

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

DENNIS FORFA, KATHY KING, :
WILLIAM KING, LYNN ROZUK, :
WILLIAM SCHLEIFER, :
ANTHONY TARGOWSKI, :
KATHLEEN BLISS, CHARLES :
D. HARVEY, SHARON :
HATCHETT, STEPHEN :
LAMBERT, CATHY MOSELEY, :
and ROBERT W. MCGUIRK, :

Petitioners, :

Vs. :

STATE OF FLORIDA, :

Respondent. :

CASE NO.

Circuit Case No. 2007-3758 CA

PETITIONER'S APPENDIX B
(Circuit Court Appendixes)

Robert N. Harrison
825 S. Tamiami Trail, Suite 2
Venice, Florida 34285
(941) 485-8551
(941) 488-8932 facsimile
Robert@HarrisonLawOffice.com
Florida Bar No. 0612545
Counsel for Petitioners

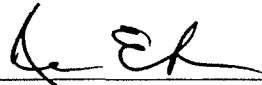
7. A Breath result on an Intoxilyzer 8000 is unreliable without a breath sample of least 1.1 liters.
8. One of the safeguards of the Intoxilyzer 8000 is the ability to record the volume of each breath sample.
9. In order to ensure any given result is reliable, the Intoxilyzer when working properly should report to the breath test operator the warning "volume not met" any time a breath sample is smaller 1.1 liters.
10. If operating properly, a breath test result without a warning of "volume not met" indicates the sample volume is greater than 1.1 liters; however, the Intoxilyzer 8000, as distributed for use in the State of Florida, contained a software flaw that on numerous occasions reported a volume of less than 1.1 liters when there was no warning flag of "volume not met", thus rendering the reliability of the reported volume unknown. Attached marked Exhibit "A" is a letter from the Florida Department of Law Enforcement acknowledging the software code was missing instructions and list of numerous known software failures.
11. If the reliability of the reported volume of a breath sample cannot be ensured, then the reliability of any corresponding breath alcohol level cannot be ensured.
12. The production of the Source Code is necessary for the Defendant to determine the extent of the software flaw(s) and the impact of the flaw(s) on the reliability of the breath test results.
13. Without the production of the Source Code, it is impossible to determine if the software flaws would stop the machine from producing other warning flags, such as mouth alcohol, which would cause the machine to report an artificially high breath alcohol level.
14. The Intoxilyzer 8000, as distributed for use in the State of Florida, contained another software flaw that allows the machine to report that no air was introduced into the machine, yet still produce a breath alcohol level. Attached marked Exhibit "B" are examples of this flaw.
15. The software contained in the Intoxilyzer 8000 used in each case was modified without having the machine recalibrated.
16. According to the manufacturer of the Intoxilyzer 8000, following a software update that modifies the analytical portion of the software, the machine must be recalibrated.
17. Without the Source Code, the Defendant cannot determine whether or not the software update modified the analytical portion of the software, thus requiring the machine to be recalibrated.

18. The Source Code is material to the Defendant's case, for with this information the Defendant can determine whether the Intoxilyzer actually used in his case was using a software program approved by 11D-8.003 or a modified version of this program, if a modified version was used, what extent the modification would have on the reliability and operation of the Intoxilyzer, and how the software effects the reliability and operation of the Intoxilyzer.
19. Without the production of the Source Code, the reliability of the Intoxilyzer 8000 is unknown.
20. Without the production of the Source Code, the Intoxilyzer 8000 is no more than is "Mystical Machine" used to establish the Defendant's guilt.
21. The Defendant seeks production of the Source Code to "Demystify" the Intoxilyzer 8000.
22. The production of the source code is necessary to the Defense, for without the Source Code, the Defendant cannot determine:
 - a. Whether the software on the local Intoxilyzers is the same program approved by FDLE in 2002;
 - b. Whether the software on the local Intoxilyzers is a modified version of the program approved by FDLE in 2002;
 - c. The extent of the modifications to the approved software;
 - d. Whether the modifications to the Software program affect the reliability or operation of the Intoxilyzers;
 - e. The impact the Software Program itself has on the reliability of the Intoxilyzer 8000;
 - f. Whether changes in the various versions of the code is substantial or inconsequential, including if the analytical portions of the code were modified;
 - g. The "fail safe" procedures contained in the code, including, but not limited to the slope formula and slope "break points"; and
 - h. The extent and impact of the software flaw(s) contained in the program.
23. Allowing the State to introduce the results of the Intoxilyzer 8000 without producing the Software Source Code, is tantamount to granting the State authority to use confidential information (i.e.: the source code) to establish

the guilt of the Defendant without disclosing the information to the Defendant for inspection and possible impeachment.

24. The Software is an integral part of the Intoxilyzer 8000.
25. The Defendant is not in possession of the Source Code, and is unable to obtain the Source Code.
26. For the reasons stated above, to allow the State to introduce the results of the Intoxilyzer 8000, without producing the Source Code, would work injustice and violate the Defendant's right to due process.

WHEREFORE, The Defendant requests that this Court require the State Attorney to produce the Source Code of the Software Program on the Intoxilyzer 8000 used in this case, together with the Source Code of the Software Program that was approved for use in 11D-8.003, or in the Alternative, an Order Excluding the Breath Test Results, for the admission of the results without production of the Source Code would violate the Defendant's right to due process.


Kerry E. Mack, Esquire
2022 Placida Road
Englewood, Florida 34224
(941) 475-7966
(941) 475-0729 Facsimile
Florida Bar No. 0337897
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to Michael Anthony Pica, Esquire, c/o Office of the State Attorney, 350 East Marion Avenue, 2nd Floor, Punta Gorda, FL 33950 by U.S. Mail on this 7 day of November, 2006.


Kerry E. Mack, Esquire



Florida Department of
Law Enforcement

Criminal Justice
Professionalism Program
Alcohol Testing Program

P.O. Box 1489
Tallahassee, Florida 32302
(850) 410-8800
(850) 410-7816 Fax
<http://www.fdle.state.fl.us>

Gerald M. Bailey
Interim Commissioner

October 19, 2006

Katherine Fernandez Rundle
State Attorney
11th Judicial Circuit
E.R. Graham Building
1350 NW 12th Avenue
Miami, Florida 33136-2111

SUBJECT: Intoxilyzer 8000

Dear State Attorney Katherine Fernandez Rundle:

This letter is to inform you of an issue regarding the Intoxilyzer 8000 that the Florida Department of Law Enforcement Alcohol Testing Program has discovered. We have been in contact with the manufacturer of the Intoxilyzer 8000, CMI, Inc., and have determined there are missing instructions in the Intoxilyzer 8000 software version 8100.26.

The issue involves the instrument's ability to correctly identify the volume of a breath sample delivered past three minutes. The programming in software version 8100.26 was not written to address this very unique and specific scenario. This issue is affecting less than 1% of all breath tests conducted on the Intoxilyzer 8000.

A software revision to add these missing instructions is in the process of being completed and will be installed in your Intoxilyzer 8000 instruments in the near future. **I would like to assure you that software version 8100.26 is operating as written and programmed. The analytical functions of the instrument are not affected by this issue and the instrument continues to correctly analyze all breath samples.** It is only with this unique and specific scenario that the breath sample has not been determined to be reliable.

A detailed letter is being forwarded under separate cover to Criminal Justice Agencies in your circuit. Enclosed is a summary of the affected breath tests determined as of October 2, 2006. The Alcohol Testing Program is continuing to closely monitor every breath test result obtained in the State of Florida and will contact you regarding any additional affected breath tests conducted by your agency. If you have any questions, please feel free to contact me at (850) 410-7810.

Sincerely,

Gerald M. Bailey
Interim Commissioner

Laura D. Barfield
Alcohol Testing Program Manager

LDB/lb

Enclosure

*Committed to
Service - Integrity - Respect - Quality*

EXHIBIT "B"

Subject Last Name	Subject First Name	Subject's Date of Birth	Offense	Instrument Serial Number	Instrument Registered To	Arresting Officer Agency	Date of Test	Time of Test	Breath Sample Volume Results	Notes
Correia	Miguel A	1/7/1988	DUI	80-000223	FDLE (loaned to Indian River County Sheriff's Office)	Florida Highway Patrol	7/6/2006	22:58:02	First Sample Volume 1.933L - OK Second Sample Volume 0.972L - No Flag First Sample Volume 0.226L - Flagged Volume Not Met	Not A Valid Test
Sedoye	Michael T	1/14/1976	DUI	80-000738	Fort Walton Beach PD	Okaloosa County SO	8/5/2006	4:54:39	No Second Sample - Purge Fail First Sample Volume 1.066L - No Flag Second Sample Volume 1.164L - OK	Not A Valid Test
Petrucci	Terrell A	12/24/1961	DUI	80-000739	Okaloosa County SO	Florida Highway Patrol	8/21/2006	0:10:12	First Sample Volume 1.550L - OK Second Sample Volume 0.605L - No Flag	Not A Valid Test
Fulford	Kenneth M	7/7/1951	DUI	80-000744	Escambia County SO	Pensacola PD	5/11/2006	2:04:10	First Sample Volume 0.664L - No Flag Second Sample Volume 2.105L - OK First Sample Volume 1.082L - No Flag	Not A Valid Test
Burges	Axel	7/11/1978	DUI	80-000744	Escambia County SO	Florida Highway Patrol	7/22/2006	3:58:14	First Sample Volume 0.607L - No Flag Second Sample Volume 1.515L - OK First Sample Volume 0.607L - No Flag	Not A Valid Test
East	Easter K.	3/21/1945	DUI	80-000744	Escambia County SO	Florida Highway Patrol	8/12/2004	2:04:13	First Sample Volume 0.607L - No Flag Second Sample Volume 1.515L - OK First Sample Volume 0.607L - No Flag	Not A Valid Test
Rives	Lisa C	6/8/1959	DUI	80-000744	Escambia County SO	Florida Highway Patrol	9/28/2006	21:07:00	First Sample Volume 0.607L - No Flag Second Sample Volume 1.515L - OK First Sample Volume 0.607L - No Flag	Not A Valid Test
Amanson	Amanda N.	9/9/1984	DUI	80-000763	Okaloosa County SO	Okaloosa County SO	5/18/2006	5:39:00	No Second Sample - Purge Fail First Sample Volume 0.129L - Flagged Volume Not Met Second Sample Volume 0.347L - No Flag Third Sample Volume 0.127L - Flagged Volume Not Met	Not A Valid Test
Hidle	Brandi C	1/19/1972	DUI	80-000763	Okaloosa County SO	Okaloosa County SO	5/25/2006	1:05:18	First Sample Volume 1.000L - No Flag Second Sample Volume 0.127L - Flagged Volume Not Met Third Sample Volume 0.127L - Flagged Volume Not Met	Not A Valid Test
Toney	Patrick S.	3/10/1967	DUI	80-000763	Okaloosa County SO	Okaloosa County SO	5/30/2006	1:28:54	First Sample Volume 0.265L - No Flag Second Sample Volume 0.054L - Flagged Volume Not Met Third Sample Volume 1.398L - OK	Not A Valid Test
Boone	Michael J.	11/9/1983	DUI	80-000763	Okaloosa County SO	Okaloosa County SO	6/25/2006	2:30:07	First Sample Volume 0.742L - No Flag Second Sample Volume 0.855L - Flag Volume Not Met Third Sample Volume 0.214L - Flag Volume Not Met	Not A Valid Test
Alcandri	Danielle M	8/1/1971	DUI	80-000763	Okaloosa County SO	Okaloosa County SO	7/25/2006	2:35:03	First Sample Volume 0.476L - No Flag Second Sample Volume 1.738L - OK Third Sample Volume 0.852L - No Flag	Not A Valid Test
Jones	Elaine J	9/18/1969	DUI	80-000772	Santa Rosa County SO	Santa Rosa County SO	5/13/2006	2:38:47	No Second Sample - Purge Fail First Sample Volume 0.632L - No Flag Second Sample Volume 0.632L - No Flag Third Sample Volume 0.761L - Flag Volume Not Met	Not A Valid Test
Bohannon	Lynette D	12/18/1972	DUI	80-000786	Broward County SO	Broward County SO	5/12/2006	0:10:42	First Sample Volume 0.324L - Flag Volume Not Met Second Sample Volume 0.632L - No Flag Third Sample Volume 0.761L - Flag Volume Not Met	Not A Valid Test
Shelton	Linda M	8/27/1940	DUI	80-000780	Vero Beach PD	Vero Beach PD	7/13/2006	3:05:22	First Sample Volume 0.851L - Flag Volume Not Met Second Sample Volume 1.292L - OK Third Sample Volume 0.613L - No Flag	Not A Valid Test
Vaught	Michael A	4/20/1981	DUI	80-000794	St. Lucie County SO	St. Lucie County SO	4/9/2006	2:49:38	First Sample Volume 1.527L - OK Second Sample Volume 0.261L - No Flag Third Sample Volume 1.371L - OK	Not A Valid Test
Lesko	Darryl R.	5/10/1958	DUI	80-000794	St. Lucie County SO	St. Lucie County SO	6/5/2006	1:49:07	First Sample Volume 1.222L - OK Second Sample Volume 1.222L - OK Third Sample Volume 1.222L - OK	Not A Valid Test
Conerz	Javier O.	1/14/1964	DUI	80-000794	St. Lucie County SO	Fort Pierce PD	6/10/2006	0:36:52	First Sample Volume 1.570L - OK Second Sample Volume 0.300L - No Flag Third Sample Volume 2.429L - OK	Not A Valid Test
Schneider	Robert P	4/23/1962	DUI	80-000794	St. Lucie County SO	Fort Pierce PD	6/19/2006	20:12:44	First Sample Volume 1.113L - OK Second Sample Volume 0.234L - No Flag Third Sample Volume 2.429L - OK	Not A Valid Test
Slater	Keith	6/24/1972	DUI	80-000794	St. Lucie County SO	Fort Pierce PD	8/21/2006	9:25:13	First Sample Volume 0.515L - No Flag Second Sample Volume 1.343L - OK Third Sample Volume 1.207L - OK	Not A Valid Test
Mahiszewski	Dagmar E	8/5/1967	DUI	80-000794	St. Lucie County SO	Port St. Lucie PD	6/25/2006	23:16:05	First Sample Volume 0.812L - No Flag Second Sample Volume 1.054L - No Flag Third Sample Volume 1.054L - No Flag	Not A Valid Test
Diaz	Alejandro	10/29/1984	DUI	80-000794	St. Lucie County SO	St. Lucie County SO	8/19/2006	3:20:08	First Sample Volume 0.816L - No Flag Second Sample Volume 1.054L - No Flag Third Sample Volume 1.054L - No Flag	Not A Valid Test
Jimenez	David Y.	1/24/1977	DUI	80-000808	Hillsborough County SO	Hillsborough County SO	3/30/2006	23:07:03	First Sample Volume 1.054L - No Flag Second Sample Volume 1.261L - OK Third Sample Volume 1.261L - OK	Not A Valid Test
Plesca	Petar J	11/25/1982	DUI	80-000808	Hillsborough County SO	Tampa PD	7/2/2006	3:58:14	First Sample Volume 1.933L - OK Second Sample Volume 0.972L - No Flag First Sample Volume 0.226L - Flagged Volume Not Met	Not A Valid Test

Roberts	Pamela R	7/23/1984	DUI	80-000808	Hillsborough County SO	Tampa PD	8/24/2006	0 30:17	First Sample Volume 1.070L - No Flag Second Sample Volume 1.679L - OK	Not A Valid Test
Rayes	Tony	6/11/1984	DUI	80-000808	Hillsborough County SO	Plant City PD	9/3/2006	0:04:38	First Sample Volume 0.363L - No Flag No Second Sample - Purge Fail	Not A Valid Test
Clark	Michael C	4/9/1983	DUI	80-000808	Hillsborough County SO	Florida Highway Patrol	9/9/2006	5:52:04	First Sample Volume 0.246L - No Flag No Second Sample - Purge Fail	Not A Valid Test
Hargrave	Evelyn M	7/20/1979	DUI	80-000808	Hillsborough County SO	Tampa PD	9/10/2006	3:08:59	First Sample Volume 0.925L - No Flag No Second Sample - Purge Fail	Not A Valid Test
Diaz-Gonzalez	Raul N	11/24/1957	DUI	80-000813	Marion County SO	Marion County SO	8/21/2006	14 35:11	First Sample Volume 2.736L - OK Second Sample Volume 0.476L - No Flag Purge Fail After Second Sample	Not A Valid Test
Mernott	Brady J.	9/9/1984	DUI	80-000817	Citrus County SO	Citrus County SO	9/14/2006	4:23:44	First Sample Volume 0.398L - No Flag Second Sample Volume 0.179L - No Flag	Not A Valid Test
Weich	Andrei C	3/20/1966	DUI	80-000824	Leesburg PD	Leesburg PD	4/15/2006	0:19:50	First Sample Volume 0.0324L - No Flag Second Sample Volume 1.117L - OK	Not A Valid Test
Garcia	Alfonso R	8/17/1980	DUI	80-000829	Hillsborough County SO	Tampa PD	4/12/2006	2:16:24	First Sample Volume 0.339L - No Flag No Second Sample - Purge Fail	Not A Valid Test
Jensen	Michael R	10/9/1961	DUI	80-000832	Martin County SO	Florida Highway Patrol	5/29/2006	3 47:51	First Sample Volume 1.680L - OK Second Sample Volume 0.972L - No Flag Third Sample Volume 1.539L - OK	Valid Test - First and Third Samples
Camacho	Rafael	4/3/1961	DUI	80-000832	Martin County SO	Stuart PD	8/22/2006	19 54:57	First Sample Volume 0.204L - Flagged Volume Not Met Second Sample Volume 0.597L - No Flag Third Sample Volume 0.219L - Flagged Volume Not Met	Not A Valid Test
Mendoza	Cecilio	11/22/1962	DUI	80-000832	Martin County SO	Martin County SO	7/9/2006	2:12:46	First Sample Volume 0.000L - Flagged Volume Not Met Second Sample Volume 2.228L - OK Third Sample Volume 0.183 - No Flag	Not A Valid Test
Schroeder	Brandon H	7/28/1987	DUI	80-000832	Martin County SO	Martin County SO	8/13/2006	2:45:47	First Sample Volume 0.468L - Flagged Volume Not Met Second Sample Volume 0.768L - No Flag Third Sample Volume 1.480L - OK	Not A Valid Test
Daher	Jabib	2/3/1948	DUI	80-000832	Martin County SO	FWC West Palm	8/26/2006	23 30:17	First Sample Volume 1.726L - OK Second Sample Volume 0.449L - No Flag Third Sample Volume 0.808L - No Flag	Not A Valid Test
Vandemark	Jeffrey W	6/16/1945	DUI	80-000832	Martin County SO	Sewall's Point PD	9/4/2006	2 04:32	First Sample Volume 0.394L - OK Second Sample Volume 0.203L - No Flag Third Sample Volume 1.691L - OK	Not A Valid Test
Michale	James M	2/27/1967	DUI	80-000832	Martin County SO	Stuart PD	9/4/2006	21:48:28	First Sample Volume 1.187L - OK Second Sample Volume 0.742L - No Flag Third Sample Volume 0.196L - Flag Volume Not Met	Not A Valid Test
Moretti	Derek P	6/2/1980	DUI	80-000833	Hillsborough County SO	Tampa PD	5/15/2006	1 09:00	First Sample Volume 0.105L - No Flag Second Sample Volume 0.212L - Flagged Volume Not Met Third Sample Volume 0.219L - Flagged Volume Not Met	Not A Valid Test
Perez	Palermo	11/20/1972	DUI	80-000833	Hillsborough County SO	Hillsborough County SO	6/10/2006	19 51:30	First Sample Volume 0.105L - No Flag Second Sample Volume 0.957L - No Flag Third Sample Volume 0.957L - No Flag	Not A Valid Test
Pospischil	Ashley N	5/10/1983	DUI	80-000833	Hillsborough County SO	Tampa PD	7/3/2006	4:13:57	First Sample Volume 0.371L - No Flag Second Sample Volume 0.648L - OK Third Sample Volume 0.625L - No Flag	Not A Valid Test
Gandamilla	Petronilo R	9/6/1972	DUI	80-000833	Hillsborough County SO	Plant City PD	7/21/2006	8:12:20	First Sample Volume 0.371L - No Flag Second Sample Volume 0.625L - No Flag Third Sample Volume 0.625L - No Flag	Not A Valid Test
Rojas	Oscar	8/27/1949	DUI	80-000833	Hillsborough County SO	Tampa PD	8/11/2006	2:46:47	First Sample Volume 0.574L - No Flag Second Sample Volume 1.289L - OK Third Sample Volume 0.428L - No Flag	Not A Valid Test
Rojan	Jose A	3/8/1961	DUI	80-000833	Hillsborough County SO	Florida Highway Patrol	8/13/2006	4:32:45	First Sample Volume 0.574L - No Flag Second Sample Volume 1.289L - OK Third Sample Volume 0.428L - No Flag	Not A Valid Test
Seymour	Patrick H	8/28/1967	DUI	80-000859	Cape Coral PD	Cape Coral PD	6/21/2006	20:35:18	First Sample Volume 0.464L - No Flag Second Sample Volume 0.168L - Flagged Volume Not Met Third Sample Volume 0.582L - No Flag	Not A Valid Test
Lisa	Denise A	12/9/1957	DUI	80-000859	Cape Coral PD	Cape Coral PD	7/10/2006	0:54:05	First Sample Volume 1.035L - Flagged Volume Not Met Second Sample Volume 0.980L - No Flag Third Sample Volume 0.015L - Flagged Volume Not Met	Not A Valid Test
Hyland	Cara L	8/23/1986	DUI	80-000859	Cape Coral PD	Cape Coral PD	8/2/2006	2:37:55	First Sample Volume 0.097L - Flagged Volume Not Met Second Sample Volume 0.457L - No Flag Third Sample Volume 0.687L - Flagged Volume Not Met	Not A Valid Test
Velez	Ernesto	7/22/1986	DUI	80-000859	Cape Coral PD	Cape Coral PD	8/6/2006	1:33:11	First Sample Volume 0.035L - No Flag Second Sample Volume 0.687L - Flagged Volume Not Met Third Sample Volume 0.035L - No Flag	Not A Valid Test
Jarrett	Donald	12/28/1955	DUI	80-000861	Sarasota County SO	Sarasota County SO	9/12/2006	21:54:31	First Sample Volume 0.035L - No Flag Second Sample Volume 0.687L - Flagged Volume Not Met Third Sample Volume 0.035L - No Flag	Not A Valid Test

Brown	Nathan	5/1/1979	DUI	80-000868	Monroe County SO	NAS Key West	7/30/2006	2:11:35	First Sample Volume 0.250L - No Flag No Second Sample - Purge Fail	Not A Valid Test
Morriere	Laurent L	6/24/1947	BUI	80-000869	Monroe County SO	Other State	4/15/2006	20:19:14	First Sample Volume 0.687L - No Flag Second Sample Volume 0.178L - Flagged Volume Not Met Third Sample Volume 1.804L - OK	Not A Valid Test
Clarke	Brian D	12/7/1991	BUI	80-000869	Monroe County SO	FWC	5/20/2006	21:23:30	First Sample Volume 1.078L - No Flag Second Sample Volume 1.078L - No Flag Third Sample Volume 1.078L - No Flag	Not A Valid Test
Conejo	Jose	4/17/1980	DUI	80-000869	Monroe County SO	Monroe County SO	7/22/2006	4:48:56	First Sample Volume 1.246L - OK Second Sample Volume 0.449L - Flagged Volume Not Met Third Sample Volume 0.535L - No Flag	Not A Valid Test
Kelly	Shane L	2/6/1981	DUI	80-000869	Monroe County SO	Monroe County SO	6/7/2006	5:16:12	First Sample Volume 1.585L - OK Second Sample Volume 0.149L - Flagged Volume Not Met Third Sample Volume 1.394L - OK	Not A Valid Test
La Paz	Gilda	11/20/1943	DUI	80-000871	Coral Gables PD	Coral Gables PD	6/4/2006	22:46	First Sample Volume 1.578L - OK Second Sample Volume 0.328L - No Flag Third Sample Volume 0.328L - No Flag	Not A Valid Test
Costa Moran	Enrique A	2/27/1975	DUI	80-000872	Miami PD	Miami PD	8/25/2006	3:03:40	First Sample Volume 0.808L - No Flag Second Sample Volume 0.328L - No Flag Third Sample Volume 1.078L - No Flag	Not A Valid Test
Costa	Hollman E	12/5/1984	DUI	80-000873	Miami PD	Miami PD	9/11/2006	9:28:14	First Sample Volume 1.078L - No Flag Second Sample Volume 0.535L - No Flag Third Sample Volume 1.585L - OK	Not A Valid Test
Mama	Hollman E	12/5/1984	DUI	80-000872	Miami PD	Miami PD	9/11/2006	9:52:59	First Sample Volume 0.535L - No Flag Second Sample Volume 0.535L - No Flag Third Sample Volume 1.394L - OK	Not A Valid Test
Diaz	Gerardo	7/30/1929	DUI	80-000873	Miami PD	Miami PD	4/1/2006	22:22:46	First Sample Volume 1.101L - OK Second Sample Volume 0.312L - No Flag Third Sample Volume 1.027L - No Flag	Not A Valid Test
Knowles	Patrick J	5/28/1906	DUI	80-000873	Miami PD	South Miami PD	9/16/2006	1:55:54	First Sample Volume 0.718L - No Flag Second Sample Volume 0.312L - No Flag Third Sample Volume 1.051L - OK	Not A Valid Test
Alonso	Ruben	11/22/1959	DUI	80-000876	Hialeah PD	Hialeah PD	5/1/2006	20:40:29	First Sample Volume 0.718L - No Flag Second Sample Volume 1.148L - OK Third Sample Volume 1.148L - OK	Not A Valid Test
Francis	Luis A	9/30/1967	DUI	80-000876	Hialeah PD	Hialeah PD	6/26/2006	21:54:08	First Sample Volume 0.504L - No Flag Second Sample Volume 0.504L - No Flag Third Sample Volume 0.504L - No Flag	Not A Valid Test
Bello	Farah T	10/4/1978	DUI	80-000879	Miami Beach PD	Miami Beach PD	9/16/2006	5:27:26	First Sample Volume 0.504L - No Flag Second Sample Volume 0.504L - No Flag Third Sample Volume 0.504L - No Flag	Not A Valid Test
Lozano	Cesar U	10/7/1975	DUI	80-000881	Miami Dade PD	Miami Dade PD	9/20/2006	2:08:52	First Sample Volume 0.304L - No Flag Second Sample Volume 0.304L - No Flag Third Sample Volume 0.304L - No Flag	Not A Valid Test
Martinez	Gilver O	9/2/1984	DUI	80-000884	Miami Dade PD	Miami Dade PD	4/9/2006	4:38:12	First Sample Volume 0.273L - No Flag Second Sample Volume 0.460L - No Flag Third Sample Volume 0.460L - No Flag	Not A Valid Test
Burgos-Donates	Myma	8/9/1957	DUI	80-000885	Miami Dade PD	Miami Dade PD	5/6/2006	2:43:50	First Sample Volume 0.433L - No Flag Second Sample Volume 0.433L - No Flag Third Sample Volume 0.433L - No Flag	Not A Valid Test
Velazquez	Valerie A	3/1/1981	DUI	80-000885	Miami Dade PD	Miami Dade PD	6/10/2006	5:27:19	First Sample Volume 0.339L - No Flag Second Sample Volume 0.339L - No Flag Third Sample Volume 0.339L - No Flag	Not A Valid Test
Mena	Marianne	10/28/1983	DUI	80-000885	Miami Dade PD	Miami Dade PD	8/20/2006	6:53:05	First Sample Volume 0.132L - Flagged Volume Not Met Second Sample Volume 0.976L - Flagged Volume Not Met Third Sample Volume 0.132L - Flagged Volume Not Met	Not A Valid Test
Mena	Marianne	10/28/1983	DUI	80-000885	Miami Dade PD	Miami Dade PD	8/20/2006	7:13:49	First Sample Volume 0.117L - Flagged Volume Not Met Second Sample Volume 0.500L - No Flag Third Sample Volume 0.871L - Flagged Volume Not Met	Not A Valid Test
Winston	Aian	4/17/1942	DUI	80-000886	North Miami Beach PD	North Miami Beach PD	4/22/2006	5:40:58	First Sample Volume 0.632L - No Flag Second Sample Volume 0.597L - No Flag Third Sample Volume 0.597L - No Flag	Not A Valid Test
Ghazanani	Sevak	9/8/1984	DUI	80-000888	Pinellas County SO	Pinellas County SO	6/2/2006	3:28:14	First Sample Volume 0.228L - No Flag Second Sample Volume 0.304L - Flagged Volume Not Met Third Sample Volume 0.101L - Flagged Volume Not Met	Not A Valid Test
Harvey	Raybeth	8/22/1959	DUI	80-000889	Pinellas County SO	Florida Highway Patrol	9/1/2006	21:20:50	First Sample Volume 0.089L - Flagged Volume Not Met Second Sample Volume 0.507L - No Flag Third Sample Volume 0.507L - No Flag	Not A Valid Test
Lee	Scott W	3/10/1973	DUI	80-000890	Pinellas County SO	Pinellas County SO	5/20/2006	4:31:38	First Sample Volume 1.074L - Flagged Volume Not Met Second Sample Volume 1.074L - Flagged Volume Not Met Third Sample Volume 1.167L - OK	Not A Valid Test
Davis	Kevin M	5/20/1969	BUI	80-000892	Fish & Wildlife CC	FWC	5/20/2006	14:37:25	First Sample Volume 1.058L - No Flag Second Sample Volume 0.554L - No Flag Third Sample Volume 2.554L - OK	Not A Valid Test
Lopez	Torbio M	10/5/1981	DUI	80-000907	Manatee County SO	Florida Highway Patrol	8/12/2006	0:51:18	First Sample Volume 1.441L - OK Second Sample Volume 0.554L - No Flag Third Sample Volume 2.554L - OK	Valid Test - First and Third Samples

Tamm	Trinity T	6/28/1977	DUI	80-000912	Manatee County SO	Manatee County SO	4/19/2006	5:10:09	First Sample Volume 0.015L - Flagged Volume Not Met Second Sample Volume 0.082L - No Flag Third Sample Volume 0.296L - Flagged Volume Not Met	Not A Valid Test
Skoliro	Richard D	6/29/1962	DUI	80-000912	Manatee County SO	Florida Highway Patrol	8/28/2006	3:01:18	First Sample Volume 0.699L - No Flag Second Sample Volume 1.398L - OK	Not A Valid Test
Hurtado	Pablo E	3/22/1967	DUI	80-000939	Lee County SO	Lee County SO	4/27/2006	2:24:56	First Sample Volume 2.125L - OK Second Sample Volume 0.550L - No Flag Third Sample Volume 0.289L - Flagged Volume Not Met	Not A Valid Test
Fanno	Lillian	4/26/1962	DUI	80-000939	Lee County SO	Lee County SO	6/12/2006	15:27:43	First Sample Volume 0.835L - No Flag Second Sample Volume 1.498L - OK Third Sample Volume 0.347L - No Flag	Not A Valid Test
Moore	Shannon C	10/25/1982	DUI	80-000939	Lee County SO	Lee County SO	7/21/2006	0:18:42	First Sample Volume 0.376L - No Flag Second Sample Volume 0.000L - Flagged Volume Not Met Third Sample Volume - Subject Refused	Not A Valid Test
Conaway	Doreen M	11/15/1965	DUI	80-000939	Lee County SO	Lee County SO	7/23/2006	2:57:31	First Sample Volume 1.605L - OK Second Sample Volume 0.230L - No Flag Third Sample Volume 0.757L - No Flag	Not A Valid Test
Daughtry	Amber S	2/11/1972	DUI	80-000940	Brevard County SO	Brevard County SO	8/30/2006	3:25:19	First Sample Volume 0.613L - No Flag Second Sample Volume 1.816L - OK Third Sample Volume 1.816L - OK	Not A Valid Test
John	Nikol A	6/6/1975	DUI	80-000943	Collier County SO	Naples PD	5/28/2008	3:00:50	First Sample Volume 2.144L - OK Second Sample Volume 0.218L - No Flag Third Sample Volume 1.875L - OK	Not A Valid Test
Lyach	Vladimir	2/27/1958	DUI	80-000943	Collier County SO	Collier County SO	8/7/2006	21:20:07	First Sample Volume 0.841L - No Flag Second Sample Volume 0.841L - No Flag Third Sample Volume 1.417L - OK	Not A Valid Test
Halt	Deborah L	11/25/1958	DUI	80-000949	Tallahassee PD	Tallahassee PD	7/26/2006	14:18:55	First Sample Volume 0.164L - No Flag Second Sample Volume 2.507L - OK Third Sample Volume 1.316L - OK	Not A Valid Test
Blanco-Neito	Francisco	5/8/1978	DUI	80-000951	Hendry County SO	Hendry County SO	7/30/2006	2:44:40	First Sample Volume 0.410L - No Flag Second Sample Volume 1.570L - OK Third Sample Volume 0.429L - No Flag	Not A Valid Test
Adams	Rodney B	6/2/1961	DUI	80-000957	Leon County SO	Leon County SO	3/30/2006	19:14:15	First Sample Volume 2.250L - OK Second Sample Volume 0.347L - No Flag Third Sample Volume 0.000L - Flagged Volume Not Met	Not A Valid Test
Tucker	Leroy	10/27/1981	DUI	80-000958	Leon County SO	Tallahassee PD	4/15/2008	22:23:00	First Sample Volume 0.347L - No Flag Second Sample Volume 0.000L - Flagged Volume Not Met Third Sample Volume 2.382L - OK	Not A Valid Test
Fuman	Shawn A	10/21/1975	DUI	80-000958	Leon County SO	Tallahassee PD	9/9/2006	1:18:33	First Sample Volume 0.675L - No Flag Second Sample Volume 0.015L - Flagged Volume Not Met Third Sample Volume 0.191L - Flagged Volume Not Met	Not A Valid Test
Childs	Kendra P	9/8/1969	DUI	80-000961	Wakulla County SO	Wakulla County SO	4/14/2008	23:27:48	First Sample Volume 0.183L - No Flag Second Sample Volume 0.546L - No Flag Third Sample Volume 1.453L - OK	Not A Valid Test
Urbano	Marcos	2/28/1982	DUI	80-000963	Orange County SO	Orlando PD	5/17/2006	4:51:48	First Sample Volume 0.347L - No Flag Second Sample Volume 0.402L - Flagged Volume Not Met Third Sample Volume 3.941L - OK	Not A Valid Test
Alvabi	Fouad	4/2/1977	DUI	80-000963	Orange County SO	Orange County SO	5/29/2006	18:30:03	First Sample Volume 0.765L - No Flag Second Sample Volume 1.939L - OK Third Sample Volume 0.457L - No Flag	Not A Valid Test
Miranda	Arnoldo	5/6/1983	DUI	80-000964	Orange County SO	Ocoee PD	9/24/2006	4:58:41	First Sample Volume 0.031L - Flagged Volume Not Met Second Sample Volume 0.554L - Flagged Volume Not Met Third Sample Volume 2.027L - OK	Not A Valid Test
Rodriguez	Candido J	8/8/1980	DUI	80-000966	Osceola County Corrections	Osceola County SO	4/22/2006	3:00:40	First Sample Volume 0.230L - No Flag Second Sample Volume 0.031L - Flagged Volume Not Met Third Sample Volume 0.554L - Flagged Volume Not Met	Not A Valid Test
Cannon	Heather M	3/3/1987	DUI	80-000999	Seminole County SO	Seminole County SO	9/22/2006	5:13:02	First Sample Volume 0.394L - No Flag Second Sample Volume 0.428L - Flagged Volume Not Met Third Sample Volume 0.359L - Flagged Volume Not Met	Not A Valid Test
Harazin	Linda S	8/24/1947	DUI	80-001003	Pinellas County SO	Pinellas Park PD	5/4/2006	4:47:35	First Sample Volume 0.421L - No Flag Second Sample Volume 0.144L - Flagged Volume Not Met Third Sample Volume 1.250L - OK	Not A Valid Test
Chapman	Douglas R	12/25/1924	DUI	80-001004	Brevard County SO	Brevard County SO	6/25/2006	1:36:28	First Sample Volume 1.636L - OK Second Sample Volume 1.062L - No Flag Third Sample Volume 1.844L - OK	Not A Valid Test
Liby	Howard J	10/7/1962	DUI	80-001005	Pinellas County SO	Pinellas County SO	4/11/2006	0:17:44	First Sample Volume 0.710L - No Flag Second Sample Volume 0.015L - Flagged Volume Not Met Third Sample Volume 0.082L - No Flag	Not A Valid Test
Richmond	Audrey L	2/9/1960	DUI	80-001005	Pinellas County SO	Pinellas County SO	4/15/2006	1:26:05	First Sample Volume 0.015L - Flagged Volume Not Met Second Sample Volume 0.082L - No Flag Third Sample Volume 0.296L - Flagged Volume Not Met	Not A Valid Test

Maggs	Robert F	9/29/1938	DUI	80-001005	Pinehills County SO	Pinehills County SO	7/26/2006	20:38:58	First Sample Volume 0.574L - No Flag Second Sample Volume 0.308L - Flagged Volume Not Met Third Sample Volume 0.281L - Flagged Volume Not Met	Not A Valid Test
Roundtree	Aaron C	8/22/1971	DUI	80-001005	Pinehills County SO	Pinehills County SO	8/20/2006	3:17:48	First Sample Volume 0.527L - No Flag Second Sample Volume 0.441L - Flagged Volume Not Met Third Sample Volume 1.152L - OK	Not A Valid Test
Smith	Heather L	10/10/1987	DUI	80-001009	Palm Bay PD	Palm Bay PD	8/28/2006	4:23:50	First Sample Volume 0.429L - No Flag Second Sample Volume 0.714L - Flagged Volume Not Met Third Sample Volume 0.281L - No Flag	Not A Valid Test
Thompson	Catherine S	2/18/1958	DUI	80-001009	Palm Bay PD	Palm Bay PD	9/11/2006	0:12:25	First Sample Volume 0.785L - Flagged Volume Not Met Third Sample Volume 0.109L - No Flag	Not A Valid Test
Zanehez	Roberto	1/30/1981	DUI	80-001043	Highlands County SO	Florida Highway Patrol	5/21/2006	0:31:19	First Sample Volume 1.878L - OK No Second Sample - RFI	Not A Valid Test
Cavinder	Brenda A	9/23/1960	DUI	80-001043	Highlands County SO	Sebring PD	8/1/2006	1:56:15	First Sample Volume 0.687L - No Flag Second Sample Volume 1.402L - OK Third Sample Volume 0.382L - No Flag	Valid Test - First and Third Samples
Marley	Lynne C	1/10/1959	DUI	80-001043	Highlands County SO	Florida Highway Patrol	6/10/2006	0:10:08	First Sample Volume 0.382L - No Flag Second Sample Volume 1.640L - OK	Not A Valid Test
Jonzal	Hermene	1/8/1956	DUI	80-001044	Cocoanut Creek PD	Cocoanut Creek PD	8/26/2006	23:34:39	First Sample Volume 1.753L - OK Second Sample Volume 0.304L - No Flag Third Sample Volume 0.351L - No Flag	Not A Valid Test
Blair	Jason L	7/14/1975	DUI	80-001051	St. Petersburg PD	St. Petersburg PD	7/4/2006	18:14:37	First Sample Volume 1.863L - OK No Third Sample - Subject Refused	Not A Valid Test
Pruett	Dennis R	12/4/1951	DUI	80-001051	St. Petersburg PD	St. Petersburg PD	8/18/2006	19:07:01	First Sample Volume 0.667L - No Flag Second Sample Volume 1.503L - OK Third Sample Volume 1.363L - OK	Refusal Valid Test - Second and Third Samples
Zuniga	Sherry C	7/1/1955	DUI	80-001055	Polk County SO	Florida Highway Patrol	7/29/2006	2:07:52	First Sample Volume 0.300L - No Flag Second Sample Volume 1.125L - OK Third Sample Volume 0.699L - No Flag	Not A Valid Test
Adleman	Holly L	10/6/1977	DUI	80-001057	Lakeland PD	Lakeland PD	6/18/2006	3:23:44	First Sample Volume 0.699L - No Flag Second Sample Volume 1.658L - OK Third Sample Volume 0.109L - No Flag	Not A Valid Test
Rivera	Victor M	4/5/1950	DUI	80-001057	Lakeland PD	Lakeland PD	8/20/2006	3:12:02	First Sample Volume 0.109L - No Flag Second Sample Volume 1.488L - OK Second Control Test Outside Tolerance	Not A Valid Test
Godinez Perez	Alberto	1/1/1975	DUI	80-001063	Hollywood PD	Hollywood PD	7/1/2006	2:21:25	First Sample Volume 0.546L - Flagged Volume Not Met Second Sample Volume 0.738L - No Flag Third Sample Volume 1.105L - OK	Not A Valid Test
Buchanan	Bonnie T	12/1/1940	DUI	80-001067	Broward County SO	Broward County SO	5/27/2006	19:03:55	First Sample Volume 0.718L - Flagged Volume Not Met Second Sample Volume 1.574L - OK Third Sample Volume 0.218L - No Flag	Not A Valid Test
Lanot	Jesufanc	11/17/1971	DUI	80-001067	Broward County SO	Broward County SO	7/1/2006	22:47:55	First Sample Volume 1.083L - No Flag Second Sample Volume 1.957L - OK Third Sample Volume 0.703L - No Flag	Not A Valid Test
Nelson	Stacy A	7/22/1963	DUI	80-001069	Jacksonville SO	Jacksonville SO	8/21/2006	4:30:22	First Sample Volume 1.382L - OK Second Sample Volume 0.671L - No Flag Third Sample Volume 0.550L - No Flag	Not A Valid Test
Doyle	Stephen V	7/24/1952	DUI	80-001069	Jacksonville SO	Jacksonville SO	9/5/2006	1:54:10	First Sample Volume 0.671L - No Flag Second Sample Volume 0.550L - No Flag Third Sample Volume 1.457L - OK	Not A Valid Test
Buckley	Unda G	5/10/1967	DUI	80-001071	Clay County SO	Clay County SO	5/6/2006	2:11:12	First Sample Volume 0.574L - Flagged Volume Not Met Second Sample Volume 0.671L - No Flag Third Sample Volume 1.457L - OK	Not A Valid Test
Davis	Kim P	11/20/1957	DUI	80-001082	Plantation PD	Sunrise PD	5/9/2006	18:54:56	First Sample Volume 0.671L - No Flag Second Sample Volume 0.714L - Flagged Volume Not Met Third Sample Volume 0.178L - Flagged Volume Not Met	Not A Valid Test
Nguyen	Thai H	8/21/1963	DUI	80-001083	Jacksonville SO	Jacksonville SO	5/14/2006	22:56:41	First Sample Volume 0.649L - No Flag Second Sample Volume 0.649L - No Flag Third Sample Volume 0.649L - No Flag	Not A Valid Test
Gagne	Audra J	12/29/1966	DUI	80-001117	Pasco County SO	Pasco County SO	4/25/2006	2:54:49	First Sample Volume 2.578L - OK Second Sample Volume 0.718L - No Flag Third Sample Volume 1.015L - No Flag	Not A Valid Test
Drake	Dawn D	6/9/1970	DUI	80-001117	Pasco County SO	Pasco County SO	4/27/2006	1:28:39	First Sample Volume 1.015L - No Flag Second Sample Volume 1.101L - OK Third Sample Volume 0.097L - Flagged Volume Not Met	Not A Valid Test
Brooks	Geoffrey D	4/20/1972	DUI	80-001131	Volusia County SO	Volusia County SO	7/4/2006	2:15:13	First Sample Volume 0.019L - No Flag Second Sample Volume 0.511L - Flagged Volume Not Met Third Sample Volume 1.261L - OK	Not A Valid Test
Block	Lyn	7/20/1942	DUI	80-001137	Flagler County SO	Flagler County SO	7/22/2006	18:30:02	First Sample Volume 0.972L - No Flag Second Sample Volume 0.972L - No Flag	Not A Valid Test
Kanyon	John R	11/20/1979	DUI	80-001139	Broward County SO	Broward County SO	6/14/2006	1:48:17	First Sample Volume 0.574L - No Flag Second Sample Volume 0.308L - Flagged Volume Not Met Third Sample Volume 0.281L - Flagged Volume Not Met	Not A Valid Test

Jean-Jacques	Paholo	5/10/1979	DUI	80-001139	Broward County SO	Broward County SO	7/8/2006	5:35:25	First Sample Volume 0.410L - No Flag Second Sample Volume 1.519L - OK Third Sample Volume 1.750L - OK	Valid Test - Second and Third Samples
Palacios	Miriam L	1/21/1978	DUI	80-001139	Broward County SO	Broward County SO	7/22/2006	3:46:52	First Sample Volume 0.519L - No Flag Second Sample Volume 0.097L - Flagged Volume Not Met Third Sample Volume 0.414L - Flagged Volume Not Met	Not A Valid Test
Heady	Mark J	5/31/1960	DUI	80-001139	Broward County SO	Broward County SO	9/22/2006	1:11:06	First Sample Volume 1.406L - OK Second Sample Volume 0.421L - No Flag Third Sample Volume 0.191L - No Flag	Not A Valid Test
Barber	Ardues E.	8/21/1976	DUI	80-001153	Leon County SO	Leon County SO	4/13/2006	21:55:59	First Sample Volume 1.046L - No Flag Second Sample Volume 0.335L - Flagged Volume Not Met Third Sample Volume 1.199L - OK	Not A Valid Test
Gibson	Amelia C	7/30/1986	DUI	80-001153	Leon County SO	Leon County SO	8/23/2006	5:26:19	First Sample Volume 0.387L - No Flag Second Sample Volume 0.125L - Flagged Volume Not Met Third Sample Volume 1.199L - OK	Not A Valid Test
Waggoner	Nicholas C	5/4/1991	DUI	80-001158	Ponce Inlet PD	Daytona Beach PD	4/5/2006	23:12:41	First Sample Volume 2.066L - OK Second Sample Volume 1.058L - No Flag Third Sample Volume 0.828L - No Flag	Not A Valid Test
Currie II	Robert A	5/11/1955	DUI	80-001166	Brevard County SO	Brevard County SO	4/13/2006	20:11:17	First Sample Volume 0.441L - No Flag Second Sample Volume 0.828L - No Flag Third Sample Volume 2.519L - OK	Not A Valid Test
Zhang	Dong	6/24/1967	DUI	80-001190	Boynton Beach PD	Boynton Beach PD	6/17/2006	8:35:40	First Sample Volume 0.015L - Flagged Volume Not Met Second Sample Volume 2.066L - OK Third Sample Volume 0.726L - No Flag	Not A Valid Test
Ferranti	Edward J	5/26/1970	DUI	80-001190	Boynton Beach PD	Boynton Beach PD	7/22/2006	3:11:52	First Sample Volume 1.406L - OK Second Sample Volume 0.441L - No Flag Third Sample Volume 1.281L - OK	Not A Valid Test
Kaszak	Kenneth	4/16/1958	DUI	80-001180	Boynton Beach PD	Boynton Beach PD	8/13/2006	0:46:51	First Sample Volume 1.285L - OK Second Sample Volume 0.488L - No Flag Third Sample Volume 1.281L - OK	Valid Test - First and Third Samples
Perez Ortiz	Issac	10/23/1982	DUI	80-001235	West Palm Beach PD	West Palm Beach PD	4/8/2006	0:03:15	First Sample Volume 0.593L - No Flag Second Sample Volume 0.816L - No Flag Third Sample Volume 1.281L - OK	Not A Valid Test
Ruckat	Curtis	3/12/1945	DUI	80-001248	Broward County SO	Broward County SO	5/7/2006	0:02:11	First Sample Volume 0.347L - No Flag Second Sample Volume 1.765L - OK Third Sample Volume 1.765L - OK	Not A Valid Test
Menner	Patricia	11/3/1968	DUI	80-001253	Brevard County SO	Brevard County SO	6/28/2006	22:40:39	First Sample Volume 0.468L - No Flag Second Sample Volume 1.785L - OK Third Sample Volume 1.242L - OK	Not A Valid Test
Brown	Joshua B	8/10/1976	DUI	80-001253	Brevard County SO	Brevard County SO	8/26/2006	23:45:57	First Sample Volume 0.644L - No Flag Second Sample Volume 1.242L - OK Third Sample Volume 1.242L - OK	Not A Valid Test
Doane	Richard G	10/26/1963	DUI	80-001255	Orange County SO	Orange County SO	4/7/2006	3:46:24	First Sample Volume 0.678L - No Flag Second Sample Volume 0.160L - Flagged Volume Not Met Third Sample Volume 1.628L - OK	Not A Valid Test
Aponte	Edgardo	10/9/1979	DUI	80-001255	Orange County SO	Orlando PD	9/9/2006	1:43:01	First Sample Volume 1.628L - OK Second Sample Volume 0.480L - No Flag Third Sample Volume 3.035L - OK	Valid Test - First and Third Samples
Quros	Ovalle	12/15/1978	DUI	80-001257	Orange County SO	Orlando PD	3/20/2006	4:45:18	First Sample Volume 0.746L - No Flag Second Sample Volume 1.128L - OK Third Sample Volume 1.351L - OK	Valid Test - Second and Third Samples
Meinken	Bradford G	11/23/1976	DUI	80-001257	Orange County SO	Orlando PD	8/5/2006	4:53:30	First Sample Volume 0.339L - No Flag Second Sample Volume 1.312L - OK Third Sample Volume 1.351L - OK	Not A Valid Test
Thomas	Jean C	7/21/1953	DUI	80-001258	Orange County SO	Florida Highway Patrol	5/6/2006	21:11:50	First Sample Volume 0.468L - No Flag Second Sample Volume 1.406L - OK Third Sample Volume 1.406L - OK	Not A Valid Test
McDaniel	Joseph N	10/6/1937	DUI	80-001260	Cocoa PD	Brevard County SO	7/15/2006	1:37:50	First Sample Volume 1.164L - OK Second Sample Volume 1.039L - No Flag Third Sample Volume 0.256L - Flagged Volume Not Met	Not A Valid Test
Gause	Julia F	1/21/1969	DUI	80-001262	Melbourne PD	Melbourne PD	5/29/2006	22:12:15	First Sample Volume 0.519L - No Flag Second Sample Volume 0.519L - No Flag Third Sample Volume 0.097L - Flagged Volume Not Met	Not A Valid Test
Young	Pamela	8/5/1958	DUI	80-001267	Palm Beach County SO	Riveria Beach PD	5/30/2006	1:40:07	First Sample Volume 1.363L - OK Second Sample Volume 0.367L - No Flag Third Sample Volume 0.972L - No Flag	Not A Valid Test
Keenan	Maureen E	10/9/1970	DUI	80-001267	Palm Beach County SO	Palm Beach County SO	7/19/2006	1:31:08	First Sample Volume 0.746L - No Flag Second Sample Volume 1.128L - OK Third Sample Volume 1.351L - OK	Not A Valid Test
Villalob	Yener R.	8/24/1984	DUI	80-001267	Palm Beach County SO	Palm Beach County SO	8/6/2006	4:53:20	First Sample Volume 1.226L - OK Second Sample Volume 0.714L - No Flag Third Sample Volume 1.789L - OK	Valid Test - First and Third Samples
Suarez	Jean	3/31/1969	DUI	80-001269	Palm Beach County SO	Florida Highway Patrol	5/5/2006	6:55:45	First Sample Volume 1.445L - OK Second Sample Volume 0.609L - No Flag Third Sample Volume 1.437L - OK	Valid Test - First and Third Samples
Goldberg	Paul E	3/18/1969	DUI	80-001269	Palm Beach County So	Florida Highway Patrol	8/24/2006	3:44:46	First Sample Volume 0.410L - No Flag Second Sample Volume 1.519L - OK Third Sample Volume 1.750L - OK	Valid Test - Second and Third Samples

Toft	Carole A.	8/6/1964	DUI	80-001269	Palm Beach County So	Palm Beach County SO	9/21/2006	4:12:02	First Sample Volume 0.253L - No Flag Second Sample Volume 1.207L - OK First Sample Volume 0.613L - No Flag	Not A Valid Test
Cornell	Daved E.	2/21/1965	DUI	80-001270	Palm Beach County So	Delray Beach PD	7/23/2006	22:32:26	First Sample Volume 0.867L - No Flag Second Sample Volume 1.703L - OK	Not A Valid Test
Hann	Karen R.	6/3/1968	DUI	80-001272	Seminole County SO	Oviedo PD	4/22/2006	5:47:26	First Sample Volume 0.710L - No Flag Second Sample Volume 0.332L - Flagged Volume Not Met Third Sample Volume 0.785L - Flagged Volume Not Met	Not A Valid Test
Wells	Barry N.	9/7/1968	DUI	80-001272	Seminole County SO	Lake Mary PD	4/10/2006	19:11:28	First Sample Volume 0.675L - No Flag Second Sample Volume 0.796L - OK Second Control Test Outside Tolerance	Not A Valid Test
Wilson	Glen M.	9/15/1964	DUI	80-001272	Seminole County SO	Florida Highway Patrol	6/25/2006	2:12:47	Second Sample Volume 0.257L - Flagged Volume Not Met Third Sample Volume 0.679L - No Flag Second Control Test Outside Tolerance	Not A Valid Test
White	Leslie J.	6/6/1960	DUI	80-001272	Seminole County SO	Oviedo PD	7/22/2006	2:46:00	First Sample Volume 0.457L - No Flag Second Sample Volume 1.390L - OK Second Control Test Outside Tolerance	Not A Valid Test
Newson	Justin B.	10/21/1978	DUI	80-001272	Seminole County SO	Seminole County SO	7/21/2006	22:17:44	First Sample Volume 0.050L - No Flag Second Sample Volume 1.414L - OK Third Sample Volume 1.613L - OK	Not A Valid Test
Lopez-Hernandez	David	4/4/1978	DUI	80-001273	Pinellas County SO	Pinellas County SO	7/15/2006	3:03:14	First Sample Volume 0.109L - No Flag Second Sample Volume 0.453L - No Flag Third Sample Volume 1.839L - OK	Not A Valid Test
Poduondo	Eric J.	12/11/1975	DUI	80-001276	Miami Dade PD	Miami Dade PD	5/12/2006	0:34:06	First Sample Volume 0.267L - No Flag Second Sample Volume 0.453L - No Flag Third Sample Volume 1.839L - OK	Not A Valid Test
Fandino	Marta L.	8/18/1967	DUI	80-001276	Miami Dade PD	Miami Dade PD	5/27/2006	4:12:02	First Sample Volume 0.152L - Flagged Volume Not Met Second Sample Volume 0.082L - Flagged Volume Not Met Third Sample Volume 0.427L - No Flag	Not A Valid Test
Fuhr	Alison R.	10/31/1978	DUI	80-001282	University of Florida PD	University of FL PD	4/13/2006	3:34:42	First Sample Volume 0.378L - Flagged Volume Not Met Second Sample Volume 0.816L - No Flag Third Sample Volume 0.289L - Flagged Volume Not Met	Not A Valid Test
Johns	Cynthia J.	5/18/1966	DUI	80-001284	Glitchrist County SO	Cedar Keys PD	6/15/2006	1:36:28	First Sample Volume 0.789L - No Flag Second Sample Volume 0.578L - Flagged Volume Not Met Third Sample Volume 1.697L - OK	Not A Valid Test
Campbell	Steven M.	7/12/1974	DUI	80-001303	Santa Rosa County SO	Santa Rosa County SO	8/6/2006	20:30:09	First Sample Volume 0.628L - No Flag Second Sample Volume 0.578L - Flagged Volume Not Met Third Sample Volume 0.571L - No Flag	Not A Valid Test
Phillips	Darius K.	4/9/1984	OTHER	80-001309	Bay County SO	Tyndall AFB	4/9/2006	13:22:01	First Sample Volume 0.571L - No Flag Second Sample Volume 0.000L - Flagged Volume Not Met Third Sample Volume 0.437L - No Flag	Not A Valid Test
Cardwell	Curis B.	11/24/1981	DUI	80-001309	Bay County SO	Bay County SO	7/23/2006	23:35:34	First Sample Volume 0.437L - No Flag Second Sample Volume 0.097L - No Flag Third Sample Volume 1.925L - OK	Not A Valid Test
Miller	Chadrick L.	4/24/1978	DUI	80-001309	Bay County SO	Parker PD	9/18/2006	22:34:35	First Sample Volume 2.710L - OK Second Sample Volume 0.097L - No Flag Third Sample Volume 1.925L - OK	Not A Valid Test
Mings	Lorrie L.	6/29/1977	DUI	80-001309	Bay County SO	Florida Highway Patrol	9/23/2006	3:41:36	First Sample Volume 0.906L - No Flag Second Sample Volume 2.613L - OK Third Sample Volume 1.246L - OK	Not A Valid Test
Castillo-Vazquez	Jose	12/6/1960	DUI	80-0001309	Bay County SO	Florida Highway Patrol	9/24/2006	1:50:55	First Sample Volume 1.246L - OK Second Sample Volume 0.558L - No Flag Third Sample Volume 1.394L - OK	Not A Valid Test
Clay	Susan S.	12/9/1953	DUI	80-001310	Niceville PD	Crestview PD	6/12/2006	0:08:55	First Sample Volume 0.554L - No Flag Second Sample Volume 1.003L - No Flag Third Sample Volume 0.882L - No Flag	Not A Valid Test
Diamond	Elfriede F.	11/1/1936	DUI	80-001328	Indian River County SO	Sebastian PD	6/30/2006	22:47:27	First Sample Volume 0.792L - OK Second Sample Volume 0.156L - Flagged Volume Not Met Third Sample Volume 0.083L - Flagged Volume Not Met	Not A Valid Test
Angus	Anthony	6/11/1959	DUI	80-001328	Indian River County SO	Florida Highway Patrol	9/11/2006	8:34:49	First Sample Volume 0.083L - Flagged Volume Not Met Second Sample Volume 0.714L - No Flag Third Sample Volume 0.937L - No Flag	Not A Valid Test
Kellowan	Shervon S.	3/20/1979	DUI	80-001344	Sarasota County SO	Florida Highway Patrol	4/1/2006	4:55:54	First Sample Volume 0.937L - No Flag Second Sample Volume 1.972L - OK Third Sample Volume 1.871L - OK	Not A Valid Test
Ryl	Frank L.	10/27/1951	DUI	80-001344	Sarasota County SO	Sarasota County SO	4/25/2006	22:40:18	First Sample Volume 0.468L - No Flag Second Sample Volume 1.871L - OK Third Sample Volume 1.691L - OK	Not A Valid Test
Kerr	Julia P.	2/11/1987	DUI	80-001344	Sarasota County SO	Sarasota County SO	5/3/2006	4:22:57	First Sample Volume 0.253L - No Flag Second Sample Volume 1.207L - OK First Sample Volume 0.613L - No Flag	Not A Valid Test

Shapiro	Wayne G.	3/25/1959	DUI	80-001344	Sarasota County SO	Sarasota PD	5/28/2006	3:58:01	First Sample Volume 0.656L - No Flag Second Sample Volume 1.683L - OK Third Sample Volume 1.800L - OK	Valid Test - Second and Third Samples
Quattrone	Nancy E.	4/9/1967	DUI	80-001344	Sarasota County SO	Sarasota County SO	6/7/2006	0:27:30	First Sample Volume 0.324L - No Flag Second Sample Volume 1.921L - OK	Not A Valid Test
Vella	Nicolaeno	10/27/1979	DUI	80-001344	Sarasota County SO	Sarasota County SO	6/18/2006	3:26:40	First Sample Volume 1.625L - OK Second Sample Volume 0.636L - No Flag Third Sample Volume 2.160L - OK	Valid Test - First and Third Samples
Palmer	Scott D.	7/13/1964	DUI	80-001344	Sarasota County SO	Sarasota PD	6/26/2006	1:53:50	First Sample Volume 1.107L - OK Second Sample Volume 0.804L - No Flag Third Sample - Subject Refused	Not A Valid Test Refusal
DeMarino	Thomas L.	5/15/1948	DUI	80-001344	Sarasota County SO	Sarasota County SO	7/8/2006	0:30:50	First Sample Volume 0.492L - No Flag Second Sample Volume 0.191L - Flagged Volume Not Met Third Sample Volume 0.378L - No Flag	Not A Valid Test
German	David M.	4/8/1957	DUI	80-001367	Pinellas County SO	Florida Highway Patrol	7/16/2006	18:23:45	First Sample Volume 0.906L - No Flag Second Sample Volume 1.125L - OK Third Sample Volume 1.371L - OK	Valid Test - Second and Third Samples
Deamast	John R.	2/1/1984	DUI	80-001415	Pinellas County SO	Pinellas Park PD	8/5/2006	3:02:07	First Sample Volume 0.130L - No Flag Second Sample Volume 0.593L - Flagged Volume Not Met Third Sample Volume 0.144L - Flagged Volume Not Met	Not A Valid Test
Diamond	Linda J.	3/13/1962	DUI	80-001416	Orange County SO	Orange County SO	8/6/2006	12:48:14	First Sample Volume 0.835L - No Flag Second Sample Volume 0.437L - Flagged Volume Not Met Third Sample Volume 0.070L - Flagged Volume Not Met	Not A Valid Test
Martinez	Noel I.	9/22/1968	DUI	80-001416	Orange County SO	Orange County SO	6/19/2006	4:17:28	First Sample Volume 0.937L - No Flag Second Sample Volume 1.781L - OK	Not A Valid Test
Katz	Chad D.	1/4/1967	DUI	80-001416	Orange County SO	Orlando PD	7/10/2006	1:34:39	First Sample Volume 1.308L - OK Second Sample Volume 0.792L - No Flag Third Sample Volume 0.042L - Flagged Volume Not Met	Not A Valid Test
Reyes	Arturo	9/1/1965	DUI	80-001418	Orange County SO	Florida Highway Patrol	8/30/2006	1:34:24	First Sample Volume 2.421L - No Flag Second Sample Volume 0.804L - No Flag Third Sample Volume 0.261L - No Flag	Not A Valid Test
Poole	Nikki K.	7/17/1975	DUI	80-001418	Orange County SO	Maitland PD	8/30/2006	3:38:20	First Sample Volume 0.703L - No Flag Second Sample Volume 0.261L - Flagged Volume Not Met Third Sample Volume 1.531L - OK	Not A Valid Test
Stephens	Patrick J.	11/20/1984	DUI	80-001420	Orange County SO	Orange County SO	6/11/2006	4:28:54	First Sample Volume 2.972L - OK Second Sample Volume 0.394L - No Flag Third Sample Volume 1.789L - OK	Not A Valid Test
Buckley	Linda G.	5/10/1967	DUI	80-001443	Clay County SO	Clay County SO	5/6/2006	1:46:18	First Sample Volume 1.464L - OK Second Sample Volume 0.648L - No Flag Third Sample Volume 1.054L - No Flag	Not A Valid Test

** Notes are concerning the listed breath tests. Additional breath tests of the referenced subject may have been conducted and are not a part of this list.

Subject Tests

EXHIBIT B

Intoxilyzer 8000 Serial # 80-001257

Instrument Registered To	Software	Date/Time of Test	Date of Last Agency Inspection	
Subject Name	DOB	Sex	Driver License	
Operator	Agency	Dry Gas Lot #	Expiration	
Arresting Officer	Agency	Arrest Time	Observation Time	Violation Code

ORANGE COUNTY SO	8100.26	07/28/2006 04:06	07/19/2006	
SCHUBACH, DANIELLE, A	03/08/1985	Female	FL/S120161855880	
LANDROVE, ROBERT,	Orange County SO	5187021	07/08/2007	
WILSON, A	Orange County SO	03:53	04:43	DUI

Type	Result	Time	
Diagnostics Check	OK	05:04	
Air Blank	0.000	05:05	
Control Test	0.082	05:05	
Air Blank	0.000	05:05	
Subject Sample #1	0.169	05:09	Volume Not Met
Breath Volume	0.000	05:09	
Air Blank	0.000	05:09	
Air Blank	0.000	05:11	
Subject Sample #2	0.194	05:13	
Breath Volume	1.441	05:13	
Air Blank	0.000	05:14	
Air Blank	0.000	05:16	
Subject Sample #3	0.188	05:18	
Breath Volume	1.230	05:18	
Air Blank	0.000	05:19	
Control Test	0.080	05:19	
Air Blank	0.000	05:20	
Diagnostics Check	OK	05:20	

Result: 0.188

Subject Tests

Intoxilyzer 8000 Serial # 80-001257

Instrument Registered To	Software	Date/Time of Test	Date of Last Agency Inspection
Subject Name	DOB	Sex	Driver License
Operator	Agency	Dry Gas Lot #	Expiration
Arresting Officer	Agency	Arrest Time	Observation Time Violation Code

ORANGE COUNTY SO	8100.26	08/04/2006 03:13	07/19/2006
BURGOS, FRANCISCO, J	03/11/1974	Male	FL/B622250740910
LANDROVE, ROBERT,	Orange County SO	518702I	07/08/2007
GRULER, M	Orange County SO	02:01	02:52 DUI

Type	Result	Time	
Diagnostics Check	OK	03:15	
Air Blank	0.000	03:15	
Control Test	0.081	03:15	
Air Blank	0.000	03:16	
Subject Sample #1	0.269	03:18	
Breath Volume	2.171	03:18	
Air Blank	0.000	03:19	
Air Blank	0.000	03:21	
Subject Sample #2	0.234	03:24	Volume Not Met
Breath Volume	0.199	03:24	
Air Blank	0.000	03:25	
Air Blank	0.000	03:26	
Subject Sample #3	0.232	03:30	Volume Not Met
Breath Volume	0.000	03:30	
Air Blank	0.000	03:30	
Control Test	0.079	03:31	
Air Blank	0.000	03:31	
Diagnostics Check	OK	03:31	

Result: 0.000

Subject Tests

Intoxilyzer 8000 Serial # 80-000963

Instrument Registered To	Software	Date/Time of Test	Date of Last Agency Inspection
Subject Name	DOB	Sex	Driver License
Operator	Agency	Dry Gas Lot #	Expiration
Arresting Officer	Agency	Arrest Time	Observation Time Violation Code

ORANGE COUNTY SO	8100.26	08/29/2006 02:29	08/16/2006	
MCCARTHY, TERRANCE,	11/01/1957	Male	FL/M263800574010	
LEACH, PRESTON,	Orange County SO	5187021	07/08/2007	
BARRON, KYLE	FHP Troop D	00:46	02:04	DUI

Type	Result	Time	
Diagnostics Check	OK	02:31	
Air Blank	0.000	02:31	
Control Test	0.082	02:31	
Air Blank	0.000	02:32	
Subject Sample #1	0.090	02:35	Volume Not Met
Breath Volume	0.000	02:35	
Air Blank	0.000	02:36	
Air Blank	0.000	02:38	
Subject Sample #2	0.093	02:41	Volume Not Met
Breath Volume	0.203	02:41	
Air Blank	0.000	02:41	
Control Test	0.082	02:42	
Air Blank	0.000	02:42	
Diagnostics Check	OK	02:42	

Result: 0.000

Subject Tests

ntoxilyzer 8000 Serial # 80-001258

Instrument Registered To	Software	Date/Time of Test	Date of Last Agency Inspection
Subject Name	DOB	Sex	Driver License
Operator	Agency	Dry Gas Lot #	Expiration
Arresting Officer	Agency	Arrest Time	Observation Time
			Violation Code

ORANGE COUNTY SO	8100.26	04/27/2006 22:08	04/11/2006	
DOBBINS, STEWART, M	05/20/1962	Male	FL/D152793621800	
TREDAFILOV, TREN,	Orange County SO	5188011	07/12/2007	
WALWYN, C	Orange County SO	20:55	21:50	DUI

Type	Result	Time	
Diagnostics Check	OK	22:10	
Air Blank	0.000	22:11	
Control Test	0.080	22:11	
Air Blank	0.000	22:12	
Subject Sample #1	0.320	22:13	No .020 agreement
Breath Volume	1.824	22:13	
Air Blank	0.000	22:14	
Air Blank	0.000	22:16	
Subject Sample #2	0.277	22:19	No .020 agreement
Breath Volume	0.000	22:19	
Air Blank	0.000	22:20	
Air Blank	0.000	22:22	
Subject Sample #3	0.217	22:25	Volume Not Met
Breath Volume	0.144	22:25	
Air Blank	0.000	22:25	
Control Test	0.078	22:26	
Air Blank	0.000	22:26	
Diagnostics Check	OK	22:26	

Exception: No .020 agreement

IN THE COUNTY COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

Vs.

CASE NO. 06-1804T

DENNIS FORFA,

Defendant.

STATE'S MOTION TO STRIKE
DEFENDANT'S MOTION FOR PRODUCTION OF THE SOURCE CODE OR IN
THE ALTERNATIVE, FOR EXCLUSION OF THE BREATH TEST RESULTS

COMES NOW, Stephen B. Russell, State Attorney for the Twentieth Judicial Circuit, by and through the undersigned Assistant State Attorney, who moves this Honorable Court to Strike Defendant's "Motion for Production of the Source Code or in the Alternative for Exclusion of the Breath Test Results" on the following grounds:

1. Defendant moves this Court to "require the State Attorney to produce the source code of the Software Program on the Intoxilyzer 8000." The motion further claims that the Defendant is not in possession of the Source Code and is unable to obtain it. The motion fails to state that the State Attorney is in possession of the source code or is in any better position to obtain it than the defendant.
2. No agent of the State of Florida has the source code, has ever had it, nor has ever destroyed it.
3. The source code for the Intoxilyzer 8000 is a proprietary trade secret of the manufacturer, as was the source code for the Intoxilyzer 5000. See, Moe v. State, 2006 WL 3327597 (Fla.App. 5 Dist.); State v. Irish, et.al, 13 Fla.L.Weekly Supp.719a (12th Cir. Sarasota, Denkin, J. 2006).
4. Defendant's motion fails to allege any legal ground to authorize the Court to compel the State Attorney to produce what it does not have, contrary to State

v. Miranda, 777 So.2d 1173 (Fla. 3d DCA 2001); and Pettit v. State, 612 So.2d 1381 (Fla. 2d DCA 1992); Florida Rule of Criminal Procedure §3.220(b)(1).

5. A motion for further discovery requires a defendant to allege and demonstrate sufficient facts to support the court's authority to grant the relief requested. Florida Elections Commission v. Florida Education Association, 30 Fla.L.Weekly D1879a (Fla. 1st DCA Aug. 4, 2005)
6. Defendant's motion requests this Court, in the alternative, to exclude the breath test results if the State Attorney does not produce what it does not have, but fails to allege any legal grounds to authorize the Court to punish the State for failure to perform the impossible.
7. Section 316.193(1)(f)(4), Florida Statutes, effective October 1, 2006, expressly excludes any entitlement of a defendant to production by the State of the software of the instrument or any other material that is not in the actual possession of the State in a prosecution for Driving Under the Influence.
8. Defendant's motion should be stricken as being legally insufficient prior to the Court setting any hearing on the merits of the claim. State v. Paul Jugov, Case 2005 CF 11805 NC (12th Cir. Sarasota Co., Roberts, J.2006); State v. Jerry Lawson, Case No. 2005 CF 20077 (12th Cir. Manatee Co. Nicholas, J. 2006).

WHEREFORE, the State of Florida moves this Honorable Court to Strike Defendant's Motion without prejudice to refile with legal sufficiency, prior to setting any hearing on the merits of Defendant's Motion.

STEPHEN B. RUSSELL
State Attorney, Twentieth Circuit

By: 15
Michael-Anthony Pica
Assistant State Attorney
Florida Bar No. 0015632
350 East Marion Avenue
Punta Gorda, Florida 33950
941-637-2104

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by regular U.S. mail to Kerry Mack, 2022 Placida Road, Englewood, Florida 34224 this ____ day of January 2007.



Michael-Anthony Pica

IN THE COUNTY COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

Vs.

CASE NO. 06-1804TT

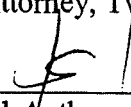
DENNIS FORFA,

Defendant.
_____ /

STATE' S MEMORANDUM OF LAW
IN SUPPORT OF STATE'S MOTION TO STRIKE
DEFENDANT'S MOTION FOR PRODUCTION OF THE SOURCE CODE OR IN
THE ALTERNATIVE FOR EXCLUSION OF THE BREATH TEST RESULTS

COMES NOW, Stephen B. Russell, State Attorney for the Twentieth Judicial Circuit, by and through the undersigned Assistant State Attorney hereby files this Memorandum of Law in Support of the State's Motion to Strike Defendant's Motion for Production of the Source Code for the Intoxilyzer® 8000 series, or in the alternative for Exclusion of the Breath Test Results in order to advise the Court prior to the hearing on the State's Motion to Strike of the issues and law expected to be presented at the brief hearing on the matter.

STEPHEN B. RUSSELL
State Attorney, Twentieth Circuit

By: 
Michael Anthony Pica
Assistant State Attorney
Florida Bar No. 0015632
350 East Marion Avenue
Punta Gorda, Florida 33950
941- 637-2104

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by regular U.S. mail to Kerry Mack, 2202 Placida Road, Englewood, Florida 34224 this ____ day of January 2007.



Michael-Anthony Pica

STATE'S MEMORANDUM OF LAW
IN SUPPORT OF STATE'S MOTION TO STRIKE
DEFENDANT'S MOTION FOR PRODUCTION OF THE SOURCE CODE OR IN
THE ALTERNATIVE FOR EXCLUSION OF THE BREATH TEST RESULTS

ISSUE: The defendant has requested the Court to enter an order compelling the State Attorney to produce the source code for the Intoxilyzer® 8000 series model, but the State Attorney does not possess this trade secret of the manufacturer, and is in no greater position to obtain it than the defendant. Defendant further seeks the Court to punish the state by suppressing the breath test results for failure to provide what it does not have.

I. PRIOR SIMILAR LITIGATION AND RULINGS:

The computer "source code" of the Intoxilyzer® has been requested by thousands of Defendants in Florida over the past several years. This defendant's request is substantially similar to those prior requests as to the Intoxilyzer® 5000 series models in Florida that have now been mostly resolved. This matter was recently addressed by the Fifth District Courts of Appeal in Moe v. State of Florida, 2006 WL 3327597 (Fla.App. 5 Dist.). In Moe, the Court held "it is without dispute that the State does not have possession of the source code because it is the property of CMI, Inc. It is also without dispute that the code is a trade secret of CMI, Inc. and that CMI, Inc. has invoked its statutory and common law privileges protecting the code from disclosure. Therefore, the State cannot obtain possession of the code." Id.

About half of the trial judges in Florida, who addressed the source code motion for the Intoxilyzer® 5000 denied the motion after a lengthy, expensive, technical hearing.¹

¹ State v. Michael Contres, et.al, Case No. CTC, 2003-1283-MMAWS, et.al. (7th Cir. Volusia Co., Marshal. April 22, 2005); State v. Fuller, 12 Fla.L.Weekly Supp 808b (18th Cir. Brevard Co., May 11, 2005) and State v. Fuller, 12 Fla.L.Weekly Supp 811b (18th Cir. May 11, 2005); State v. Gary Collins, Case No. 2005 CT-000642-O (9th Cir. Orange Co, Fleming, J. June 27, 2005); State v. Rabigi, et.al., Case No. CTC-2003-3283MMAWS (7th Cir. Volusia, Marshall, J., April 22, 2005); all the county court judges in Flagler and St. Johns County, See, e.g. State v. Robert Fischer, et.al, Case No. CT03-286 (7th Cir. St. Johns Co. Charles J. Tinlin, J. Jan. 11, 2006); all county court judges in Palm Beach County in State v. Spalding, et.al, 13 Fla.L.Weekly Supp.627b (15th Cir. Palm Beach Co., Feb. 28, 2006); State v. Cohen, et.al, Case No. 2005-CT-2049 (2nd Cir. Leon Co. Aikens, J. Oct. 11, 2005); State v. Walker, Case No.125-834-J (13th Cir. Hillsborough Co., Barber, J., Oct. 25, 2005); State v. Messina, Case No. CTC 05320010WASP (6th Cir. Pinellas Co., Overton, J. Oct. 10, 2005); State v. Lowdell, Case No. 04-5254-CTMA (1st Cir. Bay Co. Welch, J., April 22, 2005); and State v. Licari, et.al, Case No.: CTC 05-1074XAAASP (6th Cir. Pinellas Co., Feb. 23, 2006); State v. Allen, et.al., Case NO. TT05-006969-BA (10th Cir. Polk Co., Cowden, J. May

After the initial stages of this litigation, many of the courts were presented with the State's Motion to Strike. Most of the remaining trial courts in Florida, then granted the State's Motion to Strike the source code motion.² The few remaining trial courts have either been overturned, See, State v. William Becvar, et.al, Case No. 05-83-AP, (18th Judicial Circuit, Seminole County, Eaton, J., June 28, 2006), or are presently on appeal. See, State v. Irish, et.al, 13 Fla.L.Weekly Supp 719a (Fla. 12th Circuit, Sarasota County, Denkin, J., May 4, 2006) and State v. Almarez, et.al., 13 Fla.L.Weekly Supp. 724a (Fla. 12th Cir. Manatee County, Henderson, J., May 5, 2006.) The only authorities cited by the courts in *Irish* and *Almarez* (other than citing the same prior rulings of the same court) were the cases that were overturned in *Becvar, Id.* The only exception to this is State v. Bjorkland, et.al., 924 So.2d 971 (Fla. 2d DCA 2006), where the State attempted to petition for certiorari. The Second District Court of Appeal ruled that the State's action was actually an appeal, not a petition for Certiorari, and was tardy under the different time restrictions for an appeal. Those cases are presently on the trial dockets in Sarasota County with a requirement that the State prove the admissibility of the breath test results by means of an expert witness to establish the traditional scientific predicate.

17, 2006); State v. Bastos and Vlad, et.al., Case No. 413969-X (11th Cir. Miami-Dade Co. July 13, 2006); State v. Lynn, 2006 MM 020686-A, (Escambia Co. 2006).

² See, State v. Keegan Bird, Case No. 13 Fla.L.Weekly Supp. 283a (17th Cir. Broward Co., Mary Rudd Robinson, J. Jan. 18, 2006); State v. Christopher Hamal, Case No. 05-015743MM10A (17th Cir. Broward Co., Levenson, J. Dec 21, 2005); State v. Thomas Greene, Case No. 05-009650MM10 (17th Cir. Broward Co., Levenson, J. Dec. 21, 2005); State v. Vincent O'Brien, Case No 04023851MM10A (17th Cir., Berman, J., Dec. 16, 2005; State v. Juan Hernandez, Case No. 0426368MM10A (17th Cir. Broward Co., Cowart, J., Jan. 12, 2006); State v. Julie Walker, Case No. 04-22108MM10 (17th Cir. Broward Co., Jan 17, 2006); State v. Salesman, Case No. 13 Fla. L. Weekly Supp. 447c (17th Cir. Broward Co., Kaplan, J. Feb 28, 2006); and State v. Felipe Salce, 13 Fla.L.Weekly Supp. 263b (17th Circuit Court. Broward Co. Murphy, J., Jan. 25 2006)[where the Circuit Court Judge, also denied a motion for rehearing after granting the state's motion to strike, which was an identical copy of an earlier version of this same motion filed in Manatee and Sarasota Counties]; State v. George Andrew Lynn, Case No. 2006 MM 020686-A (Escambia County, May 2006). State v. Paul Jugov, Case No. 2005 CF 11805 NC (12th Cir. Sarasota Co., Roberts, J., June 2, 2006). State v. Ryan P. Adair et.al, Case No. 01-2006-CT-0200-A, et.al. (18th Cir. Alachua Co. En Banc Panel of all county court judges unanimously, May 19, 2006); State v. Daniel Bain, Case No. 06-007 CTMA (2nd Cir, Jefferson Co., Plaines, J. May 12, 2006). Note: the State's motions to strike in these cases were substantially the same as the motion to strike that was denied by the trial courts in *Irish & Almarez* as the undersigned prosecutor drafted these pleadings that were utilized statewide.

II. DUE PROCESS RIGHT TO ADDITIONAL DISCOVERY:

Florida's liberal discovery rules do not authorize the discovery of any matter, not in the possession or control of the State Attorney. Fla.R.Crim.P. 3.220(b)(1). The office of the State Attorney does not have the "source code." The state attorney has no knowledge of any agent of the State of Florida possessing or controlling the "source code." Other than *Brady* material, (exculpatory evidence) Brady v. Maryland, 373 U.S. 83 (1963), such discovery is limited to the discovery permitted in Fla.R.Cr.P. 3.220. State v. Ross, 792 So.2d 699 (Fla. 5th DCA 2001). There is no common-law right to discovery. State v. Smith, 260 So.2d 489, 491 (Fla. 1972). Nor is there any Constitutional due process right to discovery, generally. State v. Ross, 792 So.2d 699, 701 (Fla. 1972); State v. Gillespie, 227 So.2d 550 (Fla. 2d DCA 1969); Weatherford v. Bursey, 492 U.S. 545, 559 (1977). A defendant has no *Brady* right to discovery unless he can prove that the item sought is "exculpatory" and that he has exhausted his efforts and resources and concluded that there are no other available means or remedies to obtain the requested item. State v. Coney, 294 So.2d 82, 87 (Fla. 1973). A Sarasota Court in *Irish, Id.* at p. 8, indicated that a defendant has a due process "right of confrontation." While true, that right only applies to confronting a witness at trial, not the "right" of pre-trial discovery. Pennsylvania v. Richie, 480 U.S. 51 (1987).

The "full information" clause of §316.193(1)(f)(4) that was relied on in the prior rulings in Seminole, Sarasota and Manatee County courts, following State v. Muldowney, 871 So2d 911 (Fla. 5th DCA 2004) has been repealed, effective October 1, 2006. The amended statute now expressly excludes any entitlement of a defendant to production by the State of the software of the breath testing instrument or any other material that is not in the actual possession of the State in a prosecution for Driving Under the Influence. When the court attempts to interpret the meaning of a prior statute, the court should consider subsequent curative legislation to determine the meaning. Gay v. Canada Dry Bottling Co. of Florida, 59 So.2d 788, 790 (Fla. 1952). It was the legislative staff analysis of HB 187 and SB 232 (2006) that identified the *Muldowney* decision as the need for the curative amended statutory definition. This statutory amendment was clearly enacted to prevent the courts in Florida from defining "full information" to include the source code or any other material not in the possession of the state. [W]hen ... an

amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as legislative interpretation of the original law..." Lowry v. Parole and Probation Commission, 473 So.2d 1248, 1250 (Fla. 1985); see also, State v. Bodden, 877 So.2d 680, 688 fn 13 (Fla. 2004). Therefore, the "full information" clause of §316.193(1)(f)(4) is now consistent with Fla. R. Crim.P. 3.220(b)(1) requiring the state to produce only what the state possesses. See, e.g., State v. Coney, 294 So.2d 82, 87 (Fla. 1973)

The defendant claims to be unable to obtain the source code himself. However, the defendant fails to allege that he has applied due diligence to seek this information through the lawful means. Instead, defendant seeks to circumvent the lawful means of obtaining this trade secret and asks the court to compel the state to obtain it for him. See discussion under section III of this memorandum regarding the statutory method of obtaining trade secrets of a third party. The State is not required to produce what the defense has an equal opportunity to obtain itself. See, Matheson v. State, 468 So.2d 1011, 1013 (Fla. 4th DCA 1985); Hansbrough v. State, 509 So.2d 1081, 1084 (Fla. 1987). The defendant bears this initial burden, and may not request the state to seek information for him instead. Medina v. State, 466 So.2d 1046 (Fla. 1985). Before the trial court should even consider an order compelling the state to produce something for the defense the court must first determine that: 1) the defendant does not have the item; 2) the item is not available to the defense through the exercise of due diligence; and 3) the defendant has exerted their own efforts and resources, and exhausted other available means to obtain the information. See, State v. Coney, 272 So.2d 550, 554 (Fla. 1st DCA 1973). It is reversible error as a *departure from the essential requirements of law* for the trial court to compel the state to produce something for the defense prior to making this determination. See, State v. Wright, 803 So.2d 793, 795 (Fla. 4th DCA 2001).

The State of Florida cannot be compelled to produce something that it does not possess, and may not be penalized for failure to produce to the defendant something that it cannot obtain or has not possessed or destroyed. State v. Miranda, 777 So.2d 1173 (Fla. 3d DCA 2001); and Pettit v. State, 612 So.2d 1381 (Fla. 2d DCA 1992). This established controlling doctrine of Florida law specifically applies to the Intoxilyzer® "source code." State v. Rabigi, et.al. Case No. CTC-2003-3283 MMAWS

(7th Cir. Volusia Co. Marshall, J. April 22, 2005); State v. Ian Cohen, et.al, Case No. 2005-CT-2049 (2nd Cir. Leon Co. Oct. 11, 2005); State v. Licari, et.al, Case NO. CTC 05-1074XAAASP (Fla. 6th Cir. Pinellas Co, Horrox, J., Feb. 23 2006). Florida Rule of Criminal Procedure §3.220(b)(1) only applies to information and material **within the State's possession or control.** (emphasis added). The Florida Supreme Court affirmed this policy in Sinclair v. State, 657 So.2d 1138, 141 (Fla. 1995) by holding that, "none of the rules of criminal procedure relating to discovery require the State to disclose information which is not within the State's actual or constructive possession." The Florida Supreme Court held in Lopez v. Singletary, 634 So.2d 1054 (Fla. 1994) "that the State Attorney is not responsible for giving access to outside agencies' records, but instead, request must be made directly to those agencies," citing Hoffman v. State, 613 So.2d 405 (Fla. 1992).

Defendant cited two cases in his motion that afford the defendant the "due process" right to question the results of the drug/alcohol tests performed. While that general proposition is correct, the holdings of the cases submitted actually defeat defendant's claim of a pre-trial entitlement to discovery of the source code. In State v. Houser, 474 So.2d 1193, 1195 (Fla. 1985) the Supreme Court held that "[T]he due process question is whether the accused has sufficient opportunity to question the result of the test." Houser claimed he was denied due process because he could not test the blood sample because the state failed to preserve it. The court denied this claim, holding that Houser was able to check the calibration records to test the instrument's reliability and to cross-examine the operator to expose potential errors. Further, Houser was entitled to discovery of the results of the test taken, pursuant to §316.1932(1)(f)(4). Still further, Houser had the statutory right to request an independent test, as an additional tool to test the reliability of the test taken, had he chosen to do so. He was not denied due process of law. The Court in Cloe v. State, 613 So.2d 70 (Fla. 4th DCA 1993) held that the defendant was given a sufficient opportunity to question the results of the drug and alcohol tests performed to satisfy his due process right at trial. In that case, the technician's supervisor testified, but could not even say with certainty who the technician was that performed the test to determine cocaine in the blood. That supervisor was able to testify that the test followed established protocol by reviewing the readouts of the

)

)

records of the procedures that were followed, which was sufficient to question the results and the claimed “fail safe” procedures. The Court held that the defendant had “sufficient opportunity to question the test results” to satisfy due process absent any bad faith on the part of the state, following *Houser*. Defendant’s citations of authority still fail to establish a legal right to have the court compel the state attorney to produce what it does not have, or to obtain trade secrets of a third party as a pre-trial due process right. No controlling authority in Florida has ever gone so far.

III. THE SOURCE CODE IS A “TRADE SECRET” OF A THIRD PARTY THAT CAN ONLY BE OBTAINED BY FOLLOWING THE APPLICABLE FLORIDA STATUTES:

The manufacturer of the Intoxilyzer® 8000 breath testing instrument has asserted its proprietary rights in the computer source code for the 8000. See attached corporate affidavit.

Defendant fails to plead due diligence in any attempt whatsoever to follow Florida Law, consistent with the interstate compacts for obtaining “trade secrets.” A defendant’s burden of production to obtain a “trade secret” at a civil hearing in Florida is a “**reasonable necessity**” pursuant to §688.001 to §688.009, Florida Statutes, 2004, or §365.880 to §365.900, Kentucky Revised Statutes. Particularly, this defendant fails to plead due diligence in attempting to lawfully obtain this third party proprietary information, pursuant to due process, according to the interstate statutory agreements. A proper alternative remedy to compelling the State to obtain for the defense what the defense could attempt to obtain for itself, pursuant to due process, is to require the defense to follow the law pertaining to acquiring trade secrets. “When a criminal defendant requests the State to produce additional discovery, it is incumbent on the court to determine that the defendant was not able to obtain this information by due diligence itself. Further, *if* the State is not able to produce the item requested, even if there is a contract between the State and a non-State entity to not disclose the information, the court cannot compel the State to produce the discovery requested.” See, State v. Wright, 803 So.2d 793 (Fla. 4th DCA 2002), [re. State’s refusal to provide criminal history reports of its witnesses from N.C.I.C., where the State was in possession of the records]. This

court should require the defendants to employ and plead due diligence pursuant to §688.001 to §688.009, Florida Statutes, 2004, along with §365.880 to §365.900, Kentucky Revised Statutes to obtain this information on its own before granting any hearing on the merits of defendant's claims. Attorneys for similarly situated defendants in St. Johns County recently attempted this again before a three-judge en banc panel in St. Johns County. The Court, there found that the claim under §942.03, Florida Statutes, failed to establish materiality in the "Motion for Certification" (or "commission") to seek the Kentucky source code (a trade secret) by means of subpoena duces tecum of the records custodian. See, State v. Fischer, Case No. 2003 CT 2860 (Fla. 7th Cir. St. Johns Co., Tinlin, J., Feb 14, 2006); and State v. Edward, Case No. 2004 CT 1783 (7th Cir. St. Johns Co., Christensen, J. Feb. 15, 2006). Fischer and Edwards, however, still did not even attempt to seek this information pursuant to the proper statute to obtain trade secrets, pursuant to §688.001 to §688.009, Florida Statutes, 2004, or §365.880 to §365.900, Kentucky Revised Statutes.

In a similar challenge in the Twelfth Judicial Circuit, this information was sought by means of a subpoena duces tecum to the Florida registered agent of the manufacturer, CMI, Inc., but the Kentucky Court Quashed that subpoena requiring the moving party to follow the requirements of the above statutes. In Re. Subpoena Duces Tecum 2006-CT-002109, (Ky., Davies Dist. Ct. April 25, 2006). The Sarasota County Court reached the same conclusion that the moving party's effort was a defective procedure that was not in compliance with §942.01 Florida Statutes, 2005 to compel the production of the source code by the manufacturer. State v. Jack E. Irish, Jr., et.al, 13 Fla.L.Weekly Supp. 719a, n.5-8, 22. (Fla. 12th Cir. Sarasota, Denkin, J. May 4, 2006). Still further, even after an exhaustive hearing on the merits, the previous Sarasota Court failed to determine that the defendant met his burden of "material necessity" at the hearing, and still declined to "certify" the establishment of any "material necessity" to the foreign court. It is believed by the undersigned that neither this defendant, nor any defendant in Florida has ever diligently and properly sought the "source code" pursuant to the proper statutes and procedures as a "trade secret." Instead, a multitude of defendants in Florida merely persist in asking the county and circuit courts to compel the state to produce the trade

secrets for them. No controlling Court in Florida (or in any other jurisdiction) has ever agreed to do so.

In RareCoin-It v. I.J.E. Inc. 625 So.2d 1277 (Fla. 3d DCA 1993) the court determined that before the "Nintendo source code" could be compelled in civil discovery of a "party" to the litigation, there must be a showing of "reasonable necessity." Such a relevant showing requires a defendant to allege and demonstrate sufficient facts to support the court's authority to grant the relief requested. Florida Elections Commission v. Florida Education Association, 30 Fla.L.Weekly D1879a (Fla. 1st DCA Aug. 4, 2005) (denying application for commission to take discovery depositions of out-of-state witness). The requirement to plead "reasonable necessity" as to trade secrets has long been enforced through the Florida Courts. See, Rare Coin-It v. I.J.E. Inc., 625 So.2d 1277 (Fla. 3d DCA 1993); General Hotel & Restaurant Supply Corp. v. Skipper, 514 So.2d 1158 (Fla. 2d DCA 1987). If the Court finds a "reasonable necessity" for the production, the Court must specifically set forth its findings in its commission to seek out of state trade secrets. Eastern Cement Corp v. D.E.R., 512 So.2d 264 (Fla. 1st DCA 1987); Goodyear Tire and Rubber Co. v. Cooney, 359 So.2d 1200 (Fla. 1st DCA 1978). There are no known controlling cases in Florida or elsewhere requiring the *State* to produce third party trade secrets.

IV. EVEN IF DEFENDANT WERE TO PROPERLY REQUEST A "CERTIFICATION OF MATERIALITY" TO PROCEED TO THE FOREIGN JURISDICTION WITH A "COMMISSION" TO OBTAIN THE "TRADE SECRET", A MERE CLAIM OF "MATERIAL NECESSITY" MAY NOT BE SPECULATIVE, THEORETICAL OR EXPERIMENTAL.

A mere claim of "material necessity" may not be speculative, theoretical or experimental: State v. Burnett, et.al. 9 Fla.L.Supp.879a (20th Cir. Hendry Co., Jan. 5, 2001), as in the present case. The claim that a change in the Intoxilyzer® 5000's software code may result in a "potential" change to the operation of the instrument is speculative and theoretical, and fails to present the "necessity" requirement to obtain the remedy of obtaining the source code. State v. Contres, CTC-2003-1283-MMAWS, et.al (7th Cir. Volusia, April 22, 2005), following State v. Friedrich, 681 So.2d 1157 (Fla. 5th DCA

1996); Jenkins v. State, 855 So.2d 1219 (Fla. 1st DCA 2003). The Court in Wissel v. State, 691 So.2d 507 (Fla. 2d DCA 1997) denied the challenges of the alcohol test results because the claims were only speculative, theoretical or hyper-technical. Eventually the Florida Supreme Court resolved this *Reisner* issue in the State's favor as to this particular speculative challenge that, for the first time in Florida, was allowed to arise out of county court instead of an administrative hearing. Veilleux v. State, 635 So.2d 977 (Fla. 1994) (a case arising out of Sarasota County, limiting such challenges to defendants with an actual speedy trial issue). This *Reisner* ruling opened the door to a long train of annual DUI motions du jur in Florida that the county courts had been reluctant to strike, or require a lawful pleading before the proper court. In fact it was historically rare for the State to file a motion to strike on these annual DUI motions. However, with about half of the trial courts in Florida striking the last train of Florida "source code" motions, it may be necessary for the State to utilize the motion more often to avoid unnecessary, expensive, separate technical challenges before every county court judge in the state, potentially resulting in a wide array of differing lower court opinions. Chief County Court Judge Dale Ross, from Broward County made a valiant attempt to limit such DUI challenges to only those that must be legally heard by the county court. See, State v. Hasetey, Hudson and Hayes, 10 Fla.L.Weekly Supp. 942a (17th Cir. Broward Co., Sept. 1, 2003) (involving FDLE rules challenges inappropriately filed in the county court). This Court should now strike the present motion, as the circuit court judges of the Twelfth Judicial Circuit have done as to the Intoxilyzer 5000 source code challenges.

The defendant is not entitled by law to compel the State to produce discovery for the purpose of merely inspecting, experimenting or going on a "fishing expedition." The defendant merely seeks a court ordered "fishing expedition" through the wrong party in the wrong State, to obtain trade secrets of a third party. The State is not the proper party to seek to compel the production of things held by a third party if there are procedures in the law to obtain such information otherwise. See, State v. Robert Fischer, et.al., Case No. CT03-286 (7th Cir. St. Johns Co. Jan. 11, 2006), citing Lopez v. State, 634 So.2d 1054 (Fla. 1993), citing Hoffman v. State, 613 So2d 405 (Fla. 1982). On a case that is very close to the present issue, a Pennsylvania court recently concluded that a DUI defendant claiming a due process "right to challenge the test results" of a blood test, so

that he should have been permitted to use a subpoena to “obtain evidence to attempt to challenge the result.” Commonwealth of Pennsylvania v. Cook, 865 A. 2d 869 (Penn. Super. 2004). That court rejected the DUI defendant’s argument, stating:

... We agree that Appellant has every right to present evidence to rebut the presumption of the blood test’s validity. However, we conclude that when a defendant seeks to introduce such evidence by means of a subpoena to **a third party to produce documents**, the defendant must be prepared with an offer of proof that States “specific allegations of testing errors, and not general, boilerplate objections: *Denmark*, 800 A.2d at 953.

In the instant case, Appellant presented no specific allegations of testing errors before the trial court; nor does he allege any before this Court. “[S]ubpoenas are not to be used to compel production of documents **merely for inspection or for a fishing expedition.**” Commonwealth v. McEnany, 446 Pa. Super. 609, 667 A.2d 1143, 1149 (1995) (quotation marks omitted). Appellant’s position is that Mr. Jenkins should have been ordered to bring certain procedure manuals, operating instructions and personnel papers, amounting to “tons and tons of stuff,” to court without Appellant ever presenting a single allegation of testing error. N.T., 3/26/03 at 98. The trial court concluded that it was just a fishing expedition” and that it “[went] on at length with no merit to it whatsoever.” N.T., 3/26/03, at 102. We discern no error of law or abuse of discretion in the trial court’s determination of this issue. *Id.* (emphasis added).

A defendant must make a showing of actual necessity in the pleading, not just a professional curiosity. A similar “fishing expedition” had been denied by the County Court in Manatee County in State v. Schwalbach, Case No. 2004 CT 003758 (12th Cir. Manatee Co. July 11, 2005) where the Defendant contended that “the only way to determine *if* the intoxilyzer (sic) utilized in this case constitutes an ‘approved test’ is to visually inspect the breath machines (sic) in Manatee County (one and all).” The Court agreed with State v. Blackburn, Case No. 2003-OT-1158 (Clay County Court, January 21, 2005), that the Defendant “should not be permitted to go on a fishing expedition without some showing of necessity” on such a similar motion (to inspect the interior of the Intoxilyzer® 5000). The thrust of the *Schwalbach* Motion to Inspect Intoxilyzer® was, according to the Manatee Court, “similar to that of the Defendant in State v. Mueller, 9 Fla.L.Weekly supp 852a (Suwannee County, Feb. 6, 1995); basically ‘we don’t know if the machine in question is one of the approved configuration, therefore, we

want to look into the interior of the machine.” The present curiosity of the defendant to inspect a proprietary trade secret in order to check to see *if* it leads to evidence of non-compliance or unreliability, does not establish “necessity,” and like in *Schwalbach* and *Mueller* is not a legal ground to obtain supplemental discovery, like inspecting the hardware of the instrument, or, as here, inspecting the software’s source code.

Some criminal defense attorneys in Florida, through the lawful discovery means of obtaining public records of Florida Department of Law Enforcement (FDLE) Breath Testing Program, have recently discovered a rare scenario where the Intoxilyzer® 8000 software permitted a test result to be reported on low volume samples. FDLE concedes that a breath test is not reliable if the sample volume is not sufficient. This discovery resulted in FDLE investigating this phenomenon, and discovering the scenario when a defendant is trying to manipulate the administration of the breath sample at the three-minute cut off for the test and giving an insufficient volume sample after that three minute time limit. As a result of this defense discovery (without having the source code), the FDLE found a software glitch and had the manufacturer reprogram the software to continue analyzing the sample intake beyond the three-minute cut-off time, and now the Intoxilyzer® 8000 will report “volume not met” under such circumstances. Most of those test results were not admissible for other reasons, anyway, but may be subject to a “refusal” claim. Others, where there are two test results with a sufficient volume sample within the permitted range of results may be admissible. This would have to be determined on a case-by-case factual basis. This is not the first discovery of issues related to breath testing that have resulted in modifications and improvements on the testing protocols, such as radio frequency interference, interferent substances being undetected, etc. Such a discovery has never arisen from possession of the computer software, but from other investigative means. The FDLE openly offers to any defense attorney, who has a viable belief of some testing defect, to have them submit the suspicion, and FDLE will thoroughly test any such proposition in the presence of the defendant and/or his expert witnesses, as the FDLE has a public duty to make testing protocol safe and reliable.

Due process of law does not impose on the state, the pre-trial production for the defendant of something that the state does not have. The inability of the state to be in any

better position than the defendant to obtain a trade secret is not a lawful cause to suppress the otherwise reliable test results. Defendants retain their due process ability to bring in defense experts and to cross-examine state witnesses as to the reliability of the test taken. The defendants do not have any legal claim to compel the state to produce a third party's trade secret so that the defense can experiment with the testing instrument. The motion should be stricken on its face without any hearing on the merits, as the motion makes no lawful claim authorizing the court to compel the state to produce what it does not have.

CONCLUSION:

Due process that is not under the law is not due process for all. There is no statute, rule or constitutional right to this requested supplemental discovery. The Motion to compel the State to produce the source code must be stricken without prejudice, to allow the defendant to file a proper motion with the proper party utilizing the appropriate Florida Statute to obtain this trade secret, because the present motion fails to allege that:

1. The State of Florida has possession of the source code; any lawful basis to compel the State to produce what it does not have; or any lawful basis to punish the State for failure to perform the impossible.
2. Defendant has employed reasonable diligence and exhausted all legal efforts in attempting to secure this trade secret in accord with due process under existing Florida law.
3. This motion is anything other than a mere theoretical, speculative "fishing expedition" to investigate possible unknown defects in the testing instrument.

AFFIDAVIT

Comes Affiant, Randy L. Roos, and being first duly sworn, states as follows:

- 1) My name is Randy L. Roos. I am the Treasurer of CMI, Inc. ("CMI"), located at 316 East 8th Street, Owensboro, Kentucky. CMI is a Kentucky Corporation.
- 2) CMI manufactures, among other things, the Intoxilyzer 8000. CMI has sold the Intoxilyzer 8000 to customers in over 14 states, and also to various federal agencies, including the armed forces.
- 3) CMI considers the source code for the Intoxilyzer 8000 as proprietary information and a trade secret of CMI. Disclosure of the source code would allow our competition, both actual and potential, to have a blueprint for our product.
- 4) CMI has not disclosed the source code for the Intoxilyzer 8000 to the Florida Department for Law Enforcement ("FDLE") or any of its customers in Florida. CMI has not provided the source code to any other State or Federal law enforcement agency with whom it does business.
- 5) CMI has no written contractual agreement with Florida, but sells Intoxilyzers based upon purchase orders and sales invoices to customers in Florida.
- 6) I swear or affirm that all of the above statements are true and correct to the best of my knowledge and belief.

CMI, INC.

By: Randy L. Roos
Randy L. Roos, Treasurer

IN THE COUNTY COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

CASE NO.: 06-1804 T

DENNIS J. FORFA,
Defendant,

_____ /

MOTION IN LIMINE

COMES NOW, the above named Defendant, by and through his undersigned attorney, and files this Motion in Limine, and says:

1. The Defendant in this cause was arrested and charged with DUI, including Driving with an Unlawful Breath Alcohol Level (DUBAL).
2. Following the Defendant's arrest, the Defendant submitted to a breath test on an Intoxilyzer 8000.
3. The ONLY evidence of DUBAL is a printout of the Intoxilyzer 8000.
4. The Intoxilyzer 8000, in order to produce a breath alcohol level, utilizes a computer program.
5. The hardware of the Intoxilyzer 8000 introduces a light source into the defendant's breath sample at two different wave lengths, which is measured many times each second by an infrared detector; this process produces many hundreds of pieces of "raw data", the exact amount of raw data is dependant upon the amount of time the air is blown into the machine; ultimately the raw data produced by the hardware is interpreted by the Intoxilyzer software, after which the data is permanently deleted and then the machine will printout a result.
6. The "raw data" is meaningless without expert analysis.

7. Rather than having an expert witness (who could be cross examined) analyze the raw data produced by the Intoxilyzer 8000, the software program analyzes the data and renders an expert opinion of the level of alcohol contained in a breath sample which came from the defendant's blood.

8. This software program renders expert opinions which include:

- a. Whether the reading detected by the infrared detector was caused by alcohol or by other substances in the breath sample (interferent detect function);
- b. If alcohol is found in the breath sample, whether the alcohol came from the defendant's blood or from mouth alcohol (slope function);
- c. Whether a breath result was contaminated by preexisting alcohol in the breath chamber (ambient fail error);
- d. Whether a breath result was contaminated by failing to purge the previous result from the sample chamber (purge failure);
- e. Whether a sample was introduced at a time which could give false results (improper sample);
- f. Whether a breath test result was affected by radio frequency interference (RFI detect);
- g. Whether the machine was within calibration (control tests)
- h. Whether results were within 0.020 of each other; and
- i. Whether a sufficient volume of air was blown into the Intoxilyzer to obtain a reliable result.

9. Some, if not all of the fail safe procedures utilized by the Intoxilyzer 8000 are contained in and performed by this computer program.

10. Due process requires the accused to have a "sufficient opportunity to question the test results", which include making available for testing the breath testing machine and the questioning the "fail safe" procedures. *Hauser v. State*, 474 So.2d 1193 (Fla. 1985); *Cloe v. State*, 613 So.2d 70 (Fla. 4th DCA 1993).

11. Without having the source code to this computer program, the Defendant is unable to learn and question the fail safe procedures contained in this computer program, thus precluding the Defendant from having a sufficient opportunity to question the test results in violation of the Defendant's right to due process.

12. The Defendant is seeking production of the source code of the Software Program approved for use in 11D-8.003 together with production of the source code of the software on the Intoxilyzer 8000 used in this case.

13. A breath result on an Intoxilyzer 8000 is unreliable without a breath sample of least 1.1 liters.

14. One of the safeguards of the Intoxilyzer 8000 is the ability to record the volume of each breath sample.

15. In order to ensure any given result is reliable, the Intoxilyzer, when working properly, should report to the breath test operator the warning "volume not met" any time a breath sample is smaller 1.1 liters.

16. If operating properly, a breath test result without a warning of "volume not met" indicates the sample volume is greater than 1.1 liters; however, the Intoxilyzer 8000, as distributed for use in the State of Florida, contained a software flaw that on

numerous occasions reported a volume of less than 1.1 liters when there was not a warning flag of "volume not met", thus rendering the reliability of the reported volume unknown.

17. The Florida Department of Law Enforcement reported that this software flaw was limited to cases where an accused continued to give a breath sample longer than three minutes into the test; FDLE did not review the software code to make this report, but instead relied solely upon the representation of CMI, Inc., the manufacturer of the Intoxilyzer 8000, that the software was not "instructed to verify the breath sample volume."

18. A review of actual breath test results from the Intoxilyzer 8000 reveal that this explanation is false.

19. Due to FDLE's blind faith in CMI, Inc. and CMI's failure to allow anyone outside of CMI, Inc. to review the software, the extent of this flaw is unknown; without the software code, it is impossible for anyone to determine which tests are affected by this known software flaw.

20. If the reliability of the reported volume of a breath sample cannot be ensured, then the reliability of any corresponding breath alcohol level cannot be ensured.

21. The production of the Source Code is necessary for the Defendant to determine the extent of the software flaw(s) and the impact of the flaw(s) on the reliability of the breath test results.

22. Without the production of the Source Code, it is impossible to determine if the software flaws would stop the machine from producing other warning flags such as

mouth alcohol, which would cause the machine to report an artificially high breath alcohol level.

23. The Intoxilyzer 8000, as distributed for use in the State of Florida contained another software flaw that allows the machine to report that no air was introduced into the machine, yet still produce a breath alcohol level; the software allows the machine to produce an inaccurate result; either the volume is reported incorrectly or the breath alcohol level is reported incorrectly (or both); without the software code, FDLE is unaware to what extent the volume and / or breath alcohol levels are being misreported. FDLE has not yet publicly addressed this software flaw.

24. CMI claims another of the fail safe procedures of the Intoxilyzer 8000 software is the ability to detect a negative slope, and flag such a result as invalid. A negative slope occurs when the reported breath alcohol level decreases as the sample volume increases; a negative slope is contrary to the premise that deep lung air yields the highest breath alcohol level.

25. A review of actual breath test results on the Intoxilyzer 8000 reveal the machine and software are not working as represented. For example in the case of State. v. James Eve, Case no. 2006 CT 009599 SC in Sarasota County, the following results were obtained:

Subject Sample #1	0.136
Breath Volume	1.261
Subject Sample #2	0.124
Breath Volume	2.703

The second sample, with more than twice the volume of the first, was 0.012 lower than the first sample. The Intoxilyzer is either reporting the wrong Breath Alcohol Level and / or the wrong Breath Volume, but without the software code it is impossible to determine

the cause of the error and how often the machine is malfunctioning. What is known is this is not an isolated incident, and that FDLE has not yet publicly addressed this software flaw.

26. According to the Operator's Manual for the Intoxilyzer 8000, the machine is required to wait two minutes between air blanks, however, due to another software flaw, the Intoxilyzer is waiting less than two minutes between air blanks. In a review of actual breath test results conducted on the Intoxilyzer 8000, the "reported" wait time on every test is either one minute or two minutes. While it is clear that the software is not working correctly on tests with a one minute reported wait, the reported "two minute" waits in all likelihood are less than two minutes. This is due to the fact the Intoxilyzer 8000 is programmed in Florida to not report seconds. For example:

Air Blank 01:30 am

Air Blank 01:32 am

could be as follows if seconds were reported:

Air Blank 01:30:50 am

Air Blank 01:32:20 am

This example would be a 90 second wait, but the data reported by the Intoxilyzer 8000 would leave one to believe there was a two minute wait. The fact that there are no reported waits of three minutes, mathematically establishes the wait time is always two minutes or less. The initial version of this software tested by FDLE contained a flaw that caused the machine to "lock-up" during the two-minute wait for at least 10 minutes. CMI, when "fixing" this software problem, created the new one, which has neither been corrected nor addressed by FDLE.

27. The software contained in the Intoxilyzer 8000 used in this case was modified without having the machine recalibrated.

28. According to the manufacturer of the Intoxilyzer 8000, following a software update that modifies the analytical portion of the software, the machine must be recalibrated.

29. Without the Source Code, the Defendant cannot determine whether or not the software update modified the analytical portion of the software, thus requiring the machine to be recalibrated.

30. The Source Code is material to the Defendant's case, for with this information the Defendant can determine whether the Intoxilyzer actually used in this case was using a software program approved by 11D-8.003 or a modified version of this program, if a modified version was used, what extent the modification would have on the reliability and operation of the Intoxilyzer, and how the software effects the reliability and operation of the Intoxilyzer.

31. Without the production of the Source Code, the reliability of the Intoxilyzer 8000 is unknown.

32. Without the production of the Source Code, the Intoxilyzer 8000 is no more than is "Mystical Machine" used to establish the defendant's guilt.

33. The production of the source code is necessary to the Defense, for without the Source Code, the Defendant cannot determine:

- a. Whether the software on the local Intoxilyzers is the same program approved by FDLE in 2002,

- b. Whether the software on the local Intoxilyzers is a modified version of the program approved by FDLE in 2002,
- c. The extent of the modifications to the approved software,
- d. Whether the modifications to the Software program affect the reliability or operation of the Intoxilyzers.
- e. The impact the Software Program itself has on the reliability of the Intoxilyzer 8000.
- f. Whether changes in the various versions of the code is substantial or inconsequential, including if the analytical portions of the code were modified.
- g. The “fail safe” procedures contained in the code, including, but not limited to the slope formula and slope “break points”.
- h. The extent and impact of the software flaw(s) contained in the program.

34. Allowing the State to introduce the results of the Intoxilyzer 8000 without producing the Software Source Code, is tantamount to granting the State authority to use confidential information (i.e.: the source code) to establish the guilt of the Defendant without disclosing the information to the Defendant for inspection and possible impeachment.

35. The Software is an integral part of the Intoxilyzer 8000.

36. The Defendant is not in possession of the Source code, and is unable to obtain the Source Code, without either receiving it from the State or an Order from this Court directing the manufacturer to produce the Source Code.

State, 405 So.2d 211, 212 (Fla. 3d DCA 1981). This constitutional protection exists "because of the fundamental unfairness which results from placing a man on trial on a criminal charge and denying him the means to compel the attendance of witnesses, within the jurisdiction of the court, who are in possession of material facts which show or tend to show his innocence of the charge." *Trafficante v. State*, 92 So.2d 811, 815 (Fla.1957). The "trial court has no more authority to refuse to enforce for a defendant's benefit the production of the evidence available to be procured and for which compulsory process has been issued than to deny the process itself in the first instance." *Sims v. State*, 867 So.2d 1208, 1210 (Fla. 3d DCA 2004).

46. The right of the Defendant to cross-examine witnesses and his right to present evidence in opposition to or in explanation of adverse evidence are essential to a fair hearing and due process of law. *Alexander v. State*, 288 So.2d 538, 539, (Fla. 3rd DCA 1974).

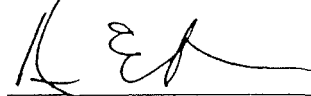
WHEREFORE, The Defendant requests this Court to enter an Order in Limine finding that the introduction of the Breath test results, without the Defendant having an opportunity to review and inspect the software source code, would violate the Defendant's right to due process and right to confrontation, and to that end direct the Clerk of Court to issue a subpoena duces tecum to CMI, Inc., for the production of the software code, and to retain jurisdiction to enter any other relief the Court determine just if software source code is not produced to the Defendant.


Kerry E. Mack, Esquire
2022 Placida Road
Englewood, Florida 34224
(941) 475-7966
(941) 475-0729 Facsimile
Florida Bar No. 0337897
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent

to Michael Anthony Pica, Esquire, c/o Office of the State Attorney, 350 East Marion
Avenue, 2nd Floor, Punta Gorda, FL 33950 by U.S. Mail on this 29 day of January,
2007.

A handwritten signature in dark ink, appearing to read 'K E Mack', written over a horizontal line.

Kerry E. Mack, Esquire

IN THE COUNTY COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

Vs.

CASE NO. 06-1804TT

DENNIS JOSEPH FORFA,

Defendant.

STATE'S MOTION TO STRIKE DEFENDANT'S "MOTION IN LIMINE"
RE. INTOXILIZER® 8000 "SOURCE CODE"

THE STATE OF FLORIDA, represented by Stephen B. Russell, State Attorney for the Twentieth Judicial Circuit of Florida, by and through the undersigned Assistant State Attorney, who moves this Honorable Court to Strike Defendant's "Motion in Limine" because the motion is facially deficient, as stated more specifically as follow:

1. **THE PLEADING IS NOT A MOTION IN LIMINE.** The present motion fails to state what evidence the Defendant seeks to be excluded in the Defendant's motion in limine. Essentially, Defendant's prayer for relief requests this Honorable court to direct the Clerk of Court to issue a subpoena duces tecum to the out of state manufacturer to produce the "source code" in this criminal case, then to retain jurisdiction over that civil procedure in this criminal case, so it may "enter any other relief the Court determines just." One could only assume that the Defendant intended the "other relief" to be some sort of exclusion of evidence in the criminal case, by calling this a "motion in

Appendix 4

limine". The title of the "motion in limine" does not make it a motion in limine. The court should consider that perhaps the pleading is intentionally disguised in an attempt to preclude the state from the right to appeal a ruling on a valid motion in limine. Therefore, Defendant's motion should be stricken as being so vague as to the relief in limine requested that it is indiscernible, if not frivolous.

2. THE DUE PROCESS CLAIMS ARE BARRED BY RES JUDICATA AND STARE DECISES: Florida's liberal discovery rules do not authorize the discovery of any matter not in the possession or control of the State Attorney. Fla.R.Crim.P. 3.220(b) (1). The Office of the State Attorney does not have the "source code." The state attorney has no knowledge of any agent of the State of Florida possessing or controlling the "source code." Section 316.193(1)(f)(4), Florida Statutes, effective October 1, 2006, expressly excludes any entitlement of a criminal defendant to production of the software of the instrument or any other material that is not in the actual possession of the State in a prosecution for Driving Under the Influence.

This matter was recently addressed by the Fifth District Courts of Appeal in Moe v. State of Florida, 2006 WL 3327597 (Fla.App. 5 Dist.). In Moe, the Court held "it is without dispute that the State does not have possession of the source code because it is the property of CMI, Inc. It is also without dispute that the code is a trade secret of CMI, Inc. and that CMI, Inc. has invoked its statutory and common law privileges protecting the code from disclosure. Therefore, the State cannot obtain possession of the code." Id.

Other than *Brady* material, (exculpatory evidence) Brady v. Maryland, 373 U.S. 83 (1963), such discovery is limited to the discovery permitted in Fla.R.Cr.P. 3.220.

)

State v. Ross, 792 So.2d 699 (Fla. 5th DCA 2001). There is no common-law right to discovery. State v. Smith, 260 So.2d 489, 491 (Fla. 1972). Nor is there any constitutional due process right to discovery, generally. State v. Ross, 792 So.2d 699, 701 (Fla. 1972); State v. Gillespie, 227 So.2d 550 (Fla. 2d DCA 1969); Weatherford v. Bursey, 429 U.S. 545, 559 (1977). A defendant has no *Brady* right to discovery unless he can prove that the item sought is “exculpatory” and that he has exhausted his efforts and resources and concluded that there are no other available means or remedies to obtain the requested item. State v. Coney, 294 So.2d 82, 87 (Fla. 1973). Although a defendant also has a due process “right of confrontation,” that right only applies to confronting a witness at trial, not the “right” of pre-trial discovery. Pennsylvania v. Richie, 480 U.S. 51 (1987).

Defendant cited two cases in the “motion in limine” that afford the Defendant the “due process” right to question the results of the drug/alcohol tests performed. While that general proposition is correct, the holdings of the cases submitted actually defeat Defendant’s claim of a pre-trial entitlement to discovery of the source code. In State v. Houser, 474 So.2d 1193, 1195 (Fla. 1985) the Supreme Court held that “[T]he due process question is whether the accused has sufficient opportunity to question the result of the test.” Houser claimed he was denied due process because he could not test the blood sample because the state failed to preserve it. The court denied this claim, holding that Houser was able to check the calibration records to test the instrument’s reliability and to cross-examine the operator to expose potential errors. Further, Houser was entitled to discovery of the results of the test taken, pursuant to §316.1932(1) (f) (4). Still further, Houser had the statutory right to request an independent test, as an additional tool

to test the reliability of the test taken, had he chosen to do so. He was not denied due process of law.

The Court in Cloe v. State, 613 So.2d 70 (Fla. 4th DCA 1993) held that the defendant was given a sufficient opportunity to question the results of the drug and alcohol tests performed to satisfy his due process right at trial. In that case, the technician's supervisor testified, but could not say with certainty which technician performed the test to determine the presence of cocaine in the blood. That supervisor was able to testify that the test followed established protocol by reviewing the readouts of the records of the procedures that were followed, which was sufficient to question the results and the claimed "fail safe" procedures. The Court held that the defendant had "sufficient opportunity to question the test results" to satisfy due process, absent any bad faith on the part of the state, following *Houser*. Defendant's citations of authority still fail to establish a legal right to have the court compel the state attorney to produce what it does not have, or to obtain trade secrets of a third party as a pre-trial due process right. No controlling authority in Florida has ever gone so far. Although the Defendant has the right to cross examine witnesses at trial, he does not have any criminal discovery right to the "source code."

3. THE MOTION FOR THE TRADE SECRETS OF THE MANUFACTURER IS IN THE WRONG COURT WITH THE WRONG PARTY: The State is not the proper party for the procedures or relief sought. Nor is the criminal case or criminal forum the proper subject matter jurisdiction or forum for a claim to obtain the trade secrets of a non-party. The source code is a "trade secret" of a non-party that can only be

obtained by following the applicable Florida Statutes. Defendant's claim that this is not really a "trade secret" belongs in a civil petition against the manufacturer who has raised the affirmative claim, not with the State of Florida in a criminal proceeding. The source code for the Intoxilyzer 8000 is a proprietary trade secret of the manufacturer, as was the source code for the Intoxilyzer 5000. The State of Florida does not represent the interests of the manufacturer. C.M.I., the manufacturer of the Intoxilyzer® 8000 breath testing instrument, has asserted its proprietary rights in the computer source code for the 8000.

Defendant fails to plead due diligence in any attempt whatsoever to follow Florida Law, consistent with the interstate compacts for obtaining "trade secrets." Instead, the Defendant is unlawfully requesting the Charlotte County criminal court to give relief that the Defendant is not legally entitled to by requesting the court to avoid and circumvent well established principles of law in Florida. A defendant's burden of production to obtain a "trade secret" at a civil hearing against the holder of the proprietary information in Florida against a Kentucky Corporation is a "reasonable necessity" pursuant to §688.001 to §688.009, Florida Statutes, 2004, and §365.880 to §365.900, Kentucky Revised Statutes. Particularly, this defendant claims, but fails to plead due diligence in attempting to lawfully obtain this third party proprietary information, pursuant to due process of law, according to the interstate statutory agreements.

This court should require the defendants to employ and plead due diligence pursuant to §688.001 to §688.009, Florida Statutes, 2004, along with §365.880 to §365.900, Kentucky Revised Statutes to obtain this information on its own before granting any hearing on the merits of defendant's claims, particularly in a criminal court action. Attorneys for similarly situated defendants in St. Johns County recently

attempted this again before a three-judge en banc panel in St. Johns County. The Court there found that the claim under §942.03, Florida Statutes failed to establish materiality in the “Motion for Certification” (or “commission”) to seek the Kentucky source code (a trade secret) by means of subpoena duces tecum of the records custodian. See, State v. Fischer, Case No. 2003 CT 2860 (Fla. 7th Cir. St. Johns Co., Tinlin, J., Feb 14, 2006); and State v. Edward, Case No. 2004 CT 1783 (7th Cir. St. Johns Co., Christensen, J. Feb. 15, 2006). *Fischer* and *Edwards*, however, still did not even attempt to seek this information pursuant to the proper statute to obtain trade secrets, pursuant to §688.001 to §688.009, Florida Statutes, 2004, or §365.880 to §365.900, Kentucky Revised Statutes.

In RareCoin-It v. I.J.E. Inc. 625 So.2d 1277 (Fla. 3d DCA 1993) the court determined that before the “Nintendo source code” could be compelled in civil discovery of a “party” to the litigation, there must be a showing of “reasonable necessity.” Such a relevant showing requires a defendant to allege and demonstrate sufficient facts to support the court’s authority to grant the relief requested. Florida Elections Commission v. Florida Education Association, 30 Fla.L.Weekly D1879a (Fla. 1st DCA Aug. 4, 2005) (denying application for commission to take discovery depositions of out-of-state witness). The requirement to plead “reasonable necessity” as to trade secrets has long been enforced through the Florida Courts. See, Rare Coin-It v. I.J.E. Inc., 625 So.2d 1277 (Fla. 3d DCA 1993); General Hotel & Restaurant Supply Corp. v. Skipper, 514 So.2d 1158 (Fla. 2d DCA 1987).

If the court finds a “reasonable necessity” for the production, the court must specifically set forth its findings in its “commission” to seek out of state trade secrets. Eastern Cement Corp v. D.E.R., 512 So.2d 264 (Fla. 1st DCA 1987); Goodyear

Tire and Rubber Co. v. Cooney, 359 So.2d 1200 (Fla. 1st DCA 1978). Then, the foreign jurisdiction would have to agree with the Florida court's findings, or may quash the subpoena, upon request of the holder of the proprietary secret. This Defendant asserts that the State of Florida could serve an investigative subpoena on an out of state corporation. While that may true of both the State and the Defense (if proper procedure is followed according to Florida law), defendant makes no claim that the State is somehow immune from following the due process protections of persons holding trade secrets or any other privilege protected from both the State and any civil or criminal litigant.

This limitation is a matter of statutes, caselaw and court rules. Rule of Criminal Procedure §90.506 acknowledges trade secrets as a privilege to refuse to disclose and prevent others from disclosing. Similarly, Florida Rule of Civil Procedure §1.280 protects such trade secrets. Still further, §815.045, Florida Statutes demonstrates the importance of protecting "trade secrets."

The Legislature finds that it is a public necessity that trade secret information as defined in §812.081, and as provided for in §815.04(3), be expressly made confidential and exempt from the public records law because **it is a felony to disclose such records**. Due to the legal uncertainty as to whether a public employee would be protected from a felony conviction if otherwise complying with chapter 119, and with § 24(a) Art. I of the State Constitution, it is imperative that a public records exemption be created. The Legislature in making disclosure of trade secrets a crime has clearly established the importance attached to trade secret protection. Disclosing trade secrets in an agency's possession would negatively impact the business interest of those providing an agency such trade secrets by damaging them in the marketplace, and those entities and individuals disclosing such trade secrets would hesitate to cooperate with that agency, which would impair the effective and efficient administration of governmental functions. Thus, the public and private harm in disclosing trade secrets significantly outweighs any public benefit derived from

disclosure, and the public's ability to scrutinize and monitor agency action is not diminished by nondisclosure of trade secrets.

In SePRO Corp.v Florida Department of Environmental Protection, 839 So.2d 781 (1st DCA 2003) the court held that if the business has taken reasonable steps to ensure secrecy, the trade secrets belonging to a business cannot be released. In the present case though, the information is not sought as a public record, the business has gone to great lengths to ensure the secrecy of its source code.

4. A "CERTIFICATE OF MATERIALITY" IN THE PROPER COURT WITH THE PROPER PARTIES TO OBTAIN A "COMMISSION" TO THE FOREIGN COURT STILL CANNOT BE BASED UPON MERE SPECULATION:

This Defendant has not pled any legal authority for the criminal court to order the Clerk of Court to issue a subpoena duces tecum on a foreign corporation to produce its trade secrets. Even if a defendant were to properly request a "certificate of materiality" to proceed to the foreign jurisdiction with a "commission" to obtain a "trade secret", a mere claim of "material necessity may not be speculative, theoretical or experimental. State v. Burnett, et.al. 9 Fla.L.Supp.879a (20th Cir. Hendry Co., Jan. 5, 2001), as in the present case. Furthermore, the Court in Wissel v. State, 691 So.2d 507 (Fla. 2d DCA 1997) denied the challenges of the alcohol test results because the claims were only speculative, theoretical or hyper-technical. The claim that a change in the Intoxilyzer® 5000's software code may result in a "potential" change to the operation of the instrument is speculative and theoretical, and fails to present the "necessity" requirement to obtain the remedy of obtaining the source code. State v. Contres, CTC-2003-1283-MMAWS, et.al

(7th Cir. Volusia, April 22, 2005), following State v. Friedrich, 681 So.2d 1157 (Fla. 5th DCA 1996); Jenkins v. State, 855 So.2d 1219 (Fla. 1st DCA 2003).

The Charlotte County Courts should not proceed on a motion that the court has no jurisdiction or authority to determine the relief requested where the manufacturer, who holds the privilege, is not even a party. The defendant is not entitled by law to compel the State (or the criminal court) to compel the clerk to compel the production of discovery for the purpose of merely inspecting, experimenting or going on a “fishing expedition.” The Defendant merely seeks a court ordered “fishing expedition” through the wrong party in the wrong State, in order to obtain the proprietary trade secrets of a third party. The State, or here, the clerk of court is not the proper party to seek to compel the production of things held by a third party if there are procedures in the law to obtain such information otherwise. See, State v. Robert Fischer, et.al, Case No. CT03-286 (7th Cir. St. Johns Co. Jan. 11, 2006), citing Lopez v. State, 634 So.2d 1054 (Fla. 1993), citing Hoffman v. State, 613 So2d 405 (Fla. 1982).

In a case that is very close to the present issue, a Pennsylvania court recently concluded that a DUI defendant claiming a due process “right to challenge the test results” of a blood test, and that he should be permitted to use a subpoena to “obtain evidence to attempt to challenge the result.” Commonwealth of Pennsylvania v. Cook, 865 A. 2d 869 (Penn. Super. 2004). That court rejected the DUI defendant’s argument, stating, “[S]ubpoenas are not to be used to compel production of documents merely for inspection or for a fishing expedition.” Commonwealth v. McEnany, 446 Pa. Super. 609, 667 A.2d 1143, 1149 (1995). Recently, in a notorious civil suit in this very Congressional District, the computer source code was sought. In that civil claim the

manufacturer was included as a defendant. The trial court found that the claim was pure conjecture, and did not demonstrate a "reasonable necessity." See, Jennings v. Elections Canvassing Commission et.al, Case No. 2006-CA-2973 (Cir. Ct. 2nd Circuit, Leon Co. Gary, J., Dec. 29, 2006). Nearly every court in Florida found that prior motions for the "source code" were only speculative. See, e.g. State v. Licari, et.al, Case NO. CTC 05-1074XAAASP (Fla. 6th Cir. Pinellas Co, Horrox, J., Feb. 23 2006. In one prior "source code" motion, Judge Sloan in State v. Burnett, et.al, 9 Fla.L.Weekly Supp.879a (20th Cir, Hendry Co., Sloan, J. Jan.5, 2001), held that

[T]he Court expresses concern that allowing 'experimentation' in this case would be 'Pandorian' in nature in that every subsequent criminal defendant in a DUI case would then be entitled to run their own tests of the Intoxilyzer 5000R by simply questioning, without sufficient legal basis or scientific proof, the results or accuracy of the Intoxilyzer 5000R. Therefore, this Court will necessarily require that any defendant seeking to run independent tests on an intoxilyzer (sic) would carry the burden of proof in order for this Court to grant testing outside of that required by the Florida Department of Law Enforcement."

Further, Defendant claims that the State can issue a subpoena duces tecum to a foreign corporation, citing General Motors Corporation v. State, 357 So.2d 1045 (Fla. 3d DCA 1978). However, that would require the Defendant following Florida law and provide a showing of materiality, which the Defendant has failed to establish.

5. DEFENDANT DOES NOT HAVE STANDING TO CLAIM THAT PRIOR CURED DEFECTS AFFECTED HIS BREATH TEST RESULT. Defendant has made allegations that there were errors in a version of the software in the Intoxilyzer® 8000. The Defendant has been provided evidence that those errors only affected less than

1% of breath tests in Florida before that glitch was remedied. The Defendant has been provided documents showing that THIS DEFENDANT WAS NOT ONE OF THE AFFECTED DEFENDANTS regarding that temporary glitch. This Defendant has failed to plead any standing to complain of any such glitch, and the fact that there was such a glitch that was identified and corrected does not establish a reasonable necessity to obtain the trade secret of a non-party. The Defendant's claim of reasonable necessity is purely speculative, and is not based on the submitted breath test. In fact, the pleadings in the Defendant's motion demonstrate that Defendant wants the source code in order to determine several speculative possibilities, but fails to establish any facts that the instrument is presently not accurate and reliable, or that the defendant's breath test was not accurate or reliable.

6. THE TRIAL COURT MUST DETERMINE, PRIOR TO ANY HEARING ON THE MERITS OF THE EVIDENCE, WITH THE PROPER PARTY THAT THE MOTION IS LEGALLY SUFFICIENT ON ITS FACE. Defendant's motion should be stricken as being legally insufficient prior to the Court setting any hearing on the merits of the claim. Any pre-trial pleading must state the ground or grounds on which it is based. §3.190(a) Fla.R.Cr.P. (2004). If a defendant requests additional discovery, he must plead the "materiality" of the discovery sought. §3.220(f) Fla.R.Cr.P (2004). As to all pleadings, the court having subject-matter jurisdiction has the power to adjudicate the sufficiency of pleadings. Lovett v. Lovett, 112 So. 768 (Fla. 1927).

This court shall determine whether the motion is legally sufficient prior to hearing evidence on defendant's motion, pursuant to F.R.C.P. 3.190(h)(3), which states:

(3) *Hearing.* Before hearing evidence, the court shall determine if the motion is legally sufficient.

If it is not, the motion shall be denied ... (emphasis added). The Second District Court of Appeal held, in State v. McCray, 626 So.2d 1017, 1020 (Fla. 2d DCA 1993), that the word "shall" in this rule imposes a mandatory requirement upon the trial court to determine the legal sufficiency of the motion prior to conducting an evidentiary hearing on the motion. If the trial court does not make this determination and the appellate court determines that the motion is legally insufficient, the mandatory language of rule 3.190 requires reversal. Id. For the defendant's motion to be legally sufficient, the allegations of fact contained in the motion must be such that, if they were found to be true, would result in the remedy prayed for. Bicking v. State, 293 So.2d 385, 387 (Fla. 1st DCA 1974) (Boyer, J., concurring). Although this defendant uses the words "material necessity" the pleading remains purely speculative, fails to sue the proper party holding the proprietary information, and fails to show standing for such a claim by this defendant. Defendant's claim still only suggests, at the most, that he needs the source code because the reliability of the instrument is "unknown" or that it just a "mystical machine." See paragraphs number 31 and 32 of Defendant's Motion in Limine. This claim is purely speculation, and like nearly every other court in Florida, the motion should be stricken¹ or denied². The only

¹ See, State v. Keegan Bird, Case No. 13 Fla.L.Weekly Supp. 283a (17th Cir. Broward Co., Mary Rudd Robinson, J. Jan. 18, 2006); State v. Christopher Hamal, Case No. 05-015743MM10A (17th Cir. Broward Co., Levenson, J. Dec 21, 2005); State v. Thomas Greene, Case No. 05-009650MM10 (17th Cir. Broward

“source code” cases in Florida that have not been stricken, denied or yet overturned are State v. Irish, et.al, 13 Fla.L.Weekly Supp.719a (12th Cir. Sarasota, Denkin, J. 2006); State v. Almarez, et.al, 13 Fla.L.Weekly 724a (12th Cir. Manatee, Henderson, J. 2006); and State v. Kradlak & Carlson, Appellate Case No. 2006-07-AC (Manatee County Circuit Court), all of which remain on appeal.

WHEREFORE, The State of Florida asks this Honorable Court to strike Defendant’s “Motion in Limine” without a hearing on the merits, with or without the proper party, where Defendant claims that the Defendant is denied due

Co., Levenson, J. Dec. 21, 2005); State v. Vincent O’Brien, Case No 04023851MM10A (17th Cir., Berman, J., Dec. 16, 2005); State v. Juan Hernandez, Case No. 0426368MM10A (17th Cir. Broward Co., Cowart, J., Jan. 12, 2006); State v. Julie Walker, Case No. 04-22108MM10 (17th Cir. Broward Co., Jan 17, 2006); State v. Salesman, Case No. 13 Fla. L. Weekly Supp. 447c (17th Cir. Broward Co., Kaplan, J. Feb 28, 2006); and State v. Felipe Salce, 13 Fla.L.Weekly Supp. 263b (17th Circuit Court. Broward Co. Murphy, J., Jan. 25 2006)[where the Circuit Court Judge, also denied a motion for rehearing after granting the state’s motion to strike, which was an identical copy of an earlier version of this same motion filed in Manatee and Sarasota Counties]. State v. George Andrew Lynn, Case No. 2006 MM 020686-A (Escambia County, May 2006). State v. Paul Jugov, Case No. 2005 CF 11805 NC (12th Cir. Sarasota Co., Roberts, J., June 2, 2006); State v. Jerry Lawson, Case No. 2005-CF-4077 (12th Cir. Manatee Co. Nicholas, J. Aug 29, 2006); State v. Udice, 14 Fla.L.Weekly Supp.82c (12th Cir. Sarasota Co., Denkin, J.); State v. Ryan P. Adair et.al, Case No. 01-2006-CT-0200-A, et.al. (18th Cir. Alachua Co. En Banc Panel of all county court judges unanimously, May 19, 2006). The Jefferson County Court granted the same State’s Motion to Strike in State v. Daniel Bain, Case No. 06-007 CTMA (2nd Cir., Jefferson Co., Plaines, J. May 12, 2006); .

² Moe v. State, 31 Fla.L.Weekly D2887 (Fla. 5th DCA, 2006); State v. Sauls, Case No. 2005 CT 13732NC (12th Cir. Sarasota County, LoGalbo, J., Dec. 12, 2006) and State v. Chambers, Case No. 2005 CT 7721 SC (12th Cir. Sarasota Co. Denkin, J., Dec. 18, 2006); State v. Michael Contres, et.al, Case No. CTC, 2003-1283-MMAWS, et.al. (7th Cir. Volusia Co., Marshal. April 22, 2005); State v. Fuller, 12 Fla.L.Weekly Supp 808b (18th Cir. Brevard Co., May 11, 2005) and State v. Fuller, 12 Fla.L.Weekly Supp 811b (18th Cir. May 11, 2005); State v. Gary Collins, Case No. 2005 CT-000642-O (9th Cir. Orange Co, Fleming, J. June 27, 2005); State v. Rabigi, et.al, Case No. CTC-2003-3283MMAWS (7th Cir. Volusia, Marshall, J., April 22, 2005); all the county court judges in Flagler and St. Johns County, See, e.g. State v. Robert Fischer, et.al, Case No. CT03-286 (7th Cir. St. Johns Co. Charles J. Tinlin, J. Jan. 11, 2006); all county court judges in Palm Beach County in State v. Spalding, et.al, 13 Fla.L.Weekly Supp.627b (15th Cir. Palm Beach Co., Feb. 28, 2006); State v. Cohen, et.al, Case No. 2005-CT-2049 (2nd Cir. Leon Co. Aikens, J. Oct. 11, 2005); State v. Walker, Case No.125-834-J (13th Cir. Hillsborough Co., Barber, J., Oct. 25, 2005); State v. Messina, Case No. CTC 05320010WASP (6th Cir. Pinellas Co., Overton, J. Oct. 10, 2005); State v. Lowdell, Case No. 04-5254-CTMA (1st Cir. Bay Co. Welch, J., April 22, 2005); and State v. Licari, et.al, Case No.: CTC 05-1074XAAASP (6th Cir. Pinellas Co., Feb. 23, 2006); State v. Allen, et.al, Case NO. TT05-006969-BA (10th Cir. Polk Co., Cowden, J. May 17, 2006); State v. Bastos and Vlad, et.al, Case No. 13 Fla.L.Weekly Supp 1003a (11th Cir. Miami-Dade Co. July 13, 2006); State v. Lynn, 2006 MM 020686-A, (Escambia Co. 2006).

process if he cannot inspect this trade secret and requests this court to “direct the Clerk of Court to issue a subpoena duces tecum to CMI, Inc. for the production of the software code” because:

1) The defendant fails to claim or follow any legal authority for the court to order the clerk to compel production of a trade secret in a foreign jurisdiction; 2) The motion is not a “motion in limine” in that it does not seek to exclude any evidence; 3) The motion for a non-party to produce its trade secrets is a civil claim against that privileged entity, not for the court to provide a criminal defendant’s supplemental discovery and circumvent well established principles of law; 4) The defendant has no standing to complain of software defects that were not only repaired or cured, but also no standing to claim the prior defects have relevance to this defendant’s breath test; 5) Defendant’s claims that he needs the source code to determine if there are any defects in the software are only speculative; 6) Defendant has failed to request a “certification of materiality” by a court with subject matter jurisdiction over “trade secrets” of a foreign corporation to obtain a “commission” for the foreign court to order such production; 7) the State of Florida is not a party to the issue of whether or not the computer software code is a “trade secret” of the manufacturer, and the case must be brought in a civil court against the manufacturer, instead; 8) The motion is facially deficient to enable the criminal court to determine what is requested to be “in limine” and what legal basis this court would have to order the production of a claimed “trade secret” merely by issuance of a subpoena duces tecum; and 9) This court should respect the rule of law as to those orders and find nothing in the present motion to

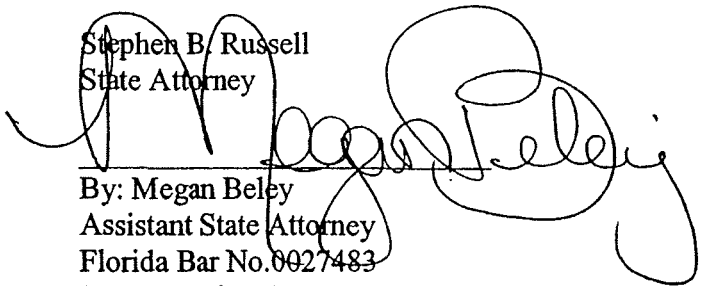
compel the court to overturn this precedent of the county and circuit courts on the same claims.

The "Motion in Limine" should be stricken.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been furnished by U.S. mail to: Kerry E. Mack, Esquire at 2022 Placida Road, Englewood, Florida 34224, attorney for on this 18 day of April, 2007.

Stephen B. Russell
State Attorney

By: 
Assistant State Attorney
Florida Bar No. 0027483
350 E. Marion Avenue
Punta Gorda, Florida 33950
(941) 637-2104

IN THE COUNTY COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

✓ KATHLEEN BLISS
CHARLES D. HARVEY
SHARON HATCHETT
STEPHEN LAMBERT
CATHY MOSELEY
DENNIS FORFA
KATHY KING
WILLIAM KING
PATRICIA MCKEAN
LYNN ROZUK
WILLIAM SCHLEIFER
ANTHONY TARGOWSKI
Defendants,

CASE NO.: 06-2042 T
CASE NO.: 06-1323 T
CASE NO.: 07-589 T
CASE NO.: 07-598 T
CASE NO.: 06- 1135 T
CASE NO.: 06-1804 T
CASE NO.: 06-2604 T
CASE NO.: 06-2408 T
CASE NO.: 06-2333 T
CASE NO.: 06-1234 T
CASE NO.: 06-1493 T
CASE NO.: 06-750 T

NOTICE OF WITHDRAWING MOTION IN LIMINE

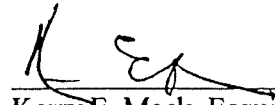
The Defendants, by and through their undersigned counsel, hereby withdraw their Motion In Limine, previously filed in each above listed case, as said Motion has been replaced by Defendant's subsequently filed Motion for Issuance of Subpoena Duces Tecum.


Kerry E. Mack, Esquire
2022 Placida Road
Englewood, Florida 34224
(941) 475-7966
(941) 475-0729 Facsimile
Florida Bar No. 0337897
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent

to Jennifer Garczewski, Esquire, Michael Anthony Pica, Esquire and Megan Beley,
Esquire, c/o Office of the State Attorney, 350 East Marion Avenue, 2nd Floor, Punta
Gorda, FL 33950 by U.S. Mail and Facsimile on this 9th day of May, 2007.


Kerry E. Mack, Esquire

IN THE COUNTY COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

KATHLEEN BLISS
CHARLES D. HARVEY
SHARON HATCHETT
STEPHEN LAMBERT
CATHY MOSELEY
DENNIS FORFA
KATHY KING
WILLIAM KING
ROBERT W. MCGUIRK
PATRICIA MCKEAN
LYNN ROZUK
WILLIAM SCHLEIFER
ANTHONY TARGOWSKI
Defendants,

CASE NO.: 06-2042 T
CASE NO.: 06-1323 T
CASE NO.: 07-589 T
CASE NO.: 07-598 T
CASE NO.: 06- 1135 T
CASE NO.: 06-1804 T
CASE NO.: 06-2604 T
CASE NO.: 06-2408 T
CASE NO.: 07-702 T
CASE NO.: 06-2333 T
CASE NO.: 06-1234 T
CASE NO.: 06-1493 T
CASE NO.: 06-750 T

MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM

COMES NOW, the above named Defendants, by and through their undersigned attorney,
and file this Motion for Issuance of Subpoena Duces Tecum, and say:

1. The Defendants were arrested and charged with DUI, including Driving with an Unlawful Breath Alcohol Level (DUBAL).
2. Following the Defendants' arrest, each Defendant submitted to a breath test on an Intoxilyzer 8000.
3. The ONLY evidence of DUBAL is a printout of the Intoxilyzer 8000.
4. The Intoxilyzer Source Code is material to the Defense in this cause, as set forth in the sworn affidavit of Harley R. Myler, Ph.D., which is fully incorporated herein, and is attached and marked Exhibit "A".

5. Without having the Source Code to this computer program, the Defendants are unable to learn and question the fail safe procedures contained in this computer program, thus precluding the Defendants from having a sufficient opportunity to question the test results, in violation of the Defendants' right to due process.

6. The Defendants are seeking production of the Source Code of the Software Program approved for use in 11D-8.003, together with production of the Source Code of the software on the Intoxilyzer 8000, used in this case.

7. The Software is an integral part of the Intoxilyzer 8000.

8. The Defendants are not in possession of the Source Code, and are unable to obtain the Source Code without either receiving it from the State, or obtaining an Order from this Court directing the manufacturer to produce the Source Code.

9. The Source Code is reasonably necessary to determine whether the Intoxilyzer in fact contains the software approved by the State of Florida, whether it is functioning as per the approved Source Code, and whether any alterations have affected its operation or reliability.

10. CMI, Inc. is registered with the Florida Secretary of State as a foreign Corporation authorized to transact business in Florida.

11. A Subpoena Duces Tecum issued by this Court reaches all documents under the control of the party required to produce them, even if those documents are located outside the territorial jurisdiction of the court. *General Motors Corp v. State*, 357 So.2d 1045 (Fla. 3rd DCA 1978).

12. The State Attorney can obtain the software Source Code by serving an Investigatory Subpoena pursuant to Chapter 27, Florida Statutes. *General Motors*.

13. The sixth amendment and the due process clause of the federal constitution guarantee to a defendant the right to subpoena a witness, and to have the witness available as he finds him.

14. The law is well-settled that the defendant in a criminal case is constitutionally entitled to compulsory process to have brought into the trial court any material evidence shown to be available and capable of being used by him in aid of his defense, including the beneficial enjoyment of the compulsory process of a Subpoena Duces Tecum for that purpose. *Green v. State*, 377 So.2d 193 (Fla. 3rd DCA 1979), affirmed, 395 So.2d 532 (Fla. 1981).

15. The right of the Defendant to cross-examine witnesses and his right to present evidence in opposition to or in explanation of adverse evidence are essential to a fair hearing and due process of law. *Alexander v. State*, 288 So.2d 538, 539, (Fla. 3rd DCA 1974).

16. A copy of the proposed Subpoena is attached Marked Exhibit "B".

WHEREFORE, The Defendants request that this Court to direct the Clerk of Court to issue a Subpoena Duces Tecum to CMI, Inc., for the production of the software code.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U. S.

Mail to Office of the State Attorney, 350 East Marion Avenue, 2nd Floor, Punta Gorda, FL 33950 on this 24th day of April, 2007.



Kerry E. Mack, Esquire
MACK LAW FIRM CHARTERED
2022 Placida Road
Englewood, Florida 34224-5204
(941) 475-7966
Florida Bar No.: 0337897
Attorney for Defendants

STATE OF TEXAS
COUNTY OF JEFFERSON

**AFFIDAVIT IN SUPPORT OF ISSUANCE OF SUBPOENA DUCES
TECUM**

1. The Intoxilyzer 8000, in order to produce a breath alcohol level, utilizes a computer program.

2. The hardware of the Intoxilyzer 8000 introduces an infrared light source into the defendant's breath sample and then samples that light at two different wave lengths, as specified by two internal filters, which is then measured many times each second by an infrared detector; this process produces many hundreds of pieces of "raw data". Ultimately the raw data produced by the hardware is interpreted by the Intoxilyzer software and then the machine will printout a result.

3. The "raw data" is meaningless without expert analysis.

4. The software program analyzes the raw data and renders an opinion of the level of alcohol contained in a breath sample that came from the defendant's blood.

5. This software program renders opinions that include:

- a. Whether the reading detected by the infrared detector was caused by alcohol or by other substances in the breath sample (interferent detect function);

- b. If alcohol is found in the breath sample, whether the alcohol came from the defendant's blood or from mouth alcohol (slope function);
- c. Whether a breath result was contaminated by preexisting alcohol in the breath chamber (ambient fail error);
- d. Whether a breath result was contaminated by failing to purge the previous result from the sample chamber (purge failure);
- e. Whether a sample was introduced at a time which could give false results (improper sample);
- f. Whether a breath test result was affected by radio frequency interference (RFI detect);
- g. Whether the machine was within calibration (control tests);
- h. Whether results were within 0.020 of each other; and
- i. Whether a sufficient volume of air was blown into the Intoxilyzer to obtain a reliable result.

6. Some, if not all, of the fail safe procedures utilized by the Intoxilyzer 8000 are contained in and performed by this computer program.

7. Without having the source code to this computer program, one cannot fully learn and question the fail safe procedures contained in this computer program.

8. A breath result on an Intoxilyzer 8000 is unreliable without a breath sample of least 1.1 liters.

9. One of the safeguards of the Intoxilyzer 8000 is the ability to record the volume of each breath sample.

10. In order to ensure any given result is reliable, the Intoxilyzer, when working properly, should report to the breath test operator the warning "volume not met" any time a breath sample is less than 1.1 liters.

11. If operating properly, a breath test result without a warning of "volume not met" indicates the sample volume is greater than 1.1 liters; however, the Intoxilyzer 8000, as distributed for use in the State of Florida, contained a software flaw that on numerous occasions reported a volume of less than 1.1 liters when there was not a warning flag of "volume not met", thus rendering the reliability of the reported volume unknown.

12. The Florida Department of Law Enforcement reported that this software flaw was limited to cases where an accused continued to give a breath sample longer than three minutes into the test.

13. A review of actual breath test results from the Intoxilyzer 8000 reveals that this explanation is in error since in some circumstances the machine would display a warning flag of "volume not met" when the reported time for the breath sample was four minutes.

14. Without having the opportunity to review the software code, the extent of this flaw cannot be determined; without the software code, it cannot be determined which tests are affected by this known software flaw.

15. Another software flaw caused the Intoxilyzer 8000 to report a volume of more than 1.1 liters, but displayed a warning flag of "volume not met", placing even more doubt into the reliability of the reported volume.

16. If the reliability of the reported volume of a breath sample cannot be ensured, then the reliability of any corresponding breath alcohol level cannot be ensured.

17. If the Source Code is produced, the extent of the software flaw(s) can be determined along with the impact of the flaw(s) on the reliability of the breath test results.

18. Without the production of the Source Code, it cannot be determined if the software flaws would stop the machine from producing other warning flags such as mouth alcohol, which would cause the machine to report an artificially high breath alcohol level.

19. The Intoxilyzer 8000, as distributed for use in the State of Florida contained another software flaw that allows the machine to report that no air was introduced into the machine, yet still produce a breath alcohol level; the software allows the machine to produce an inaccurate result; either the

volume is reported incorrectly or the breath alcohol level is reported incorrectly (or both); additionally, it is possible as well that a timing error exists such that the reported breath alcohol level is not aligned with the reported volume. The software source code is needed to determine to what extent the volume and / or breath alcohol levels are being misreported.

20. According to the Operator's Manual for the Intoxilyzer 8000, the machine is required to wait two minutes between air blanks, however, due to another software flaw, the Intoxilyzer is waiting less than two minutes between air blanks. In a review of actual breath test results conducted on the Intoxilyzer 8000, the "reported" wait time on every test is either one minute or two minutes. While it is clear that the software is not working correctly on tests with a one minute reported wait, the reported "two minute" waits in all likelihood are less than two minutes. This is due to the fact the Intoxilyzer 8000 is programmed in Florida to not report seconds. The fact that there are no reported waits of three minutes establishes the wait time is always two minutes or less.

21. The software contained in the Intoxilyzer 8000 in many instances has been modified without having the machine recalibrated.

22. According to the manufacturer of the Intoxilyzer 8000, following a software update that modifies the analytical portion of the software, the machine must be recalibrated.

23. Without the Source Code, one cannot determine whether or not the software update modified the analytical portion of the software, thus requiring the machine to be recalibrated.

24. With the Source Code one can determine whether the Intoxilyzer was using a software program approved by 11D-8.003 or a modified version of this program, if a modified version was used, what extent the modification would have on the reliability and operation of the Intoxilyzer, and how the software effects the reliability and operation of the Intoxilyzer.

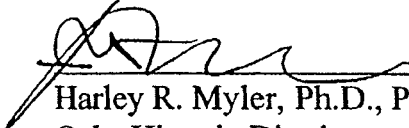
25. The production of the source code is necessary, for without the Source Code, one cannot determine:

- a. Whether the software on the subject Intoxilyzer is the same program approved by FDLE in 2002,
- b. Whether the software on the subject Intoxilyzer is a modified version of the program approved by FDLE in 2002,
- c. The extent of the modifications to the approved software,
- d. Whether the modifications to the Software program affect the reliability or operation of the Intoxilyzer.

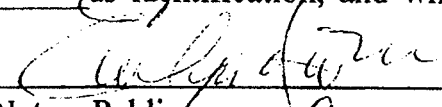
- e. The impact the Software Program itself has on the reliability of the Intoxilyzer 8000.
- f. Whether changes in the various versions of the code is substantial or inconsequential, including whether the analytical portions of the code were modified.
- g. The "fail safe" procedures contained in the code, including, but not limited to the slope formula and slope "break points".
- h. The extent and impact of the software flaw(s) contained in the program.

26. The Software is an integral part of the Intoxilyzer 8000.

FURTHER AFFIANT SAYETH NAUGHT.

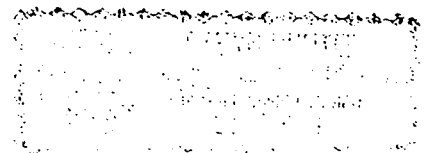

Harley R. Myler, Ph.D., P.E.
Oaks Historic District
2495 Evalon Street
Beaumont, Texas 77702

The foregoing instrument was acknowledged before me this 19th day of April 2007, by Harley R. Myler, who is personally known to me or who has produced TXDC# 19995030 as identification, and who did take an oath.


Notary Public

Print Name: Evelyn Hunter

Commission No: 02/19/2008



IN THE COUNTY COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

KATHLEEN BLISS
CHARLES D. HARVEY
SHARON HATCHETT
STEPHEN LAMBERT
CATHY MOSELEY
DENNIS FORFA
KATHY KING
WILLIAM KING
ROBERT W. MCGUIRK
PATRICIA MCKEAN
LYNN ROZUK
WILLIAM SCHLEIFER
ANTHONY TARGOWSKI
Defendants,

CASE NO.: 06-2042 T
CASE NO.: 06-1323 T
CASE NO.: 07-589 T
CASE NO.: 07-598 T
CASE NO.: 06-1135 T
CASE NO.: 06-1804 T
CASE NO.: 06-2604 T
CASE NO.: 06-2408 T
CASE NO.: 07-702 T
CASE NO.: 06-2333 T
CASE NO.: 06-1234 T
CASE NO.: 06-1493 T
CASE NO.: 06-750 T

SUBPOENA DUCES TECUM WITHOUT DEPOSITION

THE STATE OF FLORIDA:

TO: CMI INC of Kentucky
also known as
CMI, INC.

BY SERVING: NRAI Services, Inc., Its Registered Agent
2731 Executive Park Drive, Suite 4
Weston, FL 33331

YOU ARE COMMANDED to appear at the Office of the State Attorney, 350 East Marion Avenue, Second Floor, Punta Gorda, FL 33950 on _____, 2007 at _____ a.m. / p.m., and to have with you at that time and place the following:

Any and all evidence existing in paper, electronic, or other forms, of any and all Source Code(s) used in the Intoxilyzer 8000, software versions 8100.24, 8100.25, 8100.26 and 8100.27.

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You may comply with this subpoena by providing legible copies of the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production. You may condition the preparation of the copies upon the payment in advance of the reasonable cost of preparation. You may mail or deliver the copies to the attorney whose name appears on this subpoena and thereby eliminate your appearance at the time and place specified above. You have the right to object to the production pursuant to this subpoena at any time before production as provided in s.92.605 F.S. **THIS WILL NOT BE A DEPOSITION; NO TESTIMONY WILL BE TAKEN.**

If you fail to: (1) appear as specified; or (2) furnish the records instead of appearing as provided above; or (3) object to this subpoena, you may be in contempt of court. You are subpoenaed by the attorney whose name appears on this subpoena and unless excused from this subpoena by the attorney or the Court, you shall respond to this subpoena as directed.

Dated on: _____

Attorney for: Defendants

Address: Kerry E. Mack
2022 Placida Road, Englewood, FL 34224-5204

If you can not afford to pay an attorney, call Florida Rural Legal Services, Inc., at (941)-505-9007. The mailing address is c/o Charlotte County Justice Center, 350 East Marion Avenue, Ste. A107 & A108, Punta Gorda, FL 33950. An individual not eligible for free legal assistance may obtain a referral to an attorney by calling The Florida Bar Referral Service at (800)-342-8011. The mailing address for The Florida Bar Referral Service is 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

In accordance with the Americans with Disabilities Act of 1990 (ADA), persons with a disability who need a special accommodation to participate in this proceeding should contact the attorney listed above (or TDD/800-955-8771 or V/800-955-8770, via Florida Relay Service), at least five (5) business days prior to the above proceeding.

FILED FOR RECORD STAMP

Barbara T. Scott
Clerk of the Circuit Court

By: _____ Date _____
Deputy Clerk

Harley R. Myler

University Address

Department of Electrical Engineering
Lamar University Box 10029
Beaumont, Texas 77710-0029

409.880.8747
mylerhr@hal.lamar.edu

Home Address

2495 Evalon Street
Historic Oaks District
Beaumont, Texas 77702

409.838.2327
h.myler@myler.org

Education

New Mexico State University	1985	Ph.D., Electrical Engineering
	1981	M.S., Electrical Engineering
Virginia Military Institute	1975	B.S., Chemistry
	1975	B.S., Electrical Engineering (double-major)

Academic Appointments

2001-	Professor & Chair, Lamar University William B. and Mary G. Mitchell Endowed Chair in Engineering
1997-2001	Professor, University of Central Florida
1991-1997	Associate Professor, University of Central Florida
1986-1991	Assistant Professor, University of Central Florida
1985-1986	Adjunct Professor, Florida Institute of Technology
1984-1985	Instructor, New Mexico State University

Industrial Experience

President, I-Math Associates, Orlando, Florida.
Staff Engineer, Martin Marietta Orlando Aerospace, Orlando, Florida.
Digital Systems Engineer, Space Communications Company, Las Cruces, NM
Digital Systems Engineer, General Instrument Corporation, El Paso, Texas.
CPT, US Army Air Defense Artillery, Missile Systems Officer.

Administrative Summary

In August of 2001 I accepted the position of Chair of the Department of Electrical Engineering at Lamar University. During my tenure at Lamar, the department has hired two full-time faculty members and research and teaching productivity has increased substantially. The enrollment has grown to the point that Electrical Engineering has the largest student enrollment in an accredited undergraduate engineering program at Lamar. Similarly the undergraduate department scholarship endowment has tripled since I became chair. The graduate program has the highest academic standards in the university with an average GRE V+Q of 1250.

Committee Work

Council of Instructional Departments, President, 2003-2004
Academic Council, 2003-2004
Campus Survey of Needs, 2003-2004
Goldwater Scholarship Representative, 2002-present
Budget Development Committee, 2003-2004
Council on Scholarships and Fellowships Advisement, 2002-present
Honors Council/Honors Faculty, 2001-present
Doctor of Engineering Funding Allocation Committee, Chair, 2004-2004
Minimal Core Coalition, Chair, 2004-present
HEAF Policy Committee, Chair, 2002-2003
Mathematics Curriculum Development Committee, 2003-2003
College of Engineering Strategic Planning Committee, 2001-2002
College of Engineering Long Range Planning, 2001-2002
Patent Committee, 2001-present
Academic Master Planning, 2001-2002

Academic/Research/Creative Summary

I have been active in research since the beginning of my graduate education at the New Mexico State University. I worked as an Instructor and Research Assistant in the Department of Electrical & Computer Engineering and was funded through the Electronic Vision Analysis Laboratory (EVAL) under a grant from the U.S. Army Atmospheric Sciences Lab at White Sands, New Mexico. My dissertation, Knowledge-Based Intelligent Tracking (1985), was researched at the lab and was an early exploration into knowledge-based control and fuzzy-logic systems. Since then, I have authored or co-authored over thirty refereed journal and special collection articles, four books that have been enthusiastically received by the engineering and scientific communities and two patents. My books are in distribution internationally with over ten thousand volumes in print. I supervised six doctorates while at the University of Central Florida and one Doctor of Engineering at Lamar University. I have been PI or Co-PI for over \$1.4M in federally funded grants and was named "Researcher of the Year" four times by my colleagues at the University of Central Florida. At Lamar University I have been given the distinguished honor of being named the inaugural holder of the William B. and Mary G. Mitchell Endowed Chair in Engineering.

Patents and Software Copyrights

Method for Measuring and Analyzing Digital Video Quality, 2003, U.S. Patent #6577764.

Trophorometer, 1991, U.S. Patent #5,094,521.

Automated Knowledge Generation©1989, University of Central Florida.

UCFImage©1998, University of Central Florida.

simANNs©1989, ANNview© 1991, parsimANNs© 1991, University of Central Florida.

Books

- Myler, H. R., Fundamentals of Engineering Programming with C and Fortran, Cambridge University Press, 1998.
- Myler, H. R., Fundamentals of Machine Vision: Theory and Application, SPIE Press, 1998.
- Myler, H. R. and Weeks, A. R., Computer Imaging Recipes in C, Prentice-Hall, 1993.
- Myler, H. R. and Weeks, A.R., The Pocket Handbook of Image Processing Algorithms in C, Prentice-Hall, 1993.

Refereed and Special Collection Articles

- Myler, H. R., Bagasrawala, S. A., Narayana, N. V. "OFDM and GSM Protocol Optimization on a Software Defined Radio Parallel Processing Architecture," *International Engineering Consortium Annual Review of Communications*, Volume 58, accepted for publication.
- Guo, J., Van Dyke-Lewis, M. and Myler, H. R., "Gabor Difference Analysis of Digital Video Quality," *IEEE Transactions on Broadcasting*, 50:3, September 2004, pp. 302-311.
- Myler, H. R., Guo, J., and Van Dyke-Lewis, M. "No-Reference Digital Video Quality Analysis," *International Engineering Consortium Annual Review of Communications*, Volume 57, September 2004.
- Liviu I. Voicu, Mosleh Uddin, Harley R. Myler, Anthony Gallagher, Julien Schuler, "Clutter modeling in infrared images using genetic programming," *Optical Engineering* 39(09) pp. 2359-2371, Sep 2000.
- Weeks, A. R., Sartor, L. J. and Myler, H. R., "Histogram specification of 24-bit color images in the color difference (C-Y) color space," *Journal of Electronic Imaging*, Volume 8, Issue 3, July 1999, pp. 290-300.
- Myler, H. R., "Teaching C & Fortran Simultaneously to Beginning Engineering Students," Southeastern Section ASEE Annual Conference, Clemson University, April 1999.
- Voicu, L. I. and Myler, H. R., "Function support retrieval using a genetic algorithm cloning operator," *Electronic Imaging Technical Working Group Newsletter*, 8:1, January 1998, Invited.
- Rabadi, W. A. and Myler, H. R., "A fast wavelet based algorithm for signal recovery from partial Fourier domain information," *IEEE Trans. on Circuits and Systems*, 45:8, August 1998.
- Rabadi, W. A. and Myler, H. R., "Iterative Image Reconstruction: A Wavelet Approach," *IEEE Signal Processing Letters*, 5:1, January 1998.
- Voicu, L. I., Rabadi, W. A. and Myler, H. R., "Object Support Reconstruction from the support of its autocorrelation using genetic algorithms," *Optical Engineering*, 36:10, October 1997.
- Voicu, L. I., Myler, H. R. and Weeks, A. R. "Practical considerations on color image enhancement using homomorphic filtering," *Journal of Electronic Imaging*, Volume 6, Issue 1, January 1997, pp. 108-113.

- Rabadi, W. A., Myler, H. R., Weeks, A. R., "Iterative multiresolution algorithm for image reconstruction from the magnitude of its Fourier transform," *Optical Engineering*, 35:4, March 1996, pp. 1015-1024.
- Weeks, A. R., Hague, G. E. and Myler, H. R., "Histogram equalization of 24-bit color images in the color difference (C-Y) color space," *Journal of Electronic Imaging*, Volume 4, Issue 1, January 1995, pp. 15-22.
- Weeks, A.R., Myler, H. R., and Emery, J.D., "Nonlinear Image Transformations Implemented with Spatial Light Modulators," *Optical Engineering*, 33:3, 1994.
- Gonzalez, A. J., Myler, H. R., McKenzie, F.D., Towhidnejad, M. and Kladke, R.R., "Representation of Process System Knowledge through Constraint Description," *IEEE Transactions on Knowledge and Data Engineering*, 6:4, 1994.
- Myler, H. R., "A Project Oriented Approach to the Teaching of Machine Perception," *IEEE Transactions on Education*, 36:4, 1993.
- Towhidnejad, M., Myler, H. R. and Gonzalez, A.J., "Constraint Mechanism in Automated Knowledge Acquisition," *Applied Artificial Intelligence*, 7, 1993.
- Gonzalez, A. J., Myler, H. R. and McKenzie, F.D., "Representation of Process System Knowledge through Component Constraint Descriptions," *Engineering Applications of Artificial Intelligence*, 6:3, 1993.
- Weeks, A.R., Myler, H. R., and Lewis, M. D., "An Adaptive Thresholding Algorithm that Maximizes Edge-Features," *Journal of Electronic Imaging*, November, 1993.
- Weeks, A.R., Myler, H. R., and Weenas, H.G., "Computer-generated Noise Images for the Evaluation of Image Processing Algorithms," *Optical Engineering*, 32:5, 1993.
- Myler, H. R., Weeks, A.R., Gillis, R. K. and Hall, G. W., "Object-oriented Neural Simulation Tools for a Hypercube Parallel Machine," *Neurocomputing*, 4, 1992.
- Weeks, A.R., Myler, H. R., and Emery, J.D., "The Implementation of a Hybrid Optical Homomorphic Filter Using an LCTV as a Spatial Light Modulator," *Optical Engineering*, 31:9, 1992.
- Myler, H. R., "A Neural Computer for Memory-Based Reasoning in Spacecraft Launch Operations," *Journal of Neural Network Computing*, 2:4, Spring 1991.
- Gonzalez, A. J., Myler, H. R. and Kladke, R.R., "Identification of Unconstrained Item Descriptions Using String-Match Heuristics," *International Journal of Expert Systems: Research and Applications*, 4:3, 1991.
- Gonzalez, A.J. and Myler, H. R., "Issues in Automating the Extraction of a System Model from CAD Databases for Use in Model-Based Reasoning," *International Journal of Expert Systems: Research and Applications*, 4:1, 1991.
- Myler, H. R. and Gilson, R.D., "Taxonomic Selection of Computer-Driven Visual Display Systems," *Computer Standards and Interfaces*, 12, 1991.
- Myler, H. R., Jolson, A.S. and Weeks, A.R., "Automated Evaluation of Ocular Deviation," *Binocular Vision*, 6:3, 1991.
- Myler, H. R., Gonzalez, A.J. and Towhidnejad, M., "Constraint Mechanisms for Model-Based Knowledge Acquisition from Computer Aided Design Data," *AI EDAM*, 4:3, 1993.
- Gonzalez, A. J., Myler, H. R., Towhidnejad, M., McKenzie, F. and Kladke, R., "Automated Knowledge Generation from a CAD Database," Knowledge Discovery in Databases, G. Pietetsky-Shapiro and W. J. Frawley, eds., AAAI Press, 1991.

Heileman, G.L., Myler, H. R. and Georgiopoulos, M., "Incorporating Concurrent Processes into the Object-Oriented Simulation of Neural Networks," Proceedings of the 3rd Annual Florida AI Research Symposium, April 1990. Selected for inclusion in the text Advances in Artificial Intelligence Research, Vol. 2, JAI Press, 1991.

Heileman, G.L., Myler, H. R., Georgeopoulos, M., and Papadourakis, G., "Comparison of Learning Algorithms for Multi-layer Neural Networks," Proceedings of the Second Annual Florida AI Research Symposium, April 1989. Note: This paper was selected for inclusion in the book Advances in Artificial Intelligence Research, Vol. 2, JAI Press, 1991.

Myler, H. R., A.J. Gonzalez, Towhidnejad, M., McKenzie, F.D. and Kladke, R.R., "Automated Knowledge Generation from Incomplete CAD Data: Research Results," Proceedings of the 2nd Annual Florida Artificial Intelligence Symposium, April 1989. Note: This paper was selected for inclusion in the book Advances in Artificial Intelligence Research, Vol. 2, JAI Press, 1991.

Gonzalez, A.J., Myler, H. R., Owen, B.C. and Towhidnejad, M., "Automated Generation of Knowledge from CAD Design Data Bases," Proceedings of the 1st Florida Artificial Intelligence Research Symposium, May 1988. Note: This paper was selected for inclusion in the book Advances in Artificial Intelligence Research, Vol. 1, JAI Press, 1989.

Karshmer, A.I., Myler, H. R. and Davis, R., "The Architecture of an Inexpensive and Portable Talking-Tactile Terminal to Aid the Visually Handicapped," *Computer Standards and Interfaces*, Vol. 4, North-Holland, 1986.

Conference and Proceedings Articles

Myler, H. R., Bagasrawala, S. A., Narayana, N. V., "A Concurrent Processing Approach for Software Defined Radio Baseband Design," *2005 IEEE Region V Technical Conference*, Denver, Colorado, under review.

Myler, H. R., "Early Electrical Engineering Concepts Engagement in a Freshman Level Introductory Course," *Gulf Southwest Section ASEE Annual Conference*, Texas Tech University, Lubbock Texas, March 2004.

Osmanovic, N., Hrustemovic, N. and Myler, H. R., "A Testbed for Auralization of Graphic Art," *IEEE Region V 2003 Annual Technical Conference*, New Orleans, Louisiana, April 2003.

Myler, H. R., "An Analysis of Programming Aptitude of Engineering Undergraduates," *Southeastern Section ASEE Annual Conference*, Virginia Polytechnic and State University, April 2000.

Myler, H. R., "Characterization of disagreement in multiplatform and multisensor fusion analysis," *Signal Processing, Sensor Fusion, and Target Recognition IX*, SPIE Aerosense 2000, Orlando, Florida, April 2000.

Voicu, L. I., Patton, R. and Myler, H. "Detection performance prediction on IR images assisted by evolutionary learning," *Proceedings of the SPIE International Symposium on Aerospace Sensing*, Orlando, April 1999.

Patton, R., Voicu, L. I., Smith, S. P. and Myler, H. R., "Computationally intelligent approach to SAR-ATR," *Proc. SPIE Vol. 3721, p. 543-553, Algorithms for Synthetic Aperture Radar Imagery VI*, Orlando, April 1999.

- Voicu, L. I., Patton, R. and Myler, H. R., "Multi-criterion vehicle pose estimation for SAR-ATR," *Proc. SPIE Vol. 3721*, p. 497-506, Algorithms for Synthetic Aperture Radar Imagery VI, Orlando, April 1999.
- Weeks, A.R., Sartor, L. J. and Myler, H. R., "Histogram Specification of 24-bit Color Images in the Color Difference (C-Y) Space," *Proceedings of the Symposium on Electronic Imaging Science and Technology*, San Jose, February 1999.
- Voicu, L. I. and Myler, H. R., "Cloning Operator and its Applications," *Proceedings of the SPIE Conference on Applications and Science of Computational Intelligence*, Orlando, Florida, April 1998.
- M. Uddin and Myler, H. R., "Parallel Algorithm for Target Recognition using a Multiclass Hash Database," *Proceedings of the SPIE Conference on Signal Processing, Sensor Fusion and Target Recognition VII*, Orlando, Florida, April 1998.
- Myler, H. R., "Semiotic Foundation for Multisensor/Multilook Fusion," *Proceedings of the SPIE Conference on SPIE Conference on Signal Processing, Sensor Fusion and Target Recognition VII*, Orlando, Florida, April 1998.
- Myler, H. R., Patton, R., "Approach to multisensor/multilook information fusion," *Proc. SPIE Vol. 3068*, p. 2-7, *Signal Processing, Sensor Fusion, and Target Recognition VI*, July 1997.
- Myler, H. R., "Application of the Neocognitron to target identification," *Proc. SPIE Vol. 3077*, p. 282-290, *Applications and Science of Artificial Neural Networks III*, April 1997.
- Rabadi, W. A., Myler, H. R., "Image reconstruction using wavelets," *Proc. SPIE Vol. 2751*, p. 153-158, *Hybrid Image and Signal Processing V*, June 1996.
- Rabadi, W. A., Myler, H. R., Weeks, A. R., Gamble, K. J., "Pyramid framework for image reconstruction from nonimaged laser speckle," *Proc. SPIE Vol. 2484*, p. 309-320, *Signal Processing, Sensor Fusion, and Target Recognition IV*, July 1995.
- Gamble, K. J., Weeks, A. R., Myler, H. R., Rabadi, W. A., "Results of two-dimensional time-evolved phase screen computer simulations," *Proc. SPIE Vol. 2471*, p. 170-180, *Atmospheric Propagation and Remote Sensing IV*, July 1995.
- Weeks, A. R., Felix, C. E., Myler, H. R., "Edge detection of color images using the HSL color space," *Proc. SPIE Vol. 2424*, p. 291-301, *Nonlinear Image Processing VI*, March 1995.
- Myler, H. R., Weeks, A. R., Voicu, L., "RGB color enhancement using homomorphic filtering," *Proc. SPIE Vol. 2421*, p. 43-50, *Image and Video Processing III*, March 1995.
- Yoo, H. J., Crevier, D., Lepage, R., Myler, H. R., "Line drawing extraction from gray level images by feature integration," *Proc. SPIE Vol. 2353*, p. 96-107, *Intelligent Robots and Computer Vision XIII: Algorithms and Computer Vision*, October 1994.
- Clifton, D.B., Myler, H. R., Weeks, A.R., "An Approach to the Acquisition of a World Frame using a Visual Associative Memory," *Proceedings of IEEE International conference on Neural networks, IEEE World Congress on Computational Intelligence*, Vol. 2, June 1994, Orlando.
- Rabadi, W., Myler, H. R. and Weeks, A.R., "Large-Scale Image Transforms on a Hypercube Supercomputer," *Proceedings of the Second Congress of the Network of Arab Scientists and Technologists Abroad*, Amman, Jordan, July 1994.

Myler, H. R., Weeks, A.R. and Yoo, H. J., "Grayscale Image Preprocessing for Viewpoint Independent 3-D Extraction of Objects," *Proceedings of the SPIE International Symposium on Optics, Imaging and Instrumentation*, San Diego, 1994.

Myler, H. R., Weeks, A.R. and Rabadi, W., "Speckle Simulation Movies for Analysis and Evaluation of Laser Systems," *Proceedings of the SPIE International Symposium on Aerospace Sensing*, Orlando, 1994.

Weeks, A.R., Myler, H. R., and Apley, L. F., "An adaptive thresholding algorithm which maximizes the contour features within the thresholded image," *Proceedings of the Symposium on Electronic Imaging Science and Technology*, San Jose, February 1994.

Hague, G. E., Weeks, A. R., Myler, H. R., "Histogram equalization of the saturation component for true-color images using the C-Y color space," *Proc. SPIE Vol. 2298*, p. 236-247, *Applications of Digital Image Processing XVII*, September 1994.

Weeks, A. R., Myler, H. R., Cinci, L. D., "Interpretive programming language for image algebra," *Proc. SPIE Vol. 2300*, p. 180-191, *Image Algebra and Morphological Image Processing V*, June 1994.

Lewis, M. D., Weeks, A. R., Myler, H. R., "Maximization of contour edge detection using adaptive thresholding," *Proc. SPIE Vol. 1955*, p. 400-407, *Signal Processing, Sensor Fusion, and Target Recognition II*, September 1993.

Yoo, H. J., Myler, H. R., Weeks, A. R., "Surface extraction using spatial position from line drawings," *Proc. SPIE Vol. 1955*, p. 388-399, *Signal Processing, Sensor Fusion, and Target Recognition II*, September 1993.

Weeks, A. R., Myler, H. R., Jolson, A. S., "Calibration issues in the measurement of ocular movement and position using computer image processing," *Proc. SPIE Vol. 1567*, p. 77-87, *Applications of Digital Image Processing XIV*, December 1991.

Myler, H. R., Weeks, A. R., Van Dyke-Lewis, M., "Decision-directed entropy-based adaptive filtering," *Proc. SPIE Vol. 1565*, p. 57-68, *Adaptive Signal Processing*, December 1991.

Wenaas, H., Weeks, A. R., Myler, H. R., "Computer-generated correlated noise images for various statistical distributions," *Proc. SPIE Vol. 1569*, p. 410-421, *Stochastic and Neural Methods in Signal Processing, Image Processing, and Computer Vision*, October 1991.

Myler, H. R., Weeks, A.R. and Hooper-Giles, J., "A Novel Approach to Aircraft Silhouette Recognition Using Genetic Algorithms," *Proceedings of the SPIE International Symposium on Optical Engineering and Photonics*, 1992.

Weeks, A.R., Myler, H. R., and Hinnerschitz, S., "Aspects of Real-Time Video Tracker Design," *Proceedings of the SPIE International Symposium on Optical Engineering and Photonics*, 1992.

Myler, H. R., "Experiments in Computer Vision Instructional Development," *Proceedings of the 21st Annual Pittsburgh Conference on Modeling and Simulation*, May 1990.

Gilson, R.D., Myler, H. R. and Gibbons, S.C., "Taxonomic Transformations of Visual Media Selections into Display Specifications," *Proceedings of the Image V Conference*, June 1990.

Weeks, A.R., Bauer, C.S., Myler, H. R. and Khajenoori, S., "An Innovative Undergraduate Computer Systems Laboratory," *Proceedings of the 1990 ASEE Conference*, June 1990.

Gillis, R.K., Heileman, G.L., Myler, H. R., and Georgiopoulos, M., "Software Tools for the Development of Artificial Neural Network Models," *Proceedings of the 1990 ASEE Conference*, June 1990.

Weeks, A.R., Khajenoori, S., Bauer, C.S., and Myler, H. R., "Embedded Microprocessors: A Capstone Course in Undergraduate Computer Engineering Education," *Proceedings of the 21st Annual Pittsburgh Conference on Modeling and Simulation*, May 1990.

Myler, H. R., "Machine Vision Analysis of Human Eye Movements," *Proceedings of the 20th Annual Pittsburgh Conference on Modeling and Simulation*, May 1989.

Myler, H. R., "Design Optimization of a Six-Legged Walking Platform," *Proceedings of the 20th Annual Pittsburgh Conference on Modeling and Simulation*, May 1989.

Gonzalez, A.J., and Myler, H. R., "An Intelligent Instructor Support System for Training Simulators," *Proceedings of the 1989 AI and Simulation Conference*, April 1989.

Gonzalez, A. J., Myler, H. R., and Towhidnejad, M., "Automated Knowledge Generation in Support of Shuttle Ground Operations," *Proceedings of the Artificial Intelligence in Government Conference*, March 1989.

Myler, H. R. and Gonzalez, A. J., "Automated Knowledge Base Generation from CAD Databases Using Relaxation Techniques," *Proceedings of the International Symposium on Intelligent Control*, August 1988.

Myler, H. R., "Visual Primitive Recognition," *Proceedings of the 19th Annual Pittsburgh Conference on Modeling and Simulation*, May 1988.

Myler, H. R., "Object-Oriented Training Simulation," *Proceedings of the SCS Eastern Simulation Conference*, April 1988.

Myler, H. R., "Application of Hopfield Networks to Visual Tracking," *Proceedings of the 18th Annual Pittsburgh Conference on Modeling and Simulation*, 18, 1987.

Myler, H. R., Thompson, W. E. and Flachs, G. M., "Knowledge-Based Enhancement of Visual Tracking," *Proceedings of the IEEE International Conference on Acoustics, Speech, and Signal Processing*, 2, 1985.

Myler, H. R., Thompson, W. E. and Flachs, G. M., "Application of Expert System Techniques to a Visual Tracker," *Proceedings of the SPIE Conference on Artificial Intelligence II*, 1985.

Myler, H. R. and Thompson, W. E., "Knowledge-Based Intelligent Tracking," *IEEE International Conference on Systems, Man, and Cybernetics*, 1985.

Myler, H. R. and Thompson, W. E., "Computer Simulation of Intelligent Tracking," *Proceedings of the 17th Annual Pittsburgh Conference on Modeling and Simulation*, 1986.

Karshmer, A. I., Myler, H. R. and Davis, R., "An Inexpensive and Portable Talking Tactile Terminal for the Visually Handicapped," *Proceedings of the 19th Annual Hawaii International Conference on Systems Science*, 3, 1986.

Awards and Honors

Tau Beta Pi (engineering), Eta Kappa Nu (electrical engineering)
Outstanding Participation, IEEE, National Engineers Week, 1993.
Educator of the Year, UCF Department of Electrical & Computer Engineering, 1993.
Researcher of the Year, UCF Department of Computer Engineering, 1988, 1989, 1990, 1992.
Academy Member, Klipsch School of Electrical & Computer Engineering, New Mexico State University.
CRC Freshman Chemistry Award, 1973.
Eagle Scout, 1970, Troop 108, Leetsdale, Pennsylvania, BSA.

Doctoral Field Studies Supervised (Lamar University)

Jing Jane Guo, DE, 2003
Gabor Difference Analysis of Digital Video Quality

Dissertations Supervised (University of Central Florida)

Liviu Voicu, PhD, 1997
Issues in Multiresolution Genetic Algorithms
Wissam Rabadi, PhD, 1995
Multiresolution Image Processing
Hoi Yoo, PhD, 1993
VITREO: Viewpoint Independent Three-dimensional Recognition and Extraction of Objects
Massood Towhidnejad, PhD, 1990
Functional Conflict Resolution in Automated Knowledge Generation
John DeCatrel, PhD, 1990
Recognition by Aspect Constrained Stochastic Optimization
Gregory Heileman, PhD, 1989
Theoretical and Experimental Aspects of Supervised Learning in Artificial Neural Networks

Theses (MSEE) Supervised

Shabbir A. Bagasrawala, MSEE, 2004, OFDM in a Parallel Architecture Implementation of a Software Defined Radio.
Naresh V. Narayana, MSEE, 2004, GSM Baseband Optimization On A Software Defined Radio Parallel Processing Architecture.
Mithun Bannerjee, MSEE, 2004, Implementation of ITU-T G.729 Speech Codec.
Samir V. Bansikar, MSEE, 2003, Optimization of JPEG Image Compression Using Video Quality Metric.
Ravi Bellapu, MSEE, 2003, Steganographic Techniques for No-Reference Digital Video Quality Analysis.
Supriya Kher, MSEE, 2003, Object Tracking in Compressed MPEG Video Bitstream.

Prashant. K. Ruparel, MSEE, 2003, Auralization Synthesis (Sonification) for Control Room Alerts.

Mosleh Uddin, MSEE, 1998, A Parallel Algorithm for Target Classification Using Geometric Hashing.

Arthur Chang, MSE, 1994, Implementation of the Two-Dimensional Fast Hartley Transform on a Fine-grained SIMD Architecture.

Benito Graniela, MSE, 1992, Visual Primitive Decomposition Using the Pattern Spectrum.

Jill Giles, MSE, 1991, A Medial Axis Transformation Language for Recognizing Aircraft Silhouettes Using a Genetic Search Technique.

Kathleen Meade, MSE, 1991, A Novel Algorithm for Detecting Erroneous Control Points in Geometric Correction of Imagery.

Gary Hall, MSE, 1991, ANNview: A CASE Tool for Development and Evaluation of Artificial Neural Networks.

Randall Gillis, MSE, 1991, A General Object-Oriented Environment for the Development of Artificial Neural Network Models on a Hypercube Multiprocessor Network.

Shuk Fong Lai, MSE, 1990, Algorithms for Fine-Grained Architecture Implementation of 2-Dimensional Fast Walsh-Hadamard Transforms.

Cynthia Johnson, MSE, 1990, Counterpropagation Neural Network Detection of Visual Primitives.

Mitchell Winter, MSE, 1989, VLSI Implementation of a Configurable Neural Node.

Paul Vogt, MSE, 1988, An Adaptive Multi-Scene Correlation Algorithm.

Ronald Bauman, MSE, 1988, GAPP Instruction Simulator.

Eric Grajales, MSE, 1987, Edge Confidence Estimation for Subsequent Image Analysis.

Julie LeBlanc, MSc, 1987, Implementation of a Parallel Ynet Architecture.

Nancy Burrell, MSE, 1986, Adaptive Discrete Cosine Transform Image Compression Applied to Visual Flight Simulators.

Robert Holden, MSE, 1986, Design Considerations in the Development of an Automated Cartographic System.

Research Grants

Phillips Electronics, Linedancer Software Radio development system, \$25K.

Launching the Texas Engineering Education Pipeline: Deploying the Infinity Project Statewide (1 year), THECB, Austin, Texas, \$71K.

Edison Museum Website (1 year), Entergy Corporation, Beaumont, Texas, \$5K.

Adaptive Synthesis of an Objective Image Quality Function (1 year), TeraNex, Inc., Orlando, Florida, \$190,469.

Memory-Based Reasoning for Advanced Launch Operations (1 year) NASA Grant #NCC-10-0003, Kennedy Space Center, Titusville, Florida. \$147,448.

Automated Knowledge Generation (3 years, Co-Pi with A. Gonzalez) NASA Grant #NAG-10-0043, Kennedy Space Center, Titusville, Florida, \$456,095.

Visual Simulation Characteristics as Related to Human Factors and Training Needs (1 year, Co-Pi with R. Gilson) Army Research Institute, NTSC, Orlando, Florida. \$75K.

Visual Display Taxonomy (Summer, Co-Pi with R. Gilson). ARI Grant #M67-004/87/M/2227, Naval Training Systems Center, Orlando, Florida, \$22,924.

Investigation of Connectionist Vision Models for Knowledge-Based Intelligent Tracking Systems. Center for Research in Electro-Optics and Lasers, grant #2052033, University of Central Florida, \$44,670.

CREOL Support to the Innovative Science & Technology Program II: Array Imaging(2 years, Co-Pi with P. Gatt, M. Stickley, A. Weeks) Office of Naval Research, Boston, Massachusetts, \$140,173.

CREOL Support to the Innovative Science & Technology Program III: Array Imaging(1 year, Co-Pi with P. Gatt, M. Stickley, A. Weeks) Office of Naval Research, Boston, Massachusetts, \$94,462+30K for nCUBE.

CREOL Support to the Innovative Science & Technology Program IV: Array Imaging(3 years, Co-Pi with P. Gatt, M. Stickley, A. Weeks) Office of Naval Research, Boston, Massachusetts, \$412K.

Software Tools for Neural Network Modelling, (1 year, Co-PI with M. Georgiopolous, & G. Heileman), Florida High Technology Council, \$20K.

Parallel Network Modelling Tools, (1 semester) Martin Marietta Orlando Aerospace, \$10K.

Florida Space Grant Consortium--Undergraduate Research Participation Program NASA sponsored program for undergraduate research, (four summers), \$20K.

Design Considerations in Construction of Planetary Walking Vehicles (Summer) Martin Marietta Astronautics Company, Denver, Colorado, \$3K.

nCUBE Parallel Supercomputer (Equipment Grant w/ A. Weeks) nCUBE, Cupertino, California, \$160K.

Sparcserver 4/280 (w/ A. Weeks) Sun Microsystems Incorporated, Mountainview, California, \$141K.

Expert Systems Software/Hardware. (Equipment Grant w/ A. Gonzalez) NASA Grant #NAG-10-0043, Kennedy Space Center, Titusville, Florida, \$31,025.

Towerview Workstations (Equipment Grant) NCR Corporation, Engineering & Manufacturing, Lake Mary, Florida, \$6,345.

Motorola Computer Systems (Equipment Grant w/ A. Weeks) Emerge Systems, Inc., Melbourne, Florida, \$30K.

Intellidex Robots (Equipment Grant) Martin Marietta Orlando Aerospace, Orlando, Florida, \$5K.

Consulting Experience

Center for Occupational Research and Development (CORD), Waco, Texas.

American Academy of Ophthalmology, San Francisco, California.

McDonnell-Douglas Aerospace Co., St. Louis, Missouri.

Martin-Marietta (now Lockheed), Orlando, Florida and Denver, Colorado.

Autonomous Technologies, Inc., Orlando, Florida.

National Instruments, Austin, Texas.

Analog Devices, Norwood, Massachusetts.

Leadership/Service Summary

I served on the Faculty Senate of the University of Central Florida as well as on the SACs Computer Committee. I was a founding member of the IEEE Orlando Section Systems, Robotics and Controls Society, a Chairman of that society for two years, and the founding advisor of the Student Chapter of the society. I am currently the Section Chair, IEEE Beaumont Section and advisor to the Lamar University Delta Beta Chapter of HKN (Eta Kappa Nu). I have participated in two ABET accreditation cycles, both of which resulted in the maximum six year accreditation.

I hosted the 2004 meeting of the Southwest Electrical and Computer Engineering Department Heads Association (SWECEDHA) meeting at Lamar University. SWECEDHA is a subunit of ECEDHA, the nationally scope Electrical and Computer Engineering Department Heads Association, which also includes members from Canada, Mexico and Chile. The November meeting drew participation from SWECEDHA member schools in Arizona, New Mexico and Texas.

I have emphasized professional development in my activities with student organizations and have assisted the public schools in many ways to include assistance with computer network access, conduct of workshops for the engineering awareness education of High School teachers and students, and in the support of student science fair projects.

Professional Organizations and Licenses

IEEE - Senior Member (1991-present)

Chair, Beaumont Section (2002-present)

Signal Processing Society

Control Systems Society

Chair, Orlando Section, Systems, Robotics and Controls Society (1992-1994)

Florida Professional Engineer (by examination), Electrical Engineering #94001152.

Texas Professional Engineer, Electrical Engineering #94458.

Student Organizations and Activities

Advisor (2002-present) Eta Kappa Nu, Delta Beta Chapter (Lamar University)

Founding Advisor (1988-1999), UCF IEEE Robotics Society Student Chapter

Advisor (1993-1995) Eta Kappa Nu, Zeta Chi Chapter (UCF)

IN THE COUNTY COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE
COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA,

Plaintiff,

vs.

DENNIS FORFA,
KATHY KING
WILLIAM KING
LYNN ROZUK
WILLIAM SCHLEIFER
ANTHONY TARGOWSKI
KATHLEEN BLISS
CHARLES D. HARVEY
SHARON HATCHETT
STEPHEN LAMBERT
CATHY MOSELEY
ROBERT W. MCGUIRK
TAMMIE DURHAM
MARTIN GILL
RALPH MCCLOUD
ROY STRELCUN
WILLIAM VANDORNICK
KIRBY WHITE
WESLEY MCCOWIN
JEFFREY RITTERPUSCH
EDWARD SOUTHERN
ROBERT PAUL BUFFINGTON
JOSEPH R. MILLER
JASON LEE COLE
RONALD PAUL PAGE
GREGORY STEPHEN GODO
ALLEN DRZYMALA
DAVID FOSTER
MARK AULD
SHANE LOWE
JEROME SIFFORD

CASE NO. 06-1804-T
CASE NO. 06-2604-T
CASE NO. 06-2408-T
CASE NO. 06-1234-T
CASE NO. 06-1493-T
CASE NO. 06-750-T
CASE NO. 06-2042-T
CASE NO. 06-1323-T
CASE NO. 07-589-T
CASE NO. 07-598-T
CASE NO. 06-1135-T
CASE NO. 07-702-T
CASE NO. 06-1973-T
CASE NO. 07-486-T
CASE NO. 07-252-T
CASE NO. 06-2187-T
CASE NO. 06-2104-T
CASE NO. 06-1818-T
CASE NO. 07-287-T
CASE NO. 07-390-T
CASE NO. 07-1039-T
CASE NO. 07-390-T
CASE NO. 07-272-T
CASE NO. 07-113-T
CASE NO. 06-1590-T
CASE NO. 06-1717-T
CASE NO. 07-448-T
CASE NO. 06-1190-T
CASE NO. 07-935-T
CASE NO. 07-656-T
CASE NO. 07-955-T

Defendants.

ORDER

THIS CAUSE having come before this Honorable Court on Defendants' Motion for Issuance of Subpoena Duces Tecum, the Court having reviewed evidence, heard argument of counsel and the being fully and otherwise advised in the premises does hereby find as follows:

1. The Defendants seek issuance of a Subpoea Duces Tecum directing CMI, Inc., to produce the source code used in the Intoxilyzer 8000, software versions 8100.24, 8100.25, 8100.26 and 8100.27. The Defendants have cited the Federal Due Process Clause and the Florida Rules of Criminal Procedure as authority for their right to issuance of the Subpoena Duces Tecum.

2. Due Process Clause:

As a general proposition, a defendant does not have a common law right to discovery, State v. Diamond, 553 So. 2d 1185 (Fla. 1st DCA 1989), State v. Smith, 260 So 2d 489 (Fla. 1972). Therefore, neither by implication nor by specific provision does a defendant have a general Constitutional right to discovery. Diamond (supra), State v. Ross, 792 So 2d 699 (Fla. 1972). A defendant's Constitutional right to due process of law has resulted in some decisions giving a defendant certain limited rights as it relates to pre-trial discovery. Those cases are described in California v. Trombetta, 467 U.S. 479 (1984) as "access to evidence" cases. The access to evidence cases address the right to request of and receive from the State evidence that is material to guilt or relevant to the punishment to be imposed. Trombetta (supra) citing to Brady v. Maryland, 373 U.S. 83 (1963). This right to evidence has spawned a list of cases bearing on the defendant's right to be given or pursue evidence favorable to the defendant's defense against the charges they are facing. Those cases are collected and described in the Trombetta (supra) case.¹ In the Agurs (supra) case the U.S. Supreme Court described the nature of this evidence to which a

¹ United States v. Valenzuela-Bernal, 458 U.S. 858 (1982); Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S.103 (1935); Brady v. Maryland, 373 U.S. 87 (1963); United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972); Roviaro v. United States, 353 U.S. 53 (1957); United States v. Marion, 404 U.S. 307 (1971) and United States v. Lovasco, 431 U.S. 783 (1977)

defendant is entitled as material and defined material as evidence which would create a reasonable doubt. Based on that definition, the evidence to which a defendant is Constitutionally entitled under the Due Process Clause must be exculpatory. Since the Defendants in the instant cases cannot state that exculpatory evidence exists but rather only that it might exist and it might not exist, this Court cannot order access to the requested source code under the Due Process Clause.²

3. Florida Rules of Criminal Procedure:

Although not cited in Defendants' Motion, the ground for issuance of a Subpoena Duces Tecum implicit in Florida Rules of Criminal Procedure 3.220(f) has been thoroughly argued and briefed by both parties. The above cited provision provides that "[o]n a showing of materiality, the Court may require such other discovery to the parties as justice may require". The Defendants are seeking an Order directing the Clerk to issue a Subpoena Duces Tecum as a means of obtaining "other discovery" (id.). The principle issue regarding this basis for issuance of the requested Subpoena Duces Tecum is: "What showing must a Defendant make in order to be entitled to a finding of 'materiality' and, therefore, be entitled to issuance of a Subpoena Duces Tecum?". The defense argues that the showing must be merely that the evidence sought is reasonably calculated to lead to the discovery of admissible evidence citing to Florida Rules of Criminal Procedure 3.220(h) and Florida Rules of Civil Procedure 1.280(b)(1). Further analyzing the above standard, the defense cites to Vann v. State, 85 So.2d 133 (Fla. 1956) for the proposition that evidence which is "at least 'prima facie' not irrelevant to some probable issue in the cause" should be ordered produced. The State argues that the Defendants lack standing to bring the motion or in the alternative there is no showing of "materiality" as required by Florida Rules of Criminal Procedure 3.220(f) as the term materiality is defined in the James v. State, 453 So.2d 786 (Fla. 1984) case. The State has cited to no case that analyzes the proposition of standing to request additional discovery under Florida Rules of Criminal Procedure 3.220(f), however, the rule refers to "parties". Since the Defendants are parties to their case, it appears that they have standing. As the defense points out, the James (supra) case is a case dealing with an alleged discovery violation under Florida Rules of Criminal Procedure 3.220(b)(4) which is a provision designed to implement the defendant's rights under the Brady (supra) decision. If the definition of materiality under Florida Rules of Criminal Procedure 3.220(f) is identical to a Brady (supra) due process right to discovery then Florida Rules of Criminal Procedure

² Under United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) a defendant has a due process right to interview eye-witnesses before trial if the defendant believes the witness will provide favorable evidence for the defense. The Defendants cite to the case of B.E. v. State, 564 So. 2d 566 (Fla. 1990) for the proposition that a defendant has a constitutional right to pre-trial compulsory process. The U.S. Constitutional right to compulsory process in the Sixth Amendment is for obtaining witness attendance for trial (U.S. v. Valenzuela-Bernal (supra)). The B.E. (supra) case had to do with a claim of denial of access to a witness during pre-trial preparation by the defense and a preclusion of the defendant's ability to subpoena the witness for trial. The undersigned see the holding in the B.E. (supra) case as a condemnation of the due process violation of precluding pre-trial investigation vis a vis the therein identified three year old eye-witness who would provide exculpatory testimony for the defense and a condemnation of the violation of the defendant's right to compulsory process by preventing the subpoenaing of the three year old eye-witness for trial. Neither the Valenzuela-Bernal (supra) case nor the B.E. (supra) case stand for the proposition that a defendant has a right to compulsory process to accomplish pre-trial discovery. Such a right would be inconsistent with the limitations on deposing Category B, Category C and misdemeanor charge witnesses contained in Florida Rules of Criminal Procedure 3.220(h)(1)(B), (C) and (D).

3.220(f) is unnecessary as the defendant has a constitutional right to Brady (supra) material and a right under Florida Rules of Criminal Procedure 3.220(b)(4) to Brady (supra) material.³ It, therefore, appears that the James (supra) definition of materiality as used in that post-trial analysis of the significance of non-disclosure is inapposite in the instant cases. However, to the extent the State's definition of material is overly narrow, the defense's definition appears overly broad. The subpoena under consideration in the Van (supra) case appears to have been in the nature of a State Attorney's investigatory subpoena. The duty of the State to investigate and the right of a defendant to discovery are not synonymous and, therefore, the analysis of materiality in the Van (supra) would not be instructive for these proceedings. Florida Rules of Criminal Procedure 3.220(h) discusses discovery depositions. It requires that the scope of the examination during depositions be controlled by the Florida Rules of Civil Procedure. Florida Rules of Criminal Procedure 3.220(f) does not have a similar provision. There is not any general provision in Florida Rules of Criminal Procedure 3.220 requiring that the scope of discovery be controlled by the Florida Rules of Civil Procedure. Florida Rules of Criminal Procedure 3.220(f) specifically requires a showing of materiality. The undersigned have been unable to find any case law explaining that the term material evidence means the same as evidence that is "relevant or reasonable calculated to lead to relevant evidence". The version of Florida Rules of Criminal Procedure 3.220(f) that existed prior to the 1989 amendment of the rules [Florida Rules of Criminal Procedure 3.220(a)(5) (1988)] included the phrase "Upon a showing of materiality to the preparation of the defense...". It appears the Florida Supreme Court linked the defendant's right to additional discovery under Subsection (f) (supra) to the defendant's defense of the case. The addition of the State to the coverage of Subsection (f) (supra) appears only to have been intended to allow the State the same opportunity for additional discovery (by the State of inculpatory evidence) as the defense had to seek additional discovery (of exculpatory evidence).⁴ In the instant case the defense has not shown that any exculpatory evidence exists. Their request is to go looking for evidence which admittedly will be either inculpatory or exculpatory and the defendants cannot say which it will likely be. Absent a showing by the defense that exculpatory evidence exists, much less that it is substantial (see Black's Law Dictionary definition "material evidence")⁵ this Court cannot order issuance of a Subpoena Duces Tecum under Florida Rules of Criminal Procedure 3.220(f).

It is therefore

ORDERED AND ADJUDGED that the Defendants Motions shall be and are hereby denied.

³ To reiterate, the Agurs (supra) case defines material evidence or exculpatory evidence as evidence that *will* create a reasonable doubt. It does not state that the evidence *may* create a reasonable doubt. The Agurs (supra) Court seems to be saying that the evidence must be of such a significant character that it will result in an acquittal if presented in conjunction with all the State's evidence and other defensive evidence to a jury.

⁴ This interpretation appears consistent with the posture of discovery motions existing before the 1989 amendment and the analysis required by the trial court upon receipt of a discovery motion. See generally State v. Coney, 272 So.2d 550 (Fla. 1st DCA 1973)

⁵ There has been no showing that there probably are errors in the software or source code. It has also not been shown that if any errors do exist they probably render the test results unreliable.

DONE AND ORDERED in Chambers at Charlotte County Justice Center, Punta Gorda, Charlotte County, Florida, this 27 day of September, 2007.

/s/ W. WAYNE WOODARD

W. Wayne Woodard
County Court Judge

PETER A. BELL

Peter A. Bell
County Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to Office of State Attorney, Charlotte County Justice Center; Christopher Brown, Esq., Attorney for Defendants Kirby White, Tammie Durham, Martin Gill, Ralph McCloud, Roy Strelcun, William Vandornick, Wesley McCowin, Jeffrey Ritterpusch and Edward Southern, 265 E. Marion Avenue, Suite 114, Punta Gorda, FL 33950; Paul D. Sullivan, Esq., Attorney for Defendants Robert Paul Buffington, Joseph R. Miller, Jason Lee Cole, Ronald Paul Page and Gregory Stephen Godo, 520 E. Olympia Avenue, Punta Gorda, FL 33950; Thomas D. Marryott, Esq., Attorney for Defendants Allen Drzymala, David Foster and Mark Auld, 126 E. Olympia Avenue, Punta Gorda, FL 33950; Amber Weaver, Esq., Attorney for Defendant Shane Lowe, 525 E. Olympia Avenue, No. 7, Punta Gorda, FL 33950; and Toby Andrew Oonk, Esq., Attorney for Defendant Jerome Sifford, 126 E. Olympia Avenue, Suite 405, Punta Gorda, FL 33950 by Courthouse Box Delivery; and Kerry E. Mack, Esq., Attorney for Defendants Kathleen Bliss, Charles D. Harvey, Sharon Hatchett, Stephen Lambert, Cathy Moseley, Dennis Forfa, Kathy King William King, Robert W. McGuirk, Lynn Rozuk, William Schleifer and Anthony Targowski, 2022 Placida Road, Englewood, FL 34223 by United States Mail this 27 day of September, 2007.

VICKI L. DELLE DONNE

Vicki L. Delle Donne
Judicial Assistant

IN THE COUNTY COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

8000 CASES

KATHLEEN BLISS ✓
CHARLES D. HARVEY ✓
SHARON HATCHETT ✓
STEPHEN LAMBERT
CATHY MOSELEY ✓
DENNIS FORFA
RANDY L. GOFFE
NICHOLAS J. JONES
KATHY KING
WILLIAM KING
ROBERT W. MCGUIRK
PATRICIA MCKEAN
LYNN ROZUK
WILLIAM SCHLEIFER
ANTHONY TARGOWSKI

CASE NO.: 06-2042 T
CASE NO.: 06-1323 T
CASE NO.: 07-589 T
CASE NO.: 07-598 T
CASE NO.: 06- 1135 T
CASE NO.: 06-1804 T
CASE NO.: 07-1007 T
CASE NO.: 07-929 T
CASE NO.: 06-2604 T
CASE NO.: 06-2408 T
CASE NO.: 07-702 T
CASE NO.: 06-2333 T
CASE NO.: 06-1234 T
CASE NO.: 06-1493 T
CASE NO.: 06-750 T

5000 CASES

KRISTINE A. ADKINS, ✓
WILLIAM J. SUTTON, ✓
STEVEN D. CHAMBERS,
TERRI W. ELMY,
GINA L. TAYLOR

CASE NO.: 05-2043 T
CASE NO.: 04-1146 T
CASE NO.: 06-16 T
CASE NO.: 06-193 T
CASE NO.: 06-17 T

Defendants,

NOTICE OF FILING
AND
OMNIBUS MOTION TO CONTINUE TRIALS

The above-named defendants, who, taken together, have previously filed pre trial motions directed to the discovery of the source code for the Intoxilyzers used in the State of Florida, hereby file the following:

- A. Statement of Corporate Policy Concerning Intellectual Property associated with Intoxilyzer Brand of Breath Alcohol Instruments

- B. Letter from Toby Hall, President of CMI, Inc. dated September 25, 2007, consisting of 2 pages.

OMNIBUS MOTION TO CONTINUE

The Defendants, by and through their undersigned attorney, hereby move the Court to enter an Order continuing the trial of their case until CMI, Inc. actually delivers the source code to their expert, Dr. Mylar, for his inspection and review and until the report and opinion(s) of Dr. Mylar can be presented to the Courts of the State of Florida, including this Court.

Undersigned counsel, a member of State Florida Association of Criminal Defense Lawyers, FACDL, hereby certifies to the Court that the local representative of CMI, Inc., an attorney with the Sarasota firm of Abel Band represented today, to the Honorable Kimberly Bonner, that CMI, Inc. was, in fact, going to produce the source code in this State under the same kind of protective order that was entered in the State of Minnesota in the Underdahl case.

These Defendants, and a host of others around the state, have been seeking the source code for several years. Although some defendants in Sarasota County have met with a measure of success in their quest to obtain the source code, this Court has denied Defendants access to the source code for reasons set forth in the various orders it has entered.

Now that the entity in possession of the source code has agreed to provide it for inspection after an agreed protective order is entered, it would be highly prejudicial to these Defendants to have to go to trial until the source code has been examined by their expert, Dr. Mylar.

Undersigned counsel further certifies to this Court that:

- a. CMI, Inc. has agreed, in at least one court in this State, that it will produce the source code once an agreed protective order is in place; and,
- b. Attorneys for defendants in this County and statewide have requested that Dr. Mylar provide an estimate for the cost of his review, inspection and report thereof as to the source codes for the Intoxilyzer; and,
- c. Attorneys for defendants in this County and statewide have agreed to fund the cost of Dr. Mylar's review, inspection and report.

This motion is made in good faith and not for the purpose of delay. Due to time constraints, undersigned counsel has not obtained the signatures of her clients to this motion, but assures the Court that:

- a. She has had discussions with most of her clients within the last few days;
- b. Some of her clients have not yet returned her phone calls.
- c. Some of her clients live out of state or out of county and are not available to sign upon short notice.

- d. She is taking all steps necessary to notify her clients of these recent developments.
- e. Under these circumstances, a waiver of the written agreement of the multiple clients is requested.

WHEREFORE, Defendants pray this Honorable Court enter an omnibus Order continuing the trials of the affected Defendants until Dr. Mylar has received the source codes, inspected the source codes and rendered his written opinion(s) on the same.



Kerry E. Mack
Mack Law Firm CHARTERED
2022 Placida Road
Englewood, FL 34224
941 475 7966
941 475 0729 fax
FBN 337897
kerry@macklawfirm.org

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were provided by fax to:

Honorable W. Wayne Woodard, County Judge
Honorable Peter A. Bell, County Judge
Office of the State Attorney, Attn: Megan Belay, Esq. and
Michael Anthony Pica, Esq.

On this 5th day of October, 2007.



Kerry E. Mack



316 E. 9th St.
Owensboro, KY 42303
1-866-835-0690
Fax: 270-685-6678
www.alcoholtest.com

Statement of Corporate Policy Concerning Intellectual Property Associated with INTOXILYZER® Brand of Breath Alcohol Instruments

All rights in software, including both source code and object code, used in association with the INTOXILYZER® brand of breath alcohol instruments are considered confidential, proprietary or a trade secret owned by CMI, Inc. Disclosure of the software would cause irreparable harm to CMI, Inc.

Despite the utmost importance of maintaining its software in strict confidence, CMI, Inc. firmly believes that supporting law enforcements' efforts to maintain safe roads and highways for each of its citizens and guests is equally important.

Therefore, CMI, Inc. is adopting a revised corporate policy wherein CMI, Inc. will work with interested parties to provide controlled viewing of its software when ordered by a court of competent jurisdiction. Each interested party, having executed an agreed upon Non-Disclosure Agreement and under Protective Orders provided by CMI, Inc. and issued by the court, will be provided an opportunity to view the software under certain terms designed to protect CMI, Inc.'s rights. A Protective Order and Non-Disclosure Agreement will be provided by CMI, Inc. upon written request made to the attention of the President. The extent of charges will be determined and agreed upon at the time of execution of the Non-Disclosure Agreement.

In this manner, CMI, Inc. can control and protect its valuable intellectual property rights while the issue of CMI, Inc.'s software can be removed as an impediment to law enforcements' abilities to prosecute and convict drivers accused of operating a motor vehicle while under the influence of alcohol. It is the goal of CMI, Inc. that this revised policy coupled with law enforcement's on-going use of the INTOXILYZER® brand of breath alcohol instruments will continue to lower the incidence of drunk drivers on roads and highways.

Further information can be obtained by contacting CMI, Inc.'s president, Toby Hall at the address below.

US Mail:

Toby S. Hall
President, CMI, Inc.
316 East 9th Street
Owensboro, KY 42303

INTOXILYZER® ...so you can breathe easier





316 E. 9th St.
Owensboro, KY 42303
1-866-835-0690
Fax: 270-685-6678
www.alcoholtest.com

September 25, 2007

CMI Customer Communication

Greetings! My name is Toby Hall, President of CMI, Inc. I was appointed president in April of this year. As many of you know, I have been with CMI, Inc. for almost 17 years now. During that time, I have worked in design engineering, manufacturing, sales, and marketing. I have spent time providing training on instrumentation both at CMI and in many of your labs and training facilities. I have truly enjoyed what I have done over the past 17 years and look forward to putting my hands-on experience to good use in continuing to serve you.

I want to thank you for your continued patronage as customers of CMI and am always open to discuss your thoughts on both how we are performing as your supplier and how your needs are changing. CMI strives to meet your needs, allowing you to focus on running your respective programs.

CMI's products are used world-wide in law enforcement and employment related applications and have been approved for use by many internationally recognized bodies (NHTSA, OIML, Home Office (UK), etc.). These products have proven themselves in forensic laboratories and in the field time and time again. A new challenge has arisen, however, that isn't challenging the product's performance per se (because everyone knows that the way to test an instrument's performance is independently with known, traceable standards), but rather the access to intellectual property associated with the breath testing instruments and owned by CMI. Access to this intellectual property is purported to (1) give the viewer insight into the inner workings of the instruments and (2) to allow the viewer to determine whether the instruments are working properly and accurately.

The first reason given above -insight into the inner workings of breath testing instruments- is true and why indeed the intellectual property, i.e., the source code in particular, is very valuable to CMI. Our competitors, both existing and potential (e.g. in developing countries) would gain a significant economic advantage by learning how CMI is able to be so flexible in serving multiple customers while providing quality instruments. The second reason given above -determining whether instruments are working properly and accurately- is, as I have previously stated, not determined by an examination of the source code associated with that instrument. Still, the denial of access to CMI's intellectual property has placed a strain on our customers' resources in supporting their

INTOXILYZER® ...so you can breathe easier



programs. Therefore, I am taking actions in support of your programs to allow controlled viewing of our source code.

Over the coming weeks, I intend to provide a means for the review of our most valued intellectual property in a way that will protect our property and interests and provide relief to you, our highly valued customers.

As more information becomes available regarding this matter, I will be back in touch.

Again, I want to thank you all for your continued support of CMI, Inc. With this change in policy, I believe we have taken a positive step in supporting you and your changing needs.

Thank you,

A handwritten signature in black ink, appearing to read "Toby S. Hall". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Toby S. Hall
President
CMI, Inc.

Please find attached, a statement regarding CMI's modified position on the viewing of our intellectual property (source code).

Insurance -- Personal injury protection -- Discovery -- Software used to reduce medical bills -- Appeals -- Insurer asserting certiorari challenge to order compelling production of information and documents pertaining to software and database used to reduce medical bills has not shown that discovery order will cause irreparable or material harm where insurer has option to use evidence other than computer program to support defense that amounts charged exceed reasonable amounts for services rendered -- Trial court did not depart from essential requirements of law in ordering insurer to produce underlying data upon which it based determination of reasonable charge where order does not state absolute requirement that insurer produce materials allegedly not in its possession, but merely establishes condition that if insurer wants to use program and database in defense it must produce requested discovery -- No merit to argument that medical provider is not entitled to discovery on issue because burden to prove reasonableness of charges is on provider, not insurer, where insurer raised excessiveness of charges as affirmative defense

SENTRY CASUALTY COMPANY, Petitioner, vs. 1st HEALTH, INC., as assignee of ERNESTO IBARRA, Respondent. Circuit Court, 12th Judicial Circuit (Appellate) in and for Sarasota County. Case No. 2006-CA-10565-NC, Division A. L.C. Case No. 2005-SC-6140-NC. July 10, 2007. Petition for Writ of Certiorari from the Sarasota County Court, Kimberly C. Bonner, County Judge, and Judy Goldman, County Judge. Counsel: Douglas H. Stein, Anania, Bandklayder, Blackwell, Baumgarten, Torricella & Stein, Miami, for Petitioner. Thomas Andrew Player, Weiss Legal Group, P.A., Maitland, for Respondent.

OPINION

[Editor's note: County court order published at 13 Fla. L. Weekly Supp. 1210a]

(BOB McDONALD, J.) Petitioner, Sentry Casualty Company, the Defendant below, seeks review of the trial court's "Order Granting Plaintiff's Motion to Compel Better Responses to Discovery", entered October 4, 2006 [13 Fla. L. Weekly Supp. 1210a]. The Court has reviewed proposed Opinions submitted by the parties. With a minor change, the Court accepts and adopts the Opinion submitted by 1st Health, Inc. This Court is mindful of the concept of law pertaining to a court adopting one party's proposed order verbatim. (See *Perlow v. Berg-Perlow*, 875 So. 2d 383 (Fla. 2004) and *T.D. vs. DCF*, 924 So. 2d 827 (Fla. 2d DCA 2005).) In this instance, however, the proposed order adopted reflects this Court's opinions, findings, and the law. Additionally, the opposing party was given an opportunity to submit their own proposed order. This Court has made its own thoughtful and independent analysis. Under the circumstances, no valid purpose would be served by simply "rewording" the adopted proposed order.

FACTS

1st Health sued Sentry on November 10, 2005, for breach of contract after Sentry reduced payment for certain charges submitted to Sentry for treatment rendered to its insured, Ernesto Ibarra, for injuries sustained in an automobile accident which occurred on January 28, 2005. Ibarra sought treatment for his injuries from 1st Health and assigned his personal injury protection benefits thereto. 1st Health alleged that the reductions made by Sentry were wrongful and violated § 627.736, Fla. Stat. (2005), which requires that an insurer pay personal injury protection benefits at eighty percent of all reasonable

expenses for medically necessary health care services related to a bodily injury, arising out of the ownership, maintenance, or use of a motor vehicle.

1st Health conducted discovery to determine how and why Sentry took the reductions and denials to the bills at issue herein. By deposition of Sentry's adjuster Stacey Ellis, 1st Health learned that the sole basis for the reductions and denials was Sentry's reliance on a computer program licensed to Sentry by non-party Mitchell Medical, which in turn utilizes a database provided by non-party Ingenix. 1st Health served a request for admissions, interrogatories, and a request to produce seeking information related to the software system and database Sentry relied upon in making its decision to pay less than 80% of the amount billed by 1st Health. Sentry did not produce any documents and objected to 1st Health's discovery directed to the Mitchell Medical software based upon attorney-client privilege, work product privilege, and an assertion of trade secret protection. 1st Health moved to compel better responses to the discovery requests, and on July 28, 2006 the trial court ordered Sentry to make a proffer of evidence to the court and to 1st Health showing the information Sentry's witnesses will be able to testify to regarding the Mitchell Medical software and the data used in adjusting the subject bills. The proffer from Sentry included only a transcript of a deposition of Michelle Iacobacchi, a corporate representative of Mitchell Medical, from an unrelated case, and a statistical summary and charge distribution graphs from Ingenix, the company that supplies the database utilized by the Mitchell Medical software.

On September 7, 2006, a subsequent hearing on 1st Health's motion to compel better responses was held, wherein 1st Health argued that Sentry's evidence proffer was not responsive to 1st Health's discovery requests and failed to indicate what Sentry was willing to produce; that the proffer only gave an incomplete summary of Ingenix's statistical analysis and methodology, and offered no information regarding Mitchell Medical's use of the database; 1st Health asserted that the information was insufficient to allow proper preparation for trial and does not give details necessary to challenge the evidence that Sentry indicated it intends to present in defense of this case, and that failure to allow discovery of the data relied upon by Sentry would be highly prejudicial to 1st Health by rendering it incapable of properly presenting its case or effectively cross-examining Sentry's witnesses.

On October 4, 2006, the trial court granted 1st Health's motion to compel better responses to discovery and ordered that:

Within 30 days from the date of this order, the Defendant shall completely respond to the Plaintiff's First Set of Interrogatories, First Request to Produce, Supplemental Interrogatories and Supplemental Request to Produce. If the Defendant fails to completely respond, it shall be prohibited from relying upon or utilizing the Mitchell Medical/Ingenix software or the recommendations of Mitchell Medical and/or Ingenix in any way in its defense of this case.

Sentry filed a Petition for Writ of Certiorari of the trial court's Order November 2, 2006, in which it argues only two points; first, that the trial court's order departed from the essential requirements of law by requiring Sentry to produce documents that are not in its possession, custody, or control, and second, that the requested documents are not relevant to 1st Health's claim.

LEGAL ANALYSIS

A petition for certiorari must pass a "three-pronged" test before an appellate court can grant relief from an erroneous interlocutory order:

A petitioner must establish (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the action (3) that cannot be corrected on post-judgment appeal.

The final two prongs of the test are jurisdictional. The appellate court must conduct the jurisdictional analysis before it is empowered to determine whether to grant relief on the merits, i.e., whether the non-final order departs from the essential requirements of the law. *Barker v. Barker*, 909 So. 2d 333, 336 (Fla. 2nd DCA 2005) (quoting *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 648 (Fla. 2nd DCA 1995)).

The Petition for Writ of Certiorari alleges that the Order of the lower tribunal will cause irreparable harm by requiring disclosure of documents the petitioner alleges are not in its possession. However, Sentry has not shown how it will suffer any material or irreparable harm, particularly where the record supporting the petition shows that Sentry has the option of introducing other evidence, apart from the Mitchell Medical/Ingenix information, to support their defense that the amounts charged by 1st Health exceed the reasonable amounts for the subject health care services. The court's order does not foreclose Sentry from asserting this defense, and therefore Sentry cannot show any irreparable or material harm.

Even if Sentry could overcome the jurisdictional hurdle of showing material harm that cannot be remedied by plenary appeal, it is not a departure from the essential requirements of law for the Court to order that Sentry produce the underlying data upon which Sentry has based its determination of the "reasonable charge" for the services provided by Respondent, because that order is not absolute. The court did not state as an absolute that Sentry must produce materials that are allegedly not in its possession, custody, or control, but rather simply ordered that if Sentry intends to rely on the Mitchell Medical/Ingenix determination in the defense of this case, that it must produce the underlying data.

Sentry relies on *Progressive Express Insurance Co. v. Bixon Chiropractic Center, P.A.*, No. 04-115-AP (Fla. 18th Cir. Ct. Nov. 18, 2005) in support of its argument. However, *Bixon* is distinguishable from, and not inconsistent with, the order in the instant case because, unlike the order in *Bixon*, the order to produce the materials in this case was not absolute, it was conditional; if Sentry wants to use Mitchell Medical in defense of the case, then it must provide the discovery sought by Respondent.

The fact that Sentry does not have, and apparently cannot obtain, the underlying data is a consequence of the business arrangement it entered into with Mitchell Medical. When Sentry entered into its agreement with Mitchell Medical it may have lacked the foresight to anticipate the evidentiary quandary it now faces. However, Respondent should not be penalized for Sentry's poor judgment by having its ability to challenge Sentry's evidence compromised; to do so would allow Sentry to use the Mitchell Medical program as both a shield and a sword and would be highly prejudicial to Respondent. The Court's order is consistent with well-established rules of evidence and does not violate Fla. R. Civ. P. 1.350 because even if Sentry is unwilling or unable to obtain the relevant discovery from Mitchell Medical, it may still be able to independently support its determination of the "reasonable charge" for the subject services without any reference to the Mitchell Medical program or its results.

There is no departure from the essential requirements of the law. Sentry has not been forced to produce anything. The court has simply stated that if Sentry intends to rely on the Mitchell Medical/Ingenix program in its defense, then it must produce discovery relevant to that defense; if Sentry chooses not to produce that information, or cannot because of the terms of a contractual relationship that it chose to enter into, then it is free to introduce other discoverable evidence to support its defense. If this creates

what Sentry perceives to be a “catch-22” with respect to its use of Mitchell Medical, then it is a “catch-22” of its own construct.

Sentry's second point is that the order requires documents to be produced that are not relevant to the issue of the reasonable amount of 1st Health's bills. Sentry reasons that because the burden is on 1st Health to prove the reasonableness of its medical bills, its defenses to the claim are irrelevant and discovery should be prohibited as to those defenses. In support of this argument, Sentry cites several cases including *Derius v. Allstate Indemnity Company*, 723 So. 2d 271 (Fla. 4th DCA 1998) and *State Farm Mut. Auto. Ins. Co. v. Sestile*, 821 So. 2d 1244 (Fla. 2nd DCA 2002). These cases hold that the Plaintiff has the burden of proof as to the reasonableness of the bill. However, it is axiomatic that in paying a reduced amount Sentry is asserting that the amount paid is reasonable, and once a Plaintiff provides evidence and argument as to the reasonableness of the medical bill, the Defendant must then provide a defense. Further, Sentry raised an affirmative defense which alleged that Respondent's charges were in excess of what is customarily charged; it is Sentry's burden to prove its affirmative defense, and Respondent is entitled to discovery regarding that defense. Sentry's evidence proffer made clear that Sentry intends to rely upon the use of the Mitchell/Ingenix database at trial to support its defense, wherein it states to proffer “the evidence Ms. Carla Gee of Ingenix will provide at trial.” If Sentry wishes to introduce testimony concerning the accuracy of the database or how the database determines the recommended charges, evidence of the underlying data and methodology for determining the amount paid becomes very relevant and discoverable pursuant to § 90.402, Fla. Stat. (2005) and § 90.705, Fla. Stat. (2005), since such testimony would necessarily have to come from an expert witness.

In its Petition, Sentry alludes that *State Farm Mut. Auto. Ins. Co. v. Sestile*, 821 So. 2d 1244 (Fla. 2nd DCA 2002), stands for the proposition that an insurer can utilize a database to reduce bills and defend its reduction on that basis without having any obligation to produce the data upon which it relies. However, although *Sestile* holds that an insurer's use of a database to determine payment amounts does not violate the Florida No-Fault law, *Sestile* does not address the issue of whether an insurer must produce the data if it intends to rely on such at trial. *Sestile* also says that it is the insured's burden to prove the accuracy, or lack thereof, of the insurer's database, and this aspect of the holding clearly supports production of the data in order to give the Respondent a meaningful opportunity to challenge the evidence.

1st Health has the right to conduct discovery regarding the information being relied upon by Sentry to deny and reduce the Plaintiff's medical bills. It is incumbent upon the Defendant to produce the evidence upon which it intends to rely for defense of its case; it is not the responsibility of Plaintiff to independently obtain this evidence if it is in the possession of a party other than the Defendant.

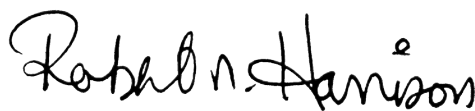
The order does not cause Sentry material harm that cannot be remedied by plenary appeal, nor does the order depart from the essential requirements of law; further, to the extent that Sentry wishes to rely on the Mitchell Medical/Ingenix software program and database in the defense of this case, the materials that are the subject of the discovery order are relevant and discoverable. Accordingly, the Petition for Writ of Certiorari is DENIED.

It is therefore,

ORDERED AND ADJUDGED that the County Court's October 4, 2006 Order Granting Plaintiff's Motion to Compel Better Responses to Discovery [13 Fla. L. Weekly Supp. 1210a] is hereby AFFIRMED.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by regular U.S. mail to Megan Belay, Assistant State Attorney, State Attorney's Office, 350 E. Marion Ave., Punta Gorda, FL 33950 on this 26th day of December , 2007.

A handwritten signature in black ink, reading "Robert N. Harrison". The signature is written in a cursive style with a horizontal line underneath it.

Robert N. Harrison