No. _____

# In The
# Supreme Court of the United States

DR. LOWELL T. JOHNSON,

*Petitioner,*

v.

ROBERT LEE STINSON,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

The questions presented herein are:

1. Whether *Johnson v. Jones*, 515 U.S. 304 (1995) precludes a Federal appellate court from exercising jurisdiction over a challenge to a denial of qualified immunity that turns not upon disputed facts, but upon the disputed application of the inferences drawn by the District Court from the facts, in concluding that a reasonable jury could find a violation of a Constitutional right which was clearly established.

2. Whether the Seventh Circuit, sitting en banc, applied an impermissibly broad reading of *Johnson v. Jones*, 515 U.S. 304 (1995) in vacating the opinion of the Seventh Circuit's three-judge panel and denying jurisdiction over Dr. Lowell T. Johnson's appeal, where the appeal sought review of the District Court's determination that a reasonable jury could find that Dr. Johnson violated respondent's right to due process.

## PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioner Dr. Lowell T. Johnson and Respondent Robert Lee Stinson. Detective James Gauger and Dr. Raymond D. Rawson, Dr. Johnson's respective co-defendants and co-appellants before the Seventh Circuit, are each filing separate Petitions for Writ of Certiorari.

## RULE 29.6 STATEMENT

Petitioner Lowell T. Johnson is an individual. Petitioner does not have a parent corporation or shares held by a publicly traded company.

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## PETITION FOR WRIT OF CERTIORARI

Dr. Lowell T. Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, sitting en banc, issued on August 18, 2017.

## OPINIONS BELOW

The Seventh Circuit's opinion en banc, issued August 18, 2017, is a reported decision, *Stinson v. Gauger*, 868 F.3d 516 (7th Cir. 2017), and is reproduced in the Appendix A, App. 1. The Seventh Circuit's initial decision, issued by the three-judge panel on August 25, 2015, is also a reported decision, *Stinson v. Gauger*, 799 F.3d 833 (7th Cir. 2015), and is reproduced in the Appendix B, App. 39. The opinion of the U.S. District Court for the Eastern District of Wisconsin which denied Dr. Johnson's motion for summary judgment on the basis of absolute and qualified immunity is an unreported decision, *Stinson v. City of Milwaukee*, no. 09-C-1033, 2013 WL 5447916 (E.D. Wis. Sept. 30, 2013), and is reproduced in Dr. Johnson's Appendix C, App. 65.

## JURISDICTION

The Seventh Circuit, sitting en banc, reversed the decision of a three-judge panel of the Seventh Circuit which had granted qualified immunity to Petitioner Johnson, and dismissed Dr. Johnson's appeal in an opinion filed on August 18, 2017, on the basis that

*Johnson v. Jones*, 515 U.S. 304, precluded jurisdiction over the appeal. App. 1. This petition has been timely filed within 90 days of that order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

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

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

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

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

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from

all final decisions of the district courts of the United States[.]



## STATEMENT OF THE CASE

### I. Material Facts.[1]

At about 7 a.m. on November 3, 1984, Milwaukee police were dispatched to the scene of a homicide at 2650 N. 7th Street. App. 70. In the rear yard at that address, police found the body of Ione Cychosz. In investigating the case, sixty photographs were taken of her body at the county medical examiner's office, including pictures of bite marks to her body. App. 71. 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 and made rubber impressions of them. App. 70-71. Dr. Johnson was a professor of dentistry and oral surgery at Marquette University and a diplomate of the American Board of Forensic Odontology. App. 70.

Milwaukee homicide detectives James Gauger and Tom Jackelen were assigned as the lead detectives to investigate Cychosz's murder. App. 72. They started by reviewing the work other officers had done to that point and met with Dr. Johnson, who described the killer's teeth and showed them a preliminary sketch. App. 73. No police reports memorialize this meeting,

[1] The facts set forth herein are taken from the district court's undisputed findings of fact. App. 68-96.

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. App. 72-73.

Gauger and Jackelen then began interviewing people who lived near the scene of the crime. App. 73. Stinson's house was closest to the yard where the body was found and Gauger already knew Stinson. App. 73-74. Two years earlier, Gauger had tried and failed to prove that Stinson was responsible for the murder of a man named Ricky Johnson. App. 69-70. The Johnson homicide was never solved, even though a witness identified Stinson and two others as having been involved. App. 70.

On November 6, 1984, Gauger and Jackelen went to Stinson's home and initially spoke with his mother and brother. App. 74. Gauger then separately interviewed Stinson's brother while Jackelen interviewed Stinson. App. 74. 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. App. 74. When they finished, 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. App. 74. 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. Regardless, Gauger and Jackelen thought they'd found the guilty party. App. 74.

The detectives met with District Attorney E. Michael McCann and Assistant District Attorney Daniel Blinka to report the status of the investigation. App. 74-75. Blinka called Dr. Johnson during the meeting, and Johnson explained he would need to personally examine Stinson to determine whether his teeth matched the bite marks on the body. App. 75. 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 (among other things) to 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. App. 78. Blinka did not believe that the detectives were "locked on" to Stinson. App. 75.

Stinson was subpoenaed and on December 3 submitted to examination at a hearing before the John Doe judge. App. 78-79. Dr. Johnson evaluated Stinson in court and concluded that his teeth were consistent with the bite marks on Cychosz's body. App. 79-80. 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. App. 80. 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. App. 81.

At some point in late November or early December 1984, Johnson collaborated with an unidentified Milwaukee Police Department detective who worked as a police sketch artist to create a second sketch of the assailant's dentition. App. 76. 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. App. 77. The sketch reflects a missing or broken upper tooth that is not the upper right front tooth. The sketch was included in the homicide file for the Cychosz investigation. App. 77.

Blinka wanted a second opinion as to the dental match. App. 81. Jackelen and Gauger flew to Las Vegas in January 1985 to meet with Dr. Raymond Rawson, a forensic odontologist on the staff of the Clark County Coroner's Office in Nevada, whom either Johnson or Blinka chose for a second opinion. App. 81-82. 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. App. 82. Dr. Rawson 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. App. 83-84.

Following corroboration of Johnson's opinion, Stinson was arrested and charged with Cychosz's murder. App. 85. The bite-mark evidence was the centerpiece of the prosecution, and Drs. Johnson and Rawson were the main 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. App. 90-91. Stinson's own counsel hired one of these odontologists. Stinson, and his defense counsel, did not call any expert to testify at trial. On December 12, 1985, a jury found Stinson guilty and he was sentenced to life in prison. App. 92.

Twenty-three years later, Stinson was exonerated with help from the Wisconsin Innocence Project after DNA evidence collected from Cychosz's body excluded Stinson. App. 92. The Wisconsin Innocence Project also enlisted a new panel of odontologists who reexamined the bite-mark evidence and determined that it too excluded Stinson. App. 92. On January 30, 2009, the judgment was vacated and Stinson was released from prison. App. 92. In April 2010, experts matched the DNA evidence recovered from Cychosz's body with a DNA sample from Moses Price, who later confessed to the murder. App. 92.

In 2010, Gauger copyrighted a memoir entitled *The Memo Book*, recounting his life as a Milwaukee police officer and detective. App. 96. In it he described the

Ricky Johnson and Ione Cychosz homicide investigations and recounted that he and Jackelen had met with Dr. Johnson before they began canvassing the neighborhood around the Cychosz murder scene. App. 73 n.5.

After his release from prison, Stinson filed this civil-rights lawsuit against Gauger and Drs. Johnson and Rawson (Jackelen is deceased). He retained a new expert odontologist, Dr. C. Michael Bowers, who agreed with the Wisconsin Innocence Project panel that the bite-mark evidence excluded Stinson. App. 93. Dr. Bowers concluded 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. App. 93-96.

## II. Proceedings Below.

Robert Lee Stinson brought claims under 42 U.S.C. § 1983 against Defendants Detective James Gauger, Dr. Lowell T. Johnson, and Dr. Raymond D. Rawson, all stemming from the forensic odontology opinions offered by Dr. Johnson and Dr. Rawson as testimonial expert witnesses in Stinson's criminal case. The District Court had jurisdiction over Stinson's claims under 28 U.S.C. §§ 1331, 1343 and 1367. First, Stinson asserts that the 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 the victim's body. Secondly, Stinson contends that the Defendants violated his

right to due process in failing to disclose *Brady* evidence by withholding from him their alleged agreement to "fabricate" the opinion evidence. Stinson also submits that each Defendant failed to intervene to prevent the other's alleged misconduct, and contends that the Defendants conspired to deprive him of his Constitutional rights. As the District Court recognized, Stinson does not contend that any physical evidence utilized in his prosecution (such as photographs, molds, and dental impressions) was "fabricated" or physically tampered with. App. 109. Instead, he contends that it was the odontologists' opinions that were "fabricated" through the intentional manipulation or misreading of physical evidence. App. 109. Similarly, the District Court recognized that Stinson's *Brady* claims were not based upon any alleged withholding of physical evidence, but instead were based upon a theory that the very falsity of the odontologist's opinions constituted exculpatory evidence known to the defendants. App. 111.

Petitioner Dr. Lowell T. Johnson (along with Co-Defendant Dr. Rawson) sought summary judgment as to all of Stinson's claims, asserting that he was entitled to absolute immunity as a testimonial expert witness at Stinson's criminal trial, or in the alternative, that he was entitled to qualified immunity. Detective Gauger also sought summary judgment under a theory of qualified immunity. The District Court denied summary judgment to each of the Defendants on all claims, finding that a reasonable jury could conclude, from the undisputed facts, that: (1) Johnson and Rawson had intentionally fabricated their expert

opinions; (2) the falsity of the expert opinion could be considered exculpatory evidence known to Defendants; and (3) that Johnson, Rawson and Gauger conspired to fabricate the opinions. App. 107-13.

Petitioner Johnson, along with each of his Co-Defendants, filed an interlocutory appeal from the District Court's denial of their respective immunity defenses. The Seventh Circuit had jurisdiction over the appeal pursuant to the collateral-order doctrine under 28 U.S.C. § 1291. A three-judge panel of the Seventh Circuit found that it had jurisdiction over each of the appeals, after conducting an analysis of *Johnson v. Jones* in light of the court's subsequent holdings in *Scott v. Harris*, 550 U.S. 372 (2007), and *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). App. 39-64. The Seventh Circuit panel affirmed the District Court's denial of absolute immunity to the two Defendant odontologists, but reversed the District Court's denial of qualified immunity to each of the Defendants. App. 39-64.

Stinson subsequently petitioned for en banc review of the panel's reversal of the District Court's denial of qualified immunity to the Defendants, and the court granted review, with no request for additional briefing from the parties. Sitting en banc, the Seventh Circuit, citing *Johnson v. Jones*, 515 U.S. 304, concluded that the court lacked jurisdiction over each of the appeals, "because those appeals fail to take the facts and reasonable inferences from the record in the light most favorable to Stinson and challenge the sufficiency of the evidence on questions of fact." App. 24-25. Judge Sykes, who had authored the original

Seventh Circuit panel opinion, authored a dissent to the en banc opinion, joined by Judges Bauer, Flaum and Manion. App. 26-38. Judge Sykes' dissent concluded that the court had jurisdiction over each of the appeals under a proper reading of *Johnson v. Jones* in light of subsequent decisions of this Court, and that each of the Defendants was entitled to qualified immunity. App. 26-38.

## REASONS FOR GRANTING THE WRIT

### I. Review Is Necessary To Remedy The Inconsistent Application Across The Circuits Of The Rule Of *Johnson v. Jones* On The Question Of When An Appellate Court Is Divested Of Jurisdiction Over An Interlocutory Appeal Of An Order Denying Qualified Immunity.

Since *Johnson v. Jones*, 515 U.S. 304 (1995), was decided in 1995, federal courts have struggled to come to grips with the intended scope of *Johnson*'s limitation of appellate court jurisdiction over an interlocutory appeal of a denial of qualified immunity. Some courts have deduced from subsequent decisions of this Court in *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834 (1996) and *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014) that *Johnson* is a narrow decision with a reach that is limited to purely factual issues that the trial court might confront if the case were tried. *Roberson v. Torres*, 770 F.3d 398, 403 (6th Cir. 2014) (" . . . *Plumhoff* appears to cabin the reach of *Johnson* to purely factual issues that the trial court might confront if the

case were tried."); *Diaz v. Martinez*, 112 F.3d 1, 8 (1st Cir. 1997) (" . . . *Behrens* places a gloss on *Johnson* and reopens an appellate avenue that some had thought *Johnson* foreclosed."). Other courts have applied *Johnson* broadly, holding that appellate courts lack jurisdiction over appeals that challenge not simply the facts found by the district court, but also appeals that challenge the district court's assessment and the inferences drawn from the facts which led the district court to determine that a reasonable jury could find that the defendant's action violated a clearly established right. *Romo v. Largen*, 723 F.3d 670, 673-74 (6th Cir. 2013); *DiLuzio v. Village of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015).

This case presents an opportunity for the Court to directly address these conflicting interpretations of *Johnson*. The question that the Court should resolve is whether *Johnson v. Jones* requires appellants and appellate courts to accept not only a district court's determination of the facts that a reasonable jury could accept, but also the district court's assessment and application of those facts and inferences drawn therefrom, in determining that a reasonable jury could find in plaintiff's favor, in order to secure appellate jurisdiction over an appeal of a denial of qualified immunity.

### A. Legal Underpinnings Of The Right To Interlocutory Review Of An Order Denying Qualified Immunity.

Under 28 U.S.C. § 1291, an appellate court has jurisdiction to hear appeals only from "final decisions" of a district court. This Court, in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949) held that certain collateral orders amount to "final decisions," which are immediately appealable under 28 U.S.C. § 1291, even though the district court may have entered those orders before the case has ended.

In 1985, this Court issued *Mitchell v. Forsyth*, 472 U.S. 511, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985), which held that a district court's order denying a defendant's motion for summary judgment was an immediately-appealable "collateral order" under *Cohen* where (1) the defendant was a public official asserting a defense of "qualified immunity" and (2) the issue appealed did not concern which facts the parties might be able to prove but, rather, whether or not certain given facts showed a violation of "clearly established" law. 472 U.S. at 528. Applying *Cohen*'s criteria, *Mitchell* recognized that an order denying qualified immunity was "effectively unreviewable," because review after trial would come too late to vindicate an important purpose of qualified immunity – the protection of public officials not simply from liability, but also from standing trial in the first place. *Mitchell*, supra, at 525-27.

Ten years after *Mitchell*, this Court issued *Johnson v. Jones*, 515 U.S. 304 (1995), which 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.'" 515 U.S. 304, 319 (1995).

This Court's decision in *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834 (1996) followed within a year of *Jones*. In *Behrens*, the petitioner sought review of an order of the Ninth Circuit which dismissed his appeal of the district court's denial of his motion for summary judgment in an action alleging violation of procedural and substantive due process. The respondent in *Behrens* argued that appeal was not available under *Johnson v. Jones* because the denial rested on the ground that "material issues of fact remain." This Court, however, noted that this argument was a misreading of *Johnson*, because the denial of a summary judgment motion often includes a determination that there are controverted issues of material fact, and the *Johnson* decision cannot mean that every such denial of summary judgment is non-appealable. *Behrens*, supra, at 312-13. This Court held in *Behrens* that the district court's denial of the petitioner's summary judgment motion necessarily determined that certain conduct attributed to the petitioner (which was controverted) constituted a violation of clearly established law, and *Johnson* permits the petitioner to claim on appeal that all of the conduct which the district court deemed sufficiently supported for purposes of summary judgment

met the *Harlow* standard of "objective legal reasonableness." *Behrens* at 313.

This Court subsequently decided a pair of cases with similar factual underpinnings – *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). In *Scott*, the issue was whether a police officer had utilized excessive force when he rammed the plaintiff's fleeing car during a high speed chase – a question which turned upon whether a reasonable officer would have believed that the plaintiff's flight posed a danger to the public. The defendant officers' claim of qualified immunity was denied by the district court, which held that a jury could side with the plaintiff in finding that a reasonable officer would not have believed that the plaintiff's flight posed a threat to the safety of others. The Eleventh Circuit affirmed, but this Court reversed, holding that the plaintiff's story was "blatantly contradicted by the record," which had included a video recording of the chase.

The *Scott* decision does not mention *Johnson* by name, but this Court referenced *Scott* subsequently in *Plumhoff*. The *Plumhoff* case also involved a high speed police chase, and the claim there was that the police had utilized excessive force when they shot at a fleeing car. The district court in *Plumhoff* found a genuine factual dispute as to the degree of danger actually posed by the driver, and subsequently rejected the officer's claim of immunity. On appeal, this Court explained that *Johnson* only forecloses appellate courts 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." *Id*. at 219. The petitioners in *Plumhoff*, unlike those in *Johnson*, did not claim that other officers were responsible for the conduct alleged; rather, they contended that their conduct did not violate the Fourth Amendment, nor did it violate clearly established law. As a result, they raised purely legal issues distinct from those purely factual issues that the trial court might confront if the case were tried.

### B. The Application Of *Johnson v. Jones* Has Proven To Be Difficult For Appellate Courts.

Appellate courts have found *Johnson v. Jones* difficult to apply. *Roberson v. Torres*, 770 F.3d 398, 402 (6th Cir. 2014) ("Applying *Johnson* has not been easy"); *Woolfolk v. Smith*, 81 F.3d 741, 743 (8th Cir. 1996) ("As the Supreme Court predicted in *Johnson v. Jones*, its new standard of appealability can be difficult to apply"); *Walton v. Powell*, 821 F.3d 1204, 1209 (10th Cir. 2016) ("Indeed we have struggled ourselves to fix the exact parameters of the *Johnson* innovation").

Appellate court decisions that wrestle with the question of *Johnson*'s impact on appellate jurisdiction over a denial of summary judgment on qualified immunity grounds are frequently accompanied by concurring or dissenting opinions (and sometimes both), which debate the proper scope of *Johnson v. Jones*. *See Romo v. Largen*, 723 F.3d 670 (6th Cir. 2013) (concurrence offering narrow interpretation of *Johnson* in

contrast to majority's broad interpretation); *Thompson v. City of Lebanon*, 831 F.3d 366 (6th Cir. 2016) (dissent/concurrence arguing that the court lacked jurisdiction over the appeal); *Williams v. Mehra*, 186 F.3d 685 (6th Cir. 1999) (dissent/concurrence arguing that the majority failed to properly apply *Johnson v. Jones*); *Elliott v. Leavitt*, 105 F.3d 174 (4th Cir. 1997) (opinion concurring in the denial of rehearing en banc, and an accompanying dissent arguing against appellate jurisdiction under *Johnson v. Jones*); *Winfield v. Bass*, 106 F.3d 525 (4th Cir. 1997) (concurrence applying narrow interpretation of *Johnson*, and dissent arguing broad application).

Scholarly literature addressing *Johnson v. Jones* has also highlighted the difficulties appellate courts have faced in determining jurisdiction over appeals from a denial of qualified immunity since *Johnson*. *See* Kathryn R. Urbonya, *Interlocutory Appeals from Orders Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction*, 55 Wash. and Lee L. Rev. 3, 11 (1998) (tracing the developing scope of appellate jurisdiction over denials of qualified immunity, and noting that *Behrens v. Pelletier* "drastically narrowed the limitation articulated in *Johnson*."). *See also* Tobias Barrington Wolff, *Scott v. Harris and the Future of Summary Judgment*, 15 Nev. L. J. 1351, 1380 N. 111 (2015) (noting challenges to the stability of the *Johnson* doctrine); Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 Drake L. Rev. 539, 594 (1998) (noting problems with the application of the *Mitchell-Johnson* rule); and Nicole B. Lieberman, *Note, Post-Johnson v.*

*Jones Confusion: The Granting of Back-Door Qualified Immunity*, 6 B. U. Pub. Int. L. J. 567, 579 (1997) (noting confusion surrounding *Johnson v. Jones* and its application).

### C. Courts Across The Circuits Have Recognized Two Conflicting Interpretations Of The Scope Of Appellate Jurisdiction Under *Johnson v. Jones*.

The lengthy concurrence appended to the Sixth Circuit's opinion in *Romo v. Largen*, 723 F.3d 670 (6th Cir. 2013) highlights two significant competing interpretations of the scope of the jurisdictional limitation imposed by *Johnson*. *Romo* was a false arrest case. The plaintiff arrestee was found by the Defendant police officer sleeping in his car in a parking lot, and was subsequently arrested for operating the vehicle while intoxicated. The district court denied qualified immunity to the arresting officer, finding that a genuine issue of disputed fact existed as to whether the officer had fabricated his story supporting the arrest. The Sixth Circuit accepted jurisdiction over the officer's appeal and affirmed the district court's denial of qualified immunity. Judge Sutton authored a lengthy concurring opinion to address what he termed a "difficult" question – the application of *Johnson v. Jones* in determining jurisdiction over an appeal from a denial of qualified immunity. *Romo*, supra, at 677.

The *Romo* concurrence highlighted that there are two distinct ways to read *Johnson* – one, a narrow

interpretation (championed by Judge Sutton) and the other an expansive interpretation. The narrow interpretation (which this Petitioner argues is supported by *Johnson* in light of this Court's subsequent decisions in *Behrens, Scott*, and *Plumhoff*) is characterized by Judge Sutton as follows:

> . . . I submit that there are two ways to read *Johnson*. One applies it only to prototypical "he said, she said" fact disputes, in which the defendants (usually government employees) refuse to accept the truth of what the plaintiffs (usually individual claimants) say happened. When the appeal boils down to dueling accounts of what happened and when the defendants insist on acknowledging on appeal only their accounts, the underlying basis for an interlocutory appeal disappears.

*Romo*, supra, at 678.

In contrast, the second (expansive) reading of *Johnson* would require an appellant to accept not only the district court's factual determinations, but also the district court's reading and application to the law of those facts and inferences drawn therefrom:

> The other (interpretation) applies the decision (in *Johnson v. Jones*) not just to whether the defendant officers accept the plaintiff's evidence – supported version of what happened, but also to whether the defendants accept the district court's reading of the inferences from those facts. . . . Under that view . . . , when a district court determines that there is a "genuine issue of fact" for trial by drawing an

> inference in favor of the plaintiff, the appellate court may not second-guess that inference, indeed lacks jurisdiction to do so. . . .

*Romo*, supra, at 678.

The typical summary judgment question, (i.e., Could a reasonable jury find for the plaintiff on the factual record as construed in his favor?), raises a legal question, though it may be intertwined with the facts. *Romo*, supra, at 681. *Johnson v. Jones* appears to divide this category of appeals – those presenting mixed questions of law and fact – into "appealable" and "non-appealable" categories. *Id*. The narrow construction of *Johnson* would confine *Johnson*'s limitation of *Mitchell* to a situation where the Defendant refuses to accept the truth of the plaintiff's evidence at summary judgment by maintaining, for example, that he did not do it, when the plaintiff produces evidence that he did. *Id.* The contrary (expansive) interpretation would apply *Johnson*'s jurisdictional prohibition whenever a defendant challenges not simply the district court's facts, but also the inferences drawn by the district court in reaching its decision to deny qualified immunity.

As the *Romo* concurrence points out, in virtually every circuit, there are decisions supporting the narrow view of *Johnson*'s jurisdictional prohibition, or otherwise permitting appellate review of inferences on the merits. *See Camilo-Robles v. Hoyos*, 151 F.3d 1, 15 (1st Cir. 1998); *Salim v. Proulx*, 93 F.3d 86, 89-90 (7th Cir. 1996); *Schieber v. City of Philadelphia*, 320 F.3d 409, 420 (3d Cir. 2003); *Winfield v. Bass*, 106 F.3d 525, 533

(4th Cir. 1997) (en banc); *Brown v. Callahan*, 623 F.3d 249, 254-55 (5th Cir. 2010); *Nelson v. Shuffman*, 603 F.3d 439, 451 (8th Cir. 2010); *Jeffers v. Gomez*, 267 F.3d 895, 907-10 (9th Cir. 2001); *Lewis v. Tripp*, 604 F.3d 1221, 1226-28 (10th Cir. 2010); and *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013). Unfortunately, there are likewise decisions originating in virtually every circuit which suggest an opposing (i.e., expansive), interpretation of *Johnson*'s jurisdictional prohibition. *See Diaz v. Martinez*, 112 F.3d 1, 4-5 (1st Cir. 1997); *Locurto v. Safir*, 264 F.3d 154, 167 (7th Cir. 2001); *Ziccardi v. City of Philadelphia*, 288 F.3d 57, 61-62 (3d Cir. 2002); *Culosi v. Bullock*, 596 F.3d 195, 201-02 (4th Cir. 2010); *Smith v. Brenoettsy*, 158 F.3d 908, 913 (5th Cir. 1998); *Parks v. Pomeroy*, 387 F.3d 949, 956 (8th Cir. 2004); *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1223 (9th Cir. 1996); *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008); and *Ratliff v. DeKalb County*, 62 F.3d 338, 341 (11th Cir. 1995).

These two disparate interpretations of *Johnson*'s jurisdictional limitation are highlighted by the approach taken by the Sixth Circuit in contrast to that articulated by the Tenth Circuit. The Sixth Circuit has held that, under *Johnson v. Jones*, an appellant is precluded from challenging not only the facts found by the district court, but also the district court's inferences drawn from those facts in applying the facts to the law. *DiLuzio v. Village of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015); *Thompson v. City of Lebanon*, 831 F.3d 366, 370 (6th Cir. 2016).

In contrast, the Tenth Circuit has viewed *Johnson* narrowly in light of this Court's subsequent clarifying guidance in *Plumhoff*. The Tenth Circuit case of *Walton v. Powell*, 821 F.3d 1204 (10th Cir. 2016) was a First Amendment retaliation suit in which the plaintiff alleged that she was terminated from her employment on the basis of her political affiliation. The defendant in the district court moved for summary judgment on qualified immunity grounds, and the Tenth Circuit accepted jurisdiction over the appeal. Parsing the guidance provided by this Court in *Plumhoff*, the Tenth Circuit noted that *Johnson* only forecloses appellate courts 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." *Walton*, supra, at 1209. The Tenth Circuit noted that *Johnson* does not forbid a court of appeals from deciding whether the facts as determined by the district court are sufficient as a matter of law to state a triable question under each legal element essential to liability. *Id*. In fact, deciding "evidence sufficiency" questions of this sort is "a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden." *Id*. Courts of appeal regularly decide whether the facts as presented at summary judgment are enough to permit a reasonable jury to render a favorable judgment, and the Tenth Circuit has recognized *Plumhoff*'s teaching that an appellate court may do the same thing in the qualified immunity context, while respecting the district court's special role in ascertaining the relevant facts for analysis. *Walton*, supra, at 1209.

According to the Tenth Circuit's formulation, under *Johnson*, it is for the district court to tell the court of appeals what facts a reasonable jury might accept as true, and under *Plumhoff*, it is for the appellate court to say whether those facts, together with all reasonable inferences they permit, fall in or out of legal bounds – i.e., whether they are enough as a matter of law to permit a reasonable jury to issue a verdict for the plaintiff under the terms of the governing legal test for any legal element of the claim. *Walton*, supra, at 1209-10.

The Tenth Circuit in the *Walton* case did not disclaim jurisdiction over the appeal in that case, because the court did not subscribe to an overly-broad interpretation of *Johnson* that would strip an appellant of the ability to challenge a district court's assessment of the facts that it found, in determining whether those facts created a triable question on any legal element essential to liability:

> But however far *Johnson*'s exception extends and whatever its consistency with general practice or capacity to fulfill its promised efficiencies, it doesn't extend so far as to bar consideration of Mr. Powell's appeal or any part of it. To be sure, *Johnson* requires us to accept as true the facts the district court expressly held a reasonable jury could accept. And in our recitation above and analysis below, we do just that, treating as true all the facts the district court held a reasonable jury could find even if we are quite confident Mr. Powell would dispute nearly all of them. But *Johnson*

> does not also require this court to accept the district court's assessment that those facts suffice to create a triable question on any legal element essential to liability. That latter sort of question is precisely the sort of question *Johnson* preserves for our review.

*Walton*, supra, at 1208.

The present case offers an opportunity to clarify the scope of *Johnson*'s jurisdictional limitation, between the narrow application (which this Petitioner contends is the correct reading of *Johnson*), and the expansive reading of *Johnson* chosen by the Seventh Circuit's en banc majority in this case. Notably, even the Sixth Circuit, while continuing to apply an expansive interpretation of *Johnson* as followed in *Romo*, supra, has suggested that there exists a real (and presently unanswered) question as to whether this Court has subsequently rejected the Sixth Circuit's broad interpretation of *Johnson* following *Plumhoff*. *See DiLuzio v. Village of Yorkville*, supra, at 609, n.1 [stating that an argument could be made that *Plumhoff* rejected the Sixth Circuit's expansive reading of *Johnson*, but refusing to make such a holding, because this Court in *Plumhoff* "did not discuss its approach to assessing the inferences, and the question of deference (or jurisdictional effect) was not at issue"].

## II. The Seventh Circuit's En Banc Opinion Misreads The District Court's Decision, Misapplies *Johnson v. Jones*, And Fails To Recognize The Purely Legal Issue Presented For Review By Dr. Johnson On Appeal.

### A. The Seventh Circuit's En Banc Majority Misreads The District Court Decision.

As the dissent to the Seventh Circuit's en banc ruling points out, the District Court's decision denying summary judgment in this case actually contains two separate rulings: (1) the evidentiary record reveals genuine 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 Respondent Stinson's favor, would permit a reasonable jury to find that Defendants violated his right to due process. App. 26.

The task of an appellate court is to divine whether the district court's order contains a legal ruling about qualified immunity. If the district court's order contains a legal ruling, the appellate court has the jurisdiction to review that ruling, whether it is presented as a purely legal matter, or as a mixed question of law and fact.

An appellate court's responsibility to separate out and address legal issues, even when presented as a mixed issue of fact and law, was contemplated in *Johnson*. *See Johnson*, at 319 ("When faced with an argument that the district court mistakenly identified clearly established law, the court of appeals can simply take, as given, the facts that the district court assumed

when it denied summary judgment for that (purely legal) reason."). Indeed, the Seventh Circuit has recognized this responsibility as well. *Anderson v. Cornejo*, 355 F.3d 1021, 1022 (7th Cir. 2004) ("Resolution of this problem starts with separating factual and legal components of the claim for relief."); *see also Sain v. Wood*, 512 F.3d 886, 890-91 (7th Cir. 2008) ("*Johnson* does not preclude appellate review of a district court's legal application, even if the court's decision necessarily involves mixed questions of fact and law. . . .").

Unfortunately, the en banc majority failed to recognize in this case that Dr. Johnson's appeal presents a mixed question of fact and law, and as a result, the Court failed to address the District Court's second holding, i.e., that the Defendants are not entitled to qualified immunity because the evidence in the record, construed in Respondent Stinson's favor, would permit a reasonable jury to find that the Defendants violated Stinson's right to due process.

As the en banc dissent discusses, the parties disputed before the District Court two historical facts that the District Judge concluded are material to the Defendants' potential liability: (1) whether Dr. Johnson met with the Detectives Gauger and Jackelen, and showed them an initial sketch of the killer's suspected dentition before they canvassed the neighborhood and interviewed Stinson and (2) whether Dr. Johnson (as opposed to Assistant DA, Daniel Blinka), contacted Dr. Rawson for a second opinion. App. 34.[2] As the dissent

[2] Dr. Johnson nowhere disputed either of these facts in his appellate brief or at oral argument before the Seventh Circuit.

noted, the District Judge's order contained a ruling completely apart from any alleged fact dispute – namely, the District Judge had ruled that if Stinson's version of the facts (for example, Dr. Johnson's pre-interview meeting with the detectives, and Dr. Johnson's call to Dr. Rawson) is credited, 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. App. 34. This is a legal question, and the Appellate Court en banc should have recognized it, and separated it out from any fact question, or any mixed question of fact and law (as the Seventh Circuit's three-judge panel did in its decision that was subsequently vacated by the en banc majority). To the extent that the en banc majority failed to recognize that Dr. Johnson's appeal presented a mixed question of fact and law, and then failed to exercise jurisdiction over the legal question of whether the evidence in the record, construed in Stinson's favor, would permit a reasonable jury to find that Dr. Johnson had violated

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The en banc majority disposed of jurisdiction over Dr. Johnson's appeal on the simple basis that these two "disputed historical facts" were not specifically set forth in the "factual background" section of Dr. Johnson's appellate brief. The en banc majority pointed to no instance where Dr. Johnson's appellate brief or argument disputed that the District Court had sufficient evidence to determine that Dr. Johnson met with the detectives before their canvas, or that he had contacted Dr. Rawson for a second opinion. On the contrary, Dr. Johnson's argument before the Seventh Circuit was that, even if these facts are conceded for purposes of appeal, they do not establish a violation of clearly established law. This was the conclusion of the Seventh Circuit panel opinion that was vacated by the en banc majority. App. 59-64.

Stinson's right to due process, the en banc majority misread the District Court's decision.

### B. The Seventh Circuit's En Banc Decision Misapplied *Johnson v. Jones*.

The scope of the jurisdictional limitation announced by *Johnson v. Jones* must be assessed in light of the teaching of this Court's subsequent cases, including *Behrens v. Pelletier*, 516 U.S. 299 (1996), *Scott v. Harris*, 550 U.S. 372 (2007), and *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). As Judge Sykes noted in her dissent to the opinion of the en banc majority, when *Johnson v. Jones* is read in light of subsequent authority, it is "really quite narrow." App. 33. Other courts have echoed this conclusion. *See Roberson v. Torres*, 770 F.3d 398, 403 (6th Cir. 2014) ("the court's recent decision in *Plumhoff* appears to cabin the reach of *Johnson* to 'purely factual issues that the trial court might confront if the case were tried.' ").

A number of courts have recognized that this Court's subsequent decision in *Behrens* significantly narrowed the jurisdictional limitation imposed by *Johnson*. *See Salim v. Proulx*, 93 F.3d 86, 89 (2d Cir. 1996) ("Though it was arguable that *Johnson* intended to preclude an interlocutory appeal whenever a district judge denied summary judgment on the ground that a material fact was genuinely in dispute, the Court's subsequent decision in *Behrens* dispelled such a notion. . . . *Behrens* laid to rest any possibility that a district court's mere assertion that disputed factual

issues existed was enough to preclude an immediate appeal."); *Cottrell v. Caldwell*, 85 F.3d 1480, 1485 (11th Cir. 1996) ("As clarified by *Behrens*, *Johnson* does not affect our interlocutory jurisdiction in qualified immunity cases where the denial is based even in part on a disputed issue of law."); *Diaz v. Martinez*, 112 F.3d 1, 8 (1st Cir. 1997) ("To this extent, *Behrens* places a gloss on *Johnson* and reopens an appellate avenue that some had thought *Johnson* foreclosed."); *Nerren v. Livingston Police Dept.*, 86 F.3d 469, 472 (5th Cir. 1996) ("In the wake of *Behrens*, the *Johnson* modification (if any) on appellate review applies only when 'what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred.' ").

The en banc majority's opinion in this case addressed *Scott v. Harris* and *Plumhoff v. Rickard* only to the extent that it concluded that neither of those cases abrogated *Johnson*. The en banc majority did not consider whether *Harris* and *Scott* had the effect of limiting, rather than abrogating, *Johnson*. The en banc majority did not consider *Behrens'* clarification of the scope of *Johnson*'s jurisdictional limitation at all.

As a result, the en banc majority's opinion erred in applying *Johnson* too broadly. The only aspect of Dr. Johnson's appeal that should be unreviewable under *Johnson* is any challenge to the facts as determined by the District Court. Dr. Johnson's appeal implicates a legal issue. Consequently, the three-judge panel of the Seventh Circuit correctly applied *Johnson* in light of subsequent decisions of this Court when accepting

jurisdiction. App. 39-64. Indeed, *Johnson* specifically contemplated that an appeal of a district court order denying qualified immunity which did not challenge the district court's findings of fact (i.e., the "who, what, when, where" questions) would be reviewable. *Johnson v. Jones*, supra, at 319 ("We concede that, if the district court in this case had determined that beating respondent violated clearly established law, petitioners could have sought review of that determination.").

### C. The En Banc Majority Applied *Johnson v. Jones* Too Broadly And Thus Failed To Recognize Or Address The Legal Issue Presented By The District Court's Denial Of Qualified Immunity To Dr. Johnson.

The Seventh Circuit's en banc majority concluded that the court lacked jurisdiction over Dr. Johnson's appeal because there were two "significant factual disputes" found by the District Court: (1) whether Dr. Johnson met with the detectives before their canvas of the neighborhood on November 6, 1984, and (2) whether Dr. Johnson made a call to Dr. Rawson for a second opinion. App. 18-19. The en banc majority points to nothing in Dr. Johnson's appeal brief that challenges these two factual findings, but instead notes simply that Dr. Johnson did not "acknowledge" these findings in his appellate brief, and as a result, Dr. Johnson (and Dr. Rawson) "have not asked us to view the record in the light most favorable to Stinson." App. 20. The en banc opinion refused jurisdiction over Dr. Johnson's appeal on that basis.

What the en banc court failed to recognize, however, is that the District Court's opinion denying qualified immunity to Dr. Johnson did not merely hold that factual issues remained with regard to whether Dr. Johnson met with the detectives before they canvassed the neighborhood in November of 1984, or whether Dr. Johnson made a call to Dr. Rawson for a second opinion. The District Court also specifically concluded that Dr. Johnson was not entitled to qualified immunity because the evidence in the record, construed in Stinson's favor, would permit a reasonable jury to find that Dr. Johnson violated Stinson's right to due process by fabricating evidence and suppressing evidence of that fabrication. This is a final no-immunity ruling which fully resolved the qualified immunity question against Dr. Johnson. It thus constitutes a legal issue that is subject to immediate review under *Mitchell*, notwithstanding any alleged factual disputes. *Sain v. Wood*, 512 F.3d 886, 890-91 (7th Cir. 2008) ("*Johnson* does not preclude appellate review of a district court's legal application, even if the court's decision necessarily involves mixed questions of fact and law.").

The dissent to the en banc opinion (and the three judge panel of the Seventh Circuit on initial review) took the required step that the en banc majority failed to take – it looked at the facts determined by the District Court, assumed them all to be true, and then proceeded to assess the District Court's legal conclusion that these facts, construed in Stinson's favor, would permit a reasonable jury to find that Dr. Johnson had violated Robert Stinson's clearly established right to

due process. App. 35-38. This assessment is a core duty of an appellate court. *Nerren*, supra, at 472 (" . . . but we retain interlocutory jurisdiction to take, as given, the facts that the district court assumed when it denied summary judgment and determine whether these facts state a claim under clearly established law").

Accepting all of the facts found by the District Court as true, the three judge panel of the Seventh Circuit (prior to being vacated by the en banc majority), properly found jurisdiction over Dr. Johnson's appeal, addressed the legal question posed by the District Court's order denying qualified immunity, and determined that, on the record construed in Stinson's favor, no reasonable jury could find that Dr. Johnson (or Dr. Rawson or Detective Gauger for that matter) had violated Stinson's clearly established right to due process by "fabricating" his expert opinion and "suppressing" evidence of that fabrication. This is so because the facts found by the District Court established only that the odontologists' 30-year-old forensic analysis was flawed and that the conclusions were inaccurate. App. 37. An "error" in expert analysis, however, is not a due process violation. *See Buie v. McAdory*, 341 F.3d 623, 625 (7th Cir. 2003) ("No decision of the Supreme Court 'clearly establishes' that experts . . . must be right; . . . that a witness may give false or mistaken testimony therefore is not an independent constitutional violation. . . . Whether a given expert witness overstated her conclusion is mete for cross-examination."). *See also Devereaux v. Abbey*, 263 F.3d 1070, 1076-77 (9th Cir. 2001) ("Failing to follow guidelines or to carry out

an investigation in a manner that will ensure an error-free result is one thing; intentionally fabricating false evidence is quite another.").

On appeal, Dr. Johnson did not challenge the evidentiary sufficiency of any fact determined by the District Court. He did not, for example, argue on appeal that he did not meet with the detectives prior to their canvas of the neighborhood, nor did he argue on appeal that he was not the one who called Dr. Rawson for a second opinion. The sufficiency of the evidence supporting these facts is not appealable under *Johnson v. Jones*. Instead, Dr. Johnson's appeal challenged the District Court's inferences and its conclusion based thereon that a reasonable jury could find, given the facts determined by the District Court, that Dr. Johnson had conspired to violate Robert Stinson's established constitutional right to due process. The en banc majority's opinion ignored the appellate court's duty to assess the legal question presented by the district court decision, separate from any factual component or mixed question of fact and law. The en banc opinion instead applied an impermissibly broad interpretation of *Johnson v. Jones*, and in doing so, abdicated its duty to review an inescapably legal issue – the District Court's determination that a reasonable jury could find, based upon Stinson's facts, that Dr. Johnson had violated Stinson's rights. Far from being forbidden by *Johnson v. Jones*, such a legal assessment is a core responsibility of an appellate court. *Walton v. Powell*, supra, at 1209.

Under a proper, narrow application of *Johnson v. Jones*, in light of this Court's subsequent decisions in *Behrens*, *Scott*, and *Plumhoff*, the Seventh Circuit panel decision (prior to being vacated by the en banc majority) properly found jurisdiction over Dr. Johnson's appeal, reached the merits of the appeal, and correctly determined that Dr. Johnson was entitled to qualified immunity under the facts found by the District Court.

In the absence of immediate review by this Court, Petitioner Dr. Johnson will effectively lose his qualified immunity right to be free from suit, which is a core right protected by the doctrine of qualified immunity. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). This question merits the Court's review because the lack of clarity amongst the circuits on the scope of the jurisdictional limitation imposed by *Johnson v. Jones* exposes governmental entities to a risk of burdensome litigation, when a proper application of the collateral order doctrine in qualified immunity cases would otherwise end the case. This Court's repeated past recognition of the importance of qualified immunity supports the need for a uniform application of the jurisdictional limitation imposed by *Johnson v. Jones* that courts across the country will be able to consistently and predictably apply.

## CONCLUSION

The Petition for Writ of Certiorari should be granted in order to clarify the important issue of appellate jurisdiction following a denial of qualified immunity.

Respectfully submitted,

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