



Florida Department of
Law Enforcement

Gerald M. Bailey
Commissioner

Alcohol Testing Program
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Charlie Crist, *Governor*
Bill McCollum, *Attorney General*
Alex Sink, *Chief Financial Officer*
Charles H. Bronson, *Commissioner of Agriculture*

August 30, 2008

Mr. Toby Hall
President
CMI, Inc.
316 East 9th Street
Owensboro, KY 42303

Subject: CMI, Inc. Intoxilyzer 8000 Filters

Dear Mr. Hall:

I am writing in response to State v Atkins, et al, an Orange County Court Order, and to gather information regarding the CMI, Inc. Intoxilyzer 8000. In order to provide information to this court, I will need the following questions answered:

1. Is the CMI, Inc. Intoxilyzer 8000 used in the state of Florida listed on the US Department of Transportation Conforming Products List of Evidential Breath Measurement Devices?
2. Is there more than one make, brand and model of CMI, Inc. Intoxilyzer 8000?
3. What is the micron wavelength of each filter used in the Intoxilyzer 8000?
4. Were the same micron wavelength filters in the Intoxilyzer 8000(s) sent to the US Department of Transportation in 2001 for evaluation and inclusion on the Conforming Products List? And again in the instruments sent for software version 8100.26 and 8100.27 evaluation by the US DOT in 2007?
5. Have the micron wavelength of the filters ever changed?
6. Can you explain the discrepancies between the micron wavelength of the filters listed in the CMI, Inc. Intoxilyzer 8000 brochure, the CMI, Inc. Instrument Specifications Summary, the CMI, Inc. Intoxilyzer 8000 Parts List, and the information listed in the Federal Register?

I have attached a copy of the Orange County Court Order, and each of the documents listed in Item 6 for your review. Please let me know if you have any questions.

Sincerely,

Laura D. Barfield
Alcohol Testing Program Manager

LDB/lb

Attachments

IN THE COUNTY COURT IN
AND FOR ORANGE COUNTY,
FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.

ROBERT ATKINS	48-2008-CT-673-E
CARLOS ANDRADE	48-2007-CT-14294-O
BELL, DAWN	48-2007-CT-14558-O
ANGELA PIMPINELLA	48-2008-CT-5198-O
VICTOR VIRGA	48-2007-CT-14484-O
LAURIE CLARK	48-2007-CT-3938-W
KELLOM, AUSTIN	48-2008-CT-1834-O
MADRUGA, MARIO	48-2006-CT-5949-O
PHILLIPS, LAWRENCE	48-2006-CT-14432-O
STOYANOV, PAMELA	48-2006-CT-1572-E
TIMOTHY BARGFREDE	48-2007-CT-10418-O
RONALD BOWLEN	48-2007-CT-19232-O
JOHN COLLINS	48-2008-CT-6-E
RENE CRUZ	48-2006-CT-19622-O
ANDREW EATON	48-2007-CT-19194-O
SUSAN HONIG	48-2006-CT-4570-W
GRADY KITE	48-2007-CT-9253-O
CRAIG LEVINE	48-2007-CT-19190-O
STANLEY OLIVER	48-2007-CT-5874-O
CAROL ROEBUCK	48-2007-CT-19441-O
KEITH SAWYER	48-2007-CT-2415-W
BRIAN BEAMS	48-2007-CT-11186-O
HW LEE BUFTON	48-2007-CT-19484-O
MOLLY TORRES	48-2007-CT-19208-O
RALPH WRIGHT	48-2008-CT-5538-O
LOUIS ALVAREZ DEL LAREGU	48-2007-CT-1246-E
MAURICIO CAMPANA	48-2008-CT-21-O
JAMES ISING	48-2008-CT-251-O
GLORIA JOHNSON	48-2007-CT-17264-O
ROBERT MONACO	48-2008-CT-347-O
KEVIN PATTERSON	48-2007-CT-17034-O
LLOYD PETERSON	48-2007-CT-5343-W
MICHAEL RILEY	48-2007-CT-17240-O
JESSICA ROSS	48-2007-CT-17236-O
JENNIFER SIDERITS	48-2008-CT-121-O
PAUL SOLOMON	48-2007-CT-17350-O
HINIE STEPHENS	48-2007-CT-20698-O
SARAH A. BENJAM	48-2007-CT-7303-O
MATTHEW A. BROWN	48-2008-CT-154-E
MARVIN CASTRILLO	48-2008-CT-169-E
SING CHOW	48-2008-CT-14-O
JAMES C. EDEN	48-2007-CT-16876-O
BRYAN DAVIS	48-2008-CT-3841-O
JONATHAN HOOKER	48-2007-CT-15472-O
JULIA JACKSON	48-2007-CT-1054-E
MONICA JOHNSON	48-2007-CT-20560-O
PAUL KRAUSE	48-2007-CT-13208-O

BRIAN LAMPMAN	48-2007-CT-20678-O
LATASHA LANE	48-2008-CT-7254-O
JOHN MACMILLAN	48-2007-CT-789-E
MAYUR PATEL	48-2007-CT-805-E
STEVEN RODRIGUEZ	48-2007-CT-942-E
GREGORY SCURRY	48-2007-CT-4371-O
DELBERT SEXTON	48-2007-CT-12341-O
MONICA STOCKBRIDGE	48-2006-CT-736-E
STEVEN WADE	48-2008-CT-542-E
JENNIFER WILLET	48-2007-CT-4226-W
MERRY WILLIAMS	48-2007-CT-704-E
CYNTHIA ZICK	48-2008-CT-506-E
HENRY ALBERSON	48-2008-CT-479-E
STEVEN BIESANZ	48-2008-CT-3315-O
RONNIE PERCIBALLI	48-2008-CT-6655-O
ROBERT WILLIAMS	48-2008-CT-6431-O
JOSE CAMPOS	48-2008-CT-3054-O
MAXWELL ERNI,	48-2007-CT-16229-O
STEVEN LARGENT,	48-2007-CT-15708-O
KRISTEN SHEEHAN,	48-2006-CT-7231-O
HERMES TIRADO	48-2007-CT-3992-O
BENJAMIN HAUMILLER	48-2007-CT-1200-E
MAYANK BHATT	48-2007-CT-20037-O
SUZZETTE BOSCH	48-2008-CT-7302-O
TONY CYR	48-2008-CT-7220-O
JEFFREY JONES	48-2007-CT-140-E
NICHOLE M. BEAUREGARD	48-2007-CT-507-O
JEFFREY BENNETT	48-2006-CT-4267-W
BORGE BORRESEN	48-2008-CT-5725-O
FRANK FERNANDEZ	48-2007-CT-11262-O
HECTOR GONZALEZ	48-2007-CT-7604-O
NICHOLAS JERDEN	48-2008-CT-7129-O
STEPAN KAZAKOV	48-2006-CT-4635-O
PAUL LAUREANO	48-2007-CT-20420-O
NICHOLAS MULLER	48-2007-CT-20420-O
JIMMY S. STEELE	48-2008-CT-3025-O
CRYSTAL TEAGUE	48-2007-CT-16422-O
ROBERT WHITESIDE	48-2006-CT-12494-O
JASON FARD	48-2008-CT-3409-O
STEPHEN BURKETT	48-2007-CT-4513-O
DAVID ASHBURN	48-2006-CT-1068-O
STEPHANIE GUTIERREZ-TOROK	48-2006-CT-17284-O
ROBERT DICERBO	48-2006-CT-14783-O
MILES BASSIN	48-2007-CT-1590-E
THOMAS HANSEN	48-2007-CT-4406-W
WESLEY PETERSEN	48-2007-CT-18970-O
ROBERT GREEN	48-2008-CT-004887-O
LAUREN HILL	48-2007-CT-000705-E
BENJAMIN MARLOU	48-2006-CT-006494-O
BRIAN MCKAY	48-2008-CT-004484-O
GEORGE PHERAI-BOGEAJIS	48-2008-CT-004694-O
CASEY CURRY	48-2008-CT-005147-O
DARREL BENJAMIN	48-2007-CT-493-E
FRANCES FALCON	48-2008-CT-2431-O
ANGEL GONZALEZ-VEGA	48-2008-CT-5862-O
KRISTEN CARBONE	48-2008-CT-6239-O
JOHN WOOSTER	48-2008-CT-5795-O
MICHAEL CAYLOR	48-2008-CT-4670
BRIAN CUNNINGHAM	48-2007-CT-1078-O
DEBORAH DYER	48-2006-CT-1435-E
ZEB HICKS	48-2007-CT-285
CARL NOLEN	48-2007-CT-5177-O

DEANNA PATTERSON
CHRISTOPHER RENAUD
PEGGY RU'D
JEREMY TROWELL
MICHAEL USSERY
RODNEY WALKER
MATTHEW WILLIAMS

48-2007-11041-O
48-2008-CT-3059-O
48-2007-11777-O
48-2007-CT-4393-O
48-2007-CT-10551-O
48-2008-CT-4227-O
48-2008-CT-4169-O

Defendants.

ORDER GRANTING DEFENDANT'S REQUEST TO PRODUCE

THIS CAUSE having come on before an En Banc panel of the Orange County Court on February 1, 2008, February 4, 2008 and again for additional testimony on June 9, 2008 and the Court having reviewed the files, all Defense motions, State's response, counsel's written arguments and being otherwise duly advised on the premises, the Court finds as follows:

The Defendant's motions at bar question the legality of the promulgation of the Florida Department of Law Enforcement (hereinafter FDLE) rules pertaining to the Intoxilyzer 8000 and its use in the State of Florida. The motions challenge whether the FDLE Rules constitute an invalid exercise of delegated legislative authority under Chapter 120 of the *Florida Administrative Procedure Act*, whether they have been properly promulgated and whether they are scientifically sufficient to ensure reliability. Additionally, the Defendants have raised other questions regarding the scientific methodology and reliability of the machine. Specifically, the Defendant's contend FDLE has made "substantial modifications" to the Intoxilyzer 8000 and question whether or not it is an approved instrument under FDLE rules. Finally, the Defendants requested to inspect the interior, electrical and computer components of the Intoxilyzer 8000 as well

as the software and source code for the computer programs used in the operation of the instrument and the instrument's qualitative and quantitative analysis of and calculation of breath alcohol content to insure that they work in a scientific manner.

The Court has subject matter jurisdiction over these matters pursuant to Bender v. State, 382 So. 2d 697 (Fla. 1980).

When the prosecution presents testimony in evidence concerning motor vehicle driver intoxication which includes an approved alcohol test method by a properly licensed operator, the fact finder may presume that the test procedure is reliable, the operator is qualified, and the presumptive meaning of the test as set forth in section 322.262(2) is applicable. Bender v. State, 382 So. 2d 697 (Fla. 1980).

Further, the Bender Court recognized the Defendant could "attack the reliability of the testing procedures, qualifications of the operator, and the standards establishing the zones of intoxicant levels." The statutory frame work has eliminated the need for the prosecution to establish the meaning of the test results by expert testimony and assumes the test is reliable. In approving the procedure, the Florida Supreme Court found a proper exercise of authority where the defendant has a "right to their individual proceeding to attack the reliability of the testing procedures" Bender at 697. See also, State v. Donaldson, 379 So. 2d 728. (Fla. 1991); Robertson v. State, 604 So. 2d 783 (Fla. 1992).

Notwithstanding the provisions of Florida's implied consent statute (sections 316.1932 and 316.1934, Florida Statutes), Florida Rule Criminal Procedure 3.220 established the Defendant's right to discovery and provides a procedure for obtaining additional discovery "as the Court may require". (Fla. R. Crim. P. 3.220(f)).

The Court declines to rule at this time on any of the motions filed relating to Defendant's challenge of the implied consent program's compliance with FDLR rules and whether the FDLR rules as applied are in compliance with Florida Statutes.

However, the Court does find Defendant's arguments questioning the status of the instrument as an "approved" instrument under Florida's implied consent statute section 316.1932(1)(a) to be compelling.

In order for a breath testing instrument to be approved for forensic/evidentiary use in Florida, the instrument must meet the requirements of FDLE *Form 34, Instrument Evaluation Procedures*. First, Form 34 requires the instrument to be listed on the United States' Department of Transportation Conforming Product List (hereinafter U.S. D.O.T.CPL). Second, the instrument must be able to meet several accuracy benchmarks outlined in Form 34.

In April 2002, Ms. Laura Barfield, the head of FDLE's Alcohol Testing Program, received two Intoxilyzer 8000's using software version 8100.09 from CMI, Inc. (hereinafter CMI), manufacturer of the instrument. She testified there "were issues" during the first attempt to evaluate the instruments resulting in the suspension of the testing. Thereafter, the two instruments were returned to CMI. In May 2002, FDLE received the same two instruments back from CMI. However, the instruments now had software version 8100.10 installed in them. Those instruments were re-evaluated by Ms. Barfield pursuant to Form 34. During the second attempt to evaluate them, only one of the instruments met all the Form 34 requirements. The second instrument's evaluation was stopped when it began to inappropriately emit smoke.

In the October 3, 2002 Federal Register (Vol 67, No 192), the Intoxilyzer 8000 was added to the U.S. D.O.T. CPL. The description read as follows "Intoxilyzer 8000 manufactured by CMI, Inc. of Owensboro, KY. This device is a non-dispersive infrared device which *uses the 3.4 micron and the 9 micron band* (emphasis added) for

measurement of alcohol. It is powered by 120 volts AC power or by 12 volts DC power from a car battery".

Based on the one evaluated instrument, FDL E proceeded through the rule promulgation process and the Intoxilyzer 8000 was subsequently added as an approved instrument in chapter 11D-8 effective November 5, 2002. The Intoxilyzer 8000 with software version 8100.26 was deployed for use in the State of Florida on March 27, 2006

In September 2006, Stuart Hyman, Esquire, informed Ms. Barfield that he had uncovered several problems with the instruments in use in Orange County. First, Mr. Hyman showed several examples of breath test tickets/affidavits showing a zero volume sample and breath alcohol result. Second, he showed examples of breath test tickets/affidavits showing samples being given outside the three minute time limit for giving successive samples which were not flagged. Finally, Mr. Hyman was able to show that many of the instruments were not reliably reporting or determining when an insufficient sample was provided by the test subject. He provided Ms. Barfield with numerous breath test tickets/affidavits showing the instrument failed to report the deficiency of the sample volume. In testimony, Ms. Barfield maintained that she does a comprehensive review of the test results before they are posted on the internet; however, neither she or any representative of FDL E noticed the volume or time problems.

In a letter dated October 5, 2006, Ms. Barfield explained she had contacted CMI and determined the cause of the problem to be "missing instructions" in the version 8100.26 software. As a result, CMI developed software version 8100.27 which was then installed in all of the Intoxilyzer 8000s in use in the State of Florida. Software version 8100.27 remains in use today. Although, Ms. Barfield testified that software version

8100.27 "fixed" the "volume not met" problem with software version 8100.26, the Defendants produced numerous breath test tickets/affidavits from instruments utilizing software version 8100.27 which still exhibited problems determining the sufficiency of the sample volume. Those breath test tickets/affidavits showed tests which were flagged as "volume not met" where a sufficient sample was provided.

Dr. Harvey Myler the defense's electrical/computer engineering expert, testified he believes the identified anomalies in the operation of the Intoxilyzer 8000 stem from problems/mistakes in the software or source code. However, he is unable to determine the specific cause or extent of the problem without examining the software or source code. Based on the identified problems with the Intoxilyzer 8000, it is his opinion that the instrument is not scientifically reliable.

FDLE Rule 11D-8.003 lists the Intoxilyzer 8000 using software evaluated by the Department in accordance with Instrument Evaluation Procedures FDLE/ATP Form 34 - Rev. March 2004 as an approved "breath test (instrument) for evidentiary use..." The Rule does NOT however specify the electrical component configuration or computer software version of the approved Intoxilyzer 8000. The Court does find that the defendants have demonstrated the Intoxilyzer 8000s in use throughout Florida contain different electrical component configurations and computer software and that there have been changes made to the interiors of some instruments--including changes that were made as a result of "anomalies" in the instrument's performance that were not properly documented. This causes the Court concern with regard to the changes in FDLE Rule 11D8-003(5). Prior to the 2004 change, the rule required the manufacturer to notify FDLE in writing prior to making any modifications and for FDLE to approve such

modifications pursuant to the Form 34 guidelines. No such requirement exists in the rule subsequent to its 2004 amendment. A change in the instrument no longer requires FDLE to do Form 34 approval. The rule now allows FDLE to merely "evaluate" the instrument.

The testimony and evidence clearly established FDLE and Ms. Barfield have little or no true knowledge or comprehension of the computer software and source code at work in the instrument or the modifications made to the computer software or source code since the approval of the Intoxilyzer 8000. (i.e., Ms. Barfield could only testify about what CMI has said or indicated about the source code or software since FDLE never possessed it nor understands how it functions). Throughout these proceedings, the State has been unable to produce a single witness from CMI, who might have a comprehension of the software and source code and could give testimony about it. Further, there were changes to the breath hose, tall feet, power supply coils, instrument case and the undocumented replacement of a screw in the purge valve with a screw of a different size because of "issues" with the purge feature of the instrument. The documentation concerning those changes, which Ms. Barfield termed "Florida Updates", made no mention of the changing of the screw. When asked why it wasn't documented, Ms. Barfield responded, "Its only a screw". The combination of the FDLE Rule 11D8-003(5) rule changes, the above listed issues with the reliability of the Intoxilyzer 8000 and CMI's refusal to provide schematics, software, source code, release notes, and other documentation required to provide insight to the Court regarding the instrument's approval status and method of operation leads the Court to wonder if CMI may be hiding some defect or shortcoming of the instrument, which places the defense in the position of being denied evidence material to their defense and in the unenviable position of proving

something to the Court without being given the tools necessary to do so. This flies in the face of the rights and guarantees of criminal defendants provided by the Florida Rules of Criminal Procedure, Florida Statutes, Florida Administrative Rules and even the Florida Constitution.

Therefore, in the instant case, the Defendants must be allowed to see the source code and the release notes and all requested documentation. Without them, the Defendant will be unable to "attack the reliability of the testing procedures and the standards establishing the zones of intoxicant levels" which the Florida Supreme Court's Bender decision clearly held to be required to ensure fairness in the application of the provisions of Florida's implied consent statute (sections 316.1932 and 316.1934, Florida Statutes). It may well be that this code, these notes and supporting documentation do not reveal a "substantial" modification or problem—but based on the evidence presented this information is material to the defense under Florida Rule of Criminal Procedure 3.220(f).

The Court previously found that the source code was not "material" under Florida Rule of Criminal Procedure 3.220(f)(2) and denied prior Defendants' the right to require CMI to produce same. However due to the additional testimony and evidence detailed above, the Court now finds the source code for all software versions of the Intoxilyzer 8000 which have been or are operating in the State of Florida, their accompanying release notes and supporting documents to be material.

The Court believes that a simple "non-disclosure" agreement consistent with industry standards in which the reviewing expert promises the following would be sufficient to protect any secret intellectual property of CMI:

- (a) The code/notes produced are provided solely for the legal purposes detailed in this Order;
- (b) The reviewer shall keep the source code and release notes in strict confidence
- (c) Neither the source code nor the release notes may be disclosed, in part or in total, to any third party without obtaining the written permission of CMI prior to disclosure.
- (d) Any entity receiving the source code or the release notes shall not refer to them in any manner in any news release, advertising or otherwise disclose their contents to any other entity unless specified herein.
- (e) That the reviewer may share the information provided to individuals working on behalf of the Defendants and the Court subject to their execution of identical non-disclosure statements.

So that the remedy is clear, the Court is *not compelling* CMI, the State of Florida or FDLE to disclose the source code, release notes and supporting documents; however if the code, notes and supporting documentation are not provided, then the Defense has been denied material evidence in support of their defense that the instrument is not an approved test as required by the implied consent statutes. If the defense is denied this evidence then the proper remedy is to prohibit the State from the benefit of the implied consent statutes. Thus, the State would be denied the benefits of section 316.1934, Florida Statutes, which gives them the presumptions of impairment and the shortened predicate for admissibility of the test result under subsection (5).

In addition, the testimony and evidence causes the Court to question whether the Intoxilyzer 8000 in use in Florida is properly listed on the U.S. D.O.T. CPL as required by subsection 1 of Form 34. As previously noted, the Intoxilyzer 8000 listed on the CPL in the October 3, 2002 Federal Register (Vol 67, No 192) specifically indicated the Intoxilyzer 8000 used the 3.4 micron and the 9 micron band. Defendant presented testimony showing CMI promotional materials, an operator's manual and other materials and testimony that indicated the Intoxilyzer 8000 in use in Florida used the 3.0 or the 3.4 or the 3.476 micron band and the 9.0 or the 9.3 or the 9.376 or the 9.4 micron band. If the Intoxilyzer 8000 in use in Florida uses any micron bands other than the 3.4 and 9.0 micron band it is not on the U.S. D.O.T. CPL. Ms. Barfield was unable to testify with any certainty as to the micron bands in use in the Intoxilyzer 8000. She testified she believed they used the 3.4 micron and the 9.376 micron band. If that is the case, the Intoxilyzer 8000 being used in Florida does not appear on the U.S. D.O.T. CPL and therefore can NOT be an approved breath testing instrument in Florida entitled to the benefits of the implied consent statutes (§316.1934, Fla. Stat.).

Although mindful of the ruling in Moe vs. State, 944 So. 2d. 1096 (Fla. 5th DCA, 2006), the Court finds that decision to be factually distinguishable from the case at bar. In Moe the parties stipulated that the instrument had been tested in accordance with applicable regulations and that all of the tests revealed that the instrument's test results were within acceptable tolerances. There were no such stipulations in the cases at bar. In fact, the Defense motions in large part challenge the very things the parties stipulated to in Moe.

On June 11, 2008. Florida's Third District Court of Appeal in State v. Bustos, 33

Fla. L. Weekly D1541a (Fla. 3d DCA June 11, 2008) held "...the *present record* (emphasis added) does not support the conclusion that the proposed testimony and documents are "material" for purposes of the Uniform Law" The decision went on to say:

The defendants are entitled to bring forth testimony, or conduct testing, to demonstrate that interferences yield false positives or skew the machine's readings. However, we cannot accept the proposition that simply because a piece of testing equipment is used in a criminal case, it follows that the source code for its computer must be turned over. There would need to be a particularized showing demonstrating that observed discrepancies in the operation of the machine necessitate access to the source code. We are unable to see that any such evidence was brought forth in the evidentiary hearing below.

The Court finds the Bustos case to be distinguishable from the case at bar. First, that decision involved the production of the source code for an Intoxilyzer 5000. Second, the court limited the decision to the factual situation and evidence presented by the Defendants. They held "The testimony in the trial court made clear that the problem of false positives is inherent in the design of the infrared portion of the machine. In the absence of a more particularized showing, we are unable to conclude that the materiality standard was met." *Id.* Clearly, the evidence presented by Bustos dealt with the Intoxilyzer 5000's design and its ability or inability to detect interferences stemming from the design of the infrared portion of the machine-not the computer software it used. The Court finds that unlike the Defendants in Bustos, the Defendants in the cases at bar did make a "particularized showing" of anomalies in the operation of the Intoxilyzer 8000 stemming from the computer control software in use in instrument.

The Court agrees with District Judge Jack Nordby from Hennepin County Minnesota who stated: "*(Just as a person who chooses to drive impliedly consents to the testing of his system for intoxicants, a seller or user of a testing instrument impliedly consents to the full disclosure and testing of all aspects of the device.)*" (State of Minnesota v. Hagen Fourth Judicial District Court, Case C'R 07-105717, December 10, 2007.)

In response to the State's claim that it does not have the codes and therefore cannot produce them, the Court finds Judge Nordby's words persuasive:

"[T]his is because the manufacturer refuses to release them, but this is hardly relevant to the immediate question. The State cannot proffer evidence and then claim immunity from the obligation to show its evidentiary foundation, especially not on behalf of a private non party...this secrecy also endangers the State's ability to prosecute accused drunken drivers, and in this sense the public as well as the accused driver has a stake. The public therefore no less than an accused driver should be outraged at the non disclosure...it is a crime even to refuse to submit to this devise. That this could be so, constitutionally, implies a very high confidence in its reliability, to the degree indeed that the driver is entitled to know that everything about the device is open to inspection and analysis that will assure the most hardened skeptic that its reading is true, accurate and reliable. Is it thinkable, constitutionally, that our society could imprison persons who simply decline to take a test on a machine to whose design, construction, and functioning they do not have complete access?" (State of Minnesota v. Hagen Fourth Judicial District Court, Case C'R 07-105717, December 10, 2007.)

IT IS THEREFORE ORDERED AND ADJUDGED AS FOLLOWS:

- A. The Court reserves ruling on *Defendant's Motions to Suppress or in Limine with Regard to Intoxilyzer and Intoxilyzer Test Results based upon the Insufficiency of the FDLE Rules and a Request for a Frye Hearing.*
- B. The Court is uncertain that the Intoxilyzer 8000 in use in the State of Florida is listed on the U.S. D.O.T. CPI, as required by subsection 1 of Form 34.

Therefore, until the State establishes the micron bands in use on the instruments in use in the State of Florida are in compliance with the instrument listed on the U.S. D.O.T. CPL, the State must first lay the proper traditional scientific predicate as to the admissibility of the Intoxilyzer results before the breath test results may be admitted into evidence.

C. The Court finds the source code to be material under *Florida Rule of Criminal Procedure 3.220 (f) (2)* and the release notes to be necessary for the interpretation of same.

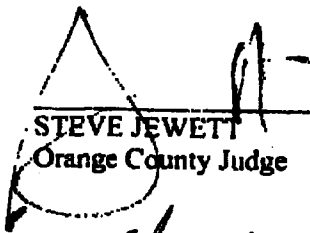
D. The Court **GRANTS** the Defendant's Request for Production of the source code for the original Intoxilyzer 8000 and the source code for all updates as well as the release notes that correspond to the original code, updates and related documents.


E. The source code and electronic build files for all software versions and corresponding release notes and supporting documents are to be provided to the defense within twenty one (21) days of this order; however the State may request a continuance for said production should the State be able to provide a good faith basis for both the need for additional time and anticipation of production. The source code and electronic build files include the C, C++ and assembly source files, libraries and make files that are needed to compile the system.


F.. Until such time as these materials are provided, the State must first lay the proper traditional scientific predicate as to the admissibility of the Intoxilyzer results before the breath test results may be admitted into evidence. Assuming the State is able to lay the proper predicate, the breath test result will be admitted, however the presumptions of impairment contained in the Florida Jury Instructions will not be given.

G. This Order does not apply to any Defendant's who were deemed to have refused to take a breath test.

2012 DONE AND ORDERED in Chambers, Orlando, Orange County, Florida, this the day of June 20008.


STEVE JEWETT
Orange County Judge


HEATHER HIGBEE
Orange County Judge


WAYNE SHOEMAKER
Orange County Judge

MAUREEN BELL
Orange County Judge



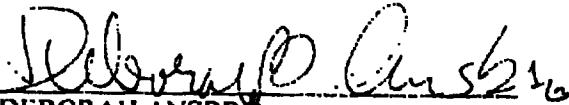
MARTHA ADAMS
Orange County Judge



FAYE ALLEN
Orange County Judge



LEON CHEEK
Orange County Judge



DEBORAH ANSBRO
Orange County Judge




MARK WIXTROM
Orange County Judge



W. MICHAEL MILLER
Orange County Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the State Attorney, Ninth Judicial Circuit Court, Wayne C. Wooten, 415 North Orange Ave., Orlando, FL 32802; Stuart I. Hyman, Esq., 1520 E. Amelia Ave., Orlando, FL 32803; and Joerg F. Jaeger, Esq., 217 E. Ivanhoe Blvd., North, Orlando, FL 32804, via U.S. Mail this 23rd day of June, 2008.



Sarah J. Sanchez
Judicial Assistant

no longer manufactured and are no longer in use. They are: (1) Alco Tector Model 500, manufactured by Decator Electronics of Decator, Illinois. This device was introduced more than 30 years ago. It has not been manufactured for at least 20 years, and its manufacturer is no longer in existence. It would be impossible to repair because replacement parts are not available. The

agency has no knowledge of any such devices in use. (2) The AE-D1 manufactured by Lion Laboratories, Ltd. of Cardiff, Wales, UK. The manufacturer has confirmed in writing that this unit is totally obsolete, no longer in use and no longer in production. (3) The Auto-Alcolmeter manufactured by Lion Laboratories, Ltd. of Cardiff, Wales, UK. The manufacturer has also confirmed in

writing that this unit is totally obsolete, no longer in use and no longer in production.

The CPL has been amended to add the seven instruments identified above to the list, and to remove the three instruments also identified above.

In accordance with the foregoing, the CPL is therefore amended, as set forth below.

CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES

Manufacturer and model	Mobile	Nonmobile
Alcohol Countermeasure Systems Corp., Mississauga, Ontario, Canada:		
Alert J3AD ^o	X	X
Alert J4X.ec	X	X
PBA3000C	X	X
BAC Systems, Inc., Ontario, Canada: Breath Analysis Computer^o		
CAMEC Ltd., North Shields, Tyne and Ware, England: IR Breath Analyzer ^o	X	X
GMI, Inc., Owensboro, KY:		
Intoxalyzer Model:		
200	X	X
200D	X	X
300	X	X
400	X	X
400PA	X	X
1400	X	X
4011 ^o	X	X
4011A ^o	X	X
4011AS ^o	X	X
4011AS-A ^o	X	X
4011AS-AQ ^o	X	X
4011 AW ^o	X	X
4011A27-10100 ^o	X	X
4011A27-10100 with filter ^o	X	X
5000	X	X
5000 (w/Cal. Vapor Re-Circ.)	X	X
5000 (w/3/8" ID Hose option)	X	X
5000CD	X	X
5000CD/FG5	X	X
5000EN	X	X
5000 (CAL DOJ)	X	X
5000VA	X	X
8000	X	X
PAC 1200 ^o	X	X
S-D2	X	X
S-D5	X	X
Draeger Safety, Inc., Durango, CO:		
Alcotest Model:		
7010 ^o	X	X
7110 ^o	X	X
7110 MKIII	X	X
7110 MKIII-C	X	X
7410	X	X
7410 Plus	X	X
Breathalyzer Model:		
800 ^o	X	X
800A ^o	X	X
9008G ^o	X	X
7410	X	X
7410-B	X	X
Gell's Inc., Lexington, KY: Alcohol Detector: System-A.D.S. 500		
Intoximeters, Inc., St. Louis, MO:		
Photo Electric Intoximeter ^o		X
GC Intoximeter MK II ^o	X	X
GC Intoximeter MK IV ^o	X	X
Auto Intoximeter ^o	X	X
Intoximeter Model:		
3000 ^o	X	X
3000 (rev B1) ^o	X	X
3000 (rev B2) ^o	X	X
3000 (rev B2A) ^o	X	X
3000 (rev B2A) w/FM option ^o	X	X

Low Power Mode

The instrument optionally can enter a lower power mode when not performing testing. The time interval between last activity and low power fall back is user defined.

Remote Activation

Instrument can be activated by a phone call for communications and remote testing when in low power mode.

Calibration

Instrument is capable of performing single or multi-point calibrations. The process will be controlled via computer in house or by a menu driven sequence for stand alone, field calibration.

Re-circulation

Instrument can be used with a simulator in a re-circulation mode to extend the life of a wet simulator's solution. The new CMI digital simulator attaches to the instrument without heated tubing while providing re-circulation.

PERFORMANCE

Range

0.003 to 0.600 gram/210 liters (0.015 to 3.000mg/L)

Accuracy

±3% or ± .003 grams/210 liters, whichever is greater.

Precision

Standard deviation of .003 or better

Test Time

Less than one minute (excluding data entry).

Interferent Detection

Meets OIML specifications.

Analytical

Dual Wavelength

The instrument analyzes the sample at two wavelengths: 3.4 uM and 9.36 uM.

Pulsed Source

The instrument eliminates the need for a mechanical chopper in the analytical section by using a fixed pulsed source.

Internal Standard

An internal standard will be performed by varying the power to the source and measuring the result at the detector. This effectively changes the intensity of the energy at the detector without inserting something mechanically into the breath path.

Sample Input Selector

An input sample switch (solenoid driven) will select between the breath hose and the external calibration standard.

Electrical

Power

Input Voltage AC: 90 - 264 VAC @ 1.5Amps max @115VAC, 47-63 HZ
Input Voltage DC: 12VDC nominal (10 - 15 VDC range), 7 Amps max.

Fusing and Filtering

AC utilizes passive filtering to meet FCC specs. AC is fused via the AC mains switch module.
DC will comply with ISO 7637-0 (road vehicles - electrical