

**STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff/Appellee.

MSC No. 162211  
COA No. 350391

v.

Circuit Case No. 2019-175232-AR

ALTON FONTENOT, JR.,  
Defendant/Appellant.

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**AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT'S  
APPLICATION FOR LEAVE TO APPEAL**



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## INTRODUCTION

Now Comes Amicus Curiae, the National College for DUI Defense (NCDD) and the Criminal Defense Attorneys of Michigan (CDAM), in support of Appellant-Fontenot's Application for Leave to Appeal. This Court is requested to grant the application and ultimately reverse the Court of Appeals.

The logs that are the subject of the appeals that followed the trial court's evidentiary ruling are designated by the Department of State Police as "OD33" logs or "Evidential Breath Testing Accuracy Check" logs. The logs reflect three important pieces of data with regards to the Datamaster DMT: (1) whether the instrument initiated a weekly "self-check" as programmed; (2) if the self-check was completed, the observed value by the instrument of a dry gas sample of inert gas; and (3) certifications and/or repairs by the technicians who have sufficient training to perform maintenance and repair, including the required 120 certification of the instrument's calibration/accuracy.

The author wishes to thank Dale Haverdink for his assistance in explaining the technical aspects of the 120-day procedure in preparation of this Amicus Curiae Brief. Mr Haverdink retired as a 120-day contractor with the prior vendor of the breath alcohol instrument in August, 2018 when the service and maintenance contract was transferred from National Patent Analytical Systems (NPAS) to the current contractor, Intoximeters.

The author also wishes to thank Andreas Stolz, PhD for providing technical assistance. Dr. Stolz has been qualified as an expert in metrology many times in courts throughout North America and he is a research scientist at the National Superconducting Cyclotron at Michigan State University.



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## PROCESS OF SCIENTIFIC MEASUREMENT OF ALCOHOL BY THE DMT

The Datamaster DMT (datamaster transportable) is like almost every single breath alcohol testing device used throughout the world. Based on the principles of Beer's Law and Infrared Absorption, it utilizes infrared detection technology. Ethyl alcohol (beverage alcohol) in the sample chamber of the Datamaster absorbs infrared light originating from an infrared light source, thereby diminishing the amount of light reaching an infrared light detector built into the device. Wavelength filters in the light path make the Datamaster more specific for the alcohol molecule. The more alcohol present, the less amount of light that reaches the infrared light detector.

The software in the device then converts the signal strength to a report of alcohol content as a proportion of 210 liters of breath. The value "210" may seem random, but the breath alcohol content is reported as a proportion of 210 liters based on a "correction factor" of 2100. The reason for the correction factor of 2100 is because breath alcohol testing was originally designed to reflect an indirect measurement of the alcohol content in a subject's blood. The end of the breath sample is assumed to reflect the contents of 2100 parts of blood to 1 part of the breath. The basis for that assumption comes from "Henry's Law" and the idea that air from the deep lung region will reflect the contents of alveoli in the lungs - tiny sacks of blood and air in our bodies. In other words, .08 grams of ethanol per 210 liters of breath is supposed to convert to .08 grams of alcohol per 100 milliliters of blood. Breath testing was invented to indirectly measure alcohol in a person's blood.

If a person has consumed and absorbed beverage alcohol, the beverage alcohol ultimately migrates to the alveoli where it remains in a constant partition. Henry's Law in chemistry states that the weight of a gas that is dissolved by a liquid is proportional to the pressure that the gas puts upon the liquid. In a closed environment with constant pressure and constant temperature,



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the contents of the liquid will evaporate into the air above the liquid within the environment. Britannica, *Henry's Law*, <<http://britannica.com/science/Henrys-law>> (accessed December 1, 2020).

### Weekly "Dry Gas" Self-Checks

The dry gas is a mixture of ethanol with nitrogen at a specified concentration. It is automatically introduced to the instrument once per week based on the software settings from a tank of gas attached to the instrument. The day and time scheduled is typically 4am every Monday at almost every police agency in the state. Most agencies designate that the supervising officer on duty on the day that the automatic test is run to inspect the ticket, record the results, and take further action if the instrument has reported an error or has gone "out of service" because the observed value deviated from the target value by greater than 5%. The target value is the amount of ethanol in the dry gas that should be measured by the DMT, based on the amount of ethanol content that is delivered by the dry gas tank after being adjusted for the barometric pressure during the self-check.

The OD33s evidential breath alcohol accuracy check logs also reflect either repairs and/or the certifications by the technician or "120-day operator," who last performed the periodic calibration check. This periodic calibration check is mandated to be performed at least every 120 days according to the Administrative Rules promulgated by the Department of State Police under its statutory duty (MCL 259.190; A/R 325.2651-2658, A/R 325.2671-2677). The purpose of these rules is to establish chemical test results that can be admitted at a trial by ensuring sufficiently accurate and reliable measurements following OWI arrests. Without the legal system, the rules regarding DMTs would not exist and neither would the logs in question. The instrument is designated after all as an "evidential" breath tester in the Michigan State Police DMT Manual.



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2018 DMT Manual, <[https://www.michigan.gov/msp/0,4643,7-123-72297\\_30536-473246--00.html](https://www.michigan.gov/msp/0,4643,7-123-72297_30536-473246--00.html)> (accessed December 1, 2020).

The trial court in this case ruled, and the circuit court agreed, that the proponent of the logs was required to produce sufficient foundational testimony at trial before the evidential breath test logs could be admitted. The trial court rejected the proponent's argument that the OD33s are admissible under the business records exception to the hearsay rule at MRE 803(6). The ruling by the trial court should be reinstated because these accuracy checks and calibration checks are an important footprint for the accuracy or reliability of the instrument's performance and its accuracy at any given point in time, which is what a jury is asked to consider – in other words, is a breath alcohol result a sufficient representation of the subject's breath alcohol content at that time.

Note that an evidential breath test device such as a DMT is not the same technology as a pre-arrest screening device, known as a Preliminary Breath Test (PBT) device. That is the reason why the DMT result may be admissible if the foundational requirements of *People v Tipolt* (198 Mich App 44 (1993)) are satisfied but the PBT is presumptively non-admissible.

The PBT is a fuel cell device that reacts to the energy of the breath sample that is delivered and it is highly susceptible to false positives or falsely-elevated readings caused by “mouth alcohol” contamination. The evidential devices like DMTs are designed and manufactured with the intention that

1. Only air from the lower part of the lung;
2. in a sample that satisfies certain parameters that are programmed into the instrument's software

is what gets analyzed in the sample chamber and used as the basis for the reported result. Every measurement, including for breath alcohol and blood alcohol, carries with it a degree of



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“uncertainty,” which in science means that the value reported is closely proximated to the “true value” of the thing to be measured (or “measurand”). The result is never perfectly accurate – the intent is to ensure that any given result is fit for the purpose -- and calibration and accuracy checks play a big part in meeting that intention.

### 120-Day “Wet Bath” Calibration Check

The 120-day calibration check involves a water-based alcohol simulator that the technician uses to attempt to replicate the delicate human physiological process of delivering an acceptable sample. The theory and operation relies on a rule from chemistry known as “Henry’s Law.” It is assumed that every subject who delivers a sample of alveolar breath (breath from the deep lung region of the body) will deliver a sample of breath that is closely-representative of the contents of the subject’s blood.

There are also 4 primary assumptions involved in the measurement of a breath sample by an infrared device for the presence and amount of alcohol. These are well-known in the scientific community, but not always readily-understood in the legal system, *Hlastala and Anderson*, “The Champion” Issue March 2020, p 34. One of the vital assumptions is that the temperature of a subject sample will be constant at 34 degrees centigrade (93.2 degrees Fahrenheit). Temperature stability is difficult to measure and achieve. It is a highly-sensitive aspect of the calibration check procedure, but it is also critical to an accurate assessment of the instrument’s calibration.

The calibration check procedure involves a technician, with that amount of training that is necessary to understand the steps involved, using a *pre-mixed* simulator solution that is water-based a/k/a “wet bath” with ethyl-alcohol (beverage alcohol) at a known concentration, heating the simulator to replicate the temperature of human breath (34 degrees centigrade), and then introducing the sample into the instrument.



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The technician is also required to check the instrument's accuracy at various points along the range of use for the instrument: .04; .08; and .20. Further, the technician is to attempt to introduce radio frequency interference using a device that mimics a cellphone's signal, initiate the instrument's process to analyze and report its Direct Current (DC) output, and finally, programs the instrument to check its "calibration factors." These final 2 steps entail essentially button-pushing by the technician. This procedure can only assess the instrument's bias and cannot prevent or minimize the uncertainty in the result produced by a subject sample from human factors or error in the administration of the test. The degree to which the technician adheres to the proper procedures, including accurately measuring the temperature of the solution and maintaining that temperature, is therefore essential for the end-user to be able to assess and understand the instrument's bias as a source of error. *Labianca*, JChemEd, Vol. 79, No. 10, October 2002, pp 1237-1240.

### AN EXAMPLE OF THE RECORDS CREATING A BRADY VIOLATION

In theory, the ability to assess whether an instrument is fit for the purpose is discernible from a review of the logs. That is not necessarily the case when human error, or in some cases duplicity, will yield either inaccurate or misleading results or a combination of the two will be recorded on the evidential breath test logs -- as was observed by the undersigned recently in a Lansing-area case described in a video here: <https://youtu.be/HiBLKvaP-k0>.

What happened in that case is contrary to the instructions on how to complete the evidential breath test log as found in the Michigan State Police's own manual:

### OD-33 Evidential Breath Testing Log

1. Whenever the instrument or a certified operator performs an accuracy check, the result shall be entered on the Evidential Breath Testing Accuracy Check Log (OD-33).



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2. Service technicians will document maintenance work on the Evidential Breath Testing Accuracy Check Log (OD-33).
3. If an instrument is taken out of service, an entry shall be made to that effect.
4. Each log sheet shall contain entries for a one-month period.
5. A new log sheet shall be used for each month.
6. The log is retained for current year plus seven years.

### **INSTRUCTIONS FOR RECORDING AN ACCURACY CHECK:**

All sections of the form must be completed. Specific instructions for each section are given below.

1. Instrument Location - Enter the name of the department where the instrument is located.
2. Instrument Number - Enter the six-digit serial number (not the MSP service tag number) for the instrument.
3. ORI Number, - Enter the seven-digit number assigned to the department assigned responsible for the instrument.
4. Month - Enter the current month.
5. Year - Enter the current year.
6. Dry Gas Alcohol Standard Lot Number/Expiration Date - Enter the lot number and expiration date. The information is on the Accuracy Check print out.
7. Day - Enter the day of the month (1-31).
8. Operation Performed:
  - a. Enter "Accuracy Check" for weekly test.
  - b. Enter "Out of Service" if the instrument is taken out of service. **CHECK WITH A SUPERVISOR BEFORE MAKING THIS ENTRY. An "OUT OF SERVICE" ENTRY REQUIRES A SERVICE CALL.**
9. Target - Enter the four-digit target listed on the Accuracy Check print out.
10. External Standard - Enter the four-digit external standard listed on the Accuracy Check print out.



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11. Operator ORI Number. - Enter seven-digit number assigned to the operator's department when recording a manual accuracy check result.
12. Certification Number. - Enter the five-digit number assigned to the certified Breath Test Operator who recorded the result. **This is not the operators MCOLES number.**
13. Signature - Enter the signature of the certified Breath Test Operator who conducted the manual accuracy check or entered the automatic accuracy check result.

**INSTRUCTIONS FOR SIGNING AT THE END OF THE MONTH:**

At the end of each month, a supervisor or designee shall sign directly below the last log entry and enter the date and time.

14. Supervisor/Designee Signature - A supervisor/designee shall sign his/her name after checking for proper log completion.
15. Date - Enter the date the supervisor/designee check was completed in month, day, and year order.

MSP Datamaster DMT 2018 manual, pp 40-41.

Even with 1 or 2 small errors it can appear that there was “nothing to see here” with the instrument’s reliability yet the instrument took itself out of service because it was unable to analyze a target value within its pre-programmed tolerance of 5%. It may be a series of innocent, human errors that could lead to such misdirection in front of the jury when the evidential breath test logs are admitted at a trial without foundation. Try telling that to the person who was convicted by the jury who found the datamaster result reliable because of the story told by the logs: “nothing to see here.”

Cui bono? Who does this benefit if the Court of Appeals opinion stands? The United States Supreme Court issued 2 opinions in the last decade that extended the analysis of the Constitution’s Confrontation clause in *Crawford v Washington*, 541 US 36 (2004) to forensic



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disciplines, in particular drug analysis and chemical testing. The cases were *Melendez-Diaz v Massachusetts*, 557 US 305 (2009) and *Bullcoming v New Mexico*, 564 US 647 (2011).

The landing spot for the justice system is that a report from a laboratory concerning the analysis of solid dose drugs or controlled substances in human blood (including alcohol) is not admissible without the lab analyst(s) who performed the work being subjected to confrontation. The report is not enough; the supervisor is not sufficient; the analyst must be present in court. A critical takeaway is the acknowledgment by the Court that the preparation of the sample, the pipetting, the mixing, the preparation and use of the calibrators and controls to “train” the instrument are some of the biggest sources of error that can lead to a wider variance between the observed result that is reported and the true value of the measurand. The justice system did not grind to a halt.

The Court in *Melendez-Diaz* stated in a footnote that not every person who touched evidence or even is relevant to the accuracy of the testing device is a necessary witness to satisfy confrontation. (*Melendez-Diaz*, FN 1). The Court also held that while business and public records are *generally* admissible absent confrontation because they were created for the administration of an entity’s affairs as opposed to the purpose of establishing or proving some fact at trial, here the records not only establish the 4<sup>th</sup> element of an OWI charge (“while operating, the defendant had a breath alcohol content at or above 0.08 grams/210 Liters of breath” (CJI 2<sup>nd</sup> 15.3)) but the evidential breath test records contain a certification by the technician. The certification is required under the Michigan Administrative Code:

“Approved evidential breath alcohol test instruments shall be inspected, verified for accuracy, and *certified* as to their proper working order within 120 days of the previous inspection by either an appropriate class operator who has been certified in accordance with a manufacturer-trained representatives approved by the department,” (A/R 325.2658(3)).



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Black's Law Dictionary defines "Certificate:"

"A written assurance, or official representation, that some act has or has not been done, or some event occurred, or some legal formality has been complied with," (West "Black's Law Dictionary," 6<sup>th</sup> Edition, p 225).

If that is not enough to establish that these logs are used to establish the 4<sup>th</sup> element of the offense of OWI – the "script" for prosecutors and law enforcement officers for trial is found near the end of the Michigan Datamaster DMT Manual. The script states in part:

24. What safeguards are required to ensure the accuracy of a test?
  - Only certified operators may conduct tests on a subject.
  - The instrument is checked at least once a week with a test standard containing a known alcohol concentration.
  - A tested subject cannot have anything in his/her mouth for 15 minutes prior to the test.
  - Two breath specimens from each subject are analyzed in succession.
25. Are there any records/logs kept concerning the use of the DATAMASTER DMT instrument?
26. Where are those records/logs kept?
27. Do you have the records with you that were kept on the instrument that was used to test the defendant on trial today?
28. Do they reflect whether or not the DATAMASTER DMT instrument has been given its weekly accuracy checks?
29. Do the records reflect whether or not the instrument has been given its inspection every 120 days as required?

(Michigan Datamaster DMT Manual p 48)

Admitting the logs without foundational testimony as a business record benefits no one other than law enforcement enjoying the convenience of a hall pass from testifying in court. Consider the following numbers: 24,000/9/1. 24,000 cases analyzed by Massachusetts crime lab analyst Annie Dookhan over a span of 9 years and it took just 1 lawyer to require her to testify in her last case. Ms. Dookhan's saga from a rising star in the Massachusetts crime lab to the owner of a prison number and to the face of the concept of a *Brady* violation (citation omitted)



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was chronicled in the Netflix series that was released on April 1, 2020 titled “How to Fix a Drug Scandal,” that many Americans devoured while in quarantine last spring.

The Supreme Court’s holdings in *Melendez-Diaz* and *Bullcoming* that reinforced the renewed vitality of the confrontation clause since the Court overturned *Ohio v Roberts*, 448 US 56 (1980) in the *Crawford* opinion, did not cause the justice system to grind to a halt. In fact, cases like the Massachusetts crime lab scandal and others, still reared their venal heads in some jurisdictions around the nation despite these holdings.

That is not to say that any current technicians who perform service and maintenance on the Datamaster DMT are stealing alcohol ampoules during simulator checks or doing anything untoward. We know that a scandal is possible though because we saw one explode in Michigan at the beginning of 2020.

Michigan State Police Colonel Joseph Gaspar – the commander of the department himself – was invited to address the Judiciary Committee of the Michigan Senate on January 18<sup>th</sup>, and explain the fact that hundreds if not thousands of breath test results were called into question because of misfeasant and - in some instances – fraudulent conduct.

Like the crime lab analysts in *Melendez-Diaz* and *Bullcoming* the technicians who calibrate/check the calibration of the Datamaster DMT and “certify” its accuracy under A/R 325.2674 perform work that is sensitive to error as the “bad breath” scandal referenced above informs. To allow the Court of Appeals opinion to stand and allow the evidential breath test logs to be admitted in every single one of the thousands of OWI cases that are prosecuted every year in Michigan is to invite an iniquitous stain on the justice system like the one that Annie Dookhan or Sonja Faruk created in the Commonwealth of Massachusetts. This court can prevent that from occurring and has options on how to do so.



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This Court accepted the invitation of its colleagues on the United States Supreme Court in *Melendez-Diaz* to lower courts and established a “Notice and Demand” provision in Michigan’s Rules of Court (MCR) at MCR 6.202. Once the proponent of a blood analysis from a certified toxicology lab sends the summary report to the defense with a proper certificate of accreditation, the defense has 14 days to file a simple objection and “invoke” confrontation. MCR 6.202.

This Court has the option to craft a very similar solution here and require that the government provide the logs to the defense attorney or pro per defendant with the same requirements of an accreditation certificate and put the opponent of the evidence on the clock. If the defense accepts the invitation to invoke confrontation, the technician must be made available to provide foundational testimony. As most skilled and seasoned defense attorneys know, whether it makes sound strategy to put the government to its proofs is case and situation-dependent. The bet is a sound one that the criminal justice system will not crumble or grind to a halt – at least not to the extent that it did when the Michigan State Police halted breath alcohol testing in every single one of the 83 counties and took all 203 Datamaster DMT’s out of service temporarily.

### THE DISSENTING OPINION IN THE COURT OF APPEALS

The dissent in Fontenot aptly observed that the circumstances of the creation of the logs belied the conclusion that “the testing logs are not merely a bureaucratic record that a routine was followed.” *People v Fontenot*, Court of Appeals No. 350391 (Slip Op. p 2) (dissent) (decided September 10, 2020). The dissenting opinion also stated that this Court’s 2012 holding in *Nunley* constrained the dissenting Judge from going so far as to call the logs testimonial. The part of the ruling in *Nunley* which the dissenting judge was addressing was the analysis that the records



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created by the Secretary of State (SOS) at issue in *Nunley*: specifically that the records were created prior to the act of Mr. Nunley driving on a suspended license, and thus were not created for the “primary purpose” of prosecuting someone in court. *People v Nunley*, 491 Mich 686, 702-705 (2012).

This Court can distinguish the evidential breath test logs from the SOS notice without overruling *Nunley*. In *Nunley*, the documents were literally postcard notices created and issued to drivers and contained nothing more than the name of the analyst, who reviewed the record and created the notice, with only the date of notice hand-written on and the name of “F. Bueter” pre-typed. *Nunley* at 690. The evidential breath test logs contain the annotations of the officers who are required to record the results of the accuracy checks and any other error messages, the officer’s signature, the signature at the end of the month of the reviewing or “supervising” officer and moreover, the *certification* of the 120-day technician (if applicable) which by its definition and by its practice includes a signature to attest to the work performed.

The postcard at issue in *Nunley* is a function of the bureaucratic machine in state government. However, as the dissent points out in *Fontenot*, the evidential breath test logs are not the product of “bureaucratic red tape” but are created and maintained to satisfy statutorily-established administrative rules that judges as gatekeepers are able to fall back on in determining the admissibility of a breath test result at trial (*Fontenot* at p 2 (dissent)). Leave us not forget, that while a log might have been started on the first Monday morning of a month, the weekend nights that fall between that first Monday and the next accuracy check or 120-day verification, will have produced who knows how many OWI arrests depending on the jurisdiction where the DMT is in use. Any officer or technician who makes an entry on those evidential breath test logs knows full-well when he or she signs his or her name that he or she may have to testify about the data that is contained within that log.



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**CONCLUSION**

WHEREFORE, Amicus Curiae respectfully requests that this Honorable Court grant Appellant-Fontenot's Application for Leave to Appeal; reverse the Michigan Court of Appeals and reinstate the prior orders of the lower courts regarding the foundation required to admit the logs.

Dated: December 2, 2020

Respectfully submitted,

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