IN THE COUNTY COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA
Plaintiff,

v. **CASE NO: 2006 CT 02109 SC**

JACK E. IRISH, JR., et.al.*
Defendant.
***(Attached is a complete list of all cases subject to this Order.)**

ORDER ON DEFENDANT'S MOTION TO COMPEL PRODUCTION OF THE SOURCE CODE

THIS CAUSE came to be heard on Defendant's Motion to Compel Production of the Source Code.

The issues before the court were (1) Whether the Defendants were entitled to production of the source code for the Intoxilyzer, and (2) If the Defendants were found to be so entitled but the State was unable or unwilling to comply, what is the appropriate sanction.

The Defendants' presented the testimony of Dr. Harley Myler and introduced various documents and photographs referencing the Intoxilyzer 5000. The State presented the testimony of two engineers (William Schofield and Glen Gilbreath) from CMI, Inc.;[1] Laura Barfield from FDLE Alcohol Testing Program; Ed Conde, Chemical Engineer with the U.S. Department of Transportation; and Dr. Frank Urban, a Professor of Electrical and Computer Engineering at Florida International University. Documentary evidence was also introduced by the State After hearing the evidence presented, argument of counsel, being provided supplemental legal argument of counsel and after otherwise being fully advised of the premises, the court hereby,

ORDERS AND ADJUDGES that said **Motion to Compel Production** is **Granted.**

INTRODUCTION

[1] The Defendants had a subpoena duces tecum issued and served on the resident agent for CMI, Inc. demanding production of the source code. The CMI people appeared, but without the source code.

The Defendants argue that the State should be required to provide the Defendants with the software source code for the Intoxilyzers in Sarasota County. The Defendants maintain that they seek production in order to determine (1) whether the intoxilyzer(s) used by the government to establish guilt of the Defendants for driving under the influence of alcohol have been substantially modified, (2) whether the intoxilyzer being used was approved by the Florida Department of Law Enforcement (FDLE), and/or (3) what the effect the source code has on the intoxilyzer 5000's reliability. *State v. Bender*, 382 So.2d 697 (Fla. 1980); *Muldowny v. State*, 871 So.2d 911 (Fla. 5th DCA 2004). The Defendants maintain that their authority is based in part on Section 316.1932(1)(a), Fla. Stat. (2005) which provides that only approved breath-testing machines may be used to establish impairment pursuant to Florida's Implied Consent Law and Implied Consent Rule 11D-8.003 which establishes the procedures for approval of the intoxilyzers. For additional authority, Defendants point to section 316.1932(1)(f)(4), Fla. Stat. (2005), which states that when a person tested with a machine requests it, full information concerning the test is to be made available. The Defendants therefore are requesting production of the software program on the intoxilyzers used in Sarasota County and the source code of the software program that was approved for use in 11D-8.003.[2]

The State argues that (1) production of the source code is not required because the information is not "material" under Fla. R. Crim. P. 3.220(f), (2) they should not be required to produce the source code when it is not within their direct or even indirect possession as it is maintained and held confidential by its owner, CMI, Inc., (3) the source code is a trade secret that is not discoverable under section 316.1932(1)(f)(4), Florida Statute (2005), and (4) the defendant(s) do not need the source code in order to determine the precision, accuracy and reliability of the Intoxilyzer and the request is merely a fishing expedition.

FACTS

The evidence presented at this hearing revealed that the source code is the set of commands for sequencing the operation, all of the data entry questions, the operational parameters and the mathematical formulas for the analysis of a defendant's breath sample. *Service Manual Intoxilyzer 5000, © 1999, Page 64.* These commands are translated on EPROMs (erasable programmable read only memory chips). Glen Gilbreath, the principal engineer for the Intoxilyzer, testified that the Intoxilyzer obtains 24 analog readings from an infrared detector

[2] Only approved breath testing machines may be used to establish impairment pursuant to section 316.1932(1)(a), Florida Statutes (2005), commonly known as Florida's "Implied Consent Law." *State v. Polak*, 598 So.2d 150 (Fla. 1st DCA 1992); *State v. Flood*, 523 So.2d 1180 (Fla. 5th DCA 1988). FDLE rule 11D-8.003 establishes the procedures for approval of the instruments/machines and its software.

approximately every six-tenths of a second. A breath sample can last from 5 to 15 seconds, with the average test lasting 7 seconds. *Understanding the Intoxilyzer 5000*, Page 17. Thus, each breath sample has between 200 and 600 analog readings. These analog readings are converted to a digital format and are sent to the CPU for analysis utilizing the algorithm contained in the source code. Mr. Gilbreath testified that each set of 24 readings is averaged, and then this average is adjusted to take into account ambient conditions, which then yields a preliminary result. The process continues as long as the defendant blows into the Intoxilyzer 5000. Each of these preliminary results is compared to the previous result as part of the slope monitoring system. The last adjusted result obtained is reported on the print card, and then all of the preliminary results and the raw data are permanently deleted.

There was further testimony and documents introduced that indicate that one feature of the Intoxilyzer 5000 is the ability to avoid false positives caused by mouth alcohol. See Understanding the Intoxilyzer 5000, Defendants' Exhibit E, Page 17 *("A mouth alcohol condition can be from breath freshener sprays, mouthwash, or cough syrups, all of which contain large amounts of alcohol. The Intoxilyzer is capable of detecting residual mouth alcohol through the use of a slope monitoring system.")* Dr. Myler, Laura Barfield and Mr. Gilbreath, all agreed that the slope monitoring system is an important part of the reliability of the Intoxilyzer. The Defendant's point out that CMI, Inc. had in fact altered the slope criteria, following a request from the State of Florida, to insert a break point at .20. The Defendants note that this is important in part because this modification was done when the R Software was created in 1989, when breath testing was under control of HRS. The Defendants argue that the significance is that when using the modified software program, the Intoxilyzer is able to report a valid sample, where the unmodified software would report an invalid sample. The Defendants opine that they need to view the source code to evaluate the reliability of the Intoxilyzer.

The Defendants point out through exhibits and testimony that the software does not merely print results that are detected by the hardware. The software processes the data from the hardware, performs a series of calculations, including the "slope monitoring system" to detect substances such as mouth alcohol which could give false positives. The Intoxilyzer software, after processing the raw data, deletes that same raw data. These mathematical computations performed on the deleted data, produce a result that the State uses to prove that the defendant committed the crime of DUI.

Mr. Gilbreath testified that the Intoxilyzer 5000 periodically conducts a self-diagnostic test called a 'checksum.' A 'checksum' is a form of redundancy check, a simple measure for protecting the integrity of data by detecting errors in data, in this case concerning the data stored

on the EPROMS. Gilbreath stated that the checksum employed adds up the bytes and stores the resulting value. Later, the initial or authentic checksum is compared to the checksum of the EPROMS and if the sums match it is concluded that the message was probably not corrupted. This is the simplest form of 'checksum.' This particular 'checksum' cannot detect several different types of errors. In particular, such a checksum would not detect: (1) re-ordering of the bytes in the message;(2) inserting or deleting zero-valued bytes; (3) multiple errors that cancel out each other out. Mr. Gilbreath acknowledged that there are more sophisticated redundancy checks designed to address these weaknesses.

Dr. Frank Urban testifed that he doesn't need the source code to test the accuracy of the machine. In fact, the State specifically pointed out in their argument that Dr. Urban testified:

> " . . . in an international programming competition, whose prize is awarded to the most efficient and effective computer program, the judges in that competition give no regard to the programmer's source code to determine a winner. . .. the ability to access the source code would be as insignificant as accessing the design plans for any other part, such as a processor board, and would yield little to no information as to the accuracy and reliability of the instrument as a whole."

ANALYSIS

Turning to the question of whether the production of the source code is or should be required, many county courts have denied this request, generally holding that the State cannot be required to produce what it does not possess and cannot obtain.[3] *State v. Sahagian,* No. 04CT71102-MEG (Fla. Lee Cty. Ct. March 22, 2006) (*the court however did order the State to provide the diagnostic check card that displays the EPROMS for each intoxilyzer)*; *State v. Greene*, 13 Fla. L. Weekly Supp. 390b (Fla. Broward Cty. Ct. 2005); *State v. Hamal*, 13 Fla. L. Weekly Supp. 390a (Fla. Broward Cty. Ct. 2005); *State v. O'Brien,* 13 Fla. L. Weekly Supp. 389a (Fla. Broward Cty. Ct. 2006); *State v. Salesman,* No. 05-007336CF10A (Fla. Cir. Ct. February 28, 2006); *State v. Fuller,* 12 Fla. L. Supp. 811a (Fla. Brevard Cty. 2005) *(this was an banc unanimous ruling of the Brevard County judge).*

Other courts, upon request from the State, have gone further by granting the State's Motion to Strike the Defendant's Motion to Produce, finding that no evidentiary hearing was

[3] Some of the courts have also included in their reasoning the argument that the Defendants failed to establish any preliminary showing that there was something wrong with the performance of the Intoxilyzer 5000.

necessary.[4] *State v. Felipe Salce,* 13 Fla. L. Weekly Supp. 263b (Fla. Broward Cty. Ct. 2006); *State v. Bird,* 13 Fla. L. Weekly Supp. 283a (Fla. Broward Cty. Ct. 2006).

In other counties, the Defendants have attempted to obtain the source code by asking the Florida court to issue a certificate under seal to the appropriate court in Daviess County, Kentucky, so that the Kentucky court would approve a summons or subpoena duces tecum requiring the records custodian of CMI, Inc. to provide the source code for the Intoxilyzer 5000. *See Section 942.03, Fla. Stat. (2005).* In order for a Florida court to enter such an order, the witness must be a "material" witness in the prosecution pending in the court. *Id.* The county court judges faced with this issue have found that the Defendants failed to sustain their burden and thus denied such a request. *State v. Fischer,et. al.,* CT03-2860 (Fla. St. Johns County February 14, 2006); *State v. Kromberg, et. al.,* CT04-1783 (Fla. St. Johns County February 15, 2006); *State v. Spaulding, et. al.,* 05-034808 (Fla. Palm Beach Cty. 2005).

Most recently, in *In Re: Subpoena Duces Tecum 2006-CT-002109* (Kentucky Daviess Dist. Ct. April 25, 2006), the Kentucky court was faced with CMI, Inc., a Kentucky corporation's[5] Motion to Quash Defendant's subpoena duces tecum[6] served by the Defendant in this case, i.e. *State v. Irish.* The Kentucky District Court found that the Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in a Criminal Proceeding (*in Florida it is found in Chapter 942),* which has been adopted by most states, applies to subpoena duces tecum[7] and to CMI, Inc., and must be followed by the Defendants in this case. The court went on to hold that the Defendants did not follow the statutory procedures of first making a showing before a Florida Court that there is a material need for the witness.[8] The court went on to note that at least three Florida courts had denied a Defendant's request and concluded that it would do the same. See also *State v. Fischer,et. al.,* CT03-2860 (Fla. St. Johns County February 14, 2006); *State v. Kromberg, et. al.,* CT04-1783 (Fla. St. Johns County February 15, 2006); *State v. Spaulding, et. al.,* 05-034808 (Fla. Palm Beach Cty. 2005).

This Court has additionally been made aware of a recent opinion in *State v. Licari,* CTC05-1074XAAASP (Fla. Pinellas Cty. 2006) by the Honorable Judge Donald Horrox. After

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[4] These courts found the source code to be the secret intellectual property of a Kentucky corporation, CMI, Inc., and not within the State's possession and thereupon held that the State cannot be compelled to produce something that it does not have.

[5] CMI, Inc. is the manufacturer of the Intoxilyzer 5000 and the new Intoxilyzer 8000 that came on line in Florida, March of this year, 2006.

[6] The subpoena required production of all "evidence" of any and all source codes "...from 1988 to date."

[7] See *In Re State of California for the County of Los Angeles, Grand Jury Investigation,* 471 A.2d 1141 (Md., 1984); *In the Matter of a Rhode Island Grand Jury Subpoena,* 605 N.E.2d 840 (Mass. 1993)

[8] Upon a proper showing, the Florida Court would issue a certificate under seal that there is a material need for the witness and the information sought. The certificate would then be brought before a judge of court of record in the county in which the witness resides.

hearing testimony from Dr. Myler for the defense, Glen Gilbreath, CMI, Inc.'s principal engineer of the Intoxilyzer 5000, and Laura Barfield from FDLE Alcohol Testing Program for the state, Judge Horrox denied the defendant(s)' motion to compel production of the source code and certified the question as one of great public importance. The denial appears to have been founded on the following reasons: (1) There was no showing by the defendants that the Intoxilyzer 5000 is producing inaccurate results; (2) There was no showing that the Intoxilyzer 5000 has been modified to the extent that it would have any impact on the breath test readings, thus making any changes insubstantial; (3) The Intoxilyzer 5000 was tested by CMI, Inc. and FDLE and found to be accurate and reliable; (4) The State does not have the source code and cannot be compelled to produce what it does not have; (5) The "full information" provision in section 316.1932(1)(f)(4), Florida Statutes (2005), only requires the State to provide "full information" within its possession; (6) The variations in the inner workings of the Intoxilyzer 5000 were adequately explained by the CMI engineer as to have no affect on the analytical ability of the 5000; and (7) The defendants have failed to sustain their burden of proof to compel production of the source code (a trade secret) by showing that allowing the trade secret privilege to remain in effect would "conceal fraud or otherwise work injustice."[9]

A few courts however, have granted the Defendant's request to compel production of the source code, and have ordered exclusion[10] for the State's failure to comply. *State v. Benjamin,* 13 Fla. L. Weekly Supp. 354a (Fla. Orange Cty. 2006) *(Judge Shoemaker found that the State's failure to produce the source code did not violate the state's discovery obligation but instead violated the Implied Consent Law's "full information" requirement); State v. Boyle,* 13 Fla. L. Weekly Supp. 202a (Fla. Seminole Cty. 2005); *State v, Bjorkland,* 13 Fla. L. Weekly Supp. 170a (Fla. Sarasota Cty. 2005) *(the Sarasota court ruling was rendered pursuant to a three-judge panel which heard testimony from Dr. Myler).*

In analyzing the Defendants' request, this court first turns to Section 316.1932(1)(f)(4), Fla. Stat. (2005). This statute provides that when a person tested with a machine requests it, full information concerning the test is to be made available. As was noted in *Muldowny* in interpreting section 316.1932(1)(f)(4), Fla. Stat. (2005),

> " . . . when a [defendant] risks the loss of driving privileges or perhaps freedom based upon the use and operation of a particular machine, full information **includes** operating manuals, maintenance manuals and schematics in

[9] Section 90.506, Fla. Stat. (2005).

[10] Some courts like Orlando and Seminole County ordered complete exclusion, while county courts in Manatee and Sarasota county ordered that the breath test results were to be excluded unless the State could admit them through the establishment of the traditional scientific predicate.

order to determine whether the machine actually used to determine the extent of a defendant's intoxication is the same unmodified model that was approved pursuant to statutory procedures." *Id at 913.*

The court in *Muldowny* specifically held that the defendant is entitled to schematics of the intoxilyzer used to test the Defendant when the results of the test are intended to be used against the defendant in a criminal proceeding that could result in a loss of driving privileges, financial penalties, and jail. The *Muldowny* court did not however, address the issue of production of the source code.

In reviewing the current state of the law, this court has not been provided with any legal authority that differentiates between the importance of producing the schematics and manuals of the Intoxilyzer as required by *Muldowney* and production of the EPROM source code. *See Bjorkland.* The intoxilyzer service manual provides that the central processing unit (CPU) of the Intoxilyzer is the 'brain' of the instrument, which includes EPROM's (erasable programmable read only memory chips).

In describing the importance of the EPROM, the manual for the Intoxylizer 5000 provides:

> "The EPROMs contain all of the programmed functions for the instrument. Here are the commands for sequencing the operation, all of the data entry questions, the operational parameters and the mathematical formulas for the final analysis. These chips can be reused due to the fact that they are "erasable". If you look at the EPROMs in the instrument you will notice that each chip has a label covering the top of the chip. Under no circumstances should this label be removed. Removing label will expose the chip to ultra-violet light and as a result will cause the chip to be erased." *Service Manual Intoxilyzer 5000, © 1999, Page 64.*

An instrument or machine that can be used by the State to establish the guilt of an accused subjecting them to mandatory fines, mandatory loss of driving privileges and loss of freedom (sometimes mandatory) should be made available to the defense for open inspection. Such an instrument should be tested by a protocol or redundancy check written by someone other than the manufacturer of that product. These instruments should not be left within a cloak of mystery. While agreeing with the majority in denying the Defendant's motion to suppress breath test results, Judge John M. Harris noted in his concurring opinion in *State v. Fuller,* 12 Fla. L. Weekly Supp. 808 (Brevard County, May 11, 2005.):

> "It should be no surprise to reveal that the judges attending the hearing were troubled to learn that every instrument appeared to contain visibly different hardware components, which in some cases indicated different software being utilized as well. It was perhaps more disconcerting that FDLE, the very agency

> charged with assuring the scientific accuracy and reliability on these instruments, had no idea or explanation as to why no two Brevard County machines were alike, and in fact seemed to be discovering this for the first time during the hearing. To say that this condition raised some level of suspicion as to the scientific reliability of these instruments would be an understatement."

When the law (section 316.1932(1)(f)(4), Fla. Stat. (2005)) expressly provides that Defendants are entitled to **full information** about the instrument that is used to establish their guilt, it would seem that such full information logically includes making the instrument available for open inspection. Full information should include the software that runs the instrument. To construe the statute otherwise, is tantamount to granting the state authority to use confidential information (i.e. the software code) to establish the guilt of a criminal defendant.[11]

When the government is legislatively given the ability to establish a rebuttable presumption of a Defendant's guilt through the intoxilyzer,[12] the statutes and administrative rules setting parameters for the use of that machine must be strictly construed and read in the light most favorable to the accused. *Mongavero v. State*, 744 So.2d 1048 (Fla. 4th DCA 1999). The law in this state has been clear since 1991 that a Defendant may explore not only whether the breathalyzer was operated in accordance with the rules, but also if it was an approved machine.[13] *See State v. Donaldson*, 579 So.2d 728 (Fla. 1991). In order to determine if the machine was in compliance it seems obvious that the Defendant should be able to inspect all aspects of the machine. *State v. Bender*, 382 So.2d 697 (Fla. 1980).

In *State v. Polak*, 598 So.2d 150 (Fla. 1st DCA 1992) and *State v. Flood*, 523 So.2d 1180 (Fla. 5th DCA 1988) the Defendants determined through discovery that the government had modified the breath test machine by either bypassing or modifying the Taguchi Sensor Cell.[14] The

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[11] It also has been testified by experts before this court that an instrument such as this should be properly, scientifically and periodically tested through generally accepted scientific practices. It was noted at the hearing that the Intoxilyzer 8000 runs a diagnostic check with a known sample before each defendant provides a breath sample as opposed to the 5000 that only conducts such a test once a month.

[12] The results from the machine give rise to a presumption that a breath-alcohol level of 0.08 or higher establishes "...prima facie evidence that the person was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired. Moreover, such person who has a blood alcohol level ....of 0.08 or higher is guilty of driving, or being in actual physical control of, a motor vehicle, with an unlawful .... breath-alcohol level." Section 316.1934, Fla. Stat. (2005).

[13] I use the term "machine" and "instrument" interchangeably because the Florida Supreme Court refers to the intoxilyzer as a machine while the administrative rules (11D-8000) refer to it as an instrument.

[14] The Taguchi Sensor cell (T-cell) is a component in the intoximeter, which detects and measures acetone and other hydrocarbons. When the T-cell is activated, it subtracts acetone and other interfering hydrocarbon readings from the alcohol reading, with the result being a pure alcohol reading. When the T-cell is deactivated, the intoximeter can no longer distinguish between alcohol and acetone and interfering hydrocarbons and instead measures acetone and hydrocarbons as alcohol.

bypassing of T-cells and the modification of the T-cell housing was found to have changed the breath-testing instrument[15] to such an extent that re-certification was required. The court then concluded that because the breath test was not administered by an approved instrument, the test results were inadmissible and the granting of the motion to suppress was affirmed.

The software is an integral part of the intoxilyzer. Florida Administrative Code 11D-8.003 specifies the only kind of software that can be used. Unless the defense can see how the intoxilyzer breathalyzer works and verify it is an approved machine, it remains as stated by the court in *Muldowny* and more recently by Judge Ralph E. Erikkson as being nothing more than a "mystical machine" used to establish an accused's guilt. *State v. Lentz*, 12 Fla. L. Weekly Supp. 806a (18th Judicial Circuit, Seminole County, April 29, 2005). The court went on to note that the government's argument that the State of Florida does not have in its possession the source code software does not provide a legal basis for non-disclosure.

> "There does not appear to be any authority in the law of Florida for a State agency (F.D.L.E.) to enter into an agreement with a private company (C.M.I.) to provide breathalyzer machines for the Implied Consent Program and at the same time keep the inner workings of the machine secret.[1] [For a further discussion on this point see *State v. Jensen*, No. 02-8674-MMA (Fla. Seminole Cty. Ct. Dec.10, 2002) [10 Fla. L. Weekly Supp. 135b]. This Court simply may not excuse the State of Florida from disclosing relevant material during the discovery phase because F.D.L.E. chose a vendor who would not allow them to show whether or not the State was complying with the Implied Consent Law.
> [Footnote 1. Perhaps F.D.L.E. should consider using other vendors so they may comply with § 316.1932(1)(f)(4), Fla. Stat.]"[16]

Both the State and the defense experts agree that the source code constitutes a trade secret. The State summarily concludes that the court should therefore find that the defendants should not be entitled to examine the source code and compare the instrument's software to the approved software and test the software for accuracy and reliability.[17]

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[15] In both cases, the breath test machine used was an Intoximeter 3000 Revision B-1.

[16] There was no evidence presented by the State to indicate whether the government ever investigated the option of contracting with other manufacturers who would be able to provide the source code information in accordance with Florida law.

[17] In prior hearings the State has argued that are other ways in which the Defendants should go about obtaining the source code. However, recent cases have revealed that Defendants have attempted this to no avail. See also *State v. Fischer, et. al.*, CT03-2860 (Fla. St. Johns County February 14, 2006); *State v. Kromberg, et. al.*, CT04-1783 (Fla. St. Johns County February 15, 2006); *State v. Spaulding, et. al.*, 05-034808 (Fla. Palm Beach Cty. 2005); *In Re: Subpoena Duces Tecum 2006-CT-002109* (Kentucky Daviess Dist. Ct. April 25, 2006).

The Florida Evidence Code, section 90.506, provides that the privilege against disclosure applies "if the allowance of the privilege will not conceal fraud or otherwise work injustice." In addition, this statute must be read in conjunction with Florida Statute §316.1932(4), which allows a person charged with DUI to obtain "full information" about the breath test. The State opines that the latter provision can never be used to allow disclosure of a trade secret.

As a general rule, courts should not interpret a statute in such a manner that it loses its meaning or becomes superfluous. *Johnson v. Feder*, 485 So.2d 409, 411 (Fla. 1986). Therefore, argues the State, the rights afforded to a defendant under section 316.1932(1)(f)(4), Fla. Stat. (2005), must be considered along with the privileges granted by section 90.506, Fla. Stat. (2005). If a party makes the requisite factual showing, a court may order disclosure of a trade secret. Such disclosure is arguably consistent with the "full information" provision of section 316.1932, Fla. Stat. (2005), as it is currently drafted. Subject to certain parameters, including protective orders to ensure against abuse or prejudice, this type of discovery is hardly unprecedented; however, the court must make a finding that disclosure is reasonably necessary. *See e.g. Rare Coin-It Inc. v. I.J.E. Inc.*, 625 So.2d 1277 (Fla. 3rd DCA 1993).

The State contends that the rulings in Sarasota and Seminole Counties are anomalies of law which are sparking much litigation, and the Florida lawmakers are seeking to define "full information" to prevent the courts from reaching such unintended results. Proposed House Bill 187 CS / SB232 defines "full information" to be limited only to the information related to the type of test, the time of the test, the type and status of the permit held by the person running the instrument, and the date of the instruments most recent inspection. The proposed amendment specifically excludes "manuals, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state." The amendment goes on to read "...full information does not include information in the possession of the manufacturer of the test instrument."

The State opines that the *Bjorkland, Benjamin, and Boyle* decisions erroneously extend the *Muldowney* definition of "full information of the test given" to include anything a defendant requests about the testing instrument, even things that the State cannot possibly obtain, like third party proprietary information. They argue that given the legislature's specific attention to "better defining" the term "full information," as evidenced by House Bill 187 CS / SB232, it is clear that the legislature never intended "full information of the test given" to include full information about the instrument or machine producing the result. The State maintains that it would be overreaching

by the court to " . . . read a remedy into the statutory scheme when that remedy was not recognized or authorized by statute." See the *State's Motion to Strike Defendant's Amended Motion for Supplemental Discovery of Intoxilyzer Software Source Code filed March 9, 2006.*

CONCLUSION

Section 316.1932(1)(f)(4), Fla. Stat., (2005), specifically provides that "full information" regarding the test taken "shall be made available" to the persons tested or their attorney. One would assume full information means just that, full information.[18]

Section 90.506, Fla. Stat., (2005), also provides that the trade secret privilege is not allowed where it would "otherwise work injustice" and that the court may take appropriate measures to protect the holder of the privilege. *See e.g. Rare Coin-It Inc. v. I.J.E. Inc.*, 625 So.2d 1277 (Fla. 3rd DCA 1993).

This court is aware of no other instrument/machine that if believed, establishes an element of a criminal offense that is not subject to complete and full investigation by the defendant. The question that must be asked is what must the defendant show before it can require *complete* disclosure. Must the Defendant demonstrate that the instrument is not approved or faulty in order to get the opportunity to 'look at' the instrument to determine if it is in substantial compliance with the rules, is an approved instrument, and/or is accurate and reliable?

Where Defendants face criminal sanctions, minimum mandatory penalties, including incarceration and loss of driving privileges, it would seem contrary to the Due Process Clause, Article I, Section 9 of the Florida Constitution, Article V and Article XIV, of the United States Constitution to permit the state limit the Defendants right of confrontation and discovery by asserting a trade secret privilege and thereby prohibit these Defendants from obtaining information relevant to the instrument that is used to prove their guilt.

It is therefore ORDERED and ADJUDGED that Defendant's Motion to Compel production of the source code is Granted.

This court must next address the second issue, that is, what is the appropriate remedy when the State does not provide the source code. The State has provided this court with

[18] *"Full"* is defined by Webster's Ninth New Collegiate Dictionary as "containing as much or as many as is possible or normal;" especially in detail, number, or duration; containing all that is wanted or needed." *"Information"* is defined by Webster's Ninth New Collegiate Dictionary as "the communication or reception of knowledge or intelligence."

documentation, in earlier cases[19] and has indicated in this case as well that they are unable to comply with this order and further, the manufacturer for the Intoxilyzer 5000, CMI Inc. refuses to disclose the source code.

The Defendants thereupon seek exclusion of the Intoxilyzer results in the above cases based upon two theories: (1) Exclusion of the results is a proper sanction based upon the State's failure to comply with the court's order compelling disclosure, and (2) Exclusion is the appropriate remedy, because the State cannot establish that the Defendant's consent was provided on some basis independent of the DUI laws or otherwise voluntarily waived their rights protected by the implied consent statutes.

The court must be mindful that exclusion of evidence should only be used as a last resort. *Fla. R. Crim. P. 3.220(n); State v. Tascarella,* 580 So.2d 154 (1991). Relevant evidence should not be excluded from the jury unless no other remedy suffices. *See State v. Eaton,* 868 So.2d 650 (Fla. 2d DCA 2004).

Florida's Implied Consent law provides a statutory scheme whereby the State may introduce a breath test result in an individual case without laying a traditional scientific predicate.[20] *State v. Bender,* 382 So.2d 697, 699 (Fla. 1980); *Robertson v. State,* 604 So.2d 783 (Fla. 1992); *State v. Clarke,* 834 So.2d 398 (Fla. 2d DCA 2003). The reasoning behind this provision follows from the presumption that the State uses authorized instruments that are certified, maintained and used in accordance with the administrative code and applicable statutes. In essence, the Implied Consent Law gives the State an evidentiary short cut that allows it to present incriminating evidence against a particular defendant by providing documentary evidence of the instrument's certification and maintenance. The trial court is then required to instruct the jury that a rebuttable presumption of impairment exists for those persons who register a result of .08 grams of alcohol per 210 liter of breath on the instrument.[21]

The State's inability to comply with the provisions of section 316.1932(1)(f)(4), Florida Statute (2005) has effectively restrained the Defendants' ability to effectively pursue investigation of the Intoxilyzer. Thus, the Defendants argue, this merits total exclusion of the results in these cases. This court disagrees.

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[19] See *State v. Bjorkland,* No. 2004-CT14406-SC (Fla. Sarasota Cty. Ct. 2005)

[20] The *Bender* predicate consists of three prongs: "(1) the test was reliable, (2) the test was performed by a qualified operator with the proper equipment, and (3) expert testimony was presented concerning the meaning of the test." *State v. Bender,* 382 So.2d 697, at 699.

[21] A criminal defendant has no other means to protest the admissibility of the breath test results into evidence absent a showing of unreliability. Further, the law provides for an increase in penalties and or possibility of jail if the breath test result is above a .20.

The Implied Consent laws, as stated above, were designed to streamline the necessary predicate for introduction of breath test results. *State v. Bender,* 382 So.2d 697, 699 (Fla. 1980). This procedure assumes compliance with the applicable administrative codes. When this assumption can be effectively challenged or disproved, the state cannot maintain the right to use the procedure to introduce breath test results. *Id.* Instead, the State must lay the traditional scientific predicate to establish the breath tests reliability and accuracy. *Id.* at 700; *Robertson v. State,* 604 So.2d 783 (Fla. 1992).

Since the Defendants have been denied its request to obtain "full information" about the instrument that is being used to prove their guilt, there must be an appropriate remedy.

HOLDING

IT IS THEREFORE ORDERED AND ADJUDGED that the Defendants' request for Exclusion is **DENIED**[22]; however, it is ORDERED that the State must first lay the proper traditional scientific predicate as to the admissibility of the Intoxilyzer results before the breath test results may be admitted into evidence. Assuming the State is able to lay the proper scientific predicate, the breath test result will be admitted, however, the presumptions of impairment contained in Florida Jury Instructions will not be given. *Robertson v. State,* 604 So.2d 783 (Fla. 1992); *State v. Clarke,* 834 So.2d 398 (Fla. 2d DCA 2003).

In consideration of the complex issues in this case, and recognizing that courts throughout the state have addressed this issue being presented with various witnesses and documents, with varying results, the court believes it is necessary to have a consistent and uniform policy within this circuit and district so that all parties will be properly advised of their rights and obligations. Due to the large volume of cases in which this issue has arisen and will continue to arise throughout the district, a direct certification to the District Court of Appeal will provide a more efficient means of establishing uniform guidelines. Therefore, the court, on its own motion, certifies the following questions as ones of great public importance to the Second District Court of Appeal:

1. UNDER THE "FULL INFORMATION" PROVISION OF FLORIDA STATUTE 316.1932, IS A DEFENDANT WHO HAS PROVIDED A BREATH SAMPLE WITH THE INTOXILYZER 5000 AND IS CHARGED WITH DRIVING UNDER THE

[22] This court also declines to accept defendants' argument that CMI, Inc. was properly served with a subpoena duces tecum and willfully refused to provide the source code. This court finds that CMI, Inc. must be served pursuant to section 942.01, Fla. Stat. (2005) and adopts the ruling announced in *In Re: Subpoena Duces Tecum 2006-CT-002109* (Kentucky Daviess Dist. Ct. April 25, 2006) to the extent that it holds that the proper procedure was not followed in serving CMI, Inc. with a subpoena duces tecum.

INFLUENCE, ENTITLED (UNDER PROPER CONFIDENTIALITY PROVISIONS) TO EXAMINE THE "SOURCE CODE" FOR THAT SAME INTOXILYZER 5000?

2. IF YES, WHAT IS THE APPROPRIATE REMEDY IF THE STATE IS UNABLE OR UNWILLING TO PROVIDE THE SOURCE CODE?

DONE AND ORDERED this 4 day of May, 2006.

COUNTY JUDGE DAVID L. DENKIN

CC: Robert Harrison, Esq. Defendant(s)
Earl Varn, Esq. State Attorney Office