Supreme Court, U.S.
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No. 21-95

IN THE
Supreme Court of the United States

DAVID W. FOLEY, JR., AND JENNIFER T. FOLEY,
Petitioners,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, TIFFANY RUSSELL,
Respondents.

On Petition for a Writ of Certiorari to the Florida Fifth District Court of Appeal

PETITTION FOR A WRIT OF CERTIORARI

David and Jennifer Foley
Pro Se
1015 N. Solandra Dr.
Orlando, FL 32807-1931
407 721-6132, 407 491-4319

ORIGINAL

QUESTION PRESENTED

Is a state court free under the Fourteenth Amendment to deprive a plaintiff of a remedy in 42 USC §1983 by granting a public servant immunity from suit without identifying the statute, ordinance, regulation, custom, or usage, the defendant must claim makes their action *virtute officii* and not merely *colore officii*?

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TABLE OF AUTHORITIES

CASES

CONSTITUTION, UNITED STATES

RULE 14.1(b)(i) STATEMENT

Petitioners are:

David W. Foley, Jr., and Jennifer T. Foley.

Respondents are:

Orange County, a subdivision of Florida, and,
Phil Smith, Inspector, Code Enforcement,
Carol Hossfield, Permitting Chief Planner,
Mitch Gordon, Manager, Zoning Division,
Rocco Relvini, BZA Coordination Chief Planner,
Tara Gould, Assist. County Attorney,
Tim Boldig, Chief of Operations, Zoning Division,
Frank DeToma, Board of Zoning Adjustment - 2007,
Asima Azam, Board of Zoning Adjustment - 2007,
Roderick Love, Board of Zoning Adjustment - 2007,
Scott Richman, Board of Zoning Adjustment - 2007,
Joe Roberts, Board of Zoning Adjustment - 2007,
Marcus Robinson, Board of Zoning Adjustment - 2007,
Richard Crotty, County Mayor, 2000-2010,
Teresa Jacobs, Comm., Dist. 1, 2000-2008, President, Florida Association of Counties, 2007-2008,
Fred Brummer, Comm., Dist. 2, 2006-2014,
Mildred Fernandez, Comm., Dist. 3, 2004-2010,
Linda Stewart, Comm., Dist. 4, 2002-2010,
Bill Segal, Comm., Dist. 5, 2004-2011,
Tiffany Russell, Comm., Dist. 6, 2006-2014.

RULE 14.1(b)(ii) STATEMENT

Petitioners have no parent corporation and no publicly held corporation owns 10% or more of their stock.

RULE 14.1(b)(iii) STATEMENT

Foley et ux. v. Orange County, et al., SC21-199 (Supreme Court of Florida, February 11, 2021)

Foley et ux. v. Orange County, et al., 5D19-2635 (Fifth District Court of Appeal of Florida, October 13, 2020)

Foley et ux. v. Orange County, et al., 2016-CA-007634-0 (Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida)

PETITION FOR WRIT OF CERTIORARI

David and Jennifer Foley petition this the Supreme Court of the United States for a writ of certiorari to review the judgment of the Florida Fifth District Court of Appeal.

OPINIONS BELOW

The Florida trial court order, 2016-CA-007634-0, granting absolute immunity to all individual defendants appears in *Petition Appendix 2a.*

The Florida appellate court order, 5D19-2635, affirming the trial court without opinion appears in *Petition Appendix 7a.*

The Florida Supreme Court order, SC21-199, denying review of the appellate court appears in *Petition Appendix 11a.*

JURISDICTION

The Florida Supreme Court order denying review was entered February 11, 2021, *Petition Appendix 11a.*

The jurisdiction of this Court is invoked under Title 28 U.S. Code Section 1257.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XIV, §1: ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Fla. Const., Art. IV, §9: *Fish and wildlife conservation commission.* The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life...

Fla. Const., Art. VIII, §1(j): *Violation Of Ordinances.* Persons violating county ordinances shall be prosecuted and punished as provided by law.

Fla. Stat., §768.28(9)(a): No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage

suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. However, such officer, employee, or agent shall be considered an adverse witness in a tort action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in her or his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

STATEMENT OF THE CASE

The order we ask the Court to remand for clarification grants immunity on absolute, unqualified terms – public servants, it concludes, are *per se* due immunity. In keeping with its theory of *unconditional* immunity, the order finds no reason to identify the challenged acts, the rights alleged, or any law that authorized defendants' trespass of those rights. Nor does the order find relevant to its creation of *unconditional* immunity, any discussion of the causes or arguments asserted. A stranger to the case learns nothing from the order about the defendants except their names and public titles. And on the basis of their public titles alone the order, citing *Harlow v. Fitzgerald,* 457 US 800, 818 (1982), grants the defendants an immunity that it calls "absolute" but is clearly *unconditional.* The order granting defendants' motion to dismiss states (see *Petition Appendix* 2a):

> There are no allegations in the Amended Complaint that the named Defendants acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. As such, all the individual Defendants in this cause are afforded absolute immunity, and therefore cannot be sued. *Corn v. City of Lauderdale Lakes* 997 F.2d 1369, 1393 ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known." (citing *Harlow v. Fitzgerald* 457 US 800, 818 (1982)); §768.28(9)(a), Fla. Stat. (2016) ("No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."); *Willingham v. City of Orlando*, 929 So. 2d 43, 48 (Fla. 5th DCA 2006) "(Importantly, the immunity provided by section 768.28(9)(a) is both an immunity from liability and an immunity from suit, and the benefit of this immunity is effectively lost if the person entitled to assert it is required to go to trial. (emphasis in original)); *Lemay v. Kondrk*, 923 So. 2d 1188, 1192 (Fla. 5th DCA 2006) ("We fully recognize that the immunity provided by section 768.28(9)(a) is both an immunity from suit and an immunity from liability, and we recognize that an entitlement is effectively lost if the case is erroneously permitted to go to trial."). This does not preclude the Plaintiffs from seeking redress against Orange County. See *McGhee v. Volusia Co.*, 679 So. 2d 729, 733 (Fla. 1996) ("In any given situation either the agency can be held liable under Florida law, or the employee, but not both.")

This bald grant of *unconditional* immunity was affirmed without opinion by Florida's Fifth District Court of Appeal. The Fifth District's affirmance was appealed without success to the Florida Supreme Court.

Our complaint alleges defendants enjoined our sale of toucans in clear absence of any local or state regulation authorizing that injunction substantively or procedurally. These allegations required any defense in immunity to identify a local regulation that did authorize the challenged injunction, or to overcome the substantive and procedural bars to county authority in Art. IV, §9, and Art. VIII, §1(j), Fla. Const. Defendants did neither.

Our complaint seeks damages in conversion and civil theft, or in the alternative pursuant 42 USC §1983, for deprivation of an adequate and available predeprivation remedy. These causes do not require allegations of malice or bad faith. Conversion and civil theft overcome the common law immunity guaranteed in §768.28(9)(a), Fla. Stat., on the complaint's allegations of acts in clear absence of substantive or procedural authority; and if not, the cause in 42 USC §1983, overcomes this protection as a matter of federal supremacy.

The question presented is deliberately presented in terms as absolute as the Court's immunity jurisprudence. It assumes immunity is due if *any*

law, even an unconstitutional law, authorizes the challenged action, *Pierson v. Ray*, 386 US 547, 557 (1967). Conversely, it assumes immunity is not due if no law does so, *Bradley v. Fisher*, 80 US 335, 352 (1872)) (distinquishing immune acts *in excess* from culpable acts *in absence* of jurisdiction). Consequently, it asks the Court for a rule as absolute –

> The Fourteenth Amendment requires any court granting a public servant immunity from suit to identify the law that vests that public servant with discretion to effect the challenged deprivation.

We ask the Court to remand and to request the Florida Fifth District Court of Appeal identify the law that justifies immunity.

At this stage of this proceeding, we bring forward no more of the record than the relevant orders, with the expectation that should the Court grant certiorari, it will provide an opportunity to perfect the record and brief the merits.

REASONS FOR GRANTING THE WRIT

I. Florida, in *Foley et ux.*, eliminates the defendants' common-law burden to prove immunity is justified by a law that authorizes their trespass.

"The burden of justifying absolute immunity rests on the official asserting the claim," *Harlow v. Fitzgerald,* 457 US 800, 812 (1982).

Nothing in the order affirmed by Florida's Fifth District Court of Appeal suggests that happened in *Foley et ux.*

The Court should grant certiorari to elaborate what it said in *Harlow* – that the common law gives defendants the burden to prove immunity is justified by "statute, ordinance, regulation, custom, or usage," 42 USC §1983 – and, consequently, any court order granting immunity must identify the law the defendants assert justifies their trespass.

It is now, as it was in 1871, the defendant claiming immunity who has the initial burden to identify for the court, and to defend as constitutionally sound, that "statute, ordinance, regulation, custom, or usage," they claim makes their action *virtute officii* and not merely *colore officii.*

Akhil Amar in *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1506 (1987), describes the contest of "trumps" that recognized defendant's burden:

> "Plaintiff would sue defendant federal officer in trespass; defendant would claim federal empowerment that trumped the state law of trespass under the principles of the supremacy clause; and plaintiff, by way of reply, would play an even higher supremacy clause trump: Any federal empowerment was ultra vires and void because of Fourth Amendment limitations on federal power itself."

Likewise, Robert Brauneis in *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 65 (1999), describes the contest of "justification" that recognized defendant's burden:

> "[The plaintiff] brought an ordinary common law action of trespass or trespass on the case against whomever might be held liable at common law... If the defendant's acts would otherwise give rise to liability at common law, the defendant could proceed to the second stage of litigation and seek to justify those acts by appealing to legislation that authorized them and thus altered the common law. It was then up to the plaintiff to introduce a third stage, by appealing to a [constitutional provision]... and arguing that the legislation invoked by the

> defendant violated that provision... If the plaintiff's argument prevailed, the court declared the legislation void, and the defendant's justification failed. Once the defendant was stripped of his justification, the plaintiff could recover the retrospective damages normally allowed under his common law action..."

Indeed, properly understood, the original version of 42 USC §1983, Ch. 22, § 1, 17 Stat. 13 (1871), was nothing more than a guaranteed federal forum for "any action at law," or what Akhil Amar, *at 1506*, calls a "vertically-pendent state law cause of action," in which it was the defendant's burden to win the contest of "trumps" and "justification," and to prove their alleged common law trespass had the virtue, and not merely the color, of constitutionality (*emphasis* added):

> That any person who, under *color of* any *law, statute, ordinance, regulation, custom, or usage* of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured *in any action at law*, suit in equity, or other proper proceeding for redress; such proceeding *to be prosecuted in the several*

> *district or circuit courts of the United States,* with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial law of the United States which are in their nature applicable in such cases. Ch. 22, § 1, 17 Stat. 13 (1871)

Whatever significance is given the modest differences between the 1871 version of the "Enforcement Act" in Ch. 22, § 1, 17 Stat. 13, and its current version in 42 USC §1983, the locus of the defendant's burden was retained in the phrase "color of law;" to avoid suit, to avoid liability, the defendant must prove their challenged trespass was *virtute officii* and not merely *colore officii.*

Consequently, even without 42 USC §1983, as either an independent or vertically-pendant cause of action, within the framework of historical common-law practice, the Fourteenth Amendment's guarantee that no State shall abridge the priviledges or immunities of citizens of the United States, or deprive any person of property but by due process, of its own force requires that any Florida court, that destroys a plaintiff's remedy by granting a defendant immunity, must determine and must declare precisely how the defendant has met thier burden in claiming that defense. Otherwise, hollow too is

Article IV's guarantee of the Republic John Adams called "a government of laws, not men."

II. Florida, in *Foley et ux.*, improperly assumes a congressional, policy-making role by its invention of *unconditional* immunity.

"Under our precedent, the inquiry begins with the common law," *Filarsky v. Delia*, 132 S.Ct. 1657, §II, A (2012).

When this Court grants immunity, as it did in *Filarsky*, it identifies the actions the plaintiff challenges, *Filarsky § I, A*, the rights the plaintiff asserts, *Filarsky § I, B*, and the "statute, ordinance, regulation, custom, or usage" the defendant claims authorize their trespass of plaintiff's asserted rights, *Filarsky § II, A*. None of that happened here. Instead, in *Foley et ux.*, Florida's Fifth District Court of Appeal granted immunity *unconditionally*.

This Court should grant certiorari to elaborate what it said in *Filarsky*; that it does not assume such a legislative, policy-making role when it grants immunity; that its discussions of the police power concerns of "public interest" and "public good" in *Harlow*, and *Pierson*, and *Bradley*, and its other immunity cases, are part of its dialog with, or obeasance to, Congress, which alone has the power to create or abrogate the rights and duties the Court applies to justify immunity; and, that this incidental discussion is not an encouragement to state courts to

assume a legislative, policy-making role and to expand immunity *unconditionally* beyond its historic bounds in this Republic of "laws, and not men."

The cases cited by Chief Justice Roberts in §II, A and B, of *Filarsky*, exemplify the two points made here – the Court justifies immunity by law, not policy.

By Law. Each of the twelve cases cited in §II, A, involves a grant of immunity supported by an authorizing "statute, ordinance, regulation, custom, or usage:" *Robinson v. State*, (authorizing arrest warrant); *State v. Mooring*, (same); *North Carolina v. Gosnell*, (same); *Reed v. Rice*, (same); *Gregory v. Brooks*,† (written certification of authority to regulate vessels "lying at the wharves in Bridgeport" signed by Mayor Munson Hawley); *Henderson v. Smith*,† (discretionary act of statutorially licensed notary was "grosz-judicial" and immune); *Chamberlain v. Clayton*,† (Section 1686 of the Iowa Code granted trustee "quasi judicial" discretion to hire and fire employees); *McCormick v. Burt*,† ("By section 48 of the school law the directors" may "'adopt and enforce all necessary rules and regulations'"); *Donahoe v. Richards*,† ("By the act of 1850, c. 193, art. 5, § 1... the authority is given [defendants] 'to expel from any school, any obstinately disobedient and disorderly scholar'"); *Downer v. Lent*,† (no "want of jurisdiction" was averred; jurisdiction may have been conceded); *Rail v. Potts & Baker*,† ("brigadier general... issued a writ of election to the sheriff... [who] appointed... a

deputy... to open and hold an election"); *Jenkins v. Waldron*,† (action against voting inspector lacked essential proof of fraud or malice).

Eight of the cases cited by Chief Justice Roberts can be found consolidated in §§639-640, of Floyd Mechem's *A Treatise on the Law of Public Offices and Officers* (1890). These are marked above with a †. These eight cases regard what Mechem calls the "exemption from liability" – instead of immunity – for a variety of public servants with quasi-judicial discretion. After Mechem reviews the cases applying that exemption, in §§639-640, he says in §641 that the exemption is *conditional*:

> But in order to render the quasi-judicial officer exempt, be must, like the judicial, keep within the limit, fixed by law, of his jurisdiction; for if he exceeds it, except as the result of a mistake of fact, he will be liable to the party injured.

For Mechem, the exception to the common-law "exemption from liability" is the same as that described by Amar and Brauneis – an absence of authority proven in a contest of "trumps" and "justifications" as a matter of law.

Not Policy. Section II, B, of *Filarsky*, summarizied the "government" or "public" interest in, and the benefit of, immunity without using the word "policy," and in doing so avoided dividing the Court, as it was sharply divided in *Wyatt v. Cole*, 504 US 158 (1992), on the question of whether the Court's earlier discussions of "public policy" were intended

as: a separate "freewheeling" judge-made justify-cation for immunity, *Wyatt at 170*; or, a defense of the Court's affirmative incorporation of all pre-existing immunities into 42 USC §1983, *Wyatt at 164*; or, simply a recognition that "Congress did not intend to abrogate such immunities" as a matter of "public policy," *Id.* Chief Justice Roberts cites *Wyatt.* And he cites *Richardson v. McKnight*, 521 US 399 (1997). Both borrow the following quote from *Owen v. Independence*, 445 US 622, 637 (1980): "[I]mmunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'"

Setting immunity "policy," in other words, is the business of Congress; the Court follows its lead.

Florida, in *Foley et ux.*, has invented a new *unconditional* immunity – with no regard for the actions challenged, the rights asserted, or the absence of any law authorizing defendants' trespass. Neither common law, nor policy, support this disregard of due process and the priveledges of a "government of laws, and not men."

III. *Foley et ux.* is the right vehicle to reassert that it is judicial exposition of law, not judge-made policy, that grounds immunity.

The Court encourages "vigorous exercise of official authority," *Richardson v. McKnight*, 521 US

399, 408 (1997), even when a public servant is in doubt about the extent of that authority. But it has never suggested a public servant may do so when in doubt about the source of that authority. This petition asks the Court to reassert the common law rule that says they cannot – a public servant requesting "exemption from liability," and the court granting it, must declare the "trump" source of the authority that provides the "justification" for immunity.

Foley et ux. is the right vehicle to reassert that rule because there is no jurisdictional impediment, the rule is dispositive, and it advances the Court's immunity jurisprudence by correcting the drift of lower courts from the concrete, objective, common law standard that promotes efficient review.

There is no jurisdictional impediment. The trial court order is final as to the defendants granted immunity, *Petition Appendix 2a.* The appellate court affirmed without opinion, *Petition Appendix 7a,* and denied a request for written affirmance, *Petition Appendix 9a.* And the highest court of the State in which a decision could be had denied review, *Petition Appendix 11a.*

When the record is perfected pursuant Rule 12.7, it will confirm that our amended complaint alleged a cause of action in 42 USC §1983, for denial of an adequate predeprivation remedy, and that we argued the claim at every stage of review. The challenged grant of immunity necessarily applied to that claim. The trial court's reliance upon *Harlow* for

all claims implies this, and certainly gave its grant the requisite "interwoven" breadth, *Michigan v. Long*, 463 US 1032 (1983). Finally, Fla. Stat. 768.28(9)(a), cannot be an independent state ground for granting immunity to 42 USC §1983, *Haywood v. Drown*, 556 US 729 (2009).

Moreover, because immunity destroys otherwise available remedies, and a remedy is property, *Pritchard v. Norton*, 106 US 124, 132 (1882), the trial court's order directly implicates the Fourteenth Amendment, irrespective of the causes asserted, and consequently can be reviewed by this Court for its violation of the process due – the common law contest of "trumps" and "justification" required when a public servant claims an "exemption from liability."

The requested rule will be dispositive. The defendants cannot show their enforcement action "trumps," or had any "justification" in, either Art. VIII, §1(j), or Art. IV, §9, Fla. Const., or that it was authorized by any provision in the Orange County code, or that we had any adequate post-deprivation remedy but damages. If they could, they would have done so; we have always conceded that if they could demonstrate any one of these three things, they were due immunity. So, in this case the rule will be dispositive.

As the record will show, the defendants asked for an *unconditional* immunity, untethered to any ordinance, statute, or state constitutional provision that authorized their challenged actions. The court, in error, gave them what they asked for.

The rule corrects lower court departure from the objective common law standard and it promotes efficient review. It is not difficult to find immunity opinions that describe a public servant's actions as discretionary but that do not identify any provision of law that vests the defendant with the authority required to take the challenged action. An example is, *Downer v. Lent*, one of the twelve cases cited by Chief Justice Roberts in *Filarsky*. This does not mean that the decision was wrong, but simply that the opinion omitted its justifying proof – the court didn't show its work. The danger in opinions that don't show their work is that they fail to teach their common law foundation, and, as a result, understanding of that foundation is lost.

Understanding of that common law foundation is lost in Florida's Fifth District. On review the Fifth District affirmed the Ninth Circuit's order without opinion. That order, taken at face value, grants immunity *unconditionally*.

Foley et ux. is not an exception in the Fifth District. It is the rule. No Fifth District opinion granting public servant immunity has required proof of authority. Florida's four other District Courts do. Florida's Supreme Court would not review *Foley et ux.*, because the Fifth District on request for rehearing and for written opinion refused to concede the District Court split, and refused to construe the state constitutional provisions that denied defendants substantive and procedural authority, Art. IV, §9, and Art. VIII, §1(j), Fla. Const.; the Florida Supreme Court interprets the last

constitutional amendment to its jurisdiction to abolish the "inherency doctrine" established in *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla. 1965), by which it could reach down and review the record of district court decisions without opinion, *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980), and now reviews the opinions of Florida's five district courts by invitation only, i.e., by express, certified conflict, validation, or invalidation of statute or constitution.

The departure by Florida's Fifth District from "the common law as it existed when Congress passed §1983 in 1871," *Filarsky at 1662*, requires an explanation. We ask the Court to remand for that purpose.

CONCLUSION

Informed legal history, sound textual analysis, and judicial prudence all weigh in favor of the requested rule. This case is the right vehicle for that rule. For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

David and Jennifer Foley
1015 N. Solandra Dr.
Orlando, FL 32807-1931
407 674-2180, 407 491-4319
david@pocketprogram.org,
jtfoley60@hotmail.com