

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

STATE OF FLORIDA, :
 :
 Plaintiff, :
 :
 Vs. : CASE NO. 2004 CT 011276 SC
 :
 Christopher Forrester :
 :
 Defendant. :
 _____/

MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM

COMES NOW, the above named Defendant, by and through the undersigned attorney, and files this Motion for Issuance of Subpoena Duces Tecum, 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 5000.
3. The ONLY evidence of DUBAL is a printout of the Intoxilyzer 5000.
4. The Intoxilyzer 5000, in order to produce a breath alcohol level, utilizes a computer program.

5. The hardware of the Intoxilyzer 5000 introduces a light source into the defendant's breath sample at three 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 5000, 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 test result was affected by radio frequency interference (RFI detect);

9. Some, if not all of the fail safe procedures utilized by the Intoxilyzer 5000 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 5000 used in this case.

13. The Software is an integral part of the Intoxilyzer 5000.

14. 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.

15. On November 2, 2005 this Court entered an *Order on Defendant's Motion to Compel Production of the Source Code*, finding in part:

...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.

16. For the reasons stated above, to allow the State to introduce the results of the Intoxilyzer 5000, without producing the Source Code, would work injustice and violate the Defendant's right to due process.

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

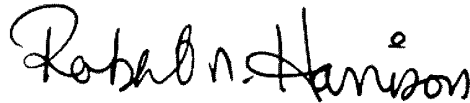
18. A subpoena duces tecum issued by this Court reaches all documents under the control of the party required to produce them, even if those documents are located outside the territorial jurisdiction of the court. *General Motors Corp v. State*, 357 So.2d 1045 (Fla. 3rd DCA 1978).

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

20. The Intoxilyzer 5000 is subject to a Federal Patent.
21. CMI, Inc. cannot claim the software code is a trade secret and seek protection under State trade secret laws.
22. 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).
23. 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).
24. 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).
25. 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).

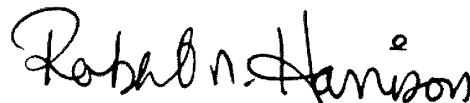
WHEREFORE, The Defendant requests that this Court to direct the Clerk of Court to issue a subpoena duces tecum to CMI, Inc., for the production of the software code, and to retain jurisdiction to enter any other relief the Court determine just if the software source code is not produced to the Defendant.



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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.



Robert N. Harrison