No. 20-31

IN THE

*Supreme Court of the United States*

PRINCE MCCOY, SR.,

*Petitioner,*

v.

TAJUDEEN ALAMU,

*Respondent.*

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

# REPLY IN SUPPORT OF CERTIORARI


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## INTRODUCTION

For "no reason at all" but a "bare desire to harm McCoy," Pet. App. 7a, Alamu doused him with pepper spray, a chemical agent that "temporarily blinds its recipients" and is "banned for use in war," Pet. App. 14a (Costa, J., dissenting). The court below correctly held that such gratuitous force was unconstitutional. Pet. App. 8a. *See Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) ("'When prison officials maliciously and sadistically use force to cause harm . . . contemporary standards of decency always are violated . . . .'") (quoting *Hudson v. McMillian*, 503 U.S. 1, 9 (1992)).

The majority held, however, that Respondent was shielded by qualified immunity. Pet. App. 11a. In doing so, it created two circuit splits. First, the majority reasoned that the unlawfulness of an attack is only "beyond debate" if all *Hudson* factors point against the perpetrator. Pet. App. 10a. Second, as the dissent correctly explained, the majority reasoned that "using a unique 'instrument' of force" permits corrections officers to "escape liability for constitutional violations." Pet. App. 14a (Costa, J., dissenting). No other circuit court of appeals follows either of these lines of reasoning; no matter which way you slice it, the majority opinion created a circuit split and conspicuously disregarded this Court's precedents.

Respondent's brief in opposition only emphasizes the necessity of granting the petition, either for plenary review of the questions presented or summary reversal. First, Respondent attempts to reframe the majority's radical categorical rule concerning *Hudson*'s application as a humdrum conclusion consistent with out-of-circuit precedent. But Respondent's reasoning is unsound. As an initial matter, it is irrelevant

that no Fifth Circuit judge called for en banc review of the decision below because Respondent has not identified an intra-circuit conflict. Likewise, that no other circuit has remarked on the out-of-circuit split is immaterial where it was the panel majority that disrupted national uniformity.

Second, Respondent argues that the dissent misunderstood the holding. As Respondent sees it, the holding did not turn on the mechanism of force used because the majority said that it did not. But, as Judge Costa explained, that disclaimer was pretext. Respondent also asserts that the Fifth Circuit is not an outlier. Yet the cases on the other side of the split are explicit—in word *and* methodology—that the qualified immunity inquiry cannot proceed mechanism-by-mechanism.

Alternatively, the decision below justifies summary reversal. Respondent criticizes Petitioner's request, arguing that it amounts to error correction implicating only McCoy's rights. Far from it. The panel majority's reasoning and conclusion require correcting because they are blatantly incompatible with two lines of precedent—specifically, *Wilkins* and this Court's "obvious violation" qualified immunity jurisprudence. Accordingly, the "strong medicine" of summary reversal, BIO 18, is precisely what is called for.

## I. The Majority's Novel *Hudson* Analysis Diverges from Four Circuits' Precedent and Creates A New, Categorical Entitlement to Qualified Immunity.

Respondent argues that the majority holding is nothing more than a "routine conclusion" wholly consistent with out-of-circuit precedents. BIO 12. Not so.

The decision below does, in fact, "amount[] to a sweeping rule"—splitting decisively from four other circuits—"that all *Hudson* factors must favor a plaintiff to overcome qualified immunity." *See* BIO 12; Pet. 8–12.

The majority properly considered the *Hudson* factors in the first prong of the analysis—whether the use of force was in good faith or sadistic—in concluding that "Alamu was motivated by a bare desire to harm McCoy." Pet. App. 7a. At the second prong of the qualified immunity inquiry, however, the analysis went off the rails. The majority explained that balancing tests, such as the *Hudson* factors, "are usually not 'clear' enough" for purposes of notice. Pet. App. 11a. It emphasized that "obvious cases" are the exception to the balancing-test rule. *Id*. After these statements of the law, the only *analysis* the majority provided was that "two of *Hudson's* five factors . . . weighed for Alamu, so the result was hardly obvious." *Id*. In other words, the majority's only justification for holding that the law was not clearly established, notwithstanding the constitutional violation, was that the *Hudson* factors did not all line up in McCoy's favor.

Attempting to reframe the majority's mixed-*Hudson*-factor rule as business as usual, Respondent argues that McCoy's common-sense reading, if accurate, would mean that "a panel majority effectively overturned numerous precedents" and yet no "Fifth Circuit judge [sought] en banc review." BIO 12–13. None of the Fifth Circuit cases Respondent cites, however, is relevant to the majority's newly-minted rule. Five of six did not even reach the issue of whether the law was clearly established. *See Bourne v. Gunnels*, 921 F.3d 484, 493 (5th Cir. 2019); *Cardona v. Taylor,* 828

F. App'x 198, 201 (5th Cir. 2020) (per curiam); *McGuffey v. Blackwell*, 784 F. App'x 240, 243 (5th Cir. 2019) (per curiam); *Preston v. Hicks*, 721 F. App'x 342, 345 (5th Cir. 2018) (per curiam); *Rankin v. Klevenhagen*, 5 F.3d 103, 109 (5th Cir. 1993). *Cowart v. Erwin* is the only case of the six that conducts the clearly established inquiry, but the relevance ends there—*Cowart* is not a mixed *Hudson*-factor case. 837 F.3d 444, 454–55 (5th Cir. 2016). Simply put, the majority's rule, indefensible as it is, did not create intra-circuit inconsistency.[1]

Respondent fares no better with his argument that the split between the panel decision on the one hand and the Fourth, Sixth, Ninth, and Eleventh Circuits on the other is illusory. BIO 13–14. In arguing that the split is not a split, Respondent leans heavily on the fact that "[n]one of the cases on which petitioner relies . . . identifies a circuit split." BIO 13. That is because the decision below *created* the circuit split. In any event, in the Fourth, Sixth, Ninth, and Eleventh

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[1] In any case, the Fifth Circuit seldom calls for en banc review, let alone *sua sponte* in a *pro se* case. *See Clerk's Annual Report* 31, *available at* http://www.ca5.uscourts.gov/docs/default-source/default-document-library/clerk's-annual-report-july-2019-to-june-2020.pdf?sfvrsn=9eb9c52d_0. Respondent subsequently improperly ascribes meaning to his supposition that no en banc poll was called. *See* BIO 17. To start, since no timely petition for rehearing was filed, Pet. App. 35a, whether a poll was requested is unknown, *see* Fifth Circuit I.O.P. 35 ("[T]he panel's order *denying the petition for rehearing en banc* must show no poll was requested." (emphasis added)). In any event, such absence would not be dispositive in light of the infrequency of polling. *See generally*, Order, *Taylor v. Riojas*, 946 F.3d 211 (5th Cir. 2019) (No. 17-10253) (denying petition for rehearing en banc without polling).

Circuits, mixed-direction *Hudson* factors do not categorically entitle officers to qualified immunity. *See Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013) (reversing grant of qualified immunity where one or more *Hudson* factors favored officers); *Thompson v. Virginia*, 878 F.3d 89, 106 (4th Cir. 2017) (similar); *Cordell v. McKinney*, 759 F.3d 573, 587–88 (6th Cir. 2014) (similar); *Skrtich v. Thornton*, 280 F.3d 1295, 1305 (11th Cir. 2002) (similar). By contrast, per the Fifth Circuit's rule in this case, where at least one of "*Hudson's* five factors" favors the officer, they are entitled to qualified immunity. Pet. App. 11a.

The Fifth Circuit's categorical rule—that all *Hudson* factors must weigh in favor of the plaintiff in order for it to be "beyond debate" that the conduct was illegal—is more than aberrant, though. The majority's holding amounts to a get out of jail free card for officers who use force for the very purpose of causing harm. To evade liability, an officer need only remember to "temper" her attack, Pet. App. 11a, by using only 3/4 of a can of pepper spray, or by ensuring prompt medical attention to injuries.

## II. The Majority Breaks with Four Circuits by Reviewing Qualified Immunity Weapon-by-Weapon.

In addition, as the dissent explains, the majority immunized Respondent because he assaulted McCoy with chemical spray rather than another weapon. Pet. App. 13a. Such a weapon-by-weapon analysis puts the Fifth Circuit at odds with the Second, Fourth, Seventh, and Ninth Circuits, which forbid it. Pet. 12–16; *see also* Pet. App. 13a.

Respondent makes two arguments in response. First, that the dissent misunderstood the majority's holding. BIO 15. Second, that Petitioner has conjured the split. BIO 16. Neither argument is convincing.

Consider Respondent's first argument, *i.e.*, that Judge Costa did not, unlike Respondent, understand the majority's reasoning.[2] Respondent leans heavily on the majority's assertion that "it's irrelevant that we hadn't previously found a use of *pepper spray*—as distinguished from some other instrument—to violate the Eighth Amendment." Pet. App. 9a. But that language is a fig leaf, Pet. App. 14a, and incanting a legal rule is of no moment when a court disregards it, *see Sears v. Upton*, 561 U.S. 945, 952 (2010) ("Although the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case." (footnote omitted)).

In any case, Judge Costa had it right: the majority considered only chemical-weapon cases at both prongs of the qualified immunity inquiry. In determining that the Eighth Amendment had been violated, the court looked to cases involving chemical weapons, and no cases involving other mechanisms of force. *See* Pet. App. 7a (reviewing *Chambers v. Johnson*, 372 F. App'x 471, 472 (5th Cir. 2010) (per curiam) (chemical irritant and pepper balls); *Johnson v. Dubroc*, No. 92-3452, 1993 WL 346904, at *2–3 (5th Cir. Aug. 11,

[2] As a matter of operations, that seems unlikely. *See* Federal Judicial Center, *Judicial Writing Manual* 28 (2013) ("Judges circulate draft opinions to other judges on a panel . . . to ensure that the opinion reflects the rationale of the judges in the majority."); 5th Cir. I.O.P. 34 ("The panel hearing the arguments usually confers on cases at the conclusion of each day's arguments.").

1993) (mace); *Treats v. Morgan*, 308 F.3d 868, 870 (8th Cir. 2002) (pepper spray)). Turning to the clearly-established inquiry, the majority again examined only chemical-spray cases. *See* Pet. App. 10a (discussing *Jackson v. Culbertson*, 984 F.2d 699, 700 (5th Cir. 1993) (per curiam) (fire extinguisher spray)). And in a footnote, the court explained that the chemical-weapon cases it had relied on in finding the Eighth Amendment violation did not provide notice pursuant to circuit precedent because they were unpublished. *See* Pet. App. 9a n.6. By explicitly confining the universe of cases it examined to those involving chemical weapons, the majority conducted its analysis in precisely the way the Respondent tries to argue it did not: by hinging "whether an Eighth Amendment excessive-force violation is 'clearly established'" on "whether an officer used a given implement before." BIO 16.

Nor does Respondent—or the panel majority—identify any legitimate factual ground for distinguishing this case from precedent clearly establishing that unprovoked use of force is excessive. Respondent's generic assertion that factual distinctions can distinguish precedent, *see* BIO 15, is meaningless where, as here, no relevant factual distinction exists. Most tellingly, neither Respondent nor the panel majority attempt to distinguish the present case from *Cowart v. Erwin*, 837 F.3d 444, 449, 454-55 (5th Cir. 2016). There, as here, "a prison guard [assaulted] an inmate 'for no reason.'" Pet. App. 13 (Costa, J., dissenting). Had either the majority or Respondent addressed it, they would have had to concede that no fact, aside from the

alternative mechanism of force, meaningfully separates the gratuitous use of excessive force here from clearly established precedent prohibiting just that.

Respondent's second argument—*i.e.*, that the majority's chemical-weapon-only analysis does not render it an outlier—is equally unpersuasive. BIO 16. The Fourth, Seventh, and Ninth Circuits explicitly analyze qualified immunity by comparing cases involving wholly different mechanisms of force. *See*, *e.g.*, *Thompson v. Virginia*, 878 F.3d 89, 102 (4th Cir. 2017) (denying qualified immunity for "rough ride" after examining excessive force by punch and kick); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 529 (7th Cir. 2012) (denying qualified immunity in gun case after comparing it with excessive force by fist); *Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 796 (9th Cir. 2018) (denying qualified immunity for "beating" by examining excessive force by "plastic bullets"). The Second Circuit has also rejected the "commonplace" trend "for defendants in excessive force cases to support their claims to qualified immunity by pointing to the absence of prior case law concerning the precise weapon" employed. *Terbesi v. Torreso*, 764 F.3d 217, 237 n.20 (2d Cir. 2014). The majority, by contrast, conspicuously limited its qualified immunity analysis to chemical-weapon cases. Pet. App. 8a–10a; *see also* Pet. App. 13a–14a (Costa, J., dissenting).

## III. Summary Reversal Is Appropriate Because the Majority Defies *Wilkins* and this Court's "Obvious Violation" Precedents.

Respondent argues that McCoy's summary reversal argument is a naked request for error correction. *See* BIO at 16. Not so. The decision below is blatantly

incompatible with two lines of precedent, a circumstance that warrants summary reversal. *See Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam); *see also Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (Thomas, J., concurring) (per curiam) (summarily reversing because it is "this Court's prerogative alone to overrule one of its precedents"). The Fifth Circuit's holding contravenes both *Wilkins* and this Court's "obvious violation" qualified immunity jurisprudence, both of which this Court has seen fit to enforce by summary reversal.

In *Wilkins*, this Court summarily reversed a lower court opinion dismissing an excessive force claim alleging an unprovoked assault by a corrections officer. *Wilkins v. Gaddy*, 559 U.S. 34 (2010). *Wilkins* reiterated that the "core judicial inquiry" of excessive force claims is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id*. at 37.

In this case, the Fifth Circuit found that Respondent maliciously sprayed a chemical weapon in McCoy's face, "motivated by a bare desire to harm [him]." Pet. App. 7a. "Deploying a chemical banned in warfare," Pet. App. 14a, against an innocent bystander for "for no reason at all," Pet. App. 6a, is—categorically—force used maliciously and sadistically to cause harm. Yet, the Fifth Circuit defied *Wilkins* by centering the extent of McCoy's injuries in its analysis.[3] *See* Pet. App. 10a. That the Eighth Amendment

[3] The panel majority's conclusion that McCoy's injuries were minor was also in error. Taken in the light most favorable to McCoy, "burning skin and eyes, congested lungs, difficulty breathing,

does not turn on "the good fortune to escape without serious injury" is, of course, one of *Wilkins'* central holdings.[4] *See* 559 U.S. at 38. This case is therefore as irreconcilable with *Wilkins* as the lower court decision in *Wilkins* was with *Hudson*. Summary reversal is called for on this basis alone.

There is a second basis on which to summarily reverse: the decision sharply deviates from this Court's qualified immunity jurisprudence as to "obvious" constitutional violations. The importance of that doctrine was recently reaffirmed by this Court where, as here, the Fifth Circuit disregarded it. *See Taylor*, 141 S. Ct. at 54 (summarily reversing the Fifth Circuit for granting officers qualified immunity on the basis that the constitutional violation was not obvious).

Is deploying a chemical weapon banned in warfare against an innocent person in the face for no reason at

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stomach pain, vision impairment, and various forms of emotional distress" do not constitute minor injury. Pet. App. 6a. n.3.

[4] It goes without saying that pepper spray is far from the "push or shove" that typically would not (but could) exceed the *de minimis* threshold. *Wilkins*, 559 U.S. at 38. Although the majority considered it relevant that Respondent used less than the full can of spray, Pet. App. 10a, no evidence in the record gave the court any guidance on how much pepper spray is typically used in such situations such that most of a five-ounce can may be considered a "tempered" use of force, and the summary judgment standard forbids making that inference without evidence. It would certainly be odd for Respondent's employers to have reprimanded him and placed him on disciplinary probation as they did here for using force that is the equivalent of a push or a shove. Likewise, the majority's notation that "medical personnel promptly attended to [McCoy]," *id.*, underscores, rather than minimizes, the seriousness of the force.

all a good-faith effort to maintain discipline or a malicious act to cause harm? To pose the question is to answer it. Respondent argues against the obvious by pointing out that the conduct "did not appear blatantly unconstitutional to three of the four federal judges to consider it." BIO 17. However, that is not the test for what constitutes an obvious constitutional violation. Indeed, the score was even worse in both *Taylor* and *Hope v. Pelzer*, where unified panels and district courts held that prison officials were entitled to qualified immunity. *See Taylor*, 141 S. Ct. at 54; *Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019); *Taylor v. Stevens*, No. 5:14-CV-149-C, 2017 WL 11507190, at *8 (N.D. Tex. Jan. 5, 2017); *Hope v. Pelzer*, 536 U.S. 730, 731 (2002) (reversing grant of qualified immunity on obvious violation grounds despite the fact that a unanimous panel and district court held a reasonable officer would not have known that the challenged conduct was unlawful).

Respondent also attempts to paint his inexcusable use of force as "a temporary lapse of judgment" rather than a malicious act. BIO 18. But whether conduct is aberrant or commonplace with respect to its perpetrator is irrelevant to the "obvious violation" inquiry. And Respondent's spotlight on the events that preceded his attack, BIO 18, only serves to affirm its obviously malicious nature. Respondent, angered by his interaction with *another* prisoner, attacked McCoy with a dangerous weapon that can "gratuitously blind" while the latter was "confined to his cell." Pet. App. 6a, 16a. Respondent's misconduct is every bit as obviously unlawful as the violations in *Hope* and *Taylor*. For that reason, too, the decision below should be summarily reversed.

## CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the decision below should be summarily reversed.

Respectfully submitted,

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