NO. 19-_____

In the Supreme Court of the United States

THOMAS SANDER,

Petitioner,

v.

CITY OF DICKINSON, NORTH DAKOTA; KYLAN KLAUZER; JEREMY MOSER; TERRY OESTREICH; DOES 1–10,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

RICHARD H. HONAKER
COUNSEL OF RECORD
HONAKER LAW OFFICES, LC
214 WINSTON DRIVE
ROCK SPRINGS, WY 82901
(307) 362-5800
RHONAKER@WYOMING.COM

NOVEMBER 19, 2019 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Whether a civil litigant's right to trial by jury under the Seventh Amendment to the Constitution of the United States is violated when a United States District Court granting summary judgment ignores the non-moving party's evidence and adopts the moving party's version of the facts, and when a United States Court of Appeals summarily affirms such a summary judgment without conducting a meaningful *de novo* review.

2. Whether, in particular, Thomas Sander's right to trial by jury under the Seventh Amendment to the Constitution of the United States was violated by the misuse of the summary judgment procedure in this federal civil rights case.

PARTIES TO THE PROCEEDINGS

Petitioner

- Thomas Sander

Respondents

- City of Dickinson, North Dakota
- Kylan Klauzer
- Jeremy Moser
- Terry Oestreich

LIST OF PROCEEDINGS BELOW

United States Court of Appeals for the Eighth Circuit

Case No. 18-1560

Thomas Sander v. City of Dickinson, North Dakota; Kylan Klauzer; Jeremy Moser; Terry Oestreich; Does 1-10

Decision Date: July 12, 2019

Rehearing Denial Date: August 23, 2019

United States District Court
for the District of North Dakota

Case No. 1:15-cv-72

Thomas Sander v. City of Dickinson, North Dakota; Kylan Klauzer; Jeremy Moser; Terry Oestreich; Does 1-10

Decision Date: February 5, 2018

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

LIST OF PROCEEDINGS BELOW iii

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Introduction 3

B. Relevant Facts 7

1. The Trinity High School Fire 7

2. The Interrogation of Thomas Sander 8

3. Thomas Sander's False Confession 10

4. Sander's Reasons for Falsely Confessing 10

5. The Voluntary, Credible Confession of James Gordon 11

6. Police Characterization of James Gordon's Confession as an "Obstacle" to Convicting Thomas Sander 12

7. The ATF Cause and Origin Report Exculpates Thomas Sander 13

8. The Police Fail to Investigate Evidence Linking Gordon to the Fire 14

TABLE OF CONTENTS – Continued

Page

9. Police Destroy Exculpatory Evidence 14

10. The Police Suppress and Ignore Evidence Undermining Their Assumptions About Thomas Sander 15

11. The Suppression of Thomas Sander's Confession and Dismissal of the Criminal Case against Sander 15

12. Harm to Thomas Sander 16

C. District Court Proceedings 16

D. Eighth Circuit Proceedings..... 17

REASONS FOR GRANTING THE PETITION..... 17

THE VANISHING SEVENTH AMENDMENT 18

THE VIOLATION OF THOMAS SANDER'S RIGHT TO TRIAL BY JURY UNDER THE SEVENTH AMENDMENT 23

I. SUBSTANTIAL EVIDENCE PROVING SANDER'S CLAIMS HAS NEVER BEEN ACKNOWLEDGED, ADDRESSED, OR APPREHENDED BY THE LOWER COURTS 23

II. THE LOWER COURTS MADE FINDINGS DIRECTLY COUNTER TO SANDER'S EVIDENCE THAT THE POLICE RECKLESSLY USED COERCIVE INTERROGATION TACTICS THAT VIOLATE ACCEPTED POLICE PRACTICES 24

TABLE OF CONTENTS – Continued

Page

III. THE LOWER COURTS DISREGARDED EVIDENCE THAT THE POLICE OVERCAME SANDER'S WILL TO MAINTAIN HIS INNOCENCE WITH COERCIVE TACTICS 26

IV. THE LOWER COURTS MADE FINDINGS DIRECTLY COUNTER TO SANDER'S EVIDENCE THAT THE POLICE RECKLESSLY IGNORED EVIDENCE AND LEADS EXONERATING SANDER . 27

V. THE LOWER COURTS' FAILURE TO ACKNOWLEDGE SANDER'S EVIDENCE ON SUMMARY JUDGMENT DEPRIVED HIM OF HIS RIGHTS TO DUE PROCESS AND TO A TRIAL BY JURY 28

CONCLUSION..... 30

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

APPENDIX A. Opinion of the United States Court of Appeals for the Eighth Circuit (July 12, 2019) 1a

APPENDIX B. Judgment of the United States Court of Appeals for the Eighth Circuit (July 12, 2019) 4a

APPENDIX C. Order of the United States District Court for the District of North Dakota Granting Defendants City of Dickinson's and Does 1-10's Motion for Summary Judgment (February 5, 2018) 6a

APPENDIX D. Order Granting Defendant Terry Oestreich's Motion for Summary Judgment (February 5, 2018) 18a

APPENDIX E. Order Granting Defendants Kylan Klauzer and Jeremy Moser's Motion for Summary Judgment (February 5, 2018) 43a

APPENDIX F. Order of the United States Court of Appeals for the Eighth Circuit Denying Petition for Rehearing (August 23, 2019)..... 78a

APPENDIX G. Report of Dr. Richard A. Leo, Ph.D, J.D. (July 12, 2016) 80a

TABLE OF AUTHORITIES

Page

CASES

Akins v. Epperly,
588 F.3d 1178 (8th Cir. 2009) 25

Amrine v. Brooks,
522 F.3d 823 (8th Cir. 2008)..... 24, 27

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S.Ct. 2505,
91 L.Ed.2d 202 (1986) .....passim

Blackburn v. Alabama,
361 U.S. 199, 80 S.Ct. 274,
4 L.Ed.2d 242 (1960) 26

Cooper v. Martin,
634 F.3d 477 (8th Cir. 2011) 24

Cosgrove v. Battin,
413 U.S. 149, 93 S.Ct. 2448,
37 L.Ed.2d 522 (1973) 18, 19

Felkins v. City of Lakewood,
774 F.3d 647 (10th Cir. 2014) 22

First Nat. Bank of Ariz. v. Cities Serv. Co.,
391 U.S. 253, 88 S.Ct. 1575,
20 L.Ed.2d 569 (1968)..... 28

Fowlkes v. Ryals,
No. 18-3131 (October 7, 2019)..... 22

Friedeberg v. Bullard,
No. 19-1896 (November 8, 2019) 22

Harvey v. Great A. & Pac. Tea Co.,
388 F.2d 123 (5th Cir. 1968)..... 21

TABLE OF AUTHORITIES—Continued

Page

Kannady v. City of Kiowa,
590 F.3d 1161 (10th Cir. 2010) 22

Miranda v. Arizona,
384 U.S. 436, 86 S.Ct. 1602,
16 L.Ed.2d 694 (1966) 9, 15

Parsons v. Bedford,
3 Pet. 433 (1830) 19

Taylor v. Louisiana,
419 U.S. 522, 95 S.Ct. 692,
42 L.Ed.2d 690 (1975) 18

Tolan v. Cotton,
572 U.S. 650, 134 S.Ct. 1861,
188 L.Ed.2d 895 (2014) .....passim

U.S. v. Lang,
466 F.2d 1021 (9th Cir. 1972)..... 21

Warrior Tombigbee Transp. Co. Inc. v. M/V Nan Fung, 695 F.2d 1294 (11th Cir. 1983)..... 21

Weinberger v. Hynson, Wescott & Duning, Inc.,
412 U.S. 600, 93 S.Ct. 2469,
37 L.Ed.2d 207 (1973) 20

Williams v. Borden, Inc.,
637 F.2d 731 (10th Cir. 1980)..... 21

Wilson v. Lawrence County,
260 F.3d 946 (8th Cir. 2001)..... 24, 26

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 2

U.S. Const. amend. VII ..... passim

U.S. Const. amend. XIV, § 1 2

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 16

28 U.S.C. § 1332(a)(1) 16

28 U.S.C. § 1343(a)(3) 16

28 U.S.C. § 1367 16

42 U.S.C. § 1983 ..... 3, 23

JUDICIAL RULES

8th Cir. L. R. 47B 6, 21, 22, 29

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Patricia Lee Refo,
The Vanishing Trial, American Bar Association, Journal of the Section of Litigation, Vol. 30, No. 2, Winter 2004..... 19

Stephan Landman,
The Impact of the Vanishing Jury Trial on Participatory Democracy,
Pound Civil Justice Institute, 2011 Forum for State Appellate Court Judges 19

The Pretrial Rush to Judgment,
78 N.Y.U. Law Rev. 982 (2003)..... 19

The Vanishing Trial:
The College, The Profession, The Civil Justice System, American College of Trial Lawyers, October 2004..... 19

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 773 Fed.Appx. 331 (8th Cir. 2019), and is included as Appendix A at App.1a. The order denying the petition for rehearing or rehearing *en banc* is not reported, but is included as Appendix F at App.78a. The three orders granting summary judgment of the United States District Court for the District of North Dakota, affirmed by the Eighth Circuit, are not reported but are included at Appendix D (App.18a), Appendix E (App.43a), and Appendix B (App.4a).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 12, 2019. Petitioner filed a motion for panel rehearing or rehearing en banc on July 26, 2019, which was denied on August 23, 2019. (App.78a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person . . . 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[.]

U.S. Const. amend. VII

The Seventh Amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. XIV, § 1

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983

> "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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

STATEMENT OF THE CASE

A. Introduction

On March 4, 2014, Respondents Kylan Klauzer ("Klauzer") and Terry Oestreich ("Oestreich"), then officers of the Dickinson, North Dakota, police department, coerced Petitioner Thomas Sander ("Sander") to confess to an arson that he did not commit.

To forcibly extract Sander's false confession, Klauzer and Oestreich employed a litany of tactics that violated established police custodial interroga-

tion standards, including not advising Sander of his constitutional rights, lying about non-existent evidence that they represented to Sander was incriminating, telling Sander that he could leave only if he confessed, threatening Sander with incarceration if he did not confess, intimidating Sander while visibly displaying firearms, and refusing to allow Sander to speak if his statements were not inculpatory.

At the conclusion of the coercive interrogation, which was video-taped, Sander made a telephone call in which he candidly explained that he confessed because he was promised freedom if he confessed and incarceration if he did not. Two nationally recognized experts in false confessions and police interrogation—including one whose work has been cited favorably by this Court—determined that the interrogation was coercive and that the tactics violated proper police practices. The state trial court presiding over Sander's criminal case excluded the false confession, finding that it was obtained in violation of Sander's federal constitutional rights.

After learning that Sander had been arrested, the actual arsonist, James Gordon ("Gordon"), confessed to the arson through a series of writings and telephone calls, and a police interview. Gordon provided non-public details about the arson, including where and how the fire was started and which fire alarm was pulled. Gordon even provided the security code necessary to enter the vault in which the fire was started, and a bag with unique markings, known to be stored in the vault, as proof that he had been in the vault.

Faced with the realization that they had coerced a false confession from Sander in violation of his

constitutional rights, the Dickinson police department, intentionally and with reckless disregard for the truth, steered its investigation away from Gordon and back toward Sander. First, the police expressly characterized Gordon's voluntary confession as an "obstacle" to convicting Sander, and, accordingly, Gordon was pressured by the police into recanting his confession and agreeing to plead guilty to the crime of hindering law enforcement. The police then failed to investigate physical evidence linking Gordon to the crime, such as testing the fire alarm Gordon pulled for fingerprints or comparing Gordon's handwriting to a note left at the scene by the arsonist. Finally, the police destroyed evidence exculpatory to Sander, including two drawings Gordon produced during his interview, and the recording of a telephone call Gordon made to the police.

Despite such unequivocal evidence in the record of unconstitutional police coercion and conduct, the United States Court of Appeals for the Eighth Circuit, *per curiam* and without conducting a meaningful *de novo* review, summarily affirmed without opinion the district court's grants of summary judgment for all Respondents. This is a fact-intensive federal civil rights case that constitutionally required the determination of facts by a federal civil jury, not the improper weighing of evidence by a judge. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)), where this Court stated:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a

> directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

More recently, in *Tolan v. Cotton*, 572 U.S. 650, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014), this Court intervened in a summary judgment case because the district court and the United States Court of Appeals for the Fifth Circuit "failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" 572 U.S. at 651 (quoting *Anderson v. Liberty Lobby, Inc.*, *supra*).

Here, the district court drew all inferences in favor of the movants and failed to acknowledge the existence of material, uncontroverted, and credible evidence of the nonmovants that established intentional and reckless violations of Thomas Sander's federal civil rights. Moreover, the district court made factual findings that directly conflicted with evidence presented by the nonmovant.

Citing Eighth Circuit Rule 47B, the United States Court of Appeals for the Eighth Circuit summarily affirmed the district in a two-page *per curiam* opinion, void of any independent analysis. In so ruling, the Eighth Circuit has failed to recognize its Seventh Amendment duty to carefully and meaningfully review district court grants of summary judgment *de novo*, and has denied Thomas Sander his Seventh Amendment right to trial by jury.

B. Relevant Facts

1. The Trinity High School Fire

Early in the morning hours of March 3, 2014, a fire was set in the vault of Trinity High School in Dickinson, North Dakota. At approximately 12:15 a.m. or 12:30 a.m., someone triggered the fire alarm at a pull-station near the men's locker room, waking up a teacher who lived in the school, Robert Storey ("Storey"). At approximately 12:52 a.m., Storey attempted to call the school's principal, Thomas Sander, who lived nearby. Because Sander's telephone had been turned off, Storey then called Rich Holgard ("Holgard"), who owned the house in which Sander lived. Holgard, who later told police that Sander had returned home before midnight, awakened Sander and informed him of Storey's call. Storey then walked to Holgard's house, informed Sander of the situation, and, at approximately 1:00 a.m., Storey and Sander walked to the school to investigate the fire alarm.

Upon entering the school, Sander saw and smelled smoke, located a fire in the vault, and called 911. Before leaving the school, Sander grabbed his work computer off his desk. He then sat in a truck outside the school with Storey and two other school officials as fire and law enforcement personnel responded to the scene.

At approximately 3:00 a.m., Sander opened his laptop to find contact information so he could inform school staff of the fire. Upon opening the laptop, Sander found a blue note stating, "I will bring this school to its knees." Sander immediately gave the note to police officers, who later said they were "suspicious" of Sander's body language because he spoke nervously and

allegedly did not maintain eye contact with them. In cooperation with police, Sander went to the Dickinson police station where detective Jeremy Moser ("Moser") interviewed him from 5:00 a.m. to 9:00 a.m.

2. The Interrogation of Thomas Sander

By mid-day on March 3, 2014, the police had learned that Sander had been working at the school on the night of the fire, and that he recently had been informed that his contract would not be renewed. This, combined with what they viewed as Sander's "suspicious body language" at the scene, led Oestreich, Klauzer, and Moser ("the police") to conclude that Sander had started the fire.

Based on his belief that Sander was the arsonist, Oestreich directed him to come back to the police station for additional questioning on March 4, 2014. In order to coerce a confession from Sander, Oestreich and Klauzer devised a plan to interrogate Sander without advising him of his constitutional rights because, as they admitted at deposition, they did not want him to exercise his right to remain silent or his right to counsel.

For two hours, Oestreich led the interrogation of Sander. The first 45 minutes consisted of questions about Sander's history and his experience at Trinity, including the fact that Oestreich's daughter had worked as Sander's assistant until she quit her job in December of 2013. At about the 70-minute mark, Oestreich adjusted his chair to block the door and shifted into an increasingly aggressive and accusatory interrogation. For the next 45 minutes, Oestreich aggressively interrogated Sander, explicitly lying to Sander about evidence

against him that did not exist, interrupting and cutting off Sander's denials, refusing to acknowledge Sander's repeated requests for counsel, and refusing Sander's requests to use the restroom or to leave.

Throughout this onslaught of intimidating interrogation, Sander steadfastly maintained his innocence, explaining that he had had nothing to do with the fire, and he attempted to leave. Video footage shows Sander being physically prevented from leaving by Klauzer, who forced him back into the interrogation room, stating that he "might not be free to leave." Klauzer admitted that he did not have probable cause to detain Sander at that point in time. Klauzer also admitted that he knew he was required to advise Sander of his constitutional rights under this Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), but he did not do so.

Thereafter, Klauzer and Oestreich, who were each wearing firearms, pinned Sander in the corner of the interrogation room and employed a litany of highly coercive interrogation tactics, including: (a) promising Sander he could leave if he confessed; (b) lying to Sander about evidence they claimed proved he started the fire; (c) refusing Sander's requests to use the restroom; (d) refusing to acknowledge Sander's requests for counsel; (e) refusing to let Sander speak unless he confessed; and (f) refusing to let Sander leave unless he confessed.

Nationally recognized experts who reviewed the interrogation issued detailed reports critical of the highly coercive tactics employed by Oestreich and Klauzer. *See* the report of Dr. John A. Leo, Ph.D., J.D., included in Appendix G at App.80a.

3. Thomas Sander's False Confession

After hours of reiterating that he did not start the fire, it was apparent to Sander that the only way to end the interrogation and leave the police station was to fabricate a confession satisfactory to the police.

Sander's fabricated confession was based entirely upon false information fed to him by the police during the lengthy interrogation. For instance, Oestreich's and Klauzer's theory was that Sander burned his personnel file inside of a file cabinet. Oestreich and Klauzer urged that theory upon Sander throughout their interrogation, and Sander then adopted it in his false confession. Klauzer later admitted that the police theory turned out to be false; the Bureau of Alcohol, Tobacco, and Firearms ("ATF") determined that the fire did not start in a file cabinet.

Sander's confession was objectively false, inconsistent with how the crime was committed, and was the product of police coercion, suggestion, and scripting.

4. Sander's Reasons for Falsely Confessing

Immediately after fabricating a confession, Sander made a telephone call from the interrogation room, explaining his reasons:

> Had better days as well . . . . I'm at the police station since 11:00 . . . . No, that's okay. I can leave soon. So I'm sitting at a— . . . . Yeah. So much so that they were not going to allow me to leave today. If I denied starting the fire, they were going to put me in—in jail, whatever it is here, behind bars and not allow me to leave because they said they had

> so much evidence against me . . . . So at first I was, you know— . . . . I did . . . . No, I did not do it . . . .. Because they said they could give me a lesser sentence . . . . You know what? At least I'm thinking if I admit to it, you know what, I'm able to walk free tonight. If I said I didn't do it, they're going to put me in jail through the night, and then, like, you know, they said there's—it's going to get worse going down. At least this way, you know what, they can give me—you know, I'll have to, like—
>
> I kind of felt being bullied and, you know—anyway, they were calling me a liar when I was denying it. And, so, then, they said there was no way they could let me leave free today if I denied starting the fire, and that things would only get worse, you know, greater sentencing, you know, jail time and all that if I was, you know, to go before a judge and be convicted with their evidence. They said if I admitted to starting the fire, that I can go free today, no jail time. You know, I'd have to, you know, go before a judge and pay money and community service hours and all that, but I'd have a lesser sentence. And so I'm like, okay, I'll do that.

5. The Voluntary, Credible Confession of James Gordon

The City of Dickinson publicly announced Sander's arrest on the evening of March 4, 2014. Soon after, Trinity student James Gordon began confessing to the arson, and told police that Thomas Sander was inno-

cent. Gordon's confession was made through a series of telephone calls and notes, and a police interview.

A note that Gordon left at the police station (the "Ghost Note") included accurate, non-public details about how the crime was committed, including how he entered the school, the correct combination needed to enter the vault, the location in the vault where the fire was started, how the fire was started, and identification of the fire alarm pull station near the men's locker room that he triggered before leaving. Gordon also attached a bag with unique markings, known to be stored in the vault, as proof that he had been inside the vault to light the fire.

Dr. Leo noted that, unlike Sander's false confession, Gordon's confession contained significant hallmarks of reliability. (App.80a).

6. Police Characterization of James Gordon's Confession as an "Obstacle" to Convicting Thomas Sander

Having coerced a false confession from Thomas Sander just one day earlier, the police found themselves in a quandary with James Gordon's March 5, 2014 voluntary confession. As Oestreich told Gordon's father, Gordon's confession "could sure make our case [against Sander] a lot more difficult."

At that point in time, the ATF had just opened its investigation into cause and origin of the Trinity fire, and it was not to issue its conclusions for another month. Nevertheless, at 2:30 a.m. on March 6, 2014—and before the police understood basic facts about how the crime actually had been committed—the

police arranged for Gordon to plead guilty to hindering law enforcement by falsely confessing to the arson.

Monsignor Patrick Schumacher, who was in charge of Trinity High School, testified that he was visited by a Dickinson police officer who told him that Gordon was arrested "to get him off the street because he was complicating the case against Sander." On the morning of March 6, 2014, a Dickinson police officer circulated an email stating, "[T]his fallacy of a second fire bug could have severely hindered a conviction."

7. The ATF Cause and Origin Report Exculpates Thomas Sander

After Sander was interrogated and arrested, the ATF concluded its investigation into the cause and origin of the Trinity fire. Among the conclusions reached were that the fire was started outside of a drawer and that no accelerant was used. Both of these conclusions were inconsistent with Sander's false confession.

Perhaps most importantly, the ATF determined that the fire alarm pull-station Gordon confessed to pulling in the "Ghost Note" was the pull-station that triggered the alarm at around 12:15 a.m. or 12:30 a.m. on the morning of the fire. Because Holgard told the police that Sander had returned home to go to bed at approximately 11:30 p.m., this meant that Sander was at home sleeping when another person inside the school triggered the alarm. Further, it corroborated a key component of Gordon's voluntary confession that only the true perpetrator would know, while further invalidating Sander's confession as Sander had stated he was not expecting the fire alarm to go off.

8. The Police Fail to Investigate Evidence Linking Gordon to the Fire

The sticky note that Sander found on his computer, and the fire alarm pull-station that Gordon says he pulled, were two critical pieces of physical evidence in the Trinity fire investigation. While both pieces of evidence could have tied Gordon to the arson, the police chose not to do any forensic testing to see if there was a link to Gordon. The City's own handwriting expert could not explain why the police chose not to compare Gordon's handwriting to the note Sander found on his computer. Oestreich admitted he did nothing to follow up on other evidence that would have established Gordon's presence at the scene of the crime, Gordon's whereabouts on the night of the fire, the bag that Gordon attached to his "Ghost Note," or the lighter Gordon said he used to start the fire.

9. Police Destroy Exculpatory Evidence

The City of Dickinson and its police officers failed to preserve two drawings made by Gordon, including a drawing which they now claim rendered his confession not credible. The police also failed to preserve a recording of one of the telephone calls Gordon made to police in which he confessed to the arson. The police also admitted that they failed to preserve a drawing made by Sander during his interrogation as well as emails upon which Oestreich's investigative report relies.

10. The Police Suppress and Ignore Evidence Undermining Their Assumptions About Thomas Sander

On March 13, 2014, Monsignor Schumacher was being recorded during a police interview when he attempted to raise concerns about James Gordon. Rather than encouraging Schumacher to disclose this information, the police instructed Schumacher to stop talking and shut down the recording. No record of Schumacher's concerns about Gordon appear in the investigative file for the Trinity fire.

Five other witnesses told the police that Sander was always socially awkward, eccentric, and had difficulty maintaining eye contact with others. Rich Holgard, who rented a room to Sander, told the police, "I think [Tom's] awkward enough that he can—he can—I've always worried that, because he's so awkward, he makes himself look guilty." Monsignor Schumacher told the police that Sander was not angry about the non-renewal of his contract and handled the situation professionally.

11. The Suppression of Thomas Sander's Confession and Dismissal of the Criminal Case Against Sander

In July of 2014, Sander's fabricated confession was suppressed because it was obtained in violation of *Miranda*, *supra.* The criminal case against Sander was then dismissed. With no actual evidence that Sander started the fire—and with the City and police having already arranged for Gordon to plead guilty to hindering law enforcement despite his clear involvement in the arson—the City's investigation is

dormant. But the Respondents still refuse to acknowledge the innocence of Thomas Sander.

12. Harm to Thomas Sander

As a result of the egregious violations of his constitutional rights, and the coerced, false confession, Sander's reputation and ability to earn a living have been severely damaged. By virtue of Sander's being publicly accused and charged with serious felonies, and by virtue of Respondents' refusal to publicly exonerate him, Thomas Sander is no longer employable in the field to which he had devoted his life—education.

C. District Court Proceedings

Sander filed suit against the City and the police officers in the United States District Court for the District of North Dakota on June 8, 2015. The basis for federal jurisdiction was 28 U.S.C. §§ 1343(a)(3), 1331, 1332(a)(1), and 1367.

On February 5, 2018, the district court granted the City's and the police officers' motions for summary judgment, and dismissed all of Sander's claims. (App.1a, 18a, and 43a). In its orders, the district court adopted the City's and the police officers' version of the facts and their arguments, and failed to acknowledge material evidence offered by Sander, including Sander's post-confession telephone call and the reports of Dr. Leo and Gregg McCrary. Sander timely appealed to the United States Court of Appeals for the Eighth Circuit.

D. Eighth Circuit Proceedings

On July 12, 2019, the United States Court of Appeals for the Eighth Circuit summarily affirmed the district court without opinion and without engaging in any meaningful *de novo* review of the motions for summary judgment. The Eighth Circuit merely adopted the district court's orders by reference. (App.1a, 4a). Like the district court, the Eighth Circuit failed to acknowledge, let alone give Sander the benefit of, material evidence that the Respondents recklessly and intentionally violated Sander's federal constitutional rights.

On August 23, 2019, the Eighth Circuit denied Sander's request for rehearing, without any discussion or analysis. (App.78a)

REASONS FOR GRANTING THE PETITION

There are two compelling reasons why the Court should grant this Petition:

1. The wrongful entry of summary judgment violates a civil litigant's constitutional right to trial by jury under the Seventh Amendment. What happened in this case is symptomatic of a growing problem throughout the federal court system in which district courts are improperly weighing evidence on summary judgment, and circuit courts are summarily affirming summary judgments without meaningful *de novo* review. The Seventh Amendment has been lost in the shuffle, and this

Court, in its sound discretion, should exercise its supervisory power to breathe life into it, safeguarding the precious right of federal civil litigants to have their cases heard by juries of their peers.

2. In particular, Thomas Sander's constitutional right to trial by jury under the Seventh Amendment was violated by misuse of the summary judgment procedure by the courts below, and his right to have this federal civil rights case heard by a jury should be restored.

THE VANISHING SEVENTH AMENDMENT

Trial by jury is an essential component of American justice. Thomas Jefferson is frequently quoted: "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." In *Taylor v. Louisiana*, 419 U.S. 522, 530, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), this Court affirmed the importance of the jury trial as a safeguard against abuses of executive or judicial power:

> The purpose of a jury is to guard against the exercise of arbitrary power—to make available the common sense judgment of the community as a hedge against the overzealous prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.

The civil jury trial is an essential component of the American civil justice system. In *Cosgrove v. Battin*, 413 U.S. 149, 152-53, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973), quoting from *Parsons v. Bedford*, 3 Pet. 433,

445 (1830), the Court observed, "[o]ne of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases."

The right of trial by jury in civil cases was so important to the founders that it became an integral part of the Bill of Rights. The Seventh Amendment achieved the primary goal of incorporating an explicit constitutional protection of the right of trial by jury in civil cases. *Cosgrove*, *supra*, 413 U.S. at 155.

Despite the importance of the Seventh Amendment, the civil jury trial is said to be "vanishing" in the federal courts.[1] The increase in summary judgments has played a role. Prof. Arthur Miller has observed, "Summary judgment has moved to the center of the litigation stage as plaintiffs struggle to survive the motion in order to reach trial and defendants increasingly invoke it in an attempt to prevent them from doing so."[2]

In the context of summary judgment, the Seventh Amendment itself is "vanishing." The Seventh Amendment is not cited or referred to in district court summary judgment rulings or in circuit court opinions that address summary judgment. The question should

---

[1] *See*, for example, *The 'Vanishing Trial': The College, The Profession, The Civil Justice System*, American College of Trial Lawyers, October 2004; *The Impact of the Vanishing Jury Trial on Participatory Democracy*, Stephan Landman, Pound Civil Justice Institute, 2011 Forum for State Appellate Court Judges; *The Vanishing Trial*, Patricia Lee Refo, American Bar Association, Journal of the Section of Litigation, Vol. 30, No. 2, Winter 2004.

[2] *The Pretrial Rush to Judgment*, 78 N.Y.U. Law Rev. 982, 1016 (2003).

arise, but is never asked, "Why has this Court set forth such exacting standards for summary judgment?"

The answer is that the Seventh Amendment requires them. The answer is that the wrongful grant of summary judgment denies a civil litigant his or her right to trial by jury under the Seventh Amendment. Because an erroneous grant of summary judgment denies a federal constitutional right, the standard of review for summary judgments is exacting. *See Weinberger v. Hynson, Wescott & Duning, Inc.*, 412 U.S. 600, 622, 93 S.Ct. 2469, 37 L.Ed.2d 207 (1973). Because an erroneous grant of summary judgment denies a federal constitutional right, courts should be cautious in granting summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The truth is that the courts, in each summary judgment ruling, restate the exacting standard of review for summary judgment, but the constitutional magnitude of a wrongful grant of summary judgment has become lost. The Seventh Amendment has vanished from the appellate review of summary judgments.

If this Court were to clearly link the Seventh Amendment to the exacting standards for summary judgment, and make it clear that meaningful *de novo* review of summary judgments by the circuit courts is required, fewer civil litigants would be denied their federal constitutional right to trial by jury. The Court would not be repeatedly asked, as it was in *Tolan*, *supra*, to review a summary judgment case where a circuit court "failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" 572 U.S. at

651 (quoting *Liberty Lobby,* 477 U.S. at 255). In *Tolan* this Court vacated the Fifth Circuit's judgment, finding that "the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing motion." *Id.* at 659. The Court noted that such practice "reflects a clear misapprehension of summary judgment standards in light of our precedents." *Id.*

Federal circuit courts have clarified that where the evidence can lead to different ultimate inferences, those inferences must be viewed in the light most favorable to the party opposing summary judgment. *Williams v. Borden, Inc.*, 637 F.2d 731, 738 (10th Cir. 1980); *U.S. v. Lang*, 466 F.2d 1021, 1026 (9th Cir. 1972); *Warrior Tombigbee Transp. Co. Inc. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983); *Harvey v. Great A. & Pac. Tea Co.*, 388 F.2d 123, 125 (5th Cir. 1968).

In this case, the Eighth Circuit's use of a summary procedure, United States Court of Appeals for the Eighth Circuit Rule 47B[3], to summarily affirm a district

---

[3] Rule 47B: AFFIRMANCE OR ENFORCEMENT WITHOUT OPINION
A judgment or order appealed may be affirmed or enforced without opinion if the court determines an opinion would have no precedential value and any of the following circumstances disposes of the matter submitted to the court for decision: (1) a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) the evidence in support of a jury verdict is not insufficient; (3) the order of an administrative agency is supported by substantial evidence on the record as a whole; or (4) no error of law appears. The court in its discretion, with or without further explanation, may enter either of the following orders:

court summary judgment without opinion, should be particularly concerning to this Court. If the circuit courts fall into a practice of rubber-stamping summary judgments in which district courts weigh evidence instead of viewing it in the light most favorable to the nonmovant, then the summary judgment process will have eaten up the Seventh Amendment entirely. If judges prevalently find the facts instead of juries, the American system of civil justice will become unrecognizable. It is beyond the scope of this petition to review the practices of all the circuit courts, but an Eighth Circuit review reveals a strong trend in that circuit of summarily affirming summary judgments without opinion. *See*, for example, *Friedeberg v. Bullard,* U.S. Court of Appeals, Eighth Circuit, No. 19-1896 (November 8, 2019), and *Fowlkes v. Ryals,* U.S. Court of Appeals, Eighth Circuit, No. 18-3131 (October 7, 2019).

In its summary opinion, the Eighth Circuit alluded to reviewing summary judgments *de novo*, but there is no evidence—or indication in the opinion—that it actually conducted a *de novo* review. In a true *de novo* review, the movant bears the burden of establishing that the summary judgment granted below is appropriate as a matter of law. *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010). In a true *de novo* review, the circuit court views the materials presented in the same light as the district court and grants no deference to the district court's decision. *Felkins v. City of Lakewood*, 774 F.3d 647, 650 (10th Cir. 2014).

"AFFIRMED. *See* 8th Cir. R. 47B"; or "ENFORCED. *See* 8th Cir. R. 47B."

THE VIOLATION OF THOMAS SANDER'S RIGHT TO TRIAL BY JURY UNDER THE SEVENTH AMENDMENT

Thomas Sander is but one American citizen who has been deprived of his federal constitutional right to a jury trial through the wrongful grant of summary judgment in a fact-intensive case that, in the genius of the founders, was to be decided by a jury of the citizen's peers and not by a judge. This denial of a jury trial is particularly egregious in the context of the police misconduct civil rights case that Sander had the courage to bring under 42 U.S.C. § 1983.

The Eighth Circuit's failure to conduct a *de novo* review, tacitly approving the weighing of evidence by the district court, which resolved issues of disputed material fact in favor of the party moving for summary judgment, is a violation of the Seventh Amendment right to trial by jury in civil cases.

The violation of Thomas Sander's federal constitutional rights was compounded when the Eighth Circuit summarily denied him the right to have a jury hear his federal civil rights case. Thomas Sander, then, was twice victimized.

I. SUBSTANTIAL EVIDENCE PROVING SANDER'S CLAIMS HAS NEVER BEEN ACKNOWLEDGED, ADDRESSED, OR APPREHENDED BY THE LOWER COURTS.

Justice Scalia noted in his *Tolan* concurrence that, "In my experience, a substantial percentage of the civil appeals heard each year by the courts of appeals present the question whether the evidence in the summary judgment record is just enough or not quite enough to support a grant of summary judgment." 572

U.S. at 661. It may be that the circuit courts' dockets are teeming with such marginal cases, but this case is not one. This case presents the question of whether the lower courts can completely disregard critical portions of the record that indisputably prove the non-moving party's claims.

In direct conflict with *Tolan*, the district court and the Eighth Circuit both disposed of Sander's case on summary judgment without ever acknowledging the existence of the substantial evidentiary record proving his claims. At a minimum, genuine issues of material fact were presented. The district court actually made factual determinations that directly conflict with Sander's evidence:

II. THE LOWER COURTS MADE FINDINGS DIRECTLY COUNTER TO SANDER'S EVIDENCE THAT THE POLICE RECKLESSLY USED COERCIVE INTERROGATION TACTICS THAT VIOLATE ACCEPTED POLICE PRACTICES.

A significant factual question for the jury to decide in Sander's case is whether the individual police officers acted intentionally or recklessly during his interrogation and the subsequent investigation. *See e.g.*, *Cooper v. Martin*, 634 F.3d 477, 481 (8th Cir. 2011); *Amrine v. Brooks*, 522 F.3d 823, 833 (8th Cir. 2008); *Wilson v. Lawrence County*, 260 F.3d 946, 956-57 (8th Cir. 2001). Evidence of such recklessness includes "(1) evidence that the state actor attempted to coerce or threaten the defendant, (2) evidence that investigators purposefully ignored evidence suggesting the defendant's innocence, [and] (3) evidence of systematic pressure to implicate the defendant in the face of

contrary evidence." *Akins v. Epperly*, 588 F.3d 1178, 1184 (8th Cir. 2009).

Sander's expert witnesses submitted detailed reports and sworn affidavits clearly and unambiguously establishing that police detectives Klauzer and Oestriech violated well-established police practices during a coercive interrogation that yielded an objectively false confession from Sander. For example, Dr. Leo found that "In their interrogations of Thomas Sander on March 3-5, detectives Oestreich, Klauzer and Moeser[sic] repeatedly and intentionally violated numerous nationally recognized interrogation training standards, protocols and generally accepted police interrogation practices." (App.140a). This evidence was material to the critical question of whether their conduct was reckless.

Without citing to any evidence in the record, the district court determined that Klauzer's and Oestreich's interrogation of Sander "did not deviate from practices and tactics commonly employed in police interrogations." There is no evidentiary support in the record for the district court's factual determination. To the contrary, all of the evidence in the record establishes that the police failed to follow universally accepted practices. Yet, the district court did not even mention the testimony and reports of Sander's expert witnesses. To date, no court has acknowledged, viewed in a favorable light, and drawn reasonable inferences from Sander's evidence as required by *Liberty Lobby* and *Tolan*.

III. THE LOWER COURTS DISREGARDED EVIDENCE THAT THE POLICE OVERCAME SANDER'S WILL TO MAINTAIN HIS INNOCENCE WITH COERCIVE TACTICS.

Another critical factual question for the jury to have decided in this case is whether the coercive tactics used during Sander's interrogation overcame his will to maintain his innocence. *Wilson*, 260 F.3d at 952; *Blackburn v. Alabama*, 361 U.S. 199, 206, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). On this question, Sander produced a recorded telephone call made directly after he falsely confessed in which he insisted that he did not start the Trinity Fire (as he had been telling the police for hours) and he only fabricated a confession because (1) he was being bullied; (2) he felt he had no other choice because the police were representing they had video evidence that he started the fire (which they did not); (3) he was promised no jail time if he gave them a confession (which was untrue); (4) he was threatened with jail if he did not confess; and (5) it became clear to him that fabricating a confession was the only way he could end the interrogation and leave the police station.

Based upon this evidence alone, a jury could reasonably conclude that the police overcame Sander's will to maintain his innocence with coercive interrogation tactics. However, the lower courts never mentioned the existence of the recorded telephone call, let alone gave Sander the benefit of it on summary judgment.

IV. THE LOWER COURTS MADE FINDINGS DIRECTLY COUNTER TO SANDER'S EVIDENCE THAT THE POLICE RECKLESSLY IGNORED EVIDENCE AND LEADS EXONERATING SANDER.

Another critical and ultimate factual determination in this case was whether the investigative blunders resulted from recklessness or from mere negligence. *Amrine*, 522 F.3d at 834 ("to establish a violation of this right by a botched investigation, [a plaintiff] must show that [investigators] intentionally or recklessly failed to investigate, thereby shocking the conscience.").

Sander produced significant evidence showing that the police unreasonably and intentionally failed to acknowledge and follow evidence implicating James Gordon. Gordon's voluntary confession, which included non-public details only the arsonist would know, such as what was used to start the fire, where exactly it was started, and which pull station triggered the fire alarm, was corroborated by the ATF cause and origin report. In contrast, the ATF cause and origin report contradicted details of Sander's confession, such as where the fire was started and what was used to start the fire.

Moreover, the police chose: (1) to not conduct any forensic testing on physical evidence Gordon admitted to touching and handling at the scene of the fire, including the pull station that Gordon told police he used to trigger the fire alarm; (2) to not investigate Gordon's whereabouts at the time the fire started; and (3) to not do any handwriting analysis that would have tied Gordon to the note left at the scene of the fire.

In contrast, the police: (1) exhaustively investigated Sander's whereabouts at the time of the fire, which ended up proving he was not even at the school when the fire started or the fire alarm was triggered; and (2) conducted a handwriting analysis between Sander and the arsonist's note that had inconclusive results. Certainly, a jury could find that the disparate investigation into Sander—who was coerced to confess—and Gordon—who voluntarily confessed—constituted a reckless investigation.

Rather than acknowledge Sander's evidence demonstrating reckless and intentional conduct, the lower courts determined that the decision of the police to dismiss Gordon as a suspect was a "mistaken judgment," not reckless or intentional. Only in the rarest and clearest of circumstances should a judge usurp the jury's role of determining intent. The district court adopted the arguments of the moving parties rather than the evidence of the nonmoving party, demonstrating a clear misapprehension of this Court's summary judgment standards under *Liberty Lobby* and *Tolan*.

V. THE LOWER COURTS' FAILURE TO ACKNOWLEDGE SANDER'S EVIDENCE ON SUMMARY JUDGMENT DEPRIVED HIM OF HIS RIGHTS TO DUE PROCESS AND TO A TRIAL BY JURY.

As recognized by Justice Black, "The plain fact is that . . . the summary judgment technique tempts judges to take over the jury trial of cases, thus depriving parties of their constitutional right to trial by jury." *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 304, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968) (Black, J., dissenting).

Every litigant is entitled to a fair and objective evaluation of the evidence under exacting summary judgment standards prior to the entry of summary judgment. The constitutional rights to trial by jury and to due process under the law have meaning only if the lower courts strictly adhere to this Court's standards governing summary judgment. *Liberty Lobby*, 477 U.S. at 252. The integrity of the civil litigation process depends upon the courts acknowledging the existence of evidence produced by the party opposing summary judgment, viewing that evidence in the light most favorable to that party, and drawing all reasonable inferences from the evidence. Otherwise, courts are free to create an evidentiary record of their own, without regard to the actual evidence.

Here, the district court granted summary judgment by failing to even acknowledge the existence of material, credible evidence produced by Sander that proved his claims and, instead, choosing to adopt the arguments and evidence advanced by the moving party. When the Eighth Circuit summarily affirmed summary judgment under its Rule 47B, without meaningful discussion or analysis, it paid mere lip service to the concept of *de novo* review, which it acknowledged it was required to conduct.

Thomas Sander not only has been denied the opportunity to have a jury hear his evidence, but he also has been denied the opportunity to have the district and circuit courts hear his evidence. Justice begins with the opportunity to be heard. Justice cannot begin in this case until the Supreme Court of the United States says that it shall.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD H. HONAKER
COUNSEL OF RECORD
HONAKER LAW OFFICES, LC
214 WINSTON DRIVE
ROCK SPRINGS, WY 82901
(307) 362-5800
RHONAKER@WYOMING.COM

COUNSEL FOR PETITIONER

NOVEMBER 19, 2019