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STATE OF NEW JERSEY, Plaintiff/Petitioner, v. THOMAS ZINGIS Defendant/Respondent.	SUPREME COURT OF NEW JERSEY / SPECIAL MASTER Docket No. 087132 QUASI-CRIMINAL ACTION On Appeal From a Final Order of the Superior Court of New Jersey, Appellate Division Docket No.: A-0905-20 Sat Below: Hon. Patrick DeAlmeida, J.A.D. Hon. Morris G. Smith, J.A.D. Hon. Heidi Willis Currier, J.A.D.

AMENDED
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Miscellaneous

PRELIMINARY STATEMENT

The issues in *State v. Zingis* are quite different than those in *State v Cassidy*, though both stem from the malfeasance of Marc Dennis. *Cassidy* dealt exclusively with whether a reported breath test result was admissible on the issue of defendant's guilt. *Cassidy* did not have before it, nor did it address, the unique issues that arise when a defendant faces enhanced sentencing based upon a possibly tainted conviction. The notice ordered in *Cassidy* did not mention a waiver of future rights and was not served in a manner that is legally binding. It was a courtesy mailing, ordered in the interests of justice, to those aggrieved who might have might have received them.

The *Cassidy* issue was evidentiary. The *Zingis* questions are on discovery and burdens of proof. How does the State satisfy its discovery obligations, when seeking an enhanced sentence, to disclose to a defendant that Dennis calibrated a subject test they took during the arrest which ultimately convicted? What is the burden of proof on the State when it knows (collectively) that a Dennis calibration was associated with the prior arrest, versus when it knows he was not?

The NJSBA submits, as we discuss herein, that a defendant facing an enhanced sentence is entitled to know that Dennis calibrated any Alcotest in their case, and that any AIR produced in that prior case is possibly subject to challenge. We do not ask here for a ruling on admissibility of any Alcohol Influence Report

(AIR) in any case not before the court. We ask, instead, for a finding that an AIR calibrated by Dennis may be sufficient grounds and properly considered in filing a PCR petition. Therefore, the State's discovery obligation includes whether or not Dennis calibrated any AIR associated with the prior arrest leading to the prior conviction, not only whether a Dennis calibration is associated with a final reported breath test reading.

Since the facts adduced in these hearings clearly revealed that mailed notifies were ineffectual and could not serve as a basis for waiver of a defendants later rights in quasi-criminal proceeding, we have proposed a simple online solution, with the examples admitted as Joint Exhibits DB/DPD-28 "*Dennis Repository*" and "29" "*Zingis Index*". We have further suggested ways to refine different burdens of proof based upon conditional parameters adduced through these hearing.

NJSBA PROPOSED FINDINGS OF FACT

I. MARC DENNIS IS A COMPROMISED WITNESS AS TO EVERY SUBJECT TEST THAT WAS BASED UPON HIS CALIBRATION

On Nov. 5, 2008, Marc Dennis, then a New Jersey State Police (NJSP) Trooper, was appointed as a breath testing coordinator. 1T180-11. During an investigation by his superiors as to whether he followed NJSP procedure to use a NIST traceable temperature sensor during calibration of Alcotest machines, in the fall of 2015, Dennis admitted to Lt. Thomas Snyder that he would lie about it on the stand if asked. 2T78-9. He became a witness that the State would not be comfortable calling to testify about his calibrations. 2T78-13. Effective Oct. 10, 2015, Dennis was no longer authorized to do calibrations. 1T181-3. On Sept. 19, 2016, Dennis was charged with tampering with public records or information and falsifying or tampering with records, *State v. Cassidy*, 235 N.J. 482, 512 (2018). Dennis was indicted on Dec. 14, 2016, and a superseding indictment was returned on June 27, 2017, charging him with one count of third-degree tampering with public records and one count of fourth-degree falsifying records, 235 N.J. 514-515. He was subsequently convicted on charges of official misconduct and a pattern of official misconduct. He was sentenced to serve five years in state prison on March 30, 2023, and he will be ineligible for parole during that time. (*Press Release of*

AG Matthew Platkin, March 30, 2023.) Dennis was in prison during the *Zingis* special master hearing. 5T150-7.

As a necessary witness as to the reliability of any calibration, Dennis is obviously compromised, not only by his conviction involving dishonesty, but because he blatantly offered to commit perjury to cover up his wrongdoings. Neither his conviction, nor his statement that he was willing to commit perjury, was before the court in *Cassidy,* 235 N.J. 482 (2018) which was not faced with, nor considered, the issue of the State's obligation to provide defendant with discovery affecting the credibility of a key state actor and the admission of an Alcohol Influence Report (AIR) in as evidence other than a reported breath test.

II. CREATION OF THE 27,833 SUBJECT TESTS SPREADSHEET REMAINS UNKNOWN

A) The role of the NJSP-ADTU in its creation was never explained.

Sometime in November or December of 2015, 3T127-16, Deputy Attorney General (DAG) Robyn Mitchell became involved in trying to ascertain what "*instruments … Dennis calibrated*" 3T130-6. Her purpose was *"to see how many people were potentially affected by Dennis' conduct*." 3T137-24. She asked the NJSP Alcohol and Drug Testing Unit (ADTU) who told her that the NJSP Information Technology Unit (ITU) could ascertain the information. 3T131-6.

Although NJSP Sgt. Dellanoce was the ADTU breath testing project manager at the time, 10T12-20, he was not called as a witness in this hearing by the State, and no State witness explained any ADTU role in creating the list ultimately obtained.

B) The NJSP -ITU could not authenticate the 27, 833 subject test records spreadsheet.

1. Donahue did not recall creating the 27,833 spreadsheet.

William Donahue, from the NJSP-ITU, had no recollection of creating the 27,833 row subject test spreadsheet ultimately received by Mitchell, 1T63-21/64-20, from Sgt. Dellanoce, 4T51-1. Sgt. Dellanoce did not testify. Donahue testified on March 20, 2023, that he has never heard the name Marc Dennis. 1T18-2. He couldn't tell the Court why the spreadsheet of 27,833 rows was created. 1T25-24. And while he testified that he was the only one who created such spreadsheets, 1T77-16, he admitted *"all I can tell you is that I don't know how this spreadsheet was created*," 1T77-11, *"Q: No idea? A: No, I don't."* 1T77-14.

2. The State's non-public database was used to find subject test records, and the other parties were not permitted to verify the State's data or methods independently.

The State Police ITU maintains a database of all the uploaded alcotest records which can then be searched ("queried") as a whole only from inside the ITU fully; the public can utilize a website but only "to access the data in the very restricted manner that's its permitted." 1T44-20/45-4. The public would have to

search town-by-town and machine-by-machine, separately. 1T45-10/13. The public has to pay up to $60 per search for each machine. 1T97-22/98-1. There are 550 Alcotest machines in service in New Jersey, 8T127-6. As the special master denied the NJSBA's motion for access to the State's non-public database, we could not verify any of the State's methods or underlying data, or analyze the data ourselves based on the missing the 290 fields of data.

3. The SQL query statement attached to the 27,833 spreadsheet did not match the accompanying spreadsheet tab, and that glaring inconsistency remains unexplained.

There are two separate tables in the non-public database, a "subject test records" table (or subjects table) and "alcotest instrument records" table (or certifications table.) 1T49-24, 1T149-23. The list of 27,833 subjects test records that Donahue did not recall creating, 1T64-8/10, had only 20 fields (with one field, "Date of Arrest," repeated twice.) 4T90-17. The spreadsheet of 27,833 subject test records also had an SQL statement tab, 1T108-6, which was a set of query instructions to find all the records in the subject test records table for the records that match the criterion specified in the SQL. 1T49-5/11.

Viewing the SQL statement of the 27,833 subject test records, Donahue agreed that there were many more than just 20 fields specified, 1T123-2. (*See* Exhibit DPD-showing 310 fields specified, not 20 as in the accompanying 27,833 spreadsheet tab. *See also* Exhibit DB-03 also showing 310 fields specified, not 20,

in the original version (S-148 aka the "5925" CD) of 27,833 rows given by Sgt. Dellanoce to Robyn Mitchell.) Moreover, Donahue testified that the query statement (SQL) specified only 19 Alcotest serial numbers to search, 1T114-23, while Dennis actually calibrated ~137 Alcotest serial numbers. 9T83-24.

So, while the query should have instructed the database to produce a spreadsheet that was 310 columns of information wide and 3,615 rows long, 4T84-20, the accompanying spreadsheet tab instead had a spreadsheet that was only 20 columns wide but ran 27,833 rows long. This fundamental mystery was never explained by any State witness, and the State did not proffer Sgt. Delanoce who was in charge of the breath testing program, 10T11-17, and apparently delivered the actual CD-ROM with the final 27,833 spreadsheet to DAG Mitchell, 4T51-1. (*See* S-148 5925 final spreadsheet.)

III. ASSUMING THE STATE'S DATA, THERE ARE 27,426 AIRs AFFECTED BY A DENNIS CALIBRATION

A) DAG Mitchell deleted 7,166 subject test records from the 27,833 records given to her by the ADTU.

DAG Mitchell deleted 7,166 subject tests from the spreadsheet of 27,833 that she had received from the NJSP. 4T182-7, 4T130:18-24, 5T248-23. She had not been certified on the Alcotest, 4T122-19, although she had a basic understanding of how it works. 4T122-22. The deletions were made before there

was even a *State v. Cassidy*, let alone a *Cassidy* special master. There was no testimony that there was any input in making the decision except from sole viewpoint of the Division of Criminal Justice (DCJ). And the decision was made well before any judicial decision on the subject. DAG Mitchell deleted all the subject test records that did not have a final breath test result. 3T139-25, 3T:140-18, 4T85-23.

The spreadsheet DAG Mitchell received had only 20 fields (with one repeated, for total of 21 columns.) 3T50-1/6, 4T:90-14. She was not given all 310 fields of the subject test records available. 4T127-19. She was aware, at least in retrospect, that without the full 310 fields, she couldn't know if the defendant blew, even up to eleven times. 3T183-3, or what volume of breath was blown, etc. 3T143-11. She knew the Alcohol Influence Report (AIR) might go into evidence against a defendant despite there being no final reading. 3T118-1, including subject refusals. 3T118-11. She also knew that a Dennis calibration would make the control tests just as unreliable as breath test itself, 4T127:12/128-1. She knew that every row of the 27,833 Dennis calibrated, subject test spreadsheet would also have had a printed AIR. 3T117-22. The State was aware that even if there were accepted breath tests with four readings, but not a final reported breath test, the AIR could still be offered into evidence. 1T239-3/1T240-6.

Nevertheless, 7,166 subject tests were deleted from the 27,883, and the 27,833 spreadsheet was not revisited again by the State until this litigation, over seven years later, when Sgt. Alcott, the NJSP Alcotest Project Manager, was tasked with double checking it. 8T127-18. Sgt. Alcott concluded that there were 436 rows in errors. 9T88-22. But he only checked for subject tests that were on the list but shouldn't be, not for individuals that should have been on it, but weren't. 10T79-10/14. Sgt. Alcott agreed that every subject test calibrated by Dennis, regardless of what followed, would have unreliable control tests and that the AIR generated would not be reliable, based upon the findings in *Cassidy*. 10T36-24/38-5, (*See also* NJSBA finding III(C) *infra*.)

B) <u>Every witness who was asked on the subject agreed that it followed from the findings in *Cassidy* that every control test, which simulates human breath and relies on the same on proper temperature being set at in calibration, would also be unreliable.</u>

In order to simulate human breath, as a "control check" on the device, the Alcotest samples the head space gas from a CU34 simulator attached to it, and then takes EC and IR readings of that sample to verify that the gas is within a +/- .005 tolerance of a .10 blood alcohol content ("BAC"). 8T14/4-16. Reference any machine that Marc Dennis calibrated, however, and these control tests are not reliable since they refer back to the temperature calibration that Dennis did to compare as a known standard of a .10 BAC device. 10T37-14/38-5. 8T25-11. An

Alcotest is not "working order" if the control test is unreliable. If the calibration was done correctly, we rely upon the fact that the Alcotest itself would report that a "control test failed" and stop testing. 10T74-75/10. But, with Dennis calibration, a court cannot rely upon the Alcotest as it was not calibrated with the proper temperature sensor. It might state on an AIR that a control passed or failed, but we wouldn't actually know if that was because it was mis-calibrated or not. The Alcotest Project Manager Sgt. Kevin Alcott, 9T29-10, testified that, accepting *Cassidy* as the law, the control tests on Dennis calibrated machines are unreliable under the same rationale. 10T38-3, 10T59-1.

C) <u>Since all of the 27,833 subject test records had unreliable control tests begun, all Dennis calibrated machines were not in "good working order", and every one of those subject tests were affected by a Dennis calibration, including the 7,166 the State deleted</u>.

This hearing established, via uncontroverted testimony from the witnesses who opined on control tests, Mitchell, Dell' Aquilo, and Alcott, that Dennis's failure to use a NIST traceable temperature sensor at calibration made the all-important control tests, which simulate human breath to establish that the device is in working order, unreliable. 4T127:12/128-1, 8T225-11, 10T59-1. The technical witnesses (i.e. certified on the Alcotest), Dell'Aquilo and Alcott, further agreed that every subject test in the 27,833 spreadsheet only gets recorded because the operator pushed the "N" at prompt to save the information which then started the

control test process automatically, 8T19:9-21, 8T25-4, 9T119-15/120-2. The obvious conclusion is that every one of the 27,833 subject tests could not be trusted. 5T250-4, including the 7,166 subject tests that were deleted. 5T250-7.

D) <u>Every subject test record in the 27,833 spreadsheet has a corresponding printed AIR that would have been admissible, but for knowledge that it was calibrated by Dennis, on a number of issues other than a breath test result including, but not limited to, its routine admission on Refusal charges.</u>

An AIR is printed out from the printer attached to the Alcotest after any subject test, whether an accepted breath reading is obtained or not, and the AIR can then go into evidence to prove otherwise hearsay facts, such as that the machine successfully passed control tests. 1T225-5-11. The AIR does not indicate who calibrated the Alcotest. 1T253-1/2. It does contain a lot of information however, including the two control tests. 7T121-8. Allowing an AIR into evidence is based upon the assumption that the particular Alcotest was in good working order. 9T122-13. Once the data entry is finished and the operator hits the "N" prompt, the machine automatically begins a control test. 9T124-4. And then, whatever happens, you will get a printed AIR. 9T124-7. The printed AIR has more information than the 20 fields in the 27,833 spreadsheet that DAG Mitchell received from the ADTU, 9T124-10, but fewer than the full 310 fields available in the State's Alcotest database. 9T124-25. The AIR is routinely admitted in trials on DWI and Refusal charges to show the facts stated thereon such as blowing,

volume, control tests, or many other reasons, and, when the subject went to multiple locations, the State is supposed to put into evidence all the AIRS from the arrest. 10T72-16/23.

Any AIR that indicated it passed the control tests (i.e. was within tolerance of .095-.105 BAC) is presumed to be in good working order under *State v. Chun*, 194 N.J. 54 (2008). However, if Dennis did the calibration, then a control test which is passed as stated on the AIR would not be reliable, and the machine would not be in good working order, based upon the findings in *Cassidy*, acknowledged the NJSP Alcotest Project Manager Sgt. Alcott. 10T36-24/38-5. Every AIR calibrated by Dennis is subject to defense challenge as inadmissible.

E) <u>Assuming the State's initial data, the actual known number of subject tests on machines calibrated by Dennis is 27,426, after additions and deletions.</u>

During this special master's proceeding, the State found that it had included 436 subject tests in the 27,833 spreadsheet that were not actually calibrated by Dennis, 9T92-23, 10T76-1/4, *see* Exhibit S-128. The State did not, however, look beyond the 27,833 to see if there were errors the other way, i.e. that were not on the list but should have been. 9T92-5/10. The NJSBA and Office of the Public Defender (OPD), however, found 26 subject records that should have been included but were not. DB-23. Plus, the OPD later found an additional three records that should have been included but were not. 9T55-15/25. The Court did

the math, and the record reflected that the final number with those subtractions and additions amounted to 27,426 subject records, 10T80-21, based upon the State's data.

IV. THE VARIOUS MAILINGS WERE FLAWED IN EXECUTION, AND, IN ANY EVENT, THEIR CONTENT DID NOT FORECLOSE DEFENDANT'S RIGHTS IN PENDING OR FUTURE CASES.

A) The first mailing, in 2017, voluntarily sent by the State, was contradictory and had a high rate of undeliverables.

1. The DCJ's first letter, in 2017, stated that it was about "all the calibrations" as well as Dennis' "false swearing," not just breath tests, but nevertheless was only sent to a list of subjects who had a final breath test on a Dennis machine.

The first batch of DCJ letters were sent in December 2017, well before there was any order or findings in *Cassidy* and done voluntarily by the State. 2T166-15/20, 4T:152-2/3. DAG Mitchell, during the *Cassidy* special master proceedings, enlisted the help of the AOC to put together her list of 20,667 subject tests with addresses from the AOC's database. 4T152:10-17. The DCJ drafted letter did not restrict those potentially effected to only reported breath tests by its language:

> "*Sergeant Dennis's alleged false swearing and improper calibrations … may call into question all of the calibrations performed by Sergeant Dennis over the course of his career as a coordinator (i.e. 2008 - 2016), and might possibly entitle you to future relief . . .*"

(Emphasis added). S-80. This was a more accurate formulation than the later letter, post *Cassidy* to come, which was related only to the breath test fact pattern of one case, as opposed to the broader issues that arose from *"all of the calibrations performed by Sergeant Dennis*." And there was nothing in this first letter, even if the letter was received, that could waive a defendant's future rights.

As an aside, it is our belief that this first mailing likely was the situs of the vast and widely held misperception by practitioners that these first notices actually meant what they said, and were sent to all subjects tested on "all of the calibrations" Dennis did. They certainly had no way to know that the breath test only list used, in fact, defeated the implication of the letter itself.

2. <u>The Administrative Office of the Courts (AOC) eliminated 1,468 additional records from what the State handed over, further reducing the subject records to 18,250, with another 948 "questionable."</u>

The AOC tasked Charles Prather to get addresses that matched the 20,667 spreadsheet. 2T:189-2. Prather was a contract data processer for the AOC. 3T:89-2, 3T91-21. In his certification to the court, he indicated that he "eliminated" 1,300 (additional) subject test records rows. 3T51-20/52-3. Some he called "duplicates" because although they appeared to be different subject tests, they were the same individual, with the same arrest date and same location of the tickets. 3T:58-19. His purpose was just to get addresses, 3T:54-4, so he wasn't thinking about legal

implications when he did that. Other records, he couldn't match up the summons numbers, name, driver's license, and date of arrest. 3T:50-22/51-15. In the end the AOC came up with a spreadsheet that had 18,250 rows where Prather felt comfortable that the data was matching, 3T80-2 in one tab, and another 948 subject test rows that were questionable in a second tab. 3T:78-2. However, those numbers still left another 168 subject tests deleted but not accounted for in Prather's certification, and he testified they also must not have matched either. 3T81:14-82-24. The total, assuming the 948 questionable ones might have been sent, was a minimum of 1,468 additional subject tests that were eliminated by Prather at the AOC.

3. The County Prosecutor's Offices further reduced the subject test records actually mailed to about 17,489 with 2,882 letters returned as undeliverable.

Mailing the two State's letters was tasked to various county prosecutor's offices. In **Monmouth County**, about 7,000 letters were sent out and about 1,000 were returned as undeliverable, then kept in a file with no further action. 6T33-23/25, 6T36-18/21. In **Somerset County**, of over 900 letters sent, 6T99-6/100-1, 103-16/20, 6T117-10/120-9, there were 159 returned without a forwarding address and no further action was taken. 6T105-19/24, 6T105-7/9, 6T106-3/6. In **Union County**, about 4,464 letters were sent out and 846 letters returned, with an unknown amount resent if they had forwarding addresses. 6T139-16/24. In

Middlesex County, they sent out 4,815 letters, 7T21-21/24, 22-1/2, and 818 were returned as undeliverable. 7T32-1/2. An unknown amount with forwarding addresses may have been resent. 7T22-7/11. In **Ocean County,** 310 letters were mailed out, 7T102-10, with 56 being returned without a forwarding address, 7T106-5/8, 7T106-9/11.

Based upon these numbers in the testimony, it appears that the five county prosecutors had an overall rate of about 17% of the letters sent out returned as undeliverable with no further action taken as to the first mailing. Moreover, the total sent would be about 17,489, which is less than either the 18,250 on the AOC match tab or the 19,198 on both AOC tabs.

B) The 2018 post *Cassidy* court ordered mailing was tailored to the holding of the particular case and had an even higher rate of undeliverables.

1. The State, well before *Cassidy*, had already limited its list to reported breath tests, then the State choose a case for direct certification (*Cassidy*) that pertained only to reported breath tests, and the second DCJ letter was specific to that case's holding on final breath tests readings.

Recall that the pre-*Cassidy*, DCJ letter had stated:

> *Sergeant Dennis's alleged false swearing and improper calibrations of these three instruments may call into question all of the calibrations performed by Sergeant Dennis over the course*

> *of his career as a coordinator (i.e. 2008 - 2016), and might possibly entitle you to future relief.*

(Emphasis added). S-80. However, now, based upon the *Cassidy* order, which was specific to breath test readings, the second DCJ letter was narrowly tailored to the holding, rather than restating the wider issue that might arise in other factual situations (such as those brought up in these *Zingis* proceedings) and stated in the first letter.

In the second letter, the DCJ wrote:

> *The Court found that the sergeant's failure to follow the established protocol adversely affected the scientific reliability of breath tests taken on Alcotest instruments calibrated by him, and ruled that the results from those instruments are inadmissible in court. Therefore, if you gave a breath sample on an Alcotest instrument calibrated by this sergeant, the results of those breath tests cannot be used as evidence in your DWI case, and you might be entitled to post-conviction relief.*

(Emphasis added) S-80. Nothing had changed as to Dennis' "*false swearing and improper calibrations*." The DCJ's notice was not incorrect, but the letter didn't change the fact that *Cassidy* was only one factual scenario, and there were others affected by Dennis, as the first DCJ letter had stated (and these *Zingis* hearings have shown.)

The State, had in fact, chosen *Cassidy*, with its facts relating only to breath test results admissibility, as the case that it wanted the Supreme Court to take out

of the Municipal Court and directly certify to the Supreme Court with a special master appointed. Although opposed by the defendant, the Court granted those requests. *Cassidy*, 235 N.J. at 513-517. The State could have asked that several cases, with different fact patterns relating to Dennis calibrations, be joined for the purpose of the hearing in *Cassidy* (as it had done in other reliability matters) but it did not.

2. <u>In their second mailing, this one court ordered, the State used the same mailing lists created over a year earlier by the AOC, and, unsurprisingly, the undeliverable rate increased from about 17% in the first mailing to about 21% in this *Cassidy* ordered mailing.</u>

For the December 2018, letters, the State did not prepare a new address list or research the vast number of undeliverables. Instead, the State merely went back to the same AOC lists (which had about 17% undeliverables, *supra*.) 6T40-12/25, 6T143-11/23, 7T35-19/23, 7T107-19/20,108-7/10. So, it was to be expected that the results would not be any better.

In **<u>Monmouth County</u>**, the number of letters sent this time was only 6,218. This was less than the original mailing due to the exclusion of undeliverable addresses on the 2017 list. 6T76-6/78-1, 6T80-20/81-3. So about a thousand individuals didn't even get either letter. 6T33-23/25, 6T36-18/21. Monmouth didn't keep track of undeliverables, although they estimated they were still "in the

hundreds" this time, which they stored for a while and then trashed. 6T43-11/15, 6T54-12/15. In **Somerset County**, the second mailing had 948 letters. 6T107-17/24. Of those, 182 were undeliverable. 6T109-3/9. 6T109-13/16. There were no additional efforts made to contact these individuals. 6T112-14/113-8. In **Union County**, they used the same spreadsheet as before to send the 4,464 letters out. 6T143-11/23. There were 860 letters returned after this mailing; an unknown amount containing forwarding addresses were resent. 6T145-11/25. In **Middlesex County**, they sent 4,815 letters in the second mailing, 7T41-12, 43-15/16. They were not even aware of the spreadsheet second tab of partial matches. 7T47-8/16. There were 1,089-1,090 undeliverables, with no forwarding address. 7T44-13/14. In **Ocean County**, 326 letters were sent the second time. 7T108-25/109-2, 109-17/20. There were 69 letters that were undeliverable with no forwarding address. 7T109-21/22. 7T109-25/110-1/4.

Excluding Monmouth (which didn't even keep track of undeliverables), the overall undeliverables rate rose from about 17% in the first mailing to about 21% in the second mailing.

C) <u>The 2021 AOC "*Cassidy* PCR Court" notices were a courtesy extended by the Court, in the interests of justice, were narrowly sent only to the most obviously aggrieved defendants under the *Cassidy* holding, and also had a high rate of undeliverables</u>.

In 2021, the Hon. Robert A. Fall, J.A.D. ret. and t/a on recall, Special Master on post *Cassidy* PCR petitions, directed the AOC to compile a list of defendants who were on the AOC mailing list from 2017, and who were convicted of the DWI charge listed therein. 2T143-9/11. The court had no legal obligation to send these mailings but, it appears, did so in the interests of justice. The AOC whittled down the prior AOC mailing lists to 13,608 and sent out new notices by mail in July 2021. 2T143-7/146-25, 157-5/6; *see* S-55. AOC counsel also responded, as follows, to a request in this *Zingis* hearing:

> *a. 13,618 notices were mailed by the AOC on July 14, 2021;*
>
> *b. 2,884 notices were returned to the AOC as being un-deliverable;*
>
> *c. 64 notices were re-mailed using a new address provided by the U.S. Postal Service; of those, two were returned to the AOC as being un-deliverable; and 34 notices were re-mailed based upon AOC support staff's belief that an incorrect zip code had been the problem; of those, twenty-five were returned to the AOC as being un-deliverable.*

S-168. Calculating these numbers out, again there was almost a 21% undeliverable rate.

V. THE WAY THAT THE FLAWED *CASSIDY* LISTS WERE USED IN PRACTICE BY PROSECUTORS FOR ENHANCED SENTENCINGS BECKONS THE IMPLEMENTATION OF THE "*ZINGIS INDEX*" AND "*DENNIS REPOSITORY*" SOLUTION JOINTLY OFFERED AS AN EXHIBIT BY THE NJSBA AND OPD

A) The flawed *Cassidy* lists were often used to represent to courts and defendants whether Marc Dennis did a calibration, although the best evidence would be the calibration documents.

Following the *Cassidy* decision, the *Cassidy* lists were used routinely by prosecutors to identify if a prior conviction was possibly affected by a Dennis calibration. In this case, *sub judice*, "the municipal prosecutor relied on what he described as a list on the Attorney General's website of defendants notified by the State that their prior DWI convictions were subject to review under *Cassidy*..." *State v Zingis*, 471 N.J. Super. 590, 606 (App. Div. 2022) *certif. granted* 251 N.J. 502 (2022).

Monica D'Outiero has been an Assistant Monmouth County Prosecutor since 2007 and is currently also the director of the office's Appellate Unit and the Municipal Prosecutor liaison. 6T10-3/8. She gave a good overview of how the *Cassidy* lists were used in day-to-day practice on enhanced sentencing questions:

> *Q Were you given any directives from the Attorney General's Office regarding what to do about any cases that were pending that had a prior DUI conviction that your prosecutors were trying to use to enhance the current conviction? In other words, did you -- you know, in a case where there's a second or subsequent case*

where the prior case would cause (indiscernible) were you given any guidance or receive any guidance from the Attorney General's Office as to what to do if one of those prior cases were a Cassidy case?

MS. RACHUBA: Objection, Judge. What's the relevance? She's a witness as to notice.

THE COURT: Yes, I don't think that Ms. D'Outiero would know the answer to the question. But I'll ask, if she can answer it, fine. Ms. D'Outiero, do you understand the question?

THE WITNESS: I do now. I believe at some point we were advised to lookup defendants on that list and that the State had the obligation to establish that the prior DWI wasn't a State versus Cassidy "matter", because I, in my role don't handle the 40-26 prosecutions, or the prosecutions in municipal court, I am not fully conversant in how that happened. I do know that I would be contacted by municipal prosecutors, assistant prosecutors, and defense attorneys to find out if certain defendants were on the list. Myself and my secretary would look up that information on the original Excel spreadsheet provided by the Office of the Attorney General in, I believe, 2017. We would always caveat if someone wasn't on the list, but the only way to definitely know is to get the calibration records. But we would provide that information as I said to municipal prosecutors, assistant prosecutors and defense attorneys that requested that information.

THE COURT: Thank you.

(Emphasis added.) 6T57-1/58-12.

Starting with the 27,833 subject test records with Dennis calibrations, about 26% (7,166) did not even make the DCJ list given to the AOC for addresses. However, using those flawed lists was better than relying on any particular subject having actually received a mailed notice. In addition to the 26% not on the list,

another 8% (1,468 of 20,667) of subject tests were eliminated by the AOC. Finally, another 17-21% of the notices mailed were undeliverable.

B) <u>The "Zingis Index" and "Dennis Repository" proposed by the NJSBA and the OPD as an Exhibit, placed online, would be a quick and easy way for prosecutors, defense, and courts to know, in minutes, whether a prior was calibrated by Marc Dennis or not, and, if Dennis did the calibration, to have the best available evidence of same printed for record, also in minutes.</u>

Given that the mail notices were clearly flawed, the NJSBA sought to get a correct final number (assuming the State's data) from the State's original list of 27,833. The "Zingis Index" of 27,426 subject tests, DB/DPD-29, was reviewed with Sgt. Kevin Alcott, NJSP Alcotest Project Manager, and he was asked if that number was correct:

> *Q ... if we were to make a list that ... corrects what you corrected and then corrects what the OPD corrected and what the New Jersey State Bar corrected, that would be a universe of all the subject tests that we think Dennis was involved in as of this point. Correct?*
>
> *A This looks to correct the original list. Yes.*

10T83-5-11.

Continuing with Sgt Alcott, we reviewed the "Dennis Repository," DB/DPD-28, to be used in conjunction with the "Zingis index", DB/DPD-30, DB/DPD-31. The Court described the repository for the record as "*containing 1,047 files each evidencing a specific calibration of a specific Alcotest instrument*

by Sergeant Marc Dennis from November 14, 2008 through October 9, 2015." 10T85-14/17. The repository is self-contained in one Windows folder file. 10T86-10. It can be sorted and/or searched as any Windows folder. For example, you can type into the search box a town name, and you will see a list of all the Dennis calibrations in that town, 10T90-15/23, 10T91-5/7, or search for an Alcotest serial number and get all those Dennis calibrations. 10T91-20/25. And the whole repository can be sorted by date, from the first Dennis calibration to the last. 10T85-12/10T86-2.

Inside the folder file, there are 1,046 item files which each evidence one Dennis calibration. 1,005 of the files are PDF digital versions of Dennis signed Alcotest calibration records. DB/DPD-31. Sgt Alcott went over an example:

> *Q And does it purport to be signed -- does it purport to be a document signed with a physical signature -- electronically, but a physical signature of Marc Dennis dated 11/14/2008?*
>
> *A Yes. It does.*
>
> *Q Now would this be as evidence, as far as you're concerned in your job, that Marc Dennis was there that day --*
>
> *A Absolutely.*

10T87-1/9.

There were 41 (of the total 1,046) Dennis calibrations that were missing any signed documents because, Sgt. Alcott testified, they were destroyed, 10T88-1/3. He also testified that, as a secondary source, the Alcotest database (aka Alcotest

Inquiry System) could be used to confirm those missing files. 10T89-9. These 41 missing files are represented in the proposed Dennis Repository as placeholder PDF files that pulled their information directly from the State's data. DB/DPD-31. Each of the 41 PDF placeholders state at the top*, "Missing signed calibration certificate. The Alcotest Inquiry System confirms that Marc Dennis likely performed this calibration."* 10T94-7/9. Sgt. Alcott agreed that if the information came directly from the Alcotest database, then this would be the next best evidence, after a signed calibration record. 10T94-10/25.

The way the State currently stores digital versions of calibration documents is by folders, by county, then sub folders for machine serial number. 10T84-2/4. The defense has no access. But, even if they did, prosecutors and defense attorneys looking for information would more likely be looking for the information by town or date of arrest, etc. Sgt. Alcott agreed that the repository, if accurate, would be a quick and helpful way to find Dennis calibrations:

> *[Q] … So if you have something like a folder like this and just assume for this purpose that you have everything you need, it would be a quick reference to, in minutes, just finding out if Marc -- if there's a signed Marc Dennis calibration. That would be useful, wouldn't it?*
>
> *[A]: Yes. If these incorporate all the files from the folders I provided, yes.*

10T92-23/93-5

In our Conclusions of Law section, *infra*, we will discuss the position of the State that these flawed notices alone, or perhaps by a fix to them, could satisfy a prosecutor's obligation to inform a defendant, directly facing an enhanced sentence, that Marc Dennis calibrated a subject test that they took during the relevant arrest. The NJSBA asserts that the issue on enhanced sentence cannot be solved with mailed notices, and that the State's burden of disclosure where a fact witness in the case has lied on relevant certifications, offered to commit perjury, and was convicted by the State of offenses involving his dishonesty, can only be properly addressed in the enhanced sentence case itself and on the record.

NJSBA PROPOSED CONCLUSIONS OF LAW

I. SINCE DENNIS'S CALIBRATION CERTIFICATIONS WERE HELD PRESUMPTIVELY FALSE IN *CASSIDY*, THEY CANNOT BE ADMITTED AT TRIAL UNDER *CHUN* AS RELIABLE ROUTINE BUSINESS RECORDS, AND SINCE "AIR" ADMISSION REQUIRES ADMISSION OF ITS CALIBRATION CERTIFICATIONS UNDER *CHUN*, NO DENNIS ASSOCIATED AIR IS ADMISSIBLE AS A HEARSAY EXCEPTION, WHETHER FOR PURPOSE OF BREATH TEST RESULT OR OTHER REASON

State v Foley, 370 N.J. Super. 341 (Law Div. 2003) was the first reliability hearing on the Alcotest 7110MKIIIc in New Jersey. While the court found the device reliable for breath tests, the evidence before the court revealed *"the troubling pattern … in which persons who seemingly are making a good faith effort to deliver a breath sample are charged with refusal*." *Id.* at 353. Therefore, the court ordered that until there are changes to NJ.3.8 firmware and police procedures, no one could be charged with Refusal if they blew .5L into the device (1/3 of the 1.5L required.) *Id.* at 358. Although the obvious issue was the admissibility of the new device's breath readings, the Court could not ignore the other purposes that the machine was used for, *i.e*., to show that defendant committed a Refusal violation. The Court carefully examined the blowing volumes and times that would go into evidence on the AIR in many Refusals. For the *Zingis* inquiry before this Court, it is also important to look beyond just breath results, to

the full implications of Dennis's misconduct to determine all of the subjects possibly affected.

In *State v Chun*, 194 N.J. 54 (2008), after the firmware was changed to NJ.3.11, the State sought and was granted consolidation of another 21 cases, with direct certification to the Supreme Court and an appointment of a special master on reliability of the Alcotest 7110MKIIIc again. The Court found the Alcotest 7110MKIIIc reliable with many conditions. One precondition, that it be in "*good working order*" and "*inspected according to proper procedure*" existed well before the Alcotest and still must be met to before an AIR is admitted:

> *Our analysis of the general scientific reliability of the Alcotest is grounded, in part, on our expectation that there will be proof that the particular device that has generated an AIR being offered into evidence … was in working order and had been inspected according to procedure… Romano, supra, 96 N.J. at 81, 474 A.2d 1.*

(Emphasis added) *Chun*, 194 N.J. at 134. *Chun* further held additional conditions to show good working order, including that the calibration documents need to go into evidence to admit the AIR.

> *The foundational documents that we conclude need to be entered into evidence … are: (1) the most recent calibration report prior to a defendant's test, with part I—control tests, part II—linearity tests, and the credentials of the coordinator who performed the calibration; (2) the most recent new standard solution report prior to a defendant's test; and (3) the certificate of analysis of the 0.10 simulator solution used in a defendant's control tests.*

(Emphasis added.) *Id.* at 134.

In 2015, faced with the revelation of Dennis's misconduct, the State decided, unilaterally, that only breath tests were affected by Dennis's misconduct. 3T139-25, 3T:140-18, 4T85-23. Then within one month of Dennis being formally charged, the State handpicked just one case to test the legal effect of Dennis's misconduct. *State v Cassidy*, 235 *N.J.* 482, 515 (2018) . "*Eileen Cassidy*" was on the State's self-created, final breath test only, spreadsheet. S-091, row 18340.

In *State v Cassidy*, the Court decided the *"pivotal issue … whether the Alcotest is sufficiently reliable absent the use of a NIST-traceable thermometer in its calibration." Id.* at 491. The State, in *Cassidy*, had asked for and was granted direct certification from Municipal Court to the Supreme Court, over the defendant's objection. The State framed the legal issue before the Court as whether the breath tests in the matter could be used against Eileen Cassidy. The Court ultimately decided that the Alcotest was unreliable absent the use of a NIST-traceable thermometer in its calibration. The *Cassidy* Special Master found that accurate temperature readings of the simulator solutions are "*the foundation upon which the <u>entire calibration</u> process is built.*" (Emphasis added.) *Id.* at 493. The Court did not consider the effect of Dennis misconduct beyond the effect on breath tests.

Nevertheless, the *Cassidy* Special Master found as fact that it was:

> *critical to the proper operation of the Alcotest instrument that the simulator-solution temperatures be within the correct range when performing the CALIBRATE function, running control and linearity tests, and performing a solution change… [and]*
>
> *As a result of the out-of-range temperature, the alcohol concentration in the vapor used to calibrate the Alcotest would be incorrect and would "teach" the Alcotest instrument an incorrect standard by which to report alcohol concentration in vapor introduced into the device.*

Id. at 608. Special Master Lisa ended his report with the final words of his Conclusions of Law, that the failure to use a NIST traceable thermometer makes the Alcotest Influence Reports inadmissible:

> *Skipping the NIST thermometer step removes from the process a substantial and essential safeguard, the magnitude of which reduces the reliability of the device to a level that is less than sufficiently scientifically reliable to allow its reports to be admitted in evidence.*
>
> *Respectfully submitted,*
>
> */s/*
>
> *Joseph F. Lisa, P.J.A.D. (retired and temporarily assigned on recall)*
>
> *Dated: May 4, 2018*

Id. at 623. The Court held: "b*ecause [the Special Master's] findings are supported by substantial credible evidence in the record, we adopt them." Id.* at 497.

Although the State wants to treat *Cassidy* as somehow dispositive of the issue before the *Zingis* Special Master, the *Cassidy* Court did not have before it an enhanced sentence, nor did the Court address the implications of its ruling for an enhanced sentence. (We note that the NJSBA was also *amicus* in *Cassidy* and had one paragraph in its brief suggesting that the Court might consider *dicta* addressing this as an issue to come. However, the Court did not address the issue at oral argument, its opinion, or its order.) After the holding that Defendant Cassidy's breath tests were inadmissible, the Court:

> *ordered the State to notify all affected defendants of our decision that breath test results produced by Alcotest machines not calibrated using a NIST-traceable thermometer are inadmissible, so that they may take appropriate action*.

Id. at 498. In our view, this was a courtesy notice that the Court felt was required in the interest of justice. But, as will been seen from our discussion of this in more detail, *infra,* such notice was flawed in execution and could not, in any event, substitute for the State's legal obligations to a specific defendant and the court when seeking an enhanced sentence.

The case *sub judice, Zingis,* is the first time that the Supreme Court is addressing the issue of the obligations of the State when it seeks an enhanced DWI sentence on a case where Dennis calibrated a subject test involved in the prior conviction. The court below held that it had to "*vacate defendant's sentence*

because the State did not produce proof beyond a reasonable doubt that his 2012 DWI conviction was not tainted by Dennis's misconduct." (Emphasis added) *State v. Zingis*, 471 N.J. Super. *590, 603* (App. Div. 2022). That court also reiterated that *Cassidy "held that the false certifications [of Dennis] rendered the results of breath sample tests administered on Alcotest instruments calibrated by Dennis inadmissible.*" *Id.* at 594, Dennis's failure to use a NIST traceable thermometer not only made the AIR scientifically unreliable, but it made any AIR based upon his false swearing procedurally unreliable for admission. *Cassidy,* by virtue of its holding pertaining to all Dennis cases, found all Dennis calibration certifications presumptively falsely sworn.

Every signed Dennis calibration record states:

> *…consistent with the Calibration Check Procedure for Alcotest 7710 as established by the Chief Forensic Scientist of the Division of State Police, I performed calibration check on the approved instrument identified on this certificate…I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.*

(Emphasis added.) *See* Dennis calibrations certificates in Exhibit DB-28. And the facts compromising those calibrations don't end with the presumptive false swearing. A grand jury found probable cause that Dennis falsified records, *Cassidy*, 235 N.J. at 515. Dennis admitted to NJSP Lt. Thomas Snyder that he

would commit perjury if asked on the stand about using the proper procedure, 2T8-2. And Dennis was convicted of official misconduct involving his dishonesty. Certainly, any defendant would have ample grounds to move to exclude any AIR associated with a Dennis calibration, regardless of whether it has a final reading, or not. Even if Dennis could be called as a witness, he would still be so particularly compromised on the very subject of the testimony that such a possibility is nil in reality.

An Alcotest, as the Breathalyzer before it, must be proven to have been in "good working order" to be reliable. *Chun*, 194 *N.J.* at 548. In order to admit an AIR, *Chun* requires several foundational documents, including the calibration certificate and coordinators credentials. This was based upon longer standing DWI laws in New Jersey. Tracing the requirement that a breath testing device must be in good working order, *Cassidy* (2018) quoted this passage from *Chun* (2008) quoting *Romano v Kimmelman*, 96 N.J. 66 (1984):

> *Our analysis of the general scientific reliability of the Alcotest is grounded, impart, on our expectation that there will be proof that the particular device that has generated an AIR being offered into evidence was in good working order and that the operator of the device was appropriately qualified to administer the test. This requirement that the test results be supported by foundational proofs for admissibility has been part of our jurisprudence since we decided Romano. There we demanded that, as a precondition for admissibility of the results of a breathalyzer, the State was required to establish that: (1) the device was in working order and had been inspected*

> *according to procedure; (2) the operator was certified; and (3) the test was administered according to official procedure.*

Chun, 194 *N.J.* at 548, citing 96 *N.J.* at 81. (Emphasis added.) *See also* DB-35.

Therefore, *Chun* ordered the following, in order to admit an Alcotest AIR:

> *The following* foundational *documents shall be offered into evidence to demonstrate the proper working order of the device:*
>
> *(1) the most recent Calibration Report prior to a defendant's test, including control tests, linearity tests, and the credentials of the coordinator who performed the calibration;*
>
> *(2) the most recent New Standard Solution Report prior to a defendant's test; and*
>
> *(3) the Certificate of Analysis of the 0.10 Simulator Solution used in a defendant's control tests.*

Id. at 154. However, *Chun* only allows these hearsay documents into evidence under the exception of "*business records that are ordinarily reliable.*" *Id.* at 142. In the case of Dennis documents, *Cassidy* has held that they were unreliable and, therefore, they cannot be admitted as "ordinarily reliable." This is in addition to the elephant in the room, that the certifications are presumptively falsely sworn. *Cassidy*, 235 N.J. at 594.

Dennis's misconduct made every one of his calibration certificates presumptively inadmissible to support an AIR. And since a Dennis associated AIR cannot be admitted without the supporting calibration docs, it follows that no

Dennis associated AIR can be admitted regardless of the reason the AIR is sought to be admitted. And while both *Chun* and *Cassidy* deal with the breath results at issue in those cases, there are many other reasons that an AIR might be sought to be placed into evidence by a prosecutor. Admissions of AIRs are routinely sought on a DWI charge, accompanied by a refusal charge, to show the facts stated thereon such as blowing, volume, control tests, or for many other reasons including that the subject was taken to multiple locations, and the State is supposed to put all the AIRs from the arrest into evidence. 1T239-3/1T240-6, 3T118-1, 3T183-3, 3T143-11, 10T72-16/23.

In short, no AIR associated with a Dennis calibration can meet *Chun's* foundational requirement for its admission, regardless of whether there are final readings or not. Such an AIR is inadmissible hearsay.

II. SINCE EVERY ALCOTEST "SUBJECT TEST RECORD", AND ITS PRINTED "AIR," HAS AT LEAST ONE CONTROL TEST (A SIMULATED HUMAN BREATH TEST) WHICH REQUIRES A NIST TRACEABLE THERMOMETER IN CALIBRATION PER *CASSIDY*, AND SINCE *CASSIDY* PRESUMES THAT SUCH CALIBRATIONS WERE NOT DONE BY DENNIS, EVERY DENNIS ASSOCIATED AIR IS SCIENTIFICALLY UNRELIABLE AND, THEREFORE, INADMISSIBLE UNDER *CASSIDY*

In addition to the conclusion that all AIRs associated with a Dennis calibration are inadmissible hearsay since Dennis's presumptively false calibration certification could not be admitted as the foundation required by *Chun*, discussed

supra, all of Dennis associated AIRs are also further inadmissible on substantive grounds adduced at this *Zingis* fact finding hearing in light of the findings in *Cassidy.*

Every subject test record has an internal control test, and the results will be printed on the AIR. 9T124-4. 9T124-7. An Alcotest must be in "good working order" to be reliable. *Chun,* 194 N.J. at 548, 9T122-9/17. To be in "good working order," an Alcotest must pass the control tests. 10T74-21/10T75-1. For any control test to be reliable, the Alcotest has to have been calibrated with a NIST traceable thermometer, per *Cassidy. Cassidy*, 235 N.J. at 497, 623, 4T127:12/128-1, 8T22, 10T36-24/38-5. Therefore, every Dennis associated AIR will be unreliable in stating whether that subject test either passed or failed the control tests. Control tests are simulated human breath tests, and, just as with actual breath test results, their results will be unreliable without proper temperature calibration. 4T127:12/128-1, 8T225-11, 10T59-1.

Once the data entry process with a subject is complete, the operator hits the "N" prompt, and the machine automatically begins a control test. 9T124-4. Then, whatever else happens, an AIR will be printed with the results of the control test(s), 9T124-7. Every one of the 27,833 rows in the initial spreadsheet (S-90) therefore had at least one internal control test and maybe two. 8T14-4/13.

In order to "simulate" human breath, as a "control check" on the device, the Alcotest samples the head space gas from a CU34 simulator attached to it, and then takes EC (electrochemical) and IR (infrared) readings of that sample to verify that the gas is within a +/- .005 tolerance of a .10 blood alcohol content (BAC). 8T14/4-16. The "CU34" or "calibrating unit" is a "wet bath simulator, meaning that it uses liquid, known as simulator solution, rather than dry gas. The simulator solution is water-based and has a "known concentration of ethanol." *Chun,* 194 *N.J.* at 523. (*See also* Exhibit DB-32.) As witness John Dell'Aquilo explained:

> *Prior to and subsequent to each Alco-Test [Alcotest] operation or breath test, the instrument receives a sample of the vapor -- what the CU34 does is it takes an ethanol alcohol solution which rests in the bottom of the jar. It heats it to a specific temperature, which in the case of these CU34, 34 degrees centigrade, and that creates a vapor, which stays in the head space, which is the upper part of the glass. <u>That vapor is supposed to stimulate a .10 human breath, or what a .10 human breath would look like</u>.*

(Emphasis added.) 8T14-4/13. It must be heated to 34 +/- .2 degrees Celsius to approximate human breath. 8T15-25.

Therefore, in order for any control test to be reliable, the Alcotest has to have been calibrated by a NIST traceable thermometer, as held in *Cassidy.* *Cassidy,* 235 N.J. at 623, 4T127:12/128-1, 8T22, 10T36-24/38-5.

Cassidy held that the failure to properly calibrate temperature of 34 degrees Celsius during the six-month calibration process rendered the later breath tests unreliable, and therefore "*its reports*" inadmissible. *Id.* at 623. All the witnesses in these *Zingis* hearings, who were asked, agreed that based upon *Cassidy*, Dennis's failure to use a NIST traceable thermometer would make the control tests, in every subject test, unreliable as well. DAG Robyn Mitchell testified:

> *A….Now, if the temperature wasn't properly calibrated, that could throw the control test off, as well as the human test; correct?*
>
> *A I'm sorry, repeat that question.*
>
> *Q Well, in other words, if we start with the proposition that the control test is basically the machine simulating a human breath, taking you know a whiff of the simulator to see if it's running properly, temperature is very important to the control test as well as the latent [later] human test; correct?*
>
> *A Yes because if it's -- well, if it's not hitting the right temperature, then it's not going to give the correct vapor, so it's not going to get the correct alcohol reading.*

4T127-13/128-1, (See also Exhibit DB-33.) John Dell'Aquilo, who was the State's second chair in *State v. Chun* and remained in the DCJ's Prosecutors' Supervisory section during the first four years of the Alcotest roll out, teaching municipal

prosecutors, agreed that the control test simulated human breath and that it would be affected by temperature similarly to DAG Mitchell. 8T22. And so did Sgt. Kevin Alcott, the NJSP's Alcotest project manager:

> *Q. Now, the simulator is a very important item in terms of making sure the device is running properly for any given subject. Correct?*
>
> *A. Yes, it performs the control test*

9T114-9

> *Q. ...[T]he problem with what Marc Dennis did was that in his six-month calibration of the machine, he, we are not certain, what actually the machine was told is a .10. Is that correct?*
>
> *A. That's my understanding.*
>
> *Q. Okay. And it is at that six-month period that the machine sort of does it's learning. Right? It doesn't know what a .10 [is] until the calibration procedure says, when you see something like this solution being at this degree, that's a .10. Correct?*
>
> *A. Yes. During that first step in the calibration. There's multiple steps. The calibration function itself teaches the instrument what a .10 is.*
>
> *Q. And if that's off, then the machine is not going to be operating according to the way Drager sets it up to operate. Is that correct?*
>
> *1A. Can you repeat the question?*
>
> *Q. Yes. I can rephrase it. If the machine wasn't (indiscernible) [taught] correctly, to use your words, by Marc Dennis and [in] his six month calibration, what a .10 is, the machine will not be reliable as to finding what a .10 is. Is that correct?*
>
> *A That's potentially correct, if it's not the right temperature when it's calibrated.*

Q Well that's what the assumption we had [have] operated on since Marc Dennis. Right?

A Yes, I believe so, that's what came out of Cassidy.

9T115-7/9T116-9.

In short, the transcripts of these *Zingis* hearings are replete with support for the simple fact that since control tests are simulated breath tests, their reliability is affected negatively just as the as the breath tests in *Cassidy*. 4T127:12/128-1, 8T225-11, 10T59-1. So, every Dennis associated AIR is unreliable in stating that it either passed or failed the control tests, and a court cannot rely on an assertion that the Alcotest was in good working order. Therefore, since in every one of the 27,833 subject tests in the State's initial spreadsheet (S-90), the associated AIR was unreliable under the findings in *Cassidy* by the extension made clear in this hearings, 4T127:12/128-1, 9T29-10, 8T225-11, 10T59-1, they would be inadmissible on this grounds that the AIR itself is unreliable on its face. This is in addition to the grounds, discussed *supra*, that the AIR is inadmissible because the required foundational calibration certificate was inadmissible.

III. THE STATE IS REQUIRED TO DISCLOSE DENNIS MISCONDUCT IN ANY PENDING CASE WHERE THE STATE SEEKS TO ENHANCE A SENTENCE WITH A PRIOR CONVICTION

A) Prosecutors And Courts Have A Special Obligation To Avoid The Possibility That Evidence Tainted By Police Misconduct Is Admitted.

In *State v. Gookins,* 135 N.J. 42, where the arresting Officer Kane falsified breathalyzer results in drunk driving cases, the Court found the conduct sufficiently egregious to vacate convictions in other unrelated cases where the defendants plead guilty to drunk driving and Kane operated their breathalyzers. The Court did not dismiss their cases but, instead, ordered new trials *"requiring the State to prove defendants guilt with evidence that is free of the taint of Officer Kane's pattern of misconduct." Id.* at 51. The Court further held at such new trials that defendants could use Kane's criminal conviction and offer evidence of his misconduct. *Id.* at 51. The Court based its decision on this "fundamental premise":

> *Because public confidence in the criminal-justice system depends on the integrity of the courts, the prosecutors, and the police, the system can never disregard misconduct by such actors in the fulfillment of their public duties. In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Court explained that corrective justice in such circumstances does not constitute "punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Id. at 87, 83 S.Ct. at 1197, 10 L.Ed.2d at 218.*

Prosecutors are ethically bound to do justice:

> *"The * * * [prosecuting] Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." [State v. Rose, 112 N.J. 454, 509, 548 A.2d 1058 (1988) (quoting Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321 (1935)).]*
>
> *Thus, a prosecutor cannot strike a foul blow against a defendant by offering tainted evidence. Courts are similarly obliged. "[C]ourts may not abide illegality committed by the guardians of the law." State v. Molnar, 81 N.J. 475, 484, 410 A.2d 37 (1980). To do otherwise "would erode public confidence in the impartiality and fairness of the judicial process." Id. at 485, 410 A.2d 37. A guiding principle in these appeals is that the judiciary is obliged to " 'preserve public confidence' in the administration of justice." State v. Dunne, 124 N.J. 303, 315, 590 A.2d 1144 (1991) (quoting In re Edward S., 118 N.J. 118, 148, 570 A.2d 917 (1990)).*

Id. at 48-49.

In *Cassidy*, 235 N.J. 482, where the Special Master determined that Marc Dennis falsified calibration records and failed to use the proper procedure necessary to make Alcotest readings reliable, the Court excluded all breath readings obtained on a machine that Dennis calibrated. The court also ordered the State to notify:

> *all affected defendants of our decision that breath test results produced by Alcotest machines not calibrated using a NIST-*

> *traceable thermometer are inadmissible, so that they may take appropriate action*.

Id. at 498. As we have noted, *infra*, *Cassidy* was a case where the sole issue on appeal was the admissibility of the Alcotest breath test results. The notice ordered was a general courtesy notice required in the interest of justice. The Court did not have before it the issue in *Zingis* of a defendant in court on a current prosecution with the State seeking to enhance his sentence, nor did the notice address future actions by the State such as using Dennis tainted cases for an enhanced sentence.

B) <u>*Cassidy* Did Not Concern, Nor Address, The State's Burden When Seeking To Enhance A DWI Sentence With A Prior Conviction Which Might Be Tainted By Dennis's Misconduct.</u>

There are huge differences between the *Cassidy*-ordered courtesy notice sent by regular mail, without any requirement of actual notice, and the rights of a defendant before a court on an active quasi-criminal matter. In fact, in that regard, *Zingis* is more akin to *Gookins* where the Court spoke to the obligation of the prosecutor and the court on a retrial where evidence may be tainted:

> *… a prosecutor cannot strike a foul blow against a defendant by offering tainted evidence. Courts are similarly obliged. "[C]ourts may not abide illegality committed by the guardians of the law." State v. Molnar, 81 N.J. 475, 484, 410 A.2d 37 (1980).*

Gookins, 135 N.J. at 49.

Zingis was a current defendant, not yet at judgment, not a petitioner seeking Post Conviction Relief (PCR), and it was clearly the State's burden to prove the facts necessary to enhance Zingis's sentence. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000) the U.S. Supreme Court held that any fact that increases the penalty must be proved beyond a reasonable doubt, unless that fact is merely the existence of a prior conviction, and then the burden on the State would be by a preponderance of evidence. In *Zingis*, the court below took notice that the *"Defendant's [prior] 2012 conviction happened during the time Dennis was filing false certifications*." 471 N.J. Super. at 597, but that the State did not provide any admissible evidence to prove that Zingis' 2012 prior conviction was not tainted by Dennis' misconduct, an additional fact, beyond a reasonable doubt.

Since the issue in *Zingis* was not addressed by the Court in *Cassidy*, the *Zingis* court below looked to what the *Cassidy* Special Master, Hon. Joseph F. Lisa, P.J.A.D. (retired and t/a on recall), ordered during the pendency of his proceedings. While recognizing that order was no longer in effect, the *Zingis* court observed that Judge Lisa's method would indeed satisfy the State's burden by *"definitive proof that a prior DWI conviction was not affected by Dennis's misconduct.*" *Zingis*, 471 N.J. Super. at 608. Judge Lisa's order stated:

> *[i]n any proceeding in any court involving a prosecution for an offense in which a prior DWI conviction constitutes a predicate offense to enhance the ... applicable punishment in [a] subsequent prosecution for another charge ... it shall be the*

> *affirmative obligation of the prosecutor in that proceeding to determine whether or not the defendant provided a breath sample on an Alcotest device that had been calibrated by ... Marc Dennis in that prior DWI case, and to produce documentary evidence of that determination to the defendant and the court[;]*

(Emphasis added.) *Id.* at 608. The *Zingis* Court did not require this method, but stated:

> *While this approach may be less convenient and efficient for the State than reliance on a list of defendants provided Cassidy notice, the definite nature of which has not been proven, the burden of Dennis's malfeasance as a law enforcement officer falls on the State. Where the State seeks to impose an enhanced sentence, it cannot escape on the grounds of convenience and expediency its obligation to prove that the prior conviction on which that enhanced sentence is predicated was not tainted by the previously established misconduct of a police officer.*

(Emphasis added.) *Id.* at 608.

C. Pursuant To *R.* 7:7-7, The State Has The Obligation In A Pending DWI To Disclose Discovery To Defendants, Which Includes Whether Dennis Calibrated Any Subject Test On Defendant in a Prior Case The State Intends To Rely Upon To Seek An Enhanced Sentence, As Well As Dennis's Criminal Record and Other Materials Affecting His Credibility.

Unlike in *Cassidy*, where no enhanced sentence was at issue, the State had a duty in *Zingis* to provide discovery in the DWI prosecution, pursuant to *R.* 7:7-7, as to any prior conviction that could be used to enhance sentence. Such enhancement is an additional element that the state would have to prove in the

present case. *Apprendi,* 530 U.S. 466. *R.* 7-7(b) (7) and (8) required the State to provide:

> *(7) names, addresses, and birthdates of any persons whom the prosecuting attorney knows to have relevant evidence or information, including a designation by the prosecuting attorney as to which of those persons the prosecuting attorney may call as witnesses;*
>
> *(8) record of statements, signed or unsigned, by the persons described by subsection (7) of this rule or by co-defendants within the possession, custody or control of the prosecuting attorney, and any relevant record of prior conviction of those persons;*

Under both *R.* 7-7(b)(7) and (8), if Marc Dennis calibrated any subject test on defendant in a prior case that could be used to enhance defendant's sentence, the prosecutor was required to disclose whether a Dennis calibration was or was not involved in the prior arrest, along with Dennis's conviction and misconduct, if it was. Both whether he was involved or was not involved are relevant information defendants need to defend their case with consequences of magnitude on the line in an enhanced DWI sentence.

"New Jersey has a tradition of what is often described as an 'open file' model of pretrial criminal discovery," State v Arteaga, ___ NJ. Super. ___ (App. Div. 2023) WL 3859579 (2023). And *R.* 7:7-7 is almost identical to *R.* 3:13-3. *State v Stein*, 225 N.J. 582 (2016). Discovery in a municipal court case, like in a criminal case, *'is appropriate if it will lead to relevant' information*." *State v.*

Hernandez, 225 N.J. 451, 453 (2016). "*Relevancy is the hallmark of admissibility of evidence.*" *State v. Darby*, 174 N.J. 509, 519 (2002). "*Evidence is relevant if it "ha[s] a tendency in reason to prove* or disprove any fact of consequence to the determination of the action*. N.J.R.E. 401.9*," (Emphasis added). *Hernandez,* 225 N.J. at 596. *"[T]he discovery rule requires that the State provide defendant with " 'material evidence affecting [the] credibility' of a State's witness whose testimony may be determinative of guilt or innocence." Id.* at 462, *(*quoting *State v. Carter, 69* N.J. *420, 433 (1976))." Hernandez,* 225 N.J. at 596.

The State of New Jersey is the prosecutorial party; it cannot atomize itself into hundreds of totally independent municipal prosecutors for the purposes of discovery. The New Jersey Supreme Court stated in *State v Murphy* that:

> *… the fact that the discovery rule speaks of orders upon the prosecutor does not mean that discovery may be defeated because the prosecutor does not possess the document or the authority to order its production. It may well be that the statement of one later accused will have been taken by some other of the many officers and agencies of the State concerned with the enforcement or the administration of the laws. So, for example, it may have been taken by a local police officer or a member of the Attorney General's staff; or in a proceeding before a professional board or some other agency in the executive department. The right of an accused to pretrial inspection can hardly depend upon the identity of the agency of the State which obtained the statement relating to the crime charged in the indictment. In short, although the State may, as it necessarily must, diffuse its total power among many offices and agencies, yet when the State brings its authority to bear upon one accused of crime, all of its agents must respond to satisfy the State's obligation to the accused.*

State v. Murphy, 36 N.J. 172, 184 (1961). In *State v Lewis*, 137 N.J. Super. 167 (Law Div. 1975) the court put it this way:

> *In a criminal proceeding the State of New Jersey is the prosecutorial party; it cannot atomize itself into hundreds of totally independent agencies. Responsibility in such matters must be interrelated. Hence, regardless of which agency within the State has been negligent -- be it the prosecutor, the surrogate, or the court -- the State, not defendant, must suffer the consequences.*

Id. at 172.

It is important that the defendant be provided with objective evidence that Dennis did or did not calibrate any subject test during the prior convictions arrest process. "*Evidence is relevant if it "ha[s] a tendency in reason to prove or disprove any fact of consequence to the determination of the action. N.J.R.E. 401.9*," (Emphasis added) 225 N.J. at 596. The facts cannot be based merely on a prosecutor's reference to secret lists or unilateral policies. We agree with the court below that the State's burden can only be satisfied by *"definitive proof that a prior DWI conviction was not affected by Dennis's misconduct.*" (Emphasis added) *Zingis*, 471 *N.J. Super.* at 608. The prior conviction discovery cannot be satisfied by mere reference to the *Cassidy* notice, as we discuss next.

D) <u>Through These *Zingis* Special Master Hearings, We Now Know that (1) The State's Mailing List Did Not Include "*Every DWI Conviction Possibly Tainted By Dennis's Misconduct*", (2) That Notice Was Not Received By Everyone On That List, And (3) That The State Did Not Create A Record Of Service Sufficient To Prove Actual Receipt Of Any Notice Beyond A Reasonable Doubt</u>.

The *<u>Zingis</u>* court below, although finding that the State did not meet its burden and suggesting Judge Lisa's definitive way of proof, still left the door ajar as to a possible, three-part way for the State to meet their burden:

> *There is, therefore, reasonable doubt with respect to whether defendant's 2012 DWI conviction was based on false calibration records executed by Dennis. We do not foreclose the possibility that a more robust record in a future case may establish beyond a reasonable doubt that the State had identified every DWI conviction possibly tainted by Dennis's misconduct, provided notice to the defendant in each of those cases, and compiled a record of each such notification. If so, such a list might well constitute evidence that a prior DWI conviction was not tainted by Dennis and can be used as a predicate to enhance a sentence for a subsequent DWI conviction. That record was not compiled here.*

Zingis, 471 N.J. Super. at 608. That record has now been made in these *Zingis* hearings. However, it is clear from that record that none of the requirements of the speculated possible, three-part alternative was met here.

1. The State's Mailing List Far From Included "Every DWI Conviction Possibly Tainted By Dennis's Misconduct".

DAG Mitchell deleted 7,166 subject tests from the spreadsheet of 27,833 that she had received from the NJSP. 4T182-7, 4T130:18-24, 5T248-23. They were all the subject test records that didn't have a final breath test result. 4T182-7. However, the testimony in these hearings has shown that every subject test had an accompanying printed AIR. 1T225-5-11. Regardless of result, that AIR would have been presumed admissible on the DWI and/or Refusal charges at the time. 10T72-16/23. Since Dennis's calibration cannot be admitted under *Chun* as reliable routine business records, they will not be admissible. And since AIR admission requires admission of its calibration certifications under *Chun*, no Dennis associated AIR is admissible whether for breath test result or other reason. (*See* NJSBA Conclusion point I, *supra*.) Additionally, the AIRs were not admissible since every Alcotest subject test record and its printed AIR has at least one control test (a simulated human breath test) in every Dennis associated AIR which is scientifically unreliable and inadmissible under the findings in *Cassidy*. (*See* NJSBA Conclusions point II, *supra.*) Therefore, every one of the subject tests in the 27,833 Exhibit S-90 (or more accurately as corrected to 27,426, 10T80-21,) should be disclosed as each one would be not admissible as part of the *res gestae* of the arrest process if it was known that Dennis calibrated it. Sgt. Alcott testified

"*all alcohol influence reports that are produced are supposed to be put into evidence*." 10T72-16/23.

In *State v Stein*, 225 N.J. 582 (2016), Peaquannock Township officers arrived at a DWI scene for a few minutes in Wayne Township. Then they were relieved when the Wayne officers arrived. The Wayne officers took the defendant to the Wayne police station for an Alcotest. The test started but malfunctioned, then the Wayne officers took the defendant to a State Police Barracks and obtained final breath test readings there. The prosecutor did not disclose the names, any reports, or any video from the Peaquannock officers who initially responded, but did not perform any tests on the defendant. The Supreme Court held that the defendant had the right to discovery as to the Peaquannock officers and to the video if it still existed. The question of discovery is not just what the State would use as its evidence, but what the defendant might find out about the facts of his case. The argument that the State makes in these *Zingis* hearings that only the final AIR is relevant is similar to what the State argued in *Stein*, where the Peaquannock officers were on the scene only briefly and did not test the defendant either with field sobriety tests or the Alcotest. Everything that occurred during the defendant's DWI arrest and testing process may be relevant to a defense. Indeed, the AIRs that occurred closer in time to the stop may be more important to a defense. As we tried to bring out in these hearings, there were many deleted subject tests where the

defendant during the process of the same arrest, went to two three, even four machines and/or locations. Not only what occurred, but sometimes just the length of time from arrest to final testing can matter in the admissibility of the final alcotest reading. In *State v Tischio*, 107 N.J. 504. 522 (1987) the Court held that a breath test to be admissible must be *"administered within a reasonable time after the defendant is stopped.*" This is a routine and fundamental defense to DWI readings. To delete subject tests just because they did not produce results, although likely the arrest process continued, is to deny defendants the ability to see if Dennis's false calibrations caused long delays relevant to a *Tischio* defense. All Dennis associated subject tests must be discoverable. It doesn't matter if Dennis didn't do the final breath tests. All of the AIRs are supposed to go into evidence. 10T72-16/23. And since any Dennis calibration would be inadmissible, all AIRs are very relevant discovery to the defense. Therefore, all subject test records should have been part of the State's list of possibly affected Dennis cases, not just final reading ones.

In answer to the *Zingis* court below: The State's mailing list far from included "*every DWI conviction possibly tainted by Dennis's misconduct*".

2. Notice was also certainly not received by everyone on the State's list, let alone from the AOC's list.

The AOC took the State's list of 20, 667 and came up with a spreadsheet that had 18,250 rows where Prather felt comfortable about the data matching, in one tab, 3T80-2, and another 948 subject test rows that were questionable in a second tab, 3T:78-2. However, those numbers still left another 168 subject tests deleted but not accounted for in Prather's certification, and he testified they also must not have matched either. 3T81:14-82-24. The total, even if one assumes the 948 questionable ones were sent, shows at least 1,468 additional subject tests were eliminated by Prather at the AOC. As to the mailing for the Cassidy ordered notices, in **Monmouth County**, the number of letters sent was only 6,218. This was less than the original voluntary mailing due to the exclusion of undeliverable addresses on the 2017 list. 6T76-6/78-1, 6T80-20/81-3. About 1,000 individuals didn't even get either letter. 6T33-23/25, 6T36-18/21. Monmouth didn't keep track of undeliverables, although they estimated they were "in the hundreds" this time. They stored them for a while and then discarded them. 6T43-11/15, 6T54-12/15. In **Somerset County**, the Court ordered mailing had 948 letters. 6T107-17/24. Of those, 182 were undeliverable. 6T109-3/9. 6T109-13/16. There were no additional efforts made to contact these individuals. 6T112-14/113-8. In **Union County**, they used the same spreadsheet as before to send the 4,464 letters out. 6T143-11/23.

There were 860 letters returned after this mailing, an unknown amount containing forwarding addresses were resent. 6T145-11/25. In **Middlesex County**, they sent 4,815 letters sent in the Court ordered mailing, 7T41-12, 43-15/16. They were not even aware of the second table of the spreadsheet containing partial matches. 7T47-8/16. There were 1,089 or 1,090 undeliverables with no forwarding address. 7T44-13/14. In **Ocean County**, 326 letters were sent out after *Cassidy*. 7T108-25/109-2, 109-17/20. There were 69 letters that were undeliverable with no forwarding address. 7T109-21/22. 7T109-25/110-1/4.

Excluding Monmouth (which didn't keep track of undeliverables) the overall undeliverable rate was about 21% in this mailing. So, to answer the rhetorical question of the *Zingis* Court, notice was certainly not from received by everyone on that the State's list, let alone from the AOC's list.

3. The State Did Not Create A Record Of Service Sufficient To Prove Actual Receipt Of Any Notice Beyond A Reasonable Doubt.

All the mailings were sent regular mail. 6T43-3, 6T109-9, 6T144-21, 7T22-1, 7T104-19, 7T109-20. There were no return receipts. The undeliverable rates were about 21% in the *Cassidy* ordered mailing. The State didn't even create a new list in 2018 but went back to the old list from the 2017 mailings. The returns were generally just stored or trashed. There was little or no follow up on the

undeliverables. Clearly, the State was not anticipating these letters as legal service sufficient to prove their receipt in court beyond a reasonable doubt.

In short, the way that the State treated these mailings confirms that they were courtesy notices, and the State obviously had no thought they would be used in court on an enhanced sentence, which, after all, was never mentioned by the Court in its opinion or order. In fact, the order was to "all affected defendants …so that they may take appropriate action." (Emphasis added.) The order did not say anything about the State taking any action if defendants did nothing. And neither did the State's letter.

So no, the State did not create record of service sufficient to prove actual receipt of notice beyond a reasonable doubt.

IV. THE CONDITIONAL PARAMETERS THAT TRIGGER THE STATE'S OBLIGATION TO PROVIDE ADDITIONAL DISCOVERY AND DETERMINE THE BURDEN OF PROOF

A) Condition Precedent: The Relevant Data Set Is All 27,426 Subject Test Records, Complete And Unredacted, Subject To Protective Order If Deemed Necessary.

Providing the calibration records involved in the prior arrest leading to conviction would, at least, satisfy the question as to whether Dennis was involved , as long as all the subject records identified as associated with Dennis were

available. It would certainly not be enough, however, if the prosecutor took the view that only subject test records with final result mattered, as we have discussed, *supra*. That narrow view would not satisfy the prosecutor's broad discovery obligation when seeking to prove beyond a reasonable doubt whether Dennis possibly affected the prior conviction. To do that, Defendant must know if Dennis was involved in any subject test during the entire arrest process. The State has a higher duty when it knows that it is possible that it is offering tainted evidence, as discussed *supra*. The idea that all that matters is the final result would be like saying that once the State obtains defendant's confession, the State doesn't need to provide discovery of the three other attempts to get a confession by police that lead up to the final confession, all four events occurring on the night of arrest. Defendant is obviously entitled to know if Dennis was involved in any subject test during the arrest leading to conviction. Each AIR would be admissible in the trial on the prior conviction, regardless of result, but for Dennis. Therefore, we begin with the notion that <u>all subject tests that can be associated with a Dennis calibration</u> are relevant to the State's obligations both as to discovery and the burden of proof. Therefore, assuming the State's data provided in these hearings, there are 27,426 relevant subject test records associated with a Dennis calibration.

B) Time Frame: November 1, 2008, To April 1, 2016, Inclusive Of Both Dates

The State's data, as provided, shows that the first Dennis associated arrest was on November 15, 2008, and the last was on March 7, 2016. (S-90 as corrected by Alcott, 10T80-21, DB/DPD-29.) However, as the AOC found that these dates didn't always match exactly with the ATS and ACS, the NJSBA posits that a small cushion on either end would benefit justice if we were to use them as an important parameter. It seems reasonable to define Nov. 1, 2008, to April 1, 2016, as the period of time that there would be Dennis associated subject test records.

C) Arrest Locations: Monmouth, Middlesex, Union, Ocean, and Somerset Counties

The State's data does not tell us that only five counties were locations of subject tests affected by Dennis calibrations, as many records end without a final result record. Therefore, those subject tests likely had a final result, if any, not in a Dennis calibration location. However, our practitioners' experience does tell us that wherever the final test occurred, the location of arrest is where the DWI or refusal is almost always prosecuted. Therefore, as long as all 27,426 subject test records are available to defense, as well as to the State, both will have enough information to connect a subject test associated with a Dennis calibration, wherever it occurred, as to a particular summons, case number, date of arrest, and

other identifying information so that the connection can be made to a final test not associated with Dennis, if necessary. Without the full 27,426 subject test records however, that connection be impossible and this parameter unreasonable.

With the condition precedent that the 27,426 full subject test records will be the relevant and necessary data set, then the counties of Monmouth, Middlesex, Union, Ocean, and Somerset can be used as another parameter.

Without that data set, however, and instead to use a list of subject tests with final results, the Court would be allowing the State to hide possibly exculpatory information that Dennis calibrated a subject test taken on the night of the arrest for which defendant was convicted. Let us not forget that Dennis was convicted of an offense involving official dishonesty and is, via *Cassidy*, presumed to have falsified the very certifications not to be disclosed. The failure to disclose his involvement in the very arrest process that lead to defendant's prior conviction, and still allow the prior conviction, would be indeed a grave injustice.

D) The Parameters Used To Define The State's Burdens

1. Outside Of Either Time Frame Or Location Parameter, Preponderance Of Evidence Standard

The purpose of the parameters is to distinguish between *Apprendi* burdens. Recall that proving the mere existence of a prior conviction need only be proved by a preponderance of evidence, while when a prosecutor has to prove an

additional fact, *Apprendi* requires that proof beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

As to a prior conviction where the arrest was not made between Nov. 1, 2008, and April 1, 2016, inclusive, or not in a location within the counties of Monmouth, Middlesex, Union, Ocean, and Somerset, then the burden of proof could be established by the Court as a preponderance of evidence. And that burden can be satisfied, as routinely done where the mere existence of the prior is at issue, by a certified abstract previously disclosed to defense in discovery.

2. Inside Both Of The Parameters, The Beyond A Reasonable Doubt Standard Must Govern.

However (1) within those dates and (2) those arresting locations in those five counties, the State has the discovery obligation to provide disclosure of whether Dennis was or was not associated with any subject test during the arrest process leading to the prior conviction, and the State is required to prove that additional fact beyond a reasonable doubt with more than the mere certified abstract per *Apprendi*.

V. THE MOST EFFICIENT WAY FOR THE STATE TO ROUTINELY SATISFY ITS DISCOVERY OBLIGATION AND BURDEN OF PROOF IS TO PLACE ONLINE THE FULL AND UNREDACTED 27,426 SUBJECT RECORDS (WITH PROTECTIVE ORDER) ALONG WITH A COMPANION REPOSITORY OF "PDF" COPIES OF SIGNED CALIBRATION RECORDS OR, IF THEY DO NOT EXIST, THE ALCOTEST DATABASE RECORDS FOR MISSING RECORDS

A) Full Discovery As To The Prior Conviction Would Be The Definitive, Solution But The NJSBA And OPD Have Jointly Suggested An Alternate As An Exhibit That Might Solve The Problem Simply And Effectively

It would be satisfactory if the State provides full discovery as to any prior that it wishes to submit as an enhancement to a DWI sentence. A ruling by the Court requiring that will end the inquiry satisfactorily. However, as we are mindful that it is not always easy to do so for municipal prosecutors, the NJSBA has been diligent in trying to find ways that defendants' rights may be satisfied while, if possible, not unnecessarily burdening the municipal prosecutors. Jointly with the Office of the Public Defender, we have provided Exhibits DB/DPD-29 (Zingis Index) and DB/DPD-28 (Dennis Repository) which serve as examples of how we believe there is a very simple way, if ordered by the court to be placed online, to: (1) satisfy a defendant's right to discovery of Dennis's malfeasance, (2) provide proof for a court if a prior conviction is possibly affected by a Dennis calibration, (3) satisfy the State's burden that a prior conviction is not possibly affected, (4)

with negligible additional work for prosecutors and defense counsel, (5) and with no delay in court proceedings, while still assuring a court that it is not sentencing on a possibly affected prior conviction.

B) The "Zingis Index"

1. Purpose Of The Index, And Possible Expansion

The Zingis Index was created to help identify defendants who were tested on an Alcotest calibrated by Marc Dennis, and assist the State in satisfying the State's obligation to notify defendants who might be affected by Dennis's malfeasance. It was created with the 20 fields supplied in *Zingis* discovery. However, if expanded to the full records available it will also serve to disclose the additional information that would be on an AIR, helping a defendant to decide quickly if a possibly affected prior is worth filing a PCR. It will further obviate discovery problems when prior AIRs have been destroyed.

2. Subject Record Rows Included

The index was created using the State's data, provided in *Zingis*. It began as the S-90 spreadsheet of 27,833 subject tests. Then the 436, identified by Sgt. Alcott as errors not actually involving machines calibrated by Dennis, were deleted. S-128. Next 26, corrected through cross-exam on the record by OPD and NJSBA, were added. DB-23. Finally, three more were added as found by OPD. 9T56-15.

The 29 additional subject tests are identified for the purpose of these *Zingis* proceedings in the field "Row in the 27,833" without a number but a description, and the rows are in yellow for the 26 and green for the three more found. This field and the row colors would not be included in any final version of the index but is included here for the convenience of the parties.

The index is sorted by (a) arrest date, then (b) DL number, then (c) last name, then (d) first name, then (e) summons number, and then (f) location of test.

3. Identifying Individual Subjects, Cross Reference

Likely the best way to search the index will be by the summons number, but should that be problematic, it can be searched by name, driver's license, date of arrest, etc. This means that there are many ways to cross check and it is extremely unlikely that any subject will ever remain unidentified.

4. Repository As Companion To Index

Once the subject arrest is identified and the accompanying calibration date ascertained, then the prosecutor and defense attorney will be able to locate the best evidence of that calibration in the "Dennis Calibration Repository." That, together with the index, will provide tangible proof if Dennis was involved.

5. Post Conviction Relief (PCR)

After the question is ascertained whether Dennis was involved in

the prior arrest, then the rest would be up to the parties and the court. The defense may or may not choose to file a PCR. It is not up to the Special Master or the Supreme Court to review the details of all 27,426 cases. The PCRs will be evaluated as needed through the adversarial system, and case law appropriate to any legal issue will develop naturally. Zingis itself is a good example of that process. There was no enhanced sentencing in *Cassidy* at issue. *Zingis* was a natural follow up case on the further implications of *Cassidy*. It is not necessary to today decide any of the legal implications of Dennis being involved in any case, except that (1) *Cassidy* decided that no breath readings on a Dennis machine were admissible, and (2) any other issues as to his effect on cases yet to be heard will be developed on trial records yet to come.

6. The Process Expected

However, the process of searching using the Index and Repository will be done online and can be completed in minutes by reference to (a) the Motor Vehicle Services drivers' abstract which is already required to be produced, and then (b) the Courts Municipal Court Case Search web portal (MCCS), (c) the online *Zingis* Index, and (d) the online Dennis Calibration Repository.

The process can be done at any time once the abstract is provided. It need not wait for sentence, but even then, a sentencing court can have assurance as to whether the defense has notice by simply directing the prosecutor to ascertain the

information before the sentence, which defense may also double check online. This will ensure judicial integrity in sentencing without burdening prosecutors any more than providing the routine discovery and abstract is now.

C) The Dennis Repository

The repository is also an example of what is needed. It can be refined if the concept is accepted, both as to content and its user interface. The repository itself is a collection of best evidence documents in printable PDF form that Dennis calibrated a particular machine on a particular date and in a particular location. The accompanying index will assist in locating which of the documents in the repository is relevant to a particular case.

The defendant's Motor Vehicle Abstract is provided, in discovery or in court, in all cases that a prior conviction is sought to be used to enhance a DWI sentence. The abstract contains the dates of all arrests that become convictions. (V is the arrest/violation date, O is the court date if DWI). The New Jersey Court Portal (portal.njcourts.gov/webe41/MPAWeb/) can be used with the abstract information for exact motor vehicle dispositions, including all summon numbers etc. With that information, the *Zingis* Index can be used to find if the defendant had any subject tests that were calibrated by Dennis. It can be searched in any field, for example by name, driver's license, arrest date, summons, and more. (Even an index without any personal information but leaving the summons number would

still account for almost all cases being found by just are summons numbers which are public info.) This will yield the broadest notice of whether Dennis was involved in the case.

Finally, once armed with a relevant calibration date, the Dennis Calibration Repository can be searched to find proof of the Dennis calibration. All 1,046 Dennis calibrations are in PDF form, printable and can be searched in any file system by name, serial number, location, or date. Of the 1,046, there are 41 which the State said were destroyed, and they are represented by PDF placeholders with the calibration information imported from the State's solution spreadsheet S-92.

CONCLUSION

For the reasons stated above, the *amicus curae* New Jersey State Bar Association submits that the Special Master should consider adopting the Findings of Fact and Conclusions of Law proposed herein.

Respectfully submitted,

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