

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

CMI, INC. OF KENTUCKY,

Petitioner,

vs.

KYLE R. WOODS ET AL.,
THE STATE OF FLORIDA,

Respondents.

Case No. 2008 CA 5961 NC ✓
County Case No. 2006 CT 12017 NC

PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 9.100, Non-Party CMI, Inc., d/b/a CMI, Inc. of Kentucky (hereinafter "Petitioner"), 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 Amended Order On Disclosure Of Source Code and Object Code For Intoxilyzer 8000 and Protective Order, and shows the Court as follows:

JURISDICTION

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

FILED FOR RECORD
2008 APR 15 PM 4:14
KAREN L. JOSEPH
CLERK OF CIRCUIT COURT
SARASOTA COUNTY FL

STATEMENT OF THE FACTS

Petitioner is a Kentucky Corporation and a non-party to Respondent's criminal DUI case. Pursuant to Rule 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 8000. (Appendix A, page 4). Petitioner filed a Limited Notice of Appearance (Appendix A, page 5), and moved for a Protective Order. (Appendix A, page 8). An Order was entered (Appendix A, page 12), and Petitioner moved the lower court to reconsider or modify this Order. (Appendix A, page 22). 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 8000 and Protective Order on March 17, 2008. (Appendix A, page 48). This amended order superseded the prior order and modified it. The Order stated that the source code to the Intoxilyzer 8000 was a trade secret but found it was reasonably necessary 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 49). 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 moot its other consolidated appeals currently on review with the Sarasota Circuit Court. (Appendix A, page 51).

Petitioner respectfully petitions this Court for a Writ of Certiorari overruling the Amended Order On Disclosure Of Source Code and Object Code For Intoxilyzer 8000 and Protective Order dated March 17, 2008.

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 departed from the essential requirements of the law in its finding that the source code was reasonably necessary and by ordering Petitioner to submit to the jurisdiction of the County Court in such order.

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). 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 Appeals 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. 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 County 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 8000 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 48, 49). 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 8000 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 8000 does contains 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.

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).

Finally, 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). If the Fourth District Court of Appeal states that a criminal defendant is not entitled to the source code, how then can it be necessary? 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 Sarasota Circuit Court wherein Petitioner is appealing the jurisdiction of the Sarasota 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 Circuit 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, 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 isolate each instrument so it could not connect to the network. FDLE would then have 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.

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 District Courts of Appeal have explicitly stated criminal defendants are not entitled to the source code in case law 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 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

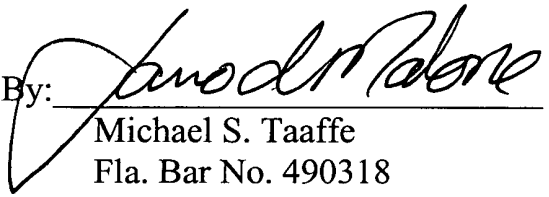
production, when it ordered versions of the source code to be produced which were not relevant because such versions were never put into use in Florida, and when it ordered the source code to be produced in electronic format despite the disastrous ramifications to the entire state's breath testing program.

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: April 15 2008.

Respectfully submitted,

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

By: 
Michael S. Taaffe
Fla. Bar No. 490318
Jarrod 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
2071 Ringling Blvd.
Sarasota, FL 34236

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

this 15 day of April, 2008.

By: 

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

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

CMI, INC. OF KENTUCKY,

Petitioner,

vs.

KYLE R. WOODS ET AL.,
THE STATE OF FLORIDA,

Respondents.

Case No. _____
County Case No. 2006 CT 12017 NC

_____/

PETITIONER'S APPENDIX A

Michael S. Taaffe
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BROWARD COUNTY SHERIFF'S OFFICE
P.O. BOX 9507 FORT LAUDERDALE, FLORIDA 33310

RETURN OF SERVICE

Assignment: **11823** Service Sheet # **07-069342**
STATE OF FLORIDA vs. **KYLE R WOODS, ET AL** **06-C1-12017NC**
SUBPOENA vs. **COUNTY/SARASOTA** **11/15/2007**
TYPE OF WRIT **CMI INC OF KENTUCKY** COURT **2731 EXECUTIVE PARK DRIVE SUITE 4** HEARING DATE
SERVE **WESTON, FL 33331**
R/A NRAI SERVICES INC

Received this process on
Date **10/15/2007**

256779
HARRISON, ROBERT N
825 S TAMiami TRAIL SUITE 2
VENICE, FL 34285

☒ Served
☐ Not Served - see comments

Date **10/18/07** at **1121A**

On **8899** Attorney **CMI INC OF KENTUCKY R/A NRAI SERVICES INC**, in Broward County, Florida, by serving the within named person a true copy of the writ, with the date and time of service endorsed thereon by me, and a copy of the complaint, petition, or initial pleading, by the following method:

☐ **INDIVIDUAL SERVICE**

SUBSTITUTE SERVICE:

- ☐ At the defendant's usual place of abode on "any person residing therein who is 15 years of age or older", to wit:
_____, in accordance with F.S. 48.031(1)(a)
☐ To _____, the defendant's spouse, at _____ in accordance with F.S. 48.031(2)(a)
☐ To _____, the person in charge of the defendant's business in accordance with F.S. 48.031(2)(b), after two or more attempts to serve the defendant have been made at the place of business

CORPORATE SERVICE:

- ☐ To _____, holding the following position of said corporation _____ in the absence of any superior officer in accordance with F.S. 48.081
☐ To _____, an employee of defendant corporation in accordance with F.S. 48.081(3)
☒ To **UNEIKA BROWN, NRAI**, as resident agent of said corporation in accordance with F.S. 48.091
☐ **PARTNERSHIP SERVICE:** To _____, partner, or to _____, designated employee or person in charge of partnership, in accordance with F.S. 48.061(1)
☐ **POSTED RESIDENTIAL:** By attaching a true copy to a conspicuous place on the property described in the complaint or summons. Neither the tenant nor a person residing therein 15 years of age or older could be found at the defendant's usual place of abode in accordance with F.S. 48.183
1st attempt date/time: _____ 2nd attempt date/time: _____
☐ **POSTED COMMERCIAL:** By attaching a true copy to a conspicuous place on the property in accordance with F.S. 48.183
1st attempt date/time: _____ 2nd attempt date/time: _____
☐ **OTHER RETURNS:** See comments

COMMENTS: _____



You can now check the status of your writ by visiting the Broward Sheriff's Office Website at www.sheriff.org and clicking on the icon "Service Inquiry"

ALL LAMBERTI, SHERIFF
BROWARD COUNTY, FLORIDA IDA

BY: *Monica 11823* D.S.

ORIGINAL

RECEIPT INFORMATION
RECEIPT #: **07-069342**
CHECK #: **5371**
SVC FEE: **\$20.00**
SUS FEE: **\$0.00**
QUANTITY:
ORIG: **1**
SVCS: **1**

EXECUTION COSTS
DOCKET & INDEX **\$0.00**
LEVYING **\$0.00**
ADVERTISING _____
HOLDING SALE _____
POSTAGE **\$0.00**
BILL OF SALE _____
TOTAL: **\$20.00**

DEMAND/LEVY INFORMATION
JUDGMENT DATE: **00/00/0000**
JUDGMENT AMT.: **\$0.00**
INTEREST PERCENT **0%**
INTEREST AMOUNT **\$0.00**
SHERIFF'S COST **\$20.00**
TOTAL AMOUNT: **\$20.00**

<input type="checkbox"/> IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR SARASOTA COUNTY, FLORIDA <input checked="" type="checkbox"/> IN THE COUNTY COURT IN AND FOR SARASOTA COUNTY, FLORIDA	
DIVISION: Criminal CIVIL	CASE NUMBER: 2006 CT 012017 NC
PLAINTIFF State of Florida	VS. DEFENDANT Kyle R. Woods et.al.,

SUBPOENA DUCES TECUM WITHOUT DEPOSITION

THE STATE OF FLORIDA:

TO: CMI INC of Kentucky
 BY SERVING: NRAI Services, Inc., Its Registered Agent
 2731 Executive Park Drive, Suite 4
 Weston, FL 33331

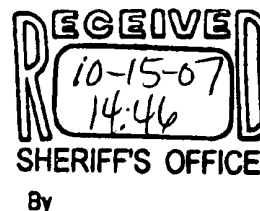
YOU ARE COMMANDED to appear at State Attorney's Office, in Sarasota, Florida, on November 15, 2007, at 9:00 A. M., and to have with you at that time and place the following: Any and all evidence existing in paper, electronic or other form of any and all source

code(s) used in the Intoxilyzer 8000, software versions 8100.24, 8100.25, 8100.26 & 8100.27. These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You may comply with this subpoena by providing legible copies of the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production. You may condition the preparation of the copies upon the payment in advance of the reasonable cost of preparation. You may mail or deliver the copies to the attorney whose name appears on this subpoena and thereby eliminate your appearance at the time and place specified above. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. **THIS WILL NOT BE A DEPOSITION; NO TESTIMONY WILL BE TAKEN.**

If you fail to: (1) appear as specified; or (2) furnish the records instead of appearing as provided above; or (3) object to this subpoena, you may be in contempt of court. You are subpoenaed by the attorneys whose names appear on this subpoena and unless excused from this subpoena by the attorneys or the Court, you shall respond to this subpoena as directed.

DATED ON October 12, 2007
Robert N. Harrison

ATTORNEY FOR: Defendants
 ADDRESS: Robert N. Harrison
825 Tamiami Trail S., Suite 2 Venice, Florida 34285



If you cannot afford to pay an attorney, call the Bar Association Legal Aid Society at (941) 366-0038. The mailing address is 1900 Main Street, Suite 311, Sarasota, Florida 34236-5921. An individual not eligible for free legal assistance may obtain a referral to an attorney by calling The Florida Bar Referral Service at (800) 342-8011. The mailing address for the Florida Bar Referral Service is 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the Sarasota County Jury Office, 2002 Ringling Blvd., Sarasota, Florida 34237, (941) 951-5785, within two (2) working days of your receipt of this Subpoena; if you are hearing impaired, call 1-800-955-8771; if you are voice impaired, call 1-800-955-8770.

FILED FOR RECORD STAMP



KAREN E. RUSHING
CLERK OF THE CIRCUIT COURT

[Signature]
 Deputy Clerk

DATE:

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

STATE OF FLORIDA,

vs.

Case No. 2006 CT 12017 NC

KYLE WOODS,

Defendant.
_____ /

LIMITED NOTICE OF APPEARANCE

NOTICE IS HEREBY GIVEN that CMI, Inc., d/b/a CMI, Inc. of Kentucky ("CMI"), hereby enters this limited Notice of Appearance for purposes of moving for a Protective Order in response to the subpoena duces tecum issued by counsel for Defendant in the above-styled matter. CMI contests the jurisdiction of this Court and expressly reserves any and all defenses available to it, including but not limited to, the right to contest *in personam* jurisdiction of this court over CMI.

916699v.1

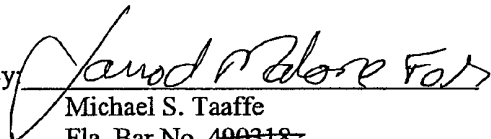
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ordinary U.S. Mail to the individuals on the attached service list this 9 day of November, 2007.

Respectfully submitted,

ABEL BAND, CHARTERED
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Attorneys for CMI, Inc.

By



Michael S. Taaffe
Fla. Bar No. ~~490318~~
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916933v.1

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

STATE OF FLORIDA,

vs.

Case No. 2006 CT 12017 NC

KYLE WOODS,

Defendant.

MOTION FOR PROTECTIVE ORDER

FILED 26 DAY Nov 20 07
KAREN E. RUSHING, CLERK
for Subst

COMES NOW, CMI, Inc., d/b/a CMI, Inc. of Kentucky ("CMI"), hereby moves this Court for a Protective Order under Fla.R.Crim.Pro. 3.220 (1)(1) from subpoenas issued by this Court regarding the Source Code and asserts a trade secret privilege under Florida Statute 90.506, and as support provides that:

1. This Court has issued a subpoena duces tecum to CMI for production of the Source Code.
2. The information requested is proprietary and is a trade secret.
3. The Sarasota County Courts have previously held the Source Code is a trade secret.
4. In *State v. Jack Irish*, Criminal Case No. 2006 CT 02109 SC (Order on Defendant's Motion to Compel Production of the Source Code dated May 4, 2006), the *Irish* decision noted that "both the State and the defense experts agree that the source code constitutes a trade secret."
5. Florida Statute 90.506 provides:

A person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by that person if the allowance of the privilege

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will not conceal fraud or otherwise work injustice. When the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require.

6. CMI is requesting that since the subpoenaed information is a trade secret, the proprietary rights of CMI and the irreparable harm that would result should this information be disclosed outweigh the potential benefit to Defendant's preparation of his defense, and a Protective Order should be issued denying Defendant's the right to the subpoenaed Source Code.
7. Non-disclosure of the Source Code will not conceal fraud or otherwise work injustice, since Defendant's have numerous other avenues from which they can prepare an adequate defense.
8. In the alternative, should this Court decide the Source Code is reasonable and necessary under 90.506, and direct disclosure of the Source Code, CMI respectfully requests this Court issue the attached Protective Order and require the requesting party sign the attached Non-Disclosure Agreement.
9. The Protective Order and Non-Disclosure Agreement are necessary to protect the proprietary nature of the Source Code and the interests of CMI.

916711v.1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ordinary U.S. Mail to the individuals on the attached service list this 19 day of November, 2007.

Respectfully submitted,

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Attorneys for CMI, Inc.

By: 

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10595

916711v.1

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916722v.1

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

STATE OF FLORIDA,
Plaintiff,

V.

KYLE R. WOODS, ET. AL.,
Defendant.

Case No. 2006 CT 12017

FILED FOR RECORD
2006 FEB -7 PM 1:15
KAREN E. RUSSELL
CLERK OF CIRCUIT COURT
SARASOTA COUNTY, FL.

**ORDER ON DISCLOSURE OF SOURCE CODE and OBJECT CODE FOR
INTOXILYZER 8000 and PROTECTIVE ORDER**

THIS CAUSE having come before the Court on the Motion of CMI, Inc. of Kentucky (hereinafter CMI) for Protective Order to allow them protections prior to the release of the Source code and Object code for the Intoxilyzer 8000, and the Court being fully advised herein, finds as follows:

1. Florida law authorizes two alternative theories for DUI offenses: actual impairment, or a blood alcohol level of 0.08 or higher. See § 316.193, Fla. Stat. (2007). The second theory has been referred to as a strict-liability theory, since the fact of operating a motor vehicle with a blood-alcohol level of 0.08 or higher is an offense even if impairment cannot be proven. The strict liability theory is the offense previously and more commonly referred to as driving with an unlawful blood alcohol level (DUBAL). *Tyner v. State*, 805 So.2d 862 (Fla. 2d DCA 2001).
2. The Defendants all are charged under the strict-liability theory (DUBAL).¹
3. The Defendants in this case have demonstrated materiality and a reasonable necessity for production of the Source Code. See Fla. R. Crim. P. 3.220(f). The defendants have established through expert testimony that the Source Code is reasonably necessary to determine whether the Intoxilyzer 8000 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.
4. CMI was served with a subpoena duces tecum, authorized by this Court, for the production of the Source Code for the Intoxilyzer 8000, Version 8100.24, 8100.25, 8100.26 and 8100.27.

¹ Most are charged by citation or information in the alternative.



5. On November 25, 2002 CMI registered with the Florida Secretary of State to transact business in the State of Florida using the name "CMI Inc. of Kentucky", with the stated purpose to sell breath alcohol testing equipment.

6. That CMI has transacted business in the State of Florida by selling breath alcohol testing equipment to FDLE, i.e. the Intoxilyzer 5000 and the Intoxilyzer 8000.

7. Counsel for CMI has stated to this court that its' Source Code and/or Object Code is a trade secret.

8. Counsel for CMI has further specifically advised this court that CMI will comply with the subpoena duces tecum for production of the Source Codes, provided that this court enters a protective order to protect the dissemination of the source code to individuals not subject to this order and require the signing of a Non-Disclosure Agreement by those experts receiving copies of the Source Code and/or Object Code.

IT IS, THEREFORE ORDERED AND ADJUDGED that CMI shall produce the Source Code(s) for the Intoxilyzer 8000, versions 8100.24, 8100.25, 8100.26 and 8100.27 in electronic format to Dr. Harley Myler, the Defendants' designated expert, or any other approved expert, within fourteen (14) days of the execution of the 3-page Non-Disclosure and Confidentiality Agreement attached hereto and incorporated herein by reference and pursuant to the definitions, conditions and parameters set out below.

I. Information disclosed by CMI and/or the State pursuant to this Order concerning the INTOXILYZER 8000 Source Code and/or Object Code shall be identified as CONFIDENTIAL. The disclosure of such information to persons other than those set out below or in any manner other than that set out below is prohibited.

A. DEFINITIONS.

"CONFIDENTIAL" information for purposes of this Order means the Source Code(s) and/or Object Code for the Intoxilyzer 8000, even if contained in any other derivative material such as depositions, transcripts, summaries or reports, and shall absolutely be prohibited from disclosure except as provided for herein.

"SOURCE CODE" means those set of commands for sequencing the operation, all of the data entry questions, the operational parameters, and the mathematical formulas for the analysis of a defendant's breath sample, in a computer program as it relates to the Intoxilyzer 8000.

"OBJECT CODE" means objects linked into computer executable code.

B. DESIGNATION OF CONFIDENTIAL INFORMATION.

The Source Code used by the Florida models of the INTOXILYZER 8000 breath alcohol instrument (hereinafter "Source Code") is hereby designated in its entirety as CONFIDENTIAL.

All transcripts, recordings or other electronic methods of preserving depositions taken or any testimony given by any witness or expert who has reviewed or otherwise obtained the Source Code or Object Code of the Intoxilyzer 8000 shall be treated as CONFIDENTIAL, until further order of the court, and upon proper notice to both parties.

All information deemed CONFIDENTIAL shall not be disclosed to any person who has not executed and filed with the court a Non-Disclosure Agreement certifying they have read and understand the terms of this Protective Order.

Those persons provided limited access to the Source Code in court, such as court personnel, jurors, and members of the public present during any testimony regarding the Source Code, shall be subject to the terms of this Protective Order but are not required to execute a Non-Disclosure Agreement. The Court will advise all persons present during any testimony regarding the Source Code that the materials discussed are subject to a Protective Order and are not to be disclosed.

C. DISCLOSURE OF CONFIDENTIAL INFORMATION.

Except as otherwise authorized by this Protective Order, information designated as CONFIDENTIAL shall be used only as necessary in connection with this proceeding and shall not be used for any other purpose, or be disclosed, disseminated or communicated to any person or expert employed or directly affiliated with any manufacturer of breath testing equipment or competitor of CMI, Inc. otherwise reviews or obtains the Source Code must first execute the Non-Disclosure Agreement appended to this Protective Order certifying that this Protective Order has been read and understood and that the terms shall be personally binding on the individuals.

Any person, requesting attorney, or expert who is provided the Source Code or otherwise reviews or obtains the Source Code must first execute the Non-Disclosure Agreement appended to this Protective Order certifying that this Protective Order has been read and understood and that the terms shall be personally binding on the individuals.

An exact copy of the executed Non-Disclosure Agreement shall be provided to CMI, Inc. The original signed and executed Non-Disclosure Agreement shall be filed with the Court issuing the Protective Order and copies shall be provided to all counsel of record.

D. MANNER OF DISCLOSURE OF CONFIDENTIAL INFORMATION.

Disclosure of the Source Code shall only be made directly to experts identified by the Parties in the Non-Disclosure Agreement. Prior to disclosure to such experts, other than Dr. Harley Myler, the Parties shall submit by certified mail to CMI, Inc., the expert's Curriculum Vitae, stating the name, address, occupation and professional background of the expert to whom the Source Code will be provided.

After receipt of the expert's Curriculum Vitae, CMI, Inc. shall then have seven (7) business days to file an objection to such expert with this Court. It is recognized that such an objection may be, for the sole purpose of objecting to the listed expert as it relates to the issue of confidentiality.

Prior to disclosure of the Source Code to the identified expert, CMI, Inc. shall have received an exact copy of a signed and executed Non-Disclosure Agreement from the requesting attorney and the identified expert.

By signing the Non-Disclosure and Confidentiality Agreement, CMI, the Defendants' expert and any other person(s) bound by the Non-Disclosure and Confidentiality Agreement submit themselves to the jurisdiction of Sarasota County for enforcement and resolution of any disputes in regards to the Non-Disclosure and Confidentiality Agreement.

The source code(s) shall be delivered only to Dr. Myler or any other approved expert personally.

Dr. Myler, or any other expert who has received the Source Code, shall not disclose to any other person or persons the Source code(s) and shall return the information to CMI once he/she has completed their examination.

Upon completion of any expert's report(s), and prior to release of the report to anyone not executing a Non-Disclosure and Confidentiality Agreement in accordance with this order, Dr. Myler, or any other approved expert, will provide a copy to CMI. CMI will have fourteen (14) days to review the report and prepare objection(s) to the specific portions of the report, if any, which CMI believes wrongfully discloses CONFIDENTIAL portions of the source code. Any objection by CMI must be in writing, with a copy provided to Defendants' designated attorney, Robert Harrison. If the parties cannot agree on whether the information should be omitted from the report, any dispute will be resolved by this Court. A hearing shall be held without delay if the parties are unable to timely resolve the matter. If CMI has no objection to the expert's report(s) or fails to object within the time frame set forth above, the report may be released to anyone, irrespective as to whether they signed the Non-Disclosure and Confidentiality Agreement.

No copies shall be made of the source code(s) nor shall it be reproduced, stored or recorded in any manner by Dr. Myler or any other person. Any disclosure or reproduction, whether willful or inadvertent, will result in sanctions from the court, including but not limited to, criminal contempt.

E. COURT FILINGS CONTAINING CONFIDENTIAL INFORMATION.

All CONFIDENTIAL information contained or discussed in any pleading, motion, exhibit, deposition or testimony transcripts, or other paper filed with the Court shall be filed under seal. This would include objected to portions of the report, summary, etc., until further order of the court. Documents containing a simple reference by name to the CONFIDENTIAL information, such as "Source Code", do not need to be filed under seal, except where any portion of the substantive CONFIDENTIAL information itself is revealed. Where possible, only portions of filings with the Court containing CONFIDENTIAL information shall be filed under seal. Information filed under seal shall be placed in a sealed envelope/box with the endorsements required by the applicable rules of the Court and/or filed in accordance with the electronic filing rules of the Court, and shall not permit public inspection of the sealed envelope/box. The Clerk shall keep such papers under seal until further order of this Court.

F. REDACTION OF VITAL SECURITY INFORMATION

Portions of the Source Code include information considered vital to the continued security and integrity of the State's enforcement programs and shall be redacted prior to disclosure of the Source Code. The redacted Source Code portions include only hard coded password, temporary password, and communications related code and are warranted by CMI to have no relevance nor bearing on the workings of the INTOXILYZER 8000 as it relates to the analysis of a subject's breath.

G. OTHER PROCEDURES.

1. Any violation or breach of the terms and conditions set forth in this Protective Order or in the appended Non-Disclosure Agreement shall be grounds for contempt, civil damages, and other appropriate sanctions which may be appropriate.
2. No license is granted concerning such Source Code and/or Object Code under the terms of this Protective Order to any Party, individual, or entity, including independent experts or consultants. This necessarily includes but is not limited to the right to copy in whole or in part or otherwise reproduce any portion of the Source Code and/or Object Code.
3. All mailings, including notices required under this Protective Order, directed to CMI, Inc. or the President of CMI, Inc., shall be mailed via certified mail to the following address: (1) CMI, Inc., 316 E. 9th Street, Owensboro, Kentucky 42303; (2) Robert Harrison, Esquire, 825 Tamiami

Trails S., Suite 2, Venice, Florida 34285 and (3) Cliff Ramey, Misdemeanor Chief, Office of the State Attorney, 2071 Ringling Blvd., Sarasota, Florida 34237.

H. PROCEDURES UPON TERMINATION OF LITIGATION.

Within ten (10) days after receiving notice of the entry of an order, judgment or decree terminating this action, regardless of whether such order, judgment or decree is appealed or otherwise challenged, all persons having received CONFIDENTIAL information, shall return all such CONFIDENTIAL information and all copies thereof, if any, to counsel for CMI, Inc. or directly to CMI, Inc by certified mail, and defense counsel shall file a certification with the Court attesting to its compliance with this provision.

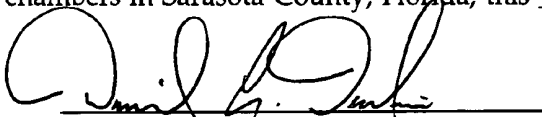
The obligations imposed by this Protective Order and Non-Disclosure Agreement shall survive the termination of this proceeding and any related proceedings.

I. RIGHT TO SEEK MODIFICATION.

CMI, Inc. or the Defendant(s) may petition the Court for a separate order governing disclosure of CONFIDENTIAL information, by limiting or expanding this Protective Order. CMI, Inc. will be provided fourteen (14) days notice prior to any modification of this order.

All hearings in this action, including the trial, will presumptively be open to the public, except that the Court may issue further orders as necessary to protect CONFIDENTIAL information from improper disclosure.

DONE AND ORDERED in chambers in Sarasota County, Florida, this 2nd day of February, 2008.


Honorable David L. Denkin
County Court Judge

cc: Robert N. Harrison, Esquire
Kerry Mack, Esquire
Cliff Ramey, Assistant State Attorney
Michael Taaffe, Esquire

NON-DISCLOSURE AND CONFIDENTIALITY AGREEMENT

THIS AGREEMENT is made and entered into this _____ day of _____, 200__ between CMI, Inc., a corporation of the Commonwealth of Kentucky, engaged in business in the State of Florida, having a place of business at 316 E. 9th Street, Owensboro, Kentucky 42303 (the "Disclosing Party"), and the "Receiving Party(ies)" _____, whose phone number is _____ and address is _____.

NOW, THEREFORE, in consideration of the mutual covenants herein and for other good and valuable consideration, the parties hereto agree as follows:

1. **Non-Use of Confidential Information.** The Receiving Party covenants and agrees that it will not, except as provided in this agreement, directly or indirectly, individually or through any related individual or entity, at any time hereafter, for any reason or purpose whatsoever, use for its personal benefit or for the benefit of others, or disclose, communicate or divulge to or for the benefit of, directly or indirectly, any person, firm, association or corporation that has not executed this agreement to become a Receiving Party, any of the Disclosing Party's "Confidential Information" without the prior written consent of the Disclosing Party.

2. **Definition of Confidential Information.** The Receiving Party acknowledges and agrees that the Disclosing Party's "Confidential Information" is limited to the Source Code(s) and Object Code(s) for the Intoxilyzer 8000, versions 8100.24, 8100.25, 8100.26 and 8100.27.

3. **Purpose.** The Receiving Party acknowledges that it is receiving the Confidential Information solely for analyzing the source code of the software used by the Intoxilyzer 8000s in the State of Florida, the preparation of a report of findings and testimony in regards to the findings.

4. **Disclosure of Confidential Information:** Disclosing Party shall produce the source code(s) for the Intoxilyzer 8000, versions 8100.24, 8100.25, 8100.26 and 8100.27 in electronic format, on a CD-ROM to any Receiving Party, within fourteen (14) days of the receipt of an executed copy of this agreement signed by the Receiving Party and a written request for the production of the Source Codes Propriety Information, sent certified mail to the Disclosing Party at 316 E. 9th Street, Owensboro, Kentucky 42303.

5. **Expert's Report.** Any Report or other material generated as a result of a review of the Confidential Information will remain confidential and may not be disclosed to anyone that has not executed this agreement to become a Receiving Party, except as provided herein, until such time as the Disclosing Party has had an opportunity to

review said report / material and may only be disclosed in the manner provided in the companion Protective Order.

6. **Return of Confidential Information.** Upon completion of the analysis and report, the Receiving Party shall return to the Disclosing Party all materials containing Confidential Information. In the event the Receiving Party is called to testify regarding the analysis of the source code, the Disclosing Party will return to the Receiving Party all of the returned information described above within ten days of receipt of written request for this material. The Receiving party, upon conclusion of the testimony, shall return the Confidential Information to the Disclosing Party within ten days of said conclusion.

7. **Acknowledgment and Remedy.** The undersigned Parties acknowledge and agree they have reviewed the protective order issued by the County Court in Sarasota County, Florida and that the failure to abide by the terms of the Protective Order may subject the violating party to sanctions from any court in Sarasota County, including but not limited to, contempt, civil damages, and other appropriate sanctions which may be appropriate.

8. **Enforcement.** In the event any party brings action/litigation as a result of a breach of either the Protective Order or this Agreement, the prevailing party is entitled to recover from the non-prevailing party costs and reasonable attorney fees associated with the action/litigation.

9. **No Rights Conveyed.** No licenses, interest, options, or rights of any kind, express or implied, are being granted to the Receiving Party by the Disclosing Party as a result of or related to this Agreement.

10. **Severability.** The invalidity or unenforceability, in whole or in part, of any covenant, promise or undertaking, or any part thereof, or any provision of this Agreement shall not affect the validity or enforceability of the remaining portions thereof.

11. **Headings and Captions.** The headings and other captions in this Agreement are for convenience of reference only and shall not be used in interpreting, construing or enforcing any of the provisions of this Agreement.

12. **Governing Law; Venue.** This Agreement shall be interpreted, construed and governed according to the laws of the State of Florida. Any and all actions, claims or lawsuits arising from this Agreement are to be brought in Sarasota County, Florida.

13. **Signature in Counterpart.** This agreement may be signed in counterparts, which taken together shall be considered an enforceable agreement. After the initial agreement

is executed, any defense attorney, prosecutor, Defendant, or expert wishing to become a Receiving Party may do so by executing this agreement in counterpart.

14. **Construction of Agreement.** Whenever and wherever the context of this Agreement so requires, any references to the singular shall be read, construed and interpreted to mean the plural and vice-versa; any references to the masculine gender shall be read, construed and interpreted to mean the feminine gender and vice-versa; and any references to the neuter gender shall be read, construed and interpreted to mean the masculine or feminine gender, whichever is applicable.

15. **Waiver of Breach.** The waiver by either party of a breach of any provision of this Agreement by the other party shall not be construed as a waiver of any subsequent breach by the other party.

16. **Entire Agreement; Binding Effect.** This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all previous communications, representations, agreements, arrangements, negotiations, or understandings, whether verbal or written, between the parties hereto. It shall bind and inure to the benefit of both parties, their respective successors, and legal representatives.

17. **Amendments.** This Agreement may be changed only by agreement in writing signed by all parties and approved by a court of competent jurisdiction.

18. **Filing Original(s) with the Court.** All original executed agreements will be filed with the Clerk Court in Sarasota County, Florida, in the Case of *State v. Kyle Woods*, No. 2006 CT 012017 NC and copies mailed to CMI, Inc., 316 E. 9th Street, Owensboro, Kentucky 42303, Robert Harrison, Esquire, 825 Tamiami Trail S., Suite 2, Venice, Florida 34285 and Cliff Ramey, Misdemeanor Chief, Office of the State Attorney, 2071 Ringling Blvd., Sarasota, Florida 34237.

Disclosing Party
BY: CMI, Inc.

Receiving Party

BY: _____

(Printed Name)

(Printed Name)

Dated _____

Dated _____

Cases Consolidated:

Kirsten Smith	Case No.	2006 CT 013763 NC
Peter Osterby		2006 CT 009094 NC
Juramir C. Sobrinho		2006 CT 013370 NC
Charles Yeagley		2006 CT 017419 NC
Homer Williams		2006 CT 010458 NC
Carl Robison		2006 CT 017802 NC
Jennifer Waelti		2006 CT 017957 NC
William Meyer		2006 MM 015639 NC
Amy Shaffalo		2006 CT 015732 NC
Debra Reecer		2006 CT 015113 NC
Denise Whitney		2006 CT 010461 NC
Sandra Masters		2006 CT 018670 NC
Sharon E. Offutt		2006 CT 021444 NC
Stephen Wall		2006 CT 013802 NC
Heather Riggenbach		2006 CT 009277 NC
Mark Peterson		2006 CT 010380 NC
Timothy John Piekarz		2006 CT 016399 NC

Case with previously consolidated:

Christopher Tominello	2006 CT 014805 NC
Erik Soal	2006 CT 008585 NC

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

STATE OF FLORIDA,

vs.

Case No. 2006 CT 12017 NC

KYLE WOODS,

Defendant.

FILED 27 DAY Feb 20 08
KAREN E. RUSHING, CLERK

**MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE
MODIFICATION OF PROTECTIVE ORDER**

CMI, Inc., d/b/a CMI, Inc. of Kentucky ("CMI"), still contesting the jurisdiction of this Court and expressly reserving any and all defenses available to it, including but not limited to, the right to contest *in personam* jurisdiction of this Court over CMI, through the undersigned counsel, hereby respectfully moves this Court to reconsider its finding that the source code is reasonably necessary and in the alternative requests this Court modify the existing Order On Disclosure Of Source Code and Object Code For Intoxilyzer 8000 and Protective Order and in support states:

1. This Court issued an Order dated February 7, 2008 regarding production of the source code which included a protective order and non-disclosure agreement intended to protect the source code from disclosure because this Court held the source code is a trade secret.

2. In this Order, this Court held, without argument or motion by either side, that the Defendant demonstrated reasonable necessity for production of the source code. Ostensibly, this finding of fact regarding reasonable necessity was derived from prior evidentiary hearings to which CMI was not involved.

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Dkt: RGT

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3. In its finding that the source code was reasonably necessary, this Court likely was responding to the current state of the law that when a court finds documents 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).

4. However, this Court found in paragraph three of page one of its Order that the source code was reasonably necessary to determine "whether the Intoxilyzer 8000 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."

5. The problem with this finding is that this Court must find the source code is reasonably necessary to ensure the Intoxilyzer works properly and is accurate and reliable. It is not reasonably necessary because there is another avenue that Defendant has to do the same thing; by way of the testing procedures FDLE puts the Intoxilyzer 8000 through under the breath testing program. If there is another avenue that Defendant can utilize to ensure accuracy and reliability, then this Court is obligated to find the production of the trade secret is not reasonably necessary.

6. Further, it is axiomatic that reasonable necessity is a much higher standard than mere materiality. Aside from the fact that virtually all the courts to address the issue in Florida have found the source code is not even material, yet this Court has found that a greater standard than materiality has been met, reasonable necessity, this Court in *State v. Udice/Woods* originally found the source code was NOT material.

7. It was only after Defendant persuaded this Court that the standard for materiality was lower than the *James v. State* standard that this Court reversed itself and held the source

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code to the Intoxilyzer 8000 was material. To compare using a scale of one to ten, this Court found the source code was not material when it was a level 5, but it was material if materiality were defined using a lower standard at a level 2. How then can the source code be reasonably necessary at a level 8 if it was not material at a level 5?

8. In order to find the source code is reasonably necessary, this Court must find that reasonable necessity is a lower standard than materiality. This the Court cannot do and CMI is requesting that this Court reverse its Order and find that the source code is not reasonably necessary to Defendant's defense.

9. CMI has informed this Court that it will produce the Source Code provided that this Court issues an appropriate protective order and requires a non-disclosure agreement to be signed which protects CMI's trade secrets. CMI provided such a proposed order to this Court and during six hours of hearing time over two separate days and repeatedly accepted changes to its original proposed order in light of objections by Mr. Harrison that more often than not were merely semantics.

10. At the same time, CMI is contesting and appealing this Court's jurisdiction over CMI. Despite this appeal, CMI would still voluntarily produce the source code if a protective order and non-disclosure agreement were issued that properly protected CMI's recognized trade secret and did not inappropriately compromise the integrity of Florida's entire breath testing program.

11. Thus, if this Court is not inclined to reverse its findings of reasonable necessity, CMI requests it modify the Order as set forth below.

12. Throughout the several months of discussion regarding such protective order, CMI understood that the production of the source code was to be in paper format, and CMI could redact security related information. Support for this lies in the various letters sent to this Court

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detailing the process whereby the source code would be bound for security with pages appropriately marked to prevent copying and disclosure. Additionally, this Court included, even in its own final Order, that security and communications related information could be redacted.

13. At no time did this Court hear testimony or formal argument regarding production of the source code in electronic format, on a CD-ROM. It thus came as a complete surprise to CMI that production was to be by way of CD-ROM.

14. CMI previously provided this Court with an affidavit from CMI president Toby Hall regarding the security reasons why information is necessary to be redacted prior to production. (**Attachment "A"**).

15. If the source code is produced in electronic form, the integrity of the entire State of Florida's breath testing program would be compromised. This would affect all future DUIs throughout Florida.

16. FDLE has informed CMI that it strongly and emphatically opposes any production of the source code in electronic format and would like the opportunity to have Laura Barfield testify before this Court on the subject. Attached is a preliminary statement from FDLE summarizing their position. (**Attachment "B"**).

17. Since FDLE is CMI's client, CMI must accommodate their security concerns with the utmost gravity.

18. In addition to FDLE's concerns that the security and integrity of Florida's breath testing program would be compromised, CMI has concerns that its trade secret would not be secure if the source code were produced in electronic format.

19. In support of this, CMI provides to this Court a letter dated July 12, 2003, wherein Harley Myler provides to defense attorney Stuart Hyman over 30 pages of confidential and proprietary data that Myler improperly copied from EPROMS that Myler received from FDLE,

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despite the fact that Myler acknowledged in the letter such information was confidential and should not be disclosed. (Attachment "C") Myler's letter supports CMI's concern that Myler or other proposed defense expert might compromise CMI's trade secret, and that production absolutely needs to be in document format bound and marked to prevent disclosure.

20. CMI is thus requesting this Court modify the protective order and non-disclosure agreement to reflect that the source code is to be produced in paper format as the parties had previously discussed. This would resolve FDLE and CMI's concerns on this issue.

21. Further, the current protective order issued by this Court provides in Section D, Paragraph 4, that CMI, the proposed expert, and anyone signing the non-disclosure agreement submits themselves to the jurisdiction of this Court. There are two serious issues with this provision.

22. First, CMI has repeatedly and consistently asserted this Court does not have personal jurisdiction over it because CMI is a non-party foreign corporation, and the long-arm jurisdiction of this Court over foreign corporations who have a Florida registered agent and who are a party to litigation is different from this Court's subpoena power over a non-party. Thus, CMI is contesting such jurisdiction in separate appellate proceedings and cannot voluntarily submit itself to the jurisdiction of this Court because those proceedings would be held moot. CMI requests the Order be modified to reflect this.

23. Next, this Court has failed to recognize that the source code could be obtained by a third party not bound by the non-disclosure agreement and outside the jurisdiction of this Court. Since Myler resides in Texas, the possibility of this scenario is high, particularly given his past action (see paragraph 19), and CMI would have to bring enforcement actions in the jurisdictions wherein they occur. CMI is requesting this Court alter the terms of the protective

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order in section D, paragraph 4, and the non-disclosure agreement, sections 7 and 12, to reflect this.

24. During the hearing on this Order, this Court specifically held that the source code was a trade secret over objection but the actual Order failed to note this. CMI requests the Order note that this Court determined the source code was a trade secret based upon prior evidentiary hearings and case law.

25. Next, Defendant is requesting CMI produce the source code to the Intoxilyzer versions 8100.24 and 8100.25, but those versions have never been utilized in the State of Florida and are therefore irrelevant. CMI is requesting that this Court modify the Order to provide for disclosure only of the source code for the software that was actually used in the instant cases.

26. Finally, CMI will not formally object to Dr. Stefan Rose being listed as a defense expert for purposes of the protective order and non-disclosure agreement because it does not appear Dr. Rose is currently affiliated with a competitor, but CMI does not otherwise waive any claims it may have, in this or a related proceeding, regarding either Dr. Rose's qualifications or the substance of any report/testimony he may provide because his curriculum vitae shows he is not qualified to review the source code.

27. WHEREFORE, CMI, prior to producing the source code, respectfully requests this Court reconsider its prior Order or, in the alternative, modify such order accordingly as set forth above, or enter CMI's proposed Protective Order and Non-Disclosure Agreement (Attachment "D").

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ordinary U.S. Mail to the following individuals on this 27 day of February, 2008.

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

Cliff Ramey, ASA, Supervisor
Office of State Attorney
2071 Ringling Boulevard
Sarasota, Florida 34230

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

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Comes the Affiant Toby Hall, and being first duly sworn,
states as follows:

1) My name is Toby Hall. I am the President of CMI, Inc., located at 316 East 9th Street, Owensboro, Kentucky. I was appointed president in April of 2007. I hold a B.S. in Electrical Engineering and have 15+ years experience in instrumentation design.

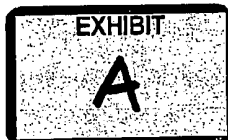
2) CMI manufactures, among other things, the Intoxilyzer 5000 and the Intoxilyzer 8000. CMI sells these products throughout the United States and abroad. The Intoxilyzer 8000 is currently in use in 10 states and is approved in 18 states. The Intoxilyzer 8000 is approved and in use in 6 foreign countries.

3) CMI owns certain copyrights in the Source Code for the Intoxilyzer 8000 breath alcohol instruments afforded by Title 17 of the United States Code.

4) CMI considers the Source Code for the Intoxilyzer 8000 breath alcohol instruments proprietary information and a trade secret of CMI. Disclosure of the Source Code would cause irreparable harm to CMI.

5) CMI has a policy in which the Source Code can be obtained for controlled viewing by way of a Protective Order and Non-Disclosure Agreement that have been written to protect our valuable property, namely the Source Code. The process to

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obtain the Source Code for controlled viewing is outlined in a separate document.

7) The Intoxilyzer 8000 software that is in each of the Intoxilyzer 8000's is an executable file that is stored in a flash ram which is similar to an executable computer program that would run on a personal computer(PC). The software stored in the flash can be read from the flash chip using the proper equipment and stored as a file on a PC. This file on a PC is sometimes referred to as machine code. The software cannot be run on a PC but rather needs to be run on the target(device) for which it was written. The file read from the flash chip can be viewed in hexadecimal format and is not easily readable by a person.

8) Source Code is more easily read by a person who has the appropriate training and experience to read it. It is similar to a foreign language. The Source Code for the Intoxilyzer 8000 spans many files and is written largely in the C++ computer language. The Source Code, once written, is compiled with a C++ compiler and linked with a compatible linker. The compiler compiles the Source Code into object files and the linker then arranges the objects to be in their proper places. The output of the linker is the file that is programmed into the flash chip and can be viewed in hexadecimal format.

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9) The Source Code for the Intoxilyzer 8000 has been coded to perform all of the functions for conducting breath tests. These functions, functions for data entry, and functions for optional accessories have been and are provided for in software as they are created. Once this original Source Code has been generated for these functions, it is available for any customer that would like to incorporate and use it. Configurations to this code are sometimes necessary to meet a customer's needs. Items such as questions asked of the operator at the beginning of a test, print format, and test sequence order are examples of items that are configured differently for different customers.

10) The Source Code used to translate the signals from the detector to an ethanol reading is the same Source Code that was in the instrument that was found to meet all applicable requirements of the National Highway Traffic Safety Administration Model Specifications for evidential breath testers, FR 58 48705 on November 26, 2001.

11) When a customer asks for changes in the functionality of their instruments, we assess the new desired function, compare that to the existing functionality, and will configure the instrument to perform in the new desired fashion. Some functional changes do require changes to the software in the instruments. When this is necessary, updates and configuration changes are made to the instrument Source Code, the code is

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compiled and linked, and subsequently uploaded into the instrument flash chip. The flash chip is analogous to a computer hard drive. The method for putting the software in the instrument can be a call to the instrument with our proprietary communications software, a direct cable connection to our proprietary communications software, or physically changing the flash chip. Once the customer is satisfied with the new configuration, one of the previously mentioned methods will be used to transfer the new program to the instruments. Upon request, a customer can obtain a list of the major changes in the functionality of the instrument.

12) The flash chip in the Intoxilyzer 8000 contains the program used to operate the instrument. If a customer chooses to store data electronically for tests ran on the instrument, that data is stored in a separate data flash in the instrument.

13) The Source Code used to generate the program for the Intoxilyzer instruments is not simple information but rather extremely valuable property owned by CMI, Inc. The Source Code is a culmination of dozens of years of engineering time spent in its creation. CMI holds the Source Code as one of its most valuable assets.

14) The Source Code contains pass codes and communication protocols for instrument operation. The Florida Department of Law Enforcement has asked CMI to put in place pass codes to

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prevent access to menu functions on the instrument that can and are used by technicians to calibrate, test, and configure the instruments to follow state needs. Were these pass codes widely known, anyone knowing the pass code could potentially change instrument configuration, turn off printing, recalibrate or wipe the calibration from an instrument, destroy subject test data stored on the instrument, or otherwise disable the instrument so that it does not function or does not function to state requirements. To insure that these probabilities do not happen, the state would need to ask CMI to change the pass code after every controlled viewing of the software. This exercise would cost the state thousands of dollars and months of downtime for each instance of controlled viewing of the Source Code. For this reason, pass codes are redacted from the Source Code made available for controlled viewing.

15) The Intoxilyzer 8000 is capable of communicating with a personal computer via phone line and direct connect cable. The communication protocol and pass keys used in these communications are proprietary protocols of CMI. With the Source Code, a person would have access to these proprietary protocols. Anyone knowing these protocols and pass keys could potentially change instrument configuration, turn off printing, recalibrate or wipe the calibration from an instrument, destroy subject test data stored on the instrument, or otherwise disable

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the instrument so that it does not function or does not function to state requirements. Further, with the appropriate skill set and development tools which are available on the market for purchase, a person with a digital version of the Source Code could change the functionality of the instrument in a subtle or obvious way to do whatever they please. These changes could be made to the instrument with a phone call and without needing to be near the instrument. These protocols are used for all Intoxilyzer 8000's utilizing this communications method around the world. For this reason, pass codes and communication protocols are redacted from the Source Code made available for controlled viewing.

16) I swear or affirm that all of the above statements are true and correct.

This 24th day of January, 2008.

Toby S. Hall
Title: President,
CMI, Inc.

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Florida Department of
Law Enforcement

Gerald M. Bailey
Commissioner

Alcohol Testing Program
P.O. Box 1489
Tallahassee, Florida 32302
(850) 617-1277
(850) 410-7816 Fax
<http://www.fdle.state.fl.us>

Charlie Crist, *Governor*
Bill McCollum, *Attorney General*
Alex Sink, *Chief Financial Officer*
Charles H. Bronson, *Commissioner of Agriculture*

February 27, 2008

Jarrold Malone, Esq.
PO Box 49948
Sarasota, FL 34230-6948

re: State v. Kyle Woods
Case No.: 2006 CT 12017

Dear Mr. Malone:

It is the position of the Alcohol Testing Program (ATP) that its interest would be seriously and significantly compromised if the source code is released electronically. It is our understanding that the security of the ATP would be undermined as information such as passwords and communication codes cannot be completely redacted when in electronic format.

As I understand it, CMI is able to produce the source code in printed form where ATP's security information could be completely protected. We hope the Court will consider the written alternative as it appears to meet the needs of those seeking the information and our concerns.

Please contact me if you have any further questions.

Sincerely,

Sharon S. Traxler
Assistant General Counsel
850.617.1276

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

Saturday, July 12, 2003

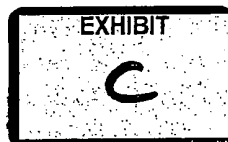
Mr. Stuart Hyman
Law Office
1520 East Amelia Street
Orlando, Florida 32803

Dear Stuart,

Please find enclosed the data listing of the ROMs that were sent to me by the FDLE. The data is in Motorola S-code format and I have made written annotations of differences. Also be advised that this data is copyright to CMI, Inc. and if used in court, the court should be made aware that this data is the protected intellectual property of CMI.

Sincerely,


Harley R. Myler



h.myler@myler.org

409.838.2327 (ofc)

720.559.8703 (fax)

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

STATE OF FLORIDA,

vs.

Case No. _____

Defendant. /

PROTECTIVE ORDER

Information disclosed by CMI, Inc. and/or the State during this proceeding concerning the INTOXILYZER® 8000 breath Source Code and/or Object Code shall be considered proprietary information owned by CMI, Inc., shall be identified HIGHLY CONFIDENTIAL, and has been found by this Court to be a trade secret. The disclosure of such information to persons other than those set out below or in a manner other than that set out below will cause substantial competitive harm to CMI, Inc. and is prohibited.

A. DEFINITIONS.

1. "This proceeding" or "this action" means the above-captioned action pending in this Court, including any related discovery, pretrial, trial, post-trial, or appellate proceedings.
2. "Party" means a plaintiff or defendant in this action (collectively "Parties").
3. "Counsel" means attorneys of record in this proceeding.
4. "HIGHLY CONFIDENTIAL" information for purposes of this Protective Order, shall include Source Code and/or Object Code for the Intoxilyzer 8000, even if contained in any other derivative material such as depositions, transcripts, summaries or reports, and shall absolutely be prohibited from disclosure except as provided for herein.

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5. "Source Code" means those set of commands for sequencing the operation, all of the data entry questions, the operational parameters, and the math formulas for the analysis of a defendant's breath sample, in a computer program as it relates to the Intoxilyzer 8000.
6. "Object Code" means objects linked into computer executable code as it relates to the Intoxilyzer 8000.
7. The "State" means the State Attorney's Office of the Twelfth Judicial Circuit.

B. DESIGNATION OF HIGHLY CONFIDENTIAL INFORMATION.

The Source Code used by the Florida models of the INTOXILYZER® 8000 breath alcohol instrument (hereinafter "Source Code") is found to be a trade secret and is hereby designated in its entirety as HIGHLY CONFIDENTIAL.

All transcripts, recordings or other electronic methods of preserving depositions taken or any testimony given by any witness or expert who has reviewed or otherwise obtained the Source Code or Object Code of the Intoxilyzer 8000 shall be treated as HIGHLY CONFIDENTIAL and are not to be disclosed to any other party, until further order of the court, and upon proper notice to both parties.

All information deemed HIGHLY CONFIDENTIAL shall not be disclosed to any person who has not executed and filed with the court a Non-Disclosure Agreement certifying they have read and understand the terms of this Protective Order.

Those persons provided limited access to the Source Code in court, such as court personnel, jurors, and members of the public present during any testimony regarding the Source Code, shall be subject to the terms of this Protective Order but are not required to execute a Non-Disclosure Agreement. This Court will advise all persons present during any testimony regarding the Source Code that the materials discussed are subject to a Protective Order and are not to be disclosed.

C. DISCLOSURE OF HIGHLY CONFIDENTIAL INFORMATION.

Except as otherwise authorized by this Protective Order, information designated as HIGHLY CONFIDENTIAL shall be used only as necessary in connection with this proceeding and shall not be used for any other purpose, or be disclosed, disseminated or communicated to any person or expert employed or directly affiliated with any manufacturer of breath testing equipment or competitor of CMI, Inc. without exception.

Any person or expert who is provided the Source Code or otherwise reviews or obtains the Source Code must first execute the Non-Disclosure Agreement appended to this Protective Order certifying that this Protective Order has been read and understood and that the terms shall be personally binding on the individuals.

An exact copy of the executed Non-Disclosure Agreement shall be provided to CMI, Inc. within five (5) business days of notice of entry of this Protective Order. The original signed and executed Non-Disclosure Agreement shall be filed with the Court issuing the Protective Order and copies shall be provided to all counsel of record.

D. MANNER OF DISCLOSURE OF HIGHLY CONFIDENTIAL INFORMATION.

Disclosure of the Source Code shall only be made directly to experts identified by the Parties in the Non-Disclosure Agreement. Prior to disclosure to such experts, the Parties shall submit by certified mail to CMI, Inc., the expert's Curriculum Vitae, stating the name, address, occupation and professional background of the expert to whom the Source Code will be provided.

After receipt of the expert's Curriculum Vitae, CMI, Inc. shall then have 7 business days to file an objection to such expert with this Court. It is recognized that such an objection may be by way of limited appearance both reserving and contesting personal jurisdiction of this Court, for the limited purpose of objecting to the listed expert.

Prior to disclosure of the Source Code to the identified expert, CMI, Inc. shall have received an exact copy of a signed and executed Non-Disclosure Agreement from the requesting attorney and the identified expert. The expert receiving the Source Code shall not provide the Source Code to any other person without written consent from CMI, Inc.

Any and all expert reports, summaries, notes, critiques or evaluations of the Source Code (hereinafter "Expert Report"), prepared by an expert on behalf of a Party shall be

submitted, by certified mail, to CMI, Inc. for review prior to submission to the Court or any other use thereof. CMI, Inc. shall have 10 business days to object to the Expert Report with this Court, during which time the parties shall not submit such Expert Report to any Court or make any other use thereof prior to the end of the review period.

Such Expert Report shall thereafter be filed with the Court under seal in accordance with paragraph E of this Protective Order. The Expert Report, after a review as outlined above, may be used in connection with other pending Florida litigation, provided that the Expert Report be filed under seal in every case and shall remain in all cases HIGHLY CONFIDENTIAL and subject to this Protective Order.

E. COURT FILINGS CONTAINING HIGHLY CONFIDENTIAL INFORMATION.

All HIGHLY CONFIDENTIAL information contained or discussed in any pleading, motion, exhibit, deposition or testimony transcripts, or other paper filed with the Court shall be filed under seal. Documents containing a simple reference by name to the HIGHLY CONFIDENTIAL information, such as "Source Code", do not need to be filed under seal, except where any portion of the substantive HIGHLY CONFIDENTIAL information itself is repeated, summarized or discussed. Where possible, only portions of filings with the Court containing HIGHLY CONFIDENTIAL information shall be filed under seal. Information filed under seal shall be placed in a sealed envelope/box with the endorsements required by the applicable rules of the Court and/or filed in accordance with the electronic filing rules of the Court, and shall not permit public inspection of the sealed envelope/box. The Clerk shall keep such papers under seal until further order of this Court.

F. REDACTION OF VITAL SECURITY INFORMATION

Portions of the Source Code include information considered vital to the continued security and integrity of the State's enforcement programs and shall be redacted prior to disclosure of the Source Code. The redacted Source Code portions include only hard coded password, temporary password, and communications related code.

G. OTHER PROCEDURES.

1. This Order shall be without prejudice to the right of any party to bring before the Court the question of whether any particular information designated **HIGHLY CONFIDENTIAL** is relevant, discoverable or admissible at any hearing or trial of this action or whether it is material or reasonably necessary to either party's case. Nothing in this Protective Order shall be construed to effect an abrogation, waiver or limitation of any kind on the right of the Parties or protected third parties to assert any applicable discovery or trial privilege or defense, including lack of jurisdiction.
2. Any production of information without its being designated as **HIGHLY CONFIDENTIAL** shall not thereby be deemed a waiver of any claim of confidentiality as to such information, and the same may thereafter be designated **HIGHLY CONFIDENTIAL**. Upon receiving notice that litigation material has not been but should have been previously designated as **HIGHLY CONFIDENTIAL**, individuals in possession of such material shall treat it as **HIGHLY CONFIDENTIAL** in accordance with the terms of this Protective Order. Any such subsequent designation shall apply retroactively to any previously disclosed **HIGHLY CONFIDENTIAL** information to any other party.
3. Any violation or breach of the terms and conditions set forth in this Protective Order or in the appended Non-Disclosure Agreement shall be grounds for contempt, civil damages, and other appropriate sanctions which may be appropriate.
4. The Parties, in conducting discovery from non-parties, shall attach to such discovery requests a copy of this Protective Order so as to apprise such non-parties of their rights and obligations.
5. CMI, Inc. owns certain copyrights in the Source Code and/or Object Code used in association with INTOXILYZER® breath alcohol instruments. No license is granted concerning such Source Code and/or Object Code under the terms of this Protective Order to any Party, individual, or entity, including independent experts or consultants. This necessarily includes but is not limited to the right

to copy in whole or in part, or otherwise reproduce any portion of the Source Code and/or Object Code.

6. All mailings, including notices required under this Protective Order, directed to CMI, Inc. or the President of CMI, Inc., shall be mailed via certified mail to the following address: CMI, Inc., 316 E. 9th Street, Owensboro, Kentucky 42303.

H. PROCEDURES UPON TERMINATION OF LITIGATION.

Within ten (10) days after receiving notice of the entry of an order, judgment or decree terminating this action, regardless of whether such order, judgment or decree is appealed or otherwise challenged, the expert and all persons having received HIGHLY CONFIDENTIAL information, including the Source Code, shall return all such materials and all copies thereof, if any, to counsel for CMI, Inc. or directly to CMI, Inc. by certified mail, without copying or otherwise reproducing any portion, and defense counsel shall file a certification with the Court attesting to its compliance with this provision.

The obligations imposed by this Protective Order and Non-Disclosure Agreement shall survive the termination of this proceeding and any related proceedings.

I. RIGHT TO SEEK MODIFICATION.

CMI, Inc. may petition the Court for a separate order governing disclosure of HIGHLY CONFIDENTIAL information. CMI, Inc. will be provided thirty (30) days notice prior to any modification of this order.

All hearings in this action, including the trial, will presumptively be open to the public, except that this Court will issue further orders as necessary to protect HIGHLY CONFIDENTIAL information from improper disclosure.

So Stipulated

Robert Harrison, Esq.
825 S. Tamiami Trail, Suite 2
Venice, Florida 34285
Counsel for Defendants

Cliff Ramey, ASA, Supervisor
Office of State Attorney
2071 Ringling Boulevard
Sarasota, Florida 34230
Counsel for State of Florida

Done and Ordered in Chambers in Sarasota County, Florida, this ____ day of
_____, 2008.

Honorable _____
County Court Judge

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APPENDIX TO PROTECTIVE ORDER

NON-DISCLOSURE AGREEMENT

This Non-Disclosure Agreement (hereinafter "Agreement") is made and entered into this ____ day of _____, 2008, (the "Effective Date") by and between CMI, Inc. ("Disclosing Party"), a corporation of the Commonwealth of Kentucky having a place of business at 316 E. 9th Street, Owensboro, Kentucky 42303, and Harley R. Mylar, Ph.D., P.E., Oaks Historic District, 2495 Evalon Street, Beaumont, Texas 77702, whose contact number is _____ ("Receiving Party") and Robert N. Harrison, 825 Tamiami Trail S., Suite 2, Venice, FL 34285, whose contact number is _____ ("Designated Attorney for Defendants"), concerning the Source Code and/or Object Code to the INTOXILYZER® 8000.

WHEREAS, Disclosing Party owns Source Code and/or Object Code used in association with the INTOXILYZER® breath alcohol instrument that was developed by Disclosing Party, at its own expense, and consists of economically valuable information that is not readily available to the public or to competitors of Disclosing Party;

WHEREAS, Disclosing Party considers the Source Code and/or Object Code used in association with the INTOXILYZER® breath alcohol instruments proprietary information and a trade secret of Disclosing Party;

WHEREAS, disclosure of the Source Code and/or Object Code used in association with the INTOXILYZER® breath alcohol instruments would irreparably harm Disclosing Party by providing potential competitors, at no cost to them, with information that could be used to their competitive advantage; and

WHEREAS, the Court has issued a Protective Order intended to protect the Disclosing Party's valuable intellectual property assets including the Source Code and/or Object Code used in association with the INTOXILYZER® breath alcohol instruments against disclosure of such assets.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned hereby agrees as follows:

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1. The undersigned have read the Protective Order issued by the Court in the present action and understand its terms and its intent to protect the Disclosing Party's valuable intellectual property assets;
2. The undersigned agree to be bound by each of the terms of the Protective Order and that the definitions as set forth in the Protective Order are incorporated herein;
3. The undersigned agree to use any information provided to them, including the Source Code and/or Object Code used in association with the INTOXILYZER[®] breath alcohol instruments, solely for purposes related to the present action and further that such information will not be used commercially or for commercial business purposes beyond the scope of the Protective Order;
4. Any report or other material generated as a result of a review of the Source Code will remain HIGHLY CONFIDENTIAL and may not be disclosed, except as provided herein, until such time as the disclosing party has had an opportunity to review such report and may only be disclosed in the manner provided by in the companion Protective Order.
5. Robert Harrison is designated as the contact attorney for the Defendant. Mr. Harrison will not be provided a copy of the Source Code, but he will receive a copy of the report created by the defense designated expert who reviews the Source Code.
6. The undersigned understand that their failure to abide by the terms of the Protective Order may subject such individual personally, without limitation, to civil and criminal penalties including contempt of Court, monetary sanctions and damages;
7. Whenever and wherever the context of this Agreement so requires, any references to the singular shall be read, construed and interpreted to mean the plural and vice-versa; any references to the masculine gender shall be read, construed and interpreted to mean the feminine gender and vice-versa, and any references to the neuter gender shall be read, construed and interpreted to mean the masculine or feminine gender, whichever is applicable;
9. The undersigned submit to any court of competent jurisdiction for the purpose of enforcing the terms of this Agreement and freely and

924757v.4

knowingly waive any right the undersigned may otherwise have to object to the jurisdiction of said court;

10. The undersigned acknowledge that disclosure or use of any information provided to the undersigned, including the Source Code and/or Object Code used in association with the INTOXILYZER® breath alcohol instruments, for commercial use or commercial business purposes beyond the scope of the Protective Order and this Agreement would cause significant economic harm to the Disclosing Party and the undersigned agrees that the Disclosing Party has the right, in addition to its other rights and remedies, to seek and obtain injunctive relief and damages for any violation of either the Protective Order or this Agreement;
11. In the event CMI, Inc. brings successful action/litigation against Receiving Party for any violation of either the Protective Order or this Agreement, Receiving Party agrees to pay CMI, Inc. for attorney's fees and costs associated with such litigation;
12. The undersigned agree that this Agreement will not create a joint venture, partnership or other business relationship or entity of any kind, or an obligation to form any such relationship or entity. Each party will act independently and not as an agent of the other party for any purposes, and neither will have the authority to bind the other;
13. The undersigned hereby warrant and represent that the undersigned has obtained the advice of independent legal counsel of his choosing to review the form and content of this Agreement and advise the undersigned as to the legal effect thereof, and that the undersigned has had sufficient time to review this Agreement and decided to enter into this Agreement voluntarily, knowingly, and without coercion of any kind;
14. The undersigned agree that in the event that any provision of this Agreement shall be unenforceable or invalid under any applicable law or be so held by applicable court decision, such unenforceability or invalidity shall not render this Agreement unenforceable or invalid as a whole, and, in such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law or applicable court decisions;

15. The undersigned agree that this Agreement shall be governed by and interpreted in accordance with the laws of the State of Florida, USA, without regard to principles of conflicts of law;
16. The undersigned agree the reasonable fee incurred by CMI, Inc. in the binding and production of the Source Code must be paid by Receiving Party or Designated Attorney for Defendants prior to its production.
17. The undersigned agree that this Agreement constitutes the entire agreement between the parties as to the subject matter hereof, and supersedes all prior and contemporaneous agreements, representations and understandings between the parties. There are no inducements, representations, warranties, or understandings between the parties that do not appear within the terms and provisions of this Agreement. This Agreement shall not be changed, modified or amended except in writing signed by both parties; and
18. All notices and other communications required or authorized hereunder shall be given in writing by registered mail to the following address: CMI, Inc., 316 E. 9th Street, Owensboro, Kentucky 42303.

IN WITNESS WHEREOF, I have executed this Agreement as of the Effective Date.

Robert N. Harrison

Dated

Harley R. Mylar, Ph.D., P.E.

Dated

cc: CMI, Inc., 316 E. 9th St., Owensboro, KY 42303

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

STATE OF FLORIDA,
Plaintiff,

V.

Case No. 2006 CT 13017

KYLE R. WOODS, ET. AL.,
Defendant.

FILED FOR RECEIPT
2006 MAR 18 AM 9:54
KAREN E. RUSSELL
CLERK OF CIRCUIT COURT
SARASOTA COUNTY, FLORIDA

**AMENDED ORDER ON DISCLOSURE OF SOURCE CODE and OBJECT CODE
FOR INTOXILYZER 8000 and PROTECTIVE ORDER**

THIS CAUSE having originally come before the Court on the Motion of CMI, Inc. of Kentucky (hereinafter CMI) for Protective Order to allow them protections prior to the release of the Source code and Object code for the Intoxilyzer 8000, and most recently pursuant to their *Motion for Reconsideration or in the Alternative Modification of Protective Order* and the Court being fully advised herein, enters this amended order as follows:

1. CMI's Motion for Reconsideration is denied.
2. CMI's Motion for modification of the Protective Order is granted in part as is set out below.
 1. Florida law authorizes two alternative theories for DUI offenses: actual impairment, or a blood alcohol level of 0.08 or higher. See § 316.193, Fla. Stat. (2007). The second theory has been referred to as a strict-liability theory, since the fact of operating a motor vehicle with a blood-alcohol level of 0.08 or higher is an offense even if impairment cannot be proven. The strict liability theory is the offense previously and more commonly referred to as driving with an unlawful blood alcohol level (DUBAL). *Tyner v. State*, 805 So.2d 862 (Fla. 2d DCA 2001).
 2. The Defendants all are charged under the strict-liability theory (DUBAL).¹
 3. The Defendants in this case have demonstrated materiality and a reasonable necessity for production of the Source Code. See Fla. R. Crim. P. 3.220(f). The defendants have established through expert testimony that the Source Code is reasonably necessary to determine whether the Intoxilyzer 8000 contains the software approved by the State of Florida, whether it is functioning

¹ Most are charged by citation or information in the alternative.



as per the approved Source Code, and whether any alterations have affected its operation or reliability.

4. CMI was served with a subpoena duces tecum, authorized by this Court, for the production of the Source Code for the Intoxilyzer 8000, Version 8100.24, 8100.25, 8100.26 and 8100.27.

5. On November 25, 2002 CMI registered with the Florida Secretary of State to transact business in the State of Florida using the name "CMI Inc. of Kentucky", with the stated purpose to sell breath alcohol testing equipment.

6. That CMI has transacted business in the State of Florida by selling breath alcohol testing equipment to FDLE, i.e. the Intoxilyzer 5000 and the Intoxilyzer 8000.

7. Counsel for CMI has stated to this court that it's' Source Code and/or Object Code is a trade secret.

8. Counsel for CMI has further specifically advised this court that CMI will comply with the subpoena duces tecum for production of the Source Codes, provided that this court enters a protective order to protect the dissemination of the source code to individuals not subject to this order and require the signing of a Non-Disclosure Agreement by those experts receiving copies of the Source Code and/or Object Code.

IT IS, THEREFORE ORDERED AND ADJUDGED that CMI shall produce the Source Code(s) for the Intoxilyzer 8000, versions 8100.24, 8100.25, 8100.26 and 8100.27 in electronic format to Dr. Harley Myler, the Defendants' designated expert, or any other approved expert, within fourteen (14) days of the execution of the 3-page Non-Disclosure and Confidentiality Agreement attached hereto and incorporated herein by reference and pursuant to the definitions, conditions and parameters set out below.

I. Information disclosed by CMI and/or the State pursuant to this Order concerning the INTOXILYZER 8000 Source Code and/or Object Code shall be identified as CONFIDENTIAL. The disclosure of such information to persons other than those set out below or in any manner other than that set out below is prohibited.

A. DEFINITIONS.

"CONFIDENTIAL" information for purposes of this Order means the Source Code(s) and/or Object Code for the Intoxilyzer 8000, even if contained in any other derivative material such as depositions, transcripts, summaries or reports, and shall absolutely be prohibited from disclosure except as provided for herein.

"SOURCE CODE" means those set of commands for sequencing the operation, all of the data entry questions, the operational parameters, and

the mathematical formulas for the analysis of a defendant's breath sample, in a computer program as it relates to the Intoxilyzer 8000.

"OBJECT CODE" means objects linked into computer executable code.

B. DESIGNATION OF CONFIDENTIAL INFORMATION.

The Source Code used by the Florida models of the INTOXILYZER 8000 breath alcohol instrument (hereinafter "Source Code") is a trade secret and is hereby designated in its entirety as CONFIDENTIAL.

All transcripts, recordings or other electronic methods of preserving depositions taken or any testimony given by any witness or expert who has reviewed or otherwise obtained the Source Code or Object Code of the Intoxilyzer 8000 shall be treated as CONFIDENTIAL, until further order of the court, and upon proper notice to both parties.

All information deemed CONFIDENTIAL shall not be disclosed to any person who has not executed and filed with the court a Non-Disclosure Agreement certifying they have read and understand the terms of this Protective Order.

Those persons provided limited access to the Source Code in court, such as court personnel, jurors, and members of the public present during any testimony regarding the Source Code, shall be subject to the terms of this Protective Order but are not required to execute a Non-Disclosure Agreement. The Court will advise all persons present during any testimony regarding the scientific and/or technical workings of the Source Code that those materials discussed are subject to a Protective Order and are not to be disclosed. This would not include mere opinions or conclusions regarding the viability of the Intoxilyzer and/or source code.

C. DISCLOSURE OF CONFIDENTIAL INFORMATION.

Except as otherwise authorized by this Protective Order, information designated as CONFIDENTIAL shall be used only as necessary in connection with this proceeding and shall not be used for any other purpose, or be disclosed, disseminated or communicated to any person or expert employed or directly affiliated with any manufacturer of breath testing equipment or competitor of CMI, Inc.

Any person, requesting attorney, or expert who is provided the Source Code or otherwise reviews or obtains the Source Code must first execute the Non-Disclosure Agreement appended to this Protective Order certifying that this Protective Order has been read and understood and that the terms shall be personally binding on the individuals.

An exact copy of the executed Non-Disclosure Agreement shall be provided to CMI, Inc. The original signed and executed Non-Disclosure Agreement shall be filed with the Court issuing the Protective Order and copies shall be provided to all counsel of record.

D. MANNER OF DISCLOSURE OF CONFIDENTIAL INFORMATION.

Disclosure of the Source Code shall only be made directly to experts identified by the Parties in the Non-Disclosure Agreement. Prior to disclosure to such experts, other than Dr. Harley Myler, the Parties shall submit by certified mail to CMI, Inc., the expert's Curriculum Vitae, stating the name, address, occupation and professional background of the expert to whom the Source Code will be provided.

After receipt of the expert's Curriculum Vitae, CMI, Inc. shall then have seven (7) business days to file an objection to such expert with this Court. It is recognized that such an objection may be, for the sole purpose of objecting to the listed expert as it relates to the issue of confidentiality.

Prior to disclosure of the Source Code to the identified expert, CMI, Inc. shall have received an exact copy of a signed and executed Non-Disclosure Agreement from the requesting attorney and the identified expert.

By signing the Non-Disclosure and Confidentiality Agreement, CMI, the Defendants' expert and any other person(s) bound by the Non-Disclosure and Confidentiality Agreement submit themselves to the jurisdiction of Sarasota County solely for enforcement and resolution of any disputes in regards to the Non-Disclosure and Confidentiality Agreement.

The Source Code(s) shall be delivered only to Dr. Myler or any other approved expert personally.

Dr. Myler, or any other expert who has received the Source Code, shall not disclose to any other person or persons the Source code(s) and shall return the information to CMI once he/she has completed their examination.

Upon completion of any expert's report(s), and prior to release of the report to anyone not executing a Non-Disclosure and Confidentiality Agreement in accordance with this order, Dr. Myler, or any other approved expert, will provide a copy to CMI. CMI will have fourteen (14) days to review the report and prepare objection(s) to the specific portions of the report, if any, which CMI believes wrongfully discloses CONFIDENTIAL portions of the Source Code. Any objection by CMI must be in writing, with a copy provided to Defendants' designated attorney, Robert Harrison. If the parties cannot agree on whether the information should be omitted from the report, any dispute will be resolved by this Court. A hearing shall be held without delay if the parties are unable to timely resolve the matter. If CMI has no objection to the expert's report(s) or fails to object within the time frame set forth above, the report may be released to anyone, irrespective as to whether they signed the Non-Disclosure and Confidentiality Agreement.

No copies shall be made of the source code(s) nor shall it be reproduced, stored or recorded in any manner by Dr. Myler or any other person. Any disclosure or reproduction, whether willful or inadvertent, will result in sanctions from the court, including but not limited to, criminal contempt.

E. COURT FILINGS CONTAINING CONFIDENTIAL INFORMATION.

All CONFIDENTIAL information contained or discussed in any pleading, motion, exhibit, deposition or testimony transcripts, or other paper filed with the Court shall be filed under seal. This would include objected to portions of the report, summary, etc., until further order of the court. Documents containing a simple reference by name to the CONFIDENTIAL information, such as "Source Code", do not need to be filed under seal, except where any portion of the substantive CONFIDENTIAL information itself is revealed. Where possible, only portions of filings with the Court containing CONFIDENTIAL information shall be filed under seal. Information filed under seal shall be placed in a sealed envelope/box with the endorsements required by the applicable rules of the Court and/or filed in accordance with the electronic filing rules of the Court, and shall not permit public inspection of the sealed envelope/box. The Clerk shall keep such papers under seal until further order of this Court.

F. REDACTION OF VITAL SECURITY INFORMATION

Portions of the Source Code that include information considered vital to the continued security and integrity of the State's enforcement programs (Alcohol Testing Program) shall be redacted prior to disclosure of the Source Code. The redacted Source Code portions shall include only hard coded password, temporary password, and communications related code and are warranted by CMI to have no relevance nor bearing on the workings of the INTOXILYZER 8000 as it relates to the analysis of a subject's breath.

G. OTHER PROCEDURES.

1. Any violation or breach of the terms and conditions set forth in this Protective Order or in the appended Non-Disclosure Agreement shall be grounds for contempt, civil damages, and other appropriate sanctions which may be appropriate.
2. No license is granted concerning such Source Code and/or Object Code under the terms of this Protective Order to any Party, individual, or entity, including independent experts or consultants. This necessarily includes but is not limited to the right to copy in whole or in part or otherwise reproduce any portion of the Source Code and/or Object Code.
3. All mailings, including notices required under this Protective Order, directed to CMI, Inc. or the President of CMI, Inc., shall be mailed via certified mail to the following address: (1) CMI, Inc., 316 E. 9th Street, Owensboro, Kentucky 42303; (2) Robert Harrison, Esquire, 825 Tamiami Trails S., Suite 2, Venice, Florida 34285 and (3) Cliff Ramey, Misdemeanor

Chief, Office of the State Attorney, 2071 Ringling Blvd., Sarasota, Florida
34237.

H. PROCEDURES UPON TERMINATION OF LITIGATION.

Within ten (10) days after receiving notice of the entry of an order, judgment or decree terminating this action, regardless of whether such order, judgment or decree is appealed or otherwise challenged, all persons having received CONFIDENTIAL information, shall return all such CONFIDENTIAL information and all copies thereof, if any, to counsel for CMI, Inc. or directly to CMI, Inc. by certified mail, and defense counsel shall file a certification with the Court attesting to its compliance with this provision.

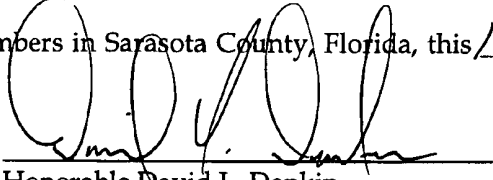
The obligations imposed by this Protective Order and Non-Disclosure Agreement shall survive the termination of this proceeding and any related proceedings.

I. RIGHT TO SEEK MODIFICATION.

CMI, Inc. or the Defendant(s) may petition the Court for a separate order governing disclosure of CONFIDENTIAL information, by limiting or expanding this Protective Order. CMI, Inc. will be provided fourteen (14) days notice prior to any modification of this order.

All hearings in this action, including the trial, will presumptively be open to the public, except that the Court may issue further orders as necessary to protect CONFIDENTIAL information from improper disclosure.

DONE AND ORDERED in chambers in Sarasota County, Florida, this 12th day of March, 2008.


Honorable David L. Denkin
Sarasota County Court Judge

cc: Robert N. Harrison, Esquire
Kerry Mack, Esquire
Cliff Ramey, Assistant State Attorney
Jarrod Malone, Esquire

Cases Consolidated:

Kirsten Smith	Case No.	2006 CT 013763 NC
Peter Osterby		2006 CT 009094 NC
Juramir C. Sobrinho		2006 CT 013370 NC
Charles Yeagley		2006 CT 017419 NC
Homer Williams		2006 CT 010458 NC
Carl Robison		2006 CT 017802 NC
Jennifer Waelti		2006 CT 017957 NC
William Meyer		2006 MM 015639 NC
Amy Shaffalo		2006 CT 015732 NC
Debora Reecer		2006 CT 015113 NC
Denise Whitney		2006 CT 010461 NC
Sandra Masters		2006 CT 018670 NC
Sharon E. Offutt		2006 CT 021444 NC
Stephen Wall		2006 CT 013802 NC
Heather Riegenbach		2006 CT 009277 NC
Mark Peterson		2006 CT 010380 NC
Timothy John Piekarz		2006 CT 016399 NC

Case with previously consolidated:

Christopher Tominello	2006 CT 014805 NC
Erik Soal	2006 CT 008585 NC

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

CMI, INC. OF KENTUCKY,

Petitioner,

vs.

KYLE R. WOODS ET AL.,
THE STATE OF FLORIDA,

Respondents.

Case No. _____
County Case No. 2006 CT 12017 NC

_____/

PETITIONER'S APPENDIX B

Michael S. Taaffe
Fla. Bar No. 490318
Jarrod Malone
Fla. Bar No. 0010595
ABEL BAND, CHARTERED
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Attorneys for CMI, Inc.

INDEX TO APPENDIX

Transcript of Hearing before the Honorable David Denkin, Case No. 2006-CT-12017, March 14, 2008.

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

STATE OF FLORIDA,

Plaintiff,

vs.

Case No.: 2006-CT-12017

KYLE WOODS,

Defendant.

_____ /

TRANSCRIPT OF HEARING BEFORE
THE HONORABLE DAVID DENKIN

1 THE COURT: All right. We're on the record in
2 the case of State of Florida versus Kyle Woods, et
3 al, case number 2006 CT 12017. We have present
4 Mr. Ramsey, (sic:) from the State Attorney's Office,
5 Mr. Malone representing CMI, Mr. Harrison and
6 Ms. Mack representing the defendants.

7 Now, before we proceed with what we scheduled
8 today hearing for, I'm concerned with some of the
9 case law that was provided to me by the
10 representative of CMI.

11 You indicate in -- or at least you indicated
12 somewhere in your motion and in the case law that
13 you've given to me that you're entitled in part to a
14 re-hearing because the Order did not state on the
15 record or anywhere in the Order sufficiently that --
16 the determination that there was a reasonable
17 necessity for production; is that correct?

18 MR. MALONE: Yes, sir.

19 THE COURT: Okay. Correct me if I'm wrong, but
20 I was under the strong impression that Mr. Taaffe
21 had said it on previously -- several occasions,
22 we'll give you the source code, that's not an issue,
23 we just won't agree on the disclosure and
24 nondisclosure conditions.

25 Are you backing off that and saying that we

1 need to establish the reasonable necessity for
2 production?

3 MR. MALONE: Well, Your Honor, the concern here
4 from CMI's standpoint is that it's been ordered to
5 produce it in a manner that is in electronic format.
6 Additionally, according to the Order, it's -- it's
7 asked that CMI submit to this Court's jurisdiction,
8 which would waive its appellate concerns.

9 CMI felt that to lay the proper record, it had
10 to ask this Court to lay the proper foundation for
11 reasons (inaudible). Aside from these issues, even
12 if the Court does not find it's reasonably
13 necessary, CMI still would produce the source code
14 and -- according -- you know, as laid out in these
15 terms.

16 So does that clarify for Your Honor or --

17 THE COURT: With all due respect, you've been
18 hanging around Mr. Harrison too long. That was a
19 yes or no question. If you can't answer it yes or
20 no, tell me.

21 MR. MALONE: Could you repeat the question,
22 Your Honor?

23 THE COURT: Yes. Is CMI backing off its
24 original statements to the Court that providing that
25 there was a nondisclosure agreement, they would

1 provide to the defendants the source code for the
2 Intoxilyzer 8000?

3 MR. MALONE: The answer is no.

4 THE COURT: Okay. Are there any preliminary
5 matters that we need to go through before we call
6 Ms. Barfield, who's been agreed to allow to testify
7 by phone?

8 MR. MALONE: Just one, I wanted to just put on
9 the record, when we initially had the -- I think it
10 was last conference on the Protective Order, I -- or
11 Mr. Taaffe provided this Court with affidavit of
12 Toby Hall. At the time it wasn't signed, we had to
13 rush to get it out for information purposes, I'm
14 just telling now we do have it signed now and we'll
15 provide it for the Court file.

16 THE COURT: Okay.

17 MR. HARRISON: And, Judge -- Judge, two other
18 matters, one when I guess day from yesterday or
19 whenever we got the fax motion to have Ms. Barfield
20 do by -- testify by telephone, I had discussed with
21 Mr. Malone last week, I said I wouldn't have an
22 objection if I would have an opportunity to depose
23 her and talk to her beforehand.

24 He attempted to arrange that, but she was on
25 vacation I think until today. And the way that I

1 left it with -- with Mr. Malone is that -- I mean,
2 he gave me a proffer as to what she was going to
3 testify to and as long as that was all she was going
4 to testify to, I didn't try to bring anything in
5 rebuttal or dealing with Dr. Milar, but what we
6 agreed upon is somehow it would be on what their
7 proffer is and (inaudible) that we would have an
8 opportunity to -- were able to talk with her, know
9 exactly what was going to be said to bring -- bring
10 in some kind of testimony Dr. Milar. Based upon
11 what Mr. Malone told me, I don't anticipate that
12 happening, but just to protect myself, I want to
13 make sure that that -- that was the provision of why
14 Ms. Ball had said we wouldn't object to the
15 testimony and so we could have today's hearing
16 without continuing it.

17 THE COURT: Would you agree however that it
18 would ultimately be the Court's determination as to
19 whether or not Dr. Milar's testimony would be
20 necessary?

21 Let's say, for example, you decide you want to
22 call Dr. Milar.

23 MR. HARRISON: I -- I could give you a proffer
24 as to what it would be if you -- oh, you're --
25 excuse me.

1 THE COURT: Would you agree that it's the
2 Court's ultimate decision as to whether or not --
3 let's say you decide you want to call Dr. Milar,
4 would you agree that we have the ability to say we
5 don't need Dr. Milar's testimony?

6 MR. HARRISON: I think -- (inaudible).

7 THE COURT: Okay. Let's -- we'll deal with
8 that should there be that issue presented. We're
9 fifteen minutes late, so let's go ahead and start
10 and let's --

11 MR. HARRISON: Well, the second matter real
12 quickly, one of the concerns I have dealing with Ms.
13 Barfield, it sounds like to a lot of extent that it
14 may be kind of hearsay through from what CMI said,
15 but I know it's going to be difficult to do
16 objections when we're dealing with a -- with a
17 telephone, if I could have so-to-speak a standing
18 objection and we can talk about it, since it's not a
19 jury trial to the extent that we can rely upon that,
20 (inaudible), that might make things move a lot
21 quicker.

22 THE COURT: All right. Anything else?

23 MR. HARRISON: No, sir.

24 THE COURT: Mr. Malone, anything?

25 MR. MALONE: No, sir.

1 THE COURT: Mr. Ramsey?

2 MR. RAMEY: No, sir.

3 THE COURT: Okay.

4 JUDGE HENDERSON: Why are you calling him
5 Ramsey? Is that Mr. Ramey right over there?

6 THE COURT: Yeah, because he's never in my
7 Courtroom, so I've basically forgotten who the heck
8 he was. At least I didn't call him Mr. Seron.
9 Okay, that's loud.

10 MS. BARFIELD: Hello.

11 THE COURT: Hello. Can I speak to Laura
12 Barfield, please.

13 MS. BARFIELD: This is Laura.

14 THE COURT: Ms. Barfield, this is Judge Denkin.
15 How are you?

16 MS. BARFIELD: Fine. How are you?

17 THE COURT: Good. Are you ready and
18 comfortable enough so that we can proceed with this
19 hearing?

20 MS. BARFIELD: Yes.

21 THE COURT: Okay. Does anybody have any
22 objection to accepting this as Ms. Barfield without
23 requiring to have a notary present with her?

24 MR. MALONE: CMI is fine, Your Honor.

25 MR. HARRISON: I recognize her voice.

1 THE COURT: Ms. Barfield, I'm going to ask you
2 to raise your right hand.

3 THE WITNESS: Yes.

4 THEREUPON,

5 LAURA BARFIELD

6 was called as the witness herein and being first duly
7 sworn on oath was questioned and stated as follows:

8 THE COURT: Would you state your name full for
9 the record, please, spelling your last name.

10 THE WITNESS: Laura Barfield, last name spelled
11 B as in boy, A-R-F-I-E-L-D.

12 THE COURT: All right. Thank you. We're going
13 to start off with questioning from Mr. Malone, since
14 he's the one who's called you as a witness.

15 THE WITNESS: Okay.

16 THE COURT: If you -- if you can't hear him or
17 anything that anybody is saying to you, please let
18 me know as soon as possible.

19 THE WITNESS: Okay.

20 THE COURT: Mr. Malone, you may proceed.

21 MR. MALONE: Thank you, Judge.

22 DIRECT EXAMINATION

23 BY MR. MALONE:

24 Q. Ms. Barfield, can you hear me?

25 A. Yes, I can.

1 Q. Okay. First could you please tell us where you
2 are employed.

3 A. I'm employed with the Florida Department of Law
4 Enforcement as the alcohol testing program manager.

5 Q. And as such, what are your duties and/or
6 authority?

7 THE COURT: Can we accept that we have --

8 MR. MALONE: Yeah, I actually was laying a
9 record.

10 THE COURT: I understand, but can we accept
11 that we can take into consideration for today's
12 hearing that Ms. Barfield's testimony in this case
13 alone at prior hearings establishing her
14 credentials, her current employment and her
15 educational background?

16 MS. MACK: As long as we clarify, Your Honor,
17 that there's been no additional educational
18 background, we can agree to that.

19 THE COURT: Have you had any additional
20 educational background or classes or lectures or
21 seminars within the last six months?

22 THE WITNESS: I don't -- I don't think so, I
23 may have attended a few conferences to -- to
24 continuing -- continually educate myself in the
25 (inaudible) instrumentation or in issues involving

1 blood, but nothing -- nothing significantly
2 different from what I've testified in your Court
3 before.

4 THE COURT: Okay. We'll take judicial notice
5 of your prior testimony with regard to, as I said,
6 your job status, your educational background and
7 your prior experience.

8 Mr. Malone

9 BY MR. MALONE:

10 Q. Ms. Barfield, the Court here has issued a
11 Protective Order regarding the source codes for the
12 Intoxilyzer 8000, wherein they have ordered that it be
13 produced in electronic format.

14 Could you please tell us whether or not FDLE
15 and the alcohol testing program has a -- any objections
16 to that and if so, what?

17 A. We -- the FDLE or the alcohol testing program,
18 I should say, would have objection to the source code
19 being issued in electronic format, only because the
20 security pass codes and the communication codes that are
21 in the software that's used for evidence in Florida
22 would not be able to be secured in an electronic format.

23 Q. What would be the ramifications of such
24 exposure?

25 A. Anyone having access to the communication codes

1 and the security passwords would then have access to
2 every -- every Intoxilyzer 8000 in Florida and I would
3 not be able to ensure the integrity of the
4 instrumentation and I would have to change the software.

5 If I changed the software revision, then the
6 next revision would be to release the source code and I
7 would be in this never -- constant ending circular
8 battle trying to keep the evidentiary instruments
9 protected in the way that they are now.

10 As far as the communications codes, if someone
11 has access to the communications codes, they could
12 access any evidentiary breath test instrument in Florida
13 and change the settings, the set-up procedures, for
14 example, the control touch value could be -- could be
15 changed, the set-up where the display would be turned on
16 could be -- could be done.

17 And this would cause me to not have -- not
18 ensure the reliability of those instruments used for
19 evidence in Florida.

20 Q. If the source code were released
21 electronically, could the alcohol testing program
22 continue as it is?

23 A. No, if the source codes were -- were -- were
24 released electronically, if the security pass codes and
25 the communication codes were contained into it, I would

1 have to change the way the State of Florida does
2 business as far as I would have to have the software
3 changed to remove the codes, there would be no
4 communications between the FDLE and evidentiary
5 instruments used with -- within the State of Florida.

6 There would be no uploading of electronic
7 records, which is part of the communications codes,
8 there would be no data supplied as it is now on the
9 website. And it would severely -- it would severely
10 disable my ability to ensure total accuracy and
11 reliability.

12 I do review all of the tests results conducted
13 in the State of Florida, all of the data is reviewed,
14 action is taken against persons who may not be doing
15 something in accordance with the rules. And the overall
16 integrity of the testing process in Florida can be
17 reviewed and without that, we'd be taking steps
18 backwards, not forwards and -- which is where FDLE would
19 like to go with their alcohol testing program, we would
20 like to go forward.

21 And that would be not be the case with -- if
22 the communication codes and the password codes were
23 released.

24 Q. If the source code were disclosed in electronic
25 format, would you be able to continue the alcohol

1 testing program or would you have to cease operations
2 while this occurs, the update?

3 A. Until a software revision could occur, I'd have
4 to cease operations, because I would not be able to
5 ensure the integrity of the evidentiary instruments
6 currently in use.

7 Q. So in effect, Ms. Barfield, what you're saying
8 -- is what you're saying that you would have to
9 temporarily shut down the State's breath testing program
10 until the proper updates have occurred?

11 MR. HARRISON: Objection, leading.

12 MR. MALONE: She's an expert.

13 THE COURT: Over -- overruled.

14 THE WITNESS: That is correct, I would have to
15 temporarily suspend until a software revision could
16 be released that did not have those codes in there
17 and then we could start back up.

18 MR. MALONE: Thank you very much. No further
19 questions.

20 THE COURT: All right. Mr. Harrison.

21 CROSS EXAMINATION

22 BY MR. HARRISON:

23 Q. Good afternoon, Ms. Barfield, it's Robert
24 Harrison. Can you hear me fine?

25 A. Yes, I can.

1 Q. Okay. Do you recall back in December receiving
2 an e-mail from Cliff Ramey at the State Attorney's
3 Office in Sarasota where you responded with a letter to
4 him as far as dealing with the information that
5 potentially would need to be redacted from the source
6 code?

7 A. Yes.

8 Q. And did you, in fact, send a letter to Mr.
9 Ramey back on January 25th?

10 A. Yes, I did respond to Mr. Ramey's e-mail in a
11 letter.

12 MR. HARRISON: Judge, if I could approach and
13 have this marked as -- am I letters or numbers,
14 would it be Exhibit A or Exhibit One?

15 THE COURT: A.

16 MR. HARRISON: As Exhibit A.

17 BY MR. HARRISON:

18 Q. Mrs. Barfield, since you're not in front of me,
19 it's a brief letter, I want to read this to you and tell
20 me if you recall if this correct -- dated January 5,
21 "Dear Mr. Ramey, I am in receipt of your e-mail
22 requesting information concerning the vital security
23 that needs to be redacted from the CMI, Inc.,
24 Intoxilyzer 8000 source code.

25 "The Florida Department of Law Enforcement's

1 alcohol testing program does not have knowledge of the
2 CMI, Inc., Intoxilyzer 8000 source code to be able to
3 successfully answer the informational request.

4 "It is the opinion of the Florida Department of
5 Law Enforcement's alcohol testing program that the
6 person best to answer this informational request is the
7 manufacturer of the instrument's software, CMI, Inc.

8 "If you have any questions concerning this
9 information, please feel free to contact me." It has a
10 phone number.

11 Do you recall that letter?

12 A. Yes, I do.

13 Q. Okay. Today you testified as to a lot of
14 specifics about what would happen or what would need to
15 be redacted; is that correct?

16 MR. MALONE: Objection, Your Honor.

17 THE WITNESS: I don't know if I am --

18 THE COURT: Overruled.

19 THE WITNESS: -- talking -- oh, I'm sorry, I
20 didn't hear the objection.

21 THE COURT: That's okay. This is going
22 somewhat cumbersome. As soon as you hear the
23 objection, just -- just stop what you're doing,
24 please.

25 THE WITNESS: Yeah, I'm sorry, I did not hear

1 the objection, I apologize.

2 THE COURT: Okay. Mr. Malone is usually much
3 louder than that.

4 THE WITNESS: I believe you overruled the
5 objection.

6 THE COURT: Yes, I did.

7 THE WITNESS: At the time I wrote the letter
8 and even to this day, I do not know what
9 specifically would need to be redacted even in a
10 hard copy format within the source code and I would
11 rely on the manufacturer to redact that information
12 and that is what that letter goes to.

13 When the Order came out for the issuance of the
14 source code in electronic format, I received a phone
15 call from CMI. They wanted to let me know in a
16 little more detail what that would cause for the
17 State of Florida, and it has to do with the security
18 pass codes, which I already know about those, we had
19 those developed to keep people out of evidentiary
20 instruments before they are used.

21 But I did not know about the communications
22 codes that would not only cause the State of Florida
23 an issue, it would cause any user of the Intoxilyzer
24 8000.

25 I do still stand behind my letter, I do not

1 know what specifically needs to be redacted or where
2 it's located within the source code or how much
3 information it is or things like that, but I do know
4 a little bit more about what -- what kind of
5 information is being -- would be disclosed in this
6 particular example.

7 BY MR. HARRISON:

8 Q. And is it true that the only reason you know
9 more information is this is information that CMI told
10 you over the telephone since January 25?

11 A. Yes.

12 Q. Who was it is that you spoke with at CMI?

13 A. I spoke with the president, Toby Hall.

14 Q. Did you speak with anybody else besides Toby
15 Hall?

16 A. No, I did not.

17 Q. Did you have -- have you had any communications
18 about this with -- with CMI, either to or from them in
19 any format other than by telephone, such as e-mail or
20 written letters?

21 A. No, I did not.

22 Q. Ms. Barfield, have you seen the Protective
23 Order?

24 A. I don't believe that I have seen the Protective

25 Order.

1 Q. But -- but your concern is that it's not the
2 production of the source code, but you believe that the
3 security pass codes need to be -- should not be
4 disclosed to our expert; is that correct?

5 A. Security pass codes and communications codes
6 would need -- would need not be supplied.

7 Q. Okay. But other than the security pass codes
8 and communication codes, those are your only objections;
9 correct?

10 A. I would defer any security type information and
11 (inaudible) to CMI.

12 MR. HARRISON: Thanks. That's all I have.

13 THE COURT: The question just so I'm clear is
14 does FDLE have any objections other than to the
15 release of the community (sic:) codes and the
16 security pass codes?

17 THE WITNESS: FDLE, specifically the alcohol
18 testing program, does not have an objection to the
19 release of source codes. We would like any source
20 sort of security pass codes, communication codes,
21 things that are crucial or vital to the integrity of
22 the instrumentation not be disclosed.

23 THE COURT: That's what I'm trying to
24 ascertain, let me -- let me try and ask it better.

25 THE WITNESS: Okay.

1 THE COURT: Is there anything else embedded in
2 the electronic format of the source code that the
3 alcohol testing program feels if released would
4 compromise the Intoxilyzer 8000 or the reporting
5 system to the website, other than the community code
6 -- communication codes and the security pass codes?

7 THE WITNESS: I don't know the full answer to
8 that. I do -- I am aware of the two things that we
9 are speaking about. I do not know if there's other
10 vital information that are not included in those two
11 categories present in the source code, I would have
12 to defer that answer to CMI.

13 THE COURT: Well, the reason -- in part, the
14 reason why I'm asking this question is that in some
15 of the documents that counsel provided me, they
16 provided the Court with a letter from Sharon
17 Traxler, assistant general counsel for FDLE, a
18 letter addressed to Mr. Malone and the letter is
19 dated February 27, 2008.

20 THE WITNESS: Yes.

21 THE COURT: The only thing she refers to is the
22 passwords and communication codes.

23 THE WITNESS: Right, those are the only two
24 categories that we have been made aware of that
25 would be an issue. I do not know if there's more,

1 but that's what I do know about.

2 THE COURT: All right. Thank you.

3 Does either counsel have any questions based
4 upon the Court's questions?

5 MR. MALONE: Yes, Your Honor.

6 THE COURT: Mr. Malone.

7 REDIRECT EXAMINATION

8 BY MR. MALONE:

9 Q. Ms. Barfield, did you have any conversations
10 with Toby Hall, president of CMI, regarding this issue
11 of whether or not in the electronic version the security
12 codes and/or pass -- or communication links could be
13 fully redacted?

14 MR. HARRISON: Objection, hearsay.

15 THE COURT: Overruled.

16 MS. MACK: (Inaudible).

17 THE WITNESS: It was my understanding in my
18 discussion with Toby Hall --

19 THE COURT: Stop, stop.

20 I'm sorry, Ms. Mack, what did you say?

21 MS. MACK: (Inaudible), she's attempting to
22 give --

23 THE COURT: He didn't ask what the statement
24 was, he asked whether or not he had a conversation
25 with.

1 MS. MACK: I think her answer is giving --
2 attempting to --

3 THE COURT: It was a yes or no question.

4 Ms. Barfield, did you understand the question?

5 Ms. Barfield.

6 THE WITNESS: If the question could be repeated,
7 I would appreciate it.

8 THE COURT: All right. Mr. Malone.

9 MR. MALONE: Certainly.

10 BY MR. MALONE:

11 Q. When you had your discussions that you've
12 previously testified about with Toby Hall, did you speak
13 with him about whether or not the source code could be
14 -- the communications links and security codes could be
15 fully redacted in the electronic version?

16 A. It was my understanding they could not be --

17 THE COURT: No, no, that wasn't -- that wasn't
18 the question. The question required a yes or a no.

19 THE WITNESS: Okay. No, it cannot be redacted.

20 THE COURT: No, that wasn't the question
21 either.

22 THE WITNESS: Okay.

23 THE COURT: The question was: Did you have a
24 conversation with Toby Hall regarding that
25 information?

1 THE WITNESS: Yes, I did have a conversation
2 regarding that information.

3 THE COURT: Thank you. Next question.

4 MR. MALONE: That's it, Your Honor.

5 THE COURT: Okay. Mr. Harrison anything
6 further?

7 MR. HARRISON: I would just -- if it wasn't --
8 if it wasn't considered her unresponsive answer to
9 the hearsay, we would ask it be stricken from the
10 record.

11 THE COURT: The-- the prior answer by
12 Ms. Barfield that was not responsive to the yes or
13 no that was required is stricken.

14 MR. HARRISON: I have no further questions then
15 for her.

16 THE COURT: Mr. Malone, do you have anything
17 further?

18 MR. MALONE: No, sir, not of Ms. Barfield.

19 THE COURT: May we release Ms. Barfield from
20 the phone?

21 MR. MALONE: Yes, Your Honor.

22 THE COURT: Judge Henderson, do you have any
23 questions?

24 JUDGE HENDERSON: Ms. Barfield, this is Judge
25 Henderson, how are you doing?

1 THE WITNESS: I'm fine.

2 JUDGE HENDERSON: Did you see Hall's affidavit?

3 THE WITNESS: No, I have not.

4 JUDGE HENDERSON: Okay. He's pretty much
5 saying what you have just told us about the concern
6 about the security pass code, communications code.

7 Is the concern where he -- I'll just tell you
8 he's saying any person with -- if these things were
9 (inaudible), any person could -- what did he say --
10 anyone knowing the pass code could potentially
11 change the instrument configuration on it, and
12 you're agreeing that that would be a huge concern;
13 right?

14 THE WITNESS: Yes, it would be.

15 JUDGE HENDERSON: Well, is the phrase any
16 person -- are we just talking about law enforcement
17 people, once they have these things in their
18 possession, is that what -- is that the concern?

19 THE WITNESS: The -- the law enforcement
20 personnel that have these, the instruments in their
21 possession in Florida do not have the pass codes to
22 enter the area that -- that he is speaking about,
23 (inaudible.)

24 JUDGE HENDERSON: Right, so -- right, but if
25 they did, then that is the concern that law

1 enforcement people would have the potential to
2 change the configuration, turn off printing,
3 re-calibrate, is that the concern, just law
4 enforcement?

5 THE WITNESS: No, it's not -- it's not law
6 enforcement, in fact, that thought didn't even cross
7 my mind. It's defense experts, it's computer
8 engineers, it's people who understand the software
9 language that would then have the communication
10 codes to remotely access an instrument and change
11 it.

12 JUDGE HENDERSON: I see. Thank you. I'm a
13 dunce at a lot of this stuff, so --

14 THE COURT: So a -- your testimony is is that
15 with knowledge of the communication codes and/or
16 security pass codes a person other than somebody
17 associated with law enforcement could gain access to
18 the Intoxilyzer 8000?

19 THE WITNESS: Yes.

20 THE COURT: Okay.

21 THE WITNESS: I do agree that -- with the Judge
22 that law enforcement could -- if they had the pass
23 code could also change it, anyone could change it,
24 anyone with knowledge of the pass code could change
25 that information.

1 THE COURT: But you're saying in the instrument
2 or machine Intoxilyzer 8000 was on that somebody
3 with the correct and sufficient knowledge having
4 access to the communication and security pass code
5 could access the actual Intoxilyzer 8000 instrument?

6 THE WITNESS: Yes, not only could they access
7 for the Intoxilyzer 8000 they can access anyone who
8 uses the Intoxilyzer 8000.

9 THE COURT: From a remote location?

10 THE WITNESS: Yes.

11 THE COURT: Thank you. Mr. Harrison.

12 RECROSS EXAMINATION

13 BY MR. HARRISON:

14 Q. The way that the Intoxilyzer 8000 communicates,
15 is it through a phone line, or is it like an
16 (inaudible), like plugged in the Internet, how does it
17 -- how does it communicate between say from Sarasota and
18 Tallahassee?

19 A. Currently it communicates via modem through a
20 telephone line.

21 Q. Is it continuously plugged into the phone line,
22 or is it just plugged in when they need to make a phone
23 call?

24 A. It could be either way, it does not have to be
25 continuously plugged in, but it can be.

1 Q. Can the machine accept an incoming phone call
2 or is it just outgoing?

3 A. Both.

4 THE COURT: Thanks. Anything further, Judge
5 Henderson?

6 JUDGE HENDERSON: No.

7 THE COURT: All right. Thank you, Ms. Barfield.

8 THE WITNESS: Thank you.

9 THE COURT: Bye.

10 THE WITNESS: Bye. Mr. Malone, anything
11 further as far as testimony, evidence or witnesses?

12 MR. MALONE: Just argument, Your Honor.

13 THE COURT: Okay. Mr. Harrison, do you have
14 any documents or witnesses you wish to produce at
15 this time?

16 MR. MALONE: (Inaudible).

17 THE COURT: Yes, you may.

18 MR. MALONE: Could I -- could I clarify, Your
19 Honor, when you asked me -- does that include the
20 attachments to my motion?

21 THE COURT: Documents or anything, any
22 documents?

23 MR. MALONE: I think it's Exhibit C to CMI's
24 motion, (inaudible) to Stuart Hemic, that's --
25 (inaudible).

1 THE COURT: The two sentence letter from
2 Dr. Milar to Stuart, dated Saturday, July 12th,
3 2003?

4 MR. MALONE: Yes, sir.

5 THE COURT: Okay. Mr. Harrison, any objection?

6 MR. HARRISON: No objection, Judge.

7 THE COURT: All right. It will be admitted.

8 MR. MALONE: Thank you. Does the clerk need a
9 copy or just (inaudible) --

10 THE COURT: If you filed a motion and attached
11 it to the motion, it will be in the clerk's file.

12 UNIDENTIFIED SPEAKER: (Inaudible), I may have
13 -- I printed off a copy from the clerk's website
14 today and it is attached -- on Page 15.

15 MR. MALONE: Mr. Harrison, for clarification,
16 (inaudible).

17 MR. HARRISON: The affidavit that's attached to
18 the motion from Toby Hall is slightly different from
19 the one that was presented today, I don't know if
20 there's other --

21 THE COURT: In what way?

22 MS. MACK: We don't know, we -- we just saw it.

23 MR. HARRISON: The number -- the numbering is
24 changed, I don't know if (inaudible) differences or
25 if -- they changed from the State of Kentucky to the

1 Common Law of Kentucky and they've re-numbered,
2 because there's no -- Paragraph 6 is missing so --

3 MR. MALONE: (Inaudible), that's the only thing
4 that's different.

5 THE COURT: And isn't there a signature missing
6 on the copy?

7 MR. HARRISON: Yes, sir, we already noted that.

8 THE COURT: That's the other difference.

9 MR. HARRISON: Otherwise I haven't had a chance
10 to do word for word, the numbered paragraph
11 (inaudible).

12 THE COURT: Yeah, the Court read it prior to
13 today's hearing and noticed A, that there was a
14 missing Paragraph 6 and as far as I could detect,
15 there was no difference in the wording of the
16 substance of the affidavit.

17 MS. MACK: I noticed the difference, Judge,
18 that's all I was trying to say.

19 THE COURT: I understand, yeah, and I noticed
20 it too and that's why I read it again.

21 MS. MACK: Yeah, I think you all were asking if
22 we had an objection and we just weren't in a
23 position to respond --

24 THE COURT: Understood.

25 MS. MACK: -- other than to say we noted that

1 difference.

2 THE COURT: Anything further as far as
3 documents or evidence the parties wish us to
4 consider before we go to argument?

5 MR. HARRISON: Judge, I'll tell you this that
6 if you wanted a proffer when I talked to Dr. Milar
7 as to what would come up, why I would want him to
8 testify.

9 THE COURT: So the answer would be, yes.

10 MR. HARRISON: There is something I would want
11 to address with the Court.

12 THE COURT: Okay. Why don't you proffer it to
13 the Court what that would be.

14 MR. HARRISON: The question that had crossed my
15 mind based upon this motion and it was kind of
16 addressed through Ms. Barfield was when it's in
17 electronic format, is there any reason that you
18 could not redact certain portions, then change the
19 pass code to asterisk to stars.

20 I don't believe there's any testimony here that
21 says that you cannot, however, I would be prepared
22 if the Court wanted to hear testimony on that issue
23 from Dr. Milar that, yes, those portions could be
24 redacted.

25 And so I was -- based upon -- until the last

1 question with Ms. Barfield, I was comfortable going
2 forward, that kind of spooked me a little bit, I
3 think in the absence of evidence, we're okay, but if
4 the Court wants to hear evidence as to can you
5 redact it or not, we're prepared to put that on if
6 the Court wants to hear that evidence.

7 MR. MALONE: May I?

8 THE COURT: Mr. Malone.

9 MR. MALONE: Just a -- just a -- maybe a simple
10 solution to this, Your Honor, would be I think CMI
11 would be willing to submit an affidavit specifically
12 on this issue and then Dr. Milar could (inaudible),
13 that may solve --

14 THE COURT: See my intent the first time I had
15 this hearing was to move the cases forward.

16 MR. MALONE: I would, (inaudible).

17 THE COURT: Okay. So would I and I think so
18 would Judge Henderson, though I don't want to speak
19 for Judge Henderson.

20 JUDGE HENDERSON: Oh, you can speak for me on
21 that.

22 THE COURT: Okay. So, no, I'm not going to
23 request any affidavits.

24 Anything else as far as evidence, testimony or
25 objections to what has been presented before we go

1 into argument?

2 MR. MALONE: No, Your Honor.

3 THE COURT: All right. Mr. Malone, it's your
4 motion, so you proceed first. If you could first
5 please encapsulize in as short as a form as you can
6 what you're asking Judge Henderson and I to do.

7 MR. MALONE: First as a preliminary foundation,
8 I'm asking this Court to reconsider determination
9 that the source code is reasonably necessary.

10 Second --

11 THE COURT: Let me -- let me stop you right
12 there. Reconsider and, what, find that the source
13 code is not reasonably necessary?

14 MR. MALONE: Yes, sir.

15 THE COURT: I thought you didn't have any
16 problem in producing the source code.

17 MR. MALONE: We do not.

18 THE COURT: You'll produce -- so you're saying
19 to this Court now that you'll produce it, but you
20 want us to enter an Order finding that it's not
21 reasonably necessary?

22 MR. MALONE: Yes, sir.

23 THE COURT: And when we enter an Order saying
24 it's (sic:) reasonably necessary, you're going to
25 produce it on your own?

1 MR. MALONE: Yes, sir, if it -- if the other --
2 if we can agree to the paper format and we don't
3 have to submit to jurisdiction, yes.

4 THE COURT: I feel like I'm on a ferris wheel,
5 but go ahead.

6 MR. MALONE: We provided -- to answer your
7 question, I mean, CMI has issued a corporate policy
8 and they will produce the source code, they have
9 done so in Minnesota.

10 THE COURT: Back up.

11 UNIDENTIFIED SPEAKER: Yeah, they got nailed in
12 Minnesota.

13 THE COURT: Minnesota told them to; correct?

14 MR. MALONE: Actually there -- there is a
15 Federal lawsuit up there right now, (inaudible).

16 THE COURT: Let me rephrase the question.
17 Minnesota Supreme Court said produce the source
18 code; correct?

19 MR. MALONE: Yes.

20 THE COURT: Some days after Minnesota entered
21 that Order, CMI changed their corporate policy and
22 said, we have a new corporate policy, we're going to
23 produce the source code; correct?

24 MR. MALONE: Yes.

25 THE COURT: Okay.

1 MR. MALONE: I can't say I don't necessarily
2 say the two have a hundred percent to do with each
3 other?

4 THE COURT: They were coincidence?

5 MR. MALONE: No, not entirely coincidental, but
6 CMI change in corporate policy reflected what was
7 going on across the country and they really -- I
8 mean, had a sincere desire to -- to produce the
9 source code to end all of this litigation the
10 country, but to do so in a manner that protects
11 their -- their trade secrets.

12 They are the leader in the entire nation for
13 the source code and its adaptability to different
14 instruments in different states using different
15 specifications and parameters. And if the source
16 code got out, there's so many competitors out there
17 that -- that would -- they can use it to catch off
18 that that's their concern. And so -- so they want
19 to end all this, but they want to do it in a manner
20 that protects their own interest.

21 So that is why despite all of this, they would
22 be willing to produce the source code as long as
23 they can do it as we've discussed, in a paper format
24 and they don't have to waive all of their -- their
25 jurisdictional issues here in the appellate Court.

1 So with the other issues -- do you want me to
2 summarize what the other --

3 THE COURT: No, I still got a question about
4 the first one. Let's assume for a moment that the
5 Court finds that there is a reasonable necessity --

6 MR. MALONE: Uh-huh.

7 THE COURT: -- for production of the source code
8 is CMI not going to produce the source code and
9 instead take up on appeal that particular issue?

10 MR. MALONE: Not if the source -- if they can
11 do it in a paper format and they don't have to
12 submit to jurisdiction, they would produce it, they
13 wouldn't appeal that, I don't see why they would.

14 THE COURT: Not if they do not have to submit
15 to jurisdiction.

16 MR. MALONE: I guess what I'm getting at is
17 right now the current Order says that CMI has to
18 submit itself to jurisdiction in Sarasota County.

19 THE COURT: Where does the Order say that and
20 under what conditions does the Order say that?

21 MR. MALONE: Give me one moment, Your Honor.

22 THE COURT: I'll give you three. By the way,
23 can -- let's go off the record for a second.

24 (Thereupon, an off the record discussion was
25 held.)

1 THE COURT: All right. Sorry, let's go back to
2 the State versus Kyle Woods' matter.

3 MR. MALONE: It's Page 4 of your Order, Section
4 D, the fourth paragraph, Your Honor, it says, "By
5 signing the nondisclosure and confidentiality
6 agreements, CMI, defendant's expert and any other
7 person bound by the nondisclosure and
8 confidentiality agreement submit themselves to the
9 jurisdiction of Sarasota County for enforcement and
10 resolution of any of these pleadings."

11 THE COURT: Disputes concerning this agreement.
12 So CMI does not want to be bound by this agreement
13 and where it's taking place?

14 MR. MALONE: The concern -- the concern is
15 submitting themselves to the jurisdiction, that
16 language, as you can imagine, we are going through a
17 very lengthy and costly appeal on this
18 jurisdictional issue that may go to the Supreme
19 Court for all we know.

20 But the point -- you know, aside from all of
21 that, it caused a concern, because this is rather
22 broad, the language that's written.

23 THE COURT: Submit themselves to the
24 jurisdiction of Sarasota County for enforcement and
25 resolution of any disputes in regards to the

1 nondisclosure and confidential agreement, nothing
2 else.

3 MR. MALONE: I think they would agree -- I
4 think they would agree that Sarasota County is the
5 jurisdiction for any disputes regarding the
6 nondisclosure agreement and modification and it
7 could be the appropriate venue for any disputes
8 regarding enforcement; however, it's not necessarily
9 the sole jurisdiction for enforcement to necessarily
10 occur.

11 Part of the reason is that Dr. Milar is in
12 Texas. I understand that if Dr. Milar --

13 THE COURT: Why do you care if Dr. Milar has
14 to come all the way down to Florida?

15 MR. MALONE: (Inaudible), if Dr. Milar gives it
16 to somebody else in Texas or sends it to somebody
17 else, then we don't have any -- they didn't sign a
18 nondisclosure agreement, they didn't have any
19 knowledge of the --

20 THE COURT: He'd be the one that violated the
21 nondisclosure agreement, nobody else.

22 MR. MALONE: I understand that, but we would
23 have to get injunctions, etcetera against the person
24 who has the source code and we would have to go to
25 the local where that occurred.

1 And so that -- I mean, that is the whole issue,
2 they don't have a problem with this -- this Court
3 has jurisdiction obviously over its own Orders and
4 any modification has to be in Sarasota.

5 THE COURT: And that's what this says.

6 MR. MALONE: To some extent.

7 THE COURT: Okay. All right. What else --

8 MR. MALONE: So -

9 THE COURT: -- are you asking for?

10 MR. MALONE: That is the electronic format and
11 I'm just getting the breakdown right now, the
12 topics.

13 HE COURT: Right.

14 MR. MALONE: CMI feels because of -- largely
15 because of FDLE's concerns that it just can't
16 produce the source code in electronic format, as you
17 -- as you've heard from the testimony of Ms.
18 Barfield, it has large and far-reaching
19 consequences.

20 Third, it --

21 THE COURT: Back up. I'm sorry, but I've got
22 to clear this up. You say largely because of FDLE's
23 concerns.

24 MR. MALONE: Yes.

25 THE COURT: I got a billion page affidavit from

1 Toby Hall listing all of his concerns that don't
2 even mention FDLE. So is it only FDLE's concerns
3 about the electronic format, or is it CMI's concern
4 as well?

5 MR. MALONE: It's both, Your Honor. I'm sorry,
6 I (inaudible) in my argument, I apologize.

7 THE COURT: Okay. I'm just trying to limit what
8 we're going to be talking about. So it's not -- you
9 want it to be written or re-written that it's not
10 reasonably necessary to provide the source code?

11 MR. MALONE: Yes.

12 THE COURT: And then you'll produce the source
13 code?

14 MR. MALONE: If we don't have to produce it
15 according to the other terms, yes.

16 THE COURT: You don't want to provide the
17 electronic format, because it compromises both the
18 alcohol testing program in FDLE and it compromises
19 CMI's ability to do business?

20 MR. MALONE: Yes.

21 THE COURT: What else?

22 MR. MALONE: The third point is -- is a simple
23 one. This Court found the source code was a trade
24 secret, yet it wasn't articulated inasmuch in a
25 Protective Order, Your Honor stated in the Order

1 that CMI asserted it was a trade secret. And we're
2 just asking this Court to articulate that it is a
3 trade secret in the Order.

4 Fourth, the language that I just read to Your
5 Honor, Section D, Paragraph 4, regarding submission
6 of jurisdiction, five, the only two versions that
7 were used in the State of Florida were 26 and --
8 8100.26 and 27 of the source code, therefore, the
9 other -- others are not relevant and we do not
10 believe that we should be forced to produce those,
11 because they are not relevant.

12 THE COURT: Which ones do you say are not
13 relevant?

14 MR. MALONE: The --

15 UNIDENTIFIED SPEAKER: 8100.24, 8100.25.

16 MR. MALONE: That's correct, 24 and 25, those
17 were never put input into any machines, Mr. Harrison
18 got me saying machines, instruments in the State of
19 Florida.

20 THE COURT: There's no jury here, you've got
21 nothing to worry about.

22 MR. MALONE: So those are -- those are the
23 topics.

24 THE COURT: Okay.

25 MR. MALONE: May I continue wit argument, Your

1 Honor?

2 THE COURT: Yes, please.

3 MR. MALONE: Thank you. With regards to the
4 reasonable necessity, I'm not going to go into --
5 you know, just basically recap my motion, but what
6 the case law says and first, I'm citing this Court
7 -- I'm citing Rare Coin versus IJE, Inc., and that's
8 625 So. 2d 1277.

9 This Court is well aware that the Court has
10 used that case going all the way back since
11 (inaudible) that production of a source code, if
12 it's a trade secret, needs to be -- there needs to
13 be specific factual findings that it's reasonably
14 necessary.

15 I would direct this Court to the second page of
16 that case on the right-hand column of the last
17 paragraph where it says, "This is true even when the
18 trial Court orders production subject to a
19 Protective Order."

20 Next in --

21 THE COURT: What did the Rare Coins case
22 involve itself about, what was that about?

23 MR. MALONE: Source code of a video game.

24 THE COURT: And this involves a machine used to
25 establish an element of an offense under strict

1 liability; correct?

2 MR. MALONE: Yes.

3 THE COURT: Okay. What else?

4 MR. MALONE: K-P-M-G-L-L-P versus State of
5 Florida, Department of Insurance, 833 So. 2d 285.

6 THE COURT: Did you provide us -- I'm sorry,
7 did you provide us with a copy of that case?

8 MR. MALONE: Yes, sir. I gave four cases and
9 there were two sets -- did you get the --

10 THE COURT: I got it. Thank you, sorry. I'm
11 sorry.

12 Go ahead, sir.

13 MR. MALONE: Looking at the first page,
14 right-hand column toward the end, it says, "As in
15 Koester, the discovery Order in question here was
16 deficient because it failed to specify what trade
17 secrets existed and as set forth by the facts
18 supporting the conclusion," and here's the important
19 part I'm directing this Court to, "That disclosure
20 in trade secrets was reasonably necessary to resolve
21 the issues in dispute."

22 So the contention here is that what Your Honor
23 had -- had articulated in his Protective Order was
24 that the source code -- "The defendants have
25 established through expert testimony, the source

1 code is reasonably necessary to determine whether
2 the Intoxilyzer 8000 contains the software approved
3 by the State of Florida, whether it's functioning as
4 per the approved source code and whether any
5 alterations have effected its operation and
6 reliability," that's --

7 THE COURT: Let me stop you for a second. The
8 first time CMI came to Court on this matter, did
9 they not through you and Mr. Taaffe say, Judge,
10 producing the source code is not the issue, we'll
11 produce the source code, we just need to come to an
12 agreement to protect our company's trade secret and
13 to its business and its right -- and its right to
14 maintain that privacy area of the source code to
15 continue to be the top distributor of an alcohol
16 breath machine?

17 Then as I recall, the Court said, okay, fine,
18 you two attempt to hash out an agreement and a
19 nondisclosure -- Protective Order and nondisclosure
20 on your own, that didn't go too well.

21 We came back to Court and had two to three
22 separate hearings lasting several hours, never
23 discussing whether or not we needed to establish
24 reasonable necessity, but just attempting to say,
25 okay, here's the parameters in which it will be

1 released and here's what we will release.

2 Is that about it?

3 MR. MALONE: Yes.

4 THE COURT: Now, you're coming to Court and
5 saying, wait a second, you can't even order us to do
6 that unless there's a reasonable necessity or a
7 finding of reasonable necessity; correct?

8 MR. MALONE: Yes. Can I -- may I explain?

9 THE COURT: I hope so.

10 MR. MALONE: Okay. At the time we did not feel
11 that it was necessarily important to -- to go into
12 the reasonable necessity argument, it was never
13 brought up.

14 Currently -- and this is largely my decision, I
15 feel that as the current Order is written, it does
16 not properly protect CMI's interest to protect and
17 -- and as my client, I -- to ensure that the Order
18 doesn't what I consider inappropriately compromise
19 their position, they need to fall back on the status
20 of the law.

21 And so -- I know, I'm sort of being unclear
22 here, what I'm saying is is that they fully intend
23 to produce the source code if they can produce it in
24 paper format and they don't have to submit
25 themselves to jurisdiction, they want this over

1 with.

2 However, (inaudible) in electronic format
3 that's being ordered that they have to submit
4 themselves to jurisdiction, they're -- they're like
5 whoa, you know, how can we do that? So therefore to
6 protect them, I had to insert -- to protect the
7 record the language regarding reasonable necessity.

8 Does that clarify?

9 THE COURT: No, but it could be just me. So
10 are you saying -- well, how can I order you to
11 produce something if I don't find, as you argue,
12 that there's a reasonable necessity?

13 MR. MALONE: You wouldn't, so --

14 THE COURT: So you're saying I shouldn't be
15 able to order reasonable -- I shouldn't be able to
16 order you to produce it, just trust you to do that
17 on your own?

18 MR. MALONE: Yes. I guess the point I'm making
19 is -- is this Court doesn't have to trust us to do
20 it on our own even though we will, because at that
21 point, this -- I mean, this Court is bound to make
22 legal determination according to the facts presented
23 it, if, in fact, the source code as we contest or
24 assert is not reasonably necessary, that ends it, it
25 can't be produced and your cases go back on track.

1 It doesn't end it for -- it ends it for you
2 anyway at that point. We would still if the
3 Protective Order were signed, the nondisclosure
4 agreement were signed or stipulated to by defense
5 counsel, we would still produce it. And then at
6 that point, it would be up to whatever expert is
7 reviewing the source code.

8 THE COURT: So again, your argument as I read
9 your motion and your argument orally here today is,
10 you can't require us to produce the source code
11 unless you find a reasonable necessity to do so?

12 MR. MALONE: Yes.

13 THE COURT: You also argue that there is no
14 reasonable necessity.

15 MR. MALONE: Correct.

16 THE COURT: Therefore, you argue we can't order
17 production of the source code?

18 MR. MALONE: Correct.

19 THE COURT: So we should reconsider our prior
20 Order and deny the request -- the Order to produce
21 the source code?

22 MR. MALONE: Yes, sir.

23 THE COURT: And then trust CMI on its own to
24 produce the source code or hope that CMI produces
25 the source code?

1 MR. MALONE: I guess I don't see that the Court
2 necessarily has a fight in -- in making CMI produce
3 the source code. I know what Your Honor is
4 saying is --

5 THE COURT: Well, my original intent since 2004
6 was produce the source code.

7 MR. MALONE: I understand, but -- but your --
8 your intention for that was for defendants, I guess
9 I'm saying defendants would have to trust that CMI
10 would turn it over, 'cause it would be helpful in
11 their case.

12 THE COURT: It's better said your way, yes, I
13 agree. Okay. So this -- the defendants then are
14 required to trust us, we'll produce it, says CMI,
15 keeping in mind that it took CMI how many years to
16 come to Sarasota to at least deal with the subpoenas
17 and deal with the --

18 MR. MALONE: I've been approached by several
19 defense attorneys on my own separate that --
20 separate from Mr. Harrison who also want the source
21 code and they just haven't gone forward yet, because
22 they're waiting for all this to wrap up.

23 THE COURT: Okay. I get your first argument.

24 MR. MALONE: Okay. Second argument -- do I
25 need to go into any further the actual legal

1 arguments regarding -- I wanted to make it clear,
2 Your Honor, that when I said that when you're
3 talking about reasonable necessity, Your Honor said
4 that the source code is reasonably necessary to
5 understand the Intoxilyzer.

6 I think that the proper standard as noted in
7 the K-P-M-G-L-L-P versus State case is that -- that
8 disclosure of the trade secret is reasonably
9 necessary to resolve the issues in dispute, more
10 appropriately, it -- is the source code necessary to
11 the defendant's case?

12 And -- and the assertion is that it is not
13 reasonably necessary, because there is another
14 avenue which we can -- they can accomplish the same
15 objective and that is through the Florida breath
16 testing program's standards and their ability as --
17 as I think it was in Houser versus State, which we
18 argued in front of this Court way back regarding due
19 process issues.

20 And they have other avenues, such as hiring an
21 independent expert, they can cross examine the
22 witnesses with regards to the reliability, etcetera,
23 so there are other avenues.

24 THE COURT: Okay.

25 MR. MALONE: And that's our argument.

1 THE COURT: Okay.

2 MR. MALONE: And second, with regard to the
3 electronic format, we've heard the testimony of
4 Laura Barfield, we have the affidavit of Toby Hall.
5 And I think from those, it is clear that the
6 production of the source code in electronic format
7 is far outweighed that -- the benefit to defendants
8 by production of electronic format, frankly is
9 minimal.

10 And the potential harm far outweighs that. The
11 electronic format, yes, CMI would be able to go
12 through and try to redact the codes and
13 communication links, they just don't think they can
14 do it fully and they have expressed that concern to
15 FDLE and that's -- that's where we're at today.

16 Now, when you're talking about passwords and
17 communication codes, it's not -- it's not like --
18 you know, a password and it's not -- a
19 communications code is not like a password, a very
20 short thing, it's -- it's more detailed and it's
21 embedded into this software. So the paper version,
22 they would be able to physically go through each
23 page and redact those.

24 Now, that's -- so that is why this CMI has
25 asked this Court to modify the Protective Order, if,

1 in fact, this Court finds the source code is
2 reasonably necessary to -- to note that, it should
3 be produced in paper format.

4 THE COURT: What's the cost of it in paper
5 format?

6 MR. MALONE: Approximately twelve hundred
7 dollars.

8 THE COURT: How many pages is it?

9 MR. MALONE: Fifteen hundred. And just so this
10 -- I know there's no testimony on this, but the -- I
11 think we had actually spoke about this before in
12 another hearing.

13 THE COURT: Yes, we did.

14 MR. MALONE: I don't believe that -- it
15 certainly is not an existing document, it's not
16 something they can -- actually you can just copy
17 onto a CD. Actually putting it onto a CD is also
18 another involved process, it's not -- it has to be
19 culled from the program.

20 So I don't -- there's a misconception that it's
21 existing and they can just print it out or -- you
22 know, they can't just print it out, you know, they
23 have to cull it put it all together and that's why
24 it takes some time.

25 CMI would not be passing on the actual cost of

1 their employees to do that, which would take them at
2 least two weeks, from what I've been told.

3 THE COURT: So what's the cost limited to?

4 MR. MALONE: The cost is limited to sending
5 that to the printer and have it bound in the
6 protective format, the pages would be numbered,
7 they'd be marked, they'd be labeled with -- with
8 numbers.

9 That way if anything were copied -- and I think
10 there would be water marks, if anything were copied,
11 they would know where it came from.

12 THE COURT: And that cost again is how much?

13 MR. MALONE: I think it's twelve hundred
14 dollars, that's what the cost was for Minnesota.

15 THE COURT: Okay.

16 MR. MALONE: And that is -- I mean, obviously
17 we would provide the printer's invoice.

18 THE COURT: Okay. Thank you. What else?

19 MR. MALONE: Next is just simply we ask this
20 Court if they did find it was a trade secret to
21 include the same in -- in this Court's Order.

22 Next, with regards to the issue of
23 jurisdiction, I think I have already gone through
24 that and I -- just to reiterate that CMI has
25 vigorously defended its assertions that there is no

1 jurisdiction over it and it continues to do so in
2 the appellate Court and to submit itself to
3 jurisdiction could moot those issues, negating
4 untold hours and -- and expense.

5 The issue goes far beyond just CMI in that
6 there are -- in effect, what -- what the
7 jurisdiction issue does it says that any company
8 throughout the country, throughout the world that
9 has a registered agent in Florida is subject to a
10 Subpoena Duces Tecum as a non-party witness and that
11 has far-reaching consequences.

12 And -- and CMI is in multiple different states
13 and I think it's at least ten different states and
14 it just really can't allow that issue to go
15 unchecked from an appellate review, because of the
16 far reaching -- potential far reaching consequences.

17 THE COURT: So basically you're saying in a
18 nice way, if you don't want me to appeal your
19 ruling, you better take the jurisdiction issue out
20 of the Order?

21 MR. MALONE: I -- I would not ever give this
22 Court an ultimatum.

23 THE COURT: But I mean you said it in a very
24 nice way and it took me at least thirteen seconds to
25 figure that out, but that's basically what you're

1 saying; isn't it?

2 MR. MALONE: They would have to assess
3 whether --

4 THE COURT: And not you personally, but your
5 client, CMI.

6 MR. MALONE: They would have to assess whether
7 or not it would be in their better interest to rely
8 -- honestly, if the appellate Court moved down and
9 says, sorry, you're under the jurisdiction of the
10 Court, I mean, I don't know -- other than to appeal
11 to the 2nd DCA, I mean, there's -- that would pretty
12 much resolve a lot of these issues. So I would just
13 ask this Court --

14 THE COURT: I thought you said earlier that
15 this is going to go all the way up to the Supreme
16 Court.

17 MR. MALONE: Well, you know, we have Kentucky
18 sort of saying Florida doesn't have jurisdiction,
19 you have Florida saying Kentucky doesn't have
20 jurisdiction, so it's a potential Supreme Court
21 matter, I suppose if -- if it went all -- I don't --
22 I'm not the one to say --

23 THE COURT: Didn't Kentucky also say -- by the
24 way now that we're also talking about different
25 Courts, didn't Kentucky also just recently say, yes,

1 you could subpoena duces tecum the source code?

2 MR. MALONE: That's a non final appeal that is
3 being -- by the State of Kentucky.

4 THE COURT: That wasn't my question, you're
5 sounding more and more like --

6 MR. MALONE: Yes.

7 THE COURT: -- counsel -- opposing counsel, they
8 did say that?

9 MR. MALONE: Yes.

10 THE COURT: Kentucky, where CMI is home.

11 MR. MALONE: And -- and the Judge that said
12 that was a retired Judge who -- I don't want to get
13 into it anyway --

14 THE COURT: Okay. All right. Go ahead.

15 MR. MALONE: All right. So I think that this
16 Court understands the jurisdictional question. We
17 would just ask this Court to leave the issue of
18 jurisdiction to the appellate Court.

19 And on the issue of relevance if, in fact, the
20 versions 24 and 25 were never used in the State of
21 Florida, I don't see how they're relevant to the
22 current -- to the current case, where they were --
23 were not even used. And so that is my position,
24 Your Honor.

25 THE COURT: Thank you.

1 MR. MALONE: Thank you.

2 THE COURT: Who's going to argue this for the
3 defense, Mr. Harrison or Ms. Mack?

4 MR. HARRISON: I'm going to do it, Your Honor.

5 THE COURT: Okay.

6 MR. HARRISON: I'm going to try to do this in
7 the order of -- what Mr. Malone, I don't want to
8 spend much time dealing -- on the reasonable
9 necessity, because this was not argued the first
10 time.

11 We're here on a motion for re-hearing. And on
12 a motion for re-hearing, they can't address
13 something for the first time. It's been laid, when
14 the Court made its finding of the trade secret, it
15 relied upon the earlier transcript of the other
16 proceeding where you found it to be a reasonable
17 necessity.

18 It's not proper to address that here for
19 re-hearing even though it certainly would establish
20 -- and the Court had found reasonable necessity when
21 we had the earlier testimony.

22 Dealing with the jurisdictional aspect, they
23 said, well, what happens if Dr. Milar gives it to
24 some -- someone else. Well, if we look at --

25 THE COURT: Let's go -- no, let's go in order.

1 MR. HARRISON: Well, that was the -- which one
2 do you have next?

3 THE COURT: Electronic format.

4 MR. HARRISON: Okay. Dealing with the
5 electronic format, first of all, that was something
6 when we got here the last time, the Court asked us
7 to address there's -- I said -- said one last big
8 speech, you know, it's going to be in electronic
9 format or paper format, you asked for much of the
10 parties to address that in writing. We addressed it
11 in writing, CMI chose to totally ignore that issue.
12 So everything that they're addressing here again is
13 for the first time.

14 But dealing with what we have here, first of
15 all, the -- the big gripe that they're saying in
16 electronic format says because of communication
17 codes or the pass codes, you're Order said those
18 were to be redacted, and that's part of the thing I
19 didn't really understand, because you can redact
20 those.

21 And -- and since you're -- you know, the
22 original Order, Section F on Page 5, the portion of
23 the source code that includes information considered
24 vital to the continued security and integrity of the
25 State's enforcement program shall be redacted prior

1 to disclosure of the source code, the redacted
2 source code portions include (inaudible), passwords,
3 temporary passwords, communication related code that
4 are warranted by CMI to have no relevance or bearing
5 on the working of the Intoxilyzer 8000 as it relates
6 to the analysis of a subject's breath.

7 This Order said that's not going to be turned
8 over. So everything that Ms. Barfield was
9 testifying to we already had agreed at the previous
10 hearing that that wasn't going to take place. And I
11 think probably the easiest way to do -- anything
12 that they want to do, kind of like an errata sheet,
13 change something to an asteric and then let us know
14 what was changed so that now when Dr. Milar realizes
15 this was something that was changed to an asterisk,
16 that takes care of it.

17 And quite candidly say -- what Mr. Malone said,
18 it would be more difficult to do in electronic
19 format, there's nothing in the affidavit said it
20 would be -- there's no testimony, it was purely his
21 argument, but they got to sit there and think about
22 dealing with common -- common sense.

23 'Cause I know when I go to edit a document and
24 I go to look to do the changes and I go to a line
25 and I write -- did some change -- like for example,

1 when I did a change on the proposed Protective Order
2 for Judge Henderson versus Judge Denkins', if Judge
3 Henderson dealt with the 5000, rather than trying to
4 make sure I picked up every place that said 5000
5 versus 8000, when you editing in Microsoft Word, you
6 say find me every place that has 8000 and the
7 computer can automatically jump to those places.

8 So actually trying to do the redaction, if --
9 if we had the testimony here it actually what I
10 believe would be a lot simpler, you know, for them,
11 'cause I would expect before they did it on paper,
12 you'd do the -- do the search in the electronic to
13 tell you where the parts were that they needed to be
14 -- you know, to be redacted.

15 JUDGE HENDERSON: Well, here -- counsel, you're
16 saying he's -- in Hall's affidavit, he's not telling
17 us how much of a burden it is to accomplish the
18 redaction on the electronic --

19 MR. HARRISON: I didn't see anything in Hall's
20 affidavit that talked about it, said they couldn't
21 do it or that it would be a burden or that it would
22 be difficult to put in electronic, you know, format.

23 And if it's -- I know I -- personally, I
24 actually have authored, you know, a few computer
25 programs, certainly not this complex. And when you

1 have it in the compiler, you know, say it's -- it's
2 not a difficult process.

3 The -- and actually you're saying, we're
4 absolutely asking -- asking for it in the format
5 that it is right -- that it exist right now as
6 opposed to they want to change it to one that would
7 be more cumbersome and expensive.

8 And the problem -- when I say expense, it's not
9 just the expense of producing it in the paper, the
10 way that the -- a computer program when it runs will
11 not just start from line one of the code to the end,
12 it will jump all over the place, but to be able --
13 for our expert to do their analysis, it would take
14 them much longer to do the analysis in paper format
15 as it would be electronic format.

16 And that certainly going to do two things,
17 number one, it's going to be more expensive for us
18 and number two it's going to take a lot longer to do
19 the analysis, and it still -- it's not going to be
20 -- it's (inaudible) full proof, 'cause we're
21 actually going to be able to -- you know, to find
22 something, because if you're saying, show me every
23 place that says volume, well, it -- again with
24 electronic, they could jump to those places as
25 opposed to Mr. Malone said it would be fifteen

1 hundred pages, it would be very cumbersome to deal
2 with.

3 So they want it to be in a method that's going
4 to take us longer, more expensive and it's not going
5 to be as thorough. So all we're asking is it be in
6 the format that it is right now, which is in
7 Kentucky, they said it's minuscule if you put it on
8 a CD.

9 I know that with the Washington case, when Dr.
10 Milar did -- offered a B-A-C data master, that was
11 done, he got that on a CD, I contacted folks in New
12 Jersey, who did the analysis in Drager, they said it
13 was sent to the lab via e-mail from Drager, if we
14 want to sit there and talk about as far as dealing
15 -- dealing with security.

16 As -- in regards to the one in Minnesota, one
17 attorney in Minnesota did obtain it in written
18 format and that code still sits in that poor
19 lawyer's office, because he has not be able to get
20 any expert to do the analysis.

21 THE COURT: Wasn't there a recent appellate
22 opinion or a Court opinion that required production
23 of the source code in electronic format?

24 MR. HARRISON: The --

25 MR. MALONE: You're talking about in Kentucky

1 or --

2 MS. MACK: Yes. (Inaudible).

3 MR. HARRISON: Yeah, the Kentucky decision said
4 that the cost of producing it would be minimal to
5 put it onto a CD ram was -- what was in the Kentucky
6 decision. So I don't think it ordered to be done in
7 electronic format, but they said it was -- basically
8 the cost would be diminuous if it were done in that
9 -- that particular format.

10 MR. MALONE: Judge, I -- for the record, I have
11 to make an objection and move to strike any argument
12 regarding the Kentucky decision, that decision is
13 not a final decision and it's under --

14 JUDGE HENDERSON: Well, but did it say that
15 though, counsel? I think it did talk about
16 minuscule or diminuous expense and -- and the ease
17 of transferring it, I think they did; didn't they?
18 Well, that's all we're talking about, you know.

19 MR. MALONE: Yes, sir, I just wanted to note
20 that -- I wanted to make sure this Court was aware
21 that it is not to be cited, it's not allowed to be
22 cited.

23 THE COURT: Right, it's a non final opinion.

24 MR. MALONE: Okay. And I guess -- if you'll
25 allow me to say that that -- they're actually

1 arguing it in the lower Court, (inaudible), the
2 manner of production was never discussed and came as
3 a complete surprise.

4 JUDGE HENDERSON: That Court was looking ahead,
5 they're being practical, say, we're going to help
6 you all.

7 MR. HARRISON: And -- and dealing with when we
8 talk about Toby Hall's affidavit, before the Court
9 actually entered its Order, we thought that the
10 Court had a signed affidavit, it turned out, it was
11 unsigned, though this affidavit that's attached --
12 that we now have signed was actually presented to
13 the Court and you had that.

14 THE COURT: I have it now, I just got it now.

15 MR. HARRISON: Yeah, what I'm saying is you had
16 an unsigned one that we actually thought was a
17 signed one at the last -- last Court hearing that
18 you actually took into account when you made the
19 ruling.

20 So what I'm saying is there's nothing new in
21 that affidavit. The only thing now is now it's --
22 is it truly is an affidavit as opposed to something
23 that was typed by -- by CMI's attorney. So again,
24 that's -- that's nothing new.

25 And the analogy dealing when we talk about

1 electronic versus paper format, it would be if I
2 said -- if I let you go into my library, and I
3 (inaudible) my southern reporters and I said, Judge,
4 get me ten cases on trade secrets, how long would it
5 take you to do find it? How long would it be if I
6 said, give me every case that said trade secret.
7 Now, I'll let you get on Weslaw, you're going to
8 have it in minutes, you know, probably more like
9 seconds that -- that it takes.

10 And so to do -- do the proper analysis, it's --
11 you know, we want it in the format that it is right
12 now, but we agree to the redaction, which is -- I
13 mean, this was part of -- I was scratching my head
14 when I read their motion, because the -- your Order
15 said we weren't going to get that information and I
16 thought it -- with Dr. Milar --

17 JUDGE HENDERSON: Okay. How about -- how about
18 this next part about making a finding of this being
19 a trade secret, haven't we all pretty much felt that
20 way all along, you weren't really disputing that?

21 MR. HARRISON: When this -- there was a slight
22 dispute as to whether it was a trade secret or
23 whether if it was proprietary and there's a question
24 since they're now claiming it's copyrighted, but the
25 bottom line is if they get a Protective Order -- I

1 don't have a problem with them having a Protective
2 Order, we're going to get it and so to me, it's more
3 of an academic argument.

4 And so when we went into the last hearing, we
5 weren't going to -- basically, my understanding was
6 Judge Denkin was going to consider the testimony
7 from when we had all of the testimony -- the hearing
8 up in Bradenton when -- when you were present and
9 those findings we're adopting in the -- and we
10 weren't going to go through and argue trade secret,
11 reasonable necessity, we were just going to be
12 talking about dealing with --

13 JUDGE HENDERSON: How about jurisdiction, how
14 about CMI's claim that, please don't say on paper,
15 judges, that we're subject to jurisdiction?

16 MR. HARRISON: Well, dealing with -- if --
17 since they cannot seek relief from this Court asking
18 for a Protective Order without at least submitting
19 to jurisdiction to the extent that they have a
20 Protective Order.

21 If I'm saying, Judge, give me a Protective
22 Order and then we're going to have -- if there's
23 going to be a dispute over that Protective Order,
24 you know, there's jurisdiction to that.

25 And the reason that language needs to be just

1 here and this is when we went through and -- the
2 evolution, when they filed their original motions
3 for Protective Order, it said, enforcement of the
4 Protective Order or anything or any disputes would
5 be in Davies County, Kentucky, it didn't say where
6 the expert was, it said it was just going to be
7 Kentucky.

8 And then, of course, that obviously was going
9 to be an absolute, you know, deal breaker with any
10 type of dispute, the way that we believe that
11 Kentucky wants to mettle over the Orders here. So
12 they changed that after those -- those objections
13 and said -- and proposed and said, well, we'll agree
14 if the language said, "Any Court of competent
15 jurisdiction."

16 Well, to us that was distinction without any
17 meaning, they're -- (inaudible), whatever the phrase
18 is, this is Friday afternoon, because the company
19 has then claimed that they are, (inaudible),
20 competent jurisdiction and that wasn't changed.
21 And --

22 THE COURT: So you believe basically that
23 Paragraph D, fourth paragraph down in Subsection D
24 should remain just the way it is.

25 MR. HARRISON: That's -- that's correct. And

1 since that is -- since they're citing that, I don't
2 believe that they're saying, we are submitting to
3 jurisdiction in any of the other cases, it -- and
4 since the cases that are before you -- and I take it
5 we're also here on -- we didn't put on the record,
6 we're here in the Manatee County (inaudible) at the
7 same time; is that correct?

8 JUDGE HENDERSON: Yes.

9 MR. HARRISON: And, State, you're agreeing that
10 would -- everything, so that's not an issue down the
11 road, appealable.

12 Neither the Woods, et al, or the Alvarez, et
13 al., case are one of the cases that there are any
14 fines that are that being accrued or ones that were
15 part of the appellate panel.

16 And so the Order doesn't say CMI is submitting
17 jurisdiction to Sarasota County for this and every
18 other case. It just says, "For the enforcement or
19 any disputes dealing with these particular Orders."

20 And I think that's critical, because I do not
21 want to be in a situation that a Judge in Kentucky
22 is going to all of the sudden announce the rewriting
23 -- writing this Order and based upon what's happened
24 over the last couple of years, I think that's a
25 genuine concern.

1 And so -- and the fact that you say it has to
2 be here, I don't have a lot of confidence that the
3 Kentucky Courts wouldn't necessarily stick their --
4 their nose into it, but I think that that certainly
5 would give us a lot better leg to stand on if they
6 tried -- tried to do that.

7 THE COURT: Okay. What been their fifth
8 argument that the Order should not include --

9 JUDGE HENDERSON: 24 and 25.

10 MR. HARRISON: Okay. The reason 24 and 25 were
11 there and that's where we went into the dealings --
12 dealing for the subpoena, of course, it doesn't
13 apply to Judge Henderson, 'cause he's only on the
14 5000, these -- the Sarasota machines were -- or some
15 of these were only calibrated -- so actually the 24
16 was installed.

17 The calibration took place on the 24, they were
18 updated to the 25 and then to the 26 when they went
19 on-line. And they have one of the memorandums that
20 says that if the source code when it's modified --
21 as long as it doesn't modify the analytical part, it
22 doesn't need to be re-calibrated. If it modifies the
23 analytical portion, it does need to be
24 re-calibrated.

25 So since these versions were on the machine

1 with the calibration for at least, you know, some of
2 the folks that were here when it first came on-line,
3 we want to see if the changes between 24 and 25 and
4 26 from the calibration to the time where people
5 submitted dealt with the analytical portion.

6 THE COURT: Let me stop you for a second.

7 Mr. Malone.

8 MR. MALONE: Yes, sir.

9 THE COURT: Do you have any definitive
10 information to refute that -- and that was my
11 understanding that the 24 and the 25 were actually
12 incorporated into some of the machines.

13 MR. MALONE: I actually wasn't aware of that.
14 I just know that the -- they were never used,
15 actually used like on-line. I don't have any
16 information of that --

17 THE COURT: Mr. Ramey.

18 MR. RAMEY: I may be wrong, but, (inaudible) in
19 a big long motion -- the 24 --

20 THE COURT: In front of Judge Miller?

21 MR. RAMEY: Yes. Which I think it was -- they
22 were put on the instruments, but they were never
23 actually used, you know, I'm not sure -- I'm not
24 sure Mr. Malone -- they put 24 on it, when they put
25 25, 24 if totally wiped off of it, when they put 25

1 -- or if they just added 24 and maybe called it 25,

2 I'm not sure.

3 But my understanding from the testimony is no
4 actual breath tests were given with 24 and 25.

5 MR. HARRISON: Not to -- (inaudible), when the
6 -- they went on-line in 2006, end of March, every
7 Intoxilyzer 8000 in Florida had version 8100.26, and
8 so every individual that's on Woods either had 26 or
9 27, however the machine did have 24 and 25 on at the
10 time of calibration.

11 THE COURT: However, it was re-calibrated by
12 the subsequent source codes. And I read Judge
13 Miller's opinion as well and I just wanted to
14 clarify as well.

15 JUDGE HENDERSON: (Inaudible).

16 THE COURT: Yeah, he did, a little.

17 MS. MACK: Judge --

18 MR. HARRISON: Well, according to the records
19 that -- that we have, that's the reason that we had
20 asked -- asked for the subpoena dealing with FDLE,
21 the certification of calibrations that they've been
22 relying upon here.

23 And what we got from the State was from when
24 the 24 version software -- when it was calibrated
25 from the 24 till when our clients took it on the 26,

1 it had not been re-calibrated. And so that -- that's
2 what we -- that's the reason we asked.

3 If it had been re-calibrated if -- because
4 re-calibration is putting in the software is not the
5 re-calibration, it's actually something that would
6 be done I believe somehow on the inside of the
7 machine, so that -- that --

8 THE COURT: Let me rephrase my question. The
9 machines were calibrated on point 24 --

10 MR. HARRISON: Yes, sir.

11 THE COURT: -- correct?

12 MR. HARRISON: That is my understanding.

13 THE COURT: 25, it was never calibrated on;
14 correct?

15 MR. HARRISON: I cannot -- without looking at
16 the records, I can't --

17 THE COURT: My recollection is it was never
18 calibrated on and you would both agree that nobody
19 was ever tested on 25?

20 MR. HARRISON: That is correct.

21 MS. MACK: But it was the next version in
22 number and --

23 THE COURT: Correct, and then -- but it was
24 never -- nobody had to -- no defendant ever had to
25 submit under the point 25?

1 MS. MACK: I think the question, Judge, is that
2 it was used in the approval process, that's what the
3 evidence we had showed --

4 THE COURT: 26 --

5 MS. MACK: Both of them, 24 and 25 were used in
6 the approval process and that's the concern that I
7 personally have and that's what I believe the
8 evidence shows, but we agree that 26 and 27 were
9 used for the testing, yes, we agree with that.

10 MR. HARRISON: See if I have a machine that was
11 calibrated on 24, then they installed 25 and then my
12 client was tested on 26, and it's still -- they're
13 relying upon the calibration of 24, I want to know
14 what those change are to make sure that that didn't
15 have any impact.

16 MS. MACK: Right.

17 MR. HARRISON: And that -- and that --

18 MR. MALONE: They're not relying on the
19 calibration on 24, they're relying on the
20 calibration that was actually in use and that's 26.

21 THE COURT: Okay. I've heard -- I understand
22 the arguments for those five issues.

23 MS. MACK: May I have a word, please? I'm
24 sorry.

25 THE COURT: Yes, ma'am.

1 MS. MACK: Only because I had the opportunity
2 to sit here and look through the file while
3 everybody else is talking and it might be helpful,
4 otherwise I would not open my mouth.

5 If you would look at the motion for Protective
6 Order that was originally filed in the Woods' case
7 by Mr. Malone -- (inaudible) sign it --

8 THE COURT: Can you give me the date?

9 MS. MACK: Yes, I'm going to give it to you
10 right now, November 19, 2007.

11 UNIDENTIFIED SPEAKER: Are you looking at the
12 attachments?

13 MS. MACK: It had attached to it -- just a
14 second -- a Protective Order --

15 UNIDENTIFIED SPEAKER: If I could interrupt
16 just to save you time, Judge, when you go on-line,
17 the clerk rejected Mr. Malone's attachments to the
18 proposed Protective Order, they thought those were
19 separate; is that correct?

20 MS. MACK: Well, here, maybe I can just
21 approach and make this simple, I --

22 UNIDENTIFIED SPEAKER: Judge, we will stipulate
23 it's in the original Protective Order.

24 JUDGE HENDERSON: We've got -- we've got --

25 MS. MACK: It's more important than that, the

1 redaction, Paragraph F is precisely what this Court
2 entered in its Protective Order and all you added,
3 Judge Denkin, was the following quote: "And are
4 warranted by CMI to have no relevance nor bearing on
5 the workings of the Intoxilyzer 8000 as it relates
6 to the analysis."

7 THE COURT: I remember that.

8 MS. MACK: And so that's why that's in your
9 Order, because they asked for it and they got it and
10 now they don't like it. And that's all I have to
11 say.

12 Thank you for listening.

13 THE COURT: All right. Mr. Malone, does CMI --
14 because I know there's something else you want to
15 say, does CMI object, 'cause I haven't seen anything
16 in your motion nor in your argument -- I'm going to
17 assume that -- I'll rephrase my statement or
18 question.

19 I'm going to assume that CMI has no objection
20 to the nondisclosure and confidentiality agreement.

21 MR. MALONE: Let me just confirm yet again.

22 There are two objections as I see it, Your
23 Honor, one is that it -- it notes that it would be
24 produced in electronic format in Paragraph 4 and it
25 also -- Paragraph 2 (inaudible) all versions, other

1 than that, no, we have no objection.

2 THE COURT: Okay. And brief rebuttal.

3 MR. MALONE: Mr. Harrison talked about
4 something that I -- I briefly went into and I want
5 to go into it a little further. I provided this
6 Court with a letter from Dr. Milar to Stuart Hemic,
7 I think that -- that comes in into play here because
8 what happened there in 2003, Dr. Milar came from
9 FDLE e-prompts and from those e-prompts, I don't --
10 I'm not going to use the word illegal, but he
11 improperly took data off those e-prompts, put them
12 into hard copy format, made notes of that and mailed
13 them to Stuart Hemic, that -- along with that
14 letter, there were thirty pages of those notes that
15 we should be provided --

16 THE COURT: Well, how is that relevant to
17 today's hearing?

18 MR. MALONE: Because it -- it bolsters CMI's
19 concerns that the source code could get out and if
20 it's electronic format in addition to the concerns
21 that FDLE has, their concern -- they wanted to make
22 sure they have a tight rein on it.

23 So if it's in hard bound format and each page
24 is -- is identified, then if that happens, if it
25 does get out, they will know where it -- exactly

1 where it came from and they will be able to take
2 appropriate action.

3 And it's kind of funny that all of Mr.
4 Harrison's arguments about jurisdiction, this is all
5 assuming that they do violate and let the source
6 code out, I mean, if they don't think that's going
7 to happen, there's no question of jurisdiction,
8 there's no issues and where it's going to be
9 enforced.

10 THE COURT: In Mr. Hall's affidavit, where does
11 it say that they can't delete the communication
12 codes and the password codes?

13 MR. MALONE: It doesn't actually say that it in
14 there. That's why I -- you know, obviously I can't
15 think to put everything -- we missed it, I guess, I
16 can submit another one.

17 THE COURT: Well, you filed the motion -- you
18 filed the motion saying, hey, we can't do it in
19 electronic format and there's all these reasons why
20 and you -- you were very thorough in your many paged
21 motion for reconsider or in the alternative
22 modification of Protective Order and the attached
23 documents.

24 However, nowhere in there did I see Mr. Hall in
25 his affidavit say that it would be impossible,

1 improbable or difficult to keep those out of
2 electronic format.

3 MR. MALONE: The only testimony evidence we
4 have before us is -- is the letter from Sharon
5 Traxler where she notes that that is their
6 understanding and in the testimony by Laura Barfield
7 where she notes that she did talk about that issue
8 with Toby Hall, there's nothing really contrary to
9 that.

10 And especially, there's nothing to suggest that
11 CMI would lie to its -- its own client nor -- Ms.
12 Barfield was completely forthright and she had never
13 seen this affidavit yet everything she testified to
14 was in line with what this Court has seen.

15 There's no slight of hand here, there's no
16 hiding of the ball. I -- we're not saying that it
17 can't be redacted, we're saying they don't think
18 they can get it all and for security reasons -- I
19 don't know how it all works.

20 I don't know, like Mr. Harrison was talking
21 about search and find everything, I don't know if
22 it's in a Word Perfect format, I mean, I could find
23 those things out, but I just know that they
24 expressed the same things to me that they did to
25 Laura Barfield.

1 THE COURT: With all due respect, wouldn't
2 today have been a really good time for us to have
3 answers to that question, since your -- CMI's
4 biggest concern apparently other than jurisdiction
5 and that we should go back to what we originally
6 found and find no reasonable necessity, don't enter
7 an Order and let CMI do it on their own, is your
8 electronic format concern.

9 MR. MALONE: Yes, sir.

10 THE COURT: And I have a letter from Sharon
11 Traxler, who I'm assuming is an attorney and has
12 absolutely I'm assuming no computer knowledge or
13 background based upon the way she wrote her letter
14 and just says, "It's my understanding or our
15 understanding," I think she says.

16 I have no basis to determine whether or not
17 that's a correct understanding or what basis or what
18 foundation she came to that understanding.

19 I understand the alcohol testing program's
20 concern to avoid compromise and I was -- fully
21 expected to hear testimony as to how that would be
22 compromised and avoided -- and unable to be avoided
23 in produce in electronic format, but I haven't heard
24 anything on that.

25 I've heard Ms. Barfield say, you know, if -- if

1 they get out those passwords and those communication
2 codes, you know, our -- our program is shut down.
3 The Court doesn't want to do that, but I've heard no
4 testimony saying that CMI can't produce it
5 electronically and redact all that stuff that would
6 shut down ATP.

7 MR. MALONE: I think that this Court has heard
8 circumstantial evidence to that effect, they've
9 heard that (inaudible) contrary --

10 THE COURT: No, I've heard a conclusionary
11 statement that it's our understanding, which --

12 MR. MALONE: I -- I apologize, Your Honor, it
13 was an oversight on my part, I probably should have
14 had have that in the affidavit.

15 And I -- you know, that's not the only reason,
16 you know, the source codes should not be produced in
17 electronic format, there's also what I was talking
18 about with Dr. Milar, there's -- there's a question
19 of whether or not it can be secured in electronic
20 format small, it's too easy to copy or, you know,
21 save -- save, or -- you know, there are situations
22 where what if Dr. Milar's computer got a virus for a
23 (inaudible) or someone -- and it got out by
24 accident, it's just -- it's too easy and there
25 are -- I mean, there are --

1 THE COURT: They can copy the -- they can copy
2 the written program and then send it to whoever they
3 want to.

4 MR. MALONE: They could, but that's why we put
5 the security procedures in place to have --

6 THE COURT: It's not preventing them from
7 making copies --

8 MR. MALONE: No.

9 THE COURT: -- it's giving you an avenue within
10 which to sue them.

11 MR. MALONE: Right, obviously, they -- if they
12 wanted to do that, if they wanted to go to that
13 expense of actually, you know, hand copying the
14 whole thing, they could probably do that, but
15 there's no way to fully protect it.

16 THE COURT: Help me understand, how is it bound
17 to prevent it from being copied?

18 MR. MALONE: I'm not sure how the printer
19 exactly did it, I think it's bound in a certain way
20 that you can't take the pages out and so therefore,
21 you have to --

22 THE COURT: So you get a digital camera and you
23 take pictures.

24 MR. MALONE: Well, you could, sure, you could
25 do that. If someone wanted to circumvent this

1 Court's Order and break the law, they probably --
2 they could find a way.

3 THE COURT: So I don't see the difference in
4 that regard between electronic copying and bound
5 copying.

6 MR. MALONE: To deliberately take a digital
7 camera and copy every page and take that and
8 physically write down the entire fifteen hundred
9 pages, to deliberately do that takes an entirely
10 different state of mind than to click save and save
11 it on your computer.

12 THE COURT: Well, can't the -- can't the disc
13 -- my understanding of discs and since we're on the
14 record here, my limited understanding of discs are
15 that you can place protections on that disc to
16 prevent it from being copied and saved.

17 MR. MALONE: There are -- right now what's
18 going on, it's -- it's on the same topic, CMI is
19 working with Stuart Hemic to meet to discuss exactly
20 these issues and one of the -- one of the topics is
21 whether or not we can figure some way of producing
22 it electronically to secure it.

23 And one -- one idea that was bantered around
24 was -- was for CMI to actually lease a -- like a
25 computer that they can't be -- have outside access,

1 to do some controlled way of doing this.

2 And it's -- if, in fact, it can (inaudible), a
3 controlled system that nothing can get out and
4 nothing can get in, that might work, but other than
5 that --

6 THE COURT: All right.

7 MR. MALONE: May I just finish with my --

8 THE COURT: Oh, you have some more to argue?

9 MR. MALONE: Yes, sir.

10 THE COURT: Okay.

11 MR. MALONE: I just wanted to note a couple of
12 things. One, Mr. Harrison stated that in asking for
13 a Protective Order, you're asking to submit to
14 jurisdiction, that's not true. The case law
15 specifically states that you can file a limited
16 notice of appearance for purposes of a Protective
17 Order.

18 Secondly --

19 MR. HARRISON: What case is that?

20 MR. MALONE: It's (inaudible), I don't actually
21 have the cite, I apologize. That's really all I
22 wanted to say -- oh, I did also want to just note
23 that -- that I think the Court would admit that the
24 provision talking being about redaction when -- you
25 know, that was when we were all contemplating paper

1 format and just that I don't think that when we --
2 when we were talking about that -- that provision
3 that we ever discussed redaction in an electronic
4 format.

5 Thank you.

6 THE COURT: Thank you. We're going to take a
7 brief recess.

8 (Thereupon, a short recess was held.)

9 THE COURT: We're back on the record in State
10 of Florida versus Kyle Woods. We're going to review
11 the notes, the case law that was provided to us,
12 discuss this between Judge Henderson and myself and
13 issue an Order. Today is Friday, hopefully by next
14 Friday.

15 JUDGE HENDERSON: Yeah, although next Friday,
16 we're all closed, so we'll get it out before that
17 hopefully.

18 THE COURT: We're adjourned.

19 (Thereupon, these proceedings were concluded.)

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TRANSCRIPTIONIST'S CERTIFICATE

STATE OF FLORIDA)
COUNTY OF MANATEE)

I, MARSHA EVANS, Notary Public, State of Florida, certify that I was authorized to and did transcribe from compact disc the foregoing proceedings recorded on March 13, 2008; and that the transcript is a true and correct record of the proceedings to the best of my ability.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 7th day of April, 2008, at
Bradenton, Manatee County, Florida.


MARSHA EVANS