IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

DENNIS FORFA, KATHY KING, WILLIAM KING, LYNN ROZUK, WILLIAM SCHLEIFER, ANTHONY TARGOWSKI, KATHLEEN BLISS, CHARLES D. HARVEY, SHARON HATCHETT, STEPHEN LAMBERT, CATHY MOSELEY, and ROBERT W. MCGUIRK,	:	
Petitioners,	:	
Vs.	:	**CASE NO.** Circuit Case No. 2007-3758 CA
STATE OF FLORIDA,	:	
Respondent.	:	

_____/

PETITIONER'S APPENDIX A

Robert N. Harrison
825 S. Tamiami Trail, Suite 2
Venice, Florida 34285
(941) 485-8551
(941) 488-8932 facsimile
Robert@HarrisonLawOffice.com
Florida Bar No. 0612545
Counsel for Petitioners

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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA **CIVIL ACTION**

DENNIS FORFA,	**[County Court Case No. 06-1804-T]**
KATHY KING,	**[County Court Case No. 06-2604-T]**
WILLIAM KING,	**[County Court Case No. 06-2408-T]**
LYNN ROZUK,	**[County Court Case No. 06-1234-T]**
WILLIAM SCHLEIFER,	**[County Court Case No. 06-1493-T]**
ANTHONY TARGOWSKI,	**[County Court Case No. 06-750-T]**
KATHLEEN BLISS,	**[County Court Case No. 06-2042-T]**
CHARLES D. HARVEY	**[County Court Case No. 06-1323-T]**
SHARON HATCHETT,	**[County Court Case No. 07-589-T]**
STEPHEN LAMBERT,	**[County Court Case No. 07-598-T]**
CATHY MOSELEY,	**[County Court Case No. 06-1135-T]**
ROBERT W. McGUIRK	**[County Court Case No. 07-702-T]**

Petitioners,

vs. **Circuit Court Case No. 07-3758CA**

STATE OF FLORIDA,

Respondent.

_____/

ORDER DISMISSING PETITION FOR WRIT OF MANDAMUS, DENYING PETITION FOR WRIT OF PROHIBITION, AND DENYING RENEWED MOTION TO STAY COURT PROCEEDINGS

THIS CAUSE comes before the Court on a Petition for Writ of Mandamus and/or Prohibition, filed on October 29, 2007 pursuant to Florida Rule of Appellate Procedure 9.100, and on the Petitioners' "Renewed Motion to Stay Court Proceedings," filed November 19, 2007. Having reviewed the petition, the appendix attached thereto, the subsequent motion, and the applicable law, the Court finds as follows:

1. The Petitioners seek an order of this Court mandating that the lower court issue a subpoena duces tecum, and prohibiting the lower court from proceeding to trial until Petitioners have had an opportunity to review the information sought in the subpoena.

N/C Civil CJG

CIVIL #30

2. "A party petitioning for a writ of mandamus must establish a clear legal right to performance of the act requested, an indisputable legal duty, and no adequate remedy at law." *Smith v. State*, 696 So. 2d 814 (Fla. 2d DCA 1997).

3. While the Petitioners present strenuous argument regarding their right to the issuance of a subpoena, they fail to address the existence of an adequate remedy at law. The appropriate remedy would be an appeal to the Circuit Court. In any event, as the Petitioners have failed to allege, let alone establish, a lack of an adequate remedy at law, the Court finds the instant petition facially insufficient for the purpose of issuing a writ of mandamus. Accordingly, this aspect of the petition will be dismissed. *See. Radford v. Brock*, 914 So. 2d 1066 (Fla. 2d DCA 2005).

4. To the extent that the Petitioners seek a writ of prohibition, the Court finds that prohibition should not be sought to forestall judicial acts that might be remedied on appeal. *Sparkman v. McClure*, 498 So. 2d 892 (Fla. 1986). Accordingly, the Court finds that Petitioners have failed to demonstrate an entitlement to a writ of prohibition.

It is, therefore,

ORDERED AND ADJUDGED as follows:

1. To the extent Petitioners seek mandamus relief the petition is **DISMISSED**.
2. To the extent Petitioners seek prohibition, and have filed a renewed motion to stay proceedings, the petition and the subsequent motion are **DENIED**.

DONE AND ORDERED in Chambers at Punta Gorda, Charlotte County, Florida, this 16th day of Nov, 2007.

Donald E. Pellecchia
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished to: The Honorable Peter A. Bell, 350 East Marion Avenue, Punta Gorda, Florida 33950; The Honorable W. Wayne Woodward, 350 East Marion Avenue, Punta Gorda, Florida 33950; Kerry Mack, Esquire, Mack Law Firm Chartered, 2022 Placida Road, Englewood, Florida 34224-5204; Office of the State Attorney, 350 East Marion Avenue, Punta Gorda, Florida 33950; and Court Administration (II), 350 East Marion Avenue, Punta Gorda, Florida 33950, this 28 day of Nov, 2007.

Barbara T. Scott
Clerk of Court

By: _____
Deputy Clerk

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, FLORIDA

DENNIS FORFA	CASE NO.: 06-1804-T
KATHY KING,	CASE NO.: 06-2604-T
WILLIAM KING,	CASE NO.: 06-2408-T
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STEPHEN LAMBERT,	CASE NO.: 07-598-T
CATHY MOSELEY,	CASE NO.: 06-1135-T
ROBERT W. MCGUIRK,	CASE NO.:07-702-T

v.

STATE OF FLORIDA

_____/

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

Pursuant to Rule 9.100, the above individuals, hereinafter "Petitioners" respectfully petition the Court for a Writ of Mandamus and/orProhibition requiring the trial Court to issue the subpoena *duces* tecum to C.M.I, Inc., and/or preventing the trial of the Defendant in violation of the United States and Florida Constitutions' Right to Compulsory Process, until Defendants obtain and examine the source code and show the Court as follows:

BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue a Writ of Mandamus and a Writ of Prohibition under Rule 9.030(c)(3) of the Florida Rules of Appellate Procedure. An appropriate writ may be issued before, or during the process of a criminal trial in order to secure to a defendant prior to conviction the protection of a fundamental right secured to him by the Constitution as part of his trial. See *State ex rel. Brown v. Dewell*, 167 So.2d 687 (Fla. 1936), where the Florida Supreme Court found Mandamus remedy available to a criminal defendant where a trial court denies the defendant the Constitutional right to compulsory process.

STATEMENT OF THE FACTS

These cases were consolidated by informal order of the Court to conserve judicial labor and to have unified rulings in front of the County bench in Charlotte County. Each of the named Defendants were arrested by law enforcement in Charlotte County, Florida. Each defendant was charged by either uniform DUI citation or by information with a violation of s.316.193, F.S. (driving under the influence of alcohol or driving with an unlawful breath alcohol level in excess of .08 grams of alcohol per 210 liters of breath-DUBAL). Following each of the subject arrests, as stated above, each Defendant submitted to a breath test on an Intoxilyzer 8000 breath machine. This machine is manufactured by CMI, Inc., a

foreign corporation which is authorized to do and is doing business in the State of Florida.

The only evidence of DUBAL is a printout of the Intoxilyzer 8000. The State of Florida has no contract with CMI, Inc., for the Intoxilyzer 8000. The State of Florida has maintained in these proceedings that it does not have possession of the source code which is the evidence that these Defendants seek in these Courts. CMI, Inc., has made no appearance in these proceedings although it has attempted, through the State, to maintain a proprietary interest in the source code.

Defendants first filed a Motion for Production of the Source Code, or in the Alternative, for Exclusion of the Breath Test Results, Appendix 1. The State filed a Motion to Strike Defendant's Motion for Production of the Source Code or in the Alternative, for Exclusion of the Breath Test Results, in response, together with a memorandum of law in support thereof, Appendix 2. Thereafter, Defendants filed a Motion in Limine, Appendix 3, and the State filed a Motion to Strike Defendants' motion Appendix 4. Defendants formally withdrew their Motion in Limine, Appendix 5.

Defendants then filed a Motion for Issuance of Subpoena Duces Tecum supported by the affidavit of Harley R. Myler, Ph.D., P.E, Appendix 6. Dr. Myler, Defendants' expert, had previously appeared live before the Court in the challenge to the breath test filed in other cases involving another CMI, Inc. breath machine,

the Intoxilyzer 5000; therefore, his credentials were well known to the Court. For this Court's information, Defendants are attaching a true and correct copy of his *curriculum vitae* as an Appendix to the Petition, Appendix 7.

The Court, Judges W. Wayne Woodard and Peter A. Bell, heard the Defendants motion on June 25, 2007; the State's main witness, Laura Barfield, was unavailable as she had been involved in a motor vehicle crash earlier that day. Defendants did not object to the continuance, and the hearing was eventually reset to September 7, 2007. Despite the State's second Motion for Continuance on the grounds that its witness, Laura Barfield, was again unavailable due to a conflict in Osceola County, (which motion was denied by the Court on August 29, 2007), Ms. Barfield did in fact appear on September 7, 2007, to give her testimony.

The Court issued its joint order denying Defendants' request for the issuance of the subpoena duces tecum to CMI, Inc. on September 27, 2007, Appendix 8. This Petition followed that denial, seeking Mandamus relief to require the lower Court to issue the subpoena duces tecum prior to trial on these cases and Prohibition relief to prevent the Court from proceeding to trial on these cases until Defendants have exhausted their Constitutional right to review these orders which are in the nature of pre trial discovery orders or until CMI, Inc. produces the source code for examination by a defense expert.

Subsequent to the denial of Defendants' Motion for issuance of the subpoena duces tecum to CMI, Inc., that entity changed its corporate policy and agreed, under certain terms and conditions, that it would produce the source code in this State (as it had in Minnesota in the *Underdahl* proceedings). The Defendants notified the Courts of this development; Judge Woodard granted the Defendants' Motion to Continue the trials stating the "fundamental fairness" required the continuance to allow Defendants time to actually obtain the source code and have it examined by their expert, Dr. Myler. Judge Bell denied the same motion and kept the cases on his then-pending trial docket. See Omnibus Motion to Continue attached as Appendix 9 to this Petition.

THE NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by this Petition is a Writ of Mandamus directing the trial to enforce the Defendants' Constitutional Right to Compulsory Process by Granting the Defendants' Motion for the Issuance of a Subpoena Duces Tecum and further issue a Writ Prohibition to prevent the trial of the Defendant until such time as the Defendant is no longer denied the Right to Compulsory process.

ARGUMENT

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. 3rd 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. 3rd DCA 1990) holding the Defendants constitutional right to compulsory process was violated when the court restricted **pre-trial** access to a three-year victim.

The Defendants requested the issuance of a subpoena duces tecum for the Source Code used on the Intoxilyzer 8000. Rule 3.220(f) provides on a showing of "materiality", the Court may require such other discovery as justice may require. The Court applied the incorrect standard as to whether the source code was material, ruling that **"evidence is material if it tends to negate the guilt of the accused."**

The failure to allow the Defendants' a subpoena in this cause will violate their right to compulsory process unless it can be shown beyond a reasonable doubt that the rights of the Defendants are not effected by the failure to issue the subpoena. *B.E.*, 564 So.2d 566. When the relevancy of requested documents is contested, "the trial judge should require production only of those documents

which are at least 'prima facie' not irrelevant to some probable issue in the cause." *Vann v. State*, 85 So.2d 133 (Fla. 1956). Thus, unless this Court finds that the source code is 'prima facie" irrelevant to any probable issue in this cause, then the subpoena should be issued. The Standards set forth in *Ivester, B.E.* and *Vann* are basically the same, just using different language. If the production of the source code *may* lead to admissible evidence, then the production should be ordered. Only if it is clear that the production of the source code will not lead to anything useful or legitimate should production be denied.

In the Case of *1st Health Inc. v. Sentry Casualty Co.*, 13 FLW Supp. 1210a (Sarasota Cty. Ct. 2005), the Plaintiffs sought the production of the software program to determine the methodology that the Defendants were using to determine that certain medical bills were customary and reasonable. This software program was the only evidence used to assess whether these bills were customary and reasonable. The Defendants claimed they could not produce this information, for it was not in their possession, but belonged to a third party. Judges Goldman and Bonner ruled "once a party asserts a claim or defense, the opposing party has the right to discover all documents or witnesses relevant to such claim or defense... this basic principle becomes even more significant because, literally no other evidence currently exists that supports the Defendant's allegation that the

charges billed were not reasonable or customary". *Id.* This decision was affirmed on appeal, where Judge McDonald ruled:

> 1st Health has the right to conduct discovery regarding the information being relied upon by Sentry to deny and reduce the Plaintiff's medical bills. It is incumbent upon the Defendant to produce the evidence upon which it intends to rely for defense of its case; it is not the responsibility of Plaintiff to independently obtain this evidence if it is in the possession of a party other than the Defendant. *Sentry Casualty Co. v. 1st Health Inc.*, 14 FLW Supp. 835a (Sarasota Cir. Ct. 2007). ***The text of both cases is attached as Appendix 10.***

In the current cases, each of the Defendants is charged with DUI. The State can prove its cases by establishing either impairment OR driving with an unlawful breath alcohol level. The only evidence of an unlawful breath alcohol level is the print out from Intoxilyzer 8000 utilizing the methodology contained in the source code. Certainly, an individual's right to discovery when his liberty is at stake is as broad, if not broader, than that allowed during a civil proceeding when the only issue is money.

Indeed, the trial court's order indicates that it has confused relevancy with the admissibility of the evidence sought by Defendants. 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 *Long* Court agreed and 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 *Long* Court referred to the appellate proceeding "[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.' *CBS, Inc. v. Cobb*, 536 So.2d 1067, 1070 (Fla. 2d DCA 1988).

Likewise in this case the trial court's decision to allow the State to introduce the breath test results while denying the Defendants the time to have their expert

examine the breath test machine's source code deprives 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. 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, provides 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 here has ignored the Defendants' right to examine the source code in preparation of their defense requiring these Defendants to prove that evidence which they have been denied would be exculpatory. This finding is patently unfair.

Defendants' Omnibus Motion to Continue was granted by Judge Woodard as he determined that fundamental fairness required the Court to allow the Defendants time to secure the source code from CMI, Inc. and have it examined by the Defense expert, despite his denial of the Defendants' motion. Judge Bell denied the Motion to Continue in a separate hearing and maintains that all affected defendants must be ready for trial.

CONCLUSION

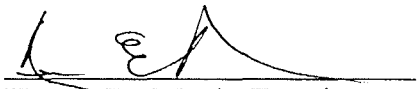
WHEREFORE, Petitioners, pray that this Honorable Court issue an Order Granting their Petition for Writ of Mandamus and/or Prohibition based upon the aforementioned argument, authorities and facts and order that that these cases be stayed until the Defendants have secured the source code evidence either by voluntary production by CMI, Inc. or through the issuance of the requested subpoena duces tecum and their expert has examined the source code.

Kerry Mack, Esquire
MACK LAW FIRM CHARTERED
2022 Placida Road
Englewood, Florida 34224-5204
(941) 475-7966
Attorney for Petitioner
Florida Bar No.: 0337897

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing was furnished to **Honorable W. Wayne Woodard and Honorable Peter A. Bell, 350 E. Marion St., Punta Gorda, FL 33950 and Megan Belay and/or Michael Anthony Pica, Esq. Office of the State Attorney, 350 E. Marion Avenue, Punta Gorda,**

FL 33950, by fax on October 29, 2007 and by hand delivery on this October 30, 2007.



Kerry E. Mack, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Kerry E. Mack, Esquire

IN THE COUNTY COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA,

Plaintiff,

vs.

DENNIS FORFA,	CASE NO. 06-1804-T
KATHY KING	CASE NO. 06-2604-T
WILLIAM KING	CASE NO. 06-2408-T
LYNN ROZUK	CASE NO. 06-1234-T
WILLIAM SCHLEIFER	CASE NO. 06-1493-T
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SHARON HATCHETT	CASE NO. 07-589-T
STEPHEN LAMBERT	CASE NO. 07-598-T
CATHY MOSELEY	CASE NO. 06-1135-T
ROBERT W. MCGUIRK	CASE NO. 07-702-T
TAMMIE DURHAM	CASE NO. 06-1973-T
MARTIN GILL	CASE NO. 07-486-T
RALPH MCCLOUD	CASE NO. 07-252-T
ROY STRELCUN	CASE NO. 06-2187-T
WILLIAM VANDORNICK	CASE NO. 06-2104-T
KIRBY WHITE	CASE NO. 06-1818-T
WESLEY MCCOWIN	CASE NO. 07-287-T
JEFFREY RITTERPUSCH	CASE NO. 07-390-T
EDWARD SOUTHERN	CASE NO. 07-1039-T
ROBERT PAUL BUFFINGTON	CASE NO. 07-390-T
JOSEPH R. MILLER	CASE NO. 07-272-T
JASON LEE COLE	CASE NO. 07-113-T
RONALD PAUL PAGE	CASE NO. 06-1590-T
GREGORY STEPHEN GODO	CASE NO. 06-1717-T
ALLEN DRZYMALA	CASE NO. 07-448-T
DAVID FOSTER	CASE NO. 06-1190-T
MARK AULD	CASE NO. 07-935-T
SHANE LOWE	CASE NO. 07-656-T
JEROME SIFFORD	CASE NO. 07-955-T

Defendants.

Appendix 8

ORDER

THIS CAUSE having come before this Honorable Court on Defendants' Motion for Issuance of Subpoena Duces Tecum, the Court having reviewed evidence, heard argument of counsel and the being fully and otherwise advised in the premises does hereby find as follows:

1. The Defendants seek issuance of a Subponea Duces Tecum directing CMI, Inc., to produce the source code used in the Intoxilyzer 8000, software versions 8100.24, 8100.25, 8100.26 and 8100.27. The Defendants have cited the Federal Due Process Clause and the Florida Rules of Criminal Procedure as authority for their right to issuance of the Subpoena Duces Tecum.

2. Due Process Clause:

As a general proposition, a defendant does not have a common law right to discovery, State v. Diamond, 553 So. 2d 1185 (Fla. 1st DCA 1989), State v. Smith, 260 So 2d 489 (Fla. 1972). Therefore, neither by implication nor by specific provision does a defendant have a general Constitutional right to discovery. Diamond (supra), State v. Ross, 792 So 2d 699 (Fla. 1972). A defendant's Constitutional right to due process of law has resulted in some decisions giving a defendant certain limited rights as it relates to pre-trial discovery. Those cases are described in California v. Trombetta, 467 U.S. 479 (1984) as "access to evidence" cases. The access to evidence cases address the right to request of and receive from the State evidence that is material to guilt or relevant to the punishment to be imposed. Trombetta (supra) citing to Brady v. Maryland, 373 U.S. 83 (1963). This right to evidence has spawned a list of cases bearing on the defendant's right to be given or pursue evidence favorable to the defendant's defense against the charges they are facing. Those cases are collected and described in the Trombetta (supra) case.1 In the Agurs (supra) case the U.S. Supreme Court described the nature of this evidence to which a

1 United States v. Valenzuela-Bernal, 458 U.S. 858 (1982); Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S.103 (1935); Brady v. Maryland, 373 U.S. 87 (1963); United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972); Roviaro v. United States, 353 U.S. 53 (1957); United States v. Marion, 404 U.S. 307 (1971) and United States v. Lovasco, 431 U.S. 783 (1977)

defendant is entitled as material and defined material as evidence which would create a reasonable doubt. Based on that definition, the evidence to which a defendant is Constitutionally entitled under the Due Process Clause must be exculpatory. Since the Defendants in the instant cases cannot state that exculpatory evidence exists but rather only that it might exist and it might not exist, this Court cannot order access to the requested source code under the Due Process Clause.2

3. Florida Rules of Criminal Procedure:

Although not cited in Defendants' Motion, the ground for issuance of a Subpoena Duces Tecum implicit in Florida Rules of Criminal Procedure 3.220(f) has been thoroughly argued and briefed by both parties. The above cited provision provides that "[o]n a showing of materiality, the Court may require such other discovery to the parties as justice may require". The Defendants are seeking an Order directing the Clerk to issue a Subpoena Duces Tecum as a means of obtaining "other discovery" (id.). The principle issue regarding this basis for issuance of the requested Subpoena Duces Tecum is: "What showing must a Defendant make in order to be entitled to a finding of 'materiality' and, therefore, be entitled to issuance of a Subpoena Duces Tecum?". The defense argues that the showing must be merely that the evidence sought is reasonably calculated to lead to the discovery of admissible evidence citing to Florida Rules of Criminal Procedure 3.220(h) and Florida Rules of Civil Procedure 1.280(b)(1). Further analyzing the above standard, the defense cites to Vann v. State, 85 So.2d 133 (Fla. 1956) for the proposition that evidence which is "at least 'prima facia' not irrelevant to some probable issue in the cause" should be ordered produced. The State argues that the Defendants lack standing to bring the motion or in the alternative there is no showing of "materiality" as required by Florida Rules of Criminal Procedure 3.220(f) as the term materiality is defined in the James v. State, 453 So.2d 786 (Fla. 1984) case. The State has cited to no case that analyzes the proposition of standing to request additional discovery under Florida Rules of Criminal Procedure 3.220(f), however, the rule refers to "parties". Since the Defendants are parties to their case, it appears that they have standing. As the defense points out, the James (supra) case is a case dealing with an alleged discovery violation under Florida Rules of Criminal Procedure 3.220(b)(4) which is a provision designed to implement the defendant's rights under the Brady (supra) decision. If the definition of materiality under Florida Rules of Criminal Procedure 3.220(f) is identical to a Brady (supra) due process right to discovery then Florida Rules of Criminal Procedure

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2 Under United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) a defendant has a due process right to interview eye-witnesses before trial if the defendant believes the witness will provide favorable evidence for the defense. The Defendants cite to the case of B.E. v. State, 564 So. 2d 566 (Fla. 1990) for the proposition that a defendant has a constitutional right to pre-trial compulsory process. The U.S. Constitutional right to compulsory process in the Sixth Amendment is for obtaining witness attendance for trial (U.S. v. Valenzuela-Bernal (supra). The B.E. (supra) case had to do with a claim of denial of access to a witness during pre-trial preparation by the defense and a preclusion of the defendant's ability to subpoena the witness for trial. The undersigned see the holding in the B.E. (supra) case as a condemnation of the due process violation of precluding pre-trial investigation vis a vis the therein identified three year old eye-witness who would provide exculpatory testimony for the defense and a condemnation of the violation of the defendant's right to compulsory process by preventing the subpoenaing of the three year old eye-witness for trial. Neither the Valenzuela-Bernal (supra) case nor the B.E. (supra) case stand for the proposition that a defendant has a right to compulsory process to accomplish pre-trial discovery. Such a right would be inconsistent with the limitations on deposing Category B, Category C and misdemeanor charge witnesses contained in Florida Rules of Criminal Procedure 3.220(h)(1)(B), (C) and (D).

3.220(f) is unnecessary as the defendant has a constitutional right to Brady (supra) material and a right under Florida Rules of Criminal Procedure 3.220(b)(4) to Brady (supra) material.3 It, therefore, appears that the James (supra) definition of materiality as used in that post-trial analysis of the significance of non-disclosure is inapposite in the instant cases However, to the extent the State's definition of material is overly narrow, the defense's definition appears overly broad. The subpoena under consideration in the Van (supra) case appears to have been in the nature of a State Attorney's investigatory subpoena. The duty of the State to investigate and the right of a defendant to discovery are not synonymous and, therefore, the analysis of materiality in the Van (supra) would not be instructive for these proceedings. Florida Rules of criminal Procedure 3.220(h) discusses discovery depositions. It requires that the scope of the examination during depositions be controlled by the Florida Rules of Civil Procedure. Florida Rules of Criminal Procedure 3.220(f) does not have a similar provision. There is not any general provision in Florida Rules of Criminal Procedure 3.220 requiring that the scope of discovery be controlled by the Florida Rules of Civil Procedure. Florida Rules of Criminal Procedure 3.220(f) specifically requires a showing of materiality. The undersigned have been unable to find any case law explaining that the term material evidence means the same as evidence that is "relevant or reasonable calculated to lead to relevant evidence". The version of Florida Rules of Criminal Procedure 3.220(f) that existed prior to the 1989 amendment of the rules [Florida Rules of Criminal Procedure 3.220(a)(5) (1988)] included the phrase "Upon a showing of materiality to the preparation of the defense...". It appears the Florida Supreme Court linked the defendant's right to additional discovery under Subsection (f) (supra) to the defendant's defense of the case. The addition of the State to the coverage of Subsection (f) (supra) appears only to have been intended to allow the State the same opportunity for additional discovery (by the State of inculpatory evidence) as the defense had to seek additional discovery (of exculpatory evidence).4 In the instant case the defense has not shown that any exculpatory evidence exists. Their request is to go looking for evidence which admittedly will be either inculpatory or exculpatory and the defendants cannot say which it will likely be. Absent a showing by the defense that exculpatory evidence exists, much less that it is substantial (see Black's Law Dictionary definition "material evidence")5 this Court cannot order issuance of a Subpoena Duces Tecum under Florida Rules of Criminal Procedure 3.220(f).

It is therefore

ORDERED AND ADJUDGED that the Defendants Motions shall be and are hereby denied.

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3 To reiterate, the Agurs (supra) case defines material evidence or exculpatory evidence as evidence that *will* create a reasonable doubt. It does not state that the evidence *may* create a reasonable doubt. The Agurs (supra) Court seems to be saying that the evidence must be of such a significant character that it will result in an acquittal if presented in conjunction with all the State's evidence and other defensive evidence to a jury.

4 This interpretation appears consistent with the posture of discovery motions existing before the 1989 amendment and the analysis required by the trial court upon receipt of a discovery motion. See generally State v. Coney, 272 So.2d 550 (Fla. 1st DCA 1973)

5 There has been no showing that there probably are errors in the software or source code. It has also not been shown that if any errors do exist they probably render the test results unreliable.

DONE AND ORDERED in Chambers at Charlotte County Justice Center, Punta Gorda, Charlotte County, Florida, this 27 day of September, 2007.

/s/W. WAYNE WOODARD
W. Wayne Woodard
County Court Judge

PETER A. BELL
Peter A. Bell
County Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to Office of State Attorney, Charlotte County Justice Center; Christopher Brown, Esq., Attorney for Defendants Kirby White, Tammie Durham, Martin Gill, Ralph McCloud, Roy Strelcun, William Vandornick, Wesley McCowin, Jeffrey Ritterpusch and Edward Southern, 265 E. Marion Avenue, Suite 114, Punta Gorda, FL 33950; Paul D. Sullivan, Esq., Attorney for Defendants Robert Paul Buffington, Joseph R. Miller, Jason Lee Cole, Ronald Paul Page and Gregory Stephen Godo, 520 E. Olympia Avenue, Punta Gorda, FL 33950; Thomas D. Marryott, Esq., Attorney for Defendants Allen Drzymala, David Foster and Mark Auld, 126 E. Olympia Avenue, Punta Gorda, FL 33950; Amber Weaver, Esq., Attorney for Defendant Shane Lowe, 525 E. Olympia Avenue, No. 7, Punta Gorda, FL 33950; and Toby Andrew Oonk, Esq., Attorney for Defendant Jerome Sifford, 126 E. Olympia Avenue, Suite 405, Punta Gorda,FL 33950 by Courthouse Box Delivery; and Kerry E. Mack, Esq., Attorney for Defendants Kathleen Bliss, Charles D. Harvey, Sharon Hatchett, Stephen Lambert, Cathy Moseley, Dennis Forfa, Kathy King Willliam King, Robert W. McGuirk, Lynn Rozuk, William Schleifer and Anthony Targowski, 2022 Placida Road, Englewood, FL 34223 by United States Mail this 27 day of September, 2007.

VICKI L. DELLE DONNE
Vicki L. Delle Donne
Judicial Assistant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by regular U.S. mail to Megan Belay, Assistant State Attorney, State Attorney's Office, 350 E. Marion Ave., Punta Gorda, FL 33950 on this 26th day of December , 2007.

Robert N. Harrison

Robert N. Harrison