

No. 17-1572

IN THE
SUPREME COURT OF THE UNITED STATES

LUCAS PETERSON, ET AL.,

Petitioners,

v.

WALTER FRANKLIN, II, TRUSTEE FOR THE ESTATE OF
TERRANCE TERRELL FRANKLIN,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Court grant certiorari to consider whether the Eighth Circuit Court of Appeals has jurisdiction to hear an interlocutory appeal based on a district court's denial of summary judgment because factual inconsistencies in the record preventing the court from making a legal determination?

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INTRODUCTION

Petitioners seek review of an order by the Eighth Circuit to deny interlocutory appeal. The Eighth Circuit stated it had no jurisdiction to hear such an appeal because the order Petitioner's sought to have reviewed was a determination by the district court that the high number of factual discrepancies in the record precluded summary judgment for Petitioners on the issue of qualified immunity.

The underlying issue is whether Terrance Franklin was justifiably killed by an officer of a Minneapolis SWAT team, on May 13, 2013. Franklin's death occurred in the basement of a Minneapolis home where the only surviving witnesses are the members of the SWAT team, making theirs the only firsthand accounts available for the district court to consider. However, circumstantial evidence presented by Respondent cast doubt on Petitioners' version of events such that both accounts could not be simultaneously true. Because of this inability to establish the relevant facts, the district court ruled summary judgment was impossible. It was this determination by the district court—that there was insufficient evidence to decide whether summary judgment was appropriate — that Petitioners sought to have reviewed by the Eighth Circuit, were subsequently denied that review, and now ask this Court to review.

COUNTERSTATEMENT OF THE CASE

Petitioners' description of the events which transpired in the Bickal home (hereinafter referred to as "the basement") immediately preceding

Franklin's death are mistaken. The discrepancies between Petitioners' account of what occurred and circumstantial evidence disputing those accounts, are at the very heart of this case.

Respondent will highlight the disputed "facts" which Petitioners alleges occurred in the basement. It is disputed that Franklin refused to comply with officers' commands to show his hands when he was discovered in the basement; that Franklin did not react after being struck in the head by officer Stender; that after being punched and struck with a flashlight in the head by officer Stender and ordered to come out from behind the heater, Franklin still refused to comply; that officers Peterson and Durand heard officer Meath say to Franklin "are you grabbing for my gun?"; that Franklin "forced his way out of the closet" past officer Meath and then struck officer Peterson in the face; that Franklin resisted arrest with such force his dreadlocks were ripped out; that Franklin was then able to tackle officer Durand into an adjacent laundry room and as the two were falling Franklin gained control over Durand's sub-machine gun, pulled the trigger twice, and each of the two bullets struck a different officer, Meath and Muro, in their respective legs; that officer Duran then yelled "He's got a gun!"; that Franklin then gained control over the submachine gun to the extent he could point it at officer Peterson; and it is disputed that officer Peterson reached out in the darkness of the basement to locate Franklin's head before firing the fatal bullets into his head and body. *Franklin v. Peterson*, CV 14-1467 (DWF/JSM), 2016 WL 6662679, at *1-3 (D. Minn. Nov. 10, 2016),

appeal dismissed sub nom. Franklin for Estate of Franklin v. Peterson, 878 F.3d 631 (8th Cir. 2017).

A video (hereinafter referred to as the “Gaines video”) recorded by a bystander outside the Bickal home and the subsequent expert analysis of the Gaines video audio (hereinafter referred to as the “Primeau analysis”) indicate the events of May 13, 2013 proceeded much differently. In fact, these two sources indicate that timeline for Franklin’s death, according to Petitioners, is entirely wrong. The Primeau analysis of the Gaines video concluded that up to seventy seconds passed in between the initial gun shots when officers Meath and Muro were shot, and the gun shots which killed Franklin.

Petitioners also fail to describe how the MP5 submachine gun which Franklin allegedly had wrested control of from officer Durand, had absolutely none of Franklin’s blood on it. The Minneapolis police department’s analysis of the MP5 found no traces of Franklin’s blood on the weapon. The importance of this fact is highlighted by the evidence that the laundry room where Franklin was killed, was covered in his blood due to the multiple gun shots to his head and body. The facts indicate that Terrance Franklin was killed seventy seconds after Meath and Muro were shot, while Franklin was completely unarmed and posed no threat.

REASONS FOR DENYING THE WRIT

There are three reasons to deny certiorari. First, Petitioners’ writ for certiorari misrepresents the facts of the case and therefore describes a legal

question which is not actually presented to this Court. Second, the *Franklin* court faithfully applied this Court's precedent. Third, any alleged split in the circuit's interpretation of this Court's precedent is not present in the case at bar.

- 1. The questions presented by the Petitioners are inappropriate for review by the United States Supreme Court because they are based on the false premise that the district court assumed certain facts to be true when instead the district court could not find a clear set facts to be true.**

This Court is not presented with a situation where the appellate court refused to apply the law to the facts, viewed most favorable to the non-movant, as Petitioners assert. Instead, the district court found that there was a question as to the credibility of the facts presented by the Petitioners, and therefore there was no set of facts that could be applied. Thus, the entire foundation for Petitioners' Writ of Certiorari is built upon the misinterpretation of the district court's opinion, which leaves no question for this Court to decide.

The Eighth Circuit found that "because the relevant legal inquiry is whether the officers believed that Franklin posed a threat of serious physical harm, and there was a *question as to whether the version advanced by the officers was true*, the district court denied qualified immunity in this case." *Franklin for Estate of Franklin v. Peterson*, 878 F.3d 631, 636 (8th Cir. 2017).

Petitioners argue the district court assumed the police officers' testimonies were true because they were "uncontroverted." In other words, Petitioners assert that because there were no eyewitnesses and the plaintiff is dead, every word of the police officers' stories must be assumed to be true. However, Petitioners also acknowledge the district court assumed that two facts presented by the Respondent were true: there was a seventy second gap between the shots fired according to the Gaines video and there was no blood on the MP5 weapon. *Franklin v. Peterson*, CV 14-1467 (DWF/JSM), 2016 WL 6662679, at *4 (D. Minn. Nov. 10, 2016). In spite of the district court's acknowledgment of the seventy second gap and the lack of blood on the MP5, Petitioners still maintain the officers had reasonable cause to shoot Terrance Franklin ten times based on the officer's version of events.

The problem with Petitioners' premise is that Respondent's facts and Petitioners' facts cannot be reconciled, meaning they cannot both be assumed to be true at the same time. As the law requires, assuming the facts most favorable to the Respondent (the non-moving party), the evidence presented by Respondent calls into question the entire veracity of the officers' stories, as both the Eighth Circuit and District Court determined.

Compared to the Petitioners' version of events, it is just as plausible that Terrance Franklin was executed in cold blood in the basement. That rather than shaking off a 70 pound police dog; charging through multiple highly trained and armed SWAT officers; gaining control of an MP5 strapped to one of

those officer's body; firing twice, with each bullet striking an officer in the leg, all while falling in the air; instead Terrance Franklin was taken to the laundry room in the basement and executed. It is plausible that seventy seconds after officers Meath and Muro were shot, however that came to happen—both officers have testified do not know how they were shot—Terrance Franklin, unarmed, and posing no threat, was shot 10 times.

The Gaines video contradicts the police officers' version of events. The order of events from the video, and outlined by the court, is significant. First the phrase "officer shot" is heard at 11 seconds *then* a command "come out and put those hands up now" is heard at 43 seconds later *then* more shots at 53 seconds. *Franklin*, 2016 WL 6662679, at *2. According to deposition testimony from the person who stated "officer shot" in the video, shots had been fired thirty seconds prior to that statement. Evidence suggests the officers were upset two of their fellow officers were shot and in retribution, killed Franklin.

Together, this demonstrates a gap of over 70 seconds between when shots were fired, which is wholly and completely inconsistent with the officers' stories. The Petitioners depict a story where Respondent had control of the gun, shot the officer, and the officers immediately responded by firing back. The evidence from the Gaines video calls Petitioners' depiction of events into serious question. If the officers are lying about the order of events, then this would give strong evidence that would discredit any and every other element of their story.

A jury may reasonably infer that the officer's credibility is at issue if the officers lied about some of the facts the jury may reasonably infer their entire story is based upon lies.

In addition to the significant factual discrepancy of the timeline, which undermines the entirety of the officers' stories, there is also no blood on the gun that Franklin allegedly used to shoot the other officers. The lack of any blood on the MP5 which according to Petitioners was held by, or in close proximity to Franklin when he was shot 10 times, disputes the veracity of Petitioners' story. As the district court correctly noted there is "at least" circumstantial evidence that Franklin was neither in possession of the MP5 nor in the vicinity of the MP5 when the officers used deadly force against him, which would preclude summary judgement." *Franklin*, 2016 WL 6662679, at *4. The crucial determination for whether excessive force was used is whether or not the officer believed a threat existed at the time he exercised force. If Franklin was nowhere near a gun, a jury could find that no threat existed when he was shot and the officers therefore employed excessive force.

The fatal flaw in Petitioners' argument is it rests on the assumption the officers' stories are uncontroverted. Petitioners' writ for certiorari argues that even if certain of Respondent's facts are true—that there was a 70 second delay and there was no blood on the gun—Petitioners must win because all of the other facts are true and uncontested. Petitioners are mistaken because if one fact falls then all the facts and it calls into question

the entirety of the officers' stories, and disputed facts are meant to be decided by a jury. *Leiendecker v. Asian Women United of Minnesota*, 895 N.W.2d 623, 636 (Minn. 2017).

As the Court knows, Federal Rule of Civil Procedure 56 requires facts and inferences in a summary judgment motion to be made most favorably to the non-movant. Here, the facts most favorable to the Respondent are that the entirety of the officers' stories is a lie: Franklin did not touch the gun, that 70 seconds did pass, and thereafter the officers executed Franklin in cold blood. The Appellate Court correctly stated that they cannot at this juncture make 'inferences' based upon the facts presented—a decision entirely consistent with *Johnson v. Jones*, as will be illustrated in the following section. *Johnson v. Jones* 515 U.S. 304, 315, 115 S. Ct. 2151, 2158, 132 L. Ed. 2d 238 (1995). Because Petitioners have wholly misinterpreted the district court's opinion, its entire argument fails and there are no questions before this Court that are ripe for review.

2. The Eighth Circuit's decision to deny interlocutory appeal follows Supreme Court precedent.

In the case at bar, the Petitioners seek to have an evidentiary dispute heard on interlocutory appeal. This is plainly untenable under the Court's prescribed framework. Petitioners incorrectly state that both the Eighth Circuit Court of Appeals, and the district court gave an "overly broad" interpretation of *Johnson* which allows the district court to "shield its denial of qualified immunity from

any meaningful appellate review.” To the contrary, *Franklin for Estate of Franklin v. Peterson*, properly refused to consider the Petitioners’ interlocutory appeal, for want of jurisdiction. 878 F.3d 631 (8th Cir. 2017). The *Franklin* court grounded its decision in clear precedent handed down by this Court. Petitioners ask this Court to review a decision which dutifully followed Supreme Court jurisprudence and as such, there is no issue for this Court to consider and Petitioners’ request for certiorari should be denied.

Johnson provides three reasons why an appellate court has no jurisdiction to hear an interlocutory appeal on an order regarding factual disputes. 515 U.S. 304, 315, 115 S. Ct. 2151, 2158, 132 L. Ed. 2d 238 (1995). First, only “clearly established” legal issue are properly heard on interlocutory appeal and a factual dispute by its very nature prevents the court from deciding a legal issue. *Id.* Second, factual disputes do not allow the appellate court to rule on an issue separate from the underlying merits of the case. *Id.* By ruling on a factual dispute indistinguishable from the underlying merits of the case, appellate courts would be forced to make what is essentially a final ruling on the case, with an inchoate record. *Id.* Third, an appellate court has no particular expertise as compared to a district court when it comes to determining the facts of any given case and it is therefore an inefficient use of the appellate court’s time and resources to attempt to do so. *Id.* at 316. The *Franklin* court’s decision not to permit an interlocutory appeal is absolutely in concert with *Johnson* and all three reasons *Johnson* stated orders

regarding factual disputes do not vest appellate courts with interlocutory jurisdiction, are firmly present in the case at bar.

First, there was no “clearly established” question of law decided by the district court, which would grant the appellate court jurisdiction. As stated by *Johnson*, a district court concluding “it is not clear what happened or what the parties will prove” is not an appealable decision. 515 U.S. at 313, 115 S.Ct. 2151. That however is exactly the sort of determination Petitioners seek to have heard on interlocutory appeal. The absence of a coherent factual record made it impossible for the *Franklin* court to rule on “the relevant legal inquiry [of] whether the officers believed that Franklin posed a threat of serious physical harm.” *Franklin*, 878 F.3d at 637. The *Franklin* court explained that “at no point did the district court deem particular facts undisputed, nor did it conduct a legal analysis based upon assumed facts.” 878 F.3d, at 636. The district court did “not determin[e] that [a] precise moment was determinative in the constitutional analysis, but rather that based on the evidence presented by the estate, the court simply could not determine whether the evidence presented supported a finding that the officers faced a threat of serious physical harm.” *Id.* Indeed, the Petitioners’ argument for summary judgment was not that even with all inferences made most favorably to Respondent they prevailed; rather Petitioners argued “the inferences raised by the estate from the evidence presented are not plausible—a *factual dispute*.” *Id.* at 637. (emphasis added). Rather than ruling on a legal issue, the district court determined the high number of factual

disputes made it impossible for a legal judgment to be rendered. *Id.* at 638. There was no conclusive determination that would allow for an appeal.

Second, because of factual disputes in the case at bar, the question of qualified immunity is not distinguishable from the underlying merits of the case. The underlying matter at issue is whether the Petitioners' use of deadly force against Franklin was proper. *Id.* at 636. That question is synonymous with the question of what actually transpired between Franklin and Petitioners in that basement. As of now, neither of those questions can be answered because the facts have not been established, "the precise question for trial is the factual question, an issue which is inseparable from, and necessarily informs, the legal one." *Franklin*, 878 F.3d at 638; *Citing Johnson*, 515 U.S. at 314- 18, 115 S.Ct. 2151. In essence the appellate court is being asked to review the sufficiency of evidence presented to *support* a claim of qualified immunity which it does not have jurisdiction to do on an interlocutory appeal. Third and finally, the efficiency concerns expressed by *Johnson* are clearly present here. There is no indication the *Franklin* appellate court would be better suited in terms of expertise or resources to sift through the inchoate factual record, rather than the district court.

In light of relevant precedent, it becomes clear the decision by the *Franklin* court to not consider Petitioners' interlocutory appeal was proper. Indeed, it was frankly a mundane decision. There is no conflict between the Supreme Court's jurisprudence on this issue and the *Franklin* court's ruling and as

such the Petitioners' petition for certiorari should be rejected.

3. Any alleged conflict between the circuits' interpretation of *Johnson* is irrelevant to the case at bar.

Petitioners' claim that a schism exists between the interpretations of *Johnson* by the tenth circuit in *Walton* and the sixth circuit decision in *DiLuzio* have no legal significance here. *Walton v. Powell*, 821 F.3d 1204 (10th Cir. 2016); *DiLuzio v. Vill. of Yorkville, Ohio*, 796 F.3d 604 (6th Cir. 2015). To clarify, Respondent takes no position on whether or not there is a split between circuits, rather, Respondent asserts under *either* circuit's calculation of *Johnson*, the *Franklin* court's decision was proper, making Defendants' claim of a split irrelevant to these proceedings.

DiLuzio and *Walton* affirm the simple principle that questions of factual determination are not properly heard on interlocutory appeal. This is the precise basis on which the appellate court denied Petitioners' appeal: the district court was unable to determine the facts of the case. The holdings of both *DiLuzio* and *Walton* present no conflict to the *Franklin* decision and indeed affirm it.

Walton states that "*Johnson* only forecloses courts of appeals from reconsidering a district court's assessment of 'evidence sufficiency, i.e., which facts a party may or may not, be able to prove at trial... [not] a court of appeals from deciding whether *the facts as determined by the district court are sufficient...* to state a triable question under each

legal element.” 821 F.3d at 1209 (internal citations omitted) (emphasis added). Likewise, *DiLuzio* reaffirmed *Johnson’s* principle that an appellate court may not review a district court’s determination “of what actually occurred or why an action was taken or omitted, who did it, or nothing more than whether the evidence could support a jury’s finding that particular conduct occurred.” 796 F.3d 604, 609 (6th Cir. 2015) (internal citations omitted).

Whether any conflict between the holdings of these cases and *Johnson* exist, it is not present in *Franklin*. The *Franklin* court made no legal determination on whether summary judgment was appropriate, precisely because the inconsistent facts precluded such an order. Alternatively, as stated in *Walton*, the Eighth Circuit denied Petitioners’ interlocutory appeal because the district court could not determine “the facts” for want of sufficient evidence. 821 F.3d at 1209 . Or, as *DiLuzio* stated, the Eighth Circuit had no jurisdiction to hear the district court’s determination there was not enough evidence to “support a jury’s finding that particular conduct occurred.” 796 F.3d at 609.

Regardless of Defendant’s claim that the circuits are in “significant disarray” over whether there is jurisdiction to hear such argument, the instant case is not a player in any supposed disputes between the appeals courts. Both the district court and the Eighth Circuit agreed that there was no set of facts to which legal elements could be applied. The inconsistencies in the officer’s stories caused a credibility crisis that threw into doubt the entirety of their story. It was not the Appellate Court’s place to

sort through the facts and make determinations of credibility that are reserved for the jury. *Franklin* followed the blackletter law of *Johnson* and applied it in an uncontroversial manner. *Franklin's* denial of interlocutory appeal presents no new issue or controversy for this Court to consider and as such, Petitioners' Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny Petitioners' petition for a Writ of Certiorari

Respectfully submitted,

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