IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
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Lyle W. Cayce
Clerk

No. 18-40856

PRINCE MCCOY, SR.,

Plaintiff–Appellant,

versus

MR. ALAMU,

Defendant–Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before JOLLY, SMITH, and COSTA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Texas prisoner Prince McCoy sued Mr. Alamu, a correctional officer, under 42 U.S.C. § 1983 for allegedly violating his Eighth Amendment rights. He claimed that Alamu had sprayed him in the face with a chemical agent without provocation. The district court granted summary judgment for Alamu on the basis of qualified immunity ("QI"), dismissed McCoy's official-capacity claim, and denied McCoy's motions to amend his complaint. We affirm.

I.

McCoy was incarcerated in the prison's administrative segregation block. The parties agree that Alamu sprayed McCoy with a chemical agent after a different prisoner had twice thrown liquids on Alamu. They disagree about almost everything else.

Start with McCoy's side of the story. On that day in 2016, Alamu came by McCoy's cell block. As Alamu approached the cell of Marquieth Jackson, one of McCoy's neighboring inmates, Jackson threw some water on Alamu. Alamu radioed a sergeant, "who dealt with the matter." About an hour and a half later, Alamu returned to conduct a roster count. Again, Jackson doused Alamu with water. Angered, Alamu grabbed his chemical spray and yelled "where you at?" repeatedly at Jackson. McCoy's fellow inmates screamed "you can't spray him!" But because Jackson had blocked the front of his cell with sheets, Alamu couldn't do anything. Two minutes passed. Alamu re-holstered the spray and walked toward McCoy's cell, asking for McCoy's name and prisoner number. As McCoy approached the front of the cell to inform him, Alamu "sprayed [McCoy] directly in the face with his [chemical] spray for no reason at all."

Alamu remembers things differently. He states that after being "chunked with an unknown liquid" by Jackson, he "immediately . . . ran away from the cell for cover." As he approached McCoy's cell, he "went blank" after McCoy threw "an unknown weapon" at him, striking him in the face. Feeling that his "life was in danger," "the next thing that crossed [his] mind was to use" the spray. He characterized his panicked reaction as an "involuntary action." Documents in the record suggested that the "weapon" was a "piece of rolled toilet paper." McCoy denies throwing anything.

The parties agree that immediately after spraying McCoy, Alamu

initiated the Incident Command System over the radio. Prison staff arrived with a video camera, and medical personnel checked on McCoy, who was provided "[c]opious amounts of water and fresh air" to wash off the chemicals. In the video,[1] McCoy, pacing around the cell, stated that he couldn't breathe, but a nurse—speaking to the camera—noted that McCoy was "moving around just fine" and was breathing "with no distress."

The Use of Force Report found that McCoy hadn't suffered any injuries, but McCoy alleged that he had burning skin and eyes, congested lungs, difficulty breathing, stomach pain, vision impairment, anxiety, nightmares, depression, and other emotional distress. The Report concluded that Alamu's use of force was unnecessary and inconsistent with prison rules, and he was placed on three months' probation.

Both McCoy and Alamu supported their versions of the events with competent summary judgment evidence. McCoy relied mainly on his allegations and declarations from neighboring inmates who witnessed the events and confirmed his story. Alamu leaned on the findings in the Use of Force Report and the video.

McCoy sued Alamu for damages in his official and personal capacities, contending that the spraying was excessive force in dereliction of the Eighth Amendment. The district court granted summary judgment for Alamu on the basis of QI for the individual-capacity claim, dismissed the official-capacity claim as barred by the Eleventh Amendment, and denied McCoy leave to amend his complaint. McCoy appeals *pro se*.

[1] The Use of Force video showed only what happened after Alamu initiated the Incident Command System—not the use of the spray.

II.

We address the summary judgment "*de novo*, applying the same standards as the district court." *Arenas v. Calhoun*, 922 F.3d 616, 620 (5th Cir. 2019). When an officer invokes QI, "the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact [dispute] as to whether the official's allegedly wrongful conduct violated clearly established law." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). The plaintiff must show that (1) "the officer violated a federal statutory or constitutional right" and (2) "the unlawfulness of the conduct was clearly established at the time." *Rich v. Palko*, 920 F.3d 288, 294 (5th Cir.) (quotation marks omitted), *cert. denied*, 140 S. Ct. 388 (2019). We still view the evidence in the light most favorable to the plaintiff. *See Bourne v. Gunnels*, 921 F.3d 484, 492 (5th Cir. 2019).

A.

The first QI prong requires McCoy to show a genuine factual dispute about whether Alamu used excessive force. *Brown*, 623 F.3d at 253. In evaluating that claim, "the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 7 (1992). We focus on the prison official's "subjective intent" and determine it "by reference to the well-known *Hudson* factors." *Cowart v. Erwin*, 837 F.3d 444, 452–53 (5th Cir. 2016). They are "(1) the extent of the injury suffered, (2) the need for the application of force, (3) the relationship between that need and the amount of force used, (4) the threat reasonably perceived by the responsible officials, and (5) any efforts made to temper the severity of a forceful response." *Bourne*, 921 F.3d at 491 (cleaned up).

The district court held that McCoy hadn't shown a requisite factual dispute. The evidence showed Alamu had acted in self-defense and in a good-

faith effort to maintain discipline, and McCoy had provided only "bare allegations" that Alamu acted with sadistic intent.

Though the court assumed (based on the Use of Force Report) that there was little need for the spray, the remaining *Hudson* factors weighed for Alamu, who presented evidence that he reasonably perceived "a threat from McCoy." Jackson, the court noted, "had twice thrown liquids on Alamu," creating a safety risk. Alamu had "tempered the use of force . . . by using only a short burst of spray, rather than the whole can, and by ending the incident immediately after the spray." And McCoy's injuries were minor, because, in the Use of Force video, McCoy never complained about his eyes, and he was "walking and talking with no detectible breathing issues."[2]

McCoy contends that the district court erroneously resolved genuine factual disputes, and we agree. The court needed to accept McCoy's "version of the disputed facts as true" and determine whether they "constitute[d] a violation of a constitutional right." *Carroll v. Ellington*, 800 F.3d 154, 169 (5th Cir. 2015). It did the opposite, crediting *Alamu*'s version and resolving factual disputes in his favor. That was error. *See Bourne*, 921 F.3d at 492.

The court noted that Alamu had presented evidence that he reacted involuntarily after sensing a threat from McCoy. But McCoy disputed that account. He alleged that Alamu had grown frustrated with *Jackson* and arbitrarily took out his anger on McCoy by spraying him "for no reason at all." So far from providing merely "conclusory allegations," McCoy specifically alleged that he had done nothing to provoke Alamu, and McCoy backed it up with declarations of fellow inmates who'd witnessed the events. That was competent summary judgment evidence. *See* FED. R. CIV. P. 56(c)(4).

[2] The district court also noted that a different, intervening event at which McCoy alleged someone rubbed ammonia into his eyes, likely contributed to his ailments.

Indeed, McCoy's version of the disputed facts demonstrates a constitutional violation. The use of chemical spray is certainly not "a per se violation of the Eighth Amendment," even where the targeted "inmate is locked in his cell." *Soto v. Dickey*, 744 F.2d 1260, 1270 (7th Cir. 1984). Instead, "the appropriateness of the use must be determined by the facts and circumstances of the case." *Id.* Officials may use chemical spray where "reasonably necessary to prevent riots or escapes or to subdue recalcitrant prisoners." *Clemmons v. Greggs*, 509 F.2d 1338, 1340 (5th Cir. 1975). But they cannot do so "for the sole purpose of punishment or the infliction of pain." *Soto*, 744 F.2d at 1270.

On McCoy's adequately supported view of the facts, there was no need to "subdue" McCoy—it was Jackson, not McCoy, who was "recalcitrant." Granted, prison officials can use pepper spray on even a non-offending inmate (such as McCoy) if doing so will help stifle a broader disturbance. *See Baldwin v. Stalder*, 137 F.3d 836, 840–41 (5th Cir. 1998). But there is no allegation of any melee beyond Jackson's aquatic mischief. Instead, McCoy alleges that Alamu sprayed him—confined to his cell—"for no reason at all."

Thus, even accepting the district court's view that the injuries were minor and that Alamu tempered the use of force,[3] McCoy has shown genuine

[3] We agree with the district court's analysis of McCoy's injuries and Alamu's tempering of force. McCoy alleged that he suffered from burning skin and eyes, congested lungs, difficulty breathing, stomach pain, vision impairment, and various forms of emotional distress. Those injuries are minor. *E.g.*, *Bradshaw v. Unknown Lieutenant*, 2002 WL 31017404, at *1 (5th Cir. Aug. 21, 2002) (characterizing as inconsequential similar injuries the plaintiff allegedly suffered as a result of being pepper-sprayed). And the court properly noted that some of them were likely attributable to the different event involving ammonia allegedly rubbed into McCoy's eyes.

Further, Alamu tempered the severity of the force he used. The court noted that he used only 3.7 ounces of the 5-ounce can. And he immediately initiated the Incident Command System after spraying McCoy instead of further antagonizing him. The injury and temperance factors thus cut against finding a violation. *See Bourne*, 921 F.3d at 491 (laying out the *Hudson* factors for excessive-force claims).

disputes as to whether there was *any* need for force, whether the force used was proportionate, and whether Alamu reasonably perceived *any* threat from McCoy. Viewing the evidence in McCoy's favor, the *Hudson* factors thus suggest that Alamu was motivated by a bare desire to harm McCoy. *See Bourne*, 921 F.3d at 493.

That conclusion squares with unpublished decisions of ours and of our sister circuits. In *Chambers v. Johnson*, 372 F. App'x 471, 472 (5th Cir. 2010) (per curiam), we affirmed a denial of QI to officers who "emptied two cans of chemical irritant into [the plaintiff's] cell and shot [the plaintiff] twenty-nine times with a pepper ball launcher." Accepting the plaintiff's version of the facts, we held that spraying the plaintiff "after he had complied with the defendants' demands was disproportionate to any possible provocation." *Id.* at 473. So too in *Johnson v. Dubroc*, 1993 WL 346904, at *2–3 (5th Cir. Aug. 11, 1993), we held that a jury could've found that a prison official had breached the Eighth Amendment in spraying the plaintiff with mace while the plaintiff was secure in his cell and threatening no one. Finally, in *Treats v. Morgan*, 308 F.3d 868, 870 (8th Cir. 2002), the court affirmed a denial of QI for a prison official who had pepper-sprayed an inmate for refusing to "take [a] copy" of a prison form. "[T]he evidence [did] not show an objective need for the force . . . because [the plaintiff] had not jeopardized any person's safety or threatened prison security." *Id.* at 872.

McCoy tells a story similar to that of the plaintiffs in *Chambers*, *Johnson*, and *Treats*: He was sprayed, in the confines of his cell, for no reason at all. "Indeed, courts have frequently found constitutional violations in cases where a restrained or subdued person is subjected to the use of force."[4] McCoy's

[4] *Kitchen v. Dallas Cty.*, 759 F.3d 468, 479 (5th Cir. 2014), *abrogated on other grounds by Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015).

allegations show a constitutional violation.

Alamu has two main responses, but neither saves him. First, he contends that he reasonably perceived a threat because McCoy threw a wad of toilet paper at him. But even if that factual contention might persuade a jury, it does not justify summary judgment. *See* FED. R. CIV. P. 56(a). McCoy denies throwing anything at Alamu and supports his denial with competent evidence. Relatedly, Alamu suggests that the spray was justified because the undisputed facts showed that Jackson had twice thrown liquids on Alamu. But the conclusion doesn't follow: Alamu sprayed McCoy, not Jackson. McCoy should not bear the iniquities of his fellow inmate.

Second, Alamu appears to contend that McCoy cannot show a violation because his injuries were *de minimis*. But unfortunately for Alamu, the Supreme Court has rejected that line of reasoning.[5] "Injury and force . . . are only imperfectly correlated, and it is the latter that ultimately counts." *Wilkins*, 559 U.S. at 38. Accordingly, because a reasonable jury could conclude that Alamu's use of force was excessive, McCoy meets his burden at the first QI prong. *See Brown*, 623 F.3d at 253.

B.

The remaining prong requires McCoy to show that the relevant right was clearly established. *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019). "The dispositive question is whether the violative nature of *particular* conduct

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[5] *Wilkins v. Gaddy*, 559 U.S. 34, 39 (2010) (per curiam) (quoting *Hudson*, 503 U.S. at 7):

> This Court's decision [in *Hudson*] did not . . . merely serve to lower the injury threshold for excessive force claims from "significant" to "non-*de minimis*"—whatever those ill-defined terms might mean. Instead, the Court aimed to shift the "core judicial inquiry" from the extent of the injury to the nature of the force—specifically, whether it was nontrivial and "was applied . . . maliciously and sadistically to cause harm."

is clearly established. [That] inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citation and quotation marks omitted). "The pages of the *United States Reports* teem with warnings about the difficulty of" showing that the law was clearly established. *Morrow*, 917 F.3d at 874. Doing so "is especially difficult in excessive-force cases" such as McCoy's, because "the result depends very much on the facts of each case." *Id.* at 876.

Even so, our caselaw "does not require a case directly on point for a right to be clearly established." *See White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (cleaned up). Indeed, QI "will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel." *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012). Thus, 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.[6]

But for the law to be clearly established, it must have been "beyond debate" that Alamu broke the law. *Pauly*, 137 S. Ct. at 551. "The Eighth Amendment's prohibition of cruel and unusual punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind."[7] Thus, for the law to be clearly established, it must be beyond debate that the spraying crossed the line dividing a *de minimis* use of force from a cognizable one. *See Hudson*, 503 U.S. at 9–10.

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[6] Above we highlighted several unpublished cases of ours finding such violations. But only published opinions can clearly establish the law. *See Cooper v. Brown*, 844 F.3d 517, 525 n.8 (5th Cir. 2016).

[7] *Hudson*, 503 U.S. at 9–10 (1992) (quotation marks removed); *see also Wilkins*, 559 U.S. at 37–38 (referencing the same principle).

Above, we held that the spraying crossed that line. But it was not *beyond debate* that it did, so the law wasn't clearly established.[8] This was an isolated, single use of pepper spray. McCoy doesn't challenge the evidence that Alamu initiated the Incident Command System immediately after the spray, nor that medical personnel promptly attended to him and provided copious amounts of water. Nor does he provide evidence to contest the Use of Force Report's finding that Alamu used less than the full can of spray. In somewhat related circumstances, we held that spraying a prisoner with a fire extinguisher "was a *de minimis* use of physical force and was not repugnant to the conscience of mankind." *Jackson v. Culbertson*, 984 F.2d 699, 700 (5th Cir. 1993) (per curiam).[9] Similarly here, on these facts, it wasn't beyond debate that Alamu's single use of spray stepped over the *de minimis* line. For that reason, the law wasn't clearly established.

In contending that the law was clear, McCoy points to the general principle that prison officers can't act "maliciously and sadistically to cause harm." *Hudson*, 503 U.S. at 7. That won't do. The Supreme Court has repeatedly

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[8] Some might find this a puzzling result, insofar as QI might have us find a violation in one breath, but, in the next, hold it too debatable to prevent immunity. No matter. What the first prong gives, the second prong will often snatch back. The Supreme Court has repeatedly reversed courts of appeals for failing to define established law narrowly, and we must follow that binding precedent. *See, e.g.*, *Wesby v. District of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from the denial of rehearing en banc) ("[I]n just the past five years, the Supreme Court has issued 11 decisions reversing federal courts of appeals in [QI] cases, including five strongly worded summary reversals."); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 83 (2018) ("The [Supreme] Court regularly reminds lower courts that 'clearly established law' has to be understood concretely."); *id.* ("[L]ower courts are somewhat regularly reversed for erring on the side of liability, but almost never reversed for erring on the side of immunity . . . .").

[9] In finding no violation, *Jackson*, 984 F.2d at 700, also relied on the prisoner's lack of injury. But *Jackson* was decided well before *Wilkins*, 559 U.S. at 39, in which the Court clarified that Eighth Amendment excessive-force claims do not *require* a showing of a more-than-*de-minimis* physical injury. As we have explained, nothing in this opinion says that prisoners must prove a certain quantum of injury. The extent of injury is relevant but not determinative. *See id.* at 37–39.

admonished courts not to define the relevant law too capaciously. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Fact-intensive balancing tests alone (such as the *Hudson* factors) are usually not "clear" enough,[10] because the illegality of the *particular conduct* at issue must be undebatable. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017). And even if general standards can clearly establish the law where the constitutional violation is "obvious," *Haugen*, 543 U.S. at 199, this is not such a case. Above, we found that two of *Hudson*'s five factors (injury, and efforts to temper force) weighed for Alamu, so the result was hardly obvious.[11] Accordingly, we affirm the summary judgment.

III.

McCoy has two remaining claims. First, he asserts that the district court erred in refusing to let him amend his complaint to add evidence from the Use of Force video and a claim for injunctive relief. We affirm, because the proposed amendments were futile.[12] The video was already in evidence, and McCoy's transfer to a different prison mooted any claim for injunctive relief.[13]

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[10] *E.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) ("The Court of Appeals . . . proceeded to find fair warning in the general tests set out in *Graham* and *Garner*. In so doing, it was mistaken. *Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality." (citations omitted)).

[11] *See, e.g.*, *Pauly*, 137 S. Ct. at 552 (citation and quotation marks omitted):

> This is not a case where it is obvious that there was a violation of clearly established law under *Garner* and *Graham*. . . . [The court of appeals] recognized that this case presents a unique set of facts and circumstances in light of White's late arrival on the scene. This alone should have been an important indication . . . that White's conduct did not violate a clearly established right.

[12] Though "[t]he court should freely give leave when justice so requires," FED. R. CIV. P. 15(a)(2), a district court may deny leave where the amendment would be futile, *e.g.*, *Foman v. Davis*, 371 U.S. 178, 182 (1962).

[13] *E.g.*, *Herman v. Holiday*, 238 F.3d 660, 665 (5th Cir. 2001) ("Herman's transfer from [one prison to another] rendered his claims for declaratory and injunctive relief moot. And any suggestion of relief based on the possibility of [being] transfer[red] back . . . is too speculative to warrant relief." (citation omitted)).

Second, McCoy urges that because he sought to "add[] an injunction" to his original complaint, the district court improperly dismissed his official-capacity claim.[14] Again, we affirm. The court properly denied McCoy leave to add a claim for injunctive relief, so dismissal was proper.

AFFIRMED.

[14] McCoy does not challenge the court's conclusion that the Eleventh Amendment barred his official-capacity claim for damages.

GREGG COSTA, Circuit Judge, dissenting in part:

If a prison guard punched an inmate "for no reason," that assault would violate clearly established law. *See Cowart v. Erwin*, 837 F.3d 444, 449, 454–55 (5th Cir. 2016). The same would be true if a guard hit an inmate with a baton "for no reason." *Cf. Outlaw v. City of Hartford*, 884 F.3d 351, 366–67 (2d Cir. 2018) (noting that "repeatedly beating an unresisting, supine, jaywalking suspect with a stick" violated clearly established Fourth Amendment law). A guard who tased an inmate without provocation could also be held accountable. *Cf. Newman v. Guedry*, 703 F.3d 757, 763–64 (5th Cir. 2012) (holding that repeatedly tasing a nonthreatening arrestee during a traffic stop violated clearly established Fourth Amendment law). Should the result be different because Alamu's weapon of choice was pepper spray?

Our precedent answers "No". "Lawfulness of force . . . does not depend on the precise instrument used to apply it." *Id.* at 763. That makes sense. Qualified immunity is about notice. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) ("Qualified immunity operates to ensure that before they are subject to suit, officers are on notice their conduct is unlawful."). If a public official knows that using force is unlawful in a given circumstance, there is no reason to "protect [him for] apply[ing] excessive and unreasonable force merely because [his] means of applying it are novel." *Newman*, 703 F.3d at 764. So just as the use of force in *Newman* violated clearly established law even though there were no "tasing" cases on the books, *id*., Alamu's gratuitous use of force on an inmate also violated clearly established law despite the lack of published "pepper spraying" cases so holding.

Despite recognizing that an unprovoked assault violates the Constitution, the majority grants the guard immunity because we have not decided a similar case involving pepper spray. That holding is at odds with

Newman, which recognizes that the circumstances surrounding the use of force—the need for applying force, "the relationship between the need and the amount of force used," *etc.*—are what matter. *Id.* at 763–64 (quotation omitted). The chosen instrument of force does not. *Id.* And apart from its wisdom in the first place, *Newman* has put officials on notice for the last seven years that using a unique "instrument" of force does not allow them to escape liability for constitutional violations. That notice alone defeats qualified immunity.

Although the majority purports to recognize that the instrument of force does not matter in a "no provocation" case, its grant of immunity ultimately turns on the fact that the guard used pepper spray instead of a fist, taser, or baton. It relies on the absence of law clearly establishing that wantonly spraying a prisoner with a chemical agent involves more than a *de minimis* use of force. The same could have been said in *Newman* about tasing. Unexplained in the majority opinion is why tasing is a more serious use of force than pepper spraying. The use of pepper spray is no small thing. The chemical agent, which temporarily blinds its recipients, is—unlike tasers—banned for use in war. *See* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. I(5), *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 317. And numerous federal courts have treated pepper spray as a dangerous weapon in criminal cases, which requires a finding that the "instrument [is] capable of inflicting death or serious bodily injury," U.S.S.G. § 1B1.1 cmt. n.1(E)(i)—a much higher force threshold than clearing the *de minimis* hurdle. *See, e.g.*, *United States v. Melton*, 233 F. App'x 545, 547 (6th Cir. 2007); *United States v. Neill*, 166 F.3d 943, 949–50 (9th Cir. 1999); *United States v. Bartolotta*, 153 F.3d 875, 879 (8th Cir. 1998). Like tasing, pepper spraying is a far more significant use of force than the "push or shove" the Supreme Court has held out as examples of *de minimis force.*

Hudson v. McMillian, 503 U.S. 1, 9 (1992) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1031 (2d Cir. 1973) (Friendly, J.)).

The majority neglects that the gratuitous tasing in *Newman* was deemed an "obvious" case of excessive force, 703 F.3d at 764, a label that also fits the pepper spraying of McCoy "for no reason." Qualified immunity is often a game of find-that-case, but not always. Common sense still plays a role; when the violation of constitutional rights is "obvious," there is no immunity. *Hope*, 536 U.S. at 740–41; *see also City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019) (per curiam) (recognizing the obviousness exception); *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (same). That principle is rooted in the fair notice concerns that animate qualified immunity. *Hope*, 536 U.S. at 739–40. A public official is liable only when "a reasonable official would understand that what he is doing violates" the law. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). That knowledge of illegality necessarily exists when an officer commits an obvious constitutional violation. That's what obvious means.

And it is obvious in prison use-of-force cases that "the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quotations omitted). "Among 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)). Judge Friendly's paradigmatic example of excessive force by a prison guard— "maliciously and sadistically" using force "for the very purpose of causing harm," *Johnson*, 481 F.2d at 1033, quoted in *Whitley*, 475 U.S. at 321—describes this case. McCoy's testimony, which we must accept at this stage, is that there was "no reason at all" to spray him. How could any guard not know that an unprovoked use of pepper spray is unlawful? Yet the majority

concludes it would have been reasonable for a guard to think the law allowed him to gratuitously blind an inmate.

Although the obviousness exception does not often apply, it plays an important role in qualified immunity doctrine. It ensures vindication of the most egregious constitutional violations. Requiring an on-point precedent for obvious cases can lead to perverse results. Because cases involving the most blatantly unconstitutional conduct will not often end up in the courts of appeals, it may be harder to find factually similar caselaw for such cases than it is for cases with conduct presenting closer constitutional questions. But cases involving obvious constitutional violations should be the easiest ones in which to find that an officer was "plainly incompetent or . . . knowingly violate[d] the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The panel agrees that if the jury finds the facts as McCoy presents them—a guard's infliction of painful force on a compliant, nonthreatening inmate—then Alamu violated the law. Any reasonable guard would know that such an unprovoked use of pepper spray violates the Constitution, so I would allow a jury to decide if that is what happened.

Because McCoy's excessive force claim should go forward under current qualified immunity law, it does not depend on the success of recent calls to reconsider or recalibrate the doctrine. *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring); *Zadeh v. Robinson*, 928 F.3d 457, 479–81 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). But with so many voices critiquing current law as insufficiently protective of constitutional rights, the last thing we should be doing is recognizing an immunity defense when existing law rejects it.