

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 August Term, 2006

4 (Submitted March 8, 2007 Decided July 26, 2007)

5 Docket No. 04-6131-pr

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7 JUAN EDGAR LOERA MACIAS,

8 Plaintiff-Appellant,

9 v.

10 MICHAEL ZENK, JOHN ANNES, STEPHANIE
11 MIDDLETON and JOSEPH PARKER,

12 Defendants-Appellees.
13 -----

14 B e f o r e: MESKILL, WINTER and STRAUB, Circuit Judges.

15 Appeal from a judgment of the United States District
16 Court for the Eastern District of New York, Trager, J., entered
17 on July 26, 2004, dismissing pro se prisoner's Eighth Amendment
18 medical indifference claims against prison officials for failure
19 to exhaust administrative remedies under the Prison Litigation
20 Reform Act, 42 U.S.C. § 1997e(a).
21

22 Affirmed in part, and vacated and remanded in part.

23 Juan Edgar Loera Macias, Brooklyn, NY,
24 Appellant Pro Se.

25 Roslynn R. Mauskopf, United States
26 Attorney, Eastern District of New York,
27 Varuni Nelson, Edward Newman, Assistant

1 United States Attorneys, Brooklyn, New
2 York, on the brief,
3 for Appellees.

4 MESKILL, Circuit Judge:

5 Appeal from a judgment of the United States District
6 Court for the Eastern District of New York, Trager, J., entered
7 on July 26, 2004, dismissing pro se prisoner's Eighth Amendment
8 medical indifference claims against prison officials for failure
9 to exhaust administrative remedies under the Prison Litigation
10 Reform Act (PLRA), 42 U.S.C. § 1997e(a).

11 Affirmed in part, and vacated and remanded in part.

12 This appeal examines the scope of the PLRA exhaustion
13 requirement. Plaintiff Juan Edgar Loera Macias is a pro se
14 federal prisoner who alleges that Metropolitan Detention Center
15 (MDC) defendants Warden Michael Zenk, Health Service
16 Administrator Stephanie Middleton, Physician Assistant John
17 Annessa, and Corrections Officer Joseph Parker, were negligent
18 and deliberately indifferent to his medical needs in violation of
19 the Eighth Amendment's proscription on cruel and unusual
20 punishment. Macias filed his pro se 42 U.S.C. § 1983 civil
21 action in the United States District Court for the Southern
22 District of New York. His case was transferred to the Eastern
23 District of New York where Judge Trager dismissed Macias' state
24 law tort and Eighth Amendment claims for failure to exhaust his
25 administrative remedies under the Federal Tort Claims Act (FTCA),

1 28 U.S.C. § 2671 et seq., and the PLRA.

2 The district court's judgment was entered before we
3 decided a series of cases examining the PLRA's exhaustion
4 requirement. We vacate that judgment in part and remand to the
5 district court to consider whether the threats Macias alleges he
6 received rendered the United States Bureau of Prisons' (BOP)
7 administrative grievance procedures unavailable to him, or
8 whether those threats estop defendants from raising Macias'
9 failure to exhaust as an affirmative defense. We affirm the
10 district court's judgment in all other respects.

11 BACKGROUND

12 For the purposes of this appeal, we discuss the facts
13 as alleged by Macias. Macias entered the MDC on February 16,
14 2002 as a pre-trial detainee. MDC medical personnel examined him
15 on March 15, 2002, March 19, 2002, April 5, 2002 and July 29,
16 2002. At these appointments Macias informed MDC personnel that
17 in 2001 he had undergone arthroscopic surgery on his right knee.
18 On October 8, 2002, while picking up his food tray in his housing
19 unit, Macias slipped and fell on a wet floor resulting in
20 injuries to his right knee, back and head. That same day
21 defendant Annessa examined Macias and prescribed medication and
22 bed rest and ordered an X-ray of his back, hip and right knee.
23 In early December 2002 Macias approached Annessa to request
24 additional pain medication. Annessa refused him and told him

1 that there was nothing further he could do to help him. Macias
2 filed an administrative tort claim shortly thereafter, numbered
3 TRT-NER-2003-00954 and received by the BOP on December 12, 2002,
4 alleging that his injuries were caused by defendants' negligence,
5 and that 57 days had passed since his injury and he still had not
6 received proper medical care.

7 On January 3, 2003 an MDC physician diagnosed Macias
8 with a right medial collateral ligament tear and ordered an MRI.
9 The results of the MRI indicated that Macias' knee had a lateral
10 and medial meniscal tear, an anterior collateral ligament tear
11 and degenerative arthritis. After his MRI, Macias was seen
12 several more times by MDC medical personnel. Macias' pain
13 medication was intermittently discontinued and he had difficulty
14 obtaining additional treatment.

15 On January 24, 2003 defendant Parker denied Macias
16 access to his medication during a cell search causing him to
17 collapse. Parker also denied Macias food by ordering him not to
18 ask other inmates to help him with his lunch tray and by telling
19 him that if he could go to the law library on crutches, he could
20 carry his food tray on crutches. Macias filed an administrative
21 tort claim against Parker on March 13, 2003, numbered TRT-NER-
22 2003-01619, alleging emotional damages as a result of Parker's
23 mistreatment.

24 Macias then filed this pro se action in the United

1 States District Court for the Southern District of New York,
2 alleging that defendants were deliberately indifferent to his
3 medical needs and negligent in causing his injuries and emotional
4 distress. On May 27, 2003 Macias' lawsuit was transferred to the
5 United States District Court for the Eastern District of New
6 York. While his case was pending Macias filed a motion for a
7 temporary restraining order claiming that the MDC had again
8 discontinued his pain medication, that he reinjured his right
9 knee when his wheelchair collapsed, and that he had not been
10 provided with prescribed rehabilitative physical therapy. Macias
11 asked the district court to order the MDC to reissue his
12 medication and to enjoin the defendants from retaliating against
13 him.

14 The district court construed Macias' 42 U.S.C. § 1983
15 lawsuit liberally, see McEachin v. McGuinnis, 357 F.3d 197, 200
16 (2d Cir. 2004) ("when [a] plaintiff proceeds pro se . . . a court
17 is obliged to construe his pleadings liberally, particularly when
18 they allege civil rights violations"), and found that Macias had
19 stated Eighth Amendment claims under Bivens v. Six Unknown Named
20 Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), and tort
21 claims under the FTCA. Defendants moved to dismiss the lawsuit
22 pursuant to Fed. R. Civ. P. 12(b)(6) because, inter alia, Macias
23 had failed to comply with the PLRA's exhaustion requirement
24 before filing both his Bivens claims and his motion for a

1 temporary restraining order, and because he had failed to comply
2 with the FTCA's exhaustion requirement before filing his tort
3 claims.

4 In a decision entered on July 26, 2004 the district
5 court granted defendants' motion and dismissed the lawsuit in
6 full. Judge Trager dismissed Macias' state law tort claims
7 without prejudice because Macias filed his complaint while his
8 two administrative tort claims were pending. The court dismissed
9 Macias' Eighth Amendment Bivens claims and his motion for a
10 temporary restraining order because Macias had never availed
11 himself of the BOP's administrative remedy system.

12 On appeal, Macias contends that his Bivens claims
13 should not have been dismissed for failing to comply with the
14 PLRA's exhaustion requirement because (1) he did not need to use
15 the BOP's administrative remedy system because the BOP is not
16 authorized to provide some of the relief he seeks, (2) his
17 administrative tort claims and other informal complaints put the
18 prison officials on notice of the nature of his grievance, and
19 (3) defendant Parker's alleged threats rendered the BOP's
20 administrative remedy system unavailable to him, or in the
21 alternative, those threats estop defendants from raising his
22 failure to exhaust as an affirmative defense. Macias does not
23 challenge either the dismissal of his tort claims pursuant to the
24 FTCA or the dismissal of his motion for a temporary restraining

1 order. Therefore, our review is limited to the district court's
2 decision to dismiss Macias' Bivens claims. For the following
3 reasons, we affirm in part, and vacate and remand in part.

4 DISCUSSION

5 Federal jurisdiction is based on this Bivens action
6 arising under the Eighth Amendment to the United States
7 Constitution. 28 U.S.C. § 1331. We have appellate jurisdiction
8 under 28 U.S.C. § 1291.

9 We review the district court's dismissal of Macias'
10 complaint for failure to state a claim de novo "accepting as true
11 all facts alleged in the complaint and drawing all inferences in
12 favor of the plaintiff." Faulkner v. Beer, 463 F.3d 130, 133 (2d
13 Cir. 2006) (internal quotation marks omitted).

14 The PLRA provides that a prisoner may not bring an
15 action under federal law "with respect to prison conditions . . .
16 until such administrative remedies as are available are
17 exhausted." 42 U.S.C. § 1997e(a). The Supreme Court has held
18 that "the PLRA's exhaustion requirement applies to all inmate
19 suits about prison life, whether they involve general
20 circumstances or particular episodes, and whether they allege
21 excessive force or some other wrong." Porter v. Nussle, 534 U.S.
22 516, 532 (2002).

23 We recently decided a series of cases examining the
24 scope of the PLRA's exhaustion requirement. See Giano v. Goord,

1 380 F.3d 670 (2d Cir. 2004); Abney v. McGinnis, 380 F.3d 663 (2d
2 Cir. 2004); Johnson v. Testman, 380 F.3d 691 (2d Cir. 2004);
3 Ortiz v. McBride, 380 F.3d 649 (2d Cir. 2004); Ziemba v. Wezner,
4 366 F.3d 161 (2d Cir. 2004); Hemphill v. New York, 380 F.3d 680
5 (2d Cir. 2004). In Hemphill we "read together" Giano, Abney,
6 Johnson, Ortiz and Ziemba and formulated a three-part test:

7 Depending on the inmate's explanation for the alleged
8 failure to exhaust, the court must ask whether
9 administrative remedies were in fact available to the
10 prisoner. The court should also inquire as to whether
11 the defendants may have forfeited the affirmative defense
12 of non-exhaustion by failing to raise or preserve it, or
13 whether the defendants' own actions inhibiting the
14 inmate's exhaustion of remedies may estop one or more of
15 the defendants from raising the plaintiff's failure to
16 exhaust as a defense. If the court finds that
17 administrative remedies were available to the plaintiff,
18 and that the defendants are not estopped and have not
19 forfeited their non-exhaustion defense, but that the
20 plaintiff nevertheless did not exhaust available
21 remedies, the court should consider whether special
22 circumstances have been plausibly alleged that justify
23 the prisoner's failure to comply with administrative
24 procedural requirements.

25 Hemphill, 380 F.3d at 686 (internal quotation marks and citations
26 omitted). Because the parties did not address Hemphill, we
27 ordered supplemental briefing in this appeal. Macias responded
28 by reiterating his argument that he did not need to use the BOP's
29 administrative remedy system because the BOP was only authorized
30 to provide some of the relief he seeks. In addition, Macias
31 argued for the first time that under Hemphill he had exhausted
32 his claims by putting prison officials on notice of the nature of
33 his grievance, that the BOP's administrative remedy system was

1 not available to him, and that defendants should be estopped from
2 raising his failure to exhaust as an affirmative defense.

3 After we received the parties' supplemental briefs, the
4 Supreme Court decided Woodford v. Ngo, 126 S.Ct. 2378 (2006). In
5 Woodford, a prisoner argued that his lawsuit was improperly
6 dismissed under the PLRA because the administrative grievance he
7 filed was rejected by the prison authorities as untimely. 126
8 S.Ct. at 2384. The prisoner claimed that he had exhausted his
9 administrative remedies because after the prison rejected his
10 grievance, no other administrative remedies were available. Id.
11 The Supreme Court rejected this argument explaining that the PLRA
12 requires "proper exhaustion," meaning that a prisoner must
13 "compl[y] with the system's critical procedural rules" because
14 "[a] prisoner who does not want to participate in the prison
15 grievance system will have little incentive to comply with the
16 system's procedural rules unless noncompliance carries a
17 sanction" and "[t]he benefits of exhaustion can be realized only
18 if the prison grievance system is given a fair opportunity to
19 consider the grievance." Id. at 2387-88. We now turn to each of
20 Macias' arguments and, when necessary, we examine Woodford's
21 effect on our PLRA decisions.

22 A. Whether Macias' Failure to Exhaust is Excused by the BOP's
23 Inability to Provide All of the Relief He Seeks.

24 Macias seeks \$4 million in damages as well as his
25 "immediate and unco[n]ditional . . . release" from prison. In

1 addition, in his motion for a temporary restraining order and in
2 other requests for relief submitted to the district court, Macias
3 asked for various forms of injunctive relief, including more
4 responsive medical care and continuous administration of pain
5 medication. Macias argues that he was not required to use the
6 BOP's administrative remedy system to exhaust these claims
7 because the BOP is not authorized to award \$4 million in response
8 to an administrative grievance. We do not agree with his
9 argument that exhaustion is not required.

10 The BOP has a three-tiered administrative remedy system
11 with the stated purpose of "allow[ing] an inmate to seek formal
12 review of an issue relating to any aspect of his/her own
13 confinement." 28 C.F.R. § 542.10(a). The first tier requires
14 the inmate to report informally the issue to the staff, the
15 second tier requires the inmate to file a written remedy request
16 with the Warden, and the third tier requires the inmate to file
17 appeals with the appropriate Regional Director and then with the
18 General Counsel. See 28 C.F.R. §§ 542.13-.15; Johnson, 380 F.3d
19 at 693 (discussing the BOP's administrative remedy system).

20 It is undisputed that Macias never proceeded beyond the
21 first tier of the BOP's administrative remedy system.
22 Nevertheless, Macias argues that because the BOP's administrative
23 remedy system was authorized to provide only some of the relief
24 he sought, he did not need to file a grievance. The Supreme

1 Court squarely addressed and rejected Macias' argument in Booth
2 v. Churner, 532 U.S. 731 (2001). In Booth, a state prisoner
3 brought a 42 U.S.C. § 1983 lawsuit alleging that corrections
4 officers had violated his Eighth Amendment rights by using
5 excessive force and failing to provide adequate medical care.
6 532 U.S. at 734. The prisoner sought injunctive relief and money
7 damages. Id. The state administrative grievance system did not
8 provide for recovery of money damages. Id. at 741. However, the
9 Supreme Court held that under the PLRA the prisoner was still
10 required to file a grievance and complete all three stages of the
11 state's grievance system before proceeding to federal court. Id.

12 Macias seeks both injunctive relief and money damages.
13 There is no question that the BOP could have provided the
14 additional medical care and some of the other relief he seeks by
15 responding to a properly filed administrative grievance.
16 However, like the prisoner in Booth, Macias cannot "skip the
17 administrative process simply by limiting prayers for relief to
18 money damages" regardless of whether the BOP was authorized to
19 provide them. Id.; see also Ruggiero v. County of Orange, 467
20 F.3d 170, 177 (2d Cir. 2006) ("[Booth] make[s] plain [that under
21 the PLRA] so long as some remedy remains available, failure to
22 exhaust is not excused.").

1 B. Whether Macias Procedurally Exhausted His Claims By Filing
2 Administrative Tort Claims and Making Informal Complaints to
3 Prison Officials.

4 Macias filed two administrative tort claims before he
5 filed his complaint in federal court. Taken together, Macias'
6 tort claims allege that he repeatedly requested medical care for
7 his injuries but the MDC did not provide any, that defendant
8 Annessa refused to provide him with pain medication, that his
9 injuries were getting worse because of the lack of medical care,
10 and that defendant Parker caused him to collapse during a cell
11 search by refusing to allow Macias access to his medication.
12 Macias also alleges that he sent more than 20 sick calls
13 complaining about his lack of medical treatment. Macias argues
14 that under Johnson, his two administrative tort claims and his
15 informal requests for medical attention excuse his failure to
16 exhaust because, although he did not use the BOP's administrative
17 remedy system, his actions "provide[d] enough information about
18 the conduct of which [he] complain[ed] to allow prison officials
19 to take appropriate responsive measures." Johnson, 380 F.3d at
20 697. Macias' reliance on Johnson is misplaced.

21 In Johnson we considered whether a prisoner could
22 satisfy the PLRA's exhaustion requirement by raising his
23 grievance in the BOP's disciplinary proceedings and appeals
24 process. 380 F.3d at 694. We remanded the case so that the
25 district court could consider (1) whether under Hemphill, 380

1 F.3d 680, and Giano, 380 F.3d 670, the prisoner was justified in
2 believing that his complaints in the disciplinary appeal
3 procedurally exhausted his administrative remedies because the
4 prison's remedial system was confusing, and (2) whether the
5 prisoner's submissions in the disciplinary appeals process
6 exhausted his remedies "in a substantive sense" by "afford[ing]
7 corrections officials time and opportunity to address complaints
8 internally." Johnson, 380 F.3d at 696-98 (emphasis added;
9 alteration omitted). Thus, in Johnson we saw the prisoner's
10 argument as raising two distinct questions -- the former
11 addressed whether the prisoner procedurally exhausted his claims
12 while the latter addressed whether the prisoner substantively
13 exhausted his claims.

14 Macias does not argue that the BOP's administrative
15 remedy system was so confusing that he reasonably believed he had
16 satisfied the PLRA's exhaustion requirement by filing tort claims
17 and by complaining informally to prison staff.¹ Instead, Macias
18 argues that he procedurally exhausted his claims because his
19 informal complaints and administrative tort claims put the prison
20 on notice of the nature of his grievance. Macias' argument
21 conflates Johnson's distinction between procedural exhaustion and

¹ For this reason, we need not decide what effect Woodford
has on Hemphill's holding that where administrative procedures
are confusing "a reasonable interpretation of prison grievance
regulations may justify an inmate's failure to follow procedural
rules to the letter." Hemphill, 380 F.3d at 690 (citing Giano).

1 substantive exhaustion. Regardless of whether his tort claims or
2 informal complaints put the prison officials on notice of his
3 grievance "in a substantive sense," Johnson makes clear that to
4 satisfy the PLRA a prisoner must also procedurally exhaust his
5 available administrative remedies. Johnson, 380 F.3d at 697-98
6 (emphasis added). Because Macias does not argue that the BOP's
7 administrative remedy system was so confusing that he justifiably
8 believed his administrative tort claims and informal complaints
9 were his only available remedies, Macias has no ground to argue
10 that he procedurally exhausted his claims under Johnson. See
11 also Woodford, 126 S.Ct. at 2388 (holding that a prisoner must
12 procedurally exhaust his claims by "compl[ying] with the system's
13 critical procedural rules").

14 Furthermore, while our decision in Braham v. Clancy,
15 425 F.3d 177, 183 (2d Cir. 2005), might have provided some
16 support for Macias' argument that he procedurally exhausted his
17 claims by providing enough information about his grievance to
18 allow prison officials to take responsive measures, we conclude
19 that Braham does not survive Woodford. In Braham, a pro se
20 prisoner alleged that prison officials violated his Eighth
21 Amendment rights by refusing to grant his request for a cell
22 change. 425 F.3d at 179. The district court dismissed the
23 prisoner's lawsuit under the PLRA for failure to exhaust
24 administrative remedies. Id. at 181. On appeal, the prisoner

1 admitted that he had never filed a formal administrative
2 grievance, but argued that he had satisfied the PLRA's exhaustion
3 requirement by submitting several inmate request forms and by
4 complaining informally to prison staff during a disciplinary
5 proceeding. Id. at 183. We remanded the case for the district
6 court to consider whether the prisoner's inmate request forms or
7 the complaints he made during the disciplinary proceeding
8 "provided sufficient notice to the prison officials 'to allow
9 [them] to take appropriate responsive measures.'" Id. at 183
10 (quoting Johnson, 380 F.3d at 697) (alteration omitted).

11 Braham expanded Johnson by allowing prisoners to
12 procedurally exhaust their claims by taking "'enough'" informal
13 steps "'to put prison officials on notice'" of their concerns,
14 regardless of whether they utilize the prison's formal grievance
15 procedures. Braham, 425 F.3d at 183 (quoting Johnson, 380 F.3d
16 at 696). However, after Woodford, notice alone is insufficient
17 because "[t]he benefits of exhaustion can be realized only if the
18 prison grievance system is given a fair opportunity to consider
19 the grievance" and "[t]he prison grievance system will not have
20 such an opportunity unless the grievant complies with the
21 system's critical procedural rules." Woodford, 126 S.Ct. at
22 2388. Macias did not comply with the BOP's critical procedural
23 rules, and under Woodford, he cannot satisfy the PLRA's
24 exhaustion requirement solely by filing two administrative tort

1 claims, or by making informal complaints to the MDC's staff.
2 "[Alert[ing] the prison officials as to the nature of the wrong
3 for which redress is sought," Braham, 425 F.3d at 184 (internal
4 quotation marks omitted), does not constitute "proper exhaustion"
5 under Woodford. See Woodford, 126 S.Ct. at 2388. Therefore, to
6 the extent that Braham allowed for less than "proper exhaustion"
7 of claims under the PLRA, Braham has been overruled.

8 C. Whether the Threats Macias Alleges He Received Rendered the
9 BOP's Administrative Remedies Unavailable, or Whether Those
10 Threats Should Estop Defendants From Raising the Affirmative
11 Defense of Non-exhaustion.

12 Macias alleges in his complaint that on January 24,
13 2003 defendant Parker denied Macias access to his medication
14 during a cell search causing him to collapse. Macias also
15 alleges that Parker denied him food by ordering him not to ask
16 other inmates to help him with his lunch tray and by telling him
17 that if he could go to the law library on crutches, he could
18 carry his food tray on crutches. In response to our order to
19 provide supplemental briefing discussing the impact Hemphill and
20 Johnson had on his case, Macias argued for the first time that
21 Parker threatened him during the course of the January 24
22 incident and that these threats, under Hemphill, rendered his
23 administrative remedies unavailable, or in the alternative, that
24 those threats estop defendants from raising the affirmative

1 defense of non-exhaustion.²

2 When the district court dismissed Macias' suit we had
3 not decided Hemphill, 380 F.3d 680, and we had only recently
4 decided Ziemba, 366 F.3d 161. These two cases considered the
5 effect that prison officials' threats might have on the PLRA's
6 exhaustion requirement. In Hemphill, the prisoner filed suit
7 under 42 U.S.C. § 1983 alleging that prison administrators denied
8 him medical attention in violation of the Eighth Amendment. 380
9 F.3d at 681. The prisoner also claimed that he had been
10 threatened by corrections officers and beaten prior to filing his
11 complaint. Id. at 684. The district court dismissed the
12 prisoner's suit in its entirety for failure to procedurally
13 exhaust his medical indifference claim. Id. at 682. On appeal,
14 the prisoner argued that his failure to exhaust should be excused
15 because the threats he endured rendered "procedures that would
16 ordinarily be available . . . effectively unavailable." Id. at
17 687. We remanded the case because "[a]s a court of appeals
18 dealing with a limited record" we could not say "whether some
19 seemingly available remedies were rendered unavailable by the
20 threats Hemphill received." Id. at 688.

² We consider Macias' argument regarding Parker's alleged threats, which he did not raise before the district court, because we decided Hemphill after the district court issued its decision, and in the proceedings below Macias "justifiably tried to counter the arguments defendants made and did so on the basis of the law as it was then established." Hemphill, 380 F.3d at 688.

1 As in Hemphill, here we also cannot determine whether
2 the remedies offered to Macias were rendered unavailable by
3 Parker's alleged threats, or whether some of the MDC defendants
4 should be estopped from asserting non-exhaustion as a defense.
5 Hemphill, 380 F.3d at 688-89; see also Ziemba, 366 F.3d at 163
6 (holding that a defendant's exhaustion defense is subject to
7 estoppel where a prisoner claimed that he was beaten, threatened,
8 and denied grievance forms and writing materials). However,
9 because Macias alleges that Parker did not threaten him until
10 January 24, 2003, even if Macias can establish that he was
11 threatened, those threats are only relevant to events that
12 occurred after January 4, 2003. Macias could not have been
13 deterred, and defendants should not be estopped, for earlier
14 conduct that did not impact his ability to file a timely
15 grievance. See 28 C.F.R. § 542.14(a) (a formal administrative
16 remedy must be submitted to the warden within 20 days of the
17 event complained of).

18 D. Whether the District Court's Judgment Should be Affirmed on
19 Alternative Grounds Presented to But Not Reached by the
20 District Court.

21 Defendants contend that we should affirm the district
22 court's judgment on grounds that were presented to but not
23 reached by the district court, arguing that Macias failed to
24 state an Eighth Amendment claim for medical indifference and that
25 some defendants are entitled to qualified immunity or absolute

1 immunity. However, at this stage in the proceedings, and taking
2 all of Macias' factual allegations as true and drawing all
3 reasonable inferences in his favor, see Faulkner, 463 F.3d at
4 133, we cannot say at this time that defendants were immune from
5 suit or that Macias has failed to state a Bivens claim.
6 Therefore, we must leave the resolution of these issues in the
7 first instance to the district court on remand.

8 CONCLUSION

9 For the foregoing reasons, the judgment of the district
10 court is affirmed in part, vacated in part, and the case is
11 remanded for further proceedings. On remand the district court
12 should consider whether the BOP's administrative procedures were
13 rendered unavailable by Parker's allegedly threatening behavior.
14 "The test for deciding whether the ordinary grievance procedures
15 were available must be an objective one: that is, would a
16 similarly situated individual of ordinary firmness have deemed
17 them available." Hemphill, 380 F.3d at 688 (internal quotation
18 marks omitted). The district court should also consider whether
19 the MDC defendants' non-exhaustion defense is barred by equitable
20 estoppel and "depending on the facts pertaining to each
21 defendant, it is possible that some individual defendants may be
22 estopped, while others may not be." Id. Of course, we take no
23 position on whether Macias can establish that his remedies were
24 rendered unavailable or whether some of the MDC defendants should

1 be estopped from asserting non-exhaustion. We affirm the
2 district court's judgment in all other respects.