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

Case Nos. 2007 AP 10721
2007 AP 10932
2007 AP 10933
2007 AP 10934
2007 AP 12538

CMI, Inc. d/b/a/ CMI, Inc. of Kentucky,

Appellant,

Vs.

John Fabian, Catherine Marsh, Morley Parent, Sara Penney, Kenneth Baker and State of Florida,

Appellees,

ANSWER BRIEF OF APPELLEES

ON APPEAL FROM THE COUNTY COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR SARASOTA COUNTY, FLORIDA

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE AND FACTS

Appellees accept the statement of the case and facts in Appellant's initial brief, with the following exceptions / additions. CMI asserts it is "contesting jurisdiction." CMI failed to cite to where CMI objected, challenged, or otherwise preserved the issue of personal jurisdiction before the trial court. The initial pleading filed by CMI in each case was the Notice of Appeal. (Baker, P. 64; Fabian, P. 208; Marsh P. 32; Parent, P. 16; Penney, P. 61) CMI states that the legislature amended Florida Statute Section 316.1932 to reflect the statute does not include the source code and that criminal Defendants are not entitled to the source code. The language of the amended Statute speaks for itself, and is more properly addressed in argument. However, the amendment to Section 316.1932(f) (4), Florida Statutes provides:

> Upon the request of the person tested, full information concerning the results of the test taken at the direction of the law enforcement officer shall be made available to the person or his or her attorney. Full information is limited to the following:
>
> a. The type of test administered and the procedures followed.
> b. The time of the collection of the blood or breath sample analyzed.
> c. The numerical results of the test indicating the alcohol content of the blood and breath.
> d. The type and status of any permit issued by the Department of Law Enforcement which was held by the person who performed the test.
> e. If the test was administered by means of a breath testing instrument, the date of performance of the most recent required inspection of such instrument.

> Full information does not include manuals, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state. Additionally, full information does not include information in the possession of the manufacturer of the test instrument.

This amended Statute does **not** provide criminal defendants are not entitled to the software. The statute only provides, the State does not have to provide the software to criminal defendants if the software is not in the actual possession of the State. Nowhere does the Statute state criminal defendants are not entitled to the software.

The County Court did not rely solely upon *General Motors v. State*, 357 So.2d 1045 (Fla. 3d DCA 1978) for issuing the subpoena to CMI for the production of the Intoxilyzer source code. The trial Court also relied upon Section 607.1505, Florida Statutes. (Baker, P. 2-3).

CMI asserts that the County Court refused to allow the State Attorney to present evidence on the issue of whether the source code was material. This assertion is not supported by the record. Rather than cite to the transcript of the hearing, CMI relies upon an allegation contained in a motion filed by the State Attorney. CMI failed to include in the record the order of the three-judge panel that rejected this allegation. (Appendix, P. 23) The record CMI provided to this Court does not include a transcript of the hearing where CMI claims the County Court refused to let the State Attorney present evidence. CMI also claims no evidentiary hearing was held for the *Fabian* cases; a transcript of the motion hearing where

Judge Bonner ruled the defendants were entitled to a subpoena was not included in the record.

The crucial facts of this cause are as follows:

- CMI was served with a subpoena duces tecum in all cases. (Baker, P. 23; Fabian, P. 106; Marsh P. 17; Parent, P. 8; Penney, P. 29)
- CMI failed to respond to any of the subpoenas, and specifically failed to:
    - Object or otherwise contest the validity of the subpoena on the grounds that the source code was not material,
    - Contest the County Court asserting personal jurisdiction over CMI,
    - Object to the production on the grounds that the source code was a trade secret.
- CMI, in all cases, was served with an Order to Show Cause why it should not be held in contempt for failing to comply with the subpoenas. (Baker, P. 52; Fabian, P. 114; Marsh P. 23)
- CMI failed to appear at the show cause hearing. (Baker, P. 53; Fabian, P. 186; Marsh P. 29)
- CMI failed to raise any of the issues raised in this appeal with the trial Court.
- CMI, after being found in contempt and after initiating this appeal, filed a Motion with the trial court in each of these cases seeking a protective order. (Appendix, P. 3 - 22)

- CMI sought affirmative relief in this matter when it filed a motion for attorney fees with the District Court of Appeal. (Appendix, Page 29)

SUMMARY OF THE ARGUMENT

CMI Failed to respond when served with the subpoenas. CMI did not contest the County Courts asserting personal jurisdiction over CMI. After being served with the subpoenas, CMI did not seek a protective order on the grounds that the source code was a trade secret. CMI raises each of these issues for the first time on appeal. CMI is legally precluded from asserting issues on appeal that were not raised at the trial court.

CMI claims that the *General Motors* decision relied upon by the trial court was wrongly decided. Even if this were true, this court is required to follow the binding precedent set forth in *General Motors.* CMI did not dispute the trial court's reliance upon Section 607.1505(2), Florida Statutes for obtaining personam jurisdiction. A point not addressed in a brief cannot be used as a ground for reversal.

CMI failed to appear at the show cause hearing to present any legal cause why it should not be held in contempt. CMI cannot present excuses for ignoring the orders of the County Court for the first time on appeal.

ARGUMENT

I. CMI DOES NOT HAVE STANDING TO CONTEST THE ISSUANCE OF THE DISCOVERY SUBPOENA; CMI FAILED TO PRESERVE THIS ISSUE FOR APPELLATE REVIEW

The trial court granted each of the Defendants' motion for issuance of a subpoena duces tecum. Each judge found the source code was material and a subpoena was issued and served upon CMI for the production of the Intoxilyzer source code. While the State of Florida had the right to appeal the decision to grant discovery in this matter, no such appeal was taken. CMI, a non-party, did not have standing to contend that materials sought are not relevant to the underlying proceedings. *Dade County Med. Ass'n v. Hlis*, 372 So.2d 117 (Fla. 3d DCA 1979). ". . . a third party deponent . . . is properly concerned only with whether the subpoena is burdensome, oppressive, unreasonable or Seeks the disclosure of confidential information. If a subpoena duces tecum does fall into one of these categories, it may be quashed, modified, or subject to a protective order, Even though it seeks relevant information." *Id.*

Even if CMI had standing to contest whether the source code was material to Defendants' cases, CMI failed to raise this issue or otherwise object in the trial court. CMI cannot rely upon objections made by the State Attorney. In order to be preserved for appeal, the objection or motion must have been made or adopted by

the party seeking review. *Eagleman v. Korzeniowski*, 924 So.2d 855 (Fla. 4th DCA 2006). CMI never appeared before the trial court prior to instituting this appeal; the initial pleading of CMI was the Notice of Appeal. It is clear CMI did not adopt in the lower proceedings any objections or motions filed by the State Attorney, for CMI elected not to participate in the trial court proceedings.

Each subpoena gave CMI three clear options: 1) appear at the specified time with the Intoxilyzer Source Code, 2) furnish the records instead of appearing, or 3) object to the subpoena. CMI had the option to object to the subpoena, but failed to do so. Florida Rule of Criminal Procedure 3.220(h) (1) provides that the issuance of subpoenas in criminal cases is governed by the Florida Rules of Civil Procedure. CMI had the right to object to the issuance of the subpoena, but the objection or motion had to be filed **at or before the time specified in the subpoena** for production. Rules 1.280 (c) and 1.410 (c). If CMI had timely objected to the issuance of the subpoena, then the issues would have been preserved for appeal. Instead of following the procedure set forth in the Rules of Procedure to object to the subpoena, CMI elected to ignore the subpoena. CMI cannot raise objections for the first time on appeal for these objections were required to be raised no later than the production date set forth in the subpoena.

What is Material Evidence?

The Defendants requested the issuance of a subpoena duces tecum for the Source Code used in the Intoxilyzer 5000 and 8000. Rule 3.220(f) provides on a showing of "materiality", the Court may require such other discovery as justice may require. The Defendants have the right to compulsory process guaranteed by both the Florida Constitution and the United States Constitution. Article I, Section 16 Florida Constitution; 6th Amendment to U.S. Constitution. This right includes both the issuance and enforcement of a subpoena duces tecum. *Green v. State*, 377 So.2d 193 (Fla. 3d DCA 1979); affirmed 395 So.2d 532 (Fla. 1981). The Defendant's right to compulsory process includes both trial and pretrial subpoenas. See *B.E. v. State*, 564 So.2d 566 (Fla. 3d DCA 1990) holding the Defendant's constitutional right to compulsory process was violated when the court restricted **pre-trial** access to a three-year victim.

The definition of what is material evidence is dependent upon the type of proceeding before the court. The definition of material evidence is broadest at the discovery stage, narrower at trial, and more narrow at a motion for new trial. While clearly the current proceedings relate to the Defendants' right to discovery, the multiple definitions of "material evidence" will be discussed to avoid confusion.

The scope of discovery includes any relevant matter or information that appears reasonably calculated to lead to the discovery of admissible evidence. *Ivester v. State*, 398 So.2d 926 (Fla. 1st DCA 1981). The scope of discovery depositions, including the issuance of subpoenas in criminal cases is governed by the Florida Rules of Civil Procedure. Rule 3.220 (h) (1). The Rules of Civil Procedure provide the scope of discovery is whether the information appears reasonably calculated to lead to the discovery of admissible evidence. Rule 1.280 (b) (1). Thus, for purposes of Discovery, material evidence is evidence that is reasonably calculated to the discovery of admissible evidence.

During a trial, the definition of material evidence is embodied in the relevancy requirement of Section 90.401, Florida Statutes. Relevant evidence is defined by statute as "evidence tending to prove or disprove a material fact." *Id.* For evidence to be "material" at trial, the evidence must tend to prove or disprove a fact in issue.

A defendant can file a Motion for a New Trial pursuant to Rule 3.600 (a) (3) upon the discovery of new and material evidence. "Material" evidence in this context requires that the newly discovered evidence "would probably have changed the verdict." *Hill v. State*, 932 So.2d 1117 (Fla. 5th DCA 2006).

If a defendant is seeking relief due to the State failing to produce *Brady* evidence, the Defendant "must demonstrate that the suppressed evidence is

material. The test for materiality is whether there exists a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial." *Smith v. State*, 931 So.2d 790 (Fla. 2006). Also see *James v. State*, 453 So.2d 786 (Fla. 1984) holding that the defendant failed to establish a *Brady* violation where "he raised only the "mere possibility" that the information might be "material"…"

In determining whether the source code is "material" for discovery purposes, the trial Court had to apply the broadest definition of material evidence, which is evidence reasonably calculated to lead to the discovery of admissible evidence. In this cause, the Defendants were not making a claim of a *Brady* violation, or seeking a new trial. The narrow definition of "material" utilized in these proceedings had no application in the defendants' request for the issuance of a subpoena for the production of the Source Code.

CMI asserts that the trial court should have applied the definition of materiality set forth in *James*. In *James*, the Florida Supreme Court held that the defendant seeking **post-conviction relief** failed to establish a *Brady* violation where "he raised only the "mere possibility" that the information might be "material"…" The *James* Decision only addressed the issue of what evidence was "material" to require the production under the Constitution under *Brady*, holding "[t]he mere possibility that an item of undisclosed information might have helped

the defense, or might have affected the outcome of trial, does not establish 'materiality' in the **Constitutional sense**. (Emphasis added). *Id.* at 789. Also see the analysis in *State v. Rice*, 14 Fla. L. Weekly Supp. 992a (Collier Cty. Court 2007) that ordered the production of jail surveillance videos, which found:

> This Court recognizes that in this motion the defense may not be able to meet the due process threshold set forth in *Wright v. State*, 857 So.2d 861 (Fla. 2003), (cited above in Footnote 2) and *State v. Powers*, 555 So.2d 888, 891 (Fla. 2d DCA 1990) (i.e., the evidence must possess both an exculpatory value that was apparent and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means). However, the Court believes that Fla.R.Crim.P. 3.220(f), separate and apart from *Brady v. Maryland*, 373 US 83 (1963) constitutional considerations, contemplates that justice requires that video evidence which bears on impairment should be made available by the State to the defense even if the defense could obtain comparable evidence by calling other witnesses or cross examining officers. The requirements of justice are served whether the video is favorable to the State or Defense because the recorded images assist the fact-finder with the truth-finding purpose of the criminal DUI trial. The burden on the State to produce this evidence is far outweighed by said interests of justice and by potentially exculpatory evidence regarding the issue of impairment of natural faculties being made available to the defendant.

The Florida Supreme Court's analysis in *Long v. State*, 610 So.2d 1276 (Fla. 1992) is applicable in this case. In *Long*,

> the trial Court granted Long's pretrial motion compelling CBS to comply with a subpoena to produce the entire unedited videotaped interview. CBS moved to quash the subpoena under the First Amendment. When the trial judge denied CBS's motion, CBS appealed this issue to the Second District Court of Appeal. Despite defense counsel's objection and the fact that this

> issue was pending before the district court, the trial judge elected to proceed with the trial. Id. at 1280.

Long argued that the State's introduction and use of selected portions of the CBS videotaped interview deprived him of his basic state and federal constitutional rights including the right to due process, the right to a fair trial, the right to compulsory process for obtaining material evidence, the right to present evidence in his own behalf, and the right to confrontation of adverse witnesses because he was denied access to the remaining portions of the taped interview. *Id.* at 1279.

The Florida Supreme Court held that "the trial judge erred in refusing to stay the proceedings until CBS complied with the court orders and produced the entire videotaped interview." *Id.* at 1280. The Florida Supreme Court wrote: "[a]s noted by the Second District Court of Appeal in *Cobb*, 'Long is at somewhat of a disadvantage in that he cannot determine whether [the fairness of introducing other portions of the videotaped interview] arises in this case -- or even whether there is anything on the tape he may want the jury to hear -- without first viewing the entire statement.' *Id.* at 1280; also see *CBS, Inc. v. Cobb*, 536 So.2d 1067, 1070 (Fla. 2d DCA 1988).

Likewise in this case, if the County Courts allowed the State to introduce the breath test results while denying the Defendants the ability have their expert examine the breath test machine's source code, it would deprive them of the basic

state and federal constitutional rights including the right to due process, the right to a fair trial, the right to compulsory process for obtaining material evidence, the right to present evidence in his own behalf, and the right to confrontation of adverse witnesses. The Defendants are not on a "fishing expedition" for evidence that "theoretically could be useful" to them in preparation of their defense. Instead, obtaining the source code is an integral step in the Defendants' due and proper preparation for trial. "The Sixth Amendment to the United States Constitution, as well as Article I, Section 16, of the Florida Constitution, provide that the accused in a criminal proceeding shall have the right of compulsory process for obtaining witnesses in his favor." *CBS* at 1071. The trial court, by enforcing the subpoena is this cause, is assuring that each Defendant's Constitutional Right to Compulsory Process is protected.

II. CMI NEVER CONTESTED PERSONAL JURISDICTION IN THE TRIAL COURT; THIS ISSUE IS WAIVED AND WAS NOT PRESERVED FOR APPELLATE REVIEW

CMI never contested personal jurisdiction in the trial court. The right to challenge personal jurisdiction, unlike subject matter jurisdiction, can be waived. A party wishing to contest personal jurisdiction **must do so in the first step taken in the case**, whether by motion or in a responsive pleading, or that issue is

waived and defendant has submitted himself to the court's jurisdiction. *Consolidated Aluminum Corp. v. Weinroth*, 422 So.2d 330 (Fla. 5th DCA 1982). CMI never contested personal jurisdiction in the trial court. This issue was waived and cannot be addressed for the first time on appeal.

Rather than contesting the jurisdiction of the County Court, CMI just ignored the County Courts' subpoenas and orders to show cause. When a party's claim is that the court does not have jurisdiction over his person to subject him to the orders of the court, lack of personal jurisdiction makes such order voidable only, not void. *Joannou v. Corsini*, 543 So.2d 308 (Fla. 4th DCA 1989). One may not disobey with impunity the order of a court which is merely voidable. *Id.* A trial court has authority to determine a motion for contempt notwithstanding an appeal of an order compelling discovery. *Id.* Here, CMI did not appeal the issuance of the subpoena, it just ignored it. Following *Joannou*, the County Court had the authority to hold CMI in contempt for failing to comply with the subpoenas.

The subpoenas in these cases were served upon CMI's Florida registered agent. A subpoena duces tecum served upon the Florida registered agent of CMI properly requires production not only of those documents located within the State of Florida, but those documents located outside Florida. *General Motors Corp. v. State*, 357 So.2d 1045 (Fla. 3d. 1978). CMI claims in its brief that the *General*

Motors decision is wrong and it has never been cited to. Whether or not this Court agrees with the analysis of the Third District Court of Appeal, this decision has not been overturned and is binding upon this Court, just like it was binding upon the trial court. CMI did not present any legal authority in its initial brief that would allow this Court to fail to follow a binding decision from the District Court of Appeal.

CMI claims the subpoenas were not valid, for they were not issued pursuant to Chapter 942, Florida Statutes, which is titled the "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings", also known as the Uniform Act. There is no dispute that the Defendants did not utilize this Statute. It was not necessary. If CMI did not have a presence in the State of Florida, then the Uniform Act would have been the only way to subpoena CMI. Since CMI has a presence in the State of Florida and is registered to transact business in the State of Florida, a Florida subpoena is lawful. This is also the analysis utilized in the *General Motors* decision. If CMI's analysis of Chapter 942 were correct, then every Florida subpoena served upon a winter resident of Sarasota would be invalid. These witnesses could only be served utilizing the Uniform Act, even if they were served in Florida before they returned to their home state. This interpretation is wrong. There is nothing in the Uniform Act that indicates it is the **only** method to serve a witness with a presence in both

Florida and another State. The Uniform Act is simply a set of procedures to subpoena a witness who is otherwise is beyond the jurisdiction of the Court. Since CMI is transacting business in the State of Florida, there was no reason to utilize the Uniform Act.

In a subsequent decision by the Third District, the Court again ruled that "a court which has obtained personam jurisdiction over a defendant may order that defendant to act on property that is outside of the court's jurisdiction, provided that the court does not directly affect the title to the property while it remains in the foreign jurisdiction. *General Electric Captal Corp. v. Advance Petroleum, Inc.*, 660 So.2d 1139 (Fla. 3d DCA 1995). In reaching this decision, the District Court cited to eleven cases, including the *General Motors* decision, *Dusesoi v. Dusesoi*, 498 So.2d 1348 (Fla. 2d DCA 1986) and a case from CMI's home State of Kentucky, *Arthur v. Arthur*, 625 S.W. 2d 592 (Ky. Ct.App. 1981). *Id.* at 1142.

The trial Court also found it had jurisdiction over CMI pursuant to Florida Statutes. A foreign corporation registered to transact business in the State of Florida, is subject to the same duties, restrictions, penalties, and liabilities imposed on a domestic corporation of like character. §607.1505(2), Florida Statutes. As a foreign corporation registered to transact business in the State of Florida, the County Court had jurisdiction over CMI just like it has jurisdiction over any Florida corporation. CMI came to Florida and registered under this

Statute so it could obtain a multi-million dollar contract to sell breath testing machines to the State of Florida. CMI cannot seek the benefits of transacting business in this state, and then claim it is not here.

In its initial brief, CMI did not claim the trial Court erred in relying upon this Statute for asserting jurisdiction over CMI. A point not addressed in a brief cannot be used as a ground for reversal; failure to pursue the argument on appeal is a waiver of the point. *City of Miami v. Steckloff*, 111 So.2d 446 (Fla. 1959). Since CMI failed to address the County Court's reliance upon Section 607.1505, Florida Statutes for asserting personam jurisdiction over CMI, the trial Court's reliance upon this statute must be affirmed.

The order of contempt found "that Court was previously provided a purchase Order for sale of Intoxilyzers to the Florida Department of Law Enforcement for $1,500,000.00. This Court further takes judicial notice that CMI also provides Intoxilyzers to the majority of the States in this country". Any corporation which sells, consigns, or leases by any means whatsoever tangible or intangible personal property, through brokers, jobbers, wholesalers, or distributors to any person, firm, or corporation in this state **is conclusively presumed** to be both engaged in substantial and not isolated activities within this state and operating, conducting, engaging in, or carrying on a business or business venture in this state. §48.181(3), Florida Statutes. Thus, CMI is conclusively presumed to

be both engaged in substantial and not isolated activities within this state and operating, conducting, engaging in, or carrying on a business or business venture in this state. Since CMI failed to present any evidence at the trial court in an attempt to overcome this presumption, the presumption stands.

CMI has now sought relief under the Florida Rules of Procedure by filing a Motion for Protective Order in each of these cases and by seeking legal fees in the District Court of Appeal. A party seeking relief under the Florida Rules of Procedure for a Protective Order waives any claim it may have had to contest personal jurisdiction. *Zimmerman v. Weinberg*, 557 So.2d 193 (Fla. 4th DCA 1990); *Royal Industries, Inc. v. Birdsong*, 340 So.2d 526 (Fla. 1st DCA 1977); *McKelvey v. McKelvey*, 323 So.2d 651 (Fla. 3d DCA 1976); *Cueto v. Golden State Industries, Inc.*, 883 So.2d 817 (Fla. 3d DCA 2004. Thus even if CMI had not waived its right to contest personal jurisdiction by failing to timely contest the issue in County Court, CMI's subsequent act of seeking relief under the Florida Rules of Procedure in the County Court and District Court of Appeal acts is a waiver of any claim it may have had to contest personal jurisdiction.

III. CMI'S EXPLANATION FOR FAILING TO ABIDE BY THE COUNTY COURT'S SUBPOENA IS BEING ARGUED FOR THE FIRST TIME ON APPEAL, FOR CMI FAILED TO ATTEND THE SHOW CAUSE HEARING

CMI, in its brief, attempts to interject its excuse for failing to comply with various subpoenas duces tecum. CMI failed to appear at the Show Cause hearing where it had the opportunity to present to the Court any legal cause for failing to comply with the subpoenas. The finding of the County Court at the Show Cause hearing included:

- This Court granted the Defendants' Motion for Order to Show, providing in the Order that the issue of what legal effect, if any, this Court must give to the Kentucky Order Quashing Subpoenas could be addressed at the Show Cause Hearing, scheduled for July 18, 2007.
- CMI was served the Order to Show Cause.
- CMI did not file a response to the Order to Show Cause with the Court, instead CMI's attorney, Allen Holbrook, mailed a letter to the Defendants' attorney with attachments, requesting that this information be provided to the Court.
- The Defendants' filed with the Court the correspondence from attorney Holbrook, which provided CMI would not appear at the July 18, 2007 Hearing.
- At the Hearing on July 18, 2007, neither CMI nor a representative appeared before this Court.
- CMI willfully failed to comply with this Court's Subpoena.
- CMI was given the opportunity to present to this Court any legal reason why it should not be held in contempt, including any legal authority for a Kentucky Trial Court to quash a Subpoena issued by this Court, but CMI intentionally elected not to appear before this Court at the Show Cause Hearing.

CMI cannot present its excuse for ignoring the County Court subpoenas and orders to show cause for the first time on appeal. An appellate court cannot consider issues not presented to the trial judge. *Dober v. Worrell*, 401 So.2d 1322 (Fla. 1981). The factual findings of the trial court support the conclusion that CMI intentionally and willfully violated the orders of the County Court.

IV. CMI FAILED TO ASSERT OR ESTABLISH TRADE SECRET PRIVILEGE AS A BASIS FOR NOT COMPLYING WITH THE SUBPOENA; THIS PRIVILEGE CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL

CMI asserts that the source code is a trade secret. Again, this issue is being raised for the first time on appeal. Section 90.506, Florida Statutes does establish a trade secret privilege, but the Statute provides "The privilege may be claimed by the person or the person's agent or employee." The State Attorney could not assert this privilege, only CMI could.

CMI had the right to file a protective order to assert trade secret privilege pursuant to Rule 1.280(c), however the motion had to be filed at or before the time specified in the subpoena for production. A party failing to timely file for a protective order waives any right it may have to assert a trade secret privilege. *Metabolife International, Inc. v. Holster*, 888 So.2d 140 (Fla. 1st DCA 2004).

CMI, by ignoring the subpoena duces tecum, waived any right CMI may have had to object to the production of the source code.

A party wishing to resist discovery has the burden of showing good cause why the information should not be produced. *American Express v. Cruz*, 761 So.2d 1206 (Fla. 4th DCA 2000). Since CMI elected not to participate in the County Court proceedings, CMI necessarily failed to meet its burden of showing good cause why the source code should not be produced.

CONCLUSION

None of the issues raised by CMI in its brief were preserved for appeal, for CMI did not appear before the County Court. The record before this court, which is devoid of any transcript of any hearing, fails to show that the County Court committed any error. CMI was lawfully served a subpoena. CMI ignored the subpoena. CMI was served an Order to Show Cause. CMI ignored this order. CMI willfully violated the orders of the County Court and the findings of contempt should not be disturbed.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by regular U.S. mail to Cliff Ramey, Assistant State Attorney, State Attorney's Office, 2071 Ringling Blvd., Sarasota, FL 34237 and Michael S. Taaffe, Esquire, PO Box 49948, Sarasota, FL 34230 on this 7th day of January , 2008.

Robert N. Harrison

Robert N. Harrison

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I hereby certify that this Brief complies with the font requirements of Rule 9.210.

Robert N. Harrison

Robert N. Harrison