

**COMMONWEALTH OF MASSACHUSETTS**

**BOSTON MUNICIPAL AND  
DISTRICT COURT DEPARTMENT**

**DOCKET NOS. 1248 CR 1075,  
1201 CR 3898, and others**

**COMMONWEALTH**

**v.**

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

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**FURTHER FINDINGS AND ORDERS ON DEFENDANTS' MOTION TO SUSPEND  
USE OF BREATH TESTS AND IMPOSE SANCTIONS**

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**Introduction**

In its November 15, 2021 Findings and Order on Defendants' Emergency Motion to Suspend Use of Breath Test Results and Impose Sanctions, this Court ordered suspension of the use of Draeger 9510 breathalyzer test results in criminal proceedings pending further hearing. This suspension was ordered based upon the record that was available at the time, including: (1) a memorandum from the Department of State Police Crime Laboratory dated June 10, 2020 stating that Breath Test Refusal Reports were sent electronically to the Registry of Motor Vehicles despite necessary "fields" being left blank, and indicating it was working with Draeger to determine the reasons and to "resolve the issue;" (2) an affidavit dated June 11, 2020 from a bioengineer with a PhD in Chemical Engineering on behalf of the consolidated defendants indicating that the Crime Laboratory notice indicated "unexpected behavior" with the 9510 that raised concerns about reliability of the device's performance; (3) affidavits by a non-scientist Draeger employee dated July 6, 2020 and October 8, 2020 addressing concerns raised by

District Attorneys and the defendants' expert, and (4) representations by prosecutors that the majority of District Attorneys had voluntarily suspended use of breathalyzer results in criminal prosecutions,<sup>1</sup> notwithstanding the aforementioned Draeger affidavits and information from the Office of Alcohol Testing (OAT). The Court balanced the unfair impact of improperly including potentially compromised breathalyzer results in criminal prosecutions and its impact on public confidence in the criminal justice system against significant concerns for public safety if an important tool in combatting impaired driving was removed from law enforcement. Although the Court's order also identified unresolved issues relating to OAT's alleged violation of the parties' Stipulation of Agreement and the Court's orders of July 29, 2019, these issues did not drive the injunctive suspension of breath test results.

After further hearing, upon consideration of additional evidence provided by the parties through expert affidavits,<sup>2</sup> and based upon oral arguments, the Court orders and finds as follows:

- (1) The November 15, 2021 Order suspending use of Draeger Alcotest 9510 breathalyzer test results in criminal prosecutions is **VACATED**.
- (2) The Consolidated Defendants request that all breath test results obtained from Alcotest 9510 breathalyzer machines that were last calibrated on or after April 19, 2019 be excluded from criminal prosecutions based upon machine malfunctions is **DENIED**.

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<sup>1</sup> The Court erroneously stated in its November 15, 2021 Findings and Order that 10 of 14 District Attorneys have unilaterally suspended use of breathalyzer evidence; in fact, it was 7 of 11 district attorneys representing 10 of the 14 counties in Massachusetts.

<sup>2</sup> See *Palandjian v. Foster*, 446 Mass. 100 (2006); *Commonwealth v. Addy*, 79 Mass. App. Ct. 835, 838 (2011) (judge may, but is not required to hold an evidentiary hearing on a *Daubert/Lanigan* challenge).

- (3) The Consolidated Defendants' requests for further access to the Alcotest 9510 device and its source code is **DENIED**.
- (4) There is no merit to the Consolidated Defendants' current challenge to the scientific reliability of Alcotest 9510 breath test results. The Court remains satisfied that the Alcotest 9510 breathalyzer machine produces scientifically reliable results as articulated in its prior Memoranda of Decisions. Accordingly, the Consolidated Defendants' request for further evidentiary hearing on this issue is **DENIED**.
- (5) The Consolidated Defendants' Motion to Impose Sanctions based upon OAT's alleged violation of the Stipulation of Agreement and this Court's Orders of July 29, 2019, including requiring expansion of OAT's discovery policy and procedures regarding exculpatory evidence and mandating OAT to develop a *Brady* checklist, shall be subject to further hearing at the parties' earliest mutually available date.

### **Analysis**

In response to the Court's request during a Zoom hearing on December 9, 2021, the Commonwealth submitted affidavits from Florian Ottenberg, a biomechanical engineer and part of the software development and engineering team at Draeger currently working on firmware updates for the Massachusetts Alcotest 9510 breathalyzer software and from Daniel Renczkowski, a forensic scientist and the Technical Leader for OAT. The consolidated defendants filed a Response to Commonwealth's Affidavits, accompanied by an affidavit from Terry Lanham, a digital forensics services expert with over forty years working in software development and computer electronics. The consolidated defendants subsequently filed a

Supplemental Affidavit by Mr. Lanham. Both affidavits assessed and critiqued the information provided by the Commonwealth experts and stressed the need to review all Draeger 9510 documentation, including its source code, in order to offer a fuller opinion regarding any operational deficiencies in the device.

After reviewing the affidavits, I am satisfied that the Commonwealth's experts have provided logical and credible explanations for the events that precipitated this most recent iteration of Massachusetts Alcotest 9510 breathalyzer litigation. I find that their affidavits, taken as a whole, satisfy any new or lingering doubts regarding the scientific reliability of Alcotest 9510 breathalyzer test results. Based upon the credible evidence contained in the Commonwealth experts' affidavits, I further find the following:

- (1) On May 7, 2020, OAT learned of an instance in which a breath test refusal report was sent to the Registry of Motor Vehicles (RMV) despite two of five post-test RMV-required data entry questions ("fields") in the report being left blank.
- (2) The five post-test questions that the officer is required to answer are: Report Prepared by Testing/Refusal Officer? Under Penalties of Perjury? Did you seize MA license? Citation Number? OBTN?
- (3) The two "fields" left blank were an affirmation that the report was prepared by the officer administering the test and an affirmation that the report was prepared under the penalties of perjury.
- (4) After a review of all breath test and refusal reports from the initial deployment of the Alcotest 9510 in Massachusetts in June, 2011 through June 9, 2020, OAT discovered that the same answer fields were not filled in 204 completed test reports and 231 breath test refusal reports.

- (5) These “blank fields” are the “machine malfunctions” referenced in this Court’s November 15, 2021 Findings and Order.
- (6) The reasons breath test reports were transmitted to the RMV with blank fields were not fully understood or not clearly conveyed by OAT to representatives of the Commonwealth and the consolidated defendants, resulting in the majority of the Commonwealth’s District Attorney’s Offices voluntarily suspending use of the Alcotest 9510 in criminal prosecutions and the consolidated defendants requesting that the Court order suspension of the use of breath test results statewide.
- (7) The transmission of reports by the Alcotest 9510 with blank fields was *not* a machine malfunction; rather, it is a programmed function consistent with the operation of the device as intended by the manufacturer, given a particular set of circumstances. Thus, the Alcotest 9510 was at all relevant times operating *as designed* according to its source code.
- (8) Specifically, if the breathalyzer machine is left inactive for twenty-five minutes after completion of a subject breath test or refusal, the Alcotest 9510 software program preserves the test data by automatically transmitting it to the Criminal Justice Information System (CJIS) database, which then relays it to the RMV. If this twenty-five minute period of inactivity occurs before the breath test operator saves the answers to the five post-test data entry questions by pressing a “save” button on the machine, the questions will appear as “blank fields” (i.e., unanswered questions) when transmitted to the RMV.
- (9) This twenty-five minute “time-out” transmission period operates completely separately from the Alcotest 9510 breath alcohol testing and calculation functions.

The source code that controls machine operation functions (on/off controls, subject personal information data entry, breath test operator information data entry, etc.) is functionally unrelated to the source code that controls breath-to-blood alcohol level calculations.

- (10) The Alcotest 9510 time-out feature that caused blank fields to be transmitted to the RMV does not impact any alcohol calculation performed by the device.
- (11) At OAT's request, Draeger designed changes to the Alcotest 9510 software intended to reduce, if not eliminate, the blank fields issue. In addition, Draeger is installing other improvements to the machine functionality aspects of the device, none of which impact the software that directs the manner in which the device collects breath samples or analyzes them for blood alcohol content.

Although I do not dismiss the concerns articulated by the defense experts, I find that they are not sufficient to raise substantive issues requiring re-opening inquiry into the scientific reliability of the machine. To be clear, this determination derives from the affidavits submitted in conjunction with the current challenge, but it also contemplates and reflects the full context of this Court's involvement in the Alcotest 9510 breathalyzer litigation since 2015. The consolidated defendants had access to the Alcotest 9510 breathalyzer and its source code, subjected it to rigorous testing and analysis, and fully vetted the device with world-renowned experts during the initial phase of this litigation. The issues raised now, and specifically concerns regarding "blank fields," echo many of the criticisms of those experts. After a full evidentiary hearing, this Court determined in 2017 and reaffirms now that the Draeger Alcotest 9510 produces scientifically reliable breath test results. As this Court observed in its February 16, 2017 Memorandum of Decision, there is no perfect source code; there is no flawless

machine. Nor is that the standard for admissibility of scientific evidence in this Commonwealth. This Court remains satisfied that the public can have full confidence in the results produced by the Alcotest 9510. Whether OAT, the agency that deploys and maintains this device in the Commonwealth, can achieve a level of transparency, communication, competence, and trust with all in the legal community and thereby inspire public confidence in this aspect of the criminal justice system remains an open question that will be addressed in a further hearing as ordered by the Court.

January 10, 2021

So ordered,

*Robert A. Brennan /s/*

Robert A. Brennan  
Justice of the District Court