

Docket No. 18-_____

IN THE
SUPREME COURT OF THE UNITED STATES

LENARD JOHNSON,

Petitioner,

v.

RICHARD WINFREY, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT

UNOPPOSED APPLICATION TO ASSOCIATE JUSTICE
SAMUEL A. ALITO, JR. TO EXTEND THE TIME 14 DAYS FOR
PETITIONER TO FILE A PETITION FOR WRIT OF CERTIORARI

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**Petitioner Requests that his Deadline to File a
Petition for Writ of Certiorari be extended 14 days**

This Court has jurisdiction, under 28 U.S.C. § 1254(1), to grant a petition for writ of certiorari and review the Fifth Circuit Court of Appeals' opinion denying qualified immunity to Deputy Johnson. Deputy Johnson requests that his current deadline of December 27, 2018, to file a petition for writ of certiorari be extended 14 days, until January 10, 2019. Respondent does not oppose the requested extension.

Due to an intervening trial and the upcoming holidays, the current deadline, between the Christmas and New Year holidays, presents substantial challenges for preparing and printing the petition due to abbreviated business operating hours. Petitioner's counsel only recently completed a jury trial in the United States District Court for the Western District of Texas, Case No. 1:15-cv-00431, styled *Hermann Crisp v. Derrick Dutton, et al.*, on December 10, 2018, which began on December 3rd. Additionally, on December 12, 2018, petitioner's counsel completed and filed an appellate brief in *San Jacinto River Authority v. Paxton* in the Texas Third Court of Appeals, and filed a petition for review to the Texas Supreme Court in *Sims v. City of Madisonville, Texas*. For these reasons, petitioner seeks a 14 day extension of the deadline to file his petition for writ of certiorari.

Course Of Proceedings

Respondent Richard Winfrey Jr. filed suit on May 26, 2010. Petitioner Deputy Sheriff Lenard Johnson asserted defenses, including qualified immunity and

limitations. In 2011, the District Court granted summary judgment in Deputy Johnson's favor, but a panel of the Fifth Circuit Court reversed that judgment and remanded the claim to the District Court for discovery regarding whether Johnson's warrant affidavit was made with reckless disregard for the truth. *Winfrey v. San Jacinto County*, 481 Fed. Appx. 969, 980 (5th Cir. 2012) ("*Winfrey I*").

After discovery, Deputy Johnson moved to dismiss Winfrey's claims based on limitations and for summary judgment. The District Court granted summary judgment finding that, regardless of whether Johnson recklessly misrepresented, or omitted, relevant facts in the warrant application, a reasonable magistrate could conclude probable cause existed to arrest and file charges against Winfrey.

Winfrey appealed again and a panel of the Fifth Circuit Court issued an opinion vacating the judgment, and denying immunity on the basis "Johnson has not established that a corrected affidavit would show probable cause to arrest Junior." *Winfrey v. Rogers*, 882 F.3d 187, 200 (5th Cir. 2018).

Deputy Johnson petitioned the Fifth Circuit Court to consider his claim of immunity *en banc* to correct the facial error of misplacing the burden of establishing immunity on Deputy Johnson and denying immunity based on the Circuit Court's opinion that probable cause was lacking. The Fifth Circuit panel withdrew its February 5, 2018 opinion, and substituted *Winfrey v. Rogers*, 2018 U.S. App. LEXIS 23139 (5th Cir. Aug. 20. 2018), wherein the panel corrected some errors in its

findings, and excised a portion of its initial opinion that explicitly stated the court had misplaced the burden of establishing immunity on Deputy Johnson. The panel characterized its action as denying the petition for rehearing but the substituted opinion contains many substantive factual and legal changes. Most importantly, the substituted opinion still places the burden of establishing immunity on Deputy Johnson, and Winfrey fails to identify any case opinion showing Deputy Johnson violated clearly established law. Instead, the panel opinion simply denied immunity on its opinion the warrant application Deputy Johnson submitted to a judge failed to establish probable cause. Additionally, the panel opinion sanctions litigating an untimely Fourth Amendment claim brought under *Franks v. Delaware*, 438 U.S. 154 (1978), as a malicious prosecution claim and this Court has never authorized a malicious prosecution claim.

Since the panel's substituted opinion still conflicts with and is insupportable under controlling authority from this Court, on September 4, 2018, Deputy Johnson petitioned the Fifth Circuit Court *en banc* to rehear and correct the panel opinion. On September 28, 2018, the Fifth Circuit Court denied Deputy Johnson's petition for rehearing *en banc*. (Appended to this filing). Therefore, the deadline for Deputy Johnson to file a petition for writ of certiorari in this Court is currently December 27, 2018. Deputy Johnson requests he be granted 14 additional days by which to file his petition for writ of certiorari.

Certificate Of Conference

Petitioner's counsel and Respondent's counsel conferred and Respondent does not oppose the requested extension of time for Petitioner to file a petition for writ of certiorari.

Prayer

For these reasons, petitioner requests that his current deadline of December 27, 2018, to file a petition for writ of certiorari be extended 14 days to January 10, 2019.

/s/ William S. Helfand

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