No. 13-731

In The
Supreme Court of the United States

DEPUTY JARRETT MORRIS, DEPUTY JOSEPH SCHMIDT and DEPUTY JEREMY ROGERS,

Petitioners,

v.

CAROL ANN GEORGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case presents a timely vehicle by which to resolve a primary issue that is of great import to law enforcement and local governments – how should the Courts of Appeals handle a District Court's denial of qualified immunity when the denial is based on the determination that there is a genuine issue of material fact? Justice Scalia recently confirmed, "there's a disagreement in the courts of appeals as to what you do [in qualified immunity appeals] when there are claims that there are factual disputes." *Plumhoff v. Rickard,* SC Case No. 12-1117, transcript of oral argument (March 4, 2014), p. 9:23-25.

The basic question posed by this case is whether the holding in *Johnson v. Jones,* 515 U.S. 304 (1995) acts as an absolute bar to appellate review of a trial court finding that claimed questions of fact are genuine or authentic. Assuming there is jurisdiction to review such a finding under *Scott v. Harris*, 550 U.S. 372 (2007) this case also offers an ideal set of facts through which to clarify the scope of that review. Appellate courts have struggled with whether there is appellate jurisdiction only when there is video or audiotaped evidence available that may "blatantly contradict" the plaintiff's version of events. Or conversely, is there appellate jurisdiction whenever there is evidence, regardless of its form, that demonstrates that plaintiff's version of events cannot be credible? In this case, there is no recorded evidence of the incident; however defendants asserted and the Ninth Circuit dissent agreed, that other evidence,

primarily the plaintiff's recorded statement the day of the incident, disproved the factual claims she made to defeat qualified immunity.[1]

I. THE BASIS FOR THE PETITION IS THE NINTH CIRCUIT'S CATEGORICAL REFUSAL TO CONSIDER WHETHER THE RECORD AS A WHOLE BLATANTLY CONTRADICTS MRS. GEORGE'S VERSION OF EVENTS

Mrs. George asserts in her Brief in Opposition to Petition ("Opp.") that the petition should fail because the Ninth Circuit decision below does not conflict with decisions from other circuits. (Opp. 9.) She goes on to describe cases in which other circuits have analyzed the record and concluded that the evidence does not blatantly contradict the plaintiff's version of events. (Opp. 9-12.) The decision below is at odds with other circuits because the Ninth Circuit in this case categorically refused to consider the record at all. While other circuits did most often find, after examination of the record, that plaintiff's version was

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[1] Throughout her Opposition, Respondent references alleged facts with no citation to record. This pattern culminates in footnote 3, which begins with the admission, "It is not part of the record below, however. . . ." (Opp. 7.) Petitioners will not address these allegations including those at footnotes 1, 2, 3 and page 7, (end of first paragraph) beyond noting the absence of any citation to the record and Respondent's admission that the charged allegations that comprise footnote 3 are not part of the record in this case.

not blatantly contradicted, they *did* almost universally conduct the analysis. Not so here.

In this case, the Ninth Circuit stated:

> . . . the scope of our review over the appeal is circumscribed. [Citation omitted.] Any decision by the district court that the parties' evidence presents genuine issues of material fact is *categorically unreviewable* on interlocutory appeal.

(Appendix to Petition for Writ ["App."] 9, emphasis added.)

Consistent with this statement, the Ninth Circuit performed no analysis of the record as a whole. It did not question the qualification or propriety of Mrs. George's expert to opine on whether the officers were lying. It did not question whether it was reasonably possible that Mr. George could descend the stairs, locate and load a gun, withstand his wife's attempts to wrench the gun from his hands, then ascend the stairway and exit to his balcony all without help, but could not raise both hands to point a gun. The Ninth Circuit did not conduct this inquiry because it determined that it had no jurisdiction to do so. The dissent *did* conduct a thorough inquiry and determined that the record did not support Mrs. George's version of the events, most specifically her contention by declaration that her husband could not raise both arms and point a gun.

The cases petitioners invoked in their Petition did not all result in the appellate court's reversal of a District Court denial of qualified immunity. They did, however, all describe the appellate court's review of the record to determine the validity of petitioners' assertion that the record as a whole compelled a qualified immunity finding.

Specifically, in *Chappell v. City of Cleveland*, 585 F.3d 901 (6th Cir. 2009), the Court considered whether police officers were entitled to qualified immunity for shooting to death a boy armed with a knife. In holding that the District Court should have granted qualified immunity, the Court provided this analysis of the record:

> Also relevant but conspicuously lacking from this summary, is the consistent testimony of both officers that [the decedent] continued moving toward them with the knife held up while ignoring their commands to drop the knife; and that they believed he was trying to attack them and, at a distance of less than seven feet, posed an imminent threat of serious bodily harm.

Id. at 910.

This statement demonstrates that the court of appeals analyzed the record to determine if there was a genuine issue; or conversely, whether the facts that plaintiff alleged created a dispute of fact were not credible given the record as a whole.

In *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010), the Court similarly considered whether police officers were entitled to qualified immunity after using deadly force to end a car chase. The Court again conducted its own review of the record to determine whether there was a genuine issue or whether the plaintiff's version of events was implausible:

> Plaintiffs' sanitized version of the incident cannot control on summary judgment when the record as a whole does not support that version. Plaintiff's state: "Key stood in front of the minivan as it backed slowly away. . . . Torres then walked to the front passenger window . . . and fire [sic] his weapon into the minivan at the driver. . . ." While perhaps true as far as it goes, this version omits the urgency of the situation. . . .

Id. at 551-552.

This excerpt shows the appellate court's detailed examination of the record, which did not include any video or audiotape to ensure that it supported the basis for the lower court's denial of qualified immunity. Again, the Court held it did not and granted qualified immunity to the officers.

In *Pourmoghani-Esfahani*, 625 F.3d 1313 (11th Cir. 2010), the appellate court considered plaintiff's allegation of deliberate indifference to medical needs and whether the District Court was correct to deny qualified immunity on summary judgment. The Court considered the entire record and whether it was

possible to conclude that defendant acted with deliberate indifference, and held that it was not:

> After his initial evaluation by a nurse, Defendant was informed that Plaintiff had a possible nose injury . . . : this report gave Defendant no subjective notice of a medical emergency exceeding the capabilities of the jail nurses or that required a different course of action . . . Two minutes after the nurse's initial check, Defendant observed Plaintiff in her cell . . . During this time, the video shows Plaintiff sitting on the cell floor apparently resting or asleep but not obviously in distress; Defendant was presented with no reason to perceive a serious medical need.

Id. at 1318.

On this basis, the *Pourmoghani-Esfahani* Court granted qualified immunity to the appellants as to the claim of deliberate indifference to medical needs. *Id.* at 1319.[2]

Contrast these three cases to the Ninth Circuit's approach in the case at bar:

> [W]e may not consider questions of evidentiary sufficiency, i.e. which facts party may, or may not, be able to prove at trial. [Citation omitted.] . . . [The district court] parsed

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[2] Respondent misrepresented the outcome of *Pourmoghani-Esfahani*, indicating that the "court found that the video did not blatantly contradict the plaintiff 's version of facts." (Opp. 9.)

> the deputies' testimony for inconsistencies, found that medical evidence[3] (and Carol's declaration) called into question whether Donald was physically capable of wielding the gun as deputies described, and found parts of Carol's expert's testimony probative. There were genuine disputes of fact such that a reasonable jury could "disbelieve the officers' testimony" . . . Because this inquiry . . . concerns genuineness – namely "the question whether there is enough evidence in the record for a jury to conclude that certain facts are true" – *we may not decide at this interlocutory stage if the district court properly performed it.*

(App. 11, emphasis added.)

The Ninth Circuit noted that the District Court parsed the evidence, but because of this self-imposed restriction, it undertook no examination of its own.

The deputies petition this Court *not* because the Ninth Circuit reviewed the record as a whole and held that the District Court's ruling was correct, but because, unlike the cases above and many others, it

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[3] The Ninth Circuit does not state what "medical evidence" established a dispute of fact but there was no medical evidence that supported Mrs. George's assertion that her husband could not have raised both hands to point the gun. The only evidence on this point was in Mrs. George's declaration. (Excerpts of Record ["ER"] 393.) She does not assert that she had any medical training. (ER 401-403.)

refused to review the record at all. Had it reviewed the record, the appellate court would have recognized the District Court's error, as did the dissenting judge, and granted summary judgment.

Petitioners seek review here to ensure that no other appellate court makes this mistake, by requesting that this Court define the parameters of appellate jurisdiction to review District Court determinations of fact. Specifically, Petitioners ask this Court to hold that where a District Court denies qualified immunity at the summary judgment stage, an appellate court has jurisdiction to review the record as a whole to determine whether there is a triable issue of fact, or whether, as Petitioners assert here, the record reveals evidence that so blatantly contradicts the plaintiff's version of events that no reasonable jury could believe it.

II. THE NINTH CIRCUIT LIMITED THE APPLICABILITY OF *SCOTT V. HARRIS* TO LIVE RECORDINGS AND CATEGORICALLY REFUSED TO CONSIDER ITS APPLICATION TO THE EVIDENCE IN THIS CASE

Mrs. George discounts the Petitioners' assertion that the court below improperly limited the applicability of *Scott v. Harris* to audio and video recordings. (Opp. 14.) She points out that the Ninth Circuit actually characterized the type of evidence that requires consideration under *Scott* more broadly, as

"videotape, audio recording or similarly dispositive evidence." Therefore, she asserts, this is not a proper case for consideration of what evidence might properly elicit a *Scott* analysis. (Opp. 14.)[4]

While the Ninth Circuit did use this broader language to describe the type of evidence that might require consideration of whether it blatantly contradicts the plaintiff's story, the Court nonetheless failed to even consider whether the evidence in this case fit this description; whether as the dissent stated, Mrs. George's statement the day of the event "was the compelling evidentiary equivalent of the videotape in *Scott v. Harris*." (App. 63.) The Ninth Circuit failed to analyze Mrs. George's statement the day of the incident giving rise to this case and compare it to her declaration and that of expert Thomas Parker in opposition to the deputies' motion for summary judgment. It failed to question whether, based on that comparison, there was nonetheless a genuine

[4] Petitioners fail to understand the reason for Mrs. George's extensive reliance on *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *Liberty Lobby* is a First Amendment case with no qualified immunity implications. It simply underscored the tenet that credibility determinations and weighing of the evidence are jury functions. Petitioners do not disagree but rely instead on the well-recognized exception to this rule, also set forth in *Liberty Lobby*, that where the evidence could permit but one reasonable conclusion, "[A] preliminary question for the judge [is] not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it." *Id.* at 251.

issue for the jury to resolve. The Court conducted no such analysis because it believed that it was categorically precluded from doing so: "[w]e may not consider questions of evidentiary sufficiency." (App. 9.)

Respondent asserts that the Circuit cases allowing review of a genuineness finding based on "'blatantly contradicting' evidence are [all] cases involving videotapes that simply cannot be reconciled with the version of facts alleged by one side or the other." (Opp. 5.) This is inaccurate. The best examples of cases in which the District Court's denial of summary judgment was reversed based on non-video/audio evidence are *Chappell v. City of Cleveland*, 585 F.3d 901 (6th Cir. 2009) and *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010). In *Chappell*, the key evidence was the undisputed testimony of the officers that the decedent had continued to advance on the officers after they commanded him to stop. *Id.* at 911. In *Wilkinson*, the Court held that the plaintiff's "sanitized version of the incident" was blatantly contradicted by the undisputed evidence showing the "urgency of the situation." *Id.* at 551. In neither case was there any live recording to dispute the plaintiff's version of events; yet relying on *Scott*, the Sixth and Ninth Circuits reversed the District Court and held that the officers were entitled to qualified immunity.

In the case at bar, the Ninth Circuit panel did not conduct any similar analysis because of the purported jurisdictional bar. This is why the deputies petition for review. Unless the Court analyzes the record as a

whole it cannot conclude what evidence is or is not enough to blatantly contradict the plaintiff's version of events. The deputies believe that if the Court performed that analysis, as *Scott v. Harris* requires, it would agree with Judge Trott's dissent, that Mrs. George's allegations in her declaration prepared to defeat summary judgment cannot be credible because they are blatantly contradicted by her own candid and undisputed statements the day her husband died.

CONCLUSION

The Ninth Circuit did not apply *Scott v. Harris* to this case. It held that it could not apply *Scott* in the face of *Johnson v. Jones*, which supposedly categorically precluded the appellate court from assuming jurisdiction where the District Court found genuine issues of material fact. The Ninth Circuit further held that even if *Scott* could be harmonized with *Johnson*, it did not apply in this case where petitioners produced no videotape, audio recording or similarly dispositive evidence.

Petitioners urge review of this decision because it mistakenly restricts the application of this Court's ruling in *Scott v. Harris,* and by doing so undercuts the protection of qualified immunity. Review would provide clarity to the Circuits regarding when they have jurisdiction to consider the record under *Scott*,

and the type of evidence that is relevant in that consideration.

Respectfully submitted,

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