

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

CMI, INC OF FLORIDA,

Petitioner,

vs

Case No. 2008-CA-3664

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

Respondents.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This cause is before the Court on the Petitioner's Petition for Writ of Certiorari, filed on April 23, 2008, pursuant to Fla. R. App. P. 9.100. The Court has reviewed the petition and the record and is otherwise advised in the premises.

Petitioner is a Kentucky corporation that manufactures the Intoxilyzer brand of breathalyzers, models 5000 and 8000, an instrument used by law enforcement authorities throughout the United States, specifically including Manatee County, Florida, to measure the level of alcohol in a person's breath. The Respondents are individuals charged with DUI in Manatee County after submitting to an Intoxilyzer breath test.

On March 24, 2008, the County Court entered its Amended Order on Disclosure of Source Code and Object Code for Intoxilyzer 5000 and Protective Order. This order directed the Petitioner, subject to specified non-disclosure and confidentiality precautions, to disclose source code for certain versions of the Intoxilyzer 5000 to the Respondents' designated expert. The County Court found, *inter alia*, that the Respondents established materiality and a reasonable necessity for production of the

source code, stating “[t]he defendants have established through expert testimony that 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 or reliability.”

For this court to grant certiorari and quash the County Court’s order granting discovery, the Petitioner must demonstrate that (1) the order departs from the essential requirements of law (2) resulting in a material injury (3) that cannot be remedied on direct appeal. *McGarrah v. Bayfront Medical Center, Inc.* 889 So. 2d 923, 925 (Fla. 2d DCA 2004). Additionally, as more recently stated by the Second District Court of Appeal,

the type of departure that will justify the issuance of a writ of certiorari is more than simple legal error. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003) (“A district court should exercise its discretion to grant certiorari review *only* when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.”).

Florida Dept. of Transportation v. Piccolo, 964 So. 2d 773, 775 (Fla. 2d DCA 2007).

Because the Court concludes that Petitioner has failed to show the County Court’s order departs from the essential requirements of law resulting in a miscarriage of justice, it denies the petition.

The Petitioner asserts that the County Court departed from the essential requirements of the law by finding that production of the source code was reasonably necessary. More particularly, Petitioner argues that the County Court erroneously made this determination based on whether analysis of the source code would enable the

Respondents to understand the Intoxilyzer. The correct standard, contends Petitioner, is whether the source code is reasonably necessary to the Respondents' case.

The County Court did not depart from the essential requirements of the law in holding that production of the source codes is material and reasonably necessary to Respondents' case. The order noted that the Petitioner has advised the County Court that it will comply with the subpoena duces tecum for production of the source codes, provided that a protective order and a non-disclosure agreement are executed. The Petitioner fails to demonstrate material injury if it has already agreed to disclose the source codes.

As a second ground, the Petitioner cites the County Court's requirement that Petitioner submits itself to the jurisdiction of the County Court by executing the non-disclosure and confidentiality agreement detailed in the order. This submission, however, was limited to "*solely* for enforcement and resolution of any disputes in regards to the Non-Disclosure and Confidentiality Agreement." This Court regards this limitation as a sensible approach, within the County Court's discretion, that achieved an *enforceable* protective order while still preserving the Petitioner's objections to jurisdiction. It certainly does not result in a miscarriage of justice as required by *Kaklamanos*.

Accordingly, it is

ORDERED AND ADJUDGED that the petition for writ of certiorari is **DENIED**.

DONE AND ORDERED in Chambers in Manatee County, Florida, this 2nd
day of June, 2008.


Edward Nicholas, Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2008, a true and conformed copy of the foregoing was furnished by U.S. Mail to the following addressees:

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The Honorable K. Douglas Henderson



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