

No. 19-486

IN THE
Supreme Court of the United States

DONNETT TAFFE, as Personal Representative
of the Estate of Steven Jerold Thompson, Deceased,

Petitioner,

v.

GERALD E. WENGERT, in his individual capacity,
SHERIFF SCOTT ISRAEL, in his individual capacity,
AND SHERIFF SCOTT ISRAEL, in his official capacity,

Respondents.

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

JOINT BRIEF IN OPPOSITION

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**QUESTIONS PRESENTED FOR REVIEW
(Rephrased)**

Did the Eleventh Circuit appropriately accept interlocutory appellate jurisdiction over the Deputy and Sheriff's *legal* challenges to the district court order denying qualified immunity?

Once the Eleventh Circuit took jurisdiction of the case, was it appropriate for the court to review the case, *de novo*, and analyze the record, in order to answer the legal question of whether the Deputy's actions were objectively reasonable or whether he otherwise violated a constitutional right?

Upon finding that Deputy Wengert did not violate the Decedent's constitutional rights, was it appropriate for the Eleventh Circuit to dismiss the related claims which could not stand as a matter of law?

LIST OF PARTIES

Donnett Taffe, Personal Representative of the Estate of
Steven Jerold Thompson

Steven Jerold Thompson, Deceased

Gerald E. Wengert, Deputy, Broward Sheriff's Office

Scott Israel, (Former) Sheriff of Broward County,
individually

Scott Israel, in his official capacity as the Sheriff of
Broward County

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STATEMENT ON JURISDICTION

Petitioner seeks certiorari jurisdiction in this Court pursuant to 28 U.S.C. § 1254(1). As recognized by this Court's Rule 10, such review is not a matter of right, but of judicial discretion and will be granted only for compelling reasons.

RELEVANT CONSTITUTIONAL PROVISION

“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.” U.S. Const. amend. IV.

STATEMENT OF THE CASE

The Amended Complaint in this case sets forth the following claims:

- Count I: State Law-Assault and Battery Claims against Deputy Wengert
- Count II: Violation of § 1983/Excessive Force against Deputy Wengert
- Count III: State Law-Negligent Hiring/Supervision/Retention against the Broward Sheriff's Office

Count IV: Violation of §1983/Supervisory Liability Claim against Sheriff Israel in his Individual Capacity

Count V: Violation of §1983/*Monell* Claim against the Broward Sheriff's Office

The district court denied the motion for summary judgment filed by Deputy Wengert, Sheriff Israel, in his individual capacity, and the Broward Sheriff's Office (Petitioner's Appendix B). Thereafter, Deputy Wengert and Sheriff Israel filed an interlocutory appeal of the district court's denial of qualified immunity.

After asking the parties to address the issue of interlocutory appellate jurisdiction, the Eleventh Circuit concluded that the appeal could proceed on the denial of qualified immunity as to the claims against Deputy Wengert and Sheriff Israel in their individual capacities. The appellate court also held that the official-capacity claims against the Broward Sheriff's Office could be carried with the case. (Petitioner's Appendix C, pp. 37a-38a).

After briefing and an oral argument on the merits, the Eleventh Circuit reversed the district court's order, granted qualified immunity to Deputy Wengert, and further dismissed the remaining claims against (former) Sheriff Scott Israel and the Sheriff's Office. (Petitioner's Appendix A); *Taffe v. Wengert*, 775 Fed. Appx. 459 (11th Cir. 2019). The Petitioner's request for rehearing and rehearing en banc was denied (Petitioner's Appendix D), and she now seeks certiorari review in this Court.

The Petitioner improperly includes a detailed discussion of “facts” in her statement of the case, even though the questions presented to this Court involve *jurisdiction*. As required by this Court’s Rule 15, the Respondents do take issue with the version of the “facts” included in the Petition which are unsupported by any evidence, or reasonable inference. Further, the Eleventh Circuit’s decision sets forth the *material* facts of the case, in detail, and the Respondents would respectfully refer this Court to that opinion, if necessary. (Petitioner’s Appendix A).

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit appropriately accepted interlocutory review of the district court’s denial of qualified immunity to Deputy Wengert and Sheriff Israel in their individual capacities.

Petitioner erroneously suggests that the Eleventh Circuit improvidently accepted review of this case by way of an interlocutory appeal. To the contrary, the Eleventh Circuit appropriately accepted jurisdiction over the district court’s denial of qualified immunity, as to both Deputy Wengert and Sheriff Israel. It is clear that the petition is founded on a disagreement with the Eleventh Circuit’s careful review of the record, once it properly accepted review. As such the Petitioner asks this Court to grant certiorari to review a factual dispute, which is wholly improper. *See Salazar-Limon v. City of Houston, Tex.*, --- U.S. ---, 137 S.Ct 1277, 1278 (2017) (holding “this Court does not typically grant a petition for a writ of certiorari to review a factual question”). Petitioner’s arguments do not satisfy Rule 10 of this Court, as there

is no cognizable conflict or any other compelling reason warranting certiorari review.

It is clear that a district court's order denying qualified immunity can be reviewed by an interlocutory appeal pursuant to 28 U.S.C. § 1291. The concept of qualified immunity was addressed by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in which this Court explained that the public interest is better served when public officials have the ability to take action with independence and without fear of consequences. *Id.* at 814.

More pointedly, in discussing interlocutory appellate jurisdiction in the qualified immunity context, this Court has reiterated that the consequences of allowing an improper claim to proceed against a public official are not limited to liability for money damages, but also include “the general costs of subjecting officials to the risks of trial – distractions of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Recognizing that “even such pretrial matters as discovery are to be avoided if possible,” this Court has held that the denial of an official's claim of immunity meets the requirements necessary to render it an appealable interlocutory decision. Decisions as to the entitlement to qualified immunity must be decided as early as possible as “[t]he entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.” *Id.*

As detailed in their jurisdictional and merits briefs below, Deputy Wengert and Sheriff Israel raised the following *legal* arguments on appeal:

- The district court failed to apply and/or improperly applied the law governing the objective reasonableness standard to the facts of the case and Deputy Wengert's conduct (*Graham v. Connor*, 490 U.S. 386 (1989));
- Deputy Wengert had probable cause to arrest the Decedent (*Illinois v. Gates*, 462 U.S. 213 (1983));
- Deputy Wengert's conduct did not violate the Decedent's constitutional rights;
- Deputy Wengert did not violate clearly-established law;
- The district court failed to even address the law governing supervisory liability claims as to Sheriff Israel, in his individual capacity (*Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Cottone v. Jenne*, 326 F.3d 1352 (11th Cir. 2003); *Gonzalez v. Reno*, 325 F.3d 1234 (11th Cir. 2003));
- Sheriff Israel did not violate the Plaintiff's constitutional rights;
- Sheriff Israel did not violate any clearly-established law.

Deputy Wengert and Sheriff Israel did not seek jurisdiction based on a disagreement with the district court's factual analysis. Rather, as public officials, they sought an interlocutory appeal based on the district court's failure, or refusal, to apply the applicable law with respect to the legal question of whether they were entitled to qualified immunity in this case. *See generally*

City of Escondido, Cal. v. Emmons, --- U.S. ---, 139 S. Ct. 500, 503, (2019) (holding the court must explain how the case law prohibited the officer's actions and set forth its analysis as to entitlement to qualified immunity).

Where qualified immunity claims “raise legal issues quite different from any purely factual issues that might be confronted at trial,” interlocutory jurisdiction is proper. *Plumhoff v. Rickard*, 572 U.S. 765, 772-73 (2014). “This is so because such orders conclusively determine whether the defendant is entitled to immunity from suit, this immunity is both important and completely separate from the merits of the action, and this question could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost.” *Id.* at 772 (citations omitted). “Deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden.” *Id.* at 773. Thus, an officer's argument that he did not violate the Fourth Amendment “is a legal question quite different from any factual issue.” *Id.*; see also, *Penley v. Eslinger*, 605 F.3d 843, 849 (11th Cir. 2010) (holding even “objective reasonableness” is, itself, a question of law); *Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir. 2002) (in conducting *de novo* review of qualified immunity ruling, after resolving the issues of material fact, the court then answers “the legal question” of whether the defendant is entitled to qualified immunity under that version of the facts); *Cottrell v. Caldwell*, 85 F.3d 1480, 1484 (11th Cir. 1996) (holding the court had interlocutory jurisdiction over “core qualified immunity issues” which were questions of law).

Petitioner’s argument that the Eleventh Circuit did not have jurisdiction here relies upon this Court’s decision in *Johnson v. Jones*, 515 U.S. 304 (1995). In *Johnson*, the Court addressed the “appealability of a portion of a district court’s summary judgment order that, although entered in a ‘qualified immunity’ case, determined only a question of ‘evidence sufficiency.’” *Id.* at 313. The Petitioner’s argument requires an overly broad interpretation of *Johnson* that is not supported by any subsequent decision.

First, *Johnson* itself acknowledges there will be interlocutory appellate decisions involving the determination of qualified immunity where it is necessary for the appellate court to provide a detailed evidence-based review of the record. *Id.* at 319 (conceding that, in some instances, a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court assumed in reaching its decision). Additionally, a number of the decisions relied upon by Petitioner in her own brief have recognized that the law set forth in *Johnson* does not bar immediate appellate review of fact-based rulings in all circumstances. *See e.g. Plumhoff*, 572 U.S. at 772 (distinguishing *Johnson* from a case where the officers contended that their conduct did not violate the Fourth Amendment or clearly established law); *Scott v. Harris*, 550 U.S. 372, 380 (2007) (determining that the first step in assessing the constitutionality of the officer’s conduct is to determine the relevant facts, and refusing to accept a plaintiff’s version that is so “blatantly contradicted by the record... that no reasonable jury could believe it.”); *Estate of Booker v. Gomez*, 745 F.3d 405, 410 (10th Cir. 2014) (explaining that before the appellate court could review the abstract legal questions raised on appeal, it needed to review the record); *Hammitt v. Paulding*

County, 875 F.3d 1036, 1050 (11th Cir. 2017) (“holding all of the contrary (and uncontradicted) evidence aside,” plaintiff had not pointed to any “affirmative evidence” to defeat summary judgment); *Blaylock v. City of Philadelphia*, 504 F.3d 405, 414 (3d Cir. 2007) (holding that *Johnson* does not apply when the trial court’s determination that a fact is subject to reasonable dispute is “blatantly and demonstrably false” and also holding that the court of appeals may say so, even on interlocutory review).

There is clearly a distinction between a case where the official seeking qualified immunity is seeking interlocutory review of a factual determination, and one where the appellate review is based on a legal analysis. The Eleventh Circuit has recognized this distinction. In this case, the appellate court accepted jurisdiction based on its earlier decision in *Cottrell* (Petitioner’s Appendix A, p. 3a). There, the court expressly held that *Johnson* does not affect the authority of an appellate court to decide “in the course of deciding the interlocutory appeal, those evidentiary sufficiency issues that are part and parcel of the qualified immunity issues.” *Cottrell*, 85 F.3d at 1485-6. Yet, in *Scott v. Gomez*, --- Fed. Appx. ---, No. 18-13619, 2019 WL 6522040 (11th Cir. Dec. 4. 2019), the court clarified that where there are *legal* issues underlying the qualified immunity determination, interlocutory appellate jurisdiction is proper, but that where the challenge is “only” to the sufficiency of the evidence, there is no such jurisdiction. *Id.* at *1; *see also*, *Koch v. Rugg*, 221 F.3d 1283, 1296 (11th Cir. 2000) (finding a lack of jurisdiction where the appeal was based “solely” on the alleged lack of evidence).

More importantly, there are more decisions from this Court which have similarly limited the reach of *Johnson* and refused to apply its holding so broadly. *See Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (noting that the officer should have been permitted to appeal a denial of summary judgment on the question of whether certain conduct met the standard of objective reasonableness set by this Court; also finding “no apparent impediment” to the officer’s right to argue, on an interlocutory basis, that his actions were objectively reasonable); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 674 (2009) (allowing review of the denial of qualified immunity on the basis of insufficient pleading; also noting that this qualified immunity legal question “sits near the law-fact divide,” and is a “‘fact-related’ legal inquiry” for the appellate court).

The Eleventh Circuit properly accepted interlocutory review of the district court’s denial of qualified immunity to Deputy Wengert and Sheriff Israel in their individual capacities. Their briefs properly raised *legal* questions about the district court’s failure, or refusal, to properly apply this Court’s precedent, and the Petitioner has not set forth any compelling reasons to warrant this Court’s review.

II. Once the appellate court accepted jurisdiction, it was equally appropriate for it to review the record on *de novo* review.

The Eleventh Circuit properly applied a *de novo* standard after accepting review of the interlocutory appeal on the issue of qualified immunity in this case. As this Court has noted, “the first step in assessing the constitutionality of [an officer’s] actions is to determine the

relevant facts.” *Scott*, 550 U.S. at 378. As recognized by the Eleventh Circuit, in its opinion here, while it had the *discretion* to accept the district court’s findings, if they were adequate, it was not *required* to do so. (Appendix A, p. 3a, *citing Cottrell*, 85 F. 3d at 1486).

Although appellate courts “usually” adopt a plaintiff’s version of the facts in qualified immunity cases, there are rules established by this Court that are material to that consideration. *Scott*, 550 U.S. at 378. As the Eleventh Circuit explained below:

“facts must be viewed in the light most favorable to the nonmoving party only if there is a ‘*genuine*’ dispute as to those facts.” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (emphasis added) (quoting FED. R. CIV. P. 56(c)); *see also*, *Penley v. Eslinger*, 605 F.3d 843, 853 (11th Cir. 2010) (“Though factual inferences are made in [Plaintiff’s] favor, this rule applies only *to the extent supportable by the record*.”). “When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott*, 550 U.S. at 380. And “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (internal quotation omitted).

(Petitioner’s Appendix A, pp. 8a-9a).

In this case, the Eleventh Circuit followed the standards promulgated by this Court which prevent a plaintiff from relying on “mere allegations” and require a plaintiff to put forward evidence that creates a “*genuine*” dispute of material fact. (Petitioner’s Appendix A, p. 12a, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The appellate court refused, as it should have, to accept the hearsay and speculation that formed the basis of the Petitioner’s claims. (Petitioner’s Appendix A, pp. 13-16).

Petitioner argues that *Johnson* is controlling because she wants this Court to address the facts of the case, which is neither necessary nor appropriate. The Eleventh Circuit first concluded that the district court did not base its ruling on any evidence that could be found in the record. Then, and only then, did the court undertake its own review of the record. Thus, while the Petitioner cites to multiple cases in the first section of her brief, none of them presents a true conflict or otherwise supports review by this Court.

First, in several of her cited cases, the appellate courts granted jurisdiction to address the question of qualified immunity, which directly contradicts her argument before this Court. See *Estate of Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017); *York v. City of Las Cruces*, 523 F.3d 1205 (10th Cir. 2008). Second, the courts denied qualified immunity where there were *genuine* and *material* facts in dispute. See *Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (discussing that there were “genuine” issues of fact); *Harris v. Pittman*, 927 F.3d 266, 279-81 (4th Cir. 2019) (finding disputed issues of “salient” facts); *Sears v. Roberts*, 922 F.3d 1199, 1208 (11th Cir. 2019) (holding that

plaintiff's *verified* complaint, *sworn* response and *sworn* affidavit created questions of material fact); *Gelhaus*, 871 F.3d at 1008 (accepting interlocutory jurisdiction over denial of qualified immunity, but was unable to resolve factual disputes); *Coble v. City of White House, Tenn.*, 634 F.3d 865 (6th Cir. 2011) (finding dispute between plaintiff's *testimony* and audio recording); *York*, 523 F.3d at 1210 (10th Cir. 2008) (finding questions of fact existed based on plaintiff's *testimony* about incident). These cases do not apply here because there simply was no dispute in this case. The Eleventh Circuit did not find *any* material facts in the Petitioner's favor. Again, as detailed above, the Deputy and the Sheriff sought review of the district court's failure to properly apply this Court's precedent, and the *legal* question of whether or not they violated the Decedent's constitutional rights. It was only in addressing those questions that the appellate court concluded that the Petitioner's claims were without basis.

The Petitioner's argument before this Court also implies that *Johnson* allows an interlocutory appeal on the question of whether or not the law was clearly established, but somehow precludes an appeal on the question of whether or not an officer's actions were objectively reasonable under the given circumstances. That is not the holding of the case. To the contrary, once the appellate court fleshed out the applicable and *material* facts of the case, the issue of probable cause and the reasonableness of Deputy Wengert's conduct on the date in question were purely questions of law properly within the appellate court's jurisdiction.

As evidenced by this Court's own decisions, the objective reasonableness of an officer's actions, and

the question of qualified immunity can, and should, be decided, as a matter of law. *Plumhoff*, 572 U.S. at 777 (holding that officer acted reasonably in using deadly force, and was entitled to summary judgment based on qualified immunity); *Messerschmidt v. Millender*, 565 U.S. 535, 555-56 (2012) (holding judgment denying qualified immunity must be reversed); *Scott*, 550 U.S. at 385-86 (holding where officer's actions were "reasonable" he was entitled to qualified immunity); *Chavez v. Martinez*, 538 U.S. 760, 776 (2003) (holding that where plaintiff had not established a constitutional violation, it was unnecessary to inquire as to whether the rights asserted by the plaintiff were clearly established). As such, it was proper for the appellate court, here, to determine whether or not those material facts showed a violation of a constitutional right which was clearly established at the time. See *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Thus, once the Eleventh Circuit accepted jurisdiction, it was entirely appropriate for the court to "slosh [its] way through the factbound morass of 'reasonableness'" in addressing Deputy Wengert's entitlement to qualified immunity. See *Scott*, 550 U.S. at 383.

The Petitioner's argument before this Court posits that because the appellate court discussed the factual evidence it relied upon in reaching its legal conclusion, the court somehow improvidently granted review. That is not the case. The decision by the Eleventh Circuit was a *legal* one. The appellate court accepted jurisdiction over *legal* questions with respect to the district court's denial of qualified immunity to Deputy Wengert and Sheriff Israel. Then, in applying this Court's precedent to the *material* facts of this case, the appellate court concluded that Deputy Wengert did have probable cause

to arrest the Decedent; his actions were objectively reasonable under the circumstances; he did not violate any constitutional rights; and he was justified in the use of deadly force against a person he perceived as posing an imminent threat of serious physical harm to the Deputy and others. In turn, Deputy Wengert was entitled to qualified immunity *as a matter of law*.

The determination that Deputy Wengert was entitled to qualified immunity was the correct decision and is supported by ample precedent. *See, e.g., Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (finding officer was entitled to qualified immunity for use of deadly force based on belief that victim was a threat to others, as law was not clearly established); *Brosseau v. Haugen*, 543 U.S. 194, 197-98 (2004) (“where the officer has probable cause to believe that a suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to . . . use deadly force”). The appellate court never needed to address the additional legal questions that were properly raised by the Deputy and the Sheriff (i.e., whether the law was clearly established as to each of their purported actions). That does not, however, mean that the appellate court was somehow lacking jurisdiction from the outset.

The Petitioner has not established that the Eleventh Circuit’s opinion in this case directly conflicts with a decision of this Court or any other circuit. Nor has she set forth any error or argument so compelling that it warrants certiorari review by this Court. Indeed, this Court will not accept certiorari review to review a factual dispute, which is what the Petitioner seeks. *Salazar-Limon*, 137 S.Ct. at 1278.

III. The Eleventh Circuit also appropriately dismissed the other state and federal claims against the Sheriff. Absent a constitutional violation, there was no legal basis upon which those claims could proceed.

The Petitioner’s final argument suggests that it was error for the Eleventh Circuit to dismiss the remaining state and federal claims against Sheriff Israel in his individual and official capacities after finding that Deputy Wengert had not violated the Decedent’s constitutional rights. This argument, too, is without merit and does not support certiorari review.

The district court found, improperly, that the claims against the Sheriff in his individual capacity and the claims against the Broward Sheriff’s Office were dependent on the conclusion that Deputy Wengert was not entitled to qualified immunity (Petitioner’s Appendix B, pp. 33a-36a). Because of that, the appellate court opted to accept pendent jurisdiction over those claims on the basis that they were “‘inextricably intertwined’ with the denial of qualified immunity” (Petitioner’s Appendix A, pp. 7a-8a n. 2). The appellate court, citing to *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1379 (11th Cir. 2009), was within its discretion in exercising pendent jurisdiction over “otherwise nonappealable” rulings where it already had jurisdiction of another issue in the case and where the district court’s misapplication of the law rendered those other claims dependent on the erroneous ruling as to Deputy Wengert’s liability. *See also Curling v. Sec’y of Georgia*, 761 F. Appx. 927, 935 (11th Cir. 2019) (discussing the determination of whether “the non-immediately appealable order is ‘inextricably intertwined’ with the

immediately appealable order” is discretionary); *Kelly v. Curtis*, 21 F.3d 1544, 1555 (11th Cir. 1994) (accepting review of state law claims so that, if the officers were correct about the merits of their appeal, the court could “put an end to the entire case”).

Ultimately, the absence of a constitutional violation by Deputy Wengert is fatal to all of the remaining claims. *See, e.g., City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (finding that the police officer committed no constitutional injury on the plaintiff removed any basis for liability against the city or his supervisors); *Garczynski v. Bradshaw*, 573 F.3d 1158, 1171 (11th Cir. 2009) (holding if individual officers are entitled to qualified immunity, summary judgment is also proper as to the sheriff). Accordingly, the dismissal of the case in its entirety was correct and, again, the Petitioner has failed to present a compelling reason why this Court should accept jurisdiction.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Court deny certiorari review.

Respectfully submitted,

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