NO. 19-_____

In the Supreme Court of the United States

MOUSSA DIARRA,

Petitioner,

v.

CITY OF NEW YORK,

Respondent.

On a Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

KISSINGER N. SIBANDA, ESQ.
COUNSEL FOR PETITIONER
P.O. BOX 714
LIVINGSTON, NJ 07039
(973) 689-5952
KSIBANDA@TEMPLE.EDU

OCTOBER 25, 2019

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. For a summary judgment to be granted, the Circuits must determine that the movant is entitled to "judgment as a matter of law", *Miller*. New York Case Law states that an "egregious deviation from proper police procedure" violates a claim to probable cause, *Blake v. City of New York*. At bar, the Second Circuit failed to apply the law of probable cause (State and Federal) pursuant to the Supreme Court's decision, *Illinois v. Gates,* and did not apply the "totality of circumstances" test to the facts.

Is the Second Circuit's refusal to apply the "totality of circumstances" test for probable cause in a *Monell* suit constitutional?

2. For a State/Town Statute to limit a substantive right, such as the fundamental right to liberty, it must be procedurally lawful. *See Carolene,* fn.4. In the matter presented, the Second Circuit upheld the Lower Court's judgement to squash a state claim involving the fundamental right to liberty without substantive due process analysis pursuant to *Carolene*.

Has the Second Circuit failed to apply substantive due process to a Municipal Statute in a false imprisonment claim?

3. A sitting Federal Judge should have the appearance of impartiality to an uninterested objective observer. Judges should recuse themselves based on extra judicial reasons. At bar, petitioner documented close to fifteen instances of bias and prejudice, including intentionally allowing a lawyer to plead and argue without filing a notice of appearance. The test for extra

judicial bias and prejudice is satisfied with direct evidence of favoritism in the docket under *Liteky*.

Has the Second Circuit correctly applied "extra judicial" test for a recusal, given documented instances of bias and prejudice by the District Judge?

LIST OF PROCEEDINGS

United States Court of Appeals for the Second Circuit

No. 18-2821-cv

Moussa Diarra, *Plaintiff-Appellant*, v.
City of New York, *Defendant-Appellee*.

Decision Date: June 21, 2019

Rehearing Denial Date: August 9, 2019

United States District Court
Southern District of New York

No. 16-cv-7075 (vsb)

Moussa Diarra, *Plaintiff,* v.
City of New York, *Defendant*.

Decision Date: September 20, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Moussa Diarra respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the United States Court of appeals for the Second Circuit is unreported and is reproduced in the Appendix at App.1a–5a. The decision of the United States District Court for the Southern District of New York is unreported and is reproduced in the Appendix at App.6a–21a.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its judgment on June 21st, 2019 (unreported). It issued a denial to rehear *en banc* on August 9, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Seventh Amendment

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. § 1983. Federal Civil 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.

N.Y. Gen. Mun. Law § 50-e(1) and § 50-i(1) State Notice of Claims[1].

Reproduced in the appendix at App.23a.

STATEMENT OF THE CASE

On September 23rd, 2014, Mr. Moussa Diarra was falsely arrested for circumcising and mutilating his wife. A fabrication was made by the arresting officer, Skorzewski, based on long held unwritten policy and customary procedure, to invent probable cause when arresting black men in certain instances by the New York Police Department. After a two-day State jury trial, Mr. Diarra was acquitted of all charges. He sued in the District Court of Southern New York under 42 U.S.C. § 1983 for false arrest and false imprisonment arising from *Monell* liability.

All Circuits have been directed to apply the "reasonable test" for any warrantless arrest as articulated in *Brinegar v. United States*, 338 U.S. 160 (1949). Essentially, an arrest without a warrant must be reasonable to any objective observer. *Id.*

This matter never went to trial in the District Court but was dismissed through summary judgment. Mr. Diarra believes that the standard for granting summary judgment by the district court is inconsistent with its own caselaw and the law of the Second Circuit. In addition, the summary order conflicts with other opinions in other Circuits where decisions on

---

1 *See,* App.23a, City of New York Notice of Claims.

issues of evidence and facts have been rendered in the best light of the nonmovant. *See*, *Mawakana v. Bd. of Trustees of the Univ. of the Dist. of Columbia*, No. 18-7059 (D.C. Cir. June 14, 2019).

At bar, the District Court and the Second Circuit advocated and argued that the movant's evidence be taken in the best light and that summary judgment standard should be reversed so that the City of New York's theories become objective and defeat a trial by jury—an abuse of their discretion. *See*, App.6a–21a.

This Court should be made aware of two statements made in the arresting police officer's deposition of November 14, 2017:

> Statement 1: "It was NYPD policy; it was a domestic situation." (Skorzewski Deposition at 11).
>
> Statement 2: "The policy is called probable cause." (Skorzewski Deposition at 15).

Statement number 1 was made during direct examination by the Petitioner's Counsel. City of New York then requested a break, took the police officer outside for 4-5 minutes, coached him, and brought him back in. Thereafter he said—"the policy is called probable cause." This abrupt interruption during deposition testimony was ignored by the Lower Courts.

Mr. Diarra argued during summary judgment and appeal that the Second Circuit and District Court under *Miller*, were supposed to resolve credibility of testimony in nonmovant's favor—that the first statement is more credible under the circumstances warranting a jury trial in conformity with accepted Circuit summary judgment application. *See*, *Mawakana*.

A. Lack of Probable Cause in Arrest of Mr. Diarra

This court has also started that for all purposes, *Illinois v. Gates*, 462 U.S. 213 (1983) is applicable to see whether at any instance before the seizure, probable cause existed to any objective police officer to warrant a legal arrest. Under *Illinois*, the Circuits, Districts Courts, and State Courts are directed to examine a totality of circumstances (evidence) surrounding the arrest, not blue points as abrogated by *Spinelli* and *Aguilar*. *See*, *Spinelli v. United States*, 393 U.S. 410 (1969) and *Aguilar v. Texas*, 378 U.S. 108 (1964).

The Supreme Court has held that:

> To determine whether an officer had probable cause to make an arrest, a court must examine the events leading up to the arrest, and then decide "whether these historical facts, viewed from the standpoint of an objectively reasonable officer amount to probable cause. *Ornelas v. United States*, 517 U.S. 690, 696. The "substance of all definitions of probable cause is a reasonable ground for belief in guilt," *Brinegar v. United States*, 338 U.S. 160, 175. And, that belief must be particularized with respect to the person to be searched or seized, *Ybarra v. Illinois*, 444 U.S. 85, 91.

Under these cases, there was no particularized and objective facts that warranted the arrest of Mr. Diarra which any Circuit would have found—the decision of the Second Circuit is an anomaly to accepted Supreme Court holding. Supra, *Illinois*.

In fact, the arresting officer invented facts in his arresting affidavit, such as, "Mr. Diarra circumcised,

infibulated and excised vagina minora, vagina majora and clitoris for his own benefit"—a fabrication without forensic evidence, rape kit, medical record proof or bloodstain evidence. In his deposition, officer Skorzewski admitted to never visiting the crime scene, never talking directly to the victim, and never talking to collaborating witnesses. *See*, Officer Skorzewski Arresting affidavit, dated September 24th, 2014, and Skorzewski deposition dated November 14, 2017.

As stated, after Mr. Diarra was acquitted, he instituted a timely civil rights complaint under 42 U.S.C. § 1983, against the City of New York for an arrest that was the product of an unconstitutional act—a policy / custom / police procedure of arresting black men without probable cause in certain instances by NYPD. This directive, procedure, or policy was evidenced by the facts of Mr. Diarra's actual arrest which lacked probable cause from an objective police officer, per *Illinois*. S*ee*, *The People of the State of New York v. Kharey Wise, Kevin Richardson, Antron McCray, Yusef Salaam*, *and Raymond Santana* Indictment No. 4762/89 (*Central Park Jogger Case*).

Mr. Diarra then cited, for purposes of summary judgement opposition, over twenty exhibits, including the police interrogation video in which, like the infamous *Central Park Jogger Case*, the arresting police officers sought to coerce a confession from Mr. Diarra. Other exhibits submitted included evidence that no forensic evidence was ever collected at the crime scene —the photos of the victim were never taken at the time of arrest, but five months later—no interviews with neighbors—and no visitation to the crime scene by the arresting police officer, Skorzewski. The victim

never gave a direct statement to the police, but a social worker alleged the incident at Harlem Hospital before any medical examination.

Mr. Diarra argues that the standard applied by the Lower Courts for summary judgment went far below the expectations of *Illinois,* in fact finding, and that an arrest of a person accused of one of the most brutal and savage crimes ever known in modern New York—circumcision of the vagina, cutting of the clitoris and labia—warranted a police investigation or collaboration of facts, a totality of evidence?

Mr. Diarra believes it is because the accused was a black man that probable cause has been ignored.

During Mr. Skorzewski's deposition, he lied under oath to having seen the victim's medical report, which only came out on September 24th, 2014 and not September 23rd, 2014 (the day of the arrest). This lie should have weighed against the despondent, but surprisingly the Lower Courts found that the lie adds to Skorzewski's credibility. *See*, App.6a–21a.

Mr. Diarra also noted that the medical report, which was not available at the time of arrest, contradicted any basis for "genital mutilation," as it merely referenced a healthy vagina with no circumcision or cutting. However, the arresting police officer wrote in his arresting affidavit that: "Mr. Diarra circumcised, exercised and infibulated his wife for his own sexual gratification." This was a medical and forensic fabrication. The Lower Courts were unwilling to consider these facts, as within the province of a jury, to ascertain existence of policy and damages—a violation of the Seventh Amendment.

The New York Daily News wasted no time reporting that *Man Circumcises Wife After Raping Her: Cops*. The New York Post stated "African Immigrant accused of performing female circumcision." These headlines are not innocuous or academic in nature, but defamatory *per se,* as they publicly accuse an innocent man of an infamous crime, and could have been avoided if the arresting police officer had applied the black letter law on probable cause per *Brinegar* and not "NYPD policy."

Despite never visiting the crime scene, never speaking directly with the victim (who spoke French and no English), Mr. Skorzewski invented and created a false narrative of facts to sanitize the lack of probable cause. Such a false narrative was rebutted by a jury at the State Trial. *See*, App.6a–21a. The arresting affidavit dated September 24th, 2014 was then used to arraign and indict Mr. Diarra by grand jury based on a false narrative.

It is well known that false evidence, fraud, and lies can never give rise to legal probable cause used in a court room. This jurisprudence was ignored by the Lower Courts:

"While an indictment creates a presumption of probable cause, such presumption may be overcome by evidence establishing either "'that the conduct of the police deviated so egregiously from acceptable police activity as to demonstrate an intentional or reckless disregard for proper procedures'" (*Blake v. City of New York*, 148 AD3d 1101, 1107 (NY A.D.3d 2017), quoting *De Lourdes Torres v. Jones*, 120 AD3d 572, 574, mod 26 NY3d 742), or "that the indictment was produced by fraud, perjury, the suppression of

evidence or other police conduct undertaken in bad faith" (*Colon v. City of New York*, 60 N.Y.2d 78, 83 (NY Ct.App. 1983) *See*, *Washington–Herrera v. Town of Greenburgh*, 101 AD3d 986, 989; *O'Donnell v. County of Nassau*, 7 AD3d 590, 591).

Mr. Diarra further averred in his complaint that from the very moment he met Skorzewski, that Skorzewski said to him: "What rights are you talking about, you have no rights in your country[2]." Mr. Diarra is a naturalized American originally from Ivory Coast.

The Second Circuit erred because its summary order contradicts its very own law on summary judgment—to view evidence in the beast light of the nonmovant, and to apply the law of probable cause regardless of the social status of litigants. *See*, *Miller*, infra.

When Mr. Skorzewski was asked during deposition why the arrest occurred he stated:

> "Answer: Mostly NYPD policy at this point.
>
> Question: And what is the policy?
>
> Answer: It was a domestic arrest, meaning they have an intimate relationship. There's a victim. There were the hospital reports." (Skorzewski deposition dated November 14, 2017).

Mr. Skorzewski lied in the deposition because the medical reports were not available on September 23rd, 2014, the day of the arrest. The medical reports did not become available until September 24th, 2014,

---

[2] *See,* Plaintiff's Complaint at ¶ 37.

the next day. This lie belongs to a jury to determine its weight, intent and motive—not to a Judge determining a summary judgment motion.

Upon consultation with his own private counsel, Skorzewski then went further and voluntarily submitted an affidavit on January 19th, 2018 in support of summary judgment for the City of New York, and clarification of his deposition on November 14th, 2017, so that it is not misinterpreted and stated:

> "On September 22, 2014 and September 23, 2014, l had no responsibilities for determining policies and practices of the NYPD." (Skorzewski affidavit dated January 19, 2017.)

This uninvited affidavit by Officer Skorzewski proves that a *de facto* policy to arrest certain individuals, here a black man, in certain situations (a domestic dispute), existed for the NYPD on September 23rd, 2014. The Skorzewski affidavit is remarkable because it seeks to distance Skorzewski from an existing and established "policy." He does not deny following this policy but instituting it as a policy maker.

B. Judicial Bias of Southern District Judge Vernon Broderick in the Lower Court

Pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455, the Appellant wrote to Judge Broderick asking him to remove himself as early as of June of 2017, forwarding the letter to Chief Judge Colleen Mallahan, who refused to remove him. Petitioner noted that on two instances, Judge Broderick had worked as a commissioner for the City of New York and that his decisions lacked fair treatment and were biased.

This court has held that the appearance of favoritism warrants the removal of a judge. See, *Liteky*.

The many instances of favoritism number fifteen, but the following examples will suffice:

(1) allowing City of New York Attorney Dara Weiss to file pleadings and arguments in front of him without filing a notice of appearance.

(2) allowing City of New York to violate discovery rules by refusing to instruct them to hand over a redacted page, DEF 99, in discovery, even though summary judgment demands the nonmovant is fully informed of redacted facts.

(3) failing to apply accepted legal standard of summary judgment in his order to the extent and degree that he makes false statements, such as "the arrest had probable cause?" *See*, App.6a–21a.

(4) giving alternative theories and testimony to justify the District Order.

(5) allowing City of New York Attorney Beth Hoffman to abuse deposition proceedings. During the deposition, Ms. Hoffman took Mr. Skorzewski outside of the room for five minutes coached him and brought him back to the room.

(6) responding to City of New York timely while delaying response to Mr. Diarra in the docket. In one example, it took Judge Broderick over 30 days to grant a procedural, unopposed

> motion to seal suggested *sua sponte*. After two letters of inquiry by the petitioner, the judge responded with a two-word opinion of "order granted," compared to the three-four days he took to address City of New York's inquiries.

The bias is most self-evident in Broderick's order dated September 21, 2018, because instead of applying the accepted summary judgment standard applicable in the Southern District and as directed by the Second Circuit, he used the opportunity as a Federal Judge to tear into the nonmovant's evidence and argument—to ridicule the legal disputes arising from the material facts of the nonmovant, to offer alternative case scenarios (speculative questions and differing testimony) which favors the movant, to ignore pertinent evidence (police interrogation video and exculpatory photos of victim)—an abuse of office which is impeachable as stated in Petitioner's Brief to the Second Circuit. *See*, Matter of Judge George Washington English impeached for abuse of power. *See*, also Matter of Judge Samuel Kent impeached for making false and misleading statements.

The Second Circuit, addressing the appeal, dismissed the many instances of favoritism as merely "administration of justice," pursuant to *Liteky*—a remarkable statement to be made in a summary order of two pages that states no factual basis and published eight days after oral argument. It directly contradicts the case of *Rivera* in the First Circuit. *See*, *United States v. Rivera-Rodriguez,* Nos. 11–1689, 11–1744. (1st Cir. 2014). In comparison, the Second Cir-

cuit's order does not address how these instances of bias are in fact administrative and fair to both parties.

C. Second Circuit's Abuse of Discretion

Under *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008); r'vsed, *Ricci v. DeStefano*, 557 U.S. 557 (2009), Chief Judge Jacobs, of the Second Circuit, stated in his dissent that: " . . . But to rely on tradition to deny rehearing *en banc* starts to look very much like abuse of discretion."

Here, Mr. Diarra requested a rehearing *en banc* on June 24th, 2019, but instead was told he requested a rehearing—a deliberate changing of the petition to defeat the petitioner's request. *See*, App.22a.

In addition, the second circuit's summary order deliberately misapplies the law of summary judgment, the law of probable cause, and the law of judicial bias. It refused a rehearing *en banc* as a matter of routine while misapplying the law. *Id.* The order openly contradicts application of summary judgment standard in other Circuits as well as its own per *Miller* at 300.

As a matter of law on bias, the holding in other Circuits—for example, the First Circuit in *Rivera-Rodriguez*, was that an appearance of bias warrants a reversal of the legal result. In *Rivera-Rodriguez*, the First Circuit found that a mere question by the judge gave the appearance of favoritism. In Diarra, Judge Broderick argues, hides facts, and testifies for the movant with the specific intent to weaken and dilute the petitioner's case.

Given that all Circuits have found bias under similar instances, the Second Circuit's order directly results in a split—as to what constitutes administration of justice. Furthermore, the summary order is so protective of scrutiny that it has no precedential value, allowing the Second Circuit to avoid scrutiny by legal minds—a systemic miscarriage of justice unless the United States Supreme Court grants Cert, addresses the facts, and record of the Lower Court who refused to apply the law. A disregard for accepted law (summary judgement and probable cause) and failure to apply it by the Second Circuit is an abuse of discretion which the Supreme Court cannot ignore as the Second Circuit's customary rules.

A writ of certiorari to the Supreme Court to address the injustice suggested by the Second Circuit's summary order and misstatement of what the law, is now a matter of national importance.

REASONS FOR GRANTING THE PETITION

Monell expressly recognized that governmental policy, custom or usage, cognizable under section 1983, could be found even though not expressly set forth in a statute or law. *Monell*, 436 U.S. at 691.

In addition, the Second Circuit's Summary Order contradicts accepted Second Circuit decisions on application of summary judgement standard. Summary judgment is appropriate only if "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); s*ee Miller*, 321 F.3d at 300. *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003).

On a motion for summary judgment, "all factual inferences must be drawn in favor of the non-moving party". *Miller*, 321 F.3d at 300. This means the Court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of [Mr. Diarra]." *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003). It also means the Court must "mak[e] all credibility assessments in his favor," *McCarthy v. N.Y. City Technical Coll.*, 202 F.3d 161, 167 (2d Cir. 2000), and "must disregard all evidence favorable to [plaintiffs] that the jury is not required to believe", *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 151 (2000); *see In re Dana Corp.*, 574 F.3d 129, 152 (2d Cir. 2009). Proper summary judgment standard was not applied in *Diarra v. City of New York* at bar.

For a non-movant to survive a motion for summary judgment the following must be satisfied: "[T]he disputes about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law," and "[f]actual disputes that are irrelevant or unnecessary will not be counted." Id.

"[I]f there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party," summary judgment must be denied. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d Cir. 2002). This was not done for *Diarra* facts which met the "any" requirement of *Marvel Characters Inc.*, instead the *Diarra* facts were ignored. These facts when

presented to a jury will show a de facto unwritten unconstitutional policy whose prognosis is a brazen lack of probable cause. *See*, Op 1-3.

Furthermore**,** this matter, *Diarra v. City of New York*, involves a question of exceptional importance. Whether information from a non-witnessing, unknown, third party informer to a police officer is enough to assert probable cause under the Supreme Court's case of *Illinois v. Gates,* 462 U.S. 213 (1983)'s standard of "totality of circumstances[3] "and Second Circuit's own holding in *Stansbury v. Wertman,* 721 F.3d 84 (2d Cir. 2013).

In addition, the Order's finding of probable cause in this matter—when in the totality of circumstances—no probable cause exists, and contradicts directly with the Supreme Court's decision in *Illinois v. Gates*, which states a "totality of circumstances" is necessary to determine probable cause for the unknown informant's allegations.

The Court below recognized the case whether a policy existed or not was one fact. All Circuits require that for a false arrest to be rebutted an inquiry into the "totality of circumstances," existing at the time of

---

3 A troubling concern of this summary order is that it states that, Diarra facts are well known by now. This is not judicious. A proper opinion discusses the facts in detail, the timeline and the reasons why the law should be applied to the facts as they are. The Panel failed to state accurately the facts of Mr. Diarra's arrest. This is reason for concern as law is not meted out to an empty theatre but to facts and circumstances before the court. Contrasted with its other opinions, the Second Circuit analyzes the facts of cases. Diarra also deserves equal justice and should not be an exception to the norm.

arrest is both appropriate and directed by the Supreme Court's holding in *Illinois*. In practice, no Circuit has circumvented the test of inquiring into the totality of circumstances and the Second Circuit offers not only a first, but a judicial repeal of established case law.

The Second Circuit held that there was probable cause in the testimony given the despondent that they acted "because of NYPD" policy. Petitioner argues that under the Second Circuit's own law, per *Miller*, this was a jury question. The standard in *Illinois* is that of an objective police officer and whether he would do the same in the same situation, objectivity is lacking in this arrest.

Here, the police never visited the crime scene, never talked to accuser, never collected forensic evidence, never viewed medical reports at time of arrest. In addition, the police interrogation video, submitted to rebut the summary judgment, was never discussed by both the District Judge and Second Circuit. The video showed a desperate attempt to coerce a confession in violation of *Powell*. *See*, *Powell v. Alabama,* 287 U.S. 45 (1932). At the oral argument, when Diarra's counsel asked—*if there is probable cause why does the video show an attempt to coerce a confession?* The panel was quiet. *Id.*

Petitioner restates that whether a policy existed, or it was probable cause based on testimony and facts of the case, is not the province of summary judgement standard but that of the jury under the Seventh Amendment.

"While an indictment creates a presumption of probable cause, such presumption may be overcome by evidence establishing either " 'that the conduct of

the police deviated so egregiously from acceptable police activity as to demonstrate an intentional or reckless disregard for proper procedures" (*Blake v. City of New York*, 148 AD3d 1101, 1107, quoting *De Lourdes Torres v. Jones*, 120 AD3d 572, 574, mod 26 NY3d 742), or "that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith". (*Colon v. City of New York*, 60 N.Y.2d 78, 83; *see Washington–Herrera v. Town of Greenburgh*, 101 AD3d 986, 989 (2017); *O'Donnell v. County of Nassau*, 7 AD3d 590, 591(2004)).

Such egregious behavior exists under Diarra. A report that a victim was "circumcised, excised and infibulated," should raise doubts to any informer's veracity and to any police officer because of the inherent savage accusation. The Panel overlooked this. *See*, App.1a–5a. Proof of veracity of complaint was further lacking because the person making the report, the social worker, was unknown to the arresting police officer and not an eyewitness. Again, the Panel ignores this inquiry into veracity of an unknown informer under *Illinois* and *Martinez v. Simonetti*, 202 F.3d 625, 634 (2d Cir. 2000) (2d Cir. 2013).

The Second Circuit refused to unify its *Diarra* decision with other Circuits and its own precedents for summary judgment. Petitioner raises the claim, that this was because the Federal Judge in the matter engaged in impeachable actions (including misfiling summary judgment exhibits for the sole purpose of creating an unrecorded evidence chain),

and the Second Circuit rather than state what the law is, protected the District Judge[4].

Single Instance of Unconstitutional De Facto Policy

A plaintiff cannot show policy through a single incident unless proof of the incident includes proof that was caused by an existing, unconstitutional policy. *City of Oklahoma v. Tuttle*, 471 U.S. 808, 823-24 (1985) (plurality opinion). However, an arrest without probable cause is an accepted unconstitutional act. *See Mapp v. Ohio*, 367 U.S. 643 (1961)[5]. It becomes an unconstitutional policy of the municipality when adopted by that municipality as an unwritten practice or custom. *See, Monell.*

"[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent

---

[4] Petitioner asked the Second Circuit for a rehearing *en banc*, and instead the Second Circuit converted the petition to a rehearing request and denied the converted petition. *See*, Petitioner's letter to Clerk. (Pet. App.). As noted in *Ricci*, the Second Circuit's refusal to hear matters *en banc* is in itself beginning to look like an abuse of discretion, and this is more apparent when "*en banc*," petitions are converted to "rehearing petitions," for the sole purpose of getting the same panel to deny the *en banc* petition. Certiorari should be granted because this case raises some interlocking principles worthy of the Supreme Court-abuse of discretion, misstatement of established Supreme Court law, and systemic bias against Mr. Diarra's claim of false arrest by the lower courts.

[5] Arrest based on probable cause is the very definition of equal justice under law, as protected in the *Fourth Amendment*. *See*, *Mapp v. Ohio,* 367 U.S. 643 (stating that all evidence from an illegal search and seizure is subject to the exclusionary rule.)

official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694. *See*, also *Powe v. City of Chicago*, 664 F.2d 639, 643(7th Cir. 1981).

Unwritten De facto Unconstitutional Policy

Petitioner has asserted that the unconstitutional policy under *Monell* in this matter, is the custom and practice of arresting black men without probable cause in domestic situations. A direct paraphrasing of the Skorzewski deposition: "It was NYPD policy, there were the reports, it was a domestic situation . . . "

Officer Skorzewski lied in the above quotation, stating that he had seen the medical report at the time of arrest on September 23rd, 2019. In actuality, the medical report was produced on September 24th, 2014. As the police interrogation video confirms, Mr. Diarra was arrested on September 23rd, 2014. This incongruous timeline and lies were presented to the Second Circuit and Judge Parker seemed surprised the medical report came after the arrest; however, their summary judgment makes no mention of these lies.

Essentially the Second Circuit condones probable cause, achieved through lies on an arresting affidavit and lies in a deposition, as an appropriate totality of evidence. *See*, App.1a–5a.

Unconstitutional arrest of black men is not a new practice in New York. It is a practice so insidious that it pretends the lack of probable cause is termed "policy of probable cause." Under-aged black men are routinely forced to make confessions for crimes they never committed, the most infamous case being the

Central Park Jogger Case. To deny that a custom, practice and policy of an unwritten de facto policy exists, when so admitted in a deposition, is for the Second Circuit to deny that the District Court abused its role as a guardian of what the law is and to deny facts as they existed at the time of arrest.

While a finding of not guilty does not prove a lack of probable cause, lack of evidence to support charges to the degree that the crime accused is outrageous, "circumcision, excision and removal of clitoris, labia minor and labia majora," requires more than a mere identification of Mr. Diarra as the perpetrator because it is outrageous in its allegations—this rebuts any claim to probable cause. *See*, supra, *Blake*.

Since the policy alleged by Mr. Diarra is unwritten, this means a jury through examination of facts should be allowed to dissect the controversy (the facts) per Seventh Amendment. The Second Circuit states that no "objective jury," would support Diarra's claims. This is false and disingenuous. An objective jury may well find that an unwritten *de facto* policy was implemented against Mr. Diarra based on the evidence and lack of probable cause. *See*, *The People of the State of New York v. Dominique Strauss-Kahn* (2011) (unreported) (Indictment No. 02526/2011).

The evidence speaks for itself. The behavior of the City's lawyer at the deposition will be presented to the jury. The veracity of the police officers' testimony is a jury question and the Second Circuit, unlike other Circuits, was supposed to find the credibility of deposition testimony in the nonmovant's favor. *See*, *Miller* at 300.

An admission during a deposition changes a single incident to a live controversy for summary judgment purposes regarding *de facto* policy or practices that have nothing to do with police training because it creates material facts for the jury per *Miller*. Furthermore, to the extent and degree that the injury occurs under someone responsible for the policy's execution this Court has held, is proof of de facto policy under *Powe v. City of Chicago*, 664 F.2d 639, 643 stating that:

> "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694.

Customary practices and policies, born from racism, to arrest without actual legal probable cause, are well documented for the NYPD. That an arresting police officer, here Skorzewski, alludes to it in a deposition under penalty of perjury is unremarkable and should be given the full weight of testimony that is given under oath.[6, 7, 8, 9] The authors (Charles Castro

---

[6] In the book, *NYPD Blue Lies: Shocking True Story of Racism. Corruption, Cover-ups and Murder in the NYPD*, Charles Castro, a NYPD police officer confesses to a culture of departmental racism against both black NYPD offices and the public in general.

[7] On August 16, 2019 the New York times reported that the NYPD had amassed a data base of 82,743 people who did not consent to DNA samples.

and Mathew Horace) alleging systemic internal racism by NYPD have never been sued by the NYPD for defamation.

In addition, besides a lack of training alleging a *Monell* claim, this court has directed the Lower Courts to find *de facto* unconstitutional policies based on evidence on a case by case basis, as opposed to class action jurisprudence. *Id.* Surprisingly in the past, the NYPD has used the fact that police followed proper police procedure to remove culpability from individual misdeeds. *See*, *Eleanor Bumpurs Case*[10].

Single Act *Monell* Split Issue

The Circuits are split as to whether one can prove policy or whether it requires many acts (pattern) to show policy. *See*, *Tuttle*, *supra. Diarra*, at bar argues that the Circuits need further direction from the Supreme Court regarding *de facto* policies admitted in a deposition and Diarra offers such an opportunity. They have misread the single/multiple debate out-

---

8 *Also*, *see* Matthew Horace, *Black and Blue: A Cop Reveals the Crimes, Racism and, and Injustice in America's Law Enforcement* (2018).

9 The most famous case is the *Central Park Jogger Case*, in which the NYPD fabricated probable cause for four teens between the ages of 14-16. The accused were forced to confess to the crime and were only released after the real rapists admitted to the crime. This was despite the fact that the detectives knew, as evidence later showed, that the four teens never committed the crime in the first place.

10 *State Judge Dismisses Indictment of Police Officers in Bumpurs Killing*. April 13, 1985. New York Times. NYPD argued that it was proper police procedure.

side the context of the rules of evidence. The Supreme Court never directed the Circuits to abrogate rules of evidence for *Monell* purposes and instead merely look for frequency of events.

Evidentially one does not require a pattern of murder to convict a suspect of the crime. In addition, even if the body is never found a circumstantial conviction for murder is possible—this should be the case with *Monell* proof of policy. Evidence should lead the outcome, not abstract theory divorced from deposition testimony and facts of the incident. The Supreme Court should offer firm guidance as to the supremacy of admissions under oath as evidence regardless of a single incident (*Diarra*)—guidance on circumstantial evidence as proof of policy (lack of probable cause) (*Diarra*)—and guidance on fraud in an arrest as proof of probable cause (*Diarra*).

As a matter of fact, the fraud is that the incident of circumcision never happened. Its reporting, if indeed that happened, does not make it probable cause because such an accusation requires a totality of circumstances under *Illinois v. Gates*. For allegations of rape or sexual in nature, a rape kit at the time of arrest supports any good faith claim to probable cause. Here, Officer Skorzewski in his deposition admitted he never made a rape kit, spoke to collaborating neighbors, or visited Diarra's apartment. He instead tried to coerce a confession, submitted as evidence to the District Court, as a police interrogation video.

There can be no serious legal debate on probable cause without addressing facts and evidence: at bar, the police interrogation video shows an attempt at a forced confession. Both the District Court and Second

Circuit did not discuss the video or make mention of the disturbing footage in their judgments. *See*, App.1a–5a. Diarra questions the reason for this in the context of totality of circumstances (probable cause) and the summary judgment standard—the best light of the movant, *Miller* at 300.

In addition, the purported victim spoke French and never at any point spoke with the arresting officer. During discovery the City never produced any verbal or written statement from the person they claim made the accusation against Mr. Diarra—except a medical report, which states that the social worker called a French speaking detective. Such *scintilla* of evidence does not meet the supreme Court's modern standard for adjudicating probable cause as it goes back to *Aguilar*.

The Supreme Court should reset the clock and use *Diarra* to address whether the number of instances defense held in some Circuits is acceptable in light of the fact that it creates immunity for a single instance of policy action with overwhelming evidence of that policy, such as in *Diarra*.

I. THE CIRCUITS ARE DIVIDED ON WHETHER PROBABLE CAUSE REQUIRES A TOTALITY OF CIRCUMSTANCES IN DETERMINING A SUMMARY JUDGMENT FOR A *MONELL* CLAIM.

A. The Circuit Split Arises from Competing Principles of Finality and Accuracy Underlying Summary Judgment Standard Regarding a *Monell* Claim's Policy, Practice, Custom Requirement.

The Circuits have failed to resolve this issue on their own and the result is that a *Monell* lawsuit in the Second Circuit produces a different result in other Circuits, when probable cause is the issue. This split is best understood with a brief preface discussing an overview of the totality of circumstances test under *Illinois v Gates* and its application in the Second Circuit. The summary order entered by the Second Circuit on June 21st, 2019 directly contradicts the Second Circuit's own holding on probable cause, and summary judgment standard—this was the basis for a rehearing *en banc* petition. Under the Second Circuit's own "totality of evidence" *Diarra* would not survive muster. *See*, *Stansbury v. Wertman*, 721 F.3d 84. (We find that the District Court erred by analyzing the evidence seriatim and in isolation. In its totality, the evidence shows . . .)

In addition, a court "must consider[only] those facts available to the officer at the time of the arrest and immediately before it." *Panetta*, 460 F.3d at 395 (internal quotation marks and emphasis omitted). *Panetta v. Crowley*, 460 F.3d 388, 394-95 (2d Cir. 2006).

Both the Second Circuit and District Court did not apply *Stansbury*: Mr. Diarra's exhibits, which refuted probable cause, were not analyzed. These included—lack of crime scene investigation, no rape kit, no blood stain evidence, lack of crime scene visitation, lack of collaborating witnesses, lack of veracity of unknown informer, admission in deposition of a lack of training by Skorzewski (arresting officer), and the fact that the medical report of victim came out a day after the actual arrest.[11]

The only thing the Second Circuit and District Court did was agree to believe the self-serving second policy statement in the Skorzewski deposition. This was not a totality of evidence.

B. History of *Monell* Liability and 42 U.S.C. § 1983.

The history of 1983 litigation is the history of the Ku Klux Kan act of 1867. This reconstruction era legislation sought to address damages done under the color of law. *See*, *Burnett v. Grattan*, 468 U.S. 42 (1984).

The District Court and Second Circuit misapplied *Monell* liability outside of its original intent to address damages for Civil Rights harm. Mr. Diarra's arrest for a charge that is outrageous required a minimal amount of investigation—a vaginal photo—before his arrest for "circumcision, excision an infibulation".

---

[11] Mr. Diarra was arrested on September 23th, 2014 and the medical report came out on September 24th, 2014. As proof, *see* Police Interrogation Video (September 23rd, 2014) contrast with Medical Report publication date, September 24th, 2014.

Instead, the arresting police officer acted upon departmental policy which is to invent probable cause where none exists. *See*, *Central Park Jogger Case*. Mr. Diarra raises the question of whether a Caucasian Male (Dominique Strauss-Kahn) would have been arrested and prosecuted under similar circumstances in the context of equal treatment by the NYPD? This question is a jury question of fact and testimony, of which the District Court was unwilling to afford a jury trial.

C. Role of Supreme Court in Giving Direction and Leadership in Civil Rights Litigation.

The Supreme Court has held that under *Brown v. Western R. Co. of Alabama*, 338 U.S. 294, 296 (1949), "Federal Right cannot be defeated by the forms of local practice."

"First, it ignores our prior assessment of "the dominant characteristic of civil rights actions: *they belong in court." Burnett,* 468 U.S., at 50 (emphasis added.)

"The central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose Federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Burnett,* 468 U.S., at 55.

The Supreme Court has been at the heart and soul of Civil Rights litigation from its onset.

It is uncontroverted that the Supreme Court has stated that Municipalities are liable for policy, custom and practice which causes Civil Rights harms and damages. *See, Monell*. However, the Supreme Court

has left the issue of occurrence to varying Circuit jurisprudence. *Id.*

The argument that a single occurrence cannot give rise to policy has divided the Circuits. In general, a single occurrence does not prove policy for training cases but, to the extent and degree that evidence collaborating a single occurrence is overwhelming—it does for *de facto* policy.

A single occurrence committed by a municipality leading to injury (an arrest for four months) and an admission of a policy by the arresting police officer should allow a jury to determine whether policy existed at the time of arrest for *Monell* litigation. This is the central theme in this matter.

D. Lack of Probable Cause Under Second Circuit's Authority in Summary Order.

The Panel cited *Martinez v. Simonetti,* 202 F.3d 625, 634 in its Opinion at App.3a:

> ("[A]bsent circumstances that raise doubts as to the victim's veracity, a victim's identification is typically sufficient to provide probable cause." (internal quotation marks omitted)). Contradicting *Illinois v. Gates*, standard of totality of circumstances. (*Diarra* underline).

Here, there were circumstances that raised doubts on victim's veracity, bearing that the victim never made the complaint directly to the police officers (because she spoke French). But a social worker unknown to the police officer (Skorzewski) made the verbal complaint at Harlem Hospital—to another police officer (Aubrey). This verbal complaint needed

to be tested under totality of circumstances standard if the finding of probable cause by the Lower Courts is to be taken seriously. This was not done.

It has been held by the First Circuit that the Government may prove its case using circumstantial evidence so long as the total evidence, including reasonable inferences, is enough to warrant a jury to conclude that the defendant is guilty beyond a reasonable doubt. *United States v. Mehtala,* 578 F.2d 6, 10 (1st Cir. 1978). Here, both direct and circumstantial evidence proved the non-existence of probable cause at the time of Mr. Diarra's arrest.

II. THE REASON FOR DISMISSING STATE CLAIM BY THE LOWER COURTS IS FOR A 12.b MOTION: FAILURE TO PLEAD. THE LOWER COURTS ALSO FAILED TO APPLY SUBSTANTIVE DUE PROCESS TO THE STATE STATUTE UNDER *CAROLENE*.

A. LAW OF THE CASE DOCTRINE AND ISSUE ESTOPPEL.

"Unless the trial court's rulings were clearly in error or there has been an important change in circumstances, the court's prior rulings must stand." *See*, *United States v. Estrada-Lucas*, 651 F.2d 1261, 1263 (9th Cir. 1980); *Smith v. United States*, D.C. App., 406 A.2d 1262 (1979).

Mr. Diarra properly amended a State Claim against the City of New York for false imprisonment on September 17th, 2017. This amended claim was litigated and argued between parties—it therefore meets principles of collateral estoppel which the Second Circuit ignored, as well as law of the case.

In addition, the amended state claim of "false imprisonment" meets the law of the case test and should have been maintained by the Second Circuit as peculiar to the matter and precedential, thereby reversing the Lower Court's decision to grant based on summary judgement on the State Claim.

B. In the Alternative, Substantive Due Process Should Have Occurred.

District Court cited the following irrelevant cases in dismissing State Claim (false imprisonment) about a fundamental right: *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 358 (1981) (deals with the taking clause.); *Hardy v. N.Y.C. Health & Hospitals. Corp.*, 164 F.3d 789, 794 (2d Cir. 1999) (deals with failure to give emergency treatment and failure to file a notice of claim against the hospital); *Kassapian v. City of New York*, 65 N.Y.S.3d 562, 566 (2d Dep't 2017) (deals with sexual harassment). These cases, as noted in Mr. Diarra's brief to the Second Circuit, are irrelevant to a false arrest claim.

However, the District Court acknowledged that Federal Civil Rights cannot be time barred by a state's notice of claims. *See*, App.20a; and *Felder v. Casey,* 487 U.S. 131(1988) at 140.

The District Order failed to account for Supreme Court's direction for substantive procedural due process under fn,4 of *United States v. Carolene Products Company*, 304 U.S. 144 (1938)—that strict scrutiny be applied to a law that limits the fundamental right to liberty. *Ibid.* and cannot be salvaged by the "more specific rule," because there was deliberate indifference to Mr. Diarra's fundamental right to liberty. By

deliberate, Mr. Diarra refers to the execution of policy by Skorzewski any means necessary to meet the intended outcome of policy directive—arrest without probable cause. This is not respondent superior, as the Lower Courts mistakenly state, but compliance with executive directive (invent probable cause for blacks) to the extent and degree that lying is condoned and encouraged by NYPD as an official unwritten policy. *See*, *Central Park Jogger Case, supra.*

The Second Circuit did not address the jurisprudence of the District Court in dismissing the State Claim, stating plainly that Mr. Diarra's argument "lacks merit." This is not true—substantive procedural due process, when there is *deliberate indifference to a person's fundamental rights*, for a law limiting a tort involving the fundamental right to liberty, is the law of the land and quite meritorious[12]. *Ibid.*

The Supreme Court has held:

> "Similarly, in actions brought in federal courts, we have disapproved the adoption of state statutes of limitation that provide only a truncated period of time within which to file suit, because such statutes inadequately accommodate the complexities of federal civil rights litigation and are thus inconsis-

---

12 City of New York has not demonstrated why in 90 days the fundamental right to liberty should be extinguished. A compelling reason for a government objective? Regarding the fundamental right to liberty tort, here false imprisonment, Mr. Diarra is arguing that City of N.Y. Gen. Law 50.1 cannot pass muster preventing a State Claim in Federal or State forum because it is overbroad.

tent with Congress' compensatory aims." *Felder*, U.S., at 140.

In addition, substantive due process is triggered if there is deliberate indifference to a fundamental right, here liberty. *See*, *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Such an indifference in the execution of *de facto* policy was characterized by Skorzewski's statement: "What law are you talking about, you have no law in your country."

The District Court was wrong to ignore this utterance verbatim before arrest under the *Hillmon* hearsay exception of a declarant's intent. *See*, *Mutual Life Insurance Co. of New York v. Hillmon*, 145 U.S. 285 (1892).

C. Standard for Dismissing State Claim Was Erroneous.

During the Second Circuit's oral argument, Judge Leval made the remark that the reason given for dismissing the state claim (false imprisonment), was a failure to file a claim under the state's notice of claim provision, a 12.b motion standard and the wrong standard for summary judgment. For summary judgment the District Court was supposed to only grant summary judgment if there was no genuine dispute to material facts, and the movant was entitled to judgment as a matter of law.

The above paraphrased comment by Judge Leval is on record in the oral argument of June 12th, 2019 and is further evidence of the matter stated. It supports Mr. Diarra's writ of certiorari at present, that while the Second Circuit disagreed with the jurisprudence for dismissing the State Claim (false impris-

onment), it did not reverse the District Court's order, leaving this abuse of discretion squarely for Supreme Court review.[13]

III. THIS CASE IS A VEHICLE TO CLARIFY BOTH THE MAIN CIRCUIT SPLIT AND THE LIMITS OF IT'S HOLDING ON "EXTRA JUDICIAL" EVIDENCE.

The Supreme Court has held that:

> "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Public Utilities Comm'n of D.C. v. Pollak*, 343 U.S. 451, 466-467 (1952). *Liteky* further held that, "However, it is better to speak of the existence of an "extrajudicial source" factor, than of a doctrine, because the presence of such a source does not necessarily establish bias, and its absence does not necessarily preclude bias." 14-15.

Recently in *United States v. Rivera-Rodriguez*, Nos. 11-1689, 11-1744, (2014) the First Circuit has held that the appearance of bias from the bench warranted a reversal of a conviction when serious prejudice was evident. The First Circuit Court of Appeals reversed a criminal conviction in which the trial judge improperly intervened through the questioning of witnesses and during closing arguments in a manner that bolstered the prosecution's case:

---

[13] *See* oral argument: https://www.courtlistener.com/audio/64096/diarra-v-city-of-new-york/ (Retrieved September 1st, 2019). Judge Leval comments during City of New York's oral argument.

> "The trial Judge intervened by telling the witnesses that if they did not testify truthfully, they could be charged with perjury, making false statements, or obstructing justice. The Judge also told the witnesses they could receive a sentence beyond the range they had agreed to in their plea agreements, if they committed perjury."

The judicial interventions by the District Judge in the District Court are more extreme than in *Riviera-Rodriguez*. The Second Circuit stated that on the issue of bias it found that there was no basis to determine the issue because there were no extra judicial grounds. Staying away from examining the instances of actual judicial intervention under abuse of discretion standard, including allowing a City attorney to appear and plead without a notice of appearance by the District Judge, the Second Circuit ruled that the District Judge was administering his docket, a remarkable disregard of the law of judicial bias considering that the lawyer who did not enter notice filed crucial pleadings to strike Mr. Diarra's court submissions.

The Second Circuit was wrong and misreads *the jurisprudence of extra judicial* basis, as well as ignoring the over fifteen instances of favoritism documented by Mr. Diarra in their appellant brief. It wedges a Circuit Split between those Circuits dedicated to investigating judicial conduct creating instances of unfairness as presumptive unfairness based on the judicial result between litigants. *See, Liteky v. United States*, 510 U.S. 540 (1994). The First Circuit got it right—a judge's decisions should not appear to favor one side regardless of a lack of "extra judicial basis for

bias." What determines an appearance of bias is what was done by the judge on the bench. *See*, *Rivera-Rodriguez* supra.

The First Circuit held that in *Rivera,* one instruction to the judge to the jury was enough to reverse the verdict because it gave the appearance of favoritism. Here, a failure to treat litigants equally marked most noticeable by a failure to subject the City of New York to the rules of evidence and professional standards is clearly present.

The Second Circuit abused its discretion in allowing acts of favoritism to be minimized as "administration of justice," and misapplied the standard in *Liteky* which advices that administration of the docket is a right of the District Judge. However, administration of a docket does not include special favors for one litigant. *See*, *Rivera-Rodriguez*. It refers to setting of dates and times by the Judge.

The Supreme Court should address the Second and First Circuit Split on the measure giving rise to bias and prejudice when extra judicial basis is said to be lacking in proof, but the district Judge's decisions, words and actions clearly favor one litigant, in this case—City of New York[14].

The absence of an extra judicial basis for bias and prejudice can be logically rebutted by showing a sustained pattern of instances of bias designed by a

---

14 The Second Circuit did not explain what is administrative when the District Judge allows spoliation when summary judgment demands a knowledge of "material facts" by the nonmovant. In fact, for favoritism purposes allowing spoliation should be proof of bias.

sitting Judge to ensure one party's success before him at the expense of square dealing.

At bar, this Court can resolve the Circuit Split regarding the application of a "totality of circumstances" test for *de facto Monell* policy considerations and whether frequency overrides evidential (direct and circumstantial) rules, and the role of a jury as impowered by the Seventh Amendment to hear evidence and decide between litigants.

Uniformity in the Circuits regarding 42 U.S.C. § 1983—probable cause and judicial bias in determining *de facto* policy in a *Monell* claim, should be addressed before a single case (*Diarra*) becomes the national trend and the trigger-point for false jurisprudence by use of summary orders in the Circuits[15].

Respectfully submitted,

KISSINGER N. SIBANDA, ESQ.
COUNSEL FOR PETITIONER
P.O. BOX 714
LIVINGSTON, N.J, 07039
(973) 689-5952
KSIBANDA@TEMPLE.EDU

OCTOBER 25, 2019

---

[15] By false jurisprudence, Mr. Diarra refers to the failure of the District and Second Circuit to state the law of probable cause, bias and substantive due process and to apply it to the facts.