

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.,  
KENNETH ARNOLD BAKER, ET AL.  
STEPHEN UDICE, ET AL.  
JACK E. IRISH, ET AL.,  
JOHN C. FABIAN, ET AL.,  
and THE STATE OF FLORIDA,

Case No. 08-CA-5961-NC  
County Case No. 2006 CT 12017 NC  
County Case No. 2005 MM 2364 SC  
County Case No. 2006 CT 9705 SC  
County Case No. 2006 CT 2109 SC  
County Case No. 2006 CT 9733 NC

Respondents.

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**AMENDED 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 matters both reserving and contesting jurisdiction, respectfully files this Amended Petition, such Amendment requesting added review of identical orders recently filed in *Baker*, *Irish*, *Udice* and *Fabian* to the original *Woods* Petition for a Writ of Certiorari to review the Amended Orders On Disclosure Of Source Code and Object Code For Intoxilyzer 8000 [and 5000] 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.

## STATEMENT OF THE FACTS

Petitioner is a Kentucky Corporation and a non-party to Respondents' criminal DUI cases. The above styled cases represent approximately one hundred (100) consolidated DUI cases. 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. (*Woods* Appendix A, page 4) (*Baker* Appendix C, page 32) (*Udice* Appendix C, page 48) (*Irish* Appendix C, page 64) (*Fabian* Appendix C, page 80). Petitioner filed a Limited Notice of Appearance (*Woods* Appendix A, page 5) (*Baker* Appendix C, page 34) (*Udice* Appendix C, page 50) (*Irish* Appendix C, page 66) (*Fabian* Appendix C, page 82), and moved for a Protective Order. (*Woods* Appendix A, page 8) (*Baker* Appendix C, page 37) (*Udice* Appendix C, page 53) (*Irish* Appendix C, page 69). An Order was entered in *Woods* (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 in *Woods* 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). The *Woods* amended order superseded the prior order and modified it. The County Court in *Baker*, *Udice*, *Irish* and *Fabian* all entered subsequent Orders on Disclosure of the Source Code that were identical to the *Woods* Amended Order and all were based upon the *Woods* record, motions, argument and hearing. (*Baker* Appendix C, page 41) (*Udice* Appendix C, page 57) (*Irish* Appendix C, page 73) (*Fabian* Appendix C, page 85). The Orders 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 Respondents on a CD-ROM. (Appendix A, page 49). The lower court also ordered for the Intoxilyzer 8000 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 courts made it a condition of source code production that Petitioner must submit to the jurisdiction of the lower courts, 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 Orders On Disclosure Of Source Code and Object Code For Intoxilyzer 8000 and 5000 and Protective Orders dated in *Woods, Baker, Udice, Irish* and *Fabian*.

### **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. (*Woods* Appendix A, page 50) (*Baker* Appendix C, page 3) (*Udice* Appendix C, page 10) (*Irish* Appendix C, page 17) (*Fabian* Appendix C, page 24). Since the Court found the source code was a trade secret, the burden then shifts to the Respondents to show that the source code is reasonably necessary to their case. *KPMG*, 833 So.2d 285. However, Respondents 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 Respondents 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 Orders 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 courts 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 *Respondents’ presentation of their 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 Respondents’ 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 contain 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 Respondents have 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 Respondents’ 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 Respondents have 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 Respondents' case because they have 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 Courts departed from the essential requirements of the law when it found the source code was reasonably necessary.

In the Orders on the 8000, the lower Courts 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 courts made it a condition of the Orders 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 Courts 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

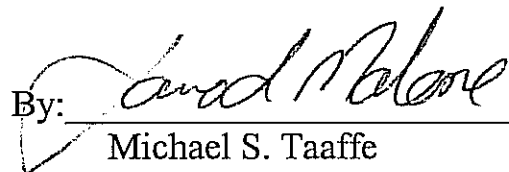
production, when it ordered versions of the source code to be produced which were not relevant because such versions were never put into use in Florida, and when it ordered the source code to be produced in electronic format despite the disastrous ramifications to the entire state's breath testing program.

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 25, 2008.

Respectfully submitted,

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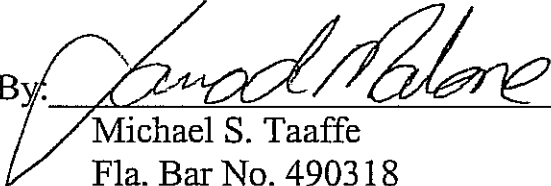
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ordinary U.S. Mail to:

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this 25 day of April, 2008.

By:   
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