

ALCOHOL INFLUENCE REPORT FORM, ALCOTEST 7110 MKIII-C  
NEW BRUNSWICK POLICE

Department Case No.: 2005-5251  
Summons No(s): Q-176057  
Sequential File No.: 00022

Subject

Last Name: MIRALDA First Name: ANGEL MI:  
D.O.B.: 09/08/1967 Age: 37 Gender: MALE Ht: 5 ft. 05 in. Wt: 199 lbs.  
Driver License Number: M45890430009672 Issuing State: NJ

Arresting Officer

Last Name: BOBADILLA First Name: EDDIE MI:  
Badge No.: 7248 Arrest Date: 02/04/2005 Arrest Time: 08:49S Arrest Location: 1214

Instrument

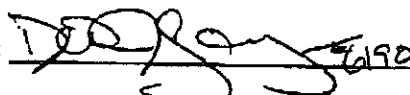
Alcotest 7110 MKIII-C Serial No.: ARNK-0043  
Location: NEW BRUNSWICK POLICE  
Calibration File No.: 00017 Calib. Date: 01/24/2005 Calib. No.: 00002  
Certification File No.: 00018 Cert. Date: 01/24/2005 Cert. No.: 00001  
Linearity File No.: 00019 Lin. Date: 01/24/2005 Lin. No.: 00001  
Solution File No.: 00020 Soln. Date: 01/24/2005 Soln. No.: 00003  
Sequential File No.: 00022 File Date: 02/04/2005  
Calibrating Unit: WET Model No.: CU-34 Serial No.: DDUJ S3-0098  
Control Solution %: 0.100% Expires: 11/13/2006  
Solution Control Lot: 04K008 Bottle No.: 0581

Breath Test Information

Function	Result %BAC	Time HH:MM	Volume (L)	Duration Sec (s)	Date of Test: 02/04/2005 Temp. Sim. (°C)	Error Message
Ambient Air Blank	0.000%	21:56S				
Control Test 1					34.0°C	
EC Result	0.103%	21:56S				
IR Result	0.102%	21:56S				
Ambient Air Blank	0.000%	21:57S				
Breath Test 1			2.7L	12.9s		
EC Result	0.148%	21:58S				
IR Result	0.148%	21:58S				
Ambient Air Blank	0.000%	21:59S				
Breath Test 2			1.5L	10.1s		
EC Result	0.127%	22:01S				
IR Result	0.126%	22:01S				
Ambient Air Blank	0.000%	22:02S				
Control Test 2					34.0°C	
EC Result	0.101%	22:02S				
IR Result	0.102%	22:02S				
Ambient Air Blank	0.000%	22:03S				

REPORTED BREATH TEST RESULT: 0.12% BAC

Breath Test Operator

Last Name: LANGAN First Name: JOHN MI:  
Signature:  Badge No.: 6190  
Date: 02/04/2005

Copy Given to Subject

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ALCOHOL INFLUENCE REPORT FORM, ALCOTEST 7110 MKIII-C  
PLAINSBORO TOWNSHIP PD

Department Case No.: 05-7760  
Summons No(s): 216092  
Sequential File No.: 00042

**Subject**

Last Name: LEBEDINSKY First Name: LEONARD MI: -  
D.O.B.: 01/27/1973 Age: 32 Gender: MALE Ht: 6 ft. 02 in. Wt: 245 lbs.  
Driver License Number: L20724590001734 Issuing State: NJ

**Arresting Officer**

Last Name: DIGGS First Name: JOSEPH MI: -  
Badge No.: 38 Arrest Date: 05/11/2005 Arrest Time: 00:39D Arrest Location: 1218

**Instrument**

Alcotest 7110 MKIII-C Serial No.: ARTL-0005  
Location: PLAINSBORO TOWNSHIP PD  
Calibration File No.: 00005 Calib. Date: 01/05/2005 Calib. No.: 00002  
Certification File No.: 00006 Cert. Date: 01/05/2005 Cert. No.: 00001  
Linearity File No.: 00007 Lin. Date: 01/05/2005 Lin. No.: 00001  
Solution File No.: 00035 Soln. Date: 04/21/2005 Soln. No.: 00006  
Sequential File No.: 00042 File Date: 05/11/2005  
Calibrating Unit: WET Model No.: CU-34 Serial No.: DDUF S3-0064  
Control Solution %: 0.100% Expires: 11/13/2006  
Solution Control Lot: 04K008 Bottle No.: 0857

**Breath Test Information**

Date of Test: 05/11/2005

Function	Result %BAC	Time HH:MM	Volume (L)	Duration Sec (s)	Temp. Sim. (°C)	Error Message
Ambient Air Blank	0.000%	01:11D				
Control Test 1					34.0°C	
EC Result	0.096%	01:11D				
IR Result	0.096%	01:11D				
Ambient Air Blank	0.000%	01:12D				
Breath Test 1			1.8L	11.9s		
EC Result	0.129%	01:14D				
IR Result	0.128%	01:14D				
Ambient Air Blank	0.000%	01:15D				
Breath Test 2			2.2L	9.6s		
EC Result	0.131%	01:17D				
IR Result	0.130%	01:17D				
Ambient Air Blank	0.000%	01:18D				
Control Test 2					34.0°C	
EC Result	0.095%	01:18D				
IR Result	0.094%	01:18D				
Ambient Air Blank	0.000%	01:19D				

REPORTED BREATH TEST RESULT: 0.12% BAC

**Breath Test Operator**

Last Name: PROCACCINI First Name: NICK MI: -  
Signature: \_\_\_\_\_ Badge No.: 23  
Date: 05/11/2005

Copy Given to Subject

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(856) 428-5055  
ATTORNEYS FOR DEFENDANTS  
Aschenbach, Chun, and Miralda

STATE OF NEW JERSEY,

*Plaintiff,*

vs.

DANIEL ASCHENBACH,  
JANE H. CHUN,  
DARIA L. DeCICCO,  
JAMES HAUSLER,  
ANGEL MIRALDA, and  
JEFFREY WOOD,

*Defendants,*

SUPERIOR COURT OF  
NEW JERSEY  
LAW DIVISION  
MIDDLESEX COUNTY

*Docket No.*

*QUASI-CRIMINAL ACTION*

**CONSENT TO CONSOLIDATION**

to:

Stephen H. Monson, D.A.G.  
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PO Box 085  
Trenton, NJ 08625

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Middlesex County Prosecutor's Office  
25 Kirkpatrick St., 3rd Floor  
New Brunswick, NJ 08901

Craig J. Coughlin, Municipal Prosecutor (for Aschenbach)  
Edison Municipal Court  
100 Municipal Drive  
Edison, NJ 08817

Mary Ann Zogg, Court Administrator  
Edison Municipal Court  
100 Municipal Drive  
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Edward G. Sponzilli, Municipal Prosecutor (for Chun)  
New Brunswick City Municipal Court  
Civic Square  
25 Kirkpatrick Street

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Kimberly A. Milligan, Court Administrator  
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Andrew S. Maze, Esq.  
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Philip Borow, Municipal Prosecutor (for Miralda)  
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PO Box 968  
East Windsor, NJ 08520

Robert Musto, Esq.  
Law Office of Robert Musto  
51 Green  
Woodbridge, NJ 07095

**CONSENT TO CONSOLIDATION**

Defendants Aschenbach, Chun and Miralda consent to the consolidation of these matters as requested by the State.



EVAN M. LEVOW, ESQUIRE

Dated: June 17, 2005

LEVOW & COSTELLO, P.A.  
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(856) 428-5055  
ATTORNEYS FOR DEFENDANTS  
Aschenbach, Chun, and Miralda

STATE OF NEW JERSEY,  
  
*Plaintiff,*

vs.

DANIEL ASCHENBACH,  
JANE H. CHUN,  
DARIA L. DeCICCO,  
JAMES HAUSLER,  
ANGEL MIRALDA, and  
JEFFREY WOOD,  
  
*Defendants,*

SUPERIOR COURT OF  
NEW JERSEY  
LAW DIVISION  
MIDDLESEX COUNTY

*Docket No.*

*QUASI-CRIMINAL ACTION*

**NOTICE OF CROSS MOTION  
TO CONSOLIDATE ADDITIONAL  
MATTERS, AND FOR A STAY OF  
ALCOTEST® LITIGATION**

to:

Stephen H. Monson, D.A.G.  
Office of the Attorney General  
PO Box 085  
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Middlesex County Prosecutor's Office  
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David Lonski, Municipal Prosecutor (for Demirelli & Ogbutor)  
East Brunswick Municipal Court  
1 Jean Walling Civic Center  
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East Brunswick, NJ 08816-1081

Eve Shapiro, C.M.C.A., Court Administrator  
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T.K. Shamy, Esq.  
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PLEASE TAKE NOTICE that on a date and time to be set by this Court, Evan M. Levow, Esquire will request that this Court enter an order consolidating the following additional pending Alcotest® cases in Middlesex County Municipal Courts: Mehmet Demirelli, East Brunswick Tickets A212463-65; Leonard Lebedinsky, Plainsboro Tickets 216092-95; Frederick Ogbutor, East Brunswick Tickets

A213648-51; Lara Slater, Woodbridge Tickets 6466-67; Elina Tirado, Woodbridge Tickets 7016-18; and any other client who retains counsel of record during the pendency of this action.

Counsel further moves to stay all Alcotest® litigation on non-consolidated cases pending resolution of the issues set forth in this matter.

Counsel will rely on the attached Certification and Brief, as well as upon oral argument.



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EVAN M. LEVOW, ESQUIRE

Dated: June 21, 2005

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(856) 428-5055  
ATTORNEYS FOR DEFENDANTS  
Aschenbach, Chun, and Miralda

STATE OF NEW JERSEY,

*Plaintiff,*

vs.

DANIEL ASCHENBACH,  
JANE H. CHUN,  
DARIA L. DeCICCO,  
JAMES HAUSLER,  
ANGEL MIRALDA, and  
JEFFREY WOOD,

*Defendants,*

SUPERIOR COURT OF  
NEW JERSEY  
LAW DIVISION  
MIDDLESEX COUNTY

*Docket No.*

*QUASI-CRIMINAL ACTION*

**CERTIFICATION IN SUPPORT  
OF CROSS MOTION  
TO CONSOLIDATE ADDITIONAL  
MATTERS, AND FOR A STAY OF  
ALCOTEST® LITIGATION**

Evan M. Levow, Esquire, upon his oath as an attorney of this State, does hereby certify:

1. I represent and/or co-represent Mehmet Demirelli in East Brunswick, Leonard Lebedinsky in Plainsboro, Frederick Ogbutor in East Brunswick, Lara Slater in Woodbridge, and Elina Tirado in Woodbridge, and as such I am familiar with these cases.

2. All of these individuals have been charged with violating N.J.S.A. 39:4-50, and Slater and Tirado have, in addition, been charged with Refusal to Submit to a Chemical Test under N.J.S.A. 39:4-50.2.

3. All of these individuals were tested on the Alcotest® 7110 MKIII-C machine.



4. The same discovery requests have been made in each of these cases as were made in the cases the State seeks to consolidate before this Court.

5. In each succeeding case for which certifying counsel is retained, it is expected that similar if not identical requests will be made in each such case.

6. In consenting to the consolidation request made by the State, it is agreed that issues of statewide importance are raised, common to each defendant, and it is submitted that those same concerns are present in the cases sought to be joined in this Cross-Motion for Consolidation. The same reasons exist to join the Demirelli, Lebedinsky, Ogbutor, Slater, and Tirado cases to this litigation. The same reasons would, further, be present to join any other pending and forthcoming Alcotest® cases to this litigation.

7. Because the State sets forth that the issues raised by these discovery requests and the application of State v. Foley, et al., 370 N.J. Super. 341 (Law Div. 2004) present issues of statewide importance, it is further submitted that all Alcotest® litigation should be stayed state-wide pending resolution of the issues in this consolidated matter. Every County will eventually deal with the issues presented in this litigation until a final resolution is obtained. It would strain judicial resources, as well as create piecemeal litigation, to conduct these hearings separately in the nineteen remaining counties. Undoubtedly, the State will seek limitation of discovery and judicial recognition of Foley in each county as this issue arises. To avoid possibly conflicting results between counties, this Court should exercise its power to stay all litigation concerning the machine until the issues set forth herein are fully litigated and resolved.

8. There is evidence that will be presented to this Court that the software for the machine is reporting results outside of the State's posited tolerance. For example, in the Miralda case, the readings reported by the New Brunswick Alcotest® machine were more than 0.01 or 10% apart. There is another New Brunswick case not included in this litigation that has similar disparate results. The Lebedinsky case involves a machine that reported calibration results below the accepted 0.095% range set by the State. The data available to the parties in Foley did not contain issues such as those presented in some of the cases in this consolidated litigation, or cases sought to be joined in this litigation. If this Court determines that the machines are rendering erroneous readings not in accord with the State's own accepted tolerances, or if based upon faulty calibration, issues of Due Process and Equal Protection arise regarding the handling of similar issues in any Alcotest® case.

9. This Court should be permitted to assess the reliability of the machine in its current format with its modified software, as opposed to the machine as it was programmed during the Pennsauken pilot program. Not only is additional and conflicting data available regarding the machine and its processing of information, the software of the machine has been changed from the 3.8 format in Foley to a 3.11 version as reported by the State presently.

10. To allow prosecutions in Alcotest® matters in this County and State-wide to continue during the pendency of this litigation could cause unfair results to be obtained, where individuals are entering pleas or being prosecuted based on limited or faulty premises.

11. This Court's consideration of the request to take

judicial notice of the holding in Foley will certainly effect pending prosecutions in Middlesex County, and may effect other Counties' assessment of judicially noticing the precepts of Foley. As a result, it is submitted that any such pending and forthcoming prosecutions be stayed pending the outcome of this consolidated matter.

I certify that the foregoing statements made by me are true and correct to the best of my knowledge and belief. I am aware that if these statements are wilfully false, I may be subject to punishment.



---

EVAN M. LEVOW, ESQUIRE

Dated: June 21, 2005

Rall

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ATTORNEYS FOR DEFENDANTS  
Aschenbach, Chun, and Miralda

STATE OF NEW JERSEY,	:	SUPERIOR COURT OF
	:	NEW JERSEY
<i>Plaintiff,</i>	:	LAW DIVISION
	:	MIDDLESEX COUNTY
vs.	:	
	:	<i>Docket No.</i>
DANIEL ASCHENBACH,	:	
JANE H. CHUN,	:	<i>QUASI-CRIMINAL ACTION</i>
DARIA L. DeCICCO,	:	
JAMES HAUSLER,	:	<b>BRIEF IN SUPPORT OF</b>
ANGEL MIRALDA, and	:	<b>CROSS MOTION TO STAY</b>
JEFFREY WOOD,	:	<b>COUNTY AND STATE-WIDE</b>
<i>Defendants,</i>	:	<b>ALCOTEST® PROSECUTIONS</b>
	:	<b>AND IN OPPOSITION</b>
	:	<b>TO JUDICIALLY NOTICING <u>FOLEY</u><sup>1</sup></b>

**LIMITED STATEMENT OF FACTS**

While State v. Foley, 370 N.J. Super. 341 (Law Div. 2003), determined that the Alcotest® 7110 MKIII-C was scientifically reliable, nothing in the opinion discusses an evaluation of the software of the machine.

As cases are being produced, errors in the software are becoming apparent.

In the Miralda case, the readings reported by the Alcotest® 7110 MKIII-C machine from the New Brunswick Police Department has reported breath testing results of 0.148% and 0.126%, which are more than 10% apart and more than 0.01 apart. See result

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<sup>1</sup> State v. Foley, et al., 370 N.J. Super. 341 (Law Div. 2004)

attached hereto as Exhibit A.<sup>2</sup>

In the Lebedinsky case that is sought to be joined in this action, one of the Control Tests permitted a 0.094% reading to be reported, when nothing less than a 0.095% reading should be accepted according to the State's standards. See result attached as Exhibit B.

As a result, discovery has been initiated in the matters before the Court, to determine the scientific reliability of the software in the Alcotest<sup>®</sup> 7110 MKIII-C machine.

#### LEGAL ARGUMENT

**POINT I: CONSOLIDATION OF PENDING ALCOTEST<sup>®</sup>  
LITIGATION IS PROPER, ALONG WITH A  
STAY OF SUCH LITIGATION FOR PENDING  
AND FORTHCOMING MATTERS DURING THE  
PENDENCY OF THIS ACTION**

Defendants consent to the proposed consolidation of the actions in this case, and agree that issues of state-wide importance are set forth for this Court to consider that will effect matters in Middlesex, and probably across the State.

Because of the importance of the issue, and because of the unsettled questions regarding the Alcotest<sup>®</sup> 7110 MKIII-C machine, it is submitted that a stay of litigation is required for all pending and forthcoming Alcotest<sup>®</sup> matters in Middlesex County and state-wide, especially where it is alleged that the software of the machine is permitting reported readings beyond acceptable tolerances or standards.

Where this Court is considering these important issues, it would be inequitable to allow identical litigation to proceed

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<sup>2</sup> Test sequence 00004 from the Rutgers Police Department contains a similar error as that set forth on Exhibit A. Counsel is seeking this document in discovery of a related New Brunswick matter, and will supply it when received.

elsewhere. Counsel is seeking joinder of additional intra-county matters to this action: Mehmet Demirelli in East Brunswick, Leonard Lebedinsky in Plainsboro, Frederick Ogbutor in East Brunswick, Lara Slater in Woodbridge, and Elina Tirado in Woodbridge.

As stated above, the Lebedinsky matter has an issue that directly questions the software's reporting capabilities, and the Demirelli case has a similar issue.

Ogbutor is simply another case where Counsel represents a defendant in Middlesex County. It is submitted that any such similar case must be included in this litigation, and consequently a stay must be issued regarding such pending litigation in non-consolidated matters.

The Slater and Tirado cases include refusal charges, following an attempt to provide breath samples. The Foley court did find a problem with refusal cases, since there were "a high and unacceptable number of persons who attempted to deliver a breath sample on the 7110 were charged with refusal to submit to a chemical test in violation of N.J.S.A. 39:4-50.2 and N.J.S.A. 39:4-50.4(a.)" As a result, the Court ordered that

New Jersey must make changes in the software/firmware's requirements for the 7110 and/or in the instructions given to those who are about to use the instrument. Until this problem is eliminated no person who delivers a breath sample of .5 liters of air or greater during a test on the 7110 may be charged with refusal.

The State was using Firmware version 3.8 in the context of Foley. Now it is using version 3.11. No information has been provided regarding this current version, and what if any changes were made to address the concern in Foley. The burden is on the State to address this issue to the satisfaction of this Court. Any and all changes made must be divulged to the Defendants in

order to assess any proper defense of this case.

It is submitted that all of these cases contain a common theme, and must be joined in this action.

All other pending Alcotest® 7110 MKIII-C cases must be stayed pending the outcome of this matter. It would be unfair for any prosecutions for DWI based on the Alcotest® to continue during the pendency of this action. Should this Court determine issues differently than the Law Division in Camden County, any prosecutions proceeding in Middlesex County, and indeed any other county, would present issues of denial of Due Process and Equal Protection under the law.

Should the Court elect to stay all Alcotest® proceedings state-wide, other than those in Camden County, only Morris County would now be effected, since no other counties have yet employed the 7110 machine. Beginning in July, Gloucester, Cumberland, Salem and Union Counties will start utilizing the 7110. In October, Burlington, Hunterdon, Mercer and Warren Counties begin use of the machine. The remaining counties will begin utilizing the machine in 2006.

In the alternative, it is requested that all Middlesex cases be stayed pending the resolution of this matter.

POINT II: THE HOLDING IN FOLEY IS INFIRM: IN ORDER TO DETERMINE THE RELIABILITY OF THE ALCOTEST® 7110 MKIII-C MACHINE, THE SOFTWARE AND ELECTRONIC CIRCUITRY MUST BE ANALYZED, ESPECIALLY WHERE FLAWS IN THE SOFTWARE CURRENTLY EXIST; DEFENDANTS HAVE A MACHINE IN WHICH THE SOFTWARE MAY BE DOWNLOADED, AND THIS COURT SHOULD ORDER THE DOWNLOAD AND PROVISION OF THE SOURCE CODES

In State v. Muldowny, 871 So.2d 911 (Fla.App. 5 Dist., 2004), the Florida Court of Appeals addressed this exact question, as it pertained to Florida's evidential breath testing machine, the Intoxilyzer 5000:

Is a defendant entitled to inspect and copy and potentially use at trial or hearing the operator's manuals, maintenance manuals and schematics of the Intoxilyzer used to test the defendant when the results of the test are intended for use to affect the driving privileges of or assess penalties against that defendant?

We answer that question in the affirmative.

Id. at 913.

The State failed to comply with the order to produce the information, and, as a result, the Court of Appeals affirmed the lower courts' rulings suppressing breath testing results. Id. at 914.

This Court must do the same, i.e. order the State to produce to Defendants the software, readable source codes, and full electronic circuitry information for the machine.

Defendants have requested a copy of the software currently being used in the Alcotest® 7110 MKIII-C machines in New Jersey, along with source coding for the software, and full electronic circuitry information for the machine. Without an understanding as to how the machine is programmed, no viable assessment may be made as to how to defend these cases.



There is nothing in the Administrative Code that tells us how the Alcotest® works. Indeed, the section regarding operation of the machine, N.J.A.C. 13:51-3.6(c), simply states:

Alcotest® 7110 MKIII:

1. The Alcotest® 7110 MKIII is equipped with an attached printer. The attached printer provides a printed record of the taking of the breath samples of a person and of the results of the chemical analyses of the samples of the breath taken in the form of an Alcohol Influence Report consistent with the provisions of N.J.S.A. 39:4-50.2(b), 39:3-10.24b or 12:7-55b.

2. A Breath Test Operator shall, consistent with his or her training, employ the following steps or procedures to set-up, operate and conclude the administration of breath tests on the Alcotest® 7110 MKIII:

i. Verify the instrument power switch is in the "On" position, the display screen is illuminated, and the calibrating unit power switch is in the "On" position. If the instrument power switch is in the "Off" position, turn the power switch to the "On" position. If the calibrating unit power switch is in the "Off" position, turn the power switch to the "On" position;

ii. When the word "Ready" appears on the display screen, push the Start button to begin the test. If the word "Stand-by" appears on the display screen, then push the Start button and wait for the word "Ready" to appear. When the word "Ready" appears on the display screen, push the Start button to begin the test;

iii. Follow the instructions on the display screen.

In essence, the section states, press the button, follow the instructions on the LCD screen on the machine, and wait for the printed results.

No studies have been published, and no information has been set forth by the State, to Defendants to determine the reliability of these printed results.

The Law Division in State v. Foley, 370 N.J. Super. 341 (Law Div. 2003), in a ruling that is binding in Camden County only, and, as to the machine as it existed at the time of that court's decision (version 3.8), concluded that the Alcotest® 7110 MKIII-C is scientifically reliable and accurate. Id. at 345.

Therefore, chemical breath test readings produced by the 7110 may be introduced in evidence in a prosecution for violation of N.J.S.A. 39:4-50, N.J.S.A. 39:3-10.13, or N.J.S.A. 12:7-46 without the need for the State to produce expert witnesses in each and every case.

Id.

Fundamental flaws exist in Foley.

The defendants in that consolidated case "were provided with documents, 7110 instruments and training sessions given by representatives of the manufacturer, Draeger." Foley at 345. At no time were the defendants given the source code for the software of the machine. Without that, no reasonably scientific assessment regarding the reliability of this computer and computer program could have been made.

Although the Foley court described the machine ("The 7110 is an evidential breath testing instrument which uses infrared (IR) absorption analysis and electrochemical (EC) cell technology analysis to simultaneously determine the presence of ethanol in a breath sample. " Id. at 346), and then described the theory of IR and EC technology, and the operation of the machine, at no time did the Court assess the software program upon which the machine runs.

The Court set forth the standard for admissibility:

Evidence of the breath test results produced by a chemical breath testing instrument will only be admitted if the proponent can prove that the instrument and the results generated by the instrument are generally accepted by the relevant scientific community. Frye v. U.S., 293 F. 1013 (D.C.Cir.1923); State v. Harvey, 151 N.J. 117, 699 A.2d 596 (1997); Romano v. Kimmelman, 96 N.J. 66, 474 A.2d 1 (1984); State v. Johnson, 42 N.J. 146, 199 A.2d 809 (1964).

To establish general acceptance within the scientific community the proponent must meet the clear and convincing standard of proof. State v. Harvey, 151 N.J. 117, 171, 699 A.2d 596, 622 (1997). ... Once the showing of general acceptability has been made, courts will take judicial notice of the given instrument's reliability and will admit in evidence the results of

tests from the instrument without requiring further proof. [State v. Johnson, 42 N.J. 146, 171, 199 A.2d 809, 823 (1964)].

The Foley court held that the four experts that testified on behalf of the State established that the EC and IR processes are scientifically accepted means to conduct evidential breath testing, and that the 7110's use of both EC and IR technology to test breath samples "enhances the scientific reliability of the 7110." Id. at 351.

While the Foley court held that the EC and IR processes are acceptable scientifically, no analysis was presented regarding the software of the machine, and how the coding of the machine affects the ultimate results set forth by the machine. The Court did state, "These test results must be within the tolerance established by Draeger to produce an acceptable breath alcohol reading." Foley at 351. "The standard established by Dr. Brettell, the State Chief Forensic Scientist, is that results will be accepted if they are within 0.01% of each other or +/-10% of the average of the highest and lowest of the IR and EC values generated, whichever is greater." Id. at 355. Presumably, the machine will give an error code if the results are out of tolerance.

Unfortunately, this is not true in at least two machines now in operation in New Brunswick: one machine at Rutgers Police Department, and the other at the New Brunswick Police Department. See result from Sequential File No. 00022, attached hereto as Exhibit A.<sup>3</sup> This document shows that the results of the two tests, 0.148% and 0.126% are more than 10% apart and more than

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<sup>3</sup> Test sequence 00004 from the Rutgers Police Department contains a similar error as that set forth on Exhibit A. Counsel is seeking this document in discovery of a related New Brunswick matter, and will supply it when received.

0.01 apart.

The same is true in the Lebedinsky case that is sought to be joined in this action. The Plainsboro machine permitted a 0.094% reading to be reported in one of the Control Tests, when nothing less than a 0.095% reading is supposed to be accepted. See result attached as Exhibit B.

This is a fundamental error in the software.

What other errors may be present in the software? This rhetorical question must be answered for the Courts of New Jersey to properly address this machine and its results. No one in Foley explored this issue, probably because the State asserted that the software was "proprietary" and could not be divulged. The Foley court's determination, "The detailed information developed by the instrument on the Alcohol Influence Report assures that the instrument was functioning properly at the time the tests were administered" states that the reliability of the machine is essentially self-defining: because the results are so detailed, it must be correct. This ignores the basis of how the results are obtained, i.e. the software. If there are errors in the software, the detailed information set forth by the printed result is infirm and unreliable.

Exhibit A demonstrates that there is an error in the software.

Even without these demonstrable errors, this Court should order that the State divulge the source codes for the software, and provide copies of the software to counsel.

Further, the machine may read certain interferences as ethyl alcohol. The only way to determine what false-positives the machine may allow, is to test the actual machine and software in use in New Jersey.

Foley did not discuss any of this, nor did it address any issues with Radio Frequency Interference (RFI). If interference from cell phones can affect instruments on airplanes, Defendants ought to know whether this machine and the software is affected by RFI.

Defendants must be permitted to know how the machine and the software work, not just have an understanding of the EC and IR technology. The principles and methodology of the technology must be understood, not just the conclusory results printed from the machine. The software is the most important part of the machine. The machine cannot run without the software. Foley presumably accepted the machine, but never analyzed what the machine runs on.

Counsel for Defendants owns an Alcotest® 7110 MKIII-C. This Court should order that the State download a copy of the software on this machine.

If the software and its source codes are not provided, this Court should follow the lead set forth by the Florida Court of Appeals in Muldowny, supra, and suppress the breath test results in this case.

To allow prosecutions and convictions based upon software that is not disclosed due to proprietary concerns is ludicrous. The Constitution is not proprietary.

To allay concerns from Draeger, however, counsel would agree to submit to a protective order providing that the source codes would not be divulged to any of its competitors.

**POINT III: WITH AN INCOMPLETE ASSESSMENT OF  
INFORMATION ABOUT THE MACHINE,  
I.E., LACK OF ANALYSIS OF THE  
SOFTWARE, JUDICIAL NOTICE OF THE  
RELIABILITY AND ACCURACY OF THE  
MACHINE MUST NOT BE ACCORDED**

In State v. Boyington, 153 N.J.Super. 252 (App. Div. 1977),  
the Appellate Division set forth the standard regarding  
accordance of judicial notice by a trial level court:

We had recent occasion to review the principles of  
judicial notice of the scientific reliability of  
instrumentation used to establish speeding by motorists  
in State v. Finkle, 128 N.J.Super. 199, 319 A.2d 733  
(App.Div.1974), *aff'd o.b.* 66 N.J. 139, 329 A.2d 65  
(1974), *cert. den.* 423 U.S. 836, 96 S.Ct. 61, 46  
L.Ed.2d 54 (1975), and see State v. Dantonio, 18 N.J.  
570, 115 A.2d 35 (1955). In relation to a device which  
has not previously been judicially noticed by an  
appellate court of this State to be scientifically  
reliable, a trial court should require such reliability  
to be established before it by expert scientific proof  
unless judicial notice may properly be taken under  
either Evid.R. 9(2)(d) or 9(2)(e). The latter rule is  
pertinent here, and it provides that judicial notice  
may be taken of "specific facts and propositions of  
generalized knowledge which are capable of immediate  
determination by resort to sources of reasonably  
indisputable accuracy."

Boyington, 153 N.J.Super. at 254.

Adoption of the new evidence rule has not changed the  
holding or directions of Boyington. N.J.R.E. 201, Judicial  
notice of law and adjudicative facts, states in pertinent part:

(a) Notice of law. Law which may be judicially noticed  
includes the decisional, constitutional and public  
statutory law, rules of court, and private legislative  
acts and resolutions of the United States, this state,  
and every other state, territory and jurisdiction of  
the United States as well as ordinances, regulations  
and determinations of all governmental subdivisions and  
agencies thereof. Judicial notice may also be taken of  
the law of foreign countries.

(b) Notice of facts. Facts which may be judicially  
noticed include (1) such specific facts and  
propositions of generalized knowledge as are so  
universally known that they cannot reasonably be the  
subject of dispute, (2) such facts as are so generally  
known or are of such common notoriety within the area

pertinent to the event that they cannot reasonably be the subject of dispute, (3) specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned, and (4) records of the court in which the action is pending and of any other court of this state or federal court sitting for this state.

Foley did establish that EC/IR technology is accepted in the scientific community, and has been for several years. Defendants do not take issue with this precept. However, the reliability of the machine does not rest on the basic technology of EC/IR processes.

The 7110 is a computer. A computer runs on software. Without the source codes or provision of the software, each defendant in the State of New Jersey is now expected to accept the "science" of the machine, simply because the State and Draeger say the software is scientifically reliable. The Foley Court did not undertake a published analysis of the reliability of the software. Defendants in that case were not permitted access to the codes or circuitry information.

The State wrote in its brief that the issues in Foley were "fully litigated". Brief at 8. However, "the request for source codes and other proprietary information was denied by Judge Orlando." Id. at 9. How can this denial be binding on courts in Middlesex County and across the State? Foley contains no published reasoning as to this issue, and simply analyzes the machine on the theory of how it works. Judge Orlando certainly could have written about the software and why he felt an analysis of it and its scientific reliability was not necessary.

There was no interlocutory or final appeal of the denial of the request for the codes, nor was there an appeal of the ultimate determinations set forth in Foley.

The litigation and the manner in which it was conducted cannot be controlling on courts outside Camden County. Foley did not fully analyze the issues presented, and was ripe for appeal. To judicially notice an incomplete process would make no sense. The Defendants herein, and across this County and State, cannot be handcuffed by strategy employed by counsel in Foley that led to the ultimate decision set forth by Judge Orlando. Further, the additional information that is now becoming available must be assessed in light of the incorrect information being produced by the machines, coupled with the fact that the software has been modified at least twice since December 2002. Where the software is allowing readings outside of the State's own accepted tolerances, what else it is improperly allowing or doing?

While EC/IR technology is reliable, this Court must determine whether the paradigm upon which it runs is also scientifically reliable.

It is ironic that no other court in any state where the 7110 is utilized has undergone a Frye/Daubert hearing, other than the Law Division in Camden County. One likely reason is that Draeger has successfully kept the software from being analyzed.

Since Foley did not address the reliability of the software, this Court must not judicially notice the holding in that case, and it is submitted that this Court must undertake a comprehensive review of the platform upon which this machine runs.

The State would rather this Court accept the bald assertion that Foley determined the overall process to be scientifically reliable. As stated above, Foley did not do this. The State would also like the Court to accept Dr. Brettell's assertions set forth in his Certification. Statements such as, "The



modifications to the NJ 3.8 version of the firmware, now denominated as NJ 3.11, have no impact on the method of chemical breath testing as employed in the Alcotest® 7110 MK-IIIC evidential breath test instrument", must be subject to cross-examination. These self-defining presentments must not be the basis of the next wave of New Jersey law on breath testing.

The machine and its software do present novel issues in this State, contrary to the State's desire to present the matter otherwise. Breath testing does have general accepted principles of scientific reliability, however the process that the 7110 sets forth is an entirely different rubric than that which this State has ever seen, and that which no other jurisdiction has analyzed. Accepting the machine as it is now because it runs on EC/IR accepted technology would make any machine that runs on such technology scientifically acceptable, regardless of the internal working of the machine and its software.

Foley only went so far. It is respectfully submitted that it is for this Court to complete the analysis of scientific reliability of this process.

In denying to accept judicial notice in Boyington, the Court stated:

The Attorney General has supplied this court with a pamphlet entitled "*Techniques for Radar Speed Detection*" by Kenneth L. Ward, Assistant Director, Research and Development Division, The Traffic Institute, Northwestern University, which explains radar. This document is beside the point. The Supreme Court long ago held our courts would take judicial notice of instruments for detection of speeding which operate on the principle of radar. State v. Dantonio, 18 N.J. 570, 115 A.2d 35 (1955). See also, State v. Overton, 135 N.J. Super. 443, 343 A.2d 516 (Cty. Ct. 1975); Annotation, 47 A.L.R.3d 822, 831 et seq. (1973). However, the pamphlet mentioned does not identify the particular instrument used in this case as operating on the radar principle, nor is there any other evidence of a competent nature before us establishing that fact. Compare State v. Finkle, *supra*, where there was a

wealth of data supporting the reliability of VASCAR and pertinent expert testimony in a companion appeal.

We conclude the conviction must be reversed for insufficient proof establishing the scientific reliability of Ra-Gun. Since the State may well be able to adduce the requisite proof at a new trial, it will be accorded the opportunity to do so. See State v. Croland, 31 N.J. 380, 384, 157 A.2d 506 (1960).

Boyington, 153 N.J.Super. at 255.

Likewise, because there is still much to learn about how the platform of the Alcotest® 7110 MKIII-C and how it actually works, it is submitted that a full hearing on the machine must be undertaken.

As to the requirements regarding the taking of judicial notice, it is submitted that neither an analysis of Rubanick v. Witco Chemical Corp., 125 N.J. 421 (1991), nor State v. Harvey, 151 N.J. 117 (1997) is even relevant at this juncture. However, applying all of the factors stated above, judicial notice of the scientific reliability of the Alcotest® 7110 MKIII-C must not be accorded.

#### CONCLUSION

For the foregoing reasons, it is requested that this Court order a full hearing on the scientific reliability of the Alcotest® 7110 MK-IIIC to include an analysis of the current software in the machine, and that all Alcotest® prosecutions be stayed pending resolution of this omnipotent issue.



EVAN M. LEVOW, ESQUIRE

Dated: June 21, 2005

Hon. Jane Bruskin Cantor, J.S.C.  
Middlesex County Courthouse, Chambers 506  
1 JFK Square  
P.O. Box 964  
New Brunswick, NJ 08903-0964

I hereby certify that two copies of Defendants-Respondents' Brief and Appendix, and two copies of this Proof of Mailing were served upon the following party, by courier on November 29, 2005:

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I hereby certify that one copy of Defendants-Respondents' Brief and Appendix, and one copy of this Proof of Mailing were served upon the following parties, by electronic transmission on November 29, 2005:

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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.

By:



EVAN M. LEVOW, ESQUIRE

Dated: November 29, 2005