

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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MICHELLE DAWN MURPHY,

*Petitioner,*

v.

THE CITY OF TULSA,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is the Tenth Circuit's affirmance of summary judgment in favor of Defendant-Appellee City of Tulsa, which was based on an issue not presented on appeal, and wrong factually about the issue it reached out to create, an abuse of discretion because it violates the party presentation jurisprudence articulated in *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020), and its precursor cases?

## LIST OF PARTIES

Michelle Dawn Murphy, petitioner on review (“Petitioner”), was the plaintiff-appellant in the district court and circuit court below.

The City of Tulsa, respondent on review (“the City”), was the defendant-appellee in the district court and circuit court below.

## TABLE OF CONTENTS

QUESTION PRESENTED .....	ii
LIST OF PARTIES .....	iii
TABLE OF CONTENTS .....	iv
TABLE OF CITED AUTHORITIES .....	v
OPINIONS BELOW .....	1
STATEMENT OF JURISDICTION .....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	2
STATEMENT OF THE CASE .....	2
ARGUMENT IN SUPPORT OF THE WRIT .....	7
<b>I. The court of appeals decided this case on a procedural, outcome determinative issue, never raised by the City of Tulsa, and in so doing it abused its discretion in violation of the party presentation principles set forth in <i>United States v. Sineneng-Smith</i> and in its precursor decisions.</b> .....	7
CONCLUSION .....	12
APPENDIX A - Court of Appeals' Opinion (December 16, 2019) .....	1a
APPENDIX B – District Court's Opinion and Order (March 13, 2018) .....	31a
APPENDIX C – District Court's Amended Opinion and Order (August 27, 2019) .....	71a
APPENDIX D – District Court's Order on Plaintiff's Rule 59(e) Motion (August 8, 2019) .....	117a
APPENDIX E – Court of Appeals' Order Denying Panel Rehearing (January 8, 2020) .....	132a

## TABLE OF CITED AUTHORITIES

### Cases:

<i>Castro v. United States</i> , 540 U.S. 375, 386 (2003) .....	8
<i>Day v. McDonough</i> , 547 U.S. 198, 202, 210, (2006) .....	9, 10
<i>Greenlawn v. United States</i> , 554 U.S. 237 (2008) .....	7, 8, 10
<i>McDonough v. Dannery</i> , 3 Dall. 188, 198 (1796) .....	10
<i>Ross v. Neff</i> , 905 F.2d 1346, 1353 (10 <sup>th</sup> Cir. 1990) .....	9
<i>United States v. Sineneng-Smith</i> , 140 S. Ct. 1575 (2020) .....	ii, 7, 8, 10, 12
<i>Wood v. Milyard</i> , 556 U.S. 463 (2012) .....	7, 9, 10, 12

### Constitutional Provisions:

U.S. Const. Amend. V .....	2
U.S. Const. Amend. XIV, §1 .....	2

### Statutes:

28 U.S.C. § 1254(1) .....	1
28 U.C.S. §§ 1331 and 1343 .....	3
42 U.S.C. §1983 .....	2, 3, 8
Okla. Stat. tit. 51, § 154 .....	3

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
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## **PETITION FOR A WRIT OF CERTIORARI**

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Petitioner, Michelle Dawn Murphy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

### **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App., 1a-30a) is reported at 950 F.3d 641. The March 13, 2018 opinion of the district court (Pet. App., 31a-70a), as amended August 27, 2018 (Pet. App., 71a-116a), is reported at 295 F. Supp. 3d 1221 and 2018 WL 4088071, respectively. The court of appeals' order denying panel rehearing is not reported. (Pet. App., 132a).

### **STATEMENT OF JURISDICTION**

The court of appeals' opinion was entered on December 16, 2019. A petition for panel rehearing was denied on January 8, 2020. (C.A. 10705333 (Jan. 8, 2020)).<sup>1</sup> United States Supreme Court Miscellaneous Order dated March 19, 2020 extended the deadline to file this Petition For Writ Of Certiorari to one hundred fifty days from the date of the court of appeals' order denying Petitioner's petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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<sup>1</sup> References to "C.A. Doc. \_\_\_\_", are to the filings in the Tenth Circuit appeal as shown on the appeal docket sheet in that court.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, U.S. Const. Amend. V, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Due Process Clause of the Fourteenth Amendment, U.S. Const. Amend. XIV, §1, provides:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Section 1983 of Title 42 of the U.S. Code provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 \*\*\*.

## STATEMENT OF THE CASE

The court of appeals reached out to create a procedural, outcome determinative, issue not raised by Appellee, the City of Tulsa (“the City”). The court of appeals determined that what Petitioner argued was outcome determinative deposition testimony of the City’s final policy maker was not “properly presented” to the district court. In the district court and on appeal Petitioner and the City argued the merits of this final policy maker’s testimony, not “proper” presentation. At oral argument the City conceded the testimony was in the district court record.

Petitioner, at seventeen years of age, stood trial in 1995 for, and was ultimately convicted of, the grizzly near-decapitation murder of her three-month-old son, whom Petitioner discovered

lying dead in a pool of blood in her kitchen when she awakened at 6 a.m. on the morning of September 12, 1994. (Pet. App., 71a-72a, 84a). Petitioner's conviction was obtained after Tulsa Police Department detective Mike Cook coerced Petitioner into confessing to the crime by, among other things, interrogating her in handcuffs right after she discovered her baby, depriving her of food, drink, and medical treatment for several hours, running his hands up and down her bare legs, and threatening her that if she did not confess to the murder, she would never see her only other child, her two year old daughter, ever again. (Pet. App., 92a). Detective Cook promised if she did confess Petitioner would receive therapy and be reunited with her daughter. (Pet. App., 93a). During her taped confession Detective Cook rewound the tape and started over. (Pet. App., 92a). Nevertheless, Cook and the Tulsa County prosecutor presented Petitioner's confession at trial. (Pet. App., 84a). A jury convicted her of first-degree murder and sentenced her to life without parole. (Pet. App., 72a).

Petitioner served twenty years in prison before she was exonerated in 2014 with the assistance of the Innocence Project. (Pet. App., 72a). In Oklahoma state court she presented a prima facie case of actual innocence beyond a reasonable doubt, satisfying the Oklahoma standard to have her criminal case dismissed with prejudice as Oklahoma statutes required. (Pet. App., 2a). The prosecutor did not object to the exoneration case Petitioner presented. (Pet. App., 72a). The State of Oklahoma did not appeal and it paid her the compensation allowed under its actual innocence statute, Okla. Stat. tit. 51, § 154.

Petitioner subsequently filed this civil rights suit under 42 U.S.C. § 1983 against the City, for its role in violating her constitutional rights. The district court's jurisdiction was premised upon federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343. Petitioner's claims are for violation of her Fifth and Fourteenth Amendment rights through the obtaining and presentation at



trial of a coerced and false confession, and violation of her Fourteenth Amendment substantive due process rights due to the City's reckless investigation of her son's murder. The City moved for summary judgment in the district court, arguing that Petitioner's constitutional rights were not violated, but that even if they were, there was no municipal policy, custom or practice that could hold the City liable for the civil rights violations she suffered. (App. Vol. II, p. 282-331).<sup>2</sup>

In her district court summary judgment response brief, Petitioner asserted genuine issues of material fact existed as to the constitutionality of her confession, its presentation at trial, and as to several theories of municipal liability. (App. Vol. IX, p. 2467-2513). Each theory was heavily dependent on the extraordinary deposition testimony of the City's conceded final municipal policy maker, Police Chief Palmer, that interrogators had the "full authority" of the department to make threats during interrogations. This crucial deposition testimony ("Chief Palmer's Authority Testimony") was:

Q. [The sergeant] further testified that an interrogator had the full authority of the Tulsa Police Department to decide what kind of threats to make. Do you agree with that testimony?

A. They would have.

App. Vol. X, p. 2680, 2729 (30:24 to 31:3).

The district court's opinion entered on March 13, 2018, (Pet. App. B), granted summary judgment to the City. Although the district court first found there was a genuine issue of material fact regarding Detective Cook's unconstitutionally coercing Petitioner's confession, it then also found that no genuine issue of material fact existed on any of Petitioner's theories of municipal liability, e.g., "...the court is persuaded that any grant of 'full authority' to interrogators was

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<sup>2</sup> References to "App. Vol. \_\_, p. \_\_" are to the record below in accordance with Supreme Court Rule 12(7), which can be found in the Court of Appeals below at Doc. No. 10623485 (Feb. 1, 2019).

constrained by [the police department's] policy requiring its officers to 'defend, enforce and obey' the Constitution." (Pet. App., 57a).

Despite Petitioner's summary judgment response brief making five references to Chief Palmer's Authority Testimony in her argument, and including two exhibits containing Chief Palmer's Authority Testimony (albeit split into two pages at different locations under two exhibit numbers), the City's summary judgment reply brief and an amended reply brief of the City made no suggestion that Chief Palmer's Authority Testimony was not properly presented to the district court.

Petitioner filed a motion to alter or amend the district court's March 13, 2018 ruling. In its August 8, 2018 order the district court granted in part and denied in part Petitioner's motion to alter or amend. (Pet. App., 131a). The August 8, 2018 order allowed Petitioner to file a sur-reply ("Petitioner's Sur-Reply") of no more than five pages addressing Exhibits 2 through 7 to the City's earlier summary judgment reply brief, which were presented for the first time by the City in its summary judgment reply brief. Petitioner filed her Sur-Reply, (App. Vol. XVI, p. 4361), in which she twice argued Chief Palmer's Authority Testimony and also attached both pages of Chief Palmer's Authority Testimony as an exhibit. (App. Vol. XVI, p. 4384-4385).

After Petitioner filed her Sur-Reply, on August 27, 2018, the district court issued its amended opinion and order. (Pet. App., 71a). In its amended opinion and order the district court continued to find there was a genuine issue of material fact regarding Detective Cook's unconstitutionally coercing Petitioner's confession, (Pet. App., 93a and 95a), but still found no genuine issue of material fact existed which would establish municipal liability, (Pet. App., 98a, 101a, 102a, 113a, 114a, and 116a).

Petitioner appealed, and as grounds argued that the district court erroneously granted summary judgment because Chief Palmer's Authority Testimony, arguably outcome determinative, created a genuine issue of material fact as to the City's liability. The City filed no cross-appeal.

Petitioner filed her Brief on Appeal. In her Opening Brief, Petitioner expressly pointed out where Chief Palmer's Authority Testimony appeared in Petitioner's summary judgment response, and amended response, (C.A. Doc. 10623474, at p. 22-24 (Feb. 1, 2019)), and argued that this testimony precluded summary judgment in several respects. *Id.*

In its appeal Response Brief, the City did not ask the court of appeals to affirm summary judgment on the basis that Chief Palmer's Authority Testimony (1) was not properly in the district court summary judgment record, or (2) was not properly presented to the district court. Instead, the City asserted that such testimony was of no moment, was nothing more than a "scintilla" of evidence, and was outweighed by other evidence. (C.A. Doc. 10631241, at p. 28, 30 (Mar. 6, 2019)).

During oral argument before the court of appeals, when asked by the panel, counsel for the City conceded that Chief Palmer's Authority Testimony was in the record.

The court of appeals acknowledged that this testimony was in the record, but affirmed summary judgment based upon its creation of a procedural, outcome determinative issue, *i.e.*, that Petitioner failed to properly present the district court with the Police Chief's Authority Testimony. It reasoned "[b]ut even without an argument by the City, we can affirm on any ground supported by the record," (Pet. App., 6a, n.3), citing an earlier Tenth Circuit court of appeals case.

The court of appeals, in affirming summary judgment, assessed the merits of four of Petitioner's theories of municipal liability, while ignoring Chief Palmer's Authority Testimony,

on the ground that it was not “properly presented”, stating “[t]he testimony did appear in the exhibits, but Ms. Murphy did not tell the court where to look...” (Pet. App., 12a) (emphasis added). The court of appeals also ignored that Chief Palmer’s Authority Testimony was in Petitioner’s Sur-Reply on summary judgment, and the district court was told exactly where to look on exhibit 3 thereto.

Petitioner filed a petition for rehearing, pointing out the argument of the Police Chief Authority Testimony in Petitioner’s Sur-Reply on summary judgment and the fact that it was attached as an exhibit to that Sur-Reply. (C.A. Doc. 10705333, at 2 (Dec. 26, 2019)). Petitioner’s petition for rehearing was denied by the court of appeals without comment. (Pet. App., 132a).

#### ARGUMENT IN SUPPORT OF THE WRIT

**Proposition I:**        **The court of appeals decided this case on a procedural, outcome determinative, issue never raised by the City of Tulsa, and in so doing it abused its discretion in violation of the party presentation principles set forth in *United States v. Sineneng-Smith* and in its precursor decisions.**

The court of appeals expressly recognized that “[T]he City has not urged affirmance based on Ms. Murphy’s failure to properly present the district court with the pertinent part of [Chief Palmer’s Testimony].” (Pet. App., 6a, n. 3). The court of appeals in this case nevertheless affirmed summary judgment, by finding that although Chief Palmer’s Authority Testimony was in the record, it was not “properly presented.”

The court of appeals’ creation of a procedural, outcome determinative, issue not raised by the City was an abuse of discretion in violation of the party presentation principles set forth in in *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020), *Wood v. Milyard*, 566 U.S. 463 (2012), and *Greenlaw v. United States*, 554 U.S. 237 (2008).

There is no dispute in this case that the final policy maker for the City's police department (within the meaning of case law under 42 U.S.C. § 1983) testified at his deposition that interrogators had the "full authority" of the department to threaten suspects during interrogations. The court of appeals expressly acknowledged that this testimony was in the record that was before the district court. (Pet. App., 12a).

There can be no dispute, as the court of appeals recognized, that Chief Palmer's Authority Testimony was the linchpin of Petitioner's assertions in the district court, and her arguments on appeal, that there was a genuine issue of material fact on four different theories of municipal liability: (1) formal policy, (Pet. App., at 4a-6a), (2) informal custom or usage, (*id.* at 16a-18a), (3) authorization of threats, (*id.* at 19a), and (4) ratification of threats in interrogations. (*Id.*).

The district court granted summary judgment to the City, finding that other evidence prevented Chief Palmer's Authority Testimony from presenting a genuine issue of material fact. That was a remarkable ruling, in that Chief Palmer's Authority Testimony, that police interrogators have the "full authority" of the department to threaten suspects, is probably among the most remarkable testimony ever given by a modern American police chief.

As this Court has most recently yet again affirmed, our adversarial system of adjudication follows the principle of party presentation. *Sineneng-Smith*, 140 S. Ct. at 1579. As this Court noted in *Sineneng-Smith*, "in both civil and criminal cases, in the first instance and on appeal... we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present". *Id.* (quoting *Greenlaw*, 554 U.S. at 243 (2008)).

As a general rule, our system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief". *Castro v. United States*, 540 U.S. 375, 386 (2003).

In 2012 this Court reversed this same court of appeals and remanded for violating party presentation principles by creating a procedural, outcome determinative, issue not raised on appeal. *Wood v. Milyard*, 566 U.S. 463 (2012). In *Wood*, the court of appeals had reversed a district court ruling that ignored the untimeliness of filing a habeas corpus motion because the affected party did not make an issue of the untimeliness. This Court held that the court of appeals' reliance on the procedural untimeliness, despite the failure of the affected party to rely thereon, was an abuse of discretion:

Does court discretion to take up timeliness hold when a State is aware of a limitations defense, and intelligently chooses not to rely on it in the court of first instance? The answer *Day* instructs is "no". A court is not at liberty, we have cautioned, to bypass, override or excuse a State's deliberate waiver of a limitations defense. *Id.* at 202, 210, n.11, 126 S.Ct. 1675. The Tenth Circuit, we accordingly hold, abused its discretion by resurrecting the limitations issue instead of reviewing the District Court's disposition on the merits of Wood's claim.

566 U.S. at 466 (citing *Day v. McDonough*, 547 U.S. 198, 202, 210, n. 11 (2006)).

*Wood* further instructs, "when a court of appeals raises a procedural impediment to disposition on the merits and disposes of the case on that ground, the district court's labor is discounted and the appellate court acts not as a court of review but as one of first review." 566 U.S. at 474.

The court of appeals' opinion here makes no reference to *Wood*. Instead, in footnote 3, (Pet. App., 6a, n.3), its reliance for affirming summary judgment without an argument by the City is placed on an earlier Tenth Circuit case, *Ross v. Neff*, 905 F.2d 1346, 1353 n.5 (10<sup>th</sup> Cir. 1990). Moreover, the court of appeals' concept that without argument from the affected party, "we can affirm on any ground supported by the record", (Pet. App., 6a, n.3), does not even recognize the existence of party presentation principles. Instead, as reflected in its opinion, the court of appeals

merely asserts, in effect, that it could affirm on any ground supported by the record because that court of appeals has so ruled in a prior case.

Logic suggests that if the appellate court cannot *create* an issue over a statute of limitations defense, *see Wood, supra*, it certainly cannot *create* an issue over “proper presentation” of evidence in the district court record. Both are procedural impediments, preventing consideration on the merits. *Wood* instructs that this violates party presentation principles.

The City did not cross-appeal on any issue in this case. The court of appeals’ creation of a procedural, outcome determinative issue not raised on appeal -- thereby in effect creating a cross-appeal -- is simply contrary to the party presentation rule discussed in *United States v. Sineneng-Smith, supra*, and precursor rulings, as well as the related cross-appeal branch of the party presentation rule discussed in *Greenlaw, supra*.

‘[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties...’. The cross-appeal rule, pivotal in this case, is both informed by, and illustrative of, the party presentation principle. Under that unwritten but longstanding rule, an appellate court may not alter a judgment to benefit a non-appealing party. This Court, from its earliest years, has recognized that it takes a cross-appeal to justify a remedy in favor of an appellee.

*Greenlaw*, 554 U.S. at 244 (quoting *McDonough v. Dannery*, 3 Dall. 188, 198 (1796)).

When an appellate court reaches out to create an issue, thereby denying the affected party the opportunity to brief that issue, the appellate court runs the risk that it misapprehends what it declares the issue to be. In this case, that is exactly what the court of appeals did. The court of appeals’ opinion is flatly wrong factually on what it says the procedural, outcome determinative, issue is.

The court of appeals defined “properly presented.” First, it stated, “[T]he district court might have discovered the pertinent part of the testimony only by trudging without guidance

through 1540 pages of exhibits.” (Pet. App., 5a). Second, it said “[T]he testimony did appear in the exhibits, but Ms. Murphy did not tell the court where to look. The [district] court could have found the rest of the relevant question and answer only by wading directionless through 1540 pages of exhibits.” (Pet. App., 12a). The problem with these definitions is that the court of appeals completely failed to recognize that the district court summary judgment briefing contained not just forceful argument on Chief Palmer’s Authority Testimony, but also specifically directed the district court to an exhibit containing the entirety of Chief Palmer’s Authority Testimony.

Petitioner’s Sur-Reply to the City’s motion for summary judgment twice refers to Chief Palmer’s Authority Testimony in argument and cites in support Exhibit 3 thereto, which is the entirety of Chief Palmer’s Authority Testimony. App. Vol. XVI, p. 4364, 4384-4385.

Thus, the court of appeals “created” a procedural, outcome determinative issue that did not exist. The district court knew exactly where to look. Of course, so did the City, which did not cross-appeal or argue on appeal that Petitioner failed to “properly present” Chief Palmer’s Authority Testimony.

Petitioner respectfully submits that this case calls for reversal and remand to the court of appeals because of its abuse of discretion in violating governing party presentation principles, as shown by:

1. Chief Palmer’s Authority Testimony was outcome determinative, as it was the linchpin of four of Petitioner’s theories of municipal liability;
2. There is no dispute that Chief Palmer’s Authority Testimony was in the district court record;
3. The City did not object to the district court’s considering the outcome determinative testimony;
4. The City filed no cross-appeal;

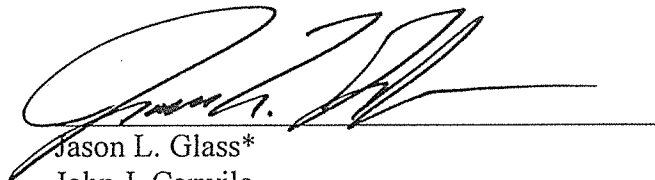


5. The City had no objection to the court of appeals' considering the outcome determinative Chief Palmer's Authority Testimony;
6. The court of appeals gave no consideration to or awareness of party presentation principles;
7. The court of appeals, in creating an issue not presented by the City, simply repeated the error it had committed in *Wood*, 566 U.S. 463;
8. The court of appeals ignored that Chief Palmer's Authority Testimony was squarely and properly presented to the district court in Petitioner's Sur-Reply;
9. The court of appeals' factual error concerning Petitioner's Sur-Reply was pointed out in Petitioner's petition for rehearing; and
10. The court of appeals denied the petition for rehearing without comment.

### CONCLUSION

This Court should grant certiorari in this case on the ground that the court of appeals clearly violated party presentation principles when it affirmed the district court by creating a procedural, outcome determinative issue not raised by the City, and, in doing so, was factually wrong. This was "radical transformation" of the case, going "well beyond the pale." *Sineneng-Smith*, 140 S. Ct. at 1582.

Respectfully submitted,



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