NO. _____

In the Supreme Court of the United States

GARY DRESSLER,

Petitioner,

v.

BRADFORD RICE, ET AL.,

Respondents.

On Petition for 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

Question I – Is an individual's Second Amendment right to bear arms violated when he is told by a security guard he cannot open carry in a store and is arrested by police officers, when the State of Ohio has passed a law (O.R.C. §9.68) that declares the individual right to keep and bear arms is a constitutionally protected right in every part of Ohio and permits a person to open carry a firearm in any part of the state, except as specifically provided by law?

Question II – Does probable cause exist to arrest an individual so as to entitle police officers qualified immunity, when the individual is a business invitee and legally open carrying a firearm, and when the police are shown that there is no sign prohibiting the individual from open carrying in the business?

Question III – Can summary judgment be granted, when the facts show a conspiracy exists, when a private party gives false information to the police about a sign prohibiting firearms in a store, when that information is shown by a customer to the police to be false, and the security guard demands the police to arrest the customer, who is legally open carrying a firearm?

PARTIES TO THE PROCEEDING

The Petitioner and Plaintiff-Appellant below is Gary Dressler.

The Respondents and Defendants-Appellees below are Bradford Rice; Safe Environment Business Solutions, Inc.; Jeffrey Zucker; Jerry W. Hodges; Interim Police Chief Paul H. Humphries; Chief of Police Jeffrey Blackwell; Unknown John/Jane Does; City of Cincinnati, OH; Larry Noschang; Pierce Bryant; Kroger Company; Kroger Limited Partnership I.

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Petitioner Dressler respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit issued on June 28, 2018.

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF CASE BELOW

The final judgment of the Southern District Court (per Judge Michal R. Barrett) granting summary judgment to the Defendants and denying summary judgment to the Plaintiff is unpublished, *Dressler v. Rice, et al*., No. 1:15-cv-00606 (S.D. Ohio, July 18, 2017), App.-21.

The opinion of the Sixth Circuit is not recommended for publication, *Dressler v. Rice, et al*., No. 17-3850 (6th Cir. June 28, 2018), App.-1

The denial of the motion for rehearing is unpublished, *Dressler v. Rice, et al*., No. 17-3850 (6th Cir. August 6, 2018), App.-58

STATEMENT OF THE BASIS FOR JURISDICTION

The Sixth Circuit Court of Appeals rendered its opinion on June 28, 2018, App.-1. The court denied a rehearing on August 6, 2018 App.-58. This Court's jurisdiction is pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

Second Amendment to the United States Constitution,

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Fourth Amendment to the United State Constitution,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code

28 U.S.C. §1652. State laws as rules of decision

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

42 U.S.C. §1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the

constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361 of title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of section 1981 or 1981a of this title,

the court, in its discretion, may include expert fees as part of the attorney's fee.

Ohio Revised Code

O.R.C. §9.68. Right to bear arms - challenge to law

(A) The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, or other transfer of firearms, their components, and their ammunition. Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition.

(B) In addition to any other relief provided, the court shall award costs and reasonable attorney fees to any person, group, or entity that prevails in a challenge to an ordinance, rule, or regulation as being in conflict with this section.

(C) As used in this section:
(1) The possession, transporting, or carrying of firearms, their components, or their ammunition include, but are not limited to, the possession, transporting, or carrying, openly or concealed on

a person's person or concealed ready at hand, of firearms, their components, or their ammunition.
(2) "Firearm" has the same meaning as in section 2923.11 of the Revised Code.

(D) This section does not apply to either of the following:
(1) A zoning ordinance that regulates or prohibits the commercial sale of firearms, firearm components, or ammunition for firearms in areas zoned for residential or agricultural uses;
(2) A zoning ordinance that specifies the hours of operation or the geographic areas where the commercial sale of firearms, firearm components, or ammunition for firearms may occur, provided that the zoning ordinance is consistent with zoning ordinances for other retail establishments in the same geographic area and does not result in a de facto prohibition of the commercial sale of firearms, firearm components, or ammunition for firearms in areas zoned for commercial, retail, or industrial uses.

O.R.C. §2911.21. Criminal trespass

(A) No person, without privilege to do so, shall do any of the following:
(1) Knowingly enter or remain on the land or premises of another;
(2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender

is in violation of any such restriction or is reckless in that regard;

(3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access;

(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified by signage posted in a conspicuous place or otherwise being notified to do so by the owner or occupant, or the agent or servant of either.

(B) It is no defense to a charge under this section that the land or premises involved was owned, controlled, or in custody of a public agency.

(C) It is no defense to a charge under this section that the offender was authorized to enter or remain on the land or premises involved, when such authorization was secured by deception.

(D)

(1) Whoever violates this section is guilty of criminal trespass, a misdemeanor of the fourth degree.

(2) Notwithstanding section 2929.28 of the Revised Code, if the person, in committing the violation of this section, used a snowmobile, off-highway motorcycle, or all-purpose vehicle, the court shall impose a fine of two times the usual amount imposed for the violation.

(3) If an offender previously has been convicted of or pleaded guilty to two or more violations of

this section or a substantially equivalent municipal ordinance, and the offender, in committing each violation, used a snowmobile, off-highway motorcycle, or all-purpose vehicle, the court, in addition to or independent of all other penalties imposed for the violation, may impound the certificate of registration of that snowmobile or off-highway motorcycle or the certificate of registration and license plate of that all-purpose vehicle for not less than sixty days. In such a case, section 4519.47 of the Revised Code applies.

(E) Notwithstanding any provision of the Revised Code, if the offender, in committing the violation of this section, used an all-purpose vehicle, the clerk of the court shall pay the fine imposed pursuant to this section to the state recreational vehicle fund created by section 4519.11 of the Revised Code.

(F) As used in this section:

(1) "All-purpose vehicle," "off-highway motorcycle," and "snowmobile" have the same meanings as in section 4519.01 of the Revised Code. (2) "Land or premises" includes any land, building, structure, or place belonging to, controlled by, or in custody of another, and any separate enclosure or room, or portion thereof.

O.R.C. §2923.126(C)(3)(a). Duties of licensed individual

(C)

(3)

(a) Except as provided in division (C)(3)(b) of this section, the owner or person in control of private

land or premises, and a private person or entity leasing land or premises owned by the state, the United States, or a political subdivision of the state or the United States, may post a sign in a conspicuous location on that land or on those premises prohibiting persons from carrying firearms or concealed firearms on or onto that land or those premises. Except as otherwise provided in this division, a person who knowingly violates a posted prohibition of that nature is guilty of criminal trespass in violation of division (A)(4) of section 2911.21 of the Revised Code and is guilty of a misdemeanor of the fourth degree. If a person knowingly violates a posted prohibition of that nature and the posted land or premises primarily was a parking lot or other parking facility, the person is not guilty of criminal trespass in violation of division (A)(4) of section 2911.21 of the Revised Code and instead is subject only to a civil cause of action for trespass based on the violation.

(b) A landlord may not prohibit or restrict a tenant who is a licensee and who on or after September 9, 2008, enters into a rental agreement with the landlord for the use of residential premises, and the tenant's guest while the tenant is present, from lawfully carrying or possessing a handgun on those residential premises.

STATEMENT OF THE CASE

A. Case Proceedings

Dressler filed a 42 U.S.C. §1983 civil rights action against the above named defendants. The case proceeded through discovery and Motions for Summary Judgment were filed by all parties. The District Court granted summary judgment for all defendants on July 18 2017. App.-21. Dressler timely appealed the order and the Sixth Circuit Court of Appeals affirmed the District court on June 29, 2018, App.-1. The Court of Appeals denied Dressler's Petition for a Rehearing on Augsut4, 2018, App.-58. Dressler now submits this Petition for a Writ of Certiorari.

B. Statement of Facts

The Kroger Co. had a long standing policy of not confronting persons who were legally open carrying firearms. O.R.C. 9.68 allows persons to transport a firearm, except as specifically provided by state law. The only law that would have specifically prohibited Dressler from open carrying in a business was O.R.C. 2923.126(c)(3), which allowed an owner or person in control of private land or premises to post a sign prohibiting persons from carrying firearms onto that person's land.

Security guard Rice was employed by SEB, which had an illegal contract with The Kroger Co. to provide security services to the Kroger store. The contract was in violation of Ohio law as SEB had not registered with the Sheriff to do business in the county. On September 20, 2013, Dressler went to the Kroger store, to shop for groceries, while open carrying his firearm. Open

carrying while shopping had been Dressler's custom for many years with no previous problems.

After Dressler had stopped to pick up a shopping basket and use the hand sanitizer, and while in the vestibule area of the store, Dressler was approached by an individual. Dressler did not recognize the individual, but thought he was a homeless man because of his scruffy beard. That person was later identified as Bradford Rice, a security guard assigned to work at Kroger. Because Dressler is hard of hearing and did not recognize Rice as saying anything, he continued on his way.

When Dressler did not respond to him, Rice phoned the Cincinnati Police Department and stated that there was a "customer with a gun." Cincinnati police Officers Zucker and Hodges responded to the call and arrived at the Kroger store without emergency lights or sirens on their cruiser. They initially spoke with Rice. Rice told Officer Zucker of the incident and falsely told Zucker that there was a sign on the Kroger store window that prohibited guns in the store. Rice led Officers Zucker and Hodges to Dressler's location, where they found him shopping with items already in his hand basket.

Officer Zucker spoke with Mr. Dressler in the presence of Officer Hodges and Rice. Officer Zucker repeated what he was told by Rice. Because Dressler knew of the long standing policy of Kroger to not interfere with customers legally open-carrying firearms, he knew there was no sign prohibiting him from open carrying in the store and wanted to show the police that no such sign existed. Dressler led the two police officers and Rice outside the store to show them that there was no sign prohibiting firearms. The police

observed that there was no sign that prohibited the open carrying of guns in the store. Dressler explained that the sign that was posted only applied to alcohol being served by the glass and exempted concealed carrying permit holders which Dressler possessed. Albeit no applicable sign was posted prohibiting firearms in the store, Rice then demanded the police arrest Dressler for criminal trespass, even though Kroger had a long standing policy of not confronting customers who were legally open carrying. Knowing that there was no sign prohibiting Dressler from open carrying in the store, and while Dressler was outside of the store, Officer Zucker honored Rice's demand and arrested Dressler for criminal trespass without a warrant. Officer Zucker spoke with the Kroger manager on duty, who confirmed Rice's demand to have Dressler arrested and/or removed from the store.

Officer Zucker searched Dressler without a warrant after his arrest, Dressler's gun, knife and other property were seized. Dressler was charged with criminal trespass under O.R.C. §2911.21(A)(1), App.-8, Because Dressler was a business invitee and there was no sign prohibiting him from open carrying in the store, he filed a Motion to Dismiss. At the hearing on the motion Officer Zucker testified on direct examination that there was a sign with a gun in a circle that was crossed out, indicating firearms were prohibited. On cross-examination, however, when shown pictures of the Kroger store windows, Zucker could not identify the sign he claimed to have seen. At the trial Officer Zucker finally admitted there was no sign prohibiting firearms as originally claimed in the Motion to Dismiss hearing. Dressler was found not guilty on June 1, 2015 after a bench trial.

REASONS FOR GRANTING THE PETITION

Question I – Is an individual's Second Amendment right to bear arms violated when he is told by a security guard he cannot open carry in a store and is arrested by police officers, when the State of Ohio has passed a law (O.R.C. §9.68) that declares the individual right to keep and bear arms is a constitutionally protected right in every part of Ohio and permits a person to open carry a firearm in any part of the state, except as specifically provided by law?

A. Second Amendment Right Violated.

There are two issues that must be addressed in determining whether Dressler's Second Amendment right to bear arms was violated, and qualifies for a Writ of Certiorari. The first issue is whether Dressler can show that there was a constitutional right that was violated.

The United States is governed by the United States Constitution, which secures the unalienable rights listed in the Declaration of Independence. Included in the Constitution is the Bill of Rights, which secures two unalienable rights, *i.e.* the right to bear arms under the Second Amendment, and the right to be secure from unreasonable searches and seizures unless there is a warrant with probable cause. Thus, the right to bear arms is a right secured by the U.S. Constitution. There is also a right to be free from searches and seizures (arrest) without probable cause. These two rights are enshrined in the Constitution. The first issue addresses the Second Amendment.

The Supreme Court in *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L.Ed 588 (1876) declared that the

right of "bearing arms for a lawful purpose." was not granted by the Constitution. The understanding was that it was in existence before the Constitution.

The Ohio Legislature enacted §9.68, which became effective in 2007. §9.68 clearly provides that a person's possession or transportation of a firearm, including the open carrying of a firearm, is a right secured by the U.S. Constitution, because it predated the Constitution.

The constitutional right to bear arms was clarified and confirmed in 2008, when the United States Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 592, 128 S.Ct. 2783, 171 L.Ed 2d 637 (2008) declared "we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment." The Court then cited *Cruikshank* as part of its historical analysis. Thus, *Heller* held that the right to bear arms for a lawful purpose was secured by the U.S. Constitution.

More importantly, *Heller* did not limit the right to bear arms. It specifically stated, "Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed,'" *id*. The Court reiterated at page 613, "Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right,* originally belonging to our forefathers."

While *Heller* recognized the right of the people to bear arms, it also stated that the right was not unlimited. The court listed several limitations at page

619. The list did not limit the right to bear arms, it only limited the right to conceal carry, possession by felons and mentally ill, in places forbidden by law, and limitations on commercial sales of firearms. O.R.C. §9.68 placed no restrictions on the right to bear arms, in that it allows persons to transport a firearm, except as specifically provided by state law. In other words, the State of Ohio allows persons to exercise their right to bear arms any place in Ohio, except where it is specifically prohibited by law.

Following *Heller*, the case of *McDonald v. City of Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) held, "We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*." Thus, the right to bear arms is a right secured by the Constitution and is applicable in Ohio through Section I of the Fourteenth Amendment.

The police officers are not ignorant of the law, but are presumed to know the law as discussed in *Northrup v. City of Toledo Police Department*, 785 F.3d 1128, 1132 (6th Cir. 2015) ("If it is appropriate to presume that citizens know the parameters of the criminal laws, it is surely appropriate to expect the same of law enforcement officers--at least with regard to unambiguous statutes."). *Northrup* relied on *Heien v. North Carolina*, __ U.S. __, 135 S.Ct. 530, 540, 190 L.Ed.2d 475 (2014), which also held, at 135 S.Ct. 539-540, "Thus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce." Officers Zucker and Hodges were duty bound to enforce §9.68.

§9.68 specifically prohibits a person from being restricted or delayed in the open-carrying of a firearm, unless specifically provided by the Constitution or law. The police officers knew that Dressler was constitutionally allowed to open carry in a private business under his business invitee status, unless the establishment posted a sign prohibiting guns in the store, per O.R.C. 2923.126(C)(3)(a), which allows an owner of private land or premises to post a sign prohibiting firearms on the land or premises. The sign, however, must be posted conspicuously. The police were falsely told by the security guard there was a sign stating no guns were allowed in the store. Without confirming the truthfulness of the claim, the police relied on that false information when they first confronted Dressler and, when they arrested him. Officer Zucker in particular had no excuse for this, because he had been personally forewarned three years earlier in *Kennedy v. City of Cincinnati*, 595 F.3d 327, 337 (6th Cir. 2010) not to rely on statements and demands from third parties, but that he had to validate the information himself.

Furthermore, neither Officer Hodges nor Officer Zucker had an excuse for not knowing there was no sign prohibiting Dressler from having a gun in the store, because Dressler told them there was no sign and led them out of the store to the outside window of the store and pointed out that there was no sign prohibiting him from having a gun in the store. Both the security guard and Officer Zucker testified at trial that he, the security guard, wanted Dressler arrested, because he had a gun in the store and refused to leave. Thus, Zucker and Hodges violated, not only §9.68, but

also the Second Amendment via Section 1 of the Fourteenth Amendment.

In light of *Heller*, *McDonald* and §9.68, there should be no doubt that the Second Amendment, through the Fourteenth Amendment secured the right of a person to bear arms (open-carry) unless prohibited by the law or the Constitution. Thus, Dressler's Second Amendment right was violated.

B. Sixth Circuit Decision in Conflict with Ohio Law and Ohio Supreme Court Cases.

The second issue to address in determining whether Dressler's Second Amendment right to bear arms was violated and qualifies for a Writ of Certiorari is whether the decision of the Sixth Circuit was in direct conflict with Ohio law and Ohio Supreme Court cases.

The June 28, 2018 decision of the Sixth Circuit is in direct conflict with O.R.C. §9.68 and two Ohio Supreme Court cases.

The Opinion failed to correctly apply Ohio law regarding O.R.C. §9.68. O.R.C. §9.68 was effective in 2007. In pertinent part §9.68(A) allows the possession or transporting of weapons in all parts of Ohio,

> Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition.

§9.68(C) specifically includes openly carrying of a firearm in the possession or transporting of a firearm. The Supreme Court of Ohio has addressed the implication of §9.68. In *Cleveland v. State*, 128 Ohio St.3d 135, 942, N.E.2d 370, 2010-Ohio-6318, ¶2 (2010) observed that the General Assembly of Ohio enacted §9.68, "recognizing that the right to keep and bear arms is a 'fundamental individual right' that is a 'constitutionally protected right ***in every part of Ohio***.'" (Emphasis added)

¶29 of the *Cleveland* case further declared, "Thus, when we consider the entire legislative scheme, as we must, we conclude that when interpreted as part of a whole, R.C. 9.68 ***applies to all citizens*** generally." (Emphasis added). See also, *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St.3d 96, 896 N.E.2d 967, 2008-Ohio-4605, ¶20 (2008) ("Simply put, the General Assembly, by enacting R.C. 9.68(A), gave persons in Ohio the right to carry a handgun unless federal or state law prohibits them from doing so.").

Thus, the plain language of the statute and the two Supreme Court cases is clear. "Unless a federal or state law prohibits them from doing so," a person is permitted to open carry in any part of Ohio.

Confirming this conclusion is the case of *Northrup, supra*. *Northrup* dealt directly with O.R.C. §9.68 and held at page 1132, "Ohio law permits the open carry of firearms, Ohio Rev. Code §9.68(C)(1), and thus permitted [Dressler] to do exactly what he was doing."

The *Northrup* case further stated at page, 1133,

> "While open-carry laws may put police officers (and some motorcyclists) in awkward situations

> from time to time, the Ohio legislature has decided its citizens may be entrusted with firearms on public streets. Ohio Rev. Code §§ 9.68, 2923.125."

The same is true for open carrying on private land or premises, such as a business. The Ohio legislature has decided its citizens may be entrusted with firearms in a business, unless that business posts a sign prohibiting the open carrying of firearms, per O.R.C. §2923.126(C)(3)(a).

In failing to correctly apply §9.68 and the two Ohio Supreme Court cases, the opinion also ignored its own decision in the case of *Warner v. Perrino*, 585 F.2d 171, 174 (6th Cir. 1978), which stated,

> Congress has declared that, "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652. ***A similar statute, 42 U.S.C. § 1988, specifically requires the lower federal courts to apply state law, in the absence of Congressional legislation, to the trial and disposition of federal civil rights suits, as long as the state law "is not inconsistent with the Constitution and laws of the United States."*** (Emphasis added)

Warner further stated,

> The rationale underlying this principle is that the law should produce uniform decision within each state regardless whether an action is

> brought in a state or a federal court. King v. Order of United Commercial Travelers, 333 U.S. 153, 157, 68 S.Ct. 488, 92 L.Ed. 608 (1948). Thus, where Congress has not otherwise spoken, federal judges are obliged to apply the law of the forum, which includes state statutes of limitations, to suits brought in federal court. *Id*.

The *Warner* case is consistent with the case of *Robertson v. Wegmann*, 436 U.S. 584, 593, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978). The *Robertson* court addressed a 42 U.S.C. §1983 action, which stated "But § 1988 quite clearly instructs us to refer to state statutes."

In its decision the Sixth Circuit declared the existence of a sign prohibiting the firearms is "irrelevant," App.-14. By declaring the sign irrelevant the court disregarded the plain language of O.R.C. §9.68 and §2923.126(c)(3), which together allow a person to open carry any place in Ohio, including a business, except where the business posts a sign prohibiting firearms. Thus, the decision is in direct conflict with Ohio law and the Ohio Supreme Court cases confirming the law and requires this Court to grant a Writ of Certiorari.

Question II – Does probable cause exist to arrest an individual so as to entitle police officers qualified immunity, when the individual is a business invitee and legally open carrying a firearm, and when the police are shown that there is no sign prohibiting the individual from open carrying in the business?

A. Fourth Amendment Right Violated.

This question is closely connected to Question I, except that it addresses an appellate court's failure to apply clear case decisions regarding the revoking of a business invitee's privilege under O.R.C. §2911.21(A). The first issue to address in determining whether Dressler's Fourth Amendment right to be free of arrest and search without probable cause was violated, and qualifies for a Writ of Certiorari, is whether Dressler can show that there was a constitutional right that was violated. The right to be free of unwarranted searches and seizures is protected under the Fourth Amendment to the United States Constitution, which states the protection is, "against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."

When Dressler walked into the Kroger store he was legally open-carrying a gun, which he had done for many years prior to September 20, 2013. Dressler was permitted to open carry per the Kroger policy and §9.68. The Kroger policy was confirmed at trial by an employee of Kroger, Pierce Bryant. During cross-examination. Bryant testified that Kroger had a long standing policy not wanting its associates in the position of having to confront a customer who is legally carrying a gun, and that the policy was in effect on September 20, 2013.

Dressler was a business invitee of Kroger. Indeed, Dressler was always referred to as a Kroger customer, both in the criminal trial and the Federal case. Regarding a business invitee, Ohio case law lists three circumstances in which the status of a business invitee may have his business invitee privilege revoked. They are:

1.) Commission of a crime, see *State v. Shelton*, 63 Ohio App.3d 137, 139-140, 578 N.E.2d 473 (4th Dist. 1989), (disorderly conduct – being a nuisance is not enough); and *Koss v. Kroger,* 10th Dist. Franklin, No. 07AP-450, 2008-Ohio-2696, ¶23 (violation of health code);

2.) No privilege at all, see *State v. Lyons*, 18 Ohio St.3d 204, 206, 480 N.E.2d 767 (Ohio 1985) (failure to pay fee); and *State v. Donahue*, 5th Dist. Fairfield, No. 2004CA20, 2005-Ohio-1478, ¶¶60-61 (entering restricted area); and

3.) No legitimate business on property, see *State v. Eizonas,* 1987 WL 31134, 87-LW-4558, 1987 Ohio App. Lexis 10 134 (7th Dist. 1987) (business completed, but stayed after being requested to leave); and *Eastwood Mall v. Slanco,* 1991 WL 172895, 1991 Ohio App. Lexis 4180 (11th Dist. 1991) (exercising federal rights on private property – no business purpose).

None of these circumstances describe Dressler. At the time the police officers found him, he was not committing any crime or about to commit a crime. All he was doing was shopping.

The presence of exigent circumstances is an exception that allows police to have probable cause to arrest without a warrant. The District Court based its

ruling on the existence of exigent circumstances, (App.-45) by considering facts it created that were not in the record, *i.e*. a 911 call. The appellate decision, however, did not address the District Court's improper creation of non-existence facts, but instead found probable cause based on an improper application of Ohio State law regarding the revocation of a business invitee's privilege as discussed below. Neither the exigent circumstances exception, nor probable cause is applicable in Dressler's case.

The Sixth Circuit has explained in *United States v. Johnson*, 22 F.3d 674, 680 (1994) citing *Minnesota v. Olsen*, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990), that four situations can give rise to exigent circumstances. They are:

1. Hot pursuit of a fleeing felon;
2. Imminent destruction of evidence;
3. The need to prevent a suspect's escape; and
4. A risk of danger to the police or others.

The first three situations are not applicable in Dressler's case. The 4th situation is only applicable if there is in fact an exigent circumstance. *Thacker v. City of Columbus*, 328 F.3d 244, 253 (6th Cir. 2003) defined, exigent circumstances are situations where 'real immediate and serious consequences' …will 'certainly occur' if the police officer postpones action to obtain a warrant. *Id*. [*Ewolski v. City of Brunswick*, 287 F.3d 492, 501 (6th Cir. 2002)] (quoting *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 997 (6th Cir. 1994)(quoting *Welsh v. Wisconsin*, 466 U.S. 740, 751 (1984)).

Not only did the police respond to the security guard's call without lights or a siren on their cruiser,

but Dressler was not disarmed until after his arrest. Therefore, he was not considered dangerous by the police. Thus, the exigent circumstances situation exception does not apply.

Dressler's situation is very similar to *Northrup, supra*. In *Northrup* at 1131-1132 the police officer had the ability to state two "specific and articulable facts." In *Northup* there was a man in open possession of a firearm and there was a 911 call. While the Fourth Amendment allowed the police officer to approach the armed man and asked him questions, "clearly established law required Bright [the police officer] to point to evidence that Northrup may have been 'Armed and dangerous.'" Citing *Sibron v. New York*, 392 U.S. 40, 64, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). But, all the police officer saw was a man in legal possession of a gun. The *Northrup* court concluded, "To allow stops in this setting 'would effectively eliminate Fourth Amendment protections for lawfully armed persons,'" (Citation omitted).

The police officers' situation in Dressler's case is even less articulate. All they had was a call, which they did not respond to as an emergency, and a customer shopping, who legally had a gun. They saw no crime, as the security guard had no authority under the Kroger policy. Nor did he have authority under §9.68 to restrict or delay Dressler from carrying his firearm, unless he was specifically prohibited by law. The only law that would have prohibited Dressler from carrying a gun into the store was O.R.C. §2923.126(C)(3)(a), which gave the owner the option of posting a sign prohibiting weapons in his business. There was no sign.

When the police arrived, they were falsely told by the security guard that there was a sign that did not allow guns in the store. Officer Zucker relayed the false information about the sign provided by Rice to Dressler when they approached him. Zucker should have known there was no such sign. This is true, because he passed the store window when he came into the store, which had no sign. He most assuredly knew that Dressler was allowed in the store with a gun, when Dressler led the officers out of the store to show him there was no sign. Thus, Zucker had no reasonable suspicion that Dressler had committed a crime, or was about to commit a crime. Zucker had been warned three years earlier in *Kennedy, supra.* 575 F.3d at 337, that he was not permitted to rely on demands and instructions from third-parties. The *Kennedy* court found,

> Zucker avers that he should be immune from suit because he was following the orders of Hudepohl, an agent of the municipal pool. However, "since World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is a reason why any of them should question the validity of that order." *O'Rourke v. Hayes*, 378 F.3d 1201, 1210 n. 5 (11th Cir.2004) (internal quotations marks and citation omitted). Regardless of the authority Hudepohl possessed, Zucker was not " relieve[d] ... of his responsibility to decide for himself whether to violate clearly established constitutional rights[.]" *Id*. at 1210. "[U]nder the Supremacy Clause, public officials have an obligation to follow the Constitution even in the midst of a

> contrary directive from a superior or in a policy." *N.N. ex rel. S.S. v. Madison Metro. Sch. Dist.*, __ F.Supp.2d __, 2009 WL 4067779, at *6 (W.D.Wis. Nov.24, 2009). See, e.g., *Glasson v. City of Louisville*, 518 F.2d 899, 903-04 (6th Cir. 1975) (officer that was following police chief's order was not immune from suit). Thus, viewing the facts alleged in the light most favorable to Kennedy, we conclude that Zucker violated Kennedy's constitutional rights by banning him from all City recreational property without due process of law.

In spite of these specific and articulable facts showing Dressler was permitted in the store with a gun, Zucker honored the demands of Rice and the store manager to arrest Dressler for a crime that was not committed. Not only was the crime not committed, it could not have been committed in the officer's presence.

In the instant case the information given by the security guard that there was a sign not allowing guns in the store was false. The officers should have known it was false when they walked into the store, But, they definitely knew it was false when they were shown by Dressler that the security guard's claim that no guns were allowed in the store was false. Thus, the police had no reasonable, articulate facts to show that Dressler had committed a crime, or was about to commit a crime. Furthermore, they did not actively witness a crime, because they actually followed Dressler out of the store, which negated any claim of criminal trespass. Thus, there was in fact no probable cause.

While *Northrup*, *supra*, dealt with an open carry on a public street, which was legal, the Ohio law also allows weapons in business establishments, except when posted by a sign, at the owner's option, see O.R.C. §2923.126(C)(3)(a). Thus, the police officers Zucker and Hodges had no authority to arrest Dressler because the security guard wanted him to leave because no guns were allowed in the store.

In light of the foregoing it is clear that not only was Dressler arrested in violation of the Fourth Amendment, but he was arrested without probable cause.

B. Sixth Circuit Court Failed to Consider Substantive Ohio Case Law.

While Question 1 dealt with the appellate court decision being in direct conflict with Ohio law and Ohio Supreme Court decisions, Question II deals with the failure of the court to properly consider substantive case law with regard to when a business invitee can be charged with criminal trespass.

Petitioner Dressler was charged in September of 2013 with criminal trespass, as a result of open carrying a firearm in a Kroger store. At the time Kroger had a long standing policy of not confronting customers who were legally open carrying a firearm. Yet, a security guard approach Dressler and asked him to place his firearm in his vehicle or leave the store. When Dressler did not respond to him, because he was hard of hearing, the security guard called the police. When the police arrived the security guard falsely told the police that there was sign on the front window prohibiting firearms in the store. When confronted by

the police, Dressler informed the police that he was permitted to open carry in the store as there was no sign posted prohibiting his open carrying of a firearm. During the discussion with the police, Dressler led them to the outside windows of the store and showed them that no sign was posted that prohibited firearms. Despite that fact that there was no sign, the security guard demanded the police to arrest Dressler for criminal trespass. In June of 2015, Dressler was found not guilty after a bench trial.

Dressler filed a 42 U.S.C. §1983 civil right lawsuit alleging that his Second Amendment right to bear arms was violated and his Fourth Amendment and Fourteenth Amendment rights to not be arrested and searched without a warrant was violated. The District Court granted the defendants summary judgment and the Sixth Circuit court affirmed the judgment. The Sixth Circuit's decision failed to consider Ohio case law that addressed the criteria required before a business invitee could have his privilege revoked.

O.R.C. §2911.21(A) provides, "No person, without privilege to do so, shall do any of the following." It then lists four circumstances under which a person could be charged with criminal trespass. Dressler was charged with and found not guilty of criminal trespass under O.R.C. §2911.21(A)(1).

The purpose of O.R.C. §2911.21 was explained in *Shelton*, supra, at 63 Ohio App.3d 139, "When R.C. 2911.21 was enacted, it embraced four concepts: privilege, entry, failure to withdraw, and entry into restricted areas. See Committee Comment to H.B. No. 511." The Ohio courts have found that a business invitee can have his privilege revoked under three

circumstances, which were listed above in subsection A of Question II.

Contrary to the established criteria for revoking a business invitee's privilege the Court of Appeals found at App.-15: "Because there was probable cause to arrest Dressler for criminal trespass, there was no violation of Dressler's Fourth Amendment rights." This statement was based on the incorrect application of Ohio law in the preceding paragraph, at App.-14-15:

> We do not believe the district court erred in concluding that Zucker and Hodges had probable cause to arrest Dressler for criminal trespass. Again, Rice asked Dressler twice to leave the store. Dressler did not comply with that request, but instead remained inside the store. Officers arrived, were given this information, and approached Dressler in the store. Dressler remained on store property even after the police confronted him. "[R]easonable minds can come to but one conclusion, namely, that [Zucker and Hodges] reasonably believed that [Dressler] refused to vacate the premises after having been notified to leave." Koss v. Kroger Co., No. 07AP-450, 2008 WL 2308771, at *6 (Ohio Ct. App. June 5, 2008).

The correct citation is *Koss v. Kroger Co*., 10th Dist., No. 07AP-450, 2008-Ohio-2696, 28. As noted above the *Koss* case is not applicable as it falls in one of the established reasons why a business invitee's privilege could be revoked, *i.e.* a violation of a health code.

The decision of the appellate court ignored the clear case law on the requirements to revoke a business

invitee's privilege. Before a business invitee's privilege can be revoked, there must be a reason as set forth in the listed above in subsection A of Question II.

Dressler was asked to leave because he was open carrying a firearm, which he was legally allowed to do, both under Ohio law §9.68 and under the policy of The Kroger Co. Thus, there was no probable cause observed by the police to initiate an arrest or a search.

This is consistent with the United States Supreme Court's "accepted and usual course of judicial proceedings" as confirmed by the following cases.

In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), the court stated,

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

The case of *King v. Order of United Commercial Travelers*, 333 U.S. 153, 157, 68 S.Ct. 488, 92 L.Ed. 608 (1948) held,

> The Rules of Decision Act [28 U.S.C. §1652] commands federal courts to regard as "rules of decision" the substantive "laws" of the appropriate state, except only where the Constitution, treaties or statutes of the United States Provide otherwise. And the *Erie R. Co.* case decided that "laws," in this context, include not only state statutes, but also the unwritten law of a state as pronounced by its courts. (Footnotes omitted).

Due regard must also be given to intermediate state courts where the state supreme court has not addressed the issue. See *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 238, 61 S.Ct. 179, 85 L.Ed. 139 (1940),

> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

See also *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967),

> This is but an application of the rule of Erie R. Co. v. Tompkins, supra, where state law as announced by the highest court of the State is to be followed. This is not a diversity case but the same principle may be applied for the same reasons, viz., the underlying substantive rule involved is based on state law and the State's

> highest court is the best authority on its own law. If there be no decision by that court, then federal authorities must apply what they find to be the state law after giving ***"proper regard"*** to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court. Bernhardt v. Polygraphic Co., 350 U.S. 198 [76 S.Ct. 273, 100 L.Ed. 199] (1956). (Emphasis added).

Thus, it is clear that despite the fact that Dressler was found not guilty of criminal trespass by a state criminal trial court, the court of appeals violated the procedure established by the Supreme Court, by not applying the substantive law regarding the revocation of a business invitee's privilege. Instead, the court incorrectly applied an out-of-context statement made in a criminal case that involved a trespass due to a violation of a health code.

C. Sixth Circuit Decision in Conflict with Other Circuits.

When addressing the question of probable cause, it has been long settled that the courts are to apply the "totality of the circumstances" test to determine if probable cause exists. The Supreme Court in *Ohio v. Robinnette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) ruled, "We have long held that the 'touchstone of the Fourth Amendment is reasonableness.' *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." The "totality of the circumstances" test has been repeatedly affirmed as shown by *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d

769 (2003) ("The probable cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.") and the more recent case *District of Columbia v. Wesby*, 583 U.S. __, 138 S.Ct. 577, 199 L.Ed.2d 453 (2018) adamantly confirmed the test in two statements.

At S.Ct. page 586, the court stated,

> To determine whether an officer had probable cause for an arrest, "we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003) (quoting *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)). Because probable cause "deals with probabilities and depends on the totality of the circumstances," 540 U.S., at 371, 124 S.Ct. 795, it is "a fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules," *Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). It "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.*, at 243-244, n. 13, 103 S.Ct. 2317 (1983). Probable cause "is not a high bar." *Kaley v. United States*, 571 U.S. __, __, 134 S.Ct. 1090, 1103, 188 L.Ed.2d 46 (2014).

At S. Ct. page 588 the court admonished that the failure to apply the "totality of circumstances" test was error.

> First, the panel majority viewed each fact "in isolation, rather than as a factor in the totality of the circumstances." *Pringle*, 540 U.S., at 372, n. 2, 124 S.Ct. 795. This was "mistaken in light of our precedents." *Ibid*. The "totality of the circumstances" requires courts to consider "the whole picture." *Cortez, supra*, at 417, 101 S.Ct. 690 Our precedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation. See *United States v. Arvizu,* 534 U.S. 266, 277-278, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). Instead of considering the facts as a whole, the panel majority took them one by one. For example, it dismissed the fact that the partygoers "scattered or hid when the police entered the house" because that fact was "not sufficient standing alone to create probable cause." 765 F.3d, at 23 (emphasis added). Similarly, it found "nothing in the record suggesting that the condition of the house, on its own, should have alerted the [partygoers] that they were unwelcome." *Ibid*. (emphasis added). The totality-of-the-circumstances test "precludes this sort of divide-and-conquer analysis." *Arvizu*, 534 U.S at 274, 122 S.Ct. 744.

The *Wesby* court did not affirm the lower court's decision that probable cause was lacking. Instead, at S.Ct. 589, it used its discretion to correct the error and to reverse the decision after it applied the totality of the circumstances to the facts in the case.

All of the Circuits routinely apply the "totality of circumstances" test as part of the established

procedure for determining probable cause. See *Cox v. Hainey*, 391 F.3d 25, 35 (1st Cir. 2004); *Dufort v. City of New York*, 874 F.3d 338, 348 (2d Cir. 2017); *Dempsey v. Bucknell University*, 834 F.3d 457, 468 (3d Cir. 2016); *Smith v. Munday*, 848 F.3d 248, 253 (4th Cir. 2017); *Crostley v. Lamar County, Texas*, 717 F.3d 410, 423 (5th Cir. 2013); *Abbott v. Sangamon County Illinois*, 705 F.3d 706, 714 (7th Cir. 2013); *White v. Jackson*, 865 F.3d 1064, 1074 (8th Cir. 2017); *Velazques v. City of Long Beach*, 793 F.3d 1010, 1018 (9th Cir. 2015); *Cortez v. McCauley*, 438 F.3d 980, 992 (10th Cir. 2006); *Manners v. Cannella*, 891 F.3d 959, 968 (11th Cir. 2018).

Thus, the Sixth Circuit decision not to employ the "totality of circumstances" test conflicts with all other circuits.

Perhaps even more importantly, the failure to employ the "totality of circumstances" test violated its own precedence, see *Courtright v. City of Battle Creek*, 839 F.3d 513, 521 (6th Cir. 2016).

> In other words, probable cause exists only when the police officer "discovers reasonably reliable information that the suspect has committed a crime." *Gardenhire v. Schubert*, 205 F.3d 303, 318 (6th Cir. 2000) (citing *Beck*, 379 U.S. at 91). "A probable cause determination is based on the 'totality of the circumstances,' and must take account of 'both the inculpatory and exculpatory evidence'" then within the knowledge of the arresting officer. *Wesley*, 779 F.3d at 429 (quoting *Gardenhire*, 205 F.3d at 318). Thus, if the officer discovers information or evidence favorable to the accused in the course of an

> investigation, the officer "'cannot simply turn a blind eye.'" *Id*. (quoting *Ahlers v. Schebil,* 188 F.3d 365, 372 (6th Cir. 1999)). Rather, that information or evidence must enter into the totality-of-the-circumstances analysis to determine whether there is probable cause for arrest. *Id.*

In Dressler's case the Sixth Circuit turned a blind eye to: 1.) §9.68; 2.) The Kroger Co. long standing policy regarding the open carry of firearms in the store; 3.) the Ohio law on revoking a business invitee's privilege; 4.) the fact that the security guard falsely told the police of a non-existent sign; 5.) the fact that the police knew no crime was committed, when they discovered no sign existed and arrested Dressler at the demands of the security guard and the store manager; and 6.) the police arrested Dressler in violation of Ohio law, when they did not observe a crime in their presence. In fact, the decision even ignored the fact that Officer Zucker misrepresented to the criminal trial court in the Motion to Dismiss hearing, claiming there was a sign that prohibited firearms in the store. When shown pictures of the store window with no such sign, Zucker changed his story. At the criminal trial he admitted there was no sign prohibiting firearms. Instead, the decision focused on the fact that a security guard, who violated the Kroger policy and §9.68, demanded a paying customer to be arrested simply because he was open carrying a firearm and had committed no illegal conduct. Without probable cause the police officers are not entitled to qualified immunity.

Because the Sixth Circuit's decision is in conflict with all other circuits it warrants the Supreme Court granting of a Writ of Certiorari. A Writ of Certiorari is also warranted because the decision has so far departed from the establish procedure regarding the "totality of circumstances" test, and that it failed to adhere to its own case precedence, by not applying the long established "totality of circumstances" test to determine whether probable cause exited to arrest and search Dressler.

Question III – Can summary judgment be granted, when the facts show a conspiracy exists, when a private party gives false information to the police about a sign prohibiting firearms in a store, when that information is shown by a customer to the police to be false, and the security guard demands the police to arrest the customer, who is legally open carrying a firearm?

The Court of Appeals correctly cited the standard for the review of a district court's granting of a summary judgment as the *de novo* standard. A *de novo* means that a reviewing court will look at the case afresh, anew, or a second time. But, the Court of Appeals did not follow the *de novo* standard.

The decision cited *Gillis v. Miller*, 845 F.3d 677, 683 (6th Cir. 2017) for the proposition of, "Summary judgment is proper 'if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.' Fed. R. Civ P. 56(a)." But the quote was taken out-of-context. In context the *Gillis* court stated at pages 683-684,

> We review de novo the district court's grant of summary judgment. *Perry v. McGinnis,* 209 F.3d 597, 600 (6th Cir. 2000). A movant is entitled to "summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). When evaluating a summary judgment motion, the reviewing court must construe the facts in the light most favorable to the non-movant. *Banks v. Wolfe Cty. Bd. of Educ.*, 330 F.3d 888, 892 (6th Cir. 2003). "Where there are no disputed, material facts, we determine, de novo, whether the district court properly applied the substantive law." *Farhat v. Jopke*, 370 F.3d 580, 588 (6th Cir. 2004).

An important aspect of a *de novo* review of the granting of a summary judgment is the requirement that the reviewing court "must construe the facts in the light most favorable to the non-movant."

This is the long standing standard judicial procedure in reviewing summary judgment decisions as set forth by the Supreme Court. See *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) ("[o]n summary judgment, the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion."). The *Matsushita* court was quoting from *United States v. Diebold*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). Neither the District Court, not the Court of Appeals, correctly applied the Rule 56 standard in considering whether a conspiracy existed.

The decision cited *Hooks v. Hooks*, 771 F.2d 935, 943-944 (6th Cir. 1985) for the elements of a conspiracy. The decision then concluded, without reviewing the facts anew,

> We think that Dressler has failed to show that Rice and Noschang conspired with police to deprive Dressler of his constitutional right to carry a firearm. That Rice called the police for assistance in removing an unwanted person from the store for which he was providing security does not provide evidence of engaging in a conspiracy with the police. That Rice provided the police with information about the conduct that caused him to request assistance also does not with information about the conduct that caused him to request assistance also does not support Dressler's conspiracy claim. (App –)

The facts were clear. Rice did much more than just provide information to the police.

Rice, the security guard employed by SEB, had a plan. His plan was to prevent Dressler from entering into the Kroger store while openly carrying a firearm. Rice executed his plan by confronting Dressler: 1.) in violation of O.R.C. §9.68; 2.) in violation Kroger policy that permitted customers to open carry in its stores; and 3.) by telling Dressler he had to leave the store and place his firearm in his vehicle. Rice did not want Dressler to enter the store while carrying a firearm. If this was all Rice did, there would be no §1983 action against Rice and no conspiracy against private parties.

But, Rice' plan included engaging the help of the Cincinnati Police. Immediately after Dressler walked

into the store to shop Rice called the police and informed them that a customer with a gun had refused to leave the store when requested to leave. If this was all Rice did, then the court would be correct, because at this point all Rice was doing was giving information. As the appellate court noted with case citations, simply giving information does not constitute conspiracy.

But, Rice did much more than give information. Both the district court and the court of appeals ignored the rest of the evidence. In doing so neither court viewed all the evidence and did not draw reasonable inferences in Dressler's favor.

The rest of the facts belie the decision's conclusion. After Rice made the call police officers Hodges and Zucker responded. They did not treat the call as an emergency, When they arrived, they talked with Rice, who informed them "that there was an individual inside of Kroger that was open carrying and he had been asked to leave the premises, or I'm sorry, place the weapon in his vehicle or leave the premises." Rice also falsely told the police that there was a sign posted at the door prohibiting guns in the store. This fact was ignored by the court. Rice led the police officers to Dressler. The police officers found Dressler shopping and carrying a shopping basket with items in it. There was no indication that Dressler was doing anything other than shopping.

A conversation ensued between the police officers and Dressler. Officer Zucker asked Dressler if the security guard had asked him to leave the store. During the conversation Zucker informed Dressler that there was "a sign that was posted on the outside of Kroger, it had a firearm with a circle and a line

through it, saying no firearm in the business." Dressler knew there was no such sign and wanted to see the sign. Dressler walked out of the store leading the police to where the sign claimed by the police was located. There was no sign that had a firearm with a circle and line through it. After being shown that the sign alleged by the security guard was not on the window, the security guard demanded the police to arrest Dressler. Dressler was arrested for criminal trespass even though no crime had been committed. This was also ignored by the court. Zucker also testified at the criminal trial that the store manager verified that "they wanted him prosecuted for criminal trespass for failing to leave the store after a representative of Kroger had informed him that he needed to leave the property,"

The police officers and the Kroger manager joined in with Rice's plan and agreed to the demand to arrest and keep Dressler out of the store because he was open carrying a firearm. Rice's reason for demanding the arrest, according to Zucker was, "because he was open carrying."

The police officers arrested and searched Dressler, even though no crime had been committed, despite the all facts being ignored, as listed above. SEB, the Kroger Co. and two Kroger employees all join in with the conspiracy by ratifying the illegal actions of the security guard and the police officers.

Thus, the facts fulfill the elements listed in *Hooks*, *supra*, *i.e*. 1.) Rice had a single plan; 2.) the police officers and the other defendants shared Rice's desire to prevent Dressler from open carrying a firearm in the store in violation of his Second Amendment right to

bear arms; and 3.) the overt act of arresting Dressler to complete the plan at the request of Rice was committed.

In short, the security guard gave false information to the police about a non-existent sign allegedly prohibiting firearms in the store. When Dressler disputed the security guard's clam and actually showed the police that no such sign existed, the security guard demanded the police to arrest Dressler. SEB, The Kroger Co., and two Kroger employees ratified these actions. These facts belie the District Court's claim and the Court of Appeal's rubber stamping that all the security guard did was provide information to the police.

By failing to follow the normal summary judgment procedure of viewing afresh the facts in the light most favorable Dressler, the Court of Appeals has clearly departed from "the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

CONCLUSION

Petitioner has shown that the Court of Appeals' decision to affirm the District Court's grant of summary judgment against Dressler; 1.) is in direct conflict O.R.C. §9.68 and two Ohio Supreme Court cases affirming §9.68; 2.) conflicts with all other circuits regarding the "totality of circumstances" test, and it own precedence by not apply the test; and 3.) has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, regarding a summary judgment *de novo*

review, as to call for an exercise of this Court's supervisory power. Accordingly, Dressler respectfully requests the United States Supreme Court to grant the requested Writ of Certiorari to resolve these questions.

Respectfully submitted,

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