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ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. DEBORAH BERNINI

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CR-20082295

COURT REPORTER: NONE

DATE: September 10, 2008

CR-20071499
STATE OF ARIZONA

VS.

JOHN CLIFTON LIVINGSTON

CR-20071798/CR-20072680
STATE OF ARIZONA

VS.

ERICA LEA DAUGHTERS-WHITE

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.
JONI MARI LUJAN

CR-20074156
STATE OF ARIZONA

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ROMEO ALONSO RODRIGUEZ

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CR-20080812
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VS.

LAURA JEAN ROWELL

CR-20081576
STATE OF ARIZONA

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KAREN CHRISTINE BURGAN

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STATE OF ARIZONA

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JUAN CARLOS RODRIGUEZ

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CR-20080687
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BELINDA MARIE SANCHEZ

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JAMES BRADLEY BROWNING

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CR-20082295
STATE OF ARIZONA

VS.

AARON C. TRITSCHLER

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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