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.

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

JOINT BRIEF OF APPELLEES LT. DON WILLIAMS, SGT. BOYD LUNSFORD, LT. CORY CONLON, ERICK HAMMOND, ROBERT DAUGHERTY, PAUL A. TALBOT, M.D., AND WEXFORD OF INDIANA, LLC

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Appellate Court No: 21-3047

Short Caption: Howard Smallwood v. Don Williams, et al

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(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:

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Attorney's Signature: /s/ Rachel D. Johnson Date: May 27, 2022
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JURISDICTIONAL STATEMENT

Appellant Howard Smallwood's jurisdictional statement is not complete and correct. On January 30, 2020, Smallwood, a *pro se* prisoner, filed his complaint under 42 U.S.C. § 1983 asserting claims under the Eighth and Fourteenth Amendments. He filed his second amended complaint on March 20, 2020, alleging violations of his constitutional rights under the Eighth and Fourteenth Amendments during his incarceration at the Pendleton Correctional Facility against officers Don Williams, Boyd Lunsford, Cory Conlon, Erick Hammond, and Robert Daugherty, and Dr. Paul Talbot and Wexford of Indiana, LLC. The district court had subject matter jurisdiction over Smallwood's claims under 28 U.S.C. §§ 1331 and 1343 because his claims alleged federal constitutional violations.

Because Smallwood was incarcerated, his suit is subject to the Prison Litigation Reform Act (PLRA). 42 U.S.C. § 1997e. On September 30, 2021, the district court granted summary judgment to all defendants on the ground that Smallwood failed to exhaust his administrative remedies as required by the PLRA. ECF No. 67. The district court entered final judgment the same day and dismissed the action without prejudice. ECF No. 68. Smallwood timely filed his notice of appeal on October 28, 2021.[1] ECF No. 71.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because it is an appeal from a final judgment as to all parties and all claims. *Crouch v. Brown*,

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

27 F.4th 1315, 1319 (7th Cir. 2022) (stating a dismissal without prejudice for failure to exhaust administrative remedies is appealable as a final judgment).

STATEMENT OF THE ISSUES

I. Whether Smallwood failed to exhaust administrative remedies because he did not follow the prison's grievance process.

II. Whether the statute of limitations bars Smallwood's claims.

STATEMENT OF THE CASE

In January 2020, Howard Smallwood, a prisoner in the Indiana Department of Correction, sued the defendants—correctional officers, an onsite physician, and a contracted medical employer—concerning an alleged incident at the Pendleton Correctional Facility, where Smallwood was incarcerated. Smallwood claims that on October 22, 2017, Dr. Talbot and the correctional officers forced Smallwood to comply with a blood draw and afterward the officers escorted him to the Restrictive Housing Unit for observation and sexually assaulted him. He further alleges that he was denied medical treatment for injuries sustained during those events.

The district court granted defendants' motion for summary judgment because it determined that Smallwood failed to exhaust available administrative remedies, as required by the Prison Litigation Reform Act, prior to filing this lawsuit.

I. The Prison Litigation Reform Act

The PLRA provides that "no action shall be brought with respect to prison conditions under 42 U.S.C. section 1983 . . . until such administrative remedies as are

available are exhausted." 42 U.S.C. § 1997e(a). Its statutory purpose is to "afford corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Woodford v. Ngo*, 548 U.S. 81, 93 (2006); *see also Cannon v. Washington*, 418 F.3d 714, 719 (7th Cir. 2005) (per curiam) (observing that the "sole objective of § 1997e(a) is to permit the prison's administrative process to run its course before litigation begins").

The exhaustion requirement is a precondition to suit, regardless of the apparent futility of pursuing an administrative remedy, whether money damages are sought, and regardless of notions of judicial economy. *Woodford*, 548 U.S. at 84–85. By making exhaustion a precondition to an inmate's suit, the PLRA affords the defendant "a valuable entitlement—the right not to face a decision on the merits." *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 536 (7th Cir. 1999). Accordingly, courts decide whether an inmate suit should be dismissed for failure to comply with the PLRA before rendering any substantive decision. *Id.*

II. Factual Background

A. Pendleton Correctional Facility's grievance process

Pendleton Correctional Facility uses the Department's offender grievance process. ECF No. 46-1 at 2. This procedure provides an internal method for inmates to resolve concerns and complaints. *Id.* at 2. An inmate handbook describes these grievance procedures, and inmates are advised of the process during orientation upon their arrival at Pendleton. *Id.*

The formal grievance process consists of three stages: a grievance, an appeal to the warden, and an appeal to the Department's offender grievance manager. ECF No. 46-1 at 2. Generally before filing a formal grievance, an inmate first must make an informal attempt at resolving the complaint. *Id.* The inmate "may do this by discussing the complaint with the staff member responsible for the situation or . . . with the person who is in charge of the area where the situation occurs." ECF No. 59-2 at 9. The inmate may instead discuss with "the staff person's immediate supervisor" if he is "uncomfortable discussing the issue with that staff member." *Id.*

If the informal attempt at resolution is unsuccessful, the offender moves to the first step of the formal grievance process and—no later than ten business days after the date of the incident—submits to the grievance specialist at the facility a grievance form along with evidence documenting their efforts at the informal stage. *Id.* Such evidence may include correspondence or a request for an interview. *Id.* A grievance specialist screens each submitted grievance for compliance with the grievance requirements to determine whether to accept or reject it. ECF No. 59-2 at 10. After rejecting a noncompliant grievance, the grievance specialist will return it to the offender with a return-of-grievance form indicating the reason for the rejection. *Id.* The offender then has five business days to correct and resubmit the grievance. *Id.*

If the grievance specialist accepts the grievance, she gives it to a staff member who investigates and responds to the grievance within fifteen business days. *Id.* If the problem is not resolved to the satisfaction of the offender (or the offender does not receive a response within twenty business days), the offender moves to the next step

and submits a grievance appeal to the warden (or designee) within five business days. ECF No. 59-2 at 12. The offender may appeal the warden's response within five business days of the response by submitting an offender grievance appeal to the Department's offender grievance manager, whose decision is final. *Id.*

When the offender alleges sexual abuse, the offender need not make an informal attempt at resolution with staff before filing a formal grievance, and the standard time limits do not apply to the sexual-abuse claim. *Id.* at 5. Those time limits remain in effect for "any portion of a grievance that does not allege an incident of sexual abuse." *Id.* And these limitations on internal review do not affect the statute of limitations for any claims. *Id.* These rules track federal regulations under the Prison Rape Elimination Act (PREA), 34 U.S.C. § 30301. *See* 28 C.F.R. § 115.52(b).

B. Smallwood's grievances and communications regarding the subject incident and other matters

Prior to the alleged incident on October 22, 2017, Smallwood correctly utilized the Offender Grievance Process at the Pendleton Correctional Facility on multiple occasions. ECF No. 59-1 at 5; ECF No. 59-3. But Smallwood did not successfully file a grievance regarding the alleged October 2017 incident. ECF No. 59-1 at 5.

On November 1, 2017, Smallwood submitted a formal written grievance regarding the October 22 incident, alleging that he experienced a forced blood test, excessive force, and sexual abuse. ECF No. 59-4; ECF No. 59-1 at 5. On November 6, 2017, the grievance specialist rejected and returned the grievance to Smallwood because he failed to provide evidence of an informal attempt at resolving his complaints beforehand. *Id.* The return of the grievance gave Smallwood five days to begin the

informal grievance process or, if he already attempted informal resolution, the return of grievance requested that he fill out the form to indicate that. *Id.* An offender must resubmit a corrected grievance within five business days of the date it was returned. ECF No. 59-2 at 10. Smallwood did not do so.

Then, on May 3, 2018, in a grievance appeal of a different grievance (in which Smallwood admitted to filing late), Smallwood again mentioned his injuries from the alleged October 22, 2017, incident. ECF No. 59-6; ECF No. 59-1 at 5–6. On May 14, 2018, the grievance specialist rejected and returned the grievance to Smallwood because it was filed too late. ECF No. 59-7; ECF No. 59-1 at 6.

On November 5, 2018—over a year after the alleged incident—Smallwood attempted to informally resolve his grievance by submitting a request-for-interview form regarding the incident from October 2017. ECF No 59-1 at 6. On the same day, the office of the grievance specialist rejected it as untimely. *Id.*

Four days later, Smallwood filed a grievance against Dr. Talbot, but the grievance specialist returned it to him because it was filed too late. ECF No. 46-1 at 3. Two days after that, Smallwood filed two grievance appeals and admitted in both that he filed the grievance too late. ECF No. 59-1 at 6–7. On the same day, the grievance specialist rejected and returned to Smallwood one appeal, noting that the appeal was submitted too late and that the grievance must first have been accepted, logged, and denied before an appeal could be filed. *Id.* On November 19, the grievance specialist rejected and returned the second grievance appeal for the same reasons. ECF No. 59-1 at 7.

After the grievance specialist returned Smallwood's grievance on November 6, 2017, Smallwood never resubmitted the grievance with evidence that he attempted to informally resolve his complaint with Dr. Talbot, the correctional officers, or anyone else as requested. Smallwood had five business days in which to do so, ECF No. 59-2 at 10, but the record demonstrates that Smallwood's only documented attempt at informal resolution of his October 2017 complaint is a request for interview submitted on November 5, 2018—more than a year after the alleged incident. ECF No. 46-1 at 3. Although Smallwood submitted to the district court copies of requests for interviews that are dated October 23, 2017, and October 31, 2017, they do not show any indication that they were actually submitted, ECF No. 64 at 4, 5, and, regardless, he did not submit them when asked to do so by the grievance specialist on November 6, 2017. ECF No. 59-1 at 7.

III. District Court's Grant of Summary Judgment to Defendants

On January 30, 2020, Smallwood filed his original complaint against Conlon, Daugherty, Hammond, Lunsford, Talbot, and Williams, alleging that they violated his constitutional rights during his incarceration at Pendleton. ECF No. 1

Three months later, Smallwood filed his first amended complaint. ECF No. 15. The district court screened the first amended complaint under 28 U.S.C. § 1915A(b) and ordered Smallwood "to show cause why this action should not be dismissed because each of the claims alleged is barred by the applicable statute of limitations or to file an amended complaint that sets forth factual allegations against the named defendants that occurred within two years of the date this action was filed." ECF No.

17 at 4. In response, Smallwood filed a motion stating that he had been prevented from getting to the law library to meet court deadlines and that the district court in a prior case had dismissed the suit without prejudice on October 31, 2018, which "extended [the] limitation period." ECF No. 18.

The district court allowed the suit to proceed under the screening standard, allowing Smallwood's Fourteenth Amendment due-process claims against each defendant (except Wexford of Indiana, LLC), his Eighth Amendment claims against the correctional officers for excessive force and sexual assault, and his Eighth Amendment claim against Dr. Talbot for failing to treat his injuries after the alleged excessive force occurred. ECF No. 21 at 3.

Smallwood then filed a second amended complaint. ECF No. 31. According to Smallwood's second amended complaint, when Dr. Talbot ordered a blood draw after the results of a urinalysis test returned on October 22, 2017, Smallwood was denied the right to refuse the ordered medical treatment. *Id.* at 8. Smallwood claims that the officers used excessive force, holding him down so a blood draw could be performed by a lab technician and causing him harm. *Id.* at 8–9. Smallwood further claims that after the blood draw, the officers escorted him to the Restrictive Housing Unit for observation and sexually assaulted him. *Id.* at 9. His complaint also alleges that he was denied medical treatment for injuries sustained during those events. *Id.*

The district court screened the second amended complaint, concluding that Wexford was properly named as a defendant. ECF No. 34.

After the defendants asserted failure to exhaust administrative remedies as a defense in their responsive pleadings, ECF Nos. 33, 41, the district court ordered briefing on the exhaustion defense and stayed all proceedings unrelated to exhaustion. ECF No. 43 at 2. The defendants then moved for summary judgment on the issues of exhaustion of administrative remedies and the statute of limitations. ECF Nos. 49, 57.

The district court granted summary judgment in favor of all defendants, concluding that "the designated evidence shows that Mr. Smallwood did not exhaust available administrative remedies before bringing this action." SA 1. The court determined that Smallwood "did not timely complete the grievance process as the grievance policy required because he did not show at the time that he attempted to informally grieve his complaint," and "even if he did" make an attempt, "he did not attach proof of his efforts to his formal grievance—which is required by the grievance policy." SA 6. Nor did he cure the lack of evidence after he received instructions on how to do so. *Id.*

The district court rejected Smallwood's arguments "in his unsworn response brief that he did not fully understand the requirements of the grievance process due to his low IQ" and that movements to different cells and prison staff's general unresponsiveness to informal actions "made it difficult for him to complete the grievance process." SA 7. The court explained 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.* In addition, "Mr. Smallwood . . . 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." *Id.*

Because the district court decided the case on exhaustion grounds, it did not reach the statute-of-limitations argument. SA 1 n.1. The district court dismissed the case without prejudice and entered final judgment. ECF No. 68.

SUMMARY OF THE ARGUMENT

By failing to follow and complete Pendleton's grievance process, Smallwood failed to exhaust administrative remedies as required by the PLRA. Administrative remedies were available to Smallwood because the prison took reasonable steps to inform inmates at Pendleton about the grievance process, and no evidence suggests that prison officials knew or had reason to know that Smallwood did not understand the grievance process or prevented him from accessing it. As for Smallwood's argument regarding his sexual-abuse claim, Smallwood failed to raise it below and therefore forfeited it. The Court should therefore affirm the district court's grant of summary judgment for failure to exhaust administrative remedies.

The Court should affirm for an additional reason—the statute of limitations bars all of Smallwood's claims. The incident allegedly occurred on October 22, 2017, making October 22, 2019, the deadline to file under Indiana's two-year statute of limitations. Yet Smallwood waited to file this lawsuit until January 30, 2020—three months late. Because Smallwood filed outside of the statute of limitations, the Court should affirm the grant of summary judgment.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo, reviewing the record in the light most favorable to the nonmoving party. *Rodrigo v. Carle Foundation Hosp.*, 879 F.3d 236, 241 (7th Cir. 2018). "Summary judgment is appropriate when there are no genuine disputes of material fact, and the movant is entitled to judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(a)). The Court "may affirm 'on any ground supported in the record, so long as that ground was adequately addressed in the district court and the nonmoving party had an opportunity to contest the issue.'" *Am. Homeland Title Agency, Inc. v. Robertson*, 930 F.3d 806, 810 (7th Cir. 2019) (quoting *Cardoso v. Robert Bosch Corp.*, 427 F.3d 429, 432 (7th Cir. 2005)).

The Court "reviews de novo the grant of summary judgment for failure to exhaust." *Reid v. Balota*, 962 F.3d 325, 329 (7th Cir. 2020). If a court determines that a plaintiff has not complied with the PLRA's exhaustion requirement, it has no discretion but to dismiss the claim. *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) (citing *Booth v. Churner*, 532 U.S. 331, 739 (2002)); *see also Ross v. Blake*, 578 U.S. 632, 639 (2016) ("[A] court may not excuse a failure to exhaust[.]"); *Bowers v. Dart*, 1 F.4th 513, 518 (7th Cir. 2021) ("[F]ederal courts lack discretion to consider a claim that has not traveled the required administrative path.").

ARGUMENT

I. Smallwood Failed To Exhaust Available Administrative Remedies

The district court correctly determined that Smallwood failed to exhaust his administrative remedies and that, as a result, his claims cannot proceed. Under the PLRA, exhaustion is mandatory, *Woodford v. Ngo*, 548 U.S. 81, 95 (2006), and "[t]his exhaustion requirement 'applies to all inmate suits about prison life, whether they involve general circumstances or episodes, and whether they allege excessive force or some other wrong,'" *Crouch v. Brown*, 27 F.4th 1315, 1320 (7th Cir. 2022) (quoting *Porter v. Nussle*, 534 U.S. 516, 532 (2002)). To exhaust under the PLRA, an inmate must take *all* steps the prison grievance system offers, and he must do so properly. *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002) ("To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require."); *see also Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006); *Strong v. David*, 297 F.3d 646, 649–50 (7th Cir. 2002). The applicable procedural rules are defined not by the PLRA, but by the facility's grievance process. *Jones v. Bock*, 549 U.S. 199, 218 (2007).

A. Smallwood failed to follow Pendleton's grievance process properly

Simply put, Smallwood failed to exhaust administrative remedies when he did not properly follow the offender grievance process. The grievance procedure at Pendleton includes an informal attempt at resolution, a formal grievance, and appeals. ECF No. 46-1 at 2.

Smallwood's first attempt to pursue administrative remedies for his October 22, 2017, claims failed because he did not submit proof that he had attempted to resolve his concerns informally. ECF No. 59-1 at 5. Evidence of an informal attempt at resolution is required. ECF No. 59-2 at 8. Accordingly, the office of the grievance specialist returned Smallwood's November 1, 2017, formal grievance and directed Smallwood either to begin the informal grievance process within five days or to submit evidence of a previous attempt at informal resolution. ECF No. 59-5. But Smallwood took no other action regarding this incident for several months.

In November 2018—more than a year later—Smallwood again attempted to grieve the October 2017 incident. By that time, however, no actions under the grievance process remained open to Smallwood. Indeed, Smallwood even acknowledged that his grievance submissions in 2018 were "late," ECF Nos. 59-9, 59-11, and the grievance specialist ultimately returned and rejected his grievances, ECF Nos. 59-10, 59-12. While the grievance specialist may accept late grievances and grievances that do not necessarily conform to the exact requirements of the offender grievance process, good cause must be shown by the offender regarding the late submission. ECF No. 59-1 at 7. Smallwood did not provide any evidence of good cause to justify his late submission to the office of the grievance specialist. ECF No. 59-1 at 7.

Smallwood thus failed to properly exhaust Pendleton's grievance process.

B. The administrative remedies were available to Smallwood

The exhaustion requirement is mandatory with one "textual exception"—"An inmate . . . must exhaust available remedies, but need not exhaust unavailable ones."

Ross v. Blake, 578 U.S. 632, 642 (2016). Administrative remedies were available to Smallwood here.

An administrative remedy is available when it is "'capable of use for the accomplishment of a purpose' and 'is accessible or may be obtained.'" *Crouch*, 27 F.4th at 1320 (quoting *Ross*, 578 U.S. at 642). That is, if a process is "'capable of use' to obtain 'some relief for the action complained of,'" it is available. *Ross*, 578 U.S. at 642. In contrast, a process is unavailable if it "operates as a simple dead end" where authorities are "unable or consistently unwilling to provide any relief," when the process is "so opaque that it becomes, practically speaking, incapable of use" such that "no ordinary prisoner can discern or navigate it," or when prison officials "thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation, . . . in order to 'trip[] up all but the most skillful prisoners." *Id.* at 643–44.

Importantly, "[t]he PLRA does not excuse a failure to exhaust based on a prisoner's ignorance of administrative remedies, so long as the prison has taken reasonable steps to inform the inmates about the required procedures." *Ramirez v. Young*, 906 F.3d 530, 538 (7th Cir. 2018).

The district court correctly concluded that Smallwood failed to exhaust *available* administrative remedies. SA 6–7. Administrative remedies were available to Smallwood because the prison took reasonable steps to inform inmates at Pendleton about the grievance process, and no evidence suggests that prison officials knew or had reason to know that Smallwood did not understand the grievance process. *See*

Ramirez, 906 F.3d at 537–38 (concluding that remedies were not available to Spanish-speaking inmate where "th[e] record shows that nothing gave him even a clue about the grievance process" and "prison officials knew—and recorded their awareness—of his inability to understand spoken or written English").

The record demonstrates that all inmates are advised of the prison's grievance process at orientation upon entering Pendleton, and that information remains available to them. ECF No. 59-2 at 7. The grievance process must be "explained 'in terms intelligible to lay persons,'" *Ramirez*, 906 F.3d at 535, which is an objective standard. *See Ross*, 578 U.S. at 648 (directing courts to ask, "were th[e] procedures knowable by an ordinary prisoner in [the inmate's] situation, or was the system so confusing that no such inmate could make use of it?"). Indeed, "a prisoner's subjective unawareness of a grievance procedure [does not] excuse[] his non-compliance." *Ramirez*, 906 F.3d at 538. Because prison officials "t[ook] reasonable steps to inform inmates about the required procedures," *id.*, those procedures were available to Smallwood.

Smallwood offers no reason and no evidence to support his position that Pendleton's grievance process was nevertheless unavailable. First, that Smallwood's "limited mental capacity made it difficult for him to understand the [Department's] grievance process," Appellant's Br. 28, does not render administrative remedies unavailable. An administrative remedy remains "available" even if one inmate "had trouble understanding" the process and made "numerous false starts," Appellant's Br. 13. *See Williams v. Wexford*, 957 F.3d 828 (7th Cir. 2020) (Barrett, J., concurring in the judgment) (explaining that the Supreme Court "could not have been more explicit that

the PLRA contains no exception for 'cases in which a prisoner makes a reasonable mistake about the meaning of a prison's grievance procedures'" (quoting *Ross*, 578 U.S. at 644)). Simply being difficult for one person does not render an administrative remedy incapable of use. *See Ross*, 578 U.S. at 644 (explaining a remedy is not available if "no *ordinary* prisoner can make sense of what it demands" (emphasis added)).

Moreover, as the district court correctly found, aside from a forty-year-old IQ test that "estimated" Smallwood "to have an IQ between 75 and 86," SA 7; ECF No. 64 at 3, Smallwood presented no evidence that he was incapable of meeting the requirements of the offender grievance policy. SA 7. Crucially, Smallwood also presented no evidence that prison officials were aware of any impediment to his understanding the grievance process. *See Ramirez*, 906 F.3d at 537–38 (concluding that remedies were not available to Spanish-speaking inmate where "th[e] record shows that nothing gave him even a clue about the grievance process" and "prison officials knew—and recorded their awareness—of his inability to understand spoken or written English"). Smallwood makes much of the fact that "not a single grievance" in Smallwood's grievance log "made it through all three steps of the process," Appellant's Br. 34, but that Smallwood has never "correctly navigated [the process] to completion" does not indicate that the prison was aware of his IQ or of any intellectual disability preventing him from understanding that process.

Ramirez v. Young confirms this point. In *Ramirez*, there was no evidence that any prison official "*ever* informed Ramirez of its grievance process in a way that he might reasonably understand." 906 F.3d at 540 (emphasis added). On the other hand,

there *was* evidence that "prison officials knew—and recorded their awareness—of his inability to understand spoken and written English." *Id.* at 538. In contrast, here, there is evidence that prison officials informed Smallwood of the grievance process "in a way he might *reasonably* understand," during orientation, while no evidence shows that prison officials knew of any reason Smallwood would not *reasonably* understand.

Weiss v. Barribeau, 853 F.3d 873 (7th Cir. 2017), is not to the contrary. The Court in *Weiss* allowed a suit to proceed where the inmate had "suffer[ed] a mental breakdown requiring hospitalization" and alleged "being forced to take psychotropic drugs that muddled his thinking." *Weiss*, 853 F.3d at 875. Moreover, in that case, the defendants failed to provide evidence that the inmate received "correspondence that would have told him what his next step to obtain relief should be." *Id.* In contrast, Smallwood had access to the grievance process—and had used it at various stages before his November 2017 grievance attempt. ECF No. 59-3. Further, prison officials returned his deficient grievance with instructions for how to continue the process. ECF No. 59-5.

Second, administrative remedies were available where prison officials placed Smallwood in a restrictive housing unit and transferred him to different cells. Appellant's Br. 38. Administrative remedies may be unavailable where prison officials a "thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation, . . . in order to 'trip[] up all but the most skillful

prisoners." *Ross*, 578 U.S. at 643–44. The Court has identified situations where administrative remedies are not available due to prison officials' conduct, including where prison officials refuse to provide inmates with the necessary forms to complete the administrative process, *Dale v. Lappin*, 376 F.3d 652, 656 (7th Cir. 2004), or where prison officials threaten or intimidate prisoners for pursuing administrative remedies, *Kaba v. Stepp*, 458 F.3d 678, 686 (7th Cir. 2006).

Smallwood presented no evidence to the district court that his housing placements prevented him from accessing the information he needed to participate in the process or "separated him from anyone who could have helped him navigate the grievance process," Appellant's Br. 38. *See* SA 6 (noting that Smallwood asserted this argument in an "unsworn response brief"). In fact, Smallwood submitted the formal grievance within the prescribed timeframe, ECF No. 59-4, and presented evidence that, at the time, he had timely sought informal resolution, ECF No. 64 at 4. As the district court observed, after the grievance specialist returned the grievance to Smallwood with information on how to cure the defect, Smallwood could have re-submitted the grievance along with the requests for interview dated October 23, 2017, and October 31, 2017, ECF No. 64 at 4–5, and he provided no admissible evidence that he was prevented from doing so. SA 4–5, 7.

Smallwood attempts to compare his circumstances to those in *Lanaghan v. Koch* and *Pavey v. Conley*, Appellant's Br. 38–39, but they are distinguishable. This case is not like *Lanaghan* where "severe physical limitations" caused by debilitating disease prevented the inmate from following the grievance process. *Lanaghan*, 902

F.3d 683, 688–89 (7th Cir. 2018). Nor is it like *Pavey*, where the inmate could not write because his arm was injured, and he alleged that he was completely isolated from anyone who could write for him. 170 F. App'x 4, 5 (7th Cir. 2006). Here, Smallwood does not allege any physical incapacitation that prevented him from following the grievance process, and there is no evidence that Smallwood's housing circumstances prevented him from accessing the grievance process.

Third, as to Smallwood's argument regarding the sexual-abuse claim, Smallwood failed to raise this argument below and therefore forfeited it. *Scheidler v. Indiana*, 914 F.3d 535, 540 (7th Cir. 2019) ("A party generally forfeits issues and arguments raised for the first time on appeal."); *CNH Indus. Am. LLC v. Jones Lang LaSalle Americas, Inc.*, 882 F.3d 692, 705 (7th Cir. 2018) (explaining that in "a civil rather than criminal case," the Court "typically will not entertain an argument raised for the first time on appeal, even for the limited purpose of ascertaining whether a plain error occurred").

In the district court, Smallwood argued that staff were "difficult to contact about Informal Grievances," ECF No. 63 at 3, not that informal resolution was not required. Now, he asserts that the prison thwarted his access to the grievance process as to his sexual-abuse claim when it rejected his November 2017 grievance for failing to file evidence of informal attempts at resolution because the prison's grievance process eliminates that requirement for claims of sexual abuse. Appellant's Br. 44. Because Smallwood raises this argument for the first time on appeal, it is forfeited.

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No evidence demonstrates that Smallwood was unaware of the grievance policy and procedures in place at the Pendleton Correctional Facility, or that prison staff prevented him from accessing the grievance system as it was implemented in October 2017. To the contrary, the record demonstrates that the grievance process was available to Smallwood and that he failed to exhaust those available administrative remedies. The district court's decision should be affirmed.

II. The Statue of Limitations Bars Smallwood's Claims

The Court should affirm the district court's judgment for yet another reason—the statute of limitations bars all of Smallwood's claims. Although the district court did not reach the limitations issue, the defendants raised it below, so the Court may affirm the judgment on this ground as well. *Am. Homeland Title Agency, Inc. v. Robertson*, 930 F.3d 806, 810 (7th Cir. 2019) (reviewing court "may affirm 'on any ground supported in the record, so long as that ground was adequately addressed in the district court and the nonmoving party had an opportunity to contest the issue'").

Smallwood's claims are barred by the two-year statute of limitations applicable to Section 1983 suits brought in Indiana. Indiana's statute of limitations applies to this Section 1983 lawsuit. *Richards v. Mitcheff*, 696 F.3d 635, 637 (7th Cir. 2012) (applying Indiana Code Section 34-11-2-4 in Section 1983 suit); *see also Woods v. Ill. Dep't of Children & Family Servs.*, 710 F.3d 762, 765–69 (7th Cir. 2013) (explaining the reasons for applying state statutes of limitations to Section 1983 claims). Under Indiana's statute of limitations, Smallwood had two years from the date of the alleged occurrence to file his complaint. Ind. Code § 34-11-2-4. The alleged incident occurred

on October 22, 2017, so Smallwood had to file by October 22, 2019. ECF No. 23 at 8. Smallwood did not meet that deadline and instead filed on January 30, 2020, more than three months late. Because he filed outside of the statute of limitations, his claims are barred.

To the extent that Smallwood argued below that the statute should have been tolled, no evidence in the record supports tolling here. Indiana permits tolling under the doctrine of equitable estoppel for fraudulent concealment or similar conduct. *Kenworth of Indianapolis, Inc. v. Seventy-Seven Ltd.*, 134 N.E.3d 370, 383 (Ind. 2019); *see also, e.g.*, *Northeastern Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 56 N.E.3d 38, 45 (Ind. Ct. App. 2016) ("[F]raudulent concealment is an equitable doctrine that operates to prevent a defendant from asserting the statute of limitations as a bar to a claim where the defendant, by his own actions, prevents the plaintiff from obtaining the knowledge necessary to pursue a claim."). "To establish equitable estoppel, a party's conduct must be of a sufficient affirmative character to prevent inquiry or to elude investigation or to mislead and hinder." *Kenworth*, 134 N.E.3d at 383.

Smallwood already demonstrated that he was initially able to meet the deadline to file a timely complaint. *See Smallwood v. Williams*, No. 1:18-cv-1506 (May 16, 2018). On May 16, 2018, Smallwood filed a "nearly identical" lawsuit, SA 5, which he voluntarily dismissed on October 29, 2018. *Smallwood*, No. 1:18-cv-1506, ECF Nos. 44, 45. Smallwood then waited to file this second lawsuit until months after the two-year statute of limitations had run.

Smallwood did not make any tolling arguments in his response to the motions for summary judgment, *see* ECF No. 63, but in a motion responding to the district court's order to show cause regarding the statute of limitations at the screening stage, ECF No. 17, Smallwood stated that he failed to timely file because he lacked access to the prison's law library on October 17, 2019—five days before the limitations period expired—and "throughout the year of 2019." ECF No. 18 at 1. Smallwood further stated that the judge who dismissed his prior lawsuit in 2018 "gave [him] permission to refile or amend" and seems to suggest that this "extended [the] limitation period." *Id.* Attached to Smallwood's motion was an affidavit from a counselor stating that Smallwood brought to his "attention several times that he ha[d] a deadline in court" and that "he need[ed] to get to the law library but was not able to do so." ECF 18-1. Smallwood's unsworn statements in his motion do not meet the certification requirement of 28 U.S.C. § 1746, which requires certification that the writing is true under penalty of perjury or similar language, and therefore are not admissible evidence. *Owens v. Hinsley*, 635 F.3d 950, 954–55 (7th Cir. 2011).

Moreover, the record shows that Smallwood used law-library passes in the months before the limitations period expired: he used three passes in August 2019 and one in September 2019, and he was granted passes that went unused for September 9, October 9, and October 17, 2019. He then used passes on October 24, 2019, and December 9, 2019, and was granted passes that went unused on October 30, November 14, and December 12. ECF No. 59-13.

Smallwood's evidence does not demonstrate that any information necessary to filing the lawsuit was concealed from or misrepresented to him. And the record is likewise bereft of any indication that, after his asserted reason for delay was mitigated, he "exercise[d] due diligence in commencing the action after the equitable ground cease[d] to operate as a valid basis for causing delay." *Perryman v. Motorist Mut. Ins.*, 846 N.E.2d 683, 690–91 (Ind. Ct. App. 2006). The record thus shows no basis for tolling the statute of limitations.

Furthermore, the PREA regulation that applies to the sexual-abuse claim expressly provides that it does not affect the statute-of-limitations defense. 28 C.F.R. § 115.52(b)(4) ("Nothing in this section shall restrict the agency's ability to defend against an inmate lawsuit on the ground that the applicable statute of limitations has expired."). Because Smallwood filed after the two-year statute of limitations had run, the Court should affirm.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment for the defendants.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this response contains 6,017 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this response.

By: *s/Melinda R. Holmes*
Melinda R. Holmes
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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