

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

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State of Minnesota,  
Plaintiff,

**ORDER**

v.

District Court File No. 27-CR-08-56487

John Dean Clark,  
Defendant.

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The above-entitled matter came before Judge Robert Small on March 11<sup>th</sup>, 2009 for an omnibus hearing. At the hearing, the Defendant made a Motion to Produce the Intoxilyzer Source Code. The record was left open to allow the parties to file written briefs.

Sarah Hilleren, Assistant Hennepin County Attorney, appeared for the State of Minnesota.

Ryan Garry, Caplan Law Firm PA, appeared for the Defendant, who was present at the hearing.

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**INTRODUCTION**

A complaint in this matter was filed on November 10, 2008 in which it is alleged that the Defendant committed the offense of first degree driving while impaired. The complaint is based on allegations that the Defendant had a blood alcohol concentration of .13 while operating his fishing boat on Lake Minnetonka. The matter is before the Court on the Defendant's Motion to Produce the Intoxilyzer Source Code.

In his written motion, the Defendant alleges that: (1) he has supplied the Court with specific details about what a source code is, how it bears on the operation of the Intoxilyzer, and what role it has in regulating the accuracy of the machine; (2) he has made a sufficient showing that the source code is relevant and thereby discoverable; and (3) the State's failure to pursue discovery of the source code from 'CMI' earlier does not justify depriving Defendant of his right to a speedy trial or force him to wait for his day in court.

In its written response, the State contends that: (1) the Defendant has failed to demonstrate how disclosure of the Intoxilyzer source code would reveal facts that relate to his guilt or innocence;

and (2) the Defendant has failed to demonstrate that the complete source code is in the State's possession, custody, or control.

The Defense filed additional letters and case law to the Court on April 1, April 7, May 27, and June 3 in light of the ongoing and still developing state and federal litigation concerning similar motions to produce discovery of the Intoxilyzer 5000 source code.

### **FACTUAL BACKGROUND**

In the case before the Court, the complaint reads as follows:

At approximately 8:00 p.m. on 09/26/2008 deputies with the Hennepin County Sheriff's Office were patrolling on Lake Minnetonka, near Spring Park, Hennepin County, MN when they observed a small fishing boat operating under dark without any front navigational lights. Deputies stopped the boat and identified the operator as **JOHN DEAN CLARK dob- 04/04/1981**, defendant herein.

Defendant had bloodshot watery eyes and the odor of an alcoholic beverage was coming from his person. Defendant failed field sobriety tests and was arrested. Defendant was read the Minnesota Implied Consent Advisory which he stated that he understood. Defendant did not wish to consult with an attorney and submitted to a breath test. The results of the test showed defendant to have an alcohol concentration of .13.

Defendant has three prior DWI convictions in the past ten years arising from incidents on 08/23/2002, 05/16, 2003 [sic] and 02/01/2004.

The breath test referred to in the complaint was administered using the Intoxilyzer 5000.

### **DISCUSSION**

It is well documented that there has been a plethora of litigation concerning the Intoxilyzer 5000 that is continually developing. However, in its decision, the Court relies upon the findings and conclusions recently decided by the Minnesota Supreme Court in State v. Underdahl, \_\_\_ N.W.2d \_\_\_, 2009 WL 1150093 (Minn. 2009). In Underdahl, the Supreme Court found that "an analysis of the source code may reveal deficiencies that could challenge the reliability of the Intoxilyzer...." Id. at \*8. In addition, the Court held that "it was not an abuse

of discretion for the district courts to find that the source code was in the possession or control of the State.” Id. The Minnesota Court of Appeals subsequently held that, pursuant to the conclusions in Underdahl, it was an abuse of discretion for the district court to find that the State did not have possession of the Source Code. See State v. Crane, --- N.W.2d ----, 2009 WL 1515264 at \*3 (Minn. App. June 2, 2009).

This Court also notes that the Defense in this case presented expert affidavits explaining what the Intoxilyzer 5000 source code is and how it works to help the Court understand how it could relate to the Defendant’s innocence or guilt.

### CONCLUSIONS

1. Based on State v. Underdahl as cited above and the Defendant’s submissions in this case, the Court concludes that the Intoxilyzer 5000 may relate to the Defendant’s innocence or guilt.
2. The State has possession or control of the source code.

### ORDER

1. The Defendant’s Motion to Produce the Intoxilyzer Source Code is hereby GRANTED.
2. The State shall produce a true and accurate copy of the source code for the Defendant within 10 days from the date of this Order. Failure to produce the source code by that date will result in suppression of the Intoxilyzer test results.

BY THE COURT:

Dated: June 4, 2009

/s/  
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Robert M. Small  
Judge of District Court