

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 **discovery** 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 14). 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.

The County Court issued an order denying the KING’S request for the issuance of the **discovery** subpoena duces tecum to CMI, Inc. on September 27, 2007. (Appendix B, Page 9). KING then filed a Petition for Writ of Mandamus and / or Prohibition in the Circuit Court on October 29, 2007. (Appendix B, Page 226). This Petition sought Mandamus relief to require the County Court to issue the **discovery** 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 B, Page 226). The Circuit Court found KING was not entitled to relief, for KING had an adequate remedy at law, an appeal following conviction. (Appendix B, Page 223).

KING was among the consolidated cases before this Court in the Case of *Forfa v. State*, Case No. 2D07-5976. In *Forfa*, the Petitioners sought a writ of mandamus to require the trial court to issue a **discovery** subpoena. The Petitioners in *Forfa* argued that the ruling in 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 applied to both discovery **and** trial subpoenas. This court did not accept this argument and denied the Petition in *Forfa* on April 25, 2008.

Following the denial of the discovery subpoena for the source code, KING obtained a **trial** subpoena for the source code. (Appendix B, Page 28). This subpoena commanded CMI Inc. of Kentucky to appear at the trial scheduled for December 17, 2007 with the Intoxilyzer Source Code. After the trial was continued, the County Court revalidated this subpoena for the trial now set for January 23, 2008. (Appendix B, Page 38). On January 23, 2008 CMI Inc of Kentucky failed to appear with the subpoenaed material. (Appendix B, Page 130). KING sought enforcement of the trial subpoena. (Appendix B, Pages 210 - 213). The County Court denied the Petitioners' request for enforcement of the subpoenas, but gave the Petitioners an opportunity to seek relief from the Circuit

Court. (Appendix B, Pages 158, 164 - 165). The County Court did not enter a written order at this time.

Later in the day on January 23, 2008, KING petitioned the Circuit Court for the issuance of a writ of mandamus to require the trial court to enforce the **trial** subpoena. (Appendix B, Page 5). This petition was dismissed by the Circuit Court without prejudice on January 25, 2008, for the Petition did not include an appropriate record or a written order to review. (Appendix B, Page 39). KING filed an amended Petition on February 11, 2008, which now contained an appendix with a record of the County Court proceedings, but was still missing the written order. (Appendix B, Page 53). On February 15, 2008, the Circuit Court ordered KING to file a copy of the order to be reviewed. (Appendix B, Page 198). On March 4, 2008, the County Judge declined to enter a written order, believing that the County Court lacked jurisdiction due to this Court's pending review in the *Forfa* case. (Appendix B, Page 207). On March 13, 2008, KING petitioned this Court in the *Forfa* proceedings, requesting that jurisdiction be released to the County Court to enter the order requested by the Circuit Court. (Appendix B, Page 193). On March 13, 2008, the Circuit Court dismissed the Petition as being premature, citing the lack of a written order. (Appendix B, Page 173). On March 26, 2008, KING timely filed a Motion for rehearing of the Circuit Court's Dismissal. (Appendix B, Page 176). On April 9, 2008, this Court denied KING'S motion to relinquish jurisdiction

to the County Court, finding there was no need for relinquishment, for the County Court proceedings were not stayed. (Appendix B, Page 208). The County Court entered its written Orders on April 16, 2008, *nunc pro tunc* to January 23, 2008. (Appendix B, Pages 210 and 212). The Circuit Court on April 29, 2008 granted KING'S Motion for rehearing, for KING has now provided the Circuit Court with a written order. (Appendix B, Page 220). This Order also dismissed the Petition for Writ of Mandamus, finding that Mandamus is only appropriate when there is not an adequate remedy at law and that the "appropriate remedy would be an appeal to the Circuit Court." (Appendix B, Page 220). The current petition seeks review of this order.

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 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 a mandamus is proper to keep the trial court from departing from the essential requirements of

law. This Cause should be remanded to the Circuit Court to rule on the merits of the Petition for Mandamus to enforce the Petitioners' **trial** subpoena.

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 County Court ruled that KING failed to show the subpoenaed material “will be” helpful to the defense, as opposed to “might and might not be” and denied enforcement. (Appendix B, Pages 210 – 213). The Florida Supreme Court stated the Constitutional Right to Compulsory Process “would be an empty right if a defense witness ... possessing documentary essential to be examined by defense counsel **in order to determine its value as evidence** for the defense” were not required to produce the evidence. *State ex rel. Brown* at 693 (emphasis added).

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).

The trial court denied the enforcement of the subpoena, finding KING only showed the information might be helpful to the defense, rather than it will be helpful. KING, like the defendant in *Long*, cannot conclusively determine if this information will be or will not be helpful, until it is produced. Following *State ex rel. Brown*, KING is entitled to enforcement of the subpoena to determine its value as 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 enforce a subpoena duces tecum to produce evidence at **trial**. The Circuit Court found mandamus was not appropriate, for since the Petitioners had the right to appeal, they had 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.

State ex rel. Brown is clear, a writ of mandamus is available prior to conviction to protect an accused right to compulsory process, The Florida Supreme Court ruled:

A denial of the right to compulsory process guaranteed by the Declaration of Rights, whether accomplished in the form of a denial of the process itself, or in the form of a denial of the legal beneficial use of the fruits of such process after it is served, is procedure outside the limitations of the trial court's power in the trial of a criminal case. And no amount of judicial discretion, such as is ordinarily vested in the trial judge with reference to matters of evidence and procedure, can supply a defect or want of jurisdiction on the part of the court to proceed outside the limitations of the constitution with respect to a defendant's constitutional procedural rights under section 11 of the Declaration of Rights to compulsory process and to the beneficial enjoyment of the fruits of that process after it has been issued and served. *State ex rel. Dillman v. Tedder* (Fla.) 166 So. 590.

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.

It therefore follows that when the defendant in a criminal case claims his constitutional right to compulsory process for his witnesses, as guaranteed to him by section 11 of the Declaration of Rights, the intent of the Constitution is that the trial court is under a bounden *duty* to enforce that right for defendant's benefit, as far as in law the same can be enforced. And if the defendant have a right to the enforcement of compulsory process for his witnesses, and to the beneficial enjoyment of that right in a practical way by being allowed to confer and consult with his witnesses after they are in court, with a view to calling them to the stand for the purpose for which they have been summoned into court, it likewise follows that there is no discretion on the part of the trial court to refuse to enforce such a right as is founded on the Constitution itself, because discretion does not exist where there is no power except to act in one way.

The United States Supreme Court ruled:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *Washington v. Texas*, 388 U.S. 14 (1967)

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*, 974 So.2d 441 (Fla. 2d DCA 2007).

CONCLUSION

The County Court, by failing to enforce 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*. This cause should be remanded to the Circuit Court to rule on the merits of the Petition for Mandamus to enforce KING'S **trial** subpoena.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by regular U.S. mail to the Office of the Attorney General, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607 on this _____ day of May, 2008.

Robert N. Harrison

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

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

Robert N. Harrison