Exhibit A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 11, 2020
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

[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.

[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

[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]

[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.

Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

PRINCE MCCOY, TDCJ # 00852958, Plaintiff, VS. MR. ALAMU, *et al*, Defendants.	§ § § § § § § § §	CIVIL ACTION NO. 3:17-CV-235

MEMORANDUM OPINION AND ORDER

Plaintiff Prince McCoy, an inmate in the Texas Department of Criminal Justice–Correctional Institutions Division ("TDCJ"), brings this lawsuit *pro se* complaining of excessive force used against him by a TDCJ officer. Plaintiff filed a motion for summary judgment (Dkt. 12), to which Defendant Tajudeen Alamu has responded (Dkt. 18) and Plaintiff has replied (Dkt. 22). Defendant filed a cross motion for summary judgement (Dkt. 20), and Plaintiff has responded (Dkt. 28). Plaintiff also has filed motions to amend his complaint (Dkt. 24, Dkt. 31). The motions are ripe for decision. After reviewing all of the evidence submitted, the parties' briefing, the applicable law, and all matters of record, the Court concludes that leave to amend the pleadings should be **DENIED** and summary judgment should be **GRANTED** for Defendant.

I. BACKGROUND

Plaintiff filed his complaint (Dkt. 1) on July 25, 2017, and later amended with the Court's leave (Dkt. 8). His amendment (Dkt. 6) attaches witness statements, medical

records, and grievances. Defendant has submitted Use of Force records for Plaintiff (Dkt. 20-1) and the Use of Force video recording (Dkt. 20-2).

The parties agree that on December 28, 2016, while Plaintiff McCoy was incarcerated at the Darrington Unit in Rosharon, Texas, Defendant Alamu sprayed him with a chemical agent. Plaintiff refers to the chemical agent as "mace" or "pepper spray." At the time, McCoy was housed in cell 1-24 on the "D-Line" of the Darrington Unit's administrative segregation block. According to McCoy's complaint, at approximately 2:00 p.m., Alamu approached the cell of an inmate named Jackson, who was nearby in D-Line cell 1-22, and Jackson threw water on Alamu. Alamu then radioed to Sergeant Jacobs, who "came and dealt with the matter" (Dkt. 1, at 4). At approximately 3:30 p.m., Jackson again threw water on Alamu. Alamu then sprayed Plaintiff in the face:

> [After Jackson threw water a second time,] Alamu stood there a minute, whipped his face and pulled out his mace. In[ma]tes began to scream, "You can't spray him." Alamu asked Jackson, "Where you at?" Two minutes later Alamu put his mace up and walked to the next cell. Plaintiff walked away from his door. Alamu came to plaintiff's cell (I-24) and stood on the side of the door, and said, "24 cell, what[']s your name and number?" Plaintiff walked to the door and began to tell him his name, when Alamu sprayed plaintiff in the face with his mace. Alamu called in on the radio what he did.

(*Id.*). McCoy alleges that Alamu sprayed him "for no reason at all" (*id*. at 14). He submits witness statements from two other inmates who also state that Alamu "whipped his face" and sprayed McCoy.[1]

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[1] Marquieth Jackson, who was in cell I-22, states that he threw water on Alamu and that Alamu attempted to spray Jackson "but I had a sheet up to block it," and that Alamu then

After spraying McCoy, Alamu immediately initiated the Incident Command System over his radio. A supervisor and additional staff then arrived with a video camera. One of the officers, Sergeant Idris, summoned medical staff to the cell for screening (Dkt. 20-1, at A-012). The video recording, which is three minutes long, began at around this point and captured Idris narrating the events (i. at A-012; Dkt. 20-2). Gregory Burkhalter, a nurse, arrived and screened McCoy without entering the cell, asking McCoy if he had any injuries (Dkt. 20-2, at 00:40-1:15). McCoy, who was walking around the cell, answered Burkhalter by saying, "I can't breathe" and "I got sprayed in my face" (*id*. at 00:40-1:00). Burkhalter then stated to the camera that McCoy "appears to be moving around just fine" and was "talking, able to breathe with no distress" (*id*. at 1:00-1:10). The written records also state, based on Burkhalter's assessment, that McCoy had no injuries (Dkt. 20-1, at A-012, A-019 & A-023). Burkhalter left and Idris then continued the narration, took still photos, explained to McCoy the reporting process and procedures, and provided him with paperwork through his cell slot.[2] Throughout the video, McCoy was walking around his cell and talking, with no breathing problems apparent on the recording. McCoy did not make any complaints to Burkhalter, or elsewhere on the video recording, about his eyes.

"whipped his face" and sprayed McCoy (Dkt. 6, at 3). Justin Johnson, who was in cell I-21, states that McCoy told Alamu his name and then Alamu "whipped his face" and "spray[ed] into 24 cell" (Dkt. 6, at 5). These statements are dated December 29, 2016, the day after the incident. According to the Use of Force Report, Jackson and Johnson, along with multiple other inmates, had declined the opportunity to submit statements when asked by TDCJ officials on December 28th (Dkt. 20-1, at A-018).

[2] *See* Dkt. 20-2, at 01:10-3:00; Dkt. 20-1, at A-024 (still photo); Dkt. 20-1, at A-016 (Idris statement); Dkt. 20-1 at A-017 (videographer statement).

McCoy maintains that because he was in his cell when Alamu sprayed him, he was not a threat (Dkt. 1, at 16). He alleges that he "show[ed] no signs of aggression and did not pose an immediate threat of harm to the officer or anyone" (*id*.). McCoy further states that, according to TDCJ regulations governing the use of force and of chemical agents, Alamu was required to warn him and give him a chance to comply (*id*. at 19).

TDCJ investigated the incident and completed a Use of Force Report, which resulted in a reprimand and three months disciplinary probation for Alamu (Dkt. 20-1, at A-006). The reprimand form reflects that officials determined that Alamu's use of force was provoked by an "assault" from McCoy, but that Alamu could have responded by "moving away" rather than spraying chemical agents:

> On 01/12/17 a fact finding inquiry was completed . . . . Review indicated that Officer Alamu was assaulted by Offender McCoy # 852958, who was secured in D-I-24 cell. Officer Alamu responded by administering his COP [Carry-On-Person] chemical agents. The assault was not ongoing and Officer Alamu was able to avoid further assault by moving away.

(*id*.). Alamu's written statement described being hit by "unknown liquid" from Jackson's cell (I-22) (*id.* at A-010). Alamu then states that, as he moved to cell I-24 where McCoy was housed, he was struck in the face, which caused him to react involuntarily:

> As soon as I approached cell 24 I was [struck] in my face with an unknown weapon and I went blank. I felt my life was in danger and the next thing that crossed my mind was to use my COP. And that resulted in initiating [the Incident Command System]. It was an involuntary action that happened to me and that was why I had to pull out my COP.

(*id*.). Other documents in the record identify the object that struck Alamu as "a piece of rolled toilet paper" (*id*. at A-027). The report's fact findings state that McCoy had "assaulted Officer Alamu with an unknown object" and that Alamu "indicate[d] that the

assault dazed him and he responded by administering his COP chemical agent" (*id*. at A-007). *See id*. at A-003 (finding that Alamu used his spray because McCoy "threw an object from his cell and struck [Alamu] in the face") McCoy denies that he struck Alamu and notes that he did not receive a disciplinary case for the incident (Dkt. 28, at 1).

The Use of Force Report concluded that Alamu's actions were not consistent with TDCJ's Use of Force Plan and had violated an internal rule, Rule 24(a) (Dkt. 20-1, at A-004). The warden found that Alamu's use of his chemical spray was inappropriate, but not aggravated (*id*. at A-007).[3] The report also noted that Alamu did not have previous violations on his record (*id*. at A-006).

TDCJ records state that neither McCoy nor Alamu were injured in the incident (*id*. at A-019). The records also reflect that McCoy was decontaminated with "copious amounts of water and fresh air" and the area sprayed was "wiped clean utilizing soap and water" (*id*. at A-011). However, Plaintiff alleges in his Complaint that he "suffers from burning skin & eyes, lungs with contested breathing (being asthmatic), irritating eyes, [and] vision impairment," as well as "discomfort [and] severe stomach pains" (Dkt. 1, at 14). He also alleges emotional and psychological harm.[4]

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[3] Alamu did not spray his entire can of chemical agents during the incident, but rather 3.7 out of 5.0 ounces (*id*. at A-011).

[4] *Id*. (in Complaint, Plaintiff alleges mental anguish, pain and suffering, shock, discomfort, "frequent nightmares in which officers attempt to kill him," emotional distress, ongoing anxiety, "lack of concentration and mental awareness," "a constant irrational fear of prison guards," and flashbacks); Dkt. 6, at 6 (in a statement dated January 8, 2017, Plaintiff stated that, "I suffer extremely from burning skin, and lungs with congested breathing, irritating eyes" as well as humiliation, mental anguish, frequent nightmares, anxiety, trouble sleeping, depression, and other emotional injury).

McCoy states that he received related medical treatment at the Clements Unit, where he was transferred the day after the incident, for "stomach pains from the chemical agents entering his digestive system" and "eye drops for a thick white discharge from his eyes" (Dkt. 28, at 2, 7-9). He provides the Court with his "sick call" slips requesting medical attention for these issues, among others. The Court notes that some of his sick call slips complain of unrelated medical issues, such as low blood sugar, and that some refer to a separate incident in which ammonia was "rubbed in [his] eyes."[5] Handwritten notes on the sick call slips, apparently made by prison medical staff, state that McCoy was seen by medical providers and that his problems had been addressed (Dkt. 6, at 7; Dkt. 12-2, at 3).

II. STANDARDS OF REVIEW

A. *Pro Se* Pleadings

In reviewing the pleadings and litigation history, the Court is mindful of the fact that Plaintiff is a TDCJ inmate proceeding *pro se*. Complaints filed by *pro se* litigants are entitled to a liberal construction and, "however inartfully pleaded, must be held to less

[5] On January 14, 2017, Plaintiff wrote a sick call slip and stated, "my vision is blurred and my eyes are irritated with burning from being sprayed with pepper spray (Dkt. 6, at 9). He also stated, apparently on the same day, that in addition to being sprayed with pepper spray, he had been "subject to ammonia being rubbed in [his] eyes" (*id*.). He submits additional sick call slips in which he complained of low blood sugar and stomach pain (March 15, 2017); an "aftertaste of burning gas which causes shortness of breath" and "stomach pains" that "might be related" to the pepper spray used in December 2016 (March 29, 2017); psychological harm because he had been denied use of the grievance system after being sprayed (April 24, 2017); "severe stomach pains, vision impairment, and irritation in my eyes" (May 30, 2017); and "irritated and burning eyes" with "thick white discharge" and "vision impairment" due to "pepper spray and having ammonia rubbed in my eyes" (July 4, 2017). *See* Dkt. 6, at 8-9; Dkt. 12-2, at 3. McCoy also provides statements from other inmates corroborating his complaints of nightmares and distress, which are dated April, June, and July 2017 (Dkt. 6, at 14-16).

stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks and citation omitted). Even under this lenient standard a *pro se* plaintiff must allege more than "'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted). Regardless of how well-pleaded the factual allegations may be, they must demonstrate that the plaintiff is entitled to relief under a valid legal theory. *See Neitzke v. Williams,* 490 U.S. 319, 327 (1989); *McCormick v. Stalder,* 105 F.3d 1059, 1061 (5th Cir. 1997).

B. Summary Judgment—Rule 56

Both Plaintiff and Defendant have moved for summary judgment. Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Curtis v. Anthony,* 710 F.3d 587, 594 (5th Cir. 2013). Once the movant presents a properly supported motion for summary judgment, the burden shifts to the nonmovant to show with significant probative evidence the existence of a genuine issue of material fact. *Hamilton v. Segue Software Inc*., 232 F.3d 473, 477 (5th Cir. 2000). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Id*. "An issue is 'genuine' if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party."

Id. The nonmoving party must present specific facts which show "the existence of a genuine issue concerning every essential component of its case." *Firman v. Life Ins. Co. of N. Am.*, 684 F.3d 533, 538 (5th Cir. 2012) (citation and internal quotation marks omitted).

In deciding a summary judgment motion, the reviewing court must "construe all facts and inferences in the light most favorable to the nonmoving party." *Dillon v. Rogers*, 596 F.3d 260, 266 (5th Cir. 2010) (internal citation and quotation marks omitted). However, the non-movant cannot avoid summary judgment simply by presenting "conclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation." *Jones v. Lowndes Cnty.*, 678 F.3d 344, 348 (5th Cir. 2012) (internal citation, alteration and quotation marks omitted); *see Little v. Liquid Air Corp*., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Likewise, Rule 56 does not impose upon the Court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment. Evidence not referred to in the response to the motion for summary judgment is not properly before the Court, even if it exists in the summary judgment record. *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003).

III. ANALYSIS

Plaintiff McCoy brings a claim against Defendant Alamu in his individual and official capacities for excessive use of force in violation of the Eighth Amendment.[6] He

[6] McCoy clarifies in his summary judgment response that he does not bring a retaliation claim against Alamu (Dkt. 28, at 1).

seeks relief in the form of compensatory, punitive, and nominal damages (Dkt. 1, at 4). Alamu seeks dismissal of all of Plaintiff's claims.

A. Eleventh Amendment Immunity

A claim against a TDCJ official in his or her official capacity is a claim against TDCJ, and thus a claim against the State of Texas. *See Mayfield v. Tex. Dep't of Crim. Justice*, 529 F.3d 599, 604 (5th Cir. 2008). Because the Eleventh Amendment protects the states' sovereign immunity, federal courts lack jurisdiction over suits against a state for money damages unless the state has waived its immunity or Congress has clearly abrogated that immunity. *NiGen Biotech, L.L.C., v. Paxton*, 804 F.3d 389, 393-94 (5th Cir. 2015); *Moore v. La. Bd. of Elem. and Secondary Educ*., 743 F.3d 959, 963 (5th Cir. 2014). Texas has not waived its Eleventh Amendment immunity, and Congress did not abrogate that immunity when enacting Section 1983. *NiGen*, 804 F.3d at 394.

Under the Eleventh Amendment, the state is immune from Plaintiff's claim for damages against Alamu in his official capacity. The claim therefore will be dismissed for lack of jurisdiction.

B. Qualified Immunity

As for the claim against Alamu in his individual capacity, Alamu has invoked qualified immunity. Plaintiff bears the burden to negate the defense. *See Hanks v. Rogers*, 853 F.3d 738, 744 (5th Cir. 2017). Determination of qualified immunity requires a bifurcated analysis: first, the court must decide "whether the undisputed facts and the disputed facts, accepting the plaintiffs' version of the disputed facts as true, constitute a violation of a constitutional right"; and second, the court must determine "whether the

defendant's conduct was objectively reasonable in light of clearly established law." *Carroll v. Ellington*, 800 F.3d 154, 169 (5th Cir. 2015) (internal quotation marks and citation omitted); *see Thompson v. Mercer*, 762 F.3d 433, 437 (5th Cir. 2014). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Pratt v. Harris Cty., Tex.*, 822 F.3d 174, 181 (5th Cir. 2016) (internal citation and quotation marks omitted). "If officers of reasonable competence could disagree as to whether the plaintiff's rights were violated, the officer's qualified immunity remains intact." *Hanks*, 853 F.3d at 744 (internal citations and quotation marks omitted).

A reviewing court may address the two prongs of the qualified immunity analysis in any sequence, depending on the circumstances of the particular case at hand. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *Heaney v. Roberts*, 846 F.3d 795, 801 (5th Cir. 2017). Given the circumstances of this case, the Court proceeds to the Eighth Amendment analysis.

C. Eighth Amendment Excessive Force Claim

When a prisoner claims that a prison official's use of force violated the Eighth Amendment's ban on cruel and unusual punishments, 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, 6-7 (1992) (citing *Whitley v. Albers*, 475 U.S. 312 (1986)). "[Not] every malevolent touch by a prison guard gives rise to a federal cause of action." *Id*. at 9. The Eighth Amendment prohibition "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." *Id*. at 9-10 (internal citations and quotation marks omitted). *Hudson*, applying *Whitley*, identified five factors relevant to the Court's analysis: (1) the extent of injury suffered by the inmate; (2) the need for 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. *Id*. at 7. Regarding injury to the inmate, the Court stated, "The absence of serious injury is . . . relevant to the Eighth Amendment inquiry, but does not end it." *Id*.[7]

In *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010), the Supreme Court reaffirmed *Hudson*'s holding that the courts must focus on the nature of force applied, rather than a certain quantum of injury. The Court again rejected the notion that a plaintiff must show "significant injury" or "serious injury" to prevail on an Eighth Amendment claim. "Injury and force . . . are only imperfectly correlated, and it is the latter that ultimately counts." *Id*.

Plaintiff alleges that Alamu violated his Eighth Amendment right not to be subjected to excessive force when Alamu sprayed him with a chemical agent. The use of chemical spray against prisoners confined in their cells is not a *per se* Eighth Amendment violation. *See Thomas v. Comstock*, 222 F. App'x 439, 442 (5th Cir. 2007) (citing *Jones v. Shields*, 207 F.3d 491, 495-96 (8th Cir. 2000); *Williams v. Benjamin*, 77 F.3d 756, 763

[7] "[T]he extent of injury suffered by an inmate is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation, 'or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.'" *Id*. (quoting *Whitley*, 475 U.S. at 321).

(4th Cir. 1996); *Soto v. Dickey*, 744 F.2d 1260, 1270-71 (7th Cir. 1984)). The Court therefore examines the totality of the circumstances. *See id*.

Applying the *Hudson* factors, the "need for the application of force" weighs in favor of Plaintiff in this case. S*ee Hudson*, 503 U.S. at 7. The Court will assume, based on the Use of Force report and the disciplinary action against Alamu, that the chemical spray against McCoy was unnecessary. The fact that Defendant's use of force was unnecessary, or that he was disciplined, does not complete the Eighth Amendment inquiry. *See Lewis v. Sec'y of Pub. Safety and Corrections*, 870 F.3d 365, 369 & n.9 (5th Cir. 2017) (prison officials' violation of their own regulations, without more, does not establish a constitutional violation).

Other *Hudson* factors weigh in favor of Alamu. Alamu has presented summary judgment evidence that he reacted involuntarily after he "reasonably perceived" a threat from McCoy (Dkt. 20-1, at A-010), which is relevant to *Hudson*'s fourth factor. The record establishes without contradiction that Jackson, the inmate in a cell near McCoy's cell, had twice thrown liquids on Alamu, striking Alamu in the face.[8] Because the prison environment "indisputably poses significant risks to the safety of inmates and prison staff," an official such as Alamu "could plausibly have . . . thought," at the time of the incident with Plaintiff on the D-Line, that some limited use of force was necessary

[8] Alamu also maintains, and the Use of Force Report states, that that he was hit in the chin by an object that McCoy threw from his cell. McCoy disputes this fact and denies throwing anything at Alamu (Dkt. 28, at 1). McCoy points to no record evidence supporting his assertion. Nevertheless, the Court does not rely on this fact in reaching its conclusion.

preserve institutional order.[9] To the extent Alamu's actions were inadvertent or not purposeful, a mere claim of negligence on the part of prison officials is not cognizable under § 1983 and does not demonstrate a violation of the Eighth Amendment. *See Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986); *see also Redmond v. Crowther*, 882 F.3d 927, 937 (10th Cir. 2018) (observing that inadvertent or accidental exposure of prisoners to chemical gas "is antithetical to deploying that force maliciously or sadistically" and does not satisfy the intent requirement for an excessive force claim).

Alamu also has presented evidence that he tempered the use of force, as is relevant to *Hudson*'s fifth factor, by using only a short burst of spray, rather than the whole can, and by ending the incident immediately after the spray. McCoy argues that the chemical spray was inappropriate because he posed no immediate threat from his cell (Dkt. 28, at 3). However, as stated above, Alamu maintains that he acted involuntarily or inadvertently when he initiated the spray (Dkt. 20-1, at A-010). He had short amount of time to react to what he reasonably perceived as a threat, used his spray to protect himself, and then terminated use of force. This fifth factor therefore weighs in favor of Alamu. *See Hudson*, 503 U.S. at 9-10 (constitutional prohibition against excessive force "necessarily excludes from constitutional recognition *de minimis* uses of physical force,

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[9] *See Whitley*, 475 U.S. at 321 (courts consider "whether the use of force ***could plausibly have been thought necessary***, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur") (emphasis added); *see also Bell v. Wolfish*, 441 U.S. 520, 546 (1979) ("maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of . . . convicted prisoners").

provided that the use of force is not of a sort repugnant to the conscience of mankind") (internal citations and quotation marks omitted); *see Thomas*, 222 F App'x at 442.

As for the extent of Plaintiff's injury, the Use of Force Report states that McCoy had no injury, based on Burkhalter's assessment (Dkt. 20-1, at A-019; Dkt. 20-2 at 1:00-1:10). The video generally corroborates the report because McCoy never complains on the video about his eyes, and is walking and talking with no detectible breathing issues (Dkt. 20-2).[10] Plaintiff disputes these facts, directing the Court's attention to his statements on the video that he couldn't breathe, as well as to his sick call slips showing his complaints over the next six months about eye discharge, stomach pain, and emotional harm, among other complaints. As stated above, however, these sick call slips indicate that a separate intervening event, in which McCoy alleges that he had ammonia "rubbed in [his] eyes," contributed to his medical issues. Moreover, the slips show handwritten notes stating that McCoy had been examined and treated (Dkt. 6, at 7; Dkt. 12-2, at 3). In any event, even crediting all of Plaintiff's allegations, his injuries resulting from the spray on December 28, 2016, qualify as a minor injury. *See*, *e.g.*, *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997) (sore, bruised ear lasting three days was *de minimis* injury); *Bradshaw v. Unknown Lieutenant*, 48 F. App'x 106, 2002 WL 31017404, at *1 (5th Cir. 2002) (burning eyes and skin, twitching of eyes, blurred vision, irritation of nose and throat, and mental anguish as result of chemical spray was *de*

[10] The Supreme Court has held that, on summary judgment, reliance on video evidence is appropriate. *Scott v. Harris*, 550 U.S. 372, 380-81 (2007) ("Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape").

minimis). This consideration is also relevant to the Court's analysis under *Hudson*. *See Wilkins*, 559 U.S. at 37-38 (noting that the "absence of serious injury" is relevant to an Eighth Amendment claim and that an inmate who lacks any discernable injury "almost certainly fails to state a valid excessive force claim").

At bottom, the Eighth Amendment inquiry is whether the force was applied "in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm" *Hudson*, 503 U. S. at 6-7. The investigative finding that Alamu's use of force was unnecessary is inadequate to demonstrate "malicious" or "sadistic" behavior by Alamu, because the Supreme Court clearly has held that inadvertence or good-faith error does not suffice to show an Eighth Amendment violation:

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause. . . . The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense.

Whitley, 475 U.S. at 319. *See Hudson*, 503 U.S. at 9 ("[Not] every malevolent touch by a prison guard gives rise to a federal cause of action"). Although Plaintiff asserts that Alamu "was motivated in his actions by ill-will with a desire to injure" (Dkt. 1, at 20) and "sprayed [McCoy] for the malicious purpose of causing pain and suffering" (*id*. at 20-21), the record contains no competent summary judgment evidence supporting these conclusory allegations. To the contrary, the evidence of record demonstrates that Alamu reacted quickly to what he reasonably perceived was a security threat, given that he had recently been hit twice by liquid thrown from a neighboring cell (Dkt. 20-1, at A-010);

that he "went blank" and acted involuntarily out of fear in the moment (*id*.); that he did not use his full can of spray and immediately ended the incident (*id*. at A-011); and that he had not been previously disciplined (*id*. at A-006). All of this evidence supports the conclusion that Alamu's misdirected efforts were taken in self-defense and in a "good-faith effort to maintain or restore discipline." *See Hudson*, 503 U.S. at 6-7. McCoy's bare allegations that Alamu acted with malicious and sadistic intent are not supported by the evidence and do not suffice to create a genuine question of material fact *See Jones*, 678 F.3d at 348 (non-movant cannot avoid summary judgment simply by presenting conclusory allegations, unsubstantiated assertions, or legalistic argumentation).

For all of the reasons stated above, the Court concludes that Plaintiff has not demonstrated a genuine question of material fact as to whether Alamu acted in a good faith effort to maintain or restore discipline, rather than maliciously or sadistically to inflict pain or use force in excess of the need. *See Hudson*, 530 U.S. at 6-7. For the same reasons, Alamu is entitled to qualified immunity because his actions were not objectively unreasonable in light of clearly established Eighth Amendment law. *See Hanks*, 853 F.3d at 744; *Carroll*, 800 F.3d at 169.

D. Plaintiff's Request for Leave to Amend His Pleadings

After Defendant moved for summary judgment, Plaintiff McCoy filed two motions for leave to amend his complaint. Rule 15(a) provides that a court "should freely give leave [to amend] when justice so requires." FED. R. CIV. P. 15(a)(2). A court must have a "substantial reason" to deny a request for leave to amend. *Stem v. Gomez*, 813 F.3d 205, 215 (5th Cir. 2016). Leave to amend is not automatic, and the decision to grant

or deny leave to amend "is entrusted to the sound discretion of the district court." *Pervasive Software Inc. v. Lexware GmbH & Co.*, 688 F.3d 214, 232 (5th Cir. 2012) (internal citation and quotation marks omitted). A district court "should consider factors such as 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment.'" *In re Am. Int'l Refinery, Inc.*, 676 F.3d 455, 466-67 (5th Cir. 2012) (quoting *In re Southmark*, 88 F.3d 311, 315 (5th Cir. 1996)); *Duzich v. Advantage Finance Corp.*, 395 F.3d 527, 531 (5th Cir. 2004).

McCoy filed his first motion for leave to amend (Dkt. 24) after he had the opportunity to review the Use of Force video. He argues in his motion that Jackson can be heard admitting that Jackson had assaulted Alamu, and that "this additional evidence . . . proves that the use of force by Alamu was unnecessary and unjustified" (*id.* at 1). Plaintiff's motion will be denied as futile because the facts he asserts do not alter the Court's analysis above of his Eighth Amendment claims. Moreover, Plaintiff's motion is unnecessary because the Court already has given full consideration to the Use of Force video.

In his second motion for leave to amend (Dkt. 31), Plaintiff seeks "injunctive relief to be assured the defendant Mr. Alamu does not violate his rights again" if McCoy and Alamu are ever on the same unit. Because Plaintiff makes no allegations relevant to the four elements necessary to warrant injunctive relief, *see Jones v. Texas Dep't of Criminal Justice*, 880 F.3d 756, 759 (5th Cir. 2018), and for all of the reasons stated

above in the Court's analysis of Plaintiff's Eighth Amendment claim, this motion to amend will also be denied.

The Court in its discretion denies both of Plaintiff's motions for leave to amend his complaint.

IV. CONCLUSION

For the reasons stated above the Court **ORDERS** that:

1. Plaintiff's motion for summary judgment (Dkt. 12) is **DENIED**.

2. Defendant's motion for summary judgment (Dkt. 20) is **GRANTED**. All of Plaintiff's claims are **DISMISSED with prejudice**.

3. Plaintiff's motions to amend his complaint (Dkt. 24, Dkt. 31) are **DENIED**.

A separate final judgment will issue.

SIGNED at Galveston, Texas, this 22nd day of August, 2018.

George C. Hanks Jr.
United States District Judge

MONDAY, FEB. 24, 2020

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
F. EDWARD HEBERT BUILDING
600 S. MAESTRI PLACE
NEW ORLEANS, LA. 70130-3408

Exhibit C

RE: PRINCE McCOY SR. V. ALAMU 18-40856

DEAR MR. LYLE W. CAYCE,

Hello. I would like to RESPECTFULLY REQUEST FROM THE COURT TO MOVE THE DEADLINE FOR FILING A PETITION FOR REHEARING EN BANC FOR (30) THIRTY MORE DAYS. I AM AT THIS MOMENT TALKING to PUBLIC-INTREST LAWYERS About taking MY CASE. It would HELP ME GREATLY IF THE COURT could MOVE THE DEADLINE FOR FILING THE PETITION FOR EN BANC REVIEW BY 30 DAYS - FROM FEBRUARY 25, 2020 TO MARCH 26, 2020. THANK YOU FOR YOUR TIME AND CONSIDERATION.

#852958

MR. PRINCE McCOY SR.
#852958
STILES UNIT
3060 FM 3514
BEAUMONT, TX. 77705

U.S. COURT OF APPEALS
RECEIVED
MAR 04 2020
FIFTH CIRCUIT

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NORTH HOUSTON TX 773

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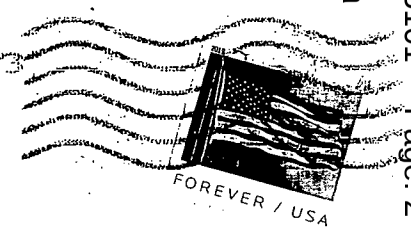

LEGAL MAIL

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
MR. LYLE W. CAYCE
F. EDWARD HEBERT BUILDING
600 S. MAESTRI PLACE
NEW ORLEANS, LA. 70130-3408

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United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 06, 2020

#852958
Mr. Prince McCoy Sr.
CID Stiles Prison
3060 FM 3514
Beaumont, TX 77705-0000

No. 18-40856 Prince McCoy, Sr. v. Alamu
USDC No. 3:17-CV-235

Dear Mr. McCoy,

We received your letter request for an extension of time to file a petition for rehearing. No action will be taken. The time for an extension, or an actual petition for rehearing under FED. R. APP. P. 40 has expired. Any attempt in filing a rehearing at this time will require leave of court to do so, out of time.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Donna L. Mendez, Deputy Clerk
504-310-7677

cc: Ms. Penelope Maley
Ms. Briana Marie Webb