

1                                   IN THE UNITED STATES COURT OF APPEALS  
2                                   FOR THE FIFTH CIRCUIT

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4                                   \_\_\_\_\_  
5                                   No. 97-40845  
6                                   \_\_\_\_\_

6                                   RAYMOND EARNEST CHRISTOPH,

7   Plaintiff-Appellant,

8   versus

9                                   JIMBO RAINS, Sheriff; CLAUDIE KENDRICK, Ex-Sheriff;  
10                                   COMMISSIONERS COURT OF HOUSTON COUNTY, TEXAS,

11   Defendants-Appellees.

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14   Appeal from the United States District Court  
15   for the Eastern District of Texas  
16   (9:94-CV-47)  
17                                   \_\_\_\_\_

17   September 15, 1999

18                                   Before EMILIO M. GARZA, Circuit Judge, and FITZWATER, District  
19                                   Judge.\*

20                                   PER CURIAM:\*\*

21                                   A county prisoner who alleged that he had been assaulted by  
22                                   another inmate in an overcrowded cell block and subjected to other  
23                                   unconstitutional jail conditions brought this civil rights action  
24                                   alleging violations of the Eighth and Fourteenth Amendments and of  
25                                   state law. He appeals an adverse judgment following a trial,

\_\_\_\_\_  
\*District Judge of the Northern District of Texas, sitting by designation. Judge Parker was originally a member of the panel but determined that he is recused. This appeal is being decided by a quorum. See 28 U.S.C. § 46(d).

\*\*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

26 contending the district court erred by denying his discovery  
27 motions (particularly a motion for disclosure) and motion for  
28 appointment of counsel, and that the jury verdict must be reversed  
29 because two witnesses gave perjured trial testimony. Although we  
30 do not find that the district court abused its discretion by  
31 refusing to appoint counsel or that plaintiff's claim of perjured  
32 witness testimony presents plain error, we hold that the district  
33 court abused its discretion and acted unreasonably by denying  
34 plaintiff's motion for disclosure. Because we conclude after  
35 studying the trial record that plaintiff likely incurred prejudice  
36 to a substantial right, we VACATE and REMAND.

37 I

38 Plaintiff-appellant Raymond Earnest Christoph ("Christoph"),  
39 who was detained in the Houston County, Texas jail while awaiting  
40 transfer to the Texas Department of Criminal Justice ("TDCJ"),  
41 brought this *pro se* civil rights action against defendants Houston  
42 County Sheriff Jimbo Raines ("Sheriff Raines"),<sup>1</sup> former Sheriff  
43 Claudie Kendrick ("Sheriff Kendrick"), and the Houston County  
44 Commissioners Court. Christoph complained of jail overcrowding,  
45 unsanitary conditions, denial of recreation and exercise, improper  
46 diet, placement of pretrial detainees with convicted felons, and

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<sup>1</sup>Christoph originally sued Sheriff Raines under the surname "Rains," but corrected the spelling in his amended complaint. We will refer to Sheriff Raines by the proper spelling of his name.

The record reflects that the claims against Sheriff Raines were dismissed without objection because he was not the Sheriff at the relevant time. The district court did not charge the jury concerning Christoph's claims against Sheriff Raines and Christoph does not appeal the dismissal of these claims. We do not disturb this dismissal.

47 detention in a racially imbalanced cell.<sup>2</sup> He alleged that jail  
48 overcrowding resulted in his being attacked on May 9, 1992 by  
49 another prisoner, resulting in 25 stitches to his face, injury to  
50 his neck, and mental, physical, and emotional pain.

51 Under the Civil Justice Expense and Delay Reduction Plan  
52 ("Plan") adopted by the Eastern District of Texas, the case was  
53 placed on Track 2 for case management purposes, meaning that the  
54 parties were obligated to make initial disclosures but were not  
55 permitted to conduct discovery. The Plan requires that each party  
56 disclose to the opposing party "[a] copy of all documents, data  
57 compilations, and tangible things in the possession, custody, or  
58 control of the party that are likely to bear significantly on any  
59 claim or defense[.]" E. D. Tex. R. CV-26(b)(1)(B).<sup>3</sup> Under the  
60 Plan, "bears significantly on" includes "information that is likely  
61 to have an influence on or affect the outcome of a claim or  
62 defense," E. D. Tex. R. CV-26(b)(3)(C), and "information that  
63 deserves to be considered in the preparation, evaluation or trial  
64 of a claim or defense," E. D. Tex. R. CV-26(b)(3)(D).

65 The magistrate judge conducted the initial *in forma pauperis*  
66 screening and recommended that the case be dismissed as frivolous.

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<sup>2</sup>Christoph complained that he was the only Caucasian among 18 prisoners, the remainder of whom were African-American. He asserted that he did not seek segregation of prisoners by race, but instead sought a more "balanced" assignment of persons of different races to the same cell block.

<sup>3</sup>The Eastern District of Texas has since integrated the initial disclosure provisions of the Plan into its Local Rules. For clarity we will cite the Plan provisions as they are now codified in the Local Rules.

67 He also denied Christoph's motion for appointment of counsel. The  
68 district judge concluded, however, that Christoph had stated a 42  
69 U.S.C. § 1983 claim and granted him leave to proceed *in forma*  
70 *pauperis*. After defendants were served and answered, they made  
71 their initial disclosures to Christoph and on February 25, 1997  
72 filed with the clerk of court the notice of disclosure required by  
73 the Plan.

74 While the case was pending before the magistrate judge, and  
75 later before the district judge, Christoph submitted several  
76 discovery motions. On March 13, 1997 he filed a motion for  
77 disclosure, in which he complained that trial was upcoming on June  
78 23, 1997 but that defendants had not disclosed *inter alia* (1)  
79 Houston County jail records that would show how many persons were  
80 detained in cell block 2 on March 27, 1992 (the day he was  
81 arrested), May 9, 1992 (the day he was assaulted), and May 11, 1992  
82 (the day he contends Sheriff Kendrick drastically reduced the  
83 population of the cell block following the assault);<sup>4</sup> and (2) the  
84 jail recreation logs or records for the period March through July  
85 1992. The district court denied the motion by March 20, 1997  
86 written order. It noted that the case had been assigned to Track  
87 2, that Christoph was not entitled to conduct discovery, and that  
88 the parties must comply with the Plan's disclosure rules. Under  
89 the Plan, only notices of disclosure, not the disclosures  
90 themselves, are to be filed with the court. See E. D. Tex. R. CV-

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<sup>4</sup>The motion for disclosure refers to May 12 rather than May 11, 1992, but Christoph refers in other pleadings and testimony to May 11 as the correct date.

91 26(e). The district court found that defendants had complied with  
92 the Plan's requirement that they give notice of disclosure. The  
93 court also held that Christoph was "not entitled to obtain any and  
94 all documents that he desires that do not bear significantly on a  
95 claim or defense."

96 On June 23, 1997, as scheduled, the parties tried the case to  
97 a jury. Roy H. House ("House"), the Jailer for Houston County in  
98 1992, testified that the jail passed state inspection in 1991 and  
99 1992. Christoph attempted to impeach House on cross-examination  
100 with Texas Commission on Jail Standards ("TCJS") inspection reports  
101 for 1989-1991 that Christoph maintained showed that the jail had  
102 not passed inspection. Christoph asserts that House committed  
103 perjury. Sheriff Raines testified that a county sheriff is not  
104 allowed by law to address prison overcrowding by releasing  
105 prisoners on his own authority. Christoph maintains that he has  
106 discovered new evidence that demonstrates that Sheriff Kendrick in  
107 fact released prisoners in 1992 without proper authorization.

108 The jury returned a verdict in favor of defendants and the  
109 district judgment entered a take nothing judgment dismissing the  
110 case. Christoph appeals.

111 II

112 We review for abuse of discretion the district court's order  
113 denying Christoph's motion for appointment of counsel. See *Norton*  
114 *v. Dimazana*, 122 F.3d 286, 293 (5th Cir. 1997). The magistrate  
115 judge explicitly noted the relevant factors and analyzed why  
116 counsel should not be appointed. We are satisfied from our review

117 of the record, including our assessment of the caliber of  
118 Christoph's appellate briefs, that this case does not present  
119 exceptional circumstances and that the magistrate judge did not  
120 abuse his discretion in denying Christoph's motion for appointed  
121 counsel.

122 Christoph contends the judgment must be reversed because House  
123 gave perjured testimony that the jail had passed state inspection.  
124 He raises this issue for the first time on appeal. "It is the  
125 unwavering rule in this Circuit that issues raised for the first  
126 time on appeal are reviewed only for plain error." *McCann v. Texas*  
127 *City Refining, Inc.*, 984 F.2d 667, 673 (5th Cir.1993) (per curiam).  
128 No plain error has been presented here. Christoph is asserting in  
129 this civil case a witness impeachment issue that was properly  
130 within the province of the jury as the judge of witness  
131 credibility.<sup>5</sup>

132 Sheriff Raines was asked, in the context of relieving jail  
133 overcrowding, whether a sheriff "was allowed by law just to start  
134 releasing people," and responded that he could not. Christoph  
135 maintains that he has discovered new evidence that demonstrates  
136 that Sheriff Kendrick released prisoners in 1992 without proper  
137 authorization. Because Christoph also raises this claim for the  
138 first time on appeal, we review for plain error. We find none,  
139 particularly since Sheriff Raines was asked what a sheriff could

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<sup>5</sup>We also note that the trial record is unclear on this point, because there is a suggestion in the testimony (and Christoph concedes to some extent in his reply brief) that TCJS granted the jail a variance before passing it, rather than that the jail failed inspection.

140 legally do, and Christoph proffers evidence that purports to show  
141 what Sheriff Kendrick was doing illegally.

142 III

143 We review for abuse of discretion the district court's order  
144 denying Christoph's motion for disclosure. *See Atkinson v. Denton*  
145 *Publ'g Co.*, 84 F.3d 144, 148 (5th Cir. 1996) (holding in review of  
146 Eastern District of Texas Track 3 case that district court did not  
147 abuse its discretion by denying plaintiff's motion to expand number  
148 of allowed interrogatories). "Control of discovery is committed to  
149 the sound discretion of the trial court and its discovery rulings  
150 will be reversed only where they are arbitrary or clearly  
151 unreasonable." *Mayo v. Tri-Bell Indus., Inc.*, 787 F.2d 1007, 1012  
152 (5th Cir. 1986).

153 A

154 Christoph sought disclosure of Houston County jail records  
155 that would have shown how many persons were detained in cell block  
156 2 on March 27, 1992, May 9, 1992, and May 11, 1992. He requested  
157 these records to prove that the jail was overcrowded and that  
158 Sheriff Kendrick had attempted to cure or cover up the overcrowding  
159 by drastically reducing the population of the cell block following  
160 the assault. Christoph pursued disclosure of the jail recreation  
161 logs or records for the period March through July 1992 to establish  
162 that Houston County did not permit inmates to engage in recreation.  
163 The district court denied Christoph's motion, concluding that he  
164 was not entitled to discovery and that defendants had complied with  
165 the Plan's notice of disclosure requirement.

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We hold that these records clearly met the Plan's definition of documents that are likely to bear significantly on any claim. Christoph complained of jail overcrowding. Information concerning the daily operation logs for cell block 2 would likely have an influence on or affect the outcome of his claim that the jail was unconstitutionally overcrowded, see E. D. Tex. R. CV-26(b)(3)(C), and deserved to be considered in the preparation, evaluation, or trial of that claim, see E. D. Tex. R. CV-26(b)(3)(D). It would also bear significantly on his assertion that Sheriff Kendrick released all but four inmates from the cell block two days following the assault of Christoph because he knew the cell was illegally overcrowded and was attempting to cover up or cure the problem. Information regarding the jail recreation logs or records would likely have an influence on or affect the outcome of Christoph's claim that he was denied recreation, and it deserved to be considered in the preparation, evaluation, or trial of that claim. Defendants were therefore obligated under the Plan to disclose these records.

Defendants do not contend that these documents were not in their possession, custody, or control. They do not cite any place in the record that establishes that they disclosed the documents to Christoph, nor have we found from our review of the record that the required disclosures were made.<sup>6</sup> Defendants principally focus on

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<sup>6</sup>As we have noted, under the Plan, only notices of disclosure, not the disclosures themselves, are to be filed with the court. See E. D. Tex. R. CV-26(e).



190 other discovery requests that Christoph submitted. Concerning the  
191 documents at issue, they assert summarily that “[o]nce Defendants’  
192 initial disclosure was filed, Plaintiff simply re-urged all of the  
193 improper motions.” They contend that the district court applied  
194 the Plan as written and did not clearly abuse its discretion. In  
195 view of the absence of any indication that defendants disclosed the  
196 documents that Christoph seeks, we hold that the district court  
197 abused its discretion and made an unreasonable discovery ruling  
198 when it held in its order that defendants had complied with the  
199 notice of disclosure requirement of the Plan but did not address  
200 whether they had in fact made the required disclosures. We also  
201 hold that the district court’s denial of Christoph’s motion for  
202 disclosure was unreasonable and an abuse of discretion, because  
203 these records were plainly within the scope of documents that  
204 defendants were obligated to disclose automatically in a Track 2  
205 case.

206 C

207 We next decide whether defendants’ failure to disclose these  
208 documents, and the district court’s failure to order their  
209 disclosure, require that the judgment be vacated.

210 In the context of district court evidentiary rulings that are  
211 reviewed for abuse of discretion, we have held that the abuse of  
212 discretion must create the likelihood of prejudice. *See United*  
213 *States v. Tansley*, 986 F.2d 880, 887 (5th Cir. 1993). Even if the  
214 district court errs in an evidentiary ruling, the error can be  
215 excused if it was harmless. *United States v. Capote-Capote*, 946

216 F.2d 1100, 1105 (5th Cir. 1991). Because we hold that this  
217 standard of review also applies to the discovery ruling at issue,  
218 we will determine whether it is likely that Christoph incurred  
219 prejudice that affected his substantial rights.

220 We have carefully considered the trial record to assess  
221 whether Christoph was prejudiced by the non-disclosure, and we  
222 conclude that he was. Christoph sought in his motion for  
223 disclosure to obtain documents that would enable him to prove that  
224 his cell block was overcrowded on the days he entered the jail and  
225 was assaulted. He also attempted to obtain records that would  
226 permit him to demonstrate that two days following the assault,  
227 Sheriff Kendrick significantly reduced the number of prisoners in  
228 the cell block (from approximately 18 to four) in an attempt to  
229 cure or cover up the overcrowding. Christoph introduced his own  
230 testimony, and that of another inmate, to establish these facts.  
231 He also attempted unsuccessfully to elicit favorable testimony  
232 concerning the jail population from witnesses aligned with  
233 defendants.

234 Defendants vigorously impeached Christoph's evidence,  
235 establishing through cross-examination that the witnesses could not  
236 recall accurately the number of prisoners held at the relevant  
237 times. In part using Christoph's exhibits concerning inspections  
238 by the TCJS for the period 1989-1991, defendants attempted to show  
239 that the number of prisoners was decreasing over time, was far  
240 below what Christoph contended, and did not exceed the rated jail

241 capacity to an unconstitutional extent.<sup>7</sup> They offered detailed  
242 evidence concerning the configuration of the jail, its rated  
243 capacity and average daily population, and approximate prisoner  
244 population. When Christoph sought to prove through House, the  
245 Jailer, that the cell block population was significantly reduced  
246 within days of the assault, House testified that he could not  
247 recall whether the number of prisoners was reduced to four on May  
248 11, 1992. Christoph, who lacked the documents that defendants  
249 should have disclosed, was forced to rely solely on the testimony  
250 of convicted felons (including himself)<sup>8</sup> to establish the jail  
251 population in 1992, and was unable to impeach defendants' evidence.  
252 In opening statement, defendants' counsel accused Christoph of  
253 exaggerating his overcrowding claim and emphasized during opening  
254 statement and closing argument that Christoph had increased  
255 dramatically the number of prisoners that he alleged were detained  
256 with him in the same cell block. Defendants' counsel also relied  
257 on plaintiff's TCJS records for 1991 to suggest that the jail was  
258 not overcrowded in 1992. Christoph likely suffered prejudice due  
259 to defendants' failure to disclose the daily operation logs for the  
260 relevant periods.

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<sup>7</sup>Defendants conceded that the jail housed more inmates than were permitted under the facility's rated capacity. They pointed out, however, that because of state prison overcrowding, many Texas counties were unable to transfer convicted felons from their jails to the TDCJ for service of sentence. They maintained that, despite these adverse circumstances, the number of prisoners in the Houston County jail never exceeded what was constitutionally permissible.

<sup>8</sup>The district court orally instructed the jury during trial that it could consider the fact that a witness had been convicted of a felony in assessing his credibility.

