LEVOW & COSTELLO, P.A.
A PROFESSIONAL ASSOCIATION
1415 ROUTE 70 EAST
CHERRY HILL, NEW JERSEY 08034
(856) 428-5055
ATTORNEYS FOR DEFENDANTS
Chun, Miralda, Demirelli, Ogbutor, Slater and Tirado

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| STATE OF NEW JERSEY,<br>*Plaintiff,*<br>vs.<br>JANE H. CHUN, et al.,<br>*Defendants,* | SUPREME COURT OF NEW JERSEY<br>*Docket No.* **58,879**<br>*QUASI-CRIMINAL ACTION*<br>**BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION** |

## LEGAL ARGUMENT

While this Court may manage its lower courts in an administrative capacity, without a justiciable question before it, the Court has created a new rule of law in contravention of existing precedent and stare decisis.

The law on this issue is succinct, as stated by the Appellate Division in State v. Doriguzzi, 334 N.J.Super. 530, 533 (App. Div. 2000):

> absent a similar determination by this court or our Supreme Court, the trial courts in this State are not at liberty to admit evidence of newly-devised scientific technology unless the general acceptance thereof is demonstrated by expert testimony, authoritative scientific and legal writings or judicial opinions. *See generally* State v. Harvey, 151 N.J. 117, 166-176, 699 A.2d 596 (1997).

Further this Court stated in Harvey:

> Thus, the test in criminal cases remains whether the scientific community generally accepts the evidence.

[State v.] Spann, 130 N.J. [484,] 509, 617 A.2d 247 [(1993)]; [State v.] Windmere, 105 N.J. [373,] 386, 522 A.2d 405 [(1987)].

> A proponent of a newly-devised scientific technology can prove its general acceptance in three ways:
>
> (1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis;
>
> (2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and
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> (3) by judicial opinions that indicate the expert's premises have gained general acceptance.
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> [[State v.] Kelly, 97 N.J. [178,] 210, 478 A.2d 364 [(1984)] (*citing* State v. Cavallo, 88 N.J. 508, 521, 443 A.2d 1020 (1982)).]
>
> The burden to "clearly establish" each of these methods is on the proponent. [State v.] Williams, 252 N.J.Super. [369,] 376, 599 A.2d 960 [(Law Div. 1991)].

Harvey, 151 N.J. at 170.

In its Order of January 10, 2006, this Court compels into evidence testing results that are not otherwise admissible based on current law. This pronouncement was made *sua sponte* and without context in the current Chun litigation. Indeed, the very issue at hand is the admissibility of the readings into trials.

This Court appointed a Special Master to advise the Court on the specific question of scientific reliability. Before the scientific reliability hearing has even begun before the Special Master, this Court has ordered the challenged evidence to be utilized in trials. With the Order to admit the readings into evidence, undergoing the hearing at this juncture appears to be pro forma, with the decision of scientific reliability already having been determined.

The remedy of staying the sentences pending resolution of

the hearing, does not cure the infirmity upon which the pronouncement lies. This Court's action in admitting the contested evidence without a hearing and ultimate determination of reliability compromises basic constitutional rights that cannot be stayed.

When the granting of the relief sought by a litigant would operate to terminate, impair or modify a substantial right or claim of another, then due notice of the proceeding must be given the person so affected in order to meet the requirements of due process; but if no such right be thus affected due process does not require that he be given notice or an opportunity to be heard in the proceeding. Chaloner v. Sherman, 242 U.S. 455, 37 S.Ct. 136, 61 L.Ed. 427 (1917); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The Court in Mullane succinctly stated, "Many controversies have raged about the cryptic and abstract words of the *Due Process Clause* but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Id. at 313, 70 S.Ct. at 656-57.

Litigants rights to confrontation are denied. Before an assessment of reliability, the testing results are admitted into evidence without challenge and without question. Trial courts are directed to accept into evidence information of which they have no understanding and for which there is no basis other than this Court's Order directing admission of the evidence.

"In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. *amend. VI.*

This right to confrontation is fundamental and essential to

a fair trial in a criminal prosecution. Pointer v. Texas, 380 U.S. 400, 403-4, 85 S.Ct. 1065 (1965). "[A] major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." Id. at 406-7.

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

Pointer at 405.

The United States Supreme Court's recent decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), reexamined the application of the *Confrontation Clause* in criminal prosecutions, reversed the erosion of *Confrontation Clause* rights exemplified by the Court's decision in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980), and re-established the fundamental importance of testing evidence by cross examination.

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." ... Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford, 541 U.S. at 62, 124 S.Ct. at 1370.

This Court recently recognized the enormity of Crawford in State v. Branch, 182 N.J. 338, 370-71 (2005), stating "Courts

must be mindful, as well, of the requirements placed by Crawford, *supra*, on the admission of testimonial evidence..."

Further, the juxtaposition of the entry of this Order on the same date that this Court decided State v. Eckel, A-95-04, is remarkable. Where this Court has extended greater protections to defendants than the Federal Constitution, the Court carves out a DWI exception to the Constitution.

Allowing the testing results into evidence now subverts the reliability issues, and assumes reliability as a foregone conclusion. Litigants are now directed that regardless of any pending process to determine reliability, cases must proceed to resolution, admitting unproven evidence, which shall be relied upon by a court in determining guilt. The litigant is forced to proceed in court, defending a case in which he or she possesses little if no information about the platform upon which he is being prosecuted. Any cross examination would be limited and restricted based upon the paucity of discovery being provided on the machine, or based upon the limited information available about the machine in the public forum.

By ordering this untested and unproven machine's results into evidence, this Court has created the appearance that the pending reliability hearing has a foregone conclusion. With the wholesale admission of the untested reading into evidence, a presumption of guilt is present, with no ability to rebut the presumption of the validity of the reading.

Allowing this evidence in at this point confounds the basic tenets of our constitutional framework. This is exactly the type of ill that is contemplated in trial by affidavit. As the United States Supreme Court stated,

The Constitution prescribes a procedure for determining

> the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.

Crawford, 541 U.S. at 67, 124 S.Ct. at 1373.

Cases must not proceed and convictions must not enter because of a concern for backlog created by the State's action in implementing this machine without following Doriguzzi and obtaining appellate court approval of the reliability of the machine. This Court is curing the State's errors even prior to the resolution of the reliability hearing.

Staying the sentences pending resolution of the reliability hearing causes undue expense to all parties. A defendant must defend a case in which he or she does not have full discovery or understanding of the process upon which the prosecution is occurring. The defendant must pay defense counsel and experts to defend the case with this incomplete information, and then wait for a full hearing on the issues presented by the machine, which may raise issues for cross-examination in his or her case. Until then, costs for the trial mount, along with the emotional expense of defending a case that may be undefendable based on the admission of this evidence. Or, the case is not defendable at this juncture due to the paucity of information available about the machine and how to challenge the specifics of the testing in each case at hand.

Any speculative aspect of these concerns must be resolved in favor of the defendant unless or until this machine has been fully vetted by this Court.

The irony of the Order of January 10, 2006 is highlighted in the pronouncements of Harvey, *supra*:

> Proof of general acceptance within a scientific community can be elusive. Windmere, *supra*, 105 N.J. at 379, 522 A.2d 405. Satisfying the test involves more

> than simply counting how many scientists accept the reliability of the proffered technology. Williams, *supra*, 252 N.J.Super. at 375, 599 A.2d 960. Proving general acceptance "entails the strict application of the scientific method, which requires an extraordinarily high level of proof based on prolonged, controlled, consistent, and validated experience." Rubanick [v. Witco Chemical Corp.], 125 N.J. [421,] 436, 593 A.2d 733 [(1991)]. Essentially, a novel scientific technique achieves general acceptance only when it passes from the experimental to the demonstrable stage. Windmere, *supra*, 105 N.J. at 378 n. 2, 522 A.2d 405.

Harvey, 151 N.J. at 171.

This machine has never even been peer reviewed by anyone in the scientific community.

The fair approach to the conundrum that the State has placed the system in, would be to stay admission of the readings pending resolution of the reliability hearings, and cause cases to proceed on the evidence available. If the State seeks to rely on the readings from the machine in any particular case, those cases ought to be stayed pending resolution of the pending reliability hearing.

**CONCLUSION**

It is respectfully requested that this Court vacate that part of the January 10, 2006 Order that compels the readings into evidence at this juncture of this litigation.

EVAN M. LEVOW, ESQUIRE

Dated: January 27, 2006