No. 19-1359

IN THE

Supreme Court of the United States

MICHELLE DAWN MURPHY,

Petitioner,

v.

THE CITY OF TULSA,

Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The City's Response focuses on irrelevant aspects of the record, including its questionable effort to argue Petitioner's innocence.

In its Response the City now attempts to challenge whether the Chief Palmer Authority Testimony was in the summary judgment record when it never disputed this evidence being in the record, in the district or in the Tenth Circuit.

The most fundamental flaw of the City's Response is that it fails to confront the Tenth Circuit's fundamental errors submitted by Petitioner. That error is that instead of conducting a *de novo* review, utilizing the entire summary judgment record available to and considered by the district court, the Tenth Circuit eliminated the key material evidence by violating the party presentation principles, and then based on that "reformed" record, which was wholly contradicted by the fact that both pages of Chief Palmer's Authority Testimony were specifically set forth in Petitioner's sur-reply and attached exhibits, it affirmed the district court. The City's Response does not directly confront this error.

ARGUMENT IN SUPPORT OF THE WRIT

I: The City's Response Does Not Dispute Key Elements of Petitioner's Argument

Despite now claiming for the first time that Chief Palmer's Authority Testimony was not in the record, the City now makes an argument completely contrary to, and attempts to ignore, the positions it actually advanced in the courts below.

1. The City's Response does not dispute that the City never raised in the district court or the Tenth Circuit the issue of Chief Palmer's Authority Testimony not being "properly presented" to the district court.

2. The City's Response does not dispute that during oral argument in the Tenth Circuit, its counsel conceded that Chief Palmer's Authority Testimony was in the summary judgment record.

3. The City's Response does not dispute that the Tenth Circuit defined the alleged failure to "properly" present Chief Palmer's Authority Testimony as: to find both pages of the testimony required (a) "trudging without guidance through 1540 pages of exhibits," (Pet. App., 5a) and (b) "wading directionless through 1540 pages of exhibits." (Pet. App., 12a).

4. The City's Response does not refute the indelible logic that when the Tenth Circuit reached out to create the issue of both pages of Chief Palmer's Authority Testimony not being "properly presented," thereby completely ignoring the presentation of that testimony in an exhibit to Petitioner's sur-reply to the City's motion for summary judgment, the Tenth Circuit's abuse of discretion is at the apex of violation of the party presentation principles.

5. The City's Response gratuitously stoops to the low level of claiming on page 2 that "no one else was ever arrested for the murder". The City fails to disclose that the district court found in its Amended Opinion and Order that a reasonable fact finder could find Detective Cook

"chose not to pursue other investigatory avenues," specifically, "Cook never considered whether [one of Petitioner's neighbors, William Lee] committed the murder and never questioned Lee's truthfulness". (Pet. App., 95a). The City also omits that Lee (i) was a 14 year old who claimed to have peered through Petitioner's windows at the time of the murder, (ii) gave untruthful and inconsistent statements, (iii) had his sexual advances to Petitioner emphatically spurned and (iv) after testifying at the preliminary hearing, but before trial, committed suicide by erotic asphyxiation. The City callously excludes this context in order to paint Petitioner as the murderer, and steers this Court away from the City's abysmal investigation, which deprived Petitioner of the ability to ever know for certain who killed her baby.

6. The City's Response magnifies this cruelty by claiming Petitioner was not exonerated. The City's Response does not dispute the unassailable fact that Petitioner received the maximum possible redress under Oklahoma's actual innocence statute when she presented a prima facie case of actual innocence beyond a reasonable doubt, which the State of Oklahoma did not oppose, then waived its right to appeal, and paid Petitioner the statutory maximum of $175,000. The Oxford English Dictionary and the Oxford Advanced American Dictionary define "exonerate" as: "to officially state that somebody is not responsible for something that they have been blamed for." *Accordingly, Petitioner stands as an Innocence Project exoneree.*

7. The City's Response also ignores the district court finding that there was a genuine issue of material fact on Detective Cook's coercing Petitioner's confession at age seventeen when she was, *inter alia,* interrogated immediately after the murder, barefoot and in handcuffs, deprived of food, drink and medical treatment for several hours and threatened that she would never see her two year old other child if she did not confess to murder.

8. The City's Response totally ignores *Wood v. Milyard*, 566 U.S. 463 (2012). *Wood* makes crystalline that a circuit court abuses its discretion by reaching out beyond what the parties have presented, to create an issue waived in district court. The City's Response does not deny that the City had every opportunity in district court and at the Tenth Circuit to urge summary judgment because both pages of the Palmer testimony were not "properly presented" together in one citation to the record, but that the City chose not to do so. Thus, the City waived the issue created by the Tenth Circuit. *This waiver alone is dispositive of the violation of the party presentation principles, but the Tenth Circuit abused its discretion in an overarching way that supersedes the City's waiver---there is no factual basis to the issue the Tenth Circuit reached out to create, because Chief Palmer's Authority Testimony was properly in the record.*

9. The City's Response misleads the Court (a) starting with the last paragraph on page 5 and ending above the last three lines on page 6, and (b) in the last paragraph on page 12. There, the Response notes discussions about the status of the record *before Petitioner filed her sur-reply to the City's motion for summary judgment.* The discussion on pages 5 and 6 then speaks of the presence of a page of the Chief Palmer Authority Testimony which the City included in its own summary judgment exhibits. However, nowhere does the City tell this Court that Petitioner's sur-reply cured any earlier deficiency. It did so because in the sur-reply both pages were together, cited as an exhibit.

10. The City's Response discussion on page 12 concerning *de novo* review by the Tenth Circuit is irrelevant and misplaced. *De novo* review required the Tenth Circuit to examine the entire summary judgment record, which necessarily includes Petitioner's sur-reply (and attached exhibits) to the City's motion for summary judgment that contains both pages of the Chief Palmer Authority Testimony and to which the district court was specifically directed. Thus, the Tenth

Circuit's violation of the party presentation rule enabled it to create out of whole cloth a summary judgment record that did not contain the linchpin Chief Palmer's Authority Testimony.

11. The City's Response further erroneously claims on page 13 "the Tenth Circuit reviewed the trial court's findings on the first four aspects of *Monell* liability" and wrote a detailed discussion on the failure to train contention. The Tenth Circuit did not "review" the trial court's findings on the first four municipal liability categories, like it did on the fifth - the failure to train *Monell* basis.[1] Unlike the district court, the Tenth Circuit found there was no genuine issue of material fact on any of the first four *Monell* avenues of municipal liability, apart from failure to train, solely because of its conclusion that the Chief Palmer's Authority Testimony was not "properly presented" in the district court.

This was made abundantly clear in the Tenth Circuit Opinion wherein it stated: (1) "No formal policymaker [sic] authorized police to make threats … This contention is also rooted in the former police chief's testimony, which was not properly presented in district court …. We thus conclude that no genuine issue of material fact existed on this contention" (Pet. App., 19a); (2) "No final policymaker ratified a practice of threatening suspects," as "[t]his argument again hinges on the former police chief's testimony, which Ms. Murphy failed to properly present in district court ….We thus reject this argument as unsupported." (Pet. App., 19a); (3) "The City of Tulsa had no informal custom authorizing threats in criminal interrogations," (Pet. App., 16a) where the court found "as discussed above, Ms. Murphy failed to properly present the district court with the former police chief's testimony….Without that testimony, the recurrence of interrogations alone does not suggest a custom involving threats or coercion." (Pet. App., 17a-18a); (4) Ms. Murphy

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[1] *See Monell v. Dep't of Soc. Svcs. of the City of New York, et al.*, 436 U.S. 658 (1978).

did not properly present the district court with the former police chief's testimony about the permissibility of threats," (Pet. App., 5a) where the Tenth Circuit found "In district court, Ms. Murphy referred to the former police chief's testimony that the police could make threats....The court could have found the rest of the relevant question and answer only by wading directionless through 1540 pages of exhibits. We thus conclude that Ms. Murphy failed to properly alert the district court to the former police chief's testimony on the use of threats." (Pet. App., 12a).

Thus, the City's Response on this point is squarely contradicted by the Tenth Circuit's own language.

If the Tenth Circuit had not violated the party presentation principles, on a *prima facie* basis, it must have found that a genuine issue of material fact was presented on one, more than one, or all, of Petitioner's *Monell* claims.

12. The Petition for Certiorari boils down to this:

A. Chief Palmer testified that interrogators of the Tulsa Police Department had "full authority" of the department to make threats during interrogations.

B. Both pages of Chief Palmer's Authority Testimony were cited together as an exhibit to Petitioner's sur-reply to the City's motion for summary judgment and were discussed in that sur-reply.

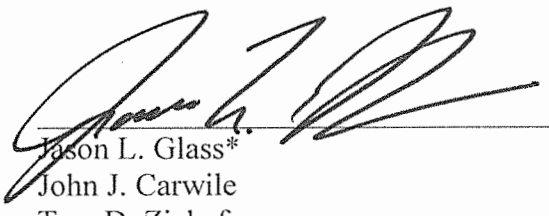
C. The Tenth Circuit reached out to an issue not presented by the parties, to hold that Chief Palmer's Authority Testimony was not "properly presented" because to find it required wading directionless through 1540 pages of exhibits to find both pages of the testimony. But the Tenth Circuit was totally, completely wrong on the facts because it utterly ignored Petitioner's sur-reply to the City's motion for summary judgment and the exhibit attached thereto with both pages of the testimony. That violated party presentation rules, which alone should be dispositive, but the

Tenth Circuit's action went much further into abuse of discretion because it utterly ignored that the district court was specifically directed to both pages of the Chief Palmer Authority Testimony in Petitioner's sur-reply.

CONCLUSION

The Court should grant the Petition for Certiorari so that the Court may reverse the Tenth Circuit on the issue of Chief Palmer's Authority Testimony not being "properly presented," and remand the case for consideration of the merits.

Respectfully submitted,



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