IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC11-2291

CARLOS A. ALEJANDRO ULLOA, et al.,

Petitioners,

v.

CMI, INC.,

Respondent.

BRIEF ON MERITS OF CMI, INC.

ON DISCRETIONARY REVIEW FROM A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

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RECORD REFERENCE ABBREVIATIONS USED IN THIS BRIEF

References to the record transmitted by the Fifth District Court of Appeal shall appear as "R."

References to respondent, CMI, Inc., will appear as "CMI."

References to Eric Jackson, Dustin Bradley Leonard and Carlos A. Alejandro Ulloa, individually, shall appear as "Jackson," "Leonard" and "Ulloa," respectively. Collectively, they will be referred to as the "Defendants."

References to the petitioners' brief on jurisdiction will appear as "PBJ."

References to the petitioners' brief on the merits will appear as "PBM."

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INTRODUCTION

This proceeding arises from the Court's discretionary review of the Fifth District Court of Appeal's decision in *CMI, Inc. v. Ulloa*, 73 So. 3d 787 (Fla. 5th DCA 2011), after the Fifth District certified its decision to be in conflict with *CMI, Inc. v. Landrum*, 64 So. 3d 693 (Fla. 2d DCA 2010) and *General Motors Corp. v. State*, 357 So. 2d 1045 (Fla. 3d DCA 1978).[1]

STATEMENT OF THE CASE AND FACTS

Except as otherwise noted in this supplemental statement of the case and facts, CMI accepts the Defendants' statement of the case and facts.

A. The history of the subpoenas duces tecum.

The Defendants each served a subpoena duces tecum (collectively, the "Subpoenas") on CMI's registered agent in Florida. R. 46-49.[2] Contrary to Defendants' recitation of the facts, the three Subpoenas were not the same. The first subpoena, issued by Jackson, was entitled "Subpoena Duces Tecum for Hearing" and commanded CMI's custodian of records, in care of NRAI Services, Inc. (CMI's designated registered agent), to appear at the offices of issuing counsel and to bring with him all source codes for the Intoxilyzer 8000 software, version 8100.27. R. 48. The Jackson subpoena says nothing about whether testimony

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1 As more fully explained below, CMI disagrees that the Fifth District's decision conflicts with *General Motors*. The conflict with *Landrum*, however, is certain.

2 The "record" exists in the appendix submitted in support of CMI's petition to the Fifth District. R. 37-189.

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would be elicited or not and provided no method of compliance other than appearance with the requested materials. As with all subpoenas, the Jackson subpoena threatened CMI with contempt for failure to comply. R. 48.

The second subpoena, issued by Leonard, was also entitled "Subpoena Duces Tecum for Hearing" and commanded CMI's custodian of records, under penalty of contempt, to produce the same source code materials to the issuing attorney. R. 49. No details are provided in the subpoena as to how the requested electronic data was to be produced.

The third subpoena, issued by Ulloa, was entitled "Subpoena Duces Tecum Without Deposition – (Records Pick-Up Only)." R. 46-47. It commanded CMI's records custodian to appear at the offices of the issuing attorney with the same source code materials or, alternatively, to mail or deliver the "copies" in lieu of appearance. R. 46. Like the first two subpoenas, it threatened CMI's records custodian with contempt in the event of non-compliance.

The nature of the Subpoenas is not immediately apparent from the face of the Subpoenas. While two of the three Subpoenas were titled as subpoenas "for hearing," it appears that the Defendants may have sought leave of the trial court to issue the subpoenas pursuant to Fla. R. Crim. P. 3.220(f).[3] PBM at 1. Consequently, notwithstanding the titles of the Subpoenas, CMI treated them as "discovery" subpoenas directed to a non-party witness. R. 50.

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[3] Fla. R. Crim. P. 3.220 governs discovery in criminal proceedings. Subsection (f) reads: "On a showing of materiality, the court may require such other discovery to the parties as justice may require."

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B. CMI's position below.

CMI made a limited appearance to quash service of the Subpoenas and filed motions to quash in each case. R. 50, 82, 94. In connection with its limited appearance and motions, CMI proffered to the trial court that CMI has no offices, employees or documents in the State of Florida.[4] *See, e.g.,* R. 55 n.7. An evidentiary hearing was not held (or requested) specifically because CMI was contesting the trial court's jurisdiction over CMI via the Subpoenas. While the Defendants assert that they "contested that allegation" (PBM at 2), they cite to no record evidence or even a court filing reflecting that they challenged the accuracy of CMI's proffered facts before the trial court. Even now, the Defendants do not substantiate how CMI's proffer of the facts was inaccurate. The record does not reflect that the trial court's ruling was based on anything other than CMI's proffer of relevant facts.

In its motions to quash, CMI asserted the following arguments (R. 50-68, 82-92, 94-118):

> 1. A Florida trial court lacks subpoena power (and attendant enforcement authority) over non-party witnesses located outside the State of Florida.
>
> 2. In the absence of such inherent subpoena power, criminal defendants are obligated to use the mechanisms afforded by the

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[4] For this reason, the analogy drawn by amicus curiae, the Florida Association of Criminal Defense Lawyers, to winter visitors to Florida is inapposite. CMI did not dispute that if one of its corporate officers traveled into the state on business, a subpoena could be personally served on the officer in connection with an action against CMI.

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> Uniform Law to Secure Attendance of Witnesses from Within or Without a State in Criminal Proceedings," codified at sections 942.01 through 942.06, Florida Statutes (the "Uniform Law"), a law enacted precisely to address a trial court's lack of extra-territorial subpoena power.
>
> 3. Florida's service of process statutes, in Chapter 48, Florida Statutes, do not provide for service of non-party witness subpoenas on out-of-state corporations' registered agents.
>
> 4. The Legislature intended for the Uniform Law to be interpreted in accordance with jurisprudence from other enacting jurisdictions so as to maintain uniformity in the law.
>
> 5. Neither the Florida Rules of Criminal Procedure nor the jurisprudence of this State contemplates the issuance of a discovery subpoena solely for production of documents, much less one directed to an out-of-state, non-party corporate witness.

Id.

The trial court rejected CMI's arguments and denied the motions to quash. Upon petition for writ of certiorari, the appellate division of the Seminole County Circuit Court consolidated the cases and upheld the trial court's decisions. R. 40-44. The circuit court, however, quashed certain other consolidated trial court orders that upheld the validity of subpoenas duces tecum that were served on CMI's registered agent and ostensibly required CMI's records custodian to appear and provide testimony along with producing the source code materials. R. 40-44; *see also Ulloa*, 73 So. 3d at 789 n.1. Relying on *General Motors* and *Landrum*, the circuit court concluded that CMI was entitled to the protections of the Uniform Law as to those subpoenas duces tecum, but not with respect to almost identical subpoenas duces tecum that merely required the production of the same source code materials. R. 42-43.

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C. The Fifth District's decision and *Landrum*.

The Fifth District granted CMI's second-tier certiorari petition, concluding (i) that the Subpoenas were governed by the Uniform Law, (ii) that registered agents in Florida serve a limited function in acquiring jurisdiction over a foreign corporation to adjudicate its rights and obligations in a legal dispute, and (iii) that Florida trial courts lack the inherent authority to subpoena either testimony or documents from an out-of-state, non-party corporate witness. *Ulloa*, 73 So. 3d at 790-91.

Lastly, contrary to the Defendants' assertion (PBM at 3), the Fifth District did not note that the Second District "had denied CMI's petition for second-tier certiorari review" in *Landrum*. On the contrary, the Fifth District stated that the *Landrum* court had reviewed and denied CMI's petition for writ of certiorari in connection with a felony charge of DUI in the circuit court. CMI's petition to the Second District, therefore, was a first-tier petition for writ of certiorari akin to an appeal. The Defendants' confusion is understandable, however, since the *Landrum* court applied a second-tier certiorari review standard to CMI's first-tier petition. *See infra* at 43-44.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal correctly exercised its second-tier certiorari jurisdiction to review the circuit court's appellate decision in this case. The unique factual and legal underpinnings of the decision under review, coupled with the potential for continued application of incorrectly decided precedent, justified certiorari review to correct a manifest departure from the essential

requirements of law resulting in a miscarriage of justice. Certiorari review was entirely consistent with this Court's reasoning in *Nader v. Fla. Dep't of Highway Safety Motor Veh.*, 87 So. 3d 712 (Fla. 2012).

Absent the Uniform Law, there is no mechanism under Florida law for the Defendants to have subpoenaed documents from an out-of-state, non-party corporate witness. No statute or rule authorizes such a subpoena. Moreover, a Florida trial court simply does not have the authority to extend its jurisdiction into another state and command a corporate citizen of that state to participate in legal proceedings to which it is not a party. Service of the subpoenas duces tecum on CMI's registered agent constituted an improper extension of the trial court's subpoena power and incorrectly conflated the concepts of personal jurisdiction and subpoena power, in contravention of long-established state and federal jurisprudence.

To maintain uniformity within the jurisprudence of this state, as well as with that of other Uniform Law jurisdictions, and to avoid the draconian consequences that might befall companies doing business in Florida, the Uniform Law should be construed to encompass subpoenas that seek only the production of documents from out-of-state witnesses, even when they have a registered agent in the state.

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ARGUMENT

I. THE FIFTH DISTRICT CORRECTLY INVOKED SECOND-TIER CERTIORARI TO REVIEW THE CIRCUIT COURT'S APPELLATE DECISION IN THIS MATTER.

A. The Defendants never asserted a conflict with this Court's certiorari jurisprudence as a basis for obtaining review, and in fact, requested that the Court address the merits of the certified conflict.

For the first time before this Court, the Defendants argue that this Court should vacate the Fifth District's decision because it improperly granted second-tier certiorari to review the circuit court's appellate decision. PBM at 6-12. However, when petitioning this Court for review, the Defendants *never* argued that the exercise of discretionary jurisdiction was warranted because of a conflict between the Fifth District's decision and this Court's certiorari jurisprudence. Nowhere in their jurisdictional brief did Defendants even suggest that the Fifth District's decision conflicts with *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086 (Fla. 2010) or *Nader v. Fla. Dep't of Highway Safety Motor Veh.*, 87 So. 3d 712 (Fla. 2012). In fact, neither case is even cited.

More to the point, the Defendants affirmatively asked this Court to resolve the conflict between *Landrum* and *Ulloa* on the merits. They stated:

> *In light of the importance of this issue*, and based on the strong conflict among the district courts, this Court should exercise its discretion to accept jurisdiction.

* * *

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> For the aforementioned reasons, this Court should accept jurisdiction, *address the merits of the instant case*, and *resolve the conflict described above.*

PBJ at 6, 7 (emphasis added).

While this Court has held that, once it accepts jurisdiction, it may reach any issue properly raised below – *e.g., Russell v. State*, 982 So. 2d 642 (Fla. 2008) – it is troubling (though admittedly not dispositive) that the Defendants misled CMI into understanding that they sought to have the *Landrum/Ulloa* conflict resolved on the merits. For that reason – and that reason alone – CMI concurred in the Defendants' request that the Court exercise its jurisdiction here.

B. In fact, the Fifth District's exercise of second-tier certiorari jurisdiction was entirely consistent with this Court's analysis in *Nader*.

(1) The unique posture of the parties.

The posture of the parties, while well known at this point, bears repeating, since it directly impacts the second-tier certiorari analysis. In this case, CMI's first appellate "bite at the apple" was before a court that had no discretion but to rule the way it did because of the existence of the Second District's *Landrum* decision. R. 40-45. Even if the circuit court had agreed entirely with CMI's arguments, it would not have been at liberty to adopt them. CMI's first-tier certiorari review was perfunctory with no chance of success; in other words, it was illusory. *See Nader*, 87 So. 3d at 724 ("[A] circuit court (even one functioning in its appellate capacity) is *bound* to apply existing precedent from another district if its district has not yet spoken on the issue. In this regard, *a party is unable to argue that the*

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circuit court should rule differently on the same issue of law – something that the party is able to do in cases on direct appeal to the district court.") (emphasis partially added). According to the Defendants' logic, CMI was forever bound by *Landrum* regardless of which district court of appeal considered the issue, so long as the DUI prosecution originated in county court.

The limitations of second-tier certiorari review concern themselves predominantly with ensuring that a party not have a second plenary appeal. *Nader*, 87 So. 3d at 726 ("Throughout this Court's pronouncements concerning the proper application of second-tier certiorari review, this Court has repeatedly emphasized that certiorari review cannot be used as a means of granting a second appeal ...."); *Custer Med. Ctr.*, 62 So. 3d at 1093. Had the circuit court independently engaged in its own analysis of a novel legal issue determined by the county court, without the binding effect of *Landrum*, CMI might find itself in a different posture now. However, the circuit court did not do that; instead, it correctly found itself constrained to follow *Landrum* (whether it agreed with *Landrum* or not).

Denial of second-tier certiorari review would have been particularly onerous where, as here, the circuit court was constrained by a district court of appeal decision that, itself, applied the wrong standard of review to CMI's first-tier certiorari petition in that case.[5] As noted below – *infra* at 43-44 – CMI's first bite at the appellate apple in *Landrum* was incorrectly judged under a second-tier certiorari standard of review. *Landrum*, 64 So. 3d at 694 (citing and applying the

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[5] The irony of this situation is certainly not lost on CMI.

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second-tier certiorari review standard from *Allstate Ins. Co. v. Kaklamanos,* 843 So. 2d 885 (Fla. 2003)). As is evident from the *Landrum* opinion, the Second District did not engage in a comprehensive examination of CMI's arguments under the Uniform Law, but rather concluded that because the trial court had applied the *General Motors* decision – a decision it described as "[t]he only Florida decision materially on point," *id.* at 695 – "the circuit court did not depart from the essential requirements of the law by violating a clearly established principle of law." *Id.* Unlike the Fifth District below, the *Landrum* court did not question the correctness of *General Motors* vis-à-vis the Uniform Law, or its continued vitality after decades of contrary jurisprudence from other Uniform Law jurisdictions.

This Court recently reaffirmed in *Nader* the propriety of engaging in second-tier certiorari review when unique circumstances warrant the extraordinary remedy. In *Nader*, the Court squarely addressed when second-tier certiorari review (or true common law certiorari review) is available to review an appellate decision of the circuit court:

> In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. *Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually.* The district courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.
>
> It is this discretion which is the essential distinction between review by appeal and review by common-law certiorari.

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87 So. 3d at 722 (original emphasis partially deleted; quoting *Combs v. State*, 436 So. 2d 93, 95-96 (Fla. 1983)).

After noting that "clearly established law" consists not only of prior precedents, but also statutes, rules and constitutional provisions, this Court went on to hold, "Accordingly, a district court may grant a writ of certiorari after determining that the decision is in conflict with the relevant statute, so long as the legal error is also 'sufficiently egregious or fundamental to fall within the limited scope' of certiorari jurisdiction." *Id.* at 723. This is precisely what the Fifth District did below.

In upholding the Second District's exercise of second-tier certiorari jurisdiction in *Nader*, the Court noted a situation remarkably like the present one:

> [T]he district court must determine whether the decision of the circuit court, *even though it followed an opinion from another district court*, is a departure from the essential requirements of law resulting in a miscarriage of justice. Here, the Second District, in granting second-tier certiorari after reviewing the provisions of the implied consent law in detail, concluded that while the circuit court attempted to obey controlling precedent, its decision (and the [controlling] decision in *Clark*) was in fact contrary to clearly established statutory law. [citation omitted].
>
> Further, the Second District noted the "dramatic" ramifications of the situation in this case, where if the district court was unable to act, circuit courts would be required to overturn every driver's license suspension based on a refusal to submit to a breath test in which a similar form was used. [citation omitted]. The Second District stressed that its second-tier certiorari jurisdiction could not be used merely to grant a second appeal but was reserved for those situations where there was a violation of clearly established principles of law resulting in a miscarriage of justice. [citation omitted]. The district court concluded that this standard was met in this case, and thus it was

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> authorized to grant certiorari relief and quash a circuit court decision where the court below obeyed the controlling precedent, but in doing so, disobeyed the plain language of the statute.
>
> * * *
>
> To hold otherwise would prevent a district court from using its second-tier certiorari review to correct "a violation of clearly established principle of law that resulted in a miscarriage of justice," *simply because a prior decision of another district court of appeal analyzed the controlling statute.*

87 So. 3d at 725-26, 726 (emphasis added).

The Fifth District below exercised the same caution the Second District did in *Nader*; in fact, it cited the Second District's decision approvingly. *Ulloa*, 73 So. 3d at 790. It noted the limited function of second-tier certiorari review, citing to this Court's decision in *Custer Med. Ctr.*, but concluded that this important issue – which affects all foreign corporations doing business in the State of Florida – justified closer examination of the legal analysis underlying *General Motors* and *Landrum*, in the context of the protections afforded by the Uniform Law.[6] 73 So. 3d at 790. The Fifth District also went on to observe that the circuit court's conclusions as to the proper role of a registered agent conflicted with Florida's

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[6] Even in *Custer Med. Ctr.*, this Court noted that "the district court's exercise of its discretionary certiorari jurisdiction should depend on the court's assessment of the *gravity of the error* and the *adequacy of other relief.* A judicious assessment by the appellate court will not usurp the authority of the trial judge or the role of any other appellate remedy, but will preserve the function of this great writ of review as a 'backstop' to correct *grievous errors* that, for a variety of reasons, are not otherwise effectively subject to review." 62 So. 3d at 1092 (emphasis in original; quoting *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 531 n. 14 (Fla. 1995)).

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long-arm and service of process statutes in Chapters 48 and 914, Florida Statutes. *Id.*

The unique circumstances presented below justified the Fifth District's exercise of second-tier certiorari jurisdiction in order to harmonize Florida's long-arm and service of process statutes with the reasoning of *General Motors*, which the Second District adopted wholesale and without question in *Landrum*.[7] The circuit court, unfortunately, lacked any guidance other than *Landrum*. Had the Fifth District merely summarily denied CMI's petition, it would have compounded (and propagated) what it perceived to be a fundamental departure from the essential requirements of the law.

II. ABSENT THE UNIFORM LAW, THERE IS NO AUTHORITY FOR A FLORIDA TRIAL COURT TO ENFORCE A SUBPOENA DIRECTED TO AN OUT-OF-STATE CORPORATE WITNESS IN CRIMINAL PROCEEDINGS.

At the heart of this matter is a question relating to fundamental principles of federalism and comity: whether a Florida trial court may lawfully, through use of a litigant's witness subpoena duces tecum, reach into a sister state and command that a corporate resident of that state deliver electronic data – in this case, valuable

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[7] As further argued below (*infra* at 43-49), the Second District, without explanation, apparently extended the holding in *General Motors* to dramatically dissimilar facts. Unlike the discovery subpoenas issued by the misdemeanor defendants here, the subpoena duces tecum in *General Motors* was issued by a State Attorney conducting a criminal investigation pursuant to broad statutory powers and directed to a corporation with an *actual* presence in the state. *See General Motors*, 357 So. 2d at 1046.

corporate assets – into Florida for use in ongoing criminal proceedings to which the corporate witness is not a party. As more fully set forth below, CMI contends that such judicial power has never existed and does not exist now, absent invocation of the Uniform Law and the cooperation of that sister state's courts.[8]

A. Florida law regarding subpoena power and jurisdiction.[9]

This Court has previously recognized that personal jurisdiction and service of process, while related, are independent and distinct concepts from each other. *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 591 (Fla. 2006). Consequently, the concepts cannot be folded into one another in a shortcut to compel compliance. The parallel anchor for this analysis is a proposition of law so basic that it has been obfuscated in the haste to obtain convenient service on CMI: Florida trial courts have no authority over out-of-state witnesses. *See Cherry v. State*, 781 So. 2d 1040, 1054 (Fla. 2000) (considering an ineffective assistance of counsel claim, the Court observed "Cherry filed a motion for continuance and to perpetuate the testimony of several witnesses who were either *beyond the jurisdiction of the trial court (i.e., out-of-state residents)* or unavailable to testify.") (emphasis added).[10]

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8 Implicit in the Second District's *Landrum* decision and the circuit court's decision below is the mistaken conclusion that *if* the Uniform Law does not apply, then *ipso facto* the Subpoenas must necessarily be valid. However, neither court addressed the source of such subpoena authority or grounded its analysis in any legal foundation other than *General Motors*.

9 *General Motors* and *Landrum* are discussed in detail in a subsequent section. *Infra* at 43-49.

10 It is no doubt for this reason that Rule 3.190(j)(1) allows for the issuance of a commission to preserve the testimony of a "prospective witness [who] (continued . . .)

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The apparent difficulty here with this basic proposition of law stems from the fact that CMI has done business in Florida in the past by selling Intoxilyzer instruments for use in Florida and, therefore, was required to identify a registered agent for service of process. DUI defendants around the state, in apparent reliance on *General Motors* and later on *Landrum*, have chosen to use the registered agent as a gateway to compel CMI – which has not been sued and is not a party to the underlying proceedings – to produce in Florida whatever corporate materials and documents those defendants deem appropriate, even if those materials and documents are located solely in Kentucky. Prior to *Landrum*, Florida courts had never endorsed such a concept, and in just about any other setting, still do not.

Time and again Florida courts have recognized that a trial court has no subpoena authority to compel an out-of-state witness to appear in Florida. Thus, in *Packaging Corp. of America v. DeRycke*, 49 So. 3d 286 (Fla. 3d DCA 2010), the Third District considered whether a directed verdict sanction was appropriate for a party's failure to compel an out-of-state corporate witness to participate in the trial proceedings. *Id.* at 288-89. In anticipation of a retrial, the *defendant* corporation (PCA) had identified a corporate vice-president to testify, but the individual resided in South Carolina. *Id.* at 288. The witness was served with a *South Carolina* subpoena, but when the time came, the witness "had a change of heart"

(. . . continued)

resides beyond the territorial jurisdiction of the court...." Fla. R. Crim. P. 3.190(j)(1).

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and obtained an order from a South Carolina court quashing his subpoena. *Id.* at 289.

In concluding that sanctions against PCA were not proper, the Third District observed that PCA, even though it was a party already subject to the trial court's jurisdiction, "had no method to compel an out-of-state witness to testify in a civil proceeding." *Id.* at 290. The court went on:

> Mr. Sumwalt wanted to disengage himself from the proceedings. The South Carolina court accommodated him. "Judicial acts of courts in other states, properly exercising their jurisdiction, should be respected under the comity doctrine" where not inconsistent with Florida public policy.

Id. *See also Washington v. State*, 973 So. 2d 611, 613 (Fla. 3d DCA 2008) (endorsing argument that "there was no method to compel an out-of-state witness to testify in a civil proceeding"); *Scripto Tokai Corp. v. Cayo*, 623 So. 2d 828, 829 (Fla. 3d DCA 1993) (holding that corporate defendant could not be compelled to produce witness outside jurisdiction).

More recently, the Fourth District Court of Appeal reached a similar conclusion in *Quest Diagnostics Inc. v. Swaters*, ___ So. 3d ___, 2012 WL 2913275 (Fla. 4th DCA July 18, 2012). In *Quest Diagnostics*, the Fourth District considered a factual pattern remarkably similar to the present one. Specifically, an airline pilot whose license was revoked sought to compel production of his urine sample from the testing laboratory (QDI and its subsidiary, QDCL) to which his sample had been sent. *Id.* at *1. The pilot sued the health care facility at which the

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sample was given for negligence in the manner it collected the specimen. As the Fourth District specifically observed:

> *Neither QDI nor QDCL is a party in that lawsuit.* QDI is a foreign corporation incorporated in Delaware with its principal place of business in Madison, New Jersey. QDCL, a wholly-owned subsidiary of QDI, is a foreign corporation incorporated in Delaware with its principal place of business in New Jersey as well.

Id. (emphasis added). The pilot subpoenaed the urine specimen from QDI and QDCL *by serving their registered agents in Florida. Id.* The laboratories opposed production arguing that the pilot "had not obtained jurisdiction over either corporation because neither was subject to Florida subpoena power or the Florida long-arm statute." *Id.* at *2.

In granting the petition for writ of certiorari, the Fourth District rejected both the improper service and the very same arguments advanced by the Defendants here:

> *We also conclude that Swaters's attempted service of the subpoenas by service on petitioners' registered agents was improper.* Swaters argues that the subpoenas were properly served on petitioners, as they are foreign corporations which actively do business in Florida, are registered under Florida statutes to do business in Florida and have designated a resident agent for service on them. He cites for support *General Motors Corp. v. State*, 357 So. 2d 1045, 1047 (Fla. 3d DCA 1978), but in that case the third district found that the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings did not apply where a subpoena sought production of documents only. *See also CMI, Inc. v. Landrum*, 64 So. 3d 693, 695 (Fla. 2d DCA 2010), *rev. denied*, 54 So. 3d 973 (Fla. 2011); *State v. Bastos*, 985 So. 2d 37, 39 (Fla. 3d DCA 2008). That would be the case here.

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> Here, even if the Uniform Law for criminal proceedings controlled this civil case, it would be inapplicable under this case law *since the subpoenas sought production of a urine specimen only, not testimony of any witnesses*.

Id. at *4 (emphasis added).

Noting the existing conflict among *Ulloa*, *General Motors* and *Landrum*, the Fourth District went on to conclude that resolution of the certified conflict in this case was not necessary to determine the validity of the service upon the registered agents. *Id. Even though the subpoenas did not seek witness testimony*, the court reasoned:

> We do not believe that this issue must be resolved by application of that authority, though, as this is not a criminal case or one relating to a criminal investigation or other proceeding. Florida and Georgia, among other states, have adopted uniform foreign depositions laws. In Florida, the Uniform Foreign Depositions Law (UFDL) is codified in section 92.251, Florida Statutes. Georgia has adopted the Uniform Foreign Depositions Act. O. C. G.A. §§ 24-10-110 to 112 (West 2011). ... The Georgia Civil Practice Act provides for subpoenas for deposition only, although a document request can be included. Georgia requires appointment of a commission and presentation of the commission to the clerk where the witnesses or documents are located before the subpoena can be issued. Rebecca B. Phalen, *Obtaining Out-of-State Evidence for State Court Civil Litigation: Where to Start?*, 17 Ga. Bar J., No. 2, 18 (Oct. 2011). *For Swaters to subpoena records from petitioners, he would have to comply with the controlling provisions of those Georgia statutes. He has not done so.*

Id. (emphasis added).

Kentucky, like Georgia, has adopted a uniform foreign depositions law, the Uniform Interstate Depositions and Discovery Act, codified at section 421.360, Kentucky Statutes. The Kentucky act, which encompasses subpoenas "to produce

and permit inspection and copying of ... documents, records, electronically store information, or tangible things," requires that the foreign subpoenas (in this instance, the Defendants' Subpoenas) be submitted to the clerk of the circuit court of the county in which discovery is sought in Kentucky. § 421.360(3)(a), Ky. Stat.

The rationale of *Quest Diagnostics*, even though it is a civil case, is equally applicable here. If a litigant in Florida wishes to compel a corporate witness in Kentucky to produce in Florida documents or materials found in Kentucky, he must invoke the assistance of the Kentucky courts. That is precisely what both the Kentucky depositions and discovery act and the Uniform Law contemplate. As the Fourth District pointedly observed in *Quest Diagnostics* (just as the Fifth District did below), the litigant cannot simply bypass the entire judicial system of a sister state by serving the registered agent of the out-of-state corporate witness that happens to have done business in Florida. The Fourth District concluded, therefore, that since the Uniform Law did not apply to a civil proceeding, there was no other authority for the subpoena. *Id.* at *4.

While, surprisingly, there is no case law addressing this point, it is fairly evident that a Florida trial court enjoys only *one* kind of subpoena power. It does *not* wield one kind of subpoena power for production of documents located in another state and another kind for production of testimony from witnesses in that same state. The judicial authority is precisely the same. If the Defendants' position is correct that a registered agent can function as a means to bypass the judicial system of a sister state to compel production of documents, then *logically*, that same authority should exist to compel the testimony of witnesses located in

that state. There would be little need for compacts enshrining interstate comity if a litigant in Florida could simply serve a witness subpoena on a Kentucky corporate witness' registered agent and demand that a corporate officer appear in Florida to testify. In both instances, Florida's judicial power is being invoked across state lines to compel participation in ongoing Florida proceedings.

Practically speaking, the foregoing makes eminent sense, since a Florida court has no authority whatsoever to compel *actual* compliance with a subpoena duces tecum directed to a corporate witness in another state. Unlike the situation where a subpoena is directed to an in-state witness (or even where an out-of-state witness has offices, employees and documents in the state), a Florida judge authorizing a subpoena to compel production of documents located outside Florida cannot direct the sheriff to travel into Kentucky, seize the documents or witness and return to Florida – at least not without substantially violating Kentucky's sovereignty.

As the Fifth District correctly concluded below, Florida's long-arm and service of process statutes do not contemplate such an expansive role for registered agents of out-of-state corporations doing business in Florida. *Ulloa*, 73 So. 3d at 790-91. While section 48.031(3), Florida Statutes, specifically addresses witness subpoenas in criminal proceedings, nowhere in the section is there a mention of service of witness subpoenas on corporations, much less those that are out of state. Section 48.031(3) focuses entirely on *individual* witnesses and does not cross-reference any other statutory provision for effecting service of a witness subpoena on corporations, both within and outside Florida.

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Section 48.081, which allows for service of process on a foreign corporation by serving the corporation's registered agent, does not contemplate *witness* subpoenas. § 48.081(3)(a), Fla. Stat. The term "process" is not defined in the statutory provision. Black's Law Dictionary defines "process" as "any means used by court to acquire or exercise jurisdiction over a person ... [the] means whereby court compels appearance of defendant before it...." BLACK'S LAW DICT., 5TH ED. at 1084. The U.S. Supreme Court has held, with respect to "service of process," that "the term 'service of process' has a well-established technical meaning. Service of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700, 108 S.Ct. 2104 (1988); *see also Roig v. Star Lofts on the Bay Condo. Ass'n, Inc.*, 2011 WL 6178882 at *1 (S.D. Fla. 2011) ("Service of process is the procedure used to provide a defendant with legal notice of a pending action.").

Regardless of the meaning of "process," what is immediately apparent is that, unlike section 48.031, section 48.081 does *not* address witness subpoenas. In fact, section 48.081(5), in discussing service of process "pursuant to this section" on corporate officers while in Florida, states:

> When a corporation engages in substantial and not isolated activities within this state, or has a business office within the state and is actually engaged in the transaction of business therefrom, service upon any officer or business agent while on corporate business within this state may *personally* be made, *pursuant to this section*, and it is not necessary in such case that *the action, suit, or proceeding against the corporation* shall have arisen out of any transaction or operation

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> connected with or incidental to the business being transacted within the state

§ 48.081(5), Fla. Stat. (emphasis added). In other words, service under section 48.081 contemplates service of process in proceedings *against* the corporation, not when the corporation is being sought as a witness.

In fact, there is no indication in section 48.031(3)(a) that the statute contemplates service on out-of-state witnesses, whether individual or corporate. A provision in 48.081, which addresses service of process on out-of-state corporations for lawsuits, actions or proceedings against the corporation, cannot be grafted onto a statute that addresses only service of witness subpoenas *within the state,* especially when there exists a statutory mechanism – the Uniform Law – for compelling the attendance of out-of-state witnesses in criminal proceedings.

Florida's long-arm statute also provides no refuge for the Subpoenas here. Section 48.193, Florida Statutes, addresses *personal* jurisdiction over an entity *as a party to litigation. See* §§ 48.193(1), Fla. Stat. (subjecting entity to jurisdiction for "any cause of action"); 48.193(2), Fla. Stat. (subjecting entity to jurisdiction for a "claim"). It does *not* address the authority of a trial court to obtain proper service of process of a subpoena over a witness. *See Borden*, 921 So. 2d at 591.

The Defendants raise *for the first time before this Court* the argument that section 607.15101, Florida Statutes, authorizes service of a witness subpoena duces tecum on an out-of-state corporation's registered agent. PBM at 14-15. This argument was never presented to the trial court, the circuit court or the Fifth District, and therefore, has been waived. *See Sunset Harbour Condominium Ass'n*

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v. Robbins, 914 So. 2d 925, 928 (Fla. 2005) ("As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal. In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.") (internal citations omitted); *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978) ("As a general matter, a reviewing court will not consider points raised for the first time on appeal."). Assuming, *arguendo*, the issue *had* been preserved, it nonetheless fails.

Section 607.15101 has never been interpreted by any Florida appellate court. It is, however, a successor to section 607.327, which was construed in passing by the Third District in *General Motors*. 357 So. 2d at 1047. Former section 607.327 merely provided that service on a foreign corporation has to be accomplished in accordance with Chapters 48 or 49, Florida Statutes. § 607.327(1), Fla. Stat. (1989) ("Process against any foreign corporation may be served in accordance with chapter 48 or chapter 49."). As previously noted, however, the provisions of Chapter 48 do not address service of a witness subpoena on an out-of-state corporation.[11] Consequently, to the extent section 607.15101 is to be construed as a continuation of the policy underlying section 607.327, as the Defendants appear to argue here (PBM at 14-15), it does not separately provide a basis for service of a

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[11] The Defendants have not identified a provision of Chapter 49 (relating to constructive service) that authorizes service of the Subpoenas on CMI's registered agent.

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witness subpoena on CMI. Section 607.15101(1) merely allows for service on a foreign corporation's registered agent when such service is "required or permitted by law." For the reasons articulated above, the service at issue here is *not* permitted by law.[12]

In short, until and except for *Landrum*, Florida jurisprudence never contemplated and still does not contemplate the ability of a trial court to authorize a litigant to serve a witness subpoena on an out-of-state corporate witness with no offices, employees or documents in the state by serving its registered agent.[13] Consequently, *if* the Uniform Law does not apply, then there exists no mechanism under *Florida* law for serving a witness document subpoena on out-of-state corporations like CMI.

B. Federal case law also strongly supports the conclusion that subpoenas may not reach across state lines.

Even in a unified, nationwide judicial system, federal courts have concluded that a subpoena may not issue from a court in one state to compel compliance from a witness located in another. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (holding "no State can exercise direct jurisdiction and authority over persons ... without its

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12 Certainly, section 607.15101 should not be casually construed as conferring extra-territorial authority on a trial court, which it historically has never enjoyed.

13 As more fully elaborated below, *General Motors* is inapposite since it involved the issuance of a *criminal investigatory* subpoena by a State Attorney pursuant to section 27.04, Florida Statutes, and directed to a corporation with offices, employees and documents in Florida.

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territory"). The analysis continues with *Minder v. Georgia*, 183 U.S. 559, 22 S.Ct. 224 (1902). In *Minder*, the U.S. Supreme Court held it was not a denial of due process to deny a criminal defendant's request for continuance because of the absence of an out-of-state witness because the witness was beyond the subpoena power of court.[14] *Id.* at 562, 22 S.Ct. at 225. Continuing this rationale is the U.S.

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[14] This decision actually gave rise to the Uniform Law. *See Preston v. Blackledge*, 332 F. Supp. 681, 683 (E.D.N.C. 1971) (tracing history). *See generally* 81 Am. Jur. 2d Witnesses ss. 15 and 34:

> Sec. 15 - Generally, a state has no power to subpoena witnesses over which it has no jurisdiction. Thus, the constitutional right of compulsory process, which includes the subpoena of witnesses, is applicable to the states but extends only to in-state process. *In the absence of an interstate compact, compulsory process cannot extend beyond the territory of the state, and a state court cannot require the attendance of a witness who is a nonresident of, and is absent from, the state.*
>
> Sec. 34 - In the absence of statute or interstate compact, compulsory process cannot extend beyond the territory of the state, and a state court cannot require the attendance of a witness who is a nonresident of, and is absent from, the state. *To remedy this situation, the Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings provides that if a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions* ... is a material witness in a prosecution pending in a court of record in the state, a judge of such court may issue a certificate, ... which certificate must be presented to a judge of a court of record in the county in which the witness is found.

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Supreme Court's decision in *New York v. O'Neill*, 359 U.S. 1, 79 S. Ct. 564 (1959), a case involving Florida's Uniform Law. There, the U.S. Supreme Court noted that the ability to compel witnesses in other states to participate in proceedings outside their states predated the U.S. Constitution and was *dependent on the issuance of a summons by a court where the witness resides*. *Id.* at 7 n. 1, 79 S.Ct. at 569. Interestingly, before the case reached the U.S. Supreme Court, this Court had already determined that "inasmuch as what was ordered was to be carried on in a foreign jurisdiction, the Florida courts could not constitutionally be given jurisdiction to order it." *Id.* at 7 (referencing *In re Application of People of the State of New York*, 100 So. 2d 149, 155 (Fla. 1958)).

The U.S. Supreme Court continued with its analysis:

> The primary purpose of this [Uniform Law] is not eleemosynary. It serves a *self-protective function for each of the enacting States*. By enacting this law the Florida Legislature authorized and enabled Florida courts *to employ the procedures of other jurisdictions* for the obtaining of witnesses needed in criminal proceedings in Florida. Today, [the States] may facilitate criminal proceedings, otherwise impeded by the unavailability of material witnesses, *by utilizing the machinery of this reciprocal legislation to obtain such witnesses from outside their boundaries*. This is not a merely altruistic, disinterested enactment.

Id. at 9, 79 S.Ct. at 570 (emphasis added). Noting "the inherent implications of our federalism within whose framework our organic society lives and moves and has its being," the U.S. Supreme Court found that the Uniform Law was "one such

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arrangement" designed to "solve problems created by a constitutional division of powers ...."[15] *Id.*

More recently, other federal courts have reaffirmed the notion that subpoena power cannot extend into another state to compel conduct from witnesses located there.[16] In *Ariel v. Jones*, 693 F.2d 1058 (11th Cir. 1982), the Eleventh Circuit affirmed the quashing of a subpoena duces tecum *seeking only documents that was served on a corporate witness' registered agent. Id.* at 1059. The court reasoned:

> The Olympic Committee is required by law to maintain an agent for service of process in every state. [citation omitted]. This requirement *does not impose an obligation on the Olympic Committee to produce documents in any state upon service of a subpoena.* In *Cates v. LTV Aerospace Corp.*, 480 F.2d 620 (5th Cir. 1973), the court held that *discovery rules cannot be used to require a non-party to produce documents in the custody of the head of the organization located in another judicial district.* Consequently, *the mere presence in the southern district of Florida of an agent for the service of process does not require the district court to enforce the subpoena in that district.*

Id. at 1060 (emphasis supplied). The Eleventh Circuit went on to note that, like CMI's registered agent here, the agent of the Olympic Committee did not control

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15 *See also Pacific Employers Ins. Co. v. Indust. Accident Comm'n of California*, 306 U.S. 493, 501, 59 S.Ct. 629, 632 (1939) (holding that, based on "the very nature of the federal union of states," one state may not impose its laws upon another); *Parker v. Brown*, 317 U.S. 341, 359, 63 S.Ct. 307, 317 (1943) (holding states are sovereign only "within their territories").

16 Federal decisions interpreting rules of procedure are deemed persuasive by Florida courts, since the Florida rules are patterned on and to be harmonized with the federal rules. *See, e.g., Gleneagle Ship Mgm't Co. v. Leondakos*, 602 So. 2d 1282, 1283-84 (Fla. 1992).

the documents requested. Instead, the documents were located at the Olympic Committee's headquarters in Colorado. *Id.* at 1061.

This conclusion is not unique among federal courts. *See Cates*, 480 F.2d at 622, 623-24 (holding that service of subpoena duces tecum on local representative of agency could not be enforced to require production of documents located in another judicial district); *In re Sealed Case*, 141 F.3d 337, 341 (D.C. Cir. 1998) (holding that "applications for order compelling disclosure from nonparties must be made to the court in the district where the discovery is to be taken"); *Cross v. Wyeth Pharmaceuticals, Inc.*, 2011 WL 2517211 (M.D. Fla. 2011) (holding that the subpoena power contemplated by Fed. R. Civ. P. 45 does not extend to compel a witness' testimony when the witness is outside the district and outside the state); *Gutescu v. Carey Int'l, Inc.*, 2003 WL 25589034 (S.D. Fla. 2003) (rejecting service of witness subpoena on agent and holding, "This Court does not have jurisdiction to hold [the non-party witness] in contempt or to compel production of documents responsive to subpoena, as the subpoena was improperly issued. This Court does not have the power to issue a subpoena duces tecum to [the non-party witness] located in New York City, for the production of documents located in the Southern District of New York to a location within this district.").

If the federal judicial system – notwithstanding its nationwide scope and the unified sovereignty of the United States – does not contemplate that its trial courts have the authority to subpoena documents from witnesses located in other judicial districts, then there is little reason to believe that a Florida trial court may subpoena

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documents from a witness in another sovereign state by serving that witness' registered agent in Florida.

C. The law in other Uniform Law jurisdictions.

The Uniform Law serves the salutary purpose of allowing for the participation of out-of-state witnesses who would otherwise be beyond the subpoena power of the forum court.[17] Those courts that have examined the issue of extra-territorial subpoena power have noted the limited scope of such power.

The Alabama Supreme Court in *In re National Contract Poultry Growers' Ass'n*, 771 So. 2d 466 (Ala. 2000) concluded that a court's subpoena power over an out-of-state nonparty is entirely distinct from its personal jurisdiction over that same entity as a party to litigation:

> [A] finding that [an entity] is subject to the personal jurisdiction of Alabama courts would not necessarily mean that it was obligated to respond to a subpoena by having to appear and produce documents in an Alabama court in a lawsuit to which it is not a party. *The underlying concepts of personal jurisdiction and subpoena power are entirely different.* Personal jurisdiction is based on conduct that subjects the nonresident to the power of the...courts to adjudicate its rights and obligations in a legal dispute.... By contrast, the subpoena power...over...a corporation that is not a party to a lawsuit is based on the power and authority of the court to compel [its] attendance...at a deposition or the production of documents by a person or entity.

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[17] There is little dispute in Florida that the Uniform Law extends to subpoenas *duces tecum*. *Bastos*, 985 So. 2d at 40; *Mastrapa v. So. Fla. Money Laundering Strike Force*, 928 So. 2d 421 (Fla. 3d DCA 2006); *Delit v. State*, 583 So. 2d 1083, 1085 (Fla. 4th DCA 1991).

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Id. at 469 (emphasis added; also noting that power to reach beyond state's border depended on the "existence of a rule or statute in the other state...which makes available compulsory process to foreign litigants").

Similarly, the Louisiana Supreme Court rejected the idea that a trial court may reach across state lines to subpoena a nonparty corporation, *even when that corporation has a registered agent in the state*:

> A principal consequence of designating an agent for service of process is to subject the foreign corporation to jurisdiction in a Louisiana court. *Finding CKB subject to the personal jurisdiction of Louisiana courts, however, does not necessarily mean that this [out-of-state] corporation is bound to respond to a subpoena ... by having to appear and produce documents in a Louisiana court in a lawsuit in which they are not a party.* ... Whereas the long-arm statute extends Louisiana's personal jurisdiction ... beyond Louisiana's borders, *there is no similar authority for extending the subpoena power ... beyond state lines to command in-state attendance of nonresident nonparty witnesses.*

Phillips Petro. Co. v. OKC Ltd. P'ship, 634 So. 2d 1186, 1187-88 (La. 1994). A similar decision issued from the Mississippi Supreme Court in *Syngenta Crop Protect., Inc. v. Monsanto Co.*, 908 So. 2d 121, 127 (Miss. 2005). In that case, the court concluded that a registered agent cannot be used "to gain access to documents located outside of the state to be used in a legal dispute between [other parties].... [T]he basic concepts of personal jurisdiction and subpoena power are vastly different." *See also Mafnas v. State*, 254 S.E. 2d 409, 411 (Ga. Ct. App. 1979) (holding in Uniform Law case, "[N]either the Georgia nor the United States Constitution obligates the state to compel the attendance of witnesses who cannot be located within its jurisdiction.") (citing *Minder*, *supra*).

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The Texas Court of Appeals in *Reader's Digest Ass'n, Inc. v. Dauphinot*, 794 S.W. 2d 608 (Tex. Ct. App. 1990) concluded that the Uniform Law trumps any attempt to use a witness subpoena served on a corporation's registered agent in order to get an out-of-state witness to testify. Addressing a situation substantially similar to the one at issue in this case, the Court of Appeals stated:

> [I]t is claimed the subpoena [on the corporation's registered agent] is invalid because it was not properly issued in accordance with the [Uniform Law] [citation omitted].
>
> * * *
>
> Both the real party in interest and the respondent argue that [the Uniform Law] applies only to "persons who truly have no contact with the State of Texas" and state that relator "has more than significant contact with Texas through its business dealings because its employees and agents reside in Texas and conduct its corporate business on a daily basis." This argument is not supported by citation to any authority, nor do we know of any. ... Assuming arguendo that a corporation may can be properly subpoenaed as a witness, ... *we hold that the proper procedure provided by law in this case for the summoning of a witness from another State to testify in a criminal proceeding in this State is through compliance with [the Uniform Law]. Consequently, the subpoena before us issued without authority in law, and upon relator's application, should have been quashed.*

Id. at 610 (emphasis added).[18]

Another appellate court has very recently expressly disapproved of the tactic of seeking to obtain documents only as a means of getting around the Uniform Law. In *Yeary v. State*, 711 S.E. 2d 694 (Ga. 2011), the Supreme Court of Georgia

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[18] It bears noting that CMI – unlike Reader's Digest – has no employees or offices in Florida conducting its business.

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was confronted with an attempt by a DUI defendant to obtain CMI's source code for the Intoxilyzer 5000, the instrument in use in Georgia. *Id.* at 694. The *Yeary* court described the Uniform Law as follows:

> The [Uniform Law], approved by the National Conference of Commissioners on Uniform State Laws in 1931 and amended in 1936, "is intended to provide a means for state courts to compel the attendance of out-of-state witnesses at criminal proceedings." *Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of Subpoena Duces Tecum,* 7 A.L.R.4th 836, § 1. Relying on the principles of comity in the absence of unilateral power to compel the appearance of a witness located out of state, the Uniform [Law] has been enacted by all fifty states. Studnicki and Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law,* 76 St. John's L.Rev. 483, 532 (2002); Wasserman, *The Subpoena Power: Pennoyer's Last Vestige,* 74 Minn. L.Rev. 37, 88 (1989).

Id. at 696.

In discussing the ability of a criminal defendant to subpoena documents from an out-of-state corporation, without naming an individual in the subpoena to bring those documents into the state, the Georgia Supreme Court held:

> We believe the more expedient course is to permit a party to request that a corporation, rather than its human agent, be found to be a material witness under the Uniform [Law] and leave the issue of designation of its human agent to the corporation. Said designation *need not occur until after a certificate of materiality has been issued by the Georgia trial court and the court in the county in which the out-of-state corporation is located conducts a hearing which the corporation has been ordered to attend, on the request for issuance of a summons to appear at the Georgia trial with the material evidence purportedly in the corporation's possession.*

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Id. at 697 (emphasis added). While the court distinguished *General Motors* and *Landrum*, it went on to conclude that the Uniform Law needed to be invoked through a subpoena directed to an out-of-state corporate witness after the hearing safeguards of the statute had been observed. *Id.* at 698.

Finally, and perhaps philosophically most on point, Virginia's courts have adopted a similar view of subpoena power and the role of registered agents. In *Commonwealth of Virginia v. Hauptman*, Case No. T08-002027-00 (Va. Gen. Dist. Ct. Apr. 8, 2008) ("*Hauptman*"), the court was presented with a similar subpoena duces tecum being served of CMI's registered agent in that state. A copy of the decision is enclosed at Appendix A. CMI did not respond and the defendant moved for a rule to show cause. *Hauptman* at 1. The court denied the motion for a rule to show cause, adopting the arguments and cases cited by CMI here. The court's discussion of the differences between personal jurisdiction and subpoena power, while obviously not binding, is instructive:

> *This is entirely consistent with the concepts of enforcement in federalism.* A Virginia court can ultimately enforce its subpoena duces tecum in Virginia by directing the Sheriff to physically take the needed documents through its broad contempt powers. [citation omitted]. *However, if documents are located in Kentucky, it cannot do so.* It must rely upon Kentucky. Fortunately, there is a method for doing so – … [Virginia's Uniform Law].

Id. at 5.

In reaching this conclusion, the *Hauptman* court relied heavily on the Virginia Supreme Court's analogous decision in *America Online, Inc. v. Nam Tai Electronics, Inc.*, 571 S.E. 2d 128 (Va. 2002), where a California litigant used the

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Uniform Foreign Depositions Act ("UFDA") to subpoena documents from a Virginia-based company. *Id.* at 129-30. The target company successfully moved to quash the subpoena, thus availing itself of the remedy afforded by UFDA: the opportunity "to review the foreign court's subpoena in the target's home court ...." *Hauptman* at 3. In discussing the relevance of the UFDA decision in *America Online*, the *Hauptman* court made the following observation clearly at the heart of CMI's dilemma:

> By requiring the use of commissions and a foreign court, the non-party target of a subpoena duces tecum can move to quash in its home court and *avoid the time and expense of moving to quash subpoenas all over the country in cases in which it is not even a party.* In the *America Online* case, this procedure protected a Virginia company from having to fly to California to quash (ultimately successfully) its subpoena. *To have permitted the California litigant to simply serve a California subpoena on the company's registered agent in California, entirely bypassing the UFDA and the Virginia court's review, would have effectively repealed the UFDA.*

Hauptman at 5-6 (emphasis added).

Underlying the *Hauptman* and *America Online* decisions is a fundamental concern about comity, protection of a state's corporate citizens, and respect for a sister state's sovereignty. The concern expressed in *Hauptman* that Virginia corporations would be subjected to the exorbitant expense and inconvenience of defending against subpoenas throughout the country has equal force with respect to Florida corporations. From a policy perspective, if this Court is prepared to make CMI (or any other non-party foreign corporation) respond to every witness subpoena duces tecum served on its Florida registered agent, then the Court should

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be equally prepared to subject Florida's corporations to the same treatment in every one of the 49 other states those corporations do business, all without the input of Florida's courts. The philosophical and practical underpinnings of comity and federalism should preclude that approach.

CMI is unaware of any other jurisdiction in the entire United States that has upheld the authority of a trial court to serve a witness subpoena on the registered agent of a foreign, non-party corporation when the Uniform Law is available.[19]

III. THE UNIFORM LAW SHOULD BE CONSTRUED TO ENCOMPASS SUBPOENAS SEEKING DOCUMENTS ONLY.

CMI does not dispute that the language in Florida's Uniform Law ostensibly addresses subpoenas that seek the *testimony* of witnesses. *See* PBM at 13-14. However, if the Uniform Law does *not*, by virtue of such language, apply to subpoenas duces tecum that (as an end run around the Uniform Law) forego

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[19] The Defendants and amicus both cite *Forbes v. State*, 810 N.E. 2d 681 (Ind. 2004), for the proposition that the Uniform Law need not be observed when obtaining documents from an out-of-state witness. PBM at 11. What they neglect to point out is that the corporate witness *voluntarily waived* its rights under the Uniform Law by complying with the subpoena:

> The procedure contemplated by the Kentucky [Uniform] law is *for the benefit of the witness*, not the parties. The issues to be heard in the receiving state (Kentucky) relate to the burden on the witness of testifying in another state, not concern for the parties. *The witness remains free to waive the requirement* of a hearing in the receiving state and agree to any means of presenting testimony *or producing their documents* in another state that are acceptable to them ....

Id. (emphasis added).

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witness testimony, *then the Defendants lack any mechanism to serve and enforce such a subpoena.* Conspicuously absent from the Defendants' or amicus' briefs is any citation to a statute or rule that authorizes a document subpoena to an out-of-state corporation. Instead, the Defendants cite solely to *General Motors* for such authority. PBM at 13-14. The Third District's analysis in that case, though, certainly cannot be said to authorize a document subpoena by DUI misdemeanor defendants. As *General Motors* makes clear, the subpoena issued by the State Attorney, "incident to a criminal investigation," was authorized by section 27.04, Florida Statutes. 357 So. 2d at 1046. The 1975 version of Section 27.04 read:

> The state attorney shall have summoned all witnesses required on behalf of the state; and he is allowed the process of his court *to summon witnesses from throughout the state* to appear before him in or out of term time at such convenient places in the state attorney's judicial circuit and at such convenient times as may be designated in the summons, *to testify before him as to any violation of the criminal law upon which they may be interrogated*, and he is empowered to administer oaths to all witnesses summoned to testify by the process of his court or who may voluntarily appear before him *to testify as to any violation or violations of the criminal law*.

§ 27.04, Fla. Stat. (emphasis added).[20]

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[20] The language of the current version of the statute is substantially identical, except for gender changes. Interestingly, the Third District in *General Motors*, by adopting the trial court's order verbatim (357 So. 2d at 1046), effectively construed section 27.04 as authorizing a subpoena for documents only, *despite* the plain language of the statute that authorizes subpoenas to provide testimony. And yet, the Uniform Law, which similarly addresses testimony, was *not* construed to encompass document requests. The incongruity may lie in the fact that the trial court in *General Motors* did not even address the statutory authority for the State Attorney's subpoena.

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The rules of criminal procedure also do not provide such authorization. There is no reasonable basis to conclude that the scope of Rule 3.220 should be broader with respect with document requests than it is with respect to depositions of witnesses. Rule 3.220(h), which governs discovery depositions, unequivocally states: "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.*" Fla. R. Crim. P. 3.220(h)(1) (emphasis added). The rule goes on to describe the circumstances under which a defendant may depose witnesses *identified by the State* and falling within Categories A, B and C, as proscribed by Rule 3.220(b)(1)(A), which governs a prosecutor's discovery obligations. *See* Fla. R. Crim. P. 3.220(h)(1)(A) – (C) and 3.220(b)(1)(A)(i) – (iii).

In fact, this Court in *Washington v. State*, 653 So. 2d 362 (Fla. 1994), upheld the denial of a defendant's "right" to depose a witness technician who was not going to be called by the State:

> Florida Rule of Criminal Procedure 3.220 states that *a defendant may not depose a person that the prosecutor does not, in good faith, intend to call at trial* and whose involvement with the case and knowledge of the case is fully set out in a police report or other statement furnished to the defense. The record reflects that the state did not intend to call Baumstark as a witness; that Baumstark submitted an affidavit which stated that she had conducted over 1200 DNA tests, had no specific recollection of Washington's test, and would have to rely on lab notes to discuss the testing procedure. Based on our review of the record, we find that the state satisfied the requirements of rule 3.220.

Id. at 365 (emphasis added). There is no evidence in this case that the State indicated it would call CMI as a witness. There is also no question that CMI's

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records custodian would have no specific knowledge regarding the specifics of the breath tests administered to the Defendants here.

Rule 3.220(f) also fails to provide refuge as that rule explicitly is limited to "discovery to the parties," not unlisted witnesses like CMI that have no knowledge of the Defendants' cases. Subsection (f) follows subsections (b) through (e) of Rule 3.220, which relate to the parties' disclosures *to each other*, but precedes subsection (h), which specifically governs how and when depositions may be conducted. In fact, subsection (h) differentiates between deposition subpoenas (the procedures for which are governed by the Florida Rules of Civil Procedure) and subpoenas duces tecum (which are not). Fla. R. Crim. P. 3.220(h)(1).

The one case that has cited Rule 3.220(f) as authority for additional discovery relating to witnesses has done so in the context of authorizing the deposition of a witness associated with the case.[21] *See Heath v. Becktell*, 327 So. 2d 3, 4 (Fla. 1976) (considering subpoena to a law enforcement officer commanding him to bring to deposition written statements made by the defendant). Nowhere in *Heath* did this Court suggest that Rule 3.220(f) expands the categories of witnesses who may be deposed by a defendant or upon whom document requests may be propounded.[22]

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[21] And, of course, it is undisputed that once a deposition is to be taken, the Uniform Law's procedures must be observed.

[22] On the contrary, Rule 3.220(f) derives from its predecessor, Rule 3.220(a)(5), which formerly allowed additional discovery from the State to defense counsel upon a showing of materiality. *See Eagan v. DeManio*, 294 So. 2d 639, 640-41 (Fla. 1974); *Adams v. State*, 495 So. 2d 1229, 1229 (Fla. (continued . . .)

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There is simply no mechanism for what the Defendants have sought to do – which is, in essence, to discover documents (and *only* documents) from a non-party witness. Essentially, the Defendants have invoked this heretofore unheard of mechanism in order to escape the Uniform Law obligations that come with requiring an out-of-state witness to produce documents in conjunction with a deposition. *See, e.g., Yeary v. State*, 690 S.E. 2d 901 (Ga. Ct. App. 2010), *vacated on other grounds*, 711 S.E. 2d 694 (Ga. 2011) (holding document production request cannot be used to circumvent requirements of Uniform Law).

The other alternative, of course, is to *construe* the Uniform Law as encompassing document production subpoenas as incident to the authority to compel testimony from an out-of-state witness. Just as section 27.04, Florida Statutes, was apparently construed to authorize subpoenas for documents only (despite the statute's language), so too should the Uniform Law. As previously noted, there is only one kind of subpoena power, and it makes little sense to conclude that an out-of-state witness is protected by the Uniform Law when testifying, but that same witness loses all protections (including those of its state courts) when being compelled to send valuable corporate data into the State of Florida.[23]

(. . . continued)

5th DCA 1986). Rule 3.220(a)(5) was amended in 1989 to become Rule 3.220(f) merely to make the disclosure obligations reciprocal, rather than unilateral. *See* Committee Notes, 1989 Amendment, Fla. R. Crim. P. 3.220.

[23] The Defendants have never explained how they would be able to use the subpoenaed source code materials absent testimony from a CMI witness to (continued . . .)

A. Uniformity of interpretation is critical.

Given the underlying purpose of the Uniform Law to maintain consistency among enacting states,[24] this Court should adopt the reasoning of the U.S. Supreme Court and the courts of Alabama, Louisiana, Mississippi, Texas, Georgia and Virginia, and conclude that a subpoena cannot effectively extend beyond Florida's borders absent compliance with the Uniform Law. The United States Supreme Court has recognized the importance of uniformity when it observed that comity among the states is "an end particularly to be cherished when the object is enforcement of internal criminal laws ...." *O'Neill*, 359 U.S. at 11-12.

Similarly, the Fourth District indicated in *Delit v. State*, 583 So. 2d 1083 (Fla. 4th DCA 1991), in construing the Uniform Law, that "the uniform holdings of our sister states should be given great weight ...." *Id.* at 1085-86. The Third District reached a similar conclusion in *State v. Bastos*, 985 So. 2d 37 (Fla. 3d DCA 2008): "Florida has adopted the Uniform Law, including that portion ... which calls for uniformity of interpretation by the adopting states [citation

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(. . . continued)

identify and authenticate the information provided. It is perhaps for this reason that the Uniform Law was written only in terms of testimony. Nonetheless, there appears to be little dispute that, despite this statutory language, the Uniform Law encompasses document requests incidental to the giving of testimony. *Bastos*, 985 So. 2d at 40; *Mastrapa v. So. Fla. Money Laundering Strike Force*, 928 So. 2d 421 (Fla. 3d DCA 2006); *Delit*, 583 So. 2d at 1085.

[24] Section 942.05 states that the Uniform Law "shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it ...." § 942.05, Fla. Stat.

omitted]. Therefore, we are to follow the prevailing rule of the adopting states." *Id.* at 40.

Service of these types of subpoenas on corporate registered agents subjects foreign, non-party corporations, including CMI, to the onerous burden of having to run around the state defending themselves or risk being held in contempt for non-compliance. *See Bastos*, 985 So. 2d at 41 (noting that CMI has been subjected to similar requests in "several hundred pending DUI cases").[25] The very purpose of the Uniform Law is to avoid such a chaotic approach to obtaining the participation of out-of-state witnesses. The Uniform Law is the only valid mechanism for obtaining the participation of out-of-state witnesses in criminal proceedings.

B. Unlike the Subpoenas, unilaterally issued by counsel, the Uniform Law specifically contemplates an opportunity for the out-of-state witness to participate and be heard within its state of residence.

The Uniform Law was intended to achieve the *dual* purposes of creating a mechanism for obtaining the participation of out-of-state witnesses while at the

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[25] The amicus misrepresents the holding in *Bastos* (Amicus Brief at 6). The quoted language was not the Third District's "clarification" of *General Motors*, but rather a direct quotation from that case. The Third District in *Bastos* did *not* independently conclude that the Uniform Law was inapplicable to document subpoenas. On the contrary, the subpoena duces tecum before the court in *Bastos* was a subpoena for testimony *and* documents. 985 So. 2d at 38.

same time safeguarding the sovereignty of adopting states and protecting the witness' right to be heard under reasonable conditions.[26]

Kentucky's version of the Uniform Law, specifically section 421.240, Kentucky Statutes, contains a provision identical to Florida's section 942.02, Florida Statutes. Both these provisions specifically provide that after the court in the jurisdiction where the proceeding is ongoing has made a determination as to the materiality of the requested witness or documentation, a certificate of materiality "shall be presented to a judge of a court of record in the county in which the witness is found." § 942.03(1), Fla. Stat.; § 421.250(1), Ky. Stat. Upon receipt of such a certificate, the court of record where the witness resides shall order the witness to appear at a hearing during which the court shall confirm that the witness "is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify ... in the other state, and that the laws of the state in which the prosecution is pending ... will give to him protection from arrest and the service of ... process." § 942.02(2), Fla. Stat.; § 421.420(2), Ky. Stat.

In short, the Uniform Law (1) imposes a series of safeguards that are otherwise not available through a counsel-issued subpoena; and (2) applies a

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[26] Florida's Rules of Criminal Procedure are similarly respectful of a witness' right not to be inconvenienced by having to travel to another jurisdiction. *See, e.g.,* Fla. R. Crim. P. 3.220(h)(3) (discovery depositions of witnesses "residing outside the county in which the trial is to take place shall be taken in a court reporter's office in the county or state in which the witness resides...."). While the Subpoena is not for appearance at a deposition, the rule's focus on the witness' place of residence is telling.

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heightened standard of "necessity" *and* "no undue hardship" that would be circumvented by the Subpoenas. Its procedures serve a very important purpose in that they comport with due process and afford the out-of-state witness a *reasonable* opportunity to be heard in its home state regarding the issues that necessitate its participation in the foreign jurisdiction.[27] *O'Neill*, 79 S.Ct. at 569. In the case of a corporate witness like CMI, which is conceivably subject to being subpoenaed in thousands of DUI prosecutions throughout the State of Florida, the practical consequences are significant. CMI could, in such a scenario, devote one hundred percent of its time to attempting to quash subpoenas as they arise in counties throughout Florida.

It would defeat, if not outright judicially repeal, the carefully crafted balance enacted by the Florida and Kentucky Legislatures if the Uniform Law's mechanisms could be easily circumvented by serving *witness* subpoenas for documents *only* on a registered agent whose sole purpose if to act as agent for service in matters in which its principal is a *party* to a lawsuit.

C. The Court should reject the reasoning in *Landrum* and affirm *Ulloa*.

In addition to the numerous reasons recited above, the Court should reject the reasoning in *Landrum* on the additional basis that the Second District applied the incorrect standard of review and misapprehended the import of the Uniform

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[27] In contrast, and as was the case here, attorney subpoenas issued by counsel outside the Uniform Law compel compliance within the state without a prior opportunity for the witness to be heard.

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Law, as well as failed to engage in any analysis regarding the continued vitality of *General Motors* in light of later contrary jurisprudence from other Uniform Law jurisdictions. The *Landrum* court erroneously applied a heightened second-tier certiorari standard of review (even though it was directly reviewing the trial court's final order as to CMI) and concluded that "a departure from the essential requirements of law requires a violation of a clearly established principle of law resulting in a miscarriage of justice." *Landrum* at 694. In fact, the case principally relied upon by the Second District was *Kaklamanos*, a second-tier certiorari case.

Because the Second District mistakenly applied *Kaklamanos* to a first-tier certiorari case akin to an appeal, it was constrained to leave undisturbed the trial court's order. It mistakenly believed *General Motors* to be on point; and subject to this misapprehension, reasoned that because *General Motors* was "the only decision on point" in Florida, its application by the trial court could not have risen to the level of a violation of a "clearly established principle of law." 64 So. 3d at 695. Had the *Landrum* court applied the ordinary standard of legal error to the trial court's decision, it would necessarily have inquired into the available "uniform" out-of-state jurisprudence and reached a different but correct result.

The fact that the *Landrum* decision does not even attempt to reconcile *General Motors* with jurisprudence from other Uniform Law jurisdictions or even acknowledge the legislatively mandated need for uniformity of interpretation of the Uniform Law is indicative of the Second District's misperceived limited role on first-tier certiorari review of what was essentially a final order based on invalid and outdated law. *See Kaklamanos*, 842 So. 2d at 889 (holding second-tier certiorari is

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narrower because a party is not entitled to a "second appeal"); *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001) (citing *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089 (Fla. 2000)) (holding where certiorari petition constitutes first level of appellate review of what is essentially a final order, it is akin to a plenary appeal); *Dusseau v. Metro. Dade County Bd. of County Comm'rs*, 794 So. 2d 1270, 1273-74 (Fla. 2001) (same holding).

D. *General Motors* should, at most, be limited to its facts and not control the outcome in this case.

At the heart of the *Landrum* decision is the belief that *General Motors* was factually indistinguishable from the facts in *Landrum* (or for that matter, from the facts in this case). Without this premise, the certiorari analysis in *Landrum* dissolves. Clearly, this Court is not constrained to follow *Landrum* or *General Motors*, even if it believes that *General Motors* is factually on point, which CMI disputes.

In *General Motors*, the Third District concluded that *in the context of an ongoing criminal investigation* it was appropriate for the State Attorney, pursuant to explicit statutory authority, to subpoena General Motors (which had offices in Florida) via its registered agent for production of corporate documents that were located in Florida. 357 So. 2d at 1047. The subpoena in question issued pursuant to section 27.04, Florida Statutes, *id.* at 1046, which confers very broad powers on the State Attorney to investigate criminal wrongdoing.[28] *See State v. Gibson*, 935

[28] As already noted, the Third District never explained why section 27.04 would permit a witness subpoena for documents only.

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So. 2d 611, 613 (Fla. 3d DCA 2006) (describing State Attorney as "one-person" grand jury who must be granted reasonable latitude in that role); *State v. Doe*, 592 So. 2d 1121, 1122 (Fla. 2d DCA 1992) (noting constitutional basis for authority of state attorney's investigative subpoena requiring witness "to testify concerning any violation of the law").

The State Attorney acting pursuant to his or her investigatory authority has considerably broader authority than a DUI defendant seeking discovery. *Imparato v. Spicola*, 238 So. 2d 503, 506 (Fla. 2d DCA 1970) (describing authority of State Attorney under section 27.04 as "far-reaching powers"). *See also State v. Investigation*, 802 So. 2d 1141, 1142 (Fla. 2d DCA 2001) (holding a State Attorney issuing a section 27.04 subpoena – unlike a DUI defendant issuing a discovery subpoena – has no obligation to demonstrate the relevance or materiality of the subpoenaed information, since the purpose of the subpoena is to obtain information to determine whether a crime has occurred);[29] *Imparato*, 238 So. 2d at 507 (further noting State Attorney is not bound by rules of procedure in exercising his subpoena authority).

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[29] For this reason, the *General Motors* analysis of the Uniform Law is flawed dicta. The essence of the Uniform Law is that courts in both jurisdictions must preliminarily determine that the witness or documents sought are *material* to the defendant's case. If the State Attorney issuing the subpoena in *General Motors* was excused from having to establish materiality, then by necessity, the Uniform Law could not have been applicable to the subpoena. There was no need, therefore, for the Third District to disallow the application of the Uniform Law on any other basis.

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In contrast, a DUI misdemeanor defendant has no investigatory authority at all. What limited discovery is available to such a defendant is considerably restricted and certainly subject to applicable rules of procedure.

While the court in *General Motors* observed that the Uniform Law would not be applicable because the subpoena sought production of documents, 357 So. 2d at 1047, and allowed service of the subpoena on the corporation's registered agent, there are multiple reasons why the holding in *General Motors* should not be extended beyond its facts or its time to authorize a DUI defendant subpoena.

First, as the discussion above suggests, there are excellent policy reasons for not equating the exceedingly broad statutory authority of a State Attorney engaged in an ongoing criminal investigation with the ability of a DUI defendant who is reaching beyond the state's borders to obtain through discovery proprietary information belonging to a non-party corporate witness. The most obvious of these is that the risk of abuse and the burden on non-party corporations is considerably reduced when exercised by a limited number of state attorneys, working in the public interest and engaged in ongoing criminal investigations, than when exercised by thousands of DUI defendants throughout the State who may, in furtherance of their own self-interests, readily target any corporation doing business in Florida simply because the corporation's product is used by law enforcement.

Second, the initial "conflict" noted in *General Motors* with respect to the Uniform Law's application to subpoenas duces tecum has since been conclusively decided in *Bastos*, *Mastrapa* and *Delit*. It is difficult to predict how the Third

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District may have decided *General Motors* had it correctly concluded that the Uniform Law *does* extend to subpoenas duces tecum.

Lastly, in the 34 years since *General Motors* was decided, the opinion has never been cited by another Florida appellate court – other than the *Landrum* court – for its interpretation of the Uniform Law or the proper use of a registered agent for service of witness subpoenas.[30] The Third District, on three separate occasions, has had cause to reference *General Motors*. The first – that same year in *State v. Jett*, 358 So. 2d 875, 877 n. 1 (Fla. 3d DCA 1978) – cited *General Motors* for an unrelated proposition related to the technical form of the subpoena. The second occasion was in *General Electric Capital Corp. v. Advance Petroleum, Inc.*, 660 So. 2d 1139 (Fla. 3d DCA 1995), where the Third District cited the case for the proposition "that a court which has obtained in personam jurisdiction over a *defendant* may order that *defendant* to act on property that is outside of the court's jurisdiction ...." *Id.* at 1142 (emphasis added). The third and final time the Third District considered General Motors was to resolve its conflict as to whether the Uniform Law applied to subpoenas duces tecum. *Bastos*, 985 So. 2d at 40. As for

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30 Moreover, the case has been cited only once by a court in another jurisdiction and there for the purpose of highlighting the incorrect interpretation of the Uniform Law. *See Application of Grand Jury of State of N.Y.*, 397 N.E. 2d 686, 688, 691 (Mass. Ct. App. 1979) ("With the possible exception of ... *General Motors* ... none of the thirty-nine jurisdictions which have adopted the Uniform Act ... presently interprets its enactment ... to preclude the issuance of subpoenas duces tecum."). Given the interstate significance of the Uniform Law, the absence of support for *General Motors* in other jurisdictions is telling.

the Second District's citation to *General Motors* in *Landrum*, such reference amounted to merely an acknowledgement of its holding rather than an analysis of its continued vitality. In short, and not to put too fine a point on it, *General Motors* has not birthed any meaningful progeny.

Since *General Motors* was decided, however, Florida's sister states have reached positions diametrically opposed to the one espoused in *General Motors* with respect to the subpoena power of trial courts and the role of a registered agent when serving non-party foreign corporations.[31] Even if *General Motors* once had some factual and legal relevance to the factual scenario presented in this case, that relevance has diminished considerably, if not entirely disappeared. There is no way to reconcile the Legislature's call for uniformity in section 942.05, Florida Statutes, and the concomitant recognition in *Bastos* and *Delit* of the need for such uniformity, with an extension of *General Motors* to the present case.

Expanding *General Motors* beyond its facts, when its holding is now the subject of serious dispute, would be judicially imprudent. To the extent this Court is unwilling or unable to distinguish *General Motors* factually, CMI respectfully urges the Court not to retreat into the past by entrenching the decision's reasoning today in the face of unanimous opposition from other jurisdictions.

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[31] The opinion in *General Motors* certainly makes no mention of countervailing authority from other jurisdictions with respect to the issue of service of a witness subpoena on the registered agent of a non-party, foreign corporation.

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CONCLUSION

CMI is not remotely suggesting that Florida defendants be precluded from subpoenaing material evidence from CMI or any other out-of-state corporation. It merely contends that appropriate procedures should be followed. The fundamental purpose of the Uniform Law, as enacted by the Florida Legislature, would be undermined – if not utterly defeated – by allowing individual DUI defendants to serve an avalanche of witness subpoenas on the registered agents of out-of-state corporate witnesses who are *not* parties to ongoing litigation. Such subpoenas would intrude upon the sovereignty of Florida's sister states by reaching across state lines and commanding the participation of their citizens in Florida's courts without any input from the courts in those states. Additionally, they would potentially force corporate witnesses, as is occurring in this case, to choose between protecting valuable proprietary trade secrets and risking being bled to death by litigating in multiple forums throughout the State of Florida.

The Fifth District reached the correct conclusion, and therefore, the certified conflict should be resolved in favor of *Ulloa* and against the reasoning in *Landrum.* Otherwise, every out-of-state corporation doing business in Florida may be subject to onerous discovery without the benefit of the safeguards provided by the Uniform Law. Additionally, the potential consequences to Florida corporations, which might be subjected to similar treatment in other jurisdictions if it were perceived that the Uniform Law is not enforced in Florida, might be immeasurable.

For all of the foregoing reasons, the Defendants' petition should be denied.

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I certify that a copy of this answer brief on the merits was mailed on August 24, 2012 to:

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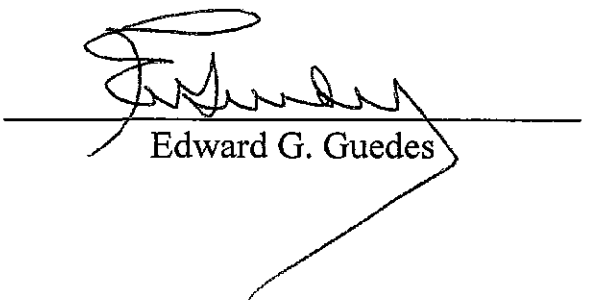
I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.



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