23-1241

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

RUSSELL SHOWERS,

Plaintiff-Appellant,

—v.—

DR. COURTNEY RODGERS, M.D., Medical Director/Supervising Physician at SCI-Mahanoy; JOHN STEINHART, Correctional Health Care Administrator; KIM MINARCHICK, CCS/Registered Nurse Supervisor (RNS); BRENDA HOUSER, CCS/Registered Nurse; PATRICIA HOWELL, CCS/Registered Nurse Supervisor (RNS); CORRECT CARE SOLUTIONS (CCS), Medical Care Vendor; JOHN O'BRIEN, Physician Assistant,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF FOR PLAINTIFF-APPELLANT AND JOINT APPENDIX VOLUME I OF II (Pages A1 to A30)

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INTRODUCTION

Plaintiff-Appellant Russell Showers has been suffering from debilitating neck and back pain while incarcerated at the State Correctional Institution–Mahanoy ("SCI Mahanoy"). For more than five and a half years, Mr. Showers has made attempt after attempt to get the facility to adequately treat his chronic condition. At every turn, Mr. Showers has been met with indifference and delay. The medical staff at SCI Mahanoy have ignored the recommendations of an outside specialist, delayed prescribed changes in medication and follow up visits, and allowed Mr. Showers's pain medication to expire. Meanwhile, Mr. Showers has suffered through chronic pain so severe that, at times, it prevents him from getting out of bed. After years of inadequate and delayed treatment, the damage is likely permanent, requiring surgery.

Mr. Showers now seeks to vindicate his rights in federal court. In doing so, Mr. Showers was diligent in exhausting all available administrative remedies. And when new facts developed, Mr. Showers promptly exhausted the relevant grievance and filed a supplemental complaint so that the District Court could address all claims concerning the inadequate treatment of his chronic condition as part of the same case.

But the District Court closed the courthouse doors to Mr. Showers, *sua sponte* holding that the Prison Litigation Reform Act ("PLRA") mandated dismissal of the

entire case because Mr. Showers had failed to exhaust administrative remedies. That conclusion was based on a misreading of the relevant precedent and an oversight concerning the factual record.

First, the District Court erred in holding that Mr. Showers had failed to exhaust his administrative remedies because two of his grievances had not been fully adjudicated when he filed his original complaint. Those grievances were fully exhausted by the time Mr. Showers filed his *operative* pleading—here, the supplemental complaint together with the amended complaint. And under this Court's clear holding in *Garrett v. Wexford Health*, 938 F.3d 69 (3d Cir. 2019), such amended and supplemental pleadings can cure any exhaustion defect in the initial pleading. If any doubt existed as to the holding in *Garrett*, this Court resolved it in *Korb v. Haystings*, 860 F. App'x 222 (3d Cir. 2021), where it applied *Garrett* in circumstances where an incarcerated plaintiff fully exhausted administrative remedies after filing the original complaint but before filing a supplemental complaint. Any contrary holding would nullify the normal operation of Federal Rule of Civil Procedure 15 in PLRA cases, in contravention of *Garrett* and the Supreme Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007). That is especially true for the claim in the supplemental complaint, which was both new and newly-exhausted. The rule the District Court applied, requiring *full* exhaustion at the outset, would

mean that no supplemental complaint could ever be filed in PLRA cases. That is not and cannot be the law.

Second, even if this Court were to hold that (contrary to *Garrett*) exhaustion must be measured as of the time of the initial pleading, Mr. Showers still exhausted all available administrative remedies in this case by the time his original complaint was filed. To start, there is no dispute that two of his grievances (Grievance Nos. 768090 and 771399)—which the District Court completely overlooked—had been fully adjudicated by the facility by the time Mr. Showers filed this action. Because those two fully exhausted grievances concern the *pattern* of failing to treat the same *chronic* medical condition, those grievances cover all of the claims Mr. Showers asserted in his amended complaint. At the very least, those two fully exhausted grievances raise facts underlying two counts in the amended complaint. So those two counts unquestionably survive dismissal under the proper claim-by-claim analysis mandated by *Jones*. What is more, even with respect to the later grievance on which the District Court partially based its dismissal order (Grievance No. 867174), Mr. Showers had exhausted by the time he filed his original complaint because the facility failed to timely respond to his grievance. Even if exhaustion were measured as of the time of the initial pleading, therefore, dismissal was inappropriate.

Third, the District Court erred in *sua sponte* raising exhaustion as to *all* claims in the amended complaint. Exhaustion is a defense that must be affirmatively raised. And here, Defendants-Appellees raised the defense of exhaustion only as to the one claim in the supplemental complaint. The District Court thus erred in *sua sponte* raising exhaustion as to the remaining claims and dismissing the entire action on that basis.

JURISDICTIONAL STATEMENT

Mr. Showers filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Middle District of Pennsylvania (the "District Court"). The District Court had jurisdiction over this civil rights action under 28 U.S.C. §§ 1331 and 1343. The District Court dismissed the case on March 17, 2022. (A-4.) Mr. Showers timely moved for reconsideration on April 14, 2022. (A-5, 473.) The Court denied reconsideration on January 6, 2023. (A-5.) Mr. Showers timely noticed this appeal on February 1, 2023.[1] (A-1.) This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

[1] The District Court docketed the notice of appeal on February 6, 2023. (A-1.) Under the prison mailbox rule, however, the notice of appeal was "filed" on February 1, 2023, when Mr. Showers "delivered it to the prison authorities for forwarding to the court clerk." *Houston v. Lack*, 487 U.S. 266, 276 (1988). Either way, the notice was timely filed.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in dismissing Mr. Showers's case despite Mr. Showers having fully exhausted administrative remedies in accordance with the Prison Litigation Reform Act by the time he filed the operative pleading.
2. Whether the District Court erred in dismissing Mr. Showers's case despite Mr. Showers having fully exhausted the relevant grievances by the time he filed his original complaint.
3. Whether the District Court erred in *sua sponte* raising exhaustion as to all claims.

STATEMENT OF RELATED CASES AND PROCEEDINGS

None.

STATEMENT OF THE CASE

I. Legal Background

The PLRA's exhaustion provision instructs that "[n]o action shall be brought with respect to prison conditions . . . by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Lack of exhaustion is an affirmative defense. *Jones*, 549 U.S. at 216.

Federal Rule of Civil Procedure 15 governs "Amended and Supplemental Pleadings." Rule 15(a) gives courts discretion to permit litigants to amend their pleadings at any stage in the litigation, and instructs courts to grant leave "freely . . .

when justice so requires." Fed. R. Civ. P. 15(a). And Federal Rule of Civil Procedure 15(d) gives courts discretion to permit litigants to supplement their pleadings at any stage in the litigation. Fed. R. Civ. P. 15(d). The court may grant leave to supplement under Rule 15(d) "even though the original pleading is defective in stating a claim or defense." *Id.*

II. Factual Background

A. Mr. Showers's History of Chronic Neck and Back Pain

Accepting the factual allegations contained in Mr. Showers's amended and supplemental complaints as true, as is required at this stage, *see Blanyar v. Genova Prods. Inc.*, 861 F.3d 426, 431 (3d Cir. 2017), the facts of this case are as follows:

Mr. Showers is an inmate at SCI Mahanoy. (A-340.) Defendant-Appellee Correct Care Solutions ("CCS") is the medical care provider for SCI Mahanoy (A-341.) While incarcerated at SCI Mahanoy, Mr. Showers has suffered from chronic neck and back pain, which has worsened over the years because of often delayed and inadequate medical treatment. (A-342.) At times, the pain is "so severe" that Mr. Showers is "unable to walk and not even able to get in and out of the bed." (A-345.) The inadequate and significantly delayed medical treatment has resulted in a high likelihood that Mr. Showers will suffer from permanent nerve damage. (A-347.)

Mr. Showers made diligent and repeated attempts to alert medical staff at SCI Mahanoy of his medical condition and pain. But the medical staff remained indifferent to these complaints, either ignoring Mr. Showers's pleas or delaying any response. For instance, Dr. Courtney Rodgers, the supervising physician at SCI Mahanoy, kept Mr. Showers on simple non-steroidal anti-inflammatory drugs ("NSAIDs") and an antidepressant that did nothing to relieve his pain and instead caused serious and painful psychological adverse effects. (A-342-44.) Dr. Rodgers did so despite the recommendations of an off-site specialist that Mr. Showers be prescribed a different medication, Neurontin, to treat his pain. (A-342-44.) It took Dr. Rodgers six months, after numerous complaints and follow ups and another change in medication, to finally adhere to the recommendations of the specialist and prescribe Neurontin to treat Mr. Showers's pain. (A-344.) And even after that, Dr. Rodgers continued to ignore Mr. Showers's complaints that the dosage for the Neurontin was inadequate and that he needed to see a specialist again to discuss other treatment, including possible surgery. (A-344-46.)

In addition, the medical staff often ignored, or delayed responding to, requests by Mr. Showers to be seen by medical staff or by the outside specialist. For instance, despite the outside specialist's instructions that Mr. Showers return within thirty days to three months for follow ups, such follow ups were often delayed by anywhere between five months and a year. (A-343, 346-47.) When Mr. Showers submitted

sick calls and request slips to the medical staff to follow up on his treatment, Defendants-Appellees John Steinhart, Kim Minarchick, Brenda Houser, and Patricia Howell[2] would respond by purportedly scheduling follow ups "with MD line to discuss his return to specialist," but the dates for the follow ups would elapse without Mr. Showers being seen by anyone. (A-345-47.)

Finally, although Mr. Showers warned the facility that his medication was about to expire and that the delay in receiving his pain medication would result in serious withdrawal symptoms, medical staff—including Defendant-Appellee John O'Brien, a physician assistant at the facility—did nothing. (A-382-83.) They accused Mr. Showers of lying about his withdrawal symptoms and delayed entering a new prescription for his pain medication by two weeks. (A-384.) This delay caused Mr. Showers "severe nerve pain, headaches, sweats, crawling on skin sensation, severe depression, insomnia, nausea, vomiting, stomach pain, severe anxiety and panic attacks . . . increased heart rate, chest pain, weakness, and severe body aches making it nearly impossible to get in and out of bed." (A-385.)

[2] According to the amended complaint, Defendant-Appellee Steinhart is the Corrections Health Care Administrator who oversees the daily operations of the medical department at SCI Mahanoy. The amended complaint further alleges that Defendants-Appellees Minarchick, Houser, and Howell are CCS employees who oversee medical personnel, respond to requests submitted to medical, and coordinate the scheduling of inmate sick calls and follow-ups. (A-341.)

B. Mr. Showers's Grievances[3]

In an effort to get SCI Mahanoy to provide medical care for his chronic neck and back pain, Mr. Showers submitted four grievances: Grievance Nos. 768090, 771399, 867174, and 908427. For each of these grievances, Mr. Showers complied with Pennsylvania Department of Corrections Policy No. DC-ADM 804, which governs the inmate grievance process at SCI-Mahanoy.

1. Grievance No. 768090

Mr. Showers submitted Grievance No. 768090 on or about October 20, 2018, complaining that Dr. Rodgers, CCS, and its medical staff failed to provide adequate medical care for his neck and back pain. (A-241-42.) Mr. Showers claimed, for example, that Dr. Rodgers failed to give him medications recommended by the off-site specialist (such as Neurontin) and that he was sent to the off-site specialist without the appropriate medical records. (A-242.)

On December 3, 2018, Mr. Showers received an Initial Review Response denying his grievance. After Mr. Showers timely appealed, the Facility Manager upheld denial of his grievance on December 11, 2018. (A-244-45.) Mr. Showers again timely appealed, and the Office of Inmate Grievances & Appeals for the

[3] Defendants-Appellees Dr. Rodgers and CCS submitted a record of Mr. Showers's grievances with their motion to dismiss the original complaint. (A-105-339.) Defendant-Appellee John O'Brien submitted an identical copy of the record of Mr. Showers's grievances with his motion to dismiss. (A-412.)

Pennsylvania Secretary of Corrections ("SOIGA") upheld the denial of his grievance on February 5, 2019. (A-237.)

2. Grievance No. 771399

Mr. Showers submitted Grievance No. 771399 on November 9, 2018, complaining that Dr. Rodgers, the medical department, and CCS "refused proper treatment . . . for the ongoing problem" he was "having with the osteoarthritis." (A-231-32.) He also alleged that CCS was "willfully denying . . . treatment proscribed to [him] … by Geisinger Hospitals Neuroscience Department," including Neurontin and further MRIs. (A-232.)

On December 7, 2018, Mr. Showers received an Initial Review Response denying his grievance, which Mr. Showers timely appealed to the Facility Manager on December 10, 2018 (and which was stamped received on December 13, 2018). (A-233-34.) The Facility Manager upheld the Initial Review Response on December 27, 2018, which Mr. Showers timely appealed to SOIGA. (A-235-36.) SOIGA upheld the denial of Mr. Showers's grievance on February 5, 2019. (A-227.)

3. Grievance No. 867174

Mr. Showers submitted Grievance No. 867174 on or about May 8, 2020, again raising the claim that Dr. Rodgers and CCS were not providing him with the proper medication for his neck and back pain. (A-109-10.) After receiving an Initial Review Response denying his grievance on June 4, 2020, and the Facility Manager

upholding the denial on July 21, 2020, Mr. Showers submitted a timely appeal to SOIGA. (A-111-17.) On August 17, 2020, SOIGA informed Mr. Showers that his grievance was referred to the Bureau of Health Care Services ("BHCS"). (A-107.) SOIGA requested that BHCS forward an opinion to SOIGA within twenty working days—September 7, 2020. (A-108.) BHCS did not issue a response within the requested twenty days. Instead, BHCS issued its response on November 4, 2020, which determined that the medical care provided was reasonable and appropriate. (A-106.) SOIGA received that response on November 17, 2020 (A-106), and denied the grievance the next day, on November 18, 2020. (A-105.)

4. Grievance No. 908427

On December 29, 2020, after Mr. Showers filed his original complaint, he submitted another grievance concerning the lack of proper medical treatment for his chronic neck and back pain, explaining that he met with Defendant-Appellee O'Brien and told him that he was experiencing withdrawal symptoms after medical staff let his Neurontin expire. (A-457.) According to the grievance, Defendant-Appellee O'Brien "denied [Mr. Showers] any type of care for withdrawal," claimed that CCS would not approve the medication, and claimed there was "nothing he can do." (A-457.) Mr. Showers further explained that he met with Defendant-Appellee Steinhart and that, although he made Defendant-Appellee Steinhart aware of his

pain, nothing happened, and he was left in "extreme pain and suffering." (A-458.) Grievance No. 908427 was noted as received on January 5, 2021. (A-457.)

On February 17, 2021, Mr. Showers received an Initial Review Response (dated January 27, 2021), which denied his grievance. (A-459.) On February 18, 2021, Mr. Showers appealed the denial of his grievance to the Facility Manager. (A-460.) On March 16, 2021, the Facility Manager remanded Mr. Showers's grievance for further review. (A-461.) Mr. Showers subsequently alerted prison staff of the delay in receiving a response following the Facility Manager's remand of his grievance. (A-462.) After remand, on April 15, 2021, Mr. Showers's grievance was denied. (A-463.) On April 21, 2021, Mr. Showers appealed the denial to the Facility Manager, explaining that the response to his grievance after remand was untimely and that the delay in his medication caused withdrawal symptoms and pain. (A-464.) The record does not include a response from the Facility Manager.

III. Procedural History

A. Mr. Showers's Complaints

Mr. Showers, proceeding pro se, filed a complaint on October 9, 2020, raising deliberate indifference claims under the Eighth Amendment against Defendants-Appellees Courtney Rodgers, John Steinhart, Kim Minarchick, Brenda Houser, Patricia Howell, and CCS. (A-40-43.) No one disputes that, at that point, Mr. Showers had fully exhausted Grievance Nos. 768090 and 771399.

After being granted leave by the District Court, Mr. Showers filed an amended complaint on April 5, 2021, again raising Eighth Amendment deliberate indifference claims against the same Defendants-Appellees. (A-340-41.) By then, Mr. Showers had received a final decision from SOIGA for Grievance No. 867174. (A-105.)

On May 3, 2021, with the District Court's permission, Mr. Showers filed a supplemental complaint, raising a new Eighth Amendment deliberate indifference claim, still relating to his chronic neck and back pain, against a new Defendant-Appellee, John O'Brien, for an incident that occurred after Mr. Showers initiated this action. (A-380-81.) The District Court directed Defendant-Appellee O'Brien to "file a responsive pleading to the Amended Complaint and Supplemental Complaint" and informed the other Defendants-Appellees that they "may file a supplemental briefing in support of their motion to dismiss, addressing Pltfs Supplemental Complaint." (A-389-90.) By then, Mr. Showers fully exhausted administrative remedies for Grievance No. 908427 because the prison failed to timely respond to that grievance.

B. Defendants-Appellees' Motions to Dismiss Mr. Showers's Amended and Supplemental Complaints

After Mr. Showers filed his amended complaint, Defendants-Appellees Rodgers and CCS moved to dismiss the claims in the amended complaint against

them for failure to state a claim. (A-362, 375.) Neither Dr. Rodgers nor CCS moved to dismiss for lack of exhaustion.[4]

After Mr. Showers filed his supplemental complaint, Defendant-Appellee O'Brien moved to dismiss the claim in the supplemental complaint against him for failure to state a claim and exhaustion "inasmuch as Plaintiff has not exhausted his administrative remedies related to the specific incident that occurred in December 2020." (A-410) Defendant-Appellee CCS similarly moved to dismiss the "Supplemental Complaint inasmuch as Plaintiff has not exhausted his administrative remedies related to the specific incident that occurred in December 2020." (A-420.) Defendants-Appellees Steinhart, Minarchick, Howell, and Houser moved to dismiss the supplemental complaint for failure to state a claim, not for exhaustion. (A-427.)

[4] Before Mr. Showers filed his amended complaint, Dr. Rodgers and CCS moved to partially dismiss the original complaint on exhaustion grounds. Specifically, they argued that only *two* of the claims had not been exhausted prior to filing suit because those claims purportedly addressed issues that Mr. Showers did not raise in any grievance. (*See* A-97.) Defendants-Appellees did not move to dismiss the original complaint in its entirety, nor did they argue that Grievance Nos. 771399 and 768090 were not fully exhausted prior to Mr. Showers bringing this action. To the contrary, Defendants-Appellees acknowledged that that "the subject matter of these grievances overlaps with many of the issues raised in Plaintiff's Complaint." (A-100.) That motion to dismiss became moot after Mr. Showers filed his amended complaint, and neither Dr. Rodgers nor CCS renewed their exhaustion argument in moving to dismiss that amended complaint. (A-362, 375.)

C. The District Court's Decision Dismissing Mr. Showers's Claims

On March 17, 2022, the District Court granted Defendants-Appellees' motions and dismissed the entirety of Mr. Showers's action for failure to exhaust administrative remedies under the PLRA. (A-20.) Focusing only on Grievance Nos. 867174 and 908427, the District Court reasoned that because Mr. Showers did not fully exhaust administrative remedies until after he filed his original complaint on October 9, 2020, his claims were subject to dismissal for lack of exhaustion. (A-16-18.) The District Court did not discuss Grievance Nos. 768090 and 771399.

D. The District Court's Denial of Mr. Showers's Motion for Reconsideration

On April 14, 2022, Mr. Showers moved for reconsideration of the District Court's order dismissing his claims for lack of exhaustion. (A-473, 475.) Mr. Showers argued that the District Court should not have dismissed the entire action because only certain Defendants-Appellees raised exhaustion and only as to the claim in the supplemental complaint. (A-479.) He argued that the District Court had "overlooked" that "claims raised within his amended complaint . . . were fully exhausted." (A-479.) He also argued that the claim in the supplemental complaint was fully exhausted at the time he filed that supplemental complaint because Defendants-Appellees failed to follow their own policies in addressing the grievance. (A-478.)

The District Court denied reconsideration because, as it explained in its original decision, Mr. Showers did not exhaust Grievance Nos. 867174 and 908427 until after he filed this action—even though Grievance No. 908427 concerned an event that occurred after Mr. Showers initially filed suit. (A-27-28.) The District Court reasoned that Mr. Showers's amended and supplemental complaints did not "cure[] his premature lawsuit" because "when [Mr. Showers] filed his amended and supplemental complaints, he was still subject to the PLRA's mandatory exhaustion requirement." (A-29.) Thus, the District Court held that it did not misunderstand or misinterpret "the law as it applies to [Mr. Showers's] situation." (A-29.) The District Court again failed to discuss Grievance Nos. 768090 and 771399.

SUMMARY OF THE ARGUMENT

I. The PLRA's exhaustion requirement requires incarcerated plaintiffs to exhaust available administrative remedies before they file their operative complaint in federal court seeking redress for claims concerning prison conditions. Here, Mr. Showers exhausted his administrative remedies for all his grievances by the time he filed his supplemental complaint, which together with his amended complaint comprised his operative pleading. The District Court therefore erred in dismissing the action for failure to exhaust.

A. Binding Third Circuit precedent is clear that, under Rule 15, an amended or supplemental complaint can "cure a deficient pleading," including

where the deficiency concerns a failure to exhaust under the PLRA. *Garrett v. Wexford Health*, 938 F.3d 69, 83-84 (3d Cir. 2019). That is because "the PLRA does not override the usual operation of Rule 15." *Id.* at 87. Exhaustion, therefore, is measured as of the time of the amended and supplemental complaints, which have become the operative pleading and which "operate[] to cure the original filing defect (*i.e.*, his failure to exhaust administrative remedies)." *Id.* at 88; *see also Korb v. Haystings*, 860 F. App'x 222 (3d Cir. 2021). That settled principle resolves this case: there is no dispute that Mr. Showers exhausted his administrative remedies by the time he filed his supplemental complaint, which together with his amended complaint comprised the operative pleading in the case.

The District Court concluded otherwise only by mistakenly limiting *Garrett* to cases in which there was a change in custody status. But *Garrett* is not so limited; the holding of the case concerns the normal operation of Rule 15 in PLRA cases, which squarely controls the outcome here. And if any doubt remained as to the holding in *Garrett*, this Court dispelled it in *Korb*, which applied *Garrett*'s reasoning to a case concerning an incarcerated plaintiff who exhausted administrative remedies before filing his supplemental complaint—just like Mr. Showers here. *Garrett* and *Korb* directly control the outcome of the exhaustion inquiry in this case and compel the conclusion that Mr. Showers had fully exhausted administrative remedies by the time he filed the operative pleading in this case.

B. At the very least, the operative pleading *must* control the exhaustion analysis when supplemental complaints asserting new facts are at issue. Rule 15(d) allows litigants to file supplemental pleadings concerning new facts that occur after filing the original complaint. For that reason, courts of appeal, including this one, to have squarely addressed this issue agree that an incarcerated plaintiff can exhaust administrative remedies for issues occurring after the litigant commences a federal action. To conclude otherwise would mean that incarcerated plaintiffs can never file supplemental complaints concerning new facts.

II. Even if this Court held (contrary to *Garrett*) that exhaustion is measured as of the time of the original complaint, the District Court's dismissal was inappropriate because Mr. Showers exhausted available administrative remedies before his original complaint.

A. The District Court entirely disregarded Grievance Nos. 768090 and 771399, which had been fully exhausted by the time Mr. Showers filed his original complaint and which relate to the same pattern of mistreatment of his chronic medical condition. Both grievances gave prison officials notice of the constitutional harm inflicted on Mr. Showers before he filed his original complaint. And although some of the issues Mr. Showers raised in the amended and supplemental complaints post-date these two grievances, all his claims ultimately concern a pattern of conduct at SCI Mahanoy of depriving him of adequate medical treatment for his chronic neck

and back pain. Although this Court has not yet addressed whether a fully exhausted grievance can cover future conduct, other circuits to have addressed the issue have answered in the affirmative. *See, e.g.*, *Morgan v. Trierweiler*, 67 F.4th 362, 369-70 (6th Cir. 2023) ("Where there is 'one, continuing harm' or a single course of conduct (which can lead to discrete incidents of harm), filing repeat grievances is unnecessary" for exhaustion under the PLRA.). At a minimum, Grievance Nos. 768090 and 771399 clearly addressed the facts that underlie Counts I and IV of the amended complaint. The District Court was required to engage in a claim-by-claim analysis of the exhaustion question, and to proceed with claims that were fully exhausted. *See Jones*, 549 U.S. at 220-21. Under that claim-by-claim analysis, Counts I and IV clearly survive. Here, the District Court replaced that claim-by-claim analysis with an all-or-nothing approach and thus erred in dismissing the entirety of Mr. Showers's action on exhaustion grounds.

B. Further, the facility here failed to comply with its own policies in addressing Grievance No. 867174, rendering administrative remedies unavailable for that grievance. That failure to respond pre-dated the filing of the original complaint. And, as this Court has held, once the facility failed to respond within the required timeframe, Mr. Showers gained the right to bring his claims in federal court. *See Shifflett v. Korszniak*, 934 F.3d 356, 365-66 (3d Cir. 2019).

III. Finally, the District Court erred in *sua sponte* raising exhaustion as to the claims in the amended complaint. Defendants-Appellees did not move to dismiss the claims in the amended complaint on exhaustion grounds, nor was the lack of exhaustion apparent on the face of that amended pleading (in fact, the opposite is true). Yet, the District Court *sua sponte* raised exhaustion as to claims in the amended complaint in its decision dismissing the entire action, without giving Mr. Showers an opportunity to be heard.

STANDARD OF REVIEW

This Court reviews an order granting a Rule 12(b)(6) motion to dismiss de novo. *Garrett*, 938 F.3d at 81. The Court exercises "plenary review over . . . the exhaustion determination" under the PLRA. *Rinaldi v. United States*, 904 F.3d 257, 264 (3d Cir. 2018); *see also Harrow v. Prudential Ins. Co. of America*, 279 F.3d 244, 248 (3d Cir. 2002) ("We review de novo the applicability of exhaustion principles, because it is a question of law.").

ARGUMENT

I. Mr. Showers Exhausted His Administrative Remedies Under the PLRA Because Exhaustion Is Measured as of the Time of the Operative Complaint.

The PLRA requires prisoners to exhaust administrative remedies before they file their operative complaint. Here, it is undisputed that Mr. Showers had exhausted all available administrative remedies by the time he filed his supplemental complaint, which together with his amended complaint comprised his operative

pleading. When it measured exhaustion as of Mr. Showers's *original* complaint, the District Court ignored square holdings of this Court. *See Garrett v. Wexford Health*, 938 F.3d 69 (3d Cir. 2019); *Korb v. Haystings*, 860 F. App'x 222 (3d Cir. 2021). And its dismissal of the claim in the supplemental complaint was even more egregious: the District Court's requirement that a plaintiff preemptively grieve future events would mean that no prisoner could ever file a supplemental complaint alleging new facts that post-date the filing of the action.

A. The Date of the Operative Pleading Governs for the PLRA's Exhaustion Requirement.

It is undisputed that all of Mr. Showers's grievances had been fully exhausted by the time he filed his supplemental complaint, which together with his amended complaint comprised his operative pleading. However, the District Court dismissed Mr. Showers's action because he did not exhaust administrative remedies as to Grievance Nos. 867174 and 908427 until after he filed his original complaint.

That was error. As this Court has held, Rule 15 allows plaintiffs to cure defects in their original complaint—including a failure to exhaust—by filing an amended and/or supplemental complaint after fixing the defect. That is precisely what Mr. Showers did here.

1. This Court Has Already Held That Amended and Supplemental Pleadings Can Cure Filing Defects for Failure to Exhaust.

Under Rule 15, "where a party's status determines a statute's applicability, it is his status at the time of the amendment and not at the time of the original filing that determines whether a statutory precondition to suit has been satisfied." *Garrett*, 938 F.3d at 83. The PLRA "does not override" this "usual operation of Rule 15." *Id.* at 87; *cf. Jones v. Bock*, 549 U.S. 199, 216 (2007) (when Congress wanted the PLRA to alter a rule of civil procedure, "it did so expressly"). Thus, whether a prisoner is released (in which case he is excused from the statute) or exhausts (in which case he has complied with it), an amended or supplemental complaint cures an initial failure to exhaust. *See Garrett*, 938 F.3d at 84, 88 (release); *Korb*, 860 F. App'x at 226 (exhaustion).

In *Garrett*, this Court held that a plaintiff's post-release amended pleading cures an initial failure to exhaust under the PLRA. *See* 938 F.3d at 84, 88. There, the plaintiff initially filed his claims while in custody. The district court subsequently allowed the plaintiff to amend his complaint. By the time the plaintiff filed the operative pleading (which was, as here, an amended and supplemental complaint), he was no longer in custody and therefore no longer subject to the PLRA's exhaustion requirements. The Third Circuit concluded that, per the "normal operation of Rule 15," his "change in status (*i.e.*, his release) operates to cure the original filing defect (*i.e.*, his failure to exhaust administrative remedies)." *Id.* at 88.

In so doing, this Court analyzed the purpose of Rule 15 and its interplay with the PLRA. Rule 15 encourages "a proper decision on the merits" rather than a dismissal "on the basis of . . . mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (citation omitted). To facilitate such a decision, Rule 15 permits amended pleadings "to assert matters that were overlooked or were unknown at the time the party interposed the original complaint," 6 C. Wright & A. Miller, Federal Practice and Procedure § 1473 (3d ed. 2019), and supplemental pleadings to "set[] out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented," Fed. R. Civ. P. 15(d). Once filed, "an amended pleading supersedes the original pleading and renders the original pleading a nullity," such that "the most recently filed amended complaint becomes the operative pleading." *Garrett*, 938 F.3d at 82. "Supplementation under Rule 15(d) therefore can be employed to allege subsequent facts to cure a deficient pleading." *Id.* at 83.

Turning to the interplay with the PLRA, the Court in *Garrett* concluded that "the usual procedural rules apply to PLRA cases unless the PLRA specifies otherwise" and that "the PLRA does not override the usual operation of Rule 15." *Id.* at 87. In support of that conclusion, the Court cited *Jones*, in which the Supreme Court rejected pleading rules that a lower court had adopted to implement the PLRA's exhaustion requirement. The Supreme Court cautioned "that courts should generally not depart from the usual practice under the Federal Rules on the basis of

perceived policy concerns." *Jones*, 549 U.S. at 212. And it explained that "when Congress meant to depart from the usual procedural requirements, it did so expressly." *Id.* at 216. The PLRA's exhaustion provision, the Court concluded, contained no such express departure. *Id.* at 214.

Just so here. Because "nothing within the language of the PLRA direct[s] a deviation from the usual operation of Rule 15," under *Jones*, the usual pleading amendment and supplementation rules must apply in PLRA cases. *Garrett*, 938 F.3d at 90. That means the amended and supplemented pleading, and not the initial pleading, is the operative pleading for purposes of the exhaustion analysis and can cure an initial failure to exhaust.

As this Court recognized in *Korb*, 860 F. App'x at 226, *Garrett*'s reasoning is not confined to post-release amendments; it applies with equal force to post-exhaustion amendments. In *Korb*, this Court held that a still-incarcerated plaintiff who informed the court that he had fully exhausted administrative remedies after filing his original complaint had complied with the PLRA. *Id.* at 224-26. Consistent with *Garrett*, this Court reasoned that "Rule 15(d) permits a PLRA plaintiff to cure a deficiency based on subsequent exhaustion by filing a supplemental pleading, and such facts are deemed to be part of the complaint that the plaintiff initially presented to the court." *Id.* at 225 n.4. "[B]ecause a supplemental complaint curing filing defects in the original complaint 'relates back to the original complaint,' courts

should consider the content of the supplement as though it were included in the original complaint when it was 'brought.'" *Id.* (citation omitted). Therefore, applying *Garrett*, this Court concluded that "the [district c]ourt should have viewed [the plaintiff's] pre-motion-to-dismiss filings as supplements to the complaint, treated the events alleged therein as part of the original complaint, and considered whether they demonstrated that [the plaintiff] had exhausted his administrative remedies." *Id.* at 226.

Notably, just last term, the Supreme Court indicated its endorsement of this natural reading of Rule 15 and the PLRA. In *Ramirez v. Collier*, an incarcerated plaintiff had failed to exhaust available remedies before suing under the PLRA. 142 S. Ct. 1264, 1276 (2022). After filing the original complaint, he had exhausted available remedies and then filed an amended complaint. *Id.* Although the issue was not squarely presented and the Supreme Court declined to settle it, the Court brushed aside an argument that the failure to exhaust barred the action, explaining that the post-exhaustion amended complaints "arguably cured" the "original defect." *Id.* (citing *Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010)).

Finally, treating an amended or supplemental complaint as the operative pleading in the exhaustion analysis furthers the PLRA's purpose. The exhaustion requirement in the PLRA seeks "to reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The normal pleading

amendment and supplementation rules further both goals. *First*, the normal operation of Rule 15 reduces the quantity of prisoner suits because it seeks to avoid "the needless formality and expense of instituting a new action when events occurring after the original filing indicated a right to relief." 6A Wright & Miller, *supra*, § 1505. Dismissal for a failure to exhaust must be without prejudice, *Garrett*, 938 F.3d at 81 n.16, such that "the court will have to entertain the case a second time after essentially the same action is re-filed," turning one case into two, *Harris v. Garner*, 216 F.3d 970, 986 (11th Cir. 2000) (en banc) (Tjoflat, J., concurring in part); *see also Garrett*, 938 F.3d at 89 (finding persuasive reasoning in *Jackson v. Fong*, 870 F.3d 928 (9th Cir. 2017), that decision to amend rather than file a new suit "promoted judicial economy"); *cf. Jones*, 549 U.S. at 223-24 (same, where a rule would result in "refiled complaints . . . identical to what the district court would have considered"); *Ortiz v. McBride*, 380 F.3d 649, 658 (2d Cir. 2004) (explaining that a rule that would simply "require plaintiffs . . . to refile their claims" undermines the PLRA's purpose). *Second*, the normal operation of Rule 15 improves the quality of prisoner suits by allowing the prisoner to amend or supplement, thereby "bringing the case up to date," 6A Wright & Miller, *supra*, § 1504, and allowing "a complete adjudication of the dispute between the parties." *Garrett*, 938 F.3d at 82. Simply put, the District Court's draconian application of the exhaustion rule not only collides with Rule 15 and this Court's precedent, but it also undermines the PLRA's purpose.

2. Mr. Showers Exhausted All Relevant Grievances Before Filing his Operative Complaints.

Garrett and *Korb* dictate the outcome of this appeal. The District Court should have considered whether, at the time Mr. Showers filed his *operative* pleading, he had fully exhausted his administrative remedies under the PLRA. No one disputes that he had—as to all four relevant grievances.

All parties agree that Mr. Showers fully exhausted three relevant grievances before filing his amended complaint. Grievance Nos. 768090 and 771399 were fully exhausted before the *original* complaint—so they were necessarily exhausted before the operative ones. (A-227, 237.) And Grievance No. 867174 was fully exhausted at least as of November 18, 2020 (if not sooner, *see infra*), months before Mr. Showers filed his amended pleadings and before any Defendant-Appellee moved to dismiss. The District Court itself recognized that Mr. Showers had fully exhausted Grievance No. 867174 prior to the "filing of his amended and supplemental complaints," (A-28), but dismissed because it measured exhaustion as of the wrong time.

The same goes for Grievance No. 908427, which, at the time Mr. Showers filed his supplemental complaint, was fully exhausted by virtue of the failure of prison staff to timely respond to his grievance. *See Shifflett v. Korszniak*, 934 F.3d 356, 365-66 (3d Cir. 2019) (concluding that after the incarcerated plaintiff "received no response within the specified time limit . . . he obtained the right to come into federal court"). The District Court similarly recognized that Mr. Showers had

exhausted Grievance No. 908427 (*see* A-27-28 (noting that "Plaintiff has cited the proper holding for *Shifflett* as it applies to his grievance filed on January 5, 2021")), and again dismissed only because it measured exhaustion as of the filing of the original complaint.

Because there is no question that Mr. Showers exhausted available administrative remedies for *all* his grievances by the time he filed his operative pleading, his claims were fully exhausted under the PLRA. *Garrett*, 938 F.3d at 87; *Korb*, 860 F. App'x at 226.

3. The District Court's Reasoning Is Flawed.

Even though it acknowledged the holding of *Garrett*, the District Court erred in its attempt to limit that holding to the specific facts in that case. The District Court reasoned that *Garrett* was inapplicable to the instant case because "there was no change in [Mr. Showers's] custody status between the time he filed his original complaint and the time he filed his amended and supplemental complaints." (A-29.) But that is wrong: This Court rejected the unreasoned distinction between post-filing release and post-filing exhaustion in *Korb*, where it applied *Garrett* to a still-incarcerated plaintiff who had exhausted remedies after filing but before supplementing. *Korb*, 860 F. App'x at 226.

Korb was right: Nothing in *Garrett*'s reasoning hinged on the change in the plaintiff's custody status. The plaintiff's release from custody was simply the new

factual development that the supplemental complaint in *Garrett* reflected. *See Garrett*, 938 F.3d at 84 ("When he filed the TAC, [the plaintiff] was no longer a prisoner and therefore was not subject to the PLRA's administrative exhaustion requirement."). *Garrett*'s holding, premised on a careful analysis of Rule 15 and its interaction with the PLRA, was that "the time of amendment and not . . . the time of the original filing . . . determines whether" PLRA exhaustion "has been satisfied," *id.* at 82 (citing *Mo., K&T Railway Co. v. Wulf*, 226 U.S. 570, 575 (1913))—not that release is the only factual development that can cure a failure to exhaust.

And *Korb* is not alone in holding that an incarcerated plaintiff can cure an exhaustion defect through an amended or supplemental pleading. The Ninth Circuit, the only other court to have squarely addressed this question, recently reached the same conclusion in *Saddozai v. Davis*, 35 F.4th 705, 708 (9th Cir. 2022). In reaching that conclusion, the Ninth Circuit relied on its prior holding that a post-release amended complaint cures a failure to exhaust because a PLRA litigant "can cure deficiencies through later filings, regardless of when he filed the original action." *Jackson v. Fong*, 870 F.3d 928, 934 (9th Cir. 2017); *see also id.* at 935 ("Exhaustion requirements apply based on when a plaintiff filed the operative complaint, in accordance with the Federal Rules of Civil Procedure.").[5]

[5] Notably, this Court also found persuasive the Ninth Circuit's reasoning in *Jackson* when analyzing whether post-release amendment cures an initial filing defect. *See Garrett*, 938 F.3d at 88 ("Looking beyond our own case law, a sister Circuit has

Although *Jackson,* like *Garrett,* arose in the post-release context—wherein the plaintiff had initially filed while incarcerated but had been released from custody by the time of the amended or supplemental pleading—the Ninth Circuit had no trouble concluding that *Saddozai* presented a "simple case." *Saddozai*, 35 F.4th at 708. The Ninth Circuit saw no reason to distinguish the post-filing release context addressed in *Jackson* from the post-filing exhaustion context *Saddozai* raised. In other words, the plaintiff's custody status did not matter. Rather, the court focused on the status of exhaustion at the time the plaintiff, still in custody, filed the operative pleading. *Id.* at 708, 710 (holding that the case "turn[ed] on" the court looking at "[p]laintiff's operative third amended complaint" in determining whether the plaintiff complied with the PLRA's exhaustion requirements).

Just as in *Saddozai*, this case presents "a simple case" in light of *Garrett* and *Korb*: Exhaustion is measured as of time of the operative pleading, not the initial filing. Once that rule is applied, there is no question that Mr. Showers fully exhausted all of his claims.

In addition to misreading *Garrett* and ignoring *Korb*, the District Court relied heavily on *Spruill v. Gillis*, 372 F.3d 218 (3d Cir. 2004), *Ahmed v. Dragovich*, 297

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applied [*Jones v.*]*Bock* to circumstances similar to *Garrett*'s, and that Court reached a conclusion consistent with how we decide the instant matter.").

F.3d 201 (3d Cir. 2002), and *Oriakhi v. United States*, 165 F. App'x 991 (3d Cir. 2006). But none of these cases supports dismissal of Mr. Showers's claims.

Neither *Spruill* nor *Oriakhi* involved an amended or supplemental complaint. *Spruill* asked only "whether the PLRA requires simple exhaustion or something more—'proper' exhaustion, as it were." *Spruill*, 372 F.3d at 228. In answering that question, this Court simply held that the PLRA requires proper exhaustion—it said nothing about when that exhaustion must occur or how Rule 15 interacts with the PLRA. *Id.* at 231. And *Oriakhi* reached the uncontroversial conclusion that exhaustion may not occur "after the filing of the complaint" *absent* an amended or supplemental complaint curing the defect. 165 F. App'x at 993. Neither case addresses the critical question here: Whether an incarcerated plaintiff can amend or supplement their complaint to cure an initial defect for lack of exhaustion under the PLRA.

The District Court's reliance on *Ahmed* is similarly misplaced. *Ahmed* rejected the argument that a proposed post-judgment amendment under Rule 60 would have cured the defect in an original complaint for failure to exhaust under the PLRA. 297 F.3d at 207-09. There, the plaintiff filed a motion for leave to file an amended complaint after the district court dismissed his claim for lack of exhaustion (which he did not appeal), and after he was released from prison and the statute of limitations for his claim expired. *Id.* This Court expressly distinguished *Ahmed* in *Garrett*,

reasoning that Rule 15 did not apply because judgment had already been entered. *Ahmed*, 297 F.3d at 208-09; *Garrett*, 938 F.3d at 85. As *Garrett* recognized, this distinction was important; "[b]ecause [the plaintiff] sought to reopen a final judgment, the policy favoring the finality of judgments was implicated" and "[t]he permissive policy favoring amendment under Rule 15 was simply not relevant." 938 F.3d at 86. Simply put, *Ahmed*'s "post-judgment posture . . . renders it inapposite to [this] case." *Id.*

Accordingly, the District Court erred in dismissing Mr. Showers's claims for lack of exhaustion under the PRLA.[6]

B. At the Very Least, the Operative Pleading Must Control the Exhaustion Analysis with Respect to Claims Raised in a Supplemental Complaint Concerning Events that Post-Date the Filing of the Original Complaint.

Regardless, the District Court erred in dismissing the claim in the supplemental complaint, which involved facts post-dating Mr. Showers's filing of this action.

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[6] Although *Garrett* and *Korb* are clear that an incarcerated plaintiff may amend or supplement her complaint pursuant to the normal operation of Rule 15 to cure an initial defect in the complaint for lack of exhaustion under the PLRA, some courts, like the District Court below, continue to misread or overlook these holdings. *See, e.g.*, *Passwaters v. Garner*, No. 22-955 (MN), 2022 WL 17669178, at *3 n.1 (D. Del. Dec. 14, 2022) (concluding that "an inmate must fully satisfy the administrative requirements of the inmate grievance process before proceeding into federal court"). This Court should therefore provide guidance to district courts, in the form of a published, precedential decision, addressing this exhaustion question to bring uniformity to the issue within the circuit.

At the outset, the District Court properly recognized that Mr. Showers fully exhausted administrative remedies as to the claim raised in his supplemental complaint. (A-27-28 ("Plaintiff has cited the proper holding for *Shifflett* as it applies to his grievance filed on January 5, 2021.").) It nevertheless dismissed the claim because Mr. Showers's "attempt to exhaust did not occur prior to filing the instant action." (A-17.) But even assuming this Court believes—contrary to *Garrett* and *Korb*—that the PLRA requires exhausting grievances about events that *have already happened* prior to filing the original complaint, the PLRA cannot possibly require preemptive exhaustion of future events.

The District Court's reasoning would mean that "[a] supplemental complaint alleging new, and newly-exhausted, claims could never be filed in a PLRA action." *Rhodes v. Robinson*, 621 F.3d 1002, 1007 (9th Cir. 2010). No court has adopted that extraordinary view. In fact, this Court has explained that "[u]nder the Prison Litigation Reform Act, prisoners may file supplemental complaints if the claims in question 1) have truly accrued since the beginning of the suit and 2) are exhausted per 42 U.S.C. § 1997e(a) before the supplement is filed." *Boone v. Nose*, 530 F. App'x 112, 113 n.1 (3d Cir. 2013); *see also Rhodes*, 621 F.3d at 1005 (holding "[d]efendants' argument that the PLRA requires the newly-added claims in the SAC to have been exhausted before the original complaint was 'brought' . . . fails because it ignores the general rule of pleading that the SAC completely supersedes any earlier

complaint, rendering the original complaint non-existent and, thus, its filing date irrelevant").

Because the supplemental complaint adds new claims based on facts that post-date the filing of the action, and because Grievance No. 908427 was fully exhausted when Mr. Showers filed his supplemental complaint, dismissal of the claim in the supplemental complaint was improper.

II. Even if Exhaustion is Measured as of the Time of the Original Complaint, Mr. Showers Fully Exhausted Available Remedies.

Even assuming the District Court did not err in disregarding the holding of *Garrett*, Mr. Showers had nevertheless fully exhausted available administrative remedies by the time he filed his original complaint, on two independent grounds. *First*, the District Court completely disregarded two fully exhausted grievances—Grievance Nos. 768090 and 771399—in its analysis. Because those grievances concern the same *pattern* of mistreatment concerning a *chronic* medical condition, they are sufficient for purposes of the exhaustion analysis to satisfy the PLRA as to all of the claims. And, in any event, the District Court was required to conduct a claim-by-claim analysis, which at the very least meant that Counts I and IV of the amended complaint were exhausted. *Second*, Grievance No. 867174 had been fully exhausted by the time Mr. Showers filed his original complaint because the facility failed to follow its own procedures. Either way, the District Court reached the wrong

conclusion on exhaustion even if it was correct to disregard *Garrett* and *Korb* (which it was not).

A. Grievance Nos. 768090 and 771399 Were Fully Exhausted at the Time of the Original Complaint, and the District Court Erred in Disregarding Them.

In focusing solely on Grievance Nos. 867174 and 908427 to examine exhaustion, the District Court committed an egregious error: it completely ignored that Mr. Showers had *two other fully exhausted grievances* concerning the same issues at the time he filed his original complaint. Those grievances were appended to the motions to dismiss, and that they were fully exhausted was evident on the face of those documents. (A-227, 237.) Because these grievances concern the same pattern of mistreatment concerning his chronic medical condition, those grievances exhausted all of Mr. Showers's claims. At the very least, the two claims in the amended complaint that fully track the facts alleged in those exhausted grievances must survive. Because the District Court simply disregarded these fully exhausted grievances and failed to conduct the requisite claim-by-claim analysis, its decision must be reversed.

1. Mr. Showers's Claims Concern a Pattern of Inadequate Medical Treatment from Medical Staff at SCI Mahanoy.

Mr. Showers's deliberate indifference claims all concern a pattern of inadequate medical care relating to his chronic neck and back pain since at least October 2018. (A-347-48.) Notably, prior to the District Court *sua sponte* raising

exhaustion as to all claims, Defendants-Appellees did not move to dismiss any claim in the amended complaint for lack of exhaustion, arguing exhaustion only as to the claim stemming from the "specific incident that occurred in December 2020" in the supplemental complaint. (A-410, 420.) For good reason: two fully exhausted grievances addressed SCI Mahanoy's pattern of failing to provide Mr. Showers with adequate medical care for his chronic neck and back pain. Dismissal of the entire action was, therefore, improper.

Although the Third Circuit has not decided whether an earlier grievance that relates to a more general course of conduct or policy can cover subsequent related conduct for the purposes of PLRA exhaustion, the circuits to have opined on the issue have unanimously answered in the affirmative. The Sixth Circuit, for instance, recently explained that "[w]here there is 'one, continuing harm' or a single course of conduct (which can lead to discrete incidents of harm), filing repeat grievances is unnecessary." *Morgan v. Trierweiler*, 67 F.4th 362, 369-70 (6th Cir. 2023). The Sixth Circuit cited to a range of district court and appellate cases in support of this proposition, and it endorsed two specific cases holding that one notice is enough to cover all claims related to the same chronic medical condition. *Id*. at 370 (citing *Ellis v. Vadlamudi*, 568 F. Supp. 2d 778, 783-84 (E.D. Mich. 2008); *McAdory v. Engelsgjerd*, No. 5:07-CV-13192, 2010 WL 1131484, at *4 (E.D. Mich. Feb. 11, 2010) (explaining that "in cases involving a failure to treat . . . a chronic condition,

the courts have held that prison officials may not parse for timeliness each individual treatment decision")).

The Seventh Circuit, too, has held that "prisoners need not file multiple, successive grievances raising the same issue (such as prison conditions or policies) if the objectionable condition is continuing." *Turley v. Rednour*, 729 F.3d 645, 650 (7th Cir. 2013). The Eleventh Circuit has said that an inmate is "not required to initiate another round of the administrative grievance process on the exact same issue each time" the conduct occurs. *Parzyck v. Prison Health Servs., Inc.*, 627 F.3d 1215, 1219 (11th Cir. 2010). And the Fifth Circuit has concluded that plaintiffs do not have to "file repeated grievances reminding the prison officials" of their "continuing failure" to prevent harm. *Johnson v. Johnson*, 385 F.3d 503, 521 (5th Cir. 2004). In *Johnson*, the Fifth Circuit cited approvingly to a range of district court cases holding that multiple grievances were not needed, even with multiple specific instances of mistreatment, as long as they related to the same injury or medical problem. *See, e.g.*, *Sulton v. Wright*, 265 F. Supp. 2d 292, 295-99 (S.D.N.Y. 2003) (holding that two grievances over several years were sufficient to cover the entire course of conduct, despite the prison's rule that grievances must be filed within fourteen days of occurrence).

These holdings implement what the Supreme Court has described as the goal of the PLRA exhaustion requirement: to "provide[] prisons with a fair opportunity

to correct their own errors," *Woodford v. Ngo*, 548 U.S. 81, 94 (2006), not to "promote early notice to those who might later be sued," *Jones*, 549 U.S. at 219; *see also Johnson*, 385 F.3d at 522 ("[T]he primary purpose of a grievance is to alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued.").

Here, Defendants-Appellees have engaged in a course of conduct that has consistently harmed Mr. Showers since at least October 2018. Mr. Showers submitted Grievance No. 768090 on October 20, 2018, because Dr. Rodgers, medical staff, and CCS were inadequately treating his chronic neck and back pain, including by failing to give him medication recommended by an off-site specialist. (A-242.) On November 9, 2018, having suffered continued harm from the same chronic condition, Mr. Showers submitted Grievance No. 771399 alleging that Dr. Rodgers, medical staff, and CCS "refused proper treatment . . . for the ongoing problem" he was "having with osteoarthritis," including a failure to provide him with medication recommended by an off-site specialist and a failure to inform him of when he would receive further treatment from the off-site specialist. (A-232.) Both grievances allege that medical staff at SCI Mahanoy failed to provide adequate medical care for his chronic neck and back pain, including delay in treatment and failure to provide proper medication. Rather than addressing these fully-exhausted grievances, the District Court ignored them altogether.

Accordingly, even if this Court disregards its own precedent and finds that exhaustion is measured as of the time of the original complaint, Grievance Nos. 768090 and 771399 cover all of Mr. Showers's claims. The District Court erred in dismissing Mr. Showers's action.

2. Even if Grievance Nos. 768090 and 771399 Do Not Apply to All Claims, Some Claims Survive.

Even if the Court disagrees that Grievance Nos. 768090 and 771399 cover all of Mr. Showers's claims, both grievances directly raise facts underlying Counts I and IV of the amended complaint, and, therefore, at a minimum, the District Court erred in dismissing those claims.

It is well-settled that courts must proceed with exhausted claims even when a plaintiff also asserts unexhausted claims. *Jones*, 549 U.S. at 220-24; *Shifflett*, 934 F.3d at 364 ("Exhaustion is considered separately for each claim brought by an inmate, and if a complaint includes both exhausted and unexhausted claims, courts will dismiss the latter but not the former."); *Small v. Camden Cnty.*, 728 F.3d 265, 269 (3d Cir. 2013) ("There is no 'total exhaustion' rule permitting dismissal of an entire action because of one unexhausted claim." (quoting *Jones*, 549 U.S. at 220-24)).

Grievance Nos. 768090 and 771399 directly concern Counts I and IV of the amended complaint. Specifically, Count I alleges that between October 2018 and February 2019, Dr. Rodgers continued an inadequate course of treatment and

ignored recommendations from a specialist on how to treat Mr. Showers. (A-347-48.) Grievance No. 771399 raises Dr. Rodgers's and CCS's failure to provide adequate medical treatment for Mr. Showers's neck and back pain and refusal to provide Mr. Showers with the treatment prescribed by the off-site specialist. (A-227.) And Count IV alleges that CCS delayed Mr. Showers's treatment (A-348); both Grievance Nos. 768090 and 771399 concern CCS's, Dr. Rodgers's, and other medical staff's failure to provide timely medical treatment for Mr. Showers's condition.

The District Court apparently believed that a plaintiff's failure to exhaust even one of his claims by the time he files his original complaint dooms his whole action. That all-or-nothing approach is incorrect. *See Jones*, 549 U.S. at 220-21. Under the proper claim-by-claim analysis, there is no dispute that at least two of Mr. Showers's claims were exhausted and should not have been dismissed.

B. Mr. Showers Fully Exhausted Grievance No. 867174 by the Time He Filed His Initial Complaint.

As we explain above, the District Court's decision is infected by multiple reversible legal errors. But its analysis fails even on its own terms. The District Court should not have dismissed Mr. Showers's entire action based on Grievance No. 867174 because that grievance was, in fact, fully exhausted by the time Mr. Showers commenced this action based on the prison's failure to timely respond to it.

"[E]xhaustion applies only when administrative remedies are 'available.'" *Shifflett*, 934 F.3d at 365. To render remedies "available," prisons must "comply with the demands of the system they created. Hence . . . as soon as a prison fails to respond to a properly submitted grievance or appeal within the time limits prescribed by its own policies, it has made its administrative remedies unavailable and the prisoner has fully discharged the PLRA's exhaustion requirement." *Id.*

Under the Pennsylvania Department of Corrections Inmate Grievance System Procedures Manual, "an appeal to final review is responded to within 30 working days of receipt unless otherwise extended and/or referred." *See* DOC Policies, DC-ADM 804, Inmate Grievance System Policy, at 2-7 (May 1, 2015), available at https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/804%20Inmate%20Grievances.pdf. When an appeal is referred to a bureau for review, the "review/referral may result in an extension to the time for issuing a final review response to the inmate." *Id.* at 2-8.

Here, Mr. Showers's administrative appeals were rendered unavailable when the prison failed to timely respond to his grievance. Mr. Showers submitted a final appeal of the denial of Grievance No. 867174 to SOIGA, which was dated July 28, 2020. On August 17, 2020, SOIGA referred the grievance to BHCS and asked for a response within twenty working days—*i.e.*, by September 7, 2020. (A-108.) BHCS did not respond by September 7. Not receiving any further information from SOIGA

or BHCS, Mr. Showers then filed this action on October 9, 2020. (A-40.) Nearly two months after its response was due, on November 4, 2020, BHCS finally responded with a denial of the grievance, and SOIGA did not receive that response until November 17, 2020. (A-106.) BHCS, therefore, was at least 58 days late in responding to the grievance referral. And once the twenty working days requested by the facility came and went, Mr. Showers had the right to commence an action in federal court. *See Robinson v. Superintendent Rockview SCI*, 831 F.3d 148, 151-55 (3d Cir. 2016) (holding that a prisoner's administrative appeals were rendered unavailable where the prisoner filed an action in federal court roughly three months after a response was due and only after another six weeks received a response to his initial grievance); *see also Shifflett*, 934 F.3d at 366 (holding that "[a]t th[e] moment" an incarcerated plaintiff "received no response within the specified time limit . . . he obtained the right to come into federal court").

Mr. Showers, therefore, fully exhausted administrative remedies with respect to Grievance No. 867174 and dismissal of his claims was improper even under the District Court's own (flawed) exhaustion rule.

III. The District Court Erred in *Sua Sponte* Raising the Affirmative Defense of Exhaustion as to Claims in the Amended Complaint.

The District Court independently erred in *sua sponte* raising exhaustion as to all claims in the amended complaint when Defendants-Appellees only raised the defense of exhaustion as to the one claim in the supplemental complaint.

Exhaustion is an affirmative defense under the PLRA. An inmate is not required to specifically plead or demonstrate exhaustion in her complaint. *See Jones*, 549 U.S. at 216; *Small*, 728 F.3d at 268 (exhaustion "is not a pleading requirement for the prisoner-plaintiff"). Instead, failure to exhaust must be pled and proved by the defendant as to each and every claim in the complaint. *See, e.g.*, *Rinaldi v. United States*, 904 F.3d 257, 268 (3d Cir. 2018); *Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir. 2002). "Sua sponte dismissal for failure to exhaust may be warranted when a plaintiff expressly concedes that failure on the face of the complaint." *Caiby v. Haidle*, 785 F. App'x 64, 65 (3d Cir. 2019). "Otherwise, the district court must provide parties with notice and an opportunity to respond before resolving any factual disputes regarding exhaustion." *Id.* (citing *Paladino v. Newsome*, 885 F.3d 203, 211 (3d Cir. 2018)).

Here, the District Court improperly *sua sponte* dismissed the claims in Mr. Showers's amended complaint based on exhaustion. Mr. Showers neither expressly nor implicitly conceded a failure to exhaust on the face of the original complaint or the amended complaint. Defendants-Appellees raised a defense of exhaustion only as to "the specific incident that occurred in December 2020," which only the supplemental complaint raised. (*See* A-410; A-420.) Indeed, Mr. Showers's opposition to Defendants-Appellees' motions to dismiss focused on rebutting arguments that the claim in his *supplemental* complaint was procedurally barred for

lack of exhaustion (A-454-55)—because no one even attempted to argue that the claims in the *amended* complaint were unexhausted until the District Court took it upon itself to do so. It was only *after* the District Court *sua sponte* dismissed the claims in the amended complaint that Defendants-Appellees, in response to Mr. Showers's motion for reconsideration, jumped on board with the District Court's flawed and overbroad exhaustion reasoning.

Further, because the District Court first raised exhaustion as to claims in the amended complaint in its decision to dismiss the claims, and no party had raised exhaustion as to these claims prior to that point, Mr. Showers was not provided with adequate notice and an opportunity to respond. Instead, Mr. Showers, proceeding *pro se*, was forced to defend against exhaustion by means of a motion for reconsideration. A motion for reconsideration, however, "is an extremely limited procedural vehicle." *Resorts Int'l v. Greate Bay Hotel & Casino*, 830 F. Supp. 826, 831 (D.N.J. 1992); *see also Hope v. Warden York Cnty. Prison*, 972 F.3d 310, 321 (3d Cir. 2020) (noting that the court's error required the party to "surmount the high hurdle applicable to a motion for reconsideration"); *Van Buskirk v. United Grp. Of Companies, Inc.*, 935 F.3d 49, 54 (2d Cir. 2019) ("A motion for reconsideration is an extraordinary request that is granted only in rare circumstances, such as where the court failed to consider evidence or binding authority."). The District Court's failure to provide Mr. Showers, a *pro se* litigant, with adequate notice and an

opportunity to respond—except on a motion for reconsideration—constitutes reversible error. *See Robinson v. Johnson*, 313 F.3d 128, 134-35 (3d Cir. 2002) ("The purpose of requiring the defendant to plead available affirmative defenses in his answer is to avoid surprise and undue prejudice by providing the plaintiff with notice and the opportunity to demonstrate why the affirmative defense should not succeed.").

The District Court thus erred in raising exhaustion *sua sponte* as to all claims and dismissing the action altogether.

CONCLUSION

For the reasons set forth above, the Court should reverse the District Court's decision, conclude that Mr. Showers fully exhausted his administrative remedies under the PLRA, and remand for further proceedings.

Dated: June 7, 2023

Respectfully submitted,

/s/ Carmen Iguina González

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CERTIFICATES OF BAR MEMBERSHIP

I, Raymond P. Tolentino, counsel for the appellant, hereby certify pursuant to Third Circuit Rule 28.3(d) that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

/s/ Raymond P. Tolentino
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I, Carmen Iguina Gonzalez, counsel for the appellant, hereby certify pursuant to Third Circuit Rule 28.3(d) that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

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I, Christopher Morel, counsel for the appellant, hereby certify pursuant to Third Circuit Rule 28.3(d) that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATES OF COMPLIANCE WITH TYPEFACE, WORD-COUNT, ELECTRONIC-BRIEF, AND VIRUS-CHECK REQUIREMENTS

I, Carmen Iguina González, hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,484 words, excluding parts the parts of the brief exempted by Fed. R. App. P. 32(f);

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally space typeface using Microsoft Word in Times New Roman, size 14;

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June 7, 2023

/s/ Carmen Iguina González
Carmen Iguina González

CERTIFICATE OF SERVICE

I, Carmen Iguina González, counsel for appellant and a member of the Bar of this Court, certify that, on June 7, 2023, a copy of the attached brief of the Appellant was filed with the Clerk and served on the parties through the Court's electronic filing system. I further certify that all parties required to be served have been served.

June 7, 2023

/s/ Carmen Iguina González
Carmen Iguina González