

STATE OF NEW JERSEY,

Plaintiff-Appellant,

**DISCOVERY ORDER**

v.

JANE H. CHUN, et al.,

Defendants-Respondents.

**APPEARANCES**

Jessica S. Oppenheim, Assistant Attorney General  
Stephen H. Monson, Deputy Attorney General  
John J. Dell'Aquilo, Deputy Attorney General  
Peter H. Lederman, Esquire  
Jeffrey Evan Gold, Esquire  
James P. Condon, Esquire  
Arnold N. Fishman, Esquire  
Jonathan A. Kessous, Esquire  
Christopher G. Hewitt, Esquire  
Samuel Louis Sachs, Esquire  
Matthew W. Reisig, Esquire  
Andrew S. Maze, Esquire  
John Menzel, J.D.  
Evan M. Levow, Esquire

**DISCOVERY ORDER**

As a result of a management conference on January 27, 2006, and after hearing all counsel in the matter, the court issues this order with respect to unified discovery (with appreciation of Judge Cantor's earlier findings and proposed draft).

The universe for discovery of the State's information on the 7110 MK-III-C (styled as 3.11) shall be all tests conducted in Middlesex County from January 1, 2005 through December 31, 2005.

The court is satisfied that this will provide a suitable statistical universe for purposes of its reliability analysis. The defense may rely on information from other counties but should give the State a copy of all documents on tests it will rely upon from other counties in advance of trial. The State shall make this information available to the defense through Evan M. Levow, Esquire.

**AS TO BREATH TEST INFORMATION:**

1. All alcohol influence report test data for all analyses by Alcotest 7110 MK-III-C 3.11 breath testing instruments [7110 3.11] in Middlesex County from January 1 to December 31, 2005, including air blank, simulator, subject, linearity, and any and all other tests conducted by the 7110 3.11s both printed and/or stored in the random access memory and/or downloaded to read only memory. This data includes: 7110 3.11 serial number; CU-34 serial number, case number; sequence number; date and time of arrest; air blank results and times; control test results and times; subject breath test results, times, volumes, and durations; subject birthdates and sex; and version and revision number for software/firmware used.

2. All diagnostic, maintenance, and calibrations data for all 7110 3.11s in Middlesex County from January 1 to December 31, 2005, including subject files, maintenance files, diagnostic files, calibration files, operational error files, quick test files, instrument files, repair files and any and all other such tests conducted by the 7110 3.11s both printed and/or stored in the random access memory and/or downloaded to read only memory.

3. Any breath testing logs, memoranda, letters, messages, or other writings maintained by the State, police stations, and departments in connection with 7110 3.11s used in Middlesex County from January 1 to December 31, 2005. The claim of privilege as to these items is rejected.

4. Any audio, video, or other electronic recordings of the administration of breath tests using 7110 3.11s in Middlesex County from January 1 to December 31, 2005.

**AS TO SIMULATOR SOLUTION:**

5. All of the State's, manufacturer's, and/or third-party's assay, analysis, quality assurance, or similar documents, including documents on each and every analysis, standard and control run in the series of runs involving analysis of simulator solutions used with 7110 3.11s in Middlesex County from January 1 to December 31, 2005; chemist's notes; gas chromatograph printouts; gas chromatograph service records, if any; quality control manual; testing procedures; and custody documents for the simulator solutions used for:

- (a) 0.040 simulator solution used in Linearity Tests,
- (b) 0.080 simulator solution used in Linearity Tests,
- (c) 0.160 simulator solution used in Linearity Tests,

and

- (d) 0.100 simulator solution lot used in breath tests.

**AS TO PERSONNEL:**

6. Records (e.g., appointment letter from Attorney General; breathalyzer operator certification replica card, front and back; and Alcotest operator certification replica card, front and back)

showing that Breath Test Coordinator Instructors involved in either certifying or changing simulator solutions for all 7110 3.11s in Middlesex County from January 1 to December 31, 2005, are properly certified as such pursuant to the Administrative Code, including by way of example:

- (a) Matteo B. Russo
- (b) Margaret M. Schmidt
- (c) Christopher Soke

**AS TO INSTRUMENTATION:**

7. Records showing that all simulators used with all 7110 3.11s in Middlesex County from January 1 to December 31, 2005 were and are in proper operating condition.

8. Records showing that all simulator temperature probes used with all 7110 3.11s in Middlesex County from January 1 to December 31, 2005 were and are in proper operating condition.

9. Full electronic circuitry information concerning the 7110 3.11, including diagrams, schematics, and specifications.

10. All empirical data, tests, and protocols relating to calibration, accuracy, precision, certification, and duty cycle of electro-chemical sensors.

11. Protocol and training for installation and replacement of electro-chemical sensors.

The claim of privilege is denied subject to the terms of a protective order to be submitted by the State or the manufacturer, for court approval.

**AS TO MANUALS AND OTHER DOCUMENTS:**

12. State and manufacturer's manuals and other documents for

7110 3.11, including those for operation, service, maintenance, repair, calibration, quality assurance, and troubleshooting.

13. State and manufacturer's manuals and other documents for simulators, including Model CU-34, operation, service, maintenance, repairs, calibration, quality assurance, and troubleshooting of the simulator.

14. State and manufacturer's manuals and other documents for temperature probes, including operation, service, maintenance, repair, calibration, quality assurance, and troubleshooting of the probes.

15. State and manufacturer's manuals and other documents for electro-chemical sensors, including operation, service, maintenance, repair, calibration, quality assurance, and troubleshooting of the sensors.

16. Courses for certifying 7110 3.11 operators and coordinators, including the three-day initial certification course, one-day conversion course, and coordinator-instructor's course.

**AS TO SOFTWARE/FIRMWARE:**

17. All interoffice communications, standard operating procedures, operational orders, memoranda, and other documents concerning the 7110 3.11 using firmware versions both current and previous to the current version. The claim of privilege as to the above is denied subject to the terms of a protective order to be submitted by the State or the manufacturer.

18. All letters, memoranda, and other correspondence between New Jersey state agencies and Drager Safety, Inc., concerning

evaluation and modification of the 7110 3.11 using firmware versions both current and previous to the current version. The claim of privilege is denied subject to the terms of a protective order to be submitted by the State or the manufacturer, for court approval.

19. All 7110 3.11 software/firmware instructions with version and revision number designations to establish, among other things:

(a) minimum volume and duration requirements for acceptance of breath samples;

(b) prompts which induce an operator to charge or not charge a subject with breath test refusal;

(c) the degree of accuracy which the 7110 3.11 will produce;

(d) the degree of precision within which the 7110 3.11 will deem multiple results reliable;

(e) commands and the conditions on which the 7110 3.11 will display the commands;

(f) error messages and the conditions on which the 7110 3.11 will display the error messages;

(g) functions executed by the 7110 3.11 and the conditions under which the functions operate;

(h) algorithms -- i.e., the complete set of steps to achieve a desired result;

(i) logic -- i.e., "if . . . then . . ." sequencing and parameters -- employed as the software/firmware runs.

(j) The claim of privilege is denied subject to the

terms of a protective order to be submitted by the State or the manufacturer, for court approval.

20. A copy of the software/firmware currently being used in the 7110 3.11 in all Middlesex County municipalities. The State has alleged that such software/firmware is designated or styled as version 3.11. If multiple revisions of version 3.11 exist, the defense is entitled to a copy of each revision with identification as to the exact nature of each revision. The claim of privilege is denied subject to the terms of a protective order to be submitted by the State or the manufacturer, for court approval.

21. The download of such software to a 7110 3.11 owned by defense counsel is allowed so that the defense may determine how the software works under divergent and varied circumstances.

The claim of privilege is denied subject to the terms of a protective order to be submitted by the State or the manufacturer, for court approval.

**AS TO TESTING:**

22. State, manufacturer, and third-party data and studies concerning:

- (a) all human and simulator testing on the 7110 3.11,
- (b) all chemical and environmental interference testing on the 7110 3.11,
- (c) use of wet bath versus dry gas simulators for the 7110 3.11,
- (d) what effect, if any, radio frequency and electromagnetic interference has on results, and
- (e) what effect, if any, sample temperature has on

results.

(f) The claim of privilege is denied subject to the terms of a protective order to be submitted by the State or the manufacturer, for court approval.

23. The State will identify "the relevant portions of the record in State v. Foley, 370 N.J. Super. 341, 851 A.2d 123 (Law Div. 2003), subject to the right to cross-examination as determined by the trial court[,]" which the State wishes this Court to consider.

24. The State will provide all discovery information to this Court and the defense by March 3, 2005.

25. The next case management hearing for this matter is set for Friday, March 10, 2006 at 1 p.m. in Westmont.

26. The hearings in this matter are tentatively scheduled for Monday, April 3, 2006 in Camden and will continue until concluded in Camden.

SO ORDERED.

/s/  
MICHAEL PATRICK KING, P.J.A.D., retired  
and Special Master

DATED: February 3, 2006