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.)

OPENING BRIEF OF PLAINTIFF-APPELLANT

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JURISDICTIONAL STATEMENT

This is a civil-rights action brought under 42 U.S.C. § 1983. The complaint alleges that Defendant-Appellee Michael Ross, acting under color of state law as a corrections officer for the Maryland Division of Correction, violated Plaintiff-Appellant Shaidon Blake's constitutional rights by failing to protect him from an unprovoked assault by another corrections officer, Defendant James Madigan, while Ross was escorting Blake to another cell block. JA12–20, 96–99. The district court had jurisdiction under 28 U.S.C. § 1331.

Although the district court awarded summary judgment to Ross on the basis of a failure-to-exhaust defense that Ross did not assert until nearly two years into this litigation, JA460–65, 507–12, the case proceeded to trial with Madigan as the remaining defendant. The jury found that Madigan violated Blake's constitutional rights and awarded $50,000 in damages. JA568. After Blake prevailed at trial, the district court entered final judgment on February 28, 2013, incorporating by reference all prior rulings disposing of claims against any party. JA570. Madigan moved for a new trial, which the district court denied on July 11. JA576–79.

On August 9, 2013, Blake timely filed a notice of appeal seeking to reinstate his claim against Ross. JA581. Madigan has not appealed the verdict against him. This Court has jurisdiction over Blake's appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in holding that Ross did not waive the affirmative defense of failure to exhaust administrative remedies when Ross failed to raise the defense in his initial answer or initial summary judgment motion and then waited nearly two years before asserting it.

2. Whether the district court erred in holding that Blake did not exhaust administrative remedies when the subject of his grievance was fully investigated and resolved by the state Internal Investigative Unit and no further administrative review was available.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Sergeant Ross Allows A Handcuffed And Defenseless Blake To Be Assaulted By Lieutenant Madigan.

On June 21, 2007, Blake was approached by two corrections officers, Sergeant Ross and Lieutenant Madigan, while resting in his

prison cell at the Maryland Reception Diagnostic & Classification Center. JA517–18. Madigan ordered Blake to pack up his possessions and prepare to be moved to another cell block. JA518, 539–40. When Blake asked why he was being moved, Madigan derided him as a "bad ass" and a "tough guy" and accused Blake of "trying to take over the unit." JA140–41, 518, 557.

Observing the tension between Madigan and Blake, Ross got the sense "that there might have been something going on" between them. JA234–35. Ross then entered Blake's cell and handcuffed Blake's hands behind his back to ensure that Blake could not "become resistant." JA180; *see also* JA540, 559. Blake did not resist, saying he was "cool" with Ross. JA181, 541, 558.

While Ross escorted Blake out of his cell and held him by the arms in an "escort grip," Madigan reached out and grabbed Blake. JA145, 247, 353, 519. Blake recoiled and told Madigan to stop pushing him. JA183, 247–48, 365–66, 519, 541, 543. Ross then led Blake down a concrete staircase, allowing Madigan to trail just behind. JA542–43.

As Ross led Blake down the narrow steps, with Blake's hands cuffed behind his back grasping the trash bag containing his belongings,

Madigan suddenly shoved Blake from behind. JA143–44, 520. Blake was forced to press against the railing with his elbow to avoid falling to the concrete floor below. JA520–21. Blake again told Madigan not to shove him. JA521.

Ross confirmed that he had Blake under control, then continued leading Blake down the staircase. JA144, 190, 521, 543. At the bottom of the steps, Ross tightened his grip and Madigan gave Blake another forceful shove. JA253, 366–67, 521. Madigan continued to taunt Blake as Ross led him toward the corridor leading to the next cell block. JA544–45.

While Ross continued to secure Blake by the arms in an escort grip, Madigan ordered Blake to stand against the wall of the corridor. JA145–46, 522, 546, 554. After speaking with the corridor officer, Madigan began yelling and screaming and pointing at Blake. JA522–23. Ross continued to secure Blake against the wall as Madigan wrapped a key ring around his fingers and then punched Blake in the face at least four successive times. JA147–49, 229–31, 353, 523, 548, 560–61. Ross did nothing to intervene. JA219, 229–31, 241–42, 524,

535–36. With Ross standing guard mere inches from Blake's side, Madigan paused, then punched Blake in the face yet again. JA523–24.

Madigan then ordered another officer who was stationed nearby, Latia Woodard, to "mace him." JA148, 281–82, 524, 547. Woodard refused. *Id.* At this point, Ross finally took action, telling Woodard to radio a "Signal 13"—a code to summon other officers for assistance, even though Blake was already defenseless and outnumbered. JA195–98, 547, 549, 562.

Ross then decided to "take control" by forcefully taking Blake to the ground. JA524–25, 547; *see also* JA244. Ross grabbed Blake on one side while Madigan grabbed him on the other, and the two officers proceeded to lift Blake into the air and then slam him down to the ground. JA149–50, 525, 562–63, 567. Ross dropped his knee onto Blake's chest and, together with Madigan, restrained a still-handcuffed Blake against the ground until other officers arrived. JA150–51, 526, 538, 564.

The responding officers carried Blake off to the medical unit, where a dozen guards swarmed around him in a confined space. Fearful of being attacked again by the agitated officers, Blake initially

declined medical treatment. JA154–56, 527–30. Blake was later diagnosed with nerve damage from the attack and now suffers from persistent headaches, for which he is being treated with Neurontin, a nerve pain medication. JA73–74 (citing ECF #26 Exhs. S–KK); JA531–34.

B. An Internal Investigation Corroborates Blake's Account Of The Assault And Forces Madigan To Resign.

Immediately following the incident, Blake reported the assault to senior corrections officers and provided a written statement with his account of the events. JA157–58, 329–33. The incident was referred to the Internal Investigative Unit of the state Department of Public Safety and Correctional Services, which undertook a thorough investigation culminating in a formal report. JA286–400.

The internal investigation confirmed that "Blake was struck several times by Lt. James Madigan while he was handcuffed from behind." JA291. "According to all reports and the investigation, it was deemed Lt. James Madigan used excessive force in assisting Sgt. Michael Ross escort inmate [Shaidon] Blake #343938 off of housing unit 7Charlie. Lt. [James] Madigan struck inmate Blake in the face four (4)

times while inmate was handcuffed from the back." JA349. The report did not find Blake in any way responsible for the assault and did not recommend any disciplinary action against him.[1]

In the course of the investigation, Madigan was issued an Unsatisfactory Report of Service and was relieved of his duties as a corrections officer. JA291, 375–77. In January 2008, Madigan entered into a settlement agreement through which he agreed to resign in lieu of termination. JA375–90, 566.

II. PROCEEDINGS BELOW

Blake filed his initial complaint in this case *pro se*, naming as defendants Ross, Madigan, two supervisors, and three government entities. JA12–20. The case was assigned to Judge Alexander Williams, Jr. On the court's own motion, Judge Williams dismissed the claims against the government entities and ordered service upon the remaining defendants. JA21–23.

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[1] Blake was subject to a disciplinary proceeding for a separate incident, earlier in the day, involving a disagreement over access to inmate telephones. JA171–76. Blake was declared not guilty on four of the five charges involved and was restricted to his cell for 15 days. JA175. The disciplinary proceeding did not address the prison guards' assault on Blake later in the day.

A. Ross Answers The Complaint And Moves For Summary Judgment Without Raising Any Exhaustion Defense.

Ross and the two supervisors filed an answer on November 19, 2009, JA24–25, and moved to dismiss or for summary judgment on February 4, 2010, ECF #18.[2] Ross argued that he was entitled to summary judgment because he acted reasonably under the circumstances, and the supervisors argued that their conduct was at most negligent and was insufficient to support a claim.[3] The defendants did not assert any exhaustion defense either in their answer or in their summary judgment motion.

On September 9, 2010, Judge Williams held that the supervisors were entitled to summary judgment because Blake had not adduced

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[2] Madigan was not successfully served until January 26, 2011, and therefore did not participate in this stage of the proceedings. *See* ECF #50; JA74.

[3] The defendants also argued that Blake should not be permitted to bring a Section 1983 claim because he refused medical treatment immediately following the attack and, in their view, suffered only *de minimis* injury. That approach was rejected by the Supreme Court in *Wilkins v. Gaddy*, 559 U.S. 34 (2010), which held that excessive-force claims must be decided "based on the nature of the force rather than the extent of the injury." *Id.* at 34. In any event, as Judge Williams correctly observed, Blake "suffered serious harm as a result of the force used," as evidenced by "medical records * * * indicat[ing] he suffered nerve damage to his face, causing headaches for which he is prescribed neurontin." JA73–74 (citing ECF #26 Exhs. S–KK).

evidence to support supervisor liability under Section 1983, JA75–76, but he denied summary judgment as to Ross, concluding that Blake's claim presents genuine issues of material fact that must be resolved at trial, JA73–75.

As Judge Williams observed, Blake "was restrained, at least partially cooperative, and he was punched in the face at least four times. A reasonable person would have known that the conduct in question was unlawful." JA74. Thus, he explained, the only remaining question is "who is responsible" for the assault. *Id.* Because Ross had control over Blake at the time of the attack and took only limited and belated steps to intervene, Judge Williams concluded that "[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." JA75.

Further, in view of the "undisputed evidence" showing "that the force used against [Blake] * * * was excessive and unnecessary," Judge Williams ordered that counsel be appointed to represent Blake on a *pro bono* basis in this action. JA73, 76, 77.

B. Nearly Two Years Later, Ross Belatedly Raises A New Affirmative Defense Of Failure To Exhaust.

On August 2, 2011—nearly two years after Ross filed his answer, and eighteen months after Ross filed his initial summary judgment motion—counsel for Ross contacted counsel for Blake and Madigan, seeking consent to file an amended answer. JA90–92. Counsel for Blake agreed in principal to allow the filing of an amended answer, JA90, but the scope of consent is disputed. Ross did not supply a copy of his proposed amendments to Blake when requesting consent to amend, nor did he disclose that he intended to raise a new affirmative defense that he had never previously raised in this litigation.

Ross filed a motion to amend his answer later that afternoon. ECF #66. The amended answer included a new affirmative defense of failure to exhaust administrative remedies as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). JA85, 89. This was the first time in the two years of litigation that any party invoked the PLRA's exhaustion requirement. Less than 24 hours later, and without allowing Blake any opportunity to object, the district court issued a paperless order granting the motion to amend. ECF #67.

Blake responded by moving to strike Ross's new exhaustion defense because it had been waived. *See* ECF #74. While that motion was pending, Blake filed an amended complaint, JA96–99, and Ross answered the amended complaint, JA100–03. Because these filings mooted the initial motion to strike, *see* ECF #85, Blake again moved to strike the failure-to-exhaust defense in Ross's latest answer, ECF #87.

C. Blake's Claim Against Ross Is Dismissed On Exhaustion Grounds.

Ross filed a second motion for summary judgment on January 9, 2012, arguing that Blake's claims were barred by the PLRA's exhaustion requirement and that the evidence was insufficient to support Blake's claims. *See* ECF #94. On May 10, 2012, Judge Williams denied Blake's motion to strike and granted summary judgment to both remaining defendants—Madigan and Ross—on the failure-to-exhaust defense. JA453–66.

Blake timely moved for reconsideration, ECF #101, and Judge Williams held a hearing on the motion on November 2, JA467–99. Blake's reconsideration motion first argued that it was error to grant summary judgment to Madigan when Madigan had not joined in Ross's motion. It then explained that Judge Williams erred in dismissing

Blake's claims against either defendant on exhaustion grounds, because the defendants had waived their failure-to-exhaust defense and because, in any event, Blake satisfied the PLRA's exhaustion requirement here. On November 14, 2012, Judge Williams reinstated the claim against Madigan, but refused to reinstate Blake's claim against Ross. JA501–15.

D. Blake Prevails At Trial Against Madigan.

Blake's claim against Madigan proceeded to a two-day jury trial on February 26–27, 2013. The jury heard testimony from Blake, Ross, Madigan, and Woodard. At the close of trial, the jury found that Madigan violated Blake's constitutional rights and awarded Blake $50,000 in damages. JA568.

Following the verdict, Madigan moved for a new trial, ECF #139, which the district court denied on July 10, JA576–79. Madigan has not appealed the verdict.[4] On August 9, Blake timely filed a notice of appeal seeking to reinstate his claim against Ross. ECF #148.

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[4] While this appeal was pending, Madigan filed for bankruptcy, listing Blake as an unsecured creditor. *In re Madigan*, No. 13-31072 (Bankr. D. Md. filed Dec. 17, 2013). Blake anticipates that Madigan will not be able to pay any substantial portion of the judgment against him.

SUMMARY OF ARGUMENT

More than two years into this litigation, Judge Williams awarded summary judgment to Ross on a belatedly asserted affirmative defense of failure to exhaust administrative remedies under the PLRA. This was error for two independent reasons. *First*, at that late stage in the proceedings, Ross's failure-to-exhaust defense should not have been considered, because Ross waived the exhaustion requirement when he failed to raise this affirmative defense in his initial answer or initial summary judgment motion and then waited nearly two years before asserting it. *Second*, even if the defense were properly considered, Blake satisfied the exhaustion requirement because the subject of his grievance—the unprovoked use of excessive force against him by corrections officers on July 13, 2007—was fully investigated and resolved by the state Internal Investigative Unit and no further administrative review was available.

I. It is well established that the PLRA's exhaustion requirement is an affirmative defense and that, under Rule 8(c), affirmative defenses must be pleaded in the defendant's answer or else are waived. Ross does not dispute that he failed to raise any failure-to-exhaust defense in his initial answer in November 2009. Nor does he

dispute that he again failed to raise any exhaustion defense in his initial summary judgment motion in February 2010. In fact, Ross never made *any* reference to the exhaustion requirement until August 2011, two years into this litigation. By failing to timely invoke the exhaustion requirement, Ross waived any failure-to-exhaust defense.

Although Judge Williams offered three reasons why he thought the failure-to-exhaust defense was properly before him, none of the reasons he gave allows a defendant to revive an affirmative defense years after it has been waived.

To begin, Judge Williams was incorrect that Blake forfeited any objection by consenting in the abstract to the filing of an amended answer. A party's consent to the filing of an amended pleading under Rule 15(a)(2) does not automatically forfeit any objection the party may have to matters within that pleading—especially where, as here, the contents of the amendments were not disclosed at the time consent was sought. Instead, as provided for by Rule 12(f), Blake timely (and repeatedly) preserved his objection by moving to strike Ross's untimely affirmative defense on the ground that it had been waived.

Nor was Judge Williams correct in suggesting that Blake invited Ross to revive his waived failure-to-exhaust defense by filing an amended complaint, especially when none of the amendments to the complaint were material to the defense at issue. Nothing in the Federal Rules requires a plaintiff to forgo amending his complaint in order to maintain an objection to an untimely affirmative defense, nor would it be fair to "lock in" an unsophisticated litigant like Blake to his original *pro se* complaint after he receives court-appointed counsel.

Finally, Judge Williams erred in declaring that he could disregard Ross's waiver because a district court can sometimes raise the exhaustion requirement *sua sponte*. On the contrary, the Supreme Court has held that a court's authority to raise a defense *sua sponte* does not negate a defendant's waiver of that defense. In other words, although a court may raise certain threshold issues *sua sponte* near the outset of the case, it is not within the court's authority to revive an affirmative defense long after it has been waived. The PLRA's exhaustion requirement is not a jurisdictional issue that may invoked at any point during the litigation; rather, it is an affirmative defense that must be raised in the answer or, at the latest, in the defendant's initial summary judgment motion, neither of which happened here.

This case well illustrates why a defendant must invoke the exhaustion requirement at the outset of the case or else be deemed to have waived it. Had Ross timely asserted his exhaustion defense, Blake could have withdrawn his complaint, availed himself of any additional administrative remedies that might have been available, and then re-filed his claims in court. Here, however, Ross chose not to raise the exhaustion issue until after the statute of limitations had run, depriving Blake of the opportunity to cure any arguable procedural deficiency and then return to court to litigate his claims. That result is unfair, unjust, and at odds with the purposes of the PLRA's exhaustion requirement.

II. Even if the exhaustion defense were properly before the court, however, Judge Williams erred in holding that Blake failed to exhaust his administrative remedies. That holding is at odds with multiple other decisions holding that, under the Maryland inmate-grievance system in place at the time Blake was assaulted, completion of an internal investigation exhausts all administrative remedies. Under that system, the commencement of an internal investigation by the state Internal Investigative Unit takes the case out of the ordinary Administrative Remedy Process for investigating inmate grievances.

Here, the Internal Investigative Unit conducted a thorough investigation into the subject of Blake's grievance. The results of that investigation were final and not subject to appeal or review by any other agency. Accordingly, the initiation and conclusion of the internal investigation "exhaust[ed]" all "administrative remedies" that were "available" to Blake, 42 U.S.C. § 1997e(a), in compliance with the PLRA's exhaustion requirement.

Judge Williams faulted Blake for not presenting his claim to the Inmate Grievance Office (IGO), which is ordinarily the final stage of appeal in the Administrative Remedy Process. But because claims that are investigated by the Internal Investigative Unit could not be pursued through the Administrative Remedy Process at the time of the assault here, it was not possible for Blake to submit a claim through the ARP and appeal it to the IGO. Judge Williams speculated that it might have been possible for Blake to file an original action directly with the IGO, but that suggestion rests on a misunderstanding of the IGO rules. Instead, because there were no other administrative remedies available to Blake once the internal investigation concluded, Blake fully complied with the PLRA's exhaustion requirement.

STANDARD OF REVIEW

"[B]ecause the question of waiver is one of law, a reviewing court should apply *de novo* review." *Grunley Walsh U.S., LLC v. Raap*, 386 F. App'x 455, 458 n.5 (4th Cir. 2010). Accordingly, the district court's decision to "consider[] the * * * [affirmative] defense" of exhaustion "when it was not affirmatively pled in the answer" must be "review[ed] *de novo*." *Id.* at 458 (citing *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 653 (4th Cir. 2006)).

On the merits, the district court's decision to dismiss Blake's claims for failure to exhaust administrative remedies is also subject to *de novo* review. *Hayes v. Stanley*, 137 F. App'x 565, 566 (4th Cir. 2005) (per curiam) (citing *Alexander v. Tippa Cnty.*, 351 F.3d 626, 629 (5th Cir. 2003) (per curiam)). Because the PLRA's exhaustion requirement is an affirmative defense, the burden is on the defendant to plead and prove that the plaintiff failed to exhaust specific administrative remedies that were available to him. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 683 (4th Cir. 2005).

ARGUMENT

I. ROSS WAIVED THE EXHAUSTION REQUIREMENT BY FAILING TO RAISE IT AS AN AFFIRMATIVE DEFENSE IN HIS INITIAL ANSWER OR INITIAL SUMMARY JUDGMENT MOTION AND THEN WAITING NEARLY TWO YEARS BEFORE ASSERTING IT.

A. Failure To Exhaust Is An Affirmative Defense That Ross Was Required To Assert In His Initial Answer Or, At The Latest, In His Initial Summary Judgment Motion.

1. This Court has held, and the Supreme Court has affirmed, that "an inmate's failure to exhaust administrative remedies is an affirmative defense to be pleaded and proven by the defendant." *Anderson*, 407 F.3d at 683; *accord Jones*, 549 U.S. at 216. And "[i]t is a frequently stated proposition of virtually universal acceptance by the federal courts 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 & Procedure* § 1278 (3d ed. 2004); *see* Fed. R. Civ. P. 8(c). The sole exception recognized by this Court applies only when the defendant raises an affirmative defense in its initial summary judgment motion and establishes that the plaintiff will not be prejudiced or unfairly

surprised by the late notice. *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 612 (4th Cir. 1999).

Here, Ross does not dispute that he failed to raise any failure-to-exhaust defense in his initial answer in November 2009. *See* ECF #6. Nor does he dispute that he again failed to raise any exhaustion defense in his initial summary judgment motion in February 2010. *See* ECF #18-1. In fact, Ross never made *any* reference to the exhaustion requirement until he sought leave to file an amended answer in August 2011, ECF #66-1, after nearly two years of litigation had transpired.

Because Ross failed to timely invoke the exhaustion requirement, his exhaustion defense was waived and should have been disallowed. *See, e.g.*, *Carr v. Hazelwood*, 2008 WL 4556607, at *3–4 (W.D. Va. 2008) (defendant waived exhaustion defense when he "did not raise the affirmative defense of failure to exhaust in his answer," "[n]or * * * in his initial motion for summary judgment," and indeed did not do so until months later in response to an amended complaint), *adopted*, 2008 WL 4831710 (W.D. Va. 2008); *Colton v. Scutt*, 2011 WL 6090152, at *2–3 (E.D. Mich. 2011) (defendant waived exhaustion defense by not raising it in the answer or in a summary judgment motion and by not

asserting it until more than a year into the litigation); *Rose v. Saginaw Cnty.*, 232 F.R.D. 267, 277–78 (E.D. Mich. 2005) (defendants "surely * * * have waived" their exhaustion defense when "[a]lmost three years have past since" the complaint was filed, "[t]he defendants have filed motions * * * arguing the merits of the case," and "[t]he court has adjudicated * * * motions for summary judgment").

Judge Williams nevertheless allowed Ross to belatedly raise an exhaustion defense and dismissed Blake's claim against Ross on that basis. JA460–65, 507–12. He reasoned that Ross should be permitted to assert the exhaustion defense two years into this litigation, despite failing to raise it at any earlier stage in the proceedings, because Blake purportedly consented to Ross raising this defense in an amended answer; because Ross was authorized to file a new answer in response to Blake's amended complaint; and because district courts may sometimes raise the exhaustion requirement *sua sponte*. *Id.* None of those reasons suffice, however, to allow Ross to revive an affirmative defense years after it was waived.

2. As a threshold matter, Judge Williams incorrectly suggested that Blake forfeited any objection to Ross's affirmative defenses by

purportedly consenting to Ross's amended answer and by not filing "a partial opposition to Ross's motion for leave to amend." JA458. That suggestion wrongly ignores the actual course of litigation in the district court here.

Blake's consent in the abstract to the filing of an amended answer was not a waiver of his right to argue that new defenses in that answer are legally flawed. By granting consent under Rule 15(a)(2) to the submission of an amended pleading that is not permitted as of right under Rule 15(a)(1), a party does not automatically forfeit any objections he might have to matters within that pleading. That is especially so where, as here, the party seeking consent did not provide opposing counsel with a copy of the proposed amendments or inform counsel what changes were being made. Correspondence between counsel at the time of the amended answer confirms that Ross's counsel did *not* disclose that he intended to assert a new affirmative defense that he previously had waived, so it is not correct to say that Blake or his counsel ever knowingly consented to Ross's addition of a failure-to-exhaust defense. *See* JA90–92.

Nor was it possible, contrary to Judge Williams's suggestion, for Blake to file a "partial opposition" to Ross's motion to file an amended answer once Ross's intent became known, because the court granted the motion by paperless order less than 24 hours later, without allowing Blake any opportunity to respond. *See* ECF #67.

Because Ross's motion to file an amended answer was granted without giving Blake an opportunity to object to Ross's belated assertion of an exhaustion defense, Blake's only recourse was to file a motion to strike under Federal Rule of Civil Procedure 12(f), which is precisely what he did. *See* ECF #74. And although Judge Williams chided Blake for taking "roughly three weeks" to file his motion to strike, JA458, Rule 12(f) specifically authorizes a motion to strike to be filed at any time "within 21 days after being served with the pleading." Fed. R. Civ. P. 12(f)(2).

In fact, Blake persistently renewed his motion to strike each subsequent time Ross invoked an exhaustion defense. *See, e.g.*, ECF #87; ECF #96; ECF #101. Judge Williams's suggestion that Blake consented to Ross's exhaustion defense is thus contradicted by Blake's multiple timely motions to strike the defense on the basis of waiver.

3. Nor was Judge Williams correct that Blake somehow invited Ross to revive his waived exhaustion defense simply by filing an amended complaint. There is no reason why a plaintiff who wishes to file an amended complaint should have to allow the defendant to revive long-waived affirmative defenses, so long as the amendments to the complaint are not material to the defense at issue. *Cf. Carr*, 2008 WL 4556607, at *4 ("If every amendment, no matter how minor or substantive, allowed defendants to assert counterclaims or defenses as of right, claims that would otherwise be barred or precluded could be revived without cause.") (quoting *EEOC v. Morgan Stanley & Co.*, 211 F.R.D. 225, 227 (S.D.N.Y. 2002)). Nothing in the Federal Rules requires a plaintiff to forgo amending his complaint in order to maintain his objections to an untimely affirmative defense.

In this instance, as Judge Williams recognized, "the changes the Amended Complaint makes to the Complaint are largely cosmetic." JA458; *compare* JA96–99 *with* JA12–20. All facts and allegations relevant to Ross's exhaustion defense were known to him when he filed his initial answer, and certainly when he filed his initial summary judgment motion; the amended complaint did nothing to change that.

Indeed, it is clear that the amended complaint has no bearing on any failure-to-exhaust defense because Ross sought to assert that defense by way of an amended answer *before* any amended complaint had been proffered.

It would be acutely unfair, moreover, to allow the threat of new affirmative defenses to "lock in" an unsophisticated litigant like Blake to his initial *pro se* (and hand-written) complaint, thereby precluding court-appointed counsel from filing an amended complaint on his behalf. Here, as in *Carr*, "the amended complaint was filed after [Blake] obtained counsel and merely takes [Blake's] *pro se* allegations and places them in proper pleading format." 2008 WL 4556607, at *4. And whereas the amended complaint here in no way prejudiced Ross, allowing Ross to amend his answer to assert a new affirmative defense unfairly prejudiced and surprised Blake, as detailed below.

Accordingly, Judge Williams erred in holding that, as a consequence of filing an amended complaint to make "largely cosmetic" changes that had no bearing on the exhaustion issue, Blake somehow opened the door to the assertion of an affirmative defense that Ross had waived nearly two years earlier.

4. Finally, Judge Williams suggested that Ross's waiver was irrelevant because a district court "may raise the issue of exhaustion of remedies on its own motion." JA508. Judge Williams pointed to this Court's decision in *Anderson*, which "recognized in the habeas context that a district court has the authority to *sua sponte* raise an affirmative defense (timeliness of the habeas filing) as grounds for dismissal" and held that "[i]n the context of PLRA claims, * * * district courts have the same authority to inquire into the appealability of an affirmative defense as in the habeas context." 407 F.3d at 682.

But Judge Williams's application of that principle in this case cannot be reconciled with the Supreme Court's recent decision in *Wood v. Milyard*, 132 S. Ct. 1826 (2012), which held that a court's authority to raise a defense *sua sponte* does not negate a defendant's waiver of that defense. *See id.* at 1834–35. Addressing the same timeliness requirement that this Court invoked by analogy in *Anderson*, the Supreme Court held that "[a]lthough a court * * * has discretion to address, *sua sponte*, the timeliness of a habeas petition," it is an abuse of that discretion for the court to do so when "the [defendant] knew it had an arguable statute of limitations defense, yet * * * chose * * * to

refrain from interposing a timeliness challenge." *Id.* (internal quotation marks omitted).

In other words, when the defendant has waived an affirmative defense—as Ross did here by failing to timely assert the exhaustion requirement—that waiver is not negated by the court's authority to raise certain issues *sua sponte*. Even when a district court has "the authority * * * to raise a forfeited * * * defense on [its] own initiative," the court "abuse[s] its discretion when it dismisse[s]" a case on that basis *after* the defense has been waived. *Wood*, 132 S. Ct. at 1834; *see also Day v. McDonough*, 547 U.S. 198, 202 (2006) ("[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense.").[5]

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[5] *Wood* distinguished the facts of the Court's prior decision in *Day*, which allowed a district court to raise a timeliness issue *sua sponte* when the defendant erroneously conceded the issue based on an inadvertent arithmetic error and the district court caught the error shortly after the answer was filed. *See Wood*, 132 S. Ct. at 1833–34; *Day*, 547 U.S. at 203–04. In this case, unlike *Day* but similar to *Wood*, the exhaustion requirement was not invoked until nearly two years after Ross's initial answer, and there has been no showing that Ross's failure to timely raise the defense on his own was based on an inadvertent or understandable error (indeed, Ross has consistently refused to proffer *any* justification for his delay). *See Carr*, 2008 WL 4556607, at *4 (exhaustion defense waived where defendant "ma[de] no

Taken to its logical conclusion, Judge Williams's contention that he could always raise the exhaustion issue *sua sponte*, notwithstanding Ross's failure to timely assert it, would imply that the PLRA's exhaustion requirement can *never* be waived, despite the longstanding rule that affirmative defenses are waived if not pleaded in the answer

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excuse for his failure to include the exhaustion defense in his original answer or in his initial motion for summary judgment").

Wood also adopted a narrow reading of the Court's prior decision in *Granberry v. Greer*, 481 U.S. 129 (1987), which recognized a "modest exception" that allows a "court of appeals' consideration of a forfeited habeas defense" in "exceptional cases," because habeas cases implicate a "broader * * * comity interest" in "harmonious relations between the state and federal judiciaries." *Wood*, 132 S. Ct. at 1832–33. Unlike habeas cases, which challenge the validity of criminal convictions issued by state courts, PLRA cases generally involve modest grievances that have not received state-court review and therefore do not threaten "the 'unseem[liness]' of a federal district court's overturning a state court conviction." *Cf. O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (alteration by Court); *see also Allen v. Zavaras*, 568 F.3d 1197, 1201 (10th Cir. 2009) ("There are good reasons to distinguish between exhaustion in the PLRA context and the habeas context."); *Ortiz v. McBride*, 380 F.3d 649, 660–63 (2d Cir. 2004) (cataloging differences between PLRA and habeas). Indeed, in contrast to habeas cases such as *Granberry*, courts in PLRA cases have refused to consider an exhaustion defense on appeal when it was waived in the district court. *See, e.g.*, *Daley v. Lappin*, --- F. App'x ---, 2014 WL 306932, at *4 (3d Cir. 2014); *Hardeman v. Stewart*, 195 F. App'x 706, 708 (10th Cir. 2006); *Johnson v. Testman*, 380 F.3d 691, 695–96 (2d Cir. 2004); *Foulk v. Charrier*, 262 F.3d 687, 697 (9th Cir. 2001). Because Blake's claims do not implicate the "exceptional" circumstances of habeas cases like *Granberry*, it was an abuse of discretion here—as it was in *Wood*—for the district court to raise the exhaustion issue after Ross had waived it.

(or, at the least, raised in the initial summary judgment motion). Indeed, Judge Williams's reasoning would allow an exhaustion defense to be asserted at *any* point in the litigation, no matter how much time has elapsed and no matter how unfairly the plaintiff is prejudiced by the defendant's delay. But the PLRA's exhaustion requirement is *not* a jurisdictional requirement that can be asserted at any time during the litigation, *see Anderson*, 407 F.3d at 677–78; rather, it is an affirmative defense that must be asserted in the defendant's answer or, at the latest, in the defendant's initial summary judgment motion. Ross's failure to timely assert that defense waived the exhaustion requirement and should have precluded him from belatedly raising it nearly two years later.

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

There can be no question that Blake has been prejudiced by Ross's untimely assertion of a failure-to-exhaust defense, because by allowing the statute of limitations to run, Ross's delay has deprived Blake of the opportunity to return to the administrative process to cure any procedural deficiency. Had Ross timely asserted an exhaustion defense, Blake would have been able to pursue any additional administrative

remedies that were available to him and then could have returned to court by re-filing this action. Because of Ross's unnecessary and unexplained delay, however, by the time Ross finally raised his exhaustion defense, the statute of limitations barred this action from being re-filed.[6]

The statute of limitations for Blake's claims against Ross is three years. *See Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 187 (4th Cir. 1999) (citing Md. Code, Cts. & Jud. Proc. § 5-101); *Nasim v. Warden*, 64 F.3d 951, 955 (4th Cir. 1995) (en banc). Blake was assaulted on July 13, 2007. Ross answered the complaint on November 19, 2009, ECF #6, and filed a summary judgment motion on February 4, 2010, ECF #18. Had Ross asserted an exhaustion defense in his initial answer or his initial summary judgment motion, or indeed at any time up through the summer of 2010, Blake could have attempted to pursue any further administrative relief that Ross believed to be available and then returned to court. By waiting until August 2011 to raise his

[6] Blake asked the district court to stay the case or equitably toll the statute of limitations so that he could attempt to pursue administrative relief, but Judge Williams refused to do so. *See* JA512.

exhaustion defense, however, Ross deprived Blake of any opportunity to reassert his claims in a judicial forum.

As a consequence of Ross's unexplained delay, Blake could now be deprived of any judicial recourse for the violation of his constitutional rights. Indeed, Ross's counsel candidly conceded at a hearing in the district court that "there may be prejudice to the plaintiff in that the statute of limitations has run." JA489.[7] No greater prejudice exists. *See S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co.*, 353 F.3d 367, 373–74 (4th Cir. 2003) (plaintiff "was taken by unfair surprise and prejudiced" when defendant waited until after the limitations period expired before raising limitations defense); *Knox v. Jasper Cnty.*, 2005 WL 2807120, at *2 (D.S.C. 2005) (defendant's attempt to "raise the exhaustion issue * * * seventeen months after removing th[e] case to

[7] Ross's counsel made this concession while discussing equitable tolling, but proceeded to argue that equitable tolling should not apply because, in Ross's view, this is not a case in which Blake "ha[s] been delayed from being able to complete his grievance by some act of the prison." JA490. As discussed below, that premise is incorrect, because prison regulations precluded inmates like Blake from filing a request for administrative remedy for complaints that were the subject of an internal investigation. In any event, whereas equitable tolling requires a showing of "'some extraordinary circumstance,'" *Holland v. Florida*, 560 U.S. 631, 649 (2010), waiver requires only a showing of prejudice, and Ross has conceded prejudice here.

federal court" would prejudice the plaintiff because he "would be precluded from filing suit under the applicable statute of limitations"); *see also, e.g.*, *Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994, 997 (1st Cir. 1983); *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152, 1157–58 (2d Cir. 1968); *cf. Peterson v. Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1166 (4th Cir. 1985).

Judge Williams downplayed this showing of prejudice as one "of [Blake's] own doing," reasoning that "[h]ad Blake exhausted administrative remedies before filing suit, he would not face the prospect of having to exhaust administrative remedies and then refiling suit." JA508. But that argument proves too much: If Judge Williams were correct that an inmate can never claim to have been prejudiced when he failed to exhaust administrative remedies, then courts could *never* enforce the waiver of a failure-to-exhaust defense; but it is well established that the PLRA's exhaustion requirement is an affirmative defense that can be waived. In any event, as we discuss below, it is not correct that Blake failed to exhaust his administrative remedies; nor can Blake fairly be blamed for any supposed failure when, as we further discuss below, Maryland's confounding inmate-grievance system is

unclear even to judges—most of whom have concluded that inmates in Blake's position *did* properly exhaust their administrative remedies. *Cf. Giano v. Goord*, 380 F.3d 670, 679 (2d Cir. 2004) (holding that inmate's interpretation of grievance procedures "was hardly unreasonable," even if incorrect, when "a learned federal district court judge not long ago endorsed an interpretation of [the] regulations nearly identical to" his).

Blake was also prejudiced because Ross's unexplained two-year delay in asserting any exhaustion defense forced Blake and his court-appointed counsel to invest in this case substantial time and resources that might have been saved if Ross had timely raised the defense. Counsel for Blake devoted more than 775 hours to litigating this case before Ross first asserted his exhaustion defense in August 2011. *See* ECF #138-2 Exh. A. As in *Carr*, allowing Ross to assert an exhaustion defense "[a]t this late stage of the game" is "unfair and prejudicial" because Blake and his counsel "expended a great deal of time and cost preparing for trial on the merits." 2008 WL 4556607, at *4.

C. Enforcing Ross's Waiver Would Advance The Purposes Of The PLRA's Exhaustion Requirement And The Waiver Rule.

As this case illustrates, there is good reason to require defendants to invoke the PLRA's exhaustion requirement at or near the outset of litigation. Timely assertion of any exhaustion defense helps to inform PLRA plaintiffs, who typically are unsophisticated litigants with no formal legal training and who frequently appear *pro se*, of the administrative remedies available to them. Once the defendant identifies any administrative remedies that have not yet been exhausted, the plaintiff can then withdraw his or her claims without prejudice and proceed through the administrative system.

By helping to channel prisoner claims into the proper administrative process, early assertion of any exhaustion defense advances the goals of the PLRA's exhaustion requirement. In some cases, the administrative remedy process may enable claims to be resolved on an informal basis without further litigation. Administrative remedies "afford[] corrections officials time and opportunity to address complaints internally," potentially "obviating the need for litigation." *Porter v. Nussle*, 534 U.S. 516, 525 (2002). In other cases, the plaintiff

may eventually re-file his or her claims in court, but this time "facilitated by an administrative record that clarifies the contours of the controversy." *Id.* Because the administrative process typically moves more swiftly than formal litigation in court, moreover, it may allow that record to be created while recollections remain fresh and before evidence goes stale. Early resort to the administrative process thus "reduc[es] litigation to the extent complaints are satisfactorily resolved, and improv[es] litigation that does occur by leading to the preparation of a useful record." *Jones*, 549 U.S. at 219.

Here, however, Ross would transform the PLRA's exhaustion requirement into little more than a trap for unwary and unsophisticated prisoner-plaintiffs. Instead of facilitating quick and informal resolution of prisoner grievances, diverting claims to the administrative process at this late stage—especially after a sizable record has already been developed through adversarial discovery—would serve only to interpose additional and unnecessary delay. And because Ross waited to assert his exhaustion defense until after the statute of limitations had run, the practical effect would be to deprive Blake of any opportunity to seek redress of his grievance at all.

Contrary to Congress's hope that "corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate," *Porter*, 534 U.S. at 525, allowing Ross to belatedly assert an exhaustion defense here would eliminate any incentive to improve prison safety and would deprive Blake of any avenue for relief. That outcome flouts the basic goals of the PLRA.

II. BLAKE EXHAUSTED HIS ADMINISTRATIVE REMEDIES BECAUSE THE SUBJECT OF HIS GRIEVANCE WAS FULLY INVESTIGATED BY THE INTERNAL INVESTIGATIVE UNIT AND NO FURTHER REVIEW WAS AVAILABLE.

In a series of prior decisions, Judge Williams held that the commencement of an internal investigation by the Internal Investigative Unit "take[s] th[e] claim out of the typical administrative remedy process"—known as the ARP process—and that the completion of that internal investigation exhausts the administrative remedies available to Maryland inmates. *See Thomas v. Bell*, 2010 WL 2779308, at *4 (D. Md. 2010); *see also Thomas v. Huff*, 2010 WL 3001992, at *3 (D. Md. 2010); *Thomas v. Middleton*, 2010 WL 4781360, at *3 (D. Md. 2010), *aff'd sub nom. Thomas v. Geraghty*, 416 F. App'x 235 (4th Cir. 2011) (per curiam). Because the Division of Correction "d[id] not permit prisoners to pursue ARP claims for matters referred to the Internal

Investigati[ve] Unit" at the time of the incident here, Judge Williams repeatedly concluded that an inmate in Blake's position "exhaust[s] his 'available' remedies by submitting to the internal investigation process.'" *Bell*, 2010 WL 2779308, at *4 & n.2; *accord Huff*, 2010 WL 3001992, at *3 & n.2; *Middleton*, 2010 WL 4781360, at *3 & n.4. Under those decisions, Blake was not required to take any further steps to exhaust his administrative remedies here.

Two other Maryland judges have come to the same conclusion. Judge Catherine Blake has rejected "the affirmative defense of failure to exhaust administrative remedies" where, as here, the underlying incident "was investigated by the Internal Investigati[ve] Unit and thus was not subject to the ARP process." *Bogues v. McAlpine*, 2011 WL 5974634, at *4 (D. Md. 2011). And Judge Benson Everett Legg has likewise held that an inmate was not required "to exhaust administrative remedies through the ARP process" because prison officials had "convened an internal investigation" into his complaint. *Williams v. Shearin*, 2010 WL 5137820, at *2 n.2 (D. Md. 2010).

In this case, however, Judge Williams reversed course and declared that his earlier decisions (and those of Judge Blake and Judge

Legg) were "unconvincing." JA464. Judge Williams acknowledged once again that Maryland inmates "may not use the ARP process when the events underlying their complaint are the subject of an IIU investigation"; Blake thus could not file an ARP grievance or appeal to the Inmate Grievance Office (IGO), which is ordinarily the final stage of the ARP process. *Id.* But Judge Williams concluded that, although the internal investigation precluded Blake from *appealing* any claim to the IGO through the ARP process, it might not preclude him from filing an *original action* with the IGO, and that by not doing so Blake failed to exhaust his administrative remedies. JA460–65, 508–11.

We submit that Judge Williams—and Judge Blake and Judge Legg—instead had it right the first time around. Because the internal investigation took Blake's claims out of the ARP process, in which "the Inmate Grievance Office * * * [is] the final level of appeal," *Chase v. Peay*, 286 F. Supp. 2d 523, 529 & n.10 (D. Md. 2003), *aff'd*, 98 F. App'x 253 (4th Cir. 2004) (per curiam), and because Maryland law does not provide for internal investigations to be appealed to the IGO, it was not possible for Blake to present his grievance to the IGO. Judge Williams's speculation that Blake might have been able to file an original action

with the IGO, in lieu of an appeal, rests on a misunderstanding of the IGO rules. Accordingly, because no further "administrative remedies" were "available" to Blake once the internal investigation was completed, 42 U.S.C. § 1997e(a), the internal investigation exhausted Blake's administrative remedies and fully satisfied the PLRA's exhaustion requirement.

1. Under the PLRA, inmates are required to exhaust only "such administrative remedies as are available." 42 U.S.C. § 1997e(a). "[A]n administrative remedy is not considered to have been available," however, "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). Because the internal investigation into the prison guards' assault on Blake displaced the ordinary administrative process and could not be appealed further, the conclusion of that investigation exhausted all administrative remedies available to Blake.

At the time Blake was assaulted in 2007, Maryland had two separate and mutually exclusive administrative systems for investigating inmate complaints. Most complaints were addressed through the first system, known as the Administrative Remedy

Procedure. *See* JA405–08 (Division of Correction Directive ("DCD") 185-002 (Feb. 15, 2005)). The three-step ARP process began with an inmate filing a request for administrative remedy with the warden; if the request was denied, the inmate could then appeal to the Commissioner of Corrections; and if that appeal was denied, the inmate could finally appeal to the Inmate Grievance Office. *Chase*, 286 F. Supp. 2d at 529 & n.10; *see* JA405–08; Md. Code Regs. § 12.07.01.05(B); *Bogues*, 2011 WL 5974634, at *3; *Bell*, 2010 WL 2779308, at *4.

Other complaints, however, were instead addressed by the Internal Investigative Unit. Incidents that "involved the use of force," like the assault here, were "investigated by the Internal Investigati[ve] Unit and thus [were] not subject to the ARP process." *Bogues*, 2011 WL 5974634, at *4; *see* Md. Code Regs. § 12.11.01.05(A)(3) (IIU investigates any "allegation of excessive force by an employee" of the Department of Public Safety and Correctional Services). An internal investigation by the IIU thus "take[s] th[e] claim out of the typical administrative remedy process," because Maryland law "does not permit prisoners to pursue ARP claims for matters referred to the Internal Investigati[ve]

Unit." *Bell*, 2010 WL 2779308, at *4 & n.2; *accord Middleton*, 2010 WL 4781360, at *3 & n.4; *Huff*, 2010 WL 3001992, at *3 & n.2.

The subject of Blake's grievance—the unprovoked use of excessive force against him by corrections officers on July 13, 2007—was fully investigated by the Internal Investigative Unit. That internal investigation took the place of the Administrative Remedy Process, including any appeal to the IGO, that governs other inmate grievances. Accordingly, the initiation and conclusion of the IIU internal investigation satisfied the PLRA's exhaustion requirement because no other "administrative remedies" were "available" to him, 42 U.S.C. § 1997e(a), once the internal investigation was completed.

For this reason, Judge Williams erred in holding (JA460–65, 508–11) that Blake failed to exhaust his administrative remedies because his grievance was never presented to the IGO. At the time of the assault here, it was not possible to appeal the findings of an internal investigation to the IGO. Although IGO regulations contemplate grievances "based on an appeal from the administrative remedy procedure," Md. Code Regs. § 12.07.01.05(B), or "based on an appeal from a disciplinary proceeding," *id.* § 12.07.01.05(C), no such provision

permitted the investigation of a complaint by the IIU to be appealed to the IGO. The results of an IIU investigation are final; nothing in Maryland law authorized the IGO to review, much less alter or overrule, any of the IIU's findings or recommendations. The conclusion of the IIU process exhausted all administrative remedies that were available to Blake.

2. In his initial order granting summary judgment to Ross, Judge Williams relied on a different version of Maryland's ARP procedures that went into effect in late 2008. *See* JA462–63 (citing DCD 185-003 (Aug. 27, 2008), *reprinted at* JA429–43). Unlike the version in effect at the time of the assault here, the newer version of the ARP procedures might be read to allow complaints that are investigated by the IIU to eventually be appealed to the IGO. Under the 2008 procedures, *all* complaints can be presented in a request for administrative remedy through the ARP process. For complaints that are subject to an internal investigation, however, "[t]he Warden or institutional coordinator shall issue a final dismissal of a request for procedural reasons when it has been determined that the basis of the complaint is the same as the basis of an investigation under the

authority of the Internal Investigative Unit (IIU)." JA437. This "final dismissal for procedural reasons * * * shall be treated as a substantive decision and the rationale for dismissal may be appealed by the inmate." *Id.*

But as Judge Williams later recognized, the 2008 procedures "were not in effect when the underlying assault took place" in this case. JA510. So even if the newer procedures might be read to allow an inmate today whose complaint is investigated by the IIU to also file a request for administrative remedy and to appeal his claims up to the IGO, it was not possible for Blake to do so in July 2007. The procedures in effect at that time did not contemplate ARP review of complaints subject to an internal investigation—indeed, the ARP procedures made no mention of internal investigations at all—and did not provide any avenue to appeal such grievances to the IGO.

3. Even after recognizing this error, however, and contrary to his earlier decisions, Judge Williams held that the internal investigation did not exhaust Blake's administrative remedies because he believed that it might still have been possible for Blake to file an

original action directly with the IGO. JA460–65, 508–11. That belief was mistaken.

Although the IGO regulations do contain a residual provision, Md. Code Regs. § 12.07.01.05(A), which allows the IGO to hear original grievances in certain circumstances, neighboring provisions make clear that this provision applies only when there is no other agency responsible for investigating the grievance in the first instance. IGO regulations specifically provide for appeals from ARP decisions and from disciplinary proceedings, *id.* § 12.07.01.05(B)–(C), and require the IGO to apply a deferential standard of review in these appeals, *id.* § 12.07.01.08(B)–(C). Because no similar provisions exist for grievances that follow an internal investigation, however, the IGO would be required to hold a hearing to make its own factual findings, *cf. id.* §§ 12.07.01.06(A), 12.07.01.07, 12.07.01.08(A), and the IGO's own findings could even conflict with those of the IIU's internal investigation. The better understanding is that an inmate cannot file an original grievance with the IGO when his claim is investigated by another agency, such as the IIU.

This potential for conflict between an IIU internal investigation and an original grievance before the IGO is magnified by other provisions. IGO regulations require that any original grievance with the IGO must be filed "within 30 days of the * * * [s]ituation or occurrence that is the subject of the grievance." Md. Code Regs. § 12.07.01.05(A)(1). This means that, if Judge Williams were correct that Blake could have filed (and indeed was *required* to file) an original grievance with the IGO, the IGO hearing would then proceed at the very same time as the internal investigation.

That would yield two concurrent investigations into the same underlying incident, with significant potential for the two investigations to reach conflicting results—and with no established legal procedure for reconciling them. That is *precisely* why the Division of Correction "does not permit prisoners to pursue ARP claims for matters referred to the Internal Investigati[ve] Unit," *Bell*, 2010 WL 2779308, at *4 n.2, and it would not make any more sense for an IGO hearing to run parallel to an internal investigation than for an ARP claim to do so.[8]

[8] Citing a regulation that requires the Internal Investigative Unit to be notified "[i]f an allegation required to be reported [to the IIU] is discovered during a proceeding properly before the Inmate Grievance

Judge Williams's conclusion that the IGO can hear an original grievance for a complaint under investigation by the IIU also contradicts the Division of Correction's official Inmate Handbook (a copy of which was provided to Blake, *see* JA168–70). According to the edition of the Inmate Handbook issued to Blake, "[t]he IGO reviews grievances and complaints of inmates against the Division of Correction * * * *after* the inmate has exhausted institutional complaint procedures." JA403 (emphasis added). Because any original grievance must be filed with the IGO within 30 days of the underlying incident, however, Blake would have been required to file his IGO grievance *before* the IIU had finished investigating his complaint, *see* Md. Code Regs. § 12.07.01.05(A)(1)—contrary to the directions provided in the Inmate Handbook.

Office," Md. Code Regs. § 12.11.01.05(B), Judge Williams suggested that Maryland regulations "expressly contemplate the contemporaneous conduct of IIU and IGO proceedings based on the same underlying events." JA463. In fact, however, this regulation demonstrates precisely the opposite: It presumes that grievances before the IGO are *not* already the subject of an internal investigation, or else the IIU would already be aware of them and would not need to be notified; and it presumably requires that the IIU be notified so that the IIU and IGO can determine which agency has primary jurisdiction, not so that the agencies can open a second, independent investigation to run concurrently with the first.

Indeed, if the handbook supplied to Blake and other inmates were incorrect or misleading, and thereby induced inmates not to file any grievance with the IGO while an internal investigation was ongoing, then the IGO process should not be deemed "available" within the meaning of the PLRA. *See Moore*, 517 F.3d at 725 ("[A]n 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."); *cf. Giano*, 380 F.3d at 678 (holding that the plaintiff's "failure to [exhaust] was justified by his reasonable belief that [prison] regulations foreclosed such recourse").

Lastly, Judge Williams's interpretation cannot be reconciled with the 2008 revisions to Maryland's ARP procedures. If Judge Williams were correct that a complaint under internal investigation could already be submitted to the IGO through an original grievance, there would have been no need to amend the ARP procedures in 2008 to provide for such complaints to be filed in the ARP process, dismissed, and then brought before the IGO on appeal. *Cf.* JA437 (DCD 185-003 (Aug. 27, 2008)) (permitting a complaint with "the same basis of an investigation under the authority of the Internal Investigative Unit" to be filed,

"dismissed for procedural reasons," and then "treated as a substantive decision * * * [that] may be appealed by the inmate").

4. Finally, Judge Williams suggested that, compared to his prior decisions, his decision in this case was more consistent with decisions of other circuits purportedly holding that "an internal investigation does not relieve prisoners from the PLRA's exhaustion requirement." JA508–09; *see also* JA464–65. We do not disagree with that principle in the abstract: Even when there has been an internal investigation, an inmate must still "exhaust[]" any other "administrative remedies" that are "available," 42 U.S.C. § 1997e(a), so an internal investigation does not *necessarily* satisfy the PLRA. The particular grievance system in effect in Maryland at the time Blake was assaulted, however, "d[id] not permit prisoners to pursue ARP claims for matters referred to the Internal Investigati[ve] Unit," *Bell*, 2010 WL 2779308, at *4 n.2, and thus no other administrative remedies were available to Blake *on the facts here*.

This case therefore is not like *Panaro v. City of North Las Vegas*, 432 F.3d 949 (9th Cir. 2005), where the plaintiff "participat[ed] in an internal affairs investigation" but did "not take[] advantage of an[other]

internal grievance procedure" that was available to him. *Id.* at 950. The plaintiff in *Panaro*, unlike Blake, was disciplined for his role in the altercation and "was informed of his right to appeal" the disciplinary action against him, but "did not appeal that decision" despite his ability to do so. *Id.* at 951 (internal quotation marks omitted).

This case is also unlike *Pavey v. Conley*, 663 F.3d 899 (7th Cir. 2011), where "administrative procedures * * * clearly laid out" that the plaintiff should have filed an official grievance within 48 hours of the incident, and an evidentiary proceeding revealed that he had neglected to do so. *Id.* at 903–05. As in *Panaro*, the *Pavey* court reasoned that an internal investigation did not excuse the plaintiff from making use of other grievance procedures *when other procedures are available*—a circumstance not present in Blake's case. *See id.* at 905–06.

And this case is unlike *Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003), where the plaintiff was permitted to—and in fact did—participate in a formal grievance process while an "internal administrative inquiry" was ongoing, but his grievance was procedurally deficient. *Id.* at 723–25, 733–35.

This case instead closely resembles *Carr*, where, after the complaint was addressed "through a four month internal investigation," the only "next step" available under the applicable state grievance procedures "was to file the instant federal action." 2008 WL 4556607, at *5. Because Blake, like the plaintiff in *Carr*, had no other administrative recourse available to him once the internal investigation concluded, Blake fully exhausted his administrative remedies.

* * *

For the reasons we have explained, Judge Williams erred in concluding that "the IGO grievance process applies to Blake's complaint" and that Blake therefore "failed to exhaust" his administrative remedies. JA463. But to the extent there is any uncertainty, this case well illustrates why it is essential that any failure-to-exhaust defense be raised early in the litigation and why waiver rules therefore must be rigorously enforced.

Had Ross asserted his exhaustion defense in his answer or in his initial summary judgment motion, and Blake's claim been dismissed—albeit erroneously—at that time, Blake could still have attempted to file a grievance with the IGO. *See* Md. Code Regs. § 12.07.01.05(D) ("If a

grievant files a complaint with a court and the court dismissed the complaint because the grievant did not exhaust administrative remedies, the grievant may file a grievance * * * with the [IGO] within 30 days of the date the order of dismissal was entered"). Then, after obtaining a definitive ruling from the IGO that it is unable to review the results of an internal investigation (or, if review were available, upon conclusion of that review), Blake could have re-filed his claim in the district court.

Instead, Ross's unjustified delay in failing to assert any exhaustion defense until after the statute of limitations had run has substantially prejudiced Blake by depriving him of the opportunity to cure any arguable procedural deficiency and litigate the fundamental issues. That result is unfair, unjust, and should not be countenanced by this Court—which is precisely why Ross should be held to have waived any exhaustion defense, and the case should be remanded for Blake's claim against Ross to be heard on the merits.

CONCLUSION

For the foregoing reasons, 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.

REQUEST FOR ORAL ARGUMENT

Oral argument is warranted in this case to address important issues of first impression in this Circuit that have divided the lower courts. As Judge Williams recognized below, this Court "has yet to address whether," under Maryland's particular administrative scheme, "an internal investigation * * * relieve[s] prisoners of the PLRA's exhaustion requirement." JA464. And Judge Williams further recognized that other "cases from the District of Maryland dictate a different result" than his decision in this case. JA509. Oral argument will aid the Court's understanding of the factual and legal issues involved and will assist the Court in providing useful guidance on questions that have generated considerable confusion and disarray among district courts in this Circuit.

Dated: February 28, 2014

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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

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(s) Scott M. Noveck

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Dated: February 28, 2014

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