CASE NO. 21-1575

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

RASHAD MATTHEW RIDDICK,

Plaintiff-Appellant,

v.

JACK BARBER,
Former Interim Commissioner of Virginia Department of Behavioral Health and Developmental Services;
REBECCA A. VAUTER, CSH Director,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

RESPONSE BRIEF OF APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1575 Caption: Rashad Riddick v. Jack Barber

Pursuant to FRAP 26.1 and Local Rule 26.1,

Dr. Jack Barber
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ M. Scott Fisher, Jr. Date: 6/1/2021

Counsel for: Dr. Jack Barber

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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- Counsel has a continuing duty to update the disclosure statement.

No. 21-1575 Caption: Rashad Riddick v. Jack Barber

Pursuant to FRAP 26.1 and Local Rule 26.1,

Rebecca A. Vauter
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
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Signature: /s/ M. Scott Fisher, Jr. Date: 6/1/2021

Counsel for: Rebecca A. Vauter

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Rules

INTRODUCTION

On March 5, 2012, a grand jury indicted Appellant Rashad Riddick on three counts of capital murder. *Virginia v. Riddick*, Nos. CR12005358-00, CR12005361-00, CR12005364-00 (Madison Cnty. Cir. Ct. March 5, 2012).[1] Riddick was found not guilty by reason of insanity and was involuntarily committed to the Central State Hospital ("CSH") shortly thereafter. He has remained confined at CSH since. At the time of the events underlying the Second Amended Complaint, Appellee Jack Barber was the Interim Commissioner of the Virginia Department of Behavioral Health and Development Services ("DBHDS"), and Appellee Rebecca Vauter was the Director of CSH.

Chapter 115 of Title 12 of the Virginia Administrative Code ("VAC") sets forth the duties of facilities like CSH that are operated by the Virginia Department of Behavioral Health and Development Services ("DBHDS"). *See* 12 VAC § 35-115-10(A)-(B). Duties relevant to the present case include limiting the use of restraint and seclusion to four-hour periods. *Id.* § 35-115-110(C)(14). But 12 VAC § 35-115-10(D) provides for an exemption from the duties set forth in § 35-115-110(C), such as the four-hour limitation on restraint and seclusion. *Id.* § 35-115-10(D). In this case, Barber sought and obtained an exemption under 12 VAC § 35-115-10(D) for restraining and secluding Riddick.

[1] Federal courts may take judicial notice of documents filed in state court. *Fusaro v. Cogan*, 930 F.3d 241, 245 n.1 (4th Cir. 2019).

After several opportunities to amend and supplement his allegations, Riddick filed the Second Amended Complaint.[2] Riddick alleged that Appellees violated the Fourteenth Amendment because CSH's use of restraint and seclusion did not comply with 12 VAC § 35-115-110(C). Not only did Riddick fail to include more than a conclusory allegation that Barber personally participated in any alleged constitutional deprivation, but Riddick failed to address the exemption Vauter sought and obtained under 12 VAC § 35-115-10(D). Thus, Riddick failed to plausibly allege that Appellees' conduct substantially departed from accepted professional judgment, practice, or standards. The District Court did not err, therefore, when it granted Appellees' motion to dismiss Riddick's Second Amended Complaint.

Additionally, Riddick twice moved for the appointment of counsel during the pendency of this action in the District Court; once based on his deteriorating mental health, and once based on his lack of access to legal resources. In well-reasoned orders, the District Court denied Riddick's motions, finding that the alleged status of Riddick's mental health was belied by Riddick's ability to clearly articulate and organize his allegations and argument, and that Riddick's claims did

[2] Although labeled a Second Amended Complaint, the complaint is technically the fourth complaint that Riddick has filed in this action. [JA 4-5 at ECF Nos. 1-1, 5, 6, 47]. For ease of reference, this Brief refers to the complaint as Riddick's Second Amended Complaint.

not present "exceptional" circumstances warranting the appointment of counsel at the pleading stage.

On appeal, Riddick fails to demonstrate that the District Court erred in dismissing the Second Amended Complaint or denying him counsel. For the reasons set forth below, this Court should affirm the district court's decisions.

JURISDICTIONAL STATEMENT

Appellant Rashad Riddick initiated this 42 U.S.C. § 1983 action in the United States District Court for the Eastern District of Virginia, Richmond Division, pursuant to the district court's federal-question jurisdiction under 28 U.S.C. § 1331. [JA 9-21]. On April 27, 2021, the District Court granted Appellee Jack Barber and Rebecca Vauter's motion to dismiss Riddick's Second Amended Complaint. [JA 165-166]. Thus, this Court has jurisdiction under 28 U.S.C. § 1291 to review the District Court's final judgment.

STATEMENT OF ISSUES

1. Whether Riddick's conclusory allegations were sufficient to plausibly allege that Barber personally participated in the alleged deprivation of Riddick's constitutional rights.

2. Whether Riddick plausibly alleged that Appellees substantially departed from accepted professional judgment, practice, and standards by obtaining a valid exemption under 12 VAC § 35-115-10(D).

3. Whether the District Court properly denied Riddick's motions for appointment of counsel when Riddick had access to legal materials, did not demonstrate an inability to articulate his allegations, and did not assert legally complex claims.

STATEMENT OF CASE

I. The DBHDS's regulations regarding restraint and seclusion.

As noted above, the VAC sets forth the duties of facilities like CSH. 12 VAC § 35-115-10(A)-(B). Among other duties, providers must limit each use of restraint[3] or seclusion[4] to four hours for individuals like Riddick who are age 18 and older. *Id.* § 35-115-110(C)(14). Standing orders for the use of seclusion or restraint are prohibited. *Id.* § 35-115-110(C)(15). Additionally, providers must monitor those in restraint or seclusion through "continuous face-to-face observation, rather than by an electronic surveillance device." *Id.* § 35-115-110(C)(17).

[3] As is relevant here, "restraint" means "the use of a mechanical device that cannot be removed by the individual to restrict the freedom of movement or functioning of a limb or a portion of an individual's body when that behavior places him or others at imminent risk." 12 VAC § 35-115-30.

[4] "Seclusion," as is relevant here, means "the involuntary placement of an individual alone in an area secured by a door that is locked . . . so that the individual cannot leave it." 12 VAC § 35-115-30.

The duties pertaining to the use of restraint and seclusion do not apply, however, if the DBHDS Commissioner determines that an exemption for a particular individual is warranted. *Id.* § 35-115-10(D). The exemption must be in writing, time limited, and "based solely on the need to protect individuals receiving services, employees, or the general public." *Id.*

II. The events underlying the Second Amended Complaint.

Construing Riddick's allegations liberally, Riddick alleged that from February 2018 to June 2018, Barber, as the Interim DBHDS Commissioner, was "legally responsible for the overall operation of DBHDS including" CSH. [JA 84 ¶ 5]. Riddick also alleged that during the events underlying his Second Amended Complaint, Vauter was the Director of CSH and was "legally responsible for daily operations" at CSH. [JA 84 ¶ 7].

According to Riddick, on January 30, 2018, CSH's "Response Team" notified Riddick that he would be placed in four-point restraints indefinitely "per" Barber and Vauter. [JA 85 ¶ 9]. Riddick's exhibits also speak to the issue. It appears that Vauter met with Riddick on January 30, 2018, for a face-to-face meeting in which Vauter explained that CSH obtained an exemption under 12 VAC § 35-115-10(D) to the restraint-and-seclusion restrictions set forth in 12 VAC § 35-

115-110. [JA 92].[5] Vauter explained that CSH obtained the exemption so that Riddick could be placed in seclusion or restraint when there was "a concern that [he] could become aggressive." [JA 92].

Riddick alleged that he remained in restraint in a "permanent stress position" for two weeks, through February 15, 2018. [JA 85 ¶¶ 9, 11-12]. During that time, he was unable to "attend groups" in the "Treatment Mall," was not permitted to use the law library or legal materials, was unable to attend religious services, and was unable to exercise in the gym. [JA 85 ¶¶ 10-11]. Riddick alleged that these services were available to all other patients. [JA 85 ¶¶ 10-11]. He also alleged that he was permitted to have only one arm free at a time while he showered. [JA 85 ¶ 11].

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[5] "[A]n exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c). Courts presume that a plaintiff "has adopted as true the contents of [a] document" attached to the complaint. *Goines v. Valley Comm. Servs. Bd.*, 822 F.3 159, 167 (4th Cir. 2016). Riddick notes on appeal that a plaintiff may attach documents to, or incorporate documents into, a complaint "for a purpose other than asserting the truth of its contents." [Riddick Br. 32 n.6]. Riddick then questions whether Vauter actually obtained an exemption. [*Id.*].

But below, Riddick never disputed that Vauter obtained a valid exemption. Riddick argued instead that despite Vauter obtaining an exemption, the alleged restraint and seclusion violated the Fourteenth Amendment. [*See* JA 29] ("Moreover, Defendant Vauter[']s request for an exemption in itself demonstrated her foreknowledge that such practices deviated from the normal professional standards . . . ."). Riddick also argues on appeal that Barber violated the Fourteenth Amendment by "granting Vauter individualized exemptions from state regulatory limits." [Riddick Br. 31]. Thus, it is hard to see how Riddick can now argue that Vauter did not obtain an exemption.

Exhibits attached to the Second Amended Complaint discuss several events that occurred during the two weeks that Riddick alleged he was in a permanent stress position. For example, on February 2, 2018, Jennifer Barker, the Director of Patient Relations and Recovery Initiatives at CSH, received a complaint from Riddick regarding CSH's use of restraint, among other things, which Barker relayed to Vauter. [JA 92]. In responding to Riddick's complaint that same day, Vauter referred to her face-to-face conversation with Riddick on January 31, 2018. [JA 92]. Vauter also stated that, based on her discussion with the Director of Nursing, Riddick had been offered opportunities for range of motion, but Riddick refused the opportunities because he could not have more than one limb free at a time. [JA 92]. Vauter further advised that Riddick had access to the outside through the ward porch and that Vauter would consult with clinicians at CSH to determine if Riddick could safely be given access to the library and gym. [JA 93]. Finally, Vauter stated that CSH had arranged a protocol that would allow for Riddick to exercise which Vauter understood to have been implemented by the time Riddick would receive her letter. [JA 92].

On February 8, 2018, Riddick received Vauter's February 2, 2018 letter. [JA 95]. On February 14, 2018, the day before his restraints were removed,

Riddick responded to Vauter's letter and reiterated many of the complaints Barker relayed to Vauter on February 2.[6] [*Compare* JA 92, *with* JA 95-97].

Riddick alleged that on February 15, 2018, he was escorted to an empty psychiatric ward at CSH. [JA 85 ¶ 12]. Vauter allegedly advised Riddick that he would remain on the ward in isolation until further notice. [JA 86 ¶ 12]. Riddick alleges that he remained on the ward "in total isolation for 577 days with absolutely no physical human contact." [JA 86 ¶ 13]. He also alleges that he did not see anyone during the 577-day "total isolation" period because the glass window in the nurses' station had been replaced with a one-way mirror. [JA 86 ¶ 13]. Riddick further alleged that he was unable to participate in outside recreation for the first year of isolation and that he was unable to attend church services and treatment groups. [JA 86 ¶¶ 13-14]. As a result, Riddick allegedly experienced "gross hallucinations" and depression, and he talked to himself and stopped eating. [JA 86 ¶ 14].

Here again, Riddick's allegations of being in "total isolation" from February 15, 2018 to approximately September 15, 2019 are belied by the very evidence upon which he relies. Rather, the record shows that Riddick initiated and participated in this action and managed to communicate with several CSH

[6] Citing a March 22, 2018 letter from the CSH's Office of Human Rights, Riddick contends that CSH treated his February 14, 2018 letter as an administrative appeal. [Riddick Br. 6; *see* JA 99]. That is not entirely clear. The March 22, 2018 letter references an appeal from Riddick dated February 27, not February 14. [JA 99].

employees. On January 30, 2019, for example, Riddick filed a motion for leave to proceed *in forma pauperis* and a complaint. [JA 4]. On March 22, 2019, in response to an order from the District Court, Riddick filed another motion for leave to proceed *in forma pauperis* and an amended complaint. [JA 4]. A week later, on March 29, 2019, Riddick filed another motion for leave to proceed *in forma pauperis* and an amended complaint. [JA 4]. That amended complaint was signed in the presence of a notary public and contained several case citations. [JA 9-21]. On June 5, 2019, Riddick responded in opposition to a motion to dismiss. [JA 23-32]. Riddick's response was typed on a computer and, like his amended complaint, was signed in the presence of a notary public.[7] [JA 32]. Riddick filed other documents that were typed on a computer and signed in the presence of a notary public. [JA 43-47, JA 49-50].

Additionally, Riddick spoke with Barker on at least two occasions and shortly thereafter received follow-up letters from Vauter. [JA 39, JA 41]. On July 25, 2018, Riddick told Barker that he felt that his living situation was making him antisocial and that staff and nurses were not speaking to him. [JA 41]. Riddick also complained that he was no longer receiving individual therapy. [JA 41]. Vauter responded that Riddick should discuss his diagnosis-related concerns with

[7] Below, Riddick filed an affidavit in response to Vauter's original motion to dismiss that contained a description of the ward in which he was confined. [JA 45-46 ¶¶ 11-15]. He noted the location of a bed and cameras, but he did not mention that there was a computer or printing services in the ward.

his treatment team. [JA 41]. She also stated that despite Riddick's nurses attempting to check in with him regularly, Riddick refused to speak with them. [JA 41]. She went on to explain that she had spoken with one of Riddick's doctors, Dr. Galusha, about his treatment. [JA 41]. Dr. Galusha stated that "in her clinical opinion the individual therapy sessions were no longer clinically indicated." [JA 41]. Dr. Galusha noted that she had discussed with Riddick his starting Moral Reconation Therapy and that this would "begin in the near future." [JA 41]. This would involve meeting with Dr. Galusha twice a week. [JA 41].

About a month later, on August 20, 2018, Riddick again spoke with Barker and discussed his concerns with this living situation. [JA 39]. In her follow-up letter, Vauter explained that the exemption under 12 VAC § 35-115-10(D) permitted Riddick's living situation. [JA 39]. Vauter also notified Riddick that the staff assigned to monitor him were not allowed to leave their post while monitoring him. [JA 39].

III. Riddick initiates this action in the District Court.

As noted above, Riddick initiated this action in January 2019, and filed his then-operative complaint on March 29, 2019, asserting claims under the Fifth, Eighth, and Fourteenth Amendments. [JA 4, JA 9-21]. At that time, Riddick was suing twelve defendants, including Vauter and Barber. [JA 9-11].

In May 2019, the defendants, including Vauter and Barber, moved to dismiss Riddick's claims, and in June 2019, Riddick responded in opposition with several attachments. [JA 5, JA 22-47]. Two months later in August 2019, Riddick moved for the appointment of counsel, alleging that his mental health had deteriorated as a result of "solitary confinement." [JA 48-50].

On November 18, 2019, the District Court denied Riddick's motion for appointment of counsel, granted the motions to dismiss, and, as is relevant here, dismissed Riddick's Fourteenth Amendment claims against Vauter and Barber without prejudice. [JA 57-77]. In denying Riddick's motion for appointment of counsel, the District Court noted that "[t]hroughout the course of the litigation," Riddick had "demonstrated an impressive ability to respond to the Court's orders and file timely and organized pleadings." [JA 76]. As such, Riddick failed to demonstrate that this case presented the "exceptional circumstances" that warranted the appointment of counsel. [JA 76]. Riddick subsequently appealed the District Court's November 18, 2019 order, and this Court dismissed the appeal for lack of jurisdiction. [JA 78-81].

On November 12, 2020, Riddick filed a Second Amended Complaint, the operative complaint here, and attached several exhibits. [JA 82-132]. Riddick alleged that CSH's use of restraints and seclusion violated the Fourteenth Amendment. [JA 87-89]. Vauter and Barber moved to dismiss. [JA 133-151].

Riddick moved for the appointment of counsel because he no longer had access to the flash drive containing his legal materials and case documents. [JA 153]. The District Court again denied Riddick's motion because this action did not present "exceptional" circumstances. [JA 157]. The District Court also instructed the clerk of the court to send to Riddick a copy of the docket sheet, the Second Amended Complaint, Vauter and Barber's Motion to Dismiss and Brief in Support, and the District Court's Order and Memorandum Opinion dismissing Riddick's amended complaint. [JA 157-158]. On March 29, 2021, Riddick then moved to reincorporate the arguments he raised in opposition to Vauter and Barber's original motion to dismiss. [JA 160].

On April 27, 2021, the District Court granted Vauter and Barber's Motion to Dismiss and dismissed Riddick's Second Amended Complaint with prejudice. [JA 165-166]. The District Court concluded that Riddick failed to allege sufficient facts to plausibly suggest that Barber personally participated in the conduct underlying Riddick's claims because Riddick merely alleged that he was restrained "per" Barber and Vauter and that he remained in seclusion "per written standing order sought by" Vauter and approved by Barber. [JA 176]. As to Vauter, the District Court concluded that Riddick failed to plausibly allege that the use of restraints and seclusion was a substantial departure from accepted professional judgment, practice, or standards. [JA 177-178].

Riddick filed a notice of appeal, and this Court assigned counsel to represent Riddick on appeal. [JA 181, JA 185-186].

SUMMARY OF ARGUMENT

In the Second Amended Complaint, Riddick alleged that Defendants violated the Fourteenth Amendment because they failed to comply with the duties set forth in 12 VAC § 35-115-110(C). The Second Amended Complaint fails to plead a claim against Barber or Riddick. First, Riddick's allegations are too conclusory to plausibly suggest that Barber personally participated in any constitutional deprivation. Second, Riddick failed to plausibly allege that Vauter's decision to seek an exemption under 12 VAC § 35-115-10(D) substantially departed from accepted professional judgment, practice, or standards. The VAC allows the Commissioner to determine that the duties set forth in 12 VAC § 35-115-110(C) are not appropriate because of "the need to protect individuals receiving services, employees, or the general public." 12 VAC § 35-115-10(D).

Moreover, the evidence Riddick submitted to support the allegations in the Second Amended Complaint completely undermines his allegations of improper restraints and prolonged seclusion. Furthermore, the record establishes that Appellees are entitled to qualified immunity under both the facts alleged and the evidence relied on by Appellant.

Finally, because this case does not present complex legal issues or "exceptional" circumstances, the District Court did not abuse its discretion in denying Riddick's motions for appointment of counsel.

For these reasons, the District Court's dismissal of the Second Amended Complaint and denial of Riddick's motions for appointment of counsel should be affirmed.

STANDARD OF REVIEW

A district court's grant of a motion to dismiss is reviewed de novo. *Langford v. Joyner*, 62 F.4th 122, 124 (4th Cir. 2023) (citation omitted). At the motion-to-dismiss stage, a court accepts all factual allegations and incorporated exhibits as true and draws all reasonable inferences from them in favor of the nonmoving party. *Menders v. Loudoun Cnty. Sch. Bd.*, 65 F.4th 157, 160 (4th Cir. 2023) (citations omitted). A "formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plaintiff's factual allegations must do more than raise a "'speculative' possibility" of wrongdoing. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 385 (2023) (quoting *Twombly*, 550 U.S. at 555, 557).

"Bare legal conclusions 'are not entitled to the assumption of truth' and are insufficient to state a claim." *King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Courts do "not accept

as true 'legal conclusions drawn from the facts' or any other 'unwarranted inferences, unreasonable conclusions, or arguments.'" *Kashdan v. George Mason Univ.*, 70 F.4th 694, 700 (4th Cir. 2023) (quoting *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008)). And although *pro se* pleadings are construed liberally, *King*, 825 F.3d at 214 (quotation omitted), courts cannot act as "de facto counsel for pro se litigants," *Hays v. Town of Gauley Bridge*, 474 F. App'x 930, 931 (4th Cir. 2012) (per curiam).

In considering the plausibility of allegations at the motion-to-dismiss stage, a court may consider documents attached to or incorporated into the complaint. *Halscott Megaro, P.A. v. McCollum*, 66 F.4th 151, 157 (4th Cir. 2023) (quotation omitted). Courts also "may properly take judicial notice of matters of public record." *Id.* (citations omitted).

The Court reviews a district court's decisions on motions to appoint counsel for abuse of discretion. *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984), *abrogated on other grounds by Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa*, 490 U.S. 296 (1989).

ARGUMENT

A. Riddick failed to plausibly allege that Barber personally participated in the conduct underlying Riddick's Second Amended Complaint.

Liability under § 1983, requires personal participation in the alleged deprivation of a constitutional right. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) (rejecting the concept of respondeat superior liability in the § 1983 context and requiring individual liability for the constitutional violation). That is, a plaintiff must "affirmatively show[] that the official charged acted personally in the deprivation of the plaintiff's rights." *Williamson v. Stirling*, 912 F.3d 154, 171 (4th Cir. 2018) (quotation omitted); *Sales v. Grant*, 158 F.3d 768, 776 (4th Cir. 1998) (recognizing "[t]he requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury"). "[T]he official's 'own individual actions' must have 'violated the Constitution.'" *Williamson*, 912 F.3d at 171 (quoting *Iqbal*, 556 U.S. at 676). Simply knowing of the deprivation is insufficient. *Id.* (citation omitted).

In the Second Amended Complaint, Riddick alleged that he was placed in restraints "indefinitely" "per the directive of" Barber and Vauter, [JA 85 ¶ 11], and that based on "information and belief," he remained in seclusion "per [a] written

standing order sought by" Vauter and "approved by" Barber in violation of 12 VAC § 35-115-110(C), [JA 88 ¶ 20]. These allegations are too conclusory to plausibly allege that Barber personally participated in any deprivation of Riddick's constitutional rights.

Riddick alleged that he was told by CSH's Response Team that he would be placed in restraints "indefinitely" "per the directive of" Barber and Vauter, [JA 85 ¶ 11]]. An exhibit to Riddick's Second Amended Complaint shows that Barber's only apparent involvement was approving the requested exemption. [*See* JA 92]; 12 VAC § 35-115-10(D). The Second Amended Complaint contains no allegation that Barber was aware of the alleged duration or conditions of Riddick's restraint and no conduct beyond approving the requested exemption. That fails to show that any constitutional violation by Barber based on his personal conduct. *Trulock v. Freeh*, 275 F.3d 391, 402 (4th Cir. 2001) (explaining that liability under § 1983 is "personal, based upon each defendant's own constitutional violations"); *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994) (Section 1983 requires a showing of personal fault on the part of a defendant either based on the defendant's personal conduct or another's conduct in execution of the defendant's policies or customs.).

Moreover, Riddick argues on appeal that he "alleges that the exemption was "not 'in writing'" and that it had no 'time limit.'" [Riddick Br. 24 (quoting JA 97)]. That is not correct. Riddick had complained that CSH had "not

demonstrated that this exemption is in writing nor ha[d] [it] set a time limit as provided by policy." [JA 97]. But the regulations require CSH to "provide the written exemption to the [State Human Rights Committee]," not to the patient. [JA 92]; *see* 12 VAC 35-115-10(D). Regardless, those allegations need not be credited. Conclusory allegations based merely "'upon information and belief' . . . are insufficient to defeat a motion to dismiss." *Harman v. Unisys Corp.*, 356 F. App'x 638, 640-41 (4th Cir. 2009); *In re Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig.*, 756 F.3d 917, 931 (6th Cir. 2014) ("The mere fact that someone believes something to be true does not create a plausible inference that it is true.").

Riddick's allegation that Barber approved a "written standing order" for seclusion is premised on an "information and belief" allegation. As with Riddick's restraint claims, such conclusory allegations that are based "'upon information and belief' . . . are insufficient to defeat a motion to dismiss." *Harman*, 356 F. App'x at 640-41; *In re Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig.*, 756 F.3d at 931. Additionally, simply asserting that something was done "per" Barber's directive, without any supporting factual allegations, fails to plausibly allege Barber's personal involvement. Riddick's Response in Opposition similarly failed to further elaborate on this argument. [*See* JA 45 ¶ 9].

Riddick argues on appeal that by nature of his position as Interim DBHDS Commissioner, Barber had to be involved in any exemption granted under § 35-

115-10(D). [Riddick Br. 31, 34]. It is true that the DBHDS Commissioner must approve exemptions. But the allegations in the Second Amended Complaint center around Barber's alleged failure to comply with the duties under 12 VAC § 35-115-110(C). Riddick alleged, for example, that:

- the alleged use of restraints violated § 35-115-110(C)(14), [JA 87 ¶ 18];
- the alleged use of seclusion violated § 35-115-110(C)(14), [JA 88 ¶ 19];
- the alleged "standing order" violated § 35-115-110(C)(15), [JA 88 ¶ 20]; and
- Barber and Vauter "knowingly and willingly disregarded the policies and procedures set forth in" § 35-115-110(C), [JA 88-89 ¶ 22].

These arguments fail to address the appropriateness of any exemption that Barber would have approved under § 35-115-10(D), which allows providers to deviate from the duties set forth in § 35-115-110(C). And at the time that he filed the Second Amended Complaint, Riddick was aware that Vauter had obtained from Barber an exemption under § 35-115-10(D). [*See* JA 92]. Despite that knowledge, Riddick failed to challenge Barber's approval of the exemption in the Second Amended Complaint. Thus, Riddick failed to plausibly allege that Barber personally deprived Riddick of constitutional rights by failing to comply with § 35-115-110(C).

B. Riddick failed to plausibly allege that Vauter obtaining an exemption under 12 VAC § 35-115-10(D) substantially departed from accepted professional judgment, practice, or standards.

A decision made by a professional "is presumptively valid."[8] *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982). "[L]iability may be imposed," therefore, "only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.*; *Doe 4 ex rel. Lopez v. Shenandoah Valley Juv. Ctr. Comm'n*, 985 F.3d 327, 342 (4th Cir. 2021) (quotation omitted). To require otherwise "would place an undue burden on the administration of institutions [for those involuntarily committed] and also would restrict unnecessarily the exercise of professional judgment as to the needs of residents." *Youngberg*, 457 U.S. at 322.

Under *Youngberg*, "courts do not determine the 'correct' or 'most appropriate' medical decision." *Doe ex rel. Lopez*, 985 F.3d at 343 (quoting *Patten v. Nichols*, 274 F.3d 829, 845 (4th Cir. 2001)). The "use of restraints or conditions of less than absolute safety," for example, need not be justified by a "'compelling' or 'substantial' necessity." *Youngberg*, 457 U.S. at 322. The question under *Youngberg* is instead whether the challenged "decision was so completely out of

[8] A "professional" is "a person competent, whether by education, training or experience, to make the particular decision at issue." *Youngberg*, 457 U.S. at 323 n.30.

professional bounds as to make it explicable only as an arbitrary, nonprofessional one." *Doe 4 ex rel. Lopez*, 985 F.3d at 343 (quoting *Patten*, 274 F.3d at 845). By applying the standard set forth in *Youngberg*, "a court 'defers to the necessarily subjective aspects of the decisional process of institutional medical professionals and accords those decisions the presumption of validity due them.'" *Id.* (quoting *Patten*, 274 F.3d at 845).

The VAC, as noted above, limits the amount of time that providers may restrain or seclude and prohibits standing orders for restraint or seclusion. 12 VAC § 35-115-110(C)(14)-(15). The VAC also requires that providers monitor those restrained or secluded through continuous face-to-face observation. *Id.* § 35-115-110(C)(17). But the VAC expressly provides that these limitations and restrictions do not apply when the DBHDS Commissioner grants an exemption for a particular individual. *Id.* § 35-115-10(D). And although the exemption must be time limited, the VAC does not place an express time limit on the exemption. *Id.*

Vauter obtained an exemption under § 35-115-10(D) to place Riddick in restraint or seclusion when there was a concern that Riddick could become aggressive.[9] [JA 92]. Vauter explained the nature of the exemption to Riddick in a face-to-face meeting on January 31, 2018, and in a letter dated February 2, 2018.

[9] It is worth noting that Riddick previously was convicted of maliciously wounding a CSH staff member. *See Riddick v. Willet*, No. 3:15CV361, 2016 WL 3282213, at *2 (E.D. Va. June 9, 2016).

[*Id.*]. Riddick does not allege in the Second Amended Complaint the Vauter failed to exercise professional judgment in obtaining the exemption. Indeed, Riddick failed to address the appropriateness of the exemption under § 35-115-10(D); the Second Amended Complaint instead focused entirely on Appellee's alleged failure to comply with § 35-115-110(C). [JA 87-89].

Riddick now argues that under *Youngberg*, the duties set forth in § 35-115-110(C) should serve as a benchmark for accepted professional standards. [Riddick Br. 19-20].

But alleging violations of state policy does not show that Appellees violated Riddick's federal constitutional rights. *See Riccio v. Cnty. of Fairfax, Va.*, 907 F.2d 1459, 1469 (4th Cir. 1990); *Belcher v. Oliver*, 898 F.2d 32, 36 (4th Cir. 1990). Even if the state regulations are considered evidence of a professional standard, § 35-115-110(C) cannot be read in a vacuum. It must be read in conjunction with § 35-115-10(D). That provision allows professionals to seek exemptions based on their judgment of safety risks. Thus, the exemption provision is part and parcel of the regulatory scheme that Riddick claims forms the standard of accepted practice.

Thus, the allegations in the Second Amended Complaint that relate to Appellees' alleged failure to comply with § 35-115-110(C) do not plausibly suggest that the exemption under § 35-115-10(D) was not the product of accepted professional judgment.

On appeal, Riddick and *amicus curiae* appear to fault the District Court for requiring that Riddick identify the relevant accepted professional standard and how Appellees departed from that standard. [Riddick Br. 21, 26; United States Br. 7-10]. This argument reads the District Court's decision too narrowly.[10] In noting that Riddick failed to identify the relevant accepted professional standard and how Appellees departed from that standard, the District Court was simply highlighting the dearth of factual allegations in the Second Amended Complaint. [JA 178]. The District Court went on to note that Riddick failed to allege that the exemption granted under § 35-115-10(D) violated *Youngberg*, [JA 178], and § 35-115-10(D)'s exemption provision was a standard of which Riddick was aware, [JA 92].

Amicus curiae also claims that "the district court's decisive reliance on Section 35-115-10(D) wrongly suggests that the *Youngberg* standard is satisfied whenever a professional renders the decision in question." [United States Br. 17-18]. That misrepresents the District Court's opinion. It explained that "12VAC35-115-110 does not by its own force establish that Vauter acted contrary to the accepted professional judgment, because 12VAC35-115-10(D) allows CSH to

[10] To the extent that this Court agrees with Riddick and *amicus curiae*'s interpretation of the District Court's decision, that is not dispositive here. This Court "may affirm the dismissal by the district court on the basis of any ground supported by the record even if it is not the basis relied upon by the district court." *Ostrzenski v. Seigel*, 177 F.3d 245, 253 (4th Cir. 1999) (citation omitted). Because Riddick failed to allege a plausible violation of the Fourteenth Amendment regardless of whether he identified the specific standard, the District Court's dismissal should still be affirmed.

exercise professional judgment in seeking and obtaining approval to suspend its requirements." [JA 178]. Thus, the District Court simply recognized that seeking an exemption under § 35-115-110 is not a *per se* violation of a professional standard. The District Court went on to conclude that Riddick had failed to allege facts supporting the conclusion that seeking the exemption "contravened acceptable professional judgment in seeking the exemption." [JA 178].

Additionally, because the exemption here was based on mitigating Riddick's propensity to become aggressive, [JA 178], Vauter's decision to seek and obtain the exemption was not "so completely out of professional bounds as to make it explicable only as an arbitrary, nonprofessional one," *Doe 4 ex rel. Lopez*, 985 F.3d at 343 (quoting *Patten*, 274 F.3d at 845). As Riddick acknowledges in his Brief, restraint and seclusion are methods employed by the federal government and the states in this Circuit. [Riddick Br. 20 n.4]. Thus, the District Court properly held that Riddick failed to plausibly allege "that Vauter deviated from the accepted professional standard." [JA 178].

Riddick also argues on appeal that whether a professional's decision substantially departed from accepted professional judgment is a question of fact that cannot be resolved at the motion-to-dismiss stage. [Riddick Br. 15-16]. The *amicus* brief makes a similar claim in criticizing the District Court because it "appeared to infer the exercise of professional judgment" from the issuance of an

exemption. [United States Br. 16.] But neither Riddick nor the *amicus* brief provide support for the proposition that *Youngberg*'s professional-judgment standard, and the corresponding presumption of correctness, does not apply at the motion-to-dismiss phase. The Supreme Court merely noted in a footnote that expert testimony *may* be relevant to whether a decision substantially departed from accepted professional judgment. *Youngberg*, 457 U.S. at 323 n.31.

Furthermore, the exhibits attached to Riddick's Second Amended Complaint and Response in Opposition belie the alleged severity of Riddick's restraint and seclusion and, therefore, undermine the plausibility of his allegations. *See S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 182 (4th Cir. 2013) ("[I]n the event of conflict between the bare allegations of the complaint and any exhibit attached [to the complaint,] . . . the exhibit prevails.") (quotation omitted).

For his restraint claim, Riddick alleges, for example, that he remained in restraints in "a permanent stress position for over 2 weeks." [JA 85 ¶ 11]. Despite allegedly being in "a permanent stress position," Riddick was able to shower while having one limb free and handwrite a letter to Vauter. [JA 85 ¶ 11; JA 95-97].

On his seclusion claim, Riddick also alleges that he was secluded without "human contact for 19 months" in a ward where he experienced, among other

things, "gross hallucinations." [JA 86 ¶ 14]. But during that 19-month period, Riddick initiated this action and filed:

- two complaints,
- two motions for leave to proceed *in forma pauperis*,
- a motion for an extension of time,
- a response in opposition to a motion to dismiss,
- an affidavit in support of his response, and
- a motion to appoint counsel.

[JA 4-5].

One of the complaints set forth clear arguments with case citations and was signed in the presence of a notary public. [JA 10-21]. At the time he submitted that complaint, Riddick had not received a document from the District Court or Appellees that contained the specific case citations, so Riddick obtained the case information from someone or something. [JA 4]. Additionally, the response in opposition to a motion to dismiss, the affidavit in support of his response, and the motion to appoint counsel, were all typed on a computer and signed in the presence of a notary public. [JA 23-32, JA 43-47, JA 49-50]. According to Riddick, he did not have a computer or printing services in the ward where he was in seclusion. [JA 45-46 ¶¶ 11-15]. These facts cannot be reconciled with his claim that he had "absolutely no human contact" over the time period he accomplished these tasks

while in seclusion. [JA 45-46 ¶ 16]; *see S. Walk*, 713 F.3d at 182 ("[I]n the event of conflict between the bare allegations of the complaint and any exhibit attached [to the complaint,] . . . the exhibit prevails.") (quotation omitted).

In short, the District Court properly held that Riddick failed to plausibly allege that Appellees substantially departed from accepted professional judgment, practice, or standards in obtaining and approving the exemption under 12 VAC § 35-115-10(D). Thus, the District Court's dismissal of the Second Amended Complaint should be affirmed.

C. The District Court's dismissal should be affirmed because Barber and Vauter are entitled to qualified immunity.

"When a government official is sued in their individual capacity, qualified immunity protects them 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 682-83 (4th Cir. 2023) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Qualified immunity, therefore, "protects all but the plainly incompetent or those who knowingly violate the law." *Putman v. Harris*, 66 F.4th 181, 186 (4th Cir. 2023) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (cleaned up)).

Courts ask two questions in determining whether qualified immunity applies: (1) "whether a constitutional violation occurred" and (2) "'whether the right violated was 'clearly established' at the time of the official's conduct."

Sharpe, 59 F.4th at 683 (quotation omitted). Courts may exercise discretion in determining which question to ask first. *Callahan*, 555 U.S. at 236. Courts also "prefer questions of qualified immunity to be decided at the earliest possible stage in litigation." *Putman*, 66 F.4th at 186 (quoting *Raub v. Campbell*, 785 F.3d 876, 881 (4th Cir. 2015) (cleaned up)).

As to the second question, "[a] right can be clearly established by cases of controlling authority in this jurisdiction or by a consensus of persuasive authority from other jurisdictions." *Sharpe*, 59 F.4th at 683 (citation omitted). For controlling authority, courts look to "decisions of the Supreme Court, [the relevant] court of appeals, and the highest court of the state in which the case arose." *Garrett v. Clarke*, 74 F.4th 579, 584 (4th Cir. 2023) (quotation and internal quotation marks omitted). "In the absence of controlling authority . . . 'a robust consensus' of persuasive authority may demonstrate" a rule that is clearly established. *Id.* (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589–99 (2018)).

But regardless of the source of authority, the "constitutional question" must have been placed "beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (internal quotation marks and citation omitted). That is, at the time of the government official's alleged misconduct, "the law was sufficiently clear that every reasonable official would understand that what he is doing is

unlawful." *Garrett*, 74 F.4th at 584 (quoting *Wesby*, 138 S. Ct. at 589 (internal quotation marks omitted)). Further, the "[c]learly established" right should not be defined "at a high level of generality." *Kisela*, 138 S. Ct. at 1152 (quotation omitted). The right should be defined "with specificity." *Knibbs v. Momphard*, 30 F.4th 200, 223 (4th Cir. 2022).

As discussed above, Riddick failed to plausibly allege that Barber and Vauter violated the Fourteenth Amendment. Thus, they are entitled to qualified immunity at the first step.[11] When defined with the appropriate level of specificity, the second-step question is whether it was clearly established that an exemption to place Riddick in restraints or seclusion when there was a concern that he could become aggressive violated the Fourteenth Amendment. [*See* JA 92].

The use of restraint or seclusion alone does not violate the Fourteenth Amendment. *See Youngberg*, 457 U.S. at 320-21. And it was not clearly established that the alleged failures to comply with procedural aspects of the exemption provision in § 35-110-10(D) would violate the Fourteenth Amendment. *Cf. Snider Int'l Corp. v. Town of Forest Heights*, 739 F.3d 140, 145 (4th Cir. 2014) ("Conduct violating state law without violating federal law will not give rise to a

[11] Although the district court did not grant Appellees' motion to dismiss on qualified-immunity grounds, Appellees raised the defense in their motion. [JA 148-150]. This Court can "affirm on any ground supported by the record regardless of the ground on which the district court relied." *Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014) (citing *United States v. Moore*, 709 F.3d 287, 293 (4th Cir. 2013)).

§ 1983 claim.") (citation omitted). Nor does Riddick cite precedent to support his claim that the those alleged procedural issues were a clearly established constitutional right.

Riddick fails to allege that Barber violated a clearly established right in approving the exemption here. To make out a claim against Barber for granting the exemption as allowed by state regulations, § 35-115-10(D), Riddick would have needed to plead facts supporting the conclusion that granting the exemption was "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Patten*, 274 F.3d at 836 (citing *Youngberg*, 457 U.S. at 232).

Here, Riddick had been involved in a physical altercation with another patient shortly before being placed in restraints. [JA 13]. And Riddick has previously pleaded guilty to malicious wounding of a hospital staff member three years after he was found not guilty by reason of insanity of three counts of capital murder. [*See supra*, p.21 n.9]. Despite admitting guilt, in the district court Riddick tried to pursue a claim against the staff member he attacked. [JA 13.] The *amicus* brief argues that "Riddick's allegations that he 'did not physically assault anyone' nor 'harm [himself] or others'" is "tension" with granting an exemption based on safety concerns. [United States Br. 17.] But the *amicus* brief does not

address the conduct in the record that could support the exercise of professional judgment in granting the exemption.

Riddick also attempts to rely on alleged procedural issues to support his claim that he has a clearly established constitutional right. Those arguments do not support such a right. For example, Riddick contends on appeal that because the exemption at issue here was not in writing or time limited, Appellees substantially departed from accepted professional judgment in granting and obtaining the exemption.[12] [Riddick Br. 24]. As discussed above, Riddick's conclusory statements regarding whether the exemptions were in writing or time limited are based on "information and belief," not personal knowledge, and need not be credited. *See supra*, pp.16-18.

Even accepting Riddick's characterization of the exemption, it was not clearly established that failing to set forth the exemption in writing or having a situation-based exemption as opposed to a time-limited exemption would violate the Fourteenth Amendment.

Additionally, the record indicates that Vauter relied on the Director of Nursing, security, clinicians, and treatment team at CSH to oversee Riddick's seclusion and restraint. [JA 41, JA 92-93]. These individuals ensured that Riddick

[12] It is worth noting that below, Riddick did not allege that the exemption was not in writing; he instead stated in a letter to Vauter that she had "not demonstrated that th[e] exemption is in writing." [JA 97].

had opportunities for range of motion while in restraints, facilitated any plan for Riddick's access to the library and gym, and ensured that Riddick had an opportunity to exercise. [JA 41, JA 92-93]. Riddick's allegations do not suggest that Vauter unreasonably relied on the representations of CSH's staff.

Furthermore, Barber's only apparent involvement was approving the requested exemption. *See* 12 VAC § 35-110-10(D). There is no allegation that Barber was aware of the alleged duration and conditions of Riddick's restraint and seclusion.

In short, neither a controlling authority nor a robust consensus had placed "beyond debate" that the exemption obtained under § 35-110-10(D) violated the Fourteenth Amendment. *Kisela*, 138 S. Ct. at 1152 (internal quotation marks and citation omitted). Thus, Vauter and Barber are also entitled to qualified immunity at the second step.

D. The District Court did not abuse its discretion by denying Riddick's request to appointment of counsel.

Under 28 U.S.C. § 1915(e)(1), *pro se* indigent litigants generally do not have a right to counsel in civil cases. *See Turner v. Rogers*, 564 U.S. 431, 441-43 (2011); *Harris v. Salley*, 339 F. App'x 281, 284 (4th Cir. 2009). Appointment of counsel is instead appropriate only in "exceptional" circumstances. *Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975) (citation omitted). Such exceptional circumstances are present when "a pro se litigant has a colorable claim but lacks

the capacity to present it." *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984), *abrogated on other grounds by Mallard v. U.S. Dist. Ct.*, 490 U.S. 296, 298 (1989).

Appellate courts review a denial of a motion for appointment of counsel for abuse of discretion. *Miller v. Simmons*, 814 F.2d 962, 966 (4th Cir. 1987). "At its immovable core, the abuse of discretion standard requires a reviewing court to show enough deference to a primary decision-maker's judgment that the court does not reverse merely because it would have come to a different result in the first instance." *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 322 (4th Cir. 2008) (citation omitted). Abuse-of-discretion review provides "deference enough to appreciate reasonable disagreement." *Id.*

On appeal, Riddick asserts two reasons that the district court erred in denying his motion for appointment of counsel: (1) Riddick's "deteriorating mental health" prevented him from adequately representing himself, and (2) Riddick's confined status prevented him from adequately representing himself. [Riddick Br. at 36]. Riddick's arguments are addressed in order.

1. Riddick fails to demonstrate that the status of his mental health required the appointment of counsel.

Riddick was allegedly released from seclusion in September 2019. [*See* JA 85-86 ¶¶ 12-13]. *More than a year later*, on November 12, 2020, Riddick filed the Second Amended Complaint. There is no indication from the Second Amended

Complaint that Riddick was still suffering from the alleged effects of his seclusion in November 2020. Additionally, Riddick did not raise this argument in his March 5, 2021 motion for appointment of counsel. [JA 153]. And although Riddick raised this argument in his August 23, 2019 motion for appointment of counsel, the district court properly exercised its discretion in finding Riddick's mental-health argument unpersuasive, given Riddick's ability to comply with court orders and present clear and coherent arguments. [JA 76].

2. Riddick fails to demonstrate that his confined status required the appointment of counsel.

Riddick argues that his confined status prevents him from conducting discovery, including deposing Defendants and interviewing witnesses. [Riddick Br. 37-38]. He also argues that he is unable to conduct legal research because CSH has inadequate access to a law library and no access to online resources. [*Id.* 38].

The obstacles imposed on discovery by Riddick's confinement are the same obstacles faced by many—if not all—plaintiffs that are confined civilly or criminally. These common obstacles, especially when considered with Riddick's ability to understand and comply timely with the District Court's orders, do not present the "extraordinary" circumstances needed to appoint counsel. *See Cook*, 518 F.2d at 780.

As to Riddick's ability to conduct legal research, a complaint that Riddick filed—while he was still in seclusion—set forth clear arguments with case citations. [JA 10-21]. At the time he submitted that complaint, Riddick had not received a document from the District Court or Appellees that contained the specific case citations. [JA 4]. Additionally, when Riddick filed the Second Amended Complaint, he had access to "a USB containing a large array of case law and legal content."[13] [*See* JA 160].

Furthermore, at the time Riddick moved for counsel, this matter was still in the pleading stage. To survive a motion to dismiss, a plaintiff need only set forth sufficient *factual* allegations to state a plausible claim for relief. *Iqbal*, 556 U.S. at 678. Indeed, when addressing plausibility at the motion-to-dismiss stage, courts disregard legal conclusions, *id.* at 678-79, and typically "do not consider materials other than the complaint and documents incorporated into it," *Braun v. Maryland*, 652 F.3d 557, 559 n.1 (4th Cir. 2011).

To survive Appellees' motion to dismiss, Riddick was required to set forth sufficient factual allegations in the Second Amended Complaint to state a plausible claim to relief. Riddick's alleged inability to conduct discovery or provide

[13] Riddick alleged in his March 29, 2021 motion for appointment of counsel that he could not respond to Appellees' motion to dismiss because the USB had been taken from him. [JA 160]. But Riddick did not allege that he did not have access to the USB when he filed the Second Amended Complaint on November 12, 2020.

extensive legal arguments in response to Appellees' motion to dismiss, therefore, is irrelevant.

On appeal, Riddick relies extensively on *Evans v. Kuplinski*, 713 F. App'x 167 (4th Cir. 2017), in arguing that the District Court erred in failing to appoint counsel. [Riddick Br. 37-41]. *Evans* is inapposite to the case for at least three reasons. First, this Court noted in *Evans* that the plaintiff did not have "access to a law library during the entire pendency of the litigation" and "was unable to conduct legal research at any point." 713 F. App'x at 170-71. As noted above, Riddick clearly had access to legal-research materials.

Second, this Court noted that the plaintiff's claims in *Evans* presented "two legally complex tolling arguments." 713 F. App'x at 170. This Court did not consider the plaintiff's constitutional claims sufficiently complex to warrant the appointment of counsel. Unlike the plaintiff in *Evans*, Riddick asserts two constitutional claims in the Second Amended Complaint. But he does not raise complex tolling doctrine arguments and did not have to do so without access to legal-research materials as the plaintiff in *Evans*.

Third, the district court in *Evans* dismissed the plaintiff's non-time-barred claims on summary judgment based on the plaintiff's failure to create a genuine dispute of material fact with evidence. *See Evans v. Kuplinski*, No. 2:15cv179, 2016 WL 10950477, at *4-8 (E.D. Va. Jan. 19, 2016). Because Riddick's claims

were dismissed on a motion to dismiss, Riddick did not need discovery or the assistance of counsel to conduct discovery. *See Eagan v. Dempsey*, 987 F.3d 667, 683 (7th Cir. 2021) (noting that the potential need for counsel increases as the litigation progresses).

* * *

In short, because the District Court reasonably concluded that Riddick's claims were not sufficiently complex, and Riddick was capable of presenting his arguments in a clear and coherent manner, the District Court did not abuse its discretion in denying Riddick's motions for appointment of counsel. Thus, even if this Court might reach a different conclusion if it were analyzing the issue in the first instance, the District Court is entitled to the deference afforded under abuse-of-discretion review. *Evans*, 514 F.3d at 322.

CONCLUSION

For the reasons set forth above, Appellees respectfully request that this Court affirm the District Court's dismissal of the Second Amended Complaint and denial of Riddick's motions for appointment of counsel.

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CERTIFICATE OF COMPLIANCE

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Dated: December 27, 2023

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