No. 21-7362

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MATTHEW JAMES GRIFFIN,

Plaintiff-Appellant,

v.

NADINE J. BRYANT; P. M. MANNION; ARLENE BURGRESS TOODLE; M. A. KHAN; M. BOSSIE; BYRON SCOTT CARTER; UNKNOWN DOE 1, Nurse; UNKNOWN DOE 2, Correctional Officer (aka Dervin),

Defendants-Appellees.

On Appeal from the U.S. District Court for the Eastern District of North Carolina
Case No. 5:17-ct-03173

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

On the same day that Defendants forcibly sedated Matthew Griffin and left him to fall alone in his cell, Mr. Griffin submitted a grievance seeking relief for this egregious civil-rights violation. However, prison officials refused to accept this grievance, pursuant to their one-grievance-at-a-time policy. In fact, prison officials and North Carolina policy ultimately gave Mr. Griffin no window in which to successfully file his involuntary-sedation grievance for review. As explained at length in the opening brief, this rendered remedies unavailable to Mr. Griffin in myriad ways. And since the Prison Litigation Reform Act ("PLRA") only requires the exhaustion of "available" remedies, Mr. Griffin has met the Act's requirements here.

Defendants have one argument in response. They've proposed a new interpretation of North Carolina's Administrative Remedy Procedure ("ARP") that, supposedly, would have kept the administrative pathway open to Mr. Griffin for his involuntary-sedation claim, if only he had tried harder to force his claim into the process. However—perhaps unsurprisingly, as Defendants did not mention the ARP provisions they now rely on anywhere at the district court—Defendants' new reading of

the ARP is divorced from reality. And, in any event, even if the ARP operated as Defendants suggest, it *still* would not have been "available" for use by Mr. Griffin under the PLRA.

Defendants tie themselves in knots to prevent this case from reaching the merits in the district court. But for multiple reasons, remedies were not available to Mr. Griffin for his involuntary-sedation claim. Defendants are wrong to say otherwise, as was the district court. This Court should reverse and remand to finally let Mr. Griffin's claims be heard.

I. Because Remedies Were Not Available to Mr. Griffin, the District Court Erred By Dismissing His Claims for Failure to Exhaust.

Mr. Griffin was only required to exhaust "available" remedies, and here, the ARP was not available for his involuntary-sedation claim. In *Ross v. Blake*, 578 U.S. 632 (2016), the Supreme Court provided three illustrative examples of situations wherein remedies could not be considered "available" given the meaning of the PLRA. *Id.* at 640-44. Those scenarios are 1) when an administrative procedure "operates as a simple dead end," 2) if an administrative procedure is "so opaque that it becomes, practically speaking, incapable of use," and 3) "when prison

administrators thwart inmates from taking advantage of a grievance process," that process is not meaningfully available. *Id.* at 643-44. As it happens, the facts in this case demonstrate that administrative remedies were not available for Mr. Griffin's involuntary-sedation claim under any one of the *Ross* examples.

A. Defendants' Reading of the Regulations Does Not Negate the Fact that Mr. Griffin Met a Dead End with His Involuntary-Sedation Claim.

As explained in the opening brief, "despite what [the] regulations . . . may promise," North Carolina's ARP operated as a dead end for Mr. Griffin's involuntary-sedation claim, and so administrative remedies were not available to him for this claim. *Ross*, 578 U.S. at 643. Specifically, because Mr. Griffin had filed grievances pertaining to other civil-rights claims that remained in the administrative pipeline, under prison rules he was blocked from filing his involuntary-sedation grievance—up to and through the deadline for submitting it. *See* Opening Br. ("OB") at 20-22. As there was thus never a time when Mr. Griffin could have submitted his grievance to have it heard by prison officials, the administrative remedy procedure was a functional dead end, and so unavailable under *Ross*.

Defendants' only argument in response is that, allegedly, Mr. Griffin could have pushed his involuntary-sedation grievance through the administrative process with enough time to re-submit it before the deadline came and went. *See* Answering Br. ("AB")[1] at 3-4, 9-12, 14-15, 19-36. This could have been accomplished, Defendants claim, if Mr. Griffin had 1) appealed the so-called "de facto denials" of his pending grievances when officials committed each of their (numerous) timeframe violations and/or 2) sacrificed other grievances in service of having his involuntary-sedation grievance heard. *See, e.g.*, *id.* at 19-20. But both of these suggestions are factually dubious and legally infirm.

First, Defendants assert that Mr. Griffin could and should have appealed his pending grievances immediately once officials failed to abide by mandatory time limits for claim processing. AB at 15. To back up this assertion, Defendants point to a provision in North Carolina's ARP that provides: "If at any level of the administrative remedy process . . . the inmate does not receive a response within the time provided for

[1] Defendant Kahn filed a separate brief adopting the brief filed by Defendants Bryant, et al. in full. For this reason, this brief refers to the latter brief as the "Answering Brief" and treats it as representative of the arguments sought to be advanced by all Defendants.

reply . . . the absence of a response shall be a denial at that level which the inmate may appeal." AB at 9-12; JA108. This provision, Defendants conclude, shows that Mr. Griffin could have pushed his pending grievance through the pipeline in a more expeditious manner despite endemic delays by prison officials.

Defendants are mistaken. Indeed, "despite what regulations or guidance materials may promise," Mr. Griffin had no functional way to appeal the "de facto denials" of his grievances. *Ross*, 578 U.S. at 643. To be sure, the regulations say that once prison officials fail to abide by mandatory time limits, that failure becomes appealable. JA108. But they give prisoners no directions as to *how* to appeal in this scenario. *Id.* Per prison policy, a prisoner's appeal from one step of the grievance process to another is accomplished by signing and submitting a form on which they have received a *written* denial. JA110-12 (ARP sections .0310(b)(1) and .0310(c)(1) describing how to appeal). That is, prisoners are supposed to receive a written response at each step of the grievance process, and on this written response, there is a field where the prisoner can sign to indicate if they would like to appeal, and return that same piece of paper to serve as their appeal:

North Carolina Department of Public Safety
Prisons

Pat McCrory, Governor
Frank L. Perry, Secretary

W. David Guice, Commissioner
George T. Solomon, Director

Step One - Unit Response

Regarding Grievance No.: 3100-2015-CBKL101432

Disposition:
Refer to Provider

01/12/2016 — *Date*
OKADE, ANTHONY ONYEISI — *Staff Electronic Signature*

(A)____ Agree with grievance response
(B) X Appeal to Step Two (24-hour limit)

21 JAN 2016 — *Date*
1481522 — *Inmate Signature*

Date
Witness Signature (optional)

NC#6

MAILING ADDRESS:
633 OLD LANDFILL RD.
TAYLORSVILLE, NC 28681

OFFICE LOCATION:
633 OLD LANDFILL RD.
TAYLORSVILLE, NC 28681
Telephone: (828)632-1331
Fax: (828)632-1345

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JA137; *see also, e.g.*, JA121; JA139-40; *see also* JA112 (listing ARP section .0310(d) which discusses the procedure in the event that, "at any step of the procedure, the inmate refuses to *sign* the [denial] indicating his/her desire to appeal" (emphasis added)). Indeed, in every instance where Mr. Griffin did appeal his administrative grievances, he did so simply by signing the written response he received from the prison, and turning

that back in for further review. *See* JA121; JA137; JA139-40. In short, the only directions the ARP gives prisoners for how to appeal a decision are to use the same form on which they receive a written denial. So, how is a prisoner supposed to appeal a decision he hasn't received, without this required form?[2]

In this way, even taking the "de facto denial" provision into account, administrative remedies remained a dead-end for Mr. Griffin's involuntary-sedation claim. As Defendants themselves point out, this Court has expressed doubts that administrative procedures remain available when they fail to provide essential directions for how to exhaust. AB at 20-21 (citing *Custis v. Davis*, 851 F.3d 358, 363 (4th Cir. 2017)). Indeed, in *Ross* itself, in defining the very concept of a "dead end," the Supreme Court concluded that remedies are not available when a grievance procedure gives directions that are not, in fact, capable of being

[2] Defendants also frame the fact that Mr. Griffin did not take an illusory appeal from a "de facto denial" as Mr. Griffin's alleged failure to properly exhaust. AB at 32-34. But the regulations do not *require* a prisoner to take such an appeal, they only provide that a prisoner *may* do so. JA108. Thus, since Mr. Griffin did not act in contravention to the process as it was laid out before him, this is not an issue of "proper exhaustion." *See Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006) (explaining that "proper exhaustion" requires compliance with "critical procedural rules" in order to have fully exhausted).

followed with success. 578 U.S. at 643. So too here: it is irrelevant that North Carolina now says Mr. Griffin could have appealed "de facto denials" because the ARP provided no mechanism for actually doing so. Because of this, Mr. Griffin had no actual capacity to free up the administrative pipeline himself, but rather met with an immovable dead end when he tried to exhaust his involuntary-sedation claim.

Second, Defendants argue that Mr. Griffin could have sacrificed a different grievance in order to make remedies available for his involuntary-sedation grievance. Specifically, Defendants assert Mr. Griffin should have done this by "dismissing" his kosher-diet grievance or his later-accepted January grievance, so that his involuntary-sedation grievance could go through. AB at 8-10. But, again, Defendants' arguments are divorced from the realities of the ARP. North Carolina's regulations never once mention the prospect of "dismissing" a pending grievance. *See* JA104-14. They certainly do not provide any directions as to how a prisoner could go about doing so. Indeed, if it were really an option to dismiss the earlier grievance in favor of a new one, one wonders why the first time anyone mentions this option is in response on appeal. Further, when Mr. Griffin asked a prison official if he had to wait for his

January grievance to proceed past Step 2 of the process in order to refile his involuntary-sedation grievance, the official simply replied in the affirmative. *See* JA91-92. Defendants' invented "dismissal" route—raised for the first time before this Court, found nowhere in the regulations, and contrary to information Mr. Griffin received from a prison official—cannot seriously be considered as an "unblocking" mechanism. The reality is that Mr. Griffin did not actually have the option to immediately dismiss a grievance, and so blocking grievances remained pending for far too long, eventually rendering remedies unavailable for his involuntary-sedation grievance.

Even if Mr. Griffin had had the option to dismiss a pending grievance in favor of his involuntary-sedation grievance, remedies are not meaningfully available where the only way to have one civil-rights claim heard is to abandon or sacrifice another. Surely, the PLRA cannot be read to deem remedies "available" where access is conditioned on the sacrificing of one or more constitutional claims, especially where exhaustion, not voluntary dismissal, is the prerequisite to suit in federal courts. *See* 42 U.S.C. § 1997e(a); *Simmons v. United States*, 390 U.S. 377, 394 (1968) (emphasizing that it is "intolerable that one constitutional

right should have to be surrendered to assert another"). And even with respect to his kosher-diet grievance, which Defendants assert Mr. Griffin should have immediately dismissed after receiving a kosher diet, *see* AB at 8, there are many reasons Mr. Griffin would have wanted to continue to pursue this grievance nonetheless, not least of which being the fact that he sought, in part, retrospective, monetary relief for the very real violation of his First Amendment rights. *See* JA121.

And these same objections apply to Defendants' final contention, that Mr. Griffin should have "sequenced" his grievances so as to prevent the intervening January grievance from blocking the way for his involuntary-sedation grievance. AB at 32. According to the prison's own rules, the January grievance should not have been accepted into the process, as the kosher-diet grievance was still pending. OB at 26. (In fact, Mr. Griffin had other grievances returned for this exact reason, including his involuntary-sedation grievance. *See* JA119.) Had prison officials followed their own regulations, Mr. Griffin's January grievance would have been returned, which would have allowed Mr. Griffin to decide which grievance to put into the process when the block from the kosher-diet grievance was lifted. Defendants can't blame Mr. Griffin for the block

on his involuntary-sedation grievance posed by their improper acceptance of the January grievance. At any rate, Defendants' "sequencing" argument just boils down to the same untenable principle as before: that prisoners must themselves prioritize grievances because the administrative process will not be available for all of them. Yet, the administrative process *must* be available for each grievance, or else prisoners need not exhaust those grievances under the PLRA. 42 U.S.C. § 1997e(a).

In all, Defendants only confirm that the administrative process operated as a dead end for Mr. Griffin's involuntary-sedation claim and, as such, was unavailable.

B. The Grievance System as Defendants Describe It Was Too Opaque for Any Ordinary Prisoner to Navigate.

Even assuming Mr. Griffin could have, theoretically, done everything Defendants say he could have done, the system Defendants evoke in that scenario is so opaque as to be unavailable. The Supreme Court in *Ross* explained that administrative remedies are unavailable under the PLRA if a grievance procedure is so difficult to navigate that it becomes "practically speaking, incapable of use. In this situation, some mechanism exists to provide relief, but no ordinary prisoner can discern

or navigate it." 578 U.S. at 643-44. In other words, grievance systems that are essentially "unknowable" are also unavailable. *Id.* at 644 (quoting *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1323 (11th Cir. 2007)).

Defendants repeatedly describe the method by which Mr. Griffin could have forced his grievance past the block as "clear." AB at 5, 14, 18, 26. But reciting the mantra does not make it true. In fact, the process Defendants describe was unknowable to Mr. Griffin or any ordinary prisoner, and thus unavailable. To start, although Defendants strongly emphasize the fact that the ARP contains a provision noting that a "de facto denial" was appealable, AB at 8-10, again, that provision gave no instructions on how to actually submit an appeal where a "de facto denial" occurred, JA108. This would be especially confusing for a prisoner attempting to navigate this system, as the way in which an appeal is submitted is on the same form that contains a written denial, which, of course, a prisoner would not have where there is only a "de facto denial." JA110-12; *see also supra* at 4-8.

And to make matters even more convoluted, the idea that prisoners can appeal from a "de facto denial" conflicts with several other provisions in the ARP detailing how timeframe violations will be handled.

Specifically, elsewhere the ARP says that if prison officials fail to abide by mandatory timeframes for processing grievances at each step, "the grievance will be forwarded to the next step for review." JA107. This suggests that, when a timeframe violation or "de facto denial" occurs, prison officials are responsible for forwarding the grievance on to the next step. Not, in other words, that prisoners will submit an appeal. In addition, this is, in fact, what happened with Mr. Griffin's kosher-diet grievance, where prison officials themselves forwarded the grievance on from Step 1 to Step 2 after they failed to timely respond at Step 1 for months. JA121. Thus, given that prison officials are tasked with forwarding—and do, in practice, forward—a grievance after a timeframe violation occurs, it is all but impossible to understand how the "de facto denial" provision fits in and when (and whether) a prisoner *must* take advantage of it.

More generally, although Defendants suggest that the entire burden was on Mr. Griffin to appeal from constant timeframe violations on the part of prison officials, again, the regulations say differently. At each step of the grievance process, the time limits prescribed for the prison to respond are written with mandatory language: a "response . . .

shall be made within [number] of days." JA107-08 (emphasis added). In this way, the regulations themselves seem to contemplate an important role for prison officials in making sure grievances proceed in a timely manner. Yet Defendants before this Court describe a system wherein *prisoners* must bear nearly all the responsibility for making sure the path is clear to file a grievance should multiple arise. *See* AB at 19-20. This conflict is, again, incredibly confusing, and it is too much to expect an ordinary prisoner to be able to parse it on his own.

Finally, good evidence that this system is virtually "unknowable" for the ordinary prisoner is that Defendants struggle to describe it in briefing intended for a Federal Court of Appeals. Defendants here needed, among other things, a multi-page chart to describe to this Court how exactly the grievance process should have gone so that Mr. Griffin could have had a chance to have his involuntary-sedation grievance accepted before it was untimely. *See* AB at 8-10. That is exactly the sort of byzantine system that *Ross* said renders remedies unavailable. And, as the cherry on top, it is not even clear that Defendants realized how this system was supposed to work until they got to the appellate level, as nowhere in their briefing or materials at the district court do they point

to the "de facto denial" provision, or suggest that Mr. Griffin should have been appealing timeframe violations all along. *See generally* JA59-71 (Defendant Bossie's Motion to Dismiss and Memorandum in Support); JA72-77 (Defendant Khan's Motion to Dismiss and Memorandum in Support).

Instead, it seems everyone was stumped by the vague, contradictory, and in places nonexistent instructions in North Carolina's Administrative Remedy Procedure for what Mr. Griffin was to do in order to get his involuntary-sedation grievance processed before it was too late. For Mr. Griffin, then, this system was unnavigable, and thus unavailable under the PLRA.

C. Prison Officials Thwarted Mr. Griffin and Rendered Remedies Unavailable to Him.

At a minimum, prison officials here prevented Mr. Griffin from having his grievance heard, making remedies unavailable to him. In *Ross*, the Supreme Court explained that, when prison officials "thwart inmates from taking advantage of a grievance process," that process is no longer available. 578 U.S. at 644.[3] That is exactly what happened here.

[3] As noted in the opening brief, thwarting need not necessarily be intentional or nefarious to render remedies unavailable—rather the

Excessive delay was the norm for prison officials in processing Mr. Griffin's various grievances, OB at 25-28, despite mandatory time limits, and an obligation to forward a grievance on to the next step should those time limits not be met, s*ee* JA107. These cumulative failures served to keep Mr. Griffin's involuntary-sedation grievance blocked from the pipeline until it was untimely. Further, prison officials, again in contravention of their own rules, accepted Mr. Griffin's January grievance into the pipeline despite the fact that his kosher-diet grievance was then still pending at Step 1. OB at 9. That is, prison officials, without explanation, misapplied their own rules and in doing so made it impossible for Mr. Griffin to submit his involuntary-sedation grievance in a timely manner. Put together, then, prison officials thwarted Mr. Griffin and made remedies unavailable for his involuntary sedation grievance.

Defendants' only response is to again claim that because there were actions Mr. Griffin theoretically could have taken to force his grievances through the process—despite these consistent administrative

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question is: did actions by prison officials make remedies functionally unavailable. *See Lanaghan v. Koch*, 902 F.3d 683, 688 (7th Cir. 2018).

roadblocks—it does not matter what prison officials themselves did during this time. AB at 8-10. But by requiring to-a-T compliance by Mr. Griffin and simultaneously asking this Court to ignore an unending stream of rule violations by grievance officers, Defendants turn the grievance process from a shield into a sword. The Supreme Court has already told us that what prison officials do or fail to do is absolutely relevant to the availability inquiry—that is the entire point of the "machination" discussion in *Ross*. *See* 578 U.S. at 644. And here, prison officials consistently failed to abide by their own regulations, blocked Mr. Griffin's involuntary-sedation grievance until it was untimely, and thus thwarted Mr. Griffin's access to the administrative process.

Additionally, when Mr. Griffin did try to clarify how he was supposed to navigate this ever-changing grievance landscape, he was thwarted once more. After prison officials defied their own rules and past practice by accepting Mr. Griffin's January grievance into the pipeline, Mr. Griffin asked a prison official how this would affect the status of his other intended grievance. JA91-92. Reasonably, Mr. Griffin wanted to know if he needed to wait to resubmit his involuntary-sedation grievance until the January grievance proceeded past Step 2. Defendants now say

that the correct answer to this question was no; that Mr. Griffin could have dismissed the January grievance or, once officials violated a timeframe, immediately appealed it. AB at 8-10. But that is not the answer Mr. Griffin received. Rather, a prison official, when specifically asked, told Mr. Griffin that yes, he did need to wait for officials to process that grievance past Step 2. JA91-92. And after Mr. Griffin did just that, his involuntary-sedation grievance became untimely. In all, then, prison officials thwarted Mr. Griffin's access and in doing so rendered remedies unavailable for his involuntary-sedation claim.

D. For the Reasons Explained in the Opening Brief, *Moore v. Bennette* Is Inapposite.

Defendants seek to defend the district court's citation to *Moore v. Bennette*, 517 F.3d 717 (4th Cir. 2008), but fail to meaningfully respond to arguments in the opening brief that dispel *Moore*'s relevance here. AB at 35-36; *see also* OB at 33-36. Defendants suggest that no matter what, a prisoner must follow even unwritten and unknowable prison procedures before filing a lawsuit, "regardless of what the particular policy requires." AB at 36. But *Ross* tells us that prisoners must only exhaust those administrative remedies that are "available" to them; that is, those "grievance procedures that are 'capable of use.'" 578 U.S. at 642

(quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)). And as this Court recognized in another case Defendants cite, a prisoner "need not take advantage of an 'unavailable' remedy." *Spires v. Harbaugh*, 438 F. App'x 185, 186 (4th Cir. 2011). That is exactly what Mr. Griffin asserts: he could not exhaust administrative remedies for his involuntary-sedation claim because the way in which the prison's procedures operated in this case made remedies unavailable. In this way, Defendants only beg the question to assert (dubiously) that Mr. Griffin did not follow these rules, and so did not exhaust remedies. The real inquiry is: were grievance procedures available to exhaust under these rules in the first place? The answer to that question is no, and the district court was wrong to hold otherwise.

***

Defendants ultimately seek to distort what happened here, asserting Mr. Griffin sat on his hands and let his grievance expire despite a multitude of tools at his disposure. But every part of that picture is inaccurate. Instead, both the record and the regulations show that, despite spirited efforts on Mr. Griffin's part, remedies were simply not available to exhaust for his involuntary-sedation claim. The PLRA's

exhaustion requirement thus poses no obstacle to Mr. Griffin's present action.

CONCLUSION

For the reasons stated above and in Mr. Griffin's opening brief, this Court should reverse the district court's grant of summary judgment on exhaustion grounds, and remand to the district court to consider Mr. Griffin's claims on the merits.

Respectfully Submitted,

Dated: May 6, 2022

/s/ Katherine Cion

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7(B) because this brief contains 4,333 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

Dated: May 6, 2022

/s/ Katherine Cion
Katherine Cion

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2022, I electronically filed the foregoing *Reply Brief of Plaintiff-Appellant* with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 6, 2022

/s/ Katherine Cion
Katherine Cion