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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

Administrative remedies were not "available" to Mr. Smallwood under the Prison Litigation Reform Act ("PLRA"). *See* 42 U.S.C. § 1997e(a). The Supreme Court, this Court, and other circuits agree that courts must consider an individual's personal circumstances in conducting an availability analysis. And Defendants do not contest Mr. Smallwood's personal circumstances—he has an IQ low enough to potentially disqualify him from the death penalty because of a diminished capacity to understand and process information, and, in his seventeen years of incarceration, he has never successfully completed all the steps of the Indiana Department of Corrections' byzantine grievance process. That should be the end of the matter. But even if Mr. Smallwood's intellectual disability were not enough on its own to render administrative remedies unavailable to him, prison officials thwarted whatever miniscule chance he had at exhausting remedies when they threw him into isolation—a fact Defendants concede is pertinent to the question of availability—and thereby separating him from anyone who could have helped him navigate the grievance process.

Defendants argue primarily that they made remedies available to all prisoners at Pendleton, including Mr. Smallwood, by explaining the process "in terms intelligible to lay persons." Defendants' Br. at 15. That argument is divorced from the law of this Court, which is clear that, for administrative remedies to be available, they must be explained to a prisoner "in a way that *he* might reasonably understand." *Ramirez v. Young*, 906 F.3d 530, 540 (7th Cir. 2018) (emphasis added). In the alternative, Defendants insist that there is no evidence indicating that prison officials knew that Mr. Smallwood had an intellectual disability and did not understand the grievance process, so administrative remedies were available. That argument not only ignores the fact that the knowledge of prison officials is not part of the availability analysis, but also that the record contains ample evidence that prison officials *did* have knowledge of Mr. Smallwood's intellectual disability.

Defendants' remaining arguments also fail. First, Mr. Smallwood did not forfeit his appellate arguments regarding the unavailability of remedies for his sexual-abuse claim—arguments that Defendants notably do not challenge on the merits. Indeed, Mr. Smallwood unquestionably argued below that administrative remedies were not

available to him for his sexual-abuse claim, and he is entitled to present more complete and focused arguments to support that claim on appeal. Second, Defendants' argument that Mr. Smallwood's claims are barred by the statute of limitations is similarly unavailing. This issue is not ripe for this Court's review. The district court ordered summary judgment only as to exhaustion, and so the record is underdeveloped as to the statute of limitations. Even so, the limited evidence in the record supports a basis for tolling the statute of limitations: Mr. Smallwood, a prisoner with a documented low IQ, could not meet the deadline to file the complaint through no fault of his own, but rather because he was denied adequate law library time. The district court is thus better-positioned to hash this factually-dependent issue out in the first instance, after further development of the record.

In all, Defendants have failed to meet their burden to "show beyond dispute that remedies were available" to Mr. Smallwood for his claims resulting from a violent and unnecessary forced blood draw and a traumatic sexual assault. *Ramirez*, 906 F.3d at 534. The district court was wrong to conclude otherwise, and this Court should reverse and remand.

ARGUMENT

I. No Administrative Remedies Were "Available" To Mr. Smallwood.

A. Mr. Smallwood's Diminished Mental Capacity Prevented Him From Understanding The Multi-Tiered Grievance Process.

It is well settled that courts must account for a prisoner's individual circumstances when analyzing whether administrative remedies were "available" under the PLRA. And Defendants' suggestion that an individual's inability to navigate a grievance process cannot render remedies unavailable, Defendants' Br. at 15-16, does not contend with the fact that the Supreme Court, this Court, and other circuits hold that where a grievance process is not "capable of use" by an individual *in a plaintiff's circumstances*, remedies are not available, *see* Opening Br. at 24-28 (collecting cases). Indeed, this Court in *Ramirez* was crystal clear that the availability "analysis must … account for individual capabilities." *Ramirez*, 906 F.3d at 535.

Defendants do not quarrel with the fact that Mr. Smallwood's personal circumstances include a documented IQ of 75—an IQ that "indicates a significant limitation in intellectual functioning." *Defining*

Criteria for Intellectual Disability, Am. Ass'n on Intellectual and Developmental Disabilities (last accessed July 27, 2022).[1] Defendants also do not dispute that, as explained in the opening brief, the Supreme Court, in banning the death penalty for capital defendants with an intellectual disability, recognized that a low IQ indicates a person's "diminished capacit[y] to understand and process information, to communicate, [and] to engage in logical reasoning." *Atkins v. Virginia*, 536 U.S. 304, 309 n.5, 318 (2002). Applying that same reasoning, Mr. Smallwood's low IQ is unassailable evidence of his inability to understand and properly navigate the IDOC's grievance system. *See* Opening Br. at 35-36.

1. Instead, Defendants sweep Mr. Smallwood's intellectual disability aside and argue that the prison took reasonable steps *generally* to inform prisoners at Pendleton about the prison's grievance process, which, they believe, is all that was required of them to make administrative remedies available to Mr. Smallwood. Defendants' Br. at 10, 14. As evidence, they point to the fact that the prison gave every prisoner a handbook explaining the prison's multi-level grievance process

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

at an orientation upon their arrival at Pendleton. Defendants' Br. at 14-15. That evidence is irrelevant.

Administrative remedies are not available to a prisoner unless the prison informs him "of its grievance process in a way that *he* might reasonably understand." *Ramirez*, 906 F.3d at 540 (emphasis added); *see also Ross v. Blake*, 578 U.S. 632, 648 (2016) (remanding case and directing lower court to consider whether an administrative grievance process "was knowable by a[ ] prisoner *in Blake's situation*."). So, although evidence that officials provide prisoners with a handbook explaining the grievance process might suffice to establish that many of the prisoners knew of the grievance process, more may be required where the usual methods of publicizing a grievance procedure are ineffective for particular prisoners, such as those with mental impairments. *See Lanaghan v. Koch,* 902 F.3d 683, 688 (7th Cir. 2018) (noting that a prison's specific "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" with disabilities).

That is especially so where, as here, a grievance process is anything but straightforward. As amici for Mr. Smallwood explain, the IDOC's

grievance process is exceedingly complex, in part because it is described in a lengthy "15 single-spaced pages, requires the use of at least three different forms, and cross-references at least three other policies." Br. of Amici Curiae at 8. Particularly relevant here, the process's explanation of what types of evidence will suffice to establish an attempt at informal resolution is especially confusing. The rules say that a prisoner is "required to attempt to resolve a complaint informally and provide evidence (e.g., 'To/From' correspondence, State Form 36935, 'Request for Interview') of the attempt." ECF 46-3 at 8-9. But the "e.g." suggests a nonexhaustive list. And, when Mr. Smallwood's grievance was returned as deficient, it was with instructions that if he had already tried to resolve his complaint informally he should "fill out the grievance form to indicate that." *Id*. at 62. Based on that information, it is unclear why Mr. Smallwood's grievance, which explained that he "contacted Sgt. Dinkin and Officer William," was insufficient to satisfy the informal resolution requirement. *Id*. at 63.

Moreover, IDOC's *own grievance rules* recognize that simply providing prisoners a handbook is not sufficient to make remedies available for certain prisoners, and mandates that "there shall be

mechanisms in place to ensure that the offender grievance process is understood by all offenders"—specifically those who have "a visual, hearing, *or mental impairment*." ECF 46-3 at 7 (emphasis added); *see also* Opening Br. at 39-42. Yet Defendants, who bear the burden on nonexhaustion, *see Thomas v. Reese*, 787 F.3d 845, 847 (7th Cir. 2015), have offered no evidence that they provided any training related to the 15-page grievance process, translated those procedures into a "plain English" format, or otherwise made the procedure understandable for Mr. Smallwood and others who are similarly-situated. *See id*.

At bottom, just as describing a grievance system in a language a prisoner cannot understand is "not enough to render those remedies 'available' to the prisoner," describing the grievance system in a manual that is too complex for a person with a mental impairment to understand was "not enough to render those remedies 'available'" to Mr. Smallwood. *Ramirez*, 906 F.3d at 533; *see Lanaghan*, 902 F.3d at 688 (noting that "[t]he availability of a grievance procedure is not an "either-or" proposition, but is instead a "fact-specific inquiry" that must account for a prisoner's personal characteristics (quoting *Kaba v. Stepp*, 458 F.3d 678, 685 (7th Cir. 2006)).

2. Relatedly, Defendants argue that even if Mr. Smallwood's intellectual disability made it impossible for him to understand the grievance process, that alone cannot render administrative remedies unavailable because prison officials did not *know* of his mental impairment. Defendants' Br. at 10, 16. Beyond the fact that it strains credulity—especially since all inferences must be drawn in Mr. Smallwood's favor—that prison officials, having interacted with Mr. Smallwood over many *years*, would not have known that he suffers from a mental impairment, that argument fails.

As an initial matter, Defendants' purported ignorance of Mr. Smallwood's inability to navigate the prison's intricate grievance process is irrelevant because the knowledge of the prison officials is not part of the availability inquiry. The text of the PLRA's exhaustion provision asks only if remedies were unavailable; nothing in the text indicates that it matters *how* they became unavailable, or that officials *know* they are unavailable. 42 U.S.C. § 1997e(a). And this Court did not mince words in *Lanaghan*: "The term 'available' is given its ordinary meaning, and it does not include any requirement of culpability on the part of the defendant." 902 F.3d at 688; *see also Hernandez v. Dart*, 814 F.3d 836,

842 (7th Cir. 2016) ("'Unavailability' extends beyond 'affirmative misconduct' to omissions by prison personnel, particularly failing to inform the prisoner of the grievance process."). Here, Defendants have offered no evidence that they took any steps at all to ensure that the complicated grievance process was explained in a way that someone with a mental impairment could understand. *See Ramirez*, 906 F.3d at 540. And that failure, coupled with Mr. Smallwood's personal circumstances, meant that he, "through no fault of his own, could not have accessed the grievance procedure," rendering administrative remedies unavailable. *Lanaghan*, 902 F.3d at 688.

Despite Defendants' argument to the contrary, *Ramirez v. Young* did not adopt a knowledge requirement. Defendants' Br. at 16-17. The prison officials in that case may have known that Ramirez could not speak English, but the Court's analysis did not rest solely upon that knowledge. *Ramirez*, 906 F.3d at 535. In fact, the *Ramirez* Court, in keeping with this Court's precedent, observed that (1) "remedial processes are available only if communicated in a way reasonably likely to be understood"; and (2) the availability "analysis must account for individual capabilities." *Id*. Neither principle hinges on the knowledge of

prison officials—the focus is on the prisoner. And, as to the second principle, the Court cited to *Weiss v. Barribeau*, where this Court had excused a failure to exhaust where "defendants failed to show that existing procedures could be used by [a] prisoner suffering from mental illness," without incorporating any sort of knowledge requirement. *Id.* (citing *Weiss*, 853 F.3d 873, 875 (7th Cir. 2017)). That makes sense, as "the proper focus is … whether [a prisoner] was not able to file the grievance within the time period through no fault of his own," not whether prison officials acted with any sort of culpability. *Lanaghan*, 902 F.3d at 688. In short, although the officials in *Ramirez* clearly knew of his lack of English, and that knowledge may have featured in the decision, the Court did not hold that knowledge was *necessary* for unavailability—nor could it have done so without running afoul of *Weiss*, *Lanaghan*, and *Hernandez*.

At any rate, Defendants' argument that they did not know that Mr. Smallwood had an intellectual disability and could not navigate the grievance process is belied by the record. In fact, Mr. Smallwood offered evidence that Defendants knew or should have known his mental capacity made it impossible for him to navigate the grievance process.

Opening Br. at 32-33. First, Mr. Smallwood, in an unrelated (and failed) grievance appeal, specifically notified the grievance coordinator of his inability to understand the prison's complicated grievance process: "I am not familiar with the policy and administrative procedures … because I am incompetent to understanding the procedures." ECF 46-2 at 54. Defendants say nothing about this disclosure, essentially conceding that Mr. Smallwood put the prison on notice of his intellectual disability and inability to understand the grievance process.

Second, and consistent with his professed lack of understanding of the process, Mr. Smallwood had a long, documented history of failed grievance attempts. ECF 46-2 at 1-3; Opening Br. at 32-33 (explaining that the grievance log in the record does not reveal a single instance of Mr. Smallwood successfully exhausting administrative remedies). Defendants nevertheless suggest that this fact is not evidence that the prison knew, or should have known, that he could not do so because of an intellectual disability. Defendants' Br. at 16. That is an argument they are free to make to a jury. But, at this stage, the evidence shows not only that Mr. Smallwood, in seventeen years, never managed to properly navigate the grievance system to completion, but also that, in at least one

instance, he *told* the prison precisely why: He could not understand the process. That evidence, construed in Mr. Smallwood's favor, supports an inference that prison officials knew that his mental capacity made it impossible to navigate the complicated grievance process.

B. Defendants Prevented Mr. Smallwood From Exhausting Administrative Remedies.

If Mr. Smallwood's intellectual disability alone weren't enough to render remedies unavailable, his disability combined with the prison's actions—throwing him into isolation and moving him from cell to cell immediately following the use of force and sexual abuse—sealed his fate. *See* Opening Br. at 37-39. Those actions prevented Mr. Smallwood—whose low IQ made it impossible for him to complete the grievance process on his own—from accessing the help he needed to "tak[e] advantage of the grievance process," and thwarted him from exhausting administrative remedies. *Ross*, 578 U.S. at 644; *see also Ramirez*, 906 F.3d at 538. Notably, Defendants do not argue that Mr. Smallwood's confinement to isolation—i.e., part of his personal circumstances—is irrelevant to the availability inquiry.

1. Instead, Defendants simply assert that Mr. Smallwood failed to offer evidence that his placement in isolation and multiple cell

assignments actually prevented him from properly exhausting administrative remedies. Defendants' Br. at 10, 18.[2] But, recall that exhaustion is an affirmative defense, so the burden is on Defendants to show that it is beyond dispute that administrative remedies were available to Mr. Smallwood after the prison placed him in isolation. *See Thomas*, 787 F.3d 845 at 847. And the only evidence Defendants offer to support their argument that Mr. Smallwood *could* navigate the grievance system while in segregation is that he did, in fact, *try* to file a grievance. Defendants' Br. at 18. That argument misses the mark. At this stage, that evidence, and all reasonable inferences from it, must be construed in Mr. Smallwood's favor. *Ramirez*, 906 F.3d at 534. And the fact that he tried to, but ultimately could not, follow the grievance process while in isolation is itself evidence that the prison, by placing Mr. Smallwood in segregation away from those that could help him, thwarted him from exhausting administrative remedies. *See* Opening Br. at 37-39.

[2] Defendants suggest that Mr. Smallwood only raised information about his placement in segregation in his "unsworn response brief." Defendants' Br. at 18. Not so. In fact, Mr. Smallwood's verified complaint and verified amended complaint both assert that after the incident he was "placed in segregation." ECF 1 at 11; ECF 15 at 11.

2. Defendants also try to distinguish Mr. Smallwood's case from *Lanaghan v. Koch* and *Pavey v. Conley*—which hold that remedies might be unavailable where a prison prevents a prisoner who cannot file a grievance on his own from obtaining help—on the sole basis that the prisoners in those cases suffered from physical, rather than mental, impairments. Defendants' Br. at 18-19. But *Lanaghan* and *Pavey* rest simply on the fact that the prisoner could not file a grievance without assistance, not *why*, specifically, he could not do so. *See Lanaghan*, 902 F.3d at 688; *Pavey*, 170 F. App'x 4, 5 (7th Cir. 2006). It would be passing strange to differentiate between physical and mental impairments that make navigating a grievance system impossible, especially given this Court's precedent affirming that a mental impairment, just as a physical one, can prevent a prisoner from completing a grievance process. *See Weiss*, 853 F.3d at 875[3] (reversing where prisoner alleged he was

[3] Defendants' attempts to distinguish *Weiss* are futile. First, Defendants suggest that, unlike the prisoner in *Weiss* who had been hospitalized and therefore did not have access to the grievance system, Mr. Smallwood could access the grievance process—and "had used it at various stages" before the forced blood draw and sexual assault. Defendants' Br. at 16. That argument ignores the fact that even though Mr. Smallwood had tried to file grievances before, in seventeen years he never navigated the process to completion, which Defendants do not dispute. Opening Br. at 32-33; Defendants' Br. at 17. Second, Defendants assert that in *Weiss*

"grappling with serious mental illness" which left him unable to "obtain or complete the forms required to invoke [administrative remedies]."); *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). Here, just as in *Lanaghan* and *Pavey*, prison officials prevented Mr. Smallwood from obtaining assistance that he needed to properly file a grievance when they placed him in isolation—the fact that it was a mental, rather than a physical, impairment that necessitated that assistance is of no moment. *See* Opening Br. at 38-39.

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there was no evidence that the prisoner had received any instruction about what next step he should take to obtain relief, but here, prison officials returned Mr. Smallwood's grievance with instructions for how to continue the process. Defendants' Br. at 17. But in *Weiss* the fact that the prisoner did not receive further instructions was not dispositive. Indeed, this Court explained that even if the prisoner had received the instructions, "[g]iven the questionable state of his mental stability at the time, we cannot have any confidence that administrative remedies actually were available to him." *Weiss*, 853 F.3d at 875. So too here. Mr. Smallwood introduced evidence that he has a low IQ and, immediately after a traumatic forced blood draw and sexual assault, he was thrown into isolation. His mental state thus undermines "any confidence that" the Court might otherwise have that "administrative remedies actually were available" to him. *Id.*

II. Mr. Smallwood Adequately Preserved An Argument That Administrative Remedies Were Not Available To Him For His Sexual-Abuse Claim And Was Entitled To Elaborate On Appeal.

Defendants do not bother contesting the merits of Mr. Smallwood's arguments that administrative remedies were not available to him for his sexual-abuse claim. *See* Defendants' Br. at 19. Nor could they. The prison's grievance process and the Prison Rape Elimination Act are clear: A prisoner grieving a claim of sexual-abuse is not required to use any informal grievance process. ECF 46-3 at 5; 28 CFR § 115.52(b)(3). It is thus obvious that the district court erred—like the prison—in dismissing the sexual-abuse claim simply because Mr. Smallwood failed to offer evidence that he tried to informally resolve that claim. *See* Opening Br. at 42-46.

Instead, Defendants invite this Court to ignore Mr. Smallwood's specific (and meritorious) arguments as to his sexual-abuse claim—that the prison thwarted him from properly using the grievance process by misapplying its own grievance rules and misleading him about what was required of him to exhaust such claims—because he forfeited those arguments by failing to raise them below. Defendants' Br. at 19. This Court should decline that invitation.

For decades, the Supreme Court has held that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992); *see also Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761 (7th Cir. 2015) ("[N]o rule prohibits appellate amplification of properly preserved issues."). Here, Mr. Smallwood argued in the district court that administrative remedies were not available to him, including for his sexual-abuse claim. ECF 63 at 2. So, while Mr. Smallwood's arguments that he was not required to informally grieve his sexual-assault claim and the prison thwarted him from utilizing the grievance process for that claim were not raised prior to this appeal, those "new argument[s] support[] a claim made before the district court" and should be reviewed by this Court. *Bew v. City of Chicago*, 252 F.3d 891, 895-96 (7th Cir. 2001).

Moreover, Mr. Smallwood proceeded *pro se* below, has a documented low IQ, and was misled by the prison as to the proper procedure for exhausting administrative remedies for his sexual-abuse claim, further counseling in favor of this Court's review. In *Grandberry v. Smith*, this Court considered the State of Indiana's argument that a

pro se prisoner failed to alert the district court adequately to one of his arguments in support of a due process claim that a disciplinary charge against him was not supported by evidence. 754 F.3d 425, 428 (7th Cir. 2014). "Perhaps so," the Court opined, "but the state bears the principle responsibility" because it refused to provide him with an investigative report he needed to figure out "what he supposedly did wrong." *Id.* So, although appellate counsel's arguments on behalf of the prisoner were "more complete and focused" than the prisoner's "*pro se* arguments in the district court," this Court found that, because the prisoner had "made a comprehensible due process argument," he was "entitled to elaborate on appeal." *Id.*

The same is true here. Just as in *Grandberry*, the prison "bears the principle responsibility" for the contours of Mr. Smallwood's *pro se* exhaustion argument regarding the sexual-abuse claim in the district court. *Id.* The prison violated its own policies, and federal law, when it told Mr. Smallwood he could not proceed on his sexual-assault claim because he did not try to informally resolve that claim. *See* Opening Br. at 42-46. By misleading Mr. Smallwood—whose low IQ already prevents him from comprehending the prison's grievance process—as to what was

required to exhaust a sexual-abuse claim, it is unsurprising that he lumped that claim in with his others in arguing that administrative remedies were not available to him. But because Mr. Smallwood clearly argued that remedies were not available for his sexual-abuse claim, he was entitled to present "more complete and focused arguments" to support that claim once he had the benefit of counsel. *Id.*; *see also United States v. Billups*, 536 F.3d 574, 578 (7th Cir. 2008) (finding plaintiff's challenge below sufficient to preserve argument on appeal, even though he "offer[ed] a new twist on that argument based upon additional authority on appeal."). In short, the Defendants should not be allowed to benefit twice—once in the grievance process and once now—from the bad information they gave to Mr. Smallwood.

Even if this Court agrees with Defendants that Mr. Smallwood, a *pro se* litigant, somehow forfeited counsel's more complete and focused arguments about his sexual-abuse claim, this Court should exercise its discretion to review those arguments anyway. *See Henry v. Hulett*, 969 F.3d 769, 786 (7th Cir. 2020) (en banc) (explaining the applicable test for plain-error review in civil cases and clarifying that the determination of when and how to apply plain-error review is "solely within [this Court's]

discretion."). And, because Defendants do not make any challenge to the merits of those arguments, it should conclude that the district court erred in dismissing Mr. Smallwood's sexual-abuse claim for nonexhaustion. Indeed, affirming the district court's erroneous decision, which sanctioned the prison's blatant violation of its own policies and federal law, would mean Mr. Smallwood's allegation of a violent sexual-assault at the hands of five prison officials will go unheard not because of a determination on the merits, but because he was misled by the prison. That would be manifestly unjust.

III. Defendants' Statute Of Limitations Argument Fails.

Defendants argue alternatively that Mr. Smallwood's case should fall not on exhaustion grounds, but because of the statute of limitations. But given the posture of this case, this is a fact-bound question that the district court is better-suited to handle in the first instance, and to address thorny issues such as equitable tolling. Once Defendants asserted failure to exhaust administrative remedies as a defense in their response to Mr. Smallwood's complaint, the district court ordered briefing only as to exhaustion and stayed all unrelated proceedings. ECF 43 at 2. Despite this order, Defendants moved for summary judgment

raising arguments that Mr. Smallwood failed to exhaust *and* filed his lawsuit a couple of months after the statute of limitations had run. But the district court stuck to its plan, and addressed only exhaustion, dismissing Mr. Smallwood's case based on its conclusion that he failed to exhaust administrative remedies; it said nothing about the statute of limitations defense, except to note that it would not reach it. SA-1 n.1. This Court should do the same for two reasons.

First, a statute of limitations defense, as with other affirmative defenses, requires a fully developed factual record. *Sidney Hillman Health Ctr. of Rochester v. Abbott Laboratories, Inc.*, 782 F.3d 922, 928 (7th Cir. 2015) ("[Q]uestions of timeliness are left for summary judgment (or ultimately trial), at which point the district court may determine compliance with the statute of limitations based on a more complete factual record."). Here, the record as it pertains to the statute of limitations is underdeveloped. And for good reason: As soon as defendants raised an exhaustion defense to Mr. Smallwood's complaint, the district court ordered briefing only as to exhaustion and stayed proceedings—before any discovery had taken place—regarding any

unrelated issues, including the statute of limitations defense.[4]

Second, even if the district court had not limited summary judgment briefing only to exhaustion, viewing the limited evidence in the record in a light most favorable to Mr. Smallwood reveals a material issue of fact as to whether an equitable basis for tolling the statute of limitations existed. *See Deimler v. Pease*, 919 F.2d 143, 143 (7th Cir. 1990) (finding fact issue over whether plaintiff was incapacitated during relevant time frame such that the statute of limitations was tolled). In response to the district court's order to show cause, at § 1915 screening, Mr. Smallwood argued that his case should not be dismissed as untimely because facility lockdowns had prevented him from accessing the law library, and included an affidavit in support. ECF 17 at 4; 28 U.S.C. § 1915A(g). That affidavit was from Mr. Smallwood's counselor, attesting that Mr. Smallwood brought it to the counselor's attention numerous

[4] This practice is "customary in prisoner civil rights cases." *Doe v. Sproul*, No. 3:20-CV-00610-MAB, 2022 WL 1061935, at *1 (S.D. Ill. Apr. 8, 2022); *see, e.g.*, *Herron v. Reveniq*, No. 19 CV 50176, 2021 WL 3116166, at *1 (N.D. Ill. July 6, 2021), report and recommendation adopted, No. 19 C 50176, 2021 WL 3115980 (N.D. Ill. July 22, 2021); *Ingram v. Wexford Health Sources, Inc.*, No. 19-CV-638-NJR, 2021 WL 2291096, at *1 (S.D. Ill. June 4, 2021); *see also Eagan v. Dempsey*, 987 F.3d 667, 685 (7th Cir. 2021) (noting plaintiff had survived a motion for summary judgment "limited to the exhaustion of administrative remedies").

times that he had a court deadline and was not able to get to the law library "throughout the year of 2019." ECF 18-1. Officer Defendants,[5] on the other hand, argued in their exhaustion briefing that "there is good reason to doubt" Mr. Smallwood's explanation that he did not have adequate access to the law library. ECF 58 at 10. They pointed to a law library pass list that they believe shows that Mr. Smallwood had passes for several days in November and December of 2019, many of which he did not use (without explanation) and that the check marks next to two dates during that time indicate that he did go to the law library. ECF 58 at 11. This is the same argument they advance before this Court. Defendants' Br. at 22. But Defendants' proclaimed "good reason to doubt" Mr. Smallwood, whose position is supported by the sworn affidavit of a corrections counselor, at most creates a question of fact on the matter, which the district court is in a better position to address in the first instance. Indeed, construing the limited evidence in Mr. Smallwood's favor, a reasonable juror could conclude that Mr. Smallwood, a prisoner

[5] Wexford Defendants did not present *any* evidence in opposition, arguing only that Mr. Smallwood had not shown evidence that lockdowns prevented him from timely filing a complaint during the entirety of the available timeframe. ECF 45 at 9.

with a documented mental impairment, could not meet the deadline to file his complaint due to no fault of his own, but rather due to facility lockdowns leading to inadequate law library time.

This Court should follow its usual practice and not address the statute of limitations in the first instance, but remand for the district court to consider at summary judgment or at trial, after the development of a complete record. *See*, *e.g.*, *Bourke v. United States*, 25 F.4th 486, 490 (7th Cir. 2022); *Sidney Hillman Health Ctr.*, 782 F.3d at 928; *Moore v. Battaglia*, 476 F.3d 504, 505 (7th Cir. 2007); *In re Copper Antitrust Litigation*, 436 F.3d 782, 789-90 (7th Cir. 2006); *Clark v. City of Braidwood*, 318 F.3d 764, 767-68 (7th Cir. 2003).

CONCLUSION

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

Dated: August 1, 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 5,145 words.

Dated: August 1, 2022

/s/ Rosalind E. Dillon
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