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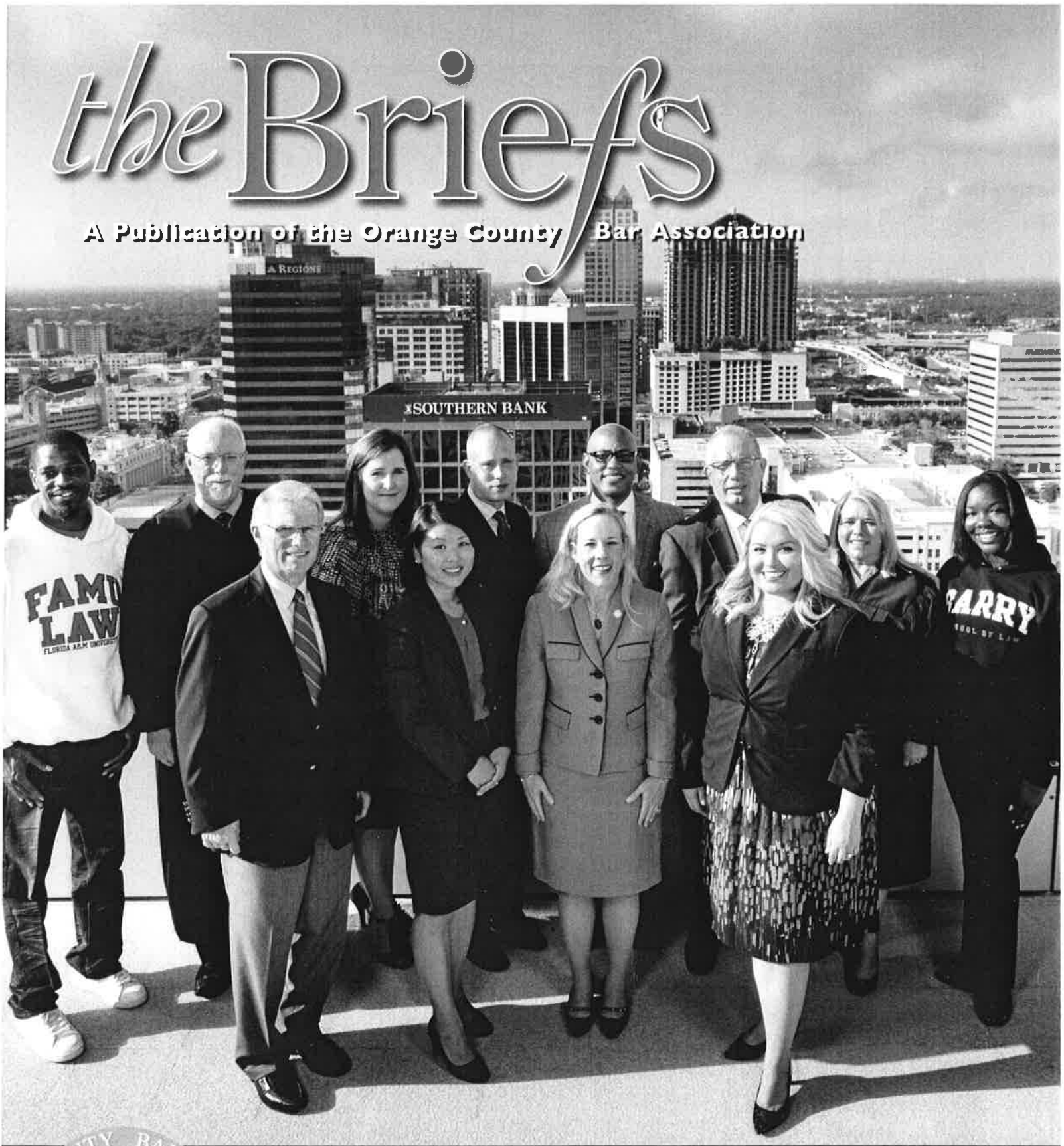

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Intoxilyzer 8000 Litigation in Orange County Florida

The admissibility of breath alcohol test results from an Intoxilyzer 8000 is likely the single most complicated issue in the county courts of the Ninth Judicial Circuit. Since the Intoxilyzer 8000 replaced the previous 5000 version in 2006, defense attorneys have sought – with great success – to suppress or exclude the test results in a large number of driving under the influence (DUI) cases. They have been most successful when asking the courts to order prosecutors to produce the Intoxilyzer 8000's source code in discovery, claiming that it is material to their defense. The prosecutors have been unable to do this because of the manufacturer's claim that it is protected intellectual property. This article is intended to quickly bring the casual legal reader up to speed on the nature, history, and current state of this litigation.

Breath Test Evidence

Florida statutes govern the admissibility of breath alcohol test evidence in criminal cases. Section 316.1934(5), Florida Statutes, sets forth the requirements for a breath test affidavit's admissibility without further proof of scientific accuracy and reliability. This is commonly referred to as the "short-form" predicate. In lieu of the short-form, the State can admit breath test evidence in the traditional manner, also known as the "scientific" or "long-form" predicate. The long-form is governed by case law and requires the State to prove the scientific accuracy and reliability of the breath test instrument through expert testimony.[1] Over the last few years in Orange County, the short-form predicate has been routinely excluded. Recently, the long-form predicate has been excluded as well.

The Intoxilyzer 8000

The Intoxilyzer 8000 is an instrument that measures breath alcohol content. It is manufactured in Owensboro, Kentucky, by CMI, Inc. (CMI). It registers how much infrared light is absorbed by the ethanol in a breath sample and uses that information to generate a breath alcohol content result. This technique has been generally accepted and widely used by the scientific community since 1973.[2]

The Florida Legislature delegated its authority to the Alcohol Testing Program (ATP) of the Florida Department of Law Enforcement (FDLE) to regulate the operation, inspection, and registration of breath test instruments used in the driving and boating under the influence provisions located in chapters 316, 322, and 327 of the Florida Statutes.[3] FDLE chose the Intoxilyzer 8000 to be the only breath test instrument allowed for evidentiary use in the state of Florida. They have promulgated administrative regulations that govern the breath testing, operator certification, instrument use, and instrument maintenance.[4] The FDLE is also responsible for purchasing the instruments from CMI.

Source Code and Software

The source code and software of the Intoxilyzer 8000 are the primary points of contention in the ongoing litigation. A source code is a set of operating instructions for a computer that is written by a computer programmer in a human-readable programming language (e.g., C++). It contains instructions that govern every action taken by the instrument. The source code is compiled (translated) by a program into a computer-readable language (e.g., binary). Such complied source code is the software that is ultimately loaded into the instrument to make it function.

Florida Law

In 2006, the Fifth District Court of Appeal decided *Moe v. State*, holding that the State did not possess the Intoxilyzer 5000 source code and could not obtain it.[5] Three years later, litigation between the FDLE and CMI resulted in a declaratory judgment from Leon County that found the source code to be the sole intellectual property of CMI.[6]

After *Moe*, in *State v. McGratty, et al.*, the Circuit Court of Orange County sitting in its appellate capacity held that the State did possess and was required to produce the Intoxilyzer 8000 software.[7] The *McGratty* courts reasoned that the State was required to produce the software because it had a copy in its possession and because "the changes made between different versions may reasonably be considered admissible and useful to the defense in the sense that it is probably material and exculpatory."[8] Subsequently, the Fifth District Court of Appeal, in *DHSMV v. Berne*, held that software changes do not require re-approval under FDLE's rules.[9] Thus, approval is likely not a basis for the disclosure of the source code and software. However, the *Berne* court did not directly address the issue of discovery under a materiality standard pursuant to rule 3.220(f), Florida Rules of Criminal Procedure.

The Florida Legislature also attempted to address this issue by amending section 316.1932(1)(f)(4.), Florida Statutes, to read as follows:

> Full information does not include manuals, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state. Additionally, full information does not include information in the possession of the manufacturer of the test instrument.

Even the Florida Supreme Court, in *Ulloa v. State*, addressed the source code issue. It held that the proper way for a DUI defendant to obtain the source code from CMI was by issuing a *subpoena duces tecum* in conformation with the Uniform Law.[10]

Important Orange County Decisions

On June 20, 2008, in *State v. Atkins, et al.*, after several days of hearings, ten Orange County criminal judges issued an order prohibiting the State from using the short-form predicate under section 316.1934(5), Florida Statutes, if it did not produce the source code of the Intoxilyzer 8000 to the defendants.[11] The order was primarily based on the source code being material and thus discoverable under the Florida Rules of Criminal Procedure. This order was appealed by the State but later withdrawn.

State v. Ganuelas

On December 5-9, 2013, in *State v. Ganuelas, et al.*, seven of the ten Orange County criminal judges met to conduct an *en masse* hearing on defense motions to produce the source code. On September 22, 2014, the judges issued orders requiring the State to provide defendants effective access to the source code and software or be forbidden from introducing breath test evidence through either the short-form or long-form predicate.[12] That order is currently under appeal by the State.

Conclusion

Currently, the admissibility of breath test evidence from the Intoxilyzer 8000 is in limbo. Many cases that were a part of the *Ganuelas* hearing that are currently under appeal have been stayed. In new cases with similar issues, some courts are requiring new hearings while others are simply entering the same *Ganuelas* order or joining the new cases to those already under appeal. In other instances, some courts are considering whether evidentiary hearings need to be held in order to determine whether the State has complied with the effective access ordered in *Ganuelas*. While awaiting the appellate ruling, new issues will surely continue to arise and the litigation does not have a foreseeable end.

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[1] *See State v. Bender*, 382 So. 2d 697 (Fla. 1980).

[2] *Rutledge v. NCL (Bahamas) Ltd.*, 446 F.Appx. 825, 828 (11th Cir. 2012) (holding, "Alcohol breath tests have been generally recognized as reliable since at least 1973.").

[3] § 316.1932(1)(a)(2), (2006).

[4] Fla. Admin. Code R. 11D-8.

[5] *Moe v. State*, 944 So. 2d 1096, 1097 (Fla. 5th DCA 2006) (observing, "It is without dispute that the State does not have possession of the source code because it is the property of CMI, Inc. It is also without dispute that the code is a trade secret of CMI, Inc. and that CMI, Inc. has invoked its statutory and common law privileges protecting the code from disclosure. Therefore, the State cannot obtain possession of the code.").

[6] *FDLE v. CMI, Inc.*, 2008-CA-003619 (Leon Cty. Cir. Ct., Sept. 10, 2009) (stating, "Accordingly, the Purchase Orders did not, as a matter of law, transfer the copyright to the operating software or source code of the Intoxilyzer 8000 to the State. The Intellectual Property, therefore, remains the property of CMI and is not the property of FDLE or DOS.").

[7] *See State v. McGratty*, 16 Fla. L. Weekly Supp. 858a (Orange Cty. Ct. June 20, 2007); *State v. McGratty*, 16 Fla. L. Weekly Supp. 813a (Orange Cty. Cir. Ct., June 29, 2009).

[8] *Id.*

[9] *Dep't of Highway Safety and Motor Vehicles v. Berne*, 49 So. 3d 779 (Fla. 5th DCA 2010) (concluding, "Finally, paragraph 6 specifically provides that a new software version does not negate the prior approval of an instrument.").

[10] *Ulloa v. CMI, Inc.*, 133 So. 3d 914, 924-25 (Fla. 2013) (stating,"Accordingly, we conclude that parties must follow the procedures of the Uniform Law when seeking to obtain documents located out-of-state from an out-of-state, nonparty witness through a subpoena duces tecum, as well when seeking testimony or seeking both testimony and documents.").

[11] *State v. Atkins*, 16 Fla. L. Weekly Supp. 251A (Fla. Orange Cty. Ct. June 20, 2008).

[12] *See State v. Ganuelas*, 48-2011-CT-003092-A/O (Fla. Orange Cty. Ct. September 22, 2014) (the named case in the latest round of hearings) and *State v. Michael Novoselac*, 48-2012-CT-000700-E (Fla. Orange Cty. Ct. September 22, 2014) (the named case in the consolidated appeal).