

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

v.

_____, :

Defendant.

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CASE NO. _____

BRIEF IN SUPPORT OF MOTION TO EXCLUDE OR SUPPRESS BREATH TEST
RESULTS FOR VIOLATION OF RIGHTS TO COMPULSORY PROCESS, FAIR TRIAL,
DUE PROCESS, AND CONFRONTATION UNDER GEORGIA STATUTORY LAW
AND THE STATE AND FEDERAL CONSTITUTIONS

COMES NOW, the Defendant in the above-styled case, by and through the undersigned counsel of record, and respectfully submits this motion to exclude or suppress the state-administered breath test results, or continue trial until the appeals process in Kentucky has been exhausted in this case based upon the violation of Defendant's due process rights. The Defendant shows this Honorable Court the following:

STATEMENT OF FACTS

1.

The Defendant was arrested for DUI and submitted to a state-administered breath test on an Intoxilyzer 5000, the results of which the State will use as evidence that his/her alcohol concentration exceeded the statutory limit, in violation of O.C.G.A. § 40-6-391(a)(5).

2.

Under Georgia's statutory scheme, the sole authority for determining a scientifically reliable means of determining a driver's alcohol concentration lies with the Division of Forensic Sciences ("DOFS") of the Georgia Bureau of Investigation ("GBI"), the State's main law enforcement agency.

3.

CMI, Inc., was approved as the sole provider of forensic breath testing devices for the State of Georgia pursuant to the Administrative Procedures Act, which can be found in GBI Rule 92-3. The Intoxilyzer 5000, which is manufactured by CMI, Inc., was selected as the only device authorized for use in determining breath alcohol concentration in Georgia DUI cases. Mr. _____ Panter, who was then the GBI-DOFS Implied Consent Manager, selected the Intoxilyzer 5000 as Georgia's evidential breath testing device on July 6, 1994.

4.

Since January 1, 1995, CMI, Inc., has enjoyed an exclusive agreement as the sole provider of evidential breath testing devices for the State of Georgia.

5.

CMI, Inc., produces a specific model of the Intoxilyzer 5000 for the State of Georgia. The Intoxilyzer 5000 designed and developed for the State of Georgia is sold only in the State of Georgia.

6.

The evidence usually determinative of a person's guilt in a DUI -per se case is produced not by a forensic expert who would testify and face cross-examination on the accuracy and reliability of his/her results, but a machine that merely takes in a breath specimen and through internal mechanisms and computer source code, generates a test report.

7.

The test operator may be qualified to operate the machine, but will have no knowledge about the computer source code, or how the machine computes its result or whether it was actually designed to produce accurate and reliable results. In fact, at trial, the jury may be instructed that "there is no requirement that the Intoxilyzer operator be an expert on the principles of the machine's internal workings." *Goethe v. State*, 294 Ga. App. 232, 233, 668 S.E.2d 859, 860 (2008). As Justice Hunstein noted, "in reality the 'witness'

against the defendant, the source of the crucial and incriminating evidence, is not the analyst, but the machine itself.” *Brown v. State*, 268 Ga. 76, 79 485 S.E.2d 486, 488 (1997) (citing *State v. Smith*, 312 N.C. 361, 323 S.E.2d 316, 323 (1984)).

8.

CMI, Inc., is a foreign corporation headquartered in Kentucky, and has gone to great lengths to distance itself from the reach of the people and the courts of Georgia and steadfastly refused to produce the computer source code for the machine in Georgia for analysis.

9.

The State, acting through the DOFS, has chosen not to possess or have access to the computer source code, further obstructing a person accused by this machine from examining or questioning the accuracy or reliability of the end result. The State of Georgia has elected not to contract with CMI, Inc., for an ownership interest in the source code, as other states, such as the State of Minnesota, have chosen to do.

10.

The State has also chosen to purchase a version of the Intoxilyzer 5000 that is limited in so far as it does not retain a breath specimen for later confirmation or independent analysis, and has even elected not to maintain a permanent electronic record of all tests for inspection or analysis. See *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2718 (2011) (noting New Mexico’s policy of preserving breath samples, and how this serves to protect the confrontation rights of the accused).

11.

Furthermore, at trial, the jury or finder of fact may be instructed “that breath alcohol measuring equipment approved by the State Crime Lab is considered accurate if properly operated.” See *Johnson v. State*, 231 Ga. App. 215, 216, 498 S.E.2d 778, 779 (1998).

12.

As a result, the Defendant could be confronted with evidence produced by a machine that the finder of fact may assume is accurate, without any means whatsoever to meaningfully challenge the reliability of the method used by the machine to arrive at that result.

13.

Through this statutory and regulatory scheme, the State has denied Defendant his/her constitutional rights to confront and cross-examine the “witness” and evidence against Defendant, and has also denied Defendant Due Process, fundamental fairness and the right to a fair trial. All of these are rights guaranteed by the United States Constitution and the Constitution of the State of Georgia.

14.

This Honorable Court, relying upon the holdings of the Supreme Court of Georgia in *Davenport and Yeary*, issued a certificate of materiality on January 3, 2012, directing the Defendant to exercise reasonably necessary measures to acquire the source code. The Defendant complied, only to find that the Kentucky trial court rejected this Honorable Court’s certificate of materiality as “defective.”

15.

The Kentucky court did not give the Defendant a hearing on the necessity or materiality of the source code at all, despite the fact that such a hearing was mandated under the Uniform Act. Nor did the Kentucky court comply with Kentucky case law, which holds that Kentucky courts may not overrule the decisions of foreign courts as error, and that in criminal cases, Kentucky courts must apply the law of the forum state.

16.

Subject matter jurisdiction to issue a protective order is not vested in Kentucky courts, whose limited jurisdiction entitles them to make a decision only regarding the necessity and materiality of the evidence requested. Rather, it is vested in the trial court, as established by Kentucky law.

17.

This same circuit court has determined uniformly that all certificates of materiality, received from all other states, are “defective.” Hundreds have been received, and despite this, not one has yet, to the Defendant’s knowledge, passed muster to actually get the hearing of necessity and materiality to which petitioners are entitled under the Uniform Act to Secure the Attendance of Witnesses from Within or Without the State (Uniform Act). See OCGA § 24-10-90 et seq.

18.

As a result, the Defendant is now expected to go forward to trial without evidence that this Honorable Court has already ruled to be material to his case.

ARGUMENT AND CITATION OF AUTHORITY

PROCEDURAL DUE PROCESS VIOLATION

Among the rights given to a party under the Uniform Act is the right to a hearing to determine whether the evidence requested is necessary and material in the issuing state. Upon presentation of a certificate of materiality, the Kentucky judge “shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.” See KRS § 421.24 (Kentucky’s version of the Uniform Act). As noted above, the Kentucky judge ruled that the certificate of materiality was defective without making any determination as to whether the evidence requested was necessary and material to the Defendant’s case.

Procedural due process is required in order to deprive one of the “interests encompassed by the Fourteenth Amendment’s protection of liberty and property.” Board of Regents of State Colleges v. Roth, 408 U.S.

564, 569-570, 92 S.Ct. 2701 (1972). “When protected interests are implicated, the right to some kind of prior hearing is paramount.” *Id.* “While ‘(m)any controversies have raged about . . . the Due Process Clause,’ . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford ‘notice and opportunity for hearing appropriate to the nature of the case’ before the termination becomes effective.” *Bell v. Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591 (1971). The hearing required by the Due Process Clause must be “meaningful” (*Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)) and “appropriate to the nature of the case” (*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950)). Through the Uniform Act, the State of Georgia, along with its fellow enacting states, has extended a defendant’s right to compulsory process outside of the jurisdictional limits of Georgia.

Here, the Defendant has been flatly denied his/her right to a hearing by the Kentucky court. This is a serious affront to his/her constitutional rights for several reasons. First, the Kentucky court acted outside its subject matter jurisdiction under the Uniform Act (which is solely to determine necessity and materiality), when it attempted to impose a protective order on a Georgia proceeding. “[A] discovery request that would require the “disclosure of a trade secret [...] clearly justifies the entry of a protective order,” though granting such an order would fall within the discretion of the trial court.” *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803 (Ky. 2004) (emphasis added). A court need not grant full faith and credit to a judgment rendered in another state unless that state had jurisdiction to render the judgment. See *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n.*, 455 U.S. 691, 705, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982).

Second, the Kentucky court failed to grant full faith and credit to this Honorable Court’s determination that the source code was material when it

ruled that the certificate of materiality as issued was defective. See *Dillingham v. Commonwealth*, 995 S.W. 2d 377, 382 (Ky. 1999) (holding that a Kentucky court may not “consider as error ... the actions of a court from a foreign jurisdiction”).

Finally, even assuming that the Kentucky court was justified in determining that the certificate of materiality as written by this Honorable Court was “defective,” the Defendant in this case took no part in drafting that order. To hold the Defendant responsible for the drafting of an apparently defective certificate of materiality and the success or failure thereof would be to deny his/her procedural due process rights on the basis of this Honorable Court’s action.

In this case, if the Defendant’s trial is not postponed, he/she will have been denied his/her full procedural due process rights required under the process clause of the Fourteenth Amendment of the Constitution of the United States, and similar rights guaranteed under the Constitution of the State of Georgia, and Georgia statutory law.

COMPULSORY PROCESS VIOLATION

(All arguments *supra* are incorporated by reference).

There is, since 1974, no longer any doubt that the trial court, in a criminal case, has the power, indeed the “manifest duty,” to marshal the evidence and vindicate the constitutional guarantees of a criminal defendant's rights “to be confronted with the witnesses against him” and “to have compulsory process for obtaining witnesses in his favor,” against an executive suppression, even by the President of the United States.

Buford v. State, 158 Ga. App. 763, 767 (1981), citing *United States v. Nixon* 418 U.S. 683 (1974).

“The Sixth Amendment to the United States Constitution and Article I, Sec. I, Par. XIV of the Georgia Constitution guarantee a Georgia criminal defendant the right to compulsory process for obtaining witnesses in his defense. “[C]riminal defendants have the right to the government's

assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).” See *Yeary v. State*, 289 Ga. 394, 395, 711 S.E.2d 694, 696 (2011).

The Compulsory Process Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment.” *Washington v. Texas*, 388 U.S. 14, 17-19 (1967).

The Defendant seeks to have access to the source code and related electronic files identified in the certificate of materiality at trial and prior to trial. The two cases that deal most directly with the rights of discovery of evidence prior to trial created by compulsory process are *United States v. Nixon* 418 U.S. 683 (1974). (No. 14692D) and *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807). In *Nixon*, the Court unanimously upheld an order requiring President Nixon to produce tapes of his personal conversations with the Watergate defendants. The defendants' right of discovery was grounded at least partly in the Compulsory Process Clause: “The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right . . . ‘to have compulsory process for obtaining witnesses in his favor.” *Nixon*, 418 U.S. at 711.

The second significant case is *United States v. Burr*. Although *Burr* emerged from a federal court in Virginia, and not the Supreme Court, it was written by the future Chief Justice Marshall and has been cited in a later Supreme Court opinion as “the first and most celebrated analysis” of the Compulsory Process Clause. *Ritchie*, 480 U.S. at 55. *Burr* was on trial for treason and sought discovery of a letter from General Wilkinson to President Jefferson. *Burr* wanted the letter because President Jefferson claimed to rely upon it when he announced to Congress that he believed *Burr* to be guilty of treason. *Burr*, 25 F. Cas. at 32. President Jefferson's main objection to the subpoena duces tecum was that it arrived

prematurely, before the grand jury indicted Burr. *Id.* In rejecting this argument, Marshall explicitly relied upon the Compulsory Process Clause as a source of pretrial discovery:

“Upon immemorial usage, then, and upon what is deemed a sound construction of the constitution and law of the land, the court is of [the] opinion that any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses.” *Id.* at 33. The Compulsory Process Clause is not the only right for which the courts have recognized pretrial implications. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court emphasized the importance of pretrial preparation, describing the time from arraignment until the beginning of trial as perhaps the “most critical period of the proceedings against these defendants.” *Id.* at 57. Because the defendants in *Powell* were without counsel during the pretrial period defined by the Court, their Sixth Amendment right to counsel was abrogated. *Id.*

The cases interpreting the Compulsory Process Clause make clear that the public policy of that Clause mandates disclosure of the source code. The Supreme Court has written that “[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . to the jury so it may decide where the truth lies.” *Washington v. Texas*, 388 U.S. 14, 19 (1967). Here the Court identified two interrelated themes in Compulsory Process Clause jurisprudence: adversariness and truth seeking. Access to the source code and related electronic files serves both those goals. It enables defendants to challenge the evidence against them, and it enables the court to understand better the value of breath test evidence. Denial of access to this evidence violates the Sixth Amendment of the Constitution of the United States, and similar rights guaranteed under the Constitution of the State of Georgia, and Georgia statutory law.

DUE PROCESS VIOLATION

(All arguments *supra* are incorporated by reference).

The State should not be permitted to absolve itself of its constitutional duty to disclose evidence simply by delegating law enforcement activities to a private corporation. As discussed below, CMI is a state actor engaging in a law enforcement activity on behalf of the state. The State should not be permitted to sit idly by when its chosen actor refuses to produce evidence material to the charges in a Defendant's case.

In *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires the prosecutor to disclose evidence where the evidence is favorable to the defendant and "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The subsequent interpretations of *Brady* have shown that its requirements extend to the disclosure of relevant evidence in the possession of the prosecutor and third parties.

In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the Supreme Court reversed a capital murder conviction for failure to disclose evidence even though that evidence was not in the possession of the prosecutor. *Id.* at 438. The exculpatory evidence in question in *Kyles* was in the possession of the police. Instead of simply extending the *Brady* guarantee of disclosure to include information held by police officers, the Court went further:

[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Id. at 437-38 (citations omitted) (emphasis added).

Under Kyles, the first question of a Brady analysis becomes: is the holder of the information requested by the defense “acting on the government's behalf in the case?”

The question cannot be answered without a brief review of the history of development of the relationship between the State of Georgia and CMI, Inc. Georgia employs a breath testing unit known as the Intoxilyzer 5000. The Intoxilyzer 5000 is produced by CMI, Inc., a Kentucky corporation. CMI, Inc., was approved as the sole provider of forensic breath testing devices for the State of Georgia pursuant to the Administrative Procedures Act, which can be found in GBI Rule 92-3. The Intoxilyzer 5000 was selected and approved by Mr. _____ Panter, who was then the GBI-DOFS Implied Consent Manager, on July 6, 1994.¹ See, Chris Tilson, Source Code: Decoding the Rhetoric (forthcoming 2011) (manuscript at 6). Since January 1, 1995, CMI, Inc., has enjoyed an exclusive agreement with the State of Georgia, whereby it is the sole provider of evidential breath testing devices for the State of Georgia.² See, Chris Tilson, Source Code: Decoding the Rhetoric (forthcoming 2011)(manuscript at 6).

CMI, Inc., produces a specific model of the Intoxilyzer 5000 for the State of Georgia. The Intoxilyzer 5000 designed and developed for the State of Georgia is sold only in the State of Georgia.¹ Members of the public cannot purchase for an Intoxilyzer 5000 from CMI, Inc. Each breath testing device sold in the State of Georgia is equipped with a software chip developed and designed by CMI, Inc., specifically for the State of Georgia. Numerous revisions of the software loaded onto the Intoxilyzer 5000 by CMI, Inc., have occurred during the use of the device in the State of Georgia. The State of Georgia elected not to contract with CMI, Inc., for an ownership interest in the source code. Other states, such as the State of Minnesota, have chosen to contract for an ownership interest in the source code.²

CMI, Inc., has enjoyed a long and profitable relationship with the State of Georgia. All Georgia counties, municipalities, and university law enforcement agencies must purchase breath testing devices from CMI, Inc. CMI, Inc. has a specific salesperson, Ms. _____ Hagan,

¹ See, Chris Tilson, Source Code: Decoding the Rhetoric (forthcoming 2011)(manuscript at 9).

² See, In re Commissioner of Public Safety v. Underdahl, 735 N.W.2d 706 (2007).

designated for the State of Georgia. CMI, Inc., is the only authorized service and repair agent for Intoxilyzer 5000 breath testing devices in the State of Georgia.

CMI, Inc. and the State of Georgia have jointly fought the ability of criminal defendants to obtain access to the source code. Many prosecutors disavow any interest in limiting a defendant's access to the source code. However, the State of Georgia's position, along with the Georgia Bureau of Investigation, seems to be that allowing criminal defendant's access to the evidence used against them would harm the State's interests. The GBI, by and through the Implied Consent Supervisor, Mr. _____ Tillson, has repeatedly sought to hinder defendants' access to the source code.

Any claim that CMI, Inc., developed its Intoxilyzer line of forensic breath alcohol testing units in an entirely private sphere, independent of government involvement, is brought into question by the history of its development. The government, in the form of the GBI, established the parameters for the Intoxilyzer 5000 and specified the requirements for the tests to be performed on the Intoxilyzer instruments within the State of Georgia.

It is imperative to consider the role of the breath testing instrument manufacturers in the larger context of their role in the criminal justice system. Under state action law, it is clear that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State." *Evans v. Newton*, 382 U.S. 296, 299, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966). Under this rule, private individuals or corporations become agencies or

instrumentalities of the state if they run elections,³ manage a company town,⁴ or maintain a municipal park.⁵

Subsequent to *Newton*, the Court increasingly narrowed the class of private entities considered agencies of the government, and the Court began to emphasize that a government agent exercised powers traditionally and exclusively reserved to the government. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158-62 (1978) (finding that the “settlement of disputes between debtors and creditors is not traditionally an exclusive public function”); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351-52 (1974) (holding that utility companies are not subject to the public functions doctrine because traditionally the services they provide have not been provided exclusively by the state).

Even under this narrowed test, the performance of scientific testing in the course of police investigation is an activity traditionally and exclusively reserved to the government. No area is more firmly within the exclusive and traditional sphere of activity of the state than law enforcement.⁶ *West v. Atkins*, 487 U.S. 42 (1988), a case involving prisons, is particularly instructive. In *West*, the Court held that a private physician under contract with North Carolina to provide medical services at a state prison hospital on

³ See *Terry v. Adams*, 345 U.S. 461, 466 (1953) (holding that private entities could not run primary elections so as to exclude African Americans from participating); *Smith v. Allwright*, 321 U.S. 649, 663-64 (1944) (holding that a political party cannot exclude on the basis of race); *Nixon v. Condon*, 286 U.S. 73, 89 (1932) (noting that a political party acts as the state's delegate in running elections).

⁴ See *Marsh v. Alabama*, 326 U.S. 501, 509 (preventing the owner of a company town from infringing upon the First Amendment rights of leafleteers).

⁵ See *Evans v. Newton*, 382 U.S. 296, 299 (1966) (preventing a golf course owned and operated by a municipal government from discriminating on the basis of race).

⁶ The Supreme Court has recognized the prominence of the government's role in judicial processes generally, commenting that “[f]ew places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it.” *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991). Thus, private actors using courtroom procedures, such as jury selection, may not discriminate on the basis of race in violation of the Equal Protection Clause. *Id.*

a part-time basis was a state actor.⁷ 487 U.S. at 54. The Court noted that because provision of medical care to prisoners was fundamentally a governmental activity, the provider of that care is a state actor. *Id.* Moreover, this analysis is not altered by the fact that respondent was paid by contract and was not on the state payroll, nor by the fact that respondent was not required to work exclusively for the prison. *Id.* at 56-57.

Like the prison hospital, the producer and designer of a breath testing instrument with specific programming parameters for a State is performing a law enforcement function exclusively associated with the government. Corporations that work _____ in _____ with those laboratories by providing the technology and know-how to perform DNA testing are, like the doctor in *West*, performing a fundamentally governmental “function within the state system.” *Id.* at 55. Further, the work CMI does in training State prosecutors how to proceed in court against criminal defendants is firmly a government function. As a result, those corporations must be considered to be “acting on the government's behalf in the case” within the meaning of *Brady*. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

Several lower courts have held that private corporations were acting on behalf of the government when they perform DNA testing on behalf of law enforcement. For example, in *People v. Davis*, 601 N.Y.S.2d 174 (App. Div. 1993), a conviction was reversed because Lifecodes, a private laboratory, refused to disclose statistical standards used in determining the probability of a “match.” *Id.* at 175. The court described the evidence as “‘material either to guilt or punishment’” and cited to *Brady*. *Id.*, quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The court then held that, “[t]he rule is plain that where the prosecution is permitted to call a witness, expert or not, who testifies as to a fact in issue or a conclusion to be drawn, the defendant is entitled to examine the underlying data, the basis for the

⁷ However, actors within the judicial system are not considered state actors where their relationship with the government is “adversarial.” *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981) (holding that public defenders are not state actors while representing criminal defendants because the relation between the defender and the government is adversarial in nature). In the case of private kit makers and forensic laboratories, the relationship is entirely commercial. The State of Georgia buy their breath testing equipment from CMI. As a result, the relationship between the two is not best described as “adversarial.”

testimony” or else the defendant suffers undue prejudice. *Id.* (citations omitted).

The Minnesota Supreme Court also has held that due process rights are implicated where information relating to testing is not revealed by private laboratories. *State v. Schwartz*, 447 N.W.2d 422, 427 (Minn. 1989) (“The fair trial and due process rights are implicated when data relied upon by a laboratory in performing tests are not available to the opposing party for review and cross examination”).

Given the historical and state action arguments suggesting that forensic breath testing instruments are acting on behalf of the government, what is the prosecution's duty with respect to Brady evidence held by them? In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court framed the prosecutor's duty in the following terms:

[N]o one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that “procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.”

Id. at 438, quoting, *Giglio v. United States*, 405 U.S. 150, 154 (1972).

The Supreme Court thus insisted that the prosecutor “establish regulations and procedures” for obtaining information from other law enforcement agencies, which, as was established above, should be understood to include private forensic technology companies that participate in testing.⁸

But the Supreme Court seemed to say more than that the prosecutor has a duty to search for the relevant information; the Supreme Court assumed that these regulations and procedures would enable the

⁸ See *United States v. Santiago*, 46 F.3d 885, 893 (9th Cir. 1995) (holding that the prosecutor is obliged to search prison, probation, and parole files); *United States v. Brooks*, 966 F.2d 1500, 1502 (D.C. Cir. 1992) (describing the prosecution's duty to search for evidence even when that evidence is “in the possession of agencies other than the prosecutor's office”). In *Brooks*, the court noted that “[t]he cases finding a duty to search have involved files maintained by branches of government ‘closely aligned with the prosecution.’” *Id.* at 1503 (quoting *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985)).

prosecutor to discover the information. As a result, the Supreme Court created no room for failure. The core inquiry made by a Court hearing a Brady claim does not relate to the prosecutor's conduct; it relates to the "character of the evidence that [the prosecutor] has withheld." *Brown v. French*, 147 F.3d 307, 312 (4th Cir. 1998) (holding that the reason for failure to disclose is insignificant where the evidence sought was not favorable to the defendant, because the character of the evidence is the primary consideration in establishing a Brady violation).

Brady requires that evidence be disclosed where it is "material either to guilt or punishment." The Supreme Court has identified two concerns underlying materiality of evidence: whether the evidence could have changed the outcome of the trial, and whether the court could make an accurate and fair ruling without the evidence.

The Court described the first concern in *United States v. Bagley*, 473 U.S. 667 (1985), where it wrote that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682. Where information sought by the defense could result in evidence against the defendant being ruled inadmissible, that information usually will have "a reasonable probability" of altering the outcome of the case. In *United States v. Yee*, 129 F.R.D. 629 (N.D. Ohio 1990), the district court addressed the materiality of data that challenges the admissibility of DNA evidence:

If [defendants] prevail in their challenge to the government's proffer of that evidence, the likelihood of conviction will be diminished substantially, if not eliminated. The opportunity for the defendants to make an effective challenge, and, more importantly, the ability of this court to resolve the issue of admissibility fairly, depend on prehearing access by defense counsel and their experts to the materials that are the subject of their discovery request. *Id.* at 636.

Although the probability that the exclusion of DNA evidence would have changed the course of the trial will vary from case to case, there are certainly many cases in which the prosecution relies heavily on DNA evidence. In most cases in which the evidence is present, it forms a strong part of the prosecution's case-in-chief. As a result, information that bears upon the admissibility of that evidence must be considered capable of altering the outcome of the trial.

The Yee court also referred to the second concern underlying the materiality requirement: the ability of courts to find the truth. The Court's most recent word on the subject came in *Kyles v. Whitley*, 514 U.S. 419 (1995), where the Court emphasized, "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434. The possibility of a fair trial is certainly reduced where information related to the value of scientific evidence is withheld from the defense. In its order granting discovery to the defense, the Yee court wrote, "The precondition to reaching a correct decision concerning the admissibility of the DNA evidence in this case is . . . a record that is as complete and clear as is reasonably possible." 129 F.R.D. at 631. Where creating a complete and clear record requires the prosecution to provide evidence in the possession of law enforcement, under *Brady* the prosecution must do so.

Finally, requiring the prosecutor to obtain this information from the sellers of the breath testing instruments serves the fundamental goal of due process: ensuring a fair trial. Requiring disclosure is the only way to ensure that private corporations do not play too great a role in the administration of justice. In *Kyles* the Court wrote: "any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." 514 U.S. at 438. The role of the courts as the arbiters of

the government's obligation to ensure fair trials is equally imperiled by private corporations.

The denial of Defendant's due process rights violates the Constitution of the United States, as well as rights guaranteed under the Constitution of the State of Georgia and Georgia statutory law.

CONFRONTATION CLAUSE VIOLATION

(All arguments *supra* are incorporated by reference).

When a criminal defendant is accused of DUI *per se* under Georgia law, the witness against him is not the officer who took his breath sample. Rather "in reality the 'witness' against the defendant, the source of the crucial and incriminating evidence, is not the analyst, but the machine itself." *Brown v. State*, 268 Ga. 76, 79 485 S.E.2d 486, 488 (1997). Merely reading the Intoxilyzer 5000 slip to the jury does not satisfy the requirements of the Confrontation Clause. As the Supreme Court put it in *Davis v. Alaska* 415 U.S. 308, 94 S.Ct. 1105 (1974) (holding that defendant was entitled to present jury with evidence of witness bias):

The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.'

Id. at 316. CMI's response to these requests has been one of extreme reticence. Yet, the State's desire that [CMI] fulfill [its] public duty to testify free from embarrassment and with [its] reputation unblemished must fall before the right of [the defendant] to seek out the truth in the process of defending himself. *Id.* at 319.

And yet, contrary to this constitutional policy, within Georgia:

(1) evidence usually determinative of the defendant's guilt (e.g., blood alcohol content in a *per se* DUI prosecution) is tested and reported, not by forensic experts who testify and face cross-examination on the reliability of their methods and the accuracy of their results, but rather by a machine (e.g., the Intoxilyzer 5000) that takes in a specimen from the defendant and, through internal mechanisms and computer code, generates a test report; (2) the machine's computer

code is unavailable to the defendant through discovery or compulsory process because the State avoids possessing it in Georgia; (3) the machine's test result is admissible at trial through a witness who can say that he was qualified to operate the machine and it operated as designed (see, e.g., OCGA § 40-6-392(a)), but who has no knowledge about whether the machine was in fact designed to produce reliable and accurate results under the circumstances presented; and (4) the machine uses up the specimen, with nothing maintained for later confirmation or independent testing.

Davenport v. State, 289 Ga. 399, 404-5, 711 S.E.2d 699, 703-4 (2011) (J., Nahmias, concurring).

The Defendant here seeks nothing more extreme than meaningful confrontation of the evidence against him/her, not merely to gaze upon the results of the witness against him/her, but in fact to determine if the machine has made its determinations accurately. "This principle is particularly important with witnesses who have substantial incentives to cooperate with the government," as in the case of a government contractor who would likely lose its lucrative monopoly if flaws were found within its machine. See Manley v. State, 287 Ga. 338, 340. 698 S.E.2d 301, 303 (2010).

"A citizen cannot shirk his duty, no matter how inconvenienced thereby, to testify in criminal proceedings and grand jury investigations in a State where he is found. There is no constitutional provision granting him relief from this obligation to testify even though he must travel to another State to do so." People of State of N. Y. v. O'Neill, 359 U.S. 1, 79 S.Ct. 564 (1959) (holding Uniform Act constitutional).

As a result, going forward to trial without evidence which this Honorable Court has already found to be material would deny the Defendant his/her right to meaningfully confront the evidence against him/her under the Constitution of the United States, the Constitution of the State of Georgia, and Georgia statutory law.

FAIR TRIAL VIOLATION

(All arguments supra are incorporated by reference).

As stated, *supra*, moving forward to trial without evidence which this Honorable Court has already deemed to be material would deny the Defendant several important constitutional rights. “Both the defendant and the state are entitled to a fair trial designed to end in a just judgment. The trial court has the duty to ensure a fair trial to all parties in a case.” *Putnam v. State*, 245 Ga.App. 95, 537 S.E.2d 384 (2000).

This Honorable Court should not proceed to trial when:

1. The Defendant has complied with the terms of its order by taking all necessary steps to procure the source code.
2. The State of Kentucky has denied the Defendant the hearing to which he/she is constitutionally entitled on the basis that it took issue with this Honorable Court’s certificate of materiality.
3. That ruling overstepped the bounds of the Kentucky court’s subject matter jurisdiction under the Uniform Act and failed to give proper deference to this Honorable Court’s ruling.
4. CMI, acting as an arm of the State, is affirmatively trying to prevent material evidence from being heard at trial.
5. A fair trial could be procured simply by delaying this trial until the appellate process in Kentucky has been properly pursued to determine whether the Kentucky trial court was correct in determining that this Honorable Court’s certificate of materiality was defective.

As a result, going forward to trial without evidence which this Honorable Court has already found to be material would deny the Defendant his right to all of the rights listed above in each section of this brief. By denying Defendant any and all of those rights guaranteed to Defendant, it violates Defendant’s right to a fair trial under the Constitution of the United States, the Constitution of the State of Georgia, and Georgia statutory law.

WHEREFORE, the Defendant respectfully prays that either the DUI – per se case against him/her be dismissed, or that the results of the state-

administered breath test be suppressed, or in the alternative, the case be continued until the appellate process in Kentucky has been exhausted.

Respectfully Submitted, this 12th day of July, 2013.

D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

v.

_____, :

Defendant.

:
:
:
:
:
:

CASE NO. _____

CERTIFICATE OF SERVICE

I hereby certify that I served a true and accurate copy of the foregoing motion to exclude or suppress the state-administered breath test results, or continue trial until the appeals process in Kentucky has been exhausted in this case to the Cobb County Solicitor's Office by _____ delivery of same.

Respectfully Submitted, this 12th day of July, 2013.

D. Benjamin Sessions
State Bar No. 141280
Attorney for Defendant