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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Ronald Romanelli brought suit *pro se* against Defendants-Appellees under a federal civil rights statute, 42 U.S.C. § 1983. DE7.¹ The district court's jurisdiction was therefore based on 28 U.S.C. §§ 1331 and 1343. On March 17, 2008, the parties consented in writing to the exercise of jurisdiction and the entry of final judgment by Magistrate Judge Stephen L. Crocker. DE84. Following a jury trial, Magistrate Judge Crocker entered judgment in favor of defendants on March 24, 2008. A18. On March 28, 2008, Romanelli filed a timely motion for a new trial and alternative motion for judgment as a matter of law under Fed. R. Civ. P. 50 and 59. DE91. The same day, Romanelli also filed a timely notice of appeal. DE92. Romanelli's motion for a new trial and alternative motion for judgment as a matter of law was denied on June 17, 2008, at which point Romanelli's notice of appeal became effective. DE97; *see* Fed. R. App. P. 4(a)(4)(B)(i). This Court therefore has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Romanelli's lawsuit alleges that each of the defendants violated his constitutional right to adequate medical care while he was incarcerated as a pretrial detainee at Columbia County jail. According to Romanelli, defendants were deliberately indifferent to his medical needs, which included Crohn's disease, an inflammatory disease of the gastrointestinal tract, and vision problems. Roughly

¹ Citations shown as "A___" are to the pages of the Required Short Appendix. Citations shown as "SA___" are to the pages of the Separate Appendix. Citations shown as "DE___" are to the district court's docket entries in this case. Citations shown as "Tr. ___" are to the transcripts of the trial proceedings, which may be found at docket entries 109 (first day of trial) and 110 (second day of trial).

two months after filing suit, and two times thereafter, Romanelli moved the district court to appoint counsel to represent him. Even though Romanelli remained incarcerated throughout the duration of his lawsuit and hence was hamstrung in his ability to line up witnesses and engage in discovery, the district court denied his motion each time.

This appeal presents the following issues:

(1) Whether, under the circumstances of this case in which the plaintiff was incarcerated for the duration of the proceedings and yet needed expert medical testimony in order to meet his burden of proof, the district court erred in denying Romanelli's repeated requests for appointment of trial counsel; and

(2) Whether the district court's admission of Romanelli's prior felony convictions for impeachment purposes was reversible error because the potential of this evidence to create unfair prejudice grossly outweighed the evidence's minimal probative value.

STATEMENT OF THE CASE

Romanelli has been incarcerated for the entire pendency of this case, first at the Columbia County jail and then later at the Green Bay Correctional Institution in Green Bay, Wisconsin. DE2, at 1 (Complaint); Tr. 1-11. On January 10, 2007, Romanelli filed this civil rights action against Dr. Dalia Suliene, Sergeant Christopher Kuhl ("Sergeant Kuhl"), Captain Darrel Kuhl ("Captain Kuhl"), and Sheriff Steven Rowe in the United States District Court for the Western District of Wisconsin. DE1. Romanelli claimed that his rights under the Eighth and

Fourteenth Amendments were violated because defendants were deliberately indifferent to his serious medical needs and failed to take appropriate action after he had brought his medical problems to their attention.

Romanelli filed amended complaints on January 17, 2007 and on February 5, 2007. DE4, 7. On March 13, 2007, the district court screened the second amended complaint pursuant to the Prison Litigation Reform Act and granted Romanelli leave to proceed on claims that: (1) Dr. Suliene, Sergeant Kuhl, and Captain Kuhl were deliberately indifferent to his Crohn's disease; (2) Sergeant Kuhl and Captain Kuhl were deliberately indifferent to his vision problems; and (3) Captain Kuhl and Sheriff Rowe failed to adequately train jail staff. DE8.

Defendants deposed Romanelli, but Romanelli, who was *pro se*, did not depose any of the defendants. Defendants moved for summary judgment in October 2007. DE31, 37. On January 11, 2008, the district court granted their motions in part and denied them in part. DE53. The district court granted judgment as to all of Romanelli's claims against Captain Kuhl and Sheriff Rowe, but allowed Romanelli's deliberate indifference claims against Sergeant Kuhl and Dr. Suliene to proceed to trial. Several weeks later, on January 30, 2008, the district court entered a trial preparation order confirming the March 17, 2008 trial date set in the court's preliminary pretrial conference order. DE22, 56.

On the morning of March 17, 2008, the parties appeared before Magistrate Judge Crocker for the final pretrial conference. DE83, 111. Trial was held on March 17 and March 19. Romanelli represented himself because each of his three

motions for appointment of counsel—on March 26, 2007; June 12, 2007; and February 4, 2008—had been denied. A22-31. The defendants were represented by three experienced lawyers.

Sergeant Kuhl contended in his opening statement that Romanelli's criminal record made him untrustworthy. As soon as the jury was excused for lunch, Romanelli protested that this reference to his past criminal charges unfairly prejudiced him. SA212. The district court granted in part defendants' request to impeach Romanelli on the basis of his prior convictions and allowed them to introduce evidence of his felony convictions for bail jumping and second degree sexual assault and a number of misdemeanor convictions for passing bad checks. SA214-216. Once the jury returned, Romanelli attempted to present his case by testifying in narrative form and by calling the defendants as witnesses. On the second day of trial, at the close of Romanelli's case-in-chief, defendants moved for judgment as a matter of law under Rule 50(a)(1). Tr. 2-30, 2-91. The district court granted Sergeant Kuhl's motion for judgment as to the deliberate indifference claim against him. Tr. 2-99.

The jury returned a special verdict finding that Romanelli's Crohn's disease and vision problems did not rise to the level of serious medical conditions. A19. The district court entered judgment in favor of all defendants on March 24, 2008. A18.

On March 28, 2008, Romanelli filed a timely motion for a new trial and judgment as a matter of law under Rules 50 and 59 and a timely notice of appeal.

DE91, 92. He argued that the district court erred by not appointing him counsel and by erroneously allowing defendants to use his prior criminal convictions as impeachment material. On June 17, 2008, Romanelli's motion for a new trial and judgment as a matter of law was denied. A1-17. This appeal followed.

STATEMENT OF FACTS

The events giving rise to Romanelli's complaint took place between May 21, 2006 and August 2, 2006, while Romanelli was detained at Columbia County jail in Portage, Wisconsin. DE33 ¶ 2 (Defendants' Proposed Findings of Fact). The defendants are four employees at Columbia County jail. Dr. Suliene provided medical services to prisoners at Columbia County jail pursuant to a contract with the county. SA1. Sergeant Kuhl was the jailer with whom Romanelli lodged a number of complaints about his medical treatment. DE34 ¶¶ 5, 10-17 (Aff. of Christopher Kuhl). Captain Kuhl was the jail administrator, and Steven Rowe was the Columbia County sheriff. DE35 ¶ 5 (Aff. of Darrel Kuhl), 36 ¶ 5 (Aff. of Steven Rowe).

This case is about defendants' refusal to recognize and appropriately treat Romanelli's serious medical needs. Almost from the moment that Romanelli arrived at Columbia County jail, he repeatedly reported that he needed a special dietary plan, medication, and eyeglasses. Defendants did not provide Romanelli with effective treatment: they refused to supplement his diet even though there were certain foods that Romanelli could not eat on account of his Crohn's disease; they refused to prescribe medications that had been effective in the past in treating

Romanelli's condition; and they refused to contact an optometrist who had his vision prescription on file. Indeed, it was not until August 3, 2006, one day after Romanelli had already left Columbia County jail, that defendants took the trivial step of obtaining records from Reedsburg Area Medical Center, another institution at which Romanelli had previously been treated. Tr. 1-30, 1-88. There is little doubt that defendants' do-nothing approach to treatment was so inadequate that it fell below minimal constitutional standards.

A. Crohn's Disease.

Crohn's disease is a "serious medical issue." DE25, at 1 (Defendant Suliene's Response to Plaintiff's Requests for Admissions). In Dr. Suliene's words, Crohn's disease "is an inflammatory bowel disease characterized by inflammation of the digestive tract between the mouth and the anus. Its symptoms may include, among other things, abdominal pains, frequent stools, bloody stools, dehydration, malnutrition, weight loss, and anemia." SA2; Tr. 1-188. Crohn's disease can flare up at any time. When it is in its "acute stage," it can be a serious problem. Tr. 1-187. Thus, when a patient with Crohn's disease "reports weight loss, frequent stools, abdominal pains, dehydration, [and] bloody stools," there is, at the very least, "an urgent need for evaluation and . . . then to make a decision depending on what evaluation tells [the doctor] to do." Tr. 1-189.

Romanelli arrived at Columbia County jail late in the evening of May 21, 2006. Tr. 1-50. In the early morning hours of May 22, 2006, jailer Damion Tassler pulled Romanelli from his cell and asked him a number of health screening questions from a pre-printed form. Tr. 1-51, 1-110. Romanelli reported to Tassler

that he had Crohn's disease, a condition for which he took Asacol twice daily, and that his condition could be verified with the Reedsburg Area Medical Center, which had extensive medical records.² SA29; Tr. 1-51 to 1-52. Romanelli also reported that he could not tolerate green peppers, onions, and lactose in his diet. SA29; Tr. 1-51.

Later that day, Romanelli met with Dr. Suliene for an intake health screening. SA2. Romanelli told Dr. Suliene that he had previously been diagnosed with Crohn's disease, that certain foods aggravated that condition, and that he had been prescribed Asacol in the past. SA2-3; Tr. 1-53. Dr. Suliene believed these statements. SA2-3; Tr. 1-194. But instead of continuing Romanelli's previous course of treatment, Dr. Suliene ordered a "self-select" diet—which simply meant that Romanelli was given ordinary meals without supplements and told to "pick the [foods] that [he didn't] want to eat and . . . keep the ones that" he did—and instructed Romanelli to get the medications he needed from home. SA3, 32; Tr. 1-197, 2-167 to 2-168. According to Romanelli, he informed Dr. Suliene that he was unable to obtain medications through that route. Tr. 1-53 to 1-54. She did not subsequently offer him medications after he told her that. *Id.*

Romanelli complained to Dr. Suliene about the inadequacy of her treatment plan on multiple occasions during the remainder of his stay at Columbia County jail, including by letter on July 7, 2006 and August 2, 2006 and in person on July

² Asacol is an anti-inflammatory medication that is used for the treatment of Crohn's disease. Tr. 2-169.

10, 2006 and August 2, 2006.³ *E.g.*, DE39 ¶ 7 (Aff. of Larry McFarlane); SA4, 31, 92-93.⁴ Romanelli's July 7 letter indicated that he had Crohn's disease, that he was having 10 to 20 bowel movements a day, and that his weight was "starting to diminish from lack of protein and food." SA92-93; Tr. 1-57, 1-61 to 1-62. Romanelli wrote that he could not "afford meds right now, but . . . need[ed] help." SA93. He requested the same diet plan that he had previously been afforded at Reedsburg Area Medical Center and at other facilities. SA92. On July 10, Romanelli met with Dr. Suliene. He again told her that he had not taken any medications because he could not afford to purchase them. Tr. 1-63. At the conclusion of the meeting, Dr.

³ Romanelli testified that he also filled out a June 17, 2006 request to see a doctor, in which he indicated that he had Crohn's disease and he needed a special diet plan and medication. He acknowledged that the request could be located in the record. Tr. 1-164.

⁴ Romanelli raised similar issues with Sergeant Kuhl, including by letter on July 11, July 13, and July 18 and in person on several other occasions. *E.g.*, DE34 ¶¶ 10-11, 14-16 (Aff. of Christopher Kuhl). Romanelli's July 11 letter stated that he was "very sick" and had "mind blowing pains in [his] stomach" and "up to twenty stools per day" because of his untreated Crohn's disease. SA24. He reiterated that his condition had been successfully managed in the past with a special diet and steroids. *Id.* He stated that he had "gotten no medical care" while at Columbia County jail because he couldn't "afford to pay." *Id.* After speaking with Romanelli about his Crohn's disease, Sergeant Kuhl talked to the jail nurse. Tr. 2-78 to 2-80. The nurse informed him that Romanelli had refused blood work because he recently had lab work done at Sauk County jail. Tr. 2-80. Sergeant Kuhl returned to Romanelli and related what the nurse had told him. Tr. 1-77, 2-82. Romanelli's July 13 letter complained that his "digestive system is so fast" and that his disease was "out of his control." SA26. Sergeant Kuhl did not take any action in response to this letter because he thought "medical [*i.e.*, Dr. Suliene] was working on [Romanelli's] concerns." Tr. 2-82. Finally, after receiving Romanelli's July 18 letter (SA27), Sergeant Kuhl spoke with the nurse on July 22 and learned that Sauk County jail did not have any blood work results; he reported that information to Romanelli. Tr. 2-83 to 2-84.

Sulienne refused to modify Romanelli's "self-select" diet and did not prescribe any medications. Tr. 1-67.

At trial, Romanelli testified in narrative form about his interactions with Dr. Sulienne and Sergeant Kuhl and introduced several exhibits. *E.g.*, Tr. 1-51 to 1-54 (intake examination); *id.* at 1-57 to 1-62 (July 7 letter); *id.* at 1-62 to 1-66 (July 10 meeting). Romanelli's theory was that Dr. Sulienne's course of treatment—which essentially amounted to no specific treatment the entire time he was at Columbia County jail—was constitutionally inadequate, because in view of the evident severity of his Crohn's disease, any minimally competent medical professional would have pursued a more aggressive treatment regimen.

Dr. Sulienne denied these allegations. She testified that a "self-select" diet was appropriate even if Romanelli could not tolerate certain foods because the ordinary jail diet provided close to 3,000 calories a day, whereas inmates, who as a rule were physically inactive, needed no more than 1,500 to 2,000 calories to function. Tr. 2-167. In her view, "[t]here were no signs of serious disease at" any of the times she examined Romanelli. Tr. 2-187. For example, Dr. Sulienne testified that on July 10, Romanelli's weight was "quite adequate for his stature" and he did not show any signs of weakness or suffering. Tr. 2-174, 2-176. According to Dr. Sulienne, she declined to prescribe Romanelli any medications because she lacked recent blood test results, and a "blood test [was] necessary to treat [his] Crohn's disease." Tr. 1-199, 2-176 to 2-178. She testified that Romanelli was not willing to have blood tests done at Columbia County jail once he was informed that he would

have to pay for them. *Id.* Dr. Suliene testified that Romanelli told her that recent blood test results could be obtained from the Sauk County jail, where he had previously been incarcerated. On July 14, Dr. Suliene learned that Sauk County jail had not performed any such tests and took no further action. *Id.*; SA72.

Romanelli testified that he never refused lab work and that he never said that Sauk County jail had performed blood tests. Tr. 1-63 to 1-66. He did grant Dr. Suliene permission to request his medical records from Sauk County jail for the purpose of showing that he had previously been prescribed a special diet and that he was losing weight because his “ongoing issue” with Crohn’s disease was not being satisfactorily addressed. Tr. 1-64 to 1-65; SA23. Romanelli testified that Dr. Suliene informed him that he had “to have the money on [his] books in order to get this lab work.” Tr. 1-63. Dr. Suliene denied that she ever conditioned medical treatment on payment from inmates. Tr. 2-177.

Both before and after his detention at Columbia County jail, Romanelli received more extensive treatment for Crohn’s disease. Romanelli was diagnosed with Crohn’s disease on January 16, 2004 by physicians at the Deer River Healthcare Center in Deer River, Minnesota. SA36-41, 79; Tr. 1-42. In July 2004, after moving from Minnesota to Wisconsin, Romanelli received treatment for Crohn’s disease at Reedsburg Area Medical Center. SA51-52, 80; Tr. 1-45. Dr. Theresa Wang’s treatment notes reflect that Romanelli was “active in his Crohn’s” at the time and was prescribed Asacol. SA52. While incarcerated at Sauk County jail between January 2005 and July 2005, Romanelli also received treatment for

Crohn's disease. Tr. 1-47 to 1-48, 1-150. He was given double portions at meals and Prednisone, a powerful anti-inflammatory steroid. SA12-19; Tr. 1-71, 1-204, 2-188.

Following Romanelli's release from Columbia County jail on August 2, 2006, he was transferred to Dodge County Correctional Institute. SA196. On August 11, 2006, after his intake medical examination, Romanelli was given a blood test and prescribed Prednisone and sulfasalazine, which are also anti-inflammatory medications. SA42; Tr. 2-171. On August 14, 2006, Romanelli was placed on a special, 4,000 calorie diet. SA42. Romanelli was not permitted to testify about his treatment after being released from Columbia County jail, because the district court granted defendants' motion *in limine* to exclude such evidence, a decision that is discussed further below.

B. Vision Problems.

Romanelli testified that on the morning of May 22, 2006, he told Tassler that he wore glasses that "got broke the night [he] got arrested." Tr. 1-52. Defendants cast some doubt on this testimony by pointing out that the screening form prepared by Tassler did not indicate that Romanelli had reported any other medical problems besides Crohn's disease and that the jail's property inventory form did not indicate that Romanelli brought a pair of broken eyeglasses with him. SA29-30; Tr. 1-114, 1-227.

On June 17, 2006, Romanelli submitted a "Request To See The Nurse/Doctor" seeking a new pair of glasses. DE39 ¶ 5 (Aff. of Larry McFarlane); SA20. He wrote that his glasses were broken, that he was getting bad headaches as a result, and that Davis Duehr Dean, of Wisconsin Dells, Wisconsin had his prescription on file.

SA20, 48, 81. Dr. Suliene read Romanelli's complaint and referred it to Larry McFarlane, a nurse at the jail. Tr. 2-117, 2-173. On or around June 19, 2006, Romanelli met McFarlane to discuss his vision problems. DE39 ¶ 5 (Aff. of Larry McFarlane); Tr. 1-120. McFarlane made a notation on Romanelli's Request to the effect that Romanelli's "[f]amily [would] bring in new glass." SA20; Tr. 2-118. Romanelli denied saying any such thing. Tr. 1-120.

On July 12, 2006, Sergeant Kuhl received a medical complaint from Romanelli dated July 11, 2006. Romanelli wrote:

My second issue is my glasses, witch [sic] got broken the night I came into custody. I've got no way o[f] getting my [n]ew ones. I've got very little contact with the outside. And I really need them for court and seeing all together. I don't need a[n] examination, I just need the glasses Right now I suffer from constant headaches from constantly straining all day long.

SA24-25. Sergeant Kuhl met with Romanelli the same day. Tr. 1-67, 1-75 to 1-77. Romanelli asked Sergeant Kuhl whether the county would pay for new glasses. Tr. 1-122. Romanelli testified that Sergeant Kuhl told him that he could obtain new glasses only if he "ha[d] the money on [his] account to pay for the glasses" and that the "county jail does not provide that kind of care." *Id.* Sergeant Kuhl recalled the conversation differently, testifying that he told Romanelli that the "jail will get the glasses for him regardless whether he has the money." Tr. 2-78 to 2-79. Sergeant Kuhl testified that he told Romanelli that he could submit a medical request to order new glasses to the Columbia County jail medical staff. Tr. 2-89. He considered the matter resolved because Romanelli seemed to be "concerned only with who paid for the glasses." Tr. 2-16.

Romanelli did not have any more conversations with Sergeant Kuhl about obtaining new glasses. Tr. 1-122. He did, however, write two more letters to Sergeant Kuhl later that week. In his first letter, dated July 13, 2006, Romanelli wrote that “nothing has happened with [his] requests about [his] Crohn’s disease or [his] glasses.” SA26. In his second letter, dated July 18, 2006, Romanelli wrote that he had not received any “co-operation” in resolving his problems with Crohn’s disease and his glasses. SA27. Romanelli expressed frustration that he had been “deprived of proper medical treatment” and that his problems were not “being looked at seriously” by jail officials. *Id.* Sergeant Kuhl spoke with McFarlane again on July 22, 2006 about Romanelli’s grievances. SA28; Tr. 2-83. The record does not reflect that any further progress was made regarding Romanelli’s request for glasses.

C. Romanelli’s Requests For Appointed Trial Counsel.

Romanelli filed his first motion for appointment of counsel on March 20, 2007. DE9. The motion was denied because Romanelli did not show that he had made reasonable efforts to obtain privately retained counsel, as required by *Jackson v. County of McLean*, 953 F.2d 1070 (7th Cir. 1992). A23.

Romanelli filed a second motion for appointment of counsel on June 12, 2007, in which he argued that he would have difficulty “explain[ing] and illustrat[ing] with clarity” the relevant legal principles without the assistance of counsel. DE23, at 1. He observed that he would have a “difficult if not [i]mpossible time investigating” his case, obtaining “authentic records,” and “[t]racking down experts and much needed evidence.” *Id.* The district court denied the motion on June 15,

2007 on the ground that Romanelli's case did not present "exceptional circumstances' justify[ing]" appointment of counsel. A26 (quoting *Farmer v. Haas*, 990 F.2d 319, 322 (7th Cir. 1993)). The district court found that Romanelli's complaint set forth "comprehensible and literate" allegations and that his case was not "overly difficult," because all Romanelli "need[ed] to show to prevail on his claim is that he had a serious medical need and that defendants consciously disregarded that need." A26-27.

On February 4, 2008, following the district court's disposition of defendants' motions for summary judgment, Romanelli sought for a third time appointment of counsel. DE57, at 1. In support of his motion, Romanelli stated that defendants had noticed his deposition and that "he should have the privilege" of deposing *them*, so that he would not be "proceed[ing] to trial with a blind eye." *Id.* Romanelli also argued that his recent diagnosis with depression constituted "exceptional circumstances." *Id.* On February 12, 2008, the district court denied Romanelli's request. A28. It purported to "consider both the complexity of the case and the pro se plaintiff's ability to litigate it himself" and to "analyze the plaintiff's capabilities in light of the challenges specific to his case, including evidence gathering, preparing and responding to motions and other court filings, and trial." A29. In relevant part, the district court found:

The record in this case reveals that plaintiff has competently represented himself thus far. All of his submissions have been coherent and articulate. Plaintiff has successfully defeated defendants' motion for summary judgment, at least in part (two of the defendants were dismissed because plaintiff failed to show how they might

have been involved personally in allegedly denying him his constitutional rights). He has been provided with instructions relating to the conduct of trial and is presently taking steps to prepare for trial. He offers no reason why he cannot formulate coherent voir dire questions beyond the court's standard questions if he believes them to be necessary, or exercise peremptory strikes against the panel of jurors called forward at trial, and I am aware of none.

Standing alone, the fact that plaintiff may be taking an antidepressant is not a factor warranting appointment of counsel. The whole point of such medications is to allow the person taking them to think and act rationally. Moreover, plaintiff does not need a lawyer to take the defendants' depositions. He has been free throughout this case to depose defendants if he believed their depositions were necessary. True, the cost of depositions is substantial, and plaintiff may not have had sufficient funds to utilize this discovery method. But appointing counsel for the mere purpose of shifting the cost of litigation to the lawyer is neither required nor appropriate. Even when an indigent party is represented by a lawyer, the cost of litigation ultimately belongs to the party.

Nothing in the record suggests that this case is factually or legally difficult. Plaintiff's claims are straightforward Eighth Amendment claims that he was denied medical care. The law governing this type of claim has been settled since *Estelle v. Gamble*, 429 U.S. 97 (1976), and was explained to plaintiff both in the order granting him leave to proceed and in connection with defendants' motion for summary judgment. Plaintiff has personal knowledge of the treatment he contends he was denied and his medical records should confirm the absence of care. Plaintiff is uniquely qualified to testify to his understanding of the reason he was denied treatment. In sum, I can conceive of no reason why plaintiff cannot prosecute his claims on his own.

A29-30.

D. The District Court's Evidentiary Rulings.

1. On the morning of trial, Judge Crocker ruled on defendants' March 10, 2008 motion *in limine*. Defendants had sought to preclude Romanelli from presenting any evidence relating to, *inter alia*, (i) the "relationship between [his] current [*i.e.*, after being released from Columbia County jail] medical treatment, including prescription drug treatment, and his medical treatment during his pretrial detention at Columbia County jail in 2006," and (ii) the "proper test for determining whether Crohn's disease is active." DE78, at 5-6. They argued that Romanelli had not named any experts and that Romanelli himself was not qualified to provide expert testimony regarding those topics. *Id.* at 6. As they pointed out, the "causal connection between [Romanelli's] current treatment and the events at Columbia County Jail is a complicated medical issue," which was "not within the understanding of a lay jury" and therefore required expert medical testimony. *Id.* at 8-9. Defendants also argued that Romanelli was not competent to testify regarding whether blood tests were the "proper test for diagnosing active Crohn's Disease." *Id.* at 13.

Magistrate Judge Crocker granted defendants' motion to exclude virtually all of Romanelli's testimony about "diagnoses and causation and things like that." SA177. He explained:

Mr. Romanelli obviously is not a doctor. He has no expertise to make causal diagnoses or to draw conclusions about those things.

....

[A]ny testimony from Mr. Romanelli about his lack of treatment at the jail and his current symptoms, . . . any direct testimony from him about what the appropriate testing for Crohn's disease should be—that's all off the board from Mr. Romanelli directly.

....

Mr. Romanelli, there is some logic to your position, but I'm not going to allow it and here is why not: There is a fancy Latin phrase that we sometimes use in the law, it's called *post hoc ergo propter hoc*, "after the thing, therefore because of the thing." If something happens, then another thing happens, maybe that second thing happened because of it.

....

The fact that you got more treatment, got some Prednisone, got some other things at jail; without an expert opinion about why they did it or what required you to get it, we can't assume that it's a result of what may have happened at the jail. Maybe it was, but we can't allow the jury to speculate about that. That's something a doctor would have to say, well, yeah, they are causal; but, also, there would need to be some sort of opinion about, and it shouldn't have happened.

SA178, 180-182.

Romanelli argued that he should be permitted to present evidence of Dr. Suliene's treatment of him in November 2006, after he had been transferred to another institution in the Wisconsin prison system. SA187. Magistrate Judge Crocker ruled that subsequent treatment was not relevant because "what [Dr. Suliene] may have learned later is irrelevant to deliberate indifference while [Romanelli was at] the jail." SA191. Romanelli had a different tack in mind: namely, he wanted to impeach Dr. Suliene's anticipated testimony that she *always* required patients to get a blood test before prescribing medication for Crohn's

disease by showing that after leaving Columbia County jail, Dr. Suliene “treated [him] with a drug called Metronidazole . . . without suggesting a blood test, without offering [him] a blood test.” SA190. Defendants pointed out, however, that Romanelli in fact been given a blood test on August 11, 2006—that is, after his release from Columbia County jail and before he again came under Dr. Suliene’s care in November 2006. SA196. Dr. Suliene would simply testify that the August 2006 test was recent enough to give her the information she needed to prescribe medications without a fresh round of testing. SA197-199. Magistrate Judge Crocker agreed that Romanelli’s proposed line of cross-examination was inadmissible because it called for expert testimony:

Without an expert’s opinion on that, you are not in a position to offer that opinion [that a blood test from three months before was no longer accurate]. You don’t know enough about these things and so therefore it’s not proper impeachment. It wouldn’t get you anywhere.

You would ask her about that and she would say at that point, “You had a blood test at Dodge,” and so I just don’t see that one going anywhere and therefore it’s not relevant to what she did at the time, okay?

SA200.

Thus, Romanelli was rebuffed at trial in his attempts to introduce evidence regarding the proper testing and treatment of Crohn’s disease or his own course of treatment following his release from Columbia County jail. Tr. 1-44 to 1-45, 1-91 to 1-94.

2. Less than a week before trial, defendants filed proposed jury instructions that adverted to Romanelli's criminal convictions. The proposed instructions read:

You have heard evidence that Ronald Romanelli has been convicted of a crime. You may consider this evidence only in deciding whether Ronald Romanelli's testimony is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

SA169. At the final pretrial conference, Magistrate Judge Crocker approved defendants' proposed instructions in their entirety. SA176.

During Sergeant Kuhl's opening statement, his counsel promised the jury that they were "going to hear [Romanelli's] criminal record and the various criminal convictions involving dishonesty." Tr. 1-18 to 1-19. At the next break in the proceedings, Romanelli objected that the reference to his "past criminal charges" would cause "unfair prejudice." SA212. Magistrate Judge Crocker explained that witnesses could be impeached with "prior felony convictions that occurred within ten years and also with nonfelonies that tend to go towards honesty or believability." SA212-213. He allowed defendants to impeach Romanelli with two felonies—bail jumping and second degree sexual assault—on the basis that "Congress, in its wisdom, has said that it is admissible evidence at a trial for one side or the other to let a jury know if a witness has convictions prior to the witness testifying because Congress believes that jurors are entitled to know that to determine whether to believe someone or not." SA214. Magistrate Judge Crocker also allowed defendants to impeach Romanelli with "22 [misdemeanor] guilty pleas,

guilty no-contest pleas, regarding issuance of worthless checks.” SA215. He did not permit defendants to refer to two other misdemeanor convictions. SA215-216.

Romanelli testified to the jury in narrative form. Towards the beginning of his testimony, he briefly mentioned that he had been convicted of issuing worthless checks 22 times. Tr. 1-48. He also explained the circumstances of his bail jumping and sexual assault convictions. Tr. 1-48 to 1-50. During Romanelli’s cross-examination, Sergeant Kuhl’s counsel had Romanelli confirm that he had been convicted of issuing worthless checks and pled no contest to sexual assault. Tr. 1-104 to 1-105.

In their closing argument, defendants reminded the jury of Romanelli’s convictions:

The Court is going to instruct you on criminal convictions, that you can consider criminal convictions for the purpose of whether testimony is truthful, so I will ask you to listen to that instruction. And you will recall Mr. Romanelli’s criminal convictions, including a variety of criminal convictions, for clearly dishonest acts.

Tr. 2-226; *see also* Tr. 2-222 to 2-223. Defendants also argued that Romanelli refused to take responsibility for his actions, using his sexual assault conviction as an example:

[L]isten[] to him tell the story after he is arrested for sexual assault as to, “Really here is what happened. I’m trying to get this woman out of the hotel so when the mother of my kids comes . . . so there really was no assault that happened,” is what he is telling you. Well we know that Mr. Romanelli, from his testimony, pled guilty, no contest, for exactly that, the sexual assault.

Tr. 2-232. Magistrate Judge Crocker then gave the jury its instructions. Tr. 2-270.

SUMMARY OF ARGUMENT

1. The district court erred in denying Romanelli's repeated requests for appointed counsel. Romanelli's deliberate indifference claims were far beyond his ken as an incarcerated, *pro se* litigant. This was no ordinary failure-to-treat case, in which the defendants simply ignored the prisoner's complaints. Rather, defendants examined Romanelli on multiple occasions and decided that the course of treatment Romanelli had received in the past—a special diet and prescription medications—was not called for. Romanelli thus had to demonstrate that defendants' response to his medical needs was so inadequate that any minimally competent medical professional would have pursued a more aggressive course of treatment. This was much easier said than done—especially for a plaintiff whose freedom was limited as a result of being incarcerated.

Given this Court's stringent standards for proving deliberate indifference, Romanelli had no chance of prevailing unless he could show that defendants' decision not to manage his medical conditions more aggressively represented “such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision[s] on such a judgment.” *Estate of Cole v. Fromm*, 94 F.3d 254, 261-62 (7th Cir. 1996). Romanelli's need for skilled trial counsel and a qualified medical expert should have been obvious, because there was no realistic alternative means of proving that defendants' conduct departed substantially from accepted professional practice. When disputes about complex medical issues lie at the heart of the case, the

assistance of counsel is essential for the plaintiff to have any hope of obtaining justice.

The district court abuses its discretion in denying a request for appointed counsel when, as here, the case is factually and legally difficult, expert medical testimony is necessary to establish both the accepted standards of medical care and defendants' departure from it, and an unassisted plaintiff is incapable of presenting a cogent, coherent case to the jury. Because there is a reasonable likelihood that the outcome at trial would have been different if Romanelli had appointed counsel—*e.g.*, any lawyer would have deposed the defendants before trial, secured the aid of medical experts, and moved for the exclusion of Romanelli's prior convictions as impeachment material—a new trial is required.

2. The district court also erred in allowing defendants to use Romanelli's prior convictions for the purpose of attacking his credibility. Romanelli's conviction for second degree sexual assault was not probative of his veracity. On the other hand, its introduction had great potential for unfair prejudice. Sexual assault is precisely the sort of odious, offensive conduct that could have led the jurors to think that Romanelli was a "bad person," and therefore undeserving of relief in his civil rights suit, even if they had otherwise believed his testimony. Romanelli was such a central figure in this case—he was his own principal witness as well as his own lawyer—that the district court's erroneous admission of prior crimes evidence irretrievably tainted the integrity of the jury's verdict. This is an independent basis for vacating the judgment below and ordering a new trial.

STANDARD OF REVIEW

The denial of a request for appointment of counsel is reviewed for abuse of discretion. *Pruitt v. Mote*, 503 F.3d 647, 658 (7th Cir. 2007) (en banc). Whether the district court improperly permitted defendants to impeach Romanelli with his prior felony convictions is reviewed for abuse of discretion. *Kunz v. DeFelice*, 538 F.3d 667, 675 (7th Cir. 2008). “[I]f the improperly admitted evidence had a substantial influence over the jury,” a motion for a new trial under Rule 59 must be granted. *Shick v. Ill. Dep’t of Human Servs.*, 307 F.3d 605, 611 (7th Cir. 2002) (internal quotation marks omitted). The district court’s decision not to award a new trial is reviewed for abuse of discretion. *Id.*

The district court abuses its discretion when “(1) the record contains no evidence upon which the court could have rationally based its decision; (2) the decision is based on an erroneous conclusion of law; (3) the decision is based on clearly erroneous factual findings; or (4) the decision clearly appears arbitrary.” *Pruitt*, 503 F.3d at 658 (internal quotation marks omitted). Moreover, “a discretionary ruling . . . cannot be upheld when there is no indication that the judge exercised discretion.” *Carr v. O’Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999).

ARGUMENT

I. The District Court Erroneously Denied Romanelli’s Requests For Appointed Trial Counsel.

Without appointment of trial counsel, Romanelli had no realistic chance of prevailing on his claims. Romanelli’s claims turned on whether defendants’ conduct represented such a substantial departure from accepted standards of medical care

as to evidence deliberate indifference to a serious medical need. He needed the assistance of counsel to develop and present the relevant, often technical, medical evidence. This need should have been apparent to the district court by the time of Romanelli's third request for counsel, which came as the trial date was impending. *See Hughes v. Joliet Correctional Ctr.*, 931 F.2d 425, 429 (7th Cir. 1991) (“[A] layman’s need for a lawyer is most acute when a case reaches the stage at which evidence must be obtained and presented.”). The district court had the authority to request counsel for Romanelli (*see* 28 U.S.C. § 1915(e)), and abused its discretion in not doing so. Because the presence of counsel could have made a difference in the outcome, this Court should reverse the judgment of the district court and remand the case for recruitment of trial counsel.

A. The Complex Factual And Legal Issues Presented By Romanelli’s Deliberate Indifference Claim Outstripped Romanelli’s Capacity To Litigate It By Himself.

“The decision whether to recruit pro bono counsel is grounded in a two-fold inquiry into both the difficulty of the plaintiff’s claims and the plaintiff’s competence to litigate those claims himself. . . . [T]he question is whether the difficulty of the case—factually and legally—exceeds the particular plaintiff’s capacity as a layperson to coherently present it to the judge or jury himself.” *Pruitt*, 503 F.3d at 655. The district court must appoint counsel when “the difficulty of the issues relative to the capabilities of the litigant would make it impossible for him to obtain any sort of justice without the aid of a lawyer.” *Farmer v. Haas*, 990 F.2d 319, 323 (7th Cir. 1993).

It is one thing to say that the law governing Romanelli's claims has been largely settled since *Estelle v. Gamble*, 429 U.S. 97 (1976): everyone agrees that “[p]rison officials violate the Eighth Amendment’s proscription against cruel and unusual punishment when they display ‘deliberate indifference to serious medical needs of prisoners.’” *Greeno v. Daley*, 414 F.3d 645, 652 (7th Cir. 2005) (quoting *Estelle*, 429 U.S. at 104). But it is quite another thing to conclude, as the district court did, that Romanelli was capable of litigating his claims by himself—from behind bars—solely by virtue of his “personal knowledge of the treatment he contends he was denied” and his possession of “medical records . . . confirm[ing] the absence of care.” A30.

The applicable legal standards are easy to explain, yet exceedingly difficult for a *pro se* plaintiff to satisfy. Under the Supreme Court and this Court’s established precedent, a deliberate indifference claim under *Estelle*:

contains both an objective and a subjective component. To satisfy the objective component, a prisoner must demonstrate that his medical condition is “objectively, sufficiently serious.” A serious medical condition is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor’s attention. To satisfy the subjective component, a prisoner must demonstrate that prison officials acted with a “sufficiently culpable state of mind.” The officials must know of and disregard an excessive risk to inmate health; indeed they must “both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists” and “must also draw the inference.”

Greeno, 414 F.3d at 653 (internal citations omitted).

It was all but impossible for Romanelli to satisfy either prong of the *Estelle* standard without the assistance of counsel. To have any hope of prevailing, Romanelli had to demonstrate that, while he was incarcerated at Columbia County jail, (1) he “suffered from an objectively serious medical condition” that created a “substantial risk of serious harm” if left unattended to; (2) defendants in fact “knew of [that] substantial risk of harm”; and (3) defendants disregarded the risk. *Greeno*, 414 F.3d at 653. Establishing the “difficult and subtle question of the state of mind required [to prove] a Fourteenth Amendment violation” was far beyond Romanelli’s abilities as an incarcerated, *pro se* litigant. *Swofford v. Mandrell*, 969 F.2d 547, 552 (7th Cir. 1992).

This was no “straightforward swearing contest, the only issue being whether [Romanelli] had or had not requested treatment.” *Cf. Farmer*, 990 F.2d at 322. Nor was this a case where the prisoner was “literally ignored” and received no medical attention whatsoever. *See Sherrod v. Lingle*, 223 F.3d 605, 611 (7th Cir. 2000). Defendants admit that Romanelli repeatedly requested medical treatment. Romanelli had accumulated voluminous “medical records, letters, health services requests, and inmate complaints” that spanned several years. *Greeno*, 414 F.3d at 658. Dr. Suliene acknowledged that Romanelli had Crohn’s disease and that Crohn’s disease is a “serious medical issue.” DE25, at 1 (Defendant Suliene’s Response to Plaintiff’s Requests for Admissions); SA2-3. Yet the symptoms of Crohn’s disease “can subside for significant periods of time, rendering medication and treatment unnecessary” during those periods. SA2. In Dr. Suliene’s view,

Romanelli's symptoms (*i.e.*, as they appeared to her while he was at Columbia County jail) did not require any specific treatment because he never showed any "signs of serious disease," weakness, or suffering. Tr. 2-174, 2-176, 2-187. She testified that a "self-select" diet was appropriate (Tr. 2-167) and that Romanelli had no immediate need for prescription medications (Tr. 1-199, 2-176 to 2-178). Thus, Romanelli's claim was far "more complicated than a typical failure-to-treat claim because it requir[ed] an assessment of the adequacy of the treatment that [he] did receive, a question that will likely require expert testimony." *Greeno*, 414 F.3d at 658.

When a prison official acknowledges and responds to a prisoner's medical complaints, a "prisoner's dissatisfaction with a doctor's prescribed course of treatment" does not generally give rise to a constitutional claim. *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996).⁵ Thus, "deliberate indifference may be inferred based upon a medical professional's erroneous treatment decision *only* when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." *Fromm*, 94 F.3d at 261-62 (emphasis added); *see also Collignon v. Milwaukee County*, 163 F.3d 982, 989 (7th Cir. 1998). Without the assistance of counsel, Romanelli had no ability to establish what "accepted professional judgment, practice, or standards" were, much

⁵ As the district court succinctly put it, "a prisoner's personal disagreement with a doctor's medical judgment" is plainly not sufficient to establish deliberate indifference. A10-11.

less that Dr. Suliene's treatment decisions represented a "substantial departure" from them.

Given these well-established principles of constitutional law, "it should have been apparent from the outset that [Romanelli] needed the expert testimony of a physician or health professional to prove two essential elements of his claim:" (1) the "accepted professional practice" regarding treatment for a patient with Crohn's disease presenting with Romanelli's cluster of symptoms, and (2) the fact that Dr. Suliene's treatment decisions "constituted a substantial departure from the accepted professional practice." *Jackson v. County of McLean*, 953 F.2d 1070, 1073 (7th Cir. 1992). "The district court should have realized that it was highly probable" that Romanelli would have needed "to call expert witnesses to present a prima facie case" and that, without the assistance of counsel, Romanelli would be unable to develop evidence needed to prove these basic elements of his claims. *Id.* Indeed, Romanelli's motions for appointed counsel emphasized that he would need to "[t]rack[] down experts and much needed evidence," including through depositions of the defendants, for him to be able to proceed to trial. (DE23, at 1; DE57, at 1.) This need must have been apparent to the district court, since it had already considered defendants' motions for summary judgment and recognized what evidentiary hurdles Romanelli's claims had to clear.

The district court erroneously concluded that it would be sufficient for Romanelli to testify as to "the treatment he contends he was denied" and as to "his understanding of the reason he was denied treatment." A30. Not so. Limited to

only his own testimony, Romanelli was deprived of an important means for establishing the objective element of the *Estelle* standard. A serious medical condition is one that “has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor’s attention.” *Greeno*, 414 F.3d at 653. What is more, “what might not be obvious to a lay person might be obvious to a professional acting within her area of expertise.” *Chavez v. Cady*, 207 F.3d 901, 905 (7th Cir. 2000) (quoting *Collignon*, 163 F.3d at 989). Without his own expert, Romanelli had no ability to respond to Dr. Suliene’s testimony that, in her judgment, his symptoms did not obviously require treatment.⁶ As the district court later observed, the jury easily could have accepted the “testimony of the medical professionals over the patient.” A10.

Moreover, Romanelli also had to show that the care he received fell so far below accepted medical standards that Dr. Suliene must subjectively have been aware that she was not giving him the care he required. When “medical issues, likely requiring expert testimony,” are involved, the district court errs in not appointing counsel. *Johnson v. Doughty*, 433 F.3d 1001, 1009 (7th Cir. 2006); *Greeno*, 414 F.3d at 658; *Merritt v. Faulkner*, 697 F.2d 761, 765 (7th Cir. 1983); *cf. Jackson v. Kotter*, 541 F.3d 688, 701 (7th Cir. 2008) (case that involved “an issue of medical treatment,” but did not “involve technical facts,” did not necessarily call for appointment of counsel) (internal quotation marks omitted). Given the stringent

⁶ For example, given Romanelli’s understandably limited ability to craft precisely drawn discovery requests from his jail cell, Dr. Suliene was able to deftly evade Romanelli’s attempt to show that “people with Crohn’s disease are in need of special treatment.” DE25, at 1 (Defendant Suliene’s Response to Plaintiff’s Requests for Admissions).

standards for bringing an Eighth Amendment deliberate indifference claim, it should have been obvious to the district court that Romanelli could not prove his case simply by testifying about his own symptoms.⁷ He needed the expert testimony of a physician to show that no minimally competent medical professional would have responded as lackadaisically to his symptoms of Crohn's disease as Dr. Suliene did.

B. The District Court's Denial Of Counsel Prejudiced Romanelli.

To establish prejudice, the plaintiff need not “demonstrate that he would have won his case had he been represented by counsel.” *Pruitt*, 503 F.3d at 659. It is sufficient that there is a “*reasonable likelihood* that the presence of counsel would have made a difference in the outcome of the litigation.” *Id.*

Unlike Romanelli, trial counsel could have marshaled a compelling case of deliberate indifference based on the testimony of medical experts. In this connection, the district court was absolutely correct to find that Romanelli could not

⁷ Although testimony about “accepted professional standards” could *in principle* have been elicited through Dr. Suliene’s testimony (*Johnson*, 433 F.3d at 1008), it should have been obvious that Romanelli’s efforts at cross-examining an adverse witness would be “muddled and ambiguous” at best (*Merritt*, 697 F.2d at 765). Without either legal or medical training, and without effectively targeted discovery, Romanelli could not meaningfully cross-examine Dr. Suliene. Testing the “opinions and [the] credibility” of a medical expert naturally “require[s] the skills of a trained advocate to aid the factfinder in the job of sifting and weighing the evidence.” *Id.* Moreover, when, as here, “complex medical evidence is at the heart of a case,” the ability to “obtain essential medical evidence from doctors outside of the prison” is crucial to the adequate presentation of a case. *Id.*; see also *Greeno*, 414 F.3d at 658 (“an assessment of the adequacy of the treatment that [the inmate] did receive . . . will likely require expert testimony”). Incarcerated and largely indigent, Romanelli was hardly capable of developing independent evidence of the medical care he thinks he should have received.

himself testify about “diagnoses and causation and things like that.” SA177. Romanelli was no doctor and lacked the “expertise to make causal diagnoses or to draw conclusions about those things.” SA178. Likewise, Romanelli lacked the knowledge to testify “about what the appropriate testing for Crohn’s disease should be.” SA180. The district court also properly restricted Romanelli’s cross-examination of Dr. Suliene. Evidence of Dr. Suliene’s subsequent treatment of Romanelli would invariably confuse the jury unless placed in the proper context with expert testimony. As the district court found, “[w]ithout an expert’s opinion . . . [Romanelli was] not in a position to offer the opinion” that Dr. Suliene’s treatment following his release from the Columbia County jail meant that her treatment of him while he was in the jail was inadequate. SA200.

Counsel would have had “a variety of options unavailable to” Romanelli to obtain expert testimony, “including depositions and contingency fee or pro bono services by physicians.” *Merritt*, 697 F.2d at 768. Counsel might have sought an order from the district court pursuant to Fed. R. Civ. P. 35(a) directing that Romanelli be examined by an independent physician. *See id.* at 768-69. Finally, an appointed attorney might have drawn upon other admissible evidence, such as medical treatises, to challenge Dr. Suliene’s medical conclusions.⁸ *See* Fed. R. Evid. 803(18) (making admissible “published treatises, periodicals, or pamphlets on a

⁸ Romanelli tried to use an excerpt from *Cecil’s Textbook of Medicine* (SA71) to show that a blood test was not necessary to determine whether a patient with Crohn’s disease required prescription medication. Tr. 1-200, 1-203. The exhibit was “very hard to read” and contained “just the [page describing] treatment[and] medication.” Tr. 1-201, 1-203. Dr. Suliene readily brushed it aside, remarking that she wasn’t “sure how that’s relevant anyway.” Tr. 1-201.

subject of . . . medicine” notwithstanding the hearsay rule, if their authoritative-ness is established by the “testimony or admission of the witness or by other expert testimony or by judicial notice”).

In its order denying Romanelli’s motion for a new trial, the district court recognized that “[i]f a qualified expert had offered an opinion challenging Dr. Suliene’s approach, perhaps Romanelli’s complaints might have more traction.” A11. An expert with “specialized scientific knowledge” could have looked at “evidence about what diagnosis and treatment Romanelli received for his Crohn’s disease after leaving the Columbia County Jail” and opined that Dr. Suliene’s treatment represented a gross deviation from accepted professional standards. *Id.*; *cf. Jackson*, 541 F.3d at 700 (affirming the district court’s decision to deny request for counsel because “an attorney could not have refashioned [the plaintiff’s] meritless [deliberate indifference] claim into a meritorious one”). If Romanelli had been appointed trial counsel, his “attorney would have dotted the ‘i’s and crossed the ‘t’s on obtaining admissible evidence from subsequent treatment providers or from independent experts.” A12.

Notwithstanding these findings, the district court opined that Romanelli’s “blunders” at trial were not material and dismissed as “unadulterated speculation” the suggestion “that Romanelli could have won this case if only he would have been represented by an attorney.” A12-13. The district court reasoned:

As noted above, the medically trained professionals at the jail were unwavering in their testimony that Romanelli was not suffering from any debilitating symptoms when they saw him, and there was credible evidence that

Romanelli gained weight, continued to eat spicy food, failed to obtain his medication from home, failed to authorize additional testing, and failed to purchase OTC pain or stomach medicine.

A13. These observations hardly show that the absence of counsel could not have made a difference in the outcome of the trial. A medical expert testifying on Romanelli's behalf might have told the jury that Romanelli's symptoms were, in fact, serious enough to warrant additional testing or treatment, even if they were not "debilitating." See *Gutierrez v. Peters*, 111 F.3d 1364, 1371 (7th Cir. 1997) (recognizing that "delays in treating painful medical conditions that are not life-threatening can support Eighth Amendment claims"). That expert might also have testified that a person with active Crohn's disease could nonetheless gain weight or eat spicy food.⁹ And finally, an expert could have supported Romanelli's contention that over-the-counter medication was not an appropriate treatment for his symptoms and that blood tests were unnecessary to treat Crohn's disease. Tr. 1-177, 1-202 to 1-206.

The assistance of counsel could also have helped bolster Romanelli's credibility. First and foremost, a lawyer would have moved *in limine* well in advance of trial to exclude Romanelli's prior felony convictions and demonstrated, based on the overwhelming weight of authority, that their minimal probative value was substantially outweighed by the potential for unfair prejudice. See *infra* Part

⁹ On multiple occasions, defendants cited Romanelli's purchases of Cajun and chili flavored instant noodles from the prison canteen as evidence that he did not have gastrointestinal issues. Tr. 1-138, 2-229, 2-234. But Dr. Suliene's own testimony established that "some people tolerate chili well and some people don't [.] with the Crohn's disease, different people tolerate different things." Tr. 2-188.

II. Moreover, as in *Pruitt*, Romanelli’s “own deposition testimony—given without the benefit of preparation and assistance of counsel—supplied the principal means of contradicting his testimony at trial. An attorney could have significantly diminished these pretrial difficulties by helping [the plaintiff] identify, locate, and prepare witnesses before trial, and avoid common deposition pitfalls.” 503 F.3d at 660; see Tr. 1-97 to 1-99, 1-102, 1-105, 1-113 to 1-114, 1-126, 1-138, 1-140, 1-161 to 1-162, 1-173 (Romanelli’s cross-examination). “[T]here is a reasonable likelihood that [Romanelli] lost the swearing contest not because of the inherent weakness of his claim, but because of his incompetent preparation and presentation of it to the jury.” *Pruitt*, 503 F.3d at 661.¹⁰

Confronted with the “nonintuitive procedural requirements” of the evidentiary rules regarding the use of expert testimony, Romanelli was substantially prejudiced in his attempt to prove his deliberate indifference claim without the assistance of counsel. See *Hughes*, 931 F.2d at 429. Appointed counsel, assisted by a properly selected expert witness, could have established that defendants’ treatment of Romanelli’s medical conditions was such a “substantial departure from accepted professional judgment, practice, or standards as to

¹⁰ Although Romanelli’s claim regarding his vision problems did not require expert medical testimony (and therefore might not independently have supported a request for counsel), once it is established that the district court abused its discretion in erroneously denying counsel, Romanelli is entitled to a new trial on both the Crohn’s disease claim and the claim regarding his vision problems. There is a reasonable likelihood that the jury could have believed Romanelli’s testimony that Sergeant Kuhl told him that he was required to pay for new glasses if Romanelli’s credibility had not so avoidably been tarnished. Tr. 2-97 (noting that “the jury has to decide, did Sergeant Kuhl actually tell [Romanelli], ‘You can’t have the glasses unless you pay for them up front’”).

demonstrate that the person responsible did not base the decision on such a judgment.” *Estate of Cole*, 94 F.3d at 261-62. Because there is a “reasonable likelihood” that the presence of counsel could have made a difference, the district’s erroneous denial of appointed counsel prejudiced Romanelli, and he is entitled to a new trial. *See Pruitt*, 503 F.3d at 659.

II. Romanelli Is Also Entitled To A New Trial Because The District Court Improperly Admitted Highly Prejudicial Prior Convictions That Had Scant Probative Value.

Given the central importance of Romanelli’s credibility in this case—he was both his own principal percipient witness and his own lawyer—there is a “significant chance” that the district court’s improper admission of irrelevant and highly prejudicial evidence of Romanelli’s prior convictions for second degree sexual assault and bail jumping “affected the outcome of the trial.” *Shick*, 307 F.3d at 611 (internal quotation marks omitted). The district court erred in admitting Romanelli’s prior convictions over his objections and then erred again in denying Romanelli’s motion for a new trial.

A. The Probative Value Of Prior Convictions For Second Degree Sexual Assault And Bail Jumping Is Weak, Whereas The Risk Of Unfair Prejudice Is Substantial.

Under Federal Rule of Evidence 609(a)(1), evidence of a prior conviction for a crime punishable by imprisonment of more than one year is admissible “[f]or the purpose of attacking the character for truthfulness of a witness” only if Rule 403 of the Federal Rules of Evidence is satisfied. Rule 403 in turn requires the district court to engage in a balancing analysis. Thus, even relevant evidence must be

excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” *Id.*

1. Because the record is devoid of any indication that the district court actually exercised its discretion and undertook the balancing analysis that Rule 403 requires, the deference usually accorded to the district court’s evidentiary determinations is unwarranted. *See Carr v. O’Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999). The district court admitted Romanelli’s prior convictions without giving “consideration” to and “balanc[ing] the probative value of the evidence against its potential for unfair prejudice.” *United States v. Dolliole*, 597 F.2d 102, 117 (7th Cir. 1979); *see also Rodriguez v. United States*, 286 F.3d 972, 983 (7th Cir. 2002) (applying Rule 609(a)(1) to the impeachment of a criminal defendant by prior crimes evidence and directing “judges [to] hold a hearing on the matter and explicitly find that the prejudicial effect of the evidence will be outweighed by its probative value”); *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976) (similar).

The district court explained to Romanelli that Rule 609(a)(1) generally allows witnesses to be impeached with felony convictions that occurred within the last ten years. SA213. So far so good. But then after eliciting from Sergeant Kuhl’s counsel that Romanelli had been convicted of second degree sexual assault and bail jumping in the last two years, the district court did not go on to weigh the probative value of these convictions against their prejudicial effect. Instead, the district court stated that “Congress, in its wisdom, has said that it is admissible evidence . . . if a witness has convictions . . . because Congress believes that jurors are entitled to know that

to determine whether to believe someone or not.” SA214. “[O]nce you are convicted, and the judgment is entered, then it may be used under the rule.” *Id.* The district court evidently believed that because Romanelli had a “criminal record[], . . . that’s why we are here, so it is fair game.” SA213.

“[A] judge must exercise his discretion, i.e., ‘consider[] the factors relevant to that exercise,’ before [this Court will] accord his decision deference.” *United States v. Taylor*, 569 F.3d 742, 747 (7th Cir. 2009) (quoting *United States v. Jackson*, 546 F.3d 465, 471 (7th Cir. 2008)). Here, the district court did not address the “principal argument made by [Romanelli]” (*Jackson*, 546 F.3d at 472)—that reference to his “past criminal charges” would cause “unfair prejudice” (SA212)—“even though the argument was not so weak as not to merit discussion” (*Jackson*, 546 F.3d at 472). Therefore, this Court cannot have any “confidence in the judge’s considered attention” to the balancing analysis required by Rule 403. *See id.*

It surely would not have been an abuse of the district court’s discretion to have “rule[d] the other way”—that is, excluded the prior convictions. *Carr*, 167 F.3d at 1127. Indeed, the district court later acknowledged that “perhaps the fact that Romanelli was imprisoned because of a sexual assault conviction was evidence that the jury should not have heard.” A16. Therefore, Romanelli was “entitled to insist that the judge exercise discretion” (*United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005)), and actually decide whether the “probative value [of his felony convictions] is substantially outweighed by the danger of unfair prejudice,” as Rule 403 contemplates. The district court did not do so. Under these circumstances, no

deference is owed to the decision to allow defendants to impeach Romanelli with prior crimes evidence.

2. In any event, the district court's decision was so manifestly erroneous that it should be overturned even under the usual abuse of discretion standard of review. Rule 609(a)(1) "reflects a judgment that . . . requiring a trial court to admit convictions in civil cases that have little, if anything, to do with credibility reach undesirable results." Advisory Committee Notes to 1990 Amendments to Fed. R. Evid. 609. Under Rule 609(a)(1), a conviction is not admissible to "stink up" a witness's character," but only to "shed light on the witness's credibility." *United States v. Neely*, 980 F.2d 1074, 1080 (7th Cir. 1992). Admission of Romanelli's conviction for second degree sexual assault "stank up" his character without shedding any light on his credibility.

Sex offenses are the archetypal sorts of "offensive acts" from which "the jury is likely to draw the prejudicial inference that the witness is a bad person," while at the same time "deriv[ing] little probative value from the conviction since these crimes say little about credibility." 28 C. Alan Wright, Arthur R. Miller, & Victor James Gold, *Federal Practice and Procedure: Evidence* § 6134 (3d ed. 2009). As this Court has recognized, a "conviction for rape [is] not highly probative of credibility," and "sex crimes" generally are "low on the list of crimes relating to veracity." *Christmas v. Sanders*, 759 F.2d 1284, 1292 (7th Cir. 1985) (internal quotation marks omitted); accord *United States v. Larsen*, 596 F.2d 347, 348 (9th Cir. 1979) (per curiam) (error in admitting conviction for "child molesting," which "bears only

nominally on credibility,” was plain); *United States v. Cox*, 536 F.2d 65, 71 (5th Cir. 1976) (“[e]vidence of illicit sexual activities is totally immaterial to . . . credibility”).

On the prejudice side of the coin, the jury might well have viewed Romanelli as a “bad person,” and therefore denied him “a verdict and an award, not because it doubt[ed] his veracity, but because it [was] appalled by his prior conduct that has nothing to do with the events in question.” *Earl v. Denny’s, Inc.*, 2002 WL 31819021, at *3 (N.D. Ill. Dec. 13, 2002) (quoting *Christmas*, 759 F.2d at 1292); *see also Coles v. City of Chicago*, 2005 WL 1785326, at *3 (N.D. Ill. July 22, 2005) (recognizing “risk that a jury would reject his claim not because of doubts about his truthfulness, but because of conduct that has nothing to do with the events in question”). That risk was significant in this case, because jurors are particularly likely to find sex offenses “odious.” *Jones v. Sheahan*, 2003 WL 21654279, at *3 (N.D. Ill. July 14, 2003); *Earl*, 2002 WL 31819021, at *3.

Thus, district courts in this Circuit have routinely rejected attempts to “stink up” a witness’s character through the introduction of highly inflammatory prior convictions that shed little light on the issue of credibility.¹¹ *Moss v. Westerman*,

¹¹ The district court’s after-the-fact rationalization that it granted defendants’ “request to impeach Romanelli with the crime for which he currently was incarcerated, since as just noted, the jury was aware that Romanelli was imprisoned” gets it exactly backwards. A15. The jury’s preexisting awareness that Romanelli had been convicted of a crime meant that it would *already* have “know[n] that [he] . . . may be less trustworthy than most witnesses.” *Brown*, 1994 WL 75423, at *1. Thus, “[e]vidence of the exact circumstances of the convictions would add little of probative value in determining [Romanelli’s] credibility.” *Id.* On the other hand, introduction of that evidence prejudiced him by “distract[ing the jury] from the relevant facts of the case (*i.e.*, [Romanelli’s] allegations)” of deliberate indifference. *Id.*

2008 WL 4148588, at *2 (S.D. Ill. Sept. 3, 2008) (“probative value of . . . aggravated criminal sexual assault . . . [is] substantially outweighed by the danger of unfair prejudice”); *Jones*, 2003 WL 21654279, at *3 (“sexual assault conviction must be excluded under Rule 403 because any probative value it may have on the issue of credibility is substantially outweighed by the danger of unfair prejudice”); *Earl*, 2002 WL 31819021, at *3 (excluding conviction for “aggravated criminal sexual assault”); *Brown v. Jennings*, 1994 WL 75423, at *1 (N.D. Ill. Mar. 8, 1994) (excluding conviction for “criminal sexual assault”); *see also Coles*, 2005 WL 1785326, at *2 (“offense[s] of violence . . . speak[] to credibility no more than other violent offenses [such as rape] that have been deemed to have limited probative value on the issue of credibility”). The district court thus erred in admitting Romanelli’s sexual assault conviction for impeachment purposes over his objection that it would unfairly prejudice him.

B. Introduction Of Romanelli’s Prior Convictions Had A Substantial Influence On The Jury’s Verdict.

Despite recognizing that Romanelli’s prior convictions could be “evidence that the jury should not have heard,” the district court nonetheless concluded that Romanelli was not entitled to a new trial because the evidence of Romanelli’s “conviction[s] was just one small datum in a sea of information about Romanelli’s credibility and it was specifically ameliorated by a jury instruction at the close of the case” and “it was possible for the jury to deem Romanelli generally a credible witness but still to find against him . . . because trained medical professionals

disagreed with him about whether his Crohn's disease presented a serious condition during his jail stay." A16. These reasons do not stand up to scrutiny.

As the district court recognized, Romanelli's credibility was one of the central issues in this case: "We do have a swearing contest on what Dr. Suliene said to Mr. Romanelli." Tr. 2-106; *see also id.* at 2-97 ("Mr. Romanelli claims, under oath, something different from what Sergeant Kuhl claims about getting the glasses"). Defendants repeatedly told the jury that it would have to decide whether Romanelli or the defendants were more credible. Tr. 1-18 to 1-19, 2-220 to 2-221, 2-253. They stressed that "the credibility question govern[ed] all of [Romanelli's claims] because if [Romanelli] is not believable, then the story he tells you about his medical condition, the story he tells you about how people ignored his need for care and treatment, what he tells you about how he was harmed, if that's not believable, you can reject that out of hand." Tr. 2-221. Defendants made Romanelli's convictions a centerpiece of their attack on his credibility—during their opening statement (Tr. 1-18 to 1-19), their cross-examination of Romanelli (Tr. 1-104 to 1-105), and their closing arguments (Tr. 2-226). Defendants even mentioned Romanelli's specific offense—sexual assault—*twice* in an effort to leave the jury with the impression that Romanelli was a despicable individual. Tr. 2-222 to 2-223, 2-232. Thus, as in *Shick* and in *Cullen v. Olin Corp.*, 195 F.3d 317 (7th Cir. 1999), the prejudicial effect of the erroneously admitted evidence "tainted beyond repair" the jury's assessment of Romanelli's testimony.

Moreover, quite apart from Romanelli's credibility as a *witness*, the district court failed to consider the prejudicial impact of the introduction of the convictions on Romanelli's ability credibly to *represent himself*. As this Court has noted in another context, reversible error occurs when the "the lawyer's credibility in the eyes of the jury" is so impaired "as to deprive the client of a fair trial." *Chlopek v. Fed. Ins. Co.*, 499 F.3d 692, 703 (7th Cir. 2007) (internal quotation marks omitted). The suggestion that "the jury might have some question about believing [the attorney] himself" could only have a "devastating impact," when the "attorney is attempting to build a case" that turned on credibility issues. *United States v. Spears*, 558 F.2d 1296, 1298 (7th Cir. 1977) (per curiam); *see also United States v. McLain*, 823 F.2d 1457, 1462 (11th Cir. 1987) ("To discredit . . . counsel in front of the jury is improper, and even subsequent jury instructions aimed at rectifying this error may not ensure that these disparaging remarks have not already deprived the [party] of a fair trial."), *overruled in other respects by United States v. Watson*, 866 F.2d 381, 385 n.3 (11th Cir. 1989).

Romanelli was serving as both client and lawyer. In both capacities, his credibility was irreparably damaged by the district court's erroneous admission of his prior felony convictions.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Dated: December 7, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 11,729 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 proportionally spaced typeface using Microsoft Word 2007 in 12-point Century Schoolbook font.

Brian J. Wong

Dated: December 7, 2009

CERTIFICATE OF COMPLIANCE WITH RULE 30(d)

I hereby certify, pursuant to Cir. R. 30(d), that all materials required by Cir. R. 30(a) are included in the Required Short Appendix and all materials required by Cir. R. 30(b) are included in the Separate Appendix.

Brian J. Wong

Dated: December 7, 2009

CERTIFICATE OF COMPLIANCE WITH RULE 31(e)

I hereby certify, pursuant to Cir. R. 31(e), that I have furnished, on a virus-free CD-ROM, digital versions of the foregoing brief and all appendix materials that are available electronically in non-scanned PDF format.

Brian J. Wong

Dated: December 7, 2009

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2009, I caused two bound copies of the Opening Brief and Required Short Appendix and one bound copy of the Separate Appendix, as well as one copy of the digital version required by Cir. R. 31(e), to be served by UPS overnight delivery on the following:

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