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

Consolidated Appeal Case Nos. **2007 AP 10721 NC** ✓
2007 AP 10932 NC
2007 AP 10934 NC
2007 AP 10933 NC
2007 AP 12538 NC

CMI, INC. d/b/a CMI, INC. of KENTUCKY,

Appellant,

vs.

JOHN FABIAN, CATHERINE MARSH, MORLEY PARENT, SARA PENNEY, KENNETH BAKER, STATE OF FLORIDA,

Appellees.

On Appeal from the Twelfth Judicial County Court

APPELLANT'S INITIAL BRIEF

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RECORD REFERENCE ABBREVIATIONS USED IN THIS BRIEF

CMI, Inc., d/b/a CMI, Inc. of Kentucky, will be referred to as "CMI."

Defendants, John Fabian, Catherine Marsh, Morley Parent, Sara Penney and Kenneth Baker, will be referred to collectively as the "Defendants."

Appellee, the State of Florida, will be referred to as the "State."

The "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings," codified at sections 942.01 through .06, Florida Statutes (2006), will be referred to as the "Uniform Act."

The Florida Department of Law Enforcement will be referred to as "FDLE."

STATEMENT OF THE CASE AND FACTS

CMI is a Kentucky corporation that has filed a limited notice of appearance reserving and contesting jurisdiction for purposes of this appeal, whose contacts with the State of Florida involve the sale of Intoxilyzer brand breathalyzers, models 5000 and 8000, to FDLE. Over the past several years, Defendants have attempted to obtain the confidential and proprietary Source Code to these breathalyzer instruments through Florida Statute 316.1932(1)(f)4, which codifies the regulation of the DUI breath testing program. Recently, the Florida Legislature amended this statute to reflect that the "full information" clause in the statute does not include the Source Code to the breathalyzers, and criminal defendants are not entitled to the Source Code. Fla. Stat. 316.1932 (2006).

After the Florida Legislature stated Defendants are not entitled to the Source Code from the State through 316.1932(1)(f)4, and the Florida Legislature closed the "full information" loophole, Defendants sought the exact same information by requesting subpoenas duces tecum directly to the out-of-state manufacturer of the breathalyzer, CMI, under another avenue, Fla.R.Crim.Pro. 3.220(f). (*Fabian* Vol. 1, p.3)

Fla.R.Crim.Pro. 3.220(f) provides that the court, upon a showing of materiality, may require such other discovery as the parties or justice require. Based upon this additional discovery rule, all three County Courts, after a limited hearing, found that the Source Code is material, and directed the clerk to issue subpoenas directly to CMI. (*Fabian* Vol. 1 p.48) (*Baker* p. 2-5) (*Marsh, Parent, Penney* p. 2-3) The case law cited by the courts for authority of the County Court to issue a discovery subpoena duces tecum directly to a non-party out-of-state corporation through a registered agent is *General Motors Corp. v. State,* 357 So.2d 1045 (Fla. 3DCA 1978). (Baker p. 4)

With respect to the determination of materiality, we must separately address the Source Code to the Intoxilyzer 5000 and the Source Code to the Intoxilyzer 8000[1].

As to the Source Code on the Intoxilyzer 5000, the County Courts based their determination of materiality on factual findings from an evidentiary hearing that occurred in *State v. Bjorkland*[2]. (*Baker* p. 3) This Court should recognize that *State v. Baker* is actually *State v. Bjorkland.*[3]

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[1] *State v. Baker, State v. Marsh, State v. Penney* and *State v. Parent* all involve the Source Code to the Intoxilyzer 5000, while *State v. Fabian* involves the Source Code to the Intoxilyzer 8000.

[2] *State v. Bjorkland*, Criminal Case No. 2004 CT 14406 SC.

[3] Originally, defendant Kenneth A. Baker was consolidated and was a part of *State v. Bjorkland*, et al. Carole Mae Bjorkland eventually pled guilty to DUI, and for convenience the courts took to referring to the

At that hearing on materiality on the Intoxilyzer 5000 held on October 31, 2005, the judge informed the State that they were not required to rebut Defendant's expert, but that they would have a later opportunity to do so if Defendants sustained their burden. (*Baker* p. 14-15) The State was told by the County Court, "Just so we are clear. I'm not requiring the State to do anything at this point. The only thing the State has to do on the 21st is show up." (*Baker* p. 14) Subsequently, the court never allowed the State to rebut Defendant's expert and ruled the Source Code was material even though the State filed a request for a response hearing. (*Baker* p. 10-21)

With respect to the Source Code on the Intoxilyzer 8000, in *State v. Fabian*, no evidentiary hearing on materiality was ever held. The *Fabian* Court *sua sponte* determined the Source Code to the Intoxilyzer 8000 was material without any hearing at all. (*Fabian* Vol. 1, p. 48-49)

After its determinations of materiality, the Sarasota County Courts approved subpoenas duces tecum which were served upon CMI's registered agent in Florida. (*Fabian* Vol. 1, p. 52-53) (*Baker* p. 2-8) (*Marsh, Parent, Penney* p. 9-10) CMI then obtained orders quashing these subpoenas from the Kentucky courts wherein they reside because the subpoenas duces tecum were not issued

consolidated cases as *Baker*. The Order of Civil Contempt even styles the case as *Baker et al.* However, no further order of consolidation can be found in the record consolidating the other 28 cases with *Baker*.

pursuant to the Uniform Act. (*Fabian* Vol. 1, p. 131, 165) CMI informed Defendants that the subpoenas had been quashed. (*Fabian* Vol. 1, p. 128-140) Defendant informed the Court CMI had quashed the subpoenas. (*Fabian* Vol. 1, p. 128-140) Defendants subsequently moved for and obtained orders from each of the County Courts finding CMI in contempt despite the County Courts awareness that CMI had already quashed the subpoenas. (*Fabian* Vol. 1, p. 184) (*Baker* p.51) (*Marsh, Parent, Penney* p. 29)

This consolidated appeal arises from these numerous court orders finding CMI in willful contempt for failing to respond to these subpoenas duces tecum and fining CMI compounding fines that have reached well over $300,000.00.

STATEMENT OF JURISDICTION

The lower Court's Orders are appealed pursuant to Florida Rule of Appellate Procedure 9.110 as Final Orders of Civil Contempt against non-party CMI.

STANDARD OF REVIEW

The standard of review applicable to the lower court's Orders is abuse of discretion and whether the court departed from the essential requirements of law and material injury occurred. *Price v. Hannahs*, 954 So.2d 97 (Fla. 2DCA 2007).

SUMMARY OF ARGUMENT

The County Court Orders of Civil Contempt should be reversed as abuses of discretion, because they misapplied the applicable law and material injury has occurred by way of fines against CMI totaling over $300,000. The appeal is based upon three grounds. First, the County Courts abused their discretion when they determined the Source Code was "material" under Fla.R.Crim.Pro. 3.220(f). Second, the Uniform Act must be utilized to subpoena an out-of-state non-party corporation, even where that corporation maintains a resident agent. Third, CMI did not "willfully" fail to respond to the County Court's subpoenas duces tecum.

The County Court first erred when it concluded that the Source Code is material because the intent of Florida Legislature is clear that the Source Code is not material, and the County Court based its determination of materiality upon a flawed evidentiary hearing where: (1) no evidence was presented that any of **these**

named defendants had any "irregularities" in their breath tests; and (2) the State had no opportunity to rebut the evidence presented.

All experts, including those of the defendants, acknowledge that the instrument's accuracy and reliability can only be determined through testing such as is done by FDLE. Knowing *how* the Intoxilyzer arrives at its results does not alter the determination of accuracy and reliability.

Judicially sanctioned access to the Source Code for the Intoxilyzer potentially threatens proprietary trade secrets associated with all devices used in connection with criminal proceedings, including radar guns, DNA testing equipment, digital fingerprinting at jails, facial recognition software, surveillance equipment or any other software-dependent equipment that provide information that could be admitted in evidence. Because of the onerous burden on out-of-state non-party witnesses who happen to manufacture equipment used in law enforcement, it is imperative that the screening safeguards of the Uniform Act be observed whenever a criminal defendant seeks to subpoena testimony or documents from a nonparty witness located in another state.

Second, the County Court abused its discretion when it issued subpoenas duces tecum directly to CMI, who is an out-of-state non-party. The County Court relied upon a 1978 case that not only has never been cited or followed, but whose

legal principles have been resoundingly rejected by every other court in the nation, including those in Florida. Further, the County Court misapplied the applicable law by failing to recognize the distinction between personal jurisdiction and the power to subpoena in discovery.

Finally, The County Court abused its discretion when it found CMI had willfully failed to respond to its subpoenas where the subpoenas in question had been previously quashed by a Kentucky court and CMI had been directed both by a Sarasota County Court and its own court in Kentucky that it did not have to respond to the subpoenas unless they were pursuant to the Uniform Act.

ARGUMENT

I. THE COUNTY COURT ERRED WHEN IT FOUND THE SOURCE CODE "MATERIAL."

Defendants attempted to obtain the Source Code to the Intoxilyzer 5000 and 8000 by way of Fla.R.Crim.Pro. 3.220(f). Rule 3.220(f) provides that the court, upon a showing of materiality, may require such other discovery as the parties or justice require. Throughout the State of Florida, and in every jurisdiction, trial courts held evidentiary hearings to determine whether the Source Code was "material" under this rule of discovery. The three Sarasota County Court divisions

are one of a scant few jurisdictions that have determined the Source Code is material.[4]

With respect to the determination of materiality, we must separately address the Source Code to the Intoxilyzer 5000 and the Source Code to the Intoxilyzer 8000[5].

Looking first at the Intoxilyzer 5000, the evidentiary hearing the County Courts rely upon to determine materiality was in *State v. Bjorkland*, Criminal Case No. 2004 CT 14406 SC, at a hearing held October 21, 2005. This Court should recognize that *Baker* is actually *Bjorkland*.[6] At that hearing in *State v. Bjorkland*, Defendants presented testimony that the Source Code was material to their defense. The State Attorney's office was told at the time the initial burden for the hearing was on the Defendants. (*Baker* p. 10) The State was led to believe by the Court if the initial burden had been shown by these Defendants the State would then be allowed the chance to rebut with their own evidence at a later date. (*Baker* p. 14-15) This never occurred. Without ever allowing the State to present any

[4] The other known case is out of Miami in *State v. Bastos*. In that case, an *en banc* panel of nine judges conducted an evidentiary hearing wherein eight of the nine determined the Source Code was **not** material, with one lone dissenter determining it was material. That Order from the one judge was appealed to the Third DCA in Case No. 3D06-1647 where it is currently pending.

[5] *State v. Baker, State v. Marsh, State v. Penney* and *State v. Parent* all involve the Source Code to the Intoxilyzer 5000, while *State v. Fabian* involves the Source Code to the Intoxilyzer 8000.

[6] Originally, defendant Kenneth A. Baker was consolidated and was a part of *State v. Bjorkland*, et al. Carole Mae Bjorkland eventually pled guilty to DUI, and the courts took to referring to the consolidated cases as *Baker*. The Order of civil contempt even styles the case as Baker et al. However, no further order of consolidation can be found in the record consolidating the other 28 cases with *Baker*.

rebuttal evidence, the County Court issued an Order in *State v. Bjorkland* that the Source Code was material.[7] The State protested vehemently to no avail and filed a "Motion Requesting a Response Hearing" dated November 10, 2005. (*Baker* p. 14-15) In this motion, the State filed a transcript of the hearing on materiality wherein they cited the judge directing the State as to the procedure at the hearing. This transcript in pertinent part can in part be found in this appeal's record. (*Baker* p. 14-15) This request by the State was denied. Thus, the Orders in Defendants' cases finding the Source Code is material as to the Intoxilyzer 5000 **all** base their findings on this prior *Bjorkland* hearing wherein the State was not permitted to present any evidence whatsoever. Contrast this with the numerous other hearings held throughout the state[8] in other counties who found the Source Code was not material after allowing the State to present evidence, and this Court can readily see why the County Court abused its discretion from the beginning by determining the Source Code is material from a procedurally flawed hearing from which they approved the subpoenas duces tecum.

With respect to the Source Code on the Intoxilyzer 8000, in *State v. Fabian*, no evidentiary hearing on materiality was **EVER** held. The *Fabian*

[7] The County Court in *Bjorkland* was forced to reverse itself after the Florida legislature amended the statute at issue and the 5th DCA ruled in *Moe v. State*, 944 So.2d 1096 (Fla. 5DCA 2006). However, in the Orders granting the subpoenas duces tecum in the instant cases, the three County Courts held that the previous **findings of fact** regarding materiality in *Bjorkland* stood, notwithstanding *Bjorkland's* reversal.

[8] See, e.g. *State v. Kocis*. (*Fabian* p.148)

Court *sua sponte* determined the Source Code to the Intoxilyzer 8000 was material. (*Fabian* p. 48-49) Further, at the time the *Fabian* Order came out stating that the Source Code to the Intoxilyzer 8000 was material, the only evidentiary hearings that had been held on the matter in all of Florida were in Miami and in Orlando, where *en banc* panels of judges numbering as many as ten all found, after lengthy and protracted evidentiary hearings, that the Source Code to the Intoxilyzer 8000 was not material. Yet the County Court in *Fabian*, without a hearing and without evidence, decided that it was material. Finally, no evidence was presented that any of these named defendants had any "irregularities" in their breath tests. Thus, these defendants have no standing for the subpoenas duces tecum and the subpoenas are simply being utilized to delay justice.

A. THE DEFINITION OF MATERIALITY

The best and most often cited definition of "materiality" comes from the Florida Supreme Court case of *James v. State*, 453 So.2d 786 (Fla. 1984). In *James*, the Florida Supreme Court considered materiality under Fla.R.Crim.Pro. 3.220(a)(2), which requires the State to disclose any material information tending to negate the guilt of the accused. *James* cited the explanation of the United States Supreme Court: "The mere possibility that an item of undisclosed information

might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *James* at 789 citing *U.S. v. Agurs*, 427 U.S. 97, 96 (1976). This Court has utilized this very standard to determine "materiality" in its Order Denying Motion For Issuance of Subpoena Duces Tecum dated October 31, 2006 in *State v. Jugov*, Criminal Case No. 2005 CF 011805 NC citing *State v. Bastos*, et al, 13 Fla. L. Weekly Supp. 1003a (June 27, 2006).

B. THE FLORIDA LEGISLATURE NEVER INTENDED THE SOURCE CODE TO BE MATERIAL

Over the past several years, Defendants have attempted to obtain the confidential and proprietary "source code" to these breathalyzer instruments through Florida Statute 316.1932(1)(f)4, which codifies the regulation of Florida's DUI breath testing program. These unsuccessful attempts to gain the Source Code merely succeeded in clogging the dockets of our courts and delay justice. After over a year of protracted litigation, the Florida Legislature became fed up with the way county courts throughout the State were handling the issue, and proactively amended 316.1932(1)(f)4 to reflect that the "full information"

clause in the statute does **not** include the source code to the breathalyzers, and criminal defendants are **not** entitled to it.

Despite the fact the Florida Legislature told Defendants in no uncertain terms that they are not entitled to the Source Code, Defendants sought the exact same information by requesting subpoenas duces tecum directly to the out of state manufacturer of the breathalyzer, CMI, under another discovery avenue: Fla.R.Crim.Pro. 3.220 (f). The overwhelming majority of courts in Florida, realizing the legislative intent to deny criminal defendants access to the Source Code, also denied these motions under 3.220 (f). A scant few, with Sarasota County in the forefront, decided to grant them.

The Florida Breath Testing Program in 316.1932(1)(f)4 is extremely comprehensive and detailed with precision because the Legislature realizes that defendants will attempt to find each and every loophole to get out of or delay their criminal DUI charges. In 2006, the Legislature amended the statute to specifically address the issue of the Source Code. The entire amendment was to tell the courts of Florida that criminal defendants cannot get the Source Code. From these legislative amendments, it is clear that the Florida legislature intended that the Source Code not be provided to Defendants.

The public policy behind the Florida legislature denying access to the Source Code is the "slippery slope" argument. Judicially sanctioned access to the Source Code for the Intoxilyzer potentially threatens proprietary trade secrets associated with all devices used in connection with criminal proceedings, including radar guns, DNA testing equipment, digital fingerprinting at jails, facial recognition software, surveillance equipment or any other software-dependent equipment that provides information that could be admitted in evidence.

C. REVIEW OF THE SOURCE CODE IS NOT NECESSARY TO DETERMINE THE ACCURACY AND RELIABILITY OF BREATHALYZERS

Defendants argue that access to the Source Code is material to their defense because there is the possibility it will somehow establish lack of reliability or accuracy of the Intoxilyzer. Assuming *arguendo* that the Intoxilyzer is unreliable or inaccurate, review of the Source Code will not and cannot discover this. Review of the Source Code cannot determine whether the instrument functions properly. The only way to ensure accuracy and reliability of the instrument is through a testing protocol exactly like the one FDLE now uses. Examining the Source Code

and understanding *how* the instrument works does not assist in a determination of the accuracy and reliability of the instrument. The only way to ensure that accuracy and reliability would be for the Defendants to take the Source Code, somehow obtain their own breathalyzer with Florida specific software, and put it through the exact same battery of tests that FDLE is now doing. To date, after over three years of litigation, Defendants in these cases have not attempted to subpoena a breathalyzer or the Florida software. Thus, even if Defendants obtained the Source Code it would be useless.

Where materiality is concerned, many criminal defendants and trial courts have confused an interest in the accuracy and reliability with a purported due process interest in the "full understanding" of how the instrument functions. Since it is clear that judicially sanctioned access to the Source Code in and of itself cannot assist the Defendants in preparation of their defense, the trial court erred as a matter of law in declaring the Source Code "material."

II. THE "UNIFORM ACT" MUST BE UTILIZED TO SUBPOENA AN OUT-OF-STATE NON-PARTY

A. THE UNIFORM ACT

The County Court did not have jurisdiction to issue the discovery subpoenas duces tecum to CMI because CMI is an out-of-state non-party. The County Court must utilize the Uniform Act to issue discovery subpoenas duces tecum to an out-of-state non-party. Defendants have argued that *General Motors Corp. v. State*, 357 So.2d 1045 (Fla. 3DCA 1978), provides authority to issue subpoenas duces tecum without utilizing the Uniform Act to an out of state non-party as long as there is an in-state resident agent. This is not the case.

The "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings," codified at sections 942.01 through .06, Florida Statutes (2007), was enacted in 1941 along with identical statutes from virtually every other state in the nation. At the time, the legislatures recognized a need to facilitate the administration of the criminal law by providing some statutory authority for securing the attendance of a witness from outside the state in which the criminal proceeding is pending.

Section 3 of the statute is entitled "Witness from another state summoned to testify in this state." Section 3 provides in pertinent part that:

> "If a person in any state ... is a material witness in a prosecution pending in a court of record in this state ... a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into

> immediate custody and delivered to an officer of this state to assure his or her attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found." Fla. Stat. § 942.03 (2007).

Section 5 of the statute concerns uniformity of interpretation throughout the United States, and provides that:

> "This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it, and shall be only applicable to such state as shall enact reciprocal powers to this state relative to the matter of securing attendance of witnesses as herein provided." Fla. Stat. § 942.05.

Early in this statute's history, there was confusion over whether Chapter 942 applied to subpoenas duces tecum. During this period of conflict, the case of *General Motors* was decided. *General Motors Corp. v. State*, 357 So.2d 1045 (Fla. 3DCA 1978). *General Motors* ruled the Uniform Act does not apply to subpoenas duces tecum. As a result, Defendants now claim an ordinary discovery subpoena duces tecum sent directly to CMI's resident agent is permissible.

B. *GENERAL MOTORS v. STATE*

Both Defendants and the County Court rely upon *General Motors* for authority to issue a discovery subpoena to an out-of-state non-party by way of registered agent. A closer examination shows that *General Motors* stands for two

separate and distinct holdings: (1) that a grand jury subpoena duces tecum issued by the State Attorney's Office under Section 27.04, Florida Statues could reach documents held by a non-resident entity under the Florida long arm statute; and (2) that the Uniform Act is inapplicable in subpoenas duces tecum for production of documents. *General Motors Corporation,* 357 So.2d at 1046, 48.

First, the subpoena duces tecum at issue in *General Motors* was a grand jury subpoena issued by the State Attorney's Office under that office's plenary discovery authority used by the State in criminal investigations. The subpoenas duces tecum issued in the County Court giving rise to the instant appeal were discovery subpoenas issued by the Defendants. As such, the *General Motors'* subpoena was issued under significantly broader statutory authority than that which is available to a criminal defendant in a misdemeanor trial. *See e.g. State v. Investigation*, 802 So.2d 1141, 1143-1144 (Fla. 2DCA 2001) ("As an initial matter, the State does have the authority to issue an investigative subpoena duces tecum. The courts of this state have repeatedly held that the state attorney acts as a one-person grand jury in carrying out investigations into noncapital criminal conduct, and the state attorney must be granted reasonable latitude in that role.") Furthermore, the State is not required to show materiality or relevance when issuing an investigatory subpoena. *Id.* at 1144. The subpoena issued in this case was not an investigatory

subpoena, but rather a subpoena duces tecum pursuant to a discovery request where the criminal defendant must show both relevance and materiality.

Therefore, in stark contrast to the broad statutory authority under which the State Attorney's Office was acting in *General Motors,* Defendants' ability to issue a subpoena duces tecum is extremely limited. The *General Motors* court was evaluating the reach of a subpoena of an entirely different nature – issued pursuant to different statutory authority and with a broader level of authority – than the one before this Court. As a matter of public policy, the restrictions upon criminal defendants with respect to issuance of subpoenas duces tecum are limited due to the high potential for abuse; exactly the situation CMI finds itself in now. As such, *General Motors* does not support issuance of this subpoena on CMI.

General Motors is further distinguishable from the instant case as to the number of, and level of, contacts that the target of the subpoena had with Florida. In that case, not only did General Motors have employees, offices and substantial property in Florida, but the Company stored a number of the documents sought by the Grand Jury subpoena within the State of Florida. *See General Motors Corporation,* 357 So.2d at 1047-47. By contrast, CMI has no employees, offices or property in the State. Nor does CMI have any documents in this jurisdiction, including the Source Code. In addition, it is noteworthy that CMI's registered

agent for service of process is merely an appointed agent, and does not have any company specific knowledge or possession of documents sought by Defendants in this case.

General Motors also held the Uniform Act is inapplicable to subpoenas duces tecum for production of documents. *Id.* at 1148. In addition to being plainly distinguishable from the instant case as noted above, on the issue of whether the Uniform Act is applicable to subpoenas duces tecum, the *General Motors* case is no longer good law.

First, the conflict that existed on this issue in 1978 has been resolved. The sole case that *General Motors* relied upon, *In Re Grothe*, 59 Ill. App.2d 1 (1965), was legislatively overruled by Illinois statute the very year it came out. *See* 1965 Ill.laws at 2694 Section 1, effective August 6, 1965. **No other known case in the entire nation supports the *General Motors* position and *General Motors* itself has never been cited.** However, there is more recent Florida case law that has held the Uniform Act does apply to subpoenas duces tecum. *Delit v. State*, 583 So.2d 1083, 1085-1086 (Fla. 4DCA 1991).

In *Delit* for instance, the Fourth DCA squarely addressed the Uniform Act where an out-of-state court had presented a certificate for subpoena duces tecum under the Act. On appeal, one of the State's arguments had been that the trial

court erred when it ruled the Uniform Act did not apply to subpoenas duces tecum. *Delit* found no Florida cases on point, but noted that "Courts of other states seem uniformly to hold that the Act permits issuance of subpoenas duces tecum." *Id.* at 1085. In its decision, *Delit* recognized that because Fla. Stat. § 942.05 mandates the Uniform Act is to be interpreted and construed as to effectuate its general purpose and make uniform the law of the states which enact it, the "uniform holdings of our sister states should be given great weight where they are well reasoned and legally sound." *Id.* at 1086. *Delit* thus held that the Uniform Act applies to subpoenas duces tecum. Since *Delit* was decided in 1991, it is clear the Third DCA case of *General Motors* from 1978 is no longer controlling law.

More recently, the Circuit Court in Seminole County held evidentiary hearings on the Source Code. In *State v. Kocis*, Judge Donna McIntosh discussed the Uniform Act and *General Motors* with regards to issuance of a subpoena duces tecum to CMI, and noted that "there existed a conflict of opinion regarding the applicability of the Uniform Law to a request for production of documents... [h]owever, since then, the conflict has largely been resolved contrary to the position adopted in *General Motors*." (*Fabian* Vol.1, p.148) *State v. Kocis*, Criminal Case No. 05-2284-CFA (Seminole Circuit Court), Order Denying

Defendant's Motion for Leave of Court to Issue Subpoena Duces Tecum dated January 11, 2007; See also *Mastrapa v. South Florida Money Laundering Strike Force*, 928 So.2d 421 (Fla. 3DCA 2006). "Implicit in the *Mastrapa* opinion is the recognition that the Uniform Law does apply to subpoenas duces tecum." *State v. Kocis,* Order Denying Defendant's Motion for Leave of Court to Issue Subpoena Duces Tecum dated January 11, 2007, paragraph 5.

C. THE CONCEPTS OF PERSONAL JURISDICTION AND SUBPOENA POWER ARE ENTIRELY DIFFERENT

The *General Motors* case cites no direct authority to support use of Florida long arm jurisdiction to obtain subpoena power over a non-party to a criminal proceeding – especially an out-of-state, non-party corporation. In resolving this issue, a critical distinction must be made between personal jurisdiction and the exercise of subpoena power.

Without compliance under the Uniform Act, the subpoena power of a state in a criminal case ends at the state's borders. See *Minder v. Georgia,* 183 U.S. 559 (1902). In fact, the Uniform Act was created to address the jurisdictional problem encountered in *Minder*. *Silverman v. Berkson*, 661 A.ed 1266 (N.J. 1995) (problem of *Minder* addressed by the Uniform Act).

The state supreme courts that have considered these issues have uniformly concluded that the exercise of personal jurisdiction and the exercise of subpoena power are distinct powers. Therefore, the act of designating an agent for service of process – typically required under law to do business in a state – is not sufficient to assert subpoena power over a non-resident, non-party corporation. See *Syngenta Crop Protection, Inc. v. Monsanto Company,* 908 So.2d 121, 129 (Miss. 2005) ("In sum, we hold that a Mississippi court cannot subpoena a nonresident nonparty to appear and/or produce in Mississippi documents which are located outside the State of Mississippi, even if that nonresident nonparty is subject in another context to the personal jurisdiction of the court"); *Phillips Petroleum Co. v. OKC Limited Partnership,* 634 So.2d 1186, 1187-88 (La. 1994) ("The concepts, and/or underlying purposes, of personal jurisdiction and subpoena power are simply different;" "Whereas the long-arm statute extends Louisiana's personal jurisdiction over persons or legal entities beyond Louisiana's borders, there is no similar authority for extending the subpoena power of a Louisiana court beyond state lines to command in-state attendance of non-resident nonparty witnesses."); *In re: National Contract Poultry Growers' Association,* 771 So.2d 466, 469, 470 (Ala. 2000) (Overturning the trial court's decision to hold a non-party, out-of-state corporation in contempt for failure to comply with a subpoena on grounds that such a

subpoena had to be issued and served under the target corporation's state's law, not under the law of Alabama).

In *National Contract Poultry Growers' Association*, The Alabama Supreme Court further commented:

> The fact that NCPGA may have sufficient contacts with the State of Alabama to subject it to the jurisdiction of the Alabama Courts under the Alabama long-arm personal-jurisdiction provisions is irrelevant to the question presented in this case ... a finding that NCPGA is subject to the personal jurisdiction of Alabama courts would not necessarily mean that it was obligated to respond to a subpoena by having to appear and produce documents in an Alabama court in a lawsuit to which it is not a party. The underlying concepts of personal jurisdiction and subpoena power are entirely different.
>
> *Id* at 469.

In addition to this unequivocal state authority, the United States Court of Appeals for the Eleventh Circuit and the United States Court of Appeals for the Fifth Circuit, along with other federal courts to address this issue, support the proposition that a statutory agent of process will not provide a basis for exercise of subpoena power over a non-party, non-resident corporation. See *Ariel v. Jones,* 693 F.2d 1058, 1061 (11th Cir. 1982) (holding that the district court did not abuse its discretion in quashing a subpoena to a non-resident non-party despite the presence of a statutory agent for service of process within the district); *Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.,* 2 F.3d 1397, 1406 (5th Cir. 1993)

("We agree with Fox that a federal court sitting in one district cannot issue a subpoena duces tecum to a non-party for the production of documents located in another district.").

The Eleventh Circuit case in *Jones, supra,* is instructive. The question in that case was whether a party in an action in the Middle District of Florida could obtain documents from a non-party corporation with a designated agent for service of process in the Southern District of Florida in Miami. The Court upheld the district court's decision to quash the subpoena and focused the inquiry on the "degree of control" exercised by the designated agent of process over the subpoenaed documents. *Id.* at 1060. The Court stated as follows:

> A corporation may not realistically be considered fungible everywhere it does business. Therefore, even positing that this court has personal jurisdiction..., it is unreasonable to assume that these appellants' local offices "control" all documents kept at their respective corporate headquarters. In the absence of such control, therefore, even the existence of personal jurisdiction in this court is insufficient to create jurisdiction over the documents where they are outside of the district.
>
> *Id.* at 1060-61 *(quoting In Re North American Acceptance Corp.,* 21 F.R.Serv.2d 612 (N.D.Ga. 1975)).

Applying this authority to the instant case, CMI's statutory agent for service of process does not exercise any control over, and does not possess, the Intoxilyzer 5000/8000 Source Code. Therefore, the mere presence of CMI's statutory agent

in Florida provides no grounds for issuance and service of a subpoena on CMI as a non-resident, non-party to compel production of documents in this Florida proceeding under the Florida long-arm statute. To the extent the Defendants have the authority to obtain the Source Code through issuance of a subpoena duces tecum, that authority lies exclusively within the scope and under the authority of the Uniform Act, and not pursuant the Florida Rules of Criminal Procedure and the *General Motors* case.

Since the Uniform Act provides in section 5 that it intends to make uniform the laws of the states which enact it, the Uniform Act not only sets forth a procedure by which Florida citizens may obtain testimony and documents from citizens of other states in the criminal context but also dictates that Florida courts interpret the Uniform Act to be uniform with such similar laws enacted in each of the signatory states. According to the dictates of the Uniform Act, therefore, the decisions of the Florida courts under the Act should be informed by other signatory states', including Kentucky's, interpretations and decisions under the Uniform Act.

The Kentucky District Courts wherein CMI resides have addressed this issue repeatedly in response to subpoenas from Sarasota, Charlotte and Manatee Counties. *See* Order Quashing Subpoena Duces Tecum, *In Re: Subpoena Duces*

Tecum (State of Florida v. Jack Irish, et al., 2006 CT002109 SC) (Ky. D.Ct. April 25, 2006); Order Quashing Subpoena Duces Tecum, *In Re: Subpoena Duces Tecum (State of Florida v. Mary Bastos, 2006 CT413969-X)* (Ky. D.Ct. May 11, 2006).

By failing to require Defendants to subpoena the Source Code under the Uniform Act, the County Court is undermining the expressly stated purposes of the Uniform Act. If the State of Florida expects other jurisdictions to follow the rules of the Uniform Act – and expects other states to respect the sovereign power of this State over its own corporations – the State of Florida must respect the procedures established under that Act which safeguard every signatory states' citizens from overreaching and unlawful service of process.

III. CMI'S "LACK" OF RESPONSE TO SUBPOENAS DUCES TECUM WAS NOT A WILLFUL VIOLATION

In their Orders of Civil Contempt directed towards CMI, the County Courts have characterized CMI's election not to appear before them as a "willful" failure to comply with the Court's Subpoenas, despite having been provided documentation from counsel for Defendants that CMI had already obtained Orders

from the Daviess District Court in and for the Commonwealth of Kentucky quashing the very subpoenas at issue.

CMI's decision not to respond to these subpoenas relied, in part, upon the Daviess Court's holding that Defendants were required to follow the requirements of the Uniform Act in order to obtain production of the Source Code from CMI. The Uniform Act is universally recognized throughout the United States, except for Sarasota County Court, as the correct way to secure the appearance of out-of-state persons or documents.

CMI additionally relied upon the Order on Defendant's Motion To Compel Production of the Source Code in *State v. Irish* (Criminal Case No. 2006 CT 2109 SC) dated May 4, 2006, wherein Judge Denkin noted in Footnote 22:

> This court also declines to accept defendant's argument that CMI, Inc. was properly served with a subpoena duces tecum and willfully refused to provide the source code. This court finds that CMI, Inc. must be served pursuant to section 942.01, Fla. Stat. (2005) and adopts the ruling announced [the Daviess Court].

Thus, even the very court that has held CMI in contempt told CMI in no uncertain terms the Uniform Act must be followed.

Finally, in a sister case arising from Charlotte County, CMI was specifically ordered by the Kentucky Daviess Court not to respond to subpoenas out of the State of Florida not comporting with the Uniform Act. *State v. Adkins*, (KY Sixth

Judicial District Court Case # 06-C-01500) ("In addition to denying Defendant's motion for a subpoena, the Court also ordered CMI to refuse to honor any subpoena directed to it without proper certification.").

It is clear CMI has not willfully failed to comply with any orders of the County Court. "Willfulness" has been characterized as the "deliberate defiance" of a court order or a showing of bad faith. *Amerimark, Inc. v. Hutchinson*, 882 So. 2d 1114 (Fla. 1DCA 2004). Assuming *arguendo* the decision of CMI, a Kentucky corporation, to contest the propriety of a subpoena issued from the State of Florida in the jurisdiction wherein it resides was incorrect, such an action simply does not constitute a "deliberate defiance" of any orders issued by this Court or a showing of bad faith. CMI was led to believe from orders out of Sarasota County Courts[9], as well as courts from around Florida[10] and in Kentucky[11], that the Uniform Act applied and, accordingly, CMI did not have to respond to the barrage of subpoenas issued out of Sarasota County, including the subpoenas issued in the instant case giving rise to the instant appeal. Under the circumstances, the record fails to establish a willful violation on CMI's part of any court order.

[9] *State v. Irish* (Criminal Case No. 2006 CT 2109 SC).
[10] *Delit v. State*, 583 So.2d 1083, 1085-1086 (Fla. 4DCA 1991).
[11] *State v. Adkins*, (KY Sixth Judicial District Court Case # 06-C-01500)

IV. THE SOURCE CODE IS A TRADE SECRET

CMI's final point on appeal is that the County Court failed to recognize that the Source Code is a trade secret. Florida law provides a more stringent standard for production of trade secrets in discovery.

Florida Statute 90.506 entitled "Privilege with respect to trade secrets" states:

> A person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by that person if the allowance of the privilege will not conceal fraud or otherwise work injustice. When the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require. The privilege may be claimed by the person or the person's agent or employee.

Pursuant to this statute, it has been well established that "When trade secret privilege is asserted as the basis for resisting production, the trial court must determine whether the requested production constitutes a trade secret; if so, the court must require the party seeking production to show **reasonable necessity** for the requested materials." *Rare Coin-it, Inc. v. I.J.E., Inc.*, 625 So.2d 1277, 1278 (Fla. 3DCA 1993) (emphasis added).

In the present case, the Source Code is unquestionably a trade secret. In the Sarasota County case of *Irish*, which held extensive evidentiary hearings on the

Source Code issue, Judge Denkin noted that "both the State and the defense experts agree that the source code constitutes a trade secret." *State v. Jack Irish*, Criminal Case No. 2006 CT 02109 SC (Order on Defendant's Motion to Compel Production of the Source Code dated May 4, 2006).

Since the County Courts acknowledge the Source Code is a trade secret, Defendants were required to meet a higher standard of production; **reasonable necessity**. *Rare Coin-it,* 625 So.2d 1277. However, the County Courts only required Defendants to show the Source Code was material. Additionally, if the County Courts recognized the Source Code was a trade secret, they were required by law to take appropriate steps to protect that information under Fla. Stat. 90.506 with a Protective Order.

CONCLUSION

Based on the foregoing, the County Courts abused their discretion and misapplied the applicable law in this case. First, it was an abuse of discretion for the County Courts to find the Source Code was "material". The Florida Legislature clearly indicated otherwise in their amendment of F.S. 316.1932 and the evidentiary procedures the County Courts utilized in their determination of materiality lack reliability. Additionally, the fact that the County Courts found the

Source Code was material in *State v. Bjorkland* after only hearing from the criminal defendants, and without ever allowing the State to rebut the defendant's evidence, is cause for serious concern. Compound to this the fact that the determination of materiality in these Defendants' cases was by judicial notice of that original flawed hearing, and we have a grave abuse of discretion.

Second, a discovery subpoena issued to an out of state non-party corporation must follow the Uniform Act, even where that corporation has a registered agent. *General Motors* is no longer good law, the statute at hand requires comity with sister states' interpretation of the Uniform Act, and that interpretation overwhelmingly holds the Uniform Act applies to subpoenas duces tecum. Further, there is a critical difference between personal jurisdiction and the power to subpoena. Contacts sufficient to subject an out-of-state corporation to personal jurisdiction are not necessarily sufficient to submit it to the power of subpoena.

Finally, CMI did not "willfully" fail to respond to the subpoenas duces tecum. The subpoenas at issue had been quashed in Kentucky for failure to follow the Uniform Act, CMI was specifically ordered by the Kentucky courts not to respond to Florida subpoenas not following the Uniform Act, and the Sarasota County Court in *Irish* both held the Uniform Act applied to out-of-state subpoenas duces tecum and CMI did **not** willfully violate that subpoena. CMI's lack of

response to these out-of-state subpoenas can hardly be considered in deliberate defiance of justice or in bad faith.

CMI is respectfully requesting this Court reverse the County Court Orders of Civil Contempt and Order that the County Court issue no further out-of-state subpoenas outside of the Uniform Act.

DATED: December 14, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ordinary U.S. Mail to: Cliff Ramey, Assistant State Attorney, 2071 Ringling Blvd., Sarasota, FL 34236, Robert Harrison, 825 S. Tamiami Trail, Suite 2, Venice, FL 34285, Kerry E. Mack, Esq., 2022 Placida Road, Englewood, FL 34224, and Paul Cherry, Office of the Public Defender, 4000 S. Tamiami Trail, Venice, FL 34293 this 14 day of December, 2007.

By: _____ FOR
Michael S. Taaffe
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief is submitted in Times New Roman 14-point font.

DATED: December 14, 2007

By: _____
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