No. 18-1372

In The
Supreme Court of the United States

CITY OF NEWARK, NEW JERSEY,

Petitioner,

vs.

ESTATE OF ADRIANO ROMAN, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JUSTIN D. SANTAGATA, ESQ.
Counsel of Record
KAUFMAN SEMERARO & LEIBMAN LLP
Two Executive Drive, Suite 530
Fort Lee, New Jersey 07024
T: 201-947-8855
F: 201-947-2402
E: jsantagata@northjerseyattorneys.com

Counsel for Respondent Estate of Adriano Roman, Jr.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

RELATED CASES

City of Newark v. Estate of Adriano Roman, Jr., No. 18-1372, Supreme Court of the United States. Petition pending.

Estate of Adriano Roman, Jr. v. City of Newark, et al., No. 17-2302, U.S. Court of Appeals for the Third Circuit. Mandate entered February 20, 2019.

Adriano Roman, Jr. v. City of Newark, et al., No. 16-1110, U.S. District Court for the District of New Jersey, Newark Vicinage. Judgment entered April 7, 2017.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15(2), Respondent submits this opposition to Petitioner City of Newark's ("**Newark**") petition for certiorari in order to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Put simply: Newark's petition wrongly suggests that there was no underlying constitutional violation by individual police officers, despite the express holding of a state court judge, and continues to state that Adriano Roman, Jr. possessed drugs during the challenged unconstitutional search, despite that the Third Circuit panel expressly rejected such an argument (twice).

I. The unconstitutional search

On the night of May 2, 2014, at least three police officers "forcibly entered" Mr. Roman's apartment in Newark, New Jersey. (App1, 4.) As Mr. Roman was watching a movie with his girlfriend, Tiffany Reyes, four police officers had set up surveillance outside Mr. Roman's apartment building because of "complaints about narcotics activity." (App4-5.) The officers supposedly heard an argument from inside the building and tried to enter, but the inner door to the building was locked. (App4-5.) Ms. Reyes' friend, Melissa Isaksem, happened to be walking into the building at the same time. (App5-6.) The officers cornered her and threatened to arrest her if she did not let them into the building and knock on the door to Mr. Roman's apartment.

(App5-6.) Ms. Isaksem complied with the officers' threats and knocked on the apartment door, announcing her presence; when Ms. Reyes opened the door, the officers stormed in. (App5-6.)[1]

After storming into Mr. Roman's apartment, the officers handcuffed Mr. Roman, Ms. Reyes, and Ms. Isaksem and "demanded Roman call someone to bring drugs to the apartment." (App5.) "If he did, they assured him they would make a deal and let him go." (App5.) The officers ransacked the apartment and supposedly found drugs in a "common area" used by "multiple tenants." (App5.) In mock celebration, one officer went over to Mr. Roman lying handcuffed on the floor, drove his knee into his neck, and told him that he would be "raped in prison." (App5.) Another officer told Mr. Roman's father, who lived next door, that his son would "go away for a long time." (App5.)

Mr. Roman was arrested and jailed the same night and eventually indicted for possession of drugs and intent to distribute in New Jersey Superior Court. Mr. Roman moved to suppress the drugs as evidence on the basis of an unconstitutional search and a suppression hearing was held. (App5-6.) A New Jersey Superior Court judge held the police version of the search was "incredible." (App126.) The judge held that the search was unconstitutional at its inception, the officers had no basis to enter the building or apartment without a

---

[1] Some of this factual background is taken directly from Mr. Roman's companion petition, docketed 18-1366.

warrant, and suppressed the drugs as evidence against Mr. Roman. (App129-131.)

Newark did not appeal and dismissed the indictment against Mr. Roman. (App6.) Mr. Roman ultimately spent six months in jail for no reason. (App5-6.)

II. Misstatements by Newark

Contrary to Newark's petition (Pet. at 27-29), the New Jersey Superior Court judge did not find that Mr. Roman was in possession of any drugs at the time of the unconstitutional search. The judge, in fact, rejected the officers' story that Mr. Roman dropped drugs in a hallway of the building upon sight of the officers. (App130.)

In its opinion below, the Third Circuit panel twice rejected Newark's argument that constructive possession of an apartment for standing to challenge a search under the Fourth Amendment is the same as possession of drugs within the apartment. (App30.)

REASONS WHY CERTIORARI SHOULD BE DENIED

Newark's petition should be denied because it does not actually present the question of whether a municipality can be liable under 42 U.S.C. § 1983 without an underlying constitutional violation, a question that has already been answered by this Court anyway. Instead, in the guise of that question, the petition merely

presents the question of whether an individual municipal officer must be a party to a claim in order to adjudicate municipal liability. No court has ever rendered such a holding, which would compel a plaintiff to sue individual municipal officers even if the plaintiff did not want to do so. In other words: Newark is advocating for a rule *that would require more lawsuits against individual municipal officers*, particularly police officers.

I. There is already a finding of an underlying constitutional violation here

Newark's arguments about the requirement of an underlying constitutional violation is based on *City of Los Angeles v. Heller*, 475 U.S. 796, 799, (1986) [italics/cites in original], which held in part:

> . . . neither *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

But Newark ignores that the New Jersey Superior Court held and the Third Circuit panel accepted that Mr. Roman was subject to a "constitutional harm"—

unconstitutional search and six months in jail. The entire premise of Newark's argument—lack of "constitutional harm"—is false.

Nor is there any split in the federal circuits on whether a municipality can be liable under 42 U.S.C. § 1983 without an underlying constitutional violation. This question was answered in *Heller*.

Newark simply confuses *Heller*'s requirement of an underlying constitutional violation with a nonexistent requirement that an individual municipal officer be a party to the complaint *and* must be adjudicated individually liable in order to establish municipal liability. This is not the law, and no court has suggested it is. For example, the Sixth Circuit explained the difference between Newark's erroneous position and the actual law in *Garner v. Memphis Police Dep't*, 8 F.3d 358, 365 (6th Cir. 1993):

> Defendants' reliance on *Heller* is misplaced. The point in *Heller* was that the city could not be held responsible for a constitutional violation which could have occurred but did not. In the instant case there is no doubt that a constitutional violation occurred.

Accord Corrigan v. District of Columbia, 841 F.3d 1022, 1039 (D.C. Cir. 2016); *Harte v. Bd. of Comm'rs*, 864 F.3d 1154, 1167 (10th Cir. 2017); *North v. Cuyahoga Cty.*, 754 F.App'x 380, 389 (6th Cir. 2018).

Much of Newark's petition is an attack on *Fagan v. City of Vineland*, 22 F.3d 1298, 1292 (3d Cir. 1994), and the Third Circuit's statement that "[w]e hold that

in a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution." The key phrase is "violated the Constitution." The Third Circuit explains this several lines later in *Fagan*: "[a] finding of municipal liability does not depend automatically or necessarily on the liability of any police officer." *Id.* at 1292.

The Third Circuit in *Fagan* is talking about the distinction between municipality liability and individual liability. Nothing in *Fagan* suggests that a municipality can be liable without an underlying constitutional violation. Instead, *Fagan* simply states what should be axiomatic:

> The fact that the officer's conduct may not meet that standard does not negate the injury suffered by the plaintiff as a result. If it can be shown that the plaintiff suffered that injury, which amounts to deprivation of life or liberty, because the officer was following a city policy reflecting the city policymakers' deliberate indifference to constitutional rights. . . .

Id. at 1291.

Subsequent Third Circuit precedent is not at odds with *Fagan*, despite Newark's argument to the contrary. *In re City of Philadelphia Litig.*, 49 F.3d 945, 972 (3d Cir. 1995), a divided panel affirmed the denial of summary judgment on municipal liability and the grant of summary judgment on individual liability. One of the critical disputes there was not whether a

municipality could be liable where an individual municipal offer was not, but what standard to apply to the claims. *Id.* at 964-965. The same dispute appears in *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1154 n.13 (3d Cir. 1995).

In *Brown v. Commonwealth of Pennsylvania, Dep't of Health Emergency Med. Servs. Training Inst.*, 318 F.3d 473, 482 (3d Cir. 2003) [cites/quotes omitted], the Third Circuit explained the municipal/individual liability distinction in plain terms and put any dispute about *Fagan* to rest:

> It is possible for a municipality to be held independently liable for a substantive due process violation even in situations where none of its employees are liable. In *Fagan I* we held that a municipality can be liable under section 1983 and the Fourteenth Amendment for a failure to train its police officers with respect to high-speed automobile chases, even if no individual officer participating in the chase violated the Constitution. However, for there to be municipal liability, there still must be a violation of the plaintiff's constitutional rights. It is not enough that a municipality adopted with deliberate indifference a policy of inadequately training its officers. There must be a direct causal link between the policy and a constitutional violation.

Newark's petition is just an argument that a municipality cannot be liable without the individual liability of a municipal officer, not the presentation of a split in the federal circuits.

It is long and well-settled that a municipality is not entitled to qualified immunity. *Owen v. City of Indep., Mo.*, 445 U.S. 622, 657 (1980). But Newark's argument would shield a municipality with qualified immunity because municipal liability would be conditioned upon a plaintiff overcoming the qualified immunity of an individual officer. This would be a direct derogation of *Owen*. In different terms, this is what the Third Circuit said in *Fagan*: "[t]hese claims are based on different theories and require proof of different actions and mental states." *Fagan*, 22 F.3d at 1291.

Paradoxically, Newark—the employer of thousands of police officers—is advocating a rule that would require police officers to be joined in all lawsuits under 42 U.S.C. § 1983 alleging municipal liability. The long-held distinctions between municipal and individual liability reject such a rule and there is no precedent for it, much less a split of the federal circuits.

II. Newark's other questions presented warrant little comment

Newark's other questions presented in the petition do not warrant extensive response.

First, Newark argues that the consent decree it entered with the Department of Justice did not give rise to a plausible inference of a pattern or practice of unconstitutional searches at the time of the unconstitutional search of Mr. Roman's building, as is necessary to plead municipal liability. *See* App16-18 (explaining standard). The consent decree was the

result of a complaint by the Department of Justice against Newark (App107), which could not lawfully be filed without "reasonable cause to believe" a pattern or practice of constitutional violations.[2] 42 U.S.C. § 12601. Thus, the *Department of Justice* thought there was sufficient notice of a pattern or practice. A news article explains that the Department of Justice investigation was ongoing at the time of the unconstitutional search of Mr. Roman's building. (App113.)

Curiously, Newark omits almost the entirety of the consent decree from its petition, which was cited at length by the Third Circuit panel, including that Newark police officers had to be *trained* "on the requirements of the Fourth Amendment." (App21.) This caused the panel to opine that the "DOJ probably did not enter into the consent decree because it was impressed with Newark's policing practices and wanted to encourage the City to keep up the good work." (App21.)

Second, Newark argues that res judicata or collateral estoppel should apply here because Mr. Roman was found to possess drugs. The problem is there is no such finding and Newark can cite to none. Again: the Third Circuit panel twice rejected this argument as lacking any support in the record and actually the opposite of the New Jersey Superior Court judge's findings. (App29-31.) Even assuming drugs were legitimately found in Mr. Roman's apartment—a big leap on

---

[2] The consent decree actually refers to 42 U.S.C. § 14141, but that statutory section has been transferred to 42 U.S.C. § 12601.

this record—Newark badly conflates possessory interest sufficient to challenge a search under the Fourth Amendment with constructive possession of drugs sufficient to warrant a conviction. *Compare Combs v. U.S.*, 408 U.S. 224, 227 (1972) (possessory interest for standing); *U.S. v. Brown*, 3 F.3d 673, 681 n.8 (3d Cir. 1993); *U.S. v. Jenkins*, 90 F.3d 814, 818 (3d Cir. 1996) (actual or constructive possession of drugs).

CONCLUSION

The questions presented by Newark in its petition are not questions that are actually in dispute or the subject of a split of the federal circuits. The petition should be denied.

Respectfully submitted,

JUSTIN D. SANTAGATA, ESQ.
Counsel of Record
KAUFMAN SEMERARO & LEIBMAN LLP
Two Executive Drive, Suite 530
Fort Lee, New Jersey 07024
T: 201-947-8855
F: 201-947-2402
E: jsantagata@northjerseyattorneys.com

Counsel for Respondent
Estate of Adriano Roman, Jr.