No. 21-3047

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HOWARD SMALLWOOD,
Plaintiff-Appellant,

v.

DON WILLIAMS, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana, No. 1:20-cv-00404
The Honorable James P. Hanlon, District Court Judge

OPENING BRIEF AND REQUIRED SHORT APPENDIX FOR PLAINTIFF-APPELLANT

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-3047

Short Caption: Smallwood v. Williams

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Howard Smallwood

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Rosalind E. Dillon, Devi M. Rao

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

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Attorney's Signature: /s/ Rosalind E. Dillon Date: 4/6/2022

Attorney's Printed Name: Rosalind E. Dillon

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

Attorney's Signature: /s/Devi M. Rao Date: 4/6/2022

Attorney's Printed Name: Devi M. Rao

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

Attorney's Signature: /s/ Daniel M. Greenfield Date: 04/06/2022

Attorney's Printed Name: Daniel M. Greenfield

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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INTRODUCTION

Howard Smallwood, who has a documented mental impairment, was left injured and traumatized when Defendants used physical violence to force his compliance with an unnecessary blood-draw and thereafter sexually abused him. Instead of receiving proper medical care after those appalling acts, Mr. Smallwood was thrown into segregation. To make matters worse, to seek redress through the prison's grievance system, Mr. Smallwood had just 10 days to not only try to informally resolve his issue, but also to file a formal grievance once the informal resolution failed. For a person with average mental capabilities, this would have proved a monumental task. For Mr. Smallwood, whose IQ of 75 diminished his ability to understand and process information and who had just been the victim of physical and sexual violence, it proved impossible. Although he managed to file a formal grievance, it was returned to him because he had failed to prove that he had made informal attempts to resolve his complaint with his abusers.

Unable to navigate the prison's grievance process, Mr. Smallwood turned to the courts. The district court, over his objection that his mental capabilities prevented him from understanding the grievance process,

held that Mr. Smallwood had not strictly followed the process and thus had not exhausted administrative remedies under the Prison Litigation Reform Act ("PLRA"). 42 U.S.C. § 1997e(a).

But the PLRA includes a caveat in its exhaustion requirement: the process must actually be "available" for exhaustion to be required. *Id*. Where, considering an individual's personal circumstances, an administrative process is not "accessible" and "capable of use for the accomplishment of a purpose," it is not "available." *Ross v. Blake*, 578 U.S. 632, 642, 635 (2016). Here, the prison's grievance process was not capable of use by Mr. Smallwood, as his low IQ and isolation from those who could provide him with assistance made it impossible for him to properly navigate its requirements. At minimum, remedies were not "available" for his sexual-abuse claim, as the requirement to make informal attempts to resolve an issue does not apply to such claims. Thus, the district court erred in finding remedies were available to Mr. Smallwood and its decision should be reversed.

JURISDICTIONAL STATEMENT

Howard Smallwood filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Southern District of Indiana.

The district court had jurisdiction over Mr. Smallwood's claims under 28 U.S.C. § 1331 because Mr. Smallwood brought claims under the Eighth and Fourteenth Amendments. The district court entered summary judgment for Defendants on September 30, 2021. SA-1. Mr. Smallwood timely noticed his appeal on October 28, 2021.[1] SA-11; *see* Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction to review the district court's final order under 28 U.S.C. § 1291.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant respectfully requests that oral argument be granted because this case raises important issues regarding the interpretation of "available" remedies under the PLRA. Cases under the PLRA are often litigated pro se—both in the district courts and this Court—and so this counseled case provides a good vehicle for this court to reiterate and clarify the applicable law.

[1] Although docketed by the district court clerk on November 1, 2021, the Notice of Appeal included a signed declaration by Mr. Smallwood certifying that he deposited the notice in the institution's mail system, postage pre-paid, on October 28, 2021. *See* Fed. R. App. P. 4(c)(1).

ISSUES PRESENTED

1. Did the district court err in concluding that administrative remedies were "available" to Howard Smallwood for his excessive-force and medical-care claims, even though he suffers from a documented mental impairment and was segregated from those who could help him navigate the prison's grievance process after the incident giving rise to his claims?

2. Did the district court err in concluding that Mr. Smallwood failed to exhaust administrative remedies because he did not submit evidence that he informally tried to resolve his sexual-abuse claim, even though the prison's grievance process is explicit that informal resolution is not required to grieve such a claim?

STATEMENT OF THE CASE

A. Legal Background

The PLRA's exhaustion provision requires that a prisoner exhaust "such administrative remedies as are available" in the jail or prison in which they are confined before bringing an action in federal court involving prison conditions. 42 U.S.C. § 1997e(a). By the terms of the PLRA, then, a prisoner must exhaust only those administrative remedies

that are "available" to him. *Id.* A prison's grievance system is not "available" where it is not "capable of use" to obtain "some relief for the action complained of." *Ross*, 578 U.S. at 634-35. When a court determines—after "account[ing] for individual capabilities"—that a process was functionally unavailable to a prisoner, the exhaustion requirement is satisfied. *Ramirez v. Young*, 906 F.3d 530, 535-36 (7th Cir. 2018). Moreover, a prisoner's failure to exhaust is an affirmative defense, for which defendants have the burden of proof. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Gooch v. Young*, 24 F.4th 624, 628 (7th Cir. 2022). In particular, at summary judgment, defendants must show that there is no genuine dispute of material fact as to a plaintiff's failure to exhaust. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

At the Pendleton Correctional Facility in Indiana, where Mr. Smallwood is housed, a prisoner must "exhaust" the administrative remedies available under the Offender Grievance Process adopted by Indiana Department of Corrections ("IDOC"). ECF 46-3, IDOC Offender Grievance Process. Although the grievance process enumerates three steps, baked into the first step is a threshold requirement for a prisoner to even get to the three-step process. *Id.* at 3. Specifically, in most

instances, a prisoner must *informally* attempt to resolve an issue before he may use the *formal* three-step grievance process. *Id.* at 9. Only after he takes that informal step may a prisoner submit a formal grievance (step one), which must be filed within 10 business days of the incident. *Id*. To that formal grievance, the prisoner must attach proof of having attempted to informally resolve the issue—the policy suggests that request for interview forms or other correspondence are acceptable evidence. *Id*. If the prisoner is not satisfied with the response to the formal grievance, he may move on to step two and submit "a written appeal to the Warden[]." *Id.* at 3, 12. Finally, if the prisoner is not satisfied with the warden's response, he may proceed to step three and file a "written appeal to the Department Grievance Manager." *Id.* at 3, 12-13.

This grievance process for claims of sexual abuse has two important differences from that described above. First, "[t]he Department shall not require an offender to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse." *Id.* at 5. Second, the process "remov[es] the standard time limits on submission for a grievance regarding an allegation of sexual abuse." *Id*.

Per IDOC's guidelines, the facility is responsible for ensuring "that the offender grievance process is explained to offenders whose primary language is other than English, or has a visual, hearing, or mental impairment." *Id.* at 7. Specifically, IDOC's guidelines require that "[t]here shall be mechanisms in place to ensure that the offender grievance process is understood by all offenders." *Id.*

B. Factual Background[2]

The trouble began on October 22, 2017, when Howard Smallwood—who has a documented IQ of approximately 75 and physical impairments such as diabetes and asthma—woke up handcuffed to a bed in the medical ward where a nurse was checking his vital signs. ECF 31, Second Am. Compl., at 10; ECF 15-1, First Am. Compl. Exs., at 27. The nurse told Mr. Smallwood that he was found unresponsive in his cell after returning from the morning medicine line, and that two shots of Narcan[3] were administered to revive him. ECF 31 at 10. She assumed he had

[2] The facts are drawn from Mr. Smallwood's complaint and verified pleadings below, and are recounted in a light most favorable to him, as is required at the summary judgment stage. *See Ramirez*, 906 F.3d at 534.
[3] Narcan is a brand name of the generic drug naloxone, which works to reverse an opioid overdose. *Naloxone DrugFacts*, NATIONAL INSTITUTE OF HEALTH (Jan. 2022), https://nida.nih.gov/publications/drugfacts/naloxone.

overdosed, and demanded to know what drugs he took. *Id*. Mr. Smallwood insisted that he had not taken any drugs—that, in fact, he suffers from diabetes and likely passed out due to low blood-sugar levels. *Id.* He reminded the nurse that in January 2016 he had been found unresponsive in his cell and also had awoke after Narcan was administered, but that an outside hospital had treated him for "respiratory distress" secondary to "likely pneumonia" and "asthma," rather than an overdose, and the hospital had noted that the Narcan did not make a difference. *Id.*; *see also* ECF 15-1 at 27.

Despite his medical history, the nurse informed Mr. Smallwood that Defendant Dr. Paul Talbot—who is employed by Defendant Wexford of Indiana, LLC, which provides medical care at Pendleton, ECF 31 at 2—ordered a urinalysis test to screen for drugs in Mr. Smallwood's system. *Id.* at 10. Mr. Smallwood agreed, telling the nurse that he had no problem taking the urinalysis test because he was not on drugs. *Id*. Two prison guards working in the hospital unit then escorted Mr. Smallwood to the Hospital Restraint Unit (HRU),[4] where Dr. Talbot had ordered him

[4] The Hospital Restraint Unit is a restricted status housing unit. Operational Procedure 02-01-102 ¶26.

to stay for 24-hours for observation and to await next steps. *Id.* About 20 minutes later, those guards returned with a urinalysis test for Mr. Smallwood to complete. *Id.* at 11. The test results came back negative for drugs. *Id*.

Despite the negative urinalysis test results, the two prison guards returned to Mr. Smallwood's cell and told him that Dr. Talbot had ordered a blood test to further check for drugs. *Id.* Mr. Smallwood asked for a standard form to refuse medical treatment, as the urinalysis was negative and he had not, in fact, been using drugs. *Id*. Instead of bringing him the form, the guards told Mr. Smallwood that he did not have a choice in the matter. *Id*. As Mr. Smallwood continued to ask for a refusal form, the guards radioed for backup and the Officer Defendants[5] responded to the call. *Id*. When the Officer Defendants arrived at the cell, they ordered Mr. Smallwood to "cuff up." *Id.* Mr. Smallwood told the Officer Defendants that he wanted to exercise his right to refuse the blood

[5] The Officer Defendants are Lieutenant Don Williams, Sergeant Boyd Lunsford, Correctional Officer Erick Hammond, Lieutenant Cory Conlon, and Correctional Officer Robert Daugherty. ECF 31 at 2. Mr. Smallwood's complaint makes specific allegations related to each of these Officer Defendants, *Id.* at 11-12; however, since the actions of each individual defendant are not relevant for the issues on appeal, this brief refers jointly to Mr. Smallwood's allegations against these Defendants.

draw, and they responded with violence. *Id*. They twisted his hands and wrists, placed him in a head lock, and held a taser to his chest while they placed him in restraints. *Id*.

The Officer Defendants then escorted Mr. Smallwood to an Urgent Care room, forced him into a chair, and held him down so that a lab technician could draw his blood. *Id*. They told Mr. Smallwood that he did not "have a choice and that he has no rights," and warned him that if he moved, causing the technician to stick one of the Officer Defendants by mistake, that he would pay. *Id*. The blood test came back negative for all drugs. *Id*. at 11-12; ECF 1-1, Blood Test Results, at 24-25.

After the blood draw, the Officer Defendants escorted Mr. Smallwood back to the HRU observation cell, where they threw him onto the bed. ECF 31 at 12. One of the Officer Defendants placed Mr. Smallwood into a choke hold, as he pleaded, "I cannot breathe your [sic] hurting me." *Id*. Mr. Smallwood, still handcuffed, felt two of the Officer Defendants pull violently on the restraints, causing injury to his right shoulder. *Id*. Several of the Officer Defendants then pulled Mr. Smallwood's shirt over his head and began punching him. *Id*. They proceeded to pull Mr. Smallwood's pants and underwear down to his

ankles, placed a knee on Mr. Smallwood's back, and inserted a cold object into Mr. Smallwood's rectum. *Id.* Mr. Smallwood screamed, "stop you are hurting me." *Id.*[6]

After they sexually abused Mr. Smallwood, the Officer Defendants left him naked in his cell. *Id.* Traumatized, Mr. Smallwood retreated to the corner of the cell and curled into a fetal position. *Id.* About one hour later,[7] the two guards working in the hospital unit found Mr. Smallwood injured in his cell and called a nurse to assess him, *Id.* The nurse gave Mr. Smallwood aspirin for his pain, ice for the swelling on his neck and wrist, and submitted a referral for Dr. Talbot to examine Mr. Smallwood.

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[6] Mr. Smallwood repeatedly suggested that surveillance video would corroborate his claims; there was no discovery ordered in the case, and it does not appear that any such video was ever entered into the record. *See*, *e.g.*, ECF 31 at 12; ECF 46-2 at 63.

[7] Because "[t]he duration of effect of naloxone depends on dose and route of administration and is shorter than the effects of some opioids," the standard of care for a suspected opioid overdose involves close "observ[ation] after administration for reemergence of overdose symptoms" for "at least 4 hours following the last dose of naloxone," not leaving a person alone in a cell. *See* Opioid Overdose Prevention Toolkit, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN. at 12-13 (2018), https://store.samhsa.gov/sites/default/files/d7/priv/sma18-4742.pdf. At this stage of the litigation, and considering Mr. Smallwood's status as a pro se litigant, it is plausible to infer that Defendants did not truly believe him to be suffering from a drug overdose because their treatment of him deviated starkly from the standard of care for a suspected overdose.

Id. The next day, Dr. Talbot gave Mr. Smallwood a shot to treat the pain resulting from his injuries, and ignored Mr. Smallwood's requests for an x-ray and an MRI scan to assess the damage. *Id.* at 12-13.

As a result of the ordeal, Mr. Smallwood was "placed in segregation for physically resisting a staff member in the performance of their duty." *Id.* at 10. While in restrictive housing, he was moved around the facility between at least three cells in one cell house, and a fourth cell in another cell house. ECF 63, Smallwood's Summ. J. Resp. at 3; ECF 64, Smallwood's Designation of Evidence, at 4, 6, 8, 9.

Mr. Smallwood suffered long-term injuries to his right shoulder, wrists, back, and neck as a result of the use of force and sexual abuse he faced. *See* ECF 31 at 9, 15; ECF 15-1 at 24 (Mr. Smallwood's May 3, 2018, request for medical care noting that, as a result of the October 22 use of force, he had untreated injuries to his right shoulder, wrists, back and neck, and asking to be seen by a nerve specialist or neurologist). Those injuries cause him "pain and severe discomfort." ECF 31 at 9.

C. Mr. Smallwood's Attempts To File A Grievance

On November 1, 2017, shortly after the forced blood draw and sexual abuse, Mr. Smallwood filed a formal grievance regarding the incident:

> "I was sexually abused by 5/6 custody officers 10-22-17 Sunday in the infirmary returning back to my cell HRU (see video tapes) I also was forced into taking a blood test against my will – I was hurt during the process … wrist, back, neck and hip – I contacted Sgt. Dinkin and Officer William – Filed a grievance 10-23-17."

ECF 46-2, Smallwood's Grievance History, at 63. Five days later, the Grievance Specialist returned Mr. Smallwood's grievance, having checked the following basis: "There is no indication that you tried to informally resolve your complaint. If you have tried to resolve it informally, please fill out the grievance form to indicate that. If you have not tried to resolve it informally, you have five (5) days to begin that process." *Id.* at 62. Mr. Smallwood did not make it past that informal step.

The record reveals that Mr. Smallwood had trouble understanding the IDOC's grievance process. For instance, while trying to navigate the process for his claims here, Mr. Smallwood had numerous false starts.

On November 9, 2017, he filed an offender complaint (which appears to be different than a formal grievance), stating that he had filed several complaints against IDOC and medical staff. ECF 15-1 at 5. He reiterated that he was forced to have his blood drawn against his will and that he had filed a complaint regarding the sexual abuse he experienced, writing that "5 officers used excessive force and as well pulled my under-wear down to my ankle … I was [sexually] abused." *Id.* A response to that complaint cannot be found in the record. Mr. Smallwood also apparently wrote letters about the incident. Those letters are not in the record, but he received responses dated November 1, 2017 from the Southern Regional Director and November 21, 2017 from the Health Services Quality Assurance Manager. *Id.* at 14-15.

The portion of Mr. Smallwood's grievance history in the record further evinces his confusion. First, he specifically documented his inability to understand the process in other, unrelated, grievances, writing in one grievance appeal: "I am not familiar with the policy and administrative procedures … because I am incompetent to understanding the procedures." ECF 46-2 at 54.

Second, Defendants confirmed Mr. Smallwood's difficulty understanding the process: "[Mr. Smallwood's] grievance history [indicates that he] has not filed any successful grievances during 2017 or 2018, while incarcerated at the Pendleton Correctional Facility." ECF 46-1, Aff. of Grievance Specialist, ¶10. Defendants also introduced into the record a grievance log with one-line summaries of twenty-one grievances Mr. Smallwood filed between 2005 and 2020 that appear to have made it to step one of the grievance process (and, in one instance, to step two). ECF 46-2, Grievance Log, at 1-3. But only three of the actual grievances corresponding to the entries can be found in the record, and it does not appear that Mr. Smallwood attached proof of informal attempts at resolution to any of those three grievances. *See Id.* at 4-13; *Id.* at 14-23; *Id.* at 24-26. And the log contains no instances of Mr. Smallwood making it to the third, and final step, of the grievance process. *Id.* at 1-3.

Finally, while the record does not reveal a single instance of Mr. Smallwood navigating the grievance process to completion, it does reveal *eighteen* instances where he tried to file grievances but could not even make it to step one: eight were returned because he had not proffered evidence that he tried to informally resolve his complaint, *id.* at 33, 37,

39, 43, 55, 58, 62, 70; seven were returned because he had filed his grievance too late, *id*. at 41, 45, 48, 50, 64, 66, 68; two were returned because he tried to appeal before filing a grievance, *id*. at 53, 60; and one was returned because the issue had already been addressed, *id*. at 35. None of those attempts appear in the grievance log, which reflected only attempts that made it at least to step one. *See Id.* at 1-3.

D. Procedural Background

Having tried to complain about the October 22, 2017, events through the prison's grievance process, Mr. Smallwood turned to the federal courts, and, with the assistance of a writ writer,[8] filed a complaint against Defendants under 42 U.S.C. § 1983. ECF 1, Compl.; *see also* ECF 15 (amended complaint to fix a "clerical mistake"). He later filed a second amended complaint. ECF 31. In it, he alleged that Defendants had violated his right to refuse medical treatment—Dr. Talbot by ordering a

[8] "There has developed within the prison system of the United States a special breed of prisoners who fill a role vital to the exercise of the right of access to the courts. These prisoners are referred to as writ-writers, jailhouse lawyers, counsel substitutes and inmate paralegals." John F. Myers, *The Writ-Writers: Jailhouse Lawyers Right of Meaningful Access to the Courts*, 18 AKRON L. REV. 649, 649 (1985). The signature pages of Mr. Smallwood's original and amended complaints include a note indicating the complaints were "Prepared By: Writ Writer." ECF 1 at 16; ECF 15 at 19.

blood draw and the Officer Defendants by holding him down while the lab technician drew his blood. *Id.* at 8. Further, he asserted that the Officer Defendants had used excessive force by grabbing him, placing him in a headlock, twisting his wrists, and holding a stun gun to his chest in order to escort him to the Urgent Care for the blood draw. *Id.* at 8-9. As a result of that use of force, Mr. Smallwood went on, he suffered serious injuries that Dr. Talbot did not adequately treat. *Id.* at 9. And, he alleged, Wexford's policy or practice of failing to retain qualified medical staff led to the inadequacy of his medical care. *Id.* at 3. Finally, he alleged that, after the blood draw, the Officer Defendants took him back to the observational cell and sexually abused him. *Id.* at 9.

The district court screened the second amended complaint under 28 U.S.C. § 1915A. It concluded that, as to the Officer Defendants, Mr. Smallwood had adequately stated due process claims for denying him his right to refuse medical treatment, as well as Eighth Amendment claims concerning the excessive force used against him before and during the blood draw, and for sexually abusing him upon returning him to his cell. ECF 34, Screening Order, at 3. In addition, the district court concluded that Mr. Smallwood had stated Eighth Amendment medical claims

against Dr. Talbot and Wexford for failing to adequately treat Mr. Smallwood's injuries sustained from the excessive force. *Id*. It noted that Wexford's violation was "based on the theory that Wexford has a policy or practice of providing constitutionally inadequate medical care." *Id*.[9]

The Defendants moved for summary judgment, arguing principally that Mr. Smallwood had not exhausted administrative remedies. ECF 49, Wexford Defs' Mot. for Summ. J.; ECF 58, Officer Defs' Mot. for Summ. J. Mr. Smallwood responded, introducing a school assessment showing that his mental age was far lower than his chronological age and asserting that his low IQ of about 75 made it impossible for him to "understand the procedures and requirements" of IDOC's grievance process. ECF 63 at 2. He also stated that his placement in restrictive housing after the incident, and thereafter his movement from "cell to cell," meant he did not have access to "someone to assist him with the filing of the Grievances due to his limited Educational ability." *Id.* at 3.

[9] The district court initially dismissed Mr. Smallwood's case as untimely. ECF 17, Order Dismissing Am. Compl. But, after Mr. Smallwood explained that he had been prevented from filing his case on time due to facility lockdowns, ECF 18, Smallwood's Mot. to Proceed, the court granted Mr. Smallwood's request to proceed. ECF 21, Order Granting Mot. to Proceed, at 2.

Finally, he pointed to copies of informal attempts to resolve his complaint dated October 23 and 31, 2017. ECF 64 at 4-5.

The district court concluded that the Defendants were entitled to summary judgment because Mr. Smallwood had not exhausted available administrative remedies because, at the time he filed a formal grievance, he had not shown that he had attempted to informally grieve his complaint. SA-6. The district court recognized that Mr. Smallwood "may have attempted an informal resolution," based on the two copies of informal attempts that he had introduced into the record. *Id*. It nevertheless concluded that Mr. Smallwood had failed to exhaust because he did not "attach proof of his efforts to his formal grievance—which is required by the grievance policy." *Id*. The district court also took issue with Mr. Smallwood's evidence to support his argument that his mental capabilities prevented him from understanding the grievance process, concluding that, "[a]side from the 40-year-old IQ estimates, there is no evidence in the record that Mr. Smallwood was incapable of following the instructions on the returned grievance." *Id.* at 7. To support its conclusion, the district court observed that Mr. Smallwood's "filings in this case have been coherent and he has responded appropriately to

orders from the Court." *Id*. Finally, the district court characterized Mr. Smallwood as having acknowledged his failure to exhaust when he voluntarily dismissed an earlier, similar, lawsuit.[10] SA-6 n.2.

Mr. Smallwood timely appealed. SA-11.

SUMMARY OF THE ARGUMENT

I. A prisoner need only exhaust "available" administrative remedies, and none were "available" to Mr. Smallwood. **A.** The Supreme Court and this Court's precedent make clear that the availability analysis must include consideration of an individual's circumstances. **B.**

[10] In that lawsuit, defendants also moved for summary judgment on the basis that Mr. Smallwood had not exhausted available administrative remedies. *Smallwood v. Williams, et al.*, 1:18-cv-1506-RLY-MPB (S.D. Ind. Oct. 31, 2018). In response, Mr. Smallwood moved for reconsideration of the district court's earlier denial of his motion to appoint counsel, asserting that his "reading and writing is at a 3rd [grade] level even finishing school where his comprehension skills is at a low level that constitutes in incompetent in understanding in even English" and that all of his filings had been done by a writ writer. Smallwood's Mot. for Recons. of Denial of Mot. to Recruit Counsel 2-3, ECF 42. The district court denied Mr. Smallwood's request, and he moved voluntarily to withdraw his complaint. *See* Smallwood's Mot. to Withdraw Compl., ECF 44. Mr. Smallwood then made additional attempts to exhaust. He tried to submit another request for interview form on November 5, 2018, to informally grieve the use of force and sexual abuse he faced during the October 22, 2017, incident. ECF 15-1 at 2. It was rejected as untimely. ECF 46-2 at 68. Mr. Smallwood appealed, but the appeal was rejected as untimely and because he skipped the formal grievance step. *Id*. at 68-69.

A consideration of Mr. Smallwood's circumstances here compels the conclusion that administrative remedies were not available to him. **1.** Mr. Smallwood suffers from a documented low IQ that made it difficult to understand and follow the grievance process. The record evidence, viewed in Mr. Smallwood's favor, suggests that he had, in fact, never successfully navigated IDOC's grievance process to completion. And the import of low IQ in the death penalty context supports a conclusion that Mr. Smallwood could not understand the grievance process. **2.** The prison thwarted Mr. Smallwood from correctly navigating the grievance process by placing him on restrictive housing status immediately following the use of force and the sexual abuse. There is thus a material issue of fact as to whether, due to his mental capabilities and removal from those who could help him navigate the grievance process, administrative remedies were actually "capable of use for the accomplishment of a purpose" by Mr. Smallwood. *Ross*, 578 U.S. at 642. **C.** Finally, the IDOC's own policies compel the conclusion that administrative remedies were not available to Mr. Smallwood. Those policies mandate that prison officials ensure that the grievance process is explained in a way that is understandable to individuals with mental impairments, like Mr. Smallwood. Yet

Defendants have offered no evidence that they complied with that mandate.

II. Even if there were remedies available to Mr. Smallwood for his excessive-force and denial-of-medical-care claims, his sexual-abuse claim should have moved forward. Under the PREA and the IDOC's grievance process, a prisoner need not attempt to informally resolve an allegation of sexual abuse. But here, the prison rejected Mr. Smallwood's sexual-abuse grievance for that very reason. By failing to follow its own procedures, the prison thwarted Mr. Smallwood's ability to access even the first step in the three-step grievance process. Administrative remedies were thus not available to Mr. Smallwood for his sexual-abuse claim.

Accordingly, this Court should reverse the judgment of the district court.

STANDARD OF REVIEW

This Court reviews a district court's exhaustion determination on summary judgment *de novo*. *Kaba v. Stepp*, 458 F.3d 678, 681, 686 (7th Cir. 2006). Summary judgment is appropriate only where, viewing the evidence in the light most favorable to the nonmoving party and drawing

all inferences in favor of that party, there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Ramirez*, 906 F.3d at 534. The obligation to construe a pro se litigant's pleadings liberally is well-established. *Kaba*, 458 F.3d at 681.

ARGUMENT

I. Administrative Remedies Were Not "Available" To Mr. Smallwood.

The administrative exhaustion provision of the PLRA requires only exhaustion of "such administrative remedies as are *available*" before a prisoner brings an action in federal court. 42 U.S.C. § 1997e(a) (emphasis added); *Ross*, 578 U.S. at 635-36. If administrative remedies are available, the PLRA requires prisoners to follow the prison's administrative process to request them. *Pyles v. Nwaobasi*, 829 F.3d 860, 864 (7th Cir. 2016). But the process must actually be "available" before exhaustion is required; where an administrative process is not "accessible" and "capable of use for the accomplishment of a purpose," it is not "available," and the exhaustion requirement is satisfied. *Ross*, 578 U.S. at 642, 635. In *Ross*, the Supreme Court explained that the

"availability limitation" on the PLRA's exhaustion requirement "has real content." *Id*. at 635.

A. The Availability Analysis Includes Consideration Of Individual Circumstances.

For the "availability limitation" on exhaustion to have "real content," *Ross*, 578 U.S. at 653, courts must consider a prisoner's individual circumstances. The Supreme Court, this Court, and other circuit courts of appeal agree.

Although the Supreme Court in *Ross* rejected non-textual, judicially created exceptions to the PLRA's exhaustion requirement, it underscored the importance of the statute's built-in exception: "availability." 578 U.S. at 635. In that case, the Supreme Court considered whether administrative remedies were "available" to a prisoner who submitted evidence that the relevant grievance system foreclosed all possible relief, was extraordinarily confusing, and was manipulated by prison officials. *Id*. at 648. In remanding the case, the Supreme Court directed the lower court to consider what materials were provided to prisoners to communicate the exhaustion requirements, and whether "those procedures [were] knowable by an ordinary prisoner *in Blake's situation*." *Id*. at 648. In other words, the Supreme Court

explicitly ordered the district court to consider the prisoner's individual circumstances in its availability analysis.

This Court's precedent is in accord. In *Ramirez v. Young*, 906 F.3d 530 (7th Cir. 2018), this Court examined whether administrative remedies were available to a prisoner who spoke only Spanish, but the prison officials explained the administrative remedy process to him only in English. *Id.* at 533-35. In conducting its availability analysis, this Court explained that "existing remedial processes are available only if communicated in a way reasonably likely to be understood," and noted that "analysis must also account for individual capabilities." *Id.* at 535. Because the prison made no reasonable efforts to ensure that a prisoner in the plaintiff's situation—i.e. a non-English speaker—could understand its grievance process, this Court concluded that the "process was unavailable to him and he was excused from the PLRA's exhaustion requirement." *Id.* at 540. *See also Lanaghan v. Koch*, 902 F.3d 683, 688 (7th Cir. 2018) ("[I]f a prison had a procedure whereby written grievance forms were provided to all inmates and they were required to fill them out without any assistance from others, that procedure might render the grievance remedy available for the majority of inmates, but the same

procedure could render it unavailable for a subset of inmates such as those who are illiterate or blind, for whom either assistance or a form in braille would be necessary to allow them to file a grievance.").

At a minimum, where there is a factual question as to whether an individual's personal circumstances rendered them unable to exhaust, this Court has recognized that the entry of summary judgment on exhaustion grounds is inappropriate. In *Weiss v. Barribeau*, 853 F.3d 873 (7th Cir. 2017), for instance, this Court reversed a grant of summary judgment on non-exhaustion grounds where a prisoner had alleged that he was "grappling with a serious mental illness" which left him unable to "obtain or complete the forms required to invoke [administrative remedies]." *Id*. at 875. *See also Lynch v. Corizon, Inc.*, 764 F. App'x 552, 554 (7th Cir. 2019) (holding plaintiff's affidavit stating "that the defendants altered his medication, that doing so left him too confused to complete the grievance process," raised factual issues precluding summary judgment and requiring an evidentiary hearing).

Other circuit courts agree that a court must take a prisoner's individual circumstances into account in its availability analysis. The Fifth Circuit in *Days v. Johnson*, 322 F.3d 863 (5th Cir. 2003), for

example, considered a prisoner's inability to fill out a grievance form because he had suffered a broken right hand, and held that "one's personal inability to access the grievance system could render the system unavailable." *Id.* at 867. *See also Braswell v. Corr. Corp. of Am.*, 419 F. App'x 622, 625 (6th Cir. 2011) (finding summary judgment inappropriate where there existed a fact issue as to whether a prisoner suffering a mental health crisis "was capable of filing a grievance" and noting that "one's personal inability to access the grievance system could render the system unavailable" (quoting *Days*, 322 F.3d at 867); *Beaton v. Tennis*, 460 F. App'x 111, 113-14 (3d Cir. 2010) (citing evidence that staff took advantage of plaintiff's confused mental state resulting from a skull fracture and post-concussion syndrome as a basis for denying summary judgment for non-exhaustion).[11]

[11] Consistent with these precedents, district courts routinely acknowledge that individual circumstances can render exhaustion "unavailable." *See*, *e.g.*, *Adams v. Wexford Health Sources, Inc.*, No. 15-cv-604-NJR-DGW, 2018 WL 4680728, at *7 (S.D. Ill., Sept. 28, 2018) (concluding that plaintiff suffering from multiple disorders "was not mentally or physically capable of filing a grievance" and "therefore administrative remedies were not available to him"); *Rowling v. Lifschitz*, No. 3:16-cv-459-NJR-DGW, 2017 WL 7420998, at *4-5 (S.D. Ill., Nov. 14, 2017) (holding "the grievance procedure, as written, was not available to plaintiff due to his serious mental impairments," and his inability to understand and follow directions), report and

B. Consideration Of Mr. Smallwood's Individual Circumstances Makes Plain That Administrative Remedies Were Not Available To Him.

Because a prisoner must only exhaust when his individual circumstances render him capable of doing so, the administrative remedies here were not "available" to Mr. Smallwood. His limited mental capacity made it difficult for him to understand the IDOC's grievance process. To make matters worse, he was placed in restrictive housing

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recommendation adopted, 2018 WL 747504 (S.D. Ill., Feb. 7, 2018); *Warner v. Cate*, No. 1:12-cv-01146-LJO-MJS, 2015 WL 9480625, at *4 (E.D. Cal., Dec. 29, 2015) (denying summary judgment for non-exhaustion based on claim that plaintiff lacked the mental capacity to file a timely grievance), report and recommendation adopted, 2016 WL 696422 (E.D. Cal., Feb. 22, 2016); *Ollison v. Vargo*, No. 6:11-cv-01193-SI, 2012 WL 5387354, at *2-3 (D. Or., Nov. 1, 2012) (holding remedy appeared "effectively unavailable" to prisoner who was mentally and physically incapable of filing a grievance during the prescribed period); *Hale v. Rao*, 768 F. Supp. 2d 367, 377 (N.D.N.Y. 2011) (noting plaintiff's IQ of 71 and excusing his failure to exhaust because his "illiteracy and poor understanding" of the grievance process rendered it unavailable); *Childers v. Bates*, No. C-08-338, 2010 WL 1268143, at *6-7 (S.D. Tex., Jan. 14, 2010) (finding remedy that required identification of defendants was not "personally available" to prisoner who could not comply because of a head injury and memory loss), report and recommendation rejected on other grounds, 2010 WL 1268139 (S.D. Tex., Mar. 26, 2010); *Langford v. Ifediora*, No. 5:05-cv-00216-WRW, 2007 WL 1427423, *3-4 (E.D. Ark., May 11, 2007) (holding plaintiff's age, deteriorating health, and lack of general education, combined with failure to provide him assistance in preparing grievances, raised a factual issue concerning the availability of the remedy to him).

immediately following the traumatic use of force and sexual abuse, away from those who could have helped him navigate the process. Those factors ensured that Mr. Smallwood could not complete even the threshold step—attempting to informally resolve the matter—that would allow him to access the formal three-step grievance process.

1. Mr. Smallwood's diminished mental capacity prevented him from understanding the grievance process.

To begin, Mr. Smallwood suffers from a mental impairment—an IQ of about 75—which caused him difficulties "understand[ing] the procedures and requirements" of the IDOC's grievance process. ECF 63 at 3. Intelligence quotient (IQ) tests are designed to measure intellectual functioning and, according to the American Association on Intellectual and Developmental Disabilities, an IQ score between 70 and 75 "indicates a significant limitation in intellectual functioning." *Defining Criteria for Intellectual Disability*, AAIDD (last accessed March 24, 2022).[12]

Mr. Smallwood's inability to understand the prison's grievance process because of his cognitive disability should have defeated Defendants' non-exhaustion argument. Recall that in *Ramirez*, this

[12] Available at: https://www.aaidd.org/intellectual-disability/definition.

Court was confronted with a situation where a prisoner did not speak English. 906 F.3d at 533; *supra* at 25. After "account[ing] for [the prisoner's] individual capabilities," the Court determined that, because the prison knew of the language barrier but never informed him of the existence of the grievance system in his native language, administrative remedies were not available to him. *Ramirez*, 906 F.3d at 533, 535, 537-38. Just as the language barrier in *Ramirez* made it impossible for the prisoner to understand the relevant grievance procedure, Mr. Smallwood's mental capabilities created a barrier to his ability to comprehend the IDOC's grievance process. Mr. Smallwood, who has a documented low IQ and a long history of failing to complete the grievance process properly, informed the prison of that barrier, *see* ECF 46-2 at 54 ("I am incompetent to understanding the procedures"), yet there is no evidence that the prison took steps to communicate the grievance procedure in a way reasonably likely to be understood by him. Those facts support a conclusion that remedies were not available to Mr. Smallwood.

This Court's decision in *Weiss v. Barribeau*, 853 F.3d 873 (7th Cir. 2017), supports the same conclusion. There, this Court held that a grant of summary judgment for failure to exhaust was inappropriate because

the prisoner had alleged a mental health issue that, if true, might have made it impossible for him to comply with the grievance process even if he had been directly told what steps he needed to take. *Id.* at 874-75. The prisoner's mental stability, the Court found, was relevant to determine whether administrative remedies were, in fact, available to him. *Id.* If, in fact, his mental health issues prevented him from understanding and complying with the prison's grievance requirements, then the process was unavailable and exhaustion was not required. *Id.* at 875. *See also Lanaghan*, 902 F.3d at 688-89 (reversing dismissal for non-exhaustion where the "undisputed facts establish[ed] that [the prisoner] faced severe physical limitations" and could not complete the required grievance form). Here too, Mr. Smallwood has offered evidence that he suffers from a mental impairment that prevented him from understanding and complying with the prison's grievance requirements, rendering the process unavailable to him.

The district court took issue with Mr. Smallwood's allegation that he suffered from a mental impairment that prevented him from navigating the grievance process, concluding that, aside from an old IQ estimate, "there is no evidence in the record that Mr. Smallwood was

incapable of following the instructions on the returned grievance." ECF 67 at 7. Not so. Mr. Smallwood introduced into evidence an assessment from childhood that his IQ is around 75. ECF 64-1 at 1. The district court criticized the 40-year-old estimate, but in fact a person's IQ remains relatively stable throughout their life. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 42 (4th ed., text revision 2000 (DSM-IV-TR)). In addition, during Mr. Smallwood's criminal sentencing in 2001 an expert placed Mr. Smallwood's IQ somewhere between 70 and 75. *Smallwood v. State*, 773 N.E.2d 259, 262 (Ind. 2002); *see id.* Br. of Appellee, 2002 WL 33949298 at *2. But even putting aside his low IQ, viewing the evidence in the light most favorable to Mr. Smallwood reveals ample evidence that he could not understand the IDOC's grievance process. *See Ramirez*, 906 F.3d at 534.

For starters, if Mr. Smallwood actually understood the grievance process, one would expect that, at some point in the last seventeen years, he would have been able to correctly navigate it to completion. *See* ECF 46-2 at 1-3 (Mr. Smallwood's grievance log while in IDOC custody, with the first entry in December 2005). Yet the record does not reveal a single instance of Mr. Smallwood successfully making it through both the

threshold step of informal resolution and all three formal steps of IDOC's grievance process. It does, however, reveal eighteen *unsuccessful* attempts to even reach step one—the filing of a formal grievance. *See Id.* at 33-70. And nearly half of those were returned without consideration because he had not proffered evidence that he tried to informally resolve his complaint—the same deficiency that the district court concluded doomed him here. *See Id.*; *supra* 14-16.

Even the evidence that Defendants submitted to show that Mr. Smallwood *could* navigate the grievance process actually supports the opposite conclusion. Defendants argued in the district court that Mr. Smallwood's grievance log showed that he could understand the grievance process. ECF 58 ¶8 (citing Ex. C, which is identical to the grievance log found at ECF 46-2 at 1-3). But a close inspection of the evidence suggests the opposite. The record contains the actual grievances and responses for just three of the grievance-log entries. *See* ECF 46-2 at 4-13; *Id.* at 14-23; *Id.* at 24-26. And each of those grievances appears to contain the same misstep Mr. Smallwood made in this case: There is no indication that he attached proof of informal attempts at resolution to his formal grievances, and it is thus unclear why the Grievance Specialist

responded to them on the merits. *See id*. The grievance log further reveals that not a single grievance, out of the twenty-one included in the log, made it through all three steps of the process. *Id.* at 1-3. In fact, all but one did not even make it past step one. *Id*.

As for the district court's conclusion that Mr. Smallwood's coherent pleadings somehow indicate that he was capable of navigating the grievance process, it is also belied by the record. Here, it is obvious that Mr. Smallwood was not litigating on his own. *Cf. Moore v. Texas*, 139 S. Ct. 666, 671 (2019) ("[T]he appeals court emphasized Moore's capacity to communicate, read, and write based in part on *pro se* papers Moore filed in court. … That evidence is relevant, but it lacks convincing strength without a determination about whether Moore wrote the papers on his own[.]"). Indeed, several of his pleadings expressly indicate that a "writ writer" assisted him. *See*, *e.g.*, ECF 1 at 16; ECF 15 at 19. And his filings in his prior, similar lawsuit, further indicate that he was not responsible for the coherency of his court filings. In asking the district court to reconsider his motion for counsel, Mr. Smallwood asserted that "his comprehension skills is at a low level that constitutes in incompetent in understanding in even English" and that all of his filings had been done

by a writ writer. *Smallwood v. Williams, et al.*, 1:18-cv-1506-RLY-MPB (S.D. Ind. Oct. 31, 2018), ECF 42 at 2-3.

Finally, the Supreme Court has recognized the significance of a low IQ in shaping a person's capacity to reason, further bolstering a conclusion that Mr. Smallwood's IQ should have carried significant weight in the district court's availability analysis here. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court categorically banned the death penalty for capital defendants with an intellectual disability because such persons have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318. The Court cited definitions of intellectual disability which, by their express terms, rejected a strict IQ cut off, and instead suggested that intellectual disability is characterized by IQs "between 70 and 75." *Id.* at 309 n.5. Mr. Smallwood's approximate IQ of 75 is thus indicative of a cognitive impairment severe enough that the Constitution would forbid executing him due, in part, to his diminished ability to understand and process information. That same reasoning supports a finding that his low IQ

diminished his ability to understand and properly navigate the IDOC's grievance system. In other words, if his IQ is enough to potentially disqualify him from the death penalty, it should be enough to satisfy the PLRA's exhaustion requirement.

At this stage, it was Defendants' burden to show that there is no material issue of fact regarding whether the IDOC's grievance process was "capable of use" by Mr. Smallwood. *See Gooch*, 24 F.4th at 628. A reasonable inference from the evidence is that, because of his mental capabilities, it was not. At a minimum, though, Defendants are not entitled to summary judgment on exhaustion, which would imply that the *only* reasonable inference is that the grievance process *was* capable of use. *See Weiss*, 853 F.3d at 874.

2. Defendants, by confining Mr. Smallwood in restrictive housing and subjecting him to recurring moves, thwarted him from accessing the help he needed to properly follow the grievance process.

On top of his limited mental capabilities, Mr. Smallwood's housing circumstances also support a finding that the prison's grievance process was unavailable to him.

Under *Ross*, administrative remedies are not "available" when "prison administrators thwart inmates from taking advantage of the grievance process through machination, misrepresentation, or intimidation." 578 U.S. at 644; *see Ramirez*, 906 F.3d at 538. Such thwarting by prison officials need not be malicious or nefarious to render administrative remedies unavailable. *See Lanaghan*, 902 F.3d at 688 ("[A] grievance procedure can be unavailable even in the absence of affirmative misconduct. The term 'available' is given its ordinary meaning, and it does not include any requirement of culpability on the part of the defendant."). This is in line with the text of § 1997e(a), which asks only if remedies were unavailable and remains agnostic as to how they got that way.

Here, prison officials thwarted Mr. Smallwood's ability to access the grievance process for his claims by throwing him into restrictive housing immediately following the forced blood draw and sexual abuse. In so doing, they separated him from anyone who could have helped him navigate the grievance process. ECF 63 at 3. They then transferred him between four different cells in two separate cell houses, further inhibiting his already diminished ability to file a grievance. *Id.*

This Court has recognized that preventing a prisoner from accessing the help he needs to properly file a grievance can thwart a prisoner from exhausting. That is so whether or not the defendants knew the prisoner needed help, since the "proper focus" is simply "whether [a prisoner] was not able to file the grievance … through no fault of his own." *Lanaghan*, 902 F.3d at 688. In *Lanaghan*, for instance, this Court held that the PLRA's exhaustion requirement was no barrier where the "undisputed facts establish[ed] that [the prisoner] faced severe physical limitations" that rendered him incapable of filling out a grievance form himself, and prison officials prevented him from obtaining assistance from other prisoners. 902 F.3d at 688-89. And in *Pavey v. Conley*, 170 F. App'x 4 (7th Cir. 2006), this Court similarly held that a grievance

procedure might be unavailable to a prisoner who could not write because of an injury to his arm and was isolated from anyone who could help him. *Id.* at 5. The Court noted that when "inmates cannot comply with [a] grievance procedure without essential help," failure "to facilitate the grievance process effectively renders administrative remedies unavailable." *Id.* at 9. Like the prisoners in *Langahan* and *Pavey*, Mr. Smallwood also did not have access to people to help him navigate the grievance process once he was placed in restrictive housing. In fact, his circumstances made it harder to file a grievance than the prisoners in either of those cases: he was moved around from cell to cell and had just been the victim of extreme physical and sexual violence.

In short, Mr. Smallwood's diminished mental capabilities, coupled with his relegation to restrictive housing and frequent moves, made it impossible for him to properly navigate the prison's grievance process. Administrative remedies were therefore not available to him.

C. To Make Administrative Remedies Available, Prison Officials Must Communicate Them In A Way That A Prisoner Can Understand.

In addition to the reasons stemming from the PLRA's plain text and precedent, the IDOC's own grievance procedures support a finding that

remedies were unavailable to Mr. Smallwood. Those policies recognize that some prisoners' individual capabilities may cause them trouble comprehending the grievance process and mandate that the prison "shall ensure that the offender grievance process is explained to offenders whose primary language is other than English, or has a visual, hearing, or mental impairment." ECF 46-3 at 7. Specifically, IDOC's guidelines require that "[t]here shall be mechanisms in place to ensure that the offender grievance process is understood by all offenders." *Id*. This Court has recognized similar policies as relevant to the availability analysis. *See Weiss*, 853 F.3d at 875 (citing to a Wisconsin law "acknowledg[ing] that some inmates, including the 'impaired, handicapped, or illiterate,' may need assistance to be able to file grievances, and order[ing] prison administrators not to 'exclude' such inmates from 'full participation' in the procedure." (quoting Wis. Admin. Code § DOC 310.09(7))).

Defendants, who bear the burden on non-exhaustion, did not offer any evidence at summary judgment that the prison took steps to ensure that the grievance process was explained to Mr. Smallwood in a way that accounted for his mental impairment. Indeed, they said only that: "As an inmate incarcerated inside of IDOC, Plaintiff has access to the offender

grievance process. The offender grievance process is noted in the offender handbook and provided to offenders upon arrival at PCF." ECF 58 ¶5. On the other hand, there is evidence in the record that the prison was aware that Mr. Smallwood could not understand the grievance process—he had a documented long history of failed grievance attempts—and did nothing to assist him. *See*, *e.g.*, ECF 46-2 at 54 (writing in a grievance appeal: "I am not familiar with the policy and administrative procedures … because I am incompetent to understanding the procedures."); *see also Ramirez*, 906 F.3d at 535.

The Defendants should not be entitled to take advantage of Mr. Smallwood's purported failure to follow IDOC procedures, when, in the first instance, the prison itself did not follow its own procedures relating to exhaustion. *See Jones*, 549 U.S. at 218 ("[I]t is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion."); *see also Shifflett v. Korszniak*, 934 F.3d 356, 367 (3d Cir. 2019) ("The PLRA requires strict compliance by prisoners seeking redress of their grievances, and by the same token we hold that it requires strict compliance by prison officials with their own policies."). Because prison officials violated their own regulations by failing to

ensure that the grievance process was communicated to Mr. Smallwood in a way that he was reasonably likely to understand, they may not take advantage of those same regulations in seeking dismissal of his case for failure to exhaust. In short, prison officials may use grievance processes as a shield, but not as a sword.

II. At Minimum, Mr. Smallwood's Sexual-Abuse Claim Should Have Been Allowed To Proceed.

Even if this Court concludes that administrative remedies were available to Mr. Smallwood as to his excessive-force and denial-of-medical-care claims, his claim of sexual abuse should move forward. Mr. Smallwood clearly grieved an incident of sexual abuse: "I was sexually abused by 5/6 custody officers 10-22-17 Sunday in the infirmary returning back to my cell HRU." ECF 46-2 at 63. Viewing the evidence in a light most favorable to Mr. Smallwood, the Officer Defendants held him down with a knee to his back, pulled his pants and underwear down to his ankles, and inserted a cold object into his rectum—all while he was restrained and pleading for them to stop. *See supra* at 10-11. Nevertheless, the district court dismissed Mr. Smallwood's sexual-abuse claim along with the others, concluding that, by failing to show that he had attempted to informally grieve his complaint at the time he filed his

formal grievance, he had not "strictly follow[ed] the required grievance process." SA-6. That was in error.

Congress enacted the Prison Rape Elimination Act ("PREA") to address the "epidemic character of prison rape and the day-to-day horror experienced by victimized inmates." 34 U.S.C.A. § 30301(12). Special rules imposed by the Act forbid a prison from "require[ing] an inmate to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse," 28 C.F.R. § 115.52(b)(3), and "impos[ing] a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse," *id.* § 115.52(b)(1).

The IDOC's grievance process, which a prisoner must use to grieve claims of sexual abuse, accounts for PREA's exhaustion restrictions by making two relevant tweaks. ECF 46-3 at 2-6. First, it asserts that "[t]he Department shall not require an offender to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse."[13] *Id.* at 5. Second, the process removes "the standard

[13] The Policy states that sexual abuse "consists of non-consensual sex acts, abusive sexual contact, and staff sexual misconduct." ECF 46-3 at 5.

time limits on submission for a grievance regarding an allegation of sexual abuse." *Id.*

The prison thwarted Mr. Smallwood from properly using the grievance process for his sexual-abuse claim by misapplying its own grievance rules for such claims and misleading him about what was required to exhaust that claim. *See Ross*, 578 U.S. 634-35.

To start, where a prison does not comply with its own grievance policies, administrative remedies are unavailable. *See Does 8-10 v. Snyder*, 945 F.3d 951, 966 (6th Cir. 2019) (finding that, by failing to provide necessary forms and respond to complaints, "prison officials effectively prevented the use of the PREA grievance process, even if that process could be an 'otherwise proper procedure.'" (citing *Ross*, 578 U.S. at 644)); *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006) ("Prison officials may not take unfair advantage of the exhaustion requirement, however, and a remedy becomes 'unavailable' if prison employees do not respond to a properly filed grievance."). Here, when Mr. Smallwood initially raised his allegation of sexual abuse in a formal grievance, the Grievance Specialist returned it as deficient with an instruction that Mr. Smallwood needed to attach any attempt he had made to informally

resolve his complaint. ECF 46-2 at 62.[14] But the IDOC policies state that informal resolution is not required for sexual-abuse claims. ECF 46-3 at 5. The violations did not end there. On November 5, 2018, for example, Mr. Smallwood filed a request for an interview to the grievance department, stating that he had filed several complaints regarding the October 22, 2017, incident of sexual abuse by the Officer Defendants. ECF 15-1 at 2. The prison returned that request as untimely, *id.*, even though the IDOC policies are explicit that the proscribed time-limits do not apply to sexual-abuse claims. ECF 46-3 at 5.

The prison's failure to heed its procedural rules governing sexual-abuse grievances, on its own, rendered remedies unavailable to Mr. Smallwood. But here that failure also misled Mr. Smallwood about what was required of him to pursue a grievance for his sexual-abuse claim. "Administrative remedies may be effectively unavailable if prison officials '… inaccurately describe the steps [an inmate] needs to take to pursue it.'" *Davis v. Mason*, 881 F.3d 982, 986 (7th Cir. 2018) (quoting

[14] Indeed, the affidavit of Defendants' grievance expert explicitly states that Mr. Smallwood had alleged sexual abuse but that they still rejected the grievance for failure to include proof of informal attempts to resolve the complaint. ECF 59-1 ¶17.

Pavey v. Conley, 663 F.3d 899, 906 (7th Cir. 2011)); *see also Hardy v. Shaikh*, 959 F.3d 578, 586-87 (3d Cir. 2020) (concluding that a "misleading or deceptive instruction" may qualify as misrepresentation under *Ross*). Here, prison officials inaccurately described the steps Mr. Smallwood needed to take to pursue a remedy for his sexual-abuse claim when they stated that he needed to make attempts to resolve the issue informally, and later told him his attempts to use the grievance process were untimely. Thus Mr. Smallwood—who already suffers from a mental impairment that makes understanding the grievance process difficult, *see supra* at 29-31—was misled about what he needed to do to properly grieve the sexual abuse.

Because both PREA and the prison's grievance process specifically exempt sexual-abuse claims from the informal-resolution requirement, the district court erred in dismissing Mr. Smallwood's sexual-abuse claim for failure to check this particular box.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment on exhaustion grounds and remand the case for consideration of the merits of Mr. Smallwood's claims.

Dated: April 6, 2022

Respectfully Submitted,

/s/ Rosalind E. Dillon

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CERTIFICATE OF COMPLIANCE WITH FRAP RULE 32(A)(7), FRAP RULE 32(G) AND CR 32(C)

The undersigned, counsel of record for the Plaintiff-Appellant, Howard Smallwood, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 9,630 words.

Dated: April 6, 2022

/s/ Rosalind E. Dillon
Rosalind E. Dillon

STATEMENT CONCERNING THE APPENDIX

Pursuant to Circuit Rule 30(d), I certify that all the materials required by Circuit Rules 30(a) and (b) are included in the attached appendix.

Date: April 6, 2022

/s/Rosalind E. Dillon
Rosalind E. Dillon

REQUIRED
SHORT APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HOWARD SMALLWOOD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:20-cv-00404-JPH-DML
	)	
LT. DON WILLIAMS, et al.,	)	
	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF FINAL JUDGMENT

Plaintiff Howard Smallwood, an Indiana inmate, brought this action under 42 U.S.C. § 1983 alleging that the defendants violated his Eighth Amendment rights on October 22-23, 2017, by denying him the right to refuse a blood draw, using excessive force against him, and sexually assaulting him. Mr. Smallwood also alleges that defendant Dr. Talbot failed to adequately treat his injuries based on defendant Wexford of Indiana LLC's ("Wexford") policy or practice of providing constitutionally inadequate medical care.

The defendants have moved for summary judgment, arguing that Mr. Smallwood failed to exhaust his available administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), before filing this lawsuit.[1] Because the designated evidence shows that Mr. Smallwood did not exhaust available administrative remedies before bringing this action, the defendants' motions for summary judgment, dkt. [49] and dkt. [57], are **granted**.

[1] Defendants also argue that Mr. Smallwood's suit is barred by the statute of limitations. Because the Court finds that Mr. Smallwood's failure to exhaust available administrative remedies bars his suit, the Court does not address Defendants' statute of limitations argument.

I. Summary Judgment Standard

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A "material fact" is one that "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party must inform the court "of the basis for its motion" and specify evidence demonstrating "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party meets this burden, the nonmoving party must "go beyond the pleadings" and identify "specific facts showing that there is a genuine issue for trial." *Id.* at 324.

In ruling on a motion for summary judgment, the Court views the evidence "in the light most favorable to the non-moving party and draw[s] all reasonable inferences in that party's favor." *Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir. 2009) (citation omitted). It cannot weigh evidence or make credibility determinations on summary judgment because those tasks are left to the fact-finder. *See O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 630 (7th Cir. 2011). The Court need only consider the cited materials, Fed. R. Civ. P. 56(c)(3), and the Seventh Circuit Court of Appeals has repeatedly assured the district courts that they are not required to "scour every inch of the record" for evidence that is potentially relevant to the summary judgment motion before them. *Grant v. Trustees of Ind. Univ.*, 870 F.3d 562, 573-74 (7th Cir. 2017).

A dispute about a material fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. If no reasonable jury could find for the non-moving party, then there is no "genuine" dispute. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

II. Exhaustion Standard

On a motion for summary judgment, "[t]he applicable substantive law will dictate which facts are material." *National Soffit & Escutcheons, Inc., v. Superior Systems, Inc.*, 98 F.3d 262, 265 (7th Cir. 1996) (citing *Anderson,* 477 U.S. at 248). The substantive law applicable to this motion for summary judgment is the PLRA, which requires that a prisoner exhaust available administrative remedies before bringing a suit concerning prison conditions. 42 U.S.C. § 1997e(a). "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle,* 534 U.S. 516, 532 (2002) (citation omitted).

"Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Woodford v. Ngo,* 548 U.S. 81, 90-91 (2006) (footnote omitted); *see also Dale v. Lappin,* 376 F.3d 652, 655 (7th Cir. 2004) ("In order to properly exhaust, a prisoner must submit inmate complaints and appeals 'in the place, and at the time, the prison's administrative rules require.'") (quoting *Pozo v. McCaughtry,* 286 F.3d 1022, 1025 (7th Cir. 2002)). "In order to exhaust administrative remedies, a prisoner must take all steps prescribed by the prison's grievance system." *Ford v. Johnson,* 362 F.3d 395, 397 (7th Cir. 2004).

An inmate may not satisfy the PLRA's exhaustion requirement by exhausting administrative remedies *after* filing suit. *See id.* (noting that lawsuits are routinely dismissed when plaintiffs exhaust their administrative remedies while the litigation is pending).

As the party asserting the exhaustion defense, the defendants bear the burden of establishing that the administrative remedies upon which they rely were available to the plaintiff. *See Thomas v. Reese,* 787 F.3d 845, 847 (7th Cir. 2015) ("Because exhaustion is an affirmative

defense, the defendants must establish that an administrative remedy was available and that [the plaintiff] failed to pursue it."). "[T]he ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'" *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016) (internal quotation omitted). "[A]n inmate is required to exhaust those, but only those, grievance procedures that are capable of use to obtain some relief for the action complained of." *Id.* at 1859 (internal quotation omitted).

III. Facts

The events alleged in Mr. Smallwood's complaint occurred on October 22-23, 2017, while he was confined by the Indiana Department of Correction ("IDOC") at Pendleton Correctional Facility. The IDOC has a grievance process which is intended to permit inmates to resolve concerns and complaints relating to their conditions of confinement before filing suit in court. The grievance process consists of three steps. First, an inmate must file a formal grievance within 10 business days of the incident if informal attempts to resolve his concern fail. The grievance policy requires the inmate to provide evidence of his attempts to informally resolve the issue. The policy suggests request for interview forms or other correspondence as examples of acceptable evidence. Dkt. 59-2 at 8-9 ("Before filing a grievance, an offender is required to attempt to resolve a complaint informally and provide evidence . . . of the attempt."). Next, if the inmate is not satisfied with the response to the formal grievance, he may submit an appeal to the warden. Finally, if the inmate is not satisfied with the response from the warden or the warden's designee, he may file an appeal to the IDOC grievance manager. Exhaustion of the grievance procedure requires pursuing a grievance to the final step. Dkt. 46-3 at 8-14; dkt. 59-2 at 8-14.

Mr. Smallwood produced copies of two requests for interview he says he submitted to the facility superintendent on October 23, 2017, and October 31, 2017, as part of the informal

grievance process. Dkt. 64 at 4-5. IDOC grievance records for Mr. Smallwood reflect that he submitted a formal grievance regarding the October 22, 2017, incident on November 1, 2017. Dkt. 59-4. The return grievance stated: "There is no indication that you tried to informally resolve your complaint. If you have tried to resolve it informally, please fill out the grievance form to indicate that. If you have not tried to resolve it informally, you have five (5) days to begin that process." Dkt. 59-5. Mr. Smallwood failed to follow these instructions or to provide proof of his October 23, 2017, and October 31, 2017, requests for interview to show that he had completed the informal process. Instead, he waited until May 3, 2018, to raise the October 22, 2017, incident in an appeal of a separate grievance. Dkt. 59-6. The grievance was rejected because it was filed too late. Dkt. 59-7.

On May 16, 2018, Mr. Smallwood filed a lawsuit nearly identical to this suit. *Smallwood v. Williams*, et al., 1:18-cv-1506-RLY-MPB. The defendants moved for summary judgment on the basis that Mr. Smallwood had not exhausted available administrative remedies. Mr. Smallwood agreed and moved to voluntarily dismiss the lawsuit due to his failure to exhaust on October 29, 2018. *See* dkt. 44 in case no. 1:18-cv-1506-RLY-MPB.

Mr. Smallwood next submitted a request for interview form on November 5, 2018, to attempt to informally grieve the October 22, 2017, incident. It was rejected as untimely. Dkt. 59-8. Mr. Smallwood appealed, but the appeal was rejected both because it was untimely and because he had skipped the formal grievance step. Dkt. 59-9; dkt. 59-10.

Mr. Smallwood asserts that he was unable to navigate the grievance process due to his low IQ. In support of his argument, he provides an educational record from 1970 which calculated that Mr. Smallwood was approximately two years behind in development when he was six years old.

Dkt. 64 at 3. The record lists his "age level compared IQ" as 75 and his "grade lvl [sic] compared IQ" as 86. *Id*.

IV. Discussion

Strict compliance is required with respect to exhaustion, and a prisoner must properly follow the prescribed administrative procedures in order to exhaust his remedies. *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006). The PLRA's exhaustion requirement is not subject to either waiver by a court or futility or inadequacy exceptions. *Booth v. Churner*, 532 U.S. 731, 741, n.6 (2001); *McCarthy v. Madigan*, 503 U.S. 140, 112 S. Ct. 1081 (1992) ("Where Congress specifically mandates, exhaustion is required.").

Mr. Smallwood did not timely complete the grievance process as the grievance policy required because he did not show at the time that he had attempted to informally grieve his complaint. He may have attempted an informal resolution, but even if he did, he did not attach proof of his efforts to his formal grievance—which is required by the grievance policy. When the grievance was rejected with information on how to cure the lack of evidence of an informal grievance, Mr. Smallwood could have returned the grievance with an explanation of his attempts at informal resolution. He did not do so.[2] He therefore did not strictly follow the required grievance process.

Mr. Smallwood next argues in his unsworn response brief that he did not fully understand the requirements of the grievance process due to his low IQ and that he was moved to several different cells after the October 22, 2017, incident which made it difficult for him to complete the

[2] Mr. Smallwood also acknowledged his failure to exhaust available administrative remedies when he moved to voluntarily dismiss his first lawsuit. *Smallwood v. Williams*, et al., 1:18-cv-1506-RLY-MPB, dkt. 44 at ¶ 6 ("Plaintiff admits that he was not fully completed in his exhaustion [of] administrative remedies prior to filing this action.").

grievance process. Dkt. 63 at 3. He also argues that prison staff often fail to respond to informal attempts to resolve a grievance. *Id*. at 2-4.

Mr. Smallwood was estimated to have an IQ between 75 and 86 in 1970. Aside from the 40-year-old IQ estimates, there is no evidence in the record that Mr. Smallwood was incapable of following the instructions on the returned grievance. His filings in this case have been coherent and he has responded appropriately to orders from the Court. And although he argues that sometimes officers would not pick up grievances from the restricted housing unit for a few days, Mr. Smallwood has provided no admissible evidence that he was prevented from filing a response to his returned grievance between its return on November 6, 2017, and his next submitted grievance form addressing the issue on May 3, 2018.

The record demonstrates that Mr. Smallwood failed to exhaust available administrative remedies. The consequence of these circumstances, in light of 42 U.S.C. § 1997e(a), is that this action should not have been brought and must now be dismissed without prejudice. *See Fluker v. County of Kankakee*, 741 F.3d 787, 791 (7th Cir. 2013) (summary judgment for failure to exhaust administrative remedies as required by Prison Litigation Reform Act should result in dismissal without prejudice), citing *Ford v. Johnson*, 362 F.3d 395, 400–01 (7th Cir. 2004).

V. Conclusion

The defendants' motions for summary judgment, dkt. [49] and dkt. [57], are **granted**. Final judgment in accordance with this Order shall issue at this time.

SO ORDERED.

Date: 9/30/2021

James Patrick Hanlon

James Patrick Hanlon
United States District Judge
Southern District of Indiana

Distribution:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HOWARD SMALLWOOD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:20-cv-00404-JPH-DML
	)	
LT. DON WILLIAMS, et al.,	)	
	)	
Defendants.	)	

FINAL JUDGMENT

The Court now enters FINAL JUDGMENT. The action is dismissed without prejudice.

Date: 9/30/2021

Roger A. G. Sharpe, Clerk of Court

By: Pam Pope
Deputy Clerk

James Patrick Hanlon
James Patrick Hanlon
United States District Judge
Southern District of Indiana

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UNITED STATES COURT OF THE SOUTHERN DISTRICT

Howard Smallwood

Plaintiff

V. Don Williams, ETAL.

Defendants

CAUSE # 1-20-CV-00404

Notice of Appeals

Notice is hereby given that Howard Smallwood, Plaintiff and the above name cause; Hereby Appeal to the United States court of Appeals for the 7th circuit from the final Judgement enter in this action on 9-30-21.

Signi: Howard Smallwood

Date: 10-28-21

Declaration

For The United States Of The Southern District

Howard Smallwood

Plaintiff

V. Don Williams, ETAL.

Defendant

Cause # 1-20-cv-00404

Declaration

I am an inmate at Pendleton Correctional Facility. I am depositing Notice of Appeals in this case in the institutional mail on this Date 10-28-21. I Howard Smallwood, do Hereby Swear and Affirm under the penalties of perjury, that the foregoing are true and correct.

28-USC SEC. 1746

18-USC SEC. 1621

JOHN HENRY COOK
NOTARY PUBLIC
SEAL
DELAWARE COUNTY STATE OF INDIANA
MY COMMISSION EXPIRES AUGUST 24, 2024

John Cook
John Cook

Sign X Howard Smallwood

Date: 10-28-21