

IN THE CIRCUIT COURT OF THE  
NINTH JUDICIAL CIRCUIT, IN AND  
FOR OSCEOLA COUNTY, FLORIDA

DIVISIONS 70, 71, 80 (En Banc)

STATE OF FLORIDA,  
Plaintiff,

vs.

GARY ALLEN	08-CT-8840, 08-CT-8841
SEANARINE BOODRAM	08-CT-7603
~ JEFFREY DAMERLY	08-CT-6642
~ JAMES DIETRICH	08-CT-8880
MATTHEW ELLIS	08-CT-7346
~ JOHN ENGLER	08-CT-8484
JAMES EVANS	08-CT-8355
JUAN GALLEGO	08-CT-5140
ERIC GOSNAY	08-CT-6633
JEROMY HENDERSON	08-CT-8063
~ CHRISTOPHER JACKSON	08-CT-5379
JEFFREY JONES	08-CT-8489
EMAD YLOUBI	08-CT-7983
FRANCES MACKEY	09-CT-738
JESSE MASSAS	09-CT-785
~ JUAN MOLLETRUO	08-CT-6430
ANTONIO MONTERIO	08-CT-6387
GEORGINA NIEVES	09-CT-491
GREGORY OLIVER	08-CT-5647
LUIS ANDRES ORTIZ	08-CT-8050
ERIC PRIETE	08-CT-5771
JACQUELINE PRIDGEON	08-CT-7761
~ JOSEPH RAKACZLAY	09-CT-505
JOSE REYES	08-CT-8523, 08-CT-8524
PETER SOLORZANO	08-CT-8075
~ HAROLD WELCH	09-CT-82

Defendants.

ORDER TO DISCLOSE SOFTWARE

This matter came before an en banc panel of the Osceola County Court on March 9-11, 2009. Numerous motions were filed by counsel for the defendants, but pursuant to

stipulation, all motions were withdrawn. The sole issue to be determined by this Court is whether the State is required to provide the Defendants with the operating software for the Intoxilyzer 8000 and the manner in which that disclosure will be accomplished.<sup>1</sup> After hearing testimony of witnesses and arguments of counsel, and being otherwise duly advised on the premises, the Court finds as follows:

The software that operates the Intoxilyzer 8000 is material to the defense because it governs the operation of the machine that produces breath test results used as evidence to prove Defendants were driving while under the influence of alcohol. The machine essentially takes the place of a prosecution witness. As one circuit court explained in a ruling relating to an earlier version of the machine, "the State has substituted the results of the Intoxilyzer 5000 for the analysis of a forensic chemist." *State v. Bastos*, 13 Fla. L. Weekly Supp. 897a (11th Jud. Cir. 2006). Thus, Defendants have a right to attack the reliability of the testing procedures. *Bender v. State*, 382 So. 2d 697 (Fla. 1980). However, they cannot adequately challenge the validity of the breath test results generated by the machine without having an expert examine the software to determine, inter alia, whether the software has effected changes in the machine's analytical process, whether the new code interacts with the old code, and whether errors are occurring.

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<sup>1</sup> The Defendants have not requested the source code for the software, and at the hearing, Ms. Barfield and Dr. Myler testified that they do not believe the software includes the source code. Furthermore, the Third District Court of Appeal has held that the source code is not "material," albeit with respect to the uniform law to compel the attendance of out-of-state witnesses. *State v. Bastos*, 985 So. 2d 37 (Fla. 3d DCA 2008). This Court makes no ruling on whether Defendants would be entitled to the source code.

There is reason to believe the software warrants a closer examination. A defense attorney, Stuart I. Hyman, discovered several problems with the Intoxilyzer 8000 and notified Laura Barfield, Program Manager of the Alcohol Testing Program at the Florida Department of Law Enforcement (FDLE). Neither FDLE nor CMI, the manufacturer of the machine, had discovered or reported these errors, yet Mr. Hyman's report led CMI to develop a new version of the software, 8100.27, which remains in use as of the date of this Order.

Dr. Harvey Myler, a professor of electrical engineering who testified for the Defendants, states that a "change log" is typically produced by the engineer in charge of a company's software revisions. Such a document details the changes that have been made and enables the user to understand them. However, CMI has not provided an adequate change log to document the specific changes it has made in each version of the Intoxilyzer 8000 operating software, or the effect of those changes on the operation of the machine. Ms. Barfield advises that she has requested documentation regarding the software changes but has never received it.

Dr. Myler asserts that he needs actual copies of the operating software order to analyze it on behalf of Defendants. The State argues that full disclosure<sup>2</sup> does not include software, citing section 316.1932(1)(f), Florida Statutes.<sup>2</sup> However, the Court

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<sup>2</sup> "... 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."

concludes that this provision is not intended to exempt all "manuals, schematics, or software" from disclosure. It has already been established that the State must provide "operator's manuals, maintenance manuals, and schematics." *State v. Muldowney*, 871 So. 2d 911 (Fla. 5th DCA 2004) (upholding sanctions imposed when the State disobeyed a discovery order requiring it to produce these materials for the Intoxilyzer 5000). The most reasonable grammatical interpretation of section 316.1932(1)(f) is that it is intended to excuse the State from producing material that is not in the State's possession.

Ms. Barfield acknowledges that she is in possession of the disks containing versions 8100.26 and 8100.27 of the software. Therefore, since the software constitutes material evidence and the State is in actual possession of it, the State is obliged to disclose the software to the defense.

Based on the foregoing, it is ORDERED AND ADJUDGED:

1. All defense motions are withdrawn except for the request for an order directing the State to disclose to the defense versions 8100.26 and 8100.27 of the operating software for the Intoxilyzer 8000.
2. Within 15 days of the date of this Order, the State shall provide the defense with disks containing exact copies of versions 8100.26 and 8100.27 of the operating software for the Intoxilyzer 8000.
3. The State shall certify that the disks provided are exact copies with no alterations or omissions.


4. Alternately, the defense may elect to send its expert to FDLE headquarters in Tallahassee, Florida to examine the original disks on site.

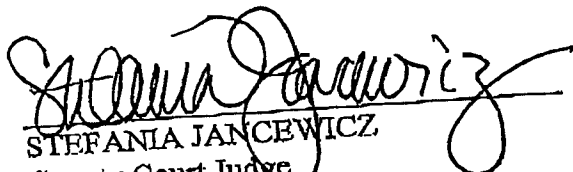
5. The defense and its expert(s) shall keep the software in strict confidence and shall not release the disks to any third party or otherwise disclose any information about the software to any party other than the State or this Court.


6. The Court is not compelling the State to disclose the software. However, if the State elects not to do so, the effect is to deny material evidence, and the remedy shall be that the State cannot introduce breath tests results pursuant to the implied consent rule. See *State v. Adkins*, 16 Fla. L. Weekly Supp. 251a (9th Jud. Cir. 2008).

DONE AND ORDERED in chambers at Kissimmee, Osceola County, Florida this

24<sup>th</sup> day of April 2009.

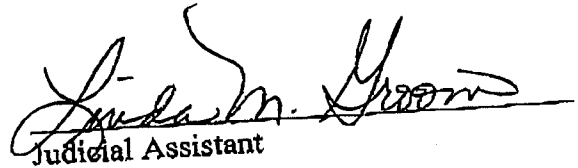
  
CAROL ENGEL DRAPER  
County Court Judge

  
STEFANIA JANCEWICZ  
County Court Judge

  
HAL C. EPPERSON, JR.  
County Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order to Disclose Softward has been furnished by mail/hand/interoffice mail to: Wayne C. Wooten, Assistant State Attorney, 2 Courthouse Square, Suite 3500, Kissimmee, Florida 34741; Don Waggoner, Esq., 917 Verona Street, Kissimmee, FL 34741; Joerg F. Jaeger, Esq., 217 E. Ivanhoe Boulevard North, Orlando, FL 32804; Ernest J. Mullins, Esq., 519 W. Patrick Street, Kissimmee, FL 34741; Matthew Leibert, Esq., 112 E. Concord Street, Orlando, FL 32801; George D. Cranton, Jr., Esq., 624 Patrick Street, Kissimmee, FL 34741; David Chico, Esq., 20 S. Rose Avenue, Suite 2, Kissimmee, FL 34741; Steven Tinsley, Esq., 1422 East Osceola Parkway, Kissimmee, FL 34744; John Samaan, Esq., 1220 Douglas Avenue, Suite 207, Longwood, FL 32779; Dione Talkington Fletcher, Esq., 151 Wymore Road, Suite 100, Altamonte Springs, FL 32714; Keith Carston, Esq., 121 South Orange Avenue, Suite 1420, Orlando, FL 32801; and Michael J. Snure, Esq., P. O. Box 2728, 1150 Louisiana Avenue, Suite 1, Winter Park, FL 32790, this 24th day of April, 2009.

  
Linda M. Brown  
Judicial Assistant