No. 17-1345

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREDRICK WALKER,
Appellant,

v.

TIMOTHY PRICE, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Central District of Illinois, Peoria Division
The Honorable Harold A. Baker
Case No. 1:14-cv-01343-HAB

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Prisoners, like all civil litigants, are entitled to their fair day in court. Sometimes, to ensure he gets this fair opportunity, a prisoner needs a lawyer. This was one of those cases. Fredrick Walker should have had a lawyer because his § 1983 suit came with a host of unique litigation challenges that, taken together, were insurmountable to this incarcerated, mentally impaired plaintiff. He had to convince the district court to reverse its decision to prohibit the calling as a witness the one Pontiac employee who knew of Walker's many ignored requests for medical care. He needed to obtain discovery from defendants who did not produce materials even after the district court ordered them to do so. He needed to find and present expert evidence about his injuries, the code of silence in prisons, and how one could tell that it was at play in his case in Pontiac. Finally, he had to litigate his case by videoconference, which is itself an independent ground for reversal. The district court underestimated the difficulty Walker would face in litigating in his case, and overestimated his capabilities and litigation experience.

The defendants respond with sweeping assurances that the district court did well enough. Properly analyzed, though, the defendants provide only post-hoc suggestions as to how the district court could have decided these issues, not meaningful explanations defending what the district court actually did. The actual facts of this case and actual events in the courtroom show that good enough was not enough; the district court abused its discretion by failing to appoint counsel for Walker and making him litigate by videoconference, and cumulative errors before

and during the trial robbed Walker of his fair day in court. To ensure Walker gets that basic right, this Court should reverse and remand for a new, in-person trial with appointed counsel.

ARGUMENT

I. The district court abused its discretion when it refused to appoint counsel for Walker, and the defendants' post-hoc rationalizations do not salvage the district court's boilerplate reasons for doing so.

A. The district court did not properly evaluate each of Walker's requests for counsel.

The district court unreasonably denied Walker's requests for counsel in a series of rote orders that did not meaningfully consider the complexity of this case and Walker's ability to litigate it in a coherent way. All said, Walker asked for counsel six times. The district court did not assess each request on its own merits, as this Court's case law requires. *See Pruitt v. Mote*, 503 F.3d 647, 656 (7th Cir. 2007) (en banc). Instead, the district court simply repeated the same boilerplate reasons for dismissing Walker's prior requests for counsel.

Everyone agrees on the test the district court should have applied: "whether the difficult 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. Walker's first request was denied because, according to the magistrate judge, his case was simple, he had personal knowledge of the events in question, he had litigation experience, and his complaint was competently written. (A.7.) His case was not simple; it involved questions of credibility and expert

evidence, and a pretrial process made more difficult by the defendants' uncooperativeness during discovery. And it is not the case that Walker's "litigation experience and the quality of his complaint . . . w[ere] the only evidence available at that early stage of the proceedings." Defs.' Br. 21. That ignores the other reasons Walker gave for needing a lawyer: that he was using a jailhouse lawyer, his poor mental health record prevented him from adequately litigating on his own, and he had consistently been denied access his legal materials and necessary supplies. Opening Br. 10.

The rulings on Walker's subsequent requests for counsel fare no better. Each simply repeated the initial reasons for rejecting Walker's request: his personal knowledge of the case, his litigation experience, and his performance in the case so far. Opening Br. 9–12. The defendants try to defend these rejections-on-repeat by blaming Walker: he "repeated the same reasons for recruiting counsel in his later motions." Defs.' Br. 21. Though Walker did restate reasons, he also added new ones. Take his second request for counsel, which added three new reasons to his first request: expert testimony may be needed, his case involved issues of credibility that required counsel's assistance to develop, and his education was elementary and his IQ only 76. Opening Br. 10–11. The magistrate judge's sole response was to order the defendants to submit Walker's Test for Adult Basic Education scores. (A.8.) The defendants never did. Only with those scores could the district court have followed through on its assurance that it would "consider [the scores] in relation to Plaintiff's

motion for appointed counsel." (A.8.) The court never did, and so Walker's low IQ scores were never considered.

In his third request for counsel, Walker added another reason for needing counsel: the defendants' obstructive approach to their discovery duties. The magistrate judge responded with the same boilerplate reasons: Walker had personal knowledge of the events in question, he had litigation experience, and he was doing a good job so far. (A.9.) The defendants' after-the-fact defense of the judge's reasoning is that the judge "ensur[ed] that defendants complied with Walker's discovery requests." Defs.' Br. 21. But compliance never came. The defendants did not answer either of Walker's requests for surveillance footage from the day in question. Opening Br. 8.

In Walker's fourth request for counsel, he provided an affidavit from Marlon Minter, his jailhouse lawyer, in hopes of proving that his "good job so far" was the result of Minter's assistance, not his own litigation skills. The district court, however, simply denied his request "for the reasons stated in [the previous] order." (A.10.) The district court again found comfort in Walker's litigation track-record, listing six federal cases that Walker had previously filed.

Minter was then transferred from Pontiac, and with his departure the quality of Walker's pleadings deteriorated. The reasoning of his sixth motion was sparse and decidedly less competent. (*See* R.103.) Even so, the district court stuck to its stock reasons for refusing to appoint counsel. (A.10.) The court reasoned that Walker's reliance on a jailhouse lawyer up to this point did not mean he was unable

to proceed pro se going forward. (A.9.) The court did not take into account that Walker's jailhouse assistance was unlikely to continue through the pretrial and trial phases. *See, e.g.*, *Henderson v. Ghosh*, 755 F.3d 559, 565 (7th Cir. 2014) (noting that it is inappropriate to consider assistance from a jailhouse lawyer in deciding whether to appoint counsel because of the limited assistance jailhouse lawyers typically provide). By focusing so much on how Walker's complaint had been drafted, the district court evaluated *Minter's* abilities, not Walker's.

The district court's persistent reliance on Walker's litigation history as a reason to deny him counsel is no different from the boilerplate reasons disallowed in *Pruitt.* Instead of assessing Walker's abilities, the district court simply tallied his federal litigation file, as if a person's ability to litigate increases with each PACER entry. For each of Walker's prior cases, the district court never looked deeper than the docket sheet. This does not prove the court engaged in the required inquiry into Walker's ability: "indeed, it flatly implies the court did not." *Pruitt*, 503 F.3d at 660. The fact that a prisoner has "done something poorly ten times does not logically lead to the conclusion that he will perform the task competently on his eleventh try." Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. Ill. U. L.J. 417, 444 (1993).

The defendants' after-the-fact analysis of Walker's litigation history takes things no further. For example, although the defendants agree that *Walker v. Illinois* demonstrates Walker's failure to litigate, Defs.' Br. 22, they fail to mention

that the district court used that case as the only 'new' reason for denying Walker's fifth motion for counsel (as opposed to his prior four), (A14).

Defendants insist that Walker's case filings demonstrated "improve[ment] over time" of his litigation ability. Defendants compare three of Walker's "early cases" that were dismissed shortly after their filing with four others (*Parnell*, *Pfister*, *French* and *Loverant*) that they call "his later cases decided on the merits." Defs.' Br. 22. For starters, the district court never considered what actually happened in these cases. Its inquiry stopped at the caption. But even the defendants' post-hoc assessment does not support the district court's portrayal of Walker as a seasoned litigant. Quite the opposite:

- In *Walker v. Parnell*, 11-cv-00726 (S.D. Ill.), Walker failed to respond when defendants moved for judgment on the pleadings;
- In *Walker v. Pfister*, 14-cv-01341 (C.D. Ill.), Walker's case failed merit review;
- In *Walker v. French*, 14-cv-01432 (C.D. Ill.), Walker failed to exhaust administrative remedies; and
- In *Walker v. Loverant*, 15-cv-01201 (C.D. Ill.), Walker again failed to exhaust internal remedies, leading the court to grant summary judgment against him.

All said, Walker has filed seven cases. He requested counsel in all of them. He had some measure of success only in *Sheahan*, where he was represented by Kirkland & Ellis from the start. Opening Br. 27. And in any event, the defendants' analysis is just that: the defendants'. It is the district court's actions that this Court is reviewing, and there is simply no evidence from the record that the district court itself did anything more than pull up Walker's name on PACER and list his filings.

(12/10/14 Text Order; 10/23/15 Text Order; 2/5/16 Text Order; A.14.) That falls far short of the type of case-specific inquiry that *Pruitt* requires.

B. In light of Walker's limitations, this case was sufficiently complex to require counsel.

The district court said, and the defendants now repeat, that Walker's case was simple because he had personal knowledge of the events. But saying a case is simple does not make it simple. This characterization glosses over the many litigation challenges Walker faced: his difficulty in identifying and producing witnesses, obtaining prison documents, producing expert testimony, and handling the unique difficulties of persuasion by videoconference. Opening Br. 23.

The defendants also downplay the significance of credibility in this case and the district court's wholesale failure to factor it into its decision to deny Walker counsel. This Court has repeatedly emphasized the need for counsel in cases that turn on credibility, as this case did. *See, e.g.*, *Swofford v. Mandrell*, 969 F.2d 547, 552 (7th Cir. 1992) ("During his incarceration Swofford has been unable to investigate crucial facts; his claim is likely to turn on the credibility of witnesses, making counsel important to ensuring that the truth is exposed; and he is unable to present his case adequately without counsel."); *Merritt v. Faulkner*, 697 F.2d 761, 765 (7th Cir. 1983) ("When properly presented the evidence in this case will consist of quite complex and probably contradictory evidence [from opposing parties] . . . Testing their 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."); *see*

also Maclin v. Freake, 650 F.2d 885, 888 (7th Cir. 1981) ("[I]t is more likely that the truth will be exposed where both sides are represented by those trained in the presentation of evidence and in cross examination."). Other circuits agree that pro se litigants in credibility-laden cases have a particular need for counsel. *See, e.g.*, *Manning v. Lockhart*, 623 F.2d 536, 540 (8th Cir. 1980) ("[W]e feel that the appointment of counsel is appropriate here, where there is a question of credibility of witnesses and where the case presents serious allegations of fact which are not facially frivolous."); *Rayes v. Johnson*, 969 F.2d 700, 704 (8th Cir. 1992) ("In essence, the case [of denial of a prisoner's medical care] hinged on determinations of witness credibility, and Rayes' lack of courtroom skills prevented the adequate examination of witnesses."); *McCarthy v. Weinberg*, 753 F.2d 836, 839 (10th Cir. 1985) ("Appointment of counsel is favored if the evidence is to consist of conflicting testimony where it is more likely that the truth will be exposed where both sides are represented by those trained in the preparation of evidence and cross-examination."). Walker needed counsel to guide him through the difficulties of litigating a case so heavily dependent on credibility.

The defendants unsuccessfully attempt to distinguish *Swofford*, *Merritt*, and *Maclin*. *See* Defs.' Br. 19–20. While these cases do point to other issues that weigh in favor or against counsel in each case, they do not suggest that courts may simply ignore the credibility factor, like the district court did here. The Eighth Circuit in both *Rayes* and *Manning* held that credibility was integral to the question. Opening Br. 24. This is not to say that counsel is always needed whenever credibility is

relevant, as the defendants characterize Walker's argument. Defs.' Br. 19–20. Credibility is merely one component of the court's decision—one component, but a necessary one that must be given due consideration. A district court abuses its discretion when it fails to consider a litigant's ability to properly undermine the credibility of opposing witnesses and to present himself to the jury in a favorable light.

Further, counsel would have equipped Walker with the ability to develop and present expert evidence to support his claim and would have defended him during his deposition, key components of pretrial advocacy. There are multiple independent areas where expert testimony would have strengthened Walker's case. It could have shown that his medical records corroborated the account of excessive force and denial of medical care; that the absence of a disciplinary report for Walker's alleged misconduct supports a cover-up; or explained the notorious 'code of silence' that exists nationally and may be pervasive within the Pontiac prison itself. Opening Br. 23, 31. For example, this Court has implied that expert evidence on code of silence is critical to maintaining such a claim. *See Rossi v. City of Chicago*, 790 F.3d 728, 737–38 (7th Cir. 2015). Yet Walker possessed neither the tools nor the capability to adequately develop this evidence. The defendants maintain that Walker did enough to introduce evidence of Pontiac's code of silence through two questions Walker posed to paramedic Jennifer Tinsley. Defs.' Br. 24. But Walker actually asked only, first, whether Tinsley's husband once worked as a guard at Pontiac, and, second, whether Tinsley was testifying "on behalf of yourself or, or because of your job or, or

on behalf of the defendants because you just being truthful about the matter?" (2/7/17 Trial Tr. 77–78.) At best, those questions elicited lay testimony about a witness's personal relationships. It is far from the expert evidence a plaintiff needs to pursue a code-of-silence theory. *See Rossi*, 790 F.3d at 737–38 (upholding trial court's denial of plaintiff's code-of-silence claim because plaintiff failed to adduce expert evidence).

Evidentiary difficulties likewise inhere in cases requiring proof of state of mind and introduction of medical evidence. Walker was confronted with both requirements. This Court has recently reaffirmed its well-established line of precedent recognizing that these serve as particular challenges for pro se litigants. *See, e.g.*, *Goodvine v. Monese*, 622 F. App'x 579, 580–81 (7th Cir. 2015) (collecting cases and remarking that "we have noted on several occasions that lawsuits involving complex medical evidence typically are more difficult for pro se litigants, as are cases involved a defendant's state of mind."); *see also* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1611–12 (2003) (noting that inmate plaintiffs are always bound to be "bad spokesmen for their causes" and "not in a good position to be arguing about a guard's mental culpability"); Eisenberg, *supra*, at 434 ("When litigating medical issues, often expert testimony is needed to prove whether or not the degree of care received by the plaintiff was appropriate, negligent, or amounted to 'deliberate indifference.'"). While Walker could testify to his injuries, he was unable to use medical evidence to explain his injuries' seriousness, their process of healing, or their connection to the defendants' conduct.

Finally, Walker needed a lawyer to defend him during his deposition, to take useful depositions of the defendants, and to ensure that this discovery was properly disclosed before trial and properly used during trial. *See, e.g.*, *Junior v. Anderson*, 724 F.3d 812, 816 (7th Cir. 2013) (describing the type of assistance counsel could have provided in discovery and pretrial fact investigation); *James v. Eli*, 846 F.3d 951, 953 (7th Cir. 2017) (noting that counsel would have been "particularly helpful with discovery" in the plaintiff's case, especially in obtaining medical evidence). *See also Tabron v. Grace*, 6 F.3d 147, 158 (3d Cir. 1993) (counting in favor of appointing counsel that a prisoner-plaintiff's "lack of legal experience clearly put him at a disadvantage countering the defendants' discovery tactics"); Schlanger, *supra*, at 1611 (noting that inmates "cannot conduct effective discovery . . . in part because of lack of legal skills and in part because prisons and judges are extremely nervous about sharing information with prisoners").

Worse, right from the start of this case, the defendants obstructed Walker's ability to pursue his claim by their persistent failure to respond properly to Walker's discovery requests. *See* Opening Br. 9. The defendants are correct that the district court ordered the defendants to comply with these requests, but wrong that doing so "resolved" Walker's discovery difficulties. Defs.' Br. 25. For example, Walker repeatedly tried to compel the defendants to comply with basic discovery obligations, most notably to produce the video surveillance footage from the day of the incident. The defendants never produced it, insisting (at least until French testified otherwise at trial) that it did not exist. (R.54.) An attorney would have

deposed French before trial, uncovered this inconsistency, prevented French's sandbagging testimony at trial, (2/8/17 Trial Tr. 61), or, at a minimum, obtained an adverse-inference instruction. Walker tried on his own to get one, (R.63), but the judge denied the motion with "leave to renew by appointed counsel after the final pretrial conference [was] scheduled," (7/13/16 Text Order). Of course Walker did not have appointed counsel by the time the pretrial conference arrived, so this important issue was left to fall through the cracks. The defendants now say Walker did a good enough job during his closing argument. Defs.' Br. 25. But Walker actually said only two things about the footage: first, if made available, the footage would show him being removed from his cell, (2/7/17 Trial Tr. 13) ("But the tape would have showed them removing me from my cell down to that area where I was assaulted, taking me to cell 107 on 1 Gallery in the North Cell House, placed me in that cell, if they would have tendered that video."), and second, that the defendants admitted Pontiac has surveillance cameras (2/8/17 Trial Tr. 122) ("Now, the—now, the defendants also acknowledge the fact that it's a video camera in the North Cell House, yet these things would have been a preserved incident that you could, could review it for yourself if they was to determine whether or not these things is clearly on the videotape."). Neither came close to imploring the jury to actually draw an adverse inference against the defendants for failing to produce the footage. Though the defendants confidently assure this Court that Walker made this argument "and it did not sway the jury," Defs.' Br. 25, the trial transcript is not so sure: the phrase

"adverse inference" does not appear once in over three hundred pages of testimony and argument.

Walker's argument is not that all failure-to-intervene claims or all deliberate indifference claims require counsel. *See* Defs.' Br. 19. But given the complexities of this case, which were exacerbated by the defendants' intransigence with respect to discovery, Walker needed the guiding hand of counsel to have his fair day in court.

C. Walker was prejudiced by the denial of counsel because there is a strong likelihood that counsel would have made a difference in the outcome of the litigation.

Walker has already made a detailed showing that the "assistance of counsel could have strengthened the preparation and presentation of the case in a manner reasonably likely to alter the outcome." *Pruitt*, 503 F.3d at 660. The opening brief catalogues the difficulties Walker faced at every turn before and during the trial. Counsel would have made all the difference. Walker was forced to litigate this far-from-normal case on his own: to navigate discovery against an uncooperative opponent, to try track down surveillance footage that never came to light, to produce witnesses who saw his beating and ignored his injuries, to obtain expert testimony about his medical records and about the code of silence that so often hides the truth in these cases, and to run a trial through a camera lens. *See* Opening Br. 22–23. And all these challenges took place in a trial where credibility was key, compounding the prejudice Walker suffered by having to litigate alone. *Id.* at 24.

The defendants try to dilute these challenges by singling out one—Walker's inability to develop a theory based on the prison's code of silence—as Walker's "primary argument," and glossing over the rest as mere "secondary arguments." Defs.' Br. 23, 25. These labels distort Walker's actual argument: the district court's denial of counsel meant Walker faced "many challenges and difficulties" which "alone or in concert" prejudiced his chance at a fair trial. Opening Br. 31. Walker's inability to develop a theory around prison guards honoring a code of silence was just one of those challenges. As noted above, to develop that theory effectively, Walker needed counsel to elicit expert testimony. These troubles continued into the trial. *See* Opening Br. 44–46.

The district court's refusal to appoint counsel prejudiced Walker not because, as the defendants say, a lawyer would have done a better job. Defs.' Br. 26. Walker was prejudiced because, without counsel, he could not coherently present his case to the jury. *Pruitt*, 503 F.3d 655. Counsel would not simply have done a better job than Walker; counsel would have done what lay-litigant, mentally impaired, and imprisoned-in-segregation Walker was not competent to do.

II. The district court also abused its discretion in holding Walker's trial by videoconference.

A. The district court disregarded this Court's *Stone* balancing test in favor of a single consideration: the defendants' claim that Walker was too dangerous to transport to court.

Testimony in person is not to be discarded lightly. Fed. R. Civ. P. 43 advisory committee's note to 1996 amendment (stating that the "opportunity to judge the

demeanor of a witness face-to-face is accorded great value in our tradition" because "[t]he very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling"). Although neither the Federal Rules nor this Court's prior cases foreclose the use of video testimony in exceptional cases, videoconferencing technology should only replace live testimony when circumstances compel its use. *See id.*; *Thornton v. Snyder*, 428 F.3d 690, 698 (7th Cir. 2005).

The district court did not properly apply this Court's multifactor framework in deciding to hold Walker's trial by video. *See Stone v. Morris*, 546 F.2d 730, 734–36 (7th Cir. 1976). A prisoner-plaintiff's dangerousness is one factor a court may consider, but it not the sole factor. Here, the district court named just one reason before conclusively deciding that Walker would not be able to try his case in front of the jury in Springfield, but rather from a prison conference room in Pontiac.

Time and time again, the defendants insist that the court "weighed the significance" of Walker's alleged dangerousness against Walker's interest in presenting his case in person. Defs.' Br. 31. But the careful, thoughtful balancing that this Court praised in *Perotti* was simply lacking in the district court's order. (A2–A4); *see Perotti v. Quinones*, 790 F.3d 712, 725 (7th Cir. 2015).

Rather, the district court flatly stated only that Walker was dangerous, that his case was simple, and that the courtroom had a large video screen. (A4.) The defendants may attempt to do the court's balancing for it, after the fact, but this does not transform the court's cursory recitation of three statements into the type of careful balancing required under *Perotti*.

The defendants point to *Thornton* as a case in which a "relatively straightforward" conditions-of-confinement claim could acceptably be tried over video. Defs.' Br. 28 (quoting *Thornton*, 428 F.2d at 699). But *Thornton* was not simply a straightforward case: it was one in which the issue at trial lacked gravity. Thornton's claim was that he had been denied yard privileges. *Id.* at 699. Walker's claim was that he had been beaten and denied medical care. Remembering that the *Stone* test is, at its core, a balancing of the difficulty of bringing a prisoner to court against the harm to the prisoner from not being able to present his case in person, it strains credulity to equate the harm to Thornton with the harm to Walker.

Additionally, Thornton called twelve witnesses, including himself, to present his case—attempting to build a wall of evidence to convince the jury. Walker's trial strategy was different: it rested, more than anything, on his ability to convince a jury, face to face. In order to convince the jury, Walker needed not only to be seen but to *see* the jury, to tell which aspects of his story were convincing to jurors. With miles separating him from each juror, Walker's perception, as well as persuasion, was muted.

Witness credibility is not a factor that would foreclose the possibility of video trial in all cases, as the defendants incorrectly characterize Walker's argument. Defs.' Br. 29. But at the same time, this Court has admonished district courts to consider "how important credibility is to the case, and how remote appearance may . . . limit the factfinder's ability to evaluate the inmate's credibility as a witness. . . ." *Perotti*, 790 F.3d at 724–25. Here, the district court's error was not

that it improperly weighed the credibility factor; it was that it discarded that factor entirely.

Neither can Judge Baker's statement to the jury that he was "not totally on unfamiliar grounds" make up for his lack of a trial run before the order of video trial. (2/7/17 Trial Tr. 5.) In *Perotti*, this Court praised the trial judge for her careful attention to the quiddities of the particular case before her. 790 F.3d at 725. Whether Perotti's trial would be by video was thus decided by a judge who had seen how that particular plaintiff looked and sounded through that particular video technology in that particular courtroom. Compare that to the decision to hold Walker's trial by video: made without reference to Walker's communicative skills or to the video technology or courtroom that would be used when the case finally went to trial in Springfield. The fact-intensive, *prisoner-specific* nature of the *Stone* inquiry is only logical: given the extreme variety of intelligibility and communication skills among the prison population, it stands to reason that the same technology may not be adequate for every prisoner.

At the core of the defendants' argument is the belief that *any* reasoning is sufficient reasoning to satisfy an abuse of discretion standard. But a district court that makes a cursory gesture in the direction of a legal standard, then fails to engage with the facts of the case before it, has failed to exercise any discretion at all.

B. Walker need not show prejudice in order to garner a reversal for the district court's abuse of discretion, but he was prejudiced nonetheless.

This Court has never categorically held that a plaintiff must also show prejudice after establishing a district court's abuse of discretion. The case upon which Defendants rely is wholly distinguishable. Defs.' Br. 26 (citing *Smego v. Payne*, 854 F.3d 387, 395 (7th Cir. 2017)). First, *Smego* involved a court order removing a civilly committed defendant from the courtroom at a certain stage of the proceedings, not the question of holding an entire trial from afar. 854 F.3d at 389. What is more, *Smego* involved a removal of the defendant after the jury had been dismissed from the courtroom to deliberate. *Id.* at 395. Thus, literally *no prejudice* to the defendant could have accrued to him in the eyes of the jury by removing him; the jury was not even aware that it had happened. The logical impossibility of prejudice in *Smego* cannot be transformed here into an additional burden on pro se plaintiffs who argue on appeal that a district court erred in forcing them to hold their entire trial by video.

Even were such a bar to be raised in front of Walker's appeal, however, he would clear it. The defendants describe the district court's admonishments of witnesses to speak up as mere "minor interruptions that were quickly resolved," Defs.' Br. 30, but a look to the trial transcript shows that these were not just minor interruptions. At times, the video technology allowed objections to go unnoticed by the court without the court reporter stepping in:

> MS. BAUTISTA: He wrote an affidavit for you, and you signed it in this case; is that right?
> WITNESS MINTER: You want—you say he wrote an affidavit for me?

BAUTISTA: Yes.
MINTER: No. I—
WALKER: I object. Object.
COURT REPORTER: He objected.
THE COURT: Who objected?
COURT REPORTER: The plaintiff objected to the defense's question.
THE COURT: Overruled.

(2/7/17 Trial Tr. 42.) Eventually, the inability to hear witnesses became a point of humor between the judge and the court reporter:

WALKER: Were you working in North Cell House, Segregation Unit?
WITNESS SCHMELTZ: Yes.
WALKER: What—
COURT REPORTER: I didn't understand that.
THE COURT: What gallery were you assigned to that day?
COURT REPORTER: Sorry. Wanna trade?
THE COURT: Well, that would be a first that I understood what you didn't. Go ahead. You may answer the question. What gallery were you assigned to?
WITNESS SCHMELTZ: [Inaudible response.]

(2/7/17 Trial Tr. 84–85.)

These technical difficulties, though they were recurring and prolonged, were not the only evidence that Walker was prejudiced by the court's order of video trial. When Walker accused one defendant of coaching a witness, for instance, the district court was unable to determine whether or not he was, instead simply reminding him that "he shouldn't be doing that, if he is." (2/7/17 Trial Tr. 104–05.)

Noting that they, too, appeared by video, the defendants insist that "any special challenges presented by trial a case via videoconference were shared by everyone." Defs.' Br. 30. But speaking to a jury via prison videoconference does not carry the same implications for a prison employee that it does for a prisoner. And, more importantly, if the defendants and Walker shared these "special challenges,"

they did not share the resources with which to combat them. The defendants were prepared for trial by attorneys who understood the added challenges of video testimony; Walker faced these challenges alone.

III. Plain error analysis is available, but more importantly, cumulative error was pervasive and overpowering.

In opening and closing statements, defense counsel improperly used Walker's confinement at Pontiac to portray him as incorrigibly dangerous, unworthy of belief, and undeserving of a remedy. The defendants charitably describe this as defense counsel merely "commenting on Walker's confinement in a maximum security prison." Defs.' Br. 31. The way defense counsel actually described Pontiac (and, by obvious implication, Walker) was far more prejudicial: Pontiac houses "the worst of the worst in the State of Illinois." (A.39.) This and similar statements made in defense counsel's opening and closing statements warrant plain error review and reversal. In addition, many other errors before and during the trial coalesced to deprive Walker of his fair day in court.

The defendants argue that plain error review is not available in this case, citing cases that ostensibly foreclose plain error review for errors that occur during closing arguments in civil cases. *See, e.g.*, *Deppe v. Tripp*, 863 F.2d 1356, 1364 (7th Cir. 1988). But none of the cases the defendants cite involve pro se litigants. That matters because this Court's rationale for limiting plain error review is based, in large part, on civil litigants having other remedies besides plain error review—remedies that are not available to pro se litigants. In *Deppe*, this Court explained

that a new trial is "not the only avenue available to prevent perceived injustice" if errors are committed but not preserved for appellate review. 863 F.2d at 1360. A represented litigant has recourse through "an independent action against the trial attorney whose omission(s) rendered the issue(s) unappealable." *Id.* After all, "a party who chooses his counsel freely should be bound by his counsel's actions." *Id.* (citing *Geiger v. Allen*, 850 F.2d 330, 334 (7th Cir. 1988)). And so if a represented litigant's attorney fails to object to improper remarks during closing argument, plain-error review is "unneeded" because "sufficient means exist to remedy any prejudice." *Id.* at 1364; *see also SEC v. Yang*, 795 F.3d 674, 679 (7th Cir. 2015) (explaining that the absence of plain error review in the Federal Rules of Civil Procedure "flows from the fact that a civil litigant 'should be bound by his counsel's actions'" and can always sue his counsel for malpractice) (quoting *Deppe*, 863 F.2d at 1360). Things are different when a lay litigant is forced to go it alone. For a lay litigant, there is no attorney's conduct that binds him, and no attorney to sue for malpractice. An unrepresented litigant like Walker has no other means to remedy unpreserved errors except through plain error review. And even if, as the defendants suggest, plain error review is foreclosed for pro se litigants, that only underscores why Walker should have had counsel. Without the possibility of plain error review on appeal, Walker especially needed counsel to either object to defense counsel's prejudicial remarks, or preserve the issue through a Rule 50 motion.

If available, this is one of those exceptional cases where reversal and remand is warranted under the plain error doctrine. The defendants try to downplay

defense counsel's inflammatory remarks by pointing out that the jury knew Walker was in prison. Defs.' Br. 32. But there is a difference between the jury knowing Walker is in prison and the jury being told he is imprisoned with "the worst of the worst in the State of Illinois" in "the place where offenders go when they cannot behave themselves in any other institution in the entire State of Illinois." (A.39.) And defense counsel's remarks were not "brief and isolated," as the defendants portray. Defs.' Br. 32. From the trial's start, defense counsel implied that Walker was one of those inmates who "continue[s] to misbehave, even when in segregation at other correctional institutions," and that Walker was housed in that part of Pontiac reserved for "inmates that continue to engage in disciplinary infractions even when at Pontiac Correctional Center." (A.35.) Defense counsel even pointed out that the door on Walker's cell was different because that section of the prison is "used for inmates that are continuing to engage in disciplinary infractions." (A.36.) Far from "brief and isolated," Walker's propensity for misbehavior was a major theme of defense counsel's opening statement. Alone, these illegitimate and prejudicial attempts to portray Walker as dangerous and unworthy of belief warrant reversal for plain error.

The errors in Walker's trial were not limited to what was said during opening and closing arguments. Many more "coalesced to render [his] trial fundamentally unfair." Opening Br. 43. The defendants separate out these cumulative errors and analyze each on its own, as if none had any cumulative effect with any other. Defs.' Br. 32–33. Assessing each error in a vacuum disregards the cumulative nature of

this type of review. *See Jordan v. Binns*, 712 F.3d 1123, 1137 (7th Cir. 2013) ("Where there are several errors, each of which is harmless in its own right, a new trial may still be granted if the cumulative effect of these otherwise harmless errors deprives a litigant of a fair trial").

As already discussed, errors began accumulating when the district court abused its discretion and refused to appoint counsel for Walker. Without counsel, Walker did not effectively enforce the defendants' discovery obligations. Outcome-determinative surveillance footage never surfaced, and Walker was unable to secure the benefit of an adverse inference for the defendants' failure to produce that footage. Walker was then forced to litigate his case by videoconference, which brought a host of difficulties that a lawyer could have ameliorated. The trial was beset with interruptions because the jury could not hear or understand Walker—difficulties that the defendants and their lawyers did not encounter.

In response, the defendants deal only—and separately—with four errors: disparaging remarks by courtroom staff, threats made against Marlon Minter, John Hudson's handcuffs not being removed, and Glendal French mouthing answers to Brian Schmeltz during Schmeltz's testimony. Defs.' Br. 32–33. Even if the jury did not hear what the courtroom staff said, their disparaging comments show that the courtroom was, at least from Walker's perspective, a far cry from an environment that "preserve[s] the appearance of fairness and the confidence of inmates in the decisionmaking process." *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 34 (1979).

The trial's appearance of unfairness was only worsened by threats made to Minter. The defendants try to push the threats aside, arguing they were harmless because they came after Minter's testimony. Defs.' Br. 32–33. While Minter said he was threatened after he testified on the first day of the trial, he returned to testify the next day. (2/8/17 Trial Tr. 85–86.) Minter then told the judge of the "threat [he] received yesterday from a prison official." (2/8/17 Trial Tr. 85.) The defendants do not point to anything in the record to show these threats were dealt with, despite the district court's assurance that they would be. (2/8/17 Trial Tr. 86.)

The defendants' no-independent-harm-no-cumulative-foul approach continues in its response to Hudson being handcuffed and Schmeltz being coached. Defs.' Br. 33. Though the jury knew Hudson was a prisoner, Walker understandably wanted to downplay it as much as possible. That was why he requested Hudson be given non-prison garb. (2/7/17 Trial Tr. 144.) Bearing in mind defense counsel had already told the jury that Pontiac prisoners were "the worst of the worst," (A.39), the jury hearing about Hudson's handcuffs further eroded the fairness of the trial. To make Walker's uphill battle even steeper, he noticed French whispering answers to Schmeltz. He objected, but the district court did not "promptly resolve[]" the issue, as the defendants suggest. Defs.' Br. 33. The judge simply said he could not see what was happening, asked Schmeltz if he was conversing with anyone, and moved on when Schmeltz said he wasn't. (2/8/17 Trial Tr. 104–05.) The sum total of the district court's "admonish[ment]," Defs.' Br. 33, was this: "I, I can't see that or hear that, so I don't know what's going on; but [French] shouldn't be doing that, if he is."

(2/8/17 Trial Tr. 105.) The district court's "prompt[] resol[ution]," Defs.' Br. 33, of Walker's complaint was to believe the defendants over Walker—itself a signal to the jury which side was more worthy of belief.

Forced to litigate without a lawyer and through a camera lens, Walker faced a barrage of difficulties that hamstrung his case. The cumulative effect of these errors deprived him of his fair day in court and now warrants reversal.

CONCLUSION

This Court should vacate and reverse the district court's judgment and remand with instructions for a new, in-person trial with appointed counsel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

1. This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,627 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Appellant, Fredrick Walker, hereby certify that I electronically field this brief with the clerk of the Seventh Circuit Court of Appeals on April 25, 2018, which will send notice of the filing to counsel of record in the case.

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