

Excluding Alcotest Evidence at Trial



a.) Burden of Proof

[I]n this case we hold that the burden of proof prescribed under *State v. Johnson, [citation omitted]*, is to be followed to establish all of the conditions necessary for the admissibility of a breathalyzer test.

Under *Johnson*, conditions of admissibility must be “clearly established.” To avoid any confusion over what is intended by this level of proof, it should be understood that it conforms to that standard conventionally referred to as “clear and convincing proof.”

Romano v. Kimmelman, 96 NJ 66, 90-91 (1984)



b.) Clear and Convincing Evidence – Defined

Clear-and-convincing evidence is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the precise facts in issue. In re Seaman, 133 NJ 67, 74 (1993).



c.) Burden of Production

We hold further that the responsibility for establishing all conditions as to the admissibility of the breathalyzer results is properly allocated to the State. This is the rule with respect to the usual conditions of admissibility under *Johnson*.

Romano v. Kimmelman, 96 NJ 66, 90-91 (1984)



d.) What facts must the State prove?

The conditions of admissibility to which this burden of proof shall apply include those presently required to establish the admissibility of the results of a breathalyzer test, namely:

- 1.) the proper operating condition of the machine;**
- 2.) the requisite qualifications of the operator;**
- 3.) and the proper administration of the test.**

Romano v. Kimmelman, 96 NJ 66, 90-91 (1984)



State v. Chun, 194 NJ 54, 134 (2008)

There [in *Romano*] we demanded that, as a precondition for admissibility of the results of a breathalyzer, the State was required to establish that:

(1) the device was in working order and had been inspected according to procedure;

(2) the operator was certified; and

(3) the test was administered according to official procedure.



e.) Procedure - Hearing to establish conditions of admissibility

1.) Procedure - NJRE 101

(a) Applicability; exceptions.

(2) *Court proceedings; relaxation.* These rules of evidence shall apply in all proceedings, civil or criminal, conducted by or under the supervision of a court. **Except as provided by paragraph (a)(1) of this rule, these rules may be relaxed in the following instances to admit relevant and trustworthy evidence in the interest of justice:**

(E) proceedings to determine the admissibility of evidence under these rules or other law.

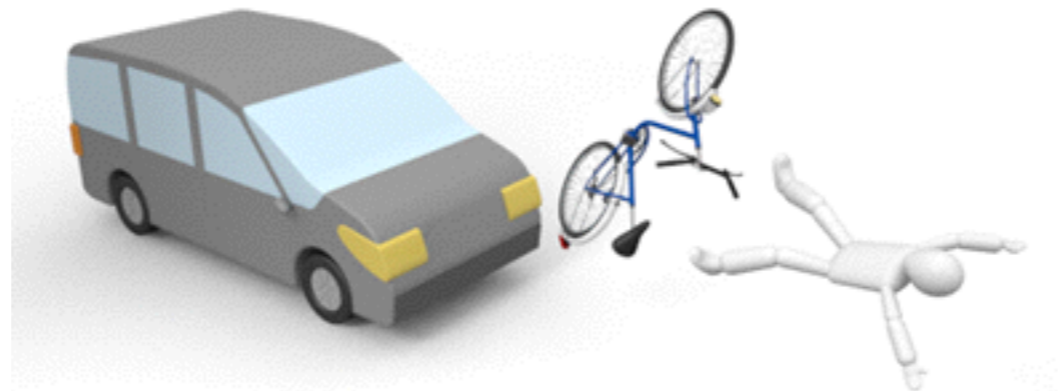


2.) NJRE 104a) and (d)

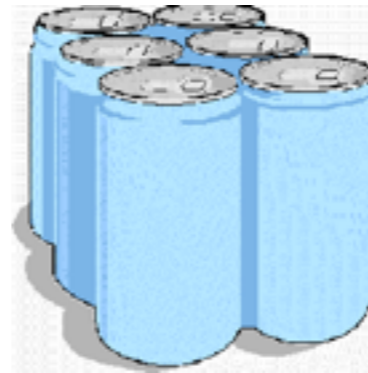
104. Preliminary questions

(a) Questions of admissibility generally. When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. In making that determination the judge shall not apply the rules of evidence except for [Rule 403](#) or a valid claim of privilege. The judge may hear and determine such matters out of the presence or hearing of the jury.

(d) Testimony by accused. By testifying upon a preliminary matter, the accused does not become subject to cross-examination as to other issues in the case.



“Clearly the rule contemplated the use of affidavits and other hearsay in such preliminary inquiries so long as the evidence appears to be reliable.”
State v. Cardone, 146 NJ Super. 23, 29 (App. Div. 1976). Accord State v. Dohme, 229 NJ Super. 49 (App. Div. 1988) (DWI Prosecution).



3.) Timing of 104(a) hearing

NJRE 611 - Mode and order of interrogation and presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

f.) Discovery - In general

1.) Rules of Court

- **Rule 7:7-7(b) Discovery by Defendant.** Unless the defendant agrees to more limited discovery, in all cases, the defendant, on written notice to the municipal prosecutor or private prosecutor in a cross complaint case, shall be provided with copies of all relevant material, including, but not limited to, the following:
- **Rule 7:7-7(g) Time and Procedure.** A defense request for discovery shall be made contemporaneously with the entry of appearance by the defendant's attorney, who shall submit a copy of the appearance and demand for discovery directly to the municipal prosecutor. If the defendant is not represented, any requests for discovery shall be made in writing and submitted by the defendant directly to the municipal prosecutor. The municipal prosecutor shall respond to the discovery request in accordance with paragraph (b) of this rule within 10 days after receiving the request.

2. Chun Alcotest-Foundational Discovery:

State v. Chun, 194 NJ 54, 153 (2008) (order)

C. Produce in discovery the twelve foundation documents identified by the Special Master as follows:

(1) New Standard Solution Report of the most recent control test solution change, and the credentials of the operator who performed that change;

(2) Certificate of Analysis for the 0.10 percent solution used in that New Solution Report;

(3) Draeger Safety Certificate of Accuracy for the Alcotest CU34 Simulator;

(4) Draeger Safety Certificate of Accuracy for the Alcotest 7110 Temperature Probe;

(5) Draeger Safety Certificate of Accuracy for the Alcotest 7110 Instrument;

(6) Calibration Records, including control tests, linearity tests, and the credentials of the coordinator who performed the calibration;

(7) Certificate of Analysis for the 0.10 percent solution used in the calibration control test;

(8) Certificate of Analysis for the 0.04, 0.08, and 0.16 percent solutions used in the calibration linearity test;

(9) New Standard Solution Report, following the most recent calibration;

(10) Draeger Safety Certificates of Accuracy for the Simulators used in calibration;

(11) Draeger Safety Certificate of Accuracy for the Alcotest 7110 Temperature Probe used in calibration; and

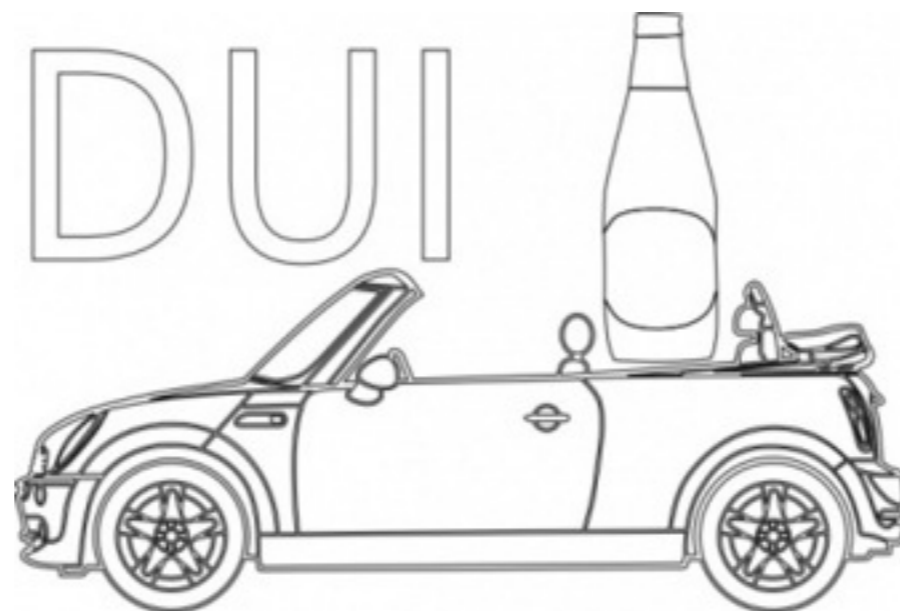
(12) Draeger Safety Ertco-Hart Calibration Report; and it is further

3. Core Foundational Documents

Our analysis of the general scientific reliability of the Alcotest is grounded, in part, on our expectation that there will be proof that the particular device that has generated an AIR being offered into evidence was in good working order and that the operator of the device was appropriately qualified to administer the test. This requirement that the test results be supported by foundational proofs for admissibility has been part of our jurisprudence since we decided *Romano*. There we demanded that, as a precondition for admissibility of the results of a breathalyzer, the State was required to establish that: (1) the device was in working order and had been inspected according to procedure; (2) the operator was certified; and (3) the test was administered according to official procedure.

State v. Chun, 194 NJ 54, 134 (2008)

The foundational documents that we conclude need to be entered into evidence therefore are few. They are: (1) the most recent calibration report prior to a defendant's test, with part I-control tests, part II-linearity tests, and the credentials of the coordinator who performed the calibration; (2) the most recent new standard solution report prior to a defendant's test; and (3) the certificate of analysis of the 0.10 simulator solution used in a defendant's control tests. Absent a pre-trial challenge to the admissibility of the AIR based on one of the other foundational documents produced in discovery, we perceive of no reason to require that they be made a part of the record routinely. State v . Chun, 194 NJ 54, 145 (2008).



4. List of Core Foundational Documents

1. Operator's Qualification Card (*Chun* at 134)

[Good for the year granted + 2 calendar years]; (see NJAC 13:51-1.8(d))

2. Most recent calibration report from NJSP - (*Chun* at 145);

3. Most recent standard solution change report prior to defendant's test (*Chun* at 145) (Note – this document may sometimes be included as part of #2 above);

4. Certificate of analysis used in defendant's control tests - (*Chun* 145);

5. The Alcohol Influence Report; (*Chun* at 134)

6. Worksheet A Tolerance Calculations (*Chun* 150-151).

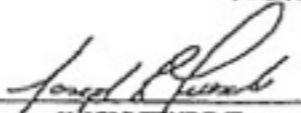
S-1


DEPARTMENT OF
Law and Public Safety
This is to certify that

Thomas J. Everist
Lawrence Township

IS QUALIFIED AND COMPETENT TO CONDUCT CHEMICAL BREATH ANALYSES PURSUANT TO CHAPTER 142 OF
THE LAWS OF 1966 IN THE OPERATION OF THE ALCOFEST 7110 MK IIC
A METHOD TO DETERMINE INTOXICATION.
GIVEN UNDER MY HAND AT TRENTON, NEW JERSEY THIS 23rd DAY OF September

TWO THOUSAND AND FIVE


SUPERINTENDENT
NEW JERSEY STATE POLICE


ATTORNEY GENERAL
STATE OF NEW JERSEY

ORIGINAL COURSE DATES _____

	DATE	Refresher Course PLACE	INSTRUCTOR
1.	12-19-07	OCDA	C. North
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			

S-2
A #6

Alcotest 7110 Calibration Certificate

Part I - Control Tests

Equipment:	Alcotest 7110 MKIII-C	Serial No.:	ARWF-0359
Location:	LAWRENCE TWP POLICE		
Calibration File No.:	00203	Calib. Date:	10/23/2007
Certification File No.:	00204	Cert. Date:	10/23/2007
Linearity File No.:	00080	Lin. Date:	10/23/2006
Solution File No.:	00201	Soln. Date:	10/20/2007
Sequential File No.:	00204	File Date:	10/23/2007
Calibrating Unit:	WET	Model No.:	CU-34
Control Solution %:	0.100%	Serial No.:	DDWJ S3-0355
Solution Control Lot:	07B045	Expires:	02/22/2009
		Bottle No.:	0024

Function	Result	Time	Temperature	Comment(s)
	%BAC	HH:MM	Simulator (°C)	or Error(s)
Ambient Air Blank	0.000%	14:15D		
Control 1 EC	0.099%	14:16D	33.9°C	*** TEST PASSED ***
Control 1 IR	0.100%	14:16D	33.9°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	14:16D		
Control 2 EC	0.099%	14:17D	33.9°C	*** TEST PASSED ***
Control 2 IR	0.101%	14:17D	33.9°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	14:18D		
Control 3 EC	0.100%	14:18D	33.9°C	*** TEST PASSED ***
Control 3 IR	0.100%	14:18D	33.9°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	14:19D		

All tests within acceptable tolerance.

Coordinator

Last Name: SNYDER

First Name: THOMAS

MI: J

Signature: *Thomas J. Snyder* 05772

Badge No.: 5792

Date: 10/23/2007

Pursuant to law, and the "Chemical Breath Testing Regulations" N.J.A.C. 13:51, I am a duly appointed Breath Test Coordinator/Instructor. In my official capacity, and consistent with "Calibration Check Procedure for Alcotest 7110" as established by the Chief Forensic Scientist of the Division of State Police, I perform calibration checks on approved instruments employing infrared analysis and electrochemical analysis when utilized in a single approved instrument as a dual system of chemical breath testing. Pursuant to, and consistent with, the current "Calibration Check Procedure for Alcotest 7110" as established by the Chief Forensic Scientist, I performed a Calibration Check on the approved instrument identified on this certificate. The results of my Calibration Check are recorded on this certificate, which consists of two parts on two pages: Part I - Control Tests; and Part II - Linearity Tests. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

S-2
B #6

Alcotest 7110 Calibration Certificate

Part II - Linearity Tests

Equipment	Alcotest 7110 MKIII-C	Serial No.:	ARWF-0359
Location:	LAWRENCE TWP POLICE		
Calibration File No.:	00203	Calib. Date:	10/23/2007
Certification File No.:	00204	Cert. Date:	10/23/2007
Linearity File No.:	00205	Lin. Date:	10/23/2007
Solution File No.:	00201	Soln. Date:	10/20/2007
Sequential File No.:	00205	File Date:	10/23/2007
Calibrating Unit:	WET	Model No.:	CU-34
Control Solution %:	0.040%	Serial No.:	DDRK S3-0003
Solution Control Lot:	07A041	Expires:	01/26/2009
		Bottle No.:	0452
Calibrating Unit:	WET	Model No.:	CU-34
Control Solution %:	0.080%	Serial No.:	DDXD S3-0184
Solution Control Lot:	07A042	Expires:	01/26/2009
		Bottle No.:	0236
Calibrating Unit:	WET	Model No.:	CU-34
Control Solution %:	0.160%	Serial No.:	DDSC S3-0009
Solution Control Lot:	07A043	Expires:	01/26/2009
		Bottle No.:	0589

Function	Result	Time	Temperature Simulator (°C)	Comment(s) or Error(s)
Ambient Air Blank	0.000%	14:34D		
Control 1 EC	0.040%	14:35D	34.0°C	*** TEST PASSED ***
Control 1 IR	0.041%	14:35D	34.0°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	14:36D		
Control 2 EC	0.041%	14:37D	34.0°C	*** TEST PASSED ***
Control 2 IR	0.041%	14:37D	34.0°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	14:38D		
Control 3 EC	0.081%	14:39D	34.0°C	*** TEST PASSED ***
Control 3 IR	0.081%	14:39D	34.0°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	14:41D		
Control 4 EC	0.081%	14:41D	34.0°C	*** TEST PASSED ***
Control 4 IR	0.080%	14:41D	34.0°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	14:43D		
Control 5 EC	0.159%	14:43D	34.0°C	*** TEST PASSED ***
Control 5 IR	0.161%	14:43D	34.0°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	14:45D		
Control 6 EC	0.159%	14:45D	33.9°C	*** TEST PASSED ***
Control 6 IR	0.160%	14:45D	33.9°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	14:47D		

All tests within acceptable tolerance.

Coordinator

Last Name: SNYDER

First Name: THOMAS

MI: J.

Signature: *Thomas J. Snyder*

Badge No.: 5792

Date: 10/23/2007

5-2
#6

Alcotest 7110 Calibration Record

Equipment	Alcotest 7110 MKIII-C	Serial No.:	ARWE-0359
Location:	LAWRENCE TWP POLICE	Calib. No.:	00004
Calibration File No.:	00203	Cert. Date:	10/23/2006
Certification File No.:	00079	Lin. Date:	10/23/2006
Linearity File No.:	00080	Soln. No.:	00033
Solution File No.:	00201	File Date:	10/23/2007
Sequential File No.:	00203		

Calibrating Unit:	WET	Model No.:	CU-34	Serial No.:	DDWJ S3-0355
Control Solution %:	0.100%	Expires:	02/22/2009	Bottle No.:	0024
Solution Control Lot:	07B045				

Coordinator
 Last Name: SNYDER First Name: THOMAS MI: J.

Signature: TPR. II Thomas J. Snyder #5792 Badge No.: 5792 Date: 10/23/2007

*Black Key Temperature Probe Serial# DDUNP2-229 (SJS)

*Ertco-Hart Digital Temperature Measuring System Serial# A29881 (SJS)



Pursuant to law, and the "Chemical Breath Testing Regulations" N.J.A.C. 13:51, I am a duly appointed Breath Test Coordinator/Instructor. In my official capacity, and consistent with "Calibration Check Procedure for Alcotest 7110" as established by the Chief Forensic Scientist of the Division of State Police, I perform calibration checks on approved instruments employing infrared analysis and electrochemical analysis when utilized in a single approved instrument as a dual system of chemical breath testing. Pursuant to and consistent with, the current "Calibration Check Procedure for Alcotest 7110" as established by the Chief Forensic Scientist, I performed a Calibration Check on the approved instrument identified on this certificate. The results of my Calibration Check are recorded on this certificate, which consists of two parts on two pages: Part I - Control Tests; and Part II - Linearity Tests. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

S-2
D #6

DEPARTMENT OF
Traffic and Public Safety
This is to certify that

Thomas J. Snyder
Breath Test Coordinator/Instructor

IS QUALIFIED AND COMPETENT TO CONDUCT CHEMICAL BREATH ANALYSIS PURSUANT TO CHAPTER 170B OF THE LAWS OF 1994 BY THE OPERATION OF THE ALCOHOL TEST 7110 MK III-C METHOD TO DETERMINE INTOXICATION.

GIVEN UNDER MY HAND AT TRENTON, NEW JERSEY THIS 12th DAY OF June 2005.

THE THOUSAND AND SIX

[Signature]
SUPERVISOR
NEW JERSEY STATE POLICE

[Signature]
ATTORNEY GENERAL
STATE OF NEW JERSEY

ORIGINAL COURSE DATES

DATE	Refresher Course PLACE	INSTRUCTOR
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		

S.P. 2334 (Rev. 01/05)

DEPARTMENT OF
Traffic and Public Safety
This is to certify that

Thomas J. Snyder
New Jersey State Police

IS QUALIFIED AND COMPETENT TO CONDUCT CHEMICAL BREATH ANALYSIS PURSUANT TO CHAPTER 170B OF THE LAWS OF 1994 BY THE OPERATION OF THE ALCOHOL TEST 7110 MK III-C METHOD TO DETERMINE INTOXICATION.

GIVEN UNDER MY HAND AT TRENTON, NEW JERSEY THIS 22nd DAY OF February 2005.

THE THOUSAND AND SIX

[Signature]
SUPERVISOR
NEW JERSEY STATE POLICE

[Signature]
ATTORNEY GENERAL
STATE OF NEW JERSEY

ORIGINAL COURSE DATES

DATE	Refresher Course PLACE	INSTRUCTOR
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		

S.P. 2334 (Rev. 01/05)

DEPARTMENT OF
Traffic and Public Safety
This is to certify that

Thomas J. Snyder
New Jersey State Police

IS QUALIFIED AND COMPETENT TO CONDUCT CHEMICAL BREATH ANALYSIS PURSUANT TO CHAPTER 170B OF THE LAWS OF 1994 BY THE OPERATION OF THE Breathalyzer METHOD TO DETERMINE INTOXICATION.

GIVEN UNDER MY HAND AT TRENTON, NEW JERSEY THIS 11th DAY OF Aug. 2005.

THE THOUSAND AND 00

[Signature]
SUPERVISOR
NEW JERSEY STATE POLICE

[Signature]
ATTORNEY GENERAL
STATE OF NEW JERSEY

ORIGINAL COURSE DATES

DATE	Refresher Course PLACE	INSTRUCTOR
1.	<u>11-14-01</u>	<u>ALIC</u> <u>Mr. [Signature]</u>
2.	<u>5-5-03</u>	<u>OCBA</u> <u>[Signature]</u>
2.	<u>4-4-05</u>	<u>ACTC</u> <u>[Signature]</u>
4.		
5.		
6.		
7.		
8.		
9.		

S.P. 2334 (Rev. 11/05)

S-12 #9
E

Calibrating Unit New Standard Solution Report

Equipment: Alcotest 7110 MKIII-C Serial No.: ARWF-0359
Location: LAWRENCE TWP POLICE
Calibration File No.: 00203 Calib. Date: 10/23/2007 Calib. No.: 00004
Certification File No.: 00204 Cert. Date: 10/23/2007 Cert. No.: 00003
Linearity File No.: 00205 Lin. Date: 10/23/2007 Lin. No.: 00003
Solution File No.: 00206 Soln. Date: 10/23/2007 Soln. No.: 00034
Sequential File No.: 00206 File Date: 10/23/2007

Calibrating Unit: WET Model No.: CU-34 Serial No.: DDWJ S3-0355
Control Solution %: 0.100% Expires: 08/21/2008
Solution Control Lot: 06H035 Bottle No.: 0373

Function	Result %BAC	Time HH:MM	Temperature Simulator (°C)	Comment(s) or Error(s)
Ambient Air Blank	0.000%	16:00D		
Control 1 EC	0.100%	16:00D	33.9°C	*** TEST PASSED ***
Control 1 IR	0.100%	16:00D	33.9°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	16:01D		
Control 2 EC	0.100%	16:01D	33.9°C	*** TEST PASSED ***
Control 2 IR	0.099%	16:01D	33.9°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	16:02D		
Control 3 EC	0.099%	16:03D	33.9°C	*** TEST PASSED ***
Control 3 IR	0.100%	16:03D	33.9°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	16:03D		

All tests within acceptable tolerance.

On this date, I installed the above indicated "NEW SOLUTION" in accordance with Alcotest 7110 operator training and procedures established by the (NJSP) Chief Forensic Scientist.

TEMPERATURE PROBE SERIAL NUMBER: DDWAP2-213 (5925)

Changed By:

Last Name: SNYDER

First Name: THOMAS

MI: J.

Signature: T.K. II Thomas J. Snyder #5792

Badge No.: 5792

Date: 10/23/2007

5-3 #1

Calibrating Unit New Standard Solution Report

Equipment: Alcotest 7110 MKII-C
Location: LAWRENCE TWP POLICE
Serial No.: ARWF-0359
Calibration File No.: 00203
Calib. Date: 10/23/2007
Calib. No.: 00004
Certification File No.: 00204
Cert. Date: 10/23/2007
Cert. No.: 00003
Linearity File No.: 00205
Lin. Date: 10/23/2007
Lin. No.: 00003
Solution File No.: 00247
Soln. Date: 01/20/2008
Soln. No.: 00037
Sequential File No.: 00247
File Date: 01/20/2008

Calibrating Unit: WET
Control Solution %: 0.100%
Solution Control Lot: 06H035
Model No.: CU-34
Serial No.: DDWJ S3-0355
Expires: 08/21/2008
Bottle No.: 0358

Function	Result	Time	Temperature	Comment(s)
	%BAC	HH:MM	Simulator (°C)	or Error(s)
Ambient Air Blank	0.000%	10:09S		
Control 1 EC	0.100%	10:09S	33.9°C	*** TEST PASSED ***
Control 1 IR	0.101%	10:09S	33.9°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	10:10S		
Control 2 EC	0.099%	10:11S	33.9°C	*** TEST PASSED ***
Control 2 IR	0.100%	10:11S	33.9°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	10:11S		
Control 3 EC	0.099%	10:12S	33.9°C	*** TEST PASSED ***
Control 3 IR	0.100%	10:12S	33.9°C	*** TEST PASSED ***
Ambient Air Blank	0.000%	10:13S		

All tests within acceptable tolerance.

On this date, I installed the above indicated "NEW SOLUTION" in accordance with Alcotest 7110 operator training and procedures established by the (NJSP) Chief Forensic Scientist.

Changed By:

Last Name: SIMON

First Name: STEVEN

MI: R

Signature: 

#212

Badge No.: 212

Date: 01/20/2008

S-4

#2



JOHN S. CORZINE
Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF STATE POLICE
Post Office Box 7068
WEST TRENTON NJ 08628-0068
(609) 882-2000

STUART RADNER
Attorney General

COLONEL JOSEPH R. FUENTES
Superintendent

CERTIFICATION OF ANALYSIS
0.10 PERCENT BREATH ALCOHOL SIMULATOR SOLUTION

ACCEPTANCE SPECIFICATIONS FOR BREATH ALCOHOL SIMULATOR SOLUTION: Ethyl alcohol concentration within, but not exceeding, the range of 0.117 to 0.125 grams per 100 milliliters of solution.

MANUFACTURER: Drager Safety, Inc. ANALYSIS DATE: 9/15/06

BREATH ALCOHOL SIMULATOR SOLUTION LOT NUMBER: 06H035

Representative samples of the above-referenced Lot Number were tested by Gas Chromatography and found to have an ethyl alcohol concentration range of 0.1213 to 0.1215 grams per 100 milliliters of solution.

This lot of breath alcohol simulator solution may be utilized as a known traceable standard for the purpose of conducting periodic tests, pursuant to N.J.A.C. 13:51-3.4, of approved breath test instruments (N.J.A.C. 13:51-3.5) utilized by law enforcement agencies in this State. The manufacturer's expiration date for this lot of breath alcohol simulator solution is August 21, 2008.

As Chief Forensic Scientist of the Division of State Police, I hereby certify and attest that the tests and results documented in this Certificate of Analysis were performed at my direction and under my supervision by personnel of, and at, the Office of Forensic Sciences of the Division of State Police on properly functioning and calibrated instruments and equipment. All procedures utilized are accurate, objective, and performed on a routine basis by personnel within the Office of Forensic Sciences, in accordance with their professional duties and responsibilities.

Ajit R. Tungari
Chief Forensic Scientist
Division of State Police

Sworn to and subscribed before me this 11th day of October, 2006.

Notary

Linda L. DeSantis
My Commission
Expires Aug. 17, 2009



Mass. Form 8 - An Official Government Employee



S-5

ALCOHOL INFLUENCE REPORT FORM, ALCOTEST 7110 MKIII-C
LAWRENCE TWP POLICE #6673

Department Case No.: 08-004382
Summons No(s):
Sequential File No.: 00249

Subject

Last Name: First Name: MI:
D.O.B.: 05/17/1963 Age: 44 Gender: MALE Ht: 6 ft. 03 in. Wt: 295 lbs.
Driver License Number: Issuing State: NJ

Arresting Officer

Last Name: LEE First Name: ANDREW MI: F
Badge No.: 213 Arrest Date: 01/27/2008 Arrest Time: 19:03S Arrest Location: 1107

Instrument

Alcotest 7110 MKIII-C Serial No.: ARWF-0359
Location: LAWRENCE TWP POLICE
Calibration File No.: 00203 Calib. Date: 10/23/2007 Calib. No.: 00004
Certification File No.: 00204 Cert. Date: 10/23/2007 Cert. No.: 00003
Linearity File No.: 00205 Lin. Date: 10/23/2007 Lin. No.: 00003
Solution File No.: 00247 Soln. Date: 01/20/2008 Soln. No.: 00037
Sequential File No.: 00249 File Date: 01/27/2008

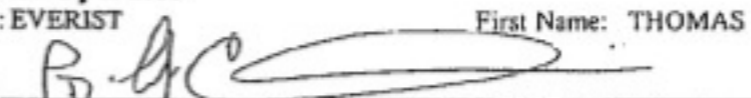
Calibrating Unit: WET Model No.: CU-34 Serial No.: DDWJ S3-0355
Control Solution %: 0.100% Expires: 08/21/2008
Solution Control Lot: 06H035 Bottle No.: 0358

Breath Test Information

Function	Result %BAC	Time HH:MM	Volume (L)	Duration Sec (s)	Date of Test: 01/27/2008	
					Temp. Sim.(°C)	Error Message
Ambient Air Blank	0.000%	20:01S				
Control Test 1					33.9°C	
EC Result	0.101%	20:01S				
IR Result	0.100%	20:01S				
Ambient Air Blank	0.000%	20:02S				
Breath Test 1			2.8L	5.4s		
EC Result	0.175%	20:03S				
IR Result	0.175%	20:03S				
Ambient Air Blank	0.000%	20:04S				
Breath Test 2			3.0L	5.9s		
EC Result	0.174%	20:06S				
IR Result	0.171%	20:06S				
Ambient Air Blank	0.000%	20:08S				
Control Test 2					33.9°C	
EC Result	0.098%	20:08S				
IR Result	0.099%	20:08S				
Ambient Air Blank	0.000%	20:08S				

REPORTED BREATH TEST RESULT: 0.17% BAC

Breath Test Operator

Last Name: EVERIST First Name: THOMAS MI: J
Signature:  Badge No.: 193
Date: 01/27/2008

Copy Given to Subject

S.6

WORKSHEET A

State v. Chun, et al.
Supreme Court of New Jersey
A-96 September Term 2006 (Docket No. 58,879)

Tolerance Worksheet (for use in connection with Alcotest New Jersey Firmware 3.11)
How to Calculate Whether Two Breath Samples are in Tolerance Under Acceptable Tolerance Standard

Line #	Subject Alcohol Results to be Input from Alcohol Influence Report		
1	Valid Breath Sample 1 IR		(Value entered from AIR)
2	Valid Breath Sample 1 EC		(Value entered from AIR)
3	Valid Breath Sample 2 IR		(Value entered from AIR)
4	Valid Breath Sample 2 EC		(Value entered from AIR)
	Breath Samples Tolerance Agreement Check		
5	Add Lines #1, #2, #3, and #4:		(This is the sum)
6	Divide Line #5 by 4:		(This is the arithmetic mean)
7	Multiply Line #6 by 1.05:		(This is relative tolerance upper limit)
8	Add 0.005%BAC to Line #6:		(This is absolute tolerance upper limit)
9	Multiply Line #6 by 0.95:		(This is relative tolerance lower limit)
10	Subtract 0.005%BAC from Line #6:		(This is absolute tolerance lower limit)
11	Report the greater of Line #7 or Line #8, to four digits after decimal point:		(This is the upper tolerance limit)
12	Report the lesser of Line #9 or Line #10, to four digits after decimal point:		(This is the lower tolerance limit)
13	Lines #1, #2, #3, and #4 are within the values of Lines #11 and #12. TRUE or FALSE?:		(If TRUE, breath samples are in tolerance and AIR is valid; if FALSE, breath samples are not in tolerance and the AIR is invalid)

5. Missing Discovery – Rule 7:7-7(j)

Continuing Duty to Disclose: Failure to Comply. There shall be a continuing duty to provide discovery pursuant to this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order that party to provide the discovery of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems appropriate.



Holup motions

By way of clarification of the situation where discovery has not been provided, we would also recommend that defense counsel serve a motion, on the papers, with certification similar to *R. 1:6–2*, upon the municipal prosecutor, filing the original with the municipal court seeking an order limiting time for the production of discovery and upon the municipal prosecutor's failure to do so, dismissal of the action. Such an application and the ensuing order would alert the municipal prosecutor and enforcement authorities to their discovery responsibilities and avoid the inconvenience to litigants and witnesses that occurs with such frequency when all parties appear in court for trial. Another salutary affect of such a practice is to expedite the processing of cases by assuring both sides of the certainty of the trial date and eliminating the unnecessary work, expense and delay resulting from the continuance of a case because the discovery process has not been completed. *State v. Holup*, 253 NJ Super. 320 (App. Div. 1992).

Contrast - *State v. Wolfe*, 431 N.J. Super. 356 (App. Div. 2013) (Judge permitting late exchange of discovery not an abuse of discretion in the absence of a showing of prejudice.)

g.) Affirmative Defenses during NJRE 104(a) Hearing.

1.) Test was administered within a reasonable period of time

[T]he statute prescribes an offense that is demonstrated solely by a reliable breathalyzer test *administered within a reasonable period of time after the defendant is stopped for drunk driving*, which test results in the proscribed blood-alcohol level. State v. Tischio, 107 NJ 504, 522 (1987).



The Court added emphasis to the reasonable time requirement in responding to a defense argument that the Court's construction of the statute would encourage police officers to hold an accused in prolonged detention in the hope that higher breathalyzer readings could be obtained. After noting the doubtful authority for such extended detention, it said: “Moreover, we now hold that breathalyzer tests must be taken ‘within a reasonable time’ after the arrest.” State v. DiFrancisco, 232 NJ Super. 317, 320 (Law Div. 1988).

One required proof as to “the proper administration of the test” is that it was performed “within a reasonable time after the defendant is stopped for drunk driving.” The State must supply this proof by clear and convincing evidence. In this case the test was given as much as 3 hours and 50 minutes after the drunk driving occurred, unless DiFrancisco was “driving” at the time of his arrest at 3:10 a.m. In either case the State was obliged to prove that the test was given within a reasonable time. This court, absent such proof, has no way of knowing what time is reasonable, a conclusion that must depend upon a variety of facts, such as time and amount of alcohol consumption. The State presented no testimony on that issue and therefore failed to carry the burden of proof, making the breathalyzer test results inadmissible. State v. DiFrancisco, 232 NJ Super. 317, 321 (Law Div. 1988).

Compare: State v. Dannemiller, 229 NJ Super. 187 (App. Div. 1988)

2. Device was in proper working order – Proved by these Documents:

2. Most recent calibration report from NJSP - (*Chun* at 145);

3. Most recent standard solution change report prior to defendant's test (*Chun* at 145) (Note – this document may sometimes be included as part of #2 above);

4. Certificate of analysis used in defendant's control tests - (*Chun* 145);

5. The Alcohol Influence Report; (*Chun* at 134)

6. Worksheet A Tolerance Calculations (*Chun* 150-151).



**** Important - Always check the credentials of the officer who last changed the solution. See NJAC 13:51-1.8(d). Should be provided in discovery as per Chun order.**

"New Standard Solution Report of the most recent control test solution change, and the credentials of the operator who performed that change;"

3. Operator was certified – Proved by Documents & Testimony

**The document is valid Operator's Qualification Card
(*Chun* at 134)**

Again, note NJAC 13:51-1.8(d)



4. Test Administered according to official procedure – Proved by officer's testimony.

A. Witnesses

Operator must personally testify. State v. Chun 194 NJ 54, 148 (2008). No surrogate witnesses. State v. Rehmann, 419 NJ Super. 451 (App. Div. 2011).



B. Twenty minute issues

Operators must wait twenty minutes before collecting a sample to avoid overestimated readings due to residual effects of mouth alcohol. The software is programmed to prohibit operation of the device before the passage of twenty minutes from the time entered as the time of the arrest. Moreover, the operator must observe the test subject for the required twenty-minute period of time to ensure that no alcohol has entered the person's mouth while he or she is awaiting the start of the testing sequence. In addition, if the arrestee swallows anything or regurgitates, or if the operator notices chewing gum or tobacco in the person's mouth, the operator is required to begin counting the twenty-minute period anew. *State v. Chun*, 194 NJ 54, 79 (2008)



One police officer was physically present with defendant during the traffic stop, the ride back to the station house, the booking process and the Alcotest administration. However, the officer left the room to stow defendant's cell phone. Because of discrepancies in the time-recording of various events, there was also insufficient evidence to establish clearly and convincingly that, even absent the departure to stow the cell phone, the officer observed defendant continuously for over twenty minutes before administering the Alcotest. Therefore, the State failed to satisfy a precondition to admitting the Alcotest results in evidence. In so concluding, this court relies on the [*Chun*](#) decision's plain language, the purpose of the twenty-minute observational requirement, and persuasive out-of-state authority construing comparable requirements. *State v. Filson*, 409 NJ Super. 246, 249 (Law Div. 2009)

See also *State v. Ugrovics*, 410 NJ Super. 482 (App. Div. 2009);

C. Pre-test procedures

Assuming that the results of the control test are within the established parameters, the instrument prompts the operator through a message on the LED screen to collect a breath sample. The operator then attaches a new, disposable mouthpiece and removes cell phones and portable electronic devices from the testing area. The operator is required to read the following instruction to the test subject: “I want you to take a deep breath and blow into the mouthpiece with one long, continuous breath. Continue to blow until I tell you to stop. Do you understand these instructions?” The arrestee then provides the first breath sample, which is measured in the IR and EC chambers. State v. Chun, 194 NJ 54, 80-81 (2008)

D. Post-test procedures

Tolerance Calculations on Worksheet A:

State v. Rivera, 411 NJ Super. 492 (App. Div. 2010)



Excluding Alcotest Evidence at Trial

