

COMMONWEALTH OF KENTUCKY  
DAVIESS DISTRICT COURT  
DIVISION I  
CASE NO. 06-XX-XXXXX

In Re: Subpoena Duces Tecum  
(State of Florida v. Jack Irish, et. al. 2006-CT-002109)

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ORDER QUASHING SUPBOENA DUCES TECUM

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This matter having come before the Court on Motion of CMI, Inc., a Kentucky Corporation, to quash a subpoena duces tecum entered in the above-styled case requiring CMI to appear and/or to produce documents at a hearing in Braddenton, Florida, on April 11, 2006, and the Hon. Allen Holbrook appearing on behalf of CMI, Inc., and the Hon. Christopher Safreed appearing on behalf of the Defendants though stating that the Defendants do not acknowledge the jurisdiction of this Court to rule on this matter, and the Court having reviewed the record and being otherwise fully advised states as follows:

- i. The Uniform Act encompasses the authority to issue subpoenas duces tecum.

On behalf of CMI, Inc., Mr. Holbrook argued that the Defendants failed to comply with the Uniform Act to Secure the Attendance of Witnesses from Within or Without the State in a Criminal Proceeding, found in Kentucky law at KRS 421.230 to 421.270. Both Florida and Kentucky are signatories to the Act. Under the Uniform Act, the Defendants would be required to make a showing before the governing Florida Court that there is a material need for the witness and the information sought, and that Court would issue a certificate of materiality, which would be brought before the Court of the jurisdiction where the witness

resides. That second Court would also conduct a hearing on the materiality of the information sought, and would also take testimony from the prospective witness regarding hardship before making a decision as to whether or not that witness should be compelled to appear before the Court of the other state. This procedure safeguards the rights of the out of state witness, gives that witness a voice and an opportunity to object to the issuance of the subpoena, provides for compensation for the witness, and also protects that witness from arrest and service of process while in the other state. It is clear that the Defendants have failed to follow this procedure: there has been no certification of materiality or order entered by the Florida Court, in fact, the subpoena duces tecum served on CMI, Inc., was merely signed by an unidentified individual, apparently a deputy court clerk.

The Defendants, though claiming not technically to be appearing before this Court of Kentucky, argue through Mr. Safreed that the Uniform Act need not be followed when the issue is a subpoena duces tecum because the witness can provide the sought after documents without appearing physically in the state of Florida. This argument gives the witness no protections, no ability to challenge the subpoena without travel to Florida, no compensation, and no protection from service of process while making such a trip to Florida. In support of this position, Mr. Safreed provided the Kentucky Court with the case of General Motors Corporation v. State of Florida, 357 So.2d 1045, (Fla.App., 1978). This case appears to limit application of the Uniform Act to subpoena ad testificandum, and

not to subpoena duces tecum. A review of the law relating to the Uniform Act shows that this is one of only two cases to have made such a distinction.

The Illinois case of In Re Grothe, 59 Ill.App.2d. 1, 208 N.E.2d 581 (1965), upon which the Florida court relied in the General Motors case, has been resoundingly rejected by the majority of jurisdictions and has even been overruled by statute in Illinois itself. See 1965 Ill.Laws at 2694 § 1, effective August 6, 1965. Since 1978, when the General Motors opinion issued from Florida, all jurisdictions addressing the issue have held that the Uniform Act encompasses the issuance of subpoenas duces tecum. See Application of a Grand Jury of the State of New York, 8 Mass.App.Ct. 760, 397 N.E.2d 686, (1979); In Re State of California for the County of Los Angeles, Grand Jury Investigation, 57 Md.App. 804, 471 A.2d 1141, (1984); In the Matter of a Rhode Island Grand Jury Subpoena, 414 Mass. 104, 605 N.E.2d 840, (1993).

In an Application of the Grand Jury of the State of New York, 397 N.E.2d 686 (Mass.App., 1979), the state of New York did comply with the Uniform Act in seeking a subpoena duces tecum and the witness sought to quash the subpoena in its home state of Massachusetts by arguing the Uniform Act was limited only to subpoenas for testimony. The Massachusetts court noted the General Motors and In Re Grothe cases, and also referenced four cases from other jurisdictions which reached the opposite conclusion: See In re Saperstein, 30 N.J.Super. 373, 104 A.2d 842 (1954); Application of Washington, 10 App.Div.2d 691, 198 N.Y.S.2d 897, appeal dismissed, 8 N.Y.2d 865, 203 N.Y.S.2d 914, 168 N.E.2d 715 (1960); In re Bick, 82 Misc.2d 1043, 372 N.Y.S.2d. 447 (N.Y.Supreme Ct.

1975); and United States v. Monjar, 154 F.2d 954, 956, 958-959 (1946). The Saperstein case, cited with approval by the Massachusetts court, relied upon an earlier, widely cited and followed New Jersey case, Catty v. Brockelbank, 124 N.J.L. 360, 12 A.2d 128 (1940), which, in turn, cited 4 Wigmore, Evidence § 2199 and 2200 (3<sup>rd</sup> ed. 1940): "It is an erroneous view to my mind to hold that Subpoena duces tecum is something different and apart from Subpoena ad testificandum and that the latter term does not include the former." 124 N.J.L. at 363, 12 A.2d at 129. The Massachusetts court also made reference to the United States Supreme Court case of New York v. O'Neill, 359 U.S. 1, 5, 79 S.Ct. 564, 568, L.Ed.2d 585 (1959), quoting from Kentucky v. Dennison, 65 U.S. (24 How.) 66, 103, 16 L.Ed. 717 (1860): "'Comity among States,' the 1959 opinion said, '(is) an end particularly to be cherished when the object is enforcement of internal criminal laws . . . .'"

Without regard to comity, these Defendants attempt to circumvent the Uniform Act, their own court system and now the Kentucky court system by the argument that this one little-cited Florida appeals court case, General Motors v. State, which relies upon an Illinois case which the state of Illinois has even now rejected, should be recognized as the sole authority for the proposition that the Uniform Act is not applicable to their attempts to obtain the Intoxilyzer 5000 source code from CMI, Inc. by subpoena duces tecum. Even if Defendants were correct in the supposition, that as citizens of Florida they should receive the benefit of the Florida case which supports their position and not be penalized by the mountain of authority from other jurisdictions rejecting this same Florida case,

in the interest of comity, the opinion of the Commonwealth of Kentucky should be given at least equal weight to the opinion of Florida. In fact, the Kentucky Supreme Court has voiced an opinion on this issue.

In Stengel v. Kentucky Bar Assoc., 162 S.W.3d (Ky. 2005), the Kentucky Supreme Court held that a grand jury could acquire out-of-state records through voluntary release. Id. at 918. In dicta, however, the Court acknowledged that “[b]eing a Uniform Act, KRS 421.250 has been interpreted to authorize subpoena duces tecum for records.” Id. at 919. The Court reasoned that it was not unethical to contact an out-of-state entity and fax them a subpoena if requested, or to advise them that KRS 421.250 will be used if necessary if compliance is not forthcoming. Therefore, though dicta, it is likely that Kentucky would side with the majority of jurisdictions in interpreting the Uniform Act to include subpoenas duces tecum.

In light of the weight of authority, including authority in this state, the Uniform Act is interpreted to include the issuance of subpoenas duces tecum, and Defendants must comply with the procedures of the Act to obtain the information they seek from a Kentucky resident if that resident will not cooperate voluntarily.

II. CMI, Inc. is a foreign citizen protected by the Uniform Act.

Defendants also rely on General Motors v. State, 357 So.2d 1045 (Fla.App. 1978), for the proposition that CMI, Inc. is not a foreign citizen, and, therefore, not entitled to the protections of the Uniform Act. This Court distinguishes CMI, Inc. from General Motors Corporation on a number of

grounds. Unlike General Motors Corporation, CMI, Inc. has no assets or employees in the state of Florida. Unlike General Motors, CMI has no premises in Florida and keeps no records there. Furthermore, the statute upon which the Florida Court relies in the General Motors case, Section 607.327, Florida Statutes (1975), appears to have been repealed in 1989. In fact, Defendants themselves in their subpoena identify CMI as "CMI of Kentucky." Therefore, Defendants have failed to prove that CMI, Inc. is anything but a foreign citizen entitled to the protections of the Uniform Act adopted by both Kentucky and Florida.

III. Defendants are engaged in a "fishing expedition" barred by both the Uniform Act and the case of General Motors v. State.

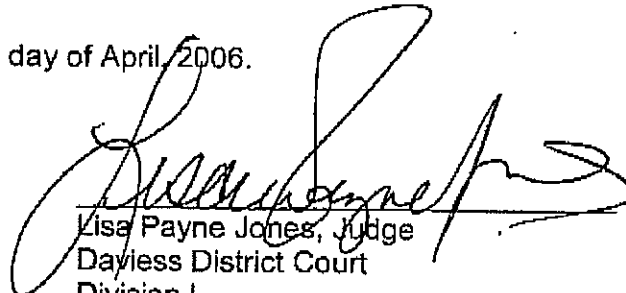
The purpose of the Uniform Act was to create comity among the states, that is courtesy and civility and cooperation. The Uniform Act sets forth a procedure by which the citizens of a sister state are free from the arbitrary actions of over zealous attorneys acting in a separate state without oversight of their judicial system. This Court finds it notable that other Florida defendants have sought this same information from CMI and have proceeded under the Uniform Act, only to have the Florida courts deny their request for a subpoena on the grounds that the defendants failed to establish the information sought, the source code to the Intoxilyzer 5000, is material to their defense of the case: "In the instant case, the defense failed to meet its burden in proving that the requested information is material to the preparation of its case. The evidence and testimony presented demonstrated only a mere possibility that the requested information would help the defense" State of Florida v. James Spaulding, et al,

In the County Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, 05-034808 "M", et al. That same Florida court, addressing the cases of eighty-one defendants in Palm Beach County further stated that the source code of the Intoxilyzer 5000 was a "trade secret" and as such, even if material, would be subject to discovery only "as justice may require." Id.

Ironically, the case upon which Defendants rely, General Motors v. State, 357 So.2d 1045 (Fla.App. 1978), counsels that subpoenas should not be issued "merely to allow for a search through them to gather evidence." Id. at 1047.

THEREFORE, IT IS ORDERED AND ADJUDGED for the foregoing reasons, that the Motion of CMI, Inc., to quash the subpoena duces tecum served upon it by the Defendants in the cases of State of Florida v. Jack Irish, et al., is GRANTED.

SO ORDERED, this the 25<sup>th</sup> day of April, 2006.



Lisa Payne Jones, Judge  
Davie District Court  
Division I

cc: Hon. Allen W. Holbrook  
Attorney for CMI, Inc.

Hon. Christopher Safreed  
Attorney for Defendants

Hon. Robert Harrison  
Attorney for Defendants

