No. 20-1667

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
Eighth District, Cuyahoga County

PETITION FOR REHEARING

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PETITION FOR REHEARING

COMES NOW, the Petitioner, City of East Cleveland et al., by and through undersigned counsel, to Petition for Rehearing. The case here deals with a Municipality and its Police Chief being found jointly and severable liable for a non-lethal use of force by it's police department. The issue of police immunity and civil damages are currently before the court with multiple petitions. If one of these cases are heard and the petition for rehearing is denied the Petitioners will have no recourse as to the new case law because the judgment will have become Res Judicata. The City asks this Honorable Court to grant this petition in the event one of the similar cases is heard by the court, and remand the cases to the lower courts to rule in light of the new case law modifying, *Monell v. Department of Soc. Svcs.*, 436 U.S. 658 (1978).

Substantial Grounds not Previously Presented show that the City was Immune under Qualified Immunity.

This reconsideration request is based upon the fact that on April 28, 2012, the City is alleged to have perpetrated certain constitutional violations upon Respondent Arnold Black causing him $50 Million in damages, and awarding him an additional $5.2 Million in pre-judgment interest in August of 2019. Respondent Black did not add on the municipal liability count until three years after the incident thereby in violation of the statute of limitations prescribed by the state of

Ohio for state claims, ORC 2305.10—a fact not considered by the court of appeals. And, even though the Respondent dismissed his malicious prosecution claim, the Jury nevertheless found Hicks and Spotts liable for that.

The first ground for reconsideration deals with whether or not excessive discovery sanctions can be upheld against a party when non-compliance is based upon inability rather than willfulness or bad faith. The unfairness of such undeserving, "inherited" liability is enhanced by the fact that no prejudice is demonstrated by any lack of compliance. Interestingly, the first trial of the instant case was conducted without the Respondents even being present and resulted in a verdict of $22 Million for Mr. Black. The second trial, where Respondents were present, albeit without the ability to put on a case given the actions of their predecessors, Mr. Black won a verdict of $50 Million. The latter is hardly indicative of prejudice.

Is the refusal by a court to allow defendant-petitioners to put on their case excessive when failure to comply has been due to inability, and not to willfulness?

This case can be distinguished from that of *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) in that any discovery non-compliance was beyond Petitioners' control. By the time the affected municipal administration came into power, the actual actors were gone. The case was also

inundated with a plethora of misinformation from the press that heralded the case, despite no medical or "closet" evidence, as a poster child for constitutional infraction. The case thus spiraled out of any reasonable control and essentially became a circus in the vein of *Sheppard v. State of Ohio*, 352 U.S. 910 (1956).

This lack of control in particular pertained to Discovery. This Court has maintained a tradition of acknowledging a defendant's lack of liability when discovery is inhibited by factors beyond its control. *Society Internationale pour Participations Industrielles et Commerciales, SA v. Rogers*, 357 U.S. 197 (1958).

When a defendant is so unfairly punished for being unable to comply with non-existent discovery requests, it has been held to be a denial of due process, *Hovey v. Elliott*, 167 U.S. 409. If, as in this instance, a hearing on the merits is denied, *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, it is the defendant's constitutional rights that have been compromised. A defendant cannot be penalized "for a failure to do that which it may not have been in its power to do." *Hammond*, *id.* at 347.

To allow such a heavy burden of $5.52 Million to be visited upon citizen taxpayers by the mistake of an intoxicated renegade officer is patently unfair. Inaction to such a travesty will go down in legal annals as the 21st Century pillaging of a 1921 Tulsa, Oklahoma. Instead of funding the police, ignoring this injustice results in erroneously funding Arnold Black's cruise ship voyages, skate club parties or Vegas trips evidenced at

trial. The gravamen of the discovery sanctions here is that Spotts nor the City were not able to employ any defenses even those of qualified immunity.

Is a Police Officer Pursuing a Felony Crime Punishable Under State Law, a State Actor Rather than a Municipal One?

While it is true that this case went up the ranks in a state forum rather than a federal one does not militate against its importance in shaping constitutional law. *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Terry v. Ohio*, 392 U.S. 1 (1968). Officer Hicks was assigned to another law enforcement agency at the time of incident. The other agency was under the auspices of the Sheriff's department and enforced state drug offenses.

Randy Hicks was acting as an arm of the state through his assignment to a joint task force whose sole mission was to interdict the violation of state drug laws. This position is contextualized by the fact that the starting point of Hicks encounter with Arnold Black was from a bar where he was partying with friends. Further, any governmental action involved at all hence was derived from that of the state. Further, City Petitioners still maintain that any involvement by the City of then Chief of Police Spotts, was a result of precipitating factors thought by Spotts to be pursuant to legitimate law enforcement objectives and so Spotts should be protected under the provisos of qualified immunity set forth in *Pierson v. Ray*, 386 U.S. 547 (1967)

and further articulated *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) in which this Court opined:

> " . . . government officials performing discretionary functions generally, are shielded from liability for civil damages insofar as them conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. 457 U.S. 815-819.

Arnold Black alleged in his Complaint that " . . . all Defendants were acting under and/or outside of color of law. . . ." See Complaint at ¶ 6. This allegation is focal, as 42 U.S. Code § 1983 provides that in order to be actionable, a constitutional injury must be caused by any:

" . . . person who, under color of any statute . . . of any State (Emphasis added).

Based on the foregoing facts and study of the law, it is urged that this Court find that Plaintiff's claims in this matter, as to official capacity, therefore fall within the well-delineated subject matter jurisdiction of the Court of Claims and consequentially in the absence of a determination by the Court of Claims, the Cuyahoga County Court of Common Pleas lacked subject matter jurisdiction because state courts lack jurisdiction to hear a claim barred by sovereign immunity unless the state waives immunity. Accordingly, this Court must find that the Judgment rendered must be vacated as void ab initio as the trial court's exercise of judicial power was unauthorized by law. This case

should have been heard by either the Northern District of Ohio or the Ohio Court of Claims.

Furthermore, Ohio Revised Code § 2743.02(F) provides in relevant part:

A civil action against an officer or employee . . . that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code. Further, a state is not a person and cannot be sued as such. *Will v. Michigan Dept. of State Police,* 491 U.S. 58.

The situation is exacerbated by the fact that due to the excessive discovery sanctions, Chief Spotts was not allowed to testify on his own behalf, *cf. United States v. Zayn Al-Abidin Muhammed Husayn, aka Abu Zubaydah, et al.,* 20-827.

Likewise, *Zubaydah's* outcome, to be decided by this Court could affect this case.

Further examination finds the allegation that Randy Hicks acted with malicious purpose, in bad faith, or in a wanton or reckless manner. See Plaintiff's Complaint at ¶ 107-10. Even though Plaintiff later dismissed these claims, see Docket of 6/29/2017, as they

were inconsistent with his evolving theory of the case's targets, since such conduct by Hicks was proven at trial, they are still pertinent to this review.

Nevertheless, Arnold Black's state law claims against the Defendants-Appellants in their individual capacity are barred under the Ohio Revised Code §§ 9.86 and 2743.02(F) and federal common law under qualified immunity and sovereign immunity.

For this case not to be reconsidered, is to establish precedent that a constitutional violation is a strict liability offense for not only the culpable office but for the city and superiors who are thereby vicariously implicated.

***Thompson v. Clark*, could affect the City's liability**[1]

There is a case that this Court will hear this term that could affect the law impacting Petitioner. *Thompson v. Clark*, No. 20-659 involves the issue of whether the rule that a plaintiff must await favorable termination of his criminal case before bringing a Section 1983 action. Is a Defendant who alleges unreasonable seizure pursuant to legal process required to show that the criminal proceeding against him has "formally ended in a manner not inconsistent with his innocence; or that the proceeding "ended in a manner that affirmatively indicates his innocence?" The court of appeals only speculated in the case herein what the criminal

[1] 20-659, *Thompson v. Clark*.

judge in the underlying case might have reasoned when he determined that there had been probable cause to arrest Respondent Black.

Also, in the instant case, there was a complete change of administrative personnel including the Mayor, the Police Chief and the Law Director when the trial court reconvened the parties for trial. The previous Mayoral administration left abruptly after being recalled from its post. In the departure, neither the Mayor nor the Law Director left anything of substance for successors. Notwithstanding Rule 25, that fact should have at least be taken into consideration by the lower courts.

This Court has already held that an entire City cannot be held liable for the actions of others that came before. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

Petitions pending before this court could affect the City's liability

Serval petitions are pending before this court that could produce new case law affecting this case here. If this petition is not granted then the City cannot benefit from the new law because the Judgment will be Res Judicata and Case Law does not apply Retroactively on Collateral Review. See, *Edwards v. Vannoy*, No. 19-5807; 593 U.S. ___ (2021).

Rivas-Villegas v. Cortesluna[2]

There is a possibility that this Court will consider the parameters of qualified immunity in a case currently pending before this Court. The case of *Rivas-Villegas v. Cortesluna*, No. 20-1539 concerns whether the U.S. Court of Appeals for the Ninth Circuit departed from this Court's decisions in *Graham v. Connor*, 490 U.S. 386 (1989) [police conduct reviewed under objective reasonableness standard]; and, *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014) [Police fired into fleeing car during police chase] in denying qualified immunity to Daniel Rivas-Villegas based upon the absence of a constitutional violation. The question in Rivas-Villegas case include pushing a suspect down with a foot and briefly placing a knee against the back of a prone, armed suspect while handcuffing him is whether the Ninth Circuit departed from this Court's decision in *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) by denying qualified immunity in that instance.

City of Tahlequah, Oklahoma v. Bond[3]

Another pending case currently before this Court that could also impact the City's as well as Chief Spotts liability is *City of Tahlequah, Oklahoma v. Bond*, No. 20-1668. Here again, the City and Spott's culpability in a 'reckless' act involving intoxication could change the result as to this Court's res judicata determination.

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[2] 20-1539 *Rivas-Villegas v. Cortesluna.*

[3] 20-1668 *City of Tahlequah, Oklahoma v. Bond.*

This issue comes again to the fore as during Defendant Randy Hicks' trial testimony, it was determined that Randy Hicks was assigned to a Joint Task Force; whose mission was solely dedicated to the interdiction of illegal drugs. Likewise, former Defendant O'Leary corroborated this when he testified that he thought "they" were conducting some sort of drug operation. Id. Video T. p. 7, lns. 1-3.

As more fully set forth hereinafter, in that Randy Hicks was acting at all in any legitimate governmental capacity, it was as an arm of the state, at the time of the alleged misconduct. R.C. 2743.03(A)(1) sets forth a jurisdictional bar prohibiting the Cuyahoga County Court of Common Pleas from exercising jurisdiction over Arnold Black's claims; and accordingly, this Court must vacate the Verdict rendered; and dismiss Arnold Black's Complaint.

Frasier v. Evans[4]

Another pending case currently before this court is *Frasier v. Evans*, 21-57. The question for review at issue is "Whether training or law enforcement policies can be relevant to whether a police officer is entitled to qualified immunity." In that case an officer violated his training and yet was found to be immune from suit in the Tenth Circuit. The court found training not relevant to qualified immunity. Here, the police chief did as trained and yet was found liable. If training is

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[4] 21-57 *Frasier v. Evans*.

relevant then Chief Spotts should be absolved from liability.

This case should be summarily disposed by way of a remand to the lower court

In light of the cases stated above this Honorable Court should grant this Petition for Rehearing, and Vacate its Order Denying the Petition for a Writ of Certiorari. The Court should after the above mentioned cases are heard: (1) Grant the Petition for a Writ of Certiorari, (2) Vacate the Orders of the Ohio Supreme Court, and the Judgment and Mandate of the Ohio Court of Appeals, Eighth District, Cuyahoga County, and, (3) Remand the case for rehearing in light of the new precedent.

CONCLUSION

This case here deals with a city being found liable for over 50 million dollars in non-lethal police use of force. This Honorable Court held oral argument on a case on October 12 that could affect this case here. Several pending petitions deal with the same issues as this current case. If this Honorable Court denies rehearing then the case will be Res Judicata and not open to review in light of the new case law.

Wherefore, for the reasons stated above the Petitioner City of East Cleveland et al., asks this Honorable Court to:

(1) Grant this Petition for Rehearing, and

(2) Vacate its Order Denying the Petition for a Writ of Certiorari

Respectfully submitted,

THE CITY OF EAST CLEVELAND

WILLA HEMMONS
Counsel for Petitioners

CERTIFICATE OF COUNSEL

As counsel of record for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

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