No. _____

In the Supreme Court of the United States

RICARDO MEDRANO-ARZATE, EVA CHAVEZ-MEDRANO,
as Personal Representative of the
ESTATE OF HILDA MEDRANO, Deceased,
Petitioners,

v.

PAUL C. MAY, individually and as SHERIFF OF
OKEECHOBEE COUNTY, FLORIDA,
and OKEECHOBEE COUNTY, FLORIDA,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a plaintiff state a cognizable claim for municipal liability under 42 U.S.C. § 1983 for the deprivation of a citizen's substantive due process rights without alleging that the employee who carried out the municipal policy also acted with a constitutionally culpable state of mind?

PARTIES TO THE PROCEEDING

Petitioners, Ricardo Medrano-Arzate and Eva Chavez-Medrano, were the plaintiffs in the district court and appellants in the Court of Appeals.

Respondents, Paul C. May, individually and as Sheriff of Okeechobee County, Florida and Okeechobee County, Florida were defendants in the district court and appellees in the Court of Appeals.

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The unpublished opinion of the Court of Appeals (App. A) is available at 2017 WL 2814356. The order of the district court (App. B) is available at 2016 WL 3033195.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

> the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

INTRODUCTION

The question of whether a municipality can be liable under 42 U.S.C. § 1983 for a policy or custom when the employee implementing it did not act with a constitutionally culpable state of mind has divided the Courts of Appeals for decades. The source of the split is uncertainty over the scope of this Court's holding in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), which rejected a claim for municipal liability under section 1983 after a jury exonerated a police officer alleged to have violated the plaintiff's constitutional rights.

The Eleventh Circuit's affirmance of the dismissal of Petitioners' complaint in this case is rooted in that circuit's broad reading of *Heller*, one which forecloses the possibility of municipal liability based on a policy or custom under section 1983 in most cases, unless the employee who carried out the policy or custom acted with a constitutionally culpable state of mind that violated the constitutional rights of the victim. Other circuits, which construe *Heller* more narrowly, do not universally bar section 1983 claims from proceeding against municipal actors irrespective of whether the individual employee acted with culpable intent. The resulting imbalance is that in the latter circuits, claims like Petitioners' – that a municipality adopted a policy which, through its foreseeable implementation, unconstitutionally deprived a citizen of her constitutional rights – get tested through discovery, enabling those courts to develop fact-specific assessments, and refinements, of the elements of a

section 1983 claim in particular contexts. In the Eleventh Circuit, and five others, those claims get cut down at the trunk, preventing the development of comparative jurisprudence examining the branch of municipal section 1983 liability that would otherwise grow from it.

This case presents a clean opportunity for the Court to clarify this core uncertainty in section 1983 jurisprudence. Although this case involves a claim of a substantive due process violation through a police-involved vehicular homicide, the fundamental legal principle in question extends across a variety of settings in which section 1983 claims may be lodged against municipal entities for their own allegedly unconstitutional policies or customs.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Around 2:00 a.m., in the darkness of the night of December 1, 2013, Petitioners' daughter, Hilda Medrano, was killed when the car in which she was riding as a passenger got blindsided while trying to make a left-hand turn at an intersection in the small town of Okeechobee, Florida by Okeechobee County Sheriff's Deputy Anthony Gracie's speeding police cruiser. Her friend who was driving the car was also killed.

Just prior to this deadly crash, Deputy Gracie heard that one of his colleagues was responding to a domestic violence call. App. 20 (¶ 19); App. 31. Since he was only a mile or two away, Deputy Gracie decided to provide back-up. App. 20 (¶ 19); App. 32. As he got into his car and began speeding towards the scene,

Deputy Gracie did not activate the emergency lights or siren on his cruiser, obeying conflicting Sheriff's Department policies that (1) required a deputy to use the radio to obtain permission from a senior officer before doing so, but (2) forbade deputies from using the radio while a fellow officer was responding to an ongoing code. App. 18, 20 (¶¶ 14-16, 20). As a consequence of Deputy Gracie's obedience to Sheriff's Department policy, he sped through the darkened streets of downtown Okeechobee, at 90 miles an hour, without warning lights or sirens. App. 20 (¶ 21). The posted speed limit was 35 miles an hour. *Id.* Hilda Medrano never had a chance when her friend unknowingly made a left turn into the path of the oncoming speeding police cruiser.

The Okeechobee Sheriff's Department implemented its policy that deputies providing back-up in response to an ongoing code were prohibited from using their radios three years earlier, in 2010, App. 18, 20-21 (¶¶ 14, 23). The rationale for the policy was to keep the radio frequency open for the first-responding officer in the event of an emergency. App. 33-34. The Sheriff's Department's other policy, requiring deputies to request and obtain permission from a superior officer over the radio before activating their lights or sirens, had been promulgated to minimize the known problem of "serious crashes occurring during [police] pursuits." App. 36. In the context of an ongoing code and other deputies providing back-up, the two policies conflicted, App. 32-33, resulting in police cruisers speeding to the scene of an ongoing event without alerting the driving public that they were operating in an emergency mode.

II. PROCEEDINGS BELOW

A. District Court Proceedings.

The Medranos initially filed suit in Florida state court against Paul May, as Sheriff of Okeechobee County, and the personal representative of the estate of the driver of the car in which their daughter was riding. The Medranos then brought the instant federal action under 42 U.S.C. § 1983 against Okeechobee County and its Sheriff, Paul May, both individually and in his official capacity (the "County Defendants"). App. 17 (¶ 9).

The federal suit alleged that the County Defendants had made "a deliberate choice" to implement a policy or custom whereby "a second (or subsequent) deputy will never use his lights and sirens when responding to an emergency even though that deputy may be driving at an extremely high rate of speed, without obeying traffic laws and may pose a danger to innocent motorists." App. 18, 21 (¶¶ 16, 23). The amended complaint alleged that this policy or custom violated Florida law, which requires an emergency vehicle "'en route to an existing emergency'" to "'warn all other vehicular traffic along the emergency route by an audible . . . siren . . . or by a visible signal by the use of displayed blue or red lights.'" App. 19 (¶ 17) (quoting § 316.126(3), Fla. Stat. (2010)).

The amended complaint included allegations concerning the County Defendants' state of mind as well as causation of the constitutional injury. It alleged that County Defendants' policy or custom "exhibit[ed] a deliberate indifference . . . to the obvious consequences that compliance with the policies and/or

customs was certain to lead to serious injuries or death." App. 21-23 (¶¶ 27, 32). And it pled that "the Decedent's death was directly caused by the . . . policies and/or customs," which "were the moving force behind her death" App. 22-23 (¶¶ 28, 33), a "violation of Decedent's 14th Amendment rights," App. 22-23 (¶¶ 29, 34).

The short proceedings in the district court raised the doctrinal issue now being presented for this Court's review. The County Defendants moved to dismiss for failure to state a claim. Sheriff May argued that under Eleventh Circuit precedent, in particular *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996), a municipal actor cannot be liable under 42 U.S.C. § 1983 for an "unconstitutional policy" that led to a police-involved vehicular homicide "absent a showing that the individual officer intended to cause the person harm." Docket Entry (DE) 36 at 3. In *Rooney*, the Eleventh Circuit held that because it affirmed a summary judgment in favor of a sheriff's deputy on a section 1983 claim on the ground that his grossly negligent operation of his police cruiser did not rise to the level of a constitutional violation of the victim's rights, the court "need not inquire into Volusia County's policy and custom relating to patrol vehicle operation and training." 101 F.3d at 1381 (citing *Heller*, 475 U.S. at 799). Sheriff May pointed out that the Medranos had "ignored the underlying requirement that . . . Deputy Gracie violated the decedent's civil rights." DE 29 at 7.

The Medranos responded that prior to *Heller*, the Eleventh Circuit had recognized that municipal liability under section 1983 in a police-involved vehicular homicide setting was not entirely dependent

upon whether the individual officer acted with a constitutionally culpable state of mind. DE 32 at 5-6 (citing *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986)). They contended that a broad reading of *Heller* was unwarranted, and highlighted the "incongruity" that would create in the law (*id.* at 6), invoking the reasoning of the Third Circuit in *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3d Cir. 1994):

> If we conditioned municipal liability on an individual police officer's liability in every case, it might lead to illogical results. A municipality would escape liability whenever the conduct of the acting police officer did not meet the "shocks the conscience" standard, even though municipal policymakers, acting with deliberate indifference or even malice, implemented a policy which dictated his injury-causing actions. It is easy to imagine a situation where an improperly trained police officer may be ignorant of the danger created by his actions and inflicts injury. Meanwhile, the city's policymakers, with a wealth of information available to them, are fully aware of those dangers but deliberately refuse to require proper training. The officer may escape liability because his conduct did not "shock the conscience." It does not follow, however, that the city should also escape liability. The city caused the officer to deprive the plaintiff of his liberty; the city therefore has violated the plaintiff's Fourteenth Amendment rights.

The district court, relying on *Rooney* and *Heller*, ruled that in order to state a cognizable section 1983

claim against the County Defendants, "Plaintiffs must show that Deputy Gracie's conduct amounted to a deprivation of Ms. Medrano's constitutional rights." App. 10. But because the Medranos did not make that allegation, and, the court ruled, could not under the circumstances, it dismissed the amended complaint with prejudice.[1]

B. The Eleventh Circuit's Decision.

Because existing Eleventh Circuit precedent construed *Heller* broadly, the Medranos could not prevail in their appeal before a three-judge panel. They consequently filed a petition for hearing *en banc*, in the first instance, urging the whole court to consider whether *Rooney*'s application of *Heller* was overbroad. The petition advised the court of the split of authority among the circuits concerning the scope of the rule in *Heller* and argued that this Court's subsequent jurisprudence in the area of section 1983 municipal liability supports a narrower reading of *Heller*. Although a member of the court requested that a poll be taken as to whether the case should be heard *en banc*, a majority of judges voted against doing so. App. 13.

As a result, a panel of the Eleventh Circuit dispensed with the Medrano's appeal without oral

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[1] The district court reasoned that the circumstances of the case – a police-involved vehicular homicide – foreclosed a possible amendment alleging that Deputy Gracie acted with constitutionally culpable state of mind based on its conclusion that the "intent to harm" standard from the high-speed, police-chase context, *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 854 (1998), would apply in this context. App. 10.

argument in a short, unpublished opinion. The court reasoned:

> As Appellants do not allege that Deputy Gracie's conduct amounted to a deprivation of Hilda Medrano's constitutional rights, Appellants cannot maintain an action against [the County Defendants] under § 1983 based upon the policies alleged to have caused Hilda Medrano's death.

App. 2. The court considered the Medranos' claims to be "foreclosed" by *Rooney*. *Id.*

REASONS FOR GRANTING THE PETITION

This case presents the Court the opportunity to clarify an important doctrinal node in its jurisprudence of municipal liability under section 1983. The opinion in *Heller*, decided *per curiam* "without the benefit of briefing or argument on the merits," 475 U.S. at 800 (Stevens, J., dissenting), contains vague and unnecessarily broad language, which has resulted in misunderstanding by lower courts. The broadest reading of *Heller* – the one adopted by the Eleventh Circuit – is at odds with this Court's subsequent jurisprudence regarding municipal liability under section 1983. As a result of the imprecision of *Heller*, the circuits are divided over whether or not municipal actors can be liable under section 1983 based on their adoption, with a constitutionally culpable state of mind, of a policy or custom that is highly likely to result in the violation of constitutional rights, even if the individual employee who carried out the policy or custom lacked constitutionally violative *scienter*.

I. The Eleventh Circuit's Reading of *Heller* Unduly Constricts Municipal Liability Under Section 1983.

Viewed in hindsight, the broad statement in *Heller* that "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point," 475 U.S. at 799, seems out of sync with this Court's subsequent refinements of the contours of the doctrine of municipal liability under 42 U.S.C. § 1983 first recognized in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). While the statement appears to convey that an individual officer's culpability for violating the victim's constitutional rights is a prerequisite to municipal liability under section 1983, that conclusion is both unnecessary from *Heller* itself and in tension with this Court's articulation of *Monell* liability.

A.

Approaching this question, first, from the perspective of this Court's subsequent jurisprudence in this area helps bring the aberrant nature of a broad reading of *Heller* into focus.

In *City of Canton v. Harris*, 489 U.S. 378 (1989), and *Collins v. City of Harker Heights,* 503 U.S. 115 (1992), this Court clarified two distinct aspects of municipal liability under section 1983. In *Canton,* the Court addressed the statutory standard for the "degree of fault" necessary to hold a municipality liable under section 1983. The Court decided the issue in the context of a failure-to-train theory for the deprivation

of a detainee's constitutional rights at the hands of the municipal defendants' employees. 489 U.S. at 388 & n.8. The Court presumed that the employees had inflicted a constitutional injury, so it was unnecessary to decide the "culpability test" applicable to proving the "underlying claim of a constitutional violation." *Id*. at 388 n.8. In part because the Court had already rejected *respondeat superior* as a basis for *Monell* liability, the Court held that the municipality could be held responsible in such a circumstance only where its policy or custom reflected its *own* "deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388.

In *Collins,* the Court "emphasize[d] the separate character of the inquiry into the question of municipal responsibility and the question of whether a constitutional violation occurred." 503 U.S. at 122. The case presented something of the inverse posture of *Canton*. It involved a section 1983 claim directed only against a municipal defendant. *Id*. at 118. The Court presumed for purposes of discussion that the complaint sufficed to allege a violation of the statutory-fault element of municipal liability under section 1983 and proceeded to explore the constitutional element of the claim – that is, "whether the complaint has alleged a constitutional violation." *Collins*, 503 U.S. at 124.

Significantly, for present purposes, the *Collins* Court undertook an inquiry into whether a municipality could be liable under section 1983 notwithstanding the absence of any claim of unconstitutional conduct on the part of any individual employee. The petitioner, the widow of a municipal employee who died after entering a manhole to fix a

sewage pipe, had sued the city under section 1983 on a variety of theories alleging that the city had directly violated her husband's substantive due process rights. *Id.* at 117, 126. A unanimous Court found those theories to be "unprecedented," *id*. at 127, and bereft of any allegation of conduct that was "arbitrary in a constitutional sense," *id*. at 128-29. Although the Court soundly rejected the particular constitutional claims the petitioner alleged, the Court's consideration of their merits implicitly recognized that a municipality's policy or custom could conceivably violate someone's constitutional rights.

In other words, the Court tacitly acknowledged that municipal liability under section 1983 was not necessarily dependent on *an employee's* constitutionally culpable conduct. Had the Court believed otherwise, it could easily have invoked the broad language of *Heller* to hold that "constitutional injury at the hands of the individual [employee]" is a prerequisite to municipal liability under section 1983, 475 U.S. at 799. But the *Collins* Court did not even cite *Heller*. That omission suggests that the Court did not view *Heller* as having announced such a broad rule.

B.

Nor does the imprecise language in the Court's decision in *Heller* require it to be read broadly. The case involved section 1983 claims for an arrest without probable cause and the use of excessive force by officers in connection with a traffic stop. 475 U.S. at 797. The plaintiff sued the police officers involved, as well as the city and members of the police commission that had adopted regulations, *id*., which the plaintiff contended "condon[ed] excessive force in making arrests," *id*. at

801 (Stevens, J., dissenting). The case against one officer, Bushey, and the municipal defendants was set for bifurcated trial. The jury returned a verdict for Bushey, but was never instructed on affirmative defenses like qualified immunity that the officer might have asserted. *Id*. at 797-98. The district court then dismissed the remaining claims against the municipal defendants. *Id.* at 798.

On appeal, the plaintiff did not challenge the jury verdict in favor of Bushey, but did contest the dismissal of his claims against the municipal defendants. *Heller v. Bushey*, 759 F.2d 1371, 1372 (9th Cir. 1985). The Ninth Circuit reversed because it was unclear whether the jury's finding that Bushey had not used excessive force was a constitutional determination (*i.e.*, that the force did not transgress the "constitutional standard" for excessiveness) or merely a decision that the force Bushey used did not exceed the police department's "escalating force" regulations. *Id*. at 1374. The Ninth Circuit concluded that it could not be ruled out that the jury's rationale might have been based on the view that Bushey was entitled to immunity for good-faith adherence to the regulations. *Id.* It therefore reasoned that "the general verdict does not foreclose a finding that Heller suffered a constitutional deprivation." *Id*.

This Court focused on the court of appeals' error in speculating about a theory the jury might have followed when the jury was never instructed on that affirmative defense. *Heller*, 475 U.S. at 798. Because "no issue of qualified immunity was presented to the jury," and courts must presume "that juries act in accordance with the instructions given them," there

was no "ambiguity" in the jury's verdict in favor of Bushey. *Id*.

The Court proceeded to explain why that adverse finding was also "conclusive" as to the claims against the municipal defendants. *Id*. at 799. The Court pointed out that the city and police commissioners "were sued only because they were thought legally responsible for Bushey's actions." *Id*. In other words, Heller's theory was that the police officers were the perpetrators of the violation of his constitutional rights. He did not assert a claim – as in *Collins* or like the Medranos here – that the municipal defendants promulgated their policy with a constitutionally culpable state of mind and thereby violated his rights *themselves*, through the executing officer as a mere causal conduit.

The *Heller* Court then elaborated, in the imprecise language that has caused confusion, that

> neither *Monell* . . . nor any other of our cases authorizes the award of damages against a municipal corporation *based on the actions of one of its officers* when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury *at the hands of the individual police officer*, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

475 U.S. at 799 (first two emphases added). When the additional italicized phrases are emphasized, the limited nature of this pronouncement – flowing from the posture of that case – becomes more evident.

But the Court's *per curiam* opinion did not draw such clear attention to its postural limitation. As a result, the above-quoted language could easily be (and has been) confused as making a broad pronouncement that a section 1983 claim against a municipal defendant challenging a policy that, of necessity, depends on an employee to implement it, cannot stand absent a finding that the employee violated the plaintiff's constitutional rights. *See* Section II.B., *infra*.

Another reason that *Heller* should not be read broadly, aside from the reasonable interpretation of the language of the opinion, is that its core rationale of the inconsistency of verdicts would not make sense as applied to a case where the plaintiff's theory is that the municipal defendant rather than the employee was the constitutionally culpable actor. Where the plaintiff does not allege that an individual officer violated her constitutional rights, there is no possibility of an inconsistent verdict. Nor would an inconsistent verdict necessarily result in a case where the plaintiff alleged that both the municipal defendant and the individual officer independently violated his constitutional rights, if different standards of culpability apply to each claim. *See Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 305 (7th Cir. 2009); *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3d Cir. 1994).

Uncertainty over the meaning of the ambiguous language in *Heller* and the breadth of its pronouncement about the importance of a finding of "constitutional injury at the hands of the individual police officer" has spawned divergent interpretations leading to vast differences among the circuits in the scope of municipal liability under section 1983.

II. The Circuits Are Deeply Divided Over Whether Municipal Liability Under Section 1983 Can Inhere Absent a Constitutionally Culpable Act by the Individual Employee.

A. Five Circuits Read *Heller* Narrowly, Resulting in Ampler Municipal Liability.

The Second, Third, Seventh, Eighth and Ninth Circuits seem to fall on one side of the doctrinal divide, acknowledging that *Heller* does not bar municipal liability in all circumstances where no individual officer is alleged or proven to have committed a constitutional violation.

The Third Circuit was one of the first circuits to take a good look at *Heller* and read it narrowly so as to not automatically preclude all municipal liability under section 1983 in the absence of individual-officer liability. In *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1063 & n.17 (3d Cir. 1991), Judge Becker observed that *Heller* provides that a pre-requisite to *Monell* liability is "a constitutional injury causally related to [municipal] regulations" committed by "the conscious decision or deliberate indifference of some natural person," whether "a high-level policymaker" or "a low-level employee."[2] Unlike in *Heller*, in which there was no allegation of the requisite *scienter* on the part of any policymaker, 475 U.S. at 799, Judge Becker pointed out that the plaintiff in *Simmons* alleged that the municipality, "through its policies or deliberate

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[2] Judge Becker's opinion was joined by Chief Judge Sloviter on the principle that municipal liability could exist independent of the individual officers. *Id*. at 1089 & n.1 (Sloviter, C.J., concurring in the judgment); *Fagan*, 22 F.3d at 1293 (explaining *Simmons*).

indifference, directly violated" the decedent's constitutional rights. 947 F.2d at 1063. *Heller* only requires the rejection of a *Monell* claim where a plaintiff's theory of municipal liability is "primarily vicarious, as opposed to direct." *Id.* at 1063 n.18.

A subsequent panel of the Third Circuit expressly clarified the principle. In *Fagan v. City of Vineland*, 22 F.3d 1283, 1291-92 (3d Cir. 1994), the court read the vague language in *Heller* to be describing a *Monell* claim erroneously predicated on the notion of *respondeat superior* rather than a claim that the municipal defendants had themselves acted with constitutionally culpable *scienter*. Without *Heller* as an obstacle, the court went on to hold "that in a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution." *Fagan*, 22 F.3d at 1292. The court noted that the claims against the individual officers and those against the municipal policymakers implicated different constitutional standards with "different . . . mental states." *Id.* Assuming that the plaintiff could not surmount the higher hurdle of proving that the individual officer's conduct shocked the conscience, the court explained why a claim against municipal actors governed by a lower, deliberate-indifference standard, could nevertheless succeed:

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

> reflecting the city policymakers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights. The pursuing police officer is merely the causal conduit for the constitutional violation committed by the City.

Id.

The Second Circuit has also held that "a municipality may be found liable under § 1983 even in the absence of individual liability." *Barrett v. Orange Cty. Human Rights Comm'n*, 194 F.3d 341, 350 (2d Cir. 1999). The court in *Barrett*, which involved a challenge to the firing of a municipal employee in violation of the First Amendment, reasoned that *Heller* precludes *Monell* claims only when they are premised on constitutional injuries that are "solely attributable to the actions of named individual defendants." *Id*. at 350. The Second Circuit has, however, read *Heller* to block *Monell* claims based on theories of "inadequate training or supervision" where the individual officer is found not to have violated a constitutional right. *Curley v. Village of Suffern*, 268 F.3d 65, 71 (2d Cir. 2001) (noting precedent so holding, but cautioning that "*Heller* should not, of course, be applied indiscriminately" and that "where alleged injuries are not solely attributable to the actions of named individual defendants, municipal liability may still be found"). The Second Circuit's present position on the meaning of *Heller* has not been free from internal controversy. *See Dodd v. City of Norwich*, 827 F.2d 1, 6 (2d Cir. 1987) (initial majority opinion construing *Heller* to allow municipal liability "even though the

police officer may be personally immune from liability"), *vacated on reargument*, 827 F.2d at 8 (reading *Heller* to foreclose *Monell* liability for city's training policy).

The Seventh Circuit, not unlike the Second Circuit, has not applied *Heller* to bar all claims of *Monell* liability in the absence of individual officer liability. In *Thomas v. Cook County Sheriff's Department*, 604 F.3d 293, 305 (7th Cir. 2009), the court concluded that the county was properly held liable for its own widespread practice of deliberately disregarding the medical needs of pretrial detainees even though none of its employees were found to have violated the victim's Eighth Amendment rights. In so concluding, the court rejected a rule that would require "individual officer liability before a municipality can *ever* be held liable for damages under *Monell*" as an "unreasonable extension of *Heller*." *Thomas*, 604 F.3d at 305 (emphasis added). Instead, the court clarified that the "actual" and "much narrower" rule from *Heller* was that "a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict." *Id.* Along these narrower lines, the Seventh Circuit has applied *Heller* to preclude *Monell* liability on the theory that a municipality had a policy of approving the use of excessive force through its failure to investigate or discipline one of its officers for his actions where the jury concluded that the individual officer had not used excessive force. *See Thompson v. Boggs,* 33 F.3d 847, 858-59 (7th Cir. 1994). *See also White v. City of Chicago,* 829 F.3d 837, 839, 844 (7th Cir. 2016) (applying *Heller* to preclude *Monell* liability against a city for its police department's "widespread" arrest warrant practices

where "all of [the plaintiff's] claims" were based on the theory that an individual officer failed to present sufficient information to establish probable cause to support plaintiff's arrest warrant but where the court concluded that probable cause for the warrant existed).

This Court recently declined to review a case out of the Seventh Circuit which permitted a *Monell* claim under circumstances where individual employees were not alleged to have violated the plaintiff's constitutional rights. *Corr. Med. Srvs., Inc. v. Glisson*, 2017 WL 2289613, at *1 (U.S. Oct. 2, 2017) (No. 16-1406). That case did not, however, frame the fundamental legal question regarding the scope of *Heller* that is presented here. The petition focused instead on evidentiary standards. Petition for Writ of Certiorari, *Corr. Med. Srvs., Inc. v. Glisson*, (No. 16-1406), 2017 WL 2303108, at *iii-*vi (U.S. May 22, 2017). Notably, for present purposes, the Seventh Circuit acknowledged that "an organization might be liable [under section 1983] even if its individual agents are not" where "institutional policies [regarding custodial medical care] are themselves deliberately indifferent to the quality of care provided[.]" *Glisson v. Ind. Dep't of Corrs.*, 849 F.3d 372, 378 (7th Cir. 2017) (en banc). The dissenting members of the court did not quarrel with this foundational issue.

The Eighth Circuit, too, has "rejected the argument that *Heller* establishes a rule that there must be a finding that a municipal employee is liable in his individual capacity as a predicate to municipal liability." *Speer v. City of Wynne*, 276 F.3d 980, 985 (8th Cir. 2002) (citing *Praprotnik v. City of St. Louis,*

798 F.2d 1168, 1172-73 n.3 (8th Cir. 1986)).[3] The court in *Speer* highlighted the panel's observation in *Praprotnik* that a "crucial fact" in *Heller* "was that the theory of municipal liability asserted was entirely dependent on the municipal defendants' responsibility for the officer's alleged unconstitutional acts." 276 F.3d at 986 (citing *Praprotnik,* 798 F.2d at 1173 n.3). Based on this reading of *Heller*, the court went on to explain that the "appropriate question under *Heller*" is whether a verdict or decision exonerating an individual government employee can be harmonized with a "concomitant verdict or decision imposing liability on the municipal entity." *Speer*, 276 F.3d at 986. Accordingly, the court in *Speer* concluded that a former officer's due process right to a name-clearing hearing was "potentially reconcilable" with a judgment in favor of one individual city defendant where other policymakers may have been involved in the denial of the former officer's rights. *Id.* at 987. The Eighth Circuit's reading of *Heller* in *Speer* is not inconsistent with its other decisions which, like the Second and Seventh Circuits, have applied *Heller* to preclude *Monell* liability on the basis of a failure-to-train theory where an individual officer has not been found to have violated anyone's constitutional rights. *See, e.g., Veneklase v. City of Fargo*, 248 F.3d 738, 748 (8th Cir. 2001) (en banc); *Schulz v. Long*, 44 F.3d 643, 649-50 (8th Cir. 1995).

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[3] This Court granted certiorari in *Praprotnik* and reversed on other grounds. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 128-30 (1988) (plurality opinion). The plurality expressly did "not address [the city's] contention that the jury verdict exonerating the individual defendants cannot be reconciled with the verdict against the city." *Id.* at 128.

The Ninth Circuit has seemingly limited *Heller* to the context of excessive force claims. In *Fairley v. Luman*, 281 F.3d 913, 916-17 (9th Cir. 2002), the court held that, under *Heller*, a verdict exonerating the individual officers from using excessive force in an arrest "precludes municipal liability for the alleged unconstitutional use of such force," but did not foreclose *Monell* claims alleging an arrest without probable cause and a substantive due process violation because "[t]he alleged constitutional deprivations were not suffered as a result of actions of the individual officers, but as a result of the collective inaction of the Long Beach Police Department." Citing to *Fagan*, the court stated: "If a plaintiff establishes he suffered a constitutional injury by the City, the fact that individual officers are exonerated is immaterial to liability under § 1983." *Fairley*, 281 F.3d at 917 & n.4. Other decisions from the Ninth Circuit have, however, construed *Heller* more broadly. *See*, *e.g.*, *Grossman v. City of Portland*, 33 F.3d 1200, 1203 (9th Cir. 1994) ("*Heller* holds that when a person sues under § 1983 for an allegedly unconstitutional arrest the city cannot be held liable absent a constitutional violation by the arresting officer.").

A leading commentator agrees that "*Heller* should be limited to cases in which the plaintiff's theory of municipal liability is the municipality's alleged responsibility for a particular officer's alleged unconstitutional conduct." Martin A. Schwartz, SECTION 1983 LITIGATION CLAIMS AND DEFENSES, § 7.13 (2016). After all, "[t]he city in *Heller* simply could not have condoned a constitutional violation that did not occur." *Id*. But where the theory of the case is that the enforcement of a municipal policy resulted in a

constitutional deprivation, *Heller* should not preclude *Monell* liability. *See id*.

B. Six Circuits Read *Heller* Too Broadly, Prematurely Foreclosing Section 1983 Claims Against Municipal Defendants.

The First, Fourth, Fifth, Sixth, and Tenth Circuits, like the Eleventh Circuit below, read *Heller* to preclude any inquiry into municipal liability under section 1983 unless the plaintiff has alleged or proven that the individual employees violated the victim's constitutional rights. Recall that the Eleventh Circuit in this case held:

> As [the Medranos] do not allege that Deputy Gracie's conduct amounted to a deprivation of Hilda Medrano's constitutional rights, [they] cannot maintain an action against [the County Defendants] under § 1983 based upon the policies alleged to have caused Hilda Medrano's death.

App. 2 (following *Rooney*, 101 F.3d at 1381). This broad conception of the breadth of the rule from *Heller* has pretermitted a wide range of *Monell* claims in the Eleventh Circuit.[4]

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[4] *See*, *e.g.*, *Penley v. Eslinger*, 605 F.3d 843, 855 (11th Cir. 2010) ("unnecessary to evaluate . . . use of force policy" where individual officer did not violate Fourth Amendment in shooting student); *Case v. Eslinger*, 555 F.3d 1317, 1328 (11th Cir. 2009) (rejecting *Monell* claim targeting sheriff's policies and customs regarding use of informants once individual officer was found to have had probable cause for arrest); *Porter v. White*, 483 F.3d 1294, 1297, 1311 (11th Cir. 2007) (summarily rejecting claim against sheriff for failure to train deputies on proper disclosure of *Brady* material

The First Circuit adopted a similar approach the same year that the Eleventh Circuit decided *Rooney*. In *Evans v. Avery*, 100 F.3d 1033, 1040 (1st Cir. 1996), a case involving a claim against a municipality for its failure to monitor and supervise police officers involved in police pursuits, the First Circuit decided to "follow *Heller*'s clear rule and hold that the City cannot be held liable absent a constitutional violation by its officers." In doing so, the panel specifically contemplated and rejected the alternative view of municipal liability in *Fagan*, signaling the beginning of the circuit split. *Evans,* 100 F.3d at 1039-40.

The Fourth Circuit follows a similar rule. *See*, *e.g.*, *Young v. City of Mt. Ranier*, 238 F.3d 567, 579 & n.9 (4th Cir. 2001) (rejecting invitation to apply *Fagan* to a failure-to-train section 1983 claim and instead following its own precedent which summarily dismisses such claims absent a constitutional violation by an individual); *Grayson v. Peed*, 195 F.3d 692, 697 (4th Cir. 1999) ("As there are no underlying constitutional

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because plaintiff failed to establish due process claim against individual investigator); *Beshers v. Harrison*, 495 F.3d 1260, 1264 n.7 (11th Cir. 2007) (refusing to consider *Monell* claim where individual officers did not violate Fourth Amendment in high-speed chase); *Cuesta v. Sch. Bd. of Miami-Dade Cty.,* 285 F.3d 962, 969, 970 n.8 (11th Cir. 2002) (because jail officers had reasonable suspicion to subject arrested high school student to strip search, court "need not decide the question of whether the County's policy, in which all felony arrestees are strip searched, might deprive others of their constitutional rights"); *Hardin v. Hayes*, 52 F.3d 934, 939 n.8 (11th Cir. 1995) (refusing to consider *Monell* claim regarding city mental health policy after finding that jail personnel were not deliberately indifferent to inmate's needs under Eighth Amendment).

violations by any individual, there can be no municipal liability.") (citing *Heller*), *cert. denied sub nom. Grayson v. Royer*, 529 U.S. 1067 (2000).

The Fifth Circuit likewise has consistently read *Heller* broadly to preclude municipal liability absent a finding that the individual officers committed a constitutional violation. *See*, *e.g.*, *Leatherman v. Tarrant Cty. Narcotics Intel. & Coord. Unit*, 28 F.3d 1388, 1398 (5th Cir. 1994); *Saenz v. Heldenfels Bros.,* 183 F.3d 389, 392–93 (5th Cir. 1999); *Darden v. City of Fort Worth*, 866 F.3d 698, 708–09 (5th Cir. 2017). At least one panel of the Fifth Circuit, however, felt compelled to acknowledge by way of "caution[ary]" note that other circuits have held "that a municipality may still be liable if the alleged injuries are not 'solely attributable to the actions of named individual defendants.'" *Bustos v. Martini Club Inc.*, 599 F.3d 458, 467 (5th Cir. 2010) (quoting *Curley*, 268 F.3d at 71).

The Sixth Circuit has taken seemingly different approaches. In *Scott v. Clay County,* 205 F.3d 867, 879 (6th Cir. 2000), a Fourth Amendment case, the court, citing *Heller*, held that because "no officer defendant had deprived the plaintiff of any constitutional right," "a fortiori" the claim against the municipal defendant for its lack of appropriate policies on the use of lethal force must fail as well. Although the court acknowledged that the conclusion that an individual officer is entitled to qualified immunity does "*not* automatically excuse a municipality or county from constitutional liability," it still remains necessary to find that the officer "*in fact* had invaded the plaintiff's constitutional rights." *Scott*, 205 F.3d at 879.

Notwithstanding this fairly categorical statement in *Scott*, a subsequent panel in the Sixth Circuit considering a Fourteenth Amendment claim against a city for its suicide prevention policies at its jail, treated the subject as unsettled, noting the circuit split over the question. *Gray v. City of Detroit*, 399 F.3d 612, 617 (6th Cir. 2005). The court "[a]ssum[ed] for the sake of argument that [the Sixth] Circuit permits a municipality to be held liable in the absence of any employee's committing a constitutional violation." *Id.* Even though the panel found that the individual officer had not violated the pre-trial detainee's substantive due process rights, *id.* at 616, it went on to consider "whether the City's policy makers' decisions regarding suicide prevention were themselves constitutional violations," *id.* at 617, seemingly contrary to the automatic bar in *Scott*.

The Tenth Circuit addressed the issue head on in an interlocutory appeal in which a district court expressly certified the question of "whether . . . a municipality can be held liable if the City's actions can be characterized as arbitrary, or conscience-shocking, in a constitutional sense, even if there are no unconstitutional acts by an individual officer." *Trigalet v. City of Tulsa*, 239 F.3d 1150, 1150-51 (10th Cir. 2001), *cert. denied*, 534 U.S. 814 (2001). The case arose out of a police chase in which the pursued vehicle struck another car, killing three people. *Id*. at 1151. The Tenth Circuit looked to *Heller* as authority "that a municipality cannot be held liable under these circumstances." *Id*. at 1154.

Thus, the Court refused to engage one of the plaintiffs' theories that the city could be directly liable for its own police-pursuit practices and policies if its actions were deemed arbitrary or conscience-shocking and thus unconstitutional. *Id.* at 1152. The court viewed "the action causing the harm" as only the conduct of the pursuing officers, who, it was conceded, did not act with constitutionally culpable *scienter*. *Id*. at 1155. It thus held that "even if . . . [the city's] policies, training, and supervision were unconstitutional, the City cannot be held liable where, as here, the officers did not commit a constitutional violation." *Id*. at 1155-56.

III. The Implications of Review for This Case

If the Court resolves the question presented by this petition and vacates the Eleventh Circuit's decision, there will of course remain other important issues to address in this case – in particular, whether the allegations suffice to state a claim for the violation of Hilda Medrano's substantive due process rights and, if so, whether the fact that the policy was carried out by an individual deputy can still satisfy the causation element of a section 1983 claim of the municipal policy being the "moving force" behind the violation. *Canton*, 489 U.S. at 389.

One or both of these issues may be implicated by the Court's analysis of the central question presented by this petition, though they could also readily be left for remand. To the extent the Court's thinking on whether to grant review may be informed by considerations of other issues the Medranos' claims implicate, two further points warrant brief mention.

First there is the question of what constitutional standard applies to a claim that the County Defendants' adoption of their policy or custom prohibiting sheriff's deputies from activating their lights and sirens while responding as back-up to a code violated Hilda Medrano's substantive due process right to life. Although the Court has not yet addressed such a question, it has framed the inquiry. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court instructed that the standard depends on "an exact analysis of circumstances," *id*. at 850, including whether "actual deliberation is practical," *id*. at 851. Thus, while an individual officer engaged in a chase only violates a victim's substantive due process rights through "intent to harm," *id*. at 854, a lower standard likely applies to policymakers who "hav[e] time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations," *id*. at 853. Under such circumstances, the standard which governs the claims against the County Defendants may render "midlevel fault" violative of the Fourteenth Amendment, *id*., such that deliberate indifference is the operative standard. *See Fagan*, 22 F.3d at 1292; *see also Browder v. City of Albuquerque*, 787 F.3d 1076, 1080 (10th Cir. 2015) (Gorsuch, J.) ("[I]n cases where forethought is feasible some form of recklessness to the plaintiff's fundamental right may be enough: our tradition suggests that we can and should usually expect more from the sovereign than deliberate indifference to fundamental rights like life, liberty, and property.")

Second, there remains an important question about the conceptualization of causation in a section 1983 claim such as this. Assuming a municipal defendant's

adoption of a policy like this one violates the constitution, it is necessary to clarify how it causes the injury. Of necessity, policies such as these are intended to be carried out by individual deputies. Courts that follow an overbroad reading of *Heller* tend to conflate the fact that the individual officer was the ultimate actor in the causal chain with the concept of whether a constitutional violation occurred. *See*, *e.g.*, *Trigalet*, 239 F.3d at 1155-56. As the Third Circuit recognized, just because the individual officer did not act with constitutionally culpable *scienter* does not mean that the victim's constitutional rights were not violated, if the officer was following municipal policy. *Fagan*, 22 F.3d at 1292. The officer is merely the "causal conduit" of the municipal defendant's constitutionally culpable policy or custom. *Id*.

CONCLUSION

The Court should seize the opportunity this case presents, at the mere pleading stage, to clarify its precedent concerning the possibility of municipal liability under section 1983 absent constitutional culpability on the part of the individual employee who followed municipal policy or custom.

Respectfully submitted,

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APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-14170
Non-Argument Calendar

D.C. Docket No. 2:15-cv-14408-RLR

[Filed June 29, 2017]

RICARDO MEDRANO-ARZATE,
EVA CHAVEZ-MEDRANO,
as Personal Representative of the
ESTATE OF HILDA MEDRANDO, Deceased,
Plaintiffs-Appellants,

versus

SHERIFF OF OKEECHOBEE COUNTY,
Paul C. May, individually,
OKEECHOBEE COUNTY, FLORIDA,
Defendants-Appellees.

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

(June 29, 2017)

Before HULL, WILSON and BLACK, Circuit Judges:

PER CURIAM:

Plaintiffs Ricardo Medrano-Arzate and Eva Chavez Medrano, as Personal Representative of the Estate of Hilda Medrano (Appellants), appeal the district court's dismissal of their amended complaint against Paul C. May, individually and as Sheriff of Okeechobee County, and Okeechobee County (Appellees). The complaint arises out of the death of Hilda Medrano on December 1, 2013, when the vehicle in which she was a passenger collided with a vehicle driven by Deputy Joseph Anthony Gracie of the Okeechobee County Sheriff's Office. Appellants filed suit against May, individually and in his capacity as Sheriff, and Okeechobee County, but did not file suit against Deputy Gracie. Appellants alleged that certain policies implemented by the Appellees, pursuant to which Deputy Gracie was unable to operate his lights and sirens while responding to an emergency call, caused the collision and Hilda Medrano's death.

While we agree with the district court that Hilda Medrano's death was tragic, we also agree that the Appellants have failed to state a claim against the Appellees under § 1983. As Appellants do not allege that Deputy Gracie's conduct amounted to a deprivation of Hilda Medrano's constitutional rights, Appellants cannot maintain an action against Appellees under § 1983 based upon the policies alleged to have caused Hilda Medrano's death. Appellants concede their claim is foreclosed by *Rooney v. Watson*, 101 F.3d 1378, 1381 (11th Cir. 1996) ("[A]n inquiry into a governmental entity's custom or policy is relevant only when a constitutional deprivation has occurred.").

Thus, we affirm the district court's dismissal. *See McKusick v. City of Melbourne*, 96 F.3d 478, 482 (11th Cir. 1996) (reviewing *de novo* a district court's dismissal under Fed. R. Civ. P. 12(b)(6) for failure state a claim).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 2:15-CV-14408-ROSENBERG/LYNCH

[Filed May 27, 2016]

RICARDO MEDRANO-ARZATE and EVA CHAVEZ-MEDRANO, as Personal Representatives of the ESTATE OF HILDA MEDRANO, Deceased, Plaintiffs,	)
v.	)
PAUL C. MAY, individually and as SHERIFF OF OKEECHOBEE COUNTY, and OKEECHOBEE COUNTY, Defendants.	)

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

THIS CAUSE is before the Court on Defendant Paul C. May's Motion to Dismiss [DE 29] ("Sheriff's Motion to Dismiss") and Defendant Okeechobee County's Motion to Dismiss [DE 31] ("County's Motion to Dismiss"), both of which seek dismissal of Plaintiffs' Amended Complaint [DE 19] pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court has carefully considered both Motions, and the parties' respective

responses in opposition thereto and replies in support thereof,[1] and is otherwise fully advised in the premises. For the reasons set forth below, both the Sheriff's Motion to Dismiss and the County's Motion to Dismiss are **GRANTED** and Plaintiffs' Amended Complaint is **DISMISSED WITH PREJUDICE**.

I. INTRODUCTION

This is an action for deprivation of constitutional rights arising out of a fatal automobile collision. Plaintiffs Ricardo Medrano-Arzate and Eva Chavez-Medrano ("Plaintiffs") are the Personal Representatives of the Estate of Hilda Medrano ("Ms. Medrano"), who died on December 1, 2013, when the vehicle in which she was a passenger collided with a vehicle driven by Deputy Joseph Anthony Gracie ("Deputy Gracie") of the Okeechobee County Sheriff's Office. Plaintiffs have filed suit pursuant to 42 U.S.C. § 1983 not against Deputy Gracie, but against Defendants Paul C. May, individually and in his capacity as Sheriff of Okeechobee County, and Okeechobee County ("Defendants"). Plaintiffs allege that certain policies implemented by Defendants—pursuant to which Deputy Gracie was unable to operate his lights and sirens while responding to an emergency call—caused the collision and Ms. Medrano's death.

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[1] The Court notes that Defendant Paul C. May's Memorandum in Support of his Motion to Dismiss [DE 36] ("Sheriff's Reply") was filed over a month after the deadline to file a reply had expired. However, Plaintiffs have not moved to strike the Sheriff's Reply as untimely. In the absence of a motion to strike, the Court will consider the Sheriff's Reply.

While Ms. Medrano's death is tragic, the Court concludes that Plaintiffs have failed to state a claim against Defendants under § 1983. Plaintiffs do not and cannot allege that Deputy Gracie's conduct amounted to a deprivation of Ms. Medrano's constitutional rights. In the absence of a constitutional deprivation arising from Deputy Gracie's conduct, the Court need not examine Defendants' policies.[2] Plaintiffs' claims must instead be dismissed.

II. BACKGROUND[3]

At all relevant times, Defendants maintained two policies that—when read together—created a third policy pursuant to which Deputy Gracie was unable to operate his lights and sirens while responding to an emergency call on December 1, 2013. The first policy required all deputies with the Okeechobee County Sheriff's Office to use the radios in their patrol cars to seek approval before operating their lights and sirens when responding to an emergency call. *See* DE 19 ¶ 14.

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[2] The Court notes that Defendant Okeechobee County denies any responsibility for the policies identified in Plaintiffs' Amended Complaint. *See* DE 31. Because the Court dismisses all claims against Defendants on other grounds, the Court need not decide whether and to what extent Okeechobee County bears responsibility for the policies. For the sake of simplicity, however, the Court refers to the policies as Defendants' policies.

[3] The background facts set forth herein are drawn from Plaintiffs' Amended Complaint. For the purposes of this Order, the Court views the Amended Complaint in the light most favorable to Plaintiffs and accepts all of Plaintiffs' well-pleaded facts as true. *See Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1066 (11th Cir. 2007) (citing *St. Joseph's Hosp. v. Hospital Corp. of America*, 795 F.2d at 954 (11th Cir. 1986)).

The second policy prohibited all but the first deputy responding to an emergency call from using their radios or creating "chatter." *See id.* ¶ 15. Read together, these two policies give rise to a third policy: the second or any subsequent deputies responding to an emergency call will never operate their lights and sirens because they cannot use their radios to seek approval. *See id.* ¶ 16.

Shortly after 2:00 a.m. on December 1, 2013, Deputy Gracie was on duty and *en route* to the scene of an emergency. *See id.* ¶¶ 18–20. Pursuant to Defendants' policies, as the second deputy responding to the emergency call, Deputy Gracie could not use his radio to seek approval and therefore was not operating his emergency lights and sirens. *See id.* Nevertheless, Deputy Gracie traveled in excess of 90 miles per hour through an area where the posted speed limit was 35 miles per hour. *See id.* ¶ 21. Deputy Gracie slowed to 87 miles per hour just before colliding with the vehicle in which Ms. Medrano was a passenger as its driver was attempting to make a left-hand turn. *See id.* ¶ 22. Ms. Medrano died as a result of that collision. *See id.*

In their Amended Complaint, Plaintiffs assert that the policies set forth above caused, or were the moving force behind, Ms. Medrano's death. *See id.* ¶¶ 28, 33. Plaintiffs further assert that Defendants implemented these policies with deliberate indifference to the obvious consequence that compliance would certainly lead to serious injuries and death. *See id.* ¶¶ 27, 32. According to Plaintiffs, had Deputy Gracie been permitted to use his radio to seek approval, or permitted to operate his lights and sirens without approval, Deputy Gracie would have done so; under

those circumstances, the driver of the vehicle in which Ms. Medrano was a passenger would have been aware that Deputy Gracie was approaching at a high rate of speed and would have taken the necessary precautions to avoid a collision. *See id.* Thus, Plaintiffs assert that Defendants' policies "were the direct, proximate, and foreseeable cause of the violation of [Ms. Medrano's] 14th Amendment rights and ultimately, her death." *See id.* ¶¶ 29, 34.

III. LEGAL STANDARD

To adequately plead a claim for relief, Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), a motion to dismiss should be granted only if the plaintiff is unable to articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing *Twombly*, 550 U.S. at 556). When determining whether a claim has facial plausibility, "a court must view a complaint in the light most favorable to the plaintiff and accept all of the plaintiff's well-pleaded facts as true." *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1066 (11th Cir. 2007).

However, the court need not take allegations as true if they are merely "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 663. "Mere labels and conclusions or a formulaic recitation of the elements of

a cause of action will not do, and a plaintiff cannot rely on naked assertions devoid of further factual enhancement." *Franklin v. Curry*, 738 F.3d 1246, 1251 (11th Cir. 2013). "[I]f allegations are indeed more conclusory than factual, then the court does not have to assume their truth." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012). In sum, "[t]he plausibility standard 'calls for enough fact to raise a reasonable expectation that discovery will reveal evidence' of the defendant's liability." *Miyahira v. Vitacost.com, Inc.*, 715 F.3d 1257, 1265 (11th Cir. 2013) (quoting *Twombly*, 550 U.S. at 556).

IV. DISCUSSION

"[T]o impose § 1983 liability on a municipality, a plaintiff must show: (1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that right; and (3) that the policy or custom caused the violation." *Best v. Cobb Cty.*, 239 F. App'x 501, 503 (11th Cir. 2007) (quoting *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004)). If Plaintiffs are unable to establish any one of the three, their challenge necessarily fails. *See id.* Thus, Plaintiffs cannot maintain an action against Defendants under § 1983 without first establishing a deprivation of Ms. Medrano's constitutional rights.

To establish the requisite constitutional deprivation, Plaintiffs cannot rely exclusively on Defendants' policies. *See Rooney v. Watson*, 101 F.3d 1378, 1381 (11th Cir. 1996) (citing *Vineyard v. County of Murray, Ga.*, 990 F.2d 1207, 1211 (11th Cir. 1993)) ("[A]n inquiry into a governmental entity's custom or policy is relevant only when a constitutional

deprivation has occurred."). Rather, Plaintiffs must show that Deputy Gracie's conduct amounted to a deprivation of Ms. Medrano's constitutional rights. *See id.* (citing *Los Angeles v. Heller*, 475 U.S. 796, 799 (1996) ("Since we have determined that Deputy Watson's conduct did not cause the Rooneys to suffer a constitutional deprivation, we need not inquire into Volusia County's policy and custom relating to patrol vehicle operation and training."); *Best*, 239 F. App'x at 503–04 (affirming entry of summary judgment in favor of county because there was no constitutional violation by police officer).

Plaintiffs do not allege that Deputy Gracie's conduct amounted to a deprivation of Ms. Medrano's constitutional rights, nor could they do so under the facts of this case. *See Sacramento v. Lewis*, 523 U.S. 833, 853–54 (1998) (holding that high-speed police chases with no intent to harm do not give rise to liability for deprivation of Fourteenth Amendment rights because challenged conduct does not shock the conscience); *Best v. Cobb Cty.*, 239 F. App'x 501, 504 (11th Cir. 2007) (citing *Sacramento*, 523 U.S. at 854)). Indeed, Plaintiffs appear to concede that fact by urging this Court to follow *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994). In *Fagan*, the Third Circuit held "that in a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution." *See* DE 32. However, Plaintiffs ignore the fact that the Eleventh Circuit has explicitly rejected the conclusion reached in *Fagan*. *See Best*, 239 F. App'x at 504 (citing *Fagan* as an example of another circuit's disagreement with Eleventh Circuit precedent).

The Court follows the reasoning expressed by the Eleventh Circuit in *Best*, a case strikingly similar to the instant case. *Best* arose from a fatal automobile collision between an innocent bystander and a suspect fleeing from police. *See id.* at 502. As in this case, the plaintiffs in *Best* did not name the officer involved in the pursuit as a defendant or claim that he had committed a constitutional violation. *See id.* at 503. "Instead, the plaintiffs focus[ed] on the county's vehicle pursuit policy, arguing that the defendants were deliberately indifferent to their constitutional rights, and therefore the county [wa]s responsible for their injuries." *Id.* Because the *officer* did not violate the plaintiffs' Fourth or Fourteenth Amendment rights, the court concluded that there was no constitutional violation and, consequently, the plaintiffs' claim against the county could not survive. *Id.* at 504 (citing *Rooney*, 101 F. 3d at 1381).

In the absence of a constitutional deprivation by Deputy Gracie, Plaintiffs cannot maintain an action against Defendants under § 1983 based upon the policies alleged to have caused Ms. Medrano's death. Plaintiffs' Amended Complaint must therefore be dismissed with prejudice.

V. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant Paul C. May's Motion to Dismiss [DE 29] and Defendant Okeechobee County's Motion to Dismiss [DE 31] are **GRANTED**.

2. Plaintiffs' Amended Complaint [DE 19] is **DISMISSED WITH PREJUDICE**.

3. The Clerk of Court is directed to **CLOSE THIS CASE**.

DONE AND ORDERED in Chambers, Fort Pierce, Florida, this 27th day of May, 2016.

Copies furnished to:
Counsel of record

/s/ Robin L. Rosenberg
ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-14170 EE

[Filed June 7, 2017]

RICARDO MEDRANO-ARZATE,	)
EVA CHAVEZ-MEDRANO,	)
as Personal Representative of the	)
ESTATE OF HILDA MEDRANDO, Deceased,	)
Plaintiffs – Appellants,	)
	)
versus	)
	)
SHERIFF OF OKEECHOBEE COUNTY,	)
Paul C. May, individually,	)
OKEECHOBEE COUNTY, FLORIDA,	)
Defendants - Appellees.	)
	)

On Petition for Hearing En Banc from the
United States District Court for the District of

BEFORE: HULL, WILSON, BLACK, Circuit Judges.

The Court having been polled at the request of one of the members of the Court on hearing en banc, and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Hearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

ORD-1

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 2:15-CV-14408-ROSENBERG/LYNCH

[Filed January 19, 2016]

RICARDO MEDRANO-ARZATE and EVA CHAVEZ-MEDRANO, as Personal Representatives of the ESTATE OF HILDA MEDRANO, Deceased, Plaintiffs,	)
vs.	)
PAUL C. MAY, as SHERIFF OF OKEECHOBEE COUNTY and OKEECHOBEE COUNT,Y Defendants.	)

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs, RICARDO MEDRANO-ARZATE and EVA CHAVEZ-MEDRANO, as Personal Representatives of the ESTATE OF HILDA MEDRANO, Deceased, (*hereinafter* "Plaintiffs"), sue Defendants, PAUL C. MAY as Sheriff of Okeechobee County and OKEECHOBEE COUNTY (*hereinafter* collectively "Defendants") for damages, and state:

INTRODUCTION JURISDICTION AND VENUE

1. This is an action for damages and attorneys' fees arising under 42 U.S.C. 1983 and 1988 only. This is not a claim for Wrongful Death under State Law.

2. This United States District Court has federal question jurisdiction over Plaintiffs in that the subject matter of this action comes under 28 U.S.C. § 1331.

3. Venue is appropriate in the United States District Court, Southern District of Florida, pursuant to 28 U.S.C. 1391, by virtue of status of each party as more fully described below.

4. The acts, omissions and practices described hereafter all occurred within the jurisdiction of the United States District Court in and for the Southern District of Florida.

5. Plaintiffs seek an award of compensatory damages, costs and expenses and reasonable attorneys' fees pursuant to 42 U.S.C. 1983, more specifically described below. Fee entitlement is alleged pursuant to 42 U.S.C. 1988.

6. At all times material hereto, the acts, omissions, practices and conduct of Defendants were committed under color of state or local law.

7. At all times material hereto, the acts and omissions of Defendants were committed within the course and scope of his employment as Sheriff of Okeechobee County.

THE PARTIES

8. At all times material hereto, Plaintiffs, as Personal Representatives of the ESTATE OF HILDA MEDRANO, Deceased (*hereinafter* "the ESTATE"), bring this action against Defendants on behalf of HILDA MEDRANO's (*hereinafter* "Decedent") survivors and on behalf of the ESTATE. Copies of the Letters of Administration are attached hereto as "Exhibit A."

9. At all times material hereto, Defendant, MAY in his official and individual capacity as Okeechobee County Sheriff, was and is a "person" subject to suit under 42 U.S.C. 1983. He is sued in both capacities.

10. At all times material hereto, Defendant, OKEECHOBEE COUNTY was and is subject to under 42 U.S.C. 1983.

11. At all times material hereto, Defendants, through their agents and employees, were responsible for the proper and efficient enforcement of the laws, regulations, policies, customs, practices and procedures of such political entity; the laws of the State of Florida; and the Constitution of the United States.

12. At all times material hereto, Defendants required to create, employ, and implement policies, customs and procedures that would not cause death of innocent motorists.

13. Plaintiffs have retained the services of the undersigned and Defendants are obligated to pay a reasonable attorney's fee for such services in pursuing the claims asserted herein.

FACTS

14. At all times material hereto, Defendants were the final decision makers and participated in establishing, creating, employing and implementing policies and/or customs that required deputies of the Okeechobee County Sheriff's Office who are responding to an emergency call in their patrol cars to use their radios to seek approval before use of their emergency lights and sirens. (*hereinafter sometimes* "Policy #1"). (Anthony Gracie Deposition P73 L18-23; P74 L1-25; P75 L1-25; P76 L1-4, attached hereto as "Exhibit B" and Noel Stephen Deposition P19 L19-25; P20 L1-25 attached hereto as "Exhibit C"). This policy and/or custom was in existence since 2010.

15. At all times material hereto, Defendants were the final decision makers and participated in establishing, creating, employing and implementing policies and/or customs that dictated that when one officer is responding to an emergency scene, other officers, including second—and subsequent—responders may not use their radio or create "chatter." (*hereinafter sometimes* "Policy #2"). (Exhibit B, P77 L9-25; P78 L1-25).

16. The abovementioned policies and/or customs when read together, give rise to a third custom or policy: because the only way that a deputy responding to an emergency could use their lights and sirens was to radio for permission and that deputy is not permitted to use the radio when responding to an emergency, the custom and policy is that a second (or subsequent) deputy will never use his lights and sirens when responding to an emergency even though that deputy may be driving at an extremely high rate of

speed, without obeying traffic laws and may pose a danger to innocent motorists. Like the prior two policies, the Defendants were the final decision makers and participated in establishing, creating, employing and implementing this resultant third policy and/or custom.

17. This third policy and/or custom is also a violation of Florida law that is designed to protect the safety and welfare of the public and specifically innocent motorists as expressed in Fla. Stat. §316.126, as follows:

> **An authorized emergency vehicle, when en route to meet an existing emergency, shall warn all other vehicular traffic along the emergency route by an audible signal, siren, exhaust whistle, or other adequate device or by a visible signal by the use of displayed blue or red lights. While en route to such emergency, the emergency vehicle shall otherwise proceed in a manner consistent with the laws regulating vehicular traffic upon the highways of this state.**

18. On or about December 1, 2013, at approximately 2:16 a.m., Deputy Joseph Anthony Gracie (*hereinafter* "Deputy Gracie"), of the Okeechobee County Sheriff's Office was on duty, acting under the color of state law and pursuant to policies and customs for which the Defendants were the final decision makers and participated in establishing, creating, employing and implementing.

19. On the aforementioned date and time, Deputy Gracie, driving a 2006 Ford Crown Victoria, responded to an emergency as backup to the initial responder.

20. While en-route to the emergency site and pursuant to the policies described above, Deputy Gracie, the second responder to the emergency, did not activate his emergency lights or sirens—there was already an initial responding officer on scene so Gracie was not permitted to use his radio and thus could not request permission.

21. Rather, Deputy Gracie, who was obeying policies and/or customs for which the Defendants were the final decision makers and participated in establishing, creating, employing and implementing, was traveling at speeds as high as ninety (90) miles per hour in Downtown Okeechobee—the posted speed limit was thirty-five (35) miles per hour—without any warning to the general public and including innocent motorists. Indeed, Deputy Gracie obeyed the policy and/or custom not to use the radio and accordingly was unable to radio a supervisor to use these warning devices.

22. At approximately 2:16 a.m., on or about December 1, 2013, while Deputy Gracie slowed to eight-seven (87) miles per hour, he slammed into a 2000 Ford Focus that was attempting to make a left turn. 21-year-old Hilda Medrano was the right front passenger in that Focus—she died as a result of the accident and the policies and procedures created, employed, and implemented by Defendants.

23. Several years before this incident, and before the creation and implementation of the policies and/or customs complained about in this pleading, there was

no requirement that a deputy radio for permission to use their lights and sirens. Accordingly, there was a deliberate choice by the Defendants to implement a policy and/or custom that resulted in second, and subsequent, emergency vehicles not using their lights and sirens when responding to emergency situations.

24. Luckily for the People of Okeechobee County, after this incident the Defendants have changed their policy.

COUNT I – VIOLATION OF CIVIL RIGHTS – 42 U.S.C. 1983 AGAINST DEFENDANT, PAUL C. MAY, as SHERIFF OF OKEECHOBEE COUNTY

25. Plaintiffs reaffirm, reallege, and incorporate by reference Paragraphs 1 through 24 as if fully set forth herein.

26. This is an action for violation of Constitutional rights under 42 U.S.C. 1983 against Defendant for the deprivation of rights, privileges and immunities secured by the Constitution of the United States under color of laws of the State of Florida.

27. The three policies and/or customs described in this pleading exhibit a deliberate indifference on the part of Defendant to the obvious consequence that compliance with the policies and/or customs was certain to lead to serious injuries or death, in that deputies responding to an emergency would travel at excessive rates of speed well in excess of normal traffic conditions and posted traffic speeds, without the use of lights and sirens to warn other motorists that a police vehicle was approaching at a high rate of speed and in violation of ordinary traffic laws. Indeed, had Deputy Gracie used his lights and sirens it would have alerted

motorists of his approach and would have resulted in other vehicles in taking extraordinary precaution and yielding to the oncoming emergency vehicle instead of operating as though traffic was normal.

28. Moreover, the Decedent's death was directly caused by the three policies and/or customs described in this complaint and these policies and/or customs were the moving force behind her death. Indeed, Decedent's death is directly connected to these three policies and that Decedent's death resulted because Deputy Gracie was executing the policies and/or customs established, created, employed and implemented by the Defendant.

29. Accordingly, Defendant's policies were the direct, proximate, and foreseeable cause of the violation of Decedent's 14th Amendment rights and ultimately, her death.

COUNT II– VIOLATION OF CIVIL RIGHTS – 42 U.S.C. 1983 AGAINST DEFENDANT, OKEECHOBEE COUNTY

30. Plaintiffs reaffirm, reallege, and incorporate by reference Paragraphs 1 through 24 as if fully set forth herein.

31. This is an action for violation of Constitutional rights under 42 U.S.C. 1983 against Defendant for the deprivation of rights, privileges and immunities secured by the Constitution of the United States under color of laws of the State of Florida.

32. The three policies and/or customs described in this pleading exhibit a deliberate indifference on the part of Defendant to the obvious consequence that

compliance with the policies and/or customs was certain to lead to serious injuries or death, in that deputies responding to an emergency would travel at excessive rates of speed well in excess of normal traffic conditions and posted traffic speeds, without the use of lights and sirens to warn other motorists that a police vehicle was approaching at a high rate of speed and in violation of ordinary traffic laws. Indeed, had Deputy Gracie used his lights and sirens it would have alerted motorists of his approach and would have resulted in other vehicles in taking extraordinary precaution and yielding to the oncoming emergency vehicle instead of operating as though traffic was normal.

33. Moreover, the Decedent's death was directly caused by the three policies and/or customs described in this complaint and these policies and/or customs were the moving force behind her death. Indeed, Decedent's death is directly connected to these three policies and that Decedent's death resulted because Deputy Gracie was executing the policies and/or customs established, created, employed and implemented by the Defendant.

34. Accordingly, Defendant's policies were the direct, proximate, and foreseeable cause of the violation of Decedent's 14th Amendment rights and ultimately, her death.

WHEREFORE, Plaintiffs demand judgment against Defendants, PAUL C. MAY, in his official and individual capacity as SHERIFF OF OKEECHOBEE COUNTY and OKEECHOBEE COUNTY for compensatory damages, attorneys' fees, and costs and such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs respectfully request trial by jury on all issues so triable.

Dated: **January 19, 2016**

Respectfully submitted,

s/Edward H. Zebersky, Esq.
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2016, the foregoing was filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/s/ Edward H. Zebersky
Edward H. Zebersky

Service List

Medrano v. Paul C. May,
as Sheriff of Okeechobee County
Case No. 2:15-cv-14408-Rosenberg/Lynch

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Exhibit A

IN THE CIRCUIT COURT OF THE 19TH JUDICIAL CIRCUIT, IN AND FOR OKEECHOBEE COUNTY, FLORIDA

PROBATE DIVISION

CASE NO.: 14-0003CPAXMX

IN RE: THE ESTATE OF)
HILDA MARISOL MEDRANO)
)

LETTERS OF ADMINISTRATION
(Multiple Personal Representatives)

TO ALL WHOM IT MAY CONCERN:

WHEREAS, HILDA MARISOL MEDRANO, a resident of Okeechobee County, Florida, died on December 1, 2013, owning assets in the State of Florida, and

WHEREAS, EVA CHAVEZ-MEDRANO and RICARDO MEDRANO-ARZATE have been appointed Co-Personal Representatives of the Estate of the Decedent and has performed all acts prerequisite to issuance of Letters of Administration in the Estate,

NOW, THEREFORE, I, the undersigned Circuit Judge, declare EVA CHAVEZ-MEDRANO and RICARDO MEDRANO-ARZATE duly qualified under the laws of the State of Florida to act as the Personal Representative of the Estate of HILDA MARISOL MEDRANO, deceased, with full power to administer the Estate according to law; to ask, demand, sue for, recover and receive the property of the Decedent; to pay

the debts of the Decedent as far as the assets of the Estate will permit and the law directs; and to make distribution of the Estate according to law. The apportionment of any wrongful death settlement must be approved by this Court.

ORDERED on this __ day of January, 2014, in Chambers in Okeechobee, Okeechobee County, Florida.

_____
CIRCUIT JUDGE
JUDGE GARY L. SWEET

cc: Laura Bourne Burkhalter, Esquire
Eva Chavez-Medrano
Ricardo Medrano-Arzate

Exhibit B

[p.73]

A. Corporal Hazellief.

Q. Hazel --

A. Hazellief.

Q. Okay. Any others?

A. That's it, I think.

Q. And they were your immediate supervisors?

A. Yes.

Q. And who was over them? Who was the next level of rank?

A. Well, the sergeant -- from what I'm told, the sergeant was out. He wasn't in. So it was just Corporal Hazellief and Lieutenant Ammons.

Q. Who was the sergeant? I know he wasn't in that day.

A. Shannon Peterson.

Q. Shannon Peterson?

A. Yes.

Q. I think you told us that the procedure for responding to emergency calls, as far as using your emergency equipment, sirens and the lights at the time of this accident, was such that you would call your supervisor to get permission to use the emergency equipment?

A. That's correct.

MR. JOLLY: Objection to form.

[p.74]

BY MR. SCHULER:

Q. And I think that you were about to say something earlier, that that procedure -- had that been in force in Okeechobee County, as far as you know, during the duration of your service at the sheriff's department?

A. That -- that policy changed, sometime after I got there, to that policy.

Q. Did it change after this accident?

A. Yes.

Q. Okay. But what, my question is -- maybe I didn't make it clear -- prior to the time of this accident of December 1, 2013, was that the policy that existed, from the time that you started at the Okeechobee County Sheriff?

A. No. There was a different policy, and I couldn't tell you what that was, but maybe, I'm guessing, a year or two after I started, this policy changed to the policy that I indicated.

Q. Okay. And how did you find out about that change?

A. All the policies are put on the computer. As they're changed, you are responsible to look at the policies and sign for them that you reviewed them.

Q. And so this policy of calling your supervisor to use your sirens and lights to respond to calls was actually put in writing?

[p.75]

A. Yes.

Q. And you had to sign off on it?

A. Yes.

Q. Do you know who made that change or how that change came about?

A. I don't know, no. All of the policies are signed by either the major, the undersheriff or the sheriff.

Q. Okay. Who was the major at the time that --

A. Noel Stephen.

Q. I'm sorry?

A. Noel Stephens.

Q. Noel Stephens?

A. It's "Stephen." I always add an "s," but it's "Stephen."

Q. Noel Stephen?

A. Yes.

Q. Well, Noel Stephen, what was his rank at the time?

A. Major.

Q. Major. Okay. Major Stephen, was he the one responsible for the change, if you know?

A. I don't know. New change or old change? Well, either way I don't know so...

Q. The one we're talking about, okay?

A. (Witness shakes head.)

[p.76]

Q. So that policy of getting your supervisor's permission to use the emergency equipment, how long had that been in effect, prior to the date of this accident?

A. I'm guessing a year and a half, two years.

Q. Now, on the day of this accident, you said you didn't remember this, but has somebody told you after the fact that you were at the RaceTrac Gas Station when you got the call?

MR. JOLLY: Objection to form. Go ahead.

THE WITNESS: Yes.

BY MR. SCHULER:

Q. Okay. And you mentioned that it was a domestic violence situation. Do you either recall or has somebody told you where the location of that emergency was?

MR. JOLLY: Objection to form. Answer it.

THE WITNESS: No, I don't know.

BY MR. SCHULER:

Q. Do you know how far the RaceTrac Gas Station is from the site of the call that you were going to on that day, approximately?

A. The call that I was going to?

Q. Yes.

A. I don't know.

Q. Was it a mile away, two miles? And just an estimate is okay.

[p.77]

A. A mile and a half to two miles.

Q. On the day of this incident, do you recall calling your supervisor and requesting permission to use the emergency equipment, the siren and the lights?

A. No, I don't.

Q. Now, I'm going to ask you a different form of this question, okay?

A. (Witness nods.)

Q. Prior to the date of this accident, when you would hypothetically be called to an emergency that may be similar to this one, how would that procedure work? How would you invoke that procedure?

A. That all depended on the time of the day, what kind of call because the policy that was in place at the time conflicted with a different policy.

Q. Okay. What different policy did it conflict with?

A. An SOP policy that states when an officer is on an emergency scene, you will not talk on the radio. You will allow them to use -- to have the radio clear from chatter, you know, talking, in case they need to yell for help.

Q. Okay.

A. So it conflicted. You hesitated to call a supervisor. Now, I'm not -- I don't know what my thinking

[p.78]

was that night, but normally if an officer is on a dangerous scene, as the senior officer, as soon as I got on there to say, "You have to tell your supervisor where you are and ask permission to put your lights on," if you did that, then all of the rookies would start doing it, and then that would tie up the radio.

Q. Okay.

A. So that caused a problem.

Q. Okay. So the two policies sort of conflicted with one another, correct?

A. Yes, sir.

Q. And the policy to not use your radio, if it was an emergency call, that was also in writing?

A. That's an SOP, yes.

Q. Do you remember the number of the SOP?

A. Oh,_ no, sir. That's a long time ago I read that. I don't know. It's part of one of the dispatcher SOP's as well.

Q. The dispatcher's SOP?

A. Yes, sir. And that's a practice that we practiced for years. If you've got an officer on an emergency scene, you don't tie up the radio because they couldn't yell for help, if that was the case.

Q. Okay. I understand. Do you remember who the dispatcher was that evening?

* * *

Exhibit C

[p.19]

BY MR. SCHULER:

Q Was he able to speak with you at all?

A Never spoke to him.

Q At some point after this accident, did you have a chance to discuss the accident with Deputy Gracie?

A No, sir.

Q Did you ever discuss this accident with Deputy Gracie?

A I don't recall ever discussing the accident with Deputy Gracie.

Q Deputy Gracie has testified that there was a policy in force and effect at the Okeechobee County Sheriff's Office that before he could put on his emergency lights and sirens, that he had to get approval from the supervisor.

Was that the case back then?

MR. JOLLY: Objection, form.

Answer his question.

THE WITNESS: There was a procedure, verbiage that the supervisor had, as well as conveyed to the officers, that prior to running code to such a call, that we wanted the supervisors to give that approval. So the nearest responding officer could be authorized to do so and we didn't have everybody running code

[p.20]

from across town to respond to a needed, requested backup.

BY MR. SCHULER:

Q Was this policy to get supervision or supervisor's approval before running code, was that in writing?

MR. JOLLY: Objection, form.

Answer.

THE WITNESS: I don't know if it was a policy at that point or if it was just a protocol that we were doing by word of mouth.

BY MR. SCHULER:

Q How long had that protocol or policy been in effect?

A It all kind of derived from the pursuit policy. Best of my recollection, around '09, '10 area, there was a standardized pursuit policy that the State of Florida, Florida sheriffs and the Florida police chiefs were working on due to serious crashes occurring during pursuits. So this all kind of derived from that time in dealing with that issue.

Q Are you saying that the policy or procedure to get supervisor's approval before running code was written in some other form with some other organization?

MR. JOLLY: Objection, form.

* * *