IN THE SUPREME COURT OF FLORIDA

KATIE D. TUCKER,

Petitioner/Defendant,

vs. CASE NO. 80,991

DONALD GEORGE RESHA,

Respondent/Plaintiff.

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REVIEW OF A CERTIFIED QUESTION OF
THE FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner will sometimes be referred to as "Tucker," while Respondent will sometimes be referred to as "Resha." References to the record are either to the Appendix to Petitioner's Brief or the Appendix to Respondent's Brief and will be designated as either "Pet. App. __ " or "Res. App. __."

STATEMENT OF THE CASE

One extremely important omission from Petitioner's statement of the case is that the instant proceeding arises from denial of her second motion for summary judgment.

Resha's complaint contained eight counts, four of which survived Tucker's motions for judgment on the pleadings and summary judgment. Of the surviving four, two are the federal counts that form the basis of the instant action and the other two are Florida counts. Tucker's filed her first motion for summary judgment on the federal claims on July 13, 1990, arguing for the same immunity she asserts in this proceeding. Res. App. A. The trial court denied the motion on October 4, 1990. Res. App. B.

Following loss of her first summary judgment motion, Tucker sought neither appeal nor certiorari relief from any court. Tucker waited eighteen months to file her second motion for summary judgment, making the same arguments on the federal counts and citing the same basic authorities and doctrines that the trial court had already rejected along with the same affidavit of Tucker that was attached to the first motion. Pet. App. C. The court

denied this second motion on May 22, 1992. Pet. App. J.

When Tucker filed her second motion for summary judgment on March 31, 1992, the trial date had long been set for May 26-29, 1992. Prospects of completing trial court disposition and any sort of appellate review without stopping the trial were virtually nil. At close of business on Friday, May 22, 1992, the last business day before trial, Tucker petitioned the First District Court of Appeal to stop the trial on the two federal counts. With no opportunity for Resha to be heard, during the Memorial Day weekend, the First District Court of Appeal ordered a stay on trial of the two federal counts. Res. App. C.

At Resha's insistence, trial proceeded as scheduled on the two Florida counts, defamation and violation of the state constitutional right to privacy. The jury returned a verdict for Resha on both counts totalling $396,000 in compensatory and punitive damages. Through special interrogatories, the jury found that Tucker acted outside the scope of her authority, acted with malice, and acted with improper purpose in her actions against Resha. Res. App. D. The trial court specifically adopted the findings of the jury and incorporated them by reference in its Amended Final Judgment. Res. App. E. The facts supporting the two Florida law claims are identical in every particular to the facts supporting the First Amendment claim. The facts supporting the civil rights cover-up claim were not presented to the jury.

STATEMENT OF THE FACTS

Tucker's statement of the facts features grievous errors and omissions, not the least of which is the assertion that no material facts were in dispute at the time of her second motion for summary judgment.

Summary of Complaint

In essence, Resha's case, on the pertinent issues before this Court, was that Tucker abused the machinery of government to gratify her political enmity against Resha.

Resha had narrowly lost an election in 1985 to Tucker's husband for president of the Florida AFL-CIO and was expected to run again in 1989. Upon becoming executive director of the Florida Department of Revenue in 1988, Tucker claimed to her staff that she had a confidential source linking Resha to illegal trafficking in guns, drugs, and pornography, as well as involvement in money laundering, organized crime, and tax evasion. Upon Tucker's instructions, the Department of Revenue extensively investigated Resha and entered upon his premises to audit his businesses. The Governor ordered the Florida Department of Law Enforcement to investigate Tucker's conduct toward Resha. In the course of that investigation, Tucker repeated the defamatory statements about Resha in a fashion designed to make these allegations public record and to be reported widely in the media. These allegations formed the general basis for the count alleging governmental retaliation against Resha for exercise of his First Amendment rights in

opposing Tucker and her husband. Pet. App. A.

Upon receipt of the FDLE's conclusion that Tucker had used her office to retaliate against Resha, the Governor and the Cabinet suspended Tucker from office. During the suspension, Tucker returned to her office and falsified, backdated, and altered various official documents, creating a phony paper trail that would portray her as blameless in the persecution of Resha, would enhance the credibility of the defamation against Resha by attributing it to more responsible sources, and would poison the well of evidence Resha needed for his civil suit against Tucker. FDLE caught on to Tucker's scheme as she began circulating the phony documents and arrested her. These allegations formed the basis for Resha's other federal count, civil rights cover-up/interference with access to courts. Pet. App. A.

Facts of Record

Tucker correctly states that her deposition and her affidavit were of record at the time of denial of her second motion for summary judgment. She incorrectly states that her affidavit was undisputed and she omits from her appendices to this Court the three voluminous investigative reports by FDLE that were exhibits to her deposition.[1] However, it is not even necessary to consult

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[1] Tucker now takes the position that these documents don't count because they are "unauthenticated." Petitioner's Brief at 15. The rationale for this assertion is that Tucker disclaimed identification of the documents at the end of her deposition after positively identifying many of them throughout the deposition. (continued...)

the FDLE reports to identify disputed issues of material fact that were before the trial court that were more than sufficient to prohibit summary judgment under any known standard.

The affidavit that Tucker attached to both her motions for summary judgment denies any involvement whatever with the actions taken against Resha. Pet. App. D. ¶¶ 5,6.[2] Numerous items of testimony from her deposition contradict these assertions and create significant triable issues of fact.

Tucker stated that a "confidential source" told her Resha was guilty of trafficking in pornography. Pet. App. E., 67. The confidential source also asked her to look into illegal gun sales by Resha. Pet. App. E., 72. Later Tucker retracted this testimony, stating that the confidential source merely mentioned Resha's name in another context, not in connection with illegal activity, and that she doesn't remember having Resha investigated. Pet. App. E., 76. Tucker authenticated an internal Department of Revenue document stating that she had ordered investigations of

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[1](...continued)
This is a recurrent theme throughout the Petitioner's Brief -- that Tucker is free to pick and choose which of her contradictory statements should control for summary judgment purposes. Under this theory, dishonest testimony would be rewarded. The dishonest deponent can pick one statement now, its contradiction later, and call each undisputed.

[2] Tucker's affidavit is completely silent on the civil rights cover-up claim arising from falsification of the documents. She made no effort whatever to introduce facts in support of her position on this claim in either of her motions for summary judgment.

Resha and that no criminal activity had been found. Pet. App. E., 87. Tucker admitted that division director Larry Wood confronted her with the assertion that she had assigned him to undertake the investigation of Resha. Pet. App. E., 89. Tucker accused FDLE of omitting exculpatory information on her from its report. Pet. App. E., 100-1. Tucker denied Larry Wood's assertion that she had also told him the derogatory information on Resha had come from a confidential source. Pet. App. E., 104-6. Tucker denied assigning the investigation to Larry Wood. Pet. App. E., 117-18. Tucker admitted telling FDLE Resha was a likely target for an investigation. Pet. App. E., 124. Tucker denied having received copies of the audits of Resha's businesses, though her name was on the circulation list. Pet. App. E., 135. Tucker authenticated a handwritten letter she wrote to Ash Williams accusing him of having consulted with her on including Resha in an investigation and of having approved her decision to investigate Resha. However, she thinks she may not have been telling the truth when she wrote that letter. Pet. App. E., 175. Tucker admitted telling FDLE she requested an investigation of Resha and his businesses because a legislator had told her to do so. Pet. App. E., 183-4. Tucker said FDLE was able to get her to make numerous admissions by "putting words in my mouth." Pet. App. E., 191. Near the end of the deposition, Tucker stated that her "confidential source" had been Senator John Hill, but that he had not linked Resha with any wrongdoing. Pet. App. E., 319.

On the cover-up claim, Tucker simply denies that she was the one who falsified the documents. She has never asserted that such activity is legal or within her authority. However, her deposition creates factual issues.

Tucker stated that photocopies of the falsified documents came to her front porch from an unknown source. Pet. App. E., 207. Tucker identified several of the documents and admitted having written them.[3] Pet. App. E. 213-15. Tucker admitted to being arrested for falsification of government documents and to pleading nolo contendere to the charge. Pet. App. E., 269. Tucker admitted typing a letter that appears on a typewriter ribbon immediately before two falsified documents. Pet. App. E., 274. Tucker stated that she heard some unknown person enter her suite of offices as she was typing on the evening the documents were falsified on the typewriter she was using. Pet. App. E., 277. Tucker acknowledged that an imprint of her initials from the letter she admits typing came through onto the sheet of paper on which one of the falsified documents was typed, but she has an innocent excuse for how it got there. Pet. App. E., 278. She also has an exculpatory excuse for how her fingerprint got on the falsified document. Pet. App. E., 278-9. Tucker had visited her attorney's office earlier the same day the originals of the falsified documents turned up in a

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[3] Tucker does not share the view of FDLE that all the documents in question were fraudulent and created long after the fact. Tucker did not admit to falsifying anything. That in itself is a triable issue of fact.

stairwell at that office. Pet. App. E., 281.

SUMMARY OF ARGUMENT

The Court lacks jurisdiction over the instant Petition on at least four grounds.

First, Petitioner sought no appellate review of denial of her first motion for summary judgment. Her appellate rights terminated in 30 days. She can not start a new appellate clock by filing a repetitive motion. Thus the denial of her second motion is not reviewable.

Second, the timing of Tucker's second motion was calculated to launch a bad-faith appeal to stop the trial and was therefore the sort of abusive appeal that works a forfeiture of jurisdiction under established law.

Third, Tucker's basis for seeking summary judgment and review of its denial is that she did not perform the deeds alleged. The law is settled that this defense is a purely factual issue, not reviewable by pre-trial appeal.

Fourth, Tucker is barred by collateral estoppel from seeking review of the settled issues underlying Respondent's First Amendment claim.

The Supremacy Clause of the U.S. Constitution does not compel Florida to copy federal practice on appeals of denials of qualified immunity. The act of Congress under which federal courts allow such appeals specifically governs federal courts only. Petitioner seeks to create confusion in this regard by merging the right to

assert qualified immunity with the right to appeal a pre-trial denial of it. Even the underlying right to assert the qualified immunity defense is merely procedural, not substantive. The U.S. Supreme court has consistently held that states may apply their own forms of practice and procedure to federal civil rights claims so long as they do not burden important federal rights. States may provide greater protection of federal rights to plaintiffs, but not lesser protection, than federal courts allow. This is such a case.

Only one state court has found the Supremacy Clause relevant to this inquiry. That court resolved the question in much the same fashion as the court below, opting for something less than a plenary interlocutory appeal. Even where the Supremacy Clause mandates establishment of a state procedure, it need not be an exact duplicate of its federal counterpart. All other courts that have squarely faced the question have held that the Supremacy Clause does not apply to the instant inquiry.

Tucker has used the certified question in this case as a vehicle for smuggling in other issues that were not properly noticed nor jurisdictionally briefed. These extraneous issues are not ripe for consideration in this action and ought not to be decided.

The Court should decline Petitioner's invitation to exercise its rule-making authority. That process should be accompanied by more careful consideration and better information gathering than this case can provide.

The parade of horrors predicted by Petitioner is wholly speculative and unsupported by experience. Piecemeal importation of federal practice should not be undertaken without consideration of how those features fit into the system as a whole. The federal system is more generous with a defendant's qualified immunity appeals, but it has the enforcement means to regulate abuses of those appeals. Florida does not.

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

An assessment of the facts and circumstances of this case reveals that the Court lacks jurisdiction to review this case for at least the following four reasons.

A. DENIAL OF THE SECOND MOTION FOR SUMMARY JUDGMENT WAS AND IS UNREVIEWABLE.

Tucker and her Amici advance the view that denial of a motion for summary judgment based on federal qualified immunity in a Florida court entitles the defendant to a plenary interlocutory appeal. The District Court below held instead that such orders are reviewable only by certiorari. Tucker v. Resha, 610 So. 2d 460 (Fla. 1st DCA 1992). Either way, jurisdiction does not lie for any sort of appellate review in the instant case because both forms of review must be sought within 30 days of rendition of the order.[4]

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[4] Rule 9.130(b), Fla. R. App. P., requires that interlocutory appeals be commenced within 30 days of rendition of (continued...)

Tucker sought no review at all of the denial of her first motion for summary judgment. The twenty months that elapsed between that denial and the filing of her petition for review of denial of the second motion for summary judgment is far more than 30 days. The law of Florida is that a litigant who has missed an appellate deadline may not set a new appellate clock running by filing a repetitive motion on the same subject. Bensonhurst Drywall, Inc. v. Ledesma, 583 So. 2d 1094 (Fla. 4th DCA 1991).

In Bensonhurst, the petitioner filed a motion for protective order against certain discovery, lost the motion, let the time for review run out, filed a beefed up version of the same motion, lost it again, and sought review by certiorari. The reviewing court was not fooled by this gambit:

> Any petition for writ of certiorari should have been filed after the first order denying the motion for protective order. Petitioner cannot evade the time requirements of Florida Rule of Appellate Procedure 9.100(c) by filing successive motions addressed to the same issue.

Id.

Application of this doctrine to the instant case is especially apt because denial of qualified immunity and denial of a protective order share the quality of not being amenable to meaningful post-trial relief. By then the protectible information is already out

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[4](...continued)
the order to be reviewed. Rule 9.100(c) requires that petitions for certiorari be filed within 30 days of rendition of the order to be reviewed.

of the bag or the immune official has already been forced to stand trial. The lesson is that courts will grant fair consideration to these irretrievable interests, but will also expect the holders of those interests to value them enough not to play tactical games with them or to assert them frivolously. It is the lesson of the boy who cried "wolf."

The instant case illustrates the wisdom of enforcing such a policy. Faced with a literally hopeless case, but an unlimited reservoir of taxpayer dollars to defend it, Tucker pursued the only possible strategy for victory: bankrupt the Plaintiff before trial. This could best be accomplished by timing a repetitive motion for summary judgment so close to trial that the trial would have to be stayed for appellate review of the inevitable denial of the motion. Trial dockets being what they are, this can buy the Defendant perhaps a year of time to continue burying the Plaintiff under a mountain of paper and setting costly depositions in distant cities. This can work where a simple motion for continuance would surely be denied.

B. EVEN UNDER FEDERAL LAW, MANIPULATIVE MITCHELL APPEALS CONSTITUTE A WAIVER OF APPELLATE JURISDICTION.

Tucker and her amici have made much of the contention that she and others like her would have fared better in federal court and that Florida should therefore mimic federal practice with regard to appeals taken pursuant to Mitchell v. Forsyth, 472 U.S. 511 (1985). It well may be that a handful of officials would so benefit, but

this Court should take cognizance of the federal courts' recognition that most such appeals are without merit and of the means by which federal courts have denied jurisdiction to many Mitchell appeals. Following a discussion of the policy allowing such appeals, Judge Easterbrook, for a unanimous panel of the Seventh Circuit, added the following:

> Although this approach protects the interests of the defendants claiming qualified immunity, it may injure the legitimate interests of other litigants and the judicial system. During the appeal memories fade, attorneys' meters tick, judges' schedules become chaotic (to the detriment of litigants in other cases). Plaintiffs' entitlements may be lost or undermined. Most deferments will be unnecessary. The majority of Forsyth appeals - like the bulk of all appeals - end in affirmance. Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding unjustified appeals. Defendants may take Forsyth appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal. Proceedings masquerading as Forsyth appeals but in fact not presenting genuine claims of immunity create still further problems.
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> Frivolousness is not the only reason a notice of appeal may be ineffectual. Defendants may waive or forfeit their right not to be tried. If they wait too long after the denial of summary judgment, or if they use claims of immunity in a manipulative fashion, they surrender any entitlement to obtain an appellate decision before trial.
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> We have no doubt, however, that defendants who play games with the district court's schedule forfeit their entitlement to a pre-trial appeal.

Apostol v. Gallion, 870 F.2d 1335, 1338-9 (7th Cir. 1989.)

State courts are even more vulnerable than federal courts to this sort of abuse because their practices tend to be more flexible, frequently not enforcing the rigid pre-trial deadlines

that tend to be virtually immutable in federal practice. Even so, the Seventh Circuit has not been alone in having to take firm action to curb these abuses. In refusing to hear an appeal from a denial of summary judgment on qualified immunity filed after a reasonable cut-off date, one court opined as follows:

> To hold otherwise would be to open the floodgates to appeals by defendants seeking delay by asserting qualified immunity at the last minute . . . If every denial of a motion for leave to file a summary judgment motion asserting qualified immunity were immediately appealable, defendants would have a guaranteed means of obtaining last-minute continuances. We read Mitchell v. Forsyth as affording defendants a reasonable opportunity to obtain review of their qualified immunity claims without losing part of their immunity rights by having to stand trial. However, Mitchell is not designed as an automatic exemption from the orderly processes of docket control. Thus we conclude that we have no jurisdiction under the facts and circumstances presented by the instant appeal.

Edwards v. Cass County, 919 F.2d 273, 276 (5th Cir. 1990) (emphasis added).

On the related issue of multiple appeals, federal courts have had to set forth policy considerations militating against similar abuses of Mitchell v. Forsyth:

> Unless courts of appeal are careful, appeals on the authority of Mitchell could ossify civil rights litigation. Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off trial. A sequence of pre-trial appeals not only delays the resolution but increases the plaintiff's costs, so that some will abandon their cases even though they may be entitled to prevail. . . . Although it is important to protect public officials from frivolous claims and burdens of trials, it is also important to curtail the outlay and delay of litigation, so that victims of

> official misconduct may receive the vindication that is their due.

Abel v. Miller, 904 F.2d 394 (7th Cir. 1990).

It is important to understand that, though these federal courts set forth policy bases for curbing Mitchell abuses, the grounds for dismissing the appeals are jurisdictional. It is not just that the strategic ploys discussed above are disfavored or undesirable, but that they literally work a forfeiture of jurisdiction and may not be heard.

The utter frivolousness of Tucker's petition for review of denial of her second motion for summary judgment is apparent from the mechanics of qualified immunity itself. The U.S. Supreme Court has held that qualified immunity protects its holder not only from trial, but even from submitting to discovery. It therefore should be asserted early in the case and appealed promptly if an appeal is to be taken. Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987). To the extent that discovery is necessary to resolve the qualified immunity issue, discovery should be tailored specifically to the qualified immunity issue. Id. Tucker sought no appellate review of the denial of her first motion for summary judgment and made no effort to limit discovery to the qualified immunity issues at any time in the next eighteen months. She had submitted to over two years of pretrial proceedings before seeking appellate review. This fairly well waives any appeal or any claim to a serious expectation of being eligible for qualified immunity. Far from

helping, discovery turned her case from poor to hopeless.

C. A DEFENSE DENYING THE DEEDS ALLEGED IS OUTSIDE THE SCOPE OF QUALIFIED IMMUNITY AND THEREFORE INELIGIBLE FOR INTERLOCUTORY APPELLATE REVIEW.

Tucker's defense to the allegations of the complaint in this action has been that she did not perform the deeds alleged. In federal case law, this has come to be dubbed as the "I-didn't-do-it" defense. In her affidavit[5] and her deposition, Tucker denied ever ordering any investigations or audits of Resha and his businesses. She offered no affidavit denying falsification of the documents, but denied doing that in her deposition. See supra, at 6-7.

The law governing appeals on such a basis has been summed up succinctly:

> Mitchell did not create a general exception to the finality doctrine for public employees. Every court that has addressed the question expressly has held that Mitchell does not authorize an appeal to argue "we didn't do it." . . . We join them.

Elliot v. Thomas, 937 F.2d 338, 342 (7th Cir. 1991) (string cite omitted).

The right of a public official, sued under 42 U.S.C. § 1983, to launch an interlocutory appeal of a denial of summary judgment

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[5] Tucker's affidavit is deliberately ambiguous, stating that she did not "personally" perform the deeds alleged. Pet. App. D., ¶¶ 5,6. That sort of evasion is unavailing in this context because, "The issue of authorization, approval or encouragement is generally one of fact, not law." Stoneking v. Bradford Area School District, 882 F.2d 720, 726 (3d Cir. 1988). This case specifically forbids interlocutory appeal based on the "I-didn't-do-it" defense. Id.

derives wholly from the reading of the "collateral order" doctrine of 28 U.S.C. § 1291 that was established in Mitchell v. Forsyth, 472 U.S. 511 (1985). Collateral orders take their name from the fact that such orders are collateral to the merits of the case -- that some legal issue such as an official's entitlement to qualified immunity might not be bound up with disputed facts and may be decided without making factual determinations.[6] The general theory of allowing such interlocutory appeals is that the benefits of the immunity would be lost in significant part merely by having to submit to discovery and stand trial, even if the official were to prevail at trial.

Thus the Supreme Court in Mitchell carefully circumscribed the pre-trial appellate right by excluding fact issues:

> [A] district court's denial of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S. C. § 1291.

Id. at 530 (emphasis added).

The purest form of factual issue is a dispute over whether or not an act actually occurred or whether it was performed by this person instead of that one. Such is Tucker's basis for seeking interlocutory review. That this is never a proper basis is a well-settled question:

> To state this question is to answer it. A defense of no wrongdoing is not collateral to the merits; it is the nub of the case.

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[6] A claim of immunity "is conceptually distinct from the merits of the plaintiff's claim." Mitchell, 472 U.S. at 527.

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> When rules of law clearly establish public officials' duty, the immunity defense is unavailable. So, too, the interlocutory appeal to vindicate the right not to be tried is unavailable when there is no legal uncertainty; there is no separate "right not to be tried" on the question whether the defendant did the deeds alleged; that is precisely the question for trial.

Elliot v. Thomas, 937 F.2d 338, 340-1 (7th Cir. 1991) (emphasis in original). This is also the law in the Eleventh Circuit. Bennett v. Parker, 898 F.2d 1530, 1532 (11th Cir. 1990) (collecting cases).

The exclusion of the "I-didn't-do-it" defense from interlocutory appeal is a complete jurisdictional bar. Gorman v. Robinson, 977 F.2d 350, 354 (7th Cir. 1992). That court also warned against allowing such issues to be improperly framed and presented as questions of law: "By sleight of hand you can turn any defense on the merits into a defense of qualified immunity." Id.

D. COLLATERAL ESTOPPEL BARS REVIEW OF DENIAL OF TUCKER'S QUALIFIED IMMUNITY CLAIM ON THE FIRST AMENDMENT COUNT.

Resha's First Amendment claim against Tucker rests on the identical set of facts and deeds as his state law claims for defamation and invasion of privacy. For both of the latter claims, a jury has made specific findings that Tucker acted outside the scope of her authority as executive director of the Florida Department of Revenue. Res. App. D. These jury findings were specifically adopted and incorporated in an Amended Final Judgment duly entered and recorded in the records of the Circuit Court of the Second Judicial Circuit. Res. App. E.

Under the doctrine of collateral estoppel, the finding of this

verdict and judgment, that Tucker acted outside the scope of her authority, may not be relitigated in any subsequent proceeding between these parties. Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843, 845 (Fla. 1984).

The significance of this particular collateral estoppel is that, under federal law, the threshold inquiry in a qualified immunity determination is whether the official was acting within the scope of authority. If the answer is negative, the reviewing court must simply deny the claim without moving on to the next step of deciding whether an established right was violated. Ziegler v. Jackson, 716 F.2d 847, 849 (11th Cir. 1983).

The jury verdict and judgment in this collateral case is not properly before this Court for review. The facts of the civil rights cover-up were not presented to the jury, but at least on the First Amendment issue, Tucker is now estopped from asserting qualified immunity in this proceeding and this Court lacks jurisdiction to hear her claim in that regard.

II. THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION DOES NOT REQUIRE FLORIDA COURTS TO COPY FEDERAL PROCEDURE ON INTERLOCUTORY APPEALS OF DENIALS OF QUALIFIED IMMUNITY.

Perhaps the centerpiece of Tucker's argument to this Court and that of Amicus State of Florida is that the Supremacy Clause of the U.S. Constitution somehow requires Florida courts to grant a plenary interlocutory appeal to public officials sued in their individual capacities who have been denied summary judgment on a

claim of federal qualified immunity in a state trial court.[7] This is said to be so because the U.S. Supreme Court in Mitchell v. Forsyth, 472 U.S. 511, 530 (1985), has held that 28 U.S.C. § 1291 requires federal courts to hear such appeals, so it must have meant for state courts to copy this procedure.

The argument is wholly blue smoke and mirrors, as evidenced by the fact that it is never set forth systematically in any of these briefs. It collapses under analysis.

The Supremacy Clause says this:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article VI, Clause 2, U.S. Const.

Thus any provision of the U.S. Constitution, a treaty, or an act of Congress mandating state courts to grant plenary interlocutory appeals of federal qualified immunity claims would necessarily override any conflicting state enactments or practices. So far so good.

The fly in the ointment is that Mitchell, 472 U.S. at 530, specifically identifies 28 U.S.C. § 1291 as the act of Congress upon which it relies for authority to grant the appeals in

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[7] Amicus Florida Sheriffs' Self-Insurance Fund blows a few flirtatious kisses at this notion in its brief at 18-19, but scholarly acumen apparently applies the brakes before a committed embrace occurs.

question. That enactment, in pertinent part, states:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

28 U.S.C. § 1291.

Two points are immediately apparent from this language. First, Congress mandated nothing at all to state courts, only federal courts of appeals. Secondly, it granted authority to hear appeals of "final decisions," not orders denying summary judgment. Recognizing that orders denying summary judgment ordinarily don't qualify under this language, the Supreme Court in Mitchell fit qualified immunity appeals into a small category of "collateral orders," that, though not really final, should be treated as final because they determine rights that would be lost if appeal were deferred until after trial. Mitchell, 472 U.S. at 524-5. Thus the appellate right at issue in the instant proceeding arises not even from an act of Congress, but from a judicially created exception to an act of Congress which was explicitly aimed only at federal courts.

This explains why Tucker and her Amici, throughout these briefs seek to conflate the right to assert a defense of qualified immunity in state courts with a "right" to appeal, before trial, a denial of summary judgment on the subject, hoping perhaps that nobody will notice the difference.

The right to assert a defense of qualified immunity in the

instant case derives from 42 U.S.C. § 1983, an act of Congress covering proceedings in both state and federal courts and an authentic example of the Supremacy Clause in action. Howlett v. Rose, 496 U.S. 356 (1990). The "right" to a pretrial appeal is not remotely connected to the Supremacy Clause.

Tucker's brief at 6 and The State of Florida's brief at 8 each cite the identical quotation from Howlett as evidence of an appellate right under the Supremacy Clause:

> The elements of, and the defenses to, a federal cause of action are defined by federal law.

Id. 496 U.S. at 375.

This is an example of the effort to smuggle appellate rights into the Supremacy Clause by wrapping them in the blanket of the qualified immunity defense itself. How, pray tell, does the appeal of a denial of summary judgment come to be a "defense"? Going further (and always without specific authority) Tucker and both Amici repeatedly characterize this exceptional federal appellate procedure as a "substantive right" and, in one instance, even as a "substantive due process right."[8] Sheriffs' Self-Insurance Fund Brief at 14. The federal appellate right in question is at least four rungs down the ladder from that status. It is not constitutionally based; it is not mandated by statute; it is not a defense; and it is purely procedural, not substantive at all.

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[8] Now it sounds like the Fourteenth Amendment has been bootlegged in along with the Supremacy Clause.

Indeed, the qualified immunity defense itself is merely procedural rather than substantive.

> [I]t is hard to depict a "right not to be tried" as substantive; it sounds distinctly procedural. The substantive right belongs to the plaintiff. It is better, we think, to recognize that official immunity is an affirmative defense, which need be asserted only after a plaintiff gets past the (slight) hurdles established by Rules 8 and 9(b).

Elliot v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991).

The appellate right in qualified immunity cases, then, is a second level procedural right -- a procedure that effectuates a procedure. It is hard to get much farther from a constitutional right than that.[9]

The reliance of Tucker and her Amici on Howlett is ironic, to say the least. The central holding of that case is that state courts may not treat § 1983 actions any less favorably than they treat comparable state law claims -- that state courts must exercise their preexisting jurisdiction over federal law claims without discriminating against them. Howlett, 496 U.S. at 373-80. That is precisely what the court below has done -- apply the same standard of interlocutory appellate review to a federal immunity that it applies to a state immunity. Indeed, the Howlett Court labored mightily not to allow the interpretation of its holding that Tucker now urges:

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[9] By contrast, the First and Fourteenth Amendment rights Resha seeks to vindicate in this action are unquestionably constitutional rights of the first order.

> When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it the requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them. The States thus have great latitude to establish the structure and jurisdiction of their own courts. In addition, states may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law.

Howlett, 496 U.S. at 372 (internal citations and quotation marks omitted).

Even more disingenuous is the reliance of Tucker and her Amici on Casey v. Felder, 487 U.S. 131 (1988). The point of that case, sustained and prolonged throughout, is that state law may not impose greater burdens than does federal law on § 1983 plaintiffs, not defendants.[10]

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[10] As a general matter, this principle is a version of an important body of American constitutional law known as the "PruneYard doctrine," after PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). The doctrine holds essentially that a state may protect a citizen's fundamental rights against government actors to a greater degree than federal law demands, but not to a lesser degree. This Court has frequently applied the doctrine, as, for example in In Re T.W., 551 So. 2d 1156 (Fla. 1989). This is certainly not to say that a public official sued under § 1983 is herself without fundamental rights such the right to trial by jury or the right to counsel. It is to say that the feeble procedural wrinkle that allows an interlocutory appeal in federal court comes nowhere near a fundamental right that can be counterposed to the First or Fourteenth Amendments.

The court below did not forbid any sort of interlocutory appellate review. It merely provided a more limited form than do (continued...)

The Court invalidated a state notice-of-claims statute in Casey because it burdened plaintiffs' § 1983 claims

> for a reason manifestly inconsistent with the purpose of the federal statute: to minimize governmental liability.

Id. at 141.

Though the notice-of-claims statute did not discriminate between federal and state causes of action, it was nevertheless stricken because:

> [T]he fact remains that the law's protection extends only to governmental defendants and thus conditions the right to bring suit against the very persons and entities Congress intended to subject to liability.

Id. at 144-5.

Like the notice-of-claim provision, the interlocutory appeal for public officials creates a special privilege for a class of governmental defendants, thereby imposing a special burden

> only upon a specific class of plaintiffs -- those who sue governmental defendants -- and, as we have seen, is firmly rooted in policies very much related to, and to a large extent directly contrary to, the substantive cause of action provided those plaintiffs.

Id. at 145.

Respondent does not wish to be misunderstood. This line of

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[10](...continued)
federal courts -- certiorari rather than plenary appeal. Even where certain inarguably fundamental federal rights, like the right to trial by jury, are concerned, states may still deviate from federal practice even if the result may be outcome-determinative in some cases. Apodaca v. Oregon, 406 U.S. 404 (1972) (federal courts must require unanimous jury verdicts, but state courts applying the same right to trial by jury need not copy the unanimity requirement).

argument is not advanced to contend that Florida may not amend its rules to allow interlocutory appeals in § 1983 cases. The argument rather is that Florida is not compelled to do so by the Supremacy Clause or anything else. That is the answer to the question certified by the District Court in this case. State courts may be more friendly than federal courts to § 1983 plaintiffs, but not more hostile. That is the bottom line.

> States may make the litigation of federal rights as congenial as they see fit -- not as a quid pro quo for compliance with other, uncongenial rules but because such congeniality does not stand as an obstacle to the accomplishment of Congress' goals.

Id. at 151.

The U.S. Supreme Court has made clear that it will not read into federal law a Congressional intent to override state practice and procedure where such intent is not plainly manifest:

> [I]f Congress intends to alter the usual constitutional balance between the states and the Federal government, it must make its intention to do so unmistakably clear in the language of the statute . . . . Congress should make its intention clear and manifest if it intends to preempt the historic powers of the States. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Will v. Michigan Department of State Police, 491 U.S. 58, 65 (1989) (internal citations and quotation marks omitted).

Of approximately twenty state court cases Respondent has been able to locate which have passed upon an official's entitlement to an interlocutory appeal of a denial of qualified immunity in a

federal civil rights case filed in a state court, only one has perceived any constraint arising from the Supremacy Clause. McLin v. Trimble, 795 P.2d 1035 (Okl. 1990). Interestingly enough, the McLin court refused to adopt the plenary appeal practices of the federal system, opting instead for "original review," much as the court below did in the instant case. Id. at 240. Another court adopted an analogous form of limited review with no apparent Supremacy Clause pressure. Henke v. Superior Court, 161 Ariz. 96, 775 P.2d 1160 (Ariz. App. 1989).

Several other state courts have flatly rejected the Supremacy Clause argument. Noyola v. Flores, 740 S.W.2d 493 (Tex. App. 1987); Ohio Civil Service Employees Association, Inc. v. Moritz, 39 Ohio App.3d 132, 529 N.E.2d 1290 (Ohio App. 1987); Jaggers v. Zolliecoffer, 290 Ark. 250, 718 S.W.2d 441 (Ark. 1986); Pizzato's Inc. v. City of Berwyn, 168 Ill. App.3d 796, 523 N.E.2d 51 (Ill. App. 1988), cert. den., 489 U.S. 1054 (1989).

In addition to Pizzato's, the U.S. Supreme Court has twice denied certiorari, in unreported cases, to officials seeking to make Supremacy Clause arguments in this connection. Lockwood v. Kozak, 111 S. Ct. 2798 (1991) (summarized at 59 U.S.L.W. 3759) and Swain v. Lindsey, 489 U.S. 1067 (1989) (summarized at 57 U.S.L.W. 3574).

III. TUCKER IMPROPERLY SEEKS REVIEW FAR BEYOND THE CERTIFIED QUESTION.

The certified question before the Court is simply whether

Tucker is entitled to the same standard of review in state court as she would get in federal court on denial of her motion for summary judgment on the issue of qualified immunity. The difference is that federal courts allow plenary appeal as a matter of right while the court below opted for more limited and discretionary review by certiorari. Tucker v. Resha, 610 So. 2d 460 (Fla. 1st DCA 1992).

Tucker now seeks to turn this proceeding into her plenary appeal. She asks this Court to overturn not only the District Court's determination of what kind of review the Florida rules allow, but also the correctness of the District Court's application of the standard it did apply, and trial court's denial of the summary judgment. Petitioner's Brief at 9-18. That is a rather ambitious agenda of matters extraneous to the certified question.

Tucker has made no effort properly to invoke this Court's jurisdiction under Rule 9.030(a)(2)(A), Fla. R. App. P. Piggy-backing these extraneous issues onto the certified question is a means of evading the requirement of giving proper notice and submitting a jurisdictional brief. It ought not be allowed.

Though this Court has authority to consider sua sponte whatever aspects of a case it may choose and has on some occasions ruled on matters beyond the certified question presented, in this case there is not a proper record, there has not been proper notice, and the issues are simply not ripe for relitigation in this forum.

Accordingly, Respondent respectfully requests that the Court

abstain from reaching the extraneous issues presented at pp. 9-18 of Petitioner's brief.

IV. THE COURT SHOULD DECLINE THE INVITATION TO EXERCISE ITS RULE-MAKING AUTHORITY

Petitioner and both her Amici have urged the Court to use this case as a vehicle for amending the appellate rules to create a special right to appeal denials of federal qualified immunity.[11]

Interestingly enough, all these proponents are silent on the issue of likewise amending the rules to accommodate interlocutory appeals of state qualified immunity, federal and state absolute immunity, and sovereign immunity, though the policies for and against such appeals are the same. Prudence dictates caution in embarking down this endless path lest the exceptions to the final order doctrine begin to swallow the rule.

Petitioner and the Amici suggest that Court might as well go all the way since the first step down the slippery slope has already been taken in Mandico v. Taos Construction, Inc., 605 So. 2d 850 (Fla. 1992), creating a new interlocutory appeal for denials of worker's compensation immunity. This observation overlooks the fact that worker's compensation involves a wholly different kind of immunity. Unlike the various official immunities, it is not a

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[11] In its brief at pp. 12-13, the Florida Sheriff's Self-Insurance Fund alternatively urges that such appellate rights be hammered into either of two existing rules. This proposed interpretation does such violence to the simple language of those rules that it warrants exactly the response its proponent reports receiving from the Second District Court of Appeal -- none.

right to avoid trial altogether, but a right to be tried in an administrative proceeding rather than a court. Thus the issue is which tribunal has jurisdiction and the nature of the allowable remedy. The policy behind the interlocutory appeal in worker's compensation cases is to avoid having a case tried a second time in the right forum after it has already been tried in the wrong forum. Questions of fact masquerading as issues of law will be few and far between. Incentives to abuse the appellate procedure for improper tactical advantage are significantly less than in official immunity cases because the worker's compensation defendant is guaranteed to be haled into one forum or another -- not to escape completely.

On an issue with implications as far-reaching as the one presented in the instant case, wisdom counsels against amending the rules incident to an adversarial proceeding. This forum allows no witnesses, no independent fact research or data gathering, no opportunity for public input, and no means of verifying the various speculations advanced in this proceeding on the expected consequences of having a new rule.

Petitioner and her Amici speculate that without interlocutory plenary appeals of denial of qualified immunity, worthy persons will refuse government employment, officials will be intimidated from doing their jobs, time spent in litigation by public officials will be stolen from their essential government functions, and that defendants will remove most civil rights cases to federal court. The obvious shortcoming of these speculations is that Florida has

been without the new rule they request for the eight years since Mitchell was decided and none of these horrors have materialized.

Justice Brennan observed that he "cannot take seriously" the notion of anyone being deterred from a government job by the presence or absence of an interlocutory appeal.[12] It is difficult to imagine anyone saying: "Sorry, Governor. I must decline your offer to nominate me for executive director of the Florida Department of Revenue. I might be sued in my personal capacity on a federal civil rights claim. Then I might not remove to federal court. I could lose my motion for summary judgment on federal qualified immunity and then be entitled only to certiorari review instead of a plenary interlocutory appeal. It has simply soured me on public service."

As Justice Brennan predicted,[13] and as the Seventh[14] and Ninth[15] Circuits have observed from actual experience, the great majority of Mitchell appeals will be frivolous and without merit. Thus time for the futile appeal must be added to the trial time. This will actually lengthen rather than shorten the time the defendant must divert from official duties. The increased caseload

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[12] Mitchell v. Forsyth, 472 U.S. at 554-5 (Brennan, J., dissenting).

[13] Mitchell, 472 U.S. at 549, 554.

[14] Apostol v. Gallion, 870 F.2d 1335, 1339 (7th Cir. 1989).

[15] Schwartzman v. Valenzuela, 846 F.2d 1209, 1210 (9th Cir. 1988).

of appellate courts that will inevitably result ought to be a weighty consideration, especially in view of the fact that a plenary appeal will require the full record from the court below. In the instant case, for example, over two years of vigorous litigation passed before the second summary judgment motion was denied. The record is immense.

This is one obvious advantage of certiorari review. Another is that the discretionary nature of certiorari allows bad-faith petitions for review to be weeded out quickly without stopping the trial.

Federal and state courts each have both advantages and disadvantages for plaintiffs and defendants alike. The briefs in this case make clear that official defendants want this Court to provide all the advantages of the state system and none of the disadvantages. Before importing federal practice on interlocutory appeals of qualified immunity into the state system, the Court would do well to consider that Florida has no true counterpart to Rule 11, Fed. R. Civ. P., or to 28 U.S.C. § 1927, both of which allow for extremely harsh sanctions against parties and counsel who file papers in bad faith, for harassment, and for delay.[16] Federal courts also tend to operate on rigid scheduling orders that limit last-minute motions for summary judgment. Florida has essentially

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[16] Our closest counterparts are § 57.105, Fla. Stat. and Rule 2.060, Fla. R. Jud. Admin. Both are toothless by comparison with the federal sanctions and neither is much of a deterrent in the context at hand.

none of the safeguards that would deter abuse of interlocutory appeals.

Official defendants might just as well get to the heart of the matter and argue for adoption of the federal summary judgment standard. In a trilogy of cases decided in 1986,[17] the U.S. Supreme Court dramatically relaxed the burdens moving parties, usually defendants, must meet to obtain summary judgment in federal court. Florida has actually gone in the opposite direction in the same general time frame.[18] It is only a matter of time before defendant public officials argue that Florida should or must copy federal procedure in this regard as well.

V. CONCLUSION.

For the reasons asserted above, this Honorable Court lacks jurisdiction to consider the instant Petition and should therefore dismiss it.

Further, the Supremacy Clause of the U.S. Constitution does not require Florida Courts to copy federal procedure on appeals of orders denying summary judgment in cases of official qualified immunity.

Issues presented by Petitioner beyond the scope of the certified question have not been noticed properly and are unripe

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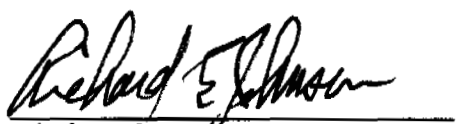
[17] Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[18] Jones v. Directors Guild of America, 584 So. 2d 1057 (Fla. 1st DCA 1991); Moore v. Morris, 475 So. 2d 666 (Fla. 1985).

for review in this proceeding.

The Court lacks adequate information to use this case as a vehicle for amendment of Florida's appellate rules. Important policy considerations militate against piecemeal adoptions of federal practice in areas in which Florida lacks the countervailing tools to curb abuses of those practices.

Respectfully submitted,



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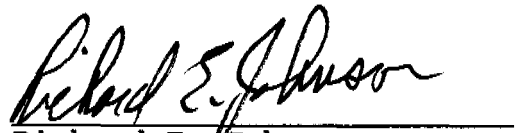

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