No. 17-4223

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

MICHELE L. RAFFERTY

Plaintiff,

AND

KATIE L. SHERMAN,

Plaintiff-Appellee,

V.

TRUMBULL COUNTY, OHIO

Defendant,

AND

CHARLES E. DRENNEN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Ohio

BRIEF OF THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE, KATIE L. SHERMAN, SUPPORTING AFFIRMANCE

David M. Shapiro
RODERICK AND SOLANGE
MACARTHUR JUSTICE CENTER
Northwestern Pritzker School of Law
375 E. Chicago Ave.
Chicago, IL 60611
(312) 503-0711

Lisa W. Bohl
MOLOLAMKEN LLP
300 N. LaSalle St.
Chicago, IL 60654
(312) 450-6700

Lauren M. Weinstein
Counsel of Record
Robert K. Kry
MOLOLAMKEN LLP
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
lweinstein@mololamken.com

Attorneys for Amicus Curiae

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Roderick and Solange MacArthur Justice Center ("RSMJC") is a non-profit corporation operating under § 501(c)(3) of the Internal Revenue Code. RSMJC has no parent corporation, outstanding stock shares, or other public securities. RSMJC does not have any parent, subsidiary, or affiliate that has issued stock shares or other securities to the public. No publicly-held corporation owns any stock in RSMJC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Roderick and Solange MacArthur Justice Center ("RSMJC") is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law and the University of Mississippi School of Law, and in New Orleans, St. Louis, and Washington, D.C.

RSMJC attorneys have led civil rights battles in areas that include the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, police misconduct, and the treatment of incarcerated men and women. RSMJC litigates appeals related to the civil rights of incarcerated men and women throughout the federal circuits.

STATEMENT OF THE CASE

I. DRENNEN'S SEXUAL DEMANDS ON MS. SHERMAN

When Katie Sherman was nineteen years old, *see* Sherman Dep., R. 102, Page ID # 672, 682, she was incarcerated at the Trumbull County Jail for approximately five months, *see* Joint Stip., R. 97, Page ID # 486 ¶2. During that

---

[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and no person other than *amicus curiae*, its members, and its counsel made such a contribution. Counsel requested both parties' consent to the filing of this brief. Appellee, Katie Sherman, consented. Appellant, Charles E. Drennen, withheld his consent, declining to provide any basis for doing so. Accordingly, counsel for RSMJC filed a timely motion for leave to file this *amicus curiae* brief.

time, Charles Drennen worked as a corrections officer in the female pod of the jail, where Ms. Sherman was housed. *See id.* at Page ID # 486-87 ¶¶3, 9.

Drennen had been working as a corrections officer at the Trumbull County Jail for over three years when Ms. Sherman arrived. *See* Joint Stip., R. 97, Page ID # 486 ¶¶3-6. During those years, he had received training on the code of conduct, and policies and procedures applicable to corrections officers at the facility. *See id.* Despite that training, Drennen's employment at the jail was not without incident. He was disciplined on at least two occasions. *See* Cty.'s Interrog. Resps., R. 99-2, Page ID # 506-07, Nos. 6-9. And the jail began to investigate him just a few days after Ms. Sherman was released from custody because "[s]everal female inmates stated that they had been harassed and threatened by Mr. Drennen." *Id.* at Page ID # 508, Nos. 12-14.

Drennen did not act like "most COs." Rafferty Dep., R. 101, Page ID # 529. When Drennen made his rounds of the female pod, he would "glare directly" at the "girls," unlike most officers, who would just walk by their cells. *Id.* Because the "girls" were wearing only "white sleep shorts" and "a white shirt," his "glar[ing]" made them "uncomfortable." *Id.*

Eventually, Drennen graduated from "glaring" and began making sexual demands. He would direct Ms. Sherman to "expose herself to him," and "to touch herself" for him. Rafferty Dep., R. 101, Page ID # 649.

She acquiesced. On at least "four or five" occasions, Ms. Sherman "exposed herself to Mr. Drennen while he was working." Rafferty Dep., R. 101, Page ID # 605. On three or four of those occasions, Ms. Sherman's cellmate, Ms. Rafferty, witnessed Ms. Sherman "exposing her breasts to [Drennen] and/or touching them [in his view]." *Id.* at Page ID # 607.

Drennen admitted that it was "improper for a female inmate to take her clothes off in front of a . . . male corrections officer," and that such conduct should be "report[ed]." Drennen Dep., R. 104-1, Page ID # 777. Although Drennen admitted that the conduct occurred, he never reported it. *See id.* (testimony that "during [his] tenure as a corrections officer at the Trumbull County Jail," he "never" "reported a female inmate taking her clothes off . . . [i]n front of a male corrections officer"). Instead, he demanded it.

Drennen would stand "right next to [Ms. Sherman's] bunk . . . tell[ing] her how hot she was and how sexy," making "all these sexual comments." Rafferty Dep., R. 101, Page ID # 606-07. He would also ask her to "lift [her] shirt up." *Id.* at Page ID # 639. "On one particular occasion," Ms. Sherman "arranged herself so that when [Drennen] came in, she was . . . masturbating for him, which was something that he had . . . requested during prior rounds." *Id.* at 607-08.

In total, there were at least "four to five encounters" between Ms. Sherman and Drennen "where [she] either exposed a part of [her] body to him or mastur-

bated at his request." Sherman Dep., R. 102, Page ID # 705. Ms. Sherman testified that she "didn't report him" because he was "intimidating." *Id.* at Page ID # 706. And she never refused to "remove whatever article of clothing . . . he asked [her] to" "because [she] was intimidated by him." *Id.* at Page ID # 716.

As Ms. Sherman's former cellmate described it, Drennen was "egging this young girl on . . . and asking her to do things to herself . . . in front of other girls." Rafferty Dep., R. 101, Page ID # 610. "[N]obody should be put in a position like that, especially not in a place like that." *Id.* In the time since her discharge from Trumbull County Jail, Ms. Sherman has experienced "night terrors . . . and flashbacks" about "two to three times a week" due to Drennen's misconduct. Sherman Dep., R. 102, Page ID # 731, 733.

II. MS. SHERMAN'S FUTILE ATTEMPTS TO REPORT DRENNEN'S DEMANDS

Trumbull County Jail maintains a "kite system" for prisoners to "communicat[e] with jail administration." Rafferty Dep., R. 101, Page ID # 530. "A kite is a formal way to let supervisors know of any type of issue [a prisoner] might be having," including "a problem with a correction officer." *Id.* at Page ID # 530-31.

The "kite" form consists of a carbon paper top sheet on which the prisoner describes the problem, and two sheets beneath it. *See* Rafferty Dep., R. 101, Page ID # 531. Once the prisoner fills out the form, the carbon copies are distributed to

the relevant personnel in jail administration. *See id.* After the form is reviewed by the administration, the prisoner receives a copy of the kite and "whatever resolution" the administration decides upon. *Id.* at Page ID # 531-32.

Prisoners do not feel that the Trumbull County Jail kite system is a "safe" or "secure" means of "fil[ing] a complaint." Rafferty Dep., R. 101, Page ID # 637. The facility does not provide prisoners with any handbook or education about "how [they] can safely report [an incident], . . . who [they] can safely report it to, and . . . what [they can] expect to happen after [they] report it." *Id.* at Page ID # 636. Moreover, complaints are not kept confidential: If something is reported to jail administration, "by the next afternoon, every lower level CO working the shift kn[ows] what [i]s going on." *Id.* at Page ID # 637.

Even if prisoners manage to overcome the fear of what will happen to them if they file a kite, the forms themselves are hard to come by. "[T]he inherent problem with [Trumbull County Jail's] kiting system" is that when a prisoner "request[s] a kite, whatever CO [she] ask[s] . . . will ask . . . the reason that [the prisoner] want[s] the kite." Rafferty Dep., R. 101, Page ID # 532. If the corrections officer doesn't "deem the reason . . . to be okay, [he or she] will deny [the prisoner] the kite." *Id.*

Despite her efforts, Ms. Sherman "never got a chance to get a kite [form] in [her] possession." Sherman Dep., R. 102, Page ID # 700. About two months be-

fore her release, after Drennen had already made sexual demands on Ms. Sherman, she told a corrections officer that she "'need[ed] to talk to [the CO] about a situation'" and stated that she "'would like to have a kite.'" *Id.* at Page ID # 702. But the officer "never came back" to give her the form. *Id.* at Page ID # 703. After that, Ms. Sherman "gave up" trying to report Drennen's misconduct. *Id.*

Drennen resigned from the Trumbull County Jail about two weeks after Ms. Sherman was released. *See* Joint Stip., R. 97, Page ID # 486 ¶2; Cty.'s Interrog. Resps., R. 99-2, Page ID # 505, No. 2. According to Drennen's testimony in this matter, he never again worked as a corrections officer. *See* Drennen Dep., R. 104-1, Page ID # 768-69.

III. DISTRICT COURT PROCEEDINGS

On February 24, 2016, Ms. Sherman and Ms. Rafferty filed a complaint in the United States District Court for the Northern District of Ohio against Officer Drennen, Trumbull County, and other defendants, alleging civil rights violations under 42 U.S.C. § 1983, intimidation, and gross negligence, and bringing a *Monell* claim against the county. *See* Compl., R. 1. Ms. Sherman alleged that while she was incarcerated, Drennen had told her to "remove [her] clothing and expose [her] bod[y] to him," and she explained that "[a]s an inmate [she] was unable to consent to the unwanted acts Drennen perpetrated upon her." *See id.* at Page ID # 9-10, ¶¶ 19-20, 22. The Complaint sought compensatory and punitive damages. *See id.*

at Page ID # 15 ¶39 & 16.[2]

On June 30, 2017, Drennen moved for summary judgment. *See* Summ. J. Mot., R. 103, Page ID # 745. Among other things, Drennen claimed that the suit should be dismissed because he was entitled to qualified immunity since his conduct did not amount to "a constitutional violation." *Id.*

The court denied the motion in pertinent part. *See* D. Ct. Order, R. 117, Page ID # 904. The court found that the evidence established that while "Drennen was performing rounds during the midnight shift, Sherman exposed her breasts on three or four occasions and . . . masturbated while covered by a blanket on one or two occasions . . . because Drennen asked her to do so." *Id.* at Page ID # 889.

The court rejected Drennen's argument that he was entitled to qualified immunity because he had not violated any clearly established right. D. Ct. Order, R. 117, Page ID # 896-98. "To violate the Eighth Amendment," the court explained, "claims of sexual abuse or harassment must meet a two-part standard: (1) an objective component that focuses on the severity of the conduct and (2) a subjective component that focuses on the actor's intent." *Id.* at Page ID # 895. With regard to the objective prong, the court found that "Drennen intimidated

---

[2] On November 3, 2016, with leave of court, Ms. Sherman and Ms. Rafferty filed a First Amended Complaint, adding a spoliation-of-evidence claim due to Trumbull County Jail's destruction of videotape evidence and investigatory notes. First Am. Compl., R. 42, Page ID # 229-30 ¶¶41-45.

Sherman into touching herself in compliance with his requests." *Id.* at Page ID # 896. And the court found that Drennen's conduct was not "isolated or relatively minor," as he had argued. *Id.* at Page ID # 897.

With regard to the subjective prong of the analysis, the court held that "all that is required" is "a sufficiently culpable state of mind," *i.e.*, "one that is deliberately indifferent to an inmate's health or safety." D. Ct. Order, R. 117, Page ID # 897. That prong was satisfied, the court explained, because "[a]n officer's requests that a female inmate perform tasks for his enjoyment that include exposing her breasts and masturbating achieve no penological justification, but rather, are demands that the inmate shed her human dignity to acquiesce to the officer's desires." *Id.* at Page ID # 897-98.

The court also rejected Drennen's argument that the right Ms. Sherman sought to assert was not "clearly established." D. Ct. Order, R. 117, Page ID # 899. The court held that "[i]t is clearly established that sexual abuse is impermissible." *Id.* (collecting cases). And, the court concluded, "[a]ny reasonable prison official would understand that he has no authority to command an inmate to engage in sexual acts." *Id.* at Page ID # 900.

Drennen took an interlocutory appeal to this Court on the issue of qualified immunity. *See* Notice of Appeal, R. 119, Page ID # 907.

SUMMARY OF ARGUMENT

This case presents an issue of critical importance: Whether Drennen, a prison official, violated a clearly established constitutional right when he directed Ms. Sherman, a teenaged prisoner entrusted to his care, to masturbate and expose herself to him on multiple occasions. The district court correctly held that Drennen's conduct violated the Eighth Amendment because he intimidated Ms. Sherman into touching herself in compliance with his instructions.

1. Drennen's suggestion that he did not violate Ms. Sherman's constitutional rights because she consented to his sexual demands, *see* Drennen Br. at 17-22, ignores the realities of prison life and the power that corrections officers exercise over the people under their control. Prisoners—especially young people, like the then-nineteen-year-old Ms. Sherman—who refuse such demands from corrections officers risk all manner of reprisals, ranging from retaliatory strip searches to transfers far away from family. The possibility for such retaliation is particularly powerful given that prisoners have little assurance that, if they report the conduct, the advances will stop or that the complaints will be taken seriously. After all, the level of sexual abuse in American prisons and jails is staggering—in large part because supervisors often turn a blind eye to such misconduct.

This case must be viewed against the backdrop of prison reality. And the reality is that victims of sexual abuse in prison too often lack recourse. Considered

in that context, Drennen's conduct becomes all the more horrifying and coercive. Because the reality of incarceration makes sexual abuse easy to inflict, judicial recourse is critical. Without it, there is little to stop officers from using prisoners in their custody to satisfy their sexual appetites, as Drennen did.

2. Drennen's repeated use of Ms. Sherman for sexual gratification excludes him from the protection of qualified immunity. That doctrine shields "'all but the plainly incompetent or those who knowingly violate the law.'" *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). That description fits Drennen to a tee. Prison rules, regulations, and standards, not to mention an extensive body of case law, make it painfully obvious that his demands on Ms. Sherman were prohibited. No one in Drennen's position could have reasonably believed that such demands were lawful.

ARGUMENT

I. PRISONERS HAVE LITTLE RECOURSE AGAINST SEXUAL ABUSE BY CORRECTIONS OFFICERS

Drennen argues that Ms. Sherman "consent[ed]" to the "unassisted act of exposing herself" for Drennen's sexual gratification. Drennen Br. at 17. That argument ignores the realities of prison life, where corrections officers commit approximately half of all sexual abuses perpetrated against prisoners and retaliate against prisoners who refuse or report their conduct. In that context, Ms. Sherman,

a nineteen-year-old prisoner, could not meaningfully "consent" to Drennen's demands.

A. Sexual Abuse by Corrections Officers Is All Too Common

The abuse Ms. Sherman suffered while incarcerated occurs all too frequently in American prisons. Sexual victimization of incarcerated persons has plagued the prison system "since its inception." Robert W. Dumond, *Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79 The Prison Rape Elimination Act of 2003*, 32 J. Legis. 142, 145 (2006). Pervasive sexual misconduct in correctional facilities has been described as "America's most open secret." Cheryl Bell, *et al.*, *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 Yale L. & Pol'y Rev. 195, 196 (1999).

Up to 30% of prisoners have been the victim of forced sex or sexual coercion. Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 Prison J. 379, 383 (2000). And at least "***one million people*** have been sexually assaulted in the Nation's prisons over the last 20 years." *Woodford v. Ngo*, 548 U.S. 81, 118 (2006) (Stevens, J., dissenting) (emphasis added) (citations omitted).

In 2003, Congress responded to the crisis of prison sexual abuse by enacting the Prison Rape Elimination Act ("PREA"), 34 U.S.C. §30301 *et seq.*, which "establish[ed] a zero-tolerance standard" for prison sexual abuse and instituted

uniform standards for prevention and response. 34 U.S.C. § 30302. In enacting that legislation, Congress found that "[m]ost prison staff are not adequately trained or prepared to prevent, report, or treat inmate sexual assaults," and that, as a result, "[p]rison rape often goes unreported, and inmate victims often receive inadequate treatment for the severe physical and psychological effects of sexual assault—if they receive treatment at all." *Id.* § 30301(5), (6).

Although federal prisons and nearly all state facilities now have policies addressing sexual abuse of prisoners, *see* pp. 25-27, *infra*, incidents of prison sexual abuse remain staggeringly high. In 2004, the year after the Act passed, 8,210 allegations of sexual violence were reported nationwide. Allen J. Beck & Timothy A. Hughes, Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2004*, at 1 (July 2005), https://bit.ly/2NYZD7c. Now, nearly fifteen years later, that number has more than tripled to 24,661 allegations. Bureau of Justice Statistics, *PREA Data Collection Activities, 2018*, at 1 (June 2018), https://bit.ly/2Jt4aeH.

Corrections officers actively participate in about ***half*** of all reported incidents of sexual abuse in state and local correctional facilities. *See* Ramona R. Rantala, *et al.*, Bureau of Justice Statistics, *Survey of Sexual Violence in Adult Correctional Facilities, 2009-11 Statistical Tables* 1 (Jan. 2014), https://bit.ly/2l5F8d1. Women prisoners, like Ms. Sherman, are the most common victims of sexual abuse

by corrections officers. Although women constitute only 7% of the incarcerated population in federal and state facilities, they disproportionately account for 33% of staff-initiated abuse. Allen J. Beck, *et al.*, Bureau of Justice Statistics, *Special Report: Sexual Victimization Reported by Adult Correctional Authorities, 2009-11*, at 1 (Jan. 2014), https://bit.ly/2JE8prE. In local jails like the one where Ms. Sherman was held, "***70%*** of victims of staff sexual misconduct [a]re female." Dumond, *supra*, at 148 (emphasis added); *see* Katherine Robb, *What We Don't Know Might Hurt Us: Subjective Knowledge and the Eighth Amendment's Deliberate Indifference Standard for Sexual Abuse in Prisons*, 65 N.Y.U. Ann. Surv. Am. L. 705, 707 (2010) ("Current research indicates that guard-on-prisoner rape appears to be more prevalent among male guards and female inmates while prisoner-on-prisoner rape appears more prevalent among male inmates.").

Ms. Sherman's experiences are not unique, nor are such incidents unfamiliar to the federal courts. In *Everson v. Michigan Department of Corrections*, 391 F.3d 737 (6th Cir. 2004), for example, this Court observed "rampant sexual abuse of female inmates" in Michigan, where "'rape, sexual assault or abuse, criminal sexual contact, and other misconduct by corrections staff are continuing and serious problems.'" *Id.* at 741. Similarly, the D.C. Circuit has recognized a "pattern of sexual assaults on female inmates," including "inappropriate remarks by [corrections officers] and invasions of the inmates' privacy." *Women Prisoners*

of D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 929 (D.C. Cir. 1996); *see also Cash v. County of Erie*, 654 F.3d 324, 336 (2d Cir. 2011) (similar).

Sexual abuse by correctional staff in Ohio—where Drennen worked and where Mr. Sherman was incarcerated—is a particular problem. Ohio district courts routinely address suits brought by victims of sexual abuse in prisons. *See, e.g.*, *Lester v. Ohio Dep't of Rehab. & Corr.*, No. 16-cv-1065, 2018 WL 565276, at *1 (S.D. Ohio Jan. 24, 2018) (sexual abuse by inmate's mental health counselor); *Reynolds v. Smith*, No. 11-cv-277, 2015 WL 5212053, at *2 (S.D. Ohio Sept. 8, 2015) (prison official threatened prisoner with physical violence and forced oral sex); *Miller v. Link*, No. 07-cv-393, 2009 WL 10679668, at *8 (S.D. Ohio Sept. 8, 2009) (guard complimented inmate's looks, kissed her, touched and took picture of her breasts, and penetrated her); *see also S.H. v. Stickrath*, 251 F.R.D. 293, 295-96 (S.D. Ohio 2008) (noting indictment of 14 corrections officers for abusing inmates and DOJ investigation finding "'significant constitutional deficiencies'" at facility).[3]

In 2011, one such suit made its way up to the Supreme Court, which upheld a jury verdict for a woman who had been shackled, handcuffed, and placed in

[3] *See also* Letter from Wan J. Kim, Assistant U.S. Att'y Gen., to Ted Strickland, Governor of Ohio, Re: Investigation of the Scioto Juvenile Correctional Facility, Delaware, Ohio, at 4 (May 9, 2007), https://bit.ly/2Jq07zH (finding "'a culture of violence among the uniformed staff, that verbal and physical abuse are common, [and] sexual misconduct by staff").

solitary confinement after reporting sexual assault by a corrections officer in the Ohio Reformatory for Women. *See Ortiz v. Jordan*, 562 U.S. 180, 182-83 (2011). A report on that facility revealed that it "operates amid a climate of fear, in which ***sexual abuse of prisoners by staff is commonplace***." Stop Prisoner Rape, *The Sexual Abuse of Female Inmates in Ohio* 9 (2003), https://bit.ly/2JymdUx (emphasis added). The report found that staff regularly abused women in every conceivable place: locked broom closets, boiler rooms, and laundry rooms, among other locations. *Id.*

Even where corrections officers do not directly perpetrate sexual abuse, they often turn a blind eye to it. As Justice Blackmun observed nearly forty years ago, "[p]rison officials either are disinterested in stopping abuse of prisoners . . . or are incapable of doing so, given the limited resources society allocates to the prison system." *United States v. Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting); *see also* Bell, *supra*, at 196 (noting that sexual abuse is "often ignored by prison administrators"). The result is a weak system of internal grievance procedures, lackluster enforcement of sexual misconduct policies, and an acceptance of abuse as an inevitable reality of prison life. Bell, *supra*, at 196, 215-16.

B. Prisoners Who Refuse Corrections' Officers Sexual Advances Often Suffer Retaliation

Corrections officers like Drennen "have a considerable amount of power while on the job" and, as a result, myriad ways in which they can coerce inmates

into giving in to their sexual demands. Jeffrey Ian Ross, *Deconstructing Correctional Officer Deviance: Toward Typologies of Actions and Controls*, 38 Crim. Justice Rev. 110, 114 (2013). Corrections officers "can write up (submit negative reports about) inmates they do not like, or they can humiliate convicts in front of others." *Id.* As Drennen testified, they can give "mandatory direction to inmates," which, if disobeyed, results in "consequences," ranging from a report to more severe punishment, such as taking away prisoners' "visits so they can't see their loved ones . . . and taking away their commissary so they can't have money sent in." Drennen Dep. R. 104-1, Page ID # at 771-73.

Corrections officers can also "confiscat[e] inmates' possessions, destroy[] their belongings, play[] with the thermostat settings, arbitrarily deny[] privileges, plac[e] inmates who hate each other in the same cell, repeatedly toss[] (search[]) cells, repetitively strip-search[] inmates, and . . . transfer[] inmates to different correctional facilities." Ross, *supra*, at 114. Other retaliatory acts include "segregation for longer periods of time" and "physical retribution." John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 Wash. U. J.L. & Pol'y 385, 515 (2006). Abusive officers employ psychological tactics "aimed primarily at exercising control and aggression," including "conquest and control, revenge and retaliation, sadism and denigration, conflict and counteraction, and status and

affiliation." Dumond, *supra*, at 149. And they can "intimidat[e]" prisoners by virtue of their positions and their "size and strength" or simply by "having a weapon present." *Id.*

Ms. Sherman acquiesced in Drennen's demands because he "intimidated" her. Sherman Dep., R. 102, Page ID # 716. Like most prisoners, Ms. Sherman was no doubt aware that corrections officers may resort to blackmail, pressure tactics, physical force, and/or psychological manipulation if their advances are refused. *See* Dumond, *supra*, at 149; *see also* Struckman-Johnson, *supra*, at 380 (prisoners who suffer sexual abuse experience "fears of reprisals"). As a result, Drennen did not have to resort to direct threats to ensure she obeyed; Ms. Sherman's knowledge of what he could do to her if she refused was sufficient to subtly, and effectively, communicate a "threat[ ] of harm." *See* Dumond, *supra*, at 149.

As a result of those power dynamics, Ms. Sherman, like other prisoners, felt that she had no choice but to agree to the corrections officer's sexual demands. Viewed in the context of prison power dynamics, "an order by prison officers to perform [a sexual] act on oneself is tantamount to the application of direct force or contact." *Marino v. Comm'r, Maine Dep't of Corr.*, No. 08-cv-326, 2009 WL 1150104, at *3 (D. Me. Apr. 28, 2009), *report and recommendation adopted*, No. 08-cv-326, 2009 WL 1395164 (D. Me. May 18, 2009); *see also Boxer X v.*

Harris, 459 F.3d 1114, 1119 (11th Cir. 2006) (Barkett, J., dissenting) ("The nonconsensual nature of prison life should lead us to recognize that [the corrections officer's] use of threats to force [the prisoner] to masturbate was as constitutionally offensive as if [the corrections officer] had physically touched [the prisoner]."). The district court's conclusion that "Drennen intimidated Sherman into touching herself in compliance with his requests," D. Ct. Order, R. 117, Page ID # 896, properly accounts for the unique power dynamic in prisons.

C. Prisoners Who Report Sexual Abuse by Corrections Officers Often Face Retaliation

Ms. Sherman, like other prisoners, was also no doubt aware of the "'recurrent pattern in American prisons of threats and retaliation against prisoners who file grievances and complaints.'" Gibbons & Katzenbach, *supra*, at 514 (quoting John Boston, director of the Prisoners' Rights Project of the New York City Legal Aid Society). One prisoner explained that corrections officers "'take it out on you one way or another'" if you file a grievance. Kitty Calavita & Valerie Jenness, *Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic* 68 (2015). Another prisoner explained that, after a prisoner files a grievance, "'they transfer them somewhere . . . all of a sudden.'" *Id*. And a third stated: "'[T]here's always consequences.'" *Id.*

The research on prison sexual abuse since PREA's enactment only confirms those observations. "[V]ictims cannot safely and easily report sexual abuse, and

those who speak out often do so to no avail." Nat'l Prison Rape Elimination Comm'n, *Final Report* 11 (June 2009), https://bit.ly/2mxZusK. "[A] survey of prisoners by the Correctional Association of New York suggest[s] that ***more than half of prisoners*** who file grievances report experiencing retaliation for making a complaint against staff." Gibbons & Katzenbach, *supra*, at 515 (emphasis added). In another study, 61% of prisoners reported that concerns about retaliation by corrections officers deterred them from filing grievances. Calavita & Jenness, *supra*, at 68. And a report regarding the Ohio Reformatory for Women found that prisoners who reported misconduct were routinely punished, intimidated, or placed in solitary confinement until they "'br[oke].'" Stop Prisoner Rape, *supra*, at 10.

One study of women prisoners in Michigan found that, when prisoners complained of sexual harassment or abuse, corrections officers would "writ[e] up disciplinary 'tickets' for specious violations of prison rules or regulations"; "force a confrontation to occur in order to create a minor violation for which [the officer] can write a ticket"; "ask a colleague to write up a ticket, whether for a false violation or for a minor one, so that the retaliation cannot be traced back to [the officer]"; or deny prisoners "visitation rights with their children." Bell, *supra*, at 210; *see* Drennen Dep. R. 104-1, Page ID # at 771-73 (similar). "Retaliation against prisoners who report sexual abuse . . . can sometimes result in prisoners having to serve longer terms." Bell, *supra*, at 210. Thus, prisoners "often endure

abuse by guards in order not to jeopardize their release date." Calavita & Jenness, *supra*, at 69.

This Court has recognized that "corrections officers systematically retaliate[] against women who report[] sexual abuse" in prisons. *Everson*, 391 F.3d at 741. Other courts have recognized the same. *See, e.g.*, *Keith v. Koerner*, 843 F.3d 833, 852 (10th Cir. 2016) (plaintiff faced "potential disciplinary action or other retaliation if she discussed the assault"); *Women Prisoners of D.C. Dep't of Corr.*, 93 F.3d at 931 (prison officials' "'leaking [of] private information'" concerning complainants was tantamount to "'coerc[ing] women prisoners and staff into silence and insulat[ing] themselves from scrutiny'").

As the studies and cases confirm, victims reasonably "fear reprisals, fear no one will believe them, or think [reporting] will only cause more problems." Dumond, *supra*, at 154. As a result, "[p]rison rape often goes unreported." 34 U.S.C. §30301(6). For example, facility officials at the Ohio Reformatory for Women—where "sexual abuse of prisoners by staff is commonplace," Stop Prisoner Rape, *supra*, at 9—testified that they had "never received a notification of grievance regarding a sexual assault" and could never "recall an inmate using the grievance procedure to complain about sexual misconduct," *Reynolds*, 2015 WL 5212053, at *2. That is not because there was no sexual abuse; it is because prisoners were too afraid to report it.

This case is a perfect example. Both Ms. Sherman and her former cellmate, Ms. Rafferty, testified that they feared retaliation if they reported Drennen's sexual abuse to jail administration officials. Ms. Rafferty testified that she was "really nervous and apprehensive" about reporting Drennen's demands on Ms. Sherman because she "fear[ed]" it "would cause problems for [her] the rest of [her] stay [at the jail]." Rafferty Dep., R. 101, at Page ID # 532-33. Those fears materialized when Ms. Rafferty ultimately confronted Drennen about "'[w]hat had been going on with [Ms. Sherman].'" *Id.* at Page ID # 631. Drennen informed her that "[s]he wasn't going to report it to anybody," unless she "want[ed] the rest of [her] stay . . . to be an uncomfortable one." *Id.* at Page ID # 632. Similarly, because Ms. Sherman was intimidated, Sherman Dep., R. 102, Page ID # 716, and denied a grievance form, *see* pp. 5-6, *supra*, it was only after she was ***out of custody*** that she was able to report Drennen's sexual assault, in an attempt to seek judicial recourse.

II. CORRECTIONS OFFICERS KNOW THAT IT IS UNLAWFUL TO MAKE SEXUAL DEMANDS ON PRISONERS

One of Drennen's principal arguments on appeal is that he is entitled to qualified immunity because "the evidence . . . suggest[s] only that Ms. Sherman touched herself in a sexual manner due to Mr. Drennen's verbal request," and that his "requests" were not "'objectively unreasonable in light of the clearly established rights.'" Drennen Br. at 12. But Drennen's conduct—requesting that

Ms. Sherman expose her breasts and masturbate for him—falls squarely within all relevant definitions of sexual abuse. And precedent unequivocally establishes that corrections officers are not permitted to request that prisoners expose and touch themselves sexually. Any corrections officer with three years' experience and training on the relevant policies, like Drennen, would know that his "verbal requests" were unlawful.

A. Courts Have Uniformly Held That the Eighth Amendment Prohibits Corrections Officers from Making Sexual Demands on Prisoners

As this Court has recognized, "[t]he standard[s] for whether a particular practice or condition constitutes cruel and unusual punishment . . . are to be interpreted 'in a flexible and dynamic manner.'" *Kent v. Johnson*, 821 F.2d 1220, 1227 (6th Cir. 1987) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981)). Sexual misconduct by corrections officers offends those standards because such abuse "is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

Courts have thus consistently held that the Eighth Amendment protects against sexual abuse by prison officials. *See, e.g.*, *Ricks v. Shover*, 891 F.3d 468, 471 (3d Cir. 2018) ("stat[ing] in [the] plainest terms" that "sexual abuse can constitute 'cruel and unusual punishment' under the Eighth Amendment" because "[o]ur society requires prisoners to give up their liberty, but that surrender does not

encompass the basic right to be free from severe unwanted sexual contact"); *Washington v. Hively*, 695 F.3d 641, 642-44 (7th Cir. 2012) ("gratuitous fondling" during a strip search violated prisoner's Eighth Amendment rights); *Schwenk v. Hartford*, 204 F.3d 1187, 1193, 1197 (9th Cir. 2000) ("series of unwelcome sexual advances and harassment that culminated in a sexual assault" by corrections officer violated Eighth Amendment); *Lester*, 2018 WL 565276, at *6 (prisoner "state[d] a clearly established claim for relief under the Eighth Amendment" based on sexual abuse by prison mental health counselor); *Miller*, 2009 WL 10679668, at *7 (similar). "Where guards themselves are responsible for the rape and sexual abuse of inmates, qualified immunity offers ***no*** shield" because "the Eighth Amendment right of prisoners to be free from sexual abuse [i]s unquestionably clearly established." *Schwenk*, 204 F.3d at 1197.

Drennen claims that—despite clearly established law prohibiting sexual abuse of prisoners by corrections officers—he is nonetheless entitled to qualified immunity because an Eighth Amendment sexual-abuse claim requires physical touching, and he "never made physical contact with Ms. Sherman." Drennen Br. at 14-16. That is not the law. Nor should it be: Drennen's interpretation would give corrections officers *carte blanche* to take and publicly post graphic photos of prisoners, leer at prisoners while they shower or change, force prisoners to engage in sexual contact with themselves or each other, and perform countless other

abusive and degrading acts that do not involve direct physical contact between the officer and the prisoner. Corrections officers do not have "free rei[n] to maliciously and sadistically inflict psychological torture on prisoners, so long as they take care not to inflict any physical injury in the process." *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003).

It is clearly established in this Circuit that corrections officers can violate the Eighth Amendment by sexually abusing prisoners without directly touching them. For example, in *Kent v. Johnson*, 821 F.2d 1220 (6th Cir. 1987), which Drennen does not address in his brief, this Court held that the plaintiff had stated a valid Eighth Amendment claim based on allegations that female prison guards had "allowed themselves unrestricted ***views*** of his naked body in the shower, at close range and for extended periods of time, to retaliate against, punish and harass him for asserting his right to privacy." *Id.* at 1227-28 (emphasis added). If "viewing" a prisoner while he showers can be an Eighth Amendment violation, instructing a prisoner to expose her breasts and touch herself for the corrections officer's own pleasure is obviously impermissible too.

Many other federal courts have similarly concluded that Eighth Amendment sexual abuse claims do not require direct touching by corrections officers. *See, e.g.*, *Calhoun*, 319 F.3d at 940 (male prisoner stated claim where guards made sexually explicit comments and gestures during a strip search conducted in presence

of female guards); *Daskalea v. District of Columbia*, 227 F.3d 433, 437 (D.C. Cir. 2000) (affirming municipal liability where guards regularly forced inmates to perform naked stripteases); *Lee v. Downs*, 641 F.2d 1117, 1120 (4th Cir. 1981) (jury could conclude that female inmate's involuntary removal of clothes in male guards' presence was cruel and unusual punishment); *Marino*, 2009 WL 1150104, at *3 (denying motion to dismiss where guards forced plaintiff to walk down hall holding his genitals). The district court merely applied that well-established law to Ms. Sherman's situation.

B. Correctional Facility Policies Prohibit Corrections Officers from Making Sexual Demands on Prisoners

Drennen's claim that he could not possibly have been aware that his conduct was unlawful is further belied by the fact that the federal Bureau of Prisons and nearly every state and territory—including Ohio, where he worked—has promulgated policies making it clear that corrections officers are not permitted to make sexual "requests" of prisoners under their care.

In its regulations implementing PREA, the Bureau of Prisons defined "[s]exual abuse of an inmate" to include "[a]ny attempt, threat, or ***request by a staff member*** . . . to engage in" direct sexual contact, as well as "[v]oyeurism," which is "an invasion of privacy . . . for reasons unrelated to official duties," including "requiring an inmate to expose his or her buttocks, genitals, or breasts." 28 C.F.R. § 115.6 (emphasis added). Under the regulations, such requests and acts

are unlawful whether or not the prisoner complies: The regulations prohibit sexual contact or requests for contact by corrections officers "with or without consent of the inmate." *Id.*

Consistent with the "zero tolerance" policy "toward all forms of sexual abuse and sexual harassment" established by PREA, 28 C.F.R. §115.311, at least 53 states and territories, including Ohio, have certified or assured compliance with the federal standards on sexual abuse of prisoners. U.S. Dep't of Justice, *FY 2017 List of Certification and Assurance Submissions for Audit Year 3 of Cycle 1*, at 1 (2017), https://bit.ly/2sGK1fh. Under the Ohio standards, sexual abuse includes "[a]ny behavior or act of a sexual nature, ***or any attempt, threat or request for same***, directed toward an inmate by an employee," *i.e.*, "1) sexual conduct, 2) sexual contact, 3) voyeurism, or 4) indecent exposure." Ohio Dep't of Rehab. & Corr., *Prison Rape Elimination Policy No. 79-ISA-01* §IV (Feb. 3, 2017), https://bit.ly/2xPf6m0 (emphasis added). Ohio's criminal code also recognizes that prisoners are unable to consent to sexual contact. *See* Ohio Rev. Code Ann. §2907.03(A)(6) ("sexual conduct" is a third-degree felony where "[t]he other person is in custody of law . . . and the offender has supervisory or disciplinary authority over the other person").

All other states in this Circuit similarly define sexual abuse of prisoners to encompass verbal "requests," threats, or voyeuristic activity. *See* Mich. Dep't of

Corr., *Prison Rape Elimination Act (PREA) and Prohibited Sexual Conduct Involving Prisoners Policy Directive No. 03.03.140* ¶H (Apr. 24, 2017), https://bit.ly/2JfhU1o (sexual abuse includes "[a]ny attempt, threat or request by an employee to engage" in sexual contact and "[i]nvasion of privacy for sexual gratification or voyeurism"); Ky. Dep't of Corr., *Sexual Abuse Prevention and Intervention Programs Policy No. 14.7* ¶I (June 1, 2018), https://bit.ly/2sOjOuQ (similar); Tenn. Dep't of Corr., *Prison Rape Elimination Act (PREA) Implementation and Compliance Index No. 502.06* ¶IV(J)(5) (May 15, 2015), https://bit.ly/2sLgwIx (similar).

The caselaw and prison policies confirm that Drennen's requests constitute sexual abuse, regardless of prisoner consent. Under these well-accepted and uniform standards, Drennen cannot credibly argue that the law was not sufficiently well established to make it clear to him that he was not supposed to ask a nineteen-year-old girl under his care to expose her breasts and touch herself for him. Those "requests" plainly violate the "'broad and idealistic concepts of dignity, civilized standards, humanity, and decency'" protected by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

CONCLUSION

The district court's judgment should be affirmed.

July 20, 2018

Respectfully submitted,

/s/ Lauren M. Weinstein

Lauren M. Weinstein
Counsel of Record
Robert K. Kry
MOLOLAMKEN LLP
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000

David M. Shapiro
RODERICK AND SOLANGE
MACARTHUR JUSTICE CENTER
Northwestern Pritzker School of Law
375 E. Chicago Ave.
Chicago, IL 60611
(312) 503-0711

Lisa W. Bohl
MOLOLAMKEN LLP
300 N. LaSalle St.
Chicago, IL 60654
(312) 450-6710

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

_X_ this brief contains 6,425 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

____ this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

_X_ this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font, or

____ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

/s/ Lauren M. Weinstein
Lauren M. Weinstein

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2018, I electronically filed the foregoing brief with the Clerk of the Court using the Court's CM/ECF system, which will send notice of this filing to all parties.

/s/ Lauren M. Weinstein
Lauren M. Weinstein

No. 17-4223

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

MICHELE L. RAFFERTY

Plaintiff,

AND

KATIE L. SHERMAN,

Plaintiff-Appellee,

V.

TRUMBULL COUNTY, OHIO

Defendant,

AND

CHARLES E. DRENNEN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Ohio

MOTION OF THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE, KATIE L. SHERMAN

David M. Shapiro
RODERICK AND SOLANGE
MACARTHUR JUSTICE CENTER
Northwestern Pritzker School of Law
375 E. Chicago Ave.
Chicago, IL 60611
(312) 503-0711

Lisa W. Bohl
MOLOLAMKEN LLP
300 N. LaSalle St.
Chicago, IL 60654
(312) 450-6700

Lauren M. Weinstein
Counsel of Record
Robert K. Kry
MOLOLAMKEN LLP
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
lweinstein@mololamken.com

Attorneys for Amicus Curiae

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Roderick and Solange MacArthur Justice Center ("RSMJC") is a non-profit corporation operating under § 501(c)(3) of the Internal Revenue Code. RSMJC has no parent corporation, outstanding stock shares, or other public securities. RSMJC does not have any parent, subsidiary, or affiliate that has issued stock shares or other securities to the public. No publicly-held corporation owns any stock in RSMJC.

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29(a), the Roderick and Solange MacArthur Justice Center ("RSMJC") respectfully moves for leave to file the attached *amicus curiae* brief in support of plaintiff-appellee, Katie L. Sherman. Before filing this motion, counsel for RSMJC consulted with the parties regarding the filing of its brief. Counsel for plaintiff-appellee consented to its filing, but counsel for defendant-appellant, Charles E. Drennen, withheld consent and declined to provide any basis for doing so.

ARGUMENT

Leave to file the attached *amicus* brief should be granted pursuant to Federal Rule of Appellate Procedure 29(a)(3) because RSMJC has a strong interest in the issue presented: whether a corrections officer violates a clearly established constitutional right by asking a prisoner to masturbate and expose herself to him. Given its experience with litigating similar issues, RSMJC expects that its brief will aid the Court in resolving this important issue.

RSMJC is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law and the University of Mississippi School of Law, and in New Orleans, St. Louis, and Washington, D.C. RSMJC attorneys have led civil rights battles in areas that

include the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, police misconduct, and the treatment of incarcerated men and women. RSMJC litigates appeals related to the civil rights of incarcerated men and women throughout the federal circuits.

This case concerns the treatment of a nineteen-year-old girl while incarcerated. It thus presents a social justice issue that is core to RSMJC's mission and with which RSMJC is familiar. As this Court has recognized, briefs by *amici curiae* "'assist in cases of general public interest by supplementing the efforts of private counsel and by drawing the court's attention to law that might otherwise escape consideration.'" *Shoemaker v. City of Howell*, 795 F.3d 553, 562 (6th Cir. 2015) (quoting 3-28 J. Moore, *Federal Practice and Procedure* § 28.84 (3d ed. 2014)); *see also, e.g.*, *Prewett v. Weems*, 749 F.3d 454, 461 (6th Cir. 2014) (noting "helpful amicus brief"); *Garner v. Cuyahoga Cty. Juvenile Court*, 554 F.3d 624, 636 (6th Cir. 2009) (relying on arguments made by *amicus curiae* in analyzing issues presented); *United States v. Hamad*, 495 F.3d 241, 244-45 (6th Cir. 2007) (expressing gratitude to "*amicus curiae* [for] offer[ring] written and oral presentations about the appropriate resolution of the appeal").

RSMJC has significant experience with litigation concerning conditions in correctional facilities and seeks to assist the Court by offering a broader perspective on the issue presented. *See* Fed. R. App. P. 29(a)(3)(B). In particular,

RSMJC's brief will put in context the corrections officer's requests to a prisoner that she expose her breasts and touch herself for him. The brief will explain the unique power dynamics between corrections officers and prisoners that lead to rampant sexual abuse by officers within the Nation's prisons. It will describe why prisoners fear retaliation when faced with sexual demands from officers, and why it is nearly impossible for prisoners to refuse such demands. And the brief will explain that corrections officers frequently retaliate against prisoners who report abuse. Those are all factors the district court considered in reaching its conclusion. *See* D. Ct. Order, R. 117, Page ID # 897-98. A broader understanding of those issues will thus assist the Court in addressing whether the corrections officer's conduct violated a clearly established right.

The brief should also assist the Court in resolving whether the district court correctly concluded that the corrections officer was not entitled to qualified immunity. *See* D. Ct. Order, R. 117, Page ID # 896-98. It will explain that the relevant caselaw recognizes that the types of demands the corrections officer made here are unlawful. And the brief will explain that federal and state prison policies also make it clear that those sexual demands are prohibited. RSMJC's brief should thus aid this Court significantly in resolving this case.

CONCLUSION

The motion for leave to file an *amicus curiae* brief in support of plaintiff-appellee should be granted.

July 20, 2018

Respectfully submitted,

/s/ Lauren M. Weinstein

Lauren M. Weinstein
Counsel of Record
Robert K. Kry
MOLOLAMKEN LLP
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000

David M. Shapiro
RODERICK AND SOLANGE
MACARTHUR JUSTICE CENTER
Northwestern Pritzker School of Law
375 E. Chicago Ave.
Chicago, IL 60611
(312) 503-0711

Lisa W. Bohl
MOLOLAMKEN LLP
300 N. LaSalle St.
Chicago, IL 60654
(312) 450-6710

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that today, July 20, 2018, I electronically filed the foregoing Motion for Leave to File Amicus Curiae Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Lauren M. Weinstein
Lauren M. Weinstein

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing document complies with Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 694 words, excluding parts exempted by Federal Rule of Appellate Procedure 32(f).

July 20, 2018

/s/ Lauren M. Weinstein
Lauren M. Weinstein