No. 84-1160

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BERTOLD J. PEMBAUR, M.D.,

Petitioner,

vs.

CITY OF CINCINNATI, OHIO, HAMILTON COUNTY, OHIO, HON. NORMAN A. MURDOCK, HON. JOSEPH M. DeCOURCY, JR., AND HON. ROBERT A. TAFT, II

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT E. MANLEY
ANDREW S. LIPTON

MANLEY, JORDAN & FISCHER
4100 Carew Tower
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

Attorneys for Petitioner

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTION PRESENTED FOR REVIEW

Can a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office fairly be said to represent official policy so as to render a county liable under 42 U.S.C. § 1983?

STATEMENT OF INTERESTED PARTIES

Certain defendants originally named in the Complaint have not been listed as parties because petitioners believe that they are not interested in the outcome of this petition. Pursuant to that belief, there are no interested parties who have not been identified in the caption. Respondents Norman A. Murdock, Joseph M. DeCourcy, Jr., and Robert A. Taft, II are the commissioners of Hamilton County, Ohio and are named only in their official capacities as the county itself. *State ex rel. Commissioners v. Allen,* 86 Ohio St. 244 (1912); Findings of Fact, Opinion and Conclusions of Law (Appendix B at 14a).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF OTHER AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. .....

BERTOLD J. PEMBAUR, M.D.,

Petitioner,

vs.

CITY OF CINCINNATI, OHIO, HAMILTON COUNTY, OHIO, HON. NORMAN A. MURDOCK, HON. JOSEPH M. DeCOURCY, JR., AND HON. ROBERT A. TAFT, II

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Bertold J. Pembaur, M.D., plaintiff in the action below, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit filed on the 18th day of October, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals, filed on October 18, 1984, is reproduced in Appendix A. The Findings

of Fact, Opinion And Conclusions of Law of the United States District Court, filed on April 5, 1983, is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was filed on October 18, 1984. This petition was filed within 90 days of October 18, 1984. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES:

FOURTH AMENDMENT

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

FOURTEENTH AMENDMENT

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 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. (As amended December 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.)

STATEMENT OF THE CASE

Petitioner, Bertold J. Pembaur, M.D., is the sole proprietor of a medical clinic known as the Rockdale Medical Center, located in the City of Cincinnati, Hamilton County, Ohio.

On May 19, 1977, two unidentified persons dressed in plain clothes arrived in the reception area of the clinic and sought to enter the inner offices of the clinic. Learning of this, plaintiff barred shut the door between the public reception area and the private working areas of the clinic. (Tr. pp. 51, 69-70) Dr. Pembaur was then told that the two individuals were deputy sheriffs armed with capiases[1] to bring two of plaintiff's employees be-

[1] A capias is a writ of attachment issued pursuant to Ohio Revised Code Section 2317.21 to have a sheriff bring a person before the court or notary before whom a subpoenaed witness has failed to appear to answer for civil contempt.

fore the grand jury. (Joint Exhibit II and III, Tr. p. 134) The deputies asked the doctor to let them into the inner areas of the medical clinic to search for the named employees. Learning that the deputies had no search warrants (Tr. pp. 48-49), Dr. Pembaur refused entry. (Tr. 52)

Shortly thereafter, Cincinnati police officers arrived and also told plaintiff to permit them to enter to search for the persons named in the capiases. Dr. Pembaur again refused entry. (Tr. p. 52) The police officers called for a supervisor and a sergeant arrived, repeating the request to permit entry. (Tr. p. 53) Plaintiff continued to refuse to open his door absent a search warrant directed to him. (Tr. pp. 53, 135)

The deputies then, pursuant to department policy, called the sheriff's execution officer and were advised to call an assistant county prosecutor, defendant William Whalen. They called Whalen and advised him of the situation. Whalen spoke with Simon Leis, the Hamilton County Prosecutor, and told him that petitioner would not permit entry; Leis told Whalen to tell the deputies to "go in and get them." (Tr. pp. 53-54, 366)

Finally, more than two hours after their arrival (Tr. p. 56), the deputies, still without a warrant and after again being refused entry, sought to batter against the door to break it down. This failing, a Cincinnati police officer took a fire axe and chopped the door down. (Tr. p. 54) The deputies and police officers entered the private inner areas of the medical center and searched for the persons named in the capiases. (Tr. pp. 55, 71) The persons sought were not found. (Tr. p. 55)

Petitioner commenced this Civil Rights Action pursuant to 42 U.S.C. § 1983 in the Southern District of

Ohio, Western Division, against Hamilton County, Ohio, the City of Cincinnati, Ohio, and against certain individuals alleged to have violated the doctor's constitutional rights. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343 (3). After a trial to the court, Findings of Fact, Opinion and Conclusions of Law were issued on April 5, 1983. The court ruled in favor of all the defendants, finding that the individual defendants were entitled to immunity and that the County and City were not liable because plaintiff had not suffered a constitutional deprivation committed pursuant to some official policy.

Upon appeal to the Sixth Circuit Court of Appeals, the court affirmed the trial court's holding as to Hamilton County, but reversed as to the City of Cincinnati, Ohio. The Court recognized that while the instructions to the deputy sheriffs "accorded with the law as it stood in 1977" based upon *Steagald* v. *United States,* 451 U.S. 204 (1981), plaintiff had suffered an "obvious constitutional violation." (Appendix A at 5a-6a)

The Appellate Court also ruled that both the county prosecutor and the county sheriff are elected officials who can establish official county policy to form the basis for the imposition of § 1983 liability. (Appendix A at 7a) The court upheld the lower court's ruling in favor of the county, however, on the ground that a "single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy." (Appendix A at 8a) The court also held that the Sheriff could not have ratified his deputies' conduct absent evidence of "acquiescing in a prior pattern of conduct." (Appendix A at 8a) [2]

[2] One of the deputies testified, however, that on prior occasions they had served capiases on the property of persons other than the

REASONS FOR GRANTING THE WRIT

The basic issue in this petition is whether a unit of local government should be held liable for a single, discrete decision, made by an elected official whose acts are found to represent official policy, which proximately causes a person to be deprived of his constitutional rights. Petitioner believes that liability should attach in such a situation and that the decision of the courts below must be reversed.

The Court of Appeals found that Hamilton County, Ohio was not liable to plaintiff for the "obvious constitutional violation" he suffered, a patently illegal search of private medical offices, for the sole reason that the doctor "failed to establish . . . anything more than that on this *one occasion,* the Prosecutor and Sheriff decided to force entry into his office." (Appendix A at 8a) Thus, while the Court recognized that the prosecutor and sheriff are officials whose "acts represent the official policy of Hamilton County," the Sixth Circuit has adopted a rule that

> "[a] single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing governmental policy." (Appendix A at 8a)

This holding is both an erroneous interpretation of the official policy requirement under § 1983 as defined

---

subject of the capias. (Tr. pp. 56-57) The Hamilton County Sheriff also testified that although he could not cite a specific example, he assumed forcible entries had been made to serve a capias on the property of a person sought to be apprehended. (Tr. pp. 222-223) He testified that after reviewing the situation it was his opinion that his deputies "acted fully and competently within their authority." (Tr. pp. 214-215)

by this Court and in conflict with decisions rendered by other circuit courts of appeals.

In *Monell* v. *Department of Social Services of the City of New York,* 436 U.S. 658 (1978), this Court held that municipalities and other units of local government not entitled to Eleventh Amendment immunity are "persons" who may be liable under § 1983 for an unconstitutional action that "implements or executes a policy statement, ordinance, regulation *or decision* officially adopted and promulgated by that body's officers." 436 U.S. at 690 (emphasis supplied) The decision in *Monell* concluded that a governmental entity is liable under § 1983 where an injury is inflicted by the execution of a policy or custom "whether made by its lawmakers *or by those whose edicts or acts may fairly be said to represent official policy.*" 436 U.S. at 694 (emphasis supplied).

Monell, however, merely drew the outline for local government liability under § 1983; this Court specifically stated that it was not addressing the "full contours" of municipal liability under § 1983 and would "expressly leave further development of this action to another day." 436 U.S. at 695.

Owen v. *City of Independence,* 445 U.S. 622 (1980), raised the question of municipal immunity against the background of a single incident of alleged unconstitutional conduct based upon the interactive behavior of various city officials. In reaching the conclusion that local government entities are not entitled to immunity from liability for damages resulting from their unconstitutional acts, 445 U.S. at 657, this Court examined and relied upon historical situations where liability was imposed. Thus, while not discussing the official policy question directly, it was recognized that:

> "A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation. T. Sherman & A. Redfield, A Treatise on the Law of Negligence § 120, p. 139 (1869)." 445 U.S. at 640.

Quoting Chief Justice Shaw's decision in *Thayer* v. *Boston,* 36 Mass. 511, 515-516 (1837), this Court noted that:

> "if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done." 445 U.S. at 641.

It can therefore be concluded that since the Civil Rights Act was adopted to afford relief for constitutional deprivations caused by the "misuse of power, possessed by virtue of state law," *Monroe* v. *Pape,* 365 U.S. 167, 184 (1968); *Owens* v. *City of Independence,* supra, 445 U.S. at 650, a rule such as that adopted by the Sixth Circuit, effectively exempting a local governmental entity from liability for the first unconstitutional act directed by a policy-making official, defeats the very purpose of § 1983. Particularly where, as here, the govern-

ment officials are found to enjoy immunity, the Sixth Circuit holding leaves the injured person without remedy or relief.

This is not a case where the plaintiff seeks to find official policy in some custom, practice or inaction. See, e.g. *Gilmere* v. *City of Atlanta,* 737 F.2d 894 (11th Cir. 1984); *Turpin* v. *Mailet,* 579 F.2d 152 (2d Cir. 1978), vacated *sub. nom. City of West Haven* v. *Turpin,* 439 U.S. 974 (1978), *cert. denied,* 439 U.S. 998 (1978); *Smith* v. *Ambrogio,* 456 F.Supp. 1130 (D. Conn. 1978). Those courts apparently would recognize governmental liability for a single, discrete decision by a policy-making official. See *Gilmere* v. *City of Atlanta, supra,* 737 F.2d at 901 (implementation or execution of "policy statement, ordinance, resolution or decision" that is "the moving force of the constitutional violation" establishes governmental liability, citing *Monell, supra,* 436 U.S. at 690-691 and *Polk County* v. *Dodson,* 454 U.S. 312, 326 (1981)); *Turpin* v. *Mailet,* 619 F.2d 196, 202 n. 7 (2d Cir. 1980), *cert. denied,* 449 U.S. 1016 (1980); *Smith* v. *Ambrogio, supra,* 465 F.Supp. at 1134 n. 3. Where a plaintiff seeks to find official policy in custom, practice, or inaction, a single discrete act by a deputy sheriff, rather than by an elected policy-making official, would not, and should not, form the basis for governmental liability.

On the other hand, we have here a specific decision and direct order by a county official who has policy-making authority to "go in and get them." The result of this direct order to the deputy sheriffs was the deprivation of petitioner's constitutional right to be secure from unreasonable searches.

Clearly, a unit of local government should be liable for the decisions of its policy-makers, be it the first oc-

casion or an oft-repeated situation, which directly cause the deprivation of an individual's constitutional rights. An elected county prosecutor is certainly one "whose edicts or acts may fairly be said to represent official policy." *Monell, supra,* 436 U.S. at 694. There is simply no reason to grant a unit of local government immunity from liability for the first edict or act in a particular area which causes a constitutional deprivation.

Petitioner believes that this is the appropriate case in which to resolve this substantial issue of federal law. The courts below have already held that the decision of the elected county prosecutor to "go in and get them" proximately caused petitioner to suffer a constitutional deprivation under color of state law. The official policy question is thus the only issue to be resolved.

Not only have the trial and appellate court rulings here erroneously decided a federal question of substance, but the Circuit Court's decision conflicts with the holdings on this very issue by other Courts of Appeals and District Courts.

Recently, the Eighth Circuit specifically addressed the question of whether a county may be liable under § 1983 for a single decision of a county official. In *Sanders* v. *St. Louis County,* 724 F.2d 665, 668 (8th Cir. 1983), the court stated:

> "It may be that one act of a senior county official is enough to establish the liability of the county, if that official was in a position to establish policy and if that official himself directly violated another's constitutional rights. See *Monell,* 436 U.S. at 694, 98 S.Ct. at 2037; *Quinn* v. *Syracuse Model Neighborhood Corp.,* 613 F.2d 438, 448 (2d Cir. 1980); *Bowen* v. *Watkins,* 669 F.2d 979, 989-90 (5th Cir. 1982)."

The Fifth Circuit, in several cases, has held that a local government may be liable where its official policy-makers "by direct orders" set a course of action which results in the deprivation of a constitutional right. *Bennett* v. *City of Slidell,* 728 F.2d 762, 767 (5th Cir. 1984). There, the city was found not to be liable because the government officials, a city attorney and building inspector, were held not to be among "those whose edicts or acts may fairly be said to represent official policy." 728 F.2d at 769. The court specifically recognized, however, that elected county officers derive authority to set governmental policy in certain areas from the electorate. 728 F.2d at 765-66, nn. 1 & 2.

In *Van Ooteghem* v. *Gray,* 628 F.2d 488 (5th Cir. 1980), *modified en banc,* 654 F.2d 204 (5th Cir. 1981), *cert. denied,* 455 U.S. 909 (1982), the court held that the improper discharge of an employee by an elected county official, a single, discrete decision, represented the official policy of the county. 628 F.2d at 495. Similarly, in *Familias Unidas* v. *Briscoe,* 619 F.2d 391, 404 (5th Cir. 1980), the court recognized that the official conduct and decisions of an elected county official "must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the county may be held responsible under section 1983."

Finally, the district court in *Himmelbrand* v. *Harrison,* 484 F.Supp. 803, 810 (W.D. Va. 1980), relying on *Monell, supra,* 436 U.S. at 694, and *Smith* v. *Ambrogio,* 456 F.Supp. 1130, 1134 n. 3 (D. Conn. 1978), stated that "discrete" acts of government officials may represent official policy even where they are directed at only a single individual, where the conduct of the government official may "fairly be said to represent official policy."

CONCLUSION

The ruling of the Circuit Court, exempting from liability the first incident of unconstitutional conduct caused by a policy-maker's decisions, effectively emasculates the Civil Rights Act as a remedy for injuries suffered by reason of the misuse of governmental power. A unit of local government should be held liable under § 1983 to the injured individual where a policy maker, be it a city council or an elected county official, makes a decision which the body or person has the authority to make, that directly sets a course of action resulting in the deprivation of a constitutional right.

For the reasons stated, a Writ of Certiorari should issue to review the judgment of the Court of Appeals in this case.

Respectfully submitted,

ROBERT E. MANLEY
ANDREW S. LIPTON

MANLEY, JORDAN & FISCHER
4100 Carew Tower
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

Attorneys for Petitioner

OF COUNSEL:

MANLEY, JORDAN & FISCHER
4100 Carew Tower
Cincinnati, Ohio 45202