

NO. 03-3531

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

KARAMO B. KABA,

Plaintiff-Appellant,

v.

E.A. STEPP, et al.,

Defendants-Appellees.

) Appeal from the United States
) District Court for the Southern
) District of Illinois
)
)
) No. 01-150-GPM
)
)
) G. Patrick Murphy,
) *Chief Judge*
)
)
)
)

BRIEF OF PLAINTIFF-APPELLANT KARAMO B. KABA

David W. Fuller
Robert M. Dow, Jr.
Marc R. Kadish
MAYER, BROWN, ROWE & MAW LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
Attorneys for Plaintiff-Appellant

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Appellate Court No: 03-3531

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Attorney's Printed Name: David W. Fuller

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Address: Mayer, Brown, Rowe & Maw LLP, 71 South Wacker Drive, Chicago, IL 60606

Phone Number: (312) 701-7736 Fax Number: (312) 706-8489

E-Mail Address: dfuller@mayerbrownrowe.com

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JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of Illinois had jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal from a final judgment of a district court.

The final judgment of the district court, dismissing all claims against all parties, was entered on August 28, 2003. A timely notice of appeal was filed on September 22, 2003.

ISSUES PRESENTED FOR REVIEW

I. Whether administrative remedies are “available” to a prisoner who is (a) warned not to file grievance forms and threatened with retaliation by prison officials, (b) actually assaulted one week after filing such a form, and (c) repeatedly denied such forms upon request both before and after the assault.

II. Whether prison officials who (a) threaten a prisoner with retaliation for filing grievance forms, (b) arrange for the prisoner to be assaulted for filing such forms, and/or (c) deny such forms to the prisoner should be estopped from raising against that prisoner the affirmative defense of failure to exhaust administrative remedies.

III. Whether a prisoner who is (a) warned not to file grievance forms and threatened with retaliation by prison officials, (b) actually assaulted one week after filing such a form, and (c) repeatedly denied such forms upon request both before and after the assault should be excused from the need to exhaust administrative remedies.

IV. Whether a complaint by a *pro se* litigant attaching a previously-filed Federal Tort Claim Act form may be construed as raising an official-capacity claim in federal district court.

STATEMENT OF THE CASE

Plaintiff Karamo B. Kaba filed a *pro se* civil rights complaint on March 12, 2001 under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 395

(1971), and the Eighth Amendment of the United States Constitution. SA2.¹ Kaba brought claims against Mickal Laird, David Benson, E.A. Stepp, and Joe Yonkman, officials at the federal prison in Marion, Illinois, in both their individual and official capacities. The complaint alleged that these parties violated Kaba's right to be free from cruel and unusual punishment by conspiring against him and/or failing to protect him from bodily harm at the hands of fellow inmates. SA7-SA9.

This is an appeal from the August 28, 2003 order, A1,² of the United States District Court for the Southern District of Illinois, Chief Judge G. Patrick Murphy, presiding, dismissing Kaba's action for failure to exhaust administrative remedies as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e ("PLRA")³ On defendants' motion to dismiss, which was converted to a motion for summary judgment, the magistrate judge found that Kaba had raised a material factual issue as to whether remedies mandated by the PLRA were available to him, and recommended against summary judgment. A11-A12. Judge Murphy disagreed, and dismissed Kaba's claims pursuant to 42 U.S.C. § 1997e(a). A5.⁴

Kaba filed a timely notice of appeal on September 22, 2003. R98.⁵ After an initial round of briefing, on January 13, 2005, this Court issued an order stating that it had "determined that the assistance of counsel and oral argument would materially advance the issues presented on appeal" and that an order appointing counsel would follow. SA1.

¹ Citations to the Separate Appendix will be in the format SA____.

² Citations to the required attached Appendix will be in the format A____.

³ The case was referred to Magistrate Judge Philip Frazier on November 1, 2001.

⁴ The magistrate further recommended dismissal of Kaba's official-capacity claims with leave to replead, A12, and the district judge found Kaba's intervening motion attempting to preserve these claims unavailing. A2-A3.

⁵ Citations to the Record will be in the format R____.

STATEMENT OF FACTS

On a motion for summary judgment, the court of appeals applies the same standard as the district court and draws all inferences in favor of the non-moving party. *Sullivan v. Gilchrist*, 87 F.3d 867, 870 (7th Cir. 1996). In addition, “facts alleged in a brief in opposition to a motion to dismiss * * * as well as factual allegations contained in other court filings of a *pro se* plaintiff may be considered when evaluating the sufficiency of a complaint so long as they are consistent with the allegations of the complaint.” *Gutierrez v. Peters*, 111 F.3d 1364, 1367 n.2 (7th Cir. 1997). Given these ground rules, the relevant facts are as follows.

A. Kaba’s Difficulty Obtaining Grievance Forms At Marion Prison.

During his tenure at the federal prison in Marion, Illinois, Kaba was denied the administrative remedy forms necessary to utilize grievance procedures established by the U.S. Bureau of Prisons (“BOP”) on multiple occasions. For example, sometime in November 2000, after his arrival in Marion, Kaba requested a grievance form from his case manager, Mickal Laird. A7; SA20. Laird’s response was to inform Kaba that it was not his job to give out forms and, oddly, to confiscate Kaba’s tennis shoes. A7; SA7, SA20. Laird also stated:

I told you if you go to the Warden or Associate Warden, I will see to it that you will never get a transfer. * * * You don’t talk to the Warden or Associate Warden and you don’t ask for BP-9s.

A8; SA20.

In December 2000, Kaba was again denied an administrative remedy form – this time by his Correctional Counselor, Estus Hood. A8; SA54. (Evidently Laird had “specifically instructed Estus Hood not to issue[] administrative remed[ies] to plaintiff.” SA45.) When Kaba spoke with prison Captain Dave Benson about this matter, Benson responded by threatening that if Kaba filed an administrative remedy form he would ship him to Puerto Rico where Kaba would ““get beat up with [a] stick.”” A8; SA20, SA51, SA54.

On several other occasions Laird and/or Hood responded to requests for grievance forms by directing Kaba to the institution's "paralegal." A8; SA20, SA54. However, as defendants' own evidence shows, there was never a paralegal employed at the Marion facility during the time Kaba was there. SA80.⁶

B. Kaba Learns His Life Is In Danger Through An Internal Prison Investigation.

Kaba brought these problems to the attention of the Warden, E.A. Stepp, who promised to initiate an investigation – but only on the condition that Kaba refrain from filing any more grievance forms. A8; SA7, SA53. The investigation was conducted during the month of January, 2001, by Special Investigative Agent ("SIA") Joe Yonkman. SA7. During this time Laird was removed from the unit and placed on home duty for one week; subsequently Laird was transferred off the unit altogether. SA4, SA7.

Later Kaba learned from fellow inmates James Barnett and Homer Richards that Laird had promised extra privileges to inmates who would "beat up" Kaba. SA21. Specifically, Laird told Barnett Kaba was "not a good person because [he] was filing to[o] many Administrative Remedies," and urged Barnett to stab Kaba in retaliation for complaining to the Warden and talking with Yonkman. A8; SA21. This information came to Yonkman's attention during the investigation, and Barnett submitted an affidavit and was subjected to a polygraph examination concerning Laird's conduct. A8; SA22.⁷ Among other things Barnett swore to in his affidavit,

⁶ Despite these obstacles, Kaba was not categorically unable to obtain and file BOP administrative remedy forms while at Marion; overall, he appears to have filed three such forms during this period. See SA31-SA32.

⁷ The results of Barnett's polygraph examination, as well as additional important documents generated in the course of Yonkman's investigation (namely two affidavits by, and a polygraph examination of, Laird), were attached to Kaba's now-stricken opening brief on appeal. Kaba evidently received these documents late in the day and did not submit them to the district

(cont'd)

he specifically stated that “[d]uring November and December, 2000, on two (2) occasions * * * Mr. Laird ask[ed him] to physically harm Karamo Kaba for filing grievances.” SA22.

Kaba also provided sworn testimony and was given a lie detector test (which he passed) in connection with Yonkman’s investigation. SA20-SA21, SA23-SA24. Kaba’s affidavit describes threats by Laird and Benson, refusals by Laird and Hood to provide Kaba with BOP grievance forms, and his knowledge of the retaliatory plot against him orchestrated by Laird. SA20-SA21. Kaba’s polygraph relates to the testimony contained in his affidavit. SA23-SA24.

In late January 2001, Kaba advised Benson, Stepp and Yonkman of his belief that he continued to be in imminent danger because of a plot by certain staff and inmates to cause him bodily harm. SA7-SA8. Although Kaba repeatedly requested special protection (including, if necessary, removal from the unit), he was not moved or placed in a more secure environment. SA7, SA46.

C. Kaba Is Assaulted In His Cell.

On February 16, Kaba managed to submit an unrelated complaint concerning staff qualifications. SA32. One week later, on the morning of February 23, 2001, two inmates entered Kaba’s prison cell and began beating him in the head. He was temporarily blinded and knocked unconscious. Following the assault Kaba was hospitalized for two days. SA8, SA11.

Kaba was diagnosed with “blunt trauma to the head.” SA 70. He displayed lacerations to his left eyebrow and lower lip (requiring stitches), a chipped tooth and a fractured left eye socket. SA69-SA72. When he awoke in the hospital his left eye was completely swollen shut. SA70.

(... cont’d)

court. Thus, although these documents will constitute significant evidence on remand if the case goes forward, they are not part of the record on appeal.

Kaba continued to experience frequent headaches, swelling and throbbing, photosensitivity and nausea weeks after the attack. SA65-SA67.

D. Kaba Continues To Encounter Difficulty Obtaining Forms.

Following the assault, Yonkman confiscated legal materials and certain other documents from Kaba's cell. SA40, SA52. At some point Kaba learned that Laird had been transferred off the unit. SA14. Kaba requested grievance forms following the assault and was again denied the necessary forms. SA38, SA53.

Because he remained unable to obtain the standard grievance forms, on March 6, 2001, Kaba decided to file an administrative complaint using a Federal Tort Claim Act ("FTCA") form he happened to have in his possession. SA14, SA18, SA37. The FTCA complaint described the February 23, 2001 assault and alleged that, throughout Kaba's time in Marion, Laird had conspired against Kaba and recruited other inmates to cause him bodily harm "for no other reason than [his] filing * * * complaint against him for his misconduct." SA14. Kaba's FTCA complaint further alleged that, although Laird had been removed from the unit, "his co-conspirator[s] were never moved out," and that the inmates who assaulted Kaba had been recruited by Laird. *Ibid.*⁸

In a move of further desperation, Kaba made an effort to correspond with the United States Attorney General on March 8, 2001, concerning the assault. A9; SA60, SA25.

Kaba filled out the complaint in the instant case and place it in the mail on or about March 12, 2001. SA2. He was transferred to the federal prison facility in Springfield, Missouri shortly thereafter. A9.

⁸ This administrative tort claim was denied by the Bureau of Prisons on December 6, 2001. SA56.

While in Springfield, Kaba followed up on his March 8 letter by sending correspondence relating to the assault to the civil rights division of the Department of Justice claiming, in an administrative remedy appeal, “that his case manager and the inmate who assaulted him presented a risk to his life.” A9; SA25. Also in Springfield, Kaba privately informed a doctor “that he was afraid of being assaulted if he was sent back to USP Marion.” SA64. The Warden in Springfield recommended on July 16, 2001 that Kaba not be sent back to Marion. A9; SA62.

Kaba was subsequently transferred to a facility in Florence, Colorado, where he remained until his release from prison on January 27, 2003. SA80.

E. The Instant Litigation.

1. Kaba’s Complaint.

Kaba filed the original complaint in this matter *pro se* in the Southern District of Illinois on March 12, 2001. SA2. The complaint requests a jury trial and raises claims under 42 U.S.C. § 1983, the United States Constitution, and RICO. SA2. The complaint collectively seeks \$1,500,000.00 from the Bureau of Prisons as well as the named defendants, in their official and individual capacities, for bribery and corruption, conspiracy to cause bodily harm, and failure to protect. SA7-SA9. The complaint makes clear that Laird targeted Kaba “for fil[ing] administrative remed[ies].” SA7.

Concerning exhaustion, the complaint states that Kaba filed a grievance “concerning the facts in this complaint,” and explains that Kaba “filed [a] complaint” with SIA Yonkman “including affidavit,” but states that he did not know the result of this complaint “because of life threatened,” and in light of “actual injuries” and an ongoing threatening situation. SA4. The complaint further states that the grievance procedure was not completed at the time of filing and that Kaba was unable to appeal the grievance “because of life threatened.” SA4-SA5.

Chief Judge Murphy granted Kaba's motion to proceed *in forma pauperis* on March 30, 2001. R3 (Order) at 1. On November 1, 2001 the Bureau of Prisons was dismissed as a party and the case was referred to Magistrate Judge Philip Frazier. R10 (Order) at 2, 4.

Kaba filed an amended complaint on December 12, 2001. SA10. The amended complaint reiterates the original allegations and request for relief and supplies additional factual details. *Ibid.* The amended complaint also attaches Kaba's March 6, 2001 FTCA claim and a BOP notice stating that a response from the agency was due on September 5, 2001. SA14-SA16. The amended complaint asserts that the response was overdue and that defendants' failure to respond constituted a waiver of sovereign immunity. SA12.⁹

Magistrate Frazier granted Kaba's motion to compel discovery responses on July 24, 2002. R31 (order) at 2. Some documents were produced to Kaba in response to this order, although discovery is far from complete and important questions remain concerning the completeness of the materials that Kaba received from defendants.¹⁰

Defendants moved to dismiss the amended complaint on July 19, 2002, arguing that Kaba had failed to exhaust his administrative remedies and noting that the amended complaint makes no mention of utilizing the prison grievance procedure. Defendants further argued that the claims against them in their official capacities should be dismissed. *Ibid.* Defendants' motion was converted into a motion for summary judgment on October 1, 2002. R45 (Order) at 1.

⁹ Kaba may not yet have received the BOP's response dated December 6, 2001 denying his FTCA claim at the time he filed his amended complaint. In any event, the agency appears to have missed the September 5 deadline acknowledged in its own prior correspondence to Kaba. SA16.

¹⁰ See *supra* n. 7; see also SA74-SA76.

2. The Magistrate's Report And Recommendation.

On May 15, 2003, the magistrate recommended granting in part and denying in part defendants' motion. A12. The magistrate noted Kaba's position "that the administrative remedy process was not available or that the circumstances justify his failure to pursue the administrative remedy process," cited several grievances and other complaints filed by Kaba, and recounted the difficulties Kaba encountered in attempting to obtain administrative remedy forms at Marion prison. A7-A9. Observing that the PLRA requires inmates to "exhaust only those processes that are 'available' to them," A10, the magistrate stated that a "process that exists, but that prison officials prevent a prisoner from using, is not 'available.'" A11 (citing *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001)). Summarizing his review of the record, the magistrate wrote:

The evidence outlined above reasonably supports an inference that, for at least several weeks following the assault on February 23, 2001, the administrative remedy process was not available to plaintiff. Specifically, plaintiff can show that, between February 23 and March 21, 2001, he could not personally obtain an administrative remedy form and/or rationally believed that he would be physically assaulted if he submitted a formal request for an administrative remedy. It does not appear that the ordinary meaning of "available" would encompass a process that is accessible only at risk of serious injury.

A11. Magistrate Frazier thus characterized the administrative remedy process as "temporarily unobtainable," and opined that the question of whether the process was still "available" for purposes of PLRA § 1997e "may turn on whether the Bureau of Prisons would have accepted, as timely, a request for an administrative remedy after the 20-day deadline expired." A11. Observing that the "record is silent on this point," the magistrate concluded that the materials before the court "do not demonstrate that plaintiff failed to exhaust the administrative remedies

that were available to him.” *Ibid.* The magistrate therefore recommended denying without prejudice defendants’ motion for summary judgment on this point. *Ibid.*¹¹

Magistrate Frazier recommended granting the motion for summary judgment concerning Kaba’s official capacity claims, however. A12. Noting that Kaba relied on the FTCA for these claims, the magistrate concluded that the amended complaint contained “no allegations that the United States is liable for a violation of state tort law,” and that it “is properly viewed as asserting a *Bivens* claim for a violation of the Eighth Amendment.” A11-A12. “If plaintiff wishes to assert a tort claim against the United States,” according to the magistrate, “he should file a motion seeking leave to file a Second Amended Complaint asserting a claim pursuant to the Federal Tort Claims Act and all other claims upon which he intends to proceed.” A12.

Although all the defendants had been jointly represented by the office of the United States Attorney for the Southern District of Illinois throughout the litigation to that point, on July 2, 2003, the Assistant U.S. Attorney handling the case filed a motion to withdraw as counsel for all defendants, citing an unspecified conflict of interest. SA96. Judge Murphy granted this motion as part of his August 28, 2003, order, and new counsel have since appeared separately for each defendant. See, e.g., R89, R94, R95 (orders granting motions to appear).

3. The Decision Of The District Court.

Entertaining objections by both sides, Chief Judge Murphy adopted in part and rejected in part the magistrate’s report and recommendation, which he reviewed *de novo*. A1. Judge Murphy adopted the portion of the magistrate’s report recommending dismissal of Kaba’s official capacity claims. A3. Considering Kaba’s motion in response to this portion of the

¹¹ The report and recommendation at one point misstates the date on which Kaba instituted this suit. See A9 (“On March 21, 2001, plaintiff filed this civil rights action.”). This error does not appear to have been critical to the magistrate’s analysis.

magistrate's report, SA92, Judge Murphy concluded that, even construed liberally, he "[could not] go so far as to construe this as a motion for leave to amend his complaint." A3.

As for exhaustion, Judge Murphy took the magistrate's recommendation to deny summary judgment without prejudice as an indication that Magistrate Frazier "did not finally determine that Plaintiff had exhausted all available remedies. Rather, he found that he could not conclude the converse on the record before him." A4. Judge Murphy concluded, in contrast, "that Plaintiff did, in fact, fail to exhaust such remedies before filing suit." *Ibid.* The court observed:

According to Plaintiff, in retaliation for filing grievances, Defendant Laird conspired with other inmates to cause harm to Plaintiff. Over the course of three months, Plaintiff complained to all Defendants about this situation; however, nothing was done to protect him, and on February 23, 2001, Plaintiff was beaten in his cell by two inmates, resulting in several injuries requiring a two-day hospital stay.

Ibid. Judge Murphy then identified various ways, both before and after the assault, in which he believed Kaba could have availed himself of the administrative remedy system, but did not. A4-A5.

First, according to Judge Murphy, during the three months leading up to the assault, Kaba "could have filed a grievance claiming that he was being retaliated against for filing grievances." A4. Judge Murphy based this conclusion on the fact that Kaba both "complained to all Defendants" about Laird and "filed other grievances during this period." *Ibid.* Second, Judge Murphy observed that Kaba filed suit "a mere 17 days after the alleged attack occurred," while three days remained in the time period for filing a formal grievance under the BOP administrative remedy program. *Ibid.* Kaba's ability "to file this action" proved to Judge Murphy's satisfaction that Kaba "[c]learly" was "physically capable of filing a formal grievance"

– or, “if not,” of seeking an extension of time to do so “based upon any physical incapacities following the alleged attack.” *Ibid.* Finally, Judge Murphy rejected Kaba’s claim “that he did not appeal his complaint to Defendant Yankman [sic] because his life was threatened and he was in danger of imminent bodily harm,” since BOP policy provides for a direct request to the Regional Director “if he feels that he is in danger.” *Ibid.* Kaba’s failure to take any of these steps led Judge Murphy to conclude that he had fallen short of PLRA exhaustion requirements, and consequently he dismissed the action without prejudice. A4-A5.

This appeal followed.

SUMMARY OF ARGUMENT

I. The district court erred in concluding that the administrative remedy process was available to Kaba. The PLRA requires prisoners to exhaust only “such remedies *as are available*,” and on multiple occasions during his time at Marion prison Kaba was denied grievance forms or threatened in response to his requests. In the course of an official investigation into his claims Kaba learned that the threat against him was more serious than he had realized – a guard was attempting to enlist fellow inmates to assault Kaba in retaliation for filing grievance forms – and he was brutally attacked one week after filing a grievance form about an unrelated matter. This event heightened Kaba’s fear of future retaliation.

The district court’s all-or-nothing approach to availability is seriously flawed. Kaba has never claimed that it was completely impossible for him to obtain forms of any kind throughout his entire time in Marion, and his ability to file grievances prior to the assault, or an FTCA claim or this lawsuit following the assault, do not prove that he was capable of obtaining and filing the forms required by BOP regulations. Accordingly, this Court should follow the magistrate’s

recommendation and hold that Kaba exhausted all the administrative remedies that were available to him. The dismissal of his complaint for failure to exhaust should be reversed.

II. In light of defendants' threatening behavior, they should be estopped from raising the affirmative defense of failure to exhaust. This Court has recognized that the defense is not jurisdictional and may be subject to estoppel, and other courts have applied estoppel in situations resembling this one – namely, where plaintiffs were denied grievance forms, threatened and beaten in retaliation for filing such forms.

III. This Court should follow persuasive authority from the Second Circuit recognizing that plaintiffs may be excused from the requirement to exhaust administrative remedies in some situations. Even if grievance forms were technically available to Kaba and defendants are not estopped from raising the defense of failure to exhaust, defendants' misconduct constitutes "special circumstances" that justify Kaba's failure to pursue administrative remedies. As Kaba argued below, he should therefore be "exempt" from the need to exhaust BOP-prescribed remedies.

IV. The district court's dismissal of plaintiff's official-capacity claims should be reversed. In attaching his previously-filed FTCA claim form to the amended complaint, Kaba, a *pro se* plaintiff proceeding *in forma pauperis*, intended thereby to assert in this lawsuit a tort claim against the United States. In keeping with the leniency such litigants are traditionally afforded, the case should be remanded with instructions to construe the amended complaint to raise an FTCA claim or to permit amendment of the pleadings with the benefit of input and analysis from counsel.

STANDARD OF REVIEW

A decision granting summary judgment is reviewed *de novo*. *Sullivan*, 87 F.3d at 870. In determining the propriety of dismissal for failure to exhaust, "all statements of fact in the

complaint are taken as true and all reasonable inferences must be drawn in favor of” the plaintiff. *Dixon v. Page*, 291 F.3d 485, 486 (7th Cir. 2002).

ARGUMENT

I. The District Court Erred in Finding That The Administrative Remedy Process Was Available to Kaba.

A. The PLRA Only Requires Exhaustion Of Available Administrative Remedies.

According to the plain language of § 1997e(a), a prisoner may not bring a suit about prison conditions “until such administrative remedies *as are available* are exhausted.” 42 U.S.C. § 1997e(a) (emphasis added). The Supreme Court has recognized that “the modifier ‘available’ requires the possibility of some relief for the action complained of.” *Booth v. Churner*, 532 U.S. 731, 738 (2001). Similarly, this Court has noted that a prisoner “must exhaust *only* those administrative remedies that are available to him.” *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) (emphasis added). Although the statute does not provide a definition of the phrase “such administrative remedies as are available,” courts have held that “its terms are to be construed in accordance with their ordinary meaning.” *Days v. Johnson*, 322 F.3d 863, 867 (5th Cir. 2003). And “the plain meaning of the term ‘available’ is ‘capable of use for the accomplishment of a purpose: immediately utilizable * * * accessible.’” *Miller*, 247 F.3d at 740 (quoting *Webster's Third New International Dictionary* 150 (1986)). Preventing inmates from submitting grievances, or failing to respond to their grievances, renders administrative remedies unavailable. See *Dale v. Lappin*, 376 F.3d 652, 656 (7th Cir. 2004); *Lewis*, 300 F.3d at 833. Where administrative remedies are unavailable, they are deemed exhausted for purposes of § 1997e(a). *Lewis*, 300 F.3d at 833.

Within this circuit, a prisoner’s failure to exhaust administrative remedies before bringing a suit is an affirmative defense, which defendants must raise. *Massey v. Helman*, 196 F.3d 727,

735 (7th Cir. 1999). Thus, “defendants have the burden of pleading and proving the defense.” *Ibid.*

Keeping in mind “that pro se pleadings are held to less exacting standards than those prepared by counsel and are to be liberally construed,” *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001) (citing *Haines v. Kerner*, 404 U.S. 519 (1972)), Kaba's allegations and submissions provide a sufficient basis for finding, at the summary judgment stage, that there were no administrative remedies available to him. At the very least, as the magistrate judge recognized, these materials establish that there is a need for further factual development on this issue. Thus, at a minimum, this Court should remand the case to permit a factual inquiry regarding exhaustion of administrative remedies and to allow the district court to decide the issue in the first instance.

B. Kaba Exhausted All Remedies That Were Available To Him.

Marion prison is subject to the multi-step federal administrative grievance system prescribed by Bureau of Prisons regulations. Under that system, an inmate seeking review of an issue relating to his or her confinement must first attempt to resolve the situation through informal discussions with prison staff. 28 C.F.R. § 542.13. If that does not resolve the issue, the inmate is to submit a formal request to the warden within 20 days following the date on which the basis for the request occurred. *Id.* § 542.14(a).¹² The warden's response may be appealed to the Regional Director and General Counsel, *id.* § 542.15, and “sensitive” requests may be submitted directly to the Regional Director. *Id.* § 542.14(d). All written requests must be submitted on “appropriate” grievance forms, which include Forms BP-9, BP-10, and BP-11 and

¹² Although an extension of the 20-day time limit may be allowed where the inmate “demonstrates a valid reason,” this ordinarily requires “written verification from staff for any claimed reason for delay.” *Id.* § 542.14(b).

are supposed to be available from a designated individual (ordinarily a correctional counselor) among the prison staff. *Id.* § 542.14(c).

Kaba was unable to utilize this system of administrative remedy procedures following his assault because it was rendered unavailable to him by defendants. As alleged in the complaint and in numerous statements on the record, on multiple occasions prior to the attack the defendants not only withheld grievance forms from Kaba but also threatened him with retaliation if he filed complaints against them. A8; SA7, SA20-SA22, SA51, SA53-SA54.¹³ The assault itself only added to the fear and intimidation in Kaba's mind by confirming the reality of the danger he was in should he attempt to employ the administrative remedy system. SA8, SA11. On those occasions following the incident when Kaba nonetheless did request grievance forms, his requests were denied. SA38, SA53.

This case bears striking resemblance to *Dale v. Lappin*, 376 F.3d 652 (7th Cir. 2004) (per curiam), another *Bivens* action alleging failure to protect from an attack by fellow inmates that was dismissed on summary judgment based on failure to exhaust administrative remedies under the PLRA. The district court in *Dale* initially dismissed the complaint *sua sponte* because it failed to allege that the plaintiff had employed prison grievance procedures within the 20-day timeframe permitted by BOP guidelines. *Id.* at 653-54. The court reconsidered when plaintiff explained that defendants had refused to provide him with BP-8 forms upon request. *Id.* at 654.¹⁴

¹³ Laird and Hood's referrals of Kaba to the "paralegal," A8; SA20, SA54, can only be understood as denials, given defendants' own evidence showing that there never was a paralegal at Marion prison while Kaba was there, SA80.

¹⁴ During Kaba's time at Marion prison, the facility evidently employed BP-8 forms such as those at issue in *Dale*. See SA20, SA54.

In response to defendants' subsequent motion for summary judgment, the plaintiff in *Dale* further explained "that he requested the proper grievance forms several times" after being transferred to different facilities but was consistently denied the necessary forms or given evasive answers. *Id.* at 655. At one institution "he was told that the employees did not have grievance forms, so they gave him blank pieces of paper instead." *Ibid.* At another "the guard told him that grievance forms would have to be obtained from the unit team or else could be provided if the warden so directed"; and at still another he was told "that the 20-day time limit for submitting a grievance had passed and thus his only recourse was to file a claim under the Federal Tort Claims Act." *Id.* at 654-655.

The district court characterized the *Dale* plaintiff's allegations concerning exhaustion of remedies as "bald assertions" lacking evidentiary value sufficient to withstand summary judgment, but this Court disagreed. *Id.* at 655-656. The plaintiff had attached a sworn, detailed "Affidavit in Support" to his response to defendants' summary judgment motion, which the Seventh Circuit found constituted "competent evidence to rebut the defendants' motion for summary judgment." *Id.* at 655. Specifically, this Court observed:

The Bureau of Prisons' regulations plainly state that a grievance should be submitted "on the appropriate form," 28 C.F.R. § 542.14(a), and the defendants have not pointed to any regulation that would allow an inmate to submit a grievance without the Bureau of Prisons' forms. If prison employees refuse to provide inmates with those forms when requested, it is difficult to understand how the inmate has any available remedies. Just as prison employees cannot exploit the exhaustion requirement by not responding to grievances, they should not be rewarded for preventing an inmate access to an administrative remedy. The defendants in this case have yet to give any reason why Dale was refused the forms he requested, or to explain how he could use the administrative grievance system without the forms mandated for that purpose.

Id. at 656 (citations omitted). The Court therefore concluded that defendants “did not meet their burden of proving that Dale had available remedies that he did not utilize,” vacated summary judgment and remanded the case for further proceedings. *Ibid.*

Like the plaintiff in *Dale*, Kaba requested grievance forms several times and was repeatedly denied the forms or given evasive answers. A7-A8; SA20, SA45, SA51, SA54. He has made specific allegations of threats against him based on the filing of grievances, including Laird’s statement that “[y]ou don’t talk to the Warden or Associate Warden and you don’t ask for BP-9s,” and Benson’s threat that if Kaba filed a grievance he would “ship [Kaba] to [Puerto Rico where he would] get beat up with [a] stick.” *Ibid.* These threats were issued before Kaba was assaulted, and it is true that he did obtain and file grievance forms prior to the attack. However, it is certainly reasonable to conclude that after the attack, Kaba took far more seriously the warnings he had received about obtaining and filing administrative remedy forms – particularly given that he had learned through Yonkman’s investigation that *Laird had enlisted fellow inmates to harm Kaba because of his practice of filing grievances*, and that he was in fact *assaulted one week after filing a grievance*. SA8, SA20-SA22.

Furthermore, Kaba’s allegation that Warden Stepp instructed him not to file a grievance in light of Yonkman’s investigation of Laird, SA53, also makes this case similar to *Brown v. Croak*, 312 F.3d 109, 111-112 (3d Cir. 2002), in which the inmate allegedly was told, contrary to prison regulations, that he could not file a grievance prior to the completion of a security investigation. The Third Circuit in that case held that the government had not met its burden of proving failure to exhaust, and also stated that “instructions by prison officials that are at odds with the wording” of state regulations might render the formal grievance procedure “unavailable” within the meaning of the PLRA. *Id.* at 112. The same result should occur here.

C. Kaba’s Filing Of Other Grievances And Complaints Does Not Conclusively Establish That BOP Remedies Were Available To Him.

The district court’s sole basis for concluding that Kaba “could have filed a grievance” (A4) is the fact that he was able to file *other* complaining documents, both before and after the assault. Specifically, the court pointed to Kaba’s filing of other grievance forms in the months and weeks prior to the assault, and his filing of the instant lawsuit after the incident and within the time period for filing a grievance under BOP regulations. As explained below, considered for summary judgment purposes in light of Kaba’s allegations, these facts in no way justify dismissal of Kaba’s complaint.

The district court stated its key observations in the following passage:

During the time when Plaintiff was complaining to Defendants, he could have filed a grievance claiming that he was being retaliated against for filing grievances. In fact, he filed other grievances during this period but none addressed the alleged retaliation. Moreover, he filed this action on March 12, 2001 – a mere 17 days after the alleged attack occurred. Under the Bureau of Prisons’ administrative remedy program, he still had three days to file a formal grievance. Clearly he was physically capable of filing a formal grievance because he was able to file this action. However, if not, he could have sought an extension of the filing time based upon any physical incapacities following the alleged attack. Plaintiff claims that he did not appeal his complaint to Defendant Yankman [sic] because his life was threatened and he was in danger of imminent bodily harm. However, Bureau of Prisons policy allows him to file a request for a remedy directly to the Regional Director if he feels that he is in danger. He did not do so. On this record, the Court finds that Plaintiff failed to exhaust available administrative remedies before filing this action as required by the Prison Litigation Reform Act.

A4-A5 (citations omitted).

With all due respect to the district court, the above passage is fraught with tenuous logical inferences and fails to account for the multiple sworn statements to the contrary submitted by Kaba. For example, the district court’s observation that Kaba “filed other grievances during this

period,” A4, refers to grievance forms submitted *before* the assault that did not address the central issues – retaliation and conspiracy – described in Mr. Kaba’s complaint in this case. Yet surely the filing of these grievances – while arguably relevant to availability – does not *decisively establish* that grievance forms were available to Kaba *after* the attack, nor (even if they were) that the personnel assigned to process grievances would accept any from Kaba during this time period. What is available one day may be unavailable the next, and Kaba has sworn that grievance forms were withheld from him following the assault. SA38, SA53. This evidence must be credited for summary judgment purposes.¹⁵

The warnings issued to Kaba prior to the assault obviously took on a whole new meaning once he was actually attacked. Kaba may well have believed in early February that despite the threats from Laird and Benson, he could safely file a grievance (as he did) concerning staff not on his unit. SA32. As it turned out, however, the February 16 grievance precipitated a brutal assault that caused Kaba lasting injury. SA8, SA11, SA65-SA67, SA69-SA72. In these circumstances it seems quite unfair, after the very incident that he believed resulted from his prior submission, to expect Kaba to submit *another* grievance, making *more serious* allegations *directly against unit staff*.

It is equally unrealistic to expect Kaba to have filed “a grievance claiming that he was being retaliated against for filing grievances,” A4, given his sworn descriptions of a broad-based conspiracy to withhold forms and retaliate against him. In the atmosphere described by Kaba – particularly following his assault, which he believed to be in direct retaliation for filing a grievance form only days earlier – any reasonable person would hesitate before attempting to file

¹⁵ Kaba has informed counsel that, unlike other inmates, whenever he requested a grievance form he was always asked exactly why he wanted one. He further stated that the grievance filed on February 16, 2001 related to prison staff from another unit.

such a “grievance about grievances.” Cf. *Davis v. Goord*, 320 F.3d 346, 353 (2d Cir. 2003) (availability of remedies in context of prisoner retaliation claim should be evaluated from perspective of an “individual of ordinary firmness”).

The district court also made much of the fact that Kaba “filed this action” within the 20-day window of time for submitting administrative remedy forms, suggesting that this clearly indicates he was “physically capable of filing a formal grievance.” A4. But one cannot file a form one does not have. As noted above, in his desperation following the assault Kaba simply did the best he could in less-than-ideal circumstances to inform the outside world what was going on at Marion: he filled out and mailed those forms he happened to have in his cell or was able to obtain – on March 6, the FTCA claim form, SA14, SA37, and on March 12, the federal district court complaint, SA2. That Kaba accomplished these feats in no way proves that he was “physically capable” of obtaining and/or submitting a BP-9 form. See *Dale*, 376 F.3d at 655 (noting that BOP regulations require grievances to be submitted “on the appropriate form”).¹⁶

The same holds true for the form required to complain directly to the Regional Director. See 28 C.F.R. § 542.14(c). This avenue of relief obviously is intended to assist prisoners like Kaba who have reason to fear retaliation from guards within their institutions. Yet no matter how many safeguards the BOP builds into its administrative remedy procedures, *none* of the prescribed remedies is “available” to a prisoner whose unit staff decide to withhold from him the

¹⁶ Kaba has informed counsel that he had retained the FTCA claim form from a prior institution, and was able to get it into the mail with surreptitious assistance from a female laundry worker on his unit. Although he believes his mail was regularly intercepted, he was able to file his federal complaint through similar means.

necessary means of enacting them.¹⁷ See *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003) (holding that district court erred in failing to consider prisoner’s claim that he was unable to submit a grievance, and therefore “lacked available administrative remedies,” because prison employees refused to provide him with the necessary forms); *Miller*, 247 F.3d at 740 (“a remedy that prison officials prevent a prisoner from ‘utiliz[ing]’ is not an ‘available’ remedy under § 1997e(a)”).

The position taken by the district court is like the government’s argument that was rejected on appeal in *Hemphill v. New York*, 380 F.3d 680, 688 (2d Cir. 2004). In *Hemphill*, the plaintiff claimed that his failure to employ prison grievance procedures that “may have been nominally available” was a result of threats against him by prison officials. *Id.* at 683-684, 687. Because the plaintiff had written a letter to the prison Superintendent during the relevant time period and filed a federal lawsuit, however, the defendants argued “that he was not – as a matter of law – sufficiently frightened as to render normal grievance procedures unavailable.” *Id.* at 688. The Second Circuit, noting that “some circumstances may render seemingly accessible remedies, in fact, unavailable,” held that further fact development was warranted, and thus remanded to determine availability of grievance procedures in light of the alleged threats. *Ibid.*

Importantly, in determining whether the fact that the plaintiff had written to the Superintendent proved he must not be “sufficiently frightened,” the Second Circuit distinguished between an argument “that the threats rendered *all* administrative remedies unavailable” and an argument “that because of the threats *some* procedures that would ordinarily be available were effectively unavailable.” *Id.* at 687 (emphasis added). The court found that plaintiff was making

¹⁷ This point applies equally to any request for an extension of time within which to file a grievance, particularly given the expectation that such requests be accompanied by “written verification from staff for any claimed reason for delay.” 28 C.F.R. § 542.14(b).

the latter as opposed to the former argument, and explained that the “test for deciding whether the ordinary grievance procedures were available must be an objective one: that is, would a *similarly situated individual of ordinary firmness* have deemed them available.” *Id.* at 687, 688 (emphasis added). In light of this standard, the court observed:

it should be pointed out that threats or other intimidation by prison officials may well deter a prisoner of “ordinary firmness” from filing an internal grievance, but not from appealing directly to individuals in positions of greater authority within the prison system, or to external structures of authority such as state or federal courts. This may be so, if for no other reason, because seeking a criminal investigation or filing a civil rights complaint may enable an inmate to draw outside attention to his complaints, thereby neutralizing threatened retaliatory conduct from prison employees.

Ibid. Elaborating further, the Second Circuit stated that given the guard’s

alleged warning of retaliation, it is arguable that [plaintiff] may have reasonably concluded that writing directly to the Superintendent involved an acceptable level of risk, whereas filing a level 1 grievance or notifying the immediate supervisors of his purported attackers was too fraught with danger.

Id. at 690.

These points apply equally in the instant case. By taking a monolithic approach to availability, the court below failed to recognize that reality in the prison system does not always fit into the neat categories that appear on the pages of the Code of Federal Regulations. Kaba’s claim has never been that he was unable to fill out or mail *any* documents – only that the FTCA form he did submit “constituted the only administrative remedy that, in view of the threats he was subjected to, was functionally available to him.” *Id.* at 687.¹⁸

¹⁸ Kaba articulated precisely this argument numerous times before the district court. SA18, SA37, SA47.

II. Defendants Are Estopped From Invoking The Affirmative Defense Of Failure To Exhaust.

It is well-settled that exhaustion under the PLRA is not jurisdictional. *Massey*, 196 F.3d at 732. Though it has not yet decided the issue, this Court has therefore acknowledged the possibility that the PLRA exhaustion defense may be subject to estoppel. See *Lewis*, 300 F.3d 829 at 834 (noting that “non-jurisdictional prerequisites to suit in federal court are typically subject to equitable estoppel”). In a recent failure-to-protect case citing *Lewis*, the Second Circuit remanded for consideration of whether defendants should be estopped from raising the affirmative defense of failure to exhaust. *Ziembra v. Wezner*, 366 F.3d 161 (2d Cir. 2004). The basis for plaintiff’s estoppel argument was that “prison officials prevented [him] from exhausting his administrative remedies by beating him, threatening him, denying him grievance forms and writing implements, and transferring him to another prison.” *Id.* at 162.

As described above, many of the same things happened to Kaba at the Marion prison, where he was denied grievance forms, threatened for filing forms, and beaten. A8; SA8, SA11, SA20-SA22; SA38, SA53-SA54. Kaba made estoppel-type arguments before the district court. See SA34 (stating that defendants knew of the conspiracy against Kaba “long before plaintiff was aware of the matter” and that Benson, Stepp and Yonkman stated “that they will handle the matter and protect plaintiff” but failed to do so), SA37 (“Any failure to exhaust by plaintiff [squarely rests] on the defendants”), and SA41 (“plaintiff[’s] failure to exhaust should [be] laid [squarely] on defendants”). In any event the Court should not find that he waived this argument since Seventh Circuit law on the issue is so unsettled. See *Ziembra*, 366 F.3d at 163 (vacating dismissal on estoppel grounds although plaintiff “did not use the technical term ‘estoppel’ in the court below”).

This case thus presents this Court with an opportunity to clarify that, in certain abusive circumstances, estoppel may prevent defendants from raising the affirmative defense of failure to exhaust administrative remedies under the PLRA. Kaba respectfully urges the Court to do so, and to hold that estoppel applies to defendants in the circumstances alleged here.

III. Defendants’ Threats Excuse Kaba From The Requirement To Exhaust Administrative Remedies.

The Second Circuit has also held that, in certain “special circumstances,” even though administrative remedies may have been available and estoppel may not prevent the government from raising failure to exhaust, a prisoner is nonetheless excused from the need to exhaust those remedies. *Giano v. Goord*, 380 F.3d 670, 676, 678 (2d Cir. 2004). This may be the case where the inmate reasonably misinterpreted procedural rules, *ibid.*, or where suit is brought after administrative remedies are no longer available simply because the plaintiff “failed to follow prison grievance procedures to the letter.” *Id.* at 677 (citing *Berry v. Kerik*, 366 F.3d 85, 88 (2d Cir. 2004)).

Kaba argued before the district court that he should be excused (or “exempt”) from having to file internal grievances. SA27, SA47. This Court should hold that Kaba is excused from the requirement to exhaust the administrative remedies prescribed in BOP regulations because he had “good reasons” to pursue “other administrative procedures” instead – namely, that he lacked access to BP-9, BP-10, and BP-11 forms following the assault and that he had grounds to believe that obtaining and filing such forms might lead to further retaliation against

him. SA20-SA24, SA38, SA40, SA52-SA53. *Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004).¹⁹

IV. This Case Should Be Remanded To Permit Plaintiff To Replead An Official Capacity Claim.

In concluding that Kaba's official-capacity claims should be dismissed, the magistrate's report and recommendation stated that if Kaba "wishes to assert a tort claim against the United States, he should file a motion seeking leave to file a Second Amended Complaint asserting a claim pursuant to the Federal Tort Claims Act and all other claims upon which he intends to proceed." A12. In response to the magistrate's suggestion, Kaba submitted "Plaintiff Motion Request For De Nova Review And Propos Amend And Amendment And Resevred His Objection," SA92-94 (title spelled exactly as on pleading), in which he appears to contend that the amended complaint already asserted an official-capacity claim. Concerning this filing, Judge Murphy stated that, even read liberally, he was unable to "go so far as to construe this as a motion for leave to amend his complaint"; he therefore dismissed Kaba's official-capacity claims. A3.

At this time Kaba states that, by attaching to his amended complaint in this case the FTCA claim form he had filed on March 6, 2001 (see SA14-SA16), he fully intended to raise an FTCA claim in federal district court, and believed this was an adequate way of doing so. Moreover, Kaba recognizes that the amended complaint and his May 30, 2003 motion in response to the magistrate's recommendation did not reflect a clear understanding of the Federal Rules of Civil Procedure, nor of official-capacity claims and the sovereign immunity issues they

¹⁹ Kaba also requests clarification from this Court of the practical implications, in the failure-to-exhaust context, of dismissal "without prejudice."

raise. At this time, Kaba respectfully requests that he be afforded an opportunity to revisit these matters with the benefit of input and analysis from counsel to determine what, if any, official-capacity claims may be available to him, whether under the Federal Tort Claims Act or otherwise.

This Court should therefore remand to the district court with instructions to construe the amended complaint as asserting an FTCA claim or, alternatively, to allow repleading of the complaint in accordance with the magistrate's recommendation.

CONCLUSION

For the foregoing reasons, the district court's order dismissing Karamo B. Kaba's complaint for failure to exhaust administrative remedies should be reversed. The case should also be remanded with instructions to allow repleading of any claims Kaba may have against defendants in their official capacities.

Respectfully Submitted,

/s/ David W. Fuller _____

David W. Fuller
Robert M. Dow, Jr.
Marc R. Kadish
MAYER, BROWN, ROWE & MAW LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

The undersigned attorney hereby certifies that all materials required by Circuit Rule 30(a) & (b) are included in the appendices.

Dated: July 5, 2005

_____/s/ David W. Fuller
David W. Fuller

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

The undersigned attorney hereby certifies that, pursuant to Circuit Rule 31(e), I have filed versions of the brief electronically on a virus-free disk in non-scanned PDF format. Nothing contained in the appendix is available in this format; therefore none of those materials has been included.

/s/ David W. Fuller

David W. Fuller

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused two copies of the foregoing BRIEF OF PLAINTIFF-APPELLANT KARAMO B. KABA and the required short appendix and one copy of APPELLANT'S SEPARATE APPENDIX, along with a digital version of the brief, to be served on the following parties via overnight delivery, postage prepaid, on this 5th day of July, 2005:

Mr. A. Courtney Cox
HART & HART
P.O. Box 937
602 West Side Public Square
Benton, Illinois 62812-0937

Mr. David S. Baker
FISHER, PATTERSON, SAYLER & SMITH, L.L.P.
9393 West 110th Street
51 Corporate Woods, Suite 300
Overland Park, Kansas 66210

Mr. Frederick J. Hess
LEWIS, RICE & FINGERSH, L.C.
325 South High Street
Belleville, Illinois 62220

Mr. Carl A. Gallagher
McANAY, VAN CLEAVE & PHILLIPS, P.A.
Fourth Floor
707 Minnesota Avenue
P.O. Box 171300
Kansas City, Kansas 66117

/s/ David W. Fuller
David W. Fuller

REQUIRED APPENDIX
PURSUANT TO CIRCUIT RULE 30(a)

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