

**IN THE COUNTY COURT OF THE TWELFTH JUDICIAL CIRCUIT  
IN AND FOR SARASOTACOUNTY, FLORIDA**

Case Number:

State of Florida

vs.

Defendant  
\_\_\_\_\_ /

**MOTION IN LIMINE AND/OR MOTION TO SUPPRESS  
REGARDING DEFENDANT'S INTOXILYZER TEST RESULTS**

COMES NOW, the Defendant, \_\_\_\_\_, by through his undersigned counsel, and moves this court for an Order suppressing the Intoxilyzer test results herein and requiring the State of Florida, not to make mention of, refer to, or interrogate concerning, any Intoxilyzer test and Intoxilyzer test results allegedly obtained from the Defendant, and as Grounds therefore would state:

1. On \_\_\_\_\_, the Defendant was arrested for DUI, by \_\_\_\_\_.
2. After the Defendant's arrest, law enforcement read Defendant his implied consent warning, and Defendant ultimately consented to submit to the breath test.
3. Two (2) samples of the Defendant's breath were obtained, with the results of [XX] and [XX] grams of alcohol per 210 liters of breath, respectively. A copy of the Breath Test Result Affidavit is attached hereto as Exhibit "1".
4. Law enforcement utilized the Florida Department of Law Enforcement Alcohol Testing Program FDLE/ATP Form 14, pursuant to Chapter 11D-8, Florida Administrative Code, pursuant to Rule 11D-8.017, in administering the Intoxilyzer test to Defendant.

5. Paragraphs 6 and 9 of the attached Form 14 require the breath test operator to have the subject into the tube through the mouthpiece until told to stop, regarding each breath test sample. That instruction was given to this Defendant.
6. The Intoxilyzer machine will obtain an acceptable sample of breath to register an acceptable/adequate/valid reading in approximately 6 seconds, but subjects/defendants, including this Defendant, are typically required to blow, untimed, into the machine for 20-40 seconds, or more. In fact, operators require subjects/defendants to continue blowing into machine, for indefinite periods of time, after the machine has received an acceptable/adequate/valid sample. The longer a subject/defendant blows into the machine, the higher the reading. These circumstances literally allow a law enforcement officer discretion to manipulate the breath test reading by the length of the blow, after the machine has received an acceptable/adequate/valid sample. These circumstances allow a law enforcement office, in many instances, to exercise discretion, by the length of the blow, in who blows over .08, and who blows under .08. Additionally, these circumstances allow law enforcement officers to manipulate readings, by the length of the blow, to bring the two (2) samples required by law within .02 of each other.
7. Section 316.1932(1)(f)1, Florida Statutes, requires:

“The tests determining the weight of the alcohol in the defendant’s blood or breath shall be administered at the request of a law enforcement substantially in accordance with the Department of Law Enforcement. Such rules must specify precisely the test or tests that are approved by the Department of Law Enforcement for reliability of result and ease of administration, and must provide and approves method of administration which must be followed in all such tests given under this section. ...”

8. Section 316.1932(1)(a)2, Florida Statutes, requires the Alcohol Testing Program within the FDLE to be responsible for the regulation of the operation, inspection, and registration of breath test machines used in DUI cases, as well as the regulation of the operators, inspectors, and instructors on said machines. ATP is required to, among other things, establish uniform requirements for instruction and curricula for the operation and inspection of breath test machines; promulgate rules for the administration and implementation of the breath alcohol testing in DUI cases.
9. The rules and regulations regarding the Intoxilyzer testing of Defendant's breath herein, are adequate/insufficient.
10. The core policies behind Florida's implied consent are the assurance of scientific reliability of tests and the protection of the health of the subjects. See State v. Bender, 382So.2d 697 (Fla.1980).
11. Form 14, pursuant to Section 11D-8.0817, Florida Administrative Code is the rule relating to the length of time a subject/defendant is required to blow into the Intoxilyzer machine. This rule provides for an indefinite period of time, and certainly does not make for uniform operations of Intoxilyzer tests.
12. The above cited administrative rule is insufficient/inadequate to insure the reliability of the Defendant's Intoxilyzer breath test results. It allows for the exercise of discretion, and the manipulation of results, by the breath test operator. This rule is inconsistent with the core policies of the Florida implied consent law. Admission of the Defendant's Intoxilyzer results violates his right to due process of law.

NOW, WHEREFORE, the Defendant respectfully demands that this court will enter an order in limine precluding the admission of, or any testimony/evidence concerning, the Intoxilyzer test results herein, and suppressing those results and all evidence related thereto.

DATED this January 26, 2010.

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Attorney for Defendant  
Florida Bar No. 494712

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been provided via U.S. Mail to State Attorney's Office, 2071 Ringling Boulevard, Sarasota, FL 34237 this January 26, 2010.

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