IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL ROSS, :

Petitioner : No. 15-339

v. :

SHAIDON BLAKE. :

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Washington, D.C.

Tuesday, March 29, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

JULIA DOYLE BERNHARDT, ESQ., Assistant Attorney General, Baltimore, Md.; on behalf of Petitioner.

ZACHARY D. TRIPP, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

PAUL W. HUGHES, ESQ., Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 15-339, Ross v. Blake.

Ms. Bernhardt.

ORAL ARGUMENT OF JULIA DOYLE BERNHARDT

ON BEHALF OF THE PETITIONER

MS. BERNHARDT: Thank you, Your Honor. Mr. Chief Justice, may it please the Court:

In this case, the Fourth Circuit adopted a nontextual exception to the requirement of the Prison Litigation Reform Act that a prisoner exhaust available administrative remedies. That exception, if accepted, would eviscerate Congress's intent in adopting the Prison Litigation Reform Act and requiring exhaustion of administrative remedies.

In the Fourth Circuit States where this exception now applies, district courts are now charged with examining prison procedures to see how murky they are. They are dispensing with the requirement of exhaustion at all if there's been an internal investigation --

JUSTICE KAGAN: Ms. Bernhardt, could I just ask you to talk about the procedures? Could you explain to me what they are?

MS. BERNHARDT: Certainly, Your Honor.

And I'd like to begin with the Inmate Grievance Commission -- or, I'm sorry -- Office, formerly the Commission -- which is the primary administrative remedy for an inmate with use-of-force or other condition of confinement.

JUSTICE KAGAN: Could I start you off in the reverse around? Because the ARP seems to be the low-level one, and in the initial understandings of this case, everybody was being told the ARP is where you file. And you file there irrespective of whether there's an IIU investigation.

Do you continue to take that view, or do you think that that is no longer true?

MS. BERNHARDT: Well, Your Honor, the view's been consistent throughout, and that is the Inmate Grievance Office is the primary remedy. The Inmate Grievance Office can itself require --

JUSTICE KAGAN: I really did ask you to start with the ARP.

MS. BERNHARDT: I'm trying to, yes, Your Honor.

JUSTICE KAGAN: Are you supposed to file with the ARP even when there's an IIU in --

MS. BERNHARDT: Yes, Your Honor. Yes, you

are.

JUSTICE KAGAN: Well, why do all of these cases suggest that, when that happens, the ARP throws out the case on the view that there's an IIU investigation?

MS. BERNHARDT: When this case arose in 2007, the warden was not required to dismiss it. And so in some cases -- in some of the cases that are before the Court, that is, indeed, what occurred. There's cases with three wardens where -- a collection of cases where there was a dismissal, but --

JUSTICE SOTOMAYOR: Do you have any example anywhere of the AR -- ARP responding and actually investigating and looking at the issue and making a recommendation or ruling?

MS. BERNHARDT: The -- we don't have the paperwork. The cases in Petitioner's lodging are cases involving an IIU investigation where it proceeded through the ARP process. In other words, there was a complaint --

JUSTICE SOTOMAYOR: In your reply brief, I looked for one ARP case where the prisoner filed and the ARP itself made a determination. Is there anything in the record?

MS. BERNHARDT: There's nothing in the record like that, Your Honor. And if I might explain that this was not an issue in the district court. And so there was no evidence presented on either side on that point.

JUSTICE KAGAN: Well, you've lodged now quite a number of materials, and we can talk about the materials that you've lodged, but now, you know, both parties have lodged materials, and nobody has come up with a case in which the ARP has adjudicated a complaint when there was an IIU complaint investigation going on; is that right?

MS. BERNHARDT: That's right, Your Honor. And there's a four-year retention policy for these records, and this case arose in 2007. And so this issue was not brought up until the Respondent's briefing in this Court --

JUSTICE GINSBURG: But at least it would show that there are papers staying -- saying as clearly as it could possibly say, "You involved an ARP; there is an IIU investigation; ARP dismissed." Couldn't be clearer.

So you say, well, other cases went beyond the way. Then it sounds like the State is making inconsistent rulings, nobody knows what the law of

Maryland really is.

So those letters say, unmistakably, "Your complaint is dismissed because there is an IIU investigation." They can't just erase that. That's what they say.

MS. BERNHARDT: Yes, Your Honor. The forms also say right on the front that your appeal rights are on the back. And the directives and the handbook all advise the -- that's only the first stage of the process.

And in Maryland, proper exhaustion is always an appeal to the commissioner and then to file complaint with the Inmate Grievance Office, which holds a quasi adjudicatory hearing in every one of these cases.

And all one need do is look at the decisions in Petitioner's lodging. You'll see these were all IIU investigation cases, and all of these inmates had a full adjudicatory hearing on the merits, and some of them got substantial amounts of money.

So there is an available remedy in Maryland for prisoners who are assaulted by guards and where there is an internal investigation. And that --

JUSTICE GINSBURG: Let's go back to the --

the procedure for the employee -- I mean, for the prisoner.

There is an IAU investigation. The prisoner then files an ARP. Under Maryland's regime, what is to happen to that ARP complaint?

MS. BERNHARDT: At the time of this case and today, the warden had discretion to reach the merits of it or to administratively dismiss it. Both of those are appealable orders.

JUSTICE KAGAN: Ms. Bernhardt, can I just ask, because in the materials you lodged yesterday, in three different places you appeared -- the office appears actually to have a rubber stamp. I mean, it's the same stamp on all these things. And it says, "Dismissed for procedural reasons. This issue is being investigated by IIU. Since this case shall be investigated by IIU, no further action shall be taken under the ARP."

That's on a rubber stamp.

MS. BERNHARDT: Yes, Your Honor. And the procedure there is the same in any other use-of-force case, and that is the first-level decision; that is appealable to the commissioner. And then once those two stages within the prison are exhausted, the internal remedy has been exhausted,

and the case can be submitted to the Inmates Grievance Commission, which, as the court of appeals of Maryland has stated, is the primary administrative remedy --

JUSTICE KAGAN: Ms. Bernhardt, we took this case on the view, which was the view that the office represented to us at the time, that the ARP was the proper place to go to receive a remedy, not the proper place to go to receive a rubber stamp saying "You've come to the wrong place," but the proper place to go to receive a remedy even when there was an IIU investigation going on.

MS. BERNHARDT: And that is true, Your Honor.

JUSTICE KAGAN: Notwithstanding this rubber stamp that says it's not true.

MS. BERNHARDT: Yes, Your Honor, because the remedy will be received from the Inmate Grievance Commission. The -- just the first --

JUSTICE SOTOMAYOR: Could you please tell me why you can't -- what's the purpose of this process? You have regulations and administrative handbook that says, "Take all of these things to the ARP. Take to the IGO directly only these things."

Why don't you just say take prison

brutality cases to the IGO? If you're not intending to confuse prisoners, if you're not intending to make this process totally opaque, why do you do it that way?

MS. BERNHARDT: Because there's one process for all use-of-force complaints, Your Honor, and it will be confusing to inmates if you told inmates, "Well, if you've requested an IIU investigation, then you should use a different process."

And it's the one -- every use of force, the inmate files the ARP with the warden, he appeals to the commissioner, and then they go to the Inmate Grievance Office. That's right in the handbook at pages 79 to 80. It's --

JUSTICE SOTOMAYOR: All right. It's more confusing to say, "If you filed a IIU, go to IGO."

MS. BERNHARDT: That would --

JUSTICE SOTOMAYOR: If you go to ARP, if you haven't, if you have -- that's more confusing than this process where they go to ARP and they can't get anything.

MS. BERNHARDT: They do, because they proceed up the -- up the process. They properly exhaust -- all the examples that they produced in the Respondent's lodging, they have four inmates who

did not properly exhaust and one who did. Mr. --

CHIEF JUSTICE ROBERTS: I'm sorry. Please finish.

MS. BERNHARDT: He had properly exhausted -- he had a hearing at the Inmate Grievance Office.

CHIEF JUSTICE ROBERTS: We're talking about what's in the lodgings and what they stand for. These are not in the record before the Court, are they?

MS. BERNHARDT: No, Your Honor.

CHIEF JUSTICE ROBERTS: Neither yours or the other side, right?

MS. BERNHARDT: That's true, Your Honor.

CHIEF JUSTICE ROBERTS: I take seriously the requirement that we limit appellate review to the argument -- to the record that's before the Court. I mean, factual issues like this are something they could deal with in the district court and flesh those out before the court of appeals. And now, as far as I understand, we're the first court that's looked at all these record material -- I mean, extra record materials, right?

MS. BERNHARDT: Yes, Your Honor. And we would --

CHIEF JUSTICE ROBERTS: So how do we deal with that? I mean, again, both of you are guilty of what I think is a serious -- a serious question. What's your proposal for dealing with the fact that, so far as we have seen so far, the cases -- the case might well turn on these lodgings if people are going to look at them?

MS. BERNHARDT: Well, your Honor, we would welcome a remand from this Court, decide the issue in front of it. This issue is very important to the States and to the Fourth Circuit States especially. And we would gladly shoulder the burden on remand to sort these availability issues out. We have much more --

JUSTICE KENNEDY: Well, it seems to me that we should dismiss your writ as improvidently granted. You just -- we just simply didn't have these materials in front of us, and it completely changes the nature of the case.

MS. BERNHARDT: Well, Your Honor, the district court rightly found that the remedy is primary. There was no -- the Respondent, he never tried to use any of these procedures. He disclaimed any intention to do so.

JUSTICE KENNEDY: That's a different --

CHIEF JUSTICE ROBERTS: Well, I suppose dismissing it would be based on a judgment about what these extra record materials show. And if they don't show what your adversary suggests, I don't know why that would be an appropriate course to take with respect to your position. On the other hand, if they do, maybe it would be.

I don't -- again, it's -- it's, I think, surprising -- and, again, I'm not criticizing just you; I'm criticizing both of you -- that -- that we have these materials now.

I mean, was -- was the individual represented by counsel below the --

MS. BERNHARDT: Yes, Your Honor. And these materials that were submitted present a very misleading picture of the remedies available to inmates. And we felt obligated to respond and --

JUSTICE BREYER: Yeah, I understand that. But, as I look through, the reason that it wasn't presented below, I would guess, is given the briefs that I've read, which are very good briefs, people have gone to an enormous amount of work. And that enormous amount of work has produced all this information that wasn't there before.

But I would like to know what you'd do if

you were me. That is to say, we took this case because we thought that it raises a question of whether the circuit can create an exception to the exhaustion requirement that, to my knowledge so far, is not a traditional exception. And that's why I thought we took it.

Now we discover, having taken it, this new issue that wasn't there. We thought the question was, can you create an exception to the requirement that they have to take into account of available administrative remedies? The issue now is whether there was an administrative remedy available on the basis of what I've read.

It's so complicated that I don't know how a genius would know how -- that he's supposed to go to the -- to the whatever that AR thing is --

(Laughter.)

JUSTICE BREYER: -- you know, while an IIU investigation is going on. You certainly could not be illiterate. I mean, you'd have to -- there are so many initials in this that -- that -- that -- okay.

So we could either go into this other issue or we could send it back to prolong this or we simply could grant a -- dismiss it as improvidently

granted.

So maybe it's an unfair question to ask you. But if you were me, what would you do?

MS. BERNHARDT: Decide the question presented, Your Honor, and that is because it's squarely presented by this record.

The procedures in the -- the procedures were taken to be clear in the court below. The --

JUSTICE BREYER: It's pretty hypothetical if we are to answer the question, is there a special kind of exception to the rule that you have to take into -- that you have to follow available administrative procedures if it is the case where there was no such remedy availability.

MS. BERNHARDT: Well, Your Honor, we've produced 13 inmates who used it. So it is available. Inmates have used it successful, and they've gotten large amounts of money. In the --

JUSTICE GINSBURG: And it's available to some and it's not available to others.

MS. BERNHARDT: It's available to all, Your Honor. And if -- if inmates are -- many more inmates, you know, that we've proposed have used it successfully than the few that they have who started the process and then abandoned it.

JUSTICE GINSBURG: Let's talk about, then, the current regulation. There's a question whether that was always the practice in Maryland. But the current regulation does say, does it not, if an IIU investigation is launched, then you don't use the ARP procedure. Isn't that what the current regulation --

MS. BERNHARDT: That's not a regulation, Your Honor. That's a directive. That's one of the ARP directives. It does say that it should be administratively dismissed and that that is an appealable decision on the merits that goes to the Inmate Grievance Office.

And if I might go back to what's happening in the district court where this case began, is that we had a procedure that was -- that was available on its face, and there was never any challenge to availability. The argument was that "Well, I went to the internal affairs, and that serves the same purpose. I don't have to exhaust."

And that doesn't serve the same purpose. All one need do is compare the criminal investigation report at JA 185 with the administrative law decisions that resolve the civil claims.

An IIU investigation doesn't produce an administrative decision on a civil claim. It doesn't give an opportunity to settle civil claim. It serves a completely different purpose.

And yet in the Fourth Circuit States, a criminal investigation is now an administrative civil remedy. And that has -- having a very bad effect on Maryland and the Fourth Circuit states.

And one need only look at experience in the Second Circuit to see the effect that's been there. It's totally contrary to the purpose of the Prison Litigation Reform Act.

JUSTICE SOTOMAYOR: I have to say that when I read the Fourth Circuit decision, there are lines in the Fourth Circuit decision that seemed to be deciding this on the burden of proof. They're saying "Ross" -- meaning you -- "have offered no evidence that would contradict Blake's belief that the IIU's investigation removed his complaint from the typical ARP process."

And the Fourth Circuit, that's at 787 F.3d 700.

It goes on to say, moreover, that "the handbook regulations and directives do not contradict Blake's belief that he had exhausted his

administrative remedies by removing the incident to senior corrections officers, thereby initiating an IIU investigation."

That's -- that's at the same page.

So I'm not sure what the Fourth Circuit was doing with availability. And so if I'm not sure, what do I do with respect to Justice Breyer's question and Justice Kennedy's question, which is, is this a availability determination?

MS. BERNHARDT: The Fourth Circuit assumed it was available. If you look at Petition Appendix 8, the district court found it was available. The Fourth Circuit assumed that. So it would certainly be appropriate, it seems to me, to remand it to the Fourth Circuit so the Fourth Circuit could sort out any availability issues that have been newly raised. But there's a question presented to be decided because of the effect that it has on the administration of the Prison Litigation Reform Act in the Fourth Circuit States. It's a -- it's a profound impact.

It's -- it's -- it's a special circumstance.

JUSTICE SOTOMAYOR: There's a new regulation that has come in, correct, after this

case? And it makes official that the ARP process will not handle an IIU proceeding?

MS. BERNHARDT: It's not a regulation, Your Honor; it's a -- it's a prison directive.

JUSTICE SOTOMAYOR: Prison directive. This --

MS. BERNHARDT: This was the first two stages of the process, but not the third stage, not the Inmate Grievance Office stage. That stage is fully open and available to inmates who have IIU investigations.

JUSTICE GINSBURG: But the IGO, or whatever it is, that is described in this hierarchy as an appellate remedy.

MS. BERNHARDT: No, Your Honor. It's a contested case hearing under the States Administrative Procedure Act. It's doesn't -- decision --

JUSTICE GINSBURG: The setup is, there are these levels that you go to. And first you go to the ARP, then you go to the commission, then you go to IGO. So it's usually -- it comes in at the third instance.

MS. BERNHARDT: But it's not an appeal, Your Honor; it's a de novo contested case qua an

adjudicated hearing.

JUSTICE GINSBURG: Where is -- where in this handbook or whatever it is, the grievance procedures, does it tell an inmate, you can go or you must go, in the first instance, to the IGO when there's an IIU investigation underway? Where does it say --

MS. BERNHARDT: It does not say that, Your Honor.

JUSTICE GINSBURG: Yeah.

MS. BERNHARDT: The inmate has a -- the inmate can always go to the IGO first. If the Inmate Grievance Office determines that it should be exhausted, it just gives --

JUSTICE GINSBURG: Where -- where -- where does it say you can go to the IGO first?

MS. BERNHARDT: That's in the handbook. At pages 79 to 80 is the description. It's -- Petition Appendix 79 to 80 is the description of the -- of how to file with the Inmate Grievance Office. And there are additional materials available to inmates that aren't in the record because this issue was not brought up in the district court, the directives -- the set of directives especially geared to inmates that are not in the record because this issue did

not come up in the district court.

There is additional information available to show that this is an available remedy, again, not in the record because this issue was not brought up by Mr. Blake in the district court. So we would strongly urge the Court that, if it has issues about availability, that it would be most appropriate to remand it and let this be sorted out on remand, because, obviously, you know, not having known that this issue was going to come up, we didn't present the evidence.

The burden is on Mr. Blake to show he meets an exception. He did not meet that burden in the district court.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

ORAL ARGUMENT OF ZACHARY D. TRIPP

FOR UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

CHIEF JUSTICE ROBERTS: Mr. Tripp?

MR. TRIPP: Mr. Chief Justice, and may it please the Court:

We're asking the Court to do two things here today. We think they're both straightforward. And then you can vacate and remand to address these

more case-specific arguments that have come up in the briefing.

So, first, we're asking you to answer the question presented. The PLRA means what it says. It does not have any unwritten exceptions. Blake doesn't even dispute the point.

Second, we're asking this Court to reject the part of Blake's argument in Part 2 of his brief, which we think is fairly encompassed within the QP, that a prison's procedure has become unavailable and that a prisoner can jump to federal court as soon as he could reasonably but mistakenly think that he was done with the grievance process.

A reasonable mistake standard is just another way of saying that you only need to exhaust plain procedures. That used to be the rule. Congress deliberately eliminated it when it enacted the PLRA. The rule now is that you need to exhaust all available remedies. And that's critical to making the prisons, not the Federal courts, the primary place for resolving disputes about prison life.

JUSTICE SOTOMAYOR: You do say in your brief that if regulations are so confusing that we're -- we're -- we're arguing about whether -- to

every inmate or every reasonable inmate or to a reasonable inmate. I don't actually see that you say "every reasonable inmate." That -- that's a little -- that's not a standard I understand in any context.

MR. TRIPP: So we definitely agree, as we say in our brief, that -- that rules could be so confusing that -- that they're no longer available. As this Court said in Booth, "available" just has its ordinary dictionary meaning of capable of being used for a purpose. And so we think if they're so confusing that they can't be used, if no reasonable prisoner can use them, then --

JUSTICE SOTOMAYOR: No, you keep saying "no reason." That a reasonable -- I would say, consistent with how we always talk about this --

MR. TRIPP: Well -- and I don't --

JUSTICE SOTOMAYOR: -- no reasonable -- a reasonable prisoner would not understand them.

MR. TRIPP: Well, I think there's a big difference between a reasonable mistake standard, which is what the court of appeals held. It held that he made a reasonable mistake, and Blake is trying to repackage that as a gloss --

JUSTICE SOTOMAYOR: I understand that

that's different.

MR. TRIPP: Right. And that's the thing that we have trouble with. And -- and -- and so there are two big differences between the reasonable mistake standard and an availability standard, which is the correct statutory standard. The first is just the degree of uncertainty.

If you have a body of regulations, it doesn't take that much to say that reasonable minds could disagree about some aspect of the procedure. It is quite another thing to say that they are so confusing that they can't even be used.

JUSTICE BREYER: What words should we use? The statute uses the word "exhausted." The word "exhausted" in administrative law, where it's most frequently found, has a huge meaning, with exceptions, built up over the years. One such exception is for a procedural rule that is, quote-- it comes from habeas corpus law -- "not firmly established and regularly followed."

MR. TRIPP: You know, I think --

JUSTICE BREYER: Now, is that the way to put the exception? To decide that, one, does the word "exhausted" pick up its administrative law meaning? That's a big question.

MR. TRIPP: So I'm --

JUSTICE BREYER: I'm not sure.

Two, if it does, is there such an exception that I just said in administrative law?

And, three, how do you put it?

All right. Now, you say what you wanted to say, because you wanted to say something.

(Laughter.)

MR. TRIPP: So I think the -- the point that you're getting at about not regular followed is that's better handled in a situation so -- at Woodford and this Court's case law says that when somebody has exhausted but has made some kind of a procedural misstep, and the question is whether they should suffer a procedural default, that -- that the question there is, as this Court said in Woodford, whether it's a critical procedural requirement. And we think that the natural analogue is what you're talking about from habeas corpus law, that you would be asking whether it's an adequate and independent State ground similar to that.

The inquiry here is different. The inquiry here, he's just -- he's saying that it's just so confusing that it's not available. And so we think that the correct standard is the one that's said in

Booth, not capable of use for a purpose. The way we articulate it in our brief we think is correct. If you want to give some guidance, it's that no reasonable prisoner can use it. But you don't need to -- to -- to get that far down in the weeds to reject his argument that a reasonable mistake is enough.

So as I --

JUSTICE SOTOMAYOR: Please.

MR. TRIPP: There's two big differences between a reasonable mistake standard and ours. The first I was saying is just the degree of ambiguity. The second is that it's myopic. It -- it overlooks all the things a prison system can do to make a system capable of being used even when it's a little confusing.

So if I could just give an example of how this works in the Federal system, when somebody arrives in the prison, they're given a -- there's an orientation. They're given a handbook. If they have questions, there's somebody in each prison who is available to answer questions, provide assistance. And then, if you just file something and you make some kind of procedural mistake, they can do one of two things.

The prison can either just -- just accept it and overlook the mistake, or what it can do is tell him what he did wrong and give him a reasonable -- a reasonable time to correct it. And those are all things that a prison can do to make its system just perfectly capable of being used, even if there might be some reasonable ambiguity somewhere in --

JUSTICE KAGAN: Can I --

MR. TRIPP: -- in the record. And --

JUSTICE KAGAN: Can I ask, it seems to me that there are three kinds of unavailability. And I'm wondering if you agree with each of the three.

One is where the prison says, you can get your remedy over here. And then it turns out that you can't get your remedy over here. So if the prison here said, you can get your remedy at the ARP, but you couldn't get your remedy at the ARP, that's a kind of factual unavailability.

You agree with that?

MR. TRIPP: Yes, I think so.

JUSTICE KAGAN: In the hypothetical sense --

MR. TRIPP: Yes.

JUSTICE KAGAN: -- not saying anything

about this case?

Now, the second is what you're saying. It's like, if it's just so confusing that a reasonable person can't use it. And that's your standard; right?

MR. TRIPP: Right.

JUSTICE KAGAN: And the third is some of these cases arise in the context where the State is deliberately trying to interfere with or trick the inmate or something like that. And you would count that as available too?

MR. TRIPP: Yeah, in, like, a -- sort of a threat hypothetical, that kind of thing.

JUSTICE KAGAN: A threat or just deception or something like that.

MR. TRIPP: Yeah, we think that's -- as we said in our brief, we think that's fairly usually dealt with under availability. You could have a case where maybe estoppel principles come in. But in, I think, all or virtually all cases, availability is the appropriate focus. And it's going to take over. That's the way this has been working in the lower courts.

I mean, because availability is the -- the statutory exception, there is a mountain of lower

court case law on this. And -- and -- and so I think the proper way for this Court to -- to delve into these issues is in some case where it's properly presented on cert.

The question here, it is squarely presented. The district court here held squarely that he could have filed a grievance. The court of appeals appeared to assume that that was right and just said that it didn't matter because there was an unwritten exception to the PLRA, where --

JUSTICE GINSBURG: Mr. Tripp, are you --

MR. TRIPP: -- it asked this Court to reverse that in his effort to repackage it.

JUSTICE GINSBURG: Are you taking -- are you -- I assume that you're taking no position on whether the remedy is available to this -- to Blake.

MR. TRIPP: The Maryland-specific question?

JUSTICE GINSBURG: Yes.

MR. TRIPP: Yeah, we -- we just frankly don't have an interest in the outcome of that question, and -- and don't think this Court would have ever granted cert on it. And we think that that's -- that's proper -- the proper approach here is -- is -- is, as we're saying, to answer the question presented, the portion of Blake's argument

that we think is fairly encompassed within it, and then it's up to the court of appeals to figure out what to do with all the late-breaking evidence.

If there are no further questions?

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Hughes.

ORAL ARGUMENT OF PAUL W. HUGHES

ON BEHALF OF THE RESPONDENT

MR. HUGHES: Thank you, Mr. Chief Justice, and may it please the Court:

We submit that the proper outcome of the case would be to dismiss it as improvidently granted or, alternatively, to affirm.

If the Court were to consider affirming this context, we think the first place for the Court to begin is what the term "available" means in the statutory context. We submit that --

JUSTICE ALITO: Well, before you get to that, the Fourth Circuit seemed to assume that there was a procedure that was available. And it held that there -- this -- it was excused here even though it was available.

Now, do you defend that argument?

MR. HUGHES: Your Honor, I -- I would disagree. I don't think the court of appeals

thought that there was something that was available, and it certainly did not think the State had met its burden of showing so.

As was pointed out earlier, at Petition Appendix page 13, the court of appeals said "Ross has proffered no evidence that would contradict Blake's belief that the IIU's investigation removed his complaint from the typical ARP process."

And at the next page, Petition Appendix 14 to 15, the court of appeals added, "Ross has provided no practical examples of an inmate being allowed to file an ARP or IGO grievance during or after an IIU investigation."

JUSTICE ALITO: Well, what was the legal rule that -- that the Fourth Circuit adopted?

MR. HUGHES: Well, Your Honor, the -- the Fourth Circuit did adopt a legal rule, as has been discussed, as that there could be implicit exceptions to the exhaustion requirement.

JUSTICE ALITO: Yeah. And that was my question. Is that correct? Do you defend that?

MR. HUGHES: We think that's a correct statement, yes, Your Honor. We do think that that is a correct understanding of implicit exceptions that exist to exhaustion requirements.

That said, we think the starting place here should be the meaning of -- of the plain term "available" that exists in the statute. And if we're correct about what the term "available" means, I don't think the Court necessarily needs to even reach the -- the rule that was adopted by the court of appeals. We think it was correct --

JUSTICE KAGAN: Do we think that the Fourth Circuit was wrong with respect to that? I mean, it's a problem leaving it on the books, isn't it?

MR. HUGHES: Well, Your Honor, I think the Court could, though, still, even if it thinks that the court -- the court of appeals was wrong about that, still recognize that the additional argument, what the term "available" means in this context that we're correct about, and that, for multiple reasons, the system that Maryland has in place doesn't meet any conceivable understanding of what available would be.

So I think the Court could certainly do that. We -- we would disagree with the submission that the -- the court of appeals was wrong, but we certainly think the starting place here is what "available" means. And -- and that, as applied to this case and given what we now know as how Maryland

has -- has explained it, structured its system, it's certainly not one that would qualify as unavailable --

CHIEF JUSTICE ROBERTS: But if we know what we --

MR. HUGHES: Go ahead.

CHIEF JUSTICE ROBERTS: I was just going to say "what we now know." Do you have any help for me with my concern that none of this is in the record in this case? None of it was before the court of appeals. None of it was before the district court. What should I do about that?

MR. HUGHES: Yes, Your Honor. I have two principal responses to that.

First, is the material that I just read from the court of appeals made quite clear the court of appeals recognized that the -- the State had failed to identify any examples where any remedy in these circumstances was available. Our principal argument throughout the district court and the court of appeals -- mind you, after we got past the waiver argument -- our first argument was waiver -- our second on the merits of this -- was that when an IIU investigation was underway, there was no ARP process whatsoever. Our consistent argument was the State

had failed to meet its burden in showing that that was in fact wrong.

We made that argument to the court of appeals, which, I think, it --

CHIEF JUSTICE ROBERTS: Well, I'm not -- I'm not so much talking about waiver; I'm talking about evidentiary record. You may have made that argument, but you did not submit any of this material as a record. If it had been presented to the district court, they'd go through a normal process. Your Honor, you know, move for the admission of this as Exhibit A. You authenticate it. Somebody comes in and says -- and you'd have discovery on -- on that.

I mean, I don't know that there aren't 180 other cases out there that make the exact opposite point or make your point. And it just seems to me that if the case is going to -- well, it seems to me to present a real serious problem of how we should consider the lodging.

MR. HUGHES: Well, first, Your Honor, I still think it does only support our burden argument, and -- and we still would think our burden argument sufficient.

But, additionally, in the -- the papers to

this Court, Maryland has consistently said that the IIU and the ARP process were entirely distinct. At page 5 of the reply brief in support of certiorari, for example, they explained the argument saying that the 2008 directive codified then-existing practice. They said that that was plainly wrong.

CHIEF JUSTICE ROBERTS: They said that in the district court and court of appeals; right?

MR. HUGHES: Yes, Your Honor. But what we did in the lodging was we identified in part briefs that the Maryland attorney general's office, the office responsible for litigating these cases in Maryland Federal court, briefs that they filed that were -- made materially different representations on these critical questions. That's at our lodgings --

CHIEF JUSTICE ROBERTS: And is there any reason that couldn't have been done before the district court and before the court of appeals and included in the record before this Court?

MR. HUGHES: Well, Your Honor, I think these materials, because they are briefs that the court -- that the State of Maryland submitted in these cases are things that are properly submitted by this Court as legal documents. I think the Court frequently takes -- considers briefs that parties

have filed in other filings that are --

CHIEF JUSTICE ROBERTS: Well, these are not briefs.

MR. HUGHES: Your Honor, we do submit two briefs to the Court. So I point to -- in our lodging to pages 23 and 24, as well as lodging page 5. We're submitting briefs that they filed to the Maryland district court.

CHIEF JUSTICE ROBERTS: Well, you're also submitting documents that were filed, I guess, by prisoners in particular cases?

MR. HUGHES: Your Honor, most of these documents were submitted by the State of Maryland as attachments to their briefs that they filed in Federal court. All these documents that we have were -- the vast majority were submitted as -- by Maryland as attachments to their briefs. A few were submitted by prisoners as attachments to a complaint, for example. But --

CHIEF JUSTICE ROBERTS: But not part of the record in this case?

MR. HUGHES: They -- they were not introduced in -- in -- in the court of appeals, that's right, Your Honor.

But, again, it's consistent with our

argument that the State has never worn its -- met its burden of demonstrating that the ARP is, in fact, available in these circumstances. We still think they've never shown their burden to demonstrate it's available, but --

JUSTICE ALITO: Why should this issue of availability be decided by this Court as opposed to the district court or court of appeals on remand?

MR. HUGHES: Your Honor, I certainly think that could be one possible outcome if the Court were to say that "available" as a legal matter means what we think it means, but that there could be subsidiary questions that would be left for remand. We would not quarrel with that outcome.

JUSTICE SOTOMAYOR: I'm sorry. What's your definition of "availability"?

MR. HUGHES: Yes, Your Honor. We think that for a remedy to properly qualify as available within the meaning of the PLRA, the prison system must sufficiently inform an inmate as to which administrative remedy he or she needs to use to -- to press a particular kind of claim and then additionally needs to explain so a reasonable inmate would know the steps that he or she needs to take to have properly exhausted that remedy.

JUSTICE ALITO: What is the difference between that and what the statute used to say before it was amended where it required exhaustion of such plain -- plain, speedy, and effective administrative remedies as are available?

MR. HUGHES: Yes, Your Honor.

JUSTICE ALITO: I think it's saying it has to be plain.

MR. HUGHES: No, Your Honor. I think there is a substantial amount of daylight between requiring administrative remedy on one hand to be plain, on the other hand to have sufficient clarity that a reasonable prisoner would understand how it works.

And perhaps an example, a prison remedy could -- a prison system could create administrative remedy that is, in fact, quite complex, that has several steps, perhaps some of the steps are conditional based on the kind of claim an individual is raising or based on the adjudication at the lower steps.

That might be very complicated, but it would be perfectly fine so long as the prison accompanies that with sufficiently clear guidance that a reasonable inmate would know how to actually

navigate the system. No --

JUSTICE KAGAN: Do you think that there is also substantial daylight between your standard and the solicitor general's standard? In other words, what I took the solicitor general to be saying with respect to this clarity question is that the standard is if the procedures are so confusing that a reasonable person could not use them. That's his standard.

Do you think that there is a difference between yours and his?

MR. HUGHES: Honestly, I don't think there's a substantial difference, Your Honor. I think we certainly agree with the solicitor general that a reasonableness is incorporated into this.

We disagree with the test that was articulated in their brief at page 21 where they suggest that the standard must be so high that, if any conceivable reasonable inmate could satisfy the test, that that would be sufficient.

We think that is certainly too high a test because if one of a hundred or one of a thousand inmates happens to get it right, that might not mean it's a reasonable system; it just might mean if an inmate is reduced to guesswork, sometimes the

inmate's going to guess correctly.

JUSTICE BREYER: This is quite important to me, and the solicitor general, I think, has -- has -- has made very clear why this is such an important question, not just your client, but I mean in general in the system.

The Fourth Circuit copied a full page of what it said was the Second Circuit's special exceptions test, and then it listed it. And the rest of the opinion that you cite really is meant to be an application of that test. What you were talking about is simply the procedure leg of that test.

So whatever words I or anyone else write here are going to take on a lot of importance in the prison system. So I'm nervous, as always, when that kind of thing happens. I'm not an expert in it.

Now, there are several ways we could go. I mean, it sounds to me, even though I did write, and I think correctly, that there are exceptions, such as for constitutional issues, for example, traditionally there is no exception for the reasonable mistake. I'm not aware of any. And it sounds as if reasonable mistake is put best under the rubric of availability.

Now, that's just tentative. But if I'm right in thinking that what we have here is simply a -- an aspect of the availability question, then maybe the thing to do is send it back and argue out all the availability, including this, in the court below rather than us trying to write a standard.

Or a second, maybe we adopt the SG standard. Or maybe we adopt your standard. I don't know what rubric we'd put it under. Under the rubric of exception? Under the rubric of availability?

Now, that's a general musing-type question, designed to provoke on your part a general response.

MR. HUGHES: Well, we certainly think that the outcome here was correct. So that's certainly our starting point. We think the best way to get there, the proper rubric that would apply in this case and all other cases, is an understanding of what "available" properly means.

So I -- I would suggest, I think, the statutory text and what "available" fairly -- has been held to mean by this Court in Booth and elsewhere does the work, certainly in this case, and I think in the vast majority of cases.

As the Court said in Booth, "available"

here means "accessible or capable of use." I don't think anyone would fairly describe a prison administrative remedy as one that's accessible or capable of use.

A reasonable prisoner wouldn't know which remedy it is he or she is supposed to use in the circumstances or wouldn't know the proper steps that he or she needs to take in order to avoid procedural default under Woodford standard.

The system has to have that -- that minimal degree of clarity for one to actually have been described as available. Certainly Congress retained the word "available" after it amended the PLRA from the prior CRIPA, and "available" must have meaning. Congress certainly didn't say any standard -- or any remedy or all remedies.

And, again, I don't think Maryland even disagrees with us on this point because they say at the reply brief at page 5, they agree that if the -- if the administrative remedy, in their words, is undecipherable, that would not be one that qualifies as available.

So I think there's broad agreement that the -- the prison system can't take the rule book, lock it in a box, not let any inmate understand how

it works, and still call that system one that is -- is fairly available. So --

JUSTICE KAGAN: If I could understand you, though, I mean, one argument that you would have, whether here or below or -- is this notion of the prison system didn't meet this level of clarity, whatever it is.

But there's another argument, don't you think -- or do you think -- that you have, which is just, they said to go to the ARP, and the ARB -- the ARP was not in the business of giving this remedy. So we did exactly what we were told to do, and it turns out the remedy is unavailable because it's just not available.

MR. HUGHES: I think that's precisely correct. I absolutely agree with that view, that here, in all of the cases that anyone has identified -- and, again, with both our lodging, but also in every case in Petitioner's lodging -- and I just point the Courts to their lodging at page 25, 32, 37, 46, 93, 231, and there are others. Every example that anyone has identified, the ARP has always said, "You've come to the wrong place. Because of the IIU is underway, there can be no relief had here." I think that's plainly an

unavailable system.

As the Court in Booth said for -- in a system, administrative remedy to qualify as available, the administrative officers must have some authority to provide relief in the circumstances.

CHIEF JUSTICE ROBERTS: I don't -- I don't mean to beat a dead horse, but the -- the citations you cited, it is true that that's to the lodgings. But I don't have any confidence that these lodgings represent the complete universe to allow me to make a judgment about the procedures under Maryland law, because this wasn't litigated or -- or subject to discovery in the district court or court of appeals.

MR. HUGHES: So, your Honor, two things. First, again, we would not disagree if -- if a remand could be appropriate for some of these issues; but, second, I think there is enough that is undisputed in the -- the record currently that -- that doesn't even require a look in -- in the hole to the lodgings to find that this was not an available system.

To begin with, the IIU exclusivity regulation that we discussed at page 17 of the red brief made quite clear at the time of this incident

that the IIU had exclusive authority whenever there was a referral that was made to the IIU at that point and that no other agency could proceed.

That, again, has nothing to do with the lodging material and, I think, makes quite clear that the ARP was not the proper place to go.

We have the additional briefs, which we think are on somewhat different footing than some of the -- the other agency materials, and we have the 2008 directive that did happen after the case but made quite clear that the ARP is simply the not -- not the correct place for these cases to go.

So I think all of these things, even independent from the lodgings, demonstrate that there was an enormous amount of confusion as to how the system works and is not one that could be described in any sense as available without even --

JUSTICE ALITO: You would argue that even if the ARP procedure turns out to have been available as a formal matter, suppose that this -- that issue were remanded, and the district court explored it thoroughly and concluded that, although there's a lot of -- there are these materials that might suggest otherwise, as a formal matter, it is available, even when the IIU procedure is going --

is going forward. All right?

I don't know whether that would happen. Maybe it wouldn't. Assume that that's the case. You would still argue that the procedure was unavailable because, although it was available as a former matter -- a formal matter, it is simply too confusing; right? And no reasonable inmate could take advantage of it.

MR. HUGHES: That's right.

JUSTICE ALITO: That's a separate agreement?

MR. HUGHES: Yes, Your Honor. Yes. So -- and --and that is why I --

JUSTICE ALITO: As to that argument, your -- your client did not try to use any procedure; isn't that correct?

MR. HUGHES: No, Your Honor.

JUSTICE ALITO: How was he confused?

MR. HUGHES: So on the day of the event -- this is at the Joint Appendix, page 229 to 230, he filed a very detailed report of the incident. And he said, at the bottom of -- of page 229 -- this is three and four lines from the bottom -- "I'm asking for a formal internal investigation." The next page, after his signature, "P.S. I will repeat this

exact statement under oath at any time you need. Please investigate this incident."

He filed this very clear report that described the entire incident. And he asked for the prison to respond. The prison did in fact respond the next day. It instituted the IIU investigation.

So I think the question is, after he had taken this clear affirmative step, would someone in these circumstances, a reasonable prisoner, known that he had to do something else? And I think everything that -- that we know shows that a reasonable prisoner wouldn't have understood he had to do anything else beyond the IIU investigation. So, again, I think very clear affirmative steps he took. And the only question is, would he have known he had to go to the ARP process? He wouldn't have known because of the IIU exclusivity regulation. He wouldn't have known because of the practice in Maryland prisons.

And even if he had shown up there, we now understand that in all cases, it was dismissed. There was a rubber-stamp that was used to dismiss all of these claims. So for both of those reasons, he wouldn't have known to have gone there; and if he had gotten there, he would have shown up to a place

that was going to dismiss --

JUSTICE ALITO: He received -- he received materials from the prison saying that that -- the ARP procedure is available in cases of -- of excessive use of force; isn't that right?

MR. HUGHES: He did, Your Honor, but none of that material said anything whatsoever about the IIU. The IIU exclusivity regulation, however, was specific, and generally the specific is going to, you know, govern over the general. And so on the one hand, when you have a regulation that says the very specific IIU mechanism is exclusive, all other agencies --

JUSTICE ALITO: What did he see that said that the IIU procedure was specific?

MR. HUGHES: Well, it -- it was in the --

JUSTICE ALITO: I'm sorry. Was exclusive?

MR. HUGHES: It was in the -- the regulations that -- again, all of the regulations that Maryland had enacted that would be available to prisoners --

JUSTICE ALITO: And he read those?

MR. HUGHES: No, Your Honor, I don't think there is direct evidence that he read those, but I think the question is what an objectively reasonable

prisoner would have understood. And the only guidance that was specific to the IIU that had anything to do -- that would inform a prisoner, once you're in the IIU channel, what is it that you should be doing at that point, said this was the exclusive mechanism; all other agencies have to relinquish authority. So I think that very tailored guidance would certainly trump the broad policy statements that exist in the other regulations in the Maryland handbook that say nothing whatsoever as to an inmate as to what he should do when the IIU investigates.

I should also add that one of the interesting things about this case is the IIU investigations are the investigations where the Maryland prison itself, it initiates them, because it thinks those are the most serious incidents in the prison. That's where Maryland thinks that its own prison officials may have engaged in criminal wrongdoing, and therefore they need to undertake this process. What Maryland has done is -- is created very substantial trips and traps for only the cases that are most likely to correspond to the very worst conduct in Maryland prisons.

So I think that's a particularly pernicious

aspect of creating the system where you're confused, told to go to the ARP, but then the ARP, in all cases, is going to dismiss your claim, telling you that you've come to absolutely the wrong place.

And, again, I think all of the material at this point is -- is totally consistent on the view that this is how the ARP would have worked. It was codified by the 2008 directive that we discussed at the red brief at page 18, and I think there is little question at this point that there was a codification of existing practice that happened in 2008, because all of the examples anyone has identified is consistent with the view that the 2008 directive served to codify what was --

JUSTICE SOTOMAYOR: Where is that in the record?

MR. HUGHES: Sorry?

JUSTICE SOTOMAYOR: The recent amendment.

MR. HUGHES: It's at page 367 of the Joint Appendix.

And this is part of the directives. It's -- it's a long directive that provides several different pieces of guidance as to how the ARP procedure works. And at -- towards the bottom of Joint Appendix page 367, it explains: "The warden

or institutional coordinator shall issue a final dismissal of a request for procedural reasons when it has been determined that the basis of the complaint is the same basis of an investigation under the authority of the IIU." It provides some additional details, and it says -- it provides the text that now appears on the rubber-stamp, which is, "Your request is dismissed for procedural reasons. Final. The issue is being investigated by IIU. Case Number," blank. "Since this case shall be investigated by IIU, no further action shall be taken within the ARP process."

So this is, I think, a quite clear regulation as to how the system now works.

I will note that Maryland's view at -- at footnote 9 of their reply brief is that even today, notwithstanding this new directive, their view is the way the system works is a prisoner still has to go to the ARP to properly exhaust their claims in these circumstances, despite the fact that this regulation, I think, is crystal clear that, if you do so, your claim is going to be denied.

And you're not told, contrary to the suggestion that you would be -- you would know to appeal, you're not told that you should appeal this

dismissal anywhere. There is not a shred of guidance that says, when you have your ARP dismissed because you've told -- been told you have come to the wrong place, the proper thing is just to keep appealing it. You're told that you're -- it's being dismissed because of the IIU investigation. So I think a reasonable prisoner would be quite clearly led to believe that the IIU is, in fact, the only thing that needs to happen in his particular case and would clearly be misled into not actually appealing.

So I think it's -- it's much more likely that it's the unreasonable prisoners who disregard the clear guidance that they're getting who continue to appeal in these circumstances.

Now, one additional point: The -- Maryland referenced the McCullough case, saying that there is State authority that -- that indicates that the Inmate Grievance Office is the exclusive avenue for these kinds of cases, and it rests on the McCullough case here. I think that argument is misplaced.

The McCullough case that they cite was decided in 1989. The internal investigative unit that's at issue here was not established until 1999, a full decade later. So I think the -- the use in

the reply brief of the McCullough case to say that the IGO is this broad-based mechanism is not responsive in any event to what happens now with the IIU investigation, because the IIU simply didn't exist at the time that -- that the McCullough case was decided.

So I think that our view is quite clear that if Maryland's system in this case were endorsed, that would become a very clear model for what other prisons could enact, this sort of upside-down system, where you're told you have to go to the ARP process to properly exhaust, but once you get there, you're told that you've absolutely come to the wrong place and, despite any guidance, you have to somehow know that you need to appeal, contrary to the instructions that you're being given, in order to properly exhaust your claim.

As the Court said in Woodford, to properly exhaust and to avoid procedural default, the prisoner needs to use the steps that the prison properly holds out. Here, the State is doing the very opposite of holding out these steps as available to the prisoners. The State is saying, you've come to the wrong place; you're using the wrong steps. That can't be what I think the Court

meant for proper exhaustion as is required by Woodford.

I would be pleased to take any more questions that the Court might have.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:57 a.m., the case in the above-entitled matter was submitted.)