

21-1303-pr
Romano v. Ulrich et al.

1
2 UNITED STATES COURT OF APPEALS
3 FOR THE SECOND CIRCUIT

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5
6 August Term, 2021

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8 (Argued: May 26, 2022

Decided: September 15, 2022)

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10 Docket No. 21-1303-pr
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14 ANTHONY ROMANO,

15
16 *Plaintiff-Appellant,*

17
18 v.

19
20 KEVIN ULRICH, C.O., JOSEPH CIANCI, C.O.,
21 GARY COVIELLO, C.O., DANIEL LEONARD, C.O.,
22 ROY BELL, C.O., GREGORY CARNEY, C.O.,
23 JEFFREY HAZARD, BRIAN FEENEY, JEFFREY
24 LACAPRUCCIA, JEFFREY MILLER, MARK
25 CUNNINGHAM,

26
27 *Defendants-Appellees.*

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29 _____
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31 Before: LIVINGSTON, *Chief Judge*, POOLER, and SACK, *Circuit Judges*.
32

1 Sinatra, Jr., J.) granting summary judgment to defendant correction officers on
2 his 28 U.S.C. § 1983 claim for excessive force.

3 Romano alleges that while he was incarcerated at the Attica Correctional
4 Facility in New York, a facility run by the New York Department of Corrections
5 and Community Supervision (“DOCCS”), he was beaten by corrections officers
6 who were attempting to break up a fight. Romano was then moved from his cell
7 to the infirmary to recover from his wounds. From there, he was transferred first
8 to a mental health observation cell, then to the Central New York Psychiatric
9 Center (“CNYPC”) in the custody of the New York State Office of Mental Health
10 (“OMH”). During his stay at CNYPC, Romano attempted to file a grievance for
11 the alleged beating, but the grievance was refused for being untimely, for not
12 being filed at the DOCCS facility at which he was housed, and because he was
13 not allowed to file grievances with DOCCS while in OMH custody.

14 Romano challenged that finding in federal court, arguing that while the
15 New York administrative code governing the filing of grievances for inmates
16 provided him with twenty-one days to file a grievance, he was transferred to
17 OMH custody after just thirteen days, rendering his administrative remedy
18 unavailable to him. The district court granted defendants’ first motion for

1 summary judgment on the grounds that because Romano had thirteen days to
2 file his grievance, the administrative remedy was sufficiently available. *See*
3 *Romano v. Ulrich*, No. 13-cv-633, 2017 WL 3701972, at *4 (W.D.N.Y. Aug. 28, 2017).
4 On appeal, a panel of this Court vacated and remanded that decision. *Romano v.*
5 *Ulrich*, 773 F. App'x 654 (2d Cir. 2019) (summary order). We observed that under
6 N.Y. Correction Law § 402, it appeared that “Romano should have received at
7 least five days’ notice of his transfer” to OMH custody, which may have placed
8 him on notice that he would be unable to file a grievance. *Id.* at 656. We
9 remanded for further discovery on that issue. *Id.* at 657.

10 However, on remand, the parties agreed that Romano was transferred to
11 OMH custody pursuant to an emergency provision of N.Y. Correction Law and
12 that, accordingly, he received no advance notice. The district court relied on its
13 prior analysis in again granting summary judgment to defendants, holding that
14 the administrative remedy was not “unavailable” to Romano and therefore he
15 was not excused from exhausting the remedy. *Romano v. Ulrich*, No. 13-cv-633,
16 2021 WL 1739219, at *1 (W.D.N.Y. Apr. 30, 2021).

17 We conclude that the district court erred in holding that Romano failed to
18 exhaust his administrative remedies. Romano’s transfer out of DOCCS custody

1 served as a “dead end” that effectively rendered his administrative remedy
2 unavailable to him. *Ross v. Blake*, 578 U.S. 632, 643 (2016). Therefore, we reverse
3 the district court’s judgment and remand for further proceedings consistent with
4 this opinion.

5 BACKGROUND

6 I. Factual Background

7 On February 17, 2011, while incarcerated at Attica, Romano was allegedly
8 beaten by corrections officers who were attempting to break up a fight. Romano’s
9 pro se complaint specifically alleges that ten officers took turns kicking and
10 stomping on his body parts, “punching” him in the face several times resulting
11 in four lacerations to his face, a black and blue right eye, as well as a broken right
12 cheek bone that remained “fractured” at the time of filing the grievance on May
13 24, 2013. App’x at 22. After the alleged assault, Romano was removed from the
14 unit and taken to the emergency room.

15 The next day, Romano was moved from his cell to the infirmary, where he
16 was held for five days until February 22, 2011. From February 22 to March 2,
17 Romano was held in an OMH observation cell at Attica. While in the observation
18 cell, Romano was forbidden from keeping a pen due to safety concerns.

1 Although “grievance-program staff regularly visit mental-health observation
2 cells to assist those who seek to submit grievances,” there is no indication that
3 any mental-health staff visited Romano to assist him in filing a grievance.
4 Appellees’ Br. at 5.

5 Romano was evaluated by a physician who filed a Certificate of an
6 Examining Physician dated March 1, 2011 to support the emergency admission
7 of Romano to an OMH facility under N.Y. Correction Law § 402(9). Per this
8 report, Romano suffered from bipolar disorder, paranoia, and other mental
9 health issues. However, the report also stated that Romano’s “[t]hought form is
10 currently linear, pressured, and concrete. He is alert and oriented in all spheres,
11 but concentration ability seems impaired by distractibility by environmental
12 cues.” App’x at 120. On March 2, thirteen days after the alleged beating, Romano
13 was transferred to the CNYPC, where he remained until his September 22
14 transfer to the Great Meadow Correctional Facility.

15 Romano attempted to file a grievance at Attica for the alleged beating in
16 early May 2011, while housed at CNYPC. The grievance was refused for being
17 untimely, because it was not filed at the facility at which he was housed, and
18 because he was not allowed to file grievances with DOCCS while in OMH

1 custody.¹ Romano attempted to file a grievance when he transferred to the Great
2 Meadow Correctional Facility, but that filing was rejected as well. He did not
3 appeal either decision. Romano then brought a Section 1983 action against the
4 defendant corrections officers for excessive force in the United States District
5 Court for the Western District of New York.

6 **II. Procedural Background**

7 On August 28, 2017, Judge Elizabeth Wolford of the Western District of
8 New York granted summary judgment to defendants. The district court held that
9 Romano failed to exhaust his administrative remedies because he did not file his
10 grievance within the twenty-one-day period after the alleged beating as required
11 by DOCCS regulations. *See Romano*, 2017 WL 3701972. The district court reasoned
12 that although Romano did not have twenty-one days before he was moved to
13 CNYPC, where he was prohibited from submitting a grievance, he still “could
14 have filed a grievance” while in the Attica infirmary for the five days
15 immediately after the alleged beating. *Id.* at *4. In any event, the district court

¹ DOCCS has since revised its policy to permit inmates housed at outside agencies, such as OMH, to submit grievances at the prison facility where they were last housed.

1 noted, Romano did not request an exception to the time limit for filing a
2 grievance within forty-five days while he was in custody per DOCCS
3 regulations. *Id.*

4 On appeal, this Court vacated and remanded by summary order. *See*
5 *Romano*, 773 F. App'x 654. However, we did not address the question briefed by
6 the parties: “[w]hether or not DOCCS’s administrative procedures are
7 ‘unavailable’ whenever DOCCS unilaterally and without notice transfers an
8 inmate during a grieving period such that the inmate is no longer able to file a
9 grievance, regardless of DOCCS’s motivation.” *Id.* at 656. Instead, we observed
10 that under N.Y. Correction Law §§ 402(1),(3), it appeared that “a superintendent
11 c[ould not] transfer an inmate out of DOCCS custody for mental health reasons
12 without first receiving a certificate from an examining physician” which was also
13 required to be served on the inmate. *Id.* at 656-57. Therefore, Romano would
14 have received at least five days’ notice of his transfer and should have had an
15 opportunity to contest it. Were that the case, Romano would have had access to
16 information that made clear he would be unable to file a grievance upon his
17 transfer outside of DOCCS, such that Romano could not demonstrate that
18 DOCCS’s procedure for filing his grievance was “unavailable” to him. However,

1 we found the record undeveloped on how this provision regarding notice was
2 implemented, so we remanded for further discovery on Romano’s transfer and
3 what notice he was given. *Id.* at 657.

4 On remand, the matter was referred to Magistrate Judge Michael Roemer.
5 The parties submitted supplemental briefing to address this Court’s concerns.
6 The magistrate judge recommended granting summary judgment to defendants.
7 *Romano v. Ulrich*, No. 13-cv-633, 2021 WL 1740048, at *4 (W.D.N.Y. Mar. 29, 2021),
8 *report and recommendation adopted*, 2021 WL 1739219. The parties agreed that
9 Romano was not transferred out of DOCCS custody pursuant to N.Y. Correction
10 Law § 402(3) as our Court assumed, but that he was actually transferred
11 pursuant to N.Y. Correction Law § 402(9). Under Section 402(9), an inmate may
12 be admitted on an emergency basis to OMH custody, without the procedural
13 protections and notice that are normally afforded to mentally ill inmates prior to
14 commitment. Defendants conceded that Romano did not receive notice of his
15 transfer to OMH custody. The magistrate judge concluded that the “facts do not
16 support the Second Circuit’s proposed theory that Romano may have received
17 advance notice of his OMH transfer and, therefore, may have had the grievance

1 procedures ‘available’ to him for the five days preceding his transfer.” *Romano*,
2 2021 WL 1740048, at *4.

3 Because the district court could not resolve the exhaustion issue in the
4 manner suggested by the Second Circuit, the magistrate judge returned to the
5 original issue: whether Romano’s impromptu transfer to OMH custody render
6 the grievance procedures unavailable to him for exhaustion purposes. The
7 magistrate judge found that Judge Wolford’s reasoning that Romano had
8 thirteen days to submit his grievance still applied. Therefore, the magistrate
9 judge recommended granting summary judgment to defendants on that ground.

10 On April 30, 2021, the district court adopted the report and
11 recommendation in its entirety and granted summary judgment to defendants.
12 *Romano*, 2021 WL 1739219, at *1. Romano appealed.

13 DISCUSSION

14 We review de novo a district court’s decision to grant summary judgment.
15 *See Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). Summary judgment is
16 warranted when, viewing the evidence in the light most favorable to the non-
17 moving party, there is no genuine issue of material fact and the movant is
18 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). We also review de

1 novo a district court's ruling on whether a plaintiff has exhausted administrative
2 remedies under the PLRA. *Williams v. Priatno*, 829 F.3d 118, 121-22 (2d Cir. 2016).

3 **I. Applicable Law**

4 The Prison Litigation Reform Act's ("PLRA") exhaustion provision
5 instructs that "[n]o action shall be brought with respect to prison conditions
6 under section 1983 of this title, or any other Federal law, by a prisoner confined
7 in any jail, prison, or other correctional facility until such administrative
8 remedies as are available are exhausted." 42 U.S.C.A. § 1997e(a). "[I]t is the
9 prison's requirements, and not the PLRA, that define the boundaries of proper
10 exhaustion." *Jones v. Bock*, 549 U.S. 199, 218 (2007). "[A]side from the 'significant'
11 textual qualifier that 'the remedies must indeed be "available" to the prisoner,'
12 there are 'no limits on an inmate's obligation to exhaust[.]'" *Williams*, 829 F.3d at
13 123 (quoting *Ross*, 578 U.S. at 637).

14 *Ross* overturned Second and Fourth Circuit case law that had adopted a
15 "special circumstances" exception to the PLRA's exhaustion requirement,
16 "permitting some prisoners to pursue litigation even when they ha[d] failed to
17 exhaust available administrative remedies." *Ross*, 578 U.S. at 635. The Supreme
18 Court "reject[ed] that freewheeling approach to exhaustion as inconsistent with

1 the PLRA.” *Id.* But the Court also “underscore[d] th[e] statute’s built-in exception
2 to the exhaustion requirement: A prisoner need not exhaust remedies if they are
3 not ‘available.’” *Id.* at 635-36.

4 *Ross* set out “three kinds of circumstances in which an administrative
5 remedy, although officially on the books, is not capable of use to obtain relief.”
6 *Id.* at 643. First, “an administrative procedure is unavailable when (despite what
7 regulations or guidance materials may promise) it operates as a simple dead
8 end—with officers unable or consistently unwilling to provide any relief to
9 aggrieved inmates.” *Id.* Second, “an administrative scheme might be so opaque
10 that it becomes, practically speaking, incapable of use. In this situation, some
11 mechanism exists to provide relief, but no ordinary prisoner can discern or
12 navigate it. As the Solicitor General put the point: When rules are ‘so confusing
13 that . . . no reasonable prisoner can use them,’ then ‘they’re no longer available.’”
14 *Id.* at 643–44. Finally, “the same is true when prison administrators thwart
15 inmates from taking advantage of a grievance process through machination,
16 misrepresentation, or intimidation.” *Id.* at 644.

17 The Second Circuit applied *Ross* shortly after it was handed down.
18 *Williams*, 829 F.3d 118. In *Williams*, an inmate alleged that corrections officers

1 violated his Eighth Amendment rights by brutally beating him for talking back
2 to another officer. *Id.* at 119. Following the assault, Williams was sent to the
3 infirmary. He alleged that while he was living in the special housing unit, he
4 drafted a grievance and gave it to a corrections officer to forward to the
5 grievance office on his behalf in accordance with DOCCS grievance procedures
6 that apply to inmates in the special housing unit. *Id.* at 120-21. A week later,
7 Williams told the prison superintendent who was making rounds in the special
8 housing unit that he had not yet received a response to his grievance. *Id.* A week
9 after that conversation, Williams was transferred to another facility and never
10 received a response to the grievance and alleged that the corrections officer never
11 filed it for him. Williams then brought a Section 1983 action in the Southern
12 District of New York which was dismissed on grounds that, “even if Williams's
13 grievance had never been filed, he still could have appealed the grievance to the
14 next level because the regulations allow an appeal in the absence of a response.”
15 *Id.* at 121.

16 Applying *Ross*, we held that “even if Williams technically could have
17 appealed his grievance,” the “regulatory scheme providing for that appeal [wa]s
18 ‘so opaque’ and ‘so confusing that . . . no reasonable prisoner can use [it].’” *Id.* at

1 124 (quoting *Ross*, 578 U.S. at 643-44). We reasoned that the regulations did not
2 adequately outline the process to appeal or otherwise exhaust administrative
3 remedies where the correction officer never actually filed Williams’s grievance.
4 The regulation provided that Williams could appeal a grievance that did not
5 receive a response if there was no reply within twenty-five days of the
6 superintendent receiving the grievance. But in Williams’s case, the
7 superintendent never received the appeal, so this provision was never triggered.
8 *Id.* Importantly, in a footnote in *Williams*, we “note[d] that the three
9 circumstances discussed in *Ross* do not appear to be exhaustive, given the
10 Court’s focus on three kinds of circumstances that were ‘relevant’ to the facts of
11 that case. Because those circumstances are also relevant to the facts of this case,
12 we do not opine on what other circumstances might render an otherwise
13 available administrative remedy actually incapable of use.” *Id.* at 123 n.2 (citation
14 omitted); *see also Rucker v. Giffen*, 997 F.3d 88, 93 (2d Cir. 2021) (citing the footnote
15 in *Williams*).

16 In *Hayes v. Dahlke*, we considered whether an inmate exhausted his
17 administrative remedies when he completed every required step of the grievance
18 procedure, yet the Central Office Review Committee (“CORC”), the last

1 appellate body within the administrative scheme, failed to respond within the
2 thirty-day time limit prescribed by the regulations. 976 F.3d 259, 268 (2d Cir.
3 2020). We held that “because the DOCCS Inmate Grievance Procedure imposes a
4 mandatory deadline for the CORC to respond, an inmate exhausts administrative
5 remedies when he follows the procedure in its entirety but the CORC fails to
6 respond within the 30 days it is allocated under the regulations.” *Id.* at 270.
7 However, because we decided the rule on exhaustion alone, we “decline[d] to
8 consider whether the administrative procedures here were so ‘opaque’ that they
9 are ‘unavailable’ under *Ross*.” *Id.* at 271. In so doing, we “avoid[ed] wading into
10 the often complex and highly fact-specific inquiries of the unavailability
11 exception.” *Id.*

12 And in *Rucker v. Giffen*, we considered whether an inmate who
13 experienced extreme medical distress and was hospitalized did not exhaust his
14 administrative remedies by failing to file a grievance when he was in a critical
15 medical condition. 997 F.3d at 90. Under the DOCCS regulations, Rucker had five
16 days to file a grievance against the prison staff who failed to take him to the
17 hospital until he was in critically ill condition. However, he remained in the
18 hospital for a month, undergoing numerous serious surgeries which almost

1 caused his death, and he had to be put into a medically induced coma. *Id.* at 91.
2 Rucker finally filed his grievance almost a year after his life-changing
3 hospitalization, but the prison refused to consider it because it was not filed
4 within the five-day timeframe. We held that “administrative remedies are
5 ‘unavailable’ when (1) an inmate’s failure to file for the administrative remedy
6 within the time allowed results from a medical condition, and (2) the
7 administrative system does not accommodate the condition by allowing a
8 reasonable opportunity to file for administrative relief.” *Id.* at 90. Notably, we did
9 not shoehorn this exception into *Ross*’s “three kinds of circumstances” where
10 administrative remedies may be considered unavailable. Instead, we reiterated
11 that *Ross*’s three circumstances are not “exhaustive.” *Id.* at 93.

12 **II. Application**

13 The relevant DOCCS regulation here, N.Y. Comp. Codes R. & Regs.
14 tit. 7, § 701.5 states:

15 *Time limit for filing.* An inmate must submit a complaint to the clerk
16 within 21 calendar days of an alleged occurrence on an inmate
17 grievance complaint form (form #2131). If this form is not readily
18 available, a complaint may be submitted on plain paper. The
19 complaint may only be filed at the facility where the inmate is
20 housed even if it pertains to another facility.

1 7 NYCRR § 701.5(a)(1). There is no dispute that Romano failed to file his
2 grievance within twenty-one calendar days of the alleged beating.

3 In this appeal, Romano argues he was placed into a situation DOCCS
4 grievance regulations “simply d[id] not contemplate” because he still had eight
5 days remaining in his grievance period but was prohibited from submitting a
6 grievance. Appellant’s Br. at 18 (quoting *Williams*, 829 F.3d at 124). By the time
7 Romano was transferred back to DOCCS custody on September 22, 2011, months
8 had passed, and he was well beyond the grievance deadlines.

9 Romano also argues that the lack of notice requires a ruling in his favor
10 under the logic of our prior summary order. In that order, we determined that
11 because Romano should have received five days’ notice of his transfer to OMH
12 with access to information making clear that he would be unable to file a
13 grievance once transferred, then “we cannot see how Romano could show that
14 DOCCS’s procedure was unavailable to him.” *Romano*, 773 F. App’x at 657.
15 Under our rationale, Romano argues, if he did not receive notice of his transfer,
16 then it likewise could not be shown how the grievance procedure was available
17 to him.

1 Defendants respond that even if Romano did not expect circumstances to
2 arise that would shorten his effective deadline to submit a grievance, he still had
3 a reasonable opportunity to submit a grievance because Romano had thirteen
4 days before he was transferred. Defendants also contend that Romano’s proposal
5 creates an exception to the “ordinary rule that the person subject to a filing
6 deadline bears the risk of his or her own delay.” Appellees’ Br. at 21. Finally,
7 defendants argue that Romano’s proposed rule is overbroad because there are
8 other circumstances in which an inmate’s time to submit a grievance is cut short,
9 for example, a “grievant might injure himself, the prison might go into
10 lockdown, or the inmate while still technically in DOCCS custody could
11 unexpectedly remain at an outside medical facility.” Appellees’ Br. at 21.

12 We agree with Romano and reverse the district court’s conclusion that
13 Romano failed to exhaust his remedies. Romano’s transfer out of DOCCS
14 custody cut short his time to file a grievance which rendered the remedy
15 “unavailable” to him.

16 An administrative procedure is unavailable when “it operates as a simple
17 dead end—with officers unable or consistently unwilling to provide any relief to
18 aggrieved inmates.” *Ross*, 578 U.S. at 643. In *Ross*, the Supreme Court provided

1 the example of a prison handbook that directs inmates to submit their grievances
2 to a particular administrative office that then disclaims the capacity to consider
3 those petitions. The procedure is not then “capable of use” for its purpose. *Id.*

4 This is precisely the situation here. Romano’s transfer to OMH custody
5 rendered him unable to file any grievance against DOCCS even though he was
6 well within the twenty-one-day time limit under Section 701.5(a). Romano’s
7 transfer constituted a dead end because, after a transfer effected by prison
8 officials, his administrative remedy became “[in]capable of use” for its intended
9 purpose “in accordance with the applicable procedural rules.”² *Id.*; *Jones*, 549 U.S.
10 at 205.

11 This result is also in line with our prior decision in this case. There, we
12 wrote that “Romano should have received at least five days’ notice of his
13 transfer, as well as the ability to contest it. Provided the required notice was
14 given and Romano had access to information that made clear that he would be
15 unable to file a grievance upon his transfer outside of DOCCS, we cannot see
16 how Romano could show that DOCCS’s procedure was unavailable to him on

² In fact, the district court’s initial opinion indicated that Romano’s claim may fit under the “dead end” exception. *See Romano*, 2017 WL 3701972, at *4.

1 the facts of his case." *Romano*, 773 F. App'x at 656-57 (citations omitted).
2 Defendants now concede that Romano was given no notice and had no
3 opportunity to contest his transfer. Therefore, the inverse of our rationale
4 applies—Romano was not given notice and did not have access to information
5 that he would be unable to file a grievance upon being transferred outside of
6 DOCCS, so the grievance procedure was unavailable to him. This is not a case
7 where an inmate is the victim of his own procrastination; instead, Romano's time
8 to file a grievance was prematurely curtailed by a sudden and unforeseeable
9 transfer of which he had no notice.

10 It is of no import that Romano may have had thirteen days to file his
11 grievance. First, it is not clear that Romano actually had thirteen days. He spent
12 five days in the infirmary and eight days in an OMH observation cell. The time
13 in the infirmary involved recovering from his serious injuries including four
14 facial lacerations, black and blue eyes, and various fractures. While in the
15 infirmary, Romano "faced substantial obstacles to filing a grievance including
16 mental decompensation so severe that his delusions, paranoia, and impaired
17 judgment left him a danger to himself and others such that emergency
18 involuntary psychiatric hospitalization was warranted." Appellant's Br. at 25 n.1.

1 Even after he was transferred from the infirmary to the OMH observation cell,
2 Romano did not have access to a pen to draft a grievance. Although defendants
3 indicate that grievance-program staff regularly visit mental-health observation
4 cells to assist those who seek to submit grievances, there is no evidence in the
5 record that any staff approached Romano or discussed filing a grievance with
6 him. *See Appellees' Br. at 5; App'x at 121.*

7 Second, because Romano had no way of knowing if or when he would be
8 transferred from DOCCS custody to OMH custody, he cannot be penalized for
9 failing to file a grievance at the earliest possible moment, well before expiration
10 of a grievance period that was cut short by prison officials. Romano was not able
11 to exhaust his administrative remedies by completing the DOCCS grievance
12 process "in accordance with the applicable procedural rules," *Jones*, 549 U.S. at
13 205. The relevant DOCCS regulation provides that "[a]n inmate must submit a
14 complaint to the clerk within 21 calendar days of an alleged occurrence on an
15 inmate grievance complaint form." 7 NYCRR § 701.5(a). The district court's
16 conclusion that thirteen days was sufficient for the remedy to be "available"
17 when the relevant statute provides for twenty-one days was error because
18 Romano's purported administrative remedy became wholly incapable of use

1 without prior notice, when he was still well within the twenty-one-day time
2 limit, and as a result of a transfer by prison officials.

3 Defendants argue that Romano failed to request an exception to the
4 twenty-one-day deadline pursuant to Section 701.5(a). Exceptions to the
5 grievance deadline can be requested based on “mitigating circumstances” as long
6 as they are made no more than forty-five days after the alleged occurrence. *Id.* §
7 701.6(g)(1). But filing a request for an exception would not have helped Romano.
8 There is no reason to believe that Romano could have requested an exception
9 after he was transferred to OMH custody just as he would not be permitted to
10 file a grievance against DOCCS once transferred. Second, even if Romano had
11 submitted a request for an exception within the thirteen days he was still in
12 DOCCS custody, he would not have been able to file a grievance once he was
13 transferred to OMH custody pursuant to Section 701.5(a). And Romano had no
14 way of knowing an exception might be needed because he did not know of his
15 transfer. Defendants’ argument continues to miss the mark – the regulations
16 permit Romano a set period of time to file a grievance or request an exception,
17 and DOCCS cut off his time entirely without notice and after only about half the

1 period had elapsed. This rendered any administrative remedy practically
2 speaking incapable of use.

3 **CONCLUSION**

4 For the reasons given above, we reverse the district court's order and
5 remand for further proceedings consistent with this opinion.