



NEW JERSEY STATE BAR ASSOCIATION

New Jersey Law Center • One Constitution Square
New Brunswick, New Jersey 08901-1500
(732) 249-5000 • Fax (732) 249-2815

December 5, 2016

Hon. Chief Justice Rabner and
Associate Justices of the Supreme Court of New Jersey
New Jersey Supreme Court
Hughes Justice Complex
25 W. Market Street
Trenton, NJ 08625

Re: State v. Cassidy (078390)

Dear Chief Justice Rabner and Associate Justices of the Supreme Court of New Jersey:

Thank you for the opportunity to provide a response to the State's motion in State v. Cassidy, as the issue to be resolved is one of great public importance and where the New Jersey State Bar Association (NJSBA) has a special interest and unique expertise. Please accept this statement in lieu of a more formal brief, pursuant to R. 2:12-2.

The New Jersey State Bar Association submits that the Court should grant the State's motion for direct certification, deny a special master appointment, hold that the Court's decision in State v. Chun, 194 N.J. 54 (2008), is dispositive of the issue, and remand the matter to municipal court for further proceedings.

This will ensure that the rights of New Jersey citizens remain protected and will preserve the confidence in and integrity of the judicial system.

The use of a NIST-traceable digital thermometer was first made a requirement by the Chief Forensic Scientist of New Jersey, head of the New Jersey State Police Laboratory, before even the pilot program and the first case on the reliability of the Alcotest 7110 MkIII ("Alcotest"), State v. Foley, 379 N.J. Super. 341 (Law Div. 2003). Its use was not challenged in Foley by either side.

After Foley, the State changed certain procedures and firmware as to the Alcotest and began to deploy the machine throughout much of the state, even though it had no prior appellate ruling on its scientific reliability. This Court issued an order in State v. Chun for appointment of a special master, the Honorable Michael Patrick King, PJAD ret. Chun, supra, 194 N.J. 54. The Court also halted further deployment of the machine and limited its use where it was deployed, pending the Court's final determination in the matter. Id.

The Chun decision was the result of a lengthy judicial process, where all parties had numerous opportunities to debate the issues and present their arguments. The NJSBA participated at every level. There were two separate rounds of hearings consisting of many months of scientific testimony. There were

three separate briefings to this Court, as well as innumerable briefings to the special master. In addition, there were two rounds of oral arguments to this Court. Not once did the State challenge its own established requirement that a NIST-traceable thermometer be used, although generally temperature was a crucial and much litigated subject in Chun. Having a reliable temperature means one traced back to a known reliable standard from the National Institute for Standards and Technology ("NIST"), a U.S. government agency. No party or amicus questioned that premise, which was proffered by the State itself. All parties before the Court today agree that Chun incorporated use of the NIST-traceable thermometer as necessary to a reliable breath test reading by the Alcotest.

Five years later, the defendants in Chun moved before this Court, in what is commonly referred to as Chun II, to hold the State to database requirements established in Chun. State v. Chun, 215 N.J. 489 (2013). There, the State argued that the Alcotest would no longer be used in New Jersey by the end of 2016, and then made an additional wide-sweeping request, not part of the data issue, that the Court reverse itself on Chun's requirement that the firmware of the Alcotest be changed. The State argued budgetary issues coupled with the anticipated elimination of the use of the machine to support its proposal. Nowhere in that wide-sweeping request did the State mention

anything about doing away their own self-imposed requirement of a NIST-traceable thermometer as incorporated in Chun. While this Court, in Chun II, granted the relief of removing the required firmware revisions in Chun, no mention was made of the thermometer in question.¹

In its current motion, the State now asks this Court to revisit, once again, the well-settled law of Chun that is based upon years of scientific litigation and the State's own established procedure, the result of which serves to protect the millions of citizens of New Jersey. And why? Because one of its own state police officers has been charged criminally with failure to use the NIST-traceable device. While the State estimates this may affect more than 20,000 cases, the NJSBA believes the actual number of affected cases will be a mere fraction of that number for two reasons.

First, the vast majority of cases are disposed cases where the defendants have already served their suspensions and would not likely be motivated to get counsel and relitigate just to recover fines that would not be more than their legal costs. Second, DWI prosecutions are proven in two ways, by breath test readings and by observation. In the vast majority of cases where a reading would be rightly excluded, the case will still be

¹The NJSBA respectfully notes that as we approach 2017, no new breath test device has been tested in a pilot program or gained an appellate stamp of

provable by observations. It may mean a few cases turn out to be first tier offenses and a few offenses might be dismissed. But overall, while the State has set forth the *possible* number of cases that *could* be affected by the actions of this one NJSP coordinator, the practitioners in the trenches suggest that, realistically, the *actual* number will be a small fraction of that.

The State rolled out use of the Alcotest before scientific reliability had even been established by the Appellate Division, as required under New Jersey law. Once reliability was established in Chun, with certain conditions, the State then asked, in Chun II, for the Court to remove the requirement that the firmware in the machine be changed. They argued budgetary constraints and that a new breath test machine would be in place by the end of 2016. Now, it seeks appointment of a special master to consider undoing another aspect of the Chun decision, citing the actions of an indicted (but not adjudicated) police officer and a questionable, seemingly inflated, number of cases that would be affected.

Nevertheless, the larger issue is whether the Court should use its ultimate legal power to diminish the rights of millions of New Jersey citizens in order to help the State prosecute a few

approval as would be required for use in prosecution of driving under the influence offenses in New Jersey despite the State's representation in Chun II.

drunk driving cases where a state police officer is now accused by the State itself of intentionally falsifying data in many of those cases. This is not the first time the Court has addressed this very issue. In State v. Gookins, 135 N.J. 42 (1994), a police officer was indicted for falsifying Breathalyzer tests. Defendants in other cases wanted to reopen their cases where the officer did the breath testing due to this new information. Not only did this Court agree that such conduct would be new evidence that could be used to impeach the officer as a reason to allow same, but moreover held:

A more fundamental premise requires vacation of these pleas. Because public confidence in the criminal-justice system depends on the integrity of the courts, the prosecutors, and the police, the system can never disregard misconduct by such actors in the fulfillment of their public duties. (emphasis added).

In conclusion, the NJSBA urges the Court to affirm the settled reliability requirements put in place to protect the rights of all citizens to cure the illegal conduct of one bad state police officer. The Court has spoken in Chun and Chun II about reliability of the Alcotest, and in Gookins about the paramount importance of the integrity of the courts, prosecutors and police when police falsify breath test records. Accordingly, the NJSBA submits that the Court should grant the State's motion for direct certification, deny the appointment of a special master, and hold that the requirement of a NIST-traceable

thermometer was decided in Chun and must be adhered to in order to establish the evidential reliability of any Alcotest breath reading.

Respectfully submitted,
NEW JERSEY STATE BAR ASSOCIATION

By: Thomas H. Prol /sab
Thomas H. Prol, Esq.
President
Attorney ID: 002312001

/sab

cc (by email only):

Elie Honig, Director, Division of Criminal Justice
Elyse S. Schindel, Esq.
Christopher D. Adams, Esq.
Evan M. Levow, Esq.
John Menzel, Esq.
Matthew W. Reisig, Esq.
Samuel Louis Sachs, Esq.