COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12932

COMMONWEALTH
Plaintiff/Appellee,

v.

BRAULIO CALIZ
Defendant/Appellant

ON APPEAL FROM THE HAMPDEN SUPERIOR COURT

BRIEF OF MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF DEFENDANT BRAULIO CALIZ

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INTERESTS OF AMICUS CURIAE

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STATEMENT OF ISSUES

Whether this Court should restore to sentencing judges the discretion vested in them prior to *Commonwealth v. Milton*, 427 Mass. 18 (1998), and *Commonwealth v. Holmes*, 469 Mass. 1010 (2014) to consider and credit individual defendants' prior convictionless time served at sentencing or on motion thereafter?

SUMMARY OF THE ARGUMENT

This Court should restore to sentencing judges the discretion vested in them prior to *Commonwealth v. Milton*, 427 Mass. 18 (1998), and *Commonwealth v. Holmes*, 469 Mass. 1010 (2014) (collectively, "*Milton-Holmes*") to consider and credit individual defendants' prior convictionless time served at sentencing or on motion thereafter.

Before *Milton-Holmes*, sentencing judges were free (but not required), in their discretion, to give defendants credit for convictionless time served. That discretion, eliminated by *Milton-Holmes*, is axiomatic to sentencing in the Commonwealth, whereby judges have wide latitude to consider a variety of factors (including uncharged conduct) in order to fashion appropriate sentences for individual defendants on a case-by-case basis. *See* Arg. I (pp. 14-17).

In the face of this longstanding discretion, and without support in law, fact, or policy, *Milton-Holmes* held that concerns around "banking time"—the concept that a defendant will commit a future offense knowing he has "time in the bank" from a vacated sentence—always outweigh equitable concerns arising from convictionless time served in cases of unrelated sentences. Yet in reaching this conclusion, the Court never grappled with the fact that "banking time" has no foothold in the Commonwealth's precedents, any empirical facts, or policy. Indeed, careful consideration of each should lead the Court to reject "banking time" as a legitimate

concern—and certainly not a concern that always outweighs equitable concerns about convictionless time served. That is, (1) "banking time" is a not a longstanding principle in the Commonwealth; (2) no study has ever suggested that serving convictionless time motivates defendants to commit crimes upon release; and, (3) policy rationales that 'only recidivists benefit' are unsupported as a matter of constitutional law, where by definition, a defendant with convictionless time served is not a recidivist. In adopting a rule that concerns about "banking time" always trump equity concerns, the Court never confronted the fact that the discretionary sentencing regime in place before *Milton-Holmes* allowed judges to make this calculus in each case before them, but never mandated that judges provide credit for convictionless time served. *See* Arg. II (pp.18-34).

In the alternative, if the Court chooses to preserve *Milton-Holmes*, the Court should clarify that egregious government misconduct, including the unprecedented government misconduct in the Annie Dookhan and Sonja Farak drug lab scandals, constitutes "equally compelling circumstances" allowing sentencing judges to exercise their discretion to give credit for convictionless time stemming from that misconduct. Certainly, no victim of Dookhan or Farak should be denied the chance to ask a sentencing judge to award credit for the resulting convictionless time served as a matter of equity simply because the scope of the Commonwealth's misconduct is so great. *See* Arg. III (pp. 34-41).

ARGUMENT

I. SENTENCING JUDGES SHOULD BE PERMITTED TO AWARD CREDIT FOR CONVICTIONLESS TIME SERVED IN THEIR DISCRETION.

The Commonwealth has long recognized that defendants should be entitled to receive credit for time served without valid convictions, according to the sentencing judge's discretion. This broad category of time unassociated with a valid criminal conviction—whether spent in pretrial incarceration on a charge resulting in acquittal or other dismissal, or in prison as a result of a conviction or sentence that is subsequently vacated—has been known in Massachusetts since 1977 as "dead time." *See Manning v. Superintendent, Mass. Corr. Inst.*, 372 Mass. 387, 390 (1977). Recognizing that "[l]iberty is of immeasurable value," *id.* at 394, sentencing judges were for decades able to exercise their discretion to give defendants credit for convictionless time served[1] they had suffered on a prior charge.

Judges have recently lost such discretion, but it should be restored. It is a bedrock principle of sentencing that, in the absence of a statutory mandate, the sentencing judge has wide discretion to fashion a sentence that serves the goals of the criminal justice system. This discretion is codified and reinforced throughout

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[1] MACDL uses the term "convictionless time served" to more accurately describe what the case law terms "dead time"— that is, time ultimately served without a valid supporting conviction.

the sentencing process. Emblematic of this principle, sentencing guidelines promulgated by the Massachusetts Sentencing Commission are advisory only, so that they are "not a constraint on judicial discretion." *Advisory Sentencing Guidelines*, Massachusetts Sentencing Commission (Nov. 2017). A judge has "discretion to consider a variety of factors and has wide latitude within the boundaries of the applicable penal statutes." *Id.* at 107 (quoting *Commonwealth v. Ferguson*, 30 Mass. App. Ct. 580, 586 (1991)). Those factors extend well beyond categories of evidence admissible at trial, and include the facts and circumstances of the crime of conviction, prior criminal record, and the defendant's background, personal history, and circumstances, among others. *Id.* In fact, the array of factors the sentencing judge may consider is so broad that she may consider *uncharged* conduct by the defendant. *Id.* at 108 (citing *Commonwealth v. Goodwin*, 414 Mass. 88, 93-94 (1993)).

Consistent with this broad discretion, Massachusetts judges were historically permitted to consider a defendant's prior convictionless time served in fashioning appropriate sentences on a case-by-case basis. Recent jurisprudence, however, has eliminated sentencing judges' ability to consider a defendant's prior convictionless time served. Discarding judicial discretion, two cases—*Commonwealth v. Milton*, 427 Mass. 18, 25 (1998), and *Commonwealth v. Holmes*, 469 Mass. 1010, 1012 (2014) (collectively, "*Milton-Holmes*")—adopted a new concept lacking deep roots

in the Commonwealth's common law or public policy: "banking time." "Banking time" posits that a defendant will be encouraged to commit a criminal offense if he knows that he has weeks, months or even years of prison time "in the bank" (analogized to a "line of credit") from a vacated sentence. *See Holmes*, 469 Mass. at 1011.

In the first attack on sentencing judges' discretion, *Milton* held that concerns about "banking time" outweighed any concerns for the injustice of convictionless time in the case before it. 427 Mass. at 25. *Milton* was the first case in the Commonwealth to apply "banking time" as a legal principle in this fashion, but was unable to draw from any authority—either prior jurisprudence or factual evidence—in doing so. Neither the Commonwealth nor the Court cited a single instance of an individual deciding to commit a crime because that individual had "banked time," much less any credible data purportedly evidencing this "banking time" phenomenon.

Where *Milton* first attacked discretion, *Holmes* took the assault to its conclusion. There, *Milton*'s "principle" against "banking time" became a "prohibition." Because of "banking time" concerns, the Court held that defendants are categorically prohibited from receiving credit for dead time on an unrelated charge. 469 Mass. 1010, 1012 (2014). That is, *Holmes* removed any discretion to consider convictionless time served. Under *Holmes*, even where a defendant

committed an unrelated offense *before* the sentence for a prior offense was vacated—i.e., without even knowing he had time "in the bank"—a judge *still* could not give the defendant credit for that time. *Id.*

Milton-Holmes' categorical prohibition against sentencing credit for convictionless time served has no place in a sentencing regime that otherwise confers wide latitude to the sentencing judge. On that basis alone, the *Milton-Holmes* jurisprudence should be abandoned in favor of restoring a sentencing judge's discretion, grounded in principles of fairness and equity, to consider convictionless time served in fashioning an appropriate sentence.

II. "BANKING TIME" IS NOT A LEGITIMATE BASIS UPON WHICH MASSACHUSETTS COURTS SHOULD BE PREVENTED FROM GRANTING PETITIONERS LIKE CALIZ CREDIT FOR CONVICTIONLESS TIME SERVED.

A. Massachusetts Law Has Long Recognized that Judges Should Be Able to Award Defendants Credit for Convictionless Time Served.

1. This Court has a long history of focusing on fundamental fairness considerations in remedying convictionless time served.

In addition to eviscerating discretion, *Milton-Holmes* created a rigid and legalistic approach to an issue—sentencing—that was previously bound up in the unique facts of a defendant's case. That *Milton* and *Holmes* removed traditional discretion on the basis of "banking time," a construct ungrounded in the realities of the criminal legal system, is more problematic still. There is simply no evidence that a defendant has ever committed a subsequent offense because he had "banked

time" that would somehow cover his as-yet-unascertained conviction and sentence of incarceration for that subsequent offense.

The importance of remedying convictionless time served through sentencing "credit" can be traced back in this Court's jurisprudence to 1952. *See Lewis v. Commonwealth*, 329 Mass. 445 (1952). In *Lewis*, a jury found the petitioner guilty of armed robbery, and he appealed his conviction. *Id.* at 446. After serving nine months of his sentence, this Court reversed the judgment, finding there was sufficient evidence only for a charge of larceny. *Id.* The Superior Court then sentenced the petitioner for larceny, but petitioner argued he should be given credit for his nine months of incarceration under the now-reversed armed robbery charge. *Id*. at 447. The Court agreed. *Id.* at 451-52. The Court rejected the notion that "the first sentence has been held invalid and so amounted to nothing at all . . . and that the Superior Court was as free to impose the second sentence of the maximum term for larceny as if there had been no previous sentence." *Id.* at 447. Noting that "[i]t is hardly realistic to say that nine months in the State prison amount to nothing," the Court held that "[a] proper sense of justice" required that Mr. Lewis receive credit

for time served under the reversed sentence by deducting that time from the later larceny sentence. *Id.* at 447-48.[2]

This Court reaffirmed its commitment to fairness in sentencing when it confronted dead time six years later in *Brown v. Commissioner of Correction,* 336 Mass. 718 (1958). There, the petitioner sought credit for time he served on vacated sentences that had run prior to sentences he received on five later indictments that were to commence "from and after" the vacated sentences. *Id.* at 719. Citing *Lewis* but recognizing "the question before the court there was quite different from that here involved," the Court noted that the *Lewis* decision "evinces a tendency on the part of this court not to adopt an overly legalistic approach in matters of this sort." *Id.* at 722. Instead, the Court was guided by notions of fundamental fairness. *Id.* at 721. The Court held the plaintiff was entitled to credit for his time served, a result that "is the better and more humane view, for only in this way can a prisoner receive credit, not as matter of grace, but as of right, for time served under an erroneous conviction." *Id.*

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[2] Unlike the later cases that addressed convictionless time served, *Lewis* involved a single actus reus, and whether that act supported a conviction for armed robbery or the lesser charge of larceny. Later cases would confront the situation of dead time for entirely separate and unrelated criminal charges, where sentences were to run "from and after" each other.

Later decisions from this Court continued to affirm the principle that defendants should receive credit for time spent incarcerated under invalid convictions. More than twenty years after laying the groundwork in *Lewis* and *Brown*, this Court again confirmed that "familiar equitable principles" of justice and fairness weigh heavily against "a prisoner having served bad or dead time for which no credit is given . . . . A prisoner should not be penalized or burdened by denial of credit simply because he had successfully appealed a criminal conviction." *Manning v. Superintendent, Mass. Corr. Inst.*, 372 Mass. 387, 396 (1977). In *Manning*, the Court held that the petitioner was entitled to credit for dead time, applied to the sentence on a subsequent conviction, where the reversal of his sentences occurred after the commission of the act giving rise to the subsequent conviction. *Id.*

This Court's jurisprudence from the 1950s onward repeatedly reinforces that evaluating and remedying dead time is fundamentally about fairness. *See Chalifoux v. Comm'r of Corr.*, 375 Mass. 424, 427 (1978) (stating "considerations of fairness and a proper sense of justice" guide the determination about whether to award credit for time spent incarcerated); *Commonwealth v. Grant*, 366 Mass. 272, 275 (1974) (credit determination made against "the backdrop of fair treatment of the prisoner"); *see also Gardner v. Comm'r of Corr.*, 56 Mass. App. Ct. 31, 37-38 (2002) (describing *Brown* and *Manning* as holdings based on "fundamental fairness" and

the "evident and overriding concern [] to assure that a prisoner receives credit as a matter of right for time served under an erroneous conviction").

2. The Legislature has repeatedly acknowledged the injustice of convictionless time served.

The Legislature, recognizing the paramount importance of a defendant's liberty, has crafted legislation to credit defendants for time spent incarcerated in the absence of a conviction. In the Commonwealth, criminal defendants have long received sentencing credit for pretrial confinement. A pair of "jail time credit" statutes enacted in 1955 and 1960, respectively, mandate that at sentencing, the defendant will "be deemed to have served a portion of said sentence, such portion to be the number of days spent by the prisoner in confinement prior to such sentence awaiting and during trial." M.G.L. c. 279, § 33A; *see also* M.G.L. c. 127, § 129B ("The sentence of any prisoner . . . who was held in custody awaiting trial shall be reduced by the number of days spent by him in confinement prior to such sentence and while awaiting trial."). Section 33A did not always *require* a sentencing credit for pre-trial confinement; a sentencing judge could, in their discretion, grant such credit. But the statute was amended in 1958 to make credit for pre-trial confinement mandatory. As this Court has acknowledged, these statutes convey a "strong indication by the Legislature that a prisoner is entitled to credit for the time he has spent in prison." *Manning*, 372 Mass. at 392.

B. "Banking Time" Is a Harmful Fiction That the Court Should Not Accept as a Valid Countervailing Principle Against Remedying Convictionless Time Served.

Unlike the Legislature's longstanding recognition that uncredited time served is unjust, the concept of "banking time" is not firmly rooted in Massachusetts precedent. "Banking time" does not have its roots in any Massachusetts statute. Rather, it is a judicially-created fiction that has little basis in law and even less in reality. "Banking time" should not be accepted as a principle upon which to restrict judges' discretion.

1. The concept of "banking time" is not rooted in Massachusetts law.

The principle against "banking time" is a relatively recent construct in Massachusetts law. The phrase was introduced in 1977 by the Department of Corrections, a litigant arguing that awarding the plaintiff credit for convictionless time served would "permit[] a prisoner to 'bank time' against future offenses." *Manning*, 372 Mass. at 395. There, the Court characterized the concern not as one rooted in Massachusetts law, but rather as one that "has troubled a number of courts" outside of the Commonwealth. *Id.* (citing cases from the U.S. Courts of Appeals for the Fourth and Fifth Circuits). Although the Court acknowledged that the newly-named concept of "banking time" "would be a matter of concern," that concern was merely hypothetical: the Court immediately dismissed that same concern as inapplicable to the case before it, because the sentence Manning was serving

stemmed from an offense committed before the reversal of the first conviction. *Id.* at 396.

Thus, the *Manning* Court's passing reference to "banking time," a concern articulated by other jurisdictions but not implicated by the facts in *Manning*, did not establish any legal principle grounded in the avoidance of "banking time." Accordingly, this Court's dead time jurisprudence in the years that followed *Manning* made no mention of "banking time" concern. *See Chalifoux*, 375 Mass. 424 (awarding credit to defendant for time served based on out-of-state sentence); *Petition of Lynch*, 379 Mass. 757 (1980) (awarding good time credits to petitioner for entire period of improper confinement).

The Court did not establish "banking time" as a principle until *Milton*, decided over twenty years later. There, the Court for the first time "conclude[d] that a defendant may not 'bank time' for credit against future offenses," and affirmed a sentencing judge's decision that the defendant was not provided credit for the 410 days he had served before being acquitted and released on one charge when sentenced for a probation violation committed six months later. 427 Mass. at 19 n.1, 25. The Court reasoned that "banking time" concerns "outweigh[ed] any fairness issues normally applicable" given the dead time the defendant had served. *Id.*

It is also worth noting that the Court's attempts in *Milton* to find footing in Massachusetts law for a principle prohibiting "banking time" are misleading and

inaccurate. First, the Court pointed to the jail time credit statutes, G. L. c. 279, § 33A and G. L. c. 127, § 129B, stating that they "do not permit the defendant, in effect, to 'bank time' for credit against future offenses." *Milton*, 427 Mass. at 18; *see id.* at 24 ("[T]he statutes do not permit defendants to 'bank time' against future offenses."). But the suggestion that these statutes prohibit "banking time" is incorrect. Although these statutes do not *require* that defendants receive credit for pretrial detention on unrelated charges, they do not proscribe courts from providing credit in subsequent sentences. They are simply silent on the matter. Before *Milton*, credit for convictionless time served in a prior unrelated case was a matter of judicial discretion; it was not controlled by statute.

Second, the SJC precedent on which the Court relied for the proposition that "time spent in custody awaiting trial for one crime generally may not be credited against a sentence for an unrelated crime," did not involve convictionless time served. *Id.* at 24 (citing *Libby v. Comm'r of Corr.*, 353 Mass. 472, 475 (1968); *In re Needel*, 344 Mass. 260, 262 (1962)). In *Needel*, the Court rejected the defendant's argument seeking credit for pretrial detention that was served *at the same time* as he was serving a sentence for an unrelated prior conviction. 344 Mass at 262. Likewise, in *Libby*, the Court did not credit pretrial time that overlapped with incarceration pursuant to a sentence on another crime that had not been overturned.

353 Mass. at 475. Far from concerning credit for convictionless time served, these cases were about a defendant's attempt to get "double time" for time served.

When this Court next confronted a defendant's request for credit for dead time in *Holmes*, the Court did not question the underpinnings of the policy against banking time, but rather elevated it further to a "prohibition" against "banking time," tying the hands of sentencing judges seeking to exercise their discretion. *Holmes*, 469 Mass. at 1010-11. If *Milton* left the door open a crack, acknowledging that "[i]n some circumstances, a defendant may be allowed to credit time in an unrelated case if necessary to prevent a defendant from serving "dead time," 427 Mass. at 24, *Holmes* closed that door. And it did so based on a "prohibition" that sits on an untenable legal foundation. There is no legitimate basis in Massachusetts law for any "prohibition" against hypothetical "banking time."

2. "Banking time" is not rooted in fact.

"Banking time" is a legal fiction without any grounding in empirical data. Judges never tell defendants that because they have served dead time, they have time in the "bank" that they can count against future crimes, nor is there a shred of empirical evidence that defendants who have served erroneous periods of incarceration will be motivated to commit crimes upon release based on this fictional theory of relative immunity. Moreover, it is unclear how a defendant could

somehow insure that his subsequent sentence matches his "banked time," and ensure that the sentencing judge will exercise their discretion in his favor.

The facts of *Milton* illustrate the absurdity and injustice of the "banking time" fiction. Mr. Milton's dead time flowed from an arrest for robbery after he had received a one-year suspended sentence for assault and battery and been placed on probation. *Milton*, 427 Mass. at 19. He was held for 410 days on the robbery charge pre-trial because he could not post $500 bail (i.e., he was poor). *Id.* When the robbery charge was dismissed, Mr. Milton was released, resulting in 410 days of dead time. *See id.* Then, he was charged with a minor offense: disorderly conduct. *Id.* at 20. The trial court judge then found him in violation of his probation and imposed the suspended assault and battery sentence. *Id.* Nothing about Mr. Milton's case suggests Mr. Milton had any intent to take advantage of "banked time." If anything, Mr. Milton's circumstances evidence the effect of poverty, mental illness and/or substance abuse in the criminal legal system. These are hardly the circumstances in which Mr. Milton's disorderly conduct offense was motivated by his belief that he would be immune due to his "time in the bank."

There is no empirical evidence indicating that the possibility of a reduced sentence due to prior "banked time" will motivate an individual to engage in criminal activity. As the National Institute of Justice has acknowledged, what deters crime is not the length of the punishment, but the "certainty of being caught." Nat'l Instit. of

Justice, *Five Things About Deterrence* (June 5, 2016), *available at* https://nij.ojp.gov/topics/articles/five-things-about-deterrence ("Research shows clearly that the chance of being caught is a vastly more effective deterrent than even draconian punishment."). The mere possibility that a hypothetical future sentencing judge might choose to exercise discretion to reduce an unknown punishment based on credit for convictionless time served is unlikely to encourage criminal behavior. In fact, the only factor increasing the likelihood that a defendant will commit a crime after discharge from convictionless time served is the dead time itself, as numerous studies show that *incarceration* increases the likelihood of future crime. *See* Rachel Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*, at 44 (Harvard University Press/Belknap, 2019); Andrew Leipold, *Is Mass Incarceration Inevitable?*, 56 Am. Crim. L. Rev. 1579, 1586 (2019). In other words, if the prohibition on credit for convictionless time served has any effect on the rate of recidivism, it is likely to *increase* recidivism because it will lead to more incarceration.

In short, "banking time" is a legal fiction. This Court has written that it does not deal in legal fictions. On the contrary, this Court has repeatedly admonished litigants that raise theories resting on fiction, particularly in the dead time context. *See Lynch*, 379 Mass. at 759 (rejecting the "fiction" presented by the Department of Corrections as one that "flies in the face of reality and would be manifestly unfair");

Manning, 372 Mass. at 394 n.7 (rejecting the argument that "because the first sentence was void appellant 'has served no sentence but has merely spent time in the penitentiary; that since he should not have been imprisoned as he was, he was not imprisoned at all" (quoting *King v. United States*, 98 F.2d 291, 293-94 (D.C. Cir. 1938)). The dead time spent incarcerated is far more real than the specter of "banking time."

3. Policy considerations weigh against accepting "banking time" as a legitimate concern.

In *Holmes*, the Court articulated certain policy justifications for the "prohibition" on credit for convictionless crime for the first time. 469 Mass. at 1013. These justifications, however, do not hold water.

First, the Court explained that a prohibition on applying credit for convictionless time served to subsequent offenses is good policy because "only recidivists would benefit from" a system to the contrary. *Id.* This statement is incorrect as a matter of constitutional law. A "recidivist" is "an individual who, after having been punished for his or her crimes, nevertheless goes on to commit further crimes." *Commonwealth v. Ruiz*, 480 Mass. 683, 698 (2018) (Gants, C.J., concurring) (citing Black's Law Dictionary 827 (10th ed. 2014)). To use the word in the dead time context, where, by definition, the relevant criminal charge has been dismissed, denies defendants their right to be presumed innocent, as guaranteed

under both the United States Constitution and the Massachusetts Declaration of Rights. Individuals who have served convictionless time are not recidivists.

Second, the Court warned that "[a]llowing credit . . . would encourage defendants who previously have not filed motions for a new trial on their prior convictions to file such motions after they have already completed their sentences, solely in order to obtain a credit to be applied against sentences for subsequently committed crimes." *Holmes*, 469 Mass. at 1013. But the proposition that a discretionary regime would overwhelm the judicial system appears to be as unsupported in fact as the bogeyman of "banking time" more broadly. Defendants have incentives to challenge old convictions in a variety of circumstances: when facing a subsequent charge in habitual offender sentencing enhancements; re-establishing the right to vote; re-establishing the right to keep and bear arms; avoiding deportation; and even to pursue otherwise unavailable jobs or professions. Courts have shown no sign of being overwhelmed by ensuing challenges to prior convictions.

Regardless, the Court should not lose sight of the fact that, by definition, a defendant who has served time on an invalid conviction is not a recidivist and has experienced an injustice. The prospect of potential motions by Farak/Dookhan defendants, seeking credit for time served on invalid convictions, does not justify a blanket rule barring relief. These defendants should not be denied the possibility of

an equitable remedy simply because the scope of the problem—of which they are the victims—is so great. A rule prohibiting defendants from seeking relief from injustice based on a policy determination that the cost, in terms of judicial resources, would be too great cannot stand. See *Bridgeman v. Suffolk County District Attorney* (*Bridgeman II)*, 476 Mass. 298, 317-18 (2017) ("[W]here large numbers of persons have been wronged, the wrong must be remedied in a manner that is not only fair as a matter of justice, but is also timely and practical. . . . [W]e do not throw up our hands and deny relief because it would be too difficult to accomplish. . . [W]e as a judiciary must and do find ways to make justice not only fair but workable.")

C. "Banking time" concerns are not implicated in a discretionary sentencing regime.

Mr. Caliz, seeks the retroactive grant of discretionary credit for time served. Even if there were any legitimacy to the concern that defendants who know they have "time in the bank" will be more likely to commit a crime upon release (and no such evidence has ever been introduced), a discretionary sentencing regime would not give defendants an assurance of a reduced sentence.[3] As noted above, sentencing judges may decline to award such credit in the interests of justice.

[3] The circumstances recognized by the Court in its amicus solicitation—noting that the defendant is seeking jail credit on his current sentence for time served on prior convictions that were vacated "while serving the current sentence"—by their very

The Court has repeatedly recognized that the sentencing judge should have broad discretion in fashioning a sentence for the particular offender. *See, e.g.*, *Commonwealth v. Plasse*, 481 Mass. 199, 205 (2019). Consistent with that principle, judges should be permitted to grant *or deny* credit for convictionless time depending on the totality of the circumstances in the interest of justice.

D. This Court Should Abandon the *Milton-Holmes* Rule and Allow Sentencing Judges to Exercise their Discretion to Give Defendants Credit for Convictionless Time Served.

The *Milton-Holmes* regime represents the "overly legalistic approach," blind to concerns of equity and justice in individual cases, that this Court had rejected for decades. It should be overturned.

Stare decisis is not a barrier. "The principle of *stare decisis* is not absolute." *Shiel v. Rowell*, 480 Mass. 106, 108 (2018) (citation omitted). "Whether it shall be followed or departed from is a question entirely within the discretion of the court." *Id.* (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting)). *Stare decisis* does not bar overruling prior decisions when "the values in so doing outweigh the values underlying" the principle. *Franklin v. Albert*, 381 Mass. 611, 617 (1980). Specifically, the Court should not

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terms demonstrate that "banking time" could not have been a consideration for this defendant or similarly situated Farak/Dookhan defendants.

adhere to judicial precedent when the rule "perpetuate[s] inequity." *Lewis v. Lewis*, 370 Mass. 619, 628 (1976). Moreover, *stare decisis* is weak "when the rule at issue is one of common law, of judicial creation." *Commonwealth v. Hernandez*, 481 Mass. 582, 593 (2019).

Judicially created, the *Milton-Holmes* rule is blind to unfairness and perpetuates inequity. "Liberty is of immeasurable value; it will not do to read statutes and opinions blind to the possible injustice of denying credit." *Manning*, 372 Mass. at 394. The Court has repeatedly rejected "an overly legalistic approach" in matters of this sort. *Brown*, 336 Mass. at 722; *see also Commonwealth v. Maldonado*, 64 Mass. App. Ct. 250, 251 (Mass. App. Ct. 2005) ("We reject 'an overly legalistic approach' toward jail credit matters . . . ."); *Gardner v. Comm'r of Corr.*, 56 Mass. App. Ct. 31, 39 (2002); *Manning*, 372 Mass. at 394.

Moreover, continued adherence to the *Milton-Holmes* rule will have an immensely disparate impact on people of color. As a report from the Harvard Law School Criminal Justice Policy Program recently detailed, Massachusetts imprisons Black people at 7.9 times the rate of white people. Elizabeth Tsai Bishop, Book Hopkins, Chijindu Obiofuma, & Feliz Owusu, *Racial Disparities in the Massachusetts Criminal System*, at 1 (Sep. 2020), *available at* http://cjpp.law.harvard.edu/assets/Massachusetts-Racial-Disparity-Report-FINAL.pdf. Additionally, because Black Massachusetts defendants receive an

average sentence 168 days longer than their white counterparts, *id.*, they are likely to have served significantly more dead time that the current regime does not acknowledge or rectify.

Massachusetts courts have historically led other states in acknowledging and acting to correct the injustice of dead time. *See* Wagner, Sentence Credit for "Dead Time," 8 Crim. L. Bull. 393, 410 (1972). Massachusetts's *Milton-Holmes* jurisprudence is a stain on this legacy, providing an anomalous restraint upon sentencing court discretion inconsistent with Massachusetts sentencing law more broadly. The Court should abandon that jurisprudence and return the law to its foundational concern for fairness and reinstate the tradition discretion given to sentencing judge.

III. IF *HOLMES* AND *MILTON* REMAIN INTACT, THE COURT SHOULD CLEARLY ARTICULATE WHAT CONSTITUTES "EQUALLY COMPELLING CIRCUMSTANCES" WARRANTING CREDIT FOR CONVICTIONLESS TIME SERVED.

Should this Court decide to leave the *Milton-Holmes* regime intact, the Court should nevertheless offer clear guidance on what constitutes "compelling circumstances," an exception carved out by the *Holmes* Court after it all but foreclosed awarding credit for dead time in any other circumstances. At a minimum, it should include cases of egregious government misconduct, such as the Dookhan and Farak lab scandals, and courts should have discretion to consider these equally compelling circumstances.

A. *Holmes* Provided that Credit May Be Warranted in "Equally Compelling Circumstances" but did not Explain what those Circumstances Might Be.

Although *Holmes* effectively eliminated a defendant's right to jail credit for convictionless time served prior to the date of the instant offense in most circumstances, it created two exceptions: if the prior convictionless time stemmed from (1) a case involving actual innocence; or (2) "some other equally compelling circumstance." *Holmes,* 469 Mass. at 1012 n.3 (2014). Affirmative demonstration of actual innocence is an extraordinarily high bar, rarely met, underscoring the perverse nature of the "banking time" rule, which ignores the basic dictum that defendants are innocent until proven guilty, and those who have served time illegitimately have suffered an injustice. *See Santana v. Commonwealth*, 88 Mass. App. Ct. 553, 556 n. 2 (2015) (Grainger, J., Concurring) ("While I need not reiterate here my other previously enumerated disagreements with *Holmes*, the casual shift of the burden of proof to require a defendant seeking liberty to establish his or her innocence is, in my opinion, certainly among its most serious flaws.") (internal citations omitted). Further, the *Holmes* Court did not elaborate or provide guidance on what "equally compelling circumstances" might be. Instead, it left a guessing game for the lower courts in want of guidelines, rules, and direction.

The Commonwealth's brief underscores this point, arguing that there *are no* "equally compelling circumstances," and that anything short of actual innocence will not warrant credit:

> Indeed, given the extremely rare circumstances of actual innocence, the *Holmes* rule has been read by some as meaning that individuals may obtain credit in one case for time spent incarcerated in another, unrelated case *only* in cases of actual innocence, notwithstanding the Supreme Judicial Court's suggestion of the theoretical possibility of 'equally compelling circumstances.' As such, the defendant is not entitled to relief in this case because of misconduct, and the motion judge therefore correctly denied his motion.

Appellee Br. at 19 (internal citations omitted); *see also id.* at 12 ("It is doubtful whether any circumstances besides actual innocence would be compelling enough to warrant an exception to the *Holmes* rule."). Massachusetts courts have suffered from both the same confusion and the same misapprehension that only "actual innocence" presents an equally compelling circumstance. *See Commonwealth v. Bond*, 88 Mass. App. Ct. 901, 902 (2015) ("[T]he presumed government misconduct that warranted vacating the defendant's conviction does not come close to establishing that he was actually innocent of the cocaine charge.") But if that were so, the Court in *Holmes* would not have stated, in the disjunctive, that actual innocence *or* "*other* equally compelling circumstance" may warrant a credit for dead time. More fundamentally, the actual innocence construction misapprehends the circumstances of any defendant who has served convictionless time: any such

defendant is *in fact* innocent, because it is not based on a vaild prior conviction. Presumed innocent until proven guilty, the defendant does not and should not bear the burden of establishing his innocence.

This Court should now take the opportunity to provide guidance on what constitutes "equally compelling circumstances," and, specifically, that egregious government misconduct satisfies the "equally compelling" standard.

B. The Unprecedented Government Misconduct in the Dookhan and Farak Lab Scandals Present "Equally Compelling Circumstances".

This Court has been required repeatedly to intervene against the Commonwealth's obstinacy and footdragging to remedy the injustice that Dookhan and Farak defendants have suffered. In *Bridgeman v. Dist. Attorney for Suffolk Dist. (Bridgeman I)*, this Court recognized that the identification of Dookhan defendants was "crucial to the administration of justice," and that "[a] return to the status quo ante would mean ignoring the egregious misconduct of Dookhan and disregarding its impact on criminal defendants whose drug samples she analyzed." 471 Mass. 465, 480, 475 (2015). In *Bridgeman II*, this Court again declared that "justice and fairness do not permit us simply to stay the course." 476 Mass. at 321. Most recently, in *Commonwealth v. Claudio*, this Court again noted the continued impact on these defendants and held that it "cannot allow the damaging effects of the government's

egregious misconduct in Farak-related cases to live on." 484 Mass. 203, 209 (2020). This case is no different.

The Commonwealth asks this Court to ignore the major role the Attorney General played in creating the epidemic of dead time resulting from the Dookhan and Farak scandals. The government is dismissive of the suggestion that its own misconduct created the compelling circumstances warranting credit for vacated sentences, sentences that were only imposed *because* of its misconduct. It even asks the Court to pretend that the government misconduct was not a contributing factor, arguing: "*Assuming that the AAGs had not engaged in misconduct,* it is probable that the 2012 predicate convictions would *still* be on the defendant's record." Appellee Brf. at 21, n. 11 (emphasis added and included). In fact, the Commonwealth doubles down, even embracing the misconduct to bolster its argument. It contends that if Farak's misconduct did in fact impact defendant's case, that "would *strengthen, rather than weaken,* the evidence of his factual guilt" because Farak was stealing from controlled substance samples, increasing the likelihood of "false negatives." *Id.* at 18, n. 8 (emphasis added). Even though these tainted convictions have been vacated, the government continues to suggest that the defendants who were the victims of the government misconduct are guilty and should be treated as if the convictions still stand.

This position is unsurprising, given that at every step of the Dookhan and Farak scandals, the Commonwealth has tried to downplay the harm that befell affected defendants, and sweep its misconduct under the rug. For example, earlier this year, the Commonwealth refused to provide *Bridgeman I* protections (an assurance that drug lab defendants will not face a greater punishment if they seek the relief to which they are entitled) to Farak defendants challenging non-drug convictions despite the Court's clear directives to the contrary. *See Commonwealth v. Claudio*, 484 Mass. 203 (2020). This is just another ripple effect the Commonwealth would like to ignore.

But if "equally compelling circumstances" is to have any meaning, it must include Dookhan and Farak defendants whose convictions and sentences were vacated due to government misconduct.

C. All Egregious Government Misconduct Constitutes "Equally Compelling Circumstances."

Providing a remedy for victims of the drug scandal is not enough. Dookhan and Farak Defendants are not the only victims of government misconduct. *See* Travis Andersen, *Cases dropped after Lowell informants accused of planting evidence*, Boston Globe (Aug. 9, 2013) (vacating convictions and dropping pending cases because informants planted evidence and lied); *Commonwealth v. Ananias*, 1248 CR 1075, 1201 CR 3898 (Mass. Dist. Ct., Bos. Mun. Ct., Jan. 9, 2019) (excluding certain breathalyzer test results in Middlesex County based in part on the

Commonwealth's failure to calibrate and certify the methodology appropriately); Maurice Chammah, *After Drug Lab Scandal, Court Reverses Convictions*, The Texas Tribune (Mar. 27, 2013) (nearly 5,000 convictions affected by Houston government employee's fabrication of drug test results); Lois Romano, *Police Chemist's Missteps Cause Okla. Scandal*, Washington Post (Nov. 26, 2001) (Oklahoma chemist's egregious misrepresentations of forensic evidence possibly affected over 1,200 felony cases including 23 capital cases, of which 11 defendants were put to death); Dorothy Atkins, *Kansas US Attorney's Office Held in Contempt for Resisting Probe*, Law360 (Aug. 14, 2019) (Kansas U.S. Attorney's Office obstruction of an investigation into alleged systemic prosecutorial misconduct in accessing at least 1,429 attorney-client calls of inmates); Ben Poston, *For years, L.A. prosecutors failed to disclose misconduct by police witnesses. Now the D.A. 's office is trying to change that*, The Los Angeles Times (Dec. 28, 2018) (reporting that the Los Angeles District Attorney's Office concealed a deputy's misconduct, allowing him to continue testifying even after admitting that he had written up to 100 inaccurate arrest reports and testified falsely).

All these victims suffer. Defendants should not have to bear the burden of a "systemic lapse" that is "entirely attributable to the government." *Claudio,* 484 Mass. at 208. Rather, "in the wake of government misconduct that has cast a shadow over the entire criminal justice system, it is most appropriate that the benefit of our

remedy inure to defendants." *Commonwealth v. Scott*, 467 Mass. 336, 352 (2014). Accordingly, all these victims should benefit from this Court's remedy. Yet, if past is prologue, the Commonwealth has shown it cannot be relied on to apply the rule sought here to future instances of egregious government misconduct. This Court must be unequivocally clear.

"[W]here large numbers of persons have been wronged, the wrong must be remedied in a manner that is not only fair as a matter of justice, but is also timely and practical. . . . [W]e do not throw up our hands and deny relief because it would be too difficult to accomplish." *Bridgeman II*, 476 Mass. 317-18. Rather, "we as a judiciary must and do find ways to make justice not only fair but workable." *Id.* at 318. As such, *amicus* requests that the Court establish a clear rule that egregious government misconduct always satisfies the "equally compelling circumstances" threshold in *Holmes* and that courts always be permitted to consider it in sentencing. Considerations of fairness and injustice underlying dead time principles require this result.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court grant Mr. Caliz's requested relief and hold that sentencing judges may exercise their discretion in appropriate cases to credit defendants like Mr. Caliz with convictionless time served prior to the instant offense. In the alternative, *amicus* requests that this

Court establish that convictionless time that was served in connection with a charge flowing from egregious government misconduct constitutes "equally compelling circumstances" under *Holmes* warranting credit for that time served in calculating the sentence for the instant offense.

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Respectfully Submitted,

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CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(K)

I, Caroline S. Donovan, certify that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. 16(a)(6), 16(a)(13), 16(e), 16(f), 16(h), 18, and 20. Rule 21 is not applicable to this brief. Compliance with Rule 20 was ascertained by using size 14 Times New Roman font, limiting the number of non-excluded words to 6797, and using Microsoft Word version 2016.

/s/ Caroline S. Donovan

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Caroline S. Donovan, BBO #683274

CERTIFICATE OF SERVICE PURSUANT TO MASS. R. APP. P. 13(E)

I, Christopher E. Hart, certify that on November 13, 2020, I filed the foregoing Brief of Massachusetts Association of Criminal Defense Lawyers as Amicus Curia in Support of Defendant Braulio Caliz in *Commonwealth v. Braulio Caliz*, SJC-12932 with the Supreme Judicial Court by electronic service. This brief was served through the electronic filing system on the following counsel of record:

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