

Garden State CLE Presents:

The Alcotest 9510 Bridge to the Future
Has Collapsed! *Now What!?*



Instructors:

John Menzel, Esquire
Evan Levow, Esquire
Robert Ramsey, Ed.D.

Lesson Plan

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PART I
INTRODUCTION
LITIGATION BACKGROUND

The issues related to the scientific reliability of the Alcotest 9510 were brought before the Supreme Court by way of a defense motion filed in State vs. Cunningham, 255 N.J. 451(2023). Evan Levow, Esquire represented the defendant. John Menzel, Esquire represented one of the amicus participants.

In order to determine the issues related to scientific reliability, the Court appointed a special adjudicator. Although the special adjudicator took preliminary case management steps, the litigation eventually bogged down based upon the payment to be made to defense experts. Both the prosecution and the State Office of the Public Defender (OPD) declined to fund the defendant's experts.

The defendant argued before the Court that she should not be compelled personally to fund expert testimony and report preparation for what amounted to a class action suit involving unknown thousands of future drunk-driving defendants who will be subject to prosecution using the Alcotest 9510 for years, if not decades into the future.

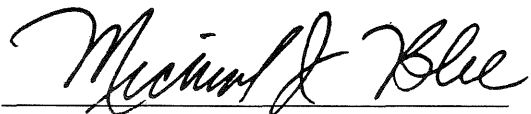
Once the Supreme Court declined to order the other parties to the case to fund the necessary defense experts, the defendant withdrew her motion before the Court for a determination of scientific reliability and opted to defend her case on the merits in municipal court. This defense action left the Court with no legal issue to resolve. Accordingly, on December 19, 2025, the Court dismissed the Cunningham case, vacated a statewide stay on Alcotest 9510 trials and determined to allow the issue of scientific reliability to be resolved at the trial level.

PART II
SUPREME COURT ORDER
DISMISSING THE LITIGATION

NOTICE TO THE BAR

SUPREME COURT LIFTS LIMITED STAY OF DWI MATTERS

The Supreme Court previously granted direct certification in State v. Cunningham (A-38-22) (087913) and simultaneously imposed a limited stay of DWI matters that involved the use of Alcotest 9510 machines, subject to certain conditions. Today, by the attached order, the Court dismissed the Supreme Court litigation and lifted the stay, effective immediately. The Court's order is attached.



Michael J. Blee, J.A.D.
Acting Administrative Director of
the Courts

Date: December 19, 2025

SUPREME COURT OF NEW JERSEY
A-38 September Term 2022
087913

State of New Jersey,

Plaintiff,

v.

O R D E R

Colleen A. Cunningham,

Defendant-Movant.

This matter was first opened to the Court in January 2023 on the State’s motions for various forms of relief, including to directly certify nine separate prosecutions pending in municipal court for driving while intoxicated (DWI). In each of the matters, the defendants had challenged the scientific reliability of evidential breath samples generated by the Alcotest 9510, a replacement for the Alcotest 7110 MKIII-C. The Court previously found the earlier model sufficiently reliable to be admissible as evidence in DWI cases. See State v. Chun, 194 N.J. 54, 65 (2008).

On May 1, 2023, the Court directly certified the matter involving only defendant Colleen Cunningham, not the other eight matters. The Court also appointed Judge Richard J. Geiger, J.A.D., to serve as a Special Adjudicator “to develop a record, conduct hearings, and make findings and conclusions

regarding the scientific reliability of the Alcotest 9510.”

Importantly, also on May 1, 2023, the Court imposed a limited stay of DWI matters that involved the use of Alcotest 9510 machines, subject to certain conditions.

The Court directed that remand proceedings be conducted on an accelerated basis. At all times, Judge Geiger has conducted them with due pace and diligence, notwithstanding repeated delays.

Since the Court imposed a stay, numerous motions have prevented the remand from proceeding apace. Most involved the issue of who would pay for defense experts and the costs of transcripts for the remand proceedings:

- On July 28, 2023, defendant filed a motion with Judge Geiger to have the State pay the cost of defense experts and daily transcripts. Defendant argued that the Court has directed the provision of financial assistance to defendants “who could not otherwise afford legal services in defense of their case.” Defendant analogized her circumstances to State v. Cassidy, 235 N.J. 482 (2018), in which the Court granted an indigent defendant’s motion to compel the State to pay the costs of defense experts. Defendant noted that here, as in Cassidy, it was the State that sought a global resolution of the scientific reliability of the Alcotest 9510, and “by mere happenstance,” she was “the named party in a case with broad implications.” Under those circumstances, defendant argued, “[i]t would be a manifest injustice . . . to impose the burden of financing defense experts solely upon [defendant] . . . even if she does not qualify as indigent.”
- On August 22, 2023, Judge Geiger granted defendant’s motion.
- The State moved before the Supreme Court to vacate Judge Geiger’s order (M-247-23) on September 26, 2023. The State distinguished Cassidy, contending that this matter does not involve an indigent defendant or alleged malfeasance by a member of law

enforcement -- both of which were present in Cassidy -- and argued that there is no precedent to require it to pay for defense experts in the circumstances of this matter. Doing so, it argued, would present “an untenable conflict of interest” in that the State necessarily would be required to exercise discretionary oversight involving decisions that affect litigation strategy (e.g., which experts to hire and how many). As a practical matter, the State also argued that defendant Cunningham would have had to pay experts to support her own challenge to the Alcotest 9510 regardless of the State’s motion to directly certify the matter and seek a global resolution.

- In October 2023, the Court granted the State’s motion to vacate Judge Geiger’s August 22, 2023 order. The Court’s ruling was without prejudice to defense counsel applying for payment from the Office of the Public Defender (OPD) to fund ancillary services, if defendant qualified. Defendant Cunningham later applied for and was denied ancillary services based on the OPD’s determination that she was not eligible.
- In June 2024, defendant Cunningham moved before the Court to compel the State to pay for defense experts and daily transcripts of the remand proceedings. The Court referred the matter to Judge Geiger, who denied relief in July 2024.
- Judge Geiger denied defendant’s motion for reconsideration in August 2024.
- In September 2024, defendant filed anew with the Supreme Court, again seeking to compel the State to pay for defense experts and daily transcripts of the remand proceedings (M-233-24). Defendant concluded her briefing in November 2024.
- On July 25, 2025, the Court (1) again declined to compel the State to pay for defense experts, and (2) directed the State to pay for daily transcripts.
- On August 5, 2025, defendant filed a motion for reconsideration, again asserting that defendant should not bear the costs of defense experts. The Court denied the motion on August 11, 2025.

Defendant Cunningham now seeks to withdraw her underlying motion challenging the scientific reliability of the Alcotest 9510. The withdrawal of defendant's challenge at this late date leaves the Court without a party in interest to challenge the admissibility of evidential breath samples generated by the Alcotest 9510.

The Court has considered the submissions from all counsel. Some proposed alternatives to dismissal include proceeding without a named defendant in an adversarial proceeding, having the Court provide and fund experts, or adding back defendants to the appeal. None of the proposals are viable, and all would cause delays in a matter that has been pending for a long period of time.

In sum, defendant Cunningham no longer challenges the scientific reliability of the Alcotest 9510, and none of the other eight defendants originally identified by the State have asked to have their case certified for review by this Court. There is therefore no legal question for this Court to decide. Moreover, defendants statewide are entitled to their day in court, and the public is entitled to have DWI matters adjudicated in a timely manner that promotes fairness and addresses safety concerns. The Court therefore dismisses the pending appeal and lifts the limited stay of DWI matters so that prosecutions may proceed, including prosecutions that rely on the Alcotest 9510. Defendants in individual cases may of course challenge the scientific

reliability of the Alcotest 9510 if they so choose. The Court's May 1, 2023 order in this matter is therefore vacated.

Jurisdiction is not retained.

For the Court

A handwritten signature in blue ink, appearing to read "Stuart Rabner", written in a cursive style.

Stuart Rabner
Chief Justice

December 19, 2025

PART III
GUIDANCE ON 9510 PROSECUTIONS
FROM THE ATTORNEY GENERAL



State of New Jersey

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
PO Box 085
TRENTON, NJ 08625-0085
TELEPHONE: (609) 984-6500

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

MATTHEW J. PLATKIN
Attorney General

THERESA L. HILTON
Director

To: All County Prosecutors
All Municipal Prosecutors

From: Theresa Hilton, Director, Division of Criminal Justice

Date: December 30, 2025

Subject: **Guidance on Prosecutions with Alcotest 9510 Instruments**

The following instructions apply to all prosecutions utilizing the Alcotest 9510 breath-testing instrument to determine an individual's blood alcohol content ("BAC").

Previously Stayed Cases

Pursuant to the Supreme Court's Order, dated December 19, 2025, the limited stay of 9510 DWI matters is lifted, and all matters should proceed in the normal course, including prosecutions relying on Alcotest 9510 readings.

The Law Remains Unchanged

The Supreme Court dismissed the reliability challenge to the Alcotest 9510 presented in State v. Cunningham after defendant moved to withdraw her motion for a reliability hearing, and no other defendant or *amici* was willing to serve as the named party in the case. Therefore, prosecutors should continue to rely on prior precedent, including State v. Chun, 194 N.J. 54 (2008) (upholding established principles of breath testing generally, and the reliability of the Alcotest 7110 specifically), and State v. Olenowski, 253 N.J. 133 (2023) (clarifying legal framework for challenges to reliability of novel scientific evidence in the criminal context).

Prosecutors seeking to admit breath-testing results from an Alcotest 9510 system should proceed in the normal manner, establishing that: (1) the instrument was in proper working order at the time of the test; (2) that the operator was certified; and (3) that the test

was administered according to official procedure. Chun, 194 N.J. at 54 (citing Romano v. Kimmelman, 96 N.J. 66, 81 (1984)). The State shall offer into evidence the most recent certification report prior to a defendant's test, including control tests, linearity tests, the parameter report, wet and dry adjust, cylinder installation reports, all certificates of analysis for the simulator solution, simulator, dry gas, and barometer, the instrument certificate of accuracy, and the credentials of the coordinator who performed the certification. See Chun, 194 N.J. at 154.

Future Reliability Challenges

The upgrade from the Alcotest 7110 to the Alcotest 9510 does not change the Supreme Court's historic acceptance of breath testing as a reliable means of determining an individual's blood alcohol content. Despite that fact, defendant Cunningham and *amici* initially sought to challenge the reliability of the Alcotest 9510 instrument specifically; however, the matter was dismissed before any challenges specific to the instrument were heard. If there are future Daubert-Olenowski challenges to the reliability of the Alcotest 9510 specifically, the State will continue to seek to consolidate those challenges to be heard at a Statewide level.

Accordingly, any prosecutor handling a DWI matter in which the defendant files a Daubert-Olenowski motion, or is informed that such a motion will be forthcoming, **must** immediately communicate that fact to their County Prosecutors Office Municipal Prosecutor Liaison, who is to then notify the Division of Criminal Justice.

Prosecutors should also inform their court that the challenge will be forwarded to the Division of Criminal Justice for review and consideration for a motion for direct certification. It is possible that such defendants may become named defendants in a reliability hearing before the Supreme Court and likely a Special Adjudicator. In order to prevent undue delay or inefficiency, prosecutors should advise defendants pursuing such motions that the Supreme Court in Cunningham repeatedly held that the defense was responsible for its own litigation expenses, including the cost of any defense expert witnesses the defense believed necessary to support its motion.

PART IV

RULE 104 HEARING UNDER DAUBERT

The use of the Alcotest model 9510 as evidence in a New Jersey drunk-driving case will be predicated upon a judicial determination following a hearing under NJRE 104 that the instrument is scientifically reliable as defined by the criteria set forth under Daubert vs. Dow Chemical, 509 U.S. 579(1993) and State vs. Olenowski, 255 N.J. 529 (2023) (Olenowski II). That is to say that reliability is to be assessed by the motion judge based upon expert testimony that details the novel methodology from the standpoint of whether:

- 1) It has been subject to peer review and publication;
- 2) It has known error rates;
- 3) It employs applicable standards and controls; and
- 4) It is generally accepted in the relevant scientific community.¹

Of course, the findings of a municipal court judge have ZERO precedential value beyond the case before the court. The same is true of a decision of a Law Division judge hearing a municipal appeal. (e.g. State vs. Maida, 332 N.J.Super 564(Law Div.2000)) (Upholding the scientific reliability of HGN). Precedent related to scientific reliability can be subject to judicial notice based upon published appellate authority from either the Supreme Court or Appellate Division of the Superior Court.² As a result, it appears that the ultimate determination as to the scientific reliability of the Alcotest 9510 may have to be determined by a case that will be initially tried on the municipal court level. Expert fees would have to be paid by the municipality (or county prosecutor?) for the prosecution AND the defense if the defendant is represented by the

¹See discussion in State vs. Harvey, 151 N.J. 117, 699 A.2d 596(1997)

²State vs. Harvey, 151 N.J. 117, 167-68, 699 A.2d 596(1997)

local public defender. See N.J.S.A. 2B:24-6(a). A privately represented defendant without the necessary resources to pay for an expert may also make an application for the payment of expert fees by way of a motion for ancillary services under the precedent set by In re Cannady, 126 N.J. 486(1991).

For the moment, it appears that if the prosecutor wishes to rely upon breath-test evidence in a DWI case from the Alcotest 9510, there will have to be a Daubert hearing under N.J.R.E. 104 in municipal court wherein the trial judge will have to decide issues related to scientific reliability based upon complex expert testimony.

In the municipal court scenario, there could be an appeal to the Law Division by the defense following a conviction or by the State on an interlocutory basis; although rarely done, either the State or defendant could seek immediate review of the municipal court decision on the motion in the Appellate Division. Rule 2:2-3(b); State vs. Mauer, 240 N.J.Super 269(App.Div1990).

There are numerous other potential pathways for venue and the funding of experts, including:

- 1) Superior Court Criminal prosecution based upon Alcotest 9510 evidence used to prove intoxication/recklessness.
- 2) Municipal Court DWI case transferred for trial to Law Division and prosecuted by county prosecutor or attorney general.
- 3) Direct appeal to Appellate Division from municipal court decision.

4) Direct involvement by the county prosecutor or attorney general would assure funds for experts. If OPD is involved in the defense that office would likely fund some (but not necessarily all) of the required expert testimony.

5) A defendant represented by private counsel who is without sufficient funds for experts may seek funding for ancillary services from OPD. See In re Cannady, 126 N.J. 486(1991).