

NONPRECEDENTIAL DISPOSITION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).

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.