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INTRODUCTION

Defendants do not dispute that it would have been impossible for Romanelli to prevail on his deliberate indifference claim at trial unless he could present expert medical testimony regarding the appropriate treatment for Crohn's disease. Nor do they dispute that Romanelli could not prove his case simply by testifying about his own symptoms and the treatment he says he was denied. That is unsurprising because a medical professional's erroneous treatment decision gives rise to a cognizable deliberate indifference claim *only* when it amounts to a substantial departure from accepted professional standards, and establishing the content of those standards is impossible without qualified expert testimony. Romanelli, an incarcerated *pro se* litigant, could not possibly "obtain any sort of justice" (*Farmer v. Haas*, 990 F.2d 319, 323 (7th Cir. 1993)) without the aid of appointed counsel, who could present technical medical evidence in support of his Crohn's disease claim. Simply put, Romanelli walked into a trial he was *virtually guaranteed to lose*, even if the jury had believed every word of his testimony. Under these circumstances, the district court's denial of Romanelli's request for appointed counsel was surely an abuse of discretion.

Instead of defending the district court's denial of counsel on its own terms, defendants rely largely on the assertion that the "appointment of counsel would have made no difference in the outcome of this case"—*i.e.*, that Romanelli suffered no prejudice. Defendants-Appellees' Resp. to Br. of Plaintiff-Appellant ("Resp. Br.") 22. Yet there is little question that a lawyer would have secured the services of a

medical expert, who could have bolstered Romanelli's case by telling the jury that Romanelli's symptoms were indicative of an objectively serious medical condition and that Dr. Suliene's treatment represented a substantial departure from accepted professional standards. Moreover, the assistance of counsel could have shored up Romanelli's credibility in any number of ways: counsel could have effectively cross-examined defendants; secured corroborating testimony from other witnesses; prepared Romanelli for his deposition, which supplied much of the impeachment material; prepared Romanelli for his direct examination; and contextualized some of the apparent inconsistencies that would have remained in the trial record. In light of all this, there is at least a "reasonable likelihood" that the presence of counsel would have made a difference in the outcome. *Pruitt v. Mote*, 503 F.3d 647, 659 (7th Cir. 2007) (en banc).

Finally, as to the district court's admission of Romanelli's conviction for second degree sexual assault, defendants do not even mention, much less attempt to distinguish, the overwhelming authority establishing that whatever probative value Romanelli's sex crime conviction might have had was far outstripped by its potential for unfair prejudice. Opening Br. 38-40. Rather, they contend that Romanelli "opened the door" to its introduction, an argument that runs aground on their concession that "[w]hen describing his version of the events giving rise to the sexual assault conviction to the jury, Romanelli omitted from the narrative the fact that he was convicted." Resp. Br. 15. Defendants also reprise their theme that Romanelli's credibility was beyond salvation. But, again, this argument misses the point: the

prejudice from the admission of the conviction stemmed not just from the suggestion that Romanelli was a *liar* (because criminals tend to lie), but also from the suggestion that Romanelli was a *bad person*. Mention of Romanelli's sexual assault conviction posed an intolerable risk of distracting jurors from the relevant facts in this case to the irrelevant issue of whether Romanelli deserved to be in jail. The potential for prejudice was heightened still further because Romanelli was his own lawyer, as well as his own star witness. Against this reasoning, defendants do not even attempt a response.

ARGUMENT

I. The District Court's Denial Of Romanelli's Motions For Appointment Of Counsel Requires Reversal.

Defendants' answering brief obfuscates the matter, but this Court's precedent is clear that the review of the denial of a motion for appointment of counsel proceeds in two conceptually distinct stages. Confining itself to the "evidence available when the [plaintiff's request] was denied," this Court first determines whether the district court's decision was an abuse of discretion. *Pruitt*, 503 F.3d at 658-59. Here, the district court's decision that Romanelli was capable of trying his case to a jury without the assistance of a lawyer was unreasonable: *ex ante*, it should have been clear that without expert medical testimony, Romanelli had no hope of prevailing. Opening Br. 24-30. Defendants have no convincing reply.

If there was an abuse of discretion, this Court next conducts a "totality-of-the-circumstances review of the proceedings as a whole" to ascertain whether "there is a reasonable likelihood that the presence of counsel would have made a difference

in the outcome.” *Pruitt*, 503 F.3d at 659-60. Defendants’ arguments that Romanelli was not prejudiced by the district court’s denial of counsel place far more weight on the jury’s finding that Romanelli did not have an objectively serious medical condition than it possibly can bear. Resp. Br. 37-39. As *Pruitt* explains, even in a simple “swearing contest,” there are a multitude of ways that the assistance of counsel can make a difference. 503 F.3d at 660; Opening Br. 33-34. Furthermore, the jury’s verdict could well have turned on considerations other than its assessment of witness credibility. Opening Br. 28-32. To that end, appointed counsel could have presented expert evidence to rebut Dr. Suliene’s testimony that Romanelli’s symptoms did not reflect an objectively serious medical condition. Defendants’ contention that there was no reasonable likelihood of prejudice is thus badly misguided.

A. The District Court Abused Its Discretion When It Relegated Romanelli To Trying A Case That He Had No Realistic Prospect Of Winning.

The opening brief explained why this case involves complex factual and legal issues (*e.g.*, the presentation of technical medical evidence about the import of Romanelli’s symptoms and the appropriate treatment for Crohn’s disease), which outstripped Romanelli’s limited ability, as an incarcerated layperson, to “coherently present . . . to the judge or jury” himself. *Pruitt*, 503 F.3d at 655; Opening Br. 24-30. Briefly, establishing deliberate indifference requires the plaintiff to show that (1) his or her medical condition was objectively serious and (2) the defendant acted with a subjectively culpable state of mind. In the context of an adequacy-of-treatment claim like Romanelli’s, as opposed to a “typical failure-to-treat claim,” expert testimony is usually required (*Greeno v. Daley*, 414 F.3d 645, 658 (7th Cir.

2005)), because the plaintiff must prove that the defendant substantially departed from “accepted professional judgment, practice, or standards” (*Estate of Cole v. Fromm*, 94 F.3d 254, 261-62 (7th Cir. 1996)). Romanelli’s “personal knowledge of the treatment he contends he was denied” (A30) would not go nearly far enough, because Romanelli was not a doctor and, as the district court cogently explained, did not have the “expertise to make causal diagnoses” or to testify about the appropriate testing or treatment for Crohn’s disease (SA178). For example, whether Romanelli needed Asacol, a prescription anti-inflammatory drug (Tr. 1-74, 1-153, 2-168 to 2-169), or whether access to over-the-counter stomach medications sufficed (Tr. 1-205), was a question Romanelli could not answer on his own. Romanelli’s claim required proof of technical medical facts and was “too complex for lay representation.” *See Merritt v. Faulkner*, 697 F.2d 761, 765 (7th Cir. 1983).

Defendants do not dispute that expert medical testimony was the only way Romanelli could have satisfied the subjective element of his deliberate indifference claim. Indeed, they acknowledge that “[e]xpert testimony regarding the appropriate treatment” for Romanelli’s conditions could “address [the subjective prong of a] deliberate indifference” claim. Resp. Br. 22, 39. Nor do they dispute that the necessity of this testimony should have been obvious to the district court, by the very latest, when it denied Romanelli’s third request for counsel about a month before trial. By itself, this establishes that the district court’s decision was an abuse of discretion. Without the assistance of counsel and access to expert medical testimony, the trial was a futile gesture, which Romanelli was virtually foreordained to lose, and hardly

“any sort of justice” at all. *Farmer*, 990 F.2d at 323. Defendants never take this argument head on. Instead, they offer a plethora of unconvincing contentions.

Defendants first assert that the “uncomplicated” nature of the case and Romanelli’s capacity to try it by himself was confirmed by his partially successful opposition to their motions for summary judgment. Resp. Br. 21. That does not follow. A plaintiff can stave off summary judgment simply by establishing a genuine issue of material fact. Romanelli accomplished this by showing that he had complained to Dr. Suliene that he was losing weight and having 10 to 20 bowel movements and by averring that Dr. Suliene told him that he would not receive any treatment unless he paid up front. DE 53, at 18, 21. But the demands of litigation do not remain constant over time. *See Hughes v. Joliet Correctional Ctr.*, 931 F.2d 425, 429 (7th Cir. 1991). The “tasks that normally attend litigation” increase as a case proceeds to trial, since evidence must be obtained and then presented to the jury in an organized and coherent manner. *See Pruitt*, 503 F.3d at 655, 661. At the trial stage of proceedings, Romanelli predictably faced the hurdle—presaged in Dr. Suliene’s discovery responses (SA2, 5)—that Dr. Suliene would testify that her approach to testing and treating Romanelli was appropriate under the circumstances. Left to his own devices, Romanelli had no meaningful response.

Next, defendants argue that Romanelli had received instructions from the district court regarding discovery, securing the presence of witnesses, voir dire, and other trial matters. Resp. Br. 29-30, 34. Be that as it may be, this observation is unresponsive to our point that, given the complexities of this particular case, boiler-

plate about trial procedure was not enough to enable Romanelli to try the case to a jury without the assistance of counsel. Whether Romanelli had the capacity to, for example, strike jurors for cause (A29) or publish exhibits to the jury (Resp. Br. 35) had no bearing on whether he had the capacity to compile and elicit technical medical evidence.¹ Tellingly, defendants do not even try to link the district court's form instructions to the key challenge facing Romanelli: namely, the need for expert testimony about the seriousness of his symptoms and the proper treatment for them. Opening Br. 28-30. This Court has never held that the distribution of generic trial instructions is sufficient to justify the denial of counsel. To the contrary, it has emphasized that the decision whether to recruit counsel must be based on "plaintiff's litigation capabilities, and those capabilities [must be] examined in light of the challenges *specific to the case at hand.*" *Pruitt*, 503 F.3d at 655 (emphasis added); *see also Hughes*, 931 F.2d at 430.

Third, defendants quote essentially the entirety of the district court's order denying Romanelli's third request for counsel and insist that the order is "based on

¹ The district court noted that it had provided Romanelli with a "detailed procedure on how to seek witness subpoenas for trial" (A3), but it is unrealistic to expect that Romanelli, an indigent litigating from prison, could have "investigate[d] crucial facts" supporting his claims. *Merritt v. Faulkner*, 697 F.2d 761, 765 (7th Cir. 1983). Romanelli was impeded by his inability to obtain essential evidence from outside witnesses—particularly if there were witnesses who were beyond the subpoena power of the court. *See id.* As Romanelli explained, "[he] tried to get a hold of people, but . . . had no way to contact them. Some of the people that were at the jail at the time are in federal prison, some of them are in state prison." Tr. 1-142. Particularly in a case like this, which turned on "the standards of medical practice," the opportunity to "[c]onsult[] with *outside medical specialists* to develop evidence concerning diagnosis, causation, [and] treatment" was essential. *Merritt*, 697 F.2d at 765 (emphasis added). Without appointed counsel, Romanelli lacked effective means to develop his case. *See also infra* pp. 11-14.

sound legal reasoning.” Resp. Br. 30-31. Assertion is no substitute for argument, however. The underpinning of the district court’s order was its conclusion that it would be enough for Romanelli to testify regarding his “personal knowledge of the treatment he contends he was denied” and his “understanding of the reason he was denied treatment.” A30. But as the opening brief explained (at pp. 27-30), and as defendants conspicuously fail to rebut, that is not the case. The atypically complex adequacy-of-treatment claim asserted by Romanelli should have made it “apparent from the outset” that he would have had to “call expert witnesses to present a prima facie case.” *Jackson v. County of McLean*, 953 F.2d 1070, 1073 (7th Cir. 1992).

Finally, defendants assert that this case is “controlled” by *Jackson v. Kotter*, 541 F.3d 688 (7th Cir. 2008), and *Johnson v. Doughty*, 433 F.3d 1001 (7th Cir. 2006). Resp. Br. 31-34. Not so. Although *Jackson* “involved an issue of medical treatment, it [did] not involve technical facts.” 541 F.3d at 701 (internal quotation marks omitted). The plaintiff in *Jackson* alleged that defendant Williams was deliberately indifferent to his medical needs after a jailhouse altercation. *Id.* at 692. According to the plaintiff, he “told Williams about his back and the incident with the guards, and explained to Williams that he needed an x-ray,” yet “Williams told him that nothing was wrong with his back, and refused to give [him] the pain medication he took on a daily basis for his back pain.” *Id.* at 691. Thus, *Jackson* involved a “typical failure-to-treat claim”—the defendant was alleged to have willfully ignored the plaintiff’s medical problems—as distinguished from Romanelli’s “legally more

complicated” adequacy-of-treatment claim, for which expert testimony is “likely require[d].” *Greeno*, 414 F.3d at 658.

Johnson is likewise inapposite. To begin with, *Johnson* expressly acknowledged that “medical issues, likely requiring expert testimony,” can be “one among several considerations for requiring counsel under [28 U.S.C.] § 1915(e)(1).” 433 F.3d at 1009. Moreover, *Johnson* involved a claim that the prison had a policy of refusing to “recommend[] surgery for . . . hernia[s] regardless of the amount of pain and difficulty,” and thus that the “doctors’ denials of surgery were made in the absence of professional judgment.” *Id.* at 1005. Demonstrating that a blanket “policy against hernia operations” departed from “accepted professional standards for treating hernias and hernia pain” was a comparatively easy task even for a *pro se* litigant. *Id.* at 1008. All the plaintiff in *Johnson* had to do was elicit testimony that *some* hernias could *conceivably* require surgery; that would suffice to show that a categorical policy against hernia operations cannot possibly have reflected a reasoned professional judgment. Romanelli’s burden was, by contrast, far more difficult: he had to show that *his particular constellation of symptoms*—which could vary with time because “Crohn’s disease can be either swollen or not swollen” (Tr. 2-172)—when he was examined by Dr. Suliene called for prescription medication, rather than blood testing to determine how his “condition affect[ed] his electrolytes or his albumin or his kidney function,” white counts, or iron levels (Tr. 2-174 to 2-175). Defendants’ suggestion that Romanelli could have “solicited [Dr. Suliene’s] expert testimony regarding his diagnoses, treatment, and causation” accordingly fails to

take account of the qualitatively more challenging task that Romanelli faced.² Resp. Br. 35.

* * *

The district court’s denial of counsel must be evaluated from *the perspective of when it was made*—and, surely, the district court was not entitled to summarily conclude, at the time it denied Romanelli’s pretrial request for counsel, that the jury would have disbelieved him and that a lawyer’s ability to secure medical testimony would have been of no import. *See Pruitt*, 503 F.3d at 659 (“Appellate review is necessarily limited to the evidence available when the § 1915(e)(1) motion was denied.”) (emphasis omitted). Defendants cannot defend the district court’s erroneous exercise of discretion by reference to events (*e.g.*, Romanelli’s performance on the stand or the jury’s verdict) postdating the district court’s ruling. The district court abused its discretion and failed to reach a “reasonable decision based on facts supported by the record” when it denied Romanelli’s request for counsel. *Pruitt*, 503 F.3d at 658.

B. Appointed Counsel Could Have Made A Difference In The Outcome Of Trial.

Defendants argue that a new trial is unnecessary because Romanelli would have lost even if he had a lawyer. According to defendants, the jury’s finding that Romanelli did not have an objectively serious medical condition “hinged on the fact

² The plaintiff in *Johnson* in fact “seized [the] opportunity [to cross-examine the defendants], eliciting sworn testimony about the alleged policy . . . and the relevant professional standard for treating hernias.” 433 F.3d at 1008 n.7. Romanelli, on the other hand, blundered about and was unable to show that Dr. Suliene’s alleged insistence on performing blood tests before offering treatment departed from the accepted professional standards for treatment of Crohn’s disease. *E.g.*, Opening Br. 27, 31 n.8

that Romanelli was not credible, and he failed to provide credible evidence to support his claims.” Resp. Br. 37. In substance, defendants contend that this Court should affirm *because* of Romanelli’s deficient performance at trial. But this argument turns the prejudice inquiry on its head and improperly “presupposes” that Romanelli lost because of “the inherent weakness of his claim,” and not “because of his incompetent preparation and presentation of it to the jury.” *Pruitt*, 503 F.3d at 661. In fact, “a totality-of-the-circumstances review of the proceedings as a whole” demonstrates that a trained lawyer could have materially improved Romanelli’s prospects of success. *Id.* at 660. Defendants’ arguments miss the mark in two principal respects.

First, they assume that the jury’s determination “hinged on the fact that Romanelli was not credible,” and not from other deficiencies in Romanelli’s trial presentation. Resp. Br. 37. True, the jury never had to reach the *subjective* component of the deliberate indifference standard, as to which expert testimony is essential; it pretermitted its inquiry after finding that Romanelli’s Crohn’s disease and vision problems were not objectively serious medical conditions. A19. But expert testimony is relevant for both prongs of the deliberate indifference test. A physician’s considered judgment that Romanelli’s symptoms were serious enough to “mandat[e] treatment” would have put Romanelli’s case on far firmer ground. *Greeno*, 414 F.3d at 653; Opening Br. 28-29. As the district court observed, the jury could conceivably have viewed Romanelli as “generally a credible witness,” and yet have found against him because “trained medical professionals” (*i.e.*, Dr. Suliene) did not think

that “his Crohn’s disease presented a serious condition.” A16; *see also* A10. Even if the jurors had fully credited Romanelli’s description of his symptoms, they might nonetheless have been won over by Dr. Suliene’s testimony that she saw “no signs of serious disease” when she examined Romanelli. Tr. 2-187. Without expert testimony of his own, Romanelli had no meaningful response. Opening Br. 29, 33. Defendants ignore the prejudicial effect of this imbalance.

Second, even assuming that credibility was the determinative issue in the case, defendants’ argument that counsel would not have made a difference is identical to one *rejected* by this Court in *Pruitt*. The Court there explained that even when the case is a “swearing contest” that turns solely on credibility determinations, the “assistance of counsel” can meaningfully strengthen the “preparation and presentation of the case in a manner reasonably likely to alter the outcome.” 503 F.3d at 660. At bottom, defendants’ “argument about the weakness of [Romanelli’s] case rests on a conclusion that [they] testified truthfully and [Romanelli] lied, which presupposes credibility determinations properly left to a finder of fact.” *Id.* at 661.

If anything, the “swearing contest” aspect of this case (Tr. 2-106) confirms why appointment of counsel could have made a difference. When trial will involve the presentation of “complex and probably contradictory evidence,” “[t]esting [the witnesses’] opinions and their credibility will require the skills of a trained advocate to aid the factfinder in the job of sifting and weighing the evidence.” *Merritt*, 697 F.2d at 765. Under those circumstances, “the truth will more likely be exposed when both sides are represented by counsel.” *Id.*; *see also* *McNeil v. Lowney*, 831

F.2d 1368, 1372 (7th Cir. 1987) (“conflicting testimony” may “require[e] skilled cross-examination by counsel to reveal the truth”). In Romanelli’s case, both sides offered dramatically different versions of what was done in response to Romanelli’s requests for medical treatment. Defendants themselves stressed that one of the central issues in this case was whether the jury should believe Romanelli or instead believe the jail employees. *E.g.*, Tr. 2-221, 2-253. Yet Romanelli’s examination of defendants was often “muddled and ambiguous.” *Merritt*, 697 F.2d at 765. For example, Magistrate Judge Crocker had to remind Romanelli not to “dance around” issues and to be “specific” about the questions he was asking. Tr. 1-185, 2-136. At other times, Romanelli was unable to follow defendants’ testimony and repeatedly had to be prodded to “move on.” Tr. 1-209, 1-214, 2-198. As in *Merritt*, a trained advocate could have tested defendants’ credibility far more effectively than Romanelli did.

An attorney also could have “help[ed] [Romanelli] identify, locate, and prepare witnesses before trial.” *Pruitt*, 503 F.3d at 660. Defendants attacked Romanelli for not “call[ing] any witnesses other than [himself] and the . . . defendants.” Tr. 1-141; *see also* Resp. Br. 34. They implied that Romanelli must have been lying about being sick, because “if somebody is sick” in jail, “there are dozens of jailers and medical staff that are on these units,” and yet Romanelli “called no one as a witness” regarding his symptoms. Tr. 2-233. Without the assistance of counsel, Romanelli was unable to secure this crucial corroborating testimony. Tr. 1-142. An attorney would have been able to interview and collect information from potential eyewitnesses,

such as other inmates or jail staff. Counsel also could have ensured that any helpful witnesses were located and brought to court to testify on Romanelli's behalf.

Defendants are equally mistaken in assuming that Romanelli's testimony would have remained the same "whether or not the district court appointed an attorney." Resp. Br. 39. Romanelli would have benefited from the guiding hand of counsel as he prepared for his deposition and his own trial testimony. *Pruitt* is, again, exactly on point: 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." 503 F.3d at 660.³ "An attorney could have significantly diminished these pretrial difficulties by helping [Romanelli] . . . avoid common deposition pitfalls." *Id.*⁴ And with the assistance of counsel, Romanelli's direct testimony would have been far more focused and crisp. He would not have, for example, volunteered the irrelevant comment that he purchased "phone cards so [he] could call the woman [with whom he had] kids" (Tr. 1-72), a statement that was contradicted by his deposition testimony that he never called the mother of his children (Tr. 1-98). Similarly, counsel would have cautioned Romanelli about the

³ See Opening Br. 34; Tr. 1-97 to 1-99 (whether Romanelli used a calling card to contact the mother of his children); Tr. 1-102 (date of Romanelli's last employment); Tr. 1-104 to 1-107 (Romanelli's contacts with people outside the jail); Tr. 1-112 to 1-114 (whether Romanelli told Deputy Tassler that he was under the influence of drugs when he was getting booked); Tr. 1-126 (whether Romanelli knew the purpose of the notice of claim form); Tr. 1-138 (number of times Romanelli made purchases from the canteen); Tr. 1-140 (whether Romanelli's weight fluctuated); Tr. 1-160 (whether Romanelli signed a medical release form on May 22, 2006).

⁴ Romanelli's third request for counsel specifically noted that "defendants have filed for leave to depose" him. DE 57, at 1; see also A28 (denying request notwithstanding recognition that Romanelli's deposition had been scheduled).

importance of not describing in overly expansive terms his degree of isolation while confined at Columbia County jail. *Compare* Tr. 1-76, 1-175 *with* Tr. 1-105.

Finally, a lawyer could have helped Romanelli to better contextualize the residual inconsistencies that would have remained in the record.⁵ For example, counsel could have lessened the sting from Romanelli's incomplete *in forma pauperis* application by preemptively explaining that he had been confused about the definition of employment. *Compare* Tr. 1-103 *with* Tr. 1-175. Counsel could have had Romanelli forthrightly admit that he had misrepresented to Sauk County jail staff that he was on prescription medication when he was transferred from Columbia County jail in the hope that he would receive the medical treatment that he so desperately required, but had heretofore been denied. *Compare* Tr. 1-136 to 1-137 *with* Tr. 1-180. A lawyer, calling on the testimony of a retained medical expert if necessary, also could have explained why Romanelli's purchases of chili-flavored noodles and candy from the canteen were not inconsistent with his contention that he was suf-

⁵ Defendants point to a number of purported "contradictions" that do not bear on credibility at all. For example, there is no reason that Romanelli's booking or intake forms should have mentioned Romanelli's broken glasses; there was no space on those forms for such a notation. Tr. 1-52, 1-114; SA29-30. Likewise, there is no reason that Romanelli should have filed a notice of claim form regarding his headaches or his need for glasses. Tr. 1-94 to 1-95, 1-126, 1-178 to 1-179. State notice-of-claim requirements are not applicable to civil rights actions brought under 42 U.S.C. § 1983. *See Felder v. Casey*, 487 U.S. 131, 151 (1988). Lastly, inconsistencies between Romanelli's testimony and defendants' testimony—*e.g.*, whether Romanelli told Dr. Suliene that he would get his medications from home (Tr. 1-53 to 1-54) or whether jail staff told Romanelli that he needed money to obtain lab work or new glasses (Tr. 1-63, 1-122)—are not themselves *evidence* that Romanelli is not credible. They simply reflected the need for the jury to make a *decision* about who was more credible: Romanelli or defendants. Defendants' arguments on these points "presuppose[] credibility determinations properly left to a finder of fact." *Pruitt*, 503 F.3d at 661.

fering gastrointestinal distress. *Compare* Tr. 1-72, 1-176; Opening Br. 33 & n.9 *with* Tr. 1-137 to 1-138. Similarly, a lawyer could have helped Romanelli show that his decision not to request pain or stomach medication from the jail dispensary was entirely reasonable, because such “over-the-counter drugs” were not an appropriate treatment for Crohn’s disease. *Compare* Tr. 1-74, 1-90, 1-177 *with* Tr. 1-117, 1-125.

In sum, there is a reasonable likelihood that the assistance of an attorney would have improved Romanelli’s chances of prevailing at trial. Although the jury found that Romanelli did not have an objectively serious medical condition (A19), that hardly means that Romanelli would have lost his “swearing contest” with defendants had he had the assistance of counsel (*Pruitt*, 503 F.3d at 660). Defendants improperly would require Romanelli to prove that his “case was a sure winner but for the absence of counsel” on the basis of a trial record riddled with the sorts of obvious missteps any competent lawyer would have prevented Romanelli from making. *Pruitt*, 503 F.3d at 660. That is not the law in this circuit.

II. The District Court’s Admission Of Prior Crimes Evidence Also Requires Reversal.

Over Romanelli’s objection (SA212), Magistrate Judge Crocker permitted defendants to impeach Romanelli with evidence of his prior conviction for second degree sexual assault without ever balancing the conviction’s probative value against the danger of unfair prejudice, as required by Federal Rule of Evidence 403. SA213-214. That was an abuse of discretion, since sexual crimes of violence bear only minimally on credibility and have a high potential for prejudice. Opening Br. 38-42. Defendants ignore virtually all of the authority offered in our opening brief, and in-

stead pin their hopes on a claim of harmless error. Yet their argument sidesteps one of the fundamental reasons why district courts must guard against the gratuitous introduction of prior crimes evidence. Defendants do not acknowledge the possibility that the jury, inflamed by the odiousness of Romanelli's prior bad acts, might have decided to deny him recovery without regard to the strength of his case.

A. The District Court Erred In Admitting Romanelli's Prior Conviction For Second Degree Sexual Assault.

We demonstrated in our opening brief that the district court did not balance the probative value of Romanelli's conviction against its potential for unfair prejudice. Opening Br. 36-38. Magistrate Judge Crocker seemed to assume that "once [the witness is] convicted" of a felony "and the judgment is entered, then it may be used." SA214. Defendants dodge the point and assert in response that Magistrate Judge Crocker "analyz[ed] each conviction under the framework of *Rule 609*."⁶ Resp. Br. 45 (emphasis added). But defendants do not—and could not—claim that Magistrate Judge Crocker applied *Rule 403*'s balancing test to Romanelli's sexual assault conviction. The court's failure to exercise discretion and "consider[] the factors relevant to that exercise" disentitles its evidentiary determination to the deference it ordinarily would receive. *United States v. Jackson*, 546 F.3d 465, 471 (7th Cir. 2008) (internal quotation marks omitted).

⁶ Fed. R. Evid. 609(a)(2) permits introduction of any crime (*i.e.*, whether a misdemeanor or a felony) if its conviction "required proof or admission of an act of dishonesty or false statement." The court did engage in this analysis and acted as a "gatekeeper" over defendants' attempts to introduce "misdemeanor fraud-type things under 609." SA214-215.

Furthermore, it is clear that whatever the applicable standard of review, Magistrate Judge Crocker's admission of Romanelli's sexual assault conviction could not stand. The opening brief cited (at pp. 38-40) a number of cases and treatises identifying the exact error committed here: the introduction of prior sex offenses, which by their nature tend to "stink up" a witness's character without shedding any meaningful light on the witness's credibility. *See United States v. Neely*, 980 F.2d 1074, 1080 (7th Cir. 1992). It is telling that defendants fail to address a single one of these authorities; it is equally telling that defendants do not cite any case in which a prior violent sex offense was admitted, in circumstances like these, for the purpose of attacking the witness's credibility.

Defendants instead attempt to deflect attention from the district court's error by suggesting that Romanelli brought the problem upon himself. They first assert that the jury already was aware that Romanelli had committed a crime because this was a prisoner's civil rights case and because Romanelli said in his opening statement that he was a convicted criminal. Resp. Br. 46. True—but this cuts *against* defendants' position. As the opening brief explained (at p. 39 n.11), the fact that the jury already knew that Romanelli was "convicted of crimes," and therefore might "be less trustworthy than most witnesses," meant that allowing *additional* evidence of the "exact circumstances of the convictions"—*i.e.*, his plea of no contest to sexual assault—was wholly gratuitous and "add[ed] little of probative value in determining [his] credibility." *Brown v. Jennings*, 1994 WL 75423, at *1 (N.D. Ill. Mar. 8, 1994).

Next, defendants claim that Romanelli “opened the door” to impeachment by prior conviction evidence because he offered his own version of the events giving rise to the conviction. Resp. Br. 47. Although it is true that Romanelli described why, in his view, he had been “charged . . . with secondary sexual assault” (Tr. 1-50), Romanelli did *not* “testify to the fact of his conviction,” as defendants contend (Resp. Br. 47). While testifying in narrative form, Romanelli told the jury only that he “had been *arrested* for sexual assault.” Tr. 1-104 (emphasis added). He “omitted . . . the fact that he [had been] *convicted*.” Resp. Br. 15 (emphasis added). As defendants elsewhere recognize, it was only later, on cross examination, that Romanelli was “forthcoming with this information.” Resp. Br. 40. Thus, *United States v. Robinson*, 8 F.3d 398 (7th Cir. 1993), has no bearing on this case. There, the witness volunteered on direct examination that he had been “convicted as an accessory after the fact to attempted murder.” *Id.* at 407. Moreover, it was not disputed that the witness’s conviction was properly admissible for impeachment purposes. *Id.* at 409. *Robinson* simply limited the permissible *scope* of the prosecutor’s cross examination into the “details of the prior conviction.” *Id.* It did not address the antecedent question of *whether* the conviction should have been admitted in the first instance.⁷

⁷ For similar reasons, *United States v. Saunders*, 359 F.3d 874 (7th Cir. 2004), which holds that a party “may not appeal an evidentiary ruling allowing evidence of a prior conviction if the [*party*] *herself* actually introduced the prior conviction” (*id.* at 877 (emphasis added)), is inapposite. As explained in the text, defendants themselves acknowledge that Romanelli’s direct testimony “omitted . . . the fact that he was convicted” of sexual assault. Resp. Br. 15, 40. Thus, it was *defendants*, not *Romanelli*, who “actually introduced” his prior conviction for sexual assault. *Cf. Saunders*, 359 F.3d at 877. In any event, defendants have not argued waiver on *Saunders* grounds, and therefore waived any possible waiver argument. *See United States v. Leichtnam*, 948 F.2d 370, 375 (7th Cir. 1991) (reaching merits of argument

(cont’d)

In short, Magistrate Judge Crocker’s admission of Romanelli’s prior convictions was an abuse of discretion, and defendants’ attempts to avoid this conclusion lack merit.

B. The District Court’s Error Was Not Harmless.

Defendants maintain that any error was harmless (Resp. Br. 48) because defendants’ “counsel did very little with the information” that Romanelli had been convicted (*id.* at 46) and, in any case, Romanelli’s overall “lack of credibility and credible evidence supporting his claims” (*id.* at 48) meant that he would have lost anyway. These contentions are insubstantial.

In the first place, defendants significantly understate the degree to which they used Romanelli’s prior convictions. Their opening statement invited the jury to view Romanelli as an untrustworthy and irresponsible individual on account of his “criminal record and the various criminal convictions.” Tr. 1-19. Defendants picked up on this theme in their closing statements. Tr. 2-222 to 2-223, 2-226, 2-232. Defendants again urged the jury to consider Romanelli’s “criminal convictions for the purpose of whether [his] testimony [was] truthful.” Tr. 2-226. They went on to deliberately juxtapose Romanelli’s “refusal to take any personal responsibility” for his medical treatment (Tr. 2-230) with what they characterized as his refusal to take responsibility for his sexual assault conviction (Tr. 2-232). Defendants went well beyond making a few passing references to Romanelli’s convictions.

because the opposing party “waived waiver”); accord *United States v. Quiroz*, 22 F.3d 489, 491 (2d Cir. 1994) (per curiam) (collecting cases).

More fundamentally, defendants' argument is based on the unarticulated premise that the *only* reason Romanelli lost was that the jury found him not to be a credible witness on the basis of inconsistencies in his testimony, and that even if the prior convictions had not been admitted, those inconsistencies would have remained. Resp. Br. 39-43. As a threshold matter, this argument fails because many of the asserted inconsistencies evaporate upon closer scrutiny; Romanelli's credibility was far from unsalvageable. *See supra* pp. 12-16 & n.5.

Furthermore, the difficulty with the erroneous introduction of prior crimes evidence is not merely that it predisposes the jury to disbelieve the witness on the ground that he is a criminal (although it surely does that as well). Rather, there is the equally grave danger that the jury, distracted by convictions that have "little, if anything, to do with credibility," will reach "undesirable results" that have nothing to do with the merits of the case actually before it. Advisory Committee Notes to 1990 Amendments to Fed. R. Evid. 609. There was therefore a real risk that the jury "reject[ed] [Romanelli's] claim not because of doubts about his truthfulness, but because of conduct that has nothing to do with the events in question." *Coles v. City of Chicago*, 2005 WL 1785326, at *3 (N.D. Ill. July 22, 2005); Opening Br. 39 & n.11, 41. By raising the specter of Romanelli's prior convictions in order to portray him as an irresponsible criminal, defendants in effect "shift[ed] the focus of the trial from the reasonableness of [their treatment of him] to his criminal past." *See Geitz v. Lindsey*, 893 F.2d 148, 151 (7th Cir. 1990).⁸ Indeed, in this case, defendants ex-

⁸ *Geitz*, an excessive force case, ultimately upheld the admission of "testimony regarding the specific details of the charges pending against [the plaintiff] and of

(cont'd)

pressly cited his sexual assault conviction as an example of Romanelli's purported inability to take responsibility for his actions. Tr. 2-230, 2-232. Lastly, defendants would have this Court ignore the fact that Romanelli was representing himself. Opening Br. 42. Introduction of unduly prejudicial prior crimes evidence had the dual effect of impairing Romanelli's performance as a witness and as a lawyer.

Because the prejudicial impact of Romanelli's prior convictions pervaded the trial from start and finish, there was a significant chance that the district court's erroneous evidentiary decision affected the integrity of the jury's verdict.

other unrelated prior convictions." 893 F.2d at 149. But what distinguishes *Geitz* is that the force a reasonable officer would have used depends on "the facts known to him at the time of the incident in question." *Id.* at 150. Thus, the fact that defendants were "aware of the specific details of [the plaintiff's] offense and of his prior unrelated convictions" was highly material on the issue of defendants' "state of mind at the time of the shooting." *Id.* at 151. Here, of course, the reason Romanelli was in jail has no bearing whatever on the medical treatment he was constitutionally entitled to receive while there. Furthermore, although *Geitz* upheld the limited use of the prior convictions for impeachment purposes without analysis, the Court's decision on this point preceded the 1990 Amendments to Rule 609, which were specifically designed to protect civil litigants from unfair impeachment of their witnesses, by subjecting all prior convictions to the "balancing test of Rule 403." Advisory Committee Notes to 1990 Amendments to Fed. R. Evid. 609.

CONCLUSION

The judgment below should be reversed.

Dated: February 17, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

I hereby certify that:

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 6370 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: February 17, 2010

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, a digital version of the foregoing brief.

Brian J. Wong

Dated: February 17, 2010

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2010, I caused two bound copies of the Reply Brief, as well as one copy of the digital version required by Cir. R. 31(e), to be served by first-class mail on the following:

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