

IN THE SUPREME COURT OF FLORIDA

BILL PAUL MARQUARDT, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

CASE NUMBER SC12-555

APPEAL FROM THE CIRCUIT COURT  
IN AND FOR SUMTER COUNTY, FLORIDA

**REPLY BRIEF OF APPELLANT**

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PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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### OTHER AUTHORITIES CITED:

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**A. Failure to Hold an Evidentiary Hearing**

Appellee argues in its brief that because the trial court found that some of his motions were legally insufficient there was no error in failing to hold an evidentiary hearing. However, Appellee ignores the fact that the motion filed on November 10, 2010, was ruled on the merits by the trial court without holding an evidentiary hearing. That occurred nearly a year prior to commencement of the

trial. Therefore, under the State's own authority, the trial court was required to hold a hearing.

## **B. Collateral Estoppel**

Appellee's argument in response to this issue is deficient in several respects. First, the doctrine of collateral estoppel applies only if five factors are present: (1) an identical issue must have been presented in the prior proceedings; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated. *Cook v. State*, 921 So. 2d 631 (Fla. 2<sup>nd</sup> DCA 2005). With regard to the requirement that the parties in the two proceedings must be identical, Appellee conveniently glosses over this. In the argument portion of his brief he does not even address the issue of mutuality of parties. Only in his summary of argument does Appellee state "the motion that the trial court considered as legally sufficient and for which the trial court provided a substantive order was governed by the doctrine of collateral estoppel because the same parties - Wisconsin law enforcement and the Defendant - had previously litigated the issue and it was settled as a matter of law by the Wisconsin Supreme Court. (Brief of Appellee, page 41) The parties in the instant case are the State of Florida and the defendant.

In Wisconsin the parties were the State of Wisconsin and the defendant. At no time were Wisconsin law enforcement a party to any legal proceeding against Appellant. While they may have been witnesses, this is not the same as being a party to a law suit. As noted by Appellant in the Initial Brief, the State of Wisconsin and the State of Florida are not the same sovereign but rather are individual sovereigns. Thus, there indeed was no mutuality of parties in the instant case. Second, with regard to all issues being litigated, even the court below in its order denying the motion to reconsider noted that Appellant was raising a *Franks v. Delaware*, 438 U.S. 154 (1978) issue regarding false statements knowingly and intentionally included by an affiant in a search warrant. (Vol. 4, R630-632) This issue was not litigated by the parties in Wisconsin. The Supreme Court of Wisconsin in *State v. Marquardt*, 286 Wis. 2<sup>nd</sup> 204, 705 N.W. 2<sup>nd</sup> 878 (Wis. 2005), noted in footnote 8:

Marquardt has not argued on appeal that the other three *Leon* [468 U.S. 897 (1984)] disqualifying circumstances present a bar to the application of the good faith exception in this case. We take this as a concession that those qualifying circumstances do not apply here. We note, however that with respect to the Chippewa County case, Marquardt requested a hearing under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2<sup>nd</sup> 667 (1978), on the issue of whether the warrant application contained material misstatements and omissions. See *State v. Marquardt*, 2001 WI App. 219 paragraph 7, 247 Wis. 2<sup>nd</sup> 765, 635 N.W. 2<sup>nd</sup> 188. This issue corresponds to the first *Leon* disqualifying circumstance. See *United States v. Leon*,

468 U.S. 897, 923, 104 S.Ct. 3485, 82 L.Ed.2nd 677 (1984) (*citing Franks*). **The court of appeals did not reach the *Franks* issue**, see *Marquardt*, 247 Wis. 2<sup>nd</sup> 765, paragraph 24, 635 N.W.2nd 188, and it appears that Marquardt has abandoned his argument on the applicability of the first *Leon* circumstance. Although he made minimal reference to *Franks* and the first *Leon* circumstance in one of his briefs and at oral argument, he has not expressly argued that this Court should decide whether the first *Leon* circumstance applies and he has not requested that this Court remand for a *Franks* hearing.

Thus, it appears that the issue concerning the reckless disregard for the truth or the knowing inclusion of false statements in the search warrant application has never been addressed by the courts in Wisconsin. Thus, the court here should have conducted an evidentiary hearing. Collateral estoppel will not apply. Because the Wisconsin courts applied the good faith exception, clearly the *Franks v. Delaware* issue was critical and necessary to the prior determination. As noted, this issue was never litigated. Thus, at least three of the five requirements for application of the collateral estoppel doctrine are not met in the instant case. Under these circumstances, Appellant was entitled to a full evidentiary hearing on his motion to suppress. Failing to do so, requires this Court to vacate his judgment and sentences and remand with instructions to conduct a full evidentiary hearing.

## CONCLUSION

Based upon the foregoing reasons and authorities cited herein as well as in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate his judgment and sentence, and remand the cause for a new trial with instructions to hold a full evidentiary hearing on Appellant's Motion to Suppress.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically delivered by email to the Office of the Attorney General, Daytona Beach, Florida, [capapp@myfloridalegal.com](mailto:capapp@myfloridalegal.com) and [mitchell.bishop@myfloridalegal.com](mailto:mitchell.bishop@myfloridalegal.com) and mailed to Bill Marquardt, DOC #U44139, Florida State Prison, 7819 N.W. 228<sup>th</sup> Street, Raiford, FL 32026-1000, on this 23<sup>rd</sup> day of September, 2013.

Michael S. Becker

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**CERTIFICATE OF FONT**

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 point.

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