No. 23-1455

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Tremonti Perry,
Plaintiff-Appellant,

v.

Anne L. Precythe; Ian Wallace, Warden, Southeast Missouri Correctional Center; Corizon LLC; Glen Babich, M.D.; John Matthews, M.D.; and Centurion of Missouri, LLC,
Defendants-Appellees,

On Appeal from U.S. District Court for the
Eastern District of Missouri - Cape Girardeau
United States District Court No. 1:17-cv-00115-HEA

OPENING BRIEF OF APPELLANT TREMONTI PERRY

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RULE 28A(i)(1) SUMMARY AND REQUEST FOR ORAL ARGUMENT

Plaintiff Tremonti Perry suffered a medical emergency while in Missouri Department of Corrections custody. He was feverish, coughing up bloody mucus, experiencing severe aches, and could barely stand on his own. Though he repeatedly sought care, Defendants repeatedly denied treatment. As a result, he deteriorated into sepsis and multi-organ failure, including renal failure. He was placed in a medically induced coma for approximately one month, during which time the Warden denied his family's request to evaluate him for a kidney transplant. Even now, he continues to suffer from serious medical issues.

The district court dismissed his Eighth Amendment action for failure to exhaust administrative remedies. But the Prison Litigation Reform Act (PLRA) requires only the exhaustion of "available" remedies. No remedies were available to Mr. Perry because he was in a coma or suffering from debilitating medical issues for the entire 15-day period in which the prison policy required him to initiate the grievance process.

This case presents important issues concerning statutory interpretation and the proper judicial role. Accordingly, Mr. Perry respectfully requests 15 minutes of oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1A, the undersigned counsel for Tremonti Perry hereby certifies that Tremonti Perry is an individual.

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Tremonti Perry filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Missouri. The district court had jurisdiction over Mr. Perry's claims under 28 U.S.C. § 1331. On December 12, 2022, the district court dismissed the action. App. 131; R. Doc. 112, at 5. On January 11, 2023, Mr. Perry filed a motion requesting clarification as to whether the district court's order disposed of all claims against all parties, and, if so, asking for additional time to file a notice of appeal. App. 133-35; R. Doc. 113; *see* Fed. R. App. P. 4(a)(5). On February 22, 2023, the district court granted the motion to clarify, indicating it dismissed all claims against all parties, and awarded Mr. Perry thirty days to perfect a notice of appeal. App. 136; R. Doc. 114. Mr. Perry timely appealed on March 8, 2023. R. Doc. 115; *see* Fed. R. App. P. 4(a)(5). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

Tremonti Perry, while incarcerated at the Southeast Correctional Center, sounded alarm bells for a day and a half that he was experiencing a medical emergency: He was feverish, coughing up bloody mucus, experiencing severe body aches, and could barely stand on his own. And for a day and a half, those he depended on for his medical care failed to properly treat him. By the time he finally received emergency medical treatment at an outside hospital, it was too late to avoid irreversible damage to his body. He arrived at the hospital septic and in multi-organ failure, and was placed in a medically induced coma for a month to save his life. His family members volunteered to donate a kidney, and hospital staff were receptive, but the Warden shut down any possibility of evaluation for a transplant, declaring, "He belongs to me." After Mr. Perry awoke from the coma, he suffered from paralysis, was unable to feed himself, and was still in renal failure. Mr. Perry now lives with end-stage renal disease, and without a kidney transplant, he will die.

To seek redress through the prison's grievance process, Mr. Perry had just 15 days to file an informal resolution request after the denials of care. As the district court correctly concluded, Mr. Perry's coma and

subsequent medical issues made it impossible for him to initiate the grievance process, and so administrative remedies were not "available" to him during that time. *Ross v. Blake*, 578 U.S. 632, 635-36 (2016). Because the PLRA requires only the exhaustion of "available" remedies, 42 U.S.C. § 1997e(a), the court should have concluded its analysis there.

Instead, the district court imposed an additional requirement, not grounded in the record, the prison's rules, or the PLRA, that Mr. Perry had to make an *untimely* attempt to initiate the grievance process once he became physically capable of doing so. That was error: Longstanding precedent makes plain that proper exhaustion requires a prisoner to comply with a prison's grievance procedures—nothing more and nothing less. *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006); *Jones v. Bock*, 549 U.S. 199, 218 (2007). So, where a prisoner, through no fault of his own, cannot comply with the prison's deadlines and rules, the PLRA's exhaustion provision is satisfied. *Ross*, 578 U.S. at 643. Full stop.

Applying those principles, this case is an easy one: Everybody agrees that Mr. Perry, through no fault of his own, was unable to comply with the prison's mandatory 15-day window to initiate the grievance process. Thus, he satisfied the exhaustion provision, and the district

court was wrong to conclude otherwise based on an unwritten untimely-filing requirement. This Court should reverse.

STATEMENT OF ISSUE

Whether administrative remedies were "available" to Mr. Perry within the meaning of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), where (1) the prison imposed a 15-day deadline to complete the first step of the grievance process; and (2) Mr. Perry was in a coma for more than 15 days after the medical emergency underlying the complaint and, even after emerging from the coma, suffered from paralysis, could not feed himself, and required a tracheotomy tube to breathe. *Jones v. Bock*, 549 U.S. 199 (2007); *Ross v. Blake*, 578 U.S. 632 (2016); *Martinez v. Fields*, 627 F. App'x 573 (8th Cir. 2015); *Lanaghan v. Koch*, 902 F.3d 683 (7th Cir. 2018).

STATEMENT OF THE CASE

I. Legal Background

The PLRA's exhaustion provision requires prisoners to exhaust "such administrative remedies as are *available*" in the jail or prison in which they are confined before bringing an action about prison conditions in federal court. 42 U.S.C. § 1997e(a) (emphasis added). "The availability of a remedy . . . is about more than just whether an administrative procedure is 'on the books.'" *Townsend v. Murphy*, 898 F.3d 780, 783 (8th Cir. 2018) (quoting *Ross v. Blake*, 578 U.S. 632, 643 (2016)). To be available, the prison's grievance system must be "capable of use" to obtain "some relief for the action complained of." *Ross*, 578 U.S. at 642-44 (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)). By the terms of the PLRA and the decisions of the Supreme Court, then, a prisoner "must exhaust available remedies, but need not exhaust unavailable ones." *Id.* at 642. Because a prisoner's failure to exhaust is an affirmative defense, defendants have the burden of proof. *Jones*, 549 U.S. at 216; *Porter v. Sturm*, 781 F.3d 448, 451 (8th Cir. 2015).

The requirements of the prison grievance process, including its procedural rules and deadlines, "define the boundaries of proper

exhaustion." *Jones*, 549 U.S. at 218. Here, the relevant rule of the Missouri Department of Corrections (MDOC) grievance process mandates that "an informal resolution request" be filed "within 15 calendar days of the alleged incident." App. 22; R. Doc. 87, at 6.

II. Factual Background[1]

In the early hours of January 7, 2014, while in MDOC custody at Southeast Correctional Center (SECC), Tremonti Perry reported to a duty guard that he was suffering a medical emergency. App. 22; R. Doc. 87, at 6. He had been experiencing fever, shortness of breath, and severe head and body aches for several days, and by the time he called for emergency care he was so weak that he had difficulty standing. *Id.* On his way to the infirmary, Mr. Perry fell three times. *Id.*

Once he arrived at the prison's infirmary—at the time, run by Corizon—Mr. Perry met with an unknown duty nurse. App. 23; R. Doc. 87, at 7. Although he informed the nurse of his worsening symptoms, the severity of which was "plain . . . to see," the nurse merely took his blood

[1] The facts are drawn from Mr. Perry's second amended complaint, which the court "must assume are true" at the motion to dismiss stage. *See Brown v. Mo. Dep't of Corr.*, 353 F.3d 1038, 1040 (8th Cir. 2004) (per curiam) (citing *Davis v. Hall*, 992 F.2d 151, 152 (8th Cir. 1993)).

pressure and sent him back to his housing unit without any treatment. *Id.* The walk back to his unit, normally a five-minute journey, took Mr. Perry nearly thirty minutes as he repeatedly fell and had to pick himself back up. *Id.* Two hours later, Mr. Perry's condition had deteriorated further, and he again requested help for his medical emergency. *Id.* The duty nurse did not take any of Mr. Perry's vitals or provide any treatment, despite his clear signs of medical distress. App. 24; R. Doc. 87, at 8.

At 8:00 a.m., four hours after Mr. Perry saw the duty nurse for the second time, he lost consciousness and was taken to the infirmary to see a nurse for the third time. *Id.* There, a duty nurse took his temperature; it was 104.6°. *Id.* Neither doctor who was supposed to be on duty, including Defendant Dr. Glen Babich, was onsite, so the nurse called Defendant Dr. John Matthews, a Corizon physician stationed four hundred miles away at Crossroads Correctional Center. *Id.* Dr. Matthews ordered only that Mr. Perry be given Tylenol. *Id.*

By late afternoon, Mr. Perry was still running a high-grade fever, was now coughing up bloody mucus, and "his oxygen saturations were in decline." App. 25; R. Doc. 87, at 9. When the duty nurse informed Dr.

Matthews of Mr. Perry's deteriorating condition, he ordered that Mr. Perry be taken to the Missouri Delta Medical Center by car. *Id.* Forty minutes later, Mr. Perry's condition continued to worsen, and the duty nurse elected to send him to Missouri Delta by Emergency Medical Services (EMS). *Id.* There, medical staff diagnosed him with either pneumonia or H1N1. *Id.* By this time, Mr. Perry was already septic.[2] App. 26; R. Doc. 87, at 10. After a few hours at Missouri Delta, medical staff refused to admit him and told the accompanying correctional officers to take Mr. Perry back to SECC because he "was going to die anyway." App. 25-26; R. Doc. 87, at 9-10.

Mr. Perry was returned to SECC that night, but it was not until late the next morning—nearly one and a half days after he first presented with emergency symptoms at the prison infirmary—that a physician at SECC finally physically examined Mr. Perry. App. 26; R. Doc. 87, at 10. Shortly afterwards, Mr. Perry was transported via EMS to St. Francis Medical Center where he received emergency medical treatment. *Id.*

[2] According to the Centers for Disease Control and Prevention, "sepsis is the body's extreme response to an infection. . . . Without timely treatment, sepsis can lead to tissue damage, organ failure, and death." *What is Sepsis*, CDC (Aug. 9, 2022), https://www.cdc.gov/sepsis/what-is-sepsis.html.

Hospital staff performed a tracheotomy so Mr. Perry could breathe and determined that he was in multi-organ failure, including renal failure. *Id.* Mr. Perry's condition was so severe that he was placed in a medically induced coma for a month. *Id.* St. Francis staff and physicians informed Mr. Perry's family that "timely and proper medical treatment" could have prevented his condition. App. 27; R. Doc. 87, at 11.

While Mr. Perry was hospitalized, his family volunteered to serve as donors for a potential kidney transplant. App. 26; R. Doc. 87, at 10. Hospital staff were receptive to the possibility that Mr. Perry could be an eligible candidate for such a transplant. App. 27; R. Doc. 87, at 11. But then-Warden Defendant Ian Wallace rejected the proposal, stating: "He belongs to me." *Id.*

Mr. Perry emerged from the coma in February 2014. App. 26-27; R. Doc. 87, at 10-11. He awoke suffering from paralysis, unable to feed himself, needing a tracheotomy tube in order to breathe, and still in renal failure. App. 27; R. Doc. 87, at 11. Despite Mr. Perry's serious medical condition, he was soon transferred to a new correctional facility. *Id.*

As a result of the delays in medical care, Mr. Perry has been diagnosed with end-stage renal disease. *Id.* Despite family members'

continued desire to donate a kidney, Corizon, Centurion, and MDOC staff have told Mr. Perry that he cannot receive a transplant while in MDOC custody. App. 28; R. Doc. 87, at 12. Without a functioning kidney, he requires three dialysis treatments a week to stay alive—treatment that causes serious side effects like severe headaches, cramps, and vision problems. *Id.* And dialysis is a temporary solution: Only 35% of dialysis patients survive more than five years of treatment.[3] Without a kidney transplant, Mr. Perry's renal failure "will shorten his life span." *Id.*

III. Procedural Background

A. Mr. Perry files a complaint.

Mr. Perry filed a *pro se* complaint under 42 U.S.C. § 1983 against Defendants, alleging Eighth Amendment deliberate indifference claims. R. Doc. 1. He also moved to appoint counsel, stating that his initial complaint was "written by a friend who is knowledgeable in the law," and that he needed counsel because his "bodily afflictions and treatment schedule" would prevent him from properly and timely litigating his case. R. Doc. 3, at 1. The district court reviewed the complaint and agreed that

[3] *E.g.*, Kidney Project, *Statistics*, U.C.S.F. School of Pharm., https://pharm.ucsf.edu/kidney/need/statistics.

"the Court and Plaintiff would benefit from appointment of counsel." R. Doc. 6.

Appointed counsel filed the operative complaint, alleging claims against three sets of Defendants: (1) Defendant Ian Wallace, Warden of SECC at the time of the incident, and Defendant Anne Precythe, Director of MDOC (together, "State Defendants"); (2) Defendant Corizon, LLC,[4] the for-profit private contractor that provided medical care to MDOC facilities until November 2021; Defendant Glen Babich, M.D., the Associate Regional Medical Director of Corizon; Defendant John Matthews, M.D., a Corizon physician at MDOC facilities; and Defendants Unknown Duty Nurses, employed by Corizon to provide medical care at SECC; and (3) Defendant Centurion of Missouri, LLC, the for-profit private contractor that has provided medical care to MDOC since November 2021. App. 18-21; R. Doc. 87, at 2-5.

[4] On February 13, 2023, Corizon filed a voluntary petition pursuant to chapter 11 of title 11 of the United States Bankruptcy Code. *See In re Tehum Care Services, Inc.*, No. 23-90086 (CML) (S.D. Tex. Bankr.). On March 27, 2023, Corizon filed a Suggestion of Bankruptcy and Notice of Automatic Stay in this Court. Plaintiff acknowledges that, under 11 U.S.C. § 362(a) and this Court's April 10, 2023 order, this appeal is stayed as to Corizon.

First, the complaint alleged that Defendants Unknown Duty Nurses and Defendant Matthews were aware that Mr. Perry was experiencing a medical emergency during the day and a half he descended into sepsis, yet denied him necessary treatment in deliberate indifference to his medical needs and in violation of the Eighth Amendment. App. 29; R. Doc. 87, at 13. Likewise, the complaint alleged that Defendant Wallace knew that Mr. Perry was suffering from renal failure, yet refused—and continues to refuse—to allow medically necessary treatment. *Id.*

Second, the complaint alleged that Defendants have: (1) implemented and maintained a policy of refusing appropriate emergency medical care to MDOC prisoners; (2) implemented and maintained a policy of refusing MDOC prisoners the ability to be evaluated for, or be recipients of, a kidney transplant; and (3) failed to train and supervise corrections and medical staff on how to administer appropriate emergency medical care to prisoners. App. 28-31; R. Doc. 87, at 12-15.

Mr. Perry requested compensatory damages as well as declaratory and injunctive relief, including an injunction to evaluate him for a kidney

transplant and, if he is eligible, to provide a transplant. App. 31; R. Doc. 87, at 15; App. 128; R. Doc. 112, at 2.

B. Defendants raise non-exhaustion and the district court dismisses the complaint.

State Defendants and Centurion moved to dismiss the complaint for failure to exhaust administrative remedies.[5] App. 42-47; R. Doc. 92, at 4-9; App. 104-107; R. Doc. 104, at 9-12. They did not dispute the 15-day deadline to initiate the first step of the grievance process. App. 44-45; R. Doc. 92, at 10-11; App. 105-06; R. Doc. 104, at 10-11. Nor did they argue that Mr. Perry could have complied with that deadline while he was in a coma or for a reasonable time period afterward. App. 44-45; R. Doc. 92, at 10-11; App. 105-06; R. Doc. 104, at 10-11. Instead, they argued that at some later point after he emerged from the coma, Mr. Perry should have filed a grievance. App. 45; R. Doc. 92, at 11; App. 107; R. Doc. 104, at 12.

[5] Defendants Corizon and Drs. Babich and Matthews filed an answer, including a blanket denial of Mr. Perry's allegations regarding the availability of administrative remedies. App. 54; R. Doc. 93, at 3. The answer also included a general assertion of the affirmative defense that Mr. Perry failed to exhaust available administrative remedies. App. 61; R. Doc. 93, at 10.

In response, Mr. Perry explained that the PLRA only required him to exhaust administrative remedies that were *available* to him. App. 70; R. Doc. 96, at 5. Here, the MDOC grievance procedure required him "to file an informal resolution request within 15 calendar days of the alleged incident." App. 71; R. Doc. 96, at 6 (citing App. 22; R. Doc. 87, at 6). And, because he was in a medically induced coma for more than 15 days after the denials of care underlying his complaint, he had no available remedies to exhaust. App. 71-72; R. Doc. 96, at 6-7.

The district court correctly recognized "that during the time [Mr. Perry] was in the coma and during his medical issues thereafter, the grievance procedure was not available to him." App. 131; R. Doc. 112, at 5. But it agreed with Defendants that Mr. Perry needed to make an untimely attempt to initiate the grievance process once he became able, *Id.*—even though no Defendant put forth any evidence of such a requirement in the MDOC grievance procedure. The district court went on to hold that, by filing his *pro se* civil complaint, Mr. Perry "demonstrated that the issues precluding filing the grievance have been eliminated," and dismissed the action. App. 131; R. Doc. 112, at 5.

Mr. Perry timely appealed.

SUMMARY OF ARGUMENT

This is a simple case. A prisoner need only exhaust "available" administrative remedies. 42 U.S.C. § 1997e(a). None were "available" to Mr. Perry, so he satisfied the PLRA's exhaustion requirement.

The Supreme Court and this Court have held that the availability analysis must consider real-world barriers, including individual circumstances and limitations, that prevent a prisoner from exhausting administrative remedies. Where exhaustion is impossible—as it was for Mr. Perry—the grievance procedure is unavailable and the prisoner has nothing to exhaust. The district court therefore got it right when it concluded that "during the time [Mr. Perry] was in the coma and during his medical issues thereafter, the grievance procedure was not available to him." App. 131; R. Doc. 112, at 5.

Rather than conclude its analysis there, the district court tacked on a new requirement—found in neither the MDOC procedure nor the PLRA—that Mr. Perry needed to try to initiate the grievance process after the prison's 15-day deadline had elapsed. But the PLRA requires only "[c]ompliance with prison grievance procedures," and courts may not impose additional atextual requirements without "exceed[ing] the proper

limits on the judicial role." *Jones*, 549 U.S. at 218, 203. This Court's sister circuits have carefully applied this dictate in nearly identical circumstances, and this Court should follow suit. The district court had no authority to create an untimely filing rule where MDOC's grievance procedure did not permit, much less require, Mr. Perry to file out of time.

The district court compounded this error by concluding that Mr. Perry was capable of filing a late grievance solely because he filed a *pro se* complaint. But the original complaint "was written by a friend," R. Doc. 3, at 1, and Mr. Perry alleged that he continued to suffer from "serious side effects," including "severe headaches, cramps and vision problems," caused by his ongoing dialysis treatments, App. 28; R. Doc. 87, at 12.

Accordingly, this Court should reverse.

STANDARD OF REVIEW

This Court reviews the dismissal of an action under Federal Rule of Civil Procedure 12(b)(6) *de novo*. *Minter v. Bartruff*, 939 F.3d 925, 926 (8th Cir. 2019). The Court "must accept the allegations contained in the complaint as true and make all reasonable inferences in favor of the nonmoving party." *Martin v. Iowa*, 752 F.3d 725, 727 (8th Cir. 2014). In

addition, "[c]ivil rights pleadings are construed liberally." *Davis v. Hall*, 992 F.2d 151, 152 (8th Cir. 1993).

Exhaustion is an affirmative defense. *Jones*, 549 U.S. at 212. Accordingly, "defendants have the burden of raising and proving the absence of exhaustion." *Porter v. Sturm*, 781 F.3d 448, 451 (8th Cir. 2015).

ARGUMENT

I. Administrative Remedies Were Not Available To Mr. Perry.

The exhaustion provision of the PLRA requires only exhaustion of "such administrative remedies as are *available*" before a prisoner brings suit in federal court. 42 U.S.C. § 1997e(a) (emphasis added). Accordingly, while a prisoner "must exhaust available remedies," he "need not exhaust unavailable ones." *Ross*, 578 U.S. at 642. Here, Mr. Perry had no "available" administrative remedies.

The district court correctly recognized as much, concluding that "the grievance procedure was not available" while Mr. Perry "was in the coma and during his medical issues thereafter." App. 131; R. Doc. 112, at 5. Given the grievance procedure's 15-day deadline, that should have resolved the issue. However, the district court went on to impose a

requirement without any grounding in the record or the procedure's text—that a prisoner physically unable to file within the prescribed deadline must attempt to file outside the deadline—and then faulted Mr. Perry for failing to comply with that non-requirement. *Id*. That was error.

A. Mr. Perry's coma and the debilitating medical issues that followed left him incapable of filing a timely grievance.

As the Supreme Court recognizes, the PLRA's availability analysis accounts for a prisoner's individual capabilities. And circuit courts of appeal—including this Court—agree that a prisoner need not exhaust if he is incapable of using a grievance process due to his physical state or mental abilities. The district court was therefore correct when it said "the grievance procedure was not available" while Mr. Perry "was in the coma and during his medical issues thereafter." App. 131; R. Doc. 112, at 5.

In *Ross*, the Supreme Court underscored that availability is a "built-in exception to the exhaustion requirement" found directly in the PLRA's text. 578 U.S. at 635. It emphasized that this "textual exception to mandatory exhaustion" has "real content" and requires courts to consider whether the administrative remedies were "accessible or [obtainable]." *Id.* at 642 (quoting *Booth*, 532 U.S. at 737-38). Procedures

are "available," it explained, if they are "'capable of use' to obtain 'some relief for the action complained of.'" *Id.* (citing Webster's Third New Int'l Dictionary 150 (1993)). Accordingly, the availability inquiry "must" account for "the real-world workings of prison grievance systems," and how a prisoner might "discern or navigate" those systems. *Id.* at 643-44. The inquiry must also account for "[the litigant's] situation." *Id.* at 648.

Before and after *Ross*, this Court has defined an available remedy the same way, explaining that "available" means "capable of use for the accomplishment of a purpose: immediately utilizable and accessible." *Porter*, 781 F.3d at 451 (cleaned up); *see also Townsend v. Murphy*, 898 F.3d 780, 783 (8th Cir. 2018) (explaining a remedy is "unavailable" if it is "not capable of use"). And that definition requires consideration of a prisoner's individual capabilities.

In *Martinez v. Fields*, 627 F. App'x 573 (8th Cir. 2015), for example, this Court reversed the district court's grant of summary judgement on exhaustion grounds where the prisoner did not speak English and was not told about the grievance process in his native language until it was "too late to file a grievance." *Id.* at 574. It concluded that the defendant officer "did not meet his burden" of showing remedies were available to

that particular prisoner. *Id*. District courts in this circuit likewise consider individual circumstances, including any "[p]hysical or mental infirmities," that "may render administrative remedies unavailable." *Michalek v. Lunsford,* No. 4:11CV00685–JMM–JTR, 2012 WL 1454162, at *2-4 (E.D. Ark. Apr. 5, 2012), report and recommendation adopted, 2012 WL 3235781 (E.D. Ark., Apr. 24, 2012).[6]

Other circuits agree that district courts must take a prisoner's capabilities into account in determining whether administrative remedies are "immediately utilizable and accessible," *Porter*, 781 F.3d at 451, and regularly conclude that physical or mental limitations short of

[6] *See also, e.g., Mason v. Corizon, Inc.*, No. 6:13-CV-06110, 2015 WL 10434528, at *5-7 (W.D. Ark. Dec. 17, 2015), report and recommendation adopted, No. 6:13-CV-6110, 2016 WL 868835 (W.D. Ark. Mar. 7, 2016) ("If, as a practical matter, one is unable to use or access a remedy due to physical or mental incapacity, it is logical to conclude that the remedy is not 'available.'"); *Hightower v. City of St. Louis*, No. 4:14-CV-1959, 2015 WL 2066268, at *3 (E.D. Mo. May 4, 2015) (finding summary judgment on exhaustion grounds inappropriate where plaintiff asserted he had no "available" remedies because nobody "explained the grievance procedure to [him], and he was not provided a copy of the inmate handbook containing the grievance procedure until several months after he was detained"); *Dorn v. Brooks*, No. 5:18-CV-05149, 2020 WL 265209, at *5 (W.D. Ark. Jan. 17, 2020) (holding prisoner was "excused from the exhaustion requirement" where he could not comply with the prison's procedural rules because he was physically restrained and then transferred).

total unconsciousness can result in unavailability. In *Lanaghan v. Koch*, for instance, the Seventh Circuit held that remedies were unavailable to a prisoner who was "physically unable to pursue" them during the relevant timeframe. 902 F.3d 683, 688-90 (7th Cir. 2018). Simply put, "[t]he PLRA exhaustion requirement does not demand the impossible" and does not fault prisoners who, "through no fault of [their] own, could not have accessed the grievance procedure." *Id*. at 688.

This is not an outlier view: Circuit after circuit holds that the availability analysis requires consideration of whether a prisoner "was actually *capable* of filing [] a grievance." *Braswell v. Corr. Corp. of Am.*, 419 F. App'x 622, 625 (6th Cir. 2011) (emphasis in original) (finding summary judgment inappropriate where there was a question as to whether a prisoner suffering a mental health crisis "was mentally capable of filing a grievance"); *see also Rucker v. Giffen,* 997 F.3d 88, 94 (2d Cir. 2021) (holding that remedies are "unavailable" where the prisoner's medical condition presented a "substantial obstacle" to exhaustion); *Beaton v. Tennis*, 460 F. App'x 111, 113-14 (3d Cir. 2010) (finding summary judgment on exhaustion grounds inappropriate where prison staff rendered remedies unavailable by taking advantage of

plaintiff's confused mental state); *Days v. Johnson*, 322 F.3d 863, 867 (5th Cir. 2003) (per curiam) (holding that plaintiff's broken right hand rendered remedies unavailable), overruled on other grounds by *Jones*, 549 U.S. at 212.

The district court's initial determination that "the grievance procedure was not available" to Mr. Perry is therefore consistent with *Ross*, *Martinez*, and a host of out-of-circuit precedent. App. 131; R. Doc. 112, at 5. And that determination makes sense. Mr. Perry's doctors placed him in a medically induced coma for a month after his medical emergency and he continued to suffer from debilitating medical issues when he awoke—he was paralyzed, "could not feed himself," and required a tracheotomy tube in order to breathe. App. 27; R. Doc. 87, at 11. These limitations on his physical capacity encompassed the entire 15-day window he had to complete the first step of the grievance process for the egregious denials of emergency care and transplant evaluation. Thus, remedies were unavailable, and the district court should have concluded its analysis there.

B. Mr. Perry was not required to file an untimely grievance.

As stated above, the PLRA requires only exhaustion of "available" remedies. *Ross*, 578 U.S. at 642. If they are unavailable, the prisoner need not exhaust. *Id.* That's it. There is no intermediate rule, buried beneath the statutory text, that if a prison's rules and deadlines make a remedy unavailable, the prisoner must nonetheless try to circumvent those rules to satisfy the PLRA. Yet the district court imposed such a rule when it held that Mr. Perry needed to make an exhaustion attempt *outside* the "prescribed time period" set by prison policy. App. 129-131; R. Doc. 112, at 3-5. That was error.

To properly exhaust, a prisoner need only "compl[y] with an agency's deadlines and other critical procedural rules." *Woodford*, 548 U.S. at 90. That is, "it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones*, 549 U.S. at 218. Accordingly, the Supreme Court has rebuffed judicial efforts to add "prerequisite[s] to proper exhaustion" that are not found in the relevant prison "policy itself." *Id.* Such requirements "lack[] a textual basis in the PLRA" and are thus impermissible. *Id.* at 217. Simply put, *Woodford* allows officials to make the rules and hold prisoners to strict compliance

with them, 548 U.S. at 88, 93, and *Jones* holds that prisoners can rely on those rules and their compliance with those rules to satisfy the exhaustion requirement, 549 U.S. at 218.

In delineating the availability exception, *Ross* relied on these principles to make clear that an administrative remedy is not "available" to a prisoner who cannot, through no fault of his own, comply with the prison's explicit rules and deadlines. It reiterated that the PLRA neither requires prisoners to guess at implicit rules that are not "officially on the books," nor authorizes courts to impose extra-textual exhaustion rules. *Ross*, 578 U.S. at 643, 640 n.1 (holding that courts cannot impose rules that "are not required by the PLRA," because doing so would "exceed[] the proper limits on the judicial role" (quoting *Jones*, 549 U.S. at 203)); *see also Doe v. Dep't of Veterans Affairs*, 519 F.3d 456, 461 (8th Cir. 2008) (recognizing courts' duty "to interpret and apply statutes as written").

In keeping with Supreme Court precedent, this Court's sister circuits hold that it is impermissible to read additional requirements into a prison's grievance policies. As the Fifth Circuit plainly put it: "Exhaustion is defined by the prison's grievance procedures, and courts neither may add to nor subtract from them." *Cantwell v. Sterling*, 788

F.3d 507, 509 (5th Cir. 2015) (per curiam) (reversing grant of summary judgment because defendants failed to establish "what the applicable procedures . . . were").

The Third Circuit is in accord. In *Small v. Camden County*, 728 F.3d 265 (3d Cir. 2013), it reversed a dismissal of several claims for nonexhaustion where the district court "erroneously read an additional requirement [to appeal from a non-decision] into [the prison's] grievance procedures." *Id.* at 273. Notwithstanding some evidence that the prisoner "*could* appeal a non-decision," the Third Circuit held that, "[b]ecause [prison] procedures did not contemplate an appeal from a non-decision, . . . the appeals process was unavailable." *Id.* at 273 & n.9.

Indeed, the weight of appellate authority agrees that district courts may not hold prisoners to unwritten requirements. *See, e.g., Williams v. Priatno*, 829 F.3d 118, 126 (2d Cir. 2016) (reversing dismissal where prison's "regulations plainly d[id] not describe a mechanism for appealing a grievance that was never filed"); *Moore v. Bennette*, 517 F.3d 717, 726 (4th Cir. 2008) (reversing dismissal for nonexhaustion where "nothing in the [prison's rules] required [the prisoner] to identify specific individuals in his grievances"); *Ingram v. Watson*, No. 21-3400, --- F.4th ---, 2023 WL

3244243, at *2 (7th Cir. May 4, 2023) (rejecting district court's conclusion that prisoner was required to take a step not "contemplate[d]" by prison regulations in order to exhaust); *Little v. Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010) (concluding a prison "rendered . . . exhaustion unavailable" where the decision to reject a grievance "exceeded its authority" under its own rules); *Turner v. Burnside*, 541 F.3d 1077, 1083 (11th Cir. 2008) (rejecting argument that a prisoner failed to exhaust by not completing steps absent from "the applicable prison regulation").

Here, MDOC's rule is clear: A prisoner wishing to initiate the grievance process must file an informal resolution request within 15 days of the incident. App. 22; R. Doc. 87, at 6. This rule did not permit, much less require, Mr. Perry to initiate the grievance process more than 15 days after the unconstitutional denials of care. *Id.* The district court nonetheless imposed an untimely-filing requirement on Mr. Perry, contrary to the Supreme Court's clear direction that "it is the prison's requirements . . . that define the boundaries of proper exhaustion." *Jones*, 549 U.S. at 218.

The Seventh Circuit, confronted with an identical scenario, flatly rejected the same atextual requirement imposed by the district court

here. In *Lanaghan*, the district court ruled for the defendants on exhaustion grounds, concluding, in relevant part, that even though the prisoner's medical condition made it impossible to meet the prison's 14-day deadline to file a grievance, he should have filed an untimely grievance as soon as he became physically capable of doing so. 902 F.3d at 688-90. In reversing, the Seventh Circuit explained that "the proper focus" was whether the prisoner was "able to file the grievance within the time period" or whether he was unable to do so "through no fault of his own." *Id.* at 688. It refused to hold the prisoner to an untimely-filing requirement that "was not presented in the handbook which described the grievance process." *Id.* at 689.

The same reasoning applies here: Mr. Perry was not able to initiate the grievance process during the 15-day deadline through no fault of his own, and Defendants either cite nothing suggesting MDOC procedure required a later attempt, App. 104-07; R. Doc. 104, at 9-12 (Defendant Centurion); App. 54, 61; R. Doc. 93, at 3, 10 (Defendants Babich and Matthews), or affirmatively admit that any later attempt would have been "untimely" under MDOC's procedure, App. 46; R. Doc. 92, at 12 (State Defendants). That settles the question. *See, e.g.*, *Spada v.*

Martinez, 579 F. App'x 82, 86 (3d Cir. 2014) (rejecting argument that plaintiff was required to file untimely grievance because the defendant "provided no basis for concluding that [plaintiff's] untimely grievance would have been accepted" and "there was no requirement" that plaintiff grieve out of time); *Peoples v. Corizon Health, Inc.*, No. 2:11-CV-01189-NKL, 2012 WL 1854730, at *3 (W.D. Mo. 2012) (rejecting argument that plaintiff "could have filed [a grievance] at a later date" because "[d]efendants have failed to meet their burden of showing that a late filing would be permitted by the prison or otherwise possible for an inmate in [plaintiff's] situation"); *see also Martinez*, 627 F. App'x at 574 (reversing grant of summary judgment for nonexhaustion where plaintiff only learned about grievance process "when it was too late to file a grievance," notwithstanding evidence that he "had not filed a grievance"—timely *or* untimely).[7]

[7] Separately, Defendant Centurion argued below that, after it assumed healthcare responsibilities in November 2021, Mr. Perry needed to "file a grievance stating his concerns regarding Defendant Centurion." App. 107; R. Doc. 104, at 12; *see also* App. 124; R. Doc. 111, at 4 (similar). Wrong. In *Jones*, the Supreme Court specifically rejected the proposition that the PLRA required plaintiffs to identify all individuals later named as defendants in the grievance process. 549 U.S. at 217-19. Any such requirement must stem from "the prison grievance process itself," not the PLRA generally. *Id.* at 218. And Defendant Centurion pointed to nothing

An untimely filing requirement is impermissible even where defendants offer assurances that they would have waived their own procedural requirements. For good reason: Allowing such a "work-around" would permit prison officials to retroactively cure unavailability with "the simple expedient of saying that they would have forgiven the procedural noncompliance and entertained a late grievance." *Ramirez v. Young*, 906 F.3d 530, 539 (7th Cir. 2018); *see also King v. McCarty*, 781 F.3d 889, 896 (7th Cir. 2015) ("[Defendants] cannot defeat prisoner suits by announcing impossible procedural hurdles beforehand and then, when they are sued, explaining that they would have waived the requirements for the plaintiff."), *overruled on other grounds by Henry v. Hulett*, 969 F.3d 769 (7th Cir. 2020) (en banc). Here, Defendants offered not even that. At most, they raised the "possibility" that prison officials "could" have waived their procedural rules. App. 46; R. Doc. 92 at 12. What's

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in MDOC's grievance procedure requiring a prisoner to file a new grievance any time a new individual or entity becomes involved in a complaint. Instead, they attempted to derive such a requirement from this Court's pre-*Jones* decisions—one of which the Supreme Court expressly vacated in light of *Jones*. App. 105; R. Doc. 104, at 10 (citing *Abdul-Muhammad v. Kempker*, 450 F.3d 350, 352 (8th Cir. 2006), *cert. granted and vacated sub nom. Ash-Sheikh Junaid v. Kempker*, 549 U.S. 1319 (2007), *remanded to Abdul-Muhammad v. Kempker*, 486 F.3d 444 (8th Cir. 2007)).

more, the record is devoid of any evidence or suggestion that Mr. Perry was made aware of even the "possibility" of submitting an untimely grievance. The district court was wrong to impose an untimely-filing requirement with no firmer basis.

The Supreme Court requires, and the weight of appellate authority supports, a rejection of the district court's unwritten untimely-exhaustion rule.

C. The complaint does not support the conclusion that Mr. Perry became physically capable of filing out of time.

Even assuming that the district court could impose an untimely filing requirement, the complaint does not support the district court's conclusion that Mr. Perry was physically capable of filing out of time. Mr. Perry alleged not only that he was in a coma in January and February of 2014, but also that his medical condition remained dire once he awoke: He suffered paralysis, could not feed himself, and needed a tracheotomy tube to breathe. App. 27; R. Doc. 87, at 11. And to this day, Mr. Perry requires three dialysis treatments weekly, which "cause serious side effects, such as severe headaches, cramps and vision problems." App. 27-28; R. Doc. 87, at 11-12.

The district court nonetheless concluded that Mr. Perry's barriers to "filing the grievance" had been "eliminated" at some point because he eventually filed a *pro se* complaint. App. 131; R. Doc. 112, at 5. But that complaint was not written by Mr. Perry; rather, it "was written by a friend." R. Doc. 3, at 1. The district court's assessment of Mr. Perry's capabilities "based on *pro se* papers [he] filed in court" thus "lacks convincing strength," because the court made no "determination about whether [he] wrote the papers on his own." *Moore v. Texas*, 139 S. Ct. 666, 671 (2019). Instead of making "all reasonable inferences" in favor of Mr. Perry, as required, *Barton v. Taber*, 820 F.3d 958, 967 (8th Cir. 2016), the district court did the opposite.

* * *

Having correctly determined that the prison's grievance procedure was unavailable to Mr. Perry during the window set by the procedure itself, the district court proceeded to impose a requirement not found in the MDOC grievance procedure or the PLRA. It then penalized Mr. Perry for failing to comply with that unwritten requirement by dismissing his suit, drawing unsupported inferences to overcome the complaint's allegations along the way. That was error.

CONCLUSION

This Court should reverse and remand for further proceedings.

Date: May 22, 2023

Respectfully Submitted,

s/ Megha Ram

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a) because this brief contains 6,400 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

/s/ Megha Ram
Megha Ram

CERTIFICATE OF SERVICE

I, Megha Ram, hereby certify that on May 22, 2023, I caused the foregoing Opening Brief of Appellant Tremonti Perry to be electronically filed with the Clerk of the Court for the United States Court Of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Megha Ram
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