No. 18-1366

IN THE

Supreme Court of the United States

THE ESTATE OF ADRIANO ROMAN, JR.,

Petitioner

v.

CITY OF NEWARK, ET AL.

Respondents

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the principle of joint and several liability supplant the pleading requirement of personal participation under 42 U.S.C. § 1983, or is joint and several liability inapplicable, at the pleading stage, as a principle of damages?

2. Whether a civil rights plaintiff has pled the personal participation of all named defendant officers in an unlawful search, where (1) he only pleads that the police officers may have been involved in a search that a state criminal court deemed to be unconstitutional; (2) the plaintiff argued personal participation of one officer through witnesses during his criminal suppression hearing; (3) the state criminal court made a final ruling as to only one officer's involvement, during the suppression hearing; and (4) the plaintiff argued in the alternative, in opposition to a Fed. R. Civ. P. 12(b)(6) motion, that no information from the suppression hearing should be considered by the district court?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- The Estate of Adriano Roman, Jr.—plaintiff and appellant below, and petitioner here.

- City of Newark (the "City"), improperly and redundantly pleaded as the Newark Police Department, former Chief of Police Anthony Campos, retired Sergeant Joyce Hill, and Officers Roger Mendes, improperly pleaded as Rodger Mendes, Albano Ferreira, Onofre Cabezas, Joseph Cueto, Miguel Ressurreicao, and William Golpe were defendants and appellees below, and respondents to this matter.

- However, as the petition appears to only seek relief against Officers Albano Ferreira, Roger Mendez, and Joseph Cueto, these three officers and the City are the only respondents that have an interest in the outcome of this appeal.

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STATEMENT OF THE CASE

A. Facts

In the original complaint, Plaintiff alleged that on May 2, 2014, six Newark police officers, their supervisor, "and others," arrested Plaintiff at an apartment in Newark (the "Residence") and searched the premises. *Roman v. City of Newark*, No. CV 16-1110-SDW-LDW, 2017 WL 436251, at *1 (D.N.J. Jan. 31, 2017. The Newark officers were not in uniform and did not have a warrant to arrest Plaintiff or to conduct the search. *Id.* The complaint "did not identify which officers were allegedly responsible for which actions, only that 'the acts . . . were committed either on the instruction of ... by ... or with the knowledge and consent of ... or were thereafter approved and ratified by' the Newark Officers." *Id.* (citations omitted) (second and third alterations in original).

The original complaint further alleged that "the Newark Officers made false statements in police reports and gave false testimony before a grand jury and at a suppression hearing." *Id.* The search of the Residence was later found to have been conducted without probable cause and the evidence gathered during the search was suppressed. *Id.* The original civil complaint alleged that on December 18, 2014, the criminal indictment against Plaintiff was dismissed. *Id.*

The amended complaint failed to provide any additional allegations as to "which Defendant committed which wrongful acts." (App. 50) (*accord*

App. 52-61).

Concerning the transcripts of the suppression hearing, the state criminal court's oral opinion found that Plaintiff's witnesses were more credible in their testimony and that an unidentified number of officers were involved in the initial alleged forcible entry into the Residence. (App. 67-68). The oral opinion only identified Officer Mendes as being involved in the forcible entry. (App. 4-5, 67-68). There was no clear finding as to whether the other officers were involved in the alleged forcible entry, (App. 4-5, 67-68), although the court ruled that Officer Golpe became involved some time after the forcible entry, (App. 67-68).

While Officer Mendes testified during the hearing that he, Officer Ferreira, and Officer Cueto were conducting surveillance of the apartment building before the search, (App. 63), the state criminal court rejected Officer Mendes' testimony as to who was present for the search and how the search was initiated, (App. 64-70). Again, this was because the state criminal court found plaintiff's witnesses more credible. (App. 64-70). Notably, nowhere in the Third Circuit's opinion does it state that the transcripts clearly establish, via estoppel principles or otherwise, that three officers were clearly identified as being responsible for the alleged search of the Residence. (*See* App. 4-5).

B. The District Court Proceedings

On February 26, 2016, Plaintiff filed the original complaint containing seventeen, mostly redundant, causes of action: (1) "improper training and supervision"; (2) "Denial of Due Process"; (3) "Civil Conspiracy – 42 U.S.C. § 1985"; (4) "Unlawful Search – NJ Constitution Article I, Paragraph 7"; (5) "Conspiracy to Commit Unlawful Search – New Jersey"; (6) "Unlawful Search – US Constitution Amendment IV"; (7) "Conspiracy to Commit Unlawful Search – 42 U.S.C. § 1985"; (8) "Intentional Infliction of Emotional Distress"; (9) "Negligent Infliction of Emotional Distress"; (10) "Assault and Battery"; (11) "Conspiracy to Commit Assault and Battery"; (12) "Unlawful Imprisonment"; (13) Conspiracy to Commit Unlawful Imprisonment of Plaintiff – 42 U.S.C. § 1985"; (14) "Malicious Prosecution"; (15) "Conspiracy to [sic] the Malicious Prosecution of Plaintiff"; (16) "New Jersey Civil Rights"; (17) "Municipal Liability for Constitutional Violations – *Monell* Claim against the City of Newark – 42 U.S.C. Sec. 1983." *Roman*, 2017 WL 436251; (App. 49).

The City, the seven defendant officers, and the former police director and chief jointly moved to dismiss the original complaint under Fed. R. Civ. P. 12(b)(6). *Roman*, 2017 WL 436251, at *1. Defendants' motion appended transcripts and other records from Plaintiff's criminal proceedings to delineate the submissions, arguments, briefing, and testimony submitted therein, as well as to present the state criminal court rulings, findings of fact, and conclusions of law. (App. 4 n.1). These documents were attached to estop Plaintiff from denying the facts

that would establish probable cause for his arrest and constructive possession of contraband. (*See* App. 29-31).

The Honorable Susan D. Wigenton, U.S.D.J., dismissed the complaint without prejudice. *Roman*, 2017 WL 436251, at *6. The district court declined to consider the transcripts and other records from Plaintiff's criminal proceedings. *See Roman*, 2017 WL 436251. The district court explicitly relied on the allegations in the complaint. *See Roman*, 2017 WL 436251. The district court "held the unlawful search claim was inadequately pled, as Roman did not 'explain which [Defendant(s)] committed the allegedly wrongful acts' during the search and arrest." (App. 8 (quoting *Roman*, 2017 WL 436251, at *4)).

On February 22, 2017, Plaintiff filed an amended complaint, reduced to nine counts: (1) "Discrimination of National Origin 42 U.S.C. § 1983"; (2) "Civil Conspiracy – 42 U.S.C. § 1985"; (3) "Municipal Liability 42 U.S.C. § 1983 and the New Jersey Civil Rights Act N.J.S.A. § 10:6-2 et seq."; (4) "Unlawful Search – NJ Constitution Article 1, Paragraph 7"; (5) "Conspiracy to Commit Unlawful Search"; (6) "Unlawful Search – U.S. Constitution Amendment IV"; (7) "Conspiracy to Commit Unlawful Search – 42 U.S.C. § 1985"; (8) "Conspiracy to Commit Unlawful Imprisonment of Plaintiff 42 U.S.C. § 1985"; and (9) "New Jersey Civil Rights." (*See* App. 47-61). However, the allegations of the amended complaint, as to the seven defendant officers, remained effectively the same. (App. 8). The only difference was that the amended complaint expressly referenced the suppression hearing and order, and noted that the

"trial court had suppressed all evidence as illegally gathered, that there was no lawfully gathered evidence." (*See* App. 59-60).

As Plaintiff had flouted the district court's directions and opportunity to amend, the City, jointly with the officer defendants, moved to dismiss the amended complaint. (App. 8, 47-48). Plaintiff presented substantially the same arguments that were made in support of the original complaint, but he added that "the Court's review is limited to the contents of the complaint and no other evidence." *See Roman v. City of Newark et al.*, 2017 WL 4510988, at *9, 35 (3d Cir. Appellee Principal Brief Oct 6, 2017) (quoting Plaintiff's moving brief at District Court Docket Entry ("DDE") 39, p. 5). In the alternative, Plaintiff argued that the documents outside of the amended complaint supported his position in any event. *Id.*

As Plaintiff failed to make any reasonable attempt to remedy the deficiencies that resulted in the first dismissal, the district court dismissed the amended complaint without prejudice or a window to file an amended complaint. (App. 50-51). Plaintiff responded by filing a motion for reconsideration. (*See* App. 8). Because Plaintiff offered no basis for reconsideration, and attempted to argue that the district court had failed to consider principles that had been explicitly discussed in the first two orders of dismissal, the court denied reconsideration. (*See* App. 8).

C. The Third Circuit Proceedings

Plaintiff filed a notice of appeal on or about June 15, 2017. (*See* App. 8). During the pendency of the appeal, Mr. Roman passed away. (App. 8 n.4). Mr. Roman's counsel, Justin D. Santagata, obtained limited/temporary administration papers from the New Jersey State Probate Court, so that he could prosecute the appeal on behalf of Mr. Roman's estate. *See* Petition ("Pet.") at 7; (App. 8 n.4). The Third Circuit allowed the substitution. (App. 8 n.4).[1]

On appeal, in pertinent part, Plaintiff presented the following issue, among others:

> "This Court has never ruled on the applicability of joint and several liability under 42 U.S.C. § 1983. That question governs what Plaintiff was required to plead against the individual Defendants here. The question presented here is: whether Plaintiff was required to plead which individual Defendants took which alleged acts in violation of the Fourth Amendment . . . in order to survive a motion to dismiss, . . . because the individual Defendants acted as a group, and the pleadings nevertheless delineated which individual Defendants were involved in an unconstitutional search, as opposed to which were merely

[1] Hereinafter, "Plaintiff" shall be used to refer to Mr. Roman and his estate/administrator interchangeably.

supervisors or involved after.

Roman v. City of Newark et al., 2017 WL 4005235, at *3 (3d Cir. Appellant Principal Brief Sep. 5, 2017).

This issue was briefed and presented for oral argument before the Third Circuit. (*See* App. 2). The City, jointly with the officer defendants, countered that (1) a *prima facie* civil rights claim against multiple officers must include allegations of personal participation as to each officer; (2) that because joint and several liability was a damages issue, Plaintiff must actually have meant to refer to the principle of civil conspiracy; (3) that even where there is an allegation of a conspiracy, there must still be an allegation of personal participation as to each officer; and (4) that on account of Plaintiff's allegations of fraud and misrepresentation, Plaintiff was subject to a heightened pleading standard. *Roman*, 2017 WL 4510988, at *11, 53-57 (Appellee Br.).

On January 29, 2019, a three-judge panel unanimously affirmed the district court's dismissal of the § 1983 claims against the officer defendants for unlawful search. (App. 28 n.10). The panel consisted of the Honorable Thomas Hardiman, the Honorable Kent A. Jordan, and the Honorable Thomas L. Ambro. (App. 1-46). The panel agreed with the district court that the unlawful search claims were inadequately pled as to all the individual defendants. (App. 28 n.10). Plaintiff now seeks certiorari to reverse the panel's judgment as to only Officers Mendes, Cueto, and Ferreira. Pet. at 3.

SUMMARY OF ARGUMENT

Plaintiff's petition should be denied. There was no error in the Third Circuit's affirmance of the district court's dismissal of Plaintiff's unlawful search claims. Nor does the affirmance implicate a novel issue of law that requires intervention by the Supreme Court of the United States of America. Substantively, Plaintiff confuses the concept of conspiracy with the concept of joint and several liability.

Procedurally, Plaintiff waived the issues now raised in his petition. Plaintiff argued before the district court that it should not consider the transcripts from the suppression hearing. Accordingly, Plaintiff has waived the right to argue on appeal that the transcripts now establish a *prima facie* claim. Likewise, Plaintiff did not raise the issue of personal participation pleading requirements until his motion for reconsideration. Thus, Plaintiff has also waived the right to argue on appeal that the theory of joint and several liability supplants the pleading requirement of personal participation.

Factually, the pleadings did not clearly identify which officers were responsible for the allegedly unlawful search. To the extent that the suppression hearing transcripts could be interpreted to identify an officer under estoppel principles, Plaintiff never made such an assertion below.

Analytically, any failure to sustain the claims against any one officer was harmless error. It was harmless because the contraband seized from Plaintiff's Residence and the circumstances

surrounding that seizure, are sufficient to bar Plaintiff's claims as a matter of law. Any error was also harmless because the allegations of fraud, and the well-established pleading requirements for a § 1983 claim, required plaintiff to allege personal participation as to each officer. Plaintiff made no such allegations.

ARGUMENT

Plaintiff's petition for certiorari should be dismissed because it is wholly without merit for the reasons stated below.

I. Plaintiff Fails to Identify an Important Federal Question or a Conflict Among the Circuits

Plaintiff's petition argues that certiorari should be granted because all federal appellate circuits, except for the Third Circuit, agree that the theory of joint and several liability supplants the § 1983 pleading requirement of personal participation as to each defendant. *See* Pet. at 9-16. The theory of joint and several liability has no rational connection to the well-established pleading requirements of personal participation, of which Plaintiff now complains.

Contrary to Plaintiff's assertion, the requirement that Plaintiff plead personal participation as to each officer is well-settled amongst the Federal Circuit Courts and by the Supreme Court. *See, e.g.*, *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 50 (1st Cir. 2009) (noting that a plausible civil rights claim requires allegations of personal participation or

some affirmative act that would foreseeably cause the injury allegedly incurred); *Nunez v. City of New York*, 735 F. App'x 756, 759 (2d Cir. 2018) (affirming lower court's partial dismissal of complaint for "failure to plead the requisite personal involvement in such violations"); *Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 284 (3d Cir. 2018) ("[A] defendant in a civil rights action must have 'personal involvement' in the alleged wrongs . . . ." (citation omitted)); *Meeker v. Edmundson*, 415 F.3d 317, 323 n.3 (4th Cir. 2005) ([B]oth direct personal participation and 'conduct that is the effective cause of another's direct infliction of the constitutional injury' can establish liability for a constitutional violation." (citation omitted)); *Medina v. Ortiz*, 623 F. App'x 695, 700 (5th Cir. 2015) (affirming dismissal because there were no allegations of personal participation); *Webb v. United States*, 789 F.3d 647, 671 (6th Cir. 2015) ("Plaintiffs produced no evidence that any [of the remaining defendants] personally participated in framing Webb or Price, and therefore it cannot be inferred that these Defendants joined in a common plan to frame Webb or Price."); *Dickens v. Illinois*, 753 F. App'x 390, 392 (7th Cir. 2018) ("Another impediment to Dickens's § 1983 claim is her failure to identify specific state actors who personally participated in the conduct of which she complains."); *White v. Jackson*, 865 F.3d 1064, 1081 (8th Cir. 2017) ("This is sufficient evidence to identify Vinson, Bates, Patterson, and Payne as officers who personally participated in Matthews's arrest."); *Carr v. Higgins*, 700 F. App'x 598, 601 (9th Cir. 2017) ("'In order for a person acting under color of state law to be liable under section 1983 there must be a showing of personal participation in the alleged rights deprivation[.]'" (citation omitted)); *Gray v. Sorrels*,

744 F. App'x 563, 568 (10th Cir. 2018) ("[A] § 1983 'plaintiff must show the defendant personally participated in the alleged violation, and conclusory allegations are not sufficient to state a constitutional violation.'" (citation omitted)), cert. denied, 139 S. Ct. 1335 (2019); *Elmore v. Fulton Cty. Sch. Dist.*, 605 F. App'x 906, 917 (11th Cir. 2015) (same); *see also Rizzo v. Goode*, 423 U.S. 362, 370-71, 375-76 (1976).

Similarly, it is well-settled that joint and several liability is a rule of damages that implicates the need for apportionment of damages **after** a defendant has been determined to be a joint tortfeasor; it concerns collection issues in the context of contribution and indemnification. *See generally Summers v. Tice*, 33 Cal. 2d 80, 87 (1948) (cited by Pet. at 10); *Northington v. Marin*, 102 F.3d 1564, 1569 (10th Cir. 1996) (cited by Pet. at 11).

The cases cited by Plaintiff confirm as much. *See* Pet. at 8-9 (citing *Thomas v. Cook Cty. Sheriff 's Dep't*, 604 F.3d 293, 312-13 (7th Cir. 2010) (applying joint and several liability principles in analyzing apportionment of damages in a jury verdict form); *Harper v. Albert*, 400 F.3d 1052, 1062 (7th Cir. 2005) ("[W]e considered the applicability of joint and several liability only *after* a jury had found all the named defendants liable for concurrently violating the plaintiff's constitutional rights."); *Anderson v. Nosser*, 456 F.2d 835, 841-42 (5th Cir. 1972) (same); *Jackson v. City of Pittsburg*, 518 Fed. Appx. 518, 520-521 (9th Cir. 2013) (same); *Finch v. City of Vernon*, 877 F.2d 1497, 1503 (11th Cir. 1989) (same); *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1159 (8th Cir. 2014) ("Here, the district court considered the arguments for

apportioning the fees but decided to apply the general rule that *non-prevailing defendants* are to be held jointly and severally liable for attorneys' fees and costs." (emphasis added)); *Whitfield v. Melendez-Rivera*, 431 F.3d 1, 19 (1st Cir. 2005) ("The special verdict form gave the jury the option of imposing liability jointly and severally to all defendants or in individual amounts as to each defendant. The jury chose to impose liability jointly and severally."); *Weeks v. Chaboudy*, 984 F.2d 185, 189 (6th Cir. 1993) (describing the principle of joint and several liability as "'a federal rule of damages'" (citations omitted)).

Stated differently, joint and several liability is not a legal theory of liability to be preliminarily assessed at the pleadings stage; it is a legal theory of damages. Accordingly, it appears that Plaintiff is not questioning the Third Circuit's application of the theory of joint and several liability. Rather, Plaintiff appears to be asserting that he should be allowed to plead less facts because he intended to plead a conspiracy claim under § 1983. *See* Pet. at 8 (referencing defendants acting in concert to produce one indivisible injury). As addressed in more detail below, Plaintiff has offered no justiciable controversy for the Supreme Court's review, concerning the requirements of conspiracy allegations vis-à-vis personal participation allegations.

II. The Procedural Disposition of This Matter Does Not Favor Review by the Supreme Court

The record below, on Plaintiff's issue as to the requirement of personal participation, does not provide a proper procedural basis for review by the Supreme Court. First, Plaintiff did not timely raise and preserve the instant issue before the district court. In fact, the issue was not raised until he moved for reconsideration of the second order of dismissal. In particular, Plaintiff argued on reconsideration that "he should not be required to plead personal participation. DDE 43-3. Plaintiff even went so far as to claim, '[t]o require the Plaintiff to plead more is an impossibility . . . . requir[ing] the Plaintiff to plead facts that he cannot know.' DDE 43-3 (at pg 1)." *Roman*, 2017 WL 4510988, at *35 (Appellees' Br.).

Plaintiff could have made this same argument earlier in response to the motion to dismiss the amended complaint. *See Roman*, 2017 WL 4510988, at *34-35 (Appellees' Br.); (App. 49-50 (noting that original complaint was dismissed for failure to allege personal participation, but amended complaint failed to address these deficiencies)). Furthermore, Plaintiff did not articulate any proper basis for reconsideration. (*See* App. 8). Accordingly, as the applicability of the personal participation requirement was not timely raised before the district court, it was not properly before the Third Circuit, and is not properly before this Court.

Likewise, Plaintiff's second presented question also rests on shaky procedural grounds. Plaintiff

waived the right to argue that the district court and Third Circuit should have relied more significantly on the suppression transcripts. Plaintiff has not preserved the right to argue that the lower courts erred in dismissing three of the seven officers that he sued. Pertinently, in response to Defendants' motion to dismiss the amended complaint, Plaintiff expressly argued "'the Court's review is limited to the contents of the complaint and no other evidence.' DDE 39 (at 5)." *Roman*, 2017 WL 4510988, at *35 (Appellees' Br.). In the alternative, Plaintiff argued that the documents outside of the amended complaint supported his position in any event. *See id.* (citing DDE 39). Plaintiff should not now be allowed to argue that the district court erred in granting his request to disregard the suppression transcripts and other materials.

III. The Factual Record of This Matter Does Not Favor Review by the Supreme Court

The petition should also be denied because Plaintiff mischaracterizes the record below. Plaintiff argues that the Third Circuit erred because it affirmed dismissal of the complaint as to all officers, despite a finding that "at least three **known** police officers 'forcibly entered' Adriano Roman's apartment." Pet. at 3 (citation omitted). The Third Circuit never found that the officers who were responsible for the forcible entry were all known. (*See* App. 1-46). In fact, the only officer referenced by name, at all, is Officer Mendes. (App. 5). Not even the state criminal court's suppression opinion identifies the officers responsible for the alleged forcible entry, other than a reference to Officer Mendes. (App. 4-5, 67-

68). While the suppression transcript of Officer Mendes's testimony indicated that he, Officer Ferreira, and Officer Cueto were conducting surveillance of the apartment building before the search, (App. 63), there is no evidence in the record indicating that these same exact officers were responsible for the alleged forcible entry into Plaintiff's Residence, (*see* App. 64-70). Nor does the Third Circuit's opinion indicate that the same exact officers who conducted surveillance of Plaintiff's building were the same officers who allegedly forcibly entered Plaintiff's Residence. (*See* App. 1-46).

Similarly, Plaintiff incorrectly argues that the record below clearly supported a finding of a *prima facie* unlawful search claim because the amended complaint indicated that five officers were all "specifically responsible for the unconstitutional search." Pet. at 5. To the contrary, the amended complaint reflected multiple purported injuries, such as unlawful arrest and malicious prosecution in the form of fraudulent grand jury and suppression hearing testimony and false police reports, allegedly perpetrated by seven named officers and an unspecified number of "other" unidentified officers. *Roman*, 2017 WL 436251, at *1. As to all of these injuries, the amended complaint "did not identify which officers were allegedly responsible for which actions, only that 'the acts . . . were committed either on the instruction of ... by ... or with the knowledge and consent of ... or were thereafter approved and ratified by' the Newark Officers." *Id.*

From an equitable standpoint, Plaintiff argues, as he did below, that he should not be charged with

having to plead personal participation in the amended complaint because he had no way of knowing which officers were responsible for which actions. Pet. at 8 ("Here, Mr. Roman was handcuffed, face-down on the floor, not taking notes on which officers were doing what."). This statement is patently false as it conflicts with the order of events as set forth in the record. (App. 1-46). Moreover, Plaintiff fails to explain how the officers could have handcuffed him and placed him on the floor of the Residence before they had even finished entering the Residence. More importantly, all of the information, that Plaintiff needed to include in his amended complaint, was supplied by Defendants in response to the original complaint on a motion to dismiss. (*See* App. 4 n.1). Specifically, this information was contained in the suppression transcripts. (*See* App. 4 n.1). Plaintiff chose to ignore all of that information. (*See* App. 49-50). Plaintiff did not even bother to correct his misspelling of Officer Mendes' first name, or insert the first names of several of the other officer defendants. The unique facts and equities of this case do not favor review of Plaintiff's two issues.

Presumably to avoid a finding of harmless error (due to the existence of probable cause to arrest and lack of a protected privacy interest), Plaintiff also incorrectly states that no drugs were found in the apartment itself. Pet. at 4 (citation omitted). Notably, Plaintiff cites to the amended complaint for this proposition. Pet. at 4. The amended complaint actually alleges that no drugs were found on Plaintiff's **person.** (App. 58). There is no dispute that heroin and cocaine were found in a common area of the Residence. (App. 4).

Likewise, presumably to establish collateral estoppel against Defendants, Plaintiff states that "Newark" did not appeal the state criminal court's suppression order or order dismissing the indictment against Plaintiff. Pet. at 5. Newark was not a party to the criminal proceedings. The criminal proceedings were prosecuted by the State of New Jersey. (App. 6).

IV. Review by the Supreme Court Is Not Warranted Because the Lower Courts Made No Error in Dismissing the Claims Against the Officers

Review is not warranted because the lower courts committed no error in dismissing/affirming dismissal of Plaintiff's claims against the officer defendants. As stated above, Plaintiff juxtaposes the pleading requirement of personal participation against the damages theory of joint and several liability. The comparison should have been made to the liability theory of civil conspiracy instead. In this respect, Plaintiff did not explicitly plead a conspiracy under § 1983 at all. (App. 52-61).

However, even if the complaint could be construed as implying a § 1983 conspiracy claim, the claim still would have failed under Fed R. Civ. P. 8 and 9. Concerning Fed R. Civ. P. 9, Plaintiff was already required to plead specific actions as to each officer defendant because his claims were based in fraud. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 347 (3d Cir. 2010) ("Rule 9(b) requires fraud to be 'pled with particularity in *all* claims based on fraud."); *see also Hill v. McDonough*, 547 U.S. 573, 582 (2006) (noting that heightened pleading standard can be

implemented under rules like Fed. R. Civ. P. 9); *Jones v. Bock*, 549 U.S. 199, 224 (2007) (same).

"Although Rule 9(b) falls short of requiring every material detail of the fraud . . . plaintiffs must use 'alternative means of injecting precision and some measure of substantiation into their allegations of fraud.'" *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002) (citation omitted), overruled on other grounds as stated in, *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008). "[E]ven when the defendant retains control over the flow of information, 'boilerplate and conclusory allegations will not suffice. Plaintiffs must accompany their legal theory with factual allegations that make their theoretically viable claim plausible.'" *Id.*

Where there are multiple defendants, the complaint must plead with particularity by specifying the allegations of misrepresentations applying to each defendant. *See Rapid Models & Prototypes, Inc. v. Innovated Sols.*, 71 F. Supp. 3d 492, 504 n.7 (D.N.J. 2014) (citing *MDNet, Inc. v. Pharmacia Corp.*, 147 Fed. Appx. 239, 245 (3d Cir.2005)).

Likewise, even under the lower standard of Fed. R. Civ. P. 8, in civil rights proceedings, it is well-settled that a plaintiff must plead personal participation as to each defendant, even in the case of conspiracy claims. *See Hauptmann v. Wilentz*, 570 F. Supp. 351, 390-91 (D.N.J. 1983) ("Plaintiff pleads no facts to show that Sisk and Wilentz reached an understanding whereby Wilentz would withhold exculpatory evidence from the defense, permit false testimony to go uncorrected, or encourage witnesses

to testify falsely. Nor does the complaint recite any facts from which such joint activity could be inferred. . . . In sum, ... The conspiracy allegations in the complaint ***are insufficient when measured against the requirement of specificity of pleading in civil rights cases***." (emphasis added)); *see also Jutrowski*, 904 F.3d at 284.

Here, Plaintiff failed to allege any well-pleaded facts indicating that the officer defendants participated in a conspiracy in violation of § 1983. Plaintiff failed to allege a concerted indivisible injury or conspiratorial action. (*See* App. 52-61). Rather the record reflected multiple purported injuries such as unlawful arrest and malicious prosecution in the form of fraudulent grand jury and suppression hearing testimony and false police reports. *Roman*, 2017 WL 436251, at *1. Plaintiff also failed to plead facts from which an agreement or joint action could be inferred. (*See* App. 52-61).

Concerning Plaintiff's attempt to rely on his suppression transcripts to bolster his claim, the suppression opinion did not establish that any officer was involved in the search, other than Officer Mendes. (*See* App. 62-70). However, even as to Officer Mendes, in the courts below, Plaintiff did not cite to the transcript of the suppression opinion as providing the necessary details of personal participation. *See, e.g.*, *Roman*, 2017 WL 4005235, at *36-37 (Appellant's Br.) ("While Mr. Roman could have pled more details about the unconstitutional search itself - which were nevertheless incorporated into his pleadings via the transcript of the suppression hearing - it would make no difference as a matter of pleading. Or, as the New

Jersey court held in the suppression hearing: Mendes' testimony 'wasn't clear on how many officers came in and what the sequence' was.").

Even if he had, those facts would only be cognizable if he could establish them through one or more estoppel principles. *See Jacobs v. Bayha*, 616 F. App'x 507, 510 n.3, 513-14 (3d Cir. 2015) (implicitly approving of district court's rationale that "the evidence that was considered ([criminal] trial transcripts) constituted official court records of which the court could take judicial notice even on a motion to dismiss."); *Adams v. Gould Inc.*, 739 F.2d 858, 870 n.14 (3d Cir. 1984) ("The rule in this circuit is that affirmative defenses, such as the statute of limitations and res judicata, can be asserted on a motion to dismiss."). In this respect, because Defendants were not parties to Plaintiff's criminal proceedings, (App 4-8, 64-70), estoppel would not have been available against Defendants. *See Del. River Port Auth. v. Fraternal Order of Police*, 290 F.3d 567, 573 (3d Cir. 2002) (discussing collateral estoppel); *Duhaney v. AG of the United States*, 621 F.3d 340, 347 (3d Cir. 2010) (discussing *res judicata*).

To the extent that Plaintiff now argues that specific parts of the transcripts, separate and apart from estoppel principles, established personal participation for any officers, he is prohibited from doing so under the Fed. R. Civ. P. 12(b)(6) standard. *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426, 427 n.7 (3d Cir. 1999) ("Specifically, on a motion to dismiss, we may take judicial notice of another court's opinion—not for the truth of the facts recited therein . . . . We have held

that a court that examines a transcript of a prior proceeding to find facts converts a motion to dismiss into a motion for summary judgment."); *Brody v. Hankin*, 145 F. App'x 768, 772-73 (3d Cir. 2005) (holding that a court cannot take judicial notice of facts adjudicated in a court proceeding or even the existence of certain prior collateral determinations not explicitly referenced in and attached to the complaint).

V. Review by the Supreme Court Is Not Warranted Because any Error by the Lower Courts Was Harmless

Review of this petition is also not warranted because any error by the lower courts would have been harmless based on the allegations in the case and the facts subject to estoppel.[2] The allegations at issue include (1) the discovery of large amounts of heroin, cocaine, and drug paraphernalia, (2) from a common area in Plaintiff's Residence, and (3) the numerous prior complaints of drug activity at Plaintiff's apartment building. On the basis of these allegations, Plaintiff's unlawful search claim is constitutionally irrelevant. Similarly, these allegations bar Plaintiff from maintaining the unlawful search claim because there was probable cause of his arrest.

In particular, it is well established in the Third Circuit that in § 1983 cases "victims cannot be

[2] The operative question in a harmless error analysis is whether it is highly probable that the error did not prejudice a party. *Gen. Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 329 (3d Cir. 2001).

compensated for injuries that result from the discovery of incriminating evidence and consequent criminal prosecution." *Hector v. Watt*, 235 F.3d 154, 157 (3d Cir. 2000), as amended (Jan. 26, 2001) (quoting *Townes v. City of New York*, 176 F.3d 138, 148 (2d Cir. 1999)); *Alvin v. Calabrese*, 455 F. App'x 171, 178 (3d Cir. 2011) (citations omitted); *Washington v. Hanshaw*, 552 F. App'x 169, 173 (3d Cir. 2014) (citations omitted). By the same logic, "[t]he lack of probable cause to stop and search does not vitiate the probable cause to arrest, because (among other reasons) the fruit of the poisonous tree doctrine is not available to assist a § 1983 claimant." *Townes*, 176 F.3d at 149.

This line of reasoning derives from the Supreme Court's holding in *Carey v. Piphus*, 435 U.S. 247, 264-65 (1978), that to be viable, a civil rights claim must be constitutionally relevant. *Hector*, 235 F.3d at 157 ("If *Carey* instructs that we should assess liability in terms of the risks that are constitutionally relevant, then damages for an unlawful search should not extend to post-indictment legal process, for the damages incurred in that process are too unrelated to the Fourth Amendment's privacy concerns."); *see also United States v. Calandra*, 414 U.S. 338, 348 (1974) ("In sum, the [fruit of the poisonous tree] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."); *United States v. Peltier*, 422 U.S. 531, 538–39 (1975) (same).

Stated differently, there is no protectable privacy interest in possession narcotics. *See Hector*,

235 F.3d at 157. Moreover, because the fruit-of-the-poisonous-tree doctrine is unavailable in civil cases, probable cause to arrest precludes the recovery of damages for the prior search.

Concerning the circumstances necessary to find probable cause, in *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), this Court held that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Ybarra* and *United States v. Di Re*, 332 U.S. 581, 593-94 (1948), together stand for the proposition that mere presence at the location of illegal activity is not alone sufficient to establish the kind of particularized suspicion necessary for probable cause.

However, probable cause to arrest on a constructive theory of possession may exist in cases where a search of a residence turns up contraband in such quantities to suggest a "routine business of drug sales in the apartment," when no individual at the residence admits ownership of the contraband. *Peteete v. Asbury Park Police Dep't*, No. CIV.A. 09-1220 MLC, 2010 WL 5150171, at *5 (D.N.J. Dec. 13, 2010), aff'd, 477 F. App'x 887 (3d Cir. 2012).

Likewise, where circumstances show (1) that a person lives in an apartment, (2) that drugs and drug paraphernalia are present in rooms commonly lived in or used by an occupant, and (3) that narcotics users frequent an apartment building, the circumstances are sufficient to support probable cause for, or a finding of, constructive possession of narcotics. *See Williams v. Atlantic City Dept. of Police*, Civil No. 08–4900 (JBS/AMD), 2010 WL 2265215, at *5 (D.N.J.

Jun. 2, 2010); *accord State v. Brown*, 80 N.J. 587, 594-97 (1979); *State v. Muldrow*, No. A-0860-10T2, A-5514-09T2, 2013 WL 1296287, at *14 (N.J. Ct. App. Div. April 2, 2013) (citations omitted).

Here, the appellate panel included, in its factual recitation, and/or was provided with, those factors that would have established probable cause, or established a basis to bar Plaintiff's claims under *Hector*. Notably, the panel established and/or was aware (1) that "four Newark police officers had set up surveillance outside of [plaintiff's] building because of complaints about narcotics activity," (App. 4); (2) that large amounts of drugs and drug paraphernalia were discovered consisting of 2 clear bags of approximately 40 grams of crack cocaine, 37 vials of crack cocaine, 126 glassine envelopes of heroin, (*Roman*, 2017 WL 4510988, at *23 (Appellee Br.)); and (3) the Contraband was seized from the common area of the Residence, (App. 5); *see Roman*, 2017 WL 4510988, at *29 (Appellee Br.).

These facts are sufficient to support a finding of either constructive possession or at least probable cause to arrest and prosecute for constructive possession, under *Brown* and *Peteete*. In turn, a finding of constructive possession or probable cause to arrest for constructive possession, would have been sufficient to vitiate Plaintiff's claims under *Hector*, as to all defendants. Accordingly, any error by the lower courts -- in dismissing the officers from the case -- was harmless.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that Plaintiff's petition for writ of certiorari should be denied.

Respectfully submitted.

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