No. 08-528

IN THE

Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

ERIC M. YOUNG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF IN OPPOSITION

and

APPENDIX

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the district court decision affirmed a trial court order, supported by competent, substantial evidence, finding an illegal search by law enforcement officers (not "by a private employer" – as asserted by Petitioner), under facts clearly showing Respondent had legitimate and reasonable subjective and objective expectations of privacy in the location and objects of the search, was prevented from refusing consent to search, and based solely on third party consent obtained from individuals without actual or any reasonably reliable apparent authority, and no inquiry was made into third party authority to consent.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the district court decision did not consider creating a new exception to the exclusionary rule for evidence illegally obtained, as a result of law enforcement officers ordering the only person with standing to consent from the premises, and obtaining consent from a third party known to them to lack actual or apparent authority – especially where Petitioner failed to raise said federal question at the trial court or on plenary appeal.

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INTRODUCTION

Petitioner has failed to present any "compelling reasons" for a grant of certiorari in this case. Sup. Ct. R. 10. There is no decision by a state court of last resort on any federal question. The Florida Supreme Court merely declined jurisdiction. Pet. App. at B1. There is no conflict between the state district court opinion and any relevant decision of this Court or a federal court of appeals. Nor does the opinion decide any unsettled question of federal law. Sup. Ct. R. 10(b) and (c). Therefore, the Petition should be denied.

The State first argues the district court misapplied a properly stated rule of law, by finding the instant search to be illegal as violative of Respondent's Fourth Amendment rights. The State next argues, assuming, *arguendo*, the instant search is illegal, the district court misapplied the exclusionary rule as to the illegally obtained evidence. Petition at 25. As to the question of application of the exclusionary rule, Supreme Court Rule 14.1.(g)(i) requires specification of the stage in the proceedings when this federal question was raised. Ignoring this requirement, Petitioner failed to inform this Honorable Court that it did not raise the question of the application of the exclusionary rule in the trial court, or in the appellate process, until it sought rehearing after the district court decision at issue here was rendered and its plenary appeal denied.

The untimely assertion of this argument was emphasized in the responses to Petitioner's motion for rehearing in the district court, Petitioner's motion for rehearing *en banc*, and its Petition for discretionary review in the Florida Supreme Court.[1] The belated timing of this argument, amounting to a waiver of the right to seek review on the question of application of the exclusionary rule, resulted in the district court striking the request for review *en banc* (not merely denying it as claimed by Petitioner). Resp. App. at A-1. As the waiver of the right to review of this question was a state law procedural question, that issue should not be considered by this Honorable Court.

The first (and sole remaining) issue here is the validity of third party consent to a search, where a subjective and objective expectation of privacy exists. The district court properly found Young had a cognizable expectation of privacy, subjectively and objectively, in his private Pastor's Office and his office computer. Pet. App. at A13-14.[2] It then correctly

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[1] Not only was this a new argument by the State, it was made in reliance on case law long available to, but ignored by the State. Authorities advanced for the first time in the motion for rehearing, and not argued in a brief or oral argument, will not be entertained by a Florida appellate court. *Cartee v. Florida Department of Health and Rehabilitative Services,* 354 So. 2d 81, 83 (Fla. 1st DCA 1978).

[2] These factual findings are entirely accurate, and were arrived at by the trial court after extensive briefing, depositions of three different church representatives, consideration of ecclesiastical rules regarding the church, its property, and personnel, a full suppression hearing with testimony from all

(Continued on following page)

applied existing law governing the validity of third party consent, relying on *Illinois v. Rodriguez*, 497 U.S. 177 (1990) and *United States v. Matlock*, 415 U.S. 164 (1974), as well as numerous state law precedents, determining that the instant third party consent was invalid. Pet. App. at A9-12. Thus, there is no "conflict" with the relevant decisions of this Court. These cases, contrary to the State's claim that existing law provides no guidance to law enforcement officers, set forth clear rules governing third party consent. The district court has not decided an unsettled question of law. Thus, the Petition should be denied.

STATEMENT OF THE CASE

Factual Misstatements

This was not a "search of a workplace by a private employer." Petition at 13. Rather, this search of the Pastor's private office was a search by law enforcement officers, thus fully implicating the Fourth Amendment. Thus, the entire premise of the Petition is a gross misstatement.

The search in question was of Young's locked, private office. Mr. Moreland testified the office had a "specific lock" because the church "wanted to make

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parties, including Young, and extensive argument. Further, "a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." Sup. Ct. R. 10.

sure that nobody could get in there unless it was the pastor." SRI 79.[3] The office "had a special lock that could not be opened by the Church's master key." Pet. App. at A3. The "church administrator acknowledged that no one was permitted to enter the office without Young's permission." *Id.* The State's claim that church trustees or parish staff had the right to use the spare key mischaracterizes testimony of the church administrator, who actually said she "guess[ed]" a "guest pastor who might need to be in there would have" been given access. RI 54. This hypothetical supposition is a far cry from any church "policy."

In fact, as the district court found,

> the office was kept locked, and the church had no specific policy giving church officials the right to control and use the office. No testimony at the suppression hearing revealed that any church officials had ever exerted such authority over the office.

Pet. App. at A16.

The State does not inform the Court that Young was present at the church just prior to commencement of the search, and he could have been asked for

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[3] Citations to the record on appeal below are by volume and page, in the form "RI pp.," where "R" is the record, "I" the volume, and "pp." the page number. Citations to the supplemental record on appeal below are by volume and page, in the form "SRI pp.," where "SR" is the supplemental record, "I" the volume, and "pp." the page number.

consent, but instead was ordered to leave by an armed police officer.[4] RI 117. In spite of the fact the police were preparing to search his private office, Young was never told of, nor asked to consent to, the impending search. RI 170. He was ordered home by an armed, uniformed deputy sheriff, and the detectives conducting the search knew this when they sought third party consent from Moreland.[5] RI 116-17.

The State's recitation of communications regarding Moreland's instructions from Neal, regarding cooperation with the police, mischaracterizes those instructions, as discussed below. However, those instructions are not significant, as would be clear, had the State informed the Court what the officers seeking consent to search knew of Moreland and Neal's authority and instructions, at the time they improperly relied on them. "Despite the clear indications of Young's autonomy at the church and the officers' lack of knowledge regarding the specific relationship between the supervisor [Neal] and Young, the officers assumed that the supervisor [Neal] had the authority to consent." Pet. App. at A17. The district court found that reliance on that

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[4] Had such consent then been sought from Young, it is uncontroverted he would have refused. RI 172.

[5] The principal detective conducting the search, Roman, also admitted she knew where Young was and could have sought his consent. RI 117.

authority was "not reasonable under constitutional standards." Pet. App. at A17.

That finding was based on the following facts, among others: (1) Moreland was not a trustee of the church (SRI 70); (2) only the church trustees have ownership authority over church property, including the computer (RI 82); (3) Moreland was never asked if he had such authority (RI 145), or if he was a trustee (RI 149); (4) Moreland was neither Young's boss nor his supervisor (SRI 74).

When Det. Boymer[6] asked Moreland to sign the consent, Boymer knew Moreland: (1) was not Young's supervisor; (2) did not have a key to Young's private office; (3) did not keep any of his property in Young's private office; (4) did not work in Young's private office; and (5) did not have use of Young's private computer. RI 149. Yet, Det. Boymer did not inquire or ask any follow-up questions to ascertain Moreland's authority. RI 144-45. He did not know what position Moreland held with the church (let alone his "authority" to grant consent).[7] RI 143. He only understood

[6] The two principle law enforcement officers obtaining the "consent" and conducting the search were Det. Boymer, a Jacksonville Sheriff's Office officer, and Roman, a U.S. Customs and Immigration Enforcement special agent.

[7] At the time he had him sign the consent form, and prior to the search, Boymer had no idea what Moreland's position or authority was. RI 143. Other than knowing Moreland was a "representative and he was a complainant," Boymer "didn't know anything else about [Moreland's] role with the church or his position." RI 144.

him to be a "representative" of the church – hardly a position of common authority over the private, locked office and computer of the Pastor. RI 142. *See also* Pet. App. at A5, A16.

The State also provides an additional misleading claim as to the issue of consent, on page 6 of the Petition, stating Neal spoke to Roman and confirmed permission to search. The State fails to inform this Court that conversation took place "after [Roman] was already inside Young's office," and thus after the search had commenced. Pet. App. at A5. Aside from being untimely, the district court found Neal's authority was insufficient for him to be able to give valid third party consent. Pet. App. at A16.

Roman knew Neal did not possess keys to Young's private office, never used Young's computer, did not work in Young's private office, and did not keep property there. RI 115-116; Pet. App. at A16. Moreover, Roman had no recall of Neal consenting – only that he stated his desire to cooperate. RI 115. Thus, the record is clear that Roman did not assert either that she asked Neal to consent, or what authority he would have had to consent.

The State fails to inform this Court of another key fact. The consent to search form signed by Moreland prior to entry into Young's private office stated that Moreland was consenting to a "search of **my** property" and "**my** computer(s)." RI 17 (emphasis added). It is undisputed neither the office nor the computer searched were Moreland's, and the officers

knew that at the time they relied on that "consent." This search, claimed in error to be valid, was conducted on the authority of Moreland's consent to search **his**, rather than Young's office, and **his**, rather than Young's computer.

REASONS FOR DENYING THE WRIT

The decision below by a state court of last resort, the Florida Supreme Court, is a jurisdictional decision (declining jurisdiction), and not a decision on an important federal question, let alone one in conflict with another state court of last resort, or of a United States court of appeals. Pet. App. at B1. The district court decision does not decide an unsettled question of federal law, and is not in conflict with relevant decisions of this Court. Accordingly, Petitioner has not carried its burden of demonstrating any "compelling reasons" for the Petition to be granted. Sup. Ct. R. 10.

There is no novel legal issue of first impression involved here. The State disingenuously claims the district court somehow held that an employer may not search the office of an employee. Pet. at 13-14. This claim is false. The issue here is not whether the Church could investigate Young, but whether State law enforcement officers had the right to search his private office and computer under the circumstances of the case. This is a run-of-the-mill examination of the consent exception to the requirement that a

search requires a search warrant. The district court properly applied existing (and adequate) federal and state law in its determination, and correctly found the instant search illegal, as violative of Young's legitimate expectation of privacy, and his constitutional rights.

I. The District Court Properly Found a Violation of Young's Fourth Amendment Rights

A. Young Had a Legitimate Subjective and Objective Expectation of Privacy in His Office and Computer

The district court, applying the proper constitutional standard for determining whether Young had a legitimate expectation of privacy in his private office and computer, concluded he had "a legitimate expectation of privacy in his office and his workplace computer."[8] Pet. App. at A13. Because Young prevailed on his suppression motion, the facts are reviewed in the light most favorable to him. *See, e.g., United States v. Cain*, 524 F.3d 477, 479 (4th Cir. 2008). *See also Ornelas v. United States,* 517 U.S. 690 (1996).

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[8] The district court applied *Smith v. Maryland*, 442 U.S. 735 (1979), for the rule that both a subjectively and objectively reasonable expectation are required. The court rightly found, citing *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987), that this conclusion is contextual, and dependent – under *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968) – on the "'operational realities'" of the workplace. Pet. App. at A8.

The district court opinion, reviewing the totality of the circumstances, found Young took "specific measures to ensure his privacy in his office." Pet. App. at A13. Suppression hearing testimony showed "Young expected no one to peruse his personal belongings in the office or on the computer." Pet. App. at A13. Young's office had a "specific lock" because the church "wanted to make sure that nobody could get in there unless it was the pastor." SRI 79. The office "had a special lock that could not be opened by the Church's master key." Pet. App. at A3. The "church administrator acknowledged that no one was permitted to enter the office without Young's permission." Pet. App. at A3. Thus the district court properly found Young had a subjective expectation of privacy in his office and computer.

The district court also properly found Young's subjective expectation of privacy to be objectively reasonable. Pet. App. at A14. It found the "facts of this case indicate that the church had endowed Young with an expectation of privacy far beyond that which an average employee enjoys." Pet. App. at A14. It cited the special lock, and Young's "recognized practice of allowing visitors into his office only with his permission or for limited purposes related to church business," adding it would be "unrealistic in any office setting," to expect Young to never allow another person to use the office. Pet. App. at A14. This met the requirement that Young's expectation of privacy be "objectively reasonable." Pet. App. at A14. The district court, concluding, found it "difficult to

imagine circumstances within a realistic business setting which would give rise to a more legitimate expectation of privacy." Pet. App. at A14 (emphasis added).

As to Young's computer, the district court also properly found Young's subjective expectation of privacy "objectively reasonable." Pet. App. at A14. Citing *Mancusi*, *supra,* the opinion stated that legal ownership is not determinative of privacy, and the correct basis for that determination is workplace "'operational realities.'" Pet. App. at A14, citing *Mancusi* at 369. Young was the "sole regular user" of his computer. Pet. App. at A14. There was no evidence that anyone but Young stored personal files on the computer or accessed it for any reason other than maintenance. Pet. App. at A14.

Most significantly, the district court found the "church had no written policy or disclaimer regarding the use of the computer." Pet. App. at A15. "There was no policy informing Young that others at the church could enter and view the contents of his computer." Pet. App. at A15. The objective reasonableness of Young's expectation of privacy was heightened, the district court ruled, as the "only way to access the computer to view its contents was to enter the office through the locked office door," as the computer was not networked to any other church computers. Pet. App. at A15. Thus, the district court's conclusion that Young had a subjectively and legitimate objectively reasonable expectation of privacy in his office and computer is correct, and supported by the facts.

B. Search Invalid Without Young's Consent

Only Young had authority to consent to this search. Young had a valid and reasonable expectation of privacy in his desk, and in his computer, and therefore has standing to contest the validity of this search. As set forth above, an individual can have a right to privacy in his desk, and its contents, both at home and at work, even where the desk does not belong to him, and even where third parties have the right to enter the room where his desk, computer, and its contents are kept.

Where a mother had the authority to clean her adult son's room, but there was no showing that the mother had actual or apparent authority to authorize a search of the son's personal effects inside his desk, where it was not determined that she owned or used the desk, or had regular access to its contents, her consent to a search of the desk was held to be without authority, and invalid. *State v. Miyasato,* 805 So. 2d 818, 821-822 (Fla. 2nd DCA 2001), *rev. den.,* 807 So. 2d 655 (Fla. 2002), *mandamus den.,* 821 So. 2d 298 (Fla. 2002). Additionally, the *Miyasato* court held that, even if the mother had access for cleaning purposes, this would not amount to joint access and control sufficient to give her common authority to consent to a valid search.

Absent some showing of common authority (diminishing an individual's expectation of privacy in the desk's contents), no authority or third party consent would be valid. *Id.* Thus, not only does Young

have standing to object, and an expectation of privacy in his desk, its contents, and the computer (the modern equivalent of a filing cabinet), since there is no other individual with common authority or other significant connection to the property in question, only his consent would be valid authority for the instant warrantless search.

Miyasato, supra, cites *United States v. Blok,* 188 F.2d 1019, 1020 (D.C. Cir. 1951). *Blok* concerned a warrantless search of a government employee's desk, assigned to her exclusive use, in the government office where she was employed, conducted with the consent of her superior. The trial court in *Blok* held Blok "had a possessory interest in the desk assigned to her and the search of the desk by police was such an invasion upon her privacy as to constitute a violation of the Fourth Amendment." *Id.* at 1020.

Concurring, the circuit court affirmed, holding Blok's "exclusive right to use the desk assigned to her made the search of it unreasonable." *Id.* This was true, even though "a search of it without her consent would have been reasonable, if made by some people in some circumstances." *Id.*

The court opined that Blok's official supervisors "might reasonably have searched the desk for official property needed for official use." *Id.* There being no regulation prohibiting Blok from keeping personal property in her desk, no search for, or of, her personal property was allowed, absent Blok's consent. "Her superiors could not reasonably search the desk for her

purse, her personal letters, or anything else that did not belong to the government and had no connection with the work of the office. Their consent did not make such a search by the police reasonable." *Id.* Affirming, the *Blok* court held the "police violated her right of privacy under the Fourth Amendment and the seized evidence should have been suppressed." *Id.* In the instant case, there was similarly no prohibition against Young keeping his personal property on his computer, the modern day analogue of the purse in *Blok*. The instant search was not for work-related materials, but a criminal investigation into Young's personal files.

Assuming *arguendo,* third party consent might have been valid to look for church documents, there was no such search made here. No individual of the church had the authority to consent to a search for or of Young's personal papers, documents, or computer files, absent his permission or a warrant. Accordingly, suppression, proper in *Blok,* is proper here. *Accord, Crawford v. Davis,* 249 F.Supp. 943 (E.D.Pa. 1966), *cert. den.,* 86 S.Ct. 923 (1966) (search of a locked desk owned by the Army, but used by defendant, based on consent by defendant's superior officer, improper, and evidence held illegally obtained.)

Here, the church had no internet usage policy, and no computer use policy. Young's activities were not monitored, and he was not on notice that his activities were subject to monitoring.

Young was in his office the day of the search, immediately prior to its commencement. He was available to be asked for consent. Had the police asked Young, consent would not have been given. RI 172. Additionally, the police had the right to seal the premises, from the outside, and obtain a search warrant, justifying their probable cause, *vel non*, to a judge, and thereby protecting Young's Fourth Amendment and Florida Constitutional rights. Instead, the police did neither. Knowing Young would not have consented to a search of his desk and computer, given an informed opportunity to do so, it is undisputed that he was ordered home by an armed, uniformed law enforcement officer. This was done because the police knew that, in his presence, and absent his consent, or a warrant, they could not search the office, or the computer. "A third party may not validly consent to a search where the person against whom the search is directed is present and objects thereto." *Pugh v. State*, 444 So. 2d 1052, 1053 (Fla. 1st DCA 1984), citing *Silva v. State,* 344 So. 2d 559 (Fla. 1997).

The police had no authority to order Young off the premises. His forcible removal was improper, and further grounds for suppression. The police may not remove the potentially objecting party to avoid a possible objection to a search. *Georgia v. Randolph*, 547 U.S. 103 (2006). Such consent is invalid – even if obtained from a party (cotenant) who had lawful authority to consent. *Id. A fortiori*, consent here was invalid, since neither Neal nor Moreland were

"cotenants" of Young's office, and they had no lawful authority to consent.

C. Third Party Consent to Search Invalid

1. Third Party Consent Was Without Actual Authority

Assuming *arguendo* that there could be valid third party consent to search Young's office, it is clear from the facts that neither Moreland nor Neal had authority to consent. The district court recognized this, finding Moreland's authority wholly derivative of Neal's, and finding Neal's authority "did not rise to the level of 'common authority' required for valid third party consent." Pet. App. at A16.

The district court applied the correct legal standard for its analysis, looking to see whether the third party consenting had "'[c]ommon authority'" over the office and computer, citing *Rodriguez*, *supra* at 181. Pet. App. at A10. This common authority, the district court stated, must be "derived from 'mutual use of the property' by a person with 'joint access or control for most purposes.'" Pet. App. at A10, citing *Rodriguez, supra* at 177. Also citing *Matlock*, *supra* at 171, the district court looked to the basis for the common authority derived from mutual use, namely the assumption of the risk by one party that the other will permit the area to be searched. Pet. App. at A10.

In the instant case, the district court properly found Neal (and Moreland) lacked common authority

or other sufficient relationship to the premises, and thus lacked authority to consent. Pet. App. at A16. "Neither Moreland nor Neal had ever used Young's workplace computer, worked in his office, or kept property there." Pet. App. at A16. Neither of them were Young's employer. Young was a salaried employee of the church, and paid by the parish council. RI 193. Moreland could not terminate Young's employment, and neither could Neal, or the Bishop (with whom Neal consulted). RI 94-95. Any complaint within the Church, relating to the issue of the image on his computer, would have to be the subject of an "ecclesiastical trial." RI 94. This would affect the Pastor's credentials only. RI 95.

Neal was not Young's employer. Neal's supervisory authority was limited only "to certain matters" relating to his duty to "lead and oversee the spiritual and temporal affairs" of the pastors in his district. He did not hire Young. RI 94-5. He could not fire Young. RI 94-5. He could not even suspend him. RI 94-5. Clearly there was no mutual use or other sufficient relationship between Moreland/Neal and Young's office or computer.

In the instant case, there was no mutual use of the property whatsoever, let alone mutual use by any two people with joint access, common authority, or any other sufficient relationship to the premises or effects to be inspected. Mr. Moreland did not (1) use the office, (2) use the computer, (3) supervise Pastor Young, (4) keep any property in the Pastor's Office, (5) clean the Pastor's Office, (6) have keys to the

Pastor's Office, or (7) have access to the Pastor's Office. Thus, he could not validly consent under *Rodriguez, supra,* and *Matlock, supra.*

Similarly, Neal did not (1) have keys to the Pastor's Office, (2) use the Pastor's Office, (3) use the Pastor's computer, or (4) work there. As noted, people were not permitted to go into Pastor Young's office without his permission or him being present. Thus, under *Rodriguez, supra,* and *Matlock, supra*, Neal did not have authority to consent.

2. Third Party Consent Was Without Apparent Authority

The district court properly found the search could not be justified on a claim of reasonable reliance on the consent of Moreland or Neal. Pet. App. at A17.

> By the officers' own admissions, they knew nothing more of Moreland other than the fact he was a "representative of the church" who had been told by a supervisor to consent to the search. Although the officers were presumably familiar with the law governing third party consent, they made no effort to ascertain whether the consenting officials had any regular access to or control over the office and the computer before commencing the search. Despite clear indications of Young's autonomy at the church, and the officers' lack of knowledge of the specific relationship between the supervisor [Neal] and Young, the officers assumed that the

> supervisor [Neal] had the authority to consent. Their actions were not reasonable under constitutional standards.

Pet. App. at A17, citing *Rodriguez, supra,* and *Morse v. State*, 604 So.2d 496, 503-04 (Fla. 1st DCA 1992).

As stated above, a reasonable belief of apparent authority is the only exception to a valid third party consent, where the third party lacks actual authority to consent to a search. *See, e.g., Rodriguez, supra. Rodriguez* frames the test thusly: "Would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party has authority over the premises?" *Id.,* 497 U.S. at 188. Where the situation is ambiguous, a law enforcement officer is charged with the responsibility of making additional inquiry into the authority of the person giving the consent to search. *Morse, supra* at 503.[9] "Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment." *Moore v. State,* 830

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[9] Here, there was nothing "ambiguous" about Moreland's lack of real or apparent authority. Boymer had him sign a consent form (for a search of "my computer(s)"), knowing he knew essentially nothing about Moreland's authority, but only that he was a "representative" of the church. Conversely, Boymer knew that Moreland had none of the indicia of common authority over the Pastor's Office (had no key, never worked there, never used the computer, etc.).

So. 2d 883, 885 (Fla. 2nd DCA 2002), citing *Rodriguez, supra.* Again, the standard is reasonableness, and **an unreasonable erroneous belief that a third party has authority to consent does not validate an otherwise illegal search**.

Where there is "no factual support for a conclusion that the officers possess a reasonable, albeit erroneous, belief that the person consenting . . . had the authority to do so, suppression is proper, and denial of a suppression motion reversible error." *Moore, supra,* at 886. The district court here followed the law and its order should be affirmed – particularly since Det. Boymer honestly conceded he had no belief Moreland had authority to consent – other than he was a "representative" of the church, and the "complainant."[10]

Neal's lack of authority is even clearer, and no officer could reasonably have relied on that authority. Additionally, it is undisputed that no contact was even made with Neal until after the search began. The taint of illegality was already on the search, and any (unsupported) assertion he consented in that

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[10] Importantly, Boymer never claimed he was relying on apparent authority; nor could he. Boymer candidly admitted he only knew Moreland as a "representative" of the church, and, conversely, knew Moreland had no key, never worked there, never used the computer, etc. In other words, the record fails to support the State's claim on appeal that Boymer had a reasonable, albeit erroneous, belief that [Moreland] had the authority to consent.

telephone call could not remove the fatal stain.[11] He was not legally endowed with the authority to consent, and there was no reasonable basis for the officers to believe he was so endowed. Hence, under no circumstances can Neal's alleged "consent" to search possibly suffice as a basis for any exception to the Fourth Amendment warrant requirement.

Where an officer does not "conduct an inquiry or elicit any facts upon which he could have reasonably determined . . . common authority . . . he will have been held to have acted unreasonably . . . and without valid third party consent." *Saavedra v. State,* 622 So. 2d 952, 959 (Fla. 1993), *cert. den.*, 510 U.S. 1080 (1994).

Roman spoke with Neal, who had no authority over any church property, including the computer.[12] RI 82. Roman knew Neal did not possess keys to Young's private office, never used Young's computer, did not work in Young's private office, and did not keep property there. RI 115-16; Pet. App. at A5. The search was already underway when Roman spoke to Neal. RI 115-16. Roman had no recall of Neal consenting – only that he stated his desire to "cooperate." RI 115. The record is clear that Roman never asserted that

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[11] As noted, Roman had no recall of him consenting – only that he stated his desire to "cooperate." RI 115.

[12] Roman testified this was the only conversation she had with Neal. SRI 200, lines 8-9; RI 114, lines 21-3. That conversation took place after she was already in Pastor Young's office, and had commenced the search. RI 114, lines 4-17.

she asked Neal to consent, or what authority he would have had to consent. Here, there could be no reasonable reliance on apparent authority, as properly found by the district court.

D. Petitioner's Cited Authorities as to Finding of Illegal Search are Inapplicable and Do Not Provide Compelling Reasons to Grant Certiorari[13]

1. *State v. Collins*

The State claims this case should be decided using the approach of the New Hampshire Supreme Court, in *State v. Collins*, 581 A.2d 69 (N.H. 1990). This is not a basis for granting certiorari. While *Collins* is a decision by a state court of last resort, the instant case is not, so Sup. Ct. R. 10(b) is not a consideration favoring the Petition here.[14] *Collins* is inapplicable, as the search there at issue was upheld on the basis of employer consent. There was no employer consent here. Consent in this case was from

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[13] The following section discusses the six authorities cited as precedent for granting certiorari and (presumably) overturning the district court decision here. While none of these cases provide any Rule 10 basis for certiorari, they do demonstrate the erroneous nature of the State's claim of a lack of existing precedent.

[14] *Collins* does not provide a basis to grant certiorari under Sup. Ct. R. 10(a) or (c).

Moreland and Neal.[15] Neither of them were Young's employer.[16]

An examination of the facts in *Collins* shows its complete inapplicability. *Collins* involved a search of a company vehicle, and held the business owner (again, with common authority) could consent to its search. This is clearly factually different from the instant case. Again, neither Moreland nor Neal were the owners of Young's private office or Young's computer, and they certainly had no common authority over either. Further, the employee in *Collins* not only allegedly committed a crime, but breached his employment obligation as well. There is no allegation here that Young violated any policy relating to his internet usage, as it is undisputed there was no such policy.

The State's argument here is based on its notion that the church as the employer and owner of the property had the right to consent to the search. The trustees of the individual church were the owners of the property and the computer, and no representative of the trustees was ever contacted or involved in the

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[15] Moreland was not a trustee of the church. SRI 70. Only the church trustees have ownership authority over church property, including the computer. RI 82. Moreland was never asked if he had such authority, or if he was a trustee. RI 145, 149. Moreland was neither Young's boss nor his supervisor; nor could he fire him. SRI 70, 74. Indeed, Moreland was nothing more than the chair of a church committee. SRI 69.

[16] See §I C. 1., *infra*.

consent. Moreland was not a church trustee. Neal was not a church trustee, and any authority he had was irrelevant, as he was consulted after the commencement of the search. Thus, the instant search, unlike the search in *Collins*, was not based on employer consent, and *Collins* is inapplicable.

2. *U.S. v. Carter*

The State next points to *U.S. v. Carter*, 569 F.2d 801 (4th Cir. 1977), in support of its erroneous contention that this Court should grant certiorari. While *Carter* is a decision by a United States court of appeals, the instant case is not a decision by a state court of last resort, so Sup. Ct. R. 10(b) is not a consideration favoring the Petition here.[17] *Carter* is also inapplicable, as it involves consent from a business owner of the business to search a company-owned truck. The fruits of the third party consent search were the subject of a motion to suppress. *Carter* stands for the proposition that a search "undertaken with the consent of one with dominion over the property" can be legal. *Id.* at 803. *Carter* relies on the common authority or sufficient relationship doctrine from *Matlock, supra*. This point of law is not in dispute, and is in no way disputed by the district court decision in the instant case.

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[17] *Carter* does not provide a basis to grant certiorari under Sup. Ct. R. 10(a) or (c).

In *Carter,* the owner of a truck, who had common authority and access to the truck, was held to have sufficient authority to consent to a search thereof. It is undisputed that neither Neal, nor Mr. Moreland, owned Young's private office, or Young's private computer, or had any common authority over them, and that the officers knew that at the time of the search. *See also* Pet. App. at A16. Since the search in *Carter,* unlike the instant search, was based on consent from a person with common authority and access to the object of the search, *Carter* is inapplicable.

3. *U.S. v. Bilanzich*

The State next points to *U.S. v. Bilanzich*, 771 F.2d 292 (7th Cir. 1985), in support of its erroneous contention that this Court should grant certiorari. While *Bilanzich*, like *Carter, supra*, is a decision by a United States court of appeals, the instant case is not a decision by a state court of last resort, so Sup. Ct. R. 10(b) is not a consideration favoring the Petition here.[18] *Bilanzich,* like *Carter, supra*, is also a case of owner consent, supporting the proposition that an owner of a business can consent to a search of an employee's office.

The precedential value of *Bilanzich* presumes Moreland (or Neal) were the "owners" of Young's private office, or the computer. They were not.

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[18] *Bilanzich* does not provide a basis to grant certiorari under Sup. Ct. R. 10(a) or (c).

Moreover, the State's argument ignores the fact that, in *Bilanzich,* the co-owner of the hotel, who was found to have authority to consent to search there, was found to have the requisite control over and relation to the business office in question, since he directed his employee, Ms. Bilanzich, to conduct hotel business there. *Id.* at 296.[19] Additionally, the office in question was a mixed use/multi-purpose room, not only used by Ms. Bilanzich, the employee, but also by visiting physicians, psychiatrists, and welfare case workers, so the court held she had no expectation of privacy in the office. *Id.* at 297.[20] The facts are just the opposite here. This was Young's private office, and the district court decision here, that Young (unlike Ms. Bilanzich) had a legitimate expectation of privacy, is correct. Pet. App. at A16.

In the instant case, neither Mr. Moreland nor Neal were, nor claimed to be, property owners.[21] Additionally, the law is well settled that third party

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[19] Conversely, neither Moreland nor Neal had any control over or relation to the Pastor's Office or computer – as everyone has acknowledged – much less the authority possessed by the consenting owner in *Bilanzich*, namely, the authority to instruct Young (who was employed by neither Moreland nor Neal) to conduct business in that office.

[20] Conversely, neither Moreland nor Neal (nor others) made any use of the Pastor's Office or computer. Indeed, they did not even have access to it – as it was secured with a special lock and key for the exclusive use of Young.

[21] This fact also defeats any "apparent authority" argument as to this issue.

consent must be by one who possesses "common authority [with the defendant] or other sufficient relationship to the premises or effects thought to be inspected." *Id.* at 296. No one in Young's case had authority common or co-equal to Young's. *Bilanzich* reemphasizes the principle that the sole fact of ownership alone does not confer authority to consent. *Id.* at 297.[22] Finally, the search in *Bilanzich* was of and for company business records and information, which the employer himself, under the rationale of *Blok, supra*, has the right to do, rather than a search of non-work related items kept on work premises, as in the instant case. Thus, *Bilanzich* in no way casts any doubt on the propriety of the suppression order. It is inapplicable.

4. *Muick v. Glenayre Elecs.*

The State next points to *Muick v. Glenayre Elecs.*, 280 F.2d 741 (7th Cir. 2002), in support of its erroneous contention that this Court should grant certiorari. While *Muick*, too, is a decision by a United States court of appeals, the instant case is not a decision by a state court of last resort, so Sup. Ct. R.

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[22] Again, it is noted that neither Moreland nor Neal owned either the office or the computer. Moreover, under the church rules, only the trustees had any ownership interest, and none of them were contacted.

10(b) is not a consideration favoring the Petition here.[23]

This reliance on *Muick* is curious, since it is on all fours against the State. Although the case does state that Muick had no expectation of privacy in his laptop, the State entirely ignores the rule of law leading to that conclusion. *Id.* at 743. The *Muick* court so ruled because Glenayre (the employer) had announced it could inspect the laptop it furnished for the use of its employees,[24] which destroyed any reasonable expectation of privacy that Mr. Muick might have had. *Id.* The *Muick* court continued, adding that the company had the right to attach any conditions to the use of a laptop they wanted to, and did. *Id.* In Young's case, no such announcement or reservation of rights was made, and no such usage conditions (such as being subject to a right to inspect) were ever set.

Even more importantly, *Muick* clearly states there **can be** "a right of privacy . . . in employer owned equipment furnished to an employee for use in his place of employment." *Id. at* 744. Young had such a right of privacy, and suppression was proper. This Court can deny certiorari on the sole basis of *Muick* alone.

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[23] *Muick* does not provide a basis to grant certiorari under Sup. Ct. R. 10(a) or (c).

[24] This announcement was of the type Det. Boymer acknowledged was on his Sheriff's Office laptop -- but not on Young's computer.

5. *U.S. v. Angevine*

The State next points to *United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002), in support of its erroneous contention that this Court should grant certiorari. While *Angevine*, too, is a decision by a United States court of appeals, the instant case is not a decision by a state court of last resort, so Sup. Ct. R. 10(b) is not a consideration favoring the Petition here.[25]

Angevine is significantly factually distinct from the instant case, which demonstrates the correctness of the district court decision here. Unlike Young, Angevine was a public employee – a professor at a state university. The university had a comprehensive computer policy explaining appropriate computer use, warning employees about the consequences of misuse, and describing in detail official administration monitoring of the university's computer network.[26] *Id.* at 1132. Thus, the *Angevine* court affirmed the district court's holding that Professor Angevine had no reasonable expectation of privacy in his office computer. *Id.* at 1135.

In the instant case, Young was subject to none of the twelve conditions and limitations placed on

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[25] *Angevine* does not provide a basis to grant certiorari under Sup. Ct. R. 10(a) or (c).

[26] The university's computer usage policy, in *Angevine*, included twelve distinct and extensive conditions, none of which are found in the instant case. *Angevine,* at 1132-33.

Angevine. Young, unlike Angevine, was subject to no reservations of rights, no monitoring, and no review of his computer usage. Contrary to Angevine's situation, no logs were kept of Young's computer use, and no notice given, or right reserved, to monitor or inspect Young's computer usage, let alone, as in *Angevine*, to report the results of any such monitoring, or inspection, to any one, much less law enforcement officials. Thus, the district court properly found Young had a reasonable expectation of privacy in the contents of his workplace computer.[27] *Angevine* does not support a grant of certiorari in the instant case.

6. *U.S. v. Ziegler*

Finally, the State cites to *United States v. Ziegler*, 474 F.3d 1184 (9th Cir. 2007), in support of its erroneous contention that this Court should grant certiorari. While *Ziegler*, too, is a decision by a United States court of appeals, the instant case is not a decision by a state court of last resort, so Sup. Ct. R. 10(b) is not a consideration favoring the Petition here.[28]

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[27] As can be seen, the cases dealing with computer searches clearly focus on the existence, *vel non*, of such a policy, and whether the employee was warned his computer was subject to monitoring by the employer. If so, no expectation of privacy likely exists. If not (as here), it does. The district court decision is consistent with that clear law.

[28] *Ziegler* does not provide a basis to grant certiorari under Sup. Ct. R. 10(a) or (c).

The State's reliance on *Ziegler* is misplaced. Although both *Ziegler* and the instant case involve a tip from an employer to law enforcement about alleged child pornography, *Ziegler* turned on the determination that Ziegler could have no reasonable expectation that his computer was "free from any type of control by his employer." *Id.* at 1192.

This determination by the *Ziegler* court was based on the following facts: (1) the company had an IT (internet technology) department which gave the employer "complete administrative access" to every company computer; (2) the company installed a firewall for the express purpose of monitoring employee internet usage to "make sure nobody is visiting any [personal or prohibited] sites"; (3) the company engaged in routine monitoring of individual internet usage; (4) firewall logs were reviewed regularly and sometimes daily; and (5) upon hiring, employees were "apprised of the company's monitoring efforts through training and an employment manual, and they were told the computers were company-owned and not to be used for activities of a personal nature." *Id.* at 1191-92.

It was these factors that led the *Ziegler* court to determine that, as a result of its policies, practices and procedures, as well as the notice thereof to

employees, the company "retained the ability to consent" to the search in question.[29]

In the instant case, there was no IT department, no monitoring, no firewall, no log, no restrictions on internet usage, and no prohibition on personal use. The trial court clearly and properly found as fact that, "The church did not have a policy or practice which would cause [Young] to believe that his computer might be searched without his consent so long as he served as pastor." RI 38. The district court, affirming, underscored this finding. Pet. App. at A15.

The threshold analysis performed by the *Ziegler* court is also informative and instructive here. The *Ziegler* court, at 1189, stated that

> a criminal defendant may invoke the protections of the Fourth Amendment only if he can show that he had a *legitimate* expectation of privacy in the place searched or the items seized. This expectation is established where the claimant can show: (1) a subjective expectation of privacy; and (2) an objectively reasonable expectation of privacy.

Ziegler's claim that he had a subjective expectation of privacy in his office and his computer was

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[29] It is also important to note there was no issue as to the authority of the consenting third party in *Ziegler*. In the instant case, the authority of Moreland (or Neal) to consent was absent. They had no "common authority" over the Pastor's private, locked office, or the computer inside.

uncontested. Similarly, Young had a subjective expectation of privacy in his office and in his computer.[30] Pet. App. at A13. The *Ziegler* court next focused on whether Ziegler's expectation of privacy in his office and workplace computer was "objectively reasonable," stating that, "in the private employer context, employees retain at least some expectation of privacy in their offices." *Id.* The court found evidence Ziegler's expectation of privacy was reasonable, because his office was not shared by co-workers and kept locked. In the instant case, Young's office was not shared by co-workers and was kept locked. Thus, Young, like Ziegler, had a reasonable expectation of privacy in his office. Conversely, Young, unlike Ziegler, also had a reasonable expectation of privacy in his computer. *Ziegler* does not support a grant of certiorari in the instant case.

II. The State's Contention that the Exclusionary Rule was Indiscriminately (and Incorrectly) Applied is Waived and Erroneous

A. Claim Waived

The State also contends, assuming, *arguendo*, that the instant search was illegal, the district court misapplied the exclusionary rule as to the illegally

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[30] This issue has never been contested in the instant case. Although Det. Boymer attempted to get Young to recede from this position, the court properly excluded this testimony, as the product of a cat-out-of-the-bag search.

obtained evidence. Petition at 25. As to the question of application of the exclusionary rule, Supreme Court Rule 14.1.(g)(i) requires specification of the stage in the proceedings when this federal question was raised. Ignoring this requirement, Petitioner failed to inform this Honorable Court that it did not raise the question of the application of the exclusionary rule in the trial court, or in the appellate process, until it sought rehearing, after the district court decision at issue here was rendered, and its plenary appeal denied.

The untimely assertion of this argument was emphasized in the responses to Petitioner's motion for rehearing in the district court, Petitioner's motion for rehearing *en banc*, and its Petition for discretionary review in the Florida Supreme Court.[31] The untimely assertion of this argument, amounting to a waiver of the right to seek review on the question of application of the exclusionary rule, resulted in the district court striking the request for review *en banc* (not merely denying it as claimed by Petitioner). Resp. App. at A-1. As the waiver of the right to review of this question was a state law procedural question,

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[31] Not only was this a new argument by the State, it was made in reliance on case law long available to, but ignored by the State. Authorities advanced for the first time in the Motion for Rehearing, and not argued in a brief or oral argument, will not be entertained by a Florida appellate court. *Cartee, supra*, at 83.

that issue should not be considered by this Honorable Court.

B. The District Court Properly Applied the Exclusionary Rule

The State, attempting to support its claim of indiscriminate (and erroneous) application of the exclusionary rule, cites *United States v. Leon,* 468 U.S. 897 (1984). *Leon,* as this Court is well aware, allows for a good faith exception to the exclusionary rule for police officers "acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *Leon, supra,* at 900. However, the sole question presented in *Leon*, concerned officers acting in good faith executing a search warrant, issued by a detached and neutral magistrate (neither of which factors exist here), subsequently invalidated as unsupported by probable cause.[32]

The State is actually urging this Court to make new law – not to simply rely on *Leon.* It attempts to

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[32] Of course, there are four exceptions to the *Leon* rule, which do require exclusion. Thus, even the *Leon* relaxation of the exclusionary rule is not unlimited, and leaves intact the remedy of exclusion under those circumstances – one of which is the proposition that an officer cannot rely on a warrant when he knows his own affidavit is defective. Here, the officers knew their reliance on Moreland's consent was defective – thus eliminating any "good faith" reliance exception – even if this case involved a warrant – which it does not.

use *Leon* as a wedge, to now allow for a new exception to excuse illegal police conduct. This flies in the face of the rationale of *Leon* itself.

The reason the *Leon* court allowed the good faith exception was that "a search warrant provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer." *Leon, supra,* at 913-14, citations omitted. Here, we have the "hurried judgment of a law enforcement officer," without any judicial safeguard – exactly the opposite of what the *Leon* court emphasized was essential. Thus, *Leon,* is entirely inapplicable, and provides no basis or support for the relief sought by the State.

The State then attempts to bootstrap its unsupported argument by citing *Hudson v. Michigan*, 547 U.S. 586 (2006). *Hudson* involved a violation of the "knock and announce" rule for search warrant execution. Again, in *Hudson*, there was a warrant, issued by a detached and neutral magistrate. The *Hudson* court properly found the "knock and announce" rule has "never protected [an individual's] interest in preventing the government from seeing or taking evidence described in a warrant." *Id.* at 594. The interest violated in *Hudson* had "nothing to do with the seizure of the evidence." *Id.* In the instant case, the violation had everything to do with the seizure.

The benefits of suppression far outweigh its costs here. "The Fourth Amendment demonstrates a

'strong preference for searches conducted pursuant to a warrant.'" *Ornelas, supra,* at 699, citation omitted. The officers here could and should have sought a warrant.[33] They chose not to submit the evidence they had to the scrutiny of a neutral magistrate. Instead, an armed officer ordered Young out of his parish office, and the consent of an individual who clearly had neither actual nor apparent authority was obtained. This conduct cannot be sanctioned or overlooked. This is no mere failure to comply with an archaic formality. It is exactly the type of heavy-handed overreaching the exclusionary rule was crafted to prevent.

[33] The state attempts to excuse the illegal conduct on that basis, citing *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). The Coolidge court held there was no search and seizure in that case. *Id. at* 489-90. Thus, *Coolidge* is entirely inapposite, as is *Burdeau v. McDowell*, 256 U.S. 465 (1921). *Burdeau* does not involve a government search.

CONCLUSION

The State has failed to assert any Rule 10 basis for certiorari review. There are no compelling reasons to grant the Petition. The State's claim that the instant search was lawful is wrong on the facts and wrong on the law. Their untimely claim as to misapplication of the exclusionary rule is both waived and incorrect. The Petition should be denied.

Respectfully submitted,

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