

**STATE OF MINNESOTA
IN COURT OF APPEALS**

In re Minnesota Intoxilyzer 5000EN
Source Code Litigation in Criminal Cases,

**PETITION FOR
DISCRETIONARY REVIEW**

and

In re Minnesota Intoxilyzer 5000EN
Source Code Litigation in Civil Cases,

MASTER FILE NOS.: 70-CR-09-19749
70-CV-09-19459

and

John Doe, et al.

DATE OF FILING ORDER: March 8, 2011

TO: The Court of Appeals of the State of Minnesota:

INTRODUCTION

Pursuant to Rule 28.02, subdivision 3 of the Rules of Criminal Procedure and Rule 105 of the Rules of Civil Appellate Procedure, the Defendants and Petitioners whose cases were previously consolidated under the omnibus file numbers listed above (“Appellants”) hereby request discretionary review of the March 8, 2011 order issued by the Honorable Jerome B. Abrams of the District Court (attached hereto).¹

Immediate discretionary appeal is necessary to maintain order, consistency, and fairness for all individuals facing criminal and civil penalties where the test results of an Intoxilyzer 5000EN are being used against them. Immediate consolidated appeal will

¹ Appellants did not attach the three exhibits issued with the order because they do not contain anything substantive and their contents are not the subject of the appeal. Exhibit A is a list of implied consent cases that are officially part of the consolidation. Exhibit B is a list of the criminal cases that are officially part of the consolidation. Exhibit C is a sample written consent form that litigants were required to sign before a criminal case could be added to the consolidation. All three exhibits are available on the Minnesota Courts website at <http://www.mncourts.gov/default.aspx?page=3928>.

also preserve the intent and spirit of Minnesota Supreme Court Order A09-2109, which assigned one judge to oversee all pretrial matters concerning the source code of the Intoxilyzer 5000EN. The Respondent parties agree that an immediate consolidated appeal is the appropriate way to proceed and it is our understanding that they will not oppose this request. In fact, the Respondents are expected to file a Petition for Accelerated Review by the Supreme Court pursuant to Rule 118 of the Rules of Civil Appellate Procedure (which Appellants would support).

The alternative to immediate consolidated appeal would be more than 4,000 individual criminal and civil appeals, all coming ripe for appeal at different times after going through individual trials in 69 different counties throughout the State of Minnesota. The appellate courts will be unable to accommodate such a large number of individual appeals, and consolidation would be cumbersome at that point because many cases will have additional unrelated issues to be heard on appeal (trial issues, other omnibus issues, sentencing issues, etc.).

This Petition also includes the identifiable appellant class designated as “John Doe, et al,” defined as individuals with pending or future Intoxilyzer 5000EN cases who want to challenge the results of the Intoxilyzer 5000EN based upon its source code. These individuals are directly affected by the March 8, 2011 order but were not officially added to the consolidated cases because their cases were not ripe to be included before the court’s October 1, 2010 deadline to join the consolidation.²

² Judge Abrams specifically retained jurisdiction over all “pending or new cases which challenge the results of the Intoxilyzer 5000EN based upon the Source Code of the instrument” in accordance with Minnesota Supreme Court Order A09-2109. *See* March 8, 2011 Order, p. iii. He further stated that “[w]hile this Court remains assigned to all

STATEMENT OF FACTS

The Minnesota Supreme Court issued Order A09-2109 on January 11, 2010, assigning Judge Abrams of the First Judicial District to administer, hear, and decide all pretrial matters concerning challenges to the reliability of Intoxilyzer 5000EN results based on the source code of the instrument in all pending and future criminal and implied consent matters. Liaison Counsel were appointed by Judge Abrams to represent the various interests present in the proceeding, and those Liaison Counsel are continuing in their roles in the filing of this Petition.

Judge Abrams presided over a lengthy process of discovery during which more than 4,000 individual criminal and civil matters were officially joined in the proceeding. The judge then presided over an extensive evidentiary hearing conducted from December 8-23, 2010. The parties were asked to submit written closing arguments by January 31, 2011. The Court issued its "Order and Memorandum Following Final Evidentiary Hearing" on March 8, 2011, which is the subject of this appeal.

During the evidentiary hearing, Appellants presented significant evidence and testimony implicating errors and omissions in the source code of the Intoxilyzer 5000EN that directly affect the accuracy, validity, and reliability of all Intoxilyzer 5000EN results. In their joint Written Closing Argument, Appellants asked the court to exclude all

pending and future cases statewide which involve the Source Code for the Intoxilyzer device, it is anticipated that in light of what has been decided herein, sufficient guidance exists for resolution of the Source Code issue in pending and future cases as well." *See id.* at 2. District Court judges have already begun applying the order to pending cases and denying motions for source code discovery altogether, declaring the issue to be "decided" by Judge Abrams. There are also many individuals who agreed in writing or on the record to be bound by the outcome of the consolidated proceeding even though they were not officially included.

Intoxilyzer 5000EN test results in their individual cases because the State did not meet its burden as the proponent of scientific evidence to establish that the source code of the machine produces reliable test results and that the administration of the tests (as carried out by the source code of the machine) conformed to the procedure necessary to ensure reliability. *See Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000); *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977); *Kramer v. Comm'r Pub. Safety*, 706 N.W.2d 231, 236 (Minn. Ct. App. 2005); *Bond v. Comm'r Pub. Safety*, 570 N.W.2d 804, 807 (Minn. Ct. App. 1997). The State argued that Appellants failed to prove that a material defect in the source code rendered the final test result unreliable.

Despite receiving evidence of several source code omissions and errors presented at the evidentiary hearing, the March 8, 2011 order grants admission of Intoxilyzer 5000EN test results at trial and further declares that the test results are reliable. The order further overrules all challenges to test results premised on problems with the source code and suppresses all evidence offered for that purpose.

STATEMENT OF ISSUES

First, the order fails to delineate the burden of production and/or burden of proof placed on the parties and how those burdens were applied to the evidence presented. Appellants provided ample source code-related evidence that the test results are untrustworthy, and Respondents failed to overcome that showing by proving that the machine still produces reliable results. The final order makes no mention whatsoever of the burdens applied, nor does it provide any findings or analysis indicating whether either party met their respective burdens. Applying the proper burden of *production* on

Appellants and burden of *proof* on Respondents, this Court should reverse the District Court's ruling that Intoxilyzer 5000EN test results are reliable and admissible at trial.

Second, the District Court made findings that were clearly erroneous. The order acknowledges the existence of source code errors and omissions, yet finds them to be insignificant or outside the scope of its charge. For example, the District Court expresses its agreement with Appellant expert witness Timothy Black that the source code incorrectly determines the number of puffs an individual blows into the machine and the total volume blown by the individual, which are both "results" that are printed on a test record. The order describes in detail the scientific importance of volume measurement in the sample acceptance protocol whereby the machine must measure a threshold of at least 1.1 liters of air prior to taking readings of alcohol content. The court acknowledges that this threshold volume measurement is a necessary part of the sample acceptance criteria and that the source code does not accurately measure volume, yet still finds the test results reliable despite this obvious flaw in a scientifically necessary step in the testing process. There are other similar examples of this erroneous thought process in other parts of the order. All erroneous findings should be reversed by this Court or remanded to the District Court.

Third, the order exceeds the jurisdiction granted by the Supreme Court by suppressing evidence of source code omissions and errors to be presented to the ultimate fact finders at criminal and civil trial. Admitting the test results while suppressing the evidence attacking the reliability of those results violates the Confrontation Clause and the Due Process Clause of the U.S. and Minnesota Constitutions. If this Court affirms the

evidentiary ruling of the District Court regarding the test results, it should still reverse the ruling suppressing source code evidence from trial proceedings.

Fourth, the order violates the Due Process Clause of the U.S. and Minnesota Constitutions by applying a blanket evidentiary ruling and finding of fact to pending and new cases whose individual litigants had no opportunity to participate in the proceeding. A person arrested tomorrow for a DWI who submits to an Intoxilyzer 5000EN test has no recourse to challenge the results based on source code omissions and errors of the machine. The test results have already been preordained prior to that person's arrest as reliable and admissible with immunity from source code-based challenges.

IMMEDIATE APPEAL IS NECESSARY AND DESIRABLE

Discretionary appeal is rarely requested because it is rarely necessary. This is one situation where the necessity is so clear that even the opposing parties agree with the request. The Supreme Court created a consistently applied, orderly framework when it consolidated the Intoxilyzer 5000EN source code litigation in front of one judge; fragmenting that consolidation into thousands of pieces on appeal would utterly defeat the purpose and intent of Order A09-2109. An immediate consolidated appeal will “expedite the determination of issues of pressing concern to all of the litigants.” *Price v. Amdal*, 256 N.W.2d 461, 462 n.1 (Minn. 1977). The broad applicability of the order (and this Court's review of it) also supports the need for immediate appellate review. *See Gordon v. Microsoft Corp.*, 645 N.W.2d 393, 399 (Minn. 2002).

Discretionary appeal will further the interests of justice while denial of the appeal will deny justice to thousands of individuals. Rule 28.02, subdivision 3 of the Rules of Criminal Procedure and Rule 105 of the Rules of Civil Appellate Procedure allow for

discretionary appeal of an otherwise non-appealable order when it is “in the interests of justice.” The March 8, 2011 order has an immediate significant impact on thousands of criminal and implied consent cases, including not only the specific cases officially included in the omnibus file numbers above but also countless others that came about too late to meet the October 1, 2010 deadline to officially join the consolidated actions. The order applies itself to all past, present, and future cases as contemplated by Order A09-2109, preventing new litigants from presenting source code-related evidence to challenge the reliability of the test results. These later drivers are bound by this order, and their stake in the outcome of this proceeding is just as immediate as the Appellants who are officially part of these proceedings. District Court judges have already begun using the order to deny new motions for source code discovery and prosecutors are declaring the source code issue as “dead.”

Taking this appeal now will not be an exercise in futility because a reversal of the order would obviate the need for further challenges to Intoxilyzer 5000EN test results. The possibility of a final resolution of the issues presented by this appeal favor the immediate discretionary review sought. *See O'Shaughnessy v. Smuckler Corp.*, 543 N.W.2d 99, 101 (Minn. Ct. App. 1996); *Larson v. New Richland Care Center*, 538 N.W.2d 915, 919 (Minn. Ct. App. 1995); *Kokesh v. City of Hopkins*, 307 Minn. 159, 238 N.W.2d 882 (1976). Even if the order is affirmed or otherwise modified, the thousands of litigants affected by the order will have a better understanding of how to proceed with their individual cases; many of them will likely settle without the need for trial.

Granting an immediate discretionary review is also the most efficient and cost-effective manner to resolve the Intoxilyzer 5000EN source code issue for all litigants and

for the District Courts. The daunting prospect of appealing thousands of individual criminal and implied consent cases would be unduly expensive, burdensome, and unworkable for all litigants involved. Many individual litigants will be unable to afford an appeal unless it is conducted in a consolidated fashion; the transcript costs alone would be cost prohibitive for most individual litigants. Requiring individual appeals would be the death knell for many individual litigants. The interests of justice strongly favor an immediate discretionary appeal of the March 8, 2011 order. This Court has granted discretionary appeal under Rule 105.01 "in the interests of justice" under far less compelling circumstances. *See In re Rice Lake Auto, Inc.*, 430 N.W.2d 881 (Minn. Ct. App. 1988) (granting discretionary review requested by Attorney General's Office of order denying discovery motion in civil consumer protection action against one individual auto dealer).

Date: March 28, 2011

Respectfully submitted by the following Liaison Counsel,



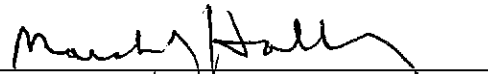
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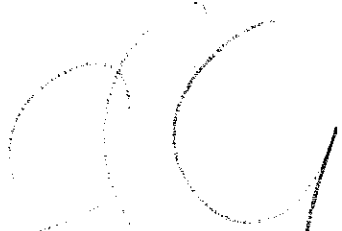
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