

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

WILLIAM KING and KATHY	:	
KING,	:	
	:	
Petitioners,	:	
	:	
Vs.	:	<b>CASE NO. 2D08-2462</b>
	:	Circuit Case No. 08-375 CA
STATE OF FLORIDA,	:	
	:	
Respondent.	:	
_____	/	

**REPLY**

WILLIAM KING and KATHY KING (hereinafter KING),  
Petitioners, respectfully file this Reply to the Response of the State of  
Florida.

The State of Florida argues that the Circuit Court should have  
dismissed the Petition for Writ of Mandamus on its merits. The Circuit  
Court never reached the merits of the Petition, for the Court dismissed the  
Petition for Writ of Mandamus on procedural grounds, 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 issue before this Court is whether the Circuit

Court should be required to address the merits of the Petition for Mandamus, not whether the Circuit Court should grant the Petition.

When the Circuit Court ruled the “appropriate remedy would be an appeal to the Circuit Court”, the 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.

The State of Florida’s Response focuses upon the merits of the Petition for Mandamus (whether Petitioners are entitled to enforcement of their trial subpoena), rather than whether the Circuit Court was correct in dismissing the Petition without addressing the merits of the Petition. The State does not argue that the holding of *Brown* (that the remedy of appeal is not an adequate remedy at law when a criminal Defendant is denied the Constitutional right to compulsory process) is not controlling. The State’s argument is the Petitioners failed to establish that the subpoenaed evidence was material. (State of Florida’s Response, pages 27 – 34).

The State cites to the recent case of *State v. Bastos*, No. 3D06-1647 (Fla. 3d DCA June 11, 2008) in support of its argument that the Intoxilyzer source code is not material. *Bastos* did not rule the source code was not material, but rather found the defendants failed to establish that the Intoxilyzer 5000 source code was material<sup>1</sup>. The Third District in *Bastos* stated:

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. (Emphasis added).

In the instant proceedings, the Petitioners were able to make a “particularized showing of observed discrepancies in the operation of the machine” that the *Bastos* defendants failed to do.<sup>2</sup> However, the County Court denied the enforcement of the trial subpoena when it applied the

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<sup>1</sup> The Petitioners in this cause are not seeking the source code for the Intoxilyzer 5000; they are seeking the source code for the Intoxilyzer 8000. Appendix B, page 65.

<sup>2</sup> The expert in the instant proceedings had access to data compilations for the Intoxilyzer 8000 that included specific examples of software malfunctions for the Florida version of the Intoxilyzer 8000. Appendix B, pages 17 -23.

narrow definition of materiality required for post conviction relief.<sup>3</sup> In the Petition for Mandamus, KING argued the standard for determining whether the Intoxilyzer 8000 source code was material for trial was broader than the narrow definition required for post conviction relief. (Appendix B, pages 59-61). The *Bastos* decision sets forth what is material:

... a material witness is “[a] witness who can testify about matters having some logical connection with the consequential facts, esp. if few others, if any, know about these matters.

On remand the Circuit Court will have the guidance of the *Bastos* decision, which clearly utilized the broader definition of materiality. Following the entry of the *Bastos* decision, a ten judge panel in Orange County, citing to *Bastos*, found that the Intoxilyzer 8000 source code was material, based in part upon the same software discrepancies presented to the trial court in instant proceedings. *State v. Atkins et al.*, No. 48-2008-CT 673 E, (Fla. Orange Cty. Ct. June 20, 2008).

## CONCLUSION

The Circuit Court, when it ruled KING’S “appropriate remedy would be an appeal to the Circuit Court”, departed from the essential requirements of law, for under *Brown*, KING was entitled to have the Petition for

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<sup>3</sup> 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 to KING. Appendix B, pages 210 – 213.

Mandamus to be heard on its merits. This cause should be remanded to the Circuit Court, where the Circuit Court can rule whether the County Court applied the correct standard of materiality, whether KING established that the Intoxilyzer 8000 source code was material and whether the trial Court should be required to enforce the subpoena.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been furnished by regular U.S. mail to Marilyn Muir Beccue, Assistant Attorney General at 3507 E. Frontage Road, Suite 200, Tampa, FL 33607, on this \_\_\_\_\_ day of June, 2008July, 2008.

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**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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Robert N. Harrison