Committee for Public Counsel Services.

18. The attorneys for the consolidated defendants maintain that they were unaware of the existence of the portal prior to this Court's February 2017 order.

19. A second generation of the eDiscovery Portal is scheduled for release at the end of the summer, 2018. This version will include the failing worksheets and the 10,000 documents provided to the *Ananias* defendants in August 31, 2017.

20. From September 2017 to the present, the *Ananias* prosecutors have been in contact with all of the District Attorneys' offices, through multiple conferences calls. The *Ananias* prosecutors have the authority to negotiate on behalf of all District Attorneys' Offices throughout the Commonwealth.

21. The Executive Office of Public Safety conducted an investigation into discovery practices at the Office of Alcohol Testing, shortly after filing of the Motion for Sanctions in this matter. The parties agree to stipulate to the facts contained therein.

*Exhibit 1* (see Appendix).

B. *Additional Findings of Fact*

During the November 2018 hearing, the court heard testimony from three witnesses, two on behalf of the consolidated defendants and one for the Commonwealth. Attorney Thomas Workman testified regarding his role as the defense team's computer forensic expert. His testimony focused on the discovery process and highlighted the difficulty the defendants experienced receiving, locating, and identifying particular documents due to the disorganization at OAT and the dysfunction between OAT and prosecutors. He specifically cited the tens of thousands of documents provided by the Commonwealth at various intervals since August 2017, which he described as being uncatalogued or indexed, and characterized as being produced in a chaotic and confusing manner. Although Mr. Workman must be credited for the persistence and diligence that uncovered OAT's intentional withholding of significant, exculpatory documents, the court does not fully credit his testimony. Mr. Workman's testimony was colored, at least in part, by his obvious disdain and antipathy for OAT, however well-founded it may have been in this instance. Of particular concern was his testimony regarding the OAT eDiscovery portal. Mr. Workman maintained that he was wholly unaware of this portal prior to the January 2107 *Daubert/Lanigan* hearing in this case. Yet, when confronted with evidence that he had accessed the portal months prior to the hearing, Mr. Workman adamantly refused to allow for the simple possibility that he may have been mistaken. Instead, he testified that his wife, secretary, and deceased former secretary had access to his eDiscovery portal password, and intimated that it

could have been one of them who accessed OAT's portal using his credentials. The court does not credit this testimony and finds that it substantially undermines Mr. Workman's testimony in this matter. The defendants' second witness, Janine Arvizu, testified via videoconference. She is the same expert on laboratory quality auditing who testified during the original *Ananias* proceedings. Here, she focused on the accreditation process and testified about various issues at OAT that, she opined, would remain obstacles to accreditation by a national body. As with her presentation in 2017, this Court found Ms. Arvizu's testimony to be credible on the whole. However, consistent with the Court's view at that time, Ms. Arvizu maintains a standard of review that "might be so high as to be unattainable." *Ananias*, 1248 CR 1075 at 26. The Court also views her testimony in this case through the lens of her lack of specific expertise in calibration laboratories as it relates to her assessment of OAT's readiness for accreditation, as well as her substantial reliance on Attorney Workman's reporting rather than her own review of discovery documents to draw her conclusions.

The Commonwealth's sole witness was Kristen Sullivan, the Chief Science Officer and Laboratory Director for the Massachusetts State Police Crime Laboratory. She testified in detail regarding the accreditation process, including her own role in ensuring that every unit under the State Police Crime Laboratory umbrella, other than OAT, has achieved accreditation by an outside, nationally recognized body. Director Sullivan outlined the steps OAT has taken to seek accreditation, and she testified about discovery practices at OAT as well as the Crime Lab's response to the 2017 EOPSS investigation into OAT practices. Although this Court fully credits Ms. Sullivan's testimony regarding the facts, it does not equally embrace all of the observations and opinions she proffered. Ms. Sullivan continues to oversee the operations at OAT, even if indirectly. She works with all of the people who were the subject of the EOPSS investigation

and was interviewed as part of that probe. Thus, the Court is mindful that, despite her best intentions and efforts, Director Sullivan's analysis is inherently impacted by the fact that she is not a wholly independent witness.

Based upon these credibility determinations and upon consideration of the documentary evidence presented, the Court makes the following additional findings of fact:

22. The consolidated defendants, through their forensic expert, Thomas Workman, were aware of the existence of the OAT eDiscovery portal prior to the January 2017 *Ananias* hearing.

23. At the time of that hearing, the eDiscovery portal did not include any reference to the Massachusetts State Police Quality Assurance (QA) Manual. The QA Manual dictates procedures, instructions, and requirements for calibration and certification of the Alcotest 9510 breathalyzer. *Exhibit 24*. The QA was in existence at the time of the January 2017 *Ananias* hearing, but was not provided to the defendants as part of discovery.

24. The QA Manual contains different information than OAT's Quality Control (QC) Manual, which was furnished to the defendants before the January 2017 *Ananias* hearing. The QC Manual is a document that provides instructions to OAT employees primarily on topics such as storage and maintenance of various solutions and equipment used at the lab. *Exhibit 26*.

25. The QA Manual contains relevant material that would have assisted the defense in its examination of Melissa O'Meara regarding the reliability of OAT's scientific methodology. Its production was subject to discovery orders issued prior to the January 2017 hearing.

26. Although not specifically listed by the Commonwealth in its Notice of Discovery, the QA Manual was provided to the defendants in the August 31, 2017 discovery documents.

27. OAT's Calibration and Certification Protocols have not been subjected to a validation study. The laboratory has relied on performance checks to validate the protocols. The practice of relying on performance checks to validate results is consistent with the approach followed in other units of the State Police Crime Laboratory, all of which have achieved accreditation. To the extent that these performance checks fall short of external validation studies, the ANAB accreditation process will cure any such deficiencies.

28. Although the investigation into the discovery practices at OAT, and particularly into aspects of the discovery process related to the *Ananias* hearing and the role of certain OAT employees in intentionally withholding exculpatory information, likely would have benefitted from an outside agency perspective, the EOPSS investigation was thorough, detailed, comprehensive, and credible. It produced a critical analysis of the culture at OAT and uncovered enormously concerning practices that compromised criminal prosecutions and substantially interfered with the liberty interests, driving privileges, and employment opportunities of individual defendants.

29. After this investigation, EOPSS maintained oversight of OAT with respect to the discovery provided to the defendants in this case. To the extent that discovery materials produced on and after August 31, 2017 were voluminous, uncatalogued, unlabeled, or otherwise overwhelming, it was not the product of bad faith on the part of EOPSS or the prosecutors. If anything, it was the result of EOPSS's effort to over-correct for OAT's prior intentional misconduct. Throughout this process, there remained a level of dysfunction in the communication between OAT and prosecutors with respect to discovery materials. However, the inability of the defendants to locate certain documents contained within the discovery was also a

product of Mr. Workman's lack of expertise needed to search the discovery provided by OAT effectively.

30. As a result of the EOPSS investigation, on October 16, 2017, the Secretary of Public Safety directed the State Police to take the following actions: (1) expand the reach of the Crime Laboratory's Case Management Unit (CMU), which adheres to protocols that specifically delineate how to respond to discovery requests, to cover OAT; (2) require OAT to eliminate its longstanding policy of requiring court orders before complying with "non-standard" discovery requests from prosecutors, and instead comply with all document requests from prosecutors' offices; (3) enhance and expand OAT's eDiscovery portal; (4) obtain ANAB accreditation within twelve months; and (5) conduct enhanced training for OAT employees, focusing on identification of and duties regarding exculpatory information.

31. The State Police CMU does not process OAT discovery requests, nor has OAT developed its own discovery protocols. OAT has no formal, uniform policy with respect to discovery requests. OAT's failure to produce 432 incomplete Alcotest 9510 worksheets and the QA Manual prior to the January 2017 hearing was the result of the lack of such a discovery policy. There is nothing currently in place at OAT to ensure that discovery requests are being handled properly and in a uniform fashion.

32. The OAT eDiscovery portal has been expanded significantly in the past year. It is accessible and easily navigated. All of the information contained in the "OAT records" typically found in court case files is available on the eDiscovery portal. The portal allows the user to search for breath test records, breathalyzer certifications, and periodic test records. It has a reference section that includes Alcotest 9510 record information, Officer in Charge guides, Breath Test Operator Training manuals, and OAT protocols. It also has a section that

provides updates – the most recent, dated 10/3/18, deals with an update to the “uncertainty of measurement” section of the breath test certification summary.

33. OAT is not ANAB accredited. Currently, twenty-two measurement laboratories in twelve states in the United States are accredited.

34. The ANAB accreditation process involves ten steps: (1) application to ANAB; (2) preparation of a “conformance file” for the lead assessor assigned to review the application; (3) e-dialogue with the lead assessor regarding the conformance file; (4) on-site assessment (once the conformance file is complete); (5) closing report (a “punch list” of non-conformities that must be addressed by the lab); (6) remedial proposals by the lab; (7) objective proof by the lab of remediation; (8) ANAB board review; (9) certificate of accreditation; (10) annual “surveillance” visits.

35. OAT has worked diligently toward applying for accreditation, particularly since the directives issued by the Director of Public Safety. In order to apply for accreditation, OAT must have certain technical and administrative reporting requirements in place. Preparation of the application involves a standard-by-standard review to ensure that all protocols meet official requirements. At the time of this hearing, all technical components were in place; however, the lab was still addressing administrative aspects of the application. It is expected that its application to ANAB will be finalized by February 2019.

36. Retired Superior Court Justice Jane Haggerty was hired to evaluate OAT’s training, particularly as to obligations regarding exculpatory information, and to make recommendations to enhance it. She has completed her assessment and discussed her findings with the Secretary of Public Safety and the Director of the Crime Laboratory.



37. On August 1, 2018, Director Sullivan sent a letter to all District Attorneys, the Boston Bar Association, all Chiefs of Police, and the Committee for Public Counsel Services outlining the activity of OAT over the course of the prior year, particularly in response to the February 16, 2017 *Ananias* decision, the October 2017 EOPSS investigation, and Judge Haggerty's recommendations. *Exhibit 31*.

### **Applicable Law**

Under Mass R. Crim. P. 14(c)(1), in response to noncompliance with a discovery order, "the court may make a further order for discovery, grant a continuance, or enter such orders as it deems just under the circumstances." In general, "(s)anctions are remedial in nature . . . (and) should be tailored appropriately to cure any prejudice resulting from a party's noncompliance and ensure a fair trial." *Commonwealth v. Carney*, 458 Mass. 418, 427 (2010). However, when the noncompliance is intentional and the information withheld exculpatory, a court may also consider fashioning a remedy designed "to discourage government agents from such deliberate and insidious attempts to subvert a defendant's right to a fair trial." *Commonwealth v. Jackson*, 391 Mass. 749, 754 (1984). The remedy must not be punitive, but under certain circumstances may be prophylactic, if narrowly tailored to remedy the particular misconduct. *See CPCS v. AG*, 480 Mass. 700, 729-33 (2018); *Commonwealth v. Cronk*, 396 Mass 194, 198-99 (1985).

### **Discussion, Rulings and Orders**

It is uncontested that exculpatory materials in the form of 432 failed calibration worksheets were intentionally withheld from the consolidated defendants by OAT. The Court has also determined that the Quality Assurance Manual, which directly addresses calibration procedures and as such was material to the issue of the reliability of OAT's scientific methodology, was not disclosed, despite being subject to discovery orders. The Secretary of

Public Safety and the Executive Office of Public Safety and Security found, and the Commonwealth concedes, that “OAT leadership made serious errors of judgment in its responses to court-ordered discovery, errors which were enabled by a longstanding culture that was reflexively guarded . . . and which was inattentive to the legal obligations borne by those whose work facilitates criminal prosecutions.” *Exhibit 28, p.1*. The degree to which OAT’s misconduct impeded the consolidated defendants’ ability to obtain a full, fair, and complete *Daubert/Lanigan* hearing is difficult to quantify. It certainly was not negligible. Similarly, the extent to which consideration of this withheld evidence in context, during real time cross-examination of Melissa O’Meara, would have impacted this Court’s qualitative assessment of OAT’s methodology cannot be determined retrospectively. It is noteworthy, however, that the Court fully credited Ms. O’Meara’s testimony in its decision of February 16, 2017. Ultimately, OAT’s misconduct resulted in a deprivation of the consolidated defendants’ due process rights. *See CPCS*, 480 Mass. at 730, *citing Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Commonwealth v. Daniels*, 445 Mass. 392, 401, 407-09 (2005) (Commonwealth’s failure to provide exculpatory witness statement violated defendant’s right to due process). Moreover, the negative impact of EOPSS’s findings regarding OAT’s approach to exculpatory information on public trust and confidence in the fairness of the system and the integrity of the process cannot be overstated. It is these harms in the aggregate that this ruling must remedy through the imposition of sanctions. Thus, this Court’s mandate, if not simple, is clear: to fashion a remedy that not only addresses 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.

The Commonwealth argues that a fair operative date for the enlarged period of presumptive exclusion of breathalyzer tests in criminal prosecutions coincides with the date that the failed calibration worksheets were disclosed, August 31, 2017. It asserts that the voluntary self-sanction of suppressing the vast majority of evidential breath tests for a six-year period is more than sufficient. I disagree. Indeed, the sanctions contemplated by agreement of the parties already go beyond the most narrowly remedial. In this case, an appropriate remedy must include, at a minimum, substantial compliance by OAT with the directives imposed on it by the Director of Public Safety. The Commonwealth has demonstrated OAT's compliance with only two of these five directives. Nor are these requirements alone, even if fulfilled, sufficient to provide the level of transparency necessary to remedy the harm to the criminal justice system. Where, 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." *Bridgeman v. District Attorney of Suffolk County*, 476 Mass. 298, 337 (2017) (Hines, J. dissenting).

The consolidated defendants assert that the misconduct in this case was so egregious that the most just remedy is to exclude breathalyzer results until OAT achieves formal accreditation. They posit that they were denied a full and fair *Daubert/Lanigan* hearing and thus, by definition, a fair trial. From the defendants' perspective, OAT cannot be trusted until fully accredited by a national organization. Although the defendants' position with respect to the substantive impact of OAT's misconduct on the right to a fair hearing is justified, their argument goes too far. In its February 2017 *Ananias* decision, this Court found that "(a)lthough accreditation is a laudable goal, the Court is not convinced that its absence inherently undermines the reliability of OAT's

work.” *Ananias*, 1248 CR 1075 at 2. The Court stands by this conclusion, while recognizing that the context is now different.

In 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. Mindful that OAT, by EOPSS’s mandate, must ultimately become accredited, the Court is satisfied that this aspect of prejudice can be mitigated by OAT formally filing its application for accreditation, as long as the Commonwealth shows that the application is substantially likely to be approved.<sup>2</sup> *Cf. Commonwealth v. Baldwin*, 385 Mass. 165, 177 (1982) (judge may exclude evidence withheld in violation of discovery obligation as a sanction). The application itself requires OAT to demonstrate that it is comporting with ANAB standards as defined by the ANAB Accreditation Requirements manual. *Exhibit 21*. Yet, this alone is not a sufficient panacea. OAT must also address the discovery practices that contributed to its misconduct. Specifically, OAT must promulgate formal discovery protocols consistent with those employed by the State Police Crime Management Unit. These protocols must include a definition of exculpatory evidence and an explanation of the obligations pursuant to such evidence. *See CPCS*, 480 Mass. at 729-734 (2018). Alternatively, the Court will be satisfied by the Commonwealth’s representation that OAT’s discovery is being handled by the State Police CMU. Regardless, the Commonwealth must certify that all OAT staff has been trained on the obligations relating to exculpatory evidence. In the interest of transparency and in the spirit of the Director of Public Safety’s October 16, 2017 directives, OAT’s application for accreditation must be available for viewing

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<sup>2</sup> For example, the Commonwealth may provide copies of applications filed by already accredited measurement labs that are substantially similar to OAT’s application.

on the eDiscovery portal, along with the ANAB Accreditation Requirements manual. At each stage of the accreditation process, updates confirming OAT's compliance must be posted on the portal. In addition, OAT's discovery protocol, once promulgated, must be uploaded onto the eDiscovery portal, along with any discovery training materials. The Court finds that making this information available on an electronic public portal 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 violation of its obligations.

Accordingly, the Court orders that the period of presumptive exclusion of Alcotest 9510 breathalyzer results in such criminal prosecutions as have been agreed by the parties shall be extended until the Commonwealth, upon motion to this Court<sup>3</sup>, demonstrates:

1. that OAT has filed an application for accreditation with ANAB that is demonstrably substantially likely to succeed;
2. that OAT's accreditation application has been uploaded onto the eDiscovery portal;
3. that the ANAB Accreditation Requirements manual is available for viewing on the eDiscovery portal;
4. that OAT has promulgated discovery protocols consistent with those employed by the State Police Case Management Unit, including a definition of exculpatory evidence and an explanation of the obligations pursuant to such evidence; or, in the alternative, that the CMU is responsible for processing OAT's discovery;
5. that OAT's discovery protocol has been uploaded to the eDiscovery portal;

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<sup>3</sup> Unless specifically requested otherwise, the Court will decide this motion on papers submitted by the parties.

6. that all OAT employees have received training on the meaning of exculpatory information and the obligations relating to it; and
7. that all written materials used to train OAT employees on discovery, and particularly on exculpatory evidence, have been uploaded to the eDiscovery portal.

If all of these requirements have been met, the Court may still, upon motion of the consolidated defendants, reinstate the period of presumptive exclusion if OAT fails to update the progress of its application for accreditation on the eDiscovery portal, or otherwise fails to make good faith efforts to gain accreditation. *See Parties' Joint Stipulation, Exhibit 1, p. 4 ("Accreditation of the Office of Alcohol Testing")*.

January 9, 2019

So Ordered,

Robert A. Brennan  
Justice of the District Court

## APPENDIX