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STATE OF NEW JERSEY,

Plaintiff,

V.

COLLEEN A. CUNNINGHAM,

Defendant.

SUPREME COURT OF NEW JERSEY  
DOCKET NO. 087913

On Direct Certification from an Order of  
the Municipal Court

Criminal Action

Brief in Support of the New Jersey State Bar Association’s  
Motion for Leave to Appear *Amicus Curiae*

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PRELIMINARY STATEMENT / STATEMENT OF FACTS /  
PROCEDURAL HISTORY

This matter focuses on the reliability of test results from a new breath-testing device, the Alcotest 9510, for admission in driving while intoxicated (DWI) prosecutions to establish a defendant's guilt or innocence. The State sought direct certification from the Supreme Court in this municipal court matter. By Order dated May 1, 2023, the Court granted direct certification, appointed a Special Master and invited *amici* to seek participation. This application follows that Order.

With over 16,000 lawyers in its membership, including lawyers prosecuting and defending DWI matters in municipal courts every day, the New Jersey State Bar Association (NJSBA) is uniquely positioned to provide the Court with valuable insight and information in this matter. It has been an active participant in previous proceedings where breath test results were in issue and was designated by the Court to receive notice of any revisions to the Alcotest New Jersey Firmware. See *State v. Chun*, 194 N.J. 54 (2008).

The reliability of Alcotest breath test results to prosecute DWI cases and ensure defendants receive a fair hearing on DWI charges are of paramount public importance and the NJSBA can provide unique insight and assistance to the Court in resolving the issues at play.

For these reasons, the NJSBA seeks the Court's leave to fully participate in this matter as *amicus curiae*.

## LEGAL ARGUMENT

### I. THE NEW JERSEY STATE BAR ASSOCIATION’S APPLICATION FOR LEAVE TO APPEAR *AMICUS CURIAE* SATISFIES THE STANDARDS SET FORTH IN R. 1:13-9

The NJSBA seeks leave to appear in this matter *amicus curiae*. Rule 1:13-9 states, in pertinent part, as follows:

An application for leave to appear as *amicus curiae* in any court shall be made by motion in the cause stating with specificity the identity of the applicant, the issue intended to be addressed, the nature of the public interest therein and the nature of the applicant’s special interest, involvement or expertise in respect thereof. The court shall grant the motion if it is satisfied under all of the circumstances that the motion is timely, the applicant’s participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby.

As set forth below, the NJSBA asserts that its application for leave to appear *amicus curiae* satisfies these criteria.

#### A. The New Jersey State Bar Association is an organization of New Jersey legal professionals dedicated to promoting fairness in the administration of justice.

The NJSBA was founded in 1899 to, among other things, “aid in the administration of justice.” *See* Certification of Sharon A. Balsamo (Balsamo Certif.) at ¶3. The mission of the NJSBA is to “serve, protect, foster and promote the personal and professional interests of its members; to serve as the voice of New

Jersey attorneys with regard to the law, legal profession and legal system; to promote access to the justice system and fairness in its administration; to foster professionalism and pride in the practice of law; to provide educational opportunities to New Jersey attorneys so as to enhance the quality of legal services; and to provide education to the public with respect to the legal system and the legal profession.” Balsamo Certif. at ¶4.

To advance its mission, the NJSBA has played an active role in the development and enforcement of the Court Rules and Rules of Professional Conduct to ensure they serve the best interest of both the justice system and the public it serves. For example, NJSBA volunteers help staff district ethics committees and the NJSBA routinely offers comments to the Supreme Court on proposed new rules. Balsamo Certif. at ¶9.

The NJSBA also routinely provides comments on pending legislation and assists in drafting of statutory amendments to ensure fair and balanced laws are enacted to best serve the public and retain confidence in our legal systems. Balsamo Certif. at ¶7.

Further, the NJSBA has appeared before the Court on many occasions as *amicus curiae*, sometimes at the invitation of the Court, with respect to issues that affect the legal profession or the system of justice. Balsamo Certif. at ¶8.

- B. The New Jersey State Bar Association intends to address the scientific reliability of the Alcotest 9510.

If granted leave to appear *amicus curiae*, the NJSBA intends to address the issue raised by the State and outlined by the Supreme Court in its May 1, 2023, Order: establishing the reliability of the Alcotest 9510. In doing so, the NJSBA has no predisposition as to the reliability or unreliability of the 9510. The NJSBA seeks only to assist the Court in ensuring rigorous reliability testing that will yield an outcome that promotes fairness in the administration of justice and public confidence in DWI prosecutions relying upon results from the Alcotest 9510.

- C. The public has a heightened interest in the outcome of this matter and participation by the New Jersey State Bar Association can advance that interest.

This is an issue of great importance to the public, as establishing appropriate parameters for the use of the Alcotest 9510 in DWI prosecutions is critical to the preservation of the public's confidence in the outcome of such prosecutions. The process used to determine those parameters, therefore, is extremely important and should include as many views as possible.

Part of the NJSBA's Mission Statement, as noted above, is to promote fairness in the administration of justice. Such fairness dictates that any scientific device, such as the Alcotest 9510, which will produce a reading that then becomes a "per se" violation of law, must be subject to rigorous testing, an open process of

public disclosure, and the highest judicial scrutiny before it can be routinely relied upon in a prosecutorial setting. The NJSBA's attorney members are in a unique position to assist the Court in that scrutiny and in advancing the public's interest and confidence in the process.

D. The New Jersey State Bar Association has a special interest and expertise in this matter.

The NJSBA seeks to appear in its capacity as a representative of its 16,000 members, which includes attorneys who practice in the municipal courts every day and are fully familiar with all aspects of a DWI case, from both the prosecutorial and defense perspective. Our members are knowledgeable about the history and use of the Alcotest 7110 and are familiar with the State's proposed use of the Alcotest 9510.

Further, the NJSBA participated in the prior proceedings testing the reliability of the Alcotest 7110, and provided valuable comments on the development of standards by which the results obtained from the machine could be utilized in DWI prosecutions. The Court recognized the role of the NJSBA in future proceedings when it required the NJSBA to be given notice of any changes to the Alcotest:

ORDERED that the State shall provide notice, both to the parties and by means calculated to be generally accessible to the public and shall specifically provide notice to the

New Jersey State Bar Association, of any and all proposed future revisions to the Alcotest New Jersey Firmware, which notice shall not be generic, but shall be sufficiently specific to identify the proposed software changes so as to afford notice in compliance with due process. . .

*State v. Chun*, 194 N.J. 54, 153 (Par. 4) (2008).

## II. THE NEW JERSEY STATE BAR ASSOCIATION'S PARTICIPATION IN THIS MATTER WILL ASSIST THE COURT IN THE RESOLUTION OF ISSUES OF SIGNIFICANT PUBLIC IMPORTANCE

The issues in this matter are of great public importance and strike at the heart of the public's confidence in the criminal justice system. Almost 6 million cases are heard in New Jersey municipal courts annually, making it the venue of choice for citizens to experience justice in this state. It is imperative that any tool utilized in a DWI prosecution in municipal court be reliable to ensure that such prosecutions yield a fair and just result.

As noted above, that would be the goal of the NJSBA participation in this matter – with no predisposition as to the reliability or unreliability of the Alcotest 9510, the NJSBA would seek to assist the court in ensuring rigorous reliability testing that will yield an outcome that promotes fairness in the administration of justice and public confidence in DWI prosecutions relying upon results from the Alcotest 9510 machine. Its members are well versed in DWI law, and the NJSBA has a history of participation in previous matters where similar issues were

presented. The NJSBA further asserts that no party to the litigation will be unduly prejudiced in the event it is permitted to appear *amicus curiae*.

## CONCLUSION

Because the NJSBA meets the standards for *amicus* participation enunciated in *Rule* 1:13-9 and its participation will assist the Court in resolving an issue of public importance, the New Jersey State Bar Association respectfully requests that this Court grant its Motion for Leave to Appear *amicus curiae* in the above-referenced matter.

/s/ Timothy F. McGoughran  
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Dated: June 20, 2023