No. 25-13222

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PAUL GEORGE BETTENCOURT

Plaintiff-Appellant,

v.

DELISHA BRYANT,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia
Case No. 7:23-cv-00114-WLS-ALS
The Honorable W. Louis Sands

PLAINTIFF-APPELLANT'S OPENING BRIEF

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Bettencourt v. Bryant
11th Cir. Docket No. 25-13222

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned hereby certifies the following list of trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that may have an interest in the outcome of this appeal:

Anand, Easha, Counsel for Plaintiff-Appellant

Bettencourt, Paul G., Plaintiff-Appellant

Bryant, Delisha, Defendant-Appellee

Carr, Christopher M., Counsel for Defendant-Appellee

Chalmers, Roger A., Counsel for Defendant-Appellee

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Cusimano, Ellen, Counsel for Defendant-Appellee

Langstaff, The Honorable Thomas Q., U.S. Magistrate Judge

Lawson, The Honorable Hugh, District Court Judge

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Bettencourt v. Bryant
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Roderick & Solange MacArthur Justice Center, Firm for Plaintiff-Appellant

Sands, The Honorable W. Louis, U.S. District Judge

Sheppard, The Honorable Alfreda L., U.S. Magistrate Judge

Stewart, David M., Counsel for Defendant-Appellee

Pursuant to Eleventh Circuit Rule 26.1-3, the undersigned further certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

Dated: November 14, 2025

Respectfully Submitted,

s/ Kathleen Pleiss
Kathleen Pleiss

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a), Mr. Bettencourt respectfully requests that this Court hold oral argument. This case raises two important questions regarding the meaning of "available" under the Prison Litigation Reform Act. 42 U.S.C. § 1997e(a). First, are administrative remedies "available" where a pen or other writing implement is required to complete a grievance form, but the prisoner is forbidden from using such an implement?

Second, are administrative remedies "available" when a prisoner has two pending grievances and prison policy requires him to withdraw one to file a new grievance? This second question also provides the Court with the opportunity to reconsider *Pearson v. Taylor*, 665 F. App'x 858 (11th Cir. 2016). District courts frequently rely on *Pearson* to dismiss claims brought by prisoner-plaintiffs, yet this Court has not, to date, had the opportunity to assess whether *Pearson* can be squared with the plain text of the PLRA. Further, because these issues typically arise in cases brought by pro se litigants, this appeal presents a rare opportunity for the Court to hear argument on the issue.

Finally, this appeal would afford a junior attorney the opportunity to present argument for the first time.

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INTRODUCTION

Suppose a car rental agent tells you a car is "available." When you get to the rental office, you see the car on the lot, but you are told that the agency has lost the car keys. You would rightly be indignant: No fair-minded speaker of English would describe a car as "available" if the tool necessary to access the car is not.

Yet that is exactly what happened to Mr. Bettencourt. The Prison Litigation Reform Act (PLRA) requires prisoners to exhaust only "such administrative remedies as are *available*." 42 U.S.C. § 1997e(a) (emphasis added). But administrative remedies were not "available" during a period when Plaintiff-Appellant Paul George Bettencourt was on "sharps restriction" and forbidden from using a pen or other writing implement to fill out a grievance form. No fair-minded speaker of English would find administrative remedies "available" if the tool necessary to access them is not.

Now suppose you head from the car rental agency into the office. Your assistant has told an important client that you are "available" for lunch. It turns out that you already committed to lunch with a different important client. Your assistant protests that you are "available" in the

sense that you could always cancel on the other important client. Again, you would have every right to be indignant: No fair-minded speaker of English would describe you as "available" when what they actually mean is "not currently available but could become available only by sacrificing something important."

But again, that is precisely what happened here. The district court held administrative remedies "available" during a period when Mr. Bettencourt could only file the grievance covering the claim at issue in this case by withdrawing one of his two pending grievances. No fair-minded speaker of English would agree: Administrative remedies cannot be "available" if filing the grievance in question requires sacrificing another important grievance.

The district court thus erred in dismissing Mr. Bettencourt's case for failure to exhaust available administrative remedies. Mr. Bettencourt alleges that he was placed in a cell covered in feces, in freezing temperatures, without even a smock to cover him—allegations that the district court rightly held stated a claim for a violation of the Eighth Amendment. This Court should reverse the district court's exhaustion

holding and remand to allow the district court to consider the merits of Mr. Bettencourt's serious claim.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over Mr. Bettencourt's Eighth Amendment claim under 28 U.S.C. § 1331. The district court entered a final order dismissing Mr. Bettencourt's claim on August 12, 2025. ECF 35. Mr. Bettencourt timely noticed his appeal on September 15, 2025. ECF 38. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1) Are administrative remedies "available" within the meaning of the Prison Litigation Reform Act when a writing implement is required to complete a grievance form and a prisoner is not allowed to use a writing implement?

2) Are administrative remedies "available" within the meaning of the Prison Litigation Reform Act when a prisoner is not allowed to file a grievance while he has two grievances pending?

STATEMENT OF THE CASE

I. Legal Background

A. The Prison Litigation Reform Act

The Prison Litigation Reform Act's exhaustion provision requires that a prisoner exhaust "such administrative remedies as are available" in the jail or prison before filing a prison-conditions suit. 42 U.S.C. § 1997e(a). By the terms of the PLRA, then, a prisoner must exhaust only those administrative remedies that are "available" to him. *Ross v. Blake,* 578 U.S. 632, 635 (2016). Remedies are not "available" to prisoners where, for instance, the grievance system "operates as a simple dead end" or is "so opaque that it becomes, practically speaking, incapable of use," or "when prison administrators thwart inmates from taking advantage of a grievance process through machination." *Id.* at 643-44.

Exhaustion is an affirmative defense, not a pleading requirement. As such, "defendants bear the burden of proving" both that administrative remedies are available and that the plaintiff failed to exhaust those remedies. *Turner v. Burnside*, 541 F.3d 1077, 1082-83 (11th Cir. 2008); *Jones v. Bock*, 549 U.S. 199, 216 (2007).

This Court has set out a two-step process for district courts to determine whether a prisoner has exhausted available administrative

remedies under the PLRA. *See Turner*, 541 F.3d at 1082-83. First, the court:

> [L]ooks to the factual allegations in the defendant's motion to dismiss and those in the plaintiff's response, and if they conflict, takes the plaintiff's version of the facts as true. If, in that light, the defendant is entitled to have the complaint dismissed for failure to exhaust administrative remedies, it must be dismissed.

Id. at 1082. If the complaint is not subject to dismissal, the court proceeds to the second step, wherein it "make[s] specific findings in order to resolve the disputed factual issues related to exhaustion." *Id.* Once the district court makes specific findings, it "decides whether under those findings the prisoner has exhausted his available administrative remedies." *Id.* at 1083.

B. Georgia Department of Corrections Grievance Policy

Under Georgia Department of Corrections' (GDC) Standard Operating Procedure (SOP), a prisoner is required to complete and submit a grievance form no later than 10 calendar days from the date he or she "knew, or should have known, of the facts giving rise to the grievance." ECF 25-4 at 2-3.

At Valdosta State Prison, grievances must be handwritten. *See id.* at 2, 14 (explaining that other prisons in Georgia have an electronic kiosk

system, but Valdosta State Prison does not). To submit a grievance, the prisoner must "sign and hand-deliver the Grievance form to any Counselor." *Id.* at 14.

Prisoners are limited to two pending grievances at a given time. *Id.* at 12. If a prisoner wishes to file a new grievance while two other grievances are pending, he or she must withdraw one of the pending grievances. *Id.* at 12-13. Each grievance must contain only one "single issue" or "incident." *Id.* at 14.

II. Factual Background

1. Following months of sexual abuse by fellow prisoners, Paul George Bettencourt, a prisoner at Valdosta State Prison in Georgia, attempted to commit suicide by swallowing 40 batteries. *See* ECF 1-2 at 6-7. On January 13, 2023, Mr. Bettencourt was placed in the Acute Crisis Unit (ACU) due to his suicidal thoughts and actions. *Id.* at 7.

Mr. Bettencourt faced horrific conditions upon his arrival in the ACU. His cell was "smeared with dryed [sic] feces, blood, and other unidentified substance[s]," *Id.*; ECF 25-1 at 86; ECF 30 at 2. The heat did not work, and the window did not seal properly, so cold air from an exhaust fan outside blew into the cell. *Id.*; ECF 30-2 at 2. Temperatures

outside were in "the low 30's and upper 20's," and it was so cold some nights that Mr. Bettencourt could "see his breath." ECF 1-2 at 7-8; ECF 25-1 at 77-78; ECF 30-2 at 1. Mr. Bettencourt's clothes were taken from him, replaced with a paper gown that he likened to a "paper towel" that would tear as soon as he moved. ECF 25-1 at 44. Two weeks into his stint in the ACU, an orderly offered Mr. Bettencourt a blanket in exchange for sexual favors. *See* ECF 1-2 at 9; ECF 25-1 at 74-75.

2. During his time in the ACU, Mr. Bettencourt was placed in a "sharps restricted" unit. *See* ECF 32 at 3. That meant he was forbidden from using a pen or other writing instrument, for any purpose, while he was housed in the ACU. *See* ECF 25-1 at 52, 63-64; ECF 30-2 at 4. Consequently, he could not fill out a grievance form while in the ACU. *See* ECF 30-2 at 4. Nor could he ask a counselor to fill one out for him—the counselor "could be fired" for doing so. ECF 25-1 at 64.

3. On February 13, 2023, Mr. Bettencourt was finally moved out of the ACU.[1] Upon his release, he discovered that almost all of his property

[1] On January 30, 2023, 17 days after his initial placement in the ACU, Mr. Bettencourt was formally "discharged," but he remained in the same feces-covered, freezing cell and "sharps restricted" unit until February 13. ECF 1-2 at 10; ECF 32 at 3.

was missing, including, most importantly, his shoes. *See* ECF 1-2 at 11-13. He was forced to walk around with shoes he made himself out of empty milk cartons. *Id*. at 13. He immediately wrote two grievances, one concerning his shoes, and the other concerning his other lost property. *Id*. at 12; ECF 25-4 at 4, 31, 38. Although his counselor initially refused to accept the grievances, he eventually managed to turn them in within the required 10-day period. *See* ECF 1-2 at 12, 14; ECF 25-4 at 2-3.

4. Once those two grievances were submitted, Mr. Bettencourt was forbidden by prison policy from submitting another grievance until his two pending grievances were resolved. *See* ECF 25-4 at 12. Those two grievances were finally rejected on March 10 and March 16, 2023. *Id*. at 30, 36. Once the first grievance was rejected, Mr. Bettencourt attempted to file a grievance concerning the deplorable conditions in the ACU. *See* ECF 1-2 at 16; ECF 25-4 at 51. Again, his counselor refused to accept his grievance initially, but Mr. Bettencourt was ultimately able to file it within the required 10-day window. *See* ECF 25-4 at 47, 51. In the grievance itself, he noted that he could not file it sooner because he first "had to wait for a response to one" of his pending grievances. *Id*. at 51.

Mr. Bettencourt's conditions grievance was denied as untimely. *Id.* at 49. He appealed, citing the GDC policy that prevents him from filing more than two grievances at once. *Id.* at 53. That appeal was rejected. *Id.* at 52-53.

III. Procedural History

1. Mr. Bettencourt, acting pro se, filed suit in the Middle District of Georgia under 42 U.S.C. § 1983. *See* ECF 1-2 at 1. The district court determined that his complaint stated a valid Eighth Amendment claim regarding the conditions of his confinement while in the ACU. *See* ECF 5 at 14; ECF 7; ECF 9.

Following discovery, Defendant-Appellee Delisha Bryant filed a motion for summary judgment asserting, as relevant here, that Mr. Bettencourt's complaint should be dismissed for failure to exhaust his administrative remedies because his conditions grievance was not timely filed.[2] *See* ECF 25 at 4; ECF 31 at 1.

[2] Because exhaustion of administrative remedies is considered "a matter in abatement," this Court treats any motion raising an exhaustion defense as a motion to dismiss, even if it is raised after discovery and relies on facts outside the plaintiff's complaint. *Bryant v. Rich*, 530 F.3d 1368, 1374-75 (11th Cir. 2008).

2. The magistrate judge issued a report and recommendation concluding that Mr. Bettencourt failed to exhaust his administrative remedies because the grievance was untimely, and it did "not appear that this is a situation where administrative procedures were unavailable." ECF 31 at 6-7.

Mr. Bettencourt objected to the report and recommendation, arguing that administrative remedies were "functionally unavailable" until he filed his grievance on March 16, 2023. ECF 32 at 5. Specifically, he urged that remedies were unavailable while he was in the ACU because he was "on sharps restriction," meaning he could not have a pen. *Id*. at 3. And, he argued, remedies remained unavailable after he was released from the "sharps restricted unit" and filed the grievances about his property and shoes because "[t]he grievance procedure restricts inmates to filing two grievances at a time, with only one claim allowed per grievance." *Id*.

3. The district court overruled Mr. Bettencourt's objections and adopted the magistrate judge's recommendation.

a. The court credited Mr. Bettencourt's uncontested assertion that he could not access a pen while in the ACU due to the "'sharps

restricted' unit." *See* ECF 34 at 3-4. Nevertheless, the court concluded that Mr. Bettencourt had an "available alternative," citing a provision in the Grievance SOP stating that prison staff "will assist Offenders who need special help filling out the grievance forms (*i.e.*, due to language barriers, illiteracy, or physical or mental disability) *upon request*." *Id.* at 4, 7. Finding it "reasonable to conclude" that prisoners "denied access to pens or pencils while in the ACU" fall within this provision, the court stated that Mr. Bettencourt should have relied on the Grievance SOP's "special help" section to request assistance filling out a grievance but had not "indicate[d] that he attempted to obtain such assistance." *Id.* at 7.

The court also cited a declaration attached to Defendant's summary judgment motion in which Counselor Stalvey asserted that prisoners "can submit grievances" in the ACU and that he had "received grievances from offenders while they [were] in the ACU." *Id.* That declaration did not explain how those offenders had managed to submit grievances. And it did not assert that the "special help" provision applied to Mr. Bettencourt. *See* ECF 25; ECF 33.

Defendant never argued that Mr. Bettencourt could have used the "special help" provision to file a grievance. Rather, the district court

raised this point sua sponte in its order adopting the magistrate judge's report and recommendation, based on "its own review of the Grievance SOP." ECF 34 at 4. Mr. Bettencourt did not have an opportunity to object to the district court's decision.

b. The district court also rejected Mr. Bettencourt's argument that remedies were not available to him during the period when his two other active grievances were pending. It relied on this Court's unpublished decision in *Pearson v. Taylor*, which concluded that a multiple grievance restriction did not render administrative remedies unavailable under the PLRA. *See* 665 F. App'x 858, 867-68 (11th Cir. 2016).

c. The district court dismissed Mr. Bettencourt's complaint for failure to exhaust. *See* ECF 34 at 9. Following the judgment, Defendant filed a motion for costs, and the court ordered Mr. Bettencourt to pay the Defendant's printing fees. *See* ECF 36; ECF 37.

4. Mr. Bettencourt timely filed a notice of appeal. *See* ECF 38 at 1.

IV. Standard of Review

This Court reviews de novo the district court's dismissal for failure to exhaust administrative remedies under the PLRA. *See*

Miller v. Tanner, 196 F.3d 1190, 1192 (11th Cir. 1999). The Court reviews the district court's factual findings relating to exhaustion for clear error. *See McGuire-Mollica v. Fed. Bureau of Prisons,* 146 F.4th 1308, 1313 (11th Cir. 2025).

SUMMARY OF ARGUMENT

I. The administrative exhaustion provision of the PLRA requires exhaustion only of "such administrative remedies as are available" before a prisoner can bring an action in federal court. *Ross*, 578 U.S. at 635-36. Administrative remedies were not "available" to Mr. Bettencourt during his placement in the Acute Crisis Unit because he was forbidden from using a pen to complete a grievance form.

A. As a consensus of dictionaries as well as precedent from this Court and the Supreme Court make clear, "available" means "capable of use," and "present or ready for immediate use." *Id.* at 642; BLACK'S LAW DICTIONARY 135 (6th ed. 1990). Here, administrative remedies were not "capable of use" under a plain reading of the PLRA: Mr. Bettencourt was forbidden from using a pen and therefore could not complete the grievance form. In *Ross v. Blake*, the Supreme Court provided a non-exhaustive list of examples where administrative remedies would be

unavailable to a prisoner, including when the grievance procedure operates as a "simple dead end." 578 U.S. at 643-44. The grievance procedure here operated as a "simple dead end" because the policy required a prisoner complete a grievance form with a pen, and Mr. Bettencourt was not able to obtain a pen.

B. The district court sua sponte raised an argument that Mr. Bettencourt should have relied on a "special help" provision of the Standard Operating Procedure, wherein prisoners who need "special help" filling out a grievance form can seek assistance from prison staff. *See* ECF 34 at 4. This argument is wrong thrice over. First, the "special help" provision is limited by its terms to prisoners with "language barriers, illiteracy, or physical or mental disability" or similar needs. ECF 25-4 at 10. Mr. Bettencourt had no such needs. And if his situation nonetheless fell within the "special help" provision, that provision would be too opaque to render remedies "available." *See Ross*, 578 U.S. at 644; *McGuire-Mollica*, 146 F.4th at 1316. Second, the argument misconstrues Defendant's evidence, which says nothing about that provision. *See* ECF 25-3 at 2; ECF 25-5 at 5. Finally, the district court did not give Mr. Bettencourt a chance to respond to the argument.

II. There were no administrative remedies "available" to Mr. Bettencourt even after he was moved out of the "sharps restricted" unit because GDC's grievance policy did not allow him to file a new grievance while he had two grievances still pending.

A. As mentioned before, "available" means "capable of use," and "present or ready for immediate use." Here, the multiple grievance limit meant that Mr. Bettencourt could not make "immediate use" of the grievance system; he had to wait until he no longer had two grievances pending. Again, this situation is akin to those the Supreme Court outlined in *Ross*. 578 U.S. at 643-44. Among other things, it operated as a "simple dead end," shutting Mr. Bettencourt's operative grievance out of the system entirely.

B. The district court relied on *Pearson v. Taylor*, where, in an unpublished decision, a panel of this Court found GDC's policy barring more than two active grievances at once did not render remedies unavailable under the PLRA. 665 F. App'x 858 (11th Cir. 2016). In addition to being an unpublished decision, *Pearson* is wrong on the merits. It ignored the plain meaning and ordinary usage of the word "available." It also wrongly treated *Ross* as if the examples listed are

exhaustive of the types of situations in which a court should find remedies unavailable. Finally, *Pearson* ignored precedent from the Supreme Court, by failing to consider exhaustion on a claim-by-claim basis. *See Jones*, 549 U.S. at 221-24.

If any doubt remains, constitutional and policy considerations counsel against *Pearson's* rule. The Supreme Court has stressed that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). But the district court's rule does just that by forcing Mr. Bettencourt to choose between two constitutional rights—the right to file grievances and the right to bring a non-frivolous civil rights suit.

ARGUMENT

The administrative exhaustion provision of the PLRA requires only exhaustion of "such administrative remedies as are *available*" before a prisoner brings an action in federal court. *Ross*, 578 U.S. at 635-36 (emphasis added) ("[W]e… underscore [the PLRA's] built-in exception to the exhaustion requirement: A prisoner need not exhaust remedies if they are not 'available.'"); *Turner*, 541 F.3d at 1084 ("A remedy has to be available before it must be exhausted."). In order for a remedy "to be

'available' [it] must be 'capable of use for the accomplishment of [its] purpose.'" *Id.*; *Ross*, 578 U.S. at 633 (same).

The grievance process thus was not "available" to Mr. Bettencourt prior to March 16, 2023. Remedies were unavailable while Mr. Bettencourt was in the "sharps restricted unit," meaning he was forbidden from using a pen. Without a pen to fill out a grievance form, administrative remedies were not "capable of use." And remedies were unavailable while Mr. Bettencourt had two active grievances pending, because prison policy forbade him from filing a third until the grievances were resolved.[3]

[3] From February 14 until February 21, 2023, Mr. Bettencourt was attempting to file a grievance but was thwarted from doing so because a counselor refused to accept his grievance. *See* ECF 1-2 at 12; ECF 32 at 3-4. The same issue occurred when he attempted to file his operative grievance, which the counselor refused to accept until March 16, 2023. *See* ECF 25-4 at 47; ECF 25-1 at 51-52. Defendant—whose burden it was to prove that remedies were "available" to Mr. Bettencourt—did not dispute that remedies were not "available" to Mr. Bettencourt during those windows. *See* ECF 25. Nor could they: The Supreme Court has squarely held that "when prison administrators thwart inmates from taking advantage of a grievance process," remedies are not "available." *Ross,* 578 U.S. at 644. During the remainder of the period between February 21 and March 16, 2023, Mr. Bettencourt had two active grievances and so was not allowed to file another. *See* ECF 25-4 at 51.

The district court thus erred in granting Defendant's motion to dismiss on exhaustion grounds.

I. Administrative Remedies Were Not Available to Mr. Bettencourt While He Was Forbidden to Use a Pen.

A. Administrative Remedies Were Not "Available" to Mr. Bettencourt Under the Plain Meaning of the Word.

No administrative remedies were "available" under the PLRA for Mr. Bettencourt while he was in the "sharps restricted" unit and forbidden from using a pen to complete a grievance form.

1. As the Supreme Court has explained, "the ordinary meaning of the word 'available'" is "capable of use for the accomplishment of a purpose" and that which "is accessible or may be obtained." *Ross*, 578 U.S. at 642 (citing BLACK'S LAW DICTIONARY 135 (6th ed. 1990) ("useable"; "present or ready for immediate use"); OXFORD ENGLISH DICTIONARY 812 (2d ed. 1989) ("capable of being made use of, at one's disposal, within one's reach")); *see also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993) ("present or ready for immediate use"); *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1323 (11th Cir. 2007) (same).

Here, Mr. Bettencourt was forbidden from using a pen or other writing implement while he was in a "sharps restricted" cell. This meant he could not "use" the grievance procedure, as a pen was required to

complete the form. *See* ECF 25-4 at 2, 14. Thus, administrative remedies were not available to Mr. Bettencourt under the ordinary meaning of the word because they were not "capable of use."

No ordinary English speaker would describe administrative remedies as "available" to Mr. Bettencourt. Refer back to the hypothetical bad day described in the introduction; no ordinary English speaker would describe a rental car as "available" without the keys to access it. So, too, here. Mr. Bettencourt may have had the paper grievance, but without a tool to access the grievance process—a pen or other writing implement—administrative remedies were not "available" to him.

The Supreme Court interpreted the word "available" the same way in *Ross v. Blake*. In *Ross*, the Supreme Court listed a few examples where administrative remedies would not be "available" to prisoners under the PLRA, including: (1) when administrative procedures operate as a "simple dead end," (2) when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation," and (3) when an administrative process is "so opaque that it becomes, practically speaking, incapable of use." 578 U.S. at 643-44.

Here, GDC's grievance procedure is comparable to the examples the Supreme Court gave for administrative remedies that are not "available." Indeed, GDC's grievance procedure could fairly be described as a "simple dead end." *Id.* In *Ross* itself, the Court explained that directing incarcerated individuals to submit grievances to an office that in practice "disclaims the capacity to consider those petitions" operates as a "simple dead end." *Id.* at 643. That procedure, in the Court's words, "is not then 'capable of use' for the pertinent purpose." *Id.* The same is true here. Just like submitting a grievance to an office that cannot consider it, a grievance policy that requires use of a pen where no pen is allowed is not "capable of use for the pertinent purpose," either.

B. The District Court's Assertion that Mr. Bettencourt Could Have Used the "Special Help" Provision of the Standard Operating Procedure is Wrong.

In its opinion below, the district court sua sponte raised a brand-new ground that neither Defendant nor the magistrate judge ever mentioned: Mr. Bettencourt should have relied on a provision of the SOP that states that "[i]nstitutional staff will assist Offenders who need special help filling out the grievance forms… *upon request*." *See* ECF 34 at 4. The district court was wrong.

1. The "special help" provision does not apply to Mr. Bettencourt's situation. The district court omitted a critical part of the policy: "Institutional staff will assist offenders who need special help filling out the grievance forms (*i.e., due to language barriers, illiteracy, or physical or mental disability*) upon request." ECF 25-4 at 10 (emphasis added). In other words, the "special help" provision is limited to circumstances where the prisoner has cognitive or physical limitations that make filling out a grievance form too difficult. That is not Mr. Bettencourt's situation. He is perfectly capable of filling out a grievance form; he was stopped not by a cognitive or physical deficit, but because he was not allowed a pen. Indeed, not even Defendant argued that the "special help" provision applied here. *See* ECF 25.

2. The district court seemed to suggest that being forbidden from using a pen would somehow trigger the "special help" provision. It is hard to see how. The list in the "special help" provision—"due to language barriers, illiteracy, or physical or mental disability"—is introduced with the acronym "*i.e.*," rather than the acronym "*e.g.*" That means the list is exhaustive, not illustrative. *Compare i.e.*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY "GRAMMAR & USAGE" (2025),

https://www.merriam-webster.com/grammar/ie-vs-eg-abbreviation-meaning-usage-difference ("that is"; used to "restate[] what has been said previously") *with e.g.* ("for example").

And even if the list in the provision—"language barriers, illiteracy, or physical or mental disability"—were illustrative rather than exhaustive, it is still clear Mr. Bettencourt did not qualify. In a list that contains illustrative examples, other objects that qualify must be "of the same general kind or class specifically mentioned." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXT § 32 (2012). In this case, this would mean that prisoners who need "special help" are only those who deal with the same *kinds* of barriers as those listed in the SOP. ECF 25-4 at 10. Being forbidden by the prison from using a writing implement is not the same kind of barrier.

This Court has previously rejected arguments that a prisoner should take steps that fall outside the plain text of a prison regulation to properly exhaust. In *Turner*, a prisoner suffered an electric shock from a defective oven, but when he attempted to file the grievance, a correctional officer tore it up. 541 F.3d at 1080-81. The defendants argued he should have filed another grievance using the "emergency" grievance process,

reserved for "unexpected situation[s] that require[] prompt action to avoid irreparable harm to the inmate." *Id.* at 1083. This Court explained that Mr. Turner's case fell outside the plain text of that regulation—no "prompt action" was required because he had already been shocked by the oven. *See id.* So, too, here. The Court should look to the plain text of the SOP to conclude Mr. Bettencourt's situation falls outside of those listed in "special help" provision.

3. Even if the "special help" provision could arguably cover a prisoner in a "sharps restricted" cell, it would be too opaque to qualify as "available." In *Ross*, the Supreme Court explained that remedies are not "available" where "no ordinary prisoner can discern or navigate" the grievance procedure. 578 U.S. at 644; *McGuire-Mollica*, 146 F.4th at 1314 (holding that an administrative remedy system that "imposes a requirement that is unknowable due to the opaqueness of the procedures," is not "available" under the PLRA). Here, the SOP language makes clear it is designed for those with cognitive or physical impairments. "No ordinary prisoner" would be able to "discern" that it was meant for prisoners who were forbidden from accessing a pen.

4. The district court relied on a prison counselor's declaration saying he had previously "received grievances from offenders while they [were] in the ACU." ECF 25-3 at 2. But that declaration has nothing to do with the "special help" provision—it does not once mention that provision. It gives us no idea *how* those prisoners were able to complete those grievances. Perhaps they were not held in a "sharps restricted" cell; perhaps they broke the rules to use a pen; perhaps they had physical or cognitive limitations that entitled them to the "special help" provision.

5. Finally, the district court's reliance on the "special help" provision is unavailing because the district court raised it sua sponte. Exhaustion is an affirmative defense. That means the burden is on a defendant to raise it—the district court did not have license to inject an argument into the case that the Defendant did not herself make. *See Jones*, 549 U.S. at 216; *see also Turner*, 541 F.3d at 1082-83.

Moreover, the Supreme Court has made clear that "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." *Day v. McDonough*, 547 U.S. 198, 210 (2006); *see also Abram v. Leu*, 759 F. App'x. 856, 861 (11th Cir. 2019). So at the very least, the district court should not have raised the "special

help" argument sua sponte without giving the Mr. Bettencourt an opportunity to respond.

II. Administrative Remedies Were Not Available to Mr. Bettencourt While He Had Two Pending Grievances.

Prison policy forbade Mr. Bettencourt from filing the instant grievance while he had two other active grievances pending. During that period, remedies were not "available" to Mr. Bettencourt—he was shut out of the grievance system altogether.

The district court relied on *Pearson v. Taylor*, where, in an unpublished decision, this panel found GDC's multiple grievance policy did not render remedies unavailable. 665 F. App'x 858 (11th Cir. 2016). But *Pearson* is impossible to square with the plain meaning of the word "available" in the PLRA.

A. Administrative Remedies Were Not "Available to Mr. Bettencourt Under the Plain Meaning of the Word.

Again, "available" means "capable of use for the accomplishment of a purpose." *See supra* at 18; *Ross*, 578 U.S. at 642. Something that is "available" is "present or ready for immediate use." BLACK'S LAW DICTIONARY 135 (6th ed. 1990); MERRIAM-WEBSTER'S THIRD NEW INT'L DICTIONARY 150 (1993) ("immediately utilizable"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993) ("present or ready for immediate

use"). Under the ordinary meaning of the word, administrative remedies were not "available" to Mr. Bettencourt while the two other grievances were pending: He was not allowed to use the grievance system at all, and he certainly was not allowed to use it "immediately."

Again, the Supreme Court's explanation of the term "available" in *Ross v. Blake* is illuminating. Where prison officials are "unable" to "provide any relief" to the aggrieved prisoner, a remedy operates as a "simple dead end" and is not "available." GDC's two-grievance restriction operated as just a "dead end" for Mr. Bettencourt's operative grievance. Per prison policy, prison officials were "unable" to even accept Mr. Bettencourt's grievance until the two grievances were resolved. *See* ECF 25-4 at 47.

Mr. Bettencourt followed the rules: He confined each grievance to one issue, as the SOP requires. *See* ECF 25-4 at 14. He started with the most time-sensitive issues—getting his shoes back. *Id.* at 35. He understood that he had to wait until his two grievances regarding that issue were resolved. *See id.* at 49-52. With no option to file the grievance regarding the freezing and disgusting prison cell conditions until March

2023, administrative remedies simply were not "available" to Mr. Bettencourt.

B. The District Court's Reliance on *Pearson* was Misplaced.

The district court relied on *Pearson v. Taylor*, where, in an unpublished decision, a panel of this Court found that a prisoner who challenged GDC's multiple grievance policy did not successfully show unavailability because his situation did "not appear to fall within any of [*Ross*'] three 'exceptions' to exhaustion." 665 F. App'x at 868. *Pearson* does not bind this court. *See* 11th Cir. R. 36-2; *Ray v. McCullough Payne & Haan, LLC*, 838 F.3d 1107, 1109 (11th Cir. 2016). And it was wrongly decided.

Pearson gave three reasons for its holding, all incorrect.

1. First, the Court in *Pearson* reasoned that the multiple-grievance restriction did not render remedies unavailable because that restriction was not specifically named in *Ross v. Blake*. As just explained, the multiple-grievance policy created the kind of "dead end" that *Ross* specifically mentioned. But even if the three examples the Supreme Court outlined in *Ross* did not cover this case, the three examples the Supreme Court gave are just that—examples. As every Court of Appeals

to decide this question has held, the three examples are not exhaustive of the types of scenarios that render remedies unavailable.[4]

That is clear from *Ross* itself and the text of the PLRA. The Court made explicit that the three examples it provided were merely those that were "relevant" to the case before it. *See Ross,* 578 U.S. at 643. Further, the Court described the listed circumstances as merely the "kinds of circumstances" in which remedies were unavailable, not the *only* circumstances in which remedies were unavailable. *See id.* Finally, the PLRA itself, which actually "contains" the "textual exception to mandatory exhaustion" says nothing about only the three circumstances *Ross* listed. *See id.* at 642; 42 U.S.C. § 1997e(a).

2. The Court in *Pearson* made a second error. It held that administrative remedies were "available" because a prisoner could always withdraw one of the pending grievances in pursuit of another. *See Pearson*, 665 F. App'x at 868. The district court did the same here, asserting that administrative remedies were "available" because Mr.

[4] *See Williams v. Correction Officer Priatno,* 829 F.3d 118, 123 n.2 (2d Cir. 2016) ("We note that the three circumstances discussed in *Ross* do not appear to be exhaustive."); *Ramirez v. Young*, 906 F.3d 530, 538 (7th Cir. 2018) (same); *Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017) (same).

Bettencourt "had the option to withdraw one of his pending grievances." ECF 34 at 8.

That argument ignores the plain meaning and ordinary usage of the word "available." *See supra* at 18, 25. Again, refer back to the introduction. No fair-minded speaker of English would describe a lawyer as "available" to meet with a client if she had to sacrifice an important meeting with a different client. This is because no ordinary use of the word "available" means "can use if willing to sacrifice some other important thing." Yet that is exactly what the *Pearson* court seemed to hold: That administrative remedies are "available" even if using those remedies would necessitate sacrificing some other important grievance.

Moreover, the idea that remedies are "available" because Mr. Bettencourt could withdraw another grievance is in conflict with Supreme Court precedent. In *Jones v. Bock*, the Court held that courts must assess exhaustion on a claim-by-claim basis. *See* 549 U.S. at 221-24. That is, claims that have been exhausted may move forward even if other, unexhausted, claims must be dismissed. *See id*. Given this rule, the question the district court should have asked when determining whether Mr. Bettencourt exhausted is not, "were any administrative

remedies available to Mr. Bettencourt?" But rather, "were administrative remedies available for Mr. Bettencourt's conditions claim?" The answer is no because he was forbidden from filing a grievance related to that claim.

3. Finally, this Court in *Pearson* noted that "'prisoners must complete the administrative review process in accordance with applicable procedural rules—rules that are defined not by the PLRA but by the prison grievance process itself.'" 665 F. App'x at 858 (quoting *Jones*, 549 U.S. at 218). But the question is not whether Mr. Bettencourt properly completed the administrative review process; everyone agrees he did not. Rather, the question is whether remedies were "available to him." The prison is free to impose a multiple-grievance policy, and prisoners are bound by that "procedural rule[]." But it cannot just "proclaim administrative remedies were available" under such a policy. *See Goebert*, 510 F.3d at 1323.

4. If any doubt remains, constitutional and policy considerations counsel against *Pearson's* rule. Affirming *Pearson's* interpretation of "available," which requires Mr. Bettencourt to give up one grievance to pursue another, raises serious constitutional concerns. The Supreme

Court has stated that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons*, 390 U.S. at 394. Forcing Mr. Bettencourt to choose between multiple grievances would force him to choose between two constitutional rights: His First Amendment right to pursue a grievance and his First Amendment right to pursue a non-frivolous civil-rights lawsuit. *See Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008) (stating that prisoners have a First Amendment right to file grievances); *Lewis v. Casey*, 518 U.S. 343, 351-53, 355 (1996) (recognizing a First Amendment right to pursue a non-frivolous civil-rights claim). This is particularly concerning, given that a prisoner's access to courts are "his remaining most 'fundamental political right, because preservative of all rights.'" *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992).

Further, a rule that requires prisoners to abandon one grievance in pursuit of another contravenes the purpose of the exhaustion requirement. The exhaustion requirement was meant to address both the quality and quantity of prison litigation by "afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516,

525 (2002); *Goebert*, 510 F.3d at 1324. But rather than allow prison officials this time and opportunity, it merely shuts grievances out of the review process altogether and therefore shields them from the courts. This undermines Congress' policy goals and is contrary to the purpose of the PLRA.

* * *

In summary, the district court erred in dismissing Mr. Bettencourt's claim on exhaustion grounds because administrative remedies were not available to him under both the plain meaning of "available" and precedent from this Court and the Supreme Court. Remedies were not available when he was forbidden from using a pen, and therefore could not fill out a grievance form. And then they were not available to him when he could not file his operative grievance because of the multiple grievance restriction. Because administrative remedies were unavailable to Mr. Bettencourt, he is not subject to the PLRA exhaustion requirement, and his claim should move forward.

This Court should reverse. And if it reverses the district court's dismissal, it must also vacate the award of costs.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal on exhaustion grounds, vacate the award of costs, and remand the case for consideration of the merits of Mr. Bettencourt's claims.

Dated: November 14, 2025

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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s/ Kathleen Pleiss
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I hereby certify that on November 14, 2025, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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