UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

ANTHONY SWAIN, et al., individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DANIEL JUNIOR, in his official capacity as Director of the Miami-Dade Corrections and Rehabilitation Department, et al.,

Defendants.
_____/

Case No.: 1:20-cv-21457-KMW

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COUNT I OF THE COMPLAINT

Plaintiffs hereby respond to Defendants' Motion to Dismiss Count I of the Complaint [ECF 66] ("Motion to Dismiss"), and state as follows:

Central to the Supreme Court's analysis of exhaustion under the Prison Litigation Reform Act ("PLRA") is an understanding that jails should not be rewarded for designing systems or engaging in misconduct that render the administrative process functionally incapable of use. In this case, when attempting to secure basic protections against a rapidly escalating viral pandemic, the detained Plaintiffs were burdened with an "emergency" grievance process too lengthy to provide any relief from imminent harm, and they were repeatedly refused the paper forms necessary to access even that grievance process. Because the administrative procedure at Metro West Detention Center was not "available" for purposes of exhaustion, Plaintiffs had no obligation to exhaust the remedy. The Court should therefore deny Defendants' Motion to Dismiss.

I. BACKGROUND

To file a grievance in a MDCR facility, a detainee "must fill out an Inmate Grievance Form" within ten workdays from the date of the incident. ECF No. 66-2 ("Inmate Handbook") at 7. Detainees must place the completed grievance form into an "inmate request drop box" to properly "grieve an issue" according to MDCR policy; if a detainee "attempt[s] to give [the]

form[] to staff," staff are required to "[i]nstruct" the detainee to place the completed form into the drop box. ECF No. 66-1 at 2, 3. The grievance will be returned if the form is incomplete, contains more than one complaint or issue, lists more than one grievant, is written offensively, "has no basis in fact," or "contains an issue that cannot be grieved." Inmate Handbook at 7. If a grievance form is returned, the detainee "may fill out a new form" and return it "to staff within 2 workdays, unless the issue cannot be grieved." *Id*.

Generally, MDCR policy states that a detainee will receive a response to his grievance within twenty calendar days. *Id*. There is no way for detainees to expedite the process by designating their grievances as an "emergency;" MDCR staff decide whether the grievance constitutes an emergency. *Id.*; ECF No. 66-1 at 4. For those grievances that MDCR staff choose to treat as an emergency, the policy states that a detainee will receive a response within seven calendar days. Inmate Handbook at 7. Regardless of whether the grievance is an emergency, the appeal process is the same: a detainee must fill out an "Inmate Grievance Appeal Form" within two workdays, and policy states that the detainee will receive a response within seven workdays. *Id*.

Plaintiffs attempted to file grievances prior to this lawsuit, but the grievance forms were unavailable in their dormitory cells and, when Plaintiffs repeatedly requested blank forms from MDCR staff, their requests were refused. *See* Blanco Decl. ¶ 18, ECF No. 3-6; Cruz Decl. ¶ 15, ECF No. 3-8; Bernal Decl. ¶ 14, ECF No. 3-10; Supp'l Blanco Decl. ¶¶ 2-6, Ex. 1 (identifying officer names and additional details); Supp'l Cruz Decl. ¶¶ 4-6, Ex. 2 (same). Plaintiffs were informed there were no grievance forms available and that they would have to wait for the arrival of their counselor to obtain a form, but counselors appeared infrequently due to the coronavirus pandemic. Supp'l Blanco Decl. ¶¶ 5-7; Supp'l Cruz Decl. ¶¶ 6-7; Bernal Decl. ¶ 14. Plaintiffs were therefore unable to access the grievance process before filing, with the exception of a few Plaintiffs who were finally provided one form each and, pursuant to Defendants' constraints, filed grievances on only one issue each in the beginning of April. Blanco Decl. ¶ 18; Supp'l Blanco Decl. ¶ 8; Supp'l Cruz Decl. ¶ 7. As of May 14, 2020, Plaintiffs Alen Blanco and Bayardo Cruz have not yet received a response to the grievance they filed in early April. Supp'l Blanco Decl. ¶¶ 8-9; Supp'l Cruz Decl. ¶ 9.

II. LEGAL STANDARD

The PLRA requires an incarcerated person to exhaust "such administrative remedies as are available" before filing an action in federal court to challenge prison conditions. 42 U.S.C. § 1997e(a). This exhaustion requirement "hinges on the 'availability' of administrative remedies: An inmate . . . must exhaust available remedies, but need not exhaust unavailable ones." *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016) (alternation marks omitted). Accordingly, incarcerated people are "required to exhaust those, but only those, grievance procedures that are 'capable of use' to obtain 'some relief for the action complained of.'" *Id*. at 1859 (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)). The Supreme Court has recognized at least three examples of circumstances "in which an administrative remedy, although officially on the books, is not capable of use to obtain relief": (1) when the procedure "operates as a simple dead end" and officers are "unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) where the "administrative scheme is so opaque that it becomes, practically speaking, incapable of use"; and (3) "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id*. at 1859-60.

This exhaustion requirement is an affirmative defense, not a pleading requirement, and Defendants bear the burden of proving a failure to exhaust available administrative remedies. *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008). In this Circuit, there is a two-step process for resolving motions to dismiss for failure to exhaust under the PLRA. *Whatley v. Warden, Ware State Prison*, 802 F.3d 1205, 1209 (11th Cir. 2015). First, the district court looks to the factual allegations raised in the motion to dismiss as well as the detainee's response and accepts the detainee's articulation of the facts as true. *Id*. (citing *Turner*, 541 F.3d at 1081). Where the facts as stated by the detainee do not demonstrate a failure to exhaust, dismissal is unwarranted. *Id*. The court then proceeds to the second step, where it "makes specific findings to resolve disputes of fact" related to exhaustion and should deny the motion if, based on those findings, defendants fail to adequately prove a failure to exhaust. *Id*. The district court is able to "consider facts outside of the pleadings and to resolve factual disputes so long as the factual disputes do not decide the merits and the parties have sufficient opportunity to develop a record." *Bryant v Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008) (citations omitted).

III. RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Defendants fail to demonstrate that Plaintiffs did not exhaust available remedies. Dismissal is unwarranted at the first step of the *Turner* inquiry, given Defendants' admissions regarding the length of time allotted (and taken by the jail) to complete even the "emergency" grievance process, as well as Plaintiffs' sworn testimony that jail officials repeatedly denied their requests for grievance forms to access even the process that would not have meaningfully addressed their concerns. Dismissal is also unwarranted at the second step. Much of the evidence proffered by Defendants corroborates Plaintiffs' assertions, and given deficiencies in their evidence, Defendants fail to contradict or adequately dispute Plaintiffs' sworn testimony at this stage. Accordingly, the Court should deny Defendants' motion to dismiss.

If the Court makes it to step two, then the parties must engage in discovery so that Plaintiffs can test Defendants' assertions and access evidence in Defendants' possession that would further corroborate Plaintiffs' testimony. *Bryant* 530 F.3d at 1376 (requiring that the parties be given "sufficient opportunity to develop a record" at step two).

A. Plaintiffs had no obligation to exhaust unavailable remedies.

Defendants argue that, at step one of *Turner*'s two-step framework, Plaintiffs' assertions do not support a finding that administrative remedies were "unavailable" at Metro West. ECF No. 66 at 5-8. Defendants are incorrect for two reasons. First, the grievance process in place at Metro West "offer[ed] no possible relief in time to prevent the imminent danger from becoming an actual harm" and was therefore unavailable under the PLRA. *Fletcher v. Menard Correctional Center*, 623 F.3d 1171, 1173 (7th Cir. 2010); *see also* Compl. ¶¶ 105-06, ECF No. 1. The unambiguous language of Defendants' own written policies confirm there was no remedy available to address the urgent concerns raised in this lawsuit to provide basic protections to Plaintiffs as the viral infection spread exponentially inside the jail within days. Second, even if Defendants' procedures were capable of providing any relief, MDCR employees denied Plaintiffs' repeated requests for grievance forms. Compl. ¶¶ 105-06. Withholding the forms necessary to access the grievance process, as a matter of law, renders the remedy unavailable.

i. *The administrative procedure at Metro West offered no possible relief in time to address the imminent threats posed by this viral pandemic.*

As Defendants acknowledge, a person "need only exhaust those remedies that are 'available' to him." ECF No. 66 at 2 (quoting *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016)). This

"built-in exception to the exhaustion requirement" of the PLRA "has real content," *Ross*, 136 S. Ct. at 1855, 1858-59, and the length of time required to access relief from an administrative remedy clearly bears on the availability of that remedy. For example, "[i]f a prisoner has been placed in imminent danger of serious physical injury by an act that violates his constitutional rights, administrative remedies that offer no possible relief in time to prevent the imminent danger from becoming an actual harm can't be thought available." *Fletcher*, 623 F.3d at 1173. Operating a grievance process that cannot be completed in time to remedy an urgent issue is one primary way that a jail can create a "dead end" to the process, thereby ensuring it is "unable or consistently unwilling to provide any relief to aggrieved inmates." *Ross*, 136 S. Ct. at 1859. The Supreme Court has noted that a grievance process with a "dead end" is unavailable for purposes of PLRA exhaustion, "despite what regulations or guidance materials may promise," and "the inmate has no obligation to exhaust the remedy." *Id*.

Defendants argue that Metro West employs an "emergency" grievance procedure that Plaintiffs should have fully exhausted prior to filing this lawsuit. But this "emergency" process is not available, on its face, to resolve issues requiring an urgent response. As stated in both the Employee Handbook and the written policies, the "emergency" grievance process at Metro West (which relies on Defendants to decide when something is an "emergency")[1] will take over two weeks to fully exhaust: seven calendar days to receive a response to the grievance, two workdays to properly submit an appeal of a denial, and seven additional workdays to receive a response to the appeal. Inmate Handbook at 7, ECF No. 66-2; ECF No. 66-1 at 5, 7. Accordingly, if a person had an emergency that must be addressed in less than two weeks — such as needing a sufficient supply of soap to wash one's hands in a crowded dormitory cell as a viral pandemic spreads — Defendants' grievance procedures are simply not available to resolve it. If it takes two weeks or more to exhaust a complaint but the detainee is in danger of imminent harm, there is no

[1] Defendants have repeatedly asserted to this Court that Plaintiffs' claims are *not* an emergency and have no basis in fact. *See, e.g.*, ECF No. 67 at 22 (claiming Plaintiffs' allegations about the cleanliness of Metro West are "at the very least incredible if not intentionally misleading"); *id.* (describing Plaintiffs' allegations about movement between cells as "baseless accusations"); *id.* at 29-30 (describing Plaintiffs' request for protection from COVID as "a wish list of additional mitigating measures" and arguing that they are unlikely to suffer irreparable harm). Given these representations, Defendants cannot now argue that they would have treated those grievances as emergencies having a "basis in fact," ECF. No. 66-2 at 7, had they been made through the administrative process and not as part of a federal lawsuit. Accordingly, the 20-day limit for the initial response to non-emergency grievances is likely the appropriate timeframe when determining how long exhaustion would take.

"possibility of some relief." *Ross*, 136 S. Ct. at 1859 (quoting *Booth*, 532 U.S. at 738). As the *Fletcher* court reasoned, "there is no duty to exhaust, in a situation of imminent danger, if there are no administrative remedies for warding off such a danger." 623 F.3d at 1173.

The situation at Metro West was one of imminent danger. Medical experts have explained that the "horizon of risk" is measured "in a matter of days, not weeks," with this novel coronavirus. *See, e.g.*, Greer Decl. ¶ 39, ECF No. 3-14; Henderson Decl. ¶ 31, ECF No. 17-1; Meyer Decl. ¶ 40, ECF No. 80-15; Paredes Decl. ¶ 9, ECF No. 80-35 ("A patient's condition can seriously deteriorate in as little as five days (perhaps sooner) following initial detection of symptoms."); Mishori Decl. ¶ 12, ECF No. 80-17 ("Complications from COVID-19, including severe damage to lung, heart, liver, or other organs, can manifest at an alarming pace. Patients can show the first symptoms of infection in as little as two days after exposure, and their condition can seriously deteriorate in as little as five days or sooner."). Data suggests, for example, that if social distancing policies had been imposed just one week earlier, there would have been a "substantial" reduction in deaths of approximately 50-80%.[2]

Defendants' primary argument (that the length of time required to access relief is irrelevant when determining the remedy's availability) is both callous and nonsensical. *See* ECF 66 at 6. Under Defendants' theory, even if a jail's "emergency" grievance process provided no practical ability for a person to obtain redress for an urgent issue, the process would nonetheless be "available" so long as the jail could respond at any time in the future — even where the process allowed the jail to respond multiple weeks (or even months) after the initial complaint. This position stretches the meaning of "available" beyond recognition. The Supreme Court's commonsense approach in *Ross*, which explains that remedies are available only if they are actually "'capable of use' to obtain 'some relief,'" 136 S. Ct. at 1859 (quoting *Booth*, 532 U.S. at 738), rejects Defendants' formalistic argument that the timing of an administrative process has nothing to do with its availability. Here, Plaintiffs' need was simple and urgent: compliance with CDC guidelines so they could disinfect their cells, wash their hands, receive proper care, and maintain medically required social distancing to protect themselves from becoming infected with a serious disease spreading rapidly within days inside jails throughout the country. For them, the more-than-two-week grievance procedure at Metro West was not "capable of use to obtain some

[2] Britta L. Jewell and Nicholas P. Jewell, *The Huge Cost of Waiting to Contain the Pandemic*, N.Y. Times (Apr. 14, 2020), available at https://www.nytimes.com/2020/04/14/opinion/covid-social-distancing.html.

relief" in any meaningful sense of those words. *Id*. (internal quotation marks omitted). Notably, Defendants cite no authority for the proposition that an "emergency" grievance procedure, specifically one with no hope of providing any relief to a detainee because the response would be delayed until after the person had suffered the very harm he sought to avoid, is considered "available" under the PLRA.

In incorrectly suggesting that the Eleventh Circuit has foreclosed Plaintiffs' arguments about the unavailability of administrative remedies at Metro West, Defendants cite a single, unpublished decision that fails to support their position. ECF No. 66 at 6. In *Bracero v. Secretary, Florida Department of Corrections*, 748 F. App'x 200 (11th Cir. 2018), a pro se prisoner's grievances were held to be procedurally improper because he did not properly fill out the informal grievance forms, and his grievances "were not submitted on the required forms and did not contain necessary information." *Id*. at 203. The court relied on those reasons to find that this prisoner had not properly exhausted his administrative remedies, thereby warranting dismissal of the complaint. *Id*. at 203-04. The prisoner later "assert[ed] that his complaint should not have been dismissed before granting injunctive relief because he alleged imminent danger," but the court dismissed this argument in a single clause with the unremarkable proposition that generally, "exhaustion is a prerequisite for any prisoner suit." *Id*. at 204. *Bracero* did not consider, let alone opine on, the specific question of whether a grievance process incapable of addressing an imminent need is "available" under the PLRA.

Defendants' remaining arguments similarly hold no merit. First, they suggest that Plaintiffs' assertions about the unavailability of Metro West's emergency grievance procedure are attempts to invoke a foreclosed "futility exception" to exhaustion. ECF No. 66 at 6. But this confuses and mischaracterizes the issue: "futility is not the same as unavailability." *Fletcher*, 623 F.3d at 1173. Futility is concerned with the adequacy rather than the availability of relief, such as when the specific remedies sought in the lawsuit (like money damages) are not the remedies permitted by the prison's grievance process, or when a prisoner chooses to not engage in the administrative process because he subjectively believes the prison may ultimately deny the relief they seek. *See Alexander v. Hawk*, 159 F.3d 1321, 1326 (11th Cir. 1998); *Higginbotham v. Carter*, 223 F.3d 1259, 1261 (11th Cir. 2000). Plaintiffs assert no such thing.

Second, Defendants incorrectly claim that even if the grievance procedures at Metro West were "not capable of use" to address the imminent danger suffered by Plaintiffs, the

remedy cannot be deemed unavailable because it does not fall within any of the three exceptions enumerated in *Ross*. ECF No. 66 at 6. This argument fails for multiple reasons. As a threshold matter, this Court need not consider whether the three exceptions identified in *Ross* are exhaustive or demonstrative, given that the situation identified by Plaintiffs falls within the first *Ross* exception: where the administrative procedure is unavailable because it "operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Ross*, 136 S. Ct. at 1859. The Supreme Court noted various examples of potential "dead end" scenarios—including one where the administrative office responsible for handling the grievance declines to exercise its apparent authority, and another where the relevant administrative procedure itself lacks authority to provide any relief. *Id.* Here, the substantial length of time allowed for responding to emergency grievances creates a system where "officers [are] unable or consistently unwilling to provide any relief to aggrieved inmates" suffering or fearing imminent harm, and it "demonstrate[s] that no such potential [of some relief] exists." *Id*. The situation here, and the analysis offered in *Fletcher*, squarely satisfies the first exception enumerated in *Ross*.

Even if this Court were to find that the situation falls outside the three examples identified in *Ross*, the administrative remedy would still be properly deemed unavailable according to the Supreme Court's articulation of availability. The Supreme Court has repeatedly relied on the "ordinary meaning of the word 'available'" to guide its analysis, and it held in *Ross* that "an inmate is required to exhaust those, but only those, grievance procedures that are 'capable of use' to obtain 'some relief for the action complained of.'" *Id*. at 1858-59. The "three kinds of circumstances" identified later in the opinion are demonstrative examples "note[d]" by the court "as relevant" to the facts presented in *Ross*. *Id*. at 1859. The Eleventh Circuit itself has stated that the Supreme Court "identified *at least* three scenarios" of unavailable remedies in *Ross*, *Montalban v. Doe*, 801 F. App'x 710, 714 (11th Cir. 2020) (emphasis added), suggesting the list of examples is not exhaustive of all potential circumstances in all future situations inside a jail or prison, and multiple other courts of appeals agree. *Williams v. Correction Officer Priatno*, 829 F.3d 118, 123 n.2 (2d Cir. 2016) ("We note that the three circumstances discussed in *Ross* do not appear to be exhaustive, given the Court's focus on three kinds of circumstances that were 'relevant' to the facts of that case."); *Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017) (describing the three categories in Ross as "non-exhaustive"); *Muhammad v. Mayfield*,

933 F.3d 993, 1000 (8th Cir. 2019) ("The Supreme Court recognizes at least three circumstances"); *Shumanis v. Lehigh County*, 675 F. App'x 145, 148 (3d Cir. 2017) (listing the three Ross circumstances as "example[s]"). Defendants are therefore incorrect to hyperbolically claim that "[t]he list ends at three; there is no fourth circumstance," that the list is "exhaustive," and that if an otherwise unavailable remedy "can't be squared with one of the 'three kinds of circumstances' enumerated in *Ross*, then as far as the PLRA is concerned, it's not worth the paper it's written on." ECF No. 66 at 6-7.

Defendants cite to a single unpublished decision to support their assertion that the list of *Ross* circumstances is exhaustive, and their reliance on this case is misplaced. ECF No. 66 at 6. In *Pearson v. Taylor*, 665 F. App'x 858 (11th Cir. 2016), an incarcerated person argued, in relevant part, that the grievance process was unavailable because the prison's policy prevented him from having more than two grievances active at one time. *Id*. at 867. Because he already had two active grievances at the time of the incident, he argued he was prevented from grieving the relevant claim—denial of medical treatment. *Id*. The court in *Pearson* acknowledged that this argument "do[es] not appear to fall within any of [*Ross's*] three 'exceptions' to exhaustion," but its finding of availability relied on another reason: the same policy also allowed him to withdraw a pending grievance and file a new one. *Id*. at 868. The court therefore sidestepped the issue and found that the plaintiff had "an available route to exhaust his claims regarding the denial of medical treatment according to the applicable procedural rules," but that he chose not to "prioritize" the relevant grievance. *Id*. *Pearson* therefore does not stand for the proposition supposed by Defendants.

Third, Defendants' attempts to undermine the analysis offered by *Fletcher* is not persuasive. *See* ECF No. 66 at 7. For the reasons above, *Fletcher*'s analysis of availability in instances of imminent danger remains viable post-*Ross*: it fits squarely within the first *Ross* exception and, to the extent the Court finds it does not, it nonetheless conforms to the Supreme Court's general articulation and analysis of availability in *Ross*.

Defendants also point to the language in *Fletcher* that this unavailability exception "does not excuse a prisoner from exhausting remedies tailored to imminent dangers," and that the *Fletcher* court ultimately found that the plaintiff had such a remedy available in the form of an emergency grievance procedure in Illinois prisons. ECF No. 66 at 7 (quoting *Fletcher*, 623 F.3d at 1175). Defendants then point to the emergency grievance process available at Metro West. *Id*.

However, the facts of *Fletcher* are easily distinguishable on this issue. For one, the danger feared by the plaintiff in *Fletcher* was "not of the greatest urgency"— the plaintiff himself admitted that the two days he waited between the beating he suffered (the same day he filed an emergency grievance) to filing the lawsuit was, "*even on his own account*[,] so short a delay" that the alleged denial of medical treatment "could not have endangered his health seriously." *Fletcher*, 623 F.3d at 1174, 1175 (emphasis added). Moreover, the plaintiff in Fletcher gave "no reason to think that the prison's grievance procedure would take longer than judicial procedure." *Id*. at 1175. In this case, the opposite is true. As noted above, in the midst of a rapidly spreading viral pandemic, an administrative procedure requiring medically vulnerable people to wait more than two calendar weeks for a response to basic health and sanitation emergencies is not "available" to exhaust. The Plaintiffs in this case fear for their lives given the symptomatic people that surround them and the lack of adequate responses undertaken by MDCR to address the possibly fatal threats of the virus. *See, e.g*., Willis Decl. ¶ 4, ECF No. 3-7; Swain Decl. ¶ 3, ECF No. 3-4; Blanco Decl. ¶¶ 2-3, 19; Cruz Decl. ¶ 2; Bernal Decl. ¶¶ 2, 17; Flores Decl. ¶¶ 2-3, ECF No. 3-9. Indeed, they obtained relief far more quickly from this Court than the Metro West grievance procedure provides.

Moreover, the emergency procedure that formed the basis of the *Fletcher* court's decision is itself distinguishable from the "emergency" process at Metro West. The Illinois prison system offered an expedited emergency grievance procedure where the "grievance is forwarded directly to the warden, who determines whether 'there is a substantial risk of imminent personal injury or other serious or irreparable harm'" and, where there is such a risk, the warden handles the grievance on an emergency basis. *Fletcher*, 623 F.3d at 1174 (quoting 20 Ill. Admin. § 504.840). That is a far cry from the lengthy process at Metro West, where once a staff member determines that a grievance is emergent, the staff member delivers a copy of the grievance to the Inmate Medical Provider or Shift Supervisor/Commander for resolution, whereby the burden falls to the Facility/Bureau Supervisor or IMP/Director of Patient Care Services to investigate and prepare the written response, and there is no expedited appeals process for the denial of emergency grievances. *See* ECF No. 66 at 5; ECF No. 66-1 at 4-5. Metro West's multi-step two-week process is easily distinguishable not only from the emergency procedure at issue in *Fletcher*, but also from the one in *Nellson v. Barnhart*. No. 20-cv-00756-PAB, 2020 WL 1890670, at *4 (D. Colo. Apr. 16, 2020) (finding that plaintiff failed to exhaust under the PLRA because he had

available an expeditious emergency procedure that provided, if the issue "threatens the inmate's immediate health or welfare, the Warden shall respond *not later than the third calendar day after filing*" (quoting 28 C.F.R. § 542.18) (emphasis added)).

Finally, Defendants' reliance on *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020), is unpersuasive. *Valentine* based its holding on the speculation that "relief . . . remains possible" so long as there is no statutory or legal *bar* to the jail offering a prompt response to a grievance. *Id.* at 805. But that distorts the meaning of "available" and ignores precedent requiring a person to wait for "available" remedies to conclude in order to properly exhaust. Even if it is theoretically possible for officials to respond to a grievance more quickly than required, a detainee is not permitted to sue until the allowed response period actually expires or he receives a final response—and it is undisputed that jail officials are *entitled* to wait the maximum amount of time permitted under policy before responding to a grievance. *Fletcher* acknowledges this practical reality and therefore offers the more compelling analysis of the meaning of "available." Moreover, here—unlike in *Valentine*—there is evidence supporting the finding that Metro West does take the full time allotted under its own policy—or longer—to respond to an emergency grievance. *See, e.g.*, Supp'l Blanco Decl. ¶ 8 (has not yet received a response to the grievance he filed approximately six weeks ago); Supp'l Cruz Decl. ¶¶ 7, 9 (same); Stuhlmiller Decl. ¶¶ 37-38, ECF No. 81-5 (an appeal has not been responded to after more than two weeks).

Accordingly, under Plaintiffs' facts, which must be accepted as true, Metro West's emergency grievance process presents no "possibility of some relief" and is thus unavailable to exhaust in accordance with Supreme Court precedent. *See Ross*, 136 S. Ct. at 1859. Dismissal of the complaint at step one of this inquiry is therefore unwarranted.

ii. *The refusal to provide grievance forms necessary to access the administrative procedure rendered the remedy unavailable.*

At step one, the grievance process at Metro West was unavailable for a second independent reason: Plaintiffs were repeatedly denied the grievance forms they needed to access this administrative remedy, thereby making it incapable of use to obtain relief. *See* Blanco Decl. ¶ 18; Cruz Decl. ¶ 15; Bernal Decl. ¶ 14; Supp'l Blanco Decl. ¶¶ 3-7; Supp'l Cruz Decl. ¶¶ 4-7. It is undisputed that according to MDCR policy, a detainee must fill out and submit an "Inmate Grievance Form" to properly file a grievance. *See* Inmate Handbook at 6. Accordingly, refusing to provide or withholding a grievance form at Metro West is akin to altogether denying access to

the administrative remedy. As the Supreme Court noted in *Ross*, exhaustion is not required under the PLRA where "prison administrators thwart inmates from taking advantage of a grievance process" because "such interference with an inmate's pursuit of relief renders the administrative process unavailable." *Ross*, 136. Ct. at 1860. Accordingly, the remedy here was rendered unavailable by the machinations of MDCR staff.

The Eleventh Circuit has suggested that an administrative remedy is unavailable where prison staff refuse to provide the forms necessary to access the grievance process. *See Abram v. Leu*, 759 Fed. App'x 856, 861 (11th Cir. 2019) (allegations that "prison staff interfered with [a prisoner's] pursuit of administrative remedies by refusing to provide him with the forms required to utilize the administrative process . . . pertain to the availability of his administrative remedies"); *Booth v. Allen*, 758 F. App'x 899, 902 (11th Cir. 2019) (allegations that "prison officials withheld certain necessary forms to thwart his efforts to timely file" suggest the remedy was not available). Other courts agree. *See, e.g., Coleman v. Holden*, No. CV 506-046, 2007 WL 201309, at *3 (S.D. Ga. Jan. 24, 2007) ("If the evidence shows that Plaintiff's requests for the forms were indeed refused, Plaintiff would have indeed exhausted all of his 'available' administrative remedies, as he would no longer have had 'the possibility of some relief for the action complained of.'" (quoting *Booth*, 532 U.S. at 738)); *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003) ("[T]he District Court incorrectly dismissed this claim because it did not consider Mitchell's allegations that he was denied grievance forms."); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) (finding that plaintiff's allegations that the Arkansas Department of Corrections failed to respond to his request for grievance forms "were sufficient to raise an inference that he had exhausted his 'available' remedies"); *Aceves v. Swanson*, 75 F. App'x 295, at *1 (5th Cir. 2003) ("If the institutional authorities refuse to provide a prisoner with the forms needed to exhaust administrative remedies, then those remedies are not 'available' to the prisoner.").

Defendants argue that even if those who finally received grievance forms well after their repeated requests were denied ultimately submitted a grievance before filing this lawsuit, they failed to "properly" exhaust because they did not wait to fulfill the entire obstructed grievance process. ECF No. 66 at 8. This argument holds no merit.[3] Defendants cite no case law for their

[3] Plaintiffs Alen Blanco and Bayardo Cruz also explain that even if grievance forms were ultimately provided, only "a few" forms were brought to the dormitory cell and, given the interest in forms from others, they were able to only file one grievance each despite having several issues to grieve. Blanco Decl. ¶ 18; Supp'l Blanco Decl. ¶ 7; Supp'l Cruz Decl. ¶ 7. The decision to refuse forms, and then to

extraordinary position that where prison officials repeatedly thwart a detainee's attempts to file an emergency grievance by withholding the necessary forms, the detainee must nonetheless wait for the official to eventually provide a form and, once that form is given, must then go through every step of the delayed and obstructed process in order to satisfy PLRA exhaustion. *See* ECF No. 66 at 8 (citing only to *Woodford v. Ngo*, 548 U.S. 81, 90, 93 (2006), for the general proposition that the PLRA requires proper exhaustion of available remedies). Accepting Defendants' argument would erase entirely the Supreme Court's guidance that a prison's "interference with an inmate's pursuit of relief renders the administrative process unavailable," and it would in fact reward prisons and prison officials for "thwart[ing] inmates from taking advantage of a grievance process." *Ross*, 136 S. Ct. at 1860. The PLRA "does not require inmates to craft new procedures when prison officials demonstrate . . . that they will refuse to abide by the established ones," *Turner*, 541 F.3d at 1083, as MDCR officials did here.

Defendants ultimately concede that where "allegations of denials of requests for grievances for lack of blank grievance forms could lead to a finding that the grievance process was not available . . . dismissal at step one would not be appropriate." ECF No. 66 at 8. Given Supreme Court precedent, the facts put forward by Plaintiffs, various case law supporting the unavailability of this remedy, and this Court's obligation to accept Plaintiffs' facts as true, dismissal at step one is unwarranted.

B. Defendants fail to carry their burden to demonstrate a failure to exhaust available remedies.

Dismissal is also unwarranted at step two of the *Turner* inquiry because Defendants have not proven that Plaintiffs failed to exhaust available remedies.

i. The grievance procedure at Metro West was incapable of use to provide any relief for the imminent danger.

At step two, in response to Plaintiffs' arguments that the grievance procedure at Metro West was incapable of use to provide any relief for the imminent danger posed by the viral pandemic, Defendants rely solely on a conclusory statement that the administrative process was "fully available" to Plaintiffs in light of the evidence provided by the County. ECF No. 66 at 12.

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restrict the number of accessible forms, is especially troubling given that MDCR policy also demands that a person may raise only one discrete issue per form, such that any practice of limiting access to grievance forms limits the very issues that can be grieved. *See* Inmate Handbook at 7 (noting that "[t]he grievance will be returned to you if: . . . [t]he form has more than 1 complaint (issue)").

However, Defendants provide *no evidence* to dispute Plaintiffs' assertions that the "emergency" grievance process at Metro West was incapable of use, or that the dangers and harms posed by the pandemic were undoubtedly urgent. Accordingly, the Court should find that the grievance procedure was unavailable for purposes of exhaustion. This finding alone is dispositive and justifies denial of the motion.

ii. *Defendants' evidence corroborates and does not contradict Plaintiffs' assertions that grievance forms were unavailable at Metro West.*

Even if the Court continues the *Turner* analysis and considers Defendants' remaining evidence regarding the grievance forms, dismissal is unwarranted.

To begin, Defendants repeatedly and incorrectly describe Plaintiffs' allegations as "unsworn,"[4] "self-serving," and "unsubstantiated," and even go so far as to argue that the "Complaint offers no proof" to support Plaintiffs' statements. ECF No. 66 at 8-10. This mischaracterization ignores the robust factual record before this Court, including the sworn declarations by Named Plaintiffs filed alongside the Complaint in support of their motion for temporary restraining order and preliminary injunction—declarations that Defendants must acknowledge constitute "supporting proof," given that they readily rely on the sworn declarations of MDCR employees to support their own assertions. ECF No. 66 at 8-9.

In pointing to various declarations filed in support of their motions, Defendants argue that their evidence demonstrates two points: that grievance forms were available and that Plaintiffs did not file any grievances prior to the filing of this lawsuit. ECF No. 66 at 8-9. However, much of Defendants' evidence actually corroborates Plaintiffs' assertions.

First, Defendants' evidence corroborates that supplies of grievance forms had been "running low" at Metro West during the same period of time when Plaintiffs' requests were repeatedly denied, and that supplies had diminished to such a degree that Correctional Counselor Supervisor Mathews had to deliver a box of 2,000 forms from headquarters to Metro West on or around April 3. Mathews Decl. ¶¶ 8-9, ECF No. 66-5. *See also* ECF No. 66 at 10 ("As a matter

[4] As stated in their declarations, Plaintiffs' declarations were sworn to orally because Metro West is currently not permitting documents to be exchanged for signatures due to the pandemic. Having made it impossible for Plaintiffs to sign their declarations, Defendants cannot now claim that a written signature is necessary in order for these declarations to constitute sworn statements, and they cite no law for that proposition.

of fact, supplies were recently getting low"). Indeed, it is unsurprising that in late March and early April, as an unprecedented global pandemic spread throughout Miami-Dade County, concerned detainees had more grievances than normal (thereby depleting the supply of forms).[5] And no declaration or piece of evidence provides that *all* the forms inside this box were actually dispersed to the dormitory cells at Metro West once delivered.

Defendants also point to Mathews's Declaration for the general facts that a box of blank grievance forms inside each dormitory cell is supposed to be restocked by the correctional counselor assigned to the unit and that, if the box is empty and the counselor is not carrying any copies, she can print a blank form upon request. ECF No. 66 at 10; Mathews Decl. ¶¶ 5, 7. First, the generalized policies identified in this declaration fail to refute Plaintiffs' specific testimony about their personal experiences attempting to obtain (and being refused) grievance forms. Moreover, the policies themselves corroborate Plaintiffs' assertions once all the relevant facts are considered. As Mathews attests, it is the correctional counselor, not a correctional officer, that restocks the box and can print blank forms. However, since the pandemic began, correctional counselors have appeared at a dormitory cell infrequently. Bernal Decl. ¶ 14 (only once to three times a week); Supp'l Blanco Decl. ¶ 7, Ex. 1 (used to come in almost every day, but "hasn't been coming in as often" since the pandemic began); Supp'l Cruz Decl. ¶ 7, Ex. 2 (counselor "[f]inally" appeared at his cell at the beginning of April). Given the infrequency of the counselors' presence (compared to the officers stationed inside the cell), this evidence supports a finding that when a box of forms is depleted, it is not restocked with frequency. It also supports a finding that during the vast majority of the time when there is no correctional counselor in the dormitory cell, there is no one to print a blank form upon request. *See* Mathews Decl. ¶ 6. Accordingly, where—as here—the box is empty and has not been restocked, correctional officers do not have grievance forms on their person or at their desk, and the correctional counselor is unavailable, grievance forms are unavailable.

Remarkably, Defendants rely on the declaration of Officer Mayo, the only declarant with personal experience as an MDCR officer inside dormitory cell 2C2, to attest that he is unaware of any grievances filed by Plaintiffs Willis, Cruz, Flores, or Blanco and that he never refused to

[5] Indeed, there is additional support in the record that grievance forms can and do run out. Although a declarant in a different dormitory cell than the Plaintiffs was able to file a grievance form on April 3, by April 22 "[t]here were no grievance forms in [his] dorm, and the guards did not supply [him or his cellmates] with forms when [they] asked." Stuhlmiller Decl. ¶ 40, ECF No. 81-5.

provide a grievance form. Mayo Decl. ¶ 16, ECF No. 65-7. However, this very officer underwent a fourteen-day quarantine and *did not appear at work from March 25, 2020 to April 11, 2020*, *id*. ¶ 9, the relevant time period at issue here. And although his and the remaining declarations of correctional officers filed by Defendants make conclusory statements that there were no shortage of grievance forms "at any point" in 2020, *id*. ¶ 16, ECF. 65-5 ¶ 19, ECF No. 65-6 ¶ 6, ECF No. 65-9 ¶ 12, such statements contradict the testimony of Correctional Counselor Supervisor Mathews as well as Defendants' counsel's own assertions that supplies had in fact been "running low" prior to the lawsuit. *See* Mathews Decl. ¶¶ 8-9; ECF No. 66 at 10.

Defendants' remaining evidence is insufficient. For example, Defendants point to an "Inmate Grievance Report" (attached to the declaration of a MDCR employee) that purportedly identifies "all [the] grievances filed [at MDCR facilities] between January 1 and April 10, 2020," Romero Decl. ¶ 4, ECF No. 66-4, and Defendants provide an edited version of this report in the body of the brief, ECF No. 66 at 9-10. Defendants argue that because, according to this report, twenty-two Metro West detainees filed a total of twenty-nine grievances in the two weeks prior to the filing of this lawsuit, grievance forms were amply available in Metro West. ECF No. 66 at 9.

This argument misses the point and ignores the relevant facts. Detainees at Metro West are housed across multiple different dormitory cells, and their access to grievance forms is limited to the supply of forms within their own cell and the MDCR officials with whom they interact in their cell. The possible presence of some forms in one or a handful of cells on any given day has no bearing on whether forms are available in all other cells. Moreover, the fact that certain detainees housed in other cells were able to obtain a grievance form does not contradict the Plaintiffs' sworn statements that they were refused the forms they requested. Plaintiffs need not prove that everyone at Metro West was similarly thwarted from accessing the grievance process—they need only demonstrate that the grievance process was made unavailable to them.

Notably, Defendants edited out critical information from the Inmate Grievance Report when they provided a summary of the report in their brief. The original report, unlike the edited version in the brief, lists the dormitory cell number of the detainee who filed the grievance. Inmate Grievance Report, Romero Decl. Ex. A, ECF No. 66-4. From March 24, 2020 to April 5, 2020, there were no grievances filed from *anyone* housed in cell 2C2 (where Plaintiffs Blanco, Cruz, Flores, and Willis were held) or from anyone housed in cell 1D3 (where Plaintiffs Hill and

Bernal were held). Accordingly, this Inmate Grievance Report corroborates, rather than contradicts, Plaintiffs' assertions about the unavailability of grievances in their cells during the relevant time period.

Defendants also argue that an Inmate Services Administrator at MDCR "attests that none of the seven Plaintiffs filed a grievance between January 1 and April 10," contrary to Plaintiffs' assertions. ECF No. 66 at 10 (citing Romero Decl. ¶ 6). However, the cited declaration clarifies the Administrator's sworn statement: that his review of the grievance records, presumably the attached Inmate Grievance Report "list[ing] all grievances filed system-wide," demonstrates that no Plaintiff filed a grievance before filing this lawsuit. Romero Decl. ¶ 6, ECF No. 66-4. Evidence demonstrates that the grievance recordkeeping on which this statement relies is incomplete. For example, a detainee in a different dormitory cell than the Plaintiffs filed a grievance on April 3 and received a response denying the grievance with the explanation that "[t]his pandemic issue is beyond MDCR control," yet his name does not appear on the Inmate Grievance Report filed by Defendants. Stuhlmiller Decl. ¶¶ 37-38, ECF No. 82-4; Stuhlmiller Grievance, Ex. 3. This fact alone—that Mr. Stuhlmiller is in possession of a document containing a written rejection of his grievance, but that he does not appear on Defendants' list—fatally undermines Defendants' evidence.[6] Because MDCR's grievance recordkeeping is not complete or credible, this evidence cannot contradict Plaintiffs' sworn testimony that they filed grievances at the beginning of April.

Finally, Defendants argue that the information provided by Plaintiffs is insufficiently detailed, ECF. No. 66 at 10-11, but this argument is easily discredited by reviewing Plaintiffs' sworn declarations and testimony before this Court.[7] For example, Plaintiffs identified the dates

[6] Stuhlmiller's grievance form indicates that it was returned because Metro West staff deemed issues concerning the pandemic to be "non-grievable." Notably, Defendants provide no evidence that MDCR is accurately and thoroughly documenting the grievances filed by detainees at Mero West or MDCR staff responses to those grievances (including whether the aggrieved issue was deemed non-grievable and the reasons justifying this decision), and they provide no records identifying the grievances filed by detainees that were rejected by staff. This is especially concerning given detainee experiences that the counselor is "known to be forgetful about grievances," has "lost" their filed grievances, or informed detainees that the grievance they properly submitted will not ultimately be "file[d]" because the counselor believes "it would get denied." Supp'l Blanco Decl. ¶ 10, Ex. 1.

[7] Defendants' reliance on three unpublished district court cases to challenge Plaintiffs' sworn testimony does not survive scrutiny. *See* ECF No. 66 at 10-11. First, in *Teran v. Johns*, 2017 WL 4678220 (S.D. Ga. Oct. 17, 2017), Mr. Teran argued that the administrative remedy was unavailable because prison officers refused to give him the requested grievance forms. *Id*. at *3. However, it was the unique constellation of

when they requested (but were refused) grievance forms, *see* Cruz Decl. ¶ 15; Prelim. Inj. Order at 29 n. 16 (summarizing Mr. Blanco's testimony), ECF No. 100, and during Mr. Blanco's testimony during the Preliminary Injunction hearing, he shared the names of the officials who refused his requests. The supplemental declarations of Mr. Blanco and Mr. Cruz provide similar and additional information, including the names of the officers who refused their requests, when they requested the forms, the officers' actions and responses when the officers refused their requests, the reasons why they were limited to one grievance form each, the fact that they properly filed the grievance (in accordance with MDCR policy), the fact that no response has yet been provided, and actions done to follow-up on the filed grievance given the lack of response. Supp'l Blanco Decl. ¶¶ 6-9; Supp'l Cruz Decl. ¶¶ 6-9.

Accordingly, given that Defendants' evidence corroborates and does not contradict Plaintiffs' credible sworn testimony, the Court should find that the grievance procedure was not available to Plaintiffs. The motion should therefore be denied.

iii. *In the alternative, Plaintiffs are entitled to discovery on the question of exhaustion.*

The Court should deny Defendants' motion outright for the two independent reasons discussed above. In the alternative, Plaintiffs are entitled to limited discovery on the issue of exhaustion before the Court rules on the motion to dismiss. As noted above, there are obvious questions about the accuracy and completeness of Defendants' evidence, and many facts

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facts that persuaded the district court to find the prison's account to be more credible: although the form Mr. Teran used to file his petition asked why he had not filed a grievance, he "never mentioned" the denial of his requests for forms and instead "c[ame] up with [this] new [story]" for the first time in his reply; his bald statement said only that prison officials failed to provide him grievance forms, without any additional details; and the undisputed evidence also demonstrate that he filed numerous grievances during his incarceration. *Id*. None of those facts are present here. The details provided in Plaintiffs' assertions also distinguish this case from *Louis-Charles v. Baker*, 2018 WL 5728054 (N.D.N.Y. July 30, 2018). The district court in that case was unpersuaded by Plaintiffs' arguments for various other reasons: although he testified that he had refused grievance forms by the two supervisors allegedly responsible in the aggrieved incident, he admitted that he did not request a form from the other four supervisors accessible to him because he "wanted [the form] to come directly from' the officers involved in the alleged incident," and the court also found that the plaintiff's arguments that he did not reach out to another officer due to his impending transfer to another jail "did not deprive him of a meaningful opportunity to access the grievance process." *Id*. at *5-6. Again, none of those considerations apply to this case. And here, unlike in *Filmore v. Cooper*, 2020 WL 1275385 (M.D. Fla. Mar. 17, 2020), Plaintiffs provide factual detail explaining "who he asked," "how many times he asked," and why there were no "other measures to obtain the forms." *Id*. at *6. The testimony provided here is credible, detailed, and far from conclusory. *Id*.

regarding exhaustion lie squarely in Defendants' possession and control. The Eleventh Circuit has noted that regarding exhaustion, the district court can properly consider facts outside the pleadings if "the parties have sufficient opportunity to develop a record," and "'the court has a broad discretion'" to determine the methods for resolving factual disputes. *Bryant v. Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008) (citation omitted). District courts in this circuit have permitted discovery on the question of exhaustion. *See, e.g.*,*Corporan v. Williams*, No. 7:17-cv-124, 2019 WL 7176826, at *1 n.3 (M.D. Ga. May 23, 2019) (noting that the parties had been "allowed discovery on the issue of exhaustion"); *Quinn v. Booz Allen Hamilton, Inc*., No. 3:14-cv-111, 2014 WL 12323684, at *4 (N.D. Fla. Dec. 2, 2014) (providing the parties thirty days to conduct discovery on the issue of exhaustion on a federal whistleblower claim and an additional fourteen days to file a supplemental brief with evidentiary materials).

IV. CONCLUSION

Defendants carry the burden to prove that Plaintiffs' failed to exhaust available remedies. They fail to do so. Accordingly, the Court should deny the motion to dismiss.[8]

Dated: May 15, 2020

Respectfully submitted,

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[8] Without any citation to caselaw, Defendants provide the conclusory statement at the end of their motion that "dismissal should be with prejudice." ECF No. 66 at 12. In fact, given the facts and posture of this case, dismissal should be without prejudice if the Court were to grant Defendants' motion. *Zocaras v. Castro*, 465 F.3d 479, 483 (11th Cir. 2006) ("[T]he '[d]ismissal of a case with prejudice is considered a sanction of last resort, applicable only in extreme circumstances.' Dismissal with prejudice is not proper unless 'the district court finds a clear record of delay or willful conduct and that lesser sanctions are inadequate to correct such conduct.'") (citations omitted).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 15, 2020 a true and correct copy of this document was electronically filed with the Clerk of the Court U.S. District Court, Southern District of Florida, using the CM/ECF system which will send notification of such filing to counsel of record.

/s/ Tiffany Yang
Tiffany Yang

Exhibit 1

SUPPLEMENTAL DECLARATION OF ALEN BLANCO

I, Alen Blanco, certify under penalty of perjury that the following statement is true and correct pursuant to 28 U.S.C. §1746.

1. My name is Alen Blanco. I am 39 years old. I am currently incarcerated at the Metro West Detention Center in Miami, Florida in cell 2C2.

2. When I filed this lawsuit, I felt that despite the fact that we rely on MDCR to protect us during this time of crisis, the protections they provided us were slim to none.

3. I began trying to file grievances during the time period between the end of March and the beginning of April. There were no grievance forms available in my cell until April 2, when I was finally able to get a grievance form from the social worker who comes into our cell.

4. There is a metal box where grievance forms are supposed to be kept. When I looked for grievance forms on March 31st, there were no grievance forms in the box. So I asked the officer in my cell who was working the shift at the time to please give me a grievance form.

5. When I asked, the officer looked inside of the drawer in their desk and told me that there were none. The officer told me that they would try to get it from the cell next door, but they never did.

6. I asked for grievance forms numerous times from March 31 and April 2. I specifically remember asking Officers Jackson, Wilkins, and Joseph. Each time, the same thing happened. They would look inside the drawer, find no grievance forms, say they'd ask in other cells, but they never did.

7. The social worker used to come in almost every day, but since coronavirus started, the social worker hasn't been coming in as often. She hadn't come into our cell on March 31st or April 1st. So when she came into our cell on April 2nd, I asked her for grievance forms. I was only able to get one grievance form because there were not enough grievance forms available for every person in my cell who wanted to file one.

8. I wrote a grievance about the jail not providing me with sufficient protection from COVID-19. I filed it on April 3rd. To this date, I have not received a response to my grievance.

9. A few weeks after I still hadn't received a response to my grievance form, I asked the counselor to please look into my grievance form. I told her I filed a grievance on April 3rd and asked her why I haven't received a response. She told me she doesn't know anything about it because she wasn't there on April 3rd or April 4th, and so the forms probably wouldn't have been picked up until Monday, the 6th. I asked her again to please look into it. I still haven't heard back from her.

10. This social worker is known to be forgetful about grievances. I've heard other people in my cell say that she holds grievances, that she lost their grievance, or that she told them she wasn't going to file it because it would get denied. It's known in my cell that she has a problem filing grievances.

This declaration was orally sworn to by Alen Blanco on May 14, 2020 because the Metro West Detention Center is currently not permitting documents to be exchanged for signature.

Under penalties of perjury, I declare that I have read the foregoing in its entirety to Alen Blanco on May 14, 2020.

By:
Maya Ragsdale
Date: May 14, 2020

Exhibit 2

SUPPLEMENTAL DECLARATION OF BAYARDO CRUZ

I, BAYARDO CRUZ, certify under penalty of perjury that the following statement is true and correct pursuant to 28 U.S.C. §1746.

1. My name is Bayardo Cruz. I am 30 years old. I am incarcerated at the Metro West Detention Center in Miami, Florida in cell 2C2.

2. During the month of March, I became extremely concerned for my life because from what I was hearing on the news, coronavirus was spreading throughout Miami and it was clear to me that MDCR was not providing anything for us to protect ourselves from the virus.

3. As a result, I wanted to file grievances asking for MDCR to take precautions to protect us.

4. At the end of March to the beginning of April, I tried to file a grievance, but there were no grievance forms available.

5. Grievance forms are supposed to be kept in a metal grievance box in the cell. However, the box was empty during the time period when I was trying to file a grievance. In fact, that box is usually empty. Even right now, there aren't any grievance forms in that box.

6. Because the grievance box was empty, I asked guards about five times if they could get me a grievance form. I remember asking Officer Joseph and Officer Hopkins. When I asked, they looked into their desk for grievance forms, but there weren't any forms available. Each of the guards told me I'd have to wait until the counselor came in and ask her for one.

7. Finally, the counselor came back in at the beginning of April. When she came back, I asked her for a grievance, which she gave me. I was only able to get a single grievance form because there were many other people in my cell who had been waiting to file a

grievance and there were not enough forms to go around for everyone who wanted to file one. I wrote a grievance about MDCR's failure to provide basic protections from COVID19. After I was done writing the grievance, I put it in the grievance box, where we are supposed to put grievance forms.

8. The counselor is supposed to pick up the grievance forms from that box. It's a locked box, so she has to come with her key to pick up the grievance forms.

9. To this date, I still have not received a response to my grievance.

This declaration was orally sworn to by Bayardo Cruz on May 14, 2020 because the Metro West Detention Center is currently not permitting documents to be exchanged for signature.

Under penalties of perjury, I declare that I have read the foregoing in its entirety to Bayardo Cruz on May 14, 2020.

By:
Maya Ragsdale
Date: May 14, 2020

Exhibit 3

MIAMI-DADE CORRECTIONS AND REHABILITATION DEPARTMENT

MIAMI-DADE COUNTY

Inmate Grievance

INMATE NAME: Kellen Stuhlmiller		CONTROL NUMBER:
JAIL NUMBER: 19015862 4	UNIT/CELL NUMBER: 2A2	

The inmate must complete and place this form into an inmate request drop box within 10 calendar days of when incident occurred. If an incident/situation affects more than one inmate, each inmate must personally submit a separate complaint/grievance. Also, if an inmate has more than one complaint/grievance, each complaint/grievance must be submitted on a separate Inmate Grievance form. You must state what or who is the subject of the grievance, related dates and places, and what effect the situation, problem, or person is causing. State the title of any policy or standard that may be the subject of your grievance, if applicable. Attach copies of all forms (if applicable) used in an attempt to resolve your complaint.

If a specific staff member is the subject of your grievance, submit this form to a different staff member WHO IS NOT the subject of your grievance.

☐ Check if a staff member is subject of your grievance Name of the staff member _____

PART I - PROVIDE SPECIFIC DETAILS OF YOUR GRIEVANCE:

I hereby formally request my release from incarceration due to the lack of safety and precautions to prevent COVID 19 from infecting me and other inmates.

PART II - WHAT STEPS HAVE YOU TAKEN TO SOLVE THE GRIEVANCE?

MDCR does not have the capability of protecting its inmate population from COVID 19, and as such are condemning said inmates to contract the virus by inhibiting their ability to protect themselves.

PART III - WHAT REMEDY/ACTIONS ARE YOU REQUESTING?

I am requesting my immediate release, with a "promise to appear" or I will be seeking legal actions against MDCR for this undeniable violation of my civil rights.

I affirm that all statements I have made are true and correct.

Inmate Signature 4/3/20 Date

PART IV - GRIEVANCE RECEIVED BY MDCR:

Staff Name (Print) Signature Date

GRIEVANCE RECEIVED BY IMP:

GRIEVANCE CATEGORY	EMERGENT / NON-EMERGENT	TIME / DATE

Staff Name (Print) Signature

This pandemic issue is beyond MDCR control. You can write your Attorney and have him/her petition the courts for securing you a release date / "promise to Appear"

PART V - GRIEVANCE RETURNED TO INMATE FOR THE FOLLOWING REASONS:

☐ INCOMPLETE ☐ MORE THAN 1 COMPLAINT AND 1 NAME ON FORM ☐ OFFENSIVE OR FRIVOLOUS ☐ NON-GRIEVABLE CONCERN/ISSUE

My signature below affirms that I have been informed this grievance form is returned unprocessed for the reason indicated above.

Inmate Signature Date

Distribution: White Copy - RPSB File Pink Copy - Inmate