

Mitch Stone

## Cowboy, Killer or Candybar... Read the Label

Who comes to mind when you read the following description: This Academy Award-winning actor epitomized rugged masculinity and has become an enduring American icon. He is famous for his distinctive voice, walk and physical presence. His career began in silent movies in the 1920s and he was a major motion picture star from the 1940s to the 1970s. He is closely associated with Westerns and war movies. OK, Pilgrim, have you figured it out yet? If you were thinking of John Wayne you are right. Now see if you can figure out who this next description concerns.

He was a notorious American serial killer. He was convicted and later executed for the rape and murder of 33 boys and young men in the Chicago area. Many were found buried in a crawl space under the floor of his house. He was called the Killer Clown because he would entertain children in a clown suit and makeup. If you guessed John Wayne Gacy, then you are correct.

Two completely different people, right? But what happens if we remove the Gacy from the serial killer's name? Does he become John Wayne the actor? Hardly. We can all agree that even without the Gacy no one would ever confuse the actor and the serial killer. There is nothing at all similar about these

two people other than they share the names John and Wayne. Even without the Gacy we can distinguish between the two without having to examine their DNA to know one from the other.

So what does this have to do with DUI? To answer that let's begin with the question of whether the Intoxilyzer 8000 is approved for evidentiary use in Florida. The first place to look to answer that question is FDLE Form 34M<sup>1</sup> which requires that to be considered approved a breath test device must be listed on the United States' Department of Transportation Conforming Products List (USDOT CPL).

To find the Intoxilyzer 8000 on the US DOT CPL we turn to the October 3, 2002 Federal Register / Vol. 67 No. 192. That is notice where the Department of Transportation amended the conforming products list for "instruments that conform to the Model Specifications for Evidential Breath Testing Devices." This CPL notice includes the Intoxilyzer 8000 which is specifically defined as a breath testing device manufactured by CMI, Inc. of Kentucky that operates via "...a non-dispersive infrared device which uses the 3.4 micron and 9 micron band for measurement of alcohol."

Therefore before we ever get to the FDLE rules regarding maintenance, inspection and repair to determine approval issues we must first determine if the State employs the specific Intoxilyzer 8000 as identified in this USDOT

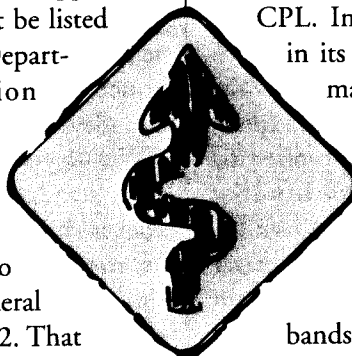
CPL. Sounds simple enough, right? If you thought this was going to be simple you haven't dealt with CMI and FDLE on breath test issues before.

OK, so to determine whether the Intoxilyzer 8000 is the same 8000 specified on the USDOT CPL we look to what CMI says in its own literature. It is there we find that according to CMI, it manufactures the Intoxilyzer 8000 with several other micron bands in addition to those listed in the USDOT

CPL. In fact CMI acknowledges in its promotional literature, its manuals and its parts list that the 8000 employs the 3, 3.0, 3.4, 3.6 or 3.476 micron bands as well as 9, 9.0, 9.3, 9.376 or 9.4 micron bands.

The 3.4 and 9 micron bands are certainly in that list of numbers so there should be some way of establishing which micron bands are at work in the devices in use in Florida. So what does CMI the manufacturer say? Interestingly, CMI issued a statement to FDLE in setting forth that in fact the machines in use in Florida employ the 3.476 and 9.376 micron bands. The issue now is whether those micron bands are the same as 3.4 and 9. So let's rewind a bit to see how this has been addressed by the courts.

In *State v. Atkins*, et al<sup>2</sup> this question of specific micron bands was presented to an En Banc panel of county court judges in Orange County, Florida. To make that determination the panel was presented with various documents including



CMI's own promotional literature, the Intoxilyzer 8000 operator's manual and CMI's parts list which verified that CMI manufactures the Intoxilyzer 8000 with 3.0, 3.4 or 3.476 micron bands and 9.0, 9.3, 9.376 or 9.4 micron bands.

Laura Barfield testified at that hearing for the State before CMI issued its statement. She apparently believed the machines in Florida used the 3.4 and 9.376 micron bands. The En Banc Panel therefore decided among other things that "the Intoxilyzer 8000 being used in Florida does not appear on the U.S.D.O.T CPL and therefore can NOT be an approved breath testing instrument in Florida."

The Atkins order was used in support of the same challenge in Duval County. In that case, *State v. McClung*<sup>3</sup> the trial court rejected the argument based on testimony from Mathew Malhoit<sup>4</sup> from FDLE. He testified that the USDOT CPL's specification of 3.4 and 9 micron bands contemplates all bandwidth ranges within 3.4 and 9. He also testified that the USDOT merely truncated the micron band measurements to 3.4 and 9. Basically, he testified that the USDOT merely lopped off the numbers after the decimal points. He could not explain why they lopped all the digits after the decimal point on the 9 micron band but stopped after the first number past the decimal point on the 3.4 micron band.

Importantly, Malhoit was not qualified as an expert toxicologist or breath test device engineer.<sup>5</sup> He also acknowledged that he had nothing to do with CMI's submission of the 8000 to the USDOT and he had nothing to do with the USDOT creation of the CPL. Nevertheless, he testified that even if the Intoxilyzer 8000 contained variations of micron bands up from 3 to 3.999 and from 9 to 9.999 it would not affect any breath test result because micron bands are so small that as long as the machine is testing within those ranges the result would be scientifically reliable<sup>6</sup>

Interestingly, although Mr. Malhoit was confident in his assessment of this issue the head of FDLE Alcohol Testing Program, Laura Barfield was apparently not so sure. In fact, a little over

one month after Malhoit testified at the McClung hearing Barfield sent a letter to CMI posing six questions concerning the issue of the US DOT CPL and the microns employed in the 8000.<sup>7</sup> Toby Hall the President of CMI responded on September 25, 2008 and in answering the questions acknowledged that the 8000 in use in Florida is outfitted with micron band filters of 3.476 and 9.376.<sup>8</sup>

So what is a micron? Literally, it is one millionth of a meter. It is safe to say that microns are pretty small but someone knows how to measure them. Not only that but as small as they are they can be measured to the third decimal point and farther. In fact, according to its own literature CMI can distinguish between the 9, 9.3, 9.375 and 9.4 micron bands as well as 3, 3.4, 3.6 and 3.476 micron bands. Although small micron bands do play a significant role in the determination of a breath test result since it is the specific micron band filter that is used to measure the ethanol molecule.<sup>9</sup>

Regardless, whether variances so small affect the accuracy of breath test results is not the issue since this challenge concerns whether the specific breath test device is listed on the USDOT CPL. Nevertheless, from a common sense standpoint accuracy is certainly a concern because breath testing machines are testing for alcohol concentrations at the molecular level. That means fractions of a micron may result in accuracy problems that are not readily apparent since the entire process relies upon microscopic measurements.

For example, when weighing a refrigerator, if a tiny speck of dirt is on the scale it will not impact the result by a measurable amount. However, when weighing a grain of sand that same speck of dirt will have a significant impact on the result. The latter is analogous to breath testing which is why our courts should be concerned about specific micron bands and the impact of even slight variations on the test results. Nevertheless, as stated above the issue is about the specific machine listed on the USDOT CPL. That brings us back to the definition provided in the USDOT

CPL Notice which specifies the microns in the approved Intoxilyzer 8000.

So is Malhoit correct? Did the USDOT merely truncate the micron measurements in its specification of the 8000 or should Florida be required to test subjects on Intoxilyzer 8000 breath testing devices that are outfitted with filters that identify the specific micron bands set forth in the USDOT CPL? These are questions that should be answered by the direct sources of this information. That being USDOT personnel and CMI scientists and engineers who were involved in the CPL process. As of now the State has only presented testimony from the head of FDLE ATP and an FDLE Department Inspector both of whom had no involvement in the creation of the 8000 or the USDOT CPL listing of the 8000.<sup>10</sup> It would be much more compelling to have the design engineers and software engineers from CMI explain this or better yet be able to independently examine the source code.

Until that happens we are supposed to accept what we are told, which is this micron band issue is really of no concern because when it comes to the USDOT CPL specified micron bands versus CMI's various micron bands all those numbers listed are really the same number. But do we really know that for certain?

At the beginning of this article we discussed what happens if the Gacy is removed from John Wayne Gacy. He would still be the serial killer regardless of whether you truncate his name or not. Removing the Gacy does not magically turn him into the Hollywood icon. The reason is because we can watch *The Searchers* or *The Green Berets* and know the star is John Wayne. There are certain characteristics that we can see with the naked eye. Likewise, if we switch on A&E's "American Justice" and see Bill Curtis along with a picture of a clown, whether we hear Bill Curtis talking about a notorious serial killer or not we know he is referring to John Wayne Gacy not John Wayne the actor. The images alone are sufficient for us to be confident in this determination.

However, with breath testing how do we know if the guts of any particular

machine have been changed materially to make it a different machine than what was approved by the USDOT? No one can tell by looking at the box itself. You need to examine the parts and technology.

To that end, what if CMI decided in a cost saving measure to use different parts or changed the technology and created a machine that was similar but not the same and named it the Intoxilyzer 8000. Could it sell them to the state of Florida as the approved device seemingly listed on the USDOT CPL? According to the State's position it would be acceptable as long as it is named the Intoxilyzer 8000 and it measures alcohol using micron bands somewhere in the ranges of 3.4 and 9.

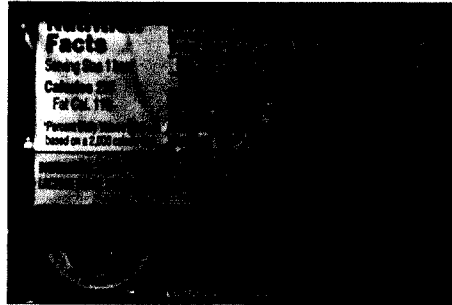
Why then did the USDOT define the 8000 in terms of specific micron bands and not approximate micron band ranges? The USDOT specifically described the 8000 by specific micron bands. We must accept that the USDOT did that for a reason.

So can the State prove that the particular 8000 our clients are required to test on employ filters to measure alcohol employing the 3.4 and 9 micron bands? The State's position is that it does and even if it doesn't it's because the US DOT truncated the micron numbers in its description. Well maybe truncating names of serial killers do not change them into actors because we can look at them and listen to them and not confuse the actor for the serial killer.

However, we cannot see what's at work inside the breath test machine. We need scientists and engineers to examine the parts of the machine. In that respect, determining the length of micron bands is more like figuring out the ingredients of say a candy bar. We can look at two similar candy bars made by the same candy maker and not know whether both have the same ingredients. Even if we take a bite we might not be able to tell the difference. We need scientists and nutritionists to examine the ingredients to tell us if the candy bars are the same or not.

Or with candy bars we can read the label. If the label of one candy bar has

different ingredients from the other then they are not the same candy bar. So why candy as the example? Well recently a candy scandal occurred when it was discovered that one of the best known chocolate making companies changed the ingredients in its chocolate to save money. Hershey's has switched to less expensive ingredients in several of its products. In particular, cocoa butter has been replaced with vegetable oil. As a result the FDA got involved.



The FDA says candy bars that contain vegetable oil instead of cocoa butter cannot be called chocolate because the U.S. Food and Drug Administration definition of milk chocolate requires cocoa butter not vegetable oil as the pivotal ingredient. As such Hershey is still selling the same candy bars but the labels now say *chocolate candy* or *chocolaty* instead of *milk chocolate*.

So if a private company like Hershey, famous for its milk chocolate, would alter the ingredients of its candy bars to save money and have to reflect that on its packaging, is it so outrageous to imagine a private company like CMI possibly changing parts or technology in the 8000 to save money? If so how would FDLE protect the citizens of Florida against such corporate conduct? Apparently, FDLE takes the position that we should blindly trust CMI and its explanations without the ability to conduct independent review to ensure what is being told to us is in fact true.

It seems the FDA is more concerned about our sweet tooth addiction than FDLE is about the technology used to convict citizens?

What should be ringing loudly in everyone's head is that throughout the years FDLE has considered challenges to breath testing machines as frivolous litigation. However, time and time again courts have validated those challenges. Every successful challenge throughout the years was initially met with skepticism by the State and by certain courts not convinced the challenges had merit. If we are to blindly accept the 8000 without raising challenges then we are basically trusting the State to identify problems and correct them. The problem is that historically that has not been our experience.

CMI and FDLE want us to simply agree that everything is working properly because they say so.<sup>11</sup> Regardless of their assurances we have learned and courts have learned throughout the years that sometimes trusting without challenging can lead to injustice. AS such challenging the Intoxilyzer 8000 based on the different micron bands than what is specified on the USDOT CPL is a legitimate concern. If not it would be like trusting Hershey without at least checking the label to make sure you're getting real milk chocolate. In that respect, checking the label of that Three Musketeers bar to make sure it's real milk chocolate is more than what FDLE expects us to do for our clients. 🏠

<sup>1</sup> Only breath test instruments listed on the US Department of Transportation Conforming Products List of Evidential Breath Measurement Devices will be evaluated.

<sup>2</sup> Case #48-2008-CT-073-E et al (Orange County, Florida, June 20, 2008)

<sup>3</sup> 15 FLWSupp 908a (4th Judicial Circuit County Court Division F July 23, 2008).

<sup>4</sup> He is an FDLE Departmental Inspector.

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