

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

STATE OF FLORIDA, :
 :
 Plaintiff, :
 :
 Vs. : CASE NO. 2006 CT 012017 NC
 :
 Kyle R. Woods et.al., :
 :
 Defendant. :
 _____/

MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM

COMES NOW, the above named Defendants, by and through the undersigned attorney, and files this Motion for Issuance of Subpoena Duces Tecum, and says:

1. The Defendants were arrested and charged with DUI, including Driving with an Unlawful Breath Alcohol Level (DUBAL).
2. Following the Defendants’ arrest, each 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 Source Code is material to the Defense in this cause as set forth in the sworn affidavit of Harley R. Myler, Ph.D, with is fully incorporated herein and is attached marked Exhibit “A”.

5. Without having the source code to this computer program, the Defendants are unable to learn and question the fail safe procedures contained in this computer program thus precluding the Defendants from having a sufficient opportunity to question the test results in violation of the Defendants' right to due process.

6. The Defendants are 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.

7. The Software is an integral part of the Intoxilyzer 8000.

8. The Defendants are 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.

9. 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.

10. CMI, Inc. is registered with the Florida Secretary of State as a foreign Corporation authorized to transact business in Florida.

11. 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).

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

13. 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).

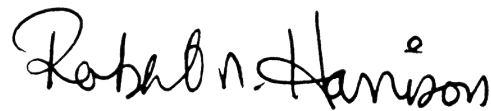
14. The law is well-settled that the defendant in a criminal case is constitutionally entitled to compulsory process to have brought into the trial court any material evidence shown to be available and capable of being used by him in aid of his defense, including the beneficial enjoyment of the compulsory process of a subpoena duces tecum for that purpose. *Green v. State*, 377 So.2d 193 (Fla. 3rd DCA 1979), affirmed, 395 So.2d 532 (Fla. 1981).

15. 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).

16. A copy of the proposed subpoena is attached Marked Exhibit "B".

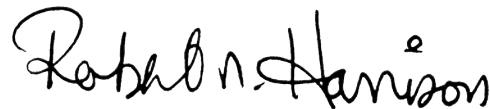
WHEREFORE, The Defendant requests that this Court to direct the Clerk of Court to issue a subpoena duces tecum to CMI, Inc., for the production of the software code.



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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, State Attorney's Office, 2071 Ringling Blvd, Sarasota, FL 34237 this 19th day of April, 2007.



Robert N. Harrison

STATE OF TEXAS
COUNTY OF JEFFERSON

**AFFIDAVIT IN SUPPORT OF ISSUANCE OF SUBPOENA DUCES
TECUM**

1. The Intoxilyzer 8000, in order to produce a breath alcohol level, utilizes a computer program.

2. The hardware of the Intoxilyzer 8000 introduces an infrared light source into the defendant's breath sample and then samples that light at two different wave lengths, as specified by two internal filters, which is then measured many times each second by an infrared detector; this process produces many hundreds of pieces of "raw data". Ultimately the raw data produced by the hardware is interpreted by the Intoxilyzer software and then the machine will printout a result.

3. The "raw data" is meaningless without expert analysis.

4. The software program analyzes the raw data and renders an opinion of the level of alcohol contained in a breath sample that came from the defendant's blood.

5. This software program renders opinions that 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.

6. Some, if not all, of the fail safe procedures utilized by the Intoxilyzer 8000 are contained in and performed by this computer program.

7. Without having the source code to this computer program, one cannot fully learn and question the fail safe procedures contained in this computer program.

8. A breath result on an Intoxilyzer 8000 is unreliable without a breath sample of least 1.1 liters.

9. One of the safeguards of the Intoxilyzer 8000 is the ability to record the volume of each breath sample.

10. 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 less than 1.1 liters.

11. 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 rendering the reliability of the reported volume unknown.

12. 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.

13. A review of actual breath test results from the Intoxilyzer 8000 reveals that this explanation is in error since in some circumstances the machine would display a warning flag of “volume not met” when the reported time for the breath sample was four minutes.

14. Without having the opportunity to review the software code, the extent of this flaw cannot be determined; without the software code, it cannot be determined which tests are affected by this known software flaw.

15. Another software flaw caused the Intoxilyzer 8000 to report a volume of more than 1.1 liters, but displayed a warning flag of “volume not met”, placing even more doubt into the reliability of the reported volume.

16. 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.

17. If the Source Code is produced, the extent of the software flaw(s) can be determined along with the impact of the flaw(s) on the reliability of the breath test results.

18. Without the production of the Source Code, it cannot be determined 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.

19. 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); additionally, it is possible as well that a timing error exists such that the reported breath alcohol level is not aligned with the reported volume. The software source code is needed to determine to what extent the volume and / or breath alcohol levels are being misreported.

20. 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. The fact that there are no reported waits of three minutes establishes the wait time is always two minutes or less.

21. The software contained in the Intoxilyzer 8000 in many instances has been modified without having the machine recalibrated.

22. 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.

23. Without the Source Code, one cannot determine whether or not the software update modified the analytical portion of the software, thus requiring the machine to be recalibrated.

24. With the Source Code one can determine whether the Intoxilyzer 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.

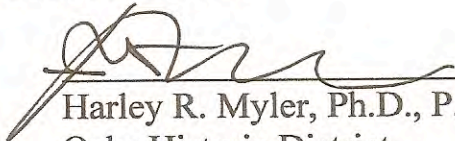
25. The production of the source code is necessary, for without the Source Code, one cannot determine:

- a. Whether the software on the subject Intoxilyzer is the same program approved by FDLE in 2002,
- b. Whether the software on the subject Intoxilyzer 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 Intoxilyzer.

- 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 whether 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.

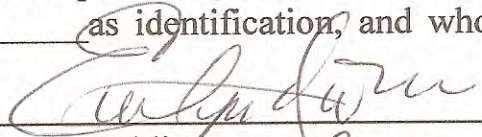
26. The Software is an integral part of the Intoxilyzer 8000.

FURTHER AFFIANT SAYETH NAUGHT.



 Harley R. Myler, Ph.D., P.E.
 Oaks Historic District
 2495 Evalon Street
 Beaumont, Texas 77702

The foregoing instrument was acknowledged before me this 19th day of April 2007, by Harley R. Myler, who is personally known to me or who has produced TRDL# 19775030 as identification, and who did take an oath.



 Notary Public
 Print Name: Evelyn Hunter
 Commission No: 02/19/2008



