No. 24-11081

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TERRI MCGUIRE-MOLLICA

Plaintiff-Appellant,

v.

THE FEDERAL BUREAU OF PRISONS, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama
Case No. 7:20-cv-01768-SGC
The Honorable Staci G. Cornelius

PLAINTIFF-APPELLANT TERRI MCGUIRE-MOLLICA'S OPENING BRIEF

Phillip Moore
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
160 East Grand Avenue, 6th Floor
Chicago, IL 60611
(202) 869-3438
phillip.moore@macarthurjustice.org

Christine Monta
Gregory Cui
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H St. NE, Suite 275
Washington, DC 20002
(202) 869-3434
christine.monta@macarthurjustice.org
gregory.cui@macarthurjustice.org

Counsel for Plaintiff-Appellant Terri McGuire-Mollica

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned hereby certifies the following list of trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that may have an interest in the outcome of this appeal:

Bailey, Sharon, Defendant-Appellee

Billingsley, Michael, Counsel for Defendant-Appellee

Borden, Hon. Gray M., U.S. District Court Judge

Cornelius, Hon. Staci G., U.S. Magistrate Judge

Cui, Gregory, Counsel for Plaintiff-Appellant

Escalona, Prim F., U.S. Attorney for the Northern District of Alabama

Griffin, Richard, Defendant-Appellee

Holt, Elizabeth, Counsel for Defendant-Appellee

Li, Xinyu, Defendant-Appellee

Long, Don B III, Counsel for Defendant-Appellee

McGuire-Mollica, Terri, Plaintiff-Appellant

Monta, Christine A., Counsel for Plaintiff-Appellant

Moore, Phillip, Counsel for Plaintiff-Appellant

Roderick & Solange MacArthur Justice Center, Firm for Plaintiff-Appellant

United States Attorney's Office for the Northern District of Alabama, Firm for Defendant-Appellee

Pursuant to Eleventh Circuit Rule 26.1-3, the undersigned further certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

Dated: July 11, 2024

Respectfully Submitted,

s/ Gregory Cui

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Terri McGuire-Mollica respectfully requests oral argument in this case. Oral argument will assist the Court in evaluating the important legal issues presented by the district court's erroneous conclusion that Ms. McGuire-Mollica failed to exhaust her final administrative appeal to the Bureau of Prisons General Counsel, despite the district court's express factual finding that Ms. McGuire-Mollica "properly completed and mailed her final appeal" by submitting the required form to prison officials for mailing. Doc. 57 at 14.

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF JURISDICTION.. 3

STATEMENT OF THE ISSUES... 4

STATEMENT OF THE CASE.. 4

I. Factual Background 4

A. Defendants Fail To Treat Ms. McGuire-Mollica's Uterine Fibroid For Years, Causing Extreme Pain, Bleeding, and Complications.. 4

B. After Seeking Medical Care For Years, Ms. McGuire-Mollica Follows The Steps For Pursuing Administrative Relief. 8

II. Procedural History 12

III. Standard of Review.. 17

SUMMARY OF ARGUMENT 17

ARGUMENT 20

I. Ms. McGuire-Mollica Satisfied The PLRA's Exhaustion Requirement By Properly Completing And Mailing Her Final Appeal. 20

A. Ms. McGuire-Mollica Did Everything The BOP's Grievance Process Rules Required Her To Do To Pursue A Final Appeal. 20

B. The Breakdown That Caused The BOP General Counsel Not To Receive Ms. McGuire-Mollica's Appeal Does Not Change The Fact That She Exhausted Administrative Remedies. 22

C. Ms. McGuire-Mollica Did Not Need To Wait 40 Days For The BOP To Respond To An Appeal They Never Received..................... 26

II. Alternatively, Ms. McGuire-Mollica Adequately Pled That Administrative Remedies Were Not Available To Her................................ 30

CONCLUSION 35

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

Cases

Andres v. Marshall,
867 F.3d 1076 (9th Cir. 2017) 35

Baughman v. Harless,
142 F. App'x 354 (10th Cir. 2005) 35

Brown v. Drew,
452 F. App'x 906 (11th Cir. 2012) 35

Daker v. Bryson,
841 F. App'x 115 (11th Cir. 2020) 28

Dimanche v. Brown,
783 F.3d 1204 (11th Cir. 2015) 19, 33

Dole v. Chandler,
438 F.3d 804 (7th Cir. 2006) 17, 18, 20, 21, 22

Eaton v. Blewett,
50 F.4th 1240 (9th Cir. 2022) 34

Fordley v. Lizarraga,
18 F.4th 344 (9th Cir. 2021) 34

Fritz v. Standard Sec. Life Ins. Co. of N.Y.,
676 F.2d 1356 (11th Cir. 1982) 28

Garrett v. Wexford Health,
938 F.3d 69 (3d Cir. 2019) 28

Harris v. Garner,
216 F.3d 970 (11th Cir. 2000) 29, 30

Hedin v. Castillo,
723 F. App'x 526 (9th Cir. 2018) 33

Houston v. Lack,
487 U.S. 266 (1988) 18, 22

Jackson v. Esser,
--- F.4th ---, 2024 WL 3174880 (7th Cir. June 26, 2024) 34

Jones v. Bock,
549 U.S. 199 (2007)..23, 28, 29

Meador v. Hammer,
No. 2:11-cv-3342, 2013 WL 753486 (E.D. Cal. Feb. 27, 2013)...........................35

Medina v. Napoli,
725 F. App'x 51 (2d Cir. 2018) 32

Miller v. Tanner,
196 F.3d 1190 (11th Cir. 1999) 17

Nunez v. Duncan,
591 F.3d 1217 (9th Cir. 2010) 32

Ramirez v. Collier,
595 U.S. 411 (2022)...28

Ross v. Blake,
578 U.S. 632 (2016)...19, 30, 31, 32, 33

Saddozai v. Davis,
35 F.4th 705 (9th Cir. 2022) 29

Shivers v. United States,
1 F.4th 924 (11th Cir. 2021) 16, 17, 24, 25

Shivers v. United States,
No. 5:16-cv-276, Doc. 34 (M.D. Fla. April 14, 2017) 24

Showers v. Rodgers,
No. 23-1241, 2024 WL 1877028 (3d Cir. Apr. 30, 2024)....................................29

Sims v. Sec'y, Fla. Dep't of Corr.,
75 F.4th 1224 (11th Cir. 2023) 17, 20, 23

Smith v. Terry,
491 F. App'x 81 (11th Cir. 2012) 29

Trevari v. Robert A. Deyton Detention Ctr.,
729 F. App'x 748 (11th Cir. 2018) 9, 27, 30

Turner v. Burnside,
541 F.3d 1077 (11th Cir. 2008) 24

White v. Staten,
672 F. App'x 919 (11th Cir. 2016) 24, 25

Williams v. Correction Officer Priatno,
829 F.3d 118 (2d Cir. 2016) 19, 26, 31, 32

Statutes

28 U.S.C. § 1291 3

28 U.S.C. § 1331 3

42 U.S.C. § 1997e(a)..15

Other Authorities

28 C.F.R. § 542.13(a)..9

28 C.F.R. § 542.14(c)(4) 9

28 C.F.R. § 542.15(a)..9, 21, 22

28 CFR § 542.13 8

28 CFR § 542.14 8

28 CFR § 542.15 ....8, 9

28 CFR § 542.18 .... 9, 10, 11, 18, 19, 23, 26, 32

Fed. R. Civ. P. 15(d) 28

Fed. R. Civ. P. 15 ....27, 28, 29, 30

6 Wright, Miller & Kane, Fed. Prac. & Proc. § 1471 (3d ed. 2019) 28

INTRODUCTION

In 2016, a Bureau of Prisons ("BOP") physician diagnosed Terri McGuire-Mollica with a uterine fibroid—a non-cancerous tumor growing on her uterus. At the time, the fibroid was relatively small and could be removed through a minimally intrusive laparoscopic procedure. But instead of ordering the procedure, prison officials allowed the fibroid to more than triple in size over the course of about five years, until the fibroid weighed over fifteen pounds and caused uterine swelling equivalent to a five-month pregnancy. Throughout this period, Ms. McGuire-Mollica suffered extreme pain, bleeding, and other serious medical complications, and she requested medical treatment dozens of times. Multiple doctors outside the BOP recommended that the fibroid be removed, but prison officials refused to authorize the surgery.

Before bringing this Eighth Amendment suit to challenge prison officials' failure to provide adequate medical treatment, Ms. McGuire-Mollica satisfied the Prison Litigation Reform Act's (PLRA) exhaustion requirement. The BOP's administrative grievance process has four levels, and at each one, Ms. McGuire-Mollica took every step required of her. As the district court expressly found, after being denied relief at the first three levels, Ms. McGuire-Mollica completed the BOP's Form BP-11 to initiate a final appeal to the BOP General Counsel, and she properly submitted the form to prison officials for mailing. By following the required

steps to seek relief at every level of the BOP's grievance process, Ms. McGuire-Mollica exhausted available administrative remedies.

Despite expressly finding that Ms. McGuire-Mollica "properly completed and mailed her final appeal," Doc. 57 at 14, the district court held that Ms. McGuire-Mollica failed to exhaust available administrative remedies for two reasons. Neither is correct.

First, the district court held that Ms. McGuire-Mollica failed to exhaust because Ms. McGuire-Mollica's Form BP-11 never made it from the prison mailroom to the BOP General Counsel. Regardless of the reason for the breakdown in the grievance process, BOP regulations do not put the burden of ensuring proper delivery of the mail on Ms. McGuire-Mollica, nor could they. Ms. McGuire-Mollica had no control over what happened to her Form BP-11 once she properly submitted it to prison officials for mailing. She even requested and received a certified mail tracking number to confirm that the prison mailroom accepted the form for mailing. The PLRA does not punish a *pro se* prisoner like Ms. McGuire-Mollica for the disappearance of her appeal through no fault of her own, after prison officials received her form for mailing.

Second, the district court held that Ms. McGuire-Mollica failed to exhaust because she did not wait 40 days for the General Counsel to respond to the appeal. But by regulation, the General Counsel's 40-day response period is not triggered

unless an appeal is logged into the BOP's Administrative Remedy Index as received. The district court expressly found the opposite: that Ms. McGuire-Mollica's appeal "was never received" by the BOP General Counsel, and thus never logged into the Index. Doc. 57 at 14. The regulations did not require Ms. McGuire-Mollica to wait 40 days for a response that was never coming because the appeal was never received by the General Counsel in the first place. And in any event, the operative amended complaint was filed well after the 40-day response period would have expired.

In short, Ms. McGuire-Mollica did everything she was required to do under the BOP's regulations to pursue administrative relief as a *pro se* prisoner. That means she exhausted available administrative remedies. Alternatively, if even "properly complet[ing] and mail[ing] her final appeal," Doc. 57 at 14, was not enough to satisfy the BOP's grievance process, then administrative remedies were not available to her, and thus did not need to be exhausted. Either way, the decision below should be reversed.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over Ms. McGuire-Mollica's Eighth Amendment claim under 28 U.S.C. § 1331. The district court entered a final order dismissing Ms. McGuire-Mollica's claim on March 8, 2024. Doc. 57 at 1. Ms. McGuire-Mollica timely noticed her appeal on April 8, 2024. Doc. 62. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1) Whether Ms. McGuire-Mollica satisfied the PLRA's exhaustion requirement by taking all of the steps she was required to take to pursue administrative relief, including properly completing and mailing Form BP-11 to initiate her final appeal.

2) Alternatively, if properly completing and mailing Form BP-11 was not sufficient to exhaust administrative remedies, whether administrative remedies were not available to Ms. McGuire-Mollica for either of two reasons: The BOP's regulations were opaque about what Ms. McGuire-Mollica was required to do in these circumstances, or she was thwarted from appealing by a breakdown in the grievance process that prevented her Form BP-11 from reaching the BOP General Counsel.

STATEMENT OF THE CASE

I. Factual Background

A. Defendants Fail To Treat Ms. McGuire-Mollica's Uterine Fibroid For Years, Causing Extreme Pain, Bleeding, and Complications.

In late September 2016, Ms. McGuire-Mollica was transferred to Federal Correctional Institution-Aliceville ("FCI-Aliceville"). Doc. 1 at 4-5; Doc. 18 at 7.[1]

[1] Ms. McGuire-Mollica, proceeding *pro se*, drafted her amended complaint to respond to issues identified by the magistrate judge in a prior order. *See* Doc. 18 at 1. Some details she provided in the original complaint were omitted from the amended complaint. The district court described the facts as pleaded using both complaints, *see, e.g.*, Doc. 57 at 2, and Ms. McGuire-Mollica does the same in this brief. To the

When she arrived, her iron levels were critically low and she had to receive a blood transfusion. Doc. 18 at 1.

On October 20, 2016, a BOP physician named Richard Griffin diagnosed Ms. McGuire-Mollica with a uterine fibroid—a non-cancerous tumor growing on her uterus. *Id.* at 8. At the time, the fibroid measured approximately six centimeters and was causing abnormal uterine and vaginal bleeding. Doc. 18 at 1, 8. When the fibroid was first diagnosed, it could have been removed through a minimally intrusive laparoscopic procedure. *Id.* at 2.

But the fibroid was not removed. *Id.* Instead, Ms. McGuire-Mollica remained at FCI-Aliceville, where she continued to experience pain and bleeding. *Id.* at 1. In January 2017, she was sent back to Dr. Griffin after she fainted due to blood loss. *Id.* In April 2017, she went to the doctor again because of fainting due to blood loss. *Id.* at 2.

On May 4, 2017—more than six months after Dr. Griffin diagnosed the fibroid—Ms. McGuire-Mollica was evaluated by an outside physician named Ted Cox. *Id.* at 2; Doc. 1 at 5. Dr. Cox found that the fibroid had nearly doubled in size

---

extent any allegations from the original complaint must be formally incorporated into the amended complaint, Ms. McGuire-Mollica requests leave to amend on remand.

to approximately eleven centimeters. Doc. 1 at 5. Dr. Cox recommended that the fibroid be removed surgically. Doc. 18 at 2.

But the fibroid still was not removed. *Id.* Instead, for years, prison officials stood by as multiple ultrasound examinations showed that the fibroid was growing larger. The ultrasounds occurred in April 2018, October 2018, November 2019, and July 2020. *Id.* at 2, 8. By November 2019, the fibroid had more than tripled from its original size, to 21 centimeters. *Id.* at 2.

The ballooning fibroid caused Ms. McGuire-Mollica pain, bleeding, and other serious medical conditions. Between her arrival at FCI-Aliceville in 2016 and her transfer to a different facility in 2021, *see* Doc. 10, Ms. McGuire-Mollica sought medical care from prison officials for pain or bleeding relating to her fibroid dozens of times. *See* Doc. 18 at 2-4. For example, between July 2017 and December 2018, Ms. McGuire-Mollica visited Dr. Griffin eight times for pain and bleeding. *Id.* at 2. In May 2018, she went to Dr. Griffin because of "fever, dehydration, excessive bleeding, and pain." *Id.* In December 2018, she fainted again due to blood loss. *Id.* In February 2019, Ms. McGuire-Mollica saw a prison nurse because her fibroid had caused a hernia, resulting in intense abdominal pain and fever. *Id.* at 4.

Between August 2019 and September 2020, Ms. McGuire-Mollica sought care from another prison doctor named Xingh Li six times because of excessive bleeding and pain. *Id.* at 2-3. For example, on August 26, 2019, Ms. McGuire-

Mollica submitted a sick call request form, rating her pain as an 8 out of 10 on a ten-point scale, with 10 being the "worst pain possible." Doc. 1 at 18. In May 2020, she submitted another sick call request form, reporting "tremendous pain in my uterus" and stating that "nothing" ameliorated the pain. Doc. 1 at 19; *see also* Doc. 18 at 8 (reporting depression and anxiety).

In June 2020, Ms. McGuire-Mollica requested permission to sleep in the bottom bunk of her cell because of the "size of fibroid and pain." Doc. 18 at 4; *see also* Doc. 1 at 20 (sick call request form reporting "pain/excessive bleeding"). A nurse named Sharon Bailey denied that request, forcing Ms. McGuire-Mollica to climb to the top bunk. Doc. 18 at 4-5. One month later, Ms. McGuire-Mollica slipped and fell off the ladder while she was trying to reach the top bunk. Doc. 1 at 21. She landed on her abdomen, causing heavy bleeding and a hernia. *Id.* She submitted a sick call request form, but received no response. *Id.*

That same month, in July 2020, a second outside physician named Dr. Autery examined Ms. McGuire-Mollica and recommended treating the fibroid, including by surgery. *See* Doc. 1 at 22; Doc. 18 at 3. But the fibroid still was not removed. Doc. 18 at 3.

In June 2021, Ms. McGuire-Mollica went to Dr. Li again because the fibroid had caused a hernia. *Id.* The size and weight of the fibroid also caused a

vaginal/uterine prolapse. *Id.* Even so, Dr. Li failed to order that the fibroid be removed. Doc. 18 at 3.

As of the filing of Ms. McGuire-Mollica's operative amended complaint in August 2022, the fibroid weighed between 15 and 20 pounds, and the uterine swelling was the equivalent size of a five-month pregnancy. Doc. 18 at 8. Because prison officials allowed the fibroid to grow so large, the fibroid could not be removed without a hysterectomy, which would require the surgical removal of Ms. McGuire-Mollica's uterus and could result in a scar across her abdomen from "hipbone to hipbone." *Id.*

B. After Seeking Medical Care For Years, Ms. McGuire-Mollica Follows The Steps For Pursuing Administrative Relief.

In 2019, after seeking medical care for years, Ms. McGuire-Mollica began the process for filing an administrative grievance against prison officials for failing to treat her uterine fibroid. The BOP's administrative grievance process contains four levels. First, the prisoner must seek an informal resolution with prison officials. *See* 28 CFR § 542.13 (providing that a prisoner "shall first present an issue of concern informally to staff"). Second, if informal resolution fails, the prisoner must submit a formal request for an administrative remedy using Form BP-9. *See* 28 CFR § 542.14. Third, if the prisoner is not satisfied with the response, the prisoner "may" file an appeal with the appropriate Regional Director using Form BP-10. *See* 28 CFR § 542.15. Finally, if the prisoner is unsatisfied with the Regional Director's response,

the prisoner "may" file a final appeal with the General Counsel of the BOP using Form BP-11. *Id.*[2]

At each stage, the relevant BOP official must respond to a filed request within a specified number of days, and if he does not, the prisoner may treat the non-response as a denial. *See* 28 CFR § 542.18. For example, in the final level of the process, the General Counsel must respond within 40 calendar days once Form BP-11 has been filed. *Id.* For purposes of the BOP's response time, "a Request or Appeal is considered filed on the date it is logged into the Administrative Remedy Index as received." *Id.*

Ms. McGuire-Mollica took every step required of her in the BOP grievance process. First, on October 31, 2019, she filed an "Informal Resolution Form," stating that she had been diagnosed with a "fibroid tumor on [her] uterus" and suffered "severe pain" and bleeding, but received "no treatment." Doc. 1 at 37; *see* Doc. 57 at 2-3. She requested to "see a specialist/surgeon to determine the best course of

[2] Notably, unlike the BOP's regulations governing the first two levels of the process, which use the mandatory language "shall," the BOP's regulations governing appeals use the permissive language "may submit." *Compare* 28 C.F.R. § 542.15(a) ("may submit an Appeal"), *with* 28 C.F.R. § 542.13(a) ("shall first present an issue of concern informally to staff"), *and* 28 C.F.R. § 542.14(c)(4) ("shall date and sign the Request and submit it to the institution staff"); *see Trevari v. Robert A. Deyton Detention Ctr.*, 729 F. App'x 748, 752 (11th Cir. 2018) ("This permissive language is ambiguous about whether an internal appeal is a necessary step to exhaust available remedies, or whether it is merely an optional requirement.").

action, within the next 30 days." Doc. 1 at 37. Prison officials returned her request unresolved on November 1, 2019. *Id.*

Next, at level two of the process, Ms. McGuire-Mollica submitted Form BP-9 on December 4, 2019. Doc. 1 at 38. Again, she asked to be "seen by an outside specialist or surgeon" within 30 days. *Id.* Prison officials confirmed receipt of Form BP-9 but failed to respond by the deadline of January 1, 2020. Doc. 1 at 40. Instead, on February 14, 2020, after Ms. McGuire-Mollica inquired about the status of her Form BP-9, officials told her that her request was "still under review," and that she would be "receiving a response soon." *Id.* at 39.

That response did not come until June 23, 2020—more than six months after she filed Form BP-9. *Id.* at 41. In the response, the acting warden informed Ms. McGuire-Mollica that she had a scheduled appointment with "an OB/GYN specialist," but due to "security considerations," she would "not be told in advance of the date, time, or location of these appointments." *Id.* at 41.

At level three of the process, Ms. McGuire-Mollica appealed the warden's decision by submitting Form BP-10 to the Regional BOP Director on June 26, 2020. Doc. 57 at 3. The Regional Director was required to respond within 30 calendar days, *i.e.*, by July 26, 2020. *See* 28 C.F.R. § 542.18. Even with a maximum 30-day extension, the response was due by August 25, 2020. *See id.*

Instead, the Regional Director did not respond until December 21, 2020, almost six months after Ms. McGuire-Mollica filed Form BP-10. Doc. 47-2 at 3. The Regional Director acknowledged that Ms. McGuire-Mollica's medical records showed "a history of an enlarged uterus with a large fundal fibroid." *Id.* But the Regional Director stated that surgery "was not recommended" by the BOP doctor who saw Ms. McGuire-Mollica in 2020. *Id.*; *but see* Doc. 18 at 3 (noting that outside physician Dr. Autery recommended "Surgery to remove uterus" in July 2020). The Regional Director instructed Ms. McGuire-Mollica that she should "return to sick call" if she experienced "any adverse changes" in her condition. Doc. 47-2 at 3.

Finally, at the last level of the process, Ms. McGuire-Mollica appealed to the BOP General Counsel by completing and submitting Form BP-11. *See* Doc. 1 at 43; Doc. 52 at 6, 20. On the form, she explained that she had sought treatment "for more than 4 years"; that doctors had conducted four ultrasounds and repeatedly recommended surgery; but that prison officials had denied her adequate medical care. Doc. 1 at 43. She asked to be sent to a surgeon and to receive a hysterectomy if the surgeon deemed it appropriate. *Id.*

Ms. McGuire-Mollica submitted Form BP-11 to prison officials for mailing on October 1, 2020. *See* Doc. 1 at 43; Doc. 52 at 6, 20. She did this after the Regional Director's time to respond to her Form BP-10 had expired, allowing her to treat "the absence of a response [as] a denial." *See* 28 C.F.R. § 542.18. She requested and

received a certified mail tracking number from the prison mailroom and noted it on the top of the signed form. Doc. 1 at 43.

According to Defendants, however, the BOP General Counsel never received the form, and Ms. McGuire-Mollica's appeal was never docketed. *See* Doc. 57 at 14. Defendants have not explained what happened to the Form BP-11 after Ms. McGuire-Mollica submitted it to prison officials for mailing.

II. Procedural History

On October 27, 2020, Ms. McGuire-Mollica filed her original *pro se* complaint, alleging an Eighth Amendment claim for deliberate indifference to her serious medical needs, as well as a claim under the Federal Tort Claims Act (FTCA). *See* Doc. 1. On August 5, 2022, the district court dismissed the FTCA claim and permitted Ms. McGuire-Mollica's Eighth Amendment claim to proceed, provided that she file an amended complaint identifying the specific individuals who demonstrated deliberate indifference to her medical needs. Doc. 17 at 1.

On July 1, 2022, Ms. McGuire-Mollica, still acting *pro se*, filed the operative amended complaint, responding to the instructions of the district court to identify "employees of the FBoP [who] were involved in the violation of her Constitutional Rights." *See* Doc. 18 at 1. The district court then ordered Defendants to file a special report addressing Ms. McGuire-Mollica's claims. *See* Doc. 24 at 4. Defendants were

instructed to attach "the sworn statement of all persons having knowledge of the facts relevant to the claims or any investigation of the claims." *Id.*

More than a year later, on October 19, 2023, Defendants filed their special report, which included both a motion to dismiss on PLRA exhaustion grounds and a motion for summary judgment on the merits. *See* Doc. 47 at 1. The special report included sworn statements from each Defendant and, according to Defendants, "[a]ll documents relevant to the claims and defenses." *Id.* at 1-2.

In the motion to dismiss, Defendants argued that Ms. McGuire-Mollica failed to exhaust available administrative remedies because she "did not appeal the response from the Regional Office to the General Counsel level." *Id.* at 5. In support, Defendants cited two documents. First, Defendants cited a printout from the BOP's electronic records database ("SENTRY") for Ms. McGuire-Mollica's administrative grievance. *See* Doc. 47-3 at 2. Second, Defendants cited a declaration from a BOP Legal Assistant, Renee McPherson, explaining how to read the SENTRY printout. *See* Doc. 47-4 at 1.

According to Ms. McPherson, the SENTRY database records a "Remedy ID" that reflects the stages that an administrative grievance has reached. *Id.* at 2. A Remedy ID ending in "F1," for example, indicates the first time the prisoner sought relief at the facility or institutional level. *Id.* Additional attempts to seek relief at that stage are denoted by "F2" and "F3." *Id.* A Remedy ID ending in "R1" signifies an

appeal to the Regional Office, and "A1" signifies an appeal to the BOP General Counsel. *Id.*

According to the SENTRY printout, Ms. McGuire-Mollica's grievance had Remedy IDs signifying the first three levels of the grievance process, but not the final appeal to the General Counsel. *See* Doc. 47-3 at 2 (Remedy ID 1000103-F1); *id.* at 3 (Remedy ID 1000103-R1); *id.* at 4 (Remedy ID 1000103-R2). Because there was no Remedy ID ending in "A1," Ms. McPherson stated that Ms. McGuire-Mollica "did not appeal this administrative remedy past the Regional Office." Doc. 47-4 at 2.

In response, Ms. McGuire-Mollica explained, as she had in her initial complaint, that she "fil[ed] the Form 11" by completing and submitting it to prison officials for mailing. Doc. 52 at 6, 20; *see* Doc. 1 at 11 ("form 11 filed on 10/01/2020; sent certified #7020 0640 0000 8156 3341"); *id.* at 43 (signed copy of Form BP-11 with certified mail tracking number). This was all she could do to seek "administrative remedies that were available to her," as she "cannot control the mail, whether the FBoP's employees actually process or respond to the form, or even when or if the remedy is logged into the FBoP system." Doc. 52 at 6.

Ms. McGuire-Mollica also explained that her original complaint identified evidence that prison mailroom staff had repeatedly failed to process and deliver her mail properly around the time her Form BP-11 disappeared. *Id.* at 7. For example,

shortly after submitting her Form BP-11, Ms. McGuire-Mollica emailed the warden about the mailroom being "at least three weeks behind" in distributing mail. Doc. 1 at 49. She also expressed concern that she had not received several pieces of legal mail she was expecting in July and September 2020 because the mail was either lost or misplaced once it arrived at the prison. *Id.* In addition, on October 7, 2020, Ms. McGuire-Mollica signed an affidavit stating that prison officials were tampering with her legal mail. Doc. 1 at 47-48. She identified numerous instances from May to September 2020 in which she had not received legal mail, or federal courts and other recipients had not received mail she had submitted to the prison mailroom for mailing. *Id.*

Defendants did not dispute Ms. McGuire-Mollica's evidence that she properly submitted her Form BP-11 to prison officials for mailing. *See* Doc. 56 at 2-4. Nor did Defendants offer any explanation for what happened to Ms. McGuire-Mollica's Form BP-11 after it was received by the prison mailroom. Instead, Defendants argued that, even accepting that Ms. McGuire-Mollica submitted her form to the prison mailroom, she had not "gone *through*" the final appeal because her appeal was never docketed and she did not wait for the BOP General Counsel's time to respond to docketed appeals to expire. *Id.* at 3-4.

On March 8, 2024, the district court dismissed Ms. McGuire-Mollica's complaint under the PLRA's exhaustion requirement, 42 U.S.C. § 1997e(a). *See*

Doc. 57. The district court evaluated exhaustion according to the two-step process laid out in *Shivers v. United States*, 1 F.4th 924 (11th Cir. 2021): first, on the face of the pleadings, and second, by making limited factual findings concerning exhaustion. Doc. 57 at 9. At the first step, the district court concluded that Defendants were "not entitled to have the complaint dismissed" on the pleadings because Ms. McGuire-Mollica alleged that she "mailed her final appeal to the General Counsel." *Id.* at 12-13; *see* Doc. 1 at 11; Doc. 18 at 7.

At the second step, the district court made a factual finding that, consistent with the pleadings, Ms. McGuire-Mollica "properly completed and mailed her final appeal." Doc. 57 at 14. The district court also made a second finding that the appeal "was never 'logged into the Administrative Remedy Index as received.'" *Id.* The district court made no findings regarding what happened to Ms. McGuire-Mollica's Form BP-11 after she submitted it to the prison mailroom. *Id.*

Based on the two findings, the district court held that Ms. McGuire-Mollica failed to exhaust administrative remedies. Citing the regulation governing the BOP's required response time for docketed appeals, the district court reasoned that "[b]ecause her appeal was never received and logged into the Administrative Remedy Index, it was never considered 'filed.'" *Id.* As a result, although Ms. McGuire-Mollica had done everything she was required to do to initiate the final appeal, the district court concluded that she had not exhausted that level of review.

Id. In addition, the district court reasoned that, even if the appeal had reached the BOP General Counsel, Ms. McGuire-Mollica filed her original complaint before "the General Counsel's time to respond" to the appeal—which was never received in the first place—would have expired. *Id.* at 14-15. Accordingly, the district court granted the motion to dismiss and denied the motion for summary judgment as moot. *Id.* at 15.

III. Standard of Review

This Court reviews *de novo* the district court's dismissal for failure to exhaust administrative remedies under the PLRA. *See Miller v. Tanner*, 196 F.3d 1190, 1192 (11th Cir. 1999). This Court reviews the district court's factual findings relating to exhaustion for clear error. *See Shivers*, 1 F.4th at 936 n.9.

SUMMARY OF ARGUMENT

I.A. Ms. McGuire-Mollica exhausted available administrative remedies by taking every step required of her by "the applicable procedural rules." *Sims v. Sec'y, Fla. Dep't of Corr.*, 75 F.4th 1224, 1230 (11th Cir. 2023). As the district court expressly found, Ms. McGuire-Mollica "properly completed and mailed her final appeal." Doc. 57 at 14. The fact that the appeal went "unresolved through no apparent fault of [her] own" does not affect whether she did what she was required to do to pursue administrative relief. *Dole v. Chandler*, 438 F.3d 804, 811 (7th Cir.

2006). Ms. McGuire-Mollica exhausted available administrative remedies because she followed the "administrative rules to the letter." *Id.*

I.B. The district court was wrong to punish Ms. McGuire-Mollica for the disappearance of her Form BP-11 after she submitted it to prison officials for mailing. The district court relied on the BOP regulation defining the BOP General Counsel's mandatory response time for docketed appeals. *See* 28 C.F.R. § 542.18. But that regulation does not hold Ms. McGuire-Mollica responsible for prison officials' mailing of her Form BP-11, nor could it. As Ms. McGuire-Mollica explained below, *pro se* prisoners "cannot control the mail" or what happens to their grievance forms once they are received by the prison mailroom. Doc. 52 at 6; *see Houston v. Lack*, 487 U.S. 266, 271 (1988) ("Unskilled in law, unaided by counsel, and unable to leave the prison, a *pro se* prisoner's control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access—the prison authorities."). Unlike in *Shivers*, the district court here expressly found that Ms. McGuire-Mollica "properly completed and mailed her final appeal." Doc. 57 at 14. That means that Ms. McGuire-Mollica fulfilled her obligations to exhaust available administrative remedies.

I.C. The district court also erred by dismissing Ms. McGuire-Mollica's claim because her original complaint was filed before the BOP General Counsel's 40-day period to respond to docketed appeals would have expired. That period does

not apply here because it is triggered only if an appeal is "filed" by being "logged into the Administrative Remedy Index as received." 28 C.F.R. § 542.18. The district court expressly determined the opposite: the appeal was "never received and logged into the Administrative Remedy Index." Doc. 57 at 14. And in any event, even if the response period were applicable, it had long since expired by the time Ms. McGuire-Mollica filed the operative amended complaint.

II. Alternatively, if doing everything Ms. McGuire-Mollica was required to do to initiate a final appeal were not enough, then administrative remedies were not available to her. Among other things, administrative remedies are not available, and thus do not need to be exhausted, if grievance procedures are "so opaque" that they are incapable of use, or if the prisoner is "thwart[ed]" from using the grievance process. *Ross v. Blake*, 578 U.S. 632, 636, 643-44 (2016).

Both circumstances apply here. First, the grievance procedures were opaque about what, if anything, a prisoner is required to do if she properly completes and mails her final appeal, but the BOP General Counsel never receives it. The BOP regulations simply do not "contemplate" that situation. *Williams v. Correction Officer Priatno*, 829 F.3d 118, 124 (2d Cir. 2016). Second, Ms. McGuire-Mollica was thwarted from pursuing a final appeal. Whatever caused her Form BP-11 to disappear, a "breakdown in the grievance process" prevented Ms. McGuire-Mollica from pursuing relief. *Dimanche v. Brown*, 783 F.3d 1204, 1214 (11th Cir. 2015).

ARGUMENT

I. Ms. McGuire-Mollica Satisfied The PLRA's Exhaustion Requirement By Properly Completing And Mailing Her Final Appeal.

A. Ms. McGuire-Mollica Did Everything The BOP's Grievance Process Rules Required Her To Do To Pursue A Final Appeal.

The district court's determination that Ms. McGuire-Mollica "properly completed and mailed her final appeal" resolves the question of whether she exhausted available administrative remedies. Doc. 57 at 14. To satisfy the PLRA's exhaustion requirement, a prisoner must follow the steps in the administrative grievance process "in accordance with the applicable procedural rules." *Sims*, 75 F.4th at 1230. Because the requirements for exhaustion "are defined by the prison grievance process itself," a prisoner satisfies the exhaustion requirement by taking the steps the grievance process requires. *Id.* ("[N]othing in Chapter 33-103 suggests that an inmate must take any steps other than the ones outlined [in that provision].").

Once a prisoner does what he is required to do, he has exhausted available administrative remedies, even if prison officials do not process his properly filed request. For example, in *Dole*, the plaintiff placed his grievance form in the "chuckhole" of his cell for a prison guard to pick up and deliver. 438 F.3d at 807. The prisoner later inquired about the status of his grievance and was informed that there was no record of it. *Id.* Although it was undisputed that the plaintiff had submitted the grievance form to prison officials, the district court still dismissed the

case for failure to exhaust. *Id*. at 808. The Seventh Circuit reversed, holding that the plaintiff had fulfilled his obligations for exhaustion because he followed the "administrative rules to the letter," and his request for administrative relief went "unresolved through no apparent fault of his own." *Id*. at 811.

Here, as the district court expressly found, Ms. McGuire-Mollica likewise followed the BOP regulations "to the letter." *Id.*; *see* Doc. 57 at 14. To initiate a final appeal, a federal prisoner must "submit an Appeal on the appropriate form (BP-11) to the General Counsel." 28 C.F.R. § 542.15(a). Ms. McGuire-Mollica submitted her appeal on a properly completed Form BP-11 by providing the form to prison officials for mailing through the prison mailroom. *See* Doc. 52 at 20; Doc. 1 at 43. She even obtained a certified mail tracking number, confirming that prison officials in the mailroom accepted her Form BP-11 for delivery to the General Counsel. Doc. 1 at 43.

Whatever the cause of the breakdown that prevented Ms. McGuire-Mollica's appeal from reaching the BOP General Counsel, it was "through no apparent fault" of Ms. McGuire-Mollica's. *Dole*, 438 F.3d at 811. By "properly complet[ing] and mail[ing] her final appeal," Doc. 57 at 14, Ms. McGuire-Mollica exhausted available administrative remedies.

B. The Breakdown That Caused The BOP General Counsel Not To Receive Ms. McGuire-Mollica's Appeal Does Not Change The Fact That She Exhausted Administrative Remedies.

Despite recognizing that Ms. McGuire-Mollica "properly completed and mailed her final appeal," the district court held that she failed to exhaust because the BOP General Counsel never docketed her appeal. Doc. 57 at 14. But the breakdown in the grievance process that caused the BOP General Counsel not to receive Ms. McGuire-Mollica's appeal does not change the fact that she did what the grievance process rules required her to do to exhaust administrative remedies. *See Dole*, 438 F.3d at 811-13.

The grievance process rules recognize, as Ms. McGuire-Mollica stated below, that she "cannot control the mail" or what happened to her appeal once she submitted it to the prison mailroom for mailing. Doc. 52 at 6; *see Houston*, 487 U.S. at 271 ("Unskilled in law, unaided by counsel, and unable to leave the prison, a *pro se* prisoner's control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access—the prison authorities."). For this reason, nothing in the BOP's regulations required a *pro se* prisoner to follow her mail through the prison mailroom and beyond—which she obviously could not do—and see to it personally that the BOP General Counsel received and docketed the appeal. The regulations simply required Ms. McGuire-Mollica to "submit" the Form BP-11, 28 C.F.R. § 542.15(a), which she properly did

using the prison mailroom. The PLRA's exhaustion requirement demands nothing more. *See Sims*, 75 F.4th at 1231 (rejecting argument that prisoner should have taken additional steps not required by grievance procedures); *Jones v. Bock*, 549 U.S. 199, 218 (2007) (rejecting requirement that prisoner name each official because "the MDOC policy did not contain any provision specifying who must be named in a grievance").

The district court relied primarily on a BOP regulation providing that, "[i]f accepted, a Request or Appeal is considered filed on the date it is logged into the Administrative Remedy Index as received." 28 C.F.R. § 542.18; *see* Doc. 57 at 13-14. The district court reasoned that, because Ms. McGuire-Mollica's appeal was not logged into the Index, "it was never considered 'filed'" for purposes of exhaustion. Doc. 57 at 14.

The BOP's regulation defining when an appeal is "filed," however, did not create an obligation that Ms. McGuire-Mollica needed to satisfy in order to exhaust available administrative remedies. Rather, the regulation establishes *prison officials*' obligations by defining the starting point for the period in which they must respond to docketed appeals, after which the prisoner may "consider the absence of a response to be a denial at that level." 28 C.F.R. § 542.18. Nothing in the regulation imposes an impossible requirement that prisoners ensure that an appeal submitted to the prison mailroom is properly delivered to and logged by the BOP General

Counsel. Nor does the regulation require a prisoner to take any action in response to the disappearance of her Form BP-11 after prison officials accepted it for mailing. *See Turner v. Burnside*, 541 F.3d 1077, 1083 (11th Cir. 2008) (rejecting requirement that a plaintiff "resubmit the same grievance to the same official who destroyed the grievance when it was properly filed"); *White v. Staten*, 672 F. App'x 919, 923 (11th Cir. 2016) (rejecting requirement that a plaintiff "resubmit the same grievance when the first grievance was properly filed and the failure to process the grievance is attributable to actions of prison officials"). As a result, the fact that the BOP General Counsel did not docket Ms. McGuire-Mollica's appeal cannot be treated as a failure by her to exhaust.

The district court also relied on *Shivers*, *see* Doc. 57 at 11, but that case differs in a critical respect: Unlike here, the district court in *Shivers* made a factual "finding that [the plaintiff] failed to file his BP-11 form." *Shivers*, 1 F.4th at 936. Before the district court, the plaintiff in *Shivers* did not provide sufficient evidence that he actually submitted a properly completed Form BP-11; he could only produce an unsigned copy of the form, and his other evidence that he properly submitted the form was "not credible." *Shivers v. United States*, No. 5:16-cv-276, Doc. 34 at 17 (M.D. Fla. April 14, 2017). On the other hand, the government provided a declaration by a BOP paralegal showing that no Form BP-11 was logged in the BOP's database. *Shivers*, 1 F.4th at 936. Based on both the absence of a database

record and the plaintiff's own evidence, including the unsigned form, the district court determined that the plaintiff "failed to file his BP-11 form," and this Court relied on that factual finding to conclude that he failed to exhaust administrative remedies. *Id.* (upholding the district court's findings, including that "the form he submitted" was "unsigned" and thus "would not have been acceptable even if it had been received").

Here, in contrast, Defendants never disputed Ms. McGuire-Mollica's evidence that she properly completed and submitted her Form BP-11 for mailing to the General Counsel, and the district court expressly found that Ms. McGuire-Mollica "properly completed and mailed her final appeal." Doc. 57 at 14; *see* Doc. 1 at 43 (signed and dated copy of Ms. McGuire-Mollica's Form BP-11, including certified mail tracking number). *Shivers* does not govern these circumstances. *See White*, 672 F. App'x at 923 (concluding a plaintiff would have exhausted remedies if his "grievance was properly filed," even though it was not processed by prison officials). Whatever caused the disappearance of the Form BP-11 after Ms. McGuire-Mollica submitted it to the prison mailroom for mailing, Ms. McGuire-Mollica did what she was required to do to exhaust available administrative remedies.

C. Ms. McGuire-Mollica Did Not Need To Wait 40 Days For The BOP To Respond To An Appeal They Never Received.

The district court also concluded that Ms. McGuire-Mollica did not exhaust administrative remedies because she filed her original complaint two weeks before the General Counsel's 40-day window to respond would have expired, had the General Counsel received the appeal. Doc. 57 at 14-15. In other words, despite recognizing that the General Counsel never received the appeal and thus would never have responded to Ms. McGuire-Mollica—whether she waited 40 days or 40 years—the district court held that Ms. McGuire-Mollica was nonetheless required to wait for 40 days before filing suit. The district court's reasoning was incorrect for two independent reasons.

First, the 40-day response period simply does not apply here because, under the plain language of the BOP's regulations, the response period is triggered only if an appeal is "filed" in the Administrative Remedy Index. *See* 28 C.F.R. § 542.18 ("Once filed, response shall be made . . . by the General Counsel within 40 calendar days."). As the district court expressly determined, that triggering condition never occurred: The appeal "was never 'logged into the Administrative Remedy Index as received,'" and thus "was never considered 'filed.'" Doc. 57 at 14. The BOP regulations do not require prisoners to wait for a response to an appeal that was never received in the first place. *See Williams*, 829 F.3d at 124 ("[I]f the grievance had never been filed, the superintendent would never have received it and the timeline

for her to provide a response within 25 days 'of receipt of the grievance' would never have been triggered").

That is for good reason: It would make no sense to penalize Ms. McGuire-Mollica for not waiting two additional, pointless weeks for a response that was never coming—especially after she spent years seeking medical care from prison officials and an additional year following each step of the administrative grievance process. *See* Doc. 1 at 37 (noting she began the grievance process in October 2019); *id.* at 43 (noting she submitted her final appeal in October 2020, during the COVID-19 pandemic, and after repeated delays by prison officials in violation of the response-period regulations). Those two weeks would have changed nothing; the General Counsel was never going to respond because he never received the appeal in the first place. *Cf. Trevari v. Robert A. Deyton Detention Ctr.*, 729 F. App'x 748, 753 (11th Cir. 2018) (noting the plaintiff may have exhausted as long as he "did file" his appeal "and received no response"). Barring this suit based on a waiting period that does not apply, and which would be pointless to apply in these circumstances, would serve none of the purposes of the PLRA.

Second, even if the 40-day response period were somehow applicable, Ms. McGuire-Mollica's operative amended complaint was filed well after the 40-day period would have expired on November 10, 2020. *See* Doc. 18 (filed on August 5, 2022); Doc. 57 at 3. It is well-established that, under Federal Rule of Civil

Procedure 15, an amended complaint supersedes the original complaint. *See, e.g.*, *Fritz v. Standard Sec. Life Ins. Co. of N.Y.*, 676 F.2d 1356, 1358 (11th Cir. 1982); *Daker v. Bryson*, 841 F. App'x 115, 122 (11th Cir. 2020). The purpose of Rule 15 is "to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities." 6 Wright, Miller & Kane, Fed. Prac. & Proc. § 1471 (3d ed. 2019). Rule 15(d) expressly allows the court to "permit supplementation even though the original pleading is defective in stating a . . . defense," like exhaustion under the PLRA. Fed. R. Civ. P. 15(d). Thus, "[i]t has long been the rule . . . that where a party's status determines a statute's applicability, it is his status at the time of the amendment and not at the time of the original filing that determines whether a statutory precondition to suit has been satisfied." *Garrett v. Wexford Health*, 938 F.3d 69, 82 (3d Cir. 2019).

The Supreme Court has stressed that courts should not interpret the PLRA to overrule the normal operation of the Federal Rules of Civil Procedure without an explicit statutory instruction. *See Jones*, 549 U.S. at 216 (stating that "when Congress meant [for the PLRA] to depart from the usual procedural requirements, it did so expressly"). The PLRA contains no such instruction with respect to Rule 15. To the contrary, the Supreme Court has indicated that the PLRA embraces Rule 15. *See Ramirez v. Collier*, 595 U.S. 411, 423 (2022) (noting that an exhaustion defect in the original complaint "was arguably cured" by the operative amended

complaint); *Saddozai v. Davis*, 35 F.4th 705, 710 (9th Cir. 2022) (emphasizing that the Supreme Court in *Ramirez* cited the Ninth Circuit's precedent holding that exhaustion is evaluated at the time of the amended complaint). After all, deviating from the normal operation of Rule 15 would "promote the precise inefficiency the PLRA was designed to avoid—requiring courts to docket, assign and process two cases where one would do." *Saddozai*, 35 F.4th at 710. The PLRA was meant to ensure "fewer and better prisoner suits." *Jones*, 549 U.S. at 203. It was not designed to force a plaintiff to dismiss one suit in order to file a second, duplicative suit, rather than simply filing an amended complaint.

Accordingly, courts have properly held that exhaustion must be evaluated at the time of the operative amended complaint. *See Saddozai*, 35 F.4th at 709 (recognizing that "[i]n PLRA cases, amended pleadings may supersede earlier pleadings" for purposes of exhaustion); *Showers v. Rodgers*, No. 23-1241, 2024 WL 1877028, at *3 (3d Cir. Apr. 30, 2024) ("Because Showers supplemented his complaint in May 2021, that is the relevant time for evaluating the failure-to-exhaust defense."). The unpublished decision to the contrary in *Smith v. Terry*, 491 F. App'x 81 (11th Cir. 2012), is neither binding nor persuasive. The *Smith* panel relied on *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000), but *Harris* addressed the separate question of whether the PLRA applies *at all* if a plaintiff was a prisoner when he filed the original complaint, but later filed an amended complaint after

being released from prison. *Harris* held that the PLRA continues to apply because the PLRA governs suits by prisoners who were confined at the time the actions were "brought." *Id.* at 981.

Here, all parties agree that the PLRA, including its exhaustion requirement, applies. The only question is whether that requirement should be evaluated at the time of the operative amended complaint, pursuant to the normal operation of Rule 15. *Harris* identified no express instruction in the PLRA to override Rule 15, nor could it. Accordingly, even if Ms. McGuire-Mollica was required to wait 40 days for a response—a response that was never coming, and has never come—she completed the waiting period by the time of the operative amended complaint. As a result, the district court's decision must be reversed.

II. Alternatively, Ms. McGuire-Mollica Adequately Pled That Administrative Remedies Were Not Available To Her.

Alternatively, if doing everything Ms. McGuire-Mollica was required to do was not enough to exhaust administrative remedies, then those remedies were not available to her. Under the PLRA, a "prisoner need not exhaust remedies if they are not 'available,'" *i.e.*, if they are not "accessible" and "capable of use" in a "real-world" sense. *Ross*, 578 U.S. at 636, 642-43; *see Trevari*, 729 F. App'x at 752 ("A remedy must be available before a prisoner is required to exhaust it."). Circumstances in which remedies are not available include those in which (1) the grievance process "operates as a simple dead end," (2) the procedures are "so

opaque" that they are incapable of use, and (3) the prisoner is "thwart[ed]" from using the process. *Ross*, 578 U.S. at 643-44; *see Williams*, 829 F.3d at 123 n.2 (noting this list of categories is not exhaustive).

At least two of *Ross*'s express categories of unavailability apply here. First, the BOP's regulations governing the grievance process are opaque about what, if anything, a prisoner must do in circumstances like these, where the prisoner "properly completed and mailed her final appeal," Doc. 57 at 14, but the appeal was never received by the BOP General Counsel.

Williams addressed the same type of situation. There, the plaintiff gave a grievance form to a corrections officer to forward to the grievance office, as the plaintiff was required to do by regulation. 829 F.3d at 120-21. A week later, however, the plaintiff learned that the prison superintendent never received the form. *Id.* at 121. When the plaintiff brought suit to challenge the same misconduct, the defendants argued that the plaintiff failed to appeal the grievance that was never filed with the grievance office. *Id.* at 124.

The Second Circuit rejected that argument, concluding that the grievance process was opaque because it did not "contemplate the situation in which [the plaintiff] found himself." *Id.* Rather, the grievance process only contemplated "appeals of grievances that were actually filed." *Id.* For a prisoner like the plaintiff, whose grievance was never filed even though he properly submitted it to prison

officials, the process was "prohibitively opaque, such that no inmate could actually make use of it." *Id.* at 126; *see also Medina v. Napoli*, 725 F. App'x 51, 53 (2d Cir. 2018).

The same is true here. The very regulation on which the district court relied prescribed a 40-day response period only for appeals that are "filed" by being "logged into the Administrative Remedy Index as received." 28 C.F.R. § 542.18. For a plaintiff like Ms. McGuire-Mollica, whose appeal was never logged even though she properly submitted it to the prison mailroom for mailing to the BOP General Counsel, the regulations "are so opaque and confusing that they were, 'practically speaking, incapable of use.'" *Williams*, 829 F.3d at 126.

Second, Ms. McGuire-Mollica was thwarted from pursuing her final appeal. A prisoner is thwarted when a physical or practical "interference" inhibits her "pursuit of relief" through the administrative grievance process. *Ross*, 578 U.S. at 644. That interference can be intentional, as in the case of "machination, misrepresentation, or intimidation." *Id.* But unintentional obstacles and interferences can also render administrative remedies unavailable. *See, e.g.*, *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010) (finding remedies unavailable regardless of whether prison officials' error was "innocent or otherwise"). The key is that there is a "breakdown in the grievance process" that prevents the plaintiff from seeking administrative relief. *Dimanche*, 783 F.3d at 1214.

Here, the district court's two factual findings—that Ms. McGuire-Mollica "properly completed and mailed her final appeal," but "her appeal was never received," Doc. 57 at 14—mean that there must have been a breakdown in the grievance process sometime after Ms. McGuire-Mollica submitted her Form BP-11 to the prison mailroom. The district court never made factual findings determining what, exactly, was the cause of the breakdown, nor did it need to. Because the district court determined that Ms. McGuire-Mollica did everything she was supposed to do to "properly" submit her appeal, *id.*, the breakdown could not have been her fault. Whatever ultimately caused the appeal not to reach the General Counsel, an "interference" with Ms. McGuire-Mollica's "pursuit of relief render[ed] the administrative process unavailable." *Ross*, 578 U.S. at 644.

Moreover, Ms. McGuire-Mollica's allegations and evidence—which Defendants never disputed—raise a reasonable inference that the breakdown occurred in the prison mailroom. *See Hedin v. Castillo*, 723 F. App'x 526, 527 (9th Cir. 2018) ("[I]f Hedin properly mailed his BP-11 appeals, it gives rise to an inference that BOP staff . . . improperly failed to process them."). The last people known to have handled Ms. McGuire-Mollica's Form BP-11 were the officials in the FCI-Aliceville mailroom, to whom Ms. McGuire-Mollica properly submitted the form. *See* Doc. 1 at 11, 43; Doc. 52 at 6, 20. She even obtained a certified mail tracking number, confirming that mailroom officials accepted her Form BP-11 for

mailing. Doc. 1 at 43.[3] Defendants have never offered any explanation for what happened to Ms. McGuire-Mollica's Form BP-11 once prison officials took control of it. *Cf. Jackson v. Esser*, --- F.4th ---, 2024 WL 3174880, at *5 (7th Cir. June 26, 2024) (noting that "prison officials needed to 'do more than point to a lack of evidence'" about what happened to grievances a prisoner filed).

Ms. McGuire-Mollica also submitted an affidavit identifying specific instances in which mailroom officials delayed or failed to deliver her legal mail in 2020, when Ms. McGuire-Mollica submitted her Form BP-11. *See* Doc. 1 at 47-49. Among other things, Ms. McGuire-Mollica mailed several forms to federal courts through the prison mailroom that, like her Form BP-11, never reached the intended recipients. *See id.* at 47; *see also Eaton v. Blewett*, 50 F.4th 1240, 1246 (9th Cir. 2022) ("Delays in processing and failures to respond to pending grievances are circumstances signaling the practical unavailability of administrative remedies.").[4]

---

[3] When the tracking number (7020-0640-0000-8156-3314) is entered in the U.S. Postal Service's tracking website, the system reports that a label was created for her mailing—presumably by officials in the prison mailroom—but the label is "not yet in system." *See* U.S. Postal Service Tracking, https://tools.usps.com/go/TrackConfirmAction?tRef=fullpage&tLc=2&text28777=&tLabels=70200640000081563314%2C&tABt=false.

[4] *See also Fordley v. Lizarraga*, 18 F.4th 344, 353 (9th Cir. 2021) (finding that a prisoner had exhausted remedies after the prison failed to assign his grievance a tracking number and later lost the grievance form); *Andres v. Marshall*, 867 F.3d 1076, 1069 (9th Cir. 2017) ("When prison officials improperly fail to process a prisoner's grievance, the prisoner is deemed to have exhausted available administrative remedies."); *Meador v. Hammer*, No. 2:11-cv-3342, 2013 WL

At this stage, Ms. McGuire-Mollica has demonstrated that administrative remedies were unavailable. *See Baughman v. Harless*, 142 F. App'x 354, 359 (10th Cir. 2005) ("[U]nder the circumstances presented here, grievance appeals may have become unavailable through the actions or inactions of the prison mail room."); *Brown v. Drew*, 452 F. App'x 906, 908 (11th Cir. 2012) (finding remedies unavailable because of the BOP's "delay in delivering the response from the Regional Office").[5]

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision.

Dated: July 11, 2024

Respectfully Submitted,

s/ Gregory Cui

Christine Monta
Gregory Cui
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H St. NE, Suite 275
Washington, DC 20002
(202) 869-3434
christine.monta@macarthurjustice.org
gregory.cui@macarthurjustice.org

753486, at *3, *7 (E.D. Cal. Feb. 27, 2013) (finding the prison's internal mail system suffered from "delay and dysfunction" such that the process was unavailable).

[5] To the extent this Court determines that any additional factfinding is necessary to determine whether administrative remedies were unavailable, the proper course would be to remand to the district court to make those determinations in the first instance.

Phillip Moore
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
160 East Grand Avenue, 6th Floor
Chicago, IL 60611
(202) 869-3438
phillip.moore@macarthurjustice.org

Counsel for Plaintiff-Appellant
Terri McGuire-Mollica

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7) because, excluding the parts of the document exempted by Rule 32(f), this document contains 8,415 words.

This document complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it was prepared in 14-point Times New Roman font.

Date: July 11, 2024

s/ Gregory Cui
Gregory Cui

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ Gregory Cui
Gregory Cui