No. _____

In The
Supreme Court of the United States

THE CITY OF EAST CLEVELAND,
JOHN C. BRADFORD, TERRENCE DUNN,
VINCENT K. JOHNSTONE, PATRICIA LANE,
D. J. MIKLOVICH, MICHAEL C. PERRY and
CHARLES TEEL,

Petitioners,

v.

LAURESE GLOVER, EUGENE JOHNSON,
and DERRICK WHEATT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented herein are:

1. Whether the Court abused its discretion in denying Petitioner City Defendants Qualified Immunity defense when it became implicated during Discovery prior to the Discovery deadline pursuant to a "forfeiture" analysis.

2. Whether the Petitioner City Defendants were acting as state actors in the purported wrongful conviction actions brought against the City and the County Defendants and therefore the County must indemnify the Petitioner City Defendants.

3. Whether, upon limited remand, the District Court's vacation of its finding that the County Defendants were not entitled to Qualified Immunity served to *ipso facto* vacate the Petitioner City Defendants' Qualified Immunity defense denial as well.

4. Whether the District Court's denial of Petitioner City Defendants' Motion to Amend their Answer was an abuse of discretion.

5. Whether the Settlement Agreement between the County Defendants and the Plaintiffs renders the Case Against the Petitioner City Defendants moot.

PARTIES TO THE PROCEEDING

(See Caption)

RULE 29.6 STATEMENT

Petitioners, the City of East Cleveland, John C. Bradford, Terrence Dunn, Vincent K. Johnstone, Patricia Lane, D. J. Miklovich, Michael C. Perry and Charles Teel. Petitioners do not have a parent corporation or shares held by a publicly traded corporation.

INDEX OF APPENDICES

OPINION BELOW

The Sixth Circuit's opinion found at Appendix A, App. 1 is the subject of this Petition, and was not recommended for publication. It upheld the District Court's decisions to deny Petitioner's Summary Judgment Motion, a Qualified Immunity Defense, an opportunity to amend a pre-Discovery deadline Answer and levied sanctions for the non-production of a 1998, Fed. R. Civ. P. 30(b)(6) witness after the Court was informed that the possible choice was still in a nursing home. These District Court decisions are also reproduced in Appendix B, App. 9, Appendix C, App. 11 and Appendix D, App. 64.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit (July 12, 2018), denied Petitioners' (City Defendants) *Opposition to Sever* the previously consolidated County Defendants' Case, Sixth Circuit COA No. 17-4262 and the City's case, Sixth Circuit COA No. 17-4232; as well as denying the City Defendants' ability to assert a Qualified Immunity defense based upon a forfeiture analysis promulgated by the Appellate Court. The Court's Decision is unpublished and marked as, "Not Recommended for full-text publication" so that it does not have general application in decisions that deprive Petitioners' Due Process. Also, after a 4.5 Million settlement, upon a limited remand, the District Court rescinded its findings that the County Defendants had asserted a frivolous defense as

well as vacating its finding that they did not have Qualified Immunity.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

> The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.
>
> The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

BASIS FOR FEDERAL COURT JURISDICTION

42 U.S.C. §1983

STATEMENT OF THE CASE

Respondents were convicted of aggravated murder as juveniles for the killing of 19-year-old Clifton Hudson in 1996. A then 14-year-old eyewitness, Tamika Harris, identified Appellee by his clothing; but, in 2017 recanted her testimony and claimed one of the detectives waved his hand over one of the three photos she

was shown. The three photos were of all the then-juvenile suspects but the only one Harris selected was of Respondent Johnson. Further, on June 24, 1998, East Cleveland police Sgt. Terrence Dunn telephoned Assistant Prosecutor Naiman, and informed her (Naiman Depo., R. 79-50, Page ID #3201-3204.) that the East Cleveland mayor was apparently about to release the Police Department's criminal case file to Wheatt's defense counsel. Concerned that defense counsel was attempting to use the public records law as an improper discovery technique in violation of *Steckman*, she concluded, with Appeals Unit Assistant Prosecutor Christopher Frey, that handing over detectives' file was not proper under *Steckman*. (R. 79-50, Page ID #3206.) Naiman then met with First Assistant Prosecutor Carmen Marino and drafted a letter to the East Cleveland police department that they jointly signed directing the East Cleveland Police Department to turn over the file to the Cuyahoga County Prosecutor's Office. (Naiman letter, R. 79-51, Page ID #2696.). The Respondents sued in 2017 for wrongful conviction and that the County and City Defendants had committed *Brady* violations.

ARGUMENT

State law provides immunity for law enforcement personnel *Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir. 1999). However, here the Sixth Circuit held, ". . . forfeiture is the failure to make the timely assertion of a right; waiver is the intentional

relinquishment or abandonment of a known right." See Decision at ¶ II. ref. *Hamer v. Neighborhood House Sevs.,* 583 U.S. __, 138 S.Ct. 13, 17 n.1 (2017). It used a forfeiture analysis to reach a conclusion that since Petitioner City Defendants did not argue Qualified Immunity in its summary judgment motion to the district court, it had "forfeited" that defense, forever. See Dec. at ¶ II.

The Court ignores the fact that the District Court's decision was made months prior to its Discovery deadline in an unpublished opinion applicable only to City Petitioners. Also, it asserts a rule that is at odds with the decisions of this Court and the U.S. Court of Appeals for the First Circuit.

While it is well-established that a determination of qualified immunity must be made early in the litigation because qualified immunity shields an officer from standing trial and from facing the burdens associated with litigation, see *Saucier v. Katz,* 533 U.S. 194, 200 (2001) (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985)); it is further well-settled that qualified immunity may be asserted at three stages of litigation. See *Guzman-Rivera v. Rivera-Cruz,* 98 F.3d 664, 667 (1st Cir. 1996) ("defendants may raise a claim of qualified immunity at three distinct stages of the litigation" – in a motion to dismiss at the pleading stage, at summary judgment, and as an affirmative defense at trial").

CONCLUSION

WHEREFORE, and by reason of the foregoing facts and law, Petitioners City Defendants pray that this Court grant their requested Writ for Certiorari.

Respectfully submitted,

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