No. 16-____

IN THE
Supreme Court of the United States

TIMOTHY BELL,

Petitioner,

v.

EUGENE MCADORY, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Federal Rule of Appellate Procedure 4(a)(5), a would-be appellant who has failed to file a notice of appeal within the time required can move before the district court for an extension of the time to appeal by showing good cause or excusable neglect. The question presented is:

Whether the denial of a motion under Federal Rule of Appellate Procedure 4(a)(5) is a separately appealable final order, as defined by 28 U.S.C. § 1291.

PARTIES TO THE PROCEEDING

Petitioner is Timothy Bell, Appellant below. Respondents are Eugene McAdory and Tarry Williams, Appellees below.

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OPINIONS BELOW

The Seventh Circuit's unreported order dismissing Petitioner's appeal from the District Court's denial of his motion for an extension of time under Fed. R. App. P. 4(a)(5) appears at 2016 WL 4994653 and is reproduced at Pet. App. 1a. The District Court's unreported order denying Petitioner's motion for an extension of time to appeal the summary judgment order is reproduced at Pet. App. 3a.

JURISDICTION

The order of the Seventh Circuit dismissing this appeal for lack of jurisdiction was entered on September 19, 2016. Pet. App. 1a. On December 6, 2016, Justice Kagan extended the time for filing this petition to and including February 16, 2017. *See* No. 16A562. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant text of 28 U.S.C. § 1291, 42 U.S.C. § 1983, and Fed. R. App. P. 4(a)(5) is set forth in the appendix. *See* Pet. App. 42a-43a.

INTRODUCTION

Petitioner Timothy Bell is a civilly committed mental patient at the State of Illinois' Rushville Treatment and Detention Facility ("*Rushville*"). In 2010, after Petitioner objected to complying with the facility's intake procedures, Respondents Eugene McAdory and Tarry Williams ordered that Petitioner be forcibly taken to a large-windowed observation cell and stripped naked, where he was left for eight days with nothing to cover himself when visitors arrived except a small piece of cardboard.

In response to this treatment, Petitioner filed a *pro se* complaint against McAdory and Williams under 42 U.S.C. § 1983. The District Court, however, mistakenly applied Eighth Amendment cases and rationales in rejecting Petitioner's Fourteenth Amendment claims, even though Petitioner is a civilly committed mental patient and not a convicted criminal. Petitioner sought to appeal, but he was unable to determine how to do so timely because—in violation of residents' constitutional rights, *see Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Johnson by Johnson v. Brelje*, 701 F.2d 1201, 1207 (7th Cir. 1983), *overruled on other grounds*, *Maust v. Headley*, 959 F.2d 644 (7th Cir. 1992)—Rushville does not provide residents with access to a law library, or even a copy of the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure ("*Federal Rules*"). Instead, one day after the time to appeal expired, Petitioner filed a document styled as a motion for reconsideration, which the District Court construed as a motion for relief from judgment under Fed. R. Civ. P. 60(b) ("*Rule 60(b)*") when denying relief.

On appeal, a panel of the Seventh Circuit agreed with Petitioner that the District Court erred by analyzing Petitioner's claims under the Eighth Amendment. The panel concluded, however, that because Rule 60(b) did not provide an avenue for challenging the merits of the underlying judgment, Petitioner could not obtain relief from the District Court's flawed decision. Even so, the Seventh Circuit held that Petitioner's motion for reconsideration could be construed as a motion for an extension of time to appeal under Fed. R. App. P. 4(a)(5) ("*Rule 4(a)(5)*"), and so it remanded the case to the District Court to determine whether Petitioner could show "excusable neglect" or "good cause" for an extension under that rule.

On remand, Petitioner explained that it is unreasonable to expect a *pro se* mental patient without any legal training to know how to take a timely appeal without the ability to at least consult the Federal Rules. The District Court, however, did not grant Petitioner an extension and denied his motion. Petitioner appealed that questionable decision, hoping to obtain relief from the Seventh Circuit. But the Seventh Circuit dismissed Petitioner's appeal on the ground that "orders under Rule 4(a)(5) are not separately appealable," but rather are only "reviewable in the initial appeal." Pet. App. 2a. As a result, Petitioner was precluded from presenting his challenge to the District Court's decision on appeal.

The Seventh Circuit's rule that orders denying Rule 4(a)(5) relief are not separately appealable under 28 U.S.C. § 1291 is directly contrary to the rule applied in every other court of appeals to have

considered the question. It is also inconsistent with this Court's precedents, which make clear that orders resolving postjudgment issues are separately appealable when those issues have been finally determined. Indeed, the approach taken by the majority of circuits makes considerable sense, as there are compelling reasons for treating the denial of a Rule 4(a)(5) motion as a final order. Such orders fulfill the finality requirements set out in § 1291 and in this Court's precedent. And, as a practical matter, without immediate appeal, those orders will most likely never be subject to any appellate review.

That is precisely what occurred in Petitioner's case. For Petitioner, the Seventh Circuit's minority rule precluded him from obtaining appellate review of the District Court's questionable Rule 4(a)(5) order, prevented him from obtaining relief from a summary judgment order that the Seventh Circuit has already recognized was fundamentally flawed, and eliminated any possibility of obtaining relief from Respondents' decision to confine him naked in an observation cell for eight days because of his refusal to pose for a photograph.

This circuit split is squarely presented in Petitioner's case and involves a recurring issue frequently affecting would-be appellants who have failed to seek timely review of the merits of their case. Petitioner thus respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Seventh Circuit or, in the alternative, for a decision summarily reversing that order and remanding this case for further proceedings consistent with this Court's precedent concerning final orders.

STATEMENT OF THE CASE

A. Events Leading To This Litigation

Petitioner Timothy Bell first arrived at Rushville in 2006, after the State of Illinois petitioned to have him involuntarily committed on the ground that he lacks emotional and volitional control. Soon thereafter, however, Petitioner was convicted of aggravated battery in connection with an incident involving one of Rushville's Security Therapy Aides and was transferred to the Menard Correctional Facility to serve a four-year prison sentence. Pet. App. 11a.

On June 4, 2010, Petitioner was returned to Rushville after completing his prison term. Pet. App. 11a. Petitioner, however, believed that because the State had not renewed its petition for his commitment, he would be allowed to return home to his family. For Petitioner, cooperating with Rushville's intake procedures was tantamount to consenting to his continued detention. As a result, Petitioner informed Respondents, Tarry Williams and Eugene McAdory, that he would not participate in Rushville's intake procedures (which included photographs and medical/psychological evaluations) until he had the chance to talk to his family about his legal concerns. *See* D.Ct. Dkt. 50-1, at 30-32. Respondents then placed Petitioner in segregation in the first cell he would occupy during the events giving rise to this litigation. Pet. App. 12a-13a.

On the twentieth day after his arrival at Rushville, Petitioner and Respondent Williams became involved in a verbal altercation from opposite sides of a locked cell door. *See* D.Ct. Dkt. 50-1, at 66,

69-70. That afternoon, Respondent Williams returned to Petitioner's cell with Rushville's tactical unit and forcibly removed Petitioner from his cell for transfer to an observation cell in the infirmary. According to Petitioner, during the transfer, members of the tactical unit punched him in the face several times and purposely injured his wrist when removing his handcuffs. Once they arrived at the observation cell, members of the tactical unit stripped off all of Petitioner's clothing and left him standing in the cell naked.

Petitioner spent the next eight days completely naked in his cell. *Id.* The air conditioning blew constantly, and he had no pillows, blankets, or sheets. His cell was equipped with only a metal bed, a plastic cot, a metal sink, and a metal toilet. Anyone walking by had a clear view into his cell thanks to two large observation windows on his cell door. D.Ct. Dkt. 50-1, at 101-04, 107. During this entire time, all that Petitioner had to cover his nakedness from visitors was a small piece of cardboard. *Id.* at 101-02.

To protest these conditions—and because he believed it would get a court involved—Petitioner went on a hunger strike. After several days, however, he relented and submitted to Rushville's intake procedures. Rushville then returned his clothing and personal property and put him in a normal cell.

B. Initial District Court Proceedings

Petitioner filed a *pro se* complaint pursuant to 42 U.S.C. § 1983 on May 18, 2012, in the United States District Court for the Central District of Illinois.

Pet. App. 13a. In the complaint, Petitioner alleged that Respondents violated his constitutional rights as a civil detainee under the Due Process Clause of the Fourteenth Amendment by placing him in segregation, using excessive force when removing him from his cell, and removing and withholding all of his clothing while he was locked in the observation cell. D.Ct. Dkt. 1, at 2-3.

On several occasions after filing the complaint, Petitioner requested the appointment of counsel, explaining that he was "detained in a mental institution that [did] not have a law library, or a legal assistant to assist him in his arguments." *See* D.Ct. Dkt. 3, at 1. He further explained that he would be "greatly handicapped" if he were required to proceed *pro se* as he was "unfamiliar with the federal rules of civil procedures [sic]" and that he was "not sure how to proceed in a timely manner, or in accordance with the strict paradigm" laid out by the District Court. D.Ct. Dkt. 13, at 1-2. The District Court, however, denied each of Petitioner's repeated requests for counsel.

On August 11, 2014, the District Court granted summary judgment to Respondents. Pet. App. 10a-31a. Even though this Court has repeatedly made clear that the Fourteenth Amendment protections for civil detainees are distinct from the Eighth Amendment protections afforded convicted prisoners, *see, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 539, 561 (1979), the District Court nonetheless concluded that the fact that Petitioner was a civil detainee rather than a criminal was "a distinction without a difference." Pet. App. 18a n.3. Moreover, although this Court has emphasized that civil detainees "are

entitled to more considerate treatment and conditions of confinement than criminals, whose conditions of confinement are designed to punish," *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982), the District Court rejected Petitioner's argument that being confined without clothes in a cold observation cell deprived him of due process on the ground that "[t]he United States Supreme Court has made clear that 'the Eighth Amendment does not outlaw cruel and unusual "conditions;' it outlaws cruel and unusual 'punishments.'" Pet. App. 17a.

In fact, despite the fact that Petitioner had not been given even a single piece of clothing or a blanket during his eight-day stay in the observation cell, the District Court held that "Bell has not demonstrated the type of conduct by Defendants that deprived him of the minimally civilized measure of life's necessities" because "routine discomfort is part of the penalty that criminal offenders pay for their offenses against society." Pet. App. 18a-19a (quotation omitted). And although Petitioner was given only a small piece of cardboard to cover his genitalia when visitors arrived, the District Court concluded that "Bell has not shown conditions so egregious that would trigger the Constitution's protections," because "[p]risoners cannot expect the 'amenities, conveniences, and services of a good hotel.'" Pet. App. 20a-21a. (quoting *Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988)).

Due to delays resulting from his detention in a mental institution, Petitioner did not receive the District Court's order until several days later. D.Ct. Dkt. 92, at ¶ 2 ("*Bell Decl.*"). On September 11, 2014—thirty-one days after entry of the summary

judgment order—Petitioner filed a document styled as a "Motion for Reconsideration on Summary Judgment," citing Fed. R. Civ. P. 59(e). D.Ct. Dkt. 61.

When Petitioner filed this motion, he believed that it was timely. Bell Decl. ¶ 4. Petitioner believed that the 30-day period to appeal mentioned in the summary judgment order did not begin to run until he received notice of the order. *Id.* Petitioner also believed that weekends and holidays were not counted when calculating the deadline. *Id.* Finally, Petitioner believed that the same 30-day deadline also applied to a motion for reconsideration under Rule 59(e), which he believed was a prerequisite to filing an appeal. *Id.*

Unfortunately, Petitioner was mistaken. Nonetheless, because Petitioner was not familiar with the Federal Rules and because Rushville's library did not contain a copy of them, he was unable to correct these misunderstandings. *Id.* ¶¶ 4-5. In stark contrast to Petitioner's experience in prison—where, as required by *Bounds*, 430 U.S. at 828, inmates had access to a law library and trained legal assistants—and in violation of the Constitution—*see Johnson*, 701 F.2d at 1207 (applying *Bounds* to mental institutions)—Rushville does not have a law library or legal assistant. Bell Decl. ¶ 5. Moreover, although Rushville does have a non-legal library for residents, that library does not contain any copies of the Federal Rules or other legal materials. *Id.* Nor are residents allowed to access the internet from Rushville, through which Petitioner could have researched the requirements for filing an appeal under the Federal Rules. *Id.* ¶ 6. Instead, residents

conduct research for legal filings based on word-of-mouth and by passing around hard copies of cases, rules, and statutes that were provided to them by their lawyers in past cases. *Id.* ¶¶ 3, 7. Petitioner was thus unable to conduct any research to verify his understandings of the Federal Rules. *Id.* ¶ 8.

Having no way to determine whether his understanding of the Federal Rules was correct, Petitioner ended up filing his motion on the thirty-first day following the summary judgment order—three days after the time to move for reconsideration under Fed. R. Civ. P. 59(e) expired and one day after his time to appeal expired. The District Court construed Petitioner's motion as a motion for relief from a judgment or order under Fed. R. Civ. P. 60(b), and, in an order dated October 1, 2014, denied Petitioner's motion. *See* D.Ct. Dkt. 63, at 1-2. Petitioner appealed the denial of Rule 60(b) relief (the "*Rule 60(b) Appeal*").[1]

C. Appellate Review Of The Rule 60(b) Order

The Seventh Circuit determined that the District Court's summary judgment order likely "erred by equating civil detainees to convicted prisoners." Pet.

[1] More precisely, in response to a petition for mandamus from Petitioner to the Seventh Circuit which sought to compel the District Court to permit Petitioner to appeal the summary judgment order, *see Bell v. Bruce*, No. 14-3793 (7th Cir. Dec. 29, 2014), the Seventh Circuit ordered the District Court to "treat Bell's motion for status, dated October 16, 2014, as a notice of appeal from the order denying his motion for reconsideration." Order at 2, *Bell v. Bruce*, No. 14-3793 (7th Cir. Jan. 8, 2015).

App. 34a. Noting that "detainees (whether civil or pretrial) have *not* been convicted and therefore must not be punished," the Seventh Circuit concluded that the District Court's rationale "that harsh conditions are proper as part of the penalty for crime" did not "remotely . . . justify Bell's treatment." *Id.* Indeed, the Seventh Circuit further cautioned that "it is far from clear that spending eight days without clothes in a fan-blown stream of chilled air would be proper for a convicted prisoner, when the goal was to get the prisoner to pose for a photograph." *Id.*

The Seventh Circuit nonetheless concluded that an appeal of a Rule 60(b) denial was not a proper vehicle in which to challenge the merits of the underlying summary judgment order. Instead, the Seventh Circuit held that the District Court should have construed Petitioner's motion to reconsider as a request for an extension of time to appeal under Rule 4(a)(5). Pet. App. 37a-38a. As a result, the panel remanded the case to the District Court, "with instructions to treat the document filed on September 11, 2014, as a request for an extension of time under Rule 4(a)(5)." *Id.* In an order entered a few days later, the Seventh Circuit clarified that the Rule 60(b) Appeal would remain pending while the District Court considered whether to extend the time to appeal. App. Ct. Dkt. No. 49.

D. Rule 4(a)(5) Proceedings in the District Court

On remand, Petitioner explained the reasons for his failure to file a timely appeal—namely, his misunderstandings of and lack of access to the Federal Rules. Citing a long list of cases holding that lack of access to a law library or legal materials

amounts to good cause and excusable neglect, Petitioner argued that the District Court should extend his time to appeal under Rule 4(a)(5). *See* D.Ct. Dkt. 93, at 9-17.

Nonetheless, the District Court entered an order denying Petitioner's motion for an extension of time on September 6, 2016 (the "*Rule 4(a)(5) Order*"). Pet. App. 3a-9a. The District Court noted that Petitioner was "not a first time, inexperienced *pro se* litigant" and that his "lack of access to a law library or legal assistant did not prevent him from citing case law in both his response to Defendants' motion for summary judgment and his own motion to reconsider." *Id.* at 7a-8a. And the District Court further ruled that Petitioner's arguments were "doomed by his failure to explain why he was confused about the appellate deadline in light of this court's clear instruction in its Summary Judgment Order that he had thirty (30) days from the entry of judgment to file his notice of appeal." Pet. App. 8a. The District Court, however, did not mention or make any effort to explain how such a notation would have made Petitioner aware that weekends and holidays are counted in the thirty-day period, even assuming Petitioner should have understood that the time was not tolled until he received the decision.

E. Petitioner's Appeal Of The Rule 4(a)(5) Order

On September 13, 2016, Petitioner filed a notice of appeal of the Rule 4(a)(5) Order, which was docketed in the Seventh Circuit as Appeal No. 16-3420 (the "*Rule 4(a)(5) Appeal*"). That same day, Petitioner also filed a document on the docket in the

Rule 60(b) Appeal to notify the Seventh Circuit of his appeal of the Rule 4(a)(5) Order.

The next day, the Seventh Circuit dismissed the Rule 60(b) Appeal, explaining that it had reviewed the Rule 4(a)(5) Order and "d[id] not see any problem in the district court's disposition." Pet. App. 40a-4a. Then, however, on September 19, the Seventh Circuit also dismissed the Rule 4(a)(5) Appeal, holding that "[p]rocedural matters such as orders under Rule 4(a)(5) are not separately appealable," but are instead "reviewable in the initial appeal." Pet. App. 1a-2a. As a result, Petitioner was precluded from presenting any arguments on appeal to challenge the District Court's Rule 4(a)(5) Order, which rested on the questionable conclusion that Petitioner should have known how to take a timely appeal even though he had no ability to consult the Federal Rules when attempting to do so.

Petitioner moved for panel rehearing in the Rule 60(b) Appeal, arguing that he should be permitted to challenge the basis for the District Court's Rule 4(a)(5) Order on appeal and noting that the Seventh Circuit's dismissal of his separate Rule 4(a)(5) Appeal was contrary to published decisions from several courts of appeals. The Seventh Circuit, however, denied Petitioner's motion without a written opinion. This petition followed.

REASONS FOR GRANTING THE PETITION

This Petition presents an issue ripe for Supreme Court review. As discussed below, the courts of appeals are squarely divided over whether an order denying Rule 4(a)(5) relief is a separately appealable final order under 28 U.S.C. § 1291, creating

confusion among the courts. Further, the minority rule adopted by the Seventh Circuit is both inconsistent with this Court's precedent and unworkable in practice. Finally, the Seventh Circuit's minority rule has precluded Petitioner from obtaining appellate review of the District Court's questionable Rule 4(a)(5) Order, which he would have obtained had his case arisen in a circuit applying the majority rule.

I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER AN ORDER DENYING RULE 4(a)(5) RELIEF IS SEPARATELY APPEALABLE

Under Federal Rule of Appellate Procedure 4(a)(5), a party who has failed to file a timely appeal can move in the district court for an extension of time to appeal the underlying judgment. Such motions must be filed within 30 days of the expiration of the time to appeal and may be granted if the party shows "excusable neglect" or "good cause." Fed. R. App. P. 4(a)(5)(A).

Twelve circuits have concluded that the denial of a Rule 4(a)(5) motion is an appealable final order under 28 U.S.C. § 1291. In these circuits, an appellant may thus seek immediate review of the denial of his or her Rule 4(a)(5) motion and may separately brief and argue this appeal before the court of appeals. *See Sueiro Vazquez v. Torregrosa de la Rosa*, 494 F.3d 227, 232 n.4 (1st Cir. 2007); *In re Orbitec Corp.*, 520 F.2d 358, 360 (2d Cir. 1975); *In re Diet Drugs Prod. Liab. Litig.*, 401 F.3d 143, 153 (3d Cir. 2005); *Donovan v. Potter*, 356 F. App'x 634, 635 (4th Cir. 2009) (per curiam); *Rodriguez v. VIA Metro. Transit Sys.*, 802 F.2d 126, 132 (5th Cir.

1986); *Flowers v. Gen. Motors Corp.*, 860 F.2d 1078 (6th Cir. 1988); *Vogelsang v. Patterson Dental Co.*, 904 F.2d 427, 428 (8th Cir. 1990); *Diamond v. U.S. Dist. Court for Central Dist. of Cal.*, 661 F.2d 1198 (9th Cir. 1981); *Bishop v. Corsentino*, 371 F.3d 1203 (10th Cir. 2004); *Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 997 (11th Cir. 1997); *Fastov v. Christie's Int'l PLC*, 222 F. App'x 4, 5 (D.C. Cir. 2007) (per curiam); *Two-Way Media LLC v. AT & T, Inc.*, 782 F.3d 1311, 1314 (Fed. Cir. 2015).

These circuits have explained that, like most post-judgment motions, "[a] district court's order refusing to extend the time for filing a notice of appeal is itself an appealable final judgment . . . ." *Harper v. Guthrie*, 660 F. App'x 620, 623 (10th Cir. 2016); *see In re Diet Drugs Prod. Liab. Litig.*, 401 F.3d at 153 ("Appellate jurisdiction therefore exists pursuant to § 1291 on the limited issue of the timeliness of Riepen's appeal and the existence of excusable neglect.").

In contrast, the Seventh Circuit treats Rule 4(a)(5) motions as non-final and not subject to independent appeal. Instead, these orders are reviewed—if at all—as part of an appeal of the underlying judgment.

The Seventh Circuit first announced this rule in *Cooper v. IBM Personal Pension Plan*, noting that "[a]ction on a motion under Rule 4(a)(5) is not independently appealable, as it is not a 'final decision' by the district court." 163 F. App'x 424, 425 (7th Cir. 2006). And it reaffirmed this position in *Bell*, concluding that it lacked jurisdiction over Petitioner's Rule 4(a)(5) Appeal. Pet. App. 1a-2a. The Seventh Circuit explained that "[t]he only

appealable order in this case is the district court's final decision" because "[p]rocedural matters such as orders under Rule 4(a)(5) are not separately appealable," but "[i]nstead . . . are reviewable in the initial appeal." *Id.*

There is thus a clear division of authority on an issue of critical importance to would-be appellants. 16A C. Wright & A. Miller, *Federal Practice and Procedure* § 3950.3, fn. 130 (4th ed. 2016) (highlighting this split). Indeed, the question whether an order denying an extension under Rule 4(a)(5) is appealable will arise whenever a party misses the time within which he or she may file an appeal and seeks to invoke Rule 4(a)(5) for relief. And, in fact, courts of appeals have specifically addressed the appealability of orders denying Rule 4(a)(5) motions at least six times within the past three years alone. *See Bell v. McAdory*, No. 15-1036, *1 (7th Cir. Sept. 14, 2016); *Harper*, 660 F. App'x 620; *Coots v. Allbaugh*, 656 F. App'x 385, 386 (10th Cir. 2016); *Two-Way Media*, 782 F.3d at 1314; *Lundahl v. Am. Bankers Ins. Co. of Fla.*, 610 F. App'x 734 (10th Cir. 2015); *Tillotson v. Pueblo State Hosp.*, 551 F. App'x 447 (10th Cir. 2014). Petitioner's case presents the Court with an ideal opportunity to resolve the confusion surrounding this often dispositive issue of appellate procedure.

II. THE SEVENTH CIRCUIT'S RULE IS CONTRARY TO THIS COURT'S PRECEDENT AND UNWORKABLE IN PRACTICE

As the majority of circuits have recognized, there are compelling reasons why the denial of a Rule 4(a)(5) motion should be treated as a final order.

First, these orders satisfy the finality requirements set out in 28 U.S.C. § 1291 and in this Court's precedent. And second, these orders must be subject to immediate appeal because otherwise they may never receive any appellate scrutiny.

A. An Order Denying A Rule 4(a)(5) Motion Is A Final Order

"A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981) (same). As this Court has explained, "[t]he final judgment rule serves several important interests." *Flanagan v. United States*, 465 U.S. 259, 263 (1984). Specifically, "[i]t helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation[,] [and] [i]t reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals." *Id.* at 263-64; *see also United States v. Nixon*, 418 U.S. 683, 690 (1974) ("The finality requirement of 28 U.S.C. § 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals."). Thus, "a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." 465 U.S. at 263.

Different considerations arise, however, when a party appeals from a *post*judgment order. In that situation, "once the original trial proceedings have

been completed, final judgment appeal should be available upon conclusion of most post-judgment proceedings." 15B C. Wright & A. Miller, *Federal Practice and Procedure* § 3916 (2d ed. Supp. 2016). Thus, this Court has long held that orders resolving postjudgment motions after conclusion of the original trial proceedings (and any post-trial proceedings that toll the time to appeal) are themselves final orders subject to independent appeal. *See, e.g., Stone v. I.N.S.*, 514 U.S. 386, 403 (1995) (postjudgment "motions that do not toll the time for taking an appeal give rise to two separate appellate proceedings that can be consolidated"); *In re Farmers' Loan & Trust Co.*, 129 U.S. 206, 213 (1889) ("[T]he doctrine that, after a decree which disposes of a principal subject of litigation and settles the rights of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court . . . and which, when they partake of the nature of final decisions of those rights, may be appealed from, is well established.").

Consequently, where postjudgment motions that do not toll the time to appeal the underlying judgment are concerned, courts consider the finality of the order resolving the postjudgment motion on its own, and not as part of the underlying judgment. In other words, a court need only ask whether resolution *of the postjudgment motion* (1) ends consideration of the postjudgment issue on its merits and (2) requires only that the district court enter that judgment or finalize the order. *Catlin*, 324 U.S. at 233 ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."); *Mayer v.*

Wall St. Equity Grp., Inc., 672 F.3d 1222, 1224 (11th Cir. 2012) ("[A]n order is deemed final if it disposes of all the issues raised in the motion that initially sparked the postjudgment proceedings.").

As the majority of courts of appeals have recognized, an order denying Rule 4(a)(5) relief satisfies these requirements. First, because the filing of a Rule 4(a)(5) motion does not toll the time for taking an appeal of the underlying judgment, *Stone* indicates that it gives rise to its own appellate proceeding separate from an appeal of the underlying judgment. *See Stone*, 514 U.S. at 403 ("Motions that do not toll the time for taking an appeal give rise to two separate appellate proceedings that can be consolidated."). *Accord In re Lang*, 414 F.3d 1191, 1196 (10th Cir. 2005) ("Generally, a ruling on a post-judgment motion is subject to independent appeal separate from the underlying judgment, and this is true of proceedings on motions for extension of time.").

Second, once a district court has denied a Rule 4(a)(5) motion, there is nothing left to do but enter judgment. Denial of the motion completely resolves the only question raised: did good cause or excusable neglect exist such that the district court should have permitted the belated filing of a notice of appeal. This is wholly distinct from the merits of the underlying appeal; indeed, this decision is informed by an entire body of case law interpreting the good cause and excusable neglect standards. *See, e.g., Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) (laying out a four-factor test to determine when neglect is excusable).

Third, there is also "little danger of interference with continuing trial court proceedings, and equally little danger of repetitious appellate consideration of related issues" if this Court permits a party to appeal from the denial of a Rule 4(a)(5) motion. Wright & Miller, *supra*; *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 670 (8th Cir. 2008) (permitting appeal of a postjudgment order under § 1291 because "[t]he underlying dispute has already been settled, and there is little danger that prompt appeal of post-judgment matters will cause confusion, duplicative effort, or otherwise interfere with the trial court's disposition of the underlying merits"). Twelve circuits have been permitting such appeals for decades without incident. Because the underlying case has necessarily concluded at the time such a motion is filed, there is no danger that this appeal will interfere with ongoing proceedings at the district court. Nor will appellate consideration of the denial of these motions lead to duplicative or inefficient appellate practices; the issues raised in these motions are separate from the underlying merits arguments and thus will not arise again in a potential future appeal.

B. If Denial Of A Rule 4(a)(5) Motion Is Not A Final Order, There Is Little Chance It Will Receive Appellate Review

The Seventh Circuit's rule is based on the assumption that appellate consideration of orders denying Rule 4(a)(5) relief can be incorporated into the appeal of the merits of the underlying judgment. While such an approach is wrong as a legal matter, as explained above, it also is unlikely to be sufficient as a practical matter to ensure that district court

decisions denying Rule 4(a)(5) motions will be subject to appellate review.

Rule 4(a)(5) motions are often filed after the normal period for taking an appeal has expired without any timely appeal having been filed. Indeed, Rule 4(a)(5) specifically contemplates the filing of such motions for an additional 30 days following the expiration of the time to appeal. *See* Fed. R. App. P. 4(a)(5)(A)(i). In those circumstances, there will most often not be any appeal of the underlying merits in which to review the Rule 4(a)(5) decision. Indeed, in such a case, a successful motion under Rule 4(a)(5) is a prerequisite to an appeal of the underlying judgment because, without an extension of the time to appeal, a court of appeals would have no jurisdiction over the untimely appeal. *See Bowles v. Russell*, 551 U.S. 205, 209 (2007). Thus, like orders denying similar postjudgment motions, "if the[se] orders are not found final, there is little prospect that further proceedings will occur to make them final; if appeal is not allowed, there is a real risk that all opportunity for review will be lost." Wright & Miller, *supra*.

This case well illustrates the impracticability of the Seventh Circuit's rule. The whole reason Petitioner was seeking relief under Rule 4(a)(5) was that he failed to file an appeal of the underlying judgment within the time prescribed by Rule 4(a). Because he failed to appeal within 30 days of the entry of summary judgment, the Seventh Circuit would have lacked jurisdiction over any appeal of the underlying judgment taken by Petitioner unless the District Court had *granted* his Rule 4(a)(5) motion. But because the District Court *denied* Petitioner's

Rule 4(a)(5) motion, it was impossible for Petitioner to present his challenge to the Rule 4(a)(5) Order in the context of an appeal of the merits. Consequently, the Seventh Circuit's rule confining appeals of orders denying Rule 4(a)(5) relief to appeals of the underlying judgment did not merely redirect Petitioner's appellate arguments; it completely precluded them.

III. PETITIONER WOULD HAVE OBTAINED APPELLATE REVIEW—AND LIKELY APPELLATE RELIEF—IF THE SEVENTH CIRCUIT HAD APPLIED THE MAJORITY RULE

In every other circuit, Petitioner's appeal from the District Court's order denying Rule 4(a)(5) relief would have been heard, and he would have been able to fully brief and argue his challenge to the District Court's reasoning. Moreover, given the persuasive arguments Petitioner can present to establish good cause or excusable neglect in failing to file a timely notice of appeal, there is a strong possibility that he would have prevailed on appeal if his arguments had been heard.

As noted above, Rule 4(a)(5) provides that "[t]he district court may extend the time to file a notice of appeal if a party moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and . . . that party shows excusable neglect or good cause." Fed. R. App. P. 4(a)(5)(A). In the Seventh Circuit, "the excusable neglect standard applies in situations in which there is fault; in such situations, the need for extension is usually occasioned by something within the control of the movant. . . . [T]he good cause standard applies in situations in which there is

no fault—excusable or otherwise." *Sherman v. Quinn*, 668 F.3d 421, 425 (7th Cir. 2012) (quotation omitted).

Many courts have recognized that a prisoner or detainee's inability to access a law library or legal materials during the time to appeal can amount to good cause or excusable neglect for an extension of time under Rule 4(a)(5). *See, e.g.*, *Thomas v. Butts*, 745 F.3d 309, 311 (7th Cir. 2014) (per curiam) (affirming extension of time "based on lack of access to the law library and . . . problems with mail"); *Broyles v. Roeckeman*, No. 12-C-7702, 2013 WL 2467710, at *2 (N.D. Ill. June 7, 2013) (granting extension due to limited time and understaffing at law library); *Jones v. Walsh*, No. 06-Civ-225, 2008 WL 586270, at *1 (S.D.N.Y. Mar. 4, 2008) (prisoner's inability to access law library constituted good cause under Rule 4(a)(5)); *Khoa Chuong Le v. Dretke*, No. 3-03-CV-2042-H, 2004 WL 1161400, at *1 (N.D. Tex. May 21, 2004) ("In support of his motion for extension of time, petitioner alleges that he has limited access to the prison law library and needs more time to research and prepare his notice of appeal. Such an excuse constitutes 'good cause' for an extension of time."); *Harris v. Cockrell*, No. 3:01 CV 2492 M, 2003 WL 21500397, at *2 (N.D. Tex. Apr. 9, 2003) (finding "good cause" where prisoner lacked access to legal materials "[d]ue to circumstances beyond his control").

This rule makes sense, for at least two reasons. First, as a legal matter, it is well-established that "the fundamental constitutional right of access to the courts" under the Due Process Clause of the Fourteenth Amendment "requires prison authorities

to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 828. Undergirding this rule is the notion that "law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts," *Bounds*, 430 U.S. at 825, and the Seventh Circuit has recognized that this is no less true for those committed to mental institutions, *see Johnson*, 701 F.2d at 1207 (extending *Bounds* to detainees that are mentally unfit to stand trial); *see also, e.g.*, *Ward v. Kort*, 762 F.2d 856, 858 (10th Cir. 1985) ("We hold that plaintiff, as a person under a mental commitment, is entitled to protection of his right of access to the courts.").

Second, as a practical matter, a detained *pro se* litigant should not be expected to perfectly understand the requirements of procedural rules to which he has no access. Indeed, as this Court observed in *Bounds*, "[i]t would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available," and "[i]f a lawyer must perform such preliminary research, it is no less vital for a *pro se* prisoner." *Bounds*, 430 U.S. at 825-26.

Courts have thus rightly recognized that a detainee's failure to file a timely appeal due to his institution's failure to provide him with constitutionally required access to legal materials or

assistance is a circumstance beyond his control amounting to good cause or excusable neglect under Rule 4(a)(5).

In Petitioner's case, Rushville has neither a law library nor a legal assistant to help Petitioner understand court rules and applicable case law. Bell Decl. ¶ 5. Nor does its library contain a copy of the Federal Rules or access to the internet. *Id.* ¶ 6. Rather, Petitioner's only access to case law or rules of procedure was through hard copies provided to him by other detainees. *Id.* ¶ 7. As a result, Petitioner was unable to determine whether his understanding of the rules for taking an appeal of the summary judgment order was accurate, and his misunderstandings caused him to miss the deadline to file an appeal. *Id.* ¶ 8. These limitations resulted from circumstances beyond Petitioner's control and constitute good cause or excusable neglect under Rule 4(a)(5).

The District Court's reasons for concluding the opposite are thoroughly unpersuasive. Pet. App. 6a-9a. *First*, Petitioner's prior experience as a *pro se* litigant in other cases does not mean that he understands all requirements of the Federal Rules. To the contrary, Petitioner expressly requested counsel at the beginning of this case specifically because he was "unfamiliar with the federal rules of civil procedures [sic]," and "not sure how to proceed in a timely manner." D.Ct. Dkt. 13, at 1-2. *Second*, the fact that Petitioner cited cases that were already in his possession in response to Respondents' motion for summary judgment does not mean that Petitioner should have been familiar with rules that were not. *Finally*, the fact that the summary judgment order

included a notation that Petitioner had to appeal within thirty days of "the entry of judgment" was not sufficient to correct Petitioner's misunderstandings of the Federal Rules. Even if Petitioner could have inferred from this instruction that the time to appeal was not tolled until he received the District Court's decision, the District Court's instruction would have done nothing to correct his misunderstanding that weekends and holidays were not counted when calculating the thirty day period. Such a misunderstanding could only have been corrected by reading a copy of the Federal Rules, to which, by no fault of his own, Petitioner had no access.

Even a trained lawyer who has litigated in federal court would be hard pressed to follow the Federal Rules if he were not able to read them to correct or confirm his understanding, and much less so a *pro se* party like Petitioner. The District Court's decision, which holds Petitioner, a *pro se* litigant, to a standard even a trained lawyer could not meet was erroneous and would likely have been reversed by the Seventh Circuit if considered on appeal.[2]

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[2] The fact that the Seventh Circuit cursorily reviewed and approved the District Court's order in Petitioner's separate appeal from the denial of his Rule 60(b) motion was clearly not a sufficient opportunity for review. The Seventh Circuit did not permit Petitioner to articulate his concerns with the District Court's order before purporting to affirm it. Because of this, the Seventh Circuit simply accepted the District Court's conclusion that its instruction to appeal within thirty days of the entry of judgment should have corrected Petitioner's misunderstandings, without hearing Petitioner's argument that this instruction says nothing about whether to count weekends and holidays within that thirty days. In any event, as this Court has

Petitioner's arguments in support of his Rule 4(a)(5) motion are persuasive. Thus, if Petitioner had had an opportunity to present those arguments on appeal before the Seventh Circuit, he likely would have obtained relief from the District Court's denial of his Rule 4(a)(5) motion. However because the Seventh Circuit—alone among the courts of appeals—does not permit appeals of orders denying Rule 4(a)(5) motions, Petitioner was precluded from doing so. This Court should grant certiorari to resolve this conflict.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari or, in the alternative, summarily reverse the Seventh Circuit and remand the case for further proceedings.

(continued…)

explained, "[f]or more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (internal citations and quotation marks omitted). Certainly, the cursory review provided by the Seventh Circuit without the benefit of Petitioner's arguments was not the kind of review guaranteed by the Due Process Clause or provided for under 28 U.S.C. § 1291.

Respectfully submitted,

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FEBRUARY 16, 2017

APPENDIX

APPENDIX A

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
Submitted September 15, 2016
Decided September 19, 2016

Before
RICHARD A. POSNER, *Circuit Judge*
FRANK H. EASTERBROOK, *Circuit Judge*
MICHAEL S. KANNE, *Circuit Judge*

No. 16-3420

TIMOTHY BELL

Plaintiff-Appellant,

v.

EUGENE MCADORY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois.

No.: 12-3138-CSB-DGB

Colin S. Bruce, Judge.

ORDER

After Timothy Bell had filed a notice of appeal (No. 15-1036), the district court denied a motion to extend

the time for appeal. See Fed. R. App. P. 4(a)(5). Bell has filed another notice of appeal, directed to that order.

The only appealable order in this case is the district court's final decision. Procedural matters such as orders under Rule 4(a)(5) are not separately appealable. Instead they are reviewable in the initial appeal. The current appeal therefore is dismissed for want of jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

TIMOTHY BELL *Plaintiff,* v. EUGENE MCADORY and TARRY WILLIAMS, *Defendants.*	)	No.: 12-3138-CSB-DGB

ORDER

COLIN S. BRUCE, U.S. District Judge:

The United States Court of Appeals for the Seventh Circuit has remanded this case with instructions to treat the document Plaintiff filed on September 11, 2014, as a request for an extension of time to file his notice of appeal under Federal Rule of Appellate Procedure 4(a)(5).

Plaintiff titled his September 11, 2014 document (#61): "Plaintiff's Motion for Reconsideration on Summary Judgment." The motion sought relief pursuant Federal Rule of Civil Procedure 59(e). In denying Plaintiff's motion, this court noted that it was too late for him to file a motion under Federal Rule of Civil Procedure 59. However, in an abundance of caution, and in fairness to the *pro se* litigant, the court considered his motion as one under

Rule 60(b). On appeal, the Seventh Circuit stated that this Court should also have taken an additional step and considered Plaintiff's motion as a request to extend the date by which he had to file his notice of appeal.[1]

On remand, this court gave the parties an opportunity to address this issue. After reviewing the Seventh Circuit's opinion and the parties' briefs, this court has concluded that Plaintiff failed to show excusable neglect or good cause for an extension of time to file an appeal. Therefore, for the reasons that follow, Plaintiff's request, as deciphered by the Seventh Circuit, to extend the date by which he had to file his notice of appeal under Appellate Rule 4(a)(5) is denied.

Appellate Rule 4(a)(5) provides that "[t]he district court may extend the time to file a notice of appeal if: (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) . . . that party shows excusable neglect or good cause." *Id*. "[T]he excusable neglect standard applies in situations in which there is fault; in such situations, the need for extension is usually occasioned by something within the control of the movant. On the other hand, the good cause standard applies in situations in which there is no fault—excusable or otherwise." *Sherman v. Quinn*, 668 F.3d 421, 425 (7th Cir. 2012)(internal quotations omitted).

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[1] The court notes that it did not find it necessary to construe Plaintiff's Motion (#61) as a motion requesting an extension of the appellate deadline for the simple fact that Plaintiff did not, in any way, hint that he wanted an extension of time to file an appeal. In fact, Plaintiff's motion did not address appellate relief in any way.

In his brief on remand, Plaintiff argues that his failure to file a timely appeal was due to two factors. First, Plaintiff states that he misunderstood the Federal Rules, specifically the time within which he had to file a notice of appeal. Second, Plaintiff claims that a lack of access to a law library or legal assistant at the Illinois Department of Human Services Treatment and Detention Facility at Rushville, Illinois ("Rushville"), prevented him from correcting this misunderstanding. Plaintiff argues that both of these factors constitute good cause and excusable neglect for his failure to file a timely appeal and that this Court should, therefore, grant his motion and give him an additional fourteen (14) days to file a notice of appeal under Appellate Rule 4(a)(5). Before addressing Plaintiff's claims in detail, the court will expand on the requirements necessary to establish excusable neglect and good cause.

As for establishing excusable neglect, "[w]hile Rule 4(a)(5) does not define what constitutes excusable neglect, the term was intended to be narrowly construed." *Satkar Hosp., Inc. v. Fox Television Holdings*, 767 F.3d 701, 706–07 (7th Cir. 2014). Indeed, "[t]he excusable-neglect standard is a strict one; few circumstances will ordinarily qualify." *Id.* Specifically, "[t]he excusable-neglect standard refers to the missing of a deadline as a result of such things as misrepresentations by judicial officers, lost mail, and plausible misinterpretations of ambiguous rules." *Id.*; *Prizevoits v. Ind. Bell Tel. Co.,* 76 F.3d 132, 133–34 (7th Cir. 1996). "The excusable-neglect standard "can never be met by a showing of inability or refusal to read and comprehend the plain language of the

federal rules." *Satkar Hosp.*, 767 F.3d at 707 (internal quotations omitted).

The standard is equitable, taking into consideration relevant circumstances, including: (1) the danger of prejudice to the non-moving party; (2) the length of the delay and its impact on judicial proceedings; (3) the reason for the delay (i.e., whether it was within the reasonable control of the movant); and (4) whether the movant acted in good faith. *Sherman,* 668 F.3d at 425. However, "[t]he word 'excusable' would be read out of the rule if inexcusable neglect were transmuted into excusable neglect by a mere absence of harm." *Prizevoits,* 76 F.3d at 134. Most important is the reason for the delay. "To establish excusable neglect, the moving party must demonstrate genuine ambiguity or confusion about the scope or application of the rules or some other good reason for missing the deadline, in addition to whatever lack of prejudice and absence of delay he can show." *Satkar Hosp.*, 767 F.3d at 707.

As for establishing good cause, "federal courts have found it in practice . . . the same standard as 'due diligence' before the rule existed. . . . Usually, 'good cause' is occasioned by something that is not within the control of the movant." *Pyles v. Nwaobasi*, 2016 WL 3924376, * 4 (7th Cir. July 21, 2016)(internal quotations omitted).

After reviewing Plaintiff's claims and the standards related to excusable neglect and good cause, this court finds that neither Plaintiff's alleged misunderstanding nor his lack of access to a law library constitutes excusable neglect or good cause. Initially, the court notes that Plaintiff made absolutely no attempt to show excusable neglect or

good cause for an extension of the appellate deadline in his motion (#61). Instead, Plaintiff focused on his attempt to persuade the court that it erred in its Summary Judgment Order.

Even when reviewing Plaintiff's arguments following remand, where he specifically addressed the issue, this court is not convinced that Plaintiff has established excusable neglect or good cause. First, this court notes that Plaintiff is not a first time, inexperienced *pro se* litigant. Indeed, Plaintiff has filed twenty-five (25) lawsuits in this court, five of which he filed before the instant one. Therefore, Plaintiff is not exactly the novice litigator that he presents himself to be.

Second, Plaintiff's lack of access to a law library or legal assistant did not prevent him from citing case law in both his response to Defendants' motion for summary judgment and his own motion to reconsider. Thus Plaintiff was able to cite applicable case law and regulations without access to a law library when it served his purpose, but allegedly could not gain access to the Federal Rules of Appellate Procedure or the Federal Rules of Civil Procedure to determine when his notice of appeal was due to be filed with this court.

Finally, and most importantly, Plaintiff's arguments fall flat for one major reason that he never addressed: this court advised Plaintiff – in bold type – in its Summary Judgment Order that he had thirty (30) days within which to file his notice of appeal challenging the Order. Thus, even if Plaintiff did not completely understand the Federal Rules based upon his *pro se* status and even if Plaintiff did

not have access to a law library, he possessed the court's Order.

Based upon the court's clear direction and with no evidence to the contrary, this court finds that Plaintiff understood, or should have understood, the applicable deadline. This finding is bolstered by the fact that this court not only advised Plaintiff of the deadline but further provided the procedure he should follow in order to seek leave to appeal *in forma pauperis* if so desired. However, instead of following the instructions provided – in bolded type – in the court's order, Plaintiff sought the advice of another resident at Rushville as to how best to proceed. Plaintiff certainly had the option of 6 seeking advice from another resident as to how to proceed. Likewise, Plaintiff had the option of filing a motion to reconsider instead of filing a notice of appeal. However, he cannot now claim that he misunderstood how to proceed given the court's clear instruction on the deadline to file his notice of appeal.

In short, Plaintiff's arguments are doomed by his failure to explain why he was confused about the appellate deadline in light of this court's clear instruction in its Summary Judgment Order that he had thirty (30) days from the entry of judgment to file his notice of appeal. Plaintiff did not need a copy of the Federal Rules, Appellate Rules, or access to the law library to know when his notice of appeal was due in light of the court's advice. Therefore, for all of the reasons stated above, this court finds Plaintiff has failed establish either excusable neglect or good cause. As a result, Plaintiff's motion (#61), construed as a motion for extension of time to file a notice of appeal, is denied.

IT IS, THEREFORE, ORDERED:

1. The Parties' requests for a hearing are DENIED.

2. Plaintiff's motion entitled motion for reconsideration to be considered a motion for extension of time to file notice of appeal (#61) is DENIED.

3. The Clerk of the Court is directed to send a copy of this Order to the United States Court of Appeals for the Seventh Circuit.

Entered this 6th day of September, 2016.

s/ Colin S. Bruce
COLIN S. BRUCE
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

TIMOTHY BELL,	)
	)
Plaintiff,	)
	)
v.	) **No.: 12-3138-CSB-DGB**
	)
	)
EUGENE MCADORY and TARRY WILLIAMS,	)
	)
	)
Defendants.	)

ORDER

COLIN S. BRUCE, U.S. District Judge:

This cause is before the Court on Defendants Eugene McAdory and Tarry Williams' motion for summary judgment. As explained more fully *infra*, Defendants are entitled to summary judgment because there are no genuine issues of material fact that must be determined by a trier of fact and because Defendants have shown that they are entitled to judgment as a matter of law on each of the three claims asserted against them by Plaintiff Timothy Bell.

I.
BACKGROUND AND MATERIAL FACTS

Plaintiff Timothy Bell is, and was at all relevant times, a civil detainee currently housed at the Treatment and Detention Facility operated by the Illinois Department of Human Services in Rushville, Illinois ("Rushville"). From June 4, 2010, through July 1, 2010, Defendant Tarry Williams was a Security Therapy Aide IV at Rushville, and he served as a zone supervisor of Rushville's Special Management Unit and infirmary. Defendant Eugene McAdory was Rushville's Security Director from June 4, 2010, through July 1, 201.

On June 4, 2010, Bell returned to Rushville after serving a four-year sentence in the Illinois Department of Corrections ("IDOC") for aggravated battery after he assaulted a security aide at Rushville. After returning to Rushville, Bell, like all other residents at Rushville, was required to participate in an initial seventy-two hour intake process. During the intake process, a new or returning resident would be assigned a room in the Special Management Unit and given few amenities. In addition, new or returning residents would be interviewed by security and treatment staff. If the resident were non-cooperative during the initial intake process or if the resident posed a threat to himself, security personnel, or other residents, the Security Director or the Program Director could order that resident to remain in the Special Management Unit until he no longer presented a threat and was cooperative. McAdory developed this intake immersion process based upon his experience as the Security Director at Rushville and based upon his experience with IDOC.

Upon his return to Rushville, Bell was placed in a room in the Special Management Unit where he had

clothes, a bed, bed sheets, a blanket, a toilet, a sink, and personal hygiene products. However, Bell refused to participate in the intake process.[1] Specifically, Bell refused to be interviewed by staff, and he displayed hostility toward the staff, including making threats against the staff.

Accordingly, McAdory ordered Bell to remain in the Special Management Unit until he no longer presented a threat to himself or to others. Nevertheless, Bell's hostility continued. On June 8 and again on June 23, 2010, Bell refused to have his photograph taken for identification purposes. In response to the directive to have his photograph taken, Bell threatened to harm Williams. On June 23, 2010, staff reported that Bell had flooded his room.[2] In addition, Bell placed paper over the observation window in his room so that staff could not see him.

In response to Bell's actions, McAdory ordered Bell be removed from the Special Management Unit and that he be placed in the infirmary so that he could more easily be observed through the larger observation windows in the infirmary. When the extraction team arrived at his room, Bell refused to comply with the team's order that he place his hands in the chuckhole to his room so that he could be placed in restraints. Accordingly, the extraction

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[1] Bell claims that he refused to participate in the intake procedures "for legal reason" and that he made this fact clear to the staff at Rushville. Regardless of his reasons, it is undisputed that Bell refused to participate in the intake process, and he threatened the staff.

[2] Bell disputes the claim that he flooded his room.

team forcibly removed Bell from his room and transported him to the infirmary. McAdory ordered that Bell have no clothing or other property while he was in the infirmary to prevent Bell from covering the observation windows and to prevent Bell from harming himself or others.

On July 1, 2010, Bell agreed to follow Rushville's rules and agreed to participate in Rushville's intake procedures. Thereafter, Bell was given clothing and was transferred to a new room.

On May 28, 2012, Bell filed the instant suit under 42 U.S.C. § 1983 alleging that McAdory and Williams violated his constitutionally protected rights. On June 28, 2012, the Court determined, after conducting a merit review under 28 U.S.C. § 1915A, that Bell's Complaint stated three causes of action: (1) a claim that Defendants violated his due process rights under the Fourteenth Amendment based upon the conditions of his confinement; (2) a claim that Defendants violated his due process rights under the Fourteenth Amendment based upon his extended stay in the Special Management Unit and his placement in segregation in the infirmary; and (3) a claim that Defendants exercised excessive force against him in violation of his rights under the Fourth and Fourteenth Amendments when he was forcibly removed from his room.

Defendants have now filed the instant motion arguing that there are no genuine issues of material fact that need to be decided by the trier of fact and that they are entitled to judgment as a matter of law. Bell responds by arguing that Defendants have failed to show that they are entitled to judgment as a

matter of law. Instead, Bell asks the Court to enter judgment on the pleadings in his favor.

II.
LEGAL STANDARDS GOVERNING SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Ruiz-Rivera v. Moyer*, 70 F.3d 498, 500-01 (7th Cir. 1995). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Gracia v. Volvo Europa Truck*, N.V., 112 F.3d 291, 294 (7th Cir. 1997). "[A] party moving for summary judgment can prevail just by showing that the other party has no evidence on an issue on which that party has the burden of proof." *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1183 (7th Cir. 1993).

Accordingly, the non-movant cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish that there is a genuine triable issue; he "'must do more than simply show that there is some metaphysical doubt as to the

material fact.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986)(quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 818 (7th Cir. 1999). Finally, a scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 250.

III.
DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT

A. Defendants did not violate Bell's due process rights based upon the conditions of his confinement.

Bell asserts three ways or manner in which Defendants violated his Fourteenth Amendment due process rights as they relate to the conditions of his confinement. *First*, Bell complains that being placed in the Special Management Unit for seventy-two hours upon his return to Rushville was unconstitutional. In fact, Bell contends that the entire intake procedures developed by McAdory are unlawful in that the Illinois Administrative Code sets forth the procedures that must be employed when a new resident arrives at Rushville, not McAdory's self-determined intake procedures. *Second*, Bell claims that Defendants' decision to use an extraction team to remove him from his room on June 23, 2010, violated his due process rights. *Third*, Bell asserts that the extreme cold in the infirmary, especially given the fact that he was totally naked while there,

violated his due process rights and constituted cruel and unusual punishment.

As for his claim regarding the extraction team, that claim will be discussed more fully *infra*. However, the Court finds that the use of an extraction team to remove Bell from his room did not violate his due process rights in light of his admission that he was being belligerent and was threatening staff.

As for his claim that his placement in the Special Management Unit for seventy-two hours failed to comply with Illinois law and, therefore, violated his Fourteenth Amendment rights, Bell is simply incorrect as a matter of law that Defendants' alleged violations of the Illinois Administrative Code establishes his case. Bell repeatedly argues throughout his brief that Defendants failed to follow 59 Ill. Adm. Code § 299 in their treatment of him. Bell argues that the entire intake procedures developed by McAdory and employed at Rushville for new residents violates 59 Ill. Adm. Code § 299 and that this Code section sets forth the proper procedures for dealing with civilly detained individuals like himself.

Assuming *arguendo* that Defendants violated 59 Ill. Adm. Code § 299 in any manner, this violation does not mean that Bell prevails in this case or that Defendants violated Bell's constitutional rights. On the contrary, "a violation of a state law by a government employee standing alone does not violate the federal Constitution." *Gonzalez v. City of Gary*, 2000 WL 1047523, * 2 (7th Cir. July 27, 2000); *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988)(*en banc*)(citing *Snowden v. Hughes*, 321 U.S. 1,

11 (1944)("Mere violation of a state statute does not infringe the federal Constitution.")). Thus, to the extent that Bell's response and motion for judgment on the pleadings are premised upon Defendants' violation of the Illinois Administrative Code, Bell's argument is incorrect as a matter of law, and Defendants are entitled to summary judgment.

As for his claim that the temperature in the infirmary was so cold that it violated his constitutional rights, the Court disagrees. The United States Supreme Court has made clear that "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions;' it outlaws cruel and unusual 'punishments.'" *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). This means that "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot . . . be condemned as an infliction of punishment." *Id.* at 838.

Accordingly, "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. This type of deliberate indifference "implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Duckworth v.*

Frazen, 780 F.2d 645, 653 (7th Cir. 1985).[3] "[M]ere negligence or even gross negligence does not constitute deliberate indifference," *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996), and it is not enough to show that a prison official merely failed to act reasonably. *Gibbs v. Franklin*, 49 F.3d 1206, 1208 (7th Cir. 1995), *abrogated on other grounds*, *Haley v. Gross*, 86 F.3d 630, 641 (7th Cir. 1996).

Here, Bell failed to present any evidence that the cold in the infirmary was of such a degree that it violated his due process rights or constituted cruel and unusual punishment. Bell acknowledges that he did not ask for the temperature to be adjusted, and Defendants have asserted that the temperature in Bell's room was the same as the temperature in the Special Management Unit. As noted *supra*, Defendants cannot be held liable for violations of which they are unaware. *Farmer*, 511 U.S. at 838.

Although Bell was without clothing and, therefore, more susceptible to being cold, "routine discomfort is part of the penalty that criminal offenders pay for their offenses against society," and so, "extreme deprivations are required to make out a conditions-of-confinement claim." *Hudson v. McMillian*, 503 U.S. 1,

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[3] As a civil detainee, Bell's claim arises under the Fourteenth Amendment, not the Eighth, but that is a distinction without a difference. "[C]ourts still look to Eighth Amendment case law in addressing the claims of pretrial detainees, given that the protections of the Fourteenth Amendment's due process clause are at least as broad as those that the Eighth Amendment affords to convicted prisoners, and the Supreme Court has not yet determined just how much additional protection the Fourteenth Amendment gives to pretrial detainees." *Rice ex rel. Rice v. Correctional Med. Servs.*, 675 F.3d 650, 664-65 (7th Cir. 2012)(internal citations omitted).

9 (1992)(internal quotations omitted). Indeed, "the Constitution . . . does not mandate comfortable prisons." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). If prison conditions are merely "restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Rhodes v. Chapman*, 452 U.S. 349 (1981). Thus, prison conditions rise to the level of an Eighth Amendment violation only when they "involve the wanton and unnecessary infliction of pain." *Id.* at 347.

Moreover, Bell has not demonstrated the type of conduct by Defendants that deprived him of the minimally civilized measure of life's necessities. Bell admits that the cold only lasted for approximately one week, and it was due to his own refusal to engage in the intake procedures and to comply with Rushville's rules regarding threatening staff. *Chandler v. Crosby*, 379 F.3d 1278, 1295 (11th Cir. 2004)("[T]he Eighth Amendment is concerned with both the 'severity' and the 'duration' of the prisoner's exposed to inadequate cooling and ventilation."); *Dixon v. Godinez*, 114 F.3d 640, 643 (7th Cir. 1997)("[I]t is not just the severity of the cold, but the duration of the condition, which determines whether the conditions of confinement are unconstitutional.").

In addition, Bell does not allege and has not shown any harm resulting from the cold. *Vasquez v. Frank*, 2008 WL 3820466, * 2-3 (7th Cir. Aug. 15, 2008)(holding that ventilation that allegedly caused dizziness, migraines, nasal congestion, nose bleeds and difficulty breathing did not rise to the level of an Eighth Amendment violation); *Jasman v. Schmidt*, 2001 WL 128430, * 2 (6th Cir. Feb. 6, 2001)(rejecting

a prisoner's complaint about poor ventilation where plaintiff failed to allege harm caused by the ventilation). As such, Bell's claim of extreme cold is insufficient to demonstrate a Constitutional violation. *Chandler*, 379 F.3d at 1290-98 (citing cases and concluding that a ventilation system that allowed summer temperatures to average eighty-five or eighty-six degrees during the day and eighty degrees at night was not sufficiently extreme to violate the Eighth Amendment where such temperatures were expected and tolerated by the general public in Florida). Bell has claimed uncomfortable conditions, but he has not alleged a violation of his Constitutional rights. *E.g., Strope v. Sebelius*, 2006 WL 2045840, * 2 (10th Cir. July 24, 2006)("Mr. Strope claims that the prison lacks adequate ventilation, and that fans are necessary to control the 'excessively hot' temperature and to provide ventilation. He further asserts that the high temperatures make it hard to sleep. Although these conditions are no doubt uncomfortable, we conclude that Mr. Strope's allegations are insufficient to state a claim of violation of the Eighth Amendment."); *Deal v. Cole*, 2013 WL 1190635, * 2 (W.D.N.C. Mar. 22, 2013) ("Plaintiff's allegations of cold air in his cell, without more, are not sufficiently objectively serious to state a claim under the Eighth Amendment."); *Cameron v. Howes*, 2010 WL 3885271, * 9 (W.D. Mich. Sept. 28, 2010)(dismissing plaintiffs' claim for failing to allege extreme deprivation as a result of inadequate ventilation causing high temperatures in the cells).

In sum, Bell has not shown conditions so egregious that would trigger the Constitution's protections.

Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992)(objective component met where prison conditions were "so strikingly reminiscent of the Black Hole of Calcutta"). Prisoners cannot expect the "amenities, conveniences, and services of a good hotel." *Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988); *Lunsford v. Bennett*, 17 F.3d 1574, 1581 (7th Cir. 1994)("[t]he Constitution does not require prison officials to provide the equivalent of hotel accommodations or even comfortable prisons."). Accordingly, Defendants are entitled to summary judgment on Bell's conditions of confinement claim against them.

B. Defendants did not violate Bell's due process rights by keeping him in the Special Management Unit and by placing him in the infirmary.

Likewise, Defendants are entitled to summary judgment on Bell's claim that they violated his Fourteenth Amendment rights by keeping him in the Special Management Unit and by placing him in the infirmary from June 4 until July 1, 2010. When a plaintiff brings an action under § 1983 for procedural due process violations, he must show that the state deprived him of a constitutionally protected interest in 'life, liberty, or property' without due process of law." *Williams v. Ramos*, 71 F.3d 1246, 1248 (7th Cir. 1995)(quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). "Decisions and actions by prison authorities which do not deprive an inmate of a protected liberty interest may be made for any reason or for no reason." *Richardson v. Brown*, 2013 WL 5093801, * 5 (S.D. Ind. Sept. 11, 2013).

An inmate[4] has "no liberty interest in remaining in the general prison population." *Williams*, 71 F.3d at 1248. "In fact, absent a constitutional, statutory, or regulatory bar, 'a prisoner may be transferred for any reason, or for no reason at all.'" *Id.* at 1249 (quoting *Williams v. Faulkner*, 837 F.2d 304, 309 (7th Cir. 1988)). "An inmate has a due process liberty interest in being in the general prison population only if the conditions of his or her confinement impose 'atypical and significant hardship . . . in relation to the ordinary incidents of prison life.'" *Richardson*, 2013 WL 5093801, at * 5 (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)).

In the Seventh Circuit, "a prisoner in disciplinary segregation at a state prison has a liberty interest in remaining in the general prison population only if the conditions under which he or she is confined are substantially more restrictive than administrative segregation at the most secure prison in that state." *Id.* "Merely being placed in a disciplinary unit, or being confined under conditions more onerous than conditions in other housing units of the jail does not violate the guarantee of due process." *Id.*

In fact, the Seventh Circuit has described an inmate's liberty interest in avoiding disciplinary

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[4] The Court recognizes that Plaintiff is a civil detainee, not an inmate. "[C]ivil detainees who are more disruptive than prison inmates can be subjected to greater restrictions without those restrictions constituting punishment. But, such detainees still have the same right as criminals to complain of a deprivation of liberty without due process of law if the restrictions constitute a deprivation of liberty within the meaning of the Constitution as interpreted by the Supreme Court . . . ." *Miller v. Dobier*, 634 F.3d 412, 415 (7th Cir. 2011).

segregation as very limited or even nonexistent. *Townsend v. Fuchs*, 522 F.3d 765, 766 (7th Cir. 2008). As a result, the Seventh Circuit has indicated that, generally, extended stays in segregation are necessary to give rise to a due process claim. *Marion v. Columbia Correctional Inst.*, 559 F.3d 693, 698-99 (7th Cir. 2009)(citing cases).

Initially, the Court questions whether Bell's twenty-three day stay in Rushville's Special Management Unit and infirmary is sufficient in duration to give rise to a claim that Defendants deprived him of his liberty interest.[5] Regardless, the Court finds that Defendants did not violate Bell's due process rights by placing keeping him in the Special Management Unit and the infirmary.

Here, Defendants acted reasonably in keeping Bell in the Special Management Unit and in the infirmary for an extended period of time. Bell admitted that he refused to participate in the intake procedures. Bell admitted that he was generally uncooperative. Bell admitted that he threatened Williams with physical harm. Bell admitted that he obstructed the view of his room with paper. Finally, Bell refused to be

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[5] *Townsend v. Fuchs*, 522 F.3d 765, 766, 722 (7th Cir. 2008) (holding that "inmates have no liberty interest in avoiding placement in discretionary segregation")(59 days); *Hoskins v. Lenear*, 395 F.3d 372, 374-75 (7th Cir. 2005)(holding that the punishments the plaintiff suffered because of his disciplinary conviction-demotion in status, segregation and transfer-raise no due process concerns)(60 days); *Holly v. Woolfolk*, 415 F.3d 678, 679 (7th Cir. 2005)(noting that "being placed in segregation is too trivial an incremental deprivation of a convicted prisoner's liberty to trigger the duty of due process")(2 days).

placed in restraints so that he could be transported to the infirmary.

The fact that Bell believed that he had a good faith basis for his actions, *i.e.*, a "legal basis," does not change the fact that Defendants acted reasonably in keeping Bell segregated until he agreed to participate in the intake procedures and to the rules and regulations imposed upon the residents at Rushville. *West v. Schwebke*, 333 F.3d 745, 748 (7th Cir. 2003) ("To the extent that plaintiffs are uncontrollably violent, and thus pose a danger to others, Wisconsin is entitled to hold them in segregation for that reason alone; preserving the safety of the staff and other detainees takes precedence over medical goals. . . . Just as a pretrial detainee may be put in isolation—indeed, may be *punished* for violating institutional rules, provided that the jailers furnish notice and an opportunity for a hearing—so a civil detainee may be isolated to protect other detainees from aggression. Institutions may employ both incapacitation and deterrence to reduce violence within their walls . . . . Either way, if at trial defendants can establish that their use of seclusion was justified on security grounds, they will prevail without regard to the question whether extended seclusion is justified as a treatment.")(internal citations omitted and emphasis in original). The Court cannot say that Defendants' exercise of their professional judgment to keep Bell isolated until he no longer presented a danger to himself, to other residents, or to the staff was anything but reasonable. *Id.*; *Townsend v. Fuchs*, 522 F.3d 765, 711 (7th Cir. 2008)(holding that involuntary detainees have no liberty interest in avoiding transfer to discretionary segregation

imposed for protective purposes). Accordingly, the Court finds that Defendants did not violate Bell's due process claims by keeping him in the Special Management Unit and the infirmary for an extended period of time.[6]

C. Defendants are not liable to Bell for his excessive force claim.

Finally, Defendants are entitled to summary judgment on Bell's excessive force claim. The United States Supreme Court has set forth the standards by which this Court must evaluate a claim of excessive force under the Eighth Amendment. In *Wilkins v. Gaddy*, 559 U.S. 34 (2010), the Supreme Court re-emphasized its holding in *Hudson v. McMillan*, 503 U.S. 1 (1992), that the "'core judicial inquiry [ ] was not whether a certain quantum of injury was sustained, but rather whether force was applied in a good faith-effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" *Wilkins*, 559 U.S. at 37 (quoting Hudson, 503 U.S. at 7). The Supreme Court went on to say:

> "When prison officials maliciously and sadistically use force to cause harm," the Court recognized, "contemporary standards of decency always are violated . . . whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of

[6] The Court also finds that Bell failed to develop a factual record demonstrating that the duration and conditions in the Special Management Unit and in the infirmary were sufficient to violate their Fourteenth Amendment rights.

injury." *Hudson*, 503 U.S. at 9, 112 S. Ct. 995; see also *id.*, at 13-14, 112 S. Ct. 995 (Blackmun, J., concurring in judgment)("The Court today appropriately puts to rest a seriously misguided view that pain inflicted by an excessive use of force is actionable under the Eighth Amendment only when coupled with 'significant injury,' *e.g.*, injury that requires medical attention or leaves permanent marks").

This is not to say that the "absence of serious injury" is irrelevant to the Eighth Amendment inquiry. *Id.* at 7, 112 S. Ct. 995. "[T]he extent of injury suffered by an inmate is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation." *Ibid.* (quoting *Whitley*, 475 U.S. at 321, 106 S. Ct. 1078). The extent of injury may also provide some indication of the amount of force applied. As we stated in *Hudson* not "every malevolent touch by a prison guard gives rise to a federal cause of action." 503 U.S. at 9, 112 S. Ct. 995. "The Eighth Amendment's prohibition of 'cruel and unusual' punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." *Ibid.* (some internal quotation marks omitted). An inmate who complains of a "push or shove" that causes no discernible injury almost certainly fails to state a valid excessive force claim. *Ibid.* (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

> Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts.

Id. at 37-38.

In the instant case, Bell has admitted that neither McAdory nor Williams had any direct, personal involvement in removing him forcibly from his room as neither was on the extraction team. "[I]ndividual liability under § 1983 requires 'personal involvement in the alleged constitutional deprivation.'" *Minix v. Canarecci*, 597 F.3d 824, 833 (7th Cir. 2010)(quoting *Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003)). Indeed, the Seventh Circuit has explained that the doctrine of *respondeat superior* (a doctrine whereby a supervisor may be held liable for an employee's actions) has no application to § 1983 actions. *Gayton v. McCoy*, 593 F.3d 610, 622 (7th Cir. 2010).

Instead, in order for a supervisor to be held liable under § 1983 for the actions of his subordinates, the supervisor must "approve[ ] of the conduct and the basis for it." *Chavez v. Illinois State Police*, 251 F.3d 612, 651 (7th Cir. 2001); *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995)("An official satisfies the personal responsibility requirement of section 1983 . . . if the conduct causing the constitutional deprivation occurs at [his] direction or with [his] knowledge and consent.")(internal quotation omitted). "[S]upervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference." *Backes v. Village of Peoria Heights, Illinois*, 662 F.3d 866, 870 (7th Cir. 2011)

(quoting *Chavez*, 251 F.3d at 651)). "In short, some causal connection or affirmative link between the action complained about and the official sued is necessary for § 1983 recovery." *Gentry*, 65 F.3d at 561.

McAdory was not on the extraction team, and there is no evidence in the record demonstrating that he was present when Bell was removed forcibly from his room. As such, it is clear that McAdory had no personal involvement in the extraction that formed the basis for Bell's excessive force claim, and thus, he is entitled to summary judgment on this claim against him.

As for Williams even if he were considered to have been personally involved in Bell's extraction based upon his supervisory status, Williams is, nevertheless, entitled to summary judgment. Bell has alleged no injury as a result of the extraction. Although sustaining an injury is not a prerequisite to maintaining his excessive force claim, the lack of any injury is evidence that excessive force was not employed.[7] *Wilkins*, 559 U.S. at 37.

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[7] Bell testified that a security therapist aide (not either Defendant) punched him in his face and pushed him to the ground. Bell Dep. at pgs. 80-84. However, Bell testified that he was not aching as a result of the punch and that any injuries that he sustained were superficial and did not need medical attention. Bell also testified that security therapist aides injured his wrist by pulling on the handcuffs and chain attached to his left arm through the chuckhole at the infirmary, but Williams was not the individual pulling on the chain or the one who injured Bell's wrist, and Bell admits that he does not know if Williams was present during the extraction. *Id.* at pgs. 122-124.

Furthermore, there is no evidence that Williams or anyone on the extraction team used excessive force in removing Bell from his room. Although Bell disputes Williams' assertion that he flooded his room, Bell admits that he threatened Williams (and others), that he obstructed the view of his room, that he had a history of assaults on staff, and that he refused to place his hands through his room's chuckhole so that he could be restrained prior to his transfer to the infirmary. The only evidence in the record is that the extraction team forcibly removed Bell and placed restrains upon him. However, simply placing a detainee in handcuffs does not by itself violate the Fourth Amendment. *West*, 333 F.3d at 748 ("If professional judgment leads to the conclusion that restraints are necessary for the well-being of the detainee (or others), then the Constitution permits those devices."); *Muehler v. Mena*, 544 U.S. 93, 98-99 (2005)(denying a § 1983 claim because the use of handcuffs to detain an occupant was reasonable because the governmental interests in safety outweighed the intrusion); *Cooper v. City of Virginia Beach, Virginia*, 817 F. Supp. 1310, 1315 (E.D. Va. 1993)("[H]andcuffing [an] arrestee does not constitute unreasonable force."). Given this undisputed evidence, the Court finds as a matter of law that Williams did not employ excessive force against Bell in violation of his constitutional rights and that, as a result, Williams is entitled to summary judgment on this claim against him.

IT IS, THEREFORE, ORDERED:

1. Plaintiff's motion for judgment on the pleadings [53] is DENIED.

2. Defendants' Motion for Summary Judgment [49] is GRANTED. The Clerk of the Court is directed to enter judgment in Defendants' favor and against Plaintiff. All pending motions are denied as moot, and this case is terminated, with the Parties to bear their own costs. All deadlines and settings on the Court's calendar are vacated.

3. If Plaintiff wishes to appeal this judgment, he must file a notice of appeal with this Court within 30 days of the entry of judgment. Fed. R. App. P. 4(a)(4).

4. If Plaintiff wishes to proceed in forma pauperis on appeal, his motion for leave to appeal in forma pauperis must identify the issues that he will present on appeal to assist the Court in determining whether the appeal is taken in good faith. *See* Fed. R. App. P. 24(a)(1)(c); *Celske v. Edwards*, 164 F.3d 396, 398 (7th Cir. 1999)(an appellant should be given an opportunity to submit a statement of his grounds for appealing so that the district judge "can make a responsible assessment of the issue of good faith."); *Walker v. O'Brien*, 216 F.3d 626, 632 (7th Cir. 2000)(providing that a good faith appeal is an appeal that "a reasonable person could suppose . . . has some merit" from a legal perspective). If Plaintiff chooses to appeal, he will be liable for the $505.00 appellate filing fee regardless of the outcome of the appeal.

Entered this 11th day of August, 2014

s/ Colin S. Bruce
COLIN S. BRUCE
UNITED STATES DISTRICT JUDGE

APPENDIX D

In the
United States Court of Appeals
For the Seventh Circuit

No. 15-1036

TIMOTHY BELL,

Plaintiff-Appellant,

v.

EUGENE MCADORY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois.
No. 12-3138-CSB-DGB — **Colin S. Bruce**, *Judge.*

ARGUED JANUARY 21, 2016 — DECIDED APRIL 29, 2016

Before POSNER, EASTERBROOK, and KANNE, Circuit Judges.

EASTERBROOK, *Circuit Judge.* In 2006 Timothy Bell was adjudicated to be a sexually dangerous person and civilly detained under Illinois law. He was sent to the Treatment and Detention Facility in Rushville but did not stay there long. After he violently attacked a guard, he was convicted and spent the next four years in prison. When his

sentence expired in 2010, he was sent back to Rushville and did not like the transfer one bit.

Bell took the position that he was entitled to release from custody and declined to cooperate with Rushville's intake procedures. He refused to answer questions. He refused to be photographed. He threatened the guards, who understandably took the threats seriously. Housed in segregation, he put paper over the windows to block monitoring and otherwise tried to frustrate the Facility's normal operation.

After the impasse had continued for 20 days, Eugene McAdory, Rushville's Security Director, told the guards to take Bell to a secure room in the infirmary, which had larger windows, and to take away his clothing. Bell refused to cooperate with the transfer, which as a result entailed some use of force. He spent the next eight days naked in the infirmary——and, he says, uncomfortably cold, because the air conditioning was on and he lacked protection from the draft. On the ninth day Bell agreed to cooperate with Rushville's intake procedure. He was given clothes and moved to the general population. He filed this suit under 42 U.S.C. §1983, contending that the eight cold, uncomfortable, unclothed days, meted out without a hearing, violated the Due Process Clause of the Constitution's Fourteenth Amendment.

The district court granted summary judgment to all defendants, concluding that Bell had no constitutional right to comfort, clothes, or a hearing. 2014 U.S. Dist. LEXIS 110337 (C.D. Ill. Aug. 11, 2014). The court observed that "routine discomfort is part of the penalty" for crime, quoting from *Hudson v.*

McMillian, 503 U.S. 1, 9 (1992), and that if prison conditions are "restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society", quoting from *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). The terms of Bell's confinement therefore did not violate the Cruel and Unusual Punishments Clause of the Eighth Amendment, the court concluded. See 2014 U.S. Dist. LEXIS 110337 at *7–15.

There's an obvious problem with this reasoning. Bell invoked the Due Process Clause, not the Cruel and Unusual Punishments Clause. He did that because he is a civil detainee, not a prisoner. States must treat detainees at least as well as prisoners, and often they must treat detainees better—precisely because detainees (whether civil or pretrial criminal) have *not* been convicted and therefore must not be punished. See, e.g., *Bell v. Wolfish*, 441 U.S. 520 (1979). So to say that harsh conditions are proper as part of the penalty for crime is not remotely to justify Bell's treatment.

Indeed, it is far from clear that spending eight days without clothes in a fan-blown stream of chilled air would be proper for a convicted prisoner, when the goal was to get the prisoner to pose for a photograph. Since Bell had been detained at Rushville before, it is unclear why he had to go through the intake process again—though it is understandable that he be cooped up while he was threatening violence against the staff.

But after the district court erred by equating civil detainees to convicted prisoners, Bell made a blunder of his own. He did not file a timely appeal. And *that* blunder is potentially conclusive, because the time to

appeal in civil litigation sets a limit on appellate jurisdiction. *Bowles v. Russell*, 551 U.S. 205 (2007).

The district court entered its judgment on August 11, 2014, giving Bell until September 10 to file a notice of appeal. See 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). In lieu of a notice of appeal, Bell might have sought reconsideration; he had 28 days (until September 8) to file such a motion. Fed. R. Civ. P. 59(e). He did not meet either deadline. Instead, on September 11, he filed a motion that the district judge treated as one under Fed. R. Civ. P. 60(b). A motion filed within 28 days of the judgment suspends the judgment's finality and defers the time for appeal. Fed. R. App. P. 4(a)(4). But a motion filed after 28 days does not affect the time for appeal. So Bell's time expired on September 10.

The disposition of a motion under Rule 60 is separately appealable. The district judge denied Bell's motion on October 1, and *again* Bell did not file a proper notice of appeal. He did file a flurry of other papers, however, and this court eventually held that a document he had filed on October 16 contained the information required by Fed. R. App. P. 3(c) and should be treated as a notice of appeal. See *Smith v. Barry*, 502 U.S. 244 (1992). This gives us appellate jurisdiction. But it is canonical that an appeal from the denial of a motion under Rule 60(b) does not allow the court of appeals to address the propriety of the original judgment, for that would be equivalent to accepting a jurisdictionally untimely appeal. See *Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n.7 (1978) ("an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review").

Bell offers excuses for his failure to appeal on time. He contends, for example, that he thought that the 28- and 30- day periods began to run only when he received the court's judgment (which he says happened on August 15) — and he did file his motion within 28 days of the judgment's receipt. But there is no ambiguity in the statute or rules, and at all events Bowles held that there can be no equitable exceptions to the time for appeal. 551 U.S. at 213–14. That's what it means to call the time limit jurisdictional. Excuses and misunderstandings can extend many a time limit, see *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015) (collecting authority), but they have no effect on jurisdictional limits.

Assisted by able counsel, Bell sees two ways around this problem. First, he contends that Fed. R. Civ. P. 60(b)(1) should be treated differently from Rule 60(b)(6), the subsection involved in *Browder* and similar decisions. Second, he maintains that the district judge himself effectively reopened the time for appeal by writing, in the brief order denying the Rule 60 motion, that the original judgment was correct. Since he is entitled to appeal from the denial of the Rule 60 motion, Bell maintains, he is equally entitled to litigate whether the original judgment was right.

Both varieties of this argument have the same problem: They would effectively override *Bowles* and *Browder* and allow belated appeals by anyone who files under Rule 60(b). Judges routinely say when denying Rule 60 motions that they do not see an error in the initial judgment. Bell has not cited, and we could not find, any decision from the Supreme Court or any court of appeals holding that, by

contesting the merits of the judgment in a Rule 60 motion, a litigant gets a second crack at appeal. Instead we find many decisions saying that disagreement with the merits of the underlying judgment simply is not a reason for relief under Rule 60(b). See, e.g., *Parke-Chapley Construction Co. v. Cherrington*, 865 F.2d 907 (7th Cir. 1989); *Cash v. Illinois Division of Mental Health*, 209 F.3d 695, 698 (7th Cir. 2000); *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 800 (7th Cir. 2000); *Banks v. Chicago Board of Education*, 750 F.3d 663, 668 (7th Cir. 2014). Instead of trying to relitigate the merits through Rule 60(b), a litigant has to come up with something *different*—perhaps something overlooked before, perhaps something new. See, e.g., *Gonzalez v. Crosby*, 545 U.S. 524, 536–38 (2005); *Ackermann v. United States*, 340 U.S. 193 (1950).

Rule 60(b)(1) does have a special use in allowing a district court to reopen a default judgment that was entered because of the litigant's mistake or excusable neglect. But this does not imply that a losing litigant's mistake about how much time he has to file an appeal provides a basis for reopening, when the goal of the Rule 60(b) motion is to extend the time for appeal rather than to get an initial decision on the merits in the district court.

The Rules of Appellate Procedure nonetheless offer some assistance to litigants who misunderstand when an appeal must be filed. Rule 4(a)(5)(A)(i) permits a district judge to add another 30 days to the time for appeal, if "a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires". It is unclear to us why the district judge did not treat Bell's motion as one under that rule. After

all, the judge knew that the motion had been miscaptioned. It called itself a Rule 59 motion for reconsideration; the judge recognized that it was too late to be *that* and treated it as if it were a Rule 60 motion. Why not treat it as a Rule 4(a)(5) motion instead? The judge did not say.

A court of appeals cannot grant relief under Rule 4(a)(5), but a district judge can—and the judge can grant that relief to Bell even now, because the document that Bell filed on September 11 was within the time allowed by Rule 4(a)(5)(A)(i), and the Rule does not set an outer limit for action by the district court. A district could may allow a potential appellant an extra 30 days measured from the judgment, or an extra 14 days from the time the extension order is entered, whichever is later. Rule 4(a)(5)(C). A court of appeals has the authority to order "such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. We think that a remand, so that the district court may decide whether to allow Bell more time for appeal, is the best way to proceed.

Lest the appeal come right back to us for decision on the merits, we add that if the district judge is inclined (in light of the analysis in this opinion) to revisit the judgment as well as to grant extra time, we grant him permission to do so under Circuit Rule 57.

Finally, to tie up one loose end, we see no reason for the district judge to give a second thought to Bell's argument that Rushville's (asserted) failure to give him the benefit of procedures established by state law creates a problem under § 1983. Although the Due Process Clause sometimes requires procedures,

as a matter of federal law, when state statutes and regulations define substantive entitlements, it does not treat state procedural requirements as property interests in their own right. See *Hewitt v. Helms*, 459 U.S. 460 (1983); *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Sandin v. Conner*, 515 U.S. 472 (1995).

The case is remanded with instructions to treat the document filed on September 11, 2014, as a request for an extension of time under Rule 4(a)(5).

CERTIFIED COPY

a True Copy
Teste:

/s/ Christine Duff Hudkins
Deputy Clerk
of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued January 21, 2016
Decided September 14, 2016

Before

RICHARD A. POSNER, *Circuit Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

No. 15-1036 TIMOTHY BELL, *Plaintiff-Appellant*, *v.* EUGENE MCADORY, *et al.*, *Defendants-Appellees.*	Appeal from the United States District Court for the Central District of Illinois. No. 12-3138-CSB-DGB Colin S. Bruce, *Judge*.

Order

Our opinion of last April directed the district court to treat post-judgment papers that Timothy Bell had filed there as a motion under Fed. R. App. P. 4(a)(5) for additional time to appeal. The district judge now has done so and, in an order dated September 6, has found that Bell lacks excusable neglect or good cause for not filing a timely appeal.

Our review of such a decision is deferential, see *Pioneer Investment Services Co. v. Brunswick Associates LP*, 507 U.S. 380 (1993), and we do not see

any problem in the district court's disposition. The judge stressed that his order on the merits had itself informed Bell that he must appeal within 30 days of "the entry of judgment", so that even if imprisoned litigants are apt to misunderstand the Appellate Rules, Bell knew the deadline. His contention that another inmate had told him that time is calculated from a decision's receipt in the prison, rather than its entry in the district court, cannot justify disregarding information provided directly by the court. Bell's delay therefore lacks a good cause and cannot be attributed "excusable" neglect. Accordingly, we dismiss Bell's appeal for lack of appellate jurisdiction.

APPENDIX F

Fed. R. App. P. 4 provides in part:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(5) **Motion for Extension of Time.**

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

28 U.S.C. § 1291 provides:

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the

district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

42 U.S.C. § 1983 provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.