

SULLIVAN, MOUNTJOY, STAINBACK & MILLER PSC

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Ronald M. Sullivan

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April 6, 2007

Andrew S. Garvis, Esq.
Richard F. Koch, Esq.
Koch & Garvis, L.L.C.
Lake Calhoun Professional Bldg.
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408

Re: Joseph Kane vs. Commissioner of Public Safety
Court File No. 06-23021
Susan Lynn Quartstad vs. Commissioner of Public Safety
Court File No. 27-CV-07-3000

Gentlemen:

Your respective letters of March 16 and March 28, addressed to CMI, have been forwarded to this firm for a response. CMI, Inc., is a Kentucky corporation, and has no offices, employees, or documents in the State of Minnesota. It is not a party to the respective cases above pending in the Minnesota courts. CMI is a vendor of a product, the Intoxilyzer 5000, sold in Minnesota and more than 40 other states in the United States.

I am not aware of any authority, other than the Uniform Act (M.S.A. Section 634.07) which authorizes a Minnesota Court to attempt to obtain testimony or documents from an out-of-state witness. That statute would require you to file a motion, and present testimony, to show that a CMI witness or documents are somehow "material" to some claim or defense either of you are making in the above cases. Cases construing the Uniform Act deem the materiality requirement to mean that the information requested from the out-of-state witness is exculpatory, or favorable, to the defendant. In the unlikely event that a Minnesota Court somehow determined "materiality" to exist, and sent a duly authenticated "certificate" to a court here in Daviess County, Kentucky, CMI would have the right to a separate hearing and an independent determination of any findings by a Minnesota Court.

Further, in terms of the letter of March 16, from Mr. Koch, the date and time set for the return is the calendar

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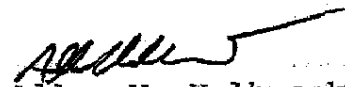
Andrew S. Garvis, Esq.
Richard F. Koch, Esq.
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Page 2

year 2007 in the letter from Mr. Garvis, the attached subpoena is for May 14, 2007. Both of you seek information from CMI, set forth in a laundry list that includes the exact same 13 requested items. Some of the requests are simply incomprehensible ("written critical design review for the software"). Others would require a CMI engineer to review and spend countless hours in order to determine applicability at all, and additional untold hours, perhaps days, to research records and files. Other requests are, apparently, for information within the possession of the state, such as documentation of any "repairs" performed on a particular instrument.

Finally, the list includes the software for the Intoxilyzer 5000, which consists of the source code itself, a trade secret of CMI. The source code consists of approximately 50,000 lines of computer code, written in assembly language, which would no doubt take you, or any expert that you might hire, weeks to review if they could read the language at all. CMI has not produced the source code to any of its customers in any state in which it does business.

In short, your list of documents to be produced is obviously intended as a complete fishing expedition, and one of astounding over-breadth, and therefore lacking in good faith in my opinion. CMI respectfully declines to comply with your request.

Sincerely yours,



Allen W. Holbrook

AWH/ej

cc: Jim Haase, Esq.
CMI, Inc.

Expert Affidavit on Software Installed in State of Minnesota Intoxilyzer Machines

By Harley R. Myler, Ph.D., P.E.

Harley Myler being duly sworn, hereby deposes and says:

A. My address is: 2495 Evalon Street in the Oaks Historic District of Beaumont, Texas. I am employed at Lamar University as a Professor and Chair of Electrical Engineering and have been with Lamar since 2001. Previously, I was a professor of at the University of Central Florida in Orlando. My professional resume is attached and it outlines my professional qualifications as an expert in electrical and computer engineering. My academic *Curriculum Vitae* is available for download from my university website [1]. I have over twenty years of experience in teaching electrical and computer engineering topics at the senior and graduate collegiate levels. I have been tenured as an expert witness in numerous courts across many jurisdictions, some of which are listed in my resume.

B. In 1988 I was asked to review issues and render an opinion concerning breathalyzer machines in use in Orange County, Florida at the request of defendants who had been tested by said machines where evidentiary materials had been produced to be used in court hearings regarding their alleged state of alcohol intoxication while operating motor vehicles. The machines in question were Intoxilyzer 5000 (I5000) devices as approved for evidentiary use by the State of Florida. My opinion was requested since I have both industrial and academic experience in embedded systems, which is the class of machines that the I5000 belongs to, and specific experience with the Zilog Z80 microprocessor software and hardware, which is the CPU of the I5000. I also have a background in general chemistry since I hold a bachelor of science in that field.

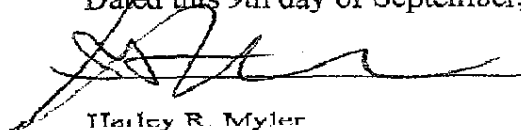
C. I am submitting this Affidavit on behalf of the clients of the Koch and Garvis, LLC firm in Minneapolis, Minnesota who have retained me as a consulting expert.

D. In formulating my opinion, I have reviewed relevant documents and reports that were provided by my clients specific to the State of Minnesota Intoxilyzer 5000 serial #68-010157.

E. My opinion, based on a reasonable degree of scientific and engineering certainty, is as follows:

At issue is the methodology of how the I5000 machine determines the value of breath alcohol concentration that it outputs as evidence. There is some debate on how this process specifically occurs and the manufacturer has described the approach in narrative form in various documents such as the operator and service manuals, but the exact process is not public. In my opinion, the exact process can only be determined by examining the source code of the software program running in the instrument. A marketing feature of the I5000 is it's ability to be fitted with software customized to any specialized requirements that the owner may have. In the case of the Minnesota machines, the software has been custom programmed to accommodate state requirements [2, p. 57]. The Intoxilyzer 5000 is a complex computer-driven device and, as such, is exclusively dependent on the software installed for effective operation. A statement from the marketing brochure of an I5000 model states: *Every aspect of operation, from displaying and printing of information to the basic electrical and mechanical functions, is micro-computer controlled*[3]. What this means is that should the control program as defined by the software be removed, the device will no

Dated this 9th day of September, 2006, at Beaumont, Texas.

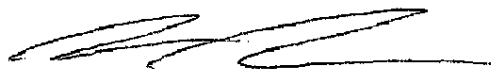
 Signature
Harley R. Myler

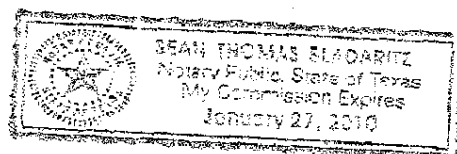
State of Texas

County of Jefferson

Subscribed and sworn to before me this 9th day of September, 2006.

Notary Public





(resume attached)

References Cited:

1. Myler, H., *Curriculum Vitae*, <http://ec.lamar.edu/myler/MylerCV.pdf>, updated February 2006.
2. Hardin, G., K. Kierzek, B. Nelson, P. Pulju, H. Weatherspoon, Intoxilyzer 5000 Basic Operator Breath Test Course Manual, Minnesota Department of Public Safety, 2nd Edition, v. 3.1, November 10th, 2005.
3. Intoxilyzer 5000EN brochure, CMI, Inc.
4. Intoxilyzer 5000 Maintenance and Calibration Records, Minnesota Bureau of Criminal Apprehension Laboratory, Serial #68-010157, August 29th, 2006, pp. 1-39.
5. State v. Muldowny, Florida 5th DCA, Case No. 5D02-4035, February 27, 2004.

**Harley R. Myler, Ph.D., P.E.
2495 Evalon Street
Historic Oaks District
Beaumont, Texas 77710**

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Professional Preparation

Ph.D., Electrical Engineering, New Mexico State University, Las Cruces, NM, 1985.

M.S., Electrical Engineering, New Mexico State University, Las Cruces, NM, 1981.

B.S., Chemistry & Electrical Engineering (double-major), Virginia Military Institute, Lexington, VA, 1975.

Industrial Experience

Missile Systems Officer, CPT, US Army Air Defense Artillery

Digital Design Engineer, General Instrument (El Paso, Texas)

Digital Systems Engineer, Space Communications Company (Las Cruces, NM)

Systems Engineer, Septor, Inc. (El Paso, Texas)

Staff Engineer, Martin-Marietta Orlando Aerospace (Orlando, Florida)

President, I-Math Inc. (Orlando, Florida)

Patents & Copyrights

Method for Measuring and Analyzing Digital Video Quality, 2003, U.S. Patent #6577764.

Trophorometer, 1991, U.S. Patent #5,094,521.

Automated Knowledge Generation©1989, University of Central Florida.

UCFImage©1998, University of Central Florida.

simANNs©1989, ANNview©1991, parsimANNs©1991, University of Central Florida.

Professional Organizations and Licenses

Institute of Electrical and Electronics Engineers (IEEE)

East Area Chair, Region V (2006-present)

Senior Member (1991-present)

Chair, Beaumont Section (2002-2006)

Florida Professional Engineer (by examination), Electrical Engineering #40199.

Texas Professional Engineer, Electrical Engineering #94458.

Consulting Experience

Center for Occupational Research and Development (CORD), Waco, Texas.
Frontier Technologies, Inc., Orlando, Florida.
American Academy of Ophthalmology, San Francisco, California.
McDonnell-Douglas Aerospace Co., St. Louis, Missouri.
Martin-Marietta (now Lockheed), Orlando, Florida and Denver, Colorado.
Autonomous Technologies, Inc., Orlando, Florida.
National Instruments, Austin, Texas.
Analog Devices, Norwood, Massachusetts.

Academic Appointments

Professor & Chair, Department of Electrical Engineering, Lamar University, Beaumont, Texas, August 2001-present.
Professor of Electrical Engineering, University of Central Florida, Orlando, Florida, September 1997-August 2001.
Associate Professor of Electrical Engineering, University of Central Florida, Orlando, Florida, September 1991-August 1997.
Assistant Professor of Electrical Engineering, University of Central Florida, Orlando, Florida, September 1986-August 1991.

Recent Publications

Myler, H. R., Bagasrawala, S. A., Narayana, N. V. "OFDM and GSM Protocol Optimization on a Software Defined Radio Parallel Processing Architecture," International Engineering Consortium Annual Review of Communications, Volume 58, 2005.

Guo, J., Van Dyke-Lewis, M. and Myler, H. R., "Gabor Difference Analysis of Digital Video Quality," IEEE Transactions on Broadcasting, 50:3, September 2004, pp. 302-311.

Myler, H. R., Guo, J., and Van Dyke-Lewis, M. "No-Reference Digital Video Quality Analysis," International Engineering Consortium Annual Review of Communications, Volume 57, September 2004.

Myler, H. R., Bagasrawala, S. A., Narayana, N. V., "A Concurrent Processing Approach for Software Defined Radio Baseband Design," 2005 IEEE Region V Technical Conference, Denver, Colorado.

Expert Witness Activity (since 1988)

Stuart Hyman, Attorney, Orlando, Florida—court appearances in Orange, Seminole and Osceola Counties.

Jaeger & Blankner, Orlando, Florida—court appearances in Orange, Seminole and Osceola Counties.

Whited Law Firm, Daytona Beach, Florida—court appearance in Volusia County.

Robert N. Harrison, Venice, Florida—court appearance in Sarasota County, FL.

Halford G. Schuhmacher, Attorney, Marathon, FL— court appearance in Monroe County.

Isaak & Zwirn, Tampa, Florida—court appearance in Hillsborough County.

Public Defender, 6th Judicial Ckt, Clearwater, Florida—court appearance in Pinellas County.

Public Defender, West Palm Beach, Florida—court appearance in Palm Beach County.

Carr & Carr, Naples, Florida—retained for consultation.

Hersch & Talisman, P.A., Coconut Grove, Florida—court appearance in Dade County.

Fox Bowman & Duarte, Bellevue, Washington—retained for consultation.

Ernest Mullins, Attorney, Kissimmee, Florida—court appearance in Osceola County.

Hale and Dorr LLP, Washington, D.C.—retained for consultation.

Fish & Richardson P.C., Wilmington, Delaware—retained for consultation.

Reed C. Cary, Melbourne, Florida—court appearance in Brevard County.

Essen & Essen, Miami, Florida—court appearance in Broward County.

McDonald & Shearer, Lakeland, Florida—court appearance in Polk County.

Cooley Godward, LLP, Palo Alto, California—retained for consultation.

The Mack Law Firm, Englewood, Florida—retained for consultation.

Harold M. Stevens, P.A., Ft. Myers, Florida—court testimony in Lee County.

Berry, Day, McFee and Martin, LLP, Naples, Florida—court testimony in Collier County.

McGuire Law Firm, Tampa, Florida—court testimony in Pinellas County.

Koch and Jarvis, LLC, Minneapolis, Minnesota—retained for consultation.