

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

Case No.: _____

HANOI HORMACHEA,
Petitioner,

Vs.

DR. HARIDAS BHADJA, M.D.,
Respondent.

APPENDIX

HANOI HORMACHEA #M56782
Petitioner, pro se
DeSoto Correctional Inst. Annex
13617 Southeast Highway 70
Arcadia, Florida 34266-7800

APPENDIX B

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-12635

Non-Argument Calendar

HANOI HORMACHEA,

Plaintiff-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF
CORRECTIONS, et al.,

Defendants,

DR. HARIDAS BHADJA,
Chief Medical Officer at Okeechobee
Correctional Institution, in official capacity,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 2:21-cv-14227-JEM

Before JILL PRYOR, BRANCH, and BLACK, Circuit Judges.

PER CURIAM:

Hanoi Hormachea, a state prisoner proceeding *pro se*, appeals the dismissal of his civil rights claim brought under 42 U.S.C. § 1983 for failure to exhaust administrative remedies. He asserts he exhausted his administrative remedies by filing a timely informal grievance and later filing a formal medical grievance because other remedies were both unavailable and futile. After review,¹ we affirm.

¹ “We review a dismissal for failure to exhaust administrative remedies *de novo*.” *Shivers v. United States*, 1 F.4th 924, 936 n.9 (11th Cir. 2021). “[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, we take the plaintiff’s factual allegations as true and determine if they entitle the defendant to dismissal for failure to exhaust administrative remedies. *Id.* Second, if dismissal is not warranted at the first step, the court should make specific findings to resolve disputes of fact and should dismiss if, based on those findings, the defendant has shown a failure to exhaust. *Id.*

I. BACKGROUND

On July 25, 2019, Hormachea filed an informal grievance. He grieved that he fell in the dining hall on July 11, 2019 and was seen by Dr. Haridas Bhadja on July 15, 2019, who prescribed him thirty tablets of ibuprofen for ninety days and scheduled him for an X-ray on July 17, 2019. Hormachea complained that he had not seen the doctor since then and that he was unable to move his arm as a result of the pain. He also complained that he had not yet received an ointment the doctor prescribed him on July 11, 2019. His informal grievance was approved and responded to on July 29, 2019. The response stated that Plaintiff had “a scheduled appointment with the provider in the near future” and that if he experienced future problems, he may present his concerns to the health care staff through sick call.

On October 10, 2019, Hormachea was transferred to another facility. Hormachea learned upon arrival that he had been transferred to receive treatment for his shoulder injury. On the day he arrived, he was seen by a doctor who took X-rays and diagnosed Hormachea with a broken bone. The doctor prescribed an injection for the pain and scheduled another appointment within four weeks.

Hormachea filed a formal grievance on October 21, 2019. In his formal grievance, he stated that Dr. Bhadja failed to provide proper treatment for his shoulder after he was seen by him on July 15, 2019. He grieved that Dr. Bhadja’s determination that there was nothing wrong with his left shoulder constituted deliberate

indifference to his serious medical conditions. The formal grievance was denied on November 4, 2019, without any mention of non-compliance with the grievance procedures. Hormachea appealed the decision to the Florida Department of Corrections (FDOC) Office of the Secretary on November 16, 2019. The appeal was returned without action on December 13, 2019 for non-compliance with the grievance procedures set forth in Chapter 33-103. The response to the appeal stated that Hormachea was “outside the timeframe to grieve this issue as [he] didn’t submit a formal grievance on it until 10/21/19 and the Institution should have returned [his] formal grievance.”

II. DISCUSSION

The Prison Litigation Reform Act (PLRA) provides that no action may be brought with respect to prison conditions under 42 U.S.C. § 1983 by a prisoner until their available administrative remedies are exhausted. 42 U.S.C. § 1997e(a). “There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court.” *Jones v. Bock*, 549 U.S. 199, 211 (2007). The PLRA’s exhaustion requirement “entirely eliminates judicial discretion and instead mandates strict exhaustion, irrespective of the forms of relief sought and offered through administrative avenues.” *Johnson v. Meadows*, 418 F.3d 1152, 1155 (11th Cir. 2005) (quotation marks omitted). “The PLRA exhaustion requirement requires proper exhaustion,” which “means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits).” *Woodford v. Ngo*, 548 U.S. 81, 90, 93 (2006) (emphasis omitted). Proper exhaustion

22-12635

Opinion of the Court

5

“demands compliance with an agency’s deadlines and other critical procedural rules.” *Id.* at 90.

Under the FDOC grievance procedures outlined in Florida’s Inmate Grievance Procedure, Fla. Admin. Code ch. 33-103, in relevant part, an inmate is required to (1) file an informal grievance with the staff member responsible for the particular area of the problem, (2) file a formal grievance with the warden’s office, and (3) if an appeal is desired, submit an appeal to the Office of the Secretary. *Parzyck v. Prison Health Servs., Inc.*, 627 F.3d 1215, 1218 (11th Cir. 2010); Fla. Admin. Code R. 33-103.005–.007. A formal grievance must be received no later than 15 days after (1) the date on which the informal grievance was responded to, or (2) the date on which the incident or action being grieved occurred if an informal grievance was not filed pursuant to the circumstances specified in Rule 33-103.006(3). Fla. Admin. Code R. 33-103.011(1)(b). If the formal grievance is not timely filed, a grievance or its appeal may be returned to the inmate without further processing. *Id.* R. 33-103.014(1)(d)–(e).

The district court did not err in granting Bhadja’s motion to dismiss because Hormachea failed to exhaust his administrative remedies. Exhaustion is mandatory under the PLRA. *See Jones*, 549 U.S. at 211. Hormachea received a response to his informal grievance on July 29, 2019, and under Florida’s Inmate Grievance Procedure, he was required to file his formal grievance no later than 15 days after receiving that response. *See* Fla. Admin. Code R. 33-103.011(1)(b). However, Hormachea did not file his formal

grievance until October 21, 2019, over two months after the administrative deadline expired. Because Hormachea's formal grievance was untimely filed, he failed to comply with the procedural rules of the Inmate Grievance Procedure, as required to exhaust administrative remedies.² *See Woodford*, 548 U.S. at 90, 93. Thus, the district court did not err in dismissing his complaint for failure to exhaust administrative remedies.

As to Hormachea's argument that administrative remedies were unavailable to him, the district court considered that argument when it found his allegations of "gate-keepers . . . shortstopping" him did not change the outcome. Additionally, Hormachea failed to allege any facts supporting a plausible inference that administrative remedies were unavailable. While he alleged various people in the administrative system "created . . . impediments," he never explained what those impediments were. Likewise, though he invoked the "machination, misrepresentation, or intimidation" category of unavailable administrative procedures, he did not identify any machination, misrepresentation, or intimidation. *See Ross v. Blake*, 578 U.S. 632, 643 (2016) (noting, as an administrative remedy not capable of use to obtain relief, "when prison administrators thwart inmates from taking advantage of a grievance process

² The district court also did not err in finding the administrative panel's review of Hormachea's untimely formal grievance on the merits did not render it timely. Nothing in Florida's Inmate Grievance Procedure law or the PLRA indicates that an administrative review of an untimely grievance on the merits renders that grievance timely. *See Fla. Admin. Code ch. 33-103; 42 U.S.C. § 1997e(a)*.

through machination, misrepresentation, or intimidation"). Instead, he referenced legitimate procedural steps which resulted in reviews that did not result in his favor. Such contentions are conclusory and do not raise his allegations above the speculative level. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (explaining a plaintiff's factual allegations must be enough to raise a right to relief above the speculative level, and something "more than labels and conclusions" is required). Disagreement with an administrative body's rulings and procedures does not constitute unavailability of the process. *See Ross*, 578 U.S. 643-44. The district court also did not err in rejecting Hormachea's argument that the administrative grievance process was futile, because futility is not a defense to the PLRA's exhaustion requirements. *See Alexander v. Hawk*, 159 F.3d 1321, 1325-26 (11th Cir. 1998) (stating futility of pursuing administrative remedies is not an exception to the exhaustion requirements of the PLRA).

III. CONCLUSION

The district court did not err in dismissing Hormachea's complaint for failure to exhaust his administrative remedies because his formal grievance was not timely filed. Accordingly, we affirm.

AFFIRMED.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION

Case Number: 21-14227-CIV-MARTINEZ

HANOI HORMACHEA,

Plaintiff,

v.

HARIDAS BHADJA, M.D.,

Defendant.

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE comes before the Court upon Defendant Haridas Bhadja, M.D.'s ("Dr. Bhadja") Motion to Dismiss Plaintiff's Amended Complaint ("Motion"). (ECF No. 22). After careful consideration, the Court finds that the Motion is **GRANTED** for failure to exhaust administrative remedies.

I. BACKGROUND

Plaintiff is a Florida state inmate currently housed at the Desoto Annex in Arcadia, Florida. On June 2, 2021, he filed a Complaint under § 1983, Chapter 42 of the U.S. Code against Mark S. Inch, former Secretary of the Florida Department of Corrections; Centurion Health Services of Florida; Haridas Bhadja, MD, Chief Medical Officer of Okeechobee Correctional Institution; and William B. Betz, MD, a radiologist at Lake Butler Reception and Medical Center. (*See generally* Compl., ECF No. 1). Plaintiff alleged that these Defendants were deliberately indifferent to his serious medical needs by failing to properly treat his broken left shoulder while he was housed at Okeechobee Correctional Institution. (*Id.*). On August 12, 2021,

the Court dismissed Plaintiff's Complaint without prejudice and allowed Plaintiff to file an amended complaint. (ECF No. 7).

On October 8, 2021, Plaintiff filed his Amended Complaint. (Am. Compl., ECF No. 11). The Amended Complaint reasserted the deliberate indifference claims against the same four defendants and added four new defendants. On May 10, 2022, the Court dismissed all but one of Plaintiff's claims for failure to state a claim. The only claim that was allowed to proceed was Plaintiff's claim for deliberate indifference to his serious medical needs against Dr. Bhadja.

Plaintiff alleges that on July 11, 2019, while assigned to work in the kitchen at Okeechobee Correctional Institution, "he slipped on a puddle of standing water in the dining room area." (Am. Compl. at 13). The next day, Plaintiff began suffering so much pain and swelling in his left shoulder that he could not move. (*Id.* at 13–14). Plaintiff submitted an emergency medical request and was later seen by Dr. Bhadja. During this consultation, Dr. Bhadja told Plaintiff, "You know the policy, if it's not bleeding, it is not classified as a medical emergency, and I am not going to put my job on the line for you!" (*Id.* at 14). Dr. Bhadja nevertheless prescribed Plaintiff thirty tablets of Ibuprofen and told Plaintiff that his bruises were "ordinary bruises" and they would go away. (*Id.*). Dr. Bhadja then "told Plaintiff that if [he] wanted to get something [sic] about the injury to his broken arm, Dr. Bhadja would have to get [] authorization from her boss 'Centurion.'" (*Id.*). She again stated, "I am not about to put my job on the line for you." (*Id.*).

A few days later, on July 25, 2019, Plaintiff filed an informal grievance. (ECF No. 11-1 at 1). He grieved that he fell in the dining hall on July 11, 2019 and was seen by a doctor on July 15, 2019, who prescribed him thirty tablets of ibuprofen for ninety days and scheduled him for an X-ray on July 17, 2019. (*Id.*). Plaintiff complained that he had not seen the doctor since then and that he was unable to move his arm as a result of the pain. (*Id.*). He also complained that he had

not yet received an ointment the doctor prescribed him on July 11, 2019. (*Id.*). His grievance was approved and responded to on July 29, 2019. (*Id.*). The response stated that Plaintiff had “a scheduled appointment with the provider in the near future” and that if he experienced future problems, he may present his concerns to the health care staff through sick call. (*Id.*).

Three months later, on October 10, 2019, Dr. Bhadja transferred Plaintiff to the Lake Butler Reception and Medical Center (“Lake Butler RMC”) “for some unexplained reason.” (*Id.*). Plaintiff learned upon arrival that he had been transferred there to receive treatment for his shoulder injury. (*Id.*). After learning this, and because of the continued pain he was experiencing, Plaintiff began filing medical grievances. (*Id.*). On the day that he arrived at Lake Butler RMC, Plaintiff was seen by Dr. Thomas Winters, who took X-Rays and diagnosed Plaintiff with a broken bone. (*Id.*). Dr. Winters prescribed an injection for the pain and scheduled another appointment within four weeks. (*Id.*).

At Lake Butler RMC, Plaintiff “learned that the bone in his shoulder hitch had been broken before” he slipped and fell on the wet floor at the Okeechobee Correctional Institution. (*Id.* at 14-15). Plaintiff’s fall had apparently reinjured his left shoulder and caused the bone to “regrow improperly,” which was likely the source of his pain. (*Id.* at 15). Plaintiff advances that, “had Dr. Bhadja examined Plaintiff’s shoulder and previous medical record[s] regarding the injury[,] the likely outcome would have been different.” (*Id.*).

Plaintiff filed a formal grievance three months later on October 21, 2019. (See ECF No. 23-1 at 3). In his formal grievance, Plaintiff stated that Dr. Bhadja failed to provide proper treatment for his shoulder after he was seen by him on July 15, 2019. (*Id.*). He grieved that Dr. Bhadja’s determination that there was nothing wrong with his left shoulder constituted deliberate indifference to his serious medical conditions. (*Id.*). The formal grievance was denied on

November 4, 2019, without any mention of non-compliance with the grievance procedures. (*Id.* at 5). Plaintiff appealed the decision to the Florida Department of Corrections (“FDOC”) Office of the Secretary on November 16, 2019. (ECF No. 23-1 at 15). The appeal was returned without action on December 13, 2019 for non-compliance with the grievance procedures set forth in Chapter 33-103. (*Id.*). The response to the appeal stated that Plaintiff was “outside the timeframe to grieve this issue as [he] didn’t submit a formal grievance on it until 10/21/19 and the Institution should have returned [his] formal grievance.” (*Id.*). A year and a half later, on June 2, 2021, Plaintiff commenced the instant action. (*See Compl.*).

II. DISCUSSION

The Prisoner Litigation Reform Act (“PLRA”) requires inmates to exhaust all available administrative remedies before filing a lawsuit under § 1983. *Bryant v. Rich*, 530 F.3d 1368, 1372 (11th Cir. 2008) (citing 42 U.S.C. § 1997(e)); *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). The purpose of the PLRA is to “eliminate unwarranted interference with the administration of prisons in order to afford corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.” *Parzyck v Prison health Servs., Inc.*, 67 F.3d 1215, 1217 (11th Cir. 2010). To “properly exhaust” administrative remedies, a prisoner must comply with the prison grievance procedures. *Id* (citing *Jones v. Bock*, 549 U.S. 199, 218 (2007)). Failure to do so results in procedural default. *Woodford*, 548 U.S. at 92 (“In habeas, the sanction for failing to exhaust properly (exclusion of review in federal court) is given the separate name of procedural default[.]”).

A failure-to-exhaust defense is non-jurisdictional, but it is akin to “a defense for lack of jurisdiction in” that it is a “matter[] in abatement, and ordinarily [does] not deal with the merits.” *Bryant*, 530 F.3d at 1374 (quoting 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice*

and Procedure § 1360 at 78 n.15 (3d ed. 2004)). There is a two-step process in deciding a motion to dismiss for failure to exhaust administrative remedies. *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008). First, the Court must “look to the factual allegations in the defendant’s motion to dismiss and those in the plaintiff’s response, and if they conflict, take[] the plaintiff’s version of the facts as true.” *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008). “If, in that light, the defendant is entitled to have the complaint dismissed for failure to exhaust administrative remedies, it must be dismissed.” *Id.* (citing *Bryant*, 530 F.3d at 1373–74). If the complaint cannot be dismissed at the first step, “where the plaintiff’s allegations are assumed to be true, the court then proceeds to make specific findings in order to resolve the disputed factual issues related to exhaustion.” *Id.* (citing *Bryant*, 530 F.3d at 1373–74, 1376). Defendant bears the burden of proving that Plaintiff has failed to exhaust his available administrative remedies. *Id.* (citing *Jones*, 549 U.S. at 216).

The grievance procedures for inmates promulgated by the FDOC is codified in the Florida Administrative Code 33-103 *et seq.* The procedures “require an inmate to (1) file an informal grievance to the staff member responsible for the particular area of the problem; (2) file a formal grievance with the warden’s office; and (3) submit an appeal to the Office of the Secretary of the FDOC.” *Parzyck*, 67 F.3d at 1218 (internal citations omitted); Fla. Admin. Code 33-103.005–.007. If an inmate is filing a medical grievance, the informal grievance step may be omitted, and the inmate can file a formal grievance directly with the warden’s office. *Parzyck*, 67 F.3d at 1218 (citing Fla. Admin. Code 33-106(3)(e)). A formal grievance must be received “no later than 15 days from: 1. [t]he date on which the informal grievance was responded to; or 2. [t]he date on which the incident or action being grieved occurred if an informal grievance was not filed pursuant

to the circumstances specified in subsection 33-103.006(3)[.]” Fla. Admin. Code 33-103.011(1)(b).

Here, the Court need not go further than the first step of the analysis to find that Plaintiff failed to exhaust his administrative remedies. Although he was not required to, Plaintiff filed an informal grievance on July 25, 2019, grieving that he had not seen a doctor since July 17, 2019 and he was unable to move his arm due to the pain he was experiencing. (ECF No. 11-1 at 1). His grievance was approved and responded to on July 29, 2019. (*Id.*). Plaintiff, however, did not file a formal grievance until three months later on October 21, 2019. (*See* ECF No. 23-1 at 3). Because the formal grievance was filed more than 15 days after both the date his informal grievance was responded to and the date the incident took place, the formal grievance was not compliant with Fla. Admin. Code 33-103.011(1)(b).¹

The formal grievance was nevertheless denied on November 4, 2019, without any mention of the non-compliance. (*Id.* at 5). Plaintiff appealed the decision to the FDOC Office of the Secretary on November 16, 2019.² (ECF No. 23-1 at 15). The appeal was returned without action on December 13, 2019 for non-compliance with the grievance procedures set forth in Chapter 33-103. (*Id.*). The denial stated that Plaintiff was “outside the timeframe to grieve this issue as [he] didn’t submit a formal grievance on it until 10/21/19 and the Institution should have returned [his] formal grievance.” (*Id.*).

¹ In his appeal, Plaintiff stated that Dr. Bhadja was deliberately indifferent to his serious medical needs when he refused to follow up on grievant’s broken arm after X-Rays were taken on July 17, 2019. While this was not included in his initial grievance complaint, even taking this as the date the incident occurred, the grievance is still deemed untimely because it was received in October 2019, more than 15 days after the date the X-rays were taken.

² Defendant argues that Plaintiff did not appeal his decision to the Office of the Secretary, yet Plaintiff has shown in his response that he appealed his decision on November 16, 2019. (ECF No. 23-1 at 15). The Court takes Plaintiff’s version of the facts as true. *Turner*, 541 F.3d at 1082.

Because Plaintiff failed to comply with the deadlines set forth in the Code, Plaintiff failed to exhaust his administrative remedies. Plaintiff contends that he did in fact exhaust his administrative remedies because he filed a formal grievance and an appeal. Yet, an “untimely grievance does not satisfy the exhaustion requirement of the PLRA.” *Johnson v. Meadows*, 418 F.3d 1152, 1157 (11th Cir. 2005). The Supreme Court has held that courts are tasked with determining “not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies[.]” *Woodford*, 548 U.S. at 92. Thus, it is not sufficient that Plaintiff submitted his formal grievance and appeal; Plaintiff was required to do so *properly*, in other words, pursuant to the deadlines set forth in the Florida Administrative Code. By failing to comply with these deadlines, Plaintiff did not properly exhaust his administrative remedies, thereby procedurally defaulting his federal habeas claim. *Woodford*, 548 U.S. at 92–93.

Plaintiff’s justifications for failing to comply with the deadlines in the grievance procedures do not excuse his default. Plaintiff advances that the Office of the Secretary serves as “gate-keepers to keep Plaintiff from taking the [] appeal by ‘shortstopping’ plaintiff from receiving a final answer from the timely grievance Plaintiff filed [on] July 25, 2019[.]” (Pl.’s Resp. at 5). But serving as “gatekeepers,” as Plaintiff would call it, is precisely the procedure set forth in the Code. Grievance appeals must be filed with the Office of the Secretary and that office is tasked with reviewing and responding to the appeals. *See* Fla. Admin. Code. 33-103.007. Their job is to ensure that the grievance procedures are adhered to, and to inform the prisoner and deny his grievance when it is not in compliance with such procedures. The purpose of this grievance procedure is that prisons are given a fair opportunity to consider the grievance and correct their own errors. *See Woodford*, 548 U.S. at 81–82. Plaintiff’s discontent with this procedure is insufficient to salvage his claim. Indeed, the exhaustion requirement is designed to deal with

parties, like Plaintiff, “who do not want to exhaust” their administrative remedies, and “creates an incentive for these parties to do what they would otherwise prefer not to do, namely, to give the agency a fair and full opportunity to adjudicate their claims.” *Woodford*, 548 U.S. at 90.

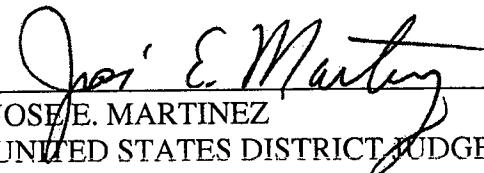
Plaintiff also argues that the grievance procedure, “although officially on the books, is not capable of ‘use’ to obtain ‘relief’ and is a ‘dead end’ [sic].” (Pl.’s Resp. at 6). This argument fares no better. The Eleventh Circuit has explicitly held that exhaustion of all administrative remedies is required “even if exhaustion would be futile.” *Garcia v. Glover*, 197 F. App’x 866, 868 (11th Cir. 2006) (citing *Alexander v. Hawk*, 159 F.3d 1321, 1323–24 (11th Cir. 1998)). Allowing Plaintiff to proceed with this lawsuit without having “properly exhausted” his administrative remedies under his proffered reasons would thwart the very purpose of the exhaustion requirement.

For these reasons, Plaintiff’s Amended Complaint must be dismissed with prejudice.³

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Defendant’s Motion to Dismiss, (ECF No. 22), is **GRANTED**.
2. Plaintiff’s Amended Complaint, (ECF No. 11), is **DISMISSED** with prejudice for failure to exhaust administrative remedies.
3. This case is **CLOSED** and all pending motions are **DENIED as moot**.

DONE AND ORDERED in Chambers at Miami, Florida, this 19th day of July, 2022.


JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Hanoi Hormachea, *pro se*

³ Because the Court finds that Plaintiff failed to exhaust his administrative remedies and his claim is barred, it need not address Defendant’s request to dismiss for failure to state a claim.

APPENDIX C

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-12635

HANOI HORMACHEA,

Plaintiff-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF
CORRECTIONS, et al.,

Defendants,

DR. HARIDAS BHADJA,
Chief Medical Officer at Okeechobee
Correctional Institution, in official capacity,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 2:21-cv-14227-JEM

ON PETITION FOR REHEARING AND PETITION FOR
REHEARING EN BANC

Before JILL PRYOR, BRANCH, and BLACK, Circuit Judges.

PER CURIAM:

Appellant's motion for leave to file the reply brief out of time is DENIED.

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 Panel Rehearing also is DENIED. FRAP 40.