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

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

_____/

PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 9.100, Dennis Forfa, Kathy King, William King, Lynn Rozuk, William Schleifer, Anthony Targowski, Kathleen Bliss, Charles D. Harvey, Sharon Hatchett, Stephen Lambert, Cathy Moseley, and Robert W. McGuirk, respectfully Petitions the Court for a Writ of Certiorari to review the Order Dismissing Petition for Writ of Mandamus, Denying Petition for Writ of Prohibition, and Denying Renewed Motion to Stay, where the Circuit Court ruled,

the Petitioners were not entitled to relief, for the Petitioners have an adequate remedy at law (a post conviction appeal).

BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue a Writ of Certiorari under Rule 9.030(b)(2) of the Florida Rules of Appellate Procedure.

STANDARD OF REVIEW

The standard of review for a certiorari petition challenging a decision of a circuit court acting in its review capacity requires assessing whether the circuit court afforded procedural due process and observed the essential requirements of the law. *Snyder v. City Council*, 902 So.2d 910, 912 (Fla. 2d DCA 2005).

STATEMENT OF THE FACTS

Each Petitioner is being prosecuted for DUI in County Court in Charlotte County. Each Petitioner filed a Motion in County Court for the Issuance of a Subpoena Duces Tecum, supported by the affidavit of Harley R. Myler, Ph.D.,

P.E, seeking production of the Intoxilyzer Source Code from CMI Inc of Kentucky (hereinafter CMI). (Appendix B, Page 64). This affidavit included the following:

> The production of the source code is necessary, for without the Source Code, one cannot determine:
>
> a. Whether the software on the subject Intoxilyzer is the same program approved by FDLE in 2002,
> b. Whether the software on the subject Intoxilyzer is a modified version of the program approved by FDLE in 2002,
> c. The extent of the modifications to the approved software,
> d. Whether the modifications to the Software program affect the reliability or operation of the Intoxilyzer.
> e. The impact the Software Program itself has on the reliability of the Intoxilyzer 8000.
> f. Whether changes in the various versions of the code is substantial or inconsequential, including whether the analytical portions of the code were modified.
> g. The "fail safe" procedures contained in the code, including, but not limited to the slope formula and slope "break points".
> h. The extent and impact of the software flaw(s) contained in the program. (Appendix B, Pages 72 - 73).

The County Court issued an order denying the Petitioners' request for the issuance of the subpoena duces tecum to CMI, Inc. on September 27, 2007, finding the Petitioners failed to make a showing that the Intoxilyzer source code was material. (Appendix A, Page 18). The Petitioners then filed a Petition for Writ of Mandamus and / or Prohibition in the Circuit Court on October 29, 2007. (Appendix A, Page 6). This Petition sought Mandamus relief to require the County Court to issue the subpoena duces tecum and Prohibition relief to prevent the

County Court from proceeding to trial on these cases until Defendants were afforded their Constitutional right for compulsory process. (Appendix A, Page 6). The Circuit Court found the Petitioners were not entitled to relief, for the Petitioners had an adequate remedy at law, an appeal following conviction. (Appendix B, Page 18).

THE NATURE OF THE RELIEF SOUGHT

The Petitioners are seeking a finding that the Circuit Court departed from the essential requirements of law by failing to follow the Florida Supremes 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 a mandamus is proper to keep the trial court from departing from the essential requirements of law.

ARGUMENT

The Petitioners have the right to compulsory process guaranteed by both the Florida Constitution and the United States Constitution. Article I, Section 16

Florida Constitution; 6th Amendment to U.S. Constitution. This right includes both the issuance and enforcement of a subpoena duces tecum. *Green v. State*, 377 So.2d 193 (Fla. 3rd DCA 1979); affirmed 395 So.2d 532 (Fla. 1981). The Defendant's right to compulsory process includes both trial and pretrial subpoenas. See *B.E. v. State*, 564 So.2d 566 (Fla. 3rd DCA 1990) holding the Defendants constitutional right to compulsory process was violated when the court restricted **pre-trial** access to a three-year victim.

The Defendants requested the issuance of a subpoena duces tecum for the Source Code used on the Intoxilyzer 8000. Rule 3.220(f) provides:

> Additional Discovery. On a showing of materiality, the court may require such other discovery to the parties as justice may require.

The current version of Rule 3.220(f) was adopted in 1989. The committee notes for the 1989 amendment provide:

> Subdivision (f) was previously numbered (a)(5) and has been modified to permit the prosecutor, as well as the defense attorney, to seek additional discovery.

The County Court found the word "material" in Rule 3.220(f) has different meanings dependant upon which party is seeking additional discovery; the Court ruled Defendants can only seek exculpatory evidence, and the State of Florida can only obtain inculpatory evidence. The County Court found that the Source Code

could be either inculpatory or exculpatory, and absence a showing that the source code is exculpatory, a subpoena cannot be issued.

The County Court's ruling limits the Petitioners' access to evidence known to be exculpatory. The Petitioners' are entitled to access to material evidence, regardless is the evidence will ultimately be used by the prosecution or the defense. Whether evidence is material is dependant upon the issues of the proceedings, not which party is seeking the evidence. Contrary to the ruling of the County Court, the Rules of Criminal Procedure do not provide alternate meanings of material evidence which are different for the prosecution and the defense.

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

The County Court applied the incorrect standard as to whether the source code was material, ruling that:

> Their request is to go looking for evidence which admittedly will be either inculpatory or exculpatory and the Defendants cannot say which it will likely be. Absent a sowing that exculpatory evidence exists, much less that it is substantial, this Court cannot order issuance of a subpoena duces tecum under Florida Rules of Criminal Procedure 3.220(f).

If the ruling of the County Court, which the Circuit Court failed to correct, is an accurate statement of the law, the State of Florida will be limited in future DUI cases where the State seeks a subpoena of a driver's medical record to obtain the results of a blood test performed for medical purposes. Prior to the issuance of the subpoena for the medical records, the State does not know if the medical blood results will be inculpatory (greater then 0.08) of exculpatory (lower than 0.08). Following the interpretation of the County Court in this case, since the blood evidence could be either inculpatory or exculpatory, the State would not have met their burden of showing that the results are material and the Court could not issue a subpoena. Obviously this result would be wrong, but this example illustrates that the County Court's interpretation of the Rules of Procedure was erroneous.

The failure to allow the Petitioners a subpoena violates their right to compulsory process unless it can be shown beyond a reasonable doubt that the rights of the Petitioners are not effected by the failure to issue the subpoena. *B.E.*,

564 So.2d 566. When the relevancy of requested documents is contested, "the trial judge should require production only of those documents which are at least 'prima facie' not irrelevant to some probable issue in the cause." *Vann v. State*, 85 So.2d 133 (Fla. 1956). Thus, unless the County Court found that the source code was 'prima facie" irrelevant to any probable issue in this cause, then the subpoena had to be issued. The Standards set forth in *Ivester, B.E.* and *Vann* are basically the same, just using different language. If the production of the source code *may* lead to admissible evidence, then the production should be ordered. Only if it is clear that the production of the source code will not lead to anything useful or legitimate should production be denied.

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

other evidence currently exists that supports the Defendant's allegation that the charges billed were not reasonable or customary". *Id.* This decision was affirmed on appeal, where the Circuit Court ruled:

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

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

Indeed, the trial court's order indicates that it has confused relevancy with the admissibility of the evidence sought by Defendants. The Florida Supreme Court's analysis in *Long v. State*, 610 So.2d 1276 (Fla. 1992) is applicable in this case. In *Long*,

> the trial Court granted Long's pretrial motion compelling CBS to comply with a subpoena to produce the entire unedited videotaped interview. CBS moved to quash the subpoena under the First Amendment. When the trial

> judge denied CBS's motion, CBS appealed this issue to the Second District Court of Appeal. Despite defense counsel's objection and the fact that this issue was pending before the district court, the trial judge elected to proceed with the trial. Id. at 1280.

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

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

Likewise in this case, the County Court's decision to allow the State to introduce the breath test results while denying the Defendants the ability have their

expert examine the breath test machine's source code deprives them of the basic state and federal constitutional rights including the right to due process, the right to a fair trial, the right to compulsory process for obtaining material evidence, the right to present evidence in his own behalf, and the right to confrontation of adverse witnesses. Defendants are not on a "fishing expedition" for evidence that "theoretically could be useful" to them in preparation of their defense. Instead, obtaining the source code is an integral step in the Defendants due and proper preparation for trial. "The Sixth Amendment to the United States Constitution, as well as Article I, Section 16, of the Florida Constitution, provides that the accused in a criminal proceeding shall have the right of compulsory process for obtaining witnesses in his favor." *CBS* at 1071. The trial court ignored the Petitioners' right to examine the source code in preparation of their defense, requiring these Petitioners to prove that evidence which they have been denied would be exculpatory. The County Court found the source code could be either exculpatory or inculpatory. Based upon this finding, the source code is material. Nevertheless, the County Court failed to allow the Petitioners a subpoena for this material evidence.

Circuit Court's Denial of Mandamus

The Circuit Court denied the Petition for Mandamus based upon the general proposition that a Criminal Defendant cannot obtain interlocutory relief when the error can be addressed on appeal. However, there are exceptions to this general rule. *Scaife v. State*, 764 So.2d 827 (Fla. 2d DCA 2000) for violation of double jeopardy, *Cunnell v. State*, 920 So.2d 810 (Fla. 2d DCA 2006), for violation of speedy trial, and *State ex rel. Brown v. Dewell*, 167 So. 687 (Fla. 1936) for violations of compulsory process. The Petitioners sought a writ of mandamus in the Circuit Court when the County Court failed to issue a subpoena duces tecum. The Circuit Court found mandamus was not appropriate, for since the Petitioners had the right to appeal, they an adequate remedy at law, which precluded the issuance of a writ of mandamus. The Circuit Court's decision failed to follow the decision of the Florida Supreme Court in *State ex rel. Brown* which held 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 a mandamus is proper to keep the trial court from departing from the essential requirements of law.

The Circuit Court's decision in this matter is a departure of the essential requirements of the law. This second-tier certiorari review is "simply another way

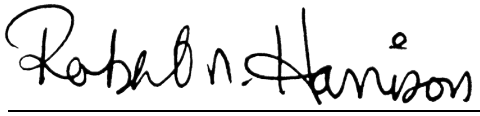
of deciding whether the lower court 'departed from the essential requirements of [the] law.' " *Miami-Dade County v. Omnipoint Holdings, Inc.,* 863 So.2d 195, 199 (Fla.2003) (quoting *Haines City Cmty. Dev. v. Heggs,* 658 So.2d 523, 530 (Fla.1995)). "A ruling constitutes a departure from the essential requirements of [the] law when it amounts to 'a violation of a clearly established principle of law resulting in a miscarriage of justice.' " *Id.* (quoting *Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1024 (Fla. 1st DCA 2003)); *see State v. Farino,* 915 So.2d 685, 686 (Fla. 2d DCA 2005) (explaining that failure to apply the correct law must result in a miscarriage of justice to warrant the issuance of a writ of certiorari).

The Circuit Court order denying The Petition for Writ of Mandamus establishes the general principle that the remedy of appeal **is** an adequate remedy at law when a criminal Defendant is denied the Constitutional right to compulsory process and a writ a mandamus is **not** proper to keep the trial court from departing from the essential requirements of law. Furthermore, the circuit court appellate decision in this case is binding on all five county courts within the Twentieth Judicial Circuit. *See Fieselman v. State,* 566 So.2d 768, 770 (Fla.1990). Because the circuit court's application of incorrect law established a legal principle binding on lower courts that is neither fact-dependent nor fact-specific, the circuit court's decision results in a miscarriage of justice that warrants the exercise of this court's

certiorari jurisdiction. *Gould v. State,* No. 2D07-2918 (Fla. 2d DCA December 19, 2007).

CONCLUSION

The County Court, by failing to issue the subpoena duces tecum, violated the Petitioners' Constitutional Right to Compulsory Process. The Circuit Court declined to issue a writ of mandamus, finding that since the Petitioners can appeal to the Circuit Court following a conviction, they have an adequate remedy at law. The Circuit Court departed from the essential requirements of law by failing to follow the Florida Supreme Court decision of *State ex rel. Brown.* The County Court must be ordered to issue the subpoena duces tecum for the Intoxilyzer Source Code in order to preserve the Petitioners' Constitutional right to compulsory process.



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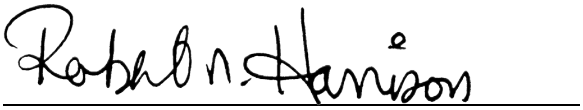
CERTICATE OF SERVICE

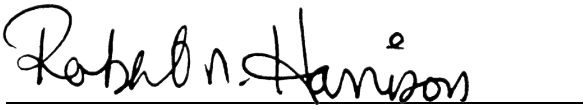
I hereby certify that a copy of the foregoing has been furnished by regular U.S. mail to Megan Belay, Assistant State Attorney, State Attorney's Office, 350 E. Marion Ave., Punta Gorda, FL 33950 on this 26th day of December, 2007.



Robert N. Harrison

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

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



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