

MA Breath Test Litigation, OAT, and Steps Forward

Forensic Science Oversight Board Meeting
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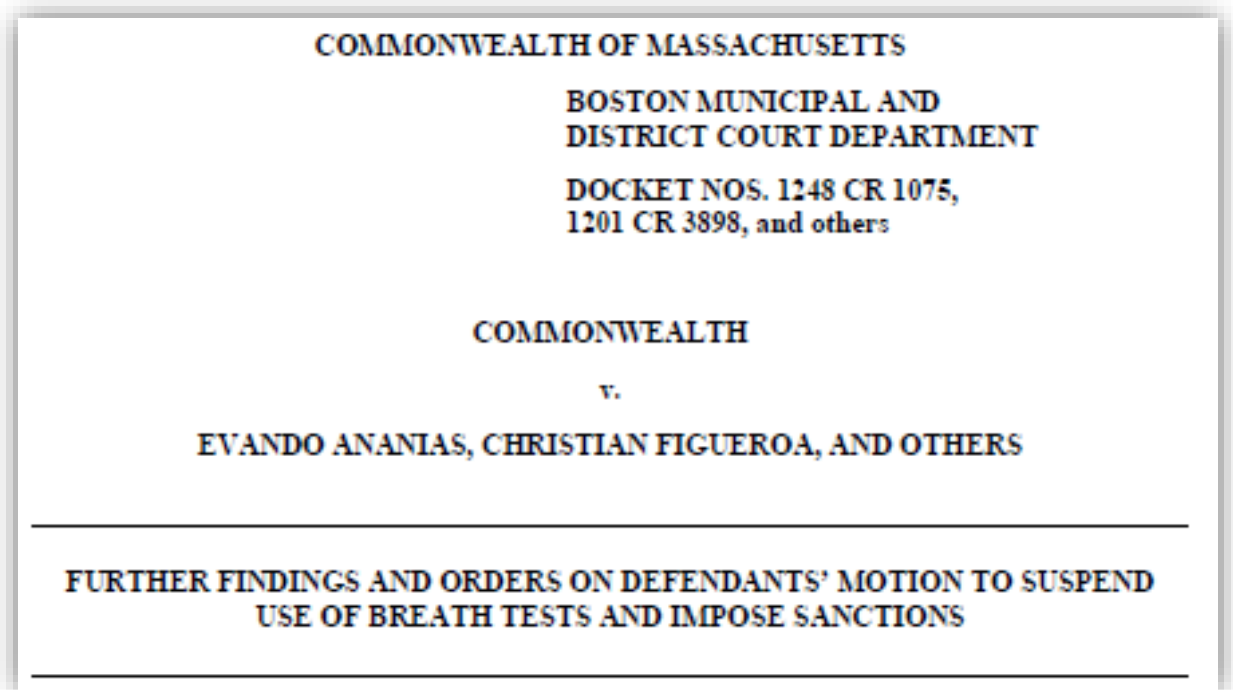
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Overview

- Summary of Breath Test Admissibility
- Timeline of Breath Test Litigation
- OAT
- OAT/CW/Defense Bar Discovery Working Group
- Trainings

Summary of Breath Test Admissibility

- As of January 10, 2022 – BT results are admissible in criminal proceedings
 - Justice Robert Brennan's decision on renewed litigation
- Draeger Alcotest 9510
- All DAs' Offices have resumed use of BT results



Timeline of Breath Test Litigation

2015-2017

- **2015** – 500+ cases consolidated on a *Daubert-Lanigan* challenge to the reliability of Alcotest 9510 machine, its operation, and blood-breath alcohol measurement. Case assigned to Justice Robert Brennan.
- **2017** – J. Brennan issues decision after hearing (“*Ananias I* decision”).

Takeaways:

- BT machine’s operation, source code, and operating system produce scientifically reliable results
- Theory of blood-to-breath ratio and algorithms scientifically sound
- OAT methodology for calibrating and certifying machines is
 - **Reliable** between Sept. 14, 2014 – Feb. 16, 2017
 - **Presumptively unreliable** between June 2012 – Sept. 13, 2014



Worksheets Not Protocols

 Consolidated Defendants filed a Motion to Compel to obtain protocols from OAT

 OAT responded that there were no written protocols, only written worksheets.

 As a result, Judge Brennan ordered OAT to produce “**ALL WRITTEN WORKSHEETS**”



Timeline of Breath Test Litigation

2017-2019

- **2017** – In case-by-case litigation over BT admissibility, defense find OAT discovery violations during *Ananias I* litigation
 - DA Offices voluntarily suspend usage of BT results
- EOPSS investigates OAT and issues report
- **2018** – *Ananias* parties file Joint Stipulation of Facts and recommend a settlement. J. Brennan accepts settlement, holds hearing on disputed discovery/sanction issues (*Ananias II*)
- **2019** – J. Brennan issues a January ruling, incorporating stipulation and EOPSS report. Presumptive exclusion of BTs until OAT takes concrete steps re. accreditation, discovery protocols, training, eDiscovery portal
 - J. Brennan issues a July ruling. **Takeaways:**
 - OAT has complied with January order
 - BT results **after April 18, 2019** are admissible
 - BT results **June 1, 2011 – April 17, 2019**, are presumptively excluded unless MV homicide, OUI SBI, OUI 5th+



OAT Discovery Violations



Attorney Thomas Workman uncovered that OAT withheld about 432 worksheets in August of 2017.



Upon discovery, multiple conference calls with ADAs were held from the District Attorney's office, who were equally unaware of the missing worksheets



Defendants filed a Motion to Reconsider



The news had broke with the Boston Globe. As a result, BTs were again suspended and tens of thousands of documents were delivered over the following months.



EOPSS Investigative Report

The investigation revealed that OAT had made:

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

Timeline of Breath Test Litigation

2020-2022

- **2020** – “Blank Fields” Issues and COVID-related Mouthpiece replacement, Cleaning Guidelines
- **2021** – BT Operator Recertification Issue
 - Most DA Offices voluntarily suspend use of BT results
 - On defense motions, J. Brennan temporarily suspends use of BT results. Holds evidentiary hearing
- **2022** – J. Brennan issues decision, BT results can be used again, but orders hearing on discovery issues
 - Parties file Joint Stipulation of Facts and recommend settlement. Justice David Frank accepts settlement. **Takeaways:**
 - Creation of OAT Discovery Ombudsman
 - Creation of OAT / CW / Defense Discovery Working Group
 - Video Recording of BT machine calibration, defense and CW present
 - Changes to OAT discovery

OAT

- OAT attained reaccreditation as a calibration laboratory from the ANAB in August of 2022. This accreditation is valid for four years.
- Firmware update began in October of 2022. New firmware is designed to minimize the opportunity for “blank fields” to occur and identify blank fields earlier. This new firmware also addresses the “CommHub 20” status that can interrupt the transmission of breath test data to CJIS.
- MSPCL Case Management Unit has begun assisting OAT in responding to discovery requests.
- Recording of video exemplar of the Alcotest 9510 certification procedure.

OAT / CW / Defense Bar Discovery WG

- Discovery Working Group, made up of volunteer ADAs and defense attorneys, has met four times to date.
- Provides feedback on notices OAT has published regarding any potential issues discovered with an instrument or test.
- Assisted in drafting the *Brady* checklist required under the April, 2022, *Ananias* settlement.

Trainings

- Joint CW/Defense training – June 8, 2023
- MDAA trainings were held in September of 2022 and February of 2023.
- OAT created instructional slideshows in November of 2022 on how to create an eDiscovery Portal account and how to access information on the portal.

Questions?
