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OCT 24 1997

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,519

L.T. # 96-2265

BARBARA WHITE GENTILE,

Petitioner,

vs.

GARY BAUDER,

Respondent.

CORRECTED PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This is a Petition to invoke the discretionary jurisdiction of this Court to review a decision of the Third District Court of Appeals which expressly and directly conflicts with this Court's decisions in Stogniew v. McQueen, 656 So.2d 917 (Fla. 1995), Department 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), and with the First District Court of Appeals' decision in Walsingham v. Dockery, 671 So.2d 166 (Fla. 1st DCA 1996).

The Third District, in this case, has determined that a police officer is collaterally estopped from raising the defense of qualified immunity in a civil rights suit. The collateral estoppel results from issues determined in the criminal action, which the officer was not a party to, resulting in the officer being held per se liable in this action. This appeal arose after the trial court granted the officers Motion For Summary Judgment finding that the officer had acted reasonably in obtaining a search warrant and was therefore entitled to qualified immunity. In so doing, the trial court considered the affidavits and depositions of the Defendant, Barbara White Gentile, (hereafter "Officer Gentile") and Assistant State Attorney, Ruth Solly, which were filed by Officer Gentile. (The affidavits and depositions are contained in the Appendix and will be cited to as "App. ")

Plaintiff, Gary Bauder, (hereafter "Bauder") sued Officer Gentile for 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. At all times material hereto, Officer Gentile was a Metro-Dade Police officer within the course and scope of her position. (App. 51).

As a result of information she had received concerning Bauder being involved in sexual assaults on children, Officer Gentile began an investigation of Bauder. (App. 12-15, 51). Having arrested Bauder before for sexual assaults on children, the officer was familiar with Bauder and conducted an investigation. (App. 12).

The investigation resulted in the officer seeking assistance from the State Attorney's Office with the preparation of a search warrant and supporting affidavit (hereafter "warrant"). (App. 23-25, 40-42, 51-52). To that end, Officer Gentile met with Ruth Solly and Richard Shiffrin of the State Attorneys Office on numerous occasions. (App. 25, 42). At that time, Ms. Solly was a member of the Sexual Battery Division for the State Attorney and Mr. Shiffrin was the Chief of the Legal Division for the State Attorney. (App. 52, 54). The attorneys reviewed the warrant and made changes as they desired. (App. 42, 52, 54). In fact, Shiffrin wrote most of the warrant. (App. 52). Both attorneys advised Officer Gentile that they believed that there was adequate probable cause stated for the warrant. (App. 23-26, 52, 55).

The warrant was presented to a Circuit Court judge who found probable cause and issued the warrant. (App. 26). Prior to this issuance, the warrant was reviewed by Officer Gentile's sergeant and lieutenant who both also believed that the warrant stated probable cause. (App. 23, 52).

Officer Gentile believed that probable cause was adequately stated in the warrant for it to be issued. (App. 31, 53).

After his arrest, Bauder moved to suppress the results of the search. His motion to suppress was heard by a Circuit Court judge who denied the motion. Bauder was later convicted of the charges and appealed that conviction which resulted 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), (hereafter "Bauder I") which found probable cause for the warrant to be lacking, and reversed that conviction. (The decision in Bauder I is contained at App. 1).

In response to Officer Gentile's Motion for Summary Judgment in this action, no counter affidavits were filed by Bauder and no evidence of any kind was presented by Bauder. Bauder did not even submit the warrant 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 ruled for Officer Gentile.

The Third District Court of Appeals' opinion in this case, Bauder v. Gentile, So.2d , 22 Fla. L. Weekly D1368 (Fla. 3d DCA 1997) (hereafter "Bauder II"), reversed the summary judgment

and precludes 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. (The decision in Bauder II is contained at App. 2-3). Since the warrant is not a part of the record in this action, it is clear that any determination on the warrant made by the Third District was the result of issue preclusion based upon Bauder I. Just as clear is the fact that Bauder I did not, and could not, decide that "...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, 106 S. Ct. 1092, 89 L. Ed. 2d 217 (1986) since that would not have been an issue in Bauder I.

SUMMARY OF THE ARGUMENTS

I.

The Third District's decision in Bauder II conflicts directly and expressly with decisions of this court in applying the decision in Bauder I to collaterally estop Officer Gentile from presenting the defense of qualified immunity. Officer Gentile was not a party to the criminal action and the issue of Officer Gentile's good faith was not decided in Bauder I. Without an identity of parties and issues, collateral estoppel cannot be applied and, as such, Bauder II conflicts expressly and directly with decisions of this Court.

II.

The standard applied by the Third District in Bauder II for when qualified immunity may be lost by an officer conflicts directly and expressly with the standard announced by the United States Supreme Court and adopted by the First District Court of Appeals. By using the standard announced in Bauder I to preclude Officer Gentile from asserting the qualified immunity defense in Bauder II, the Third District's decision in Bauder II directly and expressly conflicts with the U.S. Supreme Court and the First District.

ARGUMENT

I.

THE DECISION OF THE THIRD DISTRICT DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF THIS COURT IN APPLYING COLLATERAL ESTOPPEL TO PRECLUDE OFFICER GENTILE FROM ASSERTING HER DEFENSES IN THIS ACTION

The decision of the Third District Court of Appeals, in this action, applies Bauder I as though it has equitable estoppel effect on the parties and issues in this action.¹ The opinion 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

¹ Only two legal doctrines exist whereby a prior decision of a court precludes litigation of issues raised in a subsequent legal action. Those two doctrines are res judicata and equitable estoppel. It is clear that the decision of the Third District cannot give res judicata effect to the prior opinion since res judicata would require identity of the thing sued for. see Personnel One v. John Sommerer & Co., 564 So.2d 1217 (Fla. 3d DCA 1990). Obviously, the thing sued for in a criminal case is different than that sued for in this civil action.

raise the affiant-officer's suspicion to the level of probable cause, ' ... the shield of immunity is lost.' (citation omitted) (emphasis added) In so doing, the Third District precludes Officer Gentile from raising the defense of qualified immunity based solely upon the Bauder I decision.

The opinion directly and expressly conflicts with the large body of case law, including many decisions of this Court, which requires that there must be identity of parties and issues for equitable estoppel to apply. Stogniew v. McQueen, 656 So.2d 917 (Fla. 1995), Department 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)

Officer Gentile was not a party to the criminal case. Stogniew v. McQueen, supra. (complaining witness not a party or privy and is not "virtually represented " by State DPR for purposes of collateral estoppel). The State of Florida and the defendant are the only parties to a criminal action. Based upon this alone, the Third District's opinion directly and expressly conflicts with the established precedence of this Court set in the Stogniew case and sets a precedent which is contrary to the public interest.

In any action under section 1983 against an officer individually, the officer may raise qualified immunity as a defense. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), Malley v. Briggs, 475 U.S. 335, 344, 106 S. Ct. 1092, 89 L. Ed. 2d 217 (1986), Lassiter v. Alabama A&M University, 28 F.3d 1146 (11th Cir. 1994) (en banc) Qualified

immunity is based essentially on the good faith of the officer in obtaining the warrant in question. As can be seen from the opinion in Bauder I, the issue of the good faith of Officer Gentile was not decided in the criminal appeal and as such that opinion cannot be used, through collateral estoppel, to preclude Officer Gentile's defenses now. Department of Health and Rehabilitative Services v. B.J.M., supra. (issue sought to be precluded by collateral estoppel must have actually been determined in prior case); Mobil Oil Corporation, supra. (parties and issues must be identical for collateral estoppel to apply). In applying collateral estoppel, the decision in Bauder II directly and expressly conflicts with the opinions of this Court.

None of the prerequisites necessary to applying collateral estoppel are present in this action to allow the preclusion of Officer Gentile's defense nor to reverse the trial court's grant of summary judgment. The Third District Court of Appeals opinion reversing the trial court in this matter conflicts directly and expressly with Stogniew, supra., Department of Health and Rehabilitative Services, supra, and, Mobil Oil Corporation, supra.

To deny Officer Gentile the opportunity to avail herself of this defense, based solely on a prior ruling in which she did not participate and, in which, the issue involved was not raised, is to deny her due process. Unlike a criminal defendant, who is present to protect his rights, a police officer has no standing, no rights, nor power to affect the litigation decisions or results in a pending criminal case.

Based upon the express and direct conflict of this case with decisions of this Court, this Court has jurisdiction to hear this case and should decide the issue of whether a police officer is a party or privy in a criminal action, such that the State Attorney is virtually representing the officer, such that the offender may use decisions made in the criminal action for collateral estoppel to prevent the officer from presenting a defense in a subsequent civil action.

II.

THE DECISION OF THE THIRD DISTRICT DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN ESTABLISHING THE STANDARD FOR LOSS OF QUALIFIED IMMUNITY

The Third District Court, in using Bauder I to preclude Officer Gentile from raising the defense of qualified immunity, has necessarily found that the standard for when qualified immunity will be lost is when a search warrant is "... totally devoid of factual recitations sufficient to raise the affiant-officer's suspicion to the level of probable cause." (citations omitted) Bauder I, at 547.

The First District Court of Appeals, in Walsinoham v. Dockers, 671 So.2d 166 (Fla. 1st DCA 1996), followed the accepted standard established by the United States Supreme Court in Malley v. Briggs² 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

² 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.3d 271 (1986)

lost." Malley v. Briggs, id. at 344. These standards are completely different and conflicting.

A warrant which is insufficient to raise an officer's suspicions to the level of probable cause -- the standard used by the Third District to eliminate qualified immunity in this case -- may none the less have sufficient indicia of probable cause such that official belief in its existence is not unreasonable -- the standard established by the U.S. Supreme Court for elimination of qualified immunity. This case is an obvious example of that fact.

The Third District has stated that the warrant was insufficient to raise an officer's suspicion to the level of probable cause. However, where, as here, two assistant state attorneys, the police officer involved, a police sergeant, a police lieutenant and two Circuit Court Judges have believed that probable cause was adequately stated, it can hardly be said that the warrant ". . . is so lacking in indicia of probable cause as to render official belief in its existence unreasonable. . ." It is certainly reasonable for an officer to accept the legal interpretation of two assistant state attorneys, on whether probable cause is adequately stated in a warrant.³ This is

³ It is inconceivable that an officer can be held personally liable for the results of a defective warrant when the person to whom she must go for legal advice and whose legal advice she must accept is completely immune. The decision in this case has exactly that effect.

especially true when one of those assistants is the chief of the legal division of the State Attorney's Office.

The result is that the Third District's use of Bauder I to preclude Officer Gentile from asserting qualified immunity conflicts directly and expressly with the First District and the pronouncements of the U.S. Supreme Court on this issue.

This Court has jurisdiction and should assert that jurisdiction to decide the issue of where a police officer has sought the assistance of the State Attorney to draft a search warrant and has been told by the State Attorney that probable cause exists for the issuance of the warrant and the warrant has been issued by a circuit court judge, can the police officer be held personally liable if the warrant lacks probable cause, absent misconduct on the part of the officer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Corrected Petitioner's Brief on Jurisdiction was mailed this 20th day of October, 1997, to: LOUIS M. JEPEWAY, JR., ESQ., Jepeway and Jepeway, P.A., 407 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130; ANDRE A. ROUVIERE, ESQ., 145 Almeria Avenue, Coral Gables, Florida 33134; and RHEA P. GROSSMAN, ESQ., 2780 Douglas Road, Suite 300, Miami, Florida 33133-2749.


Assistant County Attorney

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v. *Dade County*, 249 So.2d 500 (Fla. 3d DCA 1971), *affd* 261 So.2d 832 (Fla.1972).

Reversed and remanded for further consistent proceedings.



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1

Zelia Luzia SANTOS, Appellant,

v.

Gary BAUDER, **Appellant**,

47 SERVICE STATION, INC., d/b/a

v.

Pass Rent-A-Car, Appellee.

The STATE of Florida, Appellee.

No. 92-1246.

No. **92-1019**.

District Court of Appeal of Florida,
Third District.

District Court of Appeal of Florida,
Third District.

Feb. 2, 1993.

Feb. 2, 1993.

Rehearing Denied March 16, **1993**.

An Appeal from the Circuit Court for Dade County; Allen Kornblum, Judge.

On motion of plaintiff, the Circuit Court, Dade County, Robert P. Kaye, J., entered default judgment against defendant and awarded damages to plaintiff. Defendant appealed. The District Court of Appeal held that: (1) fact that defendant did not understand English, standing alone, was insufficient basis to make finding of excusable neglect for failure to answer, and (2) trial court properly entered money judgment against defendant without holding **jury trial** since damages sought were liquidated damages.

Friend & Fleck and Geoffrey C. Fleck, South Miami, for appellant.

Robert A. Butterworth, Atty. Gen., and **Angelica** D. Zayas, Asst. Atty. Gen., for appellee.

Affirmed in part and reversed in part.

Before SCHWARTZ, C.J., and FERGUSON and LEVY, JJ.

PER CURIAM.

1. Judgment ~~↔~~**143(15)**

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 a&o Illinois v. Gates, 462 US. 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.

Fact that defendant did not **understand** English, standing alone, was insufficient basis to make finding of excusable neglect in connection with defendant's failure to file timely response so as to justify setting aside default, absent any evidence **regarding** defendant's sophistication **or** education or lack thereof.

2. **Damages** ~~↔~~**194**

Trial court properly entered judgment for damages against defendant on default without **first** holding **jury trial**, **where** damages sought by plaintiff were **liquidated** damages.

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, 1997

GARY BAUDER,

Appellant,

VS.

BARBARA WHITE GENTILE,

Appellee.

• ☐

• ☐

** CASE NO. 96-2265

** LOWER
TRIBUNAL NO. 95-529

**

Opinion filed June 4, 1997.

An Appeal from the Circuit Court of Dade County, Rosemary
Usher Jones, Judge.

Andre Rouviere; Jepeway and Jepeway, Louis M. Jepeway, Jr.,
for appellant.

Robert A. Ginsburg, Dade County Attorney, Thomas H.
Robertson, Assistant County Attorney, for appellee.

Before SCHWARTZ, C.J., NESBITT and GODERICH, JJ.

PER CURIAM.

The plaintiff, Gary Bauder, appeals from an adverse final
summary judgment. We reverse.

In Malley v. Briggs, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed.

②

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. 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.

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.

Reversed and remanded.

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IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 95-00529 CA 32

GARY BAUDER,
Plaintiff,

vs.

METROPOLITAN DADE COUNTY),
a political subdivision of
the State of Florida, and
BARBARA WHITE GENTILE,
Defendants.

COPY

DEPOSITION OF BARBARA WHITE GENTILE

Taken before IRA E. COHEN, a Court Reporter **and**
Notary Public in and for the State of Florida at Large,
pursuant to Notice of Taking Deposition filed in the above
cause.

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Attorney for Defendants Metropolitan Dade County
and Barbara White Gentile.

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>
BARBARA WHITE GENTIEL	3	--

CERTIFIED QUESTION

Page 30, line 24

1 THEREUPON --

2 BARBARA WHITE GENTILE,
3 one of the Defendants herein, was called as a witness by the
4 Plaintiff and, having been first duly sworn, was examined
5 and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. JEPEWAY:

8 Q What is your name?

9 A Barbara Gentile.

10 Q Let me give you copies of the affidavit and search
11 warrant involved in this case and also a copy of the
12 District Court of Appeals decision.

13 I am going to ask you some preliminary questions,
14 although you're welcome to look at it now.

15 A That's okay.

16 Q You are a police officer?

17 A Yes, I am.

18 Q Employed by whom?

19 A The Metro Dade Police Department.

20 Q How long have you been a police officer?

2:1 A Approximately 18 years.

2:2 Q Please tell me your educational background?

2:3 A I've a Bachelor's degree in criminal justice.

24 Q From where?

2:5 A From Florida International University.

1 Q When did you receive that?

2 A '77.

3 Q After that?

4 A As far as a college degree?

5 Q Any education after college?

6 A I have the basic standards for the police
7 department.

8 Q What does that consist of?

9 A Approximately nine months of training involving
10 everything from physical training to classroom situations,
11 criminal law, administrative orders, basic training.

12 Q Where was that?

13 A Miami Dade Community College.

14 Q Was that the police academy?

15 A Yes, it was.

16 Q Was that after college?

17 A It was -- I was working on my degree at the time.

18 No, I'm sorry, it was after, it was after.

19 Q As part of the training that you received, and can
20 I call that the academy?

21 A Sure.

22 Q As part of the academy did you receive legal
23 training?

24 A Yes, I did.

25 Q What does that consist of?

1 A It's 18 years ago, to the best of my recollection
2 it was just basic laws and statutes that we would be
3 enforcing, but I don't recall exactly what we went through,

4 Q What other training and education have you, and I
5 presume since you finished the academy, after you finished
6 the academy you became a police officer?

7 A That's correct.

8 Q What other training and education have you had?

9 A Numerous in-service trainings throughout my
10 eighteen years as a police officer.

11 Q Have you had training as to the law?

12 A I believe almost every seminar or course I have
13 taken that would have to do with specific crimes would
14 entail the law.

15 There were other courses that we have taken also.

16 Q Have you had training in the law of search and
17 seizure?

18 A Yes, I have.

19 Q When was that?

20 A I don't recall the date.

21 Q What was it?

22 A What was the training you mean?

23 Well, I had one seminar that was, I believe,
24 entitled Arrest, Search and Seizure and I don't recall the
25 date, but throughout the different trainings they discuss

1 search and seizure.

2 There's also on-the-job training when it comes to
3 search and seizure.

4 Q What did they tell you about search and seizure?

5 A Could you get a little more specific, I really
6 don't know what you want.

7 Q What did they tell you about probable cause?

8 A Probable cause is not proof of guilt or innocence
9 of an individual but it's -- I don't know the legal terms,
10 but in layman's terms it would be the information you gather
11 that leads you to believe that somebody could be guilty.

12 Q Is that all you recall of the training that you
13 received as to probable cause?

14 A There was a lot of it, I couldn't recall the
15 definitions or put it into words as an actual practicum.

16 Q Did you receive training as to the preparation of
17 affidavits for searches?

18 A Yes.

19 Q Where did you receive that from?

20 A I don't recall.

21 I have had formal training in classes and I can't
22 say which ones, but a lot of on-the-job training.

23 I have prepared numerous affidavits for search
24 warrants which have been reviewed throughout our chain of
25 command and through the State Attorney's Office, where you

1 learn as you go and are doing them whether it is correct **or**
2 if there needs to be corrections made.

3 Q And those classes that you took, who taught them,
4 not the names of the people but were they police officers or
5 judges or lawyers?

6 A There were lawyers, police officers.

7 I wouldn't recall the names.

8 Q No, I'm not interested in that.

9 A I couldn't tell you which one taught which course,
10 but I recall being taught by lawyers and police officers.

11 Q Attorneys from the State Attorney's Office?

12 A Probably, I really don't recall.

13 Q What is your understanding what is required to be
14 in an affidavit for a search warrant which would result in
15 the issuance of that?

16 A Could you repeat that?

17 Q What is required to be in an affidavit for a
18 search warrant in order to obtain a search warrant?

19 A The facts of your case which would include
20 probable cause.

21 Your question is what should be contained within
22 the affidavit?

23 Q Yes, ma'am.

24 A I believe I've stated it.

25 Q And you started with the Metro Dade Police

1 Department in approximately '77?

2 A '78.

3 Q What was your first position?

4 A I was a uniformed police officer in the Northeast
5 District.

6 Q That was for how long?

7 A Approximately two years.

8 Q And after that?

9 A I was a uniformed patrol officer in the Central
10 District.

11 Q After that?

12 A I was a detective in the Central District.

13 Q After that?

14 A I went back to Northeast District.

15 Q As a detective?

16 A As an officer.

17 Q After that?

18 A A detective in the Organized Crime Bureau.

19 Q After that?

20 A I got promoted to Sergeant.

21 Q When was that?

22 A '92.

23 Q You've been there ever since?

24 A No, after I got promoted I was a uniform sergeant
25 in Central District.

1 Q You've been a sergeant since then?

2 A Yes.

3 Q Sergeant, when did you first become aware of the
4 existence of Gary Bauder?

5 A It was 1986.

6 Q What was your position then?

7 A I was a detective in the Special Investigations
a Bureau which used to be the Organized Crime Bureau.

9 Q How did you become aware of his existence?

10 A I was working the vice section when we received a
11 complaint from a photo studio in Hollywood that stated that
12 they had what they believed to be child pornography.

13 The investigation determined that the suspect in
14 the case was Gary Bauder.

15 Q What happened?

16 A He was arrested and convicted.

17 Q When was he convicted?

18 A I'd have to look it up, I don't know if it was '86
19 or '87 but he pled out.

20 Q He pled out?

21 A Yes.

22 Q What was the sentence?

23 A It was probation, once again I don't have the
24 information in front of me, but he pled to probation.

25 Q Was there a withhold?

1 A I believe there was, again, which I objected to.

2 Q Was there a withhold?

3 A I don't have the paper in front of me, but I think
4 there was.

5 Q And I presume that you objected to the probation
6 also?

7 A Yes, I did.

8 Q When was the plea?

9 What year?

10 A I believe it was 1986.

11 Q 1986, okay.

12 When was the next time you had any information
13 about Gary Bauder?

14 A 1990.

15 Q What was that information?

16 A Which information?

17 Q From 1990.

18 A I received a **call** from another detective that
19 worked in our narcotics section that she received
20 information that Gary Bauder was again active in possible
21 child pornography.

22 Q Between the time of his plea and the **time** of the
23 phone call, had you done anything at all concerning Gary
24 Bauder?

25 A No.

Q Who was the detective that called you?

A Judy Gable.

Q Is that G-a-b-l-e?

A Yes.

Q Who is she?

A she was a detective in the narcotics section.

Q What did she tell you?

A She wrote a report and she forwarded the report to me and I believe there were several phone calls that she made to me with information that she had been contacted by a reporter who advised her that Gary Bauder was again frequenting areas where young boys were at and possibly photographing them and getting them high.

Q Photographing what?

A Photographing the children.

Q Photographing where?

A I don't recall if she told me.

Q Did she give you any other information?

A She gave me the name of the reporter and the name of a witness and the name of the two children.

Q Who was the reporter?

A The reporter's last name was Buzzella, first name, I think was James.

Q For what paper?

A Excuse me?

1 Q For what paper?

2 A No, not a reporter in a newspaper reporter, a
3 reporter as a police report. He's the one who made the
4 police report.

5 Q I see.

6 And you were given the names of **what** other people?

7 A The witness who saw Mr. Bauder **with the** children
8 and two of the children's names.

9 Q Who was the witness?

10 A Debbie Buzzella.

11 Q Is that his wife, I presume?

12 A Daughter.

13 Q How old was she?

14 A I don't recall.

15 Q And who were the two children?

16 A Chad and Casey Hargrave.

17 Q What did you do after receiving that information?

18 A I contacted both the reporter --

19 Q Can we call him Mr. Buzzella?

20 A Yes, sure.

21 I contacted Mr. Buzzella, Debbie **Buzzella** and the
22 two Hargrave boys and started my investigation.

23 Q What did Ms. **Buzzella** tell you?

24 A She told me that she saw Gary Bauder in the
25 Sunnyland Park area making friends with young boys and

1 seeing young boys get into Mr. Bauder's limousine.

2 She told me that one of the boys apparently was
3 supplying Mr. Bauder with Quaaludes.

4 Q What do you mean apparently supplying Mr.
5 Bauder --

6 A I don't know that as a fact.

7 Q What did she tell you?

8 A That's what she told me.

9 Q She said apparently?

10 A I don't recall her exact words.

11 Q Did she tell you what information she had as to
12 the Quaaludes?

13 A All I recall is she told me one of the boys was
14 supplying Quaaludes to Mr. Bauder.

15 Q Did you ask her what she knew?

16 A Well, she heard that from one of the boys and I
17 had to confirm that with one of the boys.

18 Q Did you ask her what the source of that
19 information was?

20 A I don't recall.

21 Q What else did she tell you about?

22 A She was aware of Mr. **Bauder's** past, She was the
23 sister of the first victim from the 1986 case. She was very
24 concerned about it.

25 Q What else did she tell you about it?

A I don't recall without the reports. That's all I remember right now.

Q What did Mr. **Buzzella** tell you?

A Basically the same.

Mr. **Buzzella** got the information from his daughter.

Q How old was his daughter at that time?

A I don't recall.

a Was she an adult?

10 A Yes.

11 Q And you spoke to the two Hargrave boys?

12 A Yes.

13 Q Do you remember their names?

14 A Chad and Casey.

15 Q How old were they?

16 A At that time Chad was 17 and Casey was 14.

17 Q Did you speak to their parents?

18 A Yes.

15 Q Did they have any information?

20 A I don't know what you mean by information, they told me how they met Mr. Bauder.

22 They told me some information that after Casey had come home after he spent a weekend or a night with Mr.

23 Bauder and how when Casey came home he slept for two days

24 and how Mr. Bauder sent him candies and balloons and how

25

1 they had originally met Mr. Bauder.

2 Q These are the Hargrave seniors?

3 A This is the parents, the mother.

4 Q The mother, what is her first name?

5 A I don't remember.

6 Q What did she tell you as to how they met Mr.
7 Bauder?

8 A They had apparently seen him circling the block.

9 Q Which block?

10 A Where they live and they became alarmed, so Mr.
11 Hargrave and I believe the two boys chased him down and Mr.
12 Bauder had told them that he was new in the neighborhood and
13 was just looking around.

14 The following day Mr. Bauder sent flowers and some
15 religious verses to the house and became friendly or
16 attempted to become friendly with the family.

17 Q What else did Mrs. Hargrave, the mother, tell you?

18 A I don't recall anything off the top of my head
19 right now.

20 Q What did Chad Hargrave tell you?

21 A Chad told me that Mr. Bauder would furnish limo
22 rides to the boys and would furnish marijuana to the boys to
23 get them high and would also let them come over to his house
24 and have a place to smoke their marijuana, that they
25 recalled seeing other young boys in the apartment totally

1 wasted on drugs or alcohol, passing out in the apartment.

2 Q When you say they told you about boys, do you mean
3 the two Hargrave boys?

4 A It was other boys.

5 Q When you say boys --

6 A I guess, I don't recall exactly.

7 Q Okay, please continue. I'm sorry for
a interrupting.

9 A There was another boy by the name of Kenneth who
10 had been in the apartment or Mr. **Bauder's** residence and that
11 they had left, they, I mean the Hargrave boys and when they
12 came back there was a note on the door, do not disturb and
13 they knew Kenneth was still inside and he was a young boy.

14 Basically what I had was in the affidavit, you
15 know, exactly what Chad had told me.

16 Q What about Casey, what did he tell you?

17 A Basically the same story.

18 The only additional thing he said was that he told
19 me that Mr. Bauder tried to get him to spend the night and
20 told him that a real friend would spend the night and that a
21 real friend would be closer and he did spend the night out
22 of town with **Mr. Bauder** on a surfing trip.

23 At first he said he was up all night but after he
24 felt more comfortable, he said that he was really wasted and
25 he fell asleep so he didn't know what happened overnight.

1 There was a camera there.

2 Q Were any pictures taken?

3 A There were pictures taken.

4 Q Of who?

5 A He recalls pictures being taken of him of the
6 surfing trip, in fact, there were pictures of another
7 boating trip and three boys and Mr. Bauder smoking
a marijuana.

9 Q Were they clothed?

10 A Yes, they were.

11 Q Is there anything that you learned that is not in
12 your affidavit?

13 A No, everything I learned was in the affidavit.

14 Q Did you set up surveillance?

15 A We did a few surveillances of Mr. Bauder's
16 residence but it didn't prove worthwhile.

17 We would see cars parked there but with no
18 movement and unless we were on surveillance for 24 hours a
19 day we wouldn't see anything and even if we saw him in the
20 car it really wouldn't prove anything.

21 Q Did you set up the surveillance of Mr. Bauder at a
22 park?

23 A No,

24 MR. JEPEWAY: I'll tell you what, why don't
25 you take a minute to refresh your memory with your

1 affidavit, I'm going to step out for a minute, I
2 need to step out. I'll be right back.

3 (Thereupon, a recess was taken, after which
4 the following proceedings were had:)

5 BY MR. JEPEWAY:

6 Q Officer, when you applied for the search warrant
7 in Mr, Bauder's case, how long had you been conducting your
8 investigation?

9 A A few months, since November. I applied for the
10 search warrant in January.

11 Q How many people had you spoken to?

12 A The two Buzzellas, two, four, I believe six.

13 Q At the time you applied for the search warrant,
14 approximately how many affidavits for search warrant had you
15 signed?

16 A There were many, I would say probably -- this was
17 '91? I would say probably over 50, easily.

18 Q Why did you think that there was a weapon in Mr.
19 Bauder's residence?

20 A What are you referring to?

21 Q In the affidavit on Page 1 seven or eight lines
22 from the bottom of the second paragraph --

23 A Seven or eight lines from the bottom of the second
24 paragraph --

25 Q Yes, you see where it says, "to wit" --

1 Let's do it this way, what was the best evidence
2 that **you** had that sexual performance by a child had occurred
3 at Mr. **Bauder's** residence?

4 A The evidence in the affidavit.

5 Q Show me specifically.

6 A It's enumerated within,

7 Q Show me specifically.

8 A Start at the top of **Page 2** and it goes through the
9 bottom or about the middle of Page 5, that's the evidence
10 that I had.

11 Q What evidence did you have that there were
12 photographs and other representations and/or books and/or
13 magazines or photographic equipment and/or film that showed
14 areas of juveniles and/or photographs, et cetera, of
15 juveniles engaging in sexual conduct?

16 A The same information.

17 Q How old was the information that you had at the
18 time you applied for the search warrant?

19 A It was just what both Hargrave boys had told me.

20 Q How old was it, when did you interview the
21 Hargrave boys?

22 A December 3rd and December 17th of 1990.

23 Q I'm sorry, December what?

24 A The 3rd and 17th of 1990 I interviewed Chad
25 Hargrave and December **3rd**, 1990 I interviewed Casey.

1 Q What about the **Buzzellas**?

2 A That was prior.

3 Q What about the parents, the Hargraves?

4 A Probably just about the same time.

5 Q That you interviewed the boys?

6 A I spoke to the parents before the boys and I'm
7 sure I spoke to them the same day as the boys because they
a were present.

8 Q Sergeant, when you concluded you had probable
10 cause, how did you go about preparing the affidavit for
11 search warrant?

12 A All the information that I had contained within my
13 police report, I went over it with my sergeant and my
14 lieutenant.

15 Q And who were they at that time?

16 A My sergeant was Mike Barry and the lieutenant was
17 **Vic McKeechen** (phonetic) and I also conferred in the
18 beginning with Richard Schiffirin who was the chief legal
19 advisor of the State Attorney's Office and Ruth **Solly** who
20 was an Assistant State Attorney, the entire time I conferred
23 with them.

22 Q What did you and Mr. Schiffirin talk about?

22 A The facts of the case. We spoke quite regularly.

24 Q Did you discuss the legal issues?

21 A I don't know what you mean by legal issues.

1 Q Did you discuss what might or might not be
2 **probable** cause?

3 A We discussed if we had probable cause.

4 I gave them the facts. He drafted part of the
5 warrant, you know, we worked on it together and compiled it.

6 I don't recall saying that there wasn't probable
7 cause or any discussions.

8 Q That's not my question, did he discuss or mention
9 any cases to you?

10 A I don't recall going over case law with him.

11 Q Did he mention circumstances which constituted
12 probable cause and any that did not constitute probable
13 cause?

14 A I don't recall.

15 Q Did you ask him do I need anything else or is this
16 sufficient or questions like that?

17 A I really don't remember.

18 Q How long was the process of preparing the
19 affidavit?

20 A A minimum of days, you know, it could have
21 extended longer than that.

22 Q Who typed it?

23 A I believe the State Attorney's Office did.

24 Q The affidavit and the warrant?

25 A Yes.

1 Q And you spoke to Ms. **Solly** also?

2 A Yes.

3 Q Did you speak to Ms. **Solly** and Mr. Schiffrin
4 separately, together or both?

5 A There were so many conversations, I believe I
6 would say probably both.

7 Q Approximately how many conversations did you have
8 with her?

9 A Probably more with Richard Schiffrin than with
10 Ruth **Solly** but I don't recall.

11 Q Were they in person, by phone or both?

12 A Both.

13 Q What was Mr. Schiffrin's conclusion?

14 A He approved of the affidavit.

15 Q What did you and Ms. **Solly** talk about?

16 A I don't remember the exact conversation but I
17 remember going and just compiling the information and, you
18 know, typographical things and English corrections, you
19 know, just putting the affidavit together.

20 Q Did Ms. **Solly** mention any decisions to you?

21 A As far as court decisions or anything?

22 Q Yes.

23 A Not that I remember.

24 Q Did she mention to you or did you discuss with her
25 the legal principles related to probable cause for the

1 issuance of an affidavit?

2 A Could you be more specific?

3 Q I mean the issuance of a search warrant?

4 A I don't know what you mean.

5 Q Very simply, did you discuss in legal terms what
6 is needed to support an affidavit in order to obtain a
7 search warrant?

8 A In legal terms, are you referring to case law
9 or --

10 Q In any legal terms whatsoever?

11 A All I recall is giving them the facts of my
12 investigation and compiling it into the affidavit.

13 Q The search warrant was issued on January 8th by
14 Judge Salmon, was he at the courthouse when he issued that?

15 A The Justice Building.

16 Q You took it over to him?

17 A Yes, I did.

18 Q Do you remember approximately what time of day or
19 night he issued that?

20 A **No**, I don't.

21 Q Did he read it?

22 A Yes, he did.

23 Q How long did it take him to read it?

24 A I don't recall. He went through it page by page
25 and initialed each page.

1 Q What did you do after you obtained the search
2 warrant?

3 A I went through the procedures at the Justice
4 Building as far as getting it logged in and stamped and then
5 I went back to my office and at some time prepared to
6 execute it.

7 Q When did you execute it, what was the date?

8 A I'd have to look at my report. It was sometime or
9 somewhere close to getting it executed, I don't recall, but
10 I'd have to refer to my report --

11 Q I'm sorry, you didn't bring your reports?

12 A I have my reports with me.

13 Q Could you refer to it, please?

14 A January 11th.

15 Q What day of the week was that, do you remember?

16 A It wouldn't be on the report, I don't recall what
17 day of the week it was.

18 Q What time of day or night did you execute it?

19 A It was 6:30 a.m.

20 Q And what was Mr. Bauder charged with?

21 A Sexual performance by a child and possession of
22 marijuana.

23 Q Sexual performance by a child?

24 A That is the way the statute is written, yes.

25 Q What is that? I didn't understand?

1 A Possession of photographs depicting sexual
2 activity.

3 Q Are you familiar with the decision of the Supreme
4 Court in Stanley versus Georgia?

5 A No, I am not.

6 Q And he was tried and convicted and sentenced to
7 thirty years, is that correct?

8 A Yes.

9 Q Who was the trier?

10 A Kornblum.

11 Q How many officers executed the search warrant?
12 You can give me an approximation.

13 A I believe six.

14 Q I'm sorry?

15 A Maybe six.

16 Q How long was the search --

17 A I'd rather sure.

18 Q Please do.

19 A Just to be more specific, there were five officers
20 on the scene and three supervisors.

21 Q Eight?

22 A Yes.

23 Q A big operation.

24 How long was the search?

25 A We departed the location at 10:30 a.m.

Q And you got there about 6:30?

A Correct.

Q You had special training at the time of the issuance of the search warrant in pedophilia?

A Yes.

Q What was that special training?

A Attending classes, attending seminars and training in child pornography and pedophilia.

Q About how many total hours have you had?

10 A I don't recall.

11 Q More than ten?

12 A Probably.

13 Q More than twenty?

14 A I really can't say, I don't know.

15 I'd have to review all my schooling.

16 Q What is pedophilia?

17 A It's an individual who receives sexual gratification with children.

19 Q Now, Mr. Bauder's conviction was reversed, is that correct?

21 A In the 1991 case?

22 Q **Yes, ma'am.**

23 A Yes.

24 Q And have you read the appellate decision?

25 A You just gave it to me.

1 Q You never read it before?

2 A No.

3 Q When did you learn it had been reversed?

4 A Sometime after the decision, I guess I heard it
5 from somebody at the State Attorney's office.

6 Q Well, it was reversed on February **2nd**, Ground
7 Hog's Day, 1993, approximately how long after-that did you
a learn it?

9 A I don't recall.

10 Q Who was the prosecutor at the trial court?

11 A Oh, boy, wait a minute, I know his name, I just
12 can't think of it,

13 Q Did you learn about it in 1993?

14 A Learn about what?

15 Q The reversal?

16 A I really don't remember when it was.

17 Q You knew it had been reversed prior to being
18 served in this lawsuit, is that correct?

19 A That's correct.

20 Q And you never read the opinion?

21 A No.

22 In fact, I got promoted in 1992 and I was back in
23 uniform and I wasn't even aware of it,

24 Q Did anyone ever tell you why it was reversed?

25 A All I heard is they threw the search warrant out

1 in-Layman's terms, that's what I heard.

2 Q Well, the first sentence of the Court's opinion
3 says, "We reverse the judgment of conviction entered by the
4 trial court on a holding that the affidavit given in support
5 of a search warrant was totally devoid of factual
6 recitations sufficient to raise the affiant-officer's
7 suspicion to a level of probable **cause**," do you understand
8 what I just read?

9 A Yes, I do.

10 Q Do you agree with that?

11 A No.

12 Q You disagree with that?

13 A Yes.

14 Q Why is that?

15 A I felt all along with my supervisors and the State
16 Attorney's Office through many hearings that we had prior to
17 the trial that there was probable cause.

18 Q why?

19 a That was the decision of the Court at the state
20 level.

21 Q And you have concluded or it is your conclusion
22 then that the opinion of the appellate court is wrong?

23 A That's my opinion.

24 Q Why is that?

25 A I felt there was probable cause in the search

warrant.

Q Why?

A By the facts as stated in the affidavit, by the evidence that I obtained.

Q Are you familiar with Rodriguez vs. State, a decision of the Supreme Court of Florida in 1974?

A Not by the name, no.

Q Are you familiar with Illinois vs. Gates, a decision of the Supreme Court of the United States in 1983?

A Not by its name.

Q The appellate court cited both decisions and after citing Gates they summarize that, "The information supplied for issuance of a search warrant must demonstrate fair probability that evidence of a crime will be uncovered," were you familiar with that legal principle at that time?

A Yes.

Q Where in your affidavit does it show facts demonstrating a fair probability that evidence of a crime will be uncovered?

A I believe if you read the facts stated in the affidavit, there is probable cause to believe there would be materials uncovered during the search warrant.

Q Could you show me?

A It's the entire affidavit. Do you want me to read it? I will.

Q Do you conclude that your legal determination as to probable cause is more informed than that of the appellate court?

A That's their opinion and I have my opinion.

Q That's what I'm asking for, is it your opinion, is it your judgment that your opinion as to the existence of probable cause in the affidavit is more informed than that of the appellate court?

A I wasn't there when they made their decision.

Q Excuse me, please answer my question, yes or no?

A I can't answer the question.

Q You can't answer the question.

What was your reaction when you learned the conviction had been reversed?

A My personal opinion was of disgust.

Q Did you speak to anyone at the State Attorney's Office about it?

A Not that I remember.

Q Did you speak to anyone at the Attorney General's Office about it?

A No.

Q And you probably disagree with Miranda, don't you?

A No.

Q What about the exclusionary rule --

MR. ROBERTSON: Objection, irrelevant. You

1 .. don't need to answer that.

2 MR. JEPEWAY: Certify the question,

3 BY MR. JEPEWAY:

4 Q Did you personally consult any law books during
5 the time you prepared the affidavit for search warrant?

6 A The Florida State Statute books.

7 Q What part?

8 A The laws or statutes that were being violated.

9 Q Anything else?

10 A Not that I recall.

11 MR. JEPEWAY: I have no further questions.

12 Thank you.

13 MR. ROBERTSON: Read and take a copy if it's
14 ordered.

15 (Thereupon, the formalities were not waived and
16 the taking of the deposition was concluded at 2:55
17 p.m.)

18 FURTHER DEPONENT SAITH NOT.

19 _____

20 DEPONENT

21 Sworn to and subscribed before me this _____ day
22 of _____, 1996.

23 _____

24 Notary Public

25 My commission expires:

1 JOSEPH S. SCHWARTZ COURT REPORTING, INC.
2 412 BISCAYNE BUILDING
3 19 WEST FLAGLER STREET
4 MIAMI, FLORIDA 33130

5 May 14, 1996

6 Re: Bauder vs. Metro Dade County
7 Case Number 95-529 CA 32

8 Dear **Ms.** Gentile:

9 This letter is to inform you that your deposition taken
10 on May 13th, 1996 before Louis M. Jepeway, Jr., Esq., is
11 ready for your reading and signing,

12 It is available at the office of Jepeway & Jepeway,
13 P.A., located at 19 West Flagler Street, Suite 407, Miami,
14 Florida.

15 Your attention in this matter will be appreciated.

16 Yours truly,

17 _____
18 Ira Cohen, Court Reporter

19
20 cc: **All** counsel
21
22

JOSEPH S. SCHWARTZ COURT REPORTING, INC.

35

CERTIFICATE OF OATH

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STATE OF FLORIDA)
COUNTY OF DADE)

I, IRA E. COHEN, the undersigned authority, certify that BARBARA WHITE GENTILE personally appeared before me and was duly sworn.

WITNESS my hand and official seal this May 14, 1996.

IRA E. COHEN

(36)

REPORTER'S DEPOSITION CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DADE)

I, IRA E. COHEN, Court Reporter, certify that I was authorized to and did stenographically report the deposition of BARBARA WHITE GENTILE, that a review of the transcript was requested; and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this May 14, 1996.

IRA E. COHEN

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IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 95-00529 CA 32

GARY BAUDER,
Plaintiff,

vs.

METROPOLITAN DADE COUNTY,
a political subdivision of
the State of Florida, and
BARBARA WHITE GENTILE,
Defendants.

COPY.

19 West Flagler Street
407 Biscayne Building
Miami, Florida
May 13, 1996
Monday, 3:00 p.m.

DEPOSITION OF RUTH SOLLY, ESO.

Taken before IRA E. COHEN, a Court Reporter and
Notary Public in and for the State of Florida at Large,
pursuant to Notice of Taking Deposition filed in the above
cause.

38

APPEARANCES:

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Attorneys for Plaintiff.

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Attorney for Defendants Metropolitan Dade County
and Barbara White Gentile.

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I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>
RUTH SOLLY, ESQUIRE	3	--

1 THEREUPON - -

2 RUTH SOLLY, ESQUIRE,

3 was called as a witness by the Plaintiff and, having been
4 first duly sworn, was examined and testified as follows:

5 DIRECT EXAMINATION,

6 BY MR. JEPEWAY:

7 Q What is your name?

8 A Ruth Solly, S-o-l-l-y.

9 Q And you've been an Assistant State Attorney for
10 how long, please?

11 A About eight years, since '87.

12 Q And you were involved in the preparation of an
13 affidavit for search warrant in the Gary Bauder cause,
14 correct?

15 A Correct.

16 Q Let me show you copies of an affidavit and search
17 warrant and please take your time.

18 A Okay.

19 Q Are those copies of the warrant and affidavit?

20 A It appears to be.

21 Q What is the procedure in the State Attorney's
22 Office when an officer applies or is going to apply for a
23 search warrant?

24 A They usually will contact an Assistant State
25 Attorney and we draft up the description of the premises or

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40

1 they usually do them themselves and we work together on the
2 **facts** for the affidavit and then **they usually** take it to the
3 Judge without us.

4 Q In this case, I assume Sergeant Gentile contacted
5 you and Richard Schiffrin?

6 A Contacted me.

7 Q Contacted you?

8 A And then I contacted Richard Schiffrin.

9 Q What did she tell you when she called?

10 A The first call was very brief, it was a synopsis
11 of what information she had and then we arranged to meet to
12 go into greater detail.

13 Q And I presume you met soon thereafter?

14 A Yes, I think within the day or the next day.

15 Q What information did she relate?

16 A The information she had at that time, who she had
17 interviewed, various details and answers to any questions
18 that I asked her.

19 Q Do you remember what she told you?

20 A Specifically on that first meeting, no.

21 Q Generally?

22 A Well, who she had interviewed, the background of
23 Gary Bauder and what investigation she had done to that
24 point.

25 Q Did you meet again?

1 A We met a couple of times.

2 We had talked over the phone also and I don't know
3 how many times.

4 Q Did you meet with her alone or with Richard
5 Schifffrin also?

6 A I met with her alone and I met with her with
7 Richard Schifffrin.

8 Q What other information did she give you?

9 A Whatever information she gave me and sometimes I
10 asked her for further information which she came back and
11 provided to me.

12 I don't remember if Richard Schifffrin had also
13 asked her for additional information because we met a few
14 times, I believe, with Richard Schifffrin.

15 Q Did you do any legal research in order to
16 determine if the affidavit was sufficient?

17 A I don't recall.

18 Q Is it your practice to do research when an
19 affidavit is prepared or in the process of being prepared?

20 A My personal practice, well, I might, but with
21 Richard Schifffrin and his research being in the Legal Unit
22 would really take precedence over anything that I would do.

23 Q Is it your practice then not to do research?

24 A That's not my practice, sometimes I do and
25 sometimes I do not.

1 Q Did you in this case?

2 A I don't remember my doing it personally.

3 Q Do you know if Richard did it?

4 A I don't know.

5 Q Did you discuss any law as it pertained to the
6 issuance or as it pertained to the sufficiency of the
7 affidavit?

8 A Probably, but I don't recall specifically.

9 Q How many conversations did you have with Richard?

10 A At least two that I can remember and probably
11 more.

12 Q Approximately how long were they?

13 A I don't know.

14 Q Were they in person or by phone?

15 A Two I remember were in person and I probably even
16 talked to him on the phone but I don't remember that.

17 Q Did he mention Illinois versus Gates to you?

18 A I wouldn't remember.

19 Q Did he mention Rodriguez versus State?

20 A I don't remember.

23 Q Did he mention United States versus Leon?

22 A I don't remember.

2: Q Did he talk to you about the good faith exceptions
2' to the exclusionary rule?

2: A I don't remember.

1 Q Do you remember anything about the conversation?

2 A Specifically, no.

3 I just remember in drafting the affidavit any
4 additional information he may have asked the detective for.

5 Q When did you learn Mr. **Bauder's** conviction had
6 been reversed?

7 A I don't remember, it's been a year or so.

8 Q You learned of it prior to your submission of the
9 affidavit in this case, did you not?

10 A **Yes.**

11 Q Did you know why it was reversed?

12 A Yes.

13 Q Why was it reversed?

14 A Something with reference to the search warrant, it
15 was reversed for insufficient either probable cause or
16 staleness, probably. I don't remember exactly, one or the
17 other.

18 Q Have you ever read the opinion?

19 A Yes.

20 Q It's very short.

21 The first sentence they said they reversed the
22 whole thing that the affidavit given in support of the
23 search warrant was totally devoid of factual recitations
24 sufficient to raise the affiant-officer's suspicion to the
25 level of probable cause, do you agree with that?

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A No.

Q Has this decision resulted in any changes in the procedure in the State Attorney's Office?

A Not that I'm aware of, but I don't know.

Q Approximately how much time did you devote to the preparation and sufficiency of the affidavit?

A Quite a bit of time.

Q What does that mean?

A A couple of meetings with the detective drafting the affidavit, correcting and redrafting.

I don't know in hours how much time, but it spanned over various times, 'over days and weeks.

Q Was there ever a point where you thought that there was not sufficient probable cause?

A No, I don't think so.

I think we, I was more concerned with making sure I had everything in the affidavit and that it was drafted properly and just putting everything I could into it.

Q You said you had asked her for more information at one point?

A I think so. I had asked her to interview one other person.

Q Was that because the information she had given you was insufficient for probable cause?

A No, I just think I wanted as much as I could get.

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1 a How many times have you been involved in the
2 preparation of affidavits for search warrants?

3 A I don't know, I've never counted but since 1987
4 we're on search warrant duty, we're on beeper duty once
5 every couple of months.

6 Then on the sexual battery unit it's once every
7 six weeks and now homicide it's every two to three months,
8 so it depends upon, you know, not every time, but the issue
9 of search warrants will come up regularly.

10 Q Would it be a hundred times?

13 A I don't think it's a hundred times.

14 Q Fifty times?

15 A Maybe fifty.

16 Q What is Schiffrin's position with the legal
17 department?

18 A I don't know.

19 MR. JEPEWAY: Thank you. I have nothing
20 further.

21 MR. ROBERTSON: No questions. We'll read
22 and take a copy.

23 (Thereupon, the formalities were not waived and
24 the taking of the deposition was concluded at 3:10
25 p.m.)

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FURTHER DEPONENT SAITH NOT.

DEPONENT

Sworn to and subscribed before me this _____ day
of _____, 1996.

Notary Public

My commission expires:

(47)

JOSEPH S. SCHWARTZ COURT REPORTING, INC.
412 BISCAYNE BUILDING
19 WEST FLAGLER STREET
MIAMI, FLORIDA 33130

May 14, 1996

Re: Bauder vs. Metro Dade County
Case Number 95-529 CA 32

Dear Ms. Solly:

This letter is to inform you that your deposition taken on May 13th, 1996 before Louis M. Jepeway, Jr., Esq., is ready for your reading and signing.

It is available at the office of Jepeway & Jepeway, P.A., located at 19 West Flagler Street, Suite 407, Miami, Florida.

Your attention in this matter will be appreciated.

Yours truly,

Ira Cohen, Court Reporter

cc: All counsel

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CERTIFICATE OF OATH

STATE OF FLORIDA)

COUNTY OF DADE)

I, IRA E. COHEN, the undersigned authority, certify that RUTH SOLLY personally appeared before me and was duly sworn.

WITNESS my hand and official seal this May 14, 1996.

IRA E. COHEN

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REPORTER'S DEPOSITION CERTIFICATE

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STATE OF FLORIDA)
COUNTY OF DADE)

I, IRA E. COHEN, Court Reporter, certify that I was authorized to and did stenographically report the deposition of RUTH SOLLY, that a review of the transcript was requested; and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this May 14, 1996.

IRA E. COHEN

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IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 95-00529 CA 32

GARY BAUDER,
Plaintiff,

vs.

METROPOLITAN DADE COUNTY,
etc. and BARBARA WHXTEGENTILE
Defendants.

AFFIDAVIT OF BARBARA WHITE GENTILE

STATE OF FLORIDA)
COUNTY OF DADE)

BEFORE ME personally appeared BARBARA WHITE GENTILE, who first being duly sworn, deposes and says:

1. My name is Barbara White Gentile.
2. I am a Sergeant with the Metro Dade Police Department.
3. On January 11, 1991 I was a police officer with the Metro Dade Police Department, working as a detective in the Special Investigations Division.
4. In November, 1990 I received information that Gary Bauder may be involved in sexual assault upon children. An investigation was begun then involving surveillance and interviews.
5. In January of 1991 I sought the assistance of Assistant State Attorneys Ruth Solly and Richard Shiffrin for the purposes of drafting a search warrant and affidavit in support of the

(SI)

search war-rant for Gary **Bauder's** residence. **At** the time Richard Shiffrin was the Chief of the Legal Division of the State Attorney's Office and Ruth **Solly** was a member of the Sexual Battery Division of the State Attorney's office. Both **of** those attorneys reviewed the search warrant and affidavit involved in this case prior to the execution, and, in fact, the majority of the search warrant and affidavit was written by Richard- Shiffrin. They advised me that in their opinion probable cause existed for the issuance of the warrant. I relied upon their expertise and knowledge in determining that probable cause existed for the search.

6. Prior to the signing of the search warrant by Judge Michael H. Salmon, I had the search warrant reviewed by Sgt. Mike Barry and Lt. Victor **McEachin**, who were my supervising officers. Both of those officers agreed with me and the State Attorneys that probable cause existed.

7. On January 7, **1991** the search warrant was presented to Judge Michael H. Salmon. The Judge read the search warrant and the affidavit in support of the search warrant in its entirety and signed both of them.

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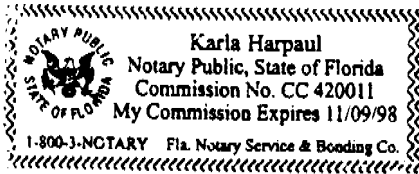
8. **At the** time of the issuance and execution of the search warrant, I believed that probable cause existed for the search **warrant** and that the search warrant was valid.

FURTHER AFFIANT SAYETH NOT.

Sgt Barbara White Gentile
Sgt. Barbara White Gentile
Metro Dade Police Department

sworn to and subscribed before
me this 15 day of March, 1996.

Karla Harpaul
NOTARY PUBLIC
State of Florida At Large



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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO. 95-00529CA32

GARY BAUDER,

Plaintiff,

vs.

AFFIDAVIT

METROPOLITAN DADE COUNTY
etc. and BARBARA WHITE GENTILE

Defendants.

STATE OF FLORIDA)

COUNTY OF DADE)

BEFORE ME personally appeared, RUTH SOLLY, who first being duly sworn,
deposes and says:

1. My name is Ruth **Solly**. I am an Assistant State Attorney with the Dade
County State Attorney's Office.

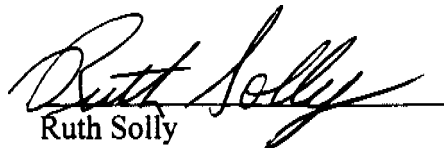
2. In December of 1990 and January of 1991, while working within the Dade
County State Attorney's **Office** as an Assistant State Attorney assigned to the Sexual
Battery Division, I had the opportunity to assist in the preparation of the search warrant
which was executed at the residence of Plaintiff, Gary Bauder.

3. In addition to reviewing the search warrant and **affidavit** in support of the
search warrant myself, I had Richard **Shiffrin**, who was the Chief of the Legal Division of
the Dade County State Attorney's Office, review the search warrant and affidavit and
make his suggestions and recommendations for changes.

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4. It was my opinion and the opinion of Richard Shiffrin at the time of the issuance and execution of the search warrant that the search warrant contained adequate probable cause and was appropriately issued by the Judge. Our opinion that the search warrant and affidavit were sufficient was relayed to Officer Barbara White-Gentile prior to her seeking issuance of the search warrant.

FURTHER AFFIANT SAYETH NOT.



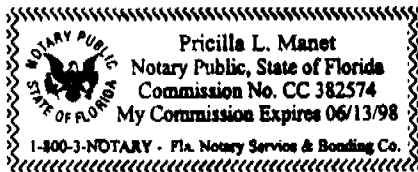
Ruth Solly
Assistant State Attorney
Dade County State Attorney's Office

Sworn to and subscribed before me this 1st day of March, 1996, by Ruth Solly, who did take an oath and who

is personally known to me.
_____ has produced _____ as identification.



NOTARY PUBLIC
State of Florida at Large



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