

DISTRICT COURT OF THE STATE OF NEW YORK
COUNTY OF XXXXXXXX:

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THE PEOPLE OF THE STATE OF NEW YORK

**NOTICE OF MOTION TO
COMPEL AND PRECLUDE**

Plaintiff,

Docket No.:

-against-

JANE DOE,

Defendant.

-----X
PERSONS:

PLEASE TAKE NOTICE that upon the annexed affirmation of Steven Epstein, Esq., counsel for JANE DOE (the “Defendant”), the exhibits annexed hereto and the prior proceedings herein, the undersigned will move this Court on xxx at 9:30 a.m. or as soon thereafter as counsel may be heard for Orders:

1. Compelling discovery, or in the alternative for an Order of the Court precluding the People from offering evidence at trial of the Intoxilyzer results in this action; and,
2. For such other and further relief as this Court may seem just and proper.

Dated: Garden City, New York

By: _____
Steven Epstein, Esq.
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DISTRICT COURT OF THE STATE OF NEW YORK
COUNTY OF XXX:

-----X

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

AFFIRMATION

Docket No.:

-against-

JANE DOE,

Defendant.

-----X

STATE OF NEW YORK)

: ss.:

COUNTY OF NASSAU)

Steven Epstein, Esq., an attorney duly admitted to practice in the State of New York, affirms under penalty of perjury as follows:

1. I am the attorney of record for Jane Doe (the “Defendant”).
2. I am fully familiar with the facts of this case and make this affirmation in support of Defendant's motion made herein.
3. Unless otherwise specified, all allegations of fact are based upon the inspection of the record of this case, conversations with Assistant District Attorneys, independent investigation, the discovery material provided in this case thus far, and/or upon other relevant materials.
4. Ms. Doe (“the Defendant”) was arrested on xxxxxxxxx, charged with operating a motor vehicle while under the influence of alcohol and other related charges.

MOTION TO COMPEL DISCOVERY

General Background

5. Subsequent to her arrest, the Defendant was transported to the Nassau County Police Department Central Testing Section (“CTS”) for the administration of a breath test to determine the Defendant’s blood alcohol concentration (“BAC”), if any.

6. At CTS, a Nassau Police Officer administered a breath test using an Intoxilyzer 5000EN breath testing device bearing Serial Number 68-013838 (the “Intoxilyzer”).

7. Upon information and belief, calibration checks are performed through the use of a simulator which is attached to an Intoxilyzer. The way it works is, a container holding simulator solution emits gas into an Intoxilyzer’s sample chamber. This gas is supposed to create a point of reference—or a “reference standard”—for the Intoxilyzer, by infusing the machine with a matter containing a “known” BAC (within a certain degree of certainty). Because it is critically important that that baseline standard is accurate, the simulator gets its own serial number, and the simulator solution gets its own lot number. This reference standard is an essential component of breath testing and is required by the New York State Department of Health Rules and Regulations §59.5.

8. Plainly, the way these reference standards are measured for accuracy is through a process that uses headspace gas chromatography (“GC”) done by the New York State Police (“NYSP”).

9. GC testing produces, among other things, data regarding the value of ethyl alcohol in the solution, and this data is generally presented on graphs called chromatograms (“GC Data”).

10. Here, the Defendant’s test was done using Simulator Serial Number 3519 and

Simulator Solution Lot Number 15210. *See* Exhibit A.

11. However, to date, the People have not disclosed the GC Data for this Simulator Solution Lot Number at all.

12. The breath test in this case was administered to the Defendant on xxxx, 2016.

Prior Demands

13. The Defendant has previously served and filed a Demand for Discovery (the “Demand”) on or about Sxxxxx, 2015. A copy of the Demand is annexed as Exhibit “B”. The Demand called for the prosecution to produce certain documents required to be disclosed to the Defendant and made available for inspection pursuant to Criminal Procedure Law (“CPL”) §240.20.

14. Among other items the Demand called for: “all records related to the testing and/or certification and/or calibration of the simulator solution(s) used in the calibration and/or certification of the Intoxilyzer utilized in this case, including but not limited to all gas chromatograms produced in the preparation and testing of the simulator solution.” *See* Exhibit B, at ¶3(b).

15. CPL §240.20(k) provides that upon a demand to produce by a defendant, the prosecutor shall disclose to the defendant and make available for inspection:

In any prosecution commenced in a manner set forth in this subdivision alleging a violation of the vehicle and traffic law, in addition to any material required to be disclosed pursuant to this article, any other provision of law, or the constitution of this state or of the United States, any written report or document, or portion thereof, concerning a physical examination, a scientific test or experiment, including the most recent record of inspection, or calibration or repair of machines or instruments utilized to perform such scientific tests or experiments and the certification certificate, if any, held by the operator of the machine or instrument, which tests or examinations were

made by or at the request or direction of a public servant engaged in law enforcement activity or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial.

See CPL §240.20 (k) (emphasis added).

16. The Defendant seeks an Order compelling the People to turn over the following records:

Any and all documents concerning the preparation and testing of the Simulator Solution Lot Number 15210, including the forensic method utilized in the production of the simulator solution i.e. standard operating procedures for the production of any and all simulator solutions produced and utilized in the testing of the Defendant's breath and the actual chromatograms (GC Data) of the headspace gas chromatography (not merely the certifications that the tests were performed).

ARGUMENT

I. THE WRITTEN REPORTS/DOCUMENTS FALL SQUARELY WITHIN CPL § 240.20.

17. As this Court has previously held, the Defendant is entitled, as a matter of law, to these records because they are evidence of whether the calibration and calibration checks were performed correctly and the machine was working properly at the time of the test. *See People v. Li*, Docket 2014NA023862 (decision attached as Exhibit “C”).

18. Upon motion of the defendant, the Court must Order discovery as to any material not disclosed upon demand pursuant to CPL § 240.20 if it finds that the People's refusal to disclose such material is not justified. *See* CPL § 240.40(1)(a).

19. The material requested by its very nature makes it reasonably likely that documentary information will bear relevant evidence. *Matter of Constantine v. Leta*, 157 A.D.2d 376, 378 (3rd Dept. 1990).

20. In the present case, the breath test operator or supervising technician is expected to testify at trial that the samples obtained from Defendant should be found to be an accurate minimum value registered by the Intoxilyzer 5000EN used during Defendant's test because the machine was properly maintained and calibrated prior to Defendant's test.

21. Defendant seeks the full set of the records upon which the testing operator or supervising technician will base this expected testimony and opinion.

22. Records related to the calibration of the machinery are essential to the defense to help determine whether the machine was working properly, and failure to provide such records to the defendant has been found to warrant reversal. *See People v. Robinson*, 53 A.D.3d 63 (2d Dept. 2008), (citing *People v. Corely*, 507 N.Y.S.2d 491; *People v. English*, 480 N.Y.S.2d 56

[1984]).

23. Notably, in the case of *People v. Robinson*, 53 AD.3d 63 (2d Dept 2008), the Appellate Division, Second Department, discussed what is discoverable in a DWI case. Specifically, the Court pointed out that pursuant to CPL § 240.20(1)(c), upon defendant's demand to produce, the prosecution shall disclose: Any written report or document, or portion thereof, concerning a physical or mental examination or scientific test or experiment, relating to the criminal action or proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the People intend to introduce at trial.

24. The Court of Appeals has explained that CPL article 240 evinces a legislative intent that a trial "should not be a sporting event," and that "[b]roader pretrial discovery enables the defendant to make a more informed plea decision, minimizes the tactical and often unfair advantage to one side, and increases to some degree the opportunity for an accurate determination of guilt or innocence" *People v. Copicotto*, 50 N.Y.2d 222, 226, 428 N.Y.S.2d 649, 652 (1980).

25. In prosecutions charging a defendant with driving while intoxicated and related offenses, courts have recognized the right of the defendant to disclosure of various documents not expressly listed in CPL § 240.20. *See, Matter of Constantine*, 157 A.D.2d at 378 (records indicating that a machine was not operating properly are discoverable, as are the State Police rules and regulations, the operational checklist, and calibration records); *People v. Crandall*, 644 N.Y.S.2d 817 (3rd Dept. 1996) (documents relating to ampoule analysis are subject to disclosure); *People v. Erickson*, 549 N.Y.S.2d 182 (3rd Dept. 1989) (breathalyzer operator's permit and the weekly test record are subject to disclosure); *see also Robinson*, 53 AD.3d at 67

(citing Gerstenzang & Sills, Handling the DWI Case in New York, § 20.39, at 431 [2007-2008 ed]); *People v. Alvarez*, 521 N.Y.S.2d 212 (1987) (defendant may not be denied discovery which prevents her from challenging the reliability and accuracy of a breathalyzer machine).

26. Additionally, in a prosecution alleging the violation of the vehicle and traffic law, CPL § 240.20(1)(k) provides for the disclosure of any written report or document, or portion thereof, concerning a physical examination, a scientific test or experiment, including the most recent record of inspection, or calibration or repair of machines or instruments utilized to perform such scientific tests or experiments and the certification certificate, if any, held by the operator of the machine or instrument, which tests or examinations were made by or at the request or direction of a public servant engaged in law enforcement activity or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial.

27. The items enumerated in CPL § 240.20(1)(k) are not a comprehensive list of all discoverable material. They are merely examples of what must be provided. Thus, the Legislature expressly placed the word "including" immediately prior to listing particular discoverable items. *See Robinson*, 53 AD.3d at 68-69; CPL § 240.20(1)(k).

28. There have been a series of lower Court decisions pertaining to the disclosure of GC Data. This Court has previously ordered disclosure of the GC Data in driving while intoxicated cases pursuant to CPL § 240.20(1)(k).

29. Multiple Courts have rightfully rejected as meritless the People's argument that the demanded documentation, which directly relates to the Defendant's breath test, are somehow not discoverable. Those Courts have Ordered the disclosure of said materials pursuant to CPL § 240.20(1)(k).

30. In a case directly on point in *People v. LoPresti*, Indictment No. 1828/07 (Bronx Co. April 25, 2011) (“Exhibit D”), the Honorable James M. Kindler ordered production of "any and all printouts of the headspace gas chromatography analyses performed by the New York State Police that relate to the Certification of Analysis".

31. In granting the motion to compel in *LoPresti*, the Court wrote that the printouts generated by the headspace gas chromatography analyses of the simulator solution:

Fall squarely within the mandate of CPL § 240.20(1)(k)... The statute does not limit discovery material to the most recent calibration or inspection report of the machine, the chemical test performed on defendant, and the certification of the test administrator. The word "including" precedes the items listed in the statute, indicating that the statute does not contain an exhaustive list of material to be produced by the people.

32. Likewise, in the Bronx Criminal Court matter of *People v. Bayette Williams*, 2014BX021095, the Court Ordered the People to disclose *inter alia*, **“[a]ny and all gas headspace chromatography reports for the simulator solution used in connection with the Defendant’s test.”**

33. Similarly, in *People v. Cecere*, the Hon. David J. Ayres, a County Court Judge and Acting Supreme Court Justice of Nassau County ordered the discovery of this documentation pursuant to CPL § 240.20(1)(k). After the People filed a Motion to Reargue, the Court issued a clear decision on the Motion to Reargue the Order to produce discovery pursuant to CPL § 240.20(1)(k) . *See* Exhibit “E”.

[T]he Court finds that the records are discoverable in accordance with the provisions of CPL [§] 240.20(1)(k) as they represent ‘...written report[s] or document[s] concerning a scientific test made by or at the request or direction of a public servant engaged in law enforcement activity...’ The requested reports are relevant to [the] matter herein in that they represent the results of scientific

testing performed on simulator solution lot number 12020, the lot that was utilized in the testing of the Intoxilyzer 5000EN number 13847, which was used to test this Defendant's breath sample" (emphasis added).

II. THE LAW ENFORCEMENT AGENCY (NYSP) WHO PROVIDES THE SIMULATOR SOLUTION AND SIMULATOR SOLUTION RECORD FOR THE TESTING OF THE DEFENDANT IS UNDER THE CONTROL OF THE PEOPLE

34. Following the noncompliance by the People of Judge Ayres's Decision and Order in *People v. Cecere*, the same matter was raised before the Trial Judge and Supervising Judge of Nassau County Courts, the Honorable Christopher G. Quinn, Acting Supreme Court Justice.

35. There, as is anticipated here, the People submitted a *pro forma* letter from the NYSP.

36. The result in *Cecere* was that the Court admonished the People for claiming that they were unable to obtain the documents because the law enforcement agency, the NYSP was *somehow* not under the control of the District Attorney's Office for the purpose of satisfying CPL § 240.20(1)(k). *See* Exhibit "F".

The Court finds that the People have failed to offer any acceptable excuse as to why the documentation has not been provided. A single letter to the N.Y.S. Police does not constitute due diligent efforts to obtain the documentation sought. There is no record of other efforts to obtain the documents made by the District Attorney, **nor is there any question that the State Police is a law enforcement agency.**" (emphasis added).

37. In fact, the NYSP have previously provided these very records related to the preparation, testing, and analysis to the Nassau County District Attorney and other District Attorney's offices after the same was requested by those offices in relation to driving while intoxicated cases.

38. These requests were made because Courts ruled that those materials were discoverable pursuant to CPL § 240.20(1)(k).

39. The People must acknowledge in their response that these very records pertaining to the simulator solution were previously obtained from the NYSP.

40. Likewise, in the *People v. Zalewski*, the Honorable Tricia M. Ferrell ordered both that the documents pertaining to the simulator solution be disclosed¹: **“The People are directed to produce all documents concerning the preparation and testing of the simulator solution lot number 88 and serial number 5882.”** (Exhibit G). Similarly, in that matter, the People sought a Motion to Reargue the directives of the Court that they comply with CPL § 240.20(1)(k). The People again attached a *pro forma* letter from the NYSP. In the Court’s decision, the Court decidedly rejected the effort of the People and the NYSP to disobey the requirements of CPL § 240.20(1)(k):

The ‘so called’ new evidence that ‘all documents concerning the preparation and testing of the simulator solution lot number 88 and serial number 5882’ is not possessed by the People, ***is actually a red herring***, as the People sought these documents from the New York State Police by letter dated June 4, 2013...and the [NYSP] erroneously responded that such documents are not discoverable under CPL [§] 240.20(1)(k)...*People v. Robinson*, 53 A.D.3d (2nd Dept., 2008) [*documents or items that evidence whether the breathalyzer machine is in proper working order at the time of the testing are discoverable under CPL [§] 240.20(1)(k)*]; *People v. English*, 103 A.D.2d 979 (3rd Dept., 1984) [***all documentation necessary to show that the breathalyzer machine was accurate and reliable are discoverable***]. Simply stated, the new facts would not change the prior determination.” (emphasis added).

1 When the records were ultimately ordered to be disclosed by the trial judge, the Honorable Fran Ricigliano, it became apparent that despite the significant litigation pertaining to the GC Data, it had actually been tested by two agencies that were not the NYSP (the Nassau County Police Department and NMS laboratories). The legal reasoning, however, remained the same: The records were discoverable pursuant to CPL § 240.20(1)(k).

41. The *Zalewski* Court went on to ensure its ruling regarding CPL § 240.20(1)(k) was clear to the People by further stating:

“The People/NYS Police must turn over “all documents concerning the preparation and testing of the simulator solution lot number 88 and serial number 5882,” as the NYS Police are not a private entity as in *People v. Robinson, supra.* (see *People v. Morgan*, 178 Misc.2d 595 (Fulton Co.Ct. 1998) [**any law enforcement agency connected with the prosecution of a particular crime has duty to disclose such evidence**].

42. Notably, in the case of *People v. Zalewski*, the simulator solution in question had been tested two times by two separate agencies and the results had *discrepancies* that became clearly apparent to a trained expert, which was thereafter able to be fairly explained to the jury.

43. In *People v. White*, 45 Misc.3d 694 (Crim.Ct. New York Co., 2014), the Court held that GC Data was not discoverable as they were “tests of tests”. That decision and reasoning has since been rejected in *People v. Ramrup*, described below.

44. Recently, in *People v. Ramrup*, 45 Misc.3d 1227(A) (Sup.Ct.Bronx Co., 2014) (Exhibit H), the Court stated in its Decision and Order, directing *inter alia*, the disclosure of the GC Data:

“Given such authority, this court sharply rejects the People's myopic view that the defendant is limited to the documents it deems discoverable...[and therefore ordered the disclosure of] any and all documents relating to the preparation and testing of the simulator solution, the forensic method utilized in the production of the simulator solution, the standard operating procedures for the production of all simulator solutions utilized in defendant's testing, and the actual chromatograms of the headspace gas chromatography.” *Ramrup, supra.*

45. A "defendant may not be denied discovery which prevents her from challenging the reliability and accuracy of the machine." *See People v. Alvarez*, 521 N.Y.S.2d 212 (1987) (citing *People v. English*, 480 N.Y.S.2d 56 [1984]).

46. Individual test results may be attacked on the grounds that proper operating procedures were not followed or that the particular machine was not working properly. *See Robinson*, 53 A.D.3d at 70.

47. Defendants are permitted "to challenge the accuracy of the test results generated by a specific machine by showing that the machine was not properly maintained or that the test was not properly administered." *Id.* at 72.

48. The failure of the People to provide the demanded materials will deprive defendant of a fair trial by undermining the defendant's right to challenge the reliability of the Intoxilyzer 5000EN machine used to measure the alcohol content of the defendant's breath and consequently calculate the defendant's alleged BAC.

49. Therefore, the Defendant requests an Order directing disclosure of the GC Data pursuant to CPL § 240.20(1)(k), and if the People fail to comply an Order of preclusion.

RESERVATIONS OF RIGHTS

50. The Defendant respectfully requests the right to make any and all further motions as may be necessary, based upon information and disclosure which may result from the granting of the request made herein, and/or information received from any record within a reasonable time. *People v. Frigenti*, 91 Misc.2d 139, CPL § 255.20(3).

WHEREFORE, the affiant, upon the foregoing grounds respectfully requests this Court to grant the relief sought herein, and for such other and further relief as to this Court may seem just and proper.

Dated: Garden City, New York

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