United States Court of Appeals, Eleventh Circuit.
Taiwan SMART, Plaintiff-Appellee,
v.
CITY OF MIAMI, An Incorporated Municipality, Defendant-Appellant.

No. 16-16740
(June 28, 2018)

## Attorneys and Law Firms

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Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:13-cv-24354-MGC
Before JORDAN and JILL PRYOR, Circuit Judges, and DUFFEY, District Judge.*

## Opinion

PER CURIAM:

Taiwan Smart was imprisoned for 19 months following his arrest as a suspect in a double homicide in Miami. After the charges against him were dismissed and he was released from custody, Mr. Smart sued the

City of Miami for false arrest under state law, false imprisonment under state law, and deprivation of his Fourth Amendment rights under 42 U.S.C. § 1983. The Fourth Amendment claims were based on the nonconsensual filming (in 2009) and broadcast (in 2010) by The First 48 of Mr. Smart's apartment, questioning, arrest, and interrogation. The First 48, a reality television program, had contracted with the City for the filming and broadcast of police investigations and activities.[1]

The district court granted summary judgment for the City on the state law false arrest claim. The remaining claims went to trial. At the close of the evidence, the district court granted judgment as a matter of law to Mr. Smart on his § 1983 Fourth Amendment claim based on the filming and broadcast of the murder scene in the apartment. It submitted that claim to the jury only to determine damages. *See* D.E. 101 at 17-18 (jury instructions).

The jury awarded Mr. Smart a total of $860,200 in damages: $403,450 on the state law false imprisonment claim, and $456,750 on the three § 1983 Fourth Amendment claims. With respect to the § 1983 claim based on the filming and broadcast of the murder scene at the apartment, the jury awarded Mr. Smart $152,250. As to the other two § 1983 claims, the jury found that the City violated the Fourth Amendment by allowing The First 48 to film and broadcast Mr. Smart in handcuffs before and after his arrest, and awarded him $152,250. It also found that the City violated the Fourth Amendment by allowing The First 48 to film and broadcast Mr. Smart's interrogation, and awarded him $152,250.

The City makes three main arguments on appeal. First, it asserts that the district court erred in

denying its renewed motion for judgment as a matter of law on the state law false imprisonment claim because Mr. Smart was held in custody pursuant to a valid judicial order. Second, it argues that the district court erred in denying its renewed motion for judgment as a matter of law on Mr. Smart's § 1983 claims, and in granting judgment as a matter of law to Mr. Smart on the liability aspect of one of his § 1983 claims, because (a) there was insufficient evidence to show a policy, custom, or practice on the part of the City and (b) the filming by The First 48 did not violate any of Mr. Smart's constitutional rights. Third, it contends that the district court should have granted its motion for a new trial due to the improper admission of evidence and a closing argument remark by Mr. Smart's counsel. Based on a review of the record, and with the benefit of oral argument, we affirm in part and reverse in part.[2]

## I

Most of the facts in this case are undisputed, but the inferences to be drawn from them, and the legal implications resulting from them, are hotly contested. We set out the basic facts below, but additional facts and relevant portions of the evidence at trial are detailed later, where appropriate, to explain our analysis of the issues on appeal.

### A

In 2004, The First 48—a popular reality television show based on the premise that homicide detectives need to get leads during the first 48 hours after a murder to have the best chance of solving the case—contracted with the City of Miami to feature the

City and its Police Department in its broadcasts. In 2008, the City requested the addition of further terms to the contract. These additional terms specified, in part, that no stagings or reenactments were permitted, and that no film crew could enter upon private property without first obtaining consent from the property owner. Crews from The First 48 often were present at the offices of the homicide division. If they were not around when a call came in about a murder, detectives would call The First 48 so crewmembers could accompany the police to the scene.

By its tenth season in 2013, The First 48 had featured the City in 64 episodes documenting 76 cases handled by the homicide division of its Police Department. The 2009 Annual Report of the City of Miami Police Department dedicated a page to The First 48, showing a group photo of the Miami homicide detectives who had appeared on the show alongside the film crews imbedded within the Police Department. The caption accompanying that photo states: "People have come from around the globe to meet the Miami Police stars of the 'The First 48,' the attention-grabbing series that has put the MPD in the limelight and captivated the television viewing audience." D.E. 110 at 67.

**B**

On November 14, 2009, 14-year-old Raynathan Ray and 18-year-old Jonathan Volcy were murdered during a drug deal in an apartment in Little Haiti, in the City of Miami. Mr. Smart had lived in that apartment for several months, including at the time of the murders. Both boys were shot at close range, one in the back of the neck and one in the top of the head.

When police officers arrived at the apartment to investigate the murders, The First 48 was with them and filmed the murder scene without Mr. Smart's consent. *See, e.g.*, D.E. 105 at 174.

Three days after the murders, Mr. Smart contacted the Miami Police Department. He said that he was in the apartment when the shootings occurred, but ran away to hide because he feared that he too would be shot. Mr. Smart later met Detective Fabio Sanchez, a homicide detective with the Police Department, at a convenience store. Detective Sanchez frisked Mr. Smart and interviewed him.

A cameraman from The First 48 who had accompanied Detective Sanchez filmed the conversation between Mr. Smart and Detective Sanchez. When Mr. Smart kept turning his head away to avoid being filmed, Detective Sanchez handcuffed Mr. Smart, ostensibly out of fear that he would run. Then Detective Sanchez put Mr. Smart in the back of his vehicle to await transportation to the police station for further questioning. Mr. Smart said he was afraid and did not want television cameras to show his face. He was never asked for his consent to be filmed, and never gave his consent to be filmed. Detective Sanchez, for his part, did nothing to stop the filming. The First 48 filmed Mr. Smart being transferred from Detective Sanchez's car to a police cruiser, exiting the cruiser at the police station, entering the police station, riding up the elevator, and walking into an interrogation room. Mr. Smart again did not consent to being filmed. *See, e.g.*, D.E. 105 at 75-76; D.E. 107 at 188.

Over a period of 15 hours, Detective Sanchez and his partner interrogated Mr. Smart. The entire interrogation was recorded. It is unclear whether the City or The First 48 owned the video equipment which

was used to record Mr. Smart's interrogation, but The First 48 obtained the interrogation videotape for use in its program. Mr. Smart did not consent to being videotaped in the interrogation room or to having the videotape given to The First 48. *See, e.g.*, D.E. 105 at 75-76.

Mr. Smart was arrested and charged with two counts of second-degree murder, two counts of drug possession, and one count of being a felon in possession of a firearm. The First 48 again filmed Mr. Smart without his consent as he exited the interrogation room, was taken to the elevator, rode in the elevator, and was put in a police cruiser to be taken to jail.

## C

The following day, November 18, 2009, the state circuit court held a bond hearing for Mr. Smart. It determined that the face of the arrest form did not demonstrate probable cause for the arrest. The state circuit court held a probable cause hearing the following day, at which Detective Sanchez testified. The federal district court later characterized his testimony as "at best, a gross misrepresentation of the facts" because Detective Sanchez "took gross liberties in misconstruing the facts known to him." D.E. 66 at 12.

For example, Detective Sanchez misconstrued Mr. Smart's explanation of what had happened at the apartment, as well as the statement of Ciara Armbrister, who had been in the apartment before the shooting:

> A. She [Ms. Armbrister] was there prior—he was prior—yes, she was aware that he was there prior to the shooting, along with the two victims

> who are now deceased—arguing over drugs and money.
> Q. So they were arguing? She could hear the argument?
> A. Yes, your Honor.
> Q. Did anyone else—was anyone else there besides the three males?
> A. Well the defendant placed himself and shortly before the shooting he places somebody else in the apartment, but then that person subsequently leaves. So the defendant himself, only places himself and two deceased victims in the apartment at the time of the shooting.

D.E. 38-8 at 7. Ms. Armbrister's testimony, however, was that two *other* people had been arguing over drugs and money, and that Mr. Smart was not part of the argument. And although Mr. Smart said that only he and the two victims were inside the apartment at the time of the shooting, he *also* said that the shooter had been outside the window and had shot through the partially-open window. Thus, Detective Sanchez did not accurately summarize the actual testimony of Ms. Armbrister and Mr. Smart.

Detective Sanchez also testified that the physical evidence was not consistent with Mr. Smart's version of events:

> Q. And then I understand—I read the A Form on page 2 that said that the physical evidence did not fit whatever it is that Mr. Smart's statement was. What was Mr. Smart's statement?
> A. Mr. Smart's statement was that him—he and the two deceased victims were in the apartment at the time of the shooting. Mr. Smart claims

> that he went to the window to serve some narcotics to a buyer. The buyer was pushed to the side by the alleged shooter, and the shooter shot through the window, killing both victims. There's no evidence that the shooting occurred outside. The evidence that we have places the shooter inside the crime scene.
> Q. What evidence is that?
> A. Body placement, along with the casings and the actual window, where he claimed that the shooting happened through, was not shattered in any way. There's a curtain that was hanging over it. There's no evidence—the absence of evidence was also very, very loud and clear.

*Id.* at 8-9. But Mr. Smart had said that the window was open and that the shooter shot through the open part of the window, so Detective Sanchez's representation that the scene was inconsistent because of the window not having been shattered was, in the district court's view, another misleading statement to the state circuit court. At the end of the probable cause hearing, Detective Sanchez reiterated his earlier incorrect description of Ms. Armbrister's testimony:

> Q. What did that witness tell you she heard as far as any comments—
> A. —she overheard the defendants, and one of the victims that were in the living room, arguing over some money, over drugs and money. And she says that the defendant, I believe—I believe it was the defendant, was asking for additional money. One of the deceased was claiming that he wasn't going to give any additional money.

> Q. And that's contained—that statement is contained in the sworn statement that you took?
> A. That is correct.

*Id.* at 11. Based on Detective Sanchez's testimony, the circuit court found probable cause for the two second-degree murder charges and denied Mr. Smart bond on those charges. The circuit court also set a bond for Mr. Smart on the other charges.

Mr. Smart remained in jail for 19 months. On June 15, 2011, the state *nolle prosed* all of the charges against Mr. Smart and he was released. In her case closeout memo, the assistant state attorney provided several reasons for the decision to dismiss the charges: the physical evidence did not completely contradict Mr. Smart's statement; one inmate had confessed to a second inmate about having committed the Ray and Volcy murders; and Mr. Smart was given a polygraph examination on June 6, 2011, which indicated he was truthful when he denied his involvement in the murders.[3]

After the criminal charges against him were dropped, Mr. Smart filed the suit which is the subject of this appeal.

## II

The City of Miami first argues that the district court erred in denying its renewed motion for judgment as a matter of law, *see* Fed. R. Civ. P. 50(a)-(b), on Mr. Smart's state law false imprisonment claim.

### A

In its post-trial Rule 50(b) motion and on appeal, the City argues that, despite Detective Sanchez's misleading testimony at the probable cause hearing, the state law false imprisonment claim fails as a matter of law because Mr. Smart's detention was based on a "valid court order." Br. of Appellant at 21; D.E. 115 at 6. As noted above, two days after his arrest, the state circuit court found that probable cause existed to detain Mr. Smart on two counts of second-degree murder. The City contends that the only issue before us is whether the probable cause hearing on November 19, 2009, was a "valid judicial proceeding, resulting in a facially valid judicial order" allowing the continued detention of Mr. Smart. *See* Br. of Appellant at 22. If we find that judicial proceeding facially valid, the City argues, Mr. Smart was not falsely imprisoned under Florida law, and the City is entitled to judgment as a matter of law on that claim. *See, e.g.*, *Harder v. Edwards*, 174 So.3d 524, 532 (Fla. 4th DCA 2015) ("The general rule is that arrest and imprisonment, if based upon a facially valid process, cannot be false.").[4]

Mr. Smart responds, and the district court ruled, that the City did not assert this "judicial process" argument in its Rule 50(a) motion at trial. Because it raised the "judicial process" argument for the first time in its post-trial Rule 50(b) motion, the district court ruled that the argument was therefore waived. We agree with the district court and Mr. Smart.

**B**

Federal Rule of Civil Procedure 50(a)(2) provides that a party may move for judgment as a matter of law "before the case is submitted to the jury." The motion "must specify the judgment sought and the

law and facts that entitle the movant to the judgment." If the district court does not grant the motion, the movant may file a "renewed motion" under Rule 50(b) after trial.

In a Rule 50(b) motion, "a party cannot assert grounds ... that it did not raise in the earlier motion." *Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1245 (11th Cir. 2001). *See also* Fed. R. Civ. P. 50, advisory committee note to 2006 amendment ("Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available."). Stated differently, "any renewal of a motion for judgment as a matter of law under Rule 50(b) must be based upon the same grounds as the original request for judgment as a matter of law made under Rule 50(a) at the close of the evidence and prior to the case being submitted to the jury." *S.E.C. v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 813 (11th Cir. 2015).

This requirement is intended to "avoid making a trap" and to prevent opposing counsel from being "ambushed" or "sandbagged" regarding the sufficiency of the evidence when it is too late to correct the problem. *See Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 903 (11th Cir. 2004). We traditionally accept arguments in a Rule 50(b) motion that are "closely related" to those made in a Rule 50(a) motion, because "setting aside a jury's verdict is no surprise to the non-movant" in that context. *McGinnis v. Am. Home Mortg. Servicing, Inc.*, 817 F.3d 1241, 1261 (11th Cir. 2016).

The City's post-trial Rule 50(b) motion focused on false imprisonment being "detention without color of legal authority," which occurs "when there is an improper restraint which is not the result of a judicial proceeding." *See* *Card v. Miami-Dade Cnty.*, 147 F.Supp.2d 1334, 1347 (S.D. Fla. 2001). To support its Rule 50(b) motion, the City argued that Mr. Smart's false imprisonment claim failed as a matter of law because "false imprisonment ends once the victim becomes held *pursuant to [legal] process*—when, for example, he is bound over by a magistrate or arraigned on charges." *Wallace v. Kato*, 549 U.S. 384, 389, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). According to the City, Mr. Smart's false imprisonment ended when the circuit court found probable cause to detain him on two counts of second-degree murder. From that point on, Mr. Smart's continued detention "was pursuant to the court's order, not the initial determination of probable cause to arrest by the officers." D.E. 115 at 7. And because the probable cause hearing resulted in a "facially valid judicial order," it did not matter whether Detective Sanchez had testified untruthfully during that hearing. *Id. See also* *Jackson v. Navarro*, 665 So.2d 340, 342 (Fla. 4th DCA 1995) (holding that imprisonment under regular process and issued by lawful authority is not false, even if it was maliciously instituted). Mr. Smart's recourse, said the City in its Rule 50(b) motion, would be a claim against Detective Sanchez individually for malicious prosecution.

The City made its Rule 50(a) motion orally, after the close of the evidence. The City argued at the Rule 50(a) hearing that "it is clear that probable cause never dissipated throughout this *entire* process." D.E. 110 at 238 (emphasis added). In support of its position, the City's counsel read into the record portions of the

sworn statement from the state attorney's information against Mr. Smart, which was filed on December 9, 2009:

> 'Personally known to me and appearing before me the State—Assistant State Attorney of the 11th Judicial Circuit of Florida whose signature appears below, being first duly sworn, says that the allegations set forth in this information are based upon facts which have been sworn to as true by a material witness or witnesses; and which, if true, would constitute the offenses therein charged. *And that this prosecution is instituted in good faith this 9th day of December, 2009,' long after the bond—the probable cause hearing, long after the arrest. And from that point forward*, this is a court case with a person in county custody under the supervision of the Department of Corrections, with the State Attorney being able to take positions, but the Police Department not.

*Id.* at 245 (emphasis added). The City's counsel summarized: "I stand on the fact that probable cause existed *at the time of the arrest* for multiple offenses. *Probable cause never dissipated throughout the entire course of the litigation* on all of those offenses." *Id.* at 247 (emphasis added). Then he immediately repeated: "Probable cause never dissipated in this case. We had it from the beginning, from the time of the arrest, and never dissipated." *Id.* at 247.

This Rule 50(a) argument clearly focused on probable cause "exist[ing] all the way through," *id.* at 249, but did not touch at all on the idea of "valid judicial process." Nowhere in the Rule 50(a) argument did the

City's counsel assert that the state circuit court's probable cause finding cut off Mr. Smart's claim of false imprisonment as a matter of law. In fact, the City's counsel did not mention the probable cause hearing at all. Counsel also did not contend that Mr. Smart should instead pursue a claim of malicious prosecution against Detective Sanchez. Counsel did not cite or refer to *Wallace*, 549 U.S. at 389, 127 S.Ct. 1091, which was a central feature of the City's Rule 50(b) motion. Counsel focused only on the reasonableness of the investigations by Detective Sanchez and the charging decision of the prosecutor, and whether their actions established the probable cause needed to arrest and prosecute Mr. Smart.

Indeed, during the Rule 50(a) hearing, it was the district court and Mr. Smart's attorney who briefly discussed the probable cause hearing and Detective Sanchez's misrepresentations to the state circuit court. Mr. Smart's counsel began his argument by stating:

> [T]he most important part or the most important issue that we're overlooking is that you cannot develop probable cause on an unreasonable investigation and just overlook facts and, more importantly, make misrepresentations to the bond hearing judge. Had they not made those misrepresentations, it would have been a totally different case.... But since they did misrepresent it to Judge Cueto, they don't get this whole probable cause staying.

D.E. 110 at 253-54. The district court responded:

> Well, their theory is to me that, once [Detective] Sanchez had objective probable cause under any

> circumstances, I should not look at the misrepresentation to Judge Cueto. *I should look at what he knew when he filled out the A-form, for lack of a better time frame.*

*Id.* at 254 (emphasis added). Despite this discussion between the district court and Mr. Smart's attorney, no one on the City's behalf mentioned "judicial process" or the theory that a probable cause finding by the state circuit court precluded the false imprisonment claim. Instead, both parties and the district court continued to focus on whether Detective Sanchez had objective probable cause to arrest Mr. Smart. The district court ultimately concluded that "there [was] a question of fact of whether or not [Detective] Sanchez had objective probable cause because of the nature of the investigation." *Id.* at 257.

Although both of the City's Rule 50 motions discussed probable cause, they did so in different legal contexts, and with different legal goals. The Rule 50(a) argument focused on Detective Sanchez's investigation and the prosecutor's charging decision, and contained no reference to valid judicial process foreclosing the possibility of a false imprisonment claim. The Rule 50(b) motion, in contrast, focused entirely on the facial validity of the judicial process, despite any misstatements by Detective Sanchez at the probable cause hearing, and on the probable cause finding by the state circuit court cutting off Mr. Smart's false imprisonment claim.

In keeping with Rule 50's underlying purposes of promoting fairness and preventing "sandbagging," we agree with the district court and Mr. Smart that the City failed to preserve its Rule 50(b) judicial process argument. The City's Rule 50(a) and Rule 50(b) motions

were not based on "closely related" arguments, but were instead made on factually different and legally independent bases relating to probable cause. The City, we hold, has not preserved its Rule 50(b) legal process argument. *See, e.g.*, *Big Apple Consulting*, 783 F.3d at 813 (defendant who moved for judgment as a matter of law under Rule 50(a) on only one element of applicable claim did not preserve Rule 50(b) argument as to other elements of that same claim). The jury's award of $403,450 to Mr. Smart for false imprisonment under Florida law therefore stands.

## III

As noted earlier, Mr. Smart asserted three Fourth Amendment claims under § 1983, all based on filming and broadcast by The First 48 without his consent. In chronological order, the first concerned the filming of the murder scene at his apartment; the second concerned the filming of Mr. Smart in handcuffs before and after his arrest; and the third concerned the filming of Mr. Smart's interrogation.

The City argues that the district court erred in denying its renewed motion for judgment as a matter of law on all of Mr. Smart's § 1983 claims, and in granting judgment as a matter of law in favor of Mr. Smart on the liability aspect of one of those claims (the one based on the filming of the murder scene in the apartment). The City asserts that there were no Fourth Amendment violations and that Mr. Smart did not present sufficient evidence of a policy, custom, or practice on its part. Mr. Smart defends the district court's rulings.

"We review *de novo* a district court's denial of a defendant's renewed motion for judgment as a matter

of law, applying the same standards as the district court." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997). *See also Bogle v. Orange Cnty. Bd. of Cnty. Comm'rs*, 162 F.3d 653, 656 (11th Cir. 1998). We construe all of the evidence and inferences in the light most favorable to the nonmoving party. *See Sherrin v. Nw. Nat'l Life Ins. Co.*, 2 F.3d 373, 377 (11th Cir. 1993).

"If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion was properly granted." *Id.* On the other hand, "if there is substantial evidence opposed to the motion such that reasonable people, in the exercise of impartial judgment, might reach differing conclusions, then such a motion was due to be denied." *Id.*

We agree with the City that the district court should not have granted judgment as a matter of law to Mr. Smart on liability for the § 1983 claim relating to the filming of the apartment, but conclude that it correctly denied the City's motion for judgment as a matter of law on all of the § 1983 claims.

**A**

A municipality cannot be held liable under § 1983 for a constitutional violation based on the doctrine of respondeat superior. Liability attaches only if the constitutional violation resulted from a policy, custom, or practice of the municipality which was the moving force behind the violation. *See generally Los Angeles Cnty. v. Humphries*, 562 U.S. 29, 36, 131 S.Ct. 447, 178 L.Ed.2d 460 (2010); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

To hold the City liable under § 1983, Mr. Smart had to prove "either (1) an officially promulgated [City] policy or (2) an unofficial custom or practice of the [City] shown through the repeated acts of a final policymaker for the [City]." *Grech v. Clayton Cnty.*, 335 F.3d 1326, 1329 (11th Cir. 2003) (en banc). As to the latter, Mr. Smart could show that the City's final policymakers acquiesced in a longstanding practice or custom which constituted the "standard operating procedure" of the City, or that a "longstanding and widespread practice [was] deemed authorized by the policymaking officials because they must have known about it but failed to stop it." *Brown v. City of Ft. Lauderdale*, 923 F.2d 1474, 1481, 1481 n.11 (11th Cir. 1991). He also could show that the City's final policymakers adopted or ratified the unconstitutional conduct or decision made by a subordinate official. *See Matthews v. Columbia Cnty.*, 294 F.3d 1294, 1297 (11th Cir. 2002).

**B**

We start with the filming of the murder scene inside the apartment in 2009 by The First 48. That filming was done without Mr. Smart's consent, and we conclude that there was sufficient evidence to show a Fourth Amendment violation under the Supreme Court's decision in *Wilson v. Layne*, 526 U.S. 603, 611-14, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (holding that the filming of a family and its private home by reporters without consent during the execution of an arrest warrant violated the Fourth Amendment because the reporters were not aiding the police in their work, and rejecting arguments that the filming was permissible because (a) the reporters helped the

police in their general law enforcement mission, (b) the filming helped publicize police efforts to combat crime, and (c) the filming could help minimize police abuses and protect innocent suspects). *See also* *United States v. Hendrixson*, 234 F.3d 494, 496 (11th Cir. 2000) (applying *Wilson* to find that the district court erred in holding that media presence during the search of a residence was not a Fourth Amendment violation).

The justifications put forth by the City were addressed and rejected in *Wilson*, and are not justifications here. We further reject the City's argument that, as a matter of law, Mr. Smart abandoned his privacy interests when he fled the apartment for fear of being shot, leaving behind his wallet, phone, and other belongings. On the evidence presented, whether Mr. Smart's Fourth Amendment rights were violated by the media presence and filming at the apartment was a matter for the jury to decide. *See generally* *Minnesota v. Olson*, 495 U.S. 91, 98-99, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990); *Jones v. United States*, 362 U.S. 257, 259, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).

We agree with the City, however, that the district court should not have granted judgment as a matter of law in favor of Mr. Smart on the municipal liability aspect of this claim. When Mr. Smart moved for judgment as a matter of law, the evidence as to policy, custom, or practice had to be viewed in the light most favorable to the City. *See, e.g.*, *Abel v. Dubberly*, 210 F.3d 1334, 1337 (11th Cir. 2000). The question, therefore, was whether—despite what the agreement between the City and The First 48 stated—there was a dispute in the evidence as to whether the City had a custom or practice to allow The First 48 to film places and people without obtaining the required consent.

The district court found as a matter of law that the City had a custom of not obtaining consent before allowing The First 48 to film inside homes and residences. *See* D.E. 111 at 4. But the evidence on this point conflicted, and, as a result, the district court erred in granting judgment as a matter of law to Mr. Smart on the § 1983 claim based on the filming of the murder scene in the apartment. For example, Sergeant Altarr Williams, who was in the homicide division, was asked whether The First 48 "ask[ed] permission of people [who] were suspects to tape them[.]" He answered "Pretty much." D.E. 110 at 110. He also testified that the crew from The First 48 kept a pad of "waivers for [everyone] they spoke to, except for arrestees that were charged. They would generally ask them to read and sign." *Id.* at 110-11. In addition, Commander Eunice Cooper, who at the time of trial was in charge of the homicide division, told the jury that "from time to time" she had seen the crew of The First 48 "get consent from people." *Id.* at 76-77. This testimony, if believed, would have permitted a jury to find that there was no custom or practice by the City to allow The First 48 to do its filming inside homes and residences without obtaining the necessary consent. It therefore precluded the district court from granting judgment as a matter of law in favor of Mr. Smart.

We therefore vacate the jury's award of $152,250 in damages to Mr. Smart based on the non-consensual filming of the murder scene at the apartment, and remand this claim for a new trial.

## C

The two other § 1983 claims are based on the filming and broadcast of Mr. Smart in handcuffs before

and after his arrest and the filming and broadcast of Mr. Smart's interrogation. We first address the City's arguments that there were no constitutional violations, and then turn to whether the jury could find municipal liability.

**1**

The evidence, viewed in the light most favorable to Mr. Smart, allowed the jury to find that the filming and broadcast of Mr. Smart in handcuffs before and after his arrest constituted a seizure of Mr. Smart's image and implicated Mr. Smart's privacy rights under the Fourth Amendment. "The Fourth Amendment seizure has long encompassed the seizure of intangibles as well as tangibles[,]" which, according to a number of courts around the country, include a person's image. *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 574-75 (2d Cir. 2003) (holding that a Fourth Amendment seizure occurred when the county videotaped an arrestee being escorted through the department of corrections parking lot and into a car for transport to the police station).

We recognize that in *Caldarola* the Second Circuit ultimately held that the county's videotaping did not violate the Fourth Amendment because it served a legitimate purpose (to inform the public about its efforts to stop the abuse of disability benefits by its employees), *see id.* at 576-77, but here the City argues only that walking Mr. Smart down a police station hallway was a valid law enforcement activity. It does not argue that videotaping Mr. Smart during the walk and allowing the images to be broadcast served any legitimate purpose. *See* Br. of Appellant at 39-40. So the

ultimate conclusion in *Caldarola* does not help the City here.

That leaves for consideration the filming and broadcast of Mr. Smart's interrogation while the murder case was ongoing. *Cf. Demery v. Arpaio*, 378 F.3d 1020, 1031-33 (9th Cir. 2004) (holding that pretrial detainees would likely prevail on their claim that round-the-clock webcam filming and internet broadcasting of them in areas of a jail which were not open to the public, including the men's holding cell bunkbeds, the booking area, and the pat-down search area, violated their substantive Fourteenth Amendment Due Process rights because the filming was not related to a non-punitive purpose and "turn[ed] pretrial detainees into the unwilling objects of the latest reality show"). The City makes only one argument in support of its contention that the filming and broadcast of Mr. Smart's interrogation did not violate his constitutional rights. The City asserts that there was no constitutional violation because it "exercised its discretion to waive the active criminal investigation and intelligence information exemption contained in [Fla. Stat.] § 119.07(1) ... and produced [Mr. Smart's] videotaped interrogation to [The First 48]." Br. of Appellant at 42. There are two problems with this argument, and we therefore reject it.

First, the 2008 version of the agreement provides that The First 48 "shall not knowingly use, publish, or broadcast any materials or images that are of a confidential nature pursuant to applicable laws and statutes." Plaintiff's Ex. 2 at ¶ 6. This provision indicates that if The First 48 wanted to use investigative materials (such as an interrogation videotape) while a murder case was ongoing, it would have needed the City's permission.

Second, statements by counsel in the City's brief about the waiver of exemptions under Florida's Public Records Act do not constitute evidence, *see* *Travaglio v. Am. Express Co.*, 735 F.3d 1266, 1270 (11th Cir. 2013), and as far as we can tell there was no evidence whatsoever at trial that The First 48 ever requested a copy of Mr. Smart's interrogation videotape from the City pursuant to the Public Records Act, or that the City chose to waive exemptions under that Act and provide a copy of the videotape to The First 48. Notably, the City does not cite any portion of the trial record to support its factual argument. There was a discussion of Florida's Public Records Act, but the assertion about the City's authority (both hypothetical and actual) to waive exemptions in favor of The First 48 was made by the City's counsel during the Rule 50(a) arguments. *See* D.E. 110 at 225-30. As we have said many times before, the factual assertions made by an attorney on a contested issue are not a substitute for proper evidence. *See, e.g.*, *United States v. Washington*, 714 F.3d 1358, 1361-62 (11th Cir. 2013).

**2**

Having concluded that the evidence allowed the jury to find violations of Mr. Smart's Fourth Amendment rights in these two circumstances, we address whether the evidence—viewed in the light most favorable to Mr. Smart—also permitted the jury to find a custom or practice on the part of the City to allow The First 48 to film individuals without obtaining consent, and whether this custom or practice was the moving force behind the constitutional violations. We answer those questions affirmatively.

As an initial matter, the City seems to be arguing that, without direct evidence of a custom or practice, it was entitled to judgment as a matter of law. As an evidentiary matter, we disagree. The "test for evaluating circumstantial evidence is the same as in evaluating direct evidence." *United States v. Henderson*, 693 F.2d 1028, 1030 (11th Cir. 1982). Indeed, circumstantial evidence can be just as probative as direct evidence. *See, e.g.*, *United States v. Cook*, 842 F.3d 597, 602 (8th Cir. 2016); *United States v. Kruse*, 606 F.3d 404, 409 (7th Cir. 2010); *Gierbolini-Colon v. Aponte-Roque*, 848 F.2d 331, 335 (1st Cir. 1988). And in the § 1983 context we have held that circumstantial evidence, in the form of the unconstitutional nature of many prior police encounters, can help demonstrate a municipal custom or practice due to city officials choosing not to take corrective action. *See* *Kerr v. City of W. Palm Beach*, 875 F.2d 1546, 1556 (11th Cir. 1989). With this matter resolved, we turn to the evidence presented at trial, which we find sufficient for a reasonable jury to find that the City had a custom or practice of allowing The First 48 to film individuals without their consent.

First, the 2008 version of the agreement between the City and The First 48 allowed the program to film at police headquarters without any apparent limitations (though the participation of individual police officers was voluntary). *See* Plaintiff's Ex. 2 at ¶¶ 1-3, 4. Such filming would, therefore, necessarily include the transport and interrogation of all or most arrestees like Mr. Smart.

Second, for suspects who were arrested (like Mr. Smart), Sergeant Williams testified that The First 48 would "generally" ask for consent to film. D.E. 110 at 111. But, significantly, if the arrestee refused consent

(or if no consent was requested), the crew would then obtain the video from the police interrogation room. That is what happened with Mr. Smart. *See* D.E. 107 at 187-88; D.E. 110 at 110-11.

Third, the testimony of Commander Cooper (who was the City's designated representative at trial), Sergeant Williams, and Detective Sanchez (as well as the reasonable inferences drawn from their testimony) indicated that the City did not promulgate any policies for interacting with The First 48; that police officers were told to cooperate with The First 48 (but not to do reenactments); that the agreement between the City and The First 48 was not given to officers or team supervisors (who therefore would not have known that it was the contractual responsibility of The First 48 to obtain consent); that the only directive the homicide detectives received regarding The First 48 was not to allow the show to compromise crime scenes or interfere with investigative work; and that there were no policies in place to ensure that the appropriate consent was obtained. *See* D.E. 107 at 178-79, 181; D.E. 110 at 52-53, 58, 60-61, 76, 79-80, 107-09, 111-13.

Fourth, the jury was not required to accept the testimony of Sergeant Williams and Commander Cooper as set out in Part III.B of this opinion. The jury apparently disbelieved both witnesses as to whether The First 48 generally obtained consents, and having rejected their testimony, was entitled to find that "the truth [was] the opposite of [their] story," i.e., that The First 48 generally did not secure consents. *See* NLRB v. *Walton Mfg. Co.*, 369 U.S. 404, 408, 82 S.Ct. 853, 7 L.Ed.2d 829 (1962) (quoting *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952) ). *See also* NLRB v. *Dixie Gas Co.*, 323 F.2d 433, 435-36 (5th Cir. 1963) (same). Significantly, the 2008 version of the agreement

between the City and The First 48 required the program to send to Lieutenant John Buhrmaster (or his designee) a video tape of each proposed episode before airing (at the "fine cut" stage) showing the work of the City's police officers so that he could notify The First 48 of any factual inaccuracies and provide written comments. *See* Plaintiff's Ex. 2 at ¶ 6. The jury could have found that Lieutenant Buhrmaster knew about the systematic failure of The First 48 to obtain consents and did nothing about it.

Fifth, as to whether the City's custom or practice was the moving force behind the constitutional violations, Detective Sanchez testified that the crew of The First 48 had been riding around with him, that he did not ask Mr. Smart for consent to be filmed by The First 48, and that he was not concerned about asking for consent because the police department's policy was to cooperate with The First 48 and permit them to film. *See* D.E. 107 at 180-81. Moreover, the testimony summarized above indicates that, as a matter of course, The First 48 would obtain interrogation videotapes even if the arrestees or suspects did not consent.

As a result, we affirm the jury's award of $152,250 to Mr. Smart for the § 1983 claim based on the non-consensual filming and broadcast of him in handcuffs before and after his arrest, and the award of $152,250 to Mr. Smart for the filming and broadcast of his interrogation.

## IV

Finally, the City argues that the district court should have granted its motion for a new trial because it was unfairly prejudiced by the introduction of certain evidence and by a closing argument comment. The City

sets forth three grounds for why it deserves a new trial: Mr. Smart should not have been permitted to introduce testimony regarding (1) the polygraph exam he took or (2) the confession of a fellow inmate, and (3) Mr. Smart's counsel should not have stated that the City "pimped" for The First 48.[5]

**A**

We review a district court's denial of a motion to grant a new trial for an abuse of discretion. *See* *Williams v. City of Valdosta*, 689 F.2d 964, 974 (11th Cir. 1982). A new trial is only warranted if an evidentiary error affected "substantial rights" or caused "substantial prejudice." *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1162 (11th Cir. 2004). As we explained in *Peat*, "the inquiry is always directed to the same central question—how much of an effect did the improperly admitted or excluded evidence have on the verdict?" *Id.*

**B**

The City first argues for a new trial based on the district court's admission of evidence that Mr. Smart offered to take, and actually took, a polygraph. The City believes this evidence was unfairly prejudicial because it bolstered his credibility, and because the jury could only reasonably conclude that Mr. Smart's case was dismissed because he passed the polygraph test. Compounding the problem, according to the City, was testimony by Mr. Smart that he "was going home because [he] didn't do it," D.E. 105 at 164, and by his criminal defense attorney, who said, "I know that I have an innocent client," D.E. 109 at 135-36. Finally, the

City argues that Detective Sanchez's credibility was undermined by Mr. Smart's argument that Detective Sanchez did not administer a polygraph because he did not want to know the truth. The City contends the prejudicial effect of the polygraph evidence, related testimony, and argument about Mr. Smart's innocence was incapable of being cured by the district court's instruction.

Mr. Smart counters that the City opened the door to evidence of the polygraph and its results by "attempting to try a criminal case against [Mr.] Smart and casting him as a lying thug and a murderer." Br. of Appellee at 47. In addition, Mr. Smart argues that the testimony regarding the detectives' refusal of his many requests for a polygraph, after they had originally offered one, was intended to show the detectives' willful indifference towards conducting a proper murder investigation. Mr. Smart further contends that even if the district court erred by admitting evidence of his multiple requests for a polygraph, the error would not warrant a new trial given the court's specific jury instructions regarding the evidence's use (which we discuss later).

The City cites a number of cases dealing with the inadmissibility and unreliability of polygraph evidence. Several of these cases, however, were decided when the Eleventh Circuit had a per *se rule* of exclusion, and are thus distinguishable. Additionally, many are criminal cases, and others are from other federal circuits and other states, which apply different rules. For example, in support of its statement that "[i]t is well-established that polygraph examination results are inadmissible because they are not reliable," Br. of Appellant at 44, the City cites *United States v. Scheffer*, 523 U.S. 303, 313-15, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). But

*Scheffer* dealt with Military Rule of Evidence 707, which completely bans all references to polygraphs. *Id.* at 306-07, 118 S.Ct. 1261. The Supreme Court addressed whether making polygraph evidence completely inadmissible in courts-martial unconstitutionally abridges the right of the accused to present a defense. *Id.* at 305, 118 S.Ct. 1261. The Supreme Court held that "[b]ecause litigation over the admissibility of polygraph evidence is by its very nature collateral, a *per se* rule prohibiting its admission is not an arbitrary or disproportionate means of avoiding it," and concluded that the rule was not unreasonable. *Id.* at 314-15. *Scheffer* does not govern here because the Eleventh Circuit no longer has a rule of *per se* inadmissibility of polygraphs.

In the Eleventh Circuit, evidence regarding polygraph examinations is not *per se* inadmissible. *See United States v. Piccinonna*, 885 F.2d 1529, 1535 (11th Cir. 1989) (en banc). In *Piccinonna*, we reviewed the history of polygraphs and the judiciary's initial concerns about polygraphs' reliability and general acceptance under Federal Rule of Evidence 702 and the *Frye* standard for admitting expert scientific evidence. *See id.* at 1531. We then explained that increased acceptance of polygraphs by the scientific community and improvements in polygraph techniques had led us to reevaluate the *per se* exclusionary rule and "institute a rule more in keeping with the progress made in the polygraph field." *Id.* at 1532. We concluded that expert polygraph evidence may be admitted at trial in two instances: (1) when both parties stipulate to the circumstances of the test and the scope of its use; and (2) to impeach or corroborate a witness's testimony. *See id.* at 1536. Additionally, evidence that a witness passed a polygraph examination, when used to corroborate in-

court testimony, is not permitted under Rule 608 unless the witness's credibility was first attacked. *See id.* Even within these above described situations, though, the "admission of polygraph evidence for impeachment or corroboration purposes is left entirely to the discretion of the trial judge." *Id.*

Here, the district court allowed Mr. Smart to introduce testimony and evidence indicating he had asked at least 85 times to take a polygraph exam. Mr. Smart also introduced evidence that his case was dismissed shortly after he took a polygraph. The City contends that the probative value of this polygraph evidence was substantially outweighed by its prejudicial effect, and that the district court's curative instruction confused and misled the jury.

Unlike many of the cases cited in the briefs, and unlike in *Piccinonna*, no expert testimony regarding a polygraph is at issue here. Neither side tried to present expert testimony related to the result of the polygraph taken by Mr. Smart. So the focus of the debate is whether testimony illustrating Mr. Smart's requests to submit to a polygraph was unduly prejudicial to the City in this civil trial.

The district court dealt with the issue of the polygraph numerous times throughout the litigation. Before trial, the district court's order on motions in limine addressed the City's motion to exclude any evidence that a polygraph was offered to or taken by Mr. Smart. The district court ruled:

> The fact that [Mr.] Smart requested a polygraph numerous times is relevant to the reasonableness of the officers' investigation of the murders and would not implicate issues

> relating to the reliability of polygraph results. The results of the polygraph given to [Mr. Smart] may not be admitted in evidence, unless the proper factual predicate is laid that the City required [Mr. Smart] to take the polygraph prior to releasing him and dropping the charges against him.

D.E. 68 at 4. It appears to us that the district court weighed the probative value of the evidence against possible prejudicial effect in arriving at this compromise.

In the middle of the City's opening statement, the district court called a sidebar to warn the City's counsel that his choice of argument might open the door to admission of more evidence about the polygraph:

> You just said [Mr. Smart] told a story that "can't be true." He must be guilty of the murder ... [W]e haven't talked about anybody else who's actually prosecuted, and you're basically retrying the murder case.

D.E. 104 at 163. At the close of the first day of trial, after dismissing the jury, the district court again cautioned:

> I don't want you all characterizing if something Mr. Smart said was true or untrue ... If that theme continues to run on the City's side of the aisle, I'm just letting you know that I may view that as opening the door to the results of the polygraph. What I have allowed so far is only the fact that Mr. Smart asked for one. I have not allowed any results.

*Id.* at 201-02. These explanations by the district court are in keeping with the standard set forth in *Piccinonna*, where the bolstering of a witness' testimony through polygraph expert testimony is allowed once opposing counsel calls into question that witness' credibility. The difference here is that any bolstering was not performed by an expert's analysis of polygraph results, but merely by Mr. Smart himself, through the interrogation video clip in which he pleaded for the opportunity to take a polygraph.

In addition to giving clear guidance to counsel regarding allowable parameters for the limited use of polygraph evidence, on several occasions throughout the trial and in response to the City's many objections and repeated motions for mistrial, the district court gave the following instruction to the jury:

> Evidence has been received regarding the plaintiff's request to take a polygraph. A polygraph examination is not required in a criminal case. This evidence is for your consideration of the officers' investigation only in this case. You should not assume that a polygraph is scientifically reliable method, as ... the results of a polygraph ... would be inadmissible in court for a criminal prosecution for homicide.

D.E. 105 at 162. Again the following day, the district court reiterated:

> Ladies and gentlemen, as I previously told you, evidence has been received regarding the plaintiff's request to take a polygraph. This evidence is for consideration of the officer's

> investigation only. You should not assume that a polygraph is a scientifically reliable method, as a polygraph would be inadmissible in court for a criminal prosecution for homicide.

D.E. 106 at 156-57. On the sixth day of trial, the district court again reminded the jury:

> Ladies and gentlemen, as I've said to you repeatedly throughout this trial, a polygraph is not an investigative tool in a homicide investigation. The State is [ ] not required to give one. It's not admissible in court, and the police officers in this case were not required to give one.

D.E. 109 at 181.

We normally presume that juries follow the instructions given to them, *see, e.g.*, *United States v. Lopez*, 649 F.3d 1222, 1237 (11th Cir. 2011), and we see no reason to conclude otherwise here given the number of times the district court provided the jury with instructions. Based on the foregoing—our circuit precedent regarding expert testimony on polygraphs, the district court's limitations on Mr. Smart's admission of polygraph evidence (i.e., that he requested a polygraph, that he ultimately took one, and that the charges were dropped after he did so), the fact that there was no expert testimony concerning the results of the polygraph, and the district court's frequent instructions to the jury—we find no abuse of discretion in the district court admitting evidence related to Mr. Smart's request for and taking of a polygraph.

## V

We affirm the jury's verdicts in favor of Mr. Smart on the state law false imprisonment claim, the § 1983 Fourth Amendment claim based on the nonconsensual filming and broadcast of Mr. Smart in handcuffs before and after his arrest, and the § 1983 Fourth Amendment claim based on the non-consensual filming and broadcast of Mr. Smart's interrogation. We reverse the district court's grant of judgment as a matter of law in favor of Mr. Smart on the liability aspect of the § 1983 claim based on the non-consensual filming of the murder scene in the apartment because the evidence, viewed in the light most favorable to the City, presented an issue for the jury on municipal custom and practice. We therefore vacate the jury's award of damages to Mr. Smart on that particular claim and remand for a new trial on that claim.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

**Footnotes**

*The Honorable William S. Duffey, Jr., United States District Court for the Northern District of Georgia, sitting by designation.

1The episode in question was entitled "Inside Job."

2We address only the arguments presented by the City on appeal. As to issues not specifically addressed in this opinion, we affirm without further discussion.

3The results of the polygraph were not presented as evidence at trial. These background facts come from the district court's order on summary judgment.

4Under federal law, the Fourth Amendment permits a claim for unlawful pretrial detention if the court's probable cause order was based solely on fabricated

evidence. *See* *Manuel v. City of Joliet*, ––– U.S. ––––, 137 S.Ct. 911, 918-19, 197 L.Ed.2d 312 (2017).

5We discuss only the evidence concerning Mr. Smart's polygraph. As to the City's two other arguments, we conclude that the testimony concerning an inmate's confession to the double murder of Mr. Ray and Mr. Volcy was not hearsay because it was not introduced for the truth of the matter asserted (i.e., that the inmate actually committed the murders) but rather to show the effect of that confession on the murder investigation. *See* Fed. R. Evid. 801(c); *United States v. Rivera*, 780 F.3d 1084, 1092 (11th Cir. 2015); *United States v. Parry*, 649 F.2d 292, 295 (5th Cir. 1981). And we conclude that the comment by Mr. Smart's counsel in closing argument that the City "pimped" for The First 48 did not constitute reversible error even though likely inappropriate. *See* *Peterson v. Willie*, 81 F.3d 1033, 1039-40 (11th Cir. 1996); *Vineyard v. Cnty. of Murray*, 990 F.2d 1207, 1214 (11th Cir. 1993).

8/12/2015

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 13-24354-CIV-COOKE/TORRES

TAIWAN SMART,

Plaintiff,

vs.

THE CITY OF MIAMI,

Defendant.
_____/

**FINAL JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 58 and the Jury Verdict (ECF No. 99), it is hereby **ORDERED and ADJUDGED** that final judgment is entered in favor of the Plaintiff, TAIWAN SMART, and against the Defendant, CITY OF MIAMI, as to all claims raised in the Complaint herein. Plaintiff shall recover from Defendant a total of EIGHT HUNDRED SIXTY THOUSAND TWO HUNDRED DOLLARS AND ZERO CENTS ($860,200.00), together with post-judgment interest accruing thereon from the date of this Judgment at the statutory rate of .33 percent per annum, for which sum let execution issue forthwith subject to Fed. R. Civ. P. 62(a) and S.D. Fla. Local R. 62.1.

This action is now **CLOSED.** The Court retains jurisdiction for consideration of any timely post-judgment submissions under the Court's Rules and the

Federal Rules of Civil Procedure.

**DONE and ORDERED** in chambers, at Miami, Florida, this 12th day of August 2015.

_____

MARCIA G. COOKE
United States District Judge

Copies furnished to:
*Edwin G. Torres, U.S. Magistrate Judge*
*Counsel of record*

**6/17/2015**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**Case No. 13-24354-CIV-COOKE/TORRES**

TAIWAN SMART,

Plaintiff,

vs.

THE CITY OF MIAMI,

Defendant.
_____/

## VERDICT FORMS

**Count I: State Law False Imprisonment**

1. Did the City of Miami intentionally cause Mr. Smart to be imprisoned under circumstances that were unreasonable and unwarranted?

Yes _x No _____

If you answered YES to Question 1, please proceed to Question 2, if you answered NO, proceed to 3.

2. What are Plaintiff's damages - Answer each line with a dollar amount or write zero.

a. Past economic loss, including lost earnings: $13,250

b. Future economic loss:
   i. Lost earnings and earning capacity $76,800
   ii. Medical expenses $2400
c. Past noneconomic loss, including physical and mental suffering: $285000
d. Future noneconomic loss, including physical and mental suffering: $26,000

430,450

**Count II: Section 1983 Claim**

3. Did the City violate Mr. Smart's Fourth Amendment rights by allowing First 48 to film and broadcast Plaintiff's interrogation?

Yes x No _____

If you answered YES to Question 3, please proceed to Question 4, if you answered NO, proceed to Question 6.

4. Did the City of Miami have a custom or practice of permitting unreasonable seizures of individuals during the interrogations filmed by the First 48 AND IS SO, was the City's custom or practice the moving force behind Plaintiff's constitutional violation?

Yes x No _____

If you answered YES to Question 4, please proceed to Question 5, if you answered NO, proceed to Question 6.

5. What are Plaintiff's damages - Answer each line with a dollar amount or write zero.

a. Past economic loss, including lost earnings: $3250
b. Future economic loss:
    i. Lost earnings and earning capacity $25,600
    ii. Medical expenses $2400
c. Past noneconomic loss, including physical and mental suffering: $95000
d. Future noneconomic loss, including physical and mental suffering: $26000

$152,250

6. I have found as a matter of law that Mr. Smart's constitutional rights were violated when the City of Miami permitted the First 48 to film the murder scene inside the apartment where he lived.

What are Plaintiff's damages - Answer each line with a dollar amount or write zero.

a. Past economic loss, including lost earnings: $3250
b. Future economic loss: $25600
    i. Lost earnings and earning capacity $25600
    ii. Medical expenses $2400
c. Past noneconomic loss, including physical and mental suffering: $95000
d. Future noneconomic loss, including physical and mental suffering: $26000

7. Did the City violate Mr. Smart's Fourth

Amendment rights by allowing First 48 to film and broadcast Mr. Smart in handcuffs?

Yes x No _____

If you answered YES to Question 7, please proceed to Question 8, if you answered NO, then proceed to have the foreperson sign the verdict form.

8. Did the City of Miami have a custom or practice of permitting unreasonable seizures of individuals by First 48 filming them in handcuffs AND IF SO, was the City's custom or practice the moving force behind Plaintiff's constitutional violation?

Yes x No _____

If you answered YES to Question 8, please proceed to Question 9, if you answered NO, then proceed to have the foreperson sign the verdict form.

9. What are Plaintiff's damages - Answer each line with a dollar amount or write zero.

a. Past economic loss, including lost earnings: $3250
b. Future economic loss:
    i. Lost earnings and earning capacity $25600
    ii. Medical expenses $2400

c. Past noneconomic loss, including physical and mental suffering:

$304500

$95,000

d. Future noneconomic loss, including physical and mental suffering: $26,000

SO SAY WE ALL.

Signe _____
FOREPERSON

Dated: 6/15/15

Total= $860200

United States Court of Appeals, Eleventh Circuit.
Taiwan SMART, Plaintiff-Appellee,
v.
CITY OF MIAMI, An Incorporated Municipality,
Defendant-Appellant.

No. 16-16740
8/13/2018

Appeal from the United States District Court for the Southern District of Florida,

Before JORDAN and JILL PRYOR, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by City of Miami is DENIED.

ENTERED FOR THE COURT:

s/
UNITED STATES DISTRICT JUDGE

*This order is being entered by a quorum pursuant to 28 U.S.C. Sec. 46(d) due to Judge Duffey's retirement on July 1, 2018.

***registration, that excludes a lot of people.

THE COURT: I don't know off the top of my head, Mr. Klock. You're welcome to explore that with the Clerk of Court, Court Executive and our Jury Pool Supervisor.

MR. BASCO: Thank you, Your Honor.

THE COURT: Counsel for the defendant, I'm going to allow you to go first on your directed verdict, which I said that I held in abeyance until we concluded testimony; not waiving your right to make it.

MR. HUNNEFELD: Thank you, Your Honor.

With regard to the directed verdict, I'd like to focus first on the 1983 claims. There are essentially three claims, as the Court resolved them, with the motion for summary judgment.

One related to the property, the search of the property; the second related to the walk down the hallway in the 400 Northwest 2nd Avenue building; and the third was the interrogation that occurred in the homicide interrogation room.

But there is a common element to each of those.

With regard to all of them, no matter what the basis for the alleged constitutional violation, there has --one of the predicates to make a claim against a municipality under Monell is that you establish a policy or practice.

Now, there was no policy or practice that was established by plaintiff in this case. Quite to the contrary

THE COURT: What would the policy or practice be that the plaintiff would have to establish?

MR. HUNNEFELD: Well, frankly, I don't know because I don't think there would be any that would be applicable.

Let me talk about the evidence that is in the

record that they did present.

They put a contract in. And that contract listed six things that in order for the City of Miami to grant access -because this is what's called an "access agreement." In order to grant access to the personnel and facilities, the producers for the ""First 48"" had to agree to six items.

No staging of scenes or phone calls. No reenactments.

THE COURT: What's Plaintiff's Exhibit Number 4?

MR. HUNNEFELD: 4, but it's also --it's in 3 and 5 as well. This is a summarization. In fact, I think it's a part of 3, really.

So no staging of scenes or phone calls; no reenactment whatsoever; no compensation to police employees; no filming at employee homes and their families; no initial accessibility to crime scene until after it's deemed safe and until a walk-through of the scene can be conducted; and no film crew may enter upon private property unless they have obtained prior consent from the owner.

Now, Your Honor, this access agreement, which again doesn't do anything except give access to City facilities and City personnel, specifically excludes many of the claims that are made: staging -

THE COURT: How?

MR. HUNNEFELD: By saying ""First 48"" isn't supposed to stage scenes.

THE COURT: So if they have presented evidence that something here was staged, what would that mean?

MR. HUNNEFELD: That would mean that there was perhaps --I'm not saying that there is --this is a purely hypothetical situation that we're talking.

Assume that evidence had been admitted. First of all, it would still not be of constitutional moment because what is staged is very important. I mean, so it is -

THE COURT: Is there not case law that has allowed a 1983 violation for what you might consider Fourth Amendment search and seizure when police units are allowed to film without the owner's consent inside of an owner's home during a search warrant --or resident's home. It doesn't have to be a homeowner.

MR. HUNNEFELD: I think you're talking about Wilson versus Layne. That was a Supreme Court case where there was an arrest warrant that was issued and the police had a valid arrest warrant, but they brought along with them some media. And a claim was brought, not by the person against whom the arrest warrant existed, but the family who owned the house, and they sued.

Now, interestingly, no claim was successful because, in that circumstance, it was only against the individual police officers and sheriff. So qualified immunity was granted, and it was granted because there hadn't been prior notice.

But what I'm focusing on is a different aspect totally.

THE COURT: Wait, wait, wait. Let's back up. So qualified immunity was not allowed at that time because the court said, "We haven't told you, Police Departments and places like that" --and I'm only going on qualified immunity at this time because you have to be clearly established --"we're telling you, you didn't know last year but you now know from henceforth." Isn't that the way qualified immunity works?

MR. HUNNEFELD: Yes.

THE COURT: You didn't know then --when you

undertook the activity, it was not established as a constitutional protection; correct?

R. HUNNEFELD: Correct. That's --

THE COURT: Slow down.

You now have a case that says this is a violation; right?

MR. HUNNEFELD: Right.

THE COURT: And the only reason the court allowed qualified immunity in that case was they said, "Police Department, you didn't know about this as a constitutional right. We are now telling you, from this moment forth, this is a clearly established constitutional right."

So wouldn't I have to look at the time that case came out and now? So we do now, as of that case, have a clearly established constitutional right to not have the media film with the police officers on a search warrant.

So that's the first part.

MR. HUNNEFELD: Your Honor, let me say, the reason why I mentioned the fact that qualified immunity --there was no successful lawsuit as a result of it. The issue was qualified immunity, it hadn't been clearly established, and that's the end of it. Under those facts, they would have, the reason I -

THE COURT: I understand. But now we know what the law is.

MR. HUNNEFELD: I understand.

THE COURT: We know what the landscape is.

MR. HUNNEFELD: My argument is going to be different than that, though.

THE COURT: Okay, let me hear what your argument is.

MR. HUNNEFELD: My argument is, under --so individual officers have qualified immunity. If it's not clearly established, then there's no claim.

THE COURT: So now we get to the second prong.

MR. HUNNEFELD: Municipalities have Monell. So in other words, under Monell --I don't think anyone would consider disputing this: It's not about whether there was a constitutional violation, that's not the issue.

Assuming you have a constitutional violation, it's whether there was a policy of the municipality that was the cause of the constitutional violation.

THE COURT: And given the fact --and I believe Officer Sanchez testified to this --that they never got consents from individuals before they allowed A&E into their homes, and they didn't have a consent before they filmed Taiwan or Ciara or any of the private individuals in that episode.

MR. HUNNEFELD: Your Honor -

THE COURT: He did testify to that; didn't he?

MR. HUNNEFELD: No, I don't think he said -- there is no evidence that anyone's constitutional rights prior to this case were violated. There's not one case.

THE COURT: Prior to what case?

MR. HUNNEFELD: Excuse me?

THE COURT: Prior to what case?

MR. HUNNEFELD: Prior to the Smart case.

THE COURT: No. Let's --I think what we're doing -let's look.

We now have a case that says, "Police established, you have a constitutional right to go into people's houses when you do search warrants and you don't have their consent." Just these, follow along, before that case, no liability.

MR. HUNNEFELD: I'm sorry, I'm making a different point.

THE COURT: Listen to where I am. The brick is not the wall. Let me put the second brick. Your argument is, "Judge, even if there was this constitutional violation, they have not established that the City had a policy that allowed the violation;" correct? MR. HUNNEFELD: No, not allowed. That caused the violation.

THE COURT: So isn't it not the city's policy that caused the violation, this contract, allowing ""First 48"" to be permitted to go along with the officers from the City of Miami on these search warrants or going into people's houses and never getting consent from them?

MR. HUNNEFELD: Absolutely not, Your Honor. THE COURT: Why? MR. HUNNEFELD: Quite to the contrary. The language of the contract itself specifically says that you can't go onto the private property unless they have obtained prior consent from the property owner.

THE COURT: But they never got consent. So consistently over time --and I don't --you've got to brush me up on Monell, and I'm sure the other side of the room will. Can you establish policy through custom? And if their custom was to continually allow A&E part of the contract to go along with the ride-along, to film people's houses, even though the contract said you were supposed to get signatures or consent or permission, and they never did, that custom now establishes the city's policy.

MR. HUNNEFELD: There's not one case that's been mentioned. Not one individual, not one property owner who they were able to advance that have -

THE COURT: It's not necessarily an owner. The resident can. Or in this case -

MR. HUNNEFELD: Or resident.

There's not one --Your Honor, what evidence exists of any individual whose rights were violated as a result of the alleged policy that we're talking about? There is none.

THE COURT: Just like there was that first case that established that the Supreme Court, you now extrapolate outward.

MR. HUNNEFELD: Exactly.

THE COURT: You now have the case that says you can't do it. You have the city's continual custom of letting A&E go on the search warrants where people reside, not getting their permission; it becomes the custom, hence the policy, under Monell.

MR. HUNNEFELD: The custom has to show that there's a widespread, a history of constitutional violations. There's not one bit of that evidence has been heard.

THE COURT: I believe Commander Cooper testified, and the exhibit said there's like 68 A&E episodes?

MR. HUNNEFELD: Sixty-eight, yes. I don't know that number, but that's possible.

THE COURT: I mean, 68 just from Miami. That's what I'm talking about.

MR. KLOCK: It's 76, Your Honor.

THE COURT: Seventy-six. I mean just from Miami. The show runs and runs and runs.

MR. HUNNEFELD: Right.

THE COURT: But just from Miami, there's 76.

MR. HUNNEFELD: But they haven't --they didn't show one case of Mr. Jones --again, everything has to be -

THE COURT: So you're saying they have to bring in every person who never had permission granted?

MR. HUNNEFELD: Right, because frankly, Your Honor, unless -

THE COURT: No, that's not my question. Slow your roll, Mr. Hunnefeld.

Did they have to bring in other people to show, given the case in this case law Monell --that they have to bring in other people?

Detective Sanchez says he's done a number of these episodes and he does not recall ever asking for anyone's permission.

MR. HUNNEFELD: But he doesn't know whether the people from A&E actually asked or actually got. That's a big leap to make, Your Honor. Because consents were obtained and were customarily obtained by A&E directly, not by the City of Miami. We don't even touch those releases.

THE COURT: What about in this case the fact that Mr. Smart said he was never asked.

MR. HUNNEFELD: So that doesn't go to a prior history of widespread violations which would lead to this specific violation. You can't prove the violation with the violation; you have to prove it with something before. And not just one thing before. The case law is pretty clear, it has to be a widespread violation from before.

So even if they had proven that one time before within a ""First 48"" episode there had been such a violation, that would clearly not be sufficient to establish a custom or policy of violating.

THE COURT: All right.

MR. HUNNEFELD: And remember, everything is being attributed to the City of Miami. But the ""First 48"" played a very substantial role here. They're the ones who have the obligation to ensure that they're complying with several laws, the state law.

THE COURT: But can we agree that, but for the access agreement, ""First 48"" would have never been there?

MR. HUNNEFELD: But for the access agreement, they would not have been in certain places. Perhaps. They might not have known about certain places. Perhaps -

THE COURT: Come on, listen.

MR. HUNNEFELD: But -

THE COURT: Wait, wait, wait, wait. I understand that this is what you do, but let's just be logical for a minute.

MR. HUNNEFELD: I try to be, Your Honor.

THE COURT: They don't know where to go. They don't know what house to show up at. They don't know where the murder's going to be.

You had the testimony from Sanchez that either someone called them when they were going out on a scene, or a lot of times they were just hanging out at homicide.

MR. HUNNEFELD: Absolutely. But, Your Honor, that is not enough. That is not enough because the policy was only to let them follow around during the interrogation. It didn't say you can't kill the people that you go --it doesn't say you can take someone's property from them. It doesn't say you can violate their privacy rights.

And in fact, where --for the most part, if you don't see an individual, it's because they didn't sign a consent form. They do get consent forms. But that's not evidence here.

But, on the other hand, that is, in fact, the difference between the City filming the things and somebody else filming them. They were there. They got access. They knew about the murders. On the other

hand, they didn't go on the property because of it.

THE COURT: Of course. How else would they have gotten there? The police should have stopped them.

If I showed up at a murder scene -

MR. HUNNEFELD: They would have known about it.

THE COURT: --with my little video camera running and I said, "Do you know what? I'm doing a documentary on murders in Miami and I'd like to come onto this property and film you, homicide officers and detectives and CSIs, while you do your job," how long do you think I would be allowed to stand there?

MR. HUNNEFELD: Your Honor, the specific agreement with Kirkstall Roads said they may not enter on private property unless they have obtained prior consent.

THE COURT: But we know that didn't happen.

MR. HUNNEFELD: This is policy -

THE COURT: Do you know why we know that didn't happen in this case? Do you know why we know that didn't happen in this case? How do you think we know that, Mr. Hunnefeld?

MR. HUNNEFELD: Let's see.

THE COURT: First of all, we know Mr. Smart didn't give it to them, and we know the person who might have had the other legitimate adult residency requirement to live there was dead

on the floor in the unit.

MR. HUNNEFELD: But that's -

THE COURT: And Ray Nathan Ray was 14. He couldn't have given consent even if he wanted because he wasn't of legal age to do it.

MR. HUNNEFELD: There's another issue that I would get into. But this is so much clearer, the Monell

issue.

There is a question about --that would be a trail that, if I went on, I would lose the focus of the thing that should win this argument now.

THE COURT: Okay, what's the focus of the thing that should win this argument now?

MR. HUNNEFELD: In the absence of anything showing that there was a widespread history of constitutional violations, that the City of Miami is not put on notice that they have to overcome this unwritten constitutional policy. The written policy is clear.

THE COURT: They knew it was a problem when they did the addendum to the access agreement. Why do we have the addendum if it wasn't a problem from the original access agreement?

MR. HUNNEFELD: Is there any evidence that anything happened from before? Again, we know -

THE COURT: We know there was at least one evidence because I believe Commander Cooper said the reason why you had the one for not filming at the officer's home was, some of the officers were disturbed that this had happened and they wanted to make sure that this wasn't a requirement in order for them to be part of the show; that the fact that it was done at, I believe, Schillaci's house, that they wanted to make sure, whoa, whoa, whoa, are we required to let them see our families and our kids and what goes on in our private life? Because it doesn't even just say "homes"; doesn't it say something about "private" or --

MR. HUNNEFELD: And their family life.

THE COURT: Yeah. I want to hear -- I understand. Let me hear from the other side.

MR. HUNNEFELD: Could I just on that point, because I think it's important.

The specific --there was evidence that they had

gone to Schillaci's house. On the other hand, there is nothing unconstitutional about going to a police officer's house, apparently, with Sergeant Schillaci -

THE COURT: That's not the constitutional violation.

MR. HUNNEFELD: Exactly. But there's evidence of many others.

THE COURT: The other thing, Mr. Hunnefeld; that agreement didn't come out of the sky.

MR. HUNNEFELD: It didn't. I know the people who were involved in the process. They're not with the City anymore, but I know those people. And frankly, these people are constantly looking for ways to improve anything that they do. And so a new case comes up, well, why don't we put this into this type of agreement or that type of agreement.

The leap is too far to say because it's in here, that must mean there were violations before. No, there has to be evidence of widespread violations.

THE COURT: I'm not --I will tell you this: Even without that access agreement, I think once you have the Supreme Court case, you have the established policy.

MR. HUNNEFELD: But this has nothing to do with an established policy. None. Nothing. Nothing.

THE COURT: Excuse me. You have -- you know the clearly established constitutional right after that case. You understand that that's now a clearly established constitutional right after that case.

MR. HUNNEFELD: I think there are parameters that we could get into, but -

THE COURT: So the only thing that you have is the fact and the issue that I have to --and I'm going to hear from the plaintiff now --is whether or not this was a custom or policy of the City.

My concern when I ask the plaintiffs, do I have to have under the case law evidence of a widespread violation or is it --how would the court on matters of law determine whether or not there is a Monell violation to the plaintiffs?

If I find that it was the city's custom to allow the ""First 48"" to film in private homes without consent --if I find that this only happened once, does the City still have Monell liability or do I have other indicia here about what could have gone on?

MR. KLOCK: Well, first, Your Honor, let's deal with the issue of the universe of ""First 48"." There's 76 cases in Miami, okay? That's pretty widespread in terms of that particular grievance in Miami.

The other thing is that, if you recall from the testimony of Detective --I'm sorry, Sergeant Williams, the question was asked, "First suspects that are not arrested, they kept a pad of contracts, I guess, waivers for any and everybody they spoke to, except for arrestees that were charged. They would probably ask them to read and sign.

"And how about those arrestees that were charged?

"Well, if they were charged, they would offer; but if they didn't want to do it or whatever, they would still, you know, they would still get the footage from the video. That's how they would do it."

So therefore, even though they had the supposed policy and practice, it didn't apply to suspects. And the problem they have here is that this particular suspect was innocent, the charges were dropped. He was never asked.

Not only was he not -

THE COURT: So would I be able to say, based upon the evidence presented in this case, that it is so

well-settled that it constitutes a custom or force of law by the City of Miami?

MR. KLOCK: Every detective that sat on the stand, all three of them, said that they --that the custom was --that the deal was, you cooperate with ""First 48"," anywhere they want to go, they can go, unless --except they can't interfere with your investigation. And there's another distinction I'd like to make if I could, Your Honor. I believe we're entitled to a directed verdict --

THE COURT: I'm not saying you don't. But let's do one at a time.

MR. KLOCK: Well, number one, with respect to --

there's tiered theories of liability we put forth and also in the jury instructions we gave you.

First, state false imprisonment; I think that's relatively straightforward, and that will go to the jury.

But the Wilson claim, the three claims --and, Judge, we did not --we did not put forth an instruction and we did not go forward on perp walk alone, because perp walk might require staging.

Now the Court asked some questions about what constituted staging, what didn't. We don't have to use the perp walk case because the case that we have that works just as well, that includes a perp walk.

Most perp walks are from the front door of the police station to the police car.

This perp walk was done from inside the police station, across the homicide unit, down the elevator into a protected area into a police vehicle.

So, therefore, the case that says that you have a claim when your Fourth Amendment rights are violated by cameras being allowed into the areas where the public is not permitted normally to go and police

activities are being held, covers, first, the store, because it was clear that no one else was allowed around where they were except the ""First 48"" and Detective Sanchez.

Once they got to the police station, the entire 15-hour interrogation, the walk from there to the police car and the trip from the police car out, all of those things are tapings being done in places where the public is not allowed to be.

There is no question but that there was a Fourth Amendment violation as far as the house is concerned and the search warrant being executed.

Now, as far as Monell is concerned, Your Honor, I thought Your Honor ruled that that is an affirmative defense.

There was no proof put on by the City with respect to any affirmative defenses in their case. The only thing they put on was relatively modest when they were trying to have a fight about probable cause in terms of what Sanchez did.

So I think our point, Judge, is that with respect to the first tier of Fourth Amendment violations there is no requirement for a policy or anything else. All they have to do is violate it. Okay? Violate the search requirement.

Violate allowing the press to come in and tape areas where the public is generally not able to be, which is both a defense to what Henry is discussing and also the basis of our motion for directed verdict, which I assume you will later hear on the same topic, because the only evidence presented to the Court was that the camera crews were permitted in areas where the public was not permitted to go, and that Mr. Smart made it abundantly clear on many occasions that he did not want to be photographed, and there was nothing put

forth by the City that they asked for his permission.

And also if I might, Your Honor, on the policy.

A piece of paper that was written and not enforced -it was absolutely clear there was no enforcement and no training to make sure that people did what they were supposed to do. Their only instruction was cooperate with ""First 48"." Wherever they want to go is okay as long as they're not interfering with your police activities.

THE COURT: All right. Counsel, just one moment. I want to check one more case cite. Based on my review, I think that there is a constitutional right not to be filmed during criminal investigation without one's permission. The only question here is whether or not there is Monell-type liability that should be established here. Obviously, when you look at the actual documents, the City seems to make an effort to present --to prevent --excuse me --those type of constitutional violations from occurring. They specifically say, "Don't film without permission."

But the testimony that I have here in this case indicates that there was a custom that allowed A&E, along with the homicide units in the City of Miami, to consistently go on private property and film without the permission of the residents, the property owners, or the tenants.

We know that in this case this happened.

We know that Mr. Smart said he did not give permission; and we know that both Ray Nathan Ray and Jonathan Volce were deceased by the time the City --the A&E filming began.

The question is, what indicia do I have that there was a policy of allowing --a custom, excuse me, of allowing A&E to film?

I have, first of all, the officers' own testimony

that they don't recall, in the course of working with A&E with people, signing consent forms. They specifically said that in

this case there wasn't. Commander Cooper's own testimony.

Could the City have prevented this? Yes.

There was testimony that the episodes prior to being aired were sent to the City.

Now, where there is a disagreement is whether or not the City could have had them deleted or changed, but that's of no moment. What is important is that the City, over time, became aware that there was filming by the A&E crews on private property and there was no consent; that there was filming inside interrogation rooms without consent.

And I believe, at least to go to the jury in the light most favorable to the nonmoving party in this case, that Mr. Smart has sustained the burden of proof to go forward on 1983 for the following.

MR. HUNNEFELD: Your Honor, I haven't made my other half of the argument. I only addressed Monell. But I have arguments, very clear arguments, also with regard to the other violations, whether there was a constitutional violation at all.

It just seemed easier to address Monell first.

THE COURT: So you don't think there was a Fourth Amendment violation when they filmed him?

MR. HUNNEFELD: Your Honor, I don't think there was a constitutional violation when they filmed him.

THE COURT: Was there consent when they filmed him?

MR. HUNNEFELD: No, but I don't believe --

THE COURT: Answer my question. Was there consent? Was there consent? Do we have any --

MR. HUNNEFELD: The testimony appears that Mr. Smart did not consent.

THE COURT: Okay. Was there a valid law enforcement purpose for A&E to go along with the officers when they went to either the property where the murder took place or when they filmed Mr. Smart for this particular episode?

MR. HUNNEFELD: Your Honor, there was a legitimate law enforcement purpose for the interrogation -

THE COURT: I didn't say the interrogation. I said for the filming of it by A&E.

I believe that the interrogations and the searches were all legitimate law enforcement functions. The case law doesn't say that.

The case law talks about the photographing, filming, broadcasting; not just that the actual incident in and of itself had to have a valid law enforcement purpose.

MR. HUNNEFELD: Your Honor, I disagree. I think that the law does stand for that proposition that -

THE COURT: That there had to be a valid law enforcement –

MR. HUNNEFELD: That there is a valid law enforcement purpose. Even the perp walk case themselves -

THE COURT: We don't have a perp walk here.

You're telling me that as long as there's valid law enforcement purposes, the parties can film --the broadcast people can film without the person's consent?

MR. HUNNEFELD: No. I'm not saying it wouldn't be a violation of the Fourth Amendment. It wouldn't be an illegal search and seizure. It might be something else.

THE COURT: Are we reading the same case?

Are we reading the same case?

MR. HUNNEFELD: These cases are --the cases that we've addressed have all arisen under the Fourth Amendment, whether it's Layne versus Wilson, Lauro. There's a whole series of cases. Carlos Davila. They talk about it in terms of a Fourth Amendment violation being unlawful search or seizure under the Fourth Amendment. The only thing that's unlawful -

THE COURT: Right, but the search and seizure is --the unlawful part is the filming.

MR. HUNNEFELD: No. The unlawful part is the filming under certain circumstances, like -

THE COURT: Without the permission and without having a valid law enforcement purpose without the permission.

MR. HUNNEFELD: Well, in someone's home, Layne says, that if you go into a home and there is no valid law enforcement purpose for the media to be present, that that would be -

THE COURT: So was there a valid law enforcement purpose for the media to be present in this case?

MR. HUNNEFELD: Yes.

THE COURT: What?

MR. HUNNEFELD: The valid law enforcement purpose for the media to be present --well, first of all, the purpose was to show the public --as was stated in an exhibit that was submitted to the Court, "the goal is to provide the families of victims with some closure; and through the program, we're able to show viewers the extent we go to accomplish that goal."

Let me --I need to point out one thing. The City of Miami videos all of its interrogations.

THE COURT: I don't disagree with you on that. But they don't -

MR. HUNNEFELD: This is a public record that can be taken by anyone.

THE COURT: They don't then take the videos and air them on broadcast TV.

MR. HUNNEFELD: We do not. But if someone makes a request for a public record, they can do -

THE COURT: Aren't they routinely -

MR. HUNNEFELD: They are subject to law themselves.

THE COURT: Exactly. And isn't it not the case that usually, the interrogation portions, there's a very limited release of them until someone is actually prosecuted.

MR. HUNNEFELD: Until the case is closed usually. But not always. It depends on the person's offer.

THE COURT: Let me ask this question. The interrogation of Mr. Smart occurred prior to a trial in this case.

MR. HUNNEFELD: Yes.

THE COURT: Prior to the case being nolle prossed.

MR. HUNNEFELD: Yes.

THE COURT: Right. So if I, as a citizen, had wanted to obtain the film, the City's film of the interrogation -

MR. HUNNEFELD: Yes, Your Honor.

THE COURT: --prior to Mr. Smart pleading guilty or being nolle prossed or some other form of lawful process, would I have been able to obtain that interrogation?

MR. HUNNEFELD: There is no testimony onto that, but I will give you the answer.

THE COURT: I'm asking.

MR. HUNNEFELD: And that is, it depends.

There is an exemption that we can exercise. When I say "we" --if I ever use the term "we," I'm talking about the City of Miami.

THE COURT: I understand the law enforcement side of the house. MR. HUNNEFELD: Right.

We have an exemption that we don't have to give it out, but we don't --we're not compelled not to give it out.

There's not a confidentiality. There's a distinction between an exemption from required disclosure and a confidentiality. There's no confidentiality.

But it's still a public record subject to exemption, and we can exert it or not exert it.

THE COURT: But is it not --speaking of practice, pattern and custom, is it not usually the practice, pattern or custom that while cases are still being investigated or before they have a lawful ending in process --meaning plea, trial, dismissal --that those witness interrogations, suspect interrogations, are not usually dismissed under the normal public records process.

MR. HUNNEFELD: Again, no evidence in the record. But I would say that the majority of the time that probably is the case. They look at it and make a determination as to whether it would compromise the investigation. That's the most important thing. As a law enforcement official, you know that if it doesn't compromise the investigation --

THE COURT: Let me ask a question.

MR. HUNNEFELD: -- what would the purpose be to hold it back? We don't necessarily exert that.

THE COURT: And is there any of the exemptions and/or confidentiality of the law that is

usually exercised if I was a news, entertainment -

MR. HUNNEFELD: Oh, Your Honor, that's something we would never do. Never.

THE COURT: Okay. So -

MR. HUNNEFELD: We don't differentiate.

If you are a member of the public and request a public record, you get that document and you say, "We don't like you, you're a member of the media."

In fact we've thought about it I think a few times, but said, "Do you know what? That's not right. That's not legal. We're not going to do that."

So we don't make those types of distinctions between those.

THE COURT: So a request is a request, but usually not while the case is under legal process is it normally just turned over.

I understand there may be exceptions, exemptions, that we have not specifically ironed out here, but usually that's not the case.

MR. HUNNEFELD: Usually interviews of suspects, if they're part of the ongoing investigation, would not be. But, again, it's not categorical.

THE COURT: I understand.

MR. HUNNEFELD: I don't want to paint myself in a corner knowing that, in the end, the exceptions might eat up the rules.

So --and again, none of this was testimony in the trial. We know that the public records laws require disclosure of these documents.

THE COURT: I understand, but we're not here under public records.

We're here under the facts, and it was never presented as testimony, in this case, that what A&E did was go get a public --say, "Dear City, public records request, give me the interrogation of Taiwan Smart,

give me the witness interview of Ciara Armbrister," and then they took those and used those to air in their broadcast.

MR. HUNNEFELD: On the contrary. A public records request does not have to be in writing. There has to be no formal --if they walk up and ask for the disk, you give them the disk.

THE COURT: Written, oral, carrier pigeon, however, it didn't happen in this case.

MR. HUNNEFELD: No, this is what happened in this case. They gave them --these were recorded by City of Miami equipment. A&E asked for a copy of it and took it, that's it.

THE COURT: So the filming that -

MR. HUNNEFELD: And the City had nothing to do with it.

THE COURT: Wait, wait, wait. Let me back up.

The filming of Mr. Smart was not done with A&E equipment?

MR. HUNNEFELD: The filming of the interrogation, no. On the outside of the interrogation room, Mr. Smart --now, of course there are other people, too, lots of different sections. But, you know, there's --there's Fabio Sanchez running a marathon.

THE COURT: Okay. I understand.

So the pieces that aired of Mr. Smart's interview were all gathered pursuant to a public records request?

MR. HUNNEFELD: They were gathered by a request of a public record that we passed over to them.

THE COURT: Okay. All right. Counsel for Mr. Smart, do you have any argument on this issue?

MR. HUNNEFELD: I still haven't gotten to my arguments on --

THE COURT: On which one?

MR. KLOCK: Your Honor, the idea that this

was done on a public records thing is just ridiculous.

They monitored while they were there and the interview was going on. They're sitting out there, you know, eating donuts and drinking coffee and watching the interview.

When was the public request made?

MR. HUNNEFELD: You know, I mean, that's just a verbal --it's not enough to make a public records request.

MR. KLOCK: Your Honor -

THE COURT: One at a time. Okay.

What are the other arguments that you have to make, Mr. Hunnefeld, that I seem to be preventing you from making this afternoon?

MR. HUNNEFELD: We talked about the property itself and --because this is the filming of Smart. But the property had nothing to do with the filming of Smart; right?

So with regard to the filming of the property, plaintiff has failed completely to establish that he had an expectation of privacy that society is willing to accept.

Let's go to the back -

THE COURT: Wasn't his phone in there?

MR. HUNNEFELD: His phone was there. My phone is here but I don't have a reasonable expectation of privacy. If I left it here, it would not create an expectation of privacy.

But if I can go through all this series of evidence that we have in the record, I will show that there can be no reasonable expectation of privacy that society is willing to accept.

Number one, there was only one bedroom in that place and nobody slept there. There was no testimony regarding Mr. Smart regularly leaving anything in this

apartment. There is testimony that he wasn't the owner; that Jonathan Volce wasn't the owner. Jonathan Volce didn't even pay rent on this apartment himself. In other words, he was staying with someone who wasn't really a tenant and he was doing that, as he testified, and his psychiatrist --psychologist testified he was doing that periodic; he was staying at various places.

You don't continue to have an expectation of privacy moving from place to place to place. And he had his mother's place that he was going to; Mr. Brannon testified to that.

In fact, when he left these premises, he had a place to stay up in North Miami.

So the concept of abandonment becomes quite clear as well, because four days go by and he had not stayed there for two weeks before when he went to New Jersey just a few days before that. I think he even testified that his girlfriend told him --his girlfriend from New Jersey had told him that he shouldn't be staying there, and so he was trying to do it less.

So the reasonable expectation of privacy, not everybody who goes into a premise has an expectation of privacy, especially under circumstances like these where, under cross-examination and only having to pull out the deposition, he admitted that this was set up to be a drug hole. The purpose of this apartment was to sell drugs. That's why nobody paid rent. It was for weed or marijuana or Crip, or whatever they called it, and crack. That's the purpose of this.

So there's no reasonable expectation of privacy.

But on top of that, there's a case called Brown versus Pepe that applies under these types of circumstances, but it's a widespread concept in the law of constitutional violations; and that is, de minimis

injury.

If you --in Brown versus Pepe, it's a Massachusetts case, a police officer took a selfie with somebody he had in custody. It seems in poor taste to me, but the --and the person in custody made a claim that --of this type. They said that may be a constitutional violation, but that's de minimis.

In this case, we have this minimal expectation of privacy at most, combined with the fact that he wasn't there. It's not like the Layne versus Wilson where the family is there and they have the intrusion upon them of the media. He wasn't there. He was someplace hiding. And there's nothing that reflects that he was damaged in any way.

De minimis injury means --the damage means, how is he damaged by showing his --a place that he stayed at every once in a while when he wasn't staying with his friends or staying with his mom or staying with his girlfriend, especially when there's no evidence of the exact amount of time he was there before, and there isn't evidence of what he was keeping there. And there is evidence of abandonment.

I mean, given those circumstances and given what that apartment was used for, de minimis injury, combined with no reasonable expectation of privacy, that, society is willing to accept. Means there should be nothing for that either. When we talk about -- originally this was broken down into three things, we understood. One is walking down the hallway but with no staging or anything like that, that's not sufficient. The person --he was being taken from a place where he had just been interrogated to be booked, and the camera was there. And even Lauro specifically says that would never be sufficient. I mean, even if you called the press, that wouldn't be sufficient. Lauro, they

didn't give anybody consent. That wouldn't be sufficient.

It's only if you set it up so that there's no legitimate law enforcement purpose for taking the perp outside of the station and walking him around and called the media.

There was a clear law enforcement purpose to take him to get booked from the interview room after he had been arrested. Likewise, there was a law enforcement purpose to film him during his interrogation.

Nothing that the police did was staged. Nothing was forced. This was all in the normal course. And the filming was only documenting what was going on and was showing people the difficulties that police officers have to go through in homicide investigations.

THE COURT: Anything else?

MR. HUNNEFELD: No, Your Honor. I believe that covers my argument.

THE COURT: Counsel for Mr. Smart.

MR. KLOCK: Your Honor, I have some clients that live down in Gables Estates. And sometimes when I'm driving through there, I think to myself, "Gee, I wonder, all these people live in these big houses must really be very, very happy." I never really think or spend a great deal of time figuring out exactly what goes on inside the house.

But Mr. Hunnefeld, the insulting way he addresses where this guy lives, "Oh, no one slept in the bedroom." The issue they, I believe, set forth in their statement of material undisputed facts, that's where he lived, right? His clothes are there. His cell phone was there. His shoes were there. His driver's license was there. Perhaps his Riviera Country Club membership card wasn't, but that's where he lived, Judge.

And whether Mr. Hunnefeld likes it or not or thinks it's where somebody should live, that's where he lived. And the reason he lived there, Judge, was because the rest of his family was living in an apartment --a room that he had given up so they didn't have to be in a homeless shelter. He didn't like necessarily living there, but that's where he lived. And that's where they came in to execute a search warrant.

I mean, so --basically --and all the arguments about the legitimate --you know, that's all dealt with in Wilson. They tried that argument. "This is very good for the public and the community." Uh-uh, that doesn't work. The Supreme Court addressed that in Wilson.

I think one of the things that's very clear, when he talks about police officers and what they do, and what has become clear in this trial is the complete lack of empathy, concern for this man as a human being; the way he was treated in interrogation, the way Ms. Armbrister was treated in interrogation. They're all just scum, to be dealt with as the City wishes to deal with them, okay?

And it's all there so that at the very conclusion of ""First 48"" we can watch Detective Sanchez jogging down Biscayne Boulevard as he's engaging in the marathon and waxing philosophically about how this guy, who is innocent, killed his two best friends. Shame on them, Judge.

But in addition to shame on them, for them to be able to decide that they're going to decide how people live who aren't as fortunate as them is disgusting.

THE COURT: All right. I think, once again, this is an area where the City and I have to agree to disagree. There's a constitutional violation here. It's a Fourth Amendment one. It involves the home. It involves the interrogation.

The mere fact that there was another individual --when I say "individual," I should say "entity" --that filmed these interrogations is not important. The important part here is, is that A&E is juxtaposing whether it's they're filming it simultaneously or they're cutting and pasting what they got from the City in with the officers watching the interrogation of Mr. Smart. I mean, but Wilson talks about this.

The fact that there's some bad community purpose and good will and, you know, all the things I think that --even Commander Cooper said, that they thought that there was some good will that was gotten through the community by the show; that people saw how hard the police worked and how difficult their job was and how important it is to cooperate to bring -- there's still two things here that cannot be forgotten, and that is, their constitutional right, their individual rights that are guaranteed by the constitution, and you don't get to violate them just in order to have better relationships with the police.

There is actually case law out there that has even said, even an individual, overnight guest, may have an expectation of privacy in a premises for better or worse.

This is where Mr. Smart, quote/unquote, lived, and where he thought he would probably --you can -- your objection's noted for the record.

MR. HUNNEFELD: That's not in the evidence.

THE COURT: --where he thought he was going to spend at least that night. All right.

So I think, Mr. Hunnefeld, have we dealt with your issues as related to the 1983 and constitutional violations? Whether or not you agree with the outcome, have we dealt with them all?

MR. HUNNEFELD: Yes, Your Honor.

THE COURT: So we will be able to go forward on those. The City's motion on those are denied.

What are the remaining legal issues that we need to discuss for your client?

MR. HUNNEFELD: So the other legal issue is the false imprisonment state law claim. There's no federal claim, so there's a state law claim for false imprisonment.

And at the close of this evidence, it is clear that probable cause never dissipated throughout this entire process.

The one case that the Court has referred to to say that this is not like a regular false arrest, even though false imprisonment in every other case --and by the Eleventh Circuit in numerous places has called it the same --is Mathis. But Mathis talks about probable cause.

THE COURT: Isn't there case law, Mr. Hunnefeld, that says the court, in evaluating probable cause, can look at whether or not a reasonable investigation took place in regard to what the --so even though you may have this so-called objective probable cause on the face, but if the officer did not look through other investigative means, that that could affect whether or not objective probable cause existed?

MR. HUNNEFELD: Your Honor, there are no cases in Florida that specifically talk about that.

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(Continued from Volume 7.)

(Call to the order of the Court:)

COURTROOM DEPUTY: All rise. Court is now in session.

THE COURT: Mr. Blanford, tell the jurors take a break, if they want to go smoke. We're going to finish this up.

MR. KLOCK: Good morning, Judge.

THE COURT: Good morning. Mr. Klock, are we to wait for Mr. Napoleon?

MR. KLOCK: He's right next door, Judge.

THE COURT: Okay. Everybody sit down. We're going to go.

Listen, there was still a motion on the table when we left and I said I was going to take it under advisement; and that's the issue as to the filming inside the home, whether or not that violated Mr. Smart's constitutional rights. And I said I did want to have an opportunity to read the case law and come here this morning refreshed.

I am making a finding, for the record, that as to the issue of the filming inside the home, as a matter of law, the plaintiff has sustained their burden on that count, and I will instruct the jury -- I understand that the defense has a different understanding. Your objection to that finding is noted for the record.

And I will be instructing the jury only on the issue of damages as to -- and if I'm reading the instructions correctly as I have it -- if you look on page --

MR. HUNNEFELD: Your Honor, one quick question. Will the issue of whether policy existed that resulted in that, under Monell; you're finding that there was a violation, the second step in the policy as well.

THE COURT: I'm finding that there was a custom that was pervasive within the department at the time of not receiving consent from individuals before allowing the "First 48" to film inside of homes and residences.
And for that reason, Mr. Smart's rights were violated as to -- right to be free from unreasonable searches and seizures were violated as to the filming inside of the apartment.
Now, that still leaves the jury to make findings as to what I'm calling B and C; the filming of the interrogation, and the filming of him in handcuffs. Those are still – but let's --
So I go to what is now page 15 and 16 of the draft.
MR. KLOCK: Your Honor, can I ask a question on that?
THE COURT: Yes.
MR. KLOCK: With respect to the filming and --
THE COURT: You've prevailed, Mr. Klock. I'm just letting you know -- on at least one issue, I'm just letting you know as you go forward.
You said you had a question. Go ahead.
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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION
Case No.: 13-24354-CV-COOKE

TAIWAN SMART,

Plaintiff,

-v¬

CITY OF MIAMI, an incorporated municipality,

Defendant.

Miami, Florida
September 21, 2016
2:22 PM -3:19 PM
Pages: 1-41

MOTION HEARING
BEFORE THE HONORABLE MARCIA G. COOKE
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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PROCEEDINGS

(Court called to order at 2:22 PM.) THE COURTROOM DEPUTY: Your Honor, we have our motion hearing this afternoon on Case No. 13-24354.

THE COURT: For the record, appearing on behalf of
Mr. Smart?

MR. KLOCK: Hilton Napoleon and Joe Klock, Your Honor.
Your Honor, towering in the back corner is
J.C. Antorcha, who doesn't have a tie. He was hiding.

THE COURT: How is the hand?

ANTORCHA: It's doing great. Thank you very much.

THE COURT: I remember the last time you had just had
surgery on your hand.

MR. ANTORCHA: Doing a lot better.

THE COURT: Appearing on behalf of the City of Miami.

MR. HUNNEFELD: Good afternoon, Your Honor. Henry Hunnefeld on behalf of the City of Miami, and along with me is Kerri McNulty and Forrest Andrews from my office as well.

THE COURT: So we have two motions filed by the City. Docket entry 114 is the renewed motion for judgment as a matter of law. Docket entry 114 [verbatim] is the alternate motion for new trial and remittitur to alter judgment.

Counsel for the City, who will be arguing on your behalf?

MR. HUNNEFELD: The arguments will be made by Ms. McNulty and Mr. Andrews.

THE COURT: Thank you very much.

Counsel for Mr. Smart, you may be seated.

Your Honor, Mr. Smart stepped out. He will be in momentarily.

MS. McNULTY: Good afternoon, Your Honor. Kerri McNulty, Assistant City Attorney on behalf of the City of Miami.

Your Honor, today Mr. Andrews and I are going to be splitting the argument. I'm going to be taking the false imprisonment state law claim, and Mr. Andrews is going to take the 1983 issue and a couple of evidentiary points that are raised in our motion for new trial.

THE COURT: Are you going to start with the issue whether or not there was sufficient evidence to go to the jury on the 1983?

MS. McNULTY: I was going to start with the false imprisonment.

THE COURT: You can start with the false imprisonment claim.

MS. McNULTY: Thank you.

On the false imprisonment is detention without color of legal authority, and the key inquiry is what authority the Plaintiff is being held pursuant to.

THE COURT: My question was was this the same false imprisonment argument that you raised at the time of trial?

Isn't there a different blush that you have placed on it in the argument here that seems to me, at least, to be different than the issue of false imprisonment that we had during the trial?

MS. McNULTY: There was a slightly different -- I would agree, there is a slightly different color to the argument during the original 50(a) motion at trial.

THE COURT: So should I consider this motion since it's very different from the one, at least in my

mind, that was raised when we had the trial? This is essentially a new issue that neither side had an opportunity to confront in the motion for summary judgment where this issue was really hashed out. Consistently throughout the trial, Mr. Hunnefeld and I had, let's see, if not heated, at least very warm discussions -

MR HUNNEFELD: Very warm, Your Honor.

THE COURT: --on the issue of whether and where the false imprisonment claim ended and began. If I recall, the argument was, Judge, once you have probable cause determination, the potential for false imprisonment ends.

My decision was, and I think remains, although I'm going to listen to your argument, is when you have a claim that rolls out of itself a falsity, it doesn't cleanse itself by having the judicial officer pass on it, particularly when the claim for which Mr. Smart was held was the nonbondable murder offense.

MS. McNULTY: So a couple of points about what you just said. First of all, in terms of the preservation, the preservation standard in the Eleventh Circuit is fairly lax between a 50(a) and 50(b) motion, and the issue is whether or not the movant sought relief on similar grounds. The issue is always to avoid making a trap or an ambush for the nonmoving party so that there is no unfair surprise and that the party can have the opportunity to put forth evidence in response to the argument that they didn't put on sufficient evidence.

So two points here. First of all, during the 50(a) motion, although you are right, the majority of the discussion was about the probable cause, and I think from the City's side it was the idea that probable cause never dissipated throughout the proceeding and

throughout the time that Mr. Smart was held.

THE COURT: Well, at least if there was any false imprisonment, it was that narrow window for which he was detained/incarcerated before a judicial determination there was probable cause to bond him over. That would be the only period that would have existed. But that once you had a judicial determination that probable cause existed to hold him, then the false imprisonment claim stops. So you might at best have I think it was 36, 48 hours before he had a completed probable cause hearing.

MS. McNULTY: I guess the problem with that assertion is that Your Honor found that there was probable cause at the time of the arrest, and then once the probable cause hearing occurs, that cuts off --so the false arrest claim goes away because there was probable cause at the time of the arrest. And then at the time of the probable cause hearing, which was two days later, he went for his first appearance, but then they had probable cause the day after. When the judge found the probable cause, that cuts off the false imprisonment.

What I wanted to point out is that during the arguments on the original motion for judgment as a matter of law, Mr. Hunnefeld did point out that there were other processes by which Mr. Smart was held other than the probable cause determination of the officers. He specifically argued about the information that was filed by the State Attorney and stated that after that point, Mr. Smart was no longer held pursuant to the officer's determination of probable cause but instead pursuant to the information and was under the care of the, you know, it was up to the State Attorney whether he was going to be held or not at that point.

THE COURT: Wasn't the information --didn't

the information contain or he was bound over on the nonbondable offense in the information? So once you have the charge, he would have been detained regardless, correct?

MS. McNULTY: I think that's correct. But the issue of the falsity of either the alleged falsity of the testimony at the probable cause hearing or anything inside the information is not really the issue, because under the United States Supreme Court Eleventh Circuit precedent, Southern District precedent, Florida precedent, it's just whether it's a facially valid process. So it's not whether it's voidable, it's not whether there may have been something wrong with the process, it's whether the process happened.

THE COURT: So just --if someone --if the person who is assisting the binding judicial officer in making the claim that a person should be held on particular charges, that that comes from a position of falsity, you would say that that is no regard in the law as to whether or not that person is detained and whether or not a cause of action flows from it?

MS. McNULTY: It has no bearing on whether a cause of action for false imprisonment is --can go forward. False imprisonment is imprisonment without judicial process. Once you have the judicial process, unless there was something, you know, procedural due processwise that was missing, like you didn't -if you didn't actually have the hearing, or you weren't there on something like that, other than that, the judicial process cleanses, it cuts off that claim absolutely.

And so the issue on the falsity is whether --most of the cases that discuss this do a distinction between the tort of false imprisonment and the tort of malicious prosecution. For malicious prosecution, that is, the abuse of the judicial process, but it doesn't turn the

judicial process into a facially invalid one.

So if you think --if you allege that the officer at the probable cause hearing was untruthful, then your cause of action is against them. It's not that you have no remedy, it's just that false imprisonment is not the remedy under the law.

And the United States Supreme Court in *Wallace v. Kato* explains that. They say, "Reflective of the fact that false imprisonment consists of detention without legal process, a false imprisonment ends once the victim becomes held pursuant to such process when, for example, he is bound over by a magistrate or arraigned on charges. Thereafter, unlawful detention forms part of damages for the entirely distinct tort of malicious prosecution which remedies detention accompanied not by absence of legal process but by wrongful institution of the legal process."

And in *Young v. Davis*, which is a case --a federal case out of Oklahoma that I cited in our papers, it's very clear that the Plaintiff is making a very similar argument to the argument made here by the Plaintiff, which is that the officer was untruthful at their preliminary hearing, and that's what caused them to be bound over, and they were bringing a false imprisonment action. The Court said --they said that the Plaintiff's allegations regarding the allegedly false statements of Defendant Davis at his preliminary hearing would be attributable to another tort than the unlawful arrest alleged in the petitioner's complaint.

This is the reason why we are arguing that *Mathis v. Coats*, which is the State case from Florida that Your Honor relied on in allowing the false imprisonment claim to go to the jury, is in opposite. And that's because in *Mathis v. Coats*, it was the officer's determination of probable cause that kept the

Plaintiff in custody the entire time, and there was no judicial process that intersected it.

So at the time that she was taken under arrest, there was probable cause to arrest her because it did seem like she had alcohol on her breath and that she was intoxicated. But then the Court found that later during the course of the 36 hours she was held over, when they did a urinalysis that came back negative and a Breathalyzer that came back negative, the probable cause had dissipated. It's impossible for probable cause to dissipate. That's not really the issue when the individual was brought before a judicial officer and had judicial process.

THE COURT: Counsel, are you now presenting me with an argument for which Mr. Smart would have no remedy? Meaning that if this argument had been brought up at some point in time during the motion for summary judgment, or even, although this might be a stretch, Mr. Klock and Mr. Napoleon are pretty creative so they might have been able to pull something out of a hat, don't you think this is a point for which they have no redress now? Meaning if I had heard this argument at some point in time, there might have been either a motion to amend the complaint, a motion to allow them to even amend during the course of trial to conform with the evidence that came.

But now we are in a situation where we have concluded the trial, and I would tell them, you know, all those other arguments were great, but we now have a different one for which you didn't have a chance to respond when you could have made a different decision during the course of the trial.

MR. HUNNEFELD: If I may just very briefly on that one thing that the Court raises.

No, it would have made no difference

whatsoever. The statute of limitations had passed before any of these determinations were even going to come up. And the claim of malicious prosecution could only be brought, as the case law is quite clear, against an individual. So the fact that there was no individual, Mr. --I think it was Sergeant Sanchez, was not sued, he could not be sued. Nothing that was done later could have changed that. So the argument does not impact what could have been brought.

MS. McNULTY: I would also add that they are not prejudiced by Your Honor entertaining this argument at this point because there is no evidence that they could have brought forth, unless they are going to say that the probable cause hearing didn't happen, which I don't think they are going to say, there is nothing they could have brought forth that would have gotten around this case law.

Their theory of the case the entire time has been that the officer lied and that's why he was held over. But according to the case law, once there is a probable cause hearing, it's not about whether the officer lied, it's about whether they had that judicial process and it was facially valid.

THE COURT: All right. Let me hear from the Plaintiff on the issue regarding false imprisonment, and then I will go back and hear from the Defendant on the issue of the 1983 claim.

MS. McNULTY: Thank you, Your Honor.

MR. KLOCK: Thank you, Judge.

Your Honor, Mr. Smart is now sitting with us at counsel table.

Your Honor started out by indicating that there was a different tone or flavor to the argument. It's a completely different argument. Whoever it is that wrote the papers after the trial was over was

completely different than the person who wrote the papers before. The argument that they have now is that there was a valid judicial process. If you go through, Judge, the argument that was made at the conclusion of the Plaintiff's case, which is we think encaptured in record 238 through record 258, there is nothing in there about a valid judicial process.

They talk about Mr. Arocha (phonetic), who is the Assistant State Attorney having made the determination. They talk about the police officers. Even though, Judge, if you recall, Detective Sanchez testified on page 43 of his deposition, "Okay. I knew guys went in there to smoke some weed and shit like that. Ain't nothing wrong with that. I'm not here --I'm not worried about anyone smoking weed. We work homicide, we don't work narcotics."

Forget, if you will, that for this purpose. The argument they made in the 50(b) motion is completely different than the argument they made in the 50(a) motion. The case law is quite clear that you cannot do that.

THE COURT: What about the idea that counsel says that that would only be a problem if you had not had a chance to completely brief the issue, which obviously you have here today?

MR. KLOCK: Well, the fact of the matter is, Judge, we could have, perhaps, amended pleadings, but there is already grounds as well as far as this being concerned.

Your Honor will remember --let's talk about false imprisonment. The false imprisonment period includes the 19 hours of interrogation, which if you will recall, caused several members of the jury to cry when they were listening to it when they saw what that young man was being put through, which the City not

only was not sorry for as they did it, but remained all the way through the trial completely unconcerned about it.

So the question would be if Your Honor wanted to go down that lane, okay, and ignore, respectfully, the various case law that says that you can't invent a new argument on a Rule 50(b) motion that you haven't raised in a 50(a), the fact of the matter is that there is false imprisonment that occurs before that occurred.

Now, the other point that I would like to focus on is the issue -

THE COURT: False imprisonment occurred before what occurred? You said "that occurred."

MR. KLOCK: Before the hearing even began.

THE COURT: So I think this is where there is some agreement. Because I think that counsel for the City, at least during the trial, would say, Judge, even though we aren't admitting, we would say any false imprisonment claim would only be valid until the probable cause hearing.

MR. KLOCK: And they made that argument in their papers after trial as well. I can't give you the exact page references. I will try to get them.

Can we return for a second to the other point that Your Honor raised, which I think is valid as well. We had a debate about this. Let's say by way of example, Judge, there was a document that is essential for the initiation of process, and there is two versions of the document. One version of the document is the arrest form that was presented to Judge Cueto, and the other version of the document is one that states in the language of the document that Mr. Smart indicated that shots came through the window and that those shots hit the individual, which, if you will recall, is what gave Judge Cueto the belief that there was probable cause to

go forward, so they had a probable cause hearing. He found that there was not probable cause. The State then asked for an evidentiary hearing, at which point they brought in Detective Sanchez to lie to the Court. Okay?

So in my mind, Judge, and I think this is the point that you were making a little bit earlier, the process, then, the documentation, that which the Court is going forward on, okay, is problematic at that point in time because the lie is what makes the judge go forward. The judge had already found on the papers that they had filed before no probable cause the day before. He then has the evidentiary hearing, and at the evidentiary hearing Detective Sanchez goes in and he lies.

THE COURT: So essentially what your argument is is, Judge, this might have been different had from the initiation of these proceedings the judge thought there was probable cause, but the judge had concerns initially.

MR. KLOCK: He said there was no probable cause.

THE COURT: And then the State said, whoa! Hold up, Judge, give us another chance. They bring in Sanchez who then through falsity convinces Judge Cueto there is probable cause.

MR. KLOCK: Which then makes the process void, the process void.

Your Honor, the reference --Hilton was on this. The reference is on page 7, section B of Plaintiff's continued detention path. It says, "Plaintiff's continued detention path two days after his valid arrest was based on the judge's probable cause determination, a valid court order." So that's when they made that argument.

So the fact of the matter is, Judge, either what you are saying now, the fact that they raised new matters in the 50(b) motion that precluded us from having to litigate those things earlier on and the fact that I believe that what they did by bringing in someone to provide a piece to the affidavit that was untrue, basically voided that process. Therefore, everything that followed after that was an improper false imprisonment.

THE COURT: Thank you very much, Mr. Klock.

Now I will hear from the Defendant on the 1983 claim.

MR. ANDREWS: Good afternoon, Your Honor. Forrest Andrews on behalf of the City of Miami.

The Plaintiff failed to establish that there was a policy or practice of the City which violated his rights by allowing *The First 48* to film individuals without their consent.

THE COURT: So how did *The First 48* get in the police station?

MR. ANDREWS: There is an access agreement that allows them to be present. However, the access agreement only allows them to be present. It also requires them to get consent from anybody that they interact with. And if they want to film people, they need to get consent. If they want to film private property, they need to get consent.

THE COURT: Was there a time when Mr. Smart offered his consent to be filmed?

MR. ANDREWS: No, Your Honor. For purposes of this hearing, we are not going to challenge the fact that there was a constitutional violation. We are just focusing on whether there was a policy or practice and whether that caused the violation.

THE COURT: What would the policy or practice

not be? Meaning if there was a practice or even through a contract that allowed *The First 48* to come into the police station and film private citizens or go on private property and film without consent, the only way that could have occurred would have been through a practice of the City of Miami. I mean, *The First 48* just can't --I don't think. Maybe they, you know, they have powers for which I am unaware. They couldn't just show up at a murder scene and other than being standing on public property, which anyone could do, I could take my iPhone and film standing on public property, but I couldn't go into a private area for which you would have to have a warrant or only lawful process would allow you to get there and start broadcasting that on TV and making money off of it. No?

MR. ANDREWS: No, Your Honor. For purposes of *Monell*, that's not the causation analysis. For what Your Honor just stated is a "but for." But for a lot of things, there probably wouldn't have been a constitutional violation. There has to be a direct cause between the City's policy and the constitutional violation.

Merely because the policy allows them to be present, if it didn't go any further, then maybe I would agree. Because the agreement in several different paragraphs says you can be present but you have to get consent, and it's that part that breaks the chain of causation from the City, and now it's a third party who is --their independent action, that is what is causing the violation. Because if *The First 48* had abided by the agreement, did what they were supposed to do based on the policy, there wouldn't have been a violation.

So -

THE COURT: Whoa, whoa, whoa, whoa. Try

that one again.

MR. ANDREWS: If *The First 48* had did what they were supposed to pursuant to the policy, which is get consent before you film anybody, get consent before you enter on private property, that there would not have been a violation because they would have gotten consent, and that's what the City did.

So for the Plaintiff to say the City's policy is deliberately indifferent to rights, that's just incorrect.

Based on the face, the plain language of the agreement, the City is providing reasonable safeguards to protect individuals' rights.

THE COURT: But when the reasonable safeguards are shown time and time again to break down, does that not in and of itself become a policy in acquiescence?

MR. ANDREWS: There is no evidence that this broke down time and time again in this case. The only evidence at best that the Plaintiffs offered at trial were instances in this case, and that cannot establish a pattern or practice.

A pattern or practice under Eleventh Circuit precedent has to be widespread and pervasive. The case in which the Plaintiff is suing on alleging that his rights were violated time and time again, that is not enough. That is their best case scenario. They did not introduce any evidence from any other people whose rights were allegedly violated by *The First*

*48*. They didn't have anybody from *The First 48* testify that they never got consent before. They didn't have any people who were depicted on the show come in and testify. There was no evidence whatsoever of past policy or practice.

So not only should a directed verdict have been entered for the City on this, but the directed verdict for

the Plaintiff should be reversed on the claim that the City had a practice -policy or practice of allowing *The First 48* to film residences when there was no evidence of that. And the Plaintiffs will be hard pressed to come up here and identify a single individual whose rights were previously violated or identify a location or an address where this alleged filming happened.

So for those reasons, because there was no policy, and there certainly was not the cause, the direct cause under Eleventh Circuit precedent, the City is entitled to a directed verdict, and the directed verdict that was entered for the Plaintiff should be reversed.

THE COURT: Thank you.

Let me hear counsel for Mr. Smart. Do you care to speak on this issue?

MR. NAPOLEON: Good afternoon, Your Honor. Hilton Napoleon on behalf of Mr. Smart.

May it please the Court, Your Honor, we have to think about where we are at in this particular circumstance. The reality is that the standard for Rule 50(b) is was there a scintilla of evidence to preserve the jury's verdict. In this particular case, there are two ways that we actually proved a policy. Okay?

Their 12(b)(6) representative, who is the one who has the most information about the policy -

THE COURT: You mean the Rule 30 representative?

MR. NAPOLEON: I'm sorry, Judge. I said 12(b)(6). Rule 30 representative, which is Commander Cooper, and they are the ones who designated her as the person who has the most experience and who is the most knowledgeable about the policy. So let's see what she said about the policy. And we are actually referring to I believe it's docket entry 110 at 79 and

78. And the question to her was with respect to

the consent issue, "Were you aware whether or not consent was secured before someone would bring a camera crew in to either a private residence or would tape anyone who appeared on the show?"

"No."

"Question: Do you know --did you assume that if you can go somewhere that the camera crew could go there as well?"

"Answer: I don't think at the time I had an assumption," which she is basically saying she knew. "I think the fact that they were given permission by the City."

So in this particular case, she is saying that the City's policy is that the camera crew has permission to go wherever they went.

THE COURT: Well, what about the City's argument that somehow you, meaning Plaintiff, had to show some sort of pattern, that you had to bring in other officers or other situations in order to say this? Is Officer Cooper's --Commander Cooper's testimony sufficient on its own --

MR. NAPOLEON: I know where Your Honor --

THE COURT: -- to preserve the verdict?

MR. NAPOLEON: Absolutely. And let me explain to you why. Under *Monell* there is two separate theories that you can go under to show a policy. You can go under a written policy or a policy of the City, or you can go under a custom or practice. If you go under the policy, which is what Commander Cooper was referring to who had the most knowledge about it, then you don't have to prove custom or practice, you don't have to prove prior events, you don't have to call and show other instances where this custom or practice was implemented. So if we are just talking about just straight policy, I know they are

trying to claim the policy is that you had to have consent, but that was not the testimony of Commander Cooper.

The question comes down to was there a scintilla of evidence to preserve the jury's verdict, and I think that based on what Commander Cooper said about what the policy is, I don't have to assume. The policy was that the show can go wherever I go, and that's what she said that the policy was. They are the ones who designated Commander Cooper as the representative, and based on that more than one way to prove a *Monell* claim under a strict policy analysis, we don't have to talk about pattern or practice.

THE COURT: So you say pattern or practice would only have come in, for example, if for some reason there was (a) no contract -

MR. NAPOLEON: Correct.

THE COURT: --which there was in this case; or (b) there was no testimony from a person with knowledge who would say what the City did in terms of the contract?

MR. NAPOLEON: Correct.

THE COURT: So you have the written document and the person telling you how the City interpreted the written document as the policy.

MR. NAPOLEON: Well, Judge, I can even go one step further. What I can tell you is that every contract, every agreement does not actually have to be written. If they are the ones who may have the designation to say what is the policy, and she says the policy is this, then I think that's legally sufficient in and of itself regardless of what the written contract says.

I will actually go one step further for you, Your Honor, which is we are talking about policy or practice. I can actually refer also in the record where Detective

Fabio Sanchez basically admitted that they never asked. And also it's important to understand, too, that Detective or Sergeant Altar Williams also indicated that they would just go and get the videotape if they did not get consent. So if you are talking about pattern or practice, that was their pattern or practice.

Do we have to name each and every single term that they are talking about? No. But we have basically admission from a person who is related to the party or has a relationship with the party which basically is saying their policy --I'm sorry, their custom or practice is to go get the video in situations where a Defendant in that particular case, since this is a criminal investigation, doesn't consent.

So, Your Honor, I think that no matter how you slice it, we win if you talk about a strict policy or if you talk about a custom or practice.

THE COURT: Okay. Thank you very much, Counsel.

MR. NAPOLEON: Thank you, Your Honor.

THE COURT: That was the 50(b) issue and motion.

Who will be arguing for the City on behalf of the Rule 59?

MR. ANDREWS: I will, Your Honor.

THE COURT: Counsel, you may proceed.

MR. ANDREWS: Your Honor, I would like to address the introduction of the polygraph evidence as well as the third-party confession evidence. The polygraph evidence was inadmissible as a matter of law. A witness's willingness to take a polygraph is not admissible in the Eleventh Circuit.

I understand that the Plaintiff in their response cited case law that says under certain situations the results of a polygraph can be admitted, but that's not

what we have here.

A request to take a polygraph and the results of a polygraph are two separate things. One, even if you treat this as were these the results of the polygraph examination, unless there is a stipulation, there are other grounds that need to be met which were not met. There is no foundation to introduce it. What we have here is the Plaintiff who requested a polygraph and was allowed to introduce that evidence. The prejudice that comes from that is that polygraphs are inherently, not inherently, but unreliable. They have not been found as a matter of law to be reliable. So to allow the jury to hear time and time again, over 85 times in a 16-minute period, that the Plaintiff wants to take a polygraph and that the polygraph will show that he is telling the truth, that infuses something into the trial that it taints the jury, and there is no instruction that can undue the harm that that does.

Plus, as Mr. Klock mentioned a few moments ago, the video, the clip that they watched, moved some of the jurors to tears. So to say that his implication of a polygraph time and time again didn't have an impact on the jury which was prejudicial to the City, it defies the reality.

Also compounding the error making it even more prejudicial to the City is the fact that the Plaintiff, as well as his criminal defense attorney, testified that he was actually innocent. So a polygraph, we know what it is. It's a lie detector test. The Plaintiff said numerous times I want to take the polygraph, I want to take the lie detector, it's going to show that I am telling the truth, and then you guys can let me go. So you have that. So you are building up on this, all of these cumulative impacts on the jury.

And then ultimately the basically final question

that they end up on is, okay, so you finally did take a polygraph while you were in jail, and then what happened. I was released shortly thereafter. The only reasonable logical conclusion that the jury could reach is that he passed the polygraph, so he must be telling the truth.

Introduction of willingness to take a polygraph test, it unfairly bolsters credibility, and that is why it is inadmissible in the Eleventh Circuit. And for all of those reasons, it unfairly prejudiced the City.

I don't believe that Your Honor's curative instructions, or I would call them instructions because they didn't cure, and the reason why they didn't cure is because they were confusing and misleading to the jury.

If I can have just a moment just to read the instructions, there are actually three different instructions that Your Honor read for basically the same type of evidence.

The first instruction is where you tell the jury that the evidence has been received regarding the Plaintiff's request for take a polygraph. "A polygraph examination is not required in a criminal case. This evidence is for your consideration of the officer's investigation only in the case."

Then Your Honor issues another instruction later on saying, "As I have said to you repeatedly throughout this trial, a polygraph is not an investigative tool in a homicide investigation. It's not admissible in Court, and the police officers in this case were not required to give one."

Finally, another instruction, "A polygraph is not a required investigative tool."

So there is no purpose other than the fact that they were trying to get in the truth of what the

Plaintiff was saying. The instructions --a reasonable juror who is hearing this and saying, well, the judge is instructing me that I can't consider this in court. However, the Court is admitting it, and I'm hearing it in court, so what am I supposed to do with this?

So the argument at trial that the Plaintiffs put forward to try to get this in was that, oh, it goes toward the reasonableness of the investigation, but then you have two instructions which say this is not required. So I believe the instructions did not cure the prejudicial impact of the evidence, and for that reason alone a new trial should be given.

Moving onto the evidence of a third-party confession, that's double hearsay. There was evidence that came in through Detective Sanchez that an inmate told him that another inmate told him that he was the one who committed these crimes. It's classic double hearsay. There is no exception that the Plaintiff tried to meet in order to introduce this. The most applicable exception would be the statement against penal interest, which they didn't meet the foundational requirements. They haven't shown or didn't show that the declarant, the out-of-court declarant was unavailable or that he was subject to any criminal penalties as a result of this. This came in secondhand. So for that reason alone, it's inadmissible.

Also we talk about the prejudicial impacts of this evidence on the case against the City. It was unfairly prejudicial to where the theme really was that the Plaintiff was telling the truth. So you combine that with the polygraph, you combine that with this hearsay statement that somebody else had confessed to the crime, now it's really bolstering the Plaintiff's credibility. And you take that into --you also take into account the Plaintiff and his defense attorney said that

he was innocent, and there was no instruction, there was no curative instruction to that statement when the defense attorney said that. There is no curative, there was no striking it telling the jury to disregard it. So we have cumulative errors that are going on in this case.

One last one that I wanted to talk about is the closing argument. The very last statement that opposing counsel stated during closing argument was that the City was pimping for *The First 48*. That's an inherently prejudicial comment. It happened at the end. It was the very last thing from either side that the jury heard. That's what they were left with.

That, I believe, inflamed --statements like that inflame the passions of the jury, which I think is reflected in the ultimate outcome and ultimate verdict.

When you add up all of these errors, I think by themselves they are enough to warrant a new trial. But when you combine them together, there is no way to separate the prejudicial impact from the false imprisonment claim or the 1983 claim, and so I believe that each of those warrant a new trial.

THE COURT: What about the damages issue? You request the Court for remittitur in this case.

MR. ANDREWS: Correct. And that's based on the fact that on the state law claim the most that the Plaintiff can get is $100,000, so the City would be capped as to what it could pay.

THE COURT: I mean, that wouldn't require remittitur. Mr. Klock and Mr. Napoleon are welcome if they wanted to petition the legislature for more money. They just can only get the $100 from your stone at this point, correct? It doesn't prevent them from seeking other redress to pay the judgment if they are so inclined.

MR. ANDREWS: That's correct. Also the other

argument on the remittitur is I think because of these prejudicial and inflammatory evidence and comments that were made, I think that's reflected in the verdict because you have the same amount of money for each claim where --a claim where the Plaintiff was imprisoned or was in jail for, I think, 19 months was worth the same as a couple-second clip showing his ID. So I believe that to say that those are worth the same amount of money, a six-figure dollar amount, can only be attributed to the fact that the jury was inflamed against the City.

THE COURT: Counsel, does the cap apply to all the claims?

MR. ANDREWS: No, just the state law claim.

THE COURT: Just the state law claim. So still on the

1983 claims, there is no cap there?

MR. ANDREWS: Right. We are not saying there is a cap to that. We are saying that the reason for such a high verdict on the 1983 claims is because of the inflammatory evidence and statements that were made.

THE COURT: Thank you very much. Let me hear from Plaintiff on this issue. I am concerned --Mr. Klock, you are going to argue?

MR. KLOCK: Yes, ma'am.

THE COURT: Talk to me a little bit about this polygraph. Did I just need an evidentiary reboot that morning when I allowed this in, or is there a true evidentiary basis for having the jury hear --I know that he repeatedly said it on the interview. As we know, the interview had been edited for the jury to hear from a number of ways, and why not edit out the issue of the polygraph?

MR. KLOCK: Well, let's first talk about whether there was any prejudice. The whole issue of whether

there is prejudice in the polygraph is because it's not admissible, correct? So the fact of the matter is that all through that edited interview, every time he said he wanted a polygraph test or he wanted a lie detector test, it was useless. You couldn't use it at trial, it had no evidentiary value. I think that was reinforced all the way through.

The fact of the matter is I will call Your Honor's attention to Volume 1, 163310, and Volume 1, 20123-202. Let me read this to you.

"The Court: You just stated that he told a story that can't be true. He must be guilty of the murder. We haven't talked about anybody else who is actually prosecuted, and you are basically retrying the murder case."

Then you say, "If that theme continues to run on the City's side of the aisle, I'm just letting you know I may view that as an opening the door to the results of the polygraph. What I have allowed so far is only the fact that Mr. Smart asked for one. I have not allowed any results."

Now, the issue, Judge, had to do all the way through with respect to probable cause the quality of the investigation. That's what was being considered. So the issue was whether or not they conducted an adequate investigation to find probable cause. Okay?

Your Honor was very careful each step of the way not to allow the results of the polygraph to come in. Okay? And the fact is is that his request for a lie detector test, okay, he can request anything he wants. But the whole flavor of the interview didn't hang on whether or not there was a lie detector test.

They suggest at the end of the closing saying that the City was pimping for *The First 48* inflamed the jury. It's hard to imagine anything inflaming the jury

more than that appalling interview that they did of that young man for 19 hours when he repeated the same thing over and over and over and over and over again, and it made no difference. They just kept at it and at it and at it.

The fact of the matter is the results of the polygraph test did not come in. Okay? And any suggestion that it was left hanging in the air that if you request a polygraph test it means you are innocent was more than adequately handled by both the Court's instruction and also by the repeated protest of the police officers.

I think as Your Honor knows, having practiced law before you assumed the bench, there is a lot of people that claim they can take a polygraph test that flunk it. So the fact of the matter of asking, that did not constitute the results of the polygraph test.

If I may, Your Honor, you will also, Your Honor, remember that they first asked him if he would take a polygraph test. That's at the very beginning of the interview. Will you take a polygraph test? He said yes. So that's okay. They can ask him if he is going to take a polygraph test. That's okay as part of the interview and as part of their investigation, but he is not allowed to make any reference to it because that should be expunged from the record. I don't get that one, Judge. If I may, do you have any other questions on that?

THE COURT: No. The other issue is the third-party
confession.

MR. KLOCK: Okay. The third-party confession, again, Judge, had to do with the investigation and whether or not there should have been a further investigation. Okay? Now, it doesn't make any difference whether or not the guy is telling the truth or

not. The question is whether these guys who had clearly no interest whatsoever in figuring out which person down in that neighborhood committed the crime, they didn't care, Judge. That was quite obvious they didn't care. Did not care. They got one in jail, that's enough. Okay?

So the issue here is in the face of someone else confessing, okay, to a third party, there should have been a further investigation, and there wasn't, Judge. That was the issue, and that was the reason why Your Honor left it in.

THE COURT: And the comment at the end of closing, Mr. Klock?

MR. KLOCK: Well, Judge, I have been accused of inflaming people before, but to suggest --I mean, the City was pimping for *The First 48*. Everything was designed --I mean, everything in that show is designed to show the city, show the great things that are going on in the city, to feature the various people. The star, you remember, we had evidence we brought in the brochures that talked about the stars and that kind of thing? For them to claim that they are offended or the jury is inflamed by suggesting that they are pimping for *First 48* I think is just preposterous, and there was no indication, I think, that anyone was inflamed by it at all.

THE COURT: Thank you very much.

MR. KLOCK: Can I respond -

THE COURT: Yes, please. The remittitur.

MR. KLOCK: Yeah. More important than the remittitur is the fact that the 100,000, $200,000 cap is not sovereign immunity. That's a limitation on liability, as the case law makes clear. Okay? It was not raised by way of affirmative defense. It was not raised in the pretrial stipulation. They have waived it. Okay?

Sovereign immunity is like pregnancy. You are either pregnant or you are not.

But caps on liability are different, and I will bring to Your Honor's attention the case of the *Ingraham* case from the Fifth Circuit, which is *Ingraham vs. U.S.*, 808 F.2d 1075, where the Fifth Circuit says, and this was cited, I believe, also by Judge Rosenbaum prior to her assuming her seat on the Eleventh Circuit when she was a district judge, "We view the limitation on damages as an avoidance within the intent of the residuary clause of 8(c).

"*Black's Law Dictionary* defines an avoidance in pleadings as 'The allegation or statement of new matter in opposition to a former pleading which admitting the facts alleged in such former pleading shows cause why this should not have the ordinary legal effect.'

"Applied to the present discussion, a Plaintiff pleads the traditional tort theory of malpractice and seeks full damages. The Defendant responds that assuming recovery is an order under the ordinary tort principles because of the new statutory limitation, the traditional precedence 'should not have their ordinary legal effect.'"

The Court continues on page 1080. "Our decision today is consistent with the conclusions reached by the Courts in two similar cases our research has disclosed." Something or other vs. Wells, 725 S.W. 2d. 271 Texas Appeals, and *Jacobson v. Massachusetts Port Authority*, 520 F.2d 810, First Circuit 1975 case holding that a state statutory limitation on tort damages was an affirmative defense which was waived because it was not timely pleaded.

And, Judge, the limitation that exists under Florida law is not sovereign immunity, it is a limitation on damages. There is a distinction between them. And

as Your Honor is well aware with respect to I think it is the *Clearfield* case where the Supreme Court of the United States made it clear that procedural issues like affirmative defense are governed by federal law not by state law. It doesn't make any difference what they do in Florida state court. The fact of the matter is that's an affirmative defense. That's a limitation on damages which had to be raised.

The only affirmative defenses that they raised in their pleadings, Judge, was first a *Monell* affirmative defense, and the other was a portion, a subsection of the statute in Florida which says that police officers are immune from liability when they are functioning in the ordinary course of their duties. At no point in time did they raise as an affirmative defense that there was a limitation on state law liability claims of $100,000 or $200,000. It's waived. Like many of the other arguments that they raise in their post-trial motions, it's waived because they didn't raise them before, Your Honor.

THE COURT: Thank you.

You know, usually we have motions for new trial and remittitur kind of close in time, and this case is an exception. I am usually not a fan when that happens, but I think because, and I think everyone here agrees, this case was so hotly contested from the very beginning, I am glad that there was this time (1) for parties to in a more quiet phase file the motions; but (2) in a more quiet phase for me to think about them.

I am going to start first with the Rule 50 motion. I'm going to start with the first argument, which was the false imprisonment argument. Very often when you have a chance to file your motion for new trial, you are putting a much more legal argument maybe to an argument that you made heatedly in trial

without the ability to truly examine all of the case law.

That's not what happened here. This is a brand new argument. It was never presented prior to the trial in the motions for judgment, it was never presented during the trial, and it never came up when we had the end-of-Plaintiff's-case verdict request. So this is beyond the idea that somehow the Plaintiff would now in the stillness of time have an opportunity to address this issue.

This is a new substantive issue that if I were to rule in the Defendant's favor, not only kick the Defendant --the Plaintiff out of Court, they never had an opportunity to adequately address it prior to today. And I think the case law supports me that this is beyond a nuanced argument, this is brand new. So the judgment as a matter of law on the issue related to false imprisonment I think is untimely raised.

Even if I were to reach it, as I have said repeatedly, the level at which the falsity occurred here negated the process. This was not a mere clearing up of something. The judge initially said there was no probable cause. The City comes back with a witness who testifies falsely in front of the judge making the judge reverse the prior decision. So that portion of the motion is denied.

Let's go to the 1983 claims. This is not a situation where the Plaintiff had to show a pattern or practice. They had actual (1) policy based upon the actual contract; and (2) as Mr. Napoleon just pointed out, the testimony of their witness with the most knowledge that said this is what we did, this was our policy. So they have established the policy based on the actual testimony of the City. There is no need for them to go -- this is not something that they had to establish through conduct or consistent acquiescence in something. The

City itself said this was their policy. So Defendant's motion pursuant to Rule 50(b) as a matter of law, docket entry number 115, is denied.

As I said at trial, I believe that there was such evidence to go forward to the jury on this case, but I'm going to go through what I think are the most salient points of the Defendant's motion for new trial that I think might be warranted for some discussion.

The jury was consistently given instructions as to how to take the polygraph in this situation, what its purpose was, what its admissibility was, and why I allowed it. I allowed it by the way the Defendant chose to try this case, essentially relitigating the murder aspect when I think I tried to limit it to whether or not there was untruth in the arresting phase and how that went to the ultimate investigation of this case.

In the case of the issue as to the third-party confession, this was also done to determine not for the truth of the matter asserted, which I believe I instructed the jury on, but to show the jury and indicate to them how this investigation occurred.

Many times in false imprisonment cases, you are talking days, you might be talking weeks. But this was a case in which the Defendant in the criminal case, the Plaintiff here, was held for almost two years. So, of course, I know what wanted to happen is that somehow the police responsibility dissipated and it all was the State Attorney. But this was a joint effort to show whether or not this prosecution should have gone forward and what the reasonableness of the investigation was, and that's why the testimony as to the polygraph was allowed.

I don't find that there was any erroneous nature of the other jury instructions in this case. Not to mention we had a very lengthy charge conference

where both sides had an opportunity to really go for the nuance of the language in the jury instructions. So this was not merely by either me or either side in this case just to do a cut-and-paste job on jury instructions. It was a pretty significant hearing.

I believe there were drafts that went back and forth between the parties; I looked at some. And then even up to the point of closing arguments we were making changes to try to make what we thought would be the best instructions given the facts of this case.

And the last issue on this section is the phrase "The City pimped for *The First 48*." The jury was consistently instructed that it was the lawyers' take on what the evidence had shown. The lawyers' comments were not evidence. Whether it might have been evidence that might have been a statement that I might make in closing argument is of no moment. It's what the Plaintiff thought they had proven in terms of the relationship between the City and the production company of *The First 48* and how that came to be.

The damages issue, was it raised until the motion for new trial? Issues related to money, the ones that are 1983 claims, if the case --if the judgment is still upheld, they get to come back for their money. The ones that aren't and are not are precluded by state law --will be precluded by state law.

Therefore, the second motion for new trial is denied, and I will enter accordingly. I do not find there was any prejudicial error of law or that the verdict was against the great weight of the evidence or that the jury award was excessive.

Thank you very much, Counsel.

MR. KLOCK: Thank you.

MR. HUNNEFELD: Thank you, Your Honor.

(Thereupon, the proceedings were concluded

at 3:19 PM.)

CERTIFICATE

I, Tamra K. Piderit, Certified Realtime Reporter and Registered Diplomate Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 5th day of December, 2016.

/s/ *Tamra K. Piderit*

Certified Realtime Reporter
Registered Diplomate Reporter

Re: "The First 48"

This letter confirms the arrangements made between Kirkstall Road Enterprises, Inc. (the "Company") and the City of Miami ("Owner") whereby Owner has kindly agreed to allow us to film at their premises at 400 N.W. 2nd Ave., Miami, FL 33128 and other premises under the jurisdiction of the Owner (the "Location"), for the purposes of filming interior and/or exterior scenes in connection with the production of a documentary television program provisionally entitled "The First 48" ("the Program") which Company intends but does not undertake to produce, under the following terms and conditions:

1 The Company shall be entitled to film at the Location up to and including February 28, 2010 or such other times as may be mutually agreed,

2. The Owner agrees that the Company shall have the right to enter the Location for the purposes of filming/recording in connection with the Program and to incorporate such footage in whole or in part or not at all in the final version of the Program. Further, Company acknowledges that the participation in the Program of Owner's officers and personnel is strictly voluntary, and Company confirms that Company shall be responsible for obtaining all necessary consents including the written consent of Owner's officers and personnel featured in the Program.

3. The Company hereby agrees that it shall carry insurance up to $1,000,000 (one million dollars) to

indemnify the Owner for any liability, loss, claim or proceedings arising from statute or common law in respect of personal injury (and/or death) of any person and loss or damage to property caused by the negligence, omission or default of the Company or any person for whom the Company is responsible provided always that the Company is notified immediately of any third party claims.

4. (a) Owner agrees and consents to the filming and recording of Owner and Owner's officers, personnel, agents and employees and their voices at Company's discretion and the use of this footage in whole or in part or not at all. Owner irrevocably grants to Company, and shall cause its officers, personnel, employees and agents to grant to Company all rights and consent or waive the same so as to permit the fullest use throughout the world of the footage or any part(s) thereof in perpetuity by all means and in all media. Owner agrees, and shall cause its officers, personnel, employees and agents to agree that the footage, their likeness(es) and photograph(s) and biographical material about Owner and them may be used for promotional purposes relating to the Program.

(b) Owner agrees that, as between Owner and Company, Company shall own all right, title and interest in and to the Program and all elements thereof and relating thereto (collectively the "Materials") and the Materials shall be considered works-made-for-hire for Company, its successors and assigns for all copyright terms

renewal terms and revivals thereof throughout the world for all uses and purposes whatsoever. In the event that the Materials are found not to be works-made-for-hire then the Owner irrevocably assigns to Company all of the Owner's interest in the Materials including without limitation the copyrights therein for good and valuable consideration receipt of which is hereby acknowledged.

(c) Company and its licensees and assigns shall be entitled to use within the Program any materials and images containing the Owner's name, trademarks and logos (whether recorded incidentally or otherwise) and to use the same for any publicity and promotional purposes and for the exploitation of the Program in all media throughout the world in perpetuity.

5. The Company shall be entitled to assign and/or license its rights in and to the Program in whole or in part to any third party.

6. (a) Owner acknowledges that Company has absolute editorial control of the Program. Prior to first transmission of the Program containing Owner's contribution hereunder, Company shall provide *Lt. John Buhrmaster* or his/her designee (the **"Representative"**) with one (1) video tape copy of the Program containing Owner's contribution at the "fine cut" stage (the **"Video Tape"**). Company shall allow the Representative five (5) business days to review the Video Tape for the purpose of identifying and notifying Company in writing of any factual inaccuracies of

which Owner is aware, and Company agrees to rectify the factual inaccuracies. In the event that Company has not received any written comments from the Representative within five (5) business days of Company providing the Video Tape, the absence of a response shall be deemed approval. However, the Company shall not knowingly use, publish or broadcast any materials or images that are of a confidential nature pursuant to applicable laws and statutes.

(b) Company will provide the Owner with at least one (1) digital video disk copy of the final edited version of the Program.

7. Company agrees to:

(a) No staging of scenes or phone calls.

(b) No reenactments whatsoever.

(c) No compensation to Police employees.

(d) No filming at Police employee homes or of their family lives.

(e) No initial accessibility to crime scenes until after the scene is deemed safe and until a walk through of a scene can be conducted.

(f) No film crew may enter upon private property unless they have obtained prior consent from the property owner.

(g) Additionally, all concerns or questions not

covered by the agreement will be submitted to the Criminal Investigations Section Major for approval or denial.

8. **COMPLIANCE WITH APPLICABLE LAWS AND RULES AND REGULATIONS:** Company agrees to obtain all required licenses and permits and to abide by and comply with all applicable laws, rules, regulations, codes and ordinances in the use of the Locations.

9. **INDEMNIFICATION:** Company shall indemnify, defend and hold harmless the Owner, including all the Owner's volunteers, agents, officers and employees, from and against all loss, costs, penalties, fines, damages, claims, expenses (including reasonable attorney's fees) or liabilities (collectively referred to as "Liabilities") by reason of any injury to or death of any person, including claims for damages to one's reputation or privacy interests, claims for invasion of privacy including: **(1) appropriation:** unauthorized use of a person's name or likeness to obtain some benefit, **(2) intrusion:** physically or electronically intruding into one's private quarters or person, **(3) public disclosure of private facts:** disclosure of private facts that are offensive to the reasonable person and of no legitimate public concern, and **(4) false light:** publication of facts that place a person in a false light even though the facts themselves may not be defamatory, and claims for defamation, libel, and slander, or damage to or destruction or loss of any property arising out of, resulting from, or in or in connection with the use of the Location,

whether caused directly in whole or in part, by any act, omission, default or negligence of the Company or any of its guests, invitees, employees, agents or subcontractors, or by the failure of the Company to comply with any of the provisions hereof, specifically the Company's obligation to comply with all applicable statutes, ordinances or other regulations or requirements in connection with the use of the Location.

10. **RISK OF LOSS:** Company understands and agrees that the Owner shall not be liable for any loss, injury or damage to any personal property or equipment brought into the Location by Company or by anyone whomsoever, during the time that the Location is under the control of, or occupied by the Company, All personal property placed or moved in the Location shall be at the risk of Company or the owner thereof. Company further agrees that it shall be responsible to provide security whenever personal property either owned or used by the Company, its employees, agents or subcontractors is placed in the Location, including any property or equipment necessary for set-up and dismantle, whether or not the Location is open to the general public.

11. **TERMINATION RIGHTS:**

(a) The Owner shall have the right to terminate this Agreement for convenience, in its sole discretion, upon a thirty (30) day prior written notice to Company. Additionally, the Owner shall have the right to cancel the filming, at any

time if, in the exercise of its reasonable discretion, the Owner determines that the filming, at the scheduled time, is not in the best interest of the Owner due to circumstances beyond the Owner's reasonable control.

(b) The Owner shall have the right to terminate this Agreement, without notice or liability to Company, upon the occurrence of an event of default.

(c) Company shall be entitled to terminate this Agreement with immediate effect at any time.

(d) In the event of termination by either party, Company shall remain entitled to all rights consents and waivers granted and/ or assigned to Company under Clause 4 of this Agreement.

12. This Agreement shall be construed and enforced according to the laws of the State of Florida. Should any provision, paragraph, sentence, word or phrase contained in this Agreement be determined by a court of competent jurisdiction to be invalid, illegal or otherwise unenforceable under the laws of the State of Florida or the City of Miami, such provision, paragraph, sentence, word or phrase shall be deemed modified to the extent necessary in order to conform with such laws, or if not modifiable, then same shall be deemed severable, and in either event, the remaining terms and provisions of this Agreement shall remain unmodified and in full force and effect or limitation of its use.

Please kindly signify your acceptance of these terms by signing below.

**AGREED AND ACCEPTED;**
**Kirkstall Road Enterprises, Inc, Representative:**

(Print Name) _____

_____
Signature

Date: _____

CITY OF MIAMI, a municipal corporation of the State of Florida

By: _____
Pedro G. Hernandez
City Manager

APPROVED AS TO FORM AND CORRECTNESS:

By: _____
Julie O Bru
City Attorney

ATTEST:

_____
Priscilla A. Thompson
City Clerk

APPROVED AS TO INSURANCE REQUIREMENTS:

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LeeAnn Brehm, Administrator
Risk Management Department