IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. DONALD MONINGER, Respondent.	Case No. SC07-510

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

BILL McCOLLUM
ATTORNEY GENERAL

ROBERT J. KRAUSS
Chief—Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar No. 0238538

ANNE SHEER WEINER
Assistant Attorney General
Florida Bar No. 0015199

CHANDRA WAITE DASRAT
Assistant Attorney General
Florida Bar No. 0569331
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On December 7, 2004, the State Attorney in the Circuit Court for the Sixth Judicial Circuit of Florida in and for Pasco County filed a felony information charging Respondent with lewd or lascivious molestation in violation of section 800.04(5), Florida Statutes (2004). (R1). Respondent was alleged to have intentionally touched in lewd and a lascivious manner the breast, genitals, genital area or buttocks, or clothing covering them of his daughter, a child under the age of 16 years of age. (R1).

On December 14, 2004, the Honorable Circuit Court Judge Daniel Diskey found probable cause to hold Respondent and bind over trial. (R3). In doing so, Judge Diskey reviewed the sworn Witness Affidavit of Pasco County Detective Mark Ewald wherein it was stated he was informed by the victim that Respondent engaged in sexual intercourse with her during a time period beginning approximately January 1, 2001 and ending September 10, 2004. (R2). It was specifically stated the act was effectuated by Respondent inserting his penis into the victim's vagina. (R2). The victim further informed Detective Ewald that sexual intercourse occurred several times and she, at first, fought against Respondent's advances but eventually stopped struggling because "it happened so many times." (R2).

Detective Ewald later learned Respondent had engaged in sexual intercourse with the victim "just prior to September 10, 2004 and had used a condom." (R2). Condoms were used during the commission of the crime. The condoms were ultimately retrieved from the home by the victim and provided to Detective Ewald. (R2). According to Detective Ewald, the condoms appeared to have contained fresh semen. (R2). Ashley Loomis, a friend of the victim, was also interviewed. Ms. Loomis stated the victim made an outcry to her and "told her tell somebody about it." (R2).

On July 6, 2005, Respondent filed a Motion to Suppress Request for Prohibition of Sampling Defendant's DNA requesting the trial court enter an order suppressing the condoms as evidence. It was also requested the trial court set aside the State's request to compel the defendant to submit samples for DNA typing "since there is no reasonable basis to believe evidence may be obtained and it would violate the Defendant's rights against unlawful search." (R23). In arguing for suppression, Respondent based his motion on facts contained in Detective Ewald's sworn police report #04-037065. (R23). According to defense counsel, the "undisputed facts" were as follows:

1. Detective Ewald was called out on a Sexual Battery complaint on July 8, 2004 at Elfers

Parkway;

2. Deputy White was the first officer on the scene with Child Protective Investigator Morgan who is an employee of the Pasco County Sheriff's Office;
3. Detective Ewald spoke with Deputy White while C.P.I. Morgan questioned the child who is the daughter of the Defendant;
4. Detective Ewald spoke with the child the evening of July 8, 2004, outside of the residence of the Defendant
5. **The daughter had already been removed from the father and was staying with the Susallas',** a friend of hers at a different address. [emphasis added]
6. The daughter is a 15-year old **juvenile** who had already been removed by C.P.I. Morgan from the care of the father, the Defendant in this matter, as evidenced by a copy of the Shelter Petition filed in the Dependency case of C.P.I. Morgan.
7. The Defendant's daughter spoke to Detective Ewald at the scene outside the presence of the father.
8. After speaking with Detective Ewald and at Detective Ewald's prompting, the child went into the father's residence and returned with two (2) condoms.
9. The daughter had told Detective Ewald that the condoms were used in the bedroom of the father's residence before she went into the residence to retrieve them.
10. The father did not consent to the unlawful entrance and removal of the condoms and his daughter did not get his permission to enter back into his residence.
11. The minor child was acting as an instrument of the police and, as such, Detective Ewald searched the Defendant's residence without permission of the Defendant.
12. There were no circumstances which justified the intrusion into the sanctidude of the homeowner's bedroom.
13. Detective Ewald had no warrant to search the Defendant's residence, therefore, the Detective violated the Defendant's 4th, 12th, and 14th Amendments' Rights of the United States

Constitution and the rights guaranteed by virtue of the Florida Constitution.

On August 11, 2005, a sworn Complaint Affidavit filed was filed. (R30). In preparation of the affidavit, Detective Ewald personally appeared before Judge Diskey. (R30). Detective Ewald stated he came into contact with the victim while conducting a follow up interview in connection with the investigation. (R31).

He stated the victim informed him Respondent started sexually abusing her shortly after turning seven years of age. (R31). Respondent initially simulated sexual intercourse with her by making her lay naked **on his bed** while he laid naked on top of her rubbing his penis between her legs. **[emphasis added].** (R31). This activity continued until the victim turned approximately twelve years of age. (R31). From approximately age nine through twelve, Respondent performed oral sex on the victim and forced her to perform oral sex on him. (R32). The victim defined the "oral sex" as the act of placing her mouth on Respondent's penis. (R32).

After turning age twelve, Respondent offered the victim the option of participating in either anal or vaginal sex. (R32). On a number of occasions, Respondent engaged in anal sex with the victim by placing his penis into her anus. (R32). However, anal

sex was performed less frequently than vaginal sex. (R32).

The following time period for each episode was given: From June 1, 1996 through May 23, 2001, Respondent intentionally touched the victim in a lewd and lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them of his daughter, a child then-under the age of twelve; from June 1, 1998 through May 23, 2001, Respondent committed a sexual battery by performing oral sex on the victim and/or having her perform oral sex on him in a lewd, lascivious, or indecent manner; and, from May 25, 2001 through July 8, 2004, Respondent engaged in sexual activity by encouraging, forcing, or enticing the victim to engage in sexual activity (anal sex). (R30).

On August 12, 2005, a suppression hearing was held before the Honorable Circuit Court Judge Stanley Mills. (R711-103). During the hearing, arguments were heard from only the prosecutor, Evangelia Vergos and defense counsel, Mark Goettel. (R71-103). During the hearing, Judge Mills and Prosecutor Vergos engaged in the following discussion regarding the claim set forth in defense counsel's motion:

> **JUDGE MILLS**: I read it over, it seems to be pretty much all on, not pretty much, but all on whether or not this was whatever the child allegedly did in the way of recovering things from the residence while the child was acting as some type of agent for the police agencies. Looks to me like the points are pretty narrowly tailored.

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The way I read it is Detective Ewald actually solicited the child to go in and get the things which arguably he would not have been able to do. I think it says that, maybe I am reading it wrong. Yes, paragraph eight, after speaking with Detective Ewald and after Detective Ewald prompted the child, the child went into the father's trailer and returned with two condoms. And it was allegedly after Detective Ewald had been told that those particular items were used in the bedroom of the father's residence. So, that's why I gather that they're saying Detective Ewald said, look, kid, it would be nice if you went in and got those condoms out, they'd be great evidence and the child went in and got them and then came back.

MS. VERGOS: ...from my reading of the motion, it's, basically, alleged that the child had been removed from the residence, which is done in paragraph four, five, or six.

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And ... as a result of her being removed and sheltered. She had no authority to go into the residence and then only went in at the prompting of law enforcement, which is what the Court just read in paragraph eight.

JUDGE MILLS: I hope that's not what they're arguing because that's going to be a pretty quick argument that the fact that the child may have trespassed on something even if that's true, and I'm not sure that it is under these circumstance. But, even if that's true, I don't know what is given to the State. It really would only be if the child was acting in effect as an agent for the police agencies that the police agencies might have evidence.

MS. VERGOS: That's not the way that I read it and that's not the way that I necessarily prepared for the motion. So, I probably would ask for some time to take a look at some of the case law regarding the

> agent issue and turning a child into an agent of the police or law enforcement. Every witness is here, however, so if the court wanted to hear the witnesses we could proceed with that aspect of the case. (R76-77).

The trial court then denied the State's request to present witness testimony after articulating "it doesn't really seem like much of a legal issue, its going to be more of a factual issue whether Detective Ewald put the child up to it or he didn't." (R77). Prosecutor Vergos proceeded to state on the record the following testimony she expected to present from prospective witnesses:

> They're going to say that she had not yet been sheltered as a matter of fact, Judge. It was the first time a detective was out there. Deputy White had originally gone to the residence and made contact and, while at the residence, he contacted major crimes. Detective Ewald responded and made contact with the child. He conducted a brief interview with her. At which time CPI Morgan was also present and was going to remove the child from the residence when that brief interview with the child was done.
>
> The detective asked the victim whether there was any evidence or anything of that nature that that would be present in order to substantiate her claim. This victim indicated that she believes there was a couple of condoms in the house. CPI Morgan and the detective told the victim to go inside and start packing because she was going to be removed at that point. So, she goes inside and starts packing, they had also indicated that if she wants she can grab the condom. And, she did grab the condoms on her way out after she had packed her belongings. That's basically what they are going to testify to.
>
> Now, the condoms, Judge, I will tell the Court were in the garbage can inside the residence inside the door of the Defendant's room. The victim is

> present and she would testify that she had access to the room, that the room had never been locked, there was nothing ever regarding that she didn't have any authority to be inside the room or that she didn't have authority to enter or look inside the room.
>
> The detective had never been told not to enter the premises prior to obtaining the condoms and had never been told that they don't have --- consent was never requested from the Defendant, Judge, nor was it ever denied to Detective Ewald prior to the detective telling the victim to go inside and start packing. And, so that aspect of it isn't there. But, basically those are the facts the Court would hear as far as the witnesses are concerned. (R78-79).

Defense Counsel Goettel accepted Prosecutor Vergos' proffer. (R79).

Judge Mills proceeded to restate the State's proffer as follows:

> And as I understand the proffer they told the child, that is Detective Ewald then the other Sheriff's Department employee, who was the child protection investigator, but who is now an employee of the sheriffs told the child to go in, start packing and that she could get the condoms and bring them back out too.
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> - - -
>
> That's where the trouble is going to be. You know, asking a child if there are condoms in there and other evidence is certainly a legitimate tactic as far as I can see because you might want to get a search warrant since this the Defendant's residence we're talking about, right? (R79-80).

Prosecutor Vergos subsequently requested additional time to research case law as it may apply to the facts reiterated by Judge Mills. She stated on the record that she believed, from her understanding of case law, that because the victim had not

yet been removed, she had full rights of the home that "dad and victim" had joint custody of the house. (R80). She further asserted it made no difference that the father was the one paying the bills, as far as case law is concerned, when determining who has authority to give consent or enter the home. (R80). Judge Mills granted her request for additional time. (R85).

On August 16, 2005, the State Attorney filed an Amended Felony Information formally charging Respondent, in addition to the crime of lewd or lascivious molestation, the following three criminal offenses: Count two, capital sexual battery; count three, lewd or lascivious battery; and, count four, lewd or lascivious battery. (R44-45). It was alleged Respondent had engaged in multiple acts of sexual activity with his daughter, a child less than twelve years of age and less than sixteen years of age. (R44-45). The time period for the abuse was further enlarged to include June 1, 1996 through July 8, 2004. (R44-45).

On August 19, 2005, the State filed a Memorandum of Law in Opposition to Defendant's Motion to Suppress. (R46-51). The following stipulated facts were stated to have been accepted in lieu of testimony during the August 12, 2005 hearing:

> On July 8, 2004, Deputy White made contact with the victim and defendant at their home located in Pasco County, Florida in response to a call by a third party regarding [a] possible child molestation. After a

> brief interview with the victim, then fifteen years of age, Deputy White called for a major Crimes [d]etective to respond. Detective Ewald responded to the scene shortly thereafter and met with Deputy White and CPI Morgan. Deputy White stood by the defendant while Detective Ewald briefly spoke with the victim. All conversations with the victim and the defendant occurred outside of the residence. Law enforcement never made entry into the residence. Defendant was NOT in custody. After a short conversation with the victim it was discovered that there were condoms that were used during the sexual episodes between the defendant and the victim. CPI Morgan then instructed the victim to go inside and start packing some of her belongings as she was being sheltered and removed from the residence. Detective Ewald told the victim that while inside she could get the condoms if she chose to obtain them. At no time did Detective Ewald direct the victim to get the condoms. At no time had the defendant denied permission to the Law Enforcement personnel on scene to enter his home. Victim did enter the residence by herself.

(R47). On August 23, 2005, Judge Mills entered an order granting Respondent's motion to suppress. (R46-51). The trial court found the stipulated facts included statements that the investigating officers told the victim to go into Respondent's residence to get her belongings but also that "she could remove two condoms that the defendant had allegedly used." (R58). It was also found that the officer provided the child with a bag in which to place the condoms. (R58).

In granting the motion, the trial court acknowledged the State's argument that the victim's action was furthered by her private interest; however, it found "...it does not seem logical

to find the private interests of the victim in obtaining corroboration of the alleged offense is any different than the State's interest in obtaining evidence of the crimes the State has charged." (R59). The trial court ultimately concluded the officers encouraged the child to obtain evidence they could not have validly obtained without permission or proper search warrant. (R58).

On January 5, 2007, the Second District Court of Appeal issued its written opinion in Moninger v. State, 957 So. 2d 2 (Fla. 2nd DCA 2007) affirming the trial court's granting of the motion. In reaching its decision, the majority found the victim acted as a state agent in retrieving the evidence from a wastebasket in her father's bedroom. Its conclusion was in based on the following factual findings:

> The trial court conducted a hearing on the motion to suppress. Although witnesses were available to testify at the hearing, the parties stipulated to the facts and did not present any testimony or other evidence. The stipulated facts expanded on the allegations of Moninger's motion. Deputy White and Detective Ewald responded to Moninger's residence, where his daughter also lived, to investigate an allegation of child molestation. CPI Morgan was present and was going to remove the daughter from the residence to shelter care. While outside the residence, Detective Ewald conducted a brief interview with the daughter and asked her if there was any evidence to substantiate her claim. She responded that she believed there were "a couple of condoms in the house."
>
> Detective Ewald and CPI Morgan "told the victim to go inside and start packing" her belongings because she

> was going to be removed from the home. They also told her that if she wanted to, she could "grab the condom. And, she did grab the condoms on her way out after she had packed her belongings." The daughter retrieved two condoms from the trash can in Moninger's room inside the residence and gave them to the detectives. The daughter had "access" to Moninger's room, and the room had never been locked. Finally, although "[t]he detectives had never been told not to enter the premises prior to the obtaining of the condoms" and consent was never "denied to Detective Ewald prior to the detective telling the victim to go inside and start packing," the stipulation confirmed that "consent was never requested from the Defendant[.]"

Moninger v. State, 957 So. 2d 2 at 3. The majority further found the daughter was being removed from the home based on what the officers already knew, and "nothing suggests that the daughter, of her own motivation, considered taking the condoms to substantiate that she had been molested or for any private purpose." Moninger v. State, 957 So. 2d 2 at 5.

In rendering its opinion, the majority found Treadway v. State, 534 So.2d 825 (Fla. 4th DCA 1988) controlling. In Treadway, the test for determining whether a private individual should be considered an agent of the government was embraced as the same found in United States v. Walther, 652 F.2d 788, 791 (9th Cir. 1981). In Walther, courts were directed look to (1) whether the government was aware of and acquiesced in the conduct; and (2) whether the individual intended to assist the police or further his own ends. The Second District ultimately

held as follows:

> [T]he facts of record establish that the daughter's action in retrieving the condoms was precipitated by Detective Ewald's suggestions and encouragement and that the interest being fulfilled was the law enforcement interest in obtaining evidence to support a criminal prosecution. The daughter was being removed from the home based on what the officers already knew, and nothing suggests that the daughter, of her own motivation, considered taking the condoms to substantiate that she had been molested or for any private purpose. As recognized in Treadway, the Fourth Amendment is implicated if the sole purpose of a private search is to further a government interest. 534 So. 2d at 827. The stipulated facts do not suggest that the daughter retrieved the condoms for any purpose other than the officers' desire to acquire evidence without the necessity of a search warrant or requesting and obtaining consent. Indeed, nothing in the record suggests that the daughter would even have thought to retrieve the condoms without the detective's suggestion that she take that specific course of action.

Moninger v. State, 957 So. 2d 2 at 5.

However, the Honorable Appellate Court Judge Chris Altenbernd found otherwise. In his dissenting opinion, Judge Altenbernd found this case is controlled by Coolidge v. New Hampshire, 403 U.S. 443 (1971). Moninger v. State, 957 So. 2d 2 at 7. He found the majority's reliance on Treadway and Walther misplaced. The analysis used by the majority, in his opinion, was not appropriately suited as applied to the facts of this case. Id. Even if the majority were to apply the reasoning in Treadway and Walther, in his opinion, the victim could not be

deemed to have acted as a state agent because she had objective independent reasons to retrieve that evidence against her father. Moninger v. State, 957 So. 2d 2 at 8. Therefore, her father had no expectation of privacy that would require a warrant for such an intrusion by his daughter. Id.

He further wrote "I have found no case treating such a victim of a crime as a state agent under similar circumstances and truly doubt the United States Supreme Court would apply its reasoning in Coolidge to distinguish this case and exclude this evidence." Id. He did, however, find support for his conclusions in People v. Heflin, 71 Ill. 2d 525, 376 N.E. 2d 1367, 17 Ill. Dec. 786 (Ill. 1978). This Illinios Supreme Court opinion was the only case discovered with facts somewhat akin to the unique facts of this case.

It was also noted by Judge Altenbernd that Respondent bore the burden of persuasion during the suppression hearing, and in his opinion, Respondent failed to establish an unreasonable search and seizure by the government that would support suppression of this evidence. Moninger v. State, 957 So. 2d 2 at 8.

It was concluded that the stipulated evidence did not support a finding the daughter acted as an agent or instrument of the state, given that she had objectively independent reasons

to retrieve this evidence from her home and to preserve that evidence against her father. Finally, Judge Altenbernd identified as DNA evidence that may or may not exist as critical evidence in this case. On remand, if that evidence is determined to exist, the dissent stated it would require Respondent to file a separate motion to suppress that evidence. Moninger v. State, 957 So. 2d 2 at 15.

On January 18, 2007, Petitioner filed a Motion for Rehearing and Motion for Rehearing En Banc which was subsequently denied. On October 7, 2007, this Court granted Petitioner's request to accept discretionary review of the Second District's decision in the instant case.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal's holding in Moninger v. State, 957 So. 2d 2 (Fla. 2nd DCA 2007) is in conflict with the Fourth District Court of Appeal's holding in Treadway v. State, 534 So. 2d 825, 827 (Fla. 4th DCA 1988) as it equates the status of a victim and a state agent as one.

The Second District's reliance on Treadway was misapplied in the instant case in light of the United States Supreme Court's holding in Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). Here, the victim's assistance to law enforcement retained its private character because she was furthering her own ends which created a dual purpose for the search. The mere fact that she was a victim of

a crime presented a built-in dual purpose for the search, and she could, therefore, not be considered an agent of the state when retrieving evidence of that crime.

The victim's purposes are in stark contrast to law enforcement's interest in securing evidence for criminal prosecution. Her decision to obtain the evidence prior to removal from the home was motivated by factors which did not in any manner violate Respondent's Fourth Amendment rights. The victim's personal purposes were independent of that of law enforcement in that she acted in furtherance of her own ends.

Petitioner further submits the Second District overlooked the fact that the victim was a fifteen year old girl who shared in all of the household duties and had open access to all areas of the home including her father's bedroom where the sexual assaults took place. Respondent engaged in illegal sexual contact with the victim in the bedroom for several years, specifically, giving her joint control over the bedroom where the evidence was retrieved. The bedroom was an area common to both she and Respondent wherein Respondent enjoyed no zone of privacy.

The victim had authority to consent to law enforcement entry, as well as law enforcement search, if either had been requested. She could have just as easily allowed Detective Ewald

to obtain the condoms without violating Respondent's rights. When the victim entered the home to pack her belongings and took the condoms, she did so with an objective to further her own interest. The victim's voluntary choice to obtain the condoms prior to leaving the residence did not in any way violate Respondent's Fourth Amendment rights. This was a private search wherein the strictures of the Fourth Amendment should not be activated.

Accordingly, this Court should find the Second District's opinion in Moninger is in conflict with the Fourth District's opinion in Treadway.

ARGUMENT

WHETHER THE SECOND DISTRICT COURT OF APPEAL OPINION IN STATE OF FLORIDA V. MONINGER, 957 SO. 2D (FLA. 2ND DCA 2007) CONFLICTS WITH THE FOURTH DISTRICT COURT OF APPEAL OPINION IN TREADWAY V. STATE OF FLORIDA, 534 SO. 2D 825 (FLA. 4TH DCA 1988), WHERE THE SECOND DISTRICT AFFIRMED THE TRIAL COURT'S FINDING THAT THE CHILD VICTIM ACTING AS AN AGENT OF THE POLICE WHEN SHE REMOVED USED CONDOMS FROM THE BEDROOM TRASH CAN IN HER FATHER'S BEDROOM.

The Fourth Amendment to the Constitution of the United States 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.

U.S. Const. amend. IV. It is well-settled that the Fourth Amendment protects people, not places. It is further settled that the Fourth Amendment protects from unreasonable searches and seizures by government officials rather than by private citizens. Whether the government's activity is considered a "search" depends upon whether the individual's reasonable expectation of privacy is disturbed. Katz v. United States, 389 U.S. 347 (1967) and California v. Ciraola, 476 U.S. 207 (1986). Thus, where there is no expectation of privacy, there can be no search within the meaning of the Fourth Amendment.

It is a basic principle of Fourth Amendment law that

searches and seizures by law enforcement conducted inside a home without a warrant are presumptively unreasonable. Brigham City, Utah v. Stuart, 126 S. Ct. 1943, 1947, 164 L. Ed. 2d 650 (2006). However, the United States Supreme Court has consistently construed this protection as proscribing only to governmental action. United States v. Jacobsen, 466 U.S. 109, 113 (1984). Fourth Amendment law is wholly inapplicable to searches or seizures, even unreasonable ones that are effected by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official. United States v. Jacobsen, 466 U.S. 109 1984).

In the instant case, the Second District Court of Appeal affirmed the trial court's granting of Respondent's Motion to Suppress Request for Prohibition of Sampling Defendant's DNA. In doing so, the Second District found the record established the victim's action in retrieving the condoms was precipitated by Pasco Count Detective Ewald's suggestions and encouragement and that the interest being fulfilled was that of law enforcement interest not the victim.

The motive of victim in retrieving the evidence was determined as follows:

> [T]he daughter was being removed from the home based on what the officers already knew, and nothing suggests that the daughter, of her own motivation, considered taking the condoms to substantiate that she

> had been molested or for any private purpose. As recognized in Treadway, the Fourth Amendment is implicated if the sole purpose of a private search is to further a government interest. 534 So. 2d at 827. The stipulated facts do not suggest that the daughter retrieved the condoms for any purpose other than the officers' desire to acquire evidence without the necessity of a search warrant or requesting and obtaining consent. Indeed, nothing in the record suggests that the daughter would even have thought to retrieve the condoms without the detective's suggestion that she take that specific course of action.

Moninger v. State, 957 So. 2d 2 at 5 (Fla. 2nd DCA 2007) . In rendering its opinion, the majority's found Treadway v. State, 534 So.2d 825 (Fla. 4th DCA 1988) controlling which in turn relied upon the Ninth Circuit's opinion in United States v. Walther, 652 F.2d 788 (9th Cir. 1981). Moninger v. State, 957 So. 2d 2 at 9.

The Honorable Appellate Court Judge Chris Altenbernd found otherwise. In his dissenting opinion, Judge Altenbernd found this case is controlled by Coolidge v. New Hampshire 403 U.S. 443. 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) not Treadway. Moninger v. State, 957 So. 2d 2 at 10-11. He found the majority's reliance on Treadway and Walther misplaced. The analysis used by the majority, in his opinion, was not appropriately suited as applied to the facts of this case. Id. He further expressed that even if the majority were to apply the reasoning of Treadway and Walther, the victim could not be

deemed to have acted as a government agent because she had objective independent reasons to retrieve evidence from her own home and to preserve that evidence against her father. Therefore, her father had no expectation of privacy that would require a warrant for such an intrusion by his daughter. The dissent further opined Respondent failed to establish an unreasonable search and seizure by the government that would support suppression of this evidence.

According to Judge Altenbernd, the stipulated evidence did not support a finding that the daughter acted as an agent or instrument of the state, given that the daughter had objectively independent reasons to retrieve this evidence from her home and to preserve that evidence against her father.

Finally, the dissent articulated that DNA evidence, which may or may not exist, as critical evidence in this case. On remand, if that evidence is determined to exist, the dissent stated it would require Respondent to file a separate motion to suppress that evidence. Moninger v. State, 957 So. 2d 2 at 15.

In Coolidge v. New Hampshire, 403 U.S. 443 (1971), Coolidge was accused of brutally murdering a 14-year old girl. During police investigation, Coolidge was charged with theft from his employer, a crime unrelated to the murder, and held in police custody overnight. Id. at 485. While in custody, two law

enforcement officers visited Coolidge's home unaware that officers had previously visited the home, and questioned Coolidge's wife. Coolidge v. New Hampshire, 403 U.S. 443 at 485.

The decision to send two officers to the Coolidge residence to speak with Mrs. Coolidge was, in the view of the United States Supreme Court, apparently motivated in part by a desire to cross-reference Coolidge's version of the story against his wife's version, and in part by the need for corroboration of Coolidge's admission to the theft charge. Id. It was determined that, at the time of the visit, the police knew very little about the weapon used during the murder of the girl and were unmotivated find a weapon. Coolidge v. New Hampshire, 403 U.S. 443 at 485.

During the visit, Mrs. Coolidge was told her husband was in "serious trouble" and "would probably not be home that night." Id. Mrs. Coolidge was asked whether her husband had been at home on the night of the murder victim's disappearance and she indicated he had not. Coolidge v. New Hampshire, 403 U.S. 443 at 486. Mrs. Coolidge was also asked her if her husband owned any guns to which she replied, "Yes, I will get them in the bedroom." Id. One of the officers then stated "we will come with you" and the two accompanied Mrs. Coolidge into the bedroom

where she retrieved four guns from a closet. Coolidge v. New Hampshire, 403 U.S. 443 at 486.

During the suppression hearing, Mrs. Coolidge testified "I believe I asked if they wanted the guns. One gentleman said, 'No'; then the other gentleman turned around and said, 'We might as well take them.' I said, 'If you would like them, you may take them.'" Id. She also stated to the officers that as far as she was concerned, she "had nothing to hide, and they might take what they wanted." Coolidge v. New Hampshire, 403 U.S. 443 at 486.

The officers continued questioning Mrs. Coolidge and asked what her husband was wearing on the night of the disappearance. Id. In response to the question, Mrs. Coolidge produced four pairs of trousers and indicated that her husband had probably worn either of the two of them that evening. She also brought out a hunting jacket. Coolidge v. New Hampshire, 403 U.S. 443 at 486.

On appeal, Coolidge argued his wife acted as an instrument of the state, complying with the demands of the officers, when she brought out the guns and clothing and ultimately handed them over to law enforcement. Id. at 487. Consequently, it was argued, Coolidge was the victim of a search and seizure within the constitutional meaning of those terms.

The legal issue, as identified by the United States Supreme Court, was whether the conduct of the police officers at the Coolidge house was such so as to make Mrs. Coolidge's actions the officers' actions for purposes of the Fourth and Fourteenth Amendments and the respective attendant exclusionary rules. Coolidge v. New Hampshire, 403 U.S. 443 at 487. The applicable test was "whether Mrs. Coolidge, in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state when she produced her husband's belongings." Id.

The Court ultimately rejected Coolidge's arguments in respect to this issue and found as follows:

> ...it cannot be said that the police should have obtained a warrant for the guns and clothing before they set out to visit Mrs. Coolidge, since they had no intention of rummaging around among Coolidge's effects or of dispossessing him of any of his property. Nor can it be said that they should have obtained Coolidge's permission for a seizure they did not intend to make. There was nothing to compel them to announce to the suspect that they intended to question his wife about his movements on the night of the disappearance or about the theft from his employer. Once Mrs. Coolidge had admitted them, the policemen were surely acting normally and properly when they asked her, as they had asked those questioned earlier in the investigation, including Coolidge himself, about any guns there might be in the house. The question concerning the clothes Coolidge had been wearing on the night of the disappearance was logical and in no way coercive. Indeed, one might doubt the competence of the officers involved had they not asked exactly the questions they did ask. And surely when Mrs. Coolidge of her own accord produced the guns and

> clothes for inspection, rather than simply describing them, it was not incumbent on the police to stop her or avert their eyes.
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> The two officers who questioned her behaved, as her own testimony shows, with perfect courtesy. There is not the slightest implication of an attempt on their part to coerce or dominate her, or, for that matter, to direct her actions by the more subtle techniques of suggestion that are available to officials in circumstances like these.

Coolidge v. New Hampshire, 403 U.S. 443 at 488-490.

In United States v. Walther, 652 F.2d 788 at 791, as relied on by the Fourth District in Treadway, the United States Supreme Court reiterated a rule set forth in Coolidge that a wrongful search or seizure by a private party does not violate the Fourth Amendment except where a private party acts as an "instrument or agent" of the state in effecting a search or seizure, and in that circumstance, Fourth Amendment interests are implicated.

However, the Walther court recognized the existence of a "gray area" between the extremes between overt governmental participation in a search and the complete absence of such participation. United States v. Walther, 652 F.2d 788 at 791. It recognized resolution of such cases could be best resolved on a case-by-case basis with the consistent application of certain general principles. Id.

Those general principles were described as follows: (1) De

minimis or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure will not subject the search to Fourth Amendment scrutiny; (2) the government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before we deem the citizen to be an instrument of the state; (3) the requisite degree of governmental participation must involve some degree of knowledge and acquiescence in the search.

United States v. Walther, 652 F.2d 788 at 791-792.

In Treadway v. State, 534 So. 2d 825, 827 (Fla. 4th DCA 1988), the charges arose out of the investment aspect of an insurance agency's activities. Treadway was apparently the owner of an insurance agency. During an investigation of the agency's investment practices, Steve Horn, an operative for the State of Florida's comptroller's office was furnished copies of papers from Keith Ruyle, one of Treadway's agents.

The papers were from Ruyle's own investment file as well as two of his clients. Ruyle had become concerned over the investment scheme, and after looking into his personal file, and found that money he invested had been improperly removed. Office rules prohibited Ruyles from looking at these files; he, however,did so out of concern for his investment. He sought to

determine whether the program was being properly handled, and probably to protect himself from possible prosecution. Horn was never shown any investor files. Horn simply listened to what Ruyle told him and looked at documentation Ruyle showed to him. On appeal, Treadway argued Ruyle's act of making copies of the files in question was done at Horn's "instance" and, in doing so, Ruyle acted as an agent of the government; thereby, activating

the strictures of the Fourth Amendment.

The Fourth District Court of Appeal disagreed finding no reversible error. It was held the burden of proof to establish government involvement in a private search rests upon the party moving for suppression of evidence. Treadway v. State, 534 So. 2d 825, 827 (Fla. 4th DCA 1988). It further acknowledged the following rule set forth in United States v. Walther, 652 F.2d 788 (9th Cir. 1981) regarding a private citizen's transformation into an agent of the state:

> While a certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state, de minimus or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure will not subject the search to fourth amendment scrutiny. The government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before [the court may] deem the citizen to be an instrument of the state.

Treadway v. State, 534 So. 2d 825 at 827 citing United States v. Walther, 652 F.2d 788 (9th Cir. 1981).

It was also held the requisite degree of governmental participation must involve some degree of knowledge and acquiescence in the search. Treadway v. State, 534 So. 2d 825 at 826. If the only purpose of a private search is to further a government interest, it is subject to Fourth Amendment strictures. Treadway v. State, 534 So. 2d 825 at 827. When a dual purpose for a search exists such that the private person is also furthering his own ends, the search generally retains its private character. Id.

In Treadway, the Fourth District ultimately concluded the victim had several good reasons for looking into Appellant's files pertaining to the investment scheme and "even if there was some modicum of government involvement," the record supported the trial court's admission of evidence. Treadway v. State, 534 So. 2d 825, 827 (Fla. 4th DCA 1988).

The Second District Court's holding in the instant case is in express and direct conflict with the Fourth District's holding in Treadway. In rendering its opinion, the majority found the victim in this case acted as a state agent in retrieving the evidence from a wastebasket in her father's bedroom in reliance upon Treadway v. State, 534 So.2d 825 (Fla.

4th DCA 1988). Petitioner submits the Second District's reliance upon Treadway was misplaced and, in fact, in direct conflict with the holding of Treadway. The majority incorrectly found the victim to be a state agent by holding the victim had no private interest in the evidence found in her home, that the victim lacked authority to seize the condoms found in the home and the victim lacked authority to consent to a search by the police had one been request. As the dissent correctly held, the victim does not meet the definition of state agent as defined in Coolidge. Coolidge is controlling in the instant case.

Here, the majority found the victim's action in retrieving the condoms was precipitated by suggestions and encouragement by law enforcement officers done with the motive of fulfilling their interest in obtaining evidence in support of a criminal prosecution and, in doing so, the victim acted as an instrument or agent of the state.

If the officer's suggestion to retrieve the evidence had any affect on the victim, Petitioner submits it was minimal. A necessary degree of governmental participation demonstrating the victim was transformed into an agent of the state either prior to or during the search was not shown in this case. The evidence did not show the victim's retrieval of the evidence was done, exclusively, with the purpose of furthering the

government’s interest. The record is absent of any indicia that the investigating officers either directed, coerced, or threatened her in any way nor were any requirements placed upon her to act.

The victim cannot be deemed an instrument of the state because it was also not shown the officer was directly involved as a participant in retrieving the evidence or indirectly as an encourager of the victim’s action. There is also an absence of evidence showing a degree of governmental participation involving some degree of knowledge and acquiescence of the government’s purpose in the victim’s retrieval of the evidence. Contact between the victim and law enforcement prior to the search was de minimus which does not subject the search to Fourth Amendment scrutiny.

Rather, the victim was a private citizen advancing her own private interests. The record reveals it was the victim who first brought to light that her father used condoms during the commission of illegal sexual contact. It appears her purpose was motivated by a desire for termination of the abuse she had endured for several years ultimately wishing to be permanently removed from the home.

There is simply no support in the record to find the victim wished to protect her father against criminal prosecution. The

implication that she only desired removal and placement in a shelter is unsupported by a reading of the record on appeal. In fact, the record reflects otherwise as, it was she, who started the process wherein law enforcement was contacted and she who provided the condoms to the authorities.

The victim's motivation is further evident given her "outcry" to her friend, Ashley Loomis, who was told about the abuse and given instructions to "tell somebody about it." (R2). In giving this instruction without limiting remarks, it is reasonable to conclude the victim, hoped, if not expected Miss Loomis would contact law enforcement.

The record further supports a finding that the victim was mature enough to appreciate the illegality of the sexual contact between her and her father. During the interview with Detective Ewald, the victim accurately defined the term "oral sex," and used the word "forcing," in her description of the sexual act. It is also clear she understood how sexual intercourse was performed. The victim specifically stated Respondent engaged in sexual intercourse with her by inserting his penis into her vagina and anus and that she was given a choice between either one; however, anal sex was performed less frequently. (R2).

The victim was also forthcoming in providing a historical overview of the abuse she endured for many years. She stated

her father first started abusing her shortly after turning seven years of age by simulating sexual intercourse while she laid naked on his bed and he laid naked on top of her rubbing his penis between her legs. (R1).

The abuse later escalated to the performance of oral sex upon her and Respondent "forcing" her to perform upon him. (R1). After turning twelve years of age, the abuse further escalated to full fledge intercourse both vaginally and anally. Sexual intercourse continued until Respondent's arrest when she was fifteen years of age. (R1). She stated she initially fought against her father's advances of intercourse but eventually stopped struggling because "it happened so many times." (R2).

The record reflects the victim was sexually abused by Respondent for over seven years. (R31). During that seven year period, she remained silent then possibly out of concern Respondent would be subjected to criminal prosecution, which she probably was not ready for at that time. However, given the substance of the instruction to Miss Loomis together with the existence of condoms to substantiate her claim, it appears the victim did not wish to be simply removed from the home. It appears her actions were motivated by the objective that her father be subjected to criminal prosecution.

The victim's motive of self-furtherance is also evidenced by

facts provided to Detective Ewald when questioned outside her home. The victim not only informed Detective Ewald of the existence of condoms inside her home but also provided extraneous details indicating Respondent had used the condoms during sexual intercourse with her shortly before the officers' visit to the home. (R2). The victim's claim of the existence of freshly used condoms was the only physical evidence the victim could provide to substantiate her claim of illegal sexual contact by her father. The existence of this evidence was possibly the driving force behind the timing her instructions to Miss Loomis.

It is inconceivable to find that when asked by a law enforcement officer whether she could substantiate her claim, the victim was not aware her father could potentially be exposed to criminal charges if informed of the existence of the condoms. In Coolidge, it was held there is nothing constitutionally suspect in the existence, without more, of incentives to full disclosure or active cooperation with the police. Coolidge v. New Hampshire, 403 U.S. 443 at 488. The policy underlying the Fourth and Fourteenth Amendments cannot be used to discourage citizens from "aiding to the utmost of their ability in the apprehension of criminals." Id.

In providing unsolicited details substantiating the

occurrence of illegal sexual contact to law enforcement officers, it was logical for the victim to believe Detective Ewald would next ask to see the condoms, if not take the condoms for further analysis. It also logical for Detective Ewald to actually ask such question. Once the victim acknowledged the sexual abuse and informed the officers of the existence of condoms in the home in support of her claim, Detective Ewald acted normally and properly.

The detective's question as to whether the victim could retrieve the condoms did not activate the strictures of the Fourth Amendment. It was a question, not a demand, to which the victim could have refused to perform. The question was logical and in no way coercive. In Coolidge, the Court found "one might doubt the competence of the officers involved had they not asked" questions that were logical and uncoercive. Coolidge v. New Hampshire, 403 U.S. 443 at 488.

In assessing the claim of whether the officers' course of conduct amounted to a search and seizure, it should be kept in mind, the victim like Mrs. Coolidge acted under a belief she had nothing to hide. Id. at 489. As in Coolidge, it cannot be said the police should have obtained a warrant for the condoms before they set out to visit the victim since they had no reason to suspect the existence of the evidence. Coolidge v. New

Hampshire, 403 U.S. 443 at 488.

Once the interview outside the home began, there is no indication the officers engaged in conduct that could lead to a conclusion that the victim was a state agent. The victim was at no time under the direction of law enforcement. Detective Ewald did not at any time instruct the victim to obtain the property. He did not coerce, dominate, or threaten the victim nor was she directed to act by more than the "**subtle techniques of suggestion** that are available to officials" in such circumstances. **[emphasis added].** Id.

The differences between the facts presented in Coolidge and the facts of this case are the ages and relationships of household occupants producing the evidence and the fact that the victim in this present case did not herself originate the idea of retrieving the condoms, but instead agreed to do so when the officer explained that it might assist the investigation or prosecution. In his dissent, Judge Altenbernd concluded those facts "do not permit a finding of unconstitutional police conduct requiring the application of the exclusionary rule." State v. Moninger, 957 So. 2d 2 at 9. However, there exist even more glaring differences in that the occupant of the home in the instant case was also the victim in the subject investigation

and who also set the forces in motion leading up to the investigation.

The victim’s assistance to law enforcement retained its private character because she was furthering her own ends which created a dual purpose for the search. The mere fact that she was a victim of a crime presented a built-in dual purpose for the search, and she could, therefore, not be considered an agent of the state when retrieving evidence of that crime.

Here, the victim’s purposes are in stark contrast to law enforcement’s interest in securing evidence for criminal prosecution. The victim’s decision to obtain the evidence prior to removal from the home was motivated by factors which did not in any manner violate Respondent's Fourth Amendment rights. The victim’s personal purposes were independent of that of law enforcement in that she acted in furtherance of her own ends. This resulted in a search consisting of a dual purpose which retained its private character during the entire transaction. The search should retain its private character as the victim was a private person.

Petitioner further submits the Second District overlooked the fact that the victim was a fifteen year old girl who shared in all of the household duties and had open access to all areas of the home including her father’s bedroom where the sexual

assaults took place. Respondent engaged in illegal sexual contact with the victim in the bedroom for several years, specifically, giving her joint control over the bedroom where the evidence was retrieved. The bedroom was an area common to both wherein Respondent enjoyed no zone of privacy.

The Second District also overlooked the number of bedrooms in the home. The majority found the condoms were in the "master bedroom," which presupposes the existence of multiple bedrooms. However, there is no support on the record for this finding. A reading of the motion to suppress reflects defense counsel stated

> The daughter had told Detective Ewald that the condoms were used in **the bedroom** of the father's residence before she went into the residence to retrieve them. (R23).

During the suppression hearing, Judge Mills further stated in his summary of the facts that "Detective Ewald have been told that those particular items were used in **the bedroom** of the father's residence." (R76).

In delivering his dissenting opinion, Judge Altenbernd noted he could find "no case treating such a victim of a crime as a state agent under similar circumstances and truly doubt the United States Supreme Court would apply its reasoning in

Coolidge to distinguish this case and exclude this evidence." He did, however, find support for his conclusions in People v. Heflin , 71 Ill. 2d 525, 376 N.E.2d 1367, 17 Ill. Dec. 786 (Ill. 1978). The Illinois Supreme Court opinion, the only case discovered with facts somewhat akin to the unique facts of this case.

In that case, the defendant argued his brother acted as an agent or instrumentality of the state in sending letters to the police. However, the court found that the brother had "common authority" over the letters and acted voluntarily and without police persuasion in submission of the letters.

In Saavedra v. State, 622 So. 2d 952 (Fla. 1993), this Court held a minor may grant valid consent for a police officer to enter a home shared with a parent. To prove the validity of consent, the State must show by clear and convincing evidence from the totality of the circumstances that the minor gave consent freely and voluntarily. Saavedra v. State, 622 So. 2d 952 at 956. Consent by the minor must further satisfy the third-party consent to a warrantless search test which is "whether the third party ha[d] joint control of the premises." Id. A joint occupant or one sharing dominion or control over the premises may provide valid consent only if the party who is the target of the search is not present or if the party is

present and does not object to the search. Saavedra v. State, 622 So. 2d 952 at 956.

In justifying a warrantless search by proof of voluntary consent, the State may show permission to search was obtained from a third party who possessed **common authority over or sufficient authority over or other sufficient relationship to the premises or effects sough to be inspected**. **[emphasis added].** United States v. Matlock, 415 U.S. 164 (1974).

Here, if the words the condoms are in "the bedroom" are taken literally, its follows logically there existed only one bedroom in the home. Given that the victim resided in the home with her father, it is leads to a conclusion the victim shared the only bedroom in the home with her father which, in turn, gave her common authority over the premise where the condoms were retrieved.

The victim had authority to consent to law enforcement entry, as well as law enforcement search, if either had been requested. In justifying the search, the State could have easily showed, by the facts of this case, that the victim was a third party who possessed common authority over or sufficient authority over or other sufficient relationship to the bedroom or effects sough to be inspected. She could have just as easily

allowed Detective Ewald to obtain the condoms without violating Respondent's rights. When the victim entered the home to pack her belongings and took the condoms, she did so with an objective to further her own interest. The victim's voluntary choice to obtain the condoms prior to leaving the residence did not in any way violate Respondent's Fourth Amendment rights.

Furthermore, Petitioner submits the condoms would have ultimately discovered by law enforcement which, in turn, could have activated the doctrine of inevitable discovery adopted by the United States Supreme Court in Nix v. Williams 467 U.S. 431 (1984), as an exception to the fruit of the poisonous tree doctrine. The inevitable discovery doctrine allows evidence obtained as the result of unconstitutional police procedure to be admitted if the evidence would ultimately have been discovered by legal means.

The inevitable discovery doctrine requires the State establish by a preponderance of the evidence that the police ultimately would have discovered the evidence independently of the improper police conduct by "means of normal investigative measures that inevitably would have been set in motion as a matter of routine police procedure." Id. at 437. For this doctrine to apply, there does not have to be an absolute certainty of discovery, but rather, just a reasonable

probability. Given that the victim indicated to Detective Ewald that the condoms were in a trash bin in the bedroom, Petitioner submits there is a reasonable probability the condoms would have been discovered by the police during a search of the home after Respondent was taken into custody and the victim was removed from the home.

The Second District Court of Appeal's holding in Moninger v. State, 957 So. 2d 2 (Fla. 2nd DCA 2007) is in conflict with the Fourth District Court of Appeal's holding in Treadway v. State, 534 So. 2d 825, 827 (Fla. 4th DCA 1988) as it equates the status of a victim and a state agent as one. This was a private search wherein the strictures of the Fourth Amendment should not be activated. Accordingly, this Court should find Moninger in conflict with Treadway.

CONCLUSION

Petitioner respectfully requests that this Honorable Court reverse the holding of the Second District Court of Appeal.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

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ROBERT J. KRAUSS
Chief—Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar No. 0238538

_____

ANNE SHEER WEINER
Assistant Attorney General
Florida Bar No. 0015199

_____

CHANDRA WAITE DASRAT
Assistant Attorney General
Florida Bar No. 0569331
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Ronald S. Gurlanick, Esquire, Ronald S. Guralnick, P.A., Bank of America Tower at International Place, 100 S.E. 2nd Street, Suite 3300, Miami, Florida 33131 this 29th day of October 2007.

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COUNSEL FOR PETITIONER

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR PETITIONER