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SC24-1088

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

BRYAN ALLEN REPPLE,
Respondent.

ON DISCRETIONARY REVIEW FROM THE
SIXTH DISTRICT COURT OF APPEAL
DCA NO. 6D23-1448

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The facts of the case are succinctly stated in the Sixth District Court of Appeal's Opinion in State v. Repple, 2024 WL2983786 (Fla. 6th DCA 2024). Officer Moore of the Maitland Police Department intentionally pulled Respondent Repple over for speeding inside the city limits of Maitland, in Orange County Florida. After smelling the odor of alcohol and observing Respondent's speech and eyes, fellow Maitland police officer Frank Banos began a driving under the influence ("DUI") investigation. After performing three field sobriety exercises, Repple was arrested by Officer Banos for DUI after Officer Banos claimed to have observed further signs of impairment.

Following the arrest, Officer Banos transported Respondent out of the Maitland city limits to a breath test facility that was also located outside of the city limits of Maitland. That breath test facility was staffed that day by a civilian technician with whom Officer Banos came in contact when he arrived at the facility. Upon his arrival Officer Banos accompanied Respondent and the civil technician into a breath testing room. While located inside the breath testing room

and outside the city limits of Maitland, Officer Banos read Respondent an implied consent warning in accordance with Section 316.1932, Florida Statutes (2021). After reading the warning, Officer Banos required Respondent to consent to a breath test to which Respondent complied and submitted to the breath test. The test yielded a breath alcohol content reportedly exceeding the legal limit, further leading the State to charge Respondent with DUI which now included also having an unlawful breath alcohol level.

Prior to trial, Respondent in the County Court, moved to suppress the breath test results. Respondent essentially argued that Officer Banos in violation of Fla. Stat. 316.1932(1)(a)1.a., unlawfully asserted his official authority under color of office because he had acted outside of his territorial jurisdiction to obtain breath test results as evidence which would not have been available to a private citizen using his or her own senses. After an evidentiary hearing, the County Court agreed with Respondent and suppressed the breath test results. The State then filed a timely Appeal of the County Court ruling to the Fifth District Court of Appeal which was transferred to the newly

formed Sixth District Court of Appeal. The State raised only a single argument for consideration by the Sixth District Court of Appeal.

The State's sole argument on Appeal, as recognized by the Sixth District Court of Appeal in their decision, was that a municipal officer may, while outside of his or her territorial jurisdiction, assert official authority to gather evidence not otherwise obtainable by a private citizen when the subject matter of the investigation originated within the officer's territorial jurisdiction. Applying that general premise to the facts of the case, the State contended that because the DUI investigation began in Maitland, a Maitland municipal police officer had the power to use his official authority and color of office, outside the city limits of Maitland, to read Respondent an implied consent warning in accordance with Section 316.1932, Florida Statutes to require and obtain a breath test from Respondent. The State never made any argument in the Sixth District Court of Appeal or the County Court below that the exclusionary rule was not applicable under the facts of the case or the law.

After considering the argument of the State and conducting a de novo review, the Sixth District of Appeal disagreed with both the premise of the State's argument as well as the reasoning of the Fifth District Court of Appeal in State v. Torres, 350 So.3d 421 (Fla. 5th DCA 2022) that recognized such extraterritorial police powers that were not authorized by the Legislature. The Sixth District Court of Appeal ultimately rejected this argument by the State and the holding of the Fifth District Court of Appeal and affirmed the County Court's decision to suppress the breath test evidence obtained by Officer Banos from the breath test search performed outside the territorial boundaries of the municipal officer's jurisdiction. In doing so, the Sixth District Court of Appeal found the power for a municipality to exercise extraterritorial powers must be provided for by the Legislature. The Sixth District Court of Appeal rejected the court-created exception and then certified it's decision to be in conflict with the Fifth District Court of Appeal's decision in Torres.

Following the decision by the Sixth District Court of Appeal, Petitioner (the State of Florida) sought discretionary review by this

Court. This Court subsequently granted discretionary jurisdiction to review the conflict on January 16, 2025.

SUMMARY OF ARGUMENT

The Sixth District Court of Appeal in State v. Repple, 2024 WL2983786 (Fla. 6th DCA 2024) correctly found that a municipal police officer was without power to use his official authority or color of office outside his city limits, pertaining to obtaining evidence not available to a private citizen, i.e. a breath test search. The Sixth District Court of Appeal correctly declined to adopt the court-created exception to the under "color of office" doctrine advocated and found to exist by the Fifth District Court of Appeal in State v. Torres, 350 So.3d 421 (Fla. 5th DCA 2022). Respondent would respectfully claim, Torres was wrongfully decided and decided in contravention of statutory and foundational jurisdictional case law in the State of Florida with regard to the under "color of office" doctrine. The decision of the Sixth District Court of Appeal in Repple is consistent with a required strict construction of the express statutory language contained within Florida's implied consent law in Fla. Stat.

316.1932(1)(a)1.a. This statute requires by it's express language that "...the chemical or physical breath test must be incidental to a ***lawful arrest*** and administered at the request of a ***law enforcement officer***...." (Emphasis added) The implied consent statute is a statute that is required to be strictly construed. State v. Demoya, 380 So.2d 505 (Fla. 3d DCA 1980) There exists no exceptions to the express language of the statute which requires the request for a breath test be made by a "law enforcement officer." Nothing in the statute exists that would extend jurisdiction to allow a municipal police officer located outside of his jurisdiction, who is therefore merely a private citizen, to act as a "law enforcement officer" by use of the color of his office to request a breath test by using an implied consent warning that required Respondent's driver's license to be suspended if Respondent failed to take part in the breath test.

The Sixth District Court of Appeal found in Repple that there was some confusion in the case law describing legislative expansions to a municipal police officer's power as so-called "exceptions" to the color of office doctrine. The Sixth District Court of Appeal specifically noted

that the Torres court did not cite any general or special law that would support such an exception. Rather the Torres decision, as found by the Court in Repple, grounded the alleged exception on a line of cases all of which mentioned the exception, but none of which, however, explicitly created the exception or cited any authority for the exception in any statute or the Constitution. 2024 WL 2983786, at pg. 7. Instead, the Sixth District Court of Appeal found based on it's reading of the cases, that the alleged exception may have simply slid inadvertently into Florida jurisprudence through multiple Courts' use of imprecise language which over time was cited by one court and then another, often in decisions that recited the purported exception, but never exclusively relied upon it and certainly never examined it's origin." 2024 WL 2983786, at pg. 7.

Importantly, the Fourth District Court of Appeal in State v. Phoenix, 428 So.2d 262 (Fla. 4th DCA 1982) and State v. Sills, 852 So.2d 390 (Fla. 4th DCA 2003) also recognized that no exception existed to the under color of office doctrine even if the subject matter

of the investigation originated within the officer's jurisdiction and gravitated outside of the jurisdiction.

The Sixth District Court of Appeal was therefore correct in finding that the municipal officer in this case was without power even by way of Fla. Stat. 316.1932(1)(a)1.a. to use his official authority outside the city limits of Maitland to obtain evidence that was not available to a private citizen.

Also, the State failed to raise below and also therefore waived any argument as to the applicability and legitimacy of the exclusionary rule. See Archer v. State, 613 So.2d 446, 448 (Fla. 1993)

ARGUMENT I

OFFICER BANOS A MUNICIPAL POLICE OFFICER LOCATED OUTSIDE OF HIS JURISDICTION HAD NO AUTHORITY TO REQUIRE RESPONDENT TO SUBMIT TO A BREATH TEST AND UNLAWFULLY USED THE COLOR OF HIS OFFICE AND VIOLATED FLA. STAT. 316.1032(1)(a)1.a. BY REQUIRING RESPONDENT TO SUBMIT TO A BREATH TEST

State v. Repple, WL2983786 (Fla. 6th DCA 2024) represents the correct interpretation of the law when the Sixth District Court of Appeal found that a municipal police officer was without power to use his official authority outside his territorial city limits to obtain

evidence not available to a private citizen and in declining to adopt a court-created exception to the color of office doctrine. The Sixth District Court of Appeal's decision in Repple is consistent with and supported by Fla. Stat. 316.1932(1)(a)1.a. and the foundation of long standing Florida jurisdictional law with regard to the "under color of office" doctrine dating as far back as Collins v. State, 143 So.2d 700 (Fla. 2d DCA 1962), cert. denied 148 So.2d 280 (Fla. 1962).

The first expressed reference to the under "color of office" doctrine was in Collins v. State, Id. In that case two officers of the West Palm Beach Police Department obtained information that the suspect was growing cannabis. After verifying evidence of cannabis plants in a "field outside the city limits" they then traveled outside of the city of West Palm Beach to confront Collins in a motel in Rivera Beach. Id. at 701-02. Collins allowed the West Palm Beach officers who were located outside of their jurisdiction to enter his motel room upon their appearing "in uniform signifying their office" at his door. Id. at 702-03. The officers therefore found cannabis evidence in a search

and Collins was ultimately convicted of growth and possession charges. Id. at 702.

The Second District Court of Appeal, in Collins, found that because the officers left their territorial jurisdiction to engage the suspect in another municipality "they had no authority or power to act as police officers" in Rivera Beach. Id. at 702-03. The Court found that when the officers approached Collins at his motel room, "signifying their official position as police officers", they acted under "color of office." The Court further found that Collins allowed them entry into the hotel room only "by virtue of the force and effect of their official position as police officers." Id. at 703.

Collins v. State, Id. was subsequently cited amongst other cases by the Fourth District Court of Appeal in State v. Phoenix, 428 So.2d 262, 266 (Fla. 4th DCA 1982), for the proposition:

> Pursuant to the "under color of office" doctrine, police officers acting outside their jurisdiction but not in fresh pursuit **may not** utilize the power of their office to gather evidence or ferret out criminal activity not otherwise observable.[2]

Id. at 266 (Emphasis added)

The Fourth District Court of Appeal in Phoenix further elaborated in footnote 2 of it's Opinion:

> We recognize the line of cases holding that municipal police officers may conduct a lawful investigation outside their territorial jurisdiction if the subject matter of the investigation originated in their own jurisdiction. Goodman v. State, 399 So.2d 1120 (Fla. 4th DCA 1981); State v. Chapman, 376 So.2d 262 (Fla. 3d DCA 1979), cert. denied 386 So.2d 642 (Fla. 1980); Parker v. State, 362 So.2d 1033 (Fla. 1st DCA 1978), cert. denied 373 So.2d 460 (Fla. 1979); Brenner v. State, 337 So.2d 1007 (Fla. 3d DCA 1976), cert. denied 348 So.2d 944 (Fla. 1977). Nonetheless, the principle espoused in these cases is subject to the proviso set forth in the text of our Opinion, viz., that officers who act outside their jurisdiction, but not in fresh pursuit, may investigate and gather evidence only through the use of their own senses and through the voluntary cooperation of citizens; they may not employ the power or color of their office either expressly or by implication in order to gather evidence or ferret out criminal activity not otherwise observable.

Id. at 267 f.n. 2

In Phoenix, the Fourth District Court of Appeal in support of its holding, also cited McAnnis v. State, 386 So.2d 1230, 1232 (Fla. 3d

DCA 1980) and State v. Shipman, 370 So.2d 1195, 1196-97 (Fla. 4th DCA 1979), cert. denied 381 So.2d 769 (Fla. 1980).

The Third District Court of Appeal in McAnnis ultimately held that Lt. Bower's arrest of McAnnis was done as a citizen rather than as a Broward police officer. However, the Third District Court of Appeal caveated in it's decision:

> "Although, his actions could not be termed those of a private citizen if executed "**under color of office**," that term, refers to a law enforcement officer actually holding himself out as a police officer, either by wearing his uniform or in some manner openly asserting his official position in order to observe the unlawful activity involved and contraband seized".

Id. at 1232

It is clear from the foregoing language, that had Lt. Bowers held himself out as a police officer or openly asserted his official position, the result of the case would have obviously been different. In the instant case, Officer Banos at all times held himself out as a police officer and even went so far as to read Respondent an implied consent warning under Fla. Stat. 316.1932(1)(a)1.a.

In State v. Shipman, 370 So.2d 1195 (Fla. 4th DCA 1979) the Fourth District Court of Appeal also discussed the "under color of office" doctrine. The Fourth District Court of Appeal in Shipman noted the actions of Officer Puleo in that case would not be sustainable as those of a private citizen if Puleo had been acting "under color of his office" at the time he observed the felonious conduct which resulted in the subsequent arrest of Shipman. The Fourth District Court of Appeal in Shipman then clarified:

> "Under color of office" refers to a law enforcement officer actually holding himself out as a police officer, either wearing his uniform or in some manner openly asserting his official position in order to observe the unlawful activity involved or the contraband seized.

Id. at 1196-97

The Fourth District Court of Appeal in Shipman ultimately found that Officer Puleo did not use the "color of his office" as he never disclosed his official identity to the participants in the transaction. Importantly, however, the Fourth District Court of Appeal did go on to caution:

> While we have concluded that the arrest in this case was lawful, we must note that we share the trial judge's concern for the apparent increase of activity by municipal police officers outside their jurisdiction. We recognize the legitimate need of police officials to detect, follow and arrest offenders wherever they may go, especially in today's society where illicit drug operations and other organized criminal activities are not conveniently conducted within the confines of a single jurisdiction. However, it would appear that there are numerous official ways whereby police authorities may be deputized or granted extra territorial police powers when it becomes necessary. It seems rather ludicrous for police officials to have to rely on a citizen's authority to justify an arrest made in the culmination of an official police operation.

Id. at 1197

The decision of the Fourth District Court of Appeal in Shipman, would have clearly been different had Officer Puleo acted "under color of his office" by actually holding himself out as a police officer. Once again, in the instant case, Officer Banos at all times held himself out to be a police officer and therefore was subject to the under "color of office" doctrine.

As noted by the Fourth District Court of Appeal in State v. Phoenix, 428 So.2d 262 (1982), the purpose of the under "color of

office" doctrine is to prevent officers from improperly asserting official authority to gather evidence not otherwise obtainable. Id. at 266. The Fourth District Court of Appeal in Phoenix further noted that when officers unlawfully assert official authority, either expressly or implicitly, in order to gain access to evidence that evidence must be suppressed. Id. at 266, citing Wilson v. State, 403 So.2d 982 (Fla. 1st DCA 1980) (Evidence suppressed where a search warrant was obtained by a municipal officer outside his jurisdiction signing an affidavit as a police officer.) Too often the courts are held responsible for turning criminals loose on society when responsibility should properly be placed on law enforcement officials who fail to adhere to reasonably foreseeable limitations on their conduct. Wilson v. State, Id. at 984.

In Mattos v. State, 199 So.3d 416 (Fla. 4th DCA 2016) the Fourth District Court of Appeal once again weighed in on the "under color of office" doctrine. In Mattos, the Fourth District Court of Appeal specifically found that Officer Pedrero, the arresting officer in that case began acting under "color of office" once he attempted, as was

done in the instant case, to have Mattos submit to a breathalyzer and perform field sobriety exercises. The Fourth District Court of Appeal found that by doing so, Officer Pedrero was seeking evidence only available to him in his capacity of a law enforcement officer and was improperly acting "under color of law," by requesting a breath test outside his jurisdiction just as Officer Banos did in the instant case.

Once a municipal police officer located outside of his jurisdiction begins utilizing the "color of office" there are no exceptions to that doctrine that exist for an ongoing investigation as was found by the Sixth District Court of Appeal in State v. Repple, 2024 WL2983786 (Fla. 6th DCA 2024). In State v. Sills, 852 So.2d 390 (Fla. 4th DCA 2003), the Fourth District Court of Appeal once again recognized that no exception existed to the under color of office doctrine even if the subject matter of the investigation originated within the officer's jurisdiction and gravitated outside of the officer's jurisdiction. The Fourth District Court of Appeal in Sills, once again specifically reiterated and found:

> That aside, and even if it could be said that in this case the subject matter of the investigation

> did originate within the officer's jurisdiction, the line of cases relied upon by the State is expressly noted in State v. Phoenix, 428 So.2d 262 (Fla. 4th DCA 1982) with the following caveat:
>
> Nonetheless, the principle espoused in these cases is subject to the proviso set forth in the text of our Opinion, viz., that officers who act outside their jurisdiction, but not in fresh pursuit, may investigate and gather evidence only through the use of their own senses and through the voluntary cooperation of citizens; they may not employ the power or color of their office either expressly or by implication in order to gather evidence or ferret out criminal activity not otherwise observable. Phoenix, 428 So.2d at 266, n.2.
>
> Thus, these cases are not, as argued by the State both below and here, a separate and distinct issue from the "under color of office" doctrine; rather, they are subject to that doctrine, not immune from it.

Id. at 393-94

Fla. Stat. 316.1932(1)(a)1.a., otherwise known as Florida's Implied Consent Statute, expressly recognizes and accepts at least implicitly the "under color of office" doctrine when it requires in its express language that "...the chemical or physical breath test must be incidental to a **lawful arrest** and administered at the request of a **law**

enforcement officer...." (Emphasis added). This requirement is reiterated again by the legislature in Fla. Stat. 316.1932(1)(f)1. which also requires the breath test "...shall be administered at the request of a *law enforcement officer...*"(Emphasis added)

A strict construction of this unambiguous statute section supports the holding of the Sixth District Court of Appeal in Repple, since the Implied Consent statute is required to be strictly construed. State v. Demoya, 380 So.2d 505 (Fla. 3d DCA 1980)There exist no exceptions to the express language of the statute which requires the request for a breath test to be made by a "law enforcement officer" so as to allow a municipal police officer located outside of his jurisdiction who while located outside his jurisdiction is merely a private citizen, to act as a "law enforcement officer" and request a breath test.

In State v. Griffis, 502 So.2d 1356 (Fla. 5th DCA 1987) the Fifth District Court of Appeal in contravention of Torres also discussed the statutory restriction placed on law enforcement officers outside their jurisdiction as it pertained in that case to Fla. Stat. 933.07, which limits by its express language a judge to issue a warrant to "any police

officer." The Fifth District Court of Appeal in Griffis found that a municipal police officer located outside of his jurisdiction had no power to act as a police officer outside the territorial limits of his municipality to serve a search warrant. Id. at 1357. The Fifth District Court of Appeal in construing the "any police officer" language of Fla. Stat. 933.07 went on to hold:

> Therefore, the phrase "any police officer" as used in that section must be construed to mean any police officer with **power to act**.

Id. at 1358 (Emphasis added)

Based on that holding in Griffis, the Fifth District Court of Appeal went on to find that there was no statute that authorized a police officer to serve a search warrant outside the boundaries of his territorial jurisdiction. Id. at 1358. Similarly, Fla. Stat. 316.1932(1)(a)1.a. by using the language "at the request of a law enforcement officer," also nowhere authorizes a police officer to request a breath test while located outside the boundaries of his territorial jurisdiction. By the express language of the statute, Officer Banos in the instant case, was located outside of his jurisdiction and

was not a "law enforcement officer" with power to act and therefore had no authority in the statute to act as a law enforcement officer and request Respondent to submit to a search of his breath.

The Sixth District of Appeal in Repple also discussed Officer Banos unlawfully asserting his official power as a police officer when he requested the breath test and read Respondent the Implied Consent warning in accordance with Section 316.1932. Repple, Id. at pg. 5. Therefore, Officer Banos did not have the "power to act" as a police officer while located outside of the territorial limits of his municipality consistent with the Fifth District Court of Appeal's decision in Griffis.

With regard to the purported court-created exception to the color of office doctrine that was relied upon by the Fifth District Court of Appeal in State v. Torres, 350 So.3d 421 (Fla. 5th DCA 2022), the Sixth District Court of Appeal after a thorough analysis declined to adopt this alleged court-created exception to the "color of office" doctrine. In doing so it specifically noted that the Torres Court did not cite any general or special law to support the purported exception, but

rather grounded the exception on a line of cases, which all referenced the exception, but none of which explicitly created the exception or cited any authority for the exception in statute or the Constitution. 2024 WL 2983786, at pg. 7. The Sixth District Court of Appeal found that the purported exception may have simply inadvertently slid into Florida jurisprudence through multiple courts use of imprecise language, which over time was cited by one Court and then another often in decisions that recited the purported exception, but never exclusively relied upon it and certainly never examined its origin.

With all due respect to the Fifth District Court of Appeal, Torres compromises the foundation of and is an extreme reordering of Florida's jurisdictional case law with regard to the "under color of office" doctrine. In analyzing various cases that were cited in Torres, including Knight v. State, 154 So.3d 1157 (Fla. 1st DCA 2014), and Nunn v. State, 121 So.3d 566 (Fla. 4th DCA 2013), both cases stated that a municipal law enforcement officer can exercise their law enforcement powers outside the limits of their municipality if the subject matter of their investigation originated within their

municipality limits. Importantly, however, the Sixth District Court of Appeal specifically found after analyzing each of the cases that neither case created that exception and upon close examination neither case relied upon that exception. Repple, 2024 WL2983756 at pg. 7. Instead, the Sixth District Court of Appeal found that those cases simply stated that such an exception exists and that even State v. Price, 589 So.2d 1009 (Fla. 4th DCA 1991) which was cited in those cases for support of the exception, actually suffered from the same infirmity as they did. 2024 WL 2983786, at pg. 7.

The Sixth District Court of Appeal specifically noted that Price is a two paragraph Opinion where the officers in Price never actually exerted police power outside their jurisdiction and therefore never needed a court-created exception to grant them that power. Price, also cited Goodman v. State, 399 So.2d 1120 (Fla. 4th DCA 1981) for that proposition.

In Repple, however, the Sixth District Court of Appeal also analyzed Goodman and noted that Goodman also did not create the continuing investigation exception nor did it cite a statute or

constitutional provision that bestowed such power upon an officer. The Sixth District Court of Appeal in Repple, went on to cynically hold that the Goodman Court applied the continuing investigation exception as if it was a well established judicially created exception to the color of office doctrine, but it noted that only a year later the District Court of Appeal in State v. Phoenix, 428 So.2d 262 (Fla. 4th DCA 1982) felt compelled to remind readers that this exception was "subject to the proviso...that officers who act outside their jurisdiction but not in fresh pursuit may investigate and gather evidence only through the use of their own senses and through the voluntary cooperation of citizens. This proviso by the Fourth District Court of Appeal was found by the Sixth District in Repple to have been lost over time and improperly went on to serve as the foundation in Price which then also served as the improper foundation for Knight and thereafter improperly served as the foundation for Torres.

It should also be noted that the cases that were unavailingly argued by the State in State v. Sills, 852 So.2d 390 (Fla. 4th DCA 2003) were also found by the Fourth District Court of Appeal to be

subject to the under color of office doctrine and not immune from it. Parker v. State, 362 So.2d 1033 (Fla. 1st DCA 1978) was specifically cited by the Fourth District Court of Appeal in both the Phoenix decision and also the Sills decision as being subject to the proviso set forth in their Opinion that officers who act outside their jurisdiction but not in fresh pursuit may investigate and gather evidence only through the use of their own senses and through the voluntary cooperation of citizens and may not employ the power or color of their office either expressly or by implication in order to gather evidence or ferret out criminal activity not otherwise observable. Likewise, Brenner v. State, 337 So.2d 1007 (Fla. 3d DCA 1976), State v. Chapman, 376 So.2d 266 (Fla. 3d DCA 1979)and Goodman v. State, 399 So.2d 1120 (Fla. 4th DCA 1981) pertaining to the ongoing investigation doctrine were also all listed as cases that the Fourth District Court of Appeal in both Phoenix and Sills found as being limited and subject to the proviso set forth in the text of their Opinion that officers are still subject to the limitations of the color of office doctrine when they operate outside of their jurisdiction.

The Sixth District Court of Appeal in Repple specifically found with regard to these cases:

> From this history, we conclude that a stand-alone, continuing investigation exception may have inadvertently slid into Florida's jurisprudence despite the Phoenix Court's warning.

24 WL 2983786 at pg. 8

The Fifth District Court of Appeal decision in State v. Griffis, is also instructive in another regard in the instant case. In State v. Griffis, Id., a Titusville police officer received sworn information that certain items reported stolen in Titusville, within the officer's jurisdiction, were at a residence of the defendant, outside the officer's jurisdiction, in Cocoa, Florida. As a result Officer Mutter of the Titusville Police Department applied for and obtained a search warrant to search the defendant's residence in Cocoa. The search warrant was directed to the Sheriff of Brevard County, his deputies and all Titusville police officers in Brevard County, Florida. After obtaining the search warrant Officer Mutter proceeded outside of his jurisdiction to the defendant's residence in Cocoa accompanied by

Cocoa and Titusville police officers to serve the search warrant on the defendant.

Even though Officer Mutter was located outside of his jurisdiction and even though the subject matter of the investigation that led to the search warrant had originated within Officer Mutter's Titusville jurisdiction, the Fifth District Court of Appeal contrary to it's decision in Torres still found:

> However, with certain limited exceptions not applicable here, a municipal police officer has no power to act as a police officer outside the territorial limits of his municipality. See e.g. State v. Phoenix, 428 So.2d 262 (Fla. 4th DCA 1983), affirmed 455 So.2d 1024 (Fla. 1984); State v. Gonzalez, 447 So.2d 1015 (Fla. 3d DCA 1984), where the court affirmed a trial court order suppressing evidence seized by City of Miami police officers outside the limits of the City of Miami. See also 70 Am. Jur. 2d Sheriff's, Police and Constables §57 (1987).

Id. at 1357

In Griffis, just as in the instant case, the subject matter of the investigation had originated in Titusville within the officer's jurisdiction. The Fifth District Court of Appeal still found, contrary to its holding in Torres, that Officer Mutter could not use the "color of his

office" outside the territorial limits of his municipality to serve the search warrant because he had no power under Fla. Stat. 933.07 to act as a police officer outside his municipality. This holding again reaffirms that an ongoing investigation outside an officer's jurisdiction is still limited by the under "color of office" doctrine and is not an exception to the "under color of office" doctrine. Torres from the Fifth District Court of Appeal still conflicts with both Griffis as well as the Sixth District Court of Appeal decision in Repple amongst others.

In summary, the Sixth District Court of Appeal's decision in Repple, contrary to the Fifth District Court of Appeal's decision in Torres, is completely consistent with decisions from the Fourth District Court of Appeal, in Phoenix, Mattos, Sills, Wilson and Collins, the Third District Court of Appeal in McAnnis v. State, 386 So.2d 1230 (Fla. 3d DCA 1980); the First District Court of Appeal in Knight v. State, 154 So.3d 1157 (Fla. 1st DCA 2014), and the Fifth District Court of Appeal in State v. Griffis, 502 So.2d 1356 (Fla. 5th DCA 1987). As a result, the Fifth District Court of Appeal's decision in Torres is an outlier to the aforesaid case law and was respectfully

wrongly decided when compared to long standing Florida precedence with regard to the under "color of office" doctrine. Therefore the Sixth District Court of Appeal was eminently correct in finding that the power for a municipality to exercise extraterritorial powers must be provided by the legislature and was likewise correct in rejecting and finding that it was in express conflict with the court-created exception accepted by the Fifth District Court of Appeal in Torres.

ARGUMENT II

THE EXCLUSIONARY RULE WAS PROPERLY APPLIED IN THE INSTANT CASE AND ANY ARGUMENT ON THIS ISSUE WAS NOT PRESERVED AND WAIVED BY PETITIONER BELOW

In State v. Sobrino, 587 So.2d 1347 (Fla. 3d DCA 1991) the Third District Court of Appeal properly found:

> The powers wielded by police officers are vast and subject to abuse. Accordingly such power has been restricted by strict construction, limited exceptions, and harsh remedies for violation of police powers.
>
> ...
>
> Because abuses of police powers diminish our individual and collective civil rights, the penalty for any violation is one of the most serious...suppression. (citations omitted) To find otherwise would result in an unjustified unbridled expansion of police "stop" power.

Id. at 1348

"For an issue to be preserved for appeal,...it 'must be presented to the lower Court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So.2d 446, 448 (Fla. 1993) quoting Tillman v. State, 471 So.2d 32, 35 (Fla. 1985). The merits of claims not properly preserved for appeal should not be addressed by an appellate court. See Perez v. State, 919 So.2d 347, 359 (Fla. 2005), as revised on denial of rehearing Jan. 5, 2006. The sole and only issue presented by Petitioner in the instant case below was the "court created continuing investigative exception." Therefore the exclusionary rule issue argued by Petitioner in the instant case was not properly preserved by Petitioner below and was therefore waived. It therefore should not be addressed by this Court.

In State v. Bender, 382 So.2d 697 (Fla. 1980), this Court has previously held that breath test results are admissible into evidence under the implied consent law, only upon compliance with the ***statutory provisions*** and the administrative rules that were enacted

under their authority. Id. at 699. Since Officer Banos was in violation of the statutory requirements of the Implied Consent law that only a "law enforcement officer" can request a breath test under Fla. Stat. 316.1932(1)(a)1.a. and the fact that Officer Banos was operating under that statute by reading Respondent an Implied Consent warning, then the breath test results would also be required to be excluded by way of the Implied Consent law statutory exclusionary rule found to exist in Bender, Id. This statutory as opposed to constitutional exclusion was found to exist in Fla. Stat. 316.1932(1)(a)1.a. by this Court in Bender. Because of the statutory violation of the implied consent statute by Officer Banos where he was only a private citizen improperly requesting a breath test; suppression here is also an appropriate remedy. See also, Gillman v. State, 373 So.2d 935 (Fla. 2d DCA 1979).

The aforesaid statutory exclusion principal was also reaffirmed by this Court in State v. Donaldson, 579 So.2d 728 (Fla. 1991) when this Court agreed to answer the following certified question to be of great public importance:

> "In a section 316.193 prosecution, where the State seeks, over defense objection, to admit the results of a breathalyzer test into evidence, to what extent must the State lay a foundation to show compliance with ***statutory provisions***, administrative rules and agency procedures governing the licensing of technicians, the maintenance of equipment, and the administration of tests?"

Id. at 729. (Emphasis added)

This Court in Donaldson answered that certified question and held:

> In State v. Bender, 382 So.2d 697 (Fla. 1980), we stated that test results obtained under section 322.262(2), Florida Statutes (1979), are admissible into evidence ***only*** upon compliance with the ***statutory provisions*** and the administrative rules enacted by the Department of Health and Rehabilitative Services (HRS)....

Id. at 729. (Emphasis added)

Once again in Donaldson this Court found breath test results to be admissible only upon compliance with the statutory provisions.

In Robertson v. State, 604 So.2d 783 (Fla. 1992), the analyst who tested the blood did not have the permit that was required by Section 316.1933(2)(b). The defense objected based on the failure of the

analyst to be properly permitted in violation of the statute. One of the questions that this Court was asked to answer in Robertson was:

> Can the State introduce into evidence results of blood samples taken at the request of law enforcement if the requirements of Section 316.1933 are not satisfied?....

In answering the aforesaid certified question in the negative, this Court based on an Implied Consent statutory violation again reaffirmed the statutory exclusionary rule and held:

> Clearly, the use of unauthorized persons to draw blood and the use of improperly maintained equipment could threaten the health of test subjects. Thus on this basis, the ***exclusionary rule*** of the Implied Consent law requires that such evidence be suppressed.

Robertson, 604 So.2d at 790 (Emphasis added).

This Court has therefore repeatedly recognized that when there has been a violation of Florida's Implied Consent statute, the violation requires that the evidence be suppressed as a result of that statutory violation. This statutory exclusion is completely independent of any Fourth Amendment analysis. This statutory exclusion is in accordance with this Court's decision in State v. Cable, 51 So.3d 434

(Fla. 2010). This exclusion in this case is based upon a statutory analysis and a recognized statutory exclusion and not necessarily a constitutional exclusion.

Officer Banos in this case, committed a statutory violation of Florida's Implied Consent statute when as a private citizen and not a law enforcement officer, he requested a breath test outside his jurisdiction despite Fla. Stat. 316.1932(1)(a)1.a. requiring that only a law enforcement officer request a breath test. The Sixth District in Repple was actually using a statutory exclusionary rule as opposed to a judge made exclusionary rule even though a constitutional exclusion would likewise have been applicable in this jurisdictional context involving a search of breath by the unlawful use of color of office. The exercise of police powers to uncover evidence by the use of color of office by a municipal police officer located outside his jurisdiction is expressly "prohibited by law." The statutory exclusion precludes the use of municipal powers outside municipal jurisdictions that are "expressly prohibited by law" See Fla. Stat. 166.021(1).

CONCLUSION

For the foregoing reasons this Court should adopt and affirm the Sixth District Court of Appeal decision in Repple that found it to be in express and direct conflict with the Fifth District Court of Appeal's decision in Torres. It should therefore quash the decision of the Fifth District Court of Appeal in Torres.

Dated: May 9, 2025

Respectfully submitted,

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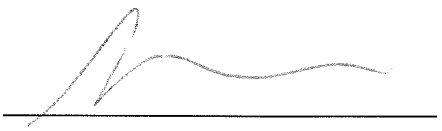
CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.045(b)(a)(2)

and contains 6496 words, as required by Florida Rule of Appellate Procedure 9.210(a)(2)(A).



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal on this 9 day of May 2025, to the following:

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