

11-2610-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALAN NEWTON,

Plaintiff-Appellant,

-v.-

CITY OF NEW YORK, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**PETITION FOR REHEARING AND
REHEARING IN BANC**

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PRELIMINARY STATEMENT

The City files this petition for rehearing and rehearing in banc to ask the Court to reconsider the panel decision in this case, which improperly constitutionalizes broad questions about good practices in the storage, management, and tracking of evidence after the conclusion of criminal prosecutions that should be left to policy makers in the legislative and executive branches of state and city government.

The facts of this case are unquestionably tragic. Plaintiff Alan Newton spent years in prison for a rape that he did not commit. The rape kit prepared at the time of the crime could not be located for several years during post-conviction proceedings because of a filing error following one post-conviction motion. Once the rape kit was located, DNA testing exonerated Newton of the crime. The panel's dismay about the case is understandable.

But the panel's conclusion that federal section 1983 liability should lie against the City here is seriously mistaken and warrants review by the full Court. First, the missteps of line employees in the tracking of the rape kit are not constitutional violations. The panel's creation of a sweeping new due process right to a "faithful accounting"

of evidence, while perhaps superficially attractive, lacks judicially administrable standards and contravenes Supreme Court precedent.

Second, the existence of other instances where evidence was negligently misfiled or otherwise mishandled does not provide a sufficient basis to impose municipal liability on the City under section 1983. The panel concluded that too many mistakes have been made by employees implementing the City's evidence management system, but this does not mean that the City itself has followed a policy or custom that is unconstitutional.

Whether and how the City's evidence management system should be reformed are questions for the policy-making branches of government. So, fundamentally, is the question whether taxpayers should compensate Newton for his wrongful imprisonment. Indeed, Newton has already prevailed on liability in state court under the specific criteria governing compensation set forth in New York's wrongful conviction statute. The panel's decision to impose federal section 1983 liability as well extends constitutional law into new areas that should continue to be the domain of policy-makers and distorts basic principles of municipal liability under section 1983.

BACKGROUND

In May 1985, Alan Newton was convicted of two sexual assaults. Only one of the convictions is at issue: Newton's conviction for the rape, robbery and assault of an adult victim, V.J., based on the identification of him by the victim and another witness. He was sentenced to an indeterminate term of 13 1/3 to 40 years imprisonment for that crime, to run consecutively to his sentence for the other sexual assault.

Newton was imprisoned until 2006, when he was exonerated of V.J.'s rape and assault by DNA testing. Newton had made several requests for the rape kit between 1994 and 2005, but the City had been unable to find it, despite substantial effort, because the invoice for it had been misfiled in the late 1980s following an earlier post-conviction proceeding. In 2005, the Bronx County District Attorney's Office found a copy of the invoice in its files, which bore a handwritten notation reflecting the correct location of the evidence. Using this copy of the invoice, the City located the evidence and produced it for testing. The DNA tests excluded Newton as the perpetrator.

Following his release, Newton sued the City and over twenty individual defendants, alleging various violations of his constitutional

and common law rights arising out of his conviction for the V.J. rape and assault. All of his claims were dismissed on the merits before trial, with the exception of his due process and First Amendment claims based on the City's inability to locate the rape kit for DNA tests, and common law intentional infliction of emotional distress claims ("IIED").

PROCEDURAL HISTORY

1. Newton's due process and First Amendment claims proceeded to trial before the United States District Court for the Southern District of New York (Scheidlin, J.). After a three-week trial, the jury returned a verdict of \$18 million on these claims, and \$592,000 on the IIED claims against two individual defendants.

The district court thereafter granted the City's motion for judgment as a matter of law, relying on the U.S. Supreme Court's decision in *District Attorney's Office v. Osborne*, 557 U.S. 62 (2009), and this Court's decision in *McKithen v. Brown*, 626 F.3d 143 (2d Cir. 2010). The district court entered judgment for the City. *Newton v. City of New York*, 784 F. Supp. 2d 470 (S.D.N.Y. 2011).

2. A panel of this Court (Lohier, Lynch and Droney, JJ.) reversed, reinstated the jury's verdict and remanded the matter to the

District Court for consideration of Newton's First Amendment claims. The panel concluded that provisions of the New York Criminal Procedure Law addressing post-conviction review based on newly discovered evidence created a "corollary" procedural right to an "accounting" of evidence post-conviction that was protected under the federal Due Process Clause. The panel also concluded that because of the misfiling of the rape kit invoice, and other alleged instances where evidence could not be located post-conviction, Newton had introduced sufficient evidence to show that a custom or practice of the City itself directly led to the violation of his constitutional rights.

REASONS FOR GRANTING REHEARING IN BANC

The panel's decision raises issues of critical significance warranting review by the full Court. The panel departed from *Osborne* and other controlling authority, expanding the scope of the Due Process Clause beyond the limits set by the Court. The panel also disregarded basic limits on municipal liability, effectively holding the City liable in respondeat superior for the filing mistake of a line-level employee.

A. The Panel Created a New Due Process Right That Contravenes Supreme Court Precedent and Lacks Judicially Administrable Standards.

The panel here mistakenly created an unprecedented due process right imposing affirmative requirements on local law enforcement and prosecutors to create “adequate” systems to store and track evidence after a criminal prosecution has ended. The panel’s holding improperly constitutionalizes the regulation of out-of-court practices for the storage and management of evidence at the post-conviction stage. These areas should be regulated by the legislative and executive branches of state and city government, not through judge-made principles newly adopted under the Due Process Clause of the federal Constitution.

The majority’s decision to bring these new areas under federal judicial superintendence via the Due Process Clause clashes with the Supreme Court’s express admonition against “the expansion of . . . constitutional guarantees [in the area of criminal law] under the open-ended rubric of the Due Process Clause.” *Medina v. California*, 505 U.S. 437, 443 (1992). The Court’s admonition stemmed partly from the fact that “preventing and dealing with crime is much more the business of the States than it is of the Federal Government.” *Id.* at 445 (quoting *Patterson v. New York*, 432 U.S. 197, 201 (1977) [further quotation marks omitted]). The Court also held that the existence of many specific

provisions in the Bill of Rights governing criminal procedure counsels against recognition of additional, novel rights under the general Due Process Clause. *Medina*, 505 U.S. at 443. The Court thus noted that “it has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.” *Id.* at 443-444 (quoting *Spencer v. Texas*, 385 U.S. 554, 564 (1967)).

Given the above points, the Court has held that a rule of state criminal procedure will not be subject to proscription under the Due Process Clause unless “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Osborne*, 557 U.S. at 69. The stark novelty of the due process right created by the panel here, by itself, shows that this test is not met. The growing importance of and sophistication in DNA testing are good reasons that the area should receive attention from the policy-making branches of government (as it has), but they are not justifications for creating a brand new federal due process right.

The panel’s sweeping holding in this case also runs counter to the Supreme Court’s decision in *Osborne*, 557 U.S. at 73. There, the Court

rejected the argument that convicted prisoners have a freestanding due process right to access DNA evidence. Relying on *Medina*, the Court held that the convicted prisoner's claims should be decided within the framework of the State's procedures for post-conviction relief unless those procedures failed the "fundamental fairness" test. 557 U.S. at 68-69. The Court later cautioned in *Skinner v. Switzer*, 562 U.S. 521, 131 S. Ct. 1289 (2011), that "*Osborne* severely limits the federal action a state prisoner may bring for DNA testing," noting that the case "rejected the extension of substantive due process to this area . . . and left slim room for the prisoner to show that the governing state law denies him procedural due process." *Id.*

In *Osborne*, the Supreme Court reiterated that deference to state legislatures in this area is critical, because "it is hard to imagine what tools federal courts would use to answer" policy questions about what sort of physical evidence should be collected for eventual DNA testing, how long it should be preserved, and similar issues. *Id.* at 74; *see also Medina*, 505 U.S. at 452-3. The decision here runs headlong into this problem: the panel holds that convicted defendants have a due process right to an "adequate" system to store, track, and manage evidence

post-conviction, but does not identify any judicially administrable principle that exists to determine whether a system for storing and managing evidence is “adequate.” Indeed, the panel recognizes that mistakes are inevitable in a complex evidence storage system, and that the mere inability to locate particular evidence post-conviction does not violate due process. Yet the panel offers no reasoned basis to determine what kind of training, data collection, or evidence tracking practices it would now deem necessary to comply with the Due Process Clause.

Nor can the panel’s holding be reconciled with *Arizona v. Youngblood*, 488 U.S. 51 (1988). There, the Supreme Court held that law enforcement’s negligent failure to preserve potentially useful evidence—samples of biological material from a sexual assault—does not constitute a denial of due process of law, unless the criminal defendant can show bad faith. 488 U.S. at 58. The panel distinguished *Youngblood* on the ground that this case is about a failure to ensure that evidence could be located, not a failure to ensure that evidence was preserved at all, and made clear it was not imposing requirements for the retention of evidence post-conviction (Op. at p. 24).

But these superficial distinctions ignore the fundamental similarities between the claim rejected by the Supreme Court in *Youngblood* and the one endorsed by the panel here. The *Youngblood* Court stressed that the case did not pertain to the government's treatment of evidence known to be exculpatory, but rather involved the government's handling of "evidentiary material of which no more [could] be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." 488 U.S. at 57. The same point applies here. The essential equivalence between challenges to a failure to preserve evidence and challenges to a failure to preserve the ability to locate evidence is shown by the panel's chiding of the City for delay in adopting a policy of preserving DNA samples indefinitely, and by its multiple references to supposed "improper destruction" of DNA evidence as support for the municipal liability finding.

Although state procedural provisions do not set the standard of federal due process, the panel was incorrect in asserting that its decision is consistent with the New York Criminal Procedure Law. The statute enacted by the New York Legislature has provided since 2004 that the People must disclose the "current physical location" of the DNA

evidence if known, but if the location of the evidence is “unknown,” the People are only required to disclose the “last known physical location” of the evidence. CPL § 440.30(1-a)(b). The Legislature thus recognized that DNA evidence from past prosecutions sometimes would not be able to be located, and determined that in such cases, the People would be required only to disclose the evidence’s last known physical location. The panel’s holding that the People must also implement “adequate” systems for the tracking and location of DNA evidence imposes requirements that the State Legislature has not seen fit to enact.¹ That additional requirement is tantamount to giving Newton a right to the evidence itself; it does not allow for missing evidence, as the statute does. Newton received a “faithful accounting” under the statute; the evidence was accurately reported as missing. No more process was due.

At bottom, the panel failed to recognize the relatively narrow role of the federal Due Process Clause in the overall field of state criminal procedural protections. The panel seems to have concluded that its holding was necessary to avoid frustrating the purpose of the New York

¹The panel decision also rests on anachronistic reasoning, as it cites numerous provisions of the Criminal Procedure Law specifically addressing DNA testing that were not in effect in 1988 or 1989, when the invoice for the evidence here was misfiled.

Criminal Procedure Law provisions governing post-conviction DNA testing. But it is not the role of the federal Due Process Clause to ensure that state criminal procedure statutes or their policies may be effectuated by reading corollary rights into those statutes that do not otherwise exist. The role of the Due Process Clause is to protect those particular principles that are so deeply rooted in our traditions and conscience as to be considered matters of fundamental fairness—something that cannot be said of the broad new rights regarding storage and tracking of evidence that the panel created here.

B. The Panel’s Decision Distorts Basic Principles of Municipal Liability.

The panel’s decision also violates fundamental and long-established principles regarding municipal liability under section 1983.

For liability to be imposed upon a municipality under 42 U.S.C. § 1983, a plaintiff must satisfy rigorous standards of culpability and causation to ensure that the municipality is not held liable for the actions of its employee. *Board of County Commissioners v. Brown*, 520 U.S. 397, 404-406 (1997). The plaintiff must prove (1) that a municipal actor violated her constitutional rights, *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), and (2) that the municipality itself actually

caused that violation through its own policies or customs. *City of Canton v. Harris*, 489 U.S. 378, 391 (1989). “In any § 1983 suit . . . the plaintiff must establish the state of mind required to prove the underlying violation.” *Brown*, 520 U.S. at 405. In cases where the plaintiff alleges injury due to the unauthorized conduct of subordinate, non-policymaking employees, this burden is distinct from the burden she bears in demonstrating the state of mind of municipal decisionmakers for purposes of *Monell* liability, which exists “quite apart from the state of mind required to establish the underlying constitutional violation.” *Id.* at 407. Here, Newton adduced no evidence at trial that the conduct of policymaking officials, acting within their lawful authority on behalf of the City, directly caused his injuries.

The panel mistakenly concluded that municipal liability could be imposed here based on a negligent act of misfiling by at most a few line-level city employees. This was error, first, because there was not sufficient evidence of any underlying constitutional violation by any city employee. The evidence presented at trial conclusively established that the City could not locate the rape kit because subordinate, non-policymaking employees committed paperwork filing errors “in 1988

and 1989, before DNA evidence was used in criminal cases and post-conviction defendants had any statutory rights to access evidence for testing.” *Newton v. City of New York*, 784 F. Supp. 2d 470, 482 (S.D.N.Y. 2011). At that time, “[n]one of the individual employees responsible for handling the paperwork could have reasonably anticipated that their actions might one day implicate Newton's constitutional rights.” *Id.* Consequently, Newton could only show at most that one or more City employees acted negligently. Such a showing is insufficient to sustain a due process violation. *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The absence of any underlying constitutional violation by a city employee necessarily means that municipal liability will not run against the City. *See Brown*, 520 U.S. at 405; *Heller*, 475 U.S. at 799.

Independently, the panel further erred in holding city policymakers demonstrated “deliberate indifference” sufficient to sustain *Monell* liability (Op. at 34-35). As this Court has recognized, “[t]o be ‘deliberately indifferent’ to rights requires that those rights be clearly established.” *Young v. Fulton County*, 160 F.3d 899, 904 (2d Cir. 1998). The due process right that Newton asserted was not clearly established at the time of the events in question—indeed, no such right

was suggested by any precedent prior to the decision in this case. Absent a clearly established right, city policymakers cannot be said to have acted with deliberate indifference.

The record is bereft of any evidence that any policy or custom of deliberate indifference by city policymakers caused any violation of Newton's constitutional rights. The panel noted that the City had been unable to locate evidence in a certain number of cases (Op. at p. 32), and that a number of invoices evidently were misfiled. But as the district court correctly observed, 784 F.Supp.2d at 480, negligent acts by various line employees, not themselves unconstitutional, do not become an unconstitutional municipal policy or custom simply because they occur multiple times. Nor does the evidence show that any policymaker was aware of such alleged mistakes at the time of the misfiling of the invoice for the rape kit here in 1988 or 1989. Thus, there is no basis to conclude that any deliberate indifference by the City itself caused the inability to locate this particular rape kit.

CONCLUSION

The petition for a rehearing in banc should be granted.

Dated: New York, New York
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Respectfully submitted,

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