No. 18-2181

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Charles Hamner,

Plaintiff-Appellant,

v.

Danny Burls, et al.,

Defendants-Appellees.

Appeal from The United States District Court for the Eastern District of Arkansas
Case No. 5:17-CV-79 JLH-BD
The Honorable Judge James Leon Holmes

REPLY BRIEF OF PLAINTIFF-APPELLANT, CHARLES HAMNER

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INTRODUCTION

For unknown reasons, Charles Hamner, who is designated "seriously mentally ill" by the Arkansas Department of Corrections ("ADOC"), was consigned to solitary confinement for 203 days, under cruel conditions that exacerbated his mental illness. Mr. Hamner sued pro se, claiming that ADOC's misconduct violated the Fourteenth Amendment's procedural due process guarantee and the Eighth Amendment's ban on conditions and medical care that amount to cruel and unusual punishment.

Without considering the nature of the restrictions imposed upon Mr. Hamner, the district court held that seven months of solitary confinement was too short—as a matter of law—to entitle a prisoner to even the most basic elements of due process. In other words, if a deprivation is seven months or shorter, officials may subject a prisoner to any conditions—no matter how dangerous and extreme—without providing an explanation or considering an objection. The district court concluded that Mr. Hamner's inadequate medical care claim was doomed by inartful pleading. And it saw no reason to review Mr. Hamner's conditions of confinement claim, having concluded that disposing of one species of Eighth Amendment claim—*i.e.*, medical care—obviated the need to analyze any other.

The district court's reasons for dismissing Mr. Hamner's complaint are erroneous in every respect. First, as the Supreme Court and every federal circuit hold, determining whether solitary confinement constitutes an "atypical and significant

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hardship"—thereby implicating a liberty interest—requires a fact-specific analysis of multiple factors, including the duration and nature of the restrictions imposed. The district court's myopic focus on duration to the exclusion of all else is contrary to this uniform authority. Second, to survive a 12(b)(6) motion to dismiss, Mr. Hamner was required to plead—not prove—that Appellees were deliberately indifferent to his medical care. He did just that: Mr. Hamner alleged that Appellees, despite their knowledge of his mental illness and pleas for assistance, turned a blind eye to the fact that he could not obtain adequate psychiatric and psychological care in solitary confinement. Pro se complaints need not be perfect to state cognizable claims, but Mr. Hamner's is adequate even if judged against the standard to which a counseled plaintiff is held. Third, conditions of confinement and inadequate medical care claims are both cognizable under the Eighth Amendment, but they are separate claims demanding distinct analyses.

Appellee's response brief, for its part, is notable not for what it contains, but for what it omits. First, Appellees do not contend that the district court considered any factor other than duration, let alone conducted a fact-specific analysis of the nature of Mr. Hamner's solitary confinement, for purposes of identifying a liberty interest. Nor do Appellees contend that they provided Mr. Hamner with any component—even the most elemental—of due process. Instead, Appellees defend the district court's legal error by block-quoting the district court's legal error. Second, Appellees do not rebut

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Mr. Hamner's allegations that they knew of but disregarded the fact that he was not afforded constitutionally adequate care in solitary confinement other than by recapitulating the district court's error in this regard. Third, Appellees do not contest—beyond a conclusory footnote—that the district court erred by not independently reviewing Mr. Hamner's conditions claim.

For years, federal courts, scientists, and correctional officials have been ringing alarm bells about the unacceptable dangers of subjecting prisoners—particularly those afflicted with mental illness—to prolonged solitary confinement. This Court should vacate the orders below and permit Mr. Hamner the chance to prove that the harsh conditions he endured violated the Eighth and Fourteenth Amendments.

ARGUMENT

I. The Atypical And Significant Hardship Analysis Demands A Multi-Factor Review Of The Nature And Duration Of Solitary Confinement.

Appellees contend that the district court was correct to ignore factors other than duration when reviewing Mr. Hamner's due process claim. Resp. Br. at 8. In fact, Appellees go so far as to assert that considering the nature of solitary confinement—including its potential impact on mental illness—is tantamount to "a departure from a straightforward 'atypical and significant hardship' analysis." Resp. Br. at 8. Not so.

The Supreme Court and every federal circuit, including this one, hold that determining whether solitary confinement is atypical and significant requires a fact-specific, multi-factor analysis that takes into account both the duration and the nature

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of the confinement. *See* Op. Br. at 42–44 (collecting cases). Thus, the district court was required to consider both the term and the conditions of Mr. Hamner's solitary confinement for purposes of determining whether he was entitled to the protections of the Due Process Clause. *See id*. Mr. Hamner's serious mental illness is also a relevant factor. *See* Op. Br. at 44–45 (collecting cases). Instead, the district court considered the length of Mr. Hamner's solitary confinement to the exclusion of all else. AA 71–72. The harsh restrictions inflicted on a mentally ill prisoner simply did not merit weight. *Id*.

The district court (and, by extension, Appellees) cited two opinions of this Court—*Orr v. Larkins*, 610 F.3d 1032, 1034 (8th Cir. 2010) (per curiam) and *Phillips v. Norris*, 320 F.3d 844, 847 (8th Cir. 2003)—to support its contention that the liberty interest question is resolvable by a singular focus on duration. AA 71. But both cases cut against the district court's reasoning because each explicitly reflects a multi-factor analysis.

The prisoner in *Orr* brought a due process challenge to a nine-month solitary confinement term. 610 F.3d at 1033. In rejecting that challenge, this Court noted that "a demotion to segregation . . . is not itself an atypical and significant hardship." *Id*. at 1034 (citation omitted). The phrase "is not itself" is key—the analysis necessarily turns on the specific conditions at issue. *Id*. (noting that to establish he was owed due process, a prisoner "must identify conditions" that constitute an atypical and

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significant hardship). That is, "the nature" of solitary confinement is fundamental to the liberty-interest question. *Id*. (citation omitted). The plaintiff in *Orr*, however, did not satisfy his obligation to "compare the conditions to which [he] was exposed in segregation with those he or she could expect to experience as an ordinary incident of prison life." *Id*. (citation omitted). In fact, the *Orr* complaint is wholly devoid of any description of the restrictions imposed in solitary confinement. *See* Complaint, *Orr v. Larkins*, No. 4:08CV1233, 2008 WL 4488805 (E.D. Mo. Sept. 30, 2008), ECF No. 1. Any defects in the *Orr* pleading, however, are irrelevant to Mr. Hamner's claim. Mr. Hamner, in contrast to the plaintiff in *Orr*, described with specificity the crushing restrictions he endured in solitary confinement and the ways in which they differed from the privileges he enjoyed in general population. *See* Op. Br. at 4–7.

In *Phillips*, a prisoner claimed that his thirty-seven day solitary confinement term was imposed in violation of the Due Process Clause. 320 F.3d at 846. To determine whether the restrictions amounted to an atypical and significant hardship, this Court considered the "difference between his new conditions in segregation and the conditions in general population." *Id*. at 847. Specifically, this Court weighed limitations on contact visitation, congregate worship, and exercise. *Id*. Although this Court noted that the exercise restriction was "perhaps pushing the outer limits of acceptable restriction," the deprivations did not amount to an atypical and significant hardship because they were withdrawn after little more than one month. *Id*. Mr.

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Hamner, in contrast, alleged that he was subjected to a far more restrictive regime for nearly seven times longer. *See* Op. Br. at 4–7.

In short, neither *Orr* nor *Phillips* undermines Mr. Hamner's claim, let alone stands for the propositions—duration is the sole relevant factor, seven months is never enough—attributed to them by the district court and Appellees. Because the district court erred by analyzing Mr. Hamner's claim without regard to nature of the conditions he endured, this Court must vacate and remand for further proceedings.[1]

II. Mr. Hamner Adequately Pleaded That Appellees Were Aware Of But Turned A Blind Eye To His Serious Medical Needs.

The crux of Appellees argument is that Mr. Hamner simply did not plead deliberate indifference artfully enough. Resp. Br. at 9–10. Not so. Mr. Hamner satisfied his pleading burden under any standard but doubly so under the rule that "a pro se complaint should be given liberal construction." *Solomon v. Petray*, 795 F.3d 777, 787 (8th Cir. 2015) (citation omitted). Where, as here "the essence of an allegation is discernible . . . then the district court should construe the complaint in a way that permits the layperson's claim to be considered within the proper legal framework." *Id*. (citation omitted). In any event, Appellees' claim that Mr. Hamner "hangs his hat on a few general statements presented in [his] pleadings," Resp. Br. at 9, is belied by the record. *E.g.*, AA 113.

[1] Notably, Appellees do not assert that Mr. Hamner received any of the hallmarks of due process prior to and throughout the term of his solitary confinement.

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First, Mr. Hamner sufficiently pleaded that he had a serious medical need, a threshold matter that Appellees do not appear to dispute. *See* Resp. Br. at 8–10. His serious mental health ailments, including borderline personality disorder and post-traumatic stress disorder, were diagnosed by a physician and required treatment by three different medications daily. AA 73, 77, 90, 113. In this circuit, Mr. Hamner's mental illness easily presents an "objectively serious medical need." *See* Op. Br. at 37 (citing *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *Coleman v. Rahija*, 114 F.3d 778, 784 (8th Cir. 1997)).

Second, Appellees argue that Defendants are not "directly responsible for [Mr. Hamner's] medical care" and therefore cannot be deliberately indifferent. *See* Resp. Br. at 10. But prison officials have a constitutional duty to ensure that prisoners receive medical treatment when they need it. *Crooks v. Nix*, 872 F.2d 800, 804 (8th Cir. 1989) (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)); *see also Langford v. Norris*, 614 F.3d 445, 460–61 (8th Cir. 2010) (holding claim for deliberate indifference to a serious medical condition cognizable against a prison administrator, even though "he [was] not a medical doctor and [did] not personally treat inmates' medical needs," because prison officials "[have] a constitutional duty to see that prisoners in [their] charge who need medical care receive it"); Op. Br. at 37–38 n.22 (collecting cases). As this line of cases makes clear, prison officials other than medical personnel are liable for constitutionally inadequate medical care if they "[knew] about the conduct and

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facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye [to it]." *Boyd v. Knox*, 47 F.3d 966, 968 (8th Cir. 1995) (citation omitted); *see also Farmer v. Brennan*, 511 U.S. 825, 843 n.8 (1994) (A defendant may "not escape liability if the evidence show[s] that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist.").

Mr. Hamner specifically and adequately pleaded that Appellees knew of his serious medical needs, knew of the utterly inadequate mental health care he received while segregated, and, despite his pleas, looked away. AA 113. For example, Mr. Hamner explained that Appellees knew he suffered from serious mental illness "because they reviewed his institutional jacket each time he saw them for classification hearings," and because his mental health counselor sat on the classification committee and "*often* ask[ed] [Mr. Hamner] at his hearings in front of the [D]efendants if he was receiving his medication as prescribed to him." AA 114 (emphasis added). And Mr. Hamner did not just "generally assert" that he was deprived of his medication and medical care for his ailments. *See* Resp. Br. at 9. He specifically asserted that his psychiatric medication frequently went undelivered to him in solitary confinement "and that the defendants were aware of the matter . . . and they acted deliberately indifferent to it." AA 74, 77, 93, 113. He also pleaded that he was deprived of psychological treatment, despite his appeals for help, while consigned to solitary confinement. AA 89–90, 114.

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Nowhere do Appellees assert that they took any action to remedy the inadequacy of Mr. Hamner's mental health treatment or to ensure he received his physician-prescribed medications while he was in solitary confinement. *See generally* Resp. Br. Appellees had the opportunity, and a constitutional duty, to do something when they became aware of the inadequacy of Mr. Hamner's treatment. *Crooks*, 872 F.2d at 804. In fact, they did nothing. *See Langford*, 614 F.3d at 460 ("[P]rison supervisors . . . can incur liability when their corrective inaction amounts to deliberate indifference to or tacit authorization of an Eighth Amendment violation."). Appellees failure to act then does not now give them license to throw their hands in the air and argue they had no idea Mr. Hamner was suffering.[2]

Mr. Hamner's deliberate indifference to serious medical needs claim should only have been dismissed if it was "beyond doubt that [he could] prove no set of facts in support of his claim which would entitle him to relief." *Crooks*, 872 F.2d at 801

[2] Appellees point out that medical grievances are handled by health services personnel, not correctional officials. Resp. Br. at 10 n.14. As an initial matter, ADOC regulations require that non-medical personnel also review grievances. ADC Administrative Directive: Inmate Grievance Procedure, Subsection IV.E.(3) (effective May 5, 2012). More to the point, Appellees' contention is irrelevant. Mr. Hamner's claim is not that his grievances were ignored, it is that Appellees knew that he was not getting adequate treatment and nonetheless turned a blind eye to his plight. *See* Op. Br. at 38–39. Mr. Hamner does concede that the appellate record contains nine perfected grievances, not 15. *See* Resp. Br. at 1 n.1. Mistakenly included within the count were six appeals Mr. Hamner lodged after his grievances were denied. *See* AA 34, 35, 38, 39, 40, 42, 44, 46, 48, 50, 52, 55, 57, 59, 61, 62, 64, 66.

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(citation omitted). He easily cleared this hurdle, and his deliberate indifference claim should proceed.

III. The District Court Erred By Failing To Independently Review Mr. Hamner's Conditions Of Confinement Claim.

The Response Brief is devoid of any meaningful attempt to address Mr. Hamner's argument that the district court erred by failing to review his Eighth Amendment conditions of confinement claim. *See* Op. Br. at 23–36. Appellees instead relegate to a footnote a cursory suggestion that this claim was properly ignored by the district court. Resp. Br. at 5 n.4.

The district court conflated Mr. Hamner's medical care claim with his conditions of confinement claim, reasoning that its conclusion that the former was inadequately pleaded obviated the need to consider the latter. AA 110 n.1. The two claims are distinct, however, and each requires a different analysis. *See* Op. Br. at 25–26.

Appellees' citation to *Orr* to support the proposition that the district court's analysis was proper, simply underscores the fact that the district court (and Appellees) erred by merging the two Eighth Amendment claims. Resp. Br. at 5 n.4 (citing *Orr*, 610 F.3d at 1034–35). In *Orr*, this Court expressly noted that the prisoner did not describe the restrictions he endured in solitary confinement, and its Eighth Amendment analysis was focused on the adequacy of the prisoner's treatment with "anti-depressants" and "anti-psychotic medication." 610 F.3d at 1034–35. Here, in

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contrast, Mr. Hamner meticulously detailed the restrictive nature of his solitary confinement, *see* Op. Br. at 4–7, and the ways in which it injured him. *See* Op. Br. at 26–27.

Because the district court failed to independently review Mr. Hamner's conditions of confinement claim, this Court should remand with instructions to consider it in the first instance.[3]

CONCLUSION

For the reasons set forth in Mr. Hamner's opening brief and above, this Court should vacate the district court's orders dismissing Mr. Hamner's claims *sua sponte* and under 12(b)(6) and remand for further proceedings.

[3] Appellees note that Mr. Hamner's grievances were not directed at his Eighth Amendment claims. Resp. Br. at 1–2. To the extent they are now suggesting that Mr. Hamner did not exhaust these claims, it is too late. Exhaustion is an affirmative defense and Appellees waived it. *E.g.*, *Guerra v. Kempker*, 134 F. App'x 112, 112 (8th Cir. 2005) (per curiam) ("An inmate's failure to exhaust available administrative remedies, as required by 42 U.S.C. § 1997e(a), is an affirmative defense, which need not be pleaded by plaintiff, and which is subject to waiver by the defendant."); *see also* Defs. Br. in Supp. of Mot. for Summ. J. at 8, ECF No. 27 (Mr. Hamner "failed to properly exhaust any claim related to alleged retaliation in the nine grievances."); Br. in Supp. of Mot. to Dismiss Pls. Am. Compl. at 2, ECF No. 38 ("Plaintiff failed to exhaust his administrative remedies regarding [his retaliation] claim.").

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Respectfully submitted,

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/s/ Daniel M. Greenfield
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Daniel M. Greenfield
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