No. 18-1252

ORIGINAL

In The

Supreme Court of the United States

REV. BARRY D. BILDER,

Petitioner, Pro Se

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Is a Search Warrant (for DNA) "reasonable" under the Fourth (4th) Amendment?

2) Was the Petitioner's Sixth (6th) Amendment, "Right to Counsel," violated when Petitioner was denied counsel while he was detained, served with a Search Warrant (for DNA), and had his DNA seized?

3) Is the Fourteenth (14th) Amendment, "Due Process" clause, violated under 42 U.S.C. §14132(d), "Expungement of Records", a statute which provides for an Arrestee to expunge his DNA records, but does not provide for a Non-Arrestee to expunge his DNA record?

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The **Opinion and Order** of the District Court (Northern Dist. Oklahoma), filed May 12, 2017, is reported on PACER as Case # 15-CV-270 JHP-TLW. (Appendix, pp. 10a-34a)

The **Order and Judgment** of the 10th Circuit Court of Civil Appeals, filed November 28, 2018, is reported on PACER as Case #17-5082. (Appendix, pp. 1a-9a)

The **Order** of the 10th Circuit Court of Civil Appeals, filed December 26, 2018. (Appendix, pp. 37a-38a)

JURISDICTION

The 10th Circuit Court of Appeals entered its **Order and Judgment** (Appendix, pp. 1a-9a) on November 28, 2018; Petitioner was denied a petition for rehearing *en banc* on December 26, 2018. This Court's jurisdiction is invoked under **28 U.S.C. § 1254(1)**.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

Fourth (4th) Amendment:

"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."

Sixth (6th) Amendment:

"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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth (14th) Amendment:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

"Civil action for deprivation of rights. Every person who, under color of any statutes, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 or an act or mission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . ."

42 U.S.C. §14132(d): (Excerpt), "Expungement of records (1) By Director (A) The Director of the Federal Bureau of Investigation shall promptly expunge from the index described in subsection (a) of this section the DNA analysis of a person included in the index—(i) on the basis of conviction . . . (ii) on the basis of arrest . . . (B) . . . 'qualifying offense' means any of the following offenses: . . . " (2) By States (A) As a condition of access to the index described in subsection (a) of this section, a State shall promptly expunge from that index the DNA analysis of a person included in the index by that State if—(i) the responsible agency or official of that State receives, for each conviction of the person . . . (ii) the person has not been convicted of an offense on the basis of which that analysis was or could have been included in the index . . . for each charge against the person . . . a certified copy of a final court order

establishing that such charge has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable time period. . . ."

STATEMENT OF THE CASE

A. INTRODUCTION

The evolution of law lags behind that of technology, in such areas as Electronically-Stored Information (ESI), and DNA. This is a case in point which presents precedential questions of national importance regarding DNA laws.

This case involves the constitutionality of DNA seizure from the Petitioner, who was served with a Search Warrant (for DNA),without arrest, and while deprived of counsel, had his DNA seized.

Petitioner subsequently made attempts through the State and Federal Court systems, to have his DNA sample(s) expunged. Petitioner found it impossible for him to expunge his DNA because he was a Non-Arrestee.

B. FACTS GIVING RISE TO THIS CASE

On March 18, 2014, the Tulsa Police Department (hereinafter referred to as "City") responded to a report of an attempted abduction of two girls. The girls informed the responding officers that they were selling lemonade at the end of a driveway, when a man driving

a gold-colored Nissan Maxima drove up and bought a cup of lemonade.

The man attempted to entice the girls to get into his car so that he could take them to his "studio" where he said they could make some money, (Appendix p. 11a).

The girls refused and ran inside the house, taking the cup the man had drunk from, with them. A neighbor's surveillance camera provided the City with images showing a gold car driven by the suspect. City collected the lemonade cup from which the man had drunk and had it analyzed for DNA. The DNA on the cup matched the DNA of an unidentified suspect in the rape and kidnapping of a 12-year-old girl.

On a Sunday in late April or early May of 2014, Detective Corey Myers of the City was driving in Tulsa while off-duty when he noticed a tan/gold Nissan Maxima being driven near him. Detective Myers took down the license plate number, and when he returned to work, he researched who owned the car. Detective Myers learned that the car was registered to the Church of Holistic Science. City officers visited the church and spoke with Ruth Bilder, Church Secretary-Treasurer, and Beth Mathers, Church Vice-President who told them the car was in the Petitioner's (former Church President) possession. Ruth Bilder advised Detective Myers that she was "married to Petitioner but they were in the process of obtaining a divorce." Det. Myers also learned that Church Officers, Ruth Bilder and

Beth Mathers were in civil litigation against Petitioner. NDOK, Opinion and Order, (Appendix p. 33a).

The City developed an interest in the Petitioner, Rev. Barry Bilder, as a suspect after conducting multiple interviews with his ex-wife, Ruth Bilder, at the Church of Holistic Science, Inc.

On May 8, 2014, two City detectives visited Petitioner's address and advised him that his car matched the description of a car involved in an attempted kidnapping. The City officers asked Petitioner to voluntarily submit a DNA sample by buccal swab to rule him out as a suspect. Petitioner refused to submit a DNA sample and advised the detectives to speak with his lawyer. *Id.* pp. 12a-13a.

On May 9, 2014, Detective Myers prepared an Affidavit for Search Warrant, which states in relevant part:

"The listed suspect is in possession of a Tan/Gold Nissan Maxima with tinted windows that matches the suspect vehicle listed in the attempted kidnapping from 3533 S. Louisville Ave. DNA was collected and preserved from the lemonade cup. Detectives Reid and Watkins visited the above listed suspect at his address on May 8, 2014, to get a DNA sample. The suspect refused to comply with giving his sample. The suspect stated that he had an attorney out of Creek County. Detective Watkins asked defendant to have his attorney call Detective Myers. As [sic] May 9, 2014 I have not heard from the suspect's attorney.

A DNA profile matched both cases on an unidentified suspect. Your affiant requests the issuance of a search warrant to obtain buccal swabs from defendant to obtain a DNA sample to compare to the evidence collected." *Id.* p. 13a.

On May 11, 2014, a magistrate judge signed the Affidavit for Search Warrant (for DNA).

On May 15, 2014, after what had become a hunt by the police for Petitioner's DNA, Petitioner retained the services of Edge Law Firm, of Tulsa, OK, with a check for $5,000.00.

Upon being retained by Petitioner, attorneys Jason Edge and Melanie Lander, of Edge Law Firm contacted City, and informed them that Petitioner had retained them as counsel. Attorney Edge suggested that, given the presence of a Search Warrant (for DNA), the Petitioner should submit his DNA to the police. Petitioner responded that he would agree to submit his DNA to the police, the following Monday, if accompanied by, and under the protection of, his attorneys. *Id.* p. 14a.

On Friday, May 16, 2014, attorney Edge told Petitioner about a proposed arrangement which he had made with City officer Eric Spradlin, for Petitioner to go to the police station on Monday, May ~~19~~, 2014, under the protection of his attorneys, to submit a DNA sample to the police. Petitioner's attorneys would be present in order to ensure, among other things, that the chain-of-custody of Petitioner's DNA sample(s) would not be tampered with or otherwise contaminated.

Despite Petitioner's anxiety about this arrangement, which police would not put in writing, Edge reassured him that the police would adhere to this verbal, "gentleman's agreement". *Id.* p. 14a.

On Saturday, May 17, 2014, Petitioner's fears were realized when, after picking up his two young sons from his ex-wife for a parental visit, Petitioner was pulled to the side of the road by two marked and two unmarked City police vehicles. Petitioner was taken from his car and placed into a police squad car where he was then served an "Affidavit for Search Warrant" (for DNA) [hereinafter Search Warrant (for DNA)], by Det. Myers and Det. Bill Bonham. Petitioner demanded his attorney but was denied counsel. Petitioner was forcibly made to surrender a DNA sample. Once the police had seized Petitioner's DNA, he was told he was free to go. Petitioner was never charged, arrested, or brought into a police station for booking procedure, prior to the seizure. *Id.* pg. 14a.

Petitioner was never informed of his exoneration from the police investigation. On September 3, 2014, Petitioner read in the newspaper that the actual perpetrator had been apprehended.

On April 27, 2016, the actual rapist, Kevin Leroy Smith, was sentenced to imprisonment before Tulsa County District Court Judge James Caputo, (see: ***State of Oklahoma v. Kevin Leroy Smith***, CF-2014-5435, Crim. Felony).

Petitioner attempted to have his DNA expunged, using the DNA Expungement process outlined in

Federal Statute **42 U.S.C. § 14132(d)(1)(A)**. DNA Expungement requires that the applicant provide the signature of the judge or magistrate before whom they were arraigned, after arrest. Since the Petitioner was never arrested, no such judge or magistrate exists for him to complete the DNA expungement application.

Despite the absence of a process for a Non-Arrestee to have his DNA expunged, the Petitioner, tried the only DNA Expungement protocol available, which requires the signature of a judge. Having no such judge, the Petitioner turned to the two Judges with tangential involvement with the case, thusly:

On November 3, 2015, Petitioner sought DNA expungement from Judge James Caputo who sentenced the actual perpetrator, Kevin Leroy Smith, in Tulsa County District Court. Petitioner was denied expungement because that Court had no jurisdiction over him.

On January 27, 2016, and again on July 22, 2016, Petitioner submitted his application for DNA Expungement to NDOK District Court Judge J.H. Payne (the adjudicator of the instant case). In an ORDER filed August 2, 2016, Judge Payne denied Petitioner's Motion for Expungement of DNA Sample, stating that he had no jurisdiction over the matter. *Id.* 35a-36a.

DISTRICT COURT PROCEEDINGS

Petitioner filed his *Complaint* (15CV-270 JHP) on May 15, 2015.

On July 29, 2016, filed his *Third Amended Complaint.*

On August 2, 2016, the Court denied the Petitioner's Motion for Expungement of DNA Sample.

On May 10, 2017, on the threshold of Trial, this case was Dismissed with Summary Judgment granted to the Defendants, City of Tulsa, et al.

On June 9, 2017, Petitioner filed a *Motion for Reconsideration*; which was denied on July 18, 2017.

On August 17, 2017, Petitioner filed his *Notice of Appeal.*

APPELLATE COURT PROCEEDINGS

On October 2, 2017, Petitioner filed his Opening Brief with the Tenth (10th) Circuit Court of Appeals.

On December 1, 2017, City of Tulsa filed its Response Brief.

On January 18, 2018, Petitioner filed his Reply Brief To Appellee, City of Tulsa's Response.

On November 28, 2018, the District Court's rulings were Affirmed, and the case was terminated on the merits, after submissions without Oral Hearing.

On December 11, 2018, Petitioner filed a Petition for Rehearing En Banc.

On December 26, 2018, the Petition for Rehearing En Banc was denied, sua sponte.

ARGUMENTS AND REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

QUESTION 1: Is a Search Warrant (for DNA) reasonable, under the Fourth (4th) Amendment?

In ***Maryland v. King***, 133 S. Ct. 1958, 1965-66 (2013), the Court granted certiorari to address whether the Fourth Amendment prohibits collection and analysis of DNA samples from arrested persons; in this case, Petitioner asks the same question of the Court, except in regard to Non-Arrested persons.

"Reasonableness" is the "ultimate measure of [Fourth Amendment] constitutionality," ***Veronica Sch. Dist. 47J v. Acton***, 515 U.S. 646, 652 (1995). Can a Search Warrant (for DNA), of a Non-Arrestee, withstand the test of the constitutionality of "reasonableness", of DNA seizure by Search Warrant?

***Banks v. U.S.*, 06-5068** (10th Cir. 2007) is informative in understanding the distinction of Fourth Amendment rights of law-abiding, Non-Arrested citizens, versus the rights of ex-felons, parolees, and arrestees on supervised release.

Can the seizure of Petitioner's DNA be condoned by "special needs" or sanctioned under "totality of circumstances", when in ***Banks***, such concepts are

restricted to parolees, arrestees, those on conditional release, or ex-felons?

In ***Banks***, Section 2, "Discussion", the Court states,

"Further, the fact that our prior precedents upheld State DNA-Indexing Statutes, as opposed to the Federal Statute challenged here, does not materially change our analysis concerning which Fourth Amendment test to apply. Nor does the fact that the Plaintiff's (in **Banks**) here are on parole, supervised release, or probation, whereas the offenders in our prior cases were prisoners. See **Padgett**, 401 F.3d at 1279 (observing that '[i]f the Supreme Court approves dispensing with the special needs analysis for probationers, we are persuaded that we may take a similar approach in cases involving prisoners')."

The "special needs" test fails in the instant case, because the government has no reason, i.e. identification, tracking, etc., to seize the DNA of a person who has not been arrested.

The "totality of the circumstances test" is discussed in ***Banks*** (B)(1), as,

" . . . cases are indistinguishable in all material respects but one: the Act, as amended, requires all felons to submit a DNA sample, whereas the statutes in those cases required DNA samples only from felons who committed crimes typically solved by using DNA evidence, such as sexual assaults. We decided whether

this distinction matters by applying the Fourth Amendment's 'totality-of-the-circumstances test'."

Black's Law Dictionary, p. 1490, defines, "Totality of Circumstances Test" as,

"Test used to determine the constitutionality of various search and seizure procedures, e.g. issuance of a search warrant, **Illinois v. Gates**, 462 US 213, 238, 239, 103 S. Ct. 2317, 2332, 76 L.Ed.2d 527; investigative stops, **U.S. v. Sokolow**, 109 S. Ct. 1581, 1585, 104 L.Ed.2d. This standard focuses on all the circumstances of a particular case, rather than any one factor."

Petitioner asks this Court whether a Non-Arrestee can legally have his DNA seized under the "totality of the circumstances test"?

In ***Boling***, 101 F.3d at 1339 (quoting ***Jones***, 962 F.2d at 306-7) the Court found that,

" . . . **Boling** upheld the statute because the inmate had diminished privacy rights . . . " " . . . After **Boling**, this Court twice had the opportunity to address the constitutionality of a State DNA-indexing statute. See **Schlicher**, 103 F.3d at 942; **Shaffer**, 148 F.3d at 1181.

"In both cases, several State prisoners challenged State laws requiring them to provide a DNA sample because they had been convicted of certain crimes, such as sex-related crimes, violent crimes, or other crimes in which authorities collect biological evidence. **Schlicher**, Id. at 941; **Shaffer**, Id."

" . . . And as the Seventh Circuit's Judge Easterbrook recognized, courts addressing DNA-indexing statutes must be aware of the privacy continuum that applies to offenders moving through the criminal justice system . . . ";

"What is 'reasonable' under the Fourth Amendment for a person on conditional release, or a felon, may be unreasonable for the general population." **Green**, 354 F.3d at 679-81 (Easterbrook, J., concurring)."

Banks v. U.S. was further refined under ***Maryland v. King***, which affirmed that the government has the right to lawfully seize DNA from persons who have been arrested. Nowhere, in ***Banks*** or ***Maryland*** does the Court authorize the government to seize DNA from Non-Arrestees, with or without a Search Warrant.

Was the Fourth (4th) Amendment violated when a Search Warrant (for DNA) was used, in lieu of an Arrest Warrant, to seize Petitioner's DNA? ***Maryland v. King***, 133 S. Ct. 1 (2013) requires arrest prior to DNA seizure (Lexis/Nexis Head Note 9):

" . . . the Maryland DNA Collection Act provides that, in order to obtain a DNA sample, all arrestees charged with serious crimes must furnish a sample . . . The arrestee is already in valid police custody for a serious offense supported by probable cause. The DNA collection is not subject to the judgment of the officers whose perspective might be colored by their primary involvement in the often competitive enterprise of ferreting out crime", Id. at HN 15, states, " . . . when

probable cause exists to remove an individual from the normal channels of society, and hold him in legal custody, DNA identification plays a critical role in serving those interests (of identification)."

Maryland v. King, Id. at 1981 (2013), [citing ***Chandler v. Miller***, 520 U.S. 305, 308 (1997)], states,

"As ratified, the Fourth Amendment's Warrant Clause forbids a warrant to 'issue' except 'upon probable cause', and requires that it be 'particula[r]' (which is to say, 'individualized . . . ') And we have held that, even when a warrant is not constitutionally necessary, the Fourth Amendment's general prohibition of 'unreasonable' searches imports the same requirement of individualized suspicion."

Considering the Fourth Amendment's Warrant Clause, the question arises: does a Search Warrant (for DNA) rise to the same level of probable cause as that of a Warrant for Arrest?

"The Fourth Amendment's proper function is to constrain, not against all intrusions as such, by against intrusions which are not justified . . . "

Schmerber v. California, 384 U.S. 757, 768 (1966).

In light of the "proper function" of the Fourth Amendment, Petitioner asks if a Search Warrant (for DNA) is a justified intrusion upon a Non-Arrestee?

In ***People v. Buza***, 129 Cal. Rptr. 3d at 755, there is a presumption of innocence of persons not yet

convicted of a crime; seizing DNA from these persons violates the spirit of the Fourth Amendment. Does a Search Warrant (for DNA) violate the premise of the presumption of innocence, in the case of a Non-Arrestee?

The Petitioner now asks this Court to set parameters, in regard to DNA seizure of a Non-Arrestee. The **Federal Rules of Criminal Procedure, Rule 41**, "Search and Seizure" makes no mention of DNA nor any so-called Search Warrant for DNA and is an opportunity for this Court to address these issues by granting Petitioner's Writ of Certiorari.

District Court Proceedings, as related to 4th Amendment issues

The lower Court relied upon the premise that a Search Warrant (for DNA) is lawful. All its arguments are based upon the constitutionality of a Search Warrant (for DNA).

In its **Opinion and Order**, *Id.* p. 24a, the District Court writes,

" . . . Plaintiff cannot show a City employee committed a constitutional violation against him, because the undisputed evidence shows the DNA search warrant was supported by probable cause and was executed in a reasonable manner. For this reason, Plaintiff's Fourth Amendment claims against the City of Tulsa fail, and the City of Tulsa is entitled to summary judgment in its favor . . . "

The Court's assertion that the Search Warrant (for DNA), " . . . supported by probable cause," is tenuous, at best. The "probable cause" contained within the Search Warrant (for DNA) was Petitioner drove a similar vehicle (Appendix 12a) to one driven by the suspect, and was an "unknown white male", *Id.* 20a.

The Search Warrant (for DNA) was not particular or individualized, and therefore prohibited as unreasonable. ***Maryland v. King***, Id. at 1981 (2013), [citing ***Chandler v. Miller***, 520 U.S. 305, 308 (1997)], states,

"As ratified, the Fourth Amendment's Warrant Clause forbids a warrant to 'issue' except 'upon probable cause', and requires that it be 'particula[r]' (which is to say, 'individualized . . . ') And we have held that, even when a warrant is not constitutionally necessary, the Fourth Amendment's general prohibition of 'unreasonable' searches imports the same requirement of individualized suspicion."

If the Petitioner assumes for argument, that the Search Warrant (for DNA) had sufficient probable cause, the question remains: is a Search Warrant (for DNA) reasonable under the Fourth Amendment?

The District Court further ruled:

" . . . Moreover, even if doubt existed as to whether Plaintiff's constitutional rights were violated, Plaintiff's Fourth Amendment claims against the City of Tulsa still must fail because Plaintiff cannot show that the City of Tulsa had a policy or custom that was the moving force behind such violations." " . . . Plaintiff

fails to demonstrate any link between the Search Warrant and a policy at TPD to violate the law of search and seizure."

"To state a claim under **42 U.S.C. § 1983** against a municipality, a plaintiff must prove: ' . . . that a municipal policy or custom was the moving force behind the constitutional deprivation," **Myers v. Okla. Cnty. Bd. of Cnty. Com'rs**, 151 F.3d 1313, 1316 (10th Cir. 1998) (citing **Monell v. Dept of Social Servs.**, 436 U.S. 658, 694 (1978).'" *Id.* p. 24a.

Petitioner asserts that the City employed the "custom" of securing a Search Warrant (for DNA), in lieu of a Warrant for Arrest, in order to seize Petitioner's DNA, thus circumventing ***Maryland v. King***.

Appellate Court Proceedings, as related to 4th Amendment issues

In its **Order and Judgment**, US Court of Appeals, Tenth Circuit, (Appendix, p. 8a) states,

" . . . As pointed out by the district court, Plaintiff failed to produce evidence of a pertinent policy or custom. He seems to believe that the practice of obtaining search warrants for the DNA of a person who is not under arrest is such a policy or custom. But he provides no evidence that the City has officially adopted a policy of seeking such warrants, nor, more importantly does he cite any authority that such warrants are unconstitutional; and we have no reason to believe that they are (if supported by probable cause)."

Using Search Warrants (for DNA) to obtain DNA, is prima facie evidence that the City "has officially adopted a policy" of using such Search Warrants. The Search Warrant (for DNA) was printed by the City on a Warrant form. This is evidence of the City's "custom" and "pertinent policy" of using a Search Warrant (for DNA) to seize DNA from a Non-Arrestee. A question to "policy" or "custom" [of City's use of Search Warrants (for DNA)] is reason to Remand this case to the District Court on its merits.

The Appellate Court accepted the premise that a Search Warrant (for DNA) without arrest, was constitutional, (Appendix pp. 8a-9a),

" . . . more importantly, does he cite any authority that such warrants are unconstitutional; and we have no reason to believe that they are (if supported by probable cause)."

However, under this logic, a Search Warrant (for DNA), which requires less probable cause than a Warrant for Arrest, would be sufficient for the seizure of DNA. Law enforcement could seize DNA from any person, using a Search Warrant (for DNA), instead of arrest.

Review is warranted and appropriate because the questions of the validity, sufficiency, and reasonableness of the use of a Search Warrant (for DNA), *in lieu* of arrest, are of national importance, and have not previously come before this Court. For these reasons, this Writ of Certiorari should be granted.

QUESTION 2: Was the Petitioner's Sixth (6th) Amendment "Right to Counsel" violated when Petitioner was denied counsel while he was detained, served with a Search Warrant (for DNA), and had his DNA seized?

A review of the standard legal definitions for "prosecution", "investigatory interrogation", "investigatory stop", and "custodial interrogation", and "accusatory stage", is valuable for discussion, as follows:

Black's Law Dictionary, (Sixth Ed., p. 1221), defines, "prosecution" as,

" . . . for the purpose of determining the guilt or innocence of a person charged with a crime." **U.S. v. Reisinger**, 128 U.S. 398, 9 S. Ct. 99, 32 L.Ed. 480. The continuous following-up . . . of a person accused of a public offense with a steady and fixed purpose of reaching a judicial determination of guilt or innocence of the accused."

The City "followed up" their investigation with an accusation in the form of a Search Warrant (for DNA), through "a steady and fixed purpose of reaching a judicial determination of the guilt or innocence of the accused." The Search Warrant (for DNA) resulted in what amounts to a confession/self-incrimination, by means of DNA seizure and analysis, during which time the Petitioner was deprived of counsel.

Black's Law, *Id.*, p. 825, "Investigatory interrogation" states,

"An 'investigatory interrogation' outside scope of **Miranda** Rule is questioning of persons by law enforcement officers in a routine manner in an investigation which has not reached an accusatory stage and where such persons are not in legal custody or deprived of their freedom of action in any significant way. **State v. Price**, 233 Kan. 706, 664 P.2d 869, 874."

Petitioner asserts that there is nothing "in a routine manner in an investigation", involving the seizure of DNA.

Black's Law, *Id.*, further defines, "Investigatory Stop" as,

"Such stop, which is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning, is considered a 'seizure' sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character, requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. **U.S. v. Black**, 675 F.2d 129, 133."

Petitioner asserts that his DNA seizure went beyond a "frisk for weapons or preliminary questioning."

Black's Law *Id.*, p. 384 defines, "Custodial Interrogation" as,

"Custodial interrogation, within **Miranda** Rule requiring that defendant be advised of his constitutional rights, means questioning initiated by law enforcement officers after person has been taken into

custody or otherwise deprived of his freedom in any significant way; custody can occur without formality of arrest and in areas other than in police station. **Miranda v. Arizona**, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694; **Brewer v. Williams**, 430 U.S. 387, 97 S. Ct. 1232."

Petitioner asserts that his "Right to Counsel" was violated during the "custodial interrogation" by police as Petitioner was "deprived of his freedom" in a "significant way."

The Courts have ruled that "custodial interrogation", per **Miranda**, must be judged according to a "totality of the circumstances" test. For this test the Court looked at a number of factors and focused on the, "physical and psychological restraints" on the person's freedom during the police stop. [**U.S. v. Axsom**, 289 F.3d 496 (8th Cir. 2002)].

In **U.S. v. Bassignani**, 575 F.3d 879 (9th Cir. 2009), the Court ruled that whether a reasonable person in a similar situation as the Petitioner, would feel free to leave, and that any conversation with police was consensual and not coercive. These conditions determine "reasonableness."

In the instant case, the roadside stop of the Petitioner by police officers in multiple squad cars created a situation in which the Petitioner was not free to leave; he was detained in a squad car and had his DNA seized, without consent and through coercion. Being deprived of counsel under these conditions is "unreasonable."

Black's Law, p. 22, defines "Accusatory stage" as,

"That stage of criminal proceedings at which right to counsel accrues to the accused; such matures when officers have arrested accused, and officers have undertaken process of interrogations that lend itself to eliciting incriminating statements. **People v. Bilderbach**, 62 Cal. 2d 757, 44 Cal. Rptr. 313, 315, 401 P.2d 921."

Petitioner asks this Court to determine whether the seizure of his DNA should be considered as a,

"process of interrogations that lend itself to eliciting incriminating statements," Id.

Petitioner asserts that the "Right to Counsel" accrued when the "process of interrogation" began, with Petitioner's DNA seizure. Despite the fact that Petitioner was not arrested, the seizure and subsequent analysis of his DNA was tantamount to "eliciting criminal statements". By the definition of "accusatory stage", the seizing of Petitioner's DNA is accusatory in nature. At that point, the Petitioner's "Right to Counsel" must attach, or "accrue".

District Court Proceedings, as related to 6th Amendment issues

The District Court wrote in its **Opinion and Order**, (Appendix p. 28a), that the Petitioner's " . . . right to counsel did not attach" to police action which the Court deemed, "investigatory,"

"Because Plaintiff complains of police activity that occurred only as part of the investigation process, Plaintiff's Sixth Amendment right to counsel did not attach to this investigation . . . ". *Id.*

This argument is refuted by ***King***, 133 S. Ct. at 1981-82, which states that,

" . . . special needs searches were never meant to cover crime detection or routine law enforcement."

The "special needs searches" of the City, to seize Petitioner's DNA, was more than an "investigation process". The seizure of Petitioner's DNA rose to the level of accusatory action. The Search Warrant (for DNA) was used in place of "crime detection or routine law enforcement."

Appellate Court Proceedings, as related to 6th Amendment issues

The Tenth (10th) Circuit Court of Appeals wrote (Appendix, pp. 7a-8a),

"'. . . Plaintiff claims the denial of his Sixth Amendment right to counsel when his DNA was seized without presence of counsel. But '[t]he Sixth Amendment right of the 'accused' to assistance of counsel in 'all criminal prosecutions' is limited by its terms: it does not attach until a prosecution is commenced. **Rothgery v. Gillespie Cty., Tex.**, 554 U.S. 191, 198 (2008) (footnote and further internal quotation marks omitted). Plaintiff was never charged with a crime.'"

Both the District and the Tenth (10th) Circuit Courts concluded that the seizure of Petitioner's DNA was merely an "investigative process" and not an "accusatory" one. (Appendix 28a). The Tenth (10th) Circuit, referring to the Sixth (6th) Amendment "Right to Counsel", stated, "It does not attach until a prosecution is commenced." (Appendix 7a-8a).

In a squad car, served with a Search Warrant (for DNA), Petitioner had his DNA seized. The "totality of circumstances" rose to the level of "interrogation", and a subsequent constitutional "Right to Counsel" was initiated, as defined in ***Miranda v. Arizona***, 384 U.S. 436 (1966).

The "prosecution is commenced," [**Rothgery v. Gillespie Cty., Tex.**, 554 U.S. 191, 198 (2008)]; with the issuance of a Search Warrant (for DNA). The prosecution began, even though Petitioner was not arrested. Review is necessary and appropriate because the Petitioner's Sixth (6th) Amendment, "Right to Counsel", was violated.

This question of "Right to Counsel" as related to DNA seizure, is of national importance, and has not previously been brought before this Court. For these reasons, this Writ of Certiorari should be granted.

QUESTION 3—Is the Fourteenth (14th) Amendment, "Due Process" clause, violated under **42 U.S.C. §14132(d)**, "Expungement of Records", a statute which provides for an Arrestee to expunge his DNA records, but does not provide for a Non-Arrestee to expunge his DNA record?

The Expungement Statute creates two categories of persons: Arrestees and Non-Arrestees. In **42 U.S.C. § 1983**, "Civil Action for Deprivation of Rights",

"Every person who, under color of any statute . . . subjects, or causes to be subjected any citizen of the United States . . . 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 . . . "

Is **42 U.S.C. § 1983** violated when Arrestees are prejudicially favored over Non-Arrestees, in the Arrestee's ability to expunge their DNA record, while Non-Arrestees are not able to obtain DNA Expungement?

The Impossibility of Obtaining DNA Expungement, for the Non-Arrestee

"Due Process" of DNA Expungement is unavailable to persons who have not been arrested, while such expungement is available to the arrestee. This disparity violates the 14th Amendment "Due Process" clause.

To demonstrate this disparity, to apply for DNA Expungement, the applicant must have appeared before a Magistrate, after arrest. The Non-Arrestee has no such Magistrate; it is therefore impossible, under the Federal and Oklahoma State Statutes, for him to obtain DNA Expungement without a Judge's signature.

The absence of any DNA Expungement protocol for the Non-Arrestee, is *prima facie* evidence that DNA was never expected to be seized from a Non-Arrestee. The following Code, which directs expungement of DNA records, is replete with references to offenders and arrestees, but nowhere addresses the Petitioner's inability to expunge his DNA.

In **42 U.S.C. § 14132 (d)(1)(A):**

"Expungement of Records . . . (i) on the basis of conviction for a qualifying Federal offense or a qualifying District of Columbia offense . . . if the Director receives, for each conviction of the person of a qualifying offense, a certified copy of a final court Order establishing that such conviction has been overturned; or (ii) on the basis of an arrest under the authority of the United States, if the Attorney General receives, for each charge against the person on the basis of which the analysis was or could have been included in the index, a certified copy of a final court order establishing that such charge has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable time period."

In Petitioner's attempts to obtain DNA Expungement, he turned to the two Judges who were tangentially-involved in the case: the first was Tulsa County District Court Judge James Caputo, who was the Judge to sentence the actual perpetrator, Kevin Leroy Smith; and the second Judge was District Court Judge Terrance Payne. As evidenced in "ORDER", the Petitioner was denied DNA expungement, by Judge

Payne in Federal District Court, due to lack of jurisdiction. (Appendix pp. 35a-36a.)

Neither of these judges could assist the Petitioner with the DNA Expungement process, since neither had jurisdiction over him. Because neither Judge could sign Petitioner's DNA expungement application, the Petitioner could not complete the DNA Expungement process.

When Non-Arrestees have no recourse within Federal or State Statutes to have their DNA Expunged, while Arrestees are able to obtain DNA Expungement, a violation of the 14th Amendment occurs, and this section of the Federal Statute should be declared unconstitutional.

This presents an unconstitutional disparity of civil rights for the Non-Arrestee, which, as the laws governing the collection and expungement of DNA develop, is of national importance, and is reason for Certiorari to be granted.

District Court Proceedings, as related to DNA Expungement

In its **Order** of August 2, 2016, the District Court DENIED Petitioner's "Motion for Expungement of DNA" sample, stating,

"Because the Court lacks the authority to grant the requested relief, Plaintiff's Motions are DENIED." *Id.*

Footnote 1 of the **Order** states,

"The OSBI must be notified, in writing of the subsequent need to expunge for each charge against the person . . . A certified copy of the final court order establishing that no charge was filed within the applicable time period, or that such charge has been dismissed or has resulted in an acquittal, must accompany the request." *Id.*

The Petitioner is without recourse since no charges were filed against him; therefore, no charges existed to be filed, dismissed, or which resulted in an acquittal.

In its **Opinion and Order**, the District Court did not address the Petitioner's inability to expunge his DNA. The phrase, "DNA Expungement", or the word, "Expungement" does not appear in the District Court's ruling. *Id.* pp. 10a-34a. The Court considered it unnecessary to add anything to its **Order**, (Appendix 35a-36a), about DNA Expungement or the absence of "Due Process" for a Non-Arrestee.

Appellate Court Proceedings, as related to DNA Expungement:

In its **Order and Judgment**, (Appendix pp. 1a-9a), the Court wrote,

" . . . 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". *Id.* at 9a.

The Petitioner respectfully disagrees, in that he *did not* request the City to expunge his DNA. As demonstrated by Petitioner's several "Motions to Expunge DNA Sample", in both State and Federal Court, the Petitioner was unable to complete the DNA expungement application because he was unable to secure the required signature of a Magistrate.

As exemplified by the **Order**, (Appendix p. 35a), denying Petitioner his,

" . . . Motion for Expungement of DNA Sample . . . and Plaintiff's Second Motion for Expungement of DNA Sample from FBI Database . . . Because the Court lacks authority to grant the requested relief, Plaintiff's Motions are DENIED."

The court pointed out that Petitioner had an administrative remedy:

"Oklahoma State Bureau of Investigation's Combined DNA Index System Unit Policy Manual § 18.4(C); see also 34 U.S.C. § 12592(d)(2)(A)(ii); 74 Okla. Stat. Ann. § 150.27a(E); but Plaintiff has not cited any authority for the district court itself to grant relief." *Id.* 35a.

Petitioner respectfully counters that no "Administrative remedy" exists which accommodates a Non-Arrestee's DNA Expungement. Further, the Court stated, " . . . Plaintiff has not cited any authority for the district court itself to grant relief," *Id.*

Petitioner could cite no legal authority for the Court to grant him relief, since caselaw does not yet exist for this issue.

The Statutes and remedies cited by the Court are replete with the term, "arrestee", and require the signature of the judge before whom the arrestee was arraigned. The Court cited the following "remedies", without noticing that the remedies apply only to persons who have been arrested, thusly:

Oklahoma State Bureau of Investigation's Combined DNA Index System Unit Policy Manual § 18.4(C), states,

"A Section 18 Expungement allows a person to expunge their entire arrest record."

This remedy cited by the Court cannot apply to a person such as the Petitioner, since there was no arraigning Judge.

In **34 U.S.C. § 12592 (d)(2)(A)(ii)**—Index to facilitate law enforcement exchange of DNA identification information states,

"The person has not been convicted of an offense on the basis of which that analysis was or could have been included in the index, and the responsible agency or official of that State receives, for each charge against the person on the basis of which the analysis was or could have been included in the index, a certified copy of a final court order establishing that such charge has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable time period."

This Statute is based on a person who has been arrested, or against whom no charge was filed after arrest, within the applicable time period; the Petitioner falls into neither category.

In **74 Okla. Stat. Ann. § 150.27a(E)**,

"The OSBI shall promulgate rules concerning the collection, storing, expungement and dissemination of information and samples for the OSBI Combined DNA Index System (CODIS) Database. The OSBI shall determine the type of equipment, collection procedures, and reporting documentation to be used by the Department of Corrections or a county sheriff's office in submitting DNA samples to the OSBI in accordance with Section 991a of Title 22 of the Oklahoma Statutes. The OSBI shall provide training to designated employees of the Department of Corrections and a county sheriff's office in the proper methods of performing the duties required by this section."

Since no arrest was made, the Petitioner falls outside the categories of the Sheriff's Department or the Department of Corrections, so this Oklahoma Statute cannot apply.

In its **Order and Judgment**, (Appendix p. 9a), the 10th Circuit presents no remedy applicable to the Petitioner regarding his efforts to expunge his DNA record(s).

The Tenth Circuit admonished the Petitioner to avail himself of existent DNA Expungement protocol,

yet the Court failed to see that the protocol applies only to persons who have been arrested.

Review is warranted because of the impossibility of a Non-Arrestee to obtain DNA expungement of records, in contrast to an Arrestee who is able to have his DNA record expunged. This results in a violation of 14th Amendment, "Due Process".

The ramifications of the U.S. Supreme Court's decision in this case, will impact every U.S. citizen through developing standards of DNA law.

CONCLUSION

Based on the foregoing, Petitioner respectively submits that this Petition for Writ of Certiorari should be granted. The Court may wish to consider remanding this case back to the District Court to be adjudicated.

Dated: March 26, 2019

Respectfully submitted,

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