

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

CONCORD DISTRICT COURT  
NO. 1248CR1075 and others

COMMONWEALTH

v.

EVANDO ANANIAS and OTHERS

**MOTION TO EXCLUDE BREATH ALCOHOL CONTENT PERCENTAGE RESULTS  
USING THE ALCOTEST 9510  
AND ANY OPINION TESTIMONY**

**NOW COMES THE CONSOLIDATED DEFENDANTS** and move to exclude from any trial any and all evidence derived from the results of the Alcotest 9510, including any and all opinion evidence, as unreliable and inadmissible.

**AS GROUNDS THEREFORE**, the Consolidated Defendants assert the following: That any and all results from and any and all opinion testimony is unreliable and admissible for the following reasons, separately or in conjunction with one or more of the following reasons;

1. The source code utilized in the Alcotest 9510 fails to meet accepted industry standards and best practices as it concerns revision control systems, programming best practices and security practices and the use of a USB access key, in the relevant field that results in unreliable Breath Alcohol Content Percentage ("BAC %") results;
2. The source code utilized in the Alcotest 9510 operates using unchecked return values resulting in unreliable BAC % results;
3. The source code utilized in the Alcotest 9510 utilizes an electrochemical sensor bit location in hardware configuration that results in unreliable BAC % results;
4. The source code utilized in the Alcotest 9510 operates using uninitialized variables that results in unreliable BAC % results;
5. The source code utilized in the Alcotest 9510's has flawed data integrity and management programming that results in unreliable BAC % results;

6. The source code utilized in the Alcotest 9510 operates using clipping of sensor measurements that results in unreliable BAC % results;
7. The source code utilized in the Alcotest 9510 operates using a flawed programming for hardware error checking and results in unreliable BAC % results;
8. The electrochemical sensor used in the Alcotest 9510 experiences fatigue and affects the reliability of results especially with regard to long-term performance of the Alcotest 9510;
9. The Alcotest 9510 calibration protocols are flawed and do not result in accurate calibration rendering unreliable results;
10. The Alcotest 9510 fails to detect and accurately report interfering substances and results in unreliable BAC % results;
11. The Alcotest 9510 methodology implemented in the development and use of the machine does not meet relevant industry standards of traceability, an uncertainly budget or measurement of uncertainty necessary to determine the accuracy of and error rate associated with any reported BAC %, resulting in unreliable BAC % results; and,
12. The Alcotest 9510's application and methodology relies on flawed scientific theories and principles as applied, including aspects of Henry's Law, and results in unreliable BAC % results.

**FURTHERMORE**, it is asserted that the Alcotest 9510's methodology and application of the methodology is unreliable and inadmissible as a result of

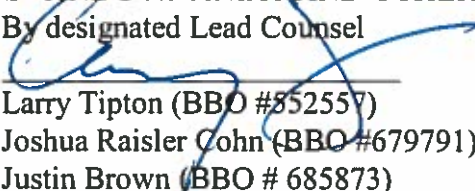
13. The lack of general acceptance in the relevant community as it concerns the source code programming, best practices, calibration methodology, and reliance on scientific principles not applicable to the Alcotest 9510.
14. That the Alcotest 9510's source code and its operation has not and cannot be adequately subjected to adequate testing, peer review and publication as a direct result of the conduct of its manufacturer.
15. That there is no reported error rate or attempt to demonstrate unreported and undetected errors that can and do occur in the operation of the Alcotest 9510 using the current source code.
16. That the Alcotest 9510 methodology, underlying theory or process, is not governed by recognized standards.

**WHEREFORE**, for the reasons set forth herein and (1) as set out in the previously submitted reports of various experts and witnesses that give examples and details of these many issues, (2) the memorandum accompanying this motion that summarizes the many issues raised in this motion, and (3) as set forth in the attached memorandum the application of relevant law, the Consolidated Defendant move to exclude the evidence.

**ALTERNATIVELY**, the Consolidated Defendants move for a hearing wherein the proponent of the evidence, the testing results produced by the Alcotest 9510 and any and all opinion testimony, must demonstrate that the evidence is reliable and admissible.

Failure to exclude such evidence, or alternatively, to require the proponent to demonstrate its reliability would violate the Consolidated Defendants' rights to due process, a fair trial, the confrontation of witnesses, to present a defense, to not have unreliable evidence presented, under the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments to the Federal Constitution, art. 12 of the Massachusetts Declaration of Rights, the common law's prohibition to the introduction of unreliable evidence. See Commonwealth v. Camblin, 471 Mass. 639 (2015); Commonwealth v. Lanigan, 419 Mass. 15 (1994); Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 562 U.S. 1 (1999); Massachusetts Guide to Evidence, Section 702; see also Strengthening Forensic Science in the United States: A Path Forward, National Research Council, National Academies Press (2009).

RESPECTFULLY SUBMITTED,  
EVANDO ANANIAS AND OTHERS,  
By designated Lead Counsel

  
\_\_\_\_\_  
Larry Tipton (BBO #852557)  
Joshua Raisler Cohn (BBO #679791)  
Justin Brown (BBO # 685873)  
Committee for Public Counsel Services  
Norwood Superior Court Trial Office  
57 Providence Highway, Suite 201  
Norwood, MA 02062  
(617) 947-6281  
[lтиpton@publiccounsel.net](mailto:lтиpton@publiccounsel.net)

/s/ \_\_\_\_\_  
Joseph D. Bernard, (BBO # 557976)  
The Law Offices of Joseph D. Bernard, PC  
One Monarch Place, Suite 1100  
Springfield, MA 01144  
(413) 731-9995  
[Joe@Bernardatlaw.com](mailto:Joe@Bernardatlaw.com)

/s/ \_\_\_\_\_  
James Milligan, (BBO # 640890)  
306 Washington St, 2 nd Fl  
Norwell, MA 02061  
(781) 878-1231

/s/ \_\_\_\_\_  
Greg Oberhauser, (BBO # 642209)  
287 Appleton Ste 207  
Lowell, MA  
(978) 452-1116