IN THE SUPREME COURT OF FLORIDA

CARLOS A. ALEJANDRO ULLOA, ET AL.

CASE NO. SC11-2291

Petitioners,

vs.

CMI INC.,

Respondent.

PETITIONERS' INITIAL BRIEF ON THE MERITS

On Review From the
District Court of Appeal
Fifth District

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STATEMENT OF JURISDICTION

This Court has discretionary jurisdiction because the Fifth District Court of Appeal certified that its decision conflicts with the decisions of the district courts in *General Motors Corp. v. State*, 357 So.2d 1045 (Fla. 3d DCA 1987), and *CMI, Inc. v. Landrum*, 64 So.3d 693 (Fla. 2d DCA 2010), *rev. denied*, 54 So.3d 973 (Fla. Jan. 26, 2011). Article V, Section 3(b)(4), FLA. CONST.; Fla. R. App. P. 9.030(a)(2)(A)(vi). This Court also has discretionary jurisdiction to review the Fifth District's decision because that decision expressly and directly conflicts with the decisions of the district courts in *General Motors* and *Landrum* on the same issue of law. Article V, Section 3(b)(3), FLA. CONST.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

STATEMENT OF THE CASE AND FACTS

The county court issued an order authorizing each of the Petitioners, the criminal defendants in the proceedings below, to serve a subpoena duces tecum on CMI, Inc. ("CMI"). (R1 - Appendix C to CMI's Petition for Writ of Certiorari - Exhibits attached to Petitioner's Motions to Quash).[1] The subpoenas duces tecum authorized by the county court required production of the source code for software version 8100.27, which is being utilized on the Intoxilyzer 8000 instruments currently being used in the State of Florida. (R1 - Appendix B to CMI's Petition). CMI is the manufacturer of the Intoxilyzer 8000 instruments that were used by the State of Florida to administer breath tests to each of the Petitioners.

In accordance with the county court's order, the Petitioners each served a subpoena duces on the registered agent for CMI in the State of Florida. The subpoenas duces tecum only required that CMI

[1] All references to an Appendix refer to the Appendix filed by the Petitioner, CMI, Inc., along with its Petition for Writ of Certiorari in the Fifth District Court of Appeal.

produce documents, not that any witness from CMI appear and provide testimony. (R1 - Appendix B to CMI's Petition).

CMI subsequently filed a Motion to Quash those subpoenas. (R1 - Appendix C to CMI's Petition). In its motion, CMI alleged that CMI has no offices, employees or documents in the State of Florida. (R1 - Appendix C to CMI's Petition at 9 n.8). The Petitioners, however, contested that allegation, and CMI never established the veracity of this allegation with evidence or testimony during the proceedings in the county court. The county court conducted a hearing and issued a written order denying CMI's motion. (R2 at 257).

CMI subsequently filed a petition for writ of certiorari in the circuit court, arguing that the county court departed from the essential requirements of the law by denying the motion to quash the subpoenas duce tecum. CMI contended that the Respondents should not have been permitted to serve the subpoenas on its registered agent in Florida, but should have been required to serve them in Kentucky, in accordance with the Uniform Law to Secure the Attendance of Witnesses from Within or Without the State in Criminal Proceedings (the Uniform Law), as codified in Fla. Stat. §§ 942.01-942.06. (R1 - Appendix A to CMI's Petition).

In regards to the three Petitioners in this case, the circuit court specifically relied on the district court's decision in *CMI, Inc. v. Landrum*, 64 So.3d 693 (Fla. 2d DCA 2010), *review denied*, 54

So.3d 973 (Fla. 2011), to deny CMI's Petition for Writ of Certiorari. The circuit court concluded that the Uniform Law did not apply because the subpoenas duces tecum served upon CMI by the Petitioners did not require witness testimony, only the production of documents. (Appendix A at 3-4).

CMI filed a petition for second-tier certiorari review in the Fifth District Court of Appeal, raising the same arguments it had raised in the circuit court. The Fifth District granted CMI's petition but certified conflict with the decision of the Second DCA in *Landrum*, *supra*, and with the Third DCA in *General Motors Corp. v. State*, 357 So.2d 1045 (Fla. 3d DCA 1987). (R2 at 256-62).

The Fifth District noted that, in *General Motors*, the Third District had explicitly held that the Uniform Law was inapplicable "[i]f a subpoena duces tecum requires only the production of documents and is directed to a foreign corporation that is authorized and doing business in Florida." The Fifth District also noted that, in *Landrum*, the Second District had denied CMI's petition for second-tier certiorari review in a similar case where the circuit court had concluded that it was bound to follow *General Motors*. The Second District held that the circuit court in *Landrum* had properly followed the principles set forth in *General Motors* in finding the Uniform Law inapplicable. (R2 at 258-59).

The Fifth District also acknowledged the narrow remedy of second-tier certiorari review and noted that it "generally will not

review a circuit court decision that followed precedent from another district court of appeal." The Fifth District concluded, however, that this is one of the rare cases where it finds that second-tier certiorari review is applicable. The Fifth District concluded that its decision to grant CMI's petition was the only way to establish a direct conflict for this Court to resolve. (R2 at 258-59).

The Petitioners filed a Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court. (R2 at 280). After reviewing the jurisdictional briefs filed by both the Petitioners and CMI, this Court accepted jurisdiction. (R2 at 282).

SUMMARY OF THE ARGUMENT

The Fifth District improperly granted second-tier certiorari relief in this case. The reasoning employed by the Fifth District establishes that the Court simply disagreed with the decision of the circuit court, not that there had been a grievous error, a miscarriage of justice, or a departure from the essential requirements of the law.

The decisions of the district courts in *General Motors* and *Landrum* properly interpreted the applicable Florida statutes. Thus, both the county court and the circuit court properly concluded that the subpoenas duces tecum were properly served upon CMI's registered agent.

ARGUMENT

I. THE FIFTH DISTRICT IMPROPERLY GRANTED SECOND-TIER CERTIORARI RELIEF IN THIS CASE.

The Fifth District improperly granted CMI second-tier certiorari relief. The reasoning employed by the Fifth District establishes that the district court simply disagreed with the decision of the circuit court, not that there had been a grievous error, a miscarriage of justice, or a departure from the essential requirements of the law.

Although the Fifth District acknowledged that second-tier certiorari review provides parties with a narrow remedy, the court actually applied *de novo* review to the circuit court's decision. "[A] circuit court appellate decision made according to the forms of the law and the rules prescribed for rendering it, *although it may be erroneous in its conclusion* as to what the law is as applied to the facts, is *not* a departure from the essential requirements of law remediable by certiorari." *Custer Medical Center v. United Automobile Insurance Co.*, 62 So.3d 1086, 1093 (Fla. 2010); *Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 682 (Fla. 2000); *Haines City*

Community Development v. Heggs, 658 So.2d 523, 525 (Fla. 1995).

> The required 'departure from the essential requirements of the law' means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in **a gross miscarriage of justice**. The writ of certiorari properly issues to correct essential illegality but not legal error.

Heggs, 658 So.2d at 527-28 (emphasis added) (citing *Jones v. State*, 477 So.2d 566, 569 (Fla. 1985) (Boyd, C.J., concurring specially)).

The granting of second-tier certiorari relief should be limited to situations where the district court acts "as a 'backstop' to correct *grievous errors* that, for a variety of reasons, are not otherwise effectively subject to review." *Custer Medical Center*, 62 So.3d at 1092; *Heggs*, 658 So.2d at 531 n.14.

In order to grant second-tier certiorari relief, a district court's decision must do more than simply indicate that the district court disagreed with the circuit court's determination and interpretation of the applicable law. The district court's decision must include sufficient rationale with regard to the manner in which the circuit court purportedly departed from the essential requirements of the law. *Custer Medical Center*, 62 So.3d at 1094, 1095 (quashing district court's decision where the court failed to provide adequate analysis and rationale).

In the instant case, it is undisputed that the circuit court

identified the correct legal issue and applied the only applicable Florida precedent on the issue. In fact, the Fifth District explicitly noted that the circuit court reached its decision based on *Landrum*, a binding district court opinion directly on point. *See Pardo v. State*, 596 So.2d 665, 666 (Fla. 1992). Despite this acknowledgment, the Fifth District granted second-tier certiorari relief because it concluded that *Landrum* violated the clearly established statutory procedures of the Uniform Law. (R2 at 259-60).

Importantly, the Fifth District was not reviewing the decision of the Second District in *Landrum*, but was charged with reviewing the decision made by the circuit court in the instant case. Since the circuit court identified the correct legal issue and correctly applied binding precedent to reach its decision, there was no reasonable basis to conclude that it failed to apply the correct law, that there was a grievous error, or a miscarriage of justice Therefore, under the applicable standard of review, the Fifth District was required to deny CMI's petition.

The Fifth District's ultimate decision to grant relief indicates that it simply disagreed with the result reached by the circuit court (and the district court in *Landrum*). Such disagreement, however, is an insufficient basis upon which to grant second-tier certiorari relief.

In order to justify the result it reached, the Fifth District

stated the following:

> Ultimately, the Florida Supreme Court may have to decide this issue. However, if we do not grant the petition, there will be no direct conflict for the supreme court to resolve. One district court of appeal, as the first to address an important issue, can bind all the circuit courts throughout the state if the other districts are unwilling to disturb precedent based on the general standard of limited review in second-tier certiorari proceedings.

(R2 at 260).

Essentially, the Fifth District indicated that it disagreed with the decisions of the district courts in *Landrum* and *General Motors*. Based on that disagreement, the Fifth District concluded that the only way it could prevent those district courts from binding all the circuit courts in Florida, and for the Florida Supreme Court to obtain jurisdiction to review the important issue in this case, would be for the Fifth District to grant CMI's petition.

Importantly, the Fifth District was simply incorrect in its conclusion that it was required to establish inter-district conflict in order to provide this Court with jurisdiction. This Court does has discretionary jurisdiction to review cases where the district court certifies its decision to be in direct conflict with another district court of appeal and where a decision of a district court of appeal expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal. Fla. R.

App. P. 9.030(a)(2)(A)(iv),(vi).

However, express conflict between district courts is not the only basis for this Court to exercise discretionary jurisdiction to review a decision of a district court of appeal. This Court also has discretionary jurisdiction to review cases where the district court certifies a question to be of great public importance. Fla. R. App. P. 9.030(a)(2)(A)(v).

Therefore, in light of the applicable standard of review, and in light of the Fifth District's belief that the issue in this case is an important issue affecting all foreign corporations doing business in the State of Florida, the appropriate result in this case was the Fifth District denying CMI's petition and certifying a question of great public importance to this Court. That result would have involved the proper application of the applicable standard of review but would have still provided this Court with the ability to review the issue in this case if it deemed it appropriate.

Furthermore, in reaching its conclusion to grant CMI second-tier certiorari relief, the Fifth District performed a cursory review and analysis of the applicable statutes. In doing so, the Fifth District did not point to any statutory language indicating that the Uniform Law applies to situations where a subpoena duces tecum does not require a witness to appear and provide testimony, but only requires the production of documents. Likewise, the Fifth

District did not point to any statutory language or case authority to support its conclusion that the Uniform Law is the exclusive means of obtaining the production of documents from an out-of-state corporation. *See Forbes v. Indiana*, 810 N.Ed.2d 681, 683, 684 (Ind. 2004) (Uniform Law is not exclusive mechanism of obtaining documents from out-of-state witness).

Therefore, this case is not like this Court's recent decision in *Nader v. Department of Highway Safety and Motor Vehicles*, 87 So.3d 712 (Fla. 2012). In *Nader*, this Court concluded that a district court properly granted second-tier certiorari relief despite the fact that the circuit court had followed a district court decision that had reached the contrary result on the same issue. This Court found that the district court acted appropriately because the decision of the circuit court, and of the district court decision it relied upon, were both contrary to clearly established statutory law. 87 So.3d at 725.

Unlike the statutory law in *Nader*, the applicable statutes in this case do not warrant the result reached by the Fifth District. In fact, as discussed in Section II of this brief, the statutes in question actually provide full support for the decision reached by the circuit court, and for the continued vitality of the decisions reached by the district courts in *General Motors* and *Landrum*.

Moreover, in order to reach its decision, the Fifth District chose to disregard *General Motors* and *Landrum*, and instead, relied

on decisions made by courts in other states, including *Philips Petroleum Co. v. OKC Ltd. P'ship*, 634 So.2d 1186 (La. 1994), *Syngenta Crop Prot., Inc. v. Monsanto Co*. 908 So.2d 121 (Miss. 2005), and *Yeary v. State*, 711 S.E.2d 694 (Ga. 2011). (R2 at 261-62).

This type of analysis and reliance on out-of-state authority does not establish a departure from the essential requirements of the law, a miscarriage of justice, or a grievous error. *See Custer Medical Center*, 62 So.3d at 1094, 1095. Again, the analysis employed by the Fifth District simply establishes that the district court disagreed with the conclusion reached by the circuit court, and disagreed with the decisions made by the district courts in *General Motors* and *Landrum*.

Neither CMI nor the Fifth District has established or provided any reasoning as to why the analysis of the Third District in *General Motors*, which was adopted by the Second District in *Landrum*, is incorrect. Accordingly, there was not a sufficient legal basis for the Fifth District to grant CMI second-tier certiorari relief. This Court should quash the decision of the Fifth District and remand with instructions that the decision of the circuit court be reinstated.

II. THE CIRCUIT COURT PROPERLY CONCLUDED THAT THE SUBPOENAS DUCES TECUM WERE PROPERLY SERVED UPON CMI'S REGISTERED AGENT IN FLORIDA.

The district courts in *General Motors* and *Landrum* properly concluded that a subpoena duces tecum requiring only the production of documents, and not the appearance of a witness and testimony, does not have to comply with the Uniform Law. Thus, this Court should resolve the certified conflict in favor of the decisions reached by the district courts in those cases and should disapprove of the Fifth District's decision in this case.

In *General Motors*, the Third District concluded that the plain language of the Uniform Law was limited to subpoenas seeking to acquire the attendance and testimony of witnesses located outside of Florida. The district court concluded that the Uniform Law did not apply to subpoenas duces tecum that only request the production of documents. 357 So.2d at 1047.

The relevant portions of the Florida version of the Uniform Law still have no application to subpoenas that only request the production of documents. Section 942.02(1), Florida Statutes provides the following:

> If a judge of a court of record, in any state which by its laws has made provision for commanding persons within that state to **attend and testify** in this state . . .

Fla. Stat. 942.02(1) (emphasis added).

Section 942.03(1), Florida Statutes provides the following:

> If a person in any state, which by its laws has made provisions for commanding persons within its borders to **attend and testify** in criminal prosecutions . . .

Fla. Stat. 942.03(1) (emphasis added).

The subpoenas duces tecum served on CMI in this case did not require any witness to appear or provide testimony. Thus, the plain language of §§ 942.02 and 942.03, Florida's Uniform Law, does not apply to the subpoenas duces tecum involved in this case.

Additionally, in *General Motors*, the Third District relied on Fla. Stat. § 607.327 and various sections of Chapter 48 of the Florida Statutes to hold that a subpoena duces tecum seeking documents from a foreign corporation is properly served upon the corporation's registered agent. The Third District reasoned as follows:

> Section 607.327, Florida Statutes (1975), perspicuously provides that process may be served upon a foreign corporation pursuant to Chapters 48 or 49 of the Florida Statutes. Sections 48.081(1) and (3), 48.091(1), and 48.181(2) Florida Statutes (1975), require every foreign corporation qualified to transact business in this state to designate a resident agent upon whom legal process may be properly served. Service of the instant criminal investigatory subpoena duces tecum upon C.T. Corporation Systems, the designated registered agent of General Motors Corporation was, therefore, authorized by and consistent with the provisions of Florida law.

357 So.2d at 1047.

The current versions of those statutes indicate that service on a corporation's registered agent is a proper means of effecting service on a corporation. Although the Legislature has replaced

Fla. Stat. § 607.327 with § 607.15101, the new statute contains virtually identical language.

Section 607.15101(1) provides that "[t]he registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the foreign corporation." Section 607.15101(4) provides that "[p]rocess against any foreign corporation . . . may be served in accordance with chapters 48 or 49."

Section 48.091(1), Florida Statutes, requires a foreign corporation doing business in Florida to designate a registered agent. Sections 48.081(3)(a) and 48.181(2), Florida Statutes, permits service of process on a foreign corporation's registered agent.

In light of the plain language of these statutes, the rationale employed by the Third District in *General Motors* remains correct and controlling. The subpoenas duces tecum in this case were properly served upon CMI's registered agent in Florida.

Therefore, the county court and the circuit court properly followed the applicable statutes and the decisions of the district courts in *General Motors* and *Landrum*. The Fifth District's decision in this case is contrary to *General Motors*, *Landrum*, and the applicable statutes. Accordingly, this Court should quash that

decision and remand the case with instructions that the decision of the circuit court be reinstated.

CONCLUSION

For the aforementioned reasons, this Court should quash the decision of the Fifth District Court of Appeal and remand with instructions that the decision of the circuit court be reinstated.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Petitioners' Brief on the Merits is submitted in Courier New 12-point font and thereby complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by mail delivery to Edward G. Guedes, 2525 Ponce de Leon Boulevard, Suite 700, Coral Gables, Florida 33134, on this 7th day

of August, 2012.

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