

STATE OF GEORGIA, :
 :
v. : Case No. _____
 : Date of Test: _____
_____, : Serial No.: _____
 :
Defendant. :

Defendant filed a motion seeking to obtain a subpoena duces tecum pursuant to O.C.G.A. § 24-10-90 et seq. for issuance of a court certification of materiality for an out-of-state witness [CMI, Inc., manufacturer of the Intoxilyzer 5000 and its “source code”] from the State of Kentucky to produce the full electronic (digital) version of the computer source code and related computer programs (assembly tools, decompilers, and computer language software) in the exact configuration the above-referenced device was programmed on the date of this Intoxilyzer 5000 breath testing (as set forth above) as installed and operated in the Intoxilyzer 5000 instrument used to test Defendant. The State opposed Defendant’s motion, claiming that the source code of the Intoxilyzer 5000 is not material to the per se charge (O.C.G.A. § 40-6-391(a)(5)) that is pending against the Defendant. On December 13, 2011, the Court held a hearing on this matter.

The Court has heard ample evidence of the materiality of the source code from expert witness Thomas E. _____, Jr., at previous motion hearings, and the State has not called any computer experts to contradict that evidence. Mr. _____'s affidavit in this case previously filed by the Defendant, and said affidavit was accepted and considered by this Honorable

Court. The State stipulated that it does not possess the Intoxilyzer 5000 source code for Georgia's sole forensic device used in breath testing of accused DUI suspects.

Accordingly, the Court finds that, based on recent rulings of the Georgia Supreme Court in Davenport v. State, 289 Ga. 399, 404, 711 S.E.2d 699 (Ga. 2011)(holding that a "material witness" is "a witness who can testify about matters having some logical connection with the consequential facts, especially if few others, if any, know about these matters."); Yeary v. State, 289 Ga. 394 (Ga. 2011), as well as Wollesen v. State, 242 Ga. App. 317 (Ga. App. 2011)(holding that a certificate of materiality is prima facie sufficient if judge is satisfied with materiality, even without written basis for decision) the Defendant has made an adequate showing that the source code is material to this case.

WHEREFORE, it is hereby ORDERED that the Defendant's request for the issuance of a certificate of materiality in order to seek an out-of-state subpoena duces tecum pursuant to CMI, Inc., of Owensboro, Kentucky, requesting the digital version of the Intoxilyzer 5000 (as identified in the caption and other provisions of this Order) computer source code is reasonable and relevant to material issues in dispute in the pending prosecution against Defendant. Defendant is hereby directed to prepare and file the necessary documents called for under O.C.G.A. §24-10-90 et seq., relating to the issuance of out-of-state subpoenas under Title 24 of the Georgia Evidence Code, within thirty (30) days from the date of this Order. The Order shall enumerate what specific digital software and assembly tools and decompilers related to the source code, are

needed to allow sorting and full analysis of the Intoxilyzer 5000 device's computer software, as configured in Georgia on the date of Defendant's arrest. Defendant's experts must have full digital data in order to fully sort through and test the program of the Intoxilyzer 5000 (as used and configured) in this case.

Based upon the foregoing, the Defendant's request for a subpoena duces tecum to out-of-state witness, CMI, Inc., is hereby GRANTED, and Defendant shall be authorized to seek an out-of-state subpoena for witnesses and evidence from CMI, Inc., for the Intoxilyzer 5000 breath test machine, as used and configured on the Intoxilyzer 5000 breath test machine, as identified in the caption of this case. Defendant will prepare and file the required documents in Kentucky within 30 days of this Order, for presentation to the appropriate Court in Kentucky, for ultimate determination as to whether said subpoenas shall be issued.

SO ORDERED, this ____ day of _____, 2012.

The Honorable Kathryn J. Tanksley
Judge, State Court of Cobb County

Original: Clerk of State Court

cc: Office of the Solicitor-General for Cobb County State Court
D. Benjamin Sessions, Attorney for the Defendant