19-7513
No. ______________

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Earl Osborn — PETITIONER
(Your Name)

vs.

Christopher Williams, et al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United states Court of Appeals For The Second Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Earl Osborn #100426
(Your Name)

50 Nunnawauk Rd.
(Address)

Newtown, CT. 06470
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. In Blake v Ross, 136 S.Ct. 1850, Did The United States Supreme Court Eliminate The Requirement For An Individualized, Fact Specific Determination Regarding The Availability of Administrative Remedies?

2. Is An Administrative Remedy Available To A Mentally Handicapped Prisoner When The Department of Correction Fails To Provide Assistance Mandated By It's own Administrative Directive?

3. Are The Department of Corrections' staff Required To Assist Impaired or Disabled Inmates To Ensure Administrative Remedies Are "Accessible" And "Capable of Use" For The Prisoner To "Obtain Relief"?

4. Is An Inmate Required To Present "Expert Witness Evidence" On His Mental Condition When He Pointed To His Treatment Records At The Prison, In order To Survive A Motion For Summary Judgment?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Earl Osborn, Plaintiff-Appellant
2. Lieutenant, Christopher Williams, Defendant-Appellee
3. Correctional Officer, Lyndon Standard, Defendant-Appellee
4. Lieutenant, Ruben Burgos, Defendant-Appellee
5. Clinical Social Worker, James Castro, Defendant-Appellee
6. Lieutenant, Jason Beebe, Defendant-Appellee, In their Individual Capacities.

RELATED CASES

1. Earl Osborn v. Christopher Williams, etal, U.S.C.A. #18-340
2. Earl Osborn v Christopher Williams, etal, No. 3:14-cv-1386 (VAB) (Dist. Conn. 2017)

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7. Margo Schlanger, Trends in Prison Litigation, as the PLRA Enters Adulthood, 5 UC Irvine. L. Rev. 153 (2015) 31

8. Sharone Levy, Balancing Physical Abuse by the System Against Abuse of the System: Defining "Imminent Danger" within the Prison Litigation Reform Act of 1995, 86 Iowa L. Rev. 361 (2000) 31

9. Substance Abuse and Mental Health Servs. Adm., U.S. Dept. of Health and Human servs., Results from the 2012 National Survey on Drug use and Health: Mental Health Findings 12 (2013), https:// www.samhsa.gov/data/sites/defaults/files/NSDUH Hmhfr 2012/ NSDUH Hmhfr 2012.pdf. 22

10. Treatment Advocacy Ctr, Serious Mental Illness (SMI) Prevalence in Jails and Prisons (Sept. 2016), https://treatmentadvocacy center.org/storage/documents/backgrounders/smi-in-jails-and-prisons.pdf. 22

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix D SPA33 to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished. available at 2017 WL6731714 (D. Conn. Dec. 29, 2017)
~~[X] unknown whether published or not~~

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.
[X] unknown whether published or not

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ______________________ court appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 11, 2019 Amended Summary Order

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: ____________, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ____________ (date) on ____________ (date) in Application No. ___A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was ____________. A copy of that decision appears at Appendix ____.

[ ] A timely petition for rehearing was thereafter denied on the following date: ____________, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ____________ (date) on ____________ (date) in Application No. ___A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983	Pg 4
42 U.S.C. § 1997e(a)	Pg. 2, 10-12, 15
28 C.F.R § 35.103(b)(7)(i)	Pg. 26
28 C.F.R. § 35.150	Pg. 26
28 U.S.C. § 1915	Pg. 31
Federal Rule of Evidence 706	Pg. 32
Administrative Directive 9.6. (App: A)	Pg. 8-10, 20

Constitutional Provisions

Eighth Amendment - Failure To Protect

Americans with Disabilities Act

Rehabilitation Act

Exhaustion of Administrative Remedies

Prison Litigation Reform Act

REASONS FOR GRANTING THE PETITION

1. The petition should be granted to protect the rights of the Mentally Disabled Inmate population, of this nation; to avoid the constitutional conflict of allowing their handicap to bar them of access to the courts.

2. This petition should be granted to clarify this courts holding in the matter of Ross v. Blake, 136 S.Ct. 1850, and its applicability to allow an assessment of the "Individual Characteristics", of the plaintiff and facts of the case, to determine whether administrative remedies are "available" and "capable of use" by a prisoner with Mental disability.

3. To protect the population at large from the misapplication of the matter in Ross v. Blake, 136 S.Ct. 1850, being used as a bar to inmate plaintiffs in general.

4. To bring unity among the many different circuits that currently disagree in the application of Ross v. Blake, 136 S.Ct. 1850, to inmate litigation.

5. This petition should be granted to prevent the requirement of an expert Medical witnes, on summary judgment, being used as a complete bar to all Eighth Amendment inmate actions

I. Statement Of The Issues Presented For Review

Section 7 of the Prison Litigation Reform Act (PLRA) requires that a prisoner exhaust available administrative remedies before bringing a federal civil-rights action with respect to prison conditions. Connecticut has an inmate grievance scheme that provides formal review relating to any aspect of an inmate's confinement; the directive says that "[S]pecial provisions shall be made to ensure access for the impaired or disabled."

Osborn, a Connecticut inmate with a known history of mental illness, is beaten up by his cellmate after he requests a transfer. Osborn then brings a federal civil-rights action but does so without first having filed an inmate grievance. The defendants, prison officials, seek summary judgment based on Osborn's not having filed and exhausted his administrative remedies by having filed a grievance; but they offer no proof that Osborn was able to comply with the scheme or that they ensured his access to it. The district court grants the defendants' motion and enters judgment against Osborn. Was the district court's decision granting summary judgment and dismissing the action correct?

No! An inmate's failure to exhaust administrative remedies under the PLRA before bringing a conditions-of-confinement civil-rights action is an affirmative defense. The defendants were thus required to either show that Osborn was capable of filling a grievance or that they provided him with access. Because the defendants made no such showing on their affirmative defense, the district court should not have granted their summary judgment motion and dismissed Osborn's action.

The question presented is whether the Connecticut Department of Correction's (CDOC) grievance procedure was available to Osborn, a prisoner with serious mental illness. The PLRA, 42 U.S.C. §1997e(a), mandates that prisoners exhaust available administrative remedies before seeking redress in court, Prison grievance systems often feature a gauntlet of rigid timelines, content requirements, and procedural minutiae. Prisoners with mental disabilities, like Osborn's, may be unable to comply with such technicalities as a result of their disabilities.

Here, Osborn submitted evidence of his mental disability and his inability to file a timely grievance. Yet, the district court declined to consider this evidence and held that Osborn failed to exhaust administrative remedies. Osborn v Williams, No. 14-cv-1386 (VAB), 2017 WL 6731714, at *8 (D. Conn. Dec. 29, 2017). The court erroneously concluded that it cannot consider whether "Mr. Osborn has a path to relief that contemplates his individual mental state..." Id at *7. It also concluded that even if it could consider Osborn's mental disability, "[a]ny probative facts regarding Mr. Osborn's mental capacity during the relevant thirty-day period would have to be provided through expert testimony" Id at *16. In so holding, the court misapplied the precedents of the Second Circuit and the U.S. Supreme Court and created a new evidentiary bar that few, if any, prisoner plaintiffs will be able to overcome.

In this brief, Osborn addresses two important questions. First, we address whether a prisoner's mental disability can render administrative remedies unavailable. In other words, should prisoners be barred from court when their mental disabilities prevent the exhaustion of administrative remedies or whether the D.O.C. staff are required to assist the inmate to ensure the remedies are "accessible" or "capable of use" for the prisoner to "obtain relief"? Second, we address whether expert testimony is necessary to demonstrate mental disability at the summary judgment stage? Allowing the district court's holding, and now the Second Circuit's; to stand would block prisoner's with mental disabilities from bringing meritorious claims to the court when symptoms of mental illness prevent them from completing complicated administrative exhaustion processes. Prisoners with serious mental illness are vulnerable, disabled individuals who are entitled to reasonable accomodations to

II. Procedural History:

STATEMENT OF THE CASE

Petition For Certiorari following affirmance by the U.S. Court of Appeals for the Second Circuit, Osborn v Williams, et al, 18-340, on appeal by the plaintiff, Earl Osborn, from a final Judgment of the United States District Court for the District of Connecticut (Victor A. Bolden, Judge) granting the defendants' motion for summary Judgment based on the plaintiff's failure to exhaust prison administrative remedies. The decision and order of the district court is not reported but is available at 2017 WL 6731714 (D.Conn. Dec. 29, 2017) (See Appendix (APP.) B)

Osborn sued the defendants for depriving him of his liberty under color of state law when they were deliberately indifferent to his request to be moved out of his cell and away from his cellmate, who had threatened to beat him up and kill him. See Rev. Stat. §1979 (1873) (Codified at 42 U.S.C. §1983). The defendants answered and asserted Osborn's failure "to exhaust his administrative remedies as required by the Prison Litigation Reform Act" (PLRA) (AA46) The district court denied without prejudice the defendants' initial summary Judgment motion, and then appointed counsel for Osborn. (AA5) The action proceeded through discovery.

The defendants' renewed their summary Judgment motion based on Osborn's failure to exhaust his prison administrative remedies by not filing a prison grievance within 30 days and, alternatively, on Osborn's inability to show the personal involvement of each defendant. (AA48) Osborn opposed the motion. (A277) He explained that immediately following his being attacked, he no longer had the mental capacity to comply with the prison's administrative scheme. (AA62) His schizophrenia got worse, and he suffered hallucinations continuing past the deadline to file a grievance. (AA182, AA261)

The district court granted the defendants' summary Judgment motion based solely on Osborn's not having complied with the prison's administrative directive by filing a grievance within 30 days and entered Judgment dismissing the action. (SPA15, AA655 AA672) Osborn then appealed (AA673).

access the Judiciary; the district court's decision instead closes the courthouse doors, permanently.

III. Facts[1]:

The historical facts are set out in the light most favorable to Osborn, the non-moving party. Osborn alleges that on or about October 13, 2013, he was violently assaulted by his cellmate, John Hightower (Hightower), when a promised cell change was not performed by D.O.C. staff who had been alerted to the conflict between Osborn and Hightower.

This case has its genesis in the D.O.C's decision to transfer Osborn to Cell N-29 at the MacDougall Correctional Institute (MacDougall), where Osborn is locked up with Hightower. Almost immediately, Hightower threatened Osborn.

> "[H]e told me that I was a punk, that I was a pedophile, that I had to be his bitch, because he was a Crip...
>
> And he would constantly tell me that I wasn't Spanish, that I shouldn't be watching spanish people, that I was black, I was a "N."...
>
> And then whenever I tried to maneuver around the cell, he would be like close to me, talking to me in a violent manner, that what he was going to do to me if I didn't succumb to his demands, be his bitch, you know [have sex with Hightower]."

AA (Appellate Appendix) 176.

FN1: This petition has been prepared on behalf of Osborn, by James A. Harnage; a well versed Jailhouse lawyer, in recognition of Osborn's clear handicap. Notably, the Second Circuit's Amended Summary Order credits Osborn with having "availed himself of the grievance process as recently as May 2013, five months prior to the incident." See

Hightower tells Osborn that he will Kill him by banging Osborn's head on the toilet. AA174 ("Hightower was telling me he was going to kill me, he's going to bang my head under the toilet, throw my body in the toilet."). Osborn, who has been in prison since 1994 and had not experienced treatment this extreme, fills out an inmate request form (the request) and asks to be transferred from his cell. AA 110, AA641.

> "Q: [D]id you submit anything in writing to them concerning your relationship with Hightower - or your cell assignment with Hightower, I should say?
>
> A: To the captain, the Unit manager. The Unit Manager I wrote a request to be moved from the cell because he was threatening me.
>
> Q: So you wrote an Inmate Request Form?
>
> A: Yes, sir." AA 121

Osborn told the prison staff that Hightower was threatening him.

> "On the morning of October 11, 2013, I wrote an inmate request form to the Unit Manager of N-Pod requesting to be transferred from the cell. I told the C.O. of the bubble control, I told the Rovers, the guards who go around the prison units, and I told Social worker [James] Castro as well as the social worker Debbie [Rothbaum now Eddinger] that Hightower was threatening me."
>
> AA 641

Osborn also tells the prison staff that Hightower is acting crazy, is making threats, and is going to kill him.

> "I told those officers and social workers Hightower was acting crazy toward me, talking in a threatening manner, and acting violent. I told them Hightower was telling me he was going to

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App: D at *5; however, the court failed to recognize that Osborn's actions were his only by aid of the Jailhouse lawyer assisting Osborn at that time. Osborn does NOT have the capacity on his own accord.

hit my head on the toilet, going to kill me, dispose of my body where nobody would ever find it. I was told in Debble's office I would be transferred and I trusted them."

AA641-642

Osborn's mental condition makes him an easy target for Hightower. Osborn is schizophrenic. AA261 But he can keep his schizophrenia under control by following his doctor's orders. AA642

But, the defendants don't move Osborn into a safe cell. And, predictably, Hightower attacks Osborn Just past Midnight on October 13, 2013. The first indication that things are not right is when Lieutenant Williams passes Cell N-29 and sees Osborn "with a chair over [his] head trying to protect [him]self from Hightower." AA134. As Osborn explains it, Hightower got down off his bunk, grabbed Osborn, and tried to hurt him.

> "And he got down off the bunk and pulled my leg towards him, twisting it, telling me I should tap tap, wrestling me down, grabbing my genitals and my buttocks, trying to hurt me.
>
> I thought that he was going to do me bodily harm, so I picked up the chair. I told him, "Leave me alone, man, because I ain't your bitch. I ain't no punk [homosexual]. I don't know where you get that from".
>
> And it was like a nightmare. It was like something - I've never been threatened like that before. I thought he was going to kill me."

AA176-177

Later, Hightower punches Osborn in the head. AA190 And, while fighting, Hightower grabs Osborn's foot, pulls it toward him, and breaks one of Osborn's toes. AA190

"Q: And do you recall specific blows that Mr. Hightower may have landed on you and where they were? Can you describe that?

A: He punched me in the head.

Q: Anywhere else?

A: No, it was more like a wrestling thing between me and Hightower. And he tore my shirt, tore my clothes off, trying to - you know [have sex with me], we was fighting. And he was trying to grab, and he grabbed my foot, and pulled me to him, and twisted my foot, and my toe he broke." AA 190

An X-ray confirms Osborn's broken toe. AA640

IV. Connecticut's Inmate-Grievance scheme

Like most states, Connecticut has set up, by administrative directive (A.D), a system of prison-based administrative remedies, the stated purpose of which is to "provide a means for an inmate to seek formal review of an issue relating to any aspect of an inmate's conefinement that is subject to the Commissioner's authority." State of Connecticut, Department of Correction, Administrative Directive 9.6, entitled "Inmate Administrative Remedies", (Aug. 15, 2013), reprinted at App: A (see also, SPA1, AA51) Connecticut has included within its administrative remedies a catch-all inmate-grievance procedure that broadly "provides an administrative remedy for all matters subject to the Commissioners authority that" are not specifically set out. A.D. 9.6, §4(A), App: A (SPA2, AA52).

The inmate grievance procedure is included in paragraph 6 of the directive. It directs an inmate to resolve a complaint informally by speaking with a staff member or a supervisor. A.D. 9.6 §6 (A)("An inmate must attempt to seek informal resolution prior to filing an inmate grievance. The inmate may attempt to resolve the issue verbally with the appropriate staff member or with a supervisor/manager.") reprinted at App: A-5 (SPA5, AA55).

If speaking with a staff member doesn't lead to a solution, the prisoner must then submit a written request. A.D. 9.6, § 6(A)("If the verbal option does not resolve the issue, the inmate shall submit a written request via CN9601, Inmate Request Form."); App: A-5 (SPA5, AA55) The written request, which must be on a state-mandated form, "must clearly state the problem and the action requested to remedy the issue." A.D. 9.6, § 6(A); App: A-5 (SPA5, AA55). The ~~pristoner~~ prisoner must drop the request in a collection box addressed to the appropriate staff member. The staff member, in turn must respond. But, the staff member is given "15 business days from receipt of the written request" to do so. A.D. 9.6, § 6A; App: A-5

Only if the inmate completes the informal procedure - possibly speaking with staff member or supervisor and then completing a written request (and getting a response) may the inmate file a grievance. A.D. 9.6 § 6(c)("An inmate may file a grievance if the inmate is not satisfied with the informal resolution offered.") App: A-6 That the inmate must first complete the informal process is underscored by the words must and shall in § 6(A) and the requirement that an inmate append the completed informal request form containing the staff member's response to the grievance. A.D. 9.6, § 6(A), (C)("The inmate shall attach CN9601, Inmate Request Form, containing the appropriate staff member's response, to the CN9602, Inmate Administrative Remedy Form.") App: A-5 - A-6 (SPA5-SPA6, AA55-AA56).

And, remarkably, the prisoner must do all this - fill out an informal request, get a response, which might not arrive for 15 business days, fill out the grievance, and attach the informal request, (if they even received a response) and the response - within "30 days of the occurrence or discovery of the cause of the grievance." A.D. 9.6, § 6(C), App: A-6 (SPA6, AA56) As can be imagined, an inmate grievance scheme that requires an informal request, gives the staff member 15 business days to respond to the request, and then requires a formal grievance on file within 30 calendar days might present a hurdle for even the most skilled inmate grievant. For example, at the year's end the proximity of Christmas Day to New Year's Day when the holidays don't fall on the weekends can turn 15 business days to respond into as many as 25 calendar days (if there are 4 intervening weekends). And thus, reduce the prisoner's actual time to file from 30 days to as few as 5 days.

To its credit, the department of correction undertakes not only to provide help to inmates "need[ing] assistance in using the Inmate Administrative Remedies Process" but also to make special provisions "to ensure access for the impaired or disabled, illiterate or those with language barriers." A.D. 9.6, §5(B), App: A-3, SPA3, AA53. But, for this latter provision to be something other than a meaningless add-on, the D.O.C. must do what it promises; help those who need help complying with the inmate grievance scheme. As will be seen, that's what the defendant's didn't do!

V. ARGUMENT:

The PLRA requires prisoners to exhaust administrative remedies prior to filling a lawsuit. 42 U.S.C. §1997e(a). But, it only requires exhaustion of available remedies. Ross v Blake, 136 S.Ct. 1850, 1855 (2016). The "ordinary meaning" of the word "available" includes "accessible" and "capable of use". Id at 1858 When prisoners with mental disabilities cannot comply with required procedures by reason of their disabilities, remedies are not "available" to them.

The District Court made two principal errors that require reversal. First, it failed to consider Mr. Osborn's mental disabilities in determining that administrative remedies were available. Federal courts have repeatedly held that individual characteristics, including mental or physical disability, can render remedies unavailable. Nothing in Ross v Blake alters this longstanding law. The opinion below not only breaks with settled precedent, but raises serious constitutional concerns by adopting a rule that bars some prisoners with mental disabilities from court. This court should avoid that constitutional conflict, and maintain consistency with its precedent and that of the many circuits, by reaffirming that individual characteristics such as mental disabilities can make remedies unavailable under the PLRA.

Second, the District Court erred when it determined that if it were to consider Osborn's mental disabilities, expert testimony would be required to prove them. This determination improperly shifted the burden of proof to Osborn. Yet, the Second Circuit remained silent on this issue. This finding is contrary to this court's ordinary practice in similar matters and creates a new evidentiary bar that may be insurmountable for some prisoner plaintiffs with mental disabilities. This court should weigh in and reverse the District Court's ruling and hold that expert testimony is not always necessary at the summary judgment stage to demonstrate a mental disability.

I. UNDER THE PLRA, REMEDIES ARE UNAVAILABLE WHEN MENTAL 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). This court, in Ross v Blake, affirmed the statutes "built-in" exception to the exhaustion requirement: "A prisoner need not exhaust remedies if they are not "available"." 136 S.Ct. at 1855. A remedy is available only if it is "accessible", and if it is "capable of use" to "obtain relief." Id at 1858-59 (internal citation omitted).

Federal courts have repeatedly held that a prisoner's individual characteristics, including mental disability, can render remedies unavailable. See, e.g., Weiss v. Barribeau, 853 F.3d 873, 875 (7th cir. 2017); Braswell v. Corr. Corp. of America, 419 F. App'x 622, 625 (6th cir 2011). Contrary to the opinion below, Ross v Blake does not disturb this extensive precedent. Instead, Ross reaffirms that availability is an individualized, fact-specific determination.

The District court's erroneous application of the PLRA ignored this guidance from the supreme Court. This error has significant and wide-ranging consequences: It will bar numerous prisoners with disabilities from court, and creates serious conflicts with the Constitution and federal disability rights laws.

A. Federal Courts Have Long Held That Individual Characteristics Such As Mental Disabilities Can Render A Remedy Unavailable

Federal courts have long held that certain personal characteristics can make an administrative remedy not "accessible" or "capable of use" by a prisoner, and thus unavailable under the PLRA. See Ross 136 S.Ct at 1859. "[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 requires prisoners to fill out a written grievance form without assistance from others "might render the grievance remedy available for the majority of inmates." Id. 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 accomodations 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 courts must take into account "individual capabilities" when analyzing whether a grievance procedure is "available" to that plaintiff and finding grievance procedure unavailable to prisoner with limited English skills); Beaton v Tennis, 460 F. App'x 111, 113-14 (3d cir. 2012)(citing evidence that staff took advantage of plaintiff's confused mental state resulting from a skull fracture and post-concussion syndrome as basis for denying summary judgment for non-exhaustion); 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 after his hand healed)[2]

Courts have also held that mental disabilities, in particular, may render grievance procedures unavailable, as they require strict compliance with an often-complex series of rules and timelines. see, e.g., Weiss, 853 F.3d at 825 (finding defendants failed to demonstrate grievance procedure was available to plaintiff being treated for 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 him."); Braswell, 419 F. App'x at 625 (finding a genuine issue of material fact as to whether defendants had met their burden of demonstrating plaintiff with mental disabilities was "actually capable of filing" a grievance).[3] Here, Osborn's case, the district court and the Second

FN2: Numerous district court decisions are to the same effect, see, e.g., Salcedo-Vazquez v. Nwaobasi, No. 13-cv-00606-NJR-DGW, 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. NY 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); Kuhadja v Ill. Dept of Corr, No. 05-cv-3263, 2006 WL 1662941 (C.D. Ill. June 8, 2006) (finding deaf prisoner with limited ability to read and write without assistance may not have available remedies).

Circuit, improperly shifted the burden on summary Judgment, requiring Osborn prove his disability, See infra. §2. (emphasis added)

The Second Circuit acknowledged the evidence reflected that "Osborn, who suffers from schizophrenia and experienced a decompensation at the time of the incident, contended that his mental illness rendered him incapable of filing of a timely grievance. [Footnoting that][a]ccording to the deposition of Deborah Eddinger, a clinical social worker who worked at MacDougall-Walker Correctional Institution, decompensating means that [the patient is] **not able to make decisions on their own.** They are actively hearing voices, they [are] actively suicidal, they [are] actively -- their mental health diagnosis is not under control, and it needs to -- they need to have either medication to get it back under control, or see a therapist to work with them to try to get it back." [A]pp'x at 499" (internal quotation marks omitted, emphasis added) Amended Summary Order (App: D) at *3-4, and FN2.

However, despite this acknowledgment, the court, relying on Ross v. Blake, concludes "we are not persuaded that administrative remedies were unavailable... Osborn does not allege that DOC's administrative process operated as a "dead end" or was opaque,

FN3: Similarly, district courts have held that mental disabilities can render a grievance procedure "unavailable". See, e.g., Smith v. Singh, No. 17-CV-170-NJR-DGW, 2018 WL 3989686 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."); Johnson-Ester v Elyea, No. 07-CV-4190, 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); Cole v Sobina, No. 04-CV-99J, 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, 1020 (D. Colo. 2007) (refusing to dismiss for non-exhaustion where plaintiff alleged he had or that administrator's kept Osborn from engaging in the process." App: D at *5. As is discussed infra., this is a mistaken application by the Second Circuit, seeing Ross as limiting the instances that might make remedies unavailable, rather than being the three that were relevant in Ross[4] as examples for guidance.

Further aggravating the courts conclusions, it found that "... Osborn had been incarcerated within the D.O.C. for over eighteen years by the time of the alleged attack and had availed himself of the grievance process as recently as May 2013, five months prior to the incident." App: D at *5 What the court failed to recognize, is that Osborn was aided by an inmate "Jailhouse Lawyer", as the relationship has been termed; much like this writer, in the filing of his past grievances. This fact alone, supports the proposition that remedies were unavailable to Osborn. Yet, the errors don't stop here, in fact, not only did Osborn not have access to the Jailhouse lawyer whom previously assisted him, he could not have received the assistance of ANY Jailhouse Lawyer, because, he was in the Restrictive Housing Unit (RHU), for what he believes, and hereby avers; was two (2) full weeks (calendar days) of the 30 days allowed pursuant to the DOC's grievance scheme discussed supra., yet, the errors

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no available remedies because he was "mentally unable to complete the grievance process"); C.M.V., ex rel., Martinez v. City of Los Angeles, No. 07-CV-5044 (CAS), 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).").

FN4: (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.

in the Second Circuit's analysis does not end here, for 3 very important reasons:

First, the court failed to pay heed, to what it rightly acknowledged, as Osborn "experienced a decompensation"; and failed to give it the weight and consideration that it rightly deserved. Decompensation, or the degradation of a mental health condition, does not happen overnight. It is a degrading condition that worsens the longer the patient is off their medication. It may begin at day one, but it progressively gets worse each day thereafter. During these weeks Osborn was "not able to make decisions on [his] own". App: D FN2.

Second, by the time Osborn was released from the RHU, and able to once again have contact with other inmates; even had he not already progressed significantly in his decompensation; by the time he would have been able to contact a competent Jailhouse Lawyer, the time within which he would have needed to file his informal, Inmate Request Form, and allow staff 15 business days to respond; would have lapsed. Even if Osborn could have done this the same day he was released from the RHU, he never could have allowed the response period to run and filed the grievance within the 30 day period. Hence, that the D.O.C. was obligated to aid Osborn who was "not able to make decisions on [his] own," was paramount.

Third, ultimately, when Osborn was finally released to General Population, because he was not receiving his medication the entire time he was in the RHU, a fact solely attributable to the defendants; he only remained in the General Population for a couple of days before his degrading "decompensation" condition became evident and staff transferred Osborn from MacDougall to Garner, where he was placed into the In-Patient-Medical (IPM) ward under constant observation. It was not until reaching the IPM at Garner, that Osborn began to receive his proper medication again and recover his state of mental health.

Remarkably though, as the Second Circuit improperly shifted the weight of the burden of proof, on a summary judgment, to Osborn, it also used Osborn's recovery of his mental health, in the final days of the 30 day grievance cycle; as the basis upon which to deny Osborn relief. The court concluded that:

> "the record does not contain sufficient evidence to permit a court to find that Osborn was incapable of filing a grievance during the relevant period, which ran from the date of the incident through November 12, 2013. First, Osborn observes that he was placed under the care of the prison psychiatrist starting on November 8, 2013, [only 4 days prior to expiration of the relevant period]; but provides no evidence that he was unable to file a complaint during the period between the October 13, 2014 incident and November 8, 2013. Second, Osborn provides no expert testimony to support his contention that his mental illness prevented him from using the grievance process or, at a minimum, from asking for assistance in filing a grievance.[5] Third, the medical records Osborn provided described him as calm and alert. For example, on November 8, 2013, Osborn's medical records indicate that he was "calm, cooperative, oriented, euthymic with full range of affect, denies hearing voices ... [and] fair impulse control." [A] App'x at 265. On November 10, 201[3], the records report that Osborn said "I'm good", and that he was "alert, calm, exercising, ate, [n]o issues."" [A] App'x at 267. On this record, a court could not conclude that Osborn was incapable of filing a grievance during the relevant thirty-day period." App: D at *56 and FN3. (emphasis added)

FN5: Here, although the court footnoted that "[t]he district court concluded that any probative facts about Osborn's mental capacity during the relevant thirty-day period had to be provided through expert testimony. We do not hold that expert testimony is always required, but simply note the absence of any here." It is clear that, not only

It is beyond doubt that the court improperly shifted the burden of proof on a summary Judgment to Osborn, improperly requiring Osborn to present "expert testimony" and used the last 4 days of the relevant grievance period, after Osborn had been admitted to the IPM and finally began receiving his medications, after a month long decompensation period; as the basis upon which to deny Osborn relief, compounding the district courts own mistakes.

Therefore, Osborn prays this court grant Certiorari for a full briefing of these issues.

B. Ross v. Blake Does Not Upend The Extensive Precedent Holding That Individual Characteristics Such As Mental Disability Can Render A Remedy Unavailable.

The District Court and the Second Circuit, misinterpreted Ross v Blake, to prohibit courts from considering the actual facts of a case when determining the availability of remedies. Ross does no such thing. In fact, Ross "underscore[d] the [PLRA's] built-in exception to the exhaustion requirement: A prisoner need not exhaust remedies if they are not 'available'" Ross, 136 S.Ct at 1855. While the court cautioned that there is no additional "special circumstances" exception, id at 1859-60, it reaffirmed the unavailability exception, declaring that it has "real content". Id at 1858.

The court cited three examples of ways a grievance procedure may be "unavailable". Id at 1859-60.[4] Both courts below erroneously treated these three examples as an exhaustive list and incorrectly concluded that Ross thus

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did the court fail to strike down the district courts improper position that expert testimony was required it left the question open implying that most of the time an inmate was required to provide expert testimony. This is not the current state of our jurisprudence. Further, the courts footnote evinces this played some role in its decision.

foreclosed consideration of an individual plaintiff's characteristics, such as mental disability. See Osborn, 2017 WL 6731714, at *7-8.

But *Ross* made no attempt to catalog all possible scenarios that might give rise to unavailability. Instead, it noted three examples of unavailability applicable to the case before it, explaining "we note as relevant here three kinds of circumstances in which an administrative remedy... is not capable of use to obtain relief." *Ross*, 136 S.Ct. at 1859 (emphasis added). Prior to Osborn's action, the Second Circuit had previously noted that "the three circumstances discussed in *Ross* do not appear exhaustive, given the Court's focus on three kinds of circumstances that were 'relevant' to the facts of that case." *Williams v. Priat*[redacted], 829 F.3d 118, 125 N.2 (2d Cir. 2016).

Every circuit court to have addressed the question agrees. See *Ramirez*, 906 F.3d at 538 ("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...").

Because *Ross's* categories of unavailability are exemplary rather than exhaustive, *Ross* does not bar courts from recognizing other factors, including individual characteristics such as injuries or disabilities, which may render a remedy unavailable. The dispositive question is whether remedies are unavailable, meaning that they are not "*accessible*" or "*capable of use*" for the prisoner to "obtain relief." *Ross*, 136 S.Ct. at 1853 (emphasis added). If a mental disability prevents a prisoner from navigating the administrative exhaustion process, remedies are not "accessible" or "Capable of use". Id.

C. *Ross* And *Williams* Require An Individualized, Fact-Specific Determination Regarding The Availability of Administrative Remedies

The Supreme Court directed a "thorough review" of the facts in each case before "address[ing] the legal issues... concerning the availability of administrative remedies." Ross 136 S.Ct at 1861. Similarly, the Second Circuit had held that the appropriate inquiry under Ross when determining the availability of administrative remedies is whether a remedy was "**actually** available to the aggrieved inmate." Williams, 829 F.3d at 123 (citing Ross, 136 S.Ct. at 1858-59)(emphasis added). To that end, a court must "[t]urn[] to the facts" of the case before it. Id at 124.

The District Court acknowledged that the instant dispute centers on whether "administrative remedies were 'capable of use' by Osborn to 'obtain some relief for the action complained of.'" Osborn, 2017 WL 6231714, at 9 (quoting Ross, 136 S.Ct. at 1859). But it then failed to perform the factual review required by Ross and Williams. Indeed, it explicitly declined to consider facts related to Osborn's mental illness. Id at 11-12. ("...his testimony about his circumstances, standing alone, does not create a genuine issue of material fact as to whether Directive 9.6 is 'so confusing that... no reasonable prisoner can use [it].'"), citing Williams, 829 F.3d at 124. However, this is just another example of the court enhancing the burden on Osborn. The question is not, in the context of a mental disability; whether the "Directive" was "so confusing that... no reasonable prisoner can use [it]", the question of fact is "whether Osborn, at the time of his decompesation, during the relevant grievance period; was himself so confused that the remedies could not be used by him"! Instead, the courts considered only the text of the grievance regulations. Id.

This truncated review reflects a misreading by the courts of its precedent. In Williams, the court measured the facts of the case against Ross's second example - whether a procedure is "so opaque that it becomes, practically speaking, incapable of use." Williams, 829 F.3d at 123 (quoting Ross, 136 S.Ct. at 1859). It determined that under the opaqueness example, the relevant question is whether the text of the grievance procedure fails to "contemplate the situation in which [the prisoner finds] himself, making it practically impossible for him to ascertain whether and how he could pursue his grievance." Id at 124. See also Rodriguez v. Reppert, No. 14-CV-671-RJA-MJR, 2016 WL 6993383, at *2 (W.D.N.Y. Nov. 30, 2016) (describing "the PLRA's opaqueness exception as interpreted by the second circuit in Williams") (citing Williams, 829 F.3d at 124) (internal alterations and quotation marks omitted).

The courts below, mistakenly treated this opaqueness analysis as if it were the only analysis potentially relevant to the availability of administrative remedies. The courts thus considered only the text of the grievance regulations, ignoring the other facts presented by the plaintiff, and found that the regulations "provide Mr. Osborn with a procedural route to obtain administrative relief." Osborn, 2017 WL 6231714, at *7 (internal quotation marks omitted). But there are other ways a remedy can be unavailable under Ross.

As noted above, the appropriate analysis of whether remedies were "actually available" to Osborn is fact-specific and includes consideration of Osborn's individual characteristics, including his mental disabilities. Williams, 829 F.3d at 123 (citing Ross, 136 S.Ct. at 1858-59). If mental disability prevents a prisoner from navigating the administrative process, remedies are not "actually available" because they are not "capable of use". Id at 123.

D. The Court's Conclusions That Mental Disabilities Cannot Render Remedies Unavailable Would Close The Courthouse Door To Many Prisoners With Mental Disabilities.

Prisoners experience mental disabilities at starkly disproportionate rates relative to the civilian population; a rule that mental disability can never excuse exhaustion deficiencies would bar many of these prisoners from accessing the courts. Further, the complex and technical nature of many prison exhaustion regimes make it extremely difficult to complete the administrative process especially while a person is experiencing symptoms of disability, such as hallucinations, decompensation, or recovery from a psychotic break. While not every prisoner with a psychiatric diagnosis is unable to complete a grievance process, many are. Should the lower court's determinations stand, many people with mental disabilities - vulnerable individuals who sometimes find themselves in desperate need of judicial protection - will lose access to the courts because of their disability.

People with mental disabilities are dramatically overrepresented in United States prisons and jails. According to a 2012 report by the United States Department of Health and Human Services, about four percent of all adults in the United States experience serious mental illness.[6] However, approximately 20 percent of prisoners in local jails and 15 percent of prisoners in state prisons are estimated to have serious mental illness.[7]

FN6: Substance Abuse and Mental Health Servs. Admin., U.S. Dept. of Human Health Servs., Results from the 2012 National Survey on Drug Use and Health: Mental Health Findings 12 (2013), available at https://www.samhsa.gov/data/sites/defaults/files/NSDUH Hmhfr 2012/NSDUH.Hmhfr2012.pdf.

FN7: Treatment Advocacy Ctr., Serious Mental Illness (SMI) Prevalence in Jails and Prisons (Sept. 2016), https://treatmentadvocacycenter.org/storage/documents/backgrounders/smi-in-jails-and-prisons.pdf.

Correctional officials themselves often observe that Jails and prisons have become the de facto mental health care providers for many cities and counties.[8] Cook County sheriff Tom Dart explains that "Jails and prisons now serve as the largest mental health providers in 44 of the 50 states."[9] In most states, Jails and prisons house far more people with serious mental illness than do state hospitals.[10] They are the "psychiatric crisis centers of last resort."[11]

Some prisoners with mental disabilities are at a particular disadvantage when attempting to fulfill the requirements of grievance procedures. These prisoners may be unable to fully comprehend the intricacies of the grievance procedure, such as strict timelines, proper formatting, content requirements, or other potentially "bewildering features". see, Ross 136 S.Ct. at 1860.

In Woodford v Ngo, the Supreme Court held that the PLRA requires "proper exhaustion", i.e., "using all steps that the [prison] holds out, and doing so properly." 548 U.S. 81, 84, 90 (2006)(emphasis added)(quoting Pozo v McCaughtry, 286 F.3d 1022, 1024 (7th cir 2002)). If a prisoner makes a technical error as a result of her disability and the grievance is rejected, the court can dismiss her case, regardless of its merits. see id. at 122-23 (stevens J., dissenting).

Further, prison and Jail systems get to craft their own grievance rules, which under the PLRA "need not meet federal standards" or be "plain, speedy, and effective." Porter v Nussle, 534 U.S. 516, 524 (2002)(internal quotations omitted). While "informality and relative simplicity" characterize some grievance procedures, Woodford, 548 U.S. at 103, others are multi-layered and complex. Prison

FN8: For a survey of comments by correctional officials on the issue of individuals with serious mental illness in Jails, see E. Fuller Torrey et al, More Mentally Ill Persons In Jails And Prisons Than Hospitals: A survey of the states 4-6 (2010), https://community.nicic.gov/blogs/mentalhealth/archive/2011/01/28/more-mentally-ill-persons-are-in-jails-and-prisons-than-hospitals-a-survey-of-the-states.aspx.

Authorities have incentives to make the procedures complicated because "[n]on-exhaustion confers immunity from liability on prison staff."[12] A complex regime, combined with tight deadlines, invites technical errors. Even trivial mistakes can be fatal to a prisoner's suit: submitting handwritten copies, rather than photocopies, of required documents can lead to dismissal for non-exhaustion (even if the prison's photocopier was broken).[13] So can sending a required form to the "Inmate Appeals Branch" instead of the "appeals coordinator,"[14] submitting a carbon copy of a document instead of the original,[15] or placing multiple grievances in a single envelope instead of separately mailing each one.[16] Thus, "proper exhaustion" may require a degree of minute technical compliance that would be challenging for anyone, let alone a prisoner with severe mental disabilities.

Given the concentration of persons with mental disabilities in Jails and prisons, and the complexity of many exhaustion regimes, the District Court's and Second Circuit's view that mental disability cannot be considered when determining the availability of administrative remedies would keep many people with meritorious claims out of court.

FN9: See Cook Cty. Sheriff's Dep't, A Mental Health Template for American Jails (2016), http://www.cookcountysheriff.org/pdf/MentalHealthTemplate_072116.pdf.

FN10: E. Fuller Torrey et al, The Treatment of Persons with Mental Illness In Prisons and Jails: A State Survey, Treatment Advocacy Center and National Sheriffs' Association 6 (April 8, 2014), https://treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf.

FN11: Fred Osher, et al., A Best Practice Approach to Community Re-entry from Jails for Inmates with Co-occurring Disorders: The APIC Model 3 (2002), http://www.namiut.org/Images/stories/Re-Entry.pdf.

FN12: Alison M. Mikkor, Correcting for Bias and Blind Spots in PLRA Exhaustion Law, 21 Geo. Mason L. Rev. 573, 582 (2014); see also Margo Schlanger & Giovanna Shay,

E. The Exhaustion Requirement Must Be Construed To Avoid Serious Conflicts with the Constitution And Federal Disability Rights Laws.

"[P]risoners have a constitutional right of access to the courts." Bounds v Smith, 430 U.S. 817, 821 (1977). Yet the District Court's holding that it could not consider Osborn's mental disability, and if it could, that he would have to provide expert testimony (Deborah Eddinger, was an expert) to support his claim, "effectively closed access" to the courts. See id at 822 (quoting Burns v Ohio, 360 U.S. 252, 257 (1959)). Such an exclusion violates his fundamental First Amendment right. Lewis v Casey, 518 U.S. 343, 351 (1996) (citing Bounds, 430 US at 823). Given the prevalence of mental disability among prisoners, the District Court's holding, and now the Second Circuit's affirmance, if accepted, threatens the enforcement of constitutional rights of a non-trivial fraction of the prison population.

At a minimum, the canon of constitutional avoidance should preclude the courts' interpretation here. "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 decisions below and find that mental disability can render administrative remedies unavailable to individual prisoners.

Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act, 11 U. Pa. J. Const. L. 139, 149 (2008); Human Rights Watch, No Equal Justice: The Prison Litigation Reform Act in the United States 12 (2009).

FN13: See Mack v Klopotoski, 540 F. App'x 108, 112-13 (3d Cir. 2013)

FN14: See Chatman v Johnson, No. CIVS-06-0578 MCE EFB P., 2007 WL 2023544, at *6 (E.D. Cal. July 11, 2007), report and recommendation adopted, No. CIVS-06-0578 MCE EFB P., 2007 WL 2796575 (E.D. Cal. Sept. 25, 2007); See also, Hamilton v Lara, No. 1:08-CV-01967-

Further, ignoring an individual's mental disabilities in assessing whether remedies are "available" would contravene federal disability rights laws. Under the Americans with Disabilities Act and Rehabilitation Act, public entities (and entities receiving federal funding) - 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. §§ 35.103(b)(7)(i), 35.150. Administrative remedies are undoubtedly "service[s], program[s], or activit[ies]" of the prison system. To read "availability" of administrative remedies as excluding consideration of a disability would read the PLRA to, subsilentio, 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 with federal disability rights principles. See Ross, 136 S.Ct at 1858-59; 28 C.F.R. § 35.150.

2. On Summary Judgment, Osborn Was Not Required To Prove His Mental Disability With Expert Witness Testimony.

The lower courts further erred in holding that if it were to consider Osborn's mental disabilities, expert testimony would be required to prove his disability. Osborn, 2017 WL 6731714 at *8 (App: C at *15-16; App: D at *6). This holding improperly shifted the burden of proof to Osborn. Further, the opinions below are inconsistent with past decisions of the Second Circuit and this court.

OWW-GSA-PC, 2011 WL 2457934, at *3 (E.D. Cal. June 16, 2011).

FN15: See Fischer v Smith, No. 10-C-870, 2011 WL 3876944, at *2 (E.D. Wis. Aug. 31, 2011) (prisoner failed to exhaust when he sent required grievance form to wrong prison administrator).

FN16: See Freeland v Ballard, No. 2:14-CV-29445, 2017 WL 337997, at *6-7 (S.D. W. Va., Jan. 23, 2017).

A. On Summary Judgment The Burden Of Proof On All Material Facts First Lays With The Movant.

The "ultimate burden of proof remains with the defendant," who must demonstrate on summary judgment that there are no disputes of material fact regarding the availability of administrative remedies to the plaintiff. Albino v Baca, 747 F.3d 1162, 1172 (9th cir 2014) (en banc). See also, Surles v Andison, 678 F.3d 452, 456 (6th cir. 2012) ("[d]efendants ha[ve] the burden of showing that [plaintiff] did not exhaust his administrative remedies"); Coleman v Nolan, No. 9:15-cv-40 (ATB), 2018 WL 4732778, at *4 (N.D.N.Y. Oct. 2, 2018) ("[W]hile the burden of production may shift to a plaintiff when a court considers whether the grievance process was unavailable, the ultimate burden of proof with respect to the exhaustion defense remains, at all times, with the defendant.") (internal quotation marks omitted).

The lower courts' suggestion that Osborn had to prove his disability conclusively through expert testimony improperly shifted the ultimate burden of proof to Osborn. Rather, at the summary judgment stage, he simply must demonstrate that there are genuine factual disputes about the availability of administrative remedies and provide information regarding the "other factors," such as his mental disability, that may have rendered those remedies unavailable.

B. Expert Testimony Is Not Required At This Stage In The Proceedings To Demonstrate That Osborn Has A Mental Disability.

Federal courts routinely accept - or reject - claims that remedies are unavailable due to mental disability without requiring expert testimony. Instead, they rely on evidence such as plaintiff's declarations, medical records, and the plaintiff's filing other grievances or completing other similar tasks during the relevant grievance time period. See, e.g., Adams v Wexford Health Sources, Inc., No. 15-cv-604-NJR-DGW, 2018 WL 4680728, at *7 (S.D. Ill., Sept. 28, 2018) (relying on medical records, plaintiff's affidavit and determining that plaintiff was "not mentally or physically capable of filing a grievance ..."); Smith, 2018 WL 3999686, at *2-3 (relying on medical records, plaintiff affidavit, and prior grievances filed with assistance and determining that "[p]laintiff did not have the mental wherewithal to file a grievance ..."); Whitington, 491 F.Supp.2d at 1015 (relying on medical records and plaintiff's affidavit and determining that defendants failed to meet their burden of showing remedies were available to plaintiff despite his transfer to a psychiatric hospital); Johnson-Ester, 2009 WL 632250, at *6 (relying on medical records and determining that the plaintiff was "not capable" of accessing the grievance procedure). See also, Galberth v. Washington, 743 F.App'x 479, 480-81 (2d Cir 2018) (summary order) (relying on plaintiff's medical records to determine mental illness did not render remedies unavailable to the plaintiff); Jones v. Nelson, 729 F. App'x 467, 469 (7th cir. 2018) (relying on plaintiff's other grievances filed during relevant time period and affirming summary judgment for defendants based on plaintiff's failure to exhaust remedies).[17]

FN17: Other courts similarly have relied on medical records and a prisoners proven ability to file other grievances during the relevant time period to reject claims of unavailability. See, e.g., Telesford v Wenderlich, No. 16-CV-6130 CJS, 2018 WL 4853667, at *8 (W.D. N.Y. Oct. 5, 2018) (relying on undisputed fact that plaintiff "filed and exhausted a large number of other grievances during the same period" and rejecting claim of unavailability); Hinton v Mark, No. 3:10-CV-305, 2017 WL 4342204, at *9 (W.D. Pa., Sept. 29, 2017) ("Given that plaintiff was filing grievances during the period immediately following his suicide attempt, no reasonable Juror could find that Plaintiff's mental health rendered the grievance procedure unavailable to him."); Ayala v. Fermon, No. 14-CV-1794 GPC (JLB), 2016 WL 11281167, at *15-16 (S.D. Cal. Nov. 16, 2016), report and recommendation adopted in part, No. 14-CV-1794 GPC (JLB), 2017 WL 836193 (S.D. Cal., Mar. 2, 2017) (relying on medical records and plaintiff's "comprehensible and legible" health care request forms submitted during relevant time period to determine

Further, this court has not required expert evidence at summary Judgment for similar legal analyses regarding mental disability, such as claims under the Americans with Disabilities Act and Fair Housing Act. "[M]edical evidence as to the extent of an individual's impairment is not always required to survive summary Judgment." Rodriguez, 288 F.3d at 43 (finding testimony from minor plaintiff's mother sufficient to establish how plaintiff's disability affected a major life activity at the summary Judgment stage). Instead, courts must determine the existence of a disability on "an individualized assessment." Id (internal quotation and alteration omitted).

Courts in the Second Circuit based individualized assessments on evidence such as a plaintiff's testimony and medical records. see, e.g., Clark v Stop & Shop Supermarket Co., No. 3:15-CV00304 (JCH), 2016 WL 4408983, at *4-5 (D. Conn. Aug. 16, 2016) (finding that testimony from the plaintiff, corroborated by dotor's records, creates "genuine and disputed issues of material fact" with respect to plaintiff's mental disability); Girard v Lincoln Coll. of New England, 27 F. Supp. 3d 289, 295 (D. Conn. 2014) ("Plaintiff's deposition testimony provides enough evidence to make the question whether she has a disability under these relaxed standards one for the Jury."). Osborn's sworn statement and medical records provide exactly the kind of factual basis that courts have relied on in identifying material factual issues.

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plaintiff mentally capable of accessing remedies); Wakeley v Giroux, No. 12-CV-2610, 2014 WL 1515681, at *15-17 (M.D. Pa. Apr. 15, 2014) (relying on medical records and rejecting claim of inability to file a grievance where mental health records and cooperation with investigators during relevant time period showed plaintiff was capable of filing); Lopez v Swift, No. 12-CV-5099-TOR, 2013 WL 4718972, at *4 (ED Wash., Sept. 3, 2013) (relying on plaintiff's affidavit, and contemporaneously filed grievances to determine plaintiff's depression did not prevent him from timely accessing the grievance procedure).

In addition, even when considering the full merits of an Eighth Amendment case regarding medical or mental health care, the Second Circuit does not require expert testimony to prove deliberate indifference. Hathaway v Coughlin, 37 F.3d 63, 68 (2d Cir. 1994) ("We have never required plaintiff alleging a denial of adequate medical care in a section 1983 action to produce expert medical testimony."). Requiring expert testimony at the summary judgment stage is thus unnecessary and inconsistent with the precedent of this court.

In this instance, the lower courts' conclusions, as applied to Osborn, are fundamentally flawed for four very important reasons:

First, the Second Circuit improperly relied on Osborn's usage of the grievance process a full Five (5) months prior to his decompensation of his mental health, after not receiving his medications from defendants, NOT during the relevant grievance time period, and;

Second, the courts below failed to recognize that Osborn's prior usage of the inmate grievance procedures, was with the close assistance of a Jailhouse Lawyer, and;

Third, the Second Circuit failed to consider that Deborah Eddinger was an expert mental health social worker employed by the defendants, and;

Fourt, and most curious, the same medical records that the court found were not sufficient evidence for consideration in Osborn's favor, were relied on by the court against Osborn, without any testimony, expert or otherwise; and the portions that were testified to by Eddinger, and in favor of Osborn; were completely ignored, by the court; which appears to give no weight to the medical expert who described Osborn's decompensation, during the relevant time period; and his inability "to make decisions on [his] own."

C. The Lower Courts' Expert Testimony Requirement Creates

An Evidentiary Bar That Pro Se And Indigent Plaintiffs Cannot Meet

Requiring plaintiffs to present expert witness testimony to avert summary judgment for non-exhaustion creates an evidentiary bar that pro se and indigent plaintiffs will rarely, if ever, be able to overcome.

Prisoners who sue to enforce their civil rights are more frequently pro se than any other category of litigant in federal court.[18] Nearly 95 percent of prisoner civil rights cases were brought pro se in 2012,[19] and nearly all pro se prisoner plaintiffs also seek to proceed in forma pauperis.[20] While federal law excuses prepayment of fees, it does not provide for the appointment of experts to assist the plaintiff. "[F]ederal courts are not authorized to waive or pay witness fees on behalf of an in forma pauperis litigant." Malik v. Lavalley, 994 F.2d 90, 90 (2d Cir. 1993). See also, Vega v. Lantz, No. 04-CV-1215 (DFM) 2006 WL 3826690, at *2 (D. Conn. Nov. 6, 2006) ("The statute authorizing indigent persons to file an action without prepayment of the filing fee, 28 U.S.C. § 1915, does not authorize the Court to pay expert witness fees.") The opinions below, therefore, creates a practically insurmountable barrier that could bar any prisoner proceeding pro se and in forma pauperis from pursuing a claim that remedies were unavailable as a result of a mental disability.[21]

FN18: Margo Schlanger, Trends in Prison Litigation, as the PLRA Enters Adulthood, 5 UC Irvine L. Rev. 153, 166-67 (2015).

FN19: Id at 167

FN20: It is estimated that 95 percent of prisoner lawsuits are brought in forma pauperis. Sharone Levy, Balancing Physical Abuse by the System Against Abuse of the System: Defining "Imminent Danger" Within the Prison Litigation Reform Act of 1995, 86 Iowa L. Rev. 361, 371 (2000)

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 bar entire categories of prisoners from bringing meritorious actions. 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)).

VI Conclusion:

For all the foregoing, the Petition for Certiorari should be granted.

Respectfully submitted,
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FN21: Federal Rule of Evidence 706 does little to rectify the situation. While pro se prisoners can theoretically request the court appoint an expert under FRE 706, and can request that the court order defendants to cover the cost, courts rarely grant these requests. See, e.g., Rachel v Troutt, 820 F.3d 390, 397 (10th cir 2016) (denying pro se request for an expert and noting "[t]hough Federal Rule of Evidence 706(a) permits the district court to appoint a medical expert, courts rarely exercise this power."). Further, defendants will undoubtedly object to being ordered to fund experts before a case even reaches the merits.