No. _____

In The
Supreme Court of the United States

THE LOS ANGELES COUNTY SHERIFF,

Petitioner,

vs.

JUAN ALBINO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

COLLINS COLLINS MUIR + STEWART, LLP
MELINDA W. EBELHAR*
CATHERINE M. MATHERS
CHRISTIAN E. FOY NAGY
JAMES C. JARDIN
1100 El Centro Street
South Pasadena, CA 91030
(626) 243-1100
mebelhar@ccmslaw.com
*Counsel of Record

Attorneys for Petitioner
The Los Angeles County Sheriff

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996), provides that "[n]o action shall be brought with respect to prison conditions" under 42 U.S.C. § 1983 or other federal law "until such administrative remedies as are available are exhausted." "[E]xhaustion in cases covered by § 1997e(a) is mandatory." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). This exhaustion requirement is not subject to "futility or other exceptions." *Booth v. Churner*, 532 U.S. 731, 746 n. 6 (2001).

The questions presented, over which the circuits are intractably split, are:

1. Does an inmate's subjective lack of awareness of existing grievance procedures excuse his failure to exhaust his administrative remedies, where there is no evidence that jail officials prevented, thwarted, or hindered him from knowing about them or otherwise prevented him from filing a grievance?

2. Whether a reviewing court may decline to apply the clear error standard of review to a district court's findings of fact on administrative exhaustion under the PLRA.

PARTIES TO THE PROCEEDINGS

Petitioner is the Los Angeles County Sheriff, named in his official capacity. At the time of the proceedings below, that individual was Lee Baca. Sheriff Baca retired effective January 30, 2014, and the Sheriff's position will be filled following the elections in November 2014.

Although the *en banc* decision incorrectly states that the County of Los Angeles was a party to the appellate proceedings (App. at 2), as the three-judge panel noted, Respondent's claims against the County had already been dismissed and no appeal from that ruling had been taken. (App. at 52, n. 2.) Thus, the County is not a Petitioner here.

Respondent is Juan R. Albino. At the time of the incidents alleged in his complaint, Albino was a detainee at Men's Central Jail (run by the Los Angeles County Sheriff's Department) in downtown Los Angeles.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

The Los Angeles County Sheriff respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit following its *en banc* decision in this matter overturning summary judgment in his favor.

OPINION BELOW

The Ninth Circuit Court of Appeals' *en banc* decision, which includes a 3-judge dissent, is reported as *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) and reproduced at App. 1-47, with the dissent beginning at App. 31. The original panel decision, which also includes a dissent, is reported at 697 F.3d 1023 (9th Cir. 2012) and reproduced at App. 48-87. The District Court did not publish an opinion in this case. Its pertinent rulings are reprinted at App. 88-101.

JURISDICTION

The Ninth Circuit filed its *en banc* decision on April 3, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Prison Litigation Reform Act of 1995 provides, in part:

> No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

STATEMENT OF THE CASE

Respondent Juan Albino was arrested and confined at the Los Angeles County Men's Central Jail. As alleged, while in confinement, he was assaulted and seriously injured by other inmates. Deputies summoned medical care for Albino and transferred him to a new housing unit, away from his attackers. Albino was attacked again three weeks later, and deputies again arranged for medical care and transferred Albino to another housing unit. Albino alleges he was attacked again some three months later, however he never reported the incident and the Jail has no record of it. When he complained to deputies that he should be placed in protective custody, they advised him to consult his court-appointed defense counsel.

The Jail has a grievance procedure that is available to inmates. Complaint boxes and complaint forms are maintained in every housing unit. During each shift members of the prison staff collect the completed complaint forms from the complaint boxes and ensure that there is an adequate supply of complaint forms in each housing unit. While the record fails to physically describe the complaint boxes, there is no evidence that the complaint boxes are inaccessible to inmates, and there is no evidence that the grievance procedure is not being used. Indeed, other cases from the Central District of California reference the Jail's grievance procedure and describe its procedures. *See, e.g.*, *Fletcher v. Baca*, 2012 WL 1114696 (C.D. Cal. 2012), *report and recommendation adopted*, 2012 WL 1114600 (C.D. Cal. 2012), *aff'd*, 554 Fed.Appx. 553 (9th Cir. 2014). Albino conceded the existence of the grievance procedure.

Albino alleges that prison officials violated his civil rights by failing to place him in protective custody, and further alleges that he was denied adequate medical care. He filed suit under 42 U.S.C. § 1983, naming former Sheriff Lee Baca and the County of Los Angeles. The County was dismissed, and the Sheriff brought a Motion for Summary Judgment based in part on Albino's failure to exhaust administrative remedies under the Jail's grievance procedures.

Albino opposed the motion on grounds that he was never aware of the grievance procedure. He claimed never to have seen a complaint box or complaint form,

and further claimed that no one had informed him of the grievance procedure's existence. He offered no evidence to suggest that the grievance procedure did not exist, or that he had been given incorrect information.

The district court granted the Sheriff's motion. The court found that the County had provided an available grievance procedure which Albino failed to exhaust, and dismissed the case without prejudice. App. at 89. The district court specifically relied upon controlling appellate authority outside the Ninth Circuit holding that an inmate's lack of personal knowledge of grievance procedures does not render that procedure unavailable, and therefore Albino's evidence of subjective knowledge was irrelevant. App. at 97. The district court was not swayed by Albino's contention that he had attempted to submit a written grievance but had withdrawn it when threatened by deputies. App. at 99, n. 5. Noting that this evidence contradicted Albino's repeated insistence that he was unaware of the existence of grievance procedures, the district court refused to consider it.

The Ninth Circuit initially affirmed the district court's decision, joining the Sixth, Seventh, Eighth, and Tenth Circuits in holding that an inmate's lack of subjective knowledge of grievance procedures does not render the grievance procedure unavailable. App. at 74-75. The original panel rejected Albino's contention that Jail staff misled him by telling him to consult his defense attorney, noting that, if anything,

instructions to seek counsel would have helped him. App. at 68.

The original panel also briefly addressed long-standing Ninth Circuit cases holding that the proper procedural vehicle for an administrative exhaustion defense is an unenumerated Rule 12 motion, with its accompanying "clear error" standard of review of factual findings. App. at 56-57. The panel held that the district court had erred in treating the motion as one for summary judgment (subject to de novo review) rather than as an unenumerated Rule 12 motion (reviewed for clear error), but found that the result would be identical under either standard because Albino had failed to offer any evidence beyond his lack of knowledge of the existence of grievance procedures.

On rehearing *en banc*, the Ninth Circuit reversed. It struck down its existing precedent, *Wyatt v. Terhune,* 315 F.3d 1108 (9th Cir. 2003), which had required an administrative exhaustion defense be presented by means of an unenumerated Rule 12 motion. It concluded that *Wyatt* had not survived this Court's decision in *Jones v. Bock,* 549 U.S. 199 (2007) (App. at 10), despite the fact that *Wyatt* was cited approvingly for another point in *Jones,* and despite the fact that other circuits have approved this same procedure, even post-*Jones. See, e.g., Bryant v. Rich,* 530 F.3d 1368, 1375 (11th Cir. 2008).

The panel replaced the former procedure with a two-step procedure: first a motion for summary

judgment and then, if there are disputed issues of fact, a judicial determination of facts subject to clear error review. App. at 13-15. The *en banc* court implicitly characterized this change as reducing a circuit split regarding the applicable procedural device for administrative exhaustion under the PLRA. App. at 14.

Because the Sheriff's motion had been titled as one for summary judgment, the *en banc* panel then reviewed the judgment de novo, ignoring the district court's factual findings. It found that the Sheriff had not met his burden to demonstrate the existence of available administrative remedies. App. at 27. It further held that the Sheriff's assumed failure to inform Albino specifically of the existence of grievance procedures rendered the Jail's administrative remedies unavailable within the meaning of the statute. App. at 30-31.

The *en banc* panel then took the de novo standard of review one step further. It presumed that the Sheriff had come forward with all of his evidence in support of the motion in the first instance. Because none of that evidence met its newly-articulated standard of "available," as a matter of law there was no evidence which would support a finding in the Sheriff's favor, and thus no triable issue of fact. App. at 29-30. It therefore directed the district court to enter summary judgment *sua sponte* in Albino's favor on the issue of exhaustion. App. at 31.

Judge N.R. Smith, writing for a three-judge dissent, sharply criticized the majority opinion, holding that the majority "misunderstands the issue of exhaustion and the district court's role as factfinder." App. at 34. Regardless of the form of the motion submitted to the district court, he noted, controlling Ninth Circuit precedent required application of the correct standard of review. In the exhaustion context the application of a summary judgment standard – which serves solely to determine whether there is sufficient evidence to return a jury verdict in favor of the non-moving party – is inapposite. App. at 34-35. Because the district court had made factual findings which supported the judgment in favor of the Sheriff, the judgment should have been reviewed in light of those findings, and such review should have been for clear error, a standard which would have required affirmance.

Judge Smith noted examples of evidence that would bear on the issue of availability under the majority's new rule: that Albino was actually informed, the number of complaints being received by the Jail, and the appearance and specific location of the complaint box in Albino's housing units. He also criticized the majority for failing to allow the Sheriff to "have notice of [its] decision and an opportunity to be heard" before ordering that summary judgment be entered against him on the exhaustion issue. App. at 43. Prior to the *en banc* decision no litigant in federal court had had any reason to dispute an inmate's contentions regarding subjective awareness of grievance

procedures, nor had there been any requirement to produce evidence that a specific inmate had been personally informed of the existence of a grievance procedure. App. at 43.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Ninth Circuit's *en banc* decision carves out a new exception to the PLRA's exhaustion requirement which all but one of the other circuit courts that have addressed the issue have refused.

Although there is no dispute that exhaustion is mandatory under the Prison Litigation Reform Act, the circuit courts are now in sharp disagreement about whether a prisoner's subjective lack of awareness about the existence and operation of a grievance procedure renders that procedure effectively "unavailable" to him, excusing failure to exhaust.

The Sixth Circuit (*Brock v. Kenton County,* 93 Fed.Appx. 793, 798 (6th Cir. 2004); *Napier v. Laurel County, Ky.,* 636 F.3d 218, 221 n. 2 (6th Cir. 2011)); the Seventh Circuit (*Twitty v. McCoskey,* 226 Fed.Appx. 594, 596 (7th Cir. 2007)); the Eighth Circuit (*Chelette v. Harris,* 229 F.3d 684, 688 (8th Cir. 2000)); and the Tenth Circuit (*Yousef v. Reno,* 254 F.3d 1214, 1221 (10th Cir. 2001); *Gonzales-Liranza v. Naranjo,* 76 Fed.Appx. 270 (10th Cir. 2003)) have rejected claims that an inmate's subjective lack of knowledge excuses exhaustion where there is no

evidence that prison officials affirmatively prevented the inmate from using the grievance system. Surveying the cases, the District Court for the District of Columbia recently noted that while the D.C. Circuit had not yet spoken on the issue, "the majority of courts to have done so have held that an inmate's subjective lack of information about his administrative remedies does not excuse a failure to exhaust." *Johnson v. D.C.,* 869 F.Supp.2d 34, 41 (D.D.C. 2012) (collecting cases).

By contrast, the Eleventh Circuit has excused a prisoner's failure to exhaust where she was never advised of the grievance system, holding that it was "unavailable." *Goebert v. Lee County,* 510 F.3d 1312, 1323 (11th Cir. 2007). The Third Circuit, in *dicta*, has suggested it would follow *Goebert. Small v. Camden County,* 728 F.3d 265, 271 (3d Cir. 2013). The Fifth Circuit has not squarely addressed the issue but has suggested that it would not follow the Eighth Circuit's holding that a prisoner's subjective knowledge is irrelevant to determining whether remedies are actually available. *Dillon v. Rogers,* 596 F.3d 260, 268 (5th Cir. 2010). Even there, the Fifth Circuit held that what an inmate "knew or could have discovered" was relevant to whether the remedies were "unavailable." *Id.*

This Court has held that Congress's foremost concern when it required exhaustion of "available" administrative remedies was to "reduce the quantity and improve the quality of prisoner suits." *Porter,* 534 U.S. at 524. As the Eleventh Circuit observed,

"Congress did not enact the PLRA in a vacuum." Rather, it "held hearings and rendered findings, concluding that prisoners file more frivolous lawsuits than any other class of persons." *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998) (internal quotation marks omitted). The *Alexander* court noted that, at the time of the statute's passage, Congress found that the number of prisoner lawsuits had "'grown astronomically – from 6,600 in 1975 to more than 39,000 in 1994.'" *Id.* (quoting 141 Cong. Rec. S14408-01, *S14413 (daily ed. Sept. 27, 1995)).

The impact of the Ninth Circuit's decision here on the federal courts' dockets may well be dramatic. Prisoner lawsuits regarding prison conditions dropped significantly after passage of the PLRA, but continue to represent a large portion of the federal docket. In 2012 alone, prisoners filed 25,110 civil petitions addressing prison conditions and civil rights claims. Administrative Office of the United States Courts, Judicial Facts and Figures 2012 ("JFF"), Table 4.6, p. 2, U.S. District Courts – Prisoner Petitions Filed, by Nature of Suit, http://www.uscourts.gov/Statistics/JudicialFactsAndFigures/judicial-facts-figures-2012.aspx (last accessed June 27, 2014). This category outnumbers all other individual categories, including habeas filings, and represents 9% of the 278,442 civil lawsuits filed in federal district courts in 2012. JFF, Table 4.2, p. 1, U.S. District Courts – Civil Cases Filed, by District.

The sheer volume of prison litigation continues to consume a significant portion of the federal judiciary's

resources. If exhaustion can be excused anytime a prisoner claims a subjective lack of specific knowledge about the grievance process, an "awareness" exception requiring courts to analyze and determine prisoners' knowledge levels of the grievance process at given points in time undoubtedly would be routinely invoked. Whether a prisoner's knowledge of the grievance process would be assessed objectively or subjectively, such a time-consuming task is fraught with uncertainty and certainly contrary to the intention of the statutory requirement.

This Petition thus presents an issue that cuts to the heart of the PLRA's gate-keeping purpose, one over which the circuits are split, and one which has the potential to increase already-impacted district court dockets. Without an objective standard to evaluate whether remedies are available, as well as clear error review of a district court's factual findings, that gate-keeping function will be undermined by irresolvable factual disputes regarding a particular inmate's knowledge of grievance procedures. Not only is such a result contrary to Congressional intent, it is irreconcilable with existing jurisprudence in the analogous context of an inmate's right of access to the courts. Such a holding warrants further scrutiny before becoming the law.

I. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO RESOLVE THE CIRCUIT SPLIT AS TO WHETHER AN INMATE'S SUBJECTIVE LACK OF AWARENESS RENDERS GRIEVANCE PROCEDURES UNAVAILABLE.

This Court has consistently refused to read extra-judicial glosses onto the PLRA. *Jones*, 549 U.S. 199 (judicially-crafted heightened pleading standards exceed judicial authority in construing the PLRA); *Booth*, 532 U.S. 731 (refusing to graft a futility exception to exhaustion onto the statute); *Porter*, 534 U.S. 516 (applying the PLRA to all prisoner suits per the plain language of the statute). This Court has applied a plain-meaning analysis to the operative terms "until such remedies as are available are exhausted," finding that they require the exhaustion of any process that can be used even if it cannot provide the specific relief desired. *Booth*, 532 U.S. at 738-739.

Following this guidance, the majority of circuit courts to consider the issue have held that an inmate's subjective knowledge does not serve as an exception to exhaustion. *Hemphill v. New York*, 380 F.3d 680, 688 (2d Cir. 2004) ("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."); *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000) ("Section 1997e(a) says nothing about a prisoner's subjective beliefs, logical or otherwise, about the administrative remedies that might

be available to him."); *see also Brock v. Kenton County*, 93 Fed.Appx. 793 (6th Cir. 2004) (unpublished) (refusing to consider prisoner's subjective lack of awareness as an exception to exhaustion); *Twitty v. McCoskey*, 226 Fed.Appx. 594 (7th Cir. 2007) (unpublished) (same); *Gonzales-Liranza v. Naranjo*, 76 Fed.Appx. 270, 272-273 (10th Cir. 2003) (unpublished) ("This court has previously rejected a prisoner's assertion that the government should have advised him of the need to follow prison administrative procedures."), citing *Yousef v. Reno*, 254 F.3d 1214, 1221 (10th Cir. 2001).

While the circuit courts have recognized that affirmative interference by prison officials may render a remedy unavailable (not an issue here), prior to the *en banc* decision here only the Eleventh Circuit imposed an affirmative obligation to insure that each inmate is aware of applicable grievance procedures. *Goebert,* 510 F.3d at 1323. However, such an approach is inconsistent with this Court's extensive body of jurisprudence regarding an inmate's right of access to the courts. For example, in *Lewis v. Casey*, 518 U.S. 343 (1996) this Court held that, while a prison is required to ensure that inmates have meaningful access, this does not include an obligation to ensure that inmates can discover grievances, or litigate effectively once in court. *Lewis*, 518 U.S. at 354. Much like PLRA decisions which find that affirmative misconduct by prison officials excuses exhaustion, this Court's access decisions protect that access "by prohibiting state prison officials from actively interfering

with inmates' attempts to prepare legal documents, or file them, and by requiring state courts to waive filing fees, or transcript fees, for indigent inmates." *Lewis*, 518 U.S. at 350, internal citations omitted, citing *Johnson v. Avery*, 393 U.S. 483, 484, 489-490 (1969), *Ex parte Hull*, 312 U.S. 546, 547-549 (1941), *Burns v. Ohio*, 360 U.S. 252, 258 (1959), and *Griffin v. Illinois*, 351 U.S. 12, 19 (1956). However, in *Lewis* this Court soundly rejected any suggestion that prison officials are required to assist inmates in presenting effective legal claims: "To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires." *Lewis*, 518 U.S. at 354.

The Ninth Circuit's *en banc* decision here is entirely inconsistent with *Lewis*, because it focuses solely on Albino's lack of subjective knowledge of the grievance procedures. App. at 25 ("[I]nmates were not even told of the existence of the Manual."); ("[T]here is nothing in Deputy Kelley's statement indicating that inmates are told that a complaint must be in writing."); App. at 26-27 ("Staff members never told him that complaint forms were 'available for any inmate who requests them.'"); App. at 30 ("Nor was Albino told that he could write a complaint on an ordinary piece of paper and hand it to one of the deputies."). The *en banc* decision does not – and cannot – reference a single portion of the record that reflects interference by Jail officials with any attempt

by Albino to submit a grievance, and the only proffered evidence of interference was rejected by the district court because it was inconsistent with Albino's repeated insistence that he was unaware of the grievance procedure. App. at 99-100, n. 5. Similarly, there is no evidence that Albino was denied access to a law library or legal assistance program as required by *Bounds v. Smith*, 430 U.S. 817 (1977). The *en banc* decision here is incompatible with both the express Congressional purpose behind the PLRA and analogous cases from this Court regarding the right of access to the courts.

The *en banc* decision deepens a circuit split without acknowledging that fact or addressing these contrary authorities. Coupled with the significant public policy concerns raised by a construction of the PLRA that will increase the burden prison litigation imposes on federal courts, while simultaneously removing the ability of the district courts to manage the resulting issues of judicial traffic control, the Ninth Circuit's decision here presents a compelling basis for grant of the Petition.

II. THIS CASE PRESENTS THE OPPORTUNITY FOR THIS COURT TO CONCLUSIVELY ESTABLISH WHAT STANDARD OF REVIEW APPLIES TO A DISTRICT COURT'S FACTUAL FINDINGS ON EXHAUSTION UNDER THE PLRA.

While the *en banc* decision acknowledges that the circuit courts have uniformly applied a clear error standard of review to a district court's factual findings on the issue of administrative exhaustion, it nonetheless refuses to do so in this case. App. at 13-14, citing *Messa v. Goord*, 652 F.3d 305, 308-310 (2d Cir. 2011); *Small*, 728 F.3d 265, 269-271; *Dillon*, 596 F.3d 260, 270-273; *Pavey v. Conley*, 544 F.3d 739, 741-742 (7th Cir. 2008); *Bryant,* 530 F.3d 1368, 1374-1375. Instead, the opinion applies a de novo standard of review because "the district court was explicit in stating that it was deciding a motion for summary judgment." App. at 22. The record confirms that is not the case.

The record establishes that the district court made certain factual findings, including a specific finding against Albino's contention that he attempted to submit a grievance but withdrew it because he was threatened by guards. App. at 99-100, n. 5. The district court rejected this evidence because it contradicted Albino's repeated insistence that he was unaware of the existence of the grievance procedures. Concluding that Albino's lack of awareness of grievance procedures was irrelevant under controlling Supreme Court and circuit court authority, the

district court dismissed Albino's First Amended Complaint without prejudice. App. at 100, see order at App. at 88. Neither of these actions is consistent with a motion for summary judgment under Rule 56.

Regardless of the form of the district court's order, it is beyond dispute that the district court never reached the merits of Albino's claims and expressly declined to dismiss them on the merits. App. at 93. That is entirely consistent with the appropriate procedural approach for the resolution of issues of judicial traffic control like administrative exhaustion. *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 188-190 (1936); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

The *en banc* panel cites no authority for its decision to substitute its weighing of evidence for the district court's, nor could it because controlling authority requires exactly the opposite. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust Fund for Southern California*, 508 U.S. 602, 623 (1993) ("Thus review under the 'clearly erroneous' standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.'"). A reviewing court "oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985). "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de*

novo." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). Additionally, a reviewing court may not selectively consider the record before it to justify a decision that ignores the district court's findings: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the *entire evidence* is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis added).

Even under the new "two-step" procedure articulated by the *en banc* decision here, if there are disputed issues which prevent summary judgment, the district court is then supposed to make factual findings. There is no dispute that the district court here made factual findings, but the Ninth Circuit afforded those findings no deference and instead substituted its judgment for the lower court's.

The decision here creates a disturbing precedent that directly undermines the ability of district courts to perform the judicial traffic control that is central to the express Congressional purpose of the PLRA. And, while this Court need not concern itself with the result of a particular case, the *en banc* panel's explicit refusal to afford the Sheriff any opportunity to present evidence based on a newly articulated interpretation of the PLRA is entirely inconsistent with this Court's guidance regarding *sua sponte* entry of summary judgment. *Fountain v. Filson*, 336 U.S. 681, 683 (1949). The Sheriff has consistently maintained that Albino's lack of awareness of grievance procedures is

irrelevant, and therefore no evidence to refute that lack of awareness is necessary to obtain dismissal under the PLRA. While the Sheriff asserts that this position is correct in light of this Court's construction of the PLRA and consistent with most circuit court authority, fundamental fairness required that the *en banc* panel permit him to respond to Albino's evidence given its contrary construction.

CONCLUSION

The Ninth Circuit's decision *en banc* creates a new exception to the PLRA's administrative exhaustion requirement, *contra* to this Court's explicit directive in *Booth*, 532 U.S. 731. In doing so, the Ninth Circuit has joined the minority in a circuit split, and additionally has muddied the waters regarding the procedure for determining exhaustion and the standard by which a district court's determination should be reviewed. As a result, the gatekeeping, traffic-control function of the district courts which Congress intended when it enacted the requirement will be severely frustrated, as any prisoner can now claim a lack of subjective awareness of an otherwise available grievance procedure in order to excuse his failure to exhaust.

For the foregoing reasons, Petitioner prays for a writ of certiorari to issue to the Court of Appeals for the Ninth Circuit.

DATED: July 2, 2014

Respectfully submitted,

COLLINS COLLINS MUIR + STEWART LLP

MELINDA W. EBELHAR
CATHERINE M. MATHERS
CHRISTIAN E. FOY NAGY
JAMES C. JARDIN

Attorneys for Petitioner
The Los Angeles County Sheriff

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUAN ROBERTO ALBINO, *Plaintiff-Appellant*, v. LEE BACA, Los Angeles County Sheriff; LOS ANGELES, COUNTY, *Defendants-Appellees.*	No. 10-55702 D.C. No. 2:08-cv-03790-GAF-MLG OPINION

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued and Submitted En Banc
June 27, 2013 – Seattle, Washington

Filed April 3, 2014

Before: Alex Kozinski, Chief Judge, and
Stephen Reinhardt, Kim McLane Wardlaw,
William A. Fletcher, Richard C. Tallman,
Jay S. Bybee, Milan D. Smith, Jr., Sandra S. Ikuta,
N. Randy Smith, Mary H. Murguia and
Paul J. Watford, Circuit Judges.

Opinion by Judge W. Fletcher;
Dissent by Judge N.R. Smith

COUNSEL

Andrea Renee St. Julian (argued), San Diego, California, for Plaintiff-Appellant.

James C. Jardin (argued), Melinda W. Ebelhar, Catherine M. Mathers, Christian E. Foy Nagy, Collins Collins Muir & Stewart LLP, South Pasadena, California, for Defendants-Appellees.

OPINION

W. FLETCHER, Circuit Judge:

Juan Roberto Albino brought suit against Los Angeles County Sheriff Lee Baca, several Doe defendants, and Los Angeles County, alleging violations of 42 U.S.C. § 1983, as well as several state laws, arising out of injuries Albino suffered while confined in Los Angeles County jail. Albino's claims are subject to the Prison Litigation Reform Act ("PLRA"), which requires that a prisoner challenging prison conditions exhaust available administrative remedies before filing suit. 42 U.S.C. § 1997e(a). Defendants moved for summary judgment based, inter alia, on Albino's alleged failure to exhaust. The district court granted the motion, dismissing Albino's federal claims without prejudice. The court also dismissed his state claims without prejudice. *See* 28 U.S.C. § 1367(c). We reverse.

First, although it may be more a matter of a change of nomenclature than of practical operation, we overrule *Wyatt v. Terhune,* 315 F.3d 1108, 1119 (9th Cir. 2003), in which we held that a failure to exhaust under § 1997e(a) should be raised by a defendant as an "unenumerated Rule 12(b) motion." We conclude that a failure to exhaust is more appropriately handled

under the framework of the existing rules than under an "unenumerated" (that is, non-existent) rule. Failure to exhaust under the PLRA is "an affirmative defense the defendant must plead and prove." *Jones v. Bock,* 549 U.S. 199, 204, 216 (2007). In the rare event that a failure to exhaust is clear on the face of the complaint, a defendant may move for dismissal under Rule 12(b)(6). Otherwise, defendants must produce evidence proving failure to exhaust in order to carry their burden. If undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. If material facts are disputed, summary judgment should be denied, and the district judge rather than a jury should determine the facts.

Second, we hold that Albino has satisfied the exhaustion requirement of § 1997e(a). Defendants have failed to prove that administrative remedies were available at the jail where Albino was confined. Because no administrative remedies were available, he is excused from any obligation to exhaust under § 1997e(a). We therefore direct the district court to grant summary judgment to Albino on the issue of exhaustion.

I. Background and Proceedings Below

Albino proceeded pro se in the district court. The following narrative is based largely on the evidence submitted to the district court by both parties. It is based partly on allegations in Albino's verified first

amended complaint that are uncontradicted by evidence in the record. Except where otherwise noted, the narrative is based on undisputed evidence.

Glendale Police officers arrested Albino for rape under California Penal Code § 261(a)(1). He was not arrested for a sexual crime against a minor. After his arrest, Albino was brought to the Los Angeles County Men's Central Jail. He alleges that when he arrived at the jail on May 11, 2006, deputies refused to place him in protective custody. Instead, they placed him in the general population of a high-medium security housing unit. Albino is 5 feet 3 inches tall. At the time, he weighed 123 pounds.

Albino alleges in his complaint that on June 16, 2006, an inmate approached him and said, "[T]he deputy said you committed sex acts with children." A group of several inmates then attacked Albino, beating him unconscious, cutting him severely, and raping him. Albino reported the assault to Deputy Jaquez, who wrote up an "Incident Report" dated June 17. Despite the one-day disparity in dates, it is clear that Albino's complaint and Deputy Jaquez's report deal with the same incident. Deputy Jaquez wrote that Albino "was holding a white piece of cloth over his right jaw and was bleeding profusely. He also had multiple cuts and redness throughout his entire facial area and he complained of pain to his face." Albino had "two lacerations approximately 6 [inches] in length across the side of his right cheek. . . . He also had multiple cuts and redness around his right eye." The lacerations were deep cuts in the form of a cross.

Albino also suffered broken teeth, broken ribs, a broken shoulder, and damage to his hip.

Deputy Jaquez wrote in his report that Albino recounted to him that he had told several inmates that he was in jail for rape, but that it had been his partner who had raped a sixteen-year-old girl. Deputy Jaquez identified Albino's attackers, including an inmate named Rodriguez. Deputy Jaquez wrote that he spoke to Rodriguez, who admitted to having been one of those who had beaten Albino. Deputy Jaquez wrote that Rodriguez told him that "Albino . . . came in last night bragging about that he had raped a girl."

Albino was taken to the hospital for treatment. When he returned from the hospital, Albino again asked to be placed in protective custody. He states in a declaration, "After the first attack, I pleaded with many staff members for help but the only thing anyone told me was; it is your attorneys [sic] job to protect me." Albino states in another declaration:

> Of the ap[p]rox. 10 or so times plaintiff begged defendant custodial deputies to be placed in segregation or for the[m] to help me, defendants[ ] responded that it was my attorney's job to protect me. As these were sworn peace officers, I was of the belief that I had to seek my trial attorney's help.

Despite Albino's pleas, deputies did not place him in protective custody upon his return from the hospital. Instead, they placed him in a different general-population housing unit. Sometime in mid-July, two

inmates in the new unit attacked Albino, punching and kicking him "numerous times." Albino reported this second attack to Deputy Espinosa. This time Albino did not identify his attackers. In his "Incident Report," Deputy Espinosa wrote, "Swelling under his left eye, swelling to his left side of his forehead, and swelling to his right temple." Albino was taken to the jail clinic rather than the hospital. He alleges in his complaint that some of the wounds from the first attack had been opened, and that his treatment at the clinic consisted only of pain medication.

Albino alleges in his complaint that after the second attack he again requested protective custody, but a deputy told him it "wasn't needed." The deputy instead placed him in yet a third general-population housing unit. In September 2006, Albino was assaulted a third time. He was taken to the jail clinic. He alleges that he suffered "damage to old wounds, including plaintiff's right eye."

As a result of these attacks, Albino has suffered severe nerve damage on the right side of his face. He has also lost hearing in his right ear and most of the vision in his right eye. He now uses a hearing aid and a cane for the blind. He states in his declaration:

> My trial attorney had to ask the court for 3 court orders to get me any medical care for my injuries, and dental care. It was not until I arrived at CDCR [California Department of Corrections and Rehabilitation] that [I received] a proper Examination, [and] the

> doctor told me it was too late to repair the nerve damage.

Albino states in a declaration filed in the district court that he was given no orientation when he was brought to the jail, that he never saw a manual describing complaint procedures, that he never saw complaint forms or a complaint box, and that when he complained and asked for help he was consistently told by deputies at the jail that he should talk to his attorney.

Defendants provided a declaration by Deputy Jason Ford, to which he attaches a copy of "Custody Division Manual § 5-12/010.00 'Inmate Complaints.'" They also provided a declaration in which Deputy Kevin Kelley describes the complaint process in the jail, describes complaint boxes and their placement, and recounts the manner in which complaint forms are made available.

Defendants moved for summary judgment. They contended that Albino had failed to exhaust his remedies at the jail system prior to filing suit, as required by 42 U.S.C. § 1997e(a). In the alternative, they contended on the merits that Albino had failed to show any constitutional violations. Albino did not cross-move for summary judgment.

In his Report and Recommendation, the magistrate judge recommended granting summary judgment to defendants on the ground that defendants had "an accessible administrative procedure for seeking redress of grievances," and that Albino did not

exhaust his remedies under that procedure. The district court accepted the recommendation of the magistrate judge and granted summary judgment to defendants. The court dismissed Albino's complaint without prejudice for failure to exhaust. Neither the magistrate judge nor the district court reached the merits of Albino's claims.

A three judge panel of this court affirmed, treating the defendants' summary judgment motion with respect to exhaustion as an unenumerated Rule 12(b) motion. *Albino v. Baca,* 697 F.3d 1023, 1029-30 (9th Cir. 2012). We vacated the panel decision and granted rehearing en banc. *Albino v. Baca,* 709 F.3d 994 (9th Cir. 2013). We now reverse.

II. Standard of Review

We review de novo a district court's grant of summary judgment. *Whitman v. Mineta,* 541 F.3d 929, 931 (9th Cir. 2008). A grant of summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In our de novo review of a district court's summary judgment ruling, we view the evidence in the light most favorable to the non-moving party. *San Diego Police Officers' Ass'n v. San Diego City Emps.' Ret. Sys.,* 568 F.3d 725, 733 (9th Cir. 2009).

III. Discussion

We decide two questions. First, we hold that an unenumerated motion under Rule 12(b) is not the appropriate procedural device for pretrial determination of whether administrative remedies have been exhausted under the PLRA. *See* 42 U.S.C. § 1997e(a). To the extent evidence in the record permits, the appropriate device is a motion for summary judgment under Rule 56. If summary judgment is not appropriate, the district judge may decide disputed questions of fact in a preliminary proceeding. Second, we hold that defendants are not entitled to summary judgment that Albino failed to exhaust available administrative remedies. Further, we hold *sua sponte* that Albino is entitled to summary judgment that there were no available administrative remedies at the jail within the meaning of the PLRA, and that he therefore satisfied § 1997e(a)'s exhaustion requirement.

A. Summary Judgment or Unenumerated Rule 12(b)

In holding that the proper procedural device for defendants to raise an exhaustion defense is an unenumerated Rule 12(b) motion, the panel followed our decision in *Wyatt v. Terhune,* 315 F.3d 1108 (9th Cir. 2003). *Wyatt* is a PLRA prison-conditions case in which we held that "the failure to exhaust nonjudicial remedies that are not jurisdictional should be treated as a matter in abatement, which is subject to an unenumerated Rule 12(b) motion rather than a motion for summary judgment." *Id.* at 1119. After we decided

Wyatt, the Supreme Court held in *Jones v. Bock,* 549 U.S. 199 (2007), that exhaustion under § 1997e(a) is an affirmative defense that must be pled and proved by a defendant. *Id.* at 216. In reaching this conclusion, the Court wrote that "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Id.* at 212. "[T]he PLRA's screening requirement does not – explicitly or implicitly – justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself." *Id.* at 214.

The Court in *Jones* cited our decision in *Wyatt* approvingly for its conclusion that PLRA exhaustion is an affirmative defense, but it did not comment on our use of an unenumerated Rule 12(b) motion for determining whether administrative remedies had been exhausted. *Id.* at 204 n.2. While *Wyatt*'s use of an unenumerated Rule 12(b) motion is consistent with PLRA's purpose of limiting prisoner litigation by screening cases at the outset of the litigation, *see id.* at 202, it is in tension with the Court's admonition in *Jones* against deviating from "the usual practice under the Federal Rules." *Id.* at 212. The very phrase we used in *Wyatt* – "an unenumerated Rule 12(b) motion" – is a concession that such a motion is not contemplated by the rules. We conclude that *Wyatt* is no longer good law after *Jones* (if it ever was good law), and that we should treat an exhaustion defense under the PLRA within the framework of the Federal Rules of Civil Procedure.

In a few cases, a prisoner's failure to exhaust may be clear from the face of the complaint. However, such cases will be rare because a plaintiff is not required to say anything about exhaustion in his complaint. As the Court wrote in *Jones,* "failure to exhaust is an affirmative defense under the PLRA, and . . . inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Id.* at 216. But in those rare cases where a failure to exhaust is clear from the face of the complaint, a defendant may successfully move to dismiss under Rule 12(b)(6) for failure to state a claim. *See id.* at 215-16; *Scott v. Kuhlmann,* 746 F.2d 1377, 1378 (9th Cir. 1984) (per curiam) ("[A]ffirmative defenses may not be raised by motion to dismiss, but this is not true when, as here, the defense raises no disputed issues of fact." (citation omitted)); *Aquilar-Avellaveda v. Terrell,* 478 F.3d 1223, 1225 (10th Cir. 2007) ("[O]nly in rare cases will a district court be able to conclude from the face of the complaint that a prisoner has not exhausted his administrative remedies and that he is without a valid excuse.").

In a typical PLRA case, a defendant will have to present probative evidence – in the words of *Jones,* to "plead and prove" – that the prisoner has failed to exhaust available administrative remedies under § 1997e(a). *Jones,* 549 U.S. at 204. The procedure under which a defendant must do so is provided by the Federal Rules. The general outlines of that procedure, applicable to all civil cases, are well understood. If the evidence permits, the defendant may move for

summary judgment under Rule 56. If there is a genuine dispute about material facts, summary judgment will not be granted.

The Court in *Jones* cautioned that we should not alter the ordinary procedural practices and rules in order to serve the policy aims of the PLRA. *Id.* at 214. At the same time, however, the Court recognized that "the PLRA mandates early judicial screening of prisoner complaints and requires prisoners to exhaust prison grievance procedures before filing suit." *Id.* at 202. A rule requiring exhaustion of prescribed administrative remedies "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan,* 503 U.S. 140, 145 (1992), *superseded by statute on other grounds as stated in Booth v. Churner,* 532 U.S. 731, 740-41 (2001). Courts have exercised substantial discretion in fashioning exhaustion rules, though "appropriate deference to Congress' power to prescribe the basic procedural scheme . . . requires fashioning of exhaustion principles in a manner consistent with congressional intent." *Id.* at 144.

The Court recognized in *Jones* that the exhaustion question in PLRA cases should be decided as early as feasible. We conclude, consistent with *Jones* as well as with non-PLRA cases, that exhaustion is analogous to subject-matter jurisdiction, personal jurisdiction, venue, and abstention, in that all these matters are typically decided at the outset of the litigation. There are, of course, differences. For example, a defect in subject-matter jurisdiction, unlike

a failure to exhaust, is a nonwaivable defect. *See Detabali v. St. Luke's Hosp.,* 482 F.3d 1199, 1202 (9th Cir. 2007). And while personal jurisdiction and venue are waivable defects, they are unlike a failure to exhaust in that they merely concern a choice among courts; they do not concern a prerequisite to bringing suit in any court. But, broadly speaking, subject-matter jurisdiction, personal jurisdiction, venue, abstention, and exhaustion are all issues of "judicial administration" that are appropriately decided early in the proceeding. *See, e.g., Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-51 (1938) (referring to the "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted"). In the words of the Seventh Circuit, these are all issues of "judicial traffic control." *Pavey v. Conley,* 544 F.3d 739, 741 (7th Cir. 2008).

For the guidance of the district courts in this circuit, we describe the procedure that we believe will best achieve the purposes of the exhaustion doctrine in PLRA cases, consistent with the Federal Rules. The procedure we describe is essentially that followed in PLRA cases in the Second, Third, Fifth, and Seventh Circuits. *See Messa v. Goord,* 652 F.3d 305, 308-10 (2d Cir. 2011) (per curiam) (court denied defendants' motion for summary judgment for failure to exhaust; court rather than jury resolved disputed questions of fact); *Small v. Camden Cnty.,* 728 F.3d 265, 269-71 (3d Cir. 2013) (same); *Dillon v. Rogers,*

596 F.3d 260, 270-73 (5th Cir. 2010) (same); *Pavey,* 544 F.3d at 741-42 (court rather than jury should resolve disputed questions of fact). All four of these circuits use a motion for summary judgment, as opposed to an unenumerated Rule 12(b) motion, to decide exhaustion, and all four allow resolution by the judge of disputed factual issues. Now that we have joined these circuits, only the Eleventh Circuit employs an unenumerated Rule 12(b) motion to decide exhaustion of non-judicial remedies in PLRA cases. *See Bryant v. Rich,* 530 F.3d 1368, 1374-75 (11th Cir. 2008).

Exhaustion should be decided, if feasible, before reaching the merits of a prisoner's claim. If discovery is appropriate, the district court may in its discretion limit discovery to evidence concerning exhaustion, leaving until later – if it becomes necessary – discovery directed to the merits of the suit. *See Pavey,* 544 F.3d at 742. A summary judgment motion made by either party may be, but need not be, directed solely to the issue of exhaustion. If a motion for summary judgment is denied, disputed factual questions relevant to exhaustion should be decided by the judge, in the same manner a judge rather than a jury decides disputed factual questions relevant to jurisdiction and venue. *See McNutt v. Gen. Motors Acceptance Corp.,* 298 U.S. 178, 188-90 (1936) (subject-matter jurisdiction); *Murphy v. Schneider Nat'l, Inc.,* 362 F.3d 1133, 1139-40 (9th Cir. 2004) (venue); *Lake v. Lake,* 817 F.2d 1416, 1420 (9th Cir. 1987) (personal jurisdiction). We reiterate that, if feasible, disputed

factual questions relevant to exhaustion should be decided at the very beginning of the litigation.

If the district judge holds that the prisoner has exhausted available administrative remedies, that administrative remedies are not available, or that a prisoner's failure to exhaust available remedies should be excused, the case may proceed to the merits. On appeal, we will review the judge's legal rulings on exhaustion de novo, but we will accept the judge's factual findings on disputed issues of material fact unless they are clearly erroneous. *See Akhtar v. Mesa,* 698 F.3d 1202, 1209 (9th Cir. 2012); *Dillon,* 596 F.3d at 273. We agree with the Seventh Circuit that, if a factual finding on a disputed question is relevant both to exhaustion and to the merits, a judge's finding made in the course of deciding exhaustion is not binding on a jury deciding the merits of the suit. *See Pavey,* 544 F.3d at 742; *cf. Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 508-11 (1959).

We recognize that our use of unenumerated Rule 12(b) motions to decide exhaustion questions has not been limited to PLRA cases. *See, e.g., Payne v. Peninsula Sch. Dist.,* 653 F.3d 863, 881 (9th Cir. 2011) (en banc) (relying on *Wyatt* in describing procedures to be followed in deciding whether non-judicial remedies under the Individuals with Disabilities Education Act had been exhausted); *Inlandboatmens Union of the Pac. v. Dutra Grp.,* 279 F.3d 1075, 1078 n.2 (9th Cir. 2002) (exhaustion of non judicial remedies under the Labor Management Relations Act ("LMRA")); *Ritza v. Int'l Longshoremen's & Warehousemen's Union,* 837

F.2d 365, 369 (9th Cir. 1988) (per curiam) (LMRA); *Stauffer Chem. Co. v. FDA,* 670 F.2d 106, 108 (9th Cir. 1982) (exhaustion of non-judicial remedies with the Food and Drug Administration); *Studio Elec. Technicians Local 728 v. Int'l Photographers of Motion Picture Indus., Local 659,* 598 F.2d 551, 552 n.2 (9th Cir. 1979) (exhaustion of non-judicial remedies under the LMRA). In light of the decisions of our sister circuits, and of our decision in this case, we believe that the basic procedure outlined here – under which a party may move for summary judgment on the exhaustion question, followed, if necessary, by a decision by the court on disputed questions of material fact relevant to exhaustion – is appropriate in these other contexts as well.

B. Summary Judgment on Exhaustion

The PLRA mandates that inmates exhaust all available administrative remedies before filing "any suit challenging prison conditions," including, but not limited to, suits under § 1983. *Woodford v. Ngo,* 548 U.S. 81, 85 (2006). An inmate is required to exhaust only *available* remedies. *Booth,* 532 U.S. at 736; *Brown v. Valoff,* 422 F.3d 926, 936-37 (9th Cir. 2005). To be available, a remedy must be available "as a practical matter"; it must be "capable of use; at hand." *Id.* at 937 (quoting *Brown v. Croak,* 312 F.3d 109, 113 (3d Cir. 2002)).

The Court made clear in *Jones* that the defendant in a PLRA case must plead and prove exhaustion as an affirmative defense. In determining the exhaustion

burdens applicable to PLRA cases, the three judge panel in this case cited the exhaustion burdens applicable to claims under the Torture Victim Protection Act ("TVPA"). *Albino v. Baca,* 697 F.3d 1023, 1031 (9th Cir. 2012) (citing *Hilao v. Estate of Marcos,* 103 F.3d 767, 778 n.5 (9th Cir. 1996)). We agree with the three judge panel that the burdens outlined in *Hilao* should provide the template for the burdens here. We wrote in *Hilao*:

> The legislature's intended operation of the exhaustion provision [of the TVPA] is set forth with remarkable clarity in the Senate Report:
>
> > . . . .
> >
> > . . . [T]he interpretation of [the exhaustion provision of the TVPA] should be informed by general principles of international law. The procedural practice of international human rights tribunals generally holds that *the respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use. Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.*
>
> S. Rep. No. 249 at 9-10.

Hilao, 103 F.3d at 778 n.5 (emphasis added).

Transposing *Hilao*'s approach onto the PLRA, we hold that the defendant's burden is to prove that there was an available administrative remedy, and that the prisoner did not exhaust that available remedy. *See id.* ("[T]he respondent . . . must show that domestic remedies exist that the claimant did not use."). Once the defendant has carried that burden, the prisoner has the burden of production. That is, the burden shifts to the prisoner to come forward with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him. *See id.* ("[T]he burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile."). However, as required by *Jones,* the ultimate burden of proof remains with the defendant.

Our sister circuits generally agree with this description of the respective burdens. For example, in *Westefer v. Snyder,* 422 F.3d 570 (7th Cir. 2005), the Seventh Circuit wrote:

> [A]s this case comes to us, we find the record hopelessly unclear . . . whether any administrative remedy remained open for the prisoners to challenge their transfers through the grievance process. . . . IDOC failed to meet its burden of proving that [the prisoners] failed to exhaust an *available* administrative remedy. . . .

Id. at 580 (internal quotation marks omitted). In *Tuckel v. Grover,* 660 F.3d 1249 (10th Cir. 2011), the

Tenth Circuit similarly put the burden on defendants to prove that the prisoner did not use existing and generally available administrative remedies. Once that was proved, however, "the onus [fell] on the plaintiff to show that [these] remedies were unavailable to him as a result of intimidation by prison officials." *Id.* at 1254; *see also Turner v. Burnside,* 541 F.3d 1077, 1082 (11th Cir. 2008); *Foulk v. Charrier,* 262 F.3d 687, 697 (8th Cir. 2001).

We have considered in several PLRA cases whether an administrative remedy was "available." In *Nunez v. Duncan,* 591 F.3d 1217 (9th Cir. 2010), we held that where a prison warden incorrectly implied that an inmate needed access to a nearly unobtainable prison policy in order to bring a timely administrative appeal, "the Warden's mistake rendered Nunez's administrative remedies effectively unavailable." *Id.* at 1226. In *Sapp v. Kimbrell,* 623 F.3d 813 (9th Cir. 2010), we held that where prison officials declined to reach the merits of a particular grievance "for reasons inconsistent with or unsupported by applicable regulations," administrative remedies were "effectively unavailable." *Id.* at 823-24. In *Marella v. Terhune,* 568 F.3d 1024 (9th Cir. 2009) (per curiam), we reversed a district court's dismissal of a PLRA case for failure to exhaust because the inmate did not have access to the necessary grievance forms within the prison's time limits for filing a grievance. *Id.* at 1027-28. We also noted that Marella was not required to exhaust a remedy that he had been reliably informed was not available to him. *Id.* at 1027.

In the case now before us, defendants conducted all the discovery that they considered necessary, including taking Albino's deposition. They then moved for summary judgment, even though not required to do so under our then-governing precedent, contending that Albino failed to exhaust available administrative remedies. In the alternative, if Albino had successfully exhausted, they contended that Albino's claims failed on the merits. The magistrate judge recommended, and the district court granted, summary judgment to the defendants on the issue of exhaustion. The district court did not reach the merits of Albino's claims.

We hold that the district court erred in granting summary judgment to defendants on the issue of exhaustion. We further hold that Albino is entitled to summary judgment on that issue.

We discuss in a moment our reasons for so holding, but we first address the contention of our dissenting colleagues that we have improperly "ignore[d] the 'clearly erroneous' standard of review in reviewing the district court's findings." Diss. Op. at 30-31. Our dissenting colleagues misunderstand the procedural posture of this case. The district court granted summary judgment to the defendants. It is black-letter law that in granting summary judgment a district court cannot resolve disputed questions of material fact; rather, that court must view all of the facts in the record in the light most favorable to the non-moving party and rule, as a matter of law, based on those facts. *See Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 247-50 (1986); *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962) (per curiam). On appeal, we review de novo a district court's ruling on a summary judgment motion. *Whitman,* 541 F.3d at 931. Like the district court, we cannot resolve any disputed questions of material fact; rather, like the district court, we must view all of the facts in the light most favorable to the non-moving party and rule, as a matter of law, based on those facts. *San Diego Police Officers' Ass'n,* 568 F.3d at 733.

Our dissenting colleagues misread our decision in *Morton v. Hall*, 599 F.3d 942 (9th Cir. 2010). Diss. Op. at 34. The district court in that case conducted an evidentiary hearing on the question whether Morton, a prisoner, had exhausted his administrative remedies. *Id.* at 944. Defendants put on two witnesses who testified about administrative procedures at the prison, and who testified that they had found no evidence that Morton had ever filed a grievance. Morton contended that he had exhausted his administrative remedies, but he put on no witnesses of his own. *Id.* We wrote, "The district court found that Morton had failed to exhaust administrative remedies on his § 1983 claims . . . and dismissed those claims without prejudice." *Id.* We concluded, "On this record, the district court did not commit clear error by finding that Morton had failed to exhaust administrative remedies on his § 1983 assault claim." *Id.* at 945. Contrary to the contention of our dissenting colleagues, there is no indication in *Morton* that we thought we were reviewing a summary judgment by

the district court on issue of exhaustion. And there is not so much as a hint in *Morton* that we thought we were changing our summary judgment procedure, such that we were required to review for clear error the district court's understanding, on summary judgment, of the facts viewed in the light most favorable to the non-moving party.

Our dissenting colleagues contend that in this case we must review for clear error the district court's understanding of the facts because that court "did decide disputed factual issues." Diss. Op. at 34. We disagree that we must review for clear error the district court's understanding of the facts. The district court was explicit in stating that it was deciding a motion for summary judgment. Because the district court was deciding a motion for summary judgment, it could not decide disputed issues of material fact; and because it could not decide any disputed issue of material fact, we are not required (or even allowed) to review its understanding of the facts for clear error.

Defendants introduced two declarations specifically directed to exhaustion. First, Deputy Ford provided a declaration to which he attached a copy of Custody Division Manual § 5-12/010.00, titled "Inmate Complaints." This portion of the Manual is four and a half pages long, single-spaced. It sets out in some detail the administrative procedures to be followed in processing prisoner complaints. Among other things, the Manual provides:

> Each unit commander shall designate a supervisor, at the permanent rank of sergeant or above, to assume the collateral duty of Inmate Complaint Coordinator. The unit commander shall also ensure that each housing unit within the facility has an adequate supply of Inmate Complaint Forms available, and that the inmates have unrestricted access to the forms. All inmates are permitted to report a complaint, whether or not it is written on the specified form. Each housing area shall have a locked repository accessible to inmates, where they are allowed to deposit their completed forms without interference.

Second, Deputy Kelley provided a declaration in which he states:

> I have personal knowledge of the policies and procedures in place regarding inmate complaints/grievances at Men's Central Jail as of the time of the incidents alleged in the First Amended Complaint.
>
> At Men's Central Jail, inmates are given access to Inmate Complaint Forms to fill out, or they may submit a written complaint of any kind, to address any number of issues, including but not limited to personnel conduct, medical care, classification actions and conditions of confinement. *The Inmate Complaint Forms are available at various locations within the facility, and an adequate supply is maintained and available for any inmate who requests them.*

> Inmates may place their complaints in a locked complaint box, or give them directly to the staff.

(Emphasis added.)

For his part, Albino provided a declaration in which he states:

> At no time during my stay was I interviewed by jail staff, or given any type of orientation. . . .
>
> At no time during my stay at the jail did I see a LASD Custody Division Manual § 5-12/010.00, or if I did it was not in Spanish where I could read and understand what it was. I have never seen or heard of a LASD Jail complaint form.
>
> . . . .
>
> I never seen [sic] a complaint box, and no one told me of such a complaint box.
>
> . . . After the first attack, I pleaded with many staff members for help but the only thing anyone told me was; it is your attorney[']s job to protect me.
>
> . . . .
>
> During the 10 or so times I begged officers to be placed in segregation. Not one officer or staff member handed me a complaint form or a rule book and told me to fill out the form and they would put it in a box. All any of the staff told me was my public defender[']s job to protect me. My public defender

> also never informed me of a LASD complaint form.

The Custody Division Manual, with its section dedicated to "Inmate Complaints," is of little help to defendants. Defendants have conceded that the Manual was a personnel manual that was available only to jail employees. Prisoners, including Albino, were not given access to the Manual. Indeed, so far as the record shows, inmates were not even told of the existence of the Manual.

Deputy Kelley's declaration is hardly more helpful. He states that an "adequate supply" of Inmate Complaint Forms is "maintained," and that they are "available for *any inmate who requests them*" (emphasis added). The clear implication of Deputy Kelley's statement is that the forms are available only on request; that is, they are not placed where inmates may see and take them on their own. Further, there is nothing in Deputy Kelley's statement indicating that inmates are told that a complaint must be in writing, or that a written complaint, even if not on an official form, will be considered. Finally, Deputy Kelley declares that inmates may place their complaints in a "locked complaint box," but he does not describe the box or its location in the unit. Nor, indeed, does he say that the box is labeled in any way to indicate its function. When pressed at oral argument, defendants' attorney rested on Deputy Kelley's declaration, even though he was obliged to concede that Deputy Kelley did not say where the complaint

box was placed or whether there was anything written on the outside of the box.

Thus, so far as the record shows, there is a personnel manual describing a complaint process, but the manual is not available, or even known, to the prisoners. There are also "locked complaint boxes" located somewhere in the prison where, we may infer from Deputy Kelley's declaration, prisoners have access to them. But there is nothing in the record to indicate that the boxes have anything written on them to signify their purpose, or that prisoners are otherwise advised of their purpose or location. Deputy Kelley states that a written complaint may be "give[n] directly to staff," but there is nothing in the record to indicate that inmates are told that a complaint must be in writing in order to be considered. Finally, we may infer from Deputy Kelley's declaration that complaint forms are available only if a prisoner knows to request them.

Albino declares, without contradiction, the following. He declares that he was never given any orientation at the jail, during which he could have been informed of a complaint process. He also declares that he has never seen the jail's personnel manual, a complaint box, or a complaint form. Finally, he declares that he repeatedly sought, and was denied, help from the prison staff. Specifically, he declares that he repeatedly complained "directly to the staff" (to use Deputy Kelley's words) that he needed to be placed in protective custody. Staff members never told him that complaint forms were "available

for any inmate who requests them" (again to use Deputy Kelley's words), and they never construed Albino's complaints as requests for such forms. Nor did staff members tell Albino that he could put in a complaint box, or give directly to them, a written complaint, even if not on an official form. Instead, staff members repeatedly told Albino that he should seek relief by talking to his criminal defense attorney.

As we noted above, failure to exhaust administrative remedies is an affirmative defense that the defendant must plead and prove in a PLRA case. *Jones,* 549 U.S. at 212. Viewing all of the evidence in the light most favorable to Albino, we conclude as a matter of law that defendants have failed to carry their initial burden of proving their affirmative defense that there was an available administrative remedy that Albino failed to exhaust. We therefore reverse the district court's grant of summary judgment to defendants on the issue of exhaustion.

Albino, acting pro se, did not make a cross-motion for summary judgment. However, we conclude he would have succeeded had he made such a motion. We therefore direct *sua sponte* that summary judgment be granted to Albino on the issue of exhaustion.

We have long recognized that, where the party moving for summary judgment has had a full and fair opportunity to prove its case, but has not succeeded in doing so, a court may enter summary judgment *sua sponte* for the nonmoving party. *See, e.g., Cool Fuel, Inc. v. Connett,* 685 F.2d 309, 311 (9th Cir.

1982); *see also Gospel Missions of Am. v. City of Los Angeles,* 328 F.3d 548, 553 (9th Cir. 2003) ("Even when there has been no cross-motion for summary judgment, a district court may enter summary judgment sua sponte against a moving party if the losing party has had a 'full and fair opportunity to ventilate the issues involved in the matter.'") (quoting *Cool Fuel, Inc.,* 685 F.2d at 312). The Supreme Court implicitly recognized this authority in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), noting that "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte,* so long as the losing party was on notice that she had to come forward with all of her evidence." *Id.* at 326. The authority to grant summary judgment *sua sponte* was made explicit in the current version of Rule 56, effective as of December 2010. Fed. R. Civ. P. 56(f).

If the record is sufficiently developed to permit the trial court to consider summary judgment, and if the court finds that when viewing the evidence in the light most favorable to a moving party the movant has not shown a genuine dispute of fact on the issue of exhaustion, it may be appropriate for the district court to grant summary judgment *sua sponte* for the nonmovant on this issue. *See* 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2720, at 351-52 (3d ed. 1998) ("[T]he practice of allowing summary judgment to be entered for the nonmoving party in the absence of a formal cross-motion is appropriate. It is in keeping with the objective of Rule 56 to expedite the disposition of

cases. . . ."). Before *sua sponte* summary judgment against a party is proper, that party "must be given reasonable notice that the sufficiency of his or her claim will be in issue: Reasonable notice implies adequate time to develop the facts on which the litigant will depend to oppose summary judgment." *Buckingham v. United States,* 998 F.2d 735, 742 (9th Cir. 1993) (citation and internal quotation marks omitted). Similarly, in *Kassbaum v. Steppenwolf Productions, Inc.,* 236 F.3d 487 (9th Cir. 2000), we noted that "if a court concludes that a non-moving party is entitled to judgment, 'great care must be exercised to assure that the original movant has had an adequate opportunity to show that there is a genuine issue and that his [or her] opponent is not entitled to judgment as a matter of law.'" *Id.* at 494 (quoting *Ramsey v. Coughlin,* 94 F.3d 71, 74 (2d Cir. 1996)). We further noted that "we should not reverse a summary judgment and order judgment for a non-moving party based on an issue that the movant had no opportunity to dispute in the district court." *Id.* at 495.

We conclude that the concerns expressed in *Buckingham* and *Kassbaum* have been satisfied in a case such as this one, where, after having had a full opportunity to gather evidence, a defendant moves for summary judgment based on a failure to exhaust under the PLRA. As the movants for summary judgment in this case, defendants were on notice of the need to come forward with all their evidence in support of this motion, and they had every incentive to do so. Defendants had ample opportunity to conduct

discovery and to provide evidence to carry their burden of proof that administrative remedies were available. There is nothing in the record to suggest that defendants' discovery with respect to exhaustion was curtailed in any way. Indeed, most of the relevant evidence was within their knowledge and control. In other words, defendants "had a full and fair opportunity to ventilate the issues involved." *Cool Fuel, Inc.,* 685 F.2d at 312.

Viewing the evidence in the light most favorable to defendants, defendants have failed to show a genuine dispute as to whether administrative remedies in the jail were available. Albino was beaten several times and repeatedly complained orally to deputies in the jail, asking repeatedly to be placed in protective custody. The jail had a manual describing a procedure for handling inmate complaints, but this manual was for staff use only and was not made available to inmates. An "adequate supply" of Inmate Complaint Forms was kept "at various locations" within the jail. But such forms had to be requested by an inmate and were never provided to Albino, despite his repeated complaints. Nor was Albino told that he could write a complaint on an ordinary piece of paper and hand it to one of the deputies. Instead, Albino was told that it was his criminal defense attorney's job to protect him from attacks in the jail. In these circumstances, we conclude as a matter of law that defendants have not carried their burden of proving that the jail provided an "available" administrative remedy.

Conclusion

We reverse the district court's grant of summary judgment for defendants and remand with instructions to enter summary judgment for Albino on the issue of exhaustion.

REVERSED and **REMANDED**.

N.R. SMITH, Circuit Judge, joined by TALLMAN and IKUTA, Circuit Judges, dissenting:

Albino is a sympathetic plaintiff. However, that fact should not excuse Albino from his duty to exhaust available administrative remedies, while other sympathetic plaintiffs are required to exhaust.

The Prison Litigation Reform Act of 1996 (PLRA) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "Available" means "capable of use for the accomplishment of a purpose," and that which "is accessible or may be obtained." *Booth v. Churner,* 532 U.S. 731, 737 (2001) (quoting Webster's Third New International Dictionary 150 (1993)). Recently, the Supreme Court instructed us to adhere closely to the plain language of the statute and not interpolate our policy concerns into the statute. *Jones v. Bock,* 549 U.S. 199, 212, 216-17 (2007).

Here, the district court found administrative remedies that the County of Los Angeles offered in the jail were "capable of use" and could be obtained. Therefore, Albino had the obligation to exhaust these remedies before he could bring an action. The majority excuses Albino from that duty and instead places an affirmative duty on prison officials to inform inmates about the administrative remedies available. Nothing in the plain language of the PLRA even suggests that prison officials have the duties that the majority places upon them today. In other words, in order to afford relief to a sympathetic plaintiff, the majority takes extraordinary steps and (1) ignores the "clearly erroneous" standard of review in reviewing the district court's findings; (2) mandates the production of unprecedented evidence in order for the defendants to meet their burden of proof on exhaustion; (3) grants summary judgment to the plaintiff *sua sponte,* without allowing the defendants the opportunity to produce the newly mandated evidence; and (4) changes the procedure by which our courts determine whether a plaintiff has exhausted administrative remedies. Because the majority's interpretation and application of the PLRA in this case deviates from the approach required by the Supreme Court and creates a circuit split with the Eighth and Tenth Circuits, I must dissent.

I.

The majority rightly adopts the burden shifting framework for administrative exhaustion disputes

applied in *Hilao v. Estate of Marcos,* 103 F.3d 767, 778 n.5 (9th Cir. 1996). Maj. op. at 17. When a defendant alleges a failure to exhaust, it "has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that . . . remedies exist that the claimant did not use." Maj. op. at 17. (internal quotation marks omitted). Once a defendant shows that nonexhausted remedies exist, the plaintiff must show that the administrative remedies were unavailable to him. *See Hilao,* 103 F.3d at 778 n.5.

Applying this burden shifting framework to all of the evidence presented by both parties, the magistrate judge found that Baca met his burden. The court supported its conclusion with the following factual findings: (1) a grievance procedure existed at the Jail; (2) the procedure was accessible to inmates; and (3) Albino failed to "avail himself of it." The district court adopted these findings in full. Even Albino concedes that Baca met his burden, as did the dissenting panel member of the three judge panel. *Albino v. Baca,* 697 F.3d 1023, 1039-40 (9th Cir. 2012) (Gilman, J., dissenting) (concluding instead that Albino met his burden of establishing unavailability).

A district court's factual findings mandate our deference. The majority writes, "[D]isputed factual questions relevant to exhaustion should be decided by the judge." Maj. op. at 14. "[W]e will accept the judge's factual findings . . . unless they are clearly erroneous." Maj. op. at 15. This clear error standard "does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced

that it would have decided the case differently. . . . Where there are two permissible views of the evidence, the factfinder's choice between them *cannot be* clearly erroneous." *Anderson v. City of Bessemer City,* 470 U.S. 564, 573-74 (1985) (emphasis added); *see also United States v. Hinkson,* 585 F.3d 1247, 1260 (9th Cir. 2009) ("[O]ur review of a factual finding may *not* look to what we would have done had we been in the trial court's place in the first instance, because that review would be de novo and without deference."). The clear error standard of review "is significantly deferential" to the district court. *Lentini v. Cal. Ctr. for the Arts, Escondido,* 370 F.3d 837, 843 (9th Cir. 2004). As a result, a trial court's factual findings must be upheld when "fall[ing] within any of the permissible choices the court could have made." *Hinkson,* 585 F.3d at 1261.

In declining to defer to the district court's factual findings in this case, however, the majority contends that "[i]t is black-letter law that in granting summary judgment a district court cannot resolve disputed questions of material fact." Maj. op. at 20. Because, in its view, the district court found only undisputed facts, it owes those findings no deference. *See id.* In so holding, it misunderstands the issue of exhaustion and the district court's role as factfinder.

Even when a nonexhaustion allegation is raised in a summary judgment motion, "we review the district court's . . . factual findings for clear error." *Morton v. Hall,* 599 F.3d 942, 945 (9th Cir. 2010). Because the general summary judgment standard is

designed to determine whether there "is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party," *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986), it is inapposite in the exhaustion context. Instead, regardless of the form of the motion, district courts have simply decided the issue, and we have deferred to that finding on appeal. *See, e.g., Morton,* 599 F.3d at 944-46; *Wyatt v. Terhune,* 315 F.3d 1108, 1119-20 (9th Cir. 2003).

This is so whether the findings pertain to disputed or undisputed facts. For instance, in *Morton v. Hall,* the district court ruled in favor of a defendant on its motion for summary judgment because the defendant had "sustained its burden to demonstrate the Plaintiff . . . did not exhaust his administrative appeals as required." 455 F. Supp. 2d 1066, 1075 (C.D. Cal. 2006). The district court's factual findings, upon which it based this decision, were based on evidence not disputed by the plaintiff. *Id.* at 1075. On appeal, this court reviewed the district court's factual findings and concluded that it "did not commit clear error by *finding* that Morton had failed to exhaust administrative remedies on his § 1983 assault claim." *Morton,* 599 F.3d at 945 (emphasis added). Therefore, the majority's contention that the presence of undisputed facts in this case gives it the right to find its own facts or attach differing weight to evidence than did the district court is without merit. The district court's factual findings in deciding an exhaustion issue warrant our deference, whether disputed or undisputed.

Further, the trial court did decide disputed factual issues in this case. For example, "[t]he Court [found], based upon the submissions of the parties, that the Los Angeles County Jail had an accessible administrative procedure for seeking redress of grievances at the time of the incidents" despite Alibno's [sic] allegations that the Jail never informed him of the grievance procedure. Indeed, only "in light of the Court's finding that the jail had available administrative remedies," was it able to conclude that "summary judgment based on failure to exhaust [was] warranted." Thus, the trial court's conclusion that there was no "genuine issue of material fact as to the existence of a grievance procedure at the jail, its accessibility to inmates, or Plaintiff's failure to avail himself of it," was predicated upon its own factual findings to that effect. Regardless of the nature of these findings, this court may only overturn them if they are clearly erroneous. *Morton,* 599 F.3d at 945.

The trial court's factual findings here are supported by ample evidence in the record. Nevertheless, the majority concludes "as a matter of law" that Baca failed to satisfy his burden of proving "that there was an available administrative remedy . . . that Albino failed to exhaust." *Id.* However, that is not what happened here. Rather, the majority impermissibly seizes on facts considered and weighed by the district court and arrives at its own conclusion. *See* Maj. op. at 20-26; *Anderson,* 470 U.S. at 574 ("[T]he court of appeals may not reverse [the district court's account of the evidence] even though convinced that had it

been sitting as the trier of fact, it would have weighed the evidence differently.").

The posture of the majority opinion speaks louder than the one sentence purporting to decide the case as a matter of law. Indeed, the majority develops its own facts to support its conclusion that Baca failed to carry his burden. *See* Maj. op. at 20-26. That process is de novo review and conflicts with the Supreme Court's instruction to accord deference to lower court findings, *Anderson,* 470 U.S. at 573-74, and the majority's own framework, maj. op. at 15. Further, the majority's factual conclusions are wrong, as it discredits each piece of evidence supporting the existence of the Jail's grievance procedure independently, absent consideration of the process as a whole.

First, the majority decides the Custody Division Manual § 5-12/010.00 "is of little help to defendants," because Albino never saw it. Maj. op. at 24. However, Baca did not submit the Custody Division Manual's grievance procedure to prove Albino was aware of the procedure. He submitted it to document the existence of the procedure, as affirmed by Jail personnel. *See Brown v. Valoff,* 422 F.3d 926, 937 (9th Cir. 2005). Indeed, "it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones v. Bock,* 549 U.S. 199, 218 (2007). This section of the Custody Division Manual gives credence to the testimony that the grievance procedure existed.

Next, the majority discredits the availability of the grievance procedure, because Inmate Complaint Forms were only "available for *any inmate who requests them*." Maj. op. at 24 (quoting Deputy Kelley's declaration). However, the majority takes the quote out of context. Deputy Kelley's affirmation also states that "Inmate Complaint Forms are available at various locations within the facility." Further, the majority fails to recognize that Jail procedures do not require that complaints only be filed on an Inmate Complaint Form to be effective – a complaint will be considered so long as it is written.

Third, the majority takes issue with a locked complaint box, decrying Baca's failure to confirm whether "the box is labeled in any way to indicate its function." *Id.* at 25. However, the majority ignores the fact that a complaint does not even need to be filed in a complaint box – the Jail would consider written complaints handed directly to Jail personnel.

The correct inquiry would have been to determine whether the district court's factual findings were "plausible." *Lentini,* 370 F.3d at 850. The evidence strongly supports the district court's factual findings, namely the presence of an "available" administrative remedy that Albino failed to exhaust. Indeed, it is beyond comprehension how a procedure as simple as writing a few words on a piece of paper and handing it to Jail personnel could somehow be "[in]capable of use." Maj. op. at 16. The majority's de novo review (in an effort to conclude otherwise) is inconsistent with governing law, the majority's own

framework, and conflicts even with Albino's view of the law and facts. Albino never once argued that Baca failed to satisfy his burden, arguing rather that he had satisfied his own burden of showing how the procedures were effectively unavailable.

II.

The majority shoulders Baca with production of evidence never before required in proving failure to exhaust administrative remedies, focusing on the lack of evidence confronting Albino's testimony that the Jail never informed him of administrative remedies. Maj. op. at 24 ("[I]nmates were not even *told* of the existence of the Manual."); *id.* at 25 ("[T]here is nothing in Deputy Kelley's statement indicating that inmates are *told* that a complaint must be in writing."); *id.* at 26 ("Staff members never *told* him that complaint forms were 'available for any inmate who requests them.'"); *id.* at 29 ("Nor was Albino *told* that he could write a complaint on an ordinary piece of paper and hand it to one of the deputies.") (emphasis added in each).

Our prior prisoner exhaustion cases required jail officials to prove that they did not "hide the ball" from defendants. *See, e.g., Sapp v. Kimbrell,* 623 F.3d 813, 823 (9th Cir. 2010) ("[I]mproper screening of an inmate's administrative grievances renders administrative remedies 'effectively unavailable' such that exhaustion is not required under the PLRA."); *Nunez v. Duncan,* 591 F.3d 1217, 1224 (9th Cir. 2010)

(excusing inmate's failure to exhaust, because "he took reasonable and appropriate steps to exhaust his . . . claim and was precluded from exhausting, not through his own fault but by the Warden's mistake"); *Marella v. Terhune,* 568 F.3d 1024, 1027 (9th Cir. 2009) (per curiam) (excusing inmate's failure to exhaust, because he pursued some relief but was informed by prison personnel that no remedies were available). Today, the majority requires jail officials prove that, not only did they not hinder a prisoner's access to administrative remedies, but also that they informed the prisoner of them. What comes in the next case to excuse a sympathetic plaintiff?

Albino's counsel conceded at oral argument that Albino never even asked if there were a grievance procedure. Although Albino spoke with his attorney about seeking medical care, the record does not show that he ever raised the issue of seeking protective confinement with him. His sole complaint: the Jail did not inform him of the procedure. As Baca's counsel aptly noted in oral argument, this case boils down to an inmate that alleges "I didn't see" rather than "I looked and couldn't find"; that alleges "no one told me" rather than "I asked and wasn't told or was told misinformation."

Indeed, neither the PLRA nor the Supreme Court has ever imposed such a duty on jail officials (alleging failure to exhaust) when the prisoner only alleged ignorance of the procedures; nor have any of the federal

courts of appeal.[1] To the contrary, the majority's opinion creates a split with the Eighth and Tenth Circuits, which have held that such is irrelevant to defendants' burden. *See Chelette v. Harris,* 229 F.3d 684, 688 (8th Cir. 2000) ("Section 1997e(a) says nothing about a prisoner's subjective beliefs, logical or otherwise, about the administrative remedies that might be available to him."); *Yousef v. Reno,* 254 F.3d 1214, 1221 (10th Cir. 2001) (holding that there is "no authority for [the] assertion that the [prison] should have advised plaintiff of the need to follow BOP administrative procedures" (internal quotation marks omitted)).

It is no wonder then that Baca did not consider it necessary to confront Albino's testimony about his alleged unawareness of administrative remedies. Instead, litigants in this circuit were presumed to have knowledge of duly enacted laws, regulations, and procedures. *See Luna v. Holder,* 659 F.3d 753, 759 (9th Cir. 2011) (presuming aliens had notice of duly enacted federal regulations and guidelines issued thereunder). Grievance procedures in California jails are promulgated under the direction of state laws and regulations. *See* Cal. Penal Code § 6030(a); Cal. Code Regs. tit. 15, § 1073(a).[2]

---

[1] Indeed the majority did not cite a single case to support this novel proposition. *See* Maj. op. at 25.

[2] Also instructive, the Third Circuit interpreted a statutory exhaustion provision similar to section 1997e(a) and declined to require a union to inform union members of grievance procedures in order for the procedures to be considered "available"

(Continued on following page)

III.

While our court may grant summary judgment *sua sponte* to a non-moving party, "we should not [do so] based on an issue that the movant had no opportunity to dispute in the district court." *Kassbaum v. Steppenwolf Prods., Inc.,* 236 F.3d 487, 495 (9th Cir. 2000) (citing *Fountain v. Filson,* 336 U.S. 681, 683 (1949)). Rather, "great care must be exercised to assure that the original movant has had an adequate opportunity to show that there is a genuine issue and that his [or her] opponent is not entitled to judgment as a matter of law." *Id.* at 494 (quoting *Ramsey v. Coughlin,* 94 F.3d 71, 74 (2d Cir. 1996)) (alteration in original). In *Kassbaum,* the court saw the issues and the law aligning in the non-moving parties favor, but "in the exercise of caution," it still declined to grant summary judgment *sua sponte* in favor of the non-movant. *Id.* at 495. The court respected the right of

---

under the exhaustion requirement. *Donovan v. Local 1235, Int'l Longshoremen's Ass'n,* 715 F.2d 70, 75 (3d Cir. 1983) ("The Secretary argues that we can [excuse the failure to exhaust, because] the union[ ] fail[ed] to inform its members as to the procedural requirements of its internal remedies. . . . The statute and regulations on which he relies do not support such a sweeping position. They provide only that the union must make its constitution and bylaws 'available' to its members."). *See also Hedges v. United States,* 404 F.3d 744, 753 (3d Cir. 2005) (stating that the plaintiff "cites no cases for the proposition that the Government [(in this case the Department of the Interior)] has an affirmative duty to inform litigants . . . that they have viable judicial, as well as administrative remedies," and refusing to "place such a responsibility on the Government which has inquiries from millions of individuals each year").

the parties to "have notice of [its] decision and an opportunity to be heard." *Id.*

The majority fails to exercise such caution here. Instead, the majority mandates the production of evidence never before necessary for defendants to prove that a plaintiff did not exhaust his administrative remedies. Then, without providing prior notice to Baca or an opportunity to submit evidence required under its newly articulated ruling, it grants *sua sponte* summary judgment in Albino's favor on the present record. The majority's lip service to the *Kassbaum* standard is the antithesis of "great care." 236 F.3d at 494.

No jail or prison in this circuit had previously been obliged to evidence that it had informed prisoners of administrative remedies to show those remedies' availability. Likewise, an inmate's subjective intent was previously inapposite to the inquiry. Thus, without notice, Baca has been afforded no opportunity to evidence, for example, (1) that the Jail actually informed Albino of the Jail's grievance procedure; (2) the number of inmates filing written complaints under the present system; or (3) the nature and labeling of the locked complaint box. Before today, Baca had no reason to dispute Albino's factual allegations to the contrary, because the resolution of those allegations was not necessary to resolving a motion for summary judgment for failure to exhaust administrative remedies.

Baca is entitled to notice and an opportunity to be heard. *Kassbaum,* 235 F.3d at 495. Given the new evidence which a defendant must hereafter produce to demonstrate the availability of administrative remedies, granting summary judgment *sua sponte* in favor of Albino is error. *See Norse,* 629 F.3d at 972.

IV.

Finally, the majority overrules circuit precedent to purportedly effect a "change of nomenclature" without changing the "practical operation" of court procedure dealing with exhaustion issues. Maj. op. at 4. However, if the majority means what it says in the opinion, it effects more than a "change of nomenclature."

Our opinion in *Wyatt v. Terhune* directed courts to treat a summary judgment motion alleging failure to exhaust administrative remedies "as a matter in abatement, which is subject to an unenumerated Rule 12(b) motion rather than a motion for summary judgment." 315 F.3d 1108, 1119 (9th Cir. 2003). Because exhaustion is a matter of judicial administration rather than an issue regarding the merits, district courts could "look beyond the pleadings and decide disputed issues of fact." *Sapp,* 623 F.3d at 821 (quoting *Wyatt,* 315 F.3d at 1119-20). In doing so, the court had "broad discretion as to the method to be used in resolving the factual dispute." *Ritza v. Int'l Longshoremen's and Warehousemen's Union,* 837 F.2d 365, 369 (9th Cir. 1988) (per curiam) (internal quotation

marks omitted). Then, on appeal, our court reviews the dismissal under Rule 12(b) *de novo* but reviews the district court's factual findings for clear error. *Id.*

Under the purported authority of *Jones v. Bock,* the majority now pens this decision overruling *Wyatt.* In the future, an allegation of "failure to exhaust is more appropriately handled" as a motion for summary judgment. Maj. op. at 4. Then if a factual dispute still persists at summary judgment, the motion must be denied. *Id.* at 14. Then only on the eve of trial (or later) may the district court decide the issue of exhaustion. *Id.* at 15. "On appeal, we will review the district judge's legal rulings on exhaustion de novo, but we will accept the judge's factual findings . . . unless they are clearly erroneous." *Id.* at 15. This decision is particularly surprising for a number of reasons.

First, "[a] goal of our circuit's decisions, including . . . en banc decisions, must be to preserve the consistency of circuit law." *Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir. 2003). In other words, while an en banc panel has the authority to overrule circuit precedent, *id.* at 899, it must have a good reason to do so. I question whether a "change of nomenclature" constitutes such good reason.

Second, the Supreme Court cited *Wyatt* approvingly in *Jones*. 549 U.S. at 204 n.2, 212 (holding that circuit courts treating exhaustion as an affirmative defense "have the better of the argument"). In light of this favorable citation, the majority's decision to

overrule *Wyatt* reads too much into *Jones.* Instead, it should "abide by the 'duty of restraint, th[e] humility of function as merely the translator of another's command.'" *Id.* at 216 (quoting Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 533-34 (1947)) (alteration in original).

Finally, and most importantly, the *Jones* Court emphasized that "the PLRA mandates early judicial screening of prisoner complaints." *Jones,* 549 U.S. at 202; *accord Woods v. Carey,* 722 F.3d 1177, 1182 (9th Cir. 2013) ("Congress enacted the PLRA to . . . provide for [frivolous prisoner lawsuits'] dismissal at an early stage."). This "allows prison officials an opportunity to resolve disputes concerning the exercise of their responsibilities before being haled into court." *Jones,* 549 U.S. at 204. Early judicial screening also helps "ensur[e] that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Id.* at 203. However, by designating summary judgment as the appropriate procedure in which to address allegations of nonexhaustion, maj. op. at 15, the majority's new framework will delay resolution of exhaustion disputes. In fact, the majority opinion guarantees it. Only in "rare" cases may exhaustion be decided on a motion to dismiss. *Id.* at 4. Then, even a decisive ruling at the summary judgment stage will be unlikely, because the district court cannot resolve factual disputes relating to exhaustion in deciding the motion for summary judgment. *Id.* at 5, 15. Only after denying summary judgment may the court then conclude

whether a plaintiff has exhausted administrative remedies. *Id.* at 15 Even though the majority has stipulated that exhaustion is not a jury issue, *id.* at 5, its opinion has the effect of commissioning a trial (by the judge) to decide an issue that is widely viewed as one of judicial traffic control. *Id.* at 14; *Pavey v. Conley,* 544 F.3d 739, 741 (7th Cir. 2008). This new procedure is utterly inconsistent with the PLRA, which "mandates early judicial screening of prisoner complaints." *Jones,* 549 U.S. at 202.

In summary, while the majority correctly preserves the district court's ability to make factual findings in determining an exhaustion issue and mandates our deference to the district court's factual findings on appeal (though it refuses to do so here), it impermissibly alters the usual procedural practice in this circuit on the basis of perceived policy concerns. *See Jones,* 549 U.S. at 212. This alteration eliminates the district court's ability to decide the exhaustion issue "at an early stage." *Woods,* 722 F.3d at 1182. As a result, it effects much more than a "change of nomenclature." Maj. op. at 4.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUAN ROBERTO ALBINO, *Plaintiff-Appellant*, v. LEE BACA, Los Angeles County Sheriff; LOS ANGELES COUNTY, *Defendants-Appellees*.	No. 10-55702 D.C. No. 2:08-cv-03790-GAF-MLG OPINION

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued and Submitted
July 12, 2012 – Pasadena California

Filed September 21, 2012

Before: Ronald Lee Gilman,* Richard C. Tallman, and N. Randy Smith, Circuit Judges.

Opinion by Judge N.R. Smith;
Dissent by Judge Gilman

COUNSEL

Andrea R. St. Julian, San Diego, California, for the plaintiff-appellant.

---

* The Honorable Ronald Lee Gilman, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

Christian E. Foy Nagy and James C. Jardin (argued), Collins Collins Muir + Stewart, LLP, South Pasadena, California, for the defendant-appellee.

OPINION

N.R. Smith, Circuit Judge:

An inmate's lack of awareness of a correctional institution's grievance procedure does not make the administrative remedy "unavailable" for purposes of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), unless the inmate meets his or her burden of proving the grievance procedure to be unknowable. *See Hilao v. Estate of Marcos,* 103 F.3d 767, 778 n.5 (9th Cir. 1996); *Goebert v. Lee Cnty.,* 510 F.3d 1312, 1322-24 (11th Cir. 2007). Because Albino has not met his burden of proof, we affirm the district court's grant of summary judgment.

I. BACKGROUND

A. Facts

No party disputes that, during all relevant periods at issue in this case, the Los Angeles County jails had a grievance procedure outlined in the Custody Division Manual § 5-12/010.00. According to the grievance procedure, inmates could file grievances (or complaints) regarding the conditions of confinement, including grievances related to classifications. All inmates were permitted to submit a written complaint; formal Inmate Complaint Forms were supplied to

facilitate complaint filings. Each housing unit in the jail was required to have an adequate supply of Inmate Complaint Forms, and inmates were required to have unrestricted access to these forms. However, inmates were not required to use the formal Inmate Complaint Forms; they could make a complaint on any medium as long as it was written. Further, each housing area also maintained a locked repository box accessible to inmates so that they could deposit their written complaints unhindered.

On May 11, 2006, Juan Albino was arrested for rape and incarcerated in the Los Angeles County Sheriff's Department's main jail ("LASD Jail" or the "jail"). Upon arriving at the LASD Jail, Albino was booked into the jail. As part of that processing, jail staff determined the appropriate custody and security level classification for inmates based on a number of factors, including the nature of their charge. After evaluation of the factors for Albino, especially Albino's charge of rape, Albino was assigned a custody and security level consistent with placing him with the general inmate population.[1] After he was assigned to the general population, Albino alleges that he orally asked to be placed in protective custody. However, sheriff's deputies refused and instead assigned him to the general population, consistent with the custody

[1] Albino was not charged under California Penal Code § 288 (lewd and lascivious acts with a minor). Therefore, it is undisputed that Albino did not require protective custody under Custody Division Manual § 5-02/060.00.

and security level classification calculated during processing.

In June 2006, Albino claims that he was physically assaulted and raped by fellow inmates after the inmates were allegedly informed by deputies that Albino was a sex offender. Albino was taken to the county hospital for treatment of the injuries he sustained. After returning from the hospital, Albino claims to have again orally asked for protective custody. Though his request was rejected, deputies told Albino to contact his public defender for assistance (Albino alleges specifically that the deputies stated, "it is your attorneys [sic] job to protect [you]"). However, without any written request from Albino or his attorney, the jail relocated him to another housing location for his safety.

Albino alleges that he was subsequently assaulted on two separate occasions, once in July 2006 and once in September 2006. He acknowledges that he was taken to the jail clinic for treatment after each of these incidents. Albino claims to have orally asked for protective custody after each incident. While the oral requests were denied, he was again relocated to a different housing unit for his safety after the July 2006 incident.

The record includes incident reports created by LASD Jail personnel for the June and July incidents. The incident reports indicate that Albino was rehoused for his safety, and the reports provide no indication that Albino was dissatisfied with this

action. There is no evidence that Albino filed (or made any effort to file) a written request for protective custody or any sort of written complaint. Instead, Albino made only oral requests for protective custody, and jail staff directed him to talk to his public defender. No evidence suggests he ever talked to his public defender about protective custody or complaining of his situation. The incident reports also provide no information concerning whether Albino was informed of the grievance procedure. Therefore, in reviewing this motion, we conclude that he was personally unaware of the grievance procedure and he was not expressly informed of the LASD Jail's grievance procedure by the jail.

B. Procedural History

Albino filed suit against Los Angeles County, Sheriff Lee Baca ("Baca"), and other John Doe defendants (collectively "Defendants") under 42 U.S.C. § 1983.[2] Albino "allege[d] that his Constitutional rights were violated by Defendants' failure to protect him from other inmates and by Defendants' deliberate indifference to his serious medical needs." In addition, Albino claimed that Baca failed to adequately train and supervise his deputies. Lastly, Albino

[2] Baca is the only remaining named defendant. The district court granted Defendant's motion to dismiss the County of Los Angeles as a defendant, D.C. Dkt. No. 26, and the magistrate judge denied a motion to add the names of the John Doe defendants. Albino does not appeal these rulings.

alleged the state law claims of intentional infliction of emotional distress and gross negligence.

On August 7, 2009, Baca filed a motion for summary judgment. Baca claimed that Albino's lawsuit must be dismissed, because Albino failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). Albino did not dispute that he failed to file a written complaint. Instead, Albino argued that the grievance procedure was "unavailable." Specifically, Albino argued that (1) he was never given an orientation by jail staff; (2) he never saw Custody Division Manual § 5-12/010.00, or, if he did, it was not in Spanish and he did not understand what it was; (3) he has never spoken to anyone who has heard of Custody Division Manual § 5-12/010.00; (4) he has never seen or heard of a complaint form; (5) he never noticed any complaint box and no one ever mentioned such a box; and (6) he was locked down to such a degree that he never learned of the procedures. In essence, Albino "contend[ed] that even if a grievance procedure existed, the failure to explicitly inform him of it obviates his need to exhaust," because the failure to inform him of the grievance procedure (even though he never asked) rendered it unavailable.

The magistrate judge agreed with Baca and recommended granting the motion for summary judgment. First, the magistrate judge found "no genuine issue of material fact as to the existence of a grievance procedure at the jail, its accessibility to inmates, or [Albino's] failure to avail himself of it." Specifically, based on the evidence regarding the

LASD Jail's grievance procedure, the magistrate judge found that the LASD Jail "had an accessible administrative procedure for seeking redress of grievances at the time of the incidents."

Second, the magistrate judge assumed that Albino was not aware of the grievance procedure and that the jail failed to inform him of such procedure. The magistrate judge noted that the Ninth Circuit has not yet addressed whether an inmate's lack of awareness of a jail's grievance procedure and a jail's failure to inform an inmate together excuse exhaustion. The magistrate judge also noted that "other Circuit Courts of Appeals have held that neither a lack of awareness of available grievance procedures nor a prison's failure to inform an inmate of them excuses his failure to exhaust." The magistrate judge then adopted the out-of-circuit approach. Therefore, the magistrate judge concluded that Albino's "lack of awareness of jail grievance procedures does not excuse his admitted failure to exhaust administrative remedies prior to bringing suit."[3]

The district court accepted and adopted the magistrate judge's findings and recommendations in

[3] In the magistrate judge's report and recommendation, the magistrate judge noted that if LASD Jail officials had actively prevented Albino from availing himself of the jail grievance procedure, his failure to exhaust may have been excused. Here, the record does not demonstrate (and the magistrate judge did not find) that Albino was prevented from availing himself of the available procedures.

full. Hence, the district court agreed that Albino had failed to exhaust his administrative remedies, because administrative remedies were "available" within the meaning of 42 U.S.C. § 1997e(a), notwithstanding Albino's lack of awareness of the grievance procedure and LASD Jail's failure to inform Albino of such a procedure.

Albino timely filed this appeal.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo a district court's decision to grant summary judgment. *Universal Health Servs., Inc. v. Thompson,* 363 F.3d 1013, 1019 (9th Cir. 2004). On summary judgment "[w]e must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* (quoting *EEOC v. Luce, Forward, Hamilton & Scripps,* 345 F.3d 742, 746 (9th Cir. 2003)) (internal quotation marks omitted).

Here, Baca asserted the affirmative defense of nonexhaustion in his answer. Later, he filed a motion for summary judgment, and the magistrate judge reviewed the case under the summary judgment standard. However, this was error. "[W]e have held that the failure to exhaust nonjudicial remedies that are not jurisdictional [such as a prison's grievance

procedures] should be treated as a matter in abatement, which is subject to an unenumerated Rule 12(b) motion rather than a motion for summary judgment." *Wyatt v. Terhune,* 315 F.3d 1108, 1119 (9th Cir. 2003); *accord Ritza v. Int'l Longshoremen's & Warehousemen's Union,* 837 F.2d 365, 368-69 (9th Cir. 1988) (per curiam) ("[F]ailure to exhaust nonjudicial remedies should be raised in a motion to dismiss, or be treated as such if raised in a motion for summary judgment."). Therefore, the magistrate judge should have treated the summary judgment motion as an unenumerated Rule 12(b) motion.[4]

If the magistrate judge had treated the motion for summary judgment as an unenumerated Rule 12(b) motion, then our review of the district court's dismissal based on a failure to exhaust would be de novo under a slightly different standard than in a motion for summary judgment review. *Sapp v. Kimbrell,* 623 F.3d 813, 821 (9th Cir. 2010). "[I]n deciding a motion to dismiss for failure to exhaust, a [district] court may 'look beyond the pleadings and

[4] Albino argues that the Ninth Circuit rule in *Wyatt* has been abrogated or overruled by *Jones v. Bock,* 549 U.S. 199 (2007), so the district court's decision should be reviewed de novo under a summary judgment standard. However, *Sapp v. Kimbrell* reaffirmed the validity of *Wyatt. Sapp v. Kimbrell,* 623 F.3d 813, 821 (9th Cir. 2010) ("In deciding a motion to dismiss for failure to exhaust, a court may 'look beyond the pleadings and decide disputed issues of fact.'" (quoting *Wyatt,* 315 F.3d at 1119-20)); *see also Jensen v. Knowles,* 621 F.Supp.2d 921, 925 (E.D. Cal. 2008) (explaining why *Jones v. Bock* does not alter *Wyatt*). Therefore, *Wyatt* continues to be the law of this Circuit.

decide disputed issues of fact.'" *Id.* (quoting *Wyatt,* 315 F.3d at 1119-20). Thus, unlike our review under a summary judgment standard, the district court's factual findings are reviewed for clear error. *Id.* A district court's factual findings are clearly erroneous if they are illogical, implausible, or without support from inferences that may be drawn from the record. *United States v. Hinkson,* 585 F.3d 1247, 1259-61 (9th Cir. 2009) (en banc).

Notwithstanding the magistrate judge's error, because there are no real factual disputes in this case, the net effect is that the de novo standard is applied effectively the same under either an unenumerated Rule 12(b) motion or a summary judgment motion. In sum, the error does not affect the outcome. *See Sussman v. Am. Broad. Cos.,* 186 F.3d 1200, 1203 (9th Cir. 1999) ("We may affirm the district court on any basis supported by the record.").

III. DISCUSSION

A. General Requirement of Exhaustion Under the PLRA and Its Purpose

Congress "placed a series of controls on prisoner suits, constraints designed to prevent sportive filings in federal court." *Skinner v. Switzer,* 131 S. Ct. 1289, 1299 (2011). One of these constraints is the mandatory exhaustion of the correctional facilities' administrative remedies. *See* 42 U.S.C. § 1997e(a); *Jones v. Bock,* 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA and

that unexhausted claims cannot be brought in court.").

Exhaustion serves two purposes. *Woodford v. Ngo,* 548 U.S. 81, 89 (2006).

> First, exhaustion protects administrative agency authority. Exhaustion gives an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court, and it discourages disregard of the agency's procedures.
>
> Second, exhaustion promotes efficiency. Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court.

Id. (internal quotation marks, alteration, and citations omitted).

The PLRA mandates that "[n]o action shall be brought with respect to prison conditions under section 1983 . . . , or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies *as are available* are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). Although "the PLRA's exhaustion requirement applies to all inmate suits about prison life," *Porter v. Nussle,* 534 U.S. 516, 532 (2002), the requirement for exhaustion under the PLRA is not absolute. As explicitly stated in the PLRA, "[t]he PLRA requires that an inmate exhaust only those

administrative remedies 'as are available.'" *Sapp,* 623 F.3d at 822 (quoting 42 U.S.C. § 1997e(a)); *see also Nunez v. Duncan,* 591 F.3d 1217, 1224 (9th Cir. 2010) ("Remedies that rational inmates cannot be expected to use are not capable of accomplishing their purposes and so are not available." (quoting *Turner v. Burnside,* 541 F.3d 1077, 1084 (11th Cir. 2008)) (internal quotation mark omitted)). "We have recognized that the PLRA therefore does not require exhaustion when circumstances render administrative remedies 'effectively unavailable.'" *Sapp,* 623 F.3d at 822 (citing *Nunez,* 591 F.3d at 1226); *accord Brown v. Valoff,* 422 F.3d 926, 935 (9th Cir. 2005) ("The obligation to exhaust 'available' remedies persists as long as *some* remedy remains 'available.' Once that is no longer the case, then there are no 'remedies . . . available,' and the prisoner need not further pursue the grievance." (alteration in original)).

B. Burden of Proof

Exhaustion, under the PLRA, is an affirmative defense. *Jones,* 549 U.S. at 216. Because exhaustion under the PLRA is an affirmative defense, "[t]he burden of establishing nonexhaustion therefore falls on defendants." *Wyatt,* 315 F.3d at 1112; *accord Brown,* 422 F.3d at 936 ("[D]efendants have the burden of raising and proving the absence of exhaustion.") (quoting *Wyatt,* 315 F.3d at 1119) (internal quotation marks omitted). Once the defense meets its burden, the burden shifts to the plaintiff to show that

the administrative remedies were unavailable. *See Hilao,* 103 F.3d at 778 n.5; *Tuckel v. Grover,* 660 F.3d 1249, 1254 (10th Cir. 2011) ("Once a defendant proves that a plaintiff failed to exhaust, however, the onus falls on the plaintiff to show that remedies were unavailable. . . .").

1. Defendant Met His Burden of Proving Administrative Remedies Existed and Were Not Followed

A defendant's burden of establishing an inmate's failure to exhaust is very low. *See Brown,* 422 F.3d at 945 (Reinhardt, J., dissenting) ("Given that the mere existence of an additional hearing or process may be sufficient to constitute an available administrative remedy under [Supreme Court precedent], any question as to whether there are in fact other types of available relief is inconsequential."). The exact extent of a defendant's burden of proof is articulated in *Hilao,* 103 F.3d at 778 n.5, and *Brown,* 422 F.3d at 936-37.

In *Hilao,* while interpreting almost identical text as that in the PLRA, we outlined the burden of a defendant when raising the failure to exhaust administrative remedies as an affirmative defense. 103 F.3d at 778 n.5. A defendant need only show the existence of remedies that the plaintiff did not use. *Id.* In *Hilao,* we dealt with the failure to exhaust (affirmative defense) under the Torture Victim Protection Act of 1991 ("TVPA"), 106 Stat. 73, note following 28 U.S.C.

§ 1350. The TVPA states that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and *available* remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350, note, § 2(b) (emphasis added). Like the TVPA, the PLRA requires the administrative remedies to be available. We determined that the respondent "has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use."[5] *Hilao,* 103 F.3d at 778 n.5 (quoting S. Rep. No. 249 at 9-10).

In *Brown,* we stated that, because "there can be no 'absence of exhaustion' unless *some* relief remains 'available,' a defendant must demonstrate that pertinent relief remained available, whether at unexhausted levels of the grievance process or through awaiting the results of the relief already granted as a result of that process." 422 F.3d at 936-37. To understand the extent of the defendant's burden to show that the "pertinent relief remained available," we stated that "[r]elevant evidence in so demonstrating would include statutes, regulations, and other official directives that explain the scope of the administrative review process." *Id.* at 937. This indicates that a

[5] "Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile." *Hilao,* 103 F.3d at 778 n.5 (quoting S. Rep. No. 249 at 9-10).

defendant, under the PLRA, must show that some administrative relief existed to meet his or her burden of proof. Thus, for Baca to meet his burden, he must show that (1) a grievance procedure existed and (2) Albino did not exhaust the grievance procedure. *See Hilao,* 103 F.3d at 778 n.5; *Tuckel,* 660 F.3d at 1254 ("Defendants thus bear the burden of asserting and proving that the plaintiff did not utilize administrative remedies.").

Baca met his burden. He presented evidence that LASD Jail had a formal grievance procedure through attaching Custody Division Manual § 5-12/010.00, which describes the procedure, and through a declaration of a sheriff's deputy. He provided evidence that inmates could submit written grievances regarding any prison condition, whether or not the inmate utilized the formal Inmate Complaint Forms; that unit commanders were required to ensure that each housing facility had adequate Inmate Complaint Forms available and that inmates had unrestricted access to the forms; and that each housing unit was required to have locked repository boxes accessible to inmates so that inmates could deposit complaints without hindrance, or inmates could give complaints to jail staff. Further, Baca claims that Albino did not submit any written grievance. Importantly, Albino concedes that a grievance procedure existed and that he did not follow the procedure. Thus, Baca has met his burden of showing a grievance procedure existed, and it was not followed.

2. Plaintiff Has Not Met His Burden of Proving that the Administrative Remedies Were Unavailable

Because Baca has met his burden of showing the absence of exhaustion, the burden shifts to Albino to demonstrate that the grievance procedure was unavailable.[6] *See Hilao,* 103 F.3d at 778 n.5 ("Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.") (quoting S. Rep. No. 249 at 9-10). Albino argues that he could not have complied with the grievance procedure, because (1) he was unaware of the procedure, (2) the LASD Jail failed to inform him of the procedure, and (3) the jail had no method in place to inform inmates of the procedure. We therefore must determine whether Albino has met his burden of showing that LASD

[6] *See Tuckel,* 660 F.3d at 1254 ("Once a defendant proves that a plaintiff failed to exhaust, however, the onus falls on the plaintiff to show that remedies were unavailable. . . ."); *Nunez,* 591 F.3d at 1224 ("Ngo hasn't shown that administrative procedures were unavailable, that prison officials obstructed his attempt to exhaust or that he was prevented from exhausting because procedures for processing grievances weren't followed." (quoting *Ngo v. Woodford,* 539 F.3d 1108, 1110 (9th Cir. 2008)) (internal quotation marks omitted)); *Johnson v. Dist. of Columbia, CIV.A.*, No. 11-1445 JEB, 2012 WL 2355577, at *3 (D.D.C. June 21, 2012) ("Once Defendant has shown that Plaintiff failed to exhaust his administrative remedies, the burden shifts to Plaintiff to establish that a failure to exhaust was due to the unavailability of remedies.").

Jail's grievance procedure was "unavailable" (within the meaning of the PLRA) where LASD Jail officials did not inform Albino of the grievance procedure and he was unaware of the existence of the jail's procedure. Because Albino has not shown (1) that jail staff affirmatively interfered with his ability to exhaust administrative remedies or (2) that the remedies were unknowable, he has not met his burden of showing that the jail grievance procedure was "unavailable."

i. Case Law Finding Administrative Remedies Effectively Unavailable Because of Affirmative Acts Preventing or Disrupting Exhaustion

In *Sapp v. Kimbrell,* we determined "that improper screening of an inmate's administrative grievances render[ed] administrative remedies 'effectively unavailable' such that exhaustion [was] not required under the PLRA." 623 F.3d at 823. We found that "[i]f prison officials screen out an inmate's appeals for improper reasons, the inmate cannot pursue the necessary sequence of appeals, and administrative remedies are therefore plainly unavailable." *Id.* We noted that our holding

> promote[d] exhaustion's benefits by removing any incentive prison officials might otherwise have to avoid meaningfully considering inmates' grievances by screening them for improper reasons. Excusing a failure to exhaust when prison officials improperly

> screen an inmate's administrative appeals helps ensure that prison officials will consider and resolve grievances internally and helps encourage use of administrative proceedings in which a record can be developed that will improve the quality of decisionmaking in any eventual lawsuit. At the same time, this exception does not alter prisoners' incentive to pursue administrative remedies to the extent possible.

Id. While the exception recognized in *Sapp* promotes the purposes of exhaustion, "[t]o fall within this exception, a prisoner must show that he attempted to exhaust his administrative remedies but was thwarted by improper screening." *Id.*

In *Nunez* we determined that Nunez's failure to exhaust his administrative remedies was excused, "because he took reasonable and appropriate steps to exhaust his . . . claim and was precluded from exhausting, not through his own fault but by the Warden's mistake." 591 F.3d at 1224. Nunez took many steps to exhaust his administrative remedies. *Id.* at 1220-22, 1224-25. However, Nunez requested a citation to the law or regulation under which the conduct at issue was authorized, and the warden mistakenly provided the wrong citation. *Id.* at 1220. Because of the erroneous citation, Nunez ultimately failed to properly follow the grievance procedures. *Id.* at 1221-23. Importantly, we did not excuse exhaustion, because "Nunez could not obtain information that he subjectively believed would be useful in preparing his appeal." *Id.* at 1225 (quoting the dissent) (internal

quotation marks omitted). Instead, we held "that exhaustion [was] excused because Nunez could not [have] reasonably be[en] expected to exhaust his administrative remedies without the Program Statement that the Warden claimed to mandate the strip search, and because Nunez timely took reasonable and appropriate steps to obtain it." *Id.* "Nunez believed in good faith that [the erroneous] Program Statement . . . was necessary, not merely useful, for preparing his appeal. He could hardly believe otherwise once the Warden told him that the challenged strip search was authorized by that Program Statement." *Id.* "[H]e was finally told . . . that the Program Statement . . . did not relate to strip searches. But up until that time, Nunez reasonably believed, based on the Warden's written response . . . that he needed to see [the] Program Statement . . . before he could prepare an effective appeal." *Id.* at 1226. Even though the Warden's mistake was innocent, "the mistake led Nunez on an almost ten-month wild goose chase." *Id.* "[H]aving done everything he could do to obtain a document that the Warden had led him to believe he needed, [Nunez] promptly filed his [grievance form]. Rational inmates cannot be expected to use grievance procedures to achieve the procedures' purpose when they are misled into believing they must" perform an impossible action "in order to effectively pursue their administrative remedies. . . ." *Id.*

Sapp and *Nunez* are not controlling for this issue. In those cases, we determined that affirmative actions by jail staff preventing proper exhaustion, even

if done innocently, make administrative remedies effectively unavailable.[7] Here, there is no evidence that any jail official engaged in any misconduct that prohibited Albino from learning of or following the grievance procedure. The jail officials did not state that there were no available remedies. *See Brown,* 422 F.3d at 946 (Reinhardt, J., dissenting) ("[R]elief would be unavailable . . . when the prisoner is explicitly told, or the regulations make it plain, that there is *no* further relief available to him."). Unlike *Nunez,* LASD Jail officials did nothing to direct Albino in a direction that would cause him not to exhaust his remedies. Further, unlike *Sapp,* there is no evidence that LASD Jail staff improperly handled a complaint by Albino, because Albino never attempted to file a written complaint. In sum, *Sapp* and *Nunez* are

[7] Our sister circuits also hold that exhaustion is not required when affirmative actions of prison officials make administrative remedies effectively unavailable. *Sapp,* 623 F.3d at 822-23 (compiling cases); *Nunez,* 591 F.3d at 1224 (same). For example, according to our sister circuits, exhaustion is excused when prison officials refuse to provide the required grievance forms upon request or ignore such a request. *See, e.g., Dale v. Lappin,* 376 F.3d 652, 656 (7th Cir. 2004); *Miller v. Norris,* 247 F.3d 736, 738, 740 (8th Cir. 2001). Similarly, exhaustion is excused when prison officials fail to respond to a properly filed grievance. *Dole v. Chandler,* 438 F.3d 804, 809, 811 (7th Cir. 2006). Exhaustion is also excused when prison staff erroneously informs the inmate that he must await the termination of an investigation before filing a grievance. *Brown v. Croak,* 312 F.3d 109, 111-12 (3d Cir. 2002). Lastly, threats of retaliation for filing a grievance excuse exhaustion. *Turner v. Burnside,* 541 F.3d 1077, 1085 (11th Cir. 2008); *Macias v. Zenk,* 495 F.3d 37, 45 (2d Cir. 2007); *Kaba v. Stepp,* 458 F.3d 678, 685-86 (7th Cir. 2006).

inapplicable here, because there is no evidence that the LASD officials took any action to delay or thwart Albino's efforts to utilize or exhaust its grievance procedure.[8]

Albino argues that deputies affirmatively acted to mislead him about the grievance procedure, because deputies told Albino to contact his attorney for help. However, no evidence suggests that he contacted his public defender about his classification or about protective custody. We presume that the public defender would have advised him of the grievance procedure process and how to comply. Instead of making the jail's grievance procedure unavailable, like providing the wrong regulation citation in *Nunez,* telling Albino to contact his attorney actually led Albino in the direction of learning of the grievance procedure and how to comply. The statement did not

[8] The dissent would conclude that the deputies' failure to inform Albino of the jail's grievance procedures after he complained orally constitutes a "mistake" by the jail that prevented Albino from exhausting his claims. There is no precedent for this premise and the dissent cites none. In *Sapp* and *Nunez,* it was the jails' own conduct, even if accidental, that prevented the detainees from exhausting their remedies. The dissent's view would dramatically extend those cases by allowing a detainee to, in essence, trigger a "mistake" that will then place the burden on the jail to assure that a prisoner is subjectively aware of grievance procedures. However, the defense has already met its burden under our precedent by evidencing the existence of administrative remedies. *See Brown,* 422 F.3d at 936-37. Albino has failed to meet his burden to show that the remedies were unavailable.

prevent Albino from discovering or complying with the grievance procedure. Lastly, our decision should not, by determining that they erred here, discourage custodians from advising detainees to speak with their lawyers should the detainees have concerns about the conditions of their confinement.

(ii) Subjective Lack of Awareness Does Not Make an Administrative Remedy Unavailable When the Remedy is Knowable

Albino has the burden to show that the grievance procedure was unavailable based on his unawareness of the grievance procedure and the LASD Jail's failure to inform him of the procedure. We hold that he has failed to meet his burden.

In *Hilao,* because we held that the defense must only show that administrative remedies were available and unused, it follows that an inmate's subjective unawareness of an administrative remedy and a prison's failure to expressly inform the inmate of the remedy are not alone sufficient to excuse exhaustion. *See* 103 F.3d at 778 n.5. We have previously required a good-faith effort on the part of inmates to exhaust a prison's administrative remedies as a prerequisite to finding remedies effectively unavailable. *See Sapp,* 623 F.3d at 823; ("[A] prisoner must show that he attempted to exhaust his administrative remedies but was thwarted by improper screening."); *Nunez,* 591 F.3d at 1224 ("[Nunez] took reasonable and appropriate steps to exhaust his Fourth Amendment claim

and was precluded from exhausting. . . .”). This principle logically extends to the current situation to obligate an inmate to make reasonable, good-faith efforts to discover the appropriate procedure for complaining about prison conditions before unawareness may possibly make a procedure unavailable.

Other circuits have addressed this issue. The Second Circuit has articulated that “[t]he 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.” *Hemphill v. New York,* 380 F.3d 680, 688 (2d Cir. 2004) (quoting *Davis v. Goord,* 320 F.3d 346, 353 (2d Cir. 2003)). Similarly, the Eleventh Circuit, in *Goebert v. Lee County,* applied an objective standard. 510 F.3d at 1322-24. An objective standard is consistent with how we have articulated the test regarding whether administrative remedies are unavailable in terms of whether “[r]ational inmates can[ ] be expected to use [the] grievance procedures. . . .” *See Nunez,* 591 F.3d at 1226.

Goebert is of particular importance because it involved an inmate’s unawareness of the administrative procedure. In *Goebert,* Goebert did not know and could not have found out that she could or should have appealed a denial of her administrative complaint. 510 F.3d at 1322. The parties agreed (1) that the Inmate Handbook contained “nothing . . . about any procedure for appealing the denial of a complaint” and (2) that, although the appeal procedure

was laid out in the jail's General Operating Procedures, "no inmate was ever permitted to see those procedures. . . ." *Id.* Thus, there was nothing in the record leading a reasonable inmate to believe there was an appeal procedure or indicating that an inmate could have discovered the appeal procedure upon a reasonable effort. *See id.* Under these circumstances, *Goebert* held that the failure to exhaust is excused when an inmate does not know of the grievance procedure and could not have reasonably discovered the procedure. *Id.* at 1322-24; *see also Bryant v. Rich,* 530 F.3d 1368, 1373 n.6 (11th Cir. 2008) ("We have said that an administrative remedy is not 'available' if it is unknown and unknowable to the inmate." (citing *Goebert,* 510 F.3d at 1323)). Simply put, "[t]hat which is unknown and unknowable is unavailable; it is not 'capable of use for the accomplishment of a purpose.'" *Goebert,* 510 F.3d at 1323 (quoting *Booth v. Churner,* 532 U.S. 731, 738 (2001)). Applying its test to the facts in *Goebert,* the Eleventh Circuit held that the grievance procedures were not "available," because Goebert was unaware of the appeal procedures and could not have discovered them through reasonable effort. *Id.* at 1322-23. The Eleventh Circuit articulated its objective standard in the context of an inmate lacking knowledge of the grievance procedure.

Other out-of-circuit cases support an "unknowable," objective standard by rejecting an inmate's subjective unawareness alone as sufficient to make a prison's administrative procedure unavailable. For example, in *Chelette v. Harris*, the Eighth Circuit

held that the inmate failed to exhaust his administrative remedies even though the warden had "stated he would take care of the matter." 229 F.3d 684, 686 (8th Cir. 2000). The Eighth Circuit rejected the district court's finding that the inmate "could logically have believed that he had exhausted such administrative remedies as were available to him. . . ." *Id.* at 688. It stated:

> If it is "likely" that Chelette could have filed a grievance over the alleged lack of medical care, it can hardly be said that he exhausted such administrative remedies as were available to him. Section 1997e(a) says nothing about a prisoner's subjective beliefs, logical or otherwise, about the administrative remedies that might be available to him. The statute's requirements are clear: If administrative remedies are available, the prisoner must exhaust them.

Id. Admittedly *Chelette* is distinguishable from the present case, because the inmate knew about the grievance procedures but chose not to pursue them given the warden's representation. Nevertheless, *Chelette* is instructive because of the court's holding that the prisoner's subjective belief was not determinative of whether a grievance procedure was "unavailable."

Construing *Chelette*, several circuit courts of appeal and district courts have concluded that a plaintiff's lack of knowledge of the administrative procedures does not make those procedures unavailable.

E.g., Twitty v. McCoskey, 226 F. App'x 594, 595-96 (7th Cir. 2007) (unpublished) (rejecting inmate's argument that his failure to exhaust should have been excused, because he was unaware of the procedure and the prison failed to inform him of it); *Brock v. Kenton Cnty.,* 93 F. App'x. 793 (6th Cir. 2004) (unpublished) (the Sixth Circuit has rejected an inmate's argument that exhaustion was unavailable to him because he was unaware of the system); *Gonzales-Liranza v. Naranjo,* 76 F. App'x. 270, 273 (10th Cir. 2003) (unpublished) ("Thus, even accepting plaintiff's allegation that he was unaware of the grievance procedures, there is no authority for waiving or excusing compliance with PLRA's exhaustion requirement."); *Johnson,* 2012 WL 2355577, at *6 ("While th[e D.C.] Circuit has not yet weighed in on the issue, the majority of courts to have done so have held that an inmate's subjective lack of information about his administrative remedies does not excuse a failure to exhaust."). None of the plaintiffs in the foregoing cases challenged the existence of the procedure nor did any of the plaintiffs suggest that they could not have discovered the administrative procedure through reasonable effort. In short, the plaintiffs' ignorance of the administrative remedies alone did not excuse exhaustion. *Cf. Fisher v. Johnson,* 174 F.3d 710, 714 (5th Cir. 1999) ("[I]gnorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing."); *Cooper v. Bell,* 628 F.2d 1208, 1212 n.6 (9th Cir. 1980) ("mere ignorance of one's legal rights does not justify extension of a filing period"), *overruled on other grounds as recognized*

in Valenzuela v. Kraft, Inc., 801 F.2d 1170, 1174 (9th Cir. 1986); *Marrero Morales v. Bull Steamship Co.,* 279 F.2d 299, 301 (1st Cir. 1960) ("[M]any cases have held that ignorance of one's legal rights does not excuse a failure to institute suit."). Furthermore, a prison's failure to inform an inmate of its grievance procedure does not automatically make a grievance procedure unavailable. *See Hilao,* 103 F.3d at 778 n.5; *Yousef v. Reno,* 254 F.3d 1214, 1221 (10th Cir. 2001) (holding that the Assistant Attorney General ("AAG") had no duty to inform the prisoner of the prison's formal grievance procedures when the AAG responded to an inmate's informal complaint).

Therefore, for an inmate to claim that a prison's grievance procedure was effectively unavailable due to the inmate's unawareness of the procedure, the inmate must show that the procedure was not known and unknowable with reasonable effort. Such a standard mitigates the concern raised in *Goebert* that jails and prisons should not be allowed "to play hide-and-seek with administrative remedies," *Goebert,* 510 F.3d at 1323, because Albino has failed to show that LASD Jail hid the procedure and failed to show that Albino could not discover it if he would have sought to pursue it. Further, the standard is consistent with the ordinary meaning of "available." *See Hilao,* 103 F.3d at 778 n.5 (indicating that an existing administrative remedy is available unless it is somehow "ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile"); *cf. Mohamad v. Palestinian Auth.,* 132 S. Ct. 1702, 1706 (2012) (reading the

word "individual" based on its natural, ordinary meaning); *Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (internal quotation marks omitted)). The definition of "available" is "capable of use for the accomplishment of a purpose," and that which "is accessible or may be obtained." *Booth,* 532 U.S. at 737 (quoting Webster's Third New International Dictionary 150 (1993)) (internal quotation marks omitted). With these considerations in mind we explain why Albino fails to meet his burden of proof.

To meet his burden of proving the unavailability of the grievance procedure, Albino submitted his declaration. However, Albino's assertions in his declaration alone do not meet his burden of proof, because the assertions simply prove that Albino was subjectively unaware of the grievance procedure.

Here, while Albino claims ignorance of LASD Jail's grievance procedure, the LASD Jail had a formal grievance procedure that was accessible and such facts were undisputed. The grievance procedure was accessible for a number of reasons: (1) the procedure was outlined in Custody Division Manual § 5-12/010.00; (2) inmates could submit written grievances regarding any prison condition, whether or not the inmate utilized the formal Inmate Complaint Forms; (3) unit commanders were required to ensure that each housing facility had adequate Inmate Complaint

Forms available and that inmates had unrestricted access to the forms; and (4) each housing unit was required to have locked repository boxes accessible to inmates so that inmates could deposit complaints without hindrance, or inmates could give complaints to jail staff. The magistrate judge also found no genuine issue of material fact that the LASD Jail's grievance procedure was accessible, and thus, by inference, knowledge of the grievance procedure could have been obtained. Therefore, simply because Albino was unaware of the grievance procedure does not mean that the procedure was unknowable.

Anticipating the problem that subjective unawareness would not be enough, Albino contends that his subjective unawareness was objectively reasonable, because he says the jail had no formal method for informing the inmates of the grievance procedure.[9] Notwithstanding, Albino's declaration only proves that he was subjectively unaware of the grievance procedures and does not support his theory that his unawareness was objectively reasonable. He provides no evidence to show that he could not have discovered the grievance procedure with reasonable effort.

---

[9] On summary judgment, Baca may have been at a disadvantage as to this argument. If he would have presented evidence of a method of informing inmates, this would have created an issue of material fact and could have derailed Baca's chances of winning on summary judgment. In any event the record is silent on this point.

For example, he asserts that (1) he never had an orientation; (2) he never saw the Custody Division Manual § 5-12/010.00, or if he did, it was not in Spanish; (3) he has never spoken to an inmate aware of § 5-12/010.00; and (4) he had never seen or heard of a complaint box. Each of these assertions only shows Albino's lack of subjective awareness. Unlike *Goebert,* where the inmate could not have discovered the procedure with reasonable effort because the inmate handbook did not explain the procedure, 510 F.3d at 1323, Albino does not show that he was foreclosed from discovering the procedure with reasonable effort. In *Goebert,* the parties agreed that the inmate manual did not describe the procedure at issue and that the jail never permitted inmates to see the General Operating Procedures manual that actually did describe the procedure. *Id.* at 1322. Here, Albino fails to dispute that the Custody Division Manual described the grievance procedure in § 5-12/010.00, that jail policies required every housing unit to have an adequate supply of Inmate Complaint Forms, or that locked grievance repositories existed in each housing unit. Albino fails to satisfy his burden of showing why these facts do not indicate that an inmate could have discovered the LASD Jail's grievance procedure with reasonable effort.[10]

---

[10] The dissent asks what more Albino should have done. Though the question seems rhetorical, the answer supports our conclusion. Albino should have followed the procedures outlined in Custody Division Manual § 5-12/010.00. He should have

(Continued on following page)

Furthermore, there is no evidence in the record that Albino would not have been able to discover the grievance procedure. Instead, the record indicates that (with some effort) he likely could have become aware of the grievance procedure. As counsel for defendant aptly noted in oral argument, this case boils down to an inmate that alleges "I didn't see" rather than "I looked and couldn't find" and "no one told me" rather than "I asked and wasn't told or was told misinformation."

Although on summary judgment the jail has not offered evidence of a prescribed method for informing inmates of the procedure, this was not the jail's burden. Moreover, a subjective lack of awareness, without (a) some affirmative actions preventing discovery or (b) objective circumstances showing that efforts to discover would be fruitless, does nothing to suggest that the procedure was unavailable when "available" is defined as "accessible or may be obtained." This is consistent with *Goebert*'s articulated rule that "[t]hat which is unknown and unknowable is unavailable." 510 F.3d at 1323. It is also consistent

---

taken advantage of the complaint boxes that were accessible to him. Instead, Albino has not met his burden to show that he took *any* of the steps that were reasonably available to him as a detainee. Thus, Albino fails to demonstrate that the grievance procedure was objectively unknowable (and, therefore, the remedy unavailable). Accordingly, while the dissent raises the issue of what more Albino could have done, this case resolves on the burden that Albino failed to carry by alleging no more than "I didn't know."

with *Nunez* and *Sapp,* because in those cases the inmates made reasonable, good faith efforts to comply with the grievance procedures and affirmative actions impeded their exhaustion, making access to or the ability to obtain the grievance procedures unreasonable.

Lastly, Albino's evidence regarding his oral complaints does not overcome his failure to meet his burden of proof. Although he orally complained, Albino never attempted to make a written complaint to any jail official or staff member. The jail's grievance procedure, as articulated in Custody Division Manual § 5-12/010.00, does not indicate that any action should be taken with regard to oral complaints. This seems especially relevant, because the jail processed Albino and calculated an appropriate custody and security level classification (based on a number of factors) that indicated that Albino should be housed with the general population. Further, Albino's oral complaints did not put the jail on some sort of constructive notice that would excuse exhaustion. *Cf. Macias,* 495 F.3d at 43-44 (holding that, even if informal complaints and administrative tort claims put the prison on notice of the grievance, that does not satisfy the requirement to procedurally exhaust; further, notice alone is insufficient because the benefits of exhaustion can be realized only if the prison grievance system is followed).

IV. CONCLUSION

Because Albino has failed to meet his burden of showing that the LASD Jail's grievance procedure was unavailable, we **AFFIRM** the district court.

GILMAN, Circuit Judge, dissenting:

I agree with the majority that an inmate must do more than simply claim that he was unaware of the jail's grievance procedure in order to show that administrative remedies were unavailable to him under the PLRA's exhaustion requirement. In the present case, however, Albino orally complained on several occasions to deputies at the jail about being raped and brutally assaulted by his fellow inmates, and about the jail's failure to transfer him to protective custody following each assault. I believe that Albino's actions were sufficient to trigger an obligation on the part of the jail to notify him of the existence of its grievance procedure. Because the jail in this case instead "stonewalled" Albino by not advising him of the procedures necessary for him to seek redress for his complaints, I would hold that Albino has demonstrated that the administrative remedies were effectively unavailable to him and that he has therefore satisfied the PLRA's exhaustion requirement. For this reason, I respectfully dissent.

I begin with what I believe is common ground between my view and the majority's view regarding when a jail's remedy is unavailable for purposes of

the PLRA's exhaustion requirement. As stated above, I agree with the majority that an inmate's unawareness of the jail's grievance procedure, on its own, is insufficient to make that procedure effectively unavailable to him. Otherwise, courts would constantly have to "inquir[e] into an individual inmate's knowledge of the grievance process" – "a time-consuming task fraught with uncertainty, as any inmate could create a triable issue of fact merely by averring he did not know of the process." *Johnson v. District of Columbia,* ___ F. Supp. 2d ___, 2012 WL 2355577, at *8 (D.D.C. June 21, 2012) (brackets, citation, and internal quotation marks omitted). Such a rule would encourage the ignorance of (rather than the use of) administrative remedies and would clog the courts, thereby thwarting the purposes underlying the exhaustion requirement. *Cf. Arnold v. Goetz,* 245 F. Supp. 2d 527, 537 (S.D.N.Y. 2003) (noting that "an inmate may not close his eyes to what he reasonably should have known") (internal quotation marks omitted).

I also agree with the majority that, at the other end of the spectrum, "affirmative actions by jail staff preventing proper exhaustion, even if done innocently, make administrative remedies effectively unavailable." (Maj. Op. at 11693-94) Were this not the rule, a jail would be able to "have it both ways": it could "obstruct an inmate's pursuit of administrative exhaustion on the one hand and then claim the inmate did not properly exhaust these remedies on

the other." *Goetz,* 245 F. Supp. 2d at 537. This outcome is antithetical to the notion of due process.

What makes the present case a close one is that it falls in between these two extremes. Albino is not alleging that the Los Angeles County Jail affirmatively interfered with his ability to exhaust his administrative remedies. But he is alleging a good bit more than subjective unawareness. His claim is that the jail had no policy of informing its inmates about its grievance procedure, that a typical inmate such as himself would have no clear basis to discover the procedure's existence, and that he repeatedly made efforts to grieve by orally notifying the sheriff's deputies of his complaint and his desire to be placed in protective custody. This brings us to the two critical questions: (1) what should the rule be under such circumstances, and (2) how should that rule be applied to the facts of this case?

With respect to the first question, the majority holds that, when a jail has in place a procedure for complaining about the conditions of confinement, an inmate must "make reasonable, good-faith efforts to discover [that procedure] before unawareness may possibly make [it] unavailable." (Maj. Op. at 11696; *see also id.* at 11699 ("Therefore, for an inmate to claim that a prison's grievance procedure was effectively unavailable due to the inmate's unawareness of the procedure, the inmate must show that the procedure was not known and [was] unknowable with reasonable effort.")) I will not quibble with this formulation of the proper rule. As set forth by the

majority, the rule is consistent with that adopted by the Eleventh Circuit, which held that the phrase "such remedies as are available" does not include "remedies or requirements for remedies that an inmate does not know about, and cannot discover through reasonable effort, by the time they are needed." *See Goebert v. Lee Cnty.,* 510 F.3d 1312, 1322 (11th Cir. 2007).

Where I part ways with the majority is on the second question – whether, in construing the facts in the light most favorable to him, Albino actually made a reasonable, good-faith effort to discover the jail's grievance procedure. In answering this question in the negative, the majority first concludes that "[t]he grievance procedure was accessible" because

> (1) the procedure was outlined in Custody Division Manual § 5-12/010.00; (2) inmates could submit written grievances regarding any prison condition, whether or not the inmate utilized the formal Inmate Complaint Forms; (3) unit commanders were required to ensure that each housing facility had adequate Inmate Complaint Forms available and that inmates had unrestricted access to the forms; and (4) each housing unit was required to have locked repository boxes accessible to inmates so that inmates could deposit complaints without hindrance, or inmates could give complaints to jail staff.

(Maj. Op. at 11700 (citations omitted))

The majority is certainly right that these facts demonstrate that a grievance procedure actually existed. (*See* Maj. Op. at 11690) But that is all they show. The enumerated facts tell us nothing about whether an inmate such as Albino could have reasonably discovered that the procedure existed and was available to him. There is simply no evidence that inmates received copies of the Custody Division Manual or were otherwise made aware of the grievance procedure. Nor is there any evidence that the locked repository boxes or grievance forms were noticeable to or identifiable by the inmates (even if the inmates technically had access to both).

Yet the majority ultimately concludes that Albino has "provide[d] no evidence to show that he could not have discovered the grievance procedure with reasonable effort." (Maj. Op. at 11701) In support of this conclusion, the majority contrasts the facts of Albino's case with the facts of *Goebert,* in which the Eleventh Circuit held that the inmate *had met* her burden of showing that the administrative remedies were not available with reasonable effort.

I am puzzled by the majority's reliance on *Goebert.* That case involved an inmate who failed to file an appeal of an adverse administrative response to her complaint, as required under the jail's grievance procedure. The court excused her failure because, as the majority here points out, "the parties agreed that the inmate manual did not describe the procedure at issue and that the jail never permitted inmates to see the General Operating Procedures

manual that actually did describe the procedure." (Maj. Op. at 11701) On these facts, as even the majority acknowledges, "there was nothing in the record leading a reasonable inmate to believe there was an appeal procedure or indicating that an inmate could have discovered the appeal procedure upon a reasonable effort." (Maj. Op. at 11697)

In attempting to distinguish *Goebert* from the present case, the majority recites the previously mentioned facts, reasoning that "Albino fails to dispute that the Custody Division Manual described the grievance procedure in § 5-12/010.00, that jail policies required every housing unit to have an adequate supply of Inmate Complaint Forms, or that locked grievance repositories existed in each housing unit." (Maj. Op. at 11701-02) But again, these facts show only that the grievance procedure *exists*. They do not suggest that Albino should have been aware of the procedure any more than the existence of the appellate procedure in *Goebert* suggested that Goebert should have been aware of it.

To the contrary, when the facts are construed in the light most favorable to Albino, they show that he persistently complained to deputies at the jail about his repeated assaults and about the jail's failure to transfer him to protective custody following each assault. Not once, however, was he ever told that he could submit a written complaint in one of the locked boxes apparently located in each housing unit.

The majority disregards these complaints because they were made orally as opposed to in writing, the latter being required by the jail's grievance procedure. But Albino had not been made aware of this procedure and had not received a copy of the Custody Division Manual. In my opinion, these facts satisfy the "good-faith effort" standard announced by the majority and should have triggered on the part of the jail an obligation to alert Albino to the existence of the jail's grievance procedure.

Instead, the deputies at various times (a) did nothing, (b) disclosed the nature of his charges to the other inmates (which precipitated the assaults), and (c) told him that only his attorney could help him. Albino deserved better. Under the circumstances, his repeated attempts to inform the deputies of his complaints should be considered "reasonable and appropriate steps to exhaust his . . . claim[s]." *Cf. Nunez v. Duncan,* 591 F.3d 1217, 1224, 1226 (9th Cir. 2010) (holding that exhaustion is satisfied when the prisoner "took reasonable and appropriate steps to exhaust his . . . claim and was precluded from exhausting, not through his own fault but by the Warden's mistake," or by the Warden's "bad faith or deliberate obstruction"). I believe that the deputies' silence in the face of Albino's complaints constitutes a "mistake" by the jail that precluded Albino from exhausting his claims.

As the Eleventh Circuit in *Goebert* explained:

> That which is unknown and unknowable is unavailable; it is not "capable of use for the accomplishment of a purpose." *Booth* [*v. Churner*], 532 U.S. [731,] 738 (2001)]. If we allowed jails and prisons to play hide-and-seek with administrative remedies, they could keep all remedies under wraps until after a lawsuit is filed and then uncover them and proclaim that the remedies were available all along. The Queen [of Hearts in *Alice's Adventures in Wonderland*] would be proud.

Goebert, 510 F.3d at 1323. This policy concern should apply with equal force here.

In sum, although the majority adopts a rule that is formally consistent with *Goebert,* the majority's application of that rule is anything but. I am frankly at a loss to determine what the majority thinks would have constituted a "good-faith effort" to discover the grievance procedure in this case. Put more simply: What more should Albino have done? In my view, once an inmate engages in a sincere effort to complain about the conditions of his confinement to someone with authority at the jail, that assertion should trigger on the part of the jail an obligation to inform the inmate about the proper procedure to pursue his complaint. Because the jail in this case "kept [Albino] in the dark about the path [he] was required to follow," *see id.,* I would reverse the judgment of the district court in favor of the sheriff.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JUAN ROBERTO ALBINO, Plaintiff, v. LEE BACA, et al., Defendant	Case No. CV 08-3790-GAF (MLG) ORDER ACCEPTING AND ADOPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE (Filed Mar. 10, 2010)

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed all of the records and files herein, including the Report and Recommendation of the United States Magistrate Judge, and has conducted a *de novo* review of those portions of the Report and Recommendation to which objections were filed. The Court accepts and adopts the findings and recommendations in the Report and Recommendation and ORDERS that the action be dismissed without prejudice.

Dated: March 9, 2010

/s/ Gary Feess
Gary A. Feess
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JUAN ROBERTO ALBINO, Plaintiff, v. LEE BACA, LOS ANGELES COUNTY SHERIFF, et al., Defendants.	Case No. CV 08-3790-GAF (MLG) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Feb. 2, 2010)

I. Facts and Procedural History

Plaintiff Juan Roberto Albino, who is currently incarcerated at the California State Prison in Corcoran, California, filed this first amended pro se civil rights complaint pursuant to 42 U.S.C. § 1983 on August 11, 2008. The complaint names Los Angeles County; Lee Baca, Sheriff of Los Angeles County; and various John Does as defendants.[1]

[1] On February 10, 2009, the Court granted Defendants' motion to dismiss the County of Los Angeles as a Defendant. On August 26, 2009, Plaintiff filed a motion to amend his complaint to add the names of the John Doe defendants, which this Court denied on September 14. On September 28, 2009, Plaintiff filed a motion for reconsideration, which is currently pending before this Court. Los Angeles County Sheriff Lee Baca is currently the only named defendant.

Plaintiff alleges that after his May 11, 2006 arrest for a sex offense, he was incarcerated in the Los Angeles County Jail, where his request to be placed in protective custody was refused by several sheriff's deputies. Plaintiff claims that on June 16, 2006, he was assaulted by fellow inmates after those inmates were informed by deputies that Plaintiff was an accused sex offender. He states that he suffered serious injuries. Plaintiff was transported to County USC Medical Center on the day he was assaulted.

Plaintiff claims that after returning from the hospital, he again asked to be placed in protective custody. That request was refused by deputies, and Plaintiff was assaulted by other prisoners on July 18, 2006, and again in September of 2006. Plaintiff claims that he was taken to the jail clinic after both assaults, but was only provided with pain medication.

Plaintiff alleges that his Constitutional rights were violated by Defendants' failure to protect him from other inmates and by Defendants' deliberate indifference to his serious medical needs. He further claims that Sheriff Baca failed to adequately train and supervise his deputies. Plaintiff also alleges state law claims of intentional infliction of emotional distress and gross negligence. Plaintiff seeks $1,000,000.00 in damages from each defendant.[2]

---

[2] Plaintiff's request for punitive damages was stricken on February 19, 2009.

On August 7, 2009, Defendant Baca filed a motion for summary judgment, contending that: (1) Plaintiff's lawsuit must be dismissed because Plaintiff failed to exhaust his administrative remedies prior to filing suit, as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) ("PLRA"); (2) there is no genuine issue of material fact as to whether Plaintiff was incarcerated under unconstitutional conditions, whether Defendant acted with deliberate indifference to Plaintiff's health and safety, or whether Defendant maintained an unconstitutional policy or practice; and (3) Plaintiff's state law claims are barred by state statute.

On October 7, 2009, Plaintiff filed his opposition to Defendant's motion for summary judgment. Defendant filed a Reply on November 6, 2009. The matter is now ready for decision.

II. Standard of Review

Summary judgment is appropriate if, viewing the evidence in a light most favorable to the nonmoving party, the Court determines that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986); *Olsen v. Idaho State Bd. of Med.,* 363 F.3d 916, 922 (9th Cir. 2004). Material facts are those that affect the outcome of the case. *Anderson,* 477 U.S. at 248; *Far Out Prods., Inc. v. Oskar,* 247 F.3d 986, 992 (9th Cir. 2001). A dispute about a material fact is "genuine" if "the evidence is such that

a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248. The Court does not weigh the evidence, but only determines if there is a genuine issue for trial. *Menotti v. City of Seattle,* 409 F.3d 1113, 1120 (9th Cir. 2005).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once the moving party presents sufficient evidence or argument to support the motion, the burden shifts to the adverse party to set forth specific facts showing a genuine triable issue. Fed. R. Civ. P. 56(e). The nonmovant must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex,* 477 U.S. at 324 (quoting Rule 56); *see also Anderson,* 477 U.S. at 257.

Conclusory allegations are insufficient to withstand a motion for summary judgment. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). The nonmoving party must "present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson,* 477 U.S. at 257. "If the evidence is merely colorable, or is not significantly probative, summary judgment maybe granted." *Id.* at 249-50 (citations

omitted); *accord Hardage v. CBS Broad., Inc.,* 427 F.3d 1177, 1183 (9th Cir. 2005).

III. Discussion

The Court begins with Defendant's claim that summary judgment is appropriate in light of Plaintiff's failure to exhaust his administrative remedies prior to filing this lawsuit. Because the Court agrees that dismissal without prejudice is appropriate due to Plaintiff's failure to exhaust, it declines to address the substantive merits of Defendant's motion for summary judgment.

A. Applicable Law

The Prison Litigation Reform Act of 1995 provides:

> No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). Under this provision, all state and federal prisoners are required to exhaust available prison administrative remedies before seeking relief in federal court, regardless of whether the administrative remedy can provide them with the relief sought. *Booth v. Churner,* 532 U.S. 731, 741 & n.6 (2001) ("[W]e will not read futility or other

exceptions into statutory exhaustion requirements where Congress has provided otherwise."). The exhaustion requirement is mandatory, and may not be excused by a court in the interests of justice. *Woodford v. Ngo,* 548 U.S. 81, 85 (2006); *Booth,* 532 U.S. at 740 n.5; *Bovarie v. Giurbino,* 421 F. Supp. 2d 1309, 1312 (S.D. Cal. 2006).

A prisoner must exhaust his administrative remedies before bringing a claim pursuant to 42 U.S.C. § 1983. *Vaden v. Summerhill,* 449 F.3d 1047, 1050-51 (9th Cir. 2006); *McKinney v. Carey,* 311 F.3d 1198, 1199 (9th Cir. 2002). It is the defendant's burden, however, to plead and prove a plaintiff's failure to exhaust. *Jones v. Bock,* 549 U.S. 199, 216 (2007); *Wyatt v. Terhune,* 315 F.3d 1108, 1120 (9th Cir. 2003).

B. Plaintiff Failed To Exhaust Available Administrative Remedies Prior to Filing this Lawsuit.

Defendant contends that summary judgment is warranted because Plaintiff failed to exhaust available administrative remedies prior to filing suit. Plaintiff acknowledges his failure to exhaust (Mathers Decl. Ex. T at 12.), but argues that the administrative grievance process was not truly available to him since he was never made aware of its existence.

The Court finds, based upon the submissions of the parties, that the Los Angeles County Jail had an accessible administrative procedure for seeking

redress of grievances at the time of the incidents. According to the declaration of Deputy Jason Ford, a formal administrative remedy procedure existed at the Los Angeles County Jail in 2006. (Ford Decl. ¶ 5.) The Custody Division Manual § 5-12/010.00 attached to Deputy Ford's declaration describes the jail's policy for handling inmate complaints. (Ford Decl. Ex. D.)

An inmate may submit an appeal and have grievances resolved concerning any condition of confinement. (*Id.* at 1.) Unit commanders must ensure that "each housing unit within the facility has an adequate supply of Inmate Complaint Forms available, and that the inmates have unrestricted access to the forms." (*Id.*) "All inmates are permitted to report a complaint whether or not it is written on the specified form," and "[e]ach housing area shall have a locked repository accessible to inmates where they are allowed to deposit their completed forms without interference." (*Id.*) At each shift, the housing officer must ensure that there is an adequate supply of forms. (*Id.* at 2.) The policy also describes the process for investigating and resolving grievances upon receipt. (*Id.* at 2-5.)

According to the declaration submitted by Deputy Kelley, at the time of the incidents, inmates at the Men's Central Jail were given access to Inmate Complaint Forms or were permitted to submit written complaints of any kind. (Kelley Decl. ¶¶2-3.) These forms were "available at various locations within the facility, and an adequate supply is maintained and available for any inmate who requests

them." (*Id.*) Inmates were permitted to place complaints in a locked complaint box or give them to a staff member. (*Id.* at ¶4.) These written complaints were picked up by legal staff, logged, and generally resolved within ten days of receipt. (*Id.* at ¶¶5-6.) If an inmate's complaint was denied, he could appeal through five levels of review. (*Id.* at ¶7.)

In response to Defendant's evidence of inmate access to a grievance process, Plaintiff has submitted a declaration, stating that: (1) he was never given an orientation by jail staff; (2) he never saw LASD Custody Division Manual § 5-12/010.00, or, if he did, it was not in Spanish and he did understand what it was; (3) he has never spoken to anyone who has heard of Custody Division Manual § 512/010.00; (4) he has never seen or heard of a complaint form; (5) he has never seen a complaint box, and no one has mentioned its existence to him; and (6) he was locked down during his entire stay at the jail, ate in the pod, was escorted to the showers in handcuffs, and never went to the yard. (Albino Decl. ¶¶2-10.)[3] Plaintiff's declaration only addresses his awareness of the jail's

[3] Plaintiff also submitted a declaration by an inmate named Cameron Hooker describing a poll Hooker conducted on June 18, 2009 of fellow inmates' awareness of the jail's grievance procedure. (Pl.'s Opp'n to Def.'s Mot. Ex. C (Hooker Decl.).) The Hooker declaration consists entirely of inadmissible hearsay, however, and cannot be relied on by Plaintiff to defeat summary judgment. *See Block v. City of Los Angeles,* 253 F.3d 410, 419 (9th Cir. 2001); In re *Sunset Bay Assocs. v. Eureka Fed. Sav. & Loan Ass'n,* 944 F.2d 1503, 1514 (9th Cir. 1991).

grievance procedure and does nothing to dispute Defendant's evidence of its existence or accessibility to inmates. As such, the Court finds no genuine issue of material fact as to the existence of a grievance procedure at the jail, its accessibility to inmates, or Plaintiff's failure to avail himself of it.

Plaintiff contends that even if a grievance procedure existed, the failure to explicitly inform him of it obviates his need to exhaust. (Pl.'s Opp'n to Def.'s Mot. at 3-5.). Plaintiff's argument seems to be that the PLRA only requires exhaustion of "available" administrative remedies, and that the jail's failure to inform him of its grievance procedure rendered it unavailable. (*Id.*) While the Ninth Circuit Court of Appeals has not spoken on this issue, several other Circuit Courts of Appeals have held that neither a lack of awareness of available grievance procedures nor a prison's failure to inform an inmate of them excuses his failure to exhaust. *See, e.g., Chelette v. Harris,* 229 F.3d 684 (8th Cir. 2000); *Twitty v. McCoskey,* 226 F. App'x 594 (7th Cir. 2007); *Brock v. Kenton County, KY,* 93 F. App'x 793 (6th Cir. 2004); *Gonzalez-Liranza v. Naranjo,* 76 F. App'x 270 (10th Cir. 2003); *see also Graham v. County of Gloucester, Va,* No. 2:08cv279, 2009 WL 3755944 (E.D. Va. Nov. 4, 2009); *Evans v. Marshall,* No. CV 105-132, 2007 WL 842056 (S.D. Ga. Mar. 15, 2007).

In rejecting a prisoner's contention that his mistaken assumption regarding available administrative remedies excused his failure to exhaust, the Eighth Circuit Court of Appeals noted that "[s]ection

1997e(a) says nothing about a prisoner's subjective beliefs, logical or otherwise, about the administrative remedies that might be available to him," and concluded that courts are "'not free to engraft upon the statute an exception that Congress did not place there.'" *Chelette,* 229 F.3d at 688 (quoting *Castano v. Nebraska Dep't of Corr.,* 201 F.3d 1023, 1025 (8th Cir. 2000)). Similarly, the Tenth Circuit Court of Appeals noted that "any factual dispute between the parties as to whether or not plaintiff was ever advised or informed of the prison's grievance procedures was not relevant" given the court's lack of "authority for waiving or excusing compliance with PLRA's exhaustion requirement." *Gonzalez-Liranza,* 76 F. App'x at 272-73. The Court agrees with the reasoning and conclusion of these courts.[4]

Moreover, Plaintiff's reliance on *Marella v. Terhune,* 568 F.3d 1024 (9th Cir. 2009) is misplaced. Marella contended that he was unable to file a grievance within fifteen days because he was in the hospital, infirmary, and administrative segregation during that time and was unable to acquire and complete a

[4] Several federal courts have held that when prison officials prevent exhaustion by making their administrative grievance process unknowable or not discoverable through reasonable efforts, the failure to exhaust may be excused. *See, e.g., Goebert v. Lee County,* 510 F.3d 1312, 1322-23 (11th Cir. 2007); *Brown v. Sikes,* 212 F.3d 1205, 1207-08 (11th Cir. 2000). Such is not the case here. There is no showing that the internal grievance procedures were hidden or made unavailable by Los Angeles County Jail officials.

grievance form. *Marella,* 568 F.3d at 1026. The Ninth Circuit relied on a state prison regulation permitting rejection of an inmate appeal if time limits were exceeded "and the appellant had the opportunity to file within the prescribed time constraints," and remanded for factual findings as to whether Marella had an opportunity to timely file given his physical limitations. *Id.* at 1027 (quoting Cal. Code Regs. tit. 15 § 3084.3(c)(6)). By contrast, Plaintiff is not challenging a prison determination that his filing was untimely: he never filed a grievance. Moreover, unlike Marella, Plaintiff does not contend that he was physically unable to exhaust, but rather that his ignorance of the process excuses his failure to file. *Marella* does not provide authority for such an exception to the exhaustion requirement. Finally, the *Marella* court merely remanded for fact-finding regarding the inmate's ability to timely file (*id.* at 1027), and this Court has found that Plaintiff had access to a grievance procedure at the Los Angeles County Jail.

Plaintiff's lack of awareness of jail grievance procedures does not excuse his admitted failure to exhaust administrative remedies prior to bringing suit.[5] As such, and in light of the Court's finding that

---

[5] Had jail officials actively prevented Plaintiff from availing himself of jail grievance procedures, his failure to exhaust might be excused. *See, e.g., Mitchell v. Horn,* 318 F.3d 523, 529 (3d Cir. 2003); *Miller v. Norris,* 247 F.3d 736, 740 (8th Cir. 2001). In Plaintiff's First Amended Complaint, he states that he signed a request to withdraw his complaint after defendants threatened to place him into general population and expose his case

(Continued on following page)

the jail had available administrative remedies, summary judgment based on failure to exhaust is warranted.[6]

IV. Conclusion

For the reasons set forth above, it is recommended that the Court GRANT Defendant's motion for summary judgment and DISMISS Plaintiff's lawsuit WITHOUT PREJUDICE.[7]

---

information if he did not withdraw his complaint. (First Am. Compl. at §§27-28.) It is unclear to the Court whether Plaintiff is suggesting that he filed a written complaint, which he subsequently withdrew. If this is his claim, it is inconsistent with Plaintiff's claims in subsequent pleadings and declarations that he did not exhaust because he was unaware of a process for filing written complaints. However, in light of the ambiguity in this statement, the Court will not consider it.

[6] Further, because Plaintiff's failure to exhaust would also be true with respect to any claims against the John Doe defendants, Plaintiff's motion to reconsider the Court's September 14, 2009 Order Denying Plaintiff's Motion to Amend the Complaint is DENIED. (Docket Entry 42.)

[7] As noted, the first amended complaint also contains several state law claims by Plaintiff. Because none of Plaintiff's federal claims are viable, this Court should not exercise supplemental jurisdiction over Plaintiff's state law claims. *See* 28 U.S.C. § 1367(c); *Acri v. Varian Assocs., Inc.,* 114 F.3d 999, 1000 (9th Cir. 1997) (stating that district court should dismiss state law claims when all federal claims have been dismissed).

Dated: February 2, 2010

/s/ Marc L. Goldman
Marc L. Goldman
United States Magistrate Judge