

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
**Case Number: 19-23822-CIV-MARTINEZ-REID**

DYMAR GOMEZ,  
Plaintiff,

vs.

CORPORAL McGAHEE, et al.,  
Defendants.

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**ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

THE MATTER was referred to the Honorable Lisette M. Reid, United States Magistrate Judge, for a Report and Recommendation on Plaintiff's *pro se* complaint, [ECF No. 1], and Defendants' Motion to Dismiss, [ECF No. 33]. Magistrate Judge Reid filed a Report and Recommendation, [ECF No. 35], recommending that Defendants' Motion to Dismiss be granted and this action be dismissed with prejudice for failure to exhaust administrative remedies under the Prison Litigation Reform Act. The Court has reviewed the entire record and notes that no objections have been filed. The Court likewise notes that Plaintiff failed to respond to Defendants' Motion to Dismiss despite being ordered to do so by the Court, [ECF No. 34].

The Court, however, dismisses Plaintiff's complaint without prejudice rather than with prejudice. The Report and Recommendation correctly cites *Bryant v. Rich*, 530 F.3d 1368, 1375 n.11 (11th Cir. 2008), for the proposition that a prisoner's unexhausted § 1983 claim may be dismissed with prejudice in certain circumstances, including where, as in this case, there is evidence that administrative remedies may no longer be available to exhaust.<sup>1</sup> Nonetheless, a review of the relevant caselaw indicates that because dismissal for failure to exhaust administrative remedies is not a determination on the merits, it is more common practice for a district court to dismiss such claims without prejudice.

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<sup>1</sup> The Court notes, however, that the *Bryant* panel explicitly stated that they were deciding the case before it, which was a dismissal without prejudice rather than with. The footnote cited by the Report and Recommendation supports the contention that the Eleventh Circuit has not held that a dismissal *cannot* be with prejudice, though it did not explicitly hold as much.

After careful consideration, it is hereby:

**ADJUDGED** that United States Magistrate Judge Reid's Report and Recommendation, [ECF No. 35] is **AFFIRMED** and **ADOPTED in part**. Accordingly, it is:

**ADJUDGED** that

1. Defendants' Motion to Dismiss, [ECF No. 33], is **GRANTED**.
2. Plaintiff's *pro se* complaint, [ECF No. 1], is **DISMISSED without prejudice**.
3. This case is **CLOSED**, and all pending motions are **DENIED** as **MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of January, 2021.

  
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JOSE E. MARTINEZ  
UNITED STATES DISTRICT JUDGE

Copies provided to:  
Magistrate Judge Reid  
All Counsel of Record  
Dymar Gomez, *pro se*