In the
United States Court of Appeals
For the Seventh Circuit

No. 21-1883

CORRIE WALLACE, *et al.*,

Plaintiffs-Appellants,

v.

JOHN BALDWIN, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Illinois.
No. 18-cv-01513 — **Nancy J. Rosenstengel**, *Chief Judge*.

ARGUED SEPTEMBER 30, 2022 — DECIDED DECEMBER 14, 2022

Before WOOD, ST. EVE, and KIRSCH *Circuit Judges*.

ST. EVE, *Circuit Judge*. Corrie Wallace and Rafael Santos, Jr. (collectively, "Plaintiffs") are inmates at Menard Correctional Center ("Menard") in Chester, Illinois. They brought this lawsuit under 42 U.S.C. § 1983, alleging that Menard's policy of housing two inmates in single-person cells violated their Eighth Amendment rights. Defendants John Baldwin, Rob Jeffreys, Jacqueline Lashbrook, Alex Jones, Jeffery Hutchinson, and Kimberly Butler (collectively,

"Defendants"), among others not party to this appeal, moved for summary judgment. They argued that Plaintiffs had failed to exhaust their administrative remedies under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e. The district court held an evidentiary hearing, *see Pavey v. Conley* ("*Pavey I*"), 544 F.3d 739, 742 (7th Cir. 2008), found that Santos had failed to exhaust his administrative remedies before filing suit, and granted summary judgment for Defendants on that issue. The court therefore dismissed all of Santos's claims. The court further dismissed Wallace's claims against any defendants who were not working at Menard at the time he filed his complaint for failure to exhaust.

Because the district court made these decisions without first considering the threshold question of whether exhaustion was required, as described in the Supreme Court's decision in *Ross v. Blake*, 578 U.S. 632, 643 (2016), we now reverse and remand for consideration of this issue. We nevertheless affirm the district court's factual findings from the *Pavey* hearing, which were not clearly erroneous.

I. Background

A. Factual Background

Plaintiffs, on behalf of a putative class of inmates, allege that they are housed like cattle at Menard, where cells meant for one person are routinely used to house two, in a policy that Plaintiffs call "double-celling." They explain that these tightly packed quarters impact everything from ventilation in the cells, to inmates' freedom to exercise, to their ability to perform legal research.

Menard's double-celling policy has been the subject of a slew of litigation for more than forty years. In *Lightfoot v.*

Walker, 486 F. Supp. 504 (S.D. Ill. 1980), a class of Menard inmates challenged the then-existing double-celling policy, which resulted in only "18 to 32 square feet of [cell] space for each resident." 486 F. Supp. at 510. The district court explicitly found that this living space was inadequate. *Id.* Ultimately, the district court ordered significant injunctive relief to remedy these living conditions. *Id.* at 526–29. Whatever the staying power of that injunctive relief may have been, by 2010, inmates began filing double-celling suits against Menard once again.[1]

But this appeal does not consider the merits of these double-celling claims. Instead, it deals with the district court's grant of summary judgment to Defendants on the preliminary issue of whether Plaintiffs had exhausted the administrative remedies available at Menard before filing their suit in federal court. Both Plaintiffs claim to have filed grievances regarding their living conditions through Menard's administrative process—Santos in 2017 and Wallace in 2018. They allege they exhausted all available administrative remedies before filing the

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[1] *See, e.g.*, *Hendricks v. Walker*, No. CIV. 09-CV-618-DRH, 2010 WL 894061 (S.D. Ill. Mar. 10, 2010); *Meskauskas v. Buskohl*, No. 15-CV-00431-MJR, 2015 WL 2407577 (S.D. Ill. May 19, 2015); *Turley v. Lashbrook*, No. 08-07-SCW, 2018 WL 7585236 (S.D. Ill. Sept. 26, 2018); *Randle v. Baldwin*, No. 3:16-CV-1191-NJR, 2020 WL 1550638 (S.D. Ill. Apr. 1, 2020); *Maya v. Wexford Health Sources, Inc.*, No. 17-CV-00546-NJR, 2020 WL 5517465 (S.D. Ill. Sept. 14, 2020); *Thornton v. Jeffreys*, No. 20-CV-01100-SMY, 2021 WL 961737 (S.D. Ill. Mar. 15, 2021).

instant double-celling lawsuit against Menard on August 17, 2018.[2]

B. Procedural History

After limited discovery, Defendants filed a motion for summary judgment based on two statutory provisions: 42 U.S.C. § 1997e(a) and 20 Ill. Admin. Code § 504.810. The former requires that incarcerated plaintiffs exhaust "such administrative remedies as are available" within the prison system before filing a lawsuit in federal court. The latter outlines those prison remedy procedures that apply in Illinois, including the requirement that inmates file grievances within sixty days of their injury. *See* § 504.810(a). Defendants contended that Santos never properly filed a grievance about double-celling and so failed to exhaust his administrative remedies at Menard before filing this lawsuit. They further argued that neither Santos nor Wallace exhausted administrative remedies with respect to claims against Butler, Hutchinson, Jones, and Jeffreys because none of those defendants worked at Menard in the sixty days before Wallace and Santos claimed to have submitted their grievances.

The district court held an evidentiary hearing on the exhaustion issue on January 28, 2021. Santos testified about complaints he claimed to have filed in 2017 concerning the double-celling problems at Menard. He explained that he submitted his grievance on this issue by placing it between the

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[2] While the principal allegations have remained the same throughout the case, several defendants have been added and removed from the complaint over the course of the litigation.

bars of his cell at night for the officers to collect.[3] But according to Santos, he never got a response from the prison. He further testified that, because he did not receive a response, he sent three follow-up letters to the then-Warden of Menard, Jacqueline Lashbrook. Santos claimed he used the same cell-bars system to send these letters.

Defendants offered documentary evidence to discredit Santos's account. First, they presented a 2017 "Kite Log," a document which catalogues any prisoner correspondence to Menard's warden, along with a supporting affidavit. The Log showed only two communications from Santos to the warden in 2017. Neither related to double-celling. Defendants further submitted copies of Santos's counseling records for 2017,[4] which contained no mention of any unanswered grievances.

After giving both parties time for argument, the district court granted in part and denied in part Defendants' motion for summary judgment. First, the judge found that Plaintiffs were subject to the PLRA's exhaustion requirement as a matter of law, but did so without making any factual findings or legal conclusions regarding whether remedies were "available" to Plaintiffs in the first place. Next, the court dismissed any defendants who did not work at Menard within sixty days of when Santos and Wallace claimed to have filed their respective grievances—Butler, Hutchinson, Jones, and Jeffreys in their individual capacities—under § 504.810(a)'s 60-

[3] Santos had successfully submitted grievances by leaving them in the cell bars, previously, and Defendants confirmed that this was an acceptable method of filing a grievance.

[4] With limited exceptions, inmates are required to address their grievances to institutional counselors. 20 Ill. Admin. Code. § 504.810(a).

day grievance filing requirement, for the administrative avenues against them could not be exhausted if they were not present at the time of the alleged problems. And finally, the district court turned specifically to Santos, finding his testimony incredible in light of the documentary evidence submitted by Defendants. Accordingly, the court found that the government had proven by a preponderance of the evidence that Santos did not submit the 2017 grievance as he claimed and had not exhausted his administrative remedies as to double-celling. The district court entered summary judgment against him on all claims. Wallace, by contrast, had undisputedly exhausted his remedies by filing a double-celling grievance with Menard in January 2018, and so the court permitted his remaining claims (i.e., those not against Butler, Hutchinson, Jones, and Jeffreys in their individual capacities) to proceed.

Plaintiffs asked the district court to enter a final order under Federal Rule of Civil Procedure 54(b) on these claims, and the district court granted the motion. This appeal followed.[5]

[5] At oral argument, we questioned whether Wallace was properly before us on appeal, as several of his claims survived. But we have jurisdiction over final orders under Rule 54(b) when a district court "direct[s] entry of a final judgment as to one or more, but fewer than all, claims or parties … if the court expressly determines that there is no just reason for delay." The district court's dismissals for failure to exhaust were effectively final judgments because, although the dismissals were without prejudice, under the 60-day grievance rule in Illinois, *see* § 504.810(a), "it would be impossible at this point for [Wallace] to exhaust his administrative remedies and thereafter amend his complaint." *Hernandez v. Dart*, 814 F.3d 836, 841 (7th Cir. 2016). And after supplemental briefing, we are satisfied that there was "no just reason for delay," because the "claim[s] resolved … dispose[d] of a distinct issue," that is, whether exhaustion is required at all under the Supreme Court's decision in *Ross*. *See Domanus v.*

II. Analysis

On appeal, Wallace and Santos raise two issues: (1) exhaustion was not necessary here because no remedies were "available" to them within the meaning of the PLRA, *see Ross*, 578 U.S. at 643; and (2) even if remedies were available to them, the district court's credibility determinations at the *Pavey* hearing—and ultimate finding that Santos had failed to exhaust—were clearly erroneous.[6] We now affirm in part and remand in part.

A. Whether Exhaustion is Necessary

Where, as here, the district court granted summary judgment after a *Pavey* hearing, we review the court's conclusions of law de novo and we review any factual conclusions for clear error. *Wilborn v. Ealey*, 881 F.3d 998, 1004 (7th Cir. 2018).

Locke Lord LLP, 847 F.3d 469, 477 (7th Cir. 2017). We are therefore certain of our jurisdiction and proceed to the merits of this appeal.

[6] Plaintiffs also contend that Defendants waived the exhaustion defense by failing to include it in their answer to the Second Amended Complaint. But "[a]n affirmative defense that is not raised in a defendant's first answer is not necessarily untimely and forfeited." *Burton v. Ghosh*, 961 F.3d 960, 965 (7th Cir. 2020). Rather, it is within the sound discretion of a district court to allow a defendant to amend his answer to a complaint if the plaintiff will not be prejudiced by the delay. *Id*. *See also* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend a pleading] when justice so requires."). As used here, "unfair prejudice mean[s] that the late assertion of the defense causes some unfairness independent of the potential merits of the defense." *Id.* at 966. Because Plaintiffs fail to point to any prejudice they incurred from Defendants' one-month delay in including the defense beyond the potential success of the defense, the district court acted well within its discretion in allowing Defendants to amend their answer.

1. "Dead End" Unavailability

We begin with Plaintiffs' argument that Menard's grievance process offered no "available remedy" for double-celling under the PLRA and therefore they did not need to exhaust their administrative remedies. This textual argument is based on the Supreme Court's decision in *Ross*. 578 U.S. at 643. In *Ross*, the Court considered Fourth Circuit precedent creating a "special circumstances" exception to the PLRA's exhaustion requirement. Rejecting such an exception, the Supreme Court explained, "[c]ourts may not engraft an unwritten … exception onto the PLRA's exhaustion requirement. The only limit to § 1997e(a)'s mandate is the one baked into its text: An inmate need exhaust only such administrative remedies as are 'available.'" *Id.* at 648.

So when is a remedy "available"? The *Ross* Court provided guidance on this point. "[T]he ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.' … Accordingly, an inmate is required to exhaust those, but only those, grievance procedures that are 'capable of use' to obtain 'some relief for the action complained of.'" *Id*. at 642. This is a practical, rather than a procedural, inquiry. *Id.* at 643. "[C]ourts in this and other cases must apply [this standard for 'available remedies'] to the real-world workings of prison grievance systems." *Id.*

The *Ross* majority went on to describe three categories of remedies that would be practically "unavailable" such that an inmate would have no exhaustion requirement. For example, "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use. In this situation, some mechanism exists to provide relief, but no ordinary

prisoner can discern or navigate it." *Id.* at 643–44. Or, the Court explained, "the same is true when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 644. Finally, and most relevant here, "an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Id.* at 643. By way of example of such a "dead end" administrative process, the *Ross* Court proposed a hypothetical: "Suppose … that a prison handbook directs inmates to submit their grievances to a particular administrative office—but in practice that office disclaims the capacity to consider those petitions. The procedure is not then [an 'available' remedy] for the pertinent purpose." *Id.* at 643.

Although we have not yet encountered such "dead end" procedures, this Circuit has applied the first two types of practical unavailability identified in *Ross* in recent appeals. *See Gooch v. Young*, 24 F.4th 624, 628 (7th Cir. 2022) (threats from prison guards made grievance procedures "unavailable"); *Reid v. Balota*, 962 F.3d 325, 330 (7th Cir. 2020) (mixed messages from the prison about the outcome of grievances and the requirements from the inmate were sufficiently confusing to obscure necessary procedures and make relief "unavailable"); *Ramirez v. Young*, 906 F.3d 530, 535 (7th Cir. 2018) (holding that grievance procedures were "unavailable" where they were only provided in English to a Spanish-speaking inmate).

While our precedent is lacking any cases in the "dead end" unavailability category, our applications of *Ross* show that we

have hewn closely to its central warning: a prisoner cannot be expected to exhaust remedies that were never "available" to him in the first place. Plaintiffs are therefore correct that where the relief offered through the prison grievance process is illusory, then there are no administrative remedies "available," and no exhaustion is required.

This "unavailable" exception is meant to be narrow. *Crouch v. Brown*, 27 F.4th 1315, 1320 (7th Cir. 2022) (quoting *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006)) ("For decades, this court 'has taken a strict compliance approach to exhaustion.'"). If a plaintiff raises this "dead end" argument, district courts should decide, prior to a *Pavey* hearing, whether limited discovery is warranted on the availability of remedies. Not every case—indeed, likely not most cases—will need an availability analysis under *Ross*. But if a plaintiff can offer some evidence that administrative remedies were "unavailable" at the time of his injury, then discovery on this issue should be allowed if appropriate and the district court should determine the issue as part of its exhaustion analysis. Other circuits have permitted discovery of (1) evidence that the inmate himself had previously filed grievances on this exact issue with no response; *see Muhammad v. Wiles*, 841 F. App'x 681, 685 (5th Cir. 2021); *Blevins v. FCI Hazelton Warden*, 819 F. App'x 853, 859 (11th Cir. 2020); *see also Grafton v. Hesse*, 783 F. App'x 29, 31 (2d Cir. 2019); *White v. Velie*, 709 F. App'x 35, 38 (2d Cir. 2017); and (2) evidence that other inmates had previously filed grievances on this exact issue with no response. *See also Grafton*, 783 F. App'x at 31; *White*, 709 F. App'x at 38; *Kee v. Raemisch*, 793 F. App'x 726, 736 (10th Cir. 2019).

Showing a remedy to be a "dead end" is a tall task. *See Green Haven Prison Preparative Meeting of Religious Soc'y of*

Friends v. New York State Dep't of Corr. & Cmty. Supervision, 16 F.4th 67, 82 (2d Cir. 2021), cert. denied sub nom. *Green Haven Preparative Meeting v. New York State Dep't of Corr. & Cmty. Supervision*, 212 L. Ed. 2d 763, 142 S. Ct. 2676 (2022) (the proof required to show that a remedy is available is "low" and requires only "the *possibility* of some relief"); *Donahue v. Wilder*, 824 F. App'x 261, 266 (5th Cir. 2020) (rejecting the plaintiff's unavailability argument where he failed to "provide evidence that [the prison's] administrators are 'unable or consistently unwilling to provide any relief'"); *Kee*, 793 F. App'x at 736 (an inmate's allegations did not warrant an evidentiary hearing in part because he did not offer any evidence about the prison's failure to address the complaints of "other aggrieved inmates"). Indeed, one circuit has suggested that plaintiffs may only proceed under the "dead end" exception where, when the district court reviews the evidence at summary judgment, it finds that "among the legion of [identical grievances], [the prison] can't cite a single favorable response to a legal challenge by" an inmate on this issue. *Barradas Jacome v. Att'y Gen. United States*, 39 F.4th 111, 121 (3d Cir. 2022) (citing and applying *Ross*'s "dead end" concept to expedited removal proceedings in the immigration context). Although we do not adopt such a stringent requirement at this time, these cases offer helpful benchmarks for district courts dealing with this issue in the first instance.

From here, a district court has two paths. If the evidence reflects that remedies were "available" at the time the inmate was injured, then the *Pavey* hearing proceeds if appropriate—exhaustion is required and failure to do so ends the case. If instead the court concludes that no remedies were "available" under *Ross*, then exhaustion is not required, and the court should deny summary judgment on those grounds.

2. Plaintiffs' Showing

Here, Plaintiffs offered some evidence that other inmates have complained of the same issue that they raise—double-celling at Menard—with no response. *See supra*, note 1. They even point to a mechanism by which prison officials can allegedly use state law to reject their grievances without any consideration of their merits. *See* 20 Ill. Admin. Code § 504.830(a)(1), (d). But the district court never considered these "dead end" arguments.[7] And "[t]he availability of a remedy is … a fact-specific inquiry," *Lanaghan v. Koch*, 902 F.3d 683, 688 (7th Cir. 2018), leaving this court ill-equipped to make that assessment now. Instead, the district court on remand should allow limited discovery as it sees fit on the results of double-celling grievances and make a "dead end" assessment in accordance with this opinion.[8]

B. Santos's Credibility

As we noted above, however, where a district court finds that remedies are "available," summary judgment on exhaustion grounds may be appropriate. "The exhaustion requirement is an affirmative defense, which the defendants bear the burden of proving." *Pavey v. Conley* ("*Pavey II*"), 663 F.3d 899,

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[7] To be clear, the question of availability was before the district court. In their summary judgment briefing, Plaintiffs argued that remedies were unavailable to them because of Menard's longstanding refusal to provide relief on the specific issue of double-celling. Plaintiffs' counsel reiterated the same position at the *Pavey* hearing.

[8] Because we agree with Plaintiffs on the need to consider *Ross*'s availability exceptions and remand accordingly, we need not consider their argument regarding vicarious exhaustion, a concept that has never before been applied to PLRA suits in this Circuit.

903 (7th Cir. 2011). "If the defense is adjudicated on the basis of factual findings after a [*Pavey*] hearing, … we review the district court's factual findings for clear error." *Wilborn*, 881 F.3d at 1004 (citing *Pavey II*, 663 F.3d at 904). Here, the district court already considered exhaustion as a factual matter. After the *Pavey* hearing, the district court held that Santos did not file a grievance with the prison regarding the double-celling policy, crediting the Defendants' evidence over Santos's testimony.

Plaintiffs argue that Defendants' evidence was insufficient to contradict Santos's claims. But this argument is belied by the record from the *Pavey* hearing and the district court's detailed findings. Defendants offered the Kite Log and the associated affidavit. Taken together, these showed that if Santos had submitted grievances and letters to the Warden as he claimed, they would have been recorded. In fact, the Kite Log did reflect two unrelated letters filed by Santos during that timeframe but had no record of the grievance or follow-up letters about double-celling that he claimed he filed. The court reasonably held that this direct contradiction undermined Santos's testimony. The counseling records only underscored this conclusion. Santos testified that he was so upset by the lack of response to his grievance that he sent the Warden three follow-ups. It is hard to square this with counseling records that do not show even a single mention of his complaint or of the Warden's failure to answer.

Based on these records, the district court did not clearly err in finding that Santos was not credible and did not submit a double-celling grievance. *See Daniels v. Prentice*, 741 F. App'x 342, 344 (7th Cir. 2018) (affirming the district court's conclusions after it "credited the … evidence [a defendant]

submitted [to show failure to exhaust], including records of … grievance activity, … counseling record[s], and affidavits explaining the prison's grievance procedure … ."). And so, to the extent exhaustion is still relevant to this case after remand, we affirm the district court's factual determinations regarding exhaustion.

III. Conclusion

In closing, we reiterate that where a Plaintiff is able to point to some evidence that administrative remedies were not "available" to him under the PLRA, as described by the Supreme Court in *Ross*, the district court must decide whether remedies were "available" before granting summary judgment on exhaustion grounds. We remand for consideration of this question as it applies to double-celling at Menard. If, however, the district court finds that double-celling remedies were "available," then the PLRA's exhaustion requirement applies to Wallace and Santos. To that end, we affirm the district court's factual determination that Santos did not file a grievance regarding Menard's double-celling policy. The judgment is therefore

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.