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**FILED**

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OCT 29 1997

CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

Case No. 91,519

L.T. No. 96-2265

BARBARA WHITE GENTILE,

Petitioner,

v.

GARY BAUDER,

Respondent.

\_\_\_\_\_ /

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**BRIEF OF RESPONDENT ON JURISDICTION**

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

ANDRE ROUVIERE, ESQ.  
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and

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## STATEMENT OF THE CASE AND OF THE FACTS

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

The Petitioner executed the search warrant on the Respondent's residence, on or about January 11, 1991, and seized various items of personal property and effects. The Petitioner arrested the respondent for various alleged criminal offenses.

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

The Respondent's conviction was reversed. *Bauder v. State*, 613 So.2d 547 (3d DCA 1993), *review denied*, 624 So.2d 268 (Fla. 1993).

The Respondent sued the Petitioner and Metropolitan Dade County<sup>1</sup> in a four count complaint. Count IV was brought pursuant to the Fourth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. 1983.

The Petitioner filed a motion for summary judgment asserting qualified immunity.

The Trial Court entered an order granting the Petitioner's Motion for Summary Judgment and Final Summary Judgment (R. 94).

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<sup>1</sup> Metropolitan Dade County is not a party to this proceeding.

The Respondent appealed.

The Third District reversed. It held that:

“In *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), the United States Supreme Court held that ‘objective reasonableness. . . defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest.’ *Malley*, 475 U.S. at 344. 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.” (*Bauder v. Gentile*, \_\_\_ So.2d \_\_\_, 22 F.L.W. D1368 (Fla. 3d DCA 1997) (App.1-2)

The Petitioner’s Petition for Review followed.

## SUMMARY OF ARGUMENT

There is no conflict jurisdiction because the Third District's opinion did not even mention collateral estoppel.

There also is no conflict jurisdiction because *Walsingham v. Dockery*, 671 So.2d 166 (Fla. 1<sup>st</sup> DCA 1996), and the Third District's opinion in this case not only are not in conflict, they are in harmony.

## ARGUMENT

### **THIS COURT HAS NO JURISDICTION TO CONSIDER THE PETITIONER'S PETITION FOR REVIEW.**

First, there is no conceivable conflict. The Third District's opinion does not even *mention* collateral estoppel. Indeed, the Petitioner did not even raise the issue until she filed her Motion for Rehearing and Motion for Rehearing *En Banc*.

Second, the Petitioner's citation of *Walsingham v. Dockery*, 671 So.2d 166 (Fla. 1<sup>st</sup> DCA 1996), quite frankly, is silly. *Walsingham* cited *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092 (1986), for the unremarkable proposition that if officers of reasonable competence can disagree about whether a warrant should issue, immunity should be recognized. However, here, the Third District held that the affidavit that the Petitioner presented to obtain the search warrant was *totally devoid* of factual recitations sufficient to raise her suspicion to the level of probable cause. Such an affidavit, by definition, is one which no reasonably objective police officer would submit to a judge.

The Petitioner's complaint about the terrible burden placed upon her was rejected by the Supreme Court in *Malley*:

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


CONCLUSION

The Petitioner's Petition for Review must be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Brief of Respondent on Jurisdiction** was mailed to **THOMAS H. ROBERTSON**, Assistant County Attorney, Metro-Dade Center, Suite 2810, 111 N.W. First Street, Miami, Florida 33128-1993; and to **RHEA P. GROSSMAN, ESQ.**, Attorney for Barbara White Gentile, 2780 Douglas Road, Suite 300, Miami, Florida this 28<sup>th</sup> day of October, 1997.

By:   
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