IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

DENNIS FORFA, et al.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 2D07-5976

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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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, 33 Fla. Law. Weekly D 162 (2d DCA January 4, 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 denying a Petition for Writ of Mandamus through which Petitioners sought to compel the county court to grant Petitioners' request for the issuance of a subpoena duces tecum. 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.

As will be discussed more fully later in this Response, Peti-

tioners have failed to establish the circuit court's judgment is not supported by competent evidence or that the circuit court committed fundamental error in applying the law. Moreover, Petitioners have not establish a denial of procedural due process. Therefore, this Court should not grant certiorari review.

MERITS

The United States Constitution, specifically, the due process clause of the Fourteenth Amendment, requires disclosure by the prosecution of evidence favorable to an accused upon request where the evidence is material either to guilt or to punishment. Brady v. Maryland, 373 U.S. 83, 87 (1963). "Favorable evidence" is evidence that the prosecution should know is probably material and exculpatory. Gillespie, 227 So. 2d at 556, citing, Giles v. Maryland, 386 So. 2d 66 (1967).

Additionally, as the United States Supreme Court has stated in reference to the right of compulsory process:

> . . . the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him "compulsory process for obtaining witnesses in his favor." (citation omitted). . . . this Court found a violation of this Clause of the Sixth Amendment when the defendant was arbitrarily deprived of "testimony [that] would have been relevant and material, and . . . vital to the defense." (citation omitted). United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (U.S. 1982).

The compulsory process clause applies only to trial witnesses;

not to pretrial discovery. See, Lampp, 155 So. 2d at 11. The Florida Constitution has not been interpreted to provide any greater protection or to afford any greater right in this regard than that provided for in the United States Constitution. See, State v. Reeves, 444 So. 2d 20, 23 (Fla. 2d DCA 1983).

At common law a criminal defendant had no right to pretrial discovery. State v. Lampp, 155 So. 2d 10, 12 (Fla. 2d DCA 1963); State v. Smith, 260 So. 2d 489, 491 (Fla. 1972). "Unless introduced by appropriate legislation, the doctrine of discovery is a complete and utter stranger to criminal proceedings." Lampp, 155 So. 2d at 10. Any legislation permitting pretrial discovery in criminal cases is in derogation of the common law and must be strictly construed. 155 So. 2d at 13. "There being no constitutional right of an accused to pretrial discovery in the first place, there can be no corresponding duty on the part of the trial judge to compel it." State v. Gillespie, 227 So. 2d 550, 557 (Fla. 2d DCA 1969).

In State v. Smith, 260 So. 2d 489 (Fla. 1972) the defendant sought to compel an eyewitness to the murder to undergo a visual examination. The trial court granted the request and the district court, treating the interlocutory appeal as a petition for writ of certiorari, held the trial court did not depart from the essential requirements of the law. The Supreme Court of Florida disagreed. The supreme court first noted that the common law does not permit

discovery in criminal cases. Therefore, one must look to the Rules of Criminal Procedure, specifically those governing discovery, to determine if there was a departure from the essential requirements of the law. Finding nothing in the rules permitting such an examination, the court held the trial court departed from the essential requirements of the law. The court also observed that the only ground asserted by the defendants in seeking an order requiring the witness to submit to a visual exam was that the state's case depended in whole or in part on the witness's identification of defendant as the perpetrator. The supreme court stated that "[e]ven assuming, that in some rare instances, justice may require some type of physical examination of a witness, more must be shown than in the case sub judice." 260 So. 2d at 491.

In Lampp, which was decided prior to the enactment of the Rules of Criminal Procedure, this Court was called upon to decide whether an order requiring the issuance of subpoenas ad testificandum compelling the state's witnesses to confer with defense counsel in the presence of a court reporter and under oath departed from the essential requirements of the law. The appellant argued that, among other things, the compulsory process clauses of the United States and Florida Constitutions required the trial court to issue the subpoenas. After observing that discovery in criminal cases did not exist, this Court found ". . . the purpose of taking the depositions of the State's witness was to obtain pre-trial discov-

ery as in civil actions. The order in question departs so far from the established practice and public policy of the State that certiorari is granted and the subject order is quashed." 155 So. 2d at 14.

In State v. Reeves, 444 So. 2d 20 (Fla. 2d DCA 1983), which was decided by this Court *after* the enactment of the Rules of Criminal Procedure, the appellant argued his right to confrontation and his right to compulsory process were violated where a confidential informant invoked his Fifth Amendment right not to incriminate himself allegedly based on the state's broken promise that his identity would not be disclosed if he agreed to assist law enforcement. This Court found a criminal defendant is not entitled to compel a witness to testify for the state so that he may confront that witness. With regard to the compulsory process portion of the argument this Court stated:

> [appellants] converse argument that the state deprived him of his right to have compulsory process for obtaining a witness in his favor requires greater study. However, we must in the end reject this argument too, for the reason that Reeves failed to offer a plausible explanation below of how Paleaz' testimony would have been both favorable and material to his defense.
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> Although not citing any case law in support of his position, Reeves asserts that a credible showing of materiality and favorability as to a witness' (sic) testimony is not necessitated in a situation such as that before us. But a reading of various decisions of the United States Supreme Court dealing with purported due process violations occurring at the pre-

trial stage in the area of a defendant's organic right to access to evidence and testimony tends to suggest otherwise. . . .

. . . However, several of the Supreme Court's earlier cases in this area strongly intimate that, regardless of whether bad faith conduct on the state's part results in a pretrial suppression or loss of evidence or testimony, such conduct will not amount to a due process of law violation unless there is at least a showing by the defense that such evidence was material and favorable to the defense or that its loss or suppression prejudiced the defense. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S. Ct. at 1196, L. Ed. 2d at 218 [emphasis added]); *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (mentioned that "the mere possibility that an item of undisclosed information might have helped the defense, or might have helped the outcome of the trial, does not establish 'materiality' in the constitutional sense. Nor do we believe the constitutional obligation [of the prosecutor to disclose exculpatory evidence] is measured by the moral culpability, or the wilfulness of the prosecutor . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." 427 U.S. at 109-10, 96 S. Ct. at 2400-01, 49 L. Ed. 2d at 353 [emphasis added]); *United States v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977) (noted that, in cases where the government has been responsible for pre-accusatory delay resulting in a loss of evidence to the defendant, "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and . . . the due process inquiry must consider the reasons for the delay as well as the prejudice to the

> accused." 431 U.S. at 790, 97 S. Ct. at 2048-49, 52 L. Ed. 2d at 759).

State v. Reeves, 444 So. 2d 20, 23 (Fla. 2nd DCA 1983)

In Florida, pretrial discovery in criminal cases has been afforded through the enactment of the Rules of Criminal Procedure. In Re Florida Rules of Criminal Procedure, 196 So. 2d 124 (Fla. 1967). Nothing in the current version of the rules mandates that a trial court issue a subpoena duces tecum at the request of the defendant. See, State v. D.R., 701 So. 2d 120 (Fla. 3d DCA 1997)(stating the Rules of Criminal Procedure do not permit the issuance of a subpoena duces tecum without leave of court.) Additionally, while the rules permit attorneys to issue subpoenas compelling a witness to appear and give testimony in a pretrial deposition, there is nothing in the rules that would permit the issuance of a pretrial subpoena duces tecum with or without testimony. In fact, the only time a subpoena duces tecum is mentioned is in Rule 3.220(h)(1) dealing with pretrial depositions. The rules states, in part:

> Generally. --At any time after the filing of the charging document any party may take the deposition upon oral examination of any person authorized by this rule. A party taking a deposition shall give reasonable written notice to each other party and shall make a good faith effort to coordinate the date, time, and location of the deposition to accommodate the schedules of other parties and the witness to be deposed. The notice shall state the time and the location where the deposition is to be taken, the name of each person to be examined,

> and a certificate of counsel that a good faith effort was made to coordinate the deposition schedule. After notice to the parties the court may, for good cause shown, extend or shorten the time and may change the location of the deposition. Except as provided herein, the procedure for taking the deposition, including the scope of the examination, and the issuance of a subpoena *(except a subpoena duces tecum)* for deposition by an attorney of record in the action, shall be the same as that provided in the Florida Rules of Civil Procedure.

(emphasis added).

Even the right to subpoena witnesses for deposition provided for in Rule 3.220(h)(1) is limited.

> (B) No party may take the deposition of a witness listed by the prosecutor as a Category B witness except upon leave of court with good cause shown. In determining whether to allow a deposition, the court should consider the consequences to the defendant, the complexities of the issues involved, the complexity of the testimony of the witness (e.g., experts), and the other opportunities available to the defendant to discover the information sought by deposition.
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> (C) A witness listed by the prosecutor as a Category C witness shall not be subject to deposition unless the court determines that the witness should be listed in another category.

Finally, unless good cause is shown, a defendant is not entitled to discovery depositions of any category of witness when charged with a misdemeanor. Fla. R. Crim. P. 3.220(h)(1)(D). The only other arguably applicable section or the Rules of Criminal Procedure is Rule 3.220(f), which states: "Additional Discovery.

--On a showing of materiality, the court *may* require such other discovery to the parties as justice." (emphasis added).

The substantive law dealing specifically with the offense of driving under the influence is found in § 316.193 - 316.1934 Fla. Stat. (2006). Florida Statute § 316.1932, Fla. Stat. (2006), reads in relevant part:

> (1) (a) 1. a. Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. . .
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> ****
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> 4. Upon the request of the person tested, full information concerning the results of the test taken at the direction of the law enforcement officer shall be made available to the person or his or her attorney. Full information is limited to the following:
>
> a. The type of test administered and the procedures followed.
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> b. The time of the collection of the blood or breath sample analyzed.
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> c. The numerical results of the test indicating the alcohol content of the blood and breath.
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> d. The type and status of any permit issued

> by the Department of Law Enforcement which was held by the person who performed the test.
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> e. If the test was administered by means of a breath testing instrument, the date of performance of the most recent required inspection of such instrument.
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> Full information does not include manuals, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state. Additionally, *full information does not include information in the possession of the manufacturer of the test instrument*.

The underlined portions were added pursuant to House Bill 187 and became effective October 1, 2006. Fla Ch. Law 2006-247. The statute was changed in response to the Fifth District Court of Appeal's decision in State v. Muldowny, 871 So. 2d 911 (Fla. 5th DCA 2005), which held that because the statute prior to its amendment required disclosure of "full information"

> [i]t must necessarily follow that when a person risks the loss of driving privileges or perhaps freedom based upon the use and operation of a particular machine, full information includes operating manuals, maintenance manuals and schematics in order to determine whether the machine actually used to determine the extent of a defendant's intoxication is the same unmodified model that was approved pursuant to statutory procedures. It seems to us that one should not have privileges and freedom jeopardized by the results of a mystical machine that is immune from discovery, that inhales breath samples and that produces a report specifying a degree of intoxication.

Additionally, as is evident from the Staff Analysis, the Legislature amended the statute in response to motions or subpoenas

throughout the state seeking information from the manufacturer of the breath testing machine. In response, the Legislature specifically stated that "full information" does not include "information in the possession of the manufacturer of the test instrument." House of Representative Staff Analysis, HB 197.[1]

Subsequent to Muldowny, the Fifth District Court of Appeal decided Moe v. State, 944 So. 2d 1096 (Fla. 5th DCA 2006). In Moe, the appellant sought the source codes for the Intoxylizer 5000 arguing the source code was necessary to verify whether the machine has been substantial modified from a prior approved version. The appellant made no showing challenging the accuracy of his particular test results, nor was there any allegation the machine was not tested and maintained according to the applicable regulations.

The Fifth District Court of Appeal stated that it is without dispute that the state does not have possession of the source code. Further, it was without dispute that the source code was a trade secret and the manufacturer took the appropriate steps to protect the code from disclosure. The appellant acknowledged that the

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[1]Petitioners do not argue that the portions of § 316.1932 dealing with the disclosure of certain information in DUI cases is procedural and, therefore, in violation of the separation of powers (nor would it appear prudent to do so considering the statute provides a DUI defendant with information that would not otherwise be available through the Rules of Criminal Procedure). Nonetheless, Respondent would point out that any arguably "procedural" provisions of the statute are intimately related to the statute's substantive rights and, consequently, do not violate the separation of powers clause of the Florida Constitution. See, Capel v. State, 753 So. 2d 49 (Fla. 2000).

discovery rules do not require the state to produce information that is not in its possession or control. Nonetheless, according to the appellant, the state was required to either produce the code or suffer the imposition of sanctions pursuant to § 316.1324(1)(f)4, Fla. Stat. as construed in Muldowny. The Fifth District Court of Appeal disagreed stating:

> Section 316.1932(1)(f)4., Florida Statutes (2004), which applies to alcohol testing, requires that the State provide "full information concerning the test taken . . . ." Nothing in the language of this statute manifests a legislative intent that the State must furnish information that cannot be obtained by it; neither did our decision in *Muldowny* interpret the statute in this manner. In *Muldowny*, we held that the lower court did not abuse its discretion when it imposed sanctions because the State had disobeyed a discovery order requiring that it produce the operator's manual, maintenance manual and schematic for the Intoxilyzer 5000. *Muldowny* did not address the situation presented here, wherein the lower court, after hearing evidence, concluded that the defendant's motion to compel production of the information should be denied because the information could not be obtained by the State.

Moe v. State, 944 So. 2d 1096, 1097 (Fla. 5th DCA 2006). The court did not address the applicability of the amended version of § 316.1932(1)(f)4, Fla. Stat. (2006).

Nothing in the United States or Florida Constitutions, the Rules of Criminal Procedure, or § 316.1932, Fla. Stat. compels the trial court to issue a subpoena duces tecum in a criminal case. More specifically, nothing in the United States or Florida

Constitutions, the Rules of Criminal Procedure, or § 316.1932, compels the disclosure of the information sought in this case. As a result, Petitioners failed to establish a "clear legal duty" of the trial court mandating the issuance of the subpoena. Therefore, it cannot be said the circuit court sitting in its appellate capacity departed from the essential requirements of the law in affirming the circuit court's decision denying the issuance of the subpoenas.

Petitioners' case citations in support of the instant Petition are either distinguishable from the facts before the Court or simply inapplicable. For example, Petitioners cite B.E. v. State, 564 So. 2d 566 (Fla. 3d DCA 1990) in support of his proposition that the right to compulsory process applies to both trial and pretrial subpoenas. (Pet. p.5). 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. First, B.E. was decided after the enactment of the Rules of Criminal Procedure that allow counsel to subpoena certain witnesses for pretrial depositions. The district court understandably took issue with the trial court's broad protective order, issued without a hearing, preventing all 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 the instant Petition is, in no way, akin to eyewitness testimony. Therefore, B.E. is inapplicable.

Petitioners also asserts that "The scope of discovery depositions, including the issuance of subpoenas in criminal cases, is governed by the Florida Rules of Civil Procedure." (Pet. p. 6). Petitioners cites to Florida Rule of Criminal Procedure 3.220(h)(1)

in support of this propositions. As noted above, Rule 3,220(h)(1) states, in relevant part:

> Except as provided herein, the procedure for taking the deposition, including the scope of the examination, and the issuance of a subpoena *(except a subpoena duces tecum)* for deposition by an attorney of record in the action, shall be the same as that provided in the Florida Rules of Civil Procedure.

(emphasis added).

Petitioners also asserts that the county court's ruling in this case would prevent the state from subpoenaing an individual's medical records to obtain the results of a blood test because the state would not be able to establish whether the results would be inculpatory of exculpatory. (Pet. p. 7). This arguments ignores § 316.1933(4), Fla. Stat.(2206), which states: "Notwithstanding any provision of law pertaining to the confidentiality of hospital records or other medical records, information relating to the alcoholic content of the blood or the presence of chemical substances or controlled substances in the blood obtained pursuant to this section shall be released to a court, prosecuting attorney, defense attorney, or law enforcement officer in connection with an alleged violation of s. 316.193 upon request for such information."[2] There

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[2]The state must comply with the notice requirements of § 395.3025, Fla. Stat. (2006). The state also has an independent subpoena power under § 27.04, Fla. Stat. (2006). The Supreme Court of Florida has held, though, that § 27.04 does not override the notice requirement of § 395.3025 when seeking medical records. State v. Johnson, 814 So. 2d 390 (Fla. 2002).

is nothing in this statutory provision requiring the state to establish the inculpatory nature of the records.

Petitioners also cites 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 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 makes 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.

In sum, Petitioners failed to establish a "clear legal duty" of the trial court mandating the issuance of the subpoena. Therefore, it cannot be said the circuit court sitting in its appellate capacity departed from the essential requirements of the law in affirming the circuit court's decision denying the issuance of the subpoenas. Consequently, Respondent respectfully requests that this Court affirm the decision of the circuit court.

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 12th day of February, 2008.

Respectfully submitted,

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