IN THE COUNTY COURT OF MANATEE COUNTY, FLORIDA

STATE OF FLORIDA,

vs. **CASE NO. 2005 CT 5586**

ISMAEL ALMAREZ, et al,

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ORDER ON STATE'S MOTION IN LIMINE AND AMENDED MOTION TO QUASH

Before the Court are the State's Motion in Limine and the State's Amended Motion to Quash the Subpoena Duces Tecum directed toward CMI for production of the source code. The Motion in Limine asks that this Court make a pre-trial ruling that the State be allowed to admit the breath test results of the Defendants[1] pursuant to the Implied Consent Law and not be required to lay the traditional scientific predicate. The Amended Motion to Quash is requesting that this Court reverse its earlier rulings and quash the subpoena ordering production of the source code because the State urges that the record doesn't satisfy the "materiality" requirement.

Prior to the Hearing on these Motions, the State filed a copy of a letter written by CMI's President dated December 19, 2008, which states that CMI is "...willing to provide the Source Code in written format for either series of the Intoxilyzer breath alcohol testing instruments pursuant to the Order and Non Disclosure Agreement previously offered to the Florida Courts." (Note: The "written format," as opposed to electronic format, is extremely voluminous; approximately 1,200 pages.) This Order for Disclosure and Protection, which included a Non-Disclosure Agreement, was issued by Sarasota County Judges in cases which have been consolidated with these Manatee

[1] Each Defendant is charged with the strict liability offense of driving with an unlawful blood alcohol level (DUBAL). *Sabree v. State*, 978 So.2d 840 (Fla. 4th DCA 2008). This means that the breath test reading is one of two elements that the State must prove to obtain a conviction for DUI. The other element is that the Defendant was driving or was in actual physical control of a vehicle; impairment of the driver need not be proven.

County cases for purposes of this source code production issue following several days of Hearings in which CMI, the State, and the Defendants participated. Despite its earlier proffer to produce the source code, CMI ultimately asserted that this Court had no authority to issue the subpoena duces tecum and had no authority to order production of the source code.

CMI also filed a Petition for Writ of Certiorari on April 25, 2008 in the related Sarasota consolidated cases (*Woods, et. al., Case No. 2008 CA 005961 NC)*, appealing the trial Court's Order requiring production of the source code. The Sarasota Circuit Court, in its appellate capacity, denied the Petition, holding that the trial Court did not depart from the essential requirements of law in finding that the production of the source code is reasonable and necessary to the Defendants' defense.

Neither the State nor CMI has presented this Court with any credible evidence to indicate that the prior Order of Disclosure and Production of the Source Code and Non-Disclosure Agreement is not appropriate, or that the earlier finding of materiality was in error. The Order for Production clearly sets out the manner of disclosure, the redaction of vital security information, and provides CMI with adequate remedies should the source code be disclosed to unauthorized persons. The Non-Disclosure Agreement must be signed by the experts employed by the Defendants, thus protecting the source code from being used for any other purpose.

In rendering this decision, this Court finds the holding in *Moe v. State*, 944 So.2d 1096 (Fla. 5th DCA 2006) factually distinguishable. In *Moe*, the parties stipulated that the Intoxilyzer was properly tested and found to be acceptable pursuant to FDLE rules and regulations; there is no such stipulation in these cases at bar.

The State argues that the Court must reverse its earlier ruling pursuant *State v. Bastos*, 985 S0 2d 37 (Fla. 3d DCA 2008). In *Bastos*, the Court was presented with two questions certified by the County Court:

> 1. Can Fla. St. Chapter 942, the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, be used to compel production of documents/source codes in light of *General Motors, Corp. v. State*, 357 So.2d 1045 (Fla. 3d DCA 1978), where the request is for testimony and production of documents?
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> 2. If so, is the source code for the Intoxilyzer 5000 "material" within the meaning of F.S. 942.03?

In answering the first question, the Appellate Court held that Chapter 942 permits issuance of subpoenas duces tecum. As to the second question, the Court found that " . . .the present record does not support the conclusion that the proposed testimony and documents are "material" for purposes of the Uniform Law." *Id. at 42*. The Court went on to hold that:

> "[T}here would need to be a particularized showing demonstrating that observed discrepancies in the operation of the machine necessitate access to the source code. We are unable to see that any such evidence was brought forth in the evidentiary hearing below.
>
> The testimony in the trial Court made clear that the problem of false positives is inherent in the design of the infrared portion of the machine. In the absence of a more particularized showing, we are unable to conclude that the materiality standard was met. We therefore answer the second question "no." *Id. at 43*.

This court finds, keeping in line with *Bastos*, that the record in the cases at bar establish a particularized showing of materiality and sufficient concerns about the inner workings of the Intoxilyzer that warrants disclosure of the "brains of the instrument," i.e. the source code.

This Court agrees with the en banc panel of the Orange County, Florida Court in *State v. Atkins*, *Case No. 2008-CT-673-E* and finds that non-disclosure of the source code denies the Defendants " . . . material evidence in support of their defense that the instrument is not an approved test as required by the implied consent statute."

Therefore, this Court holds that this non-disclosure shall result in the State being denied the presumptions and shortened predicate for admissibility of the breath test results under F.S. 316.1934. *State v. Bender*, 382 So.2d 697 (Fla. 1980); *see also Robertson v. State*, 604 So.2d 783 (Fla. 1992).

ACCORDINGLY, IT IS ADJUDGED THAT:

A. The Court denies the State's Motion in Limine;

B. The Court denies the State's Amended Motion to Quash;

C. Until the Court's prior Order of Production of the source code is complied with, the State must first establish the proper traditional scientific

predicate as to the admissibility of the Intoxilyzer breath test results before said results can be introduced into evidence;

D. If the breath test results are admitted, the presumptions of impairment are not admissible, nor shall the jury instructions regarding impairment be given.

ORDERED in Manatee County, Florida, this 10th day of February, 2009.

s/

Honorable Doug Henderson
County Court Judge

c: Erica Arend, Assistant State Attorney
Robert N. Harrison, Esquire
Varinia Van Ness, Esquire