No. 13-7279

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SHAIDON BLAKE,
Plaintiff-Appellant,

v.

MICHEAL ROSS, Sgt.,
Defendant-Appellee,

and

THE DEPARTMENT OF CORRECTIONS; STATE OF MARYLAND; M.R.D.C.C.; GARY MAYNARD, Sec.; MICHAEL STOUFFER, Comm.; JAMES MADIGAN,
Defendants.

Appeal from the United States District Court
for the District of Maryland at Greenbelt
in Case No. 8:09-cv-02367-AW (Williams, J.)

REPLY BRIEF

Reginald R. Goeke
Scott M. Noveck
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes, Regulations, And Rules

Other Authorities

ARGUMENT

I. ROSS WAIVED THE EXHAUSTION REQUIREMENT BY FAILING TO RAISE IT AS AN AFFIRMATIVE DEFENSE IN HIS INITIAL PLEADINGS AND BY WAITING MORE THAN TWO YEARS BEFORE ASSERTING IT.

Ross offers no explanation, much less any justification, for why he failed to plead the affirmative defense of failure to exhaust in his initial answer; for why he did not assert it in his initial summary judgment motion; or for why he did not raise the defense at all until nearly two years into this litigation. Instead, he insists that his belated attempt to invoke this defense was somehow proper—either because he tricked Blake into consenting to the filing of an amended complaint before revealing that it included a new affirmative defense, or because Blake's counsel later filed an amended complaint in proper pleading format to substitute for the handwritten complaint that Blake filed *pro se*. And Ross further insists that Blake was not prejudiced by his lengthy and unjustified delay, ignoring that this delay caused the statute of limitations to expire and thereby deprived Blake of the opportunity to cure any deficiency and re-file his claims. Because there is no merit to any of these arguments, the Court should hold that Ross waived the PLRA's exhaustion requirement, vacate the decision below, and remand the case for trial and a decision on the merits.

A. Ross Waived His Failure-To-Exhaust Defense By Failing To Timely Assert It.

As the opening brief explained, Ross's failure to invoke the PLRA's exhaustion requirement as an affirmative defense in his initial answer or in his initial summary judgment motion waived that defense. By the time Ross finally tried to raise this issue, nearly two years into the litigation, it was too late—the defense had already been waived when Ross failed to timely invoke it in his earlier filings, and allowing Ross to revive that defense after the statute of limitations has expired would cause unfair prejudice to Blake, so the exhaustion defense could not be un-waived. *See* Opening Br. 19–21.

Ross's principal argument in response is entirely circular. He argues that his earlier waiver should be excused because, he says, he accounted for the "frequently stated proposition of virtually universal acceptance" that "a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case," 5 Charles Alan Wright et al., *Federal Practice and Procedure* § 1278 (3d ed. 2004), by attempting to raise the defense in an amended answer and, even later, in his answer to an amended complaint. Ross Br. 34–35.

But that argument presumes that the exhaustion defense was *properly included* in those later answers—despite Ross's failure to timely plead it in his initial answer or initial summary judgment motion and his failure to raise the issue in any way until years later, after the statute of limitations expired. That erroneous presumption is precisely what Blake challenged in his repeated motions to strike in the district court and continues to challenge in this appeal. *Cf.* Ross Br. 17–18 (acknowledging that Blake timely appealed the district court's denial of his motions to strike). Because none of Ross's arguments excuses his failure to timely assert an affirmative defense, Blake's motions to strike should have been granted and the exhaustion defense disallowed.

1. Ross first insists that he was entitled to assert a new affirmative defense nearly two years into this litigation, despite failing to timely invoke it in his earlier pleadings, because Blake "chose to consent to the filing" of an amended answer and because consent "was freely given." Ross Br. 35, 36. But the effect of consent, as Ross acknowledges (Br. 35–36), is only to relieve a party of the requirement to obtain leave of court to file an amended pleading under Rule 15(a)(2). It does not establish whether particular matters contained within that pleading are proper.

Thus, as Blake previously explained, a defendant's consent to the *filing* of an amended answer does not automatically forfeit any objections he might have to matters within that pleading.[1] *See* Opening Br. 22. Blake does not object in principle to the filing of an amended answer, insofar as it may clarify the parties' stances on issues that are properly before the court. But Blake maintains, and has consistently maintained throughout this litigation, that Ross's untimely attempts to revive an affirmative defense years after it was waived are improper and must be stricken. *Cf.* Fed. R. Civ. P. 12(f) (permitting the court to "strike from a pleading an insufficient defense").

2. Ross's suggestion that Blake consented specifically *to his addition of a failure-to-exhaust defense*—either by consenting in the abstract to the filing of an amended answer, or by objecting to the untimely defense in a motion to strike rather than in a "partial opposition" to the amended answer—is misleading and inaccurate.

At the outset, Blake's consent in the abstract *cannot* be construed as consent to any particular matter contained within the amended

---

[1] Similarly, although Ross points out (Br. 35) that a district court is *required* to *accept the filing* of an amended pleading when both parties consent, this does deprive the court of its power under Federal Rule of Civil Procedure 12(f)(1) to strike any improper matters from the pleading.

answer here, because Ross did not disclose the particular contents of the amendments at the time consent was sought. It is undisputed that Ross did not share a copy of the amended answer with Blake or otherwise inform Blake that he intended to assert a new affirmative defense. *See* Opening Br. 10, 14, 22; JA90–92.

Ross argues, without any supporting authority, that the onus should be on the consenting party to "indicate[] that his consent was contingent on any limitation to the contents of the amended answer." Ross Br. 35. But such a rule would be impractical, inadvisable, and unnecessary. It would be impractical because the party being asked to consent cannot reasonably anticipate and reserve every possible objection it might have to the contents of the (undisclosed) amendments. It is inadvisable because the party asking permission to amend is better able to prevent any possible miscommunication by simply disclosing the contents of its proposed amendments when it requests consent. And it is unnecessary because Ross already was on notice that Blake had the right under Rule 12(f)(2) to file a motion to strike within 21 days after being served with the pleading; nothing requires a party to specifically advise his adversary that he might avail himself of his rights under the Federal Rules.

Equally misleading is Ross's assertion (Br. 36) that Blake "chose not to file an opposition or partial opposition in response to the motion for leave to amend." As Blake has explained, he *was not able* to file an opposition because Ross styled his motion for leave to amend as a "consent motion," which the court granted less than 24 hours later without allowing Blake to respond. Opening Br. 10, 23; *see* ECF #67.

Unable to file an opposition, Blake followed the procedures contemplated by the Federal Rules and filed a motion to strike under Rule 12(f)(2). *See* ECF #74. That rule specifically allows a party to move to "strike from a pleading an insufficient defense." Fed. R. Civ. P. 12(f). And Blake persistently renewed his motion to strike each successive time Ross attempted to invoke the exhaustion defense. *See* ECF #87; ECF #96; ECF #101.

Ross next attempts to fault Blake not for *flouting* the Federal Rules (as Ross himself did by failing to timely plead an affirmative defense), but for *complying* with them. He complains that Blake's first motion to strike was "filed three weeks after the amended answer was filed." Ross Br. 13. But Rule 12(f) specifically provides for the motion to be filed "within 21 days after being served with the pleading," Fed. R. Civ. P. 12(f)(2), and Blake adhered to that deadline. Blake's compliance

with established procedures by filing a motion to strike refutes any suggestion that he acceded to Ross's new exhaustion defense.

3. Finally, Ross contends that he was permitted to assert new affirmative defenses when he filed a new answer in response to Blake's amended complaint. Ross Br. 37–39. As with the filing of an amended answer by consent, however, the authority *to file* a new answer does not resolve whether particular matters contained within that pleading are proper.

As Blake has explained at length, the filing of an amended complaint does not allow the defendant to assert a new defense after it has been waived *when the amendments are not material to that defense*. *See* Opening Br. 24–25. Though Ross may wish otherwise, nothing in the Federal Rules requires a plaintiff to permanently forgo amending his complaint in order to avoid the risk of reviving a waived defense. Such a requirement would be particularly unfair in a case like this one, where the district court appointed counsel to assist an unsophisticated prisoner-plaintiff who was initially unrepresented, because the plaintiff could be "locked in" to his original *pro se* complaint by the threat of new affirmative defenses. *See* Opening Br. 25.

Ross is therefore incorrect when he argues (Br. 38) that this case is "procedurally identical" to *Chase v. Peay*, 286 F. Supp. 2d 523 (D. Md. 2003). Although both cases involve amended complaints, that is where the similarity ends. Unlike this case, in which "the changes the Amended Complaint makes to the Complaint are largely cosmetic," JA458, "[t]he amendments to Chase's complaint * * * were hardly insubstantial," *Chase*, 286 F. Supp. 2d at 531. There, the amendments (a) added a second, distinct count and (b) removed "allega[tions] that the plaintiff had filed a prison grievance and administrative appeal." *Id.* Those amendments, unlike the amendments here, changed the scope of potential liability and the factual basis for any exhaustion defense. The *Chase* court therefore held that the defendants could plead a new exhaustion defense in response to these material amendments because excluding the defense "would, in essence, enable plaintiffs to change their theory of the case while simultaneously locking defendants into their original pleading." *Id.* (internal quotation marks omitted).

That is not an issue here, because none of the changes in Blake's amended complaint are material to any exhaustion defense. In this situation, courts have held, the defendant's answer to the amended

complaint may not add new affirmative defenses that are not responsive to the changes to the complaint. *See, e.g.*, *Carr v. Hazelwood*, 2008 WL 4556607, at *4 (W.D. Va. 2008) (holding, in a PLRA case, that the defendant "cannot now, as a matter of right, add a previously unmentioned affirmative defense" of failure to exhaust "in response to an amended complaint that in no way changes [the] theory of the case"), *adopted*, 2008 WL 4831710 (W.D. Va. 2008); *EEOC v. Morgan Stanley & Co.*, 211 F.R.D. 225, 227 (S.D.N.Y. 2002) (holding that the defendant "was not entitled to add defenses as of right" in response to an amended complaint that "did not change the theory of the case or expand the scope" of liability); *see also Panoceanis Mar., Inc. v. M/V Eula B. Devall*, 2013 WL 264616, at *2 (E.D. La. 2013) (noting that the "predomin[ant] approach * * * requir[es] an amended response to reflect the change in theory or scope of the amended complaint").[2]

---

[2] Thus, while *Chase* relied on the Seventh Circuit's decision in *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999), district courts within that circuit have explained that *Massey* does not apply to the facts here for the same reason that *Chase* does not apply here: "*Massey* allowed the defendant to assert new affirmative defenses to an amended complaint partly because the amended complaint presented a *new* theory of liability. *Massey* does not hold that an amended [pleading] allows the [defendant] to raise as many affirmative defenses as it wants to claims both new *and* old." *Gillespie v. Robert*, 2013 WL 1339708, at *3 (N.D. Ill. 2013) (emphasis by court; citation omitted).

Indeed, this Court's decision in *Peterson v. Air Line Pilots Ass'n, International*, 759 F.2d 1161 (4th Cir. 1985), already rejected the argument Ross makes here. The defendant in *Peterson* failed to plead a statute-of-limitations defense in its initial answer, then attempted to raise the defense three years later when answering an amended complaint. *Id.* at 1163, 1164. Recognizing that the "amended complaint [was] no different as to the operative language of the count here involved," however, the Court concluded that "[t]he rule allowing a [defense] not made to an original complaint to be made to an amendment * * * has no application to a claim whose nature has not been substantially affected by the amendment." *Id.* at 1166. It would be "a result of unwarranted harshness" to "cut off [the plaintiff's] right to have a full hearing on the allegations" in this situation. *Id.* Instead, the Court held, "by failing to raise a limitations defense for three years after the case was initiated," the defendant "waived its right to rely on" that defense. *Id.* at 1164. Here, as in *Peterson*, the amendments to Blake's complaint were not material to any exhaustion defense; accordingly, Blake's motions to strike should have been granted and Ross's exhaustion defense should be excluded from the case.

B. Blake Has Been Unfairly Prejudiced By Ross's Unjustified Delay.

Ross's counsel admitted at a hearing before the district court that "there may be prejudice to the plaintiff in that the statute of limitations has run." JA489. That concession was well-founded. As Blake has explained, both this Court and other courts have held time and again that depriving a plaintiff of the opportunity to cure procedural defects by waiting to raise a defense until after the limitations period expires constitutes unfair prejudice. *See* Opening Br. 31–32 (collecting cases).

Ross can deny the existence of prejudice to Blake only by ignoring the facts. His contention that "any adverse consequence to [Blake] results from the merits of the defense, not its timing" (Br. 42) is simply not true. Had Ross timely asserted his exhaustion defense, Blake could have exhausted any remaining administrative processes and then re-filed his claims in court; yet Ross's unjustified delay has now robbed Blake of that opportunity. It is precisely that delay which now threatens to deprive Blake of any redress for his injuries and to profoundly prejudice him as a result.[3]

---

[3] This again distinguishes Blake's case from *Chase*, which held that a belated exhaustion defense did not prejudice the plaintiff because the

Ross's attempt to blame Blake for the delay (Br. 41–42) is unfounded. The internal investigation was not closed (and thus Blake's administrative remedies were not yet exhausted) until September 2008, JA291, and Blake filed his complaint less than a year later, JA12. It is not unreasonable for an inmate with limited access to legal knowledge to take roughly a year to research and prepare a complaint; and in any event, Ross can hardly complain about the time Blake took to prepare his complaint when Ross's position is that Blake should have done *even more* before filing suit. Regardless, Blake filed his complaint more than ten months before the limitations period expired, leaving ample time to address any procedural issues if Ross had timely raised them.

Unable to deny that Blake has indeed been prejudiced, Ross repeats the district court's refrain that, if Blake failed to exhaust administrative remedies, everything that followed "was 'prejudice of [Blake's] own doing'" and "'nothing more than the prejudice that always

---

"statute of limitations on [his] claims had not yet run," allowing the plaintiff to try to cure the deficiency and re-file his claims. 286 F. Supp. 2d at 531 n.13. The *Chase* court cautioned that its holding would not apply to "a case where a dispositive affirmative defense is raised only after the statute of limitations has run," as is the case here. *Id.* at 532 n.15.

accompanies * * * a [successful] affirmative defense.'" Br. 41, 42 (quoting JA459, 508). Blake already explained why that argument is wrong: It implies that the exhaustion defense can *never* be waived, because one could never establish prejudice, but it is now settled law that the PLRA's exhaustion requirement is an affirmative defense that can be waived if the defendant fails to timely assert it and his delay precludes the plaintiff from curing any deficiency—which is exactly what happened here. Opening Br. 32. Ross offers no response.[4]

---

[4] In a footnote, Ross contends—apparently without irony—that *Blake's* arguments regarding the statute of limitations were "waived," even though they were presented in Blake's Rule 59(e) motion. Ross Br. 46 n.7. That contention is mistaken. Not only did Blake squarely raise these arguments, *see* ECF #101 at 17–18, but the district court then specifically ruled upon this issue in reaching the judgment below, JA507–08. *Cf. United States v. Williams*, 504 U.S. 36, 41 (1992) (an issue is not waived if it was pressed or passed upon below). Because the district court considered these arguments and ruled as a matter of law that "the prospect of a time-bar" cannot constitute prejudice, JA507–08, the issue is properly before the Court and subject to *de novo* review. *See Westfarm Assocs. Ltd. P'ship v. Wash. Suburban Sanitary Comm'n*, 66 F.3d 669, 689 (4th Cir. 1995) ("[O]n a Rule 59(e) motion," this Court "review[s] the district court's legal holdings *de novo*."). But even under Ross's view (Br. 41, 46 n.7) that the ruling is reviewed only for abuse of discretion, the decision below still must be reversed, because "the district court necessarily abuses its discretion when it makes an error of law." *Sloas v. CSX Transp., Inc.*, 616 F.3d 380, 388 (4th Cir. 2010) (internal quotation marks omitted).

* * *

If accepted by the Court, Ross's "gotcha" approach to reviving untimely defenses—making use of subterfuge and technicalities to skirt the waiver issue—would create a host of practical problems. It would allow defendants to sandbag plaintiffs by waiting years before asserting potentially dispositive defenses. It would discourage parties from ever consenting to the filing of an amended pleading—a courtesy that experienced lawyers routinely extend to opposing counsel—and would breed litigation over every request to amend. It would punish any plaintiff who files an amended complaint, even when "the changes * * * are largely cosmetic" and not material to any defense, JA458. It would allow even the most egregious waivers to be overcome by a district court's decision to grant leave to amend, even when a plaintiff timely objects or moves to strike. And here, because Ross waited until after the statute of limitations expired and barred Blake from curing any arguable deficiency, it would unjustly deprive Blake of any judicial recourse for the violation of his constitutional rights. This Court should reject that approach and hold instead that Ross's failure to timely assert the exhaustion requirement waived that defense and bars its reintroduction into the case.

II. ROSS DID NOT PROVE THAT BLAKE FAILED TO EXHAUST ANY ADMINISTRATIVE REMEDIES THAT WERE AVAILABLE TO HIM.

Even if the exhaustion requirement were not waived, summary judgment was still improper because Ross failed to prove the defense. Because failure to exhaust is an affirmative defense, the burden is on Ross to prove that there were other administrative remedies available to Blake that Blake did not exhaust. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 683 (4th Cir. 2005). Every past decision to address the issue has held that the commencement of an internal investigation takes a case out of Maryland's ordinary administrative remedy process and that, therefore, the completion of the internal investigation exhausts the administrative remedies available to the inmate. *See* Opening Br. 36–42. Ross has failed to prove otherwise.

1. Ross repeatedly misunderstands his burden of proof. He argues, for example, that there is "no evidence" and "nothing to indicate" whether "any hypothetical request for administrative remedy" could have been entertained by the Administrative Remedy Process or the Inmate Grievance Office. Ross Br. 25. But to the extent the record

fails to establish what administrative remedies were available to Blake at the time of the assault, this means that Ross has failed to carry his burden, and summary judgment was therefore improper. It does not suffice for Ross to simply insist or assert, in conclusory fashion, that other agencies would somehow have been able to investigate Blake's complaint after the incident was referred to the Internal Investigative Unit, especially when every other court to consider the issue has held that the commencement of an internal investigation takes a case out of the ordinary administrative remedy process.

Since Ross is represented in this litigation by the Maryland Attorney General's Office, he should have ready access to any records needed to demonstrate that other relief was available. If Ross were correct that Blake could have pursued relief before other agencies, he and his attorneys should be able to point to cases where those agencies accepted and adjudicated a grievance following an internal investigation by the Internal Investigative Unit. Yet Ross fails to identify even a single instance where any agency addressed a grievance under the view he advances. He therefore has not met his burden to prove that Blake could have obtained relief from other agencies.

Ross likewise misses the mark when he complains that Blake did not "attempt[] to submit any request" for relief from other agencies after the investigation of his complaint was referred to the Internal Investigative Unit. Ross Br. 25. The PLRA requires a plaintiff to exhaust only "such administrative remedies *as are available*"; it does not require a plaintiff to attempt to file grievances before agencies that have no power to entertain them. 42 U.S.C. § 1997e(a) (emphasis added). Blake testified that he did not file a grievance with any other agency because he surmised, correctly, that the assault had been referred to the Internal Investigative Unit and thus fell exclusively within that agency's purview. JA162. It is Ross's burden, as the party asserting an affirmative defense, to prove that other administrative remedies were nonetheless available; nothing required Ross to "attempt to submit" grievances to other agencies that had no power to accept them in order to demonstrate that other remedies were in fact unavailable.

2. Ross apparently disagrees with the district court's conclusion that Blake should have filed an original grievance with the Inmate Grievance Office, arguing instead that Blake should have proceeded through the ordinary Administrative Remedy Process. Indeed, the IGO would not have been able to entertain an original grievance here. The

district court's contrary conclusion was premised on a misunderstanding of the IGO regulations and of that agency's role in Maryland's inmate-grievance system.

As Blake previously explained, IGO regulations authorize that agency to entertain an original grievance only when there is no other agency responsible for investigating the grievance in the first instance. *See* Opening Br. 44. Here, however, Blake's grievance was fully investigated by the Internal Investigative Unit, which undertook a yearlong investigation culminating in a detailed report. *See* JA286–400.

The conclusion of the IIU's internal investigation was final; no provision of Maryland law allows its findings to be appealed to or reviewed by the IGO. Opening Br. 41–42. If the district court were correct that Blake's claims could have been presented to the IGO, the IGO would have had to perform its own separate soup-to-nuts investigation of the assault, and that investigation would have had to proceed at the same time that the internal investigation was underway. *See* Opening Br. 44–46. Those two concurrent investigations would compete for access to the same witnesses and evidence, and they could

potentially reach conflicting results. Maryland law does not provide any legal mechanism for resolving these conflicts, because it instead anticipates that an internal investigation will "take[] th[e] claim out of the typical administrative remedy process." *Thomas v. Bell*, 2010 WL 2779308, at *4 (D. Md. 2010). The district court's misreading of the IGO regulations to provoke such conflicts was incorrect.[5]

3. Ross argues that he was nonetheless entitled to summary judgment on his exhaustion defense because, although a comprehensive internal investigation was already underway, Blake did not file a formal grievance through the Administrative Remedy Process. But all authorities on this issue state that Blake *could not* submit a request for administrative remedy with the ARP because his complaint was instead being investigated by the Internal Investigative Unit, and Ross does not present any evidence to the contrary.

---

[5] Ross's contention that "there is no inherent conflict" because "the inmate grievance office is not empowered to investigate" (Br. 30) is nothing more than a semantic shell game. As he acknowledges a few sentences later, the IGO "forwards complaints that are not * * * lacking in merit to the Office of Administrative Hearings" to hold a hearing and make factual findings. Ross Br. 44; *see* Md. Code Regs. §§ 12.07.01.06(A)(2), 12.07.01.07, 12.07.01.08(A). Regardless whether the investigation is ascribed to the IGO itself or to its designee, the potential for conflict is undeniable.

The court below repeatedly explained that, under Maryland's inmate-grievance system, "if the IIU is investigating an incident with the same factual underpinning as a prisoner's complaint, the prisoner may not submit the complaint to the ARP process." JA462; *accord* JA464 ("prisoners may not use the ARP process when the events underlying their complaint are the subject of an IIU investigation"); JA510 ("[T]he ARP process was inapplicable to [Blake's] grievance because of the DPSCS' internal investigation."). Every other decision to address this issue agrees. *See, e.g.*, *Bogues v. McAlpine*, 2011 WL 5974634, at *4 (D. Md. 2011) ("incident[s] * * * investigated by the Internal Investigati[ve] Unit" are "not subject to the ARP process"); *Bell*, 2010 WL 2779308, at *4 n.2 ("DOC does not permit prisoners to pursue ARP claims for matters referred to the Internal Investigati[ve] Unit.").[6]

Ross speculates that it might have been possible for the ARP to investigate a grievance that was subject to an internal investigation "provided there was sufficient coordination with the IIU to ensure that

---

[6] Ross attempts to downplay these authorities as "unreported cases" (Br. 31), but as he elsewhere acknowledges (Br. 25), they are corroborated by a 2008 regulation requiring any ARP grievance to be procedurally dismissed when the subject of the grievance is being investigated by the Internal Investigative Unit.

the IIU maintained control over the investigation." Ross Br. 25 (emphasis omitted). Yet the ARP procedures reject that approach, requiring *the warden*—not the IIU—to conduct the investigation of any ARP grievance, and setting out strict deadlines that the warden must comply with. *See* JA422 (DCD 185-002 § VI.L.12 (Aug. 27, 2008)). And the ARP procedures then provide for the Commissioner of Corrections to conduct a separate investigation upon any appeal, JA423 (*id.* § VI.M.7), so even if the warden could avert a conflict by relying on the IIU's investigation, the commissioner could not.[7]

Ross recognizes (Br. 25, 32, 33–34) that the ARP procedures were subsequently amended so that, in cases that are subject to an internal investigation, a grievance may be filed with the ARP and then dismissed on procedural grounds. *See* Opening Br. 42–43. But Ross draws the wrong inference from this amendment. The fact that the ARP procedures now allow such complaints to be filed and dismissed on procedural grounds does not mean that, prior to the amendment, the

[7] Ross also asserts, without explanation, that "internal investigative unit regulations expressly contemplate concurrent conduct of IGO or administrative remedy proceedings along with internal investigations" (Br. 24), but the cited regulation in fact demonstrates precisely the opposite. *See* Opening Br. 45 n.8.

agency could freely accept, investigate, and adjudicate grievances that were the subject of an internal investigation. Rather, the absence of any provision addressing such cases at the time of the assault here reflects that the ARP process at that time was unable to accept or entertain these cases *at all*. *See* Opening Br. 43. The only administrative process available to Blake was the internal investigation, which fully exhausted his administrative remedies.[8]

4. Finally, Ross mischaracterizes our argument as seeking an "exception" to the exhaustion requirement and asking to "be excused from compliance with available processes." Ross Br. 26–28. On the contrary, Blake does not seek to be excused from the inmate-grievance process, but instead submits that he fully exhausted that process by complying with the internal investigation. There were no other administrative remedies available to Blake once the ordinary administrative remedy process was displaced by the internal investigation. Because Ross has failed to prove that there were any further administrative remedies available to Blake that Blake failed to

[8] Even accepting Ross's premise that an internal-investigation exception to the ARP's investigative authority was not *codified* until 2008, moreover, that is insufficient to show that such an exception did not exist *in practice* at the time when Blake was assaulted.

exhaust, the district court erred in granting summary judgment to Ross on the exhaustion defense.

III. THIS CASE SHOULD BE REMANDED FOR TRIAL AND A DECISION ON THE MERITS.

Unable to prevent Blake's claim from being heard, Ross now asks this Court to reach out and award him summary judgment on the merits—even though the district court specifically reserved decision on his merits arguments and can address them on remand. There is no reason for this Court to decide the fact-intensive merits issues here in the first instance, without the benefit of full briefing and a considered district-court decision to review.

But even if the merits were properly before this Court, Ross is not entitled to summary judgment. His contention that no rational jury could find his actions unreasonable rests on a slanted and incomplete characterization of the facts in the record and the inferences that the jury is entitled to draw from them. As the Supreme Court reiterated earlier this month in another case involving the use of excessive force by law enforcement officers, courts must always "adhere to the axiom that in ruing on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be

drawn in his favor.'" *Tolan v. Cotton*, --- U.S. ---, 2014 WL 1757856, at *1 (2014) (per curiam) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Viewing all facts in the light most favorable to Blake and drawing all inferences in his favor, there is more than sufficient evidence from which the jury could conclude that Ross acted with deliberate indifference to Blake's constitutional rights.

A. A Reasonable Jury Could Find Ross Liable For The Violation Of Blake's Constitutional Rights.

As the district court explained when Ross first moved for summary judgment, the only disputed question in this case is "who is responsible" for allowing Blake to be assaulted while he was under state custody. JA74. And "to the extent Ross failed to intervene on [Blake's] behalf," the court then explained, "[w]hether Ross's actions were sufficient in light of the circumstances is a genuine dispute of material fact precluding summary judgment as to the claims against Ross." JA74–75. Summary judgment therefore was denied. *See* JA73–77.

Although the district court did not have an opportunity to consider Ross's attempt to reargue this issue after the close of discovery, the outcome should be the same. The extensive record adduced below contains not only sufficient but ample evidence from which the jury

could find Ross liable for the violation of Blake's constitutional rights on either of two independent theories.

First, the jury could find that Ross acted with deliberate indifference to a substantial risk of serious harm to Blake when he repeatedly turned a blind eye to the escalating confrontation between Madigan and Blake and when he chose not to intervene until after he allowed Madigan to throw a series of punches at Blake's face.

Contrary to Ross's self-serving account of an "unexpected and surprising conflict" (Br. 20) in which he had no knowledge of any risk to Blake "until Mr. Madigan actually punched Mr. Blake in the face" (Br. 53) and was "surprised" and "shocked" by Madigan's actions (Br. 54), there is extensive evidence from which the jury could find that Ross repeatedly recognized the escalating conflict between Madigan and Blake yet deliberately chose not to act:

- Ross observed Madigan taunting and deriding Blake as soon as they arrived at Blake's cell, with Madigan accusing Blake of being a "bad ass" and a "tough guy." JA140–41, 518, 557. Ross specifically admits that these comments alerted him "that there may have been something going on" between the two men. JA234–35.

- Ross testified that, as he escorted Blake out of the cell, "Lieutenant Madigan grabbed Inmate Blake's right arm" and, in response, Blake "twisted" and "told the lieutenant to get off of him," "'get the F--- off of me.'" JA183, 247–48; *accord* JA365–66. Ross had a firsthand view of this scuffle because he was holding Blake by the arms at the time. JA247, 519, 541.
- As Ross escorted Blake down the stairs, still holding him by the arms, Madigan again shoved Blake from behind with enough force that Blake nearly tumbled down the steps. JA143–44, 520–21.
- While Ross responded by tightening his grip, JA521, Madigan again shoved Blake toward the bottom of the stairs. JA253, 366–67, 521–22. Blake again called out, in front of Ross, "Don't f------- push me no more." JA521–22.
- When Ross secured Blake against the wall of a corridor at the bottom of the steps, Madigan began yelling and screaming and pointing at Blake. JA522–53. Madigan was visibly agitated. *Id.*

- While Ross was "standing there" and "still had [Blake's] arm the whole time," JA524, Madigan punched Blake in the face at least four successive times. JA147–49, 229–31, 353, 523–24, 536, 548, 560–61. Ross did nothing to intervene. JA219, 229–31, 241–42, 524, 535–36.
- With Ross continuing to stand guard mere inches from Blake's side, Madigan paused, then punched Blake in the face yet again. JA523–24. Still, Ross did nothing to intervene.
- Only after Madigan ordered another office to "mace him," and after Ross had allowed Madigan to punch Blake in the face at least five times, did Ross finally take action.

Ross's contention that he "had no knowledge that Mr. Madigan had acted inappropriately toward Mr. Blake while they were on the stairs" (Br. 53) is further belied by his own actions and admissions. Ross was plainly aware of the squabbling on the steps when he reassured Madigan that "I got him, I got him"—confirming to Madigan that Blake was under control and defenseless. JA144, 190, 521, 543. He could clearly hear each time Blake screamed to stop pushing him.

JA247–48. And because Ross was holding Blake by the arms this entire time, he undoubtedly could feel each forceful shove. On these facts, the jury easily could reject Ross's feigned ignorance and conclude instead that Ross was well aware of the escalating conflict between Madigan and Blake, yet consciously chose not to intervene until after he allowed Madigan to punch Blake in the face several times.

Second, the jury could find Ross personally responsible for the assault—which the jury at Madigan's trial already found to be a violation of Blake's constitutional rights—because Ross played an active and essential role in aiding and abetting the commission of the offense.

Although Ross may not personally have thrown the punches, he was no mere bystander. On the contrary, Ross was actively and extensively involved in restraining Blake and rendering him defenseless as Madigan repeatedly taunted, shoved, and punched Blake in the face. The jury could therefore find Ross responsible for aiding and abetting the assault.

The jury additionally could find that Ross acted maliciously and with conscious disregard for Blake's constitutional rights when, after having already radioed for backup, he joined Madigan in forcefully

taking Blake to the ground. A diligent officer seeing Madigan punch Blake multiple times in the face would have separated the two men, but Ross instead chose to do precisely the opposite: He joined forces with Madigan to grab onto Blake—Madigan on one side, Ross on the other—and together the two men violently slammed Blake down to the ground. JA149–50, 525, 562–63, 567. In fact, Ross slammed Blake to the ground with such force that Ross injured his own knees and back, requiring medical treatment. JA209–10, 299, 327–28, 336–39, 549–50.

Although Ross now contends that his use of violent force to take Blake to the ground was, counterintuitively, "to protect Blake from further injury" (Br. 51), the jury could disbelieve Ross's self-serving characterizations of his motives. The evidence undoubtedly presents a jury question as to "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 7 (1992).

B. The Merits Of This Case Are Best Addressed On Remand.

Even if there were any doubt that Blake has adduced sufficient evidence to proceed to a trial on the merits, that issue should first be addressed by the district court on remand, rather than decided by this

Court in the first instance. Though this Court is not precluded from considering arguments not reached by the district court, the Court has frequently held that it is "more appropriate to allow the district court to consider them, if necessary, in the first instance on remand." *Q Int'l Courier, Inc. v. Smoak*, 441 F.3d 214, 220 n.3 (4th Cir. 2006); *see also*, *e.g.*, *McBurney v. Cuccinelli*, 616 F.3d 393, 404 (4th Cir. 2010); *Alvarado v. Bd. of Trs. of Montgomery Cmty. Coll.*, 848 F.2d 457, 461–62 (4th Cir. 1988). Indeed, the particular circumstances of this case counsel strongly in favor of allowing the district court to consider the merits in the first instance.

The merits arguments that Ross seeks to present are fact-intensive and fall outside this Court's bailiwick. When "no lower court has yet considered in detail the facts of this case," an appellate court should "recognize the prudence * * * of allowing the lower court[] to undertake [this inquiry] in the first instance." *Holland v. Florida*, 560 U.S. 631, 653–54 (2010) (internal quotation marks omitted); *cf. United States v. Moss*, 963 F.2d 673, 676 (4th Cir. 1992) ("[I]njustice would more likely be caused than avoided by first instance consideration of such a fact-intensive theory on appeal.") (internal quotation marks

omitted). This Court's consideration of those fact-intensive merits questions would benefit from having a considered district-court decision to review, full briefing on the issues, and a full trial record if the claim proceeds to trial.

The district court should be allowed to consider these issues in the first instance. That court is most familiar with the extensive record in this case, having overseen years of discovery, ruled on multiple dispositive motions, and presided over Madigan's trial at which all of the principal witnesses—including both Blake and Ross—gave live testimony. Although at this stage the district court will be required to view all evidence in the light most favorable to Blake, and so cannot weigh the evidence or make its own credibility determinations, *see Tolan*, 2014 WL 1757856, at *4, 5–7, the district court's firsthand familiarity with the record will allow it to best identify the material issues that remain in dispute.

Moreover, although the district court did not address the merits when ruling on Ross's latest summary judgment motion, it denied Ross's motion for summary judgment on the merits at an earlier stage in the case, JA73–75, and the denial of summary judgment ordinarily

cannot be appealed, *see Ortiz v. Jordan*, 131 S. Ct. 884, 891 (2011).[9] Ross should not be allowed to circumvent the final-judgment rule to bring what is effectively an interlocutory appeal of a denial of summary judgment on merits issues. *Cf. Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 43–51 (1995) (refusing to permit "pendent appellate jurisdiction" over order denying summary judgment).

CONCLUSION

The Court should reverse the district court's order granting summary judgment to Ross on exhaustion grounds and should remand the case for further proceedings.

Dated: May 19, 2014

Respectfully submitted,

/s/ *Scott M. Noveck*

Reginald R. Goeke
Scott M. Noveck
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Attorneys for Plaintiff-Appellant Shaidon Blake

[9] Although an order denying summary judgment on a qualified-immunity defense may be appealed as a collateral order if it involves "purely legal" issues, "appeal is not available" where, as here, "factual issues genuinely in dispute preclude summary adjudication." *Ortiz*, 131 S. Ct. at 891 (citing *Johnson v. Jones*, 515 U.S. 304, 313 (1995)).

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-7279 Caption: Shaidon Blake v. Micheal Ross

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

   This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because:

   ☒ this brief contains 6,785 [*state number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   ☐ this brief uses a monospaced typeface and contains _____ [*state number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

   This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☒ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 [*identify word processing program*] in 14-point Century Schoolbook [*identify font size and type style*]; **or**

   ☐ this brief has been prepared in a monospaced spaced typeface using _____ [*identify word processing program*] in _____ [*identify font size and type style*].

(s) Scott M. Noveck

Attorney for Plaintiff-Appellant Shaidon Blake

Dated: May 19, 2014

CERTIFICATE OF SERVICE

I certify that on this 19th day of May, 2014, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ *Scott M. Noveck*
Scott M. Noveck
Counsel for Plaintiff-Appellant