In the
United States Court of Appeals
For the Seventh Circuit

Nos. 13-3343, 13-3346 & 13-3347

ROBERT LEE STINSON,

Plaintiff-Appellee,

v.

JAMES GAUGER, LOWELL T. JOHNSON,
and RAYMOND RAWSON,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 09 CV 1033 – **Charles N. Clevert, Jr.**, *Judge.*

ARGUED JUNE 6, 2014 – DECIDED AUGUST 25, 2015

REARGUED EN BANC FEBRUARY 9, 2016

DECIDED AUGUST 18, 2017

Before WOOD, *Chief Judge*, and BAUER, POSNER, FLAUM, EASTERBROOK, MANION, KANNE, ROVNER, WILLIAMS, SYKES, and HAMILTON, *Circuit Judges.*

WILLIAMS, *Circuit Judge*. Robert Stinson spent twenty-three years in jail for a murder he did not commit. No eyewitness testimony or fingerprints connected him to the murder. Two dentists testified as

experts that Stinson's dentition matched the teeth marks on the victim's body, and a jury found Stinson guilty. After DNA evidence helped exonerate Stinson, he filed this civil suit against the lead detective and the two dentists alleging that they violated due process by fabricating the expert opinions and failing to disclose their agreement to fabricate. The district court denied the defendants' motions for summary judgment seeking qualified immunity after finding that sufficient evidence existed for Stinson to prevail on his claims at trial.

We conclude that we lack jurisdiction to hear the defendants' appeals of the denial of qualified immunity 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. As a consequence, *Johnson v. Jones*, 515 U.S. 304 (1995) precludes interlocutory review. We do have jurisdiction to consider the district court's denial of absolute immunity to Johnson and Rawson. That denial was correct because Stinson's claims focus on their conduct while the murder was being investigated, not on their trial testimony or trial testimony preparation.

I. BACKGROUND

As this is an appeal from a ruling on summary judgment, the chronology that follows takes the facts in the light most favorable to Stinson as the nonmoving party at summary judgment. *See Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Ione Cychosz was murdered in Milwaukee, Wisconsin on November 3, 1984. Sixty photographs were taken of her body at the county medical examiner's office, including pictures of bite marks to her body. An assistant deputy medical examiner authorized the use of Dr. Lowell Johnson as a forensic odontology (the scientific study of teeth) consultant, and Johnson examined the bite marks on Cychosz's body. He identified eight complete or partial bite marks and took rubber impressions of the bite marks on Cychosz's right breast. Two days later he returned to the medical examiner's office to extract tissue from her right breast.

James Gauger and Tom Jackelen were assigned as the lead detectives to investigate Cychosz's murder. Before heading to the crime scene, Gauger reviewed the case file that had been assembled in the two to three days after the murder. According to Stinson's version of the events, and before Gauger and Jackelen's first visit to the crime scene on November 6, 1984, the two detectives met with Johnson. At that meeting, Johnson showed the detectives photos of the bite marks and a drawing he had made of the assailant's teeth. Johnson told the detectives the assailant was missing the tooth depicted in his sketch, a lateral incisor (a tooth one over from the upper front teeth). There is no police report memorializing any meeting between Johnson and either detective before November 15.

On November 6, Gauger and Jackelen went to the area where Cychosz's body was found to interview neighbors, and they visited the nearby home where

Stinson lived. Jackelen questioned Stinson while Gauger interviewed Stinson's brother. Stinson is missing his right central incisor, or what is more commonly called the upper right front tooth. On Stinson, this tooth is fractured and decayed almost to the gum line.

After they finished their interviews, the two detectives met at the front of the house, and Jackelen told Gauger, "We have him." The detectives then went back to speak with Stinson and intentionally said something to make Stinson laugh so that his teeth would be visible. When Gauger saw that Stinson had a missing upper front tooth, he thought, according to his later memoir, *The Memo Book*, published long after Stinson's conviction, "There it was. The broken front tooth and the twisted tooth just like on the diagram and pictures." (At his deposition in this case, however, Gauger said that the missing tooth was on the upper right side and to the right of the front tooth.)

This was the not first time Gauger and Jackelen had questioned Stinson regarding a murder. Two years earlier, a man named Ricky Johnson was shot and killed during an attempted robbery, and Gauger and Jackelen were assigned to the case. Stinson told the detectives he had no information regarding who killed Ricky Johnson, and the detectives responded that they were "tired of all that bull* * * * story you telling." No charges were ever filed in the case, but Gauger wrote in *The Memo Book* that he believed Stinson and his friends murdered Ricky Johnson. Writing about the case in his memoir, Gauger said "[l]ots of people get away with murder" and maintained the case was still

open "because we had the right guys, but couldn't prove it."

After the interview of Stinson at his home, the detectives met with prosecutors including Assistant District Attorney Dan Blinka. Blinka thought there was not sufficient evidence at that point to obtain a search warrant to examine Stinson's dentition. Blinka called Johnson during the meeting and asked whether Johnson could make an identification from the bite marks on the body, and Johnson replied that under the right conditions he could, if he had a full make-up of the suspect's dentition.

On November 15, 1984, Gauger and Jackelen met with Johnson. The November 15 police report states that Johnson said the offender would have a missing or broken right central incisor (i.e., the upper right front tooth). That is the same tooth that the detectives had observed that Stinson was missing when they questioned him.

The next day, the detectives interviewed and photographed two other men with at least one missing or broken tooth. Johnson ruled them out as suspects in Cychosz's murder based only on looking at the photographs. Stinson's odontological expert in the current case, Dr. Michael Bowers, states there was no scientific basis for Johnson to exclude these two men by just looking at photographs.

At some point, a police sketch artist made a second sketch of the assailant's dentition. Johnson says he

told the artist a tooth in the upper quadrant was missing but did not specify which one. The police artist used Johnson's initial sketch to make the police sketch. Consistent with Stinson's theory of Johnson's initial sketch, the police sketch reflects a missing or broken upper tooth that is not the upper right front tooth. Johnson says he did not use the police artist's sketch at any point after it was created.

On December 3, 1984, Stinson appeared in a Wisconsin state court "John Doe hearing" pursuant to subpoena as a person who might have knowledge or information bearing on an investigation. During this hearing, Jackelen testified that he observed that Stinson had missing and crooked front teeth consistent with the information he had received from Johnson. Johnson inspected Stinson's teeth at the hearing for fifteen to twenty seconds. Johnson asked for his sketch of the perpetrator's dentition, but Jackelen said he did not have a copy with him. Johnson then testified it was "remarkable" how similar Stinson's teeth were to the sketch and said that Stinson's teeth were consistent with what he expected from the assailant after his analysis of the bite marks. The judge then ordered Stinson to submit to a detailed dental examination, including the creation of wax molds of his teeth and photographs of his teeth, which he did.

Later, Johnson compared the molds and photographs of Stinson's teeth and the wax exemplars of Stinson's bite with the bite mark evidence from Cychosz's body, and he opined that Stinson's teeth were identical to those that caused the bite marks. Johnson

conveyed that opinion to Gauger, Jackelen, and Blinka. Blinka met with Johnson and one or both of Gauger and Jackelen to review the evidence, and Johnson said that Stinson's dentition was consistent with that of the person who inflicted the bite marks on Cychosz.

However, that did not satisfy Blinka. He would not approve charges against Stinson without a second opinion from a forensic odontologist. So Johnson contacted Dr. Raymond Rawson about the case, with Johnson telling Gauger that he "wanted the best forensic odontologist in the United States to confirm his findings." Rawson had a private dental practice in Las Vegas, served as a forensic odontologist since 1976 and was a diplomat of the American Board of Forensic Odontology.

Johnson had also been a diplomat of the American Board of Forensic Odontology, and the two were friends and had known each other for at least seven years. On January 17, 1985, Gauger and Jackelen hand-delivered evidence, including Cychosz's preserved skin tissue and the dental molds and models of Stinson that Johnson had generated, to Rawson in Las Vegas. Rawson reviewed the evidence for one to three hours in Gauger's hotel room and verbally confirmed Johnson's findings, saying he was impressed with the amount of evidence. Gauger recalled that Rawson looked at the x-rays and molds and said that was enough for him and that he concurred with Johnson.

A few days later, on January 21, 1985, a criminal complaint was issued that charged Stinson with the

first-degree murder of Cychosz. Before trial, Johnson authored an expert report setting forth his opinions, including that "to a reasonable degree of scientific certainty . . . the teeth of Robert Lee Stinson would be expected to produce bite patterns identical to those which [Johnson] examined and recorded in this extensive analysis." Rawson prepared a one-page expert report that summarized his opinions. After reviewing the materials Johnson generated, Rawson stated he agreed with Johnson's conclusion that Stinson caused the bite mark injuries to Cychosz.

Stinson's trial took place in December 1985. The prosecution did not offer any evidence of motive, nor did it produce any eyewitness testimony that connected Stinson to Cychosz's murder. Some testimony suggested that Stinson had given conflicting versions of his whereabouts on the night of Cychosz's death. Stinson's counsel moved to exclude any forensic odontology evidence from trial, but that request was denied. Johnson testified at trial that the bite marks on Cychosz must have been made by teeth identical in relevant characteristics to those that Johnson examined on Stinson. Rawson testified that Johnson performed "a very good work-up" and that he agreed with Johnson's conclusion to a reasonable degree of scientific certainty that Stinson caused the bite marks on Cychosz's body.

No contrary expert was offered by the defense at trial. (Stinson's counsel had hired an odontology expert but did not call him at trial.) The jury convicted Stinson of murder, and he received a sentence of life

imprisonment. After the trial, Johnson used the Cychosz bite mark evidence for teaching and career-furthering purposes.

More than twenty-three years after Stinson's conviction, a panel of four forensic odontologists reanalyzed the bite mark evidence and concluded that Stinson could not have made the bite marks found on Cychosz. DNA testing of blood found on Cychosz's clothing also excluded Stinson. Stinson's conviction was vacated on January 30, 2009, and he was released from prison. The State of Wisconsin dismissed all charges against him that July. In April 2010, the Wisconsin State Crime DNA Database matched the DNA profile of the blood found on Cychosz's clothing with that of a convicted felon, Moses Price. Price later pled guilty to Cychosz's murder.

Stinson filed the present suit under 42 U.S.C. § 1983 against, as relevant here, Gauger, Johnson, and Rawson. (Jackelen has passed away.) Stinson's expert in this case, Dr. Bowers, reviewed the bite mark evidence and concluded that the bite marks found on Cychosz excluded Stinson. Consistent with the panel, Bowers concluded that Johnson's and Rawson's explanations of why a bite mark appeared on Cychosz's body where Stinson has a missing tooth has "no empirical or scientific basis and does not account for the absence of any marks by the adjacent, fully developed teeth." Bowers believed that the methods Johnson and Rawson used "were flawed and did not comport with the accepted standards of practice in the field of forensic odontology at the time." Bowers concluded that "to a

reasonable degree of scientific certainty as a forensic odontologist . . . Johnson and Rawson knowingly manipulated the bite mark evidence and Stinson's dentition to appear to 'match' when there was in fact no correlation between Stinson's teeth and the bite marks inflicted on Cychosz's body."

Gauger, Johnson, and Rawson moved for summary judgment on immunity grounds. The district court ruled that Johnson and Rawson were not entitled to absolute immunity. All three defendants asserted qualified immunity. Regarding the due process claim of fabrication of evidence, the district court concluded that "Stinson has sufficient evidence to get to trial" and explained its conclusion that sufficient evidence in the record existed. The district court also stated that qualified immunity did not apply because the law as of 1984 and 1985 clearly established that an investigator's fabrication of evidence violated a criminal defendant's constitutional rights. As for Stinson's claim of failure to disclose pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), that the opinions were fabricated, the district court ruled that there was enough evidence to go to a factfinder on this claim as well. The court also stated that it was clearly established by 1984 that the withholding of information about fabricated evidence constituted a due process violation, citing among others our decision in *Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012).

Gauger, Johnson, and Rawson appealed. A panel of our court concluded that the defendants were not entitled to absolute immunity, that we had jurisdiction to

consider appeals of the denial of qualified immunity at summary judgment, and that the defendants were entitled to qualified immunity. We granted rehearing en banc.

II. ANALYSIS

Our threshold question in any appeal is whether we have jurisdiction to hear the case. Congress has granted us jurisdiction over appeals from "final decisions" of the district courts. 28 U.S.C. § 1291. An order denying a motion for summary judgment is usually not a final decision within the meaning of § 1291 and so is not generally immediately appealable. *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011).

Even if it is not the last order in a case, a district court decision is "final" within the meaning of § 1291 if it is within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). An appeal from the denial of a claim of absolute immunity is one such order that is appealable before final judgment. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985).

A. No Jurisdiction to Determine Qualified Immunity Appeal

Our case involves both the denial of claims of absolute immunity as well as the denial of claims of qualified immunity. Qualified immunity protects government officials from civil damages liability when their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is an immunity from suit and not just a defense to liability. *Mitchell*, 472 U.S. at 526.

"[D]eterminations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case." *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). The Supreme Court ruled in *Mitchell* that, "to the extent that it turns on an issue of law," a defendant may take an immediate appeal of a decision denying him qualified immunity at summary judgment. 472 U.S. at 530. Later, in the case at the heart of this appeal, the Supreme Court addressed appeals from the denial of qualified immunity at summary judgment when the denial is based on a factual dispute rather than a legal question. *See Johnson v. Jones*, 515 U.S. 304 (1995). For such cases, the Supreme Court made it clear: "we hold that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.* at 319-20.

The defendants here, invoking a qualified immunity defense, seek to appeal the district court's summary judgment order that concluded the pretrial record set forth a genuine issue of fact for trial. While *Johnson* might seem to end matters, we examine whether any subsequent Supreme Court decisions limit *Johnson*'s reach.

The first post-*Johnson* case to which we turn is *Scott v. Harris*, 550 U.S. 372 (2007). Like *Johnson, Harris* involved the defendant's appeal of the denial of a motion for summary judgment on the basis of qualified immunity in an excessive force case. In upholding the denial of the motion, the Supreme Court recognized that the district court had stated there were material issues of fact on which the qualified immunity decision turned. *See id.* at 376. Nonetheless, the Supreme Court addressed the appeal on the merits.[1] In light of a videotape that recorded the sequence of events and that "blatantly contradicted" the plaintiff's account, the Court concluded the defendant officer's actions were reasonable and did not violate the Fourth Amendment and that no reasonable jury could decide otherwise. *Id.* at 380, 386. As a result, the defendant officer was entitled to summary judgment. *Id.* at 386.

The Supreme Court's decision in *Harris* does not mention *Johnson*, so it was not overruling *Johnson*.

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[1] The Eleventh Circuit rejected the plaintiff's argument that it lacked jurisdiction over the appeal, stating simply that the "appeal goes beyond the evidentiary sufficiency of the district court's decision." *Harris v. Coweta Cty., Ga.*, 433 F.3d 807, 811 n.3 (11th Cir. 2005), *rev'd sub nom. Scott v. Harris*, 550 U.S. 372 (2007).

The Court's silence came despite the *Harris* respondent's argument to the Court that it lacked jurisdiction because of *Johnson*. *See* Brief for Respondent at 1-3, *Scott v. Harris*, 550 U.S. 372 (2007) (No. 05-1631), 2007 WL 118977, at *1-3. There was no need for the Court to mention *Johnson*, though, because *Johnson* and *Harris* are consistent. The events in *Harris* were captured on videotape, and the question on appeal was the constitutionality of the officer's conduct in light of the facts depicted on the unchallenged videotape. So review was of the district court's decision on an issue of law, not of whether there was a genuine issue of fact for trial.

Seven years later, the Supreme Court decided *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). There the district court denied the defendant officers' motion for summary judgment on the basis of qualified immunity, ruling that the officers' conduct violated the Fourth Amendment and was contrary to clearly established law. *See id.* at 2018. Again, unsurprisingly, the Supreme Court decided the legal question of whether there was excessive force and did not dismiss the case for lack of jurisdiction. The Court explained:

> The District Court order in this case is nothing like the order in *Johnson*. Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law. Thus, they raise legal issues; these issues are quite different from

> any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden.

Id. at 2019. The Court proceeded to decide the case on the merits. *Id.* at 2020. *Plumhoff* too is consistent with *Johnson*. As in *Harris*, the Court decided a purely legal issue, not a question of evidentiary sufficiency. The Court did the same thing when it considered an interlocutory qualified immunity appeal in *Mullenix v. Luna*, 136 S. Ct. 305 (2015) on the question of law of whether the defendants used excessive force.

No Supreme Court decision has criticized *Johnson*; to the contrary, the Court continues to rely on it post-*Harris*. *See Plumhoff*, 134 S. Ct. at 2018-19; *Ashcroft v. Iqbal*, 556 U.S. 662, 671, 673-74 (2009); *Ortiz v. Jordan*, 562 U.S. 180, 188-91 (2011). Nor has the Court disavowed its pre-*Harris* reliance on *Johnson* in multiple cases. *See Behrens v. Pelletier*, 516 U.S. 299, 306, 312-13 (1996); *Johnson v. Fankell*, 520 U.S. 911, 922 (1997); *Crawford-El v. Britton*, 523 U.S. 574, 595, 597 n.18 (1998); *Richardson v. McKnight*, 521 U.S. 399, 402 (1997).

Johnson very much remains the law. As a result, we must adhere to the distinction it draws between appeals from denial of summary judgment qualified immunity rulings based on evidentiary sufficiency and those "presenting more abstract issues of law." *Johnson*, 515 U.S. at 317. If what is at issue in the

sufficiency determination is whether the evidence could support a finding that particular conduct occurred, "the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision' under *Cohen* and *Mitchell*." *Behrens*, 516 U.S. at 313. So appeal is possible only if "the issue appealed concern[s], not which facts the parties might be able to prove, but, rather, whether or not certain given facts show[ ] a violation of 'clearly established' law." *Johnson*, 515 U.S. at 311 (citing *Mitchell*, 472 U.S. at 528). *Johnson*'s distinction between appeals of evidentiary sufficiency determinations and those of legal issues also makes practical sense, as the principle helps keep qualified immunity interlocutory appeals within reasonable bounds.

Our basic question in determining whether we have jurisdiction over this appeal, then, is whether our case is one of evidentiary sufficiency or one of a question of law. Stinson maintained in this suit that Gauger, Johnson, and Rawson violated his due process right to a fair trial by: (1) fabricating the principal evidence of his guilt (the opinions that his dentition matched the bite marks on Cychosz), and (2) failing to disclose, as required by *Brady*, the defendants' agreement to fabricate this opinion evidence. (He also brought failure to intervene and conspiracy claims that were predicated on these two claims.). In ruling on the fabrication of evidence claim, the district court reviewed the evidence presented in the summary judgment materials and concluded that Stinson had sufficient evidence to get to trial. Regarding the *Brady*

theory, the district court concluded that "there are credibility questions that preclude summary judgment" and so "in this case the jury will have to decide whether Gauger, Jackelen, and Johnson, and then Rawson, impliedly agreed that the odontologists would opine that Stinson's dentition matched the bite marks." *Stinson v. City of Milwaukee*, No. 09 C 1033, 2013 WL 5447916, at *20 (E.D. Wis. Sept. 30, 2013). More particularly, the district court stated:

> The evidence in the record about Johnson's shift regarding which tooth was missing after the detectives thought they had their man, the lack of a sketch at the John Doe hearing, Johnson's call to Rawson, Rawson's extremely brief initial review of the physical evidence in Las Vegas, and the existence of gross errors in Johnson's and Rawson's review of the physical evidence (which another expert says could not be honestly made) provides enough to allow Stinson to get Johnson, Rawson, and Gauger before the jury for evaluation.

Id.

On appeal, the defendants assert that they are crediting Stinson's account and asking only for a legal determination of whether Stinson's version of the facts means they violated a clearly established constitutional right. Accepting a plaintiff's version of the facts in the summary judgment record can help allow us to consider a defendant's legal arguments in a qualified immunity appeal. *Jones v. Clark*, 630 F.3d 677, 680 (7th

Cir. 2011). Here, however, the premise of the defendants' assertion is not true; rather, the defendants fail to take as true Stinson's version of the facts, and they fail to do so on significant matters. We have explained that if "we detect a backdoor effort to contest the facts, we will reject it and dismiss the appeal for want of jurisdiction." *Id.*; *see also id.* ("[A]n appeal from a denial of qualified immunity cannot be used as an early way to test the sufficiency of the evidence to reach the trier of fact. In such a case, where there really is no legal question, we will dismiss for lack of jurisdiction."). Said another way, "an appellant challenging a district court's denial of qualified immunity effectively pleads himself out of court by interposing disputed factual issues in his argument." *Gutierrez v. Kermon*, 722 F.3d 1003, 1010 (7th Cir. 2013).

A significant factual dispute at summary judgment was whether Johnson met with Gauger and Jackelen before the detectives interviewed Stinson on November 6, 1984. Related to that was whether, if such a meeting took place, Johnson gave or showed the detectives a sketch at that meeting. The district court concluded that viewing the submitted evidence in the light most favorable to Stinson, such a meeting did take place, and that during the pre-interview meeting Johnson showed the detectives a sketch of the assailant's dentition reflecting a missing tooth to the right of the central incisor. This pre-interview meeting is critical because, if it happened, it showed that Johnson changed his analysis after the detectives interviewed Stinson. Although under Stinson's version the original

sketch showed a missing tooth to the *right* of the central incisor, after the detectives interviewed Stinson and met with Johnson on November 15, Johnson changed his analysis and said that the assailant was missing the right central incisor, i.e., the right *front* tooth, which is the same tooth the detectives had observed missing on Stinson. Johnson had not done any analysis of the bite marks between November 6 and 15 that would explain this change.

The pre-interview meeting is critical to Stinson's theory that the defendants fabricated evidence and failed to disclose *Brady* material, but the defendants do not credit that the meeting took place in their briefs to us. To the contrary, after quoting Gauger's account of visiting Stinson for the first time including that the detectives knew they were looking for someone with a missing tooth and a twisted tooth, Gauger's brief asserts, "but since there is no report of any meeting with Dr. Johnson prior to this interview, it is not possible that it came from any meeting with the doctor." *See* Opening Brief for the Respondent Gauger at 6, *Stinson v. Gauger*, 799 F.3d 833 (7th Cir. 2015) (Nos. 13-3343, 13-3346, 13-3347). Johnson's and Rawson's briefs omit the November 6 pre-interview meeting, despite the centrality of it to the district court's analysis and Stinson's fabrication and *Brady* claims.

Who made the first call to Rawson is another dispute of historical fact. The district court concluded that, viewing the evidence in the light most favorable to Stinson, Johnson made the first contact with Rawson. That Johnson made the first contact was

significant to the district court's analysis because the call allowed Johnson to tell Rawson the "desired result" Rawson should reach. *Stinson*, 2013 WL 5447916, at *19. This call was also central to the district court's determination that Rawson was part of the conspiracy. Gauger, however, states on appeal, again in contradiction to the district court's view of the evidence, that Blinka was the one who first contacted and focused on Rawson. *See* Gauger Opening Br. at 19. Johnson's and Rawson's briefs do not even acknowledge that they ever communicated with each other.

So despite their statements to the contrary, the defendants on appeal have not asked us to view the record in the light most favorable to Stinson. That means that although they try to suggest otherwise, the defendants are not asking us for review of an abstract question of law, but rather they seek a reassessment of the district court's conclusion that sufficient evidence existed for Stinson to go to trial. *See Jones*, 630 F.3d at 680; *Gutierrez*, 722 F.3d at 1010-11, 1014 (dismissing appeal for lack of jurisdiction where qualified immunity argument depended upon disputed fact).

The nature of the defendants' appeals further demonstrates that they do not present the requisite abstract questions of law. Johnson and Rawson maintain they did not intentionally fabricate their opinions and so did not fail to turn over *Brady* material. But whether their opinions were intentionally fabricated or honestly mistaken is a question of fact, not a question of law. *Johnson* itself explains that we lack

jurisdiction over factual questions about whether there is sufficient evidence of intent:

> For another thing, questions about whether or not a record demonstrates a "genuine" issue of fact for trial, if appealable, can consume inordinate amounts of appellate time. Many constitutional tort cases, unlike the simple "we didn't do it" case before us, involve factual controversies about, for example, intent – controversies that, before trial, may seem nebulous. To resolve those controversies – to determine whether there is or is not a triable issue of fact about such a matter – may require reading a vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials. This fact means, compared with *Mitchell*, greater delay.

Johnson, 515 U.S. at 316; *see also Ortiz*, 562 U.S. at 190 (stating defendants' claims of qualified immunity did not present purely legal issues and that "[c]ases fitting that [legal issue] bill typically involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity of pre-existing law.").

The district court concluded that the evidence in the record meant that a reasonable jury could find that Johnson and Rawson fabricated their opinions. The district court recounted that, taking the record in the light most favorable to Stinson, Johnson altered the missing tooth identification only after meeting with the detectives, after they interviewed Stinson and observed his dentition. Johnson did not have any new

information before making the switch, and he has never said the change was a matter of reevaluation. The district court also stated Johnson and Rawson had to have known that Stinson was excluded from causing the bite marks because of obvious differences between Stinson's teeth and the bite mark patterns. Bowers, Stinson's expert in the current case, opined that Johnson and Rawson knowingly manipulated the bite mark evidence and Stinson's dentition to make them appear to match. Both the four-odontologist panel and Bowers found no empirical or scientific basis for finding a bite mark on Cychosz's body where Stinson has a missing tooth. They also found inexplicable Johnson's and Rawson's conclusion that Stinson's upper second molars made a bite mark because molars are located so far back in the mouth. And if Stinson's version of the facts is accepted, there was also a cover up of the switch in tooth identification, as no police report accounts for it. From all of this evidence, the district court concluded there was sufficient evidence for a factfinder to draw an inference that the defendants were lying.

We add a bit more about Rawson, who argues that he was too far removed from any misconduct and so should receive qualified immunity. As he emphasizes, he was not involved in the November meetings between the detectives and Johnson or in Johnson's initial analysis. The district court found sufficient evidence in the record of Rawson's liability, noting that it was Johnson who first called Rawson, that when he did Johnson phrased the "second opinion" request as a request for confirmation of Johnson's opinion, and that

Bowers stated that confirmation could not be made with such a short review. The district court also reasoned that a factfinder could find that Rawson complied, as supported by the short amount of time it took him to confirm Johnson's findings in a Las Vegas hotel room and to state he concurred with Johnson. Whether the evidence was sufficient for a factfinder to find the requisite intent to fabricate is beyond the scope of our interlocutory review.

Intent is, after all, most often proven circumstantially. *See, e.g.*, *Hoskins v. Poelstra*, 320 F.3d 761, 764 (7th Cir. 2003) (stating that a meeting of minds "may need to be inferred even after an opportunity for discovery, for conspirators rarely sign contracts"); *United States v. Nocar*, 497 F.2d 719, 725 (7th Cir. 1974) ("As courts have frequently pointed out, knowledge and intent must often be proven by circumstantial evidence."). Rarely will there be an admission of subjective intent. The intent to fabricate is a question of fact that the district court concluded could be inferred in Stinson's favor by the evidence in the record at summary judgment, and the defendants' challenge to whether that is true is the type of appeal forbidden by *Johnson*.

Whether Gauger knew that Johnson and Rawson fabricated their opinions that the bite mark evidence matched Stinson's dentition was a related, and important, factual dispute at summary judgment. Gauger argued that because he is not a dentist, he cannot be blamed for Johnson's and Rawson's expert conclusions. The district court determined that taking the facts in

Stinson's favor, "Gauger was cognizant of Johnson's shifting view of which tooth was missing" and "was fully aware" of the "contents of his conversations with Johnson and what he implied in their second meeting, following his and Jackelen's interview of Stinson," namely that Gauger implied a desired result in the expert opinions. *Stinson*, 2013 WL 5447916, at *20. But on appeal, Gauger argues that the evidence in the record does not support a conclusion that Gauger knew the dentists were producing false opinions. *See* Gauger Opening Br. at 25-28, 40. This challenge to the sufficiency of the evidence is again precluded by *Johnson*.

We note that the district court's conclusion that circumstantial evidence might prove intentional collusion between Gauger and the two experts is the kind of finding of historical fact that implicates *Johnson*, not an "abstract question of law." Evidence in the summary judgment record supporting an inference that there was an agreement included that there was an opportunity to agree (the detectives met with Johnson after interviewing Stinson, and Johnson called Rawson), and that later experts say no competent odontologist could have possibly concluded that Stinson was the assailant.

In short, the appeals here are not like *Harris* and *Plumhoff* where the facts are clear and the only question is the legal implication of those facts. Instead, the defendants' appeals fail to take all the facts and inferences in the summary judgment record in the light most favorable to Stinson, and their arguments dispute the district court's conclusions of the sufficiency

of the evidence on questions of fact. With *Johnson* still very much controlling law, we lack jurisdiction over the defendants' qualified immunity appeals in this case.

B. Johnson and Rawson Not Entitled to Absolute Immunity

Johnson and Rawson also argued that they were entitled to absolute immunity because they were testifying witnesses. We have jurisdiction on appeal to review denials of absolute immunity at summary judgment. *Mitchell*, 472 U.S. at 525.

Witnesses in a § 1983 trial have absolute immunity from liability based on their testimony at trial. *Briscoe v. LaHue*, 460 U.S. 325, 345-46 (1983). That principle does not carry the day here, however. The Supreme Court has ruled that absolute immunity protects a prosecutor for trial preparation and trial testimony, but not for investigating the case. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *see also Rehberg v. Paulk*, 132 S. Ct. 1497, 1507 n.1 (2012) (finding witness entitled to absolute immunity for grand jury testimony and grand jury testimony preparation, but stating absolute immunity does not extend "to *all* activity that a witness conducts outside of the grand jury room"). As we discussed in the panel opinion, Stinson's claims against Johnson and Rawson focused on their actions while Cychosz's murder was being investigated, not on their testimony at trial or preparations to testify at trial. And if a prosecutor does not have absolute immunity for investigating the case, it follows

that an expert witness does not either. So Johnson and Rawson are not entitled to absolute immunity.

III. CONCLUSION

The qualified immunity appeals are DISMISSED, and the judgment of the district court is AFFIRMED with respect to its absolute immunity rulings.

SYKES, *Circuit Judge*, dissenting, with whom BAUER, FLAUM, and MANION, *Circuit Judges*, join. My colleagues have misread the district judge's decision and failed to recognize the limits of jurisdictional principle announced in *Johnson v. Jones*, 515 U.S. 304 (1995). To the first point, the judge's decision denying summary judgment actually contains two rulings. The judge held that (1) the evidentiary record reveals genuine factual disputes about whether certain key events occurred; and (2) the defendants are not entitled to qualified immunity because the evidence in the record, when construed in Robert Stinson's favor, would permit a reasonable jury to find that they violated his right to due process by fabricating evidence used to wrongly convict him, *see Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012), and suppressing evidence of the fabrication, *see Brady v. Maryland*, 373 U.S. 83 (1963), both of which are clearly established constitutional violations.

The judge's order does not neatly separate rulings (1) and (2), which I confess makes it more difficult to

correctly apply the *Johnson* principle. But the absence of clean lines in the judge's reasoning does not make the entire decision unreviewable. Our task is to determine whether the decision below contains a legal ruling about qualified immunity. If it does, then we may review it. Here, there's no question that the judge's decision *does* contain a legal ruling about qualified immunity. For the reasons explained in my opinion for the panel, *Johnson* does not block jurisdiction over this appeal. *Stinson v. Gauger*, 799 F.3d 833, 838-40 (7th Cir. 2015).

Johnson must be read in light of *Scott v. Harris*, 550 U.S. 372 (2007), and *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). So read, *Johnson* does not apply and we have jurisdiction to address and decide whether the defendants are entitled to qualified immunity.

Scott and *Plumhoff* shed some new light on the limits of the *Johnson* jurisdictional principle, but my colleagues have misapplied *Johnson* on its own terms. To recapitulate, it is long-settled law that an order denying an immunity claim is effectively final with respect to the defendant's right to avoid the burdens of litigation and trial, so appellate jurisdiction arises under 28 U.S.C. § 1291 pursuant to the collateral-order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 524-25 (1985). *Johnson* announced a limited exception to this general rule. The Supreme Court held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order *insofar as* that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact

for trial." *Johnson*, 515 U.S. at 319-20 (emphasis added).

The "insofar as" language is important. So is the context of the Court's opinion. The plaintiff in *Johnson* sued five police officers alleging that they severely beat him during his arrest, breaking his ribs and requiring hospitalization, and in so doing violated his Fourth Amendment right to be free from unreasonable seizure. *Id.* at 307. Three of the officers moved for summary judgment, claiming qualified immunity and arguing that the plaintiff had no evidence that they were actually involved in the beating. *Id.* at 307-08. The district court denied the motion, relying on the plaintiff's statement that he was beaten by unidentified officers and the officers' admissions that they were present during the arrest. The court held that this evidence raised a genuine factual dispute about whether these particular officers participated in the beating. *Id.*

Note that this ruling dealt *only* with a disputed question of historical fact, *not* the legal question whether the evidence about the circumstances surrounding the beating – assuming the officers participated – would permit a reasonable jury to find that the officers used excessive force and thus violated the plaintiff's Fourth Amendment right to be free from unreasonable seizure. And it was precisely *because* the district court rested its ruling *solely* on a dispute about the historical facts that the Supreme Court said the order was not immediately appealable; the order contained no final legal determination about qualified immunity for the appellate court to review. *Id.* at 313-14.

Return now to the "insofar as" language, which appears in the Court's holding at the very end of the opinion. *Id.* at 319-20. Just before this closing passage, the Court explained that some qualified-immunity rulings will have both reviewable and unreviewable aspects, and acknowledged that it might sometimes be difficult "to separate an appealed order's reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is 'genuine')." *Id.* at 319. After all, a qualified-immunity order is unreviewable *only* "insofar as" it makes the latter kind of determination; the former kind of determination is the legal question at the heart of any qualified-immunity claim and is immediately appealable under *Mitchell* notwithstanding the Court's holding in *Johnson.* To illustrate the point, the Court "concede[d]" that if the district court "had determined that beating [the plaintiff] violated clearly established law, [the officers] could have sought review of *that* determination." *Id.* at 318.

The lesson of this part of the Court's opinion in *Johnson* is that a "mixed" qualified-immunity order is immediately reviewable, at least in part. If the district court holds that the summary-judgment record, viewed in the plaintiff's favor, shows a violation of clearly established law – that is, would permit a reasonable jury to find for the plaintiff on his constitutional claim – then the defendant may take an immediate appeal to obtain review of *that* determination *even if* the order also identifies a genuine factual dispute.

Scott and *Plumhoff* bring this important point into sharper focus. As in *Johnson*, the plaintiffs in *Scott* and *Plumhoff* alleged that the police used excessive force in violation of the Fourth Amendment. Each case involved a high-speed vehicular chase. In *Scott* an officer rammed the plaintiff's fleeing car during the pursuit, and the excessive-force question ultimately turned on whether a reasonable officer could have believed that the plaintiff's flight posed an actual and imminent threat to public safety, justifying the use of this degree of force. 550 U.S. at 375, 380-84. The officer moved for summary judgment based on qualified immunity, but the district court denied the motion, holding that genuine issues of fact required submission of the case to a jury. *Id.* at 376. The Eleventh Circuit affirmed. *Id.*

The Supreme Court reversed, holding that the plaintiff's version of the facts – he claimed that he remained in control of his vehicle throughout the pursuit so his flight was not a threat to public safety – was "blatantly contradicted by the record," which included a video recording of the chase. *Id.* at 380. Applying the summary-judgment standard, the Court addressed "the factual issue whether [the plaintiff] was driving in such fashion as to endanger human life." *Id.* at 380-81. Based on the video recording, the Court held that the plaintiff's flight "posed a substantial and immediate risk of serious physical injury to others" and that "no reasonable jury could conclude otherwise." *Id.* at 386. The Court thus had "little difficulty" concluding that "it was reasonable for [the officer] to take the action that he did." *Id.* at 384.

Scott did not mention *Johnson*, but as I noted in the panel opinion, the Court's decision "inescapably implies that *Johnson* should not be read too expansively." *Stinson*, 799 F.3d at 839. Indeed, "[t]he Court made this point explicit in *Plumhoff*, which specifically addressed the limits of *Johnson*'s no-jurisdiction holding in light of *Scott*." *Id.* *Plumhoff* was an excessive-force claim against police officers for shooting at a fleeing car. 134 S. Ct. at 2017-18. As in *Scott*, the district court held that the record on summary judgment revealed a material factual dispute about the level of danger posed by the driver's flight and on that basis rejected the officers' claim of qualified immunity. *Id.* at 2018. The Sixth Circuit initially dismissed the officers' appeal under *Johnson* for lack of jurisdiction, but reversed itself in light of *Scott* and affirmed the district court's denial of qualified immunity on the merits. *Id.*

The Supreme Court reversed. The Court first addressed the matter of appellate jurisdiction, noting that the order at issue in *Johnson* rested entirely on a question of historical fact about which officers participated in the beating. That is, the defendant officers "assert[ed] that they were not present at the time of the alleged beating and had nothing to do with it," but the district court held that the evidentiary record could "support a contrary finding." *Id.* at 2019. An "evidence sufficiency" ruling of that type, the Court explained, "does not present a legal question in the sense in which the term was used in *Mitchell*, the decision that first held that a pretrial order rejecting a claim of qualified immunity is immediately appealable." *Id.*

But the order at issue in *Plumhoff*, the Court observed, "is nothing like the order in *Johnson*." *Id.* The defendant officers did not claim, for example, "that other officers were responsible for [the] shooting . . . ; rather, they contend[ed] that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law." *Id.* More specifically, the officers acknowledged that they fired shots at the fleeing car but argued that their conduct was a reasonable response to the degree of danger created by the driver's flight, or alternatively, that a reasonable officer would not have known that the shooting was unjustified in light of that danger. *Id.* These were "legal issues . . . quite different from any purely factual issues that the trial court might confront if the case were tried," and "deciding legal issues of this sort is a core responsibility of appellate courts." *Id.* So *Johnson* did not apply. *Id.*

Moving to the merits, the Court held that the case was materially indistinguishable from *Scott*. The summary-judgment record established "beyond serious dispute that [the driver's] flight posed a grave public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk." *Id.* at 2022.

As *Scott* and *Plumhoff* make clear, it's a mistake to read *Johnson* as a categorical bar to appellate review of a qualified-immunity order whenever the district court makes an "evidence sufficiency" ruling or concludes that facts are in dispute. If that were the

right way to understand *Johnson*, then the district-court orders in *Scott* and *Plumhoff* were unreviewable and the Court would not have reached the merits of the qualified-immunity question. As the Court explained in some detail in *Plumhoff, Johnson* blocks an immediate appeal *only* when the district court's order is limited to pure questions of historical fact – in other words, when the sole dispute is whether and how certain events or actions occurred. *Johnson* does *not* block immediate appeal when the issue is whether the evidence, if credited by a jury, shows a violation of a clearly established constitutional right. That is, after all, the core qualified-immunity question.

Another way to think about the *Johnson* principle is this: The jurisdictional bar applies if the issues raised on appeal are limited to the "who, what, where, when, and how" of the case. The *Johnson* bar does not apply if the appeal asks whether the evidence in the summary-judgment record – construed in the plaintiff's favor – would permit a reasonable jury to find that the defendant committed the claimed constitutional violation and the constitutional right in question was clearly established at the time the defendant acted.

Properly understood, then, *Johnson*'s exception to the *Mitchell* rule is really quite narrow. That makes sense in this context. Qualified immunity protects public officers from the burdens of litigation and trial; it is immunity from *suit*, not just protection against liability. *Mitchell*, 472 U.S. at 525-27. The parties in § 1983 litigation often disagree about key historical facts, and

it's not uncommon for district judges to deny qualified immunity on both factual *and* legal grounds. Immunity from suit wouldn't mean much if these mixed orders were categorically unreviewable. Indeed, the Court acknowledged in *Johnson* that many qualified-immunity appeals are of this mixed variety. *Johnson*, 515 U.S. at 318-19.

This is one of those mixed cases. The parties dispute two historical facts that the district judge concluded are material to the defendants' potential liability: (1) whether Dr. Johnson met with the two detectives and showed them his initial sketch of the killer's dentition *before* the detectives canvassed the neighborhood and interviewed Stinson; and (2) whether Dr. Johnson or Assistant District Attorney Daniel Blinka contacted Dr. Rawson for a second opinion. If the judge's order denying summary judgment were limited to the identification of these key factual disputes, we would have no legal issue to review, *Johnson* would apply, and we'd have to dismiss the appeal for lack of appellate jurisdiction.

But the judge's order is *not* limited to identifying these material factual disputes. The judge also ruled that if Stinson's version of these events is credited – namely, if the preinterview meeting occurred and Dr. Johnson rather than ADA Blinka called Dr. Rawson – then a reasonable jury could find, based on these facts and the rest of the evidentiary record (construed in Stinson's favor), that the defendants conspired to violate Stinson's right to due process by delivering up fabricated odontology opinions and covering up the

falsehoods, two clearly established constitutional violations.

This latter aspect of the judge's summary-judgment order is a final no-immunity ruling; it fully resolved the qualified-immunity question against the defendants. That's a legal issue and is subject to immediate review under *Mitchell* notwithstanding the presence of material factual disputes. If this aspect of the judge's decision is unreviewable until after trial, then the immunity is completely lost; any mistake in the judge's legal conclusion goes wholly uncorrected.

Regrettably, by misreading *Johnson, Scott*, and *Plumhoff*, my colleagues have stripped the defendants of their right to meaningful review of the judge's adverse qualified-immunity ruling. That ruling is not unreviewable. Appellate jurisdiction is secure, and we should reverse.

Giving the evidence a Stinson-friendly benefit of the doubt, we must accept the following as true for purposes of deciding whether the defendants are protected by qualified immunity:[1] (1) Dr. Johnson met with the

[1] At several points in the majority opinion, my colleagues say that the district judge "concluded" that certain historical events occurred and "determined" that certain facts exist. *See, e.g.*, Majority Op. at p. 16 ("The district court concluded that viewing the submitted evidence in the light most favorable to Stinson, such a meeting did take place, and that during the pre-interview meeting Johnson showed the detectives a sketch of the assailant's dentition reflecting a missing tooth to the right of the central incisor."); *id.* at p. 17 ("The district court concluded that, viewing the evidence in the light most favorable to Stinson, Johnson made the first contact with Rawson."); *id.* at p. 21 ("The district court

detectives before their field canvas and showed them his preliminary sketch of the killer's dentition, which depicted a missing upper right lateral incisor (the tooth just to the right of the two front teeth); (2) Dr. Johnson changed his mind about which tooth the killer was missing after the detectives interviewed Stinson and saw that he was missing his right central incisor (that is, his right front tooth); (3) Dr. Johnson's expert opinion that Stinson's dentition matched the bite marks on the victim's body fell far below the professional standards of forensic odontology at the time (this was not a close call, according to Stinson's expert); (4) Dr. Johnson, not ADA Blinka, called Dr. Rawson to arrange a second opinion; and (5) Dr. Rawson's opinion was likewise seriously substandard.[2]

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determined that taking the facts in Stinson's favor, 'Gauger was cognizant of Johnson's shifting view of which tooth was missing' and 'was fully aware' of the 'contents of his conversations with Johnson and what he implied in their second meeting, following his and Jackelen's interview of Stinson,' namely that Gauger implied a desired result in the expert opinions."). This phrasing is wrong as a matter of basic summary-judgment methodology and potentially misleading. District judges are not empowered to make "conclusions" or "determinations" of fact at summary judgment. To be fair, the error originates in the decision below. We should not repeat it.

[2] Stinson's expert may be qualified to offer an opinion about the deep flaws in the odontologists' work, but he is not qualified to "opine[ ] that Johnson and Rawson *knowingly manipulated* the bite mark evidence and Stinson's dentition to make them appear to match." Majority Op. at p. 19 (emphasis added). Nothing in the record supports the expert's ability to know or opine about their state of mind.

Accepting these facts as true establishes only that Drs. Johnson and Rawson were grossly negligent in declaring that Stinson's dentition matched the bite marks on the victim's body. In other words, their opinions were objectively unreasonable, and egregiously so. But an error in forensic analysis – even a grossly unprofessional error – is not a due-process violation. Fabricating evidence to convict an innocent person is a clear due-process violation, but a due-process claim based on an allegation that an expert fabricated his opinion requires evidence from which a reasonable jury could infer that the opinion was both wrong *and* that the expert *knew it was wrong* at the time he gave it. In other words, it requires evidence that the expert was not just badly mistaken but that he *lied.* So Stinson needed at least *some* circumstantial evidence to support an inference that Drs. Johnson and Rawson knew that he was not the killer and implicated him anyway.

He has none. The evidence shows only that Drs. Johnson and Rawson were grossly negligent in their opinions and had an opportunity to reach an agreement with Gauger to frame Stinson. A deeply flawed forensic opinion plus evidence of an opportunity to plot a conspiracy is not enough. Stinson has no evidence of what was said in the preinterview meeting between Dr. Johnson and the detectives. He has no evidence of what was said in the phone call between Drs. Johnson and Rawson (assuming it occurred). He has no evidence of *any* motive on the part of Drs. Johnson or Rawson to falsely implicate Stinson. Why would credentialed

forensic experts want to frame him? A jury could only guess. It's sheer speculation that a conspiracy to frame Stinson was hatched in these conversations and that the experts implemented it by lying to the prosecutor, the John Doe judge, and the judge and jury at trial. No *evidence* exists to support this theory.

Think of it this way: Would the evidence in this record establish probable cause for a warrant to arrest these defendants for committing perjury in the John Doe proceeding or at trial? Clearly not. A badly botched expert opinion plus a mere opportunity to plot a frame-up does not support probable cause for a perjury charge. Something more would be needed.

On this record, even when construed in Stinson's favor, no reasonable jury could find that Drs. Johnson and Rawson violated Stinson's right to due process by fabricating their expert opinions and suppressing evidence of the fabrication. The odontologists are entitled to qualified immunity.

The related claim against Gauger is entirely derivative. Stinson claims that the detective solicited the fabrication and participated in a cover-up. Because no reasonable jury could find that the odontologists fabricated their opinions, Gauger too is entitled to qualified immunity.

I respectfully dissent.

799 F.3d 833
United States Court of Appeals,
Seventh Circuit.

Robert Lee STINSON, Plaintiff-Appellee,
v.
James GAUGER, Lowell T. Johnson, and
Raymond Rawson, Defendants-Appellants.

Nos. 13-3343, 13-3346, 13-3347.
|
Argued June 6, 2014.
|
Decided Aug. 25, 2015.
|
Corrected Aug. 26, 2015.

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Before BAUER, MANION, and SYKES, Circuit Judges.

Opinion

SYKES, Circuit Judge.

Robert Lee Stinson spent 23 years in prison for a murder he did not commit. He was exonerated by DNA evidence and now sues the lead detective and two forensic odontologists who investigated the murder and later testified at trial. The odontologists were the key witnesses for the prosecution. They testified that bite marks on the victim's body matched Stinson's dentition. In this suit for damages, *see* 42 U.S.C. § 1983, Stinson alleges that the odontologists fabricated their opinions, the detective put them up to it, and all three defendants suppressed evidence of the fabrication, all in violation of his right to due process of law.

The case comes to us on appeal from the district court's denial of the' claim of absolute or qualified immunity from suit. We agree that absolute immunity does not apply. Stinson has sued the defendants primarily for their investigative misconduct, not their testimony at trial. But the defendants remain protected by qualified immunity, which is lost only if Stinson presents evidence showing that they violated a clearly established constitutional right. He has not done so. Stinson's evidence, accepted as true, shows at most that the odontologists were negligent; it does not support his claim that they fabricated their opinions. And an error in forensic analysis – even a glaring error – is not actionable as a violation of due process. Finally, Stinson's evidence-suppression claim is wholly dependent on the allegation of fabrication, which is

unsupported by the record. Accordingly, we reverse and remand with instructions to enter judgment for the defendants.

I. Background

The immunity issue was raised at the summary-judgment stage, so our factual account of the case comes from the evidence submitted in support of and opposition to the defendants' Rule 56 motion, *see* FED.R.CIV.P. construed in Stinson's favor, *Locke v. Haessig*, 788 F.3d 662, 666-67 (7th Cir.2015).

At about 7 a.m. on November 3, 1984, Milwaukee police were dispatched to the scene of a homicide at 2650 N. 7th Street. In the rear yard at that address, they found the body of Ione Cychosz; she had been brutally raped and murdered. The most promising physical evidence was a set of bite marks left on Cychosz's body, so the Milwaukee County Medical Examiner asked Dr. Lowell Johnson to assist on the case. Dr. Johnson was a professor of dentistry and oral surgery at Marquette University, a forensic odontologist, and a diplomate of the American Board of Forensic Odontology. At the Medical Examiner's request, Dr. Johnson examined the bite marks on Cychosz's body and made rubber impressions of them.

About two days after the murder, Milwaukee homicide detective James Gauger and his partner, Tom Jackelen, assumed responsibility for the investigation. They started by reviewing the work other officers had done to that point and meeting with Dr. Johnson, who

described the killer's teeth and showed them a preliminary sketch. No police reports memorialize this meeting and the parties dispute what was said, but according to Stinson's version of events, Dr. Johnson informed the detectives of his working hypothesis: the killer had one twisted tooth and was missing the upper right lateral incisor (the tooth just to the right of the two front teeth).

Armed with this information, the two detectives began interviewing people who lived near the scene of the crime. Stinson's house was immediately to the north of the yard where the body was found. Gauger already knew Stinson. Two years earlier, Gauger had tried and failed to prove that Stinson was responsible for the murder of a man named Ricky Johnson. The Johnson homicide was never solved, even though a witness identified Stinson and two others as having been involved. To this day, Gauger believes that Stinson was responsible for Ricky Johnson's murder.

Gauger and Jackelen went to Stinson's home and initially spoke with his mother and brother. Gauger then separately interviewed Stinson's brother while Jackelen interviewed Stinson. When they finished, the detectives compared notes outside the Stinson home. Jackelen told Gauger, "We have him." Gauger asked Jackelen what he meant, and the two detectives then returned to the house to talk with Stinson again. Jackelen's plan was to say something that would make Stinson laugh so they could see his teeth. He did so, and Gauger and Jackelen saw that Stinson was missing his right front tooth (his right central incisor) and

had another tooth that was badly damaged. That did not quite match the description Dr. Johnson had given: Stinson's missing tooth was the one *just next* to the tooth that the odontologist said would be missing. Nonetheless, the detectives thought they'd found their man.

The detectives met with District Attorney E. Michael McCann and Assistant District Attorney Daniel Blinka to report the status of the investigation. Blinka summoned Dr. Johnson to the meeting, and Johnson said he would need to personally examine Stinson to determine whether his teeth matched the bite marks on Cychosz's body. Blinka did not think they had enough evidence for a warrant compelling Stinson to submit to a dental examination, so he decided to open a John Doe proceeding – a unique procedure authorized by Wisconsin law that allows district attorneys to (among other things) subpoena witnesses to appear and give evidence before a judge in order to determine whether probable cause exists to charge someone with a crime. *See* WIS. STAT. § 968.26. On Blinka's petition a Milwaukee County Circuit Judge opened a John Doe proceeding to investigate the Cychosz murder.

Stinson was subpoenaed and on December 3 submitted to examination at a hearing before the John Doe judge. Dr. Johnson evaluated him on the spot and stated that his teeth were consistent with the bite marks on Cychosz's body. The judge overseeing the hearing ordered Stinson to submit to a more thorough dental examination, including the production of molds, wax impressions, and photographs of his teeth. Dr.

Johnson's conclusion at the end of this more detailed analysis was the same: Stinson's teeth matched the bite marks on the victim.

Blinka was not quite convinced and wanted a second opinion. So Jackelen and Gauger flew to Las Vegas to meet with Dr. Raymond Rawson, a forensic odontologist on the staff of the Clark County Coroner's Office in Nevada. Dr. Rawson was also an adjunct professor of biology at the University of Las Vegas and, like Dr. Johnson, a diplomate of the American Board of Forensic Odontology. Dr. Rawson had not been involved in the case to that point but agreed to examine the evidence and possibly render an opinion. After a brief look at the evidence in Gauger's hotel room, Dr. Rawson agreed with Dr. Johnson's opinion that Stinson's dentition matched the bite marks on Cychosz's body.

This corroboration satisfied Blinka. Stinson was arrested and charged with Cychosz's murder. The bite-mark evidence was the centerpiece of the prosecution, and Drs. Johnson and Rawson were the star witnesses. Before trial the prosecutor gave all the bite-mark evidence to Stinson's counsel and also provided a list of forensic odontologists available to the defense to independently review the bite-mark evidence and render an opinion. Indeed, Stinson's counsel hired one of these odontologists, but to no avail: The expert agreed with Drs. Johnson and Rawson that the bite-mark evidence implicated Stinson, so the defense attorney did not call him to testify at trial. On December 12, 1985, a jury found Stinson guilty. He was sentenced to life in prison.

Twenty-three years later, Stinson was exonerated with help from the Wisconsin Innocence Project after it was shown that DNA evidence collected from Cychosz's body excluded Stinson. The Innocence Project also enlisted a new panel of odontologists who reexamined the bite-mark evidence and determined that it too excluded Stinson. On January 30, 2009, the judgment was vacated and Stinson was released from prison. Not long after that, state experts matched the DNA evidence recovered from Cychosz's body with a DNA sample from Moses Price, who thereafter confessed to the murder. The charges against Stinson were dismissed.

In 2010 Gauger copyrighted a memoir entitled *The Memo Book*, recounting his life as a Milwaukee police officer and detective. In it he described the Ricky Johnson and Ione Cychosz homicide investigations and revealed for the first time that he and Jackelen had met with Dr. Johnson before they began canvassing the neighborhood around the Cychosz murder scene.

After his release from prison, Stinson filed this civil-rights lawsuit against Gauger and Drs. Johnson and Rawson alleging that they conspired to frame him for the Cychosz murder. He retained a new expert odontologist, Dr. C. Michael Bowers, who agreed with the Innocence Project panel that the bite-mark evidence clearly excluded Stinson. Dr. Bowers and the panel also agreed that the forensic evaluations by Drs. Johnson and Rawson fell far below any accepted standard of forensic odontology. In Dr. Bowers's view, Drs. Johnson and Rawson went to great lengths to fit the bite-mark

evidence to Stinson's dentition. Relying heavily on Dr. Bowers's opinion, Stinson alleges in his suit that Drs. Johnson and Rawson fabricated evidence against him (namely, their expert opinions), that Gauger solicited or conspired with them to do so, and that all three defendants covered up the fabrication. The fabrication claim rests on *Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir.2012); the cover-up claim alleges that the defendants violated the due-process disclosure duty announced in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The defendants moved for summary judgment based on absolute immunity, or alternatively, qualified immunity from suit. The district judge rejected the claim of absolute immunity because Stinson's fabrication claim focused on misconduct that occurred during the investigation, before the case was charged, and not on the defendants' role as witnesses at trial. The judge also rejected the claim of qualified immunity, concluding that Dr. Bowers's affidavit, along with Gauger's belief that Stinson was responsible for the still-unsolved Ricky Johnson homicide, supported Stinson's claim that the defendants conspired to frame him. The judge accordingly denied summary judgment. All three defendants appealed.

II. Discussion

A. Appellate Jurisdiction

An order denying summary judgment normally lacks the finality required for appellate jurisdiction

under 28 U.S.C. § 1291, *Gutierrez v. Kermon*, 722 F.3d 1003, 1009 (7th Cir.2013), but orders denying claims of immunity from suit are an exception, *Mitchell v. Forsyth*, 472 U.S. 511, 524-30, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). These orders are effectively final with respect to the defendant's right to avoid the burdens of litigation and trial, so appellate jurisdiction arises under § 1291 pursuant to the collateral-order doctrine, which permits immediate appeal of a "small class" of orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 524-25, 105 S.Ct. 2806 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)).

This principle is subject to an important limitation, however. In *Johnson v. Jones*, the Supreme Court explained that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." 515 U.S. 304, 319, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). The plaintiff in *Johnson* alleged that five police officers used excessive force during an arrest, beating him so severely that he required hospitalization for broken ribs. *Id.* at 307, 115 S.Ct. 2151. Three of the officers moved for summary judgment, asserting qualified immunity and arguing that the plaintiff had no evidence that any of

them were involved in the beating. *Id.* at 307-08, 115 S.Ct. 2151. Relying on the plaintiff's statement that some unidentified officers beat him and the officers' deposition admissions that they had been present at the scene, the district court determined that the plaintiff had raised a genuine factual dispute about whether these particular officers participated in the beating and on that basis denied the qualified-immunity motion. *Id.* The officers appealed, arguing that the summary-judgment record did not support the plaintiff's version of the facts. *Id.* at 308, 115 S.Ct. 2151. Because the district court's ruling entailed only a determination of the sufficiency of the evidence – a purely factual question – the Supreme Court held that it was not immediately appealable. *See id.* at 313-17, 115 S.Ct. 2151.

At first blush *Johnson* might be seen as foreclosing this appeal, but the Court's decision must be read in light of its later decisions in *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007), and *Plumhoff v. Rickard*, ___ U.S. ___, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014). At issue in *Scott* was whether a police officer used excessive force when he rammed the plaintiff's fleeing car during a high-speed chase, a question that turned in part on whether a reasonable officer would have believed that the plaintiff's flight posed a danger to the public. The district court denied the officer's claim of qualified immunity, holding that a jury could side with the plaintiff and find that a reasonable officer would not have believed that the plaintiff's flight posed a threat to the safety of others. *See Harris v. Coweta County*, No. CIVA 3:01CV148 WBH,

2003 WL 25419527, at *5 (N.D.Ga. Sept. 25, 2003). The Eleventh Circuit affirmed, *Harris v. Coweta County*, 433 F.3d 807, 816 (11th Cir.2005), but the Supreme Court reversed, holding that the plaintiff's story was "blatantly contradicted by the record," which included a video recording of the chase. 550 U.S. at 380, 127 S.Ct. 1769.

The qualified-immunity question in *Scott* therefore turned on a pure question of law: "whether [the officer's] actions were objectively reasonable" under the Fourth Amendment in light of the danger created by the plaintiff's high-speed flight, as captured on the video recording. *Id.* at 381, 127 S.Ct. 1769. The Court had "little difficulty" concluding that "it was reasonable for [the officer] to take the action that he did." *Id.* at 384, 127 S.Ct. 1769.

The Court's opinion in *Scott* does not mention *Johnson*, but the decision inescapably implies that *Johnson* should not be read too expansively. The Court made this point explicit in *Plumhoff*, which specifically addressed the limits of *Johnson's* no-jurisdiction holding in light of *Scott*. *Plumhoff*, like *Scott*, involved a high-speed police chase: The claim in *Plumhoff* was that police used excessive force by shooting at a fleeing car. 134 S.Ct. at 2017-18. Like the district court in *Scott*, the district court in *Plumhoff* found a genuine factual dispute about the degree of danger posed by the driver and thus rejected the officers' claim of qualified immunity. Applying *Johnson*, the Sixth Circuit initially determined that it lacked jurisdiction to hear the

officers' appeal, but the court later reversed course and affirmed the district court on the merits. *Id.*

The Supreme Court reversed. Addressing the question of appellate jurisdiction, the Court explained that unlike the officers in *Johnson*, the officers in *Plumhoff* weren't contesting a purely factual issue; instead, they raised a question of law. *Id.* at 2019. They did not claim, for example, "that other officers were responsible for [the] shooting . . . ; rather, they contend[ed] that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law." *Id.* In other words, they acknowledged for purposes of their summary-judgment motion that they had fired shots at the fleeing car, but they argued that the shooting was a reasonable response to the danger the high-speed chase created, or in the alternative, that a reasonable officer would not have known that the shooting was unjustified in light of that danger.

The Supreme Court explained that these were "legal issues . . . quite different from any purely factual issues that the trial court might confront if the case were tried." *Id.* As such, the Court held that *Johnson* did not apply. *Id.* The Court went on to conclude that the case was indistinguishable from *Scott*, and the record unequivocally showed that the driver posed a serious risk to public safety, justifying the officers' actions. *See id.* at 2021-22. Alternatively, the Court held that the officers were entitled to qualified immunity. *Id.* at 2024.

Scott and *Plumhoff* make it clear that *Johnson* should not be understood as establishing a categorical bar to immediate appellate review of an order denying immunity whenever the lower court has determined that facts are in dispute. The jurisdictional inquiry requires a more nuanced assessment of the specific immunity claim asserted in the case to determine whether the appeal raises a question of law, as in *Plumhoff* and *Scott*, or merely a dispute about historical facts, as in *Johnson*. Here, the defendants have accepted Stinson's version of the historical facts for present purposes; they argue that those facts, even with inferences drawn in Stinson's favor, do not amount to a violation of a clearly established constitutional right. That is the legal question at the heart of a qualified-immunity claim. The district court's order qualifies for immediate appeal.

B. Absolute Immunity

Our jurisdiction secure, we begin with the odontologists' claim of absolute immunity. Witnesses have absolute immunity from suit on claims stemming from their testimony at trial and, as a corollary, from their preparation to testify at trial. *See Rehberg v. Paulk*, ___ U.S. ___, 132 S.Ct. 1497, 1506-07, 182 L.Ed.2d 593 (2012); *Briscoe v. LaHue*, 460 U.S. 325, 326, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). Even if Johnson and Rawson testified falsely at Stinson's trial, that testimony can't be the basis of a civil suit against them. The principle underlying this expansive immunity is that without it, witnesses might be reticent to testify or might

hedge their testimony to reduce the chance of a retaliatory or harassing lawsuit against them. *See Rehberg*, 132 S.Ct. at 1505. Moreover, civil liability is not considered necessary to deter false testimony; the threat of criminal prosecution for perjury is a sufficient deterrent. *See id.*

Drs. Johnson and Rawson argue that all of Stinson's claims arise from their trial testimony or its preparation. Not so. Stinson's claims focus primarily on actions the two odontologists took while *investigating* the Cychosz murder. That's a key distinction in the context of absolute immunity. In *Buckley v. Fitzsimmons*, or *Buckley III* as it's known in this circuit, the Supreme Court held that a prosecutor's absolute immunity covers allegations of misconduct committed during trial and in preparing for trial, but not misconduct committed while investigating the case. 509 U.S. 259, 273, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). "There is a difference," the Court said, "between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand." *Id.* A prosecutor who participates in a criminal investigation performs essentially the same function as a detective, so as a useful shorthand, the Court held that a prosecutor's conduct before probable cause exists ordinarily should be classified as investigative work rather than trial preparation, and as such is not

covered by absolute immunity. *See id.* at 274, 113 S.Ct. 2606.

Even after probable cause exists, a prosecutor might continue acting as an investigator, in which case absolute immunity remains inapplicable. *See id.* at 274 n. 5, 113 S.Ct. 2606. Whether this investigative work is later used at trial is irrelevant: "A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial." *Id.* at 276, 113 S.Ct. 2606.

If a prosecutor isn't absolutely immune for misconduct occurring during an investigation, before probable cause exists, then it's hard to see how a forensic expert working with the prosecutor to develop probable cause would be protected by absolute immunity. The immunities for prosecutors and witnesses derive from the same common-law immunity that covers all essential participants in a trial, and both exist to protect the truth-seeking function of trials by allowing participants to speak and act freely without threat of civil liability. *See Briscoe*, 460 U.S. at 334-36 & n. 15, 103 S.Ct. 1108.

Indeed, the Supreme Court recently noted, if only in passing, that the distinction drawn in *Buckley III* – between alleged misconduct during trial and trial preparation (for which a prosecutor is absolutely immune) and alleged misconduct during an investigation (for which a prosecutor has only qualified immunity) –

applies to witnesses as well. In *Rehberg* the Court held that a witness is entitled to absolute immunity for his testimony before a grand jury and for preparing grand-jury testimony. 132 S.Ct. at 1507. The Court was careful to note, however, that absolute immunity does not extend "to *all* activity that a witness conducts outside of the grand jury room. For example, we have accorded only qualified immunity to law enforcement officials who falsify affidavits . . . and fabricate evidence concerning an unsolved crime." *Id.* at 1507 n. 1 (citing, among other cases, *Buckley III*, 509 U.S. at 272-76, 113 S.Ct. 2606).

Here, Stinson accuses the odontologists of fabricating their opinions during the investigative phase of the Cychosz case, *before* probable cause existed. In light of *Rehberg* and the principles outlined in *Buckley III*, absolute immunity does not apply to this alleged misconduct.

Finally, we note that absolute immunity does not protect a witness who violates a *Brady* obligation by suppressing material exculpatory information concerning the investigation of a crime. *See Manning v. Miller*, 355 F.3d 1028, 1033 (7th Cir.2004) (holding that absolute immunity did not apply to witnesses accused of concealing their fabrication of evidence); *Ienco v. City of Chicago*, 286 F.3d 994, 1000 (7th Cir.2002) ("Neither the withholding of exculpatory information nor the initiation of constitutionally infirm criminal proceedings is protected by absolute immunity.").

C. Qualified Immunity

Although not absolutely immune from suit, the defendants remain protected by qualified immunity unless Stinson has evidence showing that their conduct violated a constitutional right and the right was clearly established at the time of their actions. *See Pearson v. Callahan*, 555 U.S. 223, 243-44, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). Relying on *Whitlock*, he alleges that the odontologists violated his Fourteenth Amendment right to due process by fabricating their bite-mark opinions and that all three defendants took part in a conspiracy to frame him with this fabricated evidence. He also alleges that the defendants engaged in a cover-up by suppressing evidence of the fabrication in violation of *Brady*.

1. *Fabrication of Evidence*

The core of Stinson's case is his contention that Drs. Johnson and Rawson falsified their expert opinions and that Gauger solicited or conspired with them to do so. Recent cases in this circuit hold that a prosecutor who fabricates evidence against a suspect and later uses that evidence to convict him violates due process, and this due-process right was clearly established by at least the early 1980s. *See Fields v. Wharrie* ("*Fields II*"), 740 F.3d 1107, 1114 (7th Cir.2014); *Whitlock*, 682 F.3d at 585-86. The constitutional violation occurs when the evidence is fabricated, not when the fabricated evidence is later introduced at trial – a crucial distinction because the prosecutor would have

absolute immunity for any constitutional violation committed during the trial. *See, e.g.*, *Fields v. Wharrie* ("*Fields I*"), 672 F.3d 505, 517-18 (7th Cir.2012); *Buckley v. Fitzsimmons* ("*Buckley IV*"), 20 F.3d 789, 794-95 (7th Cir.1994).

It's not entirely clear that the same reasoning applies to police officers and expert witnesses who are alleged to have fabricated evidence during an investigation. Unlike prosecutors, police investigators face liability for failing to disclose their own fabrication of evidence. *See, e.g.*, *Manning*, 355 F.3d at 1034. That's because immunity doesn't protect an officer who fails to disclose material exculpatory evidence as required by *Brady, see id.* at 1033, even though a prosecutor who did the same thing would have absolute immunity for the suppression, *see Fields I*, 672 F.3d at 514.

Moreover, a line of cases in this circuit has squarely held that a police officer's fabrication of evidence (as distinct from his suppression of material exculpatory evidence) is not actionable as a violation of due process as long as state law provides an adequate remedy for the fabrication – usually in the form of a malicious-prosecution tort action. *See, e.g.*, *McCann v. Mangialardi*, 337 F.3d 782, 786 (7th Cir.2003). Under these cases due process is satisfied as long as the state permits a suit against the culpable officer after the fact. *See id.*; *Newsome v. McCabe*, 256 F.3d 747, 750-51 (7th Cir.2001). *Whitlock* did not address this line of cases. If they remain good law, then the due-process claim against prosecutors recognized in *Whitlock* and

applied in *Fields II* might not be available against police officers (and other members of the investigative team, like forensic experts) unless state law lacks an adequate tort remedy for the fabrication of evidence.

We don't need to resolve this question, however, because Stinson's claims fail even assuming *Whitlock* and *Fields II* apply to state actors other than prosecutors. *See Petty v. City of Chicago*, 754 F.3d 416, 421-22 (7th Cir.2014) (declining to address the relationship between *McCann* and *Whitlock* because plaintiff's claims failed even if *Whitlock* applied to police officers). The due-process liability recognized in *Whitlock* arises only in a narrow category of cases involving evidence fabrication; the panel took care to distinguish constitutionally actionable fabrication claims from other forms of official wrongdoing – such as "[c]oercively interrogating witnesses, paying witnesses for testimony, and witness-shopping." 682 F.3d at 584. The latter "may be deplorable, and . . . may contribute to wrongful convictions, but they do not necessarily add up to a constitutional violation even when their fruits are introduced at trial." *Id.*

Whitlock thus distinguished this court's earlier decision in *Buckley IV*, which rejected a due-process claim based on allegations that investigators coerced and solicited false testimony. *Buckley* involved a prosecutor who had been told by three different experts that a bootprint left at the scene of the crime could not reliably implicate Buckley, but sought a fourth opinion from an expert who had a reputation for producing scientifically unreliable opinion testimony. 20 F.3d at 796.

She told the prosecutor and investigators "that no one but Buckley could have left the bootprint on the door – and that she could identify the wearer of a shoe with certainty even if she had only prints made with different shoes." *Id.* We explained in *Buckley IV* that "[n]either shopping for a favorable witness nor hiring a practitioner of junk science is actionable" as a constitutional violation; a due-process violation occurs, if at all, only when the testimony is offered at trial without compliance with *Brady*. *Id.* at 796-97.

Whitlock did not disagree with *Buckley IV* on this point. Instead the panel distinguished shopping for unreliable experts (among other wrongful conduct at issue in *Buckley IV*) from the evidence falsification at issue in *Whitlock*, which involved feeding witnesses details of crimes that they couldn't have known. *See Whitlock*, 682 F.3d at 572, 584. Why the distinction? Because "[e]vidence collected with the[] kind[] of suspect techniques [at issue in *Buckley IV*], unlike falsified evidence and perjured testimony, may turn out to be true." *Id.* at 584. Sorting out reliable and unreliable evidence is an ordinary matter for trial, through the crucible of the adversary process, so the use of these suspect techniques doesn't violate due process unless the evidence is introduced at trial without adequate safeguards, such as disclosure of all material exculpatory evidence as required by *Brady*. Subsequent cases have confirmed that the due-process cause of action recognized in *Whitlock* is factually limited to cases involving evidence *fabrication*. *See Petty*, 754 F.3d at 422-23; *see also Fields II*, 740 F.3d at 1112.

Although Stinson tries to situate his case in this category, the record on summary judgment, construed generously in his favor, doesn't come close to showing that Drs. Johnson and Rawson fabricated their expert opinions. The district judge thought a jury could find fabrication based on Dr. Bowers's opinion that "Johnson's and Rawson's conclusions were far afield of what a reasonable forensic odontologist would have concluded." This view reflects an incorrect understanding of the fabrication claim recognized in *Whitlock*. Nothing in *Whitlock* or *Fields II* suggests that an inference of fabrication can be drawn from an expert's opinion that another expert behaved *unreasonably* under prevailing standards in the field. Arriving at an unreasonable expert opinion may suggest negligence, perhaps even gross negligence, but it does not amount to the intentional *fabrication* of evidence. A mistake in forensic analysis – even an egregious mistake – is grievous given the stakes in this context, but an expert who renders a mistaken opinion is protected by qualified immunity. Fabricated opinion evidence, for which the expert might not have qualified immunity, must be both wrong and *known to be wrong* by the expert. *See Fields II*, 740 F.3d at 1110.

Stinson places special emphasis on the discrepancy between Dr. Johnson's early hypothesis – that the murderer was missing the right lateral incisor – and his ultimate opinion that Stinson's dentition matched the bite marks on Cychosz's body. (Recall that Stinson was missing his right *central* incisor, the tooth just

next to the right lateral incisor.) This discrepancy suggests that forensic odontology is not very precise (raising legitimate questions about its reliability), but it's not evidence that Dr. Johnson *knew* his opinion was false – i.e., that it was a *lie*.

We acknowledge that it's not easy to prove that an expert knowingly falsified an opinion. We also recognize that the first step toward proving that an expert was intentionally lying is proving that his opinion was wrong. But to conclude that an expert fabricated his opinion *solely* because it was wrong – even grossly wrong – would collapse the essential distinction between mistaken opinions (for which there is immunity) and fabricated opinions (for which there is not). Stinson's fabrication claim is based entirely on the opinions of new experts that Drs. Johnson and Rawson were terribly wrong about the bite-mark evidence and that they used unreliable methods falling far below the standards of their profession. We do not second-guess this new opinion evidence, but it demonstrates at most that the odontologists acted unreasonably, not that they fabricated their opinions. Stinson has nothing else to support his evidence-fabrication claim.

The related claim against Gauger is entirely dependent on the viability of the evidence-fabrication claim against the odontologists. Stinson contends that the detective solicited or conspired with Drs. Johnson and Rawson to falsify their opinions, or at least failed to intervene to prevent them from doing so. Because no reasonable jury could find that the odontologists violated Stinson's due-process rights by fabricating their

opinions, Gauger too is entitled to qualified immunity on this claim.

2. *Suppression of Evidence*

Stinson also claims that the defendants suppressed evidence in violation of the due-process disclosure duty announced in *Brady v. Maryland*, 373 U.S. 83, 150, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and expanded in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The duty to disclose material exculpatory and impeachment evidence extends to prosecutors and "others acting on the government's behalf in the case." *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Thus, police officers who conceal exculpatory evidence, or who fabricate evidence and fail to disclose the fabrication, cannot claim the protection of qualified immunity. *See, e.g.*, *Newsome*, 256 F.3d at 752-53; *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir.1988). We've suggested before that the same reasoning applies in cases involving forensic experts who work with the police on criminal investigations. *See, e.g.*, *Jones*, 856 F.2d at 993 (upholding a jury verdict against a lab technician who manipulated and concealed exculpatory evidence). We need not decide whether it was clearly established in 1984, when these events occurred, that forensic experts working with the police have a duty to disclose material exculpatory evidence; nothing in the record shows that the duty was violated in Stinson's case.

The *Brady* rule is not violated by the presentation of flawed expert testimony at trial. *See, e.g.*, *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006, 1029 (7th Cir.2006); *Buie v. McAdory*, 341 F.3d 623, 625-26 (7th Cir.2003). Faulty expert testimony is exposed through the adversary process; the *Brady* requirement simply ensures that the defense has all material exculpatory evidence for use during cross-examination. Here, the prosecutor disclosed all the bite-mark evidence to the defense and even provided a list of forensic odontologists to assist Stinson's counsel in preparing to contest Dr. Johnson's and Dr. Rawson's opinions. Far from exposing flaws in their analysis, Stinson's forensic expert *agreed* that they had correctly evaluated the bite-mark evidence and that it inculpated Stinson. So Stinson's own expert missed the errors later identified by the Innocence Project and Dr. Bowers.

What's left is Stinson's allegation that Dr. Johnson failed to disclose that he changed his mind about which tooth the killer was missing. But the prosecution turned over Dr. Johnson's initial sketch to the defense, and the inconsistency between it and his subsequent opinion was just as evident then as it is today. *See Carvajal v. Dominguez*, 542 F.3d 561, 567 (7th Cir.2008) ("There was nothing preventing Carvajal from discovering and drawing out this discrepancy between the officers' stories during the suppression hearing. Suppression does not occur when the defendant could have discovered it himself through 'reasonable diligence.'") (quoting *Ienco v. Angarone*, 429 F.3d 680, 683 (7th Cir.2005)). If the discrepancy was relevant in assessing

the quality or accuracy of Dr. Johnson's ultimate opinion, then Stinson and his expert could have seized on the point at the time.

We have difficulty discerning what other evidence Stinson thinks was concealed. He hasn't pointed to any material evidence that has recently come to light but wasn't disclosed in time for his trial. He points to Gauger's memoir, which was copyrighted in 2010, but the material information in *The Memo Book* – such as Gauger's belief that Stinson was responsible for Ricky Johnson's murder – was known at the time of trial. The only new fact revealed in *The Memo Book* was that Gauger and Jackelen met with Dr. Johnson prior to canvassing the neighborhood where the Cychosz murder occurred. The mere fact of that meeting is not materially exculpatory.

3. *Remaining Claims Against the Odontologists*

Stinson's remaining claims against Drs. Johnson and Rawson are wholly dependent on his primary contention that they fabricated their opinions and suppressed evidence of the fabrication. For example, Stinson alleges that the odontologists are liable for conspiracy, but a defendant cannot be liable "for conspiring to commit an act that he may perform with impunity." *House v. Belford*, 956 F.2d 711, 720 (7th Cir.1992). For the same reason, Stinson's claim against the odontogists for failure to intervene also fails.

III. Conclusion

For the foregoing reasons, the defendants are not protected by absolute immunity, but they are entitled to qualified immunity. Accordingly, we REVERSE the judgment of the district court and REMAND with instructions to enter judgment in favor of the defendants.

2013 WL 5447916
Only the Westlaw citation is currently available.
United States District Court,
E.D. Wisconsin.

Robert Lee STINSON, Plaintiff,
v.
CITY OF MILWAUKEE, James Gauger, other as-of-yet Unknown Employees of the City of Milwaukee, Dr. Lowell T. Johnson, and Dr. Raymond D. Rawson, Defendants.

No. 09-C-1033.
|
Sept. 30, 2013.

Attorneys and Law Firms

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Jan A. Smokowicz, Milwaukee City Attorney's Office, Jason J. Franckowiak, Lori Gendelman, Otjen Van Ert & Weir SC, Adam J. Freed, W. Patrick Sullivan, Siesennop & Sullivan, Milwaukee, WI, for Plaintiff.

DECISION AND ORDER DENYING RAWSON'S MOTION FOR SUMMARY JUDGMENT (DOC. 90), JOHNSON'S MOTION FOR SUMMARY JUDGMENT (DOC. 96), GAUGER'S AND THE CITY'S MOTION FOR SUMMARY JUDGMENT (DOC. 100), AND SETTING A STATUS CONFERENCE

C.N. CLEVERT, JR., District Judge.

Robert Stinson served twenty-three years in prison for crimes he did not commit. Stinson's conviction hinged on bite mark evidence found on the murder victim, Ione Cychosz, and testimony by two forensic odontologists[1] that Stinson's dentition matched those bite marks. Now, under 42 U.S.C. § 1983, Stinson sues the two forensic odontologists and one of the police officers assigned to the criminal case. He asserts violation of his due process rights to a fair trial through the fabrication of evidence and the withholding of exculpatory evidence (count I), failure to intervene (count IV), conspiracy to deprive him of his constitutional rights (count V), and several state-law tort claims.[2] Defendants James Gauger, Lowell T. Johnson, and Raymond

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[1] "Odontology" is the scientific study of teeth, especially as a branch of forensic medicine. Oxford English Dictionary, available at http://www.oed.com/view/Entry/130454?redirectedFrom=odontology#eid (last visited Sept. 30, 2013).

[2] Previously, at a status conference in August 2012 (*see* Doc. 89), Stinson dismissed a Fifth Amendment retaliation claim (count III), a supervisor liability claim (count VI), and all *Monell* claims against the City of Milwaukee, *see Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691-92, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

D. Rawson move for summary judgment on all remaining federal claims and dismissal of all supplemental claims.[3]

Summary judgment is proper if the depositions, documents or electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers or other materials show that there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a), (c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of demonstrating he is entitled to summary judgment. *Celotex*, 477 U.S. at 323. Once this burden is met, the nonmoving party must designate specific facts to support or defend each element of his cause of action, showing that a genuine issue exists for trial. *Id.* at 322-24. In analyzing whether a question of fact exists, the court construes the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The mere existence of a factual dispute does not defeat a summary judgment motion; there must be a

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Stinson now dismisses his First Amendment retaliation claim against detective James Gauger (count II). (Doc. 110 at 70.).

[3] The City of Milwaukee joined in Gauger's motion for summary judgment, though all *Monell* claims have been dismissed. The City may remain involved in this case because of indemnity issues. However, because the motion for summary judgment relates primarily to Gauger, the court for simplicity refers to the motion as Gauger's alone.

genuine issue of material fact for the case to survive. *Id.* at 247-48. "Material" means that the factual dispute must be outcome determinative under governing law. *Contreras v. City of Chicago*, 119 F.3d 1286, 1291 (7th Cir.1997). Failure to support any essential element of a claim renders all other facts immaterial. *Celotex*, 477 U.S. at 323. To establish that a question of fact is "genuine," the nonmoving party must present specific and sufficient evidence that, if believed by a jury, would support a verdict in its favor. Fed.R.Civ.P. 56(e); *Anderson*, 477 U.S. at 249.

STATEMENT OF FACTS

The following facts are set forth in the light most favorable to Stinson.[4] Certain controverted facts are noted with footnotes. To the extent that a party objected to a proposed fact and that fact appears below, the objection is overruled.

James Gauger joined the Milwaukee Police Department in 1958 and was assigned to the detective

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[4] Proposed statements of material fact are identified with initials from a party's last name. In other words, "GFOF" means Gauger's proposed statements of material fact (Doc. 104), "JFOF" means Johnson's proposed findings of fact (Doc. 97), "RFOF" means Rawson's proposed findings of fact (Doc. 106), and "SFOF" means Stinson's Statement of Additional Facts (Doc. 111). Stinson filed separate responses to each defendant's proposed statements of fact. Those are identified with the words "Resp. to": "Resp. to GFOF" (Doc. 116), "Resp. to JFOF" (Doc. 114), and "Resp. to RFOF" (Doc. 115). The defendants filed a combined response to Stinson's proposed additional facts (Doc. 126), which the court references as "Resp. to SFOF."

bureau in 1969. (GFOF ¶¶ 1, 3.) When the Homicide Division was created in January 1982, Gauger and Tom Jackelen were two of the original four detectives assigned to it. (GFOF ¶¶ 5, 6; SFOF ¶ 20.) Gauger and Jackelen were partners from 1982 through 1985. (GFOF ¶ 6; SFOF ¶ 21.) During that time, the general detective bureau would handle a homicide investigation initially, but if the crime was not solved within a day or two, the investigation would be assigned to the Homicide Division. (GFOF ¶ 7.) Ricky Johnson was murdered on or about November 1, 1982. (SFOF ¶ 23.) On the night of the Johnson murder, Darin Lloyd was on his way to catch up with his brother, Jody Lloyd, and Derrick Arms and Robert Lee Stinson, when they heard men arguing and a gunshot. (SFOF ¶¶ 24-26.) Gauger and Jackelen were assigned to investigate the Johnson murder. (SFOF ¶ 27.) A witness came forth and indicated that she heard Darin and Jody Lloyd were present around the time Johnson was shot. (SFOF ¶ 28.) Gauger and Jackelen interviewed Jody and Darin Lloyd and coerced Darin into making a false statement implicating Jody. (SFOF ¶¶ 34, 38, 40.) Gauger and Jackelen then pressured a Lester Franklin into identifying Arms, Jody Lloyd, and Stinson as being involved in the Ricky Johnson homicide, with Jody Lloyd as the shooter. (SFOF ¶¶ 43, 47, 49, 50.) Gauger and Jackelen arrested Jody Lloyd. (SFOF ¶ 51.)

Stinson was interrogated about the murder. (SFOF ¶ 52.) He told the detectives what he had done on the night of the shooting and that he had no information about who committed the murder. (SFOF ¶ 53.)

The detectives told Stinson that they were "tired of all that bullshit story you telling." (SFOF ¶ 54.) Stinson reiterated that he had told the police the truth that he and his friends were not involved in the murder. (SFOF ¶ 56.) Eventually, charges against Jody Lloyd were dropped. (SFOF ¶ 58.) However, Gauger believed that Jody and Darin Lloyd, Arms, and Stinson murdered Ricky Johnson. (SFOF ¶¶ 59, 63.) Gauger believes that the Johnson case remains open to this day, "mainly because we had the right guys, but couldn't prove it." (SFOF ¶ 60.)

Ione Cychosz was murdered on November 3, 1984; her body was found in the rear yard at 2650 North 7th Street in Milwaukee, Wisconsin. (JFOF ¶ 14; SFOF ¶ 64; (GFOF ¶¶ 11, 12.) At 7:05 a.m. that day, City of Milwaukee police were dispatched to investigate the homicide. (JFOF ¶ 17.) At 8:22 a.m. that day, an assistant medical examiner performed an external examination on Cychosz's body at the Medical Examiner's Office. (JFOF ¶ 18.) At approximately 9:00 a.m. that day, an assistant deputy medical examiner authorized the use of Dr. Lowell T. Johnson in the Cychosz murder investigation as a forensic odontology consultant. (JFOF ¶ 19.)

At all times between 1961 and 2012, Dr. Lowell T. Johnson was a member of the faculty of the Marquette University School of Dentistry and held a Wisconsin license in dentistry and oral surgery. (JFOF ¶¶ 5, 6.) From 1977 to 2012 Johnson was a diplomat of the American Board of Forensic Odontology. (JFOF ¶ 12.) Between 1961 and 2010, Johnson served as a forensic

consultant for the Milwaukee County Medical Examiner's Office. (JFOF ¶ 7.) During calendar years 1984 and 1985, Johnson was employed in the private practice of dentistry and as a member of the Marquette faculty. (JFOF ¶ 9.) He was not an employee of the City of Milwaukee, Milwaukee Police Department, or Milwaukee County District Attorney's Office in the sense of receiving a regular pay check or having an ongoing contract for his services. (JFOF ¶¶ 10, 11; Resp. to JFOF ¶¶ 10, 11.)

Around 9:00 a.m. on November 3, 1984, a Thomas Hanratty called Johnson and then (at Johnson's direction) David Cadle, a photographer for the state crime lab, to examine Cychosz's body. (JFOF ¶¶ 20, 66; SFOF ¶¶ 69, 70.) In 1984, Cadle was a forensic photography specialist or scientist and imaging unit leader with the Wisconsin State Crime Lab offices in Milwaukee. (JFOF ¶¶ 22, 23; Resp. to JFOF ¶ 22.) At 11:00 a.m. on November 3, 1984, Cadle took sixty photographs, including views of bite marks. (JFOF ¶ 21.) The cameras Cadle used for those photographs included a Polaroid CU-5 close-up land camera and a medium format film camera that provided negatives from which additional copies or enlargements could be made. (JFOF ¶ 24.) The Polaroid CU-5 had a specialized "dental kit." (JFOF ¶ 25; Resp. to JFOF ¶ 25.) The CU-5 camera used Polaroid film to create nondigital photos at several possible scales. (JFOF ¶ 26; Resp. to JFOF ¶ 26.)

At 3:00 p.m. on November 3, 1984, Johnson went to the Milwaukee County Medical Examiner's Office and examined bite marks on Cychosz's body. He found

eight complete or partial bite marks on the body, and he took rubber impressions of the bite marks on the right breast. (JFOF ¶¶ 27, 65, 67; SFOF ¶ 71.) On November 5, 1984, Johnson returned to the Medical Examiner's Office and extracted the tissue from Cychosz's right breast. (JFOF ¶ 28; SFOF ¶ 73.)

Gauger and Jackelen were the lead detectives on the Cychosz homicide investigation. (SFOF ¶ 65.) The first thing Gauger did on the investigation was to review the entire file that had been assembled up to the point of two to three days after the homicide. (GFOF ¶ 9.) The Cychosz murder investigation was the first homicide investigation recalled by Gauger that involved the collection and use of bite mark evidence. (GFOF ¶ 8.)

Prior to going to the scene, Gauger learned information about the assailant's dentition; even before interviewing witnesses, Gauger knew they were looking for someone with a missing tooth and a twisted tooth. (GFOF ¶¶ 18, 19; SFOF ¶ 80.) Gauger and Jackelen met with Johnson prior to their first visit, on November 6, 1984, to the scene where Cychosz was found. At that meeting, Johnson showed the detectives a sketch or "detailed drawing" he had made representing the assailant's teeth. (SFOF ¶¶ 74, 75, 78; Resp. to GFOF ¶ 19; Doc. 112 Ex. P at 79-80, 83-85, 143-44, Ex. AA (*The Memo Book*) at 328.[5])

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[5] Gauger proposed a statement of fact that he did not use any sketch to try to identify the assailant (GFOF ¶ 24), and defendants objected to Stinson's proposed finding about this meeting in

Thereafter, Gauger and Jackelen visited the scene. (GFOF ¶ 11.) It was Gauger's and Jackelen's practice to interview neighbors who had not been interviewed by uniformed officers or reinterview those who had previously been interviewed. The Stinson home happened to be closest to the scene and probably was the

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early November between Gauger and Johnson (Resp. to SFOF ¶ 74.) Defendants contend that the first meeting between Johnson and detectives Gauger and Jackelen occurred on November 15, 1984, as supported by the lack of any police report memorializing a meeting between Johnson and the detectives before November 15, 1984. (Resp. to SFOF ¶ 74.).

However, Gauger testified at deposition that he had seen a sketch at the meeting with Johnson prior to going to the scene and interviewing the Stinsons (Doc.112 Ex. P at 73-74, 79, 83-85.) Defendants contend that Gauger's memory, after about twenty-five years, was faulty without his being able to refresh his recollection with police reports, but Gauger's deposition testimony and his memoirs support Stinson's version of the facts. In Gauger's memoirs, titled *The Memo Book*, he wrote that the forensic odontologist provided Gauger and Jackelen with "photos of the bite marks from every conceivable angle, along with a detailed drawing" showing that the assailant had a missing or broken front tooth and a twisted tooth to the side. Then, "[w]ith this information we started to re-interview all the neighbors," including Stinson. (Doc. 112 Ex. AA at 328-39.) Any contradictions about the date of the detectives' first meeting with Johnson are for the jury, not this court, to decide. Taking the facts in Stinson's favor, Gauger and Jackelen met with Johnson and saw Johnson's sketch prior to going to the scene and interviewing Stinson on November 6, 1984. made Stinson laugh so both detectives could see his teeth. (GFOF ¶ 20.) Gauger saw that Stinson had a missing upper front tooth. (GFOF ¶ 21.) According to Gauger's memoirs: "There it was. The broken front tooth and the twisted tooth just like on the diagram and pictures." (Doc. 112 Ex. AA at 329; *see* SFOF ¶ 104.) However, at deposition, Gauger recalled that the missing tooth was on the upper right side, to the right of the front tooth. (GFOF ¶ 22; Doc. 112 Ex. P at 75-76.).

first home Gauger and Jackelen visited. (GFOF ¶ 15; SFOF ¶ 95, 96.) Stinson lived there with his mother, twin brother, and younger siblings. (SFOF ¶ 97.)

On November 6, 1984, Gauger and Jackelen spoke to Stinson's mother and his brother, Robert Earl Stinson. Afterward, Gauger interviewed Robert Earl while Jackelen interviewed Stinson.[6] (GFOF ¶ 17; SFOF ¶ 98.)

Stinson is missing his right central incisor, also known as tooth number eight (or, in the court's language, the right front tooth). (SFOF ¶ 18.) His right central incisor is fractured and decayed almost to the gum line. (SFOF ¶ 138.[7])

After the two detectives finished their interviews and were in the front of the house, Jackelen said "we have him" and Gauger asked Jackelen what he was talking about. Jackelen and Gauger then went back to talk with Stinson and Jackelen said something that made Stinson laugh so both detectives could see his teeth. (GFOF ¶ 20.) Gauger saw that Stinson had a missing upper front tooth. (GFOF ¶ 21.) According to Gauger's memoirs: "There it was. The broken front tooth and the twisted tooth just like on the diagram and pictures." (Doc. 112 Ex. AA at 329; *see* SFOF

[6] In this opinion, "Stinson" refers to the plaintiff, Robert Lee Stinson; Stinson's twin brother is referred to as "Robert Earl."

[7] Stinson's counsel submitted a photo of Stinson's dentition, which counsel says was taken at the John Doe hearing. (Doc. 112 ¶ 43.) However, she sets forth personal knowledge regarding the photo as the basis upon which to make that statement. Hence, the court will not consider the photo.

¶ 104.) However, at deposition, Gauger recalled that the missing tooth was on the upper right side, to the right of the front tooth. (GFOF ¶ 22; Doc. 112 Ex. P at 75-76.)

Following their interviews at the Stinson residence, Gauger and Jackelen went to the office and discussed what they had found with Lieutenant Ruscitti. (GFOF ¶ 28; SFOF ¶ 106.) Either that day or the following day, Ruscitti and the two detectives met with District Attorney McCann. (GFOF ¶ 29.) They explained what they had found to the district attorney and asked his opinion on how to proceed. (GFOF ¶ 30.) They told McCann about the bite mark and Stinson's missing tooth and that Gauger thought it was comparable to Johnson's sketch. (GFOF ¶ 31; Resp. to GFOF ¶ 31; Doc. 112 Ex. P at 93, 142-44.)

McCann called Assistant District Attorney Dan Blinka into the meeting. (GFOF ¶ 33; Resp. to GFOF ¶ 33; Doc. 112 Ex. P at 94.) Blinka stated his belief that insufficient evidence existed to obtain a search warrant to examine Stinson's dentition. (GFOF ¶ 34.) Blinka called Johnson during the meeting and inquired whether Johnson could make an identification from the bite marks; Johnson responded that under the right conditions he could make an identification if he had a full make-up of the suspect's dentition. (SFOF ¶¶ 114, 115.) Someone at or after the meeting recommended that a John Doe investigation be started. (GFOF ¶ 34.) Blinka did not have the impression at the meeting that the detectives were "locked on" to Stinson. (GFOF ¶ 35; Doc. 102 Attach. B at 29-30.)

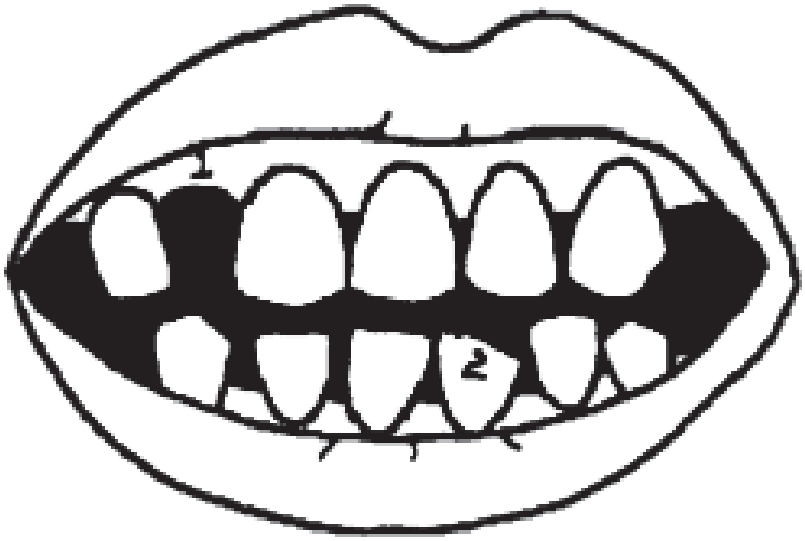
On November 15, 1984, Johnson met with and was interviewed by Jackelen and Gauger. (JFOF ¶ 29.)

On November 16, 1984, Gauger and Jackelen interviewed and prepared a report concerning a Larry Darnell Patterson, who was missing two of his upper front teeth. (GFOF ¶ 38.) On that same day, Gauger and Jackelen interviewed and prepared a report concerning a Kenneth Edward King, who had a broken right front upper tooth. (GFOF ¶ 39.) The detectives subsequently discussed this subject with Johnson and obtained photographs of King for review by Johnson. (GFOF ¶ 39.) Johnson, at the request of the Milwaukee Police Department, reviewed photographs of the dentition of the two additional potential suspects. Johnson ruled them out as perpetrators. (JFOF ¶ 82; Resp. to JFOF ¶ 82.) He did not have or request dental models, wax exemplars, and intraoral photographs of the two individuals before ruling them out. (SFOF ¶¶ 123, 124, 128, 129; Resp. to SFOF ¶¶ 123, 124, 128, 129.) Stinson's odontological expert in this case, Dr. Michael Bowers, opines there was no scientific basis for Johnson to have excluded the first two individuals by viewing photographs of their mouths; he would have needed to evaluate the biting edges of their teeth through molds or wax exemplars. (SFOF ¶ 131; Doc 117 ¶ 33.)

At some point in late November or early December 1984, Johnson collaborated with a Milwaukee Police Department detective who worked as a police sketch artist to create a second sketch of the assailant's dentition. (JFOF ¶¶ 32, 35; Resp. to JFOF ¶¶ 32, 35; SFOF

¶ 82; Resp. to SFOF ¶ 82; Doc. 112 Ex. CC at 13.) Johnson says that he did not specify to the police artist that any specific tooth or tooth number was missing but only said a tooth in the upper right quadrant was missing. (Doc. 125 Ex. B at 156.[8]) However, according to Johnson, the police artist "made a sketch from my sketch and visited the office and asked me if this was consistent with what I had in mind." (Doc. 112 Ex. CC at 13.) Johnson understood that the police artist's sketch would be used as a tool for police to understand dental terminology and the dental description to help find the assailant; but the sketch was done from memory and was a preliminary opinion. (Doc. 112 Ex. N at 151; *see* SFOF ¶¶ 85, 86; Resp. to SFOF ¶¶ 85, 86.) The sketch was included in the Milwaukee Police Department's homicide file for the Cychosz investigation (SFOF ¶ 89) and appears as follows:

[8] The sketch identifies a missing or broken "upper right lateral incisor" and a "lower left central incisor worn and/or rotated." (Resp. to JFOF ¶ 39; Doc. 112 Ex. FF.) The sketch was made by an unidentified police sketch artist. (Resp. to SFOF ¶ 141; *see* SFOF ¶ 140.) Johnson says that the writing on the police sketch was not written by him or at his behest, and he does not know who added it or when it was added. (JFOF ¶ 39.) Defendants say the writing on the sketch is hearsay because Stinson has not shown who wrote the words. For summary judgment purposes the writing need not be considered; the admissibility of the writing can be addressed at trial. Defendants do not challenge the admissibility of the sketch.



(SFOF ¶ 140; Resp. to SFOF ¶ 141.)

On November 19, 1984, the district attorney petitioned for a John Doe proceeding. (GFOF ¶ 40.) In an affidavit to the assigned judge, David Jennings, Blinka stated that based on Milwaukee Police Department reports and the autopsy, he had reason to believe a crime had been committed and a proceeding was necessary to subpoena and examine witnesses and collect evidence. (GFOF ¶ 41.) On November 30, 1984, Judge Jennings ordered a John Doe proceeding. (GFOF ¶ 42.)

Any person who may have knowledge or information bearing on an investigation may be subpoenaed to a John Doe hearing. (GFOF ¶ 36.) No one had to demonstrate probable cause to question Stinson at a John Doe hearing. (GFOF ¶ 37.)

Stinson was subpoenaed to the John Doe proceeding, which occurred on December 3, 1984, before Judge

Jennings. (GFOF ¶¶ 43, 44; JFOF ¶ 40.) Stinson was not in custody at that time. (GFOF ¶ 44.) Blinka subpoenaed Stinson to the hearing so a dental expert could conduct an oral examination of Stinson's dentition to say whether it was consistent or inconsistent with the bite wounds that appeared on Cychosz's body. (GFOF ¶ 45.) Johnson was present at the John Doe hearing. (JFOF ¶ 41.) Prior to the John Doe hearing, Johnson had never met Stinson. (JFOF ¶ 16; Resp. to JFOF ¶ 15.)

At the hearing, Jackelen testified that he had observed that Stinson had missing and crooked teeth consistent with information he had received from Johnson (GFOF ¶ 47) and Johnson testified that he needed to see Stinson's teeth to see if they were consistent with his sketch (GFOF ¶ 48; Resp. to GFOF ¶ 48; Doc. 112 Ex. CC at 8-9). Johnson said he could ascertain by looking into Stinson's mouth whether he could exclude Stinson or needed further evidence to evaluate Stinson. (SFOF ¶ 135.)

Johnson then was allowed to examine Stinson's mouth for fifteen to twenty seconds. (GFOF ¶ 50.) Johnson then asked to see a copy of his sketch of the assailant's dentition but Jackelen said he did not have a copy with him. (GFOF ¶ 50; Resp. to GFOF ¶ 50; Doc. 112 Ex. CC at 12.) Johnson then testified that what he observed of Stinson's teeth was "remarkable" and consistent with what he or the sketch artist drew. (SFOF ¶¶ 83, 137; Doc. 112 Ex. CC at 13.) He said it was consistent with what he expected from his analysis of the

bite marks and that there was reason to proceed with a detailed study. (GFOF ¶ 51.)

Judge Jennings ordered Stinson to submit to a dental examination by Johnson and to have impressions or molds and photographs taken; Stinson consented. (GFOF ¶ 52; JFOF ¶ 42; *see* SFOF ¶ 142.) On December 3, 1984, following the conclusion of the hearing, Johnson performed an extraoral and intraoral dental examination of Stinson and took dental impressions and study casts of Stinson's dentition. (JFOF ¶ 43.) Cadle took photographs of Stinson's dentition and face at or just after the John Doe hearing, using a Polaroid CU-5 camera. (GFOF ¶ 53; JFOF ¶ 44.)

Master casts are poured in stone and show the dentition as in a mouth. (*See* GFOF ¶¶ 68, 69.) The master cast could not be manipulated without leaving evidence of the change or manipulation. (GFOF ¶ 71.) Similarly, the working models of Stinson are in stone or a hard substance and cannot be changed without leaving evidence of alteration. (GFOF ¶ 72.) Likewise, the copper wax bites cannot be changed without leaving evidence of alteration. (GFOF ¶ 73.)

Following the John Doe hearing, Johnson compared the dental molds of Stinson's teeth, wax exemplars of his bite, and photographs of Stinson's dentition with the bite mark evidence obtained from Cychosz's body. (SFOF ¶ 143; JFOF ¶ 46; Resp. to JFOF ¶ 46.) Various items were used by Johnson, including master casts and models of Stinson, a copper wax bite of Stinson, and a cast of Cychosz's right breast. (GFOF ¶ 66.)

One of the techniques Johnson used was an in-depth comparison of models of Stinson's dentition with the model of the indentations on the victim's right breast. (JFOF ¶ 48.) Johnson also compared the models of Stinson's dentition to the scale photographs taken by Cadle on November 3 of the bite marks on Cychosz's body. (JFOF ¶ 49.) In addition, Johnson used positive transparencies created from the negatives of Cadle's photographs. (JFOF ¶ 50.)

After his work-up, Johnson expressed the opinion that the teeth of Stinson were identical to those that caused the bite mark injuries. (JFOF ¶ 51; Resp. to JFOF ¶ 51; Doc. 112 Ex. N at 81.) Subsequently, Johnson provided Gauger, Jackelen and Blinka with an opinion concerning the dentition and that Stinson's dentition was consistent with the wounds on the body. (GFOF ¶¶ 54, 55.) Blinka met with Johnson and one or both Gauger and Jackelen to review the bite mark evidence Johnson had generated and examined in the Cychosz case, including the photographs, Stinson's molds and impressions, and several "overlays." (RFOF ¶ 25.) During the meeting, Johnson stated that based on his review of the evidence Mr. Stinson's dentition was consistent with the person who inflicted the bite wounds on Cychosz. (RFOF ¶ 26.) After speaking with Johnson, Blinka believed there was probable cause to charge Stinson with Cychosz's murder but he still had questions. (RFOF ¶ 27; Resp. to RFOF ¶ 27; Doc. 94 Ex. 1 at 116-17.)

However, Johnson and Blinka wanted a second opinion from a forensic odontologist, and Rawson was

chosen by Johnson or Blinka. (GFOF ¶ 56; Resp. to GFOF ¶ 56, 57; Resp. to GFOF ¶ 57; RFOF ¶ 28; Resp. to RFOF ¶ 28; JFOF ¶ 52; Resp. to JFOF ¶ 52; Doc. 112 Ex. P at 105, Ex. AA at 332; Doc. 94 Ex. 1 at 117-19.) Johnson says he gave the district attorney's office two names of senior experienced members of the American Board of Forensic Odontology who could provide a second opinion: Rawson and a Dr. Levine. (Sullivan Suppl. Aff. ¶ 4, Ex. 2 at 253-55; *see* Resp. to SFOF ¶ 146.) At Blinka's direction or on his own, Johnson contacted Rawson about the case. (SFOF ¶¶ 147, 148; Resp. to SFOF ¶¶ 147, 148.) Johnson told Gauger that he "wanted the best forensic odontologist in the United States to confirm his findings." (Doc. 112 Ex. AA at 332.)

In 1984 and 1985, Rawson had a private dental practice in Las Vegas. (RFOF ¶¶ 7, 16.) He had been continuously licensed as a dentist in Nevada since 1968. (RFOF ¶ 8; JFOF ¶ 54.) Also, Rawson had been a diplomat of the American Board of Forensic Odontology since 1978 and an adjunct professor of biology at the University of Las Vegas since 1981. (RFOF ¶¶ 11, 12; JFOF ¶ 55.) He possessed a master's degree in physical anthropology and had served as a forensic odontologist for the Clark County, Nevada Coroner's Office commencing in 1976. (RFOF ¶¶ 9, 10.) Beginning in 1978, Rawson served as an expert forensic odontologist in bite mark cases. (RFOF ¶ 15.) Rawson has never been an employee of the Milwaukee County Medical Examiner's Office, the City of Milwaukee, the Milwaukee Police Department, or the Milwaukee

County District Attorney's Office, nor has he contracted to render professional services for these entities. (RFOF ¶ 17.)

Prior to January 1985 Rawson and Johnson were colleagues and professional acquaintances for at least seven years, as Johnson was also a diplomat of the American Board of Forensic Odontology. (RFOF ¶ 21; Resp. to RFOF ¶¶ 21, 22; Doc. 112 Exs. SS at 160, TT, UU.) Rawson and Johnson were also friends, though not close. (SFOF ¶ 151; Resp. to SFOF ¶ 151.)

Rawson was contacted for the first time about the Cychosz case in January 1985 when Johnson communicated with him. (RFOF ¶ 30; Resp. to RFOF ¶¶ 28, 29; Resp. to JFOF ¶ 57; Doc. 112 Exs. RR, SS at 127-28.) However, Johnson says that he did not confer with Rawson concerning Johnson's work-up, findings, or opinions in the case. (JFOF ¶ 57; Johnson Aff. ¶ 77.)

Prior to January 1985 Rawson had not met or had contact with Gauger or Stinson. (RFOF ¶¶ 19, 20.) Moreover, Rawson did not participate in any manner in the John Doe investigation or proceedings involving Stinson. (RFOF ¶ 23.) Rawson did not interview witnesses, go to the scene of the crime, or participate in police interrogations in the Stinson matter. (RFOF ¶ 24.)

Johnson signed over custody of evidence in his possession to Gauger and Jackelen, who hand delivered the material to Rawson in Las Vegas on January 17, 1985. (JFOF ¶ 56.) The evidence included preserved skin tissue of Cychosz and the photographs and dental

models and molds of Stinson that Johnson had generated and reviewed. (GFOF ¶ 59; RFOF ¶ 31; JFOF ¶¶ 52, 56; Resp. to JFOF ¶ 52.) Rawson went to Gauger's hotel room to review the bite mark evidence. (SFOF ¶ 153.) He viewed the photographs and models for one to three hours and verbally confirmed Johnson's findings. (GFOF ¶ 60; JFOF ¶ 56; SFOF ¶ 155; Doc. 112 Ex. P at 112-13.) Rawson was "impressed with the amount of evidence." (RFOF ¶ 33; Resp. to RFOF ¶ 33; Doc. 112 Ex. SS at 133.) According to Gauger, Rawson "took a look at the x-rays and the molds, and said that was good enough for him and that he concurred with [Johnson] and would testify to those findings in court." (SFOF ¶ 154; Doc. 112 Ex. AA at 333.[9])

Rawson says he did not notice any signs that the bite mark materials generated by Johnson were fabricated or improperly manipulated in any manner. (RFOF ¶ 37; Doc. 93 ¶ 27.) Rawson further says he did not fabricate or manipulate any of the bite mark materials during his initial review of the evidence. (RFOF ¶ 38; Doc. 93 ¶ 28.) Additionally, Rawson says he did not have a conversation with Gauger in which they discussed framing Stinson for the murder of Cychosz and that Gauger did not attempt to influence the outcome of his work or indicate that he desired Stinson to be

[9] Defendants object to this proposed finding to the extent it is contradicted by deposition testimony and affidavit statements that Rawson agreed to an ongoing analysis of the bite mark materials. (Resp. to SFOF ¶ 154.) However, this is a direct quote from Gauger's book.

identified as the perpetrator. (RFOF ¶¶ 39, 41; Doc. 93 ¶¶ 29, 31.)

On January 21, 1985, a criminal complaint issued charging Stinson with first degree murder of Cychosz. (RFOF ¶ 42.) The criminal complaint did not reference Rawson or his review of the bite mark materials. (RFOF ¶ 43.) Stinson was arrested on January 22, 1985. (GFOF ¶ 64; RFOF ¶ 44; JFOF ¶ 58.)

Rawson did not participate in any manner in any preliminary hearings in Stinson's murder case. (RFOF ¶ 54.) On February 20, 1985, Judge Arlene Connors of the Milwaukee County Circuit Court held a preliminary hearing at which Johnson testified. (JFOF ¶¶ 60, 61.) The State produced during the preliminary hearing a color transparency of one of the partial bite marks on the right breast of the victim, with an overlay made from the black and white negative from the photographs taken by Cadle of Stinson's dentition taped to the photograph. Johnson explained to the court how he had conducted his review of the color transparencies and photographs of the bite mark evidence using transparent overlays. (JFOF ¶ 69.) Johnson testified that he had conducted twenty-five to thirty analyses using the photographic overlays and had compared seventy-five individual tooth marks, all of which he believed to be consistent with Stinson's dentition. (JFOF ¶ 70.) Johnson said he had compared the models of Robert Lee Stinson's dentition with the model of the right breast, cast from the rubber impression of the preserved tissue. (JFOF ¶ 71.) Following the testimony of the fact witnesses and Johnson at the preliminary

hearing, Judge Connors found probable cause to bind Stinson over for trial. (JFOF ¶ 72.)

In March 1985, Rawson requested copies of the Stinson bite mark materials generated and reviewed by Johnson, to conduct a continued and more thorough independent analysis of the evidence. (RFOF ¶ 45; *see* JFOF ¶ 74.) On March 19, 1985, duplicates of the bite mark materials, including copies of the photographs and models generated and reviewed by Johnson, were mailed to Rawson in Nevada. (RFOF ¶ 46; JFOF ¶ 73.) At no time did Rawson review, receive, or rely upon the sketch of Stinson's dentition created by the police sketch artist in collaboration with Johnson. (RFOF ¶ 48.) Rawson did not create any bite mark materials or evidence of Stinson's dentition; instead, he reviewed the bite mark materials created by Johnson. (RFOF ¶ 61.)

Rawson says he did not notice any signs that the bite mark materials generated by Johnson were fabricated or improperly manipulated. (RFOF ¶ 51; (GFOF ¶ 70#[10]; Doc. 93 ¶ 37.) According to Rawson, he did not alter or manipulate any evidence in an attempt to falsely accuse Stinson of Cychosz's murder. (RFOF ¶ 52; Doc. 93 ¶ 51.) Rawson concurred with Johnson's opinion that Stinson's dentition was consistent with the person who inflicted the bite wounds on Cychosz. (RFOF ¶ 50; Resp. to RFOF ¶ 50.)

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[10] There are two paragraphs numbered 70, so the court has labeled the second one 70#.

Blinka never became aware of any statements by Gauger, Rawson, or Johnson supporting a belief of a conspiracy among them. (GFOF ¶ 62.) Blinka says he did not believe or come across evidence that Gauger, Johnson, and Rawson withheld or fabricated any physical evidence. (RFOF ¶ 68; Resp. to RFOF ¶ 68.)

At no time was Rawson given prosecutorial authority or decision-making power by the Milwaukee County District Attorney's Office. (RFOF ¶ 18.)

Blinka and the Milwaukee County District Attorney's Office insisted that exact replicas of the bite mark materials that Johnson created and Rawson reviewed be provided to Stinson and defense counsel so an accurate record could be made of what the State's experts did and to provide the defense with the evidence to perform an independent analysis. (RFOF ¶ 70.) Those duplicates "would have been immediately turned over to the defense." (Doc. 101 Ex. W at 163; *see* JFOF ¶ 125; Resp. to JFOF ¶ 125 (objecting to use of Morgan report but not Blinka deposition).)

Johnson spent between 130 to 140 hours in total performing his work-up prior to trial. (JFOF ¶ 47.) Following the completion of his comparison of the photographs, models, and overlays of the bite marks and Robert Lee Stinson's dentition, Johnson authored an expert report to Assistant District Attorney Blinka setting forth his professional opinions, plus an accounting of the work that he did in arriving at those opinions. (JFOF ¶ 83.) Johnson opined that "to a reasonable degree of scientific certainty . . . the teeth of Robert Lee

Stinson would be expected to produce bite patterns identical to those which [he] examined and recorded in this extensive analysis." (Doc. 98 Ex. J at 3.)

On December 8, 1985, Rawson authored a one-page expert forensic report summarizing his opinions and stating that he was in agreement with Johnson's opinions; after reviewing the materials generated by Johnson he agreed with Johnson's conclusion that Stinson caused the bite mark injury patterns on the body of Cychosz. (RFOF ¶ 55; JFOF ¶ 77.) At no time between March 19, 1985, and December 8, 1985, did Johnson have any contact with Rawson in which Johnson's opinions of the Cychosz case were discussed. (JFOF ¶ 78.)

Stinson's trial began December 9 or 10, 1985, and all witnesses were sequestered. (JFOF ¶ 91; SFOF ¶ 167; Resp. to SFOF ¶ 167.) According to Johnson, at no time prior to trial did he discuss with Rawson his opinions or the work that he performed on the bite mark evidence on the Cychosz murder case. (JFOF ¶ 93; Resp. to JFOF ¶ 93.) Similarly, Rawson states that at no time prior to or during Stinson's trial did he have any contact with Johnson in which Johnson's opinions or the work performed on the bite mark evidence in the Cychosz murder investigation were discussed. (RFOF ¶ 62.)

During the trial, there was no evidence of motive or any witness testimony linking Stinson to Cychosz's murder, though testimony indicated that Stinson had given conflicting versions of his whereabouts on the

night of the murder, and his version of the events of the night conflicted with some of the testimony of his friend, Darin Lloyd. (SFOF ¶ 168; Resp. to SFOF ¶ 168.)

On December 11, 1985, before Johnson or Rawson testified at the criminal trial, Stinson's criminal defense counsel moved to exclude forensic odontology evidence, and on that issue, Rawson was called to testify before the trial judge. (JFOF ¶ 94.) Rawson testified that Johnson's work-up of the bite mark evidence was "exceptionally fine," and complied with the standards of the Board of Forensic Odontology. (JFOF ¶ 96.) No opposing expert testimony was adduced at trial to counter Rawson's expert opinion that Johnson's work complied with the standards of the Board of Forensic Odontology at the time of the trial. (JFOF ¶ 97.)

Thereafter, Johnson testified at the criminal trial. (JFOF ¶ 98.) He discussed the steps he took to preserve the bite mark evidence he observed on Cychosz's body on November 3, 1984, and how he preserved evidence of Stinson's dentition following the John Doe hearing. (JFOF ¶¶ 99, 100.) During Johnson's expert testimony at the criminal trial, the photographs, models, and overlays he used in formulating his opinion were marked as exhibits and accepted into evidence without opposition from the defense. (JFOF ¶¶ 101, 102, 119, 124.)

Also, Johnson testified at trial that he performed an odontological work-up of Robert Earl Stinson that was identical to the one that he performed on Stinson

but there were gross discrepancies ruling out Robert Earl as having possibly made the bite marks. (JFOF ¶¶ 122, 123.) Johnson further testified, consistent with his report, that "the bite marks [he] examined on Ione Cychosz had to have been made by teeth identical in all of these characteristics to those that I examined on Robert Lee." (SFOF ¶ 171.)

Rawson testified that he was retained as an expert to perform an independent examination of the bite mark evidence created by Johnson to identify any discrepancies or errors in his work. (RFOF ¶ 58.) Rawson said at trial that he did not find any discrepancies in Johnson's work and that Johnson in fact performed a "very good work-up." (RFOF ¶ 59.) Additionally, Rawson testified that he agreed with Johnson's conclusion to a reasonable degree of scientific certainty that Stinson caused the bite marks on Cychosz's body. (RFOF ¶ 60.)

According to Rawson, at no time did he discuss with Johnson framing Stinson for the murder of Cychosz (RFOF ¶ 63), believe that any of the Stinson bite mark evidence that he reviewed was improperly fabricated or altered (RFOF ¶ 64), or participate in a conspiracy with Gauger and Johnson to frame Stinson for the murder of Cychosz. (RFOF ¶ 66.)

Stinson's criminal defense attorney, Steven Kohn, searched for a bite mark expert to analyze the evidence and testify on Stinson's behalf. Blinka had provided a list of fifty-four diplomats of the American Board of Forensic Odontology for Stinson's lawyers to contact.

(SFOF ¶ 218.) According to Bowers, in 1983 bite mark analysis was a relatively new field of study and there were fewer odontologists experienced in bite mark analysis than those who identified human remains from dental records. In 1983, approximately twenty-five members of the American Association of Forensic Science Odontology Section and the American Board of Forensic Odontology were active in bite mark analysis. (Doc. 117 ¶ 42; *see* SFOF ¶ 218.)

Stinson's defense counsel hired George Morgan as an odontology expert but did not call Morgan to testify at the criminal trial or offer Morgan's expert report into evidence. (*See* JFOF ¶ 88.) Stinson's defense counsel submitted Morgan's report, his resume, and a cover letter to the court; the trial judge sealed all three documents for appellate purposes. (JFOF ¶ 89.) The documents were unsealed by the court on September 25, 2008.[11] (JFOF ¶ 90.)

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[11] Defendants Johnson and Rawson presented proposed statements of material fact regarding the contents of Morgan's report and Morgan's curriculum vitae. (*See* RFOF ¶¶ 71-74; JFOF ¶¶ 85-87.) Stinson objected to the proposed statements, contending that the report and CV are inadmissible hearsay and pointing to a case for the point that unauthenticated reports are inadmissible. (*See* Resp. to RFOF ¶¶ 71-74; Resp. to JFOF ¶¶ 85-87.) Defense counsel submitted Morgan's report under their own affidavits with no explanation of where they obtained the documents or any indication of how they have personal knowledge of the report or CV. (*See* Doc. 101 ¶ 16; Doc. 94 ¶¶ 9, 10.) Because the report and CV have not been properly authenticated by someone with personal knowledge the court will not refer to their contents. Regardless, the contents of the report and CV would not alter the decision regarding summary judgment.

On December 12, 1985, the jury found Stinson guilty of murder. He was sentenced to life imprisonment. (SFOF ¶ 174.) Following the conviction, Johnson used portions of the Cychosz bite mark evidence for teaching purposes. (SFOF ¶ 227; Resp. to SFOF ¶ 227.)

More than twenty-three years after Stinson's conviction, the DNA profile obtained from evidence found on Cychosz was determined to exclude Stinson. (SFOF ¶ 2; Doc. 112 Ex. B at 47-48, 52, 56-57, Ex. C.) In February 2008, a panel of four forensic odontologists (the "Panel") reanalyzed the bite mark evidence created by Johnson and the photographs taken by Cadle on behalf of Stinson and the Wisconsin Innocence Project. They concluded that the bite mark evidence excluded Stinson. (SFOF ¶¶ 3, 184, 186, 187; Doc. 112 Ex. D.) On January 30, 2009, Stinson's conviction was vacated and he was released from prison. (SFOF ¶ 4; Resp. to SFOF ¶ 4.) In July 2009, the State of Wisconsin dismissed all charges against him. (SFOF ¶ 6.)

In April 2010, the Wisconsin State Crime DNA Database matched the DNA profile of blood found on Cychosz's clothing with the DNA of Moses Price, a convicted felon. (SFOF ¶ 10.) The next month Moses Price confessed to finding himself with a bloody knife over Cychosz after he had "blacked out." (SFOF ¶ 11; Resp. to SFOF ¶ 11; Doc. 112 Ex. H.) The State hired a new forensic odontologist, Dr. Paula Brumit, to reanalyze the bite mark evidence. She determined that Stinson was excluded and that Price could not be excluded. (SFOF ¶¶ 12, 13, 189; Resp. to SFOF ¶ 13.) In May 2012, the State charged Price with Cychosz's murder;

Price pled guilty in July 2012 and was sentenced to seven years of imprisonment. (SFOF ¶¶ 14, 15.)

According to Rawson, when he was discussing the report of the Panel, someone can manufacture a result by changing an overlay. (SFOF ¶ 181; Resp. to SFOF ¶ 181; Doc. 112 Ex. SS at 114.)

Stinson's expert in the present case, Dr. Bowers, reviewed the bite mark evidence and the reports of the four panel odontologists and Dr. Brumit, and concluded that the bite mark evidence found on Cychosz excludes Stinson. (SFOF ¶¶ 190, 202; Resp. to SFOF ¶¶ 190, 202; Doc. 112 Ex. M ¶ 31.)

The Panel and Bowers determined that Johnson's and Rawson's explanation for why a bite mark was on Cychosz's body where Stinson has a missing tooth "has no empirical basis or scientific basis and does not account for the absence of any marks by the adjacent, fully developed teeth." (SFOF ¶ 192; Doc. 112 Ex. D at 8; *see* Doc. 112 Ex. M ¶ 20.d.) Moreover, the Panel and Bowers concluded that Johnson's and Rawson's conclusion that Stinson's upper second molars made a bite mark was inexplicable because molars are located so far back in the mouth. (Doc. 112 Ex. D at 8, Ex. M ¶ 26; *see* SFOF ¶ 193.) In addition, the Panel and Bowers found it puzzling and extremely unusual that Johnson and Rawson would find a second molar "participated in a bite." (Doc. 112 Ex. M ¶ 26; *see* Doc. 112 Ex. D at 9.)

In Bowers's opinion, the methods of analysis that Johnson and Rawson used to compare Stinson's dentition with the bite mark injuries "were flawed and did not comport with the accepted standards of practice in the field of forensic odontology at the time." (SFOF ¶ 194; Resp. to SFOF ¶ 194; Doc. 112 Ex. M ¶ 4.[12]) According to the Panel, the overlays Johnson created blocked the view of whether Stinson's bite marks matched the photograph of the bite mark on the victim's body underneath. (SFOF ¶ 195.) Bowers submits that valid overlay analysis in 1984-1985 involved certain methods that revealed the biting edges of teeth, whereas Johnson used photos of teeth, gums, and lips. (Doc. 112 Ex. M ¶ 14; *see* SFOF ¶ 196.) Also, Bowers points to other errors by Johnson, Rawson, and Cadle. For instance, Cadle's photographs with the CU-5 were not scaled properly. (Doc. 112 Ex. M ¶ 15; *see* SFOF ¶ 197), Johnson and Rawson used bite marks on Cychosz's breast although breast tissue is highly prone to distortion and makes it an unreliable medium for capturing bite mark impressions (Doc. 112 Ex. M ¶ 29; *see* SFOF ¶ 200).

Bowers opined that "to a reasonable degree of scientific certainty as a forensic odontologist . . . Johnson

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[12] Defendants deny the substance of this opinion, saying that a comparison of scaled photographic overlays of a suspect's teeth over scaled color transparencies of the bite patterns was superior to another method used by forensic odontologists at that time, which involved hand tracings. (Resp. to SFOF ¶ 194.) But (as defendants seem to accept in their response to the finding) the facts must be taken in Stinson's favor. Defendants similarly deny the substance of other opinions of the Panel and Bowers.

and Rawson knowingly manipulated the bite mark evidence and Stinson's dentition to appear to 'match' when there was in fact no correlation between Stinson's teeth and the bite marks inflicted on Cychosz's body." (SFOF ¶ 203; Resp. to SFOF ¶ 203.) According to Bowers, Johnson "went to extreme efforts" to fit Stinson's missing tooth number 8 onto the bite mark patterns. (SFOF ¶ 205.) Also, Bowers found with respect to a small bite on the abdomen (Bite 2), that Johnson and Rawson ignored the tooth size and position of the upper teeth; Stinson's tooth 8, which was broken to the root, could not create a mark on the victim's skin without significant damage occurring in the skin by the adjacent teeth, but such damage did not occur in Bite 2. (SFOF ¶ 206.) According to Bowers, "[t]rained forensic odontologists such as Johnson and Rawson would not make a mistake like this because one of the most fundamental principles in an odontologist's analysis of bite mark injury patterns is that an individual's tooth position and tooth size must correlate or correspond in a significant alignment with the bitemark pattern." (Doc. 112 Ex. M ¶ 19; *see* SFOF ¶ 207.) Bowers found that Johnson and Rawson actually mislabeled the upper and lower arches on Bite 2 and that they would be expected to not make such an obvious mistake. (SFOF ¶¶ 208, 209; Doc. 112 Ex. M ¶ 19.) According to Bowers, other errors occurred as well. (*See* SFOF ¶ 211; SFOF ¶ 213; Resp. to SFOF ¶ 213.)

Bowers also found no scientific basis for Johnson to have excluded two suspects using only frontal photographs of their teeth. (SFOF ¶ 215.) And he wrote that it was impossible for Rawson within one hour to have reached the conclusion that Stinson's teeth produced the bite marks on Cychosz's body. (SFOF ¶ 217; Doc. 112 Ex. M ¶ 36.)

Gauger wrote a memoir entitled *The Memo Book* in which he chronicled his career as a police officer and detective with the Milwaukee Police Department. (SFOF ¶ 235.) The book was copyrighted in 2010. (SFOF ¶ 236; Resp. to SFOF ¶ 236; Doc. 112 Ex. AA at unnumbered 3.)

FEDERAL CLAIMS

A. State Actors and State Actions

To state a claim for relief under 42 U.S.C. § 1983 a plaintiff must show that (1) he was deprived of a right secured by the Constitution or laws of the United States, and (2) the defendants acted under color of state law. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Waubanascum v. Shawano Cnty.*, 416 F.3d 658, 665 (7th Cir.2005). Here, although the second element without question is met for Gauger, Johnson and Rawson dispute that they acted under color of state law. They argue that they cannot be sued under 42 U.S.C. § 1983 because they were private actors regarding all of their actions in Stinson's criminal case.

Acts under color of law are not limited to acts of state officials only; under certain circumstances the acts of private individuals may constitute state action. The state-action determination is made on a case-by-case basis considering the totality of circumstances. *Tarpley v. Keistler*, 188 F.3d 788, 793 (7th Cir.1999).

One scenario in which private persons act under color of law for § 1983 purposes is when they conspire with or act jointly with state officials. *Adickes*, 398 U.S. at 152; *Whitlock v. Brueggemann*, 682 F.3d 567, 577 (7th Cir.2012), *cert. denied, McFatridge v. Whitlock*, 133 S.Ct. 921 (2013); *Morfin v. City of East Chicago*, 349 F.3d 989, 1002-03 (7th Cir.2003); *Tarpley*, 188 F.3d at 791-92. The test is whether a "meeting of the minds" between the officer and the otherwise private actor occurred, *see Adickes*, 398 U.S. at 158, or whether the private party "so injected itself into the state action" that he can be held liable for that action, *Tarpley* 188 F.3d at 792 n. 2.

Proof of a conspiracy is rarely direct; conspiracy is often proved by circumstantial evidence. *See Hoskins v. Poelstra*, 320 F.3d 761, 764 (7th Cir.2003) (stating that a meeting of minds "may need to be inferred even after an opportunity for discovery, for conspirators rarely sign contracts"). In *Adickes* the Supreme Court found summary judgment improper where a police officer was present in the same restaurant as the waitresses who denied a white woman service while she was in the company of blacks. *See* 398 U.S. at 158. The woman alleged that the restaurant had conspired with the local police to deny her service. According to the

Court, "[i]f a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." *Id.* Similarly, in *Morfin* the Seventh Circuit found summary judgment inappropriate where, although no evidence of an overt agreement between a private individual and a police officer existed, the private individual's presence at the arrest scene, his urgent insistence that an arrest be made, and a sequence of events leading to arrest were enough that a reasonable juror could conclude that the private individual and officer had reached a meeting of minds. 349 F.3d at 1004.

Stinson gets to trial on the issue of state action. Construing the facts in Stinson's favor, Johnson, Gauger, and Jackelen met on or before the detectives' interview with Stinson. At the meeting, Johnson showed the detectives a sketch of the assailant's dentition. A later sketch by a police artist was similar to Johnson's sketch and shows a missing upper tooth one or two teeth to the right of the center tooth in the assailant's mouth. After this first meeting with Johnson, Gauger and Jackelen interviewed Stinson, who was missing his right central incisor (the right front tooth), and Jackelen told Gauger that they had their man. Following the interview of Stinson, Gauger and Jackelen again met with Johnson.

Thereafter, notwithstanding that the original sketch and the police artist's sketch showed a missing

tooth to the right of the central incisor, Johnson's analysis changed: a missing right central incisor, i.e., *front* tooth, rather than a lateral incisor now matched the bite marks. Johnson compared the bite marks on Cychosz's body to molds and impressions and photographs of Stinson's mouth and stated they fit, even though the prior evidence suggested that the missing tooth was to the right. Then, Johnson called Rawson and asked Rawson to become involved in the case as a second opinion. With very little time spent looking at the evidence, Rawson agreed with Johnson's analysis.

At trial, the testimony of Johnson and Rawson was dispositive. Other evidence included Stinson living in close proximity to the crime scene and a story on his whereabouts that was contradicted by other evidence, but the odontologists' testimony was the lynchpin of the prosecution's case.

Six forensic odontologists have since found that Johnson's and Rawson's opinions were grossly incorrect. Moreover, Bowers says that the errors were apparent even in light of the available scientific methods in the mid-1980s and that, in his opinion, trained odontologists would not make such mistakes, suggesting that the errors were made intentionally.

Although Stinson has not presented evidence of any express agreement between Gauger, Jackelen, and Johnson, the circumstantial evidence suggests an implied suggestion by the detectives to Johnson for the odontologist's opinion to confirm that Stinson was their man. Not until after the second meeting between

the detectives and Johnson did a missing right central incisor come into play. Johnson quickly disregarded two other potential suspects from photographs alone, which Bowers says was not scientifically sound. Taking the evidence in Stinson's favor, he never had a chance of being excluded, as Johnson changed his opinion to match Stinson after Stinson became Gauger and Jackelen's suspect. The detectives wanted the evidence to match Stinson's teeth. Evidence suggests the message was conveyed, whether expressly or impliedly, to the odontologist to opine in that manner, and Johnson complied. Thus, Johnson can be considered a state actor for § 1983 purposes. Here, the circumstances are more suggestive of a meeting of minds than was the case in *Adickes*. *See also Burke v. Town of Walpole*, 405 F.3d 66, 88 (1st Cir.2005) (finding a forensic odontologist consultant to the prosecutor to be a state actor for his review of bite mark evidence); *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir.1988) (finding sufficient evidence of conspiracy by a lab technician where she talked with one of the coconspirators several times by phone and afterward changed the file in which she placed her report).

Further, Johnson's role was one of delegated "public function." A private person may be deemed a state actor "if he performs functions that are 'traditionally the exclusive prerogative of the State.' " *Wade v. Byles*, 83 F.3d 902, 905 (7th Cir.1996) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974)). Johnson was called in to examine Cychosz's body similar to the medical examiner's doing

so. He made a sketch, molds, and impressions – acquiring or producing evidence for the State similar to a lab technician. The State could have had a forensic odontologist on its payroll but apparently did not. Instead, it hired third-party Johnson to perform that public function. Moreover, the fact that Johnson made the initial contact with Rawson supports the finding that Johnson was acting on behalf of the State at the time. Gauger, Jackelen, or Blinka could have called Rawson, but they gave that task to Johnson.

Rawson is a step removed, because he was contacted first by Johnson rather than the detectives. But by the time of the telephone call between the odontologists, Johnson had concluded that Stinson's dentition matched the bite marks. The facts support a reasonable jury finding that Johnson phrased the request for a second opinion as a request for confirmation of his own conclusion, and Rawson complied, as evidenced by the extremely short time it took him to confirm Johnson's findings at the hotel when Gauger and Jackelen arrived in Las Vegas. Bowers says a confirmation could not be made upon such a short review. Enough evidence exists on which a reasonable jury could find that a meeting of the minds occurred between Rawson and Johnson (acting on behalf of the detectives and prosecutor). That Gauger and Jackelen may have had different motives than Johnson or Rawson for pinning the crime on Stinson (animus after the Ricky Johnson murder and desire to close the Cychosz murder case quickly versus promotion of their own careers as bite mark experts), is immaterial.

B. Absolute Immunity

Next, Johnson and Rawson claim absolute immunity from liability because they were testifying witnesses. In response, Stinson clarifies that he sues them for manipulating evidence and falsifying their opinions during the investigatory phase of the homicide case; Stinson does not sue them for providing testimony at trial. (Doc. 110 at 37.)

Absolute immunity is exceptional and is to be applied sparingly in the § 1983 context. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). The official seeking absolute immunity bears the burden of establishing that it is justified. *Id.* The Supreme Court has directed a "functional approach" for absolute immunity, meaning that the court must look at the nature of the function performed rather than the identity of the actor who performed it. *Id.* For instance, when a prosecutor functions as an advocate in evaluating evidence, interviewing witnesses, and otherwise preparing for judicial proceedings or trial, he or she is absolutely immune. But if the prosecutor functions as a detective in searching for clues and corroboration that may generate probable cause to seek arrest, no absolute immunity applies. *See id.* at 273-74.

Absolute immunity for trial testimony applies even when testimony is perjured. *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). Public policy protects witness testimony because immunity promotes discovery of the truth in court; witnesses

might avoid testifying if they feared subsequent liability. *Id.* at 333. But the same rationale does not operate to protect pre-testimonial, investigatory actions. For those actions, only qualified immunity is available. *See Buckley*, 509 U.S. at 273-74; *Whitlock*, 682 F.3d at 580. Even a prosecutor does not enjoy absolute immunity before he or she has probable cause to arrest someone. *Buckley*, 509 U.S. at 274; *Whitlock*, 682 F.3d at 579. And a determination of probable cause does not guarantee absolute immunity for all actions afterward; the prosecutor may still engage in investigative work protected by qualified immunity only. *Buckley*, 509 U.S. at 274 & n. 5; *see Gregory v. City of Louisville*, 444 F.3d 725, 740-41 (6th Cir.2006) (rejecting forensic examiner's argument that she had absolute immunity for actions after probable cause was established).

The same is true of state-actor expert witnesses working with the police and prosecutor; their immunity is no greater than a prosecutor's. *Gregory*, 444 F.3d at 741 ("It would be incongruous for this Court to grant a forensic examiner greater protection for her investigatory acts than the Supreme Court has seen fit to grant to prosecutors for the same."). Thus, none of Johnson's actions or Rawson's actions before probable cause to arrest Stinson existed are covered by absolute immunity. And the time at which probable cause developed is a factual question. *See Whitlock*, 682 F.3d at 579-80. Actions occurring after the existence of probable cause must be analyzed based on the expert's function at that time. That Johnson and Rawson testified

at trial months later "does not wipe away [their] involvement in the investigation at its earliest stages." *Id.* at 578; *see Buckley*, 509 U.S. at 276 ("A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial. . . .").[13]

In *Keko v. Hingle*, 318 F.3d 639, 642-44 (5th Cir.2003), the Fifth Circuit denied absolute immunity to a forensic odontologist for actions of examining the victim's body, obtaining and examining Keko's dental

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[13] In the case below, the Supreme Court's *Buckley* decision, the Seventh Circuit found three expert witnesses were absolutely immune for "pretrial activities" such as evaluating a bootprint, writing expert reports, discussing the case with prosecutors, and preparing to testify. But those activities appear mainly related to the experts' trial testimony. *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1244-45 (7th Cir.1990) ("[T]he testimony is the real gravamen of [Buckley's] complaint."). And to the extent that such pretrial activities related to the investigatory phase of the case, the opinion must be discounted in light of the Supreme Court's decision regarding the prosecutor. *See Keko v. Hingle*, 318 F.3d 639, 644 n. 8 (5th Cir.2002) ("The expert witnesses were granted absolute immunity in *Buckley*, *supra*, [919 F.2d 1230,] but as the court's opinion granting absolute immunity to the prosecutors in that case was overturned by the Supreme Court, the status of his comparable decision for the experts seems uncertain."); *cf. Gregory*, 444 F.3d at 741 ("It would be incongruous for this Court to grant a forensic examiner greater protection for her investigatory acts than the Supreme Court has seen fit to grant to prosecutors for the same."). Moreover, even the Seventh Circuit's *Buckley* decision recognized that a suspect's rights could be violated by an expert's " 'cooking' a laboratory report in a way that misleads the testimonial experts." 919 F.2d at 1245.

impressions, and writing a report stating that Keko's dental impressions corresponded with bite marks on the victim. Similarly, the Sixth Circuit has stated that expert forensic examiners act in an investigatory fashion when they interpret and document physical evidence. *Gregory*, 444 F.3d at 740. Further, said that court:

> [u]nder the Supreme Court's functional test, the pre-trial investigatory acts by forensic examiners merit no more protection under absolute immunity than do other persons performing investigatory actions. This Court sees no reason to treat the intentional fabrication of a forensic report differently from the intentional fabrication of a police officer or prosecutor.

Id.

Here, Johnson was deeply involved in the investigatory phase of the state's prosecution of Stinson. He collected the bite mark evidence as well as the molds and impressions of Stinson's teeth. Johnson's role in late 1984 and early 1985 was to determine whether Stinson's and two or three others' teeth were consistent or inconsistent with the bite marks. Such determination of which individuals were excluded or included as suspects was a separate function from his expert testimony at trial, and for the former role absolute immunity does not apply.

Similarly, a reasonable jury could find that Rawson's actions in January 1985 were part of the investigatory phase prior to Stinson's arrest. Rawson was brought in to confirm Johnson's conclusion that Stinson had inflicted the bite marks to support a finding of probable cause to arrest; Rawson's initial conclusion that Stinson's teeth matched the bite marks could be considered part of the investigatory phase of the case. Although Blinka may have thought he had probable cause before Rawson's opinion, he and Johnson's desire for a second opinion suggests the opposite, creating a jury question. And whether Rawson's further review of evidence following Stinson's arrest and the probable cause hearing constituted investigatory or testimonial work cannot be determined on the present record. That Rawson restated his opinion in an expert report on the verge of trial, possibly as part of trial preparation, cannot immunize his prior actions in generating that opinion during the investigatory phase, before Stinson was arrested. In sum, the court cannot find as a matter of law that either odontologist has absolute immunity from Stinson's suit.

C. Qualified Immunity

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *accord Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808,

172 L.Ed.2d 565 (2009). The doctrine balances the need to hold public officials accountable when they exercise power irresponsibly with the need to shield officials from distraction and liability when they perform their duties reasonably. *Pearson*, 555 U.S. at 231. Qualified immunity protects a defendant from suit unless (1) the plaintiff has established a violation of a constitutional right and (2) that right was "clearly established" at the time of the defendant's alleged misconduct. *Id.* at 232. The court may address either step first. *Id.* at 236. To be "clearly established," a right "must be specific to the relevant factual context of a cited case and not generalized with respect to the Amendment that is the basis of the claim." *Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir.2008). However, the very act in question need not have previously been held unlawful for a public official to be on notice. *Id.*

Stinson asserts several theories of liability under federal law, all stemming from the odontologists' opinions. First, he suggests that defendants violated his due process right to a fair trial by fabricating the primary evidence of his guilt, i.e., the expert opinions that his dentition matched the bite marks on Cychosz's body. Second, he offers that defendants violated his right to due process by failing to disclose *Brady* evidence[14] by withholding from him their agreement to fabricate the opinion evidence. Third, he submits that each defendant failed to intervene to prevent the others' misconduct. And fourth, he contends that the

[14] *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

defendants conspired to deprive him of his constitutional rights.

1. Due Process

The Seventh Circuit has "consistently held that a police officer who manufactures false evidence against a criminal defendant violates the due process clause if the evidence is later used to deprive the defendant of her liberty in some way." *Whitlock*, 682 F.3d at 580; *see Dominguez v. Hendley*, 545 F.3d 585, 589 (7th Cir.2008) ("There was and is no disputing that such conduct [fabricating evidence and withholding exculpatory evidence from the defense and prosecutor] violates clearly established constitutional rights."); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir.1988). In *Jones*, the plaintiff had been wrongly accused of murder and brought to trial based on a fabricated report by police officers and a fabricated serology report by a lab technician. A detective had written a report based on new evidence he had discovered that led him to believe that the wrong individual had been charged, but that information was removed from the final police report. And the lab technician had found that plaintiff had different semen and blood type than that found on the victim but excluded this information from the lab report she prepared for the prosecution. 856 F.2d at 991. Both the officer and lab technician were held liable for their misconduct.

Defendants contend that no physical evidence was actually fabricated and that all of that physical evidence was available to Stinson and his defense team. Also, Gauger and Rawson maintain that they did not create any of the bite mark or dentition evidence – Johnson did. However, Stinson does *not* contend that the physical evidence (such as photographs, molds, and impressions) was fabricated or physically tampered with. (Doc. 110 at 49.) Instead, he contends that the odontologists' *opinions* were fabricated through intentional manipulation or misreading of physical evidence. Moreover, he contends that Gauger conspired with the odontologists to achieve those opinions.

Stinson has sufficient evidence to get to trial. As discussed above, Johnson altered the identification of the missing tooth following discussion with Gauger and Jackelen on November 15, 1984, *after* they interviewed Stinson. Then, Johnson called Rawson who subsequently concurred with his stated opinion. Further, according to Bowers, Johnson and Rawson had to have known that Stinson was excluded from causing the bite marks on Cychosz because of obvious differences between Stinson's teeth and the bite mark patterns. *See Gregory*, 444 F.3d at 745 n. 9 ("Plaintiff offers expert opinion that the evidence presented to Katz for analysis does not and could not support the conclusions that Katz reached. Plaintiff's expert provides proper testimony as to what a reasonable forensic examiner would do with hair examinations and an expert assessment of the evidence presented to Katz."). Bowers's opinion that Johnson's and Rawson's conclusions

were far afield of what a reasonable forensic odontologist would have concluded supports a reasonable jury finding that Johnson and Rawson fabricated their opinions.

Moreover, qualified immunity does not apply, as the law as of 1984 and 1985 clearly established that an investigator's fabrication of evidence violated a criminal defendant's constitutional rights. In *Whitlock*, the Seventh Circuit held that by February 1987 it was clearly established that prosecutors could not fabricate evidence during an investigation. 682 F.3d at 585-86. But such a due process violation existed before February 1987 as well. The *Whitlock* court pointed to *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), and its progeny for this holding, meaning that the right had been clearly established for some time. Moreover, in *Brown v. Miller*, 519 F.3d 231, 237 (5th Cir.2008), the Fifth Circuit held that the deliberate creation of a scientifically inaccurate serology report violated due process "and that a reasonable laboratory technician in 1984 would have understood that those actions violated those rights." In *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir.2001), the Ninth Circuit said that the due process right not to be subjected to criminal charges on the basis of evidence deliberately fabricated by the government was "virtually self-evident" even if no prior cases had expressly recognized it. The First Circuit wrote that "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and

framing individuals for crimes they did not commit. Actions taken in contravention of this prohibition necessarily violate due process. . . ." *Limone v. Condon*, 372 F.3d 39, 44-45 (1st Cir.2004).

Regarding Stinson's other due process theory, *Brady* applies when one asserts that he did not receive a fair trial because of the concealment of exculpatory evidence in existence and known at the time of that trial. *Whitlock*, 682 F.3d at 588. Defendants contend that no evidence was suppressed during Stinson's criminal case because the relevant photographs, overlays, and molds were not fabricated and all were available to Stinson prior to trial such that he could have discovered the errors in 1985. Again, as discussed above, the alleged fabrication or manipulation is not of the physical evidence, but of Johnson's and Rawson's opinions. The falsity of those expert opinions can be considered exculpatory evidence known to the defendants. That the physical evidence was available to Stinson is not dispositive because Stinson was not privy to Johnson's and Rawson's disputed adjustment of the physical evidence to create a match to Stinson's dentition. When *Brady* material is contained in someone's mind it cannot be considered available in the same way as a document or other item of physical evidence. *Boss v. Pierce*, 263 F.3d 734, 741 (7th Cir.2001). Plus, Stinson was not privy to the conversations between Gauger and Johnson and then Johnson and Rawson in which a desired result in the opinions was implied. Although the topic was not discussed in *Jones*, the lab technician in that case was held liable even though the hair

samples she tested likely were available to the defense. Likewise here, the availability of the physical evidence to Stinson does not cure the failure of defendants to inform Stinson of what they did with the evidence and what they discussed regarding the opinions. Further, the pool of experts in the forensic odontology bite mark field was small, meaning that Stinson's ability to find an appropriate expert to review the physical evidence was impeded. Stinson says his defense team located an expert in identifying a deceased through dental records, not in matching dentition to bite marks.

Gauger argues that even if the odontologists fabricated evidence, he was not aware of it, as he is not a dental expert. However, taking the facts in Stinson's favor, Gauger was cognizant of Johnson's shifting view of which tooth was missing and he was fully aware of the contents of his conversations with Johnson and what he implied in their second meeting, following his and Jackelen's interview of Stinson.

Here, the withheld evidence was material. The odontologists' opinions were the key evidence at trial. Other evidence included the proximity of Stinson's residence to the murder scene and some contradictions regarding his whereabouts the night of the murder. But a reasonable jury could find that the odontologists' opinions linking Stinson to the bite marks were the lynchpin of his conviction. Moreover, *Brady* evidence includes impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). And the credibility of Johnson and Rawson was extremely important at the criminal trial.

Here, too, there are credibility questions that preclude summary judgment. On summary judgment, the district court cannot decide credibility, weigh the evidence, or decide which inferences to draw; those actions are the province of the jury at trial. *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir.2003). Therefore, in this case the jury will have to decide whether Gauger, Jackelen, and Johnson, and then Rawson, impliedly agreed that the odontologists would opine that Stinson's dentition matched the bite marks. The evidence in the record about Johnson's shift regarding which tooth was missing after the detectives thought they had their man, the lack of a sketch at the John Doe hearing, Johnson's call to Rawson, Rawson's extremely brief initial review of the physical evidence in Las Vegas, and the existence of gross errors in Johnson's and Rawson's review of the physical evidence (which another expert says could not be honestly made) provides enough to allow Stinson to get Johnson, Rawson, and Gauger before the jury for evaluation.

Further, it was clearly established by 1984 that the withholding of information about fabricated evidence constituted a due process violation. The Seventh Circuit held in *Newsome v. McCabe*, 256 F.3d 747, 752-53 (7th Cir.2001), that it was clearly established by 1979 (and likely earlier) that police could not withhold from prosecutors exculpatory *Brady* evidence and that qualified immunity did not protect the officers in a § 1983 suit for such a violation.

2. Failure to Intervene

A person may be held liable for failing to intervene if the individual had reason to know that a constitutional violation was being committed and a realistic opportunity to prevent the harm from occurring. *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir.1994). For the reasons previously discussed, each defendant had reason to know, based on the facts and law, that a constitutional violation was being committed by the other defendants and possibly Jackelen. Moreover, the evidence shows that at any time any of the defendants could have prevented the harm by telling what he knew to ADA Blinka, DA McCann, the court, or Stinson's defense team.

A failure-to-intervene claim is dependent on the issue of whether a constitutional violation occurred in the first place. *See Stainback v. Dixon*, 569 F.3d 767, 771 (7th Cir.2009). With respect to this case, the law regarding the due process violations was clearly established by 1984. Further, in 1972 the Seventh Circuit recognized a failure-to-intervene claim against a police office[r] for failure to stop other officials from violating constitutional rights. *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir.1972). ("[O]ne who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge."). By 1984, liability for an official's failure to intervene in a manipulated-evidence case such as Stinson's was clearly established.

3. Conspiracy

To be liable as a conspirator one "must be a voluntary participant in a common venture, although you need not have agreed on the details of the conspiratorial scheme. . . . It is enough if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them." *Jones*, 856 F.2d at 992-93. The question of whether an agreement exists should not be taken from a jury in a civil conspiracy case if the jury can possibly infer from the evidence that the alleged conspirators had a "meeting of the minds" and reached an understanding to achieve the conspiracy's objectives. *Cameo Convalescent Ctr., Inc. v. Senn*, 738 F.2d 836, 841 (7th Cir.1984). For the same reasons as discussed above regarding state action, a question of fact exists as to whether a meeting of minds occurred among any of the defendants and, perhaps Jackelen, concerning one or both of the odontologists' opinions.

In *Jones*, the Seventh Circuit found the defendants liable on a conspiracy claim of "railroading" an individual in a criminal case. The conduct for which they were held liable occurred in 1981 and included *Brady* violations among other acts. Thus, the law of conspiracy under § 1983 was clearly established by late 1984.

SUPPLEMENTAL CLAIMS

Stinson asserts state-law claims of intentional misrepresentation (count VII), negligent misrepresentation (count VIII), negligent infliction of emotional

distress (count IX), intentional infliction of emotional distress (count X), and malicious prosecution (count XI), plus indemnification (count XII). Because the federal claims survive, dismissal of the supplemental claims under 28 U.S.C. § 1367 is unwarranted. Gauger bases his request for dismissal solely on the supplemental jurisdiction statute, so consideration of his summary judgment motion ends here.

Johnson and Rawson attack the state claims on the basis of absolute testimonial immunity. In *Bergman v. Hupy*, 64 Wis.2d 747, 221 N.W.2d 898 (1974), the Supreme Court of Wisconsin set forth four categories of communications afforded privilege. Pertinent to this case, (1) all words published or spoken by witnesses during judicial proceedings are absolutely privileged "if relevant to the issues in the matter where the testimony is given;" (2) statements made to law enforcement officers are conditionally privileged, meaning that they are privileged if made for the purpose of apprehension or conviction of someone and made in good faith without malice; and (3) statements made to a grand jury or district attorney relating to matters being investigated are absolutely privileged, even if the statements are malicious or false. *Id.* at 749-53, 221 N.W.2d 898. This last category includes statements made in a John Doe investigation or to an assistant district attorney seeking issuance of a criminal complaint. *Id.* at 753-54, 221 N.W.2d 898.

As discussed above, Stinson concedes that he does not seek liability for Johnson's or Rawson's statements

made during trial. Instead, he focuses on the odontologists' fabrication of opinions during the investigation. This court cannot grant summary judgment regarding all of the odontologists' statements or actions outside of the trial. Though some conduct in the end may be parsed out (such as that in the John Doe proceeding or relating to the criminal complaint), the facts are not clear enough at this time for the court to make statement-by-statement rulings regarding which statements can be considered made to law enforcement versus to the assistant district attorney. Johnson and Rawson interacted with Gauger and Jackelen before they talked with Blinka. Taking the facts in Stinson's favor, Johnson and Rawson were part of the law enforcement team. Thus, their investigative words are protected by a conditional privilege only, which was forfeited if they knew the statements were false or they otherwise acted in bad faith. Because a reasonable jury could find that Johnson and Rawson acted with knowledge of the falsity of their stated opinions and with bad faith, summary judgment must be denied. Moreover, Johnson and Rawson are sued not only for their statements and related actions but for conspiracy and their failure to disclose exculpatory evidence or to intervene. Those claims fall outside of *Bergman's* discussion of privileged communications.

Finally, Rawson argues that he deserves summary judgment on Stinson's malicious prosecution claim because he did not have prosecutorial powers and there is no evidence of malice. One element of the malicious prosecution cause of action is that prior proceedings

"must have been by, or at the instance of the defendant in this action." *Pollock v. Vilter Mfg. Corp.*, 23 Wis.2d 29, 37, 126 N.W.2d 602 (1964). As discussed above, sufficient evidence suggests that Rawson conspired with Gauger and Johnson to accuse Stinson of murder by virtue of the false expert opinion reports that matched Stinson's teeth to the bite marks, and Gauger could be seen as heavily involved in the institution of proceedings. Moreover, "[o]ne who gives to a third person . . . information of another's supposed criminal conduct . . . causes the institution of such proceedings as are brought by the third person." Restatement (Second) of Torts § 653 cmt. d. Here, the prosecution wanted a second opinion before instituting charges against Stinson, and Rawson's opinion provided the information that triggered criminal charges and Stinson's arrest. Although in the end it could very well be that Rawson's actions did not so influence Blinka in bringing charges, *see id.* ("The giving of the information or the making of the accusation, however, does not constitute a procurement of the proceedings that the third person initiates if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit."), the jury can decide the matter. As for the element of malice, the evidence is slim, but sufficient for present purposes. Bowers has opined that such gross errors were made that they should not be deemed accidental. And Rawson could be seen as wanting to boost his and his friend Johnson's careers at the expense of Stinson. For now, the claim will continue.

CONCLUSION

For the reasons set forth above,

IT IS ORDERED that the motions for summary judgment filed by Rawson (Doc. 90), Johnson (Doc. 96), and Gauger and the City (Doc. 100) are denied.

IT IS ORDERED that the parties appear in person on Monday, October 28, 2013, at 2:00 p.m. to discuss a trial date and mediation.