

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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State of Minnesota,  
by Michael Campion, its  
Commissioner of Public Safety,

File No. 08-CV-603 (DWF/AJB)

Plaintiff,

v.

**CERTIFICATE OF SERVICE**

CMI of Kentucky, Inc.,  
a Kentucky corporation,

Defendant,

and

Robert J. Bergstrom, Craig A. Zenobian,  
Shane M. Steffensen, and Christopher D.  
Jacobsen,

Plaintiff-Interveners.

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I hereby certify that on December 31, 2008, I caused the following documents to be filed electronically with the Clerk of Court through ECF:

1. Amicus Curiae Brief on behalf of Minnesota Society for Criminal Justice
2. Exhibits A – F.

and that ECF sent an e-mail notice of the electronic filing to the following:

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Dated: December 31, 2008.

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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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State of Minnesota,  
by Michael Campion, its  
Commissioner of Public Safety,

File No. 08-CV-603 (DWF/AJB)

Plaintiff,

v.

**BRIEF OF AMICUS CURIAE -  
MINNESOTA SOCIETY FOR  
CRIMINAL JUSTICE**

CMI of Kentucky, Inc.,  
a Kentucky corporation,

Defendant,

and

Robert J. Bergstrom, Craig A. Zenobian,  
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## I. INTRODUCTION

### A. Procedural History

Throughout 2007 and 2008 defense attorneys across Minnesota brought numerous motions seeking disclosure of the Intoxilyzer 5000 source code.<sup>1</sup> District courts varied on their willingness and to what degree to order disclosure of the code. Some courts denied the discovery requests, some ordered disclosure under protective conditions, and others ordered full disclosure of the code without protective conditions. A series of orders that were adverse to the State in both the criminal and implied consent cases began to grow. These orders and the manufacturer's refusal to supply the source code caused the State to commence this federal action against the manufacturer of the Intoxilyzer 5000EN (hereinafter CMI) on March 3, 2008. (Doc. No. 1.). In the federal complaint filed in this action, the State is seeking disclosure of the source code alleging that

[T]he State is entitled to, *inter alia*, an order for specific performance directing that CMI provide Minnesota litigants with access to the source code [because] Defendant CMI conveyed to the State ownership of any and all copyrightable material and documents created in the course of its performance under the contract [including] the source code to the Minnesota model of the Intoxilyzer 5000.

(Doc. No. 1 at ¶¶ 49-51.) Without any civil discovery yet occurring, the State and CMI moved this Court on September 12, 2008 (Doc. No. 34) to approve the proposed settlement through the Entry of the parties' Proposed Consent Judgment and a Permanent

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<sup>1</sup> Source code is the set of instructions and procedures that represent the Intoxilyzer software and ultimately governs how a machine will operate. *See* Declaration of Thomas E. Workman, Jr. at ¶¶ 8-23 (Doc. No. 55).

Injunction (Doc. No. 35). Numerous members of the criminal defense bar had concerns with the proposed settlement that was initially scheduled for hearing in December 2008.

Criminal defense attorney, Charles Ramsey, sought to intervene in the federal case on behalf of his clients Robert J. Bergstrom, Craig A. Zenobian, Shane M. Steffensen, and Christopher D. Jacobsen (hereinafter Petitioners) (Doc. No. 13). In support of Petitioner's application to join the suit, Mr. Ramsey filed the Declaration of Thomas E. Workman, Jr. (Doc. No. 55), a source code expert. Mr. Workman's Declaration outlines the relevance of the source code and the need for its disclosure. On November 6, 2008 this Court allowed the Petitioners to intervene, concluding that the State could not adequately represent the interests of Minnesota drivers charged with DWI (Doc. No. 58).

On November 26, 2008, the Court issued an order specifically allowing *Amicus Curie* to submit "briefs expressing their respective positions on the issues presented by the settlement reached between the State of Minnesota and Defendant CMI." (Doc. No. 65). Pursuant to that order, the Minnesota Society of Criminal Justice respectfully submits this brief.

## **II. INTERESTS OF THE AMICUS**

The Minnesota Society for Criminal Justice is a 25-year-old non-profit organization comprised of approximately fifty Minnesota criminal defense attorneys. The organization's focus is centered on current issues affecting DWI defense in Minnesota. *Amicus* in this brief addresses the propriety of approving the proposed settlement between CMI and the State of Minnesota.

### III. HISTORY OF THE SOURCE CODE ISSUE

#### A. Discoverability of the Source Code in Minnesota State Courts

CMI's failure to produce the source code resulted in two noteworthy cases in the Minnesota appellate courts colloquially known as *Underdahl I* and *Underdahl II*. *In re Commissioner of Public Safety (Underdahl I)*, 735 N.W.2d 706 (Minn. 2007) stands for the proposition that the Commissioner of Public Safety had an adequate legal remedy to obtain a copy of the source code by suing CMI. The Minnesota Supreme Court concluded that the Commissioner was not entitled to a writ of prohibition, which would have barred a district court judge's order requiring the Commissioner to turn over the source code in an Implied Consent proceeding. *Id.* at 713. The court stated that it could not "conclude that the district court ordered the production of information that is clearly not discoverable." *Id.* The *Underdahl I* court also noted that the State owns at least a portion of the Intoxilyzer 5000 source code by virtue of the contract language between CMI and the State. *See id.* at 710.

In *State v. Underdahl (Underdahl II)*, 749 N.W.2d 117 (Minn. Ct. App. 2008), the Minnesota Court of Appeals ruled that before a court determines that the source code is relevant to a party's guilt or innocence and subsequently orders disclosure of the source code, there must be some type of showing that examination of the source code could reveal possible inaccuracies in the machine's results. *Id.* at 122. The court stated that it had "no occasion on these records to attempt defining what showing would be necessary to justify requiring disclosure of the Intoxilyzer source code." *Id.* at 121.<sup>2</sup> Despite the

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<sup>2</sup> *Underdahl II* alluded to individual showings that may be enough to satisfy Minn. R. Crim. P. 9, including how source code affects the operation of the Intoxilyzer, what effect source code has on regulating the Intoxilyzer's accuracy, what possible deficiencies may

two *Underdahl* decisions there still remains a high degree of uncertainty as to when and in what context individual state district courts will order disclosure of the source code.

*Amicus* agrees with the State and CMI's assertions that CMI's failure to turn over the code has resulted in the suppression of many Intoxilyzer test results, that some counties have ceased using breath tests to avoid the possible suppression of results, and that the BCA has experienced a rise in the number of blood and urine tests as a result. As this Court is aware, the proposed settlement is CMI and the State's attempt to rectify the source code problem they created. The tumultuous history of this litigation, CMI's history in this and other states, and the State's prosecutorial position gives *Amicus* reason to be wary of any settlement that purports to be in the interests of Minnesota citizens charged with alcohol-related offenses.

#### **B. Discoverability of the Source Code in Other State Courts**

The "source code battle" is occurring in many states where CMI's machines are in use other than Minnesota. In Arizona, defendants have been seeking the source code of a different model of Intoxilyzer (the 8000). CMI has been equally uncooperative in complying with discovery orders in those cases.<sup>3</sup> The Honorable Deborah Bernini of the Arizona Superior Court in Pima County ordered production of the source code for the Intoxilyzer 8000 on September 10, 2008. (Attached as **Exhibit A**). CMI has refused to produce the code. That court held CMI President Toby Hall in contempt for CMI's

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exist in the source code, how any deficiencies could be discovered by analyzing the source code, and how any deficiencies may affect the accuracy of the machine's results or that testing the machine without the code would not reveal any possible inaccuracies. *Id.* at 122. The court did not state that all or any of these specific showings would be required to justify disclosure.

<sup>3</sup> See *Thousands of Tucson DUI Cases Could Get Tossed*, Associated Press (Nov. 10, 2008), available at <http://www.azcentral.com/news/articles/2008/11/10/20081110az-duicases10-on.html>.

failure to turn over the code and scheduled a hearing on November 24, 2008 for Mr. Hall to explain himself. *Amicus* does not believe Mr. Hall appeared for the scheduled hearing.

Multiple disputes have also arisen in Florida regarding the source code. There, a county court ordered CMI to pay fines in the amount of \$3,000 per day for its refusal to turn over the code. *See* Order of Civ. Contempt., July 10, 2007 (Attached as **Exhibit B**). In a separate case, the Circuit Court of the Twelfth Judicial Circuit in Manatee County denied CMI's petition for a writ of certiorari and quoted its lower county court which found:

“The defendants have established through expert testimony that the Source Code is reasonably necessary to determine whether the Intoxilyzer 5000 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.”

Order Den. Pet. for Writ of Cert., June 2, 2008 (Attached as **Exhibit C**). *Amicus* believes that CMI has yet to pay these fines and as a result has been held in contempt. *Amicus* calculates that the fines are in now excess of \$1.6 million.

*Amicus* is not aware of any instances in which CMI has disclosed the source code in other states. *Amicus* is not aware of any instances in which CMI has proved that it owns a proprietary interest in the code.

#### IV. ARGUMENT

##### A. **The Proposed Settlement Does Not Make the Source Code Readily and Reasonably Available to Minnesota Litigants.**

The State and CMI allege that they have a mutual desire “to make the Source Code readily and reasonably available to defendants and petitioners subject to Minnesota’s DWI and implied consent laws.” (Doc. No. 35, Part II). However, under the current terms of the settlement, this alleged goal will go unfulfilled.

**1. The Geographical Restrictions on Accessing the Source Code are Unreasonable.**

CMI and the State propose to make the source code available only at CMI's headquarters in Owensboro, Kentucky. Owensboro is roughly 750 miles away from the Twin Cities. The source code will be available for inspection only when CMI's doors are open for business. A defendant who has been arrested in Minnesota by an agent of the State of Minnesota, who took an Intoxilyzer test in Minnesota, who is charged by the State of Minnesota, who will go to court in Minnesota, who will be defended by an attorney licensed in Minnesota, who will be tried by Minnesota citizens in front of a Minnesota Judge, will have to hire a team of experts to travel to *Kentucky* to fully defend himself against the evidence presented against him in Minnesota. A 750-mile trek flies in the face of any cognizable interpretation of the phrases 'readily available' and 'reasonably available'.

*Amicus* believes the geographical restriction evidences CMI's and the State's *true* desire to discourage any analysis of the code. This Court and the State of Minnesota have numerous tools to protect unlawful dissemination of the code without resorting to an unreasonable geographical limitation on the physical home of the source code. The source code could be safeguarded equally as well if it were kept under lock and key at the Minnesota BCA or the Commissioner's headquarters in Minnesota.

By analogy, a company that conducts business in a state or has minimum contacts with a state avails itself of that State's jurisdiction and is expected to succumb to service requirements and the legal requirements of a state. The notion that Minnesota litigants must travel halfway across the country to effectively and completely defend themselves is manifestly unjust.

**2. The Proposed Digital and Paper Formats of the Source Code Do Not Allow for a Thorough and Meaningful Analysis of the Source Code.**

If a Minnesota litigant hires a team of experts to make the long trek to Kentucky, it is likely that the expert's journey will have been in vain. CMI and the State have proposed to provide the code in a digital format that allows for searching and a paper format. Even the most technologically inexperienced individual appreciates the archaic nature of studying complicated computer code in a paper format. A paper version of the code is useless for analytical purposes. When printed, the code spreads itself over voluminous pages of paper. Mr. Workman estimates that it would take an expert 30 years of full time work to comb through this many pages of code. (Doc. No. 55, p. 10, ¶ 65). The inclusion of a paper form of the code is further evidence of CMI's unwillingness to discourage any meaningful analysis of the code.

The proposed digital form of the source code is insufficient for an expert to conduct a meaningful analysis. While CMI has proposed that the digital form will be searchable, merely searching the code will not reveal how the code *actually works*. Any other useful information about the proposed digital form of the code is absent. Without more specificity as to the exact specifics of the proposed digital form, *amicus* cannot determine whether a meaningful analysis of the code can occur. *Amicus* would propose that a version of the code which would allow for the automated code review referenced in paragraph 63 of Mr. Workman's Declaration may suffice. Regardless of the exact digital form *Amicus* views the vague-yet-searchable proposed version of the code as nothing more than a veiled tactic at preventing any inquiry into an imperfect machine.

**B. The Proposed Settlement Does Not Fully Protect the Constitutional Rights of Minnesota Defendants' to Confront Their Collective Accuser.**

The United States and Minnesota Constitutions require criminal defendants to be afforded a fair trial. *U.S. Const. amend. VI; Minn. Const. art I, §6*. The Minnesota Supreme Court interprets the Minnesota Confrontation Clause to be identical to the Confrontation Clause of the Federal Constitution. *State v. Rodriguez*, 754 N.W.2d 672 (Minn. 2008). An integral part of a fair trial is a defendant's opportunity to confront the witnesses against him. A defendant's opportunity to question those witnesses comprises this right to confrontation. *State v. Greer*, 635 N.W.2d 82, 89 (Minn. 2001). The primary objective of the confrontation clause is to force a declarant to be cross-examined, as well as compelling him to stand face to face before a jury in order that they may judge whether he is worthy of belief. *State v. Byers*, 570 N.W.2d 487 (Minn. 1997). District courts possess broad discretion on imposing reasonable limits on the cross-examination of witnesses. *State v. Lanz-Terry*, 535 N.W.2d 635, 639 (Minn. 1995). "A defendant in a criminal case has the right to present a defense in accordance with the rules of evidence." *State v. Wolf*, 592 N.W.2d 866, 868 (Minn. Ct. App. 1999). Any evidence tending to make the existence of a fact of consequence to the determination of the action more or less probable than it would be without the evidence is admissible. *See Minn. R. Evid.* 401, 402.

Certainly, the Intoxilyzer is not a live witness, but its results are being used to conclude that a defendant has violated a specific provision of the Minnesota Statutes. The Intoxilyzer, then, is serving a de facto expert witness and not subject to cross-examination. While a live witness might testify as to how an Intoxilyzer has been

maintained or how the machine was operated in a certain instance, live witnesses do not testify as to how specific sections of code are executed and how such execution could affect test results. A defendant who is faced with Intoxilyzer-produced test results can *only* present a complete defense if he can conduct a complete and efficient analysis on how those results were produced. Access to the source code in a form that allows for an expeditious yet thorough examination of the code is *required* by due process. The proposed settlement calls for the source code to be provided in forms that are insufficient to conduct a meaningful analysis of the code. Providing the code in the proposed form is tantamount to allowing cross-examination of a witness who speaks a foreign language and refusing to allow an interpreter.

A meaningful analysis of the source code could reveal information that is materially related to a defendant's guilt. Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), information that is materially related to a defendant's guilt is required to be disclosed. The source code could contain information that materially relates to a defendant's alleged guilt and is therefore required to be disclosed. That information must be provided in a form in which a meaningful analysis can occur so an accused can determine *how* the machine may or may not have arrived at a correct result.

*Amicus* recognizes that recent caselaw exists that supposes that machine-generated data is not subject to the constitutional protections of the confrontation clause of the Sixth Amendment. "Witnesses with whom the Confrontation Clause is concerned are human witnesses." *U.S. v. Lamons*, 532 F.3d 1251, 1263 (11th Cir. 2008). While not binding on this Court, The *Lamons* Court concluded that statements which are wholly

generated by machines are non-testimonial and not subject to the Confrontation Clause. The court did not express an opinion on scientific reports generally and noted that “statements that may have been generated through the contemporaneous lens of human interpretation and analysis, pose[d] a more difficult problem.” *Id.* at 1264. However, the data at issue in *Lamons* was a compact disc with a list of telephone calls and a call report created from the compact disc.

The *Lamons* court noted that the right to cross-examination

is primarily a functional right that promotes reliability in criminal trials ... [Confrontation] (1) insures that the witness will give his statements under oath-thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the “greatest legal engine ever invented for the discovery of truth”; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility.

*Id.* (quoting *Lee v. Illinois*, 476 U.S. 530, 540, 106 S.Ct. 2056, 2062, 90 L.Ed.2d 514 (1986) (internal quotation marks and citations omitted).

The source code is far more testimonial than a machine-generated list of phone calls. While a machine cannot perjure itself in the traditional sense of the word, subjecting the machine's processes to scrutiny will only further the discovery of truth and will provide evidence to a jury on whether the machine's results are credible. Allowing the machine to be “cross-examined” by providing the source code in a usable form is proper and just.

It is helpful to keep in mind that the Intoxilyzer results are used in situations involving a *prima facie* case alleging a violation of Minnesota Statute 169A.20<sup>4</sup> subd. 1 (5) commonly known as the “.08 charge.” The results of the machine constitute the *entirety* of the charge. The judgment and processes of the machine are substituted for a jury. Because the machine is *completely* responsible for the evidence against someone accused of violating Minnesota Statute 169A.20 subd. 1 (5) and is the only relevant witness establishing the facts of the charge, a right to examine how that evidence is analyzed is required. In *Lemans*, discussed above, the machine-generated evidence did not constitute the charge itself. It was merely a portion of the evidence that was partially responsible for showing guilt. Here, by contrast, the Intoxilyzer result is the sole evidence of the .08 charge.

Also, this case deals with evidence of an evanescent nature and is unavailable for retesting. A Minnesota citizen accused of driving with an alcohol content of .08 or higher cannot run a new Intoxilyzer test at a later point to show that the results are incorrect. The integrity, accuracy, and reliability of the machine’s results in a .08 criminal prosecution or driver’s license suspension hearing are, therefore, of more importance than test results in other kinds of criminal cases that can be reproduced or reanalyzed.

Data generated from a machine that is *purely* mechanical in nature is different than what we are addressing in this case. For example, a telephone recording device

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<sup>4</sup> Minn. Stat. 169A.20 subd. 1 reads, “It is a crime for any person to drive, operate, or be in physical control of any motor vehicle within this state or on any boundary water of this state . . . when the person’s alcohol concentration at the time, or as measured within two hours of the time, of driving, operating, or being in physical control of the motor vehicle is 0.08 or more.

merely records the data without computer interpretation. In the case at hand, however, an Intoxilyzer through its source code makes an infinite number of determinations as to how a minute puff of air translates into a *per se* criminal violation. In that respect it is far more testimonial than a mere record. Here, the *manner* in which a machine interprets a breath sample is at issue. For this reason, the Intoxilyzer is more like a human witness than a machine. How the machine interprets a sample is not exact. If it were, the machine would not require two samples. There would never be any variation between a subject sample and a replicate sample. There would be no margin of error. Because this machine closely resembles human testimony the confrontation clause of the Minnesota and United States Constitutions are applicable. The spirit of the confrontation clause is to determine whether testimony is to be believed; CMI's unwillingness to allow an analysis of its code coupled with evidence that the machine is in need of routine software updates, combined with evidence of incorrect test results is reason enough to trigger the fundamental right to confront the machine.

**C. The Proposed Settlement Would Require this Court to Make Incorrect and Improper Findings.**

The proposed settlement would require this Court to make specific findings of fact and law. These proposed findings are based upon the unchallenged affidavits of the parties to the settlement without any discovery having yet occurred. *Amicus* asserts that some of these findings are factually incorrect and/or do not sufficiently consider the rights of Minnesota litigants, are contrary to Article I, §6 of the Minnesota Constitution and the Sixth Amendment of the United States Constitution, and are against Minnesota public policy.

A brief review of the settlement (Doc. No. 35) shows that this Court is being asked to make the following findings of fact:

1. CMI has presented substantial evidence that the majority of the Source Code was conceived and originated prior to the execution of the Contract. ¶ 2.
2. The inability to produce the Source Code has impacted the Minnesota judicial system with the increased filings of motions seeking discovery of the Source Code in criminal DWI and implied consent cases, which has taxed already strained judicial resources. ¶ 6.
3. [The inability to produce the Source Code] has disrupted the effective functioning of law enforcement agencies and the state court system . . . .  
*Id.*
4. The Source Code derives independent economic value from its continued secrecy. ¶ 7.
5. A printed, hardbound book format . . . and . . . the digital format . . . will provide reasonable access while also reasonably protecting the Source Code's trade secret status. ¶ 8.
6. The production or reproduction of the Source Code in any electronic format other than the digital format described in paragraph 3 of the Permanent Injunction presents an undue and unreasonable risk to its trade secret status . . . .  
*Id.*
7. The provision of the Source Code with critical security features and menu passcodes redacted will provide reasonable access . . . . ¶ 9.

Without proper discovery, these statements are unfounded, bald assertions. Allowing the intervening party to challenge the validity of these assertions will result in findings of fact that have been proposed *and* verified. This Court should not approve the current version of the Settlement and thereby put forth these findings of fact without first allowing proper discovery to occur. Further, any proposed findings of law are premature as they will be based upon incorrect findings of fact.

**D. There Are Strong Public Policy Reasons Against the Proposed Settlement**

**1. The State's "Unclean Hands"**

This Court should also consider that the State has “unclean hands” as it relates to the alleged fairness of any settlement. Almost a year ago, the decision in *Underdahl* put the State on notice that all copyright material associated with the Intoxilyzer machine is the State’s property. *Underdahl* at 708. *Underdahl* also alerted the State that its “contractor [will] provide information . . . to be used by attorneys representing individuals charged with crimes in which a test of the proposed instrument is part of the evidence.” *Id.* The State took the position for many months in countless implied consent or DWI criminal cases that it was improper or unnecessary for it to turn over the code. The State also alleged that it did not have the rights to the source code. Then, when it initiated this suit, the State reversed itself and alleged that it did, in fact, have contractual rights to the source code. In the proposed settlement, the State has now once again changed its position without any formal discovery occurring.

This Court should remember that the State is the party that selected CMI’s product for implementation. The Petitioners did not choose what brand of breath-testing device would be purchased and implemented to determine their alleged guilt. The State entered into the contract through its own Request for Proposals. If the State had designed and constructed its own breath testing machine it is certain that the machine and its

software would be entirely transparent and Minnesota litigants would have full access to how the machine arrived at its results. Minnesota litigants should not be denied the opportunity to review how the evidence against them was created merely because the State is unwilling to zealously pursue its contractual rights to the source code and to fully protect the rights of its citizens to fully defend themselves when accused of a crime.

**2. Minnesota Litigants' Constitutional and Property Rights Outweigh any Alleged Copyright Held by CMI.**

*Amicus* adheres to the position that the State has complete contractual rights to the source code. If, however, after discovery has occurred, this Court should find that CMI has some proprietary interest in the code, Petitioner's fundamental constitutional rights in defending themselves from incarceration and the loss of property rights should still outweigh any proprietary interest alleged by CMI. "The Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). CMI has alleged that public disclosure of the source code would result in substantial and irreparable financial harm. Even if dissemination of the code could cause some financial harm to CMI, the constitutional fundamental rights afforded to Minnesota defendants facing possible incarceration or the loss of property interests certainly outweigh any alleged monetary interests purported by CMI.

While *Amicus* recognizes that Minnesota State Court decisions are not binding on this Court, it may be of value to review several state court decisions. Attached as **Exhibit D** is Hennepin County District Court Judge Jack Nordby's November 18, 2008 order granting discovery of the source code in *State v. Gadow*, Court file No. 27-CR-08-46085.

Judge Nordby writes, “Not only is the defense entitled to this information, defense counsel would arguably be guilty of ineffectively assisting a client for not demanding the information.” *Id.* Further, Judge Nordby’s order in *State v. Schrupp*, Court file No. 27 CR 07-042907 attached as **Exhibit E** also gives judicial insight stating that the source code is “ultimately a right to confrontation of the accuser, and more broadly the right to due process of law, specifically the right to present a defense . . . .” As recently as December 16, 2008 state judges are still ordering disclosure of the code without a protective order.<sup>5</sup>

## V. CONCLUSION

MSCJ respectfully disagrees with the assertion by the State and CMI that the proposed settlement “make[s] the Source Code readily and reasonably available to defendants and petitioners subject to Minnesota’s DWI and implied consent laws”. The settlement would require Minnesota citizens to travel a great distance and at great expense to seek access to the source code. The proposed format for disclosure is inadequate for a meaningful and thorough analysis of the code. Further, the protections proposed by the State and CMI are excessive. MSCJ requests this Court to reject the proposed settlement and set a reasonable time frame for discovery to occur.

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<sup>5</sup> See Order Grant. Mot. to Recons. (Attached as Exhibit F).

Dated this 30th day of December, 2008

*Amicus Curie* - Minnesota Society  
of Criminal Justice (MSCJ)<sup>6</sup>

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<sup>6</sup> Prepared by attorneys Lee M. Orwig and Marsh Halberg on behalf of MSCJ. Jeffrey S. Sheridan, Attorney ID# 183222 will appear for oral argument on behalf of MSCJ.

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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State of Minnesota,  
by Michael Campion, its  
Commissioner of Public Safety,

File No. 08-CV-603 (DWF/AJB)

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**EXHIBIT INDEX OF AMICUS  
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JUSTICE**

CMI of Kentucky, Inc.,  
a Kentucky corporation,

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Robert J. Bergstrom, Craig A. Zenobian,  
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Plaintiff-Intervenors.

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## EXHIBIT INDEX

- A September 10, 2008 Order of the Honorable Deborah Bernini, Arizona Superior Court, Pima County
- B July 10, 2008 Order of the Honorable Kimberly C. Bonner, County Court of the Twelfth Judicial Circuit in and for Sarasota County, Florida
- C June 2, 2008 Order of the Honorable Edward Nicholas, Circuit Court of the Twelfth Judicial Circuit in and for Manatee County, Florida
- D November 18, 2008 Order of the Honorable Jack Nordby, Hennepin County District Court, Minnesota
- E December 10, 2008 Order of the Honorable Jack Nordby, Hennepin County District Court, Minnesota
- F December 16, 2008 Order of the Honorable Kevin Mark, Goodhue County District Court, Minnesota

# EXHIBIT A

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N, St L & W, PLLC

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. DEBORAH BERNINI

BY: R. ST. GERMAINE, CLERK

CASE NO. CR-20071499/CR-20071798  
CR-20072680/CR-20071561  
CR-20073256/CR-20074156  
CR-20074805/CR-20080812  
CR-20081576/CR-20070902  
CR-20080876/CR-20073946  
CR-20074048/CR-20073391  
CR-20074665/CR-20081388  
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CR-20074301/CR-20082259  
CR-20082295

COURT REPORTER: NONE

DATE: September 10, 2008

CR-20071499  
STATE OF ARIZONA

VS.

JOHN CLIFTON LIVINGSTON

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CR-20071798/CR-20072680  
STATE OF ARIZONA

VS.

ERICA LEA DAUGHTERS-WHITE

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CR-20071561  
STATE OF ARIZONA

VS.

MYRON MONTANA  
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Judicial Administrative Assistant

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CR-20073256  
STATE OF ARIZONA

VS.  
IONI MARI LUJAN

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CR-20074156  
STATE OF ARIZONA

VS.  
ARLENE KANDIS TONEY

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CR-20074805  
STATE OF ARIZONA

VS.  
ROMEO ALONSO RODRIGUEZ

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CR-20080812  
STATE OF ARIZONA

VS.

LAURA JEAN ROWELL

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CR-20081576  
STATE OF ARIZONA

VS.

KAREN CHRISTINE BURGAN

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CR-20070902  
STATE OF ARIZONA

VS.

SEAN AARON JOHNSON

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CR-20080876  
STATE OF ARIZONA

VS.

STEVEN ANTHONY BONIN

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CR-20073946  
STATE OF ARIZONA

VS.

MARTIN LEE HULETT, JR.

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CR-20074048  
STATE OF ARIZONA

VS.

JOHNNIE WILLIE TREADWAY

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CR-20073391  
STATE OF ARIZONA

VS.

JUAN CARLOS RODRIGUEZ

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CR-20074665  
STATE OF ARIZONA

VS.

JUSTIN JEFFREY STEVENS

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STATE OF ARIZONA

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CR-20080687  
STATE OF ARIZONA

VS.

JARED SHERER

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CR-20073079  
STATE OF ARIZONA

VS.

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CR-20080057  
STATE OF ARIZONA

VS.

RICKY JOSEPH WILLIAMS

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CR-20080301  
STATE OF ARIZONA

VS.

BELINDA MARIE SANCHEZ

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CR-20074301  
STATE OF ARIZONA

VS.

JAMES BRADLEY BROWNING

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CR-20082259  
STATE OF ARIZONA

VS.

KASEY LACH

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CR-20082295  
STATE OF ARIZONA

VS.

AARON C. TRITSCHLER

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RULING

UNDER ADVISEMENT RE: DEFENDANTS' CONSOLIDATED MOTIONS FOR DISCLOSURE:

The Defendants have all been charged with violations of A.R.S. §§28-1381(A) (2) or 28-1382 for having breath alcohol levels equal to or in excess of .08 while operating a motor vehicle. All were subject to breath testing on the Intoxilyzer 8000 manufactured by CMI, a Kentucky-based corporation. All defendants are alleging that the machine is unreliable and are requesting that the State produce -- in electronic format -- the manufacturer's source codes for the Arizona Intoxilyzer 8000 and the Intoxilyzer 8000 software versions 8105.44, 8105.45 and 8105.46. At the outset it is important to note that the consolidated Defendants are simply requesting to view the source code and software of the breathtesting device and not moving to dismiss or requesting sanctions.

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Over the course of two days, both live and deposition testimony was provided for the Court's consideration from the following individuals: Mark Stoltman, Thomas E. Workman, TPD Criminalist Terry Gallegos, DPS Criminalist Steve Butler, and CMI President Toby Hall. Numerous exhibits were also submitted. The following facts were established.

The Intoxilyzer 8000, its readings, and its maintenance program are the primary evidence of guilt against the consolidated Defendants. Software -- or the source code -- controls everything the intoxilyzer does, including the order of questions asked by the operator, when diagnostics are run, the results for those diagnostics, when dry gas is drawn into the machine, the results of the test, analysis and organization of any data, and the reports to COBRA. (COBRA is different software that gathers information from all intoxilyzer machines in Arizona and provides summary reports of results without showing calculations, measurements or methods). Anomalies have been found with the Intoxilyzer 8000 printouts that have been attributed to software for the breath testing machine, but those anomalies have not been detected or noted in the COBRA data. Part of this may be due to the fact that while members of the Tucson Crime Lab are convinced that their Intoxilyzer machines are working correctly, no one reviews the COBRA results for anomalies. There have been COBRA data issues, but no one testified that the inexplicable results produced by defense counsel were due to data collection errors in the COBRA software. Those anomalies, although not large in number, include tests in which there were

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exceptions during the calibration "out of tolerance" checks not attributable to operator error, error messages that were incorrect or incomplete, tests labeled as out of tolerance when they were actually within tolerance, measurements of 0.000 when alcohol was admittedly consumed (the machine is programmed so that it cannot measure alcohol concentrations less than .02%), a reading of .83 on a machine that is not programmed to measure past .60, error messages that state "No .02 Agreement" when there was .02 agreement which forced a third unnecessary test, error messages such as "range exceeded" and "diagnostic fail" yet the machine continues to operate, and target values that are slightly off the plus-or-minus 10%. Additionally, a number of subject tests had the exception "No .02 Agreement" when at least three were within agreement but were flagged as not, including the test of one of the joined parties (Defendant Hulett). The State's witnesses appear to agree that there are defects in the machine and "bugs" in the software that are attributable to the source code -- including the issues with the critical .02 agreement, but are of the opinion that any defects are causing "benign" results. The Defendants have declined to accept the State's assurances.

The State's disclosure in a criminal case is governed by Rule 15.1, Arizona Rules of Criminal Procedure. Per the rule, a prosecutor has an affirmative duty to disclose any material and information within his possession or control that will be relied upon to prove his case, in addition to any information that tends to mitigate or negate a defendant's guilt or reduce punishment. Rule 15.2, Ariz. Rules Crim.

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Procedure. If the defense feels that additional material or information not within the State's control is critical to presenting a fair defense, Rule 15.1 (g) allows counsel to move the court for an order directing "any person" to make such material available to the defendant. In order to avail himself of this subsection, the defendant must show that he has substantial need of the information, that it is not otherwise covered by Rule 15.1, and that he is unable without undue hardship to obtain the substantial equivalent by other means. Rule 15.1 (g), Ariz. Rules Crim. Procedure. In other words, the Defendants must show that they have both substantial need for the source code and software and that they are unable to obtain the substantial equivalent by other means. There is no other "equivalent" for the materials sought and so the only determination that remains is whether the Defendants have demonstrated substantial need.

There is considerable case law in the area of DUI disclosure, but nothing that addresses the precise issue before this Court. In a somewhat related context, however, the Arizona Supreme Court did discuss the importance of complete and open disclosure in the context of the raw data used for DNA analysis, stating:

"All materials relied on by prosecution experts must be available to defense experts, and vice versa . . . Protective orders should not be used to prevent experts on either side from obtaining all relevant information, which can include original materials, data sheets, software protocols, and information about unpublished databanks."

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*State v. Tankersley*, 191 Ariz. 359, 368 (1998) (quoting from the National Research Council, *The Evaluation of Forensic DNA Evidence* 69 - 70 (1996)). The Court went on to state, “[s]imilarly, there are no scientific grounds for withholding information in the discovery process. *Tankersley*, 191 Ariz. at 368. The Court finds such language to be instructive and appreciates the limited deference given to the trial courts when making a determination that subsection “g” of Rule 15.1 applies. Specifically, the Arizona Supreme Court has said that such decisions are best determined or resolved by the trial judge, “who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him.” *State v. Chapple*, 135 Ariz. 281, 297 (1983).

The Court finds that the source code for the Intoxilyzer 8000 is not within the possession or control of the Pima County Attorneys Office, any law enforcement agency, or any other person that has participated in the investigation that is under the direction or control of the Pima County Attorneys Office, and therefore declines to find that the State has a Rule 15.1 obligation to produce the programming language or software utilized by CMI in its Intoxilyzer 8000 machines. The Court further finds that while a defendant is entitled to any evidence, “that potentially could rebut the state’s prima facie showing” that an Intoxilyzer was operating correctly and is entitled to attack the intoxilyzer’s reliability before a jury, such information is not *Brady* material. *State ex rel. McDougall v. Superior*

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*Court*, 181 Ariz. 202, 206 (1985); *See also, Mack v. Cruikshank*, 196 Ariz. 541, 546 -547 (2000) (“Reliability is a due process issue only with respect to the state’s testing.”). Further, our state Supreme Court has declared that the state is not required to gather exculpatory evidence on a defendant’s behalf. *State v. Treadaway*, 116 Ariz. 163 (1977); *See, Montano v. Superior Court*, 149 Ariz. 385, 390 - 391 (1986). The information sought by the defendants is available from only one source -- CMI -- and the question before the Court is whether disclosure is warranted pursuant to Rule 15.1(g). The Court finds that it is.

Although any considerations of the potential burden imposed on CMI are premature, the issue was actually addressed at length during the hearings. Neither the State nor CMI President Toby Hall established that disclosure of the source code and software would be even minimally unreasonable or oppressive to CMI. It was agreed by experts on both sides that the software code, kept on a server at CMI’s headquarters in Kentucky, could be put on a CD-ROM disc or jump-drive, or even attached to an e-mail and sent directly to defense counsel. Curiously, if court-ordered to do so, CMI claimed it was willing to provide a paper version of the source code, which would entail more than 50,000 lines of programming language, but is unwilling to provide it in an electronic format. After extensive cross examination, CMI President Toby Hall finally acknowledged that the Intoxilyzer 8000 is not patented, nor is their a copyright on the source code, and that the company is essentially trying to protect customer

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configurable options that he does not want to make available to competitors. CMI is being sued by the State of Minnesota for the source code, is in litigation in Florida over the source code, and lost a sale of its Intoxilyzer 8000 to the State of Tennessee because state officials insisted that source code be disclosed with any machines the State would purchase for law enforcement use. CMI has further been ordered to release its source code by state courts in Louisiana, Massachusetts, Florida and New Jersey and a City Court Magistrate in Tucson. Yet CMI continues to insist that before they will comply with a court order to disclose the source code, the recipient of the code must sign a privacy agreement and non-disclosure agreement that allows CMI to "vet" and reject any expert that defense counsel wishes to use that CMI deems inappropriate -- and has so far refused to release the software code to anyone.

During the times relevant to the Defendants, the State believes that the Tucson machines were running software version 8105.46, and continue to do so, but Steve Butler testified that only 25% of the machines in use throughout the state are using version 8105.46 and the remaining machines are still using version 8105.45. In addition, the Intoxilyzer 8000 has had three software upgrades aimed at patching "unspecified" problems that were causing errors. Given these issues, the Court finds that the various software versions requested by Defendants should be included in this discovery order.

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The Court has considered the procedural, factual and equitable considerations before it and finds that the Defendants have met the requirements of Rule 15.1 (g), Ariz. Rules Criminal Procedure, and are entitled to a court order for the disclosure they seek. Accordingly,

IT IS ORDERED that CMI produce the source code for the Intoxilyzer 8000 and Intoxilyzer 8000 software versions 8105.44, 8105.45 and 8105.46 in an electronic format to lead counsel James Nesci of Nesci, St. Louis & West, PLLC, 216 North Main Avenue, Tucson Arizona, 85701, within 20 days of the date of this ORDER.

IT IS FURTHER ORDERED that service on CMI be obtained and effectuated by Mr. Nesci on behalf of the consolidated cases.

  
HON. DEBORAH BERNINI

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Judicial Administrative Assistant

# EXHIBIT B

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

STATE OF FLORIDA,

Plaintiff,

Vs.

JOHN C. FABIAN, ET. AL.

Defendant.

CASE NO. 2006 CT 009733 NC

**ORDER OF CIVIL CONTEMPT**

THIS CAUSE having come before the Court on the Order to Show Cause directed to CMI, Inc of Kentucky (hereinafter CMI), and the Court being fully advised herein, finds as follows:

1. On March 12, 2007 this Court entered an Order Directing Clerk to Issue Subpoena Duces Tecum directed to CMI to:

- a. Appear at the State Attorney's Office on May 16, 2007 at 9:00 A.M. with the Intoxilyzer 8000 Source Code, EPROM Versions 8100.24, 8100.25, 8100.26 and 8100.27,
- b. Furnish the records instead of appearing, or
- c. Object to the subpoena.

FILED FOR RECORDED  
2007 AUG 13 AM 10:10  
KAREN E. RUSSELL  
CLERK OF CIRCUIT COURT  
SARASOTA COUNTY, FL.



2. CMI, Inc., a Kentucky corporation, is registered with the Florida Secretary of State to transact business in the State to Florida using the name "CMI Inc of Kentucky".

3. On April 2, 2007 CMI was lawfully served with the subpoena approved by this Court.

4. CMI did not produce the requested material.

5. CMI did not file an Objection or a Motion challenging this subpoena with this Court.

6. The Defendants filed a Verified Motion for Order to Show Cause asking for CMI to be found in contempt for failing to comply with this Court's Subpoena.

7. The Defendants made this Court aware of an Order dated May 3, 2007 by the Daviess District Court in Kentucky, 07-C-00691, purporting to quash the subject subpoena.

8. This Court granted the Defendants' Motion for Order to Show, providing in the Order that the issue of what legal effect, if any, this Court must give to the Kentucky Order Quashing Subpoenas could be addressed at the Show Cause Hearing, scheduled for July 18, 2007.

9. CMI was served the Order to Show Cause on June 18, 2007.

10. CMI did not file a response to the Order to Show Cause with the Court, instead CMI's attorney, Allen Holbrook, mailed a letter to the Defendants' attorney with attachments, requesting that this information be provided to the Court.

11. The Defendants' filed with the Court the correspondence from attorney Holbrook, which provided CMI would not appear at the July 18, 2007 Hearing.

12. At the Hearing on July 18, 2007, neither CMI nor a representative appeared before this Court.

13. CMI willfully failed to comply with this Court's Subpoena.

14. CMI was given the opportunity to present to this Court any legal reason why it should not be held in contempt, including any legal authority for a Kentucky Trial Court to quash a Subpoena issued by this Court, but CMI intentionally elected not to appear before this Court at the Show Cause Hearing.

15. A Judgment rendered by a court without jurisdiction is a nullity. *Markham v. Nisbet*, 60 So.2d 393 (Fla. 1952). A judgment of a sister state may be attacked on the ground of lack of jurisdiction by the court rendering the judgment. *Id.* A Kentucky trial court lacks jurisdiction to quash a

subpoena issued by this Court. The Order of the Kentucky Court is void and has no effect on these proceedings.

16. As a result of CMI failing to comply with this Court's Subpoena, the Defendants' spent the sum of \$2,310.00, as set forth in the Defendants' affidavit of costs. Only one-third (\$770.00) of these costs are attributable to this cause due to these costs also being used in two companion cases.

17. In determining the amount of a coercive sanction, the Court must consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired. *Parsi v. Broward County*, 769 So.2d 359 (Fla. 2000).

18. The failure of CMI to comply with this Court's subpoena has created a tremendous backlog of cases, which includes more cases than are in this consolidated action. The magnitude of the impact of CMI's non-compliance on both the Court and each of these Defendants' right to material evidence is significant.

19. The fact that CMI appeared for neither the subpoena nor the Order to Show Cause leads this Court to the conclusion that nothing short of a large, coercive sanction will result in compliance.

20. In fixing the amount of a fine to be imposed as a means of securing future compliance, the Court must consider the amount of contemnor's financial resources and the consequent seriousness of the burden to that particular contemnor. *Parsi*.

21. CMI failed to appear at the Show Cause hearing, thus depriving the Court of an opportunity to further inquire of CMI's financial resources. However, this Court was previously provided a purchase Order for sale of Intoxilyzers to the Florida Department of Law Enforcement for \$1,500,000.00. This Court further takes judicial notice that CMI also provides Intoxilyzers to the majority of the States in this country.

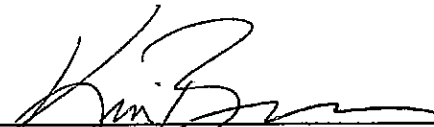
ORDERED AND ADJUDGED that CMI, Inc. of Kentucky is in willful civil contempt of this Court for failing to comply with the Subpoena Duces Tecum lawfully served to produce the Intoxilyzer 8000 Source Code, EPROM Versions 8100.24, 8100.25, 8100.26 and 8100.27. CMI shall have 30 days within which to comply with the subpoena.

IT IS FURTHER ORDERED AND ADJUDGED that CMI, Inc. of Kentucky will pay a compensatory fine in the amount \$770.00, which may be satisfied by paying said sum to the Trust Account of Robert N. Harrison.

IT IS FURTHER ORDERED AND ADJUDGED that if CMI, Inc. of Kentucky fails to comply with the subpoena within this time, CMI, Inc. of

Kentucky will be fined the sum of \$ 100<sup>00</sup> per day of each of the 32 consolidated cases, for a total of \$ 3200<sup>00</sup> per day until CMI, Inc. of Kentucky purges its self of said contempt by producing the Intoxilyzer 8000 Source Code, EPROM Versions 8100.24, 8100.25, 8100.26 and 8100.27, or until further order of this Court.

DONE AND ORDERED in chambers in Sarasota County, Florida,  
this 10 day of July, 2007.

  
\_\_\_\_\_  
Honorable Kimberly C. Bonner  
County Court Judge

cc: Robert N. Harrison, Esquire  
Jarrod Malone, Assistant State Attorney  
CMI Inc. Of Kentucky, c/o it's registered agent, NRAI Services, Inc.  
2731 Executive Park Drive, Suite 4, Weston, FL 33331  
Allen Holbrook, Esquire 100 St. Ann Building PO Box 727  
Owensboro, KY 42302-072

# EXHIBIT C

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT  
IN AND FOR MANATEE COUNTY, FLORIDA**

**CMI, INC OF FLORIDA,**

**Petitioner,**

vs

Case No. 2008-CA-3664

**ISMAEL ALMARAZ, ET AL.,  
and THE STATE OF FLORIDA,**

**Respondents.**

---

**ORDER DENYING PETITION FOR WRIT OF CERTIORARI**

This cause is before the Court on the Petitioner's Petition for Writ of Certiorari, filed on April 23, 2008, pursuant to Fla. R. App. P. 9.100. The Court has reviewed the petition and the record and is otherwise advised in the premises.

Petitioner is a Kentucky corporation that manufactures the Intoxilyzer brand of breathalyzers, models 5000 and 8000, an instrument used by law enforcement authorities throughout the United States, specifically including Manatee County, Florida, to measure the level of alcohol in a person's breath. The Respondents are individuals charged with DUI in Manatee County after submitting to an Intoxilyzer breath test.

On March 24, 2008, the County Court entered its Amended Order on Disclosure of Source Code and Object Code for Intoxilyzer 5000 and Protective Order. This order directed the Petitioner, subject to specified non-disclosure and confidentiality precautions, to disclose source code for certain versions of the Intoxilyzer 5000 to the Respondents' designated expert. The County Court found, *inter alia*, that the Respondents established materiality and a reasonable necessity for production of the

source code, stating “[t]he defendants have established through expert testimony that the Source Code is reasonably necessary to determine whether the Intoxilyzer 5000 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.”

For this court to grant certiorari and quash the County Court’s order granting discovery, the Petitioner must demonstrate that (1) the order departs from the essential requirements of law (2) resulting in a material injury (3) that cannot be remedied on direct appeal. *McGarrah v. Bayfront Medical Center, Inc.* 889 So. 2d 923, 925 (Fla. 2d DCA 2004). Additionally, as more recently stated by the Second District Court of Appeal,

the type of departure that will justify the issuance of a writ of certiorari is more than simple legal error. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003) (“A district court should exercise its discretion to grant certiorari review *only* when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.”).

*Florida Dept. of Transportation v. Piccolo*, 964 So. 2d 773, 775 (Fla. 2d DCA 2007).

Because the Court concludes that Petitioner has failed to show the County Court’s order departs from the essential requirements of law resulting in a miscarriage of justice, it denies the petition.

The Petitioner asserts that the County Court departed from the essential requirements of the law by finding that production of the source code was reasonably necessary. More particularly, Petitioner argues that the County Court erroneously made this determination based on whether analysis of the source code would enable the

Respondents to understand the Intoxilyzer. The correct standard, contends Petitioner, is whether the source code is reasonably necessary to the Respondents' case.

The County Court did not depart from the essential requirements of the law in holding that production of the source codes is material and reasonably necessary to Respondents' case. The order noted that the Petitioner has advised the County Court that it will comply with the subpoena duces tecum for production of the source codes, provided that a protective order and a non-disclosure agreement are executed. The Petitioner fails to demonstrate material injury if it has already agreed to disclose the source codes.

As a second ground, the Petitioner cites the County Court's requirement that Petitioner submits itself to the jurisdiction of the County Court by executing the non-disclosure and confidentiality agreement detailed in the order. This submission, however, was limited to "*solely* for enforcement and resolution of any disputes in regards to the Non-Disclosure and Confidentiality Agreement." This Court regards this limitation as a sensible approach, within the County Court's discretion, that achieved an *enforceable* protective order while still preserving the Petitioner's objections to jurisdiction. It certainly does not result in a miscarriage of justice as required by *Kaklamanos*.

Accordingly, it is

**ORDERED AND ADJUDGED** that the petition for writ of certiorari is  
**DENIED.**

**DONE AND ORDERED** in Chambers in Manatee County, Florida, this 2<sup>nd</sup>  
day of May, 2008.

*Joe*

  
Edward Nicholas, Circuit Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on June 2, 2008, a true and conformed copy of the foregoing was furnished by U.S. Mail to the following addressees:

Jarrod Malone, Esq.  
Abel, Band, Chartered  
P.O. Box 49948  
Sarasota, FL 34240-6948

Cliff Ramey, Esq.  
Office of the State Attorney  
2071 Ringling Blvd.  
Sarasota, FL 34236

Robert Harrison, Esq.  
825 So. Tamiami Trail, Suite 2  
Venice, FL 34285

The Honorable K. Douglas Henderson

  
Sheila Frazier, Judicial Assistant

# EXHIBIT D

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

---

State of Minnesota,

Plaintiff,

vs

ORDER ON DISCOVERY MOTION

Joshua Thomas Gadow,

FILE # 27-CR-08-46085

Defendant

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Defendant Gadow moves for an order requiring disclosure of the Intoxilyzer source codes in this criminal impaired driving case. Aware of the decision in *State v Underdahl*, 749 N.W.2d 117 (Minn. Ct. App. 2008), review granted (Aug. 5, 2008), where the court emphasized that no showing had been made to support the claim that the requested material was relevant or would lead to information useful to the defense, Mr Gadow has submitted a good deal of material, the pages of which (although I have not actually counted them) I estimate to number perhaps fifteen hundred to two thousand

I have examined these. They are for the most part informative as to the questions raised in *Underdahl*, and often of great interest. The documents consist, *inter alia*, of scholarly articles, affidavits, transcripts of testimony of expert witnesses, and judicial opinions from several jurisdictions. From their particulars, and from their cumulative effect, I have no doubt that the source codes are not only relevant to this litigation (and to virtually any dispute involving Intoxilyzer evidence), but very likely indispensable to a proper hearing of such a case. There is, indeed, good reason to believe these source

codes will reveal defects in the Intoxilyzer device's operations of a significance that makes the evidence exculpatory and constitutionally subject to mandated disclosure by the prosecution, though no such showing need be made to support a simple discovery request such as that under consideration here

These materials, considering primarily if not exclusively the sworn statements of experts whose credentials are excellent for the purpose, show (in very brief summary) the following:

1 – The Intoxilyzer is a complex, sophisticated device designed to measure the amount of alcohol in air samples (Head and Workman, "Litigation in the United States", pages unnumbered)

2 – This device is "computer controlled;" it is, in fact, effectively a computer itself, or a complex of computers. (Ibid)

3 – The device, therefore, (and each "computer" it comprises), is controlled by "software," including the "source codes " (Ibid).

4 – These codes are the instructions that dictate to the device how it must operate (Ibid)

5 – The machine itself has no autonomy, no discretion. It does what the software tells it (Ibid).

6 – Therefore all similar machines governed by the same codes will operate identically (assuming no defects or variations unique to any of the machines are present) (Ibid)

7 – Virtually all software has defects (Ibid)

8 – Such defects can cause malfunctions in the Intoxilyzer's operations, and instances of those have been proved (Ibid)

9 – Software will cause similar machines to reach identical results. A software defect, accordingly, can cause identical erroneous results in multiple machines. That is, similar results from several machines are, in themselves, no proof of accuracy except where it is known the software is defect-free (Ibid)

10 – “A computer scientist. . . can frequently find defects in software by ‘reading’ the source code.” (Ibid) Codes may also be reviewed “automatically.” Either method can identify flaws in the source code which render Intoxilyzer results inaccurate (Ibid).

11 – The process of translating “source code” to “machine code”, an essential part of the Intoxilyzer operation, involves numerous possibilities of error, in effect a result of ambiguities in instructions which can lead to contradictory or erroneous results (Ibid)

12 – Faults inherent in and resulting from defective software or source codes may affect various aspects of the Intoxilyzer's operation, including: A) determining whether a test was actually attempted or conducted, or “refused,” B) determining whether an “adequate” sample was given, C) determining whether the proper portions of the sample (“alveolar” air) are tested, and other portions excluded, D) determining that “interferents” (hydrocarbons) are properly excluded from the analyzing process (a failure to do which can result in improper elevation of a reading), E) determining whether a simulation is properly analyzed. These potential defects might lead to false and questionable readings, either as to quantity of alcohol or as to whether an inadequate sample was given (and thus a “refusal” committed)

13 - The machine's ostensibly successful analysis of known samples or simulation gases does not demonstrate its reliability in analyzing unknown subject samples, for the latter may and often do contain other substances, not present in the controlled samples, which must be accounted for and eliminated from consideration in the subject tests. Since the samples are destroyed in testing there is no way to determine whether this function is properly performed, or if the device is capable of doing so without the codes.

It is notable also that the Intoxilyzer discards samples once analyzed; they are not retained to allow additional testing. This is by choice of the manufacturer and Intoxilyzer purchasers. It results in routine destruction of potentially exculpatory evidence. "Breath testing stands alone in the forensic sciences, as the only forensic testing method that prohibits verification and validation by virtue of the design of the process." (Ibid) Moreover, no records are ordinarily kept by manufacturers or law enforcement agencies of defective tests; and there are no reporting mechanisms for failures. (Ibid)

The nature of computer construction and operation, both software and hardware, is so complex (and rapidly changing) that the potential for errors is enormous, the number of possible defects astronomical - literally in the millions or billions.

Many, if not most, if not all of these are virtually immune from detection unless the source codes can be examined.

One expert with sterling credentials has documented defects in an Intoxilyzer and said that "this obviously serious problem in data integrity makes it essential that the sources of the software be thoroughly examined to identify the source of these serious errors and their potential effect on all data." (T. BURR affidavit, December 17, 2007) In

another affidavit the same expert states that access to source codes is necessary to evaluate the functioning of Intoxilyzer, and "without access to those codes it is not possible to determine if the Intoxilyzer functions as designed or as approved by rule" (Burr affidavit, October 11, 2007)

Another well-qualified expert states that because the manufacturer has not made the source codes available, the device's "process" of breath analysis is not fully known, and "the exact process can only be determined by examining the source code of the software program running in the instrument" (H. Myler affidavit, September 9, 2006)

Evidence was also presented that a different device for analyzing breath samples operated with a source code defect affecting the "slope detector" that caused numerous failures (Simpson et al article; Kierzek testimony transcript).

Moreover, e-mail correspondence between the Minnesota Bureau of Criminal Apprehension and CMI, the manufacturer, reveals that the Intoxilyzer's determination of "deficient" breath samples varies according to the software being used, and it is unclear whether this problem has been satisfactorily corrected

Under present Minnesota law, a substantial (even alarming) portion of the truth-finding process in both criminal driving and civil licensing cases, otherwise normally performed by judges and juries, is effectively delegated to the Intoxilyzer machine, which is in turn a tool selected, obtained, maintained, and operated by the executive branch of government, more specifically its law enforcement branches, with the blessing (so to speak) of the legislature. Virtually no one who is directly involved in the courtroom aspects of these cases (police officers, prosecutors, defense lawyers, defendants, judges) has the scientific knowledge or training to understand how this machine works

We are asked, in other words, to have faith in the manufacturer's and the executive branch's decisions and judgment in certain important respects, to assume that if a minimally trained police officer follows a number of relatively simple procedures in operating the machine, it will yield a reliable result both as to sufficiency of samples and alcohol readings. To the machine itself we largely delegate the gate-keeping function of deciding whether the machine is functioning correctly. The officer who testifies about the test (who is often the only witness) has no way to determine whether it is working properly, except from what the machine tells him. (We thus abdicate our non-delegable judicial duties, demeaning the separation of powers.)

But what the machine tells him (and tells a fact-finder) is what the programmers designed it to say. Even setting aside any suspicion of deliberate deception, assuming no bad faith is involved, this programming (which for present purposes we may assume consists in significant part of the "source codes" in question) could lead to undetectable misrepresentations that are virtually conclusive of the result in litigation.

For example, (to state only one), in a state where the decisive blood-alcohol reading is .08, any quantity below that would be exculpatory. The controlling software for the device could be designed to instruct the machine to round any reading slightly below that (say .07999) to .08. Since this instruction would be only in the code, and in no way detectable from either examination of the machine itself, questioning of the operator, or other reasonably available means, it would be shielded from discovery, disclosure, or diagnosis. Innocent people would be convicted, with no recourse.

We have therefore a situation where juries and judges are asked to accept the word (virtually the verdict) of a machine that a person is guilty of a crime (of either driving with more than .08 blood alcohol or of refusing a test), and we are asked to accept these determinations without being allowed to know how the machine reached its decision, or whether it did so reliably. Although it is not the direct and immediate question here, this raises a serious concern that the accused is denied the right to confront his accuser (the machine), and the due process right to present a defense. The machine's hearsay statement is not subject to cross-examination. The machine itself destroys (or does not preserve) the sample, making further testing impossible.

But this proceeding is a mere discovery motion, a simple and reasonable request by the defense to examine the fact-maker and surrogate fact-finder. Not only is the defense entitled to this information, defense counsel would arguably be guilty of ineffectively assisting a client for not demanding the information.

No even marginally persuasive or even plausible reason to deny this threshold investigative request has come to my attention, either in the evidence or arguments in this case, or in the opinions of the Minnesota and other courts that I have examined.

It is worth repeating that this is a mere, reasonable discovery request, a routine pre-trial step in preparation for litigation or negotiation, a perfectly rational inquiry into the foundation for the result of a scientific test. The refusal of the manufacturer, and the refusal or inability of the prosecution to comply with these requests, and ensuing court orders, have caused totally unjustified disruptions in a justice system that is already overburdened by lack of adequate funding and resources. The making, opposing, hearing, deciding, and appeals of these motions have consumed untold amounts of time

of all involved, have caused a great deal of expense, have prompted certain unwise judicial policies designed to deal with the volume of these motions, have resulted in a plethora of often conflicting, often contradictory decisions in both trial and appellate courts, have prevented the resolution of cases within reasonable times, and have in general as a consequence diluted the quality of justice and besmirched the appearance and reputation of the machinery of justice. All of this is direct result of a private, profit-making corporation's desires and efforts to withhold from courts pertinent information about the product by which it makes its profits, a product which is incidentally capable under the current state of the law of convicting people (in very large numbers) of crimes. That this is true – and not the plot of a futuristic novel or screenplay – is astonishing. It is also shameful, since it is for the most part easily avoidable, by proper orders in individual cases requiring disclosure on pain of suppression or dismissal. Instead, however, the courts have too often been willing to allow an interested non-party to foul the gears of justice, and leave countless otherwise resolvable cases in a limbo of uncertainty, creating an unnecessary back-log of cases that will continue voraciously to consume resources.

The defense motion is granted.

The source codes shall be produced to the defendant within ten days of the date of this order or the test results shall be suppressed.

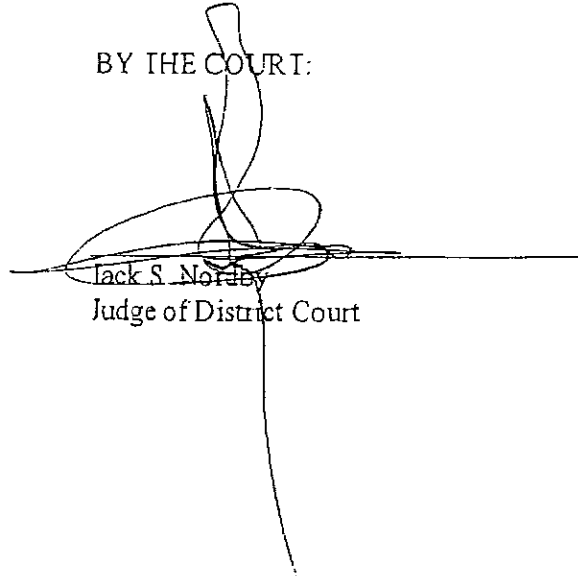
It shall be no excuse for non-compliance that the prosecution does not have the source codes. This issue has long been familiar. The prosecution is the proponent of the evidence, and cannot frustrate the defense's right to the evidence (and this court's order) either by failing to obtain the source codes, or by agreeing or acquiescing with the

manufacturer's unjustified refusal to produce them. This case may proceed the old-fashioned way, by presentation of admissible evidence to human fact-finders.

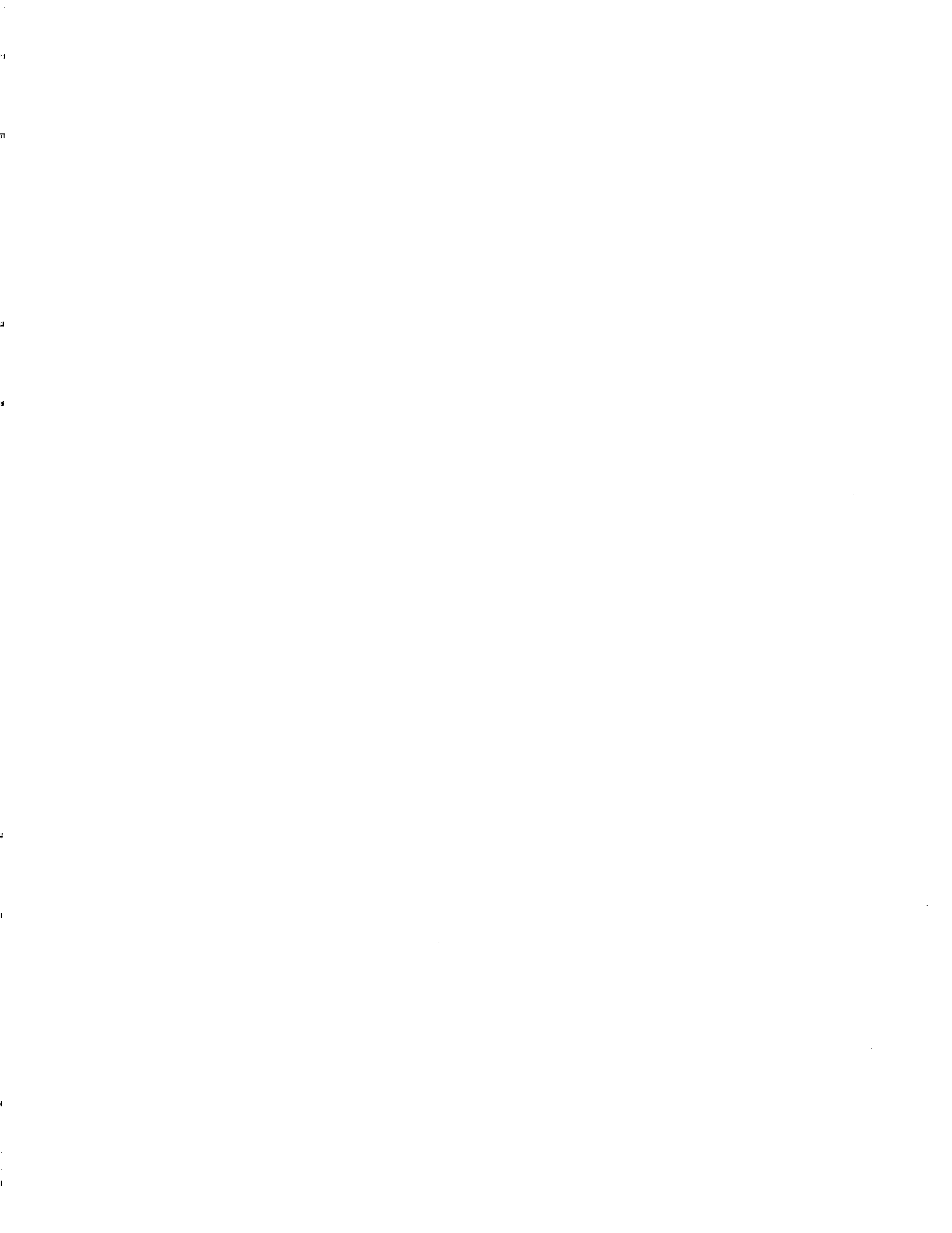
IT IS SO ORDERED

BY THE COURT:

Dated: November 18, 2008



Jack S. Norby  
Judge of District Court



# EXHIBIT E

STATE OF MINNESOTA

FOURTH JUDICIAL DISTRICT COURT

COUNTY OF HENNEPIN

CRIMINAL DIVISION

State of Minnesota  
Plaintiff,

vs

Dennis Lee Schrupp,

Defendant.

ORDER

Court File 27 CR 07-042907

ORDER

Steven Tallen, Esq., represents the Plaintiff.

Richard Koch, Esq., represents the Defendant.

The defendant, accused of impaired driving, moves for disclosure of the "source codes" for the Intoxilizer device, whose reading the prosecution proposes to offer in evidence against him; and, failing that, for suppression of the evidence.

The Intoxilizer produces a report of the subject's blood-alcohol content, (a report virtually decisive of guilt in most cases), by a technical process governed and influenced in part by these "source codes." They are, therefore, clearly discoverable, since the defense has an interest in knowing how the reading is arrived at, and an indisputable right to challenge its validity and accuracy. (Indeed, I believe the proponent of the evidence has a routine and scarcely arguable duty to provide the codes and proof of their validity as foundation for the reading's admissibility, but that is not the issue here).

This is ultimately a right to confrontation of the accuser, and more broadly the right to due process of law, specifically the right to present a defense, but at this point it is a simple discovery request within my authority and discretion.

The state does not primarily oppose disclosure as such, but claims that it, too, does not have the codes and therefore cannot produce them. This is because the manufacturer refuses to release them, but this is hardly relevant to the immediate question. The state cannot proffer evidence and claim immunity from the obligation to show its evidentiary foundation, especially not on behalf of a private non-party.

This refusal raises a natural, strong, and reasonable inference (among others) that the codes will reveal a defect in the machine or its results. The claim of proprietary information rings hollow for several reasons. First, there is no

persuasive reason to believe it, no more reason than to believe the more damning inference just mentioned. Second, even if true, although the manufacturer's profits and market security may be of primary importance to the manufacturer, these cannot be of concern to the judicial system; certainly not in a criminal case. Private cupidity does not override the state or federal constitution, or the Rules of Criminal Procedure and Evidence, or fundamental fairness. I believe and conclude an analysis of the source codes may show the Intoxilizer is flawed in design or function or both, and that the fear of this is the probable reason for secrecy. That there may be other reasons is quite beside the point.

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.

The remedy is simple and obvious. The manufacturer need not disclose the codes; but if it does not, the machine's results cannot be used in court. If the results cannot be used, the machine ceases to have value to law enforcement agencies who, therefore, will simply cease to purchase the machine, as they should. Traffic violations can and will be quite effectively prosecuted by other means, as they have been almost since the advent of the internal combustion engine. (Or a more forthcoming manufacturer may step into the breach.)

There has been discussion of disclosure conditioned upon a protective order, but such an order is neither required nor appropriate. The manufacturer is not a party to this litigation. It sells for profit a device it represents to be useful in the enforcement of impaired driving laws. It mistakenly believes, apparently, that courts will allow it to enrich itself without risk, at the expense not only of accused drivers, but of the judicial process itself. In this it is mistaken.

One can only view as sinister the proposition that a company that offers for sale an instrument designed to produce evidence before neutral factfinders in our courts would argue (and with some success) that it can arrogate to itself even a small part of the inherently and exclusively judicial function of controlling how and on what terms the admissibility of evidence should be determined. Even more alarming is that the executive branch of government would accede to and even affirmatively support this presumptuousness, and compromise the fact-finding process.

It is and should be an article of faith recognized by universal consent that no person in this state or country need accept on faith the word of any accuser, government agent or private person or corporate entity, who seeks to deprive him of life, liberty, or property. And yet that is precisely what I am asked to do here: to "take their word for it." I don't, and I won't. I believe the source codes may show that the Intoxilizer is faulty. That I do not know this for certain is of no

consequence; it is beside the point; the point being that on this record we cannot reasonably believe the contrary.

It bespeaks an astonishing degree of hubris for a company that designs and markets a device specifically to produce evidence for use against individuals in our courts to believe that it must not make every single piece of information concerning that product's composition and functions immediately and fully available to both the purchaser (the state) and the subject of its analysis (the driver). The courts should not and I shall not collude in the dilution of the quality of justice in order to protect a manufacturer's bottom line. The company and the state cannot bargain away the people's rights and privileges.

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.

Of the two obvious motives for secrecy—fear or revelation of defectiveness and preservation of profits—the former cries out for disclosure, and the latter presents no legitimate obstacle to it. Both are motivated by powerful self-interest, and the proponent of secrecy therefore lacks credibility.

This ruling is not constitutionally based (though it could be). It is a simple discovery question, a request I have the power and discretion to grant, which I do. Although it appears obvious to me that a failure to order disclosure would violate the defendant's rights to confrontation and due process, it is not necessary here to invoke those lofty concepts, and a Constitutional decision should, of course, always be avoided where a dispute admits resolution on other grounds, as this one readily does.

The criminal rules (7 and 9), incidentally, refer to evidence that relates to the "guilt or innocence" of the accused. This can be misleading since the reference to "innocence" implies a burden on the defendant that does not and constitutionally could not exist. The purpose of discovery is not to prove "innocence," but merely to illustrate potential weakness in the proffered proof of guilt.

(I note in passing that it is a crime even to refuse to submit to this device. 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? We are dealing here with a mere commercial gadget, not with state secrets, or threats to national security from non-citizens

held off-shore in wartime. It is a pernicious notion to which we should be indignantly unwillingly to subscribe.)

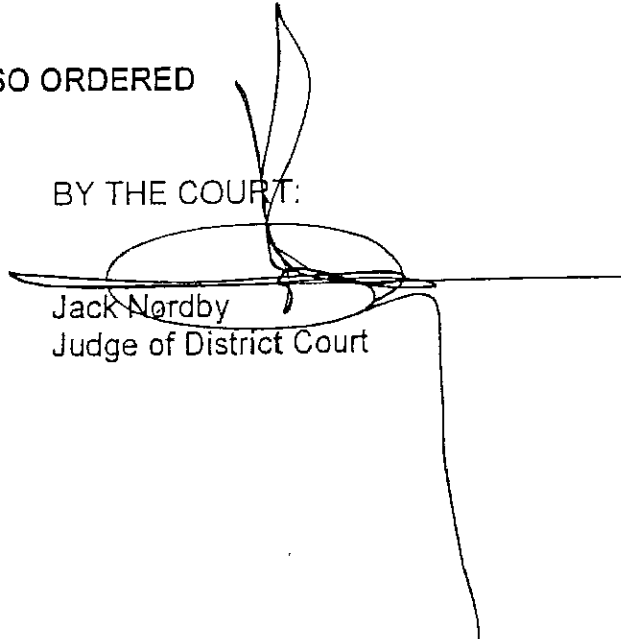
The parties have submitted and I have read with care and interest a large number of orders by many other judges, ruling for and against similar motions, in both criminal and civil cases. Many of these were obviously carefully thought-out. None of them changes my view as to the proper result.

The motion to disclose is granted. If the source codes are not produced in thirty days the Intoxilizer reading is suppressed.

IT IS SO ORDERED

Dated: 10 Dec 07

BY THE COURT:



Jack Nordby  
Judge of District Court

# EXHIBIT F

STATE OF MINNESOTA  
COUNTY OF GOODHUE

DISTRICT COURT  
FIRST JUDICIAL DISTRICT

State of Minnesota,

Goodhue County Court File No. 25-CV-07-3536

Plaintiff,

vs.

**ORDER GRANTING  
MOTION TO RECONSIDER**

Michael Todd Ehlenz,

Defendant.


The above matter came on before the undersigned Judge of District Court on the 17th day of October, 2008, at the Goodhue County Justice Center, City of Red Wing, County of Goodhue, State of Minnesota. The State of Minnesota, City of Cannon Falls, appeared through its counsel Samuel J. Edmunds, Esq. The Defendant appeared through his counsel David Ayers, Esq.

The matter was previously before the Court on a contested omnibus hearing, wherein the Defendant: challenged the stop of his motor vehicle, challenged the statements made while in the custody of the officer; argued that the testing process was illegally coercive, requested discovery of the source code for the intoxilyzer, and argued that the enhancement of the current DWI offense is not allowed under current Minnesota law. Following the hearing, the Court denied all motions of the Defendant, including the request to disclose the Intoxilyzer source code.

Subsequent to the Court's Order denying the Defendant's requests, counsel for the Defendant petitioned the Court to reconsider its motion and allow further evidence to be submitted to the Court on the issue of the source code. In support of his motion, the Defendant submitted the affidavit from Thomas Workman, Jr., and accompanying arguments.

**FILED**

DEC 16 2008

YVONNE J. SLACK  
COURT ADMINISTRATOR  
By:  Deputy

Based upon the file, record, and proceedings herein, **THE COURT MAKES THE FOLLOWING:**

**FINDINGS OF FACT**

1. In an Order dated May 15, 2008, the Court denied the Defendant's Motion to Produce the Source Code and found that there has not been an insufficient showing by the Defendant that the information sought may relate to the guilt or innocence of the Defendant or negate the guilt or culpability of the Defendant as to the offense charged.

2. Later that month on May 20, 2008, the Minnesota Court of Appeals decided the case of *State v. Underdahl*, 749 N.W.2d 17 (Minn. Ct. App. 2008), addressed the exact issue in controversy herein. Underdahl provides guidance on the showing required by a defendant who raises the source code issue.

3. At the hearings on July 24, 2008 and October 17, 2008, Defendant moved the Court to reconsider its previous hearing and accepted an affidavit from Thomas E. Workman together with two attachments.

4. The affidavit from Thomas E. Workman thoroughly and precisely explains all aspects of what the source code is and why the source code is needed in any litigation that involves the reliability of the Intoxilyzer and its results used to support a criminal charge. Mr. Workman's affidavit further establishes that it is not necessary for an expert to review each Intoxilyzer machine, nor is it necessary to review individual Intoxilyzer records, since the problem with the Intoxilyzer

Based upon the above **FINDINGS OF FACT**, the Court makes the following:

**CONCLUSIONS OF LAW**

1. That, based upon the dictates of *Underdahl* and the showing made by the Affidavit of Thomas Workman, the Court finds that a sufficient showing has been made and grants the motion of the Defendant to compel discovery in the form of the source code.
2. The defendant has, to the satisfaction of the Court, shown what an Intoxilyzer "source code" is, how it bears on the operation of the Intoxilyzer, or what precise role it has in regulating the accuracy of the machine.
3. There has been an adequate showing as to what possible deficiencies could be found in a source code, how significant any deficiencies might be to the accuracy of the machine's results, or that testing of the machine, which defendants are permitted to do, would not reveal potential inaccuracies without access to the source code.
4. That the Defendant has made the necessary showing under Minnesota Rule of Criminal Procedure 9 to compel the Court to order disclosure of the source code.
5. That the Defendant has made the necessary showing that the production of the source code for the Intoxilyzer 5000 relates, to the extent necessary, to his guilt or innocence as required under Minnesota Rule of Criminal Procedure 9.01.

Based upon the above **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, IT IS **HEREBY ORDERED AS FOLLOWS:**

1. That the Defendant's motion to reconsider is hereby **GRANTED**.
2. That the Defendant's motion to reverse the Court's previous hearing is hereby **GRANTED**.
3. That the State of Minnesota's shall compel the source code for the Intoxilyzer 5000 used in this case within 30 days of the date of this order or the test results in this matter are hereby suppressed.

Dated: December 16, 2008

BY THE COURT:



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Kevin F. Mark  
Judge of District Court