

No. _____

**IN THE
SUPREME COURT of the UNITED STATES**

DR. RAYMOND D. RAWSON,

Petitioner,

v.

ROBERT LEE STINSON,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, under *Johnson v. Jones*, 515 U.S. 304 (1995), a federal court of appeals has jurisdiction over an appeal challenging the denial of qualified immunity that turns on disputed inferences drawn by the district court, rather than disputed facts.

PARTIES TO THE PROCEEDING

Petitioner Dr. Raymond Rawson was a defendant in this matter along with James Gauger and Dr. Lowell Johnson. Robert Lee Stinson was the Plaintiff.

RULE 29.6 STATEMENT

Petitioner is an individual and not a nongovernmental corporation. The Petitioner does not have a parent corporation or shares held by a publicly-traded company.

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OPINIONS BELOW

The Seventh Circuit's opinion en banc is a reported decision, *Stinson v. Gauger*, 868 F.3d 516 (7th Cir. 2017), and is reproduced in the Appendix A, App. 1. The Seventh Circuit's initial opinion decided by the 3-member panel is a reported decision, *Stinson v. Gauger*, 799 F.3d 833 (7th Cir. 2015), and is reproduced in the Appendix B, App. 39. The opinion of the United States District Court for the Eastern District of Wisconsin on the defendants' motion for summary judgment is an unreported decision, *Stinson v. City of Milwaukee*, No. 09-C-1033, 2013 WL 5447916, at *1 (E.D. Wis. Sept. 30, 2013), and is reproduced in the Appendix C, App. 65.

STATEMENT OF THE BASIS FOR JURISDICTION

On August 28, 2017 the Court of Appeals for the Seventh Judicial Circuit, sitting en banc, issued its Decision and Judgment. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Fourteenth Amendment forbids “any State” from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

Section 1983 of Title 42 of the United States Code provides in pertinent part:

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[.]

Section 1291 of Title 28 of the United States Code provides in pertinent part:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States[.]

STATEMENT OF THE CASE

I. Material Facts.¹

Pursuant to Supreme Court Rule 14 (g), for a more complete background, Dr. Rawson adopts by reference the Statement of the Case submitted by the Co-Defendants-Petitioners. Dr. Rawson sets forth herein those material facts which are apposite to his petition.

On November 3, 1984, the body of murder victim Ione Cychosz was found in Milwaukee, Wisconsin, App. 70-71. A forensic odontologist, Dr. Lowell Johnson, was consulted to perform a work up of the bite mark evidence. App. 70-72. An early investigation into the matter was conducted by Detectives James Gauger and Tom Jackelen. App. 72. Robert Lee Stinson became a suspect in the murder based on the proximity of his home to the murder site and his dentition, which included a missing right central incisor. App. 74.

¹ The following facts are taken from the district court's finding of facts.

Dr. Rawson is a resident of and licensed dentist in the State of Nevada. App. 82. Dr. Rawson became a forensic odontologist for the Clark County Coroner's Office in Nevada in 1976. App. 82. Dr. Rawson received a master's degree in physical anthropology from the University of Las Vegas in 1978 and also served as an adjunct biology professor. App. 82. At all times from 1978 to the time of filing, Dr. Rawson has been a diplomate of the American Board of Forensic Odontology. App. 82. During 1984 and 1985, Dr. Rawson was employed in a private dental practice in Las Vegas, Nevada. App. 82. Dr. Rawson has never been an employee of the Milwaukee County Medical Examiner's Office, the City of Milwaukee, the City of Milwaukee Police Department, or the Milwaukee County District Attorney's Office, nor did he have a contract to render professional services for these entities. App. 82-83. At no time was Rawson given prosecutorial authority or decision-making power by the Milwaukee County District Attorney's Office. App. 87.

Prior to January 1985 Dr. Rawson had never met or had any contact with Detective Gauger or Stinson. App. 83. Dr. Rawson and Dr. Johnson were professional acquaintances through their involvement with the American Board of Forensic Odontology. App. 83.

Dr. Rawson was not involved in the Cychosz murder investigation or subsequent John Doe proceedings. App. 83. Upon the conclusion of the John Doe proceedings against Stinson and the dental examination, Milwaukee County Assistant District

Attorney Daniel Blinka met with Dr. Johnson and one or both of Detective Gauger or Jackelen to review Stinson's dentition evidence. App. 81. Dr. Johnson found Stinson's dentition to be consistent with the wounds upon Cychosz's body. App. 81.

Prior to charging Stinson, ADA Blinka decided to elicit a second opinion from another forensic odontologist. App. 81-82. Dr. Rawson was contacted to provide another opinion concerning Stinson's dentition and the bite mark evidence. App. 83. On January 17, 1985 Detectives Gauger and Jackelen traveled to Las Vegas to meet with Dr. Rawson and provide him with the evidence, including Cychosz skin tissue and dental molds created by Dr. Johnson. App. 83-84. Dr. Rawson performed an initial independent review of the Stinson bite mark materials and was impressed with the amount of evidence generated by Dr. Johnson. App. 84. Dr. Rawson performed an initial review of the evidence and confirmed Dr. Johnson's findings. App. 84.

During his review Dr. Rawson did not notice any signs that the bite mark materials generated by Dr. Johnson were fabricated or improperly manipulated in any manner. App. 84. Dr. Rawson did not fabricate or improperly manipulate any of the bite mark materials during his initial review of the evidence. App. 84. At no time did Dr. Rawson have a conversation with Detective Gauger whereby the topic of framing Stinson for the murder of Cychosz was discussed. App. 84. At no time during Dr. Rawson's review of the materials did Detective Gauger attempt to influence the outcome of Dr.

Rawson's work or indicate that he desired Stinson to be identified as the perpetrator. App 84 – 85.

On January 21, 1985, a criminal complaint was issued for Stinson for the first degree murder of Cychosz. App. 85. The criminal complaint did not reference Dr. Rawson or his review of the Stinson bite mark materials in any manner. App. 85. On January 22, 1985, Stinson was arrested by an officer of the Milwaukee Police Department. App. 85.

Dr. Rawson did not participate in any of the preliminary hearings or matters pertaining to Stinson. App. 85. In March 1985 Dr. Rawson requested and received copies of Dr. Johnson's bite mark materials to complete a more thorough analysis. App. 86. Duplicates of the evidence, including copies of photographs and models, were mailed to Dr. Rawson. App. 86. During his review Dr. Rawson did not independently create any bite mark materials. App. 86. His analysis was simply a review of the materials created by Dr. Johnson. App. 86. Following comprehensive his review, he concurred with Dr. Johnson's findings that Stinson's dentition matched the bite wounds on Cychosz. App. 86.

In preparation for trial Dr. Johnson authored an expert forensic report summarizing his findings and concluding that Stinson's dentition would be expected to produce bite patterns identical to those examined and recorded. App. 87-88. Dr. Rawson in turn authored a one-page report concurring with Dr. Johnson's opinions and opining that Stinson caused the bite mark patterns found on Cychoz. App. 88.

ADA Blinka provided Stinson's defense attorney with list of fifty-four diplomats of the American Board of Forensic Odontology to assist in finding a forensic odontologist to analyze the evidence on Stinson's behalf. App. 90. Stinson's defense counsel hired Dr. George Morgan as their odontological expert. App. 91. However, Stinson's attorneys did not call Dr. Morgan to testify or offer his expert report into evidence.² App. 91.

Stinson's trial began in December 1985. App. 88. During the trial Dr. Johnson testified that he performed examination of the evidence and completed an odontological work-up of Stinson. App. 89. Dr. Johnson confirmed the findings within his report; that the bite marks were identical to the characteristics of Stinson. App. 90. Dr. Rawson provided testimony that he did not find any discrepancies in Dr. Johnson's work-up and that he concurred with Dr. Johnson's conclusions that Stinson caused the bite marks on Cychosz's body. App. 90.

On December 12, 1985 the jury found Stinson guilty of Cychosz's murder and the court sentenced him to life in prison. App. 92. Over twenty-three years later a DNA panel obtained from evidence on

²Defendants Johnson and Rawson presented proposed statements of material facts to the District Court in their Motion for Summary Judgment regarding Dr. Morgan's report and curriculum vitae. In Dr. Morgan's report for Stinson's defense counsel he found to a "high degree of Medical (Dental) certainty that the bite marks inflicted upon the victim were, in fact done by Mr. Stinson." Further, in a letter to Stinson's defense counsel, Dr. Morgan states that the workup done on the evidence was "very well done" and "was not contravertible" [sic].

Cychosz was found to exclude Stinson. App. 92. A panel of four forensic odontologist reanalyzed the bite mark evidence and determined that the bite mark evidence was not consistent with Stinson's dentition. App. 92. Stinson was released from prison in January 2009. App. 92. In July 2009 the State of Wisconsin dismissed all charges against him. App. 92. In April 2010 a DNA profile matched the blood on Cychosz's clothing with Moses Price. App. 92. In May 2012 Price was charged with Cychosz's murder and pled guilty. App. 92-93.

Following his release from prison Stinson filed this civil lawsuit against Detective Gauger and Drs. Johnson and Rawson. Stinson retained a new forensic odontologist, Dr. C. Michael Bowers, who concurred with the forensic odontology panel that the bite mark evidence excluded Stinson. App. 93. Dr. Bowers found the methods of analysis used by Drs. Johnson and Rawson to compare Stinson's dentition to be flawed and did not comport with the accepted standards of practice in the field of forensic odontology at the time. App. 94. Dr. Bowers concluded that there was no correlation between Stinson's teeth and the bite marks inflicted on Cychosz's body. App. 95.

II. Proceedings Below.

Stinson brought claims under 42 U.S.C. § 1983 asserting violations of his due process rights to a fair trial through the fabrication of evidence, the withholding of exculpatory evidence, failure to intervene, conspiracy to deprive him of his constitutional rights and several state-law tort claims. Petitioner and co-defendants brought

motions for summary judgment on the federal claims and dismissal of all supplemental claims. App. 66-67. The district court denied summary judgment to all parties on all claims. App. 119. The district court held that in taking the facts in the light most favorable to Stinson, a reasonable jury could find in his favor and that Stinson has sufficient evidence to get to trial. App. 101-109. The court reiterated that a reasonable jury could conclude that Detective Gauger, Dr. Rawson and Dr. Johnson were motivated to fabricate the odontological testimony, that the three conspired to fabricate the opinions and that Drs. Rawson and Johnson subsequently fabricated their opinions. App. 101-109.

Following the ruling of the district court, the Petitioner and co-defendants filed an interlocutory appeal with the Seventh Circuit³. App. 40. The Seventh Circuit granted appellate jurisdiction finding that the legal question of whether Stinson's version of the historical facts for present purposes, even with inferences drawn in Stinson's favor, amounted to a violation of a clearly established constitutional right. App. 46-51. The court proceeded with their analysis and found that all defendants were entitled to qualified immunity holding that the undisputed evidence would not support a reasonable jury to find that the expert opinions were fabricated. App. 55-64. As such, they reversed the district court's

³ The Petitioner appealed to the Seventh Circuit Court of Appeals under the denial of both qualified and absolute immunity. In the instant matter, the Petitioner is only bringing a petition for writ of certiorari pertaining to the issue of qualified immunity.

finding on qualified immunity and ordered the matter remanded for entry of judgment. App. 40.

Stinson subsequently sought review of the Seventh Circuit's decision sitting en banc. Review was granted but additional briefing was not ordered by the court. The Seventh Circuit found that they lacked jurisdiction to hear interlocutory review on qualified immunity appeals "because those appeals fail to take the facts and reasonable inferences from the record in the light most favorable to Stinson and challenge the sufficiency of the evidence on questions of fact." App. 2. Justice Sykes, in her dissent, found appellate jurisdiction as to the question of qualified immunity. App. 26-32.

REASONS FOR GRANTING THE WRIT

State actors or officials performing discretionary functions are shielded from liability in their individual capacity in so far as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Hinnen v. Kelly*, 992 F. 2d 140, 142 (7th Cir. 1983). Qualified immunity is a "powerful shield that insulates [government] officials from suit." *Gregesich v. Lund*, 54 F. 3d 410, 413 (7th Cir. 1995). The purpose of qualified immunity is to allow officials to do their public business without the burden of distraction of possible lawsuits and to allow officials to reasonably anticipate when their conduct could give rise to civil liability. *Hinnen*, 992 F. 2d at 143 quoting *Anderson v. Creighton*, 483 U.S. 635, 646, (1987) and *Harlow*, 457 U.S. at 814.

United States Supreme Court review is necessary to clarify prior precedent governing appellate court jurisdiction of an order denying qualified immunity to an expert witness retained to offer an opinion regarding a suspect's detention. *Johnson v. Jones*, 515 U.S. 304 (1995) held that there is a narrow exception to the application of qualified immunity if questions of fact are presented.

Since *Johnson v. Jones* was decided, there have been decisions by courts of appeals rendering conflicting opinions on the issues of when appellate jurisdiction is appropriate after the denial of the application of qualified immunity in the district court. Stated simply, the issue is whether a court of appeals has jurisdiction to review legally impermissible inferences that a district court finds in denying qualified immunity. *Johnson v. Jones* provided the circuit courts of appeal with direction on the issue of appellate jurisdiction on the issue of qualified immunity. Despite the guidance provided, circuit courts of appeal reach varying results in deciding whether an appellate court has jurisdiction to decide a qualified immunity case upon the denial of summary judgment. *Johnson v. Jones* can be narrowly read to require denial of a qualified immunity appeal if the appeal presents a factual dispute between the defendants and the plaintiffs. Circuit courts reading *Johnson v. Jones* narrowly include *Schieber v. City of Phila.*, 320 F.3d 409 (3d Cir. 2003); *Winfield v. Bass*, 106 F.3d 525, 533 (4th Cir. 1997) (en banc); *Brown v. Callahan*, 623 F.3d 249, 254-55 (5th Cir. 2010); *Anderson v. Cornejo*, 355 F.3d 1021 (7th Cir. 2004); *Nelson v. Shuffman*, 603 F.3d 439, 451 (8th Cir. 2010); *Jeffers v. Gomez*, 267

F.3d 895, 907-10 (9th Cir. 2001); *Lewis v. Tripp*, 604 F.3d 1221, 1226-28 (10th Cir. 2010); *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013).

A broader reading of *Johnson v. Jones* allows an appellate court to accept the plaintiff's facts and if there are disputed inferences, then an appellate court will not review the disputed inferences. *DiLuzio v. Vill. of Yorkville, Ohio*, 796 F.3d 604, 609-10 (6th Cir. 2015) (citing *Romo* 723 R.3d at 673-74); *Penn v. Escorsio*, 764 R.3d 102, 106 1st^t Cir. 2014); *Diaz v. Martinez*, 112 F.3d 1, 4-5 (1st Cir. 1997); *Locurto v. Safir*, 264 F.3d 154, 167 (2d Cir. 2001); *Ziccardi v. City of Phila.*, 288 F.3d 57, 61-62 (3d Cir. 2002); *Culosi v. Bullock*, 596 F.3d 195, 201-02 (4th Cir. 2010); *Smith v. Brenoettsy*, 158 F.3d 908, 913 (5th Cir. 1998); *Parks v. Pomeroy*, 387 F.3d 949, 956 (8th Cir. 2004); *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1223 (9th Cir. 1996); *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008); *Ratliff v. DeKalb Cnty.*, 62 F.3d 338, 341 (11th Cir. 1995).

In the case before the court, the majority of the 7th Circuit Court of Appeals ruled that no appellate jurisdiction is available in this case because factual issues, not a legal issue, are presented. The dissent however, points out that the issue is a legal issue. Immediate appellate review of the legal issue should proceed. A key factor in *Johnson v. Jones* is the court's recognition that some qualified immunity cases will involve reviewable issues of law and may include non-reviewable issues regarding facts. 515 U.S. at 319. However, if legal issues are the heart of the case, appellate review immediately of the qualified immunity defense should be allowed to

proceed. In the case before the court, the majority of the 7th Circuit Court of Appeals concluded that Rawson's qualified immunity appeal is dismissed. The dissent cogently argues the district court decision is a legal ruling on the issue of qualified immunity. The dissent correctly observes that *Johnson v. Jones* must be read "in light of" *Scott v. Harris*, 550 U.S. 372 (2007), and *Plumhoff v. Rickard*, 134 S. Ct. 212 (2014). When read in light of those decisions, clearly, Rawson's claim of qualified immunity entitles him to immediate review because Rawson has the right to avoid the burden of litigation and a trial (App. 27). *Scott v. Harris*, *supra*, involved a question of law, namely, police officer's activities in engaging in a high speed chase. *Plumhoff v. Rickard*, *supra*, also involved a high speed chase and presented a question of law regarding the officer's conduct.

Rawson's appeal presents a question of law. As the dissent in the 7th Circuit Court of Appeals correctly pointed out, a case of qualified immunity question is whether the evidence, if it convinces the jury, shows "a violation of a clearly established constitutional right." (App. 33). The dissent succinctly concludes that a district court ruled that a reasonable jury could find Rawson conspired to violate Stinson's right to due process because providing fabricated odontology opinions and engaging in a cover up of falsehoods are clear rights and present questions of law.

CONCLUSION

For the reasons stated, it is respectfully requested that the Court grant the petition for a writ of

certiorari to clarify among the circuits the issue of jurisdiction at the appellate level following the denial of qualified immunity to an expert witness such as Dr. Rawson.

Respectfully submitted this 15th day of
November 2017.

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