No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, Petitioner

v.

ERIC M YOUNG, Respondent

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

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# PETITION FOR WRIT OF CERTIORARI
and
# APPENDIX

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## QUESTION PRESENTED

Whether the exclusionary rule requires evidence seized by law enforcement to be suppressed when the search is conducted at the request of, and with the consent of, the defendant's private employer after the private employer has discovered illegal activity.

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## OPINION BELOW

The opinion of the Florida First District Court of Appeal on motion for rehearing and certification below is published at State v. Young, 974 So. 2d 601 (Fla. 1st DCA 2008). (App. A). The State filed both a motion for rehearing and a motion for rehearing en banc in the district court. The Florida First District denied both, but substituted the aforementioned opinion on its own motion. The State moved to invoke the jurisdiction of the Florida Supreme Court, which declined jurisdiction. (App. B).

## JURISDICTION

The judgment of the Florida First District Court of Appeal was entered on February 25, 2008. The order of the Florida Supreme Court declining jurisdiction was entered on July 11, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

The State charged Respondent, Pastor Young (hereinafter Young), with possession of child pornography as a result of a video, amongst other pornographic material, located on the hard drive of his workplace computer entitled "3yogetsraped." (SR vol. I, Part II; SRII 1).[1]

Young, the pastor at the Fort Caroline United Methodist Church was one of three full-time and several part-time staff. (RI 51). The pastor's office, had a separate key, however, there were three copies of that key. (RI 52). Young possessed two copies and the third copy remained in the church office in the custody of the office administrator in case the pastor or someone else needed to enter the office. (RI 52).

The office administrator testified she had provided Young's wife with access to the computer in the pastor's office when he was not present. (RI 63-64). Additionally, the church trustees or staff parish would have the right to use the third key. (RI 54). The church had no written policy regarding the use of the third key, (RI 53), nor did Young have any written policy regarding access to his office. (RI 191). The office administrator could come and go from his office freely, if Young was present. When he was not, the office administrator would enter his office "if she had to deliver paperwork for me to sign, that would

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[1]Citation to SR and R are references to the matters contained in the original record on appeal.

be a reasonable business sort of thing for her to do" and the custodian was let into his office to clean by the church administrator. (RI 173).

The church purchased the computer it owned, that was kept in the pastor's office in May 2004, and paid for an internet connection through BellSouth. (RI 61-62). Testimony revealed, the office administrator served as the contact person for BellSouth regarding internet service, including changing e-mail addresses and user names. (RI 62-63). Young admitted that the office administrator had the authority to come into the pastor's office and conduct internet repairs. (RI 185). Young agreed that looking at pornography constituted using the computer for non-church purposes and unauthorized activity. (RI 184-85). Young further admitted that no one at the church ever indicated to him that they could not go into his office to look at the computer. (RI 134). Young's computer was not password protected, and he did not keep his counseling notes on the computer. (RI 56, 134, 140).[2]

On June 15, 2005, the church's office administrator received a call from BellSouth

[2] For example, when a problem previously occurred with the internet service at the church, (RI 64), pursuant to BellSouth's request, the office administrator checked each computer at the church, including the one in Young's office, to ascertain whether the problem had been fixed. (RI 64-65). In fact in March 2005, the office administrator shipped Young's computer from his office for repairs. (RI 65).

related to spam from the church's internet protocol address. (RI 66). As a result of the conversation, the office administrator accessed her computer and Pastor Young's computer to run a program called Spybot, which returned "some very questionable web site addresses" on only Pastor Young's computer. (RI 67-68).

Reverend Neal, the church's district superintendent who had oversight of Young's activities, was told about allegations of improper computer use on June 22, 2005. (RI 79). Specifically, Neal was told that the church had received a complaint from BellSouth indicating that child pornography traffic had been tracked to the church. An expert came in and determined that the computer had pornographic material on it. (RI 80).

Reverend Neal discussed the matter with the bishop and, pursuant to that conversation, authorized Mr. Moreland, the chairman of the staff-parish committee, to notify "the authorities that we had a problem and allow them to see the computer." (RI 80). Reverend Neal further told Mr. Moreland to authorize the search of the church buildings and turn over the church computers, including Young's computer. Mr. Moreland subsequently gave law enforcement consent to search. (SRI 84).

Reverend Neal, as district superintendent pursuant to the United Methodist Church Book of Discipline, contacted Young and informed him not to handle the computer and "suggested" Pastor Young

"not go into the office but return home" until Reverend Neal could speak with him. (RI 81). Reverend Neal later spoke to Agent Roman and confirmed that law enforcement had permission to examine the computer. (RI 83-84).

Detective Boymer was contacted by a patrol officer regarding a complaint from the church. (RI 124). Boymer spoke with church officials and enlisted the assistance of Agent Roman, to help in handling the matter. (RI 97, 99, 124, 126). Boymer and Roman both received consent to search from Moreland, who stated that he had authority to consent to the search from his supervisors in the church. Neither Boymer nor Roman obtained a search warrant. (RI 110, 142).

Agent Roman learned that an IT person found what he believed to be images of child pornography on the computer in Young's office. (RI 101). The IT person burned a copy of some of the images and provided the CD to the church. (RI 101). Roman also spoke with the office administrator, who conveyed similar information. (RI 102). Finally, Roman spoke to Reverend Neal during the search, who stated that the church's position was "to fully cooperate with the investigation," and that Mr. Moreland would assist them with whatever they needed. (RI 102-03).

As a result of Roman's request for permission to search the office and computer, Moreland let them into the office. (RI 103). Moreland signed the written consents to search the computer. (RI 103).

While inside Young's office, Roman seized papers from in or next to the trash can, which contained handwritten notations "http://cutie.does.it" and "www.videoteenage.com" along with a user name and password. (RI 106).

Pretrial, the trial court granted Young's motions to suppress, (RI 27, 34, 35-39), concluding that "[t]he issue presented is whether the officials of the United Methodist Church involved in this case who consented to the search of the office and computer had lawful authority to consent in the absence of consent by the Defendant." (RI 37). In concluding the officials had no authority, the trial court reasoned:

> The law enforcement officers knew that they were investigating possible criminal activities by the Defendant, not the church....
>
> As pastor of the church, the Defendant had a reasonable expectation of privacy in the pastor's office and the computer provided for his exclusive use. The church did not have a policy or practice which would cause the Defendant to believe that the office or computer might be searched without his consent so long as he served as pastor. He had standing to object to the search of the office and computer. Although the church officials involved

> in this case requested law enforcement involvement and clearly consented to the search under authority granted by The Book of Discipline, the rules of church contained therein do not cause the Defendant to lose rights under the constitutions of the United States and the State of Florida.

(RI 38).

The State appealed and the Florida First District Court of Appeal affirmed the granting of the motion to suppress the evidence seized. State v. Young, 974 So. 2d 601, 606 (Fla. 1st DCA 2008). The appellate court noted that under Article I, section 12 of the Florida Constitution, it was required to resolve all Fourth Amendment issues under the United States Constitution as interpreted by this Court. See id. at 608.

The state appellate court held that Young must establish that he had standing under the Fourth Amendment by demonstrating that he possessed a reasonable expectation of privacy in the area searched or item seized. See Young, 974 So. 2d at 608. With respect to the workplace computer, the court noted "the reasonableness of an employee's expectation of privacy in his or her office or the items contained therein depends on the 'operation realities' of the workplace." Id. (quoting O'Connor v. Ortega, 480 U.S. 709, 717 (1987))(citing Mancusi v. DeForte, 392 U.S. 364, 369 (1968)). Further, "[t]he

likelihood that a person has an objectively reasonable expectation of privacy in an office setting is increased where the area or item searched is 'reserved for [the defendant's] exclusive personal use.'" Id. (alteration in original)(quoting Mancusi, 392 U.S. at 369). Additionally, the court cited the case of United States v. Anderson, 154 F.3d 1225, 1232 (10th Cir. 1998), and listed other factors useful in determining the legitimate expectation of privacy in an office, including "the employee's relationship to the item, whether the item was in the employee's immediate control when it was seized, and whether the employee took actions to maintain a sense of privacy in the item." Id. The court determined that "[e]valuation of an expectation of privacy in a workplace computer involves unique considerations, but as with any other item in the workplace, the evaluation should focus on the operational realities of the workplace." Id. at 608-09. The court continued stating, "[w]hen a computer is involved, relevant factors include whether the office has a privacy policy regarding the employer's ability to inspect the computer, whether the computer is networked to other computers, and whether the employer (or a department within the agency) regularly monitors computer use." Id. at 609. The court cited the decisions of the federal circuit courts in United States v. Angevine, 281 F.3d 1130 (10th Cir. 2002) and Muick v. Glenayre Electronics, 280 F.3d 741, 742 (7th Cir. 2002). See id.

The court held that once a legitimate expectation of privacy is established, then the State

"must prove that the search and seizure was reasonable in order to use the evidence secured in the search and seizure at trial." Young, 974 So. 2d at 609. The court stated that a "search and seizure is reasonable if it is conducted pursuant to a valid warrant or with valid consent" and further found that consent must be obtained from the individual whose property is searched, a person with common authority over the premises, or someone who reasonably appeared to have common authority over the premises, citing Illinois v. Rodriguez, 497 U.S. 177, 181, 188-89 (1990). Id.

Utilizing the definition of common authority from Rodriguez, the court found common authority resulted from mutual use and joint access for most purposes. See id. The court relied on United States v. Matlock, 415 U.S. 164, 171 (1974), to establish that the basis of this rule is essentially that one party assumes the risk that the other will permit the area to be searched. See id. The court rejected the statement in United States v. Zeigler, 474 F. 3d 1184, 1191 (9th Cir. 2007), which provided that "the computer is the type of workplace property that remains within the control of the employer 'even if the employee has placed personal items in [it].'" Young, 974 So. 2d at 609. The court found that the court in Zeigler relied on the specific facts of the case such as the company had an IT department with complete administrative access to the company's computers, had a firewall to monitor internet traffic, and an employment manual informing employees of the monitoring efforts. See id. at 610. With respect

to the apparent authority doctrine, the court indicated that in some cases where the person consenting to the search may not have actual authority, law enforcement may rely on the person's apparent authority to give consent. See id. The court noted that the reliance must be reasonable. See id.

The court finally stated that "[i]f the State fails to prove a search and seizure was reasonable under constitutional standards, any evidence obtained either directly or indirectly therefrom must be excluded from the defendant's criminal trial." Young, 974 So. 2d at 611 (citing Wong Sun v. United States, 371 U.S. 471, 484 (1963)). As a result, the court determined that Young had a legitimate expectation of privacy in his office and workplace computer. See id. The court found that the totality of the circumstances, including the fact that Young kept his office locked when he was away and it was used by others for only limited purposes, indicated that he "expected no one to peruse his personal belongings in the office or on the computer." Id. Additionally, the court concluded that this expectation was one that society was prepared to recognize. See id. The court found "that the church endowed [Young] with an expectation of privacy far beyond that which an average employee enjoys" because the church installed a special lock on the door, Young allowed visitors into his office for only limited church purposes or with his permission, and because he was the sole regular user of the computer. See id. The court stated that although the church administrator performed maintenance on the computer, neither

she nor anyone else, stored files on or used the computer. See id. The court also found that the church had no written policy regarding the use of the computer. See id.

While the district superintendent had the authority to enter the office and inspect the computer under the provisions of the Book of Discipline, the court observed "that this general authority to supervise a pastor is distinguishable from an explicit policy indicating that a computer will be inspected periodically." Young, 974 So. 2d at 612. The court concluded that "this authority did not displace the law enforcement officers' obligation to respect [Young's] independent constitutional rights and it did not rise to the level of 'common authority' required for valid third party consent." Id. The court based this conclusion on the fact that neither Moreland nor the District Superintendent ever used the computer, worked in the office, or kept property there. See id.

The court held that the officer's actions did "not support a finding of apparent authority." Id. The court determined that the officers knew nothing of Moreland other than the fact that he was a church representative who had been told by a supervisor to consent to the search. See id. The officers were required "to ascertain whether the consenting officials had any regular access to or control over the office and the computer before commencing the search," and found that the officers' actions "were not reasonable under constitutional standards." Id.

## REASONS FOR GRANTING THE WRIT

### Preliminary Statement

The burgeoning prosecution of cybercrimes necessitates that clear and well thought through Fourth Amendment analysis is applied to workplace crimes. Thus while this case presents what appears facially to be a simple question of whether a private employer has the right to investigate employee misconduct and request the assistance of law enforcement once it has found suspicious activity, this area of the law has not been specifically considered by the Court. The absolute necessity of computer usage in the private workplace and the growth of crimes related to internet usage mandates clear guidelines and standards in applying the Fourth Amendment. State and federal courts should not be left to cobble together Fourth Amendment decisions which thus far have provided little or no guidance to employers and law enforcement officers. Additionally, in this case, the Florida court completely disregarded prior Supreme Court precedent when it indiscriminately applied the exclusionary rule.

### The Search of a Workplace by a Private Employer or Its Designee and the Involvement of Law Enforcement at the Private Employer's Request Does Not Implicate the Protections of the Fourth Amendment

The Court has not squarely addressed the parameters of permissible intrusion into the workplace by law enforcement at the request of the private employer. Private employers, such as the United Methodist Church, should and are permitted to inspect the computers of their employees without satisfying the prerequisites imposed by the Fourth Amendment because they are not government actors. Despite this tenant, the Florida appellate court rejected that principle and concluded that a violation of the Fourth Amendment occurred when Pastor Young's computer was subsequently searched for pornographic material. It is apparent that without clearly established precedent, the federal and state courts have been left to divine a variety of results in similar circumstances which have been accomplished through general extrapolation and cobbling of decisions of the Court.

Perhaps the best approach has been utilized by the New Hampshire Supreme Court in State v. Collins, 581 A.2d 69, 72-73 (N.H. 1990), adopting a Matlock based analysis. Interpreting Matlock and its application in the employer-employee relationship context, that court found that the State is "entitled to show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." (citing Matlock, 415 U.S. at 171)(emphasis added). The court noted that because of the factual situation in Matlock, the Court did have to examine the "other sufficient relationship" and its applicability. See id.

In Collins, the rights of the employer to give consent to search resulted from the employer's ownership of the vehicle and his employment of the defendant. See id. The court found that "[e]ntrusting a truck to an employee does not, without more, imply any limitation on the employer's continuing right to deal with the truck as he sees fit or to allow others to have access to it." Id. The defendant argued that the fact that he had the exclusive right to use the vehicle should result in the conclusion that the employer could not consent. See id. The court rejected the argument stating that this proved "nothing more than the defendant's authority, derived from his employer, to control the access of other employees to the vehicle." Id. The court also found that even though the employer did not use the vehicle, "his inactivity does not reasonably imply an agreement with his employee to observe some limitation on his rights as an owner of business property to deal with it in whatever way he might think appropriate." Id.

The New Hampshire court evaluated the additional fact that Collins had permission to use the vehicle for personal reasons. The court stated that until the employer's "permission was revoked and its revocation communicated to the employee, it would be arguable that the employee could assume that the employer would not open the building or vehicle to the police simply to facilitate a criminal investigation unconnected with the employment relationship." Id. However, the court concluded:

> Such an expectation that the employer would not enter or permit a police search would be wholly unreasonable, however, as against an employer with reason to believe that the employee's space in the building or vehicle itself had been used in the course of committing a crime, especially if the victim was the employer's customer whom it was the employee's duty to serve. An employee could hardly infer that a right to make personal use of a vehicle carried the implication that his employer had somehow barred himself from giving the police access to a business instrumentality that he had reason to believe the employee had used in breach of his employment obligation as well as of the criminal law.

Id. (emphasis added).

The court found that the employer had duties to his tenants which were:

> distinct from and independent of any citizen's general obligation to aid in the detection of crime. The employer's own interest is thus identical with the interest of the government in detecting crime, and in these circumstances, no employee could sensibly understand

> his employer to have limited his own power to detect crime in his own business by placing business property off-limits to the police, simply because the employee was allowed to make personal use of that property when he was not using it to discharge his assigned business responsibilities.

Id. As a result, the court found that the consent to search provided by the employer was sufficient. See id.

Mindful of this Court's decision in Matlock, 415 U.S. at 171, the federal circuit courts for the Fourth and Seventh Circuits have applied a "Matlock-like" analysis looking to the relationship between the private employer and employee and the item seized to determine whether a Fourth Amendment violation has occurred.

In United States v. Carter, 569 F.2d 801, 803 (4th Cir. 1977), the Fourth Circuit upheld the denial of a motion to suppress evidence where the employer had consented to the search of an employer owned vehicle assigned to and exclusively utilized by the defendant. Applying the Matlock "other sufficient relationship test," the court evaluated the sufficiency of the employer's consent. While recognizing that the ownership of the vehicle was not alone sufficient to justify the employer's consent to search, the court found that the ownership of the vehicle could not be ignored because it formed the basis of the

relationship between the defendant and the employer. See id. The court stated:

> Because of that relationship, Carter could not expect to use the vehicle free from inspection by either his employer or by the police acting with his employer's consent.
>
> Carter was assigned the truck for use in the performance of his duties as an employee.... Escann, as owner of the business, could tell Carter what he could do, or what he could not do, with the company's vehicle. Even though he was allowed to take the truck home at night, Carter was not authorized to use the truck for any purpose unconnected with the business. Moreover, Escann, at his caprice, could reassign the van to another employee. Clearly, the defendant used the vehicle solely at the owner's sufferance.

Id. Thus, the court concluded that "'every circumstance points inescapably to the conclusion that the searching officers acted in perfect good faith in relying on the authority' of the owner of the vehicle." Id. (quoting U.S. v. Peterson, 524 F.2d 167, 180 (4th Cir. 1975).

Similarly, the Seventh Circuit in United States v. Bilanzich, 771 F.2d 292, 296 (7th Cir. 1985), found

that a co-owner of a hotel could give valid consent to search a business office where the defendant, the hotel manager, kept the hotel's books and performed her managerial duties, despite the fact that he did not have a key, using the Matlock standard. The hotel owner had to request that the defendant give him access to the room, but the items seized were located in an unlocked desk and file drawers. See id. The court agreed that the defendant "'confuse[d] office routine and practice with the concept of possessory rights giving rise to an expectation of privacy.'" Id. The court held that "the owner of a business who exercises authority over a management employee has the authority to consent to a search of the business' premises, including all employee offices, for records relating to the business." See id.

In contrast to its decision in Bilanzich, rather than utilizing its previous Matlock based approach, the Seventh Circuit utilized this Court's decision in O'Connor, which involved actions by a public employer, to reach its determination in Muick, 280 F.3d. Muick was arrested for receiving child pornography. At the request of law enforcement, the employer, Glenayre, seized the laptop that it had issued to Muick for use at work. See id. Judge Posner, writing for the Seventh Circuit, stated that "Muick [the employee] had no right of privacy in the computer that Glenayre [the employer] had lent him for use in the workplace." Id. at 743. Judge Posner continued that "[n]ot that there can't be a right of privacy (enforceable under the Fourth Amendment if the employer is a public entity, which Glenayre we

have just held was not) in employer-owned equipment furnished to an employee for use in his place of employment." Id. The court noted that if an employer furnished a receptacle, like a safe, in the employee's office for keeping the employee's private documents, then the employee "can assume that the contents of the safe are private." Id. (citing O'Connor, 480 U.S. at 718-19).

Rather than utilizing either a Matlock based approach or a purely O'Connor based analysis, the Tenth Circuit applied a case-by-case analysis utilizing both this Court's decision in O'Connor and its decision in Anderson to reach its decision in Angevine, 281 F.3d at 1132. The court reviewed the claim of a professor, who had been provided a computer pursuant to his employment at Oklahoma State University, where the university had a policy on the use of its computers. See id. at 1132-34. The professor's computer had been networked with other university computers and used to download 3000 pornographic pictures involving young boys. See id. at 1132.

The Angevine court recognized the O'Connor decision and noted that an employee's expectation of privacy is addressed on a case-by-case basis. See id. at 1134. The court set forth factors to be considered included: "'(1) the employee's relationship to the item seized; (2) whether the item was in the immediate control of the employee when it was seized; and (3) whether the employee took actions to maintain his privacy in the item.'" Id. (quoting Anderson, 154

F.3d at 1229). The court found that the computer use policy prevented Angevine from having any reasonable expectation of privacy in the computer. See id. The court also found that this court's Mancusi decision was not applicable because Angevine did not have custody of the data at the moment of its seizure as he had deleted it. See id. at 1135.

Finally, the Ninth Circuit in Zeigler, 474 F.3d, used both the O'Connor approach to determine the reasonable expectation of privacy component and Matlock to determine whether an employer could consent to the search. The Zeigler court evaluated whether an employee had an expectation of privacy in his workplace computer, such that images of child pornography were properly suppressed. See Zeigler, 474 F.3d at 1185. The owner of Frontline, a private company, contacted the FBI with a tip that an employee had accessed child pornography websites from a workplace computer. See id. at 1185-86. The FBI agent contacted Frontline's internet technology ("IT") administrator and learned that the company had in place a firewall to monitor all employee internet activity. See id. The FBI agent confirmed the information provided to him by the owner, and the IT employee stated that he had viewed the websites accessed by Zeigler, which contained pictures of very young girls. See id. The IT administrator further told the FBI agent that a monitor had been placed on Zeigler's computer to record its internet traffic. See id.

At some point, Frontline made a copy of Zeigler's hard drive. See id. The record contained disputed facts as to whether this was done at the request of the FBI agent or not. See id. Thereafter, counsel for Frontline contacted the FBI agent and indicated it would cooperate fully in the investigation. See id. at 1187. Frontline's counsel indicated that it would voluntarily turnover Zeigler's computer to the FBI and did so. The FBI found child pornography on the computer. See id.

On appeal, Zeigler argued that his office computer was like the desk drawer or file cabinet which had been given protection in cases like O'Connor, 480 U.S. See Zeigler, 474 F.3d at 1188. Citing Katz v. United States, 389 U.S. 347, 351 (1967), the Zeigler court noted that the Fourth Amendment protects people rather than places. See id. at 1189. The court 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 item seized." Id. (citing Smith v. Maryland, 442 U.S. 735, 740 (1979))(emphasis in original). The court continued that "[t]his expectation is established where the claimant can show: (1) a subjective expectation of privacy; and (2) an objectively reasonable expectation of privacy." Id. (citing Smith, 442 U.S. at 740, and Katz, 389 U.S. at 351, 361). The court concluded that Zeigler had the burden to prove both elements. See id.

In Zeigler, the government did not contest

Zeigler's claim that he had a subjective expectation of privacy in his office and computer. See id. Zeigler established that he used a password on the computer and had a lock on his office door. See id. The court noted that Zeigler's expectation of privacy in his office also had to be objectively reasonable. See id.

Since no warrant had been obtained, the court required the government prove that consent had been obtained. See Zeigler, 474 F.3d at 1190-91. The court applied the Matlock holding permitting consent to come be obtained from a third party. See id. at 1191. The court evaluated the ability of Frontline to validly consent to the search under the Mancusi decision. See id. Noting that this Court stated in Mancusi, 392 U.S., that DeForte's expectation of privacy in his office and items seized was based upon the expectation that the records would not be seized without his permission or the permission of his supervisors, the Zeigler court concluded that his "interest may be subject to the possibility of an employer's consent to search of the premises which it owns." Id. The court found that Frontline could validly consent to the search of the "workplace computer because the computer is the type of workplace property that remains within the control of the employer 'even if the employee has placed personal items in [it].'" Id. (quoting Ortega, 480 U.S. at 716)(alteration in original).

The Zeigler court explained that the workplace computer is different from a piece of closed personal luggage brought into the workplace.

See Zeigler, 474 F.3d at 1191. The court found that even though each computer had an individual log-in, the IT department had administrative access to the computers. See id. The court also found that the company had installed firewalls monitoring internet traffic. See id. The court additionally stated that the company had told its employees that the computers were for business use and the computers were not to be used for personal purposes. See id. The court concluded that Zeigler

> could not have reasonably expected that the computer was his personal property, free from any type of control by his employer. The contents of his hard drive, like the files in Mancusi, 392 U.S. at 369, were work-related items that contained business information and which were provided to, or created by, the employee in the context of the business relationship. Zeigler's downloading of personal items to the computer did not destroy the employer's common authority.

Id. at 1192-93. Therefore, the employer could consent to the search of the office and the computer. See id. at 1193.

Just as the Florida court has done here, the federal courts have failed to keep a clear distinction between public and private employers and their actions. In other cases, the courts have analyzed the

private employer's ability to consent under the standards announced in Matlock. The resolution of the question presented in this case is important to smaller businesses and to businesses without extensive work place regulations. Currently, private employers and law enforcement have been placed in an untenable situation because they lack necessary guidance as to the measures they may take to stop criminal activity in the workplace. Worse yet, the decision of the Florida court has left, in this instance, the church without any authority to stop its employees from utilizing work place computers to traffic in child pornography. The Court should accept this case to settle the question of whether a private employer may consent to the search of employer owned property which has been provided to an employee for his use, thereby settling the uncertainty in this area of the law.

## The Florida Court Indiscriminately Applied the Exclusionary Rule Without Undertaking the Analysis Required by This Court's Precedent.

The Florida court moreover failed to comply with this Court's pronouncements in United States v. Leon, 468 U.S. 897 (1984), and the more recent decision in Hudson v. Michigan, 547 U.S. 586 (2006), specifically rejecting the "indiscriminate application" of the exclusionary rule. Review is warranted in this case to clarify that application of the balancing test is required rather than an indiscriminate application of the exclusionary rule

without evaluation of the societal costs of suppressing evidence compared to its deterrent effect.[3]

In Leon, the Court explained the evolution and purpose of the exclusionary rule stating:

> The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure "[works] no new Fourth Amendment wrong." United States v. Calandra, 414 U.S. 338, 354 (1974). The wrong condemned by the Amendment is "fully accomplished" by the unlawful search or seizure itself, ibid., and the exclusionary rule is neither intended nor able to "cure the

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[3]The Florida courts, which are required to resolve Fourth Amendment issues under the United States Constitution as interpreted by this Court, often fail to apply the balancing test as required. For instance, recently in Baptiste v. State, SC07-1453, 2008 Fla. LEXIS 1614 (Fla. September 18, 2008), Justice Wells pointed out in his dissent that the majority failed to undertake the essential two part evaluation required by this Court's precedent, that being first whether a violation of the Fourth Amendment occurred and second application of the Leon and Hudson analysis. See also State v. Campbell, 948 So. 2d 725 (Fla. 2007)(review dismissed)(Justice Wells dissenting and cautioning that not every violation of the Fourth Amendment requires the application of the exclusionary rule).

> invasion of the defendant's rights which he has already suffered." Stone v. Powell, [428 U.S. 465, 540 (1976)] (WHITE, J., dissenting). The rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v. Calandra, supra, at 348.

Id. at 906 (emphasis added).

> Whether the exclusionary sanction is appropriately imposed in a particular case... is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." Illinois v. Gates, [462 U.S. 213, 223 (1983)].

Id. (emphasis added). As to the mandate to apply the rule from Leon, this Court stated:

> "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." United States v. Payner, 447 U.S. 727, 734

(1980). An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. Stone v. Powell, 428 U.S., at 490. Indiscriminate application of the exclusionary rule, therefore, may well "[generate] disrespect for the law and administration of justice." Id., at 491. Accordingly, "[as] with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." United States v. Calandra, supra, at 348; see Stone v. Powell, supra, at 486-487; United States v. Janis, 428 U.S. 433, 447 (1976).

Id. at 907 (footnote omitted)(emphasis added).

And in Hudson, 547 U.S. at 591-599, this Court urged that exclusion must not be posited based solely on the fact that a constitutional violation

occurred, but must rather be evaluated by balancing the societal costs of suppressing evidence as compared to the deterrence benefits.

The Florida court failed to comply with the Court's holdings in Leon and Hudson, as it articulated that "[i]f the State fails to prove a search and seizure was reasonable under constitutional standards, any evidence obtained either directly or indirectly therefrom must be excluded from the defendant's criminal trial." Young, 974 So. 2d at 611 (citing Wong Sun v. United States, 371 U.S. 471, 484 (1963)).

Applying the balancing test here, the outcome favored not excluding the evidence.

The Florida court's decision excluded the evidence despite the fact that the church, as the computer's owner, could have simply taken the computer during its search of the pastor's office, turned it over law enforcement, and no Fourth Amendment violation could have been alleged. See Burdeau v. McDowell, 256 U.S. 465, 475 (U.S. 1921); Coolidge v. New Hampshire, 403 U.S. 443, 489-90 (U.S. 1971).

Even assuming a constitutional violation occurred, there was, and is, no remedial purpose served by the suppression of the evidence. Rather, the decision unduly discourages citizens, such as the church employees and members, and the church itself from reporting crime and aiding in the

apprehension of a criminal. Because the Florida court's decision "offends basic concepts of the criminal justice system," the Court should accept certiorari in this case.

## CONCLUSION

Therefore, for the foregoing reasons, Petitioner respectfully requests this Court grant the petition for certiorari and establish clear guidance for the lower courts, employers and law enforcement as to the application of the Fourth Amendment in cases involving private employer requests for the assistance of law enforcement once the private employer has uncovered what it believes to be criminal wrongdoing. At a minimum, Petitioner requests this Court accept certiorari and reverse the decision of the Florida court and mandate the lower court properly apply the balancing test required by this Court in United States v. Leon, 468 U.S. 897 (1984), and Hudson v. Michigan, 547 U.S. 586 (2006).

Respectfully submitted,

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