



Post-Ananias Litigation Motion for New Trial and Motion to Vacate

HELLO!

I AM JOE BERNARD

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Current State of Affairs

Finishing the BT Report

Alcotest 9510 90-24 Arrest 11/05/2016 11:29
Report Prepared By Testing Officer? YES

Alcotest 9510 90-24 Arrest 11/05/2016 11:30
Under Penalties of Perjury? YES

- Verifies that the BTO completed the breath test under penalties of perjury.
- If this is a "Refusal"
 - The Question would ask "Report Prepared By Refusal Officer?"

Version 3.0

Citation and Tracking Numbers

Alcotest 9510 90-24 Arrest 11/05/2016 11:31
Citation Number M23456789

Alcotest 9510 90-24 Arrest 11/05/2016 11:31
OBTN

- Optional fields, but should be completed.
 - To be used to assist in linking separate forms.
 - OBTN - Offender Based Tracking Number

Version 3.0

Summary

Alcotest 9510 90-24 Arrest 11/05/2016 11:32

Report Prepared By Testing Officer? YES
Under Penalties of Perjury? YES
Seized MA License YES
Citation Number M23456789
OBTN

- Scroll down verifying data for accuracy.
- Once "Save" is selected, no changes can be made.

Version 3.0

- Uncertified Breath Test Operators
- Cleaning and Mouthpiece protocols
- Training
- Missing Fields



Letter to Chief Justice Carey



THE LAW OFFICES OF JOSEPH D. BERNARD
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May 5, 2021

Paula M. Carey
Chief Justice of the Trial Court
John Adams Courthouse
One Pemberton Square, 1M
Boston, MA 02108

Paul Dawley
Chief Justice of the District Court
Administrative Office
Edward W. Brooke Courthouse
24 New Chardon St., 1st Floor
Boston, MA 02114

Re: Office of Alcohol Testing

Dear Chief Justice Carey and Chief Justice Dawley,

Over the last several months, we have received information regarding a variety of concerning issues and problems with the Office of Alcohol Testing (OAT) that impact the reliability of breath test results that are currently being used to suspend driver's licenses and criminally prosecute defendants in Court. These concerning issues deal directly with the maintenance, calibration, and administration of the Draeger Alcotest 9510. A great deal of this information was discovered by the hard work of my colleague Steven Panagiotis of Concord. It was my hope that there would be a complete transformation in the culture at OAT after the litigation surrounding *Commonwealth v. Ananias*, but unfortunately we must bring these serious problems to your attention. We are sensitive to the fact that the COVID-19 pandemic has put great strain on our state government and our courts, but citizens' drivers licenses continue to be suspended and breath test results are being used in prosecutions across the state despite concerns that potentially exculpatory information has not been provided to these citizens.

Some of the disturbing information we have received includes, but is not limited to, breath test results that have been obtained by breath test operators who have not been certified being used in criminal prosecutions and as a basis for a license suspension with the Registry of Motor Vehicles. The Draeger Alcotest 9510 machine is programmed to only produce results with a



Current State of Affairs Cont.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

CONCORD DISTRICT COURT
DOCKET NO. 1248CR1075 AND OTHERS

COMMONWEALTH OF MASSACHUSETTS)
)
v.)
)
EVANDO ANANIAS AND OTHERS)

DEFENDANTS' MOTION TO PRESERVE EVIDENCE AND IMPOSE SANCTIONS

Now come the consolidated Defendants who respectfully move this Honorable Court to order the Commonwealth and the Office of Alcohol Testing (OAT) to preserve any and all evidence related to the Draeger Alcotest 9510 software malfunctioning as discussed in OAT's June 10, 2020 memorandum and further described below. See Exhibit A. The consolidated Defendants further move this Honorable Court to impose additional sanctions against the Commonwealth and OAT for its withholding and late disclosure of exculpatory evidence from the consolidated Defendants, defense counsel, the prosecution, and this Honorable Court in violation of Mass.R.Crim.P 14(a)(1)(A)(iii) and 14(a)(4).

As reasons therefore, the consolidated Defendants state that on June 10, 2020, OAT released a memorandum indicating that it received notice on May 7, 2020 of a Draeger Alcotest 9510 software malfunction that permits the machine to illegally report and transmit breath test results to the Registry of Motor Vehicles even though the machine is designed to prevent these errors. See Exhibit A. As of June 10th, OAT has identified at least 204 breath test results that have been impacted by the machine's software malfunction since the machines were deployed in Massachusetts, indicating that Page 2 of 25 been a problem since June 2011. OAT

JOSEPH C. ANDERSON, Ph.D.

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June 11, 2020

Joe Bernard, Attorney at Law
Bernard Law
1 Monarch Pl Suite 1100
Springfield, MA 01144

RE: Alcohol Breath Test Review
RE: Alcotest 9510 Refusal and Subject Test transmission to RMV

Dear Mr. Bernard:

Thank you for requesting my review of the scientific issues regarding the transmission of Alcotest 9510 breath test results to the Registry of Motor Vehicles (RMV).

I am an Affiliate Assistant Professor of Bioengineering at the University of Washington. I have a B.S. degree in Chemical Engineering from Arizona State University and both an M.S. and Ph.D. in Chemical Engineering from the University of Washington. I was a research fellow in both Biomedical Engineering at the University of Michigan and Pulmonary Medicine at the University of Washington. Following my fellowships, I joined the Department of Bioengineering at the University of Washington as an Assistant Research Professor. More recently, I have worked in the medical device industry where I have helped develop devices to treat severe pulmonary emphysema and to measure acetone in exhaled breath. I have over 40 publications including 23 full-length scientific papers and a book chapter. My area of expertise focuses on the mechanisms by which the lung exchanges material and energy between the blood, tissue, and breath. I have expertise in the theory and practice of measuring concentrations of various products in the breath and evaluating measurement uncertainty. I have worked with a variety of breath testing devices and laboratory instruments including the Draeger Alcotest 9510, Datamaster, gas chromatograph and quadrupole mass spectrometer.

I have been asked to review the findings regarding "Alcotest 9510 Refusal and Subject Test transmission to the RMV" by the Massachusetts State Police Crime Laboratory on June 10, 2020. From this notice, 435 breath test reports between 2011 and June 9, 2020 have been submitted to the RMV where the following two necessary fields were left blank.

1. An affirmation that the report was prepared by the officer

2. An affirmation that the report by the officer was prepared under the penalties of perjury.

While speculation to causes of this problem have been presented, it is unclear how the breath test report could be transmitted to the RMV without the completion of these fields. OAT has contacted the manufacturer, Draeger, concerning this issue.

The Alcotest 9510 is exhibiting unexpected behavior which differs from the OAT specification. The Alcotest 9510 device has shown other inconsistent behavior. For example, the breath alcohol concentration on the breath test report is greater than the breath alcohol concentration data stream (breath profile) within the device (Anderson JC, and Hlastala MP. The alcohol breath test in practice: effects of exhaled volume. Journal of applied physiology. 126:1630-1635, 2019.). Additionally, breath test results have been produced that showed breath tests were allowed to start before the end of the 15 minute observation period.

The behavior and performance of a device must be understood and controlled for a user to have confidence in the output. Without these constraints, the reliability of device performance is unclear. This guidance is followed for regulated industries like medical devices. It is my opinion that measurements using the Alcotest 9510 should be paused until the cause of the issue "Alcotest 9510 Refusal and Subject Test transmission to the RMV" has been identified and a satisfactory resolution has been implemented.

Sincerely,



Joseph C. Anderson, Ph.D.

Current State of Affairs: Discovery Request by Prosecutors

Dear Darina, Sam, and Dan,

This email serves as a follow-up to the Zoom meeting conducted on April 26 between the BT ADA's and OAT/MSP. The BT ADA's are requesting the following discovery/information from OAT:

1. The complete spreadsheet of all officers impacted by the administrative error
 - a. Please include the following dates: assessment completion, practical completion, and certification expiration date
 - b. Please include the corresponding BT administrations and refusals
2. The Corrective Action Report
3. A detailed explanation on your letterhead with the following information, which we can provide to the defense bar:
 - a. A description of the error
 - b. How the error was identified
 - c. When the error identified
 - d. How many officers statewide are impacted

Fwd: secure: RE: Administrative error follow-up/OAT Discovery

- e. A description of the two categories of errors: officers who took the practical after the 30-day requirement versus officers who took the practical after the expiration of their certification
 - f. How many officers fall into each category
 - g. How many breath tests were administered
 - h. How many breath test refusals were recorded
 - i. Who was responsible for maintaining the master spreadsheet with the information related to BTO certifications
 - j. Who is currently responsible for maintaining the master spreadsheet
 - k. What remedy(ies) were implemented to ensure this error will not occur again
 - l. How often is the spreadsheet reviewed to ensure BTO compliance with certificate dates
4. Copies of the prior and current policy/procedure regarding the BTO certification, noting the 30-day requirement and removal of the requirement
 5. Is there a similar spreadsheet related to certification of OIC's?
 6. Is there a similar spreadsheet related to any other certifications – i.e., periodic testing, certification of BTO trainers, etc.
 7. Does OAT intend to publish notice on the e-Discovery portal about this error?

We are requesting this information by next Tuesday. Please let us know if OAT is not able to comply with this request by that date.

Thank you,
The BT ADA's

Current State of Affairs: Mouthpiece / Cleaning



The Commonwealth of Massachusetts Department of State Police

Crime Laboratory
Office of Alcohol Testing
124 Acton Street

Maynard, Massachusetts 01754
Telephone (857) 377-3030 Facsimile (857) 377-3035

May 27, 2020

General Guidance For Cleaning and Operating the Draeger Alcotest 9510 Evidential Breath Testing Instrument

The Office of Alcohol Testing, in consultation with Draeger, Inc., Executive Office of Public Safety and Security and the Massachusetts Department of Public Health, has developed the following instructions for cleaning and operating the Draeger Alcotest 9510 breath test instrument.

Key Safety Recommendations for the Draeger Alcotest 9510 Instrument:

- When in contact with a subject during the administration of a breath test, Personal Protective Equipment (PPE) (mask and gloves) should be worn at ALL TIMES.
- If possible, maintain at least 6 feet of distance between the breath test instrument and anyone other than the subject when conducting the breath test.
- Do not place any items on top of the breath test instrument.
- Avoid touching your face and any other exposed skin at all times during the breath test.
- Before and after each subject breath test or Periodic Test, using a new pair of disposable gloves, clean the exterior surfaces of the instrument following the guidelines below.
- Always use proper techniques when removing PPE and dispose of used PPE properly.

Cleaning Guidelines for the Draeger Alcotest 9510 Instrument:

- Do not use alcohol based products to clean the instrument, pursuant to G.L. ch. 90, s. 24K.
- NEVER spray or pour any liquids directly onto the breath test instrument.
- Use ONLY either of the following detergents that are approved for use:
 - Seventh Generation Free and Clear Dish Detergent
 - Mrs. Meyers Peony Dish Soap (no other scents)
- NOTE: Using other products may damage the breath test instrument.
- Prepare a mixture of equal parts detergent and water.

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Page 1 of 2

- Apply the detergent and water mixture to a clean paper towel until saturated and wring out excess liquid until the paper towel is not dripping.
- Wipe down the exterior surfaces of the breath test instrument, including the handle of the breath hose, with the damp, soapy paper towel.
- DO NOT ALLOW ANY MOISTURE to enter the internal printer, the breath hose, or any of the electronic components of the breath test instrument.
- Dispose of the damp paper towel and gloves appropriately.
- Use a clean paper towel and a new pair of gloves to dry the exterior surfaces of the instrument.
- Once the instrument is visibly dry, observe a 15 minute waiting period before using the Draeger Alcotest 9510 for a breath test.

During Testing:

- For each breath test, perform hand hygiene (washing hands with soap and water for at least 20 seconds) then using a new pair of gloves remove an unopened Draeger mouthpiece from its sealed packaging. Do not place new, unused mouthpieces on any potentially contaminated surfaces.
- As long as it is safe to do so, hold the breath hose with a gloved hand at a full arm's length and have the subject face away from the Breath Test Operator while blowing into the mouthpiece.
- Discard the mouthpiece immediately after the subject has completed blowing into the instrument.
- Remove gloves and perform hand hygiene (washing hands with soap and water for at least 20 seconds).

New Mouthpieces:

- OAT has recently approved the use of a new style of mouthpiece for the Draeger Alcotest 9510. These mouthpieces have a non-return valve that prevents the subject from inhaling from the breath hose.
- These new mouthpieces are available for purchase from Draeger on the attached price list.
- OAT has ordered a bag of 25 mouthpieces for every department/barracks. OAT will contact each agency to arrange for distribution as soon as they arrive.

Any questions can be directed to the Office of Alcohol Testing at 857-377-3030 or at POL-DI-OAT@mass.gov.

Thank you.

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History is Crucial!

The history of Commonwealth v. Ananias

Commonwealth v. Ananias: Daubert Hearing

- ◆ Defendant's Challenge - Are the BT's reliable?
 - ◇ Source Code
 - ◇ Blood to Breath Ratio Science
 - ◇ Interfering Substances
 - ◇ OAT Methodology & Policies

Judge Brennan Held:

- ◆ Underlying science is reliable.
- ◆ The underlying source code of the Draeger 9510 was developed and implemented in a manner that produces scientifically reliable BAC results.
- ◆ The theory of blood to breath ratio underlying the algorithmic functions of the Draeger 9510 used to produce BAC results remains sound.
- ◆ OAT annual certification **methodology/maintenance** from Sept. 14, 2014 to the present produces scientifically reliable BAC results.
- ◆ **BAC results** derived from a Draeger 9510 machine that was **calibrated and last certified between June 2011 to September 14, 2014 are presumptively excluded from evidence (methodology/maintenance)** as the “Commonwealth cannot convince the Court that the Alcotest 9510 devices were calibrated in a manner that would produce scientifically reliable results,” as there were no formal written protocols in place prior to Sept. 14, 2014. Ananias, at 30, 31.

Ananias Litigation Overview

- ◆ Ananias I - Two week hearing
 - ◇ Experts testifying from around the world
 - ◇ Decision to exclude breath test due to being presumptively unreliable between June 2012 and September 14, 2014
- ◆ Motion to Compel and Impose Sanctions - 432 Worksheets
- ◆ EOPSS Investigation
- ◆ Ananias II/Agreement - Order of presumptively unreliable expanded (+ can't use at trial) to include results from June 2011 until OAT filed for an application for accreditation with ANAB that is demonstrably substantially likely to succeed.
- ◆ Ananias III - Three day hearing-establishes the end date of the exclusion of April 18, 2019

EOPSS Investigation

- ◆ There were hundreds of pages of documents that represented failures of the annual calibration process that were intentionally withheld by the OAT.
- ◆ The Executive Office of Public Safety and Security conducted an investigation into discovery practices at the OAT, shortly after the filing of the Motion for Sanctions in this matter. The parties agreed to stipulate to the facts contained within the report released by EOPSS.



Discovery Practices at the Office of Alcohol Testing

October 16, 2017



EOPSS Investigative Report - 128 Pages

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.”

JOINT AGREEMENT/ COURT ORDER

The Agreement: Jointly Recommended Solution

- ◆ Copies of The Agreement can be found on my website, www.bernardouidefense.com under the “OUI Defense Blog” Section.
- ◆ OAT will apply for ANAB accreditation by **August 1, 2019**. Which they received on June 13, 2019.



The Agreement: Jointly Recommended Solution

- There was an **additional 432 worksheets** that represented failures of the annual calibration process.
- The 432 failed worksheets were **intentionally withheld** by the OAT.
- The withheld failing annual calibration worksheets were **exculpatory materials**.
- Expand the unreliable presumptive order + Can't use at trial.**

Order: "The degree to which OAT's **misconduct** impeded the consolidated defendant's' ability to obtain to obtain a full, fair and complete *Daubert/Lanigan* hearing is difficult to quantify. **It certainly was not negligible**, "...would have impacted this Court's qualitative assessment of OAT's methodology **cannot be determined retrospectively**..."

It is these harms in the aggregate that this ruling must remedy through the imposition of sanctions."



Expansion of the Court's February 2017 Order

- ◆ On Feb. 16, 2017, this Court ordered that the defendants' Daubert motion be allowed as to any results produced by a device calibrated and certified between June of 2011 and September 14, 2014, and are **presumptively... excluded** subject to the possibility of a case-by-case demonstration of the reliability of OAT's calibration of a particular device.
- ◆ The parties **agree to expand the period** for which the instrument shall be deemed "presumptively... excluded" from use and the Commonwealth agrees not to seek to establish the reliability of OAT's calibration **at trial**.

Expansion of the Court's February 2017 Order: CARVE OUT

- ◆ The Commonwealth further agrees not to seek to establish the reliability of OAT's calibration and certification on a case-by-case basis in this enlarged period at trial in any offense alleging a violation of G.L. c. 90, or 90B except in cases alleging motor vehicle homicide by operation under the influence, in violation of G.L. c. 90, § 24G; operating under the influence causing serious bodily injury, in violation of G.L. c. 90, § 24L; and operating under the influence of liquor as a 5th or greater offense, in violation of G.L. c. 90, § 24(1)(a)(1).



Expansion of the Court's February 2017 Order

- ◆ The parties had good-faith disagreements as to the date to which this period should be enlarged and agreed to submit the question for a hearing. *The parties agree to be bound by the decision of this Court.* The parties agree that the earliest date at which said period shall end will be August 31, 2017, and the latest date shall be the date at which OAT achieves accreditation.
- ◆ Judge Brennan's decision landed in the middle - requiring OAT to filed an application for accreditation with that is demonstrably substantially likely to succeed.

A white double quote icon inside a dark blue hexagonal shape, which is part of a vertical blue bar at the top center of the slide.

Judicial Estoppel:
Precludes a party from taking
a position in a case that is
contrary to a position or
agreement in earlier legal
proceedings

Judicial Estoppel

- ◆ All parties agree to be bound by the foregoing proposal and recognize that the doctrine of judicial estoppel binds them to its terms. See *Otis v. Arbella Mut. Ins. Co.*, 443 Mass. 634 (2005). All parties rely upon the agreements made herein to their detriment by foregoing an opportunity for a full hearing and adjudication before this Court. The parties further agree that all rights are reserved relative to the filing and argument of all **speedy trial motions to dismiss** pursuant to Mass. R. Crim. P. 36, our general laws, the Massachusetts Declaration of Rights, or the Constitution of the United States.

Section VII of the Jointly Recommended Resolution



Impact of OAT's Misconduct: Page 14 of Ananias II

- ◆ "The degree to which OAT's misconduct impeded the consolidated defendant's' ability to obtain to obtain a full, fair and complete Daubert/Lanigan hearing is difficult to quantify. It certainly was not negligible. Similarly, the extent to which consideration of this withheld evidence in context, during real time cross-examination of Melissa O'Meara, would have impacted this Court's qualitative assessment of OAT's methodology cannot be determined retrospectively...
- ◆ It is these harms in the aggregate that this ruling must remedy through the imposition of sanctions."



Brennan's Final Order: Ananias III

- ◆ On February 28, 2019, the OAT submitted its application of accreditation to ANAB satisfying Judge Brennan's First Order.
- ◆ On March 8, 2019, OAT uploaded its application onto the eDiscovery Portal, satisfying the Second Order.
- ◆ Information regarding ANAB's accreditation requirements and a link to purchase documentation was published on the eDiscovery portal, satisfying the Third Order.

Brennan's Final Order: Ananias III

- ◆ On April 5, 2019, OAT promulgated discovery protocols and OAT's Discovery Materials Policy was uploaded onto the eDiscovery portal, satisfying the Fourth and Fifth Orders.
- ◆ On March 1 and March 28, 2019, OAT conducted trainings for its employees, which included issues and obligations relating to exculpatory evidence, satisfying the Sixth Order
- ◆ The Seventh Order was satisfied on March 15 and April 4, 2019, when documents from discovery training, including attendance sheets, were uploaded onto the reference materials section of the eDiscovery portal under "Exculpatory Evidence Training".
- ◆ As a result, all Alcotest 9510 machines **calibrated and certified on or after April 18, 2019** may be admitted.

Brennan's Order Relating to Excluding Breath Tests

Judge Brennan ordered that the period of presumptive exclusion of breath test results be extended until the Commonwealth demonstrates:

1. That OAT has filed an application for accreditation with ANAB that is demonstrably substantially likely to succeed;
2. That OAT's accreditation application has been uploaded onto the eDiscovery portal;
3. That the ANAB Accreditation Requirements manual is available for viewing on the eDiscovery portal;
4. That OAT has promulgated discovery protocols consistent with those employed by the State Police Case Management Unit, including a definition of exculpatory evidence and an explanation of the obligation pursuant to such evidence; or, in the alternative, that the CMU is responsible for processing OAT's discovery;
5. That OAT's discovery protocol has been uploaded to the eDiscovery portal;
6. That all OAT employees have received training on the meaning of exculpatory information and the obligations relating to it; and
7. That all written material used to train OAT employees on discovery, and particularly on exculpatory evidence, have been uploaded to the eDiscovery portal

Method Validation

The 2017 ANAB Accreditation Manual for ISO 17025 requires the validation of methods

7.2.2 Validation of methods

7.2.2.1.1 The laboratory shall have a procedure for method validation that:

- a) includes the associated data interpretation;
- b) establishes the data required to report a result, opinion, or interpretation; and
- c) identifies limitations of the method, reported results, opinions, and interpretations.

7.2.2.2.1 The associated data interpretation is considered part of a validated method. When changes are made, then ISO/IEC 17025:2017, 7.2.2.2 applies.



MOTION FOR NEW TRIAL MOTION TO VACATE

PLEA - Motion to Vacate Concepts

- ◆ A judge "may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30 (b)..."
- ◆ A motion for a new trial pursuant to Mass. R. Crim. P. 30 (b) is the proper vehicle by which to seek to vacate a guilty plea. Commonwealth v. Fernandes, 390 Mass. 714, 715 (1984).
- ◆ "...a defendant's guilty plea also may be vacated as involuntary because of external circumstances or information that later comes to light." See, e.g., Commonwealth v. Conaghan, 433 Mass. 105, 110 (2000).



Motion to Vacate Plea

Judge Brennan's decision is a basis for a motion for new trial pursuant to Rule 36. See Commonwealth v. Scott, 467 Mass. 336 (2014).

- ◆ Newly discovered evidence
 - ◇ Unreliability/exclusion of breath test results
 - ◇ Misconduct of OAT
- ◆ Due Process - Involuntarily induced by egregious intentional government misconduct
 - ◇ Intentional withholding of exculpatory evidence
- ◆ Contract Claim-Every DA from all counties



Know Your Cases

- ◆ Commonwealth v. Scott, 467 Mass. 336 (2014) - Dookhan case, adapts the Ferrara standard.
- ◆ Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006) - The standard
- ◆ Commonwealth v. Grace, 397 Mass. 303, 305 (1986) - Newly discovered and that it casts real doubt on the justice of the conviction.
- ◆ Commonwealth v. Pike, 431 Mass. 212, 218 (2000) - The allegedly new evidence must be material and credible, and “carry a measure of strength in support of the defendant’s position.”
- ◆ Commonwealth v. Brown, 378 Mass. 165, 171 (1979) - Newly discovered evidence



Grounds For the Motion

- ◆ Ineffective assistance with counsel: No
- ◆ Newly discovered evidence: Yes
- ◆ Due process: Yes

Due Process Claim

- ◆ Motion was based in part on a claim that the plea was not knowing and intelligent and therefore violated the defendant's due process rights. Commonwealth v. Scott, 467 Mass. 336, 345 (2014).
- ◆ Requires that a plea of guilty be accepted only where "the contemporaneous record contains an affirmative showing that the defendant's plea was intelligently and voluntarily made." Commonwealth v. Furr, 454 Mass. 101, 106 (2009), citing Boykin v. Alabama, 395 U.S. 238 (1969), and Commonwealth v. Foster, 368 Mass. 100, 102 (1975).
Similar to Scott, we argue that the guilty plea was facially defective, but that it was involuntarily induced by government misconduct that since has been discovered. Our cases are similar to Scott and Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006).



Standard

- ◆ In Commonwealth v. Scott, the federal standard set out in Ferrara v. United States was adopted.
- ◆ This cases are similar to Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006). In Ferrara, it was discovered ten years after the plea that government misconduct deliberately manipulated a key witness, convincing the witness to testify against the defendant despite the recantation by that witness of his statements incriminating the defendant.

Newly Discovered Evidence

- ◆ Defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence
 - ◇ Two questions
 - ◆ Is it new?
 - ◆ Is it important?



Is It New?

- ◆ Evidence must have been “unknown to the defendant or his counsel and not reasonably discoverable by them at the time of trial (or at the time of the presentation of an earlier motion for new trial.” Commonwealth v. Brown, 378 Mass. 165, 171 (1979); Commonwealth v. Grace, 370 Mass. at 753-754.
- ◆ Unknown to the defendant or his counsel and not reasonably discoverable by them at the time of trial (or at the time of the presentation of an earlier motion for a new trial). Commonwealth v. Brown, supra at 171-172; Commonwealth v. Grace, 370 Mass. at 753-754.



Is It Important? Totality of Circumstances

- ◆ Casts real doubt on the justice of the conviction. Commonwealth v. Brown, 378 Mass. 165, 171 (1979)
- ◆ Must be material and credible but also must carry a measure of strength in support of the defendant's position. Commonwealth v. Brown, supra at 171-72.
- ◆ The judge must find there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial. Commonwealth v. Markham, 10 Mass. App. Ct. 651, 654 (1980)
- ◆ The strength of the case against a criminal defendant, therefore, may weaken the effect of evidence which is admittedly newly discovered.



Newly Discovered Evidence or Due Process?

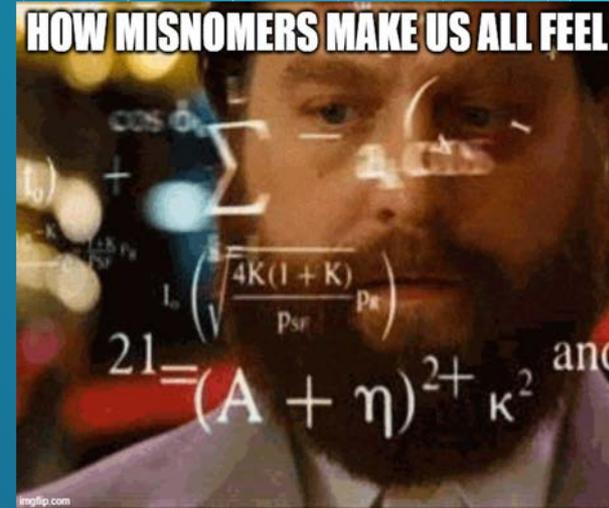
- ◆ Not necessary here to reach the question whether a voluntary and intelligent guilty plea constitutes a waiver of the defendant's right to seek to vacate a plea based either on the common-law claim of newly discovered evidence or on the constitutional claim of prosecutorial nondisclosure. Scott
- ◆ If, on remand, the defendant fails to establish that the guilty plea was involuntary under the Ferrara analysis because under the second prong he is unable to demonstrate that knowledge of Dookhan's misconduct would have materially influenced his decision to plead guilty, the Ferrara analysis will likely be dispositive of the other grounds asserted by the defendant as well.

Newly Discovered Evidence or Due Process Continued

- ◆ Both a common-law claim of newly discovered evidence and a constitutional claim of prosecutorial non-disclosure require the defendant to make some showing of prejudice or materiality. See Tucceri, 412 Mass. at 412-413; Grace, 397 Mass. at 305-306. When a defendant brings a motion for a new trial based on newly discovered evidence, the defendant has the burden to show that the evidence "casts real doubt on the justice of the conviction." Grace, at 305.
- ◆ The defendant must convince the judge that there is a "substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial." *Id.* at 306. The judge need not be convinced that the jury's verdict would have been different but rather that the evidence would have been a "real factor" in the jury's deliberations. *Id.* Similarly, when a defendant brings a motion for a new trial based on the prosecutor's failure to disclose exculpatory evidence in violation of the defendant's due process rights under art. 12 of the Massachusetts Declaration of Rights, the defendant must show that "there is a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial." Tucceri, 412 Mass. at 406, 413. As we stated in Tucceri, this test is "substantially the same as the Saferian ineffective assistance of counsel standard." *Id.* at 413. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).
- ◆ Therefore, reconsideration of the defendant's motion based on the voluntariness analysis we have set forth in this opinion should be sufficient to dispose of all the grounds on which the defendant raised his motion to withdraw his guilty plea.

Newly Discovered Evidence: It's a Misnomer here

- ◆ Newly Discovered Evidence = Breath Test should not have been used per joint agreement!
- ◆ Newly Discovered Evidence = Breath Test unreliable due lack of protocols!
- ◆ Newly Discovered Evidence = Breath Test should not have been used per Consolidated Order!
- ◆ Newly Discovered Evidence = OAT dysfunction!
- ◆ Newly Discovered Evidence = Withheld worksheets!
- ◆ Do not let the language distract you from what it is



Motion to Vacate Plea - Newly Discovered Evidence

2nd Prong Ferrara factors. See Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006).

1. Whether evidence of the government misconduct could have detracted from the factual basis used to support the guilty plea; - (Is there other overwhelming evidence of intoxication?)
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; - (Is there other overwhelming evidence of intoxication?)
4. Whether the evidence would have influenced counsel's recommendation as to whether to accept a particular plea offer; and (Is there other overwhelming evidence of intoxication?)
5. Whether the value of the evidence was outweighed by the benefits of entering into the plea agreement. - (Is there other overwhelming evidence of intoxication?)



Overwhelming Evidence of Intoxication?

Scott/Ferrara Analysis

- ◆ Prong 1: Egregious misconduct by the government in the defendant's case
 - ◇ Egregious misconduct nexus
 - Under the Ferrara analysis, defendant must first show the egregious government misconduct preceded the entry of his guilty plea & that it's the sort of conduct that implicates the defendant's due process rights. Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006)
 - ◇ By the government
 - Defendant next must show that the egregious misconduct was undertaken "by government agents" prior to the entry of the defendant's guilty plea. See Ferrara at 290.
 - ◇ In the defendant's case
 - Defendant must demonstrate that the misconduct occurred in his case
 - ◇ Needs to be nexus between the governmental wrongdoing & defendant's case was not in dispute. See Ferrara at 284.
 - ◇ In Scott, the SJC laid out a road map. Dookhan's signature as an analyst on the drug certificate is sufficient to establish the requisite nexus between egregious government wrongdoing & the defendant's case. We emphasize that this special evidentiary rule is sui generis. It's a remedy dictated by the particular circumstances surrounding Dookhan's misconduct as a chemist at the Hinton drug lab & is intended to apply only to this narrow class of cases in which a defendant seeks to withdraw his or her guilty plea after learning of Dookhan's misconduct.

Scott/Ferrara Analysis Continued

- ◆ Prong 2: Material influence on the defendant's decision to plead guilty
 - ◇ The court in Ferrara describes the reasonable probability tests as a totality of the circumstances test & identifies several factors that may be relevant to the defendant's showing under this prong:
 - ◇ (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.
 - ◇ See Ferrara at 294, citing Brady v. United States, 397 U.S. at 749.



Statewide Implications

- ◆ Ultimately, although the full extent of Dookhan's misconduct may never be known, the investigation into her wrongdoing has had an enormous impact on the criminal justice system in Massachusetts. See Commonwealth v. Charles, 466 Mass. 63, 65 (2013)
- ◆ Brennan held that “the prejudice caused by OAT’s misconduct against the consolidated defendants and the resulting **damage to the criminal justice system**, OAT must first demonstrate that its current methodology will produce scientifically reliable BAC results.” Commonwealth v. Ananias, (Ananias II at 16)

While it may be located towards Boston, OAT = Government Agent & Statewide Lab

Massachusetts Regulation 501 section 2.01 through 2.03 - the Office of Alcohol Testing (OAT) is a **statewide** calibration lab mandated to perform a variety of statewide functions including but not limited to maintaining and calibrating breath test devices. The breath test device results are utilized statewide in the prosecution for operating under the influence cases pursuant to chapter 90 section 24. Furthermore, like in Scott with the drug lab and the medical examiner's office in Woodward, "the Legislature appears to have contemplated a coordination of efforts between prosecutors and OAT because the lab was required by statute to perform chemical analyses of substances on request from law enforcement officials." Commonwealth v. Scott, 467 Mass. 336, 349 (2014). As such, OAT is clearly an agent "of the prosecution team" and a "Commonwealth agent" in all operating under the influence cases throughout the state utilizing breath test results. Id., Commonwealth v. Woodward, 427 Mass. 659, 679 (1998).



Motion for New Trial

The judge must determine whether there is a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial. See Commonwealth v. Grace, 397 Mass. 303, 305 (1986).

- ◆ Per Se Theory
 - ◇ BT was direct evidence of violation
- ◆ Impaired Theory
 - ◇ Model Jury Instructions indicates that a jury may consider “whether a breath test showed that the defendant had consumed any alcohol.” See Instruction 5.310: Operating Under the Influence of Intoxicating Liquor.

Motion to Vacate Plea

- ◆ There are two critical points you must emphasize when arguing these motions:
- ◆ A Breath Test result is powerful evidence
- ◆ Regardless of the “per se theory” the evidence is also persuasive on the “impairment theory”
- ◆ As the Supreme Court has stated “Breath tests have been in common use for many years” and their results are “widely credited by juries.” Birchfield v. North Dakota, 136 S. Ct. 2160, 2184 (2016)
- ◆ Evidence of a .08% BAC alone is enough for the Commonwealth to meet its burden with respect to the third element of the per se theory. Commonwealth v. Hebb, 477 Mass. 409, 412 (2017)



Motion to Vacate Plea

- ◆ Under the “impairment theory”, in order for the Commonwealth to prevail, they must prove beyond a reasonable doubt that the defendant’s “ability to drive safely was diminished by alcohol.” See instruction 5.310: Operating under the Influence of Intoxicating Liquor; See also Commonwealth v. Hebb, 477 Mass. 409, 412 (2017)
- ◆ In cases where both the “per se theory” and the “impairment theory” are tried together, the factfinder may consider the breath test results pertaining to the degree of impairment of the defendant with respect to the Commonwealth's case on the impaired theory. Commonwealth v. Colturi, 448 Mass. 809, 817 (2007).



Motion to Vacate Plea

“...a defendant's decision to tender a guilty plea is a unique, individualized decision, and the relevant factors and their relative weight will differ from one case to the next.”

Scott, 467 Mass. at 356.

Is there other overwhelming evidence of intoxication?

If so, judge may find client received great benefit of plea that overcomes issues with BT - reasonable probability that defendant would have accepted plea anyways. **But don't forget Colturi! Don't forget the fourth factor!!! First offense plea benefit - possible employment, but not with RMV or a subsequent analysis.**

Cases for Motion for New Trial / Motion to Vacate Plea

- ◆ Multiple level offenses
 - ◇ Review criminal history/driving record for prior BT cases
 - ◇ Not appropriate for all cases if possibility of exposing client to greater penalties
 - ◇ Unlike Dookhan defendants as the court ruled in Bridgeman v. District Attorney For The Suffolk District, 471 Mass. 465, 477 (2015)
- ◆ Clients trying to reinstate license
 - ◇ Lifetime losses for CTR/5th Offenses
 - ◇ Interlock Ignition Device issues
 - ◇ CTR suspensions
 - ◇ If successful, client can reinstate immediately after motion allowed even while case reopened and pending



Sentencing Upon Reconviction

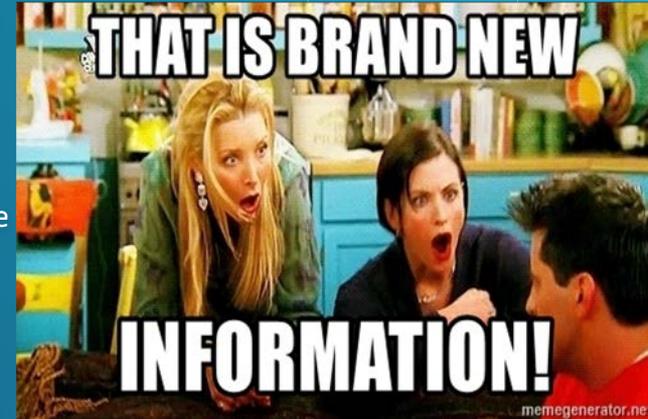
North Carolina v. Pearce, 395 U.S. 711 (1969)

- ◆ Double jeopardy protections against multiple punishments for the same offense
“constitutional[ly] guarantee” that punishment already exacted for an offense must be fully “credited” when imposing a sentence upon a new conviction for the same offense
- ◆ Unfair to impose more severe sentence after a 2nd trial simply because defendant successfully pursued an appeal
 - ◇ Defendant must be a ‘freed of apprehension of such a retaliatory motivation on the part of the sentencing judge”
 - ◇ SCOTUS adopted a rule “that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear.”
 - ◇ Reasons must be based on “objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.”
 - ◇ Alabama v. Smith, 490 US 794 (1989): Presumption of vindictiveness is applicable only when there is one sentence

Sentencing Upon Reconviction

Commonwealth v. Hyatt, 419 Mass. 815 (1995)

- ◆ **The Massachusetts Rule:** when a defendant is again convicted of a crime, the second sentencing judge may impose a harsher sentence or sentences *only if the judge's reason or reasons for doing so appear on the record and are based on information that was not before the first sentencing judge*
 - ◇ Prevents sentencing disparities that are inherently likely to occur when two different judges engage in sentencing on the same sentencing facts
 - ◇ Avoids the unseemly appearance that defendant's ultimate sentence is greater than his first for no better reason than a change in the identity of sentencing judge
 - ◇ Effectively safeguards successful appellant upon retrial from the possibility of retaliatory vindictiveness following reconviction



Commonwealth v. Lewis

96 Mass. App. Ct. 354 (2019)

A post-Dookhan case

- ◆ Plea to multiple charges can be upheld even if plea to the tainted charge made at the same time is vacated. Court allowed a plea associated with a cocaine charge to be vacated due to Annie Dookhan's involvement, but refused to allow a plea involving a heroin charge entered on the same day to be as well.
- ◆ The reason, the government's malfeasance did not impact the heroin charge and Massachusetts has a history of allowing divisibility of pleas both pre and post-Dookhan.



7110 Machines?????

- ◆ Is there a newly discovered evidence? Are the 7110 machines ripe for a motion to vacate/motion for new trial?
- ◆ The level of dysfunction and culture of clandestine activities was unknown to the entire criminal justice system. After the Executive Office of Public Safety and Security (EOPSS) investigated into the misconduct of OAT, it exposed a long-standing problem with the OAT calibration laboratory. These problems with OAT have now been exposed. One of the issues brought to light was OAT's lack of compliance and understanding with basic discovery principles. In fact, one of the remedial measures was a mandate of training regarding the concept of exculpatory evidence. See Commonwealth v. Ananias, Figueroa, et. al., 1248-CR-1075, 1201-CR-3898, and others, Decision Dated January 9, 2019 (Ananias II). This was a long-standing problem with OAT which impacted the criminal justice system for years prior. Another dysfunctional issue exposed with OAT was the complete lack of protocols when calibrating breath test devices. The lack of protocols was in direct conflict with basic scientific fundamentals when calibrating any breath testing devices.

PRACTICAL IMPLEMENTATION

Identification and Notice

- ◆ The Commonwealth agreed to provide written notice of the terms from this agreement to defendants who were charged with an OUI, submitted to a breath test using a 9510 instrument, and received an adverse disposition between June 1, 2011 and August 31, 2017.

How Notice Will Be Issued

- ◆ Such Notice will be drafted by the defense team with the assent of the Commonwealth, and will be mailed to affected defendants at the address.
- ◆ If they have a valid Massachusetts driver's license, the address used will be the one they have on file with the RMV at the time of their breath test.
- ◆ If they do not have a valid Massachusetts license or have an out of state license, then the address contained within the OAT 9510 database will be used.

How Notice Will Be Issued

- ◆ Notice will also be provided via electronic mail to the last attorney of record for each case.
- ◆ *Said notice shall not be construed as a concession or admission that any individual is entitled to any relief. The identification and notice provision shall be developed and filed with the Court and is subject to the Court's approval*



The Notice Over 27,000



THE TRIAL COURT OF MASSACHUSETTS
EXECUTIVE OFFICE OF THE TRIAL COURT

John Adams Courthouse
One Pemberton Square, 1M
Boston, MA 02108

Paula M. Carey
Chief Justice of the Trial Court

Jonathan S. Williams
Court Administrator

INFORMATION CONCERNING THE BREATHALYZER TEST USED IN YOUR COURT CASE

Court records indicate that an Alcotest 9510 breathalyzer machine was used in an Operating Under the Influence of Liquor case in which you were convicted or admitted to sufficient facts.

A statewide hearing was conducted to determine the scientific reliability of breath test results. As a result of that hearing, all breath tests administered in Massachusetts between June of 2011 and April 18, 2019 have been excluded from use in criminal prosecutions. This may provide an opportunity for you to challenge the disposition in your case.

This packet from the Court includes information about your legal rights and options, which has been provided by the Committee for Legal Counsel Services, the statewide public defender agency. If you have any questions, you are encouraged to call the public defender intake line at **617-910-5856** or to go to www.mass.gov/breathalyzer. Please review the enclosed letter from CPCS for further information.

(617) 742-8575 | www.Mass.Gov/Orgs/Executive-Office-of-the-Trial-Court

How Do You Do This? Steps You Should Take

- ◆ Request the transcript of the plea/trial
 - ◇ Was the Breath Test read into the record?
- ◆ Obtain a copy of the police report and docket
- ◆ Find out who the judge was who was presiding over the plea/trial
- ◆ Speak to the original trial counsel who handled the plea/trial
 - ◇ Prepare an affidavit for them to submit, see next slide.
- ◆ Any proof of medical issues/disorders?
 - ◇ Could provide an explanation for your client's actions





Importance of Recovery

The importance of recovery cannot be overstated when preparing a motion to vacate. It will help you leverage the prosecutor to dismiss the case after the motion is allowed.

Some items you should help your client gather are:

- ◆ Proof of recovery.
 - ◇ Letters of support
 - ◇ AA attendance sheet
 - ◇ Enrollment in treatment programs or mental health facilities
 - ◇ Mental Health documents





BERNARD
— OUI DEFENSE —

Mass. Gen. Laws Chap. 90, Section 27

“The clerk-magistrate of each court shall keep a full record of every criminal case filed therein, and of every civil motor vehicle infraction heard therein...Upon the disposition of such matters, the clerk-magistrate shall forthwith send an abstract of such record to the registrar, in such form, with such content, and by such method as the registrar and the administrative justice of the district court department shall jointly determine. The registrar shall record such information in such form as he shall determine, and such record of the registrar shall be an official record of such criminal case or civil motor vehicle infraction for purposes of any action by the registrar pursuant to chapter ninety...”



Motion for Corrected Abstract

COMMONWEALTH OF MASSACHUSETTS
The Department of the Trial Court

[COUNTY], ss. [NAME] DISTRICT COURT
DOCKET NO.: XXXXXXXXXX

COMMONWEALTH OF MASSACHUSETTS)
v.)
[DEFENDANT'S NAME])

MOTION FOR CORRECTED ABSTRACT

Now comes the Defendant, [NAME], who moves this Honorable Court to issue a corrected abstract to the Massachusetts Registry of Motor Vehicles to reflect that the disposition in this matter has been vacated.

Respectfully Submitted,
[NAME]
By His/Her Attorney:

Date: _____ [NAME/ ADDRESS, Etc]

COMMONWEALTH OF MASSACHUSETTS
The Department of the Trial Court

[COUNTY], ss. [NAME] DISTRICT COURT
DOCKET NO.: XXXXXXXXXX

COMMONWEALTH OF MASSACHUSETTS)
v.)
[DEFENDANT'S NAME])

AFFIDAVIT

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

1. My name is [NAME], the attorney of record for the above-named Defendant, [NAME].
2. On [DATE], the Defendant filed a motion to vacate her plea in this matter.
3. On [DATE], the Court heard the arguments and allowed the Defendant's motion to vacate her plea.
4. As a result of the allowed motion, it is respectfully requested that the Defendant's abstract be corrected and sent to the Registry of Motor Vehicles.
5. In order to address license suspension issues, the Registry of Motor Vehicles requires that the court submit a "corrected abstract" to the Registry to reflect that the plea has been vacated.
6. For these reasons, I respectfully request that this Honorable Court allow the Defendant's motion for a corrected abstract.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY

Date: _____ [NAME]

COMMONWEALTH OF MASSACHUSETTS
The Department of the Trial Court

[COUNTY], ss. [NAME] DISTRICT COURT
DOCKET NO.: XXXXXXXXXX

COMMONWEALTH OF MASSACHUSETTS)
v.)
[DEFENDANT'S NAME])

ORDER FOR CORRECTED ABSTRACT

This Court orders the [NAME] Criminal Clerk's Office to issue a corrected abstract to the Massachusetts Registry of Motor Vehicles to reflect that the disposition in this matter has been vacated.

SO ORDERED on _____, 2020.

[NAME OF JUDGE]

NOTE: APPROVED JUDGMENT CODES ON REVERSE MUST BE USED IN REPORTING JUDGMENTS.

DC-MV-6 (2/88)		COMMONWEALTH OF MASSACHUSETTS SUPPLEMENTAL MOTOR VEHICLE ABSTRACT				CITATION NUMBER (one number only)	
VIOLATOR NAME (LAST, FIRST, INITIAL)			DATE OF BIRTH		LICENSE NUMBER		STATE
STREET ADDRESS				REGISTRATION NUMBER		STATE	
CITY/TOWN		STATE	ZIP CODE		POLICE DEPARTMENT		
DATE OF VIOLATION		LOCATION OF VIOLATION					
DOCKET NUMBER	OFFENSE	CHAPTER	SECTION	JUDGMENT	DATE OF JUDGMENT	COMMENT	
INSTRUCTIONS TO COURT: 1. Use a separate form for each citation number. 2. To update previous abstract, fill in shaded areas only. 3. To use to report a conviction for which no citation was written, fill out as completely as possible. REGISTRY COPY 4. Certify abstract with clerk-magistrate's facsimile.				COURT ID		CERTIFIED BY CLERK-MAGISTRATE AS A TRUE RECORD	

BERNARD
— OUI DEFENSE —

Prior Counsel Affidavit

COMMONWEALTH OF MASSACHUSETTS
The Department of the Trial Court

[COUNTY], ss.

[NAME] DISTRICT COURT
DOCKET NO.: XXXXXXXXXX

COMMONWEALTH OF MASSACHUSETTS)

v.)

[DEFENDANT'S NAME])

AFFIDAVIT

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

1. I, [NAME], represented the above-named Defendant, [DEFENDANT], in the above-referenced matter. I was Mr./Mrs [NAME]'s attorney at the time of her plea. In this matter, Mr./Mrs [NAME] admitted to sufficient facts to the charge of OUI-Liquor on [DATE OF PLEA].
2. On the day of the incident in this case, [DATE OF BREATH TEST], Mr./Mrs [NAME] submitted to a breath test on a Draeger Alcotest 9510 breathalyzer as requested by the [NAME] State Police. The breath test result was 0.XX%.
3. The fact that Mr./Mrs [NAME]'s breath test result was over 0.08% permitted the government to prosecute Mr./Mrs [NAME] on the per se theory of the law.
4. The fact that the breath test result should have been inadmissible as a result of Ananias was not known to any lawyer in Massachusetts during the decision making process or at the time of Mr./Mrs [NAME]'s plea. This information may have affected my advice to Mr./Mrs [NAME] and my recommendation as to whether she should accept a plea offer.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY

Date:

[NAME OF ATTORNEY]

THANKS!

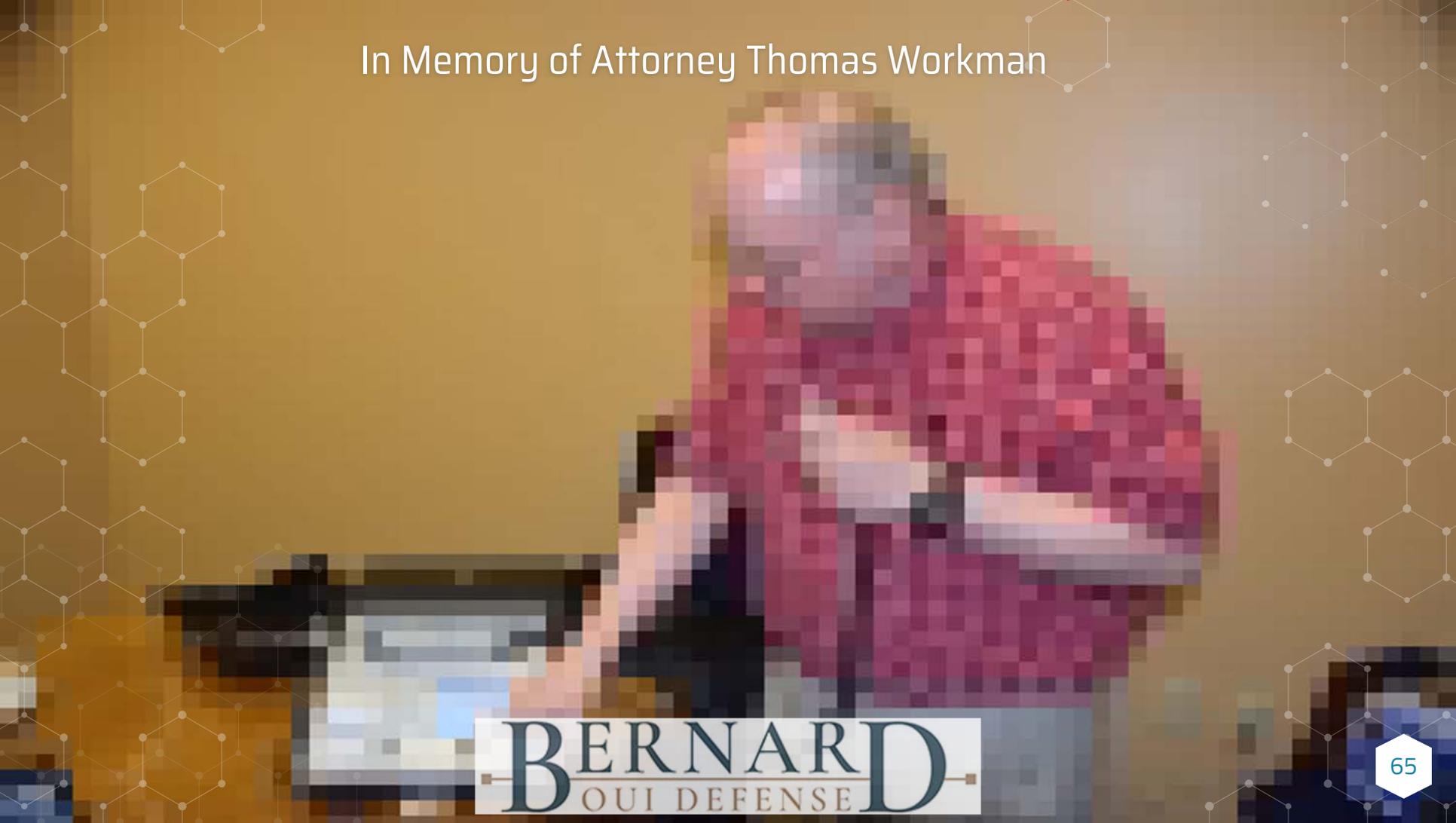
ANY QUESTIONS?

You can find me at:

- ◆ joe@bernardatlaw.com
- ◆ www.bernardouidefense.com



In Memory of Attorney Thomas Workman



BERNARD
COURTNEY DEFENSE