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November 29, 2005

VIA COURIER
Beverly Juhl, Esq.
Appellate Division Clerk's Office
Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625

Re: State v. Jane H. Chun
Docket No. AM-153-05T5

Dear Ms. Juhl:

Enclosed please find for filing an Original and two copies of Defendants-Respondent's Brief and Appendix in the above captioned matter, and one copy of a Proof of Mailing. Copies of the Brief and Appendix have been couriered directly to Judge Fall and Judge Grall, today.

An additional copy of Defendants-Respondent's Brief and Appendix is also enclosed. Kindly stamp that copy "filed", and return it to me in the enclosed stamped envelope.

Thank you.

Very truly yours,

EVAN M. LEVOW

EML:bs

c: Hon. Robert A. Fall, J.A.D. (via courier)
Hon. Jane Grall, J.A.D. (via courier)
Steven Monson, D.A.G.
Respondents Counsel

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

STATE OF NEW JERSEY,

Movant-Appellant,

v.

JANE H. CHUN, et al.

Defendants-Respondents.

DOCKET NUMBER AM-153-05T5

ON STATE'S MOTION FOR LEAVE TO APPEAL ON AN INTERLOCUTORY BASIS FROM THE LAW DIVISION, MIDDLESEX COUNTY

QUASI-CRIMINAL ACTION

SAT BELOW
HON. JANE B. CANTOR, J.S.C.

BRIEF AND APPENDIX SUBMITTED ON BEHALF OF DEFENDANTS-RESPONDENTS

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LIMITED DISPUTED STATEMENT OF FACTS & PROCEDURE

Nothing in State v. Foley, 370 N.J.Super. 341 (Law Div. 2003) discusses an evaluation of the software of the Alcotest® 7110 MKIII-C machine.

As cases are being produced in Middlesex County, and now in half of the counties in this State, errors in the software, either based on parameters set by the State and the manufacturer, or actual reporting errors by individual machines, are becoming apparent.

In the Miralda case that is part of this Chun litigation, the readings reported by the Alcotest® 7110 MKIII-C machine from the New Brunswick Police Department, 0.148% and 0.126%, are more than 10% apart and more than 0.01 apart. See result, Ra1.[1]

In the Lebedinsky case that was sought to be joined in this action, but has since been resolved due to the error reported by the machine in that Plainsboro case, 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, Ra2.

As a result, discovery was initiated in the matters before the Court, to determine the scientific reliability of the software in the Alcotest® 7110 MKIII-C machine.

The original Defendants-Respondents[2], hereinafter

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[1] Ra refers to Respondents' Appendix

[2] Judge Cantor granted motions for intervention of additional Defendants at the October 14 hearing.

"Defendants", that were included in the State's Motion in the Law Division to consolidate cases and issues, consented to the consolidation, both in writing and at the October 14 hearing before Judge Cantor, agreeing that the issues raised require determination by the Law Division, opposing judicial notice of Foley, and asserting the need for a Frye hearing on the issues raised by data available on the Alcotest® 7110 MKIII-C.[3] See Ra3-26.

Further, Defendants respond to the facts alleged by the State in the body of this response, infra.

[3] At page 7 of its Brief, the State notes that no defendant has "submitted a formal motion under the provisions of R. 1:6-2 or R. 3:10-2, for ... hearing as to the scientific reliability and accuracy of the Alcotest® 7110 MKIII-C." Defendants responded to the State's Motion, asserting the opposite of the State's request, i.e. a Frye hearing must be conducted on the issues presented by the State. See Ra26.

LEGAL ARGUMENT

POINT I: LEAVE FOR APPEAL SHOULD NOT BE GRANTED

The State acknowledges that leave to appeal from interlocutory orders from a trial court may be done "in the interests of justice", R. 2:2-4, but the power to grant such applications is discretionary and should be exercised "only sparingly." State's Brief at 11, *quoting* State v. Reldan, 100 N.J. 187, 205 (1985), Golden Estates v. Continental Cas., 317 N.J. Super. 82, 88 (App. Div. 1997), and State v. Alfano, 305 N.J. Super. 178, 190 (App. Div. 1997).

For the reasons set forth below, it is respectfully submitted that the State's application in this matter should not be granted.

A. THERE IS NO EXIGENCY TO THE ISSUES PRESENTED, OTHER THAN THAT WHICH IS SELF-CREATED BY THE STATE

New Jersey Court Rule 2:5-6, Appeals From Interlocutory Orders, Decisions and Actions, states in pertinent part:

> (a) Appeals. Applications for leave to appeal from interlocutory orders of courts or of judges sitting as statutory agents and from interlocutory decisions or actions of state administrative agencies or officers shall be made by serving and filing with the court or agency from which the appeal is taken and with the appellate court a notice of motion for leave to appeal, as prescribed by R. 2:8-1, within 20 days after the date of service of such order ...

The State's Motion for Leave to Appeal was filed on November 4, 2005. Twenty days from the October 14, 2005 Order from which the State seeks leave to appeal was November 3, 2005. As such, the State's filing is one day late, and should not be granted.

The State's claimed exigency of the issue is belied by this late filing. The importance of the issue did not arise on the twenty-first day, or even close to the twenty day time period set forth in the court rule.

More importantly, the State created its own potential harm by implementing the Alcotest® 7110 MKIII-C in the various counties prior to a statewide determination of the scientific reliability of the machine. Its improvident decision to roll out the machine in half of the State's counties must not, now, be utilized as a foundational reason to compel this Court to accept this matter on an interlocutory basis. Any harm that results from the decision to roll out the machine in its present state is self-inflicted.

The proper remedy, under the circumstances, has been set forth by Judge Cantor, which is to stay all Alcotest® 7110 MKIII-C prosecutions in Middlesex County until there is a final determination on the issue of scientific reliability by an appellate level court.

The State has also requested appellate intervention on its Motion for Leave to Appeal, as a result of motions being filed in other counties regarding this Frye[4] issue. The State says, "Without such a resolution, the State, as well as the counties, could be compelled to expend in each of the remaining counties of this State, at a minimum a Quarter of a Million dollars of taxpayer funds ... to such an undertaking." Monson Certification

---

[4] Frye v. U.S., 293 F. 1013 (D.C.Cir.1923).

at page 7, para. 16. Again, the State's error does not become this Court's emergency. It is unlikely that each county will undertake a Frye hearing. This plea for assistance to this Court is misplaced, since the State may move in each of these other counties to consolidate such hearings. As any adverse ruling would be appealable in those other cases, such a concern should not be addressed in this matter.

The State claims that if it "is compelled to proceed with this unnecessary hearing in the Law Division, it will seriously compromise the ability of the State to continue with the statewide implementation of the Alcotest® 7110 MKIII-C, causing considerable confusion" and significant expense. State's Brief at 12. First, the hearing, based on the information known about the machine at present, and based upon the argument infra, is not only necessary, it is required to establish the machine as the evidential breath testing device to be used in prosecutions in this State. Second, it is agreed that undertaking such a hearing will compromise the ability of the State to continue with the statewide implementation of the machine. Indeed, that is the purpose of the Frye hearing, i.e. to determine whether the machine may be relied upon by the State in prosecuting DWI's in New Jersey. Lastly, it is the State that rolled out the machine at the taxpayers' peril without a definitive determination of the admissibility of the machine in all courts across this State.

The State further complains about the time required to undertake a hearing in this matter. State's Brief at 12.

Ironically, the complexity of the ensuing hearing only underscores the requirement for such a proceeding.

Any delay of DWI prosecutions in this State is self-created by the Attorney General.

Defendants do not object to this Court addressing the Motion on an accelerated basis, however Defendants implore the Court to deny the application with expediency.

B. THE STATE SHOULD NOT BE PERMITTED TO SEEK COLLATERAL AFFIRMATION OF FOLEY

In his certification, Mr. Monson writes that the State did not appeal Foley "because the State won." Monson Certification at page 5, para. 14.

The State did not "win" the refusal issue. The Foley court found 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 did not appeal this determination, and made certain corrections to the software.

More fundamentally, it was incumbent upon the State to establish Foley as precedent beyond a Law Division hearing.

The State, however, failed to consider State v. Boyington, 153 N.J.Super. 252 (App. Div. 1977), or State v. Doriguzzi, 334 N.J.Super. 530 (App. Div. 2000).

While the State may have "obtained exactly what it had set out to obtain" (Monson Certification at page 5, para. 14.), it should have known that, in order to be guaranteed of state-wide acceptance, it needed appellate level certification of the reliability. See Doriguzzi, 334 N.J.Super. at 533. Not even the Municipal Courts are bound by Foley, except, perhaps those Municipal Courts in Camden County. It is arguable that based on the language in State v. Doriguzzi, supra, even the courts in Camden County are precluded from relying on evidence from the Alcotest® 7110 MKIII-C without appellate level determination on the issue of scientific reliability, unless in each trial, the scientific reliability of the machine is proven. This Court stated in Doriguzzi:

> The controlling appellate issue is whether the trial courts properly accepted evidence of the HGN test without foundation testimony establishing its general acceptance in the scientific community. The issue is presented because neither this court nor our Supreme Court has yet endorsed HGN testing. A published trial court opinion, decided subsequent to the Law Division's determination in the present case, has held that HGN testing is generally accepted in the relevant scientific community. State v. Maida, 332 N.J.Super. 564, 753 A.2d 1240 (Law Div. 2000). However, 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).

Doriguzzi, 334 N.J.Super. at 533. Based on this language, no court outside of Camden may rely on Foley as establishing scientific reliability of the Alcotest® 7110 MKIII-C. The State should have known this, and should have been aware of Boyington, supra, and Doriguzzi, supra, when assessing how to proceed in Foley.

Mr. Monson's statement that "the Rules of Court did not provide for the winning party to seek appellate review" (Monson Certification at page 5, para. 14.) is misplaced, since, the State did not win on all of the issues.

And, certainly, it was not incumbent upon any defendant in Foley to do the State's work in appealing the result. The State suggests this in that same paragraph of the certification, stating "at least one defendant had indicted (sic) through his attorney, that he would be seeking further appellate review."

The State may have addressed the adverse ruling on the refusal issue based upon the changes in software from version 3.8 to version 3.11, but it did nothing to address the issue pursuant to Doriguzzi.

In its Brief to this Court, the State further claims because Foley was a published opinion, that fact supports its position that judicial notice may be accorded to that case. See State's Brief at 14-16. Although the State cites Black's Law Dictionary to define decisional case law, it is unable to cite any case from this Court, or any other court, in support of such a newly carved out proposition.

The State's error in proceeding with state-wide implementation of the machine cannot now obfuscate the clear mandates of Boyington and Doriguzzi.

C. THE LAW DIVISION IS CORRECT IN ITS APPLICATION OF CASE LAW: THE LAW DIVISION MAY NOT JUDICIALLY NOTICE FOLEY

Whatever Judge Longhi or Judge DeVesa opined in the hearings before them is irrelevant to the decisions made by Judge Cantor. Neither judge entered any orders in this matter, and there is no "law of the case" as suggested by the State in footnote 4 of its Brief at page 8. Whether Judge Longhi would have allowed other parties into this matter, or whether he would have denied some motions in this case and granted others is of no consequence to the current litigation.

Judge Cantor's decision to allow the additional parties, and more importantly, to conduct a Frye hearing are absolutely correct, supported by law and the discretion accorded to the trier of fact. See Point III, infra.

D. THE ALCOTEST® 7110 MKIII-C CURRENTLY IN USE IS A DIFFERENT MACHINE THAN THE ONE CONSIDERED IN FOLEY AND IT IS PRODUCING VASTLY DIFFERENT DATA THAN THE TWO MACHINES UTILIZED IN THE PENNSAUKEN PILOT PROGRAM

The State was using Firmware version 3.8 in the context of Foley. Now it is using version 3.11.

Any and all changes made to the software must be divulged to the Defendants in order to assess any proper defense of this

case. The State's provision of Dr. Brettel's Certification cannot properly answer this complex question. This issue must be determined by a finder of fact. Defendants are entitled to confrontation on this issue. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The data available in the matters cited, Miralda and Lebedinsky, as well as all of the information now available on the machines as configured with 3.11 software, compel an assessment of scientific reliability on the machine and its processes, alone. As part of the discovery in this Chun case, the State has agreed to provide all of the data recorded by all of the machines in use in Middlesex County from its inception there in January through September 9, 2005. This data must be analyzed to determine the extent of the errors being set forth by the machine as it is presently configured.

E. DEMONSTRABLE EVIDENCE EXISTS THAT THERE ARE FLAWS IN THE PARADIGM OF THE ALCOTEST® 7110 MKIII-C's SOFTWARE

In the Miralda case that is part of this litigation, 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 attached hereto as Ra1. Readings greater than 0.02 apart are not accepted scientifically anywhere on the planet.

The Plainsboro machine in the Lebedinsky case that was

sought to be joined in this action, but since resolved based on the following error, 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 by the software of the Alcotest® 7110 MKIII-C. See result attached, Ra2.

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 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.

Miralda's and Lebedinsky's Alcohol Influence Reports demonstrate that there are errors 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 interferents 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.

F. THE DECISION IN FOLEY WAS INCOMPLETE, AND NOW INAPPLICABLE TO THE CURRENT MACHINE DUE TO DATA AVAILABLE DEMONSTRATING SOFTWARE ISSUES AND ERRORS, THEREBY MANDATING A NEW FRYE HEARING

The State's claim that it "will be required to, once again, prove the scientific reliability and accuracy" of the Alcotest® 7110 MKIII-C and its processes is incorrect. See State's Brief at page 3, para. 3.

A new Frye hearing must be conducted regarding the Alcotest® 7110 MKIII-C for a number of reasons. Foley failed to address the scientific reliability of the software in this computerized machine. This machine now runs on a software version (3.11) that is, presumably, three versions different than the 3.8 software from the Pennsauken Pilot program of 2002. Foley was not appealed by the State, and is now fully resolved. The State is asking the Court to collaterally affirm Foley by sidestepping a Frye hearing in Chun.

G. IN ORDER FOR THE STATE TO UTILIZE THE ALCOTEST® 7110 MKIII-C AS AN EVIDENTIAL BREATH TESTING DEVICE IN THE STATE OF NEW JERSEY, AN ANALYSIS OF THE SOFTWARE MUST BE UNDERTAKEN IN THE CONTEXT OF A FRYE HEARING

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.

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.[5] Ra1. This document shows that the results of the

[5] Upon information and belief, a similar error exists in Sequential test 0004 of the New Brunswick machine. It is expected that this error, and several others will be divulged during the discovery phase of this matter.

two tests, 0.148% and 0.126% are more than 10% apart and more than 0.01 apart.

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. This computer cannot run without the software. Foley presumably accepted the machine, but never analyzed what the machine runs on.

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.

H. SUMMARY REVERSAL OF THE STAY OF LITIGATION IN MIDDLESEX COUNTY WOULD BE IMPROPER

As she heard the issues in the matter, and grasped the enormity of the case before her, Judge Cantor appropriately tempered her initial intentions regarding expeditious hearings in this matter. Even though municipal matters are held in abeyance awaiting the outcome of the issues in this matter, Judge Cantor recognized the effect of the issues on the pending prosecutions, and properly stayed the litigation in those matters, as to issues involving the Alcotest® 7110 MKIII-C only. If individual cases

can be addressed or resolved on issues unrelated to the machine, cases may proceed on alternative bases.

The State seeks summary reversal of the Law Division's Order staying Alcotest® 7110 MKIII-C litigation in Middlesex County pending resolution of the Frye hearing in this case, pursuant to the following language from R. 2:8-3(b):

> Any party to an appeal may move the Appellate Division for summary disposition in accordance with R. 2:8-1(a). Such motion shall demonstrate that the issues on appeal do not require further briefs or full record.

Based on the information presented to this Court, the State cannot demonstrate that the issues on appeal do not require a full record. To the contrary, based upon the data set forth, and a plethora of discovery that must be obtained during the course of a factual hearing on these issues, a full record on the issues must be obtained so that the issues current to the machine and the software may be assessed by a fact-finder, and then by an appellate court, for final application to all courts in the State of New Jersey.

The Attorney General's assessment that nothing in this matter requires the taking of testimony, and that the issues before the Court are strictly legal in nature, resolvable under R. 1:6-2 and 3:29, is convenient for the State's position that Foley should be judicially recognized. However, it ignores the legal and factual realities of the position in which the State has placed accused individuals and the courts of this State.

Staying litigation in Middlesex County was not only the proper result, but required under Due Process and Equal

Protection under the law.

POINT II: IF THIS APPEAL IS HEARD BY THIS COURT, THE STATE MUST PROVIDE TRANSCRIPTS OF THE HEARINGS, RATHER THAN RELY ON CERTIFICATIONS

The State, through Mr. Monson and Mr. Dell'Aquilo, have submitted certifications on the issues presented to this Court. These certifications do not fully represent the facts of the proceedings. This is not an emergent appeal, where the State cannot order the relevant transcripts on an expedited basis.

POINT III: JUDGE CANTOR WAS CORRECT IN DENYING TO ACCORD JUDICIAL NOTICE TO FOLEY, AND, AS SUCH, A NEW FRYE HEARING MUST BE UNDERTAKEN ON THE ISSUE OF THE SCIENTIFIC RELIABILITY OF THE ALCOTEST® 7110 MKIII-C

The State recognized its error in not appealing Foley when it sought consolidation of the original six cases in this matter. In order to have the results of the machine admissible in Middlesex County, and then across the State, the State had to obtain a decision from the Law Division in Middlesex regarding the applicability of Foley in that county. A ruling judicially noticing Foley in Middlesex would then presumably follow to other counties based on similar arguments and reasoning as to judicial notice, not only of the Foley decision, but of the Middlesex Law Division's ruling, as well.

However, Judge Cantor accurately assessed the judicial notice issue, and in the first few minutes of the hearing on October 14, 2005, stated very clearly that the law precluded her

from taking judicial notice of Foley. While the State in its certifications says that Judge Cantor "did not cite any specific facts or law" (Dell'Aquilo certification, page 4, para. 13(a)), Judge Cantor stated that she reviewed all of the submissions of counsel, and it was clear to her that she could not judicially notice Foley. Cited in Defendants' submissions was State v. Boyington, 153 N.J.Super. at 254, where a panel of this Court 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.

As a result of this accurate assessment of the law regarding judicial notice, Judge Cantor proceeded to the next logical step, which is to conduct a Frye hearing on the scientific reliability of the Alcotest® 7110 MKIII-C as it is now configured.

The State's mistake in not appealing Foley cannot be cured by seeking judicial notice of that case in the remaining twenty counties. Defendants asked for a Frye hearing in counsel's response to the State's motion for judicial notice. See Brief at page 15, attached as Ra26.

The Alcotest® 7110 MKIII-C, running on software version 3.11, is not the same "instrument" as the one partially dissected in Foley. The demonstrable errors that are being produced by the machine currently were not evident in the Pennsauken pilot program.

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. If the Foley court considered the software at all, it was done as a by-product of the EC/IR process and the results produced by the machine.

The State wrote in its brief to the Law Division in this matter 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 software was treated as a collateral issue by the court.

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. 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 three times 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?

It is ironic that no other court in any state where the 7110 is utilized has undergone a Frye type 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, no court may judicially notice the holding in that case, and it is submitted that the Law Division in Middlesex must undertake a comprehensive review of the platform upon which this machine runs.

Now, the State is asking this Court to sidestep rules, procedure, and case law on scientific reliability, and proclaim that Foley was correct in this collateral proceeding. 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.

Foley only went so far. It is respectfully submitted that it is for the Law Division in Middlesex County, through Judge Cantor, to complete the analysis of scientific reliability of this process. Because the State declined or failed to appeal Foley, the process must begin anew.

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*, [128 N.J.Super. 199 (App.Div.1974), *aff'd o.b.* 66 N.J. 139 (1974), *cert. den.* 423 U.S. 836, 96 S.Ct. 61, 46 L.Ed.2d 54 (1975)] 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 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.

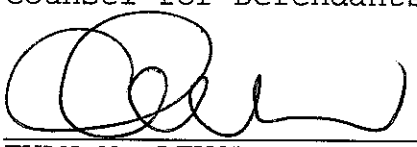
As to the requirements regarding the taking of judicial notice, it is submitted that neither an analysis of Rubanick v. Witco Chemical Corp., 125 N.J. 421 (1991), nor State v. Harvey, supra, 151 N.J. at 117 is even relevant at this juncture. However, applying all of the factors stated above, judicial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

Based on all of this, there is no option present other than to conduct a Frye hearing anew.

CONCLUSION

For the foregoing reasons, it is requested that this Court deny the State's Motion for Leave to Appeal, and the relief requested in that Motion, or deny the State's requests, including judicially noticing Foley on the merits of its application. In any event, Middlesex Alcotest® prosecutions must be stayed pending resolution of this omnipotent issue.

Counsel for Defendants:



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