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

STATE OF FLORIDA
Plaintiff,

v. **CASE NO: 2004 CT 014406 SC**

CAROLE MAE BJORKLAND, et.al.*
Defendant.

***(Attached is a complete list of all cases subject to this Order.)**
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ORDER ON DEFENDANT'S MOTION TO COMPEL PRODUCTION OF THE SOURCE CODE

THIS CAUSE having come to be heard on Defendant's Motion to Compel Production of the Source Code. The Defendants' presented the testimony of Defense Expert, Dr. Harley Myler and introduced documents which included the manuals for the Intoxylizer 5000 and photographs of the inside of Intoxylizer. The State presented no testimony or documentary evidence. After hearing argument of counsel, being provided supplemental legal argument of counsel and after otherwise being fully advised of the premises, hereby,

ORDERS AND ADJUDGES that said **Motion to Compel Production** is **GRANTED.**

The Defendant(s) argue that the State should be required to provide the Defendant(s) the software source code for the EPROM's (erasable programmable read only memory) used in the Intoxilyzers in Sarasota County. The Defendants maintain that they seek production in order to determine (1) whether the intoxilyzer(s) used by the government to establish guilt of the Defendant(s) for driving under the influence of

alcohol have been substantially modified or (2) whether the intoxilyzer being used was approved by the Florida Department of Law Enforcement (FDLE). ***State v. Bender***, 382 So.2d 697 (Fla. 1980); ***Muldowny v. State***, 871 So.2d 911 (Fla. 5th DCA 2004). The Defendant(s) argue their authority is based in part that only approved breath testing machines may be used to establish impairment pursuant to Florida's Implied Consent Law and FDLE rule 11D-8.003 establishes the procedures for approval of the intoxilyzers. ***Section 316.1932(1)(a), Fla. Stat. (2005).*** The Defendant's claim they need production of the source code for the EPROMs[1] (900.08 & 900.10) to determine if they are substantially different from one another and/or whether they are in compliance with the Implied Consent Law.[2]

The State responds that (1) production of the source code is not required because the information is not "material" under Fla. R. Crim. P. 3.220(f), and (2) they should not be required to produce the source code when it is not within their direct or even indirect possession as it is maintained and held confidential by its owner, CMI, Inc.[3]

Section 316.1932(1)(f)(4), Fla. Stat. (2005), requires that when a person tested with a machine requests it, full information concerning the test is to be made available. As was noted in ***Muldowny*** in interpreting §316.1932(1)(f)(4), Fla. Stat. (2005),

> " . . . when a [defendant] risks the loss of driving privileges or perhaps freedom based upon the use and operation of a particular machine, full information **includes** operating manuals, maintenance manuals and schematics in order to determine whether the machine actually used to determine the extent of a defendant's intoxication is the same unmodified model that was approved pursuant to statutory procedures." *Id at 913.*

The court in ***Muldowny*** specifically held that the defendant is entitled to schematics of the intoxilyzer used to test the defendant when the results of the test are

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[1] The testimony of Dr. Myler and arguments of defense counsel strongly suggest that the different numbered EPROM's (i.e. 900.08 and 900.10) may not be in compliance with the Implied Consent Law.

[2] Only approved breath testing machines may be used to establish impairment pursuant to section 316.1932(1)(a), Florida Statutes (2005), commonly known as Florida's "Implied Consent Law." ***State v. Polak***, 598 So.2d 150 (Fla. 1st DCA 1992); ***State v. Flood***, 523 So.2d 1180 (Fla. 5th DCA 1988). FDLE rule 11D-8.003 establishes the procedures for approval of the machines.

[3] FDLE, a state agency, entered into an agreement/contract with CMI to provide it with an intoxilyzer instrument. The agreement also apparently provided, either explicitly or implicitly, that CMI would not disclose its source code, as they believed it to be a trade secret.

intended to be used against the defendant in a criminal proceeding that could result in a loss of driving privileges, financial penalties, and jail. The ***Muldowny*** court did not address the issue of production of the source code. We find no reason to differentiate between the importance of producing the schematics and manuals of the Intoxilyzer and production of the EPROM source code (i.e. the software that is in effect, instructing the intoxilyzer how to operate). The intoxilyzer service manual, which was admitted as an exhibit, provides that the central processing unit (CPU) of the Intoxilyzer is the 'brain' of the instrument and is comprised of the following main components: EPROM's (erasable programmable read only memory chips), the microprocessor, the parallel input/output device (PIO), the CPU crystal, the real time clock (RTC), the random access memory chip (RAM), the analog to digital converter (ADC), and the address and data buss.

In describing the importance of the EPROM, the manual for the Intoxylizer 5000 specifically provides:

> "The EPROMs contain all of the programmed functions for the instrument. Here are the commands for sequencing the operation, all of the data entry questions, the operational parameters and the mathematical formulas for the final analysis. These chips can be reused due to the fact that they are "erasable". If you look at the EPROMs in the instrument you will notice that each chip has a label covering the top of the chip. Under no circumstances should this label be removed. Removing label will expose the chip to ultra-violet light and as a result will cause the chip to be erased." *Service Manual Intoxilyzer 5000, © 1999, Page 64*

Dr. Myler[4] testified that there appears to have been some change in the EPROMs as evidenced by the number differences (i.e. 900.08 & 900.10); but without the source code he is unable to ascertain whether the change is substantial or inconsequential. He further testified that photographs of the inside of the intoxilyzers used in Sarasota indicate that the use and positioning of the EPROMs have changed, but again without the source code, he is unable to determine the significance of such an alteration.

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[4] Dr. Myler was qualified in this hearing as an expert witness in the fields of electrical engineering and computer engineering.

An instrument or machine that if believed, establishes the guilt of an accused subjecting them to fines, loss of driving privileges and loss of freedom should be made available to the defense for open inspection. Such an instrument should be tested by a protocol written by someone other than the manufacturer of that product. Judge John M. Harris noted as in his concurring opinion in ***State v. Fuller,*** 12 Fla. L. Weekly Supp. 808 (Brevard County, May 11, 2005.):

> "It should be no surprise to reveal that the judges attending the hearing were troubled to learn that every instrument appeared to contain visibly different hardware components, which in some cases indicated different software being utilized as well. It was perhaps more disconcerting that FDLE, the very agency charged with assuring the scientific accuracy and reliability on these instruments, had no idea or explanation as to why no two Brevard County machines were alike, and in fact seemed to be discovering this for the first time during the hearing. To say that this condition raised some level of suspicion as to the scientific reliability of these instruments would be an understatement."

When the law (section 316.1932, Fla. Stat. (2005)) expressly provides that Defendants are entitled to **full information** about the instrument that is used to establish their guilt, such full information logically includes making the instrument available for open inspection. Full information should include the software that runs the instrument. To construe the statute otherwise, is tantamount to granting the state authority to use confidential information (i.e. the software code) to establish the guilt of a criminal defendant without disclosing the information to the defendant for inspection and possible impeachment.[5]

When the government is legislatively given the ability to establish a rebuttable presumption of an accused's[6] guilt, the statutes and administrative rules setting

[5] It also has been testified by experts before this court that an instrument such as this should be properly, scientifically and periodically tested through generally accepted scientific practices.

[6] The results from the machine give rise to a presumption that a breath-alcohol level of 0.08 or higher establishes "...prima facie evidence that the person was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired. Moreover, such person who has a blood alcohol level ....of 0.08 or higher is guilty of driving, or being in actual physical control of, a motor vehicle, with an unlawful .... breath-alcohol level." Section 316.1934, Fla. Stat. (2005).

parameters for the use of that machine must be strictly construed and read in the light most favorable to the accused. ***Mongavero v. State***, 744 So.2d 1048 (Fla. 4th DCA 1999).

The law in this state has been clear since 1991 that a Defendant may explore not only whether the breathalyzer was operated in accordance with the rules, but also if it was an approved machine. *See **State v. Donaldson***, 579 So.2d 728 (Fla. 1991). In order to determine if the machine was in compliance it seems obvious that the Defendant should be able to inspect all aspects of the machine. ***State v. Bender***, 382 So.2d 697 (Fla. 1980). In ***State v. Polak***, 598 So.2d 150 (Fla. 1st DCA 1992) and ***State v. Flood***, 523 So.2d 1180 (Fla. 5th DCA 1988) determined through discovery that the government had modified the breath test machine by either bypassing or modifying the Taguchi Sensor Cell.[7] The bypassing of T-cells and the modification of the T-cell housing was found to have changed the breath testing instrument[8] to such an extent that recertification was required. The court then concluded that because the breath test was not administered by an approved instrument, the test results were inadmissible and affirmed the suppression order.

The software is an integral part of the intoxilyzer. Florida Administrative Code 11D-8.003 specifies the only kind of software that can be used. Unless the defense can see how the breathalyzer works and verify it is an approved machine, it remains as stated by the court in ***Muldowny*** and more recently by Judge Ralph E. Erikkson as being nothing more than a "mystical machine" used to establish an accused's guilt. ***State v. Lentz***, 12 Fla. L. Weekly Supp. 806a (18th Judicial Circuit, Seminole County, April 29, 2005). The Honorable Judge Ralph E. Erikkson went on to note that the government's argument that the State of Florida does not have in its possession the source code software does not provide a legal basis for non-disclosure.

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[7] The Taguchi Sensor cell (T-cell) is a component in the intoximeter which detects and measures acetone and other hydrocarbons. When the T-cell is activated, it subtracts acetone and other interfering hydrocarbon readings from the alcohol reading, with the result being a pure alcohol reading. When the T-cell is deactivated, the intoximeter can no longer distinguish between alcohol and acetone and interfering hydrocarbons and instead measures acetone and hydrocarbons as alcohol.

[8] In both cases, the breath test machine used was an Intoximeter 3000 Revision B-1.

> "There does not appear to be any authority in the law of Florida for a State agency (F.D.L.E.) to enter into an agreement with a private company (C.M.I.) to provide breathalyzer machines for the Implied Consent Program and at the same time keep the inner workings of the machine secret.[1] [For a further discussion on this point see ***State v. Jensen***, No. 02-8674-MMA (Fla. Seminole Cty. Ct. Dec.10, 2002) [10 Fla. L. Weekly Supp. 135b]. This Court simply may not excuse the State of Florida from disclosing relevant material during the discovery phase because F.D.L.E. chose a vendor who would not allow them to show whether or not the State was complying with the Implied Consent Law.
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> [Footnote 1. Perhaps F.D.L.E. should consider using other vendors so they may comply with § 316.1932(1)(f)4, Fla. Stat.]"[9]

Both the State and the defense expert agree that the source code constitutes a trade secret. The State summarily concludes that the court should therefore find that the defendants should not be entitled to examine the source code and compare the instrument's software to the approved software. Even assuming that the State has standing to assert the trade secret privilege on behalf of a third party (CMI) who did not appear at the hearing, the inquiry does not end with this blanket assertion.

The Florida Evidence Code, section 90.506, provides that the privilege against disclosure applies "if the allowance of the privilege will not conceal fraud or otherwise work injustice." In addition, this statute must be read in conjunction with Florida Statute §316.1932(4), which allows a person charged with DUI to obtain "full information" about the breath test. The State opines that the latter provision can never be used to allow disclosure of a trade secret. This position violates well-settled principles of statutory construction. As a general rule, courts should not interpret a statute in such a manner that it loses its meaning or becomes superfluous. ***Johnson v. Feder***, 485 So.2d 409, 411 (Fla. 1986). Therefore, the rights afforded to a defendant under section 316.1932, Fla. Stat.

[9] There was no evidence presented by the State to indicate whether the government ever investigated the option of contracting with other manufacturers who would be able to provide the source code information in accordance with Florida law.

(2005), must be considered along with the privileges granted by section 90.506, Fla. Stat. (2005). If a party makes the requisite factual showing, a court may order disclosure of a trade secret. Such disclosure is entirely consistent with the "full information" provision of section 316.1932, Fla. Stat. (2005). Subject to certain parameters, including protective orders to ensure against abuse or prejudice, this type of discovery is hardly unprecedented; however, the court must make a finding that disclosure is reasonably necessary. *See e.g.* ***Rare Coin-It Inc. v. I.J.E. Inc.***, 625 So.2d 1277 (Fla. 3rd DCA 1993).

The defendants in the above cases have demonstrated a reasonable necessity for production of the source code. The State failed to establish any record setting forth available alternatives, lack of materiality or irreparable harm to the manufacturer of the software. Other than simply asserting that CMI was unwilling to produce the source code, the State did not present any evidence rebutting reasonable necessity.[6] Based on the record presented in this case, the court makes the factual finding that **the defendants have established that the source code is material to their theory of defense in these cases.** The defendants have established through expert testimony that the source code is reasonably necessary to determine whether the Intoxilyzer in fact 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.

Section 316.1932(4), Fla. Stat., (2005), specifically provides that "full information" regarding the test taken "shall be made available" to the persons tested or their attorney. One would assume full information means just that, full information.

Section 90.506, Fla. Stat., (2005), also provides that the trade secret privilege is not allowed where it would "otherwise work injustice" and that the court may take appropriate measures to protect the holder of the privilege.

Where defendants faces criminal sanctions, including incarceration and loss of driving privileges, it would be contrary to the purpose of sections 316.1932 and 90.506 to permit the state to assert a trade secret privilege on behalf of its contractor and thereby

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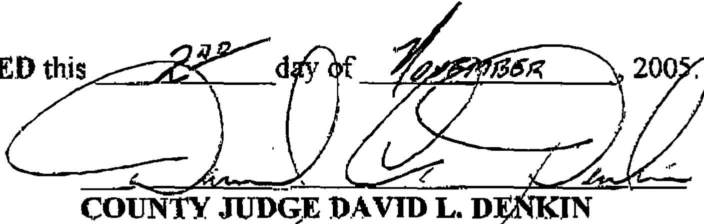
[6] The State reiterated several times that the source code issue was a purely speculative fishing expedition. The issue is speculative precisely *because* the defendants do not have the information necessary to evaluate the instrument.

prohibit these defendants from obtaining information relevant to the instrument that is used to prove their guilt.

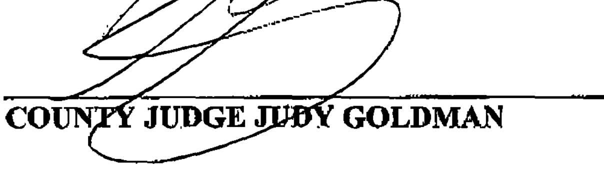
It is therefore ORDERED and ADJUDGED that the State shall produce the source code(s) for the EPROMs located in the Intoxilyzer 5000 instruments used in Sarasota County, within 15 days of this Order. The source code(s) shall be disclosed only to Dr. Myler and shall be delivered only to him personally. Dr. Myler shall not disclose to any other person or persons the source code(s) and shall return the information to the State once he has completed his examination. No copies shall be made of the source code(s) nor shall it be reproduced, stored or recorded in any manner by Dr. Myler. Any disclosure or reproduction, whether willful or inadvertent, will result in sanctions from the court, including but not limited to, criminal contempt.

DONE AND ORDERED this 2nd day of November, 2005.



COUNTY JUDGE DAVID L. DENKIN

COUNTY JUDGE KIMBERLY C. BONNER



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