



NEW JERSEY STATE BAR ASSOCIATION

August 15, 2023

Hon. Richard J. Geiger, J.A.D.
Superior Court of New Jersey, Appellate Division
The Cornerstone Building / 1201 New Road
Linwood, NJ 08221

Re: *State v. Colleen A. Cunningham*
A-38-22 September Term 2022 / Supreme Court Docket No. 087913

Dear Judge Geiger:

Pursuant to Your Honor’s August 3, 2023 letter and R. 2:6-2(b), please accept this letter brief on behalf of *amicus curiae* New Jersey State Bar Association (NJSBA). This submission addresses the defendant’s motion for a stay of further implementation of the Alcotest 9510 and Your Honor’s question about whether resolution of that motion is within the scope of the Special Master’s authority.

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PRELIMINARY STATEMENT

Since 2008, breath test results obtained from the Alcotest 7110 have been admitted as reliable evidence in DWI prosecutions so long as certain requirements are met pursuant to *State v. Chun*, 194 N.J. 54 (2008). In this action, the State now seeks to replace the Alcotest 7110 with a new breath testing instrument, the Alcotest 9510. That machine has been installed and is currently being used in police departments in Monmouth County, although the Supreme Court has stayed any prosecutions that seek to utilize those results as evidence pending a reliability determination. (*See* Supreme Court Order, May 1, 2023 (Order), at p. 4.)

The Special Master is now considering a motion to halt further use of the new machines until the conclusion of this matter and has asked in a letter to counsel dated August 3, 2023, “whether imposing the requested stay is within the scope of my assignment as Special Master.”

The NJSBA offers no argument about whether the Special Master has the ultimate authority to decide the motion. The NJSBA does, however, believe the Special Master has at a minimum the authority to hold a hearing to develop a factual record on which the ultimate decision can be made, and it urges the Special Master to do so.

LEGAL ARGUMENT

I. ALLOWING EXPANDED USE OF THE ALCOTEST 9510 WILL INCREASE THE NUMBER OF CASES SUBJECT TO THE SUPREME COURT’S PREVIOUSLY ISSUED STAY, LEADING TO GROWING BACKLOGS AND SPEEDY TRIAL CONCERNS.

In its May 1, 2023 Order, the Supreme Court (c) stayed “all DWI matters involving the use of Alcotest 9510 machines” “during the pendency of the remand proceedings and pending further order of this Court” (Order, p.4) and “DWI prosecutions and appeals based exclusively on the use of an Alcotest 9510 device (i.e., without other clinical or objective observational evidence)” (Order, p.4).

The result has been a growing backlog of unresolved cases involving breath test results from the Alcotest 9510 in Monmouth County, where the Alcotest 9510 machines are currently in use. More widespread use of this instrument will lead to an even greater backlogs, which will build over time. Despite direction to schedule proceedings on “an accelerated basis,” discovery and case preparation will take time. *State v. Chun* lasted 829 days from direct certification on December 14, 2005, to decision on March 17, 2008. *State v. Cassidy*, 235 N.J. 482 (2018), lasted 645 days from April 7, 2017, to November 13, 2018. *State v. Olenowski*, 236 N.J. 622 (2019), has lasted 1,362 days from November 18, 2019, to date.

The Constitution guarantees defendants a speedy trial. *Barker v. Wingo*, 407 U.S. 514 (1972); *State v. Cahill*, 213 N.J. 253 (2013). If the Alcotest 9510 is implemented in additional municipalities, speedy trial concerns will increase as time

goes on and will affect thousands of people. Cases could potentially be delayed more than a year while this matter is ongoing with discovery, motions, hearings, briefings and an ultimate decision.

II. REGARDLESS OF WHETHER THE SPECIAL MASTER DECIDES THE MOTION OR THE SUPREME COURT, A FACTUAL RECORD IS NEEDED ON WHICH TO BASE THE DECISION, AND THE SPECIAL MASTER HAS AUTHORITY TO ACT IN THAT REGARD.

The Supreme Court has defined the Special Master's authority "to develop a record, conduct hearings, and make findings and conclusions regarding the scientific reliability of the Alcotest 9510" (Order, p.2). Your Honor has asked "whether imposing the requested stay is within the scope of my assignment as Special Master." While the NJSBA takes no position on whether the Special Master can make the ultimate decision on the motion, the NJSBA urges that, at a minimum, Your Honor conduct a hearing on the issue to develop a record on which to base a decision. Such a hearing falls squarely the authority provided the Special Master "to develop a record, conduct hearings, and make findings and conclusions regarding the scientific reliability of the Alcotest 9510...."

Although such a hearing would not answer the ultimate question of the scientific reliability of Alcotest 9510 breath test results, it would provide the factual record needed to rule on the motion. Such a hearing could establish, among other things: (a) how many Alcotest 9510 instruments are currently in place, (b) where they are installed in Monmouth County, (c) what plans the State has for installing

the Alcotest 9510 beyond Monmouth County, (d) how many Alcotest 7110 instruments remain in service, (e) what need the State may have to replace Alcotest 7110 instruments, and (f) whether there is an emergent need to do so.

CONCLUSION

The decision to halt further implementation of the Alcotest 9510 will have serious implications in connection with the prosecution of DWI cases where the machine would be put to use. It will implicate the speedy trial rights of potentially thousands of people whose cases will likely be stayed for more than a year. Before an ultimate decision made, a factual record should be developed so the decision - maker has a clear understanding of the need for more increased use of the machine. The NJSBA urges the Special Master to develop that record.

NEW JERSEY STATE BAR ASSOCIATION

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