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December 18, 2007

Honorable Chief Justice and Associate Justices  
Supreme Court of New Jersey  
Richard J. Hughes Justice Complex  
Trenton, New Jersey 08625

Re: State v. Chun, et al.  
Docket No. 58,879

Your Honors:

Please accept this letter in response to defendants' December 10, 2007 supplemental remand brief addressing the Special Master's Supplemental Findings and Conclusions of Remand Court. Defendants' latest submission attacks source code issues, the parties, and the Court. Defendants ultimately fail on the merits because the Special Master's evaluation of the quality of the evidence at the supplemental remand hearing, as well as of the credibility and persuasiveness of the witnesses presented, rejects their position. Defendants had ample opportunity to air their claims at the hearing. The Special Master found them unconvincing. The State relies on its previous submissions, as well as on the Special Master's findings.

Defense counsel repeat the laundry-list of arguments raised during the supplemental remand hearing, characterizing them as "show stoppers." (Dsrb22 to 35).<sup>1</sup> A close reading of the entire

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<sup>1</sup> Dsrb refers to defendants' supplemental remand brief. Supplemental remand transcript references are identical to the

record demonstrates that the defense's "show stopper" arguments are unsubstantiated or selective representations.<sup>2</sup> For example, the defense continues to argue that the source code adjusts and substitutes data readings for breath measurements, citing to John Wisniewski's report. (Dsrb24). However, in his direct testimony, Wisniewski admitted that he could not recall or identify that portion of the code. Supplemental Findings and Conclusions at 47; 8RT137-3 to 22.

Similarly, the defense again dramatically states that Lint uncovered "19,000 errors" in the source code. (Dsrb7). This assertion completely ignores Wisniewski's testimony on cross-examination, during which he acknowledged having to run the outdated Lint program multiple times, customizing Lint to maximize all "error" messages, miscalculating by counting output lines rather than actual messages, and changing the language of the Lint program to substitute warnings with his own terminology of "errors." Supplemental Findings and Conclusions at 43; 9RT6-24 to 18-15. Inexplicably, the defense persists in relying solely on Wisniewski's report, ignoring his contradictory, unfavorable testimony at the supplemental remand hearing. (9RT18-16 to 87-2).

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references contained in the State's December 7, 2007 brief.

<sup>2</sup> The defense even returns to arguments raised in the original hearing, such as the tolerance between breath tests and various Alcohol Influence Reports ("AIR"). (Dsrb6; Dsrb8 to 10). After substantial testimony, the Special Master found that the tolerance was scientifically acceptable. Findings and Conclusions of Remand Court (February 14, 2007) at 179. Also, the Special Master found that the AIRs were sufficiently explained as operator or hardware errors. Id. at 66-68, 92-93.

Recall that the Special Master was "not particularly impressed with Wisniewski's testimony" and "doubt[ed] that he was as experienced as he portrayed," Supplemental Findings and Conclusions at 48, a fatal flaw that the defense simply cannot overcome in relying on this witness.

Defense counsel particularly focus upon the fuel cell "aging compensation routine." (Dsrbl0 to 22). Fuel cell aging compensation was fully considered and addressed by the Special Master. Supplemental Findings and Conclusions at 81-84.

"Because the adjustment never occurred during the analysis of a subject's breath, Shaffer maintained that the Alcotest employed two independent technologies to analyze breath samples."

Supplemental Findings and Conclusions at 83. The Special Master fully accepted Shaffer's testimony on this issue and concluded that the routine "does not undermine the scientific reliability of the breath measurement." Supplemental Findings and Conclusions at 84.

The fuel cell aging compensation routine was not initially identified by any defense expert. Rather, when being questioned about potential adjustments, Brian Shaffer readily identified this routine and the Special Master concluded that he was forthright upon all subsequent questioning. Supplemental Findings and Conclusions at 79. When subsequently directed by the defense to locate and examine this routine, Wisniewski was unable to provide any detailed explanations or indicate how the compensation would unfavorably affect a breath test. (9RT197-18 to 24, 198-17 to 199-3). Thus, as the Special Master determined,

the basic scientific reliability of the instrument and its measurements is unaffected.

Contrary to defendants' claim, there is no evidence in the record that Draeger maliciously was hiding "errors" in its source code. Rather, Draeger agreed in "Addendum A" to have its source code examined, an unprecedented position for an evidential breath test manufacturer understandably concerned with intellectual property rights. Draeger provided the complete source code for the NJ 3.11 firmware to the experts.

In addition to their more specific claims, the defense also makes the general suggestion that the Special Master unfairly limited their cross-examination. (Dsr44). This assertion is belied by the patience and diligence the Special Master exhibited in allowing defense counsel to repeatedly probe a variety of areas. Counsel for defendants -- a team of New Jersey lawyers, as well as a consultant Massachusetts lawyer -- were thoroughly versed in the subject matter of this litigation. Some of the counsel previously had participated in the Foley evidentiary hearing on the reliability of the Alcotest. This experienced defense team not only presented their own experts at the original and supplemental remand hearings, but also engaged in extensive cross-examination of the State's witnesses. See Romano v. Kimmelman, 96 N.J. 66, 95 (1983). The defense, after receiving broad discovery and access to both hardware and software, was given every opportunity to present their positions in the courtroom in over fifty days of testimony and four days of summations. Even defendants grudgingly acknowledge that the

Special Master "relented" to repeated defense demands in this area. (Dsrb44).

One more aspect of defendants' supplemental remand brief requires mention. The acerbic tone with which defense counsel deliver their substantive arguments is more striking than the arguments themselves. Some more noteworthy examples follow:

1. accusing German manufacturer Draeger of the "Big Lie" with a description quoting the teachings of Adolf Hitler (Dsrb10, n.55);
2. describing the Special Master as "confused, bored, and disinterested" (Dsrb44) and as "Draeger's apologist" (Dsrb13);
3. accusing this Court of "disregarding the Constitution with the promise of the stay pending an expedited review of this chimera" (Dsrb2) and "disregarding well-established evidentiary principles and constitutional protections" (Dsrb66-67);
4. labeling the current state of the instrumentation as "nonsense," the acceptance of which will make "this Court look foolish" (Dsrb64).

And, as a final salvo:

"Given the way the State and this Court have created an almost untenable situation in the administration of DUI defendants, the present Defendants are concerned that this Court will whitewash the terrible truth uncovered in this case and, to save face, not only convict innocent people, but also create precedent that has the potential to infect our jurisprudence in any application relying on computerized scientific evidence." (Dsrb68).

While there is much to say about accusations of this nature, the State merely wishes to point out that they are stark evidence

supporting the State's prior assertion that to require any form of agreement between the defendants and Draeger (or anyone else for that matter) on future firmware versions is to set an unattainable standard. One can only speculate as to defendants' motive for such personal attacks on the integrity of the litigants and the judiciary. "Common courtesy and civility are expected from a member of the bar whether he appears before the State's highest court or presents a matters to some administrative body." In re Mezzacca, 67 N.J. 387, 390 (1975). The right of forceful advocacy is not a license for disrespectful remarks.

The defendants in this litigation were given the unprecedented opportunity to examine the breath test instrument's computer source code, an action that completely has nullified any lingering allegations of "Crawford" or "Brady" violations. Despite having the benefit of this review, the defense has failed to produce evidence contradicting the State's overwhelming proofs of the Alcotest's reliability. The State again respectfully requests that this Court accept the Special Master's findings and conclusions, with exceptions as noted in the State's plenary and

supplemental briefs.

Respectfully submitted,

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