No. 17-1345

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREDRICK WALKER,	)	Appeal from the United States District
	)	Court for the Central District of Illinois,
Plaintiff-Appellant,	)	Peoria Division
	)	
v.	)	
	)	No. 1:14-cv-01343-HAB
TIMOTHY PRICE, GLENDAL	)	
FRENCH, and JEFFREY STAHL,	)	The Honorable
	)	HAROLD A. BAKER,
Defendants-Appellees.	)	Judge Presiding.

BRIEF OF DEFENDANTS-APPELLEES

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JURISDICTIONAL STATEMENT

The jurisdictional statement of Plaintiff-Appellant Fredrick Walker is not complete and correct. Defendants-Appellees Officer Timothy Price, Lieutenant Glendal French, and Sergeant Jeffrey Stahl submit this jurisdictional statement as required by Circuit Rule 28(b).

Walker, an inmate in the custody of the Illinois Department of Corrections, filed a complaint in the district court pursuant to 42 U.S.C. § 1983 alleging that defendants violated his rights under the Eighth Amendment to the United States Constitution. R25–56.[*] The district court had federal question jurisdiction over those federal claims under 28 U.S.C. § 1331.

The district court referred the action to a magistrate judge for certain pretrial proceedings. *See, e.g.,* R4; 28 U.S.C. § 636(b). On February 8, 2017, the jury found in favor of defendants on all of Walker's claims. R593–97. On February 9, 2017, the district court entered a separate judgment under Federal Rule of Civil Procedure 58. Doc. 144 (A1). Walker did not file a motion for a new trial or to alter or amend the judgment. On February 16, 2017, Walker filed a notice of appeal by mail (Doc. 146) that was timely under 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A). *See Saxon v. Lashbrook*, 873 F.3d 982, 986–87 (7th Cir. 2017) ("relevant date for a prisoner's notice of appeal is the date the notice is deposited into the

[*] Citations to the consecutively paginated record transmitted by the district court clerk follow the form of (R__), while citations to other documents refer to the district court docketing number (Doc. __ at __). Citations to the trial transcripts refer to the transcript for the day being cited (Tr. 1 at ___; Tr. 2 at ___) because the transcripts are not consecutively paginated across both days.

prisoner mail system"). This court has jurisdiction over this appeal under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court acted within its discretion when it denied Walker's requests to recruit counsel and whether Walker demonstrated that he was prejudiced by the court's denials.

2. Whether the district court acted within its discretion when it decided to conduct the trial via videoconference.

3. Whether Walker was not deprived of a fair trial by plain or cumulative error.

STATEMENT OF THE CASE

Walker, an inmate at Pontiac Correctional Center, pursued a number of Eighth Amendment claims against defendants, who were corrections officers at that facility. *See* R42–49. The case was tried before a jury. *See* Tr. 1, 2. Walker asserted that defendants assaulted him while they moved him to a new cell after he had complained that Officer Price refused to deliver him breakfast and then ignored his requests for medical treatment. *See* Tr. 1 at 115–27 (A21–33). Defendants maintained that Walker was moved because he was kicking his cell door and that he was relocated without incident. *See* Tr. 2 at 19–21, 45. The jury found in favor of defendants on all of Walker's claims (R593–97) and Walker appealed (Doc. 146).

The Complaint

Walker filed a *pro se* complaint claiming that defendants violated his Eighth Amendment rights when they moved him from gallery 5 to gallery 1 of the north cell house at Pontiac on August 21, 2013. R42–49. Specifically, he asserted that defendants used excessive force and failed to intervene to stop that use of force when they relocated him and that they were deliberately indifferent to his medical needs during and after the move. *Id.*

In support of these claims, Walker alleged the following. Officer Price refused to provide breakfast to him and John Hudson, another inmate in gallery 5, after he had dropped several food trays on the ground. R42–43. Walker and Hudson complained to Lieutenant French and Sergeant Stahl about Officer Price. R43–44. Hudson was then taken to gallery 1 and, about 40 minutes later, Lieutenant French handcuffed Walker and told Officer Price to collect his belongings because he was

being placed on "strip-out" status for 72 hours. R44. While on that status, inmates' belongings remain confiscated and must be earned back through good behavior. R47.

Lieutenant French and Sergeant Stahl took Walker to gallery 1 and encountered Jennifer Tinsley, a medical technician, on the way. R44–46. Lieutenant French told Tinsley that he was going to show Walker who was in charge and told Sergeant Stahl that they should put leg shackles on him. R44–45. Lieutenant French and Sergeant Stahl threw Walker to the ground, and Lieutenant French pressed down on Walker's head and neck with his knee while Sergeant Stahl bent Walker's hands and tried to remove his shoes. R45. Officer Brian Schmeltz arrived while Walker was on the ground and helped Sergeant Stahl remove Walker's shoes and attach the leg shackles. *Id.* Sergeant Stahl then picked Walker up off the ground and ordered him to proceed to gallery 1. R45–46. Walker cut his right foot on an unknown object on the way to his cell and asked Lieutenant French for medical treatment after he was moved. R46. Lieutenant French refused to obtain treatment, and Walker's subsequent medical requests went unanswered. R46–47.

The Motions to Recruit Counsel

Walker filed multiple requests during pretrial proceedings for the district court to recruit counsel for him. Walker filed his first motion along with his complaint, arguing that he had tried to obtain counsel and was unable to represent himself because he was limited by various mental health issues and believed that he would not be able to obtain legal materials from the prison law library. R61–64. The magistrate judge denied the motion, finding that Walker appeared competent to proceed

pro se. R4 (A7). The judge explained that Walker had some litigation experience, and that his complaint adequately set forth the facts underlying his claims and demonstrated knowledge of the applicable law and legal procedure. *Id.* In addition, the judge stated that Walker's claims were relatively simple, pointing out that he had personal knowledge of the facts and should be able to obtain relevant evidence during discovery. *Id.*

Walker filed two more motions for counsel after defendants filed their answer and affirmative defenses. Doc. 24; R119–21. He argued in the first motion that his claims were too complex for him to litigate, he had limited access to the law library, and he relied on jailhouse lawyers to communicate with the court. Doc. 24 at 1–6. Walker attached a neuropsychological evaluation from 2006 that indicated he had an IQ of 76. *Id.* at 13–16. Walker argued in his second motion that he needed counsel because defendants were not responding to his discovery requests. R119–20.

The magistrate judge denied both motions with leave to renew. R6–7 (A9). The judge acknowledged that Walker had intellectual limitations but found that he appeared capable of representing himself because he had pursued three other cases in federal court, and his filings in this case were well written and demonstrated knowledge of the relevant law and facts. R7 (A9). The judge also concluded that Walker's use of a jailhouse lawyer did not establish that he was unable to proceed without one. *Id.* As to discovery, the judge directed defendants to respond to Walker's claim that they were not complying with his requests (*id.*), and the district court

later ordered them to respond to those requests while extending the discovery deadline (R7).

Walker moved for reconsideration, arguing that he needed counsel because his cognitive impairments rendered him incapable of proceeding *pro se* and that he was relying on another inmate to help him in this case. R174–78. The district court denied the motion for the reasons given by the magistrate judge and pointed out that Walker had some federal litigation experience because he had pursued six lawsuits in federal court. R8 (A10).

Walker argued in his next motion that his claims were complex and that he lacked the mental capability to adequately investigate them. R194–98. The court denied the motion, finding that Walker's claims were relatively straightforward and that he could testify from personal knowledge about the alleged use of excessive force and the extent of his injuries. R250–51 (A13–14). The court also found that Walker's discovery motions demonstrated that he was capable of identifying and obtaining relevant evidence and concluded that, although there was evidence that Walker is borderline mentally challenged, his litigation performance in this case and others suggested that counsel was not required at that time. *Id.* But the court stated that it would try to recruit him counsel for the upcoming trial, cautioning that it might be challenging because recruiting pro bono counsel was becoming increasingly difficult. R251.

Shortly before the first pretrial conference, Walker obtained an attorney to represent him pro bono (R12 (A18)), but counsel later withdrew his representation due to irreconcilable differences about how to handle the case (R14 (A19)).

The district court denied Walker's final motion to recruit counsel (Doc. 103) about two months before the case was set to go to trial. R19 (A20). It found that Walker appeared competent to proceed *pro se* based on its observations of his performance when he participated at pretrial status hearings by videoconference and cited his extensive litigation experience and the quality of his pleadings as evidence of his competency. *Id.* The court also reiterated that Walker's claims were relatively simple and that he had personal knowledge of many of the facts underlying his claims. *Id.*

The Decision to Conduct the Trial by Videoconference

Defendants asked the district court to conduct the trial via videoconference pursuant to Federal Rule of Civil Procedure 43 because transporting Walker to the courthouse would be costly and potentially dangerous. R407–20. They explained that Walker was classified as a high escape risk with a high aggression level and was assigned to a maximum level facility. R407–09, R411–14, R421. Defendants presented evidence of Walker's extensive prison disciplinary history, which disclosed that he had been issued 56 tickets and found guilty of 110 offenses between April 29, 2009, and May 8, 2016, and pointed out that he was scheduled to remain in disciplinary segregation until March 2019 and in the lowest status for privileges until 2022.

R408, R415–20. Walker objected, arguing that conducting the trial via videoconference would impede his access to the courts. R422–25.

The court granted defendants' request, concluding that "compelling security reasons" warranted conducting the trial via videoconference. R432 (A4). The court found that the State's interest in not transporting Walker was supported by evidence of his classifications as a high escape risk with a high level of aggression and his extensive disciplinary record. R431–32 (A3-4). It also explained that Walker's claims were relatively simple and that conducting the trial by videoconference would not impede his ability to try his case because the courtroom had a large video screen and the jury would likely be able to see him better than if he was there in person. R432 (A4).

The Trial

Walker presented the following in support of his claims at trial. He testified that Lieutenant French and Sergeant Stahl moved him to gallery 1 after he complained about Officer Price and assaulted him in front of Tinsley on the way before ignoring his requests for medical treatment. Tr. 1 at 115–27 (A21–33). Walker also testified that defendants would have prepared a disciplinary ticket or an incident report if he had been kicking his cell door. *Id.* at 126 (A32). Hudson testified that he was moved to gallery 1 earlier that day and observed injuries on Walker's face when Walker was escorted to his cell. *Id.* at 148, 153–54. Marlon Minter testified that he was housed in gallery 1 that day and that Walker's face was swollen when he arrived at his cell. *Id.* at 22–24. Also, Minter testified that Walker repeatedly asked for

medical treatment and that Mark Spencer, who worked in the law library, submitted medical requests on Walker's behalf. *Id.* at 26–27.

Lieutenant French and Sergeant Stahl testified that Walker was relocated to gallery 1 because he had been kicking his cell door, which was a disciplinary infraction, and that he was moved without incident. Tr. 2 at 19–21, 45. They explained that an officer could decide that issuing a disciplinary ticket to an inmate for kicking his cell door was not worthwhile because it was a minor infraction that occurred frequently and could often be resolved by moving the inmate. *Id.* at 35, 45. In addition, Tinsley, Officer Price, and Officer Schmeltz testified that they did not recall observing Walker being moved or assaulted on the day in question. Tr. 1 at 72, 86; Tr. 2 at 68.

SUMMARY OF ARGUMENT

The decisions whether to recruit counsel to represent an indigent plaintiff and whether to conduct a trial via videoconference are reserved to the discretion of the district court. This court should affirm the judgment because the district court did not abuse that discretion when it denied Walker's requests for counsel or decided that all parties would participate in the trial by video.

The district court applied the correct legal standard and based its decisions on the facts in the record each time that it denied Walker's requests to recruit counsel. The court weighed the factual and legal difficulties of litigating this case against Walker's individual capabilities and reasonably determined that he could proceed *pro se* in light of the relative simplicity of his claims and the evidence of his competence to litigate them. Walker's case was not unusually difficult to litigate. He had personal knowledge of the facts underlying his claims and the governing law was settled and straightforward. In addition, the court properly relied on multiple sources of information, including his performance by videoconference at pretrial hearings, to conclude that Walker could capably litigate his claims. And even if there was an abuse of discretion, Walker has not demonstrated that he was prejudiced by the court's decisions.

The district court reasonably exercised its discretion to conduct the trial via videoconference as well. Its finding that compelling security concerns counseled against transporting Walker to the courthouse was supported by evidence that he was an escape risk and had compiled an extensive prison disciplinary history. More-

over, all parties participated via videoconference and the court safeguarded Walker's right to present his case by ensuring that he could do everything that he could have done had he tried it in person. Walker received a fair trial, and his claims that this court should reverse pursuant to the plain-error and cumulative-error doctrines are misplaced and fall short of meeting those exacting standards.

ARGUMENT

I. The district court acted within its discretion when it denied Walker's requests to recruit counsel, and Walker has not demonstrated that he was prejudiced by the court's decisions.

An indigent civil litigant does not have a constitutional or statutory right to court-appointed counsel but may ask the court to exercise its discretion under 28 U.S.C. § 1915(e)(1) to recruit an attorney to represent him. *Pruitt v. Mote*, 503 F.3d 647, 649 (7th Cir. 2007) (en banc). This court has recognized that deciding whether to recruit counsel is difficult because almost everyone would benefit from having an attorney but "there are too many indigent litigants and too few lawyers willing and able to volunteer for those services." *Olson v. Morgan*, 750 F.3d 708, 711 (7th Cir. 2014). The decision not to recruit counsel is thus reviewed for an abuse of discretion and will be reversed only if it prejudiced the plaintiff. *Dewitt v. Corizon, Inc.*, 760 F.3d 654, 657 (7th Cir. 2014). The question on appeal "is not whether [this court] would have recruited a volunteer lawyer in the circumstances, but whether the district court applied the correct legal standard and reached a reasonable decision based on facts supported by the record." *Pruitt*, 503 F.3d at 658. Here, this court should affirm because the district court applied the correct legal standard and reasonably decided not to recruit counsel based on the facts before it and because Walker has not demonstrated that he was prejudiced by those decisions.

A. The district court did not abuse its discretion when it decided not to recruit counsel for Walker.

The district court must ask two questions when deciding whether to recruit counsel: "(1) has the indigent plaintiff made a reasonable attempt to obtain counsel

or been effectively precluded from doing so; and if so, (2) given the difficulty of the case, does the plaintiff appear competent to litigate it himself?" *Id.* at 654. Here, the court based its decisions not to recruit counsel on its answer to the second question and found that Walker appeared competent to litigate his claims *pro se*. *See* R4, R6–8, R19, R250–51 (A7, A9–10, A13–14, A20).

A court ascertains a plaintiff's competency to litigate his claims by weighing the difficulty of the case at hand against his individual capabilities. *Pruitt*, 503 F.3d at 655. The relevant 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." *Id.* When evaluating the case's difficulty, this court has considered whether the facts are so complicated that a *pro se* litigant could not advance them, *Gruenberg v. Gempeler*, 697 F.3d 573, 581 (7th Cir. 2012), and whether the law governing the claims is relatively simple, *Olson*, 750 F.3d at 711. That analysis must account for all the tasks that normally attend litigation. *Pruiit*, 503 F.3d at 655. To assess the plaintiff's capabilities, a court may look to a variety of factors including his communication skills, education, litigation experience, and intellectual capacity, in addition to his performance up to that point in the litigation. *Santiago v. Walls*, 599 F.3d 749, 762 (7th Cir. 2010). The decision about a plaintiff's capacity to handle his own case is ultimately a practical one based on relevant evidence available at that time. *Pruitt*, 503 F.3d at 655–56.

1. The district court applied the correct legal standard and reasonably found that Walker was capable of proceeding *pro se* based on the evidence before it.

Walker made several requests for the district court to recruit counsel for him. *See* R61–64, R119–21, R174–78, R194–98; Docs. 24, 103. Each time, the court considered both the difficulty of the case and the evidence of Walker's individual capacity to litigate it and reasonably concluded that Walker was competent to proceed *pro se*.

Walker filed his first motion the same day that he filed his complaint and argued that the court should recruit counsel because he had been diagnosed with numerous mental health issues and believed that prison staff would interfere with his ability to litigate his claims. *See* R61–64. The magistrate judge denied the motion, concluding that Walker appeared competent to proceed *pro se* in light of the relative simplicity of his claims. R4 (A7). The judge found that the case was not difficult because Walker had personal knowledge of the underlying facts and could obtain other evidence during discovery. *Id.* The judge also found that Walker was capable of litigating the case because he had some litigation experience and he adequately stated the relevant facts and demonstrated some knowledge of the applicable law in his complaint. *Id.*

Walker's second and third motions were filed after defendants had answered the complaint. Doc. 24; R119–21. He argued that he needed counsel because he had an IQ of 76, his claims presented complex legal and factual issues, he had limited access to the law library, he was relying on a jailhouse lawyer, and defendants were not responding to his discovery requests. *Id.* The magistrate judge again balanced

the difficulty of the case against Walker's capacity to litigate his claims and denied the motions with leave to renew. R6–7 (A9). The judge explained that although there was evidence that Walker had cognitive defects, he had been able to litigate three cases in federal court, his filings in this case were relatively well written, and he had personal knowledge of the facts giving rise to his claims. R7 (A9). As to the discovery requests, the judge ordered defendants to respond to that claim. *Id.*

Walker then moved for reconsideration, asking the court to recruit counsel for the same reasons set forth in his earlier motions. R174–78. The district court denied that request for the reasons previously given by the magistrate judge, while identifying additional cases that Walker had litigated in federal court. R8 (A10).

Walker later filed two more motions to recruit counsel, arguing that his claims were complex and that he was intellectually incapable of proceeding *pro se*. R194–98; Doc. 103. The court denied both motions after once again considering the difficulty of the case and Walker's capacity to litigate it. R19, R250–51 (A13–14, A20). The court explained that his claims were relatively straightforward, he could personally testify about the incident and his injuries, and his discovery motions appeared to be effective. *Id.* Although Walker presented evidence of his diminished intellectual capacity, the court found that his litigation experience in this case and others suggested that he could proceed *pro se*. R19, R251 (A14, A20). The court added that its observations of Walker when he participated in videoconference status hearings confirmed that he did not require recruited counsel. R19 (A20).

All of this demonstrates that the district court did not abuse its discretion by denying Walker's requests to recruit counsel. The court correctly considered both the difficulty of the case and Walker's individual capacity to litigate it and reasonably found that Walker was capable of proceeding *pro se* based on the evidence that was before it at the time.

2. Walker's case was not unusually difficult and the court's competency finding was based on relevant evidence.

Walker nevertheless argues that the district court abused its discretion because it underestimated the difficulty of his case and overestimated his capabilities. AT Br. 23–30. He claims that this case was especially difficult because it presented unique litigation challenges and complex issues, *id.* at 23–26, and that the court relied too much on his litigation experience and too little on his intellectual limitations when it assessed his capacity to litigate his case, *id.* at 26–30. That is mistaken on both counts.

First, Walker's case was not unusually difficult to litigate. To the contrary, the court correctly found that Walker had personal knowledge of the facts giving rise to his claims and that the governing law was straightforward. R4, R6–8, R19, R250–51 (A7, A9–10, A13–14, A20). Walker's claims that defendants assaulted him and ignored his requests for medical treatment were factually simple. Walker was fully capable of presenting his version of what occurred to the jury. In addition, his claims rested on routine legal principles of excessive force, failure to intervene, and deliberate indifference.

Although Walker argues that his case presented unique discovery challenges because it required him to find witnesses and obtain prison documents, AT Br. 23, those are basic litigation tasks faced by every civil litigant. This court has recognized that discovery burdens that all inmates share cannot be sufficient because otherwise recruitment would be required in nearly every case. *Bracey v. Grondin*, 712 F.3d 1012, 1018 (7th Cir. 2013). Walker's case was not rendered especially difficult by the need to find witnesses and obtain prison documents because those litigation burdens are faced by almost every inmate.

To the extent that Walker argues that those tasks were more difficult in this case because defendants did not respond to his discovery requests, AT Br. 25–26, the magistrate judge's resolution of that issue illustrates that counsel was unnecessary. Walker asserted in a motion to compel and a motion to recruit counsel that defendants had not complied with his discovery requests. R110–21. The judge denied the motion to recruit counsel with leave to renew but directed defendants to respond to the motion to compel. R6–7 (A9). Defendants explained that their prior attorney, who was no longer assigned to the case, had failed to comply with Walker's discovery requests and sought 30 days to respond to them. R158–60. The judge granted the motion to compel and extended the discovery deadline. R7. Walker's successful response to defendants' failure to comply with his discovery requests demonstrates that he was capable of conducting discovery without counsel.

Walker adds that this case was factually complex because it called for expert testimony and an inquiry into each defendant's state of mind. AT Br. 23, 25. But

while some failure-to-intervene or deliberate-indifference cases involve complex medical issues and require expert testimony, this is not one of them. To begin, this court has already rejected the position that deliberate-indifference and other state-of-mind claims are categorically too difficult for *pro se* plaintiffs to litigate. *Olson*, 750 F.3d at 712; *see also Perez v. Fenoglio*, 792 F.3d 768, 784 (7th Cir. 2015). In addition, the jury did not need to resolve any complex factual issues at trial. Walker and his witnesses testified that defendants assaulted him and ignored his requests for medical treatment; defendants and their witnesses testified to the contrary. Expert testimony was not necessary to decide that straightforward credibility question. *See Romanelli v. Suliene*, 615 F.3d 847, 853–54 (7th Cir. 2010). Although Walker's claims contained a medical component, they did not involve any technical facts. *See Jackson v. Kotter*, 541 F.3d 688, 701 (7th Cir. 2008); *Forbes v. Edgar*, 112 F.3d 262, 264 (7th Cir. 1997). In short, the district court's finding that this case was relatively simple was proper.

Walker's assertion that this court has advised that recruiting counsel is especially important in cases involving credibility issues also misses the mark. *See* AT Br. 24. Although the decisions that Walker cites state that a court may consider the centrality of conflicting testimony when deciding whether to recruit counsel, they do not suggest a legal preference for recruiting counsel in credibility disputes. Indeed, in *Swofford v. Mandrell*, 969 F.2d 547, 552 (7th Cir. 1992), the court held that counsel was necessary because the legal issues were complex and the plaintiff had been unable to investigate crucial facts. In *Merritt v. Faulkner*, 697 F.2d 761, 765–66 (7th

Cir. 1983), the plaintiff's claims presented novel and complex issues requiring expert medical testimony about what caused him to go blind while his blindness prevented him from investigating and presenting his case. And in *Maclin v. Freake*, 650 F.2d 885, 888–89 (7th Cir. 1981), the plaintiff, who was confined to a wheelchair and in constant pain, was unfamiliar with basic legal procedures. Moreover, Walker overlooks more recent decisions that have upheld the district court's discretion not to recruit counsel in cases that involve credibility issues. *See Romanelli*, 615 F.3d at 853–54; *Jackson*, 541 F.3d at 700–01. The prospect of conflicting testimony thus does not transform an otherwise simple case into one that is difficult to litigate, otherwise courts would have to recruit counsel in nearly every case that goes to trial.

Finally, conducting the trial by videoconference did not impose any additional burdens on Walker because he was not required to complete any new tasks. Despite Walker's assertion, his was not a "special case" that warranted counsel. *See* AT Br. 25. His claims were factually and legally straightforward and the burdens he faced in discovery are shared by all inmates. The court did not abuse its discretion by finding that his case was relatively simple to litigate.

Second, the district court's conclusion that Walker was competent to litigate his case was based on the relevant evidence that was before it at the time. Although Walker asserts that the court's decisions rested entirely on his litigation experience, *id.* at 27, the court relied on multiple sources of information to assess his capacity to litigate. Importantly, the court based its denial of Walker's final request in part on his performance up to that point in the case and, specifically, on its observations of

Walker during the pretrial hearings that were conducted by videoconference. R19 (A20). The court's orders demonstrate that, far from issuing "rote and repeated denials" based on "boilerplate reasons," *see* AT Br. 22, 25, it carefully considered the merits of each request in light of the evidence then before it.

The magistrate judge denied Walker's first request based on his litigation experience and the quality of his complaint because that was the only evidence available at that early stage of the proceedings. *See* R4 (A7). Once Walker submitted evidence of his cognitive impairments, the court considered that in conjunction with his litigation experience, his performance litigating this case, and the relative simplicity of his claims. *See* R6–8, R19, R250–51 (A9–10, A13–14, A20). All the while, the court remained open to the possibility of recruiting counsel at some point. Indeed, the magistrate judge denied the second and third motions "with leave to renew" while ensuring that defendants complied with Walker's discovery requests. *See* R6–7 (A9). The court even stated that it would try to recruit counsel for the upcoming trial. R251 (A14). And it was only after the court observed Walker during the pretrial hearings that it denied his final request to recruit counsel. *See* R19 (A20). If the court's reasoning at times seemed repetitive, that was because Walker repeated the same reasons for recruiting counsel in his later motions. *See Mays v. Springborn*, 575 F.3d 643, 651 (7th Cir. 2009) (court may rely on reasoning in earlier rulings to deny successive requests to recruit counsel). But even then, the court accounted for the new evidence that was before it, including Walker's performance during pretrial hearings.

Moreover, litigation experience is one factor that a court is to consider when assessing a plaintiff's capabilities, *Santiago*, 599 F.3d at 762, and the court did not abuse its discretion by considering it here. The court accurately noted that Walker had litigated several prior cases and was litigating others at the time. R7–8, R250–51 (A9–10, A13–14). That demonstrated that Walker had become familiar with pretrial legal procedures. And that he did not succeed on the merits of the cases that he pursued *pro se* neither establishes that he litigated them poorly nor negates the experience that he gained. Rather, that evidence showed that Walker's skills improved over time. Unlike his early cases, where Walker advanced impermissible legal theories, *Illinois v. Walker*, No. 08-cv-3466 (N.D. Ill.), or failed to successfully apply to proceed in forma pauperis, *Walker v. Dart*, No. 07-cv-3085 (N.D. Ill.); *Walker v. Godinez*, No. 12-cv-50276 (N.D. Ill.), his later cases were decided on the merits, *Walker v. Parnell*, No. 11-cv-726 (S.D. Ill.); *Walker v. Pfister*, No. 14-cv-1341 (C.D. Ill.); *Walker v. French*, No. 14-cv-1342 (C.D. Ill.); *Walker v. Loverant*, No. 15-cv-1201 (C.D. Ill.). In fact, when the court denied Walker's motion to reconsider (R250–51 (A13–14)), he had already defeated a motion for summary judgment in an ongoing case, *see Walker v. French*, No. 14-cv-1342, Doc. 50. Walker's litigation history was thus an appropriate factor for the court to consider when deciding his requests for counsel.

Walker's argument that the court failed to adequately consider his cognitive limitations is also without merit. *See* AT Br. 29–30. The court specifically addressed Walker's neuropsychological evidence about his mental capacity in its decisions not to

recruit counsel. *See* R6–7, R250–51 (A9, A13–14). It accepted that Walker had cognitive limitations but found that he was nonetheless competent to proceed *pro se* given the straightforward nature of his case and the other indicia of his capacity to litigate. *Id.* There are no categorical rules for assessing a plaintiff's capabilities and "[t]here are no presumptions for or against recruitment of counsel, whether based on the nature of the case *or* the degree of plaintiff competence." *Pruitt*, 503 F.3d at 656 (emphasis in original). Here, the court made practical decisions based on the evidence before it and concluded that Walker was capable of litigating his claims while remaining open to the possibility of recruiting counsel if the need arose. The court's approach, which was consistent with the applicable law and supported by the record, was a valid exercise of its discretion to decide not to recruit counsel.

B. Walker has not demonstrated that he was prejudiced by the court's denials of his requests to recruit counsel.

As explained, the district court did not abuse its discretion when it denied Walker's requests for counsel. But even if it had, reversal would be unwarranted because Walker has not demonstrated that he was prejudiced by the court's decisions. This court will reverse an improper refusal to recruit counsel only upon a showing of prejudice. *Pruitt*, 503 F.3d at 659. To establish prejudice, the plaintiff must show that there is a reasonable likelihood that recruiting counsel would have made a difference in the outcome of the litigation. *Id.* Walker has not satisfied that burden.

Walker's primary argument is that recruited counsel could have developed a theory, based on "code of silence" practices, that defendants and their witnesses were not credible because they were corrections officers. AT Br. 31–32. To begin, it is far

from certain that recruited counsel would have developed that theory. The decisions that Walker cites in support—*Rossi v. City of Chicago*, 790 F.3d 729, 737–38 (7th Cir. 2015), and *Jeffes v. Barnes*, 208 F.3d 49, 61–62 (2d Cir. 2000)—are inapposite because they concerned claims for municipal liability under *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978), for maintaining obstructionist policies that were based on evidence of those municipalities' practices. Here, in contrast, Walker is proposing that counsel could have attacked witnesses' credibility by producing expert testimony about general trends in corrections officers' conduct. AT Br. 32. Predictions that recruited counsel may have developed this theory, and that the district court would have allowed the jury to hear it where there was no *Monell* claim, are much too speculative to establish prejudice.

Moreover, it is not reasonably likely that pursuing a "code of silence" strategy would have made a difference in the outcome of the case. General theories about how corrections officers testify, even if deemed admissible, are unlikely to overcome the jurors' own observations and convince them that the witnesses in this case were not telling the truth. Regardless, Walker directed the jury's attention to this issue at trial by cross-examining Tinsley on how her husband used to be a corrections officer and was now a supply supervisor at Pontiac (Tr. 1 at 77–78) and arguing during closing that defendants' witnesses had incentives as corrections officers not to testify against one another (Tr. 2 at 118–20, 137–38). The jury, however, found for defendants. Walker thus has not established that he was prejudiced by not having a lawyer to develop a "code of silence" theory.

Walker's secondary arguments fare no better. Although he complains about defendants' responses to his discovery requests, AT Br. 44, the court resolved those issues by directing defendants to respond to them (R7) and to comply with specific requests for information (R250 (A13)). Walker suggests that an attorney could have argued that the jury should draw a negative inference against defendants based on the lack of a video recording of the alleged incident, AT Br. 45, but Walker did make that argument at trial (Tr. 1 at 13; Tr. 2 at 122) and it did not sway the jury. In addition, Walker's claim that his case "was dealt a potentially critical blow" when the court denied his request to present Mark Spencer as a witness, AT Br. 45–46, overstates the importance of that evidence. Spencer did not witness the incident at issue and his proposed testimony that he submitted medical requests on Walker's behalf was adequately covered by testimony to that effect by Walker and Minter. *See Tidwell v. Hicks*, 791 F.3d 704, 709 (7th Cir. 2015) (plaintiff not prejudiced by being unable to present witnesses who did not see the incident and whose testimony would have duplicated his own); *see also* Tr. 1 at 27, 124.

Finally, Walker capably presented to the jury the theory that defendants' testimony that he was relocated to gallery 1 for kicking his cell door was untrue because they did not issue him a disciplinary ticket for doing so. Walker elicited testimony that kicking a cell door was a prison disciplinary infraction (Tr. 2 at 19) and argued to the jury that defendants would have had to write him a disciplinary ticket if he had done that (Tr. 1 at 14; Tr. 2 at 116). Perhaps a lawyer could have made that argu-

ment more effectively, *see* AT Br. 51–53, but that is not the applicable standard, *see* *Pruitt*, 503 F.3d at 655.

Walker thus has not met his burden to demonstrate that he was prejudiced by the district court's decisions not to recruit counsel. Walker obtained relevant evidence during discovery, presented that evidence at trial, cross-examined defendants' witnesses, and conveyed his theory of the case to the jury. It is not reasonably likely that recruiting counsel would have made a difference in the outcome of this case.

II. The district court acted within its discretion when it decided to conduct the trial by videoconference.

A prisoner does not have a constitutional right to attend a civil trial on a claim that he has initiated. *Thornton v. Snyder*, 428 F.3d 690, 697 (7th Cir. 2005). Rather, a prisoner's right of access to the courts is satisfied so long as he has the opportunity to present his claim. *Perotti v. Quinones*, 790 F.3d 712, 721 (7th Cir. 2015). The Prison Litigation Reform Act does not prohibit the use of videoconferencing at trial and Federal Rule of Civil Procedure 43 allows for testimony by videoconference for good cause in compelling circumstances. *Thornton*, 428 F.3d at 698. The decision to conduct a trial by videoconference is thus addressed to the discretion of the district court and reviewed for an abuse of discretion. *Perotti*, 790 F.3d at 721. That decision, even if it was an abuse of discretion, will be reversed only if it prejudiced the plaintiff. *Smego v. Payne*, 854 F.3d 387, 395 (7th Cir. 2017).

The district court must weigh the plaintiff's interest in presenting his case in person against the government's interest in maintaining his confinement. *Thornton*, 428 F.3d at 697. This court has identified the following factors for consideration

when balancing those competing interests: "(1) the cost and inconvenience of transporting the plaintiff to court from his place of incarceration; (2) the potential danger or security risk that the plaintiff would pose to the court; (3) the substantiality of the matter at issue; (4) any need for an early determination of the claim; (5) the possibility of postponing trial until the plaintiff is released from prison; (6) the plaintiff's probability of success on the merits of his claim; (7) the integrity of the correctional system; and (8) the plaintiff's interests in presenting his testimony in person rather than by alternate means, such as by deposition." *Perotti*, 790 F.3d at 721.

These factors were initially developed in the context of a trial by deposition. *Stone v. Morris*, 546 F.2d 730, 734–36 (7th Cir. 1976). Since then, technological improvements have made videoconferencing a realistic option for conducting a trial. *Perotti*, 790 F.3d at 722. This court has applied the above factors when reviewing videoconference trials on two occasions.

In *Perotti*, this court held that the district court did not abuse its discretion by requiring the *pro se* plaintiff to participate in the trial by video because its decision was justified by the risk and expense that accompanied transporting the plaintiff, who had a history of violent behavior. *Id.* at 725–29. Although the defendants and their counsel attended the trial in person, the case presented questions of credibility, and the plaintiff was the principal witness to testify in support of his allegations, the factors supporting the government's interests were sufficient to support the district court's decision. *Id.*

In *Thornton*, this court affirmed because the plaintiff was classified as an extremely high escape risk with a moderate aggression level, his conditions-of-confinement claim was relatively straightforward, and videoconferencing did not require him to try his case differently than he would have in person. 428 F.3d at 698–99. To that end, the court noted that the plaintiff presented 12 witnesses, testified himself, delivered opening and closing statements, offered other evidence, and cross-examined witnesses. *Id.* at 699.

Here, defendants argued that transporting Walker to the courthouse was costly and potentially dangerous because he was classified as a high escape risk with a high aggression level and was assigned to a maximum level prison. R407–09, R411-14, R421. Walker had an extensive prison disciplinary history: he had been issued 56 tickets and found guilty of 110 offenses between April 29, 2009, and May 8, 2016. R415–20. Due to his behavioral issues, Walker was scheduled to remain in disciplinary segregation until March 2019 and in C grade, the lowest status for prison privileges, until 2022. R408.

The district court did not abuse its discretion when it found that "compelling security concerns" warranted conducting the trial by videoconference in this case. Rather, it correctly balanced Walker's interest in presenting his case in person with the State's interest in maintaining his confinement. The court considered Walker's classifications as a high escape risk with a high level of aggression along with his extensive disciplinary history to reasonably conclude that transporting him to the courthouse would present compelling security concerns. R431–32 (A3–4). It also

found that Walker's claims were relatively simple, the available technology would allow him and the jury to clearly see each other, and the court would help him publish his exhibits to the jury. R432 (A4). The court thus exercised its discretion in a reasonable manner when it decided to conduct this trial by videoconference.

Walker argues that the court should have balanced those interests differently. AT Br. 34–39. But his various complaints about how the court weighed the relevant factors neither establish an abuse of discretion nor demonstrate prejudice.

Walker asserts that the court attached insufficient importance to the role of witness credibility in this case and suggests that a trial via videoconference is never permissible when credibility is a trial issue. *Id.* at 34–36. The court, however, specifically considered the jury's ability to observe testimony when it found that the jurors would be able to clearly see the witnesses on the courtroom's large video screen. R432 (A4). Moreover, this court has not erected a presumption against videoconference trials when credibility is at issue. To the contrary, this court affirmed the use of video technology in *Perotti*, 790 F.3d at 729, when "[c]redibility was central to the resolution of the case," and in *Thornton*, 428 F.3d at 698–99, when the plaintiff presented 12 witnesses, including himself, and the defendants presented still others. And to the extent that Walker argues that the availability of a large video screen cannot satisfy the good-cause requirement, AT Br. 35–36, he confuses the district court's reasoning. The "good cause" that supported videoconferencing here was the compelling security risk posed by transporting Walker to the courthouse, and any

concern that video trials will become ubiquitous is thus misplaced because relatively few plaintiffs will present a comparable level of risk.

Walker's submission that the video equipment used at trial was inadequate and impeded his ability to try his case fares no better. *See* AT Br. 37–38, 50–51. Although the judge who presided over the trial did not conduct a "test run," the courtroom had a "great big screen" and the judge, who conducted video trials before, was comfortable with the technology. *See* Tr. 1 at 5 ("This is not my first venture into a total video trial. I've tried a number of them, and the Court of Appeals has affirmed what I did; so I'm not totally on unfamiliar grounds."). Moreover, while the judge at times admonished witnesses to speak more loudly, those minor interruptions were quickly resolved and did not prejudice Walker. *See Thornton*, 428 F.3d at 699 ("although [the plaintiff] points to minor technical issues, the record reflects that they were small in number and quickly resolved").

Finally, Walker's contentions that the court gave short shrift to factors that supported conducting a live trial while placing too much weight on the security risks posed by transporting him to the courthouse are without merit. *See* AT Br. 39–40. The court safeguarded Walker's right to present his case to the jury by ensuring that he could do everything that he could have done had he tried it in person. Unlike in *Perotti*, 790 F.3d at 727–28, where the defendants presented their case in person, all parties participated by video here. Thus, any special challenges presented by trying a case via videoconference were shared by everyone. Although Walker's case involved constitutional issues, the plaintiffs in *Thornton* and *Walker* presented constitutional

claims as well. And the fact that this case proceeded past summary judgment cannot be relevant because that is true of every case that goes to trial and the decision not to move for summary judgment here simply reflects that the parties had conflicting accounts of what happened. Despite Walker's assertion, the court did not treat the security risks posed by transporting him as a "trump card." *See* AT Br. 40. Rather, it weighed the significance of that factor against his interest in presenting his case in person in the context of the available technology and the relative simplicity of this case, and reasonably concluded that a trial via videoconference was appropriate here.

III. Walker was not denied a fair trial by either plain error or cumulative error.

Furthermore, Walker argues that defense counsel committed plain error by commenting on Walker's confinement in a maximum security prison during opening and closing statements. AT Br. 41–43. Initially, this court need not consider this argument because the plain error doctrine is not available to remedy errors that are alleged to have occurred during argument in a civil case. *See Williams v. Dieball*, 724 F.3d 957, 964 (7th Cir. 2013); *Kafka v. Truck Ins. Exch.*, 19 F.3d 383, 385 (7th Cir. 1994). But even if plain-error review were not foreclosed, it still would not apply here.

The plain error doctrine is extremely limited and calls for reversal only if the appellant demonstrates "(1) that exceptional circumstances exist, (2) that substantial rights are affected, and (3) that a miscarriage of justice will result if the plain-error doctrine is not applied." *Sanchez v. City of Chi.*, 880 F.3d 349, 359 (7th Cir. 2018) (internal quotation marks omitted). Walker has not met this exacting standard. To

begin, information about Walker's confinement was necessarily presented to the jury because he alleged that he was assaulted while defendants moved him to a cell in gallery 1, where disruptive inmates were housed. *See* Tr. 2 at 31. Moreover, the two comments about which Walker complains were brief and isolated and do not rise to the level of exceptional circumstances that affect substantial rights and caused a miscarriage of justice. *See, e.g., United States v. DeSilva*, 505 F.3d 711, 719 (7th Cir. 2007) (no plain error where improper comments were brief and isolated and the context ameliorated their impact).

Walker further argues that he was denied a fair trial by the cumulative effect of multiple errors. AT Br. 43–53. Cumulative prejudice may warrant a new trial when the proceeding was plagued by multiple errors that were so severe as to render the trial fundamentally unfair. *Thompson v. City of Chi.*, 722 F.3d 963, 979 (7th Cir. 2013). Although most of Walker's arguments have been addressed in the discussion of the district court's discretionary decisions to deny his requests for counsel and to conduct the trial via videoconference, *see supra* pp. 24–25, 29, one issue remains.

Walker maintains that the district court failed to preserve the appearance of fairness at trial. AT Br. 46–50. But the handful of instances cited fail to establish that his trial was either beset by multiple errors or fundamentally unfair. In fact, the court directly addressed Walker's leading example by advising the parties that the jury was not in the courtroom and thus did not hear the comments from a discussion between the court reporter and clerk about their opinions of the case that were broadcast via the video transmission. *See* Tr. 2 at 79–80, 157. Also, Minter's claim

that he was threatened by a corrections officer at his prison after he testified (*id.* at 83) does not suggest that his testimony, which preceded the alleged threat, was compromised. Although Hudson's handcuffs were not removed before he testified, that oversight falls short of rendering the entire trial unfair because the jury knew that Hudson was a prisoner and the handcuffs were only briefly mentioned. *See, e.g., Harrell v. Israel*, 672 F.2d 632, 638 (7th Cir. 1982) (refusing to assume prejudice when inmates testified while wearing leg shackles because jurors naturally expect testifying prisoners to be subject to some security measures). Finally, while Walker claimed that Lieutenant French was whispering to Officer Schmeltz when he was testifying about the physical layout of gallery 1, the court promptly resolved the issue and admonished Lieutenant French that any such conduct was improper. Tr. 1 at 104–05. Walker thus also has not established that he was deprived of a fair trial by cumulative errors.

CONCLUSION

For the foregoing reasons, Officer Price, Lieutenant French, and Sergeant Stahl ask this court to affirm the district court's judgment in their favor.

Respectfully submitted,

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April 11, 2018

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2013, in 12-point Century Schoolbook BT font, and complies with Federal Rule of Appellate Procedure 32(a)(7)(A) in that the brief is 8,358 words.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 11, 2018, I electronically filed the foregoing **Brief of Defendants-Appellees** with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

I further certify that the other participant in this case is a CM/ECF user and will be served by the CM/ECF system:

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