No. 22-____

IN THE
Supreme Court of the United States

MICHAEL JOHNSON,

Petitioner,

v.

SUSAN PRENTICE, ET. AL.

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is:

> Whether punitively depriving a prisoner in solitary confinement of virtually all exercise for three years notwithstanding the absence of a security justification violates the Eighth Amendment, as ten circuits hold, or whether such a denial only violates the Eighth Amendment if it is imposed in response to an "utterly trivial infraction," as the court below, but no other circuit, holds.

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Petitioner Michael Johnson respectfully petitions this Court for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion (Pet. App. 1a-36a) appears at 29 F.4th 895, and its order denying en banc review (Pet. App. 61a-74a) appears at 47 F.4th 529. The district court's relevant ruling (Pet. App. 37a-60a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2022. Petitioner timely filed a petition for rehearing en banc, which was denied on August 25, 2022. On November 9, 2022, Justice Barrett granted an extension of the period for filing this petition to December 23, 2022. On December 2, 2022, Justice Barrett granted an extension of the period for filing

this petition to January 22, 2023.[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[1] Because that period concludes on a Sunday, this petition is timely pursuant to Supreme Court Rule 30(1) if filed on or before January 23, 2023.

INTRODUCTION

For more than three years, Michael Johnson, who is classified seriously mentally ill, was denied virtually all access to exercise—whether indoors or outdoors—while he languished in solitary confinement. That deprivation was not imposed to ensure the safety and security of the exercise yard, but rather to punish Mr. Johnson for engaging in misconduct that was born of mental illness and unrelated to exercise.

Forced to spend virtually every moment in a windowless cell that was sealed with a solid-steel door, Mr. Johnson's physical and mental health deteriorated. His muscles withered, he repeatedly smeared feces on his body, endured hallucinations, and compulsively picked at his own flesh, and he required "suicide watch" time and again.

In a 2-1 opinion, the court below held that deprivations of exercise—of any duration—including those imposed punitively and without a security justification, categorically cannot violate the Eighth Amendment unless such punishment is instituted in response to an "utterly trivial infraction." Pet. App. 14a. In dissent, Judge Rovner explained that "exercise"—no less than nutrition and shelter—is among life's minimal civilized necessities, and therefore cannot be withheld punitively. *E.g.*, Pet. App. 31a-32a (Rovner, J., dissenting). Rather, such deprivations must be necessitated by safety and security imperatives. *Id.*

Mr. Johnson petitioned for rehearing en banc. In a 5-5 vote, the court below denied the petition. Judge Scudder, who concurred in the denial of rehearing,

recognized that the majority opinion was "hard to square" with this Court's precedent and acknowledged that the "issue is important and cries out" for en banc review. Pet. App. 62a-63a (Scudder, J., concurring in denial of reh'g en banc). The dissenters went further, explaining that the majority's error "sends the message that an inmate who behaves . . . badly" is "fair game for torture," "take[s] the liberty of deleting" enumerated rights from this Court's jurisprudence, creates a lopsided circuit split, and warrants Supreme Court review. *Id*. at 65a-66a, 74a (Wood, J., dissenting from denial of reh'g en banc).

Exercise, like shelter, food, and medical care, is one of the "minimal civilized measure[s] of life's necessities" that prison officials must provide. *Wilson v. Seiter*, 501 U.S. 294, 304 (2001) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). Accordingly, every federal court of appeals to reach the question other than the court below—the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits—holds that prison officials can only impose prolonged and near-total exercise denials on those in solitary confinement if exercise cannot be provided without jeopardizing prison security. In holding otherwise, the Seventh Circuit stands alone.

And with good reason. For more than a century, this Court has called attention to the plight of prisoners in solitary confinement, a condition that Justice Kennedy labeled a "regime that will bring you to the edge of madness, perhaps to madness itself." *Davis v. Ayala*, 576 U.S. 257, 287, 288 (2015) (Kennedy, J., concurring). An extensive body of scientific research confirms the devastating physical and psychological effects of prolonged isolation. But

Defendants subjected Mr. Johnson to something far worse: "'24/7' solitary confinement" unrelieved by occasional access to exercise. Pet. App. 19a (Rovner, J., dissenting).

On any given day, several thousand men and women are held in solitary confinement in carceral facilities in Illinois, Indiana, and Wisconsin. This Court should either grant plenary review to answer the question presented or summarily reverse the decision below to ensure that the panel majority's errors are not construed as a license for prison officials in three states to impose a punishment—solitary confinement without access to exercise—that few, perhaps no, humans can tolerate.

STATEMENT OF THE CASE

1. For more than three years, Michael Johnson, who is diagnosed seriously mentally ill by the Illinois Department of Corrections,[2] spent virtually every moment in a cramped isolation cell at Pontiac Correctional Center. Pet. App. 3a-4a, 11a; 19a (Rovner, J., dissenting). Generally, prisoners held in solitary confinement like Mr. Johnson are entitled to one hour of out-of-cell exercise five days a week. Pet. App. 5a. They may take that exercise alone in an outdoor exercise cage, weather permitting, or alone in an indoor recreation room, collectively referred to as "yard." *Id*.

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[2] Mr. Johnson's bipolar disorder, severe depression, excoriation disorder, and other diagnosed mental illnesses, App. 52-65, combined with his treatment in prison, have led him to attempt suicide more than 15 times, *id*. at 458; Pet. App. 3a-4a; 19a-20a (Rovner, J., dissenting).

But Defendants designated Mr. Johnson for "yard restriction"—on top of his solitary confinement—as a superadded punishment for the behavior his mental illness induced.[3] Pet. App. 18a (Rovner, J. dissenting); App. 7-10, 29-30, 575-78. The record below shows that Defendants restricted Mr. Johnson's yard access purely as punishment; Defendants did not assert that his participation in yard would threaten security, and none of his misconduct occurred during yard time. Pet. App. 32a-36a (Rovner, J., dissenting); App. 521-23, 575-86. The "yard restriction" classification theoretically entitled Mr. Johnson to one hour of out-of-cell recreation per *month*. Pet. App. 19a (Rovner, J., dissenting). Even that monthly breather was frequently denied for insignificant reasons—*e.g.*, a messy cell—or no reason at all. *Id.* at 34a; App. 8-9, 15, 29-30, 48-49, 115-17, 138-39, 148, 202, 548-49. In fact, for more than one year, Mr. Johnson did not receive even a single *hour* of exercise. Pet. App. 68a (Wood, J., dissenting from denial of reh'g en banc).

These exercise denials "essentially result[ed] in '24/7' solitary confinement" in "a windowless cell . . . and behind a door that for most or all of his placements was a solid one." Pet. App. 19a (Rovner, J.,

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[3] One consequence of Mr. Johnson's mental illness has been "his refusal, or inability, to comply with prison rules." Pet. App. 18a (Rovner, J., dissenting). For example, he sometimes "spit[] at or in the direction of others." *Id*. at 34a. He disobeyed orders to clean his cell. *Id*. He once threw an "unknown liquid substance" in the direction of guards or prisoners. *Id.* He damaged property in his cell. Pet. App. 67a (Wood, J., dissenting from denial of reh'g en banc); App. 573-75. He possessed contraband. Pet. App. 67a (Wood, J., dissenting from denial of reh'g en banc). And he frequently covered himself in his own feces. Pet. App. 20a (Rovner, J., dissenting).

dissenting). Making matters worse, Mr. Johnson's cell "was too small to permit in-cell exercise." Pet. App. 73a (Wood, J., dissenting from denial of reh'g en banc); Pet. App. 19a (Rovner, J., dissenting).

The "impact of that prolonged isolation without the critical outlet of exercise was both terrible and predictable." Pet. App. 20a (Rovner, J., dissenting). Left only to "stare[] at walls and ceilings … until his mind played tricks on him," App. 742, Mr. Johnson was "regularly on suicide watch," "suffered from hallucinations," "excoriated his flesh," and repeatedly "smear[ed] feces in his cell and on himself,"[4] Pet. App. 20a (Rovner, J., dissenting); App. 65, 191, 199, 549, 735.

2. Proceeding pro se, Mr. Johnson filed a complaint pursuant to 42 U.S.C. § 1983, claiming that this prolonged exercise denial violated the Eighth Amendment. App. 21-22. After concluding that the deprivation was not unconstitutional, the district court granted Defendants' motion for summary judgment.[5] Pet. App. 53a-55a.

3. On appeal, the panel majority affirmed. Pet. App. 14a. It reasoned that the deprivation of exercise categorically "does not violate the Eighth Amendment unless the sanctions were meted out for 'some utterly trivial infraction of the prison's disciplinary rules.'"

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[4] Mr. Johnson "experienced physical deterioration," too—atrophied muscles, shaky hands, persistent headaches, chest pain, and overwhelming fatigue. Pet. App. 20a (Rovner, J., dissenting); App. 8, 10, 13, 539-40, 660, 663, 712.

[5] Mr. Johnson also raised other claims, but they are not relevant to this petition. App. 21-25.

Pet. App. 14a (quoting *Pearson v. Ramos*, 237 F.3d 881, 885 (7th Cir. 2001) (Posner, J.)).

Judge Rovner dissented. Recognizing that both the Supreme Court and the federal courts of appeals have long considered "exercise," much like "food, clothing or warmth," to be "a basic human need," Judge Rovner explained that exercise "cannot be denied as a punishment unrelated to serious immediate security and safety needs." Pet. App. 32a (Rovner, J., dissenting). And she explained that Mr. Johnson's isolated conditions of confinement multiplied his need for exercise, which is "even more critical for inmates in segregation." *Id.*

As Judge Rovner pointed out, however, the record established that Defendants imposed a total denial of yard without any "indicat[ion] that Johnson would present a security risk or a safety threat if allowed access to the yard, with its individual cages, to exercise." *Id.* at 35a. In fact, Defendants did not claim that "any infraction occurred during yard time" or even offer "any argument" that the "yard restrictions were necessary for safety and security reasons." *Id.* at 36a.

Illustrating the absence of an adequate justification, Judge Rovner noted that Mr. Johnson was deprived of yard for *eighteen months* for "impair[ing] surveillance, disobeying an order, insolence, property damage, and giving false information to an employee" and another *eight months* for "covering his door window with feces," possessing another prisoner's social security number, and overflowing his toilet. *Id.* at 33a-34a. Indeed, the most serious of the infractions, the only infractions classified by Defendants as "assaults," consisted of

"spitting at or in the direction of others" and "throwing an unknown liquid substance." *Id.* at 34a. For that spitting and throwing, Defendants denied Mr. Johnson yard for an additional *eleven months*.[6] *Id.*

4. Following the panel decision, Mr. Johnson petitioned for rehearing en banc. An evenly split court denied Mr. Johnson's petition. Judges Sykes, Easterbrook, Brennan, and Kirsch voted to deny rehearing. Pet. App. 61a (order denying reh'g en banc).

Judge Scudder concurred in the denial of rehearing en banc, but described the majority opinion as "hard to square" with this Court's precedent, and emphasized that "the issue is important and cries out for the full court's consideration." *Id.* at 62a (Scudder, J., concurring in denial of reh'g en banc). Five members of the court—Judges Wood, Rovner, Hamilton, St. Eve, and Jackson-Akiwumi—voted to grant rehearing en banc. *Id.* at 65a (Wood, J., dissenting from denial of reh'g en banc). Judge Wood, writing for the dissenting judges, explained that "[n]o decision from either the Supreme Court or the lower courts justifies carving out exercise from the Supreme Court's list" of fundamental needs. *Id.* By doing so, the majority "puts the Seventh Circuit at odds with many other courts" on a critical issue, a circumstance "mak[ing] this case a suitable candidate for Supreme Court attention." *Id.*

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[6] Although the precise start and end date for each exercise restriction—amounting to more than three years in total—are difficult to discern from the prison disciplinary records, Pet. App. 5a, it is clear that Mr. Johnson endured at least two years of yard restrictions with no break in between, *id.* at 2a; 19a (Rovner, J., dissenting).

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve Whether The Eighth Amendment Permits Prison Officials To Punitively Impose Lengthy, Virtually Total Exercise Deprivations On Prisoners In Solitary Confinement Without A Security Justification.

This Court has held that exercise, like food and warmth, is one of "life's necessities" guaranteed prisoners by the Eighth Amendment. *Wilson*, 501 U.S. at 304. Accordingly, every federal court of appeals to reach the question—other than the Seventh Circuit—has concluded that prison officials cannot deprive incarcerated people of nearly all exercise for an extended period of time as mere punishment. The Eighth Amendment permits extended exercise deprivation if, and only if, exercise would jeopardize prison security.

A. In A Lopsided Split, The Seventh Circuit Stands Alone.

In holding that a prolonged exercise deprivation triggers no Eighth Amendment protection as long as it is imposed to punish an infraction that is not "utterly trivial," the Seventh Circuit is on its own.

i. Ten Circuits Hold That The Eighth Amendment Only Permits Prolonged Exercise Denials From Prisoners In Solitary Confinement That Are Necessitated By Security Requirements.

The Second Circuit's "safety exception" illustrates the consensus among the circuits. *See Williams v. Greifinger*, 97 F.3d 699, 704 (2d Cir. 1996). In

Williams, a prisoner's refusal to take a tuberculosis test did not justify infringing the Eighth Amendment's command that "some opportunity for exercise *must* be afforded to prisoners." *Id.* at 704 (quoting *Anderson v. Coughlin*, 757 F.2d 33, 35 (2d Cir. 1985)). Instead, the Eighth Amendment would have permitted the deprivation only in "unusual circumstances" making "exercise 'impossible' because of disciplinary needs." *Id.* (quoting *Mitchell v. Rice*, 954 F.2d 187, 192 (4th Cir. 1992); *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979) (Kennedy, J.)). Because the prison had produced no evidence that providing the prisoner "with an opportunity for exercise would have posed an immediate danger," the "safety exception" did not apply and the exercise deprivation violated the Eighth Amendment. *Id.* at 706-07; *see also Edwards v. Quiros*, 986 F.3d 187, 191 (2d Cir. 2021) (recognizing a "right to some meaningful opportunity to exercise[,] subject to a safety exception and adequate consideration of alternatives").

The Ninth Circuit employs the same rule. The court permitted the extended deprivation of exercise from a prisoner who consistently exhibited "manifestly murderous, dangerous, uncivilized, and unsanitary conduct," including multiple acts of violence specifically "when he is permitted to engage in *outdoor* activities." *LeMaire v. Maass*, 12 F.3d 1444, 1448, 1453 (9th Cir. 1993) (emphasis added). Essential to the court's holding was that the plaintiff's "loss of [] exercise privileges [was] directly linked to his own misconduct" because he "represent[ed] a grave security risk when outside his cell." *Id.* at 1458. By contrast, the Eighth Amendment forbade limiting exercise to 45 minutes per week for a prisoner who, despite multiple disciplinary infractions, "did not lose

his exercise privileges based on a determination by prison officials that he presented a 'grave security risk when outside his cell'" and posed no "particular problems in the exercise yard." *Allen v. Sakai*, 40 F.3d 1001, 1004 (9th Cir. 1994); *see also Thomas v. Ponder*, 611 F.3d 1144, 1155 (9th Cir. 2010) (explaining that "deprivation of exercise may be 'reasonable' in certain situations, such as during a 'state of emergency' in a prison, or when a prisoner poses such a threat to inmates or guards that his confinement without exercise is the only way to maintain the security of the facility"—but, where exercise deprivation is not "necessary to maintain order in the prison, it is difficult to conceive of how a deprivation of a 'basic human necessity' may be deemed reasonable"(cleaned up)).

The Eleventh Circuit, too, requires a security justification. The court permitted a three-year deprivation of outdoor exercise from two prisoners who had attempted to escape from the yard because "it would be hard to imagine a situation in which two persons had shown a greater threat to the safety and security of the prison." *Bass v. Perrin*, 170 F.3d 1312, 1316 (11th Cir. 1999). But it upheld a preliminary injunction ending five years of little to no out-of-cell exercise where a prisoner had committed some "non-violent" but "serious" infractions—but had not exhibited "the pervasive violent conduct" that "penologically justified the *Bass* inmates' complete deprivation of out-of-cell recreation." *Melendez v. Sec'y, Fla. Dep't of Corr.*, No. 21-13455, 2022 WL 1124753, at *13 (11th Cir. April 15, 2022); *see also Sheley v. Dugger*, 833 F.2d 1420, 1429 (11th Cir. 1987) (raising "serious constitutional questions" about the constitutionality of twelve years in solitary with two

hours of out-of-cell exercise per week and noting that the "punitive . . . nature" of the deprivation strengthened the Eighth Amendment claim).[7]

The Tenth Circuit agrees. In *Housley v. Dodson*, 41 F.3d 597 (10th Cir. 1994), a prisoner who was not "a particularly high security risk" stated an Eighth Amendment claim where he was restricted to thirty total minutes of out-of-cell exercise during a three-month period. *Id.* at 599. By contrast, the Eighth Amendment permitted depriving a "dangerous and legendary" prisoner of outdoor exercise—but giving him two hours daily indoor exercise—because he posed "a continuing security concern." *Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739, 750, 755 (10th Cir. 2014).

The Fourth Circuit similarly holds that the Eighth Amendment guarantees "meaningful opportunities to exercise" that may be withheld only "under exigent circumstances that necessitate constriction of these rights." *Mitchell*, 954 F.2d at 193. In that case, the plaintiff's "incorrigibly assaultive nature," which manifested in multiple escape attempts and attempted murders while incarcerated, "may" have

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[7] In dissent, Judge Wood suggested that the Eleventh Circuit is the only court of appeals that has not recognized exercise "as one of life's necessities." Pet. App. 66a (Wood, J., dissenting from denial of reh'g en banc). That is a questionable characterization of Eleventh Circuit law, *see Melendez*, 2022 WL 1124753, at *15 (describing "the allowance of any out-of-cell time for recreation" as one of "life's necessities"), but whether the Eleventh Circuit has adopted that precise formulation is irrelevant. Regardless of its word choice, the Eleventh Circuit requires "pervasive violent conduct" to "penologically justif[y]" exercise deprivation. *Id.* at *13 (citing *Bass*, 170 F.3d at 1316-17).

justified a yearslong exercise deprivation—if prison officials could demonstrate the "infeasibility of alternatives." *Id.* at 188-89, 192-93.

The Sixth Circuit also centers "prison security requirements" in its exercise-deprivation analysis. *Walker v. Mintzes*, 771 F.2d 920, 927-28 (6th Cir. 1985). Accordingly, that court held that a 46-day "total or near-total deprivation of exercise or recreational opportunity, without penological justification, violates Eighth Amendment guarantees." *Patterson v. Mintzes*, 717 F.2d 284, 289 (6th Cir. 1983).

The Fifth Circuit followed the same rule in permitting a deprivation of outdoor exercise from a member of a violent prison gang engaged in "planning a gang war." *Hernandez v. Velazquez*, 522 F.3d 556, 558 (5th Cir. 2008). The deprivation was "not punitive in nature" but rather was compelled by concerns "for the safety of the suspected gang members and others in the prison system," and lasted only as long as necessary to "investigate[] suspected gang members and . . . defuse tensions between the rival gangs." *Id.* at 558-59. By contrast, that court held that restricting a prisoner who posed no particular security threat to twenty annual days of outdoor exercise violated the Eighth Amendment. *Maze v. Hargett*, 200 F.3d 814, *3, *6 (5th Cir. 1999) (unpublished).

Likewise, the Eighth Circuit permits depriving out-of-cell exercise only for "those inmates who would jeopardize security if released from their cells." *Campbell v. Cauthron*, 623 F.2d 503, 507 n.4 (8th Cir. 1980). In *Campbell*, the Eighth Circuit had "no trouble" concluding that the Eighth Amendment forbade restricting prisoners to "a few hours each week" of out-of-cell time and ordered that "each

inmate that is confined to his cell for more than sixteen hours per day shall ordinarily be given the opportunity to exercise for at least one hour per day outside the cell"—subject to the security exception. *Id.* at 506-07. One such exception arose in *Leonard v. Norris*, 797 F.2d 683 (8th Cir. 1986), where the court held that the Eighth Amendment permitted a 15-day exercise deprivation for prisoners who led "a potentially explosive attempt to disrupt [prison] security." *Id.* at 684-85.

The First Circuit has adopted the Ninth Circuit's rule, relying on that court's decision in *LeMaire*, 12 F.3d 1444, for the proposition that the Eighth Amendment permits depriving prisoners of exercise if they pose an out-of-cell security risk. *See, e.g.*, *Giacalone v. Dubois*, 121 F.3d 695, *1 (1st Cir. 1997) (unpublished per curiam) (45-day exclusion from the yard for a prisoner who assaulted another prisoner by striking him in the head with fists and a typewriter); *McGuinness v. Dubois*, 86 F.3d 1146, *2 (1st Cir. 1996) (unpublished per curiam) (endorsing the district court's application of *LeMaire*).

And the D.C. Circuit has expressed doubt that thirty minutes of daily indoor exercise would satisfy constitutional requirements where there were no "dangers or risks involved in providing outside recreation to maximum security prisoners," and reaffirmed that recreation is "necessary" to the health of incarcerated people. *Campbell v. McGruder*, 580 F.2d 521, 544 n.48, 546 (D.C. Cir. 1978).

Although it hasn't squarely addressed what circumstances justify depriving exercise, the Third Circuit has made clear that restrictions on even less fundamental rights, like daytime mattress use, violate

the Eighth Amendment if imposed as punishment for "wholly unrelated misconduct" that did not make "provision of the deprived needs difficult or dangerous." *McClure v. Haste*, 820 F. App'x 125, 129-32 (3d Cir. 2020). Because providing a mattress around the clock "would not have placed correctional officers or other inmates at risk," the Eighth Amendment obligated officials to do so. *Id.* at 131.

Most of the above cases addressed only the constitutionality of limiting outdoor exercise while permitting indoor exercise in a gym, day room, or other interior space. A few suggested that serious security concerns could justify limiting all out-of-cell exercise, where in-cell exercise remained available. *See, e.g.*, *LeMaire*, 12 F.3d at 1458; *Hernandez*, 522 F.3d at 559; *Mitchell*, 954 F.2d at 189, 193; *Campbell*, 623 F.2d at 507 n.4; *McGuinness*, 893 F. Supp. 2, 4 (D. Mass. 1995), *aff'd*, 86 F.3d 1146. But counsel has identified no case, under any circumstances and in any other court of appeals, approving an extended total deprivation of all exercise, in or out-of-cell. The Seventh Circuit's decision is *sui generis*.

ii. The Seventh Circuit Holds That The Eighth Amendment Permits A Long-Term Near-Total Denial Of Exercise From Prisoners In Solitary Confinement Without A Security Justification.

In holding that indefinite, virtually total exercise deprivations do not trigger Eighth Amendment concerns so long as they are imposed to punish infractions that are "not utterly trivial"—never mind if providing exercise raises no security concerns—the Seventh Circuit stands alone. As Judge Rovner

pointed out in dissent, the "critical distinction" for Eighth Amendment purposes falls between "punishment after the fact and immediate coercive measures necessary to restore order or security." Pet. App. 27a-28a (Rovner, J., dissenting) (quoting *Rodriguez v. Briley*, 403 F.3d 952, 953 (7th Cir. 2005) (cleaned up)). Where no "security concerns" justify the deprivation, the Eighth Amendment forbids it. *Id.* at 33a.

Here, however, not even "the defendants . . . assert that there are . . . any . . . security concerns" associated with honoring Mr. Johnson's constitutional right to exercise somewhere, anywhere. *Id.* at 36a. If any other circuit governed Mr. Johnson's jailers, the Eighth Amendment would forbid his years-long total denial of exercise unmotivated by security concerns.

B. The Decision Below Was Wrong

The decision below is contrary to Eighth Amendment jurisprudence in at least four respects.

First, the panel majority erred by disregarding this Court's admonition that "[*s*]*ome* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise." *Wilson*, 501 U.S. at 304.

The majority baldly rejects that principle and the sole example this Court offered to illustrate it. In *Wilson*, this Court specifically contrasted the necessity of providing "outdoor exercise" to prisoners "otherwise confined in small cells almost 24 hours per day" with the permissibility of depriving outdoor

exercise where "prisoners otherwise had access to [a] dayroom 18 hours per day." *Id.* at 304-05 (citing *Spain*, 600 F.2d at 199 (Kennedy, J.) and *Clay v. Miller*, 626 F.2d 345, 347 (4th Cir. 1980).

Nonetheless, the panel majority expressly refused *Wilson*'s directive to contextualize Mr. Johnson's exercise deprivation by considering the attendant circumstances—*i.e.*, solitary confinement. Pet. App. 10a, 14a. That innovative approach is, as Judge Scudder remarked, "hard to square" with *Wilson*. Pet. App. 62a (Scudder, J., concurring in denial of reh'g en banc). Rather, the Eighth Amendment is concerned with the "sum total of the deprivation." *Id.*; *see also id.* at 69a (Wood, J., dissenting from denial of reh'g en banc) (similar). Mr. Johnson suffered a three-year denial of out-of-cell exercise coupled with confinement in an isolation cell too cramped to permit in-cell exercise. Pet. App. 69a (Wood, J., dissenting from denial of reh'g en banc). The panel majority's decision to strip the deprivation of context contravenes this Court's longstanding Eighth Amendment case law.

Second, Mr. Johnson's three-year exercise denial violates the Eighth Amendment because it (a) posed a "substantial risk of serious harm"; and (b) was inflicted with "deliberate indifference" to his "health or safety." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Yet the panel majority elected not to apply this framework to Mr. Johnson's claim. Had it done so, the Eighth Amendment violation would have been obvious.

a. To start, Mr. Johnson has already suffered "serious harm" of both a psychological and a physical nature. *Supra*, 7. And it is reasonable to assume that Mr. Johnson's lifespan will be shortened because of

the three years of forced idleness he endured. *Infra*, 22. The probability of such future harm raises additional Eighth Amendment concerns. *E.g.*, *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding that prison officials cannot "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering").

b. Mr. Johnson also presented sufficient evidence at summary judgment to establish that Defendants were "deliberately indifferent"—that is, that they knowingly disregarded the risk. *Farmer*, 511 U.S. at 837. As an initial matter, Mr. Johnson repeatedly told them that solitary confinement without access to exercise was injuring him. *E.g.*, App. 15-16, 29-30, 32-33, 35-36, 38-39, 42-43, 48-49, 125-26, 136-41, 145-48, 186-87, 193, 537-39. But that is not the only evidence of Defendants' knowing disregard. For example, prison mental health staff reported that "yard restriction" left Mr. Johnson with "no outlet" that would blunt the effects of his mental illness. App. 291.

Neither Mr. Johnson's words nor the staff report was necessary to put Defendants on notice, however. Prison policies explicitly recognized the risks of solitary confinement generally, the "heightened risk" imposed on those with mental illness, and the ameliorating impact of "opportunities for fitness." Dist. Ct. ECF 59 at 30-31, 54. Likewise, the administrative code governing the Illinois Department of Corrections mandated that "[o]ffenders in segregation status shall be afforded the opportunity to recreate outside their cells a minimum of eight hours per week." Ill. Admin. Code tit. 20 § 504.670(a) (2017). In fact, the Department's own medical director had previously testified that "four to seven hours of

exercise outside the cell . . . are the weekly minimum necessary to prevent serious adverse effects on the physical and mental health of inmates confined . . . in . . . a form of solitary confinement." *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988); *see also* Pet. App. 22a (Rovner, J., dissenting). And, finally, the risk of harm posed by the three-year deprivation of exercise for a prisoner otherwise isolated day and night in a cell too small to permit movement, let alone exercise, is sufficiently obvious to permit the inference that Defendants were aware of but disregarded the clear danger to Mr. Johnson. *Farmer*, 511 U.S. at 837; *Wilson*, 501 U.S. at 300; *Hope*, 536 U.S. at 745 (holding that "[t]he obvious cruelty inherent" in relegating inmates to flagrantly "degrading and dangerous" conditions provides officers "with some notice that their alleged conduct violate[s]" the Eighth Amendment).

Third, because exercise—like shelter, food, and medical care—is among the "minimal civilized measure of life's necessities," *Wilson*, 501 U.S. at 304, there is a "critical 'distinction, for purposes of applying the eighth amendment in the context of prison discipline, between punishment after the fact and immediate coercive measures necessary to restore order or security.'" Pet. App. 27a-28a (Rovner, J., dissenting) (quoting *Rodriguez*, 403 F.3d at 953). In deference to this principle, the circuit cases establish that no "total deprivation" of a "basic human need" can be imposed as a "punishment unrelated to serious immediate security and safety needs." Pet. App. 32a (Rovner, J., dissenting). This holds for exercise, no less than for "food, clothing or warmth." *Id.* And, thus, when it comes to exercise, "the presence (or absence) of a particularly compelling security justification has,

rightly, played an important role in the analysis of the Courts of Appeals," since "[i]t should be clear by now that our Constitution does not permit such a total deprivation [of outdoor exercise] in the absence of a particularly compelling interest." *Apodaca v. Raemisch*, 139 S. Ct. 5, 7-8 (2018) (statement of Sotomayor, J., respecting denial of certiorari).

Here, Defendants asserted no security justification for depriving Mr. Johnson of virtually all opportunity to exercise for *three years*, and the summary judgment record confirms none existed. Pet. App. 32a-36a (Rovner, J., dissenting). Rather, Defendants withheld exercise to punish past misconduct that was unrelated to and did not occur in connection with exercise. *Id.* The panel majority, apparently "tak[ing] the liberty of deleting 'exercise'" from the Court's "list of 'minimal' needs that must be addressed," saw no constitutional problem with exercise deprivation as punishment, never mind that "[n]o decision from either the Supreme Court or the lower courts justifies" its approach. Pet. App. 65a (Wood, J., dissenting from denial of reh'g en banc).

Fourth, and finally, the conditions endured by Mr. Johnson violate the Constitution because they are contrary to the "evolving standards of decency that mark the progress of a maturing society." *Rhodes*, 452 U.S. at 346. For decades, courts have recognized exercise as both "an indispensable component of preventive medicine," *Anderson v. Romero*, 72 F.3d 518, 528 (7th Cir. 1995), and "a necessary requirement for physical and mental well-being," *Delaney v. DeTella*, 256 F.3d 679, 683 (7th Cir. 2001). And, as with solitary confinement, *see infra* 27-28**,** a vast body of scientific research warns of the harm caused by lack

of exercise. A "three-millennia history . . . recognizes that physical inactivity reduces functional capacity and health," and "[o]verwhelming evidence proves the notion that reductions in daily physical activity are primary causes of chronic diseases/conditions." Frank W. Booth et al., *Lack of exercise is a major cause of chronic diseases*, 2 COMPREHENSIVE PHYSIOLOGY 1143, 1143-44 (April 2012). The American College of Physicians has specifically recommended that U.S. jails and prisons "offer incarcerated persons regular opportunities for healthy exercise as recommended by federal Physical Activity Guidelines." Newton E. Kendig et al., *Health Care During Incarceration: A Policy Position Paper From the American College of Physicians*, ANNALS OF INTERNAL MED. 2 (Nov. 22, 2022). Those guidelines emphasize that "only a few lifestyle choices have as large an effect on mortality as physical activity." U.S. Dep't of Health and Human Servs., *Physical Activity Guidelines for Americans* 34 (2018 2d ed.).[8]

Given the undisputed scientific consensus, it comes as no surprise that the courts of appeals have long recognized that the wholesale deprivation of exercise offends the Eighth Amendment. *E.g.*, *Williams*, 97 F.3d at 704 (noting that the Second Circuit has "described the right to exercise in unequivocal terms, stating that '[c]ourts have recognized that some opportunity for exercise *must* be afforded to prisoners.'"); *Mitchell*, 954 F.2d at 191 ("It may generally be considered that complete deprivation of exercise for an extended period of time violates Eighth Amendment prohibitions against

[8] Available at https://health.gov/sites/default/files/2019-09/Physical_Activity_Guidelines_2nd_edition.pdf.

cruel and unusual punishment."); *Ruiz v. Estelle*, 679 F.2d 1115, 1152 (5th Cir. 1982) ("[C]onfinement of inmates for long periods of time without opportunity for regular physical exercise constitutes cruel and unusual punishment."); *Housley*, 41 F.3d at 599 ("[T]here can be no doubt that total denial of exercise for an extended period of time would constitute cruel and unusual punishment prohibited by the Eighth Amendment."), *abrogated on other grounds by Lewis v. Casey*, 518 U.S. 343 (1996); *Thomas*, 611 F.3d at 1152 ("Like food, [exercise] is a basic human need protected by the Eighth Amendment."). And although Defendants deprived Mr. Johnson of exercise for years on end, the panel majority condoned the practice notwithstanding the fact that such deprivations have long been recognized as both dangerous and constitutionally infirm.

C. This Is An Ideal Vehicle To Resolve The Question Presented.

This case presents the ideal vehicle to resolve the question presented for four reasons.

First, this petition "sharply present[s]" a single, well preserved, pure question of law: May prison officials punitively deny virtually all exercise to a prisoner in solitary confinement for years on end without a security justification, or must that deprivation be necessitated by security requirements? *See* Pet. App. 70a (Wood, J., dissenting from denial of reh'g en banc); Pet. App. 18a (Rovner, J., dissenting). That question has already been addressed in five reasoned opinions (one in the district court; four in the court of appeals), incorporating the views of eleven different federal judges, five of whom expressly noted its suitability for Supreme Court review. Pet. App.

37a-60a; Pet. App. 1a-17a; Pet. App. 18a-36a (Rovner, J., dissenting); Pet. App. 62a-64a (Scudder, J., concurring in denial of reh'g en banc); Pet. App. 65a-74a (Wood, J., dissenting from denial of reh'g en banc).

Second, the record is straightforward and appropriately developed. Concurring in the denial of rehearing en banc, Judge Scudder identified several facts that would "have benefitted from full development and sound adversarial presentation in the district court." Pet. App. 63a (Scudder, J., concurring in denial of reh'g en banc). But this Court need not wait for a (vanishingly unlikely) counseled trial in a similar case for additional fact development.[9] The summary judgment posture of this case obligates a reviewing court to take as true Mr. Johnson's evidence. Thus, this Court must accept that Defendants subjected Mr. Johnson to a "total deprivation" of exercise—his cell was too small to exercise within and he was denied virtually all out-of-cell exercise opportunities—for more than three *years* based on misconduct that did "not involve any apparent security risk to yard access." Pet. App. 36a (Rovner, J., dissenting); Pet. App. 67a (Wood, J., dissenting from denial of reh'g en banc). And this Court must accept that the deprivation imposed a "terrible and predictable" price: physical and psychological deterioration. Pet. App. 20a (Rovner, J., dissenting).

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[9] 0.5% of prisoners' rights cases go to trial. *See Table D: Outcomes in Federal District Court Cases by Case Type, Cases Terminated FY 2021*, INCARCERATION AND THE LAW: CASES AND MATERIALS, https://incarcerationlaw.com/resources/data-update/#TableD (last visited Jan. 23, 2023).

In any event, the panel majority ruled against Mr. Johnson because it believed that, *as a matter of law*, such a deprivation could not violate the Eighth Amendment. Pet. App. 14a. Thus, current Seventh Circuit case law renders "the factual details that the concurrence claims are essential to review . . . irrelevant." Pet. App. 70a-71a (Wood, J., dissenting from denial of reh'g en banc). Simply put, "there are no quirks in the record . . . that stand in the way" of reaching the question presented. *Id*. at 66a (Wood, J., dissenting from denial of reh'g en banc).

Third, the unusually prolonged nature of Mr. Johnson's exercise deprivation makes this case the ideal vehicle to address the question presented. As Judge Wood noted, some exercise deprivations may, by virtue of their comparatively short duration, involve complicated constitutional line-drawing. Pet. App. 69a-70a (Wood, J., dissenting from denial of reh'g en banc). This is not such a case. Indeed, counsel is unaware of *any* case involving such a lengthy, near-total exercise deprivation. If the Eighth Amendment imposes any durational limit on the deprivation of exercise, *three years* surely surpasses that limit. *Id.*

Fourth, and finally, by failing to properly raise qualified immunity in the trial court, Defendants have forfeited it at the summary judgment stage, Pet. App. 36a n.4 (Rovner, J., dissenting), so the question before this Court is presently unencumbered by thorny questions of clearly established law that typically accompany similar constitutional claims raised by incarcerated people. *See, e.g.*, *Apodaca v. Raemisch*, 864 F.3d 1071, 1077-79 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 5 (2018).

For each of these reasons, the question presented is well suited to the Supreme Court's review.

II. The Question Presented Is Exceptionally Important.

The split created by the Seventh Circuit presents a question of fundamental importance.

1. Mr. Johnson endured his time at Pontiac almost entirely inside "a windowless cell, with a cell light that remained on 24/7, and behind a door that for most or all of his cell placements was a solid one." Pet. App. 19a (Rovner, J., dissenting). He had little to no meaningful social contact with guards or other prison personnel and his interactions with other prisoners, many of whom were also mentally ill, appeared to consist of "listening to [them] screaming and hollering and banging and kicking." App. 544.

These conditions of confinement are not unusual among prisoners housed in solitary. And they are not per se unconstitutional. But members of this Court and the scientific community alike have repeatedly warned against the deleterious effects that these sorts of conditions wreak on the human mind and body. Over 130 years ago, this Court noted that, at our nation's founding, solitary confinement "was found to be too severe." *In re Medley*, 134 U.S. 160, 168 (1890). For, as this Court observed, "[a] considerable number of the prisoners" consigned to solitary fell "into a semi-fatuous condition … others became violently insane; others still, committed suicide; while [others] … did not recover sufficient mental activity to be of any subsequent service to the community." *Id.* In fact, at common law, solitary confinement was considered a rare punishment: one that was only prescribed as

"punishment of the worst crimes of the human race," and "'a further terror and peculiar mark of infamy' to be added to the punishment of death." *Id.* at 170, 171.

More recently, Justice Kennedy noted that "[t]he human toll wrought by extended terms of isolation long has been understood" as a "regime that will bring you to the edge of madness, perhaps to madness itself." *Davis v. Ayala*, 576 U.S. 257, 287, 288 (2015) (Kennedy, J., concurring). And Justice Breyer repeatedly raised concerns regarding the psychological and physical injury inflicted by prolonged solitary confinement. *E.g.*, *Glossip v. Gross*, 576 U.S. 863, 926 (2015) (Breyer, J., dissenting); *Jordan v. Mississippi*, 138 S. Ct. 2567, 2568-69 (2019) (Breyer, J., dissenting from denial of certiorari); *Ruiz v. Texas*, 137 S. Ct. 1246, 1246-47 (2017) (Breyer, J., dissenting from denial of certiorari).

Consistent with the commentary by Supreme Court justices for the past century, an extensive and growing body of research from the scientific community "confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price." *Ayala*, 576 U.S. at 289 (Kennedy, J., concurring). Prisoners exposed to solitary confinement consistently develop some or all of the following injuries: severe depression, hallucination, anxiety, panic attacks, withdrawal, lethargy, cognitive dysfunction, paranoia, memory loss, insomnia, and stimuli hypersensitivity. *E.g.*, Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH U. J. L. & POL'Y 325, 335-36, 349, 370-71 (2006). Life-threatening behavior, such as suicidal ideation, is all too common among prisoners in solitary confinement. *Id.* at 349; Stuart Grassian,

Psychopathological Effects of Solitary Confinement, 140 AM. J. PSYCHIATRY 1450, 1453 (2006). And prisoners suffering from mental illness—whether preexisting or solitary-induced—are disproportionately vulnerable to the well documented harms caused by solitary confinement, and are also at the greatest risk of having their suffering "deepen into something more permanent and disabling." Craig W. Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 142 (2003); Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 290 (2018).

Corrections professionals, too, have increasingly called attention to the dangers of solitary confinement. *See* Pet. App. 22a n.2 (Rovner, J., dissenting) (citing to Br. for Amici Curiae Former Corrections Directors & Experts at 3, 9-11, 13, 17-18, 26). They have likewise noted the lack of a countervailing benefit, explaining that the "decreased use of isolation and an increase in out-of-cell exercise . . . has consistently resulted in a substantial decrease in violence, resulting in an improvement in prison security and a reduction of operating costs." *Id.*

2. The concerns expressed by jurists, researchers, and correctional officials apply to the use of solitary confinement far less brutal than that at issue here; the rigors of Mr. Johnson's near-total isolation served as a multiplier for the decision to deny him virtually all opportunities for exercise—both indoors and outdoors—for a period in excess of three years. Typically, prisoners in solitary confinement receive some minimal time outside of their cells for exercise each week—as then-Judge Kennedy explained

decades ago, the isolation of solitary confinement made out-of-cell exercise "a necessity." *Spain*, 600 F.2d at 199. Indeed, this Court recently denied certiorari in a case where petitioners in solitary confinement were allowed to spend five hours per week in a designated indoor exercise cell, but were otherwise denied outdoor exercise. *Apodaca*, 139 S. Ct. at 5-7 (2018).

Justice Sotomayor, in a statement respecting the denial, pointed to the well-documented ravages of solitary confinement and urged that "[i]t should be clear by now that our Constitution does not permit such a total deprivation [of outdoor exercise] in the absence of a particularly compelling interest." *Id*. at 8 (statement of Sotomayor, J., respecting denial of certiorari). This case is categorically more troubling—unlike in *Apodaca,* where the petitioners had access to almost daily exercise in a dedicated recreation room, Mr. Johnson was stripped of virtually all access to exercise for years on end.

3. Though Mr. Johnson's three years in solitary confinement without any opportunity for out-of-cell exercise is "unusual," solitary confinement is commonplace. For example, 2021 saw some 25,000 prisoners across the country in solitary confinement, nearly a quarter of whom had been isolated for a year or more. The Correctional Leaders Assoc. & The Liman Center for Pub. Interest Law at Yale Law Sch., Time-in-Cell 2021: A Snapshot of Restrictive Housing 10-11 tbl.2 (Aug. 2022). In the states that make up the Seventh Circuit alone, thousands of prisoners are regularly held in solitary confinement. *Id*. at 8, 11. The panel majority's unmistakable message that prisoners are "now fair game" for the "wholesale

deprivation of exercise" risks subjecting any number of the thousands of people held in solitary confinement in Illinois, Wisconsin, and Indiana to conditions that "come[] perilously close to a penal tomb." *Apodaca*, 139 S. Ct. at 10 (statement of Sotomayor, J., respecting denial of certiorari).

This Court should grant certiorari to resolve the circuit split created by the decision below.

III. In The Alternative, This Court Should Summarily Reverse Because The Decision Below Cannot Be Squared With This Court's Precedents.

If the Court does not grant plenary review, it should summarily reverse the decision below because it is blatantly incompatible with the Court's Eighth Amendment precedents for at least four reasons.

First, as both Judges Scudder and Wood noted, the majority opinion is irreconcilable with this Court's decision in *Wilson v. Seiter*. Pet. App. 62a-63a (Scudder, J., concurring in denial of reh'g en banc); Pet. App. 69a (Wood, J., dissenting from denial of reh'g en banc). Contrary to *Wilson*, the majority explicitly refused to consider context—*i.e.*, that Mr. Johnson endured a three-year exercise deprivation while he was otherwise held in solitary confinement—but rather insisted on reviewing the exercise deprivation in a vacuum, despite this Court's clear direction to the contrary. *See* Pet. App. 69a (Wood, J., dissenting from denial of reh'g en banc) (explaining that "[t]he panel majority has attempted to avoid the question Johnson has presented in his briefs" by analyzing the issues of solitary confinement and exercise separately). In fact, this Court has not only made clear that conditions of

confinement with a "mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise" must be analyzed "in combination," it has also described (as the only provided exemplar of that rule's application) the precise situation faced by Mr. Johnson—the necessity of out-of-cell exercise when prisoners are "otherwise confined in small cells almost 24 hours per day." *Wilson*, 501 U.S. at 304-05.

Second, the panel decision deletes from the case law the Court's long-established conditions of confinement analytical framework. In its place, the court below substituted a novel rule: It categorically cannot violate the Eighth Amendment to punish prisoners by withholding exercise (or, presumably, any other of the minimal civilized measures of life's necessities) "unless the sanctions were meted out for some utterly trivial infraction of the prison's disciplinary rules." Pet. App. 14a (quotations omitted).

But that is not the law. Rather, for decades, this Court has held that conditions of confinement cases are reviewed under the familiar deliberate indifference framework. *See Estelle v. Gamble*, 429 U.S. 97 (1976); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Hope v. Pelzer*, 536 U.S. 730 (2002). That framework makes sense. The Eighth Amendment "imposes duties on [prison] officials, who must provide humane conditions of confinement." *Farmer*, 511 U.S. at 832. Thus, prison officials may not be deliberately indifferent to "conditions posing a substantial risk of serious harm." *Id.* at 834. That approach, which balances risk, on the one hand, with the prison's knowledge of and ability to avoid that risk, on the

other, is eminently suitable for evaluating conditions of confinement, including those imposed when prisoners commit infractions. The Eighth Amendment's promise to provide humane conditions of confinement simply does not evaporate in the face of disciplinary infractions. Pet. App. 35a (Rovner, J, dissenting); Pet. App. 70a (Wood, J., dissenting from denial of reh'g en banc).

Third, Defendants deprived Mr. Johnson of one of life's essential needs for approximately three years, as a consequence of which his physical and mental health deteriorated—yet Defendants have not asserted (and the record would not support any such assertion) that the deprivation was necessitated by security. On these facts, "the Eighth Amendment violation is obvious." *Hope*, 536 U.S. at 738. For, "[d]espite the clear lack of an emergency situation," Defendants "knowingly subjected [Mr. Johnson] to a substantial risk of physical harm [and] to unnecessary pain," conduct that is incompatible with this Court's rule that gratuitous, punitive treatment is forbidden by the Eighth Amendment. *Id*.

Fourth, and finally, withholding all opportunities for exercise—one of very few identified minimal civilized necessities of life, *Wilson*, 501 U.S. at 304—violates contemporary standards of decency. For decades this Court has recognized that "[t]he [Eighth] Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency. . .,' against which we must evaluate penal measures." *Estelle*, 429 U.S. at 102 (citation omitted). Jurists, scientists, and corrections officials have long recognized the life-preserving necessity of exercise, a necessity that becomes all the more essential for those

confined in isolation cells. *See supra*, 22 & 27-28; *see also* Pet. App. 21a-23a (Rovner, J., dissenting) (citing cases). Holding Mr. Johnson in a cramped, isolation cell for *three years* without the temporary relief of exercise, is not only "antithetical to human dignity," *Hope*, 536 U.S. at 745, it is the stuff of nightmares.

For each of these reasons, the decision below should be summarily reversed.

CONCLUSION

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

Respectfully submitted,

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Counsel for Petitioner

JANUARY 2023

APPENDIX

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-3535
MICHAEL JOHNSON,

Plaintiff-Appellant,

v.

SUSAN PRENTICE, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois.
No. 16-C-1244 — Colin S. Bruce, *Judge*.

ARGUED JULY 22, 2020 — DECIDED MARCH 31, 2022

Before SYKES, *Chief Judge*, and EASTERBROOK and ROVNER, *Circuit Judges*.

SYKES, *Chief Judge*. Michael Johnson, a former Illinois prisoner, sued prison officials and healthcare providers raising claims under 42 U.S.C. § 1983 for alleged Eighth Amendment violations arising while he was in disciplinary segregation. Johnson entered state custody in 2007. His history of prison misconduct—some of it violent and destructive—led to his transfer in March 2013 to the Pontiac Correctional Center to serve a lengthy accumulated term of segregation, more commonly known as solitary confinement.

Johnson suffers from serious mental illness, including depression and bipolar disorder, and he was on crisis watch nine times while he was in segregation. Mental-health professionals employed by Wexford Health Sources, Inc., the prison healthcare provider, regularly monitored his condition and treated him with medication, which was periodically adjusted.

Johnson's misconduct continued while he was in segregation, especially when he refused to take his medication, and many of his violations were serious enough to trigger penalties of 30 to 90 days of no "yard" access—that is, exercise time outside his cell—as a sanction. Johnson alleged in his pro se complaint that the cumulative yard restrictions—about three years in total, some 24 months of it consecutive—violated his Eighth Amendment right to be free from cruel and unusual punishment. He also complained of unsanitary conditions, poor ventilation, and summertime heat in his cell, and excessive noise by other inmates. Finally, he alleged a claim for inadequate mental-health treatment. The district court entered summary judgment for the defendants.

Johnson's case has undergone a major transformation on appeal. Now represented by counsel and supported by two amici, he seeks redress for the prolonged period he spent in solitary confinement from March 2013 until his transfer to a mental-health unit in August 2016. For support he cites academic research on the harmful effects of solitary confinement.

This claim is new on appeal. Johnson never sought relief for the time he spent in solitary

confinement; he sued over his loss of yard access, certain unhealthy conditions in his cell, and his mental-health treatment. Not surprisingly, the record is entirely undeveloped on the issue of the physical and psychological effects of prolonged solitary confinement. Claims not raised in the district court are waived. To the very limited extent that Johnson's current arguments track the claims that were raised below, they are foreclosed by the record and circuit precedent. We therefore affirm.

I. Background

Johnson began serving a sentence in Illinois state prison in February 2007. He was frequently transferred between correctional facilities, partly because of his serious prison misconduct, which includes more than 70 conduct violations from 2008 through August 2016. Almost all were classified as "major" violations. Johnson was often violent, threatening, and destructive. His adjudicated misconduct includes, for example, multiple instances of assaulting correctional officers or other inmates, fighting, intimidation and threats, possession of contraband, damaging property, throwing feces or urine out of his cell or at others, smearing feces on himself or his cell, impairing surveillance, disobeying direct orders, and insolence. In March 2013 he was transferred to Pontiac Correctional Center to serve a lengthy accumulated period of disciplinary segregation resulting from consecutive penalties for multiple conduct violations.

Johnson was classified as a seriously mentally ill inmate and was diagnosed with antisocial personality disorder, depression, bipolar disorder, poor impulse control, panic disorder, anxiety

disorder, and excoriation disorder (compulsive scratching). He also has a history of suicide threats or attempts. When he arrived at Pontiac, a psychiatrist employed by Wexford, the prison system's healthcare contractor, reviewed his records, evaluated him, and developed a treatment plan that included several psychotropic medications.

Johnson's misconduct continued while he was in segregation at Pontiac. Between March 2013 and August 2016, the time period at issue here, he accumulated more than three dozen conduct violations, all but one classified as "major." These included assaults on staff and other inmates (repeated spitting and throwing bodily fluids); possession of contraband (including, once, a piece of mirror); disobeying orders; impairing surveillance; and throwing urine or feces out of his cell (among other violations). For this new misconduct, he accrued additional periods of time in disciplinary segregation, which when added to his already-accumulated segregation time meant that Johnson spent almost three and a half years—from March 2013 to August 2016—in solitary confinement. (He was also sanctioned with restrictions on his yard access, which we'll discuss in a moment.)

Johnson never stayed long in any one cell. During his time in segregation, Johnson transferred cells roughly 40 times. His stays typically lasted under 14 days. Some were longer, with eight stays lasting between 15 to 30 days and four stays lasting between 30 to 60 days. Johnson's longest stay in a single cell was 150 days, which happened once. The reasons for the cell transfers varied. Many were routine, some were disciplinary, and some were for medical or other nondisciplinary reasons.

Johnson's pro se complaint alleged Eighth Amendment claims under § 1983 for deprivations that can be grouped into three categories: (1) loss of yard access; (2) poor cell conditions; and (3) inadequate treatment of his mental illness. Because Johnson's case has markedly changed on appeal, he has largely abandoned the claims that were litigated below, so a brief summary of each category will suffice. We add pertinent factual detail drawn from the record at summary judgment, giving Johnson the benefit of reasonable inferences in his favor.

An inmate in segregation is permitted to exercise outside his cell for a few hours each week, either in an outdoor exercise area (in a small secured cage) or in an indoor recreation room. These out-of-cell exercise sessions are referred to as "yard" privileges. Yard privileges may be revoked as punishment for major misconduct, and Johnson incurred many such sanctions. Each of his individual yard restrictions ranged from 30 to 90 days, depending on the severity of his misconduct. But the sheer volume of his violations meant that he was under a yard restriction of some duration from April to July 2013 and then almost continuously from about January 2014 through August 2016, for a cumulative total of about three years. (The prison disciplinary records are not clear about the precise start and end dates for each restriction period.)

While under yard restrictions, an inmate is permitted only one hour of out-of-cell exercise per month. Johnson claimed that this too was often withheld for unknown reasons. He contended that between June 2015 and June 2016 he was not permitted any yard access at all.

Johnson also alleged that he was subjected to certain unhealthy cell conditions. He claimed that his cells were often filthy and at times became overheated when temperatures rose in the summer and air circulation was poor. Inmates in segregation were given a half cup of cleaning solution once a week to clean their cells but that was inadequate, especially when he smeared his cell with excrement (or a prior occupant did so). To ameliorate the summertime heat, officers placed an industrial fan at the end of the gallery to increase airflow. They also gave inmates a cup of ice each day. These measures, too, were inadequate. Johnson claimed that the temperature in his cell was as high as 90–100 degrees on an unspecified number of summertime days.

Johnson complained to guards three times in the summer of 2016 about the heat in his cell and was twice relocated in response. Johnson also alleged that noise from other inmates screaming and pounding on their cell doors contributed to the poor conditions in the segregation unit, making it hard to sleep and causing him to suffer headaches and "frayed nerves."

Finally, Johnson challenged the adequacy of his mental-health treatment. From almost the moment of his arrival at Pontiac in March 2013, his compliance with treatment was sporadic, and he vacillated between periods of stability and instability. As noted, he was evaluated when he arrived in segregation, and a treatment plan was put in place. The record reflects that he was regularly monitored by Wexford physicians and other mental-health professionals. Sometimes he agreed to meet with them, sometimes not. His medication regimen

was adjusted many times, especially when he refused to take his prescribed medication or complained of side effects. From March 2013 to August 2016, Wexford psychiatrists prescribed the following medications at various times as they adjusted his treatment in an effort to achieve better control of his mental illness: Vistaril, Thorazine, Risperdal, Depakote, Lithium, Lamictal, Zoloft, and Cogentin (for side effects). Still, sustained stability was elusive. Johnson was placed on crisis watch nine times because of suicidal thoughts or threats, sometimes for a day or two and sometimes longer. While on crisis watch, a guard checked on him every 15 minutes.

Johnson repeatedly requested a transfer to a mental-health unit, but his treating psychiatrists concluded that it was not warranted. In August 2016 the psychiatrists finally recommended a transfer to a specialized mental-health unit. Johnson attributes the decision to this lawsuit, which he had filed two months earlier. The providers say it was because he achieved a measure of compliance with his treatment plan and was a better candidate for transfer to the specialized unit. Either way, Johnson was transferred to a mental-health unit by the end of that month.

Johnson's suit named numerous corrections officials,[1] Wexford mental-health staff,[2] and Wexford

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[1] Warden Michael Melvin; Correctional Majors Susan Prentice and Warren Hadsell; Correctional Lieutenants James Boland and John Gasper; Correctional Counselor Kimberly Kelly; Casework Supervisor Terri Kennedy; and Correctional Officers Travis Devries, Eric Myers, and Gerald Henkel.

[2] Mental-health professionals Andrea Moss, Kelly Haag, Linda Duckworth, and Stephen Lanterman; psychiatrist Scott

itself as defend ants, and he raised the claims we've just described. At several points during the litigation, he moved for the appointment of pro bono counsel. The district judge denied each motion, reasoning that while Johnson had made a reasonable attempt to obtain counsel, he had not shown that he could not litigate the case himself as required by the framework established in *Pruitt v. Mote*, 503 F.3d 647, 654–55 (7th Cir. 2007) (en banc).

After discovery both sets of defendants—the corrections officials and the Wexford defendants—moved for summary judgment. They supported their motions in the usual way with sworn declarations, deposition testimony, and prison records. At first Johnson did not respond. The judge gave him an additional 30 days to do so. He then filed a timely 18-page, 60-paragraph response but submitted no evidence. At the end of his response, he wrote: "I could not finish."

The judge granted the motions and entered judgment for the defendants. He first addressed Johnson's contentions regarding poor conditions and excessive heat in his cell. The record was unclear about how often and for how long Johnson's cell was excessively hot. The judge reasoned that at most this condition was intermittent (occurring only occasionally in the summer) and would have been brief because Johnson routinely switched cells. The same was true about his complaint of poor ventilation and unsanitary cell conditions. The record did not show the frequency or extent to which Johnson was subjected to these conditions.

McCormick; Medical Director Andrew Tilden; and physician's assistant Riliwan Ojelade.

The judge next rejected the claim about loss of yard access, citing our decision in *Pearson v. Ramos*, 237 F.3d 881 (7th Cir. 2001), and also noting that the record did not establish that Johnson suffered any adverse health consequences. We'll return to *Pearson* later. For now, it's enough to say that our decision there establishes that a 90-day denial of yard privileges for serious misconduct by an inmate in segregation is not cruel and unusual punishment, *id.* at 884, nor is it an Eighth Amendment violation to "stack" such penalties unless the inmate's misconduct was so minor as to be "trivial," *id.* at 885.

Finally, the judge addressed the claim of inadequate mental-health treatment and rejected it as unsupported by the record. Undisputed evidence established that the Wexford defendants continuously monitored Johnson's mental-health condition and regularly adjusted his medication as circumstances warranted. The corrections defendants did nothing to interfere with his treatment and were otherwise entitled to defer to the decisions of the mental-health professionals. For these reasons, the judge concluded that although Johnson suffered from objectively serious mental illness, the record did not support an inference that the defendants were deliberately indifferent to his mental-health needs.

II. Discussion

We review the judge's order granting summary judgment de novo. *Quinn v. Wexford Health Sources, Inc.*, 8 F.4th 557, 565 (7th Cir. 2021). As we've noted, Johnson was unrepresented in the district court, but on appeal he has the assistance of counsel and the support of two amici. The briefing on his side is

therefore plentiful and well written. But it dramatically reframes the case.

In the district court, Johnson raised claims concerning his loss of yard access, certain unhealthy conditions in his cell, and the adequacy of his mental-health treatment. In contrast, his appellate counsel and amici now mount an extensive and sophisticated attack on solitary confinement generally, especially when it is used for prolonged periods of time and for inmates with mental illness. Relying on academic literature, they argue that solitary confinement causes psychological and physical injuries that can last for decades after release. Indeed, they question whether *any* use of solitary confinement is compatible with the Eighth Amendment. In short, almost the entire opening brief—48 of its 55 pages— recasts Johnson's case as a claim for the three and a half years that he was held in solitary confinement, with special emphasis on his mental illness.

Whatever its potential merit, this claim was not raised in the district court. It is therefore waived. *Mahran v. Advoc. Christ Med. Ctr.*, 12 F.4th 708, 713 (7th Cir. 2021). As we recently explained:

> "Failing to bring an argument to the district court means that you waive that argument on appeal." *Wheeler v. Hronopoulos*, 891 F.3d 1072, 1073 (7th Cir. 2018). A party must present the specific argument urged on appeal and cannot rest on having addressed the same general issue. *Puffer v. Allstate Ins. Co.*, 675 F.3d. 709, 718 (7th Cir. 2021); *Fednav Int'l Ltd. v. Cont'l Ins. Co.*, 624 F.3d 834, 841 (7th Cir. 2010). Although the argument need not be

> present in all its particulars and a party may elaborate in its appellate briefs, *Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761 (7th Cir. 2015), a conclusory argument that amounts to little more than an assertion does not preserve a question for our review[,] *Betco Corp. v. Peacock*, 876 F.3d 306, 309 (7th Cir. 2017).

Soo Line R.R. Co. v. Consol. Rail Corp., 965 F.3d 596, 601 (7th Cir. 2020). Waiver doctrine rests on concerns about fair notice and the proper roles of the trial and appellate courts in our adversarial system.

One more point: Although we construe pro se filings liberally, pro se litigants are generally subject to the same waiver rules as those who are represented by counsel. *Douglas v. Reeves*, 964 F.3d 643, 649 (7th Cir. 2020).

Even liberally construed, Johnson's pro se filings in the district court never raised and developed a claim for damages for his prolonged detention in solitary confinement. As the case comes to us, the record is entirely undeveloped on the issue of the physical and psychological effects of solitary confinement, either in general or in Johnson's case in particular. The record clearly establishes that he suffered from serious mental illness predating his transfer to Pontiac and remained seriously mentally ill during the extended time he spent in solitary confinement, cycling between periods of stability and crisis. But it is equally clear that neither Johnson's complaint nor his response to the summary-judgment motions hinted at a claim for damages stemming from his placement or continuation in solitary confinement. To repeat, he challenged the

loss of yard privileges, certain cell conditions, and the adequacy of his mental-health treatment.

Accordingly, neither the corrections officials nor the Wexford defendants developed legal arguments or an evidentiary record to meet a general attack on the use of solitary confinement or even a more focused argument regarding the use of solitary confinement as a response to Johnson's persistent and serious misconduct. Nor did the judge address any such claim in his summary-judgment ruling. There was no need to. Read fairly and with generosity, Johnson's filings never mentioned such a claim.

To be sure, the reframed appellate argument incorporates some of the evidence underlying Johnson's original claims— but only as part of the background for the newly raised challenge to his solitary confinement. That could be construed as an abandonment of the claims raised below. We have nonetheless carefully reviewed the record and are satisfied that the judge properly entered judgment for the defendants on the claims pertaining to the loss of yard access and poor cell conditions.

We begin with the familiar deliberate-indifference liability standard:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference.

Farmer v. Brennan, 511 U.S. 825, 837 (1994). The claim thus has subjective and objective elements, "each of which must be satisfied." *Quinn*, 8 F.4th at 565. The plaintiff must prove that the defendant was subjectively aware of and intentionally disregarded an objectively serious risk to his health or safety. *Id.* at 565–66.

The record is unclear about how often or for how long Johnson endured each of the harsh cell conditions he complained of below. (Recall that he was moved to a different cell some 40 times.) Generally speaking, challenges to conditions of confinement cannot be aggregated and considered in combination unless "they have a mutually enforcing effect that produces the deprivation of a single, identifiable need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets." *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). That's because "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Id.*

The record does not establish the frequency, severity, or duration of the unsanitary cell conditions, excessive heat, or poor ventilation in Johnson's cells, making it hard to evaluate the objective component of the claim. And even if we assume that one or more of these conditions was objectively serious, there's a failure of proof on the subjective element. The record lacks an adequate factual basis to evaluate the state-of-mind question for each defendant regarding each of the complained-of cell conditions. Without sufficient evidence of their subjective culpability, they cannot be held liable.

The yard-access claim is deficient under our decision in *Pearson*. There we held that a 90-day period of no yard privileges as a sanction for misconduct does not inflict cruel and unusual punishment on an inmate in segregation. *Pearson*, 237 F.3d at 884. We further held that imposing consecutive 90-day periods of no-yard privileges for separate misconduct violations does not violate the Eighth Amendment unless the sanctions were meted out for "some utterly trivial infraction of the prison's disciplinary rules." *Id.* at 885. *Pearson* involved a challenge to four "stacked" 90-day yard restrictions, for a total of 360 consecutive days. The sanctions were imposed for beating a guard, spitting on a guard, setting fire to cell property, and throwing bodily fluids at a medical technician. *Id.* That is not trivial misconduct, so the challenge to the aggregated 360-day no-yard sanction failed. *Id.*

Johnson's cumulative yard restrictions were far longer: about three years in total, approximately two years of it consecutive. But he did not argue below (and does not argue here) that his misconduct was trivial, either individually or in the aggregate. Nor could he. While perhaps not as violent as the misconduct at issue in *Pearson*, his violations were continuous, serious, and sometimes highly dangerous, including spitting on inmates or guards and throwing urine and feces. Summary judgment for the defendants on this claim was appropriate.

The rest of Johnson's opening brief consists of seven short pages directed at the challenge to the adequacy of his mental-health treatment. Though the argument is thin— almost an afterthought—this claim was preserved below and is raised again here, so we turn to it now. We can be brief. To prevail,

Johnson needed to present evidence that one or more of the defendants deliberately disregarded his mental-health needs. *Quinn*, 8 F.4th at 565. More specifically, he needed evidence that the defendants "actually knew of [his] serious health need and acted with deliberate indifference to [his] suffering." *Howell v. Wexford Health Sources, Inc.*, 987 F.3d 647, 653 (7th Cir. 2021).

For a claim against a prison medical provider, the plaintiff must show that "the medical professional's response was so inadequate that it demonstrated an absence of professional judgment." *Stewart v. Wexford Health Sources, Inc.*, 14 F.4th 757, 763 (7th Cir. 2021) (quotation marks omitted). A mere difference of opinion about a treatment decision will not suffice; "[a] medical professional is entitled to deference in treatment decisions unless no minimally competent professional would have so responded under those circumstances." *Id.* (quotation marks omitted). Put slightly differently, "where a prisoner has received at least *some* medical treatment[,] … he must show a substantial departure from accepted professional judgment, practice, or standards." *Eagan v. Dempsey*, 987 F.3d 667, 683 (7th Cir. 2021) (quotation marks omitted). And "expert medical evidence is often required to prove this aspect of [the] claim." *Id.* (quotation marks omitted).

There's no real dispute about the objective element of the claim here: Johnson clearly suffered from serious mental illness. But the record falls far short on the subjective element. The evidence shows that the Wexford defendants evaluated Johnson when he arrived at Pontiac, developed a treatment plan for his mental illnesses, and continuously monitored his condition, adjusting his medication as

needed. He maintains that they should have transferred him to a specialized mental-health unit far sooner. This argument reflects a difference of opinion about his medical care. There is no expert testimony that their treatment decisions represented a departure from accepted professional standards—much less a *substantial* departure—and no evidence suggests that their decisions were not actually based on medical judgment.

The *Monell* claim against Wexford itself suffers from two deficiencies: there is no proof of an underlying constitutional violation by any individual Wexford defendant nor any evidence that an institutional policy caused such a violation. *Quinn*, 8 F.4th at 568.

Johnson's discussion of this claim does not mention the corrections defendants. We take that as a waiver, but we add that any claim against them fails for a different reason. "We have long recognized that the division of labor within a prison necessitates that non-medical officials may reasonably defer to the judgment of medical professionals regarding inmate treatment." *Giles v. Godinez*, 914 F.3d 1040, 1049 (7th Cir. 2019).

Before closing, we note for completeness that Johnson does not challenge the judge's denial of his several requests under 28 U.S.C. § 1915(e)(1) to recruit pro bono counsel. The standard of review is highly deferential: "[T]he question on appellate review is not whether we would have recruited a volunteer lawyer in the circumstances, but whether the district court applied the correct legal standard and reached a reasonable decision based on facts supported by the record." *Pruitt*, 503 F.3d at 658.

This deference means that a decision not to recruit counsel is seldom reversible error. We express no view on this issue because it was not raised.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

ROVNER, *Circuit Judge,* dissenting in part. Although the appellant and the amici present strong arguments that confinement in a segregation unit, particularly for the length of time and under the conditions here, is constitutionally problematic, I agree with the panel that the issue as to the constitutionality of solitary confinement itself was never presented to the district court. Therefore, I join the majority in concluding that this issue was not before us, and in its disposition of the remaining issues with one exception.

I cannot join in the opinion to the extent that it upholds summary judgment as to the yard restrictions. In contrast to the issue of segregation itself, the constitutionality of the yard restrictions, which operated to virtually eliminate all opportunity to exercise, was directly preserved in the district court and is argued here. And it, too, necessarily involves consideration of the conditions of confinement in the segregation unit. See *Delaney v. DeTella*, 256 F.3d 679, 683 (7th Cir. 2001) (noting that "segregation is akin to solitary confinement and that such confinement, uninterrupted by opportunities for out-of-cell exercise could reasonably be described as cruel and, by reference to the current norms of American prisons, unusual") (internal quotation marks omitted). For more than three years, Johnson was held in segregation and denied virtually all access to exercise as a punishment for his refusal, or inability, to comply with prison rules. The result was a deteriorating mental state that virtually ensured further rules violations, creating a self-perpetuating cycle. But access to exercise is not a perquisite or privilege to be used as a sword to ensure compliance with any institutional rule. It is

an essential human need, and Johnson's challenge to those conditions should have survived summary judgment. See *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

In segregation at Pontiac, Johnson was held in isolation day and night, in a windowless cell, with a cell light that remained on 24/7, and behind a door that for most or all of his cell placements was a solid one. Meals were eaten in the cell and delivered through a slot in the door. He was allowed out of his cell once per week for a ten minute shower, and when not on yard restriction, was provided an opportunity to exercise in the yard on a weekly basis. Even in the yard, inmates were kept in individual cages, but the cage in the yard was a little bigger than his cell, contained a pull-up bar, and allowed room for exercise because in his cell any of his clothes and possessions had to be kept on the limited floor space as no shelves or storage options were provided. The rest of his time was spent in his cell in the segregation unit and therefore alone and isolated from others.

When on yard restrictions, Johnson was allowed only one hour per *month* of yard time, and even that time was routinely eliminated, thus essentially resulting in "24/7" solitary confinement. As the majority recognizes, the yard restrictions imposed in this case were extensive. Johnson was almost continuously under yard restrictions from January 2014 through August 2016, and under some restrictions from April to July 2013, which resulted in yard restrictions for over three years. For Johnson, who suffers from myriad mental disorders including antisocial personality disorder, severe depression, bi-polar disorder, anxiety, and

excoriation disorder (a disorder involving the repeated picking or scratching at one's skin), the impact of that prolonged isolation without the critical outlet of exercise was both terrible and predictable. During that time period, Johnson was regularly on suicide watch. He suffered from hallucinations, excoriated his flesh, cycled through different medications, experienced physical deterioration, and engaged in the types of behavior, including the smearing of feces in his cell and on himself, that tragically we see all too often among inmates kept in such conditions for long periods of time.[1] After years of requesting a transfer to a specialized mental health unit and being denied,

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[1] See e.g. *Ruiz v. Johnson*, 154 F. Supp. 2d 975, 984–85 (S.D. Tex. 2001) (noting a court finding that Texas's segregation units were "virtual incubators of psychoses," and describing in tragic detail the behavior of inmates in segregation, presented as "an everyday occurrence," including smearing themselves in feces, urinating on their cell floor, babbling incoherently, shrieking, banging their heads on the side of the wall and screaming, or withdrawing and appearing incommunicative*); Davis v. Baldwin*, 2021 WL 2414640, at *15–16 (S.D. Ill. June 14, 2021) (describing expert testimony as to the conditions of restrictive housing units in Illinois, which found that virtually all of the prisoners suffered psychological deterioration, with frequent reports of depression, near-constant anxiety, bouts of anger, and feelings of impending breakdown, and with descriptions as well of hallucinations, playing with and/or eating their own feces, self-mutilation, and suicide attempts); *Freeman v. Berge*, 441 F.3d 543, 544–45 (7th Cir. 2006) (discussing the problems of inmates throwing feces or urine, and smearing feces and blood on walls); *Gillis v. Litscher*, 468 F.3d 488, 490–91 (7th Cir. 2006) (describing behavior of inmate, after he had been deprived of all human contact and sensory stimuli for three days, including smearing blood and feces around his cell).

Johnson's request was finally granted and he was transferred out of segregation.

Among his objections to the conditions of his confinement while in that segregation unit, Johnson challenges those yard restrictions, arguing that "prolonged solitary confinement cannot be imposed without access to regular out-of-cell exercise (whether indoor or outdoor) unless a pressing security concern necessitates this severe restriction." Appellant's Brief at 20. As to that issue, I would vacate the district court's grant of summary judgment and remand the case.

In assessing an action under the Eighth Amendment's prohibition against cruel and unusual punishment, courts consult the "'evolving standards of decency that mark the progress of a maturing society,'" *Delaney*, 256 F.3d at 683, quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). "Thus, conditions which may have been acceptable long ago may be considered unnecessarily cruel in light of our growing understanding of human needs and the changing norms of our society." *Id.* For well over 20 years, we have recognized that the failure to provide opportunities for exercise to prisoners can violate the Eighth Amendment. In 1995, we recognized that "exercise is now regarded in many quarters as an indispensable component of preventive medicine," *Anderson v. Romero*, 72 F.3d 518, 528 (7th Cir. 1995), and by 2001 we held that "exercise is no longer considered an optional form of recreation but is instead a necessary requirement for physical and mental well-being." *Delaney*, 256 F.3d at 683. At that time, we "acknowledged the strong likelihood of psychological injury when segregated prisoners are denied all access to exercise for more than 90 days."

Id. at 685; see also *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988) ("isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage"); *Pearson v. Ramos*, 237 F.3d 881, 884 (7th Cir. 2001) ("long stretches of [solitary] confinement can have serious adverse effects on prisoners' psychological well-being" and can be described as cruel under the Eighth Amendment if "unrelieved by opportunities for out-of-cell exercise"). In fact, we noted in *Delaney* that the medical director of the Illinois Department of Corrections testified to the "'serious adverse effects on the physical and mental health' of segregated inmates who were denied access to exercise," with the result that the Department issued an institutional directive requiring five hours of exercise per week for segregated inmates. *Id.* at 686, quoting *Davenport*, 844 F.2d at 1314.[2] Because yard restrictions which

[2] The amicus brief filed in this case by former corrections directors and experts from Pennsylvania, Oklahoma, Texas, Washington, New Hamp-shire, and New York City, provides strong evidence that the norms are continuing to change, with a growing, widespread antagonism to solitary confinement and exercise restrictions such as those presented here. For in-stance, they provide evidence of an increasing rejection of solitary confine-ment as to all but the most dangerous inmates, and evidence that de-creased use of isolation and an increase in out-of-cell exercise in institu-tions has consistently resulted in a substantial decrease in violence, result-ing in an improvement of prison security and a reduction of operating costs. Correctional Brief at 3, 9–11, 13, 17–18, 26. They also note that the American Correctional Association, the largest accrediting body in the United States for correctional institutions, proposed standards for limiting the use of isolation and ensuring opportunities for outdoor exercise. *Id.* at 8. I do not explore those changing norms, however, as that evidence and those arguments were not before the district court.

deny the prisoner the ability to exercise deprive him of a necessity for physical and mental well-being and create a strong likelihood of psychological injury, a disciplinary restriction with such an impact on the health of prisoners cannot be imposed lightly if it is to survive Eighth Amendment scrutiny.

In upholding summary judgment against Johnson on that claim, the majority relies on *Pearson* as holding that "a 90-day period of no yard privileges as a sanction for misconduct does not inflict cruel and unusual punishment on an inmate in segregation." Maj. op. at 13. Again relying on *Pearson*, the majority also holds that "imposing consecutive 90-day periods of no-yard privileges for separate misconduct violations does not violate the Eighth Amendment unless the sanctions were meted out for 'some utterly trivial infraction of the prison's disciplinary rules.'" Maj. op. at 13-14, quoting *Pearson*, 237 F.3d at 885. The majority then concludes that Johnson failed to argue that his misconduct which led to yard deprivations was "trivial," and that he could not make any such argument because his violations were "continuous, serious, and sometimes highly dangerous, including spitting on inmates or guards and throwing urine and feces." Maj. op. at 14.

As an initial matter, the *Pearson* holding that a yard restriction limited to 90 days is not cruel and unusual punishment is a qualified one. The *Pearson* court cautioned that the 90-day threshold avoids constitutional issues "[a]t least in general," but noted that the cruel and unusual punishments clause has both a relative and an absolute component, and that even a 90-day denial of yard privileges could violate the Eighth Amendment if imposed for a trivial infraction. *Id*. at 884-85. The "trivial" language, then,

applied in *Pearson* even to a single 90-day restriction, and not only to consecutive 90-day periods for separate misconduct allegations. See *Turley v. Rednour*, 729 F.3d 645, 652 (7th Cir. 2013) (noting that *Pearson* held that even a lockdown not greater than 90 days could violate the Eighth Amendment if imposed for a trivial infraction, and noting that in *Pearson* the prisoner behaved "like a wild beast" when out of the cell, which made confinement to his cell the "least cruel measure" for dealing with him). Prison officials cannot immunize their yard restrictions from constitutional inquiry by staying within a 90-day limit. Regardless of the duration of the restriction, we must consider whether the restriction constitutes cruel and unusual punishment.

Moreover, the language in *Pearson* regarding "trivial" infractions must be read in light of the issue actually before the court. The four infractions at issue in *Pearson* were indisputably "serious" ones that involved: attacking and beating a guard such that the guard required hospitalization; setting fire to blankets, coats and boxes so as to require evacuation of prisoners with respiratory problems; spitting in the face of a guard who was trying to restrain him after he assaulted another guard; and throwing a broom and a bottle of bodily fluids at a medical technician, such that the fluids got in the victim's face. 237 F.3d at 885. Because the yard restriction was necessary for the security of the staff and prisoners, *Pearson* did not have occasion to consider the other end of the spectrum of misconduct–behavior which would be insufficiently serious to justify the deprivation of the right to exercise under the Eighth Amendment. See e.g.

Delaney, 256 F.3d at 684 (emphasizing that *Pearson* addressed "*serious violations* of prison disciplinary rules) (emphasis in original). The infractions in *Pearson* "marked the plaintiff as violent and incorrigible," such that "[t]o allow him to exercise in the yard would have given him additional opportunities to attack prison staff and set fires." *Pearson*, 237 F.3d at 885. Accordingly, "[p]reventing access to the yard was a reasonable method of protecting the staff and the other prisoners from his violent propensities." *Id*. In such a circumstance, the court held that any objection to the punishment on considerations of proportionality would be unavailing. *Id*. The court further considered whether the denial of yard privileges for a year does so much harm that it is "intolerable to the sensibilities of a civilized society no matter what the circumstances," and it answered in the negative, noting that other cases supported that conclusion including *Martin v. Tyson*, 845 F.2d 1451, 1456 (7th Cir. 1988) (per curiam), *Bass v. Perrin*, 170 F.3d 1312, 1316–17 (11th Cir. 1999), and *LeMaire v. Maass*, 12 F.3d 1444, 1457-58 (9th Cir. 1993). *Pearson*, 237 F.3d at 885.

Those cases cited in *Pearson* illustrate the type of situations in which a restriction on yard access can be constitutionally justified as not intolerable in a civilized society. In *Martin*, the court held that there were no outdoor exercise facilities available and that the space within Martin's cell allowed for exercise, but also that Martin posed a security risk because he was facing criminal charges for an escape from jail. 845 F.2d at 1456. The court therefore concluded that the limitation on his access to the outdoors was related to a legitimate prison concern. *Id*. *LeMaire* similarly recognized that out-of-cell exercise could be

denied where it would present a serious security threat. In that case, the court recognized that exercise was one of the basic human necessities protected by the Eighth Amendment. *Id.* at 1457. The court upheld the suspension of LeMaire's yard exercise privileges in that case because he abused the privileges and represented a grave security risk when outside his cell, including by attacking a fellow inmate while in the recreation yard, and on a different occasion attacking two officers while exiting the exercise cubicle–an attack which he vowed to repeat. *Id*. at 1448-49, 1458. The court also noted that LaMaire was able to exercise in his cell, as it was large enough and the prison supplied tennis shoes for that purpose, and that the restriction on exercise privileges was tied to his actions indicating a serious security threat. *Id*. at 1458. Finally, in *Bass*, we held that the restrictions on yard time were not without penological justification because "it would be hard to imagine a situation in which two persons had shown a greater threat to the safety and security of the prison." 170 F.3d at 1316. Each of the prisoners had been convicted of violent crimes and were serving life sentences, and each had attempted to escape during yard time–with one having five convictions for escape. *Id*. The common thread in those cases cited in *Pearson*, then, is that a restriction on outdoor exercise opportunities can be constitutional where participation by the inmate in that yard time would present a serious security threat, such as the risk of an escape attempt or an attack on others in the yard.

That holding is consistent with the holdings in other cases in which restrictions on exercise were imposed upon prisoners by the institution. In those

cases, we have repeatedly held that "'[t]o deny a prisoner *all* opportunity for exercise outside his cell would, the cases suggest, violate the Eighth Amendment unless the prisoner posed an acute security risk if allowed outside of his cell for even a short time.'" *Delaney*, 256 F.3d at 687, quoting *Anderson*, 72 F.3d at 527. That approach to assessing exercise restrictions was echoed recently by Justice Sotomayor in a statement respecting the denial of certiorari in *Apodaca v. Raemisch*, 139 S. Ct. 5, 7-8 (2018), noting that with respect to deprivations of outdoor exercise, "the presence (or absence) of a particularly compelling security justification has, rightly, played an important role in the analysis of the Courts of Appeals," and that "[i]t should be clear by now that our Constitution does not permit such a total deprivation [of outdoor exercise] in the absence of a particularly compelling interest."

That focus is consistent with our treatment of deprivations of food or warmth, which, like exercise, have been identified as essential human needs for Eighth Amendment purposes. See *Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (considering, in the Eighth Amendment analysis, whether the actions included "the deprivation of a single, identifiable human need such as food, warmth, or exercise."); *Isby v. Brown*, 856 F.3d 508, 522 (7th Cir. 2017) (quoting *Wilson*); *Smith v. Dart*, 803 F.3d 304, 311 n.4 (7th Cir. 2015) (same); *LeMaire*, 12 F.3d at 1457-58 (same). In analyzing restrictions impacting such identifiable human needs, we have recognized that "there is a critical 'distinction, for purposes of applying the eighth amendment in the context of prison discipline, between punishment after the fact and immediate coercive measures necessary to restore order or

security.'" *Rodriguez v. Briley*, 403 F.3d 952, 953 (7th Cir. 2005) quoting *Ort v. White*, 813 F.2d 318, 324-25 (11th Cir. 1987). Therefore, for instance, in *Rodriguez*, we upheld against an Eighth Amendment challenge the denial of showers and meals based on an inmate's failure to comply with rules applicable whenever they were outside their cells. 403 F.3d 952. The prison in *Rodriguez* had a rule requiring that certain of an inmate's belongings must be placed in a storage box whenever the inmate left the cell, to enhance fire safety, facilitate cell searches, and promote safety and security. *Id.* Rodriguez was forbidden to leave his cell, and therefore obtain meals or showers, until he complied with the rule, and he missed numerous meals and showers when he refused to do so. *Id.* We held that deliberate non-compliance with a valid rule does not convert the consequences into punishment, but specifically noted that "[i]t is not as if the sanction for violating the storage-box rule were to starve the violator or even force him to skip his next meal … . [a]s soon as Rodriguez puts his belongings in the storage box, he can leave his cell." *Id.* at 953. We distinguished in *Rodriguez* between coercive measures necessary for prison order and safety, with which Rodriguez had to comply in order to obtain the human needs of food and showers, and the withholding of such human needs as a punishment for a past violation. *Id.* at 953.

Similarly, in *Freeman v. Berge*, 441 F.3d 543, 544 (7th Cir. 2006), we addressed the denial of food service to Freeman when he refused to comply with the rules for the receipt of food, including the requirement to stand in the middle of the cell and to wear shorts or pants while the food was delivered

through the door slot. As a result of violations of that rule, Freeman was denied a significant number of meals, and he argued that the denial of food for the violation of a prison rule was cruel and unusual punishment under the Eighth Amendment. *Id*. We held that "there is a difference between using food deprivation as a punishment and establishing reasonable condition to the receipt of food." *Id*. at 545. We noted that the requirement to stand in the middle of the cell and to wear pants or shorts were conditions related to the security of officers delivering food, because it decreased the likelihood of inmates exposing themselves to officers or throwing urine or feces at them when delivering the food. On the other hand, we noted that the denial of meals for other reasons such as the refusal to clean his cell or for being asleep could be problematic because those violations could not be "easily related to the refusal to comply with a reasonable condition on the receipt of food." *Id*.

In *Gillis v. Litscher*, 468 F.3d 488, 491 (7th Cir. 2006), we again considered whether the conditions to which an inmate was subjected were sufficiently serious to deny him "the minimal civilized measure of life's necessities." Gillis was placed in a Behavioral Modification Program (the "Program") after violating the prison rule requiring inmates to sleep with their head positioned towards the back of the cell rather than aligning themselves on the bed with their head to the front, so that guards could see their heads through the small window on the cell door. *Id*. at 489-90. The Program involved progressive stages of various levels of deprivations. Stage one involved confinement to a cell with no clothes, property, or bedding, in which he had to sleep naked on a

concrete bed, and received nutri-loaf ("basically a ground-up block of food") for meals. *Id.* at 490-91. He argued that without clothing or bedding he was so cold he had to pace in his cell for some 14 hours trying to get warm, resulting in sores on his feet. *Id.* That stage was supposed to last for three days, but was continued for two more days after he smeared blood and feces around his cell, which the government argued can impair its ability to see through the window. *Id.* at 490. At stage two, which is supposed to last for seven days, he received some limited additional "privileges," including a one-piece item of clothing like a sleeveless poncho, and meals in his cell, although no bedding, mattress, or shower. *Id.* at 491. He suffered a deteriorating mental state, including becoming suicidal, under those conditions, and argued that the Program was a punitive measure unrelated to the conduct the officials were trying to correct, whereas the prison argued that the Program was not punitive and was merely an effort to convince him to conform his behavior to prison rules. *Id.* at 491. We recognized that Gillis could prevail on his Eighth Amendment claim only if he could show that the Program imposed conditions that denied him the "'minimal civilized measure of life's necessities,'" and that the prison officials in denying humane conditions of confinement knew the inmate faced a substantial risk of serious harm and failed to take reasonable measures to abate it. *Id.*, quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). We held that Gillis could survive summary judgment on his Eighth Amendment claim that the conditions of confinement violated those minimal standards. In so holding, we distinguished Gillis's case from cases such as *Rodriguez* and *Freeman*, because Gillis "did not hold the keys to his own release." *Id.* at 494.

Rodriguez could have corrected the situation immediately by placing his items in the storage box, and Freeman could have done the same by standing in the middle of the cell clothed with pants or shorts. *Id*. As to them, we held that "'deliberate noncompliance with a valid rule does not convert the consequences that flow automatically from that noncompliance into punishment,'" noting that there "'is a difference between using food deprivation as a punishment and establishing a reasonable condition to the receipt of food.'" *Id*. at 494, quoting *Rodriguez*, 403 F.3d at 952-53 and *Freeman*, 441 F.3d at 545. Gillis, in contrast, was not deprived of life's necessities only until he conformed with the prison rules. *Id*. at 495. Once he was placed in the Program, he had to complete it in its entirety, and could not end it by altering his behavior. Moreover, we rejected the argument that Gillis could have avoided the Program altogether by not breaking the rules in the first place, holding that such reasoning would "severely limit valid Eighth Amendment claims" in that "[o]ne could say that most punishments could be avoided by simply following the rules." *Id*.

Those cases relating to the denial of the basic human necessities establish the "critical 'distinction, for purposes of applying the eighth amendment in the context of prison discipline, between punishment after the fact and immediate coercive measures necessary to restore order or security.'" *Rodriguez*, 403 F.3d at 953, quoting *Ort*, 813 F.2d at 324-25. Even where a prison rule is violated such as the failure to sleep in an orientation that would enable proper observation, we have recognized that the denial of essential human needs can result in unconstitutional conditions of confinement. Here, the

deprivation of all opportunities to exercise deprived Johnson of an essential human need, and it was an after-the-fact punishment not a coercive measure. Johnson could not restore his ability to exercise by simply complying with the rule. Once the violation was assessed, he could not exercise for the entirety of the 2 to 3 month period regardless of his conduct. If the deprivation here was food, clothing or warmth, the cases cited above would be clear that the total deprivation adequately alleged a violation of the Eighth Amendment. But exercise, too, has been recognized as a basic human need, rendered even more critical for inmates in segregation. The deterioration of the physical and mental health of inmates who are deprived of all out-of-cell, or even in-cell, options has been recognized for decades now. And our cases establish that basic human needs cannot be denied as a punishment unrelated to serious immediate security and safety needs.

Many, if not most, of the disciplinary infractions in this case do not signify any acute security risk, such as a threat of an escape attempt or a danger to other prisoners or correctional officers, as was present in the cases in which expansive yard restrictions were upheld.[3] The infractions in this

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[3] The majority here first holds that Johnson failed to argue below or on appeal that his misconduct was trivial, and then holds that he could not make such an argument in any event because his violations–though not as violent as the conduct in Pearson–were continuous, serious and sometimes highly dangerous. Maj. op. at 14. In the court below, Johnson sought the appointment of counsel numerous times, and was denied that appointment, so we liberally construe his pleadings, as a pro se litigant, in deter-mining whether an issue was adequately raised. The record in this case, including the state's statement of undisputed facts, sets forth numerous disciplinary

case that resulted in yard restrictions include some assaults—which involved spitting at or in the direction of other inmates and the throwing of feces, urine, or other liquid—which the state certainly could argue constitute a serious security issue, but numerous other infractions which resulted in the denial of yard time for many additional months do not by their nature indicate any security threat to yard access by Johnson. For instance, according to the Undisputed Material Facts in the State Defendants' Motion for Summary Judgment, Johnson was assessed 3 months' yard restriction for an incident on May 12, 2014, for the infraction of covering his door window with feces. App. 520 # 112, 522 #117. The Department of Corrections Adjustment Committee Report further reveals that he received 3 months' yard restrictions for an incident on February 17, 2016, based on the observation that

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infractions which resulted in the loss of yard privileges but which do not reflect any security risk related to the use of the yard. More-over, in response to the summary judgment motion, Johnson pointed out that problem, asserting that he was deprived of out-of-cell exercise based on infractions that were not yard related at all. App. 728, #3. That sufficiently raises the issue. On appeal, the briefs further develop the issue. In fact, the first sentence in the Appellant's Summary of Argument states that every federal court of appeals including our own "has held that prolonged solitary confinement cannot be imposed without access to regular out-of-cell exercise (whether indoors or outdoors) unless a pressing security concern necessitates this severe restriction," and then proceeds to state that no such security risk exists here. Appellant Brief at 20. The brief subsequently develops its argument that out-of-cell exercise is required absent an extraordinary security risk, and that no such security risk is present here or is even asserted by the government. Appellant Brief at 34, 36-39; see also factual basis of claim *id*. at 4-10. Accordingly, this issue is presented to us.

"water and what appeared to be human feces was coming out of offender Johnson's cell," and a Disciplinary Card indicates that he received 2 months' yard restriction for possession of another inmate's social security number on February 18, 2016. App. 586, 578. Those infractions accounted for a full eight months of yard restrictions. Moreover, the yard restrictions ordered for Johnson were imposed consecutive to each other, without any pause from one punishment to another for even a week of yard access, thus magnifying the adverse impact. See *Bass*, 170 F.3d at 1316 (recognizing that with respect to solitary confinement, there is a "significant difference between some time outside–even a minimal amount–and none at all"). None of those infractions involved charges of assaults. The charges alleged for those infractions included "impairment of surveillance," "health, smoking or safety violation," and "disobeying a direct order" (all three of which were cited for incidents such as smearing feces on the cell window and refusing to clean it). And other infractions in the record, in which the disciplinary report in the record contains the charge but not the factual details, also do not on their face reflect any security risk related to yard access. Additional charges of impairment of surveillance, disobeying an order, insolence, property damage, and giving false information to an employee, accounted for another 18 months of yard restrictions. Only 11 months of yard restrictions were attributed to charges of assault, with 26 months to charges other than assault, and all of those assault charges involved spitting at or in the direction of others except for one charge based on throwing an unknown liquid substance.

Considering only the infractions identified above for which we have a factual basis, however, none present the type of acute security risk that can support a granting of summary judgment as to the constitutionality of that expansive denial of the right to exercise–a right rendered even more critical given that Johnson was in segregation and that exercise constituted his only regular reprieve from the isolation of the cell and the psychological deterioration that comes with that situation. The question here is not whether such misconduct warranted disciplinary action. Indeed, Johnson received other consequences for the infractions in addition to the yard restriction. For each of those infractions, Johnson also received discipline in the form of 2-3 months' additional segregation. But the yard restrictions at issue deprived Johnson of all but one hour a month of out-of-cell exercise (with even that one hour regularly cancelled and not rescheduled) even though the infractions did not indicate that Johnson would present a security risk or a safety threat if allowed access to the yard, with its individual cages, to exercise. The imposition of consecutive yard restrictions for those infractions is particularly disturbing in light of the admission in the State's Statement of Undisputed Facts that "Plaintiff would voluntarily cover himself and his cell with feces due to his mental illness." App. 523, #132. Given the acknowledgment that his mental illness contributed to that behavior, it is particularly problematic to then use that conduct as a basis to deny yard privileges— when the access to exercise is recognized as critical for mental health, and denial of that exercise for segregated prisoners for more than 90 days creates the strong likelihood of further psychological injury. *Delaney*, 256 F.3d at 685. That

creates a cycle which a prisoner in segregation will be ill-equipped to overcome. The Constitution cannot countenance such a routine use of yard restrictions absent any security concerns with the actual yard access by the prisoner.

And significantly, the defendants do not assert that there are indeed any such security concerns. In fact, there are no allegations that any infraction occurred during yard time, whether serious or trivial. Accordingly, as to the yard restrictions, the district court cannot determine as a matter of law that the Eighth Amendment is not violated, and on summary judgment that is the standard. Given the absence of any argument from the defendants that the yard restrictions were necessary for safety and security reasons, and given the numerous disciplinary infractions that on their face do not involve any apparent security risk to yard access, the district court's grant of summary judgment as to the challenge to the yard restrictions was improper.[4]

For those reasons, I respectfully dissent as to the grant of summary judgment regarding the challenge to the denial of exercise.

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[4] I express no opinion as to whether qualified immunity would apply regarding any of the claims as to the state defendants, as they acknowledge that they forfeited the issue by not raising it below

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

[filed Nov. 15, 2018]

No. 16-1244

MICHAEL JOHNSON,

Plaintiff,

versus

SUSAN PRENTICE, *et al.,*

Defendants.

SUMMARY JUDGMENT ORDER

Plaintiff, proceeding pro se and presently incarcerated at Joliet Treatment Center, brought the present lawsuit pursuant to 42 U.S.C. § 1983 alleging inadequate mental health and medical care and inhumane conditions of confinement arising from events that occurred while he was incarcerated at Pontiac Correctional Center. The matter comes before this Court for ruling on the Defendants' respective Motions for Summary Judgment. (Doc. 76, 92). The motions are granted.

PRELIMINARY MATTERS

Plaintiff's Motion to Request Counsel (Docs. 104, 105)

Plaintiff has no constitutional or statutory right to counsel in this case. In considering the Plaintiff's motion, the court asks: (1) has the indigent Plaintiff made a reasonable attempt to obtain counsel or been effectively precluded from doing so; and if so, (2) given the difficulty of the case, does the plaintiff appear competent to litigate it himself? *Pruitt v. Mote*, 503 F.3d 647, 654-55 (7th Cir. 2007). Plaintiff previously made a showing that he attempted to obtain counsel on his own.

As to the second prong, the Court conducted a detailed analysis of Plaintiff's capacity to represent himself at this stage of the proceedings in its Order entered August 29, 2018. *See* (Doc. 101). The Court assumes familiarity with that Order.

In his current motions, Plaintiff asserts that he has completed some high school, that he currently takes medications to treat diagnosed mental illnesses, and, because he is mentally ill, he suffers from mental breakdowns when things are overwhelming. Plaintiff also asserts that the issues in this case are overly complex, but he does not elaborate further.

Plaintiff attached a document dated May 5, 2018, describing an episode Plaintiff experienced while he was incarcerated at Dixon Correctional Center. (Doc. 105-1). The Court has already addressed the contents of this document in its previous rulings on Plaintiff's motions for recruitment of counsel. *See* Text Order dated Aug. 6, 2018; (Doc. 101). Plaintiff does not

provide any new information on this point or any other point the Court previously considered.

Further, Plaintiff has since filed a response to Defendants' motion for summary judgment. (Doc. 108). In the response, Plaintiff adequate conveys the facts of the case and, although he does not appear to have attached the documents he cites, Plaintiff provides specific dates that the Court can cross-reference with the available medical records. As explained in the Court's previous order, this was all that was required at this stage in the proceedings. Accordingly, for these reasons and the reasons stated in the Court's previous orders, Plaintiff's motions for recruitment of counsel are denied.

Plaintiff's Motions (Docs. 102, 103, 106, 107)

Plaintiff's motions seek this Court's recusal from this matter. 28 U.S.C. § 455 requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. However, the negative bias or prejudice from which the law of recusal protects a party must be grounded in some personal animus or malice that the judge harbors against him, of a kind that a fair-minded person could not entirely set aside when judging certain persons or causes. *Hook v. McDade*, 89 F.3d 350, 355 (7th Cir. 1996). In addition, this bias must...arise from an extrajudicial source. *Id.* Finally, recusal is required only if actual bias or prejudice is proved by compelling evidence. *Id.* (citing *U.S. v. Balistrieri*, 779 F.2d 1191, 1202 (7th Cir. 1985)).

Plaintiff accuses the Court of "attacking" him and "making every effort to make this case difficult for [him]." (Doc. 102). Plaintiff has not provided any evidence of the Court's bias other than his own beliefs

that the Court erred in its rulings on his motions seeking recruitment of counsel. Speculative personal opinions are not sufficient to obligate the Court to further explore Plaintiff's allegations. *Willis v. Freeman*, 83 Fed. Appx. 803, 805 (7th Cir. 2003) (citing *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 988-89 (7th Cir. 2001)). Furthermore, "judicial rulings alone almost never constitute a valid basis for a recusal motion." *Id.* (quoting *Grove Fresh Distrs., Inc. v. John Labatt*, 299 F.3d 635, 640 (7th Cir. 2002)). The other matter Plaintiff alleges in his most recent motion is not related in any way to this lawsuit. To the extent that Plaintiff seeks this Court's recusal, the motions are denied.

Plaintiff also seeks a transfer of venue to the Northern District of Illinois. (Doc. 103). Venue for federal civil rights actions brought under 42 U.S.C. § 1983 is governed by 28 U.S.C. § 1391(b). According to that statute, such actions may be brought only in (1) the judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought. *Id.*

Plaintiff concedes in his motion that the relevant events took place within this judicial district. Nonetheless, Plaintiff seeks transfer to the Northern District, where he currently resides, "for purposes of having a judge to look at this case with new eyes [and] having a judge who is not colluding with the Defendants seeking to sabotage [his] case…." Plaintiff provides no evidence supporting these allegations and any complaints of bias were addressed above. The

Court sees no basis to transfer this case for the reasons Plaintiff sets forth. Accordingly, Plaintiff's request for a transfer of venue is denied.

Plaintiff's Motion to Withdraw Deidre Marano (Doc. 96)

The Court interprets Plaintiff's request to withdraw Deidre Marano as a motion to voluntarily dismiss this defendant from the lawsuit. The motion is granted.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment should be granted "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). All facts must be construed in the light most favorable to the non-moving party, and all reasonable inferences must be drawn in his favor. *Ogden v. Atterholt*, 606 F.3d 355, 358 (7th Cir. 2010). The party moving for summary judgment must show the lack of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In order to be a "genuine" issue, there must be more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

FACTS

Plaintiff was incarcerated at Pontiac Correctional Center ("Pontiac") from March 2013 until December 2016. Defendants Moss, Haag, Duckworth,

McCormick, Ojelade, Lanterman, Tilden, and Wexford Health Sources, Inc. were responsible for Plaintiff's mental health and medical care at Pontiac. Defendant Moss, Haag, Duckworth, and Lanterman were mental health professionals; Defendant McCormick was a psychiatrist; Defendant Tilden was a physician; and, Defendant Ojelade was a physician's assistant. Defendant Wexford Health Sources, Inc. ("Wexford") employed these defendants in its capacity as the company contracted to provide medical and mental health services at Illinois prisons.

The remaining Defendants (collectively, the "IDOC Defendants") were employed at Pontiac in the following capacities: Defendant Melvin served as the Assistant Warden of Programs, and later as the Warden; Defendants Prentice and Hasdall were correctional majors; Defendant Boland was a correctional lieutenant; Defendant Gasper was a correctional sergeant; Defendant Kelley was a correctional counselor, and also served as the Assistant Warden of Programs from March through August 2016; Defendant Kennedy was a casework supervisor; and, Defendants DeVries, Myers, and Henkel were correctional officers.

Plaintiff was transferred to Pontiac from Lawrence Correctional Center ("Lawrence") for disciplinary reasons after he was found guilty of several rules violations over a period spanning approximately three months.[1] At the time of his transfer, Plaintiff was

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[1] Specifically, Plaintiff was found guilty at Lawrence of assaulting a staff member, intimidation, fighting, damage or misuse of property, impairment of surveillance, and, on seven (7) separate occasions, disobeying a direct order. (Doc. 93-14) at 3-4. Plaintiff's punishment for these violations included a disciplinary transfer, revocation of good-time credits, demotion

serving a term of segregation as punishment for two separate violations for disobeying a direct order. (Doc. 93-14 at 4-5) (decisions dated March 23, 2013, and March 26, 2013). Plaintiff accrued additional segregation time thereafter for numerous offenses he committed at Pontiac.[2] *Id.* at 3-7 (segregation time totaling 51 months imposed for rules violations committed from March 2013 through August 2016). As a result, Plaintiff remained in segregation and the North Cell House at Pontiac from his arrival until August 2016, when he was transferred to the South Cell House.

Plaintiff was transferred cells approximately 40 times between June 2014 and August 2016. (Doc. 76-10 at 2-3). The frequency of these cell transfers made Plaintiff's stay in any given cell relatively short: on at least 25 occasions, Plaintiff's stay lasted less than 14 days; eight (8) stays lasted between 15-30 days; and, four (4) stays lasted between 30-60 days. The longest duration Plaintiff was housed in any cell lasted 150 days on one occasion. *Id.* Plaintiff was provided with a styrofoam cup "half-filled with green liquid" once per week, but he was not provided any other cleaning materials. Pl.'s Dep. 74:15-16.

Plaintiff testified that the cells had different types of doors (solid plexiglass or metal, plexiglass with perforated holes, or bars). Pl.'s Dep. 56:5-24. In the cells with solid doors, Plaintiff testified that poor

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in grade to C-grade, restitution, restrictions on contact visits, segregation, and yard restriction. *Id.*

[2] These offenses include including assaulting a staff member, disobeying a direct order, insolence, providing false information, spitting on other inmates, possession of contraband, health and safety violations, and impairment of surveillance. (Doc. 93-14 at 3-7).

airflow made the cells uncomfortably warm. Pl.'s Dep. 23:18-23 (temperatures reached 90-100 degrees in cell with solid door); 53:7-9 ("I am in a cell…behind a solid metal door, solid plexiglass. Temperatures are extremely hot.").

Plaintiff told officials about the heat on July 9, 2016, when he stated to Defendant Haag, "I'm dying in this bitch behind plexiglass with no fan." (Doc. 78-9 at 9); and, on July 10, 2016, Plaintiff told Defendant Duckworth that he was "depressed about…not getting a fan." (Doc. 78-10 at 1). On August 7, 2016, Plaintiff stated to Defendant Duckworth that "he bugged up because it was so hot." (Doc. 78-10 at 4). On these three dates, Plaintiff's "property [was] limited due to potential for self-harm." (Doc. 78-9 at 10); (Doc. 78-10 at 2, 4). Fans were otherwise available for purchase through the commissary, but Plaintiff could not afford one. No policy existed at the prison that permitted officials to loan a fan to an indigent inmate. Melvin Aff. (Doc. 93-3).

Plaintiff, however, was not left to suffer; he conceded in his deposition that prison officials provided ice and operated fans at the ends of the gallery as a means to provide relief to inmates when temperatures rose. Pl.'s Dep. 90:16-91:11. Nor did Plaintiff's stay in those cells last an extended period of time: Plaintiff was transferred to a different cell seven (7) days after the July 2016 complaints, and one (1) day after the August 2016 complaints. (Doc. 78-10 at 2). The record does not disclose, nor does Plaintiff specify, any additional cells or timeframes in which temperature became an issue.

Plaintiff appears to have been primarily confined indoors. Per his disciplinary records, Plaintiff accrued

yard restrictions for multiple infractions. At most, Plaintiff's yard privileges would have been restricted from April 2013 until July 2013; from January 2014 until October 2014; and, from December 2014 until January 2017.[3] The yard restriction limited Plaintiff's access to the outdoor recreation yard to a maximum of once per month. Pl.'s Dep. 47:24-48:3.

Plaintiff testified that he made requests to Defendants Myers, Henkel, and DeVries on separate occasions, respectively, to go to the recreation yard. *Id.* 47:1-52:19. Plaintiff does not remember the exact dates, but he testified that he made each of these requests at some point after December 2014. Plaintiff did not go to yard on those days. *Id.* Plaintiff also testified that Defendant Prentice denied him access to the yard an unspecified number of times because his cell was not in compliance with the applicable prison rules. Pl.'s Dep. 60:15-62:20. Plaintiff does not remember the dates of his interactions with Defendant Prentice.

Plaintiff testified that the conditions he endured while housed in segregation caused him to bang and

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[3] The records do not indicate that a yard restriction was in place at the time Plaintiff was transferred. In April 2013, Plaintiff received three (3) months yard restriction and no additional yard restriction was imposed before expiration of that period. In January 2014, Plaintiff received six (6) months yard restriction. Plaintiff received another three (3) months yard restriction for a May 2014 rule violation. If the latter took effect after expiration of the original 6-month restriction, the yard restriction would have expired in October 2014. In December 2014, Plaintiff received four (4) months yard restriction, and if imposed consecutively, the yard restrictions Plaintiff accrued as discipline for multiple rules violations from December 2014 through February 2016 would have expired in January 2017.

kick at the cell door, scream, and smear feces on all available surfaces, including himself. Pl.'s Dep. 42:8-23. These behaviors, however, were not exclusive to Pontiac as Plaintiff had a history of these behaviors while confined at different prisons dating back to 2008. (Doc. 93-14 at 1-4). Plaintiff also attributed his actions at Pontiac to the depressive and bipolar disorders with which he had been diagnosed.

Plaintiff's mental health conditions predate his incarceration, and he had received inpatient psychiatric treatment on several occasions prior to his arrival at IDOC. Pl's Dep. 29:9-24. Plaintiff's mental health treatment team at Pontiac consisted of Defendants McCormick, Moss, Haag, Duckworth, and Lanterman, as well as several non-defendant psychiatrists and mental health professionals (collectively, the "Mental Health Defendants"), who monitored Plaintiff's condition through examinations and regular contact. From March 2013 through August 2016, Defendant McCormick met with Plaintiff on at least ten (10) occasions, not including several scheduled examinations that did not happen because of Plaintiff's refusal to attend, time constraints, operational delay within the prison, or prison lockdowns. Plaintiff otherwise met with Defendants Moss, Haag, Duckworth, and Lanterman on a regular basis, with the frequency of these visits changing as needed. Routine appointments were generally scheduled every four-to-six weeks.

Defendant McCormick and non-defendant psychiatrists prescribed Plaintiff several different medications to treat his mental health conditions over the relevant time period, including Thorazine, Vistaril, Risperdal, Cogentin, Depakote, Lamictal, Sertraline, Zoloft, and Lithium. Plaintiff reported

positive results, or otherwise did not identify any issues, with most of these medications when he took them as prescribed. *See* (Doc. 78-6 at 1) (Plaintiff reported to Defendant Haag that he was taking medication and that "he is good."); (Doc. 78-7 at 6) (Plaintiff reported to Defendant Moss that the new medications were "working well."); (Doc. 78-8 at 5) ("No concerns voiced" to Defendant Lanterman); (Doc. 78-9 at 2) (Plaintiff stated "I'm all right" to Defendant Haag). If no issues were reported, the psychiatrists renewed the medications. *See* (Doc. 93-15 at 42) (Dr. Dempsey, a non-defendant, continued Depakote prescription); *id.* at 54, 61 (Dr. Dempsey continued Lamictal prescription in June and July 2014); (Doc. 93-16 at 3, 26) (Dr. Dempsey continued Lamictal prescription in March and September 2015); (Doc. 93-16 at 61) (Defendant McCormick renewed Lithium prescription in July 2016).

The medications were also adjusted when Plaintiff reported adverse side effects. *See* (Doc. 93-15 at 12, 39) (Plaintiff's Cogentin and Risperdal prescriptions modified in October 2013 and March 2014, respectively, after Plaintiff reported adverse side effects); (Doc. 78-8 at 1) (Plaintiff's Zoloft prescription modified in February 2016 for same reasons). But, ultimately, the decision to discontinue or change any given medication was largely predicated on Plaintiff's willingness to take it. *See* (Doc. 93-15 at 9, 21, 48) (Thorazine, Risperdal and Cogentin, and Depakote discontinued after Plaintiff refused it in August 2013, December 2013, and May 2014, respectively); (Doc. 93-16 at 51) (Zoloft discontinued in March 2016 after nurses reported Plaintiff was consistently refusing it). Once Plaintiff's noncompliance became a recurring issue, Plaintiff's mental health treatment team

discussed the possibility of the forced administration of these medications, but opined that Plaintiff was not a good candidate for that option. (Doc. 76-3 at 4).

Plaintiff was placed on crisis watch at least seven (7) times after he expressed a desire to hurt himself or others: once in 2013 and 2015, respectively; twice in 2016; and, four (4) times between January 2014 and May 2014. *See* (Doc. 93-15 at 4-6, 26-27, 34-36, 42, 45-49); (Doc. 93-16 at 30-33, 46); (Doc. 78-9 at 9). This classification resulted in Plaintiff's placement in a crisis cell with his access to property limited to a suicide smock and blanket because of the risk Plaintiff would try to hurt himself. Generally speaking, officials would check on Plaintiff every 10-15 minutes while Plaintiff was so classified, and mental health professionals and psychiatrists would monitor Plaintiff's status on a daily basis. As his condition improved, Plaintiff was permitted additional property and access to other services. Aside from the first instance in May 2013, Plaintiff's medications were adjusted shortly after each crisis watch.

Plaintiff was also examined approximately 50 times over the relevant time period for medical issues not related to his mental health conditions, mostly for relatively non-serious conditions (colds, athlete's foot, hemorrhoids). Plaintiff testified in his deposition that he sued Defendants Tilden and Ojelade for an alleged failure to treat heart palpitations, muscles cramps and atrophy, nosebleeds, headaches, skin infections, and respiratory problems Plaintiff attributes to his cell conditions. Pl.'s Dep. 24:13-26:8.

For skin conditions, Defendant Tilden examined Plaintiff for nodular acne in July 2014, for which he prescribed Keflex (an antibiotic) and lotion. (Doc. 78-

2 at 8). Medical reports appear to indicate improvement in this condition three months later during an examination with a non-defendant medical provider. (Doc. 93-15 at 66). In April 2015, Defendant Ojelade diagnosed Plaintiff with chronic cystic acne. (Doc. 93-16 at 10). Defendant Ojelade prescribed an oral antibiotic to prevent infection of a small wound Plaintiff had on his hand, apparently from excess scratching, and an antibiotic cream. (Doc. 76-2 at 2, ¶ 6). During an annual physical exam in January 2016, Defendant Ojelade noted that Plaintiff had no open lesions, polyps or muscle atrophy. *Id.* at 3, ¶ 8.

Upon a referral from Defendant McCormick, Defendant Ojelade examined Plaintiff in April 2016 for "acne with a dry wound that occurred from [Plaintiff] scratching a lesion." (Doc. 76-2 at 3). After Plaintiff reported that hydrocortisone cream had not worked in the past, Defendant Ojelade prescribed an oral antibiotic and a different type of medicated cream to reduce acne-causing bacteria. (Doc. 93-16 at 52). Defendant Ojelade scheduled a follow-up appointment in three months. The medical records disclose no further issues for this condition.

Plaintiff first complained of muscle cramps in his shoulder and back in May 2016. During the initial examination for this condition, a nurse prescribed an over-the-counter pain medication and advised Plaintiff to follow up as needed. (Doc. 93-16 at 54-55). Defendant Ojelade examined Plaintiff on June 2, 2016, for Plaintiff's complaints of occasionally shaky hands, and advised Plaintiff to increase regular exercise. *Id.* at 58. Plaintiff refused sick call for muscle cramps in July 2016. (Doc. 93-16 at 59-60).

Defendant Tilden examined Plaintiff in July 2016, and he opined that dehydration was causing Plaintiff's muscle spasms. (Doc. 93-16 at 63). Defendant Tilden prescribed Motrin and Robaxin. Defendant Tilden also advised Plaintiff to increase his hydration levels and return to sick call as needed. The medical records reveal no further complaints from Plaintiff for this issue.

ANALYSIS

To prevail on his claims that prison officials violated the Eighth Amendment, Plaintiff must show that (1) he suffered an objectively serious deprivation that resulted in the "denial of the minimal civilized measure of life's necessities," and (2) that prison officials acted with deliberate indifference in response to the situation. *Gray v. Hardy*, 826 F.3d 1000, 1005 (7th Cir. 2016) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

A prison official acts with deliberate indifference when "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. A prison official's subjective awareness of a risk "is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* at 842.

Conditions-of-Confinement

Plaintiff was housed in segregation at Pontiac from May 2013 until August 2016. Prolonged confinement in segregation "may constitute a violation of the Eighth Amendment…depending on the duration and nature of the segregation and whether there were feasible alternatives to that commitment." *Isby v. Brown*, 856 F.3d 508, 521 (7th Cir. 2017). As an initial matter, Plaintiff's confinement in segregation was not the result of a single punishment, but rather the cumulative punishments Plaintiff received for numerous disciplinary infractions he committed while housed at Pontiac. Plaintiff cannot aggregate these punishments to argue that the duration of his confinement in segregation resulted in a single, long-term deprivation; instead, the Court must evaluate each punishment separately. *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001) ("Every disciplinary sanction…must be treated separately, not cumulatively, for purposes of determining whether it is cruel and unusual.").

Plaintiff does not challenge the individual punishments imposed for the violations he committed, and nothing about these punishments suggests that they were excessive in relation to the infraction committed or imposed without penological justification. Accordingly, the Court finds that no reasonable juror could conclude that the duration of Plaintiff's confinement in segregation, or the lengths of time for which the yard restrictions were imposed, on their own, violate the Eighth Amendment.

That said, the Court must still evaluate Plaintiff's claims regarding the conditions he allegedly endured.

Prison conditions may be uncomfortable and harsh without violating the Constitution. *Dixon v. Godinez,* 114 F.3d 640, 642 (7th Cir. 1997). Thus, "extreme deprivations are required to make out a conditions-of-confinement claim." *Henderson v. Sheahan,* 196 F.3d 849, 845 (7th Cir. 1999). "Some conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so along, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need…." *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). Plaintiff asserts he was forced to endure excessive heat without a fan inside his cell, that he was exposed to unsanitary conditions without adequate cleaning supplies, and that he was denied access to the outdoor recreation yard for an extended period of time.

The excessive heat, according to Plaintiff, resulted from the lack of ventilation in the cell and officials' refusal to provide him with a fan free-of-charge. Plaintiff could not have experienced excessive heat in every cell as his testimony regarding the different construction of cell doors suggests that the level of airflow within the cells also varied. Plaintiff's documented complaints are also limited to the summer months. Even assuming the temperatures reached 90-100 degrees as Plaintiff opined, prison officials provided Plaintiff with ice when the temperatures rose and operated fans at the ends of the galleries to alleviate the heat. Plaintiff's stay in the offending cell was short-lived and his access to property was restricted because he was on crisis watch for suicidal thoughts. Plaintiff does not otherwise identify any specific cell in which temperature became an issue.

The presence of feces inside a cell could be considered sufficiently serious, *see Vinning-El v. Long*, 482 F.3d 923, 923-25 (7th Cir. 2007) (feces smeared on walls is sufficiently serious deprivation), but, again, Plaintiff has not provided any evidence regarding the duration of time he was exposed to such conditions, or identified any specific prison official responsible for the alleged deprivation. Plaintiff was disciplined multiple times for offenses involving use of his own feces, but only one of those incidents involves the presence of human feces within Plaintiff's cell to the extent that the continued exposure could be considered sufficiently serious. *See* (Doc. 93-14 at 10) (Plaintiff smeared feces on his cell window); *compare id.* at 8 (Plaintiff pushed a tray of feces into another cell); *id.* at 11 (Plaintiff threw feces at another cell). This condition, however, could not have persisted for any significant length of time as Plaintiff was housed in a crisis cell with well-being checks conducted every ten (10) minutes. Plaintiff refused several orders to clean his cell once officials noticed it, and officials removed him from that cell shortly thereafter.

Finally, as to the yard restrictions, the denial of outdoor exercise for any duration may violate the Eighth Amendment if serious psychological or physical consequences result therefrom. *Pearson*, 237 F.3d at 886; *Gruenberg v. Schneiter*, 474 F. App'x. 459, 462-63 (7th Cir. 2012). The extent to which Plaintiff was permitted access to the outdoor recreational yard is unclear. Plaintiff testified that even those inmates on yard restriction were permitted access to the yard once per month, but that he was denied access to same on several occasions for which he cannot provide dates more specific than "after December 2014." Plaintiff also testified that Defendant Prentice denied him

access to the yard because he was not in compliance with prison rules at the time of his requests.

Plaintiff does not assert that he was wholly denied the opportunity to exercise. Plaintiff could still move around in his cell to a certain extent, and the outdoor recreational area was not that much bigger than his cell. Pl.'s Dep. 92:6-23. Prison officials were also entitled to attach conditions aimed at addressing legitimate penological concerns upon Plaintiff's access to the yard. If, as Plaintiff suggests, a prison rule required his cell to be orderly before he was granted access, prison officials do not violate the Constitution merely through its enforcement. *Rodriguez v. Briley*, 403 F.3d 952, 952-53 (7th Cir. 2005) ("[D]eliberate noncompliance with a valid rule does not convert the consequences that flow automatically from that noncompliance into punishment.").

Nonetheless, Plaintiff cannot show that he suffered adverse health consequences as a result of the denial of access to the yard. The medical records disclose that Plaintiff reported some improvement in his mental health conditions throughout the relevant timeframe. Defendant Ojelade opined that Plaintiff suffered from occasional shaky hands due to a lack of exercise, but nothing connects this condition with the denial of access to the outdoor recreational yard. Plaintiff's mental health and medical issues are discussed in further detail below.

Regardless of whether the deprivations Plaintiff alleges are evaluated individually or in combination, the Court finds that no reasonable juror could conclude on the record presented that Plaintiff suffered the type of extreme deprivation required to prevail on a conditions-of-confinement claim.

Moreover, no reasonable inference exists that prison officials acted with deliberate indifference towards any risk of harm Plaintiff faced.

Plaintiff's Mental Health and Medical Care

Inmates are entitled to adequate medical care under the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). To prevail, a plaintiff must show that the prison official acted with deliberate indifference to a serious medical need. *Id.* at 105. Plaintiff's access to mental health or medical treatment is not at issue, and neither party asserts that Plaintiff's conditions were not objectively serious.

In the medical context, treating physicians are entitled to deference. *Zaya v. Sood*, 836 F.3d 800, 805 (7th Cir. 2016). To constitute deliberate indifference, a treatment decision must be "such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Petties v. Carter*, 836 F.3d 722, 729 (7th Cir. 2016) (en banc). In other words, a medical professional is deliberately indifferent only if "'no minimally competent professional would have so responded under those circumstances.'" *Sain v. Wood*, 512 F.3d 886, 894-95 (7th Cir. 2008) (quoting *Collignon v. Milwaukee Cnty.*, 163 F.3d 982, 988 (7th Cir. 1998)).

Circumstances that could permit such an inference include: persisting in a course of treatment known to be ineffective; failure to follow an existing protocol; inexplicable delays in treatment without penological justification; and, refusal to follow a specialist's recommendations. *Petties*, 836 F.3d at 729-30. Claims of negligence, medical malpractice, or disagreement

with a prescribed course of treatment, however, are not sufficient to impose constitutional liability. *See id.*; *McDonald v. Hardy*, 821 F.3d 882, 888 (7th Cir. 2016).

Plaintiff argues that the Defendants should have recognized that the conditions he allegedly endured while at Pontiac caused the symptoms he presented, and that failure to alleviate these conditions through his release from segregative confinement, granting access to the recreational yard, and providing him with a fan violated the Constitution.

As to causation, Plaintiff's mental health issues arose prior to his incarceration at any prison, and his disciplinary records disclose behaviors similar to those he allegedly displayed while at Pontiac long before the relevant time period. Further, Plaintiff's behavior was not always related exclusively to his cell conditions or mental health issues. *See* Pl's Dep. 35:1-17 (the rules violations Plaintiff committed at Lawrence were motivated by a desire to force a transfer to another facility); (Doc. 93-14 at 13) (Plaintiff's mental health condition did not contribute to his actions in spitting on another inmate); (Doc. 78-9 at 1) (Plaintiff told Defendant Moss that "he returned to [segregation] because he lives off the gallery via trading and on 8 gallery people don't even talk to the [inmates]."); (Doc. 99-1 at 7) (Plaintiff falsely conveyed that he was suicidal in an effort to persuade mental health officials to "be more of an advocate to help with his legal cause and also issues with owing the state money."). The record does not otherwise permit a reasonable inference that the conditions in segregation at Pontiac caused or exacerbated Plaintiff's issues.

Even assuming Plaintiff could establish the connection he asserts, the actions the Defendants took in addressing Plaintiff's mental health and medical issues do not permit a reasonable inference that they ignored any substantial risk of harm Plaintiff faced, unreasonably delayed or persisted in a course of treatment known to be ineffective, or based their decisions on factors not related to the exercise of sound medical judgment.

The Mental Health Defendants continuously monitored Plaintiff's mental health condition throughout the relevant timeframe, and they adjusted Plaintiff's medications in response to any issues that arose. Plaintiff's treatment team also addressed Plaintiff's recurring noncompliance with the prescribed medications within the context of whether forced administration of those drugs was appropriate, though they ultimately declined to pursue that treatment option. Less than a month after this option was discussed, Plaintiff reported that his new medication was "working well." (Doc. 78-7 at 6, 8).

Plaintiff also has not offered any evidence to show that the Mental Health Defendants had any authority to order the relief Plaintiff sought. The record discloses that the Mental Health Defendants had authority over Plaintiff's cell placement and property only when Plaintiff was on crisis watch. As this designation encompassed situations where Plaintiff had indicated a desire to hurt himself, no reasonable juror could conclude that the decisions to confine Plaintiff in a cell with limited access to items that he could use to inflict self-harm ran contrary to acceptable medical judgment. To the extent that Plaintiff's desired remedy could be considered treatment, he had no constitutional right to demand

it. *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996). Nor, as noted above, does his disagreement with the treatment provided support a finding of deliberate indifference.

For the physical conditions Plaintiff identified during his deposition, Defendants Tilden and Ojelade only examined Plaintiff a handful of times. For the skin conditions, Plaintiff generally showed improvement after receiving treatment or otherwise did not report any significant issues thereafter. On the one occasion where Plaintiff reported that hydrocortisone cream did not work, Defendant Ojelade prescribed different medications. For the muscle cramps, Plaintiff received pain medication, and when his complaints continued, he was prescribed a different type of pain medication with other medications. No further problems were reported. Any other treatment Plaintiff received for these conditions was not attributable to any Defendant in this case.

In addition, Plaintiff cannot prevail on any medical claims against the IDOC Defendants. Plaintiff's requests for medical treatment were not ignored and no reasonable inference arises that Plaintiff's access to treatment was obstructed in any way. In this scenario, the IDOC Defendants were entitled to defer to the decisions made by the medical professionals providing treatment to Plaintiff. *See, e.g., Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010) (nonmedical prison officials "are entitled to defer to the judgment of jail health professionals" so long as the inmate's complaints are not ignored (citations omitted)).

Accordingly, the Court finds that no reasonable juror could conclude that the Defendants acted with

deliberate indifference towards Plaintiff's serious mental health or medical needs. Because there is no underlying constitutional violation, Plaintiff's claims against Wexford also fail. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Pyles v. Fahim*, 771 F.3d 403, 412 (7th Cir. 2014).

IT IS THEREFORE ORDERED:

1) **Plaintiff's Motions [102] [103] [104] [105] [106] [107] are DENIED for the reasons stated above.**

2) **Plaintiff's Motion [96] is GRANTED. Defendant Marano is dismissed with prejudice. Clerk is directed to terminate Defendant Marano.**

3) **Defendants' Motions for Summary Judgment [76] [92] are GRANTED. The clerk of the court is directed to enter judgment in favor of Defendants and against Plaintiff. All pending motions not addressed above are denied as moot, and this case is terminated, with the parties to bear their own costs. Plaintiff remains responsible for the $350.00 filing fee.**

4) **If Plaintiff wishes to appeal this judgment, he must file a notice of appeal with this Court within 30 days of the entry of judgment. Fed. R. App. P. 4(a)(4). A motion for leave to appeal in forma pauperis MUST identify the issues the Plaintiff will present on appeal to assist the court in determining whether the appeal is taken in good faith. *See* Fed. R. App. P. 24(a)(1)(c); *see also Celske v Edwards*, 164 F.3d 396, 398 (7th Cir. 1999) (an appellant**

should be given an opportunity to submit a statement of his grounds for appealing so that the district judge "can make a reasonable assessment of the issue of good faith."); *Walker v. O'Brien*, 216 F.3d 626, 632 (7th Cir. 2000)(providing that a good faith appeal is an appeal that "a reasonable person could suppose…has some merit" from a legal perspective). If Plaintiff does choose to appeal, he will be liable for the $505.00 appellate filing fee regardless of the outcome of the appeal.

Entered this 15th day of November, 2018.

s/Colin S. Bruce
COLIN S. BRUCE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-3535
MICHAEL JOHNSON,

Plaintiff-Appellant,

v.

SUSAN PRENTICE, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois.
No. 16-C-1244 — Colin S. Bruce, *Judge*.

On Petition for Rehearing and Rehearing En Banc

DECIDED AUGUST 25, 2022

Before SYKES, *Chief Judge*, and EASTERBROOK, ROVNER, WOOD, HAMILTON, BRENNAN, SCUDDER, ST. EVE, KIRSCH, and JACKSON-AKIWUMI, *Circuit Judges*.

On consideration of the petition for panel rehearing or rehearing en banc filed May 18, 2022, Chief Judge Sykes and Circuit Judges Easterbrook, Brennan, Scudder, and Kirsch voted to deny rehearing en banc. Circuit Judges Rovner, Wood, Hamilton, St. Eve, and Jackson-Akiwumi voted to grant rehearing en banc. On the tie vote, the petition for rehearing en banc is DENIED. The petition for panel rehearing is DENIED.

SCUDDER, *Circuit Judge*, concurring in the denial of the petition for rehearing *en banc*. Michael Johnson asks the full court to revisit our 2001 decision in *Pearson v. Ramos*, 237 F.3d 881, and therefore to reconsider the standard for determining the point at which denying a prisoner access to exercise offends the Eighth Amendment. In my view, this case is not the best candidate for *en banc* review because the record, perhaps owing to Johnson representing himself in the district court, is underdeveloped on points of fact and law essential to proper consideration of such a difficult question. Make no mistake, though: the issue is important and cries out for the full court's consideration in a future case.

What makes the question presented so difficult is that it does not seem amenable to a categorical answer at either bookend. To my eye, *Pearson* is too broad: it suggests that the proper Eighth Amendment focus is not on the cumulative effect of disciplinary infractions, which can result in a prisoner losing access to exercise for months or years on end, but rather on whether each individual instance of misconduct warranted denying that access for some lesser increment of time. See *id.* at 886. *Pearson*, in short, seems to say that the Eighth Amendment is not concerned with the sum total of the deprivation so long as each component is not problematic when measured in isolation. It is hard to square that view with the Supreme Court's observation in *Wilson v. Seiter* that "[*s*]*ome* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the

deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets." 501 U.S. 294, 304 (1991) (emphasis in original).

Nor does the question presented seem amenable to an equally categorical answer at the other end of the spectrum— that the deprivation of access to exercise always violates the Eighth Amendment once some point in time is surpassed. So much would seem to depend on how two primary variables intersect: the safety risk presented by the prisoner and the harm he suffers from being unable to exercise, either on the yard or in a larger cell, over the length of time at issue.

My point is that broad rules (akin to always and never answers) are most often the exception and not the norm on difficult questions of law. At the very least, categorical answers in any direction seem at odds with the established preference of resolving Eighth Amendment challenges to prison conditions on their individual facts with legal guideposts informing the proper inquiry. See *Farmer v. Brennan*, 511 U.S. 825 (1994).

Getting to the right legal standard requires a case where the facts and law have benefitted from full development and sound adversarial presentation in the district court. At a minimum, it seems a record would benefit from evidence on these points:

- Why and for how long did the prisoner lose access to exercise?

- Was the loss of access just to the prison yard or also to indoor spaces, including oversized cells, that would have allowed some forms of exercise?
- What risks—security or otherwise—did the institution face by affording the prisoner access to exercise? Was the institution unable to manage those risks? Did the answer change over time?
- What was the physical and mental impact of the deprivation on the prisoner and how did it change over time? These points seem especially amenable to being informed by expert testimony on the importance, if not necessity, of exercise to some baseline of physical and mental well-being.
- What institutional policies exist around eliminating access to exercise, and did the deprivation in question reflect implementation of those institutional policies? This question may inform the prospect of municipal liability, especially where it may be difficult to identify any one decision maker responsible for the cumulative effect of the denial of access to exercise. See *Monell v. Dep't of Social Servs. of New York*, 436 U.S. 658 (1978).

It is also easy to foresee how a deprivation of access to exercise may intersect with other detrimental and equally serious conditions, including prolonged solitary confinement.

This case, then, is by no means the final word. To the contrary, we will await another appeal with a more developed record that will afford the full court an opportunity to answer the important and unresolved question we decline to resolve today.

WOOD, *Circuit Judge*, with whom ROVNER, HAMILTON, ST. EVE and JACKSON-AKIWUMI, *Circuit Judges*, join, dissenting from the denial of rehearing *en banc*. In a civilized country, even prisoners cannot be deprived of what the Supreme Court calls the "minimal civilized measure of life's necessities." See *Wilson v. Seiter*, 501 U.S. 294, 298 (2001) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). However badly behaved a prisoner may be, actions such as starvation, torture, deprivation of essential healthcare, and failure to provide life-sustaining warmth (or cooling), are out of bounds for the prison authorities. The case now before this court focuses on another one of those necessities: exercise. *Wilson* confirms that exercise is on the list of "minimal" needs that must be addressed. *Id.* at 304.

The majority's opinion, however, has taken the liberty of deleting "exercise" from the prison's responsibilities. It holds instead that Michael Johnson's right to some minimal level of exercise can be withdrawn from him for a period of more than *two years*, because (as all agree) Johnson is an obstreperous, violent person. No decision from either the Supreme Court or the lower courts justifies our carving out exercise from the Supreme Court's list. Indeed, the majority's decision puts the Seventh Circuit at odds with many other courts and thus makes this case a suitable candidate for Supreme Court attention. See S. CT. R. 10(a).

As far back as 1979, then-Judge Anthony Kennedy, writing for a panel of the Ninth Circuit, recognized that the total deprivation of exercise "for a period of years" is an impermissible form of punishment under the Constitution. *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979); *cf.*

Davis v. Ayala, 576 U.S. 257, 286–90 (2015) (Kennedy, J., concurring). Today, by my count, the Second, Fourth, Fifth, Eighth, and Ninth Circuits all recognize some minimal opportunity to exercise as one of life's necessities.[1] As best I can determine, only the Eleventh Circuit might be on the other side, but it has not reconsidered this issue since the Supreme Court handed down *Wilson*, and so may by now have a different position. See *Bass v. Perrin*, 170 F.3d 1312, 1317 (11th Cir. 1999).

Moreover, a brief review of the facts confirms (contrary to the concerns expressed by the concurring opinion) that there are no quirks in the record of this case that stand in the way of our reaching this issue. See *Johnson v. Prentice*, 29 F.4th 895 (7th Cir. 2022). Imprisoned since 2007, Johnson was often violent,

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[1] See *Williams v. Greifinger*, 97 F.3d 699, 704 (2d Cir. 1996) (recognizing a longstanding circuit rule that "some opportunity for exercise *must* be afforded to prisoners"); *Mitchell v. Rice*, 954 F.2d 187, 191 (4th Cir. 1992) (recognizing both the general principle that "complete deprivation of exercise for an extended period of time violates Eighth Amendment prohibitions against cruel and unusual punishment" and a narrow security exception); *Lyles v. Stirling*, 844 F. App'x 651, 653–54 (4th Cir. 2021) (noting the continued force of the general principle established in *Mitchell*); *Hewitt v. Henderson*, 271 F. App'x 426, 428 (5th Cir. 2008) (summarizing circuit precedent to hold "that deprivation of exercise may constitute an impairment of health, which is actionable under the Eighth Amendment" and that such claims should be evaluated in light of "(1) the size of the inmate's cell; (2) the amount of time the inmate spends locked in his cell each day; and (3) the overall duration of the inmate's confinement"); *Wishon v. Gammon*, 978 F.2d 446, 449 (8th Cir. 1992) ("[L]ack of exercise may be a constitutional violation if one's muscles are allowed to atrophy or if an inmate's health is threatened."); *Thomas v. Ponder*, 611 F.3d 1144, 1152 (9th Cir. 2010) (reaffirming *Spain*).

disruptive, and destructive, engaging in such behaviors as fighting, possessing contraband, damaging property, attacking guards with feces and urine, disobeying orders, and insolence. This behavior earned him a lengthy stint in disciplinary segregation, for which he was transferred to Pontiac in March 2013. Once at Pontiac, he continued to misbehave, and so he accumulated additional conduct violations that led to consecutive periods in disciplinary segregation. This meant "that Johnson spent almost three and a half years—from March 2013 to August 2016—in solitary confinement. (He was also sanctioned with restrictions on his yard access … .)" *Id.* at 900.

Normally, inmates subject to segregation are given permission to exercise outside their cells for a few hours each week, *id.*, or, at a bare minimum, they have enough room within their cells to engage in limited exercise. As the majority does, I will refer to the out-of-cell activities as "yard" privileges. I will specify when in-cell activities are relevant. Because this case reaches us from a grant of summary judgment for the defendants, we must accept for present purposes Johnson's account of any disputed facts. That means we must accept the fact that Johnson's cell was too small to permit in-cell exercise—in other words, on this record, it was exercise out of the cell (*i.e.*, in the yard) or nothing.

The key issue before us, on that understanding, is whether there is a limit on how long yard privileges may be revoked entirely, when yard time constitutes the prisoner's *only* meaningful opportunity to exercise. It is hard to avoid the conclusion that there is indeed such a limit, given the recognition in *Wilson* that "exercise" is a fundamental necessity. The only

serious issue is whether a jury could find that the deprivation Pontiac imposed on Johnson exceeded that limit. It is common ground between the majority and me that Johnson was "almost continuously" prohibited from yard access "from about January 2014 through August 2016." *Id.* While an inmate is under yard restrictions, Pontiac permits him only one hour of out-of-cell exercise per month, but even this paltry amount was frequently denied to Johnson. *Id.* at 900–01. "He contended that between June 2015 and June 2016 he was not permitted *any yard access at all*." *Id.* at 901 (emphasis added). The record also indicates that inmates in disciplinary segregation were permitted one ten-minute shower per week, but no one contends that this qualifies as exercise time.

The panel majority has attempted to avoid the question Johnson has presented in his briefs by recharacterizing it as a challenge to prolonged solitary confinement. See *id.* at 902–04. It asserts that there is a sharp break between Johnson's theories in the district court, which concerned specific conditions such as the lack of opportunity to exercise (and which he advanced *pro se*), and his argument on appeal, which the majority characterizes as one about solitary confinement.

But that is not a fair reading of Johnson's argument, either in the district court or before this court. Johnson is asserting that he had exactly *zero* time outside his cell that he could use for purposes of exercise, and he is also contending that in-cell exercise was impossible. It is easy enough to see a factual link between his exercise argument and an argument about confinement to the cell, but it is not unusual for one set of facts to underlie two or more

legal theories. His lengthy confinement to his cell provides important context for his exercise claim.

In making that connection, it is worth recalling that the Supreme Court in *Wilson* acknowledged the importance of context:

> Some conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets.

501 U.S. at 304 (emphasis deleted). As applied here, Johnson has focused not on any generalized problems with solitary confinement, serious and troublesome though they may be, but instead on the total deprivation of meaningful exercise opportunities, either in or out of his cell, for an extended time.

The length of the deprivation is relevant. No one is saying that a 24-hour deprivation, or even a deprivation lasting two or three weeks, automatically violates the Eighth Amendment, any more than one would say that the Constitution entitles Johnson to a state-of-the-art gym. But somewhere between three weeks and two years, the constitutional line is crossed. At this stage of the litigation, we must credit Johnson's assertion (based on personal knowledge) that he was *totally* deprived of exercise for more than two years. That happened because of the prison's decision to impose back-to-back terms of confinement to his cell. Maybe that was a convenient punishment,

but at some time well short of two years, it became an unconstitutional one—just as unconstitutional as if the prison had decided to punish Johnson by refusing to feed him or by keeping the temperature in his cell at 40 degrees Fahrenheit. See *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

The legal issue that is sharply presented in this case is whether a prison is entitled to deprive an inmate of any of the *basic necessities* of human life as punishment for bad behavior. The majority answers that question in the affirmative, but that squarely conflicts with *Wilson* and the decisions of the other circuits noted earlier. If this case involved any of the other basic necessities—food, medical care, warmth—we would not be having this discussion. No matter how obstreperous Johnson was, no matter how violent or inappropriate his behavior, the Eighth Amendment does not permit the deprivation of the basic necessities of human existence. Exercise, the Supreme Court has said, is one of those necessities. Only the Court has the authority to delete it from that list.

The concurrence to the denial of Johnson's petition for rehearing agrees that "determining the point at which denying a prisoner access to exercise offends the Eighth Amendment… is important and cries out" for review, but insists that the record is too underdeveloped to permit *en banc* review. *Ante* at 3 (Scudder, J. concurring in the denial of rehearing *en banc*). Under the panel majority's view, however, the factual details that the concurrence claims are essential to review—such as whether an inmate lost access to all or only some exercise spaces, whether the prison could manage any security risk associated with allowing exercise, and the physical and mental

impact of the deprivation on the inmate—are irrelevant. That is because the panel majority held that completely depriving an inmate of exercise for two years does not violate the Eighth Amendment as a matter of law so long as the inmate has committed a "serious" offense. *Johnson*, 29 F.4th at 904–05. No deficiency in the record prevents us from correcting this sweeping holding.

I conclude with a few words about *Pearson v. Ramos*, 237 F.3d 881 (7th Cir. 2001). If it indeed compels the result here, then it too should be overruled by the *en banc* court of appeals. That said, it may be possible to distinguish it on its facts, as I now explain.

The plaintiff in *Pearson* was seeking damages for the harm he suffered "as a result of being denied access to the prison yard for exercise for an entire year." *Id.* at 883. A majority of the panel reversed a jury verdict in Pearson's favor on the ground that the record did not reveal circumstances that amounted to cruel and unusual punishment. Judge Ripple, concurring in the judgment, would have found qualified immunity for the prison officials, not because he had ruled out a constitutional violation, but instead because any such right was not yet, in his view, clearly established. The panel majority portrayed the "dispositive issue" as "whether the stacking of … sanctions to the point of depriving a prisoner of an entire year of yard access is cruel and unusual punishment." *Id.* at 884. It held that a single 90-day denial of yard privileges did not amount to such punishment, but then (problematically) said that four consecutive denials of 90 days apiece similarly could not be understood as cruel and unusual punishment. *Id.* at 885. What else

was the prison to do, the majority asked, faced with a violent and incorrigible inmate? *Id.*

But that takes us right back to the distinction between deprivation of yard privileges and deprivation of *all* opportunities to exercise. A closer look at *Pearson* shows that the plaintiff there, unlike Johnson, had some residual opportunities for movement outside his cell. The *Pearson* majority reported that there was "no credible evidence … of any physical or psychological harm to the plaintiff as a result of his protracted confinement in the segregation unit … ." *Id.* at 886. Second, as footnote 3 to the concurring opinion notes, the yard was not. Pearson's only outlet—he had some opportunities to leave his cell for other purposes:

> Over the course of the year, Mr. Pearson left his cell at least four times a month and more often seven or eight times a month, either to take showers (generally once a week), to visit family members, to go to the law library, or to visit the health center. Whenever he left his cell, Mr. Pearson's legs were shackled and his arms restrained by chains. "Any walking he did outside his cell would have been little more than a shuffle." R.88 at 2. During the first 90–day period, Mr. Pearson left his cell at least 23 times for a total of 31.7 hours. (Although prison records show that Mr. Pearson was given 3 hours of yard time on February 14, 1994, Mr. Pearson denies that this occurred.) During the second 90 day period, Mr. Pearson left his cell at least 20 times for a total of about 33 hours away from it. The prison was under a lockdown for 33 days during this period. During the third 90–day period, Mr. Pearson

> left his cell at least 16 times for a total of 32.5 hours. The prison was under a lockdown for 28 days during this period. Finally, during the fourth 90–day period, Mr. Pearson left his cell 13 times for a total of 24 hours. The prison was under a lockdown for 42 days during this period.

Id. at 888 n.3 (Ripple, J., concurring in the judgment). Yet at a different point, the concurring opinion recognized that Pearson too may have been faced with a complete deprivation of exercise: "The existence of out-of-cell exercise must also be taken into consideration. … But it seems less than certain that he could exercise in any meaningful way in his cell. Notably, the district court stated that Mr. Pearson's cell was 'too small for meaningful exercise.'" *Pearson*, 237 F.3d at 890 (Ripple, J. concurring).

The more faithful reading of *Pearson* thus shows that it makes the same mistake that the majority is making here, by failing to give effect to the Supreme Court's recognition that exercise is a basic need. This is an error that the *en banc* court can and should correct.

The *Johnson* majority also overreads *Pearson* in its discussion of the reasons that might justify a total deprivation of yard privileges and the opportunity to exercise. Speaking of the norm of proportionality found in the Eighth Amendment (pursuant to which some forms of punishment that are permitted for serious crimes may violate the clause if imposed for trivial ones), the *Pearson* majority stated that it "could imagine the norm's being violated by imposing a 90-day denial of yard privileges for some utterly

trivial infraction of the prison's disciplinary rules … ." *Id.* at 885. The imposition of a severe sanction for an "utterly trivial" violation would certainly be *sufficient* to show an Eighth Amendment violation, but the *Pearson* panel never said that this was *necessary*. Deprivation of an essential human need is not acceptable even for major transgressions. Again, we are confusing two things: what measures is the prison entitled to use in a punitive way, and when do its actions reach the point at which there is a deprivation of the minimal civilized necessities of human life? Prisons are entitled to use proportionate sanctions within a wide range, but the Eighth Amendment still insists that the basics of human life be furnished.

This may be a low bar, but in my opinion Johnson showed enough to defeat the motion for summary judgment. In finding to the contrary, the majority has failed to observe the distinction between the minimal necessities of life and other sanctions. Depriving an inmate of the former is incompatible with the Eighth Amendment. We are making a grave mistake by failing to clarify, and then to follow, the difference between those two standards. Regrettably, this opinion sends the message that an inmate who behaves as badly as Johnson did is now fair game for torture, or starvation, or medical neglect, or wholesale deprivation of exercise. The Eighth Amendment assures that minimal human standards cannot be compromised. I respectfully dissent from the *en banc* court's decision not to correct this error.