APPENDIX

TABLE OF CONTENTS

APPENDIX A

[FILED: JULY 16, 2024]

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIAN ESTRADA, Plaintiff – Appellant, v. JACOB SMART, Defendant – Appellee.	No. 23-1189

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:20-CV-00549-WJM-STV)

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Abigail L. Smith, Senior Assistant Attorney General (Philip J. Weiser,Colorado Attorney General, with her on the brief), Colorado Department of Law, Denver, Colorado, for Appellee.

Before **McHUGH**, **MURPHY**, and **FEDERICO**, Circuit Judges.

FEDERICO, Circuit Judge.

When Congress enacted the Prison Litigation Reform Act ("PLRA") in 1996, it declared that "[w]hat this country needs . . . is fewer and better prisoner suits." *Jones v. Bock*, 549 U.S. 199, 203 (2007). The PLRA elevated mandatory administrative exhaustion to its current height in 42 U.S.C. § 1997e(a). Section 1997e(a) states: "No action shall be brought **with respect to prison conditions** under . . . Federal law, 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) (emphasis added).

Section 1997e(a) requires a prisoner to exhaust all available administrative remedies "prior to filing a lawsuit regarding prison conditions in federal court." *Little v. Jones*, 607 F.3d 1245, 1249 (10th Cir. 2010) (citing § 1997e(a)). Exhaustion under the PLRA is "mandatory" and "unexhausted claims cannot be brought in court." *Jones*, 549 U.S. at 211 (citing *Porter v. Nussle*, 534 U.S. 516, 524 (2002)).

In May 2018, Plaintiff Brian Estrada was a prisoner confined in the custody of the Colorado Department of Corrections ("CDOC"). While attempting to escape a Colorado county courthouse, he was shot three times by Defendant Jacob Smart, a CDOC officer. Estrada later sued Smart under 42 U.S.C. § 1983 and alleged excessive force, but the district court granted Smart's summary judgment motion. It concluded that Estrada had failed to

exhaust all available CDOC administrative remedies by not following CDOC's three-step grievance process.

Final judgment was entered, and Estrada timely appealed, so we have jurisdiction under 28 U.S.C. § 1291. Estrada now argues that a county courthouse is not a CDOC prison, so his lawsuit is not "with respect to prison conditions" under the PLRA. He also claims the CDOC grievance procedures apply only to CDOC prisons, so his claim is outside the scope of when and where they apply.

Having considered the record, briefing, and oral argument in full, we affirm the entry of summary judgment. In this PLRA case, geography is not the controlling factor. Instead, as the district court correctly determined, the PLRA and CDOC's grievance procedures both applied to the shooting of a CDOC inmate by a CDOC officer.

I

In May 2018, Estrada was an inmate of CDOC. That month, CDOC transported him to the Logan County Courthouse in northeastern Colorado for a hearing in a pending criminal case. While in the jury box of a courtroom on the second floor, Estrada attempted to escape. His hands and ankles were shackled to his waist, so he could only shuffle across the floor. During Estrada's shuffle across the courtroom, he was shot three times by Smart, a CDOC officer, who was posted in the courtroom and in charge of guarding Estrada. No other officer in the courtroom had reached for their gun. Estrada was unarmed.

Estrada survived being shot and returned to custody as a CDOC inmate. In 2020, while in CDOC custody, he sued Smart, in his personal capacity, in federal district court in Colorado. His complaint alleged a single claim for

excessive force in violation of the Eighth Amendment under § 1983.

After Estrada filed his First Amended Complaint, Smart moved to dismiss under Federal Rule of Civil Procedure ("Rule") 12(b)(6) based on qualified immunity. The district court denied that motion, ruling that Smart "should have been on notice that use of deadly force on an unarmed prisoner restrained in the manner as was Plaintiff would violate Plaintiff's Eighth Amendment right to be free of the use of excessive force[.]" Aplt. App'x at 79–80.

The case then entered the discovery phase. Beyond Estrada's deposition, it is unclear whether any other depositions occurred. The parties cite to no depositions in the record, nor do they mention written discovery.

After discovery concluded, Smart filed a motion for summary judgment under Rule 56 based on his affirmative defense of failure to exhaust administrative remedies. Estrada was a CDOC inmate at the time of the shooting and when he filed suit, yet he did not pursue CDOC's three-step grievance process regarding the courthouse shooting.

In support of the summary judgment motion, Smart introduced the following evidence: (1) a declaration from Anthony DeCesaro (the "DeCesaro Declaration"), a CDOC Step 3 Grievance Officer with personal knowledge about Estrada's grievance filings and the scope of the CDOC's grievance procedures; (2) CDOC Administrative Regulation ("AR") 850-04; and (3) portions of Estrada's deposition testimony.

As described by Estrada in his Opening Brief, the DeCesaro Declaration "appended a complete copy of the operative administrative regulation governing

grievances, and the regulation in effect at the time this suit was filed." Aplt. Br. at 15 (citations omitted). The DeCesaro Declaration detailed CDOC's "formalized three-step grievance process for inmates set forth in Administrative Regulation ('AR') 850-04." Aplt. App'x at 116.

At summary judgment, Estrada disputed only the scope of AR 850-04. He argued it did not apply to the courthouse shooting, as he pointed out that the Logan County Courthouse is not a CDOC facility.

As to the scope of the administrative regulation, both sides focused on AR 850-04(IV)(D)(1), which states that the CDOC grievance procedures cover "a broad range of complaints including, but not limited to: policies, conditions, and incidents within the facility that affect the offender personally; actions by employees and offenders and for resolving offender issues relating to health care concerns." *Id.* at 123.

Smart also showed that other language in AR 850-04 supported his interpretation. He pointed to AR 850-04(IV)(D)(2), which lists several exclusions for which CDOC's grievance procedures do not apply; it states that "[t]his grievance procedure may not be used to seek review" of the excluded topics listed. *Id.* Yet incidents external to a CDOC facility, including a courthouse, are not part of this exclusions list. *Id.*

DeCesaro next declared: "Inmates may also file grievances regarding incidents that occur outside of the facility while they are in the custody of the CDOC, such as during transport to court appearances or medical visits." Aplt. App'x at 117 (citing AR 850-04(IV)(D)(1)-(2)). AR 850-04 supports this statement because it says the CDOC grievance procedures are available "to offenders sentenced to the [C]DOC. This includes [C]DOC

offenders housed in private facilities and offenders who have been released to parole, community, or ISP supervision." Aplt. App'x at 121 (AR 850-04(IV)(A)(2)); *see also* Aplt. App'x at 117 (DeCesaro Declaration, at ¶ 10) (citing AR 850- 04(IV)(A)(2)).

DeCesaro further established that Estrada had filed three grievances on unrelated topics in the year following the shooting, which ranged from May 1, 2018, to May 30, 2019. Thus, the CDOC grievance system was "available" to Estrada, and he utilized it three times in the year following the courthouse shooting. But, as DeCesaro established, Estrada did not file a grievance for the courthouse shooting.

By introducing the DeCesaro Declaration and attachments, Smart met his burden of proof on his affirmative defense. He established that Estrada failed to exhaust the available CDOC administrative remedies, while simultaneously filing three grievances on unrelated topics.

At this point, the summary judgment burden shifted to Estrada, the nonmovant, to show that the CDOC regulations did not apply or were not available. To survive summary judgment, Estrada needed to offer evidence. But he provided only bare allegations and legal arguments made by his counsel about the scope of AR 850-04. And he did not make the definitional challenges to the PLRA that he now raises on appeal. Estrada failed to attach or cite any evidence or deposition testimony (for example, deposition testimony from DeCesaro or a Federal Rule 30(b)(6) deposition of CDOC); his response included as exhibits only an inmate orientation video and handbook from a CDOC facility. He failed to establish the factual or legal significance of either exhibit. Nor did he offer his own declaration or deposition testimony to

describe what he received from CDOC regarding the grievance procedures, when he received it, where he received it, from whom he received it, or anything else. Indeed, in support of his argument before the district court, Estrada effectively provided no summary judgment evidence.

The district court granted the motion for summary judgment without holding an evidentiary hearing. It ruled that both the PLRA and CDOC's three-step grievance procedures applied to the May 2018 courthouse shooting, and that Estrada failed to exhaust CDOC's available administrative remedies.

On appeal, Estrada argues the May 2018 courthouse shooting is beyond the scope of both the PLRA, generally, and the CDOC's specific three-step grievance process. According to Estrada, a courthouse is not a prison, so his claim about the courthouse shooting is not "with respect to prison conditions," as the scope of § 1997e(a) requires.

II

"We review de novo the district court's finding of failure to exhaust administrative remedies." *Little*, 607 F.3d at 1249 (quoting *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002)).

"Failure to exhaust under the PLRA is an affirmative defense." *Tuckel v. Grover*, 660 F.3d 1249, 1254 (10th Cir. 2011). When a defendant moves for summary judgment based on an affirmative defense, Rule 56 puts the burden on the defendant to "demonstrate that no disputed material fact exists regarding the affirmative defense asserted." *Hutchinson v. Pfeil*, 105 F.3d 562, 564 (10th Cir. 1997). "If the defendant meets this initial burden, the plaintiff must then demonstrate with specificity the existence of a disputed material fact." *Id.* "If the plaintiff

fails to make such a showing, the affirmative defense bars his claim, and the defendant is then entitled to summary judgment as a matter of law." *Id.* Applied to this case, "[o]nce" Smart "prove[d] that [Estrada] failed to exhaust," then "the onus f[ell] on [Estrada] to show that remedies were unavailable to him[.]" *Tuckel*, 660 F.3d at 1254.

III

First, we must decide whether the district court correctly decided the exhaustion question, without a hearing, and instead of sending that question to a jury. Estrada argues the district court usurped the role of a jury by resolving all disputed issues regarding administrative exhaustion at summary judgment. Arguing by analogy to a breach of contract claim decided under state law, Estrada claims that the district court violated Rule 56 by resolving all disputes. But the CDOC grievance procedures are not a contract between two parties, nor are they interpreted based on state law. *See Ruggiero v. Cnty. of Orange*, 467 F.3d 170, 174 (2d Cir. 2006) ("There is no indication that Congress intended state law to govern [how we interpret the PLRA] . . . or that the PLRA's exhaustion requirement should vary from state to state.").

We affirm the district court's decision to resolve all disputed issues on administrative exhaustion, including all disputed facts (if any existed). The district court correctly noted that our circuit "has not specifically instructed district courts as to how they should resolve factual disputes in the context of exhaustion." Aplt. App'x at 199. We do so now and join "the Second, [Third,] Fifth, Seventh, Ninth, and Eleventh Circuits and hold that judges may resolve factual disputes relevant to the exhaustion issue without the participation of a jury."

Small v. Camden Cnty., 728 F.3d 265, 271 (3d Cir. 2013) (collecting cases).[1]

Prisoners "have a right to a jury trial on the merits, but this right does not guarantee resolution by a jury of all factual disputes." *Id.* at 269. Ultimately, "[j]uries decide cases, not issues of judicial traffic control." *Pavey v. Conley*, 544 F.3d 739, 741 (7th Cir. 2008). And "[u]ntil the issue of exhaustion is resolved, the court cannot know whether it is to decide the case or the prison authorities are to." *Id.*

More fundamentally, "exhaustion is a precondition for bringing suit" under the plain language of § 1997e(a). *Small*, 728 F.3d at 269. The PLRA states: "'No action *shall be brought* with respect to prison conditions . . . until such administrative remedies as are available are exhausted.'" 42 U.S.C. § 1997e(a) (emphasis added). The term "shall" is a direct command that we must follow. *Smith v. Spizzirri*, 144 S. Ct. 1173, 1177 (2024) (Congress's "use of the word 'shall' 'creates an obligation impervious to judicial discretion.'") (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)). Thus, to allow a § 1983 claim to reach a jury trial *before* determining the status of administrative exhaustion would violate the statute's plain language.

Estrada also claims the district court erred by failing to hold an evidentiary hearing. Ordinarily, if there are disputed issues of fact, a district court should hold an evidentiary hearing before granting summary judgment on the defense of failure to exhaust administrative remedies. In this case, however, Estrada offered "no

[1] This holding contains a caveat: The holding applies "as long as the facts are not bound up with the merits of the underlying dispute." *Id.* at 270. In this case, Estrada makes no argument that the merits are intertwined with administrative exhaustion.

evidence to support" his "allegation[s]" about the CDOC grievance procedures "beyond the allegation[s] [themselves]." *May v. Segovia*, 929 F.3d 1223, 1235 (10th Cir. 2019). While Estrada attached a CDOC prison orientation video and inmate handbook to his summary judgment response, they stayed inert without testimony or a declaration to give them any force. The mere existence of a video and an inmate handbook tells us nothing about whether the CDOC grievance procedures were available for Estrada to complain about the courthouse shooting.

To avoid summary judgment, a nonmovant must offer evidence, not bare allegations. *See* Fed. R. Civ. P. 56(c)(1)(A) (setting forth how a party introduces summary judgment evidence, including depositions and declarations, to support a factual assertion). Applied here, that standard means once Smart introduced evidence showing that Estrada had filed three other grievances but none about the May 2018 shooting, the burden shifted to Estrada to "do more than refer to allegations of counsel contained in a brief to withstand summary judgment." *Adams v. Am. Guar. and Liab. Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000) (quoting *Thomas v. Wichita Coca–Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992)). "Rather, sufficient evidence (pertinent to the material issue) must be identified by reference to an affidavit [or declaration],[2] a deposition transcript or a specific exhibit incorporated therein." *Id.* (quoting *Thomas*, 968 F.2d at 1024); *accord Fields v. Okla. State Penitentiary*, 511 F.3d 1109, 1112 (10th Cir. 2007) (emphasizing that "bald allegations cannot preclude summary judgment" in a PLRA exhaustion case).

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[2] 28 U.S.C. § 1746 (making affidavits and declarations effectively synonymous).

In sum, in a prisoner case involving the defense of failure to exhaust, a district court should, before trial, resolve all disputed issues of law and fact that are not intertwined with the merits of the claim. If the plaintiff establishes a disputed issue of material fact, an evidentiary hearing should usually be held. If the district court declines to conduct a hearing, it should explain why one is unnecessary. But if neither party requests an evidentiary hearing, a district court is not obligated to raise the topic sua sponte. Here, the district court correctly followed this procedure.

IV

We now turn to whether Estrada forfeited his challenge to the scope of the PLRA. Estrada argues that the PLRA does not apply to a courthouse shooting – or any location outside the prison walls. This argument is new because Estrada did not make it before the district court when he opposed Smart's motion for summary judgment. Rather, he focused his argument on the scope of the CDOC regulation. *See* Aplt. App'x at 200.

However, we will consider this argument on appeal because the district court thoroughly analyzed the scope of the PLRA in its order granting summary judgment. We set aside our general rules on forfeiture and waiver when an issue has been "passed upon," meaning "the district court explicitly [has] consider[ed] and resolve[d] an issue of law on the merits." *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 991–92 (10th Cir. 2019) (quoting *United States v. Verner*, 659 F. App'x 461, 466 (10th Cir. 2016)); *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1328 (10th Cir. 2003) ("We conclude that when the district court sua sponte raises and explicitly resolves an issue of law on the merits, the appellant may challenge that ruling on appeal on the ground addressed by the district court

even if he failed to raise the issue in district court. In such a case, review on appeal is not for 'plain error,' but is subject to the same standard of appellate review that would be applicable if the appellant had properly raised the issue."). The district court extensively considered the scope of the PLRA, along with the CDOC grievance procedure, when it granted summary judgment in favor of Smart. Because it "passed upon" the question of the scope of the PLRA, we therefore reach Estrada's PLRA challenge raised on appeal.

V

Next, we must examine the scope of the PLRA. That is, whether and how it applies to Estrada's § 1983 claim for excessive use of force based upon a courthouse shooting.

A

Regarding the applicability of the PLRA, Estrada's appellate briefing centers around a geography-based test. Under his proposed test, the PLRA's exhaustion requirement applies only to a claim for relief "related to the conditions of . . . confinement in prison." Aplt. Br. at 11. In turn, he contends that because a courthouse is not a prison, the PLRA does not apply to the May 2018 courthouse shooting.

In evaluating Estrada's geography-based test, we start with the text of § 1997e(a). *Wichita Ctr. for Graduate Med. Educ., Inc. v. United States*, 917 F.3d 1221, 1224 (10th Cir. 2019) ("As always, we start with the plain meaning of the text."). Congress did not define the terms in § 1997e(a). But a related provision of the PLRA, 18 U.S.C. § 3626(g)(2), defines a "civil action with respect to prison conditions" broadly as "any civil proceeding . . . with respect to the **conditions of confinement** or the

effects of actions by government officials on the lives of persons confined in prison[.]"[3] (emphasis added). The district court cited this definition when it concluded that the PLRA applied to a courthouse shooting, and it explained that we have cited § 3626(g)(2) in support of applying the PLRA to a prisoner case regarding activity outside a prison. Aplt. App'x at 201 (discussing *Dmytryszyn v. Hickox*, 172 F.3d 62, *1 (10th Cir. 1999) (unpublished)).

We agree with the district court's use of the § 3626(g)(2) definition to interpret "prison conditions" in § 1997e(a). Our court has cited § 3626(g)(2) in a case concluding that § 1997e(a) reaches a prisoner "challenging the amount of compensation he received for work performed outside the prison." *Dmytryszyn*, 172 F.3d at *1. In another case, we applied § 1997e(a) to "an assault at [a] county courthouse" where the plaintiff was in custody, *Forbes v. Garcia*, 696 F. App'x 381, 382 (10th Cir. 2017) (unpublished) – a nearly identical fact pattern to this case. Thus, although unpublished, we have in two prior cases considered these two statutory provisions together to reject the strict geographic test proposed by Estrada.

Estrada counters that the Supreme Court has cast doubt on importing the language in § 3626(g)(2) to define the scope of § 1997e(a). We do not sense this same doubt. Rather, the Supreme Court "express[ed] no definitive

[3] "The PLRA is codified in scattered sections of Titles 11, 18, 28, and 42 of the United States Code[.]" *Green v. Young*, 454 F.3d 405, 409 n.1 (4th Cir. 2006). The PLRA's exhaustion requirement, § 1997e(a), is in Title 42 of the U.S. Code, while § 3626(g)(2) is in Title 18. Both sections were enacted at the same time in the same law: the Omnibus Consolidated Recissions and Appropriations Act of 1996, PL 104–134, April 26, 1996, 110 Stat. 1321.

opinion on the proper reading of § 3626(g)(2)" as applied to § 1997e(a). *Porter*, 534 U.S. at 525 n.3.

Our marrying together of § 3626(g)(2) with § 1997e(a) aligns with three other Circuits, who have held it is proper to import the § 3626(g)(2) definition to the § 1997e(a) exhaustion requirement. We agree with them that both statutes "are part of the same legislation with the same overarching objectives," and "it makes good sense to assume that a definition provided by Congress in one statute applies to another related statute." *Smith v. Zachary*, 255 F.3d 446, 449 (7th Cir. 2001); *see also Ruggerio*, 467 F.3d at 175 (same); *Witzke v. Femal*, 376 F.3d 744, 752–53 (7th Cir. 2004) (same); *Alexander S. v. Boyd*, 113 F.3d 1373, 1381 (4th Cir. 1997), *abrogated on other grounds by Martin v. Hadix*, 527 U.S. 343 (1999) (same).

Estrada repeatedly cites the Seventh Circuit's decision in *Witzke* to argue that the phrase "prison conditions" includes only the area inside a prison. Aplt. Br. at 22—24. We agree that *Witzke* is persuasive, but it does not help Estrada in this appeal.

In *Witzke*, a prisoner alleged that his claim was not "with respect to prison conditions" under § 1997e(a) because it involved "his treatment as a probationer participating in rehabilitation programs" and in a halfway house. 376 F.3d at 749–50; *see id.* at 750 ("Mr. Witzke contends that he is not complaining of *prison* conditions. Rather, he maintains that the alleged events took place while he was a probationer participating in probationary programs; therefore, he continues, he is not complaining about *prison* conditions but about his treatment while he was a probationer. Such allegations are, in his view, pre-incarceration claims."). The Seventh Circuit rejected the prisoner's arguments on scope. It first relied on the broad

definition in § 3626(g)(2) and then observed that the term "prison" is also broadly defined in the PLRA as "any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law." *Id.* at 752 (quoting 18 U.S.C. § 3626(g)(5)); *see also Jackson v. Johnson*, 475 F.3d 261, 266 (5th Cir. 2007) (favorably discussing *Witzke*). Like the court in *Witzke*, we conclude the § 3626(g)(2) definition applies to the PLRA and aids in our decision to reject Estrada's strict geography test.

B

For Estrada, on the day of the May 2018 courthouse shooting, the Logan County courthouse functioned as a "prison." It was a "local facility" that "detains" inmates, like Estrada, "accused" or "convicted" of "violations of criminal law[.]" 18 U.S.C. § 3626(g)(5). Estrada was a prisoner in CDOC custody at the time he was shot; he was fully restrained, shackled, and under the control of armed CDOC officers inside the courthouse. He was only at the courthouse temporarily and only for a hearing in another Colorado state criminal case. Likewise, he was transported there (and also shot) by a CDOC officer. And, finally, but-for the shooting, he would have been transported back to the Logan County jail from the courthouse in CDOC custody.

It is important to our holding that every case fact fits under CDOC's umbrella. When the shooting happened, Estrada was in CDOC custody and Smart was acting as a CDOC officer. This posture distinguishes this case from the Second Circuit case Estrada relies on, *Hubbs v. Suffolk Cnty. Sheriff's Dep't*, 788 F.3d 54 (2d Cir. 2015).

In *Hubbs*, the plaintiff sued the sheriff's deputies under § 1983 for beating him in a holding cell inside a

courthouse. *Id.* at 57. The Second Circuit reversed summary judgment, but not because of the geographic location of the courthouse. Rather, the sheriff's deputies (defendants) did not adduce sufficient evidence to establish the exhaustion affirmative defense at the summary judgment stage. *Id.* at 56–57. The available grievance procedure in that case stated it did not apply to issues and events outside of the warden's control, and the defendants' summary judgment filings failed to establish that the deputies fell within the warden's chain of command. *Id.* at 59–61. As a result, the Second Circuit determined, on the limited record before it, "no administrative remedies were available to [plaintiff], and there was thus nothing for him to exhaust." *Id.* at 61. Here, in contrast, Estrada was a CDOC inmate and Smart was a CDOC officer. As a result, CDOC's grievance procedures applied.

Again, whether the PLRA applies is not dependent strictly and solely upon geography but on whether a prisoner is confined in any jail, prison, or other correctional facility. Congress used the term "any" in § 1997e(a). "The term 'any' ensures that the definition has a wide reach[.]" *United States v. Hutchinson*, 573 F.3d 1011, 1022 (10th Cir. 2009) (quoting *Boyle v. United States*, 556 U.S. 938, 944 (2009)); *see also Nelson v. United States*, 40 F.4th 1105, 1115 (10th Cir. 2022) (holding that "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'") (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Here, the word "any" expands a list of three nouns already listed disjunctively, i.e., "any jail, prison, or other correctional facility[.]" § 1997e(a). "Equally broad is the phrase 'with respect to.'" *Pharm. Care Mgmt. Ass'n v. Mulready*, 78 F.4th 1183, 1205 (10th Cir. 2023). The phrase "with

respect to prison conditions" is therefore "unmistakably broad[.]" *Id.*

"Time and again," the Supreme Court has "refus[ed] to add unwritten limits onto [the PLRA's] rigorous textual requirements" and "reject[ed] every attempt to" narrow the PLRA. *Ross v. Blake*, 578 U.S. 632, 639 (2016). In fact, "§ 1997e(a) mandates initial recourse to the prison grievance process even when a prisoner seeks . . . a remedy not available in that process[.]" *Porter*, 534 U.S. at 525 n.4 (describing the holding in *Booth v. Churner*, 532 U.S. 731, 741 (2001)).

We are bound to adhere to this clear guidance. No federal Circuit has adopted Estrada's narrow reading of the PLRA; instead, our sister Circuits have all determined the scope of the PLRA is broadly construed, as we do again in this case. *See, e.g.*, *Ruggiero*, 467 F.3d at 174 (joining "[t]wo other courts of appeals" in reading the phrase "any jail, prison, or other correctional facility" within § 1997e "expansively") (first citing *Witzke*, 376 F.3d at 744; and then citing *Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997), *abrogated on other grounds by Martin v. Hadix*, 527 U.S. 343 (1999)); *id.* at 175 ("By referring to 'prisoners,' Congress placed a constraint on suits filed by all litigants who could be characterized as prisoners, regardless of the type of facility in which they are imprisoned.").

In *Porter*, the Supreme Court addressed the phrase "prison conditions" in § 1997e(a) and determined that it "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." 534 U.S. at 532. *Porter* did not provide a geographical dimension to this holding and did not cabin its reach. Rather, *Porter* held: "We here read the term 'prison

conditions' not in isolation, but 'in its proper context.' The PLRA exhaustion provision is captioned 'Suits by prisoners'; this unqualified heading scarcely aids the argument that Congress meant to bi-sect the universe of prisoner suits." *Id.* at 527–28 (citations omitted).

Estrada's appeal also runs contrary to another holding in *Porter*. In his Reply Brief, he claims that "construing the text to impose a temporal limit (rather than a geographical limit) does not withstand scrutiny." Reply Br. at 10. But *Porter* held that it is "plausible that Congress inserted 'prison conditions' into the exhaustion provision simply to make it clear that preincarceration claims fall outside § 1997e(a), for example, a § 1983 claim against the prisoner's arresting officer." 534 U.S. at 518. Although the temporal test may limit the statute's reach, nothing indicates that Congress intended courts to add a geographic limitation.

C

Another reason we determine the PLRA's scope broadly is because narrowing it to only apply within the prison walls would subvert a major purpose of the PLRA: to improve the overall conditions of confinement by drawing immediate attention to prisoner treatment issues as they occur. Rapid reporting allows corrections officers and officials to address problems quickly, not months or years later following the outcome of a lawsuit.

For example, in this case, if Estrada had timely pursued the threestep grievance process regarding the courthouse shooting, he would have alerted prison officials that CDOC officers perhaps need additional training on the appropriate tactics and means to prevent prisoners in custody from escaping a courthouse. Or, at the very least, his grievances would have drawn CDOC's attention to Smart, who shot a fully restrained prisoner

three times without any attempt to use a taser or other lesser force. Estrada's unwarranted shooting "by a corrections officer may be reflective of a systemic problem traceable to poor hiring practices, inadequate training, or insufficient supervision." *Id.* at 530; *see also Ruggerio*, 467 F.3d at 178 (explaining the importance of the "larger interests at stake under the PLRA" beyond the prisoner's federal lawsuit).

Carving out a wide exception for all incidents that happen anywhere beyond the boundary of a prison would unravel the PLRA's blanket coverage. As oral argument in this case demonstrated, these gaps in coverage would cover far more than courthouse shootings. When pressed, Estrada's counsel could not defend an objective test based on geography (and, in fact, disclaimed proposing a geographic test for the PLRA, at one point) or refute that if we adopted Estrada's interpretation of the PLRA, all transportation of all prisoners to or from prisons would be deemed outside the zone of the PLRA. Such gaps would be significant; prisoners routinely are transported from prison to other correctional facilities, medical appointments, or courthouses.

Estrada's geography-based test is also contrary to the history and statutory context of the PLRA. *See Ross*, 578 U.S. at 640 ("So too, the history of the PLRA underscores the mandatory nature of its exhaustion regime."). Congress passed the PLRA for a variety of reasons, including to "reduce the 'disruptive tide of frivolous prisoner litigation.'" *Tuckel*, 660 F.3d at 1252 (quoting *Woodford v. Ngo*, 548 U.S. 81, 97 (2006)). The goal was "fewer and better prisoner suits." *Jones*, 549 U.S. at 203. Congress also sought "to eliminate unwarranted federal-court interference with the administration of prisons," *Woodford*, 548 U.S. at 93, and "to . . . afford[ ] corrections officials time and opportunity

to address complaints internally before allowing the initiation of a federal case." *Porter*, 534 U.S. at 525.

Requiring a prisoner to file a grievance is not a technicality; instead, it is mandatory to ensure prison "efficiency" and "administrative agency authority" by allowing prison officials to promptly review incidents and gather evidence, as well as maintain control over the flow of prison life. *Woodford*, 548 U.S. at 89 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). Administrative exhaustion alerts prison officials to problems as they occur, avoiding delays and the loss or destruction of evidence. Exhaustion also gives an agency the "'opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court,' and it discourages 'disregard 'disregard of [the agency's] procedures.'" *Id.* (quoting *McCarthy*, 503 U.S. at 145).

As a result, if a prisoner later files a federal lawsuit, the parties and the court will have a developed factual record. *See id.* at 95 (explaining that "proper exhaustion often results in the creation of an administrative record that is helpful to the court [because] [w]hen a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved"). From a prisoner's perspective, administrative exhaustion plays a critical role in gathering and preserving critical evidence.

We also must consider the statutory evolution of administrative exhaustion. The PLRA "differs markedly from its predecessor." *Porter*, 534 U.S. at 524. In passing the PLRA, Congress "invigorated" the exhaustion requirement. *Woodford*, 548 U.S. at 84 (quoting *Porter*, 534 U.S. at 524). Prior to 1980, prisoners faced "no

obligation to exhaust administrative remedies." *Id.* Congress then initially "enacted a weak exhaustion provision" that was "in large part discretionary" and "authorized district courts to stay actions . . . for a limited time while a prisoner exhausted 'such plain, speedy, and effective administrative remedies as are available.'" *Id.* (quoting § 1997e(a)(1) (1994 ed.)).

"[T]he new § 1997e(a) removed the conditions that administrative remedies be 'plain, speedy, and effective' and that they satisfy minimum standards." *Ross*, 578 U.S. at 641 (quoting *Porter*, 534 U.S. at 524). We must acknowledge that "[w]hen Congress amends legislation, courts must 'presume it intends [the change] to have real and substantial effect.'" *Id.* at 641–42 (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)). Thus, because Congress' intent in passing the PLRA was to broaden and strengthen administrative exhaustion, we decline to exclude the courthouse shooting from the reach of the PLRA.

For all these reasons, we hold that the PLRA's exhaustion requirement applies to the May 2018 courthouse shooting of a CDOC inmate by a CDOC officer.

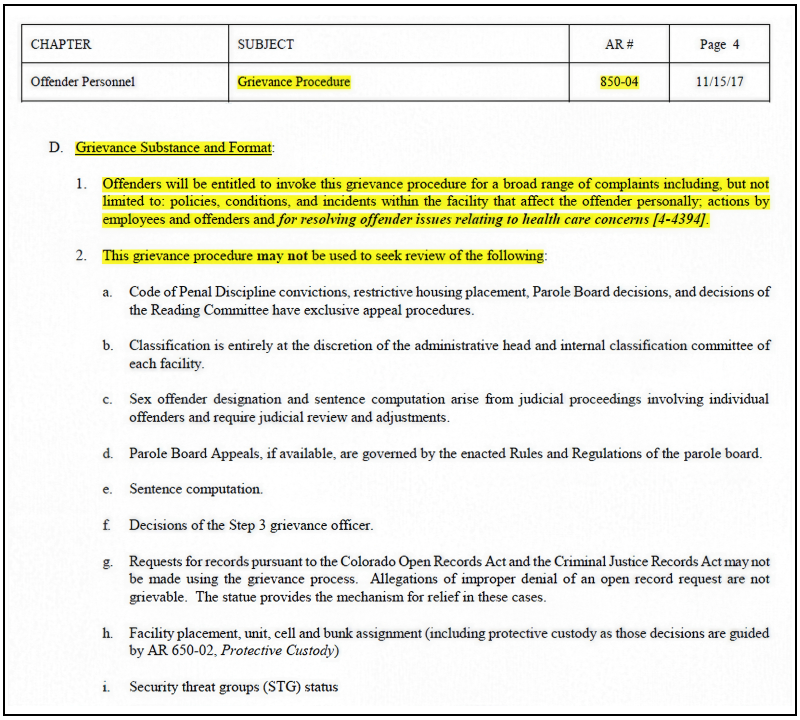
VI

We now turn to the scope of the CDOC grievance procedures. Ultimately, we must decide whether AR 850-04 applies to a courthouse shooting, because "it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones*, 549 U.S. at 218.

The district court ruled that to plead a federal lawsuit based on the courthouse shooting, Estrada was first required to file Steps 1, 2, and 3 grievances about the shooting, as set forth in CDOC's AR 850-04. In this case,

like in *Jones*, which analyzed administrative exhaustion within the Michigan Department of Corrections, AR 850-04 "describes what issues are grievable[.]" *Jones*, 549 U.S. at 206–07. Thus, AR 850-04 defines the scope of the CDOC grievance procedures.

Here is the language in AR 850-04 that determines whether the threestep grievance procedures applied to Estrada's courthouse shooting:



CHAPTER	SUBJECT	AR #	Page 4
Offender Personnel	Grievance Procedure	850-04	11/15/17

D. Grievance Substance and Format:

1. Offenders will be entitled to invoke this grievance procedure for a broad range of complaints including, but not limited to: policies, conditions, and incidents within the facility that affect the offender personally; actions by employees and offenders and ***for resolving offender issues relating to health care concerns [4-4394].***

2. This grievance procedure **may not** be used to seek review of the following:

   a. Code of Penal Discipline convictions, restrictive housing placement, Parole Board decisions, and decisions of the Reading Committee have exclusive appeal procedures.

   b. Classification is entirely at the discretion of the administrative head and internal classification committee of each facility.

   c. Sex offender designation and sentence computation arise from judicial proceedings involving individual offenders and require judicial review and adjustments.

   d. Parole Board Appeals, if available, are governed by the enacted Rules and Regulations of the parole board.

   e. Sentence computation.

   f. Decisions of the Step 3 grievance officer.

   g. Requests for records pursuant to the Colorado Open Records Act and the Criminal Justice Records Act may not be made using the grievance process. Allegations of improper denial of an open record request are not grievable. The statue provides the mechanism for relief in these cases.

   h. Facility placement, unit, cell and bunk assignment (including protective custody as those decisions are guided by AR 650-02, *Protective Custody*)

   i. Security threat groups (STG) status

Aplt. App'x at 123 (highlight added).

In analyzing this language, the district court provided four reasons why the courthouse shooting is within the scope of AR 850-04. The first three reasons are based on the highlighted language above, and the fourth is based on nearby language in AR 850-04:

1. **Including But Not Limited To**. *First*, "AR 850-04 explicitly states that the grievance procedure includes issues that occur within the facility, but is *not limited to* them."

2. **Employees' Actions**. *Second*, "the phrase 'actions by employees and offenders' is not placed within the previous portion of the paragraph which describes incidents within the facility, indicating that employees' actions need not necessarily occur within the facility to be covered by AR 850-04."

3. **Not Listed as an Exclusion**. *Third*, the list of exclusions included in AR 850-04 "notably does not include incidents occurring outside the prison, quite clearly implying that the procedure *is* available for such incidents."

4. **Covers Offenders Outside the Facility**. *Fourth*, "[Smart] points out that CDOC policy does mention covering incidents outside the facility in the context of who the grievance procedure is made available to in AR 850-04(IV)(A)(2). To wit, the AR provides that '[t]he grievance procedure is available only to offenders sentenced to the [C]DOC. This includes [C]DOC offenders housed in private facilities and offenders who have been released to parole, community, or ISP supervision.'" (citation omitted).

Aplt. App'x at 197, 204.

We conclude that the district court's analysis of the scope of the CDOC regulations is reasonable. The fourth point, on its own, disproves Estrada's repeated assertion that nothing suggests the CDOC procedures apply outside the prison walls.

The Supreme Court has advised that "[w]hen an administrative process is susceptible of multiple reasonable interpretations, Congress has determined that the inmate should err on the side of exhaustion." *Ross*, 578 U.S. at 644. In *Ross*, the Supreme Court expressly held that "new § 1997e(a) removed the conditions that administrative remedies be 'plain, speedy, and effective' and that they satisfy minimum standards." *Id.* at 641 (quoting *Porter*, 534 U.S. at 524). As a result, a prisoner is not excused from the duty to exhaust all administrative remedies by pointing to a "reasonable mistake about the meaning of a prison's grievance procedures." *Id.*; *see also Porter*, 534 U.S. at 525 n.4 ("[T]he PLRA establishes a different regime. For litigation within § 1997e(a)'s compass, Congress has replaced the 'general rule of non-exhaustion' with a general rule of exhaustion.").

Applied to this case, the Supreme Court's dual guidance in *Ross* and *Porter* is dispositive. The district court's inquiry was not to choose who, as between Estrada and Smart, offered a better interpretation of AR 850-04. Instead, under controlling Supreme Court law, Estrada was required to show that it would be *unreasonable* to apply CDOC's three-step grievance procedures to the courthouse shooting. *Ross*, 578 U.S. at 641, 644. This is a more difficult showing, and Estrada failed to make it. The district court pointed to four reasons why it is reasonable to apply AR 850-04 to the courthouse shooting, and we affirm this "reasonable interpretation of the grievance requirements." *Thomas v. Parker*, 609 F.3d 1114, 1118 (10th Cir. 2010).

Ultimately, we affirm the district court's entry of summary judgment. We agree that, because Estrada failed to exhaust his § 1983 claim regarding the

courthouse shooting by following CDOC's three-step grievance process, his claim was barred.

VII

Estrada makes a final argument that we decline to reach. Trying to expand what he argued in response to the summary judgment motion, Estrada argues on appeal that his claim was not subject to the PLRA based on an exception. He did not make this argument below. We acknowledge a "built-in exception to the exhaustion requirement: A prisoner need not exhaust remedies if they are not 'available.'" *Ross*, 578 U.S. at 635–36. This "unavailability" of administrative remedies exception can take three forms:

1. **Dead end**: if the administrative process "operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates";
2. **Opaqueness**: if it is so "opaque that it becomes, practically speaking, incapable of use"; and
3. **Threats or Intimidation**: if prison administrators "thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation."

Id. at 643–44; *see also May*, 929 F.3d at 1234 (same).

Estrada claims on appeal that the opaqueness exception applies here, because no prisoner, including him, could determine that AR 850-04 applied to a courthouse shooting. But this new argument was never presented to the district court, and we decline to reach it. As we have repeatedly held, we "deem arguments that litigants fail to present before the district court but then subsequently urge on appeal to be forfeited." *Havens v.*

Colo. Dep't of Corr., 897 F.3d 1250, 1259 (10th Cir. 2018). The district court specifically noted that it did not analyze opaqueness because Estrada did not argue it. Aplt. App'x at 208.

In addition, failure to argue plain error on appeal waives the issue. *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) ("When an appellant fails to preserve an issue and also fails to make a plain-error argument on appeal, we ordinarily deem the issue waived (rather than merely forfeited) and decline to review the issue at all—for plain error or otherwise."). In this case, Estrada argued plain error on appeal, but he waited until the reply brief, affording Smart no opportunity to respond. We "need not decide whether" raising plain error for the first time in a reply "avoids waiver because [Estrada's] argument is insufficient." *Hayes v. SkyWest Airlines, Inc.*, 12 F.4th 1186, 1201 (10th Cir. 2021). Estrada fails to show it is "clear or obvious that the district court should have" applied the opaqueness exception when he "did not present" this argument – or any probative evidence supporting it – at summary judgment. *Id.*

VIII

The district court's entry of summary judgment against Estrada is AFFIRMED.

APPENDIX B

[FILED: MAY 3, 2023]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Judge William J. Martínez

Civil Action No. 20-cv-0549-WJM-STV

BRIAN ESTRADA,

Plaintiff,

v.

JACOB SMART

Defendant.

ORDER GRANTING DEFENDANT'S FIRST MOTION FOR SUMMARY JUDGMENT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Before the Court is Defendant Jacob Smart's First Motion for Summary Judgment for Failure to Exhaust Administrative Remedies ("Motion"). (ECF No. 65.) Plaintiff Brian Estrada filed a response. (ECF No. 71.) Defendant filed a reply. (ECF No. 74.)

The Court determines that there are no factual disputes material to the issue of exhaustion, and therefore, the Court need not conduct an evidentiary hearing to resolve the Motion. For the following reasons, the Motion is granted.

I. LEGAL STANDARD

Summary judgment is warranted under Federal Rule of Civil Procedure 56 "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986). A fact is "material" if, under the relevant substantive law, it is essential to proper disposition of the claim. *Wright v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231–32 (10th Cir. 2001). An issue is "genuine" if the evidence is such that it might lead a reasonable trier of fact to return a verdict for the nonmoving party. *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997).

In analyzing a motion for summary judgment, a court must view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In addition, the Court must resolve factual ambiguities against the moving party, thus favoring the right to a trial. *See Houston v. Nat'l Gen. Ins. Co.*, 817 F.2d 83, 85 (10th Cir. 1987).

II. MATERIAL FACTS[1]

On May 30, 2018, Plaintiff was a convicted inmate in the custody of the Colorado Department of Corrections ("CDOC"). (ECF No. 65 ¶ 1.) Defendant is a correctional officer with the CDOC. (ECF No. 25 ¶ 2.) Plaintiff alleges

[1] The following factual summary is largely based on the briefing on the Motion and documents submitted in support thereof. All citations to docketed materials are to the page number in the CM/ECF header, which sometimes differs from a document's internal pagination. Facts disputed by the parties are noted as such.

that on May 30, 2018, Defendant subjected him to excessive force in violation of the Eighth Amendment when he shot Plaintiff as he was attempting to escape from the Logan County Courthouse. (ECF No. 65 at 1 ¶ 2.) (the "May 2018 Shooting"). Plaintiff was incarcerated in the Logan County Jail when he filed this lawsuit on February 27, 2020. (ECF No. 65-1 at 6–7.)

Anthony DeCesaro is the Step 3 Grievance Officer for the CDOC and the custodian of records for Step 3 grievances. (ECF No. 65-2 at 1 ¶¶ 1, 3.) The CDOC provides inmates with administrative remedies pursuant to a three-step grievance process governed by Administrative Regulation ("AR") 850-04. (*Id.* ¶ 5; ECF No. 65-2 at 5–21.) If an inmate is not satisfied with the result of the Step 1 grievance, he must file a Step 2 grievance form concerning the issue within 5 days of receipt of the written response to the Step 1 grievance. (ECF No. 65-2 at 2 ¶ 7; AR 850-04(IV)(F)(1)(d)). Likewise, if an inmate is unsatisfied with the response to his Step 2 grievance, he must file a Step 3 grievance within 5 days of receipt of the written response to the Step 2 grievance. (ECF No. 65-2 at 2 ¶ 7.) The Step 3 grievance is the final step in the grievance process, and the Step 3 response is the final agency action. (*Id.* ¶ 8.)

According to Defendant, inmates within the CDOC may file grievances regarding a broad range of topics, including, but not limited to, actions by CDOC employees that affect the inmate personally, such as assertions that they have been subjected to excessive force by CDOC employees in violation of the Eighth Amendment. (*Id.* ¶ 11.) Further, Defendant asserts that inmates may also file grievances regarding incidents that occur outside of the facility while in the custody of the CDOC, such as during transport to court appearances or medical visits. (*Id.*) To exhaust administrative remedies, Defendant states that

Plaintiff was required to file Step 1, 2, and 3 grievances about the May 2018 Shooting in accordance with AR 850-04's procedural rules governing the grievance process before filing suit. (*Id.* ¶ 16.)

Plaintiff disputes the fact that the CDOC's grievance policy applies to incidents occurring *outside* of CDOC facilities, such as a county courthouse, where the incident at issue occurred. (ECF No. 71 at 2 ¶ 8.) For support, he points to the language of the policy that says

> [t]he CDOC policy in effect from November 15, 2017 through December 1, 2018 provides that "Offenders will be entitled to invoke this grievance procedure for a broad range of complaints including, but not limited to: policies, conditions, and incidents **within the facility** that affect the offender personally" and does not mention covering any incidents outside of the facility.

(*Id.* ¶ 8(a) (emphasis added by Plaintiff).)

In his reply, Defendant points out that CDOC policy does mention covering incidents outside the facility in the context of who the grievance procedure is made available to in AR 850-04(IV)(A)(2). To wit, the AR provides that "[t]he grievance procedure is available only to offenders sentenced to the DOC. This includes DOC offenders housed in private facilities and offenders who have been released to parole, community, or ISP supervision. The DOC grievance procedure is not available to offenders currently housed outside of Colorado, pursuant to the Colorado Interstate Corrections Compact." (ECF No. 74 at 3; ECF No. 65-2 at 6.)

DeCesaro reviewed the CDOC's records concerning Plaintiff's grievances to determine whether he exhausted

the grievance process with respect to his allegations against Defendant. (ECF No. 65-2 at 3 ¶ 17.) DeCesaro found that Plaintiff did not file any grievances between May 1, 2018 to May 30, 2019 regarding the May 2018 Shooting. (*Id.* ¶ 18.) During that timeframe, Plaintiff filed three grievances, none of which pertain to Defendant's alleged use of excessive force. (*Id.*)

III. ANALYSIS

A. The Prison Litigation Reform Act Framework

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, or any other Federal law, 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). An inmate must exhaust available remedies, but need not exhaust unavailable ones. *Ross v. Blake*, 578 U.S. 632, 642 (2016). A prisoner is required to exhaust only those grievance procedures that are "capable of use" to obtain "some relief for the action complained of." *Booth v. Churner*, 532 U.S. 731, 738 (2001). The PLRA's exhaustion requirement "is mandatory, and the district court [is] not authorized to dispense with it." *Beaudry v. Corr. Corp. of Am.*, 331 F.3d 1164, 1167 n.5 (10th Cir. 2003); *see also Williams v. Bock*, 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court."); *Woodford v. Ngo*, 548 U.S. 81, 85 (2006) ("Exhaustion is no longer left to the discretion of the district court, but is mandatory.").

A prisoner's failure to exhaust mandatory administrative remedies under the PLRA is an affirmative defense that a defendant must raise, and it normally cannot be resolved by a Federal Rule of Civil

Procedure 12(b)(6) motion. *See Jones v. Bock*, 549 U.S. 199, 216 (2007); *Toevs v. Quinn*, 2017 WL 1055314, at *3 (D. Colo. Mar. 21, 2017). Instead, a court presented with an exhaustion defense usually must consider the issue under the Rule 56 summary judgment framework. *See Aquilar-Avellaveda v. Terrell*, 478 F.3d 1223, 1225 (10th Cir. 2007). When a defendant moves for summary judgment based on an affirmative defense, such as the defense of exhaustion, that defendant bears the burden to demonstrate the absence of any disputed fact as to the affirmative defense asserted. *See Helm v. Kansas*, 656 F.3d 1277, 1284 (10th Cir. 2011). The burden then will shift to the plaintiff to "demonstrate with specificity the existence of a disputed fact" as to the affirmative defense in question. *See Hutchinson v. Pfeil*, 105 F.3d 562, 564 (10th Cir. 1997).

Unlike in a typical summary judgment proceeding, factual disputes regarding exhaustion of administrative remedies must be resolved by the trial court because they are not triable to a jury. *See Pavey v. Conley*, 544 F.3d 739, 741 (7th Cir. 2008) ("Juries decide cases, not issues of judicial traffic control. Until the issue of exhaustion is resolved, the court cannot know whether it is to decide the case or the prison authorities are to [do so]."). In other words, summary judgment in the PLRA exhaustion context is different than summary judgment generally; in the latter, a material factual dispute is for a jury to decide, whereas in the former, the Court must resolve such disputes. *Id.*

While the Tenth Circuit has not specifically instructed district courts as to how they should resolve factual disputes in the context of exhaustion, other circuits have. (*See* ECF No. 65 at 5.) Those jurisdictions are virtually uniform in holding that because there is no right to a jury trial on factual issues pertaining to exhaustion,

the trial court—not a jury—should act as factfinder and resolve any factual disputes as to whether the plaintiff properly exhausted administrative remedies, rather than delegating resolution of those factual disputes to the jury by construing them in favor of the non-moving party, as is typical at the summary judgment stage. *See Albino v. Baca*, 747 F.3d 1162, 1170–71 (9th Cir. 2014); *Small v. Camden Cnty.*, 728 F.3d 265, 270 (3d Cir. 2013); *Messa v. Goord*, 652 F.3d 305, 309–10 (2d Cir. 2011); *Dillon v. Rogers*, 596 F.3d 260, 271, 273 (5th Cir. 2010); *Pavey*, 544 F.3d at 741; *Bryant v. Rich*, 530 F.3d 1368, 1373–74 (11th Cir. 2008). According to that authority, district courts should conduct an evidentiary hearing to resolve factual disputes material to the issue of exhaustion before the conclusion of pretrial discovery. *See, e.g.*, *Pavey*, 544 F.3d at 742 (crafting procedures for trial courts to conduct an evidentiary hearing to resolve disputed factual issues and decide questions of exhaustion before pretrial discovery).

Other district judges within the District of Colorado have also determined that they must "allow limited discovery on the exhaustion issue if appropriate, hold a hearing and resolve any factual disputes material to the issue." *Colbruno v. Diggins*, 2018 WL 10215848, at *5 (D. Colo. Jan. 31, 2018), *aff'd sub nom. Colbruno v. Kessler*, 928 F.3d 1155 (10th Cir. 2019); *see also Carbajal v. Keefer*, 2017 WL 4297343, at *7 (D. Colo. Sept. 27, 2017) (holding that where "issues of fact . . . preclude summary judgment [as to exhaustion], it is necessary to schedule an evidentiary hearing to determine whether plaintiff has exhausted his administrative remedies").

B. Application to this Lawsuit

In the Motion, Defendant argues that because Plaintiff was incarcerated in the Logan County Jail at the time the incident occurred, this lawsuit is subject to the

administrative exhaustion requirement of the PLRA. (ECF No. 65 at 1.) Defendant further argues that the record shows that Plaintiff failed to exhaust his available administrative remedies as the PLRA requires before filing this lawsuit, and therefore, Defendant is entitled to summary judgment. (*Id.* at 1–2.)

By contrast, Plaintiff argues that he did not have an available remedy for incidents occurring *outside* of the CDOC facility, and therefore he was not required to exhaust administrative remedies before filing suit regarding the incident at the Logan County Courthouse. (ECF No. 71 at 6.) He primarily relies on the language in AR 850-04 which provides that "[o]ffenders will be entitled to invoke this grievance procedure for a broad range of complaints including, but not limited to: policies, conditions, and incidents *within the facility* that affect the offender personally" and argues that AR 850-04 does not mention covering any incidents outside of the facility. (*Id.* at 8(a) (emphasis added by Plaintiff).)

According to Plaintiff, "the CDOC policy in effect on May 30, 2018 defined the boundaries of proper exhaustion—and those included incidents within the facility—not those outside of the facility." (*Id.*) He contends that his interpretation of the CDOC policy "cannot be rejected at this stage in the proceedings where Defendant bears the burden of proof and all inferences must be drawn in [his favor]." (*Id.*) Thus, Plaintiff contends that he was not required to submit grievances regarding Defendant's alleged use of deadly force inside the Logan County Courthouse—a location outside of the CDOC facility—because there was no available remedy for that conduct according to the CDOC policy in effect at the time. (*Id.*)

The PLRA provides that "a prisoner confined in any jail, prison, or other correctional facility" may not bring an "action . . . with respect to prison conditions under section 1983 . . . " if he has not first exhausted his administrative remedies. *Dmytryszyn v. Hickox*, 172 F.3d 62 (10th Cir. 1999) (unpublished table decision) (quoting 42 U.S.C. § 1997e(a) (Supp. 1998)). Regarding the phrase "civil action with respect to prison conditions," the PLRA defines it as "any civil proceeding arising under Federal law with respect to the conditions of confinement *or the effects of actions by government officials on the lives of persons confined in prison* but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g) (Supp. 1998) (emphasis added); *see Dmytryszyn*, 172 F.3d at 62.

Further, "[t]he PLRA's exhaustion requirement applies to all inmate suits about prison life, *irrespective of the type of wrong* the prisoner alleges." *Apodaca v. Franco*, 2017 WL 6759099, at *4 (D.N.M. Dec. 29, 2017) (emphasis added), *aff'd*, 737 F. App'x 428 (10th Cir. 2018) (citing *Porter v. Nussle*, 534 U.S. 516, 532 (2001)). The exhaustion requirement remains a prerequisite to suit even where an inmate's suit requests relief that is not available through a grievance proceeding. *Porter*, 534 U.S. 516, 524 (citing *Booth v. Churner*, 532 U.S. 731, 741 (2001)). Confusion about the grievance process does not excuse failure to comply with that process. *Beals v. Jay*, 730 F. App'x 633, 637 (10th Cir. 2018) (citing *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) ("[I]t is well established that ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing.")); *Hobbs v. Okla. State Penitentiary*, 673 F. App'x 837, 841 (10th Cir. 2016) (applying this concept

to uphold dismissal of a § 1983 action based on a prisoner's failure to exhaust).

On this record, the Court finds that the PLRA's exhaustion requirement applies to Plaintiff's lawsuit. It is undisputed that Plaintiff was a convicted inmate in the CDOC when Defendant shot him while trying to escape from the courthouse. (ECF No. 65 at 1 ¶ 1; ECF No. 71 at 2 ¶ 1.) Further, Plaintiff admits that he was confined in the Logan County Jail when he filed this lawsuit on February 27, 2020. (ECF No. 65 at 1 ¶ 7; ECF No. 71 at 2 ¶ 4). Therefore, the remaining issue the Court must decide is whether the PLRA required Plaintiff to utilize the grievance process set forth in AR 850-04 and exhaust his administrative remedies before filing this lawsuit.

The Supreme Court instructs that "[c]ompliance with prison grievance procedures . . . is all that is required by the PLRA to 'properly exhaust.'" *Jones*, 549 U.S. at 218. Further, "[t]he level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Id.* In light of the Supreme Court's teachings, the Court first looks to the CDOC's grievance procedure set forth in AR 850-04 to examine the boundaries of proper exhaustion.

1. Language of AR 850-04

AR 850-04's language explaining the substance and format of a grievance is critical to the Court's analysis:

> D. Grievance Substance and Format:
>
> 1. Offenders will be entitled to invoke this grievance procedure for a broad range of complaints *including, but not limited to*: policies, conditions, and incidents within the

facility that affect the offender personally; actions by employees and offenders and for resolving offender issues relating to health care concerns [4-4394].

2. This grievance procedure may *not* be used to seek review of the following:

a. Code of Penal Discipline convictions, restrictive housing placement, Parole Board decisions, and decisions of the Reading Committee have exclusive appeal procedures.

b. Classification is entirely at the discretion of the administrative head and internal classification committee of each facility.

c. Sex offender designation and sentence computation arise from judicial proceedings involving individual offenders and require judicial review and adjustments.

d. Parole Board Appeals, if available, are governed by the enacted Rules and Regulations of the parole board.

e. Sentence computation.

f. Decisions of the Step 3 grievance officer.

g. Requests for records pursuant to the Colorado Open Records Act and the Criminal Justice Records Act may not be made using the grievance process. Allegations of improper denial of an open record request are not grievable. The statue provides the mechanism for relief in these cases.

> h. Facility placement, unit, cell and bunk assignment (including protective custody as those decisions are guided by AR 650-02, Protective Custody)
>
> i. Security threat groups (STG) status[.]

(ECF No. 65-2 at 8 (emphasis added).) Of particular consequence is the fact that AR 850-04 explicitly states that the grievance procedure includes issues that occur within the facility, but is *not limited to* them. Moreover, the phrase "actions by employees and offenders" is not placed within the previous portion of the paragraph which describes incidents within the facility, indicating that employees' actions need not necessarily occur within the facility to be covered by AR 850-04. Finally, the list of actions that the grievance procedure does not cover notably does not include incidents occurring outside the prison, quite clearly implying that the procedure *is* available for such incidents.

Crucially, Plaintiff has not offered any convincing evidence to support his interpretation of AR 850-04. He points to the fact that Sterling Correctional Facility Offender Orientation Memorandum ("Memorandum") "states nothing about the grievance policy or procedure covering incidents that occur outside of the facility and inmates must rely on the policy in AR 850-04(IV)(D)(1), which only addresses 'incidents within the facility.'" (ECF No. 71 at 3; ECF No. 71-1.) He also highlights that the Sterling Correctional Facility New Arrival Memorandum Orientation Video ("Video") "states nothing about the grievance policy or procedure covering incidents that occur outside of the facility and inmates must rely on the policy in AR 850-04(IV)(D)(1), which only addresses 'incidents within the facility.'" (ECF No. 71 at 4; ECF No. 71-2.)

The crux of this particular dispute is for the Court to decide, not the jury. Having examined AR 850-04, the Memorandum, and the Video and drawing all inferences in Plaintiff's favor, the Court cannot conclude that a genuine issue of material fact exists based on the evidence upon which Plaintiff relies. While it may be true that the Memorandum and Video do not explicitly state that an inmate must file a grievance for incidents occurring outside the facility, that is not evidence sufficient to create a genuine issue of material fact on this issue—particularly in light of the language in AR 850-04 that the Court analyzed above.

2. DeCesaro Declaration

The Court also considers the Declaration of Anthony DeCesaro ("Declaration"). [2] (ECF No. 65-2.) In his Declaration, DeCesaro states that "[i]nmates may also file grievances regarding incidents that occur outside of the

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[2] Plaintiff takes issue with the Declaration, stating that "unsubstantiated allegations such as the one made by Mr. DeCesaro in his affidavit carry no probative weight in summary judgment proceedings." (ECF No. 71 at 9.) He also contends that the affidavit "is not supported by any evidence and actually contradicts the CDOC policy." (*Id.* at 10.)

However, the Tenth Circuit has found that "[a]t the summary judgment stage, evidence need not be submitted 'in a form that would be admissible at trial.'" *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). "Parties may, for example, submit affidavits in support of summary judgment, despite the fact that affidavits are often inadmissible at trial as hearsay, on the theory that the evidence may ultimately be presented at trial in an admissible form." *Id.* (citing *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1122 (10th Cir. 2005)).

Because DeCesaro could present evidence at trial to confirm his statements, the Court may—and does—consider them at the summary judgment stage.

facility while they are in the custody of the CDOC, such as during transport to court appearances or medical visits." (*Id.* ¶ 11 (citing AR 850-04(IV)(D)(1)-(2)).) While Plaintiff argues that DeCesaro's statement is the "**opposite** of the policy's clear language regarding the grievance policy covering incidents within the facility" (ECF No. 71 at 9 (emphasis added by Plaintiff), the Court disagrees. His statement is consistent with the Court's reading of AR 850-04. Moreover, as a Step 3 Grievance Officer employed by the CDOC, DeCesaro is well-positioned to offer evidence concerning the specific types of grievances that fall within the purview of AR 850-04.[3]

It is undisputed that Plaintiff did not file any grievances regarding the May 2018 Shooting. However, DeCesaro states that Plaintiff filed three grievances—none of which pertain to Defendant's alleged use of excessive force on May 30, 2018—between May 1, 2018 and May 30, 2019. (*Id.* ¶ 18.) The fact that Plaintiff filed three other grievances within a year of the incident demonstrates that he was well familiar with the grievance procedures, and was not deterred or chilled in any way from utilizing that system.

3. Case Law

Also instructive here, the Tenth Circuit has found in two different unpublished opinions that the exhaustion requirement applies to circumstances that occur outside the prison, including a plaintiff's allegation of an assault at a county courthouse, *Forbes v. Garcia*, 696 F. App'x

[3] DeCesaro also states that "[t]o exhaust his administrative remedies under the CDOC's policies, Mr. Estrada was required to file Step 1, 2, and 3 grievances about this incident in accordance with the CDOC's procedural rules governing the grievance process." (ECF No. 65-2 ¶ 16.) This statement is a legal conclusion, and therefore, the Court does not rely on it to support this ruling.

381, 382 (10th Cir. 2017), and a plaintiff's challenge to the amount of compensation he received for work performed outside the prison, *Dmytryszyn*, 172 F.3d at 62. As unpublished orders of our Circuit these decisions are not binding on this Court, but given the factual similarity of those cases to the facts presented here, their persuasive value cannot be denied.

Plaintiff does not acknowledge *Forbes* or *Dmytryszyn.* (*See* ECF No. 71) Instead, Plaintiff relies on *Hubbs v. Suffolk Cnty. Sheriff's Dep't*, 788 F.3d 54 (2d Cir. 2015), which he argues supports his theory that CDOC's grievance policy was not available to him because it does not cover incidents outside a CDOC facility. (ECF No. 71 at 9–10.) In *Hubbs*, the plaintiff brought a § 1983 action alleging that sheriff's deputies beat him while in a holding cell at a courthouse. *Hubbs*, 788 F.3d at 57. The deputies were not correction officers and did not work in the corrections division. *Id.* at 56–57. The applicable grievance procedure stated that issues outside of the warden's control were not subject to a grievance. *Id.* at 59. The court stated that defendants did not provide sufficient evidence that addressed whether the deputies fell within the warden's chain of command. *Id.* at 60–61. Therefore, the Second Circuit found that the defendants failed to meet their burden of establishing that the grievance procedures applied at the court holding facility where the plaintiff alleged he was beaten. *Id.* at 61.

As an initial matter, *Hubbs* is a Second Circuit opinion and is not binding on this Court. However, even if the Court were to consider *Hubbs*, the Court finds that it is readily distinguishable. The critical distinction is that the deputy sheriffs who allegedly beat the plaintiff in *Hubbs* were *not* correctional officers employed by the facility in which plaintiff was being held. Here, in contrast, it is undisputed that at the time of the incident, Plaintiff

was an inmate with the CDOC and Defendant was a CDOC correctional officer. Unlike in *Hubbs*, therefore, there is no dispute in this case concerning whether any party was under the warden's control. Plaintiff also admits thatthe CDOC provides inmates with administrative remedies pursuant to the three-step grievance process governed by AR 850-04. (ECF No. 71 at 1 ¶ 6.) He further admits that he never filed a grievance regarding the May 2018 Shooting. (*Id.* at 4 ¶ 12.) For all of these reasons, the Court does not find *Hubbs* persuasive.

It is true that the law recognizes an exception to the exhaustion requirement when administrative remedies are made unavailable in three circumstances: (1) when it is a dead end, where officers are unable or consistently unwilling to provide relief; (2) when it is so opaque that it is incapable of use and no ordinary prisoner can discern or navigate it; or (3) "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross*, 578 U.S. at 643–44. However, Plaintiff has failed to demonstrate that any of the three exceptions apply in this case. In fact, as previously noted, he filed three grievances during the relevant time period. He does not argue that the grievance process is a dead end or opaque, or that prison administrators thwarted him from using the grievance process. (*See* ECF No. 71.)

Therefore, the Court finds that Plaintiff has failed to exhaust his administrative remedies and that Defendant is entitled to summary judgment.

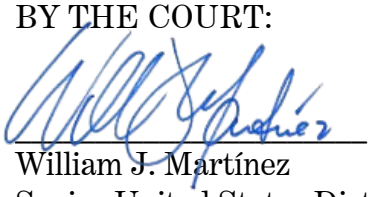
IV. CONCLUSION

For the foregoing reasons, the Court ORDERS that:

1. Defendant Jacoby Smart's Motion for Summary Judgment (ECF No. 65) is GRANTED;
2. This case is DISMISSED WITHOUT PREJUDICE for failure to exhaust administrative remedies;
3. The Clerk shall enter judgment in favor of Defendant Jacob Smart, and against Plaintiff Brian Estrada;
4. The parties shall bear their own attorney's fees and costs; and
5. The Clerk shall terminate this action.

Dated this 3rd day of May, 2023.

BY THE COURT:



William J. Martínez
Senior United States District Judge

APPENDIX C

[FILED: SEPTEMBER 11, 2024]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIAN ESTRADA, Plaintiff – Appellant, v. JACOB SMART, Defendant – Appellee.	No. 23-1189 (D.C. No. 1:20-CV-00549-WJM STV) (D. Colo.)

ORDER

Before **McHUGH**, **MURPHY**, and **FEDERICO**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX D

Amend. VII. Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

APPENDIX E

Amend. VIII. Excessive Bail, Fines, Punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX F

42 U.S.C.§ 1997e

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative rememdies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 1 of this title, such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply

has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "Prisoner" defined

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.