No. 84-1160

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENTS

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QUESTON PRESENTED FOR REVIEW

CAN THE SINGLE, DISCRETE STATEMENT OF A COUNTY PROSECUTOR IN GIVING ADVICE TO A DEPUTY SHERIFF CONSTITUTE THE IMPLEMENTATION OF A COUNTY POLICY SO AS TO RENDER A COUNTY LIABLE UNDER 42 U.S.C., Sec. 1983?

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OPINIONS BELOW

The opinion of the Court of Appeals, filed October 18, 1984, is reproduced in Appendix A to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. That decision also appears at 746 F. 2d 337 (6th Cir. 1984).

The Findings of Fact, Opinions and Conclusions of Law of the United States District Court, filed on April 5, 1983, is reproduced in Appendix B to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 18, 1984. The Petition for Writ of Certiorari was filed in the Supreme Court of the United States on January 15, 1985. The Petition for Writ of Certiorari was granted on June 17, 1985. The jurisdiction of this Court is founded upon 28 U.S.C., Sec. 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. Sec. 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, Sec. 1, 93 State. 1284.)

STATEMENT OF THE CASE

In April, 1977, the Grand Jury in Hamilton County, Ohio, began an investigation of the petitioner, Bertold J. Pembaur, M.D., involving the Rockdale Medical Center. During the investigation two employees of Dr. Pembaur, Marjorie McKinley and Kevin Maldon, were directed to appear before the Grand Jury, but they failed to appear. Subsequent to their failure to appear, two separate judges of the Court of Common Pleas of Hamilton County, Ohio, issued *capiases* for the arrest and detention of each witness. A *capias* was issued by Judge Robert S. Kraft on April 29, 1977 for Kevin Maldon and a *capias* was issed by Judge Robert H. Gorman on May 19, 1977, for Marjorie McKinley. (Joint Ex. II and III, Joint Appendix, J.A. 20-22)

On May 19, 1977, at approximately 2:00 p.m., Hamilton County Deputy Sheriffs Frank Webb and David Allen attempted to serve the *capiases* on Marjorie McKinley and Kevin Maldon at the Rockdale Medical Center, their usual place of employment. (R. 49, 138). The two Deputy Sheriffs showed their identification but were denied admittance by Dr. Pembaur who not only closed the door, but also barricaded the door with a piece of wood. (R. 51).

Dr. Pembaur called the Cincinnati Police Department and the news media to his office. After discussions with the County Sheriff's office and the County Prosecutor's Office, the Deputy Sheriffs attempted to force the door but they were unsuccessful.

Certain Cincinnati Police Officers arrived on the scene and sought advice from their supervisors as to what they were supposed to do. (Pl. Ex. 38, J.A. p. 24) A Cincinnati Police Officer then took an axe and chopped a hole in the door (R. 54) Neither Marjorie McKinley nor Kevin Maldon were found although Marjorie McKinley was hiding on the premises and Kevin Maldon was probably on the premises. (Stipulation, J.A. p. 34-35) At no time did the County Prosecutor appear at the scene of the indicent described above. No evidence was presented that there had ever been another occasion when a search had been conducted of a business office in an attempt to execute a *capias* for the arrest of two employees of the business owner.

The petitioner commenced an action pursuant to 42 U.S.C. Sec. 1983 and on other grounds on April 20, 1981, in the Southern District of Ohio, Western Division. The trial was conducted to the Court which ruled in favor of all defendants and dismissed petitioner's complaint. The Prosecuting Attorney was not named in the complaint, nor were there any allegations raised as to him.

The Sixth Circuit Court of Appeals affirmed the Trial Court's Decision as to Hamilton County, Ohio, but reversed as to the City of Cincinnati. The Sixth Circuit Court held that the petitioner had suffered no constitutional deprivation at the hands of Hamilton County. The petitioner failed to prove that he had suffered any constitutional deprivation pursuant to any policy, custom or practice in Hamilton County, Ohio. The Sixth Circuit Court of Appeals specifically found that the one entry into petitioner's business office to execute a *capias* for the arrest of two of petitioner's employees did not constitute an implementation of a governmental policy causing a constitutional deprivation.

SUMMARY OF ARGUMENT

From the respondents' viewpoint this case presents the question of whether a single, discrete rendering of advice by a County Prosecuting Attorney to a Deputy Sheriff in executing a *capias* is the implementation of a county policy so as to render a county liable under 42 U.S.C., Sec. 1983, for an unconstitutional search of a petitioner's business premises. The Sixth Circuit Court of Appeals, in affirming the judgment of the Trial Court as to Hamilton County, Ohio, clearly held that with regard to the one occasion on which there was a forcible entry to the petitioner's office, that neither the Prosecuting Attorney nor the Sheriff were implementing any governmental policy. Therefore, liability on the part of the County did not exist. *Pembaur* v. *City of Cincinnati*, 746 F. 2d 337, 341 (6th Cir. 1984).

Respondents believe that the petitioner's argument fails on several counts. First, and foremost, the petitioner has failed to show an unconstitutional policy on the part of Hamilton County, which was clearly established in May, 1977, when the search took place. That a search of the petitioner's premises took place without a search warrant cannot be denied. The petitioner, however, fails to show that the search was a implementation of a policy of Hamilton County. It is respondents' position that the rendering of legal advice by the County Prosecuting Attorney to either the Sheriff or the Deputy Sheriff does not constitute the implementation of a governmental policy required to impose liability within the dictates of *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

Further, it is the respondents' position that the petitioner must show that there was more than one single forcible entry into a business premises without a search warrant to constitute an unconstitutional policy. One, single, discrete action of a county employee, even when based upon the advice of a County policy maker, is not sufficient to rise to the level to the implementation of a county policy. This is especially true where the County Prosecuting Attorney has no authority to

direct the actions of the County Deputy Sheriffs, or City Police Officers. The sole role of the County Prosecuting Attorney in the present case was to render advice to the Sheriff's Department.

To embark on the road urged by the petitioner would essentially mean that the requirement of proving the existence of an unconstitutional policy whose implementation caused a constitutional deprivation had been eliminated. To accept the petitioner's argument would mean that proof of a constitutional deprivation in which a county employee had participated was enough to impose liability on the County.

ARGUMENT

THE SINGLE, DISCRETE STATEMENT OF A COUNTY PROSECUTOR IN GIVING ADVICE TO A DEPUTY SHERIFF DOES NOT CONSTITUTE THE IMPLEMENTATION OF A COUNTY POLICY SO AS TO RENDER A COUNTY LIABLE UNDER 42 U.S.C., SEC. 1983.

1. The petitioner must clearly show an existing unconstitutional policy that was the cause of the unconstitutional deprivation.

The direction and scope of the petitioner's entire argument focuses on a hearsay statement attributed to the County Prosecutor. The County Prosecutor's advice was sought by the County Sheriff in the execution of a *capias* for the arrest of two employees of the petitioner. The advice allegedly provided by the County Prosecutor has been elevated to the position of a County policy proclamation by which the petitioner is attempting to impose liability on Hamilton County, Ohio under 42 U.S.C. Sec. 1983.

The touchstone of petitioner's argument, of course, is *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978). This Court included local govern-

ment units as persons capable of being sued under 42 U.S.C. Sec. 1983 and concluded by saying:

> ". . . that a local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it 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 Sec. 1983." 436 U.S. at 694.

Further, the policy statement or ordinance must be the "moving force" behind the constitutional violation. *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981).

This court has provided clarification of when liability may be imposed on a local goverment unit in the recent case of *City of Oklahoma City* v. *Tuttle*, ____ U.S. ____, 105 S. Ct. 2427 (1985). In *Tuttle* this Court recognized that, first of all, a policy can exist or be established in many ways. Liability should only occur when an unconstitutional policy exists. Secondly, this Court recognized that "some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional," or the test set out in *Monell* will become a dead letter. *Tuttle, supra,* at 105 S. Ct. at 2436.

In the present action the petitioner has made the quantum leap to impose liability by concluding that because his office door was forced in an allegedly unconstitutional manner and because the County Prosecutor may have been involved in giving legal advice, then there must have been a county policy involved.

The petitioner has sidestepped the three-step approach that is suggested in *Bennett* v. *City of Slidell*, 728 F. 2d 762 (5th Cir. 1984), in determining when a local government unit would be liable for an unconstitutional act. In *Bennett* the Fifth Circuit stated that to impose liability on a city

> ". . . The complainant must identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy. 728 F. 2d at 767.

The petitioner blurs the distinction between the role of the Sheriff and the Prosecuting Attorney within Hamilton County, Ohio.[1] It is the Sheriff's responsibility to serve and execute a *capias* for the arrest of an individual. The Prosecuting Attorney may be requested to give legal advice but the Prosecuting Attorney has no duty with regard to the service of a *capias*. The Prosecuting Attorney may not direct or order the movement of the Sheriff or his deputies.

In the present action the Prosecuting Attorney did no more than give advice to the County Sheriff. The policy of the County Sheriff may have been to seek advice from the Prosecuting Attorney. The policy of the Prosecuting Attorney was

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[1] The duties of the County Sheriff are generally found in Chapter 311, Ohio Revised Code. Section 311.07, Ohio Revised Code, provides in pertinent part:

> "(A) Each sheriff shall preserve the public peace and cause all persons guilty of any breach of the peace, within his knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the court of common pleas, and the Sheriff shall commit such persons to jail in case they refuse to do so. He shall return a transcript of all his proceedings with the recognizance so taken to such court and shall execute all warrants, writs, and other process directed to him by any proper and lawful authority."

The duties and responsibilities of the Prosecuting Attorney are generally found in Chapter 309, Ohio Revised Code. Section 309.09, Ohio Revised Code, provides in pertinent part:

> "(A) The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax supported public libraries, and any of them may require written opinions or instructions from him in matters connected with their official duties."

to give legal advice based upon the law as he knew it to exist.[2] The Prosecuting Attorney did not order any forcible entry or search and he had no authority to do so.

The seeking of legal advice and the granting of legal advice can hardly be considered an unconstitutional policy on the part of Hamilton County, Ohio.

To render a County liable itself for a constitutional deprivation caused by a county employee, there should be a clear showing of an unconstitutional policy causing the injury. *Polk County, supra,* 454 U.S. at 325; *City of Oklahoma City, supra,* 105 S. Ct. at 2436; *Wellington* v. *Daniels,* 717 F. 3d 932, 935 (4th Cir. 1983).

The petitioner has clearly failed to establish the crucial step of showing the alleged county policy that was unconstitutional. Absent an unconstitutional policy there can be no liability imposed on the county.

2. The showing of a single incident of a Prosecuting Attorney giving legal advice to the County Sheriff should not be sufficient to impose liability on the county.

The petitioner would have this Court adopt a rule that any single, discrete decision by a policy making official of the County is sufficient to cause the establishment and implementation of a governmental policy for which the county could be liable in an action under 42 U.S.C. Sec. 1983. This Court recently held in the case of *City of Oklahoma City* v. *Tuttle, supra,* at 105 S. Ct. 2436, that:

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[2] The Sixth Circuit recognized that at the time of the incident on May 19, 1977 the state of the law would have allowed a search of the premises absent a search warrant to execute an arrest warrant. *Pembaur* v. *City of Cincinnati,* 746 F. 2d 337, 339, 340 (6th Cir. 1984), citing *United States* v. *McKinney,* 379 F. 2d 259, 263 (6th Cir. 1967). This was the basis for granting qualified immunity to William Whalen in this case and which has not been challenged by the petitioner.

> "Proof of a single incident of unconstitutional activity is not sufficinet to impose liability under *Monell* unless proof of the incident includes proof that it was caused by an existing, unconsitutional municipal policy, which policy can be attributed to a municipal policy maker."

Contrary to the petitioner's belief, lower Federal Courts have not consistently found that a single, discrete decision by a policy making official constitutes the official policy of the governmental entity for which a local government could be liable. In *Losch* v. *Borough of Parkesberg*, 736 F. 2d 903 (3d Cir. 1984), there was a claim that the police chief had caused the arrest of a citizen without probable cause because the chief possessed final authority for determining arrest procedures and that an arrest at his direction would make the city liable. The Third Circuit Court of Appeals rejected this reasoning and held that the municipal policy, as that term is used in *Monell*, cannot be inferred from a single incident of illegality. 736 F. 2d at 903.

In the Fourth Circuit the Court in *Wellington* v. *Daniels*, *supra*, refused to hold a municipality liable for the inadequate training of officers by its police chief on the basis of a single incidence of police brutality. Even though the police chief was the final authority for training police, the link needed to tie the alleged unconstitutional policy with the unconstitutional act was missing when there was only one allegation of misconduct. Also see *Milligan* v. *City of Newport News*, 743 F. 2d 227 (4th Cir. 1984).

The Fifth Circuit Court of Appeals in *Bennett* v. *City of Slidell*, *supra*, refused to hold the City liable for the activities and misconduct of the City Attorney and a Building Inspector in unnecessarily delaying the issuance of permits to a particular business. This was so even though the City Attorney had the final discretionary authority in undertaking the action relevant in that case. Not every discretionary action taken by a policy making official renders the local government authority liable for that discretionary act. See also *Berry*

v. *McLemore*, 670 F. 2d 30 (5th Cir. 1982), in which the City was held not liable for the actions of the police chief using excessive force during an arrest, even though the police chief determined the arrest policy.

It is clear that there are many cases which support the Sixth Circuit's reasoning in this action in that the single, discrete advice given by the Prosecutor and the decision of the Deputy Sheriffs to force entry into the petitioner's office was not the implementation of a government policy. *Pembaur*, *supra*, 746 F. 2d at 341. A single, discrete decision does not a policy make.

The petitioner has done little more than to establish that on a particular occasion his door to his office was forced and a search of the business premises was conducted without a search warrant, even though an arrest warrant existed for two of petitioner's employees. There is no evidence that such an action had ever taken place before or that the Prosecuting Attorney's advice had ever been sought before or had ever been given before. The petitioner clearly cannot point to an existing unconstitutional policy on the part of Hamilton County in May, 1977 when the search of the business premises did not clearly become unconstitutional until this Court's decision in *Steagald* v. *United States*, 451 U.S. 204 (1981).

The petitioner has done little more than show that on one particular occasion the Prosecuting Attorney rendered advice to the Deputy Sheriff, giving his interpretation of the law with regard to the execution of arrest warrants at that particular time.

The single occurrence of the entry into the petitioner's office because of the interpretation of the advice of the Prosecuting Attorney by the Deputy Sheriffs should not be a type of occurrence which renders the County liable under 42 U.S.C. Sec. 1983.

3. To adopt the Petitioner's position would be tantamount to imposing liability on the County under a theory of respondeat superior.

This Court has consistently held that liability will not be imposed on a government unit under 42 U.S.C Sec. 1983 under a theory of *respondeat superior*. *Monell, supra*, at 436 U.S. 691; *Polk County, supra*, at 454 U.S. 325; *Owen* v. *City of Independence*, 445 U.S. 622, 655 (1980). To adopt the petitioner's argument, however, and impose liability upon the County, seems to clearly be a situation where liability would be imposed on the theory of *respondeat superior*.

In the present action the Prosecuting Attorney was not named as a defendant in the complaint. No allegations were raised against the Prosecuting Attorney in the complaint. No allegations were made against the Prosecuting Attorney at trial. The entry into the office of the petitioner to effectuate the arrest warrant for two of his employees was clearly a one time occurrence. There was no evidence presented that such an entry had previously occurred. There clearly was no showing of any existing policy on the matter within Hamilton County. The only thing that was shown was that the Prosecutor's Office was contacted for advice.

The facts further reflected that a separate governmental entity, the City of Cincinnati, sent several police officers to the scene. These police officers, when advised of the advice given by the Prosecuting Attorney, indicated that they were going to seek further opinions from their superiors. It was only when the police officers from the City of Cincinnati had arrived at the scene that the door to the petitioner's office was actually chopped down by a Cincinnati Police Officer. The Cincinnati Police Officers were clearly not under the direction or control of the County Prosecuting Attorney.

There clearly was no showing that there was any policy of Hamilton County that directed that the offices of the peti-

tioner be searched in executing the arrest warrants for two of his employees.

As stated earlier, the Prosecuting Attorney did no more than give legal advice to the County Sheriff, as was his duty under Ohio Law. To find that the advice given to the County Sheriff, based upon the law as it existed at the time, could amount to a policy statement as required under *Monell, supra,* seems to stretch the contours and restrictions of liability as enunciated by this Court. To hold that the legal advice given by the Prosecuting Attorney becomes a county policy for which the County can be liable for an unconstitutional search under 42 U.S.C. Sec. 1983, seems tantamount to imposing liability on the County under a theory of *respondeat superior.*

The petitioner in the present action has done nothing more than show that on one particular occasion his business offices were searched without a search warrant, but pursuant to an arrest warrant issued for the arrest of two of his employees. To impose liability on the County in such a situation seems to be an end run around the prohibition that liability will not be imposed on a theory of *respondeat superior.*

CONCLUSION

The respondents firmly believe that the petitioner has failed to establish that the single incident of the constitutional deprivation which may have occurred in this case was caused by an existing, unconstitutional policy of Hamilton County attributable to the County Prosecuting Attorney.

For all of the reasons set forth above, the respondents believe that the Decision of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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