

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

HITHAM ABUHORAN and AKTHAM ABUHOORAN,	:	
Plaintiffs,	:	
	:	CIVIL ACTION
v.	:	
	:	No. 03-3091
R.L. MORRISON, et al.	:	
Defendants.	:	
	:	

**MEMORANDUM AND ORDER**

YOHAN, J. September \_\_\_\_\_, 2005

Plaintiffs, brothers Hitham and Aktham Abuhouran, who are currently incarcerated at the Federal Correctional Institution (“FCI”) in Elkton, Ohio and the Federal Medical Center in Devens, Massachusetts, bring this *pro se Bivens* suit<sup>1</sup> against various employees of the Federal Bureau of Prisons (“BOP”)<sup>2</sup> in their official and individual capacities.<sup>3</sup> They charge that

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<sup>1</sup>Although plaintiffs filed this suit under 42 U.S.C. § 1983, because § 1983 does not authorize suits against federal officials, I will treat plaintiffs’ claims as if they were brought pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which established a direct cause of action against federal officials for violations of the federal constitution.

<sup>2</sup>Plaintiffs amended complaint names the following seventeen defendants: (1) Gary Buck, a counselor at FCI McKean, Pennsylvania, (2) Dan Schneider, a unit manager at FCI McKean, (3) Bernie Ellis, the warden of FCI McKean, (4) Jack Richmond, a unit manager at FCI Allenwood, Pennsylvania, (5) Mark Potova, a case manager at FCI Allenwood, (6) Tammy True, a case manager at FCI Allenwood, (7) William Fink, a counselor at FCI Allenwood, (8) Michael Zenk, the former warden of FCI Allenwood, (9) Susan Gerlinski, the warden of the Low Security Correctional Institution (“LSCI”) in Allenwood, (10) William Campbell, a unit manager at LSCI Allenwood, (11) Tracy Johns, the former warden of LSCI Loretto, Pennsylvania, (12) Don Swanson, a unit manager at LSCI Loretto, (13) R.L. Morrison, the former warden of FCI Elkton, (14) Ralph Montalvo, the assistant warden at FCI Elkton, (15) Lynn Harper, manager of Inmate Systems Management at FCI Elkton, (16) Ernest Chandler, the former warden of the Federal Detention Center (“FDC”) in Philadelphia, (17) and Edward Motley, the warden of FDC Philadelphia.

<sup>3</sup>Plaintiffs do not indicate whether they intend to sue defendants in their official or

defendants violated their rights under the First and Fifth<sup>4</sup> Amendments of the United States constitution by (1) imposing “separation” assignments on plaintiffs, (2) restricting plaintiffs’ correspondence between each other and third parties, (3) and by requiring plaintiffs, who are natives of Jordan and speak Arabic,<sup>5</sup> to correspond solely in English. They seek money damages<sup>6</sup> and an injunction permitting plaintiffs to correspond with each other and their relatives in Arabic, and ordering the BOP to house plaintiffs in the same housing unit. Presently before the court is defendants’ motion to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), or, in the alternative, for summary judgment under Rule 56(c). Defendants contend that plaintiffs failed to exhaust their administrative remedies, that the plaintiffs failed to personally serve defendants with the complaint, and that plaintiffs’ allegations fail to state a

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individual capacities. Nonetheless, because plaintiffs seek injunctive relief voiding the BOP’s housing and correspondence restrictions, and money damages against the individual officers, I will assume that plaintiffs intend to sue defendants in both their official and individual capacities. *See Miller v. Smith*, 220 F.3d 491, 494 (7th Cir. 2000) (“Where the plaintiff seeks injunctive relief from official policies or customs, the defendant has been sued in her official capacity; where the plaintiff alleges tortious conduct of an individual acting under color of state law, the defendant has been sued in her individual capacity.”)

<sup>4</sup>Plaintiffs assert that their due process and equal protection claims arise under the Fourteenth Amendment. However, because the Fourteenth Amendment applies only to state actors, I will assume that plaintiffs’ claims arise under the due process clause of the Fifth Amendment, which governs due process and equal protection violations by the federal government. *See Richmond v. J. A. Croson Co.*, 488 U.S. 469, 560 (1989) (observing that “the content of the Equal Protection Clause [has been] substantially applied to the Federal Government through the Due Process Clause of the Fifth Amendment.”)

<sup>5</sup>Because plaintiffs have filed various *pro se* legal memoranda in English, it is apparent that plaintiffs are capable of reading and writing in English.

<sup>6</sup>In the original complaint, plaintiffs only sought injunctive relief. However, in their second reply brief, plaintiffs, for the first time, assert that they are seeking money damages. Because plaintiffs are proceeding *pro se*, I will treat the allegations raised in their reply as if they had been raised in an amended complaint, and I will permit plaintiffs to pursue their damages claims.

claim upon which relief can be granted. For the reasons set forth below, I will grant the motion.

## **I. BACKGROUND<sup>7</sup>**

On October 3, 1995, plaintiffs Hitham and Aktham Abuhouran were indicted along with five other co-conspirators, including their brother Adham and their sister Adma, for their role in a complicated scheme to defraud a local bank. In September 1996, plaintiff Hitham and his sister Adma pled guilty in the United States District Court for the Eastern District of Pennsylvania. Plaintiff Aktham and his brother Adham chose to proceed to trial where they were convicted by a jury on October 29, 1996.

On May 2, 1997, before plaintiffs could be sentenced,<sup>8</sup> Hitham, Aktham, and Adham were arrested under suspicion of conspiring to deposit counterfeit checks. Aktham and Adham were eventually released on electronic monitoring, but Hitham, who allegedly orchestrated the counterfeit check scheme, remained in federal custody. Sentencing for the three brothers on the bank fraud charges was scheduled for August 1997. However, on August 14, 1997, Aktham, Adham, and Adma abandoned their electronic monitoring bracelets and attempted to flee the country. Authorities apprehended Aktham that night at John F. Kennedy Airport in New York. Adham and Adma managed to elude authorities and are currently fugitives believed to be living

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<sup>7</sup>I have assembled the following facts from the allegations in plaintiffs' amended complaint, affidavits and other documents submitted by both parties on the exhaustion issue, and from prior judicial opinions that describe plaintiffs' and their siblings' criminal histories. *See United States v. Abuhouran*, 119 Fed. Appx. 402, 402–04 (3d Cir. 2005) (non-precedential); *United States v. Abuhouran*, No. 95-560, U.S. Dist. LEXIS 24723, \*1–\*2 (E.D. Pa. Dec. 12, 2002); *United States v. Abuhouran*, No. 01-629, 2002 U.S. Dist. LEXIS 22905, \*1–\*2 (E.D. Pa. Nov. 26, 2002).

<sup>8</sup>Adma was sentenced to four months home detention on March 24, 1997.

in Jordan.<sup>9</sup>

In August 1997, Hitham and Aktham were sentenced to 188 months and 109 months in prison for their role in the bank fraud. Initially, plaintiffs were both incarcerated at FCI Fort Dix, New Jersey. However, beginning on March 19, 1998, plaintiffs have been housed in separate BOP facilities. Apparently, plaintiffs were given “separation” assignments pursuant to the Central Inmate Monitoring program (“CIM”)<sup>10</sup> at the behest of the United States attorney due to the government’s ongoing investigation into plaintiffs’ criminal conduct. (Pls.’ Reply to Defs.’ Mot. at 11.) Inmates with “separation assignments” “may not be confined in the same institution (unless the institution has the ability to prevent any physical contact between the separatees) with other specified individuals who are presently housed in federal custody . . . .” 28 C.F.R. § 524.72.

In June 1998, while Hitham was incarcerated at FCI McKean, Pennsylvania, and Aktham was housed at FCI Allenwood, Pennsylvania, Hitham filed an administrative request seeking permission to correspond with Aktham. (Certification of Darrin Howard dated September 10, 2004 (“September 2004 Howard Certification”) at ¶ 12.) The request was denied by officials at FCI McKean. (*Id.*) Hitham appealed the decision to the BOP’s Northeast Regional Office, which overruled FCI McKean and granted Hitham’s request in part.<sup>11</sup> (*Id.* at ¶ 13.) Although

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<sup>9</sup>According to plaintiffs’ latest brief, Adma has recently returned to the United States, and was sentenced to seven months for fleeing the country while in federal custody. (Pls.’ Second Reply to Defs.’ Mot at 13.)

<sup>10</sup>Inmates who “present special needs for management” and require “a higher level of review” are designated CIM cases. 28 C.F.R. § 524.70.

<sup>11</sup>Hitham subsequently appealed the Regional Office’s partial denial to the BOP’s Central Office, which upheld the prior decision. (September 2004 Howard Certification at ¶ 14.) Neither party has described the specifics of the Regional Office’s decision, but apparently,

plaintiffs were permitted to correspond with each other following the Regional Office's decision, they contend that various employees at FCI McKean and FCI Allenwood<sup>12</sup> required plaintiffs to correspond solely in English because they were angered by the decision of the Regional Office. (Am. Compl. at 2.)

On August 30, 2001, while Hitham was housed at FCI Elkton, and Aktham was housed at FCI Ray Brook, New York, Hitham filed an administrative request with his institutional counselor seeking permission to correspond with Aktham. (Ex. D to Def.'s Reply to Pl.'s Mot. for Summ. J.) There is no evidence that FCI Elkton responded to this request. However, on October 10, 2001, defendant Morrison, the warden of FCI Elkton at the time, imposed new<sup>13</sup> restrictions on plaintiffs' correspondence. Morrison prohibited Hitham from corresponding by mail with Aktham, Adham, Adma, and Anna Kennedy, a friend living in Rhode Island. (Ex. E to Pls.' Reply to Defs.' Mot.) Morrison also required Hitham to leave all outgoing correspondence unsealed and to "conduct all written correspondence in English." (*Id.*) In a memorandum describing the new restrictions, Morrison explained that because Adham and Adma had been "identified as leaving the country with a criminal charge/warrant in place," because Hitham had used a "third person" to correspond with Aktham, and because Hitham's previous correspondence with his siblings "ha[d] been identified as containing coded language," Hitham's "continued correspondence with these individuals [was] a continuing security risk and a threat to

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plaintiffs were permitted to correspond with each other following the Regional Office's decision.

<sup>12</sup>Specifically, plaintiffs allege that defendants Buck, Ellis, Schneider, Richmond, True, Fink, Gerlinski, and Campbell conspired to impose the 1998 "English only" requirement on plaintiffs. (Am. Compl. at 2-4.)

<sup>13</sup>In their amended complaint, plaintiffs characterize the restrictions imposed by defendant Morrison as "whole new restriction[s]." (Am. Compl. at 5.)

the orderly running of the institution.”<sup>14</sup> (*Id.*)

Plaintiffs allege that Morrison and two other employees at FCI Elkton<sup>15</sup> conspired with the other named defendants to impose these restrictions on plaintiffs in violation of their First and Fifth Amendment rights. (Am. Compl. at 4.) Plaintiffs contend that the restrictions are racially motivated and violate their right to equal protection under the law.<sup>16</sup> According to plaintiffs, “most of the defendants” made discriminatory remarks to plaintiffs such as, “This is America. Why should you speak any other language? This is not Arabia.” (Am. Compl. at 6.) Further, defendants allegedly threatened to place plaintiffs in segregation if they attempted to correspond in Arabic. (*Id.*)

At the conclusion of Morrison’s memorandum describing the new correspondence restrictions, he advised Hitham that if he disagreed with the restrictions, he could file an administrative complaint through the BOP’s “Administrative Remedy Program.” (Ex. E to Pls.’ Reply to Defs.’ Mot.) Between November and December 2001, Hitham filed three administrative complaints challenging the correspondence restrictions. (September 2004 Howard

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<sup>14</sup>At first glance, these correspondence restrictions only appear to affect Hitham’s constitutional rights. Nonetheless, in *Nadir v. Morgan*, 350 F.3d 366, 369 n.3 (3d Cir. 2003), the Third Circuit permitted a prisoner to raise the First Amendment rights of a former prisoner with whom the current prisoner was prohibited from corresponding because the Supreme Court’s decision in *Procunier v. Martinez*, 416 U.S. 396, 408–09 (1974), “suggests that a total ban on correspondence between two people implicates the First Amendment rights of both in a way that is inextricably intertwined.” Here, because FCI Ekton’s regulations substantially restrict correspondence between Hitham and Aktham, I will assume that these provisions also implicate Aktham’s constitutional rights.

<sup>15</sup>Defendants Harper and Montalvo also allegedly conspired with Morrison to restrict plaintiffs’ correspondence. (Am. Compl. at 4.)

<sup>16</sup>Although plaintiffs do not explicitly invoke equal protection, I will assume that plaintiffs’ claims alleging racial discrimination arise under the equal protection component of the Fifth Amendment.

Certification at ¶ 15.) However, all three complaints were filed with the BOC's Northeast Regional Office, instead of Hitham's designated institution, FCI Elkton, as required by BOP regulations. *See* 28 C.F.R. § 542.14(c) (providing that inmates shall submit "formal written Administrative Remedy Request[s]" to "the *institution* staff member designated to receive such Requests . . . .") (emphasis added). All of Hitham's complaints were rejected for failure to comply with administrative procedure, and Hitham was instructed to resubmit his requests with FCI Elkton. (September 2004 Howard Certification at ¶ 15; Ex. I to Pls.' Reply to Defs.' Mot.) There is no evidence that Hitham ever resubmitted the complaints through FCI Elkton.

On January 5, 2002, Hitham filed a petition for writ of habeas corpus under 28 U.S.C. § 2241 in the United States District Court for the Northern District of Ohio challenging FCI Elkton's correspondence restrictions. The court dismissed the petition because such challenges to conditions of confinement may only be raised in a civil rights suit under *Bivens*. *See Abuhouran v. R.L. Morrison*, 46 Fed. Appx. 349, 349 (6th Cir. 2002) (non-precedential) (upholding the district court's determination).

On April 25, 2002, plaintiffs were indicted for their role in the counterfeit check scheme. On August 13, 2002, both plaintiffs were transferred to the Federal Detention Center ("FDC") in Philadelphia to await trial on these charges.<sup>17</sup> FDC Philadelphia continued to keep plaintiffs in separate housing units pursuant to their "separation" assignments. Plaintiffs allege that defendants Ernest Chandler and Edward Motley, the former and current wardens of FDC Philadelphia, violated plaintiffs' constitutional rights by failing to remove the "separation"

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<sup>17</sup>Plaintiffs eventually pled guilty to these charges on March 26 and 27, 2003. Hitham was sentenced to 60 months in prison for his role in the scheme, and Aktham was sentenced to 42 months in prison.

assignments and the correspondence restrictions. (Am Compl. at 6.)

On November 12, 2002, Aktham filed an administrative complaint with FCI Ray Brook, New York, his designated institution,<sup>18</sup> challenging the “separation” assignments. (September 2004 Howard Certification at ¶ 6.) The complaint was denied on December 13, 2002. (*Id.*) On January 11, 2003, Aktham appealed the decision to the BOP’s Northeast Regional Office, which upheld FCI Ray Brook’s decision. (*Id.* at ¶ 7.) On February 21, 2003, Aktham appealed to the BOP’s Central Office, which also rejected his complaint. (*Id.* at ¶ 8.)

On May 14, 2003, while plaintiffs were housed at FDC Philadelphia, they filed this *Bivens* action against defendants Morrison and Chandler seeking injunctive relief. The court granted plaintiffs leave to proceed *in forma pauperis* on July 7, 2003. On May 6, 2004, plaintiffs filed an amended complaint naming fifteen additional defendants.

On September 29, 2004, defendants filed the instant motion to dismiss, or, alternatively, for summary judgment. When plaintiffs failed to file a timely response after several extensions of time, the court granted the motion and dismissed the amended complaint on May 10, 2005. Three days later, Hitham filed a response and the court vacated the prior order and reinstated the case. Defendants filed a consolidated reply on June 30, 2005, and plaintiffs filed their reply thereto on July 25, 2005.

Since plaintiffs filed the initial complaint, Hitham has been transferred back to FCI Elkton, and Aktham has been transferred to the Federal Medical Center in Devens,

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<sup>18</sup>Although Aktham was detained at FDC Philadelphia at the time, because he was assigned to FCI Ray Brook, that was the proper institution to hear his administrative complaint. Apparently, Aktham initially filed with FDC Philadelphia, but then properly filed with FCI Ray Brook after his initial complaint was rejected for failure to comply with the administrative remedy procedure.

Massachusetts, where he is receiving treatment for a medical condition.

## II. STANDARD OF REVIEW

Defendants have styled their motion as a motion to dismiss, or, alternatively, as a motion for summary judgment. Ordinarily, a court will convert a motion to dismiss into a motion for summary judgment if it considers evidence beyond the complaint. *Anjelino v. New York Times Co.*, 200 F.3d 73, 88 (3d Cir. 2000) (citing Fed. R. Civ. P. 12(c)). Here, both plaintiffs and defendants have submitted affidavits in response to defendants' claim that plaintiffs failed to exhaust their administrative remedies as required by the Prison Litigation Reform Act of 1995 ("PLRA"). The parties have not submitted any extraneous material with respect to defendants' other grounds for dismissal. In *Camp v. Brennan*, 219 F.3d 279, 280 (3d Cir. 2000), the Third Circuit converted the defendant prison guards' motion to dismiss for failure to exhaust administrative remedies into a motion for summary judgment because the court considered the declaration of a prison employee to resolve the issue. *See also Greer v. Smith*, 59 Fed. Appx. 491, 492 (3d Cir. 2003) (non-precedential) (vacating a district court's order dismissing a prisoner's complaint for failure to exhaust administrative remedies because the court relied on representations made in the defendants' affidavit, and failed to convert the motion into a motion for summary judgment). Similarly, here, because I will consider the parties' affidavits to resolve defendants' exhaustion argument, I will treat this portion of defendants' motion as a motion for summary judgment under Federal Rule of Civil Procedure 56(c).<sup>19</sup> *See Steele v. Fed. Bureau of*

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<sup>19</sup>"It is . . . well-established that prior to converting a motion to dismiss into a motion for summary judgment, the district court must provide adequate notice to the parties." *Hilferty v. Shipman*, 91 F.3d 573, 578 (3d Cir. 1996) (citations omitted); *see also* Fed. R. Civ. P. 12(b) (providing that upon the conversion of a motion to dismiss into a motion for summary judgment

*Prisons*, 355 F.3d 1204, 1212 (10th Cir. 2003) (observing that when a factual dispute precludes resolution of an exhaustion issue under Federal Rule of Civil Procedure 12(b)(6), “[a] motion for summary judgment limited to the narrow issue of exhaustion and the prisoner’s efforts to exhaust would then be appropriate.”); *Taylor v. N.Y. State Dep’t of Corr.*, No. 03-1929, 2004 U.S. Dist. LEXIS 25795, at \*10 (S.D.N.Y. Dec. 22, 2004) (“When a defendant submits evidence outside the pleadings to demonstrate that plaintiff has not exhausted his administrative remedies . . . , the Court may treat that part of the motion as one for summary judgment . . . .”). Because neither party has submitted any material outside of the pleadings with respect to defendants’ other grounds for dismissal, I will review the balance of the motion under a motion to dismiss standard of review.

### **III. DISCUSSION**

#### **A. Exhaustion of Administrative Remedies**

As I described above, I will convert defendants’ motion to dismiss into a motion for summary judgment for the limited purpose of resolving defendants’ exhaustion argument. A court may only grant a motion for summary judgment, “if the pleadings, depositions, answers to

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“all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”). In *Hilferty*, the court found that the plaintiff had adequate notice that the district court would convert the defendants’ motions to dismiss into motions for summary judgment because two of the five motions to dismiss were framed in the alternative as motions for summary judgment, and because the plaintiff had over eight months to respond to these motions. *Id.* at 578–79. Here, defendants also framed their motion in the alternative as a motion for summary judgment. Plaintiffs have had nearly a year to present appropriate material in response to defendants’ motion, which was originally filed in September 2004. Further, in plaintiffs’ second reply brief, they have submitted an affidavit, which may only be considered on a motion for summary judgment. For these reasons, I find that plaintiffs had sufficient notice that defendants’ motion might be treated as one for summary judgment, and had an adequate opportunity to respond with appropriate materials.

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). “Facts that could alter the outcome are ‘material,’ and disputes are ‘genuine’ if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted).

When a court evaluates a motion for summary judgment, “[t]he evidence of the non-movant is to be believed.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In addition, “[a]ll justifiable inferences are to be drawn in [the non-movant’s] favor.” *Id.* “Summary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed.” *Ideal Dairy*, 90 F.3d at 744 (citation omitted). However, “an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment.” *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The non-movant must show more than “[t]he mere existence of a scintilla of evidence” for elements on which she bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations omitted).

The PLRA requires prisoners to exhaust “such administrative remedies as are available” before challenging prison conditions in court. 42 U.S.C. § 1997e(a). This requirement “applies equally to § 1983 actions and to *Bivens* actions.” *Nyhuis v. Reno*, 204 F.3d 65, 68 (3d Cir. 2000)

(citation omitted). To comply with the PLRA's exhaustion requirement, prisoners must exhaust all available administrative remedies. *Id.* at 75; *see also* *Murphy v. Kearney*, No. 03-554, 2004 U.S. Dist. LEXIS 7079, at \*8-\*9 (D. Del. Apr. 19, 2004) ("To exhaust all available administrative remedies, a prisoner must complete all stages of review or take part in the appeals process."). Further, in the Third Circuit, a prisoner must *properly* exhaust his remedies by following the procedural rules governing his prison's grievance process. *See Spruill v. Gillis*, 372 F.3d 218, 231-32 (3d Cir. 2004) (observing that prisoner procedural defaults should be governed by "the applicable prison grievance system."); *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002) ("To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require."). If a prisoner fails to properly exhaust administrative remedies, and the prison's procedural rules bar the prisoner from seeking further relief, the claim is procedurally defaulted, and federal courts may not reach its merits.<sup>20</sup> *See Spruill*, 372 F.3d at 230 (3d Cir. 2004) ("We believe that Congress's policy objectives will be . . . better served by interpreting § 1997e(a)'s exhaustion language to include a procedural default component than by interpreting it merely to require termination of all administrative grievance proceedings.").

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<sup>20</sup>The Seventh and Tenth Circuits have also interpreted the PLRA's exhaustion requirement to include a procedural default component. *See Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004) ("The PLRA, like 28 U.S.C. § 2254, contains a procedural default concept within its exhaustion requirement."); *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002). In contrast, the Sixth and Ninth Circuits have determined that "the PLRA's exhaustion requirement does not bar subsequent judicial consideration of an exhausted administrative appeal that was denied on state procedural grounds." *Ngo v. Woodford*, 403 F.3d 620, 631 (9th Cir. 2005); *see also Thomas v. Woolum*, 337 F.3d 720, 723 (6th Cir. 2003) ("We hold that so long as an inmate presents his or her grievance to prison officials and appeals through available procedures, the inmate has exhausted his or her administrative remedies, and a prison's decision not to address the grievance because it was untimely under prison rules shall not bar the federal suit.").

The BOP's administrative remedy procedure provides for three levels of formal review.<sup>21</sup> *See* 28 C.F.R. 542.10–542.19. First, a prisoner must file a formal written administrative request with his designated institution<sup>22</sup> within “20 calendar days following the date on which the basis for the Request occurred.” 28 C.F.R. §§ 542.14. If the prisoner is not satisfied with the institution's response, he may submit an appeal with the appropriate Regional Office. 28 C.F.R. § 542.15(a). A prisoner may appeal the Regional Office's response to the Central Office. *Id.*

Defendants contend that plaintiffs never properly exhausted their administrative remedies with respect to their challenge to the BOP's correspondence restrictions. Although plaintiffs allege that the 1998 “English only” restrictions imposed by officials at FCI McKean and FCI Allenwood violated their constitutional rights, they never challenged these restrictions through the BOP's grievance process.<sup>23</sup> Because plaintiffs are no longer housed at either of these institutions, and because these restrictions have been replaced by the 2001 restrictions adopted at FCI Elkton, any attempt to challenge these restrictions, or the conduct of officials in connection with these restrictions, would be time-barred pursuant to 28 C.F.R. § 542.14(a)'s twenty-day time limit for administrative grievances. Because plaintiffs are procedurally barred from raising any claim in connection with the 1998 correspondence restrictions, these claims are procedurally

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<sup>21</sup>Under the regulations governing the BOP's remedy process, before prisoners may file a formal grievance, they must “first present an issue of concern informally to staff.” 28 C.F.R. § 542.13. The informal remedy process is not at issue here.

<sup>22</sup>The regulations provide four limited exceptions to the requirement that prisoners must initially file grievances with their designated institution. *See* 28 C.F.R. § 542.13(d). Plaintiffs do not contend that any of these exceptions apply here.

<sup>23</sup>Hitham's appeal to the BOP's Central Office dated August 31, 1998 does not reference the “English only” policy. (See Ex. A to Pls.' Reply to Defs.' Mot.)

defaulted, and I will dismiss these claims with prejudice.<sup>24</sup> *See Spruill*, 372 F.3d at 230.

Defendants also argue that plaintiffs have failed to properly exhaust their challenge to the 2001 correspondence restrictions. Hitham filed three administrative complaints challenging these restrictions between November and December 2001.<sup>25</sup> However, he filed all three complaints with the BOP's Northeast Regional Office, instead of his designated institution as required by 28 C.F.R. § 542.14(c). The Regional Office rejected all of Hitham's complaints for failure to comply with administrative procedure and clearly instructed him to resubmit his requests with FCI Elkton. However, there is no evidence that Hitham ever resubmitted the complaints through FCI Elkton. (*See Ex. I to Pls.' Reply to Defs.' Mot.*)

In an affidavit accompanying plaintiffs' second reply brief, Hitham asserts that officials at FCI Elkton are responsible for any deficiencies in his administrative proceedings because he "personally handed" administrative grievance forms to his "Unit Team," and "fully relied" on their assistance to exhaust his administrative remedies. (*Ex. C to Pl.'s Second Reply to Def.'s Mot. for Summ. J.*) Even if I view this evidence in the light most favorable to plaintiffs, which I must do for the purposes of this motion, it does not create a genuine issue of material fact, or excuse Hitham's failure to properly exhaust his administrative remedies. The BOP rejected Hitham's administrative complaints because he erroneously directed his complaints to the regional office. Prisoners themselves determine where their complaints are directed by filling out

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<sup>24</sup>Even if plaintiffs properly exhausted their claim for injunctive relief voiding the 1998 "English only" correspondence restrictions, this claim would be moot because plaintiffs concede that these restrictions have been replaced by the 2001 restrictions. *See N.J. Tpk. Auth. v. Jersey Cent. Power & Light*, 772 F.2d 25, 31 (3d Cir. 1985) ("The doctrine of mootness requires that 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'") (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974)).

<sup>25</sup>There is no evidence that Aktham ever challenged these restrictions.

the remedy forms that correlate with the appropriate level of review. Hitham does not contend that his “Unit Team” completed the grievance forms for him, and thus, they cannot be responsible for his failure to submit his requests with the appropriate administrative decision-maker.

Although plaintiffs have clearly failed to properly exhaust their administrative remedies with respect to the 2001 correspondence restrictions, they are not procedurally barred from challenging these restrictions in another administrative request. Because the 2001 restrictions remain in place, plaintiffs are not affected by 28 C.F.R. § 542.14(a)’s twenty-day time limit, and they may file a new grievance with the BOP at any time.<sup>26</sup> For these reasons, I will grant defendants’ motion for summary judgment with respect to plaintiffs’ challenge to the 2001 correspondence restrictions, and I will dismiss these claims without prejudice. *See Blackwell v. Vaughn*, No. 97-3467, 2001 U.S. Dist. LEXIS 10893, at \*4–\*5 (E.D. Pa. July 3, 2001) (“On a motion for summary judgment, all unexhausted claims will be dismissed under the PLRA.”) (citations omitted).

Defendants concede that Aktham exhausted his administrative remedies with respect to plaintiffs’ “separation” assignments.<sup>27</sup> (Defs.’ Br. in Supp. of Mot. at 19.) Consequently, I will consider the merits of these claims.<sup>28</sup>

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<sup>26</sup>Of course, the time limit may bar plaintiffs from challenging any of the specific acts by defendants that they complain about.

<sup>27</sup>Although Hitham technically failed to exhaust administrative remedies with respect to the “separation” assignments, because plaintiffs seek the same relief, and because Aktham properly exhausted his administrative remedies, it makes little practical difference whether or not I dismiss Hitham’s claim for failure to exhaust administrative remedies.

<sup>28</sup>There is some disagreement among the federal courts of appeals as to whether the PLRA permits a district court to review an exhausted claim brought by a prisoner when the

B. Sufficiency of Service of Process

Defendants argue that plaintiffs' remaining claims should be dismissed under Federal Rule of Civil Procedure 12(b)(5)<sup>29</sup> for insufficient service of process because plaintiffs failed to serve the United States Attorney General or any individual defendants. Under Federal Rule of Civil Procedure 4(i), which governs service upon the United States and its employees, when an employee of the United States is sued in his or her personal capacity, "service of process shall be effected by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought . . . to the Attorney General of the United States . . . and to the individual defendants. Fed. R. Civ. P. 4(i)(1) & 2(B). Here, contrary to defendants'

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complaint also raises unexhausted claims. *Compare Ortiz v. McBride*, 380 F.3d 649, 663 (2d Cir. 2004) ("[W]e do not think that requiring district courts to dismiss the entirety of any prison-conditions action that contains exhausted and unexhausted claims, and thereby requiring prisoners to institute their actions containing only the exhausted claims in federal court all over again, is a meaningful way to 'reduce the quantity and improve the quality of prisoner suits,' or to 'help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits'") (internal citations omitted), *with Jones Bey v. Johnson*, 407 F.3d 801, 806 (6th Cir. 2005) (holding that "total exhaustion is required under the PLRA."), *and Ross v. County of Bernalillo*, 365 F.3d 1181, 1190 (10th Cir. 2004) (same) *and Graves v. Norris*, 218 F.3d 884, 885 (8th Cir. 2000) (per curiam) ("When multiple prison condition claims have been joined . . . the plain language of § 1997e(a) requires that all available prison grievance remedies must be exhausted as to all of the claims."). The Third Circuit has not resolved this issue, although, in a recent non-precedential opinion, the court upheld a district court's order dismissing a prisoner's complaint because he failed to exhaust administrative remedies on *all of the claims* in his complaint. *See Vazquez v. Ragonese*, No. 05-1203, 2005 U.S. App. LEXIS 16118, at \*1–\*2 (3d Cir. Aug. 4, 2005) (non-precedential); *see also Rivera v. Whitman*, 161 F. Supp. 2d 337, 343 (D.N.J. 2001) (concluding that "the plain language of the § 1997e(a), as well as the legislative intent and policy interests behind it, compels a 'total exhaustion' rule."). Nonetheless, here, because defendants have not raised a "total exhaustion" argument, and because the issue remains unsettled in this circuit, I will assume for the purposes of this case only that the PLRA does not include a "total exhaustion" component, and I will address the merits of plaintiffs' exhausted claims.

<sup>29</sup>Although defendants' motion solely purports to rely on Rule 12(b)(6), because courts may only dismiss a complaint for insufficient service of process under Rule 12(b)(5), I will assume that defendants intend to seek relief under this provision.

assertions, the docket report indicates that the United States attorney, the Attorney General, and each individual defendant, have been properly served.<sup>30</sup> Moreover, even if defendants have not been properly served, this was not plaintiffs' responsibility because the court authorized them to proceed *in forma pauperis*. Under Federal Rule of Civil Procedure 4(c)(2), in cases where the plaintiff is authorized to proceed *in forma pauperis*, service is to "be effected by the United States marshal, deputy United States marshal, or other person or officer appointed by the court for the purpose." *See also* 8 U.S.C. § 1915(d) ("The officers of the court shall issue and serve all process, and perform all duties in [*in forma pauperis*] cases."). Here, the court absolved plaintiffs of any responsibility to effectuate service of process when it granted plaintiffs leave to proceed *in forma pauperis* on July 7, 2003. For these reasons, I will deny defendants' motion to dismiss with respect to the service of process issue.

C. The "Separation" Assignments

Plaintiffs only remaining claim alleges that plaintiffs' "separation" assignments violate their right to due process. (Pls.' Reply to Defs.' Mot. at 11.) They seek injunctive relief voiding the assignments and money damages in connection with defendants' imposition of these restrictions. (Pls.' Second Reply to Defs.' Mot.) Defendants contend that these allegations fail to state a claim upon which relief can be granted. *See* Fed. R. Civ P. 12(b)(6).

In ruling on a motion to dismiss under Rule 12(b)(6), the court must accept as true all well-pled allegations of fact in the plaintiff's complaint, and any reasonable inferences that may

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<sup>30</sup>According to the docket report, the United States Attorney and the United States Attorney General were served on May 12, 2004. Defendant Chandler was personally served by the United States' Marshals' Service on August 1, 2003, defendant Morrison was personally served by the United States Marshals' Service on August 5, 2003, and the remaining defendants were personally served by the United States' Marshals' Service on May 17, 2004.

be drawn therefrom, to determine whether “under any reasonable reading of the pleadings, the plaintiff may be entitled to relief.” *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996); *Colburn v. Upper Darby Township*, 838 F.2d 663, 665–66 (3d Cir. 1988) (citations omitted). Although the court must construe the complaint in the light most favorable to the plaintiff, it need not accept as true legal conclusions or unwarranted factual inferences. *See Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). Courts will grant a 12(b)(6) motion to dismiss “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). *Pro se* complaints, such as plaintiffs, “must be held to ‘less stringent standards than formal pleadings drafted by lawyers’ and can only be dismissed for failure to state a claim if it appears ‘beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (citation omitted).

1. *Plaintiffs’ claim for injunctive relief*

Because plaintiffs have failed to provide any further details about the legal theory behind their challenge to the “separation” assignments, I will assume that plaintiffs intend to proceed under the line of cases that have established a fundamental substantive due process right to association among family members. *See, e.g., Moore v. East Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality opinion) (invalidating a zoning ordinance that intruded on family living arrangements because “the Constitution protects the sanctity of the family”). When prisoners have attempted to invoke these cases to obtain family visitation rights, courts have uniformly held that the constitution does not confer a right to visitation upon prisoners and their family

members.<sup>31</sup> See *Mayo v. Lane*, 867 F.2d 374, 375–76 (7th Cir. 1989) (“Prison necessarily disrupts the normal pattern of familial association, so lawful imprisonment can hardly be thought a deprivation of the *right* of relatives to associate with the imprisoned criminal.”) (emphasis in original) (citation omitted); *Neumeyer v. Beard*, No.02-2152, 2003 U.S. Dist. LEXIS 24066, at \*10-11 (M.D. Pa. Nov. 20, 2003) (“It is well-settled that convicted prisoners, their family and spouses have no constitutional right to visitation.”); *Africa v. Vaughn*, 1996 U.S. Dist. LEXIS 1622, at \*1 (E.D. Pa. Feb. 14, 1996) (same); cf. *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (“The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution. Equally as obvious, the inmate’s ‘status as a prisoner’ and the operational realities of a prison dictate restrictions on the associational rights among inmates.”). If prisoners have no constitutional right to receive visits from family members who are not incarcerated, they certainly have no protected right to associate with family members who are incarcerated. Hence, because plaintiffs have failed to allege an underlying constitutional violation to support their *Bivens* action, I will dismiss their claim for injunctive relief challenging the BOP’s “separation” assignments under Federal Rule of Civil Procedure 12(b)(6).<sup>32</sup>

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<sup>31</sup>Courts have also rejected attempts by prisoners to obtain family visitation rights under the First Amendment. See *Thorne v. Jones*, 765 F.2d 1270, 1274 (5th Cir. 1985) (“Such incarcerated persons as [plaintiffs] maintain no right to simple physical association -with their parents or with anyone else -grounded in the first amendment.”)

<sup>32</sup>To the extent that plaintiffs intend to argue that they have a protected liberty interest under the procedural component of the due process clause in being assigned to a particular institution, or in a particular security classification, the Supreme Court has specifically rejected these arguments. See *Moody v. Daggett*, 429 U.S. 78, 88 (1976) (“Congress has given federal prison officials full discretion to control [prisoner classification and eligibility for rehabilitative programs] . . . and petitioner has no legitimate statutory or constitutional entitlement sufficient to invoke due process.”); *Meachum v. Fano*, 427 U.S. 215, 223–29 (1976) (determining that no due

2. *Plaintiffs' claim for damages against individual defendants*

Plaintiffs assert that they are somehow entitled to money damages as a result of the imposition of their “separation” assignments. Defendants counter that they are immune from suit under the doctrine of qualified immunity. When a defendant in a *Bivens* action raises qualified immunity, the court must apply the following two-step approach. First, the court must determine whether “the facts alleged show the officer’s conduct violated a constitutional right?” *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Next, “if a violation could be made out on a favorable view of the parties’ submissions,” the court must decide “whether the right was clearly established.” *Id.*

Here, plaintiffs appear to blame an unidentified U.S. attorney, rather than any named defendant, for their “separation” assignments. Plaintiffs assert that they were given “separation” assignments because the U.S. attorney expressed “false concerns” about the potential for ongoing criminal conduct between plaintiffs. (Pls.’ Reply to Defs.’ Mot. at 11.) At the outset, plaintiffs claim against the U.S. attorney must fail because they neglected to include the U.S. attorney as a defendant in the amended complaint. Further, even if the U.S. attorney were a named defendant, he or she would have qualified immunity against any claims in connection with plaintiffs’ separation assignments. As I described above, plaintiffs’ allegations with respect to the separation assignments fail to state a valid constitutional claim. Additionally, plaintiffs have failed to provide any specific allegations describing the alleged “false concerns” expressed by the U.S. attorney that might suggest that the U.S. attorney’s conduct violated a constitutional right. *See Saucier*, 533 U.S. at 201. Finally, the unidentified U.S. attorney’s concerns about an ongoing

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process protections were required upon the discretionary transfer of state prisoners to a prison with less desirable living conditions); *see also Hewitt v. Helms*, 459 U.S. 460, 468 (1983) (“It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence.”)

criminal conspiracy between plaintiffs were apparently well-founded because both plaintiffs pled guilty to engaging in a conspiracy to cash counterfeit checks while they were in federal custody. For these reasons, defendants, and the U.S. attorney, have qualified immunity against plaintiffs' damages claim, and I will grant defendants' motion to dismiss on these claims.

#### **IV. CONCLUSION**

For the reasons explained above, I will grant defendants' motion to dismiss, or alternatively, for summary judgment. Because the parties submitted affidavits beyond the scope of the complaint on the issue of exhaustion, I will convert this portion of defendants' motion into a motion for summary judgment. *See* Fed. R. Civ. P. 12(b). Because plaintiffs have failed to properly exhaust their administrative remedies for their challenge to the BOP's correspondence restrictions, I will grant defendants' motion for summary judgment and dismiss these claims. I will dismiss plaintiffs' challenge to the 1998 "English only" restrictions with prejudice because plaintiffs are procedurally barred from raising these claims under the BOP's twenty-day time limit for administrative grievances. I will dismiss plaintiffs' challenge to the 2001 correspondence restrictions without prejudice because these restrictions remain in place, and thus, plaintiffs may file a new grievance challenging these restrictions at any time. Lastly, because plaintiffs have no constitutional right to familial association while incarcerated, I will dismiss plaintiffs' challenge to their "separation" assignments under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

HITHAM ABUHORAN and AKTHAM ABUHOORAN,	:	
Plaintiffs,	:	
	:	CIVIL ACTION
v.	:	
	:	No. 03-3091
R.L. MORRISON, et al.	:	
Defendants.	:	
	:	

**ORDER**

AND NOW, this \_\_\_\_\_ day of September, 2005, upon consideration of defendants' motion to dismiss plaintiffs' amended complaint, or, alternatively, for summary judgment (Doc. No. 62), plaintiffs' opposition thereto (Doc. No. 72), defendants' consolidated reply in further support of their motion (Doc. No. 77), and plaintiffs' reply thereto (Doc. No. 80), it is hereby ORDERED that the motion is GRANTED as follows:

1. Plaintiffs' challenge to FCI McKean's 1998 correspondence restrictions is DISMISSED with prejudice.
2. Plaintiffs' challenge to FCI Elkton's 2001 correspondence restrictions is DISMISSED without prejudice.
3. Plaintiffs' challenge to their "separation" assignments is DISMISSED with prejudice.
4. The amended complaint is DISMISSED.
5. The Clerk is directed to mark this case CLOSED for statistical purposes.

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William H. Yohn, Jr., J.

