

## Will Florida Supreme Court Make DUI Breathalyzers Inadmissible?

By: ERIC GIUNTA | Posted: February 6, 2013 3:55 AM

The Florida Supreme Court heard oral arguments Tuesday in a case that could have ramifications for the tens of thousands of drivers who are subjected to breathalyzer exams every year in the Sunshine State.

Three criminal defendants, charged with drunk driving in Seminole County, are trying to obtain documentation relating to the software employed by CMI Inc., whose breath alcohol testing devices are the only ones whose results are admissible in Florida courts.

At issue is the proper legal procedure for obtaining these documents, which are held by CMI in its Kentucky headquarters. Attorneys for the defendants argue courts only need to subpoena the documents from CMI's registered state agent, while the company insists the documents need to be obtained following the procedures established by Florida's "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings" ("Uniform Law").

CMI is headquartered in Owensboro, Ky. Under the Uniform Law, which Kentucky has also adopted, a witness living in Kentucky can only be compelled to appear in a Florida court if the appropriate Kentucky court certifies and approves the Florida subpoena.

Lawyers for the DUI defendants argue that, according to the statute's plain language, the Uniform Law only applies to the subpoena of persons, not of documents.

"Normally our subpoena powers end at Florida's border," attorney Robert Harrison, who represents the Florida Association of Criminal Defense Lawyers, tells Sunshine State News. "The Uniform Act was set up for those cases when we have somebody from out of state who's a witness to a crime, and they're just down here visiting [Florida], and they go back up North and you need to subpoena them for a case that's come to trial."

The FACDL is not a party to the suit, but has filed briefs supporting the defendants' case. Harrison was one of the attorneys who argued on their behalf in front of the high court Tuesday.

Harrison cited a 1970s Florida case where a court allowed documents possessed by General Motors to be subpoenaed without going through the procedures of the Uniform Act, even though that company is not headquartered in Florida.

But attorney **Edward Guedes**, who is representing CMI, tells the News that case does not apply to the one currently before the Supreme Court.

"General Motors had offices in Florida, had documents in Florida, and had employees in Florida," he tells the News, echoing arguments he made earlier before the justices. "General Motors was for all intents and purposes present in the state of Florida, so there was no need to [subpoena] a registered agent. [CMI] doesn't have a presence in Florida."

CMI has been the subject of numerous lawsuits in several states challenging the validity of their breathalyzer tests, with at least some jurisdictions finding them suspect or inadmissible. Dozens of such lawsuits have been filed in Florida, but in every instance the Kentucky courts have not approved subpoena of documents relating to CMI's software.

The justices Tuesday seemed sympathetic to the defendants' desire for full disclosure, even as they appeared suspicious as to their arguments against having to go through the Uniform Law.

"Is it fair to let a company in some state manufacture equipment that is producing false readings, causing individuals in this state to get locked up?" asked Justice R. Fred Lewis.

His concerns were echoed by Justice Barbara Pariente: "I understand we have a legal principle here, but at some point here we're also here to try to do justice, and if this source code is, in fact, show[ing] that the breathalyzer is not reliable then we really want to get in search of the truth here."

Guedes told the justices that any flaws in the law need to be remedied through the legislative process, not the courts, and that courts in other jurisdictions (both in Florida and in other states) have found that the Uniform Law applies to both documents and persons.

"Courts can't willy-nilly just haul off and do things across state lines even though it seems to make common sense," Lewis admitted.

Harrison told the News that Kentucky judges have a history of "hometowning" -- i.e., of not honoring subpoena requests from Florida courts. He pointed out that the courthouse in Owensboro, the Morton J. Holbrook Judicial Center, is named after the father of one Allen Holbrook, who Harrison said is CMI's general counsel.

"That's absurd and it's insulting," an impassioned Guedes told Sunshine State News, when confronted with the accusation. "Even if you were prepared to accept that outside counsel might get 'hometowned' at the trial court level, it is an absolute insult to the courts of Kentucky to say that all the intermediate appellate courts and the Supreme Court of Kentucky would behave in such a juvenile manner."

Guedes also said Allen Holbrook is not CMI's general counsel, just an attorney who has done some work for the corporation, and that the corporation's general counsel is in fact one Alan Trigs.

Even if the Supreme Court finds that the defendants have no recourse to the software documents except through the Uniform Law, Harrison tells the News the justices can still remedy any defect in Florida statutes by unilaterally revising the Florida Rules of Criminal Procedure so as to make breathalyzer results inadmissible unless a company makes available to defendants documentation for how their software works.

"We have a computer program here that is saying that individuals are committing crime. We believe that were entitled to know how that computer works and how that evidence is generated," he says of the civil rights ramifications of this case. "We don't have 'secret evidence' in this country, and that's essentially what you have in these cases."

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