

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

STATE OF FLORIDA, :
 :
 Plaintiff :
 :
 Vs. : CASE NO. 2004 CT 014406 SC
 :
 CAROLE MAE BJORKLAND, et al.*, :
 :
 Defendant. :
 _____/

**DEFENDANTS' RESPONSE TO STATE'S SUPPLEMENTAL
AUTHORITY**

The Case of *State v. Walker et. al*, out of Hillsborough County, presented by the State Attorney as Supplemental Authority is distinguishable from the cases heard in Sarasota County. The Defense at the Sarasota County hearing presented crucial, concrete evidence of software modifications that was not presented in Hillsborough County. Also, the Hillsborough prosecutors presented rebuttal testimony (Laura Barfield from FDLE and Dana Gilbreath from CMI); the expert testimony presented at the hearing in Sarasota remains un rebutted.

A critical fact presented in Sarasota was the undisputable evidence of the modification of the software by CMI. In the letter to FDLE dated April 29, 2004, CMI stated that the size of the software code for the 900.10 was larger than the old version, requiring the extra EPROM chip (three chips

instead of two chips). The photographs of the inside of the Sarasota Intoxilyzers revealed that one version of the 900.10 software (66-005066) was on three chips (A, B & C), and on the other Intoxilyzer (66-004886) the program was on only two chips (A & B), with the third EPROM slot being empty. There is no indication in the Hillsborough opinion that this undisputable evidence of differences in the program was presented. While Dr. Myler also testified in Hillsborough, he stated prior to reviewing the photographs of the Sarasota County Intoxilyzers, he had not come upon the situation where the 900.10 Software is on an A & B chip, with the third EPROM slot being left empty. (Dr. Myler testified he previously had examined two sets of 900.10 EPROM's with A B & C chips, one with data on the C chip, and one with a blank C chip, but there always was a chip in the C slot. The set of facts presented in Sarasota appear to be a first in this State, namely concrete, incontrovertible evidence of software modifications by CMI (modifying the 900.10 to fit onto two EPROM chips). Unknown at this time is the effect this modification has on the reliability of the Intoxilyzer. Also unknown is the extent of the secret modifications. In Sarasota, the unrefuted evidence was the only way to determine if the modifications are significant or if they affect the reliability of the Intoxilyzer is to review the source code. Unlike Hillsborough County, the prosecution in

Sarasota elected not to present any evidence to rebut Dr. Myler's testimony. Without production of the source code, neither the State Attorney nor the defense can know the significance or extent of the software modifications.

In Hillsborough County, the State Attorney presented evidence that the source code was a trade secret. The State presented no such evidence in Sarasota. The State had the burden to show "good cause" for limiting discovery by demonstrating the information sought is a trade secret and that disclosure may be harmful. *Citigroup, Inc. v. Holtsberg*, 2005 WL 1812819 (Fla. 4th DCA, August 3, 2005). By presenting no testimony, this burden was not met by the State. Never the less, the unrefuted testimony presented by the defense was the production of the source code was **necessary** to determine:

1. Whether the software on the local Intoxilyzers is the same program approved by FDLE in 1993,
2. Whether the software on the local Intoxilyzers is a modified version of the program approved by FDLE in 1993,
3. The extent of the modifications to the approved software, and
4. Whether the modifications to the R Software program affect the reliability of the Intoxilyzers.

Even if the State had met its burden that the source code was a trade secret,

the evidence presented at the Sarasota County hearing established the defendant's right to the source code, regardless if it is a trade secret. "When trade secret privilege is asserted as the basis for resisting production, the trial court must determine whether the requested production constitute a trade secret; if so, the court must require the party seeking production to show reasonable necessity for the required materials." *Rare Coin-it, Inc. v. IJE, Inc.*, 625 So.2d 1277 (Fla. 3rd DCA 1993). Due to the fact the Defense in Sarasota established the **reasonable necessity** of having the source code, a claim of trade secret cannot prevent disclosure of the source code. This Court can safeguard the secrecy of the source code by way of a protective order directing the source code to be released only to the defendants' expert (Dr. Myler) and directing Dr. Myler not to disclose the source code, as provided for in Section 90.506, Florida Statutes. Again, the State presented no evidence to rebut the testimony that the production of the source code was both material and necessary to the defense.

The case of *Muldowny v. State*, 871 So.2d 911 (Fla. 5th DCA 2004) discussed the "full information" clause of the Implied Consent Statute. Full Information is to provide the defense with sufficient information to

determine whether the machine actually used to determine the extent of a defendant's intoxication is the same unmodified model that was approved pursuant to statutory procedures. It seems to us that one should not have privileges and freedom jeopardized by the results of a

mystical machine that is immune from discovery, that inhales breath samples and that produces a report specifying a degree of intoxication.

At the Hearing in Sarasota, the defense went into great detail to explain to the Court which functions of the Intoxilyzer the software performs, and which functions the hardware performs. For example, the mouth alcohol detector is totally a software function. The Order out of Hillsborough County does not indicate whether this testimony was presented. Dr. Myler testified that without having the source code to analyze, he could not make a meaningful analysis as to the reliability of the Intoxilyzer. He also stated without the production of the source code, the operation of the Intoxilyzer was no more than a mystical machine. This testimony at the Sarasota County Hearing established that without the source code, the defense does not have full information about the Intoxilyzer as contemplated by *Muldowny*; even the State conceded during closing statements that they do not know what modifications were made to the software.

The issue before this Court is whether production of the source code is reasonably calculated to lead to the discovery of relevant evidence. The software on the Intoxilyzer is arguably the most critical part of the instrument, and certainly can lead to unreliable results, either by design or by error. For example, see the attached letter from the president of the

Florida Prosecuting Attorneys Association to FDLE, dated July 29, 2005, urging that the software program on the Intoxilyzer 8000 be modified to print “low sample volume” results, despite the determination of FDLE and CMI these results are scientifically unreliable. While the intention of the FPAA does not appear nefarious, it is never the less disturbing these scientifically unreliable results have been allowed to used on the Intoxilyzer 5000. The Intoxilyzer 5000 program does not inform an individual with a low volume sample that the results may be scientifically unreliable. While the pending “low volume sample” cases have a separate *Brady* hearing set, this letter further demonstrates the materiality of the source code.

At the Sarasota County Hearing, the Court was presented with rock-solid evidence of software modifications. The State cannot utilize the results of the Intoxilyzer, unless the Intoxilyzer was using an approved software program. The Defense is entitled to know the extent and significance of the secret software modifications. Without this information all we have is a mystical machine.

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to Jason Miller, Assistant State Attorney, State Attorney's Office, 2071 Ringling Boulevard, Sarasota, Florida 34237, David Haenel, John Pangallo, Derek Byrd, Kerry

Mack, Mark Zimmerman, James Dirmann, Angela Flaherty, Frederick Mercurio, Brett McIntosh, Varinia VanNess, Mike Burns, Todd Hunger, William Price, Henry Lee, Tom Hudson, Tom Shultz, and Lori Huskisson, Assistant Public Defender this 1st day November, 2005.



Robert N. Harrison
825 South Tamiami Trail, Suite 2
Venice, Florida 34285
(941) 485-8551
(941) 488-8932 Facsimile
Florida Bar No. 612545
Counsel for Defendants



Florida Department of Law Enforcement

Guy M. Tunnell, Commissioner

*Jeb Bush, Governor
Charlie Crist, Attorney General
Tom Gallagher, Chief Financial Officer
Charles H. Bronson, Commissioner of Agriculture*

October 12, 2005

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

RE: Our Public Records Request No.: 05-292
Florida Prosecuting Attorneys Association Correspondence

Dear Mr. Harrison:

I am writing in response to your public records request received by e-mail on October 10, 2005. We are providing a letter from the Florida Prosecuting Attorneys Association dated July 29, 2005, which pertains to your request. This document is being provided to you pursuant to Florida's Public Records Law (Chapter 119, Florida Statutes) without charge.

Should you have any questions, feel free to contact this office at (850) 410-7810.

Sincerely,

Guy M. Tunnell
Commissioner

A handwritten signature in cursive script, reading "Tanya D. Shrum", is positioned below the typed name of the Administrative Assistant.

Tanya D. Shrum
Administrative Assistant I /Custodian of Records
Alcohol Testing Program

*Committed to
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Criminal Justice Professionalism Program
Post Office Box 1489, Tallahassee, Florida 32302-1489 • (850) 410-8600
www.fdle.state.fl.us



Bruce H. Colton
State Attorney

OFFICE OF THE

State Attorney

NINETEENTH JUDICIAL CIRCUIT OF FLORIDA
SERVING
INDIAN RIVER, MARTIN, OKEECHOBEE
AND ST. LUCIE COUNTIES

411 South Second Street
Fort Pierce, Florida 34950
(772) 465-3000
Fax (772) 462-1214

Director's Office
cc: AC Bustle

July 29, 2005

RECEIVED

AUG 01 2005

Commissioner Guy M. Tunnell
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, FL 32302

Office of the Commissioner

Re: **Intoxilyzer 8000**

Dear Commissioner Tunnell:

The Florida Prosecuting Attorneys Association (FPAA) has been made aware of a potential legal problem with the Intoxilyzer 8000, scheduled to be introduced in the immediate future. The information provided by your staff indicates that the new instrument has certain physical requirements for a valid breath sample and if they are not met, a result is not provided. The instrument which is currently in use provides, under such circumstances, a numerical representation known as a "low volume sample" or "insufficient sample". We have been told that the Intoxilyzer 8000 is capable of printing this reading, but is programmed not to do so. Your staff has indicated that it is the position of the Department and the manufacturer that the instrument has been programmed in this manner because any such reading is scientifically unreliable.

The FPAA has the utmost respect for your scientific staff's abilities, as well as their conclusion in this regard. Our concern is that since the Intoxilyzer 5000 does report "low volume samples" and "insufficient samples", and the Intoxilyzer 8000 has the ability to do so, it could appear that the intentional concealment of this information may be interpreted by the courts as destruction of potentially exculpatory evidence, in violation of the U.S. Supreme Court decisions in *Brady v. Maryland*, *Arizona v. Youngblood*, and a defendant's due process rights. Such findings would result in a suppression of the intoxilyzer results.

Commissioner Guy M. Tunnell

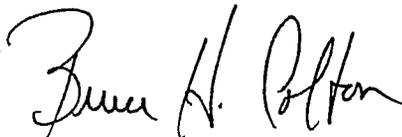
July 29, 2005

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Even if only in an abundance of caution in order to avoid litigation, our association urges you to make the necessary changes to prevent this from becoming an issue in Florida. This could be accomplished by printing the result with the caveat that such is not scientifically valid. It is the opinion of the Florida Prosecuting Attorneys Association that the position currently being taken by FDLE may be scientifically sound, but could be argued as not legally sound.

If you have any questions or wish to discuss this situation, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bruce H. Colton".

BRUCE H. COLTON

President

Florida Prosecuting Attorneys Association

BHC/cp