No. _____

IN THE

Supreme Court of the United States

CITY OF NEWARK,

Petitioner

v.

THE ESTATE OF ADRIANO ROMAN, JR.,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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April 29, 2019

QUESTIONS PRESENTED

This matter involves a *Monell* claim based on false arrest and malicious prosecution arising out of a warrantless and non-consensual search of Plaintiff's apartment by Newark police officers. The officers seized 2 clear bags and 37 vials of crack cocaine, 126 glassine envelopes of heroin, all of which were suppressed during Plaintiff's criminal proceedings under the fruit-of-the-poisonous-tree doctrine. Concurrently, the United States Department of Justice was concluding an investigation into the Newark Police Department, which resulted in a Consent Decree two years later. **The issues presented are as follows:**

(1) Whether, under *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), dismissal of a *Monell* claim should be affirmed, where all of the underlying claims against the officers have been dismissed.

(2) Whether, under *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009), a plausible inference from a Consent Decree, includes inferences that contradict the plain terms of the Consent Decree.

(3) Whether, under *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 317 (2011), *res judicata* estops Plaintiff, as between Plaintiff's criminal and subsequent civil-rights proceedings.

(4) Whether dismissal of a *Monell* claim should be affirmed, where Plaintiff is estopped from denying that his apartment building was known to be frequented by drug users and from denying that copious amounts of contraband and drug paraphernalia were discovered in his kitchen.

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Corporation Counsel, Kenyatta K. Stewart, Esq., through Assistant Corporation Counsel Wilson D. Antoine, Esq., and on behalf of the City of Newark (the "City"), respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

INTRODUCTION

The City seeks a writ of certiorari as to four issues of paramount importance and public interest. Certiorari is especially appropriate here, where the Third Circuit's opinion is published. In this case, the Third Circuit correctly affirmed the district court's dismissal, under Fed. R. Civ. P. 12(b)(6), of Plaintiff's original and amended complaint as to the City's individual officers because Plaintiff failed to plead a plausible claim as to those individuals.

However, the appellate panel reviewing this matter issued three separate opinions as to how, and to what extent, Plaintiff's *Monell* claim was plausible. In doing so, the appellate panel focused exclusively on whether Plaintiff had alleged that the City engaged in abusive conduct, to the exclusion of whether Plaintiff had alleged an underlying constitutional violation by the City. Certiorari should be granted to review the Third Circuit's opinion in this matter, because that opinion erodes well-established Supreme Court jurisprudence, exacerbates a split in Circuit jurisprudence, and eliminates the protections to public entities that have been developed by this Court over the course of decades.

Likewise, the appellate panel erred when it ruled that any possible inference from a consent decree constitutes a plausible inference, so long as it is consistent with a defendant's liability to a plaintiff. Here, the City had voluntarily entered into a consent decree with the United States, and both governmental entities acknowledged the City's good faith in wanting to work with United States to promoted best practices among its police force. Nevertheless, the panel ruled that it could reasonably infer that the City entered into the consent decree because it had been conducting unlawful searches. This holding is not only directly in conflict with the plain terms of the consent decree, but it is directly contrary to well-established law. In fact, it directly contradicts the landmark holding in *Ashcroft v. Iqbal*, and threatens to establish precedent that will create a conflict in the Third Circuit and with other Circuits. The Supreme Court's intervention is necessary to avoid a split in the Third Circuit as to what inferences are permissible under the *Iqbal/Twombly* standard.

Third, this matter arises out of Plaintiff's allegations of an unconstitutional search of his apartment, resulting in false arrest and malicious prosecution. Plaintiff hotly contested and disputed various facts and legal issues, resulting in findings of fact, conclusions of law, and a final judgment of dismissal in his state-court criminal proceedings. Under this Court's precedent, any adverse rulings should be binding on Plaintiff under the principle of *res judicata*. However, the appellate panel relied on a split among the Circuits on the issue of *res judicata*,

to avoid its application as between Plaintiff's criminal matter and this subsequent civil matter. This split requires resolution by the Supreme Court, and this case is an excellent vehicle to settle the matter.

Finally, the appellate panel failed to apply estoppel principles to its findings of facts to find probable cause to arrest. This failure appears to be attributable to a need for guidance from this Court. In particular, the appellate panel knew that the search of Plaintiff's residence by Newark police officers resulted in the discovery of 2 clear bags of approximately 40 grams of crack cocaine, 37 vials of crack cocaine, and 126 glassine envelopes of heroin. The appellate panel recited in its facts that Plaintiff had a possessory interest in the apartment that was searched and that the police had been conducting surveillance of his building because of numerous complaints of narcotics. Nevertheless, contrary to the weight of persuasive precedent, the Third Circuit held that there was no basis to find constructive possession or probable cause to arrest for constructive possession. Accordingly, the City seeks review by this Court to establish binding precedent for this case, and for future civil rights litigants, public entities, and criminal defendants that these factors establish probable cause to arrest and prosecute.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-45) is reported at 914 F.3d 789. The opinion of dismissal of the original complaint by the district court (App. 60-74) is reported at 2017 WL 436251. Also included in the appendix is the Third Circuit Clerk's order

substituting the Estate of Adriano Roman for decedent Adriano Roman (App. 46-47) and the district court's Opinion denying reconsideration (App. 48-51), Order denying reconsideration (App. 52-53), Opinion Dismissing the amended complaint (App. 54-58), Order dismissing the amended complaint (App. 59), and Order dismissing the original complaint (App. 75).

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Fourth Amendment of the United States Constitution, Article I, Paragraph 7 of the New Jersey Constitution, 42 U.S.C. § 1983/Federal Civil Rights Act, N.J.S.A. § 10:6-2/New Jersey Civil Rights Act, N.J.S.A. § 2C:35-5/Manufacturing CDS, N.J.S.A. § 2C:35-7/Possession of CDS Near School, and N.J.S.A. § 2C:35-10/Unlawful Possession of CDS are reproduced in the appendix to the petition (App. 77-82).

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction Below

The basis for federal jurisdiction in the court of first instance was federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), as well as supplemental jurisdiction over State-law causes of action under 28 U.S.C. § 1367. (App. 8, 61, 84). The

claim subject to that jurisdiction, which was revived by the Third Circuit, and for which review is now sought, is the *Monell* claim set forth in Count Three of the First Amended Complaint. (App. 3-4, 9 n.5, 93-101). The *Monell* claim is brought against the City under the Federal Civil Rights Act, 42 U.S.C. § 1983 and the New Jersey Civil Rights Act, N.J.S.A. § 10:6-2. (App. 3-4, 9 n.5, 93-101).

The *Monell* claim is further based on alleged underlying constitutional violations of false arrest/imprisonment and malicious prosecution. (App. 93-105). These civil rights claims, in turn, stem from Newark police officers' allegedly unlawful warrantless and non-consensual search of Plaintiff's apartment under the United States and New Jersey Constitutions. (App. 87-105).

B. Facts

On May 2, 2014, four Newark police officers had set up surveillance outside of Plaintiff's building because of complaints about narcotics. (App. 4, 87). The officers heard an argument between a man and a woman, and they decided to enter Plaintiff's apartment without a warrant. (App. 4, 87). According to the complaint, they forcibly entered Plaintiff's apartment and conducted a non-consensual search of his living space. (App. 87).

The search by Newark officers resulted in the discovery of 2 clear bags of approximately 40 grams of crack cocaine, 37 vials of crack cocaine, 126 glassine envelopes of heroin, 12 tan rubber bands used to secure glassine envelopes, 1 clear bag used to house

the aforementioned vials (the "Contraband"). (*See* App. 123, 125-126, 134-137). Plaintiff was arrested and charged with possession of a controlled dangerous substance and possession with the intent to distribute near a school. (App. 5-6, 117).

On or about December 8, 2014, the Honorable Bahir Kamil of the Superior Court of New Jersey, Essex County, Criminal Division, issued an oral opinion during Plaintiff's suppression hearing. (App. 121-122). As part of his findings of fact, Judge Kamil found that the Contraband was discovered in the kitchen of the apartment, having found Plaintiff's witnesses more credible on this issue. (App. 128). Judge Kamil also found that Plaintiff had a possessory interest in the apartment from which the Contraband was seized based on the testimony of Plaintiff's landlord. (App. 127).

Nevertheless, Judge Kamil ruled that the Contraband had to be suppressed under the fruit-of-the-poisonous-tree doctrine. (*See* App. 131). Specifically, Judge Kamil found Plaintiff's witnesses to be more credible as to how the search was conducted, and he found that the officers had unlawfully searched Plaintiff's apartment without probable cause. (App. 131). With the only incriminating evidence suppressed, the prosecutor recommended dismissal of the case. (App. 118, 131-132). On December 18, 2014, Judge Kamil issued a final judgment of dismissal. (App. 118).

C. 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." (App. 62, 64-74).

The documents incorporated by reference into the complaint were a press release from the U.S. Attorney's Office ("USAO") and a Star-Ledger article, referencing both the appointment of a federal monitor of the Newark Police Department and an investigation of the Newark Police Department by the federal government. (*See* App. 56-57, 113-115). Although, the complaint quoted and relied on these articles as evidence of a custom of poor training and supervision of Newark Officers, the articles did not match the type of constitutional violation asserted in

this case. (*See* App. 42n.6, 67-68, 113-115). Furthermore, they stated that the City had taken measures to address any the violations referenced in the articles. (App. 113-115). In particular, although the articles reference the USAO's opinion that the City's reporting and/or training customs might be deficient, they also note that the appointment of a federal monitor was a result of an agreement reached by both the City and the USAO. (App. 113-115). The press release in particular, explicitly referenced the agreement as a consent decree (the "Consent Decree") between the City and the USAO. (App. 113).

The City and the officer defendants jointly moved to dismiss the original complaint under Fed. R. Civ. P. 12(b)(6). (App. 60). Attached to the City's motion, was the Consent Decree with the USAO. (*See* App. 11). In the Consent Decree, (1) the USAO recognized that the Newark Police Department "is also committed to [the goals that police services delivered to the people of Newark fully comply with the Constitution and the law of the United States among other things,] and is taking steps to better achieve them"; (2) the City denies the allegations of the [USAO's] complaint; and (3) the Consent Decree and related documents are deemed settlement material and that nothing in the agreement should be "construed as an acknowledgement, agreement, admission, statement, or evidence of liability of the City, NPD, or any of its officers or officials." (App. 106-108). Notably, the Consent Decree did not address allegations of unlawful searches of homes without probable cause. (App. 39-40).

The City's motion also 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 Judge Kamil's 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. (*See* App. 29).

The Honorable Susan D. Wigenton, U.S.D.J., dismissed the complaint without prejudice. (App. 7-8). Concerning the *Monell* claim, the district court declined to consider the transcripts, Consent Decree, and other records from Plaintiff's criminal proceedings. (*See* App. 60-74). The district court explicitly relied on the allegations in the complaint, and implicitly relied on the press releases incorporated therein by reference. (*See* App. 60-74). The district court found that the complaint was not plausible because (1) Plaintiff had alleged a pattern of constitutional violations by the City, relating to violations distinct and different from those alleged in the Complaint; and (2) Plaintiff had not plausibly alleged deliberate indifference, and/or failure to engage in corrective measures, in light of the incorporated allegations that the City agreed to the imposition of a federal monitor. (*See* App. 60-74).

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." However, the allegations of the amended complaint in support of the *Monell* claim remained effectively the same. The only difference was that the amended complaint expressly referenced the suppression hearing and order, noted that the "trial court had suppressed all evidence as illegally gathered, that there was no lawfully gathered evidence." (App. 57, 83-105).

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, 55, 57). Plaintiff presented substantially the same arguments that were made in support of the original complaint, but 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 Brief Oct 6, 2017) (quoting Plaintiff's moving brief at District Court Docket Entry 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. 54-59). Plaintiff responded by filing a motion for reconsideration. (App. 48-49). 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. (App. 48-53).

D. 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. (*Cf.* App. 46-47). The Third Circuit allowed the substitution. (*See* App. 46-47).

On appeal, in pertinent part, one of the issues presented by Plaintiff was "how and to what extent a plaintiff can rely upon . . . consent decrees as a basis for custom or policy liability under 42 U.S.C. § 1983." *Roman v. City of Newark et al.*, 2017 WL 4005235, at *2 (3d Cir. Appellant Principal Brief Sep. 5, 2017). This issue was briefed and presented for oral argument before the Third Circuit. (*See* App. 2). Plaintiff argued that the Consent Decree and Transcripts effectively established a *prima facie Monell* claim, because the transcripts established an underlying unconstitutional search (without probable cause to search) and the Consent Decree established a pattern of unconstitutional conduct **generally**. Conversely, the City, jointly with the officer defendants, countered that the Consent Decree and Transcripts effectively barred Plaintiff's claim because the transcripts established probable cause to

arrest Plaintiff, while the Consent Decree's plain terms negated any inference of deliberate indifference and did not reference the same type of underlying constitutional violation being asserted by Plaintiff in this matter.

On January 29, 2019, a three-judge panel issued three opinions, consisting of a majority opinion, a concurring opinion, and a concurring and dissenting opinion. (App. 1-45). The split panel issued a published opinion, affirming the district court in part and reversing and remanding the case in part. (App. 1-45). The panel consisted of the Honorable Thomas Hardiman, the Honorable Kent A. Jordan, and the Honorable Thomas L. Ambro. (App. 1-45).

The appellate panel unanimously affirmed the district court's dismissal of the civil rights claims against the individual officers because Plaintiff had unequivocally failed to allege personal participation as to each officer. (App. 3-4, 32, 34-35). The appellate panel likewise unanimously held that (1) *res judicata* was unavailable as between a criminal case and a subsequent civil rights case; and (2) that the possessory interest in the apartment was not enough to conclude that Plaintiff has actual or constructive possession over the Contraband found therein. (App. 28-30, 32, 34-35). Concerning the holding on constructive possession, the appellate panel's opinion, (App. 29-30), did not reference its own factual findings that (1) the officers "found drugs in a common area," and (2) the "police officers had set up surveillance outside of [Plaintiff's] building because of complaints about narcotics activity," (App. 2, 4), or the undisputedly large amount of Contraband discovered,

(App. 123, 125-126, 134-137).

The appellate panel's diverging opinions related to how much of the *Monell* claim should be reinstated, and why. (App. 1-45). Circuit Judge Jordan joined in Circuit Judge Ambro's opinion in holding that the Consent Decree in connection with the press releases, stated a plausible *Monell* claim against the City based on a pattern of unconstitutional warrantless and nonconsensual searches, and based on a failure to sufficiently train, supervise, and discipline officers. (App. 32). Circuit Judge Jordan also wrote a concurring opinion that the Consent Decree and the Complaint alone were sufficient to state such a plausible *Monell* claim. (App. 32-33). Circuit Judge Hardiman dissented that neither the press releases, nor the Consent Decree established a plausible *Monell* claim. (App. 34-45). However, Circuit Judge Hardiman concurred that a plausible *Monell* claim based only on insufficient training, supervision, and discipline was established by the allegations of the amended complaint. (App. 44). Notably, those allegations selectively and misleadingly quoted the above-referenced press releases. (*See* App. 44, 94-98).

While the Majority agreed "with the dissent on the 'clear' difference between 'agreeing to train more' (the consent decree on its face) and 'agreeing that prior training was constitutionally inadequate' (the way in which the decree supports Roman's claims)," the Majority concluded that a "reasonable inference bridges the gap in this case." (App. 21-22). The Majority reasoned that a pattern of constitutionally inadequate training was inferable from the Consent

Decree's requirement that certain best practices would begin, or continue, to be enforced (the Consent Decree was silent on which practices might already have been in place). (*See* App. 21-23). By the same reasoning, the Majority implied that the district court should have ignored all inferences favoring the City, even if they arose from the plain terms of the Consent Decree. (*See* App. 23-24).

Notably, the appellate panel did not expressly address the requirement of *Monell* that there be an underlying constitutional violation by a public entity's employees. (*See* App. 1-45). Rather, its opinion implies that a public entity can be held liable for a *Monell* violation where none of the persons alleged to have committed a constitutional violation are party to the suit, where its employees have committed no constitutional violation against a plaintiff, and/or where such employees have been dismissed from the case. (*See* App. 1-45). In fact, the Majority opined that "the specific events leading up to Roman's search and arrest are not relevant to the merits of his municipal liability claim." (App. 22-23).

REASONS FOR GRANTING THE PETITION

The City intends to file a petition for certiorari to the Supreme Court of United States on the following four meritorious and substantial grounds: (1) That a *Monell* claim cannot proceed against a public entity without the underlying employees and an adjudication of whether they violated Plaintiff's constitutional rights; (2) that a reasonable inference only includes *plausible* inferences, not any *possible* inference; (3) that the doctrine of *res judicata* is

applicable as between a criminal matter and a civil matter; and (4) that Plaintiff's *Monell* claim is barred by *Hector v. Watt*, 235 F.3d 154, 157 (3d Cir. 2000), where he is estopped from denying that his apartment complex was known to be frequented by drug users and that copious amounts of contraband and drug paraphernalia were discovered in his apartment.

I. The Supreme Court Should Grant Certiorari to Address the Issue of Whether a Monell Claim Can Proceed in the Absence of the Employees Alleged to Have Violated Constitutional Rights

The City petitions for writ of certiorari on the issue of whether a *Monell* claim is barred by the dismissal of employees alleged to have violated Constitutional rights. Certiorari should be granted because the Third Circuit's ruling was palpably incorrect and conflicts with well-established decisions of the U.S. Supreme Court and other Circuit Courts of Appeal. The Third Circuit improperly focused on whether Plaintiff alleged abusive conduct by the City, rather than on whether any conduct of the City resulted in a violation of Plaintiff's constitutional rights.

As the U.S. Supreme Court enunciated in *Collins v. City of Harker Heights, Tex.*, the focus of the *Monell* analysis is not on abusive versus non-abusive municipal conduct, but on whether the municipal conduct violated a plaintiff's constitutional rights. 503 U.S. 115, 119-120 (1992) ("Our cases do not support the Court of Appeals' reading of § 1983 as requiring proof of an abuse of governmental power

separate and apart from the proof of a constitutional violation.").

Here, the appellate panel focused exclusively on the issue of alleged abuse of governmental power, with no consideration of whether Plaintiff had alleged an underlying constitutional violation by a named defendant officer. (*See* App. 1-45). The Third Circuit even went so far as to state that the alleged facts that were needed to show a constitutional violation are irrelevant. (App. 22-23 ("Additionally, and to repeat, the specific events leading up to Roman's search and arrest are not relevant to the merits of his municipal liability claim")).

For over three decades, the highest court in the land has unequivocally established,

> neither *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (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 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.

City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986).

For over two decades, certain appellate panels have created a split in the Third Circuit by eroding

Supreme Court precedent. *See, e.g.*, *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3d Cir. 1994) (holding that a municipality can be liable under section 1983 where no individual officer has violated the Constitution); *In re City of Philadelphia*, 49 F.3d 945, 972 (3d Cir. 1995) (dissenting because a municipality cannot be liable under a *Monell* claim where there is no underlying constitutional violation by an employee) (J. Greenberg Dissenting); *Brown v. Commonwealth of Pennsylvania, Dep't of Health Emergency Med. Servs. Training Inst.*, 318 F.3d 473, 482 (3d Cir. 2003) ("In *Fagan I* we held 'that a municipality can be liable under section 1983 and the Fourteenth Amendment . . . even if no individual officer . . . 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." (citations omitted)); *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153, n.13 (3d Cir. 1995) ("In this regard, we note that there is some inconsistency in our circuit as to the standard governing the underlying constitutional violation in policy, custom or practice cases. . . . [t]he Fagan panel opinion appeared to hold that a plaintiff can establish a constitutional violation predicate to a claim of municipal liability simply by demonstrating that the policymakers, acting with deliberate indifference, enacted an inadequate policy that caused an injury. It appears that, by focusing almost exclusively on the 'deliberate indifference' prong of the *Collins* test, the panel opinion did not apply the first prong—

establishing an underlying constitutional violation.").

The complete disregard of the "underlying constitutional violation" prong by certain appellate panels has also created a conflict with other circuits. *See, e.g.*, *Young v. City of Mt. Ranier*, 238 F.3d 567 n.9 (4th Cir. 2001) ("The Parents urge us to ignore our own cases and instead accept the analysis of the Third Circuit Court of Appeals. . . . . We are, of course, bound by the precedent in our own circuit." (citing *Fagan,* 22 F.3d at 1292) (citations omitted)); *Evans v. Avery*, 100 F.3d 1033, 1040 (1st Cir. 1996) ("The *Fagan* panel described the 'deliberate indifference' test as a 'different theor[y]' for municipal liability, 22 F.3d at 1292, but the 'deliberate indifference' test is not an independent theory at all. Rather, deliberate indifference is merely an articulation of the second prong of the *Collins* framework, adapted to 'policy and custom' cases. In treating it as a separate theory, the *Fagan* panel ignored the first segment of the framework: the requirement that the plaintiff's harm be caused by a constitutional violation."); *Thompson v. Boggs*, 33 F.3d 847, 859 n.11 (7th Cir. 1994) ("We note that a recent Third Circuit decision, [*Fagan*], held that a city could be liable under *Monell* even though the individual officer was not liable. . . . Thus we choose to follow the clear holding of *Heller* that '[i]f 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.'" (citations omitted)).

This holding from *Fagan*, has resulted in a published decision by the Third Circuit, in

contravention of *Heller*, that Plaintiff's *Monell* claim should proceed even though the underlying constitutional claims have been dismissed as to the City's officers.

II. The Supreme Court Should Grant Certiorari to Address the Issue of Whether any Possible Inference From a Consent Decree Can Be Deemed Plausible, Even When It Conflicts With the Plain Terms of the Consent Decree

The City petitions for writ of certiorari on the issue of what inferences from a consent decree can be deemed plausible. Certiorari should be granted because the Third Circuit's ruling was palpably incorrect and conflicts with the well-established decision of the U.S. Supreme Court in the landmark cases of *Bell Atl. Corp. v. Twombly ("Twombly")*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal ("Iqbal")*, 556 U.S. 662 (2009).

The application of the plausibility standard in the context of *Monell* claims is a matter of substantial import and public interest, with far reaching implications for all public entities. It for this reason that intervention by the Supreme Court is necessary. The published opinion of the majority of the appellate panel in this matter would allow Plaintiff (and plaintiff in other similar cases) to proceed to burdensome discovery by relying on speculative inferences, rather than plausible ones. *See Twombly*, 550 U.S. at 546 ("It is no answer to say that a claim just shy of plausible entitlement can be weeded out early in the discovery process, given the common

lament that the success of judicial supervision in checking discovery abuse has been modest.").

"A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 129. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (citation omitted).

For example, in *Iqbal*, the complaint had not "'nudged [plaintiff's] claims' of invidious discrimination 'across the line from conceivable to plausible.'" *Id.* at 681 (citations omitted). There were well-pleaded allegations the FBI and "Defendant MUELLER, arrested and detained thousands of Arab Muslim men." *Id.* (citations omitted) (internal quotation marks omitted). Also alleged was that "[t]he policy of holding post–September–11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER." *Id.* (citations omitted) (internal quotation marks omitted).

The Supreme Court held, "[t]aken as true, these allegations are consistent with petitioners purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But given **more likely explanations**, they do not

plausibly establish this purpose." *Id.* (citations omitted) (internal quotation marks omitted) (emphasis added); *accord Argueta v. U.S. Immigration & Customs Enf't*, 643 F.3d 60, 73 (3d Cir. 2011).

While the Supreme Court acknowledged that "parallel conduct was consistent" with discrimination, the plaintiff's detainment was "**likely lawful** and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Iqbal*, 556 U.S. at 681, 682 (citations omitted) (emphasis added). Stated differently, it was more likely that the government defendants had not acted for an improper purpose because the legitimate reason proffered for their conduct was not contradicted by the remaining allegations of the complaint. *See id.*

Here, the appellate panel held that the district court should have ignored all legitimate reasons for the City's entry into a consent agreement. (*See* App. 23). The panel agreed that specific well-pleaded allegations and warranted inferences were required to satisfy the plausibility standard. (App. 9 ("However, 'we are not compelled to accept unsupported conclusions and unwarranted inferences . . . or a legal conclusion couched as a factual allegation[.]'") (citations omitted)). The panel acknowledged the plain reasonable inferences from the Consent Decree. (App. 21-22). Nevertheless, the panel held that they were authorized to derive an inference completely contrary to the plain terms of the Consent Decree. (App. 22). Likewise, even the dissent/concurrence deemed allegations to be well-pleaded,

notwithstanding that those allegations mischaracterized the underlying documents that the Complaint relied on. (App. 44, 93-98, 113-115).

Concerning the Majority's unwarranted inferences, as discussed by the dissent of the Honorable Thomas M. Hardiman, none of the documents outside the Complaint, and in the record before the district court, provided a basis to find that there were well-pleaded allegations of a pattern of warrantless searches and constitutional violations, or of a failure to train and supervise, by the City. (*See generally*, App. 34-45).

While the Majority agreed "with the dissent on the 'clear' difference between 'agreeing to train more' (**the consent decree on its face**) and 'agreeing that prior training was constitutionally inadequate' (the way in which the decree supports Roman's claims)," the Majority concluded that a "reasonable inference bridges the gap in this case." (App. 21-22 (emphasis added)). The Majority reasoned that a pattern of constitutionally inadequate training was inferable from the Consent Decree's requirement that certain best practices would begin, or continue, to be enforced (the Consent Decree was silent on which practices might already have been in place). (*See* App. 15-23).

This inference contradicted the plain language of the Consent Decree, and the inference was thus not plausible. *See* (App. 107 at ¶¶ 2-3 (wherein United States recognized that the Newark Police Department "is also committed to [the goals that police services delivered to the people of Newark fully comply with the Constitution and the law of the United States among other things,] and is taking steps to better

achieve them"; (2) that "the City and NPD do not admit to the allegations of the [USAO's] complaint"; and (3) the Consent Decree and related documents are deemed settlement material that cannot be used as evidence against the City of Newark)); (App. 108 at ¶¶ 216-217 (same)); *Genesis Bio Pharm., Inc. v. Chiron Corp.*, 27 F. App'x 94, 99 (3d Cir. 2002) (noting that allegations and inferences, specifically parole evidence, should not contradict the plain terms of a settlement agreement).

Concerning the allegations of the Complaint, the dissent, contrary to established law, effectively implied that the amended complaint was sufficient on its own because the complaint alleged a *Monell* claim by mischaracterizing the documents relied on. *Compare* (App. 44 (citing -- as sufficient to support a *Monell* claim based on training and supervision -- paragraphs of the Complaint that quote the press release and article); *with* App. 42n.6 (stating that neither the press release, nor the article support any *Monell* claim); *and S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 427 (3d Cir. 1999) (noting that on a motion to dismiss a court should disregard allegations that are contradicted by the documents on which they rely).

The panel's published opinion effectively states that Plaintiff is not entitled to only *plausible* inferences, but any *possible* inference that is consistent with a *prima facie Monell* claim. The Supreme Court should exercise its supervisory jurisdiction over this matter, to preserve the holding of *Iqbal* and *Twombly* in the Third Circuit.

III. The Supreme Court Should Grant Certiorari to Address the Issue of Whether *Res Judicata* Applies As Between Criminal and Civil Proceedings

The City petitions for writ of certiorari on the issue of whether *res judicata* applies to estop a civil rights plaintiff from re-litigating, in a civil rights proceedings, facts that were adversely established against him in prior criminal proceeding. Certiorari should be granted because this issue presents an important question of federal law that has not been, but should be, settled by the Supreme Court, especially in light of the split in how this matter is address by different circuit court of appeals.

The Supreme Court has already noted that some federal courts have expanded the definition, of cause of action, so that criminal judgments can be given preclusive effect to civil actions. *Allen v. McCurry*, 449 U.S. 90, 95 n.6 (1980) ("In *Blonder–Tongue* the Court noted other trends in the state and federal courts expanding the preclusive effects of judgments, such as the broadened definition of 'claim' in the context of *res judicata* and the greater preclusive effect given criminal judgments in subsequent civil cases." (citations omitted)).

The Supreme Court has also appeared to embrace the broader definition of "cause of action" which should in turn allow criminal cases to have a greater preclusive effect in subsequent civil cases. In particular, this Court has held that causes of action are the same "if they are based on substantially the same operative facts, regardless of the relief sought in

each suit." *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 317 (2011). Likewise, the Third Circuit also espouses this interpretation of claims for the purposes of *res judicata*. In the Third Circuit, "*res judicata* is generally thought to turn on the essential similarity of the underlying events giving rise to the various legal claims." *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 261 (3d Cir. 2010).

Accordingly, causes of action can still be considered to be the same, even when one is asserted in a criminal matter, and another in a civil matter. *Mujaddid v. Wehling*, No. CV 12-7750 (JBS/JS), 2016 WL 310742, at *9 (D.N.J. Jan. 25, 2016) (applying *res judicata* where "Plaintiff's instant federal civil rights suit is 'based on the same cause of action' as his . . . criminal prosecution in Cumberland County and later the Vineland Municipal Court.); *Wheeler v. Nieves*, 762 F. Supp. 617, 625 (D.N.J. 1991) ("In the instant case, there is a sufficient identity of causes of action and parties to hold the prior criminal proceedings preclusive of the present civil action."); *John Wiley & Sons, Inc. v. Brock,* No. 13-CV-5524 (KM), 2016 WL 8679220, at *3 (D.N.J. Aug. 5, 2016) ("Brock's guilty plea is the equivalent of a conviction, beyond a reasonable doubt, of wire fraud in connection with the textbook scheme. It will be given effect in this action, where the burden of proof is far lower.").

Nevertheless, as the panel in this matter pointed out, both within the Third Circuit, and outside of the Third Circuit, courts have declined to apply *res judicata*, as between a criminal proceeding and a subsequent civil proceeding, focusing instead on the legal elements of the cause of action and on the mere

fact that the burden differs. *See, e.g.*, (App. 29 (quoting *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938) ("The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*."); *Leather v. Eyck*, 180 F.3d 420, 425 (2d Cir. 1999) ("[B]ecause the nature of the prior state[-]court proceeding was such that [the Appellant] could not have sought damages for his alleged constitutional injuries (while defending himself on [a criminal] charge . . .), *res judicata* does not bar his federal § 1983 suit for damages.")); *Hernandez v. City of Los Angeles*, 624 F.2d 935, 937 n.3 (9th Cir. 1980) ("[W]e refused to invoke collateral estoppel to foreclose a section 1983 plaintiff from raising a fourth amendment claim which he had previously asserted in a suppression hearing in his defense against criminal charges in state court."); *Flood v. Schaefer*, 367 F. App'x 315, 319 (3d Cir. 2010) (finding plaintiff's claims were not barred by preclusion principles because Plaintiff could not be expected to raise excessive force claims in his criminal suppression hearing unrelated to the voluntariness of his confession.); *Sibert v. Phelan*, 901 F. Supp. 183, 186 (D.N.J. Sept. 21, 1995) (same).

The Supreme Court should exercise its supervisory jurisdiction over this matter, to finally settle the issue of applicability of res judicata under circumstances such as the one presented in this case.

IV. The Supreme Court Should Grant Certiorari to Address the Issue of Whether the Facts, that Plaintiff Is Estopped from Denying, Both Establish Probable Cause and Bar His Claims As Constitutionally Irrelevant

The City petitions for writ of certiorari on the issue of whether a certain set of facts establish probable cause for arrest and simultaneously bar an unlawful search claim as constitutionally irrelevant. Certiorari should be granted because this issue presents an important question of federal law that has not been, but should be, settled by the Supreme Court. The facts at issue include the discovery of large amounts of contraband and drug paraphernalia from a common area in Plaintiff's home (namely the kitchen) and the numerous complaints of drug activity at his apartment building prior to his arrest.

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

Much less settled is the issue of what minimal evidence, over and above a possessory interest in a residence, is necessary to a finding of probable cause to arrest and prosecute. 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), which 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, in the absence of clear guidance from the Supreme Court or the Third Circuit, New Jersey

district courts have held that 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, New Jersey district courts have held that circumstances showing that a person lives in an apartment, that drugs and drug paraphernalia are present in rooms commonly lived in or used by an occupant, and that narcotics users frequent an apartment building, are sufficient to support probable cause for, or a finding of, constructive possession. *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).

Nevertheless, the panel ruled that a mere possessory interest in the residence where the drugs were found was insufficient to bar Plaintiff's claim. (App. 31). The panel's error is manifest in light of the fact that it included, in its factual recitation, those factors that would have established probable cause or a basis to bar Plaintiff's claims under *Hector*. Notably, the panel established (1) that "the[officers] were in that area . . . due to numerous complaints of CDS," (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, (App. 123, 125-126, 134-137; *Roman*, 2017 WL 4510988, at *23 (Appellee Br.)); and (3) the Contraband was seized from the kitchen in the back of the apartment, (App. 5, 130; *see Roman*, 2017 WL 4510988, at *29 (Appellee Br.)).

These facts were 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*. The Third Circuit's failure is now the Supreme Court's opportunity to settle this matter and provide precedential guidance for future circuit and district courts, civil rights litigants, public entities, and even criminal defendants.

CONCLUSION

For the foregoing reasons, Petitioner City of Newark respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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