NO. 17-2727

TO THE SUPREME COURT OF THE UNITED STATES

Master Baye Balah Allah- Petitioners

V.

Brain Wilson#27486, Dexter Russell#447,Sgt. Aliyev#00140, Cedrick Brown#0000, Jason Wursop#3547

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MASTER BAYE BALAH ALLAH

129 FULTON ST. N.Y., N.Y., 10038

347-375-5041

QUESTIONS PRESENTED

1. Whether the court of appeals abused its discrection by dismissing petitioners appeal under 28 U.S.C. 1915 (e) after four years of diliberating all the issues with the lower court and the defendants. thus denying petitioners the relief sought by rejecting eveidence that is clearly visible in the record and which is based in law and in facr.

2. Whether Innaaconnee and Chung are in direct conflict with Whitmore and Fed. Rule of Civ. P. 17 [c] [2] and whether petitioners were prejudiced by the lower courts refusal to grant relief under these established rules of law.

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LIST OF PARTIES

Master Baye Balah Allah- petitioner

v.

Brain Wilson # 27486, Dexter Russell #447, Sgt. Aliyev #00140, Cedrick Brown #0000, Jason Wursop #3547

PETITION FOR WRIT OF CERTIORARI

Master Baye Balah Allah Allah . petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

JURISDICTION

The judgment of the court of appeals was entered on Jan. 2, 2018. This petition for writ of certiorari was filed on March 30, 2018. This court has jurisdiction pursuant to 28 U.S.C. 1254 (1).

STATEMENT OF THE CASE

On Aug. 4, 2012 at 12:56 am, petitioners, Master Baye Balah Allah and his five year old grandson, B.Z.B.S. were arrested at Brooklyn Bridge by Officer Brain Wilson and DHS [Dept. of Homeless Svcs.] peace officer Dexter Russell where petitioner was charged with resisting arrest and sleeping on the train. During the course of the illegal arrest several of petitoners constitutional rights were violated by the defendants. This petitioners constantly pointed out to the district court and this court through the evidence that is easliy found in the record.

During the next four years petitioners were constantly prejudiced by the district courts actions in its refusal to what it is mandated to do as an administrator of the law which is to make sure that the entire litigation is not tainted in anyway. Instead petitioners were denied the right to counsel, the right to appear in court, the right to be a Next Friend, the right to infomation pertaining to petitioner that defendants possessed but petitioners were not allowed to have, the right to compel defendants to admit to truthful information that is easliy found in the record and the right to a jury trial. These are all things that the Supreme Court, this court, FRCP and decisions from other courts in other circuits said petitioners can and should have but were denied anyway.

The district courts actions created a double standard where defendants got everything that they wanted even if it verged on the point of ridiculous. [See motion for sanctions

against petitioners based on mere heresay, 12.18.15 when the record shows that petitioners were trying to get the court to sanction defendants for two years.]. It had become petitioners versus defendants and the district court.

On 7.31.18 granted defendants motion for summary judgment despite the massive amount of evidence in the record and the history of this court that says that it should have never been granted. [This court violated several of its own laws in denying petitioners appeal. See summary judgment motion.]. On 8.29.18 petitioners filed a timely response to this court for review and on 1.2.18 the appeal was denied.

REASONS FOR GRANTING CERTIORARI

The court of appeals decision to dismiss petitioners appeal because it "lacks an arguable basis either in law or in fact." Neiztke v. Willaims, 490 U.S. 319 (1989) also 28 U.S.C. 1915 (e) further prejudices petitoners and is reversible error.

In Anders v. California, 386 U.S. 738 (1967) the Supreme Court ruled "that an appeal on a matter of law is frivolous where [none] of the legal points are arguable on their merits."

28 U.S.C. 1915 (e) states: notwithstanding any filing fee or any portion thereof that may have been paid, the court shall dismiss the case at any time if the court determines that (b) the action or appeal (i) is frivolous or malcicious (ii) fails to state a claim which relief can be granted.

It is standard knowledge and practice that a court has the authority to screen sua sponte an in forma pauperis complaint at any time and must dismiss the complaint or portion thereof that is frivolous or malicious, fails to state a claim upon which relief can be granted or seeks montary relief from a defendant who is immune from such relief. 28 U.S.C. 1915 (e)(2)(b), see also Livingston v. Adirondack Beverage Co., 141 f.3d 434 (2nd cir. 1998). On 8.2 13 petitioners complaint passed this intial step of the judical process that ensured the court that the court's time and resources wasn't being wasted on a petitioner who was untruthful about his inability to pay court fees or who was being frivolous and malicious in his attempt to get relief for the wrongs committed against him and his five year old grandson. The record shows that this was never an issue with the district court. In fact all issues rasied by petitioners were addressed in length by both the defendants and the court and are all based in law and in fact as the record proves. This courts denial of petitioners appeal based on the courts reason denies petitioners the

relief that can be granted and prejudices petitioners according to the law, decisions rendered by the Supreme Court, the Court of Appeals, FRCP and other court decisions in other circuits.

[A] The record shows that on August 4, 2012 at 12:56 am petitioners, Master Baye Balah Allah and five year old B.Z.B.S. were arrested at Brooklyn Bridge by Officer Brain Wilson and DHS [Dept. of Homeless Svcs.] peace officer Dexter Russell. This is an undisputable fact that is affrimed by Wilson in his own words who states on the accusatory instrument "that the defendant intentionally attempted to prevent a police officer and a peace officer from effecting a lawful arrest of himself and another person." Wilson swears under oath that his statement is truthful under penalty of perjury. This act is a violation of petitoners right to due process especially when it pertains to a five year old child. The Supreme Court has ruled this to be reversible error. [See ex.1 copy of Wilson's sworn complaint.]

In J.D.B. v. North Carolina the Supreme Court reaffrimed Miranda and ruled that a child's age was relevant to determine when he has been taken into custody and is entitled to a Miranda warning. [See also Stansbury v. California, 511 U.S. 318, Yarborough v. Alvarado, 541 U.S. 652, Dickerson v. U.S., 530 U.S. 428 [2000]. The record proves that petitioners were arrested. B.Z.B.S. was a five year old minor at the time of arrest. The record proves that no Miranda was read to him because no legal act against him can take place without a parent or guardian being present. The record also proves that this is a fact that is based in law and is a direct violation of petitioners due process rights.

[B] On 8.2 13 petitioner B.Z.B.S was removed from the docket. From 9.16.13 to 5.1.15 petitioner Master Baye Balah Allah submitted motions for B.Z.B.S. to be appointed counsel pursuant to 28 U.S.C. 1915 (e)(1) and that the court appoint petitioner Next Friend pursuant to Whitmore, 495 U.S. 149 and FRCP 17(c)(2) so that B.Z.B.S. can be represented in court. The record shows that all motions and request for representation for B.Z.B.S. were denied and some were ignored.

Petitioner has a legal right to be Next Friend according to the Supreme Court's decision in Whitmore and FRCP 17 (c)(2). The Whitmore court ruled that anyone can be a Next Friend to anybody as long as the three prongs established by the court are fulfilled. Those prongs are: (1) that there must be some kind of "disability" such as inaccessibility to the court or some other kind of "disability." (2) that the Next Friend must be truly dedicated to the best interest of the person they wish to represent and (3) their must be some kind of relationship between the Next Friend and the person they wish to represent.

Petitioner has repeatedly demonstrated to the lower court and the Court of Appeals that petitoners fulfill all three requirements (1) B.Z.B.S.'s "disability" is his age which prevents him from having access to the courts. (2) petitioners four year committment in fighting the issues relating to B.Z.B.S.'s right to have representation in a court of law is reflected in the record and (3) the relationship between both petitioners is biological in nature though the Supreme Court has ruled and other courts in this and other circuits have agreed that a biological relationship is not mandatory. [See Ad Hocc Comm. of Concerned Teachers v. Greenburgh #11 Union Free School Dist., 873 f.2d 25 [2nd cir.].

FRCP 17 (c)(2) states: a minor or incompetent person who does not have a duly appointed representative may sue by next friend or by guardian ad litem. The court must appoint an guardian ad litem or issue another appropriate order to protect a minor or incompetent person who is under represented in an action. [sic]. This very court stated in Ad Hocc Comm. of Concered Teachers, id., "We follow the general rule that when an infants authorized representative is unable, unwilling, or refuses to act or has interest that conflict with the infant the court may appoint a next friend to ensure that the infants rights are protected in a court of law." The record shows that the only time that B.Z.B.S.'s mother was a part of this litigation is when petitioner was ordered by the district court on 11.4.13 to sign an amendend complaint. Petitioner was instructed by the court that this would be the only way to get B.Z.B.S. back on the docket.

Petitioner as repeatedly stated to the lower court that just removing B.Z.B.S. from the action does not protect his rights in a court of law. Whitmore and FRCP 17 (c)(2) are very similar and say the same thing, that the rights of a minor are to be protected in a court of law. The lower court instead came up with different reasons why the rule and the law should not be obyed. [See court orders dated 3.2.15 and 5.9.14, also Ex.2 copy of court docket sheet]. This very court has ruled that this is reversible error. Petitioners were prejudiced by this action and suffered harm as a result.

[C] On 6.2.14 petitioners sumitted request for documents pursuant to FRCP 34. On the same day petitioners also requested that defendants provide copies of the 1,000 page ACS document pertaining to B.Z.B.S. and to admit to admissions 1 and 4. (1) was to admit that petitioner has never been arrested for pedophilia and (4) was to admit that both (petitioners) Master Baye Balah Allah and B.Z.B.S. were arrested on 8.4.12 pursuant to FRCP 36. The answer to both these request are facts that are easily found in the record. [See Ex.1 Wilson's sworn complaint and 3 DA packet/fingerprint response summary, Ex.9 copy of Wilsons memo book where Russell tells him before they both arrest petitioners that petitioner was "a known pedophile."]

On 6.4.14 petitioners again requested that defendants produce the 1,000 page ACS document and answer admissions 1 and 4. Petitioners were denied the ACS information that defendants had pertaining to B.Z.B.S. [See Ex. 4, pg. 2 letter from defendants].

FRCP 26 [a] [1] [A] [ii] states: "To comply with FRCP 26 a party must provide to the other party a copy of all documents that the disclosing party has in its possession, custody or control and use to support its claims or defense."

FRCP 36 [a] [b] [1] states: "A party may serve on any other party a written request to admit for the purpose of the pending action only the truth of any matter within the scope of Rule 26 [b] [1] relating to [a] facts, the application of the law or opinions about either and [b] the genuineness about either." [sic]. [4] states: If a matter is not admitted the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it....the answering party may assert lack of knowledge or information for a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that information it knows or can readily obtain is insufficient to enable it to admit or deny.

The record shows that the defendants crafted their response to fit FRCP 36 by the letter to keep from admitting what is easily found in the record. This is not what the rule was created for. The purpose of discovery is too speed up pretrial proceedings and to ensure that there are no surprises during trial based on the documentation or information collected between parties. Rule 36 [4] states that a party can only admit or deny after a party has made a genuine effort to get the information requested and is unable to get it. Rule 36 was not created to help cover up defendants guilt or used as a tool to avoid admitting what is, as in petitioners case, clearly and easily found in the record.

The record shows that defendants continued to come up with excuses to avoid following the rules of the court by stating "petitioners response contains vague and ambiguous wording that does not allow the defendants to admit or deny." After that petitioners renewed their request to have the defendants answer admissions 1 and 4. On 4.29.15 defendants stated: "That without being provided an aurhorized release of records pursuant to NYCPL 160.50 and 55 they do not have sufficient information to to fairly admit or deny if petitioner has ever been arrested for pedophilia." [See Ex.5 copy of NYCPL 160.50 and 55 and order of confidentiality." On 5.4.14 petitioner eagerly signed the release forms giving defendants access to the sealed records so that they would be able to answer if petitioner has ever been arrested for pedophilia and that both

petitioners were arrested at Brooklyn Bridge by the arresting officers Wilson and Russell as it appears in the record.

But on 6.10.15 defendants once again with the help of the court refused to comply with FRCP. Petitioners objected and asked the court compel the defendants to comply and admit to facts based in the record. On 6.15.15 petitioners renewed their request and asked for the 1,000 page document and for the court to compel the defendants to answer admissions 1 and 4 which defendant were now able to do with the releasing of the sealed records. On 6.26.15 defendants again refused to do what they said they would do by stating "That defendants are not in possession of plaintiff's complete arrest history and as such cannot admit or deny this request for admissions. Defendants submit that they have fully answered plaintiff's request for admissions to the extent possible."

On 8.30.15 petitioner attrended the conference to once again ask the court to compel the defendants to follow the rules of the court and admitt to facts based in the record and the lower court denied petitioners motion to compel. On 11.30.15 tried again to get the court to compel the defendants to admit to facts that is easily found in the record. At this conference defendants stated that they would abide by the rules of the court and answer admissions 1 and 4 but once again came up with a reason not to by stating "That because plaintiff was charged with a crime of a sexual nature they couldn't admit od deny plainmtiff has never been arrested for pedophilia." [See Ex.6 copy of summons that was immeadietly dismissed].

At the conference held on 10.18.16 petitioner showed the court how the defendants were intentionally avoiding answering admissions 1 and 4 and presented the court with proof to show that the defendants had the information they needed to admit or deny admissions 1 and 4 which was NYPD complaint #2012-041-04151 which is a part of petitioners sealed arrest history that defendants requested and said they would need in order to fairly admit or deny that petitioner has never been arrested for pedophilia. [See Ex.7 copy of NYPD complaint #2012-041-04151].

The evidence in the record proves that the lower court never made the defendants obey any of the rules of the court like pertitioners were required to and as a result petitioners were prejudiced by this. No information during discovery was shared, no admissions admitted to, and defendants were consistently allowed to disregard FRCP when it benefited them. The lower court even allowed the defendants to sanction petitioners on mere heresay when petitioners were trying to get the court to sanction defendants for their disregard for the rules of the court and petitioners rights. [See Ex.8 copy of court

order granting sanctions dated 12.18.15]. It is obvious that a double standard existed and petitioners were prejudiced by this. This court has ruled thais as reversible error.

[D] On 7.31.17 the district court granted defendants motion for summary judgment based on three points: petitioners false arrest and excessive force claims and petitioners not stating his injuries to anyone.

SUMMARY JUDGMENT

It is well known that when deciding a motion for summary judgment "a court may not grant a motion for summary judgment unless all of the parties submissions read together revel that there is no genuine dispute as to any material fact and the movant is entitiled to judgment as a matter of law." FRCP 56 [a], See also, Stewart v. County of Nassau, 2014 U.S. Dist. Lexis 6526 [E.D.N.Y.], Anderson v. Liberty Lobby Inc., 477 U.S. 242. "In determining whether summary is appropriate the court will construe the facts in a light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." Brad v. Omya Inc., 635 f.3d 15 [2nd cir. 2011], Diastasio v. Perkin Elmer Corp., 157 f.3d 55 [2nd cir. 1998], Overton v. N.Y. State Div. of Military and Naval affairs, 373 f. 3d 83 [2nd cir. 2004], Sec. Ins. Co. of Hartford v. Old Dominion Freight Line Inc., 391 f.3d 77 [2nd cir. 2004].

When a party moves for summary judgment this circuit has ruled that "The initial burden is on the moving party to demonstrate the absence of a genuine issue of material of material fact. [See Celotex Corp. v. Catrett, 477 U.S. 317 [1986], Feingold v. New York, 366 f.3d 138 [2nd cir. 2004]. This circuit has also moved that the non-moving party need not make a compelling showing. The non-moving party need merly show that reasonable miinds could differ as to the proffered evidence, [See R.B. Ventura v. Shane, 112 f.3d 54 [2nd cir. 1997]. Especially "where the non-moving party is a pro se litigant. A court must consider into evidence in opposition to summary judgment all contentions offered in motions and pleadings where such contentions are on personal knowledge and sets forth facts that would be admissible in evidence and wher the pro se litigant attest under penalty of perjury that the contents of the motions and pleadings are true and correct." [See Weinstein v. Albright, 261 f.3d 127 [2nd cir. 2001], Burgos v. Hopkins, 14 f.3d 787 [2nd cir. 1994], Salahuddin v. Coughlin, 999 f. Supp. 526 [SDNY 1998], McPherson v. Coombe, 174 f.3d 276 [2nd cir. 1999].

Again when looking at the record the first thing that the reader can see is that the lower courts decision was already predetermined and appears to be a carry over from all the other prejudicial decisions that the court has made in this litigation regarding petitioners. In the order granting summary judgment the court does not do what it is required to do

when dealing with a summary judgment motion, that is look at the information favorably towards petitioners. Under the caption "background" the court repeats the defendants view of events verbatim construing them as true against petitioners and then goes on to craft the events that took place on 8.4.12 in the defendants favor to justify granting the summary judgment motion.

Petitioners were also prejudiced by both courts decisions because when looking at the complete record it is esay to see that there are "genuine issues of material fact" that this court has held in the past, not only denies the granting of a summary judgment motion but are issues only for the jury to decide, Like the animosity between Russell and petitioner that is a genuine issue of fact because after Russell attacks petitioner he arrest petitioner and then tells all the other defendants the lie that petitioner is "a known pedohile." [See Ex. 9 copy of Wilson's memo book]. The record proves that is a lie. [See Ex.3 DA Packet/Fingerprint Response Summary]. B.Z.B.S. being held and questioned by police for six hours and fourteen minutes without his legal guardian or a representative [See Ex.9] is also another issue for a jury to decide not the court as this court has ruled in previous cases like this in its history. These acts prejudices petitioners as this very court has ruled in the past and is reversible error.

FALSE ARREST

The defendants stated and the district court agreed that petitioners false arrest claim is barred as a matter of law because petitioner was convicted for the crime for which he was arrested. In Heck the Supreme Court affirmed the dismissal of plaintiff-appellants 1983 claim stating "that when the success of such claims requires the plainttiff to prove the unlawfulness of his conviction or confinement the complaint must be dismissed unless the plaintiff can prove that the conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination or called into question by a federal courts' insuance of a writ of habeas corpus." Heck v. Humphrey, 512 U.S. 477 [1994].

HOWEVER, IT IS SECOND CIRCUIT LAW that a plaintiff not in state custody, who thus does not have a habeas corpus remedy available may bring a 1983 action even if a successful claim "would necessarily imply the invalidity of his conviction." In Leather v. Eyck, 180 f.ed 420 [2nd cir. 1999] the court ruled that Heck did not bar an arrestee's 1983 claim. The court reasoned "because Leather is not and never was in the custody of the state, he has no remedy in habeas corpus. Having escaped the jaws of Heck Leather should be allowed to pursue his 1983 claim in the district court." A year after deciding Leather the Second Circuit further explained that "Heck only acts to bar a 1983 claim when the plaintiff has a habeas corpus remedy available to him [i.e. when he is in state

custody] because it appears that plaintiff is not in state custody his 1983 claim is not barred by Heck." quoting Green v. Montgomery, 219 f.3d 52 [2nd cir. 2000], Huang v. Johnson, 251 f.3d 65 [2nd cir. 2001].
In Jenkins v. Haubert, 179 f.ed 19 [2nd cir. 1999] this court held "In light of our holding in Leather and in light of both the Spencer majority's dictum and the fact that the Spencer concurrences and dissent 'reveled that five of the Supreme Court Justices hold the view that where that where federal habeas corpus is not available to address constitutional wrongs 1983 must be.' We conclude that plaintiff's 1983 claim must be allowed to proceed." quoting John v. Lewis, 2017 WL 1204828.

Petitioner was convicted for sleeping on the train and was sentenced to time served. The certificate of disposition proves that petitioner was never in state custody.This circuit has adamanatly ruled that where petitioner is not currently incarcerated or in the custody of the state Heck will not bar his 1983 claim. [See Ex. 11 Certificate of disposition, see also Chillemi v. Town of South Hampton, 943 f. Supp. 365 [E.D.N.Y. 2013][1983 remains a possible remedy when there is no other federal avenue through which to bring a claim and finding that Heck did not bar plaintiff's 1983 claim."][Hope v. city of New York, Wl 331678 [E.D.N.Y. 1.22.2010][finding that its prior reliance on Heck to be erroneous where plaintiff had spent no time in custody.][See also Houston v. City of New York, No. 06-CV-2094 2013 WL 1310554 [E.D.N.Y. 3.28.2013][holding that the court need not consider whether plaintiff's claims are barred by Heck because plaintiff was never in custody for that charge.][Barmapov v. Barry, No. 09-CV-3390, 2001 WL 32371 [E.D.N.Y. 1.5.2011][finding that because plaintiff was not incarcerated Heck did not bar plaintiff's 1983 claim because plaintiff cannot challenge his conviction through a habeas corpus petition.].

Again the language and understanding of this law created by this very court is clear. Petitioners disposition proves that petitioner was never in the custody of the state when petitioner suffered his conviction based on an false arrest and has this court has repeatedly stated does not bar petitioners 1983 claim. This is one of many reasons that petitioner has demonstrated to this court why the granting of the summary judgment motion should never have been granted because it is an issue based in law and in fact that is reflective of the record yet this court went against its own specifically created law to hand petitioners an unjust and prejudicial verdict that completely contradicts all that the Court of Appeals has said pertaining to false arrest claims.

EXCESSIVE FORCE

It is well known that all claims that law enforcement officers used excessive force in the course of an arrest, investigatory stop or other seizure of a free citizen ia analyzed under

the fourth amendments reasonableness standard test. [See Graham v. Connor, 490 U.S. 386, Jenkins v. Town of Greenburgh, No. 13 Civ. 884, 2016 WL 205466]. In determining whether an officers use of force was reasonable we must balance the nature and quality of the intrusion on the individuals fourth amendment rights against the goverments interest. [1] whether the use of force was objectively unreasonable in light of the facts and circumstances confronting the officers. [2] the severity of the crime, whether the individual posed an immediated threat to the officers safty or to others. [3] whether the individual actively resisted arrest or tried to evade arrest by flight. [See Phelan v. Sullivan, 541 fed. Appx. 21 [2nd cir. 2013]. It is the standard that applies to both the arrest and post arrest booking process. [See Campbell v. City of New York, 2010 U.S. Dist. Lexis 66389 24 [S.D.N.Y. 2010]. All couirts are required to use this proceedure when examining excessive force claims but instead of using this proceedure the district court stated that "because plaintiff did not report his immediate injuries that absent any supporting evidence Allah's testimony is insufficient to defeat defendants summary judgment motion." Both the district court and the Court of Appeals are in error.

In Ortiz v. Pearson, 88 f. Supp. 2d 151 the court held: "while the extent of the injury is one factor to be consideredwhen determining whether the use of force was excessive, an injury need not be serious in order to give rise to a constitutional claim. Just as reasonable force is not unconstitutional even if it causes serious injury neither does unreasonable force become immunized from challenge because it causes only minor injury. In Robison, 821 f.2d 913 the court held that "While Robison did not seek treatment for her injuries and this may ultimately weigh against her in the minds of the jury in assessing whether the force used was excessive, this failure is not fatal to her claim. If the force used was unreasonable and excessive the plaintiff may recover even if the injuries inflicted were not permanent or severe." [See also Sash v. U.S., 674 f. Supp 2d 541 [S.D.N.Y. 2009][Although plaintiff's immediate injuries may turn out to be minor, the court cannot find them de minimis as a matter of law."][See also Kennedy v. Arias, 2017 WL 2895901][The court ruled: even where the only physical injuries are brusies, if they are sustained during an unjustified use of force, the claim of excessive force will survive a summary judgment motion."][See also Jie Yin v. NFTA, 188 f. Supp 3d 259 [W.D.N.Y.], Hayes v. N.Y.C.Police Dept.., 212 fed appx 60 [2nd cir.][We have permitted claims to survive summary judgement were the only injury is bruising."][See also Maxwell v. City of New York, 380 f.3d 106 [2nd cir. 2004][We have permitted a plaintiff's claim to survive summary judgment on allegation thatb during the course of an arrest a police officer twisted her arm].

Also this circuit and other circuits have repeatedly ruled that a plaintiff's failure to report his injuries to a medical provider or the arresting officers will survive a motion for

summary judgment. In Shevere v. Jessamine County Fiscial Court, 453 f.3d 681 [6th cir. 2006]the court fuled that summary judgment was not warrented because she has provided sufficient evidence of a violation of her clearly established right to be free from excessive force in the course of an arrest.

This court has consistently ruled that failure to report ones injuries, the absence of a long term injury, minor brusing or swelling as well as the mere allegation of pain have all surviverd summary judgment motions. Petitioners case is just a mirror reflection of the cases citied bur the results arn't the same and as a result petitioners were once again prejudiced by the district courts decision and this courts decision to agree with the lower court when once again the evidence proves that the judgments of both courts are in error. Both courts have made erroneous decisions that is exclusively reservered for the jury. A jury that both courts have denied petitioners access to by their rulings. This court has sent many cases back to the lower court or reversed decisions based on this poinr alone because it is reversible error and prejudicies petitioners under the law.

[E] There was no probable cause for the arrest. In Savino v. City of New York, 331 f.3d 63 [2nd cir. 2003] this court held that in order for plaintiff to state a claim for false arrest plaintiff must prove: (1) that the defendant intended to confine the plaintiff. (2) plaintiff was conscious of the confinement. (3) plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged. And once again petitioner fulfills all four prongs established by this court to prove to both courts that the arrest was illegal.

Under both state and federal law false arrest constitutes false imprisonment accomplished by the means of an unlawful arrest." the claims of false arrest and false imprisonment are synonymous because an imprisonment starts at the moment of arrest. [See Jenkins v. New York City, 478 f.3d 76]. The record demonstrates that Russell intended to confine petitioner. Wilson's memo book and petitioners complaint shows that as soon as Russell appears on the scene he attacks petitioner from behind by pushing petitioner into a pillar and then follows that up with a chokehold while twisting petitioners left arm behind his back and bending petitioner over backwards before throwing petitioner to the ground and arresting him. [See Ex.9 copy of Wilson's memo book and Ex.10 petitioner's complaint]]. To further justify his illegal acts he tells all the defendants that petitioner is "a known pedophile" [See Ex.9]. We know now, through the evidence that this is a lie. [See Ex.3 DA Packet/Fingerprint response summary]. This shows intent on Russell's and Wilson's part to confine petitioner unlawfully based on Russell's testimony. Both petitioners were conscious of ttheir unlawful confinement and non-consent came in the foorm of peaceful protest against the unlawful mistreatment petitioners were suffering at the hands of the defendants. And the confinement was not

privilleged because it was unlawful. [See Ex.10 copy of complaint, para.19]. It was not done in the course of a legal right but it was done malicilously and sadistically to satify Russell's own need to get even with petitioner. Petitioners fulfill all four prongs and prove that the arrest by the defendants Russell and Wilson was an illegal arrest. All the courts have held that the right of an individuals to proceedural due process forbids the use of an illegal process for a wrongful purpose. [See Cook v. Sheldon,. 41 f.3d 73 [2nd cir. 1994]. This too is reversible error.

These three issues rasied by the lower court, failure to report injuries to a medical provider or the arresting officer, false arrest and excessive force were used to grant defendants motion for summary judgment and are all prejudicial and reversible errors according to the Court of Appeals and the Supreme Court. But the Court of Appeals who created laws to make sure things that petitioners have experienced wouldn't happen have turned their backs on the very rules the court has created to protect litigants rights, especially when the litigants are pro se litigants who have in forma pauperis status.

[F] It is well established in the circuit that the gratutious ise of force on a handcuffed prisoner is unconstitutional. [See McDowell v. Rogers, 863 f.2d. 1302[[6th cir. 1988] However it is a settled rule that credibility, assessments, choices between conflicting versions of the events and the weighing of the evidence are matters for the jury, not for the court on a motion for summary judgment. [See Mcclellan v. Smith, 439 f.3d 137 [2nd cir. 2006], Fischi v. Amitage, 128 f.3d 50 [2nd cir. 1997]. It is beyond doubt that that the act of a police officer hitting a restrained suspect [in the head] is excessive force. See Bultema v. Benize, County, Case No. 1.03-civ-56 [W.D. Mich. 12.2.2005, Phelps v. Coy, 286 f.3d 295 [6th cir. 2002]holding that a police officer's tackling of a handcuffed suspect, hitting him twice in the face and banging his head on the floor three times was unconstitutional.

Petitioners complaint describes how he was assualted twice by the defendants, first by Russell as the other defendants stood by and watched and then by all of the defendants while petitioner was handcuffed and lying on the ground. {See Ex.10 , para. 16-19. The fourth amendment protcts individuals from a law enforcement officers use of excessive force during an arrest. See Jones v. pamley, 465 f.3d 46 [2nd cir. 2006]. This circuit has ruled that this is reversible error.

[G] It is well known that a law enforcement officer has a duty to intercede on behalf of a person whose rights are being violated by other law enforcement officers in his presence. An officer who fails to intercede is liable for the preventable harm caused by

the actions of the other officers where that officer observes or has reason ro know (1) that excessive force is being used. (2) that an individual has been unjustly arrested (3) or that any constitutional violations has been committed by a law enforcement official." Anderson v. Brenan, 17 f.3d 552 [2nd cir. 1994], see also Curley v. Village of Suffern, 268 f.3d 65 [2nd cir. 2001]["We recognize that law enforcement have an affirmative duty to intervene on the behalf of others whose constitutional rights are being violated by other officers in their presence." Thompson v. Tracy, 00 8360, 2008 U.S. Dist. Lexis 4228, 2008 WL 190440 [S.D.N.Y. 2008][Same], see also Smith v. P.O. Canine Dog Chase, 02 civ. 6240, 2004 U.S.Dist. Lexis 19623, 2004 WL 2202564 [S.D.N.Y. 9.28.2004] "defendant officers were entitiled to summary judgment on excessive force claims based on their failure to intercede because there was no evidence to suggest that these officers were present at the time of the incident....."].

Evidence in the record shows that while Russell was assualting petitioner, officers Wursup, Wilson, Brown and Sgt. Aliyev just looked on and did nothing as petitioners constitutional rights were being violated in their presence. [See Ex. 10 copy of petitioners complaint]. The Supreme Court and the Court of Appeals have ruled this has reversible error.

IANNACCONE AND CHEUNG AND OTHER COURT DECISIONS ARE IN DIRECT CONFLICT WITH WHITMORE AND FRCP 17 [C] [2]

The record shows that on 8.2.13 the district relied heavily on Innaccone v. Law, 142 f.3d 553 [2nd cir. 1998], Cheung v. Youth Orchestra Found. Of Buffalo, Inc. 906 f.2d 59 [2nd cir. 1990] and Trindall v. Poultney High School Dist., 414 f.3d 281 [2nd cir. 2005] to deny petitioner the right to be Next Friend to B.Z,B.S. According to this courts decision in Whitmore and FRCP 17 [c] [2] petitioner has a legal right to represent B.Z.B.S. regardless of the fact that petitioner is not an attorney.

In Cheung the court denied the father the right to represent his daughter and remanded the case until Cheung got an attorney because Cheung was a M.D. who could afford to pay court fees. In Innacconne the court ruled that 'because pro se means to appear for one's self, a person may not appear on another person's behalf." See also Meeker v. Kercher, 782 f.2d 153. Again petitioner states that the court is in error.

In Whitmore, 495 U.S. 149 the Supreme Court ruled that three prongs must be met in order for someone to be a Next Friend. (1) that the person must have some kind of

"disability" such as inaccessibility to the courts, mental incompentence or somer other "disability." (2) that the next Friend must be truly dedicated to the interest of the person they wish to represent and (3) there mus be some kind of relationship between the next friend and the person they wish to represent.

FRCP 17 [c] [2] states: a minor or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court must appoint a guardian ad litem or issue another appropiate order to protect the minor or incompetent person who is under represented in an action.

The controlling authority in all issues relating to Next Friend is Whitmore and this further enforced by FRCP 17 [c] [2]. Both say the same thing that anyone at anytime during can be someones Next Friend has long as they meet the three prongs established by the Supreme Court.. But other courts in other districts come to different conclusions when dealing with the same subject. See Berrios v. New York City Housing Authority, 564 f.3d 130.

This shows that the previous decision of the lower court and other courts in different circuits are in conflict with Whitmore when addressing the same issues and reaching different conclusions that are not consistent with the decision reached by the Supreme Court and prejudicies petitioners due to its different appliciations of its use.

CONCLUSION

As petitioner has stated in his mandate to the Court of Appeals and will repeat it is evident that the Court of Appeals has inexplicably and erroneously agreed with the district court's decision when the evidence, the law, FRCP and decisions in the record prove that both the district court and the Court of Appeals are in error and as a result as prejudiced petitioners.

Respectfully Submitted

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