No. 18-14824

In the

United States Court of Appeals

for the Eleventh Circuit

Jeffery Geter,

Plaintiff-Appellant,

v.

Dr. Ike Akunwanne,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Georgia, Macon Division.
No. 5:16-cv-00444 — TES-CHW, *Judge Tilman E. Self*

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons and entities may have an interest in the outcome of this case:

Akunwanne, Dr. Ike, Defendant/Appellee;

Carr, Christopher M., Counsel for Defendant/Appellee;

Chalmers, Roger, Counsel for Defendant/Appellee;

Geter, Jeffery, Plaintiff/Appellant;

King, Dr., Defendant;

Pacious, Kathleen, Counsel for Defendant/Appellee;

Self, Tilman E., United States District Judge;

Stay, Ronald J., Counsel for Defendant/Appellee; and

Weigle, Charles W., United States Magistrate Judge;

/s/ *Ronald J. Stay*
Counsel for Appellee

STATEMENT REGARDING ORAL ARGUMENT

Appellee Dr. Akunwanne does not request oral argument in this case. The law governing the issues on appeal is settled and the facts and legal arguments of the parties are adequately set forth in the record. Oral argument is not necessary to advance the disposition of the appeal. Fed. R. App. P. 34(a)(2)(C).

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STATEMENT OF ISSUES

1. Under *Ross v. Blake*, __ U.S. __, 136 S. Ct. 1850 (2016), is an inmate's subjective inability to understand a particular grievance procedure a permissible excuse for avoiding the PLRA's exhaustion requirement?

2. Was the district court's factual finding that Geter could have subjectively understood the prison's "single issue" rule, which requires only one issue per grievance, clear error, given that Geter did not assert he could not understand the rule and there was no evidence that Geter's particular mental health conditions were of such severity that he could not have possibly understood the rule?

INTRODUCTION

In *Ross v. Blake*, __ U.S. __, 136 S. Ct. 1850 (2016), the Supreme Court established consistency as to what constitutes an "available" administrative remedy under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997(e). *Ross* swept away the inconsistent "special circumstances" exceptions that certain lower courts had engrafted onto the PLRA's exhaustion mandate and identified three sets of circumstances in which an administrative remedy is unavailable, including that the procedure for a grievance is "so opaque that it becomes, practically speaking, incapable of use," such that "no ordinary prisoner can discern or navigate it." In this appeal, Geter seeks to create a new "special circumstances" exception based on his alleged *subjective* inability to understand a grievance rule that requires each grievance to include only a single issue. The district court correctly determined, as a legal matter, that *Ross* does not permit this new basis for unavailability and that in any event, as a factual matter under step two of the *Turner* analysis, Geter could have understood the grievance procedure at issue in this case. This Court should affirm the district court's dismissal of Geter's complaint.

STATEMENT OF THE CASE

Plaintiff-Appellant Jeffery Geter sued Defendant-Appellee Dr. Ike Akunwanne and Defendant Dr. King[1] under 42 U.S.C. § 1983 for alleged deliberate indifference to Geter's serious medical needs, in violation of the Eighth Amendment. Doc. 1. Dr. Akunwanne filed a Rule 12(b) motion to dismiss, showing that Geter failed to exhaust his administrative remedies under the Prison Litigation Reform Act. Doc. 45. The district court agreed and dismissed Geter's complaint. Doc. 77. This appeal by Geter followed.

A. Factual Background

Geter is serving a "30 or 40" year sentence in the Georgia Department of Corrections ("GDC") for child molestation and rape. Doc. 10. He filed this lawsuit in October 2016. Doc. 1. The magistrate judge subsequently ordered Geter to file a recast complaint on the required form, which he did without difficulty. Doc. 8; Doc. 10. While his recast complaint, like most of his pleadings, was rambling it was clear that Geter's primary complaint was the quality of his medical care from Drs.

[1] Dr. King was dismissed by the district court *sua sponte* for a failure to timely serve the summons and complaint. Doc. 87. Geter does not appeal the judgment in favor of Dr. King. *See* Appellant's Brief, at 10, fn. 3.

Akunwanne and King. *Id.* About two months later, Geter moved to amend his complaint, further clarifying the nature and scope of his claims. Doc. 16; Doc. 18. The motion was granted and that pleading became Geter's operative, amended complaint. Doc. 18. Based upon his amended complaint, Geter's medical deliberate indifference claims against Dr. Akunwanne and Dr. King, construed broadly, seek more, or better, pain management for his medical conditions. Doc. 39, at 4; Doc. 60, at 2.

Over the course of two years and dozens of docket entries, Geter's filings were consistent in numerous areas. He consistently described his alleged medical conditions to include Parkinson's Disease and bipolar disease. Doc. 16; Doc. 23; Doc. 39; Doc. 81. He consistently claimed to have undergone fairly recent brain surgery, which resulted in alleged headaches, loss of balance, vision problems, memory loss, and confusion. *Id.* Geter also consistently alleged he is a Level III mental health inmate with an "8th grade special education," although he failed to provide any allegations or detail as to what these terms mean, what limitations they impose on him, or how—if at all—they impacted his case. Doc. 16, p. 4; Doc. 23; Doc. 39; Doc. 81. In fact, the pleadings contain nothing more specific about Geter's actual

mental health diagnoses[2] beyond the conclusory label he is a "Level 3 mental health" inmate. *See, e.g.,* Doc. 10-2.

Geter consistently followed the rules of procedure and the instructions of the district court. When directed to restate and clarify his complaint using the required form, he did so quickly. Doc. 8; Doc. 10. When he wished to supplement that complaint with additional detail, he moved for leave to amend. Doc. 16. When Geter knew he could not timely file objections to a magistrate's recommendation, he moved to extend the time within which to object. Doc. 50; Doc. 81. When he thought his "mail was not going out like it s[h]ould," he sent the court an accurate summary of his filings to date, to ensure they had been docketed. Doc. 13. Geter drafted and filed written discovery requests that not only cited the Federal Rules of Civil Procedure but also sought relevant documents. Doc. 23; Doc. 52; Doc. 65. He also filed

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[2] Geter's counsel attempts to impermissibly introduce evidence into the record via GDC's policy definitions and outside statistics. *See* Appellant's brief, fn. 1, 7, 9, 11. Dr. Akunwanne objects to the consideration of this evidence by this Court, as it was not part of the record below. Moreover, even if the Court were to consider this information it is of minimal relevance. Statistics and generalized definitions do not inform as to Geter's own, individualized condition and how it may have impacted – if at all – any of the issues in this appeal.

pleadings acknowledging the importance of the filing fee and evidencing understanding of how it is paid. Doc. 54.

At no time did Geter claim or provide evidence[3] that any of his mental health issues or medical conditions prevented him from understanding the grievance procedures, despite having multiple opportunities to do so. Dr. Akunwanne moved to dismiss based on failure to exhaust on September 15, 2017. Doc. 45. The district court ultimately granted that motion on August 16, 2018, nearly a year later. Doc. 77. In the intervening time, Geter filed numerous pleadings or documents with the district court. *See* Docket. None of them claimed that Geter did not understand GDC's grievance rules, including the "one issue" rule, or that he was unfamiliar with GDC's grievance policy. *See, e.g.,* Docs. 49, 50, 52, 53, 54, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 70, 74, 75, 76.

Geter also did not contend that any prison official misled him or otherwise prevented him from properly grieving his claims. *Id.* His only arguments in that regard are premised on speculation. While Geter mentions Officer Mary Danzy numerous times as being somehow involved in the grievance process, Geter alleged at

[3] Although Geter's complaint was dismissed under Rule 12, the district court could receive evidence directly pertaining to exhaustion. *See Turner v. Burnside*, 541 F.3d 1077, 1083-85 (11th Cir. 2008).

least twice that Officer Danzy did *not* help him. Doc. 81, at 2. Doc. 68, at 2. He made only two other detailed statements concerning Officer Danzy. One is that when Geter requested an "informal grievance form" she correctly informed him that informal grievances were no longer used. Doc. 16, at 8. The other is that Officer Danzy told Geter to give his grievance to her, which Geter evidently did and, if so, she correctly submitted to GDC. Doc. 28, at 2.

Beyond this, it is undisputed that Geter submitted a single grievance concerning the issues raised in his lawsuit, No. 218930, on April 28, 2016. Doc. 45-2, ¶ 21. It is also undisputed that this grievance contained, in addition to complaints regarding Geter's medical care, several other unrelated complaints, which meant that the grievance violated GDC's "one-issue" rule for prisoner grievances. *Id.* While the warden initially denied Geter's grievance on the merits, his appeal of that decision to GDC's Central Office was denied due to the procedural violation of the "one-issue" rule and the merits of the grievance were not considered at that second and final step in the process. *Id.*; Doc. 77.

B. Proceedings Below

Geter filed this Section 1983 lawsuit *pro se* on October 12, 2016, at which time it was referred to the magistrate judge for

screening. Doc. 1; Doc. 2. That screening order was entered on July 13, 2017, in which the magistrate both granted Geter's motion to amend his complaint and, in reviewing that amended complaint, allowed his Eighth Amendment deliberate indifference to serious medical needs claims to go forward against Dr. Akunwanne and Dr. King. Doc. 33, p. 13.

Dr. Akunwanne moved to dismiss Geter's claims, showing that he failed to exhaust administrative remedies under the PLRA by failing to comply with the "one-issue" rule promulgated in GDC's grievance procedure. Doc. 45. The magistrate recommended denial of Dr. Akunwanne's motion because: (1) he did not make an affirmative showing whether Geter had mental deficiencies and whether any such deficiencies made "the grievance system effectively unavailable" under *Ross;* and (2) because he did not "adequately explain" whether Geter received any potentially misleading official assistance in preparing his grievance. Doc. 71, at 6-7. Dr. Akunwanne timely filed objections to the magistrate's recommendations. Doc. 73.

The district court sustained Dr. Akunwanne's objections and granted the motion to dismiss on August 16, 2018. Doc. 77. In his order, the district judge held that consideration of Geter's specific, subjective mental limitations as a potential basis of unavailability

violated the clear command of *Ross*. *Id.* at 15. He further held that even if one considered Geter's specific alleged mental health conditions, there was sufficient evidence that they did not prevent him from understanding the "one issue" rule and there was no allegation or evidence that any staff member had offered Geter misleading assistance. *Id.* at 16-17.

The only remaining defendant below, Dr. King, was dismissed upon recommendation of the magistrate after Geter was unable to serve him with the summons and complaint. Doc. 80; Doc. 87. Final judgment was entered in favor of both Dr. Akunwanne and Dr. King on October 19, 2018. Doc. 88. This appeal followed.

C. Standard of Review

A district court's interpretation and application of the PLRA's exhaustion requirements are reviewed *de novo*. *Whatley v. Smith*, 898 F.3d 1072, 1082 (11th Cir. 2018). The district court's factual findings as to whether an administrative remedy was "available" within the meaning of the PLRA are reviewed for clear error. *Id.*

SUMMARY OF ARGUMENT

The district court correctly dismissed this suit for failure to comply with the PLRA's exhaustion requirement. *First*, Geter has not alleged a permissible excuse for failing to exhaust

administrative remedies. *Ross* squarely rejected the subjective approach to unavailability that Geter advances, listing instead three bases of unavailability that focus on objective factors related to the prison's grievance procedure itself and the manner in which it is administered. The grievance process with which Geter failed to comply is not "unavailable" in any of the three ways *Ross* identified as permitting a finding of unavailability. Moreover, even if *Ross* permitted Geter's argument as a new basis of unavailability, Geter did not allege and show that his alleged mental health issues impacted his ability to understand or use the grievance procedures. On clear-error review, the record supports the district court's finding that Geter's mental health issues did not make the administrative grievance process unavailable to him.

Second, the district court properly applied the PLRA availability analysis in this case, where Geter never actually asserted that he could not understand the "one-issue" grievance rule due to mental incapacity. While the burden of proving the availability of administrative remedies, generally, falls to the defendants, that burden does not include negating situations or arguments that were never raised by the inmate. In this case, even taking Geter's alleged mental incapacity into account, the district judge properly considered the allegations and evidence to

determine that the prison grievance procedure was not unavailable within the meaning of the PLRA. The district court's dismissal of Geter's complaint should be affirmed.

ARGUMENT

I. Geter has not alleged a permissible excuse for failing to properly exhaust administrative remedies before filing this lawsuit.

"The Prison Litigation Reform Act of 1995 (PLRA) mandates that an inmate exhaust 'such administrative remedies as are available' before bringing suit to challenge prison conditions." *Ross*, 136 S. Ct. at 1854–55 (quoting 42 U.S.C. § 1997e(a)). In *Ross*, the Supreme Court held that this exhaustion requirement does not leave room for judge-made exceptions for "special circumstances." Instead, the exhaustion provision's text excuses exhaustion only for one reason—where administrative remedies are not "available." *Ross*, 136 S. Ct. at 1858. *Ross* went on to describe "three kinds of circumstances in which an administrative remedy, although officially on the books, is [unavailable]." *Id.* at 1859. They are: (1) when the remedy "operates as a simple dead end – with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) when the administrative scheme is "so opaque that it becomes, practically speaking, incapable of

use" such that "no *ordinary prisoner* can discern or navigate it"; or (3) when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 1859-60 (emphasis added).

Especially in light of *Ross*, the district court correctly rejected Geter's argument that the PLRA's exhaustion requirement does not apply to him. None of *Ross*' bases for unavailability apply. *Ross* rejected the kind of subjective, individualized approach to unavailability that Geter advances. And even if Geter's new, subjective basis for unavailability were permissible in the abstract, his allegations do not support it.

A. None of *Ross*'s three bases for deeming an administrative remedy unavailable apply in this case.

Geter's arguments concerning his failure to exhaust do not fall within any of the three bases set forth in *Ross*. He does not allege that the grievance process at Baldwin State Prison operated as a "dead end," such that prison officials were unable or unwilling to offer relief. He does not allege that prison officials attempted to thwart inmates' use of the grievance process through machination, misrepresentation, or intimidation. Although there is indication that Officer Mary Danzy had some involvement in either

preparing or submitting Geter's grievance, there is no actual allegation that Geter was misled or that Officer Danzy otherwise acted improperly. The allegation that a correctional officer was involved in some unstated fashion in receiving or submitting Geter's grievance, or even that she may have helped him write down his grievance, does not equal the distinct, and serious, allegation that Officer Danzy actively misled Geter. *Ross* requires more than mere assistance, it requires "machination, misrepresentation, or intimidation" by a prison official. *Ross,* 136 S. Ct. at 1860. There is no evidence in the record that Officer Danzy did anything at all beyond, perhaps, transcribing Geter's grievance[4], accurately informing him that informal grievances were no longer required, and possibly receiving his grievance for filing. To infer active misrepresentation or interference from Geter's allegations would be so speculative as to not be a reasonable factual inference from Geter's complaint. *Sinaltrainal v. The Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009).

Finally, GDC's grievance procedure – and in particular the "one issue" rule - was not so opaque that no ordinary prisoner could navigate it. The record does not support any argument that

[4] As the district court pointed out, such assistance is contemplated and permitted under the grievance policy. Doc. 77, at 17, fn.13.

Geter's mental conditions, standing alone, made the grievance policy "unknowable" under this second basis of *Ross*. As the district court correctly held, this basis applies in the first instance to the "ordinary prisoner" and not with regard to a particular prisoner's situation. Doc. 77, at 15. There is little doubt that the ordinary, reasonable GDC prisoner would have access to, and easily understand, GDC's "one issue" rule. None of the three stated bases of unavailability in *Ross* apply in this case.

B. *Ross* rejected the subjective approach to unavailability that Geter advances in this case.

Rather than expressly claiming one of *Ross'* bases for unavailability of administrative remedies, Geter contends on appeal that administrative remedies were not "available" to him because he lacked the mental capacity to understand GDC's grievance process and, in particular, the "one-issue" rule that resulted in the rejection of his grievance. *Ross* forecloses this argument. Prior to *Ross*, judge-created "special circumstances" exceptions to the PLRA's exhaustion requirement could focus exclusively on the subjective characteristics of the prisoners making the claims. For example, in *Ross* itself, the Fourth Circuit excused an inmate's failure to exhaust in an excessive force case where that inmate "'reasonably' – even though mistakenly –

'believed that he had sufficiently exhausted his remedies'" due to a misreading of the state's grievance procedure. *Ross*, 136 S. Ct. at 1856 (*quoting Blake v. Ross*, 787 F.3d 693, 695 (4th Cir. 2015)).

In *Ross*, however, the Supreme Court held that "such wide-ranging discretion 'is now a thing of the past.'" *Ross*, 136 S. Ct. at 1858 (*quoting Booth v. Churner*, 532 U.S. 731, 739 (2001)). Instead of focusing on an individual inmate's subjective characteristics or limitations, courts must enforce the statutory mandate to exhaust unless the procedural remedy was shown to be "unavailable." *Id.* at 1856-57. Unavailability, in turn, focuses not on subjective factors that may vary from inmate to inmate but on the grievance policy itself and the actions of the institution and its officials, i.e., whether the policy itself was too opaque, whether prison officials did not bother to follow the policy, or whether officials actively thwarted efforts to use the policy. *Id.* at 1858-60.

After *Ross*, arguments such as Geter's do not provide a permissible basis for avoiding the PLRA's exhaustion requirement. Geter contends his alleged mental conditions prevented him from understanding that he could discuss only one issue per grievance. This focuses not on the characteristics of the GDC grievance policy, nor does it focus on the manner in which that policy was administered at Baldwin State Prison. Rather, it focuses entirely

upon Geter himself and whether, regardless of the policy and the fairness of its implementation, his particular circumstances contributed to a failure to exhaust. But this is exactly the kind of subjective "special circumstances" argument that *Ross* foreclosed[5].

Ross forecloses Geter's argument at a more specific level as well. Only one of the three *Ross* bases considers an inmate's understanding of the rules: an administrative scheme "so opaque that it becomes, practically speaking, incapable of use" such that "no ordinary prisoner can discern or navigate it". *Ross,* 136 S. Ct. at 1859. But as the district court correctly held, this basis of unavailability clearly contemplates an objective approach when it uses the phrase "ordinary prisoner." Limiting this basis to the

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[5] Geter cites past decisions of this Court that considered "individual circumstances" in determining availability. However, those analyses of availability all predated *Ross*. And in any event, each focused not on the inmate's subjective characteristics but upon actions of prison officials that arguably still fit within *Ross'* three identified bases of unavailability. *See, e.g., Brown v. Drew*, 452 Fed. Appx. 906, 908 (11th Cir. 2012) ("unknowable" grievance rule regarding right to request extension of time for appeal); *Turner v. Burnside*, 541 F.3d 1077, 1083-85 (11th Cir. 2008) (warden's intentional interference with grievance process), and *Palmore v. Tucker*, 522 Fed. Appx. 717, 719 (11th Cir. 2013) (official's interference with inmate's ability to grieve by not making grievance forms available). These opinions did not address whether an inmate's own, subjective characteristics could make the grievance process unavailable.

"ordinary" prisoner necessarily implies that a particular prisoner's subjective understanding of a policy is not a sufficient basis to excuse exhaustion[6]. When considered objectively, a rule that simply requires one issue per grievance cannot be characterized as "opaque" or "unknowable" such that "no ordinary prisoner can use [it]" as would be required to invoke unavailability under *Ross*. *See Ross,* 136 S. Ct. at 1859. It is instead a rule so simple that it cannot be said that "no ordinary prisoner can discern or navigate it." *Id.*

This Court's post-*Ross* PLRA exhaustion cases share this view, discussing availability solely in the context of the three objective bases set forth in *Ross* itself rather than permitting an expansion to subjective "special circumstances."[7] *See Pearson v.*

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[6] Geter argues that *Ross'* three stated bases of unavailability are not an exhaustive list. While *Ross* does not indicate that its three bases are mere examples, this Court need not decide that particular question in this appeal. *Ross* forecloses Geter's particular purported basis for unavailability for the reasons above – it rejected the subjective "special circumstances" exceptions and while Geter may argue the second *Ross* basis applies, it is an objective basis not a subjective one.

[7] The Third, Fourth, Sixth, and Tenth circuits share the same view. *See, e.g., Rinaldi v. United States*, 904 F.3d 257 (3rd Cir. 2018); *Germain v. Shearin*, 653 F. Appx. 231, 232 (4th Cir. 2016) (*Ross'* three bases described exclusively and inmate's complaint dismissed where his excuse for non-exhaustion did not fall under one of the three bases); *Green v. Haverstick*, 2017 U.S. App.

Taylor, 665 Fed. Appx. 858, 868 (11th Cir. 2016) (*Ross* "distilled three situations in which an administrative remedy is not 'available'"); *Pavao v. Sims*, 679 Fed. Appx. 819, 823 (11th Cir. 2017) ("[a]dministrative remedies are unavailable in three main scenarios [under *Ross*]"); *Forde v. Miami Fed. Dep't of Corr.*, 730 Fed. Appx. 794, 798-99 (11th Cir. 2018) ("[t]he Supreme Court has outlined three circumstances under which administrative remedies could be 'unavailable'"); *Bracero v. Sec'y, Fla. Dept. of Corr.*, 2018 U.S. App. LEXIS 22495, at *3 (11th Cir., Aug. 14, 2018) ("[t]he Supreme Court has identified three kinds of circumstances in which an administrative remedy is not available"). Geter argues his mental status is not a "special circumstances" argument but rather a question of "availability" under *Ross.* Such an argument, however, begs the question as it would allow any type of subjective excuse to exhaustion formerly deemed a "special circumstance" to simply be recast as a "new basis" of unavailability. It ignores the fact that *Ross* focuses on the conduct of officials and the process itself, rather than the subjective characteristics of the inmates. In

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LEXIS 22748, at *4 (6th Cir. Aug. 30, 2017) (stating "[a]n administrative remedy is unavailable when" one of the three *Ross* bases are present); *See also Burnett v. Miller,* 736 F. Appx. 951 (10th Cir. 2018) *Burnett v. Allbaugh,* 715 F. Appx. 848, 851 (10th Cir. 2017).

that regard, Geter's failure to exhaust was not excused under *Ross* and the judgment of dismissal should be affirmed.

C. Geter has not sufficiently alleged or shown that he did not properly complete GDC's grievance process because he did not understand it.

The grievance rule at issue in this case—the single issue rule—simply states that "[t]he complaint on the Grievance Form must be a single issue/incident." Doc. 45-2, at 18; GDC SOP IIB05-0001, § VI(D)(2). Under the standards of *Ross*, nothing about this rule is objectively opaque or difficult to understand. However, even assuming an inmate's subjective lack of understanding could serve as a basis of "unavailability" sufficient to excuse exhaustion, Geter's allegations do not support a finding that such a basis would even apply in this case. Despite numerous filings in the district court in the many months following Dr. Akunwanne's motion to dismiss, Geter failed to allege that he did not, or could not, understand GDC's grievance rules or the "one issue" rule. *See generally* Docs. 49–76. Moreover, as discussed in detail, *infra*, the district judge made a factual finding under step two of *Turner*—reviewed only for clear error—that Geter, "despite his eighth-grade special education, could have subjectively understood the single-issue rule mandated by the grievance procedure." Doc. 77 at

17. Therefore, even fully granting Geter's argument as to a new basis of unavailability, it would not apply in this case.

II. The district court properly applied the PLRA availability analysis.

In *Turner v. Burnside,* 541 F.3d 1077, 1082-83 (11th Cir. 2008), this Court set forth a two-step process for analyzing exhaustion claims. In this case, the district court made the requisite findings and concluded dismissal was not warranted under *Turner's* first step. Doc. 77, at 14. It therefore moved to *Turner's* second step, where the court may review evidence as the finder of fact. Doc. 77, at 14; *Turner*, 541 F.3d at 1082; *Bryant v. Rich*, 530 F.3d 1368, 1373-74 (11th Cir. 2008). Because Geter did not ask for an evidentiary hearing, the district judge properly resolved factual issues based on documentary evidence alone. *Id.* at 1377. The court conducted this analysis properly, the opinion reflects the necessary factual findings, and the decision should be affirmed.

A. The district court properly declined to require prison officials to rebut a basis of unavailability that Geter never raised.

While it is Dr. Akunwanne's ultimate burden to prove the availability of administrative remedies, it is not his burden to rebut specific availability arguments that Geter never raised.

Turner, 541 F.3d at 1082. If Geter argues that unavailability of the grievance procedure due to Geter's mental status was, in fact, raised in the pleadings, he would have to rely upon only three allegations: (1) Mary Danzy "did all plaintiff grievance [sic]"; (2) Geter has various health problems, an "8th grade special education," and "can not think good"; and (3) "unusual circumstances" prevented Geter from "*timely* doing some of his law work." Doc. 53, Doc. 55, Doc. 67 (emphasis added). However, no reasonable interpretation of these three allegations would place Dr. Akunwanne on notice that Geter was contending that mental health issues precluded him from understanding the "one issue" rule.

Once availability is generally proven it is the inmate's burden to provide evidence of a specific incidence of unavailability. *See, e.g., Albino v. Baca,* 747 F.3d 1162, 1172 (9th Cir. 2014); *Tuckel v. Grover*, 660 F.3d 1249, 1254 (10th Cir. 2011); *Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001). The mere allegations that an inmate may have received some unstated assistance with a grievance and that he has alleged mental health conditions, standing alone, do not give rise to an inference that the assistance or the conditions made the grievance process unavailable. Beyond that, an argument that Dr. Akunwanne must parse the pleadings,

speculate, and preemptively rebut any potential argument for unavailability— regardless of whether Geter actually raised it—is unavailing. The district court thus properly declined to require Dr. Akunwanne to rebut an unavailability argument that Geter never asserted.

B. The district court weighed the evidence appropriately.

The district court's findings of fact on the issue of exhaustion of administrative remedies are reviewed for clear error. *See Bryant v. Rich*, 530 F.3d 1368, 1377 (11th Cir. 2008). "For a factual finding to be clearly erroneous, this court, after reviewing all of the evidence, must be left with the definite and firm conviction that a mistake has been committed." *See id.* (quoting *Dresdner Bank AG v. M/V Olympia Voyager*, 465 F.3d 1267, 1275 (11th Cir. 2006)). Where the district court's findings, including inferences therein, are plausible or in other words not unreasonable, then the findings will not be overturned "even if cause to disagree also exists." *See id.* (*citing Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504 (1985)).

The Supreme Court's explanation of the clearly erroneous standard in *Anderson*, which was cited by this Court in *Bryant*, is instructive:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." [ ]. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

470 U.S. at 573-574, 105 S. Ct. at 1511 (internal citations omitted). Thus the clear error standard of review is highly deferential. And "[t]his is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson*, 470 U.S. at 574, 105 S. Ct. at 1511-12.

In this case, the district court made an express factual finding that Geter could have subjectively understood the single-issue rule. Doc. 77, at 17. This finding was based upon both documentary evidence and inferences and, as such, is entitled to a high level of deference. It included evidence from Sebrena Grant,

the grievance coordinator at Baldwin State Prison. Doc. 45-2. Ms. Grant's declaration set forth the basic rules of the GDC grievance procedure, including the "one-issue" rule, and explained how those rules are communicated to inmates generally. Doc. 45-2, ¶ 5. In addition to being communicated through verbal orientation and the inmate handbook, copies of the current prison grievance procedure are made available to inmates in the Baldwin State Prison library. *Id.* This applies to "all inmates" which would include Geter. *Id.* Geter argues that GDC's grievance policy may have changed between the time of his initial orientation to GDC and 2016. However, he does not allege, nor is there evidence, that the "one-issue" rule changed.

The district court also relied upon evidence that Geter was able to consistently understand the Federal Rules of Civil Procedure and effectively litigate this lawsuit. Doc. 77, at 17-18. No caselaw in this circuit prevents the district judge from considering this evidence in this particular context. Geter misapplies *Turner* in this regard. The portion of *Turner* cited in his brief discussed whether threats of retaliation by prison officials would make the grievance process unavailable under the PLRA. 541 F.3d at 1085-86. It held that, under those facts, filing a lawsuit was not dispositive of whether retaliatory threats would

deter an inmate from pursuing a grievance to such a degree as to make the grievance procedure "unavailable." *Id.* at 1086. However, the *Turner* court expressly declined to "adopt a rule categorically precluding the factfinder from considering" litigation conduct in determining availability. *Hemphill v. New York*, 380 F.3d 680, 688 (2nd Cir. 2004), cited by *Turner*, concerned precisely the same issue. Unlike those two cases, this case does not concern availability under the third prong of *Ross* but rather whether Geter's mental condition prevented him from understanding the GDC's "one-issue" grievance rule. Thus the relevant inquiry is not intimidation or deterrence but whether Geter has the mental wherewithal to understand and apply procedural rules such as the Federal Rules of Civil Procedure which are, if anything, considerably more complicated than GDC's grievance procedures. His conduct in this litigation is relevant to this issue and was properly considered by the court below.

Geter argues that Dr. Akunwanne's initial burden includes proving that Geter, individually, was "personally able to access the grievance procedure." Geter cites no Eleventh Circuit cases for that proposition. Instead, Geter cites a Seventh Circuit case,

Lanaghan v. Koch, 902 F.3d 683 (7th Cir. 2018)[8]. *Lanaghan*, however, is an opinion that discusses availability under the PLRA without even mentioning *Ross* and, especially, its focus on the culpability of defendant prison officials in determining the three bases of unavailability. *Id.* at 689. This Circuit, conversely, tracks the express guidance of *Ross* in its post-2016 PLRA opinions. *See, e.g., Pearson v. Taylor*, *Pavao v. Sims*, *Forde v. Miami Fed. Dep't of Corr.*, *supra.*

Geter has not shown on appeal that the district court's findings of fact under the second prong of *Turner* were "clear error". Merely pointing to evidence that may cast doubt on availability is insufficient to overcome the clear error standard, which allows district courts to find that other record evidence outweighs an inmate's contentions. *See, e.g., Trias v. Fla. Dep't of Corr.*, 587 Fed. Appx. 531, 536 (11th Cir. 2014) ("Trias has provided

[8] He also cites *Days v. Johnson*, 322 F.3d 863, 867-68 (5th Cir. 2003). *Days* predates *Ross*, and in any event,, its "holding is limited to the narrow facts of this case. . . administrative remedies are deemed unavailable when (1) an inmate's untimely filing of a grievance is because of a physical injury and (2) the grievance system rejects the inmate's subsequent attempt to exhaust his remedies based on the untimely filing of the grievance."

no evidence to support his contention that FDOC personnel lost his appeal, other than his own testimony, which the district judge was entitled to find was outweighed by other record evidence.") (citing *Turner* and *Bryant*); *and see also Wright v. Langford*, 562 Fed. Appx. 769, 775-76 (11th Cir. 2014) (finding prisoner position on exhaustion "was not credible" given other record evidence). Similarly, any evidence that Mr. Geter may have mental health conditions was outweighed by the fact that Mr. Geter's pleadings were consistent and coherent enough to understand his claims and the fact that Mr. Geter was able to understand the Federal Rules of Civil Procedure well enough to effectively litigate this lawsuit. The district court's factual finding that Geter had sufficient capacity to understand the "single-issue" rule was plausible in light of the record viewed in its entirety and, under the clear error standard, cannot be disturbed on appeal.

CONCLUSION

For the reasons set out above, this Court should affirm the judgment of the district court.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,550 words as counted by the word-processing system used to prepare the document.

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2019, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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