IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-14824

Jeffery Geter, *Plaintiff-Appellant*

v.

Baldwin State Prison, *Defendant,*

Dr. Ike Akunwanne, *Defendant-Appellee,* and

Dr. King, *Defendant-Appellee*

On Appeal from
the United States District Court
for the Middle District of Georgia
Case No. 5:16-cv-00444-TES-CHW

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Geter v. Baldwin State Prison, et al., No. 18-14824

STATEMENT OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant does not have a parent corporation and is not a publicly held corporation. The following parties have an interest in the outcome of this case:

Akunwanne, Dr. Ike, defendant-appellee

Baldwin State Prison, defendant

Geter, Jeffery, plaintiff-appellant

King, Dr., defendant-appellee

Self III, Tilman E., U.S. District Court Judge

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Jeffery Geter respectfully moves this Court pursuant to Fed R. Civ. App. 34(a) for addition of this case to the argument calendar. Oral argument is warranted in this case because it raises important legal issues of first impression for this Court regarding the availability of administrative remedies under the Prison Litigation Reform Act to prisoners with serious mental illness and/or cognitive disabilities.

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INTRODUCTION

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), requires prisoners to exhaust administrative remedies before seeking redress in court—but only if those remedies are available. Prison grievance systems often contain a gauntlet of rigid timelines, content requirements, and procedural rules. The rules can stymie prisoners with serious mental illness or intellectual disabilities, like the Appellant here, Jeffery Geter. Due to his mental illness and disabilities, Mr. Geter relied on a prison staff member for assistance, only to see her bungle his grievance and cause it to be rejected on procedural grounds. This case is about whether remedies are available when serious mental illness and intellectual disabilities—combined with misleading or ineffective assistance from prison staff—make exhaustion impossible.

The District Court dismissed the complaint because it determined—contrary to the Magistrate Judge's recommendation—that Mr. Geter had failed to properly exhaust his administrative remedies. The District Court concluded that Mr. Geter's mental illness and intellectual disabilities were irrelevant to the availability of remedies. The District Court also went further, holding that even if it were to consider Mr. Geter's individual disabilities, it would determine that he was fully capable of accessing the grievance procedure. The District Court arrived at this assessment of Mr. Geter's mental health and intellectual disabilities based not on

the undisputed evidence placed in the record through sworn declarations, but on the fact that Mr. Geter filed the lawsuit at hand. And the District Court ignored another important circumstance: a staff member purportedly helping Mr. Geter instead caused his grievance to be rejected on a procedural defect.

The decision below closed and locked the courthouse doors to Mr. Geter. It also misapplied the precedents of this Court and the Supreme Court, which recognize that the particular circumstances of a given case can render remedies unavailable.

JURISDICTIONAL STATEMENT

Jurisdiction is proper in this case under 28 U.S.C. § 1331. This appeal arises from a final judgment entered on October 19, 2018, dismissing a civil action brought under 42 U.S.C. § 1983 in the U.S. District Court for the Middle District of Georgia. Doc 88. Mr. Geter timely filed his Notice of Appeal on November 16, 2018. Doc 89.

STATEMENT OF ISSUES ON APPEAL

(1) Whether the District Court erred in dismissing Mr. Geter's claims based on failure to exhaust administrative remedies.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Mr. Geter's Serious Mental Illness and Cognitive Disabilities

Jeffery Geter, a prisoner at Georgia's Baldwin State Prison, has a serious mental illness. The Georgia Department of Corrections ("GDC") designates Mr. Geter as a Mental Health Level III patient. Doc 10-2 at 4; Doc 53 at 3. According to GDC policy, prisoners with a Level III designation have "a tenuous mental status that is easily overwhelmed by everyday pressures, demands, and frustrations resulting in . . . disorganization, impulsive behavior, poor judgment, a deterioration of emotional controls, loosening of associations, delusional thinking, and/or hallucinations."[1] Mr. Geter reports he has been designated as a Level III patient for about 18 years. Doc 75 at 4.

Mr. Geter also has difficulty with comprehension and has trouble understanding other people. Doc 53 at 3. In sworn statements filed below, Mr. Geter described his cognitive disabilities: "Plaintiff is mentel helth (3) Plaintiff his bipoler and is bad sick. And he has a 8th grade special education. Plaintiff is disable for life his nervous system is not know good. He can not think good. [sic]" *Id*.

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[1] Georgia Department of Corrections, Standard Operating Procedures: Mental Health Levels of Care 7 (2018), https://www.powerdms.com/public/GADOC/documents/106278 (last visited Jan. 10, 2019).

Mr. Geter also has serious physical disabilities including Parkinson's disease, epilepsy, a brain tumor requiring brain surgery, and "old timer's" (Alzheimer's Disease). Doc 10-2 at 2, 10. Mr. Geter reports: "I can not see good. I have double vision. I can not eat good. I can not think good. I have severe headache. I have trouble talking. I have tingling on 1 side of my body. I have blackout and I can not work. . . . One day I had memory loss. [sic]" *Id.* at 2-3.

B. The Grievance Process

At the time Mr. Geter's claims arose, all GDC prisoners were subject to the 2015 Statewide Grievance Procedure, a 17-page policy, with eight attached forms. Doc 45-2 at 11-37. The policy and forms comprise a complex and multi-layered grievance process. Prisoners may file a grievance about "any condition, policy, procedure, or action or lack thereof" unless the grievance falls into one of eight enumerated "non-grievable" categories. *Id.* at 16-17. The grievance policy cross-references at least four separate administrative processes that are to be used instead of the grievance procedure to address particular concerns, such as the disciplinary process or co-pay charges assessed for health care. *See id.* at 16.

The grievance procedure has two steps: an original grievance and a central office appeal. *Id.* at 18. The original grievance must conform to the following conditions: the grievance must be legible; it must be written on a grievance form; it must be no longer than the single-page form and one additional page; prisoners

may only write on one side of the page; the grievance must only pertain to a "single incident/issue"; the grievance must be signed; the grievance must be given to a counselor; and the grievance must be submitted no later than 10 days from the date of the facts giving rise to the grievance. *Id.* at 18-19.

The original grievance is then "screened" by the Grievance Coordinator, who will recommend that the Warden reject the grievance "only if it falls into one of the categories" listed below. *Id.* at 19. The four categories for which a grievance can be denied upon screening are (1) the grievance "raises a non-grievable issue"; (2) the grievance "is not filed timely"; (3) the grievance "includes threats, profanity, insults or racial slurs that are not part of the offender's complaint"; and (4) "the offender already has two active grievances." *Id*. The "single-issue" requirement is not included as a ground upon which a grievance can be rejected. *See id.*

If the Warden rejects a grievance, the prisoner can appeal the rejection to the Central Office. *Id.* at 20. If the Warden accepts a grievance, it will be sent to the Grievance Coordinator to process. *Id*. An investigation will be completed, and a recommendation will be submitted to the Warden, who will issue a decision. Doc *Id.* at 20-21. The Warden has 40 calendar days, with the option for a 10-day extension, to complete this process. *Id.* at 21. That decision will be communicated to the prisoner, who may appeal the decision to the Central Office. *Id*.

Any appeal must be filed within seven calendar days from receipt of the Warden's decision. *Id.* at 23. The Commissioner then has 100 calendar days to issue a final decision. *Id.* at 24.

C. Mr. Geter's Attempt to Complete the Grievance Process

Mr. Geter has been incarcerated since 1998. Doc 10 at 1. The operative grievance procedure in this case went into effect 17 years later, in 2015. Doc 45-2 at 3. Although the policy provides that upon entry to GDC all prisoners will receive an oral explanation of the grievance procedure and a copy of the Orientation Handbook for Offenders, which "includes instructions about the procedure," *id.* at 14, the record is silent on whether Mr. Geter received either. The 2015 policy also provides that a document showing receipt of the grievance policy and oral explanation "will be noted in the inmate's institutional file." *Id.* at 14. There is no such notation or receipt in the record in this case.

Mr. Geter filed the grievance at issue in this case, grievance 218930, on April 28, 2016. In the grievance, Mr. Geter primarily seeks improved medical care to treat his serious ailments. *Id.* at 41. He requests proper medication, rehabilitation, and accommodations for his disabilities. *Id.* In addition, the grievance states, "I hear somebody got the strip off my ID card and is using it. My 3-15-16 package and it said it was 6.19373 and would like to know what does number means [sic]." *Id.*

Mr. Geter's grievance was not rejected through the screening process; instead, the prison initiated and completed an investigation. *Id.* at 55-58. The Warden's response, dated May 27, 2016, denied Mr. Geter's grievance on substantive grounds. *See id.* at 59; Doc 77 at 8. The response stated that Mr. Geter "is being seen by medical and receiving medical care. Issue addressed. Therefore, this grievance should be denied." Doc 45-2 at 59. The response indicates it was provided to Mr. Geter on June 1, 2016. *Id*. An appeal was submitted on June 8, 2016. *Id.* at 60.

The Central Office's response to the appeal, unlike the warden's response, rejected the grievance on procedural grounds and did not consider the merits: "This grievance revealed that you failed to follow the proper procedure for filing the formal grievance. Policy states that the complaint on the grievance form must be a single issue/incident. You have noted more than one issue. The grievance was rejected at the institutional level in accordance with policy; therefore, this grievance is denied." *Id.* at 74.

It was not Mr. Geter but a prison staff member named Mary Danzy who wrote the initial grievance that contained the fatal error. Mr. Geter asked Ms. Danzy for assistance with the grievance process. Doc 16 at 8. Policy allows as much, providing that staff will assist prisoners "who need special help filling out

the grievance forms (*i.e.*, due to language barriers, illiteracy, or physical or mental disability) upon request." Doc 45-2 at 15.

In a sworn statement styled as a motion to amend his complaint, Mr. Geter stated that he initially asked Ms. Danzy for an informal grievance form and was told by Ms. Danzy that informal grievances are no longer used. Doc 16 at 8. Mr. Geter then asked who the grievance coordinator was, and Ms. Danzy said that she did all grievances. *Id*. In another sworn statement, Mr. Geter referenced grievance and appeal number 218930 and stated, "C.O.2 Mary Danzy officer did all of plaintiff grievance and appeals [sic]." Doc 28 at 2. Mr. Geter also stated that Mary Danzy "said for plaintiff to [give] all my papers to her. So I did." *Id*. The initial grievance is not in Mr. Geter's handwriting, as the Magistrate Judge acknowledged. Doc 45-2 at 41. *See also* Doc 71 at 6 ("[T]he April 28 grievance . . . appears to have been written by someone besides Plaintiff.").

II. PROCEEDINGS BELOW

Mr. Geter filed a *pro se* complaint on October 12, 2016, seeking damages and equitable relief under 42 U.S.C. § 1983. Doc 1. Mr. Geter subsequently filed an amended complaint on January 3, 2017. Doc 10. The Magistrate Judge conducted a preliminary screening under the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915A(a), and determined that Mr. Geter stated an Eighth

Amendment claim alleging inadequate medical care against Defendants Dr. Ike Akunwanne and Dr. King. Doc 33 at 13.

Mr. Geter filed five motions seeking appointment of counsel. Docs 4, 9, 22, 26, 70 at 6. The court denied each of them. Docs 33, 72. Mr. Geter asked the court for counsel in several additional documents as well.[2]

Dr. Akunwanne moved to dismiss the complaint, arguing that Mr. Geter failed to exhaust his administrative remedies because he listed more than one complaint on his grievance, in violation of the "single issue" rule in the GDC grievance policy. Doc 45. The Magistrate Judge rejected this argument and recommended denying the motion to dismiss. The Magistrate Judge concluded that Mr. Geter's "mental deficiencies prevented him [from] complying with the procedural rules for filing prison grievances." Doc 71 at 7. Dr. Akunwanne did not meet his burden of proof, the Magistrate Judge reasoned, because he failed to demonstrate that the grievance process was "available" to Mr. Geter. Doc 71 at 7. Finally, the Magistrate Judge questioned whether Ms. Danzy had given Mr. Geter "misleading official assistance" in filing the non-compliant grievance. *Id.*

The District Judge rejected the Magistrate's recommendations and granted Dr. Akunwanne's Motion to Dismiss on August 16, 2018. Doc 77. The court

[2] *See, e.g.* Doc 10-2 at 11; Doc 10-3 at 10; Doc 12 at 8; Doc 13 at 4; Doc 16 at 9, 11; Doc 18 at 2; Doc 21 at 4; Doc 25 at 2; Doc 31 at 2; Doc 36 at 2; Doc 39 at 3; Doc 39 at 10; Doc 44 at 2; Doc 59 at 3; Doc 60 at 9; Doc 61-1 at 3; Doc 68 at 4.

dismissed the claims against Dr. King on October 18, 2018.[3] The court entered a final judgment on October 19, 2018. Doc 88.

III. STANDARD OF REVIEW

This Court reviews a lower court's application of the PLRA's exhaustion requirement *de novo*. *Whatley v. Smith*, 898 F.3d 1072, 1082 (11th Cir. 2018). A lower court's factual findings on the issue of exhaustion are reviewed for clear error. *Id.* For all other facts, this Court accepts as true the facts pleaded by a *pro se* party, as Mr. Geter was at the district court level, and draws all reasonable inferences in his favor. *See id.*

SUMMARY OF ARGUMENT

The PLRA requires prisoners to exhaust administrative remedies prior to filing a lawsuit in court. 42 U.S.C. § 1997e(a). But it only requires exhaustion of *available* remedies. *Ross v. Blake*, 136 S. Ct. 1850, 1855 (2016) ("A prisoner need not exhaust remedies if they are not 'available.'"). The "ordinary meaning" of the word "available" includes whether it is "accessible" and "capable of use." *Id.* at 1858. Mr. Geter made a good-faith effort to exhaust his administrative remedies but was unable to access and use the grievance process due to his psychiatric and

[3] Mr. Geter does not appeal the dismissal of the complaint as to Dr. King.

intellectual disabilities. He even sought out reasonable accommodations in the form of assistance from a staff member, but that staff member introduced a fatal procedural error and caused his grievance to be dismissed. Under these circumstances, the process was not "available" to Mr. Geter.

The District Court's decision contained three principal errors that require reversal. First, the District Court erred by failing to consider Mr. Geter's mental illness and intellectual disabilities when determining the availability of administrative remedies. This Court has long acknowledged that individual circumstances must be considered when determining the availability of remedies. *See Turner v. Burnside*, 541 F.3d 1077, 1085 (11th Cir. 2008) (finding remedies unavailable to an individual prisoner due to the factual circumstances surrounding his attempts to grieve, including threats from the warden). But the District Court opined that mental illness and intellectual disability could *never* render remedies unavailable. Doc 77 at 15. Such a rule not only breaks with settled precedent, but closes the courthouse door to prisoners with serious mental disabilities, thereby raising serious constitutional concerns about the right of prisoners with mental illness or intellectual disabilities to access the courts. This Court should avoid that constitutional problem by holding, consistent with its precedent and that of other circuits, that individual circumstances such as mental illness and intellectual disabilities can make remedies unavailable under the PLRA.

Second, the District Court erred when it concluded that Mr. Geter could have exhausted administrative remedies despite his mental illness and intellectual disabilities. The District Court failed to consider the type of evidence in the record traditionally evaluated by this Court when making determinations about availability, such as whether the plaintiff has successfully completed the grievance process on prior occasions. *Whatley*, 898 F.3d at 1081. The District Court instead drew broad conclusions based on the mere fact that Mr. Geter filed a lawsuit in the first place. The court additionally refused to take into consideration the fact that it was a staff member who incorrectly filled out the grievance on Mr. Geter's behalf, though courts routinely find that this type of misleading official assistance renders remedies unavailable. *Ross*, 136 S. Ct. at 1860 (holding remedies are unavailable "when prison administrators thwart inmates from taking advantage of a grievance process through . . . misrepresentation . . . .").

Third, the District Court erred by shifting the burden of proof from Dr. Akunwanne to Mr. Geter. Defendants undeniably bear the burden of proving administrative remedies were available to a particular prisoner. *Turner*, 541 F.3d at 1082 ("The defendants bear the burden of proving that the plaintiff has failed to exhaust his available administrative remedies."). In this case, Dr. Akunwanne failed to provide any information demonstrating the grievance procedure was

available to Mr. Geter despite his serious mental illness and intellectual disabilities. The District Court nonetheless dismissed the case.

The District Court's decision should be reversed, and the case should be remanded for further proceedings.

ARGUMENT

I. UNDER THE PLRA, REMEDIES ARE UNAVAILABLE WHEN SERIOUS MENTAL ILLNESS OR INTELLECTUAL DISABILITIES PREVENT A PRISONER FROM EXHAUSTING.

The PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Supreme Court in *Ross v. Blake* affirmed the statute's "built-in" exception to the exhaustion requirement: "A prisoner need not exhaust remedies if they are not 'available.'" 136 S. Ct. 1850, 1855 (2016). A remedy is available only if it is "accessible or may be obtained" and if it is "capable of use for the accomplishment of a purpose." *Id.* at 1858 (internal quotation marks and citation omitted). And a remedy is capable of use only if the prisoner can use it to "obtain relief." *Id.* at 1859.

This Court has long held that a prisoner's individual circumstances can render remedies unavailable. *See Turner v. Burnside*, 541 F.3d 1077, 1085 (11th Cir. 2008). Mental illness and intellectual disabilities similarly have been

recognized by other courts as the type of individual circumstances that may render a grievance procedure incapable of use for a particular plaintiff. *See Weiss v. Barribeau*, 853 F.3d 873, 875 (7th Cir. 2017); *Braswell v. Corrections Corp. of America*, 419 Fed.Appx. 622, 625 (6th Cir. 2011) (unpublished). The Supreme Court's recent opinion in *Ross v. Blake* does not upend this longstanding precedent.

This District Court's interpretation of the PLRA's exhaustion requirement is reviewed *de novo*. *Whatley*, 898 F.3d at 1082. Here, the court erred in its analysis and application of the PLRA and Supreme Court precedent, requiring reversal. Indeed, failure to do so would result in categorically excluding a large portion of the prison population from accessing the courts, and raise serious constitutional concerns.

A. This Court Has Long Held that Individual Circumstances Can Render Remedies Unavailable.

This Court has already acknowledged that individual, fact-specific circumstances may render a grievance procedure incapable of use and therefore "unavailable" to a specific plaintiff. *See Turner*, 541 F.3d at 1085. The *Turner* Court examined a situation in which a warden threatened the plaintiff after he filed a grievance. *Id.* at 1081. The Court established a two-part test with both subjective and objective components, considering (1) whether the circumstances actually rendered the procedure unavailable to the individual plaintiff himself, and

(2) whether the particular circumstances would render the grievance process unavailable for an ordinary prisoner. *Id.* at 1085.

Similarly, this Court considered individual circumstances in *Palmore v. Tucker*, examining whether the unavailability of grievance forms to a particular individual could render the grievance process unavailable. 522 Fed. Appx. 717, 719-20 (11th Cir. 2013) (unpublished). In that case, the Court remanded for further factual determinations around these individualized circumstances. *Id.* And in *Brown v. Drew*, this Court relied on individual circumstances when it determined that the facility's delay in returning a grievance rendered the grievance procedure unavailable to the plaintiff. 452 Fed. Appx. 906, 908 (11th Cir. 2012) (unpublished).

This approach is consistent with the underlying goals of the PLRA and this Court's rationale in *Turner*. It provides an incentive to prison officials to properly and appropriately assist prisoners who may struggle with the grievance process, thus better "provid[ing] prisons with a fair opportunity to correct their own errors," *Woodford v. Ngo*, 548 U.S. 81, 94 (2006), and "safeguard[ing] the benefits of the administrative review process for everyone." *Turner*, 541 F.3d at 1085.

B. Courts Recognize Serious Mental Illness and Intellectual Disabilities as Individual Circumstances that Can Render Remedies Unavailable.

Sister circuits have long held that individual characteristics, including mental illness or disability, can render a grievance procedure incapable of use and therefore "unavailable" to a plaintiff. "[O]ne's personal inability to access the grievance system could render the system unavailable." *Days v. Johnson*, 322 F.3d 863, 867 (5th Cir. 2003). The Seventh Circuit recently explained that determining availability must be a "fact-specific inquiry." *Lanaghan v. Koch*, 902 F.3d 683, 688 (7th Cir. 2018). For example, a procedure that required prisoners to fill out a written grievance form without assistance from others "might render the grievance remedy available for the majority of inmates." But that same requirement could render the procedure "unavailable for a subset of inmates such as those who are illiterate or blind" and who may need assistance or accommodations to file a grievance due to those individual characteristics. *Id.*

Courts have recognized a range of individual characteristics that may render a grievance procedure unavailable, including injury, illiteracy, language access, and disabilities. *See, e.g.*, *Lanaghan*, 902 F.3d at 688-89 (finding grievance process was unavailable to plaintiff "through no fault of his own" due to illness and physical disabilities); *Ramirez v. Young*, 906 F.3d 530, 535 (7th Cir. 2018) (finding district courts must take into account "individual capabilities" when

analyzing whether a grievance procedure is "available" to the plaintiff and finding grievance procedure unavailable to prisoner with limited English skills); *Beaton v. Tennis*, 460 Fed. Appx. 111, 113-14 (3d Cir. 2012) (unpublished) (citing plaintiff's skull fracture and post-concussion syndrome at the time he was induced to withdraw his grievance); *Days*, 322 F.3d at 867 (holding remedy unavailable to prisoner who could not write because of a broken hand and who was not permitted to exhaust late when his hand had healed).[4]

Courts have also held that mental illness and intellectual disabilities, in particular, may render a grievance procedure unavailable, as grievance procedures require strict interpretation of an often-complex series of rules and timelines. *See, e.g.*, *Weiss*, 853 F.3d at 875 (finding defendants failed to demonstrate grievance procedure was available to plaintiff being treated for a serious mental illness and noting that "[g]iven the questionable state of his mental stability at the time, we cannot have confidence that administrative remedies were actually available to

[4] Numerous district courts across the country similarly have held that individual characteristics can render a grievance procedure "unavailable." *See, e.g.*, *Salcedo-Vazquez v. Nwaobasi*, 2014 WL 2580517, at *4 (S.D. Ill. June 9, 2014) (citing failure to provide information about grievance process in a language the plaintiff understood); *Hale v. Rao*, 768 F. Supp. 2d 367, 377 (N.D.N.Y. 2011) (citing illiteracy and poor understanding of grievance system of a plaintiff with a recorded IQ of 71); *Williams v. Hayman*, 657 F. Supp. 2d 488, 495-97 (D.N.J. 2008) (citing Deaf plaintiff's inability to communicate in writing or with his counselor); *Kuhajda v. Illinois Dept. of Corrections*, 2006 WL 1662941 (C.D. Ill. June 8, 2006) (finding Deaf prisoner with limited ability to read and write and without assistance may not have available remedies).

him."); *Braswell*, 419 Fed. Appx. at 625 (finding a genuine issue of material fact as to whether defendants had met their burden of demonstrating plaintiff with serious mental illness was "actually capable of filing" a grievance and whether plaintiff "sufficiently understood the detention facility's grievance system").[5]

C. Nothing in *Ross v. Blake* Upends the Longstanding Rule that Individual Circumstances such as Mental Disability Can Render Remedies Unavailable.

The District Court misinterpreted the Supreme Court's decision in *Ross v. Blake* by concluding that it must ignore Mr. Geter's individual circumstances. Contrary to the decision below, *Ross* does not undermine the longstanding rule that

[5] Similarly, district courts have held that mental illness and cognitive disabilities can render a grievance procedure "unavailable." *See, e.g.*, *Smith v. Singh*, 2018 WL 3999686, at *4 (S.D. Ill. July 27, 2018), *report and recommendation adopted*, 2018 WL 3993679 (S.D. Ill. Aug. 21, 2018) ("[T]he Court finds that Plaintiff's continued mental deficiencies, in addition to his limited remembrance and his limited mental capacity, made the administrative process unavailable."); *Cole v. Sobina*, 2007 WL 4460617, at *7 (W.D. Pa. Dec. 19, 2007) (refusing to dismiss for non-exhaustion where plaintiff alleged mental disabilities which could account for his noncompliance with grievance procedures); *Whitington v. Sokol*, 491 F. Supp. 2d 1012, 1019 (D. Colo. 2007) (refusing to dismiss for non-exhaustion where plaintiff alleged he had no available remedies because he was "mentally unable to complete the grievance process"); *Johnson-Ester v. Elyea*, 2009 WL 632250, at *6 (N.D. Ill. Mar. 9, 2009) (concluding that a "constellation of physical and mental impairments" may render administrative remedies unavailable); *C.M.V., by & through Martinez v. Cty. of Los Angeles*, 2007 WL 9662176, at *4 (C.D. Cal. Nov. 28, 2007) ("[T]he Court concludes that [plaintiff's] mental incapacity rendered him unable to comply with the PLRA's exhaustion requirements. . . . [T]he administrative remedies at issue here were not 'available' to [plaintiff] within the meaning of 42 U.S.C. § 1997e(a).").

individual circumstances, including mental illness and intellectual disabilities, can render administrative remedies unavailable.

In *Ross*, the Supreme Court explained that courts assessing the availability of remedies must "perform a thorough review" of the facts presented "and then address the legal issues . . . concerning the availability of administrative remedies." *Ross*, 136 S.Ct. at 1861. The Supreme Court provided as examples three possible ways in which a grievance procedure may be "unavailable." *Id.* at 1859-60. It cautioned that courts "may not engraft an unwritten 'special circumstances' exception onto the PLRA's exhaustion requirement" in addition to the unavailability exception "baked into its text." *Id.* at 1859-60, 1862.

The District Court incorrectly concluded that *Ross* foreclosed consideration of individual plaintiff characteristics, such as mental disability. Doc 77 at 15 ("Thus, . . . subjective considerations of a prisoner's assumed particular mental deficiencies effectively creates a 'fourth avenue' to show a prison's grievance procedure was unavailable under the PLRA."). In so holding, the District Court erroneously treated the three unavailability examples from *Ross* as an exhaustive list and incorrectly held that consideration of any additional circumstance, such as a prisoner's disability, would constitute an improper "special circumstance." Doc 77 at 14-15.

This application of the PLRA's exhaustion requirement is incorrect in two distinct ways. First, the District Court misinterpreted and misapplied the Supreme Court's ban on a "special circumstances" exception to the exhaustion requirement as a restriction on a court's consideration of whether remedies are "available." But the "special circumstances" exception rejected by the Supreme Court in *Ross* left the individualized assessment of "availability" unchanged. In *Ross*, the Supreme Court rejected the lower court's attempt to carve out an exception to the exhaustion requirement *in addition to* the unavailability exception already captured in the PLRA's text. *See Ross*, 136 S. Ct. at 1856 (rejecting the Fourth Circuit's conclusion that there "are certain 'special circumstances' in which, though administrative remedies may have been available[,] the prisoner's failure to comply with administrative procedural requirements may nevertheless have been justified") (internal quotations omitted). The prohibition against "special circumstance" carve-outs, in other words, does not apply to an analysis of whether a grievance procedure is "available" to the plaintiff nor constrain the circumstances in which a court may determine availability. Indeed, the *Ross* Court went on to discuss the availability of the grievance procedure in that matter, noting that "our rejection of the Fourth Circuit's 'special circumstances' exception does not end this case—because the PLRA contains its own, textual exception to mandatory exhaustion." *Id.* at 1858.

Second, the District Court misinterpreted and misapplied the Supreme Court's discussion about unavailability, improperly treating the three examples provided by the Court as an exclusive, exhaustive list. Doc 77 at 13-14. The Supreme Court identified three ways in which the grievance procedure could have been unavailable to the plaintiff in the case before it. *Id.* at 1859 ("[W]e note *as relevant here* three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief.") (emphasis added).[6]

But every circuit court that has addressed the question has held that the three scenarios described in *Ross* constitute a non-exhaustive list of examples. *See Ramirez v. Young*, 906 F.3d 530, 538 (7th Cir. 2018) ("In *Ross*, the Court offered three examples of situations in which a finding of unavailability would be proper . . . [b]ut these were only examples, not a closed list, and to the extent the district court thought they were the latter, it erred."); *Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017) (per curiam) ("By way of a non-exhaustive list, the Court recognized three circumstances in which an administrative remedy was not capable of use to obtain relief . . . ."); *Williams v. Priatno*, 829 F.3d 118, 125 n.2 (2d Cir.

[6] Those three examples included (1) the grievance procedure "operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) the grievance procedure is "so opaque that it becomes, practically speaking, incapable of use"; and (3) when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross,* 136 S. Ct. at 1859-60.

2016) ("We note that the three circumstances discussed in *Ross* do not appear to be exhaustive, given the Court's focus on three kinds of circumstances that were 'relevant' to the facts of that case").

Ross, therefore, does not absolve a court of its duty to consider other circumstances or individual characteristics, such as disability, which may render a grievance process "unavailable" to a plaintiff. Rather, *Ross* reaffirmed that courts must consider whether remedies are "accessible" or "useable" for a prisoner to "obtain relief." *Ross*, 136 S. Ct. at 1858-59. Nevertheless, here, the District Court declined to consider whether the grievance procedure was "accessible" or "useable" for Mr. Geter, given his mental illness and intellectual disability. Instead, the District Court erroneously limited its analysis to the three examples in *Ross* and determined that an "ordinary" prisoner would be able to "readily understand that he must only list one issue per grievance." Doc 77 at 15-16. This misapplication of *Ross* should be reversed.

D. The District Court's Conclusion That Serious Mental Illness or Intellectual Disabilities Cannot Render Remedies Unavailable Would Close the Courthouse Door to a Major Portion of the Correctional Population.

Because prisoners experience mental illness and intellectual disabilities at disproportionate rates, a rule that disability can never excuse the exhaustion requirement would bar a large portion of the prison population from accessing the courts. Nationwide, 37 percent of state prisoners have a history of mental illness,

according to the Bureau of Justice Statistics ("BJS").[7] Similarly, 14 percent of state prisoners experienced "serious psychological distress" in the 30 days prior to the BJS study, compared with about five percent of people in the general population.[8] In Georgia, nearly 20 percent of state prisoners are receiving mental health treatment.[9] More than three percent of Georgia prisoners—approximately 1,800 prisoners in November 2018—are considered a mental health "Level III" or above, like Mr. Geter, according to GDC data.[10] In addition, according to the BJS, about 20 percent of state prisoners nationwide report having a cognitive disability, compared with about five percent of the general population.[11]

Prisoners with serious mental illness or intellectual disabilities are at a particular disadvantage when attempting to fulfill the rigorous requirements of grievance procedures that may stump even the most proficient jailhouse lawyers.

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[7] JENNIFER BRONSON & MARCUS BERZOFSKY, BUREAU OF JUSTICE STATISTICS, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-12, at 1 (2017), *available at* https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf.

[8] *Id*. at 2-3.

[9] *See* OFFICE OF INFORMATION TECHNOLOGY, GA. DEP'T OF CORR., INMATE STATISTICAL PROFILE: ALL ACTIVE INMATES 45 (Dec. 1, 2018), *available at* http://www.dcor.state.ga.us/sites/all/themes/gdc/pdf/Profile_all_inmates_2018_11.pdf (indicating 10,710 prisoners out of a grand total of 54,881 prisoners are receiving some level of mental health treatment).

[10] *See id.* (indicating 1,830 prisoners are designated as a Level III or above, out of a grand total of 54,881 prisoners).

[11] JENNIFER BRONSON & MARCUS BERZOFSKY, BUREAU OF JUSTICE STATISTICS, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011-12, at 3 table 1 (2015), *available at* https://www.bjs.gov/content/pub/pdf/dpji1112.pdf.

These prisoners may be unable to fully comprehend the numerous and varied intricacies of the grievance procedure, such as strict timelines, proper formatting, content requirements like the "one-issue" rule, or one of many other potentially "bewildering features." *See Ross*, 136 S.Ct. at 1860. Those who attempt to file a grievance may be thwarted when the grievances are rejected due to failure to comply with procedural minutiae. When grievances are rejected out of hand because the prisoner is unable, through no fault of her own, to follow complex directions, the process cannot be used to "obtain relief." *See Ross*, 136 S. Ct. at 1859.

A failure to acknowledge the reality that mental disabilities can render a grievance procedure unavailable would result in categorically barring thousands of prisoners from the opportunity to enforce their constitutional rights in court, contrary to the intent of the PLRA. Congress intended the PLRA "to reduce the quantity and improve the quality of prisoner suits" as well as to "afford[] corrections officials time and opportunity to address complaints internally . . . ." *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). The PLRA was never intended to eliminate entire categories of individuals from bringing meritorious actions in court. *See Tuckel v. Grover*, 660 F.3d 1249, 1253 (10th Cir. 2011) ("[W]e are confident that Congress did not intend the exhaustion requirement to summarily

prevent inmates from vindicating their constitutional rights.") (citing *Brown v. Plata*, 563 U.S. 493, 526 (2011)).

Further, failing to consider an individual's disabilities in assessing whether remedies are "available" would be directly contrary to federal disability rights laws that predate the PLRA. Under the Americans with Disabilities Act and the Rehabilitation Act, public entities—including jails and prisons—must make reasonable modifications to services, programs, and activities to ensure that "the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. §§ 35.130(b)(7)(i), 35.150. Administrative exhaustion, and access to the courts, are undoubtedly "service[s], program[s], or activit[ies]" of the prison system. To read "availability" of administrative remedies as excluding consideration of disability would read the PLRA to, *sub silentio*, roll back core requirements of the ADA and Rehabilitation Act. Rather, this Court must consider whether remedies are "accessible" or "usable" to a plaintiff, as the Supreme Court did in *Ross*, to allow the PLRA to coexist easily with federal disability rights principles. *See Ross*, 136 S.Ct. at 1858-59; 28 C.F.R. § 35.150.

E. The Exhaustion Requirement Must Be Construed to Avoid the Serious Constitutional Difficulties Resulting from the District Court's Ruling.

It is "established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). Yet, the District Court held that Mr. Geter's mental illness and disability should not be considered when assessing whether the grievance procedure, a mandatory prerequisite to filing a lawsuit, was available to him. The District Court then went further, blocking any ability for Mr. Geter to access the courts despite the unavailability of administrative remedies by erroneously relying on the very filing of this lawsuit as evidence that Mr. Geter was capable of following the grievance procedure. This two-part holding blocks every avenue Mr. Geter has to obtain relief and "effectively foreclosed access" to the courts. *See Bounds*, 430 U.S. at 822 (*quoting Burns v. Ohio*, 360 U.S. 252, 257 (1959)). To the extent that this holding prevents Mr. Geter's access to the courts from being "meaningful," it violates his fundamental First Amendment right. *Lewis v. Casey*, 518 U.S. 343, 351 (1996) (*citing Bounds*, 430 U.S. at 823). And given the prevalence of mental illness and disability among prisoners, it would also prevent a large portion of prisoners and pretrial detainees from accessing the courts as well.

At minimum, the canon of constitutional avoidance should prevent the District Court's interpretation of the exhaustion requirement. "Under the

constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). The Court should therefore avoid the constitutional conflict created by the District Court in this case and find that mental illness and disability can render administrative remedies unavailable to individual prisoners.

II. SERIOUS MENTAL ILLNESS AND INTELLECTUAL DISABILITIES PREVENTED MR. GETER FROM COMPLETING THE GRIEVANCE PROCESS.

This Court reviews "*de novo* the district court's interpretation of section 1997e(a)'s exhaustion requirements and application of that section to [a plaintiff's] claims." *Higginbottom v. Carter*, 223 F.3d 1259, 1260 (11th Cir. 2000). The District Court made a legal error that requires reversal when it ignored the uncontested evidence in the record regarding Mr. Geter's individual circumstances and determined that remedies were available to him.

Mr. Geter's serious mental illness and intellectual disabilities prevented him from exhausting on his own, so he turned to a prison staff member for assistance. But that staff member introduced a procedural error that caused the grievance to be rejected. These facts are undisputed, yet the court concluded that remedies were available to Mr. Geter simply because he litigated the instant case *pro se*. The

District Court attempted to bolster its holding with a serious of additional observations related to filing this lawsuit, such as the fact that Mr. Geter filed a request to proceed *in forma pauperis*; "read and understood the Federal Rules of Civil Procedure"; sought leave to amend his complaint; followed direction to recast his complaint; inquired into the status of his case; and filed a response to Dr. Akunwanne's objections. Doc 77 at 17. But this Court's precedents dictate that such considerations do not provide a sufficient basis to conclude that remedies were available to Mr. Geter under the PLRA, and this legal error should be reversed.

A. Mr. Geter Has a Serious Mental Illness and Intellectual Disabilities.

It is undisputed that Mr. Geter has a serious mental illness and intellectual disabilities. Mr. Geter raised his mental illness and disability repeatedly throughout his sworn pleadings, both prior to and in response to Defendant's Motion to Dismiss. *See, e.g.*, Doc 10-2 at 2, 4 (affirming he is a mental health level three prisoner with an eighth grade special education and noting that "I can not think good"); Doc 12 at 5, 8 (affirming he has Parkinson's disease and bipolar disorder and experiences "periods of blank staring with loss of awareness and unresponsiveness to questions and instructions"; reiterating that he is a mental health level three prisoner with an eighth grade special education); Doc 16 at 4-5 (affirming he has been diagnosed with bipolar disorder and that "I can not think

good"); Doc 53 at 3 (affirming he has been diagnosed with bipolar disorder, is a mental health level three prisoner, "can not think good" and has trouble understanding other people).

Dr. Akunwanne did not contest these facts. Further, the Court is required to liberally construe facts presented by Mr. Geter as true, and draw all reasonable inferences in his favor. *See Harris v. Ostrout*, 65 F.3d 912, 915 (11th Cir. 1995); *Whatley*, 898 F.3d at 1082. Indeed, the District Court noted with approval that the Magistrate Judge "correctly accepted Plaintiff's allegations of mental deficiency as true." Doc 77 at 14. *See also Turner*, 541 F.3d at 1082 (requiring courts to accept facts pleaded by plaintiff as true).

B. Mr. Geter Could Not Complete the Exhaustion Process Because His Mental Illness and Intellectual Disabilities Forced Him To Seek Assistance From A Staff Member, Who Botched The Procedure and Caused the Grievance To Be Dismissed.

Mr. Geter's difficulty thinking and understanding other people, and his serious mental illness, resulted in an inability to understand and complete the grievance process. He therefore sought assistance from a staff member, Ms. Danzy, who completed the initial grievance for him. Doc 53 at 1. Ms. Danzy failed to follow the strict rules of the grievance procedure herself, ultimately leading to the dismissal of the grievance. These undisputed circumstances prevented proper exhaustion, and the District Court erred in refusing to consider

whether Ms. Danzy's introduction of a fatal procedural error rendered remedies unavailable to Mr. Geter.

Mr. Geter repeatedly presented evidence that Ms. Danzy completed the grievance form for him. In response to Defendant's Motion to Dismiss, Mr. Geter submitted a sworn statement asserting that Mary Danzy "did all plaintiff grievance . . . .[sic]" Doc 53 at 1. In an earlier sworn statement, Mr. Geter stated that he asked about submitting an informal grievance and was informed by Ms. Danzy that informal grievances are no longer used. Doc 16 at 8. Mr. Geter then asked who the grievance coordinator was, and Ms. Danzy informed him that she handled grievances. *Id.* In another sworn statement, Mr. Geter referenced his grievance and appeal and stated that Mary Danzy "did all of plaintiff grievance and appeals [sic]." Doc 28 at 2. Mr. Geter also stated that Mary Danzy "said for plaintiff to [give] all my papers to her. So I did." Doc 28 at 2. The grievance itself is not written in Mr. Geter's handwriting. *See* Doc 71 at 7. This evidence is undisputed. Dr. Akunwanne presented no evidence that Mr. Geter wrote the grievance. Dr. Akunwanne similarly presented no evidence from Ms. Danzy regarding her role in the process.[12] The grievance was subsequently denied for "fail[ure] to follow the

[12] Dr. Akunwanne noted in his Reply that Ms. Danzy had no role in the "evaluation or denial" of Mr. Geter's grievance. Doc 55 at 2. That assertion misses the point and fails to address whether Ms. Danzy was the person who incorrectly filled out the original grievance form.

proper procedure for filing the formal grievance. . . . You have noted more than one issue." Doc 45-2 at 74.

Thus, the record reflects that Ms. Danzy helped Mr. Geter with his grievance and completed the grievance at issue. In doing so, she failed to follow GDC's "one issue" rule. At best, this indicates GDC so poorly communicates the requirements of the grievance policy that even the staff members charged with implementing it are unaware of the intricacies. At worst, a staff member, knowing the appropriate procedure and knowing the grievance would be thrown out for failure to follow that procedure, submitted the defective grievance on Mr. Geter's behalf regardless. In either scenario, "such interference with an inmate's pursuit of relief renders the administrative process unavailable." *Ross*, 136 S. Ct. at 1860.

The Magistrate Judge noted that "[t]he pronounced change in handwriting between Plaintiff's successively dated grievances suggests that Plaintiff may have received . . . assistance." Doc 71 at 7. Yet, the District Court declined to determine whether someone assisted Mr. Geter with the grievance that ultimately ran afoul of the grievance procedure's "one issue" rule. *See* Doc 77 at 17-18.

The court erred by failing to undertake that analysis. The Supreme Court has recognized that a grievance process may be incapable of use and therefore unavailable to prisoners who are given misleading information by prison officials. *See Ross*, 136 S. Ct. at 1860. Other circuits also routinely have held that

misinformation provided by a staff member can render a grievance procedure unavailable. *See, e.g.*, *Townsend v. Murphy*, 898 F.3d 780, 783 (8th Cir. 2018) (finding grievance procedure was unavailable to prisoner who was misinformed about the process by a staff member); *Pavey v. Conley*, 663 F.3d 899, 906 (7th Cir. 2011) (finding an administrative remedy is unavailable to a plaintiff if prison officials "inaccurately describe the steps he needs to take to pursue it"); *Brown v. Croak*, 312 F.3d 109, 112 (3d Cir. 2002) (finding grievance procedure "unavailable" to plaintiff who "relied to his detriment on the defendants' erroneous or misleading instructions"). Indeed, there is "no reason" that a prisoner "should not be entitled to rely on the representations of his jailers." *Davis v. Fernandez*, 798 F.3d 290, 296 (5th Cir. 2015).

In *Davis*, the Fifth Circuit delineated a clear rule: "Grievance procedures are unavailable to an inmate if the correctional facility's staff misled the inmate as to the existence or rules of the grievance process so as to cause the inmate to fail to exhaust such process." 798 F.3d at 295. There, the court found administrative remedies unavailable to the plaintiff after prison officials erroneously informed him there was no option to appeal his grievance. Courts in this circuit have adopted the Fifth Circuit's rationale. *See Terrell v. Davis*, 2018 WL 4502329, at *2 (M.D. Ga. Sept. 20, 2018) (applying the *Davis* court's reasoning and finding

that "the grievance procedure was clearly 'unavailable' to [plaintiff], due to staff misrepresentation, under *Ross v. Blake*.").

Here, like in *Davis*, Mr. Geter sought out a staff member's assistance with the grievance policy. Ms. Danzy went beyond just providing Mr. Geter with incorrect information, however. In this case, Ms. Danzy filled out the grievance form for Mr. Geter herself, and in so doing, failed to follow the required procedure.

The Magistrate Judge appropriately concluded that if Mr. Geter "received assistance in filing grievance 218930, and yet was not given assistance in understanding and complying with the 'single issue' rule, then arguably, the grievance system was not available to Plaintiff . . . ." Doc 71 at 7. The District Court's failure to consider all of the facts in the record and the applicable law regarding misleading official assistance is reversible error.

C. The District Court Erred by Relying on a Subsequent Lawsuit When Considering Whether Mr. Geter's Mental Illness and Other Disabilities Were Sufficiently Severe to Hinder the Grievance Process.

The District Court erroneously held that, should it be required to take into account Mr. Geter's personal characteristics, Mr. Geter "could have subjectively understood the single-issue rule mandated by the grievance procedure." Doc 77 at 17. As a result, the Court determined that the grievance procedure was available to Mr. Geter and his failure to exhaust administrative remedies mandated dismissal of his case. *Id.* at 18. This result directly contradicted the findings by the Magistrate

Judge, who determined that the evidence in the record "suggests that Plaintiff's mental deficiencies prevented him [from] complying with the procedural rules for filing prison grievances . . . ." Doc 71 at 7. The District Court did not conduct a hearing prior to rejecting the Magistrate Judge's recommendation and reaching its conclusion.

The District Court's conclusion that Mr. Geter understood the grievance process, despite his mental illness, intellectual disabilities and the misleading "help" of Ms. Danzy, resulted from reversible legal errors. First, the District Court grounded its findings not in the evidence placed in the record through sworn declarations, but on the simple fact that Mr. Geter filed the lawsuit at hand. Reliance on a subsequent lawsuit when considering the availability of administrative remedies has been rejected by this Court. *Turner*, 541 F.3d at 1086 (finding that the fact that a prisoner filed a lawsuit does not mean that the administrative remedy was available to her). *See also Hemphill v. New York*, 380 F.3d 680, 688 (2d Cir. 2004) (rejecting argument that filing of subsequent lawsuit should be considered as evidence that administrative remedies were available to plaintiff). Indeed, such a rule only furthers an unacceptable categorical bar against prisoners with mental illness and intellectual disabilities from enforcing their rights in court. The District Court also inappropriately pointed to factors related to the filing of the lawsuit, such as Mr. Geter filing a motion to proceed *in forma*

pauperis, requesting to amend his complaint, filing a response to Dr. Akunwanne's objections, and inquiring into the status of his case. The District Court's reliance on these additional elements shares the same legal defect as reliance on fact of the lawsuit itself.

Second, the District Court failed to take into account the type of evidence typically considered by this Court when determining the availability of remedies, such as whether a plaintiff has a history of accurately filing grievances. In *Whatley v. Smith*, this Court found that there was "ample evidence" that the plaintiff "had pursued a good number of grievances all the way through to the third and final step of resolution, indicating that he was aware of the proper process and that it was available to him." 898 F.3d at 1081. By contrast, Mr. Geter has only filed one grievance in addition to the grievance at issue in this case, according to GDC records. Doc 45-2 at 39. Mr. Geter filed that grievance four years prior, in 2012. *Id*. That grievance was denied; there is no evidence in the record regarding whether it was denied on procedural grounds, due to an inability to follow the process, or whether it was denied on substantive grounds. *See id.* Accordingly, unlike in *Whatley*, there is no evidence in the record that Mr. Geter has ever been "aware of the proper process" and no evidence that the process was available to him now. *See Whatley*, 898 F.3d at 1081. On these legal bases alone, this Court should reverse the decision below.

In addition to these legal errors, the District Court also made clearly erroneous findings of fact to support its incorrect conclusion that Mr. Geter was capable of accessing the grievance procedure despite his serious mental illness and intellectual disabilities. First, the District Court determined that Mr. Geter "read and understood the Federal Rules of Civil Procedure." Doc 77 at 17. Nothing in the record supports that supposition, however, nor did the District Court buttress it with any evidence. To the contrary, the District Court itself characterized Mr. Geter's complaint as "almost completely indecipherable" and "what could be graciously described as 'rambling.'" Doc 77 at 4, n.3.

Indeed, there is no evidence in the record that Mr. Geter had access to a copy of the Federal Rules of Civil Procedure, let alone that he "read and understood" them. In fact, the Magistrate Judge previously found that Mr. Geter failed to follow the Federal Rules and denied his motions regarding discovery on that ground. *See* Doc 72 at 1. Further, a reasonable inference based on additional evidence in the record is that Mr. Geter struggled with how to bring and conduct this lawsuit, at times seeking direction from the court and requesting a copy of the "rule book." *See, e.g.*, Doc 1 at 1 ("Is this the court I need to file in help me if you can."); Doc 4 at 1 ("I need to know is this the court I need to file in. And if you have a court book that I need to go by"); Doc 49 at 2 (noting he does not have the "books and paperwork" needed to conduct this case); Doc 59 at 6 ("Plaintiff prays

the court gave plaintiff a copy of the court rule book if it can."). Mr. Geter also noted that he was at times unable to access the law library, the only place in a prison where there may be a copy of the Federal Rules. Doc 64 at 2 (affirming he is housed "in lockup" and thus does not have access to the law library). In addition, Mr. Geter begged many times for appointed counsel, explaining that he could not litigate on his own. *See, e.g.*, Docs 4, 9, 22, 26, 70 at 6.

Second, the District Court determined that Mr. Geter would have been able to exhaust administrative remedies because, during the litigation, he "followed the direction of the Magistrate Judge to recast his complaint." Doc 77 at 17. In fact, the Magistrate Judge specifically found that "Plaintiff completely failed to follow the Court's instructions in his recast complaint." Doc 33 at 8.

III. THE DISTRICT COURT ERRED BY SHIFTING THE BURDEN OF PROOF FROM DR. AKUNWANNE TO MR. GETER.

The District Court's analysis runs afoul of Supreme Court and Eleventh Circuit precedent by shifting the burden of proof from Dr. Akunwanne to Mr. Geter. *See Whatley*, 898 F.3d at 1082 ("The burden therefore is on the defendant to show that the plaintiff has not exhausted properly his administrative remedies.") (*citing Jones v. Bock*, 549 U.S. 199, 216 (2007)). Dr. Akunwanne indisputably bears the burden of showing that remedies were available to Mr. Geter. *See*

Turner, 541 F.3d at 1082. The District Court erred by reversing the burden and requiring Mr. Geter to prove affirmatively that remedies were *not* available.

A. Dr. Akunwanne Bears the Burden of Showing that Remedies Were Available To Mr. Geter.

"It is the defendant's burden to prove a plaintiff has failed to exhaust his administrative remedies, which requires evidence that the administrative remedies are available to the plaintiff." *Presley v. Scott*, 679 F. App'x 910, 912 (11th Cir. 2017) (unpublished) (*citing Turner*, 541 F.3d at 1082). This Court employs a two-step process to determine if the exhaustion requirement has been met. *See Turner*, 541 F.3d at 1082. First, the Court must look to the facts presented by the parties and, if they conflict, take "the plaintiff's version of the facts as true." *Id.* at 1082. If those facts demonstrate the plaintiff did not meet the exhaustion requirement, the claims must be dismissed. *Id.* If the complaint is not dismissed, the Court must move to step two, and "make specific findings in order to resolve the disputed factual issues related to exhaustion" and decide whether the prisoner has met the exhaustion requirement. *Id.* The defendant bears the burden of proof and must demonstrate that the grievance process was available to the plaintiff and that the plaintiff failed to exhaust administrative remedies. *Id.* This Court reviews a lower court's application of the PLRA's exhaustion requirement *de novo. Whatley*, 898 F.3d at 1082.

B. Dr. Akunwanne Failed to Provide Evidence that Remedies Were Available to Mr. Geter Despite Mr. Geter's Mental Illness and Intellectual Disabilities.

Dr. Akunwanne consistently failed to address Mr. Geter's mental illness and disabilities in his filings, even as Mr. Geter repeatedly pointed to these factors. Even before Dr. Akunwanne moved to dismiss on exhaustion grounds, Mr. Geter had already submitted sworn statements regarding his mental health, his disabilities, and the fact that he sought and received assistance with the grievance process. *See, e.g.*, Doc 10-2 at 2, 4; Doc 12 at 6; Doc 16 at 4-5, 8; Doc 28 at 2. Dr. Akunwanne did not address this information in his motion. Nor did Dr. Akunwanne provide any information regarding the availability of the grievance process to Mr. Geter specifically. Mr. Geter responded, again providing information regarding his attempts to exhaust and the reasons he was unable to fully access the grievance procedure. Specifically, Mr. Geter submitted a sworn statement affirming that Mary Danzy "did all plaintiff grievance [sic] . . . ." Doc 53 at 1. Mr. Geter further reiterated that he has bipolar disorder and has an eighth grade special education, "can not think good," and has trouble understanding other people. Doc 53 at 3. At that time, Dr. Akunwanne was provided with another opportunity to address the circumstances raised by Mr. Geter, having been put on notice of Mr. Geter's arguments in his response to the motion to dismiss, as well as in his earlier filings. Notably, however, Dr. Akunwanne again failed to address the

issues raised by Mr. Geter. *See* Doc 55. Mr. Geter submitted a sworn statement in response to Dr. Akunwanne's reply brief, providing additional information that "prevented the plaintiff from timely doing some of his law work." Doc 67 at 2. Mr. Geter reiterated that he recently underwent brain surgery and that he is a mental health level three prisoner with an eighth grade special education. *Id.* at 3. He also noted his epilepsy, severe headaches, double vision, memory loss and confusion. *Id.* at 2.

Rather than addressing the availability of remedies to Mr. Geter, Dr. Akunwanne discussed only the availability of remedies to prisoners *generally.* Dr. Akunwanne submitted a declaration by the Chief Counselor at Baldwin State Prison, who reiterated the basic grievance policy and noted that prisoners, generally, are given a verbal explanation of the process at the time they enter GDC. Doc 45-2 at 4. The declaration further provided that prisoners, generally, are given a handbook at the time they enter GDC. *Id.* Finally, the declaration noted that a copy of the grievance policy is available, generally, in the law library. *Id.* Dr. Akunwanne failed to provide any information showing that Mr. Geter—despite his serious mental illness and intellectual disabilities and Ms. Danzy's procedural error—was personally able to access the grievance procedure.

Without such a showing, Dr. Akuwanne failed to carry his burden to demonstrate the availability of administrative remedies. A facility may have a

policy in place that on its face is available to all prisoners. However, in practice, that policy may be inaccessible to certain prisoners based on their individual characteristics, such as mental illness or disability or the misdirection of staff. *See Lanaghan*, 902 F.3d at 688 (discussing that availability must be a fact-specific inquiry because a grievance procedure available to most prisoners may be unavailable to others). Such is the case here.

In addition, Dr. Akunwanne failed to present any evidence that even the general procedures for acquainting prisoners with the grievance process were provided to Mr. Geter. *See Days*, 322 F.3d at 867 (holding plaintiff needed to exhaust only those administrative remedies that were "personally available" to him). No information was provided to demonstrate that Mr. Geter received an oral orientation or a handbook in 1998 when he entered the GDC system. The grievance policy requires documentation noting the receipt of this oral explanation and handbook be included in each prisoner's institutional file. Doc 45-2 at 14. That documentation was not provided. In addition, no information was provided to address the fact that the grievance procedure has been updated one or more times since Mr. Geter entered the GDC system in 1998 and that substantive changes have been made to the policy during that time. *See id.* at 11 (indicating the operative grievance policy was effective as of July 20, 2015, and replaced a policy that was effective as of December 10, 2012). *See also* Doc 16 at 8 (affirming that Ms.

Danzy informed him that the informal grievances were no longer used). Dr. Akunwanne failed to meet his evidentiary burden, and this Court should reverse the decision below.

CONCLUSION

For the foregoing reasons, the Court should reject the District Court's decision, find that Mr. Geter's mental illness and intellectual disabilities rendered the grievance procedure "unavailable" under 42 U.S.C. § 1997e(a), and remand this matter for further proceedings.

Respectfully submitted,

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Dated: January 14, 2019

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 10,505 words.
2. 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).

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2019, I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit, causing notice of such filing to be served upon all parties registered on the CM/ECF system. I further certify that one true and correct paper copy of the Brief will be sent via first-class mail to counsel of record.

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