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 012017 NC**

KYLE WOODS, et. al. *
Defendants.
***(Attached is a complete list of all cases subject to this Order.)**
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ORDER ON DEFENDANT'S MOTION FOR REHEARING ON DEFENDANT'S REQUESTING ISSUANCE OF SUBPOENA DUCES TECUM COMPELLING PRODUCTION OF THE SOURCE CODE FOR THE INTOXILYZER 8000 FROM CMI

THIS CAUSE came to be heard on Defendant's Motion for Rehearing for the Issuance of a Subpoena Duces Tecum to CMI for the for the source code to the Intoxilyzer 8000.

The Defendants argue that this Court's original order was incorrect because it was not based upon presented testimony, was issued pursuant to findings contrary to the record and finally that the court applied the incorrect legal standard in determining whether to issue the subpoena duces tecum.

ANALYSIS

This court denies outright the first two grounds for relief cited by Defendant and will address the remaining issue that the court applied an incorrect definition of materiality in denying the Defendant's discovery request.

The Defendants maintain that their discovery request should be granted under the authority of Fla. R. Crim. P. 3.220(f) that allows for the court, "...upon a showing of materiality...", to require such other discovery as the parties or justice require. The State counters that there has been an insufficient showing of materiality. There is no definition for "materiality" within the context of Rule 3.220(f). Other authorities have defined materiality as follows: "Material" means "Having some logical connection with the consequential facts." Black's Law Dictionary (8th ed. 2004); "Materiality" means "bearing on a fact to be proved." *Simms v. Brown,* 574 So.2d 131 (Fla. 1991).

The State and Defendant disagree on which definition of "materiality" should be used in making this determination.

The State argues that the Defendants must show" *'materiality'* to the preparation of the defense in order to secure an order requiring further discovery.' " *Spalding,* 13 Fla. L. Weekly Supp. 627a (quoting *Eagan v. DeManio,* 294 So. 2d 639, 640 (Fla. 1974)). "Evidence is material if it tends to negate the guilt of the accused as to the offense charged." *Id.* (quoting *James v. State,* 453 So. 2d 786, 789 (Fla. 1984)). The State goes to argue that the "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality." *James*, 453 So. 2d at 789.

The Defendant argues the State, and Court its original order, are applying the wrong "materiality standard." The Defendant posits that the scope of discovery, and thus the proper definition of materiality to be used, includes any relevant matter or information that appears reasonably calculated to lead to the discovery of admissible evidence. *Ivester v. State,* 398 So.2d 926 (Fla. 1st DCA 1981).

Upon further review, this court finds that the analysis and definition argued by the State envisions the situation where the court is asked to take a 'backward look' in a post-conviction Brady violation scenario.[1] That is not the legal issue currently facing this court. The court is being asked to rule on a pretrial discovery matter. Under Florida law, a trial court has broad discretion in ruling on discovery matters. *See Richardson v. State,* 831 So.2d 799 (Fla. 2d DCA 2002).

Defendants further point out that they are entitled to compulsory process during the pre-trial and trial stages. *See 6th Amendment U.S. Const.; Art. I, §16, Fla. Const.* The Defendant does not have access to the source code in any other way. The source code is the 'brains' of the Intoxilyzer 8000 which is used in this case to present as fact an essential element of the pending

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[1] Recently, in Young v. State, 739 So.2d 553 (Fla.1999), the Florida Supreme Court recognized the emphasis placed on the materiality prong and stated:

[Although] defendants have the right to pretrial discovery under our Rules of Criminal Procedure, and thus there is an obligation upon defendant to exercise due diligence pretrial to obtain information ... the focus in post conviction *Brady-Bagley* analysis is ultimately the nature and weight of undisclosed information. The ultimate test in backward-looking post conviction analysis is whether information which the State possessed and did not reveal to the defendant and which information was thereby unavailable to the defendant for trial, is of such a nature and weight that confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different.

charge of DUI, i.e. a breath test result of above a .08. *See State v. Chun,* 923 A.2d 226 (N.J. 2007) and *Underdahl v. Comm. Of Public Safety,* Case No. 2007 WL 2127888 (Minn.).[2]

Upon reconsideration of the matter, it is the finding of this court that the testimony and evidence presented at the original hearing establishes that disclosure of the source code is reasonably calculated to lead to the discovery of admissible evidence.

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant's Motion for Rehearing is **GRANTED** and this Court does thereby grant the Defendant's request for an order directing the clerk to issue a subpoena duces tecum to CMI, Inc. for the source code to the Intoxilyzer 8000.

DONE AND ORDERED this 5TH day of OCTOBER 2007.

SARASOTA COUNTY JUDGE DAVID L. DENKIN

CC: Robert Harrison, Esq. for Defendants
Kerry Mack, Esq. for Defendants
12th Circuit State Attorney Office

[2] In *Chun* the parties stipulated to the review of the source code and all future modifications of the source code by an agreed to outside expert. In *Underdahl,* the court that under the particular contract between the State of Minnesota and CMI, the state owned the source code for the Intoxilyzer 5000EN. The Minnesota Supreme Court further noted that the state conceded that it owned that portion of the source code created exclusively for the Intoxilyzer 5000EN. Finally, the Court noted that *CMI had agreed with the State of Minnesota, in their contract, to provide the attorneys representing individual charged with crimes "in which a test with the [Intoxilyzer 5000EN] is part of the evidence" the information necessary to comply with a court's order.*

Cases Consolidated:

Kirsten Smith	Case No.	2006 CT 013763 NC
Peter Osterby		2006 CT 009094 NC
Juramir C. Sobrinho		2006 CT 013370 NC
Charles Yeagley		2006 CT 017419 NC
Homer Williams		2006 CT 010458 NC
Carl Robison		2006 CT 017802 NC
Jennifer Waelti		2006 CT 017957 NC
William Meyer		2006 MM 015639 NC
Amy Shaffalo		2006 CT 015732 NC
Debora Reecer		2006 CT 015113 NC
Denise Whitney		2006 CT 010461 NC
Sandra Masters		2006 CT 018670 NC
Sharon E. Offutt		2006 CT 021444 NC
Stephen Wall		2006 CT 013802 NC
Heather Riggenbach		2006 CT 009277 NC
Mark Peterson		2006 CT 010380 NC
Timothy John Piekarz		2006 CT 016399 NC

Case with previously consolidated:

Christopher Tominello	2006 CT 014805 NC
Erik Soal	2006 CT 008585 NC