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IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,519

L.T. # 96-2265

BARBARA WHITE GENTILE,

Petitioner,

vs.

GARY BAUDER,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE AND FACTS

This is a Petition invoking the discretionary jurisdiction of this Court to review *Bauder v. Gentile, 697* So.2d 1222 (Fla. 3d DCA 1997) *("Ruder* II'), which expressly and directly conflicts with this Court's decisions in *Stogniew v. McQueen, 656* So.2d 917 (Fla. 1995), *Dep '1. of Health and Rehabilitative Services v. B.J.M., 656* So.2d 906 (Fla. 1995), *Mobil Oil Corp.* v. *Shevin*, 354 So.2d 372 (Fla. 1977), and with the First District Court of Appeal's decision in *Walsingham v. Dockery*, 671 So.2d 166 (Fla. 1st DCA 1996). This Court has accepted jurisdiction.

Plaintiff Gary Bauder (Bauder) sued Barbara White Gentile (Officer Gentile) far alleged civil rights violations under 42 U.S.C. $1983 seeking to hold the officer *personally* liable for the results of a search and arrest.' (R. at 1-9.) [2] This appeal arose after the trial court granted the off'cer's Motion For Summary Judgment, finding that the officer had acted reasonably in obtaining a search warrant and was therefore entitled to qualified immunity. On appeal, the Third District determined that the police off'cer is collaterally estopped from raising the defense of qualified immunity in this civil rights suit. The collateral estoppel results from issues determined in the criminal action-to which the off'cer was not a party—resulting in the officer potentially being held *per* se liable in this action. (R at 96-97.) Officer Gentile was, at the relevant times, a detective in the Special Investigations Division of the Metro Dade Police Department. (R. at 22.) She had attended numerous classes and

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[1] He also made 3 claims against Miami Dade County, which remain pending in the trial court.

[2] The record consists of only one volume and, as such, citations will be "R. at ____)"

seminars in child pornography and pedophilia. (R. at SO.) In November 1990, Office Gentile received information from Metro Dade detective Judy Gable that Bauder wa believed to be involved in sexual assaults upon children. (R. at 22, 65.) Specifically, Gabl told Offtcer Gentile that she had received information that Bauder was frequenting area "where young boys were at and possibly photographing them and getting them high." (R. a 65.) Officer Gentile was familiar with Bauder, having arrested him in 1986 for crime involving child pornography. (R. at 63.) Officer Gentile was also aware that Bauder "ple out" to those charges, and was sentenced to probation. *Id.*.

Based on Gable's report, Officer Gentile began another investigation of Bauder including surveillance and interviews. (R, at 66.) Specifically, Officer Gentile contacted th reporter of the information, James Buzzella; a witness, Debbie Buzzella; and two boys wh had been seen with Bauder. (R. at 66.) She interviewed the boys on December 3rd ant December 17th, 1990. (R. at 73.) She interviewed the Buzzellas prior to that.

Offtcer Gentile also interviewed the parents of the two boys who had been seen witl Bauder. They reported that one of the boys had spent a weekend with Bauder, and that h had slept for two days thereafter. (R. at 68.) One of the boys added that Bauder woul furnish limousine rides and marijuana to the boys, and that they had seen other boys in hi apartment "totally wasted on drugs or alcohol, passing out in the apartment," (R. at 69-70.)

The investigation resulted in the officer seeking assistance from the State Attorney' Office with the preparation of a search warrant and supporting affidavit. (R. at 74-79, 42-44 21-22.) To that end, Offtcer Gentile met with Ruth Solly and Richard Shiffrin of the Stat Attorneys Office on numerous occasions. (R. at 76, 44.) At that time, Ms. Solly was member of the Sexual Battery Division for the State Attorney and Mr. Shiffrin was the Chie

of the Legal Division for the State Attorney. (R. at 22, 24.) The attorneys reviewed the warrant and affidavit and made changes as they desired. (R. at 44, 22, 24.) In fact, Shiffrin wrote most of the warrant and affidavit. (R. at 22.) The affidavit ultimately included all of the information known to Officer Gentile. (R. at 71) Both attorneys advised Officer Gentile that they believed that there was adequate probable cause stated for the warrant and affidavit. (R. at 74-77, 22, 25) The warrant and affidavit were also reviewed by Officer Gentile's sergeant and lieutenant who both determined that the warrant and affidavit stated probable cause. (R. at 77, 22) Based upon this, Officer Gentile believed that probable cause was adequately stated in the warrant and affidavit for it to be issued. (R. at 82, 23)

The warrant and affidavit were presented to a Circuit Court judge on January 8, 199 I who found probable cause and issued the warrant. (R. at 77.) The warrant was executed on January 11, 199 1 and, based on photographs found during the search, Bauder was arrested.

After his arrest, Bauder moved to suppress the results of the search. His motion to suppress was heard by a second Circuit Court judge, who denied the motion." Bauder was later convicted of the charges and sentenced to 30 years in state prison. He appealed that conviction resulting in the Third District Court's decision in *Bauder v. State*, 613 So.2d 547 (Fla. 3d DCA 1993), *review denied*, 624 So. 2d 268 (Fla. 1993), *("Nader I")* which found probable cause for the warrant and affidavit to be lacking, and reversed the conviction.

Officer Gentile defended this civil action by asserting qualified immunity. She filed a Motion for Summary Judgment supported by affidavits and depositions from Assistant State Attorney Ruth Solly and herself, (R. at 19-26, 38-52, 53-88.) In response to Officer

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'There is no citation to the record for the suppression hearing or its denial. However. for the issue to have been preserved for appeal, it must have been heard and denied.

Gentile's Motion for Summary Judgment in this action, Bauder filed no counter affidavits and no evidence of any kind. No allegations or evidence of misconduct or collusion by Officer Gentile were ever presented. Bauder did not even submit the warrant and affidavit to the trial court for the summary judgment determination, Bauder relied *solely* on the decision of the Third District Court in *Bauder I* to preclude Officer Gentile from asserting any defenses. The trial court, upon consideration of the affidavits and the depositions, ruled for Officer Gentile. (R. at 94.)

The Third District Court of Appeal reversed the summary judgment, precluding Officer Gentile from raising the defense of qualified immunity based on the prior determination in *Bauder I* 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 I at* 547. (R. at 96-97.) Since the warrant and affidavit are not a part of the record in this action, it is clear that any determination on sufficiency of the warrant and affidavit made by the Third District in this action was the result of issue preclusion based upon *Bauder I.*

SUMMARY OF THE ARGUMENT

In 1990, the police received information that Gary Bauder apparently was involved in luring young boys into his house, giving them drugs and alcohol, and using them for child pornagraphy, For this same behavior he had been previously arrested by Special Investigations Detective Barbara Gentile and had been sentenced to probation. Through surveillance and witness interviews, Gentile learned and confirmed that Bauder was again drawing youths into his house, giving them drugs and alcohol, and keeping them overnight. She took this information to two assistant state attorneys, and with their help drafted a warrant and affidavit that was approved by two circuit court judges, one who issued the warrant and one who denied Bauder's subsequent motion to suppress. But the Third District reversed Bauder's conviction and held that Bauder's affidavit failed to state probable cause.

Now Bauder is suing Officer Gentile personally. He contends that, based on the reversal in his criminal case -- a case where Officer Gentile was not a party -- the Officer cannot assert her defense of qualified immunity defense that has never been previously addressed. The Third District has accepted Bauder's contention, but in doing so it plainly erred and contradicted this Court's well-established law.

Officer Gentile cannot lose her defense of qualified immunity through the ruling in a case where she was not a party and her defense was not addressed. By denying the Officer's qualified immunity based on a prior ruling in another case, the Third District applied the doctrine of collateral estoppel. But that doctrine requires the identity of parties and of issues. Here there were neither. The other party in Bauder's criminal case was the State of Florida, not Officer Gentile. Officer Gentile was not represented by the State, and indeed

was not the focal interest of the State, And the issue in the criminal conviction involved the ***actual*** probable cause necessary to sustain a search warrant, not the *arguable* probable cause necessary to sustain the defense of qualified immunity. By denying Officer Gentile the defense of qualified immunity based on a ruling in a case where she was not a party and the defense was not at issue, the Third District has denied Officer Gentile her due process.

Beyond that, once the merits and well-established principles of qualified immunity are considered, it is clear the trial court properly granted Officer Gentile summary judgment. Qualified immunity is a "good faith" defense, based on ***arguable,*** not actual, probable cause. Officer Gentile should be immune from personal liability as long as officers of reasonable competence could disagree about whether a warrant should issue, Here, circuit court judges experienced state attorneys, and Offficer Gentile's supervising officers all unanimously agreed that the search warrant should issue, In addition, Bauder did not satisfy his burden of showing the law clearly establishes that Gentile's affidavit was deficient. Accordingly. Officer Gentile is entitled to qualified immunity.

The Third District's decision should be quashed and the judgment in favor of Officer Gentile should be reinstated.

STANDARD OF REVIEW

The standard of review with respect to the lower appellate court's application of preclusion doctrines is *de novo*. The standard of review with respect to summary judgments generally is whether there was suffkient competent, substantial evidence before the trial court from which a jury could have lawfully drawn an inference against the prevailing party under the issues framed by the pleadings in the case. *Wills v. Sears, Roebuck & Co*, 351 So.2d 29 (Fla. 1977). However, because entitlement to qualified immunity is generally a question of law, the standard of review in this case on that issue is de novo.

ARGUMENT

I.

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING GENTILE'S QUALIFIED IMMUNITY SUMMARY JUDGMENT BASED ON ITS PRIOR OPINION, BECAUSE A PARTY CANNOT BE STRIPPED OF THE PROTECTION OF QUALIFIED IMMUNITY WHERE SHE WAS NOT PARTY TO THE PRIOR DECISION, AND WHERE THE ISSUES DECIDED IN THE TWO PROCEEDINGS WERE NOT IDENTICAL.

The decision of the Third District Court of Appeals applies *Bauder I* as though it has collateral estoppel effect on the parties and issues in this action. The opinion in this case specifically states, "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,' . . . the shield of immunity is lost." *Bauder II* at 1222.[4] (citation omitted). In so doing, the Third District precludes Officer Gentile from raising the defense of qualified immunity based solely upon the *Bauder* I decision. This is in error in that Officer Gentile was not a party to the criminal case, and

[4] All emphasis is supplied unless expressly noted otherwise.

because the issues sought to be precluded in this action were not actually adjudicated in the criminal action,

The Third District opinion is contrary to the large body of case law, including many decisions of this Court, which requires that there must be identity of parties and issues for collateral estoppel to apply, *Stogniew v. McQueen*, 656 So.2d 917 (Fla. 1995), *Dep't. of Health and* ***Rehabilitative Services v. B.J.M., 656*** So.2d 906 (Fla. 1995), ***Mobil*** *Oil Corp. v. Shevin*, 354 So.2d 372 (Fla. 1977). In fact, the Third District erroneously failed to follow its own numerous precedents which properly apply these clear rules. See, *e.g.*, *Baxas Howell Mobley,* ***Inc.*** v. ***BP Oil*** *Co*, 630 So.2d 207 (Fla. 3d DCA 1993), ***West v. Kawasaki Motors*** *Mfg.* ***Corp., U.S.A., 595*** So.2d 92 (Fla. 3d DCA 1992), ***Hochstadt*** *v. Orange Broadcast*, ***588*** So.2d 51 (Fla. 3d DCA 1991), ***Prudential*** *Ins. Co. of America* v. *Turkal*, ***528*** So.2d 487 (Fla. 3d DCA 1988). In all of these cases, the fundamental requirements for the application of collateral estoppel are that: (a) the parties to the actions must be identical, and (b) the issue sought to be precluded in the latter action must be identical to the issue adjudicated in the prior action. Here, Officer Gentile was not a party to the prior action, and the objective reasonableness of her actions in obtaining and executing the warrant and affidavit was not adjudicated.

A. THE PRIOR DECISION OF THE THIRD DISTRICT CANNOT STRIP GENTILE OF HER QUALIFIED IMMUNITY BECAUSE SHE WAS NOT PARTY TO THAT CASE.

This court has recently revisited the requirement of mutuality of parties for collateral estoppel[5] in *Stogniew v. McQueen*, 656 So.2d 917 (Fla. 1995). There, this court was presented with the issue of whether an administrative determination of professional misconduct could be used offensively as conclusive proof of the facts underlying that determination in a subsequent suit against the professional for negligence based on the same facts. ***Id.*** at 918. The court first recounted that "Florida has traditionally required that there be a mutuality of parties in order for the doctrine [of estoppel] to apply. Thus, unless both parties are bound by the prior judgment, neither may use it in a subsequent action" *Id.* at 919 (citations omitted); ***see also Starr*** *Tyme, Inc. v.* ***Cohen, 659*** So.2d 1064 (Fla. 1995); *Trucking Employees of* ***North*** *Jersey Welfare* ***Fund, Inc.*** *v. Romano*, ***450*** So.2d 843, 845 (Fla. 1984) ("[T]he well established rule in Florida has been and continues to be that collateral estoppel may be asserted only when the identical issue has been litigated between the same parties or their privies."). This court therefore rejected Stogniew's argument that Florida should abandon the requirement of mutuality in the application of collateral estoppel, explaining that "any judicial economies which might be achieved by eliminating mutuality would be [insufficient] to affect our concerns over fairness for the litigants." *Id.* at

920. See also Dep't. of Health and Rehabilitative Services v. B.J.M., *656* So.2d 906 (Fla 1995), *Mobil Oil Corporation v. Shevin*, 354 So.2d 372 (Fla. 1977). This Court reaffirmed its holding in *Stogniew* in *Starr Tyme, Inc.* v. *Cohen*. Clearly, Officer Gentile was not a party to the criminal case. The State of Florida and the defendant are the only parties to a criminal action.

It also can not be said that Officer Gentile was somehow in privity with the State of Florida. In Florida, for one to be in privity with a party to a lawsuit or for one to have been virtually represented by a party, one must have an interest in the action such that she will be bound by the final judgment as if she were a party. *Stogniew*. Officer Gentile had no such interest here. As found in *Stogniew*, a complaining witness (Officer Gentile) is not a party or privy and is not "virtually represented" by the State. The Third District has similarly recognized that in a criminal action, the State Attorney does not act in a representative capacity as to a county or its employees. *See Metropolitan Dade County v. Curry*, *632* So.2d 667 (Fla. 3d DCA 1993) (order directing county law enforcement officer to return property not valid absent notice and hearing to the county). Certainly, the State Attorney does not represent the personal interest of an officer. Nor are issues or strategies which might affect her in a subsequent action properly considered by the State. This is dynamically demonstrated in this case, where the State failed to raise the good faith exception to the exclusionary rule in its brief on appeal. (R. 115-154.) It is fundamentally unfair to preclude

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[5] "Collateral estoppel, also known as estoppel by judgment, serves as a bar to relitigation of an issue which has already been determined by a valid judgment." *Stogniew*, 656 at 919.

an officer from raising a defense where the officer has had no input regarding the prior determination.

Although no Florida court has had occasion to address the precise scenario *sub judice*, other courts have. In *Trujillo* v. *Simer*, 934 F.Supp. 1217 (D. Colo. 1996), for example, the court granted summary judgment to the defendant officers, and rejected plaintiffs' contention that the prior criminal court order granting their motion to suppress barred the officers from relitigating the constitutionality of their conduct. The court found the doctrine of estoppel inapplicable because the officers had not been parties in the criminal case and were not in privity with the United States. *Id.* at 1224. The court explained:

> The criminal case was brought on behalf of the United States of America. The Assistant U.S. Attorney who prosecuted the criminal case was representing the United States, not the interests of the individual Defendants in this case. The defendants in this case had no control over how the criminal case was handled and no ability to appeal Chief Judge Matsch's decision. Under these circumstances, there was no privity between the United States and the individual Defendants in this case. See *Garza v. Henderson*, 779 F.2d 390, 394 (7th Cir. 1985); *Duncan v. Clements*, 744 F.2d 48, 51-53 (8th Cir. 1984); *Warren v. Byrne*, 699 F.2d 95, 97 (2d Cir. 1983); *Davis v. Eide*, 439 F.2d 1077, 1078 (9th Cir.), cert. *denied*, 404 U.S. 843, 92 S.Ct. 139, 30 L.Ed.2d 78 (1971); *Griffin v. Strong*, 739 F. Supp. 1496, 1503 (D. Utah 1990).

Id. The same reasoning applies to the present case. The criminal case was brought on behalf of the State of Florida. The Assistant State Attorney represented not Officer Gentile, but the State. Officer Gentile had no control over how the criminal case was handled, and certainly no control over the State's appeal, wherein the State inexplicably didn't even cite to *United States v. Leon*, 468 U.S. 897 (1984), the seminal Supreme Court case on the good faith exception to the exclusionary rule. (R. at. 115-154.)

Bauder I should not have been used to preclude Officer Gentile from asserting her qualified immunity. The Third District's opinion is therefore erroneous, in conflict with three established precedents of this Court set forth in the *Stogniew* case, and itself sets a precedent which is contrary to the public interest. The trial court's Order Granting Summary Judgment should have been affirmed and the decision of the Third District should be reversed.

B. GENTILE IS NOT BOUND BY THE THIRD DISTRICT'S PRIOR DECISION BECAUSE THE ISSUES THERE WERE NOT IDENTICAL TO THOSE IN THE PRESENT ACTION

A second independent reason why it was error for the Third District to strip Officer Gentile of her qualified immunity is that its prior decision did not address the identical issue presented in the civil case. This requirement of identical issues is particularly important where, as here, a plaintiff seeks to use the prior judgment offensively. *See, e.g., Sun Chevrolet, Inc. v. Crespo*, 623 So.2d 105, 107 (Fla. 3d DCA 1993) ("[T]he well established rule in Florida has been, and continues to be, that a prerequisite to the offensive use of collateral estoppel is that the *identical* issue has been litigated between the same parties."). Absent mutuality of issues sought to be precluded, the decision of the Third District in this case is improper and should be reversed, *Dep 't. of Health and Rehabilitative Services v. B.J.M.*, 656 So.2d 906 (Fla. 1995) (issue sought to be precluded by collateral estoppel must have actually been determined in prior case); *Mobil Oil Corp. v. Shevin*, *354* So.2d 372 (Fla. 1977) (parties and issues must be identical for collateral estoppel to apply).

Bauder will surely argue here, as he has in the past, that the decision in *Bauder I* that "the affidavit given in support of the search warrant was totally devoid of factual recitations

sufficient to raise the afftant-officer's suspicion to the level of probable cause" necessarily decided the issue of "whether the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986). A review of the principles applicable to civil rights actions generally, Fourth Amendment claims in particular, and the defense thereto of qualified immunity demonstrates why Bauder's argument is wrong.

A government employee or official sued pursuant to 42 U. S.C. § 1983 in his personal capacity has the defense of qualified immunity. *Kentucky v. Graham, 473* U.S. 159, 167-68 (1985). In all but exceptional cases, qualified immunity protects government officials performing discretionary functions from civil rights liability. *Lassiter v. Alabama A & M University*, *28* F.3d 1146, 1149 (1 lth Cir. 1994). Qualified immunity protects government officials performing discretionary functions from civil trials and liability if their conduct violates no clearly established **statutory or** constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

In the context of Fourth Amendment claims, the issue for determination is therefore not whether probable cause existed for the search and arrest, but rather whether *arguable* probable cause existed. *Swint v. City of Wadley*, 51 F.3d 988, 996 (1 1th Cir. 1995); Post v. *City of Fort Lauderdale,* 7 F.3d at 1558 (1 lth Cir. 1993), *modified on other grounds,* 14 F.3d 583 (1 1th Cir. 1994); *Moore v. Gwinnett County*, 967 F.2d 1495, 1497 (1 lth Cir. 1992). Thus, the question is whether reasonable officers in the same circumstances and possessing the same knowledge, as the Defendant could have believed that probable cause existed. *Swint* **at** *996, quoting Von Stein v. Brescher*, 904 F.2d 572, 579 (1 1th Cir. 1990). Put another way, if reasonable public officials could differ on the legality of a defendant's actions, the

defendant is entitled to immunity from suit, *Pfannstiel v. City of Marion, 918* F.2d 1178 (5th Cir. 1990).

Thus, even if a criminal court finds that a warrant is lacking in probable cause, that issue, although related, is far different from a finding that an officer's conduct violated clearly established law. As the Second Circuit has emphasized, "evidence before the court might be insufficient to sustain a finding of probable cause for the warrant application, yet be adequate for the judge to conclude that it was reasonable for [the defendant police officer] to believe he had a good basis for his actions." *Magnotti v. Kuntz*, 918 F.2d 364, 367 (2d Cir. 1990). See *also Trujillo*, 934 F.Supp. at 1225 ("If [the two issues were the same] then all suppression orders would automatically trigger section 1983 liability-a ludicrous result.").

Bauder I gives no indication whatsoever that it addressed that question of *arguable* probable cause,. Indeed, the opinion does not even mention Leon, the seminal case setting forth the "good faith' exception to the exclusionary rule." And particularly in light of the fact that the State's Brief in *Bauder I* did not even cite to *Leon* one time, (R. at 115-154), it is more than merely possible that the court did not consider it.

Absent mutuality of issues sought to be precluded, the decision of the Third District in this case is improper and should be reversed. *Dep 't. of Health and Rehabilitative Services v. B.J.M.*, (issue sought to be precluded by collateral estoppel must have actually been determined in prior case); *Mobil Oil Corp. v. Shevin* (parties and issues must be identical for collateral estoppel to apply). To deny Officer Gentile the opportunity to avail herself of the

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[6] "Good faith is the issue in the criminal context which would have been most analagous to qualified immunity, had it been raised.

defense of qualified immunity, based solely on a prior ruling in which she did not participate and in which the issue involved was not raised, would be to deny her due process. *See Allen v. McCurry*, 449 U.S. 90, 95 (1980); *Trujillo* 934 F.Supp. at 1224 (D. Colo. 1996) ("[S]ince the individual Defendants did not have the opportunity to fully and fairly litigate the validity of the search in the criminal case, applying collateral estoppel against them in this case would also violate their due process rights."). Unlike a criminal defendant, who is present to protect his rights, a police officer has no standing, no rights, and no power to affect the litigation decisions or results in a pending criminal case.

Thus, it is clear that the Third District erred in relying on its prior opinion in the criminal case to "strip" Officer Gentile of her qualified immunity. It erred not only because Officer Gentile was neither party to that case nor privy to a party, but also because the issue decided in the criminal case was not identical to that presented in the case *sub judice*.

II.

BECAUSE OFFICER GENTILE'S ACTIONS WERE OBJECTIVELY REASONABLE, SHE IS ENTITLEDTO FINAL SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY AS A MATTER OF LAW

The Third District was equally wrong in reversing the lower tribunal's final summary judgment, because the unrefuted evidence submitted to the lower court demonstrated that Officer Gentile took all actions that could possibly be expected from an officer, and because at worst reasonable attorneys and judges *did in fact differ* as to whether the affidavit contained information sufficient to constitute probable cause. Specifically, Gentile's reliance on two State Attorneys to not only review, but also assist in the preparation of the affidavit and warrant is alone sufficient to establish her qualified immunity. Finally, it is clear that not only did Bauder fail to sustain his burden to prove that the specific law was so clearly established to overcome the presumption of immunity, no such law exists.

A. OFFICER GENTILE'S OVERALL INVESTIGATION, OBTAINING THE ASSISTANCE OF TWO STATE ATTORNEYS, AND THE APPROVAL OF TWO CRIMINAL COURT JUDGES, ALL COMBINE TO DEMONSTRATE QUALIFIED IMMUNITY.

The record evidence submitted by Officer Gentile, and unrefuted by Bauder, demonstrated that the detective was well trained in the field of child pornography and

pedophilia. She had prior knowledge of Bauder's criminal behavior. Upon receiving reliabl information from another detective, she did not rush to obtain a warrant, but instea undertook a thorough investigation over the next several months.

More significantly, upon completion of her investigation, Officer Gentile took th information she had to the State Attorney's Office to seek professional guidance in th preparation of a search warrant and affidavit. Two Assistant State Attorneys, one in th sexual battery division, and the other the Chief of the Legal Division, reviewed Office Gentile's findings and concluded that she had probable cause. The State Attorneys in fac drafted the majority of the warrant and affidavit. Officer Gentile went on to have the issue warrant and affidavit reviewed by her sergeant and lieutenant, who also believed that th warrant and affidavit was supported by probable cause. Based on this alone, Office Gentile's actions are "objectively reasonable." ***See*** *Hart v. O'Brien*, ***127*** F.3d 424, 445 (5t Cir. 1997) (conclusion that affiants protected by qualified immunity "bolstered by the fac that the neutral and detached magistrate, faced with the same facts, determined that probabl cause existed . .").

Offtcer Gentile further demonstrated the reasonableness of her conduct in provin that *two* Circuit Court judges concluded that the warrant and affidavit contained sufficien probable cause: the issuing judge and the criminal trial court judge. In a Fifth Circui decision after *Malley*, the defendant police officer was protected by qualified immunity i connection with his obtaining a search warrant, even though it turned out that no illega drugs were found. The court noted, "When a factual situation presents a close question o probable cause, the benefit of the doubt belongs to the police officer who submits the clos question for a magistrate's decision." *Jennings v. Joshua Indep.* ***Sch.*** *Dist.*, ***877*** F. 2d 3 I 3

3 18 (5th Cir. 1989). The court there also observed that the police officer acted reasonable and with caution in seeking the advice of the county attorney as well as his superiors before securing the warrant. *See also Torchinsky v. Siwinski*, *942* F.2d 257, 261 (4th Cir. 1991) ("the decision of a detached district judge that [defendant] satisfied the more stringent probable cause standard is plainly relevant to a showing that he met the lower standard of objective reasonableness required for qualified immunity"); *Ortiz v. Van Auken*, *887* F.2d 1366, 1371 (10th Cir. 1989) (Noting that the defendant officer relied on the legal opinions of a deputy district attorney and a judge, both of whom concluded that probable cause existed to issue the warrant).

"If officers of reasonable competence could disagree as to whether a warrant should issue, immunity should be recognized." *Malley v. Briggs*, *475* U.S. at *341; Walsingham v. Dockery*, *671* So.2d 166 (Fla. 1 st DCA 1996). Where, as here, two high placed, experienced Assistant State Attorneys, a sergeant, a lieutenant, and two Circuit Court judges believed that probable cause exists, it can hardly be disputed that "a reasonable officer possessing the same information could have believed that his conduct was lawful." *McGory* v. *Metcalf*, 665 So.2d at 260. To place Officer Gentile *personally* at risk, in light of all the steps she took to insure that her actions were legal, would place an inordinate chilling upon the actions of police officer. As the Second District Court of Appeals queried,"[W]hat more is a police officer to do?" *McGory*, 665 So.2d at 260.

B. RELIANCE ON ADVICE OF COUNSEL, AFTER FULL AND COMPLETE DISCLOSURE, MAKES GENTILE'S CONDUCT OBJECTIVELY REASONABLE AS A MATTER OF LAW.

The Supreme Court has recognized that Congress intended Section 1983 to b construed in the light of common law principles that were well settled at the time of it enactment. See *Kalina v. Fletcher*, 118 S.Ct. 502 (1997); *Briscoe v. La Hue*, 460 U.S. 32 *(I 983); Tenney v. Rrahdyhove,* 341 U.S. 367 (195 1). The common law in the state of Florid and throughout the vast majority of the United States is that advice of counsel is a defense t both false arrest and malicious prosecution. *Glass v. Parrish,* 5 I So.2d 717, (Fla. 1951) *Royal Trust Bank, N.A.* v. *Von Zamft*, 511 So.2d 654 (Fla. 3d DCA 1987); *Arney v. Dept. o Natural Resources,* 448 So.2d 1041 (Fla. I st DCA 1984); *Toomey v. City of For Lauderdale*, 3 11 So.2d 678 (Fla. 4th DCA 1975); *Kilburn v. Davenport,* 286 So.2d 241 (Fla 3d DCA 1973); see *also* 52 Am. Jut-. 2d *Malicious Prosecution* §§ 77-87; 32 Am. Jur. 2 *False Imprisonment* § *69.*

In Section 1983 actions, advice of counsel has been defined either as an exceptiona circumstance, which eliminates liability, or as a step indicative of good faith. *See Hollingsworth v. Hill,* 1 10 F.3d 733 (10th Cir. 1997); *V-l Oil Co. v. Wyoming Dep 't. o Envtl. Quality, 902* F.2d *1482* (10th Cir.), *cert. denied, 498 U.S. 920 (1990); United States v Taxacher*, 902 F.2d 867 (1 lth Cir. 1990). The Tenth Circuit in particular has adopted thr common law standard that advice of counsel will be an absolute defense as a complete bar to a Section 1983 action, *V-f Oil Company.* There, as here, an officer had spoken to high- ranking government attorneys, fully informed them of the circumstances and, promptly

acted upon their advice, The court found qualified immunity. The extensive advice and input of high ranking State Attorneys sought and obtained in this case entitles Officer Gentile to nothing less. Although the Eleventh Circuit in *Taxacher* found that seeking advice of counsel was a step indicative of objective good faith, this small difference between the Circuits proves that at a minimum, the law is *not* "clearly established."

Whether looked at as a special circumstance or a step indicative of objective good faith advice of, when as extensive as was given in this case, should be qualified immunity as a matter of law

Where, as here, the actions of the officer are done upon advice of counsel, after full and complete disclosure to attorneys who are clearly high-ranking and experienced in matters of this sort, the court should find as a matter of law that qualified immunity is applicable.

C. BAUDER COMPLETELY FAILED TO CARRY HIS BURDEN TO SHOW THAT A CLEARLY ESTABLISHED STANDARD OF LAW HAS BEEN VIOLATED BY OFFICER GENTILE

Finally, it is clear that Bauder did not even begin to satisfy his burden on Officer Gentile's Motion for Summary Judgment, Once the qualified immunity defense is raised, a plaintiff bears the burden of showing that the federal rights allegedly violated were clearly established, and that the defendant's conduct violated that law. In asserting qualified immunity, it is first the officer's burden to establish that she was acting within the scope of her discretionary authority (a point not in dispute here); the burden then shifts to the plaintiff to show that the officer's action violated the plaintiffs rights in light of clearly established

law. *Brescher v. Pirez*, **696** So.2d 370 (Fla. 4th DCA 1997); *McGory* v. *Metcalf*, 665 So.2d **254, 258-59** (Fla. 2d DCA 1995), ***rev. denied,*** 672 So.2d 543 (Fla.1996); *Jordan v.* **Doe, 38** F.3d 1559, 1565 (1 1th Cir. 1994); ***Rich*** v. Dollar, 841 F.2d 1558 (1 1th Cir. 1988); *Zeigler v. Jackson*, 716 F.2d 847 (1 lth Cir. 1983).

Under this standard, a plaintiff must show that when the defendant acted, the law was developed in such a concrete and factually defined context to make it obvious to *all* reasonable government actors, in the defendant's place, that what he is doing violates federal law. [7] *Lassiter* at 1149 ***(citing Anderson v. Creighton, 483*** U.S. 635, 640 (1987)). "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances," *Lassiter* at 1150. The qualified immunity standard demands that the defendant cross a bright line that is not found in abstractions-to act reasonably, to act with probable cause, and so on-but in studying how these abstractions have applied in concrete circumstances. ***Post v*** *City of Fort* ***Lauderdale, 7*** F.3d 1552, 1557, *modified*, 14 F.3d 583 (1 lth Cir. 1994). The qualified immunity doctrine means that government agents are not always required to err on the side of caution. *Davis v. Scherer*, 468 U.S. 183, 196 (1984).

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[7] Much of the general discussion that follows here is derived from the seminal Eleventh Circuit court of Appeals opinion in *Lassiter*. This court has had only one prior occasion upon which it addressed the principles of qualified immunity in a federal civil rights context: *Tucker v.* ***Resha,*** 648 So.2d 1187 (Fla. 1995), in which this court adopted the federal rule that orders denying summary judgments based upon claims of qualified immunity are subject to interlocutory review. Officer Gentile respectfully urges this court to adopt as Florida precedent the procedural framework set forth in ***Lassiter*** and ***Rich v. Dollar,*** 841 F.2d 1558 (I lth Cir. 1988). Although *Lassiter* is not now binding precedent on this court, the principles set forth therein were in factbinding on the Third District, having been adopted in *City of* ***Hialeah*** *v. Fernandez*, ***661*** So.2d 335 (Fla. 3d DCA 1995).

Thus, Officer Gentile is protected from personal liability by qualfied immunity unless the plaintiff proves that the law was so clearly established in a *specific* sense—not merely in general terms-that **no** reasonable official could have believed that the affidavit comported with constitutional requirements. Gentile does not disagree that the United States Supreme Court has set forth the applicable *general* rule with respect to affidavits and warrants in *Illinois v. Gates*, 462 U.S. 213 (1983). But the Supreme Court in *Gates* expressly noted that "probable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 232.

The Court noted that some limits do exist, such as when an affiant presents only conclusions and no information, beyond which a magistrate may not go in issuing a warrant. *See, e.g, Nathanson v. United* **States, 290** U.S. 41 (1933). However, the Court significantly added:

> But when we move beyond the "bare bones" affidavits present in cases such as *Nathanson* and *Aguilar*, this area simply does not lend itself to a prescribed set of rules, like that, which had developed from *Spinelli*. Instead, the flexible, common-sense standard articulated in ***Jones,*** *Ventresa,* and *Brinegar* better serves the purposes of the Fourth Amendment's probable cause requirement.

Gates at 2333.

There is thus no case which draws a "clear line" such that no reasonable officer would believe it proper to request a warrant under the circumstances confronted by Officer Gentile. *Malley v. Briggs* is certainly not such a case, The most *Malley* does is provide the general rule that "[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. *Id* at 1098. Missing from the Third District's analysis, and indeed, nonexistent, is the case which is factually so similar so as to create the requisite bright line under concrete, not abstract, circumstances which would have been a clear indication to any reasonable officer that the affidavit was insufficient.

CONCLUSION

The Third District Court of Appeal clearly erred in stripping Detective Gentile of her qualified immunity based on a prior decision to which she was not party, and which involved issues different than hers.

The Third District also erred in reversing the lower court's final summary judgment in Gentile's favor because Bauder did not and could not have proven that Gentile's actions were violative of clearly established law such that no reasonable public official would have believed them lawful, particularly in light of the unrefuted fact that two state attorneys and two circuit court judges in fact concluded that they were lawful.

Gentile therefore respectfully requests that this court REVERSE the decision of the Third District, and REINSTATE the final summary judgment in favor of Gentile

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Petitioner's Initial Brief On The Merits was mailed this 6 day of February, 1998, to: LOUIS M. JEPEWAY, JR., ESQ., Jepeway and Jepeway, P.A., 407 Biscayne Building, 19 West Flagler Street, Miami, Florida 33 130; ANDRE A. ROUVIERE, ESQ., 145 Almeria Avenue, Coral Gables, Florida 33 134; and RHEA P. GROSSMAN, ESQ., 2780 Douglas Road, Suite 300, Miami, Florida 33 133-2749,

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