Marshall did not identify any other persons who had been treated more favorably; hence his Equal Protection cause of action failed. And given that his underlying Fourth and Fourteenth Amendment claims were unavailing, his Monell allegations were fatally deficient.

http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2012cv07128/402227/38 (last accessed Apr. 17, 2014).

Search and Seizure: Officers Who Recorded Attorney-Client Conversations During Non-Custodial Interview Cannot Assert Qualified Immunity

Gennusa v. Canova, No. 12-13871 (11th Cir. Apr. 8, 2014).

The Eleventh Circuit has upheld a lower court decision rejecting the assertion of qualified immunity by two law enforcement officers who recorded conversations between a suspect and his attorney while inside the Sheriff's office.

In 2009 St. John's County (Florida) police suspected that Joel Studivant had violated a domestic violence injunction. Officer Marmo and Sgt. Canova conducted a non-custodial interview of Studivant in the Sheriff's office in the presence of Studivant's attorney, Anne Marie Gennusa. Unbeknownst to either Studivant or Gennusa the officers recorded and actively monitored the entire interaction in the interview room – including attorney-client conversations when the officers were not present. The officers had no warrant for this surreptitious recording.

Moreover, the officers did not have a warrant for the seizure of papers they took during the interview. At the beginning of the interview, Studivant had agreed to provide a written statement, but upon finding out at the end of the interview that he was going to be arrested, he decided against doing so. The officers argued with attorney Gennusa that she had to turn over the statement. This she refused to do, prompting the interviewing officer, Marmo, to leave the interview room and speak with Canova. The officers then saw Gennusa take the statement from Studivant to put in her bag. Sgt. Canova directed Marmo to go in immediately and take the statement. Marmo forcibly took the paper from Gennusa.

Gennusa, learning of the recording after the fact, filed suit. She alleged Section 1983 violations under the Fourth Amendment for the warrantless recording of privileged conversations and the seizure of the written statement, as well as under 18 U.S.C. § 2520(a), the Federal Wiretap Act, for the warrantless recording. The officers defended that they had qualified immunity. The district court denied the officers such protection. The officers appealed.

HELD: The Eleventh Circuit affirmed the district court, denying the officers qualified immunity.

DISCUSSION: The doctrine of qualified immunity protects officials from civil damages when their conduct does not violate clearly established law, which a reasonable person would know existed at the time of the alleged violation. The burden is on the plaintiff to prove that qualified immunity is not appropriate when officials act within their discretionary duty, meaning Gennusa

and Studivant had to prove 1) the officers violated the Fourth Amendment and 2) that at the time of the alleged violation it was clearly established that such conduct violated the amendment.

The plaintiffs argued the surreptitious monitoring violated the Fourth Amendment because since the 1960s it has been clear that communications cannot be electronically monitored without a warrant. The officers responded that there was no violation because Gennusa and Studivant did not have a reasonable expectation that their attorney-client conversation was private, given that they were in an interview room in the sheriff's office.

The Circuit Court held that Gennusa and Studivant had an objectively reasonable expectation that their conversations were privileged because there was no indication of monitoring taking place, they were not told they were being monitored, and, despite being in a Sheriff's office, they were in a non-custodial, voluntary interview. The officers countered these points by citing cases where attorney-client conversations in police stations were not privileged, but the court readily distinguished them since all of the clients in those cases were arrested and/or were told their conversations were monitored.

As to whether it was clearly established that in 2009 the Fourth Amendment protected the warrantless surveillance of attorneys and non-incarcerated clients, the Circuit Court said it does "not always require a case directly on point before concluding that a law is clearly established." The court made the link by saying "it has long been clear" electronic surveillance of conversations violates the Fourth Amendment, that "it has long been clear" that in an ordinary criminal case the warrantless interception of phone calls violates the Fourth Amendment, and that "it has long been clear" that even in sensitive national security cases, law enforcement must obtain a warrant before listening to a private communication. As a result it was "obvious and apparent to any reasonable law enforcement official in June of 2009 that the Fourth Amendment requires that a warrant be secured before non-custodial privileged communications between attorneys and their clients – communications which are normally entitled to be kept confidential as a matter of law – can be electronically monitored, intercepted, or recorded."

As to the Fourth Amendment seizure claim, the officers posited that taking the written statement did not violate the Constitution because it fell within the exigent circumstances exception – e.g. the statement would have been destroyed. The Court disagreed with this argument on two levels. First, the officers failed to raise the issue below and thus could not use it on appeal. The Circuit Court noted that, while the defendants made one "single, passing reference" to exigent circumstances which was not enough to preserve the argument on appeal. Second, the Court noted that even if it found the argument was preserved, the defendants failed to win on the issue since they failed to show why they could not have simply asked the attorney to preserve the written statement and then obtained a warrant for it. As a final testament to the court's opinion on just how unreasonable it was to record an attorney-client conversations in 2009, the Court closed with a case from 1928, saying "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

http://www.ca11.uscourts.gov/opinions/ops/201213871.pdf (last accessed Apr. 16, 2014).