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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant does not have a parent corporation and is not a publicly held corporation. All parties having an interest in the outcome of this case have been identified previously in Appellant's Initial Brief, Appellee's Brief, and the Brief of Amici Curiae.

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INTRODUCTION

The fundamental issue in this case is whether Mr. Geter, a prisoner with serious mental illness and intellectual disabilities, should be barred from court because his disabilities prevented him from exhausting administrative remedies.

In seeking to block Mr. Geter's access to the courts, Dr. Akunwanne asks this Court to create a circuit split by severely restricting the circumstances in which a remedy may be unavailable under the Prison Litigation Reform Act ("PLRA"). Dr. Akunwanne's proposed new rule provides that unavailability is limited to a facially deficient policy or official malfeasance. This interpretation of the PLRA would prohibit courts from considering a prisoner's mental disabilities, or any other individual characteristic, when determining if remedies are "available" under the PLRA.

But the new rule proposed by Dr. Akunwanne—that individual characteristics can never be considered when determining unavailability—appears nowhere in the statute's plain language and nowhere in *Ross v. Blake*, 136 S. Ct. 1850 (2016). *Ross* prohibits courts from inventing freewheeling exhaustion exceptions external to the PLRA's singular textual exception—unavailability. *Ross* does not distinguish between different forms of unavailability. At bottom, therefore, Dr. Akunwanne's proposal is an invitation to judicial policy-making that

asks this Court to replicate the very error condemned by the Supreme Court in *Ross*—interpreting the PLRA based on atextual policy preferences.

Dr. Akunwanne's proposal also ignores the decades of federal appellate decisions that recognize unavailability based on individual characteristics without invoking the atextual "special circumstances" exception prohibited by *Ross*. Nor does it account for post-*Ross* precedent that continues to recognize that individual characteristics can render remedies unavailable. To be clear: Since the enactment of the PLRA, no appellate court has ever adopted the blanket rule that individual characteristics can *never* render remedies unavailable. Indeed, in an opinion cited approvingly by *Ross*, this Court has held that individual, fact-specific circumstances may render a grievance procedure "unavailable." *See Turner v. Burnside*, 541 F.3d 1077, 1085 (11th Cir. 2008). Further, *Ross* does not limit what types of availability can be considered by the courts below. In fact, every appellate court to consider the question has confirmed *Ross* does not constrain the availability analysis.

Not every prisoner with a mental disability is unable to complete a grievance process, and not every prison is incapable of providing adequate assistance to prisoners who need it. But where prisoners with mental disabilities, like Mr. Geter, are unable to access a grievance procedure due to their disabilities, administrative remedies are unavailable to them. Further, acceptance of an iron rule that bars

prisoners from court on the basis of their disability would violate the First Amendment right of access to the courts. Dr. Akunwanne and amici do not attempt to rebut the constitutional violation that their preferred rule would require. Nor could they.

ARGUMENT

I. UNDER THE PLRA, MENTAL DISABILITIES THAT PREVENT A PRISONER FROM EXHAUSTING CAN RENDER REMEDIES UNAVAILABLE.

Under the PLRA, prisoners must exhaust administrative remedies before filing suit in federal court. 42 U.S.C. § 1997e(a). The statute's plain language provides a single exception to this mandate—administrative remedies need not be exhausted if they are not available. *Ross*, 136 S. Ct. at 1858. The key question thus becomes, what makes a remedy unavailable?

Contrary to the assertions by Dr. Akunwanne, unavailability is not limited to situations involving a deficient policy or official malfeasance. Appellee Br. at 15. The PLRA's plain language provides no support for this position. And *Ross v. Blake* did not limit unavailability so drastically. Indeed, *Ross* did not upend longstanding circuit court precedent holding that individual characteristics such as mental disabilities can render remedies unavailable.

A. The PLRA's Plain Language Provides No Support for Dr. Akunwanne's Restrictive Interpretation of the Statute.

When interpreting the language of the PLRA, this Court has "endorsed Justice Frankfurter's three-part test: (1) Read the statute; (2) read the statute; (3) read the statute!" *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1283 (11th Cir. 2016) (quoting *Dobbs v. Costle*, 559 F.2d 946, 948 n.5 (5th Cir. 1977)) (internal quotation marks omitted).

Here, the PLRA's language "speaks in unambiguous terms." *Ross*, 136 S. Ct. at 1856. The PLRA provides, "[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) (emphasis added). The statute itself does not define "available." The Supreme Court therefore uses the "ordinary meaning" of the word: "capable of use for the accomplishment of a purpose, and that which is accessible or may be obtained." *Ross*, 136 S. Ct. at 1858 (internal quotation marks omitted).

Dr. Akunwanne contends that only a facially deficient policy or official malfeasance can render remedies unavailable, and therefore individual, fact-specific characteristics can never be taken into consideration. But the "rules" proposed by Dr. Akunwanne are unsupported by the PLRA's text, and "crafting and imposing them exceeds the proper limits on the judicial role." *Jones v. Bock*, 549 U.S. 199, 203 (2007). Instead, the "ordinary meaning" of the text requires

courts to determine whether a remedy is "accessible" and "useable" to a prisoner to "obtain relief." *Ross*, 136 S. Ct. at 1858-59.

After considering the PLRA's text, courts "must apply it to the real-world workings of prison grievance systems." *Id.* at 1859. This Court did just that in *Turner*, considering not just the actions of prison officials but also individual characteristics that may "actually" render remedies "not capable of accomplishing their purposes." *Turner*, 541 F.3d at 1084-85. Dr. Akunwanne's position would erase the *Turner* analysis from the books.[1]

But *Turner* was cited with approval by the Supreme Court, *Ross*, 136 S. Ct. at 1859-60, and its analytical framework has been adopted by sister circuits both before and after *Ross*. *See, e.g.*, *Rinaldi v. United States*, 904 F.3d 257, 269 (3d Cir. 2018) ("[W]e perceive a valuable role for both the objective and subjective components of the *Turner* test and today adopt it as our own."); *McBride v. Lopez*, 807 F.3d 982, 987 (9th Cir. 2015) ("The Eleventh Circuit's test is straightforward and conceptually simple to apply. . . . We therefore adopt it."); *Tuckel v. Grover*,

[1] Dr. Akunwanne's attempt to distinguish this Court's other past decisions is unpersuasive because in those cases the Court also examined, or instructed the lower court to examine on remand, the plaintiff's individual characteristics and whether remedies were actually available to the plaintiff. *See Palmore v. Tucker*, 522 F. App'x 717, 719-20 (11th Cir. 2013) (unpublished) (remanding for further consideration of whether grievance forms were made available to individual plaintiff); *Brown v. Drew*, 452 F. App'x 906, 908 (11th Cir. 2012) (unpublished) (determining that "nothing in the record establishes that [plaintiff] was aware or could readily become aware of his right to request an extension of time to resubmit his appeal.").

660 F.3d 1249, 1254 (10th Cir. 2011) (adopting the *Turner* test and noting that "[u]nder this analysis, a court must determine if the plaintiff was subjectively deterred in addition to the objective inquiry utilized by the other circuits."). To narrow the PLRA's unavailability exception to encompass only those situations in which the policy or the malfeasance of prison officials resulted in unavailability would add atextual limitations to the statute and roll back decades of precedent based solely on the policy preference of Dr. Akunwanne.

B. *Ross* Provides No Support for Dr. Akunwanne's Restrictive Interpretation of the Statute.

Contrary to assertions by Dr. Akunwanne and amici, *Ross* made no attempt to catalogue every way an administrative remedy could be unavailable under the PLRA. Instead, *Ross* instructed courts to "perform a thorough review" of the individual facts of a case "and then address the legal issues we have highlighted concerning the availability of administrative remedies." 136 S. Ct. at 1862. To be sure, after reviewing the facts of the case before it, the Court identified as examples three ways the administrative remedy may have been unavailable to that plaintiff. *Id.* at 1859 ("[W]e note *as relevant here* three kinds of circumstances in which an administrative remedy . . . is not capable of use to obtain relief.") (emphasis added). But the Court did not foreclose the possibility that other circumstances, such as a prisoner's mental disability, may also render remedies unavailable.

Only the Second, Seventh, and Ninth Circuits have considered whether the *Ross* scenarios are exemplary or exhaustive. Those circuits are unanimous: the *Ross* scenarios are simply examples. *See Ramirez v. Young*, 906 F.3d 530, 538 (7th Cir. 2018); *Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017) (per curiam); *Williams v. Priatno*, 829 F.3d 118, 125 n.2 (2d Cir. 2016).

Further, despite Dr. Akunwanne's suggestion to the contrary, neither the Third, Fourth, Sixth, nor Tenth Circuits have addressed whether the *Ross* examples are an exhaustive list. Indeed, the Third Circuit explicitly declined to consider whether the *Ross* examples are exhaustive. *Rinaldi*, 904 F.3d at 267 n.9 ("[W]e do not have occasion to address, as have some of our Sister Circuits, whether *Ross*'s three categories are exhaustive or merely illustrative."). The unpublished Fourth Circuit case cited by Dr. Akunwanne quotes *Ross*, but does not ultimately address availability at all. *Germain v. Shearin*, 653 F. App'x 231, 233 n.1 (4th Cir. 2016) (unpublished) ("Given that [plaintiff's] response demonstrates that exhaustion has not occurred, we need not examine whether the final step was 'available' . . . ."). And the decisions Dr. Akunwanne cites from the Sixth and Tenth Circuits quote *Ross* but make no conclusions regarding the examples provided therein. *See Green v. Haverstick*, No. 16-2523, 2017 WL 5171244, at *2 (6th Cir. Aug. 30, 2017); *Burnett v. Miller*, 738 F. App'x 951, 952-53 (10th Cir. 2018) (unpublished); *Burnett v. Allbaugh*, 715 F. App'x 848, 851 (10th Cir. 2017) (unpublished).

Amici, in turn, assert that "no circuit court has ever recognized any exception beyond the three explicated in *Ross* . . . ." Amici Br. at 5. To the contrary, a number of circuit courts have held that individual characteristics, aside from those discussed in *Ross*, may render remedies unavailable. *See, e.g.*, *Lanaghan v. Koch*, 902 F.3d 683, 688-89 (7th Cir. 2018) (holding that remedies were unavailable due to plaintiff's serious illness and physical disabilities); *Weiss v. Barribeau*, 853 F.3d 873, 875 (7th Cir. 2017) (holding that defendants failed to demonstrate grievance procedure was available to plaintiff with serious mental illness); *Braswell v. Corrections Corp. of America*, 419 F. App'x 622, 625 (6th Cir. 2011) (unpublished) (finding a genuine issue of material fact as to whether remedies were available to plaintiff with serious mental illness); *Days v. Johnson*, 322 F.3d 863, 867 (5th Cir. 2003) (holding that remedies were unavailable to prisoner who could not write because of a broken hand). Indeed, not a single case cited by amici supports their proposition.[2]

[2] In *Galberth*, an unpublished summary decision cited by amici, the Second Circuit conducted a fact-specific inquiry, including a review of plaintiff's medical records, and determined that the record did not support the allegation that the plaintiff's mental health condition prevented him from using the grievance procedure. *Galberth v. Washington*, 743 F. App'x 479, 480-81 (2d Cir. 2018) (unpublished summary order). The Second Circuit did not exclude the possibility that mental illness could render remedies unavailable in other circumstances. *Id.* The remaining nine cases cited by amici similarly do not support the proposition that the availability exception is limited to the three examples in *Ross* or that mental disability can never render remedies unavailable. Indeed, two of the cases cited by

C. *Ross* Did Not Upend Extensive Precedent Recognizing that Individual Characteristics Such as Mental Disability Can Render Administrative Remedies Unavailable.

Dr. Akunwanne and amici suggest, as did the District Court, that consideration of individual characteristics such as mental disability would result in an impermissible "special circumstances" exception rejected by *Ross*. But this argument misstates *Ross*. It also ignores federal appellate decisions, both before and after *Ross*, that recognize unavailability based on individual characteristics without invoking the atextual "special circumstances" exception prohibited by *Ross*. If *Ross* intended to overrule decades of precedent recognizing, without resort to any "special circumstances" exception, that individual characteristics can give rise to unavailability, then the Supreme Court would have said so. *Ross*, of course, says no such thing.

Indeed, the "special circumstances" exception prohibited by *Ross* has never been necessary for federal courts to accept—or reject—claims that remedies are unavailable due to individual characteristics. Before *Ross*, federal courts were divided on whether the PLRA permitted a "special circumstances" exception to the exhaustion requirement. The vast majority of pre-*Ross* authority holding that individual characteristics could excuse exhaustion based that conclusion upon

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amici reach precisely the opposite conclusion, holding that the *Ross* examples are not an exclusive list. *See Andres*, 867 F.3d at 1078; *Williams*, 829 F.3d at 125 n.2.

unavailability, not the "special circumstances" exception.[3] *See, e.g.*, *Braswell*, 419 F. App'x at 625 (finding a genuine issue of material fact as to whether remedies were available to plaintiff with serious mental illness); *Beaton v. Tennis*, 460 F. App'x 111, 113-14 (3d Cir. 2010) (unpublished) (citing plaintiff's injuries and mental state as contributing to the unavailability of remedies); *Days*, 322 F.3d at 867 (holding that remedies were unavailable to prisoner with physical injury).[4] Because these decisions turned on availability and not "special circumstances," *Ross*'s rejection of a "special circumstances" exception does not affect their validity or logic.

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[3] Similarly, courts considered individual characteristics but determined, based on the facts of the particular case, that remedies remained available to the plaintiff. *See, e.g.*, *Wright v. Langford*, No. 5:10-CV-272 CAR, 2012 WL 1074508, at *2 (M.D. Ga. Mar. 29, 2012), aff'd, 562 F. App'x 769 (11th Cir. 2014) (rejecting claim of unavailability based on broken hand after determining that plaintiff did not ask others to help him fill out a grievance form, as provided for by policy, and plaintiff's frequent use of grievance procedure evidenced familiarity with the process).

[4] *See also Salcedo-Vazquez v. Nwaobasi*, No. 3:13-CV-00606-NJR-DGW, 2014 WL 2580517, at *4 (S.D. Ill. June 9, 2014) (holding that remedies were unavailable because plaintiff did not have access to information about grievance process in a language he understood); *Williams v. Hayman*, 657 F. Supp. 2d 488, 495-97 (D.N.J. 2008) (determining a reasonable jury could find remedies unavailable to Deaf plaintiff due to inability to communicate in writing or with his counselor); *Cole v. Sobina*, No. 04-99J, 2007 WL 4460617, at *7 (W.D. Pa. Dec. 19, 2007) (refusing to dismiss for non-exhaustion where remedies were unavailable to plaintiff who alleged mental disabilities); *Whitington v. Sokol*, 491 F. Supp. 2d 1012, 1019 (D. Colo. 2007) (refusing to dismiss for non-exhaustion where defendants had not met burden of demonstrating remedies were available to mentally disabled plaintiff).

This Circuit's pre-*Ross* jurisprudence holding that individual characteristics must be considered when determining availability similarly remains untarnished by the *Ross* decision. This Court grounded its pre-*Ross* decisions, including those in *Turner*, *Palmore*, and *Brown*, in the PLRA's textual unavailability exception and did not rely on "special circumstances." *See, e.g.*, *Turner*, 541 F.3d at 1084; *Palmore*, 522 F. App'x at 719-20; *Brown*, 452 F. App'x at 908. *Ross* therefore has no bearing on these decisions and their rationale remains sound.

II. DR. AKUNWANNE FAILED TO MEET HIS BURDEN OF PROOF TO DEMONSTRATE THAT ADMINISTRATIVE REMEDIES WERE AVAILABLE TO MR. GETER.

Exhaustion is not a pleading requirement, but an affirmative defense to be raised by defendants. *Jones v. Bock*, 549 U.S. 199, 212-16 (2007). Once defendants assert the defense, defendants bear the burden of proving administrative remedies were available to a plaintiff, as Dr. Akunwanne concedes. *See Turner*, 541 F.3d at 1082 ("The defendants bear the burden of proving that the plaintiff has failed to exhaust his *available* administrative remedies.") (emphasis added).

Notably, Dr. Akunwanne does not argue he met this burden. Nor could he, because he provided only general information about the grievance policy and provided no evidence that the grievance procedure was "actually" available to Mr. Geter. *Id.* at 1085.

Instead, Dr. Akunwanne attempts to improperly shift the burden of proof to Mr. Geter, by suggesting Mr. Geter must plead with particularity the portion of the grievance procedure he misunderstood.

Further, Mr. Geter repeatedly raised his serious mental illness and intellectual disabilities in his sworn statements both before and after Dr. Akunwanne moved to dismiss, providing more than enough information for a court to determine that his mental disabilities rendered remedies unavailable. Indeed, the Magistrate Judge made just that determination. Doc. 71 at 7.

A. Dr. Akunwanne Has Not Met His Burden of Proof Because He Presented No Evidence Demonstrating Remedies Were Actually Available to Mr. Geter.

Dr. Akunwanne has not demonstrated that administrative remedies were actually available to Mr. Geter. The record shows:

- Mr. Geter has a serious mental illness and an intellectual disability, which made him unable to complete the grievance process. Doc. 10-2 at 2, 4; Doc. 12 at 5, 8; Doc. 16 at 4-5; Doc. 53 at 3.

- Specifically, Mr. Geter has bipolar disorder, is designated a mental health level III prisoner, has an eighth grade special education, "can not think good," and has trouble understanding other people. *See, e.g.*, Doc. 16 at 4-5; Doc. 53 at 1, 3.[5]

[5] Mr. Geter respectfully requests that this Court take judicial notice of the government policies and reports cited in his Initial Brief. *See* Fed. R. Evid. 201(c)(2) ("The court . . . must take judicial notice if a party requests it and the court is supplied with the necessary information."). Those documents include the GDC policy defining "Mental Health Level III." *See* Initial Br. at 3 n.1; 23 n.7, 9, 11. This Court may take judicial notice at any point during the proceeding of a fact

- Mr. Geter asked for staff assistance with the grievance procedure. Doc. 28 at 2; Doc. 53 at 1.

- The grievance at issue was completed by a staff member. Doc. 28 at 2; Doc. 53 at 1.

- The staff member made a procedural error when she filled out the grievance form. Doc. 45-2 at 41, 74.

- The grievance was denied due to that procedural error. Doc. 45-2 at 74.

- There is no evidence that Mr. Geter was provided an oral explanation of the grievance procedure during orientation. *See* Initial Br. at 41.

- There is no evidence that Mr. Geter was provided with a copy of the inmate handbook describing the grievance procedure. *See* Initial Br. at 41.

- There is no evidence that Mr. Geter's file contains the required form indicating receipt by Mr. Geter of the inmate handbook. *See* Initial Br. at 41.

- There is no evidence that Mr. Geter was apprised of any substantive changes to the grievance policy since his initial incarceration in 1998, until he sought assistance from a staff member to complete the procedure. *See* Initial Br. at 41-42.

The District Court's abbreviated analysis failed to consider whether Dr. Akunwanne met his burden of proving remedies were available to Mr. Geter. *See Turner*, 541 F.3d at 1082. Further, the District Court improperly placed the burden on Mr. Geter to prove remedies were unavailable. In so doing, the court made a legal error that is reviewed *de novo* and requires reversal.

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that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2), (d).

Dr. Akunwanne argues that he has no obligation to demonstrate that Mr. Geter, in particular, was able to access the grievance procedure. But this argument ignores the analysis conducted both in *Turner* and in *Ross*, which recognize that a grievance procedure may be available generally, but unavailable to a specific person due to individual characteristics. In *Turner*, this Court determined remedies were unavailable to the plaintiff, not because the grievance procedure was unavailable to *all* prisoners, but because it was unavailable to the individual plaintiff, due to the warden's threats. *Turner*, 541 F.3d at 1085. Indeed, *Turner* requires courts to consider not just whether circumstances would render remedies unavailable to a "reasonable inmate" but whether remedies were "actually" unavailable the plaintiff at issue. *Id.* The Supreme Court affirmed this prisoner-specific analysis in *Ross*. 136 S. Ct. at 1860 ("[A]ppellate courts have addressed a variety of instances in which officials misled or threatened *individual* inmates . . . [S]uch interference . . . renders the administrative process unavailable.") (emphasis added).

Dr. Akunwanne next argues that this Court should adopt a burden-shifting analysis used by other circuits. In *Albino v. Baca*, for example, the Ninth Circuit held that defendants must prove that "there was an available administrative remedy, and that the prisoner did not exhaust that available remedy." 747 F.3d 1162, 1172 (9th Cir. 2014). If defendants meet that burden, the plaintiff then has

the "burden of production" to "come forward with evidence showing that there is something in his particular case" that rendered remedies unavailable. *Id.* But "the ultimate burden of proof remains with the defendant." *Id*; *see also Tuckel*, 660 F.3d at 1254.[6]

Both *Albino* and *Tuckel* applied this analysis on summary judgment, whereas this case and *Turner* arise on a motion to dismiss. *Compare Albino*, 747 F.3d at 1166 (applying summary judgment standard), *and Tuckel*, 660 F.3d at 1251 (same), *with Turner*, 541 F.3d at 1081 (applying motion to dismiss standard). But even if this Court were to adopt the summary judgment, burden-shifting analysis utilized in other circuits, under that analysis "the ultimate burden of proof remains with the defendant." *Albino*, 747 F.3d at 1172. Dr. Akunwanne has not met that burden, as the Magistrate Judge held. Doc. 71 at 4-5.

Further, both *Albino* and *Tuckel* support a holding for Mr. Geter. In *Albino*, as in this case, defendants provided declarations from prison officials regarding the general policies and procedures governing the administrative remedy process. 747 F.3d at 1174. In *Albino*, as in this case, defendants did not provide evidence demonstrating remedies were available to the particular plaintiff. *See id.* at 1174-

[6] Despite Dr. Akunwanne's additional reliance on *Foulk v. Charrier*, that case does not provide that plaintiffs have a burden of production. Rather, the Eighth Circuit held that "it is the burden of the defendant asserting this affirmative defense to plead and prove" that the plaintiff "failed to exhaust all available administrative remedies." *Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001).

76. Based on this evidence, and evidence that the plaintiff did not have any materials explaining the complaint process in his native language, the Ninth Circuit concluded "as a matter of law that defendants have failed to carry their *initial* burden of proving their affirmative defense that there was an available administrative remedy that [the plaintiff] failed to exhaust." *Id.* at 1176 (emphasis added). Here, Dr. Akunwanne presented no evidence that the grievance procedure was accessible to Mr. Geter despite his mental disabilities. Further, Dr. Akunwanne presented no evidence that even general information and instructions regarding the grievance procedure were provided to Mr. Geter. *See* Initial Br. at 39-42. Dr. Akunwanne therefore failed, as a matter of law, to carry his "initial burden" of proving remedies were available to Mr. Geter. *See Albino*, 747 F.3d at 1176.

In *Tuckel*, the Tenth Circuit discussed a burden shifting analysis, but did not have the opportunity to apply it, instead remanding to allow the plaintiff a "meaningful opportunity to gather evidence" regarding the availability of remedies. *See* 660 F.3d at 1254-55. In that case, as here, the district court disallowed discovery before ruling on the issue of exhaustion. *See Tuckel v. Grover*, Order Granting Defendant Grover's Motion to Stay Discovery, No. 1:10-cv-00215 (D. Colo. May 6, 2010). The Tenth Circuit faulted the district court for granting summary judgment to defendants without critical evidence, determining

that the "sparse record" and "disputed factual issues" regarding whether the plaintiff was able to access the grievance procedure required further proceedings. *Tuckel*, 660 F.3d at 1255. Similarly, in this case, the District Court made its determination on a scant record after refusing to allow any discovery and failing to hold an evidentiary hearing.

B. Should This Court Determine Mr. Geter Has a Burden of Production, He Has Met That Burden.

Should this Court adopt the *Albino* framework and determine that Mr. Geter bears a burden of production to "come forward with evidence showing that there is something in his particular case" that rendered remedies unavailable, he has met that burden. *Albino*, 747 F.3d at 1172. Specifically, Mr. Geter provided evidence showing that he has mental disabilities and a staff member provided erroneous assistance.

It is undisputed that Mr. Geter has a serious mental illness and intellectual disabilities. Mr. Geter was unable to access GDC's grievance procedure as a result of his mental disabilities. He therefore sought assistance from a staff member, who filled out the grievance form for him, and in doing so, failed to comply with the grievance policy's "one-issue" mandate. Although it was a staff member who caused that particular error, Dr. Akunwanne suggests that Mr. Geter was obligated to specifically plead an inability to comply with one individual provision of the grievance procedure.

This argument is unavailing because the grievance procedure, as a whole, was unavailable to Mr. Geter due to his mental disabilities. Further, a requirement that a *pro se* plaintiff with mental disabilities identify the very part of a grievance procedure that he cannot understand puts Mr. Geter, and plaintiffs like him, into an impossible Catch-22. A plaintiff who is unable to understand and comply with a grievance process due to his mental disabilities is similarly going to be unable to explain exactly which provision or provisions he is unable to understand or comply with.

Dr. Akunwanne's position also contravenes this Court's directive to construe liberally pleadings by *pro se* plaintiffs, with all inferences drawn in favor of the plaintiff. *See Fernandez v. United States*, 941 F.2d 1488, 1491 (11th Cir.1991); *Whatley v. Smith*, 898 F.3d 1072, 1082 (11th Cir. 2018). Courts are required to hold *pro se* pleadings "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Mr. Geter provided sufficient information for a court to determine that remedies were unavailable to him due to his serious mental illness and intellectual disability. Indeed, the Magistrate Judge did just that. Doc. 71 at 4-5. Dr. Akunwanne's brief points to only three statements from Mr. Geter, but the record is replete with evidence regarding Mr. Geter's mental health, his intellectual 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 5, 6, 8; Doc. 16 at 4-5, 8; Doc. 28 at 2; Doc. 53 at 1, 3, 4; Doc. 75 at 4. In response to Dr. Akunwanne's motion to dismiss, Mr. Geter provided information addressing his attempts to exhaust and a staff member's failure to properly assist him with the procedure. *See* Doc. 53 at 1, 4. Mr. Geter also again discussed his serious mental illness and intellectual disabilities. *Id.* at 3. Based on this record, the Magistrate Judge concluded that Mr. Geter's "mental deficiencies prevented him [from] complying with the procedural rules for filing prison grievances" and questioned whether Ms. Danzy provided "misleading official assistance." Doc. 71 at 7.

Dr. Akunwanne, who bears the burden of proof to show that the grievance procedure was available to Mr. Geter, failed to address the information provided by Mr. Geter, and failed to show that the procedure was actually available to him.

III. A STAFF MEMBER'S ACTIONS CAUSED MR. GETER'S GRIEVANCE TO BE REJECTED AND REMEDIES TO BE UNAVAILABLE.

Administrative remedies may be incapable of use and therefore unavailable to prisoners who are given erroneous information by prison officials. *See Ross*, 136 S. Ct. at 1860. It is undisputed that a staff member assisted Mr. Geter with the

grievance at issue.[7] That staff member introduced a procedural error, which caused the grievance to be denied.

Dr. Akunwanne speculates that Ms. Danzy's assistance may have been limited to "transcribing" Mr. Geter's grievance, as provided for in GDC's grievance policy, and suggests that this is not the type of staff behavior that would render remedies unavailable.[8] Appellee Br. at 13. Dr. Akunwanne's speculation that Ms. Danzy only transcribed a grievance cannot be credited at this stage because the court must draw all reasonable inferences in Mr. Geter's favor. *Whatley*, 898 F.3d at 1082. But even assuming Dr. Akunwanne's speculation is correct, it strains credulity to argue that a staff member assisting a mentally disabled prisoner with a grievance should not be expected or required to provide accurate assistance. Indeed, "prison authorities may not employ their own mistake to shield them from liability . . . ." *Turner*, 541 F.3d at 1083 (quoting *Dole v. Chandler*, 438 F.3d 804, 811 (7th Cir. 2006)).

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[7] Dr. Akunwanne inaccurately suggests that there is evidence in the record that Ms. Danzy did not assist Mr. Geter. In fact, Dr. Akunwanne presented no evidence regarding Ms. Danzy's role in the grievance process or suggesting Mr. Geter wrote the grievance himself. *See* Initial Br. at 30-31. In the filings to which Dr. Akunwanne cites, Mr. Geter rues that he tried to complete the grievance process and sought assistance from Ms. Danzy, but ultimately his grievance was denied and thus "no one would help plaintiff on this." *See, e.g.*, Doc. 81 at 2. By contrast, Mr. Geter states repeatedly that Ms. Danzy completed the grievance form for him. Doc. 53 at 1, Doc. 28 at 2.

[8] The GDC grievance policy provides 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.

Further, the bar set by *Ross* does not require proof that staff intentionally impeded the grievance process, as Dr. Akunwanne suggests. Indeed, Dr. Akunwanne points to no authority to support that proposition.

The text of the PLRA does not contain an intent requirement for unavailability. The *Ross* Court collected a variety of appellate court cases to illustrate its example of "machination, misrepresentation, or intimidation" by prison officials. *Ross*, 136 S. Ct. at 1860 n.3. These cases include some instances of intimidation or retaliation by prison officials. But they also include cases where more innocuous staff behavior, with no malicious motive, similarly rendered remedies unavailable. *See, e.g.*, *Davis v. Fernandez*, 798 F.3d 290, 295 (5th Cir. 2015) (holding that remedies were unavailable when plaintiff relied on erroneous information from staff regarding the grievance procedure); *Pavey v. Conley*, 663 F.3d 899, 906 (7th Cir. 2011) (holding that a remedy is unavailable to a plaintiff if prison officials "inaccurately describe the steps he needs to take to pursue it"). "As all those courts have recognized, such interference with an inmate's pursuit of relief renders the administrative process unavailable." *Ross*, 136 S. Ct. at 1860. Other circuit courts similarly have found that unavailability "does not include any requirement of culpability on the part of the defendant." *Lanaghan*, 902 F.3d at 688; *see also Townsend v. Murphy*, 898 F.3d 780, 783 (8th Cir. 2018) (holding that grievance procedure was unavailable to prisoner who was misinformed about the

process by a staff member); *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010) (holding that remedies were unavailable to plaintiff after warden made "innocent mistake" and gave plaintiff erroneous information); *Brown v. Croak*, 312 F.3d 109, 112 (3d Cir. 2002) (holding that grievance procedure was unavailable to plaintiff who relied on erroneous instructions from staff).

IV. THE DISTRICT COURT'S DETERMINATION THAT THE GRIEVANCE PROCEDURE WAS AVAILABLE TO MR. GETER SHOULD BE REVERSED ON *DE NOVO* REVIEW.

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). Factual findings underlying exhaustion determinations are reviewed for clear error. *Whatley*, 898 F.3d at 1082. Here, the District Court's legal errors, reviewed *de novo*, require reversal.

First, the District Court made a legal error by incorrectly placing the burden on Mr. Geter to demonstrate remedies were unavailable, as shown above in Section II.

Second, the District Court committed legal errors in its interpretation and application of the PLRA's exhaustion requirement when it determined that remedies were available to Mr. Geter despite his mental disabilities. The distinction between a court's determination about the availability of remedies and

the factual findings underpinning that determination is an important one. Under the the *Turner* analysis, the district court "must make specific findings in order to resolve the factual issues related to exhaustion." *Id.* (quoting *Turner*, 541 F.3d at 1082). Those individual factual findings are reviewed for clear error. *Id*. "After making specific findings of fact, the district court then decides whether under those findings the prisoner has exhausted his available administrative remedies." *Id.* (internal quotation marks omitted). That ultimate determination requiring the application of the PLRA's exhaustion requirements to the case at hand is a question of law to be reviewed *de novo*. *See Higginbottom*, 223 F.3d at 1260; *see also Hubbs v. Suffolk Cty. Sheriff's Dep't*, 788 F.3d 54, 59 (2d Cir. 2015) ("Whether an administrative remedy was available to a prisoner in a particular prison or prison system is ultimately a question of law, even when it contains factual elements.").

Dr. Akunwanne conflates these two steps and argues that District Court's ultimate determination that the grievance procedure was accessible to Mr. Geter despite his mental disabilities is a factual finding to be reviewed for clear error. But accepting this argument would eliminate this Court's carefully drawn distinction between legal determinations regarding exhaustion and factual findings. *See, e.g.*, *Bingham v. Thomas*, 654 F.3d 1171, 1174-75 (11th Cir. 2011) (distinguishing

between *de novo* review of legal conclusions and clear error review of factual findings in PLRA exhaustion cases).

In making its ultimate determination, the District Court failed to thoroughly consider the evidence placed in the record through sworn declarations, and instead grounded its determination that remedies were available to Mr. Geter on the fact that Mr. Geter filed a lawsuit *pro se*. The Supreme Court recently rejected the argument that filings in a *pro se* lawsuit can be dispositive evidence of a prisoner's mental capabilities. *See Moore v. Texas*, 139 S. Ct. 666, 671 (2019). In *Moore*, the Court faulted the lower court for its reliance on *pro se* filings to determine mental capacity "without a determination about whether Moore wrote the papers on his own" and without considering "the possibility of outside help." *Id.* Here, the District Court's analysis replicates the lower court's error in *Moore*. As in *Moore*, there is no evidence in the record that Mr. Geter filed his case without assistance and the District Court made no such finding before relying on the *pro se* suit as dispositive evidence of Mr. Geter's mental capabilities. Further, the District Court failed to conduct a full analysis regarding the erroneous assistance provided to Mr. Geter by a staff member, as addressed above.

On *de novo* review, this Court should reverse the decision below based on these legal errors.

Should this Court consider the District Court's factual findings, they are clearly erroneous. The District Court's limited findings, aside from those simply noting what filings Mr. Geter submitted, Doc. 77 at 17, are either directly contradicted by the record or entirely unsupported by the record. *See* Initial Br. at 36-37.

V. THE EXHAUSTION REQUIREMENT MUST BE INTERPRETED CONSISTENTLY WITH THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS AND THE INTENT OF THE PLRA.

Failure by this Court to rectify the decision below will result in a serious constitutional conflict—one that neither Dr. Akunwanne nor amici address. The lower court's opinion, and the position taken by Dr. Akunwanne and amici, "effectively foreclosed access" to the courts for Mr. Geter and other prisoners with mental disabilities. *See Bounds v. Smith*, 430 U.S. 817, 822 (1977) (quoting *Burns v. Ohio*, 360 U.S. 252, 257 (1959)).

Under the lower court's decision, and the atextual rule designed by Dr. Akunwanne, prisoners with mental illness or intellectual disabilities who are unable to complete the grievance process would have no recourse even when they have meritorious claims. Instead, they would be barred from court if and when their mental disabilities prevent exhaustion of administrative remedies. This rule also has far-reaching implications for prisoners who are ill, illiterate, or have physical disabilities that prevent them from exhausting, similarly constricting their

constitutional right to access the courts. A prisoner with a broken hand who cannot physically fill out the grievance form would be barred from court. *See Days*, 322 F.3d at 867. A prisoner who could not read or write in English would be barred from court. *See Ramirez*, 906 F.3d at 535. A prisoner who is so acutely ill he cannot write without assistance would be barred from court. *See Lanaghan*, 902 F.3d at 688-89. And a prisoner involuntarily committed to a psychiatric hospital would be barred from court. *See Weiss*, 853 F.3d at 875. Indeed, the District Court's holding and Dr. Akunwanne's rules, if accepted, threaten the enforcement of the constitutional rights of a significant fraction of the prison population, putting this Court in a constitutional quagmire.

To avoid this constitutional conflict, this Court should employ the canon of constitutional avoidance and "shun" the District Court's interpretation of the PLRA, which "raises serious constitutional doubts" and "instead . . . adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). The alternative is a holding that serious mental illness and intellectual disability that prevent access to a grievance procedure can render remedies unavailable to prisoners.

Further, despite amici's assertion that it would be "bad for the courts, the States, and the judicial system" and "especially bad for inmates" if this Court follows the lead of its sister circuits and finds that mental disabilities can render

remedies unavailable, this case is not about the undoing of the PLRA. *See* Amici Br. at 9-10. It is about ensuring that Mr. Geter and prisoners like him have access to administrative remedies, as intended by the PLRA, and the ability to seek redress in court when necessary. When prisoners with mental disabilities are unable to access the grievance procedure, "the inmate loses a benefit that Congress intended to bestow on him." *Turner*, 541 F.3d at 1077.

Similarly, contrary to amici's assertions, providing accommodations for prisoners with mental disabilities, or determining remedies are unavailable when those accommodations are denied, will not result a flood of "frivolous" litigation making its way to federal courts. *See* Amici Br. at 3. Rather, a determination by this Court that serious mental illness and intellectual disability can render remedies unavailable in individual cases will encourage facilities to provide proper accommodations to prisoners with disabilities, thereby "safeguard[ing] the benefits of the administrative review process for everyone." *Turner*, 541 F.3d at 1085.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below, hold that Mr. Geter's serious mental illness and intellectual disabilities rendered the grievance procedure "unavailable" to him under the PLRA, and remand this matter for further proceedings.

Respectfully submitted,

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Dated: April 3, 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 6,493 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 April 3, 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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