IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 18-2468

RODNEY MINTER and ANTHONY BERTOLONE,
Plaintiffs-Appellants,

vs.

JERRY BARTRUFF, in his Official Capacity as Director of the IDOC; KATRINA CARTER, in her Official Capacity as Interim Deputy Director of Offender Services of the IDOC; KRIS WEITZELL, in her Official Capacity as Warden of the Newton Correctional Facility, TERRY MAPES, in his Official Capacity as Warden of the Newton Correctional Facility; IOWA DEPARTMENT OF CORRECTIONS,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

PLAINTIFFS'–APPELLANTS' REPLY BRIEF

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ARGUMENT

I. Obtaining postconviction relief in state court is not an administrative remedy.

The Defendants continue to rely heavily on *State v. Belk*, a recent decision of the Iowa Supreme Court, which permitted an inmate to pursue similar constitutional claims against the Iowa Department of Corrections ("IDOC") through an action for postconviction relief under Iowa Code chapter 822. 905 N.W.2d 185, 192 (Iowa 2017). According to the Defendants, *Belk* created a hard-and-fast rule requiring an inmate to litigate an action for postconviction relief in state court before he may litigate an action pursuant to 42 U.S.C. §1983: "[the Plaintiffs] cannot pursue such a claim without exhausting available remedies in the Iowa court system." (Appellee's Br. p. 10).

The Plaintiffs have not filed an action for postconviction relief; the Plaintiffs filed four distinct claims pursuant to §1983. The Defendants' argument therefore flips §1983 exhaustion precedent on its head. Federal law provides an inmate may bring a claim under that section once "such *administrative remedies as are available* are exhausted." 42 U.S.C. §1997e(a) (emphasis added). A remedy granted by a state court—upon filing an action for postconviction relief—is not an administrative remedy. It is flat-out incorrect to argue an inmate must clear one judicial hurdle in state court before approaching the next one in federal court. There are two roads to relief—one traveled by inmate Laverne Belk, the other by the Plaintiffs.

Moreover, the Iowa Supreme Court in *Belk* had no occasion—even in dicta—to consider federal exhaustion principles. No §1983 claims were raised by that inmate. 905 N.W.2d at 187. No discussion of §1997e(a) was therefore required. *See id.* And even if the Court had considered federal exhaustion, it would have been guided by the same legal authority as this Court: the plain language of 42 U.S.C. §1997e(a).

For the reasons set forth on Appellant's Brief pp. 10–13, the statutory phrase "administrative remedies" in §1997e(a) cannot be construed to include relief from an action for postconviction relief, granted by a judicial officer, in state court. In *Concepcion v. Morton*, the United States Court of Appeals for the Third Circuit interpreted the phrase and that opinion may be instructive for this Court. 306 F.3d 1347 (3d Cir. 2002). The issue in *Concepcion* was whether the term "administrative remedies" included a grievance procedure available, yet not formally adopted, by the department of corrections. *Id.* at 1352.

"Because Congress did not define the term 'administrative remedy' in §1997e(a), we give those words their ordinary meaning." *Id.* at 1352–53. The Third Circuit reasoned the term "is far less clear and instructive" than a plain dictionary definition. *Id.* at 1353. Nonetheless, the Third Circuit pointed out the word "administrative" is commonly defined as " 'proceeding from . . . an administration,' which, in turn, is defined as 'a body of persons who are responsible for managing a

business or an institution.' " *Id.* (quoting *Webster's Third New International Dictionary* 28 (1993)). Therefore, even if the remedy was not formally promulgated, it still provided the administration an opportunity to consider the grievances, and "the possibility exists that the prison and its administration may benefit or improve." *Id.* at 1355.

The same cannot be said for an application for postconviction relief filed under Iowa Code chapter 822. No administration grants relief under those circumstances; a court does. That relief cannot be construed as "administrative" under any reading of §1997e(a).

The Defendants next argue the Plaintiffs were required to proceed with an administrative grievance "to the extent applicable." (Appellee's Br. p. 10). However, as noted in the opening brief, the Defendants have failed to identify any particular grievance they believe is applicable (and required to be exhausted) prior to filing suit under §1983. Practically, this is because the Defendants raised this issue in a pre-answer motion to dismiss. Failure to exhaust is an affirmative defense. *See Benjamin v. Ward Cnty.*, 632 Fed. Appx. 301, 301 (8th Cir. 2016) (per curiam). The Defendants cannot rely on a blanket statement that exhaustion of administrative grievances is required "to the extent applicable." Further, the Defendants did not raise any facts or particular grievance below, and the district court did not address any particular grievance. (Appellant's Br. p. 9). This Court should therefore not

consider it for the first time on appeal. *United States v. Hirani*, 824 F.3d 741, 751 (8th Cir. 2016).

CONCLUSION

The district court erred in granting the Defendant's pre-answer motion to dismiss. This Court should reverse and remand this matter for further proceedings, including discovery as to the claims raised in the Complaint and Jury Demand. *Aten v. Scottsdale Ins. Co.*, 511 F.3d 818, 821 (8th Cir. 2008).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that upon receipt of the notice from CM/ECF system that the brief and addendum have been filed, the foregoing Plaintiffs'–Appellants' Reply Brief will be served upon counsel by depositing two (2) copies thereof in the U.S. Mail, postage prepaid, in an envelope addressed to the following counsel:

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CERTIFICATE OF FILING

The undersigned hereby certifies the attached Plaintiffs'–Appellants' Reply Brief, which was scanned for viruses using the latest available software, was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECR users will be served by the CM/ECR system.

Within 5 days of receipt of the notice that the brief has been filed, filer will forward 10 paper copies of the reply brief to the court and serve the opposing side via United States Postal Service with Mr. Michael E. Gans, Clerk of Court, United States Courthouse, 111 South Tenth Street, Saint Louis, Missouri, 63102.

The attached Plaintiffs'–Appellants' Reply Brief is electronically filed with the CM/ECF system on October 26, 2018.

/s/ *Michael Boal*
Michael Boal, Attorney
Dated: October 26, 2018

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 814 words (no more than 6,500 words), excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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/s/ *Michael Boal*
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Dated: October 26, 2018