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FIELD SOBRIETY TESTING INSTRUCTOR
▼ALSO ADMITTED TO PENNSYLVANIA BAR



Charles A. Lutz
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◊CERTIFIED BY THE SUPREME COURT OF
NEW JERSEY AS A CIVIL TRIAL ATTORNEY

February 24, 2006

Sandy Sandford, Case Manager
Supreme Court Clerk's Office
Hughes Justice Complex
25 W. Market Street
P.O. Box 970
Trenton, NJ 08625-0970

**Re: State v. Chun, et al. (#58,879)
MOTION FOR FUNDING EXPERTS**

Dear Ms. Sandford:

Enclosed please find an original and eight copies of Defendants' Motion for Funding of Experts.

Please file the Motion and return a copy stamped "filed" in the enclosed envelope.

Please advise the parties as to the scheduling of this motion.

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "E. Levow", written over a circular stamp.

EVAN M. LEVOW

EML:bs

c: Hon. Michael Patrick King, P.J.A.D., retired
Andrew S. Maze, Esq.
Christopher Hewitt, Esq.
Jonathan Kessous, Esq.
John Menzel, Esq.
Matthew W. Reisig, Esq.
Samuel L. Sachs, Esq.
Peter Lederman, Esq.
Jeffrey Evan Gold, Esq.
Arnold Fishman, Esq.
Christine A. Hoffman, D.A.G.

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(856) 428-5055
ATTORNEYS FOR DEFENDANTS
Chun, Miralda, Demirelli, Ogbutor, Slater and Tirado

STATE OF NEW JERSEY,
Plaintiff,
vs.
JANE H. CHUN, et al.,
Defendants,

SUPREME COURT OF
NEW JERSEY
Docket No. 58,879
QUASI-CRIMINAL ACTION
**NOTICE OF MOTION FOR
FUNDING OF DEFENSE EXPERTS**

PLEASE TAKE NOTICE that on a date and time to be set by this Court, counsel for the Defendants in this matter, Evan M. Levow, Andrew S. Maze, Christopher Hewitt, Jonathan Kessous, John Menzel, Matthew W. Reisig, and Samuel L. Sachs, will request that this Court grant funding for defense experts for this litigation.

Counsel rely on the attached Brief in Support of the Motion.



EVAN M. LEVOW
ANDREW S. MAZE
CHRISTOPHER HEWITT
JONATHAN KESSOUS
JOHN MENZEL
MATTHEW W. REISIG
SAMUEL L. SACHS

Dated: February 24, 2006

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STATE OF NEW JERSEY,

Plaintiff,

vs.

JANE H. CHUN, et al.,

Defendants,

SUPREME COURT OF
NEW JERSEY

Docket No. 58,879

QUASI-CRIMINAL ACTION

**BRIEF IN SUPPORT OF MOTION
FOR FUNDING OF EXPERTS**

**DEFENDANTS MUST BE GRANTED FUNDING
FOR EXPERTS TO ASSIST IN A FAIR
ASSESSMENT OF THE SCIENTIFIC
RELIABILITY OF THE Alcotest® 7110
MKIII-C**

5

The defendants in this matter are a cross-section of defendants throughout the State, having been charged with violations of N.J.S.A. 39:4-50 and having been tested on the new Alcotest® 7110 MKIII-C. These Defendants comprise the current "test" case for the State to seek pronouncement of scientific reliability of the Alcotest® 7110 MKIII-C.

10

Even though the Defendants are participants in this scientific reliability assessment, they must not be caused to pay for the expert testimony required to defend, challenge, and refute the State's claims that this machine is scientifically

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reliable.

In addition to the voluminous discovery that has been and is being produced by the State to the Defendants, Judge King has ordered the State and the manufacturer of the machine, Draeger Safety, Inc., to provide four machines for testing, along with a copy of the software and source-coding for the Alcotest® 7110 MKIII-C, so that the Defendants may analyze the machine and its processes. Without funding, no meaningful assessment of the data and the software may be undertaken. Obtaining the data, software and coding would be a Pyrrhic victory, ultimately useless without expert analysis of its processes. The same is true for any statistical analysis of the other data being produced by the State.

Without access to defense experts in this matter, this Court would only be assessing one side of the argument, presumably sustaining unrebutted proofs set forth by the State as to the computerized machine's scientific reliability, charting the future of breath testing in New Jersey for the decades to come on one-sided non-peer reviewed processes.

Evidence of the breath test results produced by a chemical breath testing instrument can 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 (1997); Romano v. Kimmelman, 96 N.J. 66; State v. Johnson, 42 N.J. 146 (1964). To establish general

acceptance within the scientific community the proponent must meet the clear and convincing standard of proof. Harvey, 151 N.J. at 171. No peer review has been undertaken on this machine and its processes. This litigation will be the first assessment of the reliability of this machine. Defendants should not have to pay for being part of this litigation, where it is the State's burden to establish reliability. This is especially true where this is the second attempt by the State to seek such an assessment. See State v. Foley, 370 N.J.Super. 341 (Law Div. 2003).

In State v. Doriguzzi, 334 N.J.Super. 530 (App. Div. 2000), the Appellate Division stated that "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. [citing Harvey, 151 N.J. at 166-176]." Without a two-sided presentation regarding this machine and software, any assessment of scientific reliability would be dubious.

As for actual payment, funding may come from a number of potential sources: the Administrative Office of the Courts, the DWI Enforcement Fund, the State Public Defender, the Municipalities, or any other viable source that this Court deems proper.

In In re Cannady, 126 N.J. 486 (1991), this Court ruled that an individual who was represented by private counsel, but who was

otherwise indigent, could apply to the Office of the Public Defender for the payment of ancillary services related to the defense of the case.

5 Dale Jones, Assistant Public Defender was contacted regarding this issue, and his response is attached hereto, as Exhibit A. Because this matter does not arise out of an indictable offense, it appears to be his position that the State Public Defender is not responsible for funding.

10 As to Municipal funding, N.J.S.A. 2B:24-6(a) states, in pertinent part:

15 ... All necessary services and facilities of representation, including both expert and lay investigation and testimony as well as other preparations, shall be provided in every case. The municipality shall be responsible for payment for services pursuant to this section. The factors of need and real value to a defendant may be weighed against the financial constraints of the municipality in determining the necessary services and facilities of representation. The final determination as to necessity for services required pursuant to this section shall be made by the court.

20 However, subsection (c) of that statute further states:

25 Nothing in this section shall be deemed to require a municipality to pay for expert and lay investigation or testimony for a period of one year after the effective date of P.L.1997, c. 256 (C.2B:24-1 et seq.).

N.J.S.A. 2B:24-6(c) .

30 It is in this context, then, that Defendants seek funding from this Court, either from one of the above mentioned sources, or from another source as the Court Orders.

CONCLUSION

In order to maintain the public confidence in the impartiality and fairness of this proceeding, funding must be accorded to the Defendants for expert assistance in this case.

5 Whatever the funding source, the Defendants cannot and should not fund the State's reliability hearing. It is respectfully requested that this Court Order funding for all required defense experts to this litigation from whatever source the Court determines to be proper.

10 In compliance with discovery rules once the State has provided discovery in this matter, Defendants will submit applications for expert assistance, in camera to the Court.



EVAN M. LEVOW, ESQUIRE
ANDREW S. MAZE
CHRISTOPHER HEWITT
JONATHAN KESSOUS
JOHN MENZEL
MATTHEW W. REISIG
SAMUEL L. SACHS

Dated: February 24, 2006

Evan M. Levow

From: "Dale Jones" <Dale.Jones@opd.state.nj.us>
To: <evanlevow@dwi-nj.com>
Sent: Monday, December 12, 2005 10:26 AM
Subject: Re: Alcotest Litigation in Middlesex County (II)

Does this matter arise out of an indictable offense? If not, see NJSA 2B:24-6 (a).

>>> "Evan M. Levow" <evanlevow@dwi-nj.com> 12/09/05 03:56PM >>>

...sorry -- to be more specific -- seeking assistance for funding of expert testimony. The State can pay all the experts it needs to seek to establish scientific reliability, however the defense does not have any war chest. Most of the individual defendants have little if no funding for expert assistance. More importantly, on an issue of statewide importance, they cannot fund that battle. The State is seeking acceptance of the machine, and accordingly, the State should assist in funding the overall case.

Thank you, and I look forward to hearing from you.

Evan M. Levow, Esq.
(856) 428-5055 office
(856) 889-5181 cell

----- Original Message -----

From: Evan M. Levow
To: dale.jones@opd.state.nj.us
Sent: Friday, December 09, 2005 2:44 PM
Subject: Alcotest Litigation in Middlesex County

Dale -

I am part of the defense team now doing the Frye hearing in Middlesex County in State v. Chun.

We are a group of 6, basically solo or small practice, defense attorneys, seeking to demonstrate that the new machine, the Alcotest 7110 MKIII-C, in it's present configuration, is not reliable.

We have demonstrable evidence that the machine is reporting readings that it should not be reporting. Further, the State's parameters for tolerance are far beyond what is accepted in the scientific breath testing community. For example, the State would allow +/- 10% on an averaged 0.20 reading, allowing for a 0.04 deviation. The National Safety Counsel allows for only a 0.02 variance.

I would like to discuss funding assistance from the Office of the Public Defender.

EXHIBIT A

Please call me as soon as you can.

Thank you,

Evan M. Levow, Esq.

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