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

STATE OF FLORIDA,   :
                          :
      Plaintiff,   :
                          :
Vs.   :   CASE NO. 2006 CT 009733 NC
                          :
JOHN C. FABIAN, ET. AL.,   :
                          :
      Defendant.   :
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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

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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 rending 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.

37. 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.

38. CMI, Inc. is registered with the Florida Secretary of State as a foreign Corporation doing business in Florida.

39. 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).

40. The State Attorney can obtain the software source code by serving an investigatory subpoena pursuant to Chapter 27, Florida Statutes. *General Motors.*

41. The Intoxilyzer 8000 is subject to a Federal Patent.

42. CMI, Inc. cannot claim the software code is a trade secret and seek protection under State trade secret laws.

43. Trade secret protection can only arise in a private context before an article is placed in the public domain by seeking a patent; State trade secret protection is preempted by the operation of Federal patent laws. *Bonito Boats, Inc., v. Thunder Crafts Boats, Inc.*, 515 So.2d 220 (Fla. 1987).
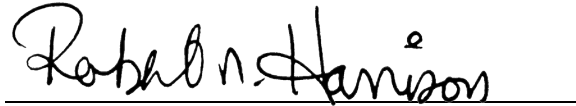
44. The sixth amendment and the due process clause of the federal constitution guarantee to a defendant the right to subpoena a witness, and to have the witness available as he finds him. *State. v. Montgomery*, 467 So.2d 387, 392, (Fla. 3rd DCA 1985).

45. The "defendant has a constitutional right to compulsory process of witnesses to produce testimony which is admissible in the cause for which he is on trial." *Krantz v. 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
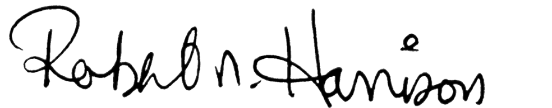
confrontation, and to that end direct the Clerk of Court to issue a subpoena duces tecum to CMI, Inc., for the production of the software code, and to retain jurisdiction to enter any other relief the Court determine just if software source code is not produced to the Defendant.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by regular U.S. mail to Jason Chapman, Assistant State Attorney, South County Courthouse, 4000 South Tamiami Trail, Venice, FL 34293, this ___22nd___ day of January, 2007.

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Robert N. Harrison