OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: TYSON JOHNSON, ET AL., Petitioners v.

HOUSTON JONES

CASE NO: No. 94-455

PLACE: Washington, D.C.

DATE: Tuesday, April 18, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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TYSON JOHNSON, ET AL., :

Petitioners :

v. : No. 94-455

HOUSTON JONES :

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Washington, D.C.

Tuesday, April 18, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:15 a.m.

APPEARANCES:

CHARLES ROTHFELD, ESQ., Washington, D.C.; on behalf of the Petitioners.

CORNELIA T. L. PILLARD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

EDWARD G. PROCTOR, JR., ESQ., Chicago, Illinois; on behalf of the Respondent.

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P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 94-455, Tyson Johnson v. Houston Jones.

Mr. Rothfeld.

ORAL ARGUMENT OF CHARLES ROTHFELD

ON BEHALF OF THE PETITIONERS

MR. ROTHFELD: Thank you, Mr. Chief Justice, and may it please the Court:

The issue in this case is whether a public official who sued under section 1983 and whose response is that he did nothing wrong has asserted a defense of qualified immunity that may be raised on interlocutory appeal.

In answering that question, I think it's useful to divide it into three component parts and to consider them separately.

First, whether an official who says that he did not violate clearly established law because he didn't violate the law at all has asserted a defense of qualified immunity, second, whether the validity of that defense is somehow called into question by the existence of a predicate factual dispute about what the defendant did, and third, whether an immunity defense of this kind satisfies the Cohen test for interlocutory appeals, and

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I'll consider those three points in turn.

QUESTION: What was the second point again? You went too fast for me.

MR. ROTHFELD: I'm sorry, Your Honor. The second issue, which I think is an integral component of the first, is whether the existence of a predicate factual dispute about what it is that the defendant did somehow calls into question the validity of what otherwise would be a valid qualified immunity defense.

On the first point, whether or not there is an immunity defense at all, the court of appeals was of the view that immunity comes into play only to protect public officials who acted in the face of legal uncertainty, and therefore, under the court's approach, a public official who says that he didn't violate clearly established law because the law was in a state of flux or uncertainty when he acted, does state an immunity claim and may take an interlocutory appeal if that defense is denied.

But under this approach, the public official who says that he did not violate clearly established law because there is no evidence that he violated the law at all does not raise an immunity claim and cannot take an interlocutory appeal.

Now, we think that that approach is based on a fundamental misunderstanding of the immunity doctrine.

Immunity is not designed solely to protect public officials who face legal uncertainty when they act. Instead, the Court has repeatedly defined qualified immunity to protect all official defendants who did not violate clearly established law. That is a group that necessarily includes defendants who did not violate the law at all either because they didn't commit the acts alleged or because the acts alleged were clearly constitutional.

That point follows directly, I think, from the purposes of the immunity doctrine as repeatedly stated by the Court. The Court has said time and again in cases like Harlow --

QUESTION: You're immune if you're innocent? How can you possibly apply a doctrine like that, you're immune if you're innocent. You don't know whether you're innocent until you've been -- until the facts have been displayed.

I mean, it seems to me an immunity doctrine divorced from reference to some principle of law seems to me meaningless.

MR. ROTHFELD: Well, I think, Your Honor, that we're not saying that we shouldn't be liable here. We're saying that we have a conceptually distinct immunity from suit because we didn't violate clearly established law,

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and we shouldn't lose that immunity --

QUESTION: No, but isn't -- may I ask you if it would be proper to restate your position this way: you're claiming that there should be an immunity from trial if two conditions are met. Number 1, you would be entitled to summary judgment before trial, and number 2, you're a public official, and therefore may take an interlocutory appeal to make good on your claim. That's really what you're saying here, isn't it?

MR. ROTHFELD: Essentially that's right, Justice Souter. We're saying that --

QUESTION: You're saying public officials should have a right to interlocutory appeal on summary judgment issues because there is a value in not subjecting them to trial unless there really is a genuine dispute, and they would not be entitled to judgment.

MR. ROTHFELD: Well --

QUESTION: That's what you're saying.

MR. ROTHFELD: -- we're saying they have a right to interlocutory appeal when they've moved for summary judgment on the ground that they did not violate clearly established law because they didn't --

QUESTION: No, but that's -- you keep bringing in they did not violate clearly established law. As I understand it, your position is their claim is that they

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did not violate the law, clear as it may be, in effect at the time of the acts.

MR. ROTHFELD: Well, I think that's right, but there are two aspects --

QUESTION: And that's a different concept of immunity from the normal qualified immunity concept in which your first concern is that public officials should not have to guess about possible changes in the law or clarifications of the law that occur after they act.

Here, you're saying the claim for immunity is satisfied, in effect, by the value in not subjecting them to trial, period, unless there's a genuine dispute of fact, the kind of thing that you raise on summary judgment.

MR. ROTHFELD: Well, I think there are a number of aspects that are being connected here, Your Honor. I think it's useful to look at them individually. The first is the question of, can we claim immunity because we didn't violate the law at all, and I think that this Court's decision in Siegert v. Gilley makes clear that we can, that the first step involving an immunity claim is to decide whether the plaintiff has alleged --

QUESTION: Mr. Rothfeld, maybe I can clarify what the problem seems to be, at least for me, this way. Isn't your claim that in every 1983 case the public

officer is entitled to an interlocutory appeal on evidentiary sufficiency. Isn't that what your point is?

MR. ROTHFELD: That is -- that would -- theoretically it would be possible in every case.

QUESTION: Not theoretically. Your position is, I didn't do it. The question is, is there sufficient evidence to go to trial, every 1983 case on a clear question of evidentiary sufficiency, no question of what the law is, just evidentiary sufficiency?

MR. ROTHFELD: On the question of whether there is a genuine issue of material fact as to whether the defendant committed a constitutional violation, that is our position, and let me --

QUESTION: That may be a very good rule, but I just question your trying to sneak it in under the name immunity.

MR. ROTHFELD: Well, let me, if I can --

QUESTION: It does not bear any resemblance to a doctrine of immunity. It's a doctrine of automatic interlocutory appeal for a Government officer.

MR. ROTHFELD: If I can take a step back and try to describe the conceptual framework which I think makes clear what it is that we're asking for, in resolving an immunity claim there are going always to have to be two steps. The allegation is that what the defendant did

violates clearly established law.

In addressing that claim, the court has to a) make some assumption about what the defendant did and then apply the clearly established law to that state of facts, so looking first at whether the law was clearly established or not, clearly we cannot lose the immunity claim, because the law was clear that what we did was constitutional, so the fact that the claim here is that the defendant ultimately didn't violate the law at all shouldn't detract from the immunity claim.

The second step of the inquiry is then, all right, let's look at what the defendant did and decide whether that violated clearly established law.

Now, there typically are disputes about what defendants have done. in cases in which immunity is claimed, and in that situation the court has to make some assumption about what the defendant did. It can either accept the allegation of the complaint, or it can look to the summary judgment record.

QUESTION: It seems to me that immunity is usually used to characterize a situation in which had the official been a private person he would have been liable, but by reason of his official status he is not.

If that's true, then I think what you're proposing here would be inadequate, and would be wrong.

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MR. ROTHFELD: Well, I think certainly, Justice Kennedy, preventing liability for public officials who acted in a state of legal uncertainty is a purpose of the immunity doctrine, but immunity has considerably broader purposes, and Siegert I think demonstrates clearly that the principle that only officials who did violate the Constitution but did so at a time when it all was in flux, I think that is not the only purpose, but the conclusion in Siegert was that the official defendant was entitled to immunity, because the plaintiff had not made out a violation of the Constitution at all. The Court said --

QUESTION: Mr. Rothfeld, wouldn't it be better to stick with this category? We have one category where the law is not clear. That's not this case. We have another category where plaintiff says -- defendant says, what I did doesn't add up to a violation of Federal law, typical 12(b)(6) case, and this case where, if I did it, I'm liable, but I say I didn't do it, so why don't we just stick with that case?

You've already said candidly that every evidentiary sufficiency case goes up on appeal on an interlocutory basis, and what's troubling me about it is this. In the cases that involve clearly established law, think of it in relative competence. The courts of appeals know something about the law, but they're really not so

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good on the facts, not nearly as good as the trial court, so why don't we leave that question of evidentiary sufficiency to the trial judge and say, but when it's a question of law, then you could take your interlocutory appeal?

MR. ROTHFELD: Well, I think there are several answers to that, Justice O'Connor -- Justice Ginsburg. I've done this before, and I apologize.

I think that first of all we have some significant empirical evidence of how good the courts are in handling appeals of this sort. There are six circuits that have adopted the rule that we are endorsing here. They have applied it for some years, and have not had any difficulty in sorting through these factual records. This is the kind of inquiry that courts make routinely when they review decisions granting summary judgment motions, so I think that we are not --

QUESTION: So you don't think that trial judges on the whole have a better feel for facts than courts of appeal judges?

MR. ROTHFELD: No, I don't, but the question here is a legal question of whether or not there is a genuine issue of material fact, and the Court has recognized repeatedly that is a question of law. That is a question that the courts of appeals resolve routinely,

as I say, on appeals with --

QUESTION: Well, Mr. Rothfeld, this -- my question ties in with that of Justice Ginsburg. Typically on a question like this the district court will decide whether there's enough evidence to go to trial.

In this case, the police officer found the plaintiff banging his head against the wall, and by the time the arrest had been completed and he'd been hauled off to jail, he was found to have suffered from broken ribs and other physical injuries that are not consistent with banging the head against the wall.

Now, the trial judge thought that was enough circumstantial evidence to let it go to trial. Now, it seems to me it would be a very rare case that the court of appeals is going to second guess that kind of thing and say, oh, no, you've got it wrong, it shouldn't go to trial at all.

There may be circuits that are allowing this kind of thing, but in how many instances is the court of appeals really reversing the trial judge's determination of the facts? I think you're asking for something that's not very practical.

MR. ROTHFELD: Well, I think, to the contrary -- let me make two points in response to that. First, in a substantial number of these cases in which these appeals

are taken, a majority of the reported decisions, the decisions of the district courts denying summary judgment motions, are overturned by the court of appeals, and we cite a number of these decisions in footnote 3 of our brief, of our opening brief.

And that I think is because there are substantial institutional constraints that prevent public officials in this situation from taking insubstantial appeals, because they are faced with additional section 1983 attorney's fees liability if they ultimately lose on the merits, because the district courts and the courts of appeals both have procedures for weeding out insubstantial claims.

In fact, in every case --

QUESTION: Maybe we should extend that to everybody in 1983 cases. Maybe everybody in a 1983 case who -- every defendant who makes a summary judgment motion ought to be able to get an interlocutory appeal.

MR. ROTHFELD: Well, I think, Your Honor, we should not depart from the basic principle that the Court has stated repeatedly in its immunity decisions in Harlow and in Anderson and in Mitchell, over and over, that the point of the immunity doctrine, the fundamental purpose, is to prevent the trial of insubstantial claims because of all the familiar reasons that insubstantial suits against

innocent public officials, because of the burdens that those impose on the political system and the court.

QUESTION: That is the purpose of the immunity doctrine, but it does not follow that everything that deters or prevents the trial of insubstantial claims is immunity.

MR. ROTHFELD: No, that --

QUESTION: Your equating it with the immunity doctrine simply because this new device would happen to achieve the same end, it would, but it seems to me new law --

MR. ROTHFELD: Well, I'm using, Your Honor --

QUESTION: -- and not the immunity doctrine at all.

MR. ROTHFELD: I'm using the court's definition of immunity, which is that it protects all public officials who did not violate clearly established law, which necessarily, as I say, includes officials who didn't violate the law at all. It would be a perverse result --

QUESTION: But immunity -- to my mind, it's a defense. You know, when you state a claim for a violation, the answer is, that may all be true, but I have this immunity defense available, whereas you're really attacking the allegations of the complaint.

MR. ROTHFELD: Well, again, as in Siegert,

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Mr. Chief Justice, the Court concluded that the first step was to determine whether or not there had been a violation of the law.

QUESTION: In Siegert, there was no dispute about the facts.

MR. ROTHFELD: That's true.

QUESTION: We didn't take that to reevaluate the factual conclusions or the summary judgment conclusions of the lower courts.

MR. ROTHFELD: That's true, and if it is -- if we accept the proposition that there is an immunity defense stated when there has been no violation of law at all because then there necessarily hasn't been a violation of clearly established law, you're led to the question of, does the existence of the factual dispute somehow preclude the appeal of that issue, and again, the court has to make some assumption about what the defendant did so that it can apply to clearly established law.

In making that assumption, it either sticks with the allegations in the complaint, or it looks at the entire summary judgment record.

Now, the Court's decision in Anderson v. Creighton makes clear that in the district court, the district court is not stuck with the allegations in the complaint, when there's a factual dispute about what the

defendant did that is relevant to the immunity question.

The court will look to the entire record, will apply Rule 56, as it ordinarily does, and will decide whether there's a genuine issue of material fact. If there is no such issue, the court will accept the defendant's version of what he did for purposes of resolving the immunity argument. In this case, that would lead to judgment for the defendants.

When appeal is taken, the question then is, is the court of appeals stuck with what the district court said about whether there is a genuine issue of material fact. We think it would be a very peculiar rule to say that the district court may consider the entire summary judgment record, and the court of appeals cannot. Ordinarily, the courts of appeals consider on appeal of a question which is legitimately before them, and the question here can always be raised whether what the defendant did violated clearly established law. The court ordinarily considers all issues --

QUESTION: Mr. Rothfeld, I still think that the clearly established law is coming into this case when it really doesn't fit. It comes out of Harlow, and there, wasn't it Justice White trying to get rid of getting into that officer's head: I want it to be an objective test about what's clearly established law. I don't want to

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find out whether this particular officer knew what the law was. That was what the clearly established was all about. It doesn't fit into this picture of what were the historic facts, what happened.

MR. ROTHFELD: No, certainly Harlow doesn't resolve the question here, but Harlow sets the framework of what is it that determines whether a defendant should be accorded liability, and as we say, the formulation of Harlow has been repeated in all of these Court's cases. The innocent defendant, as the defendant in Harlow was characterized, the defendant who has done nothing wrong, should not be subjected to the burdens of litigation for all of the reasons that the Court has identified, and I think I had probably better sit down while I have the chance, if there are no immediate further questions.

QUESTION: Just in time.

QUESTION: Very well, Mr. Rothfeld.

Ms. Pillard.

ORAL ARGUMENT OF CORNELIA T. L. PILLARD

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONERS

MS. PILLARD: Thank you, Mr. Chief Justice, and may it please the Court:

We agree with the petitioner that the right that petitioner seeks here is properly characterized as part of

the immunity, but I don't think that the nomenclature is really the key. The key is that a right not to be tried on insubstantial claims is as much at stake here as it was in Mitchell v. Forsyth. The only way to protect that right is to allow for immediate appeal.

The reason this Court in Mitchell recognized a right not to be tried was to protect public officials' exercises of discretion as long as they don't violate clear law.

Fear of baseless suits can create skewed incentives and drive public officials to inaction when the public interest requires that they act. That fear is created as much by suits like this one that lack an evidentiary basis under Celotex and Anderson as by suits based on unclear law.

The respondents here are, if anything, even more entitled to claim a right not to be tried than are persons who do violate the law.

QUESTION: May I ask if your position would also lead to allowing appeals in these cases from denials of motion to dismiss for legal insufficiency?

MS. PILLARD: I think it would.

QUESTION: Yes.

MS. PILLARD: I think it would, Your Honor, and that's because the same interests would be served in those

cases, which is when --

QUESTION: Basically any interlocutory -- any order we used to think of as interlocutory would be appealable by the defendant in a 1983 case if he could say there really isn't much basis for this suit.

MS. PILLARD: I would say that all you would have to decide to rule for petitioners in this case is whether a claim under Rule 12(b)(6) or under Rule 56 that included an assertion that the official did not violate clear law, and so it might not apply. It might apply, but it wouldn't --

QUESTION: How about, did not violate any law? Did not violate any law?

MS. PILLARD: That would be included, and the distinction that I was trying to make is that there might be dispositive defenses, but that would be statute of limitations or something --

QUESTION: Where do you get this out of? I mean, it certainly is nothing like Cohen v. Beneficial, which said it's got to be an issue to the side of the merits. This is the nub of the merits, did somebody do it or not.

MS. PILLARD: Well, I think the key question in responding to whether Cohen applies, again, is whether there is a reason to recognize here a right not to be

tried, and in Mitchell the Court found that the Cohen factors, including the separability factor, was easily met there because there was a right not to be tried there.

Now, the inquiry here is separate from the merits. It's the threshold Rule 56 inquiry, whether there's sufficient evidence to go forward, and you know, once the --

QUESTION: It seems that would take Cohen totally away from what its purpose was, something that was not tied in with the merits. What was Cohen, the issue in Cohen itself?

MS. PILLARD: The issue in Cohen was whether a denial of a motion for security for counsel fees was --

QUESTION: Security for costs?

MS. PILLARD: Right, could be --

QUESTION: It had nothing to do with the merits of the litigation.

MS. PILLARD: That's right, and there is moreover --

QUESTION: This has everything to do with the merits of the litigation.

MS. PILLARD: You're exactly right that there's more overlap here, and I think under Mitchell, where the right not to be tried is at stake, more close association with the merits is tolerated. Under Mitchell, all that

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was required was that the issue be conceptually distinct, and here I think that it is.

I wanted to add a response to some of the questions from the bench to Mr. Rothfeld from Justices O'Connor and Ginsburg, who I think were suggesting that it perhaps might be more practical to defer to what the district court does in sifting the evidence, and limit this kind of appeal under Mitchell to the circumstance where there's really a doctrinal question for the court of appeals to address, and I have two responses to that, and one is really addressing the policies of recognizing a right not to be tried, and the second is perhaps more technical.

That idea of making a distinction between legal issues that have to do with sifting the evidence and legal issues that are more doctrinal runs contrary to the fundamental impetus of Harlow. The court in Harlow reformulated the qualified immunity inquiry precisely to ensure that qualified immunity would be more susceptible of pretrial disposition by the courts and less likely to be tied up with a jury disposition on the facts, and to say that Mitchell, in turn, takes a unique and narrow view of what a legal determination is, and thereby deprives the courts of appeal --

QUESTION: Ms. Pillard, I thought that Harlow

was a case concerned with motive, and it said it didn't want the judges to be exploring what's in the head of the public officer. That's a motive case. Here, there's no question of motive. It's a question of what they did, objectively.

MS. PILLARD: That's right, and my point was really on a slightly more general level, that the notion of taking what doesn't require a jury trial. Perhaps a motive inquiry would require a jury trial.

Here, under Rule 56, it's established that that doesn't infringe any Seventh Amendment jury right, or it doesn't entrench on the fact-finder's rule, and yet the suggestion, I think, is that even there we're going to leave that inquiry with the district courts, and I think that cuts against the impetus of Harlow to say, let's take as much of this as we can, make it a legal determination, and make it susceptible of disposition pretrial, and then again, if the district court errs, susceptible to correction on an immediate appeal.

QUESTION: It seems to me if we adopt your position that one way to curtail the number of appeals would be to say in another case, and the dispute has yet to be resolved, that there can be only one interlocutory appeal. Would you agree with that position?

MS. PILLARD: Well, I'm aware that that's an

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issue on which the Court has granted certiorari, and that is one of the mechanisms that the courts of appeals have explored.

QUESTION: Would you agree with that position, because everything you have said about protecting the officer seems to me to indicate that you would allow multiple appeals if new affidavits, or new evidence was adduced after a summary judgment disposition the first go-around.

MS. PILLARD: I think a rule restricting to one in every case might be too rigid, but I think there is an interest in finality that might -- adherent in the Cohen finality doctrine might be some kind of limitation --

QUESTION: So you're telling us --

MS. PILLARD: -- on the number of appeals.

QUESTION: So you're telling us that there can be a motion, an interlocutory appeal in every summary judgment case, and that they can be multiple.

MS. PILLARD: There may be cases in which multiple appeals would be appropriate.

QUESTION: Well, all right, then, then it doesn't -- I mean, you're asking, I think -- you cut the doctrine loose from its mooring in Cohen. I think you do, but there's an argument for doing that, and there's a pretty -- and we're thinking of the case where a policeman

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says, I was in Timbuktu. There's no doubt if he shot the plaintiff, I mean, he's liable, but he says, I was in Timbuktu at the time. That's the issue.

Now, you can stop the appeals coming up all the time on that through just what Justice Kennedy suggested, though that goes into the case we're hearing in October.

But the other practical thing that bothered me is this, that if you do that, you get these cases in the courts of appeals that are very complicated factually, with people's motives, and very often district courts in those circumstances just say, send it to trial, and the only practical way to run these things, they send it to trial. I'm not going to go through 5,000 affidavits about what the state of mind was of each of 15 prison officers, and let's try it out. We'll get some facts. It will work.

Then you're going to be asking before that trial the court of appeals is going to have to be separating all these things out, deciding these factual matters on states of mind that even the district court couldn't decide, and that's why it sent it to trial, and that struck me as a kind of mess.

I'm not saying that's a determinative argument, because there are other problems the other side, but I'd like to get your response to that.

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MS. PILLARD: Well, I think under Anderson v. Liberty Lobby that the court of appeals would be in a proper position to affirm the district court's decision to go ahead and let that --

QUESTION: Why?

MS. PILLARD: -- mess go to trial.

QUESTION: Why? How could you?

MS. PILLARD: For the same reason the district court applied Rule 56 --

QUESTION: You'd have --

MS. PILLARD: -- that way. The court of appeals could do that as well if there was some suggestion there.

But I think also your point is premised on a distinction that just wouldn't work, and I think if you take a hypothetical from the Mitchell case itself, that shows why that distinction would frustrate even the core qualified immunity claim.

For example, if the district court in Mitchell had not denied qualified immunity because it found the law was clear, but instead had denied it by erroneously holding that there was a dispute in the evidence in that case about whether there was a national security justification for the wire tap, the court of appeals in that kind of case has to look at the record to conclude that the district court was wrong. Without correcting

that error, the court of appeals would be unable to verify that the claim falls within the gray area and that qualified immunity is warranted.

Now, that kind of review, the sifting of the evidence, has to be available in that case, otherwise Mitchell would have been deprived of immunity, his conduct would have been the same, the state of the law would have been the same, and the interest in prompt disposal in that case would have been the same as they were in the Mitchell case, so a refusal to consider a district court's error when it inheres in the evaluation of whether the facts meet the Rule 56 standard is something that has to be amenable to interlocutory review.

QUESTION: Thank you, Ms. Pillard.

Mr. Proctor.

ORAL ARGUMENT OF EDWARD G. PROCTOR, JR.

ON BEHALF OF THE RESPONDENT

MR. PROCTOR: Mr. Chief Justice, and may it please the Court:

The question presented here is whether there is an absolute right to an appeal, an interlocutory order denying a motion for summary judgment, where a trial judge found that there was a genuine issue of material fact in dispute, simply because the moving party is a public official who has also raised a qualified immunity defense.

That's what I hear as being the issue in this case.

The general rule is clear that with very narrow exceptions denials of motion for summary judgment are not immediately appealable. That's the law everyone is subject to, but you must wait for final judgment.

The reasons for the final judgment rule are to avoid delay and unnecessary appeals, precisely what would result if the decision below were not upheld.

Thus, if only a claim in this case were assault and battery based on the same events that are alleged in this complaint, there's no dispute that there would be no interlocutory appeal. The only question is whether the fact the petitioners are police officers who claim qualified immunity because they allege they did not do the acts alleged, whether that changes the result.

In our view, the narrow exception created in Mitchell is just that. It's a narrow exception, and it does not apply here, because much of the rationale for Mitchell is not present in this case.

QUESTION: Well, why not, Mr. Proctor? Isn't it from the officer's point of view much more sympathetic when the officer said, I didn't do anything wrong, than when the officer says, I did something that was wrong, but it wasn't so clear that it was wrong. If you get upstairs immediately on the second case, why shouldn't you on the

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first case?

MR. PROCTOR: Okay. In this case, I believe this would be the first case scenario where an officer says, I didn't do anything, or I was out of town, or I was there but I didn't do anything or nothing happened.

That should not get upstairs because Mitchell wanted cases to be dismissed before discovery. That was the rationale in Mitchell. Mitchell, this Court did not want police officers subjected to any suit, any burden whatsoever. This case and cases like it necessarily require that discovery be done in order for an appellate court to, or district court to pour through a factually -- a factual record, so one half of what Mitchell and this Court in Mitchell wanted isn't even present here.

Secondly, it's not the type of question that had ever been held by this Court to be appropriate for interlocutory appeal. It's a very different character.

The appellate courts are to determine what is the state of the law and teach us in other cases, and police officers and other governmental officials, what is the clearly established law. They are to determine what is clearly established law, so the focus really is upon what is legal precedent, not what the facts are.

QUESTION: Well then, what facts do you take? The real practical problem that was mentioned, and it

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doesn't move people but it did move me a lot, is what does -- what set of facts is the court of appeals supposed to assume when it decides this purely legal question of whether or not there's qualified immunity under the kind of standard you're talking about?

Look, the case comes up. The case involves a plaintiff who says the policeman stood by and watched while I was beaten. The policeman says, I was in the next room, and anyway, it isn't clearly established that a person who stands by and watches is liable.

The second is obviously appropriate for the court of appeals. What facts is the court of appeals supposed to assume there? Is he supposed to go -- I mean, how can you avoid, if you're in the court of appeals, going through that record to see precisely where the policeman was standing, and once you admit that, you're right down the road to saying that the court of appeals has to look to see what the evidence will support as to the factual matter, and then there's no distinction from giving him the appeal in the first place, at least no workable one that I could find.

I'm trying to get you to focus on what I once rejected, but it seems is a very important practical problem.

MR. PROCTOR: The -- reviewing the facts, or a

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question of fact, Your Honor, is subordinate to getting, in my view to getting to what the real issue is. Was there a violation of any established law in this case?

QUESTION: Well, I can't decide whether or not it's clear unless I know whether the policeman's in the door towards one room, or in the other room. The answer might all differ, and if I'm a court of appeals judge, I have to know what set of facts I'm supposed to answer that question on the basis of.

MR. PROCTOR: If you're a court of appeals judge, it seems to me, though, that you would take the facts most favorable to the nonmoving party as --

QUESTION: Yes, most favorable as supported in the record, right, and now what I've done is I've gone through the record to make my summary judgment determination.

MR. PROCTOR: Okay. You definitely have to look at the facts to determine what's going on.

QUESTION: Which? Which? Which? That's what gives rise to this problem and is not answered in any of the prior cases.

QUESTION: Wouldn't it be the facts as alleged in the complaint --

QUESTION: Ah.

QUESTION: -- because these go up before any

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discovery. You don't know what the facts are. It's a question of law.

QUESTION: Yes.

QUESTION: And doesn't the court of appeals consider the facts alleged in the complaint?

MR. PROCTOR: Yes, I --

QUESTION: The problem with that is in many of these cases that was long by the boards. Nobody in the district court thinks the things that were alleged in the complaint, often very general in nature, have much to do with the real issue. I mean, there are cases where you can do that, but others you can't.

QUESTION: Well then, wouldn't you consider the affidavits that were filed in connection with the summary judgment motion showing the showing made by the plaintiff?

MR. PROCTOR: Yes. Mr. Chief Justice, in this case we agreed to forego to submit such a record, but in the court of appeals, I can assure you the record was pretty lengthy, and you can consider affidavits, consider all of the depositions which were taken by the police officers, or were taken of the police officers in this case, the plaintiff's deposition, an expert was disclosed and deposed --

QUESTION: And the court of appeals would simply review what the district court had done on summary

judgment.

MR. PROCTOR: That is what is being suggested here. Really what I think is being suggested here is it is appropriate for a court of appeals to review whether or not the district judge may have made a mistake or not with respect to --

QUESTION: Yes.

MR. PROCTOR: -- deciding to send a case to a jury.

QUESTION: But you've admitted that the court of appeals has to go through all this anyway to decide what the immunity claim is. While you're at it, why not finish the job?

MR. PROCTOR: I think that this Court's recent decision --

QUESTION: I mean, I could understand your position if these immunity motions were motions in limine, before there's any discovery, before any evidence, but then you'd just have to go on what's in the complaint, but if you bring up one of these motions in a summary judgment context, after there's been discovery, where the other side has to have had the opportunity to make discovery, all that goes up into court. Why not finish the job while you're up there?

MR. PROCTOR: I think this Court's recent

decision in Swint is instructive on that, and I think you just -- you have to go back and --

QUESTION: I think your answer is the statute, that there -- we don't have open-ended authority to provide interlocutory appeals. Cohen is an exception to the statute, and your answer is this doesn't come within Cohen. It's very closely connected to the merits. So it might be a good idea, but we should get a statutory amendment.

MR. PROCTOR: Yes, Your Honor. It is not collateral to the merits, and I was going to go back to my first point that this is a very narrow exception to allow interlocutory appeals under these -- under the circumstances.

QUESTION: But I'm still concerned with what Justice Breyer's concern was. Suppose there are two arguments at the summary judgment stage. One is that there are no facts to support your claim. The other is, even if the facts do support the claim, there has been no clearly established constitutional right. Are you saying that only the first goes up to the court of appeals?

MR. PROCTOR: No --

QUESTION: Only the second goes to the court of appeals, because if you say that, then we're reversing the usual order in which we don't reach constitutional

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questions if it's not necessary to do so.

MR. PROCTOR: If the first case were allowed to be determined, or an appeal would be allowed to be entertained, it wouldn't help anybody else handling any other type of claim. It wouldn't state a new rule or a new law. It would only be helpful in that case, maybe, to say that --

QUESTION: No, but you're asking the court of appeals -- suppose both issues are in the case, and you're asking the court of appeals to reach an important, difficult constitutional question which might not be necessary, because there is a strong argument that the facts don't establish the position anyway, and that this is reversing the usual presumption, which is that we don't reach constitutional issues unless we have to, and the defendant in this case says you don't have to.

MR. PROCTOR: To say that, Your Honor, though, I think would be to say that a court of appeals is in a better decision -- a better position, or an equal position with the district court to review factual determinations. That's precisely the function of the district court.

QUESTION: Well, but this is always a question of law. Courts of appeals can do this.

MR. PROCTOR: But when the courts of appeals review the facts to determine whether or not clearly

established law was violated --

QUESTION: They're reviewing the pleadings on summary judgment. They do it all the time.

MR. PROCTOR: Courts of appeals, in an interlocutory appeals setting where a qualified immunity defense is asserted?

QUESTION: Not in an interlocutory setting, of course.

MR. PROCTOR: The general rule, I thought, Your Honor, is that you cannot take an immediate appeal just because you had a motion for summary judgment denied. You cannot, and this is a very narrow exception.

QUESTION: Well, Mr. Proctor, can't you argue that you're not really reaching a constitutional issue when your only question in effect is, what was the state of the law at the time of the act? Is that maybe a way out of this problem?

MR. PROCTOR: That is an appropriate question for appellate review on an interlocutory appeal, whether -- what was the state of the law when the acts were allegedly done.

QUESTION: If that's appropriate, then maybe one answer to the problem which I think bothers all of us that Justice Breyer raised would be to say, if the courts of appeals are going far afield in the records when qualified

immunity issues come up, the answer perhaps is that they should not be doing that, and they in effect should simply be deciding the qualified immunity issues based on the facts pleaded in the plaintiff's pleadings and go no further, and if that's -- if they confine their review to that, then it would be very easy to make a distinction between that kind of a case and the case that is before us here.

MR. PROCTOR: Yes.

QUESTION: But that would pretty much eliminate the value to the defendant of the interlocutory appeal in Mitchell v. Forsyth. If all you can challenge is the plaintiff's pleadings, the complaint, which can be very general, vague, and so forth, you get a much clearer idea of what the case is about if you do have discovery and take some depositions.

MR. PROCTOR: Yes, there can be orders entered for limited discovery, and has been so in some of the cases that I read. You can limit discovery precisely to this issue without even getting into the damages issues or any other of the issues which may be in the case.

QUESTION: Well, it would seem to me odd to start constructing discovery rules based on preserving an interlocutory right of appeal under the Cohen doctrine, but perhaps what you could say is something like pendent

jurisdiction.

You could say, under your position, that the only issue that the court of appeals should be reviewing is whether or not there's a clearly established constitutional right, or similar issues of law, but that if it is necessary in a case in order to reach the issue to look at a summary -- to look at the facts and the sufficiency allegation, then the court may do that. That might be something of an exception, but I'm afraid it might swallow the rule.

MR. PROCTOR: But you would still be making factual determinations if you did that which --

QUESTION: Well, these are factual determinations of the kind the appellate court can make in a summary judgment context, i.e., to determine the sufficiency of the evidence and the allegations to go forward.

MR. PROCTOR: Well, this case, for example, there were police reports filed by all of the police individuals. There were directly contradictory statements between the plaintiff and the defendants. There were multiple injuries and several broken ribs. The police officers had placed themselves at the scene of the arrest and --

QUESTION: And the police officers said, if we

did that, no question we violated clearly established law.

Justice Breyer asked before a positive and more complex kind of case that involved my, maybe questions of motive, but in your category of case, and I think there are a significant number of them where it is just a question that someone says the police beat me up, and the police say no, we didn't, there are no questions about motive. It's a question about what happened.

You started to say yes, that's the kind of case that cries out for discovery. In the other kinds of cases, discovery is either some courts of appeals think not allowed at all, others think it's got to be tailored, but I thought you were starting out by saying, my case is a discrete category. The only thing that's at issue is what happened, not what's in anybody's head, not any question about what the law is.

MR. PROCTOR: Exactly, Justice Ginsburg, and that determination -- let's say that -- well, the district court in this case found that a question of fact exists as to whether they did the deeds that were complained of. Now it goes to the appellate court.

Well, what is the appellate court supposed to decide at that point? Is it the petitioner's petition that the appellate court can take sides, or determine which fact is more credible than another, how many

facts --

QUESTION: But appellate courts do review sufficiency of the evidence, but they usually do it after the trial is over.

MR. PROCTOR: Yes, after a much clearer record has been made, rather than vague affidavits and inconsistent statements being made and thousands of pages, perhaps, of deposition testimony, and that, it's our position, is the more appropriate time to review the sufficiency of the evidence at trial, not the sufficiency of evidence before trial, or not what a jury might -- which fact a jury might hang their hat on or do we think that the jury might believe this fact or the other fact as opposed to this defendant as opposed to the plaintiff.

QUESTION: But there's still the problem, the haunting problem, try to explain to an officer who says, my buddy had an idea that he may be doing something wrong but it wasn't clear. I wasn't doing anything wrong. He gets to avoid a trial, and I don't. How does that make sense?

MR. PROCTOR: Okay, I just, if I can, put it in the context of this case. The law in the Seventh Circuit is, if you do stand by and watch other officers beat an individual or use excessive force, you are just as culpable, so the law was clearly established here.

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Now I think should that -- I think your question is, should that officer then, since that defense is not available, the law is clearly established, should that officer be able to just assert, I'm innocent, and the district court didn't believe me, and therefore I wanted to try my case in the appellate court before we have -- before any notion --

CHIEF JUSTICE REHNQUIST: We'll resume there at 1:00 p.m.

(Whereupon, at 12:00 noon, the Court recessed, to reconvene at 1:00 p.m. this same day.)

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AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. Proctor, you may resume.

ORAL ARGUMENT OF EDWARD G. PROCTOR, JR.

ON BEHALF OF THE RESPONDENT (RESUMED)

MR. PROCTOR: Thank you, Mr. Chief Justice, and may it please the Court:

I would like to just start with trying to further answer questions that were posed by Justice Breyer and Justice Kennedy this morning with respect to what facts, if in fact these types of appeals are to be allowed, should the appellate court consider, and as I thought about it, if it's a motion to dismiss in the pleading stage, my answer to that would be the pleadings.

If it's a motion, denial of a motion for summary judgment, in my estimation the appellate court should only review the facts that the district court found persuasive, or that the district court lays out in the appeal.

The district court will write an opinion, and did so in this case, laying out the facts that in this case she relied upon.

QUESTION: But of course, the district court doesn't find facts on a motion for summary judgment.

MR. PROCTOR: No. No, Your Honor.

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QUESTION: It may -- it decides how it rules on the basis of either uncontroverted facts or those that are controverted in favor of the nonmoving party.

MR. PROCTOR: And then lays out the facts that the district court found persuasive to that point.

QUESTION: So you're confined to the facts the district court thought was relevant to the legal inquiry?

MR. PROCTOR: That would be our position, with -- in an interlocutory appeal, to decide whether or not a question of fact exists, or decide whether or not the district court was correct in finding there were sufficient facts, or really, if there was a fact that a jury could find would prove the guilt or innocence.

QUESTION: But I thought you were saying that's what the appellate court should not be doing.

MR. PROCTOR: I don't think the appellate court should be doing that, but in answer to your question, Your Honor, if in fact they are to review -- I think your question was along the lines, what factual inquiry if these appeals are allowed should the appellate court review.

QUESTION: Only if you lose this case, and your case is that there is no interlocutory review when it's only a question of what happened.

MR. PROCTOR: Absolutely, and that's our

position, and that's -- and our position is certainly the district court is in every bit as good if not better position to make factual determinations as to whether a question of fact exists or whether or not a case should go to a jury than an appellate court, and that is absolutely unequivocally our position.

QUESTION: But you get an awful lot of -- I mean, I'm not saying this is an insuperable problem. It may be possible to resolve it, but a lot of appellate -- I've seen quite a lot of -- quite a few decisions. The defendant moves for summary judgment, one of five defendants, and the piece of paper that the district court writes has on it the word, denied.

That's it. No findings, nothing, because the judge wants to send it to trial. It's too complicated. Let's get it sorted out after we know what we're talking about. That's the kind of case that's worrying me. My worry is not insuperable. It doesn't mean that there's no way to -- et cetera, but that's what I was worried about.

MR. PROCTOR: Okay, as opposed to in this case there was a memorandum order which was written by the magistrate judge.

If there's no further questions, I would just say in conclusion, the petitioners have a burden here to demonstrate to this Court why these appeals should be

allowed. They haven't done so. They haven't met their burden in that.

Contrary to that, this issue would not be collateral to the merits. It would be an unjustifiable deviation from this Court's ruling in Cohen and in Mitchell. There is no separate right not to be tried on a question of whether an official did the acts complained of or simply a plea of I'm not guilty. That's precisely the question for trial.

It could lead to multiple appeals not only in the same case, but where would it end? Then an appeal would be taken, I would think, in every one of these types of cases where the police officer summarily asserts the district court made a mistake with respect to deciding if I used reasonable force instead of excessive force. I want an appeal on that issue.

It wouldn't end, and just because of that very issue an appeal would be taken on every case. It would cause undue hardship and burden on the plaintiffs, and as I expressed earlier, the benefits to the public officials, at least one half of them aren't even present in this type of a scenario.

Thank you.

QUESTION: Thank you, Mr. Proctor.

Mr. Rothfeld, you have 3 minutes remaining.

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REBUTTAL ARGUMENT OF CHARLES ROTHFELD

ON BEHALF OF THE PETITIONERS

MR. ROTHFELD: Thank you, Mr. Chief Justice.

Let me start with the hypothetical that was presented at the opening argument by Justice Breyer. What happens in a case in which there is an unsettled question of law and a factual dispute? There's no doubt an appeal lies in that case.

When it gets to the court of appeals, what state of facts should the court assume? As matters now stand, every circuit, as the Seventh Circuit has pointed out, including the Seventh Circuit, does not consider itself bound either by the statement in the complaint or by the district court's conclusion. Instead, the court of appeals itself makes a determination of whether there's a genuine issue of material fact by looking to the entire summary judgment record, and that approach makes perfect sense.

The question of whether there's a genuine issue of fact about what the defendant did is inextricably bound up with the question of whether the defendant's actions violated clearly established law.

QUESTION: It is not always inextricably bound, though, is it?

MR. ROTHFELD: Well, I think --

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QUESTION: And I'm -- the reason I ask is, I'm wondering if we could make a distinction on that basis.

MR. ROTHFELD: Well, I think typically it will be, certainly in the case --

QUESTION: Typically this case is not at all bound up in that question. I thought it was agreed that if the defendants did what the plaintiff alleged they did, that would violate clearly established law. If they beat up the defendant, they violated clearly established law.

MR. ROTHFELD: But the question is, Justice Ginsburg, is the conduct of the defendant violative of clearly established law? The court has to make some assumption about what it is the defendant did, and --

QUESTION: I thought, and tell me if I'm wrong, this case is a very good case for an illustration, because there were two questions, one that did involve the interlocutory appeal, was there probable cause to arrest, a question of law. The court of appeals said yes, there was. A perfect case for interlocutory appeal.

Second issue: did the defendants, as alleged, beat up the plaintiff? The defendants say no. The plaintiffs say yes. Everyone agrees that if they did, that violates clearly established law.

MR. ROTHFELD: Let's look at the first point, the probable cause issue. Had the issue -- the question

of fact there been disputed, had there been some dispute as to what the arresting officers knew at the time of the arrest, the appellate court would have to have some factual basis for resolving the question of whether there was probable cause or whether a reasonable officer would have believed probable cause to exist, and the question then is, is the court stuck with what the district court said about whether there's a genuine issue of material fact, or may the appellate court make its own determination on that question.

QUESTION: That's a case where you have an appeal because there is a question of law.

MR. ROTHFELD: Now --

QUESTION: When you don't have any question of law -- this case is one where there is no question of law.

MR. ROTHFELD: Well, I think, Justice Ginsburg, the question is -- there is a question of law. It's an easy question of law. Is what we say the defendants did violative of the Constitution? The answer is clearly no, but again, there is always going to be a question of law, an issue of law to be applied to the facts, and the question is, what facts should the Court assume in deciding that question of law?

In the probable cause situation that you stated, again, you have to look to what the officers knew, and in

looking to what the officers knew, you have to say, what did they know? Either they knew what the district court believed they knew, or the court of appeals can look to the record in deciding that.

And if the court can do that in a question -- in a case in which there is an unsettled question of law, it would be perverse to say that they can't do it where the law is clear that what the defendant did was constitutional. That would give more favorable treatment to defendants who might have or who actually did violate the Constitution than to those who clearly did not.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rothfeld.

The case is submitted.

(Whereupon, at 1:08 p.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)