

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

**STATE OF FLORIDA,  
Plaintiff,**

**Vs .**

**Case No. 41 2005 CT 005586**

**ISMAEL ALMARAZ, ET. AL.,  
Defendant.**

---

**ORDER ON DISCLOSURE OF SOURCE CODE and OBJECT CODE FOR  
INTOXILYZER 5000 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 5000, 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).<sup>1</sup>
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 5000 contains the software approved by the State of Florida, whether it is functioning as per the approved Source Code, and whether any alterations have affected its operation or reliability.
4. CMI was served with a subpoena duces tecum, authorized by this Court, for the production of the Source Code for the Intoxilyzer 5000, Version 900.08, 900.10.

---

<sup>1</sup> 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 5000, versions 900.08, 900.10 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 5000 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 5000, 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 5000.

"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 5000 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 5000 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 Manatee 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 5000 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) Erica Arend, Assistant State Attorney, Office of the State Attorney, PO Box 1000, Bradenton, Florida 34206.

**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 Manatee County, Florida, this 26<sup>th</sup> day of February, 2008.

  
\_\_\_\_\_  
Honorable Douglas Henderson  
County Court Judge

cc: Robert N. Harrison, Esquire  
Erica Arend, 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 5000, versions 900.08, 900.10.
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 5000s 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 5000, versions 900.08, 900.10 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 Manatee 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 Manatee 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 Manatee 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 Manatee County, Florida, in the Case of *State v. Ismael Almaraz*, No. 41 2005 CT 005586 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 Erica Arend, Assistant State Attorney, Office of the State Attorney, PO Box 1000, Bradenton, Florida 34206.

Disclosing Party  
BY: CMI, Inc.

Receiving Party

BY: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
(Printed Name)

\_\_\_\_\_  
(Printed Name)

Dated \_\_\_\_\_

Dated \_\_\_\_\_