

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

CMI, INC. OF KENTUCKY,

Petitioner,

vs.

Case No. _____
Circuit Court Appeal No. 2008-CA-3664
County Case No. 2005CT005586

ISMAEL ALMARAZ, ET AL.,
and THE STATE OF FLORIDA,

Respondents.

_____ /

PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 9.100, Non-Party CMI, Inc., d/b/a CMI, Inc. of Kentucky (hereinafter "Petitioner"), through its undersigned counsel, and having filed a limited Notice of Appearance in the underlying matter both reserving and contesting jurisdiction, respectfully petitions the Court for a Writ of Certiorari to review the Circuit Court Order Denying Amended Petition For Writ Of Certiorari dated June 2, 2008, and shows the Court as follows:

JURISDICTION

This Court has jurisdiction to issue a Writ of Certiorari under Rule 9.030(b)(2) of the Florida Rules of Appellate Procedure.

STATEMENT OF THE FACTS

Petitioner is a Kentucky corporation and a non-party to Respondent's criminal DUI case. Petitioner has no offices, employees, documents or agents in the State of Florida, and is merely a vendor of the Intoxilyzer brand breathalyzer instrument, used by the Florida Department of Law Enforcement in its breath testing program. Pursuant to Rule of Criminal Procedure 3.220(f), the County Court authorized the issuance of a subpoena duces tecum to CMI's Florida registered agent for the source code to the Intoxilyzer 5000. (Appendix A, page 3). The source code would be approximately fifteen hundred pages long, but is not currently an existing document, and would have to be manually culled from the software at great expense to Petitioner. (Appendix B, page 48). Petitioner, through counsel, filed a Limited Notice of Appearance contesting jurisdiction (Appendix A, page 5), and moved for a Protective Order from the subpoena. (Appendix A, page 8). Petitioner's Motion for a Protective Order objected to the subpoena on the grounds that the source was a trade secret.¹

Without any request by either party or hearing on the issue of "reasonable necessity", the County Court *sua sponte* entered an Order that the source code was

¹ When a court finds documents requested in discovery to be a trade secret, the standard for production rises to reasonable necessity for such documents, and a court must make written particularized factual findings as to the reasonable necessity. see *Rare Coin-it, Inc. v. I.J.E., Inc.*, 625 So.2d 1277, 1278 (Fla. 3DCA 1993).

material and reasonably necessary. (Appendix A, page 12). Petitioner moved the lower Court to reconsider or modify this Order.² (Appendix A, page 34). A hearing for the reconsideration or modification was held on March 14, 2008. (Appendix B). The County Court issued an Amended Order On Disclosure Of Source Code and Object Code For Intoxilyzer 5000 and Protective Order on March 24, 2008. (Appendix A, page 60). This Amended Order superseded the prior Order and modified it. The Order stated that the source code to the Intoxilyzer 5000 was a trade secret but found it was reasonably necessary to understand the Intoxilyzer and stated that Petitioner must produce it to Respondent on a CD-ROM. (Appendix A, page 49).

The lower Court also ordered that Petitioner produce source code versions 8100.24, 8100.25, 8100.26, and 8100.27, despite Petitioner's objection that versions 8100.24 and 8100.25 were not relevant because they were never put into use for any Florida instrument. (Appendix A, page 61). Additionally, the lower Court made it a condition of source code production that Petitioner must submit to the jurisdiction of the lower Court, despite Petitioner's objections that it specifically contests such jurisdiction and any submission to jurisdiction would

² At all times during the proceedings in the lower court Petitioner contested the very jurisdiction of the court over Petitioner and to even issue the subpoena in the first place.

moot its other consolidated appeals currently on review with the Second District Court of Appeal.³ (Appendix A, page 63).

Petitioner then petitioned the Circuit Court to review this Order on April 22, 2008. (Appendix C, page 1). The Circuit Court, without argument or Response Brief from Respondent, entered an Order on June 2, 2008. (Appendix C, page 23) The Circuit Court Order held that “the trial court did not depart from the essential requirements of the law in finding that production of the source code is material and reasonably necessary to the Defendant’s case,” and also that Petitioner failed to demonstrate material injury resulting in irreparable harm. (Appendix C, page 25).

THE NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by this Petition is a Writ of Certiorari, ruling that the County Court and Circuit Court departed from the essential requirements of the law in their finding that the source code to the Intoxilyzer was material and reasonably necessary, and further that the Circuit Court departed from the essential requirements of the law in its finding that Petitioner failed to demonstrate material injury. Petitioner also contests the very jurisdiction of the lower court over

³ Currently on appeal with this Court is *CMI v. Fabian et al.*, Case No. 2D08-2134, wherein Petitioner contests the very jurisdiction of the county court to issue the subpoenas in the first place. *CMI v. Fabian et al.* is a consolidated case of nearly one hundred other cases. The lower court refused to stay anything pending review by this Court, and the instant appeal is a consolidation of hundreds of other cases, including those in *Fabian* before this court in *CMI v. Fabian et al.*

Petitioner, but that issue is more properly handled in the *Fabian* case already before this court.

ARGUMENT

Certiorari will lie to quash an order granting discovery when the order (1) departs from the essential requirements of the law, (2) resulting in material injury that (3) cannot be corrected on direct appeal. *McGarrah v. Bayfront Medical Center, Inc.*, 889 So.2d 923 (2DCA 2004). Because the County Court ordered Petitioner to produce discovery the Court recognized is a trade secret, production will cause irreparable harm and material injury to Petitioner's business that no appeal could cure because disclosure would have already taken place.

When a court finds documents requested in discovery to be a trade secret, the standard for production rises to reasonable necessity for such documents, and a court must make written particularized factual findings as to the reasonable necessity. See *Rare Coin-it, Inc. v. I.J.E., Inc.*, 625 So.2d 1277, 1278 (Fla. 3DCA 1993); see also *KPMG LLP v. State of Florida, Department of Insurance*, 833 So.2d 285 (Fla. 1DCA 2002). The lower Court found in paragraph one of Section B on page three of its Order that the source code is a trade secret. (Appendix A, page 50). Since the Court found the source code was a trade secret, the burden then shifts to the Respondent to show that the source code is reasonably necessary to his case. *KPMG*, 833 So.2d 285. However, Respondent never asserted that the

source code was reasonably necessary and never moved the Court for such a ruling. The lower Court *sua sponte* found the source code was reasonably necessary without motion, argument or evidence. (Appendix B, page 41, lines 21-24). Despite the fact this case is a consolidation of hundreds of cases, not even one of these criminal defendants could show anything wrong with their own breath test.

It is important to note that *Rare Coin-it* found there was no reasonable necessity where source code was sought from a party and defendant to the case despite the fact that the ownership of the source code was the ultimate issue in the case. The Third District Court of Appeal held that the defendant had not made the requisite showing the source code was reasonably necessary. *Rare Coin-it, Inc.*, 625 So.2d at 1279. Here, as in *Rare Coin-it, Inc.*, the Defendant never made any showing whatsoever that the source code was reasonably necessary and in fact failed to even request that the Court find it was in fact reasonably necessary.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Here, Petitioner is not even a party to the underlying action like in *Rare Coin-it*, but is a non-party discovery witness and is a foreign corporation. An order that is not based on an issue that

had been framed by the pleadings, noticed for hearing, or litigated by the parties is voidable and must be overturned. *Sabine v. Sabine*, 834 So.2d 959 (Fla. 2DCA 2003). Here, the issue of whether the source code is reasonably necessary was never raised by either party, framed in any pleading, noticed for hearing, or litigated by the parties. Since neither party requested such relief from the lower court, it was reversible error for the Court to find the source code was reasonably necessary on its own. Thus, the Order cannot stand and Petitioner respectfully requests this Court reverse it.

**IT WAS A DEPARTURE FROM THE ESSENTIAL
REQUIREMENTS OF THE LAW TO FIND THE SOURCE CODE
WAS REASONABLY NECESSARY**

The Order from the Court held that the source code was reasonably necessary. However, what the lower Court actually stated was “the source code is reasonably necessary to determine whether the Intoxilyzer 5000 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 and reliability.” (Appendix A, pages 61, 62). The lower Court in essence found that the source code was reasonably necessary to understand the Intoxilyzer. This is the incorrect standard because the trade secret must be reasonably necessary to Respondent’s presentation of his case. The lower Court’s use of an incorrect

application of reasonable necessity was in itself a departure from the essential requirement that the reasonable necessity be towards Respondent's absolute need for the requested discovery that rises above Petitioner's rights in protecting its trade secret.

Further, when we look at the standard the lower Court applied to determine reasonably necessary, we find that it erred because The Florida Statutes confer upon FDLE the right to determine whether the Intoxilyzer 5000 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 and reliability. FDLE has conducted extensive testing and has concluded the Intoxilyzer 5000 does contain the software approved by the State of Florida, it is functioning as per the approved source code, and any alterations have not affected its operation and reliability. Combine FDLE's findings with F.S. 316.1932, which specifically states that defendants cannot obtain the source code from the State and the manufacturer, and we can see that aside from the fact that no one requested a finding of reasonable necessity, it was error to find the source code was reasonably necessary under the lower Court's analysis.

Merriam-Webster's dictionary defines necessary as something that is "absolutely needed or required." The source code is not reasonably necessary or absolutely needed or required for two important reasons. First, the Florida

Legislature has stated the source code is not necessary through its amendments to F.S. 316.1932. Second, since Respondent has other avenues to contest the breath test, it cannot as a matter of law be absolutely necessary. Additionally, none of these particular Respondents showed any issues with their own breath samples. Counsel for Respondents provided the lower court with alleged irregularities of other criminal defendant's breath samples. The reason for this is simple; if there are any irregularities in a breath sample, the State does not use it.

Florida Statute 316.1932 is an extremely detailed and lengthy statute that lays out Florida's breath testing program. Under this statute, the Florida Legislature has clearly delineated what a criminal defendant is entitled to with respect to the breath testing instruments, and the statute provides that such defendants are entitled to full information regarding the results of the test. However, 316.1932(4) was recently amended in 2006 to state:

“full information does not include 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. Additionally, full information does not include information in the possession of the manufacturer of the test instrument.”

Petitioner is that manufacturer. Therefore, the Florida Legislature has expressly stated that criminal defendants are not entitled to the source code from the manufacturer. Logically then, while the source code may be relevant, it cannot be necessary to Respondent's case because the Florida Legislature has stated no

criminal defendants are entitled to it. Since the source code cannot be reasonably necessary as a matter of law under F.S. 316.1932, the lower Court's Order should be reversed.

The source code is also not necessary because Respondent has significant other opportunities to question the results of the breath test. The Florida Supreme Court squarely addressed a defendant's right to contest breath and blood tests and found that "the due process question is whether the accused has sufficient opportunity to question the results of the tests." *Houser v. State*, 474 So.2d 1193, 1195 (1985). *Houser* noted that defendants are free to seek discovery under 316.1932 from the State, to cross-examine the technician who actually performed the test, to introduce evidence as to the general reliability of testing to further attack the reliability of the results, and are permitted under 316.1932 to have an independent blood, urine or breath test performed at their own expense. *Id.* The analysis here is exactly the same. The source code is not reasonably necessary for Respondent's case because he has these same avenues to question the results of the breath test. Also, as Petitioner has already noted, discovery under 316.1932 expressly excludes the source code from discovery.

This analysis of *Houser* and the full information amendment in F.S. 316.1932, which excludes the source code from disclosure, are now the primary reason virtually all courts in Florida have denied the latest motions for the source

code. See, e.g. *State v. Abrahamsen et. al.*, Criminal Case No. 2007-CT-993-O, Order Denying Motion for Production of the Source Code dated June 6, 2007 (Orange County Court) (ten judge panel finding *Houser* analysis and the Florida Legislature's full information amendments precluded a finding of even mere materiality); see also *State v. Beise, et. al.*, Criminal Case No. TC06-7665, Order Denying Motion for Subpoena Duces Tecum dated May 14, 2007 (Osceola County Court) (en banc panel finding no entitlement to source code based in part upon *Houser* analysis on Page 20-21).

The Fourth District Court of Appeal held just last year that a criminal defendant is “not entitled to the manufacturer’s proprietary source code information for the Intoxilyzer 5000.” *Pflieger v. State*, 952 So.2d 1251, 1254 (Fla. 4DCA 2007). **Additionally, the Third District Court of Appeal on June 11, 2008, specifically held that the source code to the Intoxilyzer was not material and criminal defendants are not entitled to it.** *State v. Bastos*, Case No. 3D06-1647 (Fla. 3d DCA June 11, 2008). It is important to note that in *Bastos* the defendants had two experts testify live subject to cross examination, Dr. Stefan Rose and Dr. Harley Mylar. Here, the Respondents merely presented an affidavit of Dr. Mylar, without any live testimony and with no ability to cross examine, yet the County Court still found the source code material and reasonably necessary.

If the Florida legislature specifically amended Fla. Stat. 316.1932 in 2006 to

specifically preclude criminal defendants from obtaining the source code from Petitioner, and the Fourth District Court of Appeal states that a criminal defendant is not entitled to the source code, and the Third District Court of Appeal states that the source code is not material, how then can it be material **and reasonably necessary** to the Sarasota County DUI defendants? The simple answer is that it cannot and the lower Court departed from the essential requirements of the law when it found the source code was reasonably necessary.

In the Amended Order, the lower Court also ordered that Petitioner produce versions 8100.24 and 8100.25 of the source code, despite the fact that these two versions were never used in Florida on even one criminal defendant's breath test. (Appendix B, page 67, line 3). Since these older versions were never in use like versions 8100.26 and 8100.27, they are not relevant and should not have to be produced.

Next, the lower Court made it a condition of the Order that if Petitioner wanted the protections of the protective order and non-disclosure agreement to protect its trade secret, Petitioner would have to agree to submit to jurisdiction of the County Court. Petitioner explained to the Court that there currently was a consolidated appeal with the Second District Court of Appeal wherein Petitioner is appealing the jurisdiction of the Manatee County Courts, and Petitioner could not voluntarily submit to jurisdiction because it would moot its appeals. Despite this,

the lower Court ordered that Petitioner would have to submit to jurisdiction to obtain a protective order. Since Petitioner is expressly contesting the jurisdiction of the lower Court over it in another higher court proceeding currently pending, it was a departure of law for the lower Court to order that Petitioner agree to submit to jurisdiction.

Finally, Petitioner informed the lower court that if an appropriate protective order were entered protecting its trade secret, and that order did not force Petitioner to inappropriately submit to jurisdiction, Petitioner would produce the source code in paper format with security passwords and communications links redacted. However, such production was completely voluntary, and Petitioner has always stood by its objection to any production. Despite this, the lower Court ordered that the source code be produced electronically on a CD-ROM. At the hearing for reconsideration, Petitioner presented the testimony of Laura Barfield, head of Florida's breath testing program. Ms. Barfield testified that Florida's breath testing program is computerized and the entire state is linked by telephone modem. (Appendix B, page 10, 11). The source code itself contains passwords and communications links that would enable anyone to remotely access any instrument and change settings. Ms. Barfield testified that because it is not completely clear that these passwords and communications links could be completely redacted from the source code, if it were produced electronically, she would be forced to

temporarily shut down the entire State of Florida's breath testing program.

(Appendix B, page 12). This would then require FDLE to manually reconfigure every instrument at a cost of thousands of dollars per instrument and FDLE would have to isolate each instrument so it could not connect to the network. FDLE would then have to redefine the entire breath testing program.

Despite this testimony, the lower Court still ordered the source code be produced in electronic form rather than in paper format. Respondent presented no testimony or evidence regarding the need for the source code in electronic format rather than paper. Since the evidence presented clearly showed that the harm electronic production would cause outweighed any need by the individual defendant, the lower Court departed from the essential requirements of the law when it ordered the production be in electronic format.

Finally, the Circuit Court held that Petitioner failed to demonstrate material injury because it voluntarily said it would produce the source code provided certain protections were in place, but the Circuit Court completely failed to recognize that Petitioner in its Motion for a Protective Order objected to any production of the source code. The fact that Petitioner told the Court it would voluntarily produce the source code on its own provided certain protections were put in place does not preclude Petitioner from appealing the order of production, especially where Petitioner objected to any production of the trade secret and the Court failed to

provide such appropriate protections which Petitioner required be put into place before any voluntary production occurred. Thus, by requiring the source code be produced electronically, the Circuit Court failed to recognize the protections for the trade secret that Petitioner required were not put into place and it failed to recognize the injury to Petitioner's client relations with FDLE should the breath testing program be shut down.

SUMMARY

The lower Court first departed from the essential requirements of law when it found the source code was reasonably necessary because neither party requested such a finding in argument or motion and an order that is not based on an issue that had been framed by the pleadings, noticed for hearing, or litigated by the parties is voidable and must be overturned. *Sabine v. Sabine*, 834 So.2d 959 (Fla. 2DCA 2003). Additionally, the Florida Legislature explicitly stated criminal defendants are not entitled to the source code in F.S. 316.1932, the Fourth District Court of Appeal stated criminal defendants are not entitled to the source code, the Third District Court of Appeal stated the source code is not even material, and the Florida Supreme Court has stated criminal defendants have sufficient other opportunities to question the results of the breath test. Thus, the source code is not and cannot be as a matter of law material and reasonably necessary.

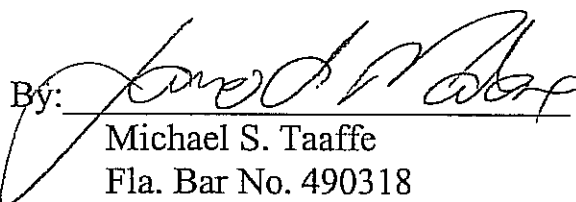
The lower Court also departed from the essential requirements of the law when it ordered the Petitioner to submit to jurisdiction as a condition of production, when it ordered versions of the source code to be produced which were not relevant because such versions were never put into use in Florida, and when it ordered the source code to be produced in electronic format despite the disastrous ramifications to the entire state's breath testing program.

For these reasons, Petitioner faces irreparable harm which no appeal could cure, and respectfully requests this Court reverse the Order of the lower Court.

DATED: June 30, 2008.

Respectfully submitted,

ABEL BAND, CHARTERED
240 S. Pineapple Avenue
Post Office Box 49948
Sarasota, Florida 34230-6948
(941) 366-6660
(941) 366-3999 (fax)
Attorneys for CMI, Inc.

By: 
Michael S. Taaffe
Fla. Bar No. 490318
Jarrod J. Malone
Fla. Bar No. 0010595

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ordinary U.S. Mail to:

Cliff Ramey, Assistant State Attorney
Office of the State Attorney
2071 Ringling Blvd.
Sarasota, FL 34236

Robert Harrison
825 S. Tamiami Trail, Suite 2
Venice, FL 34285

this 20 day of June, 2008.

By: 

Michael S. Taaffe
Fla. Bar No. 490318
Jarrod J. Malone
Fla. Bar No. 0010595