

No. 18-1252

In The
Supreme Court of the United States

REV. BARRY D. BILDER,

Petitioner, Pro se,

v.

REV. BETH MATHERS, RUTH BILDER,
CITY OF TULSA, a municipal corporation,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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**COUNTERSTATEMENT
OF QUESTION PRESENTED**

Whether the Petitioner's failure to identify any policy, practice or custom of the City of Tulsa as the motivating force behind any alleged Constitutional violation, as is required by *Monell v. New York City Dept. of Social Svcs.*, 436 U.S. 658 (1978), is fatal to Petitioner's claims against the City of Tulsa.

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CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. IV

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

U.S. Const. Amend. VI

The Sixth Amendment provides “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

STATEMENT OF THE CASE

On March 18, 2014, two girls, ages 9 and 11, were selling Kool-Aid at a stand they set up in their neighborhood. A man pulled up to their stand driving a tan/gold colored Nissan Maxima. He purchased a cup of Kool-Aid and tried to proposition the girls to go with

him. The girls refused and ran home. The man drove off leaving the cup with his DNA with the girls. (Pet. App. 2a)

The Tulsa Police Department (“TPD”) was called to investigate the attempted kidnapping and was able to test the cup for DNA. (Pet. App. 2a) TPD also obtained a copy of video from a neighbor’s surveillance camera. *Id.* It showed the man drove a newer model tan/gold Nissan Maxima. *Id.* The DNA results from the Kool-Aid cup matched the DNA of an unidentified suspect in a rape/kidnapping of a 12 year old girl. *Id.*

Later, TPD Detective Corey Myers was driving in Tulsa on his day off and noticed a tan/gold Maxima that matched the description of the suspect’s car. He was not able to see who was driving the car, but he took down the license plate information. *Id.* The car was owned by the Church of Holistic Science. Detective Myers was informed that the car was owned by the church, but that it was in the possession of Barry Bilder, the Petitioner. *Id.* Two TPD detectives went to Petitioner’s residence, advised him of the situation, and asked if he would voluntarily provide a buccal swab of his DNA so he could be ruled out as a suspect. Petitioner refused to consent to the DNA swab.

Accordingly, Detective Myers prepared an Affidavit For Search Warrant and presented it to the Magistrate Judge. *Id.* The Judge found probable cause existed and authorized the search warrant allowing TPD to obtain a buccal swab from Petitioner. Detective Myers indicated in the Affidavit that Petitioner drives

a tan/gold Nissan Maxima, which is the same vehicle that the suspect in the Kool-Aid stand incident was driving at the time of the attempted kidnapping. (Pet. App. 2a)

Under Oklahoma law, the search warrant was only valid for 10 days. Therefore, time was of the essence in obtaining the sample. (Pet. App. 14a) Detective Myers received information about a time, date, and location where Petitioner would be to pick up his children for a scheduled visit. *Id.* Although the officers just missed meeting him at the pickup location, they did see him drive off in the identified car toward his house. As such, a marked car pulled Petitioner over, served the search warrant, and obtained a sample of his DNA by way of a buccal swab. (Pet. App. 2a, 14a)

The DNA testing revealed that Petitioner's DNA did not match the DNA from the Kool-Aid stand event or the prior Glenpool incident. (Pet. App. 2a) As such, Petitioner was ruled out as a suspect. He was never charged, questioned, arrested, or convicted of anything. (Pet. App. 2a, 14a)

Petitioner filed this lawsuit in the United States District Court for the Northern District of Oklahoma claiming violations of his Fifth, Sixth, Ninth, Tenth, Fourteenth, and Fourth Amendment rights as well as asserting claims for "selective prosecution." In order to prevail against the City of Tulsa, Petitioner needed to establish (1) not only that his constitutional rights were violated, but (2) that the City had a municipal policy or custom that was the moving force behind the

alleged constitutional deprivation. *Monell v. New York City Dept. of Social Svcs.*, 436 U.S. 658, 691 (1978). Importantly, at no point during any of his pleadings in this case, has Petitioner identified any policy, practice or custom that he can show was the moving force behind any alleged deprivation.

The City filed a Motion For Summary Judgment and Brief In Support that was granted by the District Court on May 12, 2017. Petitioner then filed a “motion for reconsideration.” The Court entered a minute Order on July 18, 2017 denying the motion for reconsideration. Petitioner appealed to the United States Circuit Court for the Tenth Circuit. On November 28, 2018, the Tenth Circuit entered an Order affirming the trial court’s grant of summary judgment. Petitioner then filed a Petition For Rehearing *En Banc*, which was denied. At no point during any of the lower court proceedings did Petitioner present any claim under 42 U.S.C. § 14132(d).

SUMMARY OF THE ARGUMENT

The Writ should be denied because at no time has the Petitioner set forth any facts that would establish the City had a municipal policy or custom that was the moving force behind the alleged constitutional deprivation as required by *Monell v. New York City Dept. of Social Svcs.*, 436 U.S. 658, 691 (1978). Petitioner continues to focus on whether his Constitutional Rights were violated. However, even if Petitioner could show

a violation of his Constitutional Rights, which the City disputes, Petitioner has made no effort to identify any policy or practice, which is necessary for him to be able to proceed with a case against the City.

REASONS TO DENY THE PETITION FOR WRIT OF CERTIORARI

1. The Applicable Law Is Well Established And Does Not Warrant Review By This Court.

Both the Trial Court and the Circuit Court found that Petitioner failed to present any facts that would establish that the City of Tulsa had a municipal policy or custom that was the moving force behind any alleged Constitutional deprivation. It has long been settled law that even if Petitioner could establish that his Constitutional rights were violated, he would still need to establish that the City had a policy or practice that was the motivating force behind that alleged violation. *Monell*, *supra*. In this case, Petitioner failed to do that.

Petitioner has not identified any issue of unsettled law or other issue that would warrant this Court's Certiorari review. See Sup. Ct. R. 10. This Court rarely grants discretionary review "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law" such as whether the Petitioner put forth any facts which would establish a claim under *Monell*. Sup. Ct. R. 10. Whether Petitioner's claims of a Constitutional violation are based

on the Fourth Amendment or the Sixth Amendment, the requirements of *Monell* remain the same, and it is clear that Petitioner failed to establish the elements necessary to meet those requirements. Petitioner's claims do not warrant review by this Court.

2. 42 U.S.C. § 14132(d) Does Not Create A Cause Of Action Against The City Of Tulsa.

Petitioner has only mentioned 42 U.S.C. § 14132(d) *one time* during the briefing in both the trial court and the appellate court. In essence, Petitioner contends that the trial court erred in denying his request to expunge his DNA from various databases. Even if Petitioner properly preserved this argument, which the City contends he did not (this matter was not addressed in the City's Motion For Summary Judgment from which the appeal to the Tenth Circuit was commenced), the statute at issue does not create a private right of action that would provide Petitioner a claim against the City of Tulsa. The action Petitioner now complains about is a ruling made by the trial court, in which the City had no involvement.

Further, the Tenth Circuit made clear that Petitioner had failed in his duty, not only to properly support his claims, but to do what he is required to do to obtain the relief sought. The Circuit ruled:

Finally, Plaintiff appears to claim that his constitutional rights are being violated by the failure of the City to expunge his DNA test and that the district court should have

ordered the expungement. But his briefs do not adequately develop any supporting argument. In particular, the district court declined to order expungement on the ground that it lacked authority to do so, yet Plaintiff does not cite any statute or case law granting a federal court such authority in the present circumstances. We note that the district court pointed to an Oklahoma statute that would appear to offer Plaintiff the relief he seeks, but Plaintiff has not cited any authority for the district court to grant relief under the state statute when he has taken no action to comply with the procedural requirements of that statute.

Pet. App. 9a.

For these reasons, Petitioner's claims under 42 U.S.C. § 14132(d) do not warrant Certiorari review by this Court.

CONCLUSION

Petitioner has failed to establish that the Tenth Circuit Court of Appeals “has decided an important federal question in a way that conflicts with relevant decisions of this Court.” Sup. Ct. R. 10. “A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings of the misapplication of a properly stated rule of law.”

The Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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