

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

STATE OF FLORIDA,

Plaintiff,

VS.

**KENNETH ARNOLD BAKER, ET. AL.
CATHERINE C. MARSH
MORLEY J. PARENT
SARA PENNEY
JACK IRISH, ET. AL.
STEPHEN UDICE, ET. AL.
KYLE R. WOODS, ET. AL.
DANIEL P. LYONNAIS, ET. AL.**

**CASE NO. 2005 MM 2364 SC
2005 CT 16113 NC
2003 MM 8714 NC
2003 CT 18637 NC
2006 CT 2109 SC
2006 CT 9702 SC
2006 CT 12017 NC
2007 CT 5358 NC**

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

The two Motions currently before the Court are the State's Motion in Limine and the State's Amended Motion to Quash the Subpoena Duces Tecum directed toward to 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 Defendants¹ 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 does not satisfy the "materiality" requirement. Prior to the hearing on these motions, the State filed a copy of a letter written by the CMI, Inc., President, dated December 19, 2008, which is directed to "...Whom it may concern" and states that it is "...willing to provide the Source Code in written format for either series of the

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 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 at the time of the breath test reading. Impairment of the driver need not be proven.

Intoxilyzer breath alcohol testing instruments pursuant to the Order and Non Disclosure Agreement previously offered to the Florida Courts.”

This Court has previously found that the Defendants established the materiality and the reasonable necessity for the production of the Intoxilyzer source code. Pursuant to this finding, the Court directed the Clerk of Court to issue a subpoena duces tecum, to be served upon CMI Inc. of Kentucky (hereinafter referred to as CMI) to produce the source code. When CMI failed to comply, the courts of Sarasota County (three separate county court judges) found CMI in contempt and imposed a daily fine, giving CMI the opportunity to purge issuance of the fines by producing the source code. CMI filed a “Limited Notice of Appearance” in each of the above-styled consolidated cases after Orders to Show Cause were issued against it for failing to comply with or file an objection to the subpoena duces tecum. The fines have continued to grow, and CMI continued in its refusal to comply with the subpoena duces tecum and the Court’s Order of Disclosure.

After the county courts of Sarasota County uniformly found that CMI must produce the source code, CMI sent correspondence to both Judge Bonner and Judge Denkin (which was filed in *Woods et. al.*). This letter stated that pursuant to litigation in Minnesota regarding disclosure of the source code, CMI decided that the source code would be produced if this court would enter their ‘not yet’ drafted protective order and nondisclosure agreement.

The Defendants objected to CMI’s proposed protective order for disclosure and the non-disclosure agreement. This Court conducted a hearing over several days regarding the precise wording of both documents. The State, CMI and the Defendants were all participants in these proceedings. The Court thereupon entered its Order for Disclosure and Protection, which included as part of the Order a Non-Disclosure Agreement that was to be signed by all participating parties. Despite its earlier proffer to produce the source code if its conditions were met, CMI nonetheless asserted this court had no authority to issue the subpoena duces tecum and had no authority to order production of the source code.

CMI appealed the finding of contempt. In the *Lyonnais, et. al.*² consolidated cases, *Marsh, Parent, Penney*,³ and *Baker, et. al.*⁴ the circuit court denied CMI's appeal, and affirmed the order of the trial court finding CMI in contempt and the order of daily fines which could be purged upon disclosure. A petition for writ of certiorari was filed with the Second District Court of Appeals, which was per curiam denied. In the *Woods, et. al.* consolidated cases, CMI's appeal on the issue of contempt is currently pending.

CMI also filed a petition for writ of certiorari on April 25, 2008, in *Woods, et. al.*, Case No. 2008 CA 005961 NC, appealing the trial court's order requiring the production of the source code for the Intoxilyzer 8000. The circuit court denied the petition holding that the trial court did not depart from the essential requirements of the 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 Production of the Source Code and Non-Disclosure and Confidentiality Agreement for both the Intoxilyzer 5000 and 8000 are not appropriate or that the 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, the 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. That was not the case in these consolidated cases.

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.

² These consolidated cases were originally known as the 'Fabian' cases but were changed to *Lyonnais* when Mr. Fabian resolved his pending charge.

³ These 3 cases have run with the *Fabian*, now *Lyonnais, et al.* cases but were never consolidated with *Fabian* or *Lyonnais*.

⁴ The *Baker, et. al.* cases use to the *Bjorkland, et. al.* cases before Ms. Bjorkland resolved her pending DUI charge.

1. Can 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?
2. If so, is the source code for the Intoxilyzer 5000 "material" within the meaning of § 942.03?

In answering the first question the appellate court held that Chapter 942 permits issuance of subpoenas duces tecum. Responding to the second certified 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 above-consolidated cases establish a particularized showing of materiality and sufficient concerns about the inner workings of the Intoxilyzer 5000 and 8000 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 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 §316.1934. State v. Bender, 382 So.2d 697 (Fla. 1980); see also Robertson v. State, 604 So.2d 783 (Fla. 1992).

IT IS, THEREFORE, ORDERED AND ADJUDGED:

- 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.

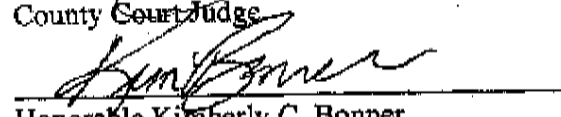
DONE AND ORDERED in chambers in Sarasota County, Florida, this 6th day of February, 2009.



Honorable David L. Denkin
County Court Judge



Honorable Judy Goldman
County Court Judge



Honorable Kimberly C. Bonner
County Court Judge

cc: Robert N. Harrison, Esquire
Cliff Ramey, Assistant State Attorney