No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

ZAVIA JOHNSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Zavia Johnson, pursuant to Title 18, United States Code, Section 3006A(d)(6) and Rule 39 of the United States Supreme Court, asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs, and to proceed in forma pauperis. Pursuant to an appointment under the Criminal Justice Act of 1964, as amended, the Federal Public Defender's Office was appointed to represent the Petitioner in the United States District Court for the Western District of Pennsylvania and in the United States Court of Appeals for the Third Circuit.

Date: February 26, 2019

Respectfully submitted,

LISA B. FREELAND
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District of Pennsylvania

s/ Kimberly R. Brunson
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Does a federal courts of appeals misapply the clearly erroneous standard of review when it upholds a district court's crediting of a law enforcement officer's testimony on a crucial issue where that testimony is contradicted by the officer's prior statements that are captured on videotape recorded at the time of the event, contrary to this Court's instruction in *Scott v. Harris*, 550 U.S. 372 (2007), that a court of appeals must view the facts in a light consistent with the recording of actual events?

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No.

IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Zavia Johnson, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit at Docket No. 17-2008 entered on July 31, 2018. Mr. Johnson's petition for rehearing *en banc* and petition for rehearing by the panel were denied on November 29, 2019.

OPINION BELOW

The not precedential opinion of the Court of Appeals for the Third Circuit (Appendix A) is at *United States v. Johnson*, No. 17-2008, 742 Fed. Appx. 616 (3d Cir. July 31, 2018). The Court of Appeals' Order denying rehearing and rehearing *en banc* (Appendix B) is also unreported.

JURISIDICTION

The District Court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. That Court issued its not precedential opinion and judgment on July 31, 2018. Mr. Johnson filed a timely petition for rehearing before the original panel and the court *en banc,* which was denied by Order dated November 29, 2018. This petition is timely filed pursuant to Sup. Ct. R. 13.3.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the court of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1651(a), which grants the United States Supreme Court jurisdiction to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Mr. Johnson was pulled over by a Pennsylvania State Trooper for driving in the left hand lane of traffic without a specified permitted purpose. During the stop, the traffic officer summoned a drug detection canine and his handler to the scene and Mr. Johnson's car was subjected to a dog sniff. The traffic officer's police cruiser was equipped with a dashcam recorder mounted to the windshield which records on video everything in its field of view. (A.158). A microphone that records the accompanying audio was attached to the traffic officer's uniform. (A.158-159). The traffic stop at issue here, including the dog sniff, was captured on both video and audio recording.[1] At a suppression hearing, the traffic officer testified that the language on the video is "an accurate depiction of what happened that day." (A.273).

A. Three important terms: "air scent," "alert," and "indication."

To comprehend the significance of the audio recording and, in particular, the canine handlers' comments about his dog not "giving him an alert," one must understand the three distinct dog behaviors described throughout this case: (1) an "air scent"; (2) an "alert"; and (3) an "indication." The government's own expert, Corporal Michael Ruhf, one of the only two certified trainers in the Pennsylvania

[1] A copy of the video and accompanying audio were introduced into evidence before the district court and provided to the Third Circuit. Citations to the recording are referred to as "Vid." followed by a number corresponding to the hour and minutes revealed on the video when the close-captioned ("CC") icon is engaged.

State Police Canine section, and the person who actually trained the drug dog team at issue here, testified about these different terms.

Corporal Ruhf explained that any dog – not just trained ones -- will "air scent" when the dog samples the air to detect airborne odors; this is not a trained behavior and, in the case of trained drug dogs, it has no relationship to odors the dog is trained to detect. (A.339-340). It could even be "the odor of a steak." (A.339). An "air scent" is simply a dog's innate "drive to follow airborne odors or scents." (A.339).

An "alert" is very different than an "air scent." Only trained detection dogs will "alert" when the dog encounters an odor it is trained to detect. (A.307-308). An "alert" is an instinctive change in the dog's behavior, such as a change in body posture or breathing rate. (A. 307-308). Corporal Ruhf testified that because a handler and a dog are trained together as a team, the handler is in the best position to determine if a dog has "alerted." (A.342).

Finally, a trained dog will "indicate" by engaging in a specific trained behavior when it "identifies the source of the odor that the dog has been trained to detect." (A.297; 308). For the dog here, this means he will sit. (A.335-336; 374). There is no dispute that the dog did not "indicate" at Mr. Johnson's car. (A.329; 345; 387; 398; 412; 414-415; 435).

The question here is whether or not the dog "alerted." If the dog did not "alert," the officers lacked probable cause to seize and search Mr. Johnson's car, and the motion to suppress should have been granted.

B. The audio recording of the law enforcement officers' conversation immediately after the dog sniff.

On the audio recording, Corporal Peters, the canine handler, and Trooper Knott, the traffic officer, can be heard immediately after the dog sniff discussing the dog's **failure** to detect the presence of a controlled substance:

- Immediately after the sniff, Corporal Peters said to Trooper Knott "I had an **air scenting** with him coming up on that first approach, but **he wouldn't give me anything coming back around on it.**" (Vid.10:47:50-10:48:05).
- Trooper Knott responded "okay, I think I'm **still** going to take it and do a search warrant on it … do you agree? You know, **money or a gun** I think" and Corporal Peters replied "yeah." (Vid.10:47:50-10:48:05).[2]
- Corporal Peters again told Trooper Knott that the dog was "**air scenting**" and stated: "I thought man this is gonna be really good" but "**he didn't catch anything on the open window, he didn't give me anything on the door handle, which are usually places** that you know a lot of times **I catch an alert at**."(Vid.10:48:14-10:48:38).
- Trooper Knott speculated: "**It's probably a money** run. He's got a load of money and he's going back to Pittsburgh to re-up." (Vid.10:48:39-10:48:44).
- Corporal Peters then said to Trooper Knott: "I was totally excited at first, then I was kind of pissed off at the end." (Vid.10:49:16-10:49:19).

At no point did the officers discuss the possibility that Mr. Johnson had illegal drugs in his car, as one would expect had the dog alerted to the presence of

[2] Significantly, the dog was not trained to detect money or guns; the dog was trained only to detect marijuana, cocaine, heroin, and methamphetamine. (App. 544).

marijuana, cocaine, heroin, or methamphetamine, which are the substances the dog was trained to detect. (A.544).

C. After finding heroin in the trunk of the car during an inventory search, the canine handler wrote a report stating that the dog detected the odor of a controlled substance.

A subsequent warrantless search of the car led to the discovery of heroin in the trunk of Mr. Johnson's car.

After the warrantless search, the canine handler wrote a report that is contrary to this recorded conversation with the traffic officer. Specifically, Corporal Peters wrote in his Canine Section Utilization Report that "before initiating the search, I observed a change in [the dog's] behavior consistent with his alert to odors that he had been trained to detect." (A.549).

D. Mr. Johnson seeks to suppress the drugs.

Mr. Johnson was arrested and charged with possession with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(i). Mr. Johnson sought suppression of the heroin contending, *inter alia*, that the officers lacked probable cause to seize and search his vehicle because the drug detection dog neither "indicated" nor "alerted" to the presence of a substance of a controlled substance. (A.9; 54-133).

E. The government's expert witness, who trained the handler and dog team at issue here, testified that an "air scent" is merely a dog trying to find smells in the air, and that an alert is a change in the dog's behavior when it first encounters a smell the dog is trained to detect.

As noted above, the government's expert, who trained the dog team at issue here, testified unequivocally that an "air scenting" is not an "alert." (A.339-340).

"Air scenting," is something **all** dogs – not just trained ones – will do. An "air scent" is simply the dog sampling the air to detect airborne odors; in the case of trained drug dogs, it has no relationship to odors the dog is trained to detect. (A.339-340). It is simply a dog's innate "drive to follow airborne odors or scents." (A.339).

F. <u>At the suppression hearing, Corporal Peters claims his dog "alerted" several times during the sniff, and Trooper Knott testified it was apparent to him that the dog gave a "positive response."</u>

At the suppression hearing, Corporal Peters initially testified consistent with his recorded conversation, and said his dog was "air scenting" as he approached Mr. Johnson's vehicle. (A.385). He testified: "even as I was coming up along the side of Trooper Knott's vehicle, which is between us and Mr. Johnson's vehicle, before we even got there, his head was raised, his mouth closed, he was sniffing, his head was drifting back and forth, we call that air scenting." (A.385). In fact, Corporal Peters testified: "I referred to the air scenting [during the video], that was the behavior of him testing the wind, if you will." (A.416).

However, Corporal Peters would claim his dog "alerted" "pre-search" and "far from the vehicle," (A.388-389), and later agreed with the prosecutor's assertion that the dog "alerted" "at multiple times throughout the search,"(A.431), and that the significance of the "alert" "actually impressed" him. (A.389).

Trooper Knott testified that Corporal Peters relayed to him after the sniff that the dog was "air scenting." (A.187; 259). Trooper Knott, who is not a canine handler, testified that he believed "air scenting" referred to a time "when a dog can pick up an odor that he is trained to detect and not be able to follow it to its

source." (A.187-189). Trooper Knott agreed that Corporal Peters told him when he came back around the vehicle, the dog "didn't give him anything," (A.259), and that Corporal Peters told Trooper Knott he did not get an alert on the open window or door handle, which are places where there is often an alert. (A.260). Nonetheless, Trooper Knott testified that it "was apparent to me that there was a positive response." (A.188).

G. The district court credited the officers' suppression hearing testimony and documents created by the officers after the heroin was found.

The district court denied Mr. Johnson's motion to suppress, crediting Corporal Peters' supplemental report and the officers' suppression hearing testimony. *See United States v. Johnson*, Crim. No. 12-70 Erie, 2015 WL 1444269, *10 (Mar. 30, 2015) (*citing* A.385).

On December 9, 2016, Mr. Johnson pled guilty while retaining his right to take a direct appeal from his conviction challenging the District Court's ruling. (Sealed A.699-703).

H. On appeal, the Third Circuit found no clear error, citing to the report written by Corporal Peters after the heroin was found and the Corporal Peters' testimony that his dog alerted.

The Third Circuit stated: "admittedly, the dashboard footage is somewhat ambiguous," and "Corporal Peters seemed to express frustration with [the dog's] performance during the sniff." *United States v. Johnson*, No. 17-2008, 742 Fed. Appx. 616, 622 (3d Cir. July 31, 2018). The Third Circuit nonetheless upheld the District Court's finding, holding that "the record contains sufficient evidence to

support the District Court's finding that [the dog] alerted." *Id.* Specifically, the Third Circuit pointed to the same supplemental report the District Court found persuasive, which Corporal Peters wrote **after** the heroin was found. *Id.* (*citing* A.549). Further, the Third Circuit agreed with the government that the dog handler – a party with a vested interest in the outcome - was "in the best position to interpret his canine's response…." *Id.* (*quoting* the Government's Brief at 26).

Neither the District Court nor the Third Circuit reconciled the finding that the dog "alerted" with the videotape capturing the officers' contemporaneously recorded discussion to the contrary.

REASONS FOR GRANTING THE WRIT

Factual findings are reversed only when there is clear error. This standard of review affords great respect to the trial court's findings of fact with deference to the court's ability to judge the credibility of witnesses. In keeping with the limited role of appellate courts, this Court has recognized "when a judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575, 105 S.Ct. 1504, 1512 (1985).

However, the clearly erroneous standard of review will not insulate a judge's acceptance of a witness' testimony where that testimony is contradicted by other unequivocal evidence. "Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." *Id.* Where videotape evidence contradicts a witness' story, this Court has instructed that a "Court of Appeals should not … rel[y] on such visible fiction: it should … view[] the facts in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 380-381, 127 S.Ct. 1769, 1776 (2007).

In *Scott*, this Court reversed the Eleventh Circuit's affirmance of a district court's denial of summary judgment based on qualified immunity in a § 1983 claim alleging excessive force. When resolving questions at the summary judgment stage,

"courts are required to view the facts and draw reasonable inference 'in the light most favorable to the party opposing the [summary judgment] motion.'" *Scott*, 550 U.S. at 378, 127 S.Ct. at 1774-1775 (citation omitted). Likewise, when addressing the issue of qualified immunity, courts are required to consider the facts "in the light most favorable to the party asserting the injury." *Scott*, 550 U.S. at 377, 127 S.Ct. at 1774. Nonetheless, even when considered under an analysis that so strongly favors the plaintiff, where there is a videotape that "quite clearly contradicts the version of the story told by the [witness] and adopted by the Court of Appeals," this Court held there could be no "genuine" dispute. *Scott*, 550 U.S. at 378-380, 127 S.Ct. at 1775-1776.

Here, the District Court made a factual finding that the dog "alerted" to the presence of a controlled substance in Mr. Johnson's car, thereby providing probable cause to search the vehicle. *See United States v. Johnson*, Crim. No. 12-70 Erie, 2015 WL 1444269, *10 (Mar. 30, 2015). The District Court based this factual finding on Corporal Peters' suppression hearing testimony and his supplemental report, which was written after heroin had already been found. *Id*. The District Court did not address the recorded conversation between Corporal Peters and Trooper Knott at the time of the sniff when the officers talked about the dog "not giving an alert" and the arresting officer's decision to "still" take it because he suspected "money or a gun." *See id*.

On appeal, the Third Circuit upheld the District Court's factual finding, also citing to the supplemental report which was written after heroin was found. *United*

States v. Johnson, No. 17-2008, 742 Fed. Appx. 616, 622 (July 31, 2018) (*citing* App. 549). As further support for upholding the district court's finding, the Third Circuit "also agree[d] with the government that, in light of the fact that Corporal Peters and [the dog] had been a unit since 2007 and underwent their most recent training one week before the traffic stop, 'Corporal Peters … [was] in the best position to interpret his canine's response….'" *Id.* (*quoting* the Government's Brief at 26).[3]

The scenario at issue here did not present a mere credibility determination to be resolved by the factfinder. Rather, as it was in *Scott*, the existence of a recording capturing the officers' contemporaneous conversation immediately following the dog sniff provides an "added wrinkle." *See Scott*, 550 U.S. at 378, 127 S.Ct. at 1775. The officers' recorded conversation establishes that – contrary to the officers' testimony at the suppression hearing – the dog **did not alert**. By relying solely on Corporal Peters' written report made after heroin was found in Mr. Johnson's vehicle, and the officers' suppression hearing testimony, both of which are contradicted by the contemporaneous conversation recorded at the time of the

[3] The fact that a dog handler – clearly a party with a vested interest – says it is so should not tip the scales in favor of that party, particularly when that interested party's statements at the time of the event are contrary to his later claims. Indeed, it is the subjective nature of interpreting whether a drug dog has "alerted" at all that has caused at least one federal court to reject an "alert" without an "indication" as sufficient to provide probable cause. *See United States v. Heir*, 107 F.Supp.2d 1088, 1096-97 (D.Ne. 2000) (an "alert" is "simply too subjective a standard to establish probable cause" and to adopt the government's position would "elevate the officer's subjective interpretations of a dog's ambiguous behavior – which itself may be noticeable only to the handler – to the level of 'facts' sufficient to amount to probable cause").

sniff, the District Court committed clear error and the Third Circuit misapplied the clearly erroneous standard to this critical factual finding.

The holding of *Scott* has been widely applied in the context of summary judgment in § 1983 claims. *See, e.g.*, *Farrell v. Montoya*, 878 F.3d 933, 938 (10th Cir. 2017) (reversing district court denial of summary judgment where "dash-cam video contradicts the factual basis of [the plaintiff's] argument." (*citing Scott*, 550 U.S. at 380, 127 S.Ct. 1769); *Rudlaff v. Gillispie*, 791 F.3d 638 (6th Cir. 2015) (reversing district court denial of summary judgment where plaintiff's "story — that he was jerked out of the truck, and that he attempted to comply with Gillispie's commands when Bielski deployed the taser without warning, —amounts to a visible fiction in light of the dash-cam videos and his own admissions.") (internal citations, quotations and brackets omitted) (*citing Scott*, 550 U.S. at 381, 127 S.Ct. 1769); *Marksmeier v. Davie*, 622 F.3d 896, 900 (8th Cir. 2010) (affirming district court grant of summary judgment as there was no genuine issue of fact for trial where the plaintiff's statements, captured on audiotape, blatantly contradicted his version of the events) (*citing Scott*, 550 U.S. at 380, 127 S.Ct. 1769).

Further, federal courts of appeals have recognized the applicability of the principal underlying *Scott* in federal criminal prosecution proceedings. *See, e.g., United States v. Gillespie*, No. 16-6402, 713 Fed. Appx. 471, 476 (6th Cir. Nov. 9, 2017) (district court committed clear error by crediting officer testimony that defendant pointed gun at him, where officer testified gun was pointed at him "off

camera," and police cruiser video camera footage showed defendant holding gun in an "almost backward" position and gun almost immediately flying out of the defendant's hand and off to the side of the car); *United States v. Thomas*, No. 12-11471, 521 Fed. Appx. 878, 882-885 & n.1 (11th Cir. 2013) (district court clearly erred in not suppressing statements where interrogation video revealed detectives continuing to press defendant after she requested counsel, but holding admission of statements was harmless) (*citing Scott*, 550 U.S. at 380-381, 127 S.Ct. at 1776); *United States v. Prokupek*, 632 F.3d 460, 463 (8th Cir. 2011) (clear error where video "plainly contradicts Trooper['s] suppression-hearing testimony"); *United States v. Bell*, 555 F.3d 535, 538 n.3 (6th Cir. 2009) (district court finding of fact was clearly erroneous where court "apparently relied solely on the Officers' testimony, rather than the video, in making these findings.") (*citing Scott*, 550 U.S. at 380, 127 S.Ct. at 1776).

As it was in *Scott*, this Court is just as well-positioned as the district court to view the video in question. *See Scott v. Harris*, 550 U.S. 372, 379-380 (2007) (describing in detail the events depicted on videotape taken from police cruiser dashboard camera, which this Court concluded "quite clearly contradicts the version of the story told by respondent and by the Court of Appeals," thus warranting reversal of Court of Appeals' decision affirming denial of summary judgment). The dog handler's testimony is contradicted by his statements on the contemporaneous recording and neither the District Court nor the Third Circuit provided any justification for crediting the officer's later claims to the contrary.

"[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona v. Hicks,* 480 U.S. 321, 329 (1987). Here, the recording "contradict[s] the witness' story" and Corporal Peters' testimony is "so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." *Anderson v. City of Bessemer, N.C.*, 470 US. 564, 575, 105 S.Ct. 1504, 1512 (1985). The Court of Appeals erred by failing to view the officers' testimony in the light depicted by the contemporaneous recording, and this Court should grant the writ to clarify that this standard set forth in *Scott* applies equally outside the summary judgment context.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgement of the United States Court of Appeals for the Third Circuit entered in this case.

Dated: February 26, 2019

Respectfully submitted,

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CERTIFICATE OF MEMBERSHIP IN BAR

I, Kimberly R. Brunson, Assistant Federal Public Defender, hereby certify that I am a member of the Bar of the Supreme Court of the United States.

s/ Kimberly R. Brunson
KIMBERLY R. BRUNSON
Assistant Federal Public Defender

IN THE SUPREME COURT OF THE UNITED STATES
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ZAVIA JOHNSON,
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UNITED STATES OF AMERICA,
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DECLARATION PURSUANT TO RULE 29.2
OF THE RULES OF THE SUPREME COURT

I hereby declare on penalty of perjury, as required by Supreme Court Rule 29, that the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari were sent to the Clerk of the United States Supreme Court in Washington, D.C., through the United States Postal Service by first-class mail, postage prepaid, on February 26, 2019, which is timely pursuant to the rules of this Court. The names and addresses of those served in this manner are as follows:

Scott S. Harris, Clerk
Supreme Court of the United States
1 First Street NE
Washington, DC 20543

This filing pursuant to Rule 29.2 was contemporaneous with the electronical filing.

Date: February 26, 2019

s/ Kimberly R. Brunson

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