NO. _____

_____

IN THE

SUREME COURT OF THE UNITED STATES

_____

Devin Kugler - PETITIONER

vs.

Gregg scott, James mccury and Eric Kunkle - Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAS SEVENTH CIRCUIT

APPENDIX A

Devin Kugler, Pro se
17019 county Farm Rd.
Rushville, IL. 62681

_____

phone number

cover

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 29, 2025*
Decided September 29, 2025

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

NANCY L. MALDONADO, *Circuit Judge*

No. 24-2456

DEVIN M. KUGLER,
Plaintiff-Appellant,

v.

GREGG SCOTT, et al.,
Defendants-Appellees.

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

No. 4:19-cv-04168-CSB

Colin S. Bruce,
Judge.

ORDER

Devin Kugler, an Illinois civil detainee at Rushville Treatment and Detention Facility, alleges that a facility policy banning residents from possessing legal pornography violates his rights under the First Amendment. *See* 42 U.S.C. § 1983. After Kugler's voluntary dismissal of two defendants, the district court granted summary judgment for the remaining defendants. The court based its decision on an expert report

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

APPENDIX A

disclosed during discovery by the previously dismissed defendants. Kugler argues that this was procedural error. But because any flaw related to the report's disclosure was harmless, we affirm.

In 2019, officials at Rushville prohibited Kugler, who had been adjudicated a "sexually violent person" under the Illinois Sexually Violent Persons Commitment Act, *see* 725 ILCS 207/5(f), from possessing pornography. He sued three detention officials and two clinical directors in August, seeking injunctive and declaratory relief. The two groups of defendants were represented by different counsel.

The clinical directors complied with the expert-disclosure deadline, which expired in March 2021. Two months later, Kugler dismissed them, continuing his suit against only the detention officials. Those defendants did not tender any disclosures.

In April 2021 and again in May 2022, the detention officials moved for summary judgment. The district court denied both motions because the defendants had failed to present evidence supporting the pornography policy. The district court explained that the defendants must offer "research-based underpinnings" for the policy. *See Brown v. Phillips*, 801 F.3d 849, 853–54 (7th Cir. 2015); *Payton v. Cannon*, 806 F.3d 1109, 1110–11 (7th Cir. 2015).

In February 2024, the detention officials moved to dismiss under Federal Rule of Civil Procedure 12(b)(1). They argued that Kugler's claims were moot because Rushville had changed its pornography policy, resulting in the return of some of Kugler's pornographic materials. The officials attached an expert report by Dr. Drew A. Kingston, Ph.D. The report concluded that Rushville's restriction on Kugler's access to pornography was reasonable based on his sexually deviant behaviors and a review of the pertinent literature. But the district court denied the motion, finding that the new policy still largely restricted Kugler's access to pornography.

The court explained, however, that summary judgment may be proper based on the contents of the Kingston Report. The court noted that the report seemed to eliminate any issue of material fact regarding whether the challenged policy bears a rational relationship to the state's legitimate interest in the security and rehabilitation of sexually violent persons, generally, or Kugler, specifically.

The court then gave Kugler an opportunity to respond with evidence contradicting the report. Kugler argued that the Kingston Report was inadmissible

because none of the defendants had disclosed Dr. Kingston as an expert witness in compliance with Federal Rule of Civil Procedure 26.

The detention officials responded by supplying the February 24, 2021, disclosure statement from the dismissed defendants, which included Dr. Kingston's name and his report. The defendants also supplied the certificate of service document filed by the dismissed defendants, showing that the disclosure document had been served on Kugler at Rushville via certified mail.

The court entered summary judgment for the detention officials. The court concluded that the Kingston Report had been disclosed properly by the dismissed defendants in 2021, the detention officials could rely on it, and the report resolved any material dispute of fact about the facility's legitimate interest in restricting Kugler's access to pornography.

Kugler appealed and filed a motion for relief from judgment in the district court. In the motion, Kugler alleged that the detention officials falsified the disclosure documents related to the Kingston Report. In response, the officials submitted an affidavit from an office assistant for the Illinois Attorney General's Office, confirming the Kingston Report's authenticity and timely disclosure. The court denied Kugler's motion, deeming his accusations "near-frivolous." Kugler did not amend his notice of appeal to challenge that ruling.

On appeal, Kugler argues that the district court should have prohibited the detention officials from relying on the Kingston Report because they failed to disclose Dr. Kingston as an expert under Rule 26. Kugler contends that, without the report, his case must proceed to trial. We review a district court's decision to consider expert evidence for an abuse of discretion. *Uncommon, LLC v. Spigen, Inc.*, 926 F.3d 409, 417 (7th Cir. 2019).

Federal Rule of Civil Procedure 26(a)(2)(A) requires a party to disclose the identity of any expert witness it may use for testimonial evidence. While the typical remedy for a violation of Rule 26 is exclusion of the evidence, an error may be forgiven if the failure to disclose was justified or harmless. *See* FED. R. CIV. P. 37(c)(1); *id.* advisory committee's note to 1993 amendment (identifying as harmless "the failure to list as a trial witness a person so listed by another party"). In deciding whether to excuse a violation, a district court should consider the prejudice or surprise to the opposing party, that party's ability to cure the prejudice, possible disruption to the trial,

and any bad faith on the part of the party who failed to timely disclose. *See David v. Caterpillar, Inc.*, 324 F.3d 851, 856–58 (7th Cir. 2003); *Uncommon*, 926 F.3d at 417–19.

The detention officials concede that they never disclosed Dr. Kingston as an expert witness. But they argue that no Rule 26 violation occurred because their former co-defendants disclosed Dr. Kingston before Kugler dismissed them from the suit. Relying on *S.E.C. v. Koenig*, 557 F.3d 736 (7th Cir. 2009), the detention officials contend that a disclosed expert may be used by any party.

But *Koenig* does not control here. In that case, Koenig disclosed the identity of an expert but later chose not to call the expert at trial. The SEC had not identified the expert in its own disclosures, yet it presented the expert's deposition testimony at trial. Koenig argued that this violated Rule 26(a)(2)(A). We held that no error occurred because the expert's identity had been disclosed by Koenig, so the SEC's use of the expert did not implicate Rule 26. *See id.* at 743–44. We did not address in *Koenig* whether it is error for a defendant to fail to identify as its own witness an expert disclosed by a co-defendant who has been dismissed from the case.

We need not resolve whether the detention officials violated Rule 26 by failing to identify Dr. Kingston as an expert during discovery, however, because any failure to disclose was harmless. Rule 26 requires expert disclosures so that the parties have adequate notice and may "prepare intelligently for trial" and "ask for other experts' views on the soundness of the conclusions reached by the testimonial experts." *Id.* at 744. Kugler was aware of Dr. Kingston and the report in 2021, when the clinical directors tendered their disclosures. While Kugler denies getting the report in 2021, the district court found this assertion—made in Kugler's motion for relief from judgment—"near-frivolous." Kugler did not appeal the district court's order denying the motion, and in any event, he offers no evidence contradicting the affidavit that confirmed the report's 2021 delivery. Even if Kugler had not received the report in 2021, the detention officials attached the Kingston Report to their motion to dismiss in February 2024. So Kugler cannot plausibly argue that he did not have an adequate opportunity to consider and respond to it.

Further, the district court gave Kugler an opportunity to dispute the Kingston Report after it had been re-disclosed by the defendants in February 2024. But Kugler neither challenged the report's contents nor requested additional time to secure his own expert, even though he had previously sought—and obtained—extensions for similar purposes. The opportunity to respond to the Kingston Report before the district court relied on it to enter summary judgment for the detention officials cured any potential

prejudice. *See Uncommon*, 926 F.3d at 418–19 (citing *David*, 324 F.3d at 857) (Rule 26 error was harmless, in part, because the other party did not "request additional expert discovery or, at a minimum, a deposition of [the expert]."); *id.* at 419 ("Rule 37 ... does not safeguard a party's decision to sense an error, seize on it, and then, when it is resolved, claim incurable harm in the face of apparent remedies.").

Because any failure by the detention officials to comply with Rule 26's disclosure requirements was harmless, the judgment of the district court is AFFIRMED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 21, 2025

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

NANCY L. MALDONADO, *Circuit Judge*

No. 24-2456

DEVIN M. KUGLER,
Plaintiff - Appellant,

v.

GREGG SCOTT, *et al.*,
Defendants-Appellees.

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

No. 4:19-cv-04168-CSB

Colin S. Bruce,
Judge.

ORDER

On consideration of the petition for panel rehearing filed by Plaintiff-Appellant on October 6, 2025, all members of the original panel have voted to deny the petition for panel rehearing.

Accordingly, the petition for panel rehearing is hereby DENIED.

APPENDIX
A-1

E-FILED
Friday, 16 August, 2024 04:34:55 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
ROCK ISLAND DIVISION

DEVIN KUGLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	19-4168
	)	
GREGG SCOTT, *et al.*	)	
	)	
Defendants.	)	

ORDER

Plaintiff, Devin Kugler, proceeding pro se and presently civilly detained at the Rushville Treatment and Detention Facility, brought the present lawsuit pursuant to 42 U.S.C. § 1983 alleging a First Amendment claim based on Rushville's ban on legal pornography. The matter is before the Court on the Court's own motion pursuant to Federal Rule Civil Procedure 56(f)(3).

The procedural history of the case is reviewed at length in the Court's Order (Doc. 178). In that Order, the Court directed the parties to address whether a genuine issue of material fact existed requiring a trial in this matter. The parties have now filed their respective briefs as to that question.

Plaintiff's History

Plaintiff has been civilly detained at Rushville Treatment and Detention Facility since 2007 pursuant to the Illinois Sexually Violent Persons Commitment Act (SVP Act), 725 Ill. Comp. Stat. § 207/1 *et seq.*

The SVP Act defines "sexually violent person" as "a person who has been convicted of a sexually violent offense ... and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." 725 Ill. Comp. Stat. § 207/5(f). Commitment lasts until such time that the individual is no longer a sexually violent person as determined by the state court that issued the commitment order. *Id.* § 207/40(a).

Plaintiff's diagnosis history of multiple psychological disorders includes pedophilia, sexual masochism, delusional disorder of an erotomania type, bipolar disorder with psychotic features, paraphilia not otherwise specified - non-consent, antisocial personality disorder, and Tourette's disorder. (Doc. 120-10) at 17. Plaintiff's Master Treatment Plan, undated, seeks "improvement in developing, increasing and maintaining healthy sexual interest and behaviors." *Id.*

His sexual arousal patterns have been described in the Master Treatment Plan as "normal" and not indicating a need for further testing, he did not demonstrate significant arousal to any deviant stimuli, and a sexual arousal reconditioning program was not recommended as of the Master Treatment Plan provided by Plaintiff. *Id.*

Plaintiff was convicted of aggravated battery in September 1998 and battery in May 2002. In June 2002 Plaintiff was convicted of criminal sexual assault of an eight-year-old girl. Plaintiff self-reported three separate sexual assault victims in 1998 and 2002. Plaintiff states his 2002 crime was misdemeanor criminal sexual abuse, which was a Juvenile Adjudication case rather than an adult criminal case. (Doc. 120-12) at 2.

According to Plaintiff's 2019 Psychological Re-Evaluation, Plaintiff scored "well above average" on the diagnostic tool that evaluators use to assist in the prediction of sexual and violent recidivism for SVPs. The evaluator found it "substantially probable" Plaintiff would commit acts of sexual violence if granted release. (Doc. 120-15) at 3 – (Doc. 120-16) at 1. Plaintiff's 2021 evaluation is similar. (Doc. 120-17) at 17.

Facility Policies

The policies Plaintiff challenges ban possession of legal pornography. The policy in effect from 2013 through 2024 banned possession of this material.

In December 2023, the Department issued a new Media Review Policy creating a screening and review procedure whereby a committee reviews items that may amount to sexually explicit material to determine if a given item is banned. (Doc. 162-3).

In early 2024, the Department instituted an updated policy banning possession of legal pornography with definitions that are somewhat more detailed than the earlier policy. (Doc. 162 and exhibits).

Dr. Drew A. Kingston's Expert Report

Dr. Drew A. Kingston, an international authority on human sexuality, sex crimes, and persons civilly detained based on court determinations of sexual threat, prepared a report related to the research underpinning policies prohibiting possession of legal pornography by persons in Plaintiff's position. (Doc. 162-6) at 4-26; (Doc. 172-1) at 8. His research is extensive and diverse and bears directly on persons determined by courts to be sexually violent.

After a detailed review of the relevant research literature, Dr. Kingston writes:

> The fact that pornography has shown the potential to result in the formation and expression of negative attitudes and beliefs and subsequent aggressive behavior underscores the notion that such material would be counter-productive to the underlying goals of a treatment program; that is to rehabilitate and promote public safety. This concern is even greater when the facility houses individuals who have exhibited problematic sexual behavior and who, by definition, have displayed factors that are associated with their proclivity to re-offend sexually. While not all individuals in a civil commitment type facility would inevitably suffer negative consequences of pornography consumption, such as developing negative attitudes or increasing their likelihood for sexual recidivism, the negative impact of such material is much more likely among individuals who have been assessed as high risk and who present with features consistent with Pedophilic Disorder and Antisocial Personality Disorder
> ....

(Doc. 162-6) at 8.

The Court notes that Plaintiff has been diagnosed with the specific disorders highlighted at the end of Dr. Kingston's report.

Summary judgment legal standard

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. "With the court drawing all inferences in the light most favorable to the non-moving party, the moving party must discharge its burden of showing that there are no genuine questions of material fact and that [it] is entitled to judgment as a matter of law." *Spierer v. Rossman*, 798 F.3d 502, 507 (7th Cir. 2015). If the moving party carries this burden, "it passes to the non-movant 'to come forward with specific facts showing that there is a genuine issue for trial.'" *McMahan v. Deutsche Bank AG*, 892 F.3d 926, 933 (7th Cir. 2018), quoting *Spierer*, 798 F.3d at 507. "The

existence of merely a scintilla of evidence in support of the non-moving party's position is insufficient; there must be evidence on which the jury could reasonably find for the non-moving party." *Madison v. Frazier*, 539 F.3d 646, 652 (7th Cir. 2008).

Federal Rule of Civil Procedure 56(f)(3)

Under Federal Rule of Civil Procedure 56(f)(3) "[a] district court is permitted to enter summary judgment sua sponte if the losing party has proper notice that the court is considering granting summary judgment and the losing party has a fair opportunity to present evidence in opposition." *Whitfield v. Walker*, 438 F. Appx. 501, 504 (7th Cir. 2011), citations omitted, (affirming district court's sua sponte grant of summary judgment to the defendants after allowing the plaintiff an opportunity to respond).

***Turner* and *Brown* standards**

Claims under the First Amendment raised by civil detainees, such as Plaintiff, are governed by the test from *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). *Turner* requires that a state's restraint of detainees' First Amendment rights must be rationally connected to the state's legitimate interests. *Brown v. Phillips*, 801 F.3d 849, 853 (7th Cir. 2015) (reversing grant of summary judgment for the defendants on Rushville's ban on movies and video games portraying graphic depictions of sex and violence).

There is no question that the state's interests in security and the rehabilitation and treatment of sexually violent persons is legitimate. *Id.* The real question before the Court in this case is whether the record would allow a rational jury to determine that Defendants' policy – the ban on legal pornography - lacks a rational relationship to the state's legitimate interests.

For Defendants to obtain summary judgment on this issue, the record must show more than a "formulistic logical connection," that is, the record must include "some evidence to show that the restriction is justified." *Id.*

Courts must afford deference to officials' decisions regarding the best ways to achieve legitimate penological goals. *Kingsley v. Hendrickson*, 576 U.S. 389, 396-97 (2015); *Trowbridge v. Indiana Dep't of Correction*, 854 F. Appx. 84, 86 (7th Cir. 2021) (affirming grant of summary judgment in favor of prison officials' policy banning explicit images).

However, "some data is needed to connect the goal of reducing the recidivism of sex offenders with a ban on their possessing legal adult pornography." *Brown*, 801 F.3d at 854, citing *United States v. Taylor*, 796 F.3d 788, 792–93 (7th Cir. 2015) (overturning condition of supervised release prohibiting convicted sex offender from possessing legal adult pornography where no evidence suggested that the legal material contributed to the illegal activity); *United States v. Siegel*, 753 F.3d 705, 709 (7th Cir. 2014) (access to legal pornography by rapist of adult women can decrease likelihood of recidivism because research shows that viewing legal pornography can be a safe outlet for sexual behavior). The Seventh Circuit also discussed the need for objective scientific analysis in support of bans of legal pornography in *Payton v. Cannon*, 806 F.3d 1109, 1110-11 (7th Cir. 2015). There, the court upheld a prison pornography ban based on the ex-warden's unopposed affidavit stating the bases for the policy. The court added, though, "we think it important to note for future reference that the ex-warden's statement, though plausible and thus sufficient for judgment given the absence of countervailing evidence, is not ironclad." *Payton*, 806 F.3d at 1110. The court went on to

further discuss why it believed that data and scientific research are necessary in support of such policies.

Analysis

Dr. Kingston's expert report eliminates any issue of material fact and indicates that Defendants are entitled to judgment as a matter of law. Defendants' former, and current, policies are supported by the scientific research, data, and literature, and were so supported going back to the time Plaintiff filed suit, based on Dr. Kingston's expert report and the citations to research papers within the report.

Director Donathan's Declaration (Doc. 122-5), filed in support of Defendants' second summary judgment motion, is also directly supported by Dr. Kingston's report. Director Donathan's statement that "from a clinical standpoint, Rushville is concerned about resident access to pornographic materials interfering with professional efforts to rehabilitate sexual offenders as well as those residents suffering from an array of mental health disorders" is dispositive here, supported as it is by Dr. Kingston's expert report. See (Doc. 122-5). Why Donathan's Declaration does not cite Dr. Kingston's report is unclear to the Court. Nevertheless, the Declaration is supported by the sound, research-based, data-driven logic of the report. On these facts, no reasonable juror could find for Plaintiff.

The Court finds *Bailey v. Stover*, 766 F. App'x 399, 401, 402 (7th Cir. 2019), directly on point. In *Bailey*, the Seventh Circuit affirmed the district court's ruling upholding a facility's explicit material ban, because the defendants there relied on several studies showing that "sexually stimulating material is detrimental to sex offenders' treatment."

Bailey, 766 F. App'x at 402 (affidavit of clinical staff, supported by "studies showing that sexually stimulating material is detrimental to sex offenders" sufficient for court to defer to the expertise of prison clinical staff).

Here, Defendants' concerns about treatment interference are securely grounded in the rational, objective, scientific basis encouraged by *Payton* and required by *Brown*. *See Bailey*, 766 F. App'x at 402; *Trowbridge v. Indiana Dep't of Correction*, 854 F. App'x 84, 86 (7th Cir. 2021) ("where, as here, no reliable evidence contradicts plausible reasons advanced by prison authorities, the defendants are entitled to summary judgment").

Plaintiff continues to focus on the fact that this Court has twice denied summary judgment. His point is well taken. However, where the undisputed material facts show that no reasonable jury could return a verdict for Plaintiff, the Court has an obligation to resolve the case short of trial. This does not appear to be a close case, nor is it a case where Defendants are being allowed an unfair third attempt to secure judgment in their favor. Rather it is a case where Defendants failed to supply the Court with the evidence *they already had in their possession* demonstrating that there is no genuine issue of material fact, and that they are entitled to judgment as a matter of law.

The Court considers the implications of allowing the case to proceed to trial based merely on the fact that Defendants failed to earlier present this determinative evidence to the Court.

Plaintiff asserts that Dr. Kingston was never disclosed to him as an expert in this case. However, the record, coupled with the attachments to Defendants' supplemental reply (Doc. 183) indicate otherwise. The Court finds Dr. Kingston, and his report, were

properly disclosed to Plaintiff in February 2021. (Doc. 77) (notice of expert disclosures); (Doc. 183-1) (full expert disclosure and report). Dr. Kingston is exceedingly well-qualified as an expert in this action.

Plaintiff objects to Dr. Kingston's expert report being considered and would presumably object to Dr. Kingston testifying at trial, as his former pro bono counsel did. See Motion in Limine (Doc. 136). Plaintiff's argument is that the *remaining Defendants* did not disclose Dr. Kingston. But the co-Defendants since dismissed from the case did timely disclose him and his written report, in February 2021. The Court finds Dr. Kingston and his report were properly and timely disclosed to Plaintiff, and that his testimony and report are admissible evidence. Presuming Dr. Kingston were to testify as an expert witness at trial, the Court would, it believes, then be required to direct a verdict for Defendants for the same reasons discussed in this Order.

Conclusion

The undisputed material facts now before the Court entitled Defendants to judgment as a matter of law. The Court provided Plaintiff with ample time to provide a response, and Plaintiff has filed an extensive response with attached exhibits. (Doc. 179). The Court has considered Plaintiff's arguments and for the reasons stated in this Order finds them unpersuasive. Summary judgment is granted in favor of Defendants and against Plaintiff.

IT IS THEREFORE ORDERED:

1) **Pursuant to Federal Rule of Civil Procedure 56(f)(3), summary judgment is entered in favor of Defendants and against Plaintiff.**

2) **All pending deadlines are vacated and the case is to be closed.**

3) **The Clerk is directed to enter judgment in favor of Defendants and against Plaintiff.**

Entered this 16th day of August, 2024.

s/Colin S. Bruce

COLIN S. BRUCE
U.S. DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.