OCT 23 2007

No. 07-130

IN THE
Supreme Court of the United States

CLAYTON EDWARDS,
Petitioner,

v.

DAVID KENYON,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly denied petitioner's motion for summary judgment based on a claim of qualified immunity.

2. Whether the two-step framework for analyzing claims of qualified immunity, set forth in *Saucier v. Katz*, should be abandoned.

3. Whether the rule that an evenly divided appellate court affirms the lower court's judgment should not apply to interlocutory appeals challenging the rejection of a claim of qualified immunity.

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioner seeks this Court's review of a Magistrate Judge's order, affirmed by an evenly divided Court of Appeals for the Eighth Circuit *en banc*, denying petitioner's motion for summary judgment based on qualified immunity.[1] The Court should decline to review this case because petitioner has failed to show any compelling reason to grant the writ.

First, petitioner argues that where a district court's denial of qualified immunity is affirmed by an evenly divided court of appeals, the district court's decision is necessarily erroneous because the failure to garner a majority indicates that the constitutional right at issue is not "clearly established" under the second prong of the qualified immunity test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001). Petitioner's premise is flawed because he can only speculate that half the judges of the Eighth Circuit agree with his position that the right at issue was not clearly established at the time of the incident in question. Even if petitioner could support his premise, disagreement among judges does not preclude a finding that a right is clearly established.

Second, petitioner claims that the decision below conflicts with every other court to have considered whether the particular conduct at issue violates the

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[1]The parties consented to have a Magistrate Judge conduct all proceedings in the case, including trial. *See* 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

Fourth Amendment, but the cases on which petitioner relies involve strikingly different facts from those alleged by respondent. As discussed below, in more analogous cases, the circuits have ruled consistently that the conduct at issue is unlawful.

Third, petitioner seeks review to urge the Court to overrule *Saucier*'s two-step approach to analyzing qualified immunity claims, but petitioner never explains why he believes this case is a suitable vehicle for that adventure. In any event, petitioner does not (and could not) argue that a different approach would change the outcome of this case.

Finally, petitioner suggests that the Court grant certiorari to announce an exception to the equally divided court rule so that it operates to reverse rather than affirm a lower court's judgment denying qualified immunity. Petitioner's suggestion that the Court entertain his request for an unprecedented change to a long-standing rule does not provide a sound basis for granting the writ, particularly in the absence of any showing that the rule has been applied frequently in this context.

STATEMENT

On September 13, 2003, respondent David Kenyon was attending a demolition derby in Searcy, Arkansas. Four deputy sheriffs, including petitioner Clayton Edwards, responded to a report of an altercation near the derby pits. When they arrived, Edwards found that respondent's son, Stephen Kenyon, had been in a

fight and that respondent's ex-wife, Shirley Cox, had been hit in the face. Cox told Edwards—falsely—that David Kenyon had hit her.[2] Edwards asked the assembled crowd where David Kenyon was, and Kenyon was pointed out. Edwards and the other officers approached Kenyon, asked him his name, and, when Kenyon identified himself, Edwards told him that he was under arrest. Kenyon, having done nothing wrong, turned his hands palms-up in an inquiring gesture and asked, "For what?" Edwards then grabbed Kenyon's arm and threw Kenyon face-down onto the hood of a nearby car. Kenyon posed no threat to the safety of the officers or others, and he had not resisted arrested or attempted to flee. App. 4, 12-13, 20-23.

After Edwards threw Kenyon onto the hood of the car, one of the other officers on the scene, Jim Hale, took Kenyon's right arm and brought it down low behind Kenyon's back so that Kenyon could be handcuffed. Edwards took Kenyon's left arm but did not bring it down beside Kenyon's hip and around Kenyon's back to meet the other wrist. Rather, Edwards took Kenyon's left arm, which was outstretched perpendicular to Kenyon's body, and attempted to force it behind Kenyon's back in an unnatural motion. One of Edwards's fellow officers testified that they are trained to handcuff arrestees by bringing the hand and arm down by the arrestee's side and then around to the back, and that the raised-arm

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[2]In fact, Stephen Kenyon had accidently elbowed Cox in the face. R. 134, 137.

technique used by Edwards is unorthodox and not officially sanctioned. App. 21-23. As Edwards forced Kenyon's arm to move in an unnatural direction, Kenyon pulled back in pain and yelled that Edwards was badly hurting his arm.[3] Edwards replied, "If you don't shut your mouth, I'm gonna break the thing off," and continued to torque Kenyon's arm while repeatedly banging Kenyon's head against the car. App. 20. Because of the force and technique Edwards applied to Kenyon's arm, Kenyon suffered a torn rotator cuff requiring surgery. He continues to suffer pain and diminished use of his arm. App. 8, 23 n.3.

Kenyon was arrested on misdemeanor charges of third-degree battery and public intoxication. Kenyon was acquitted on the third-degree battery charge, and the public intoxication charge was dismissed. App. 21 n.2.

Kenyon sued the four officers under 42 U.S.C. § 1983, alleging false arrest and excessive force. The case was tried to a jury, and the jury returned a verdict for defendants on all counts except the excessive force claim against Edwards. The jury was unable to reach a verdict on that claim, and the district court scheduled a new trial on that claim only. One month before the second trial was to begin, Edwards filed a motion for summary judgment based on qualified

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[3] Several witnesses, including Kenyon, testified that Kenyon did not resist arrest and that he only pulled back from Edwards in an attempt to alleviate the pain in his arm. App. 20, 23 n.3.

immunity. Edwards argued that there was no constitutional violation because there was no evidence from which a reasonable jury could conclude that the force used by Edwards was excessive. Edwards further argued that even if there had been a constitutional violation, Edwards was entitled to qualified immunity because it had not been clearly established that the use of such force violates the Fourth Amendment. App. 5-6.

The district court rejected Edwards's claim of qualified immunity. The court noted that material facts were in dispute, but found that under Kenyon's version of the events, Edwards's conduct violated the Fourth Amendment, and a reasonable officer in Edwards's position would have known that it did. App. 8-9. Although the district court's order does not explicitly set forth the latter conclusion, such a conclusion is implicit because the district court correctly set forth the two-step procedure for evaluating qualified immunity claims and denied Edwards's motion. The district court's reference to material questions of fact, in connection with its brief discussion of the second prong of the analysis, indicates that the district court found that the legal question of whether the right at issue was clearly established turns on which version of the facts is accepted.

Edwards appealed the district court's denial of qualified immunity. In a two to one decision, a panel of the Eighth Circuit found that Edwards was entitled to summary judgment based on qualified immunity.

The panel majority found that Edwards had not used excessive force, and that even if he had, "it would not necessarily have been clear to a reasonable officer that the amount of force used was problematic." App. 17. Circuit Judge Smith dissented from the decision of the panel majority on the ground that the majority gave "too little deference to Kenyon's version of the facts," and that "[t]he facts alleged by Kenyon, if true, establish that Edwards violated a clearly established constitutional right to be free from excessive force." App. 20. Significantly, the majority and dissenting opinions were in full agreement on the applicable legal standards, but reached different conclusions based on conflicting characterizations of the summary judgment evidence.

Kenyon sought and was granted rehearing *en banc*, and the panel's decision was vacated. After rehearing *en banc*, the district court's decision was affirmed without opinion by an equally divided court. App. 1. Edwards then petitioned for a second rehearing *en banc* in an attempt to raise for the first time his argument that the rule that an equally divided appellate court affirms the decision below should not apply where the appellant is pursuing an interlocutory appeal of a denial of qualified immunity. Edwards's petition was denied. The two judges who had formed the panel majority dissented from denial of a second rehearing. App. 26.

REASONS FOR DENYING THE WRIT

I. Petitioner's Assertion That a Lower Court's Determination That a Constitutional Right Is "Clearly Established" Is Necessarily Erroneous If It Is Affirmed by an Equally Divided Appellate Court Is Unsupported by Law or the Record in This Case.

Petitioner argues that even though the Court of Appeals did not issue a decision, the fact that the district court's judgment was affirmed by an equally divided court suggests that half the judges on the Eighth Circuit would have granted qualified immunity to Edwards on the basis that it was not clearly established that Edwards's conduct was unlawful. Petitioner then argues that if judges cannot agree on such an issue, qualified immunity should be granted because it could not have been clear to a reasonable officer that the conduct complained of violated the law. Thus, petitioner argues that the Court should grant certiorari to announce an unprecedented exception to the equally divided court rule—specifically, that an equally divided appellate court will reverse a lower court's denial of qualified immunity because a right cannot be clearly established if a reviewing court cannot reach a majority. The Court should decline to review this case because petitioner's arguments are flawed.[4]

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[4] Petitioner makes a related argument when he urges the Court to grant certiorari to entertain his "request[] that this Court exercise its supervising and

First, petitioner's argument is based on speculation about why the Eighth Circuit was unable to reach a majority. Petitioner acknowledges that the court "never discussed the rationale for its decision," but concludes that "[i]t is clear, however, that the Court of Appeals was 'equally divided' on the second *Saucier* question regarding clearly established law." Pet. at 11 n.2. Petitioner does not offer any explanation for his conclusion and none can be found in the record. There is simply no way to know why, or on what issues, the Eighth Circuit was unable to reach a majority.

Second, even if petitioner could support his speculation that the judges of the Eighth Circuit are equally divided on the question of whether the right at issue in this case was clearly established, the existence of such disagreement is not determinative. A right can be clearly established even though some judges might err and rule incorrectly that it is not. Indeed, the same reasoning advanced by petitioner here was rejected by this Court in the habeas context in *Williams v. Taylor*, 529 U.S. 362 (2000). In *Williams*, the defendant

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rulemaking authority by holding that 'the vote of an equally divided Court' in this case should have resulted in a grant of the Petitioner's request for qualified immunity rather than an affirmance of the district court." Pet. at 28. Petitioner does not cite any other case where a district court's denial of qualified immunity was affirmed by an equally divided appellate court, and any purported problem resulting from application of the rule in this context is far too rare to justify this Court's review.

seeking federal habeas relief was required to show that the state court's decision "'was contrary to, or involved an unreasonable application of, clearly established Federal law.'" *Id.* at 376 (quoting 28 U.S.C. § 2254(d)(1)). Noting that reasonable jurists "regularly disagree with one another," the Court rejected a requirement of judicial unanimity, finding that "[i]t would impose a test for determining when a legal rule is clearly established that simply cannot be squared with the real practice of decisional law." *Id.* at 377. Thus, "the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new." *Id.* at 410. That some judges of the Eighth Circuit might disagree does not preclude a finding that Kenyon's right not to have his rotator cuff torn under the circumstances was clearly established.

In support of his argument, petitioner relies primarily on this Court's conclusion in *Wilson v. Layne*, 526 U.S. 603, 618 (1999), that where judges "disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *See* Pet. at 10. But *Wilson* involved a situation where there was a lack of case law on the issue at the time of the event, and the disagreement among judges that later developed confirmed that the right had not been clearly established at an earlier time. In *Wilson*, the Court found that the police violated the Fourth Amendment by bringing members of the media into a home during the execution of a warrant, 526 U.S. at 614, but held that the right had not been clearly established at the

time of the search in question. The Court found that a reasonable officer could have believed that the action at issue was lawful because it was not obvious that the conduct violated the Fourth Amendment, the practice was common, there were no cases of controlling authority in the jurisdiction to establish the rule, and there was no "consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Id.* at 617. The Court further found that given the undeveloped state of the law at the time, it was reasonable for the officers to rely on their formal policies that allowed the practice. Finally, the Court noted that the circuit split that prompted the grant of certiorari did not develop until *after* the events at issue. In contrast to *Wilson*, this case involves a right that had been established by numerous cases before the event in question and, as discussed below, there is no split among the courts that have addressed the issue.

II. There Is No Circuit Split on the Issue of Whether Conduct of the Type Alleged by Kenyon Violates the Fourth Amendment, or Whether a Reasonable Officer in Edwards's Position Would Have Known That it Did.

Petitioner claims that "[t]his ruling by the Eighth Circuit Court of Appeals creates a distinct split in the circuits" because every other court of appeals that has considered a similar claim of excessive force has found no constitutional violation. Pet. at 20; *see also id.* at 26. Even if petitioner's claim was accurate it would not provide a compelling reason to grant certiorari. An

affirmance by an evenly divided appellate court has no force as precedent, *see, e.g., Neil v. Biggers*, 409 U.S. 188, 192 (1972); *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264 (1960), and a single district court judgment—which is all that remains here in light of the Eighth Circuit's *en banc* ruling—that stood in conflict with every other court would represent too shallow a split to justify this Court's review. But petitioner's claim is not accurate. In fact, the federal courts of appeal agree that qualified immunity must be denied in circumstances such as those alleged by Kenyon, and petitioner's claim to the contrary is based on a mischaracterization of the conduct challenged in this case.

Contrary to petitioner's characterization of the issue, Kenyon does not allege that his Fourth Amendment rights were violated simply because his arm was "taken back in an 'unnatural,' 'high,' or even 'painful' manner." Pet. at 20. Rather, Kenyon argues that Edwards intentionally applied force that was gratuitous and abusive in light of the circumstances and which a reasonable officer would have known was unlawful and would result in serious injury. When evaluating excessive force claims, courts must "pay careful attention to the facts and circumstances of [the] particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). In this case, Kenyon was being arrested for misdemeanors, had posed no threat to the

officers or others, and was not resisting or attempting to flee when Edwards forcibly threw Kenyon onto the hood of a car, banged his head repeatedly against it, and tried to force Kenyon's arm behind his back in an unnatural and painful direction that was contrary to normal handcuffing technique. As Kenyon cried out in pain, Edwards continued to force Kenyon's arm back in the same manner and threatened to "break the thing off" if Kenyon continued to protest. Ultimately, Edwards's actions resulted in Kenyon suffering a torn rotator cuff.

The courts of appeal agree that suspects have "a clearly established right to be free from gratuitous violence during arrest . . . ." *See, e.g., Griffith v. Coburn*, 473 F.3d 650, 659-60 (6th Cir. 2007) (denying qualified immunity where officers allegedly used a choke hold on an arrestee who posed no threat to officer safety by passively resisting their attempts to handcuff him); *Clash v. Beatty*, 77 F.3d 1045, 1048 (7th Cir. 1996) (allowing case to proceed where genuine issues of material fact existed as to whether the officer's "shove" of handcuffed suspect into police car was "wholly gratuitous" or reasonable under the circumstances); *see also Smith v. Mattox*, 127 F.3d 1416, 1420 (1st Cir. 1997) (denying qualified immunity where officer applied force sufficient to break a suspect's arm and holding that the unlawfulness of such force was "readily apparent"—despite a dearth of case law at the time—because of the suspect's lack of resistance, the force required to break the arm, and the severity of the resulting injury). Moreover, federal appeals courts consistently have denied qualified

immunity in cases with facts similar to those alleged by Kenyon—specifically, where police officers cause serious injury by using unorthodox and unnecessarily rough handcuffing techniques involving the forceful yanking, wrenching, or twisting of arrestees' arms behind their backs at high angles when the arrestees are unarmed, nonviolent, and passively resisting arrest as a result of enduring extreme physical pain. *See, e.g., Davis v. Williams*, 451 F.3d 759, 767-68 (11th Cir. 2006) (denying qualified immunity to officer who twisted plaintiff's arms behind his back to handcuff him and, after being informed of plaintiff's injured shoulder, pushed his arm "hard way up"); *Turmon v. Jordan*, 405 F.3d 202, 208 (4th Cir. 2005) (finding it clearly established in 2001 that it was unlawful for an officer to point a gun at plaintiff's head, "wrench" him from his room, and twist his arm back to handcuff him, aggravating a prior injury, where plaintiff was compliant and unarmed); *Solomon v. Auburn Hills Police Dept.*, 389 F.3d 167, 174-75 (6th Cir. 2004) (clearly established in 2003 that twisting the arm of a nonviolent, unarmed suspect behind her back with such force that it fractured in several places was excessive); *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003) (clearly established by 1998 that forcibly throwing suspect to the ground and twisting her arms to handcuff her was excessive when arrestee vociferously objected to a search but only passively resisted the arrest); *accord Winterrowd v. Nelson*, 480 F.3d 1181, 1186 (9th Cir. 2007) (clearly established that forcing an unarmed suspect onto the hood of a car, forcing his arm behind his back, and "pumping [it] up and down" was unreasonable); *Kukla v. Hulm*, 310

F.3d 1046, 1050 (8th Cir. 2002) (finding that an officer violated an arrestee's clearly established right when he "forced [the suspect] against his truck, twisted his arm, and raised it high behind his back injuring his collar bone, shoulder, neck, and wrist"); *Mickle v. Morin*, 297 F.3d 114, 122 (2d Cir. 2002) (denying qualified immunity where the force used to handcuff nonviolent, unarmed arrestee resulted in a dislocated rotator cuff). Thus, the right to be free from unorthodox handcuffing techniques involving gratuitous violence was clearly established when Edwards used such a technique during Kenyon's arrest in late 2003, and the issue does not divide the circuit courts today.

Petitioner quotes extensively from *Rodriguez v. Farrell*, 280 F.3d 1341 (11th Cir. 2002), and argues that it conflicts with the district court's decision below. But in *Rodriguez* the court held that an officer's use of a "common and ordinarily accepted" handcuffing technique did not constitute excessive force simply because the suspect in that case happened to have a severe, pre-existing arm injury of which the officer was unaware. In contrast to the circumstances in *Rodriguez*, Kenyon does not argue that Edwards' use of ordinary force or a standard handcuffing technique exacerbated a prior injury of which Edwards should have known; rather, Kenyon alleges that Edwards applied unnecessary force and deliberately used an unorthodox technique that caused injury even where there was no pre-existing injury. The Eleventh Circuit emphasized this distinction in *Davis*, noting that the force applied in *Rodriguez* was "nothing more than 'ordinary,'" but denying qualified immunity to officers

accused of "grabb[ing] [an individual's] arm, twist[ing] it around [the individual's] back, jerking it up high to the shoulder and then handcuff[ing the individual]." 451 F.3d at 767 (internal citations omitted).

Finally, Kenyon does not argue that painful cuffing alone constitutes excessive force; rather, he notes that handcuffing techniques involving force sufficient to cause major physical injury where the suspect did not resist arrest are unlawful. Thus, petitioner's reliance on *Brissett v. Paul*, 141 F.3d 1157, 1998 WL 195945 (4th Cir. 1998) (unpublished) and *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912 (9th Cir. 2001) is misplaced. In *Brissett*, the Fourth Circuit granted summary judgment to the arresting officer in large part because the force the officer applied did not lead to major physical injury, and the plaintiff "admitted that his injuries were more emotional than physical." 1998 WL 195945, at *4. Likewise, in *Arpin,* the Ninth Circuit affirmed a grant of summary judgment on qualified immunity grounds to officers who allegedly twisted the plaintiff's "arm behind her with enough force to lift her off the ground and break her watch band," because the plaintiff had actively resisted arrest and she failed to support her claim of physical injury. 261 F.3d at 921-22. In contrast, Kenyon did not actively resist arrest, and he suffered serious physical injury as a result of the substantial and gratuitous force applied by Edwards.

III. Petitioner's Suggestion That the Court Overrule *Saucier v. Katz* Does Not Provide a Sound Basis to Grant Certiorari in This Case.

Edwards urges the Court to grant his petition and use this case "to abandon *Saucier*'s mandatory two-step approach to qualified immunity claims." Pet. at 14. Because Edwards did not raise this issue below, it is not preserved for this Court's review. In any event, petitioner's criticisms of the *Saucier* approach do not support a grant of certiorari in this case. It is undisputed that the district court enunciated the binding two-part legal standard established in *Saucier* for determining whether a law enforcement officer is entitled to summary judgment on qualified immunity grounds. The only question to be resolved is the correctness of the district court's application of that settled legal standard to a particular set of facts. Thus, this case presents no occasion for the Court to revisit its decision in *Saucier*, and petitioner never explains how abandoning *Saucier*'s two-step approach would change the outcome in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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