No. 05-1620

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BENJAMIN PRUITT,

Plaintiff-Appellant,

v.

STEPHEN D. MOTE, et. al.,

Defendants-Appellees.

On appeal from the U.S. District Court for the
Central District of Illinois (Urbana), No. 03 C 1030
Hon. Judge Harold A. Baker, presiding

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANT BENJAMIN PRUITT

Peter C. McCabe III
William P. Ferranti
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Counsel for Plaintiff-Appellant

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: **05-1620 (7th Cir.)**

Short Caption: **Pruitt v. Mote, et. al.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Benjamin Pruitt, Inmate No. B-55009

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

WINSTON & STRAWN LLP

(3) If the party or amicus is a corporation:

(i) Identify all its parent corporations, if any; and

Not Applicable

(ii) List any publicly held company that own 10% or more of the party's or amicus' stock:

Not Applicable

Attorney's
Signature: _____Date:_____
Attorney's Printed Name: **Peter C. McCabe III**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **No**

Address: **Winston & Strawn LLP**
35 West Wacker Drive
Chicago, Illinois 60601
Phone Number: **(312) 558-5600**
Fax Number: **(312) 558-5700**
Email Address: **pmccabe@winston.com**

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: **05-1620 (7th Cir.)**

Short Caption: **Pruitt v. Mote, et. al.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Benjamin Pruitt, Inmate No. B-55009

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

WINSTON & STRAWN LLP

(3) If the party or amicus is a corporation:

(i) Identify all its parent corporations, if any; and

Not Applicable

(ii) List any publicly held company that own 10% or more of the party's or amicus' stock:

Not Applicable

Attorney's
Signature: _____Date:_____
Attorney's Printed Name: **William P. Ferranti**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes**

Address: **Winston & Strawn LLP**
35 West Wacker Drive
Chicago, Illinois 60601
Phone Number: **(312) 558-5600**
Fax Number: **(312) 558-5700**
Email Address: **bferranti@winston.com**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The district court abused its discretion by refusing to recruit counsel for Pruitt pursuant to 28 U.S.C. §1915(e)(1), and moreover, by doing so without any consideration of Pruitt's competence to proceed *pro se*. Pruitt filed this lawsuit because he was sexually assaulted by a prison guard and the responsible officials did not care. As his pleadings in the district court demonstrate, Pruitt has limited intelligence and none of the skills necessary to try his claims to a jury. The district court, focusing exclusively on the case's objective complexity, denied all four of Pruitt's requests for counsel. Predictably, Pruitt's *pro se* performance at trial was an embarrassment to the Seventh Amendment.

On appeal, a panel of this Court, with one judge dissenting, concluded that the district court had not abused its discretion in denying Pruitt's §1915(e)(1) motions. Panel Op., No. 05-1620 (7th Cir. Dec. 28, 2006) (attached to Pruitt's Pet. for Reh'g). The Court subsequently granted Pruitt's petition for rehearing *en banc*, vacated the panel decision, and invited the parties to file supplemental briefs addressing two questions: (1) whether, when an indigent person asks a district court to recruit an attorney to represent him at trial pursuant to 28 U.S.C. §1915(e)(1), the court must consider the person's competence to try the case without the assistance of counsel; and, if so, (2) what criteria the court should use in evaluating the litigant's ability to try the case. *See* Order, No. 05-1620 (7th Cir. March 21, 2007).

It is well-established, in this circuit as in every other, that a district court should consider a litigant's competence when deciding whether to grant a motion under

§1915(e)(1). In undertaking this inquiry, the district court should evaluate the plaintiff's education, job training, and past *pro se* experience; whether the plaintiff's conduct in the litigation to date demonstrates an ability to advocate on his own behalf; and whether anything about the underlying events further suggests an inability to proceed without counsel. Based on this standard and these criteria, and for the other reasons discussed in Pruitt's Opening Brief, Reply Brief, Petition for Rehearing, and below, the Court should reverse and remand this case for a new trial at which Pruitt can receive the professional assistance that he requires.

SUMMARY OF THE SUPPLEMENTAL ARGUMENT

When an indigent litigant asks a district court to recruit an attorney to represent him at trial pursuant to 28 U.S.C. §1915(e)(1), the court must consider the litigant's competence to try the case without assistance. This rule is well-established, and it is entirely appropriate that competence play a dominant role in the district court's inquiry. Accordingly, Pruitt is entitled to relief for two reasons.

First, the district court abused its discretion by denying Pruitt's requests for counsel without undertaking any analysis of Pruitt's competence. The court decided that Pruitt's claims were not complex, but a request for counsel requires the court to evaluate complexity *relative to competence*. A case may appear objectively simple to a seasoned district court judge, yet be littered with pitfalls and stumbling blocks for a particular *pro se* plaintiff. Pruitt has not argued, as the panel majority feared, that Eighth Amendment cases, or sexual abuse cases, or even cases that make it to a jury *per se* require appointment of counsel. Rather, the district court's decision *in this case* is an

abuse of discretion because, contrary to the prevailing standard for §1915(e)(1) motions, the court made no attempt to put complexity into a competency frame-of-reference.

Second, if the district court had considered Pruitt's competence, the court reasonably could have reached only one conclusion: Pruitt was not capable of litigating and trying this case to a jury. In evaluating an indigent plaintiff's competence to handle his case without assistance, a court should consider several criteria: (1) the plaintiff's education, job training, and past *pro se* experience; (2) whether the plaintiff's conduct in the litigation to date demonstrates an ability to advocate on his own behalf in writing and orally before the court; and (3) whether there is anything about the underlying events that would restrict the litigant's ability to represent himself, for example, the likelihood that a sexual assault victim is not capable of performing a minimally competent cross-examination of his attacker.

Even before the debacle of trial, based on these factors, it should have been clear to the district court that Pruitt was incompetent to proceed *pro se*. The court abused its discretion in failing to accede to Pruitt's request for help.

SUPPLEMENTAL ARGUMENT

I. A Motion For Appointment Of Counsel Requires The District Court To Consider The Indigent Litigant's Competence To Try The Case Without Assistance.

The indigent litigant's competence is a well-established part of the prescribed inquiry for §1915(e)(1) motions: "given the difficulty of the case, did the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel have made a difference in the outcome?" *Farmer v. Haas,* 990 F.2d 319, 322 (7th Cir. 1993); *Gil*

v. Reed, 381 F.3d 649, 656 (7th Cir. 2004); *Greeno v. Daley*, 414 F.3d 645, 658 (7th Cir. 2005); *see also* Defs.' Resp. Br. at 22 (". . . the initial question is whether [Pruitt] appeared competent to try his own case").

This standard is a simplification of the five-factor *Maclin* test, pursuant to which a court would consider (1) whether the plaintiff's claim was colorable; (2) the plaintiff's ability to investigate crucial facts; (3) whether the nature of the evidence indicated that the truth would more likely be exposed where both sides were represented by counsel—particularly "where the only evidence to be presented to the factfinder consists of conflicting testimony"; (4) the plaintiff's capability to present her case; and (5) the complexity of the legal issues raised by the complaint. *See Maclin v. Freake,* 650 F.2d 885, 887-89 (7th Cir. 1981); *see also Merritt v. Faulkner*, 697 F.2d 761, 764 (7th Cir. 1983); *McNeil v. Lowney*, 831 F.2d 1368, 1371-72 (7th Cir. 1987); *Jackson v. County of McLean,* 953 F.2d 1070, 1072 (7th Cir. 1992); *Swofford v. Mandrell,* 969 F.2d 547, 551 (7th Cir. 1992).

This list was never intended to be exhaustive, *see*, *e.g.*, *Maclin*, 650 F.2d at 889; *Jackson*, 953 F.2d at 1072; and as *Farmer* explains, the *Maclin* factors "collapse upon inspection" into the simpler, more generalized standard noted above: if the plaintiff's claim is colorable, the district court must determine whether the plaintiff is competent to litigate her case—that is, investigate the facts, understand the law, argue the law, and present the evidence to the finder-of-fact—without the assistance of counsel. *See*

Farmer, 990 F.2d at 321-22.[1] Whether drawn out into a list of non-exhaustive factors or "collapsed" to its core components, however, the standard for determining whether to recruit counsel under §1915 depends fundamentally upon the indigent litigant's competence to proceed *pro se*.

And rightfully so. The district court's decision should be driven by the plaintiff's ability to handle without assistance whatever lies immediately ahead, be it discovery, summary judgment, or a jury trial. The complexity of the plaintiff's claim is important,[2] but complexity is relative—a thoroughly incompetent plaintiff with a colorable claim should be given counsel. The panel majority concluded that it was "unnecessary to consider when, *if ever*, a district judge must recruit counsel in a case that is surely too complex for a given *pro se* litigant, but also too weak to attract representation on contingent fee from even a well-informed bar." Panel Op. at 8 (emphasis added). But the proper disposition of "*a case that is surely too complex for a given* pro se *litigant*" is not an open question—that is *precisely* when the district court must recruit counsel.

Beyond the fact that this Court has firmly rejected a "market forces" approach, *see*, *e.g.*, *Gil*, 381 F.3d at 657-58, the argument for relying on the market to provide representation to indigent plaintiffs is flawed. The panel majority put it as follows:

---

[1] There is a threshold requirement that the litigant make some effort to obtain counsel for himself, before asking the district court for help. *Jackson*, 953 F.2d at 1072-73. It is undisputed that Pruitt's efforts satisfied this requirement. *See* Defs.' Resp. Br. at 22 ("Because the record suggests that Pruitt made a reasonable attempt to find his own counsel, Doc. 37 (App.33), the initial question is whether he appeared competent to try his own case.").

[2] As discussed in other briefs, the district court underestimated the complexity of Priutt's case. Op. Br. at 14-16; Reply Br. at 6-9; *see also* Panel Op. at 11 (Posner, J., dissenting) (distinguishing complexity from difficulty).

> Contingent-fee lawyers take many weak cases; if a given plaintiff cannot persuade any lawyer to assist, his case must be weaker than the most feeble of these. When a judge nonetheless directs legal assistance to that case, he displaces the collective judgment of the bar and likely leaves some other client unrepresented in the process—for the lawyer recruited to assist Client X won't have time to work for Client Y.

Panel Op. at 4. This assessment assumes that an imprisoned litigant with Pruitt's capacities can effectively avail himself of the market for legal services. He can't. There is no reason to think that someone incapable of expressing himself orally or through writing is any more competent to arrange for legal representation based on a contingent fee or the prospect of a fee award, than he is to try the case alone.

Indeed, this Court has noted that "it would be unrealistic to suppose that many prisoners could, by dangling the lure of a contingent fee or an award of damages under 42 U.S.C. §1988, entice a lawyer to conduct the necessary investigation before the filing of a complaint (lawyers are, and with reason, terribly skeptical about the merits of prisoners' civil rights suits, most of which are indeed hoked up and frivolous, and prisons generally are located far from cities having large numbers of lawyers)." *Billman v. Ind. Dep't of Corr.*, 56 F.3d 785, 790 (7th Cir. 1995); *see also Johnson v. Doughty*, 433 F.3d 1001, 1020 (7th Cir. 2006) (Ripple, J., dissenting) ("Prisoners, however, are rarely in a situation that permits them to make a sufficient segment of the bar aware of their case. Indeed, few prisoners are able to explain adequately the merits of the case to an attorney considering undertaking such representation."). Obtaining counsel is difficult even for relatively competent prisoners—they must overcome geographic isolation

(prisons typically are located in non-metropolitan areas), the low damage awards that most prisoner civil rights cases garner, and the limitation on attorneys' fees imposed by the Prison Litigation Reform Act. *See* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1613, 1622, 1654-55 (2003).[3] These obstacles are likely to prove insurmountable to prisoners like Pruitt.

In addition, the panel majority apparently assumed that there is a scare supply of federal practitioners willing and able to take cases like Pruitt's. There isn't. The district court is limited to *requesting* counsel, but as this Court has noted, "judges are usually able to find lawyers willing to accede to such 'requests,' which as a practical matter therefore are appointments." *Hughes v. Joliet Correctional Center*, 931 F.2d 425, 429 (7th Cir. 1991). Even so, the Court need not worry about protecting the federal bar from being overrun by offers-they-can't-refuse from district court judges in prisoner cases. Just as Judge Ripple pointed out in *Johnson*, so too here, "The presence of counsel in this case on appeal belies that suggestion—as does the long list of counsel who regularly take such cases." *Johnson*, 433 F.3d at 1020 (Ripple, J., dissenting).

In fact, district court recommendations via §1915(e)(1) are a boon to federal practitioners and *pro bono* programs circuit-wide. As this Court is well aware, prisoners file a substantial number of federal lawsuits each year many of which do not raise

---

[3] As Professor Schlanger accurately notes, in litigation brought by prisoners, 42 U.S.C. §1997e(c) limits the fee award against losing defendants to the *lesser* of 150% of the damages recovered or 150% of the amount that would be payable under the established Criminal Justice Act hourly rate. *See* 116 Harv. L. Rev. at 1654-55.

colorable claims for relief.[4] In a study of prisoner litigation under 42 U.S.C. §1983, the Bureau of Justice Statistics determined,

> The overwhelming majority of the prisoners win nothing (94%). Seventy-five percent of the issues are dismissed by the court and twenty percent result in the granting of defendants' motions to dismiss. In four percent of the issues, prisoners win little through stipulated dismissals or settlements …. While the remaining two percent of the issues result in trial verdicts, less than half of them (i.e., less than one half of one percent of the issues) result in a favorable verdict for the prisoner.

Henry W.K. Daley & Roger A. Hanson, *Challenging the Conditions of Prisons & Jails: A Report on Section 1983 Litig.* 36 (92-BJ-CX-K026) (Bureau of Justice Statistics, U.S. Dep't of Justice) (1994), available at http://www.ojp.usdoj.gov/bjs/abstract/ccopaj.htm; *see also* Schlanger, 113 Harv. L. Rev. at 1594, 1610 n.158 (between 1990 and 1995, 3% of inmate civil rights cases went to trial, of which plaintiffs won 10%; in 2000, 1% of these cases went to trial, of which plaintiffs won 13%).

Abuses suffered by individual prisoners garner little publicity, which means that attorneys must spend time investigating and screening to find the core of potentially meritorious cases—but an hour spent screening is an hour that cannot be spent providing legal services. Under these circumstances, the bar should welcome cases that, in the assessment of a district court judge, involve colorable claims raised by a *pro*

---

[4] During 2005, prisoners filed more than 1,500 civil rights and prison conditions suits in this circuit. *See* Civil Table 2, *Report on the Business of the Federal Courts of the Seventh Circuit – 2005*, available at http://www.ca7.uscourts.gov/rpt/2005_statistics_report.pdf.

se plaintiff who needs help taking his case to the next stage—particularly when that next stage is a jury trial.

But practical considerations aside, the very existence of §1915(e)(1) demonstrates that Congress is not content to rely on the market to supply counsel to indigent litigants. (The discussion above assumes that §1915(e)(1) precludes district judges from opting out of the process, not that judges have more time to sort through *pro se* cases than attorneys in private practice.) Congress having issued its orders, the question is not whether a district court should entertain requests for counsel from indigent litigants, but rather what standard should apply in deciding *which* of these requests to grant. It is well-established, in this circuit as in every other, that a §1915(e)(1) motion requires district courts to consider the plaintiff's ability to proceed without assistance.[5]

---

[5] *See*, *e.g.*, *DeRosiers v. Moran*, 949 F.2d 15, 25 (1st Cir. 1991) (court must examine "litigant's ability to represent himself"); *Hodge v. Police Officers*, 802 F.2d 58, 61-62 (2d Cir. 1986) (court should consider indigent's "ability to investigate the crucial facts" and "ability to present the case"); *Tabron v. Grace*, 6 F.3d 147, 156 (3d Cir. 1993) (court should consider "plaintiff's ability to present his or her own case," and relevant factors include plaintiff's education, literacy, and work and litigation experience); *Gordon v. Leeke*, 574 F.2d 1147, 1153 (4th Cir. 1978) ("If it is apparent to the district court that a *pro se* litigant has a colorable claim but lacks the capacity to present it, the district court should appoint counsel to assist him."); *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982) (standard turns on two factors, "the type and complexity of the case, and the abilities of the individual bringing it"); *Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993) (same); *Phillips v. Jasper County Jail*, 437 F.3d 791, 794 (8th Cir. 2006) (court should consider the plaintiff's ability to investigate the facts and present his claims); *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004) (court should evaluate "plaintiff's ability to articulate his claims in light of the complexity of the legal issues involved") (internal quotation marks omitted); *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995) (court should consider "the litigant's ability to present his claims") (citing *Tabron* as authority for the factors to be considered); *Kilgo v. Ricks*, 983 F.2d 189, 193 (11th Cir. 1993) ("The key is whether the *pro se* litigant needs help in presenting the essential merits of his or her position to the court."); *Gaviria v. Reynolds*, 476 F.3d 940, 944 (D.C. Cir. 2007) (fact that litigant had "competently prosecuted his case" was relevant to complexity and interests-of-justice prongs).

II. The District Court Abused Its Discretion By Failing To Consider Pruitt's Competence To Try The Case Without Assistance.

The district court's failure to consider Pruitt's competence should be dispositive. This Court has said, albeit with respect to the now-defunct *Maclin* test, that "[f]ailure to identify and discuss these factors when ruling on a §1915(d) [now (e)] motion will be treated as clear abuse of discretion by the district court." *Jackson*, 953 F.2d at 1072; *see also McNeil*, 831 F.2d at 1372 ("This case is not one in which the court based its decision on an impermissible factor, or failed to exercise its discretion at all.") (internal citations omitted).

Likewise, a district court abuses its discretion when it ignores one of the fundamental pieces of *Farmer*'s complexity/competence/helpfulness standard; indeed, "before the issue of abuse is even reached, the appellate court must be satisfied that the judge has exercised her discretion responsibly by considering all the salient factors that would enter into a responsible exercise." *Extra Equipamentos E Exportacao Ltda. v. Case Corp.*, 361 F.3d 359, 364 (7th Cir. 2004); *see also United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005) ("whenever a district judge is required to make a discretionary ruling that is subject to appellate review, we have to satisfy ourselves, before we can conclude that the judge did not abuse his discretion, that he exercised his discretion, that is, that he considered the factors relevant to that exercise").

Here, the district court never made an informed judgment about Pruitt's need for counsel. Instead, in three strikingly similar orders, the court focused entirely on one of

the three *Farmer* factors, the complexity of the issues, ignoring Pruitt's competence and the assistance that counsel could have offered:

> "This cause is before the court on the plaintiff's motions for appointment of counsel [6-1] and [2-1]. Appoint [sic] of counsel is not warranted in this case. Neither the legal issues raised in te [sic] complaint nor the evidence that might support the plaintiff's claims are so complex or intricate that a trained attorney is necessary...." App. A, 03/31/2003 Order.
>
> "This cause is before the court on the plaintiff's motion for appointment of counsel [d/e 29] and case management. Appointment of counsel is not warranted in this case. Neither the legal issues raised in the complaint nor the evidence that might support the plaintiff's claims are so complex or intricate that a trained attorney is necessary...." App. B, 11/30/2004 Order.
>
> "The plaintiff's motion for appointment of counsel is denied. [d/e 36] Appointment of counsel is not warranted in this case. Neither the legal issues raised in the complaint nor the evidence that might support the plaintiff's claims are so complex or intricate that a trained attorney is necessary...." App. C, 1/25/2005 Order.

None of these orders gives any indication that the district court considered Pruitt's sixth-grade education (evidence of which Pruitt submitted with his third motion), or Pruitt's pleadings, which demonstrated his inability to litigate this case with even a minimal level of competence. For this reason alone, the court's decision was an abuse of discretion.

III. Pruitt Was Not Competent To Handle His Case Without Assistance.

Based on any reasonable set of criteria, it should have been clear to the district court that Pruitt was not competent to handle his case without assistance. This Court has never prescribed specific criteria to govern the competence inquiry, but an indigent plaintiff's competence, or lack thereof, should be apparent from the following: (1) education, job training, and past *pro se* experience; (2) how the plaintiff has conducted himself in the litigation to date, particularly whether he has demonstrated the ability to advocate on his own behalf in writing and orally before the court; and (3) whether there is anything about the underlying events that might restrict the plaintiff from proceeding without help, for example, whether the trauma of sexual abuse is likely to interfere with the plaintiff's ability to cross-examine his attacker.[6]

The point of these criteria, or any others that a particular case might suggest, is to determine whether the indigent litigant has the knowledge and the ability to vindicate his due process rights without the assistance of counsel. Pruitt has no such knowledge, no such ability. He was not competent to handle this case *pro se*, and the district court abused its discretion by forcing him to do so.

A. Training and Experience

Foremost, the district court should consider whether the litigant has the training or experience to handle his case with some minimal degree of competence. Few

---

[6] The Third Circuit has adopted a similar set of criteria. *See Tabron v. Grace*, 6 F.3d 147, 156 (3d Cir. 1993) (courts should consider "the plaintiff's education, literacy, prior work experience, and prior litigation experience").

indigent litigants will have three years of law school, and most will surpass Pruitt's sixth grade education. But in all events, the court should consider the plaintiff's formal schooling, test scores, job history, and any prior experience with civil litigation.

In *Farmer*, for example, the court noted that plaintiff's history of fraud suggested "the possession of an intelligence superior to that of a criminal who relies on brawn rather than brains," an intelligence evidenced by her "shrewd" cross-examination of one of the defendants. *Farmer*, 990 F.2d at 322-23. In addition, the plaintiff in *Farmer* did not move for counsel until a week before trial, after litigating the case for more than three years and successfully prosecuting an appeal *pro se*. *Ibid.* Similarly in *Forbes v. Edgar*, 112 F.3d 262 (7th Cir. 1997), the plaintiff had experience with civil litigation from at least four other cases, including one in which she filed a response to a summary judgment motion just before the litigation at issue got underway. *Id.* at 264.

In this case, the district court refused to recruit assistance for an indigent litigant who has the intelligence equivalency of a sixth grade education, and who lacks any employment or other experience that might provide him with the familiarity—or ability to grasp—the legal procedures necessary to prepare and take this case to a jury. As Judge Posner concluded, Pruitt "plainly lacks the educational or vocational background that would enable him to conduct [a jury] trial with minimum competence." Panel Op. at 15 (Posner, J., dissenting).

B. Conduct of the Litigation

A district court also should consider whether the plaintiff's conduct of the litigation up to and including the motion for counsel demonstrates a workable

knowledge of the legal process. Although the district court here did not mention Pruitt's flat incompetence in this regard, this criterion—and in particular, the quality and coherence of a plaintiff's pleadings—factors into most of this Court's appointment-of-counsel decisions.

In *Gil*, for example, the district court erred by ignoring the plaintiff's limited language skills and reliance on a jailhouse lawyer to produce competent pleadings. *Gil*, 381 F.3d at 657. And in *Maclin*, the court found it significant that the plaintiff made no attempt to submit an affidavit to contest the defendant's motion for summary judgment, even though the motion depended on issues of fact that the plaintiff "vigorously dispute[d]." *Maclin*, 650 F.2d at 889 & n.3; *see also Greeno*, 414 F.3d at 658 (concluding that plaintiff's "inability to serve seven of the defendants with process despite repeated attempts is illustrative of his inability to try the case by himself"); *Weiss v. Cooley*, 230 F.3d 1027, 1034 (7th Cir. 2000) (noting that counsel would be helpful, and leaving appointment to the district court's discretion on remand, even though plaintiff's complaint appeared serviceable and his opposition to summary judgment "competently addressed the key points").

In *Johnson*, on the other hand, the plaintiff "displayed the necessary competence" by filing an acceptable complaint; successfully defending that complaint "with detailed and well-organized memoranda of law opposing the defendants' motions to dismiss"; filing "similarly satisfactory memoranda of law concerning summary judgment"; filing a motion for information necessary to serve one of the defendants; and "[a]stutely" filing a motion in limine to restrict references to his criminal history and prison

disciplinary record. *Johnson*, 433 F.3d at 1007. Similarly in *McNeil*, the plaintiff "demonstrated the ability to present his case to the court" by stating a claim in a cogent complaint with exhibits; responding appropriately to the court's request for a more definite and complete statement; filing a motion for summary judgment together with exhibits; and filing a motion to strike together with an affidavit and exhibits. *McNeil*, 831 F.2d at 1372-73.

Likewise in *Forbes*, the court concluded that the plaintiff was "an exceptionally able litigant," in part based on the "comprehensible and literate" documents she submitted to the district court. *Forbes*, 112 F.3d at 264. And in *Zarnes v. Rhodes*, 64 F.3d 285 (7th Cir. 1995), the plaintiff's pleadings suggested that she "understood the elements of her claims and the legal authority supporting them," and her use of letters and other evidence suggested that she recognized the relevant facts. *Id.* at 289; *see also Luttrell v. Nickel*, 129 F.3d 933, 936 (7th Cir. 1997) (concluding that the plaintiff "was able to present a clear complaint, conduct discovery requests, and file numerous motions," albeit with help from "jailhouse lawyers"); *Barnhill v. Doiron*, 958 F.2d 200, 203 (7th Cir. 1992) (plaintiff's "pleadings demonstrated that he was more than capable of prosecuting his constitutional claims before the district court," and "that he was well versed in federal procedure and the presentation of evidence").

Pruitt's pleadings, however, should have alerted the district court that Pruitt was not competent to represent himself through discovery and a jury trial. Indeed, the district court recognized that Pruitt's complaint was largely incomprehensible: "The plaintiff's jumbled, sixty page complaint is very difficult to decipher. The plaintiff has

attached numerous documents in the middle (Comp., p. 9-36) and at the end of his complaint. (Comp., p. 40-60) Many of this [sic] documents appear to have little or no relevance to the claims in the main body of the plaintiff's complaint." R.24 at p.1; *see also* Compl., R.9. Every document authored by Pruitt and submitted to the district court is similarly deficient. *See*, *e.g.*, Plaintiff's Motions to Appoint Counsel, R.2, R.6, R.29, R.34-37 (reprinted in Joint App. at 14-36); R.9 at p. 11 (letter to Defendant Wiles) and p. 12 (Letter to Kim); Supp. R. at 35 (letter to clerk); *see also* R.61, R.66 (Pruitt's post-verdict pleadings, "Plaintiff's Response in Opposition To An Notice Of Appeal On An Motion For Reconsideration Act of An Judgment Order In A Jury Verdict" and "Plaintiff's Response in Opposition To Submit A Brief Informing The Court Of His Grounds For Appeal Within The Jury Verdict").

Unlike the plaintiff in *Johnson* who demonstrated by surviving dismissal and summary judgment "that he knew what he had to do to prosecute an adequate case and that he had the ability to do so," 433 F.3d at 1007-08, Pruitt survived a motion to dismiss on the strength of his claim and because his response in opposition was, as that pleading plainly states, "Crafted by a Law Clerk at the request of Mr. Pruitt." R.21 at p.4.

In addition, although the district court did not do so, it would have been appropriate to consider any oral advocacy skills that Pruitt may have displayed at two pretrial videoconferences. *See* Docket Entries for 12/08/2004 and 2/02/2005. In *Merritt*, for example, from the "often muddled and ambiguous" cross-examination conducted by the plaintiff's lay assistants, the court concluded that the assistants were

"well meaning but, nevertheless, incompetent" and that it was "obvious that the lay assistants had little understanding of the hearsay rule or of how to present a closing argument." *Merritt*, 697 F.2d at 765. Contrast *Farmer*, where the court pointed to (among other factors noted above) plaintiff's "shrewd cross-examination . . ., bringing out all the contradictions and implausibilities in that defendant's testimony." *Farmer*, 990 F.2d at 322-23.

The district court in this case never characterized Pruitt's conduct at the pretrial videoconferences, and the record does not indicate how long the conferences lasted. Accordingly, there is no basis for assuming, as the panel majority erroneously did (Panel Op. at 7), that the district court took the opportunity to evaluate Pruitt's ability to proceed without counsel. Indeed, Pruitt's written submissions were incoherent, and the trial transcript demonstrates that Pruitt was unable to properly engage the judge, defense counsel, and witnesses at trial—which makes it hard to believe that Pruitt's appearances at the pretrial conferences could have done anything but *exacerbate* the concerns that the district should have had about Pruitt's competence to take this case to the jury *pro se*.

C. Nature of the Case

Finally, a district court should consider whether the nature of the case suggests that the indigent litigant is capable of proceeding without assistance. In this case, the fact that Pruitt is an alleged sexual assault victim should have been taken into account by the district court. Sexual assault can leave severe scars, and even a person who

might be competent to handle other litigation *pro se* might be incapable of presenting a case against his attacker without assistance. *See* Op. Br. at 23-26; Reply Br. at 11-13.

Appointing counsel tends to be appropriate in any "he said, she said" case, where the outcome depends heavily upon which of two mutually-exclusive pieces of testimony the jury believes. As Judge Posner concluded in this case, "[t]his was a difficult case because the outcome depended entirely on which side created the better impression in the eyes of the jury," a task for which Pruitt needed, and should have had, an attorney. *See* Panel Op. at 11 (Posner, J., dissenting); *see also Maclin*, 650 F.2d at 888 ("Counsel may also be warranted where the only evidence presented to the factfinder consists of conflicting testimony. In such cases, it is more likely that the truth will be exposed where both sides are represented by those trained in the presentation of evidence and in cross examination."); *Merritt*, 697 F.2d at 765 ("Testing [witnesses'] opinions and their credibility will require the skills of a trained advocate to aid the factfinder in the job of sifting and weighing the evidence.").

This general rule for "simple" swearing contests—that a defendant with counsel is a prohibitive favorite against a *pro se* plaintiff—applies with particular force in cases like this one, where the plaintiff is a victim of sexual assault, and it would take an unusual amount of strength and wherewithal to narrate his story to the jury, stand up to cross-examination by the defense attorneys, and then stand face-to-face with and cross-examine his attacker. It is just not reasonable to expect a plaintiff like Pruitt to handle these challenges in an adequate manner by himself. Defendants suggested that the district court's assistance should lessen this concern, Defs.' Resp. Br. at 25-26, but

this was a jury trial, not a bench trial, and a neutral party eliciting information is no substitute for an advocate to present Pruitt's story and pierce the Defendants'.[7]

* * * * *

In this case, neither the district court nor the panel majority applied these or any other criteria to evaluate Pruitt's competence. Both fell into error by focusing exclusively on the complexity of the case and ignoring Pruitt's lack of education and incompetent pleadings. The panel majority also was mistaken to consider only a stripped-down version of Pruitt's claims. In addition to overlooking the precedent holding that "swearing contests" are precisely the kind of cases that call for counsel, the majority neglected to consider that *if* other issues fell by the wayside, it was only because Pruitt was incompetent to handle the threshold issues by himself. *See* Jury Instructions, R.56 (Officer Mesch not liable unless Pruitt proved damages and proximate cause); Reply Br. at 16 (explaining why the general verdict provides little information as to what the jury believed).

---

[7] For similar reasons, the denial of counsel was not harmless. Defendants cannot seriously argue, given the nature of the case and what we know now about Pruitt's performance, that the decision to deny counsel could have made no difference in the outcome of this case. As already briefed in some detail, Pruitt was not able to perform an adequate pretrial investigation or collect the evidence he needed, and the trial transcript demonstrates that he could not present even the limited evidence he had at his disposal, much less mount an effective cross-examination of the Defendants. *See* Op. Br. at 17-23; Reply Br. at 13-17; *see also* Panel Op. at 13 (Posner, J., dissenting) ("it is apparent that had Pruitt been represented by a competent lawyer he might well have won his case"); *see also* Schlanger, 116 Harv. L. Rev. at 1610-11 ("Among [inmate civil rights cases] terminated in 2000, counseled cases were three times as likely as pro se cases to have recorded settlements, two-thirds more likely to go to trial, and two-and-a-half times as likely to end in a plaintiff's victory at trial. One-quarter of settlements and one-third of plaintiff's trial victories occurred in the four percent of cases with counsel.") (internal footnote omitted).

Deciding that Pruitt was entitled to counsel does not require the Court to adopt a *per se* rule in favor of counsel for the 1% of cases that reach a jury, as the panel majority supposed. *See* Panel Op at 3. It requires only reaffirming the rule that a district court must evaluate the indigent plaintiff's competence, and rejecting the district court's decision in this case to consider complexity in a vacuum. Pruitt lacked the competence to represent himself. By putting him in front of a jury without counsel, the district court abused its discretion.

CONCLUSION

For the foregoing reasons, Pruitt respectfully requests that the Court vacate the judgment, and remand for a new trial.

Dated: April 18, 2007

Respectfully Submitted,

Peter C. McCabe
William P. Ferranti
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Counsel for Plaintiff-Appellant
Benjamin Pruitt

CERTIFICATE OF COMPLIANCE

I, William P. Ferranti, certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as it contains 5,724 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as qualified by Circuit Rule 32(b), as it has been prepared in a 12-point, proportionally spaced typeface, Book Antiqua, by using Microsoft Word 2003.

Dated: April 18, 2007

_____

William P. Ferranti
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I, William P. Ferranti, an attorney, certify that on April 18, 2007, I caused to be served the foregoing Supplemental Brief of Plaintiff-Appellant Benjamin Pruitt by having one digital and two paper copies of same delivered via messenger to:

Carl Elitz
Assistant Attorney General
Civil Appeals Division
100 W. Randolph Street, 12th Floor
Chicago, IL 60601

I also certify that I have on this day caused an original and 30 copies (and a digital version on disk) of the foregoing Supplemental Brief to be delivered by messenger to the Clerk of the Court.

_____
William P. Ferranti
Attorney for Plaintiff-Appellant