IN THE SUPREME COURT OF FLOIUDA

Case No. 91,519

BARBARA WHITE GENTILE,

Petitioner,

v.

GARY BAUDER,

Respondent.

L.T. No, 96-2265

ANSWER BRIEF OF RESPONDENT

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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STATEMENT OF THE CASE AND OF THE FACTS

The Petitioner, Barbara White Gentile, presented a sworn affidavit in support of a search warrant for the residence of the Respondent, Gary Bauder, to a Circuit Judge in Dade County, Florida on or about January 7, 1991. The Circuit Judge issued the search warrant for the Respondent's residence.

The Petitioner executed the search warrant on or about January 11, 1991 and seized various items of personal property and effects. The Petitioner arrested Mr. Bauder for various alleged criminal offenses (R.6).

The State of Florida prosecuted Mr. Bauder for various alleged criminal offenses and he was convicted. The basis of the State's case was the evidence seized from Mr. Bauder's residence by the Petitioner and other evidence derived as a result of the seizure.

Mr. Bauder's conviction was reversed. *Bauder v. State,* 613 So.2d 547 (3d DCA), *rev. denied,* 624 So.2d 268 (Fla. 1998). The Third District held that:

> "We reverse the judgment of conviction entered by the trial court on a holding that the aftidavit given in support of a search warrant was totally devoid of factual recitations sufficient to raise the affiant-officer's suspicion to the level of probable cause. *Rodriguez v. State, 297* So.2d 15 (Fla. 1974). *See also Illinois* v. *Gates,* 462 U.S. 213, 239, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (Information supplied for the issuance of a search warrant must demonstrate fair probability that evidence of crime will be uncovered). The evidence seized pursuant to the warrant should have been suppressed." *(Ibid)*

The Plaintiff sued the Defendant and Metropolitan Dade County[1] in a four count complaint. Count IV was brought pursuant to the Fourth and Fourteenth Amendments to

[1] Metropolitan Dade County was not a party in Mr. Bauder's appeal in the Third District and is not a party in this Court.

the Constitution of the United States and 42 U.S.C. 1983 (R.1-9;6).

Count IV alleged that no reasonable law enforcement officer would have believed that the affidavit of the Petitioner established probable cause to search Mr. Bauder's residence and that any reliance by the Petitioner upon the validity of the warrant issued by the Circuit Court was unreasonable (R.8).

Count IV further alleged that as a direct and proximate result of the unlawful conduct of the Petitioner, Mr. Bauder's residence and personal effects were unlawfully searched and seized, Mr. Bauder was unlawfully arrested based upon the fruits of the illegal search and seizure, Mr, Bauder was incarcerated prior to his conviction for several months. He served two years of his thirty year sentence in the State penitentiary, and that he suffered severe mental and emotional pain and anguish, embarrassment and humiliation, lost earnings, and incurred expenses for legal representation (R.8).

The Petitioner filed a motion for summary judgment asserting qualified immunity (R. 19-21). She set forth that she had requested and obtained the assistance of the State Attorney's Office, specifically, the Chief of the Legal Division, to draft the search warrant and insure that it met all legal standards. Additionally, the search warrant was reviewed and approved by her supervisors (R.20).

The Trial Court entered an order granting the Petitioner's motion for summary judgment and final summary judgment (R.94).

The Third District reversed. *Bauder v. Gentile,* 697 So.2d 1222 (Fla. 3d DCA 1997). The Third District's *per curium* decision stated and held that:

> "In *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), the United States Supreme Court held that 'objective reasonableness . . . defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest.' *Malley*, *475* U.S. at 344, 106 S.Ct. at 1098. Further, '[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable . . . will the shield of immunity be lost.' *Malley*, 475 U.S. at 344-45, 106 S.Ct. at 1098.
>
> In the instant case, where this Court previously found that 'the affidavit given in support of the search warrant was totally devoid of factual recitations sufficient to raise the affiant-officer's suspicion to the level of probable cause,' *Bauder v. State,* 613 So.2d *547* (Fla. 3d DCA, *rev. denied,* 624 So.2d 268 (Fla. 1993), the shield of immunity is lost. Accordingly, we find that the trial court erred, as a matter of law, by granting the defendant police officer's motion for summary judgment." *(Ibid)*

The Petitioner's motion for rehearing and rehearing en banc raised the collateral estoppel issue for the first time (R.98-154). They were denied.

The Petitioner's Notice to Invoke the Discretionary Jurisdiction of this Court followed (R.157-158).

POINTS ON REVIEW

I

THE PETITIONER'S ACTIONS WERE IJNREASONABLE; NO OBJECTIVELY REASONABLE POLICE OFFICER WOULD PRESENT AN AFFIDAVIT IN SUPPORT OF A WARRANT WHICH IS TOTALLY DEVOID OF FACTUAL RECITAITONS SUFFICIENT TO RAISE THE AFFTANT-OFFICER'S SUSPICION TO TIIE LEVEL OF PROBABLE CAUSE.

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B

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III

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A

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B

THE PETITIONER WAS IN PRIVITY WITH THE STATE AND DADE COUNTY IN THE CRIMINAL CASE AND IS IN PRTVITY WITH DADE COUNTY IN THIS CASE; MOREOVER, THIS CASE INVOLVES A CRIMINAL TO CIVIL SITUATION, UNLIKE THE DECISIONS RELIED UPON BY THE PETITIONER, WHICH ALL INVOLVE CIVIL TO CIVIL SITUATIONS.

C

THE THIRD DISTRICT DECIDED THE IDENTICAL ISSUE IN BOTH THE CRIMINAL AND CIVIL DECISIONS – THE SUFFICIENCY OF THE PETITIONER'S AFFIDAVIT.

SUMMARY OF THE ARGUMENT

I

An affidavit which is totally devoid of factual recitations sufficient to raise the officer's suspicion to the level of probable cause is objectively unreasonable and a police officer who presents such an affidavit has lost her qualified immunity,

The issuance of a warrant by a court does not protect a police officer who submits such an affidavit to the judge. The officer cannot excuse her own default by pointing to the greater incompetence of the magistrate. Since the issuance of the warrant by the magistrate does not immunize the police officer, the approval of* the affidavit by other police officers and prosecutors certainly cannot. The buck stops with the police officer.

Federal law governs. The elements of, and the defenses to, a federal cause of action are defined by federal law. Accordingly, a state law defense to a 1983 action brought in state court is invalid.

The law was clearly established that a police officer was liable for damages which resulted from her presentation of an affidavit which was totally devoid of factual recitations sufficient to raise her suspicion to the level of probable cause at the time the Petitioner presented her affidavit to the judge in this case. Indeed, *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092 (1986), had been decided approximately four and a half years prior to her presentation of her affidavit to the magistrate.

a

II

The District Court of Appeal applied precedent, it did not apply collateral estoppel. Its decision in the criminal case was purely legal. The Petitioner cannot expect the District Court of Appeal to ignore its own precedent.

III

The Petitioner waived any collateral estoppel argument by failing to raise it in either the Trial Court or the District Court of Appeal. She raised it first in her motion for rehearing and for rehearing en banc, which was too late.

The writ granting review must be discharged.

IV

The District Court of Appeal properly could have invoked collateral estoppel.

Federal law governs. Offensive and defensive use of collateral estoppel, without mutuality of parties, is permitted under federal law. Its use is particularly proper here, where the only issue is purely legal.

The Petitioner was in privity with the State and Dade County in the criminal case and is in privity with Dade County in the civil case. She committed the act which violated Mr. Bauder's clearly established rights. Certainly, an evenhanded application of collateral estoppel requires that it be utilized offensively, in this case, in a criminal to civil situation, since the court has sanctioned its use defensively in a criminal to civil situation.

The District Court of Appeal decided the identical issue in both the criminal and civil decisions – the sufficiency of the Petitioner's affidavit. Since the affidavit was

totally devoid of factual recitations sufficient to raise the Petitioner's suspicion to the level of probable cause, her actions prior to the presentation of the affidavit to a judge are immaterial. The sufficiency of the affidavit is decided solely by the contents of the affidavit.

ARGUMENT

I

THE PETITIONER'S ACTIONS WERE UNREASONABLE; NO OBJECTIVELY REASONABLE POLICE OFFICER WOULD PRESENT AN AFFIDAVIT IN SUPPORT OF A WARRANT WHICH IS TOTALLY DEVOID OF FACTUAL RECITAITONS SUFFICIENT TO RAISE THE AFFIANT-OFFICER'S SUSPICION TO THE LEVEL OF PROBABLE CAIJSE.

Malley v. Briggs, *475* U.S. 335, 106 S.Ct. 1092 (1986), governs. Tn *Malley*, the Supreme Court held that qualified immunity does not protect a police officer who seeks a warrant on the basis of an affidavit that does not show reasonably objective probable cause -- even if a judge erroneously issues the warrant. The question is:

> ". . . Whether a reasonably well-trained officer...would have known that his affidavit failed to establish probable cause and that he should not have applied for a warrant. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest." (Id at 344, at 1098) (Footnote omitted)[2]

Garmon v. Lumpkin County, 878 F.2d 1406 (1 lth Cir. 1989), and Kelly *v. Curtis,* 21 F.3d 1544 (1 lth Cir. 1994), ignored by the Petitioner, are in accord.

In *Garmon*, an officer sought and obtained an arrest warrant for the plaintiff based upon an affidavit which a reasonably objective officer would have known failed to establish probable cause. 878 F.2d at 1410. The officer contended that even if he should

[2] *Malley* applies equally to search warrants and arrest warrants. 475 U.S. at 344, n.6, 106 S.Ct. at 1097, n.6.

have known that the affidavit failed to establish probable cause, the court's issuance of the warrant broke the causal chain between the warrant application and the arrest. The Eleventh Circuit strongly disagreed:

> ". . . The Supreme Court has squarely addressed this question and held that a magistrate's decision to issue an arrest warrant does not absolve the officer who applied for the warrant from liability:
>
> > [The question] is whether a reasonably well-trained officer [applying for a warrant] would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the officer's application for a warrant was not objectively reasonable . . . It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system . . . We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising professional judgment.
>
> *Malley*, 475 U.S. at 345, 106 S.Ct. at 1098. . . ." (878 F.2d at 1410-1411)

In *Kelly*, the Eleventh Circuit again ruled that the police officer was liable for obtaining an arrest warrant predicated upon an affidavit which fell woefully short of establishing probable cause:

> "[defendant's], . . affidavit articulates neither the basis for her belief that [plaintiff] violated the law nor any affirmative allegation that she had personal knowledge of the circumstances of [plaintiffs] alleged crime. By seeking an arrest warrant on the basis of such a conclusory affidavit, [defendant] appears *to have violated a clearly established constitutional right of [plaintiff].*" (21 F.3d at 1555) (Footnote omitted) (Emphasis Added)

The Third District reversed Mr. Bauder's conviction. *Bauder v. State*, 613 So.2d *547* (3d DCA) *rev. denied,* 624 So.2d 268 (Fla. 1993). In a very strong *per curium*

opinion it held that the Petitioner's affidavit in her application for the search warrant was woefully deficient:

> "We reverse the judgment of conviction entered by the trial court on a holding that the affidavit given in support of a search warrant was *totally devoid* of factual recitations sufficient to raise the affiant-officer's suspicion to the level of probable cause. *Rodriguez v. State, 297* So.2d 15 (Fla. 1974). *See also Illinois* v. *Gates, 462* U.S. 213, 239, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (Information supplied for the issuance of a search warrant must demonstrate fair probability that evidence of crime will be uncovered). The evidence seized pursuant to the warrant should have been suppressed." (*Ibid*) (Emphasis Added)[3]

An affidavit given in support of a search warrant which is ". . . totally devoid of factual recitations sufficient to raise the affiant-officer's suspicion to the level of probable cause . . . ." by definition is one which no reasonably objective police officer would submit to a judge. By seeking the warrant on the basis of such an affidavit the Petitioner violated Mr. Bauder's clearly established Constitutional right. *Kelly v. Curtis,* 21 F.3d 1544, 1555 (11th Cir. 1994).

A

THE ISSUANCE OF A WARRANT BY A COURT DOES NOT PROTECT THE PETITIONER FOR HER INCOMPETENT ACTION IN SEEKING THE WARRANT PREDICATED UPON AN AFFIDAVIT WHICH WAS TOTALLY DEVOID OF FACTUAL RECITATIONS SUFFICIENT TO RAISE HER SUSPICION TO THE LEVEL OF PROBABLE CAUSE; ACCORDINGLY, THE INCOMPETENT ADVICE OF TWO PROSECUTORS AND

[3] The Petitioner does not challenge this decision.

POLICE OFFICERS CERTAINLY PROVIDE HER WITH NO IMMUNITY.

In *Malley*, as here, the police officer argued that his action was reasonable, Here, the Petitioner, checked with her supervisors and two prosecutors before submitting her affidavit. Therefore, she argues, she is immune from suit. She is wrong.

Malley squarely rejected the argument that the issuance of a warrant by a judge immunized the police officer:

> " . . . The . . . question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. *We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment." (475* U.S. at 345-346; 106 S.Ct. at 1098)

If a judge issues a warrant based upon such an affidavit, it does not absolve the police officer:

> "Notwithstanding petitioner's protestations, the rule we adopt in no way 'requires the police officer to assume a role even more skilled...than the magistrate.' Brief for Petitioner's 33, It is a sound presumption that "the magistrate is more qualified than the police officer to make a probable cause determination,' . . . and it goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable. But it is different if no officer of reasonable competence would have requested the warrant, *i.e.*, his request is outside the range of the professional competence expected of an officer. If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. *The*

officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate." (475 U.S. at 346, n.9, 106 S.Ct. at 1098-1099, n.9) (Emphasis Added)

Thus, the Defendant's assertion that she checked with other police officers and with prosecutors about the reasonableness of her affidavit simply is no defense. Not even the issuance of the warrant by a judge is a defense. ". . . If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. *The officer then cannotexcuse his own default by pointing to the greater incompetence of the magistrate." Ibid.* If the issuance of the warrant by the magistrate does not immunize the police officer, how can the approval of the affidavit by other police officers and prosecutors?

The buck stops with the police officer.

The Petitioner's argument, at p.24, that she took all actions that could be possibly be expected from an officer and that at worst reasonable attorneys and judges differed as to whether her affidavit contained information sufficient to constitute probable cause begs the question. Indeed it is nonsense. Reasonable attorneys and judges did not differ as to the sufficiency of her affidavit. The prosecutors and police officers with whom he consulted were as incompetent as she. How can the judge who issued the warrant, the prosecutors, and the police officers have acted reasonably if the affidavit submitted by the Petitioner was: ". . . totally devoid of factual recitations sufficient to raise the affiant-officer's suspicion to the level of probable cause. . . ."?

The Petitioner, at pp. 24-25, argues that her "thorough" investigation insulates her from damages. That is ridiculous. Her "thorough" investigation resulted in an affidavit totally devoid of factual recitations sufficient to raise her suspicion to the level of probable cause.

The Petitioner's argument concerning Mr. Bauder's alleged criminal behavior is immaterial and a maladroit attempt to prejudice this Court against Mr. Bauder. She will not succeed.

The Petitioner's reliance upon *Jennings v. Joshua Indep. Sch. Dist.*, *877* F.2d 3 13 (5th Cir. 1989), is woefully misplaced. There is no close question here, contrary to *Jennings. Torchinsky v. Siwinski,* 942 F.2d 257 (4th Cir. 1991), is a curious case for the Petitioner to cite. Probable cause *existed* in *Torchinsky. Hart v. O 'Brian, 127* F.3d 424 (5th Cir. 1997), involved a very close issue of probable cause.

The Petitioner's reliance upon *Wafsingham* v. *Dockery*, 671 So.2d 166 (Fla. 1st DCA 1996), and *McGory* v. *Metcalf*, 665 S.2d 254 (Fla. 2d DCA 1995), is equally woefully misplaced.

Walsingham cited *Malley v. Briggs,* for the unremarkable proposition that if officers of reasonable competence can disagree as to whether a warrant should issue, immunity should be recognized. Here, no officer, prosecutor, or judge acted competently until the Third District issued its decision in *Bauder.* The holding was straight-forward: ". . . the affidavit given in support of a search warrant was *totally devoid* of factual recitations sufficient to raise the affiant-officer's suspicion to the level of probable cause.

. . ." 613 So.2d 547 (Emphasis Added). Does the Petitioner argue that the officers, prosecutors, and judges acted competently in approving and issuing a search warrant predicated upon an affidavit totally devoid of factual recitations sufficient to raise the Petitioner's suspicion to the level of probable cause? The evidence compels the conclusion that the officers, prosecutors, and judges were grossly incompetent. Mr. Bauder repeats:

> ". . . Where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable. *But it is different if no officer of reasonable competence would have requested the warrant, i.e., his request is outside the range of the professional competence expected of an officer.* If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. *The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate." (475* U.S. at 346, n.9, 106 S.Ct. at 1098-1099, n.9) (Emphasis Added)

McGory involved no affidavit. Probable cause existed. The officer made a split-second, life or death decision. Here, there was an affidavit. Here, the affidavit was totally devoid of factual recitations sufficient to raise the Petitioner's suspicion to the level of probable cause. Here, the Petitioner acted at her leisure.

The Petitioner complains **that** placing her personally at risk would place an inordinate chilling upon the actions of police officers. That is nonsense. To hold her personally liable is consistent with the Constitution, consistent with Federal law, consistent with *Malley*, and would chill only illegal and unconstitutional actions of police officers, *which must be chilled.*

The Petitioner asks, what more is a police officer to do? The answer is simple. She can obey the Constitution and laws of the United States.

B

FEDERAL LAW GOVERNS; THE ADVICE OF COIJNSEL CONFERS NO IMMUNITY UPON THE PETITIONER.

Federal law governs. *Howlett v. Rose, 496* U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d *332* (1990). *Howlett* was a 1983 action brought in Florida court. The issue was whether a state statutory sovereign immunity defense was available to a school board which had been sued in State court even though such a defense would not be available if the action had been brought in a Federal forum. The Supreme Court unanimously held that the defense was not available:

> "... the elements of, and the *defenses to,* a federal cause of action are defined by federal law. ..." (496 U.S. at 375, 110 L.Ed.2d at 353)

The Supreme Court explained:

> "... since the Court has held that municipal corporations and similar governmental entities are 'persons,'. . , a state court entertaining a § 1983 action must adhere to that interpretation, 'Municipal defenses – including an assertion of sovereign immunity – to a federal right of action are, of course, governed by federal law.' . . . 'By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, congress – the supreme sovereign on matters of federal law – abolished whatever vestige of the State's sovereign immunity the municipality possessed.' . . . ." (496 U.S. at 376, 110 L.Ed.2d at 353)

Malley, of course, held that:

> "..., if no officer of reasonable competence would have requested the warrant, his request is outside the range of the professional competence expected of an officer. If the magistrate issues the warrant in such a case,

> his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect *of* duty. *The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate."* (475 U.S. 346, n.9, 106 S.Ct. at 1098-1099, n.9) (Emphasis Added)

If the issuance of a warrant by a judge does not excuse the incompetence of the officer, how can the incompetent advice of an incompetent prosecutor excuse the incompetence of the officer? Can state law supercede Federal law?

The Petitioner's reliance upon *Kalina v. Fletcher,* U.S. ___, 118 S.Ct. 502 (1997); *Briscoe v. La Hue, 460* U.S. 325, ___ S.Ct. ___ (1983); and *Tenney v. Brandhove,* 341 U.S. 367, ___ S.Ct. (1951), provides her with no comfort.

Kalina was a 1983 action against a state prosecutor who had submitted a "Certificate for Determination of Probable Cause" that summarized the evidence supporting the charge. The prosecutor personally vouched for the truth of the facts set forth in the certification under penalty of perjury. Predicated upon her certification, the trial court found probable cause and issued an arrest warrant. The plaintiff was arrested and spent a day in jail. About a month later, the prosecutor dismissed the case.

The complaint focused on the false statements made by the prosecutor in the certification. She moved for summary judgment on the ground that she enjoyed absolute prosecutorial immunity. The trial court denied the motion, holding that she was not entitled to absolute immunity and whether qualified immunity would apply was a question of fact. The Ninth Circuit affirmed. It noted that under *Malley v. Briggs, 475* U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), "a *police officer* who secures an arrest

warrant without probable cause cannot assert an absolute immunity defense," and then held that the prosecutor's "actions in writing, signing and filing the declaration for an arrest warrant" were "virtually identical to the police officer's actions in *Malley*." *Fletcher v. Kalina,* 93 F.3d 653, 655-656 (1996). The Ninth Circuit concluded that "it would be 'incongruous' to expose police to potential liability while protecting prosecutors for the same act." 93 F.3d at 656,

In affirming, the Supreme Court held that:

> " 'There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.". . . Thus, if a prosecutor plans and executes a raid on a suspected weapons cache, he 'has no greater claim to complete immunity than activities of police officers allegedly acting under his direction.". . .'" (___ U.S. at ___, 118 S.Ct. at 507-508)

The Supreme Court concluded that in swearing to the certification the prosecutor:

> ". . . performed an act that any competent witness might have performed . . .
>
> * * *
>
> . . . Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required 'Oath or affirmation is a lawyer, the only function that she performs in giving sworn testimony is that of a witness." (___ U.S. at ___, 118 S.Ct. at 509-5 10)

Justice Scalia, joined by Justice Thomas, agreed:

> "I agree that Ms. Kalina performed essentially the same 'function' in the criminal process as the police officers in *Malley* v. *Briggs* . . . and so I join the opinion of the court. . . ." (___ U.S. at ___, 118 S.Ct. at 510) (Scalia, J., concurring)

If a prosecutor had done that which the Petitioner did, she would be liable. The Petitioner is liable.

Briscoe merely held that a witness who testified at trial was immune from damages for perjury. *Tenney* held that legislators were immune from suits for damages, when acting in their legislative capacity, under 1983.

The Petitioner's citation of *Glass* ***v. Parrish,*** 51 So.2d 717 (Fla. *195 I); Royal Trust Bank, N.A. v. Von Zamft, 5 11* So.2d *654* (Fla. 3d DCA 1987); *Arney v. Department of Natural Resources, 448* So.2d 1041 (Fla. *1* st DCA 1984); *Toomey v. City of Fort Lauderdale, 3* 11 So.2d *678* (Fla. 4th DCA 1975); and *Kilburn v. Davinport, 286* So.2d 241 (Fla. 3d DCA 1973), is futile. First, all these cases accept *Royal Trust Bank* were decided before *Malley* v. *Briggs, 475 U.S. 335,* 106 S.Ct. 1092 (1986). Second, Federal law governs a 1983 action brought in state court: ". . . the elements of, and the *defenses to,* a federal cause of action are defined by federal law. . . ." *Howlett v. Rose, 496* U.S. 356, 375, 110 L.Ed.2d 332, 353 (1990) (Emphasis Added). A state defense simply is no defense. Third, if no officer of reasonable competence would have requested the warrant and the judge issues the warrant: ". . .The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate." *Malley v. Briggs, 475* US. 335, 349, n.9, 106 S.Ct. 1092, 1098-1099, n.9 (1986). If the issuance of the warrant by the

magistrate does not immunize the police officer, the approval of the affidavit by an attorney cannot possibly immunize her.

The Petitioner's citation *of Hollingsworth v. Hill*, 110 F.3d 733 (10th Cir. 1997); *V-1 Oil Co. v. Wyoming Dep't. of Envtl. Quality, 902* F.2d *1482* (10th Cir.), *cert. denied,* **(498** U.S. 920 1990); and *United States v. Taxacher, 902* F.2d 867 (11 th Cir. 1990), similarly provide no support for her.

Hollingsworth involved no affidavit and no *Malley* situation. A claim of domestic abuse was involved and a husband sought an *ex parte* protective order through the filing of a petition with the state district court. The order was served upon the defendant in the same manner as the summons. Thus, the police officers had no involvement in obtaining the order, unlike the Petitioner whose affidavit was used to obtain the warrant to search Mr. Bauder's home. Additionally, there was no Fourth Amendment violation in *Hollingsworth.* Moreover, the legal advice concerned the police officer's response to a court order, not the sufficiency of an affidavit for a warrant, which the officer himself had submitted. *V-1 Oil Co.* involved the validity of a statute which had not been tested. The search was warrantless. *V-l Oil* did not overrule *Malley.*

C

THE LAW WAS CLEARLY ESTABLISHED AT THE TIME THE PETITIONER VIOLATED MR. BAUDER'S RIGHTS THAT SHE WAS LIABLE FOR DAMAGES FOR OBTAINING A WARRANT PREDICATED UPON HER AFFIDAVIT WHICH WAS TOTALLY DEVOID OF FACTUAL RECITATIONS

SUFFICIENT TO RAISE HER SUSPICION TO THE LEVEL OF PROBABLE CAUSE.

The Petitioner's argument that the law was not clearly established at the time she violated Mr. Bauder's rights can only be described as bizarre.

The Fourth Amendment to the Constitution of the United States, ratified in the last decade of the Eighteenth century, provides that:

> "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." (Emphasis Added)

The Fourth Amendment and its exclusionary rule are applicable to the states through the Fourteenth Amendment. *Mapp v. Ohio, 367* U.S. 643, 81 S.Ct. 1684 (1961). An affidavit for a warrant must contain probable cause. *Aguilar v. Texas, 378* U.S. 108, 84 S.Ct. *1509* (1964); *Spinelli v. United States, 393* U.S. 410, 89 S.Ct. 584 (1969); *Illinois* v. *Gates,* 462 U.S. 213, 103 S.Ct. 23 17 (1983). The Third District cited *Gates* for the fundamental principle that the information supplied for the issuance of the search warrant must demonstrate a fair probability that evidence of crime would be uncovered. 613 So.2d 547.

Malley v. *Briggs,* 475 U.S. 335, 106 S.Ct. 1092 (1986), of course, held that: ". . . Objective reasonableness . . . defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." 475 U.S. at 344, 106 S.Ct. at 1098. Thus: ". . . only where the warrant application is so lacking in indicia of

probable cause as to render official belief in its existence unreasonable , . . will the shield of immunity be lost." 475 U.S. at 344-345, 106 S.Ct. at 1098.

In *Kelly* v. Curtis, 21 F.3d 1544 (11th Cir. 1994), the Eleventh Circuit ruled that the police officer was liable for obtaining an arrest warrant predicated upon an affidavit which fell woefully short of establishing probable cause:

> "[defendant's] . . . affidavit articulates neither the basis for her belief that [plaintiff] violated the law nor any affirmative allegation that she had personal knowledge of the circumstances of [plaintiff's] alleged crime. By seeking an arrest warrant on the basis of such a conclusory affidavit, [defendant] appears *to have violated a clearly established constitutional right of [plaintiff]*." (21F.3d at 1555) (Footnote Omitted) (Emphasis Added)

How can Petitioner argue that the law was not firmly established prior to the presentation of her affidavit to a judge on January 7, 1991 (R.6)?

The Petitioner's argument that the law was in doubt, at pp.28-31, is disingenuous at best. She refuses even to mention *Malley,* which governs, She does not because there simply is no argument to rebut *Malley*'s clear and specific holding.

The shallowness of the Petitioner's argument is confirmed by carrying it to its logical conclusion, No officer would ever be liable under her theory because every factual situation is different. Since every factual situation is different, there would never be an earlier case decided on the very facts of any case in litigation. Fortunately, that is not the law. *Malley* commands that, when the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, the shield of immunity is lost. *Malley v. Briggs, 475* U.S. at 344-345, 106 S.Ct. at 1098.

II

THE DISTRICT COURT OF APPEAL DID NOT APPLY COLLATERAL ESTOPPEL; RATHER, IT SIMPLY APPLIED PRECEDENT.

The District Court of Appeal reversed Mr. Bauder's criminal conviction. *Bauder v. State,* 613 So.2d 547 (Fla. 3d DCA), *reviewed denied, 624* So.2d 268 (Fla. 1993). The Third District held that: ". . , the affidavit given in support of the search warrant was totally devoid of factual recitations sufficient to raise the affiant-officer's suspicion to the level of probable cause. . . ." 613 So.2d 547.

Here, the Trial Court granted the Petitioner's Motion for Final Summary Judgment on the ground of qualified immunity. The issue in the Respondent's appeal was the sufficiency of the Petitioner's affidavit in support of the search warrant. This was the same affidavit which the Third District concluded in the criminal appeal was totally devoid of factual recitations sufficient to raise the Petitioner's suspicion to the level of probable cause. The issue was purely legal. The Third District invoked the precedent of Mr. Bauder's criminal appeal to conclude that the Petitioner had lost her immunity:

> "In the instant case, where this Court previously found that 'the affidavit given in support of a search warrant was totally devoid of factual recitations sufficient to raise the affiant-officer's suspicion to the level of probable cause,' *Bauder v. State,* 613 So.2d 547 Fla. 3d DCA), *review denied, 624* So.2d 268 (Fla. 1993), the shield of immunity is lost. Accordingly, we find that the trial court erred, as a matter of law, by granting the defendant police officer's motion for summary judgment." *(Bauder v. Gentile, 697* So.2d 1222 (Fla. 3d DCA 1997))

The correctness of Mr. Bauder's position is illustrated by a simple example: Assume *arguendo* that this Court reverses the decision of the Third District and holds that the Third District improperly utilized collateral estoppel. The cause is remanded to the Third District. The issue remains the same: whether a reasonably objective police officer would have submitted such an affidavit in seeking a warrant. The answer must be no. The Third District has held that an identical affidavit was totally devoid of factual recitations sufficient to raise the affiant-officer's suspicion to the level of probable cause. *Bauder v. State,* 613 So.2d 547 (Fla. 3d DCA), rev. *denied, 624* So.2d 268 (Fla. 1993). Surely, the Petitioner does not argue that the Third District should ignore its own precedent. Would the Petitioner's position be stronger if another police officer's identical affidavit had been held to be totally devoid of factual recitations sufficient to raise that affiant-officer's suspicion to the level of probable cause in another case?

Therefore, very simply, a reversal by this Court would be a useless gesture and destructive of precedent, whose purposes are to preclude the endless litigation of settled issues and to bring stability to the law.

III

THE PETITIONER WAIVED ANY COLLATERAL ESTOPPEL ARGUMENT BECAUSE SHE FAILED TO RAISE IT TN EITHER THE TRIAL COURT OR THE DISTRICT COURT OF APPEAL; THE PETITIONER'S FIRST MENTION OF COLLATERAL ESTOPPEL CAME IN HER MOTIONS FOR REHEARING AND FOR REHEARING EN BANC, WHICH OF COURSE WAS TOO LATE.

It is fundamental that this Court will not consider issues that were not raised before the Trial Court and the District Court of Appeal. In *Morales v. Sperry Rand Corp., 601* So.2d 538 (Fla. 1992), the petitioner attempted to argue an issue that was presented neither to the trial court nor the district court of appeal. This Court rejected the attempt:

> ". . . This issue was not raised before the trial judge and was not discussed by the district court in the opinion under review. We therefore decline to address this issue. . . ." (601 So.2d at 540)

Here, the Petitioner did not raise the collateral estoppel issue in either the Trial Court or the District Court of Appeal. The Third District did not discuss it in the opinion under review. *Bauder v. Gentile,* 697 So.2d 115, 117 (Fla. 1st DCA 1977). She first raised it in her motions for rehearing and rehearing en banc. However, that was too late. It also is fundamental that a new issue may not be raised or argued in a motion for rehearing. *Homestead v. Poole, Masters & Goldstein,* 604 So.2d 825, 827 (Fla. 4th DCA 1991); *Price Wise Buying Group* v. *Nuzum*, 343 So.2d 115, 117 (Fla. 1st DCA 1977).

This Court cannot consider the collateral estoppel issue. It must discharge the writ granting review.

IV

THE THIRD DISTRICT PROPERLY COULD HAVE INVOKED COLLATERAL ESTOPPEL.

A

FEDERAL LAW GOVERNS; OFFENSIVE USE OF COLLATERAL ESTOPPEL, WITHOUT MUTIALITY OF PARTIES, IS PERMITTED UNDER FEDERAL LAW.

Federal law governs. When a 1983 action is brought in state court:

> "... the elements of, and the defenses to, a Federal cause of action are defined by Federal law" (*Howlett* v. *Rose, 496* U.S. 356, 375, 110 L.Ed.2d 332, 353 (1990))

In *Blonder-Tongue Laboratories, Inc. v. University of Illinois* Foundation, 402 US, 3 13, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), and *Parklane Hosiery Co. v. Shore, 439* U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), the Supreme Court sanctioned the use of collateral estoppel without the requirement of mutuality, defensively and offensively.

Montana v. United States, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), illustrates the principle well. There, a government contractor, at the direction and with the financing of the United States, filed suit in state court challenging the constitutionality of a state statute imposing a gross receipts tax upon contractors of public construction projects. The Montana Supreme Court upheld the statute. The United States then filed suit in Federal court challenging the constitutionality of the statute. The Supreme Court held that the contractor was precluded from relitigating the constitutionality of the statute by the doctrine of collateral estoppel since the issue had been determined by the Montana

Supreme Court, despite the absence of mutuality:

> ". . . Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving *a* party to the prior litigation. *Parklane Hosiery Co. v. Shore.* . . Application of both doctrines [res judicata and collateral estoppel] is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. . . ." (440 U.S. at 153, 99 S.Ct. at 973) (Emphasis and Brackets Added)

The issue in *Montana* in both cases was the constitutionality of the statute. Here, the issue in both cases is the sufficiency of the Petitioner's affidavit. Both are purely legal issues. Mr. Bauder is a party in both cases. The Petitioner was the representative of' the State in the criminal case. Here, the application of collateral estoppel is as warranted as it was in *Montana.*

B

THE PETITIONER WAS TN PRTVTTY WITH THE STATE AND DADE COUNTY IN THE CRIMINAL CASE AND IS IN PRIVITY WITH DADE COUNTY IN THIS CASE; MOREOVER, THIS CASE INVOLVES A CRIMINAL TO CIVIL SITUATION, UNLIKE THE DECISIONS RELIED UPON BY THE PETITIONER, WHICH ALL INVOLVE CIVIL TO CIVIL SITUATIONS.

Trucking Emp. of N. Jersey Welfare v. Romano, 450 So.2d 843 (Fla. 1984), held that:

> "Collateral estoppel may be asserted only when the identical issue has been litigated between the same parties or their privies. . ." (450 So.2d at 845)

Here, the Petitioner was the representative of the State of Florida and Dade County. ***She*** prepared the affidavit that was totally devoid of factual recitations sufficient to raise her suspicion to the level of probable cause. ***She*** violated Mr. Bauder's rights.

R. *D.J.* ***Enterprises, Inc. v.*** *Mega* ***Bank,*** 600 So.2d 1229 (Fla. 3d DCA 1992), mandates affirmance. Mega Bank filed two actions against R.D.J. arising from R.D.J.'s non payment of a debt. The debt had been secured by a security agreement on inventory, personal guarantees by officers of R.D.J., a second mortgage on real property, all evidenced by a promissory note. Mega Bank sought foreclosure on the real property in one action and replevin of-the inventory in the other.

Mega Bank prevailed in the foreclosure action. R.D.J. had asserted that the promissory note was not in default because Mega Bank, through its president, Kantor, had verbally agreed to forbear collection on the defaulted note. The court ruled that there had been no agreement to forbear.

R.D.J. filed a counter claim against Mega Bank and a third party complaint against Kantor, Mega Bank's president, in the replevin action. R.D.J.'s third party complaint against Kantor alleged that Kantor improperly instructed Mega Bank officers to repudiate the alleged oral agreement to forbear. R.D.J. contended that Mega Bank had improperly disposed of the replevied asset. Both issues had been fully litigated in the foreclosure trial. The trial court, in the foreclosure suit, had ruled that there had been no oral agreement between the bank and R.D.J. to forebear collection on the note and that the replevin of R.D.J.'s assets had been disposed of in a reasonable manner.

The trial court dismissed R.D.J.'s third party complaint against Kantor in the replevin action, on collateral estoppel grounds. R.D.J. contended that since Kantor was not a party to the foreclosure action, the dismissal of the third party complaint against him, on the ground of collateral estoppel, was improper, The Third District disagreed:

> "In dealing with the identities of the parties, collateral estoppel requires that the 'real parties in interest' be identical. Seaboard Coastline Railroad Company v. Cox, 338 So.2d 190 (Fla. 1976) . . .
>
> "R.D.J. sued Kantor for actions which Kantor took in his capacity as president of Mega Bank. R.D.J.'s complaint stated that Kantor did not abide by a previous alleged oral agreement to forbear . , .
>
> * * *
>
> In the foreclosure action, the trial court found that there was no agreement to forebear. Accordingly, Kantor cannot be liable for failing to abide by an agreement which the court found to be nonexistent . . . ." (600 So.2d at 1231-1232)

Here, the Petitioner was in privity with the State and Dade County in the criminal case. She is in privity with Dade County, a party, in the civil case. The issue the woeful insufficiency of her affidavit – was decided in the criminal case. Qualified immunity is determined solely by the sufficiency of the affidavit. It makes no difference what occurred prior to the time the Petitioner presented her affidavit to the judge. She cannot relitigate the issue.

Additionally, in *Zeidwig v. Ward,* 548 So.2d 209 (Fla. 1989), the Court approved the use of defensive collateral estoppel to prevent a criminal defendant, as a civil plaintiff, from relitigating the same issue which had been decided against him in prior criminal proceedings, despite the non-mutuality of parties. A convicted criminal defendant tiled a

motion for post-conviction relief alleging ineffective assistance of counsel. The trial court and appellate court ruled against him and denied relief. He then sued theattorney in a civil malpractice action. The Court held that collateral estoppel precluded the civil malpractice action:

> "We. . . hold that defensive collateral estoppel applies in this criminal-to-civil context. We concluded that, where a defendant in a criminal case has had a full and fair opportunity to present his claim in a prior criminal proceeding, and a judicial determination is made that he has received the effective assistance of counsel, then the defendant/attorney in a subsequent civil malpractice action brought by the criminal defendant may defensively assert collateral estoppel.
>
> If we were to allow a claim in this instance, we would be approving a policy that would approve the imprisonment of a defendant for a criminal offense after a judicial determination that the defendant has failed in attacking his conviction on grounds of ineffective assistance of counsel but which would allow the same defendant to collect from his counsel damages in a civil suit for ineffective representation because he was improperly imprisoned, To fail to allow the use of collateral estoppel in these circumstances is neither logical nor reasonable.
>
> > '. . . It would undermine the effective administration of the judicial system to ignore completely a prior decision of a court of competent jurisdiction in this state on the same issue which plaintiff seeks to relitigate in a subsequent action.'. . ." *(549* So.2d at 214)

Here, the issues, purely legal, are identical. There is absolutely no reason why collateral estoppel should not be used offensively, in these circumstances. The affidavit cannot change. Collateral estoppel must be evenhandedly applied. *Cf. Seaboard Coastline* R. Co. v. *Cox*, 338 So.2d 190, 191 (Fla. 1976). That a criminal defendant may prevail in one instance and lose in another is immaterial.

Trucking Emp. of N. Jersey Welfare v. Romano, 450 So.2d 843 (Fla. 1984), is not to the contrary. The certified question there was:

> " 'May a litigant, who is not a party to a prior criminal proceeding that resulted in a judgment of conviction, use the judgment of conviction "offensively" in a civil proceeding to prevent the same defendant from relitigating issues resolved in the earlier criminal proceeding?"' (450 So.2d at 845)

The Court's answer was no. However, here, Mr. Bauder very much was a party to the prior criminal proceeding,

In *Romano,* the plaintiffs argued that judicial economy required that the doctrine of mutuality of parties should be changed. However, they acknowledged that the determination of whether the facts were identical and the defendant had a fair opportunity and reasonable inducement to defend the action had to be left to the discretion of the trial court in the civil suit. This court noted that this would create fertile grounds for appeal and that any savings to the trial court would be at the expense of the district courts of appeal. However, here, there is only one legal issue the sufficiency of the Petitioner's affidavit.

This court also noted, in *Romano,* that evidence of the underlying facts might be relevant to issues other than liability. That is not so here. The only issue, purely a legal issue, is the sufficiency of the Petitioner's affidavit. When, as here, the affidavit is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, the shield of immunity is lost. *Malley v. Briggs, 475* U.S. 335, 344-345, 106 S.Ct. 1092, 1098 (1986).

Trujillo v. *Simer*, 934 F.Supp. 1217 (D. Colo. 1996), is distinguishable. ". . . Most fundamentally, collateral estoppel is not applicable because the issues – though related – are far from identical. . . ." 934 F.Supp. at 1225. The holding in the criminal case that the search and seizure violated the plaintiffs Fourth Amendment right was not identical to a finding that the defendants' conduct violated clearly established rights. The contrary is true here. The only issue is the sufficiency of the affidavit. That is decided solely by the contents of the affidavit. *Malley* v. *Briggs, 475* U.S. 335, 106 S.Ct. 1092 (1996).

C

THE THIRD DISTRICT DECIDED THE IDENTICAL ISSUE IN BOTH THE CRIMINAL AND CIVIL DECISIONS – THE SUFFICIENCY OF THE PETITIONER'S AFFIDAVIT.

The issue in the criminal decision was the sufficiency of the Petitioner's affidavit. *Bauder v. State,* 613 So.2d 547 (Fla. 3d DCA), *rev. denied, 624* So.2d 268 (Fla. 1993). The issue in the civil decision was the sufficiency of the Petitioner's affidavit. *Bauder v. Gentile,* 697 So.2d 1222 (Fla. 3d DCA 1997).

The sufficiency of the affidavit alone determines the availability of qualified immunity. When the affidavit is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, immunity is lost. *Malley v. Briggs, 475* U.S. 335, 344-345, 106 S.Ct. 1092, 1098 (1986), that determination depends not at all upon that which preceded the Petitioner's submission of the affidavit to the judge.

The Petitioner presents a garbled – and frankly wrong – explication of the law of qualified immunity, at pp.2 1-23. The Petitioner cites three cases for the general proposition that qualified immunity is available to government officials. However, most significantly, the Petitioner ignores *Malley v. Briggs*, the seminal decision, which governs this case. *Malley* held that objective reasonableness determines the qualified immunity accorded an officer whose request for a warrant causes an illegal arrest. 475 U.S. at 344, 106 S.Ct. at 1098. When the affidavit is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, immunity is lost. 475 U.S. at 344-345- 106 S.Ct. at 1098.

The Petitioner assiduously avoids *Malley*. Rather, she claims that the issue for determination is not whether probable cause existed for the search and arrest but rather whether arguable probable cause existed. The Petitioner's apparent argument, that an affidavit for a warrant which was totally devoid of factual recitations sufficient to raise an officer's suspicion to the level of probable cause may present a question of arguable probable cause, is nonsense. How can such an affidavit magically be transferred to one that presents arguable probable cause?

The Petitioner begs the question at pp. 21-22, by asserting that the issue is whether reasonable officers in the same circumstances and possessing the same knowledge as the Petitioner could have believed that probable cause existed. No reasonable officer, no reasonable prosecutor, no reasonable judge could have believed that this affidavit contained allegations of probable cause.

The Petitioner's citation of *Magnotti* v. *Kuntz*, 918 F.2d 364 (2d Cir. 1990), and *Trujillo v. Simer*, 934 F.Supp. 1217 (D.Colo.1996), does not merit a response.

The Petitioner's complaint that the State's brief in the criminal case did not cite *United States* v. *Leon*, 468 U.S. 897 (1984), is meaningless. First, the *Leon* good faith exception does *not* apply to an affidavit such as the Petitioner's Second, the objective reasonableness standard of *Leon* and of *Malley* are identical.

CONCLUSION

This Court must affirm the decision of the Third District or, in the alternative, discharge the writ granting review.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Answer Brief of Respondent** was personally delivered to **THOMAS H. ROBERTSON,** Assistant County Attorney, Metro-Dade Center, Suite 2810, 111 N.W. First Street, Miami, Florida 33128-1993; and ~~to~~ mailed to **RHEA P. GROSSMAN, ESQ.,** Attorney for Barbara White Gentile, 2780 Douglas Road, Suite 300, Miami, Florida this 23rd day of March, 1998.

By: _____
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