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Case at a Glance

The position of sheriff in Alabama seems to be a hybrid. On the one hand, there is much to suggest that sheriffs are the chief law enforcement officers for their respective counties; on the other hand, they are denominated state officers by the Alabama constitution. In this case, the Supreme Court is asked to decide which designation matters. If the former, Monroe County, Alabama, can be held liable for its sheriff's action in convicting an innocent man of murder; if the latter, the County is off the hook.

Are Alabama Sheriffs County Officials for Purposes of Local Governmental Liability Under Federal Civil Rights Law?

by J. Gordon Hylton

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Section 1 of the Civil Rights (Ku Klux Klan) Act of 1871, now found at 42 U.S.C. § 1983 ("Section 1983"), permits an individual whose federal rights have been violated to sue for damages. (Refer to Glossary for the definition of damages.)

The Supreme Court ruled almost 20 years ago that the word "person" in Section 1983 included local governments as well as individuals. *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978). However, in declaring that local governments could be liable under Section 1983 for violating an individual's federal rights, the Court declined to base liability on a theory of *respondeat superior*, i.e., an employer's liability for certain unlawful acts of its employees. Instead, the Court ruled that local governments are subject to Section 1983 liability only when the alleged injury is the result of "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." 438 U.S. at 694.

Monell did not provide a precise formula by which to identify "those whose edicts or acts . . . represent

official policy." And subsequent cases that have reached the Supreme Court have dealt primarily with the question of whether or not a particular local government official or employee possessed the requisite policymaking authority. Less explored has been the question of which officials with policymaking authority can fairly be said to represent local government as opposed to state government. Making such a determination is the focus of this case.

ISSUE

Are Alabama sheriffs final policymakers in matters of law enforcement for their respective counties for purposes of governmental liability under Section 1983?

FACTS

In 1988 Walter McMillian was sentenced to death for the murder of a woman in Monroe County, Alabama. Five years later, his conviction was overturned by the Alabama Court of Criminal Appeals on the ground that Alabama law enforcement offi-

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DOCKET NO. 96-542

ARGUMENT DATE:
MARCH 18, 1997
FROM: THE ELEVENTH CIRCUIT

cials had unlawfully concealed exculpatory evidence supporting his innocence. 616 So. 2d 933 (Ala. Crim. App. 1993). Shortly thereafter, all charges against McMillian were dismissed. On March 3, 1993, he was released from prison after having served nearly six years on Alabama's death row, including more than a year on death row between the time of his arrest and trial on murder charges.

McMillian subsequently filed a Section 1983 action in federal district court, naming as defendants Monroe County, Monroe County Sheriff Tom Tate, and a number of county and state officials who McMillian alleged were responsible for his arrest, imprisonment, and conviction. According to McMillian's complaint, Sheriff Tate arrested him without cause; subjected him to racial slurs, threats, and insults (Tate is white, McMillian is African American); knowingly suppressed exculpatory evidence pointing toward his innocence; intimidated witnesses into giving false testimony implicating him; testified falsely before a grand jury; and conspired to place him on death row prior to trial.

Monroe County was sued on the ground that it was liable for Sheriff Tate's unconstitutional actions because they represented the official policy of Monroe County in matters of law enforcement. McMillian's complaint also alleged that Tate's actions were taken pursuant to an unwritten policy and custom of Monroe County to "instigate unwarranted and malicious criminal prosecutions" and to engage in the kinds of misconduct of which Tate was accused.

The district court, in an unpublished opinion, granted Monroe County's motion to dismiss the claim against it. The court agreed

with the County's argument that under the Alabama constitution a sheriff is a state, not county, official and, as such, does not exercise policymaking authority for the county when enforcing the law.

McMillian appealed the dismissal order to the Eleventh Circuit which affirmed. 88 F.3d 1573 (11th Cir. 1996). According to the Eleventh Circuit, Alabama counties have no law enforcement authority, and an Alabama sheriff "does not exercise county power when he engages in law enforcement activities." 88 F.3d at 1578.

McMillian responded by filing a petition for a writ of certiorari with the Supreme Court which was granted. 117 S. Ct. 554 (1996).

CASE ANALYSIS

This case raises the question of the role of state constitutional arrangements in determining local governmental liability under Section 1983. As mentioned above, it is now firmly established that local governmental bodies may be sued under Section 1983 if the alleged injury is inflicted pursuant to governmental policy or custom, whether put into place by its lawmakers or by those with policymaking authority. Moreover, all parties agree that the county sheriff has final policymaking authority over law enforcement activities at the county level in Alabama. What is at issue is whether, under Alabama law, the sheriff exercises that authority on behalf of county government or state government.

The basic issue of whether a county sheriff is an official policymaker for county government has been litigated in many states. In *Pembaur v. City of Cincinnati*, 746 F.2d 337 (6th Cir. 1984), *aff'd*, 475 U.S. 469 (1986) (plurality opinion), the Sixth Circuit, applying Ohio law, concluded

that local governments are potentially liable for the unconstitutional actions of county sheriffs. (Refer to Glossary for the definition of plurality opinion.) In so holding, the Sixth Circuit relied on evidence that county residents elected the sheriff; that the county paid the sheriff's salary and provided the budget for the office; that the county provided the sheriff with office space and law enforcement equipment; and that the sheriff was the chief law enforcement officer in each Ohio county.

Other circuit courts have reached similar conclusions with respect to the status of sheriffs in Massachusetts, Maryland, Texas, Michigan, and Oklahoma. See *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985); *Dotson v. Chester*, 937 F.2d 920 (4th Cir. 1991); *Turner v. Upton County, Texas*, 915 F.2d 133 (5th Cir. 1990); *Marchese v. Lucas*, 758 F.2d 181 (6th Cir. 1985). Only with regard to Wisconsin has a circuit court reached a decision similar to that of the Eleventh Circuit in this case. *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 292-93 (7th Cir. 1985) (county not liable under Section 1983 when the plaintiff "made no effort to show that the sheriff is a policymaking official of the county government").

In rejecting the argument that the Sixth Circuit's reasoning in *Pembaur* and the similar reasoning of other circuit courts is dispositive, the Eleventh Circuit focused on the specific status and role of the office of sheriff under Alabama law, especially focusing on two facts. First, under Alabama law, counties have no law enforcement responsibilities; second, under the Alabama constitution, sheriffs are state rather than county officers. ALA. CONST. art. V, § 112.

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The first fact relied on by the Eleventh Circuit is the structure of the county-state relationship in Alabama. County governments in Alabama exercise only that authority explicitly granted to them by the Alabama legislature, i.e., they have no home rule powers. According to the court, because no specific Alabama statute or constitutional provision grants law enforcement authority to county governments, those governments have none. Instead, law enforcement authority is granted to sheriffs by a statutory provision which declares it to be the "duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as is within their power, to gather evidence of crimes in their counties." ALA. CODE § 36-22-3(4) (1991).

The second fact relied on by the Eleventh Circuit is the State's constitution which explicitly provides that sheriffs are state officers and part of Alabama's executive department. ("The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county." ALA. CONST. art. V, § 112.)

The court found further support for its holding that Alabama sheriffs are not county officials in the fact that they are protected by the Alabama constitution's grant of sovereign immunity, ALA. CONST. art. I, § 14. Moreover, under Alabama personal injury law, sheriffs cannot create *respondeat superior* liability for the counties in which they operate. *Hereford v. Jefferson County*, 586 So. 2d 209 (Ala. 1991).

McMillian contends that these distinctions in no meaningful way differentiate Alabama sheriffs from sheriffs in other states. As already pointed out, several federal circuit courts of appeals have held that the mere fact that a sheriff's law enforcement decisions are nonreviewable by other members of county government does not mean that the sheriff is not a final policymaker for the county in law enforcement matters. In addition, McMillian insists that the Eleventh Circuit erred in concluding that Alabama counties have no law enforcement role, citing the counties' role in funding law enforcement activities and the participation of other county officials, including the coroner, in certain aspects of the law enforcement process.

In regard to the status of the office of sheriff, McMillian maintains that the Alabama constitution's identification of the sheriff as a state official and the county's lack of accountability for a sheriff's actions under the State's personal injury law should not be controlling on the issue of a sheriff's status as a county official. He argues that in almost all other respects, Alabama sheriffs function as county officials. Here, McMillian observes that sheriffs are treated as county rather than state officials in a variety of state statutes, e.g., ALA CODE § 17-8-5 (pertaining to electoral ballots and referring to sheriffs as county officials); he also notes that sheriffs have been referred to as county officials in several decisions of the Alabama Supreme Court. Moreover, McMillian maintains that since Alabama sheriffs are elected by county residents, receive their funding and financing from the county treasury, and have jurisdiction only within the boundaries of the county, there is no reasonable conclusion except that they are county officials.

In its prior decisions involving the question of who is a final policymaker for purposes of local governmental liability under Section 1983, the Supreme Court has failed to articulate a clear test for classifying local officials as either having or not having final policymaking authority. While the Court has employed what could be described as a functional analysis of policymaking authority, it has emphasized that state law ordinarily determines which officials have final policymaking authority. For example, in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124-25 (1988) (plurality opinion), the Court's plurality noted that "the states have extremely wide latitude in determining the form that local government takes, and local preferences have led to a profusion of distinct forms. Among the many kinds of municipal corporations, political subdivisions, and special districts of all sorts, one may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies." Monroe County relies on this and similar observations of the Court in its Section 1983 cases to insist that Tate was not a policymaker for the County in this case.

As a practical matter, however, the office of sheriff in Alabama does not differ significantly from the office of sheriff in other states. In functional terms, one would be hard-pressed to explain how a sheriff who is a state official with exclusive law enforcement authority for a single county, as in Alabama, performs a function different from that of a sheriff who is the law enforcement policymaker for a particular county government, as in most states. Nevertheless, as a matter of Alabama constitutional law, sheriffs are state rather than county officials. (The reasons for this are historical. Alabama sheriffs were classified as state officials by

the Alabama Constitution of 1901 in order to make them more accountable to state authority. The change was prompted by the widespread belief that sheriffs had acquiesced to mob violence and that local government had failed to punish sheriffs for neglect of duty which resulted in an "excessive number of lynching cases in Alabama." *Parker v. Amerson*, 519 So. 2d 442, 443-44 (Ala. 1987).

If the Supreme Court chooses to overturn the decision of the Eleventh Circuit in this case, it will probably do so on the ground that the state official/county official distinction relied upon by the Eleventh Circuit is purely formal and provides no good reason for immunizing a county government from liability in cases such as this one. To hold that a county sheriff who possesses final policymaking authority in the area of law enforcement is acting on behalf of the county for purposes of county governmental liability under Section 1983 would be consistent with the tenor of the Court's Section 1983 decisions over the past three decades. If, on the other hand, the Court decides to uphold the Eleventh Circuit's decision, it will most likely rely on the special status of sheriffs under Alabama constitutional and statutory law, rather than on the failure of Alabama law to explicitly delegate law enforcement responsibilities to county governments.

SIGNIFICANCE

This case will have its greatest significance if the Supreme Court upholds the lower court decision on the narrow ground that Alabama sheriffs are state, not local, officials. Although that result would have no immediate effect outside Alabama (and those other states, if there are any, that define a sheriff as a state official), such a holding could be read by the states as an invitation to immunize county and municipal governments from Section 1983 liability by reclassifying local governmental officials as state officials.

Taken to its extreme, that approach could significantly undercut the effect of *Monell* and its progeny. That any state would choose to respond in this way is, of course, an open question.

If the Court accepts the Eleventh Circuit's implicit holding that a state's failure to delegate law enforcement authority to county governments immunizes those governments from responsibility for the county sheriff's actions, local governments lacking home rule authority in other states could be immunized from liability for actions on the part of their sheriffs when they have not been so absolved in the past. As with a holding that Alabama sheriffs are not county officials, this conclusion could be seen as an incentive for states to formally deny county governments any law enforcement authority as a way of restricting Section 1983 liability.

On the other hand, if the Court overturns the decision of the Eleventh Circuit in this case, that decision also will have few immediate consequences since it appears that in most jurisdictions county sheriffs are deemed to be county policymakers for purposes of county liability under Section 1983. Only in states such as Alabama and, per-

haps, Wisconsin where sheriffs have been held not to be county policymakers will the liability of local governments be expanded.

This case also may provide valuable insight into how much deference the Court will accord to formal state constitutional arrangements, particularly when they vary from the form ordinarily encountered in municipal and county liability cases.

ATTORNEYS OF THE PARTIES

For Walter McMillian (Bryan A. Stevenson; Equal Justice Initiative of Alabama; (334) 269-1803).

For Monroe County, Alabama (Paul M. Smith; Jenner & Block; (202) 639-6000).

AMICUS BRIEFS

In support of Walter McMillian

Joint brief of the American Civil Liberties Union and the Lawyers' Committee for Civil Rights Under Law (Counsel of Record: Mitchell F. Dolin; Covington & Burling; (202) 662-6000);

Southern States Police Benevolent Association (Counsel of Record: J. Michael McGuiness; (910) 862-7097);

The United States (Counsel of Record: Walter Dellinger, Acting Solicitor General; Department of Justice; (202) 514-2217).

In support of Monroe County, Alabama

Jefferson County, Alabama (Counsel of Record: Jeffrey M. Sewell, Assistant County Attorney of Jefferson County, Alabama; (205) 325-5688);

Joint brief of the National Association of Counties and six other associations (Counsel of Record: Richard Ruda; State and Local Legal Center; (202) 434-4850).