**Discovery Violations in the Breathalyzer Litigation:**

**Will There Be Sanctions?**

**Presumptively Unreliable Breath Tests**

After a two-week long Daubert-Lanigan hearing in Commonwealth v. Ananias, Judge Robert Brennan issued a decision finding that breath tests which were last calibrated between June 2011[[1]](#footnote-1) and September 14, 2014 are presumptively unreliable. Based on the testimony of expert Janine Arvizu, a certified laboratory quality auditor, Judge Brennan determined that the scientific community requires written protocols in order to accept the presumptive reliability of results obtained from measuring instruments, yet that standard was not met by the Office of Alcohol Testing (“OAT”). Accordingly, he held that “[i]n the absence of written protocols, it cannot be assumed that any particular calibrator understood or routinely applied the proper standards in calibrating a device,” and that “the Commonwealth has not shown that OAT had a scientifically reliable methodology for calibrating the Alcotest 9510 prior to the promulgation of the Certificate of Calibration Procedures for the Alcotest 9510 on September 14, 2014.” Therefore, if OAT did not calibrate the breath test devices according to a standardized protocol, any breath test obtained on that device during specified time period cannot be used to prosecute a defendant. However, the prosecution does have the right to a hearing to specifically show that the defendant’s breath test was properly calibrated.

**Discovery Violations**

After Judge Brennan had issued his decision, it was learned by defense counsel that the OAT withheld critical information during the litigation, including worksheets that indicated that the laboratory had difficulties calibrating breathalyzers. As a result, OAT was investigated by the Executive Office of Public Safety and Security. The investigation revealed that OAT has 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.” Exec. Office of Pub. Safety & Sec., *Discovery Practices at the Office of Alcohol Testing*, (October 16, 2017).

Defense counsel has filed a motion for sanctions, and the District Attorney’s Offices across the state have put a temporary moratorium on the use of breath tests as evidence to prosecute OUI defendants. Discovery has been re-opened in Ananias, and defense counsel and its experts are still analyzing the discovery that has now been turned over. At this point in time, there has been no resolution. Be sure follow the result of defense counsel's motion for sanctions based upon these discovery violations if your client was administered a breath test.

**Post-Conviction Motion for New Trial**

If your client has prior OUI convictions where a breath test was used to prosecute them, there may be a viable motion for a new trial based upon the recent litigation regarding breath tests. If your client is currently facing another OUI charge and has a record of prior OUI convictions where they were prosecuted with evidence of a breath test, you may be able to reduce the level of the offense in the current case by filing a motion for new trial for one of your client’s prior OUI convictions. See Mass. R. Crim. P. 30. If a motion for new trial is allowed, and you are subsequently able to negotiate a dismissal of the OUI charge or your client is found not guilty after trial, your client’s current charge for OUI will be reduced to a lower offense.

The recent litigation in Ananias has brought new evidence to light that may cast real doubt on the justice of the conviction in your client’s case. See Commonwealth v. Pike, 431 Mass. 212, 218 (2000). Specifically, it has been learned that a category of breath tests have been deemed presumptively unreliable and should not have been used to prosecute a defendant. This evidence has only recently come to light, and would not have been discoverable through “reasonable pretrial diligence.” Pike, 431 Mass. at 218. Prior to the decision in Commonwealth v. Camblin, 471 Mass. 639 (2015), there was no legal route to discover material relating to the reliability of a breath test device since a breath test was “automatically” admissible by statute. Camblin opened the door for a defendant to challenge the reliability of a breath test device, thereby leading to newly discovered evidence produced from Ananias. Moreover, the information discovered in Ananias, that OAT’s “worksheets” were not a protocol by scientific standards, took an exceptional amount of time and effort to discern through testimony from experts from around the world. This newly discovered evidence is unquestionably material to a defendant’s case and supports their position as it directly challenges an essential element of the crime charged. See Commonwealth v. Grace*,* 397 Mass. 303, 305 (1986). With no means to challenge the admissibility of a breath test result at the time this matter was pending, it is clear that “justice may not have been done.” Commonwealth v. DeMarco, 387 Mass. 481, 482 (1982).

If your client was found guilty after trial, you will need to show that there was a “substantial risk that the jury would have reached a different conclusion.” Grace*,* 397 Mass. at 306. It is important to analyze the facts of the case to determine whether there are other strong indicators of impairment. Even where there are some indicators of impairment, a breath test is a very strong piece of evidence that may have erased any doubt from the jury’s mind.

When challenging a guilty plea, it is also important to analyze whether, based upon these facts and circumstances surrounding his plea, there is a reasonable probability that he would not have pleaded guilty had he known of this newly discovered evidence. See Commonwealth v. Scott, 467 Mass. 336, 361 (2014). The reasonable probability test is analyzed based on the totality of the circumstances. The Court looks to the following factors:

(1) whether evidence of the government misconduct could have detracted from the factual basis used to support the guilty plea, (2) whether the evidence could have been used to impeach a witness whose credibility may have been outcome-determinative, (3) whether the evidence was cumulative of other evidence already in the defendant’s possession, (4) whether the evidence would have influenced counsel’s recommendation as to whether to accept a particular plea offer, and (5) whether the value of the evidence was outweighed by the benefits of entering into the plea agreement.

Id. at 355-56. These factors are examined on a case by case basis, and the Court is to look to the “full context” of the defendant’s decision to enter into a plea Id. at 356-57.

You may also be able to challenge older cases where a breath test obtained from an older breath test device was used to prosecute a defendant. The newly discovered evidence is still based upon Judge Brennan’s decision -- that the use of standardized protocols is necessary to produce scientifically reliable breath test results. Melissa O’Meara, the former technical leader of OAT, admitted in Ananias that OAT did not implement a formal written protocol to annually calibrate breath test devices until September 14, 2014. Further, through FOIA requests, it has been confirmed that OAT did not have any standardized protocols in place prior to September 14, 2014. Accordingly, the scientific reliability of a breath test, even from older breath test devices, is called into question and may cast real doubt on the justice of the conviction in your client’s case.

Because the litigation regarding the discovery violations is still unresolved, it may be too early to file a motion for a new trial based upon the use of breath tests after the presumptively unreliable period. However, it is expected that there will be viable motions for new trials based upon these discovery violations and EOPSS’ investigation. These findings only further support a defendant’s position that OAT has had a “longstanding and insular culture” of failing to meet the scientific and legal standards of a laboratory that produces reliable breath test results. It is clear from the report that OAT is not an organization that has a culture of quality, and instead has a clear history of misconduct.

COMMONWEALTH OF MASSACHUSETTS

The Department of the Trial Court

HAMPDEN, ss. XXX DISTRICT COURT

DOCKET NO.:

COMMONWEALTH OF MASSACHUSETTS )

)

v. )

)

DEFENDANT )

MOTION TO WITHDRAW GUILTY PLEA

The Defendant moves pursuant to Mass. R. Crim. P. 30(b), that this Honorable Court dismiss, strike or set aside his prior plea on the above-entitled matter.

As reasons therefore, the Defendant has attached a supporting Affidavit and states that newly discovered evidence has come to light that “casts real doubt on the justice of the conviction” in this matter. Commonwealth v. Pike, 431 Mass. 212, 218 (2000). The newly discovered evidence is material and credible, and carries a “measure of strength in support of the defendant’s position.” Id.; see also Commonwealth v. Scanlon, 412 Mass. 664 (1992) (overruled on other grounds); Commonwealth v. Moore, 408 Mass. 117, 126-27 (1990); Commonwealth v. Grace, 397 Mass. 303, 305-306 (1986). Further, there is a reasonable probability that he would not have pleaded guilty had he known of this newly discovered evidence.See Commonwealth v. Scott, 467 Mass. 336, 361 (2014).

Wherefore, the Defendant respectfully requests that this Honorable Court withdraw the plea in theabove-captioned matter.

Respectfully Submitted,

Defendant

By His Attorney:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(Memo for BT cases that fall within the presumptively unreliable class)

COMMONWEALTH OF MASSACHUSETTS

The Department of the Trial Court

HAMPDEN, ss. XXX DISTRICT COURT

DOCKET NO.:

COMMONWEALTH OF MASSACHUSETTS )

)

v. )

)

DEFENDANT )

MEMORANDUM IN SUPPORT OF MOTION TO WITHDRAW GUILTY PLEA

The Defendant respectfully moves this court pursuant to Mass. R. Crim. P. 30(b), to withdraw his plea on the above-referred matter. The Defendant asserts that new facts affecting his guilty plea, accepted on or aboutmm/dd/yyyy, have come to light that “casts real doubt on the justice of the conviction” in this matter. Commonwealth v. Pike, 431 Mass. 212, 218 (2000). Specifically, new evidence has come to light through the decision in Commonwealth v. Ananias, Figueroa and Others, and the decision has rendered the breath test results from the Draeger 9510 breathalyzer used to prosecute the Defendant presumptively unreliable.

Under Mass. R. Crim. P. 30(b), a judge may grant a motion to withdraw a plea “if it appears that justice may not have been done.” Commonwealth v. DeMarco, 387 Mass. 481, 482 (1982). A motion for a new trial under Rule 30(b) may be made on the basis of discovery of new facts bearing on the question of guilt. See Reporter’s Notes, Mass R. Crim. P. 30(b). “A defendant seeking a new trial on the basis of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction.” Pike, 431 Mass. at 218. A defendant must also show that “the evidence was unknown to the defendant or the defendant's counsel, and not discoverable through ‘reasonable pretrial diligence’ at the time of trial or at the time of the presentation of any earlier motion for a new trial.” Id., citing Commonwealth v. Ortiz*,* 393 Mass. 523, 537-38 (1984). The evidence must be both material and credible, and “carry a measure of strength in support of the defendant’s position.” Id., quoting Commonwealth v. Grace*,* 397 Mass. 303, 305 (1986). “As a general rule, a judge may decide a motion for a new trial based solely on affidavits, and additional testimony need not be heard.” Commonwealth v. Conaghan, 48 Mass. App. Ct. 304, 309 (1999), citing, Commonwealth v. Lopez, 426 Mass. 657, 663 (1998).

In the context of a guilty plea, a defendant bears the burden of establishing that there is a reasonable probability that he would not have pleaded guilty had he known of this newly discovered evidence. Scott, 467 Mass. at 361. The reasonable probability test is analyzed based on the totality of the circumstances. The Court looks to the following factors:

(1) whether evidence of the government misconduct could have detracted from the factual basis used to support the guilty plea, (2) whether the evidence could have been used to impeach a witness whose credibility may have been outcome-determinative, (3) whether the evidence was cumulative of other evidence already in the defendant’s possession, (4) whether the evidence would have influenced counsel’s recommendation as to whether to accept a particular plea offer, and (4) whether the value of the evidence was outweighed by the benefits of entering into the plea agreement.

Id. at 355-56. These factors are examined on a case by case basis, and the Court is to look to the “full context” of the defendant’s decision to enter into a plea Id. at 356-57.

Here, the Blood Alcohol Concentration (“BAC”) result used to prosecute the Defendant has been deemed presumptively unreliable as a result of the decision in Commonwealth v. Ananias, Figueroa and Others. See Exhibit A. “[A]ny Alcotest 9510 BAC result from a device calibrated and last certified by OAT between June, 2012 and September 14, 2014 presumptively is excluded from use by the Commonwealth in any criminal prosecution.” [[2]](#footnote-2) Ananias, at 31. Based on the date of the Massachusetts of Office of Alcohol Testing Breath Test Report Form, the Draeger Alcotest 9510 machine used to obtain the BAC result from the Defendant was calibrated and last certified on mm/dd/yyyy. See Exhibit A. Because this machine was calibrated and last certified prior to September 14, 2014, the breath test result falls within the presumptively unreliable period specified by Judge Brennan.

Furthermore, after Judge Brennan issued his decision in Ananias, OAT was investigated by the Executive Office of Public Safety and Security (“EOPSS”) after defense counsel alleged discovery violations. The investigation revealed that OAT has 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.

See Exhibit B at 1 (emphasis added). These findings only further support the Defendant’s position that OAT has had a “longstanding and insular culture”of failing to meet the scientific and legal standards of a laboratory that produces reliable breath test results. It is clear from the report that OAT is not an organization that has a culture of quality, and instead has a clear history of misconduct. As such, the BAC result used to prosecute the Defendant should be excluded from evidence.

This evidence has only recently come to light, and would not have been discoverable through “reasonable pretrial diligence.” Pike, 431 Mass. at 218. Prior to the decision in Commonwealth v. Camblin, 471 Mass. 639 (2015), there was no legal route to discover material relating to the reliability of a breath test device. Camblin opened the door for a defendant to challenge the reliability of a breath test device, thereby leading to newly discovered evidence produced from Ananias. Moreover, the information discovered in Ananias, that OAT’s “protocol” was not a protocol by scientific standards, took an exceptional amount of time and effort to discern through testimony from experts from around the world. This newly discovered evidence is unquestionably material to the Defendant’s case and supports his position as it directly challenges an essential element of the crime charged. With no means to challenge the admissibility of a BAC result at the time this matter was pending, it is clear that “justice may not have been done.” DeMarco, 387 Mass. at 482.

Based on the totality of the circumstances, reasonable probability that the Defendant would not have pleaded guilty had he known of a challenge to the BAC result. First, this newly discovered evidence could have detracted from the factual basis used to support the Defendant’s guilty plea because the exclusion of a breath test result significantly weakens the government’s position in an OUI-Liquor case. Second, the evidence could have been used to impeach a witness whose credibility may have been outcome determinative, particularly the arresting officer. See Commonwealth v. Collins, 386 Mass. 1, 8 (1981) (Evidence tending to impeach the credibility of a key prosecution witness is clearly exculpatory.”). Third, the newly discovered evidence was not cumulative of other evidence already in the Defendant’s possession. Fourth, the evidence would have influenced counsel’s recommendation as to whether or not to accept a plea offer; a BAC result is a critical piece of evidence in an OUI-Liquor case and, without it, a case is significantly stronger for a defendant to challenge at trial. Finally, the value of this newly discovered evidence is not outweighed by the benefits of entering into the plea agreement, as most OUI-Liquor cases without a breath test are taken to trial.

Additionally, the Defendant had legitimate challenges to the officer’s observations in his case. He does not believe the police report does not accurately reflected his performance on the field sobriety tests. The Defendant has medical issues that cause him to walk with what is considered a “waddling gait,” which does cause him to look unbalanced. His flat feet have caused him much difficulty over the years, including toe problems requiring minor surgery and fairly frequent back, knee and ankle pain. As a result of these problems, he wears prescribed orthotics in my shoes. Further, the Defendant’s employment was jeopardized as a result of his plea triggering a loss of license, causing him great hardship. Based on these factors, reasonable probability that he would not have pleaded guilty had he known that there was a challenge to the BAC result leading to its exclusion from evidence in his case.

For the reasons set forth above, the Defendant respectfully requests that the motion to withdraw his plea be allowed.

Respectfully Submitted,

Defendant

By His Attorney:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

COMMONWEALTH OF MASSACHUSETTS

The Department of the Trial Court

HAMPDEN, ss. XXX DISTRICT COURT

DOCKET NO.:

COMMONWEALTH OF MASSACHUSETTS )

)

v. )

)

DEFENDANT )

AFFIDAVIT

Under oath, I depose and state upon information and belief that:

1. I, Joseph D. Bernard am currently representing the above-named Defendant in the above-referenced matter.
2. Upon information and belief, the Defendant tendered and the Court did accept his guilty plea on mm/dd/yyyy in the XXX District Court with regards to the above-referenced matter.
3. I have been practicing law for approximately twenty years. Currently, a large part of my practice focused on representing citizens who are charged with a crime of operating under the influence.
4. I have been involved in the statewide Draeger Alcotest 9510 litigation as lead counsel. In the memorandum of decision in Commonwealth v. Ananias, at 31-32, Judge Brennan stated that “any Alcotest 9510 BAC result from a device calibrated and last certified by OAT between June, 2012 and September 14, 2014 presumptively is excluded from use by the Commonwealth in any criminal prosecution,” as the Commonwealth has failed to show that Draeger Alcotest 9510 machines that were calibrated and last certified within that period were routinely calibrated in a manner that would produce scientifically reliable results.
5. Upon information and belief, the Defendant was charged with OUI-liquor, first offense, and submitted to a chemical breath test as requested by the Massachusetts State Police Department in Sturbridge on mm/dd/yyyy. The machine used by the Massachusetts State Police Department to perform the chemical breath test on the Defendant was a Draeger Alcotest 9510 machine that was calibrated and last certified prior to September 14, 2014. It was calibrated and last certified on mm/dd/yyyy. See Exhibit A.
6. The BAC result obtained from the Draeger Alcotest 9510 machine is presumptively excluded from use by the Commonwealth in this criminal proceeding because the last certification of the machine used to obtain the BAC result from the Defendant falls within the period specified by Judge Brennan. See Exhibit A.
7. This evidence was not discoverable through “reasonable pretrial diligence.” Commonwealth v. Pike, 431 Mass. 212, 218 (2000). Prior to the decision in Commonwealth v. Camblin, 471 Mass. 639 (2015), there was no legal route to discover material relating to the reliability of a breath test device.
8. The fact that the BAC result used to prosecute the Defendant in this matter is presumptively excluded from evidence casts real doubt on the justice of the conviction. See Pike, 431 Mass. at 218.
9. Upon information and belief, it would have been rational for the Defendant to reject the plea had he been aware of the challenge to the BAC result. See Commonwealth v. Scott, 467 Mass. 336, 361 (2014).
10. For these reasons, I respectfully request that this Honorable Court withdraw the plea in theabove-captioned matter.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date: Joseph D. Bernard

COMMONWEALTH OF MASSACHUSETTS

The Department of the Trial Court

HAMPDEN, ss. XXX DISTRICT COURT

DOCKET NO.:

COMMONWEALTH OF MASSACHUSETTS )

)

v. )

)

DEFENDANT )

AFFIDAVIT

Under oath, I depose and state upon information and belief:

1. I, xxx, am the Defendant in the above-entitled action. I was charged with OUI-Liquor, first offense, and plead guilty in the XXX District Court on or about mm/dd/yyyy.
2. On mm/dd/yyyy, the date of the offense resulting in the above-described charge, I was stopped by a Massachusetts State Trooper. I was arrested and taken to the Massachusetts State Police Department in Sturbridge. I was asked and did submit to a chemical breath test which rendered a breath test result.
3. I believe the police report does not accurately reflect my performance on the field sobriety tests. I have flat feet and “idiopathic bowing of my knees.” My knees cause me to walk with what is considered a “waddling gait” which does cause me to look a bit unbalanced. My flat feet have caused me much difficulty over the years, including toe problems requiring minor surgery and fairly frequent back, knee and ankle pain. I wear prescribed orthotics in my shoes.
4. Upon information and belief, my lawyer did not know that there were any potential issues with the breath test or the breath test result. My lawyer did not explain or discuss with me any potential issues with the breath test or the breath test result.
5. My decision to plead guilty was based upon the results of the breath test. My lawyer never discussed the possibility of trying the case to a judge or a jury without the government using the breath test against me. But for the results from the breath test I think I would have taken this case to trial.
6. When I plead guilty, I was unaware that there was a potential challenge to the breath test result in my case. Had I known that there was a challenge to the breath test result in my case, I believe that I would not have plead guilty and I would have taken my case to trial.
7. As a result of my guilty plea, I suffered a loss of license. This was a difficult hardship for me as I worked and continue to work as at the xxx which required me to travel for some of my tasks and assignments. I was concerned that I might lose my job as a result of my loss of license. I was also unable to help provide for my family without a license as I could not drive myself to work or even drive to the store when my family was in need of necessities.
8. I respectfully request the opportunity to litigate this case without the breath test result.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date: Defendant

(Memo for BT cases that fall prior to the presumptively unreliable class with other BT devices)

COMMONWEALTH OF MASSACHUSETTS

The Department of the Trial Court

FRANKLIN, ss. XXX DISTRICT COURT

DOCKET NO:

COMMONWEALTH OF MASSACHUSETTS )

)

v. )

)

DEFENDANT )

MEMORANDUM IN SUPPORT OF MOTION TO WITHDRAW GUILTY PLEA

The Defendant respectfully moves this court pursuant to Mass. R. Crim. P. 30(b), to withdraw his guilty plea on the above-referred matter. The Defendant asserts that new facts affecting his plea accepted on or aboutmm/dd/yyyy have come to light that “casts real doubt on the justice of the conviction” in this matter. Commonwealth v. Pike, 431 Mass. 212, 218 (2000). Specifically, the memorandum and order in Commonwealth v. Ananias, Figueroa and Others has rendered the breath test results derived from the Intoxilyzer device used to prosecute the Defendant presumptively unreliable. Alternatively, the highly relevant evidence regarding the breath test is newly discovered and casts real doubt upon the justice of the conviction.

Under Mass. R. Crim. P. 30(b), a judge may grant a motion to withdraw a plea “if it appears that justice may not have been done.” Commonwealth v. DeARCO, 387 Mass. 481, 484-487 (1982). A motion for a new trial under Rule 30(b) may be made on the basis of discovery of new facts bearing on the question of guilt (newly discovered evidence). See Reporter’s Notes, Mass R. Crim. P. 30(b). “As a general rule, a judge may decide a motion for a new trial based solely on affidavits, and additional testimony need not be heard.” Commonwealth v. Conaghan, 48 Mass. App. Ct. 304, 309 (1999), citing, Commonwealth v. Lopez, 426 Mass. 657, 663 (1998). “A defendant seeking a new trial on the basis of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction.” Pike, 431 Mass. at 218; see also Commonwealth v. Scott, 467 Mass. 336, 360 (2014). A defendant must also show that “the evidence was unknown to the defendant or the defendant's counsel, and not discoverable through ‘reasonable pretrial diligence’ at the time of trial or at the time of the presentation of any earlier motion for a new trial.” Id., citing Commonwealth v. Ortiz*,* 393 Mass. 523, 537-38 (1984). The evidence must be both material and credible, and “carry a measure of strength in support of the defendant’s position.” Id., quoting Commonwealth v. Grace*,* 397 Mass. 303, 305 (1986).

In the context of a guilty plea, a defendant bears the burden of establishing that there is a reasonable probability that he would not have pleaded guilty had he known of this newly discovered evidence. Scott, 467 Mass. at 361. The reasonable probability test is analyzed based on the totality of the circumstances. The Court looks to the following factors:

(1) whether evidence of the government misconduct could have detracted from the factual basis used to support the guilty plea, (2) whether the evidence could have been used to impeach a witness whose credibility may have been outcome-determinative, (3) whether the evidence was cumulative of other evidence already in the defendant’s possession, (4) whether the evidence would have influenced counsel’s recommendation as to whether to accept a particular plea offer, and (4) whether the value of the evidence was outweighed by the benefits of entering into the plea agreement.

Id. at 355-56. These factors are examined on a case by case basis, and the Court is to look to the “full context” of the defendant’s decision to enter into a plea Id. at 356-57.

As a result of the decision in Commonwealth v. Ananias, Figueroa and Others, the Blood Alcohol Concentration (“BAC”) result obtained on mm/dd/yyyy which were used to prosecute the Defendant on a xxx breath test device has been indirectly deemed presumptively unreliable due to the lack of any protocols standardizing testing and calibration procedures to be followed by scientists at the Massachusetts Office of Alcohol Testing (“OAT”). In the Ananias decision, Judge Brennan specified that “any Alcotest 9510 BAC result from a device calibrated and last certified by OAT between June, 2012 and September 14, 2014 presumptively is excluded from use by the Commonwealth in any criminal prosecution.” Ananias, at 31.[[3]](#footnote-3) However, the foundation of Judge Brennan’s reasoning supports the presumptive exclusion of BAC results that were obtained on breathalyzer devices that were last calibrated and certified *anytime* prior to September 14, 2014.

Judge Brennan held that the specified range BAC results that are presumptively excluded from use as evidence are so excluded because there were no protocols in place standardizing calibration procedures. He found that:

When Ms. O’Meara became the supervising scientist at OAT [in June of 2011], there were no formal, written policies in place covering the duties and responsibilities of OAT scientists or the management of the equipment and materials under OAT care. Nor were there written protocols formally standardizing testing and calibration procedures to be followed by the lab’s scientists.

Id. at 29. Based on the testimony of expert Janine Arvizu, a certified laboratory quality auditor, Judge Brennan determined that the scientific community requires written protocols in order to accept the presumptive reliability of results obtained from measuring instruments, yet that standard was not met by OAT. Id, at 26, 30. Accordingly, he held that “[i]n the absence of written protocols, it cannot be assumed that any particular calibrator understood or routinely applied the proper standards in calibrating a device,” and that “the Commonwealth has not shown that OAT had a scientifically reliable methodology for calibrating the Alcotest 9510 prior to the promulgation of the Certificate of Calibration Procedures for the Alcotest 9510 on September 14, 2014.” Id. at 30.

Judge Brennan only made findings with respect to the Draeger Alcotest 9510 because that was the breathalyzer device that was challenged in Ananias, and the only breathalyzer device currently in use in Massachusetts. However, he still found that prior to September 14, 2014, “there were no … written protocols formally standardizing testing and calibration procedures to be followed by the lab’s scientists.” Ananias, at 29. Judge Brennan could have specified further that there were no written protocols formally standardizing testing and calibration procedures for the Alcotest 9510 devices, and yet he didn’t. This implies that there were no written protocols formally standardizing testing and calibration procedures for *any* breathalyzer device under OAT care.

Moreover, the Defendant has requested pursuant to the Freedom of Information Act any and all protocols in place relating to the certification or annual inspection of the breathalyzer devices in use prior to the implementation of the Draeger 9510 device. The Defendant received a response from OAT. See Exhibit B. The response included only four sets of documents: a Certification Procedure for the Alcotest 7110 MKIII-C & CU34 3.2007, dated December 2009; a 13 page Draft Protocol Version 1.5 Certification Procedure for the Alcotest 7110 MKIII-C & CU34 3.2007, dated May 19, 2010; an un-dated Certification Procedure for the Alcotest 7110 MKIII-C & CU34; and a 6.2011 Certification Procedure for the Alcotest 9510. All of these documents are related to the Draeger 7110 or the Draeger 9510. However, not one of these documents amounts to a proper protocol under Judge Brennan’s decision. “Absent from these forms, however, is a variety of important items, such as the permissible tolerance range of the IR and EC sensors for the annual calibration check… preparing breathalyzer devices for deployment into the field, testing of solutions and dry gases, verification of standards received from outside suppliers, annual certification, administrative procedures, and quality control.” Ananias, at 28-29. Without these important items, the documents cannot be considered to be a “standardized written protocol.” Accordingly, the Commonwealth is unable to show that OAT had any policy or protocol in place standardizing the annual calibration of the breath test device used in this matter.

Judge Brennan held that “[w]ithout demonstrating a scientifically sound methodology, the Commonwealth cannot convince the Court that Alcotest 9510 devices deployed or last certified by OAT prior to September 14, 2014 were calibrated routinely in a manner that would produce scientifically reliable results.” Id. at 31. Again, Judge Brennan specifically referenced the Alcotest 9510 devices because those were the only devices at issue. The scientific community required written protocols in order to create reliable results from measuring instruments. There were no written protocols in place on the date the breath test device that was used to obtain the BAC from the Defendant on mm/dd/yyyy was last calibrated and certified. Thus, the BAC result obtained from the Defendant is presumptively excluded from evidence.

Furthermore, after Judge Brennan issued his decision in Ananias, OAT was investigated by the Executive Office of Public Safety and Security (“EOPSS”) after defense counsel alleged discovery violations. The investigation revealed that OAT has 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.

See Exhibit D at 1 (emphasis added). These findings only further support the Defendant’s position that OAT has had a “longstanding and insular culture”of failing to meet the scientific and legal standards of a laboratory that produces reliable breath test results. It is clear from the report that OAT is not an organization that has a culture of quality, and instead has a clear history of misconduct. As such, the BAC result used to prosecute the Defendant should be excluded from evidence.

While the Defendant argues that the BAC result should now be excluded from evidence, alternatively, the Court may simply find that this information is newly discovered and would have benefitted the Defendant in challenging his breath test result at or before trial. Even if the Court does not find that the breath test used to prosecute the Defendant is presumptively unreliable, it is undeniable that this information is highly relevant and would have supported the Defendant’s position, thereby casting doubt on the justice of the conviction. This evidence has only recently come to light, and would not have been discoverable through “reasonable pretrial diligence.” Pike, 431 Mass. at 218. Prior to the decision in Commonwealth v. Camblin, 471 Mass. 639 (2015), there was no legal route to discover material relating to the reliability of a breath test device. Camblin opened the door for a defendant to challenge the reliability of a breath test device, thereby leading to newly discovered evidence produced from Ananias. Moreover, the information discovered in Ananias, that OAT’s “protocol” was not a protocol by scientific standards, took an exceptional amount of time and effort to discern through testimony from experts from around the world. This newly discovered evidence is unquestionably material to the Defendant’s case and supports his position as it directly challenges an essential element of the crime charged. With no means to challenge the admissibility of a BAC result at the time this matter was pending, it is clear that “justice may not have been done.” DeMarco, 387 Mass. at 482; see also Exhibit E & F.

Based on the totality of the circumstances, there is a reasonable probability that but for the breath test result, the Defendant would not have plead guilty. First, this newly discovered evidence could have detracted from the factual basis used to support the Defendant’s guilty plea because the exclusion of a breath test result significantly weakens the government’s position in an OUI-Liquor case. Second, the evidence could have been used to impeach a witness whose credibility may have been outcome determinative, including the arresting officer. See Commonwealth v. Collins, 386 Mass. 1, 8 (1981) (Evidence tending to impeach the credibility of a key prosecution witness is clearly exculpatory.”). Third, the newly discovered evidence was not cumulative of other evidence already in the Defendant’s possession. Fourth, the evidence would have influenced counsel’s recommendation as to whether or not to accept a plea offer because a breath test result is a critical piece of evidence in an OUI-Liquor case, and without it, a case it significantly stronger for a defendant to challenge at trial. Finally, the value of this newly discovered evidence is not outweighed by the benefits of entering into the plea agreement because the Defendant’s occupation was dependent on his Commercial Driver’s License (“CDL”) which was suspended as a result of entering into this plea, thereby significantly affecting his career and finances. Based on these factors, there is a reasonable probability that the Defendant would not have plead guilty had he known that there was a challenge to the BAC result leading to its exclusion from evidence in his case.

Respectfully Submitted,

Defendant

By His Attorney:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(Affidavit for BT expert for BT cases that fall prior to the presumptively unreliable class with other BT devices)

COMMONWEALTH OF MASSACHUSETTS

The Department of the Trial Court

HAMPDEN, ss. XXX DISTRICT COURT

DOCKET NO.:

COMMONWEALTH OF MASSACHUSETTS )

)

v. )

)

DEFENDANT )

AFFIDAVIT

I, Expert, under oath do depose and state upon information and belief:

1. (Expert qualifications)
2. My Curriculum Vitae is attached to this affidavit as Exhibit A and incorporated by reference.
3. I have been hired by the Defendant in this matter.
4. Upon information and belief, the Defendant was charged with OUI-Liquor. The Defendant did submit to a chemical breath test which rendered a Blood Alcohol Concentration (“BAC”) result, and this result was used to prosecute the Defendant.
5. The foundation of Judge Brennan’s reasoning supports the presumptive exclusion of BAC results that were obtained on breathalyzer devices that were last calibrated and certified *anytime* prior to September 14, 2014, including the BAC result from the Defendant in this matter.
6. In the memorandum of decision in Commonwealth v. Ananias, at 31-32, Judge Brennan stated that “any Alcotest 9510 BAC result from a device calibrated and last certified by OAT between June, 2012 and September 14, 2014 presumptively is excluded from use by the Commonwealth in any criminal prosecution,” as the Commonwealth has failed to show that Draeger Alcotest 9510 devices that were calibrated and last certified within that period were routinely calibrated in a manner that would produce scientifically reliable results.
7. The foundation of Judge Brennan’s reasoning supports the presumptive exclusion of BAC results that were obtained on breathalyzer devices that were last calibrated and certified *anytime* prior to September 14, 2014.
8. Judge Brennan held that the BAC results are presumptively excluded from use as evidence because there were no protocols in place standardizing calibration procedures. He found that based on the testimony of Melissa O’Meara, the Technical Leader of OAT, that when she became the supervising scientist at OAT in June of 2011, (the earliest period Ms. O’Meara could testify to as a scientist of OAT) there were no formal, written policies in place covering the duties and responsibilities of OAT scientists or the management of the equipment and materials under OAT care. Further, there were no formal, written protocols formally standardizing testing and calibration procedures to be followed by the lab’s scientists. Ananias, at 26, 29.
9. Based on the testimony of expert Janine Arvizu, a certified laboratory quality auditor, Judge Brennan determined that the scientific community required written protocols in order to accept the presumptive reliability of results obtained from measuring instruments, yet that standard was not met by OAT. Id, at 26, 30. Accordingly, he held that “[i]n the absence of written protocols, it cannot be assumed that any particular calibrator understood or routinely applied the proper standards in calibrating a device,” and that “the Commonwealth has not shown that OAT had a scientifically reliable methodology for calibrating the Alcotest 9510 prior to the promulgation of the Certificate of Calibration Procedures for the Alcotest 9510 on September 14, 2014.” Id. at 30.
10. Judge Brennan only made findings with respect to the Draeger Alcotest 9510 because that was the breathalyzer device that was challenged in Ananias, and the only breathalyzer device currently in use in Massachusetts. However, he still found that prior to September 14, 2014, “there were no … written protocols formally standardizing testing and calibration procedures to be followed by the lab’s scientists.” Ananias, at 29. Judge Brennan could have specified further that there were no written protocols formally standardizing testing and calibration procedures for the Alcotest 9510 devices, and yet he didn’t. This implies that there were no written protocols formally standardizing testing and calibration procedures for *any* breathalyzer device used OAT care.
11. Judge Brennan continued to state that “[w]ithout demonstrating a scientifically sound methodology, the Commonwealth cannot convince the Court that Alcotest 9510 devices deployed or last certified by OAT prior to September 14, 2014 were calibrated routinely in a manner that would produce scientifically reliable results.” Id. at 31. Again, Judge Brennan specifically referenced the Alcotest 9510 devices because those were the only devices at issue. The scientific community required written protocols in order to accept the presumptive reliability of results obtained from measuring instruments.
12. In this matter, the Defendant was charged with OUI-liquor and submitted to a chemical breath test. There were no written protocols in place on the date on which the breath test device that was used to obtain the BAC from the Defendant was last calibrated and certified. A breath test device must be calibrated pursuant to a written standardized protocol to ensure the scientific reliability of a breath test result. This is necessary to ensure that any particular calibrator understood or routinely applied the proper standards in calibrating a device. Without any evidence that a calibration was performed in such manner in this case, the BAC result obtained from the Defendant should be presumptively excluded from evidence in this criminal proceeding.
13. At the very least, this evidence -- the discovery of the lack of written standardized protocols in conjunction with the testimony of Janine Arvizu -- is newly discovered and casts real doubt on the justice of the conviction. See Pike, 431 Mass. at 218.
14. This evidence was not discoverable through “reasonable pretrial diligence.” Id., citing Commonwealth v. Ortiz*,* 393 Mass. 523, 537-38 (1984). Prior to the decision in Commonwealth v. Camblin, 471 Mass. 639 (2015), there was no legal route to discover material relating to the reliability of a breath test device.
15. This newly discovered evidence is both material and credible, and carries a measure of strength in support of the Defendant’s position. See Pike 431 Mass. at 218, quoting Commonwealth v. Grace*,* 397 Mass. 303, 305 (1986).

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date: Breath Test Expert

1. Please note that Judge Brennan made a docket entry in Ananias on May 1, 2017 amending his findings of fact, stating “Correction as to the factual findings of the Memorandum of Decision issued by Brennan, J. specifically correcting the date of deployment of the Alcotest 9510 breathalyzer to MA law enforcement agencies beginning June, 2011 (and NOT June, 2012).” [↑](#footnote-ref-1)
2. Please note that Judge Brennan made a docket entry in Ananias on May 1, 2017 amending his findings of fact, stating “Correction as to the factual findings of the Memorandum of Decision issued by Brennan, J. specifically correcting the date of deployment of the Alcotest 9510 breathalyzer to MA law enforcement agencies beginning June, 2011 (and NOT June, 2012).” [↑](#footnote-ref-2)
3. Please note that Judge Brennan made a docket entry in Ananias on May 1, 2017 amending his findings of fact, stating “Correction as to the factual findings of the Memorandum of Decision issued by Brennan, J. specifically correcting the date of deployment of the Alcotest 9510 breathalyzer to MA law enforcement agencies beginning June, 2011 (and NOT June, 2012).” [↑](#footnote-ref-3)