No. 25-131

In the Supreme Court of the United States

DAVID C. L. WALTON,

Petitioner,

v.

ASHLEY NEHLS,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED
(Restated)

Did the Seventh Circuit correctly conclude that no reasonable jury could find that Walton's Eighth Amendment right to be free from "cruel and unusual punishment" was violated based on his allegation that he willingly and voluntarily entered into a consensual sexual relationship with a prison official, where he repeatedly testified that he welcomed the relationship and "enjoyed" it?

TABLE OF CONTENTS

TABLE OF SUPPLEMENTAL APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Petitioner David C. L. Walton is a Wisconsin prisoner. He alleges he willingly engaged in a voluntary sexual relationship with Respondent Ashley Nehls, a registered nurse, in the health services unit at the prison. Despite testifying that he welcomed the relationship and "enjoyed" it, Walton believes he is entitled to compensation under 42 U.S.C. § 1983 for an alleged violation of his Eighth Amendment right to be free from "cruel and unusual punishment" because he cannot *legally* consent to the sexual relationship under criminal statutes.

Regardless of whether consent can be raised as a defense in the criminal context, the Circuits agree that consensual sexual relations between a prisoner and a prison official do not give rise to an Eighth Amendment claim. Every Circuit that has addressed the issue has ruled that consent is relevant to whether the prisoner suffered "the unnecessary and wanton infliction of pain." The Circuits disagree, however, about where to place the burden of proving consent or nonconsent. Three courts of appeals—the Second, Eighth, and Tenth Circuits—place the burden on plaintiff to prove that the relationship was nonconsensual. This rule has also been followed by district courts in the Third and Fifth Circuits. In contrast, two courts of appeals—the Sixth and Ninth Circuits—apply a presumption of nonconsent that the defendant must overcome. The other courts of appeals, including the Seventh Circuit, have not yet weighed in on the issue.

At the district court level, Walton's claim was dismissed on summary judgment. The district court concluded that no reasonable jury could find in

Walton's favor based on his own testimony. Walton testified that he was attracted to Nehls, that he looked forward to their interactions, that he enjoyed their encounters, that he initiated contact, that he was a willing participant, and freely admitted that he consented to the relationship. As the district court concluded, "By his own admission, Walton did not suffer from the unnecessary and wanton infliction of pain."

On appeal, Walton asked the Seventh Circuit to join the Sixth and Ninth Circuits and adopt a rebuttable presumption that sexual activity between a prisoner and prison official is nonconsensual, shifting the burden of establishing consent onto the defendant. The Seventh Circuit declined Walton's invitation. The appellate court ruled that this case "does not present the best vehicle for working out the dimensions of a presumption framework for future Eighth Amendment prison sexual abuse cases." That is because, even if a presumption of nonconsent is applied, Walton's claim fails as a matter of law based on the undisputed facts. The Seventh Circuit therefore affirmed.

In his petition, Walton no longer advocates for a rebuttable presumption. Instead, he asks this Court to create a strict *per se* rule that sexual activity between a prisoner and prison official is never consensual and always violates the Constitution (a rule that none of the Circuits follow).

The Court should deny the petition for the following reasons: First, Walton misrepresented the district court's decision in his Appendix by altering its text. Second, the Seventh Circuit's decision is not squarely in conflict with the rule of any other Circuit.

Third, this case is a poor vehicle for resolving a split amongst the other Circuits. Fourth, the Seventh Circuit's decision was correct.

STATEMENT

Walton does not allege that he was coerced, forced, or threatened to engage in any unwanted sexual activity. He freely admits that any sexual activity was voluntary and welcome. He has always described his relationship with Nehls as "consensual." He repeatedly testified that he "enjoyed" it and was a willing participant.

Nehls categorically and vehemently denies Walton's allegations. Because no reasonable jury could find that Walton's constitutional rights were violated based on his own sworn testimony, however, Nehls was entitled to summary judgment.

The following facts—which are taken from Walton's own testimony—were accepted as true for purposes of summary judgment:

I. Factual Background

Walton is an inmate in the Wisconsin state correctional system. (Pet. App. 21a.) He is serving an 18-year sentence for his second armed robbery conviction. (*Id.*) At the relevant time, he was incarcerated at Waupun Correctional Institution where Nehls worked as a nurse. (*Id.*)

Walton alleges he began a romantic and sexual relationship with Nehls in June 2021. (Pet. App. 2a, 14a, 21a.) The relationship began when Nehls touched his arm during a medication pass in the health

services unit (HSU). (Pet. App. 21a.) In response, Walton joked, "You touch me like that, I might touch you." (Pet. App. 14a.) Nehls replied, "All right," and grabbed Walton's shirt. (*Id.*) Walton and Nehls then kissed each other. (*Id.*) Walton testified that he did not report the kiss to anyone because he enjoyed the attention and wanted it to happen again. (Pet. App. 21a.)

According to Walton, he and Nehls kissed and touched each other in the HSU several times a week for three months. (*Id.*) They kissed "almost every single day." (Pet. App. 14a.) Nehls would touch Walton's chest, stomach, and penis over his clothing and "allow[ed]" Walton to touch her chest and buttocks over her clothing. (Pet. App. 14a, 21a.) Sometimes Nehls initiated the contact; sometimes Walton initiated the contact. (Pet. App. 14a, 16a, 24a.)

Walton looked forward to his encounters with Nehls. (Pet. App. 24a.) He compared their interactions to "kind of like two high school kids making out." (Pet. App. 14a, 21a.) Walton did not report the relationship to anyone because he "enjoyed it," wanted it to continue, and did not want himself or Nehls "to get into trouble." (Pet. App. 15a-16a, 21a, 24a.)

Walton testified that he would have considered Nehls his "girlfriend" outside of prison. (Pet. App. 15a, 21a-22a.) He was physically attracted to her. (Pet. App. 21a-22a.) In addition to a physical connection, they also had an "emotional connection." (*Id.*) During his deposition, Walton repeatedly spoke of his attraction to Nehls and the fact that he "enjoyed" his contact with her and did not want it to stop. (Pet. App. 24a.)

Walton has always described his relationship with Nehls as "consensual." (Pet. App. 2a, 15a-16a, 22a-24a.) He likened it to a romantic relationship he would have cherished were he not incarcerated. (Pet. App. 23a.) He agreed under oath he was a willing participant. (Pet. App. 22a-24a.)

During the course of their relationship, Nehls provided Walton with contraband, including chips, candy, chewing gum, a cell phone, and an unprescribed antidepressant. (Pet. App. 15a, 21a.) Walton testified that these were all gifts, and that Nehls never asked Walton for anything in return and Walton never gave her anything in return. (Pet. App. 15a-16a, 21a, 24a.) Walton has never suggested that Nehls provided the contraband in exchange for sexual contact. (Pet. App. 16a.) Nor has Walton ever suggested he was coerced to participate in the relationship or that he participated out of fear. (*Id.*)

The relationship ended on August 30, 2021 when officers discovered Walton and Nehls kissing in the HSU. (Pet. App. 15a, 21a-22a.) Walton testified that Nehls touched his penis underneath his clothing with her bare hand—an interaction Walton again described as "consensual." (Pet. App. 15a.) Walton was transferred to another institution the next morning. (Pet. App. 2a, 15a, 22a.) He has had no contact with Nehls since his transfer. (Pet. App. 2a, 15a, 22a.)

II. Procedural History

Walton filed this lawsuit against Nehls on January 4, 2022. (R. 1.) He alleges in the Complaint that Nehls "willingly and freely engaged in sexual activity with [him]." (*Id.* at 2.) He does not allege in the Complaint that Nehls forced or coerced him to

participate. (*Id.*) Instead, he alleges that Nehls "allow[ed]" him to touch her. (*Id.* at 3.) Despite the relationship being consensual, Walton asserts that he is entitled to compensatory and punitive damages from Nehls because she "violate[d] DOC policy." (*Id.* at 4.)

A. The District Court Ruled in Favor of Nehls.

Nehls moved for summary judgment on October 26, 2022. (R. 18.) Although Nehls denies the allegations, she argued that she was entitled to summary judgment as a matter of law based on Walton's own deposition testimony. (*Id.*) Even if the district court accepted everything Walton says as true, it does not rise to the level of a constitutional violation. (*Id.*)

In response to Nehls' motion, Walton did not deny that he willingly and voluntarily engaged in the relationship, enjoyed it, and wanted it to continue. (R. 24.) Rather, he argued that he could not legally consent, so "it really doesn't matter what I wanted, or if I wanted it or if I liked it or if I consented to it." (*Id.*; R. 21-1 at 83.)

On January 20, 2023, the district court issued a written decision granting Nehls' motion and dismissing Walton's claim with prejudice. (Resp. Supp. App. 1a-10a.) In the decision, the district court described Walton's claim as "absurd" and "ludicrous." (Resp. Supp. App. 1a, 4a.) Based on Walton's "own admission" that he "did not suffer from the unnecessary and wanton infliction of pain," the district court concluded that no reasonable jury could find that his Eighth Amendment rights had been

violated (Resp. Supp. App. 4a-5a.) "In no sense of the word could [Nehls'] alleged conduct be considered the infliction of pain or sexual abuse upon Walton, wanton or otherwise." (Resp. Supp. App. 5a.)

B. The Seventh Circuit Ruled in Favor of Nehls.

Walton appealed to the Seventh Circuit. (Pet. App. 1a-19a.) He urged the court to join the Sixth and Ninth Circuits and adopt a legal presumption that any sexual activity between a prisoner and prison official is nonconsensual and, by extension violates the Constitution, unless the prison official can show an absence of coercion. (Pet. App. 2a.) He based his argument on the fact that all fifty states, the District of Columbia, and federal law make it a criminal offense for a prison official to engage in a sexual act with a prisoner, regardless of consent. (*Id.*)

In an opinion dated May 2, 2025, the Seventh Circuit affirmed the district court's entry of summary judgment in favor of Nehls. (*Id.*) In doing so, it declined to decide whether to adopt the presumption framework followed by the Sixth and Ninth Circuits. (Pet. App. 8a-14a.) It ruled that it was unnecessary because Walton's claim fails as a matter of law whether or not a presumption framework is followed. (Pet. App. 14a-17a.) "Absent evidence of coercion, we are left with Walton's clear, consistent, and unqualified statements that his relationship with Nehls was consensual. Those statements would be sufficient to overcome any presumption that the relationship was nonconsensual." (Pet. App. 17a.)

REASONS FOR DENYING THE WRIT

I. Walton Misrepresents the District Court's Decision in His Appendix by Altering Its Text.

In re-typing the district court's decision for his Appendix, Walton altered the text to read more favorably to him. For example, on page one of the decision, the district court called his claim "absurd":

> Walton's claim rests on **the absurd notion** that he was subjected to such punishment while an inmate at Waupun Correctional Institution (WCI) when he freely engaged in a consensual sexual relationship with a female WCI staff nurse from June 2021 through August 2021.

(Resp. Supp. App. 1a) (emphasis added.) In retyping the decision for this Court, Walton omitted the word "absurd" and changed the word "notion" to "assertion":

> Walton's claim rests on **the assertion** that he was subjected to such punishment while an inmate at Waupun Correctional Institution (WCI) when he freely engaged in a consensual sexual relationship with a female WCI staff nurse from June 2021 through August 2021.

(Pet. App. 20a) (emphasis added.) Similarly, on page five of the decision, the district court called Walton's argument "ludicrous":

> **<u>It is ludicrous to suggest that</u>** a reasonable jury could find from this evidence that Defendant violated Walton's Eighth Amendment rights by subjecting him to cruel and unusual punishment.

(Resp. Supp. App. 4a) (emphasis added.) Walton replaced the words "ludicrous to suggest" with "unlikely":

> **<u>It is unlikely that</u>** a reasonable jury could find from this evidence that Defendant violated Walton's Eighth Amendment rights by subjecting him to cruel and unusual punishment.

(Pet. App. 23a) (emphasis added.) This is not a typo. It is an obvious, intentional change. The change is particularly troublesome because it alters the meaning of the sentence: Nehls would not be entitled to summary judgment if it was merely "unlikely" that a reasonable jury could find in Walton's favor. *See McEwen v. Delta Air Lines, Inc.*, 919 F.2d 58, 60 (7th Cir. 1990) ("Federal courts may grant summary judgment under Rule 56 on concluding that no reasonable jury could return a verdict for the party opposing the motion …").

These are only two of many inexplicable changes Walton made to the district court's decision in his Appendix. (*Compare* Pet. App. 23a *with* Resp. Supp. App. 4a-5a) (omitting citations; adding an entirely new sentence; changing the phrase "an inmate serving a sentence in a prison" to "incarcerated"; and deleting the phrase "wanton or otherwise" from the end of a sentence.)

The district court's decision is unreported but appears at 2023 U.S. Dist. LEXIS 9890 and 2023 WL 346041. For the Court's convenience, a complete and accurate copy of the decision is reproduced in a Supplemental Appendix attached to this brief.

Supreme Court Rule 14 required Walton to reproduce the district court's decision "with accuracy" in his Appendix. He did not. He altered the decision to help his case. This alone is sufficient grounds for the Court to deny his petition. *See* Sup. Ct. R. 14.4 ("The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.").

II. The Seventh Circuit's Decision Is Not Squarely in Conflict With the Decision of Any Other Circuit.

Walton asks the Court to accept his petition because the other Circuits are split as to whether to apply a presumption of nonconsent, but the Seventh Circuit did not enter the conflict. The Seventh Circuit declined to decide whether to adopt the presumption because it was unnecessary in this case. Regardless of whether a presumption of nonconsent applies, Walton's claim fails as a matter of law. As such, the Seventh Circuit's decision is not squarely in conflict with the decision of any other Circuit. It does not conflict with decisions from the Second, Eighth, and Tenth Circuits which held that a prisoner bears the burden of proving that the sexual activity was nonconsensual. *See Boddie v. Schneider*, 105 F.3d 857 (2nd Cir. 1997); *Freitas v. Ault*, 109 F.3d 1335 (8th Cir. 1997); *Richardson v. Duncan*, 117 F.4th 1025 (8th Cir.

2024); *Graham v. Sheriff of Logan Cnty.*, 741 F. 3d 1118 (10th Cir. 2013); *Works v. Byers*, 128 F.4th 1156, 1162 (10th Cir. 2025). Nor does it conflict with decisions from the Sixth and Ninth Circuits which held that sexual activity between a prisoner and prison official is presumed nonconsensual. *See Hale v. Boyle County*, 18 F.4th 845 (6th Cir. 2021); *Rafferty v. Trumbull County*, 915 F.3d 1087 (6th Cir. 2019); *Wood v. Beauclair*, 692 F.3d 1041 (9th Cir. 2012).

Absent a square conflict, the Court should decline to grant certiorari. *See Miroyan v. United States*, 439 U.S. 1338, 1343 (1978) ("… [T]he Court is not likely to grant certiorari in this case unless such an action would appear to offer the strong likelihood of deciding an issue on which a square conflict exists."); *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (stating that certiorari should not be granted when the issue is only academic). "Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. A petition for a writ of certiorari will be granted "only for compelling reasons." *Id.* Among the compelling reasons is that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). Because the Seventh Circuit's decision is not squarely in conflict with any other Circuit's decision, the petition should be denied.

III. This Case Is a Poor Vehicle for Resolving a Split Amongst the Other Circuits.

The Seventh Circuit correctly concluded that this case "does not present the best vehicle for working out the dimensions of a presumption framework for

future Eighth Amendment prison sexual abuse cases." (Pet. App. 14a.) Even if the Court wants to resolve the circuit split, this is not the case to do it. The announced rule will not influence or determine the disposition of the case. Walton has not made a strong showing that he will succeed on the merits. It would be better for the Court to resolve the issue on a case where it would make a difference on the outcome of the petitioner. *See Miroyan*, 439 U.S. at 1343 (the Court hesitates to grant certiorari to decide propositions in the abstract).

IV. The Seventh Circuit's Decision Was Correct.

The petition should be denied because the result below was correct. Walton's claim is meritless. It is universally accepted that consensual sexual relations between a prisoner and a prison official do not give rise to an Eighth Amendment claim. Walton is looking to undo this long-standing principle. While sexual abuse of prisoners by prison officials *can* violate the Constitution, not "every malevolent touch by a prison guard gives rise to a federal cause of action." *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). The Eighth Amendment protects only against "cruel and unusual punishment." U.S. Const. Amend. VIII. In simple terms, "cruel and unusual punishment" means "the unnecessary and wanton infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *see also Ingraham v. Wright*, 430 U.S. 651, 670 (1977). Allegations like Walton's simply do not meet this threshold.

Unless this Court adopts a strict *per se* rule of nonconsent (which none of the Circuits currently follow), Walton loses. His claim fails under the

majority rule followed in the Second, Third, Fifth, Eighth, and Tenth Circuits that a plaintiff bears the burden of proving that sexual activity between a prisoner and prison official was nonconsensual. His claim also fails under the minority rule followed in the Sixth and Ninth Circuits that sexual activity between a prisoner and prison official is presumed non-consensual unless rebutted with evidence that the conduct involved no coercive factors. And the Seventh Circuit was correct that Eighth Amendment cases require a flexible approach and are not compatible with strict *per se* rules.

A. Walton's Claim Fails Under the Majority Rule That a Prisoner Bears the Burden of Proving Sexual Activity With a Prison Official Was Nonconsensual.

In deciding how to approach prisoner sexual abuse cases, courts in the Second, Third, Fifth, Eighth, and Tenth Circuits have ruled that the prisoner bears the burden of proving that the sexual activity was nonconsensual. If the prisoner alleges only consensual sexual encounters, his or her claim fails as a matter of law.

a. Second Circuit: *Boddie*, *Fisher*, and *McGregor*

In *Boddie v. Schneider*, the Second Circuit Court of Appeals ruled that "isolated episodes of harassment and touching … do not involve a harm of federal constitutional proportions as defined by the Supreme Court." *Boddie*, 105 F.3d at 861. In *Boddie*, a male prisoner alleged that a female prison guard squeezed his hand, touched his penis, bumped into

him with her breasts, and verbally harassed him. *Id.* at 859-60. The guard filed a motion to dismiss, arguing that the facts alleged, even if true, were insufficient as a matter of law to show an Eighth Amendment violation. *Id.* at 860. The district court granted the motion and the Second Circuit affirmed. *Id.* The Second Circuit began its decision by acknowledging "that sexual abuse of a prisoner by a corrections officer may in some circumstances violate the prisoner's right to be free from cruel and unusual punishment." *Id.* at 860-61. The complaint in *Boddie* did not, however, allege acts that were "serious enough to constitute cruel and unusual punishment." *Id.* at 861-62.

In followup to *Boddie*, the Western District of New York ruled in *Fisher v. Goord*, 981 F. Supp. 140 (W.D.N.Y July 16, 1997), that consensual sexual acts do not violate a prisoner's right to be free from cruel and unusual punishment. *Id.* at 171. In *Fisher*, a female prisoner alleged that she had sex with several male correctional officers. *Id.* at 143, 145. The officers denied having sex with the prisoner. *Id.* at 155. While testifying, the prisoner stated that the officers never forced her to have sex and she never refused or resisted their advances. *Id.* at 145-47. Accepting the prisoner's testimony as true, the district court held that the prisoner's descriptions of the sexual encounters "could only reasonably be described as consensual." *Id.* at 151.

Like Walton, the plaintiff in *Fisher* argued that "there exists a 'power discrepancy' between a correction officer and an inmate, making it impossible for an inmate to ever consent truly to having sexual relations with a correction officer." *Id.* at 174. While the district court agreed that a power imbalance

exists, it held there is no basis "to support the proposition that an inmate may never, as a matter of law, consent to sexual relations with a correction officer." *Id.* at 175 (citing *Freitas*, 109 F.3d 1335). The court concluded that "consensual sexual interactions between a correction officer and an inmate, although unquestionably inappropriate, and in this Court's view despicable, do not constitute cruel and unusual punishment under the Eighth Amendment." *Id.* at 174-75.

A similar decision was reached by the Northern District of New York in *McGregor v. Jarvis*, 2010 U.S. Dist. LEXIS 97408, 2010 WL 3724133 (N.D.N.Y. Aug. 20, 2010). In *McGregor*, a male prisoner brought an Eighth Amendment claim against a female corrections officer based on allegations they had a sexual relationship. *Id.* at *4. According to the plaintiff, the relationship "morphed from friendly to 'flirtatious,' until eventually their relationship became intimately physical." *Id.* The sexual contact included "groping, fondling, touching, kissing, and, eventually, oral and vaginal sex." *Id.* (internal quotation omitted). During the course of the relationship, the prisoner was allegedly given "minor privileges [… and] contraband, such as chewing tobacco, cigarettes, and marijuana." *Id.*

The defendant in *McGregor* moved to dismiss the plaintiff's Eighth Amendment claim on summary judgment because the "plaintiff consented to the sexual relationship, thereby nullifying or obviating any Eighth Amendment violation." *Id.* at *26. The plaintiff argued that he was incapable of consenting to the sexual acts based on criminal statutes and "an innuendo of authority, which made him fear for his safety." *Id.* at *26-27. The district court rejected the

plaintiff's arguments and granted summary judgment to the defendant. *Id*. at *27-36. The district court began its decision by recounting the Second Circuit's decision in *Boddie*:

> In *Boddie*, the Second Circuit was careful to announce the rule that "sexual abuse *may* violate contemporary standards of decency" and "*may* meet both the subjective and the objective elements" of the Eighth Amendment test. The Circuit did not hold, as a matter of law, that all sexual contact is violative of the Eighth Amendment, and instead requires a case-by-case analysis of the relevant facts to determine whether the acts complained of are "objectively, sufficiently serious."

Id. at *27-28 (internal citations omitted) (emphasis in original). Under this framework, the court ruled that the sexual relationship between the plaintiff and the defendant was, by all accounts, consensual. *Id*. at *30-31. The plaintiff was not forced or threatened to participate in the relationship. *Id*. at *4, 29. Like Walton, the plaintiff in *McGregor* did not deny that the relationship was consensual, "and in fact, much of his testimony before trial supports it." *Id*. at *31. Even when viewing the facts in a light most favorable to the plaintiff, the district court ruled that the facts did "not rise to the level of an Eighth Amendment violation in that the conduct at issue, though inappropriate, is not objectively sufficiently serious and did not cause pain as contemplated by that Amendment." *Id*. at *36.

b. Third Circuit: *Phillips*

Although the Third Circuit Court of Appeals has not yet weighed in, the District Court of Delaware ruled in *Phillips v. Bird*, 2003 U.S. Dist. LEXIS 22418, 2003 WL 22953175 (D. Del. Dec. 1, 2003), that "[c]onsensual sex between two adults does not constitute cruel and unusual punishment simply because it occurs within the walls of a prison." *Id*. at *18. In *Phillips*, a female prisoner engaged in multiple incidents of sexual activity with a male prison guard, including kissing, oral sex, and sexual intercourse. *Phillips*, 2003 U.S. Dist. LEXIS 22418, at *3-4. It was undisputed that the prisoner "voluntarily and willingly had sex with" the guard. *Id*. at *18. There was no evidence that the guard engaged in sexual acts with the prisoner against her will. *Id*. The issue for the district court was "whether a plaintiff who admits that she agreed to have sexual relations with a prison guard can then recover monetary damages by claiming that the agreed to sexual relations were a violation of her Eighth Amendment right to be free of cruel and unusual punishment." *Id*. at *1.

Like Walton, the plaintiff in *Phillips* took the position that a prisoner can never legally consent to having sex in the prison setting. *Id*. at *16. In response, the defendant argued that, since the plaintiff agreed to participate in the sexual acts, "no facts exist from which plaintiff can demonstrate that she has suffered a cognizable injury." *Id*. at *10. The district court agreed with the defendant and dismissed the prisoner's claims. *Id*. at *19. Because the prisoner voluntarily and willingly had sex with the guard, the prisoner could not meet her burden under the Eighth Amendment of proving that the guard's conduct caused objectively serious injury or

pain. *Id*. at *19. It did not matter, the district court ruled, that consent cannot be asserted as a defense to a crime of having sexual relations in a detention facility. *Id*. at *18-19. A prisoner cannot rely on criminal statutes to "avoid the consequences of consent in a civil suit." *Id*. at *18. "Consensual sex between two adults does not constitute cruel and unusual punishment simply because it occurs within the walls of a prison." *Id*.

c. Fifth Circuit: *Petty*

Similarly, while the Fifth Circuit Court of Appeals has also not yet weighed in, the Northern District of Texas ruled in *Petty v. Venus Correctional Unit*, 2001 U.S. Dist. LEXIS 27123, 2001 WL 360868 (N.D. Tex. April 10, 2001), that a prisoner could not state an Eighth Amendment claim based on allegations of consensual sexual activity. In *Petty*, a male inmate alleged that he was sexually harassed by female prison officers who asked him to masturbate in front of them. *Id.* at *2. He did not allege any unwanted touching or that any of the officers forced him to masturbate. *Id*. at *5-6. The court ruled that the inmate's Eighth Amendment claim was "frivolous" and dismissed the claim at summary judgment. *Id*. In doing do, the district court held that, "welcome and voluntary sexual interactions, no matter how inappropriate, cannot as matter of law constitute 'pain' as contemplated by the Eighth Amendment." *Id*. (quoting *Freitas*, 109 F.3d at 1339).

d. Eighth Circuit: *Freitas* and *Richardson*

In *Freitas v. Ault*, the Eighth Circuit ruled that "welcome and voluntary sexual interactions, no

matter how inappropriate, cannot as matter of law constitute 'pain' as contemplated by the Eighth Amendment." *Freitas*, 109 F.3d at 1339. In *Freitas*, a male prisoner alleged that he and a female prison guard met in secluded areas of the prison where they would kiss, hug, and talk. *Id.* at 1336. After the prisoner and guard had a falling out, the prisoner reported the relationship to the warden. *Id.* As a result of the inappropriate relationship, the prisoner was transferred to another facility. *Id.* at 1336. Unhappy with the transfer, the prisoner brought a § 1983 action against the guard asserting that she sexually harassed him. *Id.* After a bench trial, the district court found in favor of the guard. *Id.* The Eighth Circuit affirmed, concluding that there was "ample evidence supporting the trial court's finding that their relationship was consensual in the freest sense of the word." *Id.* at 1339.

In *Richardson v. Duncan*, 117 F.4th 1025 (8th Cir. 2024), the Eighth Circuit recently reaffirmed its holding in *Freitas* that "a prisoner who engages in a consensual sexual encounter suffers no 'pain' or harm at all under the Eighth Amendment." *Richardson*, 117 F.4th at 1029. In *Richardson*, a female prisoner alleged that she had a romantic and sexual relationship with a female prison guard that lasted for months. *Id.* at 1027-28. They would kiss and touch each other in the prison's medical facilities where the guard was stationed. *Id.* The guard occasionally deposited money into the prisoner's prison account, but the prisoner did not allege that she traded sex for money or that any gifts or privileges influenced her participation in the sexual encounters. *Id.* at 1030. The district court dismissed the prisoner's claims because the complaint "alleged only consensual sexual encounters" *Id.* at 1027-28. The prisoner "did not

allege that [the guard] used force, intimidation, or threats of retaliation to procure sexual activity." *Id*. at 1030. On appeal, the Eighth Circuit affirmed. *Id*. at 1030-31. After a lengthy discussion of *Freitas*, the court ruled that "a prisoner who recounts sexual contact that is outwardly consensual must allege at least some manifestation of resistance by the prisoner or some act of coercion by the corrections official." *Id*. at 1030. Because the prisoner's complaint made no such allegation, it was insufficient to state a claim under the Eighth Amendment. *Id*.

e. Tenth Circuit: *Graham* and *Works*

In *Graham v. Sheriff of Logan Cty*., the Tenth Circuit ruled that "consent can be a defense to an Eighth Amendment claim based on sexual acts." *Graham*, 741 F.3d at 1124-26. In *Graham*, a female prisoner had sexual intercourse with two male prison guards. *Id*. at 1120. The guards confessed and were fired immediately. *Id*. The prisoner sought damages under § 1983 for alleged violations of her Eighth Amendment right to be free from cruel and unusual punishment. *Id*. The district court granted summary judgment to the guards on the basis that the sexual acts were consensual. *Id*. Finding "overwhelming evidence of consent," the Tenth Circuit affirmed. *Id*. at 1126. There was no genuine dispute that the guards did not force the prisoner to have sex, and the prisoner stated repeatedly and consistently that the sexual acts were consensual. *Id*. at 1123-24.

Like Walton, the plaintiff in *Graham* took the position that she cannot *legally* consent under criminal statutes and argued that under "evolving standards of decency" even consensual intercourse

with a prisoner is cruel and unusual punishment. *Id.* at 1124. The Tenth Circuit discussed the presumption of nonconsent approach adopted by the Ninth Circuit (*see* infra), but ruled (like the Seventh Circuit did here) that it was unnecessary to decide the issue because, "Even were we to adopt the same presumption as the Ninth Circuit, the presumption against consent would be overcome by the overwhelming evidence of consent." *Id.* at 1126. "[T]here is no difficulty presented by the facts relied on by [the prisoner] in this case. … [her] rights under the Eighth Amendment were not violated." *Id.*

The Tenth Circuit recently reaffirmed its *Graham* holding in *Works v. Byers*. In *Works*, a female prisoner alleged that she was raped by a male prison guard in the laundry room at the prison. *Works*, 128 F.4th at 1160-61. The guard alleged that the sexual acts were consensual. *Id.* at 1162. The district court ruled that it must presume a lack of consent "beyond a reasonable doubt" unless the guard could produce "overwhelming evidence of consent." *Id.* On appeal, the Tenth Circuit ruled that the district court incorrectly applied the principles set forth in *Graham* by impermissibly shifting the burden of proof to the defendant. *Id.* In the Tenth Circuit, "the burden remains on the plaintiff—not the defendant—to establish that sexual conduct is nonconsensual." *Id.* at 1162.

Based on these holdings, the Seventh Circuit correctly concluded that Walton's claim fails as a matter of law. Under the majority rule, sexual activity between a prisoner and prison official does not always violate the Eighth Amendment. It depends on the circumstances and plaintiff bears the burden of proving that a violation occurred. Allegations that a

prisoner engaged in voluntary, consensual sex acts with a prison official are insufficient to meet this burden. Without qualification, Walton testified that his relationship with Nehls was consensual and that he was a willing participant.

B. Walton's Claim Fails Under the Minority Rule That Sexual Activity Between a Prisoner and Prison Official Is Presumed Nonconsensual.

Even if the Court adopted the rebuttable presumption framework followed by the Sixth and Ninth Circuits, Walton's claim still fails.

a. Ninth Circuit: *Wood*

In *Wood v. Beauclair*, 692 F.3d 1041 (9th Cir. 2012), the Ninth Circuit created a rebuttable presumption that sexual activity between a prisoner and prison official is nonconsensual. *Wood*, 692 F.3d at 1048-49. "[W]hen a prisoner alleges sexual abuse by a prison guard, … the prisoner is entitled to a presumption that the conduct was not consensual [and the defendant] may rebut this presumption by showing that the conduct involved no coercive factors. … Unless the [defendant] carries its burden, the prisoner is deemed to have established the fact of non-consent." *Id*. In *Wood*, a prisoner alleged that a prison guard "perpetrated sexual acts on him without his consent." *Id*. at 1043. The prisoner testified that he "pushed [the guard] away" and "tried to end the relationship." *Id*. at 1044. The district court granted summary judgment to the prison guard, but the Ninth Circuit reversed and remanded because factual issues existed for trial. *Id*. at 1043-44, 1049.

b. Sixth Circuit: *Rafferty* and *Hale*

In *Rafferty v. Trumbull County*, the Sixth Circuit affirmed the district court's denial of summary judgment because there was a disputed issue of material fact about whether the plaintiff consented. *Rafferty*, 915 F.3d at 1096. In *Rafferty*, a female prisoner alleged that a male prison guard forced her to expose her breasts and masturbate in front of him. *Id.* at 1091. The guard argued that the prisoner consented to his sexual requests. *Id.* at 1096. Viewing the evidence in the light most favorable to the plaintiff, the court could not conclude that the prisoner consented. *Id.* *Wood* is mentioned in the *Rafferty* decision, but the Sixth Circuit did not expressly adopt the Ninth Circuit's rebuttable presumption framework in *Rafferty*.

The Sixth Circuit expressly adopted the presumption of nonconsent in *Hale v. Boyle County*. In *Hale*, a pretrial detainee alleged that she had sex with a court security officer on trips to and from the courthouse for hearings. *Hale*, 18 F.4th at 848. After the detainee became pregnant, she filed a § 1983 lawsuit under the Fourteenth Amendment. *Id.* The district court dismissed her claims, finding that she consented to the sexual contact. *Id.* On appeal, the Sixth Circuit ruled that a genuine issue of material fact existed as to whether the plaintiff consented. *Id.* at 855. Before remanding the case to the district court, the *Hale* court stated "that a rebuttable-presumption framework regarding consent applies in cases involving sexual conduct between prison officials and incarcerated persons," quoting from *Wood*. *Hale*, 18 F.4th at 854.

Even if a presumption of nonconsent is applied, the Seventh Circuit correctly concluded that Walton's claim still fails. Walton's own testimony establishes that the alleged sexual relationship between Walton and Nehls lacked any coercive factors. While Walton testified that Nehls would sometimes give him contraband, he said he did not expect anything in return and has never suggested that Nehls provided the contraband in exchange for sexual contact. As the Seventh Circuit correctly observed, there is "nothing that would allow a jury to find that Nehls coerced Walton into a sexual relationship." (Pet. App. 16a.)

C. The Court Should Not Create a Strict *Per Se* Nonconsent Rule.

Walton does not contest that his claim fails under the tests followed in the Second, Third, Fifth, Eighth, and Tenth Circuits or the Sixth and Ninth Circuits. He does not ask this Court to adopt either test. Nowhere in his petition does Walton argue that the Seventh Circuit made an erroneous finding of fact or applied either test incorrectly. Even if he did, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see also Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) ("Error correction is outside the mainstream of the Court's functions." (internal quotation omitted)).

Realizing he cannot prevail under either of the established tests based on his own sworn testimony, Walton asks this Court to create a new *per se* rule that sexual activity between a prisoner and prison official is never consensual and always violates the Constitution. He concedes in his petition that none of

the Circuits follow such a rule. The Court should decline to adopt a *per se* rule.

As discussed above, many courts have considered and rejected a *per se* rule. *See*, *e.g.*, *Wood*, 692 F.3d at 1048 (declining to adopt a *per se* rule because it was "concerned about the implications of removing consent as a defense for Eighth Amendment claims.") In most of the cases, the plaintiff argued that he or she cannot consent to sexual activity based on criminal statutes or due to a power imbalance between the prisoner and the prison official. Rather than adopt a categorical *per se* rule, every court has taken a case-by-case approach to determine whether the plaintiff's Eighth Amendment rights were actually violated based on the relevant facts of the case.

The Seventh Circuit also considered and rejected a categorical *per se* rule. (Pet. App. 10a.) It ruled that a "*per se* nonconsent rule would run counter to the Supreme Court's instruction by broadly and indeed categorically expanding Eighth Amendment liability in one fell swoop—without regard to the unique factual circumstances that could arise in future cases." (*Id.*) "[B]ecause evolving standards of decency define the Eighth Amendment's scope, Eighth Amendment cases require a flexible approach that is not often compatible with *per se*, broadly applicable rules." (*Id.*)

Contrary to Walton's argument, a *per se* rule would not coincide with society's evolving standards of decency. In *Hudson v. McMillian*, this Court ruled that the "Eighth Amendment's prohibition of cruel and unusual punishments draws its meaning from the evolving standards of decency that mark the progress of a maturing society." *Hudson*, 503 U.S. at 8 (internal

quotation omitted). Allowing a factfinder to consider evidence that Walton consented to sexual conduct is, in fact, consistent with our evolving standards of decency. It is unrealistic to think that sexual contact between a prisoner and prison official 'can never truly be consensual.' In a situation like this—where Walton testified that he voluntarily and willingly entered into a consensual sexual relationship with Nehls and repeatedly testified that he "enjoyed it"—it would be offensive to society's moral principles if a factfinder was forbidden from even considering the issue of consent.

Criminal statutes cannot be considered legislative intent that a prisoner is utterly incapable of giving consent as a matter of law. In an analogous situation, many courts have held that consent can be raised as a defense in a civil battery action against a minor, even though it is irrelevant in a criminal prosecution for statutory rape. *See*, *e.g.*, *Beul v. ASSE International, Inc.*, 233 F.3d 441, 450-51 (7th Cir. 2000); *Michelle T. v. Crozier*, 173 Wis. 2d 681, 495 N.W.2d 327, 329 (1993); *Doe v. Mama Taori's Premium Pizza, LLC*, 2001 Tenn. App. LEXIS 224, 2001 WL 327906, at *7 (Tenn. Ct. App. Apr. 5, 2001); *L. K. v. Reed*, 631 So. 2d 604, 607 (La. App. 1994); *Barton v. Bee Line, Inc.*, 238 A.D. 501, 502, 265 N.Y.S. 284 (App. Div. 1933); *Harvey Freeman & Sons, Inc. v. Stanley*, 259 Ga. 233, 378 S.E.2d 857, 859 (Ga. 1989); *Tate v. Bd. of Educ., Prince George's County*, 155 Md. App. 536, 843 A.2d 890, 901 (Md. Ct. Spec. App. 2004); *Braun v. Heidrich*, 62 N.D. 85, 241 N.W. 599, 601 (N.D. 1932); *Parsons v. Parker*, 160 Va. 810, 170 S.E. 1, 3 (Va. 1933); *Doe by Roe v. Orangeburg County Sch. Dist. No. 2*, 335 S.C. 556, 518 S.E.2d 259, 261 (S.C. 1999); *Cynthia M. v. Rodney E.*, 228 Cal. App. 3d 1040, 279 Cal. Rptr. 94, 97 (4th Dist. 1991). Prohibiting the

defendant from arguing consent would give "too much force to the criminal statute in [a] civil case, for the statute cannot be considered a legislative judgment that minors are utterly incapable of avoiding becoming ensnared in sexual relationships." *Beul*, 233 F.3d at 451. The same can be said of prisoners. Although state and federal law criminalizes sex between a prisoner and a prison official, those laws cannot be considered a legislative judgment that prisoners are incapable of avoiding becoming ensnared in sexual relationships with prison officials.

Walton cannot rely on criminal statutes to prove his § 1983 claim. Section 1983 "protects plaintiffs from constitutional violations, not violations of state [or federal] laws." *Thompson v. City of Chi.*, 472 F.3d 444, 454 (7th Cir. 2006); *see also Blessing v. Freestone*, 520 U.S. 329, 340 (1997). A violation of state or federal law "is completely immaterial as to the question of whether a violation of the federal Constitution has been established." *Thompson*, 472 F.3d at 454. In order to seek redress through § 1983, Walton "must assert the violation of a federal right not merely a violation of federal law." *See Blessing*, 520 U.S. at 340.

Finally, a *per se* nonconsent rule would encourage inmates to manipulate the legal system by seducing officials for possible financial gain. Rewarding a prisoner for consensual sexual acts is unnecessary because society is adequately protected by criminal statutes. There can be no doubt that the purpose of the legislative enactments discussed in Walton's petition is to protect vulnerable inmates. But it is one thing to say that society will protect itself by punishing those who consort with inmates; it is another to hold that an inmate who voluntarily enters

into a consensual sexual relationship with a prison official shall be rewarded for his indiscretion.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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SUPPLEMENTAL APPENDIX

TABLE OF SUPPLEMENTAL APPENDIX

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DAVID CHRISTOPHER LEE WALTON,

Plaintiff,

v.

Case No. 22-C-7

ASHLEY NEHLS,

Defendant.

DECISION AND ORDER

Plaintiff David Christopher Lee Walton is a prisoner currently serving a state sentence at Green Bay Correctional Institution (GBCI). Walton filed this 42 U.S.C. § 1983 action *pro se* seeking damages for violations of his rights under the Eighth Amendment to the United States Constitution, which proscribes cruel and unusual punishment. Walton's claim rests on the absurd notion that he was subjected to such punishment while an inmate at Waupun Correctional Institution (WCI) when he freely engaged in a consensual sexual relationship with a female WCI staff nurse from June 2021 through August 2021. The Court has jurisdiction under 28 U.S.C. § 1331. The case is before the Court on the defendant nurse's motion for summary judgment. The Court will grant Defendant's motion and dismiss this case.

BACKGROUND

During the relevant time, Walton was an inmate at Waupun Correctional Institution where Defendant worked as a nurse. Walton, who is serving a sentence of eighteen years for his second armed robbery conviction, is six feet, three inches tall, and weighs 245 pounds. Defendant, according to Walton, is five feet, six inches and weighs about 120 pounds. Dkt. No. 21-1 at 3–6. Walton asserts that, in early June 2021, Defendant touched his arm and kissed him during a medication pass. He states that he did not report the kiss, in part, because he enjoyed the attention and wanted it to happen again. According to Walton, he and Defendant kissed and touched each other in the health services unit several times a week for nearly three months. The touching consisted of Walton touching Defendant's breasts or buttocks, and Defendant touching his chest or stomach. On several occasions, Walton testified that Defendant touched his penis. On all but one occasion it was over his clothing. *Id.* at 14–37.

Walton describes their relationship as "kind of like two high school kids making out." He acknowledges that he was physically attracted to Defendant and that he "enjoyed it." He states that the two of them had an "emotional connection" and that he would have considered her his girlfriend had they met outside of prison. Walton asserts that Defendant would sometimes give him contraband such as junk food, candy, pain pills, and a cell phone. He states that Defendant never asked for anything in return, and he never gave her anything in return. Dkt. Nos. 20, 26 at ¶¶6–20.

Walton explains that their relationship ended on August 30, 2021, after officers discovered him bending over Defendant in a room with the lights off and the door closed and blocked by a medication cart. Walton was transferred to Dodge Correctional Institution the next day. Walton asserts that, following an investigation, Defendant's employment was terminated. Walton has had no contact with Defendant since his transfer. Dkt. Nos. 20, 26 at ¶¶23–26; Dkt. No. 21-1 at 28–31; Dkt. No. 1 at 4.

LEGAL STANDARD

Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, the Court must view the evidence and draw all reasonable inferences in the light most favorable to the non-moving party. *Johnson v. Advoc. Health & Hosps. Corp.*, 892 F.3d 887, 893 (7th Cir. 2018) (citing *Parker v. Four Seasons Hotels, Ltd.*, 845 F.3d 807, 812 (7th Cir. 2017)). In response to a properly supported motion for summary judgment, the party opposing the motion must "submit evidentiary materials that set forth specific facts showing that there is a genuine issue for trial." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) (citations omitted). "The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* Summary judgment is properly entered against a party "who fails to make a showing to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Austin v. Walgreen Co.*, 885

F.3d 1085, 1087–88 (7th Cir. 2018) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

ANALYSIS

The Eighth Amendment to the United States Constitution proscribes "cruel and unusual punishment." U.S. Const. amend. VIII. In simple terms, "cruel and unusual punishment" means "the unnecessary and wanton infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *see also Ingraham v. Wright*, 430 U.S. 651, 670 (1977) ("After incarceration, only the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment." (altered)).

By his own admission, Walton did not suffer from the unnecessary and wanton infliction of pain. To the contrary, Walton testified that he was attracted to Defendant and enjoyed his encounters with her. He testified under oath that his relationship with her was consensual. He even said they acted like "two high school kids kind of like making out" and that, if he had not been incarcerated, he would have considered her his girlfriend "because who has that type of an emotional connection or a physical—a physical connection, should I say, without being in some type of relationship." Dkt. No. 21-1 at 15, 33–34. It is ludicrous to suggest that a reasonable jury could find from this evidence that Defendant violated Walton's Eighth Amendment rights by subjecting him to cruel and unusual punishment. *See Freitas v. Ault*, 109 F.3d 1335, 1339 (8th Cir. 1997) (holding that "welcome and voluntary sexual interactions, no matter how inappropriate, cannot as matter of law constitute 'pain' as contemplated by the Eighth Amendment"); *see also Graham v. Sheriff of Logan*

Cnty., 741 F.3d 1118, 1126 (10th Cir. 2013) ("Absent contrary guidance from the Supreme Court, we think it proper to treat sexual abuse of prisoners as a species of excessive-force claim, requiring at least some form of coercion (not necessarily physical) by the prisoner's custodians."); *Hall v. Beavin*, 202 F.3d 268, 1999 WL 1045694, at *1 (6th Cir. 1999) (unpublished decision) (finding no merit to plaintiff's Eighth Amendment claim where the "evidence established that [plaintiff] voluntarily engaged in a sexual relationship with [defendant]").

This is not to suggest that a prison official who sexually abuses an inmate does not violate the Eighth Amendment's prohibition of cruel and unusual punishment. *See J.K.J. v. Polk Cnty.*, 960 F.3d 367, 376 (7th Cir. 2020). Not only does the prison official who sexually abuses an inmate violate the inmate's Eighth Amendment rights, but so does the governmental entity that employs the official if it exercises deliberate indifference and fails to act in the face of obvious and known risks to the inmate. *Id.* at 380–81. Nor should a court ignore "the factors which make it inherently difficult to discern consent from coercion in the prison environment." *Wood v. Beauclair*, 692 F.3d 1041, 1048 (9th Cir. 2012). However, those factors are not present where, as in this case, the plaintiff inmate no longer has any contact with the accused prison staff member and he freely admits that he consented to the relationship and likens it to a romantic relationship he would have cherished were he not an inmate serving a sentence in a prison. In no sense of the word could Defendant's alleged conduct be considered the infliction of pain or sexual abuse upon Walton, wanton or otherwise.

During his deposition, Walton repeatedly spoke of his attraction to Defendant and the fact that he enjoyed his contact with her and wanted it to continue. He stated, "I'm in prison with an 18-year prison sentence. Any time that a female shows me any type of affection or intimacy, I'm not going to willingly turn the other cheek." He conceded that, apart from a brief disagreement, he never told her to stop and that he looked forward to his encounters with her. He acknowledged that he sometimes initiated the contact and stated that their interactions were "like two high school kids making out." Although Walton testified that Defendant gave him junk food, candy, pills, and even a cell phone, he asserted that these were all gifts and that Defendant never asked him for anything in return and he never gave her anything in return. *See Graham*, 741 F.3d at 1124 (concluding that the gifting of limited favors "cannot undermine the other overwhelming evidence of consent, particularly when [plaintiff] did not testify that the favors influenced her"). Without qualification, Walton agreed that, at the time, his relationship with Defendant was consensual and that he was a willing participant. Dkt. No. 21-1 at 13–15, 18–22, 32, 34.

Walton also testified that he did not report the relationship until after he transferred to Dodge because he did not want to get Defendant or himself in trouble and because he enjoyed his contact with Defendant. Dkt. No. 21-1 at 13–14, 18. In response to Defendant's proposed statements of fact, Walton attempted to qualify his deposition testimony by asserting that he *also* did not report it because Defendant was a staff member. He further responded that he did not feel like he could tell Defendant to stop because of her position. Dkt. No. 26 at ¶¶11, 14. But Walton's qualifications, which he appears to have

made in an attempt to create a triable issue on the question of consent, are not included in his sworn complaint, Dkt. No. 1, his declaration, Dkt. No. 25, or in the portions of his deposition that he cites, Dkt. No. 21-1 at 34–35, and are therefore not properly supported. *See* Fed. R. Civ. P. 56(c). Accordingly, based on this record, the Court finds that, as a factual matter, the only reasonable conclusion a jury could reach is that Walton consented to the sexual contact he had with Defendant.

Nonetheless, despite characterizing himself as a willing participant, Walton insists that Defendant violated the Eighth Amendment when she had sexual contact with him because, as a matter of law, he cannot consent to a sexual relationship with a prison official. *See* Dkt. No. 21-1 at 35 ("[I]t really doesn't matter what I wanted, or if I wanted it or if I liked it or if I consented to it. I cannot give consent to a sexual relationship with a staff member whether I wanted to or not. That's what it boils down to."). The Court concludes, as have other courts in this district, that consensual sexual contact does not give rise to a constitutional violation. *See Bentley v. Baenen*, No. 17-cv-1791-JPS, 2018 WL 1108701, at *2–3 (E.D. Wis. Feb. 27, 2018); *Torgerson v. Rasmussen*, No. 20-cv-1297-SCD (E.D. Wis. Sep. 28, 2022).

Walton's argument is predicated upon the Prison Rape Elimination Act (PREA), 34 U.S.C. §§ 340301 *et seq.*, which has as its goal the elimination of prison rape, and the Wisconsin Criminal Code, which defines second degree sexual assault to include "sexual contact or sexual intercourse with an individual who is confined in a correctional institution" by a correctional staff member. Wis. Stat.

§ 940.225(2)(h). Neither the PREA, nor Wisconsin law, warrant a different conclusion, however.

Defendant's alleged conduct does not constitute a rape within the meaning of the PREA. *See* 34 U.S.C. § 30309(9) (defining "rape" as "the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person forcibly or against that person's will;" ". . . where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity;" or ". . . achieved through the exploitation of the fear or threat of physical force or bodily injury"). More importantly, the PREA does not create a private right of action. *See, e.g.*, *Bentley*, 2018 WL 1108701, at *2 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)); *Truly v. Moore*, No. 16-cv-00783-NJR, 2017 WL 661507, at *4 (S.D. Ill. Feb. 17, 2017) (collecting cases). And while it may constitute a crime for a correctional staff member to have sexual contact or sexual intercourse with a prison inmate, it does not follow that such conduct constitutes cruel and unusual punishment. To the extent Defendant's alleged behavior violated internal policy or even state law, it has long been held that violations of that nature "do not form the basis for imposing § 1983 liability." *Est. of Novack ex rel. Turbin v. Cnty. of Wood*, 226 F.3d 525, 532 (7th Cir. 2000); *Langston v. Peters*, 100 F.3d 1235, 1238 (7th Cir. 1996) ("But ignoring internal prison procedures does not mean that a constitutional violation has occurred.").

In short, "not all misbehavior by public officials, even egregious misbehavior, violates the Constitution." *Graham*, 741 F.3d at 1126. Walton's rights under the Eighth Amendment were not violated because the record establishes that Walton consented

to the sexual contact he had with Defendant. To hold otherwise would encourage inmates to manipulate the legal system by seducing officials for possible financial gain. Defendant is entitled to summary judgment.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant Ashley Nehls' motion for summary judgment (Dkt. No. 18) is **GRANTED**.

IT IS FURTHER ORDERED that Defendant's motion to compel (Dkt. No. 28) is **DENIED as moot**.

IT IS FURTHER ORDERED that this case is **DISMISSED**. The Clerk of Court is directed to enter judgment accordingly.

Dated at Green Bay, Wisconsin
this 20th day of January, 2023.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

This order and the judgment to follow are final. Plaintiff may appeal this Court's decision to the Court of Appeals for the Seventh Circuit by filing in this Court a notice of appeal within **30 days** of the entry of judgment. *See* Fed. R. App. P. 3, 4. This Court may extend this deadline if a party timely requests an extension and shows good cause or excusable neglect for not being able to meet the 30 day deadline. *See* Fed. R. App. P. 4(a)(5)(A). If Plaintiff appeals, he will be liable for the $505.00 appellate filing fee regardless of the appeal's

outcome. If Plaintiff seeks leave to proceed *in forma pauperis* on appeal, he must file a motion for leave to proceed *in forma pauperis* with this Court. *See* Fed. R. App. P. 24(a)(1). Plaintiff may be assessed another "strike" by the Court of Appeals if his appeal is found to be nonmeritorious. *See* 28 U.S.C. §1915(g). If Plaintiff accumulates three strikes, he will not be able to file an action in federal court (except as a petition for habeas corpus relief) without prepaying the filing fee unless he demonstrates that he is in imminent danger of serious physical injury. *Id.*

Under certain circumstances, a party may ask this Court to alter or amend its judgment under Federal Rule of Civil Procedure 59(e) or ask for relief from judgment under Federal Rule of Civil Procedure 60(b). Any motion under Federal Rule of Civil Procedure 59(e) must be filed within **28 days** of the entry of judgment. Any motion under Federal Rule of Civil Procedure 60(b) must be filed within a reasonable time, generally no more than one year after the entry of judgment. The Court cannot extend these deadlines. *See* Fed. R. Civ. P. 6(b)(2).

A party is expected to closely review all applicable rules and determine, what, if any, further action is appropriate in a case.