


# Notice to the Bar

## **ORDERS BY JUDGE LISA AS SPECIAL MASTER IN STATE V. EILEEN CASSIDY STAYING CERTAIN ALCOTEST-RELATED DWI CASES**

The Supreme Court granted direct certification in the matter of State v. Eileen Cassidy pursuant to Rule 2:12-1. On April 6, 2017, the Court appointed Appellate Division Judge Joseph F. Lisa, Retired on Recall, as Special Master. The Court directed Judge Lisa to determine whether the failure of New Jersey State Police Sergeant Marc Dennis to test the simulator solutions with the NIST-traceable digital thermometer before calibrating an Alcotest machine (breath-testing device) undermines or calls into question the scientific reliability of breath tests subsequently performed on the Alcotest machine. The Alcotest machines calibrated by Sergeant Dennis during his tenure with the State Police were used in over 20,000 DWI prosecutions. Although most of these cases were filed in five counties (Middlesex, Monmouth, Ocean, Somerset and Union Counties), there have been cases in twelve counties total.

On November 2, 2017, Judge Lisa issued an Order (attached) requiring a stay in all open DWI cases where the Alcotest reading was taken using a machine serviced by Sergeant Dennis ("Dennis" cases). That same order provides that a stay is also to be granted, unless the defendant expressly waives his or her right to the stay, on any new case (e.g., new DWI, refusal or driving while suspended charge) where an original "Dennis" DWI conviction constitutes a predicate offense to enhance the gradation or applicable punishment in that subsequent proceeding. Finally, judges handling these cases have the discretion to stay outstanding sentence provisions pending the Supreme Court's ultimate decision in State v. Cassidy.

Additionally, on November 28, Judge Lisa issued a Supplemental Order (attached) providing that the burden for determining whether or not the defendant provided a breath sample on an Alcotest device calibrated by Sergeant Dennis rests with the prosecutor handling the case. The prosecutor is also required to produce and provide documentary evidence of that determination to the defendant and the court. Further, in any proceeding in any court involving a prosecution for an offense in which a prior "Dennis" DWI conviction constitutes a predicate offense that can enhance the gradation or applicable punishment in that new case, or involving a sentence emanating from such a case that has been adjudicated, the burden rests with the prosecutor to determine whether or not the defendant provided a breath sample on an Alcotest device calibrated by Sergeant Dennis in that prior DWI case, and to produce documentary evidence of that determination to the defendant and the court.

  
Glenn A. Grant, J.A.D.  
Acting Administrative Director

Dated: December 6, 2017

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SUPREME COURT OF NEW JERSEY  
DOCKET NO. M-244/245/246  
SEPTEMBER TERM 2016 078390

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff-Movant,	:	ORDER GRANTING STAY
	:	OF PROCEEDINGS IN OTHER COURTS
V.	:	THAT RAISE ISSUES POTENTIALLY
	:	AFFECTED BY THE SUPREME COURT'S
EILEEN CASSIDY,	:	DETERMINATION IN THIS CASE
Defendant-Respondent.	:	

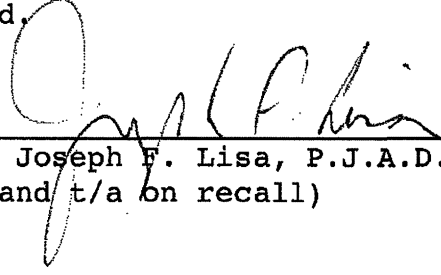
This matter having been brought before this Court by Robert Czepiel, Jr., Supervising Deputy Attorney General, appearing for the State of New Jersey, and Michael R. Hobbie, Esq., appearing on behalf of the defendant, Eileen Cassidy, and Sharon A. Balsamo, Esq., appearing on behalf of the New Jersey State Bar Association, and Samuel Louis Sachs, Esq., appearing as amicus curiae, and John Menzel, J.D., appearing as amicus curiae, and Matthew W. Reisig, Esq., appearing as amicus curiae, on the State's Motion for a Stay of all proceedings in other courts that raise issues potentially affected by the Supreme Court's determination to be made in this matter; and the Court having heard oral argument and for good cause shown;

It is on this 2nd day of November, 2017 ORDERED that, based on the attached certification of Mr. Czepiel, the State's Motion for a stay of proceedings in other courts that raise issues potentially affected by the Supreme Court's ultimate determination in this matter, i.e. a DWI prosecution in which a BAC reading derived from an Alcotest device calibrated by coordinator Marc Dennis, is hereby GRANTED.

It is FURTHER ORDERED that the stay of proceedings contained in this Order shall not preclude other courts from ordering that sentences for DWI convictions or sentences for driving while suspended under N.J.S.A. 39:3-40(f)(2) and (3) or N.J.S.A. 2C:40-26 in, or as a result of, adjudicated Dennis cases be stayed pending the ultimate determination by the Supreme Court in this matter;

It is FURTHER ORDERED that if a DWI conviction in a Dennis case constitutes a predicate offense to enhance the gradation or applicable punishment in a subsequent prosecution for another charge, proceedings in the subsequent prosecution shall be stayed, unless the defendant expressly waives the right to the stay (and therefore the right to challenge his or her DWI conviction in the Dennis case regardless of the determination

ultimately made by the Supreme Court in this matter), and agrees  
to allow the prosecution to proceed.



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Honorable Joseph F. Lisa, P.J.A.D.  
(retired and t/a on recall)

Prepared by the Court

SUPREME COURT OF NEW JERSEY  
M-244/245/246 September Term 2016  
078390

STATE OF NEW JERSEY,

Plaintiff-Movant

v.

EILEEN CASSIDY,

Defendant-Respondent.

Order Supplementing Order Granting Stay of Proceedings in Other  
Courts that Raise Issues Potentially Affected by the Supreme  
Court's Determination in this Case

This matter being opened on the court's own initiative and being entered, after notice to all parties, as a supplement to the November 2, 2017 order of this court staying certain proceedings in other courts, for the purpose of effectively identifying cases in which breath samples were provided on an Alcotest device calibrated by New Jersey State Police coordinator Marc Dennis, to which the November 2, 2017 stay order applies,

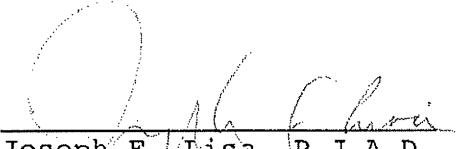
It is on this 28th day of November, 2017, ORDERED AS  
FOLLOWS:

1. In any proceeding in any court involving a prosecution, conviction or sentence for a DWI offense for which the offense date was between January 1, 2008 and September 30, 2016, it shall be the affirmative obligation of the prosecutor in that

proceeding to determine whether or not the defendant provided a breath sample on an Alcotest device that had been calibrated by coordinator Marc Dennis, and to produce documentary evidence of that determination to the defendant and the court;

2. In any proceeding in any court involving a prosecution for an offense in which a prior DWI conviction constitutes a predicate offense to enhance the gradation or applicable punishment in that subsequent prosecution for another charge, or involving a sentence emanating from such a case that has been adjudicated, it shall be the affirmative obligation of the prosecutor in that proceeding to determine whether or not the defendant provided a breath sample on an Alcotest device that had been calibrated by coordinator Marc Dennis in that prior DWI case, and to produce documentary evidence of that determination to the defendant and the court.

IT IS FURTHER ORDERED that the Attorney General shall forthwith provide a copy of this order to all county and municipal prosecutors.

  
Joseph F. Lisa, P.J.A.D.  
(retired and t/a on recall)

Dated: November 28, 2017