

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*
)
)
)
)

REPLY BRIEF OF PLAINTIFF-APPELLANT KARAMO B. KABA

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REPLY BRIEF OF APPELLANT

As defendants would have it, this is an open-and-shut case driven by ineluctable syllogistic logic. Since Kaba was able to obtain and file BOP grievance forms *at some point* during his time at Marion prison, they contend, he *must* have been able to do so later. Once available, always available. And, they say, since Kaba was able to file his FTCA claim and this lawsuit within 20 days after the assault, he *must* have been able to obtain and file a BOP grievance form during that same time frame. A form is a form is a form. Case closed.

These facile arguments speak past the central points in our opening brief and fail to grapple with the real questions raised by this appeal. We pointed out, for example, that Kaba never alleged that *other* kinds of forms were withheld from him, nor that BOP grievance forms were *always* withheld from him. Opening Br. 20, 23. We also noted (at 16, 20) that it would be eminently reasonable for someone in Kaba's position – who had been *viciously attacked in his cell shortly after filing a grievance* – to take more seriously in retrospect defendants' prior threats of retaliation for filing such forms. And we observed (at 21-22) that, although BOP regulations provide for a direct appeal to the Regional Director, such protections are effective *only if unit staff cooperate* by making the necessary forms available in the first place.

Defendants ignore all of this (and more), and have pointed to no undisputed record evidence to support their position under the high standard they must meet as summary judgment movants. Instead, they are content to cite and quote their own district court briefs, and make conclusory statements to the effect that Kaba “clearly” was neither “fearful” nor without grievance forms (Joint Br. 5)¹, and that for Kaba to argue that he may have had a greater fear of

¹ Citations to the “joint brief” of defendants-appellees Stepp, Benson and Yonkman will appear as “Joint Br. ___.”

retaliation for filing an internal prison grievance than for filing an FTCA claim or this lawsuit is “absurd.” Laird Br. 10.

These “arguments” could not be more wrong. They presume to peer into Kaba’s psyche and are simply not true to the record in this case. They do little to advance the analysis or to justify the district court’s decision, contrary to the magistrate’s recommendation, to dismiss Kaba’s complaint for failure to exhaust. As we showed in our opening brief, and as we elaborate below, that ruling was flawed in several key respects. It should therefore be reversed.

I. Kaba Has Raised A Material Issue Of Fact Concerning The Availability Of Prison Grievance Forms.

A. The Law Recognizes That Withholding Grievance Forms Renders Them Unavailable.

As we explained in our opening brief (at 16-18), *Dale v. Lappin*, 376 F.3d 652 (7th Cir. 2004) (per curiam) is a powerful precedent supporting reinstatement of the magistrate’s recommendation to deny defendants’ motion for summary judgment against Kaba.² This Court in *Dale* found that the conduct of the prison officials – repeatedly either denying plaintiff grievance forms outright or giving him the “runaround” when he requested them – rendered administrative remedies “unavailable” under the terms of the PLRA. *Id.* at 654-56. As the Court there stated: “If prison employees refuse to provide inmates with [the required] forms when requested, it is difficult to understand how the inmate has any available remedies.” *Id.* at 656.

The only thing defendants have to say in response to *Dale* is to try to distinguish it by suggesting that the case “does not involve a situation where the prisoner repeatedly used the grievance procedure.” Joint Br. 8. In fact, however, the *Dale* decision is utterly silent on this issue. The focus in that case was where it belongs: on the availability of the specific remedies required by the PLRA *during the relevant time period*, which is the time period *after* the

² *Dale* was inadvertently omitted from the table of authorities to Kaba’s opening brief. The case is discussed at pages 14, 16-18, and 21 of that brief.

incident. The *Dale* plaintiff's ability or inability to file grievances at other times was not relevant to the Court's decision in that case. Indeed, when it comes to the question that really matters – whether the inmate was able to file a grievance *after* the incident – *Dale* and this case are on all fours. Neither plaintiff had access to grievance forms at the critical time they were needed. *Dale* thus remains directly on point, and it counsels strongly in favor of reversal.

Smith v. Briley, 2005 WL 2007230 (N.D. Ill. Aug. 16, 2005), is another recent decision from within this Circuit finding PLRA remedies to be unavailable. In *Smith*, Judge Lefkow denied defendants' motion for summary judgment based on failure to exhaust, finding that grievance forms had been withheld by defendants. *Id.* at *1, *4. The *Smith* plaintiff's *pro se* complaint raised an Eighth Amendment claim and explained that he had “repeatedly complained” to prison officials about “below-freezing temperatures in his cell.” *Id.* at *1, *2. The plaintiff in *Smith* had initially been “told that the forms would be provided later or by the next shift of prison guards,” but he “never received a grievance form.” *Id.* at *2. He was later told that his “counselor was inaccessible,” and ultimately “resorted to writing a formal grievance on part of a brown paper bag.” *Ibid.* The plaintiff was subsequently “told not to file any more grievances,” whereupon he used “another portion of the paper bag” to write out a grievance to give to the warden – followed by “a third grievance on the remaining portion of the paper bag,” which also elicited no response. *Ibid.* *Smith* is instructive here, and confirms the inappropriateness of the grant of summary judgment against Kaba.

In our opening brief, we also explained that it is important to distinguish between allegations that “*all* administrative remedies” are unavailable and allegations (like Kaba's) that “because of the threats *some* procedures that would ordinarily be available were effectively unavailable.” Opening Br. 22 (quoting *Hemphill v. New York*, 380 F.3d 680, 687 (2d Cir.

2004)). The *Hemphill* court recognized that “some circumstances may render *seemingly accessible* remedies, in fact, unavailable,” and observed that inmates may very well be deterred 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.*” *Id.* at 687-688 (emphasis added). Once again, defendants’ silence is deafening. The fact that they have offered nothing in response to this point is fatal to their argument, which seems to rest entirely on the suggestion that administrative remedies must be “available” whenever an inmate has availed himself of them in the past or managed to file other complaining documents during the relevant time period.

The only thing defendants do say about *Hemphill* is completely wrong. In a bizarre misstatement of fact (Joint Br. 9), defendants claim that plaintiff’s opening brief failed to note that the *Hemphill* court set out an objective test for deciding availability, i.e., “would ‘a similarly situated individual of ordinary firmness’ have deemed them available.” 380 F.3d at 688. In fact, our opening brief (at 23) quoted not only this exact passage from *Hemphill*, but also (at 21) the same language as it appeared in another case, *Davis v. Goord*, 320 F.3d 346, 353 (2d Cir. 2003).

Defendants display their profound misunderstanding of the objective test when they actually turn it on its head, raising the *subjective* argument that Kaba must not have been “deterred from filing internal grievances” since he had filed other documents during his time in Marion. Joint Br. 9; see also Laird Br. 6-7 (calling it “uncontroverted” that Kaba filed this suit “without fear of retaliation”). This, of course, amounts to an argument that Kaba must have been a special “individual of *extraordinary* firmness” – one who was *not* intimidated after being brutally beaten in his prison cell and having his eye socket shattered – and who should therefore be held to a higher standard than normal people when it comes to determining whether

administrative remedies were available to him. That is precisely what the Second Circuit in *Hemphill* so wisely counseled against, and we urge this Court to adopt the same approach.

Elsewhere defendants reveal their inability to distinguish between pre- and post-assault availability by insisting that Kaba “cannot claim that something he regularly used was unavailable.” Joint Br. 11. For his part, Laird goes so far as to call it “absurd” for Kaba to claim that he feared retaliation for filing an internal grievance form but not an FTCA claim or this lawsuit, since the latter “certainly would have the same alleged retaliation consequences, and most probably, worse.” Laird Br. 10. These presumptuous assertions about Kaba’s state of mind, which fly directly in the face of the Second Circuit’s insights in *Hemphill*, should be rejected out of hand.³

B. Kaba Has Consistently Alleged That He Was Denied Grievance Forms.

Defendants assert that “in neither complaint does Kaba ever claim that he was denied grievance forms or had difficulty filing such grievances,” and that Kaba raised the denial of grievance forms “[o]nly after facing a motion to dismiss because of his failure to exhaust.” Joint Br. 10-11. Once again, defendants are wrong. Construed liberally in Kaba’s favor, the initial *pro se* complaint by this non-native speaker of English makes clear that he felt unable to make use of the normal administrative remedy system because of an ongoing belief that his life was

³ Defendants (along with the district court) have assumed that Kaba was within the window of time for exhausting administrative remedies when he filed the FTCA claim eleven days after the assault and this lawsuit seventeen days after the assault. BOP regulations, however, require inmates to attempt informal resolution before they may file the formal grievance that must be submitted within 20 days of the incident complained of, and instruct each prison to establish its own informal procedures. 28 C.F.R. § 542.13(a). As far as we know from this incomplete record, it is entirely possible that Marion prison required a BP-8 form to be filed within seven days of an incident, which would mean Kaba was already *outside* the PLRA time-window when he submitted his other complaints. The facts surrounding informal resolution procedures at Marion prison need to be developed on remand.

under threat. SA4. For example, Kaba answered a question on the complaint form as to why he did not file a grievance, saying “Because of Life Threatened and immet [sic] Bodily harms [sic].” *Ibid.* He also checked boxes answering “no” to the question “Is the grievance procedure now completed?” and “yes” to the question “If there is no grievance procedure in the institution, did you complain to authorities?” SA5; see also SA7 (alleging that, as a result of threats in retaliation for filing prior grievance forms, Kaba was “deprived to proceed My Legal Remedy [sic]”).⁴

Beyond the specific complaint allegations concerning exhaustion of remedies, the *substance* of Kaba’s claims from the beginning of this litigation has been that defendants engaged in a pattern of threats and retaliation against him *specifically for filing grievance forms* – a worsening course of conduct that culminated in the assault on February 23, 2001. Opening Br. 3-6; SA7-SA8. Thus, as the district court observed, Kaba’s “theory regarding exhaustion” is “intertwined with his theory of the case.” SA75. Moreover, as early as January 12, 2001, during the internal prison investigation of Kaba’s claims conducted by Yonkman, Kaba swore out an affidavit making clear that both Laird and Benson had repeatedly denied him grievance forms. SA20. Contrary to defendants, the unavailability of grievance forms is not some new allegation introduced late in the litigation.

⁴ Kaba also checked a box on the complaint form indicating that he *had* “filed a grievance” concerning the facts in the complaint. SA4. However, his responses to the subsequent detailed questions on the form suggest that (1) he saw the assault and other facts alleged in the complaint as part of a single course of conduct by defendants, (2) the “grievance” he was referring to was his prior complaint to prison officials that led to the internal investigation by Yonkman, and (3) because of an ongoing threat, he was both unaware of the resolution of that investigation and unable to file an “appeal” from the result. SA4-SA5. The complaint’s allegations concerning exhaustion are not necessarily contradictory, and are perhaps best understood as a form of pleading in the alternative.

1. Kaba's Statements Cannot Be Brushed Aside As "Self-Serving" and "Self-Contradictory."

Defendants disparage Kaba's statements as "self-serving," suggesting they cannot create a fact issue to preclude summary judgment. Joint Br. 7, 10-11. This Court, however, has "routinely found that a nonmoving party's own affidavit can constitute affirmative evidence to defeat a summary judgment motion." *Payne v. Pauley*, 337 F.3d 767, 771 (7th Cir. 2003); see also *Dale*, 376 F.3d at 655-56 (rejecting district court's characterization of plaintiff's allegations as "bald assertions" and noting the "affidavit in support" that plaintiff had attached to his response to defendants' motion for summary judgment). The *Payne* Court specifically addressed the concept of "self-serving" affidavits in the summary judgment context, seeking to

lay[] to rest the *misconception that evidence presented in a "self-serving" affidavit is never sufficient to thwart a summary judgment motion*. Provided that the evidence meets the usual requirements for evidence presented on summary judgment – including the requirements that it be based on personal knowledge and that it set forth specific facts showing that there is a genuine issue for trial – *a self-serving affidavit is an acceptable method for a non-moving party to present evidence of disputed material facts*.

337 F.3d at 773 (emphasis added). Defendants' contention to the contrary is particularly misplaced here, given that "facts alleged in a brief in opposition to a motion to dismiss * * * as well as factual allegations contained in other court filings" are commonly considered in evaluating the sufficiency of a *pro se* plaintiff's complaint. *Gutierrez v. Peters*, 111 F.3d 1364, 1367 n.2 (7th Cir. 1997).⁵

⁵ See also *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001) ("pro se pleadings are held to less exacting standards than those prepared by counsel and are to be liberally construed"); *Smith*, 2005 WL 2007230, at *4 n.6 (rejecting defendants' argument that plaintiff's "own unsubstantiated allegations" should not be recognized as part of his effort "to counter defendants' evidence that Smith failed to complete the grievance process").

Defendants also attempt to discount Kaba's statements as "self-contradictory," and cite *United States v. Funds in the Amount of Thirty Thousand Six Hundred Seventy Dollars*, 403 F.3d 448, 466 (7th Cir. 2005), in which the plaintiff made statements on appeal that directly contradicted factual assertions he made at trial and in earlier bankruptcy proceedings. Joint Br. 10-11. Rather than identifying any actual contradictions in the record, however, defendants have simply included (at 10) a block quote from one of their own district court briefs.⁶ Kaba has never changed his story or made representations contrary to the record. Indeed, the only supposed "contradiction" defendants point to – Kaba's ability to file *other* forms – is not a contradiction at all, since Kaba has never alleged that he was denied access to *all* grievance forms at *all* times.

Witzke v. Femal, 376 F.3d 744 (7th Cir. 2004), is another case in which a *pro se* litigant's complaint was dismissed for failure to exhaust administrative remedies, only to be reinstated by this Court. The district court in *Witzke* had found that the plaintiff had "pleaded himself out of court" by admitting both that a prison grievance procedure existed and that he had failed to take advantage of it. *Id.* at 749. This Court, however, concluded that the plaintiff had "also stated that 'he exhausted the *only* administrative remedies that were *available* to him,'" and remanded for further fact findings, stating that the district court should have "give[n] the *pro se* litigant a more complete opportunity to demonstrate whether any administrative remedy was available." *Id.* at 754 (emphasis in original). *Witzke* confirms that, even if Kaba's statements were in some

⁶ Inexplicably, defendants' "joint" appendix (to which Kaba did not, and does not, consent) consists entirely of their motion to dismiss and supporting briefs filed before the district court. In no event should any reference by defendants to their own prior briefs be considered record evidence competent to establish uncontroverted facts under Rule 56. See also Fed. R. App. P. 30(a)(2) ("Excluded Material") ("Memoranda of law in the district court should not be included in the appendix unless they have independent relevance.").

way “self-contradictory” (which they are not), it is appropriate to overlook such apparent problems in the pleadings of *pro se* litigants.

In any event, the truth of Kaba’s statements is not at issue here: a party challenging summary judgment need not “persuade the court that [his] case is convincing, [he] need only come forward with appropriate evidence demonstrating that there is a pending dispute of material fact.” *Payne*, 337 F.3d at 771; see also *id.* at 770 (“On summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder.”).

2. Defendants’ Position Is Extreme.

The legal position staked out by defendants in this case is an extreme one: that, as a matter of law, PLRA remedies are necessarily available whenever an inmate has previously filed BOP grievance forms (on any topic) or whenever the inmate has filed another complaining document (of any kind) concerning the incident in question during the time period for exhaustion of PLRA remedies. Such a rule would be unnecessarily rigid, permit district courts to ignore important facts, and tie this Court’s hands in future appeals. Yet it is difficult to see how, in light of the evidence and Kaba’s allegations, this Court can affirm the decision below without adopting defendants’ absolutist approach (or something close to it).

The district court purported to be rejecting the “*per se* rule” proposed by defendants (A4), but rested its decision on an oversimplified view of the facts that effectively led to the same thing. The district court’s suggestion that Kaba could have simply filed “a grievance claiming that he was being retaliated against for filing grievances,” *ibid.*, for example, fails to consider the possibility that some topics may have been more dangerous than others when it came to filing

grievances, or that grievance forms addressing more serious issues may have been intercepted by defendants whereas others were not. See SA42 (alleging interference with mail).

Similarly, the district court never bothered to learn exactly when or how Kaba came into possession of the FTCA or litigation complaint forms, nor how he managed to mail them off after the assault. See Opening Br. 21 n.16. It therefore had no opportunity to consider the true evidentiary value of these facts in assessing the availability of BOP grievance forms during the same time period, instead simply asserting that Kaba's ability to "file this action" meant he was "[c]learly * * * physically capable of filing a formal grievance." A4. According to this bright-line rule, Kaba would have been just as "clearly" capable of filing a grievance if he had filed his federal complaint using a blank piece of paper — a conclusion directly contrary to *Dale*, 376 F.3d at 655 – or, for that matter, on parts of a ripped-up paper bag. See *Smith*, 2005 WL 2007230, at *3-*4 (remedies unavailable where inmate "forced to write his grievances on a paper bag").

Nor will a decision finding material issues of fact concerning exhaustion in this case open the floodgates to future "unavailability" claims by all prisoners who simply prefer to avoid having to go through the usual channels prior to filing suit. It is not every day, for example, that the Department of Justice *withdraws from representation* of all four individual defendants on the eve of appeal, citing an unexplained "perceived conflict of interest." SA96-SA110. This case also involves:

- core substantive claims *directly related to the availability of administrative remedies*, SA7-12;
- *sworn affidavits* of plaintiff and another inmate taken by a government official before the complaint was filed describing in detail a pattern of intimidation, bribery and corruption apparently connected to a perception among prison staff that plaintiff was a troublemaker who filed too many prison grievance forms, SA20-SA22;

- an extensive *internal prison investigation* triggered by the plaintiff's charges of threats, retaliation and withheld grievance forms, Opening Br. 4-5; SA20-SA24;
- a *successful polygraph examination* of plaintiff relating to his claims, SA23-SA24;
- undisputed evidence that the inmate alleged to have been the target of the conspiracy was *brutally assaulted inside his cell* just one week after he filed a grievance form, Opening Br. 5-6; SA8, SA11, SA32, SA65-SA67, SA69-SA72;
- evidence that the prison guard alleged to be the ringleader of the conspiracy was *transferred off the unit* at some point, possibly during the investigation, Opening Br. 4; and
- evidence that the *inmate was transferred away* from Marion prison altogether within a few short weeks after the assault, Opening Br. 6; A9.

These facts illustrate the unique context in which this important appeal arises. All of them also bear either directly or indirectly on the availability of administrative remedies, and therefore must be taken into account in this Court's *de novo* review of the summary judgment ruling against Kaba.

C. Reversing Summary Judgment Will Not Thwart The Purposes Of The PLRA.

Defendants argue that allowing Kaba's suit to proceed would render the PLRA "meaningless" or "toothless" (Joint Br. 10, 14), and observe that the "purpose of the PLRA is to reduce the burden of prisoner lawsuits on the courts and the litigants." Joint Br. 9. This Court, however, has "refuse[d] to interpret the PLRA 'so narrowly as to * * * permit [prison officials] to exploit the exhaustion requirement through indefinite delay in responding to grievances,'" *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002); moreover, "[j]ust 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." *Dale*, 376 F.3d at 656.

As recognized in *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004), cited by defendants (Joint Br. 13), the PLRA was also intended to “give prison officials the opportunity to take corrective action that may satisfy inmates” and to “create an administrative record that would facilitate subsequent judicial review.” Where prison officials refuse to furnish grievance forms, or threaten inmates with retaliation for filing them, it is they – not the inmates who complain about their misconduct – who are directly undermining this statutory purpose: their abusive actions make clear their unwillingness to take any “opportunity” for corrective action that “may satisfy inmates,” and prevent any possibility of creating an “administrative record.” *Ibid.*

In the end, of course, the proper question on this review of summary judgment is what public purpose is served by dismissal *assuming Kaba’s allegations are true*. See *Dixon v. Page*, 291 F.3d 485, 486 (7th Cir. 2002). The answer to *that* question, we submit, should be clear. What cognizable public interest is there in preventing a lawsuit where the inmate alleging a conspiracy to cause him severe physical harm was *denied* administrative remedies both “before the assault and after the assault[]”? SA38; see SA53. What legitimate purpose is served by shutting the courthouse doors to a prisoner who alleges in his complaint that he could not file a grievance “[b]ecause of Life Threatened and [imminent] Bodily harm[]”? SA4. Certainly not the purposes meant to be furthered by the PLRA – which, after all, was never intended to “prevent inmates from raising legitimate claims.” *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 113 (3d Cir. 2002) (citing 141 Cong. Rec. S14267 (1995) (statement of Sen Hatch)). It is not inconsistent with the purposes of the PLRA to recognize that

Prison authorities cannot have it both ways – they cannot obstruct an inmate’s pursuit of administrative remedies exhaustion by failing to comply with statutory procedure on the one hand, and

then claim that the inmate did not properly exhaust these remedies on the other.

Gadson v. Goord, 2002 WL 982393, at *3 (N.D.N.Y. May 10, 2002).

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

Defendants mistakenly argue (Joint Br. 11-12) that they cannot be estopped from asserting an exhaustion defense. Based on a hypertechnical reading of the elements of equitable estoppel found in *Lewis v. Washington*, 300 F.3d 829, 834 (7th Cir. 2002) – which did not even apply estoppel under the facts as presented there – they advance the perverse argument that, although Kaba was *subjected to physical threats and abuse*, he cannot assert estoppel because he was not *misled* by the defendants. In addition to being contrary to public policy, this argument ignores that defendants did make “misrepresentations” to Kaba, in that on several occasions Laird and/or Hood responded to requests for grievance forms by directing Kaba to the institution’s “paralegal” – who (they now concede) did not exist. Opening Br. 4; A8; SA20, SA54, SA80.

Although this Court has hinted that various equitable defenses may be available in response to PLRA exhaustion claims,⁷ in fact the Seventh Circuit is in the same position the Second Circuit found itself in at the time it decided *Ziembra v. Wezner*, 366 F.3d 161, 163 (2d Cir. 2004), which remanded for further fact finding after adopting the estoppel doctrine in the

⁷ See *Lewis*, 300 F.3d at 834 (noting that “the Fifth Circuit's ruling on this matter is persuasive because non-jurisdictional prerequisites to suit in federal court are typically subject to equitable estoppel” and discussing *Wendell v. Asher*, 162 F.3d 887, 890 (5th Cir. 1998), which recognizes that the PLRA’s exhaustion requirement “may be subject to certain defenses such as waiver, estoppel, or equitable tolling”).

PLRA context as a matter of first impression.⁸ Notably, in *Ziembra*, prison officials had prevented the plaintiff 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. Principles of equity and estoppel should apply equally in this case to bar defendants from abusively asserting the affirmative defense of failure to exhaust.

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

Defendants cite *O’Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) – a case involving “procedural default” in the *habeas corpus* context – and other cases for the supposed proposition that there can *never* be an exemption from the exhaustion requirement. Joint Br. 13-14; Laird Br. 11-12. Defendants’ cases, however – none of which involved administrative remedy forms being withheld from an inmate – in no way preclude this Court from overlooking Kaba’s failure to file a grievance form under the extraordinary circumstances of this case.

Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002), for example, dealt only with questions of untimeliness and prisoners who “thumb their noses at the specified procedures.” Yet it can hardly be said that Kaba “thumbed his nose” at anyone by failing, in the face of repeated threats against his life and safety, to file grievance forms that were withheld from him by defendants. And while *Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004), consciously departed from the Seventh Circuit in some respects, the Second Circuit in *Giano* correctly observed that *Pozo* left “open the question of whether a prisoner might, under certain circumstances, be ‘relieve[d] * * * of a default in the [administrative] process.’” 380 F.3d at 676 n.4 (quoting *Pozo*, 286 F.3d at 1025). This Circuit’s precedents do not foreclose recognition that some cases

⁸ This fact refutes Laird’s cryptic attempt to distinguish *Ziembra* on procedural grounds. See Laird Br. 10.

involve “facts that, if true, suffice to justify [plaintiff’s] failure to file an ordinary grievance.” *Id.* at 678.

The effort by Stepp, Benson and Yonkman to draw a sharp line of distinction between themselves and Laird does not comport with the facts of record as they must be construed at this stage of the litigation. They argue (narrowly) that “[t]here has never been an allegation that [they] were part of any alleged conspiracy that resulted in the assault upon plaintiff,” and mistakenly suggest that the assault as such formed the sole basis for Kaba’s claim that he should be excused from the exhaustion requirement under the circumstances. Joint Br. 14. They assert that all they did was “refuse[] to provide grievance forms,” claiming that this does not amount to “conduct that would justify excusing plaintiff from exhausting” his remedies as to his claims against them. *Ibid.*

This fails to reflect reality. As the district court recognized, Captain Benson threatened to have Kaba sent to Puerto Rico where he would be “beat up with [a] stick” if he did not quit filing grievance forms. A8; SA20. Stepp, Benson and Yonkman were also complicit in Laird’s threatening behavior insofar as they took no protective action despite being repeatedly informed, prior to the assault, of what was going on with Laird. SA10. Yonkman, for his part, “confiscated” Kaba’s “legal material” and “removed certain[] documents” from his cell on the day of the assault. SA52. And Kaba has made more general allegations suggesting that all the defendants were involved, at some level, in harassment and threats against him, as well as in the assault itself. SA38, SA40.

In any event, even if it were correct that “all” Stepp, Benson and Yonkman did was “refuse[] to provide grievance forms” to Kaba, it is hard to see how Kaba could be expected to exhaust administrative remedies against prison officials who engage in such conduct.⁹

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

Defendants rest their argument (Joint Br. 15-17) against construing the amended complaint to include an official-capacity claim (or remanding to allow repleading) primarily on this Court’s recent decision in *Myles v. United States*, 416 F.3d 551 (7th Cir. 2005). But *Myles* is a far cry from this case. The principal failure in *Myles*, and the basis for this Court’s concern about prejudice to the defendants there, was that the *pro se* plaintiff had neither identified nor served the individual defendants he wished to sue under *Bivens*. *Id.* at 551-52. By contrast, there is no question about notice to defendants here. In both his initial and amended complaints, Kaba has consistently named not only the Bureau of Prisons but all the individual defendants in both their personal and official capacities. SA2, SA9, SA10, SA12.¹⁰

Myles also did not involve a plaintiff who, like Kaba, had appended to his complaint a form previously filed with the government alleging the very claim he wished to preserve on appeal for reassertion in the district court. Notably, defendants say not a thing in response to the

⁹ Alternatively, if the Court concludes there is a qualitative distinction among the defendants for purposes of determining whether a failure to exhaust may be justified, Kaba asserts this argument only with respect to Laird and/or any of the other defendants whose conduct rises to the level required to serve as justification for such failure.

¹⁰ The handwritten caption on the amended complaint reads “Karamo B. Kaba Plaintiff vs. Warden Stepp et al Defendants.” SA10. This can reasonably be construed as referring back to the prior caption of the case and incorporating by reference the defendants named in the initial complaint, SA2.

point in our opening brief (at 26) that Kaba may in fact have asserted an official-capacity claim by attaching the FTCA claim form to his amended complaint.

In any event, Kaba grants that his submission in response to the magistrate's suggestion that he file a second amended complaint including an FTCA claim (SA92-SA94) fell short in certain respects. But the motion's deficiencies plainly involve "the substantive sufficiency of allegations" – which the *Myles* Court identified as being subject to the principle that *pro se* pleadings should be liberally construed – as opposed to "preliminary steps such as identifying and serving defendants." 416 F.3d at 552.¹¹

Nor was Kaba's understanding of the effect of his amended complaint entirely without basis. In *Lehn v. Holmes*, 364 F.3d 862, 872 (7th Cir. 2004), this Court liberally construed a *pro se* litigant's complaint to find that the required elements of an Eighth Amendment claim were present where the key allegations necessary to make out the claim were contained *only* in a document attached to the complaint. The district court opinion dismissing plaintiff's claim in *Lehn* was therefore reversed. *Ibid.*; see also Fed. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof *for all purposes.*") (emphasis added). The same result should occur here, or, at the very least, Kaba should be permitted to re-

¹¹ The *Myles* Court observed that the plaintiff used a claim form found in the district court's *Pro Se Handbook*, and emphasized that a chapter from that handbook contained clear instructions informing litigants of their obligation to do the exact thing (identify in the complaint every person they want to sue) that the *Myles* plaintiff failed to do. 416 F.3d at 554. Here, nothing in the record indicates what handbooks or other guidance Kaba had available to him when he was filing his complaints or submitting the motion the district court found to be inadequate. This constitutes an additional reason to remand for further fact finding.

plead his complaint on remand, in consultation with counsel, to more clearly assert an official-capacity claim.¹²

CONCLUSION

For the foregoing reasons, and the reasons stated in appellant's opening brief, the judgment of the district court should be reversed.

Respectfully Submitted,

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¹² Kaba may have other official-capacity claims, and claims against the government, besides an FTCA claim. For example, his complaint names the Bureau of Prisons (SA2), and he has made far-reaching allegations of institutional corruption (SA7-SA8) that could rise to the level of challenging an agency policy or practice under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. See *Bunn v. Conley*, 309 F.3d 1002, 1009 (7th Cir. 2002) ("The APA applies to the Bureau of Prisons"); *Simmat v. United States Bureau of Prisons*, 413 F.3d 1225, 1238-39 (10th Cir. 2005) (noting that the federal government in the APA has waived sovereign immunity).

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

The undersigned attorney hereby certifies that, pursuant to Circuit Rule 31(e), I have filed a version of the brief electronically on a virus-free disk in non-scanned PDF format.

David W. Fuller

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused two copies of the foregoing REPLY BRIEF OF PLAINTIFF-APPELLANT KARAMO B. KABA, along with a digital version of the brief, to be served on the following parties via overnight delivery on this 3rd day of October, 2005:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for plaintiff-appellant Karamo B. Kaba certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) and contains 5,740 words, excluding the table of contents, table of authorities, and certificates of counsel.

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