APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11177
Non-Argument Calendar

D.C. Docket No. 5:15-cv-00375-TJC-PRL

SAMUEL ROY ABRAM,

Plaintiff-Appellant,

versus

DAVID LEU,
Captain of Security,
A. CLUNTZ,
SIS Agent,
K. BARKER,
SIS Lieutenant,

Defendants-Appellees.

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

(March 25, 2021)

Before ROSENBAUM, NEWSOM, and ANDERSON, Circuit Judges.

PER CURIAM:

Samuel Abram, proceeding *pro se*, appeals the dismissal without prejudice of his action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), relating to the alleged confiscation of certified mail and other materials from him in October 2013 and his subsequent transfer, for failure to exhaust available administrative remedies. He argues that he was not required to exhaust the Federal Bureau of Prisons' ("BOP") administrative remedies because they were unavailable since prison officials refused to provide him with the forms necessary to initiate the grievance process.

I.

We review a district court's interpretation and application of the Prison Litigation Reform Act's ("PLRA") exhaustion requirement *de novo*. *Johnson v. Meadows*, 418 F.3d 1152, 1155 (11th Cir. 2005). Additionally, we review a district court's factual findings for clear error. *Whatley v. Smith*, 802 F.3d 1205, 1209 (11th Cir. 2015). We may affirm on any ground supported by the record. *Big Top Koolers, Inc. v. Circus-Man Snacks, Inc.*, 528 F.3d 839, 844 (11th Cir. 2008).

The PLRA requires prisoners who wish to challenge some 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); *Alexander v. Hawk*, 159 F.3d 1321, 1324–25 (11th Cir. 1998) (holding that the PLRA's exhaustion requirement applies to federal prisoners bringing *Bivens* actions).

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 that the action be dismissed. *Chandler v. Crosby*, 379 F.3d 1278, 1286 (11th Cir. 2005).

To satisfy the exhaustion requirement, a prisoner must complete the administrative process in accordance with the applicable grievance procedures set 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). Procedurally defective grievances or appeals are not adequate to exhaust. *Woodford v. Ngo*, 548 U.S. 81, 93-95 (2006). As a result, an untimely grievance that is rejected as such by prison officials does not satisfy the PLRA's exhaustion requirement. *Johnson*, 418 F.3d at 1156–59.

Although proper exhaustion is generally required, 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). An administrative remedy may be unavailable when prison officials interfere with a prisoner's pursuit of relief. *Ross v. Blake*, 136 S. Ct. 1850, 1860 (2016).

Defendants in this Circuit may raise lack of exhaustion in a motion to dismiss. *Whatley*, 802 F.3d at 1209. Deciding a motion to dismiss for failure to exhaust

administrative remedies is a two-step inquiry. *Id.* (citing *Turner*, 541 F.3d at 1081–82). 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.*

II.

In this case, the defendants filed a motion to dismiss the complaint for lack of exhaustion. They asserted that, as a federal prisoner, Abram was subject to the BOP's administrative-remedy program, codified at 28 C.F.R. §§ 542.10, *et seq.*, under which a prisoner is required to (1) submit an institutional-level request, usually through both an "informal resolution" request (typically using form BP-8) and a formal request (form BP-9), within 20 days following the incident ; (2) appeal to the Regional Director (form BP-10); and (3) appeal to the General Counsel (form BP-11). *See* 28 C.F.R. §§ 542.13–542.15.

The defendants submitted evidence showing that on February 10, 2014, Abram first filed a grievance (number 767898-F1) relating to the basis for his *Bivens* claim, that this grievance was denied for being untimely and for improperly raising

more than one issue, and that Abram failed to appeal the denial of this request to the regional or central-office level. Further, according to the defendants, Abram filed another grievance (number 771756-R1) on March 17, 2014, but it was rejected as improperly filed at the regional level rather than the institutional level, and Abram failed to reinitiate the grievance at the institutional level.

Abram responded that the administrative-grievance procedure was not available to him because prison officials refused to provide him with the forms (BP-8 and BP-9) necessary to initiate the grievance process. He claimed that, after he was transferred to the Special Housing Unit ("SHU") following the confiscation of his materials on October 28, 2013, the unit or case manager never visited him, so he could not request the forms required to timely initiate the grievance process. In addition, he submitted an affidavit from another prisoner who stated that, while housed in the SHU, he witnessed Abram requesting BP-8 and BP-9 forms "to no avail." It appears that Abram obtained the required form by February 10, 2014, when he initiated the grievance process.

Applying the two-step process for resolving exhaustion issues, *see Whatley*, 802 F.3d at 1209, the district court first found that dismissal of Abram's claims for lack of exhaustion was not warranted, accepting his view of the facts as true. Turning to the second step of the analysis, the court concluded that, even assuming prison officials refused to timely provide Abram with the required forms, Abram

was still required to comply with the grievance procedure by either resubmitting the grievance or appealing its denial. The court reasoned that to "properly exhaust his administrative remedies," Abram had "to appeal the Warden's unsatisfactory response that his institutional-level grievance was untimely." Finally, the court found that the evidence refuted any claim that Abram did not have access to the forms for appealing the denial of his February 10, 2014, grievance. The court then denied Abram's motion for reconsideration.

III.

BOP regulations require prisoners to initiate the administrative-grievance procedure using the "appropriate form," which must be obtained from prison staff. 28 C.F.R. § 542.14(a). So if prison staff refuses to provide the form necessary to initiate the grievance procedure, as Abram alleges occurred here, it is difficult to say that the procedure is "available" to the prisoner. Other circuits agree. *See Hill v. Snyder*, 817 F.3d 1037, 1041 (7th Cir. 2016) ("[E]xhaustion is not required when the prison officials responsible for providing grievance forms refuse to give a prisoner the forms necessary to file an administrative grievance."); *Dale v. Lappin*, 376 F.3d 652, 656 (7th Cir. 2004) ("If prison employees refuse to provide inmates with those forms when requested, it is difficult to understand how the inmate has any available remedies."); *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003) (suggesting that remedies were not available where "prison officials denied [the prisoner] the

necessary grievance forms"); *Miller v. Norris*, 247 F.3d 736, 738–40 (8th Cir. 2001) (holding that allegations of prison officials' failure "to respond to the requests for grievance forms" were sufficient to raise a genuine issue of fact as to the availability of administrative remedies).

In *Bryant v. Rich*, however, we indicated that temporary obstacles that prevent the submission of a timely grievance—such as a lockdown, a transfer, or a refusal by prison officials to provide the necessary forms—do not make administrative remedies unavailable where prisoners may "request consideration of untimely grievances for good cause." 530 F.3d 1368, 1373 (11th Cir. 2008). One of the plaintiffs in *Bryant*, a Georgia state prisoner, alleged that the prison's grievance procedure was unavailable to him because prison officials denied him the necessary forms and then transferred him to another institution. *Id.* Although we recognized that a grievance filed after the prisoner's transfer "would have been untimely," we noted that "the relevant grievance procedures provide inmates with the opportunity to request consideration of untimely grievances for good cause." *Id.*

Given that opportunity, we concluded that the prisoner "could have exhausted his administrative remedies by filing a grievance at [the new institution] and then by showing good cause for its tardiness." *Id.* And while there was some evidence that the prisoner had been denied the required forms at the new institution, which presented a genuine issue of fact as to the availability of the remedies, we found that

the district court's contrary finding was adequately supported by the record. *Id.* at 1373, 1377–78. We therefore affirmed the dismissal of the prisoner's complaint for lack of exhaustion. *Id.* at 1378.

Bryant controls our resolution of this case. While Abram's case concerns the BOP's administrative remedies, not the Georgia administrative remedies at issue in *Bryant*, the BOP regulations similarly give prisoners the opportunity to request consideration of an untimely grievance for a "valid reason" (instead of "good cause"). *See id.* at 1373. Specifically, 28 C.F.R. § 542.14(b), titled "Extension," states that "[w]here the inmate demonstrates a valid reason for delay, an extension in filing time may be allowed. In general, valid reason for delay means a situation which prevented the inmate from submitting the request within the established time frame." A refusal to provide the forms necessary to initiate the grievance process appears to qualify as such "a situation which prevented the inmate from submitting the request within the established time frame."

So, although Abram, like the prisoner in *Bryant*, may have been prevented from filing a timely grievance due to prison officials' refusal to provide him the necessary forms, the record reflects that he "could have exhausted his administrative remedies by filing a grievance . . . and then by showing good cause for its tardiness." *Bryant*, 530 F.3d at 1373. We know this because Abram filed an untimely grievance related to the grounds for his *Bivens* claim, stemming from events in October 2013,

on February 10, 2014. But there is no indication that he presented a "valid reason" for its tardiness or otherwise sought an extension of time as permitted under the grievance procedure.[1] *See id.* Thus, Abram failed to exhaust his available administrative remedies and dismissal was proper.[2]

IV.

For these reasons, we affirm the dismissal of Abram's complaint for failure to exhaust administrative remedies as required by the PLRA.

AFFIRMED.

[1] In addition, throughout the proceedings in this case, Abram has given no indication that he was unaware of or misinformed about the BOP's prison-grievance procedure.

[2] The record reflects that in 2015 Abram filed other grievances related to the ground for his current *Bivens* claim, but the district court correctly concluded that these grievances were not timely or otherwise adequate to exhaust his administrative remedies. *See Dimanche*, 783 F.3d at 1210; *Johnson*, 418 F.3d at 1156–59.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

APPENDIX B

SAMUEL ROY ABRAM,

Plaintiff,

v. Case No: 5:15-cv-375-Oc-32PRL

DAVID LEU, A. CLONTZ, and K. BARKER,

Defendants.

ORDER OF DISMISSAL

I. Status

Plaintiff, a federal inmate proceeding pro se, initiated this action by filing a civil rights Complaint, which the Court construes as being filed pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).[1] See Doc. 1 (Complaint). He alleges that several Bureau of Prisons employees at FCC Coleman tampered with his mail and confiscated paperwork in violation of his First, Fifth, and Eighth Amendment rights. See generally id. Plaintiff names three Defendants: David Leu, A. Clontz, and K. Barker. Id. at 2.

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[1] Plaintiff cites 42 U.S.C. § 1983 as a means of bringing this action. See Doc. 1 at 10. However, to the extent he sues federal employees in their individual capacities, the Court construes such claims as being brought pursuant to Bivens, the federal analog to § 1983.

This case is on remand from the Eleventh Circuit Court of Appeals after it vacated this Court's September 6, 2016, Order granting Defendants' previous motion to dismiss for failure to exhaust. See Doc. 52; see also Doc. 28. On May 10, 2019, the Court directed Defendants to file a second motion to dismiss raising all arguments for dismissal that they wish to raise or otherwise respond to the Complaint. See Doc. 55. Plaintiff filed an Objection arguing that any new motion to dismiss must be limited to the exhaustion issue for which the Eleventh Circuit remanded. See Doc. 56. The Court overrules Plaintiff's Objection and finds that allowing Defendants to raise new arguments on remand is not inconsistent with the Eleventh Circuit's decision. See generally Doc. 52.

Before the Court is Defendants' Motion to Dismiss or, Alternatively, for Summary Judgment. See Doc. 57 (Motion). Defendants seek dismissal or summary judgment, because: (a) Plaintiff failed to exhaust his administrative remedies; (b) Plaintiff fails to allege a physical injury; (c) Bivens has not been extended to provide a right of action for Plaintiff's claims; (d) Defendants are entitled to qualified immunity; and (e) Plaintiff lacks standing. See generally id. In support of their Motion, Defendants rely on exhibits filed with their prior motion to dismiss. See Docs. 20-1 through 20-4; Doc. 27-1. The Court previously advised Plaintiff that the granting of a motion to dismiss may represent an

adjudication of this case which may foreclose subsequent litigation on the matter. Doc. 55. Plaintiff filed a Response (Doc. 62; Response) and a Supplemental Response (Doc. 63; Supp. Response) to Defendants' Motion. Defendants' Motion is ripe for review.

II. Plaintiff's Complaint

While not a picture of clarity, Plaintiff asserts that on October 28, 2013, while housed at FCC Coleman, Defendant Clontz intercepted some of Plaintiff's certified mail. Doc. 1 at 8. Plaintiff alleges that when Defendant Clontz attempted to question Plaintiff about the mail, Plaintiff invoked his Fifth Amendment right and refused to answer Defendant Clontz's questions. Id. According to Plaintiff, in response to Plaintiff's silence, Defendant Clontz "became enraged at [Plaintiff's] lack of cooperation" and retaliated against Plaintiff by placing him in the Special Housing Unit. Id. at 8.

According to Plaintiff, in the days following his move to the SHU, Defendant Clontz continued to withhold from Plaintiff more incoming certified mail. Id. Plaintiff alleges that Defendant Barker also confiscated "14 inches of sovereign paperwork" from Plaintiff's housing quarters. Id. at 9. He avers that this confiscation of documents occurred without due process as Defendant Barker failed to allow Plaintiff an opportunity to inventory the confiscated materials. Id. He claims that eventually, Defendant Leu "informed [Plaintiff]

that they were conducting an investigation" and were either going to refer Plaintiff to close management or place him back in the compound of FCC Coleman. Id. at 8 However, according to Plaintiff, Defendant Leu instead transferred Plaintiff to another prison. Id. He claims that the transfer was in retaliation for how Plaintiff responded, or failed to respond, to Defendant Clontz's questions regarding Plaintiff's incoming mail. Doc. 62 at 18.

Plaintiff alleges that Defendants violated his First, Fifth, and Eighth Amendment rights. Doc. 1 at 10. Plaintiff avers that the "'extreme circumstances' concerning the retaliatory seizing and destruction of the Plaintiff's legal work . . . constitutes an Eighth Amendment" violation. See Doc. 62 at 18. He also alleges that Defendants Barker and Clontz "conspired together to deny [ ] Plaintiff access to the Court by confiscating Plaintiff's legal work and destroying two pieces of certified mail." Id. at 19. Additionally, he appears to claim that the retaliatory transfer of Plaintiff "to a more dangerous prison . . . constitutes cruel and unusual punishment." Id. at 14. As relief, Plaintiff requests, "return of [his] personal property which was and is still in custody at Coleman USP-2," and "the $700,000.00 [Plaintiff] was asking for in Tort Claim TRT-SER-2014-06457." Id. at 10

III. Standard of Review

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). "Labels and conclusions" or "a formulaic recitation of the elements of a cause of action" that amount to "naked assertions" will not do. Id. (quotations, alteration, and citation omitted). Moreover, a complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 683 (11th Cir. 2001) (quotations and citations omitted). The Court liberally construes the pro se Plaintiff's allegations. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Bingham v. Thomas, 654 F.3d 1171, 1175 (11th Cir. 2011).

III. Analysis

a. Exhaustion

In examining the issue of exhaustion, courts employ a two-step process.

If the inmate is not satisfied with the Warden's response at the institutional level, he may next submit a Regional Administrative Remedy Appeal (form BP-10) to the appropriate regional director within 20 calendar days of the date the Warden signed the response – hereinafter referred as the regional level of the grievance procedure. See id. § 542.15(a). If the inmate is dissatisfied with the Regional Director's response to his appeal, he may submit a Central Office Administrative Remedy Appeal to the General Counsel within 30 calendar days of the date the Regional Director signed the response – hereinafter referred to as the central office level of the grievance procedure. Id. The appeal to the General Counsel (central office level) is the final step of the administrative process. See id. Each of these steps is generally required to satisfy the exhaustion requirement.

At any level, the coordinator may reject and return a grievance that does not meet any of the procedural requirements. 28 C.F.R. § 542.17. The inmate must be provided with written notice of the reason for rejection. If the defect is correctable, the inmate must be given a reasonable extension of time to correct the deficiency. Id. "When a Request or Appeal is rejected and the inmate is not given an opportunity to correct the defect and resubmit, the inmate may appeal the rejection . . . to the next appeal level." Id.

Defendants argue that Plaintiff failed to exhaust his administrative remedies, because his intuitional-level remedy requests were returned without action for failure to comply with procedural rules and he failed to appeal to the regional level or central office level thereafter. Doc. 57 at 10. In support of their argument, Defendants provided printouts of the BOP's computerized administrative remedy records listing all administrative requests (institutional, regional, and central office) that Plaintiff filed between August 2008 and July 2016. See id. at 7-13 (SENTRY Printout, Administrative Remedy Generalized Retrieval). They also provide the Declaration of Caixa Santos, a Paralegal Specialist at FCC Coleman. See Doc. 27-1 at 2-4.

In his Response, Plaintiff argues that he was not obligated to exhaust his administrative remedies because they were unavailable. Doc. 62 at 5-9. Plaintiff alleges that the process was unavailable because prison officials prevented him from timely filing his institutional-level requests; thus, he could not initiate the first step of the grievance procedure. Id. He claims that once he was moved to the SHU, the unit or case manager never visited him, so he could not request a BP-8 form (request for informal resolution) or a BP-9 form (request for the Warden). Id. As such, he argues that he was unable to timely complete the institutional level of the exhaustion process, and prison officials thwarted his ability to complete the first step because "it was the responsibility of the unit

counselor" to provide Plaintiff with those forms. Id. at 7. In support of his unavailability argument, Plaintiff provides an "Affidavit of Truth" from inmate Charlie Buddha Bells who was housed in the SHU with Plaintiff.[2] Doc. 63 at 23. According to Bells, he witnessed Plaintiff "requesting BP-8s and BP-9s to no avail from his unit manager Panero and other staff members." Id.

Accepting Plaintiff's view of the facts as true, the Court finds that dismissal of these claims for lack of exhaustion is not warranted at the first step of Turner. See Jackson v. Griffin, 762 F. App'x 744, 746 (11th Cir. 2019) (holding disputes about availability of administrative remedies are question of fact that can bar dismissal at Turner's first step). Thus, the Court proceeds to the second step of the two-part process where the Court considers Defendants' arguments regarding exhaustion and makes findings of fact.

Plaintiff was sent to the SHU on October 28, 2013. See Doc. 62 at 6. As such, Plaintiff's deadline to submit an institutional-level grievance to the Warden regarding his claims was November 17, 2013. However, the evidentiary materials demonstrate that the first institutional-level grievance Plaintiff

[2] Plaintiff also directs the Court to review an affidavit that Plaintiff filed in case no. 5:14-cv-142 from fellow inmate Steven Donovan Dixon. See Doc. 62 at 6. That affidavit is not a part of this record. However, the Court did review the document and notes that the contents of Dixon's affidavit are that he witnessed Plaintiff request BP-8 and BP-9 forms, but prison officials never provided Plaintiff with the forms. Abram v. Leu, et al., No. 5:14-cv-142-Oc-36PRL (Doc. 16). As such, according to Dixon, he gave Plaintiff one BP-8 form and multiple BP-9 forms.

submitted to the Warden once he was moved to the SHU was in February 2014. See Doc. 27-1 at 8. Notably, BOP documents indicate that on February 10, 2014, the Warden received Plaintiff's institutional-level request no. 767898-F1 regarding "confiscated sover. pwk & missing certified mail." Id. According to Santo's Declaration, institutional-level request no. 767898-F1 "was rejected on February 12, 2014, for raising more than one issue/related issue or appeal and [Plaintiff] was advised that he must file a separate request/appeal for each unrelated issue or incident report he wants to address (MLT)." Doc. 27-1 at 3. Santo further explains institutional-level request no. 767898-F1 "was also rejected for being untimely, as the request must be received within 20 days of the date of the event complained about (UTF)." Id. at 3. Santos asserts that Plaintiff failed to appeal the return of the institutional-level request no. 767898-F1 to the Regional Director or Central Office thereafter. Id.

Plaintiff argues that prison officials' refusal to timely provide him with the institutional-level forms (i.e., BP-8 and BP-9) rendered his institutional-level remedy unavailable. Nevertheless, even accepting that statement as true, the record demonstrates that Plaintiff finally obtained access to institutional-level request forms by February 10, 2014, when the Warden received institutional-level request no. 767898-F1. Although the Warden rejected request no. 767898-F1 as improperly filed and untimely, Plaintiff was still

required to "properly take each step within the administrative process." Bryant v. Rich, 530 F.3d 1368, 1378 (11th Cir. 2008) (citations omitted). Indeed, the Warden instructed Plaintiff to refile his claims by "filing a separate request/appeal for each unrelated issue or incident report he want[ed] to address." However, Plaintiff did not attempt to properly refile his claims at the institutional level, and he does not assert that he was prevented from resubmitting his claims to the Warden once he received the Warden's rejection of grievance no. 767898-F1.

Further, and likely of more import, Plaintiff does not explain how the rejection or untimely nature of his institutional-level grievance no. 767898-F1 hindered Plaintiff's ability to appeal the Warden's rejection and complete the grievance process. Instead, he essentially argues that the Warden's finding that his institutional-level grievance was untimely relieved him of his requirement to appeal to the Regional Director and then the Central Office thereafter. Plaintiff is mistaken. Section 542.15(a) provides that [a]n inmate who is not satisfied with the Warden's response may submit an Appeal . . . to the appropriate Regional Director . . . ." 28 C.F.R. § 542.15(a). This provision allowed Plaintiff to appeal the Warden's unsatisfactory response that his institutional-level grievance was untimely, and he was required to do so to properly exhaust his administrative remedies. See Harper v. Jenkin, 179 F.3d

1311, 1312 (11th Cir. 1999) (holding that a prisoner who declined to appeal an untimely grievance failed to exhaust his administrative remedies); see e.g., Tucker v. Jones, No. 2:17-cv-133, 2018 WL 3557462, *6 (S.D. Ga. July 24, 2018) (finding that the Regional Director's finding that the plaintiff's BP-10 filing was untimely did not relieve the plaintiff of his requirement to file an appeal to the Central Office), report and recommendation adopted, No. 2:17-cv-133, 2018 WL 4688721, at *1 (S.D. Ga. Sept. 28, 2018).

The record also refutes any allegation that Plaintiff did not have access to the appropriate forms for appealing to the regional level after the Warden rejected institutional-level grievance no. 767898-F1. Indeed, the record demonstrates that the Regional Office received grievance no. 771756-R1 from Plaintiff on March 17, 2014. Doc. 27-1 at 8. While it appears that regional-level grievance no. 771756-R1 involved a "mail complaint," it was not an appeal of the Warden's rejection of the operative institutional-level grievance no. 767898-F1. Notably, according to Santos, regional-level request no. 771756-R1 "was rejected on March 18, 2014, for failure to file a request at the institutional level for the Warden's review and response before filing at the regional level (INS)." Id. at 3. In other words, instead of proceeding with the appeal of the Warden's rejection of no. 767898-F1, Plaintiff submitted a new, distinct grievance to the Regional Director. Nevertheless, even assuming the March 17, 2014, grievance

1311, 1312 (11th Cir. 1999) (holding that a prisoner who declined to appeal an untimely grievance failed to exhaust his administrative remedies); see e.g., Tucker v. Jones, No. 2:17-cv-133, 2018 WL 3557462, *6 (S.D. Ga. July 24, 2018) (finding that the Regional Director's finding that the plaintiff's BP-10 filing was untimely did not relieve the plaintiff of his requirement to file an appeal to the Central Office), report and recommendation adopted, No. 2:17-cv-133, 2018 WL 4688721, at *1 (S.D. Ga. Sept. 28, 2018).

The record also refutes any allegation that Plaintiff did not have access to the appropriate forms for appealing to the regional level after the Warden rejected institutional-level grievance no. 767898-F1. Indeed, the record demonstrates that the Regional Office received grievance no. 771756-R1 from Plaintiff on March 17, 2014. Doc. 27-1 at 8. While it appears that regional-level grievance no. 771756-R1 involved a "mail complaint," it was not an appeal of the Warden's rejection of the operative institutional-level grievance no. 767898-F1. Notably, according to Santos, regional-level request no. 771756-R1 "was rejected on March 18, 2014, for failure to file a request at the institutional level for the Warden's review and response before filing at the regional level (INS)." Id. at 3. In other words, instead of proceeding with the appeal of the Warden's rejection of no. 767898-F1, Plaintiff submitted a new, distinct grievance to the Regional Director. Nevertheless, even assuming the March 17, 2014, grievance

no. 771756-R1 was intended to be an appeal of the Warden's rejection of grievance no. 767898-F1, it is undisputed that Plaintiff never filed an additional appeal to the Central Office by April 17, 2014, within thirty days of when the Regional Director rejected grievance no. 771756-R1.

Accordingly, the Court finds that Plaintiff failed to exhaust his available administrative remedies. Even assuming prison officials initially refused to provide Plaintiff with the proper forms to initiate the institutional level of the grievance process, Plaintiff was eventually able to file a grievance with the Warden on February 10, 2014. Although that institutional-level grievance was rejected as untimely, Plaintiff was still required to complete the grievance process by submitting grievance appeals to the Regional Director and then the Central Office thereafter. He did not complete the process, and neither Plaintiff's allegations nor the evidentiary materials in the record indicate that those administrative remedies were unavailable so as to relieve Plaintiff of the obligation to exhaust. As such, the Court concludes that Defendants' Motion is

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C: Samuel Roy Abram, #11398-002
Counsel of Record

APPENDIX C

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12319
Non-Argument Calendar

D.C. Docket No. 5:15-cv-00375-WTH-PRL

SAMUEL ROY ABRAM,

Plaintiff-Appellant,

versus

DAVID LEU,
Captain of Security,
A. CLUNTZ,
SIS Agent,
K. BARKER,
SIS Lieutenant,

Defendants-Appellees.

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

(January 2, 2019)

Before MARCUS, ROSENBAUM, and BRANCH, Circuit Judges.

PER CURIAM:

Samuel Abram, a prisoner proceeding *pro se*, appeals the district court's dismissal of his federal civil-rights action for failure to exhaust available administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(e). First, Abram argues that the district court improperly *sua sponte* raised the affirmative defense of failure to exhaust. Second, he contends that Federal Bureau of Prisons ("BOP") staff interfered with his pursuit of administrative remedies and made them unavailable. We disagree with his first argument, but we do not reach the second one because we conclude that the district court did not afford Abram a meaningful opportunity to address the issue of exhaustion and did not analyze that issue under the correct legal standard. We therefore vacate and remand for further proceedings.

I.

In July 2015, Abram filed this civil-rights action, pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against several BOP employees at United States Penitentiary, Coleman II ("Coleman"). Abram alleged that BOP staff had tampered with his mail and confiscated paperwork in violation of his rights under the First, Fifth, and Eighth Amendments.

The defendants filed a motion requesting either dismissal or summary judgment. The defendants offered three specific grounds for dismissal or summary judgment: (1) Abram failed to allege physical injury, as required by the PLRA; (2) the defendants were entitled to qualified immunity from Abram's claims; and (3) Abram lacked standing to pursue some of his claims.

In the course of making these arguments, the defendants explained that Abram had sought administrative review of the confiscation of his property, but his grievance was denied as untimely and as not filed in accordance with proper procedures. In support of that statement, they attached an affidavit from Caixa Santos, a paralegal specialist at Coleman, who discussed Abram's pursuit of administrative remedies. Abram filed a response in opposition but did not directly address the issue of exhaustion.

In an order entered on August 15, 2016, a magistrate judge reviewed the defendants' motion and Abram's response and found that it was unclear whether the defendants sought to dismiss the complaint for failure to exhaust administrative remedies or if they had waived the defense and for what reason. Noting that exhaustion was mandatory under the PLRA, the magistrate judge was "uncertain" based on the materials in the record whether Abram had exhausted his administrative remedies. Faced with these ambiguities, the magistrate judge ordered the defendants

to file within fourteen days a response clarifying their position on Abram's exhaustion of administrative remedies.

On August 29, 2016, the defendants filed a response to the magistrate judge's order and specifically requested dismissal for lack of exhaustion. The defendants asserted that Abram did not timely grieve the confiscation of his property within 20 days of the incident, as required by BOP procedures; that he did not properly appeal the denial of that untimely grievance; and that his other, later attempts at exhaustion were inadequate. The defendants relied on another affidavit from Santos and records of Abram's grievance history.

Just over a week later, on September 6, 2016, the district court dismissed Abram's complaint for failure to exhaust administrative remedies based on the materials the defendants submitted. The court entered judgment two days later.

On September 21, 2016, Abram moved for reconsideration of the dismissal. Abram did not dispute that the defendants' evidence accurately reflected his grievance history. But he maintained that his attempt to timely exhaust his administrative remedies had been frustrated by the defendants' misconduct. Specifically, Abram alleged that BOP staff had refused to provide him with the forms necessary to exhaust his administrative remedies. Abram also submitted an affidavit from another prisoner, who stated that he witnessed Abram requesting grievance forms from BOP staff "to no avail."

The district court denied Abram's motion. The court stated that Abram's "attempt at exhaustion did not comply with the administrative procedures and was deemed untimely," and that he had not demonstrated that he was entitled to relief from the exhaustion requirement or to reconsideration of the dismissal. The court noted that another district court had rejected Abram's claim that he had been prevented from starting the exhaustion process. Abram now appeals.

II.

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.

The PLRA requires prisoners who wish to challenge some 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 that the action be dismissed. *Chandler v. Crosby*, 379 F.3d 1278, 1286 (11th Cir. 2005).

To satisfy the exhaustion requirement, a prisoner must complete the administrative process in accordance with the applicable grievance procedures set 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). Procedurally defective grievances or appeals are not adequate to exhaust. *Woodford v. Ngo*, 548 U.S. 81, 93-95 (2006). As a result, an untimely grievance that is rejected as such by prison officials does not satisfy the PLRA's exhaustion requirement. *Johnson*, 418 F.3d at 1156–59.

Although proper exhaustion is generally required, 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). An administrative remedy may be unavailable when prison officials interfere with a prisoner's pursuit of relief. *Ross v. Blake*, 136 S. Ct. 1850, 1860 (2016).

According to the Supreme Court, lack of exhaustion is an affirmative defense. *Jones*, 549 U.S. at 216. In this Circuit, defendants may raise that defense in a motion to dismiss. *Whatley v. Warden, Ware State Prison*, 802 F.3d 1205, 1209 (11th Cir. 2015). Deciding a motion to dismiss for failure to exhaust administrative remedies is a two-step inquiry. *Id.* (citing *Turner*, 541 F.3d at 1081–82). 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. "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.*

We first consider Abram's contention that the district court erred by *sua sponte* raising the issue of exhaustion when the government did not initially move to dismiss the complaint on that basis. The Supreme Court has explained that while "exhaustion is mandatory under the PLRA," failure to exhaust is an affirmative defense. *See Jones*, 549 U.S. at 211–12. And we have recognized that courts generally lack the ability to raise affirmative defenses *sua sponte*. *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1239–40 (11th Cir. 2010). "That's because the principle of party presentation is basic to our adversary system, and the court's invocation of a party's affirmative defense generally conflicts with that ideal." *Burgess v. United States*, 874 F.3d 1292, 1296 (11th Cir. 2017) (alteration adopted) (citation and internal quotation marks omitted).

At the same time, district courts are not absolutely barred from making "limited inquiry" into possible defenses. *Id.* at 1301. In particular, "[i]n an effort to streamline the proceedings and manage their dockets, district courts may make limited inquiry into litigants' possible claims and defenses, without violating the

party-presentation principle that animates our judicial system." *Id.* So, while a court may not invoke an affirmative defense, it may ask whether the defendant intends to rely on an available affirmative defense. *See id.*

Here, although the defendants did not clearly raise lack of exhaustion as a defense in their initial response to Abram's complaint, the district court did not err by seeking further clarification from the defendants as to that defense. Given that the motion to dismiss and attached materials addressed Abram's grievance history and indicated that he had not exhausted his administrative remedies, the court reasonably and permissibly made a "limited inquiry" into whether the defendants intended to rely on that defense. *See id.* The defendants then clearly requested dismissal for lack of exhaustion. Accordingly, the district court did not improperly invoke a defense on behalf of a defendant who did not raise it.

But the district court erred when, after the defendants decided to rely on lack of exhaustion as a defense, it did not provide Abram with an opportunity to respond and be heard on the issue before entering judgment against him. *See id.* ("Of course, if the [defendant] decides to [rely on a defense in response to a court's limited inquiry], the district court must provide the movant with an opportunity to respond and be heard on the issue."); *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1336 (11th Cir. 2011) (stating that district courts generally must provide the plaintiff with an opportunity to respond before dismissing a complaint). And we are hesitant to

conclude that the court's consideration of Abram's motion for reconsideration, which addressed the exhaustion issue, provided a *meaningful* opportunity to be heard given the narrow grounds for granting reconsideration. *See Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007).

Although the failure to provide a meaningful opportunity to be heard could be considered harmless if the complaint were "patently frivolous or if reversal . . . would be futile," *Tazoe*, 631 F.3d at 1336 (quotation marks omitted), on this record, we cannot find that this exception applies here. In concluding that Abram had failed to exhaust, the district court did not analyze the exhaustion issue pursuant to this Court's two-step inquiry for deciding motions to dismiss for failure to exhaust under the PLRA. *See Whatley*, 802 F.3d at 1209. As outlined above, that inquiry requires the court to first accept the prisoner's allegations as true and dismiss only if "the facts as stated by the prisoner show a failure to exhaust." *Id.* If not, the court must make factual findings to resolve the issue of exhaustion. *Id.*

Here, Abram's allegations and evidence bear on the critical question of whether the administrative remedies allegedly unexhausted were "available." *See Ross*, 136 S. Ct. at 1858 ("An inmate, that is, must exhaust available remedies, but need not exhaust unavailable ones."); *see* 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 . . . until such administrative remedies as are available are exhausted."). Abram contends that

prison staff interfered with his pursuit of administrative remedies by refusing to provide him with the forms required to utilize the grievance process and interfering with his mail. While the district court concluded that Abram had not demonstrated that he should be excused from the exhaustion requirement, that is not the correct inquiry. As the Supreme Court has made clear, "a court may not excuse a failure to exhaust," even to take special circumstances into account. *Ross*, 136 S. Ct. at 1856. But remedies must be "available" before exhaustion is required. Because Abram's allegations pertain to the availability of his administrative remedies, we cannot say that it would be futile to remand this matter to the district court to conduct the proper two-step inquiry as outlined in *Whatley* and *Turner*. *Cf. Tazoe*, 631 F.3d at 1336.

IV.

Because the district court failed to provide Abram a meaningful opportunity to respond and be heard on the exhaustion issue and then analyzed the exhaustion issue under an incorrect standard, we vacate the dismissal of Abram's complaint and remand this case for further proceedings consistent with this opinion.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

APPENDIX D

SAMUEL ROY ABRAM,

Plaintiff,

v. **Case No: 5:15-cv-375-Oc-10PRL**

DAVID LEU, A. CLONTZ and K. BARKER

Defendants.

ORDER

Plaintiff, a federal inmate proceeding *pro se*, initiated this case by filing a civil rights complaint pursuant to Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Plaintiff alleges that Defendant Clontz intercepted a piece of his mail, questioned him to no avail and, therefore, subsequently placed him in the Special Housing Unit. (Doc. 1). Plaintiff also claims that Defendant Barker confiscated his "sovereign paperwork," and Defendant Leu conducted an investigation and improperly transferred him in violation of his Constitutional rights. Id.

Defendants have filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (Doc. 20), to which Plaintiff has filed a Response. (Doc. 22).[1] Defendants argue in part that this case is due to be dismissed because Plaintiff failed to exhaust his administrative remedies. (Docs. 20, 27).[2]

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[1]On June 1, 2016, the Clerk issued the Summary Judgment Notice. (Doc. 24).

[2]Defendants clearly contended in the Motion to Dismiss/Motion for Summary Judgment that the complaint was due to be dismissed because Plaintiff failed to allege a physical injury, had not established a constitutional violation with respect to his First, Fifth and Eighth Amendment claims and that they were entitled to qualified immunity. (Doc. 20). What was not so clear to the Court was Defendants' position on Plaintiff's exhaustion of administrative remedies. Accordingly, the Court directed Defendants to clarify whether Plaintiff exhausted his

Here, the record reflects that Plaintiff failed to properly exhaust his administrative remedies. Defendants state that inmates at FCC Coleman have the right to seek formal review of an issue relating to any aspect of his/her confinement, including improper confiscation of property by filing an administrative claim within 20 days of the incident. (Doc. 20). Defendants provide that Plaintiff filed a claim, but it was untimely and was not in accordance with proper procedures. Id.

Specifically, Defendants state that on February 10, 2014, Plaintiff filed administrative remedy number 767898-F1 at the institutional level claiming that staff confiscated his sovereign paperwork and he was missing certified mail. Id. Ex. 3, Doc. 27, Ex. A. The request was rejected because he raised more than one claim and he was advised to file a separate request for each unrelated issue. Id. The request was also rejected as untimely because it was not received within 20 days from the date of the event. Id. Defendants state that Plaintiff failed to appeal this administrative remedy at the regional or central office level. (Doc. 27).

Defendants also provide that on March 17, 2014, Plaintiff filed administrative remedy number 771756-R1 at the regional level complaining about his mail. The request was rejected for failure to file a request at the institutional level for the warden's review before filing at the regional level. Id. Defendants assert that Plaintiff failed to re-initiate his request at the institutional level. (Doc. 27). Based on the foregoing, Defendants argue that Plaintiff failed to properly exhaust his administrative remedies.

(Docs. 20, 27). Defendants have attached declarations and computer print-outs regarding the administrative remedies in support of their argument. Id.

Upon due consideration, Defendants' request for dismissal of this case (Doc. 20) is hereby **GRANTED** to the extent that the complaint is **DISMISSED without prejudice** for failure to exhaust administrative remedies. The Clerk is directed to enter judgment accordingly, terminate any pending motions and close the file.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 6th day of September 2016.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

APPENDIX E

No. 20-11177-HH

SAMUEL ROY ABRAM,

Plaintiff - Appellant,

versus

DAVID LEU,
Captain of Security,
A. CLUNTZ,
SIS Agent,
K. BARKER,
SIS Lieutenant,

Defendants - Appellees.

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

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

BEFORE: ROSENBAUM, NEWSOM, and ANDERSON, 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)

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

APPENDIX-F

No. 20-11177

District Court Docket No.
5:15-cv-00375-TJC-PRL

SAMUEL ROY ABRAM,

Plaintiff - Appellant,

versus

DAVID LEU,
Captain of Security,
A. CLUNTZ,
SIS Agent,
K. BARKER,
SIS Lieutenant,

Defendants - Appellees.

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

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: March 25, 2021
For the Court: DAVID J. SMITH, Clerk of Court
By: Djuanna H. Clark

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11177-HH

SAMUEL ROY ABRAM,

Plaintiff - Appellant,

versus

DAVID LEU,
Captain of Security,
A. CLUNTZ,
SIS Agent,
K. BARKER,
SIS Lieutenant,

Defendants - Appellees.

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

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

BEFORE: ROSENBAUM, NEWSOM, and ANDERSON, 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)