

## NOTICE TO THE BAR

### **SCIENTIFIC RELIABILITY OF ALCOTEST 9510 – APPOINTMENT OF SPECIAL MASTER; LIMITED STAY OF AFFECTED DWI MATTERS**

The Supreme Court granted direct certification in State v. Cunningham, (A-38-22)(087913), to address the use of the new Alcotest 9510, which the State represents is being used as a replacement for the Alcotest 7110 in driving while intoxicated (DWI) cases due to the manufacturer's discontinuation of the 7110 device.

By the attached order, the Court imposed a limited stay of affected DWI matters, and appointed Judge Richard J. Geiger, J.A.D., to serve as a Special Master to develop a record, conduct hearings, and make findings and conclusions regarding the scientific reliability of the Alcotest 9510. This appointment is in addition to Judge Geiger's regular Appellate Division assignment and responsibilities.

The Special Master shall determine the extent of participation of any person or entity in addition to the State and defendant. All such motions for participation in the remand must be served and filed with the Special Master on or before June 20, 2023.

Questions about this matter can be directed to the Supreme Court Clerk's  
Office at 609-815-2955.

A handwritten signature in blue ink that reads "Heather Joy Baker". The signature is written in a cursive style with a large initial "H" and "B".

Heather Joy Baker  
Clerk of the Supreme Court

Date: May 1, 2023

SUPREME COURT OF NEW JERSEY  
M-754/755/764/765/766  
September Term 2022  
087913

State of New Jersey,

Plaintiff-Movant,

v.

O R D E R

Colleen A. Cunningham,

Defendant.

The Court having previously found results from Alcotest machines sufficiently reliable to be admissible in driving while intoxicated (DWI) cases to establish a defendant's guilt or innocence for DWI, see State v. Chun, 194 N.J. 54, 65 (2008); and

That determination having been made based on law enforcement's use of the Alcotest 7110 MKIII-C ("7110") to analyze breath samples; and

The State having opened this matter with the Court to address the use of the new Alcotest 9510, which the State represents is being used as a replacement for the 7110 due to the manufacturer's discontinuation of the 7110 device and the unavailability of certain replacement parts that are necessary for the 7110's operation, see State's Certif. ¶¶3-4; and

For good cause appearing, it is

ORDERED that the unopposed motions to relax the Court Rules (M-754), for direct certification (M-755), for a stay of DWI matters involving the Alcotest 9510 (M-764), for the appointment of a special master (M-765), and to issue a Notice to the Bar (M-766) are granted, in part, as provided below; and it is further

ORDERED that the motions to relax the Court Rules (M-754) and for direct certification of the matter involving defendant Colleen Cunningham (M-755) are granted; and it is further

ORDERED that the Court hereby appoints as the Special Master Judge Richard J. Geiger, J.A.D., who is currently serving in the Superior Court, Appellate Division; and it is further

ORDERED that the matter is remanded to the Special Master to develop a record, conduct hearings, and make findings and conclusions regarding the scientific reliability of the Alcotest 9510, which proceedings shall be scheduled on an accelerated basis; and it is further

ORDERED that the Special Master shall provide to the Court a written update on the remand proceeding every ninety (90) days until the remand proceedings have concluded; and it is further

ORDERED that the Special Master shall determine the extent of participation of any person or entity in addition to the State and defendant,

Colleen Cunningham, provided that the Court hereby directs that all motions for participation in the remand must be served and filed with the Special Master on or before June 20, 2023; and it is further

ORDERED that the Special Master shall hear testimony, including expert testimony, hear the arguments of the parties, and make findings of fact and conclusions of law; and it is further

ORDERED that the State shall make arrangements to ensure that the Special Master receives transcripts of the remand proceedings conducted pursuant to this Order; and it is further

ORDERED that the Special Master shall complete and submit to the Court a written report of his findings and conclusions following the completion of the hearing; and it is further

ORDERED that upon the filing of the Special Master's written report, the parties and other participants shall have thirty days to serve and file briefs with the Court, and ten days thereafter to file any responding briefs, and that no further submissions will be permitted unless requested by the Court; and it is further

ORDERED that upon completion of the briefing, the matter shall be set down for oral argument at a date and time to be established by the Clerk of Court; and it is further

ORDERED that, during the pendency of the remand proceedings and pending further order of this Court, a limited stay as imposed by this Order shall apply to all DWI matters involving the use of Alcotest 9510 machines in Municipal Courts and appeals in the Law Division and Appellate Division of Superior Court; and it is further

ORDERED that DWI prosecutions and appeals based exclusively on the use of an Alcotest 9510 device (i.e., without other clinical or objective observational evidence), are stayed unless otherwise provided by this Order; and it is further

ORDERED that the State may proceed with the prosecution of DWI matters in the normal course when those prosecutions will not include Alcotest 9510 results, but rather will be based on clinical evidence, including but not limited to objective observational evidence; and it is further

ORDERED that all requests for a reliability hearing in respect of Alcotest 9510 devices shall be stayed pending the filing of the Court's final decision herein, at which time all pending challenges to the reliability of the Alcotest 9510 shall be decided consistent with the Court's disposition; and it is further

ORDERED that a defendant who challenges the use of Alcotest-related evidence may enter a conditional guilty plea pursuant to Rule 7:6-2(c), reserving the right to apply for relief from the municipal court should the

appeal before this Court result in a determination that the Alcotest 9510 device is not reliable.

The provisions of this limited stay do not apply to matters involving the use of results from an Alcotest 7110 unit.

Jurisdiction is retained.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 1st day of May, 2023.

A handwritten signature in blue ink that reads "Heather J. Bates". The signature is written in a cursive, flowing style.

CLERK OF THE SUPREME COURT