IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

WILLIAM KING
KATHY KING,

Petitioners,

v. Case No. 2D08-2462

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

BILL McCOLLUM
ATTORNEY GENERAL

MARILYN MUIR BECCUE
Assistant Attorney General
Florida Bar No. 119581
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR RESPONDENT

FACTS

These cases were set for trial January 23, 2008, at which time Petitioners sounded the hall for a representative from CMI, Inc. CMI, Inc. is the company that manufactures the Intoxylizer 8000, which is used by law enforcement to determine an individual's breath/blood alcohol levels. No representative from CMI, Inc. responded. Petitioners had issued a subpoena duces tecum to CMI requesting "Any and all evidence existing in paper, electronic, or other forms, of any and all source codes used in the Intoxylizer 8000, software version 8100.27." (Pet. Apx. B, p. 34). CMI, Inc has taken the position that, among other things, the source code is a protected trade secret.

Upon determining that CMI, Inc. was not going to comply with the subpoena, Petitioner's moved for an order to show cause and a continuance of the trial. Both motions were denied. Below is a somewhat lengthy, but important, excerpt from the motion for order to show cause hearing. The letter "J" indicates the judge is speaking, the letters "KM" represent defense counsel, the letter "S" represents the states, and the letter "B" indicates the bailiff is speaking.

> J: State versus William King. State ready?
>
> S: Yes, the State is ready.
>
> KM: Mr. King is present Your Honor. Um, I asked the Bailiff to poll the halls for a representative, um, [INAUDIBLE] Kentucky.

B: I'm sorry, Ms. Mack. Who?

KM: CMI, Inc., Kentucky. I need that response before I can advise the court if I'm ready Your Honor.

B: No response.

KM: Your Honor, the defense can not announce ready at this point. Um, we, uh, would ask, uh, uh, the Court to enforce the subpoena that was issued in this case to CMI to be present at the trial date. There was a hearing, I don't know the date of the hearing. Uh, the court ordered the hearing. We had filed a Motion to Revalidate the subpoena. Uh, the court asked for a hearing. There was a hearing. I don't have the date of the hearing. Um, [INAUDIBLE] this case. Um,anyway you issued an Order, urn, the hearing was on January 11th, and you issued an order at or around that time, revalidating my subpoena to CMI. Those Orders with the Clerk's seal were faxed to CMI and sent to them by, uh, UPS. So we know that they received the Order revalidating the subpoena. Um, we can't be prepared to go forward without that information. I, um, I believe that the Florida Constitution is, uh, probably probative on this issue because the Florida Constitution gives a defendant the, um, right not only to ask subpoena's issued on their behalf, but also to have those subpoena's enforced. The fact that the cases on 5000's, uh, Atkins, Sutton, Chambers, Eli, and Taylor in a, um, opinion offered by this Court dated September 20th of 2007 in footnote 3, the court noted the defendant has the right to compulsory process through a trial, including issuance of a subpoena duces tecum, the court cited for that proposition the Green versus State case at 277 So.2d 1993, 3rd District case from 1979. Although it's not in the footnote, Green was [INAUDIBLE] by the Florida Supreme Court, in another decision and I have that here if we need it. The footnote continues on, the standard for issuance of a Subpoena Duces Tecum for Trial is that the evidence sought must be relevant. Standard is not the same standard as a standard for additional discovery under Florida Rules of Criminal Procedure, 3.220F. Any reliance upon the Green case in the court's prior order, the [INAUDIBLE] on the issue of the right to issuance of a Subpoena Duces Tecum for pretrial discovery [INAUDIBLE]. Well, why is that important? I think it's important because the court recognized [INAUDIBLE] is the very proposition we're advancing this morning, that is that this defendant, under the Florida Constitution,

under the decision by the 3rd District in Green, which was affirmed, in that respect, at least, by the Florida Supreme Court, we are entitled not only to the issuance of the subpoena, but to the enforcement of the subpoena. As this court knows, the CMI has basically, uh, taken the position that it's not subject to the, uh, power of this court to subpoena it. Uh, we previously, uh, cited the General Motors case in support of the proposition that that is not true. There is a corporate statute right on point. These people, uh, at CMI have, uh, appointed a resident agent in the State of Florida. They actively do business in this State.

They are subject to subpoena like every other corporation that does business in this State to the powers of this Court. Um, they simply not even responded to the Subpoena in any way. So it's impossible for us to go forward, um, without having them provide the evidence that we have sought in the subpoena, which is the source code. The relevance of the source code, I think, has become, um, much more wide spread than it was when we first began this process. It has recently been applied by the Department, excuse me, Insurance in the Allstate matter.

Allstate has the [INAUDIBLE] program for, uh, determining [INAUDIBLE] claims. Uh, Allstate was subpoenaed to produce the Collasis Program so that, uh, the Department of Insurance could determine how it works, i.e. as a computer program, i.e. what is its source code, and, um, Allstate refused to, um, respond to that Subpoena. And so the Insurance Commissioner shut them down. Now,albeit, they went into court and got relief from that on other grounds that had nothing to do with the Subpoena Duces Tecum. I have, uh, copies of those Orders here if the court would like to see the Allstate proceedings. Um, in addition, uh, on the issue of relevance, I think that, um, this Court knows that these people, uh, the [INAUDIBLE] was included, although his case was continued, Kathy King and William King have been charged in the alternative with driving under the influence of alcohol to the extent that their normal faculties were affected or in the alternative, was driving with an unlawful breath alcohol level.

The court knows that typically the evidence of unlawful breath alcohol level is the evidence produced from, in these cases, the intoxilizer 8000. So it's, um, I think [INAUDIBLE] as to whether, how that machine works in

relevant to a defendant's [INAUDIBLE]. Um, the court, I believe, in this footnote, in Atkins, that I've previously read into the record, has previously made that determination on the issue of relevance. Um, on the issue of materiality, I think this court and I differ. I think we'll always differ and that's okay, but, um, there is a definition of what is material and is dependent on the definition of relevance. The best definition I found and, for some reason, with all this, all these trees we killed yesterday in making all these copies, we didn't get this packet, this case in this packet, but it's the City of Winter Haven, and I don't know who the other party is, at 370 So.2d 829. It is the 2 District Court of Appeal case. It's a pretty old case. From, I think '79, but it defines, um, what's material and the definition is consistent with what, with what has been [INAUDIBLE] before the evidence code chapter in the Florida Statutes. So, um, we simply can't go forward through [INAUDIBLE] of our own. Uh, we have witnesses that we have listed that are prepared to testify about the source code. They obviously can't be prepared fully without seeing that piece of evidence. We have tried very hard to, uh, obtain that. Not only here in Charlotte County, but in Sarasota County. In Sarasota County, the fines against CMI for their Failure to Comply, uh, exceed three hundred thousand dollars as of today. We have a pending Writ. Uh, we disagree with this Court's Order on the 8000 and the issuance of a subpoena at retrial for discovery purposes. We took the Writ to the Circuit Court in Charlotte County. Uh, Judge [INAUDIBLE], uh, determined that, uh, we didn't have the right to a Writ retrial, uh, totally ignored the Supreme Court's ruling in Brown and, uh, we took that to the Second District.

That is pending. The Writ was delivered to the Second District on December the 26th of, uh, 2007. For some reason unknown to us, the Second District lost one of the appendices, so that Writ issued an Order on, on, uh, I don't know, it was last week sometime, um, I don't remember the date. Uh, and, uh, asked us to supplement the record. We had seen, were watching for the, uh, Court's action on that Writ and, uh, we have the Order, we delivered those documents to them the very next day. Now, as I understand it, although I'm not an appellate an attorney, the Second District rules on Motions on Tuesday's and Friday's. We didn't find the Order yesterday, um, but we know that they're working on it for the simple reason that they had issued this other Order.

So, uh, Judge, I think for, for all of those reasons, but the most fundamental of which is my client's constitutional right to not only the issuance of a subpoena, which has been done and revalidated by Order of [INAUDIBLE], but also to the enforcement of that subpoena, we would respectfully request that, uh, the Court issue a Show Cause Order to CMI, Inc., and have a hearing on that matter. Thank you. And also, a continuance case.

J: What was the Atkins case number?

KM: I'm sorry, Judge. I have a copy. Um, it's Atkins, is 05-2043T, but there were a number of them Sutton, '04, I think it comes out as one Order, but I have it here, Judge, for you.

J: And that was in the 5000?

KM: Yes. And it's your footnote appearing on page three. Uh, the Green, um, the reference to the Green decision. Um, I'm gonna, I'll give you the entire Allstate package. It was, um, it's, it's, quite large, but I think that, um, for purposes of what you need to consider, Judge, I've flagged, the Florida, the Insurance Commissioners Order that has to do with the Collasis Program, wasn't nice enough to do that to the State's copy. I'm sorry, but I'll find it for you. A copy of the subpoena is here as well, on top. Um, here I'll [INAUDIBLE]. I'll flag it with this little blue sticky so you would, um, see the nature of this Collasis Program. And I, I think, Judge, you know that, you know, Source Code issue is not, um, just confined to people that are charged with a crime, uh, of DUI. It's been brought up in the voting area in the Jennings matter, the Christine Jennings matter. It's obviously been brought up by the Insurance Commissioner with regard to the settling of motor vehicle accident claims and it was brought up in Sarasota County in cases that we previously provided to the Court in the First Health versus Sentry Insurance. Now, we originally had an Order from Judges, uh, Savana and Goldman, and, uh, that issue had to do with Sentry producing their, um, method of, uh, determining what, uh, medical bills were reasonable and necessary. Because under the, um, uh, Motor Vehicle Statute, 636 something or another, I don't remember those numbers, but, the Florida No Fault law, the, uh, criteria is whether the medical bills was reasonable and necessary, is kind of a causation issue in

something else. And so, in that, uh, Sentry versus, First Health, the, um, Court ordered Sentry to produce its, uh, program, uh, of how it determines what's reasonable and necessary, i.e. on a source code issue similar to the Colasis, Colasis is claimed [INAUDIBLE] entry portion of the clients. And, um, that court sifting as a county court ordered, in a Pre-Trial Order, ordered Sentry to produce that entire program, including it's source code. Sentry took that off and then went from [INAUDIBLE] McDonald sitting in his appellate capacity in Circuit Court, we've previously given these cases to you Judge, and, uh, he determined the same thing. And he basically said there was no prejudice to Sentry. That, uh, that, uh, if they didn't want to produce the evidence to show how they determined the, the critical issue, they didn't have to do that, because it's, they weren't gonna be forced to do it. But if they didn't do it, they weren't gonna have any evidence. I think it's the same thing here. I don't think it's any different. I don't think, and I've heard, um,

J: Like a civil.

KM: I've heard civil trial lawyers beating on their chest. These people are nothing but a bunch of drunks. They don't deserve the protection of the courts. Yada, yada, yada. Constitution says otherwise. Constitution in this state says otherwise, the Constitution of this country says otherwise. But the important part is that it's something that touches all of our lives on a daily basis in the matters of insurance. In the matters of who our elected officials are gonna be, source code is a very probative and hot issue. So it cuts across everything, not just criminal courts. And it is a vital, vital issue. This case, we have tried very hard, spent thousands and thousands of dollars and countless hours trying to convince this Court, but we're here now at a trial. We've done everything we can to be prepared and CMI has failed to respond to a subpoena that was locally served upon them and revalidated by this Court.

J: Any response from the State?

S: Your Honor, if the State would kindly request, uh, thirty minutes to, to look at this information as we were not given it previously. [INAUDIBLE]. Our, also our expert in the matter of the source code should be present by ten o'clock to have a chance to talk with him as well

and examine this information Your Honor.

KM: I didn't hear that last part. I'm so sorry.

S: No,

KM: I just got my

S: I, that's okay. No, we, the State was, um, being for a chance to review this information and to review the Allstate package and also, uh, our, our expert in the matter of the source code and those issues should be present at ten o'clock and we would like a chance to.

KM: And, and who is that expert?

S: Uh, Mr. George Venturi of FDLE.

KM: Judge, I'm asking you remember that Mr. Venturi was not determined to be an expert in the source code. He has absolutely no education with regard to computers at all. That was previous finding by this court and Judge ordered. So I don't, I think, he's certainly a Department Inspector for FDLE, but he has not got any expertise and he doesn't represent in any way, you've heard it over and over again,

S: Ms. Mack, you're right. You're right. I'm sorry. I misspoke Your Honor, in regards to his expertise. But we would like a chance to be able to review this, this information.

KM: Judge, I don't have a problem with the State, um, reviewing anything. But, uh, uh, we have a subpoena that was lawfully served and our request is presently, aside from the Motion to Continue, is the issuance of an Order to Show Cause pursuant to the Constitutional provision, uh, of the enforcement of subpoena's that the court has, um, in this case validated and revalidated.

J: All right. And, uh, in this particular case, now, the, the, um, the subpoena for a trial is not a discovery tool. Uh, it's for the purpose of presenting evidence to the trier at fact and you've suggested that your witnesses can't testify until they review that evidence. Um, I'm, I'm not sure that the review of evidence from the witness is a predicate, uh, to other witnesses testifying. Otherwise it's simply a, using a trial

subpoena as a discovery tool. So, is there something in the source code that you're prepared to present to the trier at fact that is relevant to your client's defense without any prior analysis by some other witness?

KM: Well, Judge, the, um, you know, that begs the question. Um, the subpoena to CMI is issued. They, I don't think that they can just send down a document. Okay? The last time I check in our criminal courts, that means that somebody's gotta bring it. Okay? So, arguably, that's a records custodian for CMI or an engineer or the president. I don't know. It's not my, um, it's not my job, nor do I have the power to force CMI to name the person who brings it. So, I intend to have that source code introduced. Okay? I intend to have that. That's why I subpoenaed the witness. Bring it in here so we have it here. Okay? Now what you're suggesting is that some expert, or experts that the defense hires would then not have the opportunity to review that, uh, information once it's admitted into evidence, I think just totally flies in the face of every rule of law, every trial proceeding and just the fundamentals of, uh, of boardroom proceedings in criminal cases. So, I'm not saying that we are trying to use it. You put us into the box, Judge. Okay? You denied our Motion for the issuance of a Subpoena Duces Tecum. You would now have to find that my, uh, subpoena is going to subpoena evidence that isn't relevant. How can you have a breath case when the workings of the intoxilizer is deemed to be not relevant. That, that also defies description. Also, defies 316.1932. So, I, I think that, um, um, the courts attempt to construct this as a, uh, discovery usage is simply wrong. You put us in this box. We're happy to live in the box, um, and we've done exactly what the court required us to do. We issued a trial subpoena. We have the right to have that evidence produced. It has not been produced. Under the constitution of the State of Florida, we have the absolute right to find out why they have failed to, uh, produce these documents. So, the issue of whether it's a pretrial matter, it's something that's actively in front of the Second District and I guess they're gonna tell us their view on it. At least we hope they are. Or some court is gonna tell us. All right? But at this point, that's a discovery matter. We're not here at trial. We cannot announce ready until our Subpoena is complied with. And we're asking this Court for enforcement of that Subpoena.

J: Okay. And that's, my question is, how is the source code relevant to the defense?

KM: Well, I thought I answered that question already. The, uh, source code is the heart and soul of the intoxilizer which is the evidence that the State has to use by statute to introduce the breath results because that's how they obtain the breath results in these cases. They didn't use some other methodology. They used Intoxilizer 8000, therefore, there has been an abundance of testimony before this Court in these cases about a function of the source code. It's not even in dispute. The State and the Defense both agree that the source code is the heart and soul of the software program for the operation of this intoxilizer and the hardware doesn't operate without the software. So, we have the right to know and to show to the jury any failings or whatever, uh, there may be in this, uh, source code. You didn't give it to us. You refused to give it to us pretrial, so we're left with getting it at trial. That doesn't mean that an expert can't examine admissible evidence in the course of the trial. It's done all the time. It's done all the time. Why are experts allowed to sit in when, uh, when witnesses testify. For the simple reason, they're still gathering evidence. It's something that they could or could not use in formulating an opinions that they're gonna give. This is no different. This is no different.

J: All right, It, it, it appears that you're saying that the source code is relevant to the case. However, I'm still trying to understand how it's relevant to the defense, which is the defense's position, in defense of the State's allegation that Mr., this is on Mr. King's case, Mr. King is guilty of the charge.

KM: Well, Judge, I, you know, I guess I'm having a little trouble understanding how you're trying to torture this. Because, uh, I don't, I don't really get it, but I'm gonna try and answer your question. Okay? You know, if you've got the, the evidence that the State puts in. None of our statutes require the production of the source code as a part of the evidence in this case. They don't. So the State arguable could prove their case by simply putting on their piece of paper, the breath test result affidavits. Okay? That's it. They're not even required to produce the underlying records of the intoxilizer 8000 and our courts have ruled it's okay. A piece of paper can convict someone of a crime. But what is behind that piece

of paper is what we are questioning and we have every right to question. In a blood case, okay? What do you ask, what are you looking for? You're looking for the methods, the machines. What's been used. The expertise of the person that's, that's doing the blood analysis. It's no different in a direct case, except that in this case, the State has, with the cooperation of CMI and with the court has played by the ball. Something that is very vital to the operation of this machine, has been kept from every single defendant who has joined in these Motions to try to get this, uh, source code pre-trial. It doesn't change because we're at trial. It simply makes it more critical that we have the information. So I think this is, uh, certainly done something that, uh, is appropriate for an inquiry at this point on the issuance of a subpoena. Court's already determined in a prior ruling that it was relevant and that this was the appropriate methodology to use and we've gone by that guidance whether we agree with it or not and we've done that and now you're telling us that we didn't do the right thing.

J: All right. Um, I did review the, uh, Atkins ruling and it, uh, talks about the standard, but I still haven't heard an explanation as to how the source code is relevant to the defendant's defense in the case. And I'm not saying it's not relevant to the issues in the case. It might be something the State might use to prove that the machine is operating properly.

KM: Judge,

J: But the defense is trying to prove something different from that the machine is operating properly. And that

KM: If the State brings in that evidence and, um, well, let me just say that I know from experience that, uh, if they call the right people and they comply with the FDLE Rules in Chapter 316.1932, this Court is gonna allow that Breath Test Affidavit, i.e. the alleged result in these cases into evidence. Are you trying to tell me that the defense does not have the right to try to rebut that evidence? Because we certainly have that right and we need to have that evidence in order to give credible testimony to a jury about why they shouldn't believe that evidence. At the heart and soul of that defense is how this machine works. That is, the source code. So, if you're worrying about the logistics of what our witness

is gonna be, then you can worry about that during the course of the trial. It is not appropriate to worry about that now. We don't have to be in a position to answer at this moment what our witnesses are gonna say. Every time we've had Mr. Smith come in, he's been allowed as an expert to sit in here and listen to what the arresting officer has to say. Why? Because all he's had the benefit of previous to that, typically is the Probable Cause Affidavit. Piece of paper. He then gets to listen to the evidence to formulate his opinion. How is that any different? And the answer is, it isn't. It just isn't. All right? It just isn't. It's, it's, uh, it, it is [INAUDIBLE]. Um, basis of one of the main challenges that these defendant's have to the operation of this machine.

J: All right. With, without some information as to the, the problem with the source code that's going to be presented to the jury, I can't find that there is prejudice to the defense by CMI not being here and there wouldn't then be a reason to enforce the subpoena.

KM: That is the very same ruling we heard pre-trial. That's an excuse, Judge. That is not a founded reason. That is an excuse because you have the view and you're trying to advance your personal view in this matter. That is improper. It is putting your head in the sand as to the importance of this evidence. We do not have to prove how important a piece of evidence is if we haven't had the opportunity to look at it, to see it, to inspect it. You have denied us that opportunity and we're asking for it again. If you deny it again, you certainly can do that. I will sit down, I am telling you, I am not prepared to go to trial. If you force us to bring in a jury, I will say the very same thing. We will not go forward. I will immediately take this up.

J: All right. Well, I'm, I'm denying your request for the issuance of an Order to Show Cause. And,

KM: What is your position on our Motion for Continuance Your Honor?

J: And that's based on the nonappearance

KM: Same, very same thing that we have a witness that we have subpoenaed that we believe is a vital, necessary witness to this case, that is not here.

J: All right. Without some explanation as to why they would be vital to the case, uh, beyond what was already represented, I would deny the request to continue.

KM: Well, we're not prepared, Your Honor, for all the reasons I've previously stated, and I hate repeating myself.

J: Well, is that the same position as the, uh, Kathy King case?

KM: I've already announced that it was, Judge.

J: All right. Thank you. State versus Patrick.

J: All right. We do have the, uh, William King and the Kathy King cases that are, uh, in a trial posture today. Any input from the State as to which case [INAUDIBLE] to trial.

S: Uh, the William King case Your Honor?

J: All right. Any input from the defense as the choice of the two cases for trial today?

KM: Uh, Judge, I have some further cases on our request for continuance in the [INAUDIBLE] before that I'd like to put on the record.

J: All right.

KM: And [INAUDIBLE] our position on both cases, we're not ready. Um, the, um, Florida Supreme Court, well, actually the Third District Court in a case called B.E. versus the State of Florida, 564 So.2d 566, July 17th, 1990 addressed this issue of, um, uh, whether or not, um, the, um, defendant is entitled to, uh, pre-trial discovery and/or in this case, in B.E., um, the issuance of a trial subpoena. In B.E., was a, uh, juvenile case and the victim was three years old, and the attorney attempted to, uh, take the deposition pre-trial, attempted to have her subpoenaed for trial with no success. Uh, the case went to trial, the court found B.E. guilty. There was an appeal and the basis of the appeal was the, um, denial of, there were two, one was the um, failure to permit the defense any pre-trial access to the victim and, uh, the court held in B.E. that that was a violation of the compulsory attendance of witnesses in the United States

and Florida Constitution. There was no requirement, of course, in this case that, um, uh, B.E. meet the test that this court has [INAUDIBLE] here this morning. In fact, there is no case law to support this court's instruction. Uh, secondly, the Florida Supreme Court, um, in CBS, Inc., versus, uh, Cobb, Cobb being a Circuit Judge in the Sixth Judicial Circuit [INAUDIBLE]. Here's a copy of B.E. Um, CBS versus, uh, Cobb, I think, is the way it's cited. That's a Second District case from 1988, uh, cites 536 So.2d 1067. Um, Cobb, um, actually involved primarily the application or the determination of whether a journalist has a qualified privilege in a criminal proceeding to, um, refuse to produce, uh, basically evidence that they had, um, made. In this case it was video taped. Now, we're not dealing here with a question of a qualified privilege. But I don't think it matters because I think that there are things in the Cobb case that are important to the determination in this, uh, proceeding. Um, in Cobb, um, actually, uh, when the Second District considered it in 1988, uh, actually went on to the Supreme Court in CDST versus Jackson, it's not a Cobb case directly going to the Supreme Court. It was a collateral case, the Second District found that there was a qualified journal, journalist, journalists privilege, uh, and the Supreme Court in this Jackson case, which is that, uh, 578 So.2d. 698 on page two said, um, uh, that there isn't such a thing. In fact, [INAUDIBLE] reaching this decision, we note that CVS, Inc., versus Cobb and Johnson v. Bentley, both addressed factual situations where a party sought discovery on to publish photographs or video tape on the news media.

And Cobb and Johnson, the district court held that the journalist qualified privilege applied to the extent, in light of our decision in the case at large, we disapprove those decisions. Now, why do I tell you that? I tell you that because I don't want to hear that Cobb was overturned. The only part of Cobb that was overturned was the erroneous ruling by the Second District on whether a journalist has a qualified privilege or determined that it did not. Why is it important? It's important because it's talking about the very same concept that this court is, is advocating this morning. That is that the defendant has the burden, somehow, to prove that evidence that it hasn't seen is prohibitive (sic). That's the standard that doesn't exist in the State of Florida. And, it's, um, not a, uh, concept therefore that, that this court can apply because, I might have given you two of

the same. Let me just take a look at those, Judge, I'm sorry if I did. Uh, it's not a concept. It should say Cobb, page two. Let me just see this. Yeah, okay. [INAUDIBLE]. One of these, is just give me one of these if you will please.

J: All right.

KM: Thank you. So I can give them to the State. Okay. So, uh, you know, I think that that's the standard that the court is basing it's decision on that somehow we have to prove, with the court denying us the ability to see the evidence that it's probative. Well, nobody can meet that burden and, uh, and I think that, uh, they direct that case, um, that's, that was the issue in Cobb, although it was the, um, not the direct issue that was decided. If you look at page three of the decision style, CBS [INAUDIBLE] Victoria Corderi versus Cobb and then, then Long. And Long, of course, is the subject of another decision that I'll talk about in a minute. If you look on page three of Gillespie and [INAUDIBLE], it says, um, in the middle, conceitedly, Long is at somewhat of a disadvantage in that he cannot determine whether such "fairness" 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. Yet we must take care not to confuse relevancy with the ultimate question of the admissibility of that evidence. So, I think that, um, although the test on this qualified privilege was maybe a little different, one of the criteria is relevance. Okay? There are two others. But the, [INAUDIBLE] pertain here, um, and I think that, uh, Cobb stands for exactly the opposite proposition and that this court is relying upon this morning. And then, um, Long and you'll see in the, um, case style, CBS, Inc., versus Corderi, uh, versus Cobb, that it also cites Robert Joe Long and the State of Florida. Now, Bobbie Joe Long was a murderer. He probably had more trials in this State than anybody else. I don't know if that's a claim to fame or not. But apparently he was a pretty bad guy, according to this record, anyway. So, Robert Joe Long went to Supreme Court of Florida several times, um, in this particular decision that I'm relying on, it's at 610 So.2d 1276, 1992. And there is a long history of facts, uh, he was convicted of First Degree Murder. He was sentenced to death. And, uh, in this case, the Supreme Court remanded it, again, it had been remanded a couple times. He was first indicted. This case was in '92. So he was first indicted on the

December 6th of '84. He was originally convicted and sentenced to death in April of '85. That conviction was reversed because they obtained Long's conviction in violation of his right to counsel under Miranda. And so then, it was remanded and, uh, they tried to get a jury in Pasco County, where apparently these events occurred and venue was changed to Ft. Myers. And there, there was a trial. And, and none of the facts about the witnesses identity are important. What is important is what's referred to on page two, in the right hand column. The State next produced over defense counsel's objection a video taped interview of Long by CBS News, as [INAUDIBLE] rule evidence. And then they cite the footnote to, to the [INAUDIBLE] case. They go on to say that CBS had interviewed Long for approximately ninety minutes on November 25th, 1986. That interview took place in the first Pasco County trail in the conviction in this case, and after Long had entered into a plea agreement in Hillsborough County wherein he pleaded guilty to a murder. As I said, this was a very bad guy. However, only an edited two minute portion of that interview was supplied by CBS for viewing by the jury. Before showing the video tape, the trial judge instructed the jury that evidence of other crimes allegedly committed by Long was to be considered only for motive, plan and identity. The video tape was then shown to the jury. Now, um, and then there was, there was other evidence. So there was a lot of evidence in the Long case. Okay? I'm not, I, I think that the, the, the, uh, situation is that if you read all these horrible facts, that there was a lot of evidence, um, in order to support the conviction, but despite that, the Supreme Court reversed because of this error ,which I'm containing is the very same error that you're committing here this morning, Judge. If you look on page three in the right hand column, the second full paragraph. Long claims that the trial judge erred by allowing the State to introduce, 1. edited portions of the CBS video taped interview of Long while denying Long access to the remaining portions of the video tape. And then the rest of them, I don't think are important, at least for my purposes. We first address goes on in the next full paragraph. We first address Long's contentions regarding the CBS video taped interview of Long. And, um, it says Long argues that the State's introduction and use of selective portions of the interview deprive Long 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 or obtaining the

jury evidence, the right to present evidence in his own behalf and the right to confrontation of bad [INAUDIBLE] witnesses because Long was denied access to the remaining portions of the taped interview. We agree. Now, the rest of this is equally important to the, to the posture that this case is in. This case, these cases this morning. The King cases. Originally, the trial judge, I'm still reading, granted Long's pretrial motion in telling CBS to comply with the subpoena to produce the entire, unedited video tape interview. And to, uh, try to relate that to this case, we have a similar situation here. Um, but it wasn't a pre-trial Motion, it was in the nature of a revalidating [INAUDIBLE] trial subpoena. In the King cases. Reading again from Long, CBS moved to [INAUDIBLE] the subpoenas under the First Amendment. Well, we don't have that here. When the trial Judge denied CBS's motion, CBS appealed this case to the Second District Court of Appeal. Despite defense counsel's objection and the fact that this issue is pending before the District Court, the trial Judge elected to proceed with the trial.

So we saved a lot of time in Long. We have to do it again for the third time because of that rule. Reading again from Long: During the course of the trial, but before the District Court's decision, CBS did produce an additional thirteen minute video tape consisting of context out takes taken from [INAUDIBLE] interview. That very same day, the District Court issued it's opinion requiring CBS to release the entire interview, and they give the citation, CBS v. Cobb, 536 So.2d 1067. That time, however, the guilt phase of the trial is already completed. The trial Judge refused to order CBS to produce the entire video tape as requested by the defense. The trial judge ruled that the thirteen minute portion was sufficient to determine whether other portions of the interview should have been admitted. Now, this, of course, is the nature of a confession or an admission. And in Bradenton, there are special rules that apply. But I think that, if you read down on page four, and the third full paragraph, um, after they say this requirement was clearly violated in this instances, uh, relating again to the admissibility of the court confession, we therefore find that the trial judge erred in refusing to stay the proceedings until CBS complied with the court order to produce the entire video taped interview. This portion, I think, is terribly important for this court to consider. As 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 video tape interview), arises in this case or even whether there is anything on the tape he may want the jury to hear without first hearing the entire statement. Now, I think that's the critical part for the courts consideration here because you're telling us that we have to prove the contents of something while it is continually kept from us. That is impossible burden. That is not the standard. The Supreme Court revisited that standard in a first degree murder case where someone had been sentenced to death. And I think Judge, that's, um, these cases, these are not new. Cobb or Long are not new to this Court, and I'm the first one to say that in, uh, Long, they were certainly dealing with the defendant's confession, but, and it should have been more obvious, I think, to the trial court that the defense had the right to see this whole tape. But, um, that court, uh, didn't allow it either. We're here in a very similar posture with the court telling us that despite the fact that we have lengthy and protracted pre-trial ruling, uh, excuse me, proceedings, hearing, and we didn't win. Those rulings are on not appeal, because we're not entitled to an appeal pre-trial, but we are entitled to a Writ, despite Judge Collecki's ruling. Um, but for the fact that the Second District Clerk lost an appendix on, that, that, that we, we hand carried this to them. We didn't mail it. We hand carried it to them. So, we don't know how that happened, but we do know, that like in Long, that this issue is pending in front of the District Court. We know that. And that is not something just to be fu fued by this court. That is something that the court, this is the process. And, uh, if the defendant is not entitled to the process, then the rest of it is just a mockery. It doesn't make any sense. So, I think that, you know, these, uh, two cases Cobb and Long and B.E. really show a fundamental principal here that we don't have to show what the evidence would have been.

It's um, It's an impossible burden that you have given to us. We cannot meet that burden without first seeing the evidence. Did we try to get it? We did. We hired an expert. Dr. Mower's Affidavit is a part of the record in this case. He says in his Affidavit that there are demonstrable errors that have occurred in this 8000 where breath tests have [INAUDIBLE] and it clearly didn't meet the volume, uh, requirement under the Chapter 11 B8 rules. Um, when, uh, when, based with that issue, that

was the issue that was the subject of the publication by FDLE [INAUDIBLE] we made a mistake, but we fixed it. It has to do with, and they came up with this whole intricate explanation that truly defies logic. But, it doesn't matter. That was a demonstrable error that Dr. Milar testified, uh, in his Affidavit was clearly a software error. So, this is not a fishing expedition in that regard. Item number two. We've had instances, again in Dr. Milar's, uh, Affidavit where he points out to cases where, um, you have a reading, you have, uh, sufficient volume, meets the standards and the machine is still printing volume not met. So you can have an arguably, and arguably a breath test that meets the standard and the machine's telling you volume not met. So, that again is a, an error that is clearly pointed out. Not a fishing expedition, but a demonstrable error, ergo, just like Mr. Long, Mr. Cobb, don't show us part of it, we want to see the whole thing, and we're entitled to see the whole thing. Um, the, uh, there are other flaws, that, again, demonstrable flaws that Dr. Milar points out. The rules say you've got to have a two minute wait. There are legions of cases where there's not a two minute wait. How do you find out there's a two minute wait? Because of the intoxilizer manual. It says so. So, the manufacturer says you have to have this two minute wait. There are a ton of instances when the two minute wait has not been demonstrated. That is a demonstrable error that Dr. Milar has pointed out in his Affidavit. So, when the court says that we have not produced evidence to show why we think this source code could be important, the Court, now granted, Judge, this was quite a while ago. I don't expect you to remember chapter and verse of everything that Dr. Milar had to say, that's why I sat down to look at the file, to make certain that, cause I felt strongly that we had. I, I don't agree for one moment that that's the standard. So, please don't mistake what I'm saying. I don't think that's the standard. But even if it is the standard, we met that standard. And we met it through not only the testimony of Dr. Milar, which was admitted in these cases, in all these 8000 cases by the Court. It's not something you can fu fu or ignore. It's there. There are at least three demonstrable occurrence that Dr. Milar attributes to software issues arising from the source code and, um, and so, we even meet your test, Judge. We meet your test. I don't think your test is right. And I think Cobb and Long say that, but uh, again, you know, we, uh, we, we think we've met whatever tests the, the court wants to fashion. But the test that the court

should fashion is the test that our Supreme Court has set forth. And so, if indeed we have, because we have been denied the right to discover this evidence pre-trial, we then had a subpoena issued to CMI for the very document, uh, item, I'll call it, uh, that, uh, we sought to discover pre-trial. Uh, we had a hearing on whether the subpoena was gonna be revalidated. There was absolutely no indication at that hearing, and the court then issued an order revalidating that subpoena. Now we're met with, you're asking me to show you, at this hearing, at this Motion hearing, where I'm telling you it's halls have been called, CMI is not here. I discussed it with the State yesterday. They've heard nothing from CMI. I certainly have heard nothing from CMI. Those Orders were sent to CMI. Uh, and you're telling me that I now have to prove somehow that this, uh, evidence that I'm seeking to have the court compel CMI to produce in a trial subpoena in a trial setting is relevant when I've been denied the ability to see it. That's Cobb, that Long, that's B.E., that's a long history of cases Judge. You're applying the wrong standard, most respectfully.

But even if you do think your standard is correct, I'd ask you to look at Dr. Milar's Affidavit, because again, I believe we have met any tests that the court desires to fashion to try to defeat the remedy that the defendant's are seeking in this case. I'd ask the court to think about this again. To reconsider it's position. To, uh, find that, uh, CMI is, uh, at least have a Show Cause Order, at least make these people show up and tell us what they're hiding. That's the very least we should expect from the court. Why? Because the constitution says so. The Florida Constitution as determined by these cases. So, and, and the court's own ruling and appointment of, in the 5000 cases in Atkins. So, so here we are, we come, if you think about what we've done, we file Motions. We hire experts. We have hearings. We get rulings from the Court. You know, rulings from the court are supposed to give guidance to the parties as to what they're supposed to do. This is not just something that we do because, um, we get a paycheck. We do it because it's a part of the job that delivers that paycheck to us. So, uh, we have a duty. We've taken an oath to be a lawyer and, uh, the State of Florida, we have certain requirements that we have to follow. One of those is to follow the court's rulings. So, whether we agree with your ruling, or disagree with your ruling, we've followed your ruling. And now you're, you're throwing up another

barrier and expecting us to be prepared to go to trial. It defies description, Judge. It just totally defies description. And I, I will tell you that, uh, uh, Dr. Milar's Affidavit bars the date of April 19th I'm not exactly certain, uh, it looks like we filed our Motion that had Dr. Milar's Affidavit attached to it sometime in April. My Certificate of Service says April 24, 2007. So, uh, you should, it was filed simultaneously in all these cases, which include Kathy King and William King, the cases we're here about this morning. My argument is not just to just those two cases, but to all the 8000 cases that this Court has said, um, we are really expecting a ruling from the Second District at any moment. And, uh, it is not as if there is some prejudice to the State. In fact, before we came, uh, before the Court this morning, uh, Ms. Bell indicated to me that the State was not gonna oppose the Motion to Continue in for this case. The first I heard that, Mr. [INAUDIBLE] Moreland, being on permanent family leave, was when that was in house by the State. That wasn't shared with me. But I was also told at the very same time, that the State was not, [INAUDIBLE] Motion on the King and King case. So, I'm a little surprised.

S: Your Honor, the State did not say that they were not opposing. The State said that they would be saying that they were ready. And that would be the State's response.

J: All right. Any response to the case law submitted by, uh, Ms. Mack?

S: You're Honor, CBS, Inc., versus Cobb does not apply in this case. It's actually a very long [INAUDIBLE] from a partial video tape, um, to the source code of the Intoxilizer 8000. Um, this court revalidated a subpoena. This court did not order or issue the subpoena for CMI [INAUDIBLE] be here with the source code information. And also, actually, for the record, the State is [INAUDIBLE] to Milar's Affidavit.

KM: It was attached to the Motion for the issuance of a subpoena duces tecum.

S: Um,

KM: April 24, 2007. We had hearings on it pre-trial. [INAUDIBLE]. I don't expect you to realize that, but we

did have hearings on it. It's not admitted.

S: Thank you. Further, um, Your Honor, this is very much like the blood instrument. The blood cases. Um, we have, for [INAUDIBLE] toxicologist come here and testify about how, um, about how the instrument separates the blood and determines how much alcohol is in the blood. Um, we do not have someone from the manufacturer of those machines come in and testify exactly about the software and how this software is, is produced or what it's composed of, in order for the machine to measure the amount of alcohol in blood. Um, this is very similar, very akin to that situation. Moreover, it appears that the information that the defense is seeking, should have gone through Discovery, according to Discovery Rule 3.220, um, defendant should have acquired any material that they are planning on using at trial, subsection D and [INAUDIBLE] papers or objects that the defendant intends to use in the hearing or trial and disclose that to the State prior to trial. Um, which she is, what defense is looking for is ordinarily something that would have been received with the discovery process. Um, and she is attempting to admit that into evidence, um, which it has not been produced as a discovery violation, Your Honor. Um, this not the proper means of acquiring new evidence into a case and use it at trial, to bring it up on, on Office of Counsel. It is an improper venue for, um, defense to acquire additional information, um, additional discovery in this situation.

J: All right. I did submit, uh, review the, um, authorities submitted, uh, starting with the, uh, B.E. case, which appears to be a case where there was a, uh, denial of pre-trial access to a three year old victim witness. And in that case, there was an allegation that the victim witness had exculpatory evidence. Um, additionally, the, uh, defense was not permitted to serve that, uh, victim witness with a trial subpoena. And that was the, uh, court's concern, was, uh, lack of pre-trial access to someone with exculpatory evidence and, uh, lack of ability to subpoena a witness with exculpatory evidence for trial and that doesn't appear, uh, to be the case in this particular setting. Uh, with regard to the other cases, it appears that the, the court is still going on in saying that there must be some relevancy shown,uh, in that Cobb case. The court specifically uses that phrase and says that the fact that the State is gonna introduce a portion of the, um, video bolsters, and

this is on page three, uh, left hand column. Bolster's Long's claim of relevancy. So, relevancy does appear to have been something that had to have been shown in the Cobb case. And, uh, with regard to the, uh, CBS case, it appears that that related to a statement, and once the State, uh, indicated they were gonna use a statement, they opened the door to the defenses, uh, rights to the full statement, as opposed to a portion of the statement and so that case is distinguishable from what we're dealing with in this case. So, the court having reviewed that authority, it's not gonna, uh, change it's previous ruling, um, denying your request for the Order to Show Cause or the request for a continuance. I will need from the State a list of witnesses the State is planning on calling in this case. We will go forward at this time with the State versus William King case, and, uh, the State versus Kathy King case will be our backup case for today.

ARGUMENT

REQUIREMENTS FOR SECOND-TIER CERTIORARI REVIEW:

Where the district court is reviewing a decision of the circuit court sitting in its appellate capacity, the district court is limited to reviewing whether the circuit court afforded procedural due process and whether it applied the correct law. Dep't of Highway Safety and Motor Vehicles v. DeGroot, 971 So. 2d 237, 239 (Fla. 2d DCA 2008), citing, Miami-Dade County v. Omnipoint Holdings, Inc., 863 So. 2d 195 (Fla. 2003).

> Certiorari is an extraordinary remedy, the entitlement to which is dependent upon a showing that the order for which review is sought departs from the essential requirements of law, resulting in a material injury for which there is no adequate remedy by way of appeal.

Boyd v. Pheo, Inc., 664 So.2d 294, 295 (Fla. 1st DCA 1996); See also, Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla. 1987).

Petitions for certiorari should not be used to address simple legal error. Rather, a "departure from the essential requirements of the law" means "an inherent illegality or irregularity, and an abuse of judicial power, or act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." Haines City Community Development v. Heggs, 658 So. 2d 523, 527 (Fla. 1995), quoting, Jones v. State, 477 So. 2d 566, 569 (Fla. 1983). Certiorari review is concerned primarily with essential illegality, not merely legal error. Id.

Furthermore, where a case has been decided by a county court and appealed to and decided by a circuit court acting in its review capacity, the parties have exercised their right to review and the decision of the circuit court is final. Griffin v. State, 367 So. 2d 736, 737 (Fla. 4th DCA 1979).

> It is only when a judgement has been rendered in the absence of any competent evidence to support the judgement or material fundamental errors in applying the law that such a departure from the essential requirement of the law will arise to justify a superior court to exercise its ancient power to issue the common law writ of certiorari.

Id., See also, Magnus v. Century Village, Inc, 379 So. 2d 145, 146 (Fla. 4th DCA 1980).

Petitioners are seeking this Court's review of the circuit court's order dismissing a Petition for Writ of Mandamus through which Petitioners sought to compel the county court to grant Petitioners' request for an order to show cause enforcing Petitioners' subpoena duces tecum served on CMI, Inc.

A Writ of Mandamus is appropriate only to enforce an "established legal right by compelling a person in an official capacity to perform an indisputable legal duty required by law." Smith v. State, 696 So. 2d 814, 815 (Fla. 2d DCA (1997), quoting, Puckett v. Gentry , 577 So. 2d 965, 967 (Fla. 5th DCA 1991). The legal duty in question must be ministerial in nature and not subject to discretion. Id. Furthermore, in addition to establishing a "clear legal duty" the petitioning party must

establish there is no adequate remedy at law. 696 So. 2d at 815.

Petitioners assert that in dismissing their Petition on the grounds that they failed to establish an inadequate legal remedy by way of appeal the circuit court departed from the essential requirements of the law "by failing to follow the Florida Supreme Court decision of State ex rel. Brown v. Dewell, 167 So. 687 (Fla. 1936) which found the remedy of appeal is not an adequate remedy at law when a criminal Defendant is denied the Constitutional right to compulsory process and a writ of mandamus is proper to keep the trial court from departing from the essential requirements of the law." (Pet. p. 6).

Contrary to Petitioners' assertion Brown does not hold that mandamus is the proper remedy in all cases where a criminal defendant is alleging a denial of his constitutional right to compulsory process. Rather, the Supreme Court of Florida stated:

> Where ***denial of the benefit of the constitutional Bill of Rights is clearly alleged and shown***, the remedy by writ of error ***may not*** be adequate to fully protect the rights of an accused to a speedy and fair trial according to essential requirements of law, ***and where the demonstrated exigencies of a particular situation shown to exist demand it, an appropriate original writ from the Supreme Court may be issued*** before, or during the progress 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 a part of his trial.

State ex rel. Brown v. Dewell, 123 Fla. 785, 794, 167 So. 687, 689

(Fla.1936)(emphasis added). In fact, the cases cited in the rest of this Response dealing with compulsory process - as far back as 1893 - arise on appeal of a conviction and sentence.

As will be discussed in more detail, Petitioners wholly failed to establish a clear denial of a constitutional right or that they would be denied a fair trial. Moreover, Petitioners have failed to demonstrate any exigency demanding immediate review by a superior court. Petitioners can make no argument they are being denied a speedy trial in that it is Petitioners' own actions that have delayed the resolution of these cases.

This Court should not exercise its original certiorari jurisdiction and deny the Petition for Writ of Certiorari.

MERITS

PETITIONERS HAVE FAILED TO ESTABLISH ANY RIGHT TO COMPULSORY PROCESS OF THE EVIDENCE SOUGHT IN THIS CASE BECAUSE THE HAVE FAILED TO SHOW THE EVIDENCE IS MATERIAL AND BENEFICIAL TO THE DEFENSE; RATHER, PETITIONERS MERELY STATE THE EVIDENCE MIGHT BE HELPFUL TO THEIR CASES.

The Sixth Amendment to the United States Constitution reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

Similarly, the Article I, §16(a) of the Florida Constitution reads, in part:

> In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed.

"A violation of (the compulsory process and due process clauses of the United States Constitution) requires some showing that the evidence lost would be both *material and favorable* to the defense." United States v. Valenzuela- Bernal, 458 U.S. 858, 873 (1982).

Likewise, the Florida Courts have required a showing the witnesses testimony is material and beneficial to the defendant before finding any right to compulsory process under the Florida Constitution. In Trafficante v. State, 92 So. 2d 811, 815 (Fla. 1957) the Florida Supreme Court explained the purpose of the compulsory process clause is to prevent the "unfairness which results from placing a man on trial on a criminal charge and denying him the means to compel the attendance of witnesses within the jurisdiction of the court, *who are in possession of material facts which show or tend to show his innocence of the charge.*"

In fact, materiality of the evidence sought is a significant

factor in determining whether there has been a denial of the right to compulsory process. Ashley v. State, 433 So. 2d 1263, 1269 (Fla. 1st DCA 1983). Even where the witnesses absence from the jurisdiction is due to state conduct, the defendant is required to make establish a "colorable need for the person to be summoned, lest the right be abused by those who would make frivolous requests." 433 So. 2d at 1269, citing, Hoskins v. Wainwright, 440 F. 2d 69, 71 (5th Cir. 1971). See also, State v. Montgomery, 467 So. 2d 387, 394 (Fla. 3d DCA 1985)(stating, the purpose of right to compulsory process is not to give the defendant an unlimited right to present witnesses without regard to privileges and the rules of evidence.)

A criminal defendant bears the burden of establishing materiality of the witnesses testimony or evidence in order to claim the right to compulsory process. Ashley, 433 So. 2d at 1270. "'[T]he constitutional standard of materiality must impose a higher burden on the defendant' than the standard applicable under the harmless error rule." 433 So. 2d at 1269, quoting, Smith v. State, 400 So. 2d 956, 964 (Fla. 1981).

In Smith the Supreme Court of Florida citing U.S. v. Agurs, 427 U.S. 97, 111-12 (1976) stated with regard to the showing of materiality of nondisclosed Brady[1] material:

> It necessarily follows that the judge should

[1]Brady v. Maryland, 373 U.S. 83 (1963).

> not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless-error standard. Under that standard when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his "conviction is sure that the error did not influence the jury, or had but very slight effect." Kotteakos v. United States, 328 U.S. 750, 764 (66 S.Ct. 1239, 1248, 90 L.Ed. 1557). Unless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant.

The courts have used the same test of materiality in determining allegations of a compulsory process right violation. See, Ashley v. State, 433 So. 2d 1263 (Fla. 1s DCA 1983). Essentially, evidence is material if it necessarily creates reasonable doubt as to the defendant's guilt. Id.

Once again, in McAden v. State, 155 So. 2d 523, 529 (Fla. 1945), the Florida Supreme Court, specifically referencing Brown, held that the trial court did not error in refusing to issue a trial subpoena duces tecum seeking the transcript of a state witnesses prior testimony and statements because "the allegations of the motion for subpoena duces tecum (made only on information and belief and by defense counsel) just what the nature or substance of the alleged contradictory statements of the witnesses were in reference to the subject matter of the prosecution; or in what manner they were or might become material in proof of refutation of the crime charged."

The Supreme Court of Florida, again citing Brown, held that "a

defendant's right to the disclosure of evidence does not embrace and unbridled authority to inspect all the documents possessed by the witness. In such a situation, a defendant's right to disclosure at trial must be discriminately applied and only extends to subpoenaed materials shown to possess evidentiary value, relevant and material to his defense." Sosa v. State, 215 So. 2d 736, 741 (Fla. 1968).

In Hoskins v. State, 221 So. 2d 447 (Fla. 1st DCA 1969), the defendant sought to subpoena two witnesses from a federal penitentiary in Georgia. The state objected based on the numerous delays of the trial at the defendant's request and the fact the defendant failed to inform the court of what the witnesses would testify to and how their testimony was material and beneficial. The defendant appealed his conviction alleging, among other thing, that he was denied his right to compulsory process. The First District Court of Appeal in affirming the denial of the issuance of the subpoenas stated, "The rule that issuance of a summons under these circumstances is within the wide discretion of the trial court is so well settled it does not require the dignity of citation of authority."

As far back as 1893 the Supreme Court of Florida has recognized the right of compulsory process is not unlimited. In Jenkins v. State, 12 So. 680, 681 (Fla. 1893) the appellant alleged the trial court erred in refusing to issue a witness subpoena for

trial. The reason for the refusal, according to the trial court, was that it was not satisfied that the witness was a "material witness for the defendant, or would swear to material facts for the defense." The Supreme Court of Florida said with regard to the right to compulsory process:

> Neither do we understand that this constitutional provision was designed to give to parties charged with crime carte blanche right, at the cost of the state, to have any and all parties whom they may choose to represent to be witnesses in their favor summoned ad libitum without let or hindrance.

The court continued that it is within the trial court's discretion to make a finding of materiality or lack thereof because the trial judge "occupies a peculiarly advantageous position to prevent abuse or curtailment of the right." Id.

Recently, the Third District Court of Appeal decided the question of materiality of the Intoxilyzer's source code with reference to § 942.06, Fla. Stat. (2007). State v. Bastos, (3D06-1647, June 11, 2008). Section 942 is Florida's Uniform Law to Secure the Attendance from Within or Without a State in Criminal Proceedings. Pursuant to the statute, the court issuing the subpoena for a witness in another state must, among other things, certify that the witness is "material." Interestingly, there is no indication from what has been thus far presented that Petitioners in this case utilized the procedure in Chapter 942.

In Bastos the county court ruled that the defendants in that

case, who were charged with DUI, were entitled to have testimony about, and the production of, the source code for the Intoxilyzer. The county court certified the information sought was "material" within the meaning of Chapter 942. The Third District Court of Appeal reviewed the county court's factual findings, which were developed after an evidentiary hearing before eleven county court judges.[2] At the evidentiary hearing both the state and the defense presented expert testimony regarding the Intoxilyzer and its source code.[3]

The county court's rationale with regard to the issue of "materiality" was as follows:

> While the defendant has hired experts to physically inspect the Intoxilyzer 5000 machine, that physical inspection has not yielded complete information about how the Intoxilyzer 5000 machine makes its calculations because the final calculations and reports, including notations of mouth alcohol or interferents (other chemicals with similar infrared absorption patterns in the selected frequencies of the Intoxilyzer 5000), are performed by, and a product of, the CPU (central processing unit), a Z80

---

[2]Each of the eleven judges had pending requests for certification of the out-of-state subpoenas duces tecum. The procedure used here was agreed to by all eleven judges, but each judge was free to decide on his or her own whether to certify the subpoena. Only one judge certified the subpoenas as seeking material evidence. In doing so, that judge also certified two questions of great public importance to the district court. 1) Whether the Chapter 942 can be used to subpoena documents/source codes where the request is for testimony and production of documents. 2) Whether the source code for the Intoxilyzer 5000 is "material" within the meaning of Chapter 942.

[3]

microprocessor.

. . . .

> As a practical matter the only way the Intoxilyzer 5000 software can be intelligible is through disclos[ur]e of the source code. Therefore, this Court finds that the source code is material for the defendants to have a full understanding of the machine that reported the defendants' breath alcohol levels.
>
> The defendants have a constitutional right to investigate their case and of access to evidence. See Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); see also Rock v. Arkansas, 483 U.S. 44, 51-53, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); Taylor v. Illinois, 484 U.S. 400, 408-09, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). In these cases, credible testimony explains that the state has substituted the results of the Intoxilyzer 5000 for the analysis of a forensic chemist. Although defendants cannot cross-examine a machine as they could a chemist, this constitutional right to investigate the evidence against them gives the defendants a right to understand how the machine calculates and reports the breath alcohol reading, how and when the machines does or does not filter out or report the presence of other molecularly similar substances in the breath, and how and when the machine makes all of its other determinations and reports such as mouth alcohol or radio interference.

The Third District Court of Appeal rejected this analysis of materiality. Rather, the district court held:

> After careful consideration, we conclude that the present record does not support the

> conclusion that the proposed testimony and documents are "material" for purposes of the Uniform Law. The defendants certainly are entitled to investigate their case. They have retained two experts, Dr. Rose and Dr. Harley Myler[4], who are highly knowledgeable about the Intoxilyzer 5000. The defendants are entitled to bring forth testimony, or conduct testing, to demonstrate that interferents yield false positives or skew the machine's readings.
>
> However, we cannot accept the proposition that simply because a piece of testing equipment is used in a criminal case, it follows that the source code for its computer must be turned over. There would need to be a particularized showing demonstrating that observed discrepancies in the operation of the machine necessitate access to the source code. We are unable to see that any such evidence was brought forth in the evidentiary hearing below.
>
> The testimony in the trial court made clear that the problem of false positives is inherent in the design of the infrared portion of the machine. In the absence of a more particularized showing, we are unable to conclude that the materiality standard was met. We therefore answer the second question "no."

Petitioners cite Green v. State, 377 So. 2d 193 (Fla. 3d DCA 1979) as authority for their position that they are entitled to enforcement of their subpoena duces tecum. Notably, the court in Green reaffirmed the long-standing principle that the right to compulsory process applies only to evidence shown to be material and "capable of being used by (the defendant) in aid of his defense

---

[4]Interestingly, Dr. Myler is the expert upon whose affidavit Petitioners in this case rely.

. . . ." 193 So. 2d at 202. In Green, the defendant was an attorney who was convicted of grand larceny based on certain financial transactions she made allegedly on behalf of certain clients. One of the attorney's former clients, Mr. Chin, testified that he sought Green's services only to set up a standard trust fund for his son because he was gravely ill and was about to undergo a serious operation. Mr. Chin specifically denied he authorized Green to invest money on his behalf in order to protect his assets from expropriation by the Japanese government. To directly contradict this testimony Green sought production of certain business and financial documents and medical records of Mr. Chin.

The Third District Court of Appeal held that the trial court was incorrect in not enforcing the subpoena *without a hearing*. Such is not the case here. There have been multiple hearings regarding the relevance and materiality of the documents sought. Petitioner has never established to the court's satisfaction that the information is material and beneficial to the defense. Without showing of materiality, a criminal defendant is not entitled to the enforcement of a subpoena duces tecum. To hold otherwise would allow criminal defendants to circumvent the rules of criminal procedure, the rules of evidence, and various privileges under the guise of a constitutional right.

Petitioners completely ignore this critical first step in

determining whether they are entitled to enforcement of the subpoena duces tecum. Petitioners made no showing as to the evidence's materiality. As the trial court succinctly stated, "it's simply using a trial subpoena as a discovery tool." (Pet. Apx. B. p. 138).[5] Although given more than ample opportunity, through numerous motions, petitions, and hearings, Petitioners have not been able to establish, to either the county court or circuit court's satisfaction, that the information sought here is material to their case.

Additionally, Petitioners cite to Long v. State, 610 So. 2d 1276 (Fla. 1992). In that case, the Supreme Court of Florida, relying on § 90.108, Fla. Stat. (1987) found that the introduction of portions of a taped interview unfairly prejudiced the defendant. The court cited § 90.108, Fla. Stat. (1987), which provides in part: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded

---

[5] As an aside, Petitioners include in their appendix a copy of an motion requesting this Court to relinquish jurisdiction for entry of a written order. (Pet. Apx. B, p.195). The motion included in the appendix represents that the Office of the Attorney General had no objection. In fact, the undersigned was in contact with Ms. Mack via email after a brief telephone discussion and specifically stated her belief the stay did not apply, but to the extent it did the State took no position on the motion. (Resp. Apx. A, ex. 2) Because Ms. Mack had a draft of the motion prepared prior to the email exchange, the undersigned will assume that this representation was inadvertent and resulted from the incorrect version of the motion being sent to this Court.

statement that in fairness ought to be considered contemporaneously." Long, 610 So. 2d at 1280. There is absolutely no discussion of the compulsory process clause in Long. Petitioners make no argument, nor could they, that the information sought here is the equivalent to the introduction of only a portion of a written or recorded statement or that § 90.108, Fla. Stat. is applicable to the instant case.

Although not cited in this Petition, Petitioner argued B.E. v. State, 564 So. 2d 566 (Fla. 3d DCA 1990) to the trial court in support of the motion for an order to show case. In B.E. the trial court issued a protective order, without benefit of a hearing, preventing the appellant from deposing or having any access to the three-year old victim. The district court understandably took issue with the trial court's broad protective order, issued without a hearing, preventing all pretrial access to the victim.

Additionally, the district court's discussion of the compulsory process clause centered on its belief the clause gave criminal defendants the right to interview "eyewitnesses" to the alleged crime. In support of this conclusion, the district court cited Justice O'Connor's concurring opinion in United States v. Valenzuela- Bernal, 458 U.S. 858, 876 (1982). Respondent submits the district court erred in relying on this language because Justice O'Connor's concurrence proposed an alternate procedure, based on her assertion the clause permits interviewing of

eyewitness, for the temporary detainment of illegal aliens who witness crimes in order to allow defendants access to them. A procedure not adopted by the majority of the Court. Even under her proposed standard, a criminal defendant would need to establish "the deported aliens possessed any material evidence that was not merely cumulative of other evidence." Therefore she concurred with the holding of the majority. The majority opinion, though, held "A violation of (the compulsory process and due process clauses) requires some showing that the evidence lost would be both *material and favorable* to the defense." 488 U.S. at 873. Even if this Court were to accept that the compulsory process clause permits access to "eyewitnesses" to crimes, the information sought in this case is, in no way, akin to eyewitness testimony. Therefore, B.E. is inapplicable.

Petitioners argument to the trial court that they are being presented with an impossible burden of establishing the source code's materiality without first looking at the source code is without merit. As the United States Supreme Court observed in Valenzuela- Bernal, "Respondent contends that requiring him to show materiality is unreasonable in light of the fact that neither he nor his attorney was afforded an opportunity to interview the deported witnesses to determine what favorable information they possessed. But while this difference may well support a relaxation of the specificity required in showing materiality, we do not think

that it affords the basis for wholly dispensing with such a showing." 458 U.S. at 870. The Court further stated, "that while a defendant who has not had an opportunity to interview a witness may face a difficult task in making a showing of materiality, the task is not an impossible one." Id. at 871. Ultimately, the Court held that the neither the defendant's right to compulsory process nor his due process rights were violated by the government's deportation of witnesses.

In conclusion, with the exception of citing one case, Brown, which does not stand for the broad proposition proposed by Petitioners, they have failed to establish the circuit court sitting in its review capacity departed from the essential requirement of the law in ruling that Petitioners failed to make a necessary showing of no adequate remedy at law. Without such a showing, the circuit court was correct in dismissing the Petition for Writ of Prohibition and Mandamus. Moreover, Petitioners have failed to establish the information sought in the extremely broadly-worded subpoena duces tecum is material to their cases as that term is defined in relevant case law dealing with the compulsory process clause. As such, they are not entitled to enforcement of that subpoena. Consequently, this Court should likewise dismiss this Petition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert N. Harrison, Esq., 825 Tamiami Trial, Venice, Florida 34285, this 18th day of June, 2008.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

MARILYN MUIR BECCUE
Assistant Attorney General
Florida Bar No. 119581
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR RESPONDENT