No. 18-3535

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAEL JOHNSON,

Plaintiff-Appellant,

v.

SUSAN PRENTICE, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of Illinois, No. 1:16-cv-1244
Before the Hon. Colin S. Bruce

REPLY BRIEF OF PLAINTIFF-APPELLANT MICHAEL JOHNSON

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

For nearly a thousand days straight, Michael Johnson, classified Seriously Mentally Ill ("SMI") by the Illinois Department of Corrections ("IDOC"), was denied the right to exercise outside of his cell. With limited exceptions throughout that period, Johnson was trapped, twenty-four hours a day, seven days a week, inside a room the size of a parking spot. In that "penal tomb," *Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (2018) (Sotomayor, J., respecting denial of cert.), Johnson endured one psychological crisis after another. Ultimately, personnel employed by Wexford Health Sources ("Wexford") agreed to transfer Johnson to a mental health unit. But by then, the damage was done.

Without a lawyer, Johnson sued, claiming that the out-of-cell restriction violated the Eighth Amendment's prohibition on cruel and unusual punishment. He claimed, too, that his mental health care providers had denied him constitutionally adequate care when, for years, they refused to modify his treatment program despite abundant evidence that it amounted to a catastrophic failure. But the district court granted Defendants' motions for summary judgment against Johnson.

Before this Court, Defendants—IDOC and Wexford Personnel, and Wexford as an entity—concede damning and dispositive facts, impermissibly construe other facts in the light most favorable to them, misstate and misapply the law, argue that Johnson forfeited a claim that he preserved, and press a concededly waived

argument. In doing so, they have only succeeded in emphasizing that the district court erred in granting their summary judgment motions. This Court should vacate the district court's order.

ARGUMENT

I. The Undisputed Facts Are Damning And Dispositive.

Johnson argues two Eighth Amendment claims on appeal. First, that all Defendants subjected him to unconstitutional conditions of confinement by denying him indoor and outdoor exercise, which they euphemistically refer to as "yard," a punishment that essentially relegated him to contaminated solitary confinement cells twenty-four hours a day, seven days a week, for years. Opening Br. 23-48. Second, that the Wexford Defendants denied him constitutionally adequate healthcare by insisting on a course of treatment they knew to be ineffective. Opening Br. 48-55. Specifically, Johnson alleged that they refused to transfer him to a mental health treatment ward until long after their treatment protocol had consistently and repeatedly failed. Opening Br. 50.

Each of these Eighth Amendment claims has two parts: an objective prong (Johnson must have been subjected to a sufficiently severe deprivation) and a subjective prong (Defendants must have been deliberately indifferent to that deprivation). *Delaney v. DeTella*, 256 F.3d 679, 683 (7th Cir. 2001). As the response

briefs filed by the IDOC and Wexford Defendants illustrate, the undisputed facts are damning and dispositive.

The Wexford Defendants concede, and the IDOC Defendants do not dispute, that Johnson, whom they designated SMI, suffered from a broad array of psychological disorders while he was in their custody and under their care. *E.g.*, Wexford Br. 7-16, 32-33; IDOC Br. 9, 30; *see also* Opening Br. 3-4. Among other diagnoses, Johnson is afflicted with bipolar disorder, panic disorder, anxiety disorder, and severe depression. Wexford Br. 33, 36; *see also* Opening Br. 3-4. As a consequence, Johnson has attempted to kill himself more than 15 times. Opening Br. 4; *see* Wexford Br. 7, 32. At times, Johnson also struggled with his medication compliance, Opening Br. 4; Wexford Br. 8-14, as is common among those who suffer from serious mental illness. Jan Scott & Marie Pope, *Nonadherence With Mood Stabilizers: Prevalence and Predictors*, 63(5) J. CLIN. PSYCHIATRY, 384, 389 (2002) (study of individuals with bipolar disorder or depressive disorder found 33% were non-compliant with medication).

The Wexford Defendants nonetheless do not dispute that they had the option of transferring Johnson to a specialized mental health unit where he could, as they describe it, receive a "higher level of mental health treatment." Wexford Br. 11; *see also* Opening Br. 10. Despite Johnson's myriad psychiatric crises while under their care, however, the Wexford Defendants do not dispute that they refused to transfer

him to this unit—at least until he filed this lawsuit. Wexford Br. 11, 16-17; *see also* Opening Br. 12.

Instead, as the Wexford Defendants concede, when Johnson struggled with medication compliance, they often responded by halting delivery of psychiatric medication. Wexford Br. 8, 10, 14; *see also* Opening Br. 49-50. And the Wexford Defendants concede that when Johnson became suicidal—which sometimes happened after the Wexford Defendants cut off his psychiatric medication—they placed him on suicide watch rather than transfer to a unit where he would receive a "higher level of mental health treatment." Wexford Br. 8, 10, 11, 12; *see also* Opening Br. 49-50. Indeed, the Wexford Defendants concede that Johnson was placed on suicide watch in excess of nine times while he was subject to their control. Wexford Br. 41; *see also* Opening Br. 51-52.

In light of Johnson's psychological state and the psychological crises he experienced under Defendants' custody and control, it is no surprise that he was not a model prisoner. *E.g.*, Opening Br. 4. Johnson asserted that his serious mental illnesses were the genesis of his misconduct. *E.g.*, Opening Br. 4. To some extent, Defendants agree. *E.g.*, IDOC Br. 24-25, 30; Wexford Br. 6; Opening Br. 38. Indeed, Defendant Andrea Moss, the Wexford employee with primary responsibility for providing mental health care to Johnson, Wexford Br. 3, conceded as much. Wexford Br. 6; Opening Br. 4.

Nonetheless, all Defendants concede that, as a consequence of the "yard restriction" status imposed as punishment for this misconduct, Johnson was, with only infrequent exception, confined to a prison cell twenty-four hours a day, seven days a week, for years. *E.g.*, IDOC Br. 7-8; Wexford Br. 18-19; *see also* Opening Br. 5-6. These cells, IDOC Defendants do not dispute, were often sealed by a solid door behind which Johnson lived in squalor under the glare of an always-on lightbulb, exposed to smeared human feces, noxious odors emanating from cracked sewage pipes, and excessive heat caused by clogged vents. *E.g.*, IDOC Br. 8-9; *see also* Opening Br. 7-8. Defendants also do not dispute that Johnson endured these conditions under circumstances that amount to solitary confinement—*i.e.*, incarceration without social interaction and positive environmental stimulation. *E.g.*, IDOC Br. 19-20; Wexford Br. 5-6; *see also* Opening Br. 6.

Defendants do not dispute—presumably because it cannot be disputed—that out-of-cell exercise, positive social interaction, and environmental stimulation are important components of physical and psychological health.[1] *E.g.*, IDOC Br. 19-20; Wexford Br. 24-27; *see also* Opening Br. 29. Defendants do not dispute—again, presumably because it cannot be disputed—that seriously mentally ill humans are

[1] Defendants ask this Court to ignore the context in which Johnson was denied out-of-cell exercise for years. See *infra* at 16-17.

especially susceptible to injury from conditions like those that Johnson endured. *E.g.*, IDOC Br. 19-20; Wexford Br. 24-27; *see also* Opening Br. 27-28.

Defendants do not dispute that Johnson repeatedly pleaded for out-of-cell exercise. *E.g.*, IDOC Br. 7-8; Wexford Br. 40-41; *see also* Opening Br. 10. Defendants do not dispute, that Johnson informed them of the physical and psychological harm inflicted by the perpetual denial of out-of-cell exercise and the decrepit conditions he endured twenty-four hours a day as a result. *E.g.*, IDOC Br. 35-36; Wexford Br. 16, 40-41; *see also* Opening Br. 10. Defendants concede that Johnson informed them that, as a consequence of his conditions of confinement and the inadequate mental health care he was receiving, he required transfer to a specialized mental health care unit. *E.g.*, IDOC Br. 37; Wexford Br. 11, 13; *see also* Opening Br. 10. And Defendants do not dispute that Johnson's mental and physical health was atrocious throughout this period. *E.g.*, Wexford Br. 6-16; *see also* Opening Br. 8-9.

Defendants either concede or do not dispute each element of Johnson's deliberate indifference claims. On this basis alone, the undisputed facts compel reversal of the district court's summary judgment order.

II. Defendants Impermissibly Present Other Facts In The Light Most Favorable To Them.

Faced with these damaging facts, Defendants hope to enhance the record by misrepresenting the evidence, presenting disputed facts as undisputed, and drawing inferences in their favor. But it is "axiom[atic]" that Defendants, as the moving parties, were required to accept Johnsons' evidence as true and draw all reasonable inferences in his favor when they contested his lawsuit at summary judgment. *Tolan v. Cotton*, 572 U.S. 650, 651 (2014). Because Defendants disregarded this axiom—and sowed confusion in the process—Johnson sets the record straight below.

A. Johnson's Disciplinary Record

In construing Johnson's disciplinary record, the IDOC Defendants have mischaracterized the record and impermissibly drawn every reasonable inference against Johnson in order to justify an argument that an urgent security rationale necessitated the multi-year deprivation of out-of-cell recreation. *See* IDOC Br. 7-8; 27-32. Beyond the fact that such an argument is forfeited, see Opening Br. 36; *infra* at 20, it is belied by the summary judgment record even if not construed in Johnson's favor.

First, the IDOC Defendants claim that, at Pontiac, "each of the yard restrictions was imposed for the legitimate penological purpose of protecting prison staff and other inmates from Johnson's violent misconduct." IDOC Br. 24. But that is blatantly false. Johnson repeatedly received yard restrictions in response to a wide variety of non-violent misconduct, including such trivial offenses as "disobeying a

direct order" and "insolence." App.572-78. Likewise, what the IDOC Defendants describe as "violent misconduct" is most often characterized by the very record they cite to as "spitting." IDOC Br. 6 (citing, *e.g.*, Doc 93-14 at 5-7, Disciplinary history from 1/1/1998 through 9/13/2016).

Second, the IDOC Defendants characterize nine of Johnson's disciplinary tickets as punishments for "destroying parts of his cells." IDOC Br. 6, 26. Defendants failed to acknowledge that Johnson was found not guilty for two of the nine instances they cite. App.572-573. Of greater significance, each of the nine infractions Defendants hyperbolically described as "destroying parts of his cell" were actually characterized by the IDOC as "Damage or Misuse of Property." App.572-576. And for most of these offenses, *no* additional detail is available in the record. *Id*. That is, what Defendants describe as "destroying parts of his cell" could just as easily mean scratching a line on the cell wall each time Johnson endured another year without out-of-cell exercise.

In his opening brief, Johnson conceded that his disciplinary record is flawed. *E.g.*, Opening Br. 38. The IDOC Defendants were entitled to argue that Johnson's disciplinary record, taking his evidence as true and drawing all reasonable inferences in his favor, necessitated the crippling restrictions they imposed upon him. They were not, however, permitted to disregard the summary judgment standard, let alone mischaracterize and exaggerate Johnson's disciplinary record.

B. The Length Of Time Johnson Was Denied Out-of-Cell Exercise

Johnson's evidence is that he endured approximately three years without access to out-of-cell recreation during his 2013-2016 incarceration at Pontiac. App. 575-78; *see also* Short.App. 7 n.3; 28j n.1. That deprivation, Johnson attested, left him consigned to his cell twenty-four hours a day, seven days a week, with the occasional exception of a *once-a-month* hour-long reprieve. App.7-8, 29-30. Even that single hour was frequently denied for arbitrary reasons, Johnson asserted. App.8, 29-30, 138-39, 202-03.

Rather than accept Johnson's evidence as true, as they were required to, the IDOC Defendants blatantly mischaracterize the record to assert—repeatedly—that Johnson was only denied out-of-cell access for a single year.[2] IDOC Br. 7-8, 11, 35. But that assertion requires discounting Johnson's evidence. His evidence is that, at best, he was entitled to one hour of out-of-cell exercise per month from 2013-2015, that reprieve was frequently denied arbitrarily, and he had *no* out-of-cell exercise from June of 2015 through June of 2016. Opening Br. 4-5.

At trial, a factfinder can weigh Johnson's evidence against the IDOC's. At summary judgment, however, the IDOC Defendants were required to accept Johnson's evidence as true and draw all justifiable inferences in his favor. Under

[2] That is not the only time the IDOC Defendants patently mischaracterize the record. *See* III.D., *infra*.

that standard, Johnson endured nearly three years—not one—without out-of-cell exercise.[3]

C. Whether Johnson Could Exercise In His Cell

Johnson's evidence is that he could not exercise inside his cell. *E.g.*, App.556 (Johnson testifying that it was "a very small, confined space where [he] couldn't even move around like [he] wanted to"). App.556. That description makes sense. Most solitary confinement cells are the size of a "parking spot," *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring), and prison officials must also cram a bed, desk, and toilet into that space. What's more, Johnson's evidence is that his cells lacked shelving or other storage space for his property, which required him to store his possessions on the floor. App.471; App.556.

[3] It is doubtful that, as a matter of law, Defendants could prevail even if the facts were construed in their favor—*i.e.*, Johnson received a total of twenty-four hours of out-of-cell access from 2013-3016. *E.g.*, *Delaney*, 256 F.3d at 682, 684, 686-87 (affirming denial of summary judgment to guards where prisoner in solitary denied out-of-cell exercise for six months, emphasizing that exercise is "a necessary requirement for physical and mental wellbeing," and faulting Defendants for not offering out-of-cell alternatives which "may have mitigated the severity of a 6-month denial of yard privileges"); *Antonelli v. Shehan*, 81 F.3d 1422, 1432 (7th Cir. 1996) (seven-week partial restriction on out-of-cell exercise states a claim); *Davenport v. DeRobertis*, 844 F.2d 1310, 1315 (7th Cir. 1988) (affirming injunction requiring "at least five hours of exercise time per week" for prisoners in solitary confinement for more than 90 days); What is certain, though, is that they cannot press that view of the facts at summary judgment.

The IDOC Defendants concede that Johnson's cells were "small and cramped" but nonetheless assert that Johnson "could exercise in his cells in a restricted manner" if his "belongings were not strewn across the floor." IDOC Br. 8. This view of the facts is directly contradicted by Johnson's evidence that he could not, in fact, exercise in his cell, because it was "a very small, confined space." App.556. Further, Johnson explained that this space restriction was exacerbated by the fact that the floor was the *only* space he had to store his possessions given "that there is literally no shelfs [sic], tables" or other "sufficient storage room." App.471. That is, he had no choice but to leave his possessions— "strewn" or not—on the floor.

At trial, the IDOC Defendants are permitted to try to convince the jury that Johnson was lying when he presented testimonial and documentary evidence that he could not exercise inside prison cells even they concede were sufficiently "small and cramped" to permit only "restricted" movement.[4] IDOC Br. 8. At summary judgment, IDOC Defendants are free to press an argument that exercise is not a

[4] It is unlikely, however, that Defendants could prevail as a matter of law even if they were to prove that Johnson could exercise in his cell. *E.g.*, *Delaney*, 256 F.3d at 682, 684, 686-87 (7th Cir. 2001) (denying summary judgment on 6-month out-of-cell exercise claim even where prisoner could perform "calisthenics inside his small cell.")

constitutional requirement. However, they must accept Johnson's evidence that he could not exercise within the cells.

D. Whether The Wexford Defendants' Refusal To Transfer Johnson To A Mental Health Unit Was Based On Medical Judgment.

The Wexford Defendants assert that "[n]othing in the record suggests" that their delayed decision to transfer Johnson to a mental health treatment unit was "based on anything other than professional judgment." Wexford Br. 43. Wexford Br. 43. They insist that Johnson's inconsistent compliance with his prescribed treatment regimen was to blame for the prolonged denial of a transfer to a mental health unit. Wexford Br. 11, 13, 22. Indeed, the Wexford Defendants go so far as to assert that once "Johnson had achieved a history of documented compliance with his treatment and medication regimen, he was transferred to the mental health unit." Wexford Br. 36.

The summary judgment evidence is to the contrary. For years, the Wexford Defendants gave contradictory justifications for their refusal to transfer Johnson to a specialized mental health unit. When Johnson asked to be transferred, the Wexford Defendants refused because Johnson made "little use of the treatment already available to him." App.431. According to the Wexford Defendants, they "did not believe Plaintiff should be placed in a mental health unit to receive a higher level of care" because "[w]hen an inmate does not comply with the treatment provided while

in the segregation setting, it is impossible to adequately determine whether he would benefit from a higher level of care." App.319. Yet when the Wexford Defendants did eventually transfer Johnson to a residential mental health unit, where his "mental health needs could be better met," it was because his prior "inability . . . to consistently adhere to treatment regimen for management of bipolar symptoms substantiate[d] referral for residential level of care." App.461; App.458.

At summary judgment, the Wexford Defendants were required to construe the facts in the light most favorable to Johnson and draw all reasonable inferences in his favor. One reasonable inference from evidence that the Wexford Defendants used the *same* rationale to deny and then grant Johnson's transfer to a mental health unit is that impermissible non-medical judgment motivated Defendants' decision-making. This is particularly so where, as here, the transfer followed shortly on the heels of Johnson filing a lawsuit. Surely there are other possible inferences. At trial, the Wexford Defendants are free to draw them in their favor, but not now.

E. Whether The Wexford Defendants Had A Hand In Johnson's Conditions Of Confinement.

The Wexford Defendants take the evidence in the light most favorable to them in order to deny any responsibility for the conditions Johnson endured. Specifically, the Wexford Defendants assert that they were only "occasionally" involved in discipline and only to the extent of "advis[ing] whether the inmate's mental illness

contributed" to punishable conduct. Wexford Br. 5-6 & n.2. Further, the Wexford Defendants assert that their conclusions regarding whether a prisoner's mental illness were a contributing factor "can be considered" by the Adjustment Committee but are not binding. *Id.*

The summary judgment record tells a different story. When a seriously mentally ill prisoner faces disciplinary sanctions that may include solitary confinement, IDOC personnel are *required* to take into account "the recommendations of a mental health professional." App.746. Likewise, a mental health professional *must* consult with IDOC personnel considering whether to place seriously mentally ill prisoners in solitary confinement. App.748. Further, Wexford personnel, including Defendant Moss, specifically recommended that sanctions be imposed upon Johnson. *E.g.*, App.410. And in August 2016, the "SMI Committee," comprised of Wexford and IDOC personnel, App.228, recommended that Johnson be released from solitary confinement, and the committee's recommendation was approved the very same day by the warden. App.195-196.

At summary judgment, the record evidence is that the Wexford Defendants played a role in Johnson's discipline. At trial, they may seek to minimize their liability, but they cannot write themselves out of the record at this juncture.

III. Defendants Misstate and Misapply The Law.

The IDOC and Wexford Defendants misstate the law in three primary ways. First, Defendants incorrectly argue that this Court must disregard record evidence that Johnson, a seriously mentally ill pro se prisoner, did not enter into the record in the customary fashion. IDOC Br. 5-6, 13, 35; Wexford Br. 28-29. Second, Defendants argue that this Court must conduct a context-free analysis of Johnson's Eighth Amendment claims, but that is not the law of this or any other federal court. IDOC Br. 22-24; Wexford Br. 27-29. Third, Defendants disregard the maxim that Johnson is the master of his complaint. Accordingly, they are not entitled to recast his conditions of confinement claim as a sentencing proportionality challenge. Fourth, retaining medical professionals employed by Wexford on staff does not entitle the IDOC Defendants to bury their heads in the sand.

A. Pro Se Prisoners Are Owed A Liberal Construction Of Their Pleadings, And This Court Must Consider The Full Record Before It.

Defendants argue that this Court must close its eyes to record evidence that Johnson, a seriously mentally ill prisoner, did not place in the record in the customary fashion while he was boomeranging from mental health crisis to crisis. IDOC Br. 5-6, 13, 35; Wexford Br. 28-29. Specifically, they argue that this Court cannot consider exhibits attached to his proposed amended complaint, which the district court erroneously denied him leave to file, or declarations and additional exhibits—"including IDOC Administrative directives," "grievances and medical

records"—that Johnson filed with the district court shortly after defendants moved for summary judgment. IDOC Br. 35; Wexford Br. 28; App. 354-511; App.533-722.

But that is not the law. "Given the district court's obligation to construe pro se pleadings," such as Johnson's, "liberally," this Court must also examine evidence Johnson did not put into the record in the customary way. *Smith v. Dart*, 803 F.3d 304, 309 (7th Cir. 2015). *See also*, *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001) ("pro se pleadings are held to less exacting standards than those prepared by counsel and are to be liberally construed."). Here, as in *Smith*, while several documents were not "formally labeled as a motion" in response to Defendants' motion for summary judgement, they were "filed on the heels of" Defendants' motion and "contained additional factual assertions that added to the allegations that [Johnson] made in his original complaint." 803 F.3d at 311. *See also Gutierrez v. Peters*, 111 F.3d 1364, 1367 n.2 (7th Cir. 1997) (holding that a pro se plaintiff's "proposed amended complaint and the medical records attached thereto . . . ought to have been considered by [the district] court in evaluating the sufficiency of [plaintiff's] complaint."). Likewise, this Court must consider competent evidence that Johnson placed in the record prior to summary judgment. *Smith*, 803 F.3d at 311, *Gutierrez*, 111 F.3d at 1367.

Related, Defendants ask this Court to ignore the overwhelming scientific consensus that the out-of-cell exercise ban consigned Johnson to conditions of

confinement that were independently dangerous in light of the well-known risks solitary confinement poses to those suffering from serious mental health disorders. IDOC Br. 19; Wexford Br. 28. Defendants instruct the Court in this fashion because, they argue, Johnson's evidence below did not address the well-known harms of prolonged solitary confinement. That is false. *Rasho v. Walker*, No. 1:07-CV-1298-MMM-JEH (C.D. Ill. filed May 23, 2016), which Johnson cited extensively and attached as an exhibit, details the harms of solitary confinement. App.226-229. Even if Johnson had not introduced this evidence, this Court cannot cover its eyes to the reality of Johnson's confinement. *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer J., dissenting) ("[i]t is well documented that . . . prolonged solitary confinement produces numerous deleterious harms."); *Scarver v. Litscher*, 403 F.3d 972, 975-76 (7th Cir. 2006) (citing "extensive literature" describing devastating effect of solitary confinement on "mentally disturbed prisoners").

B. This Court Cannot Ignore The Context Of Johnson's Out-Of-Cell Exercise Restriction.

Defendants argue that Johnson "attempts on appeal to expand his" claims to add a claim challenging prolonged solitary confinement. IDOC Br. 19; *see also* Wexford Br. 24-25. That is a red herring.

Johnson does not bring a challenge to prolonged solitary confinement on appeal. Rather, Johnson's discussion of the harms of solitary confinement merely

contextualizes the years-long out-of-cell exercise ban imposed in this case. As Defendants surely understand, the necessary consequence of denying Johnson out-of-cell exercise for this extraordinary duration was to consign him to 24/7 solitary confinement in cells that frequently did not otherwise satisfy constitutional minima.

This Court is permitted to—indeed, must—take into account this context when reviewing Johnson's conditions of confinement claim.[5] *E.g.*, *Hutto v. Finney*, 437 U.S. 678, 681-87 (1978) (noting that conditions of confinement cannot be considered in a "vacuum"); *Turley v. Bedinger*, 542 Fed App'x 531, 533 (7th Cir. 2003) (holding that prisoner's confinement in a "tiny, cramped, poorly ventilated cell," which was "exacerbated by his inability to leave it for exercise," was sufficient to state an Eighth Amendment claim); *Delaney*, 256 F.3d at 682, 684, 686-87 (affirming denial of summary judgment, emphasizing that "solitary confinement . . . uninterrupted by opportunities for out-of-cell exercise" constitutes cruel and unusual punishment); *Pearson v. Ramos*, 237 F.3d 881, 884 (7th Cir. 2001) (similar); *French v. Owens*, 777 F.2d 1250, 1252-53 (7th Cir. 1985) (in light of "totality of conditions of confinement," from "lack of space and furnishings, to the unwholesome food, medical neglect and continuous threats to prisoners' safety," practice of "double

[5] Notably, even if this Court were to eschew context and merely consider the out-of-cell exercise restriction in isolation, reversal would still be required. See Opening Br. 34-35.

celling" violates Eighth Amendment). Understandably, Defendants wish this Court to examine the out-of-cell exercise ban in isolation, but the law does not permit such a myopic focus.[6]

C. This Is Not A Case About Sentencing Proportionality.

The IDOC Defendants attempt to wedge this case into a sentencing proportionality framework, and then erroneously suggest that this Court must review the years-long out-of-cell exercise ban as discrete and presumptively constitutional 90-day punishments. IDOC Br. 29. As an initial matter, Johnson raised a conditions of confinement claim, not a sentencing challenge, and he is the master of his complaint.[7] What's more, the IDOC Defendants' argument that 90-day out-of-cell restrictions are presumptively constitutional, IDOC Br. 17, is incorrect. *E.g.*, *Turley v. Rednour*, 729 F.3d 645, 652 (7th Cir. 2013) ("The State relies heavily on *Pearson*

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[6] Defendants cite to three Seventh Circuit cases—*Smith*, 803 F.3d at 304, *Sanders v. Sheahan*, 198 F.3d 626 (7th Cir. 1999) and *Antonelli v.*, 81 F.3d at 1432—along with one Ninth Circuit case—*Keenan v. Hall,* 83 F.3d 1083 (9th Cir. 1996)—to argue that this Court must examine Johnson's out-of-cell deprivation without any consideration of the collateral consequences of that denial. IDOC Br. 23-24; Wexford Br. 23. But none of those cases stands for that proposition.

[7] The IDOC Defendants assert that Johnson forfeited any argument that this Court is not limited to construing the years-long out-of-cell exercise ban as a series of independent 90-day restrictions. IDOC Br. 29. Not so. The entire thrust of Johnson's opening brief is that this Court must take into account the full duration of the out-of-cell denial. Further, Johnson explicitly explained why the IDOC Defendant's preferred approach, which impermissibly chops a years-long deprivation into a single, 90-day restriction, is unworkable here. IDOC Br. 37-38 n.18.

. . . for the notion that there exists an ironclad rule that a denial of yard privileges shorter than 90 consecutive days cannot be the basis for an Eighth Amendment claim. However, the State has misconstrued this rule.”).

In any case, continuous terms of out-of-cell exercise bans (and similar restrictions) can be aggregated for purposes of determining compliance with the Constitution. *E.g.*, *Turley*, 729 F.3d at 651 (7th Cir. 2013) (considering “the cumulative impact of numerous imposed lockdowns”); *see also id*. at 654 (Easterbrook, J., concurring) (noting that “lockdowns that cumulate” to periods “much longer” than 90 days “with only short breaks” may be aggregated). This makes sense. Absent such a rule, prison officials could evade constitutional compliance by continuously imposing short-term restrictions that, for all practical purposes, amount to a single, impermissibly long deprivation.

In the alternative, the IDOC Defendants argue that Johnson’s out-of-cell exercise ban was acceptable in light of Johnson’s allegedly violent propensities which, as noted above, the IDOC Defendants have unabashedly misrepresented. IDOC Br. 24-25. As an initial matter, the IDOC Defendants have waived this argument. The IDOC Defendants point to a single hint of this argument in the district court. IDOC Br. 28. But that is not nearly enough. E.g., *Ramos v. City of Chicago*, 716 F.3d 1013, 1020 (7th Cir. 2013). In any event, the cases the IDOC Defendants rely upon to support that position—*Delaney*, 256 F.3d at 683-84, *Scarver*, 434 F.3d

at 976; *Thomas v. Ponder* , 611 F.3d 1144 (9th Cir. 2010); and *Housley v. Dodson*, 41 F.3d 597 (10th Cir. 1994)—simply do not help them.

In *Delaney*, the Seventh Circuit found the general unsupported statement of a "potential security threat" *insufficient* to justify prolonged deprivation of out-of-cell access. 256 F.3d at 684. Here, Johnson was repeatedly denied out-of-cell access for trivial misconduct—*e.g.*, "insolence," App.572-78—a far cry from even the "potential security threat" the *Delaney* court deemed inadequate. The plaintiff in *Scarver*, by contrast, murdered two other inmates, and the Seventh Circuit noted that treatment of a "harmless lunatic" would compel a different result. 434 F.3d at 976.

The Ninth Circuit explained in *Thomas* that exercise may be curtailed when a "genuine emergency" exists but held that standard was not even satisfied where a prisoner stabbed a correctional officer. 611 F.3d at 1146. Johnson's persistent low-level misconduct does not begin to approach the requisite standard. Moreover, the *Thomas* court noted that even if a valid security concern had existed, "such concerns do not explain why other exercise arrangements are not made." *Id*. at 1155.

Finally, the IDOC Defendants misconstrue the Tenth Circuit's holding in *Housley*. In that case, the court Tenth Circuit held that a short-term out-of-cell exercise ban stated an Eighth Amendment claim. 41 F.3d at 599. The *Housley* court

further noted that, "even a convicted murderer who had murdered another inmate and represented a major security risk was entitled to outdoor exercise." *Id.*

D. The IDOC Defendants Cannot Escape Liability By Burying Their Heads In The Sand.

The IDOC Defendants argue that, as a matter of law, prison officials cannot be deliberately indifferent when medical personnel sign off on particular conditions of confinement, no matter how harsh. IDOC Br. 33-35. Even if this Court's case law were as simple as the IDOC Defendants suggest—and it is not[8]—the argument is merely academic in this case.

In *Giles v. Godinez*, 914 F.3d 1040, 1052 (7th Cir. 2019), which the IDOC Defendants rely upon, medical personnel "repeatedly determined that his condition did not contraindicate continued segregation." Here, in contrast, the Wexford employee with primary responsibility for managing Johnson's mental health, Defendant Moss, indicated years before the out-of-cell ban was lifted that Johnson was suffering adverse psychological effects as a consequence of the restriction. Opening Br. 10 (Defendant Moss reporting that "yard restriction" deprived Johnson

[8] *E.g.*, *Hayes v. Snyder*, 546 F.3d 516, 527 (7th Cir. 2008) (nonmedical prison officials may be deliberately indifferent when they have "a reason to believe (or actual knowledge)" medical officials are "mistreating (or not treating) a prisoner"); *Greeno v. Daley*, 414 F.3d 645, 656 (7th Cir. 2005) (nonmedical prison officials may be deliberately indifferent if they "ignored [the plaintiff]'s complaints entirely.")

of "outlet for his mania" which caused a cascade of adverse psychological effects, including "poor impulse control").

The IDOC Defendants do not acknowledge this evidence. In fact, they baldly assert that it does not exist. IDOC Br. 34 ("Until June 2016, Johnson's doctors did not identify any harm or risk from lack of exercise.") At trial, they may attempt to minimize the weight of inconvenient evidence. At summary judgment, however, all reasonable inferences must be drawn in Johnson's favor, a rule that prohibits the IDOC from pretending that troublesome evidence does not exist.

IV. The Wexford Defendants Erroneously Accuse Johnson Of Forfeiting A Claim He Preserved.

Below, Johnson adequately raised a *Monell* claim against Wexford as an entity. Wexford's argument to the contrary disregards the district court record.

Wexford latches onto a single quote from Johnson's deposition, where he did not have the benefit of counsel, to argue that Johnson's only claim against Wexford as an entity was premised on *respondeat superior* liability. Wexford Br. 45. Not so.

However imprecisely, Johnson also raised a *Monell* claim against Wexford for its *de facto* policy of providing inadequate mental health care to seriously mentally ill prisoners in solitary confinement. A private corporation that has contracted to provide essential government services is subject to entity liability the same way a municipal corporation may be. *Glisson v. Indiana Dept. of Corrections*,

849 F.3d 372, 378-79 (7th Cir. 2017) (citing *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978)). To prove entity liability, a plaintiff must show that the corporation's official policy caused the constitutional deprivation. *Id*. at 379. "[E]vidence of custom will suffice" to prove *Monell* liability, even if such a custom was not formally approved through an entity's official decision-making channels. *Id*.

Here, Johnson alleged that Wexford has a practice and pattern of providing constitutionally inadequate mental health care to prisoners App.256. Johnson alleged in his original complaint that Wexford, a named Defendant, denied him access to adequate and meaningful mental health care for his well-known mental illness. App.6, 84; App.126. Johnson did not allege that he alone had suffered at the hands of Wexford. To demonstrate the policy and custom of Wexford's constitutionally inadequate mental health care provided to prisoners, Johnson submitted statements from other prisoners alleging similarly constitutionally inadequate mental health treatment received from Wexford. App.244-254.

Johnson also filed the Seventh Circuit opinion in *Rasho v. Elyea*, 856 F.3d 469 (7th Cir. 2017) as an exhibit. App.258-274. In *Rasho*, this Court denied summary judgment against two Wexford doctors in a case that bears striking similarities to Johnson's. *Rasho*, 856 F.3d at 476. Johnson declared that he submitted this opinion to the district court as evidence "illustrating a long history & common

practice & pattern of abuse, neglect, deliberate indifference, inadequate mental health & medical treatment & care in Pontiac." App.256.

As discussed above, claims are judged by looking at all the pleadings, not just the operative complaint. *See* § III, *supra*. The totality of Johnson's pleadings demonstrate sufficient evidence of his *Monell* claim against Wexford. Additionally, this Court has long recognized that a *pro se* plaintiff's pleadings are to be construed liberally and held to a "less stringent standard than formal pleadings drafted by a lawyer." *Perez v. Fenoglio*, 792 F.3d 768, 776 (7th Cir. 2015) (quoting *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir.2011)). Johnson, a mentally ill prisoner and *pro se* litigant, may not have artfully drafted his complaint. However, Johnson articulated that Wexford has a history and practice of providing inadequate mental health care to mentally ill prisoners, provided support from other prisoners alleging similar harm from Wexford's *de facto* policy, and sufficiently demonstrated that Wexford's *de facto* policy caused his constitutional deprivation. App.256; App.244-254.

V. The IDOC Defendants Have Waived Or Forfeited The Affirmative Defense Of Qualified Immunity, And Must Wait For Remand To Assert it.

The IDOC Defendants raised qualified immunity in a single sentence—among a litany of other defenses—in boilerplate fashion in their answer but nowhere else, including at summary judgment. *See* ECF 33 at 5; ECF 35 at 2. Accordingly, they

have waived the defense at this stage of litigation, and must wait for remand to raise it.[9] *E.g.*, *Maul v. Constan*, 928 F.2d 784, 785-86 (7th Cir. 1991); *Walsh v. Mellas*, 837 F.2d 789, 799 n.6 & n.7. (7th Cir. 1988). Indeed, IDOC Defendants concede as much, although they characterize their failure as forfeiture. IDOC Br. 41.

Nonetheless, Defendants maintain that the Seventh Circuit should sit as a court of first view because Defendants may ultimately assert their entitlement to qualified immunity on remand. *See* IDOC Br. 41. But the pursuit of administrative efficiency cannot confer authority where it is lacking. *Wood v. Milyard*, 566 U.S. at 471 & n.5. And it is lacking here.

First, Defendants have waived, not merely forfeited, their qualified immunity defense by not briefing it below. *See Walsh*, 837 F.2d at 799-800 & n.6, n.7 (prison officials waived the right to assert qualified immunity defense on appeal where defendants "raised" the defense in "[a] single sentence in their seven-page answer" but failed to otherwise argue the defense). That Defendants chose to mention qualified immunity in their answer is telling—they knew the defense was available to them but decided to fight the case on the merits. That knowing and voluntary relinquishment of a right constitutes waiver rather than forfeiture. *See Wood*, 566

[9] Defendants may raise qualified immunity in a renewed motion for summary judgment or judgment on the pleadings or may litigate it at the conclusion of trial. *Behrens v. Pelletier*, 516 U.S. 299 (1996).

U.S. at 470 n.4. And it is axiomatic that this Court cannot review a waived defense. *Id*.

Second, even assuming Defendants only forfeited the affirmative defense, granting Defendants' invitation to consider qualified immunity for the first time on appeal would be exceptional.[10] Indeed, undersigned counsel is not aware of *any* case where the Seventh Circuit has permitted defendants to assert qualified immunity for the first time on appeal.[11] That makes sense—a reviewing court may "resurrect" forfeited affirmative defenses only under "extraordinary circumstances." *Wood*, 566 U.S. at 471 & n.5. Defendants have failed to bring to the Court's attention any extraordinary circumstances. *See Maul*, 928 F.2d at 785-86 (refusing to consider

[10] In contrast, refusing to review qualified immunity for the first time on appeal has been customary for decades. *E.g.*, *DeMallory v. Cullen*, 855 F.2d 442, 449 n.4 (7th Cir. 1988); *Montoya v. Vigil*, 898 F.3d 1056, 1064-65 (10th Cir. 2018); *Robinson v. Pezzat*, 818 F.3d 1, 11 (D.C. Cir. 2016); *Summe v. Kenton Cty. Clerk's Office*, 604 F.3d 257, 269-70 (6th Cir. 2010); *Bines v. Kulaylat*, 215 F.3d 381, 385 (3d Cir. 2000); *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 226 (4th Cir. 1997); *Kelly v. Foti*, 77 F.3d 819, 822-23 (5th Cir. 1996); *Hill v. City of N.Y.*, 45 F.3d 653, 663 (2d Cir. 1995); *Moore v. Morgan*, 922 F.2d 1553, 1557-58 (11th Cir. 1991); *Lewis v. Kendrick*, 944 F.2d 949, 953 (1st Cir. 1991).

[11] The IDOC Defendants point to three cases of this Court—*Sebesta v. Davis*, 878 F.3d 226, 233 (7th Cir. 2017), *McCann v. Mangialardi*, 337 F.3d 782, 791 (7th Cir. 2003), and *Schultze v. White*, 127 Fed. Appx. 212, 216 (7th Cir. 2005)—to support the argument that its forfeiture should be excused. IDOC Br. 41-42. However, none of those cases is on point. In *Sebesta*, the defendant "properly raised th[e] defense in her motion for summary judgment." 878 F.3d at 233. In *McCann*, the story is much the same—the defendant "moved for summary judgment . . . on the ground that he was entitled to qualified immunity." 337 F.3d at 784. The *Schultze* case did not involve the issue of qualified immunity at all. 127 Fed. Appx. 212.

waived qualified immunity defense where defendants failed to establish such "exceptional circumstances where justice demands more flexibility."). To the extent any exceptional circumstances exist, Defendants have forfeited that argument. What's more, if such circumstances existed, it stands to reason that Defendants would do more than assert in cursory—and erroneous—fashion that clearly established law entitles them to qualified immunity. IDOC Br. 43.

CONCLUSION

For the aforementioned reasons, this Court should vacate the district court's summary judgment order.

Date: February 10, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that:

This brief complies with the type-volume limitation of Seventh Circuit Rule 32(a)(c) because this brief contains 6,491 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2019 and Times New Roman 14-point font.

Date: February 10, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2020, I electronically filed the foregoing Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: February 10, 2020

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