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

REPLY BRIEF

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There is no question in this case that petitioner was denied his constitutional rights. There is no question that this deprivation occurred as a result of an order by the county prosecutor, a policymaking official. The only question is whether Dr. Pembaur has a remedy for this constitutional deprivation.

1. The county should be liable for the implementation of an unconstitutional policy decision made by an elected county official.

In the matter at hand, an elected county official, acting within the scope of his authority, made a policy decision and issued an edict or command choosing a course of action that directly caused county employees to violate petitioner's constitutional rights. For this "obvious constitutional violation" the county should be liable.

Respondents would have this Court impose government liability only where there is a formally adopted policy statement or ordinance repeatedly implemented by county employees. Formality and frequency are not the hallmarks of § 1983 liability, however. Under *Monell*, a policy statement or ordinance is not the only indicia of official policy; a decision, edict or act by a policymaking official can likewise create official policy. *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 690, 694 (1980). Governmental entities are liable where a policymaking official makes a "conscious decision" choosing a course of action which becomes the "moving force" or cause of a constitutional deprivation. *City of Oklahoma City* v. *Tuttle*, ___ U.S. ___, 105 S.Ct. 2427, 2436, 85 L.Ed. 2d 791, 804 (1985). Certainly where unconstitutional conduct is expressly directed by an elected official acting within the scope of his duties, the government itself should be held accountable under 42 U.S.C. § 1983.[1]

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[1] This was the law at the time the Civil Rights Act of 1871 was adopted and has been the fundamental basis for § 1983 liability. See *Thayer* v.

The county seeks to avoid liability here by euphemistically characterizing the prosecutor's edict to "go in and get them" as legal advice.[2] The record simply does not support respondents' argument. When asked "what to do" by the deputy sheriffs (R. 365), the situation was explained and the prosecutor boldly directed them to "go in and get them." (R. 53-54, 366, J.A. 29.) The deputies then told petitioner "that if he didn't open the door and let us come in, that we had been told by the prosecutor to go in and get them." (R. 54, J.A. 29.) Such an order by the prosecutor is certainly within the scope of his powers and duties as a policymaker.

An Ohio county prosecutor is specifically authorized and required to give "instructions" to county officials "in matters connected with their official duties." Ohio Rev. Code Ann. § 309.09. Furthermore, the District Court found that a county official had given "authorization" for the forcible entry and search (P.A. 27a), and the Court of Appeals held that the prosecutor had "decided to force entry" into petitioner's

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Boston, 36 Mass. 511, 516 (1837), imposing government liability for an act done "by the authority and order of the city government." See also, *City of Oklahoma City* v. *Tuttle*, *supra*, 105 S.Ct. at 2434, n.5, 85 L.Ed. 2d at 801, indicating that *Thayer* is "in harmony with the limitations on municipal liability expressed in *Monell*." See also, *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Owen* v. *City of Independence*, 445 U.S. 622 (1980).

[2] The record is quite clear that the county prosecutor's involvement in this matter was not as simple or innocuous as the respondents suggest; the prosecutor was intimately involved in this matter from its inception. The county prosecutor, pursuant to his statutory authority, initiated the investigation of petitioner, assigning the matter to an assistant, defendant Whalen. (R. 14, Ohio Rev. Code Ann. § 309.08.) The prosecutor then assigned his secret service officer to assist in the ongoing investigation (R. 15) and personally made the decision to obtain a search warrant for an April 15, 1977 search and seizure of petitioner's medical records. (R. 359.) The county prosecutor's office conducted the grand jury proceedings for which the subject capiases were issued (R. 11), and the prosecutor then gave instructions to the deputy sheriffs, pursuant to his statutory duty, as to the execution of those capiases. (R. 53-54, 366, Ohio Rev. Code Ann. § 309.09.) Finally, he prosecuted petitioner for impeding the performance by "public officials, of an authorized act within their official capacity." (Jt. Ex. IV, R. 318, 319.)

private medical office. (P.A. 8a.) Under these circumstances, petitioner has established the necessary nexus[3] between the constitutional deprivation and the county: one "whose edicts or acts may fairly be said to represent official policy" of Hamilton County personally ordered the constitutional violation. *Monell* v. *Department of Social Services of the City of New York*, *supra*, 436 U.S. at 694.

When respondents' disingenuous argument that the prosecutor merely gave "legal advice" is analyzed,[4] it becomes clear that the so-called "advice" actually articulated an existing official policy and practice. Deputy Webb testified that prior to this incident he had frequently served capiases on third party premises. (R. 56-57.) The sheriff did not disagree; he simply could not recall a specific example, but assumed that forcible entries to execute capiases on the property of third persons not named in the writs had occurred. (R. 222-223.) Thus, whether the prosecutor's order to the deputies was an edict, command or instruction which in and of itself is official policy, or was "legal advice" articulating that which was the sheriff's official policy,[5] the county must be found liable.

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[3] In *City of Oklahoma City* v. *Tuttle*, *supra*, 105 S.Ct. at 2435, 85 L.Ed. 2d at 803 (1985), this Court held that the official policy requirement "was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decision makers."

[4] Respondents did not make this argument below. Rather, they argued to the appellate court that "this policy or practice causing the alleged constitutional deprivation was not a policy of Hamilton County itself, but rather a policy of the Hamilton County Sheriff or the Hamilton County Prosecutor." (Brief of the Defendants-Appellees at 5.)

[5] The sheriff, also a policymaking official for the county (see Court of Appeals decison, P.A. 7a), testified that he had a policy to follow court decisions with respect to execution of capiases and warrants. (J.A. 31.) Since respondents argued (and the lower courts here held) that *United States* v. *McKinney*, 379 F.2d 259 (6th Cir. 1967), permitted the unconstitutional conduct, then that decision was adopted by the sheriff as the official policy of Hamilton County.

2. A single incident of misconduct caused by the policy decision of an elected official is sufficient to establish government liability.

Respondents argue that the implementation of a single unconstitutional decision by a policymaking official[6] is not sufficient to establish county liability under 42 U.S.C. § 1983. This Court recognized in *City of Oklahoma City* v. *Tuttle*, supra, 105 S.Ct. at 2436, 85 L.Ed2d at 804, that a single policy or decision by a policymaking official, which in and of itself is unconstitutional, need be implemented only once to establish government liability. See also concurring opinion, 105 S.Ct. at 2440-2441, 85 L.Ed.2d at 809-810. Rose Marie Tuttle failed because she could show no decision whatsoever by a policymaker; rather, she sought to infer a policy of inadequate training from a single incident of misconduct by a police officer. Dr. Pembaur, on the other hand, has been able to point to a specific command by a policymaking official choosing a course of action which proximately caused the single incident of patently unconstitutional conduct.

In *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S 247 (1981), a local government was found liable for an *ad hoc* decision to terminate a contract. While municipalities were held to be immune from punitive damages, the jury award of compensatory damages was not disturbed. See also, *Owen* v. *City of Independence*, 445 U.S. 622 (1980), involving a single unlawful termination of a municipal employee. Thus, a single incident, even if unlikely to recur, can certainly form the

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[6] Respondents do not dispute that the county prosecutor is a policymaking official. However, they do suggest that not every decision by a policymaker renders a local government liable for the discretionary act. (Brief of Respondents at 10) *Bennett* v. *City of Slidell*, 728 F.2d 762 (5th Cir. 1984), cited by respondents, offers them no support. There, the court specifically found that the city attorney was not a policymaking authority. 728 F.2d at 769. The court recognized, however, that where an official is elected and thus has authority derived from his office and state law, his conduct and decisions "must necessarily" represent official policy. 728 F.2d at 766. A policymaker's "direct orders" or other acts "setting a course of action" clearly would support government liability. 728 F.2d at 767.

basis for § 1983 liability. A single decision by a policymaker, be it a city council as in *Fact Concerts*, a city manager as in *Owen*, or as in the case at hand, is sufficient to create government liability.

Respondents fail to distinguish between those cases where an official policy is sought to be inferred from a single incident of misconduct and those where a single incident of unconstitutional conduct is caused by a separately proven official policy. Thus, their reliance on *Wellington* v. *Daniels*, 717 F.2d 932 (4th Cir. 1983), is misplaced. There, plaintiff sought to impose governmental liability for a single incident of police misconduct. The court refused to infer an official policy of inadequate supervision where there was no widespread abuse and no municipal omissions from which "tacit authorization" or "deliberate indifference" could be inferred. 717 F.2d at 936. The court recognized, however, that a causal link sufficient to create governmental liability exists "where the policy commands the injury of which the plaintiff complains." 717 F.2d at 936.

Milligan v. *City of Newport News*, 743 F.2d 227 (4th Cir. 1984), and *Berry* v. *McLemore*, 670 F.2d 30 (5th Cir. 1982), also relied upon by respondents, are likewise inapposite. Again, in both of these cases the plaintiffs sought to impose government liability for misconduct by low-level employees. The courts aptly concluded that in the absence of at least tacit authorization no official policy of inadequate training or supervision would be inferred from an isolated instance of misconduct.

In the case at hand, no inference of official policy is necessary. Dr. Pembaur has introduced direct evidence[7] of

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[7] Respondents characterize the county prosecutor's instruction to the deputy sheriffs to "go in and get them" as hearsay. (Brief of Respondents at 6.) Not only was no objection asserted at trial to this testimony, but Rule 801(d)(2)(D) of the Federal Rules of Evidence provides that a statement is not hearsay if made by an agent of a party-opponent concerning a matter within the scope of his agency or employment. Statements made by a public official in the course of his official duties are not hearsay and are thus ad-

both the unconstitutional official policy attributed to a county policymaker and the implementation of that policy as the cause of Dr. Pembaur's constitutional deprivation. The evidence here cannot be disputed; the county prosecutor authorized and directed the unconstitutional conduct. Thus, under *Wellington*, *Milligan* and *Berry*, the county should be liable.

Only *Losch* v. *Borough of Parkesburg*, 736 F.2d 903 (3rd Cir. 1984), (noted in Brief of Petitioner at 27 and Brief of Respondents at 10), arguably supports respondents' position. In *Losch*, however, there was a dispute as to whether the police chief was acting pursuant to some policy or was even a policymaking official. 736 F.2d at 911. Be that as it may, petitioner believes that *Losch* is wrong to the extent that it suggests or can be read to suggest that a local government may not be liable absent repeated actions by a policymaking official. As noted in petitioner's initial brief, federal courts have repeatedly and consistently held that the implementation of even a single decision by a policymaking county official can establish government liability. See, e.g. *Rookard* v. *Health and Hospitals Corp.*, 710 F.2d 41 (2d Cir. 1983); *Languirand* v. *Hayden*, 717 F.2d 220 (5th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 2656, 81 L.Ed. 2d 363 (1984); *Sanders* v. *St. Louis County*, 427 F.2d 665 (8th Cir. 1983); *McKinley* v. *City of Eloy*, 705 F.2d 1110 (9th Cir. 1983); and *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980).

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missible. *Eastern Rotorcraft Corp.* v. *United States*, 397 F.2d 978, 983 (Ct.Cl. 1968); *United States* v. *American Telephone & Telegraph Co.*, 498 F.Supp. 353 (D.D.C. 1980); *Gannon* v. *Daley*, 561 F.Supp. 1377 (N.D. Ill. 1983). Furthermore, the statement was never offered to prove the truth of the matter asserted, but rather as evidence of the official authorization for the deputies' conduct. Again, this is not hearsay. Rule 801(c) of the Federal Rules of Evidence.

3. County liability for a constitutional deprivation caused by a decision of an elected county official is not imposed upon a theory of *respondeat superior*.

Respondents argue that even though the elected county prosecutor decided that a warrantless, non-consensual entry should be forced, the county itself should not be held accountable because this would improperly impose liability on a theory of *respondeat superior*. (Brief of Respondents at 12.) In furtherance of this *respondeat superior* argument, respondents claim that it would "stretch the contours and restrictions of liability" to find an official policy in the decision allegedly based on the prosecutor's interpretation of the law in existence at the time. (Brief of Respondents at 13.)

It is beyond cavil that the only way any government entity can act or establish policies is through the actions of individuals. See, e.g., *Van Ooteghem* v. *Gray*, 628 F.2d 488, 494-495 (5th Cir. 1980). While a unit of local government cannot be held vicariously liable under § 1983, juxtaposed against this limitation is the recognition that:

> "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 an injury that the government as an entity is responsible under § 1983." *Monell* v. *Department of Social Services of the City of New York*, supra, 436 U.S. at 694.

Here, the Court of Appeals found, and respondents do not dispute, that the county prosecutor is one whose edicts or acts may fairly be said to represent official policy. (P.A. 7a, fn. 3.) The implementation of the prosecutor's policy decision choosing a course of action, the clear command to "go in and get them," renders the county liable under § 1983; there is no need to impose liability on a theory of *respondeat superior*.

Finally, if respondents' argument is to suggest that liability cannot be imposed for an unconstitutional policy allegedly

believed at the time to be correct, they are patently wrong. While the policymaker himself would be entitled to at least qualified immunity where the constitutional right was not clearly established, *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), this court held in *Owen* v. *City of Independence*, 445 U.S. 622 (1980), that local governments are not entitled to such immunity. *Owen* noted that

> "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." 445 U.S. at 655.[8]

Despite the county's protestations, the Fourth Amendment has never been interpreted to permit the egregious conduct exhibited here. Respondents argue that *United States* v. *McKinney*, 379 F.2d 259 (6th Cir. 1967), permitted the warrantless search of petitioner's private medical offices. While the county's interpretation of that case may very well be an amplification of the county's official policy at the time (the county sheriff testified that he adopted case law as his department's official policy [J.A. 31]), it did *not* authorize a search of a third person's premises to seek an individual named in a capias.

In *McKinney*, the Sixth Circuit held that an arrest warrant justifies a search of a third person's premises because there has been a judicial determination of probable cause to believe that a crime had been committed. 379 F.2d at 263. A capias or writ of attachment, however, is issued where a witness has failed to respond to a subpoena; it is punishable in contempt, neither a felony nor a misdemeanor, Ohio Rev. Code Ann. § 2317.22. A capias certainly cannot be said to create the ex-

[8] This is consistent with the common law in effect at the time the Civil Rights Act was adopted. In *Thayer* v. *Boston*, supra, 36 Mass. at 515, the court held that local governments could be liable for unlawful conduct even "if it was not known and understood to be unlawful at the time . . . ."

igent circumstances essential to override the general dictates of the Fourth Amendment. Thus, the fundamental premise supporting the search in *McKinney* is missing here. A capias simply is not the functional equivalent of an arrest warrant (or search warrant). See District Court docket entry 10, *State* v. *Pembaur*, No. C-790380 (Hamilton County Court of Appeals, February 18, 1981), reversed on other grounds, 69 Ohio St. 2d 110, 430 N.E.2d 1331 (1982).

Furthermore, *United States* v. *McKinney* did not advance a broadly accepted doctrine. Other circuit courts specifically rejected the argument that arrest warrants could constitutionally justify a search of a third person's home or office.[9] See, for example *Wallace* v. *King*, 626 F.2d 1157 (4th Cir. 1980), cert. denied 451 U.S. 969 (1981); *Virgin Islands* v. *Gereau*, 502 F.2d 914 (3rd Cir. 1974), cert. denied 424 U.S. 917 (1976); *United States* v. *Ford*, 553 F.2d 146 (D.C. Cir. 1977); and *United States* v. *Prescott*, 581 F.2d 1343 (9th Cir. 1978). This Court has also consistently held that warrantless searches are per se unreasonable except in very narrow instances. For example, in *Camara* v. *Municipal Court*, 387 U.S. 523, 528-529 (1967), it was recognized that:

> "one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant."

Finally, in *Steagald* v. *United States*, 451 U.S. 204 (1981), this Court held that even an arrest warrant is constitutionally insufficient to justify a search of premises owned by a person

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[9] There is no doubt that an office is the equivalent of a home for Fourth Amendment purposes here. *State* v. *Pembaur*, 9 Ohio St.3d 136, 137 (1984), cert. denied ____ U.S. ____ 104 S.Ct. 2668, 81 L.Ed. 2d 373 (1984). See also, *Donovan* v. *Dewey*, 452 U.S. 594, 599, 101 S.Ct. 2534, 69 L.Ed. 2d 262, 269 (1981); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 474 (1971); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 311-312 (1978); *Mancusi* v. *DeForte*, 392 U.S. 364 (1968); *See* v. *City of Seattle*, 387 U.S. 541 (1967), *Go-bart Importing Co.* v. *United States*, 282 U.S. 344 (1930).

not named in the warrant. The *Steagald* Court recognized that it has "consistently held" that warrantless entries to conduct a search, absent consent or exigent circumstances, are unreasonable under the Fourth Amendment. 451 U.S. at 211. Since an arrest warrant safeguards only the interests of the person sought to be seized, it does

> "absolutely nothing to protect the petitioner's privacy interest in being free from an unreasonable invasion and search of his home. Instead, petitioner's only protection from an illegal entry and search was the agent's personal determination of probable cause. In the absence of exigent circumstances, we have *consistently* held that judicially untested determinations are not reliable enough to justify an entry into a person's home to arrest him without a warrant, or a search of a home for objects in the absence of a search warrant . . . We see no reason to depart from this *settled course* when a search of a home is for a person rather than an object." *Steagald* v. *United States*, supra, 451 U.S. at 213-214 (citations omitted, emphasis supplied).

As the Sixth Circuit has recognized, Dr. Pembaur suffered "an obvious constitutional violation." (P.A. 6a fn. 1.) No case has ever held that a capias is constitutionally sufficient to justify a warrantless search of a third person's premises. The county should be liable here whether or not the prosecutor and sheriff misinterpreted Fourth Amendment requirements. The alleged good faith defenses of public officials is not available to the government entity. *Owen* v. *City of Independence*, 445 U.S. 622 (1980).

CONCLUSION

If the county is not liable here, then petitioner has no remedy for the deprivation of his constitutional rights. That loss was directly caused by an official policy of the county which was implemented pursuant to a direct order by an elected county official.

The judgment of the Court of Appeals with respect to the liability of the county should be reversed and the matter should be remanded for a determination of damages.

Respectfully submitted,

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