No. 24-5161

In the
Supreme Court of the United States

GENUINE TRUTH BANNER,

Petitioner,

V.

MR. TISDALE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

David C. Holler
Counsel of Record
SMITH, ROBINSON, HOLLER,
DUBOSE & MORGAN, LLC
126 North Main Street
Post Office Box 580
Sumter, South Carolina 29151
(803) 778-2471
Email: davidholler@smithrobinsonlaw.com

Counsel for Respondents

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STATEMENT OF THE CASE

On April 2, 2020, Banner, a pro se inmate at Lee Correctional, was questioned after Lt. Bethea was stabbed in the neck. After questioning by staff, Banner was escorted to RHU and was asked to remove his blood-stained clothing for evidence. Banner admits he flushed articles of clothing down a toilet despite directives from staff. While continuing directives, staff deployed a single burst of chemical munitions (23 grams) to restore compliance.

Banner claims staff thereafter entered his RHU cell, jumped on his back, grabbed his left arm and twisted it, slammed his head into the ground, kicked him in the head, and stomped on his knee. Banner claims staff recorded the whole event. Banner admits he was then escorted to medical where he refused medical evaluation or treatment. Banner admits medical staff would not have noticed any injuries to his body other than the use of mace.

Staff, on the other hand, testified no one used excessive force at any time in RHU. After multiple directives, chemical munitions were used, and Banner was immediately taken to medical. No recordings were taken. Medical staff testified Banner refused treatment at Lee.

Banner admits an investigator spoke with him soon after he was seen in medical. Banner claims he complained of the excessive use of force in RHU but refused to speak about the stabbing of Lt. Bethea. Banner admits he only signed a Miranda warning.

The investigator testified Banner refused to discuss Lt. Bethea's stabbing. The investigator states that Banner did not complain about any excessive use of force and did not appear to have any visible injuries.

Banner admits he was transferred the same day to Kirkland and presented to medical. Staff who transported him testified he did not complain of excessive use of force, and did not appear to have any injuries. Banner was immediately presented to medical at Kirkland. Medical staff reported Banner was seen walking in chains in no acute distress, his vital signs were normal, and Banner reported he did not need medical attention.

Banner admits his first written request for medical assessment or treatment was April 20, 2021, more than a year after the alleged April 2, 2020, events. Banner claims he filed multiple RTSMs shortly after arriving at Kirkland, and orally told multiple staff members of the excessive use of force at Lee. Banner claims because no one responded to these alleged multiple RTSM's, the grievance process was unavailable to him.

Respondents testified Banner's first RTSM regarding excessive use of force was on November 3, 2020, and far beyond the deadlines of the grievance process. During this time period he claims the grievance process was unavailable, Banner filed a July 12, 2020, RTSM (complaining homosexual staff members were receiving sexual gratification during pat downs and strip searches) and a February 13, 2021, RTSM (claiming his mailing address had not been updated since his transfer, and he was

thereafter notified that he must personally update his mailing address within the kiosk system).

Although he claimed he "sent out multiple RTSMs to Police Services and the Warden", the magistrate judge and district court concluded Banner failed to include any evidence of any RTSM prior to November 3, 2020. Bald allegations are not evidence. The district court dismissed Banner's claims for failure to exhaust his administrative remedies for the April 2, 2020, alleged excessive use of force. The Fourth Circuit Court of Appeals affirmed the dismissal.

REASONS FOR DENYING THE PETITION

I. Did District Court properly grant summary judgment dismissing Banner's claims for failure to exhaust his administrative remedies, where Banner offers only a bald allegation he timely filed a RTSM with no evidence to support this allegation, where Respondent offered evidence that Banner utilized the RTSM system several times between April 2, 2020 and April 21, 2021, where Respondent offered evidence that Banner twice refused medical care on April 2, 2020, and did not file any written requests for medical evaluation or treatment until April 20, 2021. Banner has no Seventh Amendment right to a jury trial on the issue of exhaustion, and Banner did not request an evidentiary hearing on exhaustion.

Banner failed to exhaust his administrative remedies. Banner asserts Respondents used excessive force against him on April 2, 2020, following an assault of Lt. Bethea. The Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a) (1996)), mandates, among other things, that prisoners exhaust their administrative remedies prior to filing civil actions concerning prison conditions under § 1983 or

any other federal law. See *Jones v. Bock,* 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court"). "[T]he PLRA's exhaustion requirement is mandatory", *Anderson v. XYZ Corr. Health Servs., Inc.,* 407 F.3d 674, 677 (4th Cir. 2005), abrogated on other grounds by *Custis v. Davis,* 851 F.3d 358 (4th Cir. 2017), and "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong". *Porter v. Nussle*, 534 U.S. 516, 532 (2002). In *Porter v. Nussle,* 534 U.S. 516, 532 (2002) (holding "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes"). "The requirement that inmates comply with all steps of a grievance policy is important because it gives a prison a full 'opportunity to correct its own mistakes' before federal litigation is launched." *Moss v. Harwood,* 19 F.4th 614, 621 (4th Cir. 2021) (quoting *Woodford v. Ngo,* 548 U.S. 81, 89 (2006)); see *Woodford,* 548 U.S. at 95 ("The prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules."); *Moore v. Bennette,* 517 F.3d 717, 725 (4th Cir. 2008) (stating "a prisoner must have utilized all available remedies 'in accordance with the applicable procedural rules' " (quoting *Woodford*, 548 U.S. at 88)). "[T]he PLRA exhaustion requirement requires proper exhaustion, "*Woodford*, 548 U.S. at 93, and "it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones v. Bock*, 549 U.S. 199, 218 (2007). However, the PLRA has a

"built-in exception to the exhaustion requirement: A prisoner need not exhaust remedies if they are not 'available'." *Ross v. Blake*, 578 U.S. 632, 635-36 (2016).

The PLRA requires "proper exhaustion" of available administrative remedies prior to filing suit. *Woodford v. Ngo*, 548 U.S. 81, 93-94 (2006). As the Supreme Court of the United States has noted, "[a]ggrieved parties may prefer not to exhaust administrative remedies for a variety of reasons," whether it be concerns about efficiency or "bad faith." Id. at 89-90. This is especially true in a prison context. Id. at 90 n.1. Nevertheless, "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." Id. At 90-91.

However, "an administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it." *Moore v. Bennette,* 517 F.3d 717, 725 (4th Cir. 2008). Thus, an administrative remedy is considered unavailable when: (1) "it operates as a simple dead end-with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) it is "so opaque that it becomes, practically speaking, incapable of use"; or (3) "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross v. Blake,* 578 U.S. 632, 643-44 (2016).

Banner was questioned after Lt. Bethea was severely stabbed in his neck on April 2, 2020. Banner was thereafter sent to the restricted housing unit (RHU)

after the Bethea assault. Agent Horne interviewed Banner in RHU about the Bethea assault. Banner claims he orally informed Horne of the excessive use of force. Agent Horne denies Banner reported any excessive use of force or reported any injury. Horne states Banner did not appear to be injured. Rather, Horne claims Banner refused to discuss the Bethea assault, stating that it was all on camera. See ECF 168-11 and 168-12.

Banner's first written claim of excessive use of force was on November 3, 2020, an untimely RTSM to General Counsel. ECF 168-2, p. 111 of 131. On April 20, 2021, Banner filed an untimely Step 1 grievance alleging the same facts and requesting medical treatment for the first time. Banner's own testimony is conflicting. On the one hand he acknowledges he never asked for medical treatment in writing until April 20, 2021, yet he claims Agent Horne wrote down his claims of excessive use of force on April 2, 2020, read back his statement to him, and Banner signed the document. Agent Horne's contemporaneous report and affidavit directly conflict Banner's claims. See ECF 168-11 and 168-12. Banner did not orally claim excessive use of force and did not orally claim injury on April 2, 2020. Id. Banner refused to discuss the Bethea assault and directed Horne to look at the video surveillance. Id. Banner's bald assertion that Deputy Warden Jana Hollis at Kirkland prevented him from exhausting his administrative remedies by failing to respond to his RTSM, yet he fails to offer <u>any</u> evidence that a RTSM was <u>actually</u> submitted at any time before November 3, 2020.

Banner acknowledges in his deposition that he never requested medical treatment in writing before April 20, 2021, yet nonetheless offers a bald allegation he filed a RTSM soon after arriving at Kirkland on April 2, 2020. ECF 167-2, page 69 of 87. Respondents offered evidence Banner did file RTSM's during the time frame of April 2, 2020, through April 20, 2021. On July 14, 2020, Banner submitted a RTSM regarding inappropriate strip searches by staff. ECF 168-2, page 110 of 131. Banner was informed that his concerns were being forwarded to the Warden and Police services on July 20, 2020. On February 13, 2021, Banner submitted a RTSM complaining that his "address in the SCDC system has never been updated because I keep getting mail forwarded from Lee Correctional." ECF 168-2, page 108 of 131. Banner was informed that he personally would have to update his address in the system on February 26, 2021. ECF 168-2, page 107 of 131. Banner failed to mention the lack of response to any prior RTSMs generally and did not specifically raise an issue about an alleged RTSM submitted on April 2, 2020. Respondents offered evidence Banner accessed and used the RTSM/Grievance process during this relevant period. Banner offers only a bald allegation, yet failed to offer any evidence, that he timely submitted a RTSM or that the administrative process was unavailable to him. Fed. R. Civ. P. 56(0)(1)(A)(setting forth how a party introduces summary judgment evidence); *Estrada v Smart*, 107 F.4th 1254 (10th Cir. 2024)("once [Correctional officers] introduced evidence showing that [the prisoner] filed three other grievances but none about the May 2018 [alleged civil rights violation], the burden shifted to [prisoner] to 'do more than refer to allegations of

counsel contained in a brief to withstand summary judgment."). Banner's claims were properly dismissed for failure to exhaust his administrative remedies.

Banner has no Seventh Amendment right to trial by jury on the issue of exhaustion. Seven Circuits addressing the issue - the Second, Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuit Courts of Appeals - agree that exhaustion is for the judge to decide. *Drippe v. Tobelinski*, 604 F.3d 778, 782 (3d Cir.2010); see also *Messa v. Goord*, 652 F.3d 305, 308 (2d Cir.2011); *Dillon v. Rogers*, 596 F.3d 260, 272 (5th Cir.2010); *Lee v. Willey*, 789 F.3d 673, 678 (6th Cir. 2015)(Because exhaustion of administrative remedies touches on matters of judicial administration, the Court may address factual issues relating to exhaustion to ensure "litigation is being conducted in the right forum at the right time."); *Bryant v. Rich*, 530 F.3d 1368, 1375B77 & n. 15 (11th Cir.2008); *Pavey v. Conley*, 544 F.3d 739, 741B42 (7th Cir.2008); *Wyatt v. Terhune*, 315 F.3d 1108, 1119B20 (9th Cir.2003).

District courts within the Fourth Circuit have also followed this rule. *Turner v Clelland*, 2016 WL 6997500 (M.D. NC 2016)("[A]ll six of the [other] circuits that have considered the issue agree that judges may resolve factual disputes relevant to the exhaustion issue without the participation of a jury." quoting *Lee v. Willey*, supra); *Kelly v Lewis*, 2017 WL 354267 (M.D. NC 2017); *Woodhouse v Duncan*, 2018 WL 1513009 (W.D. Va 2018)("a court may resolve that issue [exhaustion] on its own and without a jury."); *Miller v Rubenstein*, 2018 WL 736044 (S.D. WV 2018)("Whether an inmate has exhausted available administrative remedies under

the PLRA is a question of law to be determined by a judge."); *Murray v Matheny*, 2017 WL 5894545 (S.D. WV 2018)("The seven circuits that have addressed the issue, however, all agree that judges may resolve factual disputes concerning exhaustion under the PLRA without the participation of a jury."); *Creel v Hudson*, 2017 WL 4004579 (S.D. WV 2017); *Strickland v Wang*, 2013 WL 866075 (W.D. Va 2013); *Springer v Brown*, 2013 WL 865978 (W.D. Va 2013); *Jones v F.C.I. Beckley Med. Staff Employees*, 2013 WL 5670858 (S.D. WV 2013).

Whether Banner exhausted his administrative remedies was properly before the District Court. Respondents respectfully submit the District Court properly dismissed - and Fourth Circuit Court of Appeals affirmed - the dismissal of Banner's claims for failure to exhaust under the PRLA.

II. Respondents fully complied with all discovery orders.

Respondents provided relevant portions of the SCDC Use of Force Policy, specifically section 2.2, to Banner. This was done and acknowledged by Banner. See ECF 64-2. See also ECF 85 (Order), ECF 109 (Order denying ECF 95), and ECF 165 (Order denying ECF 119). Banner's bald allegation that he was not provided access to discovery was (at least) thrice denied by the District Court. Respondents timely and appropriately complied with ECF 50.

CONCLUSION

For the foregoing reasons, the Respondents submit that the Petition for Writ of Certiorari should be denied and that this Court affirm the Order of the United States District Judge Joseph Dawson, III, filed on June 23, 2023, granting Respondents' summary judgment, and affirming the Fourth Circuit Court of Appeals dismissal of Banner's appeal. No. 23-6709, filed May 23, 2024.

Respectfully submitted,

David C. Holler
Counsel of Record
SMITH, ROBINSON, HOLLER,
DUBOSE & MORGAN, LLC
126 North Main Street
Post Office Box 580
Sumter, South Carolina 29151
(803) 778-2471
Email: davidholler@smithrobinsonlaw.com

Counsel for Respondents

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