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Appendix A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13248
Non-Argument Calendar

D.C. Docket No. 5:16-cv-00450-TES-MSH

ROBERT WRIGHT,

Plaintiff - Appellant,

versus

GEORGIA DEPARTMENT OF CORRECTIONS,
CYNTHIA NELSON,
Regional Director, Georgia Department of Corrections,
DR. SACHDIVA,
Dooly State Prison,
DOOLY SP WARDEN,
WARE SP WARDEN, et al.,

Defendants - Appellees.

No. 19-10273
Non-Argument Calendar

D.C. Docket No. 5:16-cv-00450-TES-MSH

ROBERT WRIGHT,

Plaintiff - Appellant,

versus

GEORGIA DEPARTMENT OF CORRECTIONS, et al.,

Defendants,

DR. UTLEY,
Dentist, Dooly State Prison,

Defendant - Appellee.

Appeals from the United States District Court
for the Middle District of Georgia

(June 25, 2020)

Before JILL PRYOR, GRANT and LUCK, Circuit Judges.

PER CURIAM:

Robert Wright, a Georgia state prisoner, appeals the district court's dismissal of his 42 U.S.C. § 1983 civil rights action for failure to exhaust administrative remedies, as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). Wright's complaint alleged that while he was a prisoner at Dooly State

Prison ("DSP"), Georgia Department of Corrections ("GDC") officials failed to provide adequate medical treatment for injuries he suffered when he was attacked in his cell by a fellow prisoner. The district court dismissed this claim for failure to exhaust administrative remedies because Wright filed this action without waiting for the GDC Commissioner to respond to Wright's appeal of the denial of his grievance about this incident, as required under GDC's Standard Operating Procedures regarding grievances. After careful review, we affirm the district court's dismissal.

I. BACKGROUND

Wright alleged that in October 2014, a fellow prisoner at DSP attacked him, "blindsid[ing him] with a blow to [his] face." Doc. 1 at 10.[1] Wright informed prison officials, who confirmed the attack, photographed his injuries, and then, without giving him any treatment, placed him in "'the hole' . . . where prisoners are sent to be punished." *Id.* at 10-11. The next day, defendants Westley Harper and Cornelius Hollis, prison guards, transported him to a regional trauma center. Wright's x-rays showed that he had a fractured jaw, which, according to doctors there, needed "immediate treatment." *Id.* at 11. But Harper and Hollis instead transported Wright back to DSP, refusing him treatment

[1] Citations in the form "Doc. #" refer to the numbered entries on the district court's docket.

because "Atlanta would not pay for his care." *Id.* He received no treatment until nearly a month after his injury, when he was transferred to August State Medical Prison ("ASMP"), where he had surgery to remove several teeth and implant a metal plate in his jaw.

Two months after his surgery, Wright was transported back to DSP, where he received no additional treatment, despite having been referred to the dental department at DSP by ASMP's doctor. Wright then saw defendant Dr. Sachdeva, who put him on some medication and referred him to the prison dentist, defendant Robert Utley, for further treatment, including a custom mouthguard and medication to relax the nerves in his jaw. A couple of months later, at his annual physical, Dr. Sachdeva again referred Wright for dental treatment. Despite the referrals, he received no additional treatment until more than three years after the initial surgery, when he was returned to ASMP to undergo surgery to remove two teeth.

On August 24, 2016, Wright filed a grievance concerning his lack of medical or dental treatment; the warden denied the grievance one month later. Wright timely appealed the denial on September 27, 2016.[2] Before the GDC Commissioner resolved the appeal, Wright filed this § 1983 action in the Middle District of Georgia on October 17, 2016, alleging that by withholding medical

[2] The GDC Commissioner denied the appeal in April 2017.

treatment, the defendants had violated his constitutional rights. The district court reviewed his complaint—under 28 U.S.C § 1915A(a) and 28 U.S.C. § 1915(e)—and allowed his claims for deliberate indifference to his serious medical needs against Harper, Hollis, and Utley to proceed. Harper and Hollis moved to dismiss the claims against them, arguing that Wright failed to exhaust his administrative remedies. The district court agreed, adopting the magistrate judge's recommendation that the claims should be dismissed because Wright did not wait the requisite time for the appeal of his grievance to be resolved before filing the lawsuit. Utley then filed a motion for summary judgment on the same ground. Construing the motion as a motion to dismiss, the district court again concluded that Wright failed to exhaust his administrative remedies and dismissed the claims. This appeal followed.

II. STANDARDS OF REVIEW

We review *de novo* a district court's interpretation and application of the PLRA's exhaustion requirement. *Johnson v. Meadows*, 418 F.3d 1152, 1155 (11th Cir. 2005). We review the factual findings underlying an exhaustion determination for clear error. *Bryant v. Rich*, 530 F.3d 1368, 1377 (11th Cir. 2008).

III. DISCUSSION

The PLRA requires prisoners who wish to challenge an aspect of prison life to exhaust all available administrative remedies before resorting to the courts.

Porter v. Nussle, 534 U.S. 516, 532 (2002); *see* 42 U.S.C. § 1997e(a). Exhaustion is mandatory under the PLRA, and unexhausted claims cannot be brought in court. *Jones v. Bock*, 549 U.S. 199, 211 (2007). The failure to exhaust administrative remedies requires dismissal of the action. *Chandler v. Crosby*, 379 F.3d 1278, 1286 (11th Cir. 2004).

To satisfy the exhaustion requirement, a prisoner must complete the administrative process under the applicable grievance procedures established by the prison. *Jones*, 549 U.S. at 218; *Johnson*, 418 F.3d at 1156. In other words, "[t]he PLRA requires proper exhaustion that complies with the critical procedural rules governing the grievance process." *Dimanche v. Brown*, 783 F.3d 1204, 1210 (11th Cir. 2015) (internal quotation marks omitted).

An exception to the general rule requiring exhaustion is that a remedy must be "available" before a prisoner is required to exhaust it. *Turner v. Burnside*, 541 F.3d 1077, 1082, 1084 (11th Cir. 2008). The Supreme Court has identified three kinds of circumstances in which an administrative remedy is not available. *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016). First, "an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Id.* Next, "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use." *Id.*

And finally, a remedy may be unavailable "when prison administrators thwart prisoners from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 1860.

In response to a prisoner lawsuit, defendants may file a motion to dismiss raising as a defense the prisoner's failure to exhaust administrative remedies. *Whatley v. Warden, Ware State Prison*, 802 F.3d 1205, 1209 (11th Cir. 2015). We have established a two-step process for deciding motions to dismiss for failure to exhaust under the PLRA. *Id.* District courts first should compare the factual allegations in the motion to dismiss and those in the prisoner's response and, where there is a conflict, accept the prisoner's view of the facts as true. *Id.* "The court should dismiss if the facts as stated by the prisoner show a failure to exhaust." *Id.* Second, if dismissal is not warranted at the first stage, the court should make specific findings to resolve disputes of fact, "and should dismiss if, based on those findings, defendants have shown a failure to exhaust." *Id.*

DSP follows the GDC's Standard Operating Procedures ("SOPs") regarding grievances. The SOPs mandate that a prisoner follow a two-step process to exhaust his remedies: (1) file an original grievance, and (2) file an appeal to the Central Office.[3] Generally, a prisoner "may file a grievance about any condition,

[3] Wright contends that the district court erred because it did not resolve whether the 2012 grievance policy or the 2015 grievance policy applied in this case. But he failed to demonstrate that there was a material difference between the grievance policies such that the application of

policy, procedure, or action or lack thereof that affects the offender personally." Doc. 25-2 at 14. The prisoner must file the grievance within 10 days of the event giving rise to it; the warden then has 40 days to respond to the grievance. After the warden issues a decision or the time to issue a decision expires, the prisoner may file an appeal. The GDC Commissioner then has 100 days to respond to the appeal.

The district court did not err in dismissing Wright's complaint for failure to exhaust administrative remedies. The facts Wright alleged, viewed alongside uncontradicted evidence offered by the defendants, established that he did not exhaust his administrative remedies because he failed to complete the grievance process before he filed this action.[4] The GDC Commissioner had 100 days from Wright's appeal of his grievance, filed September 27, 2016—until December 30,

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the 2012 grievance policy would have meant that he exhausted his remedies. Accordingly, the district court did not need to resolve this dispute.

[4] Wright argues that he had no meaningful opportunity to prove his claim because the magistrate judge's order did not specifically inform him of his right to pursue discovery on the exhaustion issue and the magistrate judge and district court thwarted his efforts to obtain discovery related to other issues, suggesting that seeking discovery as to the exhaustion issue would have been pointless. This argument is meritless because in a notification of a pre-answer motion dismiss, the magistrate judge specifically informed Wright that he had a chance to develop the record by providing the court with affidavits or other documents showing that he had exhausted available administrative remedies. Further, although Wright sought discovery from the trauma center and his medical and records to respond to the motion to dismiss, he never requested that the district court allow him discovery related to exhaustion. *See United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1281 (11th Cir. 2009). Having never brought his need for discovery on this issue to the attention of the district court, Wright has waived it. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004).

2016—to issue a decision. Wright filed this action on October 17, 2016. Because he did not wait until the GDC Commissioner responded to his appeal or the 100 days elapsed, he failed to fully exhaust his administrative remedies before filing his complaint. *See Harris v. Garner*, 216 F.3d 970, 981 (11th Cir. 2000) (concluding that facts as they exist when a complaint is filed should be considered when determining whether a prisoner has satisfied the PLRA's exhaustion requirement).

Citing *Turner*, 541 F.3d at 1082, Wright argues that the district court impermissibly shifted to him the burden of proof as to the availability of administrative remedies. Although he raised the availability issue before the district court, he makes the burden of proof argument for the first time on appeal and thus arguably waived it. "This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered." *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). But we need not decide whether the argument has been waived because it fails nonetheless.

Wright is correct that the defendants must first prove that a remedy was available to him before they can prove failure to exhaust the remedy. But he confuses the issue of whether a remedy is generally available (i.e., a grievance procedure exists) with whether a remedy was available to him practically

speaking. Nothing in *Turner* dictates that defendants initially establish this latter meaning of availability in establishing a lack of exhaustion. Instead, *Turner* mandates that "defendants bear the burden of proving that the plaintiff has failed to exhaust his *available* administrative remedies," which includes showing that a remedy is generally available. 541 F.3d at 1082 (emphasis added). Indeed, it is difficult to conceive of how a defendant could show that a plaintiff failed to exhaust his remedies without showing that there was a remedy to be exhausted. In response, the plaintiff may defeat the failure-to-exhaust argument by showing that the general remedy was effectively unavailable to him. *See, e.g.*, *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014) ("Once the defendant has carried [the] burden [of proving a generally available administrative remedy], . . . the burden shifts to the prisoner to come forward with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him."). Wright argued that the grievance process was an unavailable dead end because the wardens had never approved an inmate grievance involving medical treatment; however, he provided no factual support for this assertion. Accordingly, the district court did not err in concluding that the defendants satisfied their burden to show the failure to exhaust an available remedy and Wright failed to show that the remedy was effectively unavailable to him.

CONCLUSION

For the above reasons, we affirm the district court's dismissal for failure to exhaust administrative remedies.

AFFIRM.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

September 15, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-13248-EE ; 19-10273-EE
Case Style: Robert Wright v. Georgia Department of Corr., et al
District Court Docket No: 5:16-cv-00450-TES-MSH

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Elora Jackson, EE/lt
Phone #: (404) 335-6173

REHG-1 Ltr Order Petition Rehearing

Rec'd 9-22-20

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13248-EE

ROBERT WRIGHT,

Plaintiff - Appellant,

versus

GEORGIA DEPARTMENT OF CORRECTIONS,
CYNTHIA NELSON,
Regional Director, Georgia Department of Corrections,
DR. SACHDIVA,
Dooly State Prison,
DOOLY SP WARDEN,
WARE SP WARDEN, et al.,

Defendants - Appellees.

No. 19-10273 -EE

ROBERT WRIGHT,

Plaintiff - Appellant,

versus

GEORGIA DEPARTMENT OF CORRECTIONS, et al.,

Defendants,

DR. UTLEY,
Dentist, Dooly State Prison,

Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JILL PRYOR, GRANT and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ROBERT WRIGHT, *Plaintiff,* **v.** **GEORGIA DEPARTMENT OF CORRECTIONS, *et al.*,** *Defendants.*	**CIVIL ACTION NO.** **5:16-cv-00450-TES-MSH**

ORDER ADOPTING THE UNITED STATES MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This case is before the Court on the United States Magistrate Judge's Report and Recommendation ("Recommendation") [Doc. 98]. In the Recommendation, the magistrate judge recommends that Defendant Dr. Robert Utley's Motion for Summary Judgment [Doc. 81] be granted. [Doc. 98 at p. 1]. In response to the Recommendation, Plaintiff timely filed an Objection [Doc. 101]. As such, the Court conducted a *de novo* review of the portions of the Recommendation to which objection was made. *See* 28 U.S.C. § 636(b)(1)(C).

In the Recommendation, the magistrate judge provides a detailed description of the Georgia Department of Corrections' ("GDC") Standard Operating Procedure regarding grievances. [Doc. 98 at pp. 5-6]. In short, this procedure is as follows. The inmate must file his grievance within ten days of the event giving rise to the grievance.

[*Id.* at p. 5]. Then, a prison warden has 40 calendar days to respond to the inmate's grievance. [*Id.*]. Should the inmate disagree with the warden's decision or should the warden's time for issuing a decision to the grievance expire, the inmate may then file an appeal to the GDC Commissioner, who then has 100 days to respond to the appeal. [*Id.*].

Here, it is clear that Plaintiff did not complete the grievance process, and thereby failed to exhaust his administrative remedies, before filing his lawsuit in federal court. [*Id.* at p. 7]; *see also Brown v. Sikes*, 212 F.3d 1205, 1207 (11th Cir. 2000). Plaintiff filed his grievance on August 24, 2016, which was denied on September 20, 2016. [*Id.* at p. 6]. The following day, he appealed. [*Id.*]. Thus, the GDC Commissioner had 100 days—or until December 30, 2016—to respond to the appeal. However, Plaintiff filed his lawsuit on October 11, 2016,[1] and thus failed to exhaust his administrative remedies by not either (1) allowing the GDC Commissioner to respond to his appeal or (2) allowing the 100-day time period for response to expire.

Plaintiff's Objection arguing that the Recommendation should not be approved is without merit. In his Objection, he contends that the administrative procedure is unavailable given its purported operation as a "simple dead end."[2] [Doc. 101 at p. 2].

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[1] Previous orders from the Court state that Plaintiff filed his lawsuit on October 17, 2016. [Doc. 77 at p. 2]. However, under the "prison-mailbox rule" the actual date of Plaintiff's filing was October 11, 2016. *See* [Doc. 98 at p. 7 n.3]. Nevertheless, both of these dates are prior to the operative date of December 30, 2016, and their distinction is immaterial.

[2] Given Plaintiff's prior arguments, the Court can only assume that he restates this contention based on his previous assertion that corrections officials "have never approved an inmate grievance involving medical treatment at Dooly State Prison." [Doc. 76, at pp. 10-11].

However, his current Objection offers no factual support for this or other its conclusory allegations. *See* [Doc. 101 at p. 3]. Therefore, the Court **ADOPTS** the United States Magistrate Judge's Report and Recommendation [Doc. 98] over Plaintiff's Objection **AND MAKES IT THE ORDER OF THE COURT**.

Accordingly, the Court **GRANTS** Defendant Dr. Robert Utley's Motion for Summary Judgment [Doc. 81]. In light of this ruling, there are no remaining parties and the Court **DIRECTS** the Clerk of Court to **CLOSE** this case.

SO ORDERED, this 7th day of January, 2019.

S/ Tilman E. Self, III
TILMAN E. SELF, III, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ROBERT WRIGHT,	:	
	:	
Plaintiff,	:	
	:	**NO. 5:16-CV-00450-TES-MSH**
v.	:	
	:	
ROBERT UTLEY,	:	
	:	
Defendant.	:	

REPORT AND RECOMMENDATION

Pending before the Court is Defendant's motion for summary judgment (ECF No. 81), which the Court construes as a motion to dismiss. For the reasons explained below, it is recommended that Defendant's motion be granted.

BACKGROUND

Plaintiff states that on October 30, 2014, he was attacked by a fellow inmate at Dooly State Prison ("DSP"). Compl. 10, ECF No. 1. Plaintiff alleges he "was blindsided with a blow to [his] face while trying to leave [his] cell and avoid trouble" and that he "was knocked-out" by the blow. *Id.* Plaintiff notified prison officials, who took photos of the injuries, confirmed Plaintiff was attacked by another inmate, and placed Plaintiff in "'the hole' . . . where prisoners are sent to be punished" with no other treatment. *Id.* at 10-11. The next day, Plaintiff was transported to the Taylor Regional Trauma Center by prison guards Westley Harper and Cornelius Hollis. Suppl. Compl. 2, ECF No. 13. There, x-rays revealed Plaintiff suffered a badly fractured jaw. Compl. 11. Although the emergency room doctor stated that Plaintiff "needed immediate treatment," Harper and Hollis refused

and stated that "Atlanta" would not pay for Plaintiff's care. *Id.*; *see also* Suppl. Compl. 2. Harper and Hollis returned Plaintiff to DSP and placed him back in the hole until November 4, 2014; Plaintiff received little to no medical attention until he was transferred to Augusta State Medical Prison on that date. Suppl. Compl. 2; Compl. 11. On November 5, 2014, Plaintiff had surgery to remove several teeth and implant a metal plate in his jaw. Compl. 11.

Plaintiff was transferred back to DSP in February 2015, and received no additional treatment for the next eleven months, until his aunt called the governor. *Id.* Plaintiff then saw several medical professionals who referred Plaintiff to the prison dentist for further treatment consisting of a custom mouth guard and medication to relax the nerves in Plaintiff's jaw. *Id.* Plaintiff states he was given two call-out slips to go to the dental department at DSP. On both occasions, he was told they would need to be re-scheduled, which never happened. Compl. 7. Plaintiff alleges that "[n]o dental treatment was done," until April 25, 2017, when Plaintiff received surgery to remove two teeth at the Augusta State Medical Prison. *Id.* at 6-7, 11-12; *see also* Suppl. Compl. 2. Defendant was employed by MHM Correctional Services, Inc. and was assigned to provide dental services at DSP. Utley Aff. ¶ 4, ECF No. 55.

After a preliminary review of Plaintiff's original and supplemental complaints, his claims for deliberate indifference against Harper, Hollis, and Defendant were allowed to proceed. Order & R. & R. 6-8, Jun. 29, 2017, ECF No. 14. On April 25, 2018, this Court recommended that the claims against Harper and Hollis be dismissed due to Plaintiff's failure to exhaust his administrative remedies. Order & R. & R. 12, ECF No. 72. That

Order and Recommendation was adopted and made the Order of the Court on June 29, 2018. Order 17, ECF No. 77. Defendant moved for summary judgment (ECF No. 81) on August 8, 2018 and Plaintiff responded on August 24, 2018 (ECF No. 84).

DISCUSSION

Defendant moves for summary judgment (ECF No. 81) claiming, *inter alia*, that Plaintiff failed to exhaust his administrative remedies. Br. in Supp. of Mot. 5-10, ECF No. 81-1.[1] Because the Court finds that Plaintiff did not exhaust his administrative remedies, the other grounds raised in Defendant's motion will not be addressed.

I. Exhaustion Standard

The Prison Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "[W]hen a state provides a grievance procedure for its prisoners, as Georgia does here, an inmate alleging harm suffered from prison conditions must file a grievance and exhaust the remedies available under that procedure *before* pursuing a § 1983 lawsuit." *Brown v. Sikes*, 212 F.3d 1205, 1207 (11th Cir. 2000) (emphasis added). "To exhaust administrative remedies in accordance with the PLRA, prisoners must properly take each step within the

[1] "Because exhaustion of administrative remedies is a matter in abatement and not generally an adjudication on the merits, an exhaustion defense...is not ordinarily the proper subject for a summary judgment; instead, it should be raised in a motion to dismiss, or be treated as such if raised in a motion for summary judgment." *Bryant v. Rich*, 530 F.3d 1368, 1374-75 (11th Cir. 2008). Defendant's motion for summary judgment, therefore, will be treated as a motion to dismiss.

administrative process. If their initial grievance is denied, prisoners must then file a timely appeal." *Bryant v. Rich*, 530 F.3d 1368, 1378 (11th Cir. 2008) (citation and punctuation omitted).

The argument that a plaintiff has failed to satisfy section 1997e(a) is properly raised in a motion to dismiss. *Bryant*, 530 F.3d at 1375 ("[E]xhaustion should be decided on a Rule 12(b) motion to dismiss[.]"). Further, since dismissal for failure to exhaust is not an adjudication on the merits, the Court can resolve factual disputes using evidence from outside the pleadings. *Id.* at 1376. "[D]eciding a motion to dismiss for failure to exhaust administrative remedies is a two-step process." *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008). "First, the court looks to the factual allegations in the defendant's motion to dismiss and those in the plaintiff's response, and if they conflict, takes the plaintiff's versions of the facts as true." *Id.* If, taking plaintiff's facts as being true, the defendant is entitled to dismissal for failure to exhaust, then the complaint should be dismissed. *Id.* "If the complaint is not subject to dismissal at the first step . . . the court then proceeds to make specific findings in order to resolve the disputed factual issues related to exhaustion." *Id.* The defendant bears the burden of proof during this second step. *Id.*

II. Plaintiff's Failure to Exhaust

Defendant moves to dismiss for lack of exhaustion, claiming the Georgia Department of Corrections ("GDOC") has a grievance procedure that applies to all inmates, which Plaintiff failed to fully utilize regarding his claims. Br. in Supp. of Mot. 5-10. Plaintiff responds that he did file a grievance but the grievance procedure is futile and, in reality, unavailable as a remedy. Compl. 3; Pl.'s Opp'n to Mot. 2-4, ECF No. 84. Because

at this stage of the exhaustion analysis the Court must take Plaintiff's version of the facts as true, Plaintiff's Complaint cannot be dismissed at this first step. *Turner*, 541 F.3d at 1082; *see also Dollar v. Coweta Cty. Sheriff Office*, 446 F. App'x 248, 251-52 (11th Cir. 2011) (per curiam).

Since the Complaint was not dismissed at the first step, the Court can make factual findings relating to exhaustion. A defendant bears the burden of establishing a lack of exhaustion at the second step of the inquiry. *Turner*, 541 F.3d at 1082-83. The Court makes the following factual findings and determines Defendant has met his burden.[2]

DSP follows the GDOC's Standard Operating Procedures ("SOPs") regarding grievances. McClairen Aff. ¶ 3, ECF No. 25-2. The SOPs mandate that an inmate follow a two-step process in order to exhaust his remedies: (1) file an original grievance; and (2) file an appeal to the Central Office. *Id.* ¶ 14 & Attach. A-1 at 16-22. Except for a limited number of non-grievable issues, an inmate "may file a grievance about any condition, policy, procedure, or action or lack thereof that affects the offender personally." *Id.* Attach. A-1 at 14-15. The inmate must file the grievance within ten days of the event giving rise to it. *Id.* Attach A-1 at 17. A warden has forty calendar days within which to respond to an original grievance. *Id.* Attach A-1 at 19. An inmate may file an appeal after the warden issues a decision or the time for the warden to issue his decision expires. *Id.* Attach A-1 at 21. The Commissioner has 100 days within which to respond to a grievance appeal. McClairen Aff. Attach. A-1 at 22.

[2] The Court has previously rejected Plaintiff's argument that the grievance process was not available to him. Order 15-16, June 29, 2018, ECF No. 77.

Plaintiff alleges that on October 30, 2014, he was attacked in his cell by a fellow inmate. Compl. 10. He states he suffered a broken jaw as a result of that attack but failed to receive proper medical treatment for the next several years. *Id.* at 10-12. Plaintiff specifically alleges Defendant failed to treat Plaintiff despite medical referrals to DSP's dental department. Compl. 5-7, 10-11.

The Court finds that Plaintiff filed one grievance at DSP. On August 24, 2016, Plaintiff filed grievance number 226345. Therein, Plaintiff complains that "staff and medical staff" have shown "deliberate indifference" to Plaintiff's severe medical needs—specifically his jaw and teeth. McClairen Aff. Attach. A-3 at 31. This grievance was denied on September 20, 2016. *Id.* Attach. A-3 at 33. Plaintiff appealed the denial the following day. *Id.* Attach. A-3 at 34. The Commissioner thereafter had 100 days to respond. *Id.* Attach. A-1 at 22. Plaintiff filed his Complaint in this Court on October 11, 2016—twenty days after appealing the grievance denial. Compl. 13.

In order for an inmate to have exhausted his administrative remedies, he must complete the grievance process *prior* to filing a civil action. *See, e.g., Brown*, 212 F.3d at 1207. The relevant date for determining whether the administrative remedies are exhausted is the date on which a plaintiff files his initial complaint, not an amended or recast complaint. *See Smith v. Terry*, 491 F. App'x 81, 83-84 (11th Cir. 2012) (per curiam) ("The only facts pertinent to determining whether a prisoner has satisfied the PLRA's exhaustion requirement are those that existed when he filed his original complaint.").

Plaintiff signed his Complaint on October 11, 2016, and it was received by the Court

on October 17, 2016. Compl. 13.[3] The Commissioner had 100 days from Plaintiff's appeal of grievance 226345—until December 30, 2016—to issue a decision.[4] Plaintiff failed to allow the time for the Commissioner to respond to his appeal to expire. Thus, he failed to fully exhaust his administrative remedies before filing his Complaint, and Defendant's motion to dismiss should be granted.

CONCLUSION

For the reasons explained above, it is recommended that Defendant's motion to dismiss (ECF No. 81) be granted. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, within fourteen (14) days after being served with a copy hereof. The district judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual

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[3] "Under the 'prison mailbox rule,' a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing. Absent evidence to the contrary, we assume that [it] was delivered to prison authorities the day he signed it." *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1286 (11th Cir. 2016) (citations and internal quotation marks omitted).

[4] The record indicates that Plaintiff's appeal was denied on April 10, 2017, but that Plaintiff was not informed of this denial until August 2017. McClairen Aff. Attach. A-2 at 1 & Attach. A-3 at 2, 6.

and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO RECOMMENDED, this 4th day of December, 2018.

S/ Stephen Hyles
UNITED STATES MAGISTRATE JUDGE