

1 Now, that's just tentative. But if I'm
2 right in thinking that what we have here is simply
3 a -- an aspect of the availability question, then
4 maybe the thing to do is send it back and argue out
5 all the availability, including this, in the court
6 below rather than us trying to write a standard.

7 Or a second, maybe we adopt the SG
8 standard. Or maybe we adopt your standard. I don't
9 know what rubric we'd put it under. Under the
10 rubric of exception? Under the rubric of
11 availability?

12 Now, that's a general musing-type question,
13 designed to provoke on your part a general response.

14 MR. HUGHES: Well, we certainly think that
15 the outcome here was correct. So that's certainly
16 our starting point. We think the best way to get
17 there, the proper rubric that would apply in this
18 case and all other cases, is an understanding of
19 what "available" properly means.

20 So I -- I would suggest, I think, the
21 statutory text and what "available" fairly -- has
22 been held to mean by this Court in Booth and
23 elsewhere does the work, certainly in this case, and
24 I think in the vast majority of cases.

25 As the Court said in Booth, "available"

1 here means "accessible or capable of use." I don't
2 think anyone would fairly describe a prison
3 administrative remedy as one that's accessible or
4 capable of use.

5 A reasonable prisoner wouldn't know which
6 remedy it is he or she is supposed to use in the
7 circumstances or wouldn't know the proper steps that
8 he or she needs to take in order to avoid procedural
9 default under Woodford standard.

10 The system has to have that -- that minimal
11 degree of clarity for one to actually have been
12 described as available. Certainly Congress retained
13 the word "available" after it amended the PLRA from
14 the prior CRIPA, and "available" must have meaning.
15 Congress certainly didn't say any standard -- or any
16 remedy or all remedies.

17 And, again, I don't think Maryland even
18 disagrees with us on this point because they say at
19 the reply brief at page 5, they agree that if the --
20 if the administrative remedy, in their words, is
21 undecipherable, that would not be one that qualifies
22 as available.

23 So I think there's broad agreement that
24 the -- the prison system can't take the rule book,
25 lock it in a box, not let any inmate understand how

1 it works, and still call that system one that is --
2 is fairly available. So --

3 JUSTICE KAGAN: If I could understand you,
4 though, I mean, one argument that you would have,
5 whether here or below or -- is this notion of the
6 prison system didn't meet this level of clarity,
7 whatever it is.

8 But there's another argument, don't you
9 think -- or do you think -- that you have, which is
10 just, they said to go to the ARP, and the ARB -- the
11 ARP was not in the business of giving this remedy.
12 So we did exactly what we were told to do, and it
13 turns out the remedy is unavailable because it's
14 just not available.

15 MR. HUGHES: I think that's precisely
16 correct. I absolutely agree with that view, that
17 here, in all of the cases that anyone has
18 identified -- and, again, with both our lodging, but
19 also in every case in Petitioner's lodging -- and I
20 just point the Courts to their lodging at page 25,
21 32, 37, 46, 93, 231, and there are others. Every
22 example that anyone has identified, the ARP has
23 always said, "You've come to the wrong place.
24 Because of the IIU is underway, there can be no
25 relief had here." I think that's plainly an

1 unavailable system.

2 As the Court in Booth said for -- in a
3 system, administrative remedy to qualify as
4 available, the administrative officers must have
5 some authority to provide relief in the
6 circumstances.

7 CHIEF JUSTICE ROBERTS: I don't -- I don't
8 mean to beat a dead horse, but the -- the citations
9 you cited, it is true that that's to the lodgings.
10 But I don't have any confidence that these lodgings
11 represent the complete universe to allow me to make
12 a judgment about the procedures under Maryland law,
13 because this wasn't litigated or -- or subject to
14 discovery in the district court or court of appeals.

15 MR. HUGHES: So, your Honor, two things.
16 First, again, we would not disagree if -- if a
17 remand could be appropriate for some of these
18 issues; but, second, I think there is enough that is
19 undisputed in the -- the record currently that --
20 that doesn't even require a look in -- in the hole
21 to the lodgings to find that this was not an
22 available system.

23 To begin with, the IIU exclusivity
24 regulation that we discussed at page 17 of the red
25 brief made quite clear at the time of this incident

1 that the IIU had exclusive authority whenever there
2 was a referral that was made to the IIU at that
3 point and that no other agency could proceed.

4 That, again, has nothing to do with the
5 lodging material and, I think, makes quite clear
6 that the ARP was not the proper place to go.

7 We have the additional briefs, which we
8 think are on somewhat different footing than some of
9 the -- the other agency materials, and we have the
10 2008 directive that did happen after the case but
11 made quite clear that the ARP is simply the not --
12 not the correct place for these cases to go.

13 So I think all of these things, even
14 independent from the lodgings, demonstrate that
15 there was an enormous amount of confusion as to how
16 the system works and is not one that could be
17 described in any sense as available without even --

18 JUSTICE ALITO: You would argue that even
19 if the ARP procedure turns out to have been
20 available as a formal matter, suppose that this --
21 that issue were remanded, and the district court
22 explored it thoroughly and concluded that, although
23 there's a lot of -- there are these materials that
24 might suggest otherwise, as a formal matter, it is
25 available, even when the IIU procedure is going --

1 is going forward. All right?

2 I don't know whether that would happen.
3 Maybe it wouldn't. Assume that that's the case.
4 You would still argue that the procedure was
5 unavailable because, although it was available as a
6 former matter -- a formal matter, it is simply too
7 confusing; right? And no reasonable inmate could
8 take advantage of it.

9 MR. HUGHES: That's right.

10 JUSTICE ALITO: That's a separate
11 agreement?

12 MR. HUGHES: Yes, Your Honor. Yes. So --
13 and --and that is why I --

14 JUSTICE ALITO: As to that argument,
15 your -- your client did not try to use any
16 procedure; isn't that correct?

17 MR. HUGHES: No, Your Honor.

18 JUSTICE ALITO: How was he confused?

19 MR. HUGHES: So on the day of the event --
20 this is at the Joint Appendix, page 229 to 230, he
21 filed a very detailed report of the incident. And
22 he said, at the bottom of -- of page 229 -- this is
23 three and four lines from the bottom -- "I'm asking
24 for a formal internal investigation." The next
25 page, after his signature, "P.S. I will repeat this

1 exact statement under oath at any time you need.

2 Please investigate this incident."

3 He filed this very clear report that
4 described the entire incident. And he asked for the
5 prison to respond. The prison did in fact respond
6 the next day. It instituted the IIU investigation.

7 So I think the question is, after he had
8 taken this clear affirmative step, would someone in
9 these circumstances, a reasonable prisoner, known
10 that he had to do something else? And I think
11 everything that -- that we know shows that a
12 reasonable prisoner wouldn't have understood he had
13 to do anything else beyond the IIU investigation.
14 So, again, I think very clear affirmative steps he
15 took. And the only question is, would he have known
16 he had to go to the ARP process? He wouldn't have
17 known because of the IIU exclusivity regulation. He
18 wouldn't have known because of the practice in
19 Maryland prisons.

20 And even if he had shown up there, we now
21 understand that in all cases, it was dismissed.
22 There was a rubber-stamp that was used to dismiss
23 all of these claims. So for both of those reasons,
24 he wouldn't have known to have gone there; and if he
25 had gotten there, he would have shown up to a place

1 that was going to dismiss --

2 JUSTICE ALITO: He received -- he received
3 materials from the prison saying that that -- the
4 ARP procedure is available in cases of -- of
5 excessive use of force; isn't that right?

6 MR. HUGHES: He did, Your Honor, but none
7 of that material said anything whatsoever about the
8 IIU. The IIU exclusivity regulation, however, was
9 specific, and generally the specific is going to,
10 you know, govern over the general. And so on the
11 one hand, when you have a regulation that says the
12 very specific IIU mechanism is exclusive, all other
13 agencies --

14 JUSTICE ALITO: What did he see that said
15 that the IIU procedure was specific?

16 MR. HUGHES: Well, it -- it was in the --

17 JUSTICE ALITO: I'm sorry. Was exclusive?

18 MR. HUGHES: It was in the -- the
19 regulations that -- again, all of the regulations
20 that Maryland had enacted that would be available to
21 prisoners --

22 JUSTICE ALITO: And he read those?

23 MR. HUGHES: No, Your Honor, I don't think
24 there is direct evidence that he read those, but I
25 think the question is what an objectively reasonable

1 prisoner would have understood. And the only
2 guidance that was specific to the IIU that had
3 anything to do -- that would inform a prisoner, once
4 you're in the IIU channel, what is it that you
5 should be doing at that point, said this was the
6 exclusive mechanism; all other agencies have to
7 relinquish authority. So I think that very tailored
8 guidance would certainly trump the broad policy
9 statements that exist in the other regulations in
10 the Maryland handbook that say nothing whatsoever as
11 to an inmate as to what he should do when the IIU
12 investigates.

13 I should also add that one of the
14 interesting things about this case is the IIU
15 investigations are the investigations where the
16 Maryland prison itself, it initiates them, because
17 it thinks those are the most serious incidents in
18 the prison. That's where Maryland thinks that its
19 own prison officials may have engaged in criminal
20 wrongdoing, and therefore they need to undertake
21 this process. What Maryland has done is -- is
22 created very substantial trips and traps for only
23 the cases that are most likely to correspond to the
24 very worst conduct in Maryland prisons.

25 So I think that's a particularly pernicious

1 aspect of creating the system where you're confused,
2 told to go to the ARP, but then the ARP, in all
3 cases, is going to dismiss your claim, telling you
4 that you've come to absolutely the wrong place.

5 And, again, I think all of the material at
6 this point is -- is totally consistent on the view
7 that this is how the ARP would have worked. It was
8 codified by the 2008 directive that we discussed at
9 the red brief at page 18, and I think there is
10 little question at this point that there was a
11 codification of existing practice that happened in
12 2008, because all of the examples anyone has
13 identified is consistent with the view that the 2008
14 directive served to codify what was --

15 JUSTICE SOTOMAYOR: Where is that in the
16 record?

17 MR. HUGHES: Sorry?

18 JUSTICE SOTOMAYOR: The recent amendment.

19 MR. HUGHES: It's at page 367 of the Joint
20 Appendix.

21 And this is part of the directives.
22 It's -- it's a long directive that provides several
23 different pieces of guidance as to how the ARP
24 procedure works. And at -- towards the bottom of
25 Joint Appendix page 367, it explains: "The warden

1 or institutional coordinator shall issue a final
2 dismissal of a request for procedural reasons when
3 it has been determined that the basis of the
4 complaint is the same basis of an investigation
5 under the authority of the IIU." It provides some
6 additional details, and it says -- it provides the
7 text that now appears on the rubber-stamp, which is,
8 "Your request is dismissed for procedural reasons.
9 Final. The issue is being investigated by IIU.
10 Case Number," blank. "Since this case shall be
11 investigated by IIU, no further action shall be
12 taken within the ARP process."

13 So this is, I think, a quite clear
14 regulation as to how the system now works.

15 I will note that Maryland's view at -- at
16 footnote 9 of their reply brief is that even today,
17 notwithstanding this new directive, their view is
18 the way the system works is a prisoner still has to
19 go to the ARP to properly exhaust their claims in
20 these circumstances, despite the fact that this
21 regulation, I think, is crystal clear that, if you
22 do so, your claim is going to be denied.

23 And you're not told, contrary to the
24 suggestion that you would be -- you would know to
25 appeal, you're not told that you should appeal this

1 dismissal anywhere. There is not a shred of
2 guidance that says, when you have your ARP dismissed
3 because you've told -- been told you have come to
4 the wrong place, the proper thing is just to keep
5 appealing it. You're told that you're -- it's being
6 dismissed because of the IIU investigation. So I
7 think a reasonable prisoner would be quite clearly
8 led to believe that the IIU is, in fact, the only
9 thing that needs to happen in his particular case
10 and would clearly be misled into not actually
11 appealing.

12 So I think it's -- it's much more likely
13 that it's the unreasonable prisoners who disregard
14 the clear guidance that they're getting who continue
15 to appeal in these circumstances.

16 Now, one additional point: The -- Maryland
17 referenced the McCullough case, saying that there is
18 State authority that -- that indicates that the
19 Inmate Grievance Office is the exclusive avenue for
20 these kinds of cases, and it rests on the McCullough
21 case here. I think that argument is misplaced.

22 The McCullough case that they cite was
23 decided in 1989. The internal investigative unit
24 that's at issue here was not established until 1999,
25 a full decade later. So I think the -- the use in

1 the reply brief of the McCullough case to say that
2 the IGO is this broad-based mechanism is not
3 responsive in any event to what happens now with the
4 IIU investigation, because the IIU simply didn't
5 exist at the time that -- that the McCullough case
6 was decided.

7 So I think that our view is quite clear
8 that if Maryland's system in this case were
9 endorsed, that would become a very clear model for
10 what other prisons could enact, this sort of
11 upside-down system, where you're told you have to go
12 to the ARP process to properly exhaust, but once you
13 get there, you're told that you've absolutely come
14 to the wrong place and, despite any guidance, you
15 have to somehow know that you need to appeal,
16 contrary to the instructions that you're being
17 given, in order to properly exhaust your claim.

18 As the Court said in Woodford, to properly
19 exhaust and to avoid procedural default, the
20 prisoner needs to use the steps that the prison
21 properly holds out. Here, the State is doing the
22 very opposite of holding out these steps as
23 available to the prisoners. The State is saying,
24 you've come to the wrong place; you're using the
25 wrong steps. That can't be what I think the Court

1 meant for proper exhaustion as is required by
2 Woodford.

3 I would be pleased to take any more
4 questions that the Court might have.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 The case is submitted.

7 (Whereupon, at 11:57 a.m., the case in the
8 above-entitled matter was submitted.)

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