No. 25-_____

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN TAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

1. Did the Ninth Circuit err when it disregarded Petitioner Taum's argument that *Hudson v. McMillian*, 503 U.S. 1 (1992) was wrongly decided and should be overruled as the historical tradition of the Eighth Amendment does not protect a prisoner for injuries inflicted by a prison guard and moreover, the facts of this case do not establish that Petitioner engaged in conduct equivalent to "torture" possibly triggering Eighth Amendment protection?

PARTIES

Jonathan Taum is the petitioner. The United States of America is the respondent.

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Petitioner Jonathan Taum respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The order denying Mr. Taum's petition for panel rehearing and rehearing en banc is captioned as *United States of America v. Jonathan Taum*, No. 22-10306. Copies of the order denying said petition and the earlier Ninth Circuit's panel Memorandum Opinion is attached as Appendix A.

JURISDICTIONAL STATEMENT

The order denying Mr. Taum's petition for panel rehearing and rehearing en banc was filed on January 3, 2025 by the United States Court of Appeals for the Ninth Circuit [Appendix A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and is timely under Rule 13.1 of the Rules of Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISION INVOKED

Implicated in this case is the Eighth Amendment to the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

On June 15, 2015, Hawai'i Department of Public Safety Adult Correction Officers ("ACOs") Craig Pinkney and Jason Tagaloa were accompanying prisoner Chawn Kaili ("Kaili") from one building of the Hawai'i County Correctional Facility to another. [2-ER-46-52]. Kaili was "acting strange" but was unhandcuffed as they began their walk to the second building. [2-ER-41]. As they crossed the outdoor recreation area between the two buildings, Kaili did not comply with instructions and the two ACOs took Kaili down to the ground. [2-ER-51-52]. Kaili resisted attempts to handcuff him and did not comply with repeated orders to put his hands behind his back. [2-ER-158-161], [2-ER-226, 232].

Sgt. Jonathan Taum, the supervisors of these two ACO's, witnessed the take down, and assisted by laying on Kaili's legs while ACO's attempted to subdue Kaili. [2-ER-57]. During this time, Pinkney, Tagaloa and other ACOs used various strikes upon Kaili in attempt to get him to comply with their requests for him to allow them to handcuff him. [2-ER-57-66]. By the time the ACOs picked Kaili back up and exited the rec yard, there appeared to be blood on the ground where the takedown took place and Kaili's face was swollen and wet with his own blood. [2-ER-72].

Kaili, a former football player, admitted at trial that he resisted being handcuffed and that he was high on methamphetamine at the time. [2-ER-172, 204, 226-232], [3-ER-295]. After Kaili was subdued, Sgt. Taum spent a significant amount of time trying to calm down Kaili when he was returned to his cell. [3-ER-

304]. Only after two hours, with Sgt. Taum trying to reason with him, did Kaili allow himself to be transported to the hospital for treatment. [2-ER-187-188], [3-ER-312-313]. After a CT scan of Kaili's head, doctors determined that both his jaw and the bone of his right eye socket were broken. [2-ER-168-169].

ACO Pinkney, ACO Tagaloa and Sgt. Taum were charged together in a federal indictment. Sgt. Taum was charged with the following: Count 1 (Deprivation of Rights Under Color of Law, in violation of 18 U.S.C. § 242 and § 2, alleging the deprivation of a prisoner's Eighth Amendment Right to be free of cruel and unusual punishment); Count 3 (Conspiracy to Obstruct Justice, in violation of 18 U.S.C. § 371, and Count 6, (Obstruction of Justice in violation of 18 U.S.C. § 1519). [4-ER-497].[1] Taum, Pinkney and Tagaloa were tried together, and the jury found Taum guilty on all three counts. On November 17, 2022, the United States District Court for the District of Hawai'i entered its judgment against Taum for Count 1 (120 months); Count 3 (144 months) and Count 6 (60 months), all to be served concurrently. [1-ER-2].

On appeal, among other issues, Mr. Taum argued "that his conviction for Count 1 (Eighth Amendment right violation under 18 U.S.C. § 242) fails because 1)

[1] In regard to Count 1, the Indictment alleged that Taum, Pinkney, Tagaloa and Officer "A" allegedly used excessive force on Kaili and failed to stop others from doing so. In regard to Count 3, all the Defendants were accused of taking steps by themselves, and in concert with others, to cover up this use of excessive force. In regard to Count 6, Taum is alleged to have omitted material information in his incident reports concerning Kaili's transfer. [4-ER-497].

there was insufficient evidence to convict Taum of Count 1; 2) the jury was improperly instructed as to the applicable standard for conviction and 3) per Justice Thomas' dissent in *Hudson v. McMillian*, 503 U.S. 1 (1992), Taum did not violate Mr. Kahili's Eighth Amendment rights." Ninth Circuit Docket #21, at pages 20-21. In regard to this last issue, Taum argued in part, "Respectfully, because *Hudson* interprets rights that accrue under the Eighth Amendment by relying upon 'contemporary standards of decency,' as opposed the original intent of the framers, it was wrongly decided and should be overturned." Ninth Circuit Docket #21 at 40.

In its Memorandum affirmance, the Ninth Circuit panel did not address Defendant's argument that *Hudson* was wrongly decided, but did note, "We review Taum's challenges to the sufficiency of the evidence for plain error because he did not renew them in a post-trial judgment for acquittal. *United States v. Mongol Nation*, 56 F.4th 1244, 1250–51 (9th Cir. 2023). Taum challenges the sufficiency of the evidence for his convictions under 18 U.S.C. §§ 242 and 371. On plain error review, the evidence offered against Taum for both charges was sufficient to support the convictions." [Appendix A:005].

In his *Petition for Panel Rehearing and Rehearing En Banc*, Taum argued that the Ninth Circuit panel erred in not holding that *Hudson* had been wrongly decided. Taum noted in part the history of the Eighth Amendment, as cited in Justice Thomas' dissent in *Hudson*: "Until recent years, the Cruel and Unusual

Punishment Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime. For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration." *Hudson*, Dissent of Thomas, J. 503 U.S. at 18." Ninth Circuit Docket #67, page 7.

The Petition for Panel Rehearing and Rehearing En Banc was denied without discussion. [Appendix A:001].

Reason For Granting the Writ

A. *Hudson v. McMillian*, 503 U.S. 1 (1992) was wrongly decided and should be overruled. Because the historical tradition of the Eighth Amendment does not protect a prisoner for injuries inflicted by a prison guard, the prisoner's Eighth Amendment rights were not violated by Petitioner's actions. Moreover, the facts of this case do not establish that Petitioner engaged in conduct equivalent to "torture" possibly triggering Eighth Amendment protection.

Count 1 alleged a violation of Kaili's Eighth Amendment rights as the basis for the 18 U.S.C. § 242 charge. [4-ER-497].[2] In *Hudson v. McMillian*, 503 U.S. 1 (1992), the Supreme Court held, "[t]he Eighth Amendment's prohibition of cruel and

[2] 18 U.S.C. § 242 provides in part: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, . . . shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section . . . imprisoned not more than ten years, or both[.]"

unusual punishments " 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,' " and so admits of few absolute limitations. . . . The objective component of an Eighth Amendment claim is therefore contextual and responsive to 'contemporary standards of decency.' " *Id.* at 8. (citation omitted). Respectfully, because *Hudson* interprets rights that accrue under the Eighth Amendment by relying upon "contemporary standards of decency," as opposed to the original language and intent of the framers, it was wrongly decided and should be overturned.

To begin, the framers in enacting the Eighth Amendment focused on prohibiting legislative punishments that were "inhuman and barbarous," not on actions taken by jailors against inmates. As stated by the Supreme Court over a hundred years ago, "What constitutes a cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous,—torture and the like. *McDonald v. Com*. 173 Mass. 322, 73 Am. St. Rep. 293, 53 N. E. 874." *Weems v. United States*, 217 U.S. 349, 368-369 (1910).

The *Weems* court described the types of activities that were forbidden under the Eighth Amendment, noting, "In *Wilkerson v. Utah*, 99 U. S. 130, 25 L. ed. 345, the clause came up again for consideration. . . . The court quoted Blackstone as saying that the sentence of death was generally executed by hanging, but also that circumstances of terror, pain, or disgrace were sometimes superadded. 'Cases

mentioned by the author,' the court said, 'are where the person was drawn or dragged to the place of execution, in treason; or where he was disemboweled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder and burning alive in treason committed by a female.' . . .” *Weems*, 217 U.S. at 369. Further, “it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that Amendment to the Constitution. Cooley, Const. Lim. 4th ed. 408; Wharton, Crim. Law, 7th ed. § 3405.” *Weems*, 217 U.S. at 369. “Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, and something more than the mere extinguishment of life.’ ” *Weems*, 217 U.S. at 369-370 (emphasis added quoting *Re Kemmler*, 136 U. S. 436, 447, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930.[3]

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[3] In regard to the history of the Eighth Amendment, the *Weems* court noted,

> The provision received very little debate in Congress. We find from the Congressional Register, p. 225, that Mr. Smith, of South Carolina, 'objected to the words 'nor cruel and unusual punishment,' the import of them being too indefinite.' Mr. Livermore opposed the adoption of the clause saying: . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislature to adopt it; but until we have some security

In *Hudson v. McMillian*, 503 U.S. 1 (1992), this Court did not rely on this Nation's historical tradition in defining an Eighth Amendment violation: "What is necessary to show sufficient harm for purposes of the Cruel and Unusual Punishments Clause depends upon the claim at issue, for two reasons. First, '[t]he general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should . . . be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.' " *Hudson*, 503 U.S. at 8 (citation omitted). "Second, the Eighth Amendment's prohibition of cruel and unusual punishments ' 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,' ' and so admits of few absolute limitations. . . . The objective component of an Eighth Amendment claim is therefore contextual and responsive to 'contemporary standards of decency.' " *Id.* (citation omitted). *See also Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010)("Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts. An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury").

> that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.' . . . The question was put on the clause, and it was agreed to by a considerable majority.

Weems, 217 U.S. at 368-369.

Ignoring the historical meaning of "cruel and unusual punishment," *Hudson* interpreted rights that accrue under the Eighth Amendment by relying upon "contemporary standards of decency." Justice Thomas, joined by Justice Scalia, commented on this problem in his dissent in *Hudson*. Justice Thomas wrote, "Until recent years, the Cruel and Unusual Punishment Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime. For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration." *Hudson*, Dissent of Thomas, J. 503 U.S. at 18. Justice Thomas continued,

> Nowhere does *Weems* even hint that the Clause might regulate not just criminal sentences but the treatment of prisoners. Scholarly commentary also viewed the Clause as governing punishments that were part of the sentence. *See* T. Cooley, Constitutional Limitations *329 ("It is certainly difficult to determine precisely what is meant by cruel and unusual punishments. Probably any punishment declared by statute for an offence which was punishable in the same way at the common law, could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offence may be punished to the extent and in the mode permitted by the common law for offences of similar nature. But those degrading punishments which in any State had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual") (emphasis added). *See also* 3 J. Story, Commentaries on the Constitution of the United States 750-751 (1833).

Id. at 18-19.

Justice Thomas further noted, "Surely prison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life. **Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment.** Thus, historically, the lower courts routinely rejected prisoner grievances by explaining that the courts had no role in regulating prison life." *Id.* at 19 (citation omitted) (emphasis added). Justice Thomas later added, "Abusive behavior by prison guards is deplorable conduct that properly evokes outrage and contempt. But that does not mean that it is invariably unconstitutional. The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation." *Id.* at 28.[4]

Justice Thomas' analysis is correct. As other Amendments are treated, Eighth Amendment protections should be seen through an analysis of this Nation's historical tradition. *See United States v. Stevens*, 559 U.S. 460, 468–471 (2010) (placing the burden on the government to show that a type of speech belongs to a

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[4] *See also Wilkins v. Gaddy*, 559 U.S. 34, 40-41 (2010)(Dissent of Thomas, J., joined by Scalia, J.)("I agree with the Court that the Fourth Circuit's Eighth Amendment analysis is inconsistent with *Hudson v. McMillian*, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). But I continue to believe that *Hudson* was wrongly decided. *Erickson v. Pardus*, 551 U.S. 89, 95, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (dissenting opinion); *Farmer v. Brennan*, 511 U.S. 825, 858, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (opinion concurring in judgment); *Helling v. McKinney*, 509 U.S. 25, 37, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (dissenting opinion); *Hudson, supra*, at 17, 112 S.Ct. 995 (dissenting opinion)").

"historic and traditional categor[y]" of constitutionally unprotected speech "long familiar to the bar" (internal quotation marks omitted)); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, __, 142 S. Ct. 2111, 2126 (2022) ("Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.' ")(citation omitted).

Further, the doctrine of originalism is well-founded in our nation's jurisprudence and should be applied here. "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and, when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).[5] "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention in clear

[5] *See Herrera v. Santa Fe Pub. Sch.*, 41 F.Supp.3d 1188, 1275 fn. 86 (D. N.M. 2014) (" 'What defines originalism as a method of constitutional interpretation is the belief that (a) the semantic meaning of the written Constitution was fixed at the time of its enactment, and that (b) this meaning should be followed by constitutional actors until it is properly changed by a written amendment. The original meaning of the text provides the law that governs those who govern us; and those who are bound by the Constitution, whether judges or legislators, may not properly change its meaning without going through the amendment process.' Randy E. Barnett, *Interpretation and Construction*, 34 Harv. J.L. & Pub. Pol'y 65, 66 (2011)").

there is no room for construction and no excuse for interpolation or addition." *United States v. Sprague*, 282 U.S. 716, 731 (1931).

Here, "cruel and unusual" punishment has been understood for generations as those punishments involving torture or lingering death: "For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration." *Hudson*, Dissent of Thomas, J., 503 U.S. at 18. *See Weems*, 217 U.S. at 369-370 ("Punishments are cruel when they involve torture or a lingering death"). Because the Eighth Amendment historical standard, focusing on preventing "torture" or "lingering death" is inconsistent with *Hudson*'s "contemporary standards of decency" test, *Hudson* should be overruled by this Court.

Moreover, applying this historical standard, Sgt. Taum's actions do not arise to such "torture" prohibited by the Eighth Amendment. Chawn Kaili testified he had taken methamphetamine and was in "a major state of paranoia" at the time of his transfer [2-ER-172]. He wanted to separate himself from others in his unit because he was "afraid of what would happen." Kaili testified that Taum came to see him once Kaili was taken to back to his cell, and, after much cajoling, agreed to be taken to the hospital for treatment. Taum was only able to convince Kaili to go after Taum took a picture of Kaili with his phone and showed it to him. [2-ER-187-188].

ACO Demattos, a corrections officer who assisted in attempting to restrain Kaili, indicated that all Taum did was to help hold Kaili down [2-ER-158-159]. ACO Demattos stated that while Taum had ordered him to kick Kaili in the shoulder, that Kaili was refusing to give up his hands to be handcuffed, and that the purpose of the order was so that they could loosen Kaili's shoulder to get him to relent. Indeed, Demattos indicated that this had been done in a "similar situation." [2-ER-160-161]. Once Kaili was restrained, the ACOs stopped using any kind of force and helped him stand up. [3-ER-290]. After Kaili was returned to his cell, ACO Ahuna-Alofaituli testified that Kaili was kept verbalizing they were coming for me, and "banging his head against the walls, the doors, the bunk." [3- ER-308]. Sgt. Taum went to Kahili's cell and it took them over two hours to calm Kaili down so he could be transported to the hospital. [3-ER-312]. Taum was concerned that if they forced themselves into Kaili's cell, he would suffer more injuries. [3-ER-313].

Because (i) the historical tradition of Eighth Amendment protections does not include injuries received by a prisoner from a prison guard and (ii) Taum did not engage in conduct equivalent to "torture," Kaili's Eighth Amendment rights were not violated by Taum's actions. Because of this, Count 1 must fail.

For the foregoing reasons, Petitioner Taum requests this Court vacate Count I, and remand this case to the district court for resentencing or other relief as may be appropriate in this case.

CONCLUSION

Pursuant to Sup.Ct. Rule 10(c), because the Ninth Circuit's orders involve an important federal question in a way that conflicts with relevant decisions of this Court, this Court should grant certiorari.

DATED: March 24, 2025 Kailua, Hawai'i

Respectfully submitted,

/s/ Lars Robert Isaacson
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