No. _____

In The
Supreme Court of the United States

EAST CLEVELAND *et al.*,

Petitioners,

v.

ARNOLD BLACK,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Ohio Eighth District Court of Appeals committed plain error and the Ohio Supreme Court abused its discretion in denying review of this case. Here, pursuant to §1983; but, without a finding of *deliberate indifference*, the municipality and the police chief were found to be vicariously liable for police misconduct. At the time of the incident, the officer was off duty, inebriated and assigned to an outside law enforcement agency. After seven years, body cam footage was lost so the trial court committed plain error and abused its discretion by imposing excessive discovery sanctions. The trial court refused judicial notice of probable cause and introduction of rebuttable evidence. The *ex parte* verdict in the first trial was reversed. So, exhorted to send a message, the second jury entered an exemplary verdict for $50 million. The petition is for review of these questions:

> Ques. No. 1. The case below conflicts with the precedents of the Sixth Circuit, other circuits, fellow state supreme courts as well as is violative of constitutional rights and the precedents of this Honorable Court on matters of pure federal law resulting in splits between both state and federal courts.
>
> Ques. No. 2. Whether §1983 provides for $50 million in exemplary damages to be vicariously awarded against a city and its supervisor police chief without a showing of

QUESTIONS PRESENTED FOR REVIEW – Continued

deliberative indifference when the officer assailant was inebriated, off duty and tasked to an outside law enforcement agency.

Ques. No. 3. Whether the trial court's denial of judicial notice, rebuttable evidence (from a corollary criminal case, *State v. Black*, CR 12-562242) and a contradictory Admissions statement (approved inapposite of an appellate order, Ohio Appellate Eighth District Case No. 16-105248) was an abuse of discretion violative of City Petitioners' Due Process rights.

PARTIES TO THE PROCEEDINGS

Petitioners (Petitioners-appellant-petitioners below) are the City of East Cleveland (Cuyahoga County, Ohio) a home rule chartered municipal corporation and city, and Chief Ralph Spots in both his personal capacity and in his official capacity as a former Police Chief of the City of East Cleveland.

Respondent (Respondent-appellee-respondent below) is Mr. Arnold Black.

Respondent (Defendant-appellee-respondent below) is Officer Randy Hicks in both his personal capacity and in his official capacity as a former officer of the East Cleveland Police Department [in absentia as he is not appealing neither the $15 million verdict nor the joint and several $50 million verdict against him as well as Respondents].

CORPORATE DISCLOSURE – RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the City of East Cleveland discloses the following: it is a home rule municipal corporation and city Charted pursuant to the laws and conditions of the State of Ohio and the United States of America. It is a Political Subdivision of the State of Ohio located in Cuyahoga County, Ohio.

RELATED PROCEEDINGS

Supreme Court of Ohio

No. 2020-1054

Arnold Black v. Detective Randy Hicks, et al.

Order Denying Review: 2020-Ohio-5169, November 10th, 2020

Order Denying Reconsideration: 2020-Ohio-6835, December 29th, 2020

Ohio Court of Appeals for the Eighth District, Cuyahoga County, Ohio

No. CA-16-105248

No. CA-19-108958

Arnold Black v. Detective Randy Hicks, et al.

Final Opinion and Judgment: August 6th, 2020

Issuance of Mandate: January 12th, 2021

Ohio Court of Common Pleas for Cuyahoga County, General Division

CV-14-826010

Jury Interrogatories

Verdict: August 12th, 2019

Judgment: August 15th, 2019

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PETITION FOR WRIT OF CERTIORARI

The City of East Cleveland, Ohio and former Chief of Police Ralph Spotts respectfully petition this Honorable Court for a Writ of Certiorari to review the judgment of the Eighth District Court of Appeals, jurisdiction denied by the Ohio Supreme Court.

OPINIONS BELOW

The Order of the Ohio Supreme Court denying rehearing is reported as *Black v. Hicks*, 2020-Ohio-6835, 160 Ohio St. 3d 1511, 159 N.E.3d 1170. (Appendix A). The Order of the Ohio Supreme Court denying review is reported *Black v. Hicks*, 2018-Ohio-2289, 114 N.E.3d 365 (Ct. App.). (Appendix B). The Final Opinion of the Ohio Court of Appeals Eighth District, Cuyahoga County, Ohio (Eighth District) is reported *Black v. Hicks*, 2020-Ohio-3976, 157 N.E.3d 193 (Ct. App.) (Appendix C). The Order of the Ohio Supreme Court denying review of the prior trial is reported *Black v. Hicks*, 2018-Ohio-4288, 153 Ohio St. 3d 1503, 109 N.E.3d 1259. (Appendix D). The order of the Eighth District granting new trial is reported *Black v. Hicks*, 2018-Ohio-2289, 114 N.E.3d 365 (Ct. App.), and 2018-Ohio-680, 107 N.E.3d 716 (Ct. App.). (Appendix E). The Order of the Ohio Supreme Court denying interlocutory review is reported *Black v. Hicks*, 2018-Ohio-4288, 153 Ohio St. 3d 1503, 109 N.E.3d 1259.

JURISDICTION

The Order of the Ohio Supreme Court Denying review was issued on November 10th, 2020. (*Id.*, Appendix B). The Order of the Ohio Supreme Court denying a timely motion for rehearing was issued on December 29th, 2020. (Appendix A). The order of this Honorable Court on March 19th, 2020 has extended the time to file a petition to 150 days. (ORDER LIST: 589 U.S.). This Honorable Court has jurisdiction under 28 U.S.C. §1257(a) and U.S. Const. art. III, §1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 provides in part that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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".

U.S. Const. amend. XIV provides in part that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws."

Other Statutory Provisions are located in the Appendix and are incorporated into this petition.

INTRODUCTION

This case presents questions of whether, pursuant to §1983, vicarious liability can be imposed against a municipality and a supervisor on the basis of a 'presumptive,' intentional tort. Can '*deliberate indifference*' be presumed without more? The state appellate court held that it can and the state supreme court declined jurisdiction. That declination was an abuse of discretion on the important question of the appropriate standards for *deliberate indifference* determinations as relate to vicarious liability. There needs to be greater articulation of the principle. Or, at least there should be a re-affirmation that the principle be correctly, applied. As a result of the trial court's plain error in this decision, the municipality and police chief were found jointly and severally liable for police misconduct. Hence, they were vicariously responsible for that wrongdoing when the actual officer assailant was inebriated, off duty and tasked to another [county] law enforcement agency at the time of the incident. Neither medical records nor loss of wages were introduced for jury consideration. That is because there were none. The appellate court committed plain error in affirming vicarious liability when no nexus was

demonstrated and that was based largely upon an unlawful, uncorroborated 'Admissions' statement of the culpable officer. Of the $50 million in damages awarded, $20 million was for compensatory damages and the remaining $30 million was for punitive damages as the jury was exhorted to 'send a message. Tr. p. 65, lns. 3-6.' The officer who slapped the victim while handcuffed was *Pro se* except for victim counsel's 'assistance.' Immediately after the incident, the officer submitted his resignation to the police chief and did not appeal his individual $15 million judgment. He is not part of the within petition for certiorari. Beyond the fact that the state court erred in affirming vicarious liability under such untenable circumstances, the ruling addresses an issue of tremendous importance to our constitutional structure and the effect it has upon the society as well as the law enforcement community. Other cases pending around the country present the same issue. The parties in those cases, and the courts deciding them, need this Court's guidance. To address that issue and others, the Court should review this case.

STATEMENT

Procedural History

Respondent Black was stopped and arrested for suspected drug activity on April 28, 2012 at the direction of Randy Hicks, an East Cleveland police sergeant who, at the time, was assigned to a Cuyahoga County

drug task force. On July 19, 2012, the Respondent's criminal case was dismissed without prejudice with a finding of probable cause. Appendix H. On April 28, 2014 at 23:44 hours, Respondent Black brought a Complaint asserting a claim under 42 U.S.C. §1983 for violations of his Fourth, Fifth and Fourteenth Amendment Constitutional rights; asserting excessive force, battery and false arrest/imprisonment. Appendix I. During the time the initial trial was on appeal, Mr. Black created another*, belated* claim, not in his refiled Complaint in 2017 and *five years after the incident*, alleging municipal and supervisor liability by the City of East Cleveland. Appendix I. Mr. Black's supervisory liability claim was against not only Det. Hicks, but Police Chief Spotts, as well. The latter two claims included Respondent Black's allegations that the City of East Cleveland and Chief Spotts had failed to properly supervise, discipline and train police officers and cultivated a 'culture of violence.'

Having answered Black's Complaint; and including therein a jury demand, Petitioners the City of East Cleveland and East Cleveland Police Chief Ralph Spotts (hereinafter Petitioners) further asserted a Cross-Claim against Appellee Hicks, alleging his conduct was outside the scope of his authority as an East Cleveland police officer.[1] The trial dismissed the City's Cross-Claim. That dismissal was during a period when the appellate court had suspended such trial court activity, *see* CA-16-105248, Appendix E, insofar as the

[1] East Cleveland Police Officer O'Leary, and John Does 1-10 were dismissed from this case by Plaintiffs during the Trial.

first trial was conducted during an Appeal to the Ohio Supreme Court, Appendix L. During the trial the Court affirmed the dismissal.

This case has been earmarked by the appearance of "*strange bedfellows*" with the Respondent and the Co-Defendant, Hicks, joining in together both in search of a deeper pocket. Pursuant thereto, Hicks claimed his actions were part of a citywide practice. Tr. p. 99, lns. 4-11.

> Q. DICELLO: Sure. On the night that this occurred, you directed the men to drive Arnold to the station, correct?
>
> A. HICKS: Correct.
>
> Q. DICELLO: And he had done nothing, by law, that required incarceration, isn't that right?
>
> A. HICKS: Correct.
>
> Q. DICELLO: He had done nothing?
>
> HEMMONS: Objection.

Likewise, Counsel for Mr. Black assisted Appellee Randy Hicks in his defense so Hicks could essentially 'purge' his own misconduct and thereby project it onto the City Appellant-Petitioners.[2]

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[2] *See Plaintiff's Motion To Dismiss, East Cleveland Petitioners Cross-Claim Per Civ. R. 41(B) For Failure To Prosecute* at p. 3 ("In discussion with pro se Defendant Hicks, the undersigned offered to draft motion for the relief set out here after learning that Defendant Hicks was having confusion about how to do so. . . .")

On April 19, 2016 the lower court issued an Order requiring Petitioners to produce responses to discovery no later than May 2, 2016, cautioning that failure to produce discovery [i.e., the missing body cam] would result in sanctions including precluding Petitioners from offering at trial witnesses and evidence. *See Trial Court's Journal Entry of April 19, 2016*, Appendix I.

However, on the afternoon of April 20, 2016, the lower court would vacate its April 19, 2016 Order and set a show cause hearing. On May 6, 2016, Petitioners appealed the lower court's April 20, 2016 Order. *See* Eighth District Court of Appeals Case No. CA-16-104453 (the "16-104453 Appeal"). Appendix J. As mentioned above, during pendency of the "16-104453 Appeal" on May 9, 2016 the lower court entered Orders, tantamount to discovery sanctions, which actions were inconsistent with the appellate court's exercise of jurisdiction.[3, 4]

On May 10, 2016, Petitioners appealed the lower court's May 9, 2016 orders as being improvidently granted during pendency of appeal. *See* Eighth District

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[3] On May 10, 2016 the lower court granted: (a) *Plaintiff's Motion in Limine to Exclude Petitioners Inability to Satisfy a Judgment*; (b) *Plaintiff's Motion in Limine to Exclude Character Evidence*; (c) *Plaintiff's Motion to Preclude Petitioners from Offering Evidence and Witnesses Not Disclosed During Discovery*; and (d) *Plaintiff's Motion in Limine to Preclude Petitioners from Offering Evidence or Argument in Support of Affirmative Defenses.*

[4] On May 9, 2016, the Appeal in Case No. CA-16-104453 was dismissed.

Court of Appeals' Case No. CA-16-104461 (the "104461 Appeal"). Appendix K.

On May 24, 2016, the appellate court *sua sponte* dismissed the "104461 Appeal." Thereafter, on May 25, 2016 at 9:36 a.m., Petitioners perfected their appeal to the Ohio Supreme Court of CA-16-104461. *See* Ohio S. Ct. Case No. 2016-0805. On May 25, 2016 at about 11:50 a.m., the lower court commenced an *ex parte* jury trial after the appeal to the Ohio Supreme Court had been perfected.

In *Black II*, the Court of Appeals stated at ¶34, "After reviewing the record, we find that the trial court lacked jurisdiction to issue the May 9, 2016 orders. Appendix E for CA-16-105248. When the trial court issued these orders, *Black I* was still pending. The May 9, 2016 orders were inconsistent with this court's jurisdiction to reverse, modify or affirm the trial court's April 20, 2016 judgment that [Petitioners] appealed."

In the later reversed *ex parte* jury trial reversed by the state court of appeals in CA-16-105248. *Id.*, Appendix E. Appellants were found liable for $22 million in damages on Appellee Arnold Black's civil rights claims. In addition, on July 7, 2016, the lower court *sua sponte* dismissed Petitioners' Cross-Claim against Randy Hicks, an erroneous action inapposite of the moratorium imposed by the Court of Appeals February 2, 2018 ruling in CA-16-105248. *Id.*, Appendix E.

Factual Background

Upon the Eighth District Court of Appeals' remand in *Black II*, *id.* having reversed the $22 million verdict*, id.*, Appendix E, this case nevertheless went forward with a jury trial on August 5, 2019.

At this second trial, Officer O'Leary testified that when he came upon Det. Randy Hicks, Hicks was "assigned to the Task Force under the Cuyahoga County Sheriff's Office that centered around narcotics." Video Tr. p. 7, lns. 1-3. Officer O'Leary said that he "believed they [the Cuyahoga County Sheriff's task force] were in the middle of something that I happened to walk through or drive through . . . " *Id*. Video Tr. p. 7, lns. 11-13. After their initiation, the events took some time, "During the events of April 28, 2012, you at some point escort Arnold Black to the back of his truck after pulling him over, correct?" A. "Correct." *Id*. Video Tr. p. 8, lns. 8-11. O'Leary testified that while Respondent Arnold Black was detained and handcuffed, Det. Hicks hit him, "like more of a slap." *Id*. Video Tr. p. 9, lns. 11.

O'Leary testified that a few days after this event, Hicks called him and told him he had done the "right thing" by telling the supervisors. *Id*. Video Tr. p. 31, ln. 18 informing them of how he, Hicks, had hit Arnold Black. The events resulted in a "supervisor disciplinary hearing." *Id*. Video Tr. p. 31, lns. 6, 7. When Respondent's Counsel questioned O'Leary claiming "the department was marred with violence." *Id*. Video Tr. p. 37, lns. 24, 25, O'Leary responded "I have heard that, yes." Nowhere in his testimony did O'Leary state that

he had ever personally witnessed any such violence except for the encounter with Det. Hicks slapping Black. When Hicks was asked why he resigned immediately Tr. p. 143, lns. 1-17 after the incident even while maintaining that the department condoned his type of violence, Hicks responded, "I knew I had screwed up." Tr. p. 110, ln. 13.

And, with regard to the city's training, in response to Petitioner Counsel question, " . . . violence used against Arnold in this case would have not been in keeping with the force continuum that you've been trained on; is that right?", O'Leary responded, "Correct." *Id*. Video Tr. p. 41, lns. 16-20.

Hicks also corroborated what Respondent Arnold Black and Officer O'Leary had related that during the incident, he noticed that Officer Hicks was likewise under the influence of alcohol, "So, if at least two people say they smelled alcohol on your breath, that would be Correct?" Tr. p. 129, lns. 13-18. Arnold Black testified during Cross-Examination that Hicks was "drunk," Tr. p. 291, lns. 23-15; Tr. p. 292, lns. 1-4.

Intoxicated, according to both O'Leary *Id.* Video Tr. p. 71, lns. 2-9; and Black Tr. p. 233 lns. 13, 18, Randy Hicks hit Black at least once. [The $50 million slap.] O'Leary said he blocked the second blow Hicks attempted to strike at Black. *Id*. Video Tr. p. 72, lns. 3-15.

As to Black's arrest, Hicks gave contradictory statements in trial testimony when he stated he was the one who had arrested Black, Tr. 86, lns. 19-25.

Likewise, in his "Admissions," statement erroneously approved by the trial court on April 5, 2019; and, later submitted to the Jury, Hicks testified that he was the one who made the arrest and processed Respondent into the city jail. He stated further that he was the one who "brandished" his badge and arrested Black. Tr. p. 382, lns. 18-21; Tr. p. 86, p. 19-25. Such statement contradicted his previous court filing that claimed he had not arrested Black and had no knowledge thereof. This contradiction in Hicks' "Admissions" statement is at odds with Hicks' 5/3/2016 *Motion to Dismiss the City's Cross Claim*, Appendix F against him in which Hicks states, "Defendant Hicks did not arrest . . . [Black] . . . O'Leary made the arrest." The trial court denied Petitioners' efforts to present the latter as rebuttal testimony during the August 5-9, 2019 trial. Tr. p. 131, lns. 4-25; Tr. p. 132, lns. 1-25. The Court denied the introduction of evidence of Hicks' contradictory statement and ruled: " . . . the motion to dismiss the crossclaim is being granted. So, this is irrelevant and not going to be gone into." Tr. p. 132, lns. 22-25. *Ibid*.

After three days in East Cleveland's Jail, Tr. p. 286, lns. 14-25. Black was transferred to the Cuyahoga County jail when the county prosecutor obtained an Indictment. Appendix H. No medical evidence nor health assessments were ever submitted by Respondent Black relative to his encounter with Hicks. According to Black's Attorney, " . . . We don't bring medical records . . . because this is not a medical records case . . . This is a civil rights issue. Tr. p. 412, lns. 12-15. "This is not a fancy medical case. After you get hit in

the head, you start feeling nauseous and you sleep a lot and you start falling down and you end up having surgery later, that is proximate cause." Tr. p. 62, lns. 9, 14. *Sans* any corroborative medical records, the jury awarded Mr. Black $50 million. The trial court found $5.2 million in pre-judgment interest against City Petitioners for failure to negotiate a good faith result.

Compensatory damages were derived from the testimony of Respondent's mother and ex-fiancé who testified that, at some indeterminate time, between 2012 and 2015, Respondent's head was swollen. Respondent experienced no wage loss – he supervised then fiancé's landscapers and had no medical invoices relative to the incident. Mother and then fiancé did testify that, every once in a while, he was too depressed to engage in his favorite skating past time or to Las Vegas. Tr. p. 225, ln. 25. Several of the trial court's rulings excluding defense evidence, were made while the case was on one of its several interlocutory appeals, i.e., the Officer's "Admissions" – never propounded to the other City Petitioners – were deemed admitted and Petitioner's Counsel was not allowed to question Hicks on the fact he had made contradictory statements in his 'Admissions.' Tr. p. 131, lns. 8-18.

Hicks, contended that Spotts was aware of a *culture of violence* because he had been one of the 'jump out boys' as a patrolman. No one, including Hicks, testified that Chief Spotts nor the city knew that, Hicks, was under the influence of alcohol, off duty and beyond 'the call of duty,' assigned to the County Task Force when he slapped the handcuffed Arnold Black. Hicks

testified, in terms of rank, that Commander Cardilli was his direct supervisor. Tr. p. 97, lns. 10-12. Black's Counsel negated whether Hicks was actually under the control of the City, when he stated, "I don't think . . . employment . . . comes into play. If it's a crime, it's a crime." Tr. p. 412, lns. 5-8. The only personal involvement Spotts had in the instant situation was when he came to the jail to do a welfare check on Arnold Black. Black testified, that it was the Chief who came and got him out of that room. Tr. p. 279, lns. 12-14.

REASONS FOR GRANTING THE PETITION

QUES. NO. 1. THE CASE BELOW CONFLICTS WITH THE PRECEDENTS OF THE SIXTH CIRCUIT, OTHER CIRCUITS, FELLOW STATE SUPREME COURTS AS WELL AS IS VIOLATIVE OF CONSTITUTIONAL RIGHTS AND THE PRECEDENTS OF THIS HONORABLE COURT ON MATTERS OF PURE FEDERAL LAW RESULTING IN SPLITS BETWEEN BOTH STATE AND FEDERAL COURTS.

The background for this discussion is provided by *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)). A *Bivens* action seeks to hold federal officers individually liable for constitutional violations. Although "more limited in some respects," a Bivens action is the federal analog to an action against state or local officials under §1983. *Hartman v. Moore*, 547 U.S. 250, 254 n. 2, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006).

In the case of *Doe v. City of Roseville*, 296 F.3d 431 (6th Cir. 2002), the Court declined to impose Section 1983 liability for mere negligence in supervision. The findings in the instant case, are in direct contravention of this principle and should not be allowed to stand.

At minimum a Respondent must show that the official at least implicitly "authorized, approved, or knowingly acquiesced in the specific unconstitutional conduct of the offending officers." *Sheehee v. Lutrell*, 199 F.3d 295 (1999). The instant case not only presents a conflict with the federal courts, but it expressly overturns the state's own precedents. The Court in *Reznickcheck v. N. Cent. Correctional Inst.*, 2007-Ohio-6425 held that a local government cannot be found liable under Section 1983 pursuant to the theory of vicarious liability unless it is shown that employers are *deliberately indifferent* to the offending acts. *Reznickcheck* upheld the state opinion in *Ramey v. Mudd*, 2003 Ohio 5170 that likewise affirmed the *deliberate indifference* standard. And, in the same year as *Reznickcheck, Thompson v. Faddis*, 2007-Ohio-891, the state courts decided that to hold a supervisor liable, a party must demonstrate that the supervisor either encouraged the specific incident of misconduct or in some other way directly participated in it. From these cases, it is apparent that the testimony of *more than the one complicit officer* is required to meet this standard. The intra state conflict is presented more recently in the case of *Henderson v. City of Euclid*, 2015-Ohio-15, decided by the same appellate district as *Black* (Eighth Appellate District). The *Henderson* court found that in

order for supervisory liability to attach under *Bass v. Robinson*, 167 F.3d 1041, 1048 (6th Cir. 1999), the supervisor must have encouraged or condoned the actions of the employee (¶46). Further, in *Graham ex rel. v. City of Washtenaw*, 358 F.3d 377, 383 (6th Cir. 2004), it was ruled that there must be a direct causal link between the policy and the alleged constitutional violation such that the municipality's deliberate conduct can be deemed the moving force behind the violation.

Revisiting the agreed upon facts, there was no moving force of the city or the supervisor behind Hicks' drunken, off duty misconduct. The *Black* case clearly is an aberration inapposite of both federal and state law precedent. It thereby creates a conflict within the state, and its own previous rulings, as well as those of the federal courts which cover its jurisdiction. This is especially true with reference to punitive damages. And, since the punitive damages imposed upon the supervisor are directly related to the general ones, all of the damages as to the City and the supervisor are inapplicable.

The irreconcilable conflict with reference to the instant case, then, is that it diverges from state and federal law. Compensatory damages were vicariously awarded against a city and its supervisor (along with punitive damages) without a finding of an intentional tort. How any city or municipality could direct and control an intoxicated, off duty officer who was assigned elsewhere at the time is not in line with the precepts of Section 1983. There was no evidence that the city

and supervisor were aware of and/or approved the officer's actions under those circumstances.

In another iteration to the holdings of the Sixth and Tenth Circuits, the Ninth Circuit has opined that the requisite causal connection can be established " . . . by setting in motion a series of acts by others," (alteration in original; internal quotation marks omitted), or by "knowingly refuse[ing] to terminate a series of acts by others, which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional injury," *Dubner v. City & Cnty. of San Francisco*, 266 F.3d 959, 968 (9th Cir. 2001). "A supervisor can be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others." *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998).

In *Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. (2010) the Court opined post *Iqbal* that "[T}here must be 'an affirmative link . . . between the constitutional deprivation and either the supervisor's 'personal participation, his exercise of control or direction, or his failure to supervise,'" *Poolaw v. Marcantel*, 565 F.3d 721, 732 (10th Cir. 2009) (quoting *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir. 1997)), or his "knowledge of the violation and acquiesce[nce] in its continuance." *Jenkins v. Wood*, 81 F.3d 988, 995 (10th Cir. 1996).

Again, according to *Dodds v. Richardson*, 614 F.3d 1185, 1204 (10th Cir. 2010) ("after *Iqbal*, Respondents could no longer succeed on a §1983 claim against a Defendant by showing that as a supervisor he behaved knowingly or with deliberate indifference that a constitutional violation would occur at the hands of his subordinates, unless that is the same state of mind required for the constitutional deprivation he alleges."

JB v. Lawson State Community College, 29 So.3d 164 (2009), from the Alabama Supreme Court 2009 stands for the proposition that: "Only if a state official exhibits deliberate indifference to his official duties may he be liable for damages under §1983." *Lawson State Community* quoting, *George v. McIntosh-Wilson*, 582 So.2d 1058, 1061 (Ala.1991) (emphasis and footnote omitted) notes: "Supervisory liability [under §1983] occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation " Likewise, the Court in *Potter v. Bd. of Regents of Univ. of Neb*., 844 N.W.2d 741 (Neb. Supreme Court 2014) wrote,

> "The U.S. Supreme Court has made clear that there is no respondeat superior liability under §1983.[31] The standard by which a supervisor is held liable under §1983 in his or her individual capacity for the actions of a subordinate is extremely rigorous.[32] The Respondent must establish that the supervisor personally participated in the unconstitutional conduct

> or was otherwise the moving force of the violation by authorizing, approving, or knowingly acquiescing in the unconstitutional conduct.[33]"

In short, the state supreme courts such as Alabama and Nebraska are at odds with Ohio supreme court's denial of jurisdiction in this case where it let stand the aberrant decision here.

In violation of the federal precedents established by this Honorable Court, the appellate court ruled that the city and its police chief were vicariously liable pursuant to §1983. The trial court effectuated this deviant finding of constitutional violations based upon a preponderance of evidence standard. This was contrary to *Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). In *Canton*, Justice White explained that a jury cannot find against a city on a 'mere respondeat' theory. This Court in *Canton* vacated the court of appeals decision inasmuch as the Sixth Circuit's holding represented an impermissible broadening of municipal liability under §1983. The instant case runs squarely afoul of the *Canton* rule that there must be shown *deliberate indifference* by the supervisor or the city of the constitutional rights of a Respondent. There must also have been shown a direct, causal link by a municipal custom and an alleged constitutional deprivation.

In the case of *Doe v. City of Roseville*, 296 F.3d 431 (6th Cir. 2002), the Court declined to impose Section 1983 liability for mere negligence in supervision. The findings in the instant case, is in direct contravention of this principle and should not be allowed to stand.

This is because the supervisory liability as to Chief Spotts and the City are based solely upon the preponderance of the evidence indicating a mere negligence standard of review. As with the supervisor in the *Sheehee, Op. cit.* case, Spotts role in this case was merely administrative. He had no active participation in either the assault or the detention other than to see to it that Black received other jail accommodations.

It is thus well established that "liability under §1983 must be based upon active unconstitutional behavior and cannot be based upon a mere failure to act." *Salehpour v. University of Tennessee*, 159 F.3d 199 (6th Cir. 1998), cert. denied, 526 U.S. 1115 (1999).

The *Canton* legacy of this Court regarding the limits of supervisory liability has continued. Based upon the expansion of that ruling, it is now indisputable that government officials may not be held liable for the unconstitutional conduct of their subordinates merely under a theory of respondent superior, *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) supervisory officials may be liable on the basis of their own acts or omissions, including supervising "with deliberate indifference toward the possibility that deficient performance of the task may contribute to a civil rights deprivation." (quoting *Iqbal*, 129 S. Ct. at 1948).

A defendant may only be held liable as a supervisor under §1983 "if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the

supervisor's wrongful conduct and the constitutional violation." *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989). "[A] Respondent must show the supervisor breached a duty to Respondent which was the proximate cause of the injury.

A defendant who chooses to sue a city, must state a claim that the denial of his civil rights was the result of the implementation or execution of "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the municipality's] officers," or a "governmental custom'. . . ." *Monell v. Department of Social Services*, 436 U.S. 658 at 690 (1978). Allegations that the City is liable "on a *respondeat superior* theory" will not suffice. *Id*. at 691. Likewise, if no *credible* evidence is presented as to a police co-defendant's allegations of any "widespread practice" of malfeasance, then such claim is dismissed, *Rossi v. City of Chicago*, 790 F.3d 729, 737 (7th Cir. 2015). Based on agency principles, an employer can only be vicariously liable for injury to a third party if the employer expressly authorizes or otherwise ratifies the employee's tortious actions. *Fulwiler v. Schneider*, 104 Ohio App. 3d 398, 406 (1995), citing *State ex rel. Riley Constr. Co. v. E. Liverpool City School Dist. Bd. of Edn.*, 10 Ohio St. 2d 25, 29 (1967).

Here, as in *Walters v. City of Ocean Springs*, 626 F.2d 1317, 1323 & n. 3 (5th Cir. 1980), an allegedly malicious warrantless arrest without probable cause does not give rise to municipal liability under section 1983 where there is no evidence "there existed a municipal policy or custom that, when carried out, inflicted the

injury," and such a policy is not adequately shown by testimony that investigation in question would meet the standards required by the [city] Police Department. This rationale was followed in *Reimer v. Smith*, 663 F.2d 1316 (5th Cir. 1981), in upholding the dismissal of a section 1983 complaint against a Texas Ranger captain grounded on the actions of his subordinates, it being alleged that "as their superior officer" he "was negligent in his failure to supervise them." *Id.* at 1323. The *Reimer* opinion observes: " . . . a supervisory official could not be held liable for failing to adopt policies to prevent constitutional violations. . . ." *Id*. *See also Vela v. White*, 703 F.2d 147, 153 (5th Cir. 1983).

According to *Evans Chevrolet v. General Motors Corp*., 74 Ohio App. 3d 266 (1991), "Where a party establishes that the law was not clearly and fairly represented to the jury and that he was prejudiced thereby, a reversal may be justified. *See also Marshall v. Gibson*, 19 Ohio St. 3d 10 (1985), *Wagenheim v. Alexander Grant & Co.*, 19 Ohio App. 3d 7, 8 (1985).

QUES. NO. 2. WHETHER §1983 PROVIDES FOR $50 MILLION IN DAMAGES TO BE VICARIOUSLY AWARDED AGAINST A CITY AND ITS SUPERVISOR POLICE CHIEF WITHOUT A SHOWING OF DELIBERATIVE INDIFFERENCE WHEN THE OFFICER ASSAILANT WAS INEBRIATED, OFF DUTY AND CURRENTLY TASKED TO AN OUTSIDE LAW ENFORCEMENT AGENCY.

This question is also related to the standard of review for vicarious liability. In *Newport v. Fact Concerts*, 453 U.S. 247, 271, 101 S. Ct. 2748, 2762, 69 L. Ed. 2d 616, 635 (1981) this Court held "that a municipality is immune from punitive damages under 42 U.S.C. §1983." Here, the police chief, was held jointly and severally liable for $20 million as well as $15 million in punitive damages. Conversely, the 'evidence' was based solely on Respondent's [and his mother and girlfriend's] testimony. In *Cooper Indus. v. Leatherman Tool Grp., Inc*., 532 U.S. 424, 431, 121 S. Ct. 1678, 1683 (2001), this court held that the Eighth Amendment applies to the states and to punitive damages as to excessive fines and that a challenge as to the burden of proof is to be reviewed de novo.

This Honorable Court noted in *Exxon Shipping Company v. Baker*, 128 S. Ct. 2605 (2008), that, "(c) State regulation of punitive damages varies. A few States award them rarely, or not at all, and others permit them only when authorized by statute." Interestingly, although the state of Ohio does allow punitive damages in §2744 of the *Ohio Revised Code*, the appellate court found that because the City Petitioners had

not asserted it as a defense, *Black v. Hicks*, 19-108958. *Id.* at ¶83, 84. Appendix C Ohio 8th Distr. Court of Appeals Case No. 19-108958, that they thus forfeited the 'protection' of that provision. However, in an internally inconsistent opinion, the state appellate court concurrently found that O.R.C. 2744 appropriately governed the case. ¶25, 26, 35 even though the appellate court later determined that O.R.C. 2744 was nullified as to Petitioners.

Such findings are an uncanny leap of remote control theory given the requirement that vicarious liability findings show at least some participatory culpable intent. Foretelling *Canton*, the Sixth Circuit court has held "§1983 liability must be based on more than *respondeat superior*, or the right to control employees." Thus, a supervisory official's failure to supervise, control or train the offending individual is not actionable unless the supervisor either encouraged the specific incident of misconduct or in some other way directly participated in it.

Even though the trial court endorsed a $20,000,000 partial verdict of compensatory was warranted, the jury did not bother to make the requisite finding by circling its prerequisite. Jury haste is just as violative of a party's substantial rights as jury confusion. *Hayward v. Summa Health Sys.*, 139 Ohio St. 3d 238 (2014). As the dissent *Hayward* court says, a {¶ 34} "jury's interrogatory answers are not evidence of prejudice, but that does not mean there was no prejudice." That precision in verdict form affects substantial rights is also found in the criminal corollary

cases, *State v. Easterlin*g, 2019-Ohio-2470. For instance, in criminal cases, an unfilled jury interrogatory can mean the difference in years of imprisonment. In the instant case, Jury Interrogatory No. 9, ratifying the finding as to Chief Spotts in its Interrogatory No. 5, was only partially completed. That jury verdict form incompletion invalidated the verdict as it related to retired Chief Spotts. Here, for the municipality and the chief supervisor, it ultimately meant $50 million. An incorrect jury form is insufficient to sustain a jury determination. *Id.*, *Easterling*, ¶72.

Limiting the analysis to the facts of the case, both sides agreed unequivocally that Hicks was intoxicated when he slapped Respondent once or twice while Respondent was handcuffed. Respondent did not bother to complain to the Chief of Police Tr. p. 277, lns. 3-18 when he was visited by him in the jail, Tr. p. 272, lns. 21-35; p. 273, p. 1-7. The Chief was nevertheless found to be vicariously liable as was the City for Respondent being slapped and held in jail for three days Tr. p. 286, lns. 14-25. Mr. Hicks' conduct was wanton, malicious and in bad faith despite efforts of the Respondent to conveniently remove those specific claims from his Complaint after the fact. *Id*., Appendix I Docket of 6/29/2017. Such a result is not cognizable under state or federal law.

A defendant who chooses to sue a city, must state a claim that the denial of his civil rights was the result of the implementation or execution of "a policy statement, ordinance, regulation, or decision officially

adopted and promulgated by [the municipality's] officers," or a "governmental custom'. . . ." *Monell v. Department of Social Services*, 436 U.S. 658 at 690 (1978). Allegations that the City is liable "on a *respondeat superior* theory" will not suffice. *Id*. at 691. Likewise, if no credible evidence is presented as to a police co-defendant's allegations of any "widespread practice" of malfeasance, then such claim is dismissed, *Rossi v. City of Chicago*, 790 F.3d 729, 737 (7th Cir. 2015). Based on agency principles, an employer can only be vicariously liable for injury to a third party if the employer expressly authorizes or otherwise ratifies the employee's tortious actions. *Fulwiler v. Schneider*, 104 Ohio. App. 3d 398, 406 (1995), citing *State ex rel. Riley Constr. Co. v. E. Liverpool City School Dist. Bd. of Edn.*, 10 Ohio St. 2d 25, 29 (1967).

QUES. NO. 3. WHETHER THE TRIAL COURT'S DENIAL OF JUDICIAL NOTICE, REBUTTABLE EVIDENCE (FROM A COROLLARY CRIMINAL CASE *STATE V. BLACK*, CR 12-562242) AND A CONTRADICTORY ADMISSIONS STATEMENT (APPROVED INAPPOSITE OF AN APPELLATE ORDER OHIO APPELLATE EIGHTH DISTRICT CASE NO. 16-105248) WAS AN ABUSE OF DISCRETION VIOLATIVE OF CITY PETITIONERS DUE PROCESS RIGHTS.

This question deals specifically with basic due process rights. In the case herein such a violation occurred when petitioners were held to Mr. Hick's admission of liability and denied any opportunity to defend

themselves by asserting judicial notice of presenting rebuttal evidence.

Neither the city nor the police chief were ever propounded an Admissions request from Respondent; yet, Hicks lack of an Admissions response was used against them. Appendix I Respondent's *Motion to Have Admissions Deemed Admitted*, of 5/9/16. This violated the due process clause of section 1 of the Fourteenth Amendment and also the Eighth Amendment. The city was effectively banned from offering any defense in the trial in an overreaction to the lost body cam video. Tr. p. 131, lns. 4-25; Tr. p. 1-15, *Ibid.* Therefore, the judgment of the trial court should be vacated.

The trial court abused its discretion in allowing the jury to consider Hicks' "Admissions." Its 'acceptance' was by the trial court was granted on June 7, 2016, during a period when the appellate court had put a moratorium upon all discovery after May 10, 2019, *id*., Appendix E. Therefore, that Order was thereby null and void. Hicks 'Admissions' statement, then, should not have been given to the jury and to do so was a fatal error nullifying the jury's verdict as a matter of plain error.

On May 6, 2016, the City Petitioners filed a Notice of Appeal. On May 9, 2016, Respondent filed a Motion to have the Admissions which had been propounded to "Co-Defendant Officer" Hicks deemed admitted. The trial court granted Respondent's Motion on May 26, 2016 when the matter by that time was on appeal to the state supreme court and the Appellate Court had

ruled that the state of discovery was to be maintained as of May 9, 2016, Ohio Eighth District Court of Appeals Case No. 16-105248. For good measure, the trial court granted Respondent's Motion to have Hicks Admissions deemed admitted again on April 5, 2019. Contrary to his 5/3/2016 *Motion to Dismiss*, in his "Admissions," erroneously approved by the trial court on April 5, 2019; and, later submitted to the Jury, Hicks states he was the one who had arrested Black and processed him into the East Cleveland jail. (Appendix I)

Again, Defense Counsel was not allowed to cross-examine Hicks, who was at that point Respondent's witness, on this contradiction. Tr. p. 131, lns. 8-18. *Id.*

During the trial when Defense Counsel attempted to compare these two inapposite Hicks' docket statements – the former in that 5/3/2016 *Motion to Dismiss*; Appendix F, *Ibid.*; and, the latter, in his 'Admissions,' Petitioner Counsel immediately rose up to object in front of the jury. The Court called a side bar and strenuously prohibited Defense Counsel from impeaching Hicks with the two contradictory statements as to who arrested Black, Hicks or O'Leary. Tr. p. 131, lns. 8-18. *Op. cit.*

The doctrine of judicial estoppel prevents a party from asserting a position in one legal proceeding that directly contradicts a position taken by that party in an earlier proceeding. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 802 (1999). *See also* Lawrence B. Solum, "Caution! Estoppel Ahead: *Cleveland v. Policy Management Systems Corporation*, 32 Loyola Rev. 461,

471 (1999). Judicial Estoppel therefore applies when a party files positions that are inconsistent. For instance, in *Lowery v. Stovall*, 92 F.3d 219, 220, 224 (4th Cir. 1996), the court described the Respondent's behavior as '"wanting to 'have [his] cake and eat it too. Jurists have described the threat to courts' integrity as occurring when litigants "'play [] fast and loose with the courts to suit the exigencies of self-interest' or "abus[e] the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment. *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1988).

As the U.S. Supreme Court in *Berger v. United States*, 295 U.S. 78 (1935), said of a prosecutor for the Respondent government in a case, " . . . while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." That principle is applicable here. Where there was rebuttal evidence for some of the misrepresentations that Respondent Counsel made, they should they should not have been denied admittance. For, if the other side makes false allegations, it is not fair to tie the other party's hands so that they cannot be rebutted. That goes too far in the zeal to counteract purported discovery deficiencies.

In the case of *Phung v. Waste Management, Inc.*, 71 Ohio St. 3d 11 (1994), the Court held

> "A party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in chief and should not be brought in the rebutting party's case-in-chief.

Citing *Katz v. Enger,* 29 Ohio App. 3d 118 (1995).

The trial testimony of Respondent fulfills both of those criteria. A focal point, in Respondent Black's case in chief was that there was no probable cause. Tr. p. 137. lns. 1-25. Petitioners were denied rebuttal evidence as to that misrepresentation:

> HEMMONS: "Are you aware that a county judge found that he had probable cause?"
>
> DICELLO: "Objection, your Honor."
>
> COURT: Sustained. Tr. p. 132, lns. 11-14.

Petitioners were denied the admission of the police report written by O'Leary. When Arnold Black claimed he had done nothing wrong and that no drug contraband had been found in his truck, Defense Counsel should have been allowed to impeach him. If not through the police report which had been attempted to be introduced May 19, 2019 as "archival data" (denied by the trial court judge), at least through judicial notice of Arnold Black's corollary criminal case judge's finding of probable cause through the legal concept of judicial notice. Tr. p. 132, lns. 19-25. *Ibid.* Even the portions of O'Leary's video trial testimony where he related

that he turned the drugs confiscated from Arnold Black's car was not allowed to be played before the jury. O'Leary was asked by Defense Counsel, "What did you do with the cocaine or the drugs that were found? *Id*. Video Tr. p. 89, lns. 14, 15. His ultimate response was *Id*. Video Tr. p. 90, lns. 10-18: . . . "I don't remember if I put it in safe 10 or I put it in the storage lockers. But there was a little bit of crack cocaine. And I don't remember if it was like a joint or if it was like a bag of marijuana and rolling papers. But there was some form of personal use marijuana. And those items were – would have been logged into the drug book."

Not to allow this rebuttal evidence was prejudicial to the defense and indicated an abuse of discretion. A result under such circumstances is unconscionable, *Eberly v. AP Controls, Inc.*, 61 Ohio St. 3d 27 (1991). Such a ruling unduly restricted the Defense's ability to at least defend, if not put on a case, presided over in a fair and equitable forum. In fact, Respondent Black never showed how he was prejudiced by any alleged Discovery inadequacies. The scope of rebuttal testimony is limited by the evidence adduced by the opposing party. So, even with any Discovery limitations precluding City Petitioners presentation in their case-in-chief – some opportunity to rebut the rampant misrepresentations should have been allowed. This is required to allow the jury base their determinations upon the facts. The trial court judge's refusal to allow rebuttal evidence was abuse of discretion and plain error. Such rebuttal evidence included the facts that

1) probable cause existed, CR 12-562242;

2) there were drugs found in Arnold Black's truck, *id.* Video Tr. p. 89, lns. 14, 15;

3) the subject holding cell was twice as big as a regular jail cell, Video Tr. p. 86, lns. 4-6;

4) violence against suspects was not customary under Chief Spotts inasmuch as O'Leary was "shocked" by Hicks' conduct, Tr. p. 26, lns. 9-12; and

5) there was no claim for municipal liability in Black's refiled Complaint (*see* Complaint)

Id., Appendix I.

This Honorable Court has defined probable cause as the "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 441 U.S. 31, 37 (1979). O'Leary found illegal substances in Mr. Black's vehicle and logged them into the police evidence book. Criminal courts subsequently corroborated that finding. The trial court abused its discretion when it precluded, out of an abundance of over zealous rulings, that finding to be presented to the jury. Any prejudice to Black's discovery complaints were overcome by his complicity with the perpetuating officer. Thus, sanctions awarded against the city and police chief, in this

regard absolutely prohibiting affirmative defenses, character evidence and any rebuttal patent falsehoods were an abuse of the trial court's discretion. *State ex rel. Sawyer v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 2006-Ohio-4574. It was reasonable for Spotts to rely upon the courts' (municipal and state" ratification of probable cause – particularly when he had not participated in the collection of the evidence thereof.

According to *Evans Chevrolet v. General Motors Corp*., 74 Ohio App. 3d 266 (1991), "Where a party establishes that the law was not clearly and fairly represented to the jury and that he was prejudiced thereby, a reversal may be justified. *See also Marshall v. Gibson*, 19 Ohio St. 3d 10 (1985), *Wagenheim v. Alexander Grant & Co.*, 19 Ohio App. 3d 7, 8 (1985).

Petitioner Counsel attempted for the trial court to take judicial notice of the fact that the criminal court had found probable cause Tr. p. 131, lns. 20-25; Tr. 132, lns. 1-15. when Mr. Black's corollary criminal case was dismissed. However, the Trial court refused to take such notice on the grounds of his Discovery sanctions and his Cross-Claim denial ruling. Tr. p. 132, lns. 16-25; p. 133, ln. 25.

It is well established that a court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related findings. *State ex rel. Coles v. Granville*, 116 Ohio St. 3d 231, 2007-Ohio-6057. As the court in *Kramer v. Time Warner, Inc.*, 937 F.2d 767 (1991) pointed

out, facts and materials admitted under judicial notice are accepted without being formally introduced by a witness or other rule of evidence, and they are even admitted if one party wishes to enter evidence to the contrary.

According to Ohio R. Evid. 201, "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." That state Rule is essentially reiterated by Fed. R. of Evidence 201 as well. The fact that Judge Michael P. Donnelly who presided over Respondent's corollary criminal court case dismissed Mr. Black's criminal case *without prejudice* and *with a finding that probable cause existed* was certainly a fact that was from a source "whose accuracy cannot reasonably be questioned." Tr. 131, lns. 20-25; Tr. p. 132, lns. 1-15. *Op. cit.* Its denial is further evidence that the trial court committed plain error in violating Petitioners Due Process rights for not producing the video tape lost by prior Administrations. *Id.*, Appendix I.

Further as pointed out by *Cook v. City of Cincinnati,* 103 Ohio App. 3d 80 (1995). the mere fact that a criminal charge was later dismissed by a trial court "does not make the arrest unlawful . . . ". Here, the trial court confused discovery sanctions with judicial notice. It further abused its discretion by not allowing the Defense to impeach Det. Hicks with his misrepresentation as to not having probable cause. In not allowing

rebuttal testimony, the jury's verdict was based upon misinformation and the trial court thereby erred causing a result adverse to commonly accepted principles of state and federal constitutional law.

CONCLUSION

WHEREFORE, and by virtue of the foregoing study of law and facts Petitioners pray that this Court grant their requested Writ of Certiorari.

Respectfully submitted,

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