

**IN THE COUNTY COURT, FOURTEENTH JUDICIAL CIRCUIT  
OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY**

**STATE OF FLORIDA,**

**Plaintiff,**

**vs.**

**CASE NO.: 09-002506 CTMA**

**CHRISTOPHER TODD FOSTER,**

**Defendant.**

**MOTION IN LIMINIE TO EXCLUDE  
THE BREATHALIZER RESULT**

COMES NOW, the Defendant, CHRISTOPHER TODD FOSTER, by and through his undersigned counsel, moves this Honorable Court to exclude Defendant's breathalyzer results as the current FDLE rules do not provide for uniform breath testing procedure, as grounds for this Motion the Defendant in support thereof shows:

**FACTS**

1. On June 3, 2009, the Defendant was arrested and subsequently charged with driving Under the Influence with injury.
2. After his arrest, the Defendant was placed in custody and read the Florida Implied Consent Form.
3. Mr. Foster submitted to testing by the intoxilyzer 8000 ( Machine No.: 80-001309) (software 8100.27). The breath test reported a breath sample of .088 and .090.

4. The law enforcement personnel utilized Florida Department of Law Enforcement Alcohol Testing Program Form 37 pursuant to Rule 11D-8 and 11D-8.0127, F.A.C. in administering the intoxilyzer 8000 test.
5. The intoxilyzer 8000 manufacturer specifies only a **1 second blow** is necessary to provide an acceptable sample to evaluate a person's breath alcohol level.
6. Despite these internal controls for minimum acceptable breath sample. Test operators are trained as follows:  
"3.3 . Instruct the subject to inhale normally and provide a continuous, sustained breath sample **until they are told to stop.** (e.s.)  
The breath test operator shall tell the subject **to stop blowing** when the subject appears to have expelled all of the air out of his lungs during a single breath. (e.s.)  
[ Breath Test Operator Course Lesson plan - March 1, 2007"]
7. In contrast to the instructions above, Mr. Foster was instructed by Officer Wilburn as follows:

*"Ok what we are going to have to do here..  
Umm... when it tells me to, you need to take a deep  
breath as deep as you can and blow on this thing  
like you are going to blow up a balloon and this  
will make a tone if you are blowing hard enough."*

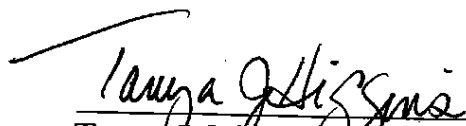
*"You got to do this for six seconds, it takes a  
while. You are going to run out of air .. But you  
can do it."*

*" Deep deep deep breath and just blow and keep  
on blowing. If you run out of air take a breath real  
fast and keep going."*

8. Mr. Foster blew for approximately 28 seconds for the first breath, with two puffs. (See intoxilyzer frames 21:59:14 thru 21:59:44). The second breath test sample, also with two puffs took approximately 35 seconds (See intoxilyzer frames (22:02:25 thru 22:02:59). Since Mr. Foster blew so long there is no way to know at what point the intoxilyzer analyzed his breath.
9. The "keep going" instructions by the breath test operator caused manipulation of the intoxilizer 8000 results.
10. The purpose of the rules are to insure the tests are reliable. As held in *State v. Hoover*, et al. 2003 1754 CTMA, Fourteenth Judicial Circuit, "rules that permit a test operator to have the subject blow into the machine as long as he, in his undirected discretionary wishes, with attendant variations in test results, is insufficient, to create a scientifically reliable test".

**WHEREFORE**, Defendant, CHRISTOPHER TODD FOSTER, respectfully requests this Honorable Court enter an Order granting His Motion in Liminie to Exclude The Breathalyzer Results.

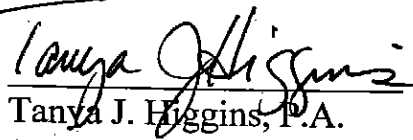
Respectfully submitted,



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Attorney for Defendant

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a copy of the foregoing Motion in Limine to Exclude The Breathalyzer Results. has been furnished to Jennifer Hawkins, Assistant State Attorney, P.O. Box 1040, Panama City, Florida, on March 12<sup>th</sup>, 2010



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