The Prison Litigation Reform Act

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Pro Bono Training

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The Prison Litigation Reform Act

I. Introduction

The Prison Litigation Reform Act of 1995 (PLRA), actually enacted in 1996, comprises a number of provisions of the U.S. Code that restrict and discourage litigation by prisoners.\(^1\) They fall into two broad categories: the prospective relief provisions, directed mainly at institutional reform injunctive litigation, and the prisoner litigation provisions, directed generally at civil actions brought by prisoners. The text of the statute, as codified, is reproduced in Appendix B. This summary reviews the provisions of the statute, the most important judicial interpretations of it, and major open questions concerning its application, with emphasis on the state of the law in the Second Circuit. All opinions expressed are the author’s.

II. Scope and definitions

The prospective relief sections of the PLRA apply to “civil action[s] with respect to prison conditions,” which are defined to include “any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but do not include habeas corpus proceedings challenging the fact or duration of confinement in prison.”\(^2\) A “prison” is a facility “that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law.”\(^3\) It is not settled whether police and courthouse holding cells are prisons.\(^4\) “Prospective relief” is “all relief other than compensatory money damages.”\(^5\)

The prisoner litigation sections of the PLRA mostly apply to “civil actions” that are “brought” by “prisoners.” The in forma pauperis statutes as amended by the PLRA refer separately to “actions” and to “appeals,” so it appears that if a litigant is not a prisoner when the action is brought, but is one at the time a notice of appeal is filed, those provisions will apply to the appeal.\(^6\) Other PLRA provisions do not refer separately to appeals, so the plaintiff’s status as

\(^1\) The Supreme Court has characterized the PLRA’s provisions collectively as “constraints designed to prevent sportive filings in federal court.” Skinner v. Switzer, ___ U.S. ___, 131 S.Ct. 1289, 1299 (2011).

\(^2\) 18 U.S.C. § 3626(g)(2); see Valdivia v. Davis, 206 F.Supp.2d 1068, 1074 n. 12 (E.D.Cal. 2002) (holding challenge to parole revocation procedures was not a “civil action with respect to prison conditions”).

\(^3\) 18 U.S.C. § 3626(g)(5).

\(^4\) In Bowers v. City of Philadelphia, 2007 WL 219651, *34 n.40 (E.D.Pa., Jan. 25, 2007), the court held that police holding cells that were separate from the jails, which had their own intake facilities, were not prisons under the prisoner release provisions of the PLRA prospective release section, discussed in § III.C, below. 2007 WL 219651, *5-6.  In Khatib v. County of Orange, 639 F.3d 898, 902-05 (9th Cir. 2011), cert. denied, 132 S.Ct. 115 (2011), the court held that court holding facilities were both “pre-trial detention facilities” and “jails” for purposes of 42 U.S.C. § 1997. Khatib was brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA), which borrows the relevant definitions from the PLRA.

\(^5\) 18 U.S.C. § 3626(g)(7). Interpretation of this term is discussed in § III.F, below.

\(^6\) Brown v. Eppler, 725 F.3d 1221, 1228-31 (11th Cir. 2013) (holding that the obligation of 28 U.S.C. § 1915(b)(1) to pay filing fees in installments applies where the plaintiff was a prisoner at the time he appealed). See § VII, below, concerning filing fees. The same reasoning would presumably apply to 28 U.S.C. § 1915(g), the “three
a prisoner or not when the action is initially brought governs. Most courts have held that an action is brought for PLRA purposes when the prisoner tenders the complaint to court—a point that may precede actual filing by some time, since most prisoners seek in forma pauperis status and the processing of their applications may take weeks or even months.

A prisoner is “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.” Case law to date holds that military prisoners are “prisoners” under the PLRA, as are persons held in privately operated prisons and jails or juvenile facilities. Most decisions reach the same result with respect to “halfway houses” or drug treatment programs that the person is confined in as a result of a criminal charge or conviction, though results may vary depending on whether the facility is restrictive enough that the plaintiff can be said to be “confined” in it.

strikes” provision, see § VIII, below, since it begins: “In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding . . .” (emphasis supplied).


Under the “prison mailbox” rule, a prisoner’s complaint is deemed filed when it is delivered to prison officials for mailing, and that date may be considered the date the complaint is tendered to court. Vaughn v. Wilson, 2011 WL 2357869, *4 (N.D.Ind., June 8, 2011); Drake v. Berg, 2010 WL 309034, *2-3 (N.D.Cal., Jan. 26, 2010); Schoenlein v. Halawa Correctional Facility, 2008 WL 4761791, *3-5 (D.Haw., Oct. 29, 2008); Gilliam v. Holt, 2008 WL 906479, *6 (M.D.Pa., Mar. 31, 2008); see Cohen v. Corrections Corp. of America, 439 Fed.Appx. 489, 491 (6th Cir. 2011) (unpublished) (holding complaints were deemed filed when the plaintiff signed them under the prison mailbox rule).

8 42 U.S.C. § 1997e(h); 28 U.S.C. § 1915(h); 28 U.S.C. § 1915A(c) (emphasis supplied). The administrative exhaustion requirement is said to apply to “a prisoner confined in any jail, prison, or other correctional facility.” 42 U.S.C. § 1997e(a). The difference in phraseology does not seem to make a substantive difference, except possibly in the rare situation where someone is held involuntarily in a civilian institution—i.e., one that cannot be characterized as a correctional facility—as a result of violation of criminal law, parole terms, etc. See note 22, below.


12 Jackson v. Johnson, 475 F.3d 261, 266-67 (5th Cir. 2007) (holding that parolee in a halfway house, which he could not leave without permission, was a prisoner, since his placement was ultimately a result of his criminal conviction); Ruggiero v. County of Orange, 467 F.3d 170, 174-75 (2d Cir. 2006) (holding “drug treatment campus” was a “jail, prison, or other correctional facility” under 42 U.S.C. § 1997e(a) even though state law said it wasn’t a correctional facility; that term as used in the PLRA “includes within its ambit all facilities in which prisoners are held involuntarily as a result of violating the criminal law”); Witzke v. Femal, 376 F.3d 744, 752-53 (7th Cir. 2004) (holding “intensive drug rehabilitation halfway house” was an “other correctional facility” under the PLRA); Troutt v. Franklin-Williamson Human Services, Inc., 2009 WL 666388, *2 (S.D.Ill., Mar. 11, 2009) (persons confined in
Persons who are civilly committed are generally not prisoners, even if their commitment has its origins in past criminal charges or sentences. Thus, persons held pursuant to sexually violent predator statutes are generally not prisoners, nor are persons held in connection with immigration proceedings. However, persons who are civilly committed in connection with criminal proceedings that are still pending remain pre-trial detainees and are therefore prisoners. This category includes criminal defendants held in mental hospitals because of federal Contract Community Corrections Centers must exhaust); Fernandez v. Morris, 2008 WL 2775638, *2 (S.D.Cal., July 16, 2008); Clemens v. SCI-Albion, 2006 WL 3759740, *5 (W.D.Pa., Dec. 19, 2006) (holding halfway house with random urine tests, limited visiting was an “other correctional facility”); see Miller v. Wayback House, 2006 WL 297769, *4 (N.D.Tex., Feb. 1, 2006) (assuming plaintiff, released on parole to halfway house, was a prisoner, without much analysis whether facility was a correctional facility under the statute), aff’d, 253 Fed.Appx. 399 (5th Cir. 2007). But see Abdul-Matiyv v. Allen, 2010 WL 3880687, *7 (N.D.N.Y., Mar. 4, 2010) (holding plaintiff paroled to a mental hospital was not a prisoner), report and recommendation adopted in part, rejected in part on other grounds, 2010 WL 3880510 (N.D.N.Y., Sept. 28, 2010).

Confinement in such facilities may raise other issues about the applicability of PLRA provisions. See, e.g., Wilson v. Phoenix House, 2011 WL 3273179, *2 (S.D.N.Y., Aug. 1, 2011) (holding person released to drug treatment facility was subject to the PLRA exhaustion requirement, but declining to dismiss for non-exhaustion of jail grievance procedure without evidence that that procedure was available at the drug treatment facility, was known to be available, and addressed complaints arising there).

In Wade v. Swiekatowski, 2010 WL 152073, *1-2 (E.D.Wis., Jan. 15, 2010), the court held the plaintiff, resident in a halfway house who was not free to leave, was subject to the PLRA filing fees provisions, and distinguished an earlier contrary decision on the ground that the plaintiff in the less restrictive halfway house at issue there was not confined, but was more like a probationer. See Doss v. Gilkey, 2007 WL 1810514, *2 (S.D. Ill., June 22, 2007).

Perkins v. Hedricks, 340 F.3d 582, 583 (8th Cir. 2003) (person civilly detained in prison Federal Medical Center).


Kalinowski v. Bond, 358 F.3d 978, 979 (7th Cir.) (holding that persons held under the Illinois Sexually Dangerous Persons Act are prisoners for PLRA purposes), cert. denied, 542 U.S. 907 (2004). In Cooper v. Russell, 2013 WL 1332002, *1 n.1 (S.D.Ill., Apr. 2, 2013), the court stated without qualification (and therefore wrongly) that the PLRA “is equally applicable to civilly committed sex offenders,” citing Kalinowski, but not describing the precise nature of the plaintiff’s commitment.
incompetency to assist in their defense. A defendant psychiatrically confined after a finding of not guilty by reason of insanity is civilly committed and therefore not a prisoner, but a person committed pursuant to statutory requirement after a “guilty but insane” verdict is a prisoner. The same is true of a person serving a prison sentence who is committed to a mental health facility, even one operated by a mental health department and not a correction department. One court has held that a prisoner paroled to a mental hospital is not a prisoner.

Persons who are not lawfully subject to detention are not prisoners. Prospective prisoners are not prisoners; an arrestee is not a prisoner even if he is subsequently jailed, and someone who has been sentenced to prison but has not yet surrendered is not a prisoner because

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22 Abdul-Matyn v. Allen, 2010 WL 3880687, *7 (N.D.N.Y., Mar. 4, 2010), report and recommendation adopted in part, rejected in part on other grounds, 2010 WL 3880510 (N.D.N.Y., Sept. 28, 2010). This decision appears inconsistent with decisions holding that persons paroled to halfway houses and drug treatment programs remain prisoners. See cases cited in n. 27, below. However, it may be accounted for by the difference in language between the PLRA’s general definition of “prisoner” including persons held in “any facility” and the more specific language of the exhaustion requirement referring to a “prisoner confined in any jail, prison, or other correctional facility.” See note 8, above.

23 Lee v. State Dept. of Correctional Services, 1999 WL 673339, *4 (S.D.N.Y., Aug. 30, 1999) (holding that a mentally retarded person imprisoned based on mistaken identity was not a prisoner because he had not actually been accused or convicted of any crime); Williams v. Block, 1999 WL 33542996, *6 (C.D.Cal., Aug. 11, 1999) (holding that persons held after they were entitled to be released were not prisoners); Watson v. Sheahan, 1998 WL 708803, *2 (N.D.Ill., Sept. 30, 1998) (holding that persons detained for 10 hours after they were legally entitled to be released were not prisoners during that period).

24 Brewer v. Philson, 2007 WL 87625, *2 (W.D.Ark., Jan. 10, 2007) (holding plaintiff was not a prisoner for purposes of excessive force on arrest, though he was for purposes of excessive force in a jail holding cell); Lofton v. Cleveland City Jail Institution Guard Badge No. 3701, 2006 WL 3022989, *2 (N.D.Ohio, Oct. 23, 2006) (same). But see Roach v. Bandera County, 2004 WL 1304952, *5 (W.D.Tex., June 9, 2004) (holding that a person beaten in jail was not a prisoner because he had not yet been brought before a judicial officer). Roach relied on Circuit law holding that the line between arrest and detention or incarceration is drawn after arrest, processing, and significant periods of time in detention. Id. However, that line was drawn to determine whether the Fourth Amendment or the Due Process Clause applies to excessive force claims, see Brothers v. Klevenhagen, 28 F.3d 452, 455-57 (5th Cir. 1994), cert. denied, 513 U.S. 1045 (1994), and does not appear apposite to determining the PLRA’s applicability.
he is not yet “confined” in a correctional facility, even though he may be within the prison system’s legal custody.25

Ex-prisoners are not prisoners; the overwhelming majority of decisions hold that the PLRA does not apply to suits filed after release, on parole or otherwise, even if they concern events that occurred in prison.26 However, persons released on parole to residential facilities they are not free to leave remain prisoners because they remain “incarcerated or detained in [a] facility” and were “accused of, convicted of, sentenced for, or adjudicated delinquent for” criminal violations.27 Persons on home detention are not prisoners either.28 A few decisions do apply PLRA provisions to persons who file suit after release, but in my view they rely on strained reasoning and are inconsistent with the plain language of the relevant statutes, which employ some variation of “actions brought by a prisoner.” A couple of decisions have held that,


One court has held that a prisoner who files suit while in prison, and then amends to add a new claim after release, must have exhausted that claim. Siler v. Baldwin, 2011 WL 6371012, *2-4 (E.D.Mich., Dec. 20, 2011). This holding is inconsistent with the statutory language, which requires that actions filed by prisoners be exhausted before they are brought. The Supreme Court has held that in multi-claim cases, each claim’s exhaustion status must be assessed individually, Jones v. Bock, 549 U.S. 199, 220-24 (2007), and thus each claim brought by a prisoner must be exhausted—but not claims brought by non-prisoners. A claim that is not brought by a prisoner need not be exhausted at all. The Siler holding also makes little practical sense, since the ex-prisoner could file the new claim separately and then seek consolidation, probably wasting more of the courts’ time than would a straightforward amendment.

27 42 U.S.C. § 1997e(h); see Jackson v. Johnson, 475 F.3d 261, 265-67 (5th Cir. 2007); Clemens v. SCI-Albion, 2006 WL 3759740, *5 (W.D.Pa., Dec. 19, 2006) (holding halfway house with random urine tests, limited visiting was an “other correctional facility”); see also n. 12, above.
unlike the administrative exhaustion requirement, the bar on actions for mental or emotional injury without physical injury, 42 U.S.C. § 1997(e)(e), applies to cases filed by released prisoners, asserting that the congressional purpose of weeding out frivolous cases would be served thereby.29 However, almost all (and the better reasoned) decisions follow the statutory language and hold that § 1997(e) does not apply to cases filed after release from prison.30 This approach is consistent with the Supreme Court’s instruction to district courts not to supplement the text of the PLRA based on judges’ policy views.31 The handful of decisions holding that the administrative exhaustion requirement of 42 U.S.C. § 1997(e)(a) applies to cases filed after release are now mostly overruled.32 Several decisions have stated that a federal regulation, which states that the Federal Bureau of Prisons Administrative Remedy Program applies to former prisoners,


30 See Kerr v. Puckett, 138 F.3d at 322 (“The statutory language does not leave wriggle room; a convict out on parole is not a ‘person incarcerated or detained in any facility who is . . . adjudicated delinquent for, violations of . . . the terms and conditions of parole.”); Harris v. Garner, 216 F.3d 970, 976-80 (11th Cir. 2000) (en banc); In re Nassau County Strip Search Cases, 2010 WL 3781563, *4 (E.D.N.Y., Sept. 22, 2010) (“. . . [T]he plain language of § 1997(e), the declared purpose of the PLRA, and the case law demonstrate that the limitation on recovery is inapplicable where a plaintiff is no longer incarcerated at the time an action is commenced.”); Trevino v. Bandera County, Tex., 2008 WL 4239842, *3 (W.D.Tex., Sept. 15, 2008); Lombard v. Gusman, 2008 WL 2704527, *3 (E.D.La., July 3, 2008); Gibson v. Kendrick, 2005 WL 1309161, *1 (E.D.La., May 19, 2005); Billingsley v. Shelby County Dept. of Correction, 2004 WL 2757915, *7 n.4 (W.D.Tenn., Nov. 24, 2004).


31 Jones v. Bock, 549 U.S. 199, 212-16, 220-24 (2007). The Jones holding was made in connection with the exhaustion requirement of the PLRA, but there is no apparent reason why it is not equally applicable to other provisions including § 1997(e). See Silva v. Di Vittorio, 658 F.3d 1090, 1098 (9th Cir. 2011) (applying Jones prohibition on judicial supplementation of PLRA to three strikes provision, 28 U.S.C. § 1915(g)); Miller v. Donald, 541 F.3d 1091, 1099 (11th Cir. 2008) (same).

requires released federal prisoners to exhaust. However, these decisions (which are either unpublished and nonprecedential, or involve prisoners who had not actually been released, or both) fail to explain how the language of the regulation trumps the plain language of the PLRA.

Most courts have held that a prisoner who files suit while in prison and then is released should continue to be treated as a prisoner for PLRA purposes. (A prisoner who is merely released to another prison or jail system remains a prisoner, and must exhaust the grievance process of the system where the claim arose.) Several have held that the filing of an amended complaint after release means that the case is no longer “brought by a prisoner” and the PLRA is inapplicable. However, the majority holding is that if the plaintiff was a prisoner at the time of filing suit, they are not required by the PLRA to exhaust even though they were covered by grievance procedures.


34 See Bisgeier v. Michael [sic] Dept. of Corrections, 2008 WL 227858, *4 (E.D.Mich., Jan. 25, 2008) (parolees were not required by the PLRA to exhaust even though they were covered by grievance procedures).

35 See Harris v. City of New York, 607 F.3d 18, 21-22 (2d Cir. 2010) (where a case was filed from prison, the three strikes provision applied despite plaintiff’s subsequent release); Williams v. Henagan, 595 F.3d 610, 618-19 (5th Cir. 2010) (where a case was filed from prison, the exhaustion requirement applied despite the plaintiff’s subsequent release, notwithstanding grievance policy provision that upon release pending grievances became moot); Cox v. Mayer, 332 F.3d 422, 425-27 (6th Cir. 2003); Harris v. Garner, 216 F.3d 970, 973-76 (11th Cir. 2000) (en banc) (holding that plaintiffs released after filing remain prisoners for purposes of PLRA mental/emotional injury provision), cert. denied, 532 U.S. 1065 (2001); Cruz v. Dart, 2013 WL 6283687, *2 (N.D.Ill., Dec. 4, 2013) (noting that excusing prisoners from exhaustion because they were released after filing is a minority approach); Bowen v. Michigan Dept. of Corrections, 2010 WL 956000, *4 (E.D.Mich., Mar. 15, 2010); Banks v. York, 515 F.Supp.2d 89, 106 n.7 (D.D.C.2007); Ross v. Felstead, 2006 WL 2707344, *7 n.6 (D.Minn., Sept. 19, 2006) (same, for exhaustion requirement); Collins v. Goord, 438 F.Supp.2d 399, 408-09 (S.D.N.Y. 2006) (same, for exhaustion requirement); stating the statutory language “brought” requires a focus on the plaintiff’s status at the time of filing);


One court has declined to apply the PLRA attorneys’ fees restrictions to a prisoner released a few weeks after filing suit, citing the “absurdity exception” to the plain meaning rule. Morris v. Eversley, 343 F.Supp.2d 234, 243-44 (S.D.N.Y. 2004). However, the decision on which it relied was reversed on appeal. Robbins v. Chronister, 435 F.3d 1238 (10th Cir. 2006) (en banc), rev’g Robbins v. Chronister, 2002 WL 356331 (D.Kan., Mar. 31, 2002).

Most courts, including the Second Circuit, have held that prisoners proceeding in forma pauperis who are released after filing are no longer obliged to pay the filing fee in installments. See § VII, below.


37 Miller v. Zaruba, 2013 WL 5587288, *14 (N.D.Ill., Oct. 10, 2013) (citing Minix v. Pazera, below); Minix v. Pazera, 2007 WL 4233455, *2-3 (N.D.Ind., Nov. 28, 2007) (holding that filing of amended complaint after release was equivalent to filing a new complaint, and ex-prisoner need not have met the exhaustion requirement; amendment reasserted a federal claim that had been dismissed); Gibson v. Commissioner of Mental Health, 2006 WL 1234971, *6 (S.D.N.Y., May 8, 2006) (rejecting as “victory of form over substance” dismissal for nonpayment of filing fee under PLRA where the prisoner had been released and his amended complaint was offered when he was no longer a prisoner), relief from judgment denied, 2006 WL 2192865 (S.D.N.Y., Aug. 2, 2006); Stevens v. Goord,
original filing, an amended complaint filed after release does not exempt the case from the PLRA. Indeed, one court has taken this view so far as to hold that a plaintiff who filed while in prison and then filed an amended complaint after release adding new claims must have exhausted those claims, even though he could have filed them as a separate complaint without exhausting. A prisoner who files and is released may voluntarily dismiss and refile the action (or refile after dismissal for PLRA-related reasons) and avoid the PLRA’s requirements as long as the limitations period has not expired. In cases where persons are released and reincarcerated, whether the plaintiff was incarcerated at the time the suit was filed determines whether he or she is a prisoner for PLRA purposes. A prisoner who begins exhaustion and is released before the


39 In the Minix case, cited above, the amended complaint filed after release reinstated federal claims that had been dismissed entirely for non-exhaustion while the plaintiff was incarcerated.


41 Compare Lopez v. City of New York, 2009 WL 229956, *3-4 (S.D.N.Y., Jan. 30, 2009) (plaintiff jailed repeatedly need not have exhausted where she filed when out of jail); Segalow v. County of Bucks, 2004 WL 1427137, *1 (E.D.Pa., June 24, 2004) (holding that a prisoner who was released, filed his complaint, was reincarcerated, was released again, and then filed an amended complaint naming a new party was not a prisoner for PLRA purposes); Dolberry v. Levine, 567 F.Supp.2d 413, 422 (W.D.N.Y. 2008) (claim filed while plaintiff was out
process is complete, then files suit after reincarceration, may be found to have failed to exhaust if
the grievance system remained available after release. A prisoner who delivers a complaint to
prison officials for mailing to court remains a prisoner for PLRA purposes even if the complaint
arrives at court after his or her release. Persons who join a previously filed case are prisoners if
they are incarcerated as of the date they join the case, not as of the date the case was first filed.

Prisoners cease to be prisoners upon death and therefore litigation on their behalf is not
subject to the PLRA, though a case filed by a prisoner before death remains a case brought by a

of prison was not governed by “three strikes” provision) with Napier v. Laurel County, Ky., 636 F.3d 218, 221 n.1
(6th Cir. 2011) (holding prisoner released, then reincarcerated on new charges when he filed suit was a prisoner for
PLRA purposes); Berry v. Kerik, 366 F.3d 85, 87 (2d Cir. 2003) (holding plaintiff who had been released but was
re-incarcerated at the time lawsuit filed was required to exhaust administrative remedies under the PLRA); Brahan v.
Erickson, 2007 WL 1430201, *4 & n.4 (E.D.Wis., May 11, 2007), relief from judgment denied, 2007 WL 2209257
335 F.Supp.2d 325, 330-31 (D.Conn. 2004) (all holding the exhaustion requirement applied to a prisoner who was
released after the incident sued about, but did not file suit until he had been reincarcerated); see George v. Hogan,
2008 WL 906523, *6 (M.D.Pa., Mar. 31, 2008) (holding plaintiff who was an ICE detainee at the time of the
relevant events but was criminally committed when he filed suit was required to exhaust). But see Evans v.
Cameron, 2009 WL 3415160, *2 (W.D.Pa. 2009) (prisoner who was released before the grievance filing deadline,
but was reincarcerated before he filed suit, by which time the grievance deadline had passed, could go forward
without exhaustion as remedies were unavailable); Almond v. Tarver, 468 F.Supp.2d 886, 896-97 (E.D.Tex. 2006)
(holding that a prisoner who pursued the grievance process but was released before it concluded, then was
reincarcerated in a different system and filed suit while there, could not practically be required to resume the
grievance process and had sufficiently exhausted). Under the majority view, a prisoner who was released after the
claim arose and then reincarcerated before filing would be obliged to try to exhaust upon reincarceration, relying on
claim that the plaintiff was a prisoner at filing and subject to the PLRA); Lopez v. City of New York, 2009 WL
229956, *3-4 (S.D.N.Y., Jan. 30, 2009) (suggesting that prisoner who was repeatedly jailed, but never for long
enough to complete the grievance process, would not be required to have exhausted).

McCullough v. Yates, 2011 WL 773233, *3-4 (E.D.Cal., Feb. 28, 2011) (grievance policy was made available to
parolees, and notice of grievance decision provided after date of parole provided instructions for appeal). By
Fed.Appx. 534 (6th Cir. 2013) (unpublished), cert. denied, 134 S.Ct. 1029 (2014), the court noted that the grievance
policy says that grievances, including pending ones, are mooted by release; a prisoner must follow the grievance
policy until released, but no longer, and the mooted grievance process need not be resumed upon reincarceration.

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44 Turner v. Grant County Detention Center, 2008 WL 821895, *5 (E.D.Ky., Mar. 26, 2008); In re Bayside Prison
(M.D.Pa. 2009) (newly added plaintiff is a prisoner if incarcerated when the amended complaint is filed, not when
plaintiffs seek leave to file it).

In the Bayside case, one of the numerous plaintiffs alleging abuse by prison staff had joined the action only
after he was released. Prison officials argued that his claim should be deemed to “relate back” to the filing of the
original complaint under Rule 15(c), Fed.R.Civ.P., when he was still in prison, so it would be barred. The court held
that that Rule was completely inapposite, since it was intended to mitigate the effect of statutes of limitations, and
pointed out that the plaintiff would have been free to file a separate suit after release in any case.

F.Supp.2d 204, 206 (D.P.R., Aug. 28, 2007); Rivera-Quinones v. Rivera-Gonzalez, 397 F.Supp.2d 334, 340 (D.P.R.,
Civil actions do not include habeas corpus and other post-judgment proceedings challenging criminal convictions or sentences or their calculation. Most courts have now held female prisoner suing over the death of her child was barred for non-exhaustion, but the estate of the child might have a claim if it was born alive.

46 Tretter v. Pennsylvania Dept. of Corrections, 2012 WL 360029, *4 (M.D.Pa., Feb. 2, 2012) (“Mr. Bender's death, the substitution of plaintiffs, and the amendment of the original complaint after his death, do not change Mr. Bender's status as a prisoner at the time of filing his initial complaint.”).


48 Braswell v. Corrections Corp. of America, 2009 WL 2447614, *4 (M.D.Tenn., Aug. 10, 2009), rev’d on other grounds, Braswell v. Corrections Corp. of America, 419 Fed.Appx. 622 (6th Cir. 2011) (unpublished). Braswell cites cases in which the courts applied the PLRA to suits by guardians, but without discussion or specific holding on the point.

49 See Arsberry v. Illinois, 244 F.3d 558 (7th Cir.) (holding that prisoner plaintiffs were barred for non-exhaustion but non-prisoners’ claims could be decided on the merits), cert. denied, 534 U.S. 1062 (2001); Miller v. Hartley, 120 F.3d 536 (D.Colo., Apr. 12, 2001) (holding prisoner’s mother’s claim not governed by exhaustion requirement); Carter v. Jones, 2006 WL 2320807, *6 (W.D.Okla., Aug. 9, 2006) (holding prisoner’s mother’s claim not governed by exhaustion requirement); Apanovich v. Taft, 2006 WL 1477040, *4 (S.D.Ohio, July 21, 2006) (dismissing prisoner’s claim about execution procedures for non-exhaustion, allowing claims of newspaper and non-profit organization to go forward); Turner v. Wilkinson, 92 F.Supp.2d 697, 704 (S.D.Ohio 1999) (holding that a case filed by a prisoner husband and his non-prisoner wife was not “brought by a prisoner” and therefore PLRA fees limits did not apply). But see Johnson v. Martin, 2006 WL 1361771, *5 n.6 (W.D.Mich., May 15, 2006) (applying PLRA attorneys’ fees limitations where only two plaintiffs—a religious organization and its president—were non-prisoners, where the “primary benefits” went to prisoners, and there was no “intelligent way” to differentiate between hours spent on prisoner and non-prisoner claims). In Ray v. Evercom Systems, Inc., 2006 WL 2475264 (D.S.C., Aug. 25, 2006), appeal dismissed on other grounds, 234 Fed.Appx. 248 (5th Cir. 2007), like Arsberry a challenge to telephone charges involving prisoner and non-prisoner plaintiffs, the court stated that all plaintiffs would have to exhaust, but appears not to have considered the question whether the non-prisoners were actually within the scope of the exhaustion requirement. 2006 WL 2475264, *4-5.

50 See Montcalm Pub. Corp. v. Com. of Va., 199 F.3d 168, 171-72 (4th Cir. 1999) (holding a publisher who intervened in a prisoner’s challenge to prison censorship, rather than filing a separate complaint, was bound by the PLRA attorneys’ fees provisions, since it intervened in an action brought by a prisoner).


52 See, e.g., Jennings v. Natrona County Detention Center Officer, 175 F.3d 775, 779 (10th Cir. 1999); Alexander v. U.S., 121 F.3d 312 (7th Cir. 1997); Thomas v. Federal Bureau of Prisons, 2009 WL 5111764, *3 n.2 (C.D.Cal., Dec. 17, 2009); Zapata v. Scibana, 2004 WL 1563239, *1 (W.D.Wis., July 9, 2004) (holding a habeas challenge to good time calculation not subject to the PLRA), vacated on other grounds, 2005 WL 752243 (W.D.Wis., Mar. 31, 2005); Neal v. Fleming, 2004 WL 792729, *2 (N.D.Tex., Apr. 14, 2004) (holding a prisoner challenging the failure to release him early for completion of a drug program was not subject to PLRA exhaustion), report and
that habeas proceedings not arising from the original criminal conviction or sentence are also not civil actions for PLRA purposes. Under that holding, habeas challenges to prison disciplinary convictions resulting in the loss of good time are not governed by the PLRA, though subsequent damage actions would be. Habeas petitioners seeking release from disciplinary or administrative confinement to general population have been held not subject to the PLRA, though it is questionable at this point whether habeas is a proper vehicle for such challenges.

In most circuits, including the Second, mandamus and other extraordinary writs are treated as civil actions when the relief sought is similar to that in a civil action, but not when the writ is directed to criminal matters. However, challenges to seizures of property related to criminal proceedings have so far been treated as civil actions, as have motions for disclosure of matters before a grand jury. Decisions are divided concerning motions made under the caption recommendation adopted,

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55 In most circuits, including the Second, mandamus and other extraordinary writs are treated as civil actions when the relief sought is similar to that in a civil action, but not when the writ is directed to criminal matters. However, challenges to seizures of property related to criminal proceedings have so far been treated as civil actions, as have motions for disclosure of matters before a grand jury. Decisions are divided concerning motions made under the caption recommendation adopted, 2004 WL 1175736 (N.D.Tex., May 26, 2004); Monahan v. Winn, 276 F.Supp.2d 196, 204 (D.Mass. 2003). In Garza v. Thaler, 585 F.3d 888, 889-90 (5th Cir. 2009), the court held that a district court may not impose the PLRA filing fee installment payment scheme on an IFP litigant appealing a habeas decision, either under the PLRA or as a matter of discretion.

56 The Second Circuit has held that it is, see Abdul-Hakeem v. Koehler, 910 F.2d 66, 69-70 (2d Cir. 1990) (holding that either habeas or § 1983 may not be used to challenge the place of confinement), but has not re-examined that conclusion in light of subsequent Supreme Court authority concerning the line between habeas and § 1983 proceedings. In my view, Abdul-Hakeem and similar decisions are at least implicitly overruled by Muhammad v. Close, 540 U.S. 749 (2004) (per curiam), which held that a prisoner seeking damages for placement in segregation “raised no claim on which habeas relief could have been granted,” 540 U.S. at 754, and stated: “This Court has never followed the speculation in Preiser v. Rodriguez, 411 U.S. 475, 499 (1973), that such a prisoner subject to ‘additional and unconstitutional restraint’ might have a habeas claim independent of § 1983. . . .” 540 U.S. 751 at n.1.

57 See In re Kissi, 652 F.3d 39, 41 (D.C.Cir. 2011) (per curiam) (applying Grant holding to applicability of three strikes provision); In re Grant, 635 F.3d 1227, 1230 (D.C.Cir. 2011) (holding “the filing-fee requirements of the PLRA apply to a petition for a writ of mandamus filed in connection with a civil proceeding in the district court”); In re Steele, 251 Fed.Appx. 772 (3d Cir. 2007) (per curiam) (unpublished) (holding “if a prisoner files a ‘mandamus petition’ that actually would initiate an appeal or a civil action, the PLRA applies” (citing Madden v. Myers, infra)); In re Jacobs, 213 F.3d 289, 289 n.1 (5th Cir. 2000); In re Smith, 114 F.3d 1247 (D.C.Cir. 1997); Madden v. Myers, 102 F.3d 74, 77-78 (3d Cir. 1996) (holding mandamus petitions are neither civil actions nor appeals, and mandamus petitions that are not the kind of litigation the PLRA sought to curb are not subject to the PLRA); In re Nagy, 89 F.3d 115 (2d Cir. 1996); Banks v. Ballard, 2013 WL 786355, *2 (W.D.Pa., Jan. 18, 2013) (holding “bona fide writ of prohibition” is not barred by PLRA three strikes provision, but this petitioner is not entitled to relief because he could pursue his claim as a civil action), report and recommendation adopted, 2013 WL 786338 (W.D.Pa., Feb. 28, 2013); Keys v. Department of Justice, 2009 WL 648926, *3 (M.D.Pa., Mar. 10, 2009).


59 U.S. v. Campbell, 294 F.3d 824, 826-29 (7th Cir. 2002).
of a criminal prosecution addressing conditions of confinement related to the prosecution.\(^{60}\) (At least one court has held that such requests may not be entertained in a criminal action, since they require exhaustion, and since the adverse party—the prosecution—may lack authority over prison and jail conditions.\(^{61}\) In general, motions in already filed civil cases addressed to those cases’ subject matter are not considered separate “actions” for purposes of the PLRA.\(^{62}\) Motions involving new parties or new subject matter are considered new actions.\(^{63}\)

The PLRA exhaustion requirement is not explicitly limited to civil actions; the statute refers generally to “action[s] . . . with respect to prison conditions.”\(^{64}\) PLRA exhaustion law has

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\(^{60}\) In *U.S. v. Lopez*, 327 F.Supp.2d 138, 140-42 (D.P.R. 2004), the court held that a motion challenging placement in administrative segregation after the government decided to seek the death penalty against the defendant was not a civil action requiring administrative exhaustion, and granted relief. In another case raising the same issue, the court made a similar statement but ultimately disposed of the matter by holding that the motion was properly treated as a habeas corpus proceeding to which the PLRA is inapplicable. *U.S. v. Catalan-Roman*, 329 F.Supp.2d 240, 250-51 (D.P.R. 2004). In *U.S. v. Hashmi*, 621 F.Supp.2d 76, 84-85 (S.D.N.Y. 2008), the court held that a motion in a criminal case contesting “Special Administrative Measures” affecting communication between the defendant and his counsel was not an “action,” a term which it defined to mean a separate proceeding, and plaintiff need not exhaust administrative remedies. *Accord*, U.S. v. Savage, 2012 WL 5866059, *2* (E.D.Pa., Nov. 16, 2012) (holding defendant “was not required to exhaust his administrative remedies before challenging aspects of the SAMs that ‘directly affected his ability to prepare his defense in this criminal action’”; this recharacterizes holding of prior decision in same case; holding restrictions on visiting children could impair capital defendant’s preparation of mitigation evidence); U.S. v. Savage, 2010 WL 4236867, *3-7* (E.D.Pa., Oct. 21, 2010) (following *Hashmi*; cautioning that holding is limited to “challenges aspects of prison life that directly implicate the court's ability to fairly and efficiently manage the defendant's criminal prosecution”); see *U.S. v. Savage*, 2012 WL 424993, *3* n.7 (E.D.Pa., Feb. 10, 2012) (“Because Defendant's complaints implicate regulations that affect his ability to prepare his defense in this criminal action, he need not have exhausted his administrative remedies prior to raising these concerns to the Court, applying prior holding to new restrictions.”). Other decisions are to the contrary, holding that motions challenging SAMs or other pre-trial jail restrictions must be exhausted. See *U.S. v. Khan*, 540 F.Supp.2d 344, 349-52 (E.D.N.Y. 2007) (this court seems to confuse PLRA and habeas exhaustion requirements); *U.S. v. Ali*, 396 F.Supp.2d 703, 705-77 (E.D.Va. 2005). An appellate decision holds that a motion in a long-completed criminal case challenging a prison policy forbidding inmates from retaining possession of pre-sentence reports should have been treated as a separate civil action and that it required exhaustion. *U.S. v. Antonelli*, 371 F.3d 360, 361 (7th Cir. 2004). The Fifth Circuit held before the PLRA was enacted that a motion in a criminal proceeding to obtain grand jury transcripts is a civil action requiring administrative exhaustion, and since the adverse party—Judith M. Kick First Circuit Judge, U.S. v. Lopez, 327 F.Supp.2d 138, 140-42 (D.P.R. 2004), the court held that a motion challenging placement in administrative segregation after the government decided to seek the death penalty against the defendant was not a civil action requiring administrative exhaustion, and granted relief. In another case raising the same issue, the court made a similar statement but ultimately disposed of the matter by holding that the motion was properly treated as a habeas corpus proceeding to which the PLRA is inapplicable. *U.S. v. Catalan-Roman*, 329 F.Supp.2d 240, 250-51 (D.P.R. 2004). In *U.S. v. Hashmi*, 621 F.Supp.2d 76, 84-85 (S.D.N.Y. 2008), the court held that a motion in a criminal case contesting “Special Administrative Measures” affecting communication between the defendant and his counsel was not an “action,” a term which it defined to mean a separate proceeding, and plaintiff need not exhaust administrative remedies. *Accord*, U.S. v. Savage, 2012 WL 5866059, *2* (E.D.Pa., Nov. 16, 2012) (holding defendant “was not required to exhaust his administrative remedies before challenging aspects of the SAMs that ‘directly affected his ability to prepare his defense in this criminal action’”; this recharacterizes holding of prior decision in same case; holding restrictions on visiting children could impair capital defendant’s preparation of mitigation evidence); U.S. v. 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\(^{64}\) 42 U.S.C. § 1997e(a).
nonetheless generally not been applied in habeas proceedings, since habeas corpus has its own pre-existing exhaustion requirement.\footnote{See § IV.B.1, below.}

There are other variations in the substantive scope of the PLRA prisoner litigation provisions. For example, the filing fees provisions apply to all civil litigation brought by prisoners,\footnote{28 U.S.C. § 1915(a)(2).} while the exhaustion of administrative remedies provision applies only to prisoners’ actions “with respect to prison conditions.”\footnote{42 U.S.C. § 1997e(a).} Always check the language of the particular provision you are dealing with.

III. Prospective Relief

The prospective relief sections of the PLRA, as noted above, apply to “civil action[s] with respect to prison conditions,” i.e., “any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, [excluding] habeas corpus proceedings challenging the fact or duration of confinement in prison.”\footnote{18 U.S.C. § 3626(g)(2); see Valdivia v. Davis, 206 F.Supp.2d 1068, 1074 n. 12 (E.D.Cal. 2002) (holding challenge to parole revocation procedures was not a “civil action with respect to prison conditions”).} A “prison” is a facility “that incarceraes or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law.”\footnote{18 U.S.C. § 3626(g)(5).} Whether police and courthouse holding cells are prisons has not been settled.\footnote{See n.4, above.}

Prospective relief is defined as “all relief other than compensatory money damages.”\footnote{18 U.S.C. § 3626(g)(7).} Several courts have held that special masters, court monitors, or other monitoring arrangements designed to effectuate injunctive relief are not themselves relief subject to the prospective relief restrictions,\footnote{See Williams v. Edwards, 87 F.3d 126, 128, 133 (5th Cir. 1996) (holding there was no prospective relief in a case where an expert had been appointed to investigate and report on prison conditions); Coleman v. Brown, 2013 WL 6071977, *1 (E.D.Cal., Nov. 13, 2013) (holding direction to special master to monitor inpatient mental health programs is not relief under the PLRA); Carruthers v. Jenne, 209 F.Supp.2d 1294, 1300 (S.D.Fla. 2002); Benjamin v. Fraser, 156 F.Supp.2d 333, 342-43 and n.11 (S.D.N.Y. 2001), aff’d in part, vacated and remanded in part, 343 F.3d 35 (2d Cir. 2003), and cases cited; see also United States of America v. Territory of the Virgin Islands, 884 F.Supp.2d 399, 409 n.5 (D.V.I. 2012) (noting parties’ agreement to the same effect re special master appointment).} though the Second Circuit has expressed considerable doubt about that conclusion without ruling on the question.\footnote{See Benjamin, 343 F.3d at 49 (dictum); see also Plata v. Schwarzenegger, 2005 WL 2932253, *25-28 (Oct. 3, 2005) (applying need-narrowness-intrusiveness analysis to appointment of a receiver for prison medical care).} One circuit has held that an order that does no more than enforce an earlier order or decree is not prospective relief within the statute’s meaning.\footnote{Jones-El v. Berge, 374 F.3d 541, 545 (7th Cir. 2004); accord, Coleman v. Brown, 2013 WL 3773963, *3 n.8 (E.D.Cal., July 12, 2013) (“To the extent that this order directs specific action by defendants or the Special Master it implements a remedy that has already been ordered by the court. For that reason, the court is not required to make the findings set forth in 18 U.S.C. § 3626(a) (1).”); see Coleman v. Brown, 2013 WL 6071977, *1 (E.D.Cal., Nov. 13, 2013) (holding no further PLRA findings are required for a further order in aid of the remedy required by an older order finding liability).}

A recent decision notes that in Jones-El, the parties agreed that the requirements of the later order were the only available means to implement the earlier consent decree, and declined to follow Jones-El where a consent
Attorneys’ fees, even those awarded for monitoring compliance with an injunction, are not prospective relief.\textsuperscript{75} Orders issued in the course of pre-trial case management are not prospective relief.\textsuperscript{76} One federal circuit has held that punitive damages are prospective relief, a holding discussed further below.\textsuperscript{77} A couple of district court decisions have dubiously characterized § 3626 as a limited waiver of sovereign immunity.\textsuperscript{78}

A. Limitations on Relief

1. Entry of Relief

Prospective relief in prison conditions litigation, whether contested or entered by consent, must be supported by findings that it is narrowly drawn, extends no further than necessary to correct a violation of federal rights, and is the least intrusive means of doing so\textsuperscript{79} (the “need-narrowness-intrusiveness” standard). Courts have disagreed whether the findings must be made on a provision-by-provision basis,\textsuperscript{80} or the order need only be considered as a whole.\textsuperscript{81} (One federal appeals court has held that the provision-by-provision requirement applies to the retention of relief in the face of a motion to terminate, but not to the initial entry of relief.\textsuperscript{82} The statutory language does not appear to me to support that distinction.) At least one circuit has

\textsuperscript{75} Carruthers v. Jenne, 209 F.Supp.2d at 1299-1300.
\textsuperscript{76} In re Arizona, 528 F.3d 652, 658 (9th Cir. 2008) (Martinez order (direction that defendants submit a report on facts relevant to a pro se prisoner claim), was not “relief”), cert. denied, 557 U.S. 918 (2009).
\textsuperscript{77} See § III.F, below.
\textsuperscript{78} Tanner v. Federal Bureau of Prisons, 433 F.Supp.2d. 117, 122 n. 6 (D.D.C.2006); accord, McIntosh v. Lappin, 2012 WL 4442760, *10 (D.Colo., Sept. 26, 2012), order entered, 2012 WL 4478973 (D.Colo., Sept. 28, 2012). In Tanner, the Federal Bureau of Prisons was named as the defendant and asserted sovereign immunity, and the court responded that § 3626 “authorizes suits arising from prison conditions or actions of prison officials.” Tanner, id. Suits against prison officials in their official capacities for injunctive relief have long been understood not to contravene sovereign immunity. Cf. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) (citing “the presumed availability of federal equitable relief against threatened invasions of constitutional interests”). Injunctive relief against the United States is authorized notwithstanding sovereign immunity under specified circumstances by 5 U.S.C. § 702. There is no indication in § 3626 that it is intended to expand the government’s amenity to suit any further than did pre-existing case and statutory law.
\textsuperscript{79} 18 U.S.C. § 3626(a); see Fields v. Smith, 712 F.Supp.2d 830, 869-70 (E.D.Wis. 2010) (supplying required findings to support injunction after initial merits decision), aff’d, 653 F.3d 550 (7th Cir. 2011); Jordan v. Pugh, 2007 WL 2908931, *2 (D.Colo., Oct. 4, 2007) (same). The findings need not recite the statutory language in haec verba if they “are inescapable” from the court’s orders. Plata v. Schwarzenegger, 2009 WL 799392, *14 (N.D.Cal., Mar. 24, 2009), aff’d in part, dismissed in part, 603 F.3d 1088 (9th Cir. 2010).
\textsuperscript{80} See Cason v. Seckinger, 231 F.3d 777, 785 (11th Cir. 2000); Ruiz v. United States, 243 F.3d 941, 950-951 (5th Cir. 2001); Castillo v. Cameron County, 238 F.3d 339, 354 (5th Cir. 2001).
\textsuperscript{81} See Armstrong v. Schwarzenegger, 622 F.3d 1058, 1071 (9th Cir. 2010) (“What is important, and what the PLRA requires, is a finding that the set of reforms being ordered—the ‘relief’—corrects the violations of prisoners’ rights with the minimal impact possible on defendants’ discretion over their policies and procedures.”); Benjamin v. Fraser, 156 F.Supp.2d 333, 342 (S.D.N.Y. 2001), aff’d in part, vacated and remanded on other grounds, 343 F.3d 35 (2d Cir. 2003) (expressing doubt point-by-point findings are required).
\textsuperscript{82} Gates v. Cook, 376 F.3d 323, 336 n.8 (5th Cir. 2004); Jones v. Gusman, 296 F.R.D. 416, 455 (E.D.La., June 6, 2013) (following Gates).
held that the findings need not have been explicitly made “so long as the record, the court's decision ordering prospective relief, and relevant caselaw fairly disclose that the relief actually meets the § 3626(b)(2) narrow tailoring standard.”

The restriction to “federal rights” means that federal courts may not grant prospective relief in prison litigation based on state law under their supplemental jurisdiction because § 3626 overrides 28 U.S.C. § 1367, the supplemental jurisdiction statute. Courts have also held that they cannot grant prospective relief that is not directly related to the claims in the complaint. In particular, some courts have held that they cannot grant relief with respect to obstructions to the plaintiff’s ability to litigate the case. The latter holding appears wrong, as other decisions have acknowledged, since courts have power under the All Writs Act, 28 U.S.C. § 1651(a), to issue orders in aid of their own jurisdiction, against non-parties if necessary, and to “prevent threatened injury that would impair the court's ability to grant effective relief in a pending action.”

Another section of the PLRA, governing the termination of injunctions, requires a showing of a “current and ongoing” federal law violation to preserve previously granted relief. That requirement does not appear in, and does not apply to, the PLRA provision governing the initial entry of relief.

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83 Gilmore v. California, 220 F.3d 987, 1007 n.25 (9th Cir. 2000) (quoted in Clark v. California, 739 F.Supp.2d 1168, 1228 (N.D.Cal. 2010)). Contra, United States of America, v. Territory of the Virgin Islands, 884 F.Supp.2d 399, 412 (D.V.I. 2012) (holding the PLRA “does not provide an avenue for district courts to make, post hoc and nunc pro tunc, the findings required by the Act” (quoting Cagle v. Hutto, 177 F.3d 253, 257 (4th Cir. 1999)).

84 Handberry v. Thompson, 446 F.3d 335, 344-46 (2d Cir. 2006).


89 18 U.S.C. § 3626(a)(1); see Thomas v. Bryant, 614 F.3d 1288, 1320 (11th Cir. 2010) (finding no indication the “current and ongoing” language was intended to change “the well-established law that injunctive relief is available in the first instance ‘to prevent a substantial risk of serious injury from ripening into actual harm,’ i.e., to prevent future harm’); Austin v. Wilkinson, 372 F.3d 346, 360 (6th Cir. 2004), aff’d in part, rev’d in part and remanded on other grounds, 545 U.S. 209 (2005). Contra, Indiana Protection and Advocacy Services Com’n v. Commissioner,
Courts are also to give substantial weight to adverse impacts on public safety or criminal justice operations, though this requirement “does not require the court to certify that its order has no possible adverse impact on the public. A court is required to consider the public safety consequences of its order and to structure, and monitor, its ruling in a way that mitigates those consequences while still achieving an effective remedy of the constitutional violation.” Further, one court has pointed out that there may be dangers to public safety within the prison or jail at issue which support the necessity for relief. Courts are also directed to avoid requiring or permitting officials to violate state or local law unless necessary to correct violations of federal rights.

The restrictions of 18 U.S.C. § 3626(a) apply only to the fashioning of prospective relief and have no implications for other aspects of litigation, e.g., decisions on class certification or the contempt power. Common sense and the Federal Rules of Civil Procedure
suggest that any determination about the propriety of particular relief be made only after a violation of federal rights has been found. Since the statute requires relief to be supported by findings that it is tailored to the violation, it is hard to see how a rational determination of appropriate relief could be made until there is a finding of violation and a record that might illuminate how best it can be corrected. Further, the Federal Rules of Civil Procedure provide that “[e]very [non-default] final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” Since the court is to determine the proper relief at the end of the case, independently of the parties’ demands, there is no apparent reason why remedial issues should—or can—be addressed at an earlier stage. In particular, one recent decision states:

The “need-narrowness-intrusiveness” test, however, is a limitation on judicial authority over prisons at the remedial stage, not a heightened-pleading requirement imposed on the plaintiffs. . . .

The PLRA did not abrogate the longstanding rule that, at the motion-to-dismiss stage, a complaint is judged by whether it presents “enough facts to state a claim to relief that is plausible on its face,” . . . not whether the relief requested will be granted in full.

Nonetheless, several misguided decisions have applied the § 3626(a) standards at the pleading stage, usually where prisoners were proceeding pro se. Treating these standards as establishing limitations on broad prospective relief are not determinative of the class certification issue, but neither can those limitations be ignored. If this court does not have the authority to grant the injunctive relief requested, the purpose of proceeding as a class action is defeated.” Shook v. Board of County Com’rs of County of El Paso, 2006 WL 1801379, *12 (D.Colo., June 28, 2006). On appeal from that decision, the appeals court reaffirmed its holding that reliance on the PLRA’s restrictions as a basis for denying class certification was error, Shook v. Board of County Com’rs of County of El Paso, 543 F.3d 597, 613 (10th Cir. 2008), though it affirmed the denial of certification on Rule 23 grounds.


Fed.R.Civ.P. 54(c).

Henderson v. Thomas, 2012 WL 3846439, *13 (M.D.Ala., Sept. 5, 2012) (citations omitted); accord, Goode v. Bruno, 2013 WL 5448442, *7 (D.Conn., Sept. 30, 2013) (“The fact that the plaintiff may seek relief that is not narrowly drawn or extends further than necessary or is not the least restrictive means necessary to correct the violation of the federal right at issue is not a reason to dismiss all claims for injunctive relief at this stage of the proceedings. If Goode were to prevail in this action, the court would be constrained by the requirements set forth in 18 U.S.C. § 3626 in awarding injunctive relief against the defendant.”); Echezarreta v. Kemmeren, 2013 WL 4080293, *4 (N.D.Ill., Aug. 13, 2013) (denying request to strike injunctive demand in motion to dismiss as premature; “Although defendants boldly state that it is impossible to narrowly draw any injunctive relief that may be awarded in this case, there is nothing in the complaint which supports such a contention”); noting issue may be raised again on summary judgment); Royer v. Federal Bureau of Prisons, 934 F.Supp.2d 92, 95 (D.D.C. 2013) (on motion to dismiss or for summary judgment, holding argument based on § 3626(a)(1) “is premature given the status of this case and the Court will not consider it now.”).

a pleading requirement is contrary to the Supreme Court’s holding that new pleading requirements cannot be judicially created but must be promulgated through the usual process for amending the Federal Rules of Civil Procedure.\footnote{100} Similarly, some courts have denied preliminary relief on the ground that the prayer for relief in the motion did not conform to the need-narrowness-intrusiveness standard.\footnote{101}

## 2. Settlements

Injunctive settlements must meet the standards and the findings requirement of § 3626(a) in order to be enforceable in federal court.\footnote{102} Settlements that do not meet the PLRA standards are not prohibited, but these must be entered as “private settlement agreements” not enforceable


\footnote{100} Jones v. Bock, 549 U.S. 199, 216-17 (2007) (citing Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993)).


in federal court. The only federal court remedy permitted after such a settlement is reinstatement of the action, though some litigants and courts have devised alternative means to maintain the district court’s involvement in implementation of relief, such as providing for mediation in the district court before commencing litigation in state court, or for the agreed implementation of significant relief as an interim measure without the actual entry of judgment.

This requirement that an agreed injunctive order be supported by judicial findings of a federal law violation is a major change from prior law and practice and has significant effects on the conduct of litigation. Avoiding such findings is a major incentive for defendants to settle, and they will often be unwilling to agree to such findings or subject themselves to the risk of them. As a practical matter, the choice for many plaintiffs has become private settlement agreement or trial. That said, the findings entered in PLRA settlement usually amount to little more than an agreed recitation of the statutory terms, sometimes with reservations that

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103 18 U.S.C. § 3626(c)(2); see Rowe v. Jones, 483 F.3d 791, 796 (11th Cir. 2007) (“judicial enforcement is . . . the critical distinction between private settlement agreements and consent decrees”); Ingles v. Toro, 438 F.Supp.2d 203, 215-16 (S.D.N.Y. 2006) (approving settlement in use of force class action, noting the irrationality of having to enforce it before a state court unfamiliar with the case).


105 In a statewide action challenging inadequate prison mental health services, the parties entered into an extensive private settlement agreement providing that in the event of a claim of pervasive noncompliance and inability to resolve the dispute through meeting and conferring, either party could seek mediation by the district judge. If mediation failed, plaintiff could either seek reinstatement or ask the district judge to recommend a one-year extension of the agreement, which recommendation the parties agreed would be binding. Disability Advocates, Inc. v. New York State Office of Mental Health, No. 02 Civ. 4002 (GEL), Private Settlement Agreement, ¶ 11 (S.D.N.Y., Apr. 27, 2007).

106 In another statewide prison mental health case, the court approved what it characterized as a private settlement while staying the litigation rather than entering judgment, stating that it was retaining the authority to enforce the agreement but that the agreement would not be enforceable in contempt. It characterized this arrangement as “an exercise of its inherent authority to decide how to manage its docket” and not as a grant of prospective relief. Rather, “the court is only approving an Agreement that provides a means of obtaining relief for any future violation of federal law and not now ordering any form of remedy.” Disability Law Center v. Massachusetts Dept. of Correction, 2012 WL 1237760, *11-13 (D.Mass., April 12, 2012).

107 Federal courts approving settlements in class actions have generally been required to make only a general finding of adequacy. See, e.g. Joel A. v. Giuliani, 218 F.3d 132, 138 (2d Cir. 2000) (“fair, adequate, and reasonable, and not a product of collusion”); Isby v. Bayh, 75 F.3d 1191, 1196 (7th Cir. 1996) (“fair, reasonable, and adequate”). Consent judgments have not been required to be tailored closely to a federal court violation filed by the court. Rather, their terms must only “spring from and serve to resolve a dispute within the court's subject-matter jurisdiction, . . . com[e] within the general scope of the case made by the pleadings, . . . further the objectives of the law upon which the complaint was based,” and not be otherwise unlawful. Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 525 (1986) (citations and internal quotation marks omitted).

arguably undermine their import.\textsuperscript{109} Courts have held that they must make an independent judgment whether the PLRA standards for settlement have been met,\textsuperscript{110} but it is not always clear from opinions and orders to what extent the court has independently examined the question. As noted below, courts have held that agreements between the parties may be evidence that the agreed terms are PLRA-compliant,\textsuperscript{111} and some courts have extended that proposition to agreements that the proposed order as a whole satisfies the PLRA.\textsuperscript{112}

3. The Need-Narrowness-Intrusiveness Standard

The need-narrowness-intrusiveness standard is not much different from pre-PLRA law governing federal court civil rights injunctions.\textsuperscript{113} The pre-PLRA rule that defendants must have

\begin{footnotesize}
\textsuperscript{109} See Jones v. Gusman, 296 F.R.D. 416, 463 (E.D.La., June 6, 2013) (noting stipulation refers to “the violations of the federal rights as alleged by Plaintiffs in the Complaints” and provides “Any admission made for purposes of this Agreement is not admissible if presented by Third Parties in another proceeding,” and stating: “Neither the PLRA nor caselaw requires a plainly worded concession of liability. . . .”); Orndorff v. Jefferson County, No. 02-5096 RBL, Order Approving Settlement Agreement and Dismissing Litigation at 2-3 (W.D.Wash., Jan. 27, 2004) (reciting conclusory PLRA findings and stating that order “shall not be construed or deemed as an admission . . . of any liability or violations of any law . . . and . . . may not be used as evidence in any proceeding” except for enforcement of the agreement); Duffy v. Riveland, No. C92-1596R, Stipulation and Order at 2-3 (W.D.Wash., Aug. 31, 1998) (including stipulation disclaiming admissions of liability or violation and conclusory recitation by court of the PLRA findings); United States v. Clay County, Georgia, No. 4:97-CV-151, Consent Decree (M.D.Ga., filed Aug. 20, 1997), approved, Order (M.D.Ga., Aug. 26, 1997) (stipulating to conclusive PLRA findings, stating that liability had not been litigated, and disclaiming any preclusive effect except between the parties); Makinson v. Bonneville County, Case No. CIV97-0190-E-BLW (D. Idaho, Apr. 30, 1997) (stipulating that agreements are not findings of fact or conclusions of law with respect to the parties’ claims or defenses); Lozeau v. Lake County, Montana, Cause No. CV95-82-M RMH, Decree at 15 (D. Montana, Oct. 23, 1996) (referring to “alleged” violation of federal rights).

\textsuperscript{110} Jones v. Gusman, 296 F.R.D. 416, 429 (E.D.La., June 6, 2013) (“The parties to the consent judgment have stipulated that it complies with the PLRA, but the Court conducts an independent inquiry.”) (footnotes omitted)); Austin v. Hopper, 28 F.Supp.2d 1231, 1235 (M.D.Ala. 1998).

\textsuperscript{111} See cases cited in n. 132, below.


\end{footnotesize}
an opportunity to propose remedies in the first instance is preserved under the PLRA,\textsuperscript{114} though it is within the trial court’s discretion over trial management to require that remedies be proposed at the hearing on the merits and not in a later separate proceeding.\textsuperscript{115} Injunctions entered under the PLRA remain subject to appellate review for abuse of discretion.\textsuperscript{116}

The Supreme Court has said: “Narrow tailoring requires a fit between the remedy's ends and the means chosen to accomplish those ends.”\textsuperscript{117} However, “[n]arrow tailoring does not require perfection.”\textsuperscript{118} The practical meaning of “narrowly drawn” and “least intrusive” is not always clear,\textsuperscript{119} and many decisions address the subject on an \textit{ad hoc} basis without stating any general principles.\textsuperscript{120} Some decisions have cited this standard as a makeweight in support of

\textsuperscript{114} Henderson v. Thomas, 2012 WL 6681773, *39 (M.D.Ala., Dec. 21, 2012) (noting defendants will have an opportunity to propose relief and the parties will then meet and seek agreement; specifying certain prerequisites for relief); see also cases cited in n. 131, below.

\textsuperscript{115} Graves v. Arpaio, 623 F.3d 1043, 1047 (9th Cir. 2010) (citing Lewis v. Casey, 518 U.S. 343, 363 (1996)).


\textsuperscript{118} Jones v. Gusman, 296 F.R.D. 416, 429 (E.D.La., June 6, 2013) (quoting Bd. of Trustees v. Fox, 492 U.S. 469, 480 (1989)).

\textsuperscript{119} See Caruso v. Zenon, 2005 WL 5957979, *5 n.9 (D.Colo., Oct. 18, 2005) (pointing out that the more narrow a remedy is, the more it may intrude on officials' ability to exercise discretion).

\textsuperscript{120} See, e.g., G.B. ex rel T.B. v. Carrion, 486 Fed.Appx. 886, 889-90 (2d Cir. 2012) (unpublished) (holding district court did not abuse its discretion in concluding that “prone restraints” against juvenile offenders may be necessary in limited circumstances rather than banning them entirely); Morrison v. Garraghty, 239 F.3d 648, 661 (4th Cir. 2001) (affirming injunction prohibiting refusing the plaintiff a religious exemption from property restrictions solely based on his non-membership in the “Native American race”; emphasizing its narrowness); Lipscomb v. Pfister, 2014 WL 287269, *3 (C.D.Ill., Jan. 27, 2014) (suggesting measures that appear more or less likely to satisfy the PLRA standards); Bakhtiari v. Walton, 2013 WL 6405794, *2 (S.D.Ill., Nov. 5, 2013) (holding medical condition was best addressed by attention from a physician familiar with it, not a transfer to another prison), \textit{report and recommendation adopted as modified}, 2013 WL 6405796 (S.D.Ill., Dec. 6, 2013); Burgos v. Long, 2013 WL 5818093, *11 (E.D.Cal., Oct. 29, 2013) (holding request for order transferring plaintiff to a prison of his choice “would not be the least intrusive means necessary to correct the harm”); court had ruled against plaintiff on the merits, does not say what an appropriate remedy might have been); Rigsby v. Arizona, 2013 WL 4774775, *2-3 (D.Ariz., Sept. 5, 2013) (holding request for order directing defendants to “provide Plaintiff safety, protection, human[e] conditions, and adequate grievance papers and grievance staff access, adequate outside exercise” was “far too broad and general to satisfy the restrictions of the PLRA”); McCormack v. Burnett, 2013 WL 3967852, *3 (W.D.Wis., July 31, 2013) (holding plaintiff’s request for an out of state transfer “exceeds the scope [of] authorized injunctive relief under the Prison Litigation Reform Act” and was “not narrowly drawn or the least intrusive means to correct the alleged deliberate indifference” in case about denial of hernia surgery); Plata v. Brown, 2013 WL 3200587, *14-15 (N.D.Cal., June 24, 2013) (holding order removing prisoners at risk for Valley Fever from prisons where it is prevalent complied with standard); Cudjo v. Delarosa, 2013 WL 2242456, *16 (E.D.Tex., May 21, 2013) (holding request for an order “to take out of my file any and all negative statements and comments, off the computer also” did not conform to the prospective relief standards); Roark v. Individuals of Federal Bureau of Prisons, 2013 WL 2153944, *1-2 (E.D.Tex., May 16, 2013) (holding request for population limit, medical and dental treatment, rehabilitative treatment for injured arm, population limit, and functional tables in all cells was not shown to be permissible under PLRA), \textit{aff'd}, ___ Fed.Appx. ____ (2014 WL 1015312 (5th Cir. 2014)); Still v. Schmidt, 2013 WL 1091745, *9 (D.Alaska, Mar. 15, 2013) (holding general request to comply with prison policy was not narrow and non-intrusive as pled; request for expungement of disciplinary convictions arising from events at issue in case satisfied § 3626(a)(1)); McNearney v. Washington Dept. of Corrections, 2013 WL 392490, *2-3 (W.D.Wash., Jan. 9, 2013) (granting motion to modify medical care order to terminate upon release), \textit{report and recommendation adopted}, 2013 WL 392489 (W.D.Wash., Jan. 31, 2013); Lopez v. Shiesha, 2012 WL 6719555, *3 (E.D.Cal., Dec. 26, 2012) (holding PLRA prohibits “generalized” relief against “medical department,” even though the case is
conclusions they seemingly have reached for other reasons. The requirement to avoid unnecessary violations of state law has so far been little litigated.

It is clear that enjoining defendants to follow the language of a statute they have violated is appropriate under the PLRA. Most courts have held that upon finding a policy unconstitutional in a non-class action, they can simply enjoin the policy, though a few have


See, e.g., Burns v. PA Dept. of Corrections, 642 F.3d 163, 182 (3d Cir. 2011).


Handberry v. Thompson, 446 F.3d 335, 347-48, 350-51 (2d Cir. 2006); see Rodley v. Lappin, 2006 WL 889744, *2 (D.D.C., Mar. 30, 2006) (holding that the appropriate remedy for Bureau of Prisons’ violation of APA rule-making provisions is for the plaintiff to participate in the rule-making process, which has now commenced, rather than vacating the rule or enjoining its consequences).

See Fields v. Smith, 653 F.3d 550, 558-59 (7th Cir. 2011) (affirming injunction of state Inmate Sex Change Prevention Act in its entirety based on holding that it is unconstitutional in all applications), aff’g 712 F.Supp.2d 830, 869 (E.D.Wis. 2010); Crawford v. Clarke, 578 F.3d 39, 43-44 (1st Cir. 2009) (granting injunction concerning religious practices for all “special management units” in non-class suit brought by residents of one unit); Clement v. California Dept. of Corrections, 364 F.3d 1148, 1152 (9th Cir. 2004) (affirming statewide injunction against receipt of materials downloaded from the Internet); Ashker v. California Dept’ of Corrections, 350 F.3d 917, 924 (9th Cir. 2003) (citations omitted) (affirming injunction against a requirement that “approved vendor labels” be affixed to all books sent to prisoners, stating that the injunction “‘heel[s] close to the identified violation’ and is not overly intrusive because the prison still searches every incoming package and can determine from the address label and invoice whether the package came directly from a vendor.”); Prison Legal News v. Columbia County, 942 F.Supp.2d 1068, 1092 (D.Or., Apr. 24, 2013) (enjoining postcard-only jail mail policy, stating injunction “will not provide for ongoing Court supervision and will not require Defendants to submit compliance reports, institute trainings, or submit revised policies to the Court for review,” and therefore satisfied need-narrowness-intrusiveness standard); Couch v. Jabe, 737 F.Supp.2d 561, 574 (W.D.Va. 2010) (enjoining prison
held that they must restrict relief to the plaintiffs in the suit. Systemic relief is permissible if supported by proof of a systemic violation; the command that remedies extend no further than necessary to remedy the violation of the rights of a “particular plaintiff or plaintiffs.” means only that “the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court.” Conversely, if a violation is narrowly focused on one or a few individuals, or on part of a system, relief should be focused accordingly. Allowing the defendants to propose a remedial plan in the first instance has been

censorship policy as facially unconstitutional, staying injunction to give defendants opportunity to draft a new one); Jordan v. Pugh, 2007 WL 2908931, *4 (D.Colo., Oct. 4, 2007) (holding a nationwide injunction appropriate where a rule was found facially overbroad under the First Amendment); Riley v. Brown, 2006 WL 1722622, *14 (D.N.J., June 21, 2006) (entering injunction to protect all prisoners from sex offender facility from assault notwithstanding lack of class certification since the record shows that all of them were at risk because of their status; stating the injunction “is not overly broad because it applies to a particular group of inmates who are likely to be targeted by other state inmates and it does not apply to any inmates that are unlikely to be targeted.”); Williams v. Wilkinson, 132 F.Supp.2d 601, 604, 608-09, 611-12 (S.D.Ohio 2001) (finding an informal policy of refusing to call witnesses in disciplinary hearings, rejecting defendants’ argument that the PLRA limited relief to the individual plaintiff, directing defendants to promulgate a new policy); see also Ball v. LeBlanc, ___ F.Supp.2d ____, 2013 WL 6705141, *42 (M.D.La., Dec. 19, 2013) (granting unit-wide relief against excessive temperatures; it is necessary since named plaintiffs could be moved to any location within the unit). See Lindell v. Frank, 377 F.3d 655, 660 (7th Cir. 2004) (holding injunction against restrictions on receipt of clippings overbroad insofar as it applied to other prisoners besides the plaintiff); Lipscomb v. Pfister, 2014 WL 287269, *3 (C.D.II., Jan. 27, 2014) (holding injunction protecting against throwing of bodily fluids during recreation periods should apply only to the individual plaintiff); Thomas v. Baca, 2006 WL 2547321, *7 (D.Ariz., Aug. 31, 2006) (stating in dictum that a request to revise a policy to remove a disability-based exclusion from work programs is more intrusive than a request to give the plaintiff the job he wants; contrary to Ninth Circuit Clement and Ashker decisions cited above). In Ackerman v. Nevada Dept. of Corrections, 2012 WL 846581, *2 (D.Nev., Mar. 12, 2012), prisoners challenged the discontinuance of kosher meals in favor of a “Common Fare Diet,” and the court restricted its preliminary injunction to the named plaintiff and those other prisoners who had expressly elected to continue to receive kosher food. In Fulbright v. Jones, 2012 WL 4471207, *2 & n.8 (W.D.Okla., Sept. 26, 2012), another kosher food case, the court relied on § 3626 in holding that a prior judgment on behalf of several prisoners did not extend to another prisoner on an “intended beneficiary” theory. In Pinson v. Prieto, 2012 WL 7006131, *6-7 (C.D.Cal., July 2, 2012), report and recommendation adopted, 2013 WL 427108 (C.D.Cal., Feb. 1, 2013), the court held that plaintiff’s request for procedures to identify and segregate gang members and associates contravened § 3626 because it “reaches much farther than the harm at issue and extends to all prisoners” although the case was not a class action.

In Someya v. Spencer, 851 F.Supp.2d 228, 251 (D.Mass. 2012), the court found a GID policy “is facially invalid insofar as it determines, without exception, that certain accepted treatments for GID are never medically necessary for inmates in GID custody,” but directed an individualized medical assessment, governed by community standards, followed by a good faith security review, only for the plaintiff. Armstrong v. Schwarzenegger, 622 F.3d 1058, 1073 (9th Cir. 2010) (holding system-wide injunction required more evidence than “single incidents that could be isolated”).

Brown v. Plata, ___ U.S.___, 131 S.Ct. 1910, 1940 (2011). Thus, the Court held, a remedy for persistent failure to provide constitutionally adequate medical and mental health services need not be restricted to persons presently suffering from physical or mental illness. “Prisoners who are not sick or mentally ill do not yet have a claim that they have been subjected to care that violates the Eighth Amendment, but in no sense are they remote bystanders in California’s medical care system. They are that system’s next potential victims.” Id.

See Thomas v. Bryant, 614 F.3d 1288, 1324-26 (11th Cir. 2010) (affirming injunction against use of chemical agents on prisoners with mental illness, noting limitation to the individual plaintiffs); Benjamin v. Fraser, 343 F.3d 35, 56-57 (2d Cir. 2003) (vacating finding of no constitutional violation in jail food service, directing district court to make particular findings concerning three jails where the record showed serious sanitary problems); Gomez v. Vernon, 255 F.3d 1118, 1130 (9th Cir.) (affirming injunction benefiting named individuals; though an unconstitutional policy had been found, it had been directed at those persons), cert. denied, 534 U.S. 1066 (2001);
said to be the least intrusive means to correct violations, though one recent decision has cautioned against adopting operational details of a defendants’ plan that are not required by federal law. Agreements between the parties are “strong evidence,” if not dispositive, that provisions reflecting those agreements comply with the needs-narrowness-intrusiveness requirement, and tracking existing agency or institutional policy is further evidence of PLRA compliance. Plaintiffs’ proposals may be deemed narrow and non-intrusive if the defendants


100 Pierce v. County of Orange, 761 F.Supp.2d 915, 954 (C.D.Cal. 2011). Having said that, the court then specified the requirements of such an order.

110 Westerfer v. Neal, 682 F.3d 679, 682-86 (7th Cir. 2012) (disapproving injunctive settlement that was more specific than constitutional requirements; injunction should direct adoption of policies complying with constitutional requirements and then verify that the policies do so). An early application of this holding states: “The Court understands this case to mean the injunction awarded is the general instruction to satisfy constitutional obligations; the verification of the plan is simply a way to ensure compliance with the injunction.” Lipscomb v. Pfister, 2014 WL 287269, *2 (C.D.Ill., Jan. 27, 2014).

130 Benjamin v. Fraser, 156 F.Supp.2d 333, 344 (2001), aff’d in part, vacated and remanded in part on other grounds, 343 F.3d 35 (2d Cir. 2003) (quoting Cason v. Seckinger, 231 F.3d at 785 n. 8 (noting particularized findings are not necessary concerning undisputed facts, and the parties may make concessions or stipulations as they deem appropriate)); accord, Henderson v. Thomas, 2013 WL 5493197, *8 (M.D.Ala., Sept. 30, 2013) (citing Cason and noting parties’ agreement that the relief satisfied the statute); Clark v. California, 739 F.Supp.2d 1168, 1229 (N.D.Cal. 2010) (citing parties’ agreement that the agreed relief met the statutory requirements); McBean v. City of New York, 2007 WL 2947448, *3 (S.D.N.Y., Oct. 5, 2007) (weighing parties’ agreement that detailed requirements meet need-narrowness-intrusiveness standard); Morales Feliciano v. Calderon Serra, 300 F.Supp.2d 321, 334 (D.P.R. 2004) (“The very fact that the defendants chose to join the plaintiffs in selecting this remedy would seem to mean—and must be taken to mean—that they understood it to be precisely tailored to the needs of the occasion, that it is narrowly drawn and least intrusive—in fact not intrusive at all.”) (footnote omitted), aff’d, 378 F.3d 42, 54-56 (1st Cir. 2004), cert. denied, 543 U.S. 1054 (2005); Little v. Shelby County, Tenn., 2003 WL 23849734, *1-2 (W.D.Tenn., Mar. 25, 2003) (“Where the parties in jail reform litigation agree on a proposed remedy, or modification of a proposed remedy, the Court will engage in limited review for the purpose of assuring continued compliance with existing orders and compliance with the Prison Litigation Reform Act. . . . Clearly, the least intrusive means in this case is that advocated by the parties themselves and determined by the parties and the court-appointed experts as being in the interest of both inmate and public safety.”). But see Lancaster v. Tilton, 2006 WL 2850015, *14 (N.D.Cal., Oct. 4, 2006) (excluding to approve agreed order with “conclusory and collusive” stipulated findings of violation). Cf. Native American Council of Tribes v. Weber, 897 F.Supp.2d 828, 855-56 (D.S.D. 2012) (holding decision that found “no tobacco” policy unlawfully restricted religious rights did not require reinstatement of prior policy, which was not least intrusive; directing parties to confer and propose a narrowly tailored injunction), stay pending appeal denied, 2013 WL 3923451 (D.S.D., July 29, 2013).

133 Thomas v. Bryant, 614 F.3d 1288, 1325 (11th Cir. 2010) (citing use of defendants’ existing policies in formulating relief as evidence of non-intrusiveness); Benjamin v. Schriro, 370 Fed.Appx. 168, 171 (2d Cir. 2010) (unpublished) (defendants’ remedial plan for jail ventilation “necessarily must provide a practicable means of effectuating its objectives, otherwise, it stands to reason, the Department Plan would not have been proffered . . . in the first instance.”); Benjamin v. Fraser, 156 F.Supp.2d at 344 (“Requiring the Department to follow its own rules can hardly be either too broad or too intrusive.”). The court further rejected the argument that a requirement’s existence in agency policy obviates the need for its inclusion in the judgment, since its presence in policy “obviously
do not come forward with anything. Assuming time deadlines must meet the need-narrowness-intrusiveness standard, defendants must justify any delay in implementation, since “by providing defendants any time at all to implement the ordered relief the Court allows defendants to further trespass on detainees’ constitutional rights.” A declaratory judgment holding a practice unlawful “will not in any way be intrusive nor will it negatively impact public safety,” though the court that said so additionally held that the plaintiff was entitled to a permanent injunction.

The needs-narrowness-intrusiveness test is applied with an eye towards practicality and towards the potential intrusiveness of enforcement of the remedy. Thus, where the failure to repair non-functioning jail windows was found to contribute to a constitutional violation, the court ordered the defendants to repair the windows, noting that such a requirement is not overly intrusive since it is “a routine task in any building,” and since “a comprehensive repair program is the only rational means to correct the system-wide violation, and is far less intrusive than the Court making window-by-window repair/replace determinations.”


135 Benjamin, 156 F.Supp.2d at 344; accord, Brown v. Plata, ___ U.S. ___, 131 S.Ct. 1910, 1944 (2011) (“When a court is imposing a population limit, . . . the court must . . . order the population reduction achieved in the shortest period of time reasonably consistent with public safety.”); see Skinner v. Uphoff, 234 F.Supp.2d 1208, 1217 (D.Wyo. 2002) (directing that the parties propose remedies that “will promptly and effectively” abate the violations) (emphasis supplied).

136 Id. On appeal, the court agreed emphatically. 343 F.3d at 53-54 (“. . . It is ironic that the City . . . invokes the PLRA, which was intended in part to prevent judicial micro-management, in support of the proposition that the district court was required to examine every window. . . . Given the impracticability of the court examining each window, ordering comprehensive repairs was a necessary and narrowly drawn means of effectuating relief—even though the Constitution would certainly permit a broken window or two.”); accord, Graves v. Arpaio, 623 F.3d 1043, 1048-49 (9th Cir. 2010) (affirming order that all prisoners taking psychotropic medications be held in areas that do not exceed 85 degrees; though some such medications are not hazardous in high temperatures, jail record-keeping was inadequate to determine who was taking which medication; also affirming order requiring jail diet to
Although the PLRA requires that remedies be tailored to violations, it allows highly intrusive or burdensome remedies where the record supports their necessity. In this connection, one court has distinguished between intrusiveness and burden: “A demonstration that an order is burdensome does nothing to prove that it was overly intrusive. . . . [T]he question is . . . whether the same vindication of federal rights could have been achieved with less involvement by the court in directing the details of defendants' operations.” The failure of earlier less intrusive measures and recalcitrance by defendants or their agents may support more intrusive relief. As one court put it, in ordering appointment of a receiver to take over a large

meet or exceed Department of Agriculture’s Dietary Guidelines in light of record showing inadequate jail diets for “moderately active” persons); Thomas v. Bryant, 614 F.3d 1288, 1325-26 (11th Cir. 2010) (noting remedy does not require “onerous continuous supervision by the court or judicial interference in running” the prison, and “adds but one layer to a long list of existing prerequisites to the use of non-spontaneous force” that will affect only a few instances); Handberry v. Thompson, 446 F.3d 335, 347 (2d Cir. 2006) (stating that a remedy may be PLRA-compliant even if “over-inclusive”; noting generally that a remedy may require more than the bare minimum of federal law and may still be necessary and narrowly drawn); Coleman v. Schwarzenegger, 2011 WL 2946707, *3-4 (E.D.Cal., July 21, 2011) (requiring provision of suicide resistant beds for prisoners in mental health crisis center in order to implement prior order to take necessary steps to reduce the suicide rate); Caruso v. Zenon, 2005 WL 5957979, *4-5 (D.Colo., Oct. 18, 2005) (directing provision of kosher meals to satisfy Muslim prisoner’s dietary needs; directing defendants to provide head covering meeting certain criteria; stating that these directions do not require ongoing supervision by the court); Balla v. Idaho Bd. of Correction, 2005 WL 2403817, *10 (D.Idaho, Sept. 26, 2005) (holding retention of population limits and time limits for plumbing repairs met PLRA standards; relying on Benjamin), clarified on denial of reconsideration, 2005 WL 34136306 (D.Idaho, Dec. 9, 2005).


Armstrong v. Schwarzenegger, 622 F.3d 1058, 1071 (9th Cir. 2010).

Plata v. Schwarzenegger, 603 F.3d 1088, 1097-98 (9th Cir. 2010) (affirming appointment and continuation of a receiver for prison medical care system where less drastic measures had failed); Benjamin v. Schriro, 370 Fed.Appx. 168, 171 (2d Cir. 2010) (unpublished) (“The needs-narrowness-intrusiveness requirement of the PLRA notwithstanding, we find that nearly a half-decade of untruthfulness, non-compliance and inaction constitutes sufficient justification for the intrusiveness of a subsequent order to compel compliance with an original order entered pursuant to the PLRA that has been ignored.” Court properly entered comprehensive order adopting
state prison medical care system, the PLRA “codifies the Court’s authority to issue prospective relief that fully remedies a constitutional violation, while mandating that the relief not be overly broad.”\textsuperscript{142} A provision stating that “[n]othing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts”\textsuperscript{143} does not prohibit these actions if they could have been taken under the courts’ existing equitable powers.\textsuperscript{144}

**B. Termination of Prospective Relief**

Injunctions in prison conditions litigation may be terminated on motion if the need-narrowness-intrusiveness findings have not been made.\textsuperscript{145} Even if they were made, relief may be terminated after the passage of specified time periods unless the court finds that there is a “current and ongoing” violation of federal law; if the court makes such findings, relief must meet the same need/narrowness/intrusiveness requirements as for the initial entry of relief.\textsuperscript{146} Most defendants’ remedial plan in detail where earlier, general command had not been followed.); Morales Feliciano v. Rullan, 378 F.3d 42, 54-56 (1st Cir. 2004) (finding remedy of privatization of medical care appropriate in light of failure of less intrusive measures; “[d]rastic times call for drastic measures.”), \textit{cert. denied}, 543 U.S. 1054 (2005); Clark v. California, 739 F.Supp.2d 1168, 1233-35 (N.D.Cal. 2010) (granting further relief based on showing of ongoing violation and non-compliance with prior orders); McBean v. City of New York, 2007 WL 2947448, *3 (S.D.N.Y., Oct. 5, 2007) (approving detailed requirements for ensuring compliance with law regarding strip searches; noting violation of previously adopted policy and resistant “culture” within correction department); Skinner v. Uphoff, 234 F.Supp.2d 1208, 1218 (D.Wyo. 2002) (stating that a remedy for inmate-inmate violence must address the admitted “culture” impeding the effective supervision and discipline of staff; “systematic and prophylactic measures” may be ordered if necessary to correct the violations); see Skinner v. Lampert, 2006 WL 2333661, *9-12 (D.Wyo., Aug. 7, 2006) (discussing operation of remedy for “culture” found in \textit{Skinner v. Uphoff}).\textsuperscript{142} Plata v. Schwarzenegger, 2005 WL 2932253, *25 (N.D.Cal., Oct. 3, 2005); \textit{see id.}, *27-28 (explaining why other remedies would be ineffective).\textsuperscript{143}

\textbf{Endnotes:}

\textsuperscript{142} 18 U.S.C. § 3626(a)(1)(C).

\textsuperscript{143} Plata v. Schwarzenegger, 2005 WL 2932253, *25 (N.D.Cal., Oct. 3, 2005); \textit{see id.}, *27-28 (explaining why other remedies would be ineffective).

\textsuperscript{144} 18 U.S.C. § 3626(a)(1)(C).

\textsuperscript{145} 18 U.S.C. § 3626(b)(2); \textit{see United States of America v. Territory of the Virgin Islands, 884 F.Supp.2d 399 (D.V.I. 2012)} (finding various orders subject to termination for failure to make required findings as to particular relief; hearing on current conditions to be held); \textit{see also} cases cited in nn. 81-83, above, concerning the requirements for PLRA findings.

courts hold that any existing relief should be adapted to conform to the current record if an ongoing violation is found. Relief may not be continued based on the prospect of future violations, but the court may reimpose relief after termination if a new showing of constitutional violation is made and if the court has retained jurisdiction of other aspects of the case. The majority of courts have held that the plaintiffs have the burden of proof in a termination proceeding.

The termination provision has been upheld against challenges based on separation of powers, due process, and equal protection grounds.

A motion to terminate may be filed immediately if the required findings were not made; if the findings were made, the motion will lie two years after the grant or approval of prospective

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(D.Idaho, Dec. 9, 2005); Benjamin v. Fraser, 161 F.Supp.2d 151 (S.D.N.Y.), on motions for reconsideration, 156 F.Supp.2d 333 (S.D.N.Y. 2001) (making additional findings of continuing and ongoing violations), aff’d in part, vacated and remanded in part, 343 F.3d 35 (2d Cir. 2003).

One court has held that a termination motion may be made sua sponte. Jones’El v. Schneider, 2006 WL 2168682, *1-3 (W.D.Wis., July 31, 2006).

One court has stated that the court must terminate relief that is found too broad or intrusive on the current record rather than conform it to the new findings. Hines v. Anderson, 547 F.3d 915, 922 (8th Cir. 2008). The weight of authority and of common sense holds that if the record shows that a constitutional violation remains, the relief should be adapted to the current facts. Pierce v. Orange County, 526 F.3d 1190, 1204 n.13 (9th Cir. 2008), cert. denied, 555 U.S. 1031 (2008); Laaman v. Warden, 238 F.3d 14, 19 (1st Cir. 2001); Graves v. Arpaio, 2008 WL 4699770, *3 (D.Ariz., Oct. 22, 2008), aff’d, 623 F.3d 1043 (9th Cir. 2010) (noting district court’s decision to modify the relief rather than terminate it); see Benjamin v. Fraser, 156 F.Supp.2d at 345-55 (formulating relief based on hearing record with little regard to prior consent judgment). That view is consistent both with judicial economy (since otherwise a new proceeding would be required to address the current legal violation) and with the purpose of § 3626 to limit federal court intervention to current violations of federal law. See Benjamin v. Jacobson, 172 F.3d 163 (2d Cir. 1999) (en banc), cert. denied, 528 U.S. 824 (1999).

Para-Professional Law Clinic at SCI-Glatterford v. Beard, 334 F.3d 301, 304-05 (3d Cir. 2003); Castillo v. Cameron County, 238 F.3d 339, 353 (5th Cir. 2001); Cason v. Seckinger, 231 F.3d 777, 784 (11th Cir. 2000). But see Graves v. Arpaio, 2008 WL 4699770, *16 (D.Ariz., Oct. 22, 2008) (with respect to the use of portable beds, “the Court may assume that if prospective relief is not granted, Maricopa County Jails are likely to return to the longstanding practice discontinued only days before inspections for this litigation were to begin”; granting relief), aff’d, 623 F.3d 1043 (9th Cir. 2010).


A later decision in this litigation holds that where a case was settled by consent judgment without a finding of constitutional violation (i.e., before the PLRA), further relief is limited by the terms of the consent judgment as well as the PLRA. Hadix v. Caruso, 2009 WL 891709, *8 (W.D.Mich., Mar. 31, 2009). There is no discernible basis in the statute for this holding.


Benjamin v. Jacobson, 172 F.3d 144 (2d Cir.) (en banc), cert. denied, 528 U.S. 824 (1999); see Miller v. French, 530 U.S. 327 (2000) (adopting same separation of powers rationale as Benjamin); see also Hines v. Anderson, 547 F.3d 915, 919-20 (8th Cir. 2008) (plaintiffs do not have a property interest in a prison consent decree requiring any particular degree of process for termination; court had allowed substantial discovery and submission of evidence but did not hold an evidentiary hearing).
relief, and one year after the date of an order denying an earlier motion to terminate.\footnote{152} One court has recently held that appellate proceedings concerning the entry of prospective relief deprive the district court of jurisdiction to entertain a new termination motion, even if otherwise timely, until those proceedings are concluded and the case is returned to the district court.\footnote{153} Another has reopened discovery and required defendants to disclose their experts and their reports at least 120 days before filing a termination motion.\footnote{154}

When a motion is filed to terminate prospective relief, the motion operates as a stay (suspension) of the relief after 30 days, which may be extended to 90 days for good cause.\footnote{155} During that period, the suspended relief may not be coercively enforced, even if the termination motion followed a request for enforcement.\footnote{156} Appellate proceedings may “reset” the time preceding the automatic stay so it starts anew when district court proceedings resume.\footnote{157}

The automatic stay provision, too, has been upheld against a separation of powers challenge.\footnote{158} Private settlement agreements not enforceable in federal court are not subject to the termination provisions.\footnote{159}

C. Prisoner Release Orders

In addition to the general provisions concerning prospective relief, the PLRA includes special provisions restricting “prisoner release orders,”\footnote{160} defined as “any order, including a

\footnote{152} 18 U.S.C. § 3626(b); Coleman v. Brown, 922 F.Supp.2d 1004, 1025 n.23 (E.D.Cal. 2013) (noting that motion to terminate could not be filed less than two years after entry of relief), appeal dismissed, 134 S.Ct. 436 (2013).
\footnote{154} Plata v. Brown, 2013 WL 654996, *1 (N.D.Cal., Feb. 21, 2013) (holding it would be unfair for defendants to have unlimited time to prepare while plaintiffs had only the time between the filing of the motion and the beginning of the automatic stay to prepare, less the time for the hearing and a decision).
\footnote{155} 18 U.S.C. § 3626(e). The statute does not contain any guidance as to what “good cause” might mean, but courts have found it where the record indicated some likelihood that a constitutional violation persisted. See Lancaster v. Tilton, 2007 WL 4145963, *1 (N.D.Cal., Nov. 19, 2007) (holding evidence of continuing sanitary deficiencies were good cause); U.S. v. Commonwealth of Puerto Rico, 2007 WL 1119336, *3-4 (D.Puerto Rico, Apr. 10, 2007) (finding good cause to postpone automatic stay in juvenile conditions case because of allegations of physical and mental abuse and delays in responding to them); Skinner v. Uphoff, 410 F.Supp.2d 1104, 1112 (D.Wyo. 2006) (finding good cause to postpone automatic stay in inmate violence case based on allegations of ongoing violence, delays in defendants’ remedial actions, etc.), aff’d, 175 Fed.Appx. 255 (10th Cir. 2006).
\footnote{156} U.S. v. Puerto Rico, 642 F.3d 103, 104 (1st Cir. 2011). In that case, the court declined on ripeness grounds to review the propriety of denying enforcement in the hypothetical event that the termination motion was denied and the relief reinstated. 642 F.3d at 108-09.
\footnote{160} 18 U.S.C. § 3626(a)(3); see U.S. v. Cook County, Ill., 761 F.Supp.2d 794, 797 (N.D.Ill. 2011) (“we interpret the statute as authorizing a prisoner release order if overcrowding is a primary cause of unconstitutional violations beyond what would exist without overcrowding”); Coleman v. Schwarzenegger, 2008 WL 4813371, *4-6 (E.D.Cal., Nov. 3, 2008) (discussing requirement that crowding be the “primary cause” of constitutional violations to justify relief); Bowers v. City of Philadelphia, 2007 WL 219651, *33-34 (E.D.Pa., Jan. 25, 2007) (order limiting number of prisoners in a particular cell or limiting the time arrestees can be held before arraignment would not be a prisoner release order; police holding cells are not prisons). This provision applies prospectively and does not disturb pre-}
temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison.” These provisions were virtually unused until recently. Such orders may be entered only after “a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order,” and the defendants have had a reasonable amount of time to comply with it. Such orders may be entered only by a three-judge federal court, which must make findings by clear and convincing evidence that “(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right.” The actual remedy imposed by the court must also conform to the more general need-narrowness-intrusiveness provisions discussed above. In framing a remedy, the court may make its own judgment as to the likely efficacy of remedies proffered by defendants.

existing orders. Castillo v. Cameron County, Texas, 238 F.3d 339, 348 (5th Cir. 2001); Berwanger v. Cottey, 178 F.3d 834, 836 (7th Cir. 1999).

161 18 U.S.C. § 3626(g)(4); see Brown v. Plata, ___ U.S. ___, 131 S.Ct. 1910, 1929 (2011) (holding order limiting population to a percentage of design capacity was a prisoner release order even though it could be complied with by increasing capacity or transferring prisoners); Ruiz v. Estelle, 161 F.3d 814, 825-27 (5th Cir. 1998) (order limiting population density is a prisoner release order), cert. denied, 526 U.S. 1158 (1999); Tyler v. Murphy, 135 F.3d 594, 595-96 (8th Cir. 1998) (holding order limiting technical probation violator population at a jail is a prisoner release order). But see Plata v. Brown, 2013 WL 3200587, *8-10 (N.D.Cal., June 24, 2013) (holding order removing prisoners at risk for Valley Fever from prisons where it is prevalent was not a prisoner release order; transfers for reasons other than crowding relief are not governed by § 3626(g)(4)).

162 See Brown v. Plata, ___ U.S. ___, 131 S.Ct. at 1944-47 (affirming order that California reduce its prison population to 137.5% of its design capacity); U.S. v. Cook County, Ill., 761 F.Supp.2d 794, 797 (N.D.Ill. 2011) (holding prerequisites to release order met, directing narrowing of parties’ agreed order); Roberts v. County of Mahoning, Ohio, 495 F.Supp.2d 784, 786 (N.D.Ohio 2007) (noting entry of prisoner release order by consent).

163 18 U.S.C. § 3626(a)(3)(i-ii); see Butler v. Kelso, 2013 WL 1883233, *10 (S.D.Cal., May 2, 2013) (denying request to convene three-judge court for prisoner release order absent a prior order). Only a single order, followed by time to comply, is required. A court may enter a series of orders to correct the problem, but the time required to wait for results “must be assessed in light of the entire history of the court’s remedial efforts.” Brown v. Plata, ___ U.S. ___, 131 S.Ct. at 1930-31 (holding that the lower court, having waited five and twelve years from the initial remedial orders, need not wait comparable periods to assess the effects of recent orders, or impose a moratorium on new orders before entering a release order).


165 18 U.S.C. § 3626(f); see Brown v. Plata, ___ U.S. ___, 131 S.Ct. at 1936 (affirming finding that overcrowding is the primary cause of violations; stating “Overcrowding need only be the foremost, chief, or principal cause of the violation. If Congress had intended to require that crowding be the only cause, it would have said so. . . .”). The Court added: “The PLRA should not be interpreted to place undue restrictions on the authority of federal courts to fashion practical remedies when confronted with complex and intractable constitutional violations. Congress limited the availability of limits on prison populations, but it did not forbid these measures altogether. . . . A reading of the PLRA that would render population limits unavailable in practice would raise serious constitutional concerns.” 131 S.Ct. at 1937.

166 Brown v. Plata, ___ U.S. ___, 131 S.Ct. at 1940.

Certain law enforcement officials and other officeholders are entitled to intervention as of right to oppose such an order. The prisoner release provisions are applicable to newly imposed limits on prison population but not to the preservation of pre-existing relief in the face of a termination motion.

D. Preliminary Injunctions

Preliminary injunctions must meet the same need-narrowness-intrusiveness standards as other prospective relief. They are limited in duration to 90 days, but courts may enter sequential preliminary injunctions if the factual justification for relief continues to exist. Preliminary relief has been denied in a number of cases under the requirement of § 3626(a)(2) to “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief.”


170 18 U.S.C. § 3626(a)(2); Gates v. Fordice, 1999 WL 33537206 (N.D.Miss., July 19, 1999) (holding that the PLRA did not change the standards for granting a preliminary injunction, but the relief must meet the PLRA standards); see Stephens v. Jones, 494 Fed.Appx. 906, 911-12 (10th Cir. 2012) (unpublished) (affirming holding that pro se plaintiff’s request for an injunction to “recover [his] confiscated legal materials,” “end prison-to-prison transfers and DOC one cubic foot legal material limit rules,” “provide meaningful access to legal resources, tools, time access, relevant legal-related internet information,” and “access to DOC procedures” was overbroad and too intrusive in light of plaintiff’s conclusory allegations); Foster v. Ghosh, ___ F.Supp.2d ____, 2013 WL 6224572, *7 (N.D.Ill., Nov. 26, 2013) (granting preliminary injunction requiring defendants to send the cataract-afflicted plaintiff to an ophthalmologist and follow his recommendations); Swearington v. California Dept. of Corrections and Rehabilitation, 2012 WL 5386919, *3 (E.D.Cal., Nov. 1, 2012) (rejecting request for preliminary injunction that did not specify the relief sought or the persons against whom it should run).


because the plaintiff has not exhausted administrative remedies. At least one court has held that the presence of a preliminary injunction request does not permit bypassing the preliminary screening process or even call for an expedited screening.

E. Special Masters

The use of special masters has been limited in prison conditions litigation, though that provision’s effect has been blunted by holdings that it does not apply to monitors or other court agents that lack quasi-judicial powers. Nor does it displace the courts’ pre-existing equitable authority to appoint a receiver. In addition, courts have held that the appointment of a special master or monitor, and instructions to such an agent, do not constitute prospective relief.

F. Punitive Damages as Prospective Relief

Prospective relief is defined as “all relief other than compensatory money damages.” Applying this language literally would mean that punitive damages are prospective relief under the PLRA. One federal appeals court has held just that, and that after a plaintiff’s verdict the district court should have determined whether the jury’s punitive damage award was necessary and in the proper amount to deter future violations. The court did not comment on the potential Seventh Amendment problem its holding presents, since it calls for reexamination of

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173 See § IV.H, below, for a more extensive discussion of this and related points.
174 See § IX, below.
178 Plata v. Schwarzenegger, 603 F.3d 1088, 1093-96 (9th Cir. 2010).
179 See nn. 72-74, above.
181 Johnson v. Breeden, 280 F.3d 1308, 1325 (11th Cir. 2002).
the jury’s judgment about the need for deterrence, and why it did not hold that the jury should be instructed to apply the PLRA standards.

There are other good reasons to think Johnson is wrong. One of them is simply the disparity between its holding and the ordinary usage of “prospective relief” to denote injunctive and declaratory relief. Johnson acknowledged that argument but responded that “where the statutory language provides an explicit definition we apply it even if it differs from the term’s ordinary meaning.” However, the rest of the relevant statutory language is clearly directed at injunctive relief. “Narrowly drawn” and “least intrusive” are the language of injunctive jurisprudence and not damages. The stricture that “[t]he court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless . . .” makes no sense applied to an award of damages. The same is true of the provisions for termination of prospective relief.

While it may be technically accurate to describe punitive damages as “prospective” in the sense that their purpose is deterrent and therefore future-oriented, the notion that Congress would attempt to legislate restrictions on them without naming them, employing language not previously made applicable to them, is simply implausible. In my view, this holding invokes the Supreme Court’s warning that “interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”

To date there is little law actually applying the Johnson holding. However, one district court has surpassed Johnson’s absurdity by holding that the prospective relief provisions abolish punitive damages altogether in prison cases.

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182 See generally Smith v. Wade, 461 U.S. 30, 33 (1983) (noting jury was charged that punitive damages should be assessed in “such sum as you believe will serve to punish that defendant and to deter him and others from like conduct.”).


184 Id. at 1325 (citing Stenberg v. Carhart, 530 U.S. 914, 942 (2000)).

185 One court has observed: “At first blush, it seems that one can neither ‘narrowly draw’ punitive damages, not adjust them to better ‘correct’ a violation of rights, nor render them any more or less ‘intrusive.’” Tate v. Dragovich, 2003 WL 21978141, *6 n.7 (E.D.Pa., Aug. 14, 2003).


188 Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982); see Benjamin v. Jacobson, 172 F.3d 144, 192 (2d Cir. 1999) (in banc) (concurring opinion) (stating “a legislature can tell us to treat a banana the same way as an apple. But if it seems to say that a banana is an apple, we should not hesitate to try to figure out what it really meant to say”). But see Robbins v. Chronister, 435 F.3d 1238, 1241-44 (10th Cir. 2006) (rejecting absurdity doctrine in connection with another PLRA provision).

189 One court concluded that Johnson supplemented rather than supplanted existing punitive damages law, and held that a $10,000 punitive damages award satisfied Johnson in a case where $1.00 in compensatory damages had been awarded for a “conniving and malicious” series of actions designed to retaliate for a prisoner’s use of the grievance system. Tate v. Dragovich, 2003 WL 21978141, *6-7 (E.D.Pa., Aug. 14, 2003). The PLRA’s restrictions on compensatory damages in cases involving mental or emotional injury, 42 U.S.C. § 1997e(e), justify such disproportions between compensatory and punitive damages. Id., *9.

In Hudson v. Singleton, 2006 WL 839339 (S.D.Ga., Mar. 27, 2006), a jury awarded $1000 actual damages and $10,000 in punitive damages against each of two officers in a use of force case. The court rejected defendants’
IV. Exhaustion of Administrative Remedies

A. The Statutory Requirement

The most-litigated provision of the PLRA is its exhaustion requirement, which provides: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”\(^{191}\) However, the litigation is almost entirely about the statute’s interpretation and application; the exhaustion requirement is not facially unconstitutional.\(^{192}\)

The Supreme Court has stated: “Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.”\(^{193}\) The PLRA’s mandatory exhaustion requirement replaced the former discretionary approach to exhaustion\(^{194}\) and, according to the Supreme Court, rendered argument that the punitive award would have no deterrent effect because neither defendant was employed by the prison system any longer, and the assaulter had been suspended and his pay docked for entering a prisoner’s cell in violation of prison procedure. The court noted the jury’s apparent view that a punitive award was necessary to punish or deter the officer’s actions, and that the administrative punishment was for violation of prison procedure and not excessive force. It stated that the award might not deter these defendants but might well deter other employees from using excessive force. The court concluded that a punitive award is “the least intrusive means necessary to correct a correctional officer’s use of excessive force” under the circumstances, though it reduced the award against the less culpable officer on non-PLRA grounds. 2006 WL 839339, *2; accord, Benton v. Rousseau, 940 F.Supp.2d 1370, 1379-80 (M.D Fla. 2013) (awarding $15,000 in punitives in excessive force case as a deterrent against defendants who no longer worked for the jail, noting the jail had not investigated or punished them); In Rieara v. Sweat, 2007 WL 853465, *5-6 (S.D.Ga., Mar. 16, 2007), the court declined to dismiss a claim for punitive damages on the ground that its propriety is initially for the trier of fact, subject to subsequent court review under the Johnson v. Breeden rule.\(^{190}\) Margo v. Bedford County, 2008 WL 857507, *10 (W.D.Pa., Mar. 31, 2008); accord, Crockett v. Miller, 2014 WL 585887, *4 (W.D.Pa., Feb. 14, 2014) (“Since by definition punitive damages are not compensatory damages and do not ‘correct a violation’ of a plaintiff’s rights, but rather are punishment for a defendant’s wrongdoing, they are precluded.”).\(^{191}\)


Porter v. Nussle, 534 U.S. 516, 524-25 (2002); accord, Jones v. Bock, 549 U.S. 199, 219 (2007) (“We have identified the benefits of exhaustion to include allowing a prison to address complaints about the program it administers before being subjected to suit, reducing litigation to the extent complaints are satisfactorily resolved, and improving litigation that does occur by leading to the preparation of a useful record.”).\(^{192}\)


Exhaustion of available remedies has been held mandatory under the PLRA even if state law or prison rules seem to make it optional. See Short v. Greene, 577 F.Supp.2d 790, 793 & n.4 (S.D.W.Va. 2008); accord, Ferrell v. Miller, 2014 WL 131067, *3 (S.D.W.Va., Jan. 10, 2014); Wade v. Spencer, 2014 WL 51235, *3 (N.D.W.Va., Jan. 7, 2014) (same as Short v. Greene); Brandon v. Davis, 2010 WL 2985957, *1 (S.D.Miss., July 27, 2010) (holding policy that said prisoners “may” file grievances was not optional; “the issue is what is required by the PLRA.”), certificate of appealability denied, 2010 WL 3025136 (S.D.Miss., July 27, 2010); Short v. Walls, 2010 WL 839430, *4 (S.D.W.Va., Mar. 5, 2010), aff’d, 412 Fed.Appx. 565 (4th Cir. 2011). But see In re Bayside Prison Litigation, 190 F.Supp.2d 755, 771-72 (D.N.J. 2002). In that case, the court held that a process that had no authority except to “make recommendations for change,” and that prison officials asserted was optional and not mandatory and was not intended to modify or restrict access to the judicial process, need not be exhausted. The court appeared to be concerned mainly with the character of the remedy. See also Taber v. McCracken County, 2008 WL 4500859, *2
inapplicable “traditional doctrines of administrative exhaustion, under which a litigant need not apply to an agency that has ‘no power to decree . . . relief,’ [citation omitted], or need not exhaust where doing so would otherwise be futile.”¹⁹⁵ Thus, the fact that prior grievance decisions or standing prison policy seem to dictate the response does not justify non-exhaustion.¹⁹⁶ However, the Court has more recently stated that the statutory term “exhausted” has the same meaning as in administrative law,¹⁹⁷ and it has drawn on the understanding of the term in habeas corpus as well,¹⁹⁸ leading one Justice to suggest that the exceptions to exhaustion requirements recognized in those bodies of law should apply as well under the PLRA.¹⁹⁹ The Court has done nothing yet to resolve the tension between these decisions.

The Supreme Court has cautioned in its most recent PLRA decision against judicial embellishment of the exhaustion requirement, holding that the PLRA’s scheme for prison litigation does not displace usual litigation practices, under the Federal Rules of Civil Procedure or otherwise, and that the exhaustion requirement may not be enhanced based on judges’ policy views.²⁰⁰

(W.D.Ky., Sept. 30, 2008) (procedure not stated to be mandatory or required to preserve the right to sue, and not the exclusive means described to prisoners to solve their problems, would not be an “available” remedy).

Courts have differed over whether appeals are mandatory under the PLRA if characterized as optional under the grievancy policy. See nn. 473-475, below.


¹⁹⁶ Murray v. Arizona Dept. of Corrections, 2007 WL 2069831, *2 (D.Ariz., July 13, 2007) (regulation permitting lowering classification of death row prisoners did not excuse failure to appeal from a reclassification hearing decision); Morrow v. Goord, 2005 WL 1159424, *3 (W.D.N.Y., May 17, 2005) (prior adverse grievance rulings did not excuse non-exhaustion). But see Rose v. First Correctional Medical, 2007 WL 2873441, *4-5 (D.Del., Sept. 28, 2007) (refusing to dismiss where prisoner who had been told he had six months to live and it was a waste of time to treat him did not appeal his grievance decision sending him back to the same practitioner who had refused to treat him previously).


¹⁹⁸ Woodford, 548 U.S. at 92.

¹⁹⁹ Id., 548 U.S. at 103-04 (Breyer, J., concurring); see § IV.E.7, below, concerning this point.

²⁰⁰ Jones v. Bock, 549 U.S. 199 (2007). In Jones, the Court held that exhaustion is not a pleading requirement, since pleading is governed by the Federal Rules and they had not been amended to require exhaustion pleading. 549 U.S. at 212. It also rejected the “total exhaustion” rule on the ground that the usual practice of litigation is to dismiss bad claims but retain good ones. 549 U.S. at 221-24.
Though the PLRA exhaustion requirement is mandatory, it is not absolute, and the Supreme Court has confirmed the view of most circuits that it is not jurisdictional.\footnote{Woodford v. Ngo, 548 U.S. at 101; accord, Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 677-78 (4th Cir. 2005); Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1208 (10th Cir. 2003), cert. denied, 543 U.S. 925 (2004) and cases cited; Richardson v. Goord, 347 F.3d 431, 433-34 (2d Cir. 2003). Even now, some government litigants have not gotten the message. Lineberry v. Federal Bureau of Prisons, 923 F.Supp.2d 284, 292 (D.D.C. 2013) (rejecting argument based on jurisdiction).} Most circuits to consider the question have held that courts therefore can apply doctrines of waiver, estoppel, and equitable tolling to excuse failure to exhaust.\footnote{Underwood v. Wilson, 151 F.3d 292, 294 (5th Cir. 1998), cert. denied, 526 U.S. 1133 (1999); accord, Hemphill v. New York, 380 F.3d 680, 686 (2d Cir. 2004) (waiver and estoppel); Wright v. Hollingsworth, 260 F.3d 357, 358 n.2 (5th Cir. 2001) (reiterating Underwood holding after Booth v. Churner); Foulk v. Charrier, 262 F.3d 687, 697 (8th Cir. 2001); see generally §§ IV.G.3, below, concerning estoppel, § IV.D.2, concerning waiver, and nn. 874-878, 1156-1157 concerning equitable tolling.} The Supreme Court has held that non-exhaustion is an affirmative defense to be raised by defendants;\footnote{Jones v. Bock, 549 U.S. 199, 213-17 (2007).} it follows that the defense can be waived by failure to do so, as the Second Circuit had already held.\footnote{See Handberry v. Thompson, 446 F.3d 335, 342-43 (2d Cir. 2006) (finding waiver); Johnson v. Testman, 380 F.3d 691, 695-96 (2d Cir. 2004) (finding waiver); Davis v. New York, 316 F.3d 93, 101 (2d Cir. 2002) (directing court on remand to determine whether exhaustion had been waived); see § IV.D.2, below.} The Second Circuit has also held that “special circumstances” may justify failure to exhaust and allow the prisoner to proceed without exhaustion if remedies are no longer available.\footnote{Giano v. Goord, 380 F.3d 670, 676 (2d Cir. 2004); accord, Brownell v. Krom, 446 F.3d 305, 311-13 (2d Cir. 2006).} It has suggested, in considering these responses to a defense of non-exhaustion, that courts ought first to consider any argument that administrative remedies were not available,\footnote{Abney v. McGinnis, 380 F.3d 663, 667 (2d Cir. 2004).} which makes sense because a finding that no remedies were available ends the inquiry as to exhaustion. Estoppel and special circumstances arguments are more complex.\footnote{An estoppel argument may have different results for different defendants depending on their involvement in the conduct on which the argument is based, though it is not yet certain whether that is the case. See § IV.G.3, below; see also Lewis v. Washington, 300 F.3d 829, 834-35 (7th Cir. 2002) (declining to apply equitable estoppel where the defendants did not affirmatively mislead the plaintiff). An argument of justification, if accepted, will require consideration of whether remedies that were once available remain available. Brownell v. Krom, 446 F.3d 305, 313 (2d Cir. 2006); Giano v. Goord, 380 F.3d 670, 679-80 (2d Cir. 2004); Hemphill v. New York, 380 F.3d 680, 690-91 (2d Cir. 2004).} These holdings are discussed in more detail in appropriate sections below. The Supreme Court decision in Woodford v. Ngo,\footnote{548 U.S. 81 (2006).} with its subsequent adoption of a “proper exhaustion” requirement enforced by a procedural default rule, appears to have had limited effect on that body of law.\footnote{See §§ IV.E.7 and IV.E.8, below.}

The Supreme Court has held that the provisions of the prison grievance or other remedial procedure govern what steps a prisoner must take to exhaust.\footnote{Jones v. Bock, 549 U.S. 199, 218-19 (2007).} However, the scope and applicability of PLRA provisions are questions of federal law determined by the language of the statute regardless of contrary provisions in prison policy.\footnote{Bisgeier v. Michael [sic] Dept. of Corrections, 2008 WL 227858, *4 (E.D.Mich., Jan. 25, 2008) (parolees were not required to exhaust even though they were covered by grievance procedures).}
B. What Cases Must Be Exhausted?

1. Scope of the Statute

The exhaustion requirement applies to prisoners’ “action[s] . . . brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner. . . .”212 Its terms are not restricted to “civil actions” as are some other PLRA provisions.213 However, the Second Circuit has stated in dictum, and other courts have held, that the PLRA exhaustion requirement does not apply to habeas corpus actions.214 Such a proceeding would still be subject to the habeas corpus exhaustion requirement, which is arguably more rigorous.215 Decisions are mixed on whether a motion by the defendant in a criminal proceeding that affects prison conditions requires exhaustion.216 Prisoners’ challenges to prison conditions under federal statutes (e.g., the Americans with Disabilities Act) must be exhausted under the PLRA even if the ADA or other statute itself does not require exhaustion.217 A suit filed under the general

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212 42 U.S.C. § 1997e(a). The meaning of the term “prisoner” is discussed in § II, above.
213 Compare, e.g., 42 U.S.C. § 1997e(e) (restricting civil actions for mental or emotional injury); 28 U.S.C. § 1915(a) (requiring filing fees of indigent prisoners in civil cases).
215 See Carmona, 243 F.3d at 633-34; U.S. v. Basciano, 369 F.Supp.2d 344, 348 (E.D.N.Y. 2005); see also Muhammad v. Close, 540 U.S. 749, 751 (2005) (suggesting the PLRA exhaustion requirement is a “lower gate” than the habeas requirement). On the other hand, the common law exhaustion rules that a court would apply in habeas corpus proceedings arising from prison administrative matters allow a number of exceptions, including futility, which may not be available under the PLRA, see Putnam v. Winn, 441 F.Supp.2d 253, 255-56 (D.Mass. 2006) (noting that habeas exhaustion could be waived by court); Perez v. Zenk, 2005 WL 990696, *2 (E.D.N.Y., Apr. 11, 2005) (acknowledging futility and irreparable harm exceptions, though ruling adversely on merits), and also permit district courts some generalized discretion to excuse non-exhaustion. See Zuspan v. O’Brien, 2013 WL 6805574, *4, 8 (N.D.W.Va., Dec. 20, 2013) (waiving exhaustion in habeas proceeding on the ground that the case is ripe for decision and dismissing would be a waste of judicial resource); see also nn. 726-728, below, for conflicting Supreme Court dicta and separate opinions on this subject.
216 See n. 60, above. At least one court has held that such requests may not be entertained in a criminal action, since they should be exhausted, and since the United States—the adverse party in a federal prosecution—may not have authority over the criminal defendant’s custody. U.S. v. Luong, 2009 WL 2852111, *2 (E.D.Cal., Sept. 2, 2009) (rejecting requests for orthopedic boots and jail law library visits).
federal question jurisdiction statute, 28 U.S.C. § 1331, raising federal constitutional claims must be exhausted.\(^{218}\)

A motion to enforce the terms of a judgment is not a separate “action” requiring exhaustion,\(^{219}\) nor is a request for further relief in already-filed litigation.\(^{220}\) Exhaustion will be required if a prisoner seeks relief about matter not already part of the case,\(^{221}\) or if a non-party seeks to intervene in an already filed case.\(^{222}\) Decisions are mixed with respect to motions for conditions-related relief made under the caption of a criminal prosecution.\(^{223}\)

The exhaustion requirement applies generally to private prisons and jails and to private contractors operating in prisons and jails,\(^{224}\) although particular grievance systems may not be available remedies in such cases because they exclude private contractors and their employees from coverage, in terms or in practice.\(^{225}\)

The phrase “under section 1983 . . . or any other Federal law” would appear to encompass all federal question cases including those filed in state court and then removed,\(^{226}\) but


\(^{223}\) See n. 60, above.


not state law cases removed to federal courts under their diversity jurisdiction, since the latter are not “brought” under “Federal law” as the statute prescribes. State law claims brought in conjunction with federal claims cannot be dismissed for non-exhaustion under the PLRA, though the plaintiff must have satisfied any state law exhaustion requirement.

One court has rejected the argument that it denies equal protection to apply the exhaustion requirement to claims of sexual assault of juvenile prisoners, since it requires them to put their consent to sex with an adult at issue, contrary to state statutes and common law. Another court has held that it is not unconstitutional to require a prisoner who has been read his or her Miranda rights to file grievances in order to pursue litigation about that incident.

2. “Prison Conditions”

Prisoners are required to exhaust cases if they involve “prison conditions.” That phrase applies “to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” So prior


decisions holding that use of force cases are not about “prison conditions” and need not be exhausted are no longer good law. (This is a non-issue in use of force cases arising in the New York City jails, since prisoners cannot bring “complaints pertaining to an alleged assault” under that system’s grievance procedure, and therefore that system is not “available” to persons suing about assaults.\textsuperscript{232}) The line of cases in the Second Circuit holding that the phrase “prison conditions” encompasses only conduct “clearly mandated by a prison policy or undertaken pursuant to a systemic practice”\textsuperscript{233} is now overruled. If it happened in prison, most likely it’s a prison condition.\textsuperscript{234}

There is some ambiguity about when events or circumstances during post-arrest processing involve prison conditions.\textsuperscript{235} Complaints that arise in halfway houses or residential treatment programs are likely to be considered as about prison conditions if the plaintiff is there

\begin{itemize}
\item plaintiff cease all attempts to contact his son is a prison condition); Ray v. Evercom Systems, Inc., 2006 WL 2475264, *5 (D.S.C., Aug. 25, 2006) (holding antitrust suit about telephone service charges was about prison conditions), appeal dismissed on other grounds, 234 Fed.Appx. 248 (5th Cir. 2007); Dennis v. Taft, 2004 WL 4506891, *4 (S.D.Ohio, Sept. 24, 2004) (holding challenge to execution procedures is about prison conditions; it involves “the effects of actions by government officials on the lives of persons confined in prison.”); Johnson v. Luttrell, 2005 WL 1972579, *3 (W.D.Tenn., Aug. 11, 2005) (“Plaintiff’s inability to obtain an application for an absentee ballot in a timely manner is a ‘prison conditions claim.’”); Reid v. Federal Bureau of Prisons, 2005 WL 1699425, *3 (D.D.C., July 20, 2005) (holding Privacy Act claim about inaccuracy in prison records affecting classification was about prison conditions); Salaam v. Consovoy, 2000 WL 33679670, *4 (D.N.J., Apr. 14, 2000) (holding that failure to provide proper parole hearing is a prison condition); see also Allen v. Hickman, 407 F.Supp.2d 1098, 1102-03 (N.D.Cal. 2005) (dismissing a request for a stay of execution pending receipt of medical care for non-exhaustion because relief concerning medical care was available administratively even if a stay of execution was not).\textsuperscript{235}

\item Appendix C, New York City Dep’t of Correction Directive 3375R, Inmate Grievance Resolution Program at § II.B (March 4, 1985); see Mojias v. Johnson, 351 F.3d 606, 608-10 (2d Cir. 2003). The current directive states: “Inmate allegations of physical or sexual assault or harassment by either staff or inmates are not subject to the IGRP process.” Appendix H, New York City Dep’t of Correction Directive 3376, Inmate Grievance and Request Program at § IV.B.2.b (http://www.nyc.gov/html/doc/downloads/pdf/Directive_3376_Inmate_Grievance_Request_Program.pdf).\textsuperscript{236}

\item Marvin v. Goord, 255 F.3d 40, 42-43 (2d Cir. 2001), overruled in pertinent part, Porter v. Nussle, 534 U.S. 516 (2002).\textsuperscript{234} A rare exception to this rule of thumb is Ayyad v. Gonzales, 2008 WL 203420, *3 (D.Colo., Jan. 17, 2008), vacated on reconsideration on other grounds, 2008 WL 2955964 (D.Colo., July 31, 2008), which holds that denial of a prisoner’s ability to meet with clinical law students was not a matter of prison conditions, in part because the administrative dictates were made by the Attorney General and the Bureau of Prisons had no authority to remove or amend them.\textsuperscript{235}

\item One court has held, dubiously, that an arrestee who alleged he was beaten first in the hall of the jail, and second as he was being placed in a cell, was not complaining about prison conditions because, under that Circuit’s law, the line between arrest and detention or incarceration is drawn after arrest, processing, and significant periods of time in detention. Roach v. Bandera County, 2004 WL 1304952, *5 (W.D.Tex., June 9, 2004). It is questionable whether this holding is responsive to the language of 42 U.S.C. § 1997e(a), which is applicable to any prisoner “confined in any jail, prison, or other correctional facility,” and 18 U.S.C. § 3626(g), which defines “prisoner” as anyone subject to “incarceration, detention, or admission to any facility who is accused of . . . violations of criminal law.” Compare Brewer v. Philson, 2007 WL 87625, *2 (W.D.Ark., Jan. 10, 2007) (holding that excessive force after arrest is not a prison condition but excessive force before arrest in a jail holding cell is); Lofton v. Cleveland City Jail Institution Guard Badge No. 3701, 2006 WL 3022989, *2 (N.D.Ohio, Oct. 23, 2006) (similar to Brewer); see Bowers v. City of Philadelphia, 2007 WL 219651, *34 n.40 (E.D.Pa., Jan. 25, 2007) (holding that police holding cells were not prisons for purpose of prisoner release provisions of PLRA). But see Khatib v. County of Orange, 639 F.3d 898, 902-05 (9th Cir. 2011) (holding court holding cells were “jails” and “detention facilities” under 42 U.S.C. § 1997e), , cert. denied, 132 S.Ct. 115 (2011).

\end{itemize}
because of a criminal conviction or charge and is not free to leave.\textsuperscript{236} However, several courts have held that issues involving prisoners’ placement in or transfer from halfway houses or “community corrections centers” are not about prison conditions.\textsuperscript{237}

Cases involving agencies outside the prison system may not be “prison conditions” cases even if the plaintiff is a prisoner. For example, an unpublished appellate decision holds that a prisoner’s placement on a watch list by the Department of Homeland Security “occurred outside the prison gates” and was not a prison condition, but the consequences of the classification imposed in prison (segregated housing, telephone restrictions, etc.) were.\textsuperscript{238} Similarly, another court held that claims against police officers based on an interrogation and a refusal to allow the plaintiff to call an attorney were not prison conditions claims, even though the interrogation took

\textsuperscript{236} See Witzke v. Femal, 376 F.3d 744, 752-53 (7th Cir. 2004) (holding a probationer required to reside in an “intensive drug rehabilitation halfway house” was “confined,” if not in a “jail [or] prison,” then in an “other correctional facility,” and his complaint about his medical treatment there was therefore about “prison conditions”); Miller v. Wayback House, 2006 WL 297769, *4 (N.D.Tex., Feb. 1, 2006) (holding claim about halfway house to which plaintiff was released on parole was about prison conditions, citing Witzke, but failing to analyze whether plaintiff was confined or whether facility was a correctional facility), aff’d, 253 Fed.Appx. 399 (5th Cir. 2007); William G. v. Patak, 2005 WL 1949509, *2-3 (S.D.N.Y., Aug. 12, 2005) (holding that question whether persons incarcerated pending parole revocation proceedings were entitled to be placed in less restrictive residential treatment programs for mental illness and chemical addition involved prison conditions); see nn. 12, 27, above, concerning whether such institutions are “prisons” and their residents “prisoners.”


\textsuperscript{238} Almahdi v. Ridge, 2006 WL 3051791, *2 (3d Cir., Oct. 27, 2006) (unpublished); accord, Singh v. U.S. Dept. of Homeland Sec., 2013 WL 1704296, *20-21 (E.D.Cal., Apr. 19, 2013) (holding Privacy Act suit about Department of Homeland Security misinformation re immigration detainer need not be exhausted within Bureau of Prisons, which could not do anything about this problem), report and recommendation adopted, 2013 WL 2474497 (E.D.Cal., June 7, 2013); see Boyd v. Driver, 579 F.3d 513, 514 n. 2 (5th Cir. 2009) (per curiam) (allegation of misconduct in criminal prosecution arising from altercation in prison was not about prison conditions); Crooker v. U.S., 2010 WL 3860597, *8 & n.12 (D.Mass., Sept. 29, 2010) (where prisoner’s mail was opened at prosecutors’ behest, stating claim was “about misconduct by a prosecutor in a criminal investigation, not a challenge to prison conditions”); Afeworki v. Hubert, 2008 WL 3243950, *5 (W.D.Wash., Aug. 5, 2008) (claim against attorney, now in prosecutor’s office, for interference with plaintiff’s litigation need not be exhausted); Pate v. Clerk of Court, 10th Judicial Circuit, 2008 WL 1885477, *3 (M.D.Fla., Apr. 28, 2008) (claim that plaintiff was mis-classified in prison as a sex offender was subject to exhaustion requirement, but claim that he was mistreated in the community because of the erroneous listing was not); Crumpton v. Finnin, 2007 WL 2697461, *6 (D.Colo., Sept. 11, 2007) (holding complaint about seizure of property in connection with criminal proceedings is not about prison conditions); Lee v. U.S. Dep’t of Justice, 235 F.R.D. 274, 290 (W.D.Pa., Mar. 30, 2006) (holding alleged violation of Privacy Act resulting in plaintiff’s and his agents’ being unable to access his outside bank accounts for a year “did not relate to prison life” and need not be exhausted); Johnson v. Quinn, 1999 WL 116222, *3 (N.D. Ill., Feb. 26, 1999) (holding prisoner’s claim that prosecutors and investigators conspired to harm him in jail because he had information about official corruption was not a prison conditions claim even though it had an impact on prison conditions, and the exhaustion requirement did not apply to it). But see Farnworth v. Craven, 2007 WL 793397, *5 (D.Idaho, Mar. 14, 2007) (where plaintiff sought a new parole hearing, stating “all state prisoner cases that are not classified as habeas corpus cases” are “prison conditions” cases, though also holding grievance policy only had authority over actions of Board of Correction and not Parole Commission).

Some grievance systems explicitly exclude from their coverage claims involving persons or agencies outside the prison system. See § IV.G.1, below.
place in the jail. These outcomes make sense because if the people responsible are not prison employees, the prison grievance system likely cannot do anything about the problem, and the remedy is not really “available” within the meaning of the statute. Outcomes are mixed with respect to complaints about outside medical facilities and private medical providers within the prison.

Cases challenging the legitimacy of incarceration itself are not about prison conditions. Courts have reached differing decisions on matters related to parole release or revocation. In

\[239\] Battle v. Whetsel, 2006 WL 2101766, *3 n.4 (W.D.Okla, July 17, 2006). \textit{But see} Adger v. Wynn, 2008 WL 4186865, *2 (W.D.La., Aug. 13, 2008) (allegation that cell was searched by a police detective should have been exhausted; court does not explain how the remedy is “available” for someone who doesn’t work for the jail).

\[240\] \textit{See} § IV.G, below, concerning the definition of “available.”

\[241\] In \textit{Borges v. Administrator for Strong Memorial Hosp.}, 2002 WL 31194558, *3 (W.D.N.Y., Sept. 30, 2002), the court expressed doubt that a claim that injuries inflicted on prisoners by dentists at an outside hospital involved “prison conditions,” citing the unlikelyhood that the prison grievance system had any authority to take action on the complaint. Contra, Schlicker v. McAdams, 2013 WL 271695, *1 (N.D.Tex., Jan. 23, 2013) (dismissing for non-exhaustion against outside medical provider); Middleton v. Falk, 2009 WL 666397, *6 (N.D.N.Y., Mar. 10, 2009) (holding exhaustion required of complaint against private hospital and private physician, since they treated plaintiff at the behest of the prison and the grievance system would give it an opportunity to correct deficiencies—court does not explain how; court does not discuss phrase “prison conditions”); Abdur-Raqiyb v. Erie County Medical Center, 536 F.Supp.2d 299, 304 (W.D.N.Y., Feb. 21, 2008) (claim arising at an outside hospital was about prison conditions because the statute is supposed to be read broadly and the plaintiff was clearly a prisoner); see Collins v. Federal Bureau of Prisons, 2011 WL 1532041, *6 (C.D.Cal., Mar. 8, 2011) (rejecting argument that exhaustion was “meaningless” with respect to outside hospital as plaintiff’s “subjective opinion”), \textit{report and recommendation adopted}, 2011 WL 1532027 (C.D.Cal., Apr. 21, 2011). Cf. Holtz v. Monsanto, Inc., 2006 WL 1596830, *1 (S.D.Ill., June 6, 2006) (holding prisoner’s claim of “negligence, strict products liability, “deceit and misrepresentation,” and breach of express or implied warranties arising out of Defendants’ involvement with the product Aspartame,” was not about prison conditions).


any case, if the litigant is still incarcerated, he or she must pursue relief for unlawful confinement via habeas corpus, which is not governed by the PLRA exhaustion requirement. One court has suggested—wrongly, in my view—that “all state prisoner cases that are not classified as habeas corpus cases are considered cases ‘regarding prison conditions,’ and are subject to the administrative exhaustion requirement of § 1997e(a).” Even if that rule were accepted, it would not entirely settle matters, since courts continue to differ about the precise line between habeas and civil litigation with respect to placement in or removal from segregated housing.

One court has held that a claim that prisoners with mental illness were discharged without receiving psychiatric medication and referrals is not about prison conditions.

C. What Happens If the Plaintiff Has Failed To Exhaust?

Section 1997e(a) says that “No action shall be brought . . . until such administrative remedies as are available are exhausted.” Although the statute is silent on this point, the Second Circuit, consistently with most others, has held that claims not exhausted before filing must generally be dismissed, even if exhaustion has been completed by the time the court reaches the exhaustion question. Most courts have held that the exhaustion requirement, like other PLRA provisions, applies to cases filed during confinement even if the plaintiff has subsequently been released, but some have declined to dismiss in those circumstances.

2003 WL 22023108 (D.N.H., Aug. 27, 2003) (holding that sex offender treatment director’s disclosure of private information from plaintiff’s treatment file to parole authorities and prosecutor involved prison conditions, since the director was a prison employee and the action affected the duration of his prison confinement); Salaam v. Consovoy, 2000 WL 33679670, *4 (holding that the failure to provide proper parole release hearings is a prison condition). Salaam may be distinguishable from Valdivia on the ground that parole release hearings involve a process commenced in prison, while parole revocation proceedings are commenced and are based on events that took place outside prison. See also Farnworth v. Craven, 2007 WL 793397, *2-3 (D.Idaho, Mar. 14, 2007) (holding demand for new parole hearing was about “prison conditions” because it need not be pursued via habeas corpus, though the grievance system was not available because it had no authority over the Parole Commission).


249 Compare Levine v. Apker, 455 F.3d 71, 78 (2d Cir. 2006) (stating § 2241 habeas actions extend to “prison disciplinary actions, prison transfers, type of detention and prison conditions”); Medberry v. Crosby, 351 F.3d 1049, 1053 (11th Cir. 2003); Krist v. Ricketts, 504 F.2d 887, 887-88 (5th Cir. 1974) (per curiam) (holding that placement in segregated or restricted confinement can or must be challenged via habeas corpus) with Cardona v. Bledsoe, 681 F.3d 533, 536-37 (3d Cir. 2012) (holding 28 U.S.C. § 2241 habeas jurisdiction did not extend to a petition seeking release from Special Management Unit), cert. denied, 133 S.Ct. 805 (2012); Palma-Salazar v. Davis, 677 F.3d 1031, 1035-37 (10th Cir. 2012) (challenge to placement in highly restrictive ADX unit sought change in place of confinement and not immediate or earlier release, so had to be pursued via Bivens claim and not habeas petition); Montgomery v. Anderson, 262 F.3d 641, 643-4 (7th Cir. 2001); Brown v. Plaut, 131 F.3d 163, 167-68 (D.C.Cir. 1997), cert. denied, 524 U.S. 939 (1998); Toussaint v. McCarthy, 801 F.2d 1080, 1102-03 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987) (all holding a civil action provides the correct remedy for such claims).

247 See n. 476, below; see also nn. 483, below, concerning when a case is considered filed for this purpose.
248 See cases cited in nn. 35-37, above.
The Second Circuit, like most courts, has held that the PLRA eliminated the option to stay a case pending exhaustion.\textsuperscript{253} In my view, now reinforced by the most relevant Supreme Court decision, this holding should be re-examined in an appropriate case. While it is true that the PLRA eliminated the provision of prior law instructing district courts to stay cases in which they thought exhaustion was appropriate, the logical conclusion from that amendment and the present statute’s silence on the subject is that the matter is now left to the courts’ discretion. That discretion may be appropriately exercised to grant stays pending exhaustion in cases where prisoners have tried to exhaust but have failed to do so because of misunderstanding or technical mistakes or because of circumstances beyond their control, or because of other unusual circumstances. No such factors were before the court in \textit{Neal v. Goord}. There are a few cases in which courts have granted such stays, or directed the functional equivalent of a stay, under such circumstances.\textsuperscript{254} The view that such action should be permitted is supported by the Supreme

\textsuperscript{252}See cases cited in n. 480, below.


\textsuperscript{254}In \textit{Bucano v. Sibum}, 2013 WL 2456009, *29-30 (M.D.Pa., June 6, 2013), in which the plaintiffs said they had been unable to get grievance forms, the magistrate judge recommended that the case be dismissed but that the plaintiffs be provided with forms and allowed to pursue grievances \textit{nunc pro tunc}, after which they could re-file. In \textit{Brown v. Walker}, 2009 WL 2447977, *2 (S.D.Ill., July 7, 2009), \textit{report and recommendation adopted}, 2010 WL 1415989 (S.D.Ill., Mar. 31, 2010), grievance officials required plaintiff to resubmit his grievance with additional information, and they returned it to him again though they should have processed it. Since the plaintiff was not at fault in failing to complete the process, the court stayed the case for six weeks so the grievance body could assess the grievance. In \textit{Kennedy v. Mendez}, 2004 WL 2280225, *1-2 (M.D.Pa., Oct. 7, 2004), the court stated: “Staying of the present action would not create an exception to the exhaustion requirement, it would merely enforce the exhaustion requirement through a different procedural mechanism. Ultimately, the congressional intent of the exhaustion requirement is still served because of the administrative process will fully review the matter before it is reviewed by a court.” It concluded that on the facts before it—the litigation nearly complete, discovery over and a motions deadline pending, exhaustion completed as to some claims and the unexhausted claims related to them—the interest of judicial economy is strongly served by litigating all of the claims within a single action, rather than piecemeal.” In \textit{Campbell v. Chaves}, 402 F.Supp.2d 1101, 1108-09 (D.Ariz. 2005), the court stayed the litigation and directed the prison system to consider a grievance where the prisoner had filed a tort claim rather than a grievance at staff direction, the tort claim had been rejected for jurisdictional reasons, and meanwhile the grievance system rules had been changed so the matter would have been grievable. In \textit{Hause v. Smith}, 2006 WL 2135537 (W.D.Mo., July 31, 2006), where the plaintiff alleged that his attempts to file grievances were “significantly thwarted,” the court directed that the plaintiff be allowed to file a grievance and that its processing be expedited and the results submitted to the court. 2006 WL 2135537, *1-2. Similarly, in \textit{Ouellette v. Maine State Prison}, 2006 WL 173639 (D.Me., Jan. 23, 2006), \textit{aff’d} 2006 WL 348315 (D.Me., Feb. 14, 2006), where the plaintiff did not complete exhaustion because of actions by grievance staff suggesting no further remedies were available to him, the court stated: “Given that the spirit of § 1997e(a) is to allow the correctional institution an opportunity to address allegations of civil rights abuses, if the defendants wish to file a motion to stay this action to allow the parties to funnel Ouellette’s grievance through the second and third stages of the grievance procedure, such a request would deserve consideration.” \textit{Id.} *4; \textit{see also} Kensu v. Rapelje, 2013 WL 1774637, *7 (E.D.Mich., Apr. 25, 2013) (granting stay pending exhaustion for unexhausted claims or decision to drop them, based on concerns for judicial economy and the likelihood of refiling); Nieves v. Ortiz, 2007 WL 1791256, *6 (D.N.J., June 19, 2007) (staying defendants’ motion for summary judgment pending exhaustion, no reference to contrary case law). \textit{But see
Court’s holding that courts applying the PLRA should not deviate from the usual practices of civil litigation,\textsuperscript{255} which include the discretionary granting of stays.\textsuperscript{256}

In cases where the prisoner has failed to exhaust for excusable reasons, such as actions by prison staff that make the remedy unavailable in practice, the case can generally go forward without exhaustion, or the prisoner will be deemed to have exhausted.\textsuperscript{257} However, one federal appeals court has held that when “the failure to exhaust was innocent (as where prison officials prevent a prisoner from exhausting his remedies), . . . he must be given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround). . . .”\textsuperscript{258} The court does not specify what it means by “innocent” and by “runaround” and what relationship those terms might have with the availability of remedies,\textsuperscript{259} or how its “another chance” holding can be justified under statutory language that says, in substance, “exhaust available remedies” and, by implication, “you don’t have to exhaust unavailable remedies.”\textsuperscript{260}

Most courts that have addressed the question have held that, once an unexhausted claim is dismissed, it must be re-filed, and may not be reinstated after exhaustion through a post-judgment motion,\textsuperscript{261} though such motions can be used to reinstate cases dismissed for non-
exhaustion as a result of mistakes, or in some instances where the case was dismissed under legal rules that were subsequently invalidated. The Sixth Circuit has held that the plaintiff need not pay a new filing fee when re-filing a claim that was previously dismissed for non-exhaustion. Other courts have generally assumed without analysis that a new filing fee is due.

In a few cases, dismissal for non-exhaustion has been accompanied by instructions to prison officials with respect to the grievance process. In one case where a prisoner with mental illness complained of denial of psychiatric treatment, the court directed prison officials to appoint someone to assist the plaintiff in exhausting his claims. Another court directed that the grievance appeal deadline be held open because the prisoner may have missed it out of “excusable confusion.” In cases involving prisoners who had made substantial efforts to exhaust, the courts have directed that prison officials “consider referral from this Court as a mitigating circumstance,” allowing the plaintiff to pursue his grievance late or have made dismissal contingent upon officials’ allowing the prisoner to pursue a new grievance. An early


268 Burgess v. Morse, 259 F.Supp.2d 240, 247 (W.D.N.Y. 2003); accord, Hill v. Chalanor, 419 F.Supp.2d 255, 256, 259 (N.D.N.Y., Mar. 8, 2006) (finding failure to appeal resulted from “confusion or mis-communication” and not official misconduct, directing that plaintiff’s renewed grievance appeal “shall be deemed timely” and directing prison officials to make sure it reached its destination); see Coronado v. Goord, 2000 WL 52488 (S.D.N.Y., Jan. 24, 2000) (dismissing case, suggesting that a time extension for the grievance should be granted).

269 Rivera v. Goord, 253 F.Supp.2d 735, 753-54 (S.D.N.Y. 2003) (noting that plaintiff had relied on prior law that indicated he was not required to exhaust).
post-Woodford v. Ngo case of this sort, though dismissing because the plaintiff failed to appeal the lack of response to his grievances, held that his efforts had “earned him a response” and directed the Bureau of Prisons to consider a new appeal timely and respond within 30 days.\(^{271}\)

Dismissal for non-exhaustion is generally without prejudice.\(^{272}\) Some courts, including the Second Circuit, have held that it may be with prejudice if it is clear that remedies are no longer available, \textit{e.g.}, because they are time-barred.\(^{273}\) (Others have held that after Woodford v. Ngo, dismissal should always be with prejudice, a point on which the Court did not rule and which seems a \textit{non sequitur}.\(^{274}\)) The Seventh Circuit has held—correctly, in my view—that all dismissals for non-exhaustion should be without prejudice, since, \textit{inter alia}, “[s]tates may allow cure of failure to exhaust,” or plaintiffs may be able to proceed without exhaustion in state court, and defenses to a new suit should be addressed directly in that suit.\(^{275}\) Further, defendants can

\(^{270}\) 548 U.S. 81 (2006) (holding that the PLRA requires “proper exhaustion,” \textit{i.e.}, compliance with all rules of the prison grievance system).


Other decisions have said that if a prisoner did not exhaust and has been released so the prison remedy is no longer available, dismissal should be with prejudice. \textit{See} Toomer v. County of Nassau, 2009 WL 1269946, *9 (E.D.N.Y., May 5, 2009); Edwards v. Peasant, 2008 WL 5427591, *5 (M.D.Ala., Dec. 30, 2008); McKinney v. Smallwood Prison Dental Services, 2008 WL 4847071, *5 (M.D.Ala., Nov. 7, 2008). That holding makes no sense; after release from prison, the plaintiff is no longer bound by the exhaustion requirement, and should be able to refile without exhausting. \textit{See} nn. 26-32, above.


and sometimes do waive the exhaustion defense in litigation. These questions’ importance is diminished after the Supreme Court’s holding that prisoners must comply with the procedural rules of the prison’s administrative system, including time limits, or their claims will be procedurally defaulted; most prisoners will be time-barred from curing their failure to exhaust properly. It is only in cases where the defense is waived, the prisoner has properly completed exhaustion after the litigation was filed, prison officials allow the filing of an out-of-time grievance, or the prisoner has been released from prison and can refile without being subject to the exhaustion requirement, that dismissal for non-exhaustion without prejudice will allow the prisoner to re-file and litigate the claim.

One circuit has approved dismissal for non-exhaustion with prejudice with regard to the prisoner’s ability to proceed in forma pauperis, stating that a prisoner who filed without exhaustion “sought relief to which he was not entitled—that is, federal court intervention in prison affairs prior to the prison having had the opportunity to address the complaint within its grievance procedures.” Such a disposition is not only in my view an unauthorized and unwarrantedly punitive response to what may be only the blunder of a pro se litigant, but is also an outright denial of access to courts if the prisoner is indigent and unable to pay the filing fee up front. Further, this rule has not been reexamined after Jones v. Bock and appears invalid under that decision. In Jones, the Court held that PLRA provisions should not be read to overturn the ordinary practices of litigation, under the Federal Rules and otherwise, without a clear direction actually enforces its procedural rules.”), report and recommendation adopted, 2010 WL 2640418 (W.D.Mich., June 30, 2010).

One recent district court decision holds, in effect, that Ford v. Johnson has been overruled in this regard by Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008), cert. denied, 556 U.S. 1128 (2009), which states that where the failure to exhaust was the prisoner’s fault, “the case is over.” See Reyes v. Randle, 2011 WL 7109199, *4 (S.D.Ill., Dec. 1, 2011), report and recommendation adopted, 2012 WL 253499 (S.D.Ill., Jan. 26, 2012). I do not think that that phrase in Pavey can be read as saying anything one way or the other about the nature of dismissal for non-exhaustion.


277 Tomassini v. Correctional Health Services Corp., 2012 WL 1601528, *3-4 (D.P.R., May 7, 2012) (noting dismissal without prejudice is appropriate where plaintiff has been released from prison and is not bound by the exhaustion requirement).


One exception to the proposition in the text says in effect that the Underwood rule is supported by Jones v. Bock: “. . . [T]he district courts may no longer dismiss unexhausted complaints sua sponte. Rather, taxpayers must fund service by the Marshal, followed by motion practice offered by taxpayer-funded attorneys for the prison officials, before the cases can be dismissed. These burdens make it important to discourage the filing of unexhausted prisoner complaints.” Frank v. Batson, 2014 WL 801046, *3 (W.D.La., Feb. 28, 2014).
by Congress.\textsuperscript{281} There seems no apparent reason why the PLRA should require abandonment of the usual practice under the \textit{in forma pauperis} statutes without a clear statement to that effect.

D. How Is Exhaustion Addressed Procedurally?

Some courts have held that when exhaustion is raised, the court should address it before it reaches the merits of the case.\textsuperscript{282} However, plainly meritless claims can be dismissed on the merits without considering exhaustion.\textsuperscript{283} Courts also have the power to decide the merits after finding non-exhaustion, at least in cases where discovery has been completed and the merits have been briefed, since non-exhaustion is not jurisdictional.\textsuperscript{284}

1. Burden of Pleading

The Supreme Court has held that failure to exhaust is an affirmative defense that must be raised by defendants, not a pleading requirement for plaintiffs.\textsuperscript{285} That means failure to exhaust is not failure to state a claim except where non-exhaustion is apparent on the face of the

\textsuperscript{281} Jones, 549 U.S. at 212-16, 221-24.

\textsuperscript{282} Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008) (district court should address exhaustion and hold a hearing to resolve disputed facts about it before allowing discovery on the merits), \textit{cert. denied}, 556 U.S. 1128 (2009); Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 534 (7th Cir. 1999) (“Application of a law designed to prevent decision on the merits cannot be avoided by making the very decision whose propriety is contested, then declaring the decision-avoidance statute ’moot’.”); Bacon v. Reyes, 2013 WL 5522263, *5 (D.Nev., Oct. 3, 2013) (staying discovery pending decision of a motion to dismiss for non-exhaustion because exhaustion is a “preliminary issue warranting a stay”); Martin v. Mohr, 2012 WL 5915501, *2 (S.D.Ohio, Nov. 26, 2012) (staying discovery pending defendants’ filing of motion alleging non-exhaustion); McCoy v. Goord, 255 F.Supp.2d 233, 248-49 (S.D.N.Y. 2003); see Torrence v. Pesanti, 239 F.Supp.2d 230, 234 (D.Conn. 2003) (stating that exhaustion should be dealt with quickly so plaintiffs’ claims are less likely to be time-barred if it is necessary to re-file after exhaustion). Torrence’s holding has little practical relevance because most grievance deadlines are so short that a court will never resolve an exhaustion issue before the deadline passes.

Even under Perez v. Wisconsin DOC, if material facts are disputed concerning exhaustion, but not the merits, the court may proceed to summary judgment on the merits. See Gray v. Hinsley, 2008 WL 2005029, *1-4 (S.D.Ill., May 8, 2008); see also cases cited in n. 413, below.

\textsuperscript{283} 42 U.S.C. § 1997e(c)(2); see Fitzgerald v. Corrections Corp. of America, 403 F.3d 1134, 1140-45 (10th Cir. 2005) (holding that notwithstanding the Perez holding, the court can reach the merits of arguably unexhausted claims on summary judgment as well as on a motion to dismiss); Bowen v. Cady, 2010 WL 148843, *3 (E.D.Mich., Jan. 13, 2010) (same).

\textsuperscript{284} Fluker v. County of Kankakee, 741 F.3d 787, 793-94 (7th Cir. 2013) (rejecting argument that to reach the merits of a case subject to dismissal for non-exhaustion is to render an advisory opinion); see Ramos v. Patnaude, 640 F.3d 485, 487-91 (1st Cir. 2011) (affirming summary judgment for defendant on the merits without reviewing district court’s alternative decision to dismiss for non-exhaustion); Wisniewsky v. Salameh, 445 Fed.Appx. 545, 549-50 (3rd Cir. 2011) (unpublished) (affirming on the merits a district court’s grant of summary judgment for the defendant without reviewing decision that he had not exhausted); see also Thorson v. Epps, 701 F.3d 444, 445-46 (5th Cir. 2012), \textit{cert. denied.}, 124 S.Ct. 53 (2013) (affirming summary judgment on the merits even though the defendant also invoked the PLRA exhaustion defense in the district court). \textit{Contra}, Snyder v. Harris, 406 Fed.Appx. 313, 316 (10th Cir.2011) (unpublished) (“[E]ven if the district court could enter a disposition dismissing for lack of exhaustion and alternatively dismissing because the claim failed on the merits, this court should not affirm the merits determination if [the plaintiff] in fact failed to exhaust administrative remedies.”).

complaint. This holding resolved a conflict among circuits and overruled a body of law that had required plaintiffs to plead exhaustion with specificity and support the pleading with documentation when available, with district courts directed to dismiss sua sponte for noncompliance with that requirement. One circuit had also held that prisoners cannot amend their complaints to avoid dismissal under the PLRA, including to cure inadequate pleading of exhaustion. That rule was rendered mostly meaningless by Jones’s holding that exhaustion need not be pled at all. The holdout circuit has finally abandoned its rule and acknowledged its inconsistency with Jones v. Bock’s broader holding that the PLRA’s screening requirement does not justify deviating from the usual procedural practice of federal courts, which of course includes amendment of complaints, without statutory language to that effect.

The Jones v. Bock holding that non-exhaustion is an affirmative defense has significant consequences for the initial processing of prisoner complaints: the PLRA’s provisions for screening and sua sponte dismissal of cases that are frivolous or fail to state a claim are inapplicable to exhaustion except where non-exhaustion is apparent on the face of the complaint. Courts do have authority, even without statutory authorization, to dismiss on their own motion based on non-exhaustion or other affirmative defenses. However, this authority, too, is generally limited to non-exhaustion that is apparent on the face of the complaint. Further, the Second Circuit has held that plaintiffs are “entitled to notice and an opportunity to be heard” before such dismissal unless it is “unmistakably clear” that the complaint is subject to dismissal.

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287 Two circuits, the Sixth and the Tenth, had so held. See, e.g., Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1210 (10th Cir. 2003), cert. denied, 543 U.S. 925 (2004); Knuckles El v. Toombs, 215 F.3d 640, 642 (6th Cir.), cert. denied, 531 U.S. 1040 (2000); see also Aquilar Avellaveda v. Terrell, 478 F.3d 1223, 1225 (10th Cir. 2007) (acknowledging overruling).

288 Baxter v. Rose, 305 F.3d 486, 488 (6th Cir. 2002); McGore v. Wrigglesworth, 114 F.3d 601, 612 (6th Cir. 1997).

289 LaFountain v. Harry, 716 F.3d 944, 951 (6th Cir. 2013).

290 See § IX, below, concerning screening and dismissal.


292 Aquilar Avellaveda v. Terrell, 478 F.3d 1223, 1225 (10th Cir. 2007) (“Because Mr. Aquilar-Avellaveda's complaint was silent as to whether he had exhausted his administrative remedies—which is acceptable under Jones—the district court erred in requesting Mr. Aquilar-Avellaveda to supplement the record on that issue.”); Ray v. Kertes, 285 F.3d 287, 297 (3d Cir. 2002) (“As a general proposition, sua sponte dismissal is inappropriate unless the basis is apparent from the face of the complaint.”). Cf. Calvert v. Fischer, 2009 WL 5167648, *5 (N.D.N.Y., Dec. 18, 2009) (“Simply stated, if a prisoner says nothing or little about exhaustion in his pro se civil rights complaint, he is likely protected from a Fed.R.Civ.P. 12(b)(6) motion to dismiss premised on failure to exhaust. However, if he says too much about exhaustion in that complaint so that his non-exhaustion is readily apparent, he may plead himself out of court,” the saying goes.

293 Snider v. Melindez, 199 F.3d at 113; accord, Aquilar Avellaveda v. Terrell, 478 F.3d 1223, 1225 (10th Cir. 2007). In a later decision, the Second Circuit stated that “the better practice in a given case may be to afford notice and an opportunity to respond before dismissal when exhaustion is the basis for that action. . . . In future cases we leave it to the district court to determine . . . which procedural practice is most appropriate.” Neal v. Goord, 267 F.3d 116, 123-34 (2d Cir. 2001). However, the court subsequently stated: “We now reiterate that notice and an opportunity to respond are necessary in cases such as these. . . .” Mojias v. Johnson, 351 F.3d 606, 611 (2d Cir. 2003) (emphasis supplied). Giano v. Goord, 380 F.3d 670, 675 (2d Cir. 2004), restates this stronger position, which must be regarded as the law in the circuit.
It is very difficult for non-exhaustion—i.e., failure to comply with the PLRA exhaustion requirement—to be genuinely apparent on the face of the complaint, since there are so many circumstances in which failure to exhaust does not violate the statute.\textsuperscript{294} Courts must “ensure that any defects in exhaustion were not procured from the action or inaction of prison officials” and that the prisoner is “without valid excuse” for non-exhaustion.\textsuperscript{295} One recent decision states that non-exhaustion must be “crystalline” on the face of the complaint to justify dismissal.\textsuperscript{296}

\textsuperscript{294} Mateo v. Bристow, 2013 WL 3863865, *3 (S.D.N.Y., July 16, 2013) (declining to dismiss where complaint made clear plaintiff had not exhausted but also pled facts supporting an argument that the remedy was not available).

\textsuperscript{295} Aguilar Avellaveda v. Terrell, 478 F.3d 1223, 1225 (10th Cir. 2007) (“Because Mr. Aguilar-Avellaveda's complaint was silent as to whether he had exhausted his administrative remedies—which is acceptable under Jones—the district court erred in requesting Mr. Aguilar-Avellaveda to supplement the record on that issue.”); accord, Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d at 682 & n.5 (“To determine whether an inmate has exhausted his administrative remedies requires an understanding of the remedies available and thus likely would require information from the defendant as well as the inmate.”); Hardimon v. Westchester County, 2013 WL 5952862, *4 (S.D.N.Y., Nov. 6, 2013) (denying motion to dismiss where plaintiff acknowledged failure to exhaust but alleged that a staff member had refused to accept his grievance in segregation); Rosario v. Anson, 2013 WL 5236568, *7 (N.D.N.Y., Sept. 17, 2013) (declining to dismiss for non-exhaustion where complaint seemed to allege obstruction at a second prison, and alleged unawareness of grievance policy at first prison might be attributable to prison officials; citing liberal construction of pro se complaints); Simmons v. Cripps, 2013 WL 1285417, *3 (S.D.N.Y., Mar. 28, 2013) (citing principle of liberal construction of pro se complaints, declining to dismiss ambiguous complaint for non-exhaustion); Butler v. Suffolk County, 289 F.R.D. 80, 92-93 (E.D.N.Y. 2013) (noting that complaint was ambiguous as to exhaustion and exceptions to exhaustion requirement cannot be assessed on an undeveloped record); Benjamin v. Flores, 2012 WL 5289513, *5 (E.D.N.Y., Oct. 23, 2012) (holding complaint allegation that plaintiff filed a grievance and was told that the complaint was under investigation “by itself, does not necessarily mean that plaintiff has not exhausted administrative remedies.”); Albadry v. Wiepper, 2012 WL 3726698, *5 (E.D.Tenn., Aug. 27, 2012) (declining to dismiss based on admission in complaint of non-exhaustion where “aside from [plaintiff’s] alleged inability to read or write English, lack of access to an Arabic interpreter, and lack of knowledge that he was required to satisfy the PLRA requirement, Defendants have not proven administrative remedies were available to Plaintiff”); Justice v. McGovern, 2012 WL 2155275, *2 (E.D.N.Y., June 12, 2012) (following White v. Schriro; White v. Schriro, 2012 WL 1414450, *6 (S.D.N.Y., Mar. 7, 2012) (noting incomplete grievance allegations “do not rule out the possibility that one of several exceptions to the exhaustion requirement applies”), report and recommendation adopted, 2012 WL 1450422 (S.D.N.Y., Apr. 23, 2012); Hernandez-Vazquez v. Ortiz-Martinez, 2010 WL 132343, *3 (D.P.R., Jan. 8, 2010) (“Dismissal therefore is only warranted under Rule 12(b)(6) when the complaint on its face conclusively shows that the plaintiff could not have exhausted his remedies.”) (emphasis supplied); see Meador v. Pleasant Valley State Prison, 333 Fed.Appx. 177, 178 (9th Cir. 2009) (unpublished) (concession that grievance was untimely did not establish non-exhaustion, since the grievance rules allow late exhaustion under some circumstances, and plaintiff also alleged reasons he was unable to file timely); Davis v. Talisman, 2009 WL 3416122, *1 (9th Cir., Oct. 23, 2009) (unpublished) (where complaint form explained what had happened at first and second level, and then just said “third level” with no further details, the complaint did not concede non-exhaustion on its face since it did not clearly show plaintiff had not completed the third level); Hilson v. Maltese, 2011 WL 767696, *2 (N.D.N.Y., Feb. 28, 2011) (where plaintiff alleged he did not exhaust because he “was mentally unstable at the time” and “had a mental break down,” whether exhaustion was unexcused was not apparent on the face of the complaint); Ware v. Gallegos, 2010 WL 749852, *6 (D.Colo., Mar. 3, 2010) (plaintiff’s murky statements about circumstances of non-exhaustion “cast[] enough doubt” to bar dismissal on the face of the complaint); Harper v. Urbano, 2010 WL 3629838, *3 (D.Colo., Feb. 9, 2010) (non-exhaustion was not apparent on the face of the complaint where plaintiff admitted non-exhaustion but alleged it was caused by threats and misconduct by prison staff), report and recommendation adopted, 2010 WL 3615025 (D.Colo., Sept. 10, 2010); see Appendix A for further authority on this point. But see Brand v. Hamilton, 2010 WL 4973358, *3 (N.D.Fla., Oct. 27, 2010) (inferring non-exhaustion because of brief interval between event complained of and signing of complaint), report and recommendation adopted, 2010 WL 4955400 (N.D.Fla., Dec. 1, 2010); Tellefsen v. McDevitt, 2010 WL 3156546, *1-2 (W.D.N.C., Aug. 10, 2010) (dismissing without consulting grievance policy where plaintiffs alleged that “there was no procedure to handle the complaints stated in this case”); West v. Harkleroad, 2010 WL 2867416, *1 (W.D.N.C., July 20, 2010) (inferring non-exhaustion solely from time between
filing of grievance and of complaint, and dismissing); Moultrie v. South Carolina Dept. of Corrections, 2009 WL 3124426, *1 (D.S.C., Sept. 29, 2009) (same); Miller v. Walker, 2009 WL 2135798, *2 (S.D.Ga., July 16, 2009) (same); Henderson v. Kennell, 2007 WL 1424550, *1 (C.D.Ill., May 10, 2007) (same); see also Roman v. Washington, 2011 WL 1331962, *2 (E.D.Cal., Apr. 5, 2011) (holding non-exhaustion apparent on the face of the complaint where the prisoner said he didn’t exhaust because he was transferred, but the court says state regulations don’t forbid exhaustion in that situation; but dismissing with leave to amend to plead some basis for excusing non-exhaustion).


297 Snider v. Melindez, 199 F.3d 108, 114 (2d Cir. 1999).

298 Snider, 199 F.3d at 113.

299 Mojias v. Johnson, 351 F.3d 606, 610 (2d Cir. 2003); accord, Anderson v. XYZ Correctional Health Services, 407 F.3d 674, 683 n.5 (4th Cir. 2005); Walker v. Vargas, 2013 WL 4792765, *6 (S.D.N.Y., Aug. 26, 2013) (noting warnings “that a pro se plaintiff’s check-marks on a form complaint are not sufficient to establish the availability of an administrative remedy” in case where plaintiff alleged he was not aware of the remedy; defendants must pursue contrary claim via summary judgment); Daniels v. Caldwell, 2013 WL 85165, *3 (E.D.Va., Jan. 7, 2013) (“Without information about the requirements of the Jail grievance procedure, the Court cannot ascertain whether Daniels's complaint about medical care conducted outside of the Jail was grievable. . . . Moreover, without more information about the Jail grievance procedure and the timing of Daniels's transfer, the Court cannot assess whether Daniels's transfer excuses any failure by Daniels to utilize the Jail grievance procedure.”) (footnote omitted).

In Mojias, the district court had dismissed a New York City jail excessive force claim apparently without reviewing the City grievance policy, which made all claims of alleged assaults “non-grievable.” Other decisions have erroneously dismissed the claims of New York City prisoners, citing a remedy set out in state regulations that is available only to state prisoners and that has a different scope of grievable issues from the New York City grievance system. See Kearsey v. Williams, 2002 WL 1268014 (S.D.N.Y., June 6, 2002), vacated, 2004 WL 2093548 (S.D.N.Y., Sept. 20, 2004); John v. N.Y.C. Dept. of Corrections, 183 F.Supp.2d 619, 624-25 (S.D.N.Y. 2002); Harris v. N.Y.C. Dept. of Corrections, 2001 WL 845448, *2-3 (S.D.N.Y., July 25, 2001).


The Second Circuit addressed this issue before Jones v. Bock, and has held that a court may not dismiss for non-exhaustion without “establish[ing] the availability of an administrative remedy from a legally sufficient source.” 297 In that case, the district court had assumed that a remedy was available solely because the prisoner had answered “Yes” to a question on a pro se complaint form asking whether there was a grievance process in his prison. 298 Such an answer does not establish that the process was available for the particular problem at issue or to the particular prisoner, as illustrated in a later case in which the court, on nearly identical facts, strongly reiterated the need to establish “that an administrative remedy is applicable and that the particular complaint does not fall within an exception. . . . Courts should be careful to look at the applicable set of grievance procedures, whether city, state or federal.” 299 (Nonetheless, the pernicious practice of relying on check marks and questionnaire answers to determine exhaustion persists in some jurisdictions.)
Consistently with *Jones*, a number of courts have rejected arguments that if the prisoner includes any exhaustion-related information or documentation in the complaint, any gaps or ambiguities in that presentation mean that non-exhaustion is apparent on the face of the complaint. Others, however, continue to dismiss, or to demand that plaintiffs establish exhaustion, based on mere inferences from their *pro se* pleadings.

because the plaintiff checked no for availing himself of grievance procedures, that he did not actually file grievances, nor is it clear what grievances were available to him if he was transferred to another facility. It is apparent that any determination as to whether the operative complaint may be subject to dismissal under § 1997e(a), will require further development of the record.”), *report and recommendation adopted*, 2011 WL 283327 (S.D.Fla., Jan. 24, 2011); Roland v. Wenz, 2010 WL 2834828, *4 (N.D.N.Y., July 16, 2010) (noting that check marks indicating failure to use grievance system might refer to current prison and not institution where claim arose), *report and recommendation adopted*, 2010 WL 2817485 (N.D.N.Y., July 16, 2010).

Coleman v. Sweetin, ___ F.3d ___, 2014 WL 958275, *4 (5th Cir. 2014) (holding dismissal in reliance on grievance documentation attached to complaint which had no allegations re exhaustion was reversible error); Yasin v. Bragg, 460 F.3d 345, 346 (5th Cir. 2012) (unpublished) (complaint allegation that plaintiff had asked for a grievance form and not received one did not support dismissal based on an inference that he had not done more); Bingham v. Thomas, 654 F.3d 1171, 1176 (11th Cir. 2011) (holding exhaustion was not apparent on the face of a complaint alleging that the plaintiff had filed several grievances and appealed them); Montanez v. Feinerman, 439 Fed.Appx. 545, 549-50 (7th Cir. 2011) (unpublished) (holding lack of appeal documentation among attachments to complaint did not show non-exhaustion; plaintiff explained on appeal why the procedure was unavailable to him); McDonald v. Cain, 426 Fed.Appx. 332, 333 (5th Cir. 2011) (unpublished) (reversing dismissal for non-exhaustion where plaintiff acknowledged non-exhaustion but provided reasons for it, but district court held they were conclusory and did not establish exhaustion); Brooks v. Potter, 2013 WL 6513356, *3 (S.D.Ohio, Oct. 31, 2013) (rejecting argument that a complaint that said only that plaintiff “wrote a[n] incident report” must be dismissed for failing to allege completion of the administrative process), *report and recommendation adopted*, 2013 WL 6513354 (S.D.Ohio, Dec. 12, 2013); Coleman v. Terrebonne Parish Criminal Justice Complex, 2013 WL 6004051, *2 (E.D.La., Nov. 13, 2013) (declining to dismiss based on statement “Didn’t need to [exhaust], cause went to see Doctor,” where plaintiff also alleged that he could not appeal because he was transferred and forms were not available); Johnakin v. NYC Dept. of Corrections, 2013 WL 5519998, *6 (E.D.N.Y., Sept. 30, 2013) (holding the fact that he described the first step of the grievance procedure did not make it apparent that he had not completed the others; Dabney v. Sawyer, 2013 WL 5494074, *6 (N.D.N.Y., Sept. 30, 2013); McNair v. Rivera, 2013 WL 4779033, *5 (S.D.N.Y., Sept. 6, 2013) (holding omissions from complaint form concerning exhaustion did not establish non-exhaustion; “Plaintiffs have not pled that they did not exhaust; and at this stage in the litigation they do not need to demonstrate that they did.”); Townsend v. Holt, 2013 WL 4459023, *9 (M.D.Pa., Aug. 16, 2013) (declining to dismiss based on incomplete grievance because court did not know whether plaintiff had attached all grievances to complaint); Heilman v. Cherniss, 2013 WL 3992420, *3 (E.D.Cal., July 31, 2013) (holding complaint that alleged exhaustion was not subject to dismissal because attached grievances did not completely establish non-exhaustion). *See Appendix A for additional authority on this point.*


In my view, in light of the numerous circumstances in which remedies may be unavailable or failure to use them excusable, almost the only situations in which non-exhaustion can legitimately be said to be apparent on the face of the complaint are those in which the complaint affirmatively states that the prisoner did not exhaust, or abandoned the process, for reasons that are inexcusable as a matter of law, such as disbelief in its efficacy, its ability to provide a particular remedy, or filing of the complaint before the administrative process was completed. Some courts have inferred non-exhaustion from their own calculations of the time a complaint was filed compared to the usual length of the grievance process (though one federal amend complaint to add new claims, holding references to sick call slips and filing of grievances did not show proper exhaustion); Uman v. Monroe, 2012 WL 481760, *2 (D.Kan., Feb. 14, 2012) (dismissing based on fact that complaint mentioned only grievances that predated the matter complained of); Kurgan v. Yates, 2011 WL 4841054, *3 (E.D.Cal., Oct. 12, 2011) (holding non-exhaustion was apparent on the face of the complaint, and plaintiff must show cause why it should not be dismissed for non-exhaustion, where plaintiff submitted some irrelevant grievance material and did not answer questions on the form complaint about exhaustion); Markovich v. Kansas Dept. of Corrections, 2010 WL 1563686, *2 (D.Kan., Apr. 19, 2010) (court concludes it is “very unlikely” that the plaintiff exhausted and therefore plaintiff must demonstrate exhaustion); Williams v. City of Wadesboro, NC, 2010 WL 1009982, *3 (W.D.N.C., Mar. 16, 2010) (dismissing for non-exhaustion based on conclusion that grievances attached to complaint did not address the claims asserted in the complaint); Brown v. Napoli, 687 F.Supp.2d 295, 297-98 (W.D.N.Y. 2009) (where plaintiff wrote letters to the Superintendent rather than grievance, and said he was afraid to grieve, the lack of factual allegations to support his claim of fear meant that non-exhaustion was apparent on the face of the complaint); Albritton v. Johnson, 2007 WL 7303552, *1 (E.D.Va., Dec. 20, 2007) (demanding documentation or detailed statement of grievances and appeals filed and responses received).


304 See, e.g., Braggs v. California, 2010 WL 234878, *1 (N.D.Cal., Jan. 14, 2010) (“Plaintiff states that he failed to complete the appeals process because the requested relief available through the grievance process is ‘inadequate.’”).


The circuit has held that even such a visible defect “would not have affected the complaint's sufficiency” and the court should not have acted upon it.\(^{307}\). In many cases that inference will be correct, but such reasoning, applied at initial screening without benefit of a record, does not “ensure that any defects in exhaustion were not procured from the action or inaction of prison officials” and that the prisoner is “without valid excuse” for non-exhaustion,\(^{308}\) or that the administrative remedy actually was available for the claim the plaintiff raised.\(^{309}\) For these reasons, the safest and fairest way to proceed is to allow for notice and opportunity to be heard even where the failure to exhaust seems unequivocal on the face of the complaint. One economical way to accomplish this end is to direct the plaintiff to show cause why the case should not be dismissed for non-exhaustion,\(^{310}\) and to submit an amended complaint if that will clarify matters.\(^{311}\) Alternatively, the court can dismiss for non-exhaustion with leave to amend and to clarify whether the plaintiff has exhausted.\(^{312}\)

Unfortunately devices such as these have often been used inappropriately, where the complaint does not clearly reveal non-exhaustion. Some courts have essentially flouted Jones v. Bock’s holding that non-exhaustion is an affirmative defense which must be raised by defendants. One circuit had held before Jones that courts could raise exhaustion sua sponte even where non-exhaustion was not apparent on the face of the complaint, as long as the prisoner received an opportunity to respond; on this view, exhaustion’s being an affirmative defense does not preclude a court’s “inquiring on its own motion into whether the inmate exhausted all administrative remedies.”\(^{313}\)

This rationale and result appear to conflict with Jones. The Anderson court noted its prior holding that in habeas corpus proceedings, courts have the power to raise timeliness defenses sua sponte, since doing so promotes judicial efficiency and conservation of judicial resources. It continued: “Similar concerns of efficiency and conservation of scarce judicial resources, of course, underlie the PLRA in general and its exhaustion requirement in

\(^{307}\) Grullon v. City of New Haven, 720 F.3d 133, 141 (2d Cir. 2013). In Grullon, the district court had declined to allow the plaintiff to amend his complaint based on its calculation indicating non-exhaustion; the appeals court held this was an abuse of discretion. See Read v. Calabrese, 2013 WL 5506344, *10 n.5 (N.D.N.Y., Aug. 29, 2013) (stating Grullon holding “appears contrary to existing law”).

\(^{308}\) Aquilar Avellaveda v. Terrell, 478 F.3d 1223, 1225 (10th Cir. 2007).

\(^{309}\) See Mojias v. Johnson, 351 F.3d 606, 610 (2d Cir. 2003).


\(^{312}\) Ortega v. Flavetta, 2013 WL 2557781, *3 (N.D.Cal., June 10, 2013) (where complaint seemed to indicate that only some claims, if any, were exhausted, dismissed with leave to amend to show exhaustion): Dew v. Chen, 2013 WL 1903866, *2 (E.D.Cal., May 7, 2013) (where timing of complaint seemed to indicate that plaintiff could not have exhausted, dismissed with leave to submit amended complaint pleading exhaustion or excuse from it); Edmundson v. O'Fallon, 2013 WL 682824, *5 (D.Mont., Feb. 22, 2013).

\(^{313}\) Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 683 (4th Cir. 2005) (emphasis supplied). After Jones, the court reiterated that “even if it is not apparent from the pleadings that there are available administrative remedies that the prisoner failed to exhaust, a complaint may be dismissed on exhaustion grounds so long as the inmate is first given an opportunity to address the issue.” Moore v. Bennette, 517 F.3d 717, 725 (4th Cir. 2008). In Moore, however, the court did not dismiss at initial screening; rather, defendants raised exhaustion in a motion for judgment on the pleadings, and the court found non-exhaustion based on the materials the plaintiff submitted in response to that motion. 517 F.3d at 724. Thus Moore, unlike Anderson, is not directly in conflict with Jones.
particular.”314 This appears to be precisely the kind of reasoning the Supreme Court rejected in holding that “courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.”315

In any case, some Fourth Circuit district courts have taken the Anderson holding to authorize, notwithstanding Jones, a demand that prisoner plaintiffs establish exhaustion even if non-exhaustion is not apparent on the face of the complaint, and in some cases before defendants put it in issue.316

Such a requirement appears contrary to Jones’s holding that the defendants must raise the exhaustion defense.317 The persistence of such demands reflects to some extent the essentially inquisitorial procedures some courts had adopted for the handling of pro se prisoner complaints. The Fifth Circuit has addressed this problem directly, holding that in that circuit’s long-established “Spears hearing” practice,318 it is no longer permissible to resolve exhaustion before it is raised in a responsive pleading, and adding: “It bears emphasis that a district court cannot by

314 Anderson, 407 F.3d at 682.
316 Wilson v. Kalinski, 2014 WL 546692, *2 (W.D.N.C., Feb. 10, 2014) (holding at initial screening that where plaintiff attached a grievance to the complaint, but no other grievance documents, “he has not shown that he grieved his claim through all steps of the grievance process”; dismissed for non-exhaustion); Knox v. Davis, 2013 WL 5947782, *2 (W.D.N.C., Nov. 6, 2013) (dismissing for non-exhaustion where plaintiff pled exhaustion but did not provide copies of documents demonstrating it, providing only a handwritten summary to satisfy “requirement that he show exhaustion of his remedies”); Matthews v. Hull, 2013 WL 3322386, *3 (E.D.Va., July 1, 2013) (“Plaintiff must show that he has exhausted his administrative remedies before his claims may proceed.”), appeal dismissed, 544 Fed.Appx. 226 (4th Cir. 2013); Galeas v. David, 2012 WL 6608250, *1 (W.D.N.C., Dec. 18, 2012) (noting that the court had directed the plaintiff to file an “Administrative Remedy Statement”); Riddick v. Herlock, 2012 WL 6042351, *6 (E.D.Va., Nov. 30, 2012) (“Before this action may proceed, plaintiff will be required to submit additional information concerning his exhaustion of administrative remedies.”), vacated and remanded on other grounds, 531 Fed.Appx. 388 (4th Cir. 2013) (unpublished); Reaves v. Jackson, 2011 WL 1226020, *2 (W.D.Va., Mar. 30, 2011) (noting court directed plaintiff to submit information about exhaustion; dismissing based on submission); Beahm v. Berkebile, 2010 WL 3220653, *1 (S.D.W.Va., Aug. 6, 2010) (noting court upon screening the case set a show cause hearing, ordered plaintiff to produce documentary proof of exhaustion, and dismissed when he did not produce it by the time of the hearing); Lay v. Diggs, 2010 WL 7920623, *2 (E.D.Va., June 15, 2010) (holding complaint does not state a claim, directing filing of amended complaint, and also that “plaintiff will be required to submit additional information concerning his exhaustion of administrative remedies as to each claim he wishes to assert in this federal action”); Carnichael v. Ozment, 2009 WL 3805297, *2 (D.S.C., Nov. 12, 2009) (court notes it used special interrogatories to determine non-exhaustion); Wiley v. Boone County Sheriff’s Office, 2009 WL 2390164, *3 (E.D.Ky., Aug. 4, 2009) (citing Fourth Circuit law; noting it gave plaintiff an opportunity at screening to submit documentation supporting exhaustion); Roddy v. West Virginia, 2008 WL 5191243, *3 (N.D.W.Va., Dec. 11, 2008) (noting magistrate judge issued an order on remand from reversal of a screening dismissal directing plaintiff to provide proof of exhaustion); Mora v. Shah, 2008 WL 8837022, *2 (E.D.Va., Sept. 2008) (“plaintiff has informed the Court that he filed a grievance based on this complaint, but it is unclear whether plaintiff has fully exhausted his administrative remedies. Before this action may proceed, plaintiff will be required to submit additional information concerning his exhaustion of administrative remedies.”); see Kelly v. Terrangi, 2008 WL 4707230, *5 (E.D.Va., Oct. 21, 2008) (requiring plaintiff to submit additional information concerning exhaustion in response to a motion to dismiss).
317 Aquilar Avellaveda v. Terrell, 478 F.3d 1223, 1225 (10th Cir. 2007) (“Because Mr. Aquilar-Avellaveda’s complaint was silent as to whether he had exhausted his administrative remedies—which is acceptable under Jones—the district court erred in requesting Mr. Aquilar-Avellaveda to supplement the record on that issue.”)
318 A Spears hearing is an evidentiary hearing, often held at the prison, to permit the prisoner to “clarify, amend, and amplify” the pleadings at the point of consideration of in forma pauperis applications. Eason v. Holt, 73 F.3d 600, 602 n.15 (5th Cir. 1996); see Spears v. McCotter, 766 F.2d 179, 181-82 (5th Cir. 1985).
local rule sidestep Jones by requiring prisoners to affirmatively plead exhaustion.”\(^{319}\) The same court has acknowledged that use of a court-approved form complaint demanding exhaustion-related information, and using that information to dismiss, is just another way to “sidestep Jones,” invalid because “it is defendants’ job to raise and prove such an affirmative defense.”\(^{320}\) However, similar practices persist in other jurisdictions, without yet having attracted appellate attention.\(^{321}\)

There are many other post-Jones decisions that either demand information, about exhaustion, or dismiss for lack of such information, at the initial screening of the complaint, despite Jones. In some cases, the courts cite Jones but don’t seem to see the connection between its holding and their actions.\(^{322}\) In other cases, Jones is not mentioned at

\(^{319}\) Carbe v. Lappin, 492 F.3d 325, 327-28 (5th Cir. 2007); see Coleman v. Sweetin, ___ F.3d ___, 2014 WL 958275, *4 (5th Cir. 2014) (reiterating Carbe holding, also holding that relying either on Spears hearing testimony or grievances attached to complaint was error); Beasley v. Ivy, 2012 WL 5613265, *8 (E.D.Tex., Oct. 23, 2012) (holding district court could not rely on facts elicited in Spears hearing to dismiss for non-exhaustion where plaintiff asserted he had exhausted), report and recommendation adopted, 2012 WL 5596036 (E.D.Tex., Nov. 15, 2012).

\(^{320}\) Torns v. Mississippi Dept. of Corrections, 301 Fed.Appx. 386, 389, 2008 WL 5155229 (5th Cir. 2008) (unpublished). Notwithstanding the Carbe holding and this one, the court can be forgiving of such errors. See McMillan v. Director, Texas Dept. of Criminal Justice, Correctional Institutions Div., 40 Fed.Appx. 358, 359 (5th Cir. 2013) (unpublished) (noting propriety of raising exhaustion sua sponte, but affirming because “the record otherwise demonstrates” non-exhaustion and the court can affirm on any basis evident in the record).


The same type of error crops up at later stages in other cases. Of course many other decisions get Jones right. The correct approach was reiterated by the Seventh Circuit in a
recent unreported decision, in which the complaint did not mention exhaustion but the plaintiff had made some relevant comments about it in a telephone conference: “The exception to the rule that complaints should not be dismissed for failure to exhaust requires that the affirmative defense be obvious on the face of the complaint itself. . . .” Further, non-exhaustion must be obvious on the face of the current complaint; once the complaint is amended, allegations from a superseded complaint are no longer in the case.

One court has held that a plaintiff must demonstrate exhaustion in order to obtain a default judgment.

2. Burden of Proof

As with other affirmative defenses, the burden of proof concerning exhaustion follows the burden of pleading, and defendants are obliged to establish non-exhaustion as well as to assert it. On summary judgment, once defendants have produced evidence that arguably meets their burden of showing non-exhaustion, the plaintiff has a burden of production to come forward with evidence supporting exhaustion, though the ultimate burden of showing an absence


See, e.g., Smith v. U.S., 2010 WL 307942, *4-5 (E.D.Ky., Jan. 27, 2010) (“Unless the lack of exhaustion is obvious on the face of the Complaint, it is up to the Defendants to raise or waive the issue of exhaustion.”), amending and superseding 2009 WL 3756641, *3 (E.D.Ky., Nov. 6, 2009) (stating at screening: “It is a plaintiff's burden to demonstrate exhaustion of his or her administrative remedies with regard to each claim and each defendant, by either attaching copies of documents therefrom or by describing with particularity the administrative steps he took and responses he or she received in the process.”).


McCurdy v. Johnson, 2012 WL 3135906, *2 (D.Nev., Aug. 1, 2012). There is no apparent basis in the statute for this requirement and the court does not explain its reasoning. As explained in § X, below, there is some question whether default judgments are permitted in cases governed by the PLRA.

See Risher v. Lappin, 639 F.3d 236, 240 (6th Cir. 2011) (“Non-exhaustion is an affirmative defense under the PLRA, with the burden of proof falling on the Bureau.”); Dillon v. Rogers, 596 F.3d 260, 266 (5th Cir. 2010) (stating defendants have the burden to establish “beyond peradventure all of the essential elements of the defense of exhaustion to warrant summary judgment”); Roberts v. Barreras, 484 F.3d 1236, 1240-41 (10th Cir. 2007) (citing established rules that the burden of proving affirmative defenses is on the defendant and that burden of proof follows burden of pleading); Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 683 (4th Cir. 2005); Nerness v. Johnson, 401 F.3d 874, 876 (8th Cir. 2005) (per curiam); Wyatt v. Terhune, 315 F.3d 1108, 1117-18 (9th Cir.), cert. denied, 540 U.S. 810 (2003) and cases cited; Turner v. Grant County Detention Center, 2008 WL 821895, *5 (E.D.Ky., Mar. 26, 2008). Contra, Timms v. Tucker, 2012 WL 2008599, *2 (M.D.Tenn., June 5, 2012) (holding, erroneously, that once exhaustion is raised by defendants on a motion to dismiss, plaintiff must submit evidence showing exhaustion), report and recommendation adopted, 2012 WL 2872053 (M.D.Tenn., July 12, 2012).
of material factual dispute remains with the defendants. Decisions suggesting that, e.g., once defendants produce evidence of non-exhaustion, “the burden shifts to Plaintiff to establish that a failure to exhaust was due to the unavailability of remedies,” are erroneous.

One circuit in an unpublished case has stated, more subtly: “Although a defendant generally bears the burden of proving an affirmative defense, like exhaustion, a plaintiff typically bears the burden of establishing an exception to it. . . .” In that case, the prisoner argued that the remedy was not available to him under the circumstances. In my view, it is mistaken to characterize this argument as an “exception” to exhaustion. The exhaustion requirement is statutory, and the statute states that prisoners must exhaust “such administrative remedies as are available.” The exhaustion defense, stated more precisely, must be the claim that the prisoner plaintiff did not comply with the statute. If defendants have the burden of proof of the defense, they must have the burden of proving that the remedy was actually available, since availability is an essential term of the statute and not an exception to it.

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331 Johnson v. District of Columbia, 869 F.Supp.2d 34, 38 (D.D.C. 2012) (emphasis supplied); accord, Williams v. Gavins, 2013 WL 5408638, *6 (M.D.Pa., Sept. 25, 2013) (referring to plaintiff’s “exacting burden” to show non-exhaustion resulted from his being misled or impeded or by other extraordinary circumstances). So is Garcia v. Steed, 2010 WL 3001849, *1 (D.Kan., July 28, 2010), in which the defendants, having pled non-exhaustion, moved for a more definite statement concerning exhaustion. The court acknowledged that exhaustion is an affirmative defense and not a pleading requirement, but stated:

Unless plaintiff now comes forth with actual facts or exhibits including the dates and contents of his grievances and administrative appeals showing that he did exhaust all available administrative remedies in a timely and proper manner on the claims raised in his complaint prior to filing his complaint, this action is subject to being dismissed under § 1997e(g) for failure to exhaust. Plaintiff will be given time to show that he fully and properly exhausted administrative remedies on his claims.

Thus, the court apparently contemplated dismissal without requiring the defendants to come forward with any evidence at all of non-exhaustion.

332 Surles v. Andison, 678 F.3d 452, 456 (6th Cir. 2012) (noting the argument contradicts Jones v. Bock’s holding that exhaustion is an affirmative defense).

333 Moore v. Feinerman, 515 Fed.Appx. 596, 598-99 (7th Cir. 2013); accord, Still v. Schmidt, 2013 WL 1091745, *5 (D.Alaska, Mar. 15, 2013) (holding that once defendants show lack of exhaustion, the plaintiff has the burden to show the remedy was not available).

Similarly, a panel of the Ninth Circuit has recently stated: “A defendant's burden of establishing an inmate's failure to exhaust is very low. . . . A defendant need only show the existence of remedies that the plaintiff did not use.” Albino v. Baca, 697 F.3d 1023, 1031 (9th Cir. 2012), rehearing en banc granted, 709 F.3d 994 (9th Cir. 2013). This statement, while it may be correct in some cases, ignores the fact that numerous factual issues may arise concerning either the availability of remedies or whether the plaintiff used or tried to use them, and defendants should have the burden of proof as to each of them that are actually at issue, as discussed in this section. Appropriately, the case has been ordered to be reheard en banc.


335 The authority cited in Moore for its assertion of the plaintiff’s burden consists of cases about equitable tolling of statutes of limitations, 515 Fed.Appx. at 599, which are more plausibly characterized as exceptions to the limitations defense.
Defendants’ burden of establishing non-exhaustion encompasses, first, showing that there was an available remedy at the relevant time and place for the particular complaint raised by the prisoner, and what it was. 336

Many decisions have held that it is defendants’ burden to establish that a remedy was made known to prisoners. 338 However, other decisions have held that officials are not obliged

336 Of course if the plaintiff does not respond to a summary judgment motion asserting non-exhaustion, the defendants’ evidence or statement of material facts may be taken as admitted, and summary judgment granted regardless of the adequacy of defendants’ evidence. Townsel v. Raupp, 2013 WL 6842474, *5 (E.D.Mich., Dec. 27, 2013) (holding evidence that might be inadequate if contested supported summary judgment when uncontested); Bell v. Blume, 2009 WL 5172969, *3 (M.D.Pa., Dec. 30, 2009).

337 See Brown v. Valoff, 422 F.3d 926, 940 (9th Cir. 2005) (“Establishing, as an affirmative defense, the existence of further ‘available’ administrative remedies requires evidence, not imagination.”); Gardner v. County of Baldwin, 2014 WL 171839, *17 (S.D. Ala., Jan. 15, 2014) (holding defendants failed to meet their burden where they failed to submit the grievance policy that was in effect at the time of plaintiff’s grievances); Beltran-Ojeda v. Doe, 2013 WL 6059242, *1 (D.Ariz., Nov. 18, 2013) (“To demonstrate that there were remedies available, Defendants must submit adequate and complete documents of the grievance system. . . .”), reconsideration denied, 2014 WL 1047148 (D.Ariz., Mar. 18, 2014); Lawrence v. Rucker, 2013 WL 3490956, *3 (M.D.Ga., July 10, 2013) (“Although Plaintiff acknowledges that there was a grievance procedure at Wilcox State Prison, there is nothing in the record to show what the grievance procedure entails. Defendants have failed to present evidence of the grievance procedure or affidavits of prison officials describing the available grievance procedure. . . .”); Peterson v. Stephens, 2013 WL 1386673, *3 (D.S.C., Mar. 7, 2013) (denying summary judgment to defendants who presented no evidence concerning the alleged remedy), report and recommendation adopted, 2013 WL 1386676 (D.S.C., Apr. 4, 2013); Dubois v. Washoe County Jail, 2013 WL 100940, *2 (D.Nev., Jan. 7, 2013) (declining to dismiss where defendants provided no information about the grievance policy or its availability to a prisoner transferred immediately); Lawson v. Youngblood, 2012 WL 5356058, *3 (E.D.Cal., Oct. 30, 2012) (holding defendants failed to meet their burden by establishing the grievance procedures), report and recommendation adopted, 2012 WL 6047161 (E.D.Cal., Dec. 5, 2012; see Appendix A for additional authority on this point; see also n.1032 (citing cases so holding with respect to prisoners transferred away from the place where the claim arose before they had injured). But see Napier v. Laurel County, Ky., 636 F.3d 218, 224 (6th Cir. 2011) (holding that prisoners are obliged to try to use the grievance policy unless it specifically precludes them from grieving; “We are not requiring that a prisoner utilize every conceivable channel to grieve their case, but even when a policy is vague, a prisoner must do what is required by the grievance policy.”). In Napier, the question was whether the grievance system could be used by a prisoner held in a different prison operated by another jurisdiction. Cf. Johnson v. Visvardis, 2012 WL 1204389, *3 (N.D.Ill., Apr. 11, 2012) (dismissing for non-exhaustion despite defendants’ failure to submit the grievance procedure; no discussion of whether the complaint was within the scope of the policy.)

In Strole v. Coats, 2005 WL 1668900, *3 (M.D.Fla., July 11, 2005), the court took judicial notice of documents in its files showing that there is a grievance procedure at a particular jail, without mentioning how or whether it was established that that procedure was in effect at the time of the events complained of by the current plaintiff. Accord, Lefebvre v. Pallito, 2012 WL 7198435, *5 n.9 (D.Vt., Dec. 17, 2012) (“The court takes judicial notice of this grievance procedure, as it is ‘generally known’ in this jurisdiction, and ‘can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.’ Fed.R.Evid. 201(b)”), report and recommendation adopted in part, rejected in part, 2013 WL 682741 (D.Vt., Feb. 25, 2013); see Trackling v. Tillman, 2010 WL 724356, *2 n.2 (M.D.La., Mar. 2, 2010) (taking judicial notice of the existence of a grievance process based on prior proceedings in other litigation in which the court had approved the prison rule book and subsequent modifications to it).

affirmatively to inform prisoners of a remedy as long as the prisoners have some means of finding out about it.\textsuperscript{339}

The burden to establish non-exhaustion encompasses showing that the plaintiff is a prisoner who is required to exhaust (or was at the time suit was filed).\textsuperscript{340}

Defendants must also reliably establish the failure to exhaust.\textsuperscript{341} Numerous courts have found prison officials’ affidavits and documentation asserting that a prisoner had not exhausted to be inadequate or outright inadmissible because they were conclusory,\textsuperscript{342} reflected an

\textsuperscript{339} See nn. 1078-1089 for decisions on both sides of this question.

\textsuperscript{341} One court in dicta usefully summarized what such a showing should involve:

\textquotedblright . . . [T]he affidavit on such matters should include more detailed facts about what records the person reviewed and why a review of those records should be dispositive of whether a grievance was filed and exhausted. . . . The movant should provide the court with factual information from which a reasonable person would be assured that a diligent search of the relevant records has been conducted. The affidavit should, rather than being drafted as narrowly as possible, tell the story of what the affiant did and explain to the court why that action establishes that a grievance was not filed and exhausted with regard to the allegations in the suit.


\textsuperscript{342} See Ray v. Kertes, 130 Fed.Appx. 541, 543 (3d Cir. 2005) (unpublished) (holding “conclusory statement” that “does not constitute a factual report describing the steps Ray did or did not take to exhaust his grievances” did not meet defendants’ burden); Jaros v. Illinois Department of Corrections, 2013 WL 5546189, *2-3 (S.D. Ill., Oct. 8, 2013) (holding staff affidavit stating grievance appeal was untimely, but without submission of supporting documents, failed to establish actual date of appeal and whether plaintiff had received previous decision in time for a timely appeal); Burke v. Baker, 2012 WL 1203350, *9 (W.D.Pa., Apr. 10, 2012) (holding submission of grievances without authentication and sworn declaration that they were a complete and accurate record of plaintiffs’ grievance proceedings did not meet defendants’ burden; noting plaintiff alleged that he had filed another grievance which was improperly rejected); Branhm v. Mansfield, 2009 WL 3102909, *5 (W.D.Mich., Sept. 23, 2009) (holding claim
that plaintiff only filed one grievance concerning legal mail was inadequate when they did not also file a list of all his grievances or an affidavit from the grievance coordinator in support, and where plaintiff referenced other grievances that seemed to be relevant); Harrison v. Deen, 2008 WL 5435339, *1-2 (W.D.La., Dec. 31, 2008) (conclusory affidavits that did not explain the operation of the grievance system or assert that the records had been searched, merely asserted that plaintiff filed no grievances on the subject matter, rejected); Owens v. Campbell, 2007 WL 2128244, *4 n.3 (D.S.C., Mar. 26, 2007) (where plaintiff alleged he never received a response to his grievance, defendants failed to meet their burden when they provided no evidence about their procedure or what happened to his grievance), report and recommendation adopted in part, 2007 WL 2128287 (D.S.C., July 25, 2007); Laws v. Walsh, 2003 WL 21730714, *3 n.3 (W.D.N.Y., June 27, 2003) (holding conclusory affidavit about records search and lack of appeals inadmissible).

343 Roberts v. Neal, ___ F.3d ___, 2014 WL 929047, *2-3 (7th Cir. 2014) (noting it was unclear whether defendants' records search would have uncovered the emergency grievance the plaintiff said he had submitted); Stout v. North-Williams, 476 Fed.Appx. 763, 765-66 (5th Cir. 2012) (unpublished) (noting absence of verified statement that defendants had reviewed plaintiff's grievance history for the relevant time period); Howard v. Gambino, 2011 WL 5189007, *1 (9th Cir., Nov. 2, 2011) (unpublished) (holding defendants' presentation inadequate where they "relied on a declaration by their attorney stating that she reviewed documents contained in her office file, rather than conducting a complete search of the jail's tracking system for inmate grievances and their dispositions"); White v. Whorton, 430 Fed.Appx. 621 (9th Cir. 2011) (unpublished) (holding defendants' submission of unverified grievance report "unaccompanied by a declaration describing its import or completeness, is insufficient to meet the defendants' burden to show nonexhaustion"); Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2002) (noting that defendants' affidavit does not state whether the plaintiff exhausted his appeals; their "Appeal Record" lacks a foundation and is not shown to be complete), cert. denied, 540 U.S. 810 (2003); Crawford v. Prison Health Services, 2013 WL 6255375, *4 (W.D.Mich., June 28, 2013) (holding list of plaintiff's grievances that was not authenticated, did not adequately define the time period covered, and did not establish that they were his only grievances could not support summary judgment for non-exhaustion), report and recommendation adopted, 2013 WL 6254331 (W.D.Mich., Dec. 4, 2013); see Appendix A for additional authority on this point. But see Dupree v. Pierce, 2007 WL 4565021, *4 (C.D.Ill., Dec. 21, 2007) (accepting affidavit which did not state methodology for finding the absence of a record where the plaintiff did not make allegations of specific grievances and their subjects).


345 Hicks v. Irvin, 2010 WL 2723047, *6 (N.D.Ill., July 8, 2010) (refusing to consider defendants' "Sentry" records system where they failed to establish its status as business records); Bey v. Williams, 2010 WL 1759573, *2 (D.Md., Apr. 29, 2010) (declining to dismiss for non-exhaustion where defendants cited documents, but did not produce them because they were archived); Donahue v. Bennett, 2003 WL 21730698, *4 (W.D.N.Y., June 23, 2003) (holding counsel's hearsay affirmation about a telephone call with grievance officials did not properly support their motion); see Mandeville v. Anderson, 2007 WL 4287724, *3-4 (D.N.H., Dec. 4, 2007) (declining to dismiss based on a prison official's characterization of plaintiff's complaints where the actual complaints were not submitted to court); see Mandeville v. Anderson, 2007 WL 4287724, *3-4 (D.N.H., Dec. 4, 2007) (declining to dismiss based on a prison official's characterization of plaintiff's complaints where the actual complaints were not submitted to court).
issues raised by the plaintiff, or otherwise failed to establish officials’ claims. (In a remarkable number of cases, plaintiffs have produced documentation of grievances that prison officials did not produce, had no record of, or claimed did not exist.) Several decisions have held that defendants’ summaries or characterizations of prisoners’ grievances do not sufficiently establish what matters were and were not exhausted. The absence of a record confirming

346 Surles v. Andison, 678 F.3d 452, 457 n.10 (6th Cir. 2012) (holding defendants must negate allegations that defendants interfered with plaintiff’s efforts to exhaust).

347 See Surles v. Andison, 678 F.3d at 457 (showing earlier dismissal for non-exhaustion and subsequent grievance rejections as untimely did not show non-exhaustion, since initial dismissal was under legal rules later overruled); Little v. Indiana Dept. of Corrections Com'r, 2013 WL 1149607, *6 (N.D.Ind., Mar. 19, 2013) (holding defendants did not prove their claim that plaintiff filed his appeal in the wrong place without a declaration or affidavit to that effect); Hubbard v. Houglund, 2012 WL 4469110, *7-8 (E.D.Cal., Sept. 27, 2012) (holding defendants had not met their burden of refuting plaintiff’s testimony at an evidentiary hearing that he filed a grievance which vanished), report and recommendation adopted, 2012 WL 5304773 (E.D.Cal., Oct. 25, 2012); Hise v. Arevalo, 2012 WL 928405, *5 (C.D.Cal., Feb. 8, 2012) (declining to dismiss because plaintiff declared under penalty of perjury he had taken the proper steps to file it, and defendants provided no declaration or other evidence to the contrary), report and recommendation adopted, 2012 WL 928384 (C.D.Cal., Mar. 19, 2012); Baker v. Walker, 2012 WL 761596, *5 (E.D.Cal., Mar. 8, 2012) (declining to dismiss because there was a grievance which might have exhausted the claim at issue but defendants did not place its substance in the record), report and recommendation adopted, 2012 WL 1075523 (E.D.Cal., Mar. 29, 2012); Hall v. Bendoff, 2011 WL 6288122, *6-7 (S.D.Ill., Nov. 18, 2011) (noting that grievance officer denied receiving any grievances from plaintiff, but other prison records confirmed their submission); see Appendix A for additional authority on this point.

348 See Abdul-Aziz v. Nwachukwu, 523 Fed.Appx. 128, 130 & n.3 (3d Cir. 2013) (unpublished) (noting that the defendants denied that the grievance appeal the plaintiff produced had been filed, then admitted on appeal that it had been filed); Whitmore v. Jones, 456 Fed.Appx. 747, 749-50 (10th Cir. 2012) (unpublished) (noting the state’s change of position in response to plaintiff’s producing the grievance they denied was filed); Spires v. Harbaugh, 438 Fed.Appx. 185, 187 n.2 (4th Cir. 2011) (unpublished) (noting “the State alleged to the district court that Spires availed himself of none of the avenues of administrative relief. This highly material fact is clearly disputed by Spires’ submission of copies of dismissals of his administrative remedy requests.”); Adams v. Suttmiller, 2014 WL 584749, *6 (W.D.Okla., Feb. 12, 2014) (noting plaintiff’s production of a file-stamped grievance contrary to defendants’ claim that he filed no relevant grievances); Barghouti v. Pfister, 2014 WL 509328, *4 (S.D.Ill., Feb. 10, 2014) (crediting plaintiff’s testimony that grievance he produced was submitted despite lack of record); Alsobrook v. Alvarado, 2013 WL 6246383, *8 (S.D.Fla., Dec. 3, 2013) (stating that plaintiff’s evidence of filing at least one grievance showed that defendants’ declaration stating he had filed no grievances was unreliable); LaPointe v. Bienovidas, 2013 WL 3439905, *5 (D.Ariz., July 9, 2013) (declining to infer from defendants’ lack of records that certain documents were not submitted, since they had so claimed about a grievance appeal and the plaintiff had produced the appeal); Green v. Nish, 2013 WL 4781732, *6 (M.D.Pa., Sept. 5, 2013) (noting plaintiff’s production of an appeal of which defendants had no record); see Appendix A for additional authority on this point; see also Kelly v. Tan, 2013 WL 4811913, *5 (W.D.N.Y., Sept. 10, 2013) (noting defendants’ acknowledgement of second grievance after they had initially denied it).

exhaustion does not meet defendants’ burden if plaintiff’s claim is that prison officials failed to follow the procedures that would have led to creation of such a record. If plaintiffs attach exhaustion-related documentation to their complaints, officials may not establish non-exhaustion simply by pointing to omissions in those documents, unless they also show that the documents present the complete picture of the plaintiff’s exhaustion efforts. A plaintiff’s inability to remember with certainty whether he pursued a grievance or not does not meet defendants’ burden of establishing non-exhaustion.

Officials must also show what prisoners were required to do to exhaust. If officials rely in court on procedural errors by the prisoner, they must show that they relied on those procedural errors in rejecting the prisoner’s grievance.


In Collins v. McCaughtry, 2005 WL 503818, *2 (W.D.Wis., Feb. 28, 2005), the court held that a declaration summarizing the contents of the plaintiff’s grievances was admissible under Fed.R.Ev. 1006, which allows admission of summaries of voluminous writings, etc., that cannot conveniently be examined in court. Accord, Zarco v. Burt, 355 F.Supp.2d 1168, 1174 (S.D.Cal. 2004) (holding grievance records summary admissible under Fed.R.Ev. 803(7) and 901). In Collins, the plaintiff disputed defendants’ claim that he had failed to exhaust and stated that certain of his grievances did raise the issues he was suing about. The court held that his declaration was not sufficient to establish the content of his grievances, but since the defendants had the burden of proof, they would have to submit copies of the disputed grievances. Accord, Burnette v. Bureau of Prisons, 2009 WL 1650072, *3 (W.D.La., June 10, 2009) (content of grievances was not established by an affidavit or a computer-generated list).

Drew v. Ramos, 2013 WL 5212343, *8 (N.D.Ill., Sept. 17, 2013) (denying summary judgment for non-exhaustion despite lack of record of grievances where plaintiff averred that he filed grievances through the means available to him, and that he was told by prison personnel they had been forwarded to the Administrative Review Board and he should wait for a response); Harp v. Secretary of Corrections, 2013 WL 416645, *4 & n.7 (D.S.D., Jan. 31, 2013) (denying summary judgment for non-exhaustion; noting that if plaintiff’s account of a non-responsive grievance system is true, documentation of his efforts would not be available to him); Bratchett v. Braxton Environmental Services, Corp., 2012 WL 781099, *2 (E.D.Wis., Mar. 7, 2012); Badwi v. Hedgpeth, 2012 WL 479192, *4 (N.D.Cal., Feb. 14, 2012) (holding lack of a record of receiving appeal did not establish non-exhaustion; “if a claim of nonreceipt were sufficient to foreclose exhaustion, prison officials, in effect, would have complete control over whether a prisoner could pursue a civil action in federal court. Moreover, a prisoner’s rights would be dependent upon the accuracy of the defendant’s record-keeping priorities.”); Jacobs v. Woodford, 2011 WL 1584429, *4 (E.D.Cal., Apr. 26, 2011), report and recommendation adopted, 2011 WL 2262494 (E.D.Cal., June 7, 2011); see Appendix A for additional authority on this point.


Breedland v. Baker, 439 Fed.Appx. 93, 96 (3d Cir. 2011) (unpublished) (“Without any showing concerning the specific policy that Breedland allegedly violated,” summary judgment for non-exhaustion was inappropriate);
In practice, courts have sometimes rejected plaintiffs’ submissions as conclusory, insufficiently detailed, or uncorroborated, in some instances doing so in ways arguably inconsistently with the usual rules for assessing evidence.\textsuperscript{355}

3. Waiver

As an affirmative defense, exhaustion may be waived by failure to raise it, or to raise it timely.\textsuperscript{356} One court has distinguished between waiver (“the intentional relinquishment of a

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Beltran-Ojeda v. Doe, 2013 WL 3742410, *3 (D.Ariz., July 17, 2013) (declining to dismiss where defendants submitted different and contradictory accounts of their medical grievance process); Peterson v. Stephens, 2013 WL 1386673, *3 (D.S.C., Mar. 7, 2013), report and recommendation adopted, 2013 WL 1386676 (D.S.C., Apr. 4, 2013); Avery v. Pagel, 2013 WL 593438, *2 (E.D.Wis., Feb. 15, 2013) (“I cannot determine that plaintiff failed to exhaust the Jail's grievance procedure if I do not know what that procedure is.”), reconsideration denied, 2013 WL 5570417 (E.D.Wis., Oct. 9, 2013); Lawson v. Youngblood, 2012 WL 6047161, *1 (E.D.Cal., Dec. 5, 2012); Lassiter v. Sherrrr, 2011 WL 4594203, *4 (D.N.J., Sept. 30, 2011) (declining to dismiss for non-exhaustion absent record evidence of grievance appeal procedure as of the time plaintiff was in the jail); Lewis v. Morehouse Detention Center, 2011 WL 1790466, *8 (W.D.La., Mar. 3, 2011) (declaring to dismiss where defendants did not submit actual grievance policy stating deadlines and filing requirements), report and recommendation adopted, 2011 WL 1790458 (W.D.La., May 10, 2011); Ingram v. Sanders, 2010 WL 4924791, *2 (W.D.Ark., Nov. 8, 2010) (citing defendants’ failure to “indicate how inmates obtain grievance forms, who the forms are submitted to, who respond[s] to the grievances, and where the grievances are placed after they are submitted,” or to “set forth the steps of the grievance procedure or [to] indicate[] if the use of facility forms is mandated”), report and recommendation adopted, 2010 WL 4924785 (W.D.Ark., Nov. 29, 2010); McKeown v. Kermell, 2010 WL 597191, *4 (D.S.C., Feb. 12, 2010); Allen v. Warden of Dauphin County Jail, 2009 WL 4406121, *6 (M.D.Pa., Nov. 25, 2009) (defendants had the burden of showing what steps were available to a prisoner who received no answer to his grievances); Perry v. Torres, 2009 WL 2957277, *3-4 (S.D.N.Y., Sept. 16, 2009) (defendants had the burden of showing what procedures plaintiff should have followed when he received no decision on his initial grievance); Houseknecht v. Doe, 653 F.Supp.2d 547, 560 (E.D.Pa. 2009) (defendants had the burden of showing that a prisoner who made an informal complaint and was told his allegations would be investigated was also required to grieve formally); Brown v. Bynum, 2009 WL 1298203, *4 (E.D.Va., May 8, 2009) (rejecting non-exhaustion where defendants did not show that the rules and options they asserted actually existed or that prisoners were notified of them); Ayala v. C.M.S., 2008 WL 2676602, *3 (D.N.J., July 2, 2008) (where plaintiff said he was unable to pursue administrative remedies, defendants’ failure to establish their policy’s requirements made it impossible for the court to assess plaintiff’s claim).

\textsuperscript{354} Olney v. Hartwig, 323 Fed.Appx. 598, 599 (9th Cir. 2009) (unpublished) (“There is no indication that Olney's grievance was rejected for the procedural bases urged by the defendants, thus they have not met their burden of demonstrating nonexhaustion.”). If prison officials decide the merits of a grievance despite procedural errors, those defects are waived and cannot be relied upon to seek dismissal for non-exhaustion. \textit{See} cases cited in nn. 796-797.

\textsuperscript{355} \textit{See} 444-448, below for further discussion of this issue.

\textsuperscript{356} Handberry v. Thompson, 446 F.3d 335, 342-43 (2d Cir. 2006) and cases cited (finding waiver); Johnson v. Testman, 380 F.3d 691, 695-96 (2d Cir. 2004) (holding the defense was waived by failure to assert it in the district court); Smith v. Mensinger, 293 F.3d 641, 647 n.3 (3d Cir. 2002); Randolph v. Rodgers, 253 F.3d 342, 348 n. 11 (8th Cir. 2001); Perez v. Wis. Dept. of Corr., 182 F.3d 532, 536 (7th Cir. 1999); Henricks v. Pickaway Corr. Inst., 2013 WL 4804983, *1-2 (S.D.Ohio, Sept. 9, 2013) (holding defense waived by two-year failure to answer the complaint, absent a showing of diligence or excusable neglect); Ervin v. Wilson, 2013 WL 2317234, *2 (D.Colo., May 24, 2013) (holding defendant who did not raise exhaustion on motion to dismiss could not raise it in objections to magistrate judge’s decision); Blake v. Maynard. 2012 WL 5568940, *3-4 (D.Md., Nov. 14, 2012) (holding defendant who did not raise non-exhaustion in answer or in response to motion waived the defense, even though another defendant successfully pursued it); Vector v. SCI Smithfield, 2011 WL 3584781, *9 (M.D.Pa., Aug. 12, 2011) (holding argument that plaintiff filed suit before completing exhaustion was waived where defendants pled non-exhaustion generally but not lack of timely exhaustion); Leybinsky v. Millich, 2004 WL 2202577, *2 (W.D.N.Y., Sept. 29, 2004) (holding defense waived where it was omitted from answer and not raised until after discovery closed and the case was trial ready); see Alexander v. Fritch, 396 Fed.Appx. 867, 873 (3d Cir. 2010) (unpublished) (holding that acceding to filing of a supplemental complaint with unexhausted claims waives
known right”) and forfeiture (“the failure to make a timely assertion of a right”), and held that the non-assertion of untimeliness by officials in the grievance process constituted forfeiture where there was no evidence that it was intentional.\(^{357}\) Most courts do not make this distinction and refer only to waiver.

Ordinarily, affirmative defenses including exhaustion are required to be pled in the answer or raised by motion to dismiss.\(^{358}\) An omitted exhaustion defense may be asserted in an exhaustion as to them). Compare Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 679-80 (4th Cir. 2005) (rejecting the argument that exhaustion defense is “not forfeitable”) with Chase v. Peay, 286 F.Supp.2d 523, 531 (D.Md. 2003) (noting that in the Fourth Circuit affirmative defenses are not waived except for unfair surprise or prejudice), aff’d, 98 Fed.Appx. 253 (4th Cir. 2004). See Johnson v. California, 543 U.S. 499, 528 n.1 (2005) (Thomas, J., dissenting) (stating that the majority assumed exhaustion is nonjurisdictional and waivable by its failure to inquire about it). But see Vega v. Lantz, 2009 WL 3157586, *3 (D.Conn., Sept. 25, 2009) (defendants raised the defense by pleading it generally and were not required to specify in their answer which claims they were unexhausted).


amended answer, but courts may deny such amendments when they are sought late in the case. The filing of an amended complaint ordinarily revives defendants’ right to raise exhaustion and other defenses. There is some variation in procedural practice among federal courts. For example, some courts allow exhaustion to be raised for the first time by summary judgment motion, particularly if the court deems the defense raised at a “pragmatically failure to raise it in first motion to dismiss, since a motion is not a pleading): Almasleh v. U.S., 2008 WL 356486, *3 (W.D.Pa., Feb. 7, 2008) (holding omission of exhaustion from first motion to dismiss did not waive it).

Some courts have held that under the Ninth and Eleventh Circuit’s “matter in abatement” approach to exhaustion, an exhaustion defense cannot be raised after the answer; “unenumerated” Rule 12(b) motions must be made before the answer. Logan v. Chestnut, 2010 WL 3385026, *2 (M.D.Fla., Aug. 26, 2010); accord, Anaya v. Campbell, 2011 WL 4458769, *9-11 (E.D.Cal., Sept. 23, 2011) (holding Rule 12(b) motion to dismiss for non-exhaustion untimely when filed many months after answers).


One court has asserted: “Failure to exhaust administrative remedies is not a defense that is waived by failing to assert it prior to a responsive pleading, and it can be asserted at any time before or during trial. See Fed.R.Civ.P. 12(b).” Cohron v. City of Louisville, Ky., 2012 WL 1015789, *1 (W.D.Ky., Mar. 22, 2012), aff’d, 530 Fed.Appx. 534 (6th Cir. 2013) (unpublished), cert. denied, 134 S.Ct. 1029 (2014).

sufficient time” with no prejudice to the plaintiff.\textsuperscript{364} One creative defendant has unsuccessfully sought to raise an otherwise waived exhaustion defense by pretrial motion \textit{in limine}.\textsuperscript{365}

Pleading aside, the exhaustion defense may be waived by failing to pursue it reasonably promptly during the course of the litigation.\textsuperscript{366} However, one recent appellate decision has “decline[d] to read a strict timing requirement into the PLRA for prosecution of the affirmative defense of failure to exhaust,” relying on the Supreme Court’s direction to lower courts not to invent rules for PLRA exhaustion that are contrary to usual litigation practices without a textual basis in the statute.\textsuperscript{367} There, the defendant had failed to seek dismissal for non-exhaustion until seven months after the deadline for dispositive motions; the court held that the governing standard was the requirement of Fed.R.Civ.P. 6(b) that requests to file a motion after the deadline set in a scheduling order must be made by motion based on a finding of excusable neglect.\textsuperscript{368} It is not clear whether the court intended to hold that missing the dispositive motions


\textsuperscript{364} Campfield v. Tanner, 2011 WL 4368723, *5 (E.D.La., Aug. 16, 2011) (allowing exhaustion defense raised for the first time in response to plaintiff’s summary judgment motion, since it was raised at a “pragmatically sufficient time” and plaintiff was not prejudiced), \textit{report and recommendation adopted as modified}, 2011 WL 4368842 (E.D.La., Sept. 19, 2011); Tyner v. Donald, 2007 WL 842131, *2 n.1 (M.D.Ga., Mar. 16, 2007) (holding defense may be raised at a “pragmatically sufficient” time if there is no prejudice to the plaintiff; allowing defense to be raised in third summary judgment motion).


\textsuperscript{366} Keup v. Hopkins, 596 F.3d 899, 904-05 (8th Cir. 2010) (holding exhaustion defense was waived by failure to raise it at trial after earlier denial of summary judgment); Handberry v. Thompson, 446 F.3d 335, 342-43 (2d Cir. 2006) (holding that a defendant who disclaimed exhaustion at the pleading stage, then reasserted it later based only on information available at the pleading stage, had waived); Johnson v. Testman, 380 F.3d 691, 695-96 (2d Cir. 2004) (finding waiver); Hackworth v. Torres, 2013 WL 3815882, *3 (E.D.Cal., July 22, 2013) (holding exhaustion defense was waived by not pleading it within the deadline for dispositive motions); Nirtington v. Poland, 2009 WL 5069014, *1-2 (S.D.Ind., Dec. 15, 2009) (holding exhaustion defense that was pled, but not pursued for four years until the time of trial, was waived); Jones v. Grubman, 2009 WL 3049216, *2 (S.D.Ill., Sept. 18, 2009) (defendants waived exhaustion, even though they pled it in their answer, by failing to pursue the defense for two years until the final pre-trial conference); Stevenson v. Hochberg, 2009 WL 1490828, *4 (D.N.J., May 26, 2009) (finding waiver where defendant pled exhaustion in answer but then engaged in nine months of litigation without pursuing the defense); Ludy v. Sherman, 2007 WL 320831, *7 (W.D.Pa., Jan. 30, 2007) (holding that court “is compelled to address the merits” of a claim as to which defendants disavowed an exhaustion defense); Williams v. Illinois Dept. of Corrections, 1999 WL 1068669, *3-4 (N.D.Ill., Nov. 17, 1999) (holding defendant who moved to dismiss for non-exhaustion, withdrew the motion, and after two years had not reasserted it had waived). \textit{But see} Giraldes v. Prebula, 2012 WL 4747240, *4 (E.D.Cal., Oct. 4, 2012) (on reconsideration, holding that failure to pursue non-exhaustion before eve of trial and after close of motion deadline did not waive defense where it had been raised in an amended complaint); Haj-Hamed v. Rushing, 2010 WL 2650174, *3 (N.D.Ohio, July 2, 2010) (defense was not waived by failure to raise it in response to motion for a temporary restraining order); Short v. Walls, 2010 WL 839430, *4 (S.D.W.Va., Mar. 5, 2010) (defense was not waived by delay of a year and a half between its assertion in answer and motion for summary judgment based on non-exhaustion), \textit{aff’d}, 412 Fed.Appx. 565 (4th Cir. 2011) (unpublished).


\textsuperscript{368} \textit{Drippe}, 604 F.3d at 782-83 (citing Lujan v. National Wildlife Federation, 497 U.S. 871 (1990)).
deadline without excusable neglect is the only circumstance in which non-exhaustion, once pled, can be procedurally waived.

Some courts, but not the Second Circuit, have tied waiver to a showing of prejudice. However, it is clear in any court including those in the Second Circuit that a claim of waiver is strongly supported by a showing of prejudice. In some cases, courts have allowed relief from waiver based on changes in exhaustion law during a case’s pendency.

369 Curtis v. Timberlake, 463 F.3d 709, 711 (7th Cir. 2005) (noting that circuit holds affirmative defenses are waived by late assertion only if the plaintiff was harmed as a result); Panaro v. City of North Las Vegas, 432 F.3d 949, 952 (9th Cir. 2005); Redd v. Daley, 2009 WL 2941527, *3-4 (N.D.Cal., Sept. 10, 2009) (holding exhaustion, omitted from a summary judgment motion, could be raised by a motion to dismiss after the deadline for dispositive motions); Burks v. Pate, 2005 WL 4859266, *4 (D.S.C., Aug. 5, 2005) (holding that defendants did not waive non-exhaustion by failing to raise it in their first summary judgment motion; stating affirmative defense is not waived if defendant “raised the issue at a pragmatically sufficient time and [the plaintiff] was not prejudiced in its ability to respond”) (citation omitted).

370 See Handberry v. Thompson, 446 F.3d 335, 343 (2d Cir. 2006) (noting that plaintiffs could have timely exhausted and returned to court had the defense been timely raised); Giraldes v. Prebula, 2013 WL 1876500, *5-7 (E.D.Cal., May 3, 2013) (applying law of the case to adhere to earlier finding of waiver, despite later finding of non-exhaustion, in 11-year-old trial ready case where dismissal would bar claims because of expiration of limitations period); Espey v. Spectrum Health System, Inc., 2011 WL 2516638, *12 (M.D.Tenn., June 23, 2011) (holding defense waived where it was raised only in a summary judgment motion after plaintiff had been released from prison and could not cure non-exhaustion, with a trial date in a month), report and recommendation adopted, 2011 WL 2946709 (M.D.Tenn., July 20, 2011); Bonilla v. Janovick, 2005 WL 61505, *2 (E.D.N.Y. Jan. 7, 2005) (holding defense waived where it was not asserted for two years and eight months after Porter, plaintiff would have to expend additional resources and his long-pending case would be delayed, and further discovery and additional dispositions would be needed to determine whether special circumstances excusing failure to exhaust were present); Thomas v. Keyser, 2004 WL 1594865, *2 (S.D.N.Y., July 16, 2004) (declining to allow assertion of non-exhaustion after 21 months of delay, where plaintiff would be prejudiced by having to refile after investing time and effort in completing discovery); Hightower v. Nassau County Sheriff’s Dep’t, 325 F.Supp.2d 199, 205 (E.D.N.Y. 2004) (holding defense waived where raised only after trial, after 23 months’ delay and plaintiffs’ loss of opportunity to take discovery), vacated in part on other grounds, 343 F.Supp.2d 191 (E.D.N.Y., Nov. 1, 2004); see also Rahim v. Sheahan, 2001 WL 1263493, *6-7 & n.3 (N.D.Ill., Oct. 19, 2001) (noting that one plaintiff was deceased and would not be able to exhaust and refile); Orange v. Strain, 2000 WL 158328 (E.D.La., Feb. 10, 2000) (finding waiver where the defense was asserted after the passage of two years and the plaintiff’s transfer out of the county jail at issue, presenting “myriad logistical difficulties” to his exhausting), aff’d, 252 F.3d 436 (5th Cir. 2001) (unpublished).

371 See Wisenbaker v. Farwell, 2010 WL 3385303, *5 (D.Nev., June 7, 2010) (allowing defense to be raised after Woodford v. Ngo changed circuit law), report and recommendation adopted, 2010 WL 3385310 (D.Nev., Aug. 24, 2010); Guizar v. Woodford, 2010 WL 250508, *4-5 (N.D.Cal., Feb. 8, 2010) (allowing defense to be pursued after its omission from a 2006 summary judgment motion because Woodford v. Ngo and later Ninth Circuit decisions clarified the law). In one case where the defendants sought relief from waiver on the ground that the law had changed to bring the claim within the exhaustion requirement, the court conditioned the relief on prison officials’ permitting the prisoner to exhaust late, since the prisoner, too, had relied on prior law. As the court put it: “In other words, DOCs cannot have it both ways.” Rivera v. Goord, 2003 WL 1700518, *13 (S.D.N.Y., Mar. 28, 2003). The change in law was the Supreme Court’s decision in Porter v. Nussle, 534 U.S. 516 (2002); reversing the Second Circuit’s holding that use of force claims were not subject to the exhaustion requirement. But see Robertson v. Vandt, 2008 WL 752589, *8 (E.D.Cal., Mar. 19, 2008) (dismissing for non-exhaustion in situation like Rivera where prisoner’s grievance filed after change in law was dismissed as untimely); Wilson v. Hendel, 2005 WL 775902, *3-4 (W.D.N.Y., Apr. 6, 2005) (holding defense waived where it was not asserted after Porter v. Nussle and defendants did not respond to plaintiffs’ waiver argument).

Rivera’s holding has been overtaken by the broader one in Rodriguez v. Westchester County Jail Correctional Dep’t. 372 F.3d 485, 487 (2d Cir. 2004), which held that a prisoner had acted reasonably in failing to exhaust, and could therefore proceed without exhaustion if remedies were no longer available, because his actions
Prison officials may also waive the defense in the administrative process; if they decide the merits of the grievance, they cannot later rely on the prisoner’s procedural missteps as a basis for dismissal. They may also waive compliance with particular rules simply by accepting non-compliant actions by the prisoner. One court has rejected the argument by a prison employee that the correction agency could not waive or forfeit a procedural defense on the employee’s behalf in the grievance process. The court held that since the exhaustion requirement is intended to serve certain institutional purposes, and since the grievance system at issue did not give individual employees a role in controlling the resolution of grievances, the employee was bound by the grievance system’s failure to enforce particular rules.

Even when the exhaustion defense as a whole is not waived, particular arguments may be waived procedurally by failure to assert them timely.

4. Procedural Vehicles for Raising Exhaustion

The courts are divided over how to decide exhaustion disputes. Since the Supreme Court has held that exhaustion is an affirmative defense and not a pleading requirement, it cannot properly be addressed at initial screening or by motion under Fed.R.Civ.P. 12(b)(6) for failure to state a claim, except in those cases where non-exhaustion is clear on the face of the complaint. Motions under Rule 12(b)(1), Fed.R.Civ.P., for lack of subject matter jurisdiction are equally inapposite, since failure to exhaust is not jurisdictional. Courts have rejected efforts to litigate exhaustion by motion in limine.

Many courts have addressed exhaustion on motion for summary judgment as a matter of course. In some cases, motions under Rule 12(b)(6) are converted to summary judgment when consistent with the erroneous legal position that the Second Circuit itself had adopted. But see Robertson v. Vandt, 2008 WL 752589, *8 (E.D.Cal., Mar. 19, 2008) (dismissing for non-exhaustion in situation like Rivera where prisoner’s grievance filed after change in law was dismissed as untimely).

See cases cited in nn. 796-797, below.

Rodriguez v. Miramontes, 2012 WL 1983340, *6 (D.Ariz., June 4, 2012) (even if defendant was not “appropriate unit staff” to receive an Informal Resolution, once he accepted it, the plaintiff had the right to rely on the acceptance).


Drew v. Ramos, 2013 WL 5212343, *9 (N.D.Ill., Sept. 17, 2013) (holding argument based on failure to name employees of medical contractor individually was waived by asserting it only in a reply brief on a summary judgment motion).

Jones v. Bock, 549 U.S. 199, 212-16 (2007). In courts where exhaustion was formerly viewed as a pleading requirement, it was often addressed at the initial screening stage, and some courts held that it had to be. See Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1211 (10th Cir. 2003), cert. denied, 543 U.S. 925 (2004); Baxter v. Rose, 305 F.3d 486, 490 (6th Cir. 2002). Those decisions are overruled by Jones.

See § IV.D.1, above.

See n. 201, above.


See, e.g., Breeland v. Baker, 439 Fed.Appx. 93, 96 (3d Cir. 2011) (unpublished) (reversing summary judgment on exhaustion without prejudice to renewed summary judgment motion); Hernandez v. Coffey, 582 F.3d 303, 308-09 (2d Cir. 2009) (holding that the usual requirement to notify pro se litigants of the nature and consequences of summary judgment applies to summary judgment motions asserting non-exhaustion); Fargas v. U.S., 334 Fed.Appx. 40 (8th Cir. 2009) (granting summary judgment, noting applicability of procedure to exhaustion); Hinojosa v.
because they are supported by extrinsic matter,\textsuperscript{381} sometimes with provisos for relevant discovery.\textsuperscript{382} I am not sure why it makes sense to convert a mis-framed motion to dismiss, rather than deny it without prejudice to the defendants’ filing a proper summary judgment motion. In any case a number of courts have declined to convert when presented with extrinsic materials on a motion to dismiss for non-exhaustion, sometimes citing, e.g., “plaintiff’s incarceration, his pro se status, and the lack of any discovery, the Court declines to convert defendants’ motion.”\textsuperscript{383}

If there is a material factual dispute, summary judgment must ordinarily be denied, and the factual dispute reserved for the trier of fact.\textsuperscript{384} Exhaustion disputes would therefore go to a

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\textsuperscript{381} Dowdy v. Hercules, 2010 WL 169624, *4 (E.D.N.Y., Jan. 15, 2010); accord, McNair v. Rivera, 2013 WL 4779033, *6-7 (S.D.N.Y., Sept. 6, 2013) (declining to convert where defendants had not provided or alluded to any documents that would be dispositive); Pratt v. City of New York, 2012 WL 4948051, *6-7 (S.D.N.Y., Oct. 11, 2012) (converting motion to summary judgment, giving notice, directing discovery and a briefing schedule where plaintiff alleged grievance personnel told him “there was nothing else I could do” and he had been “running back and forth to grievance”); Kellogg v. New York State Dept. of Correctional Services, 2009 WL 2058560, *3 (S.D.N.Y., July 15, 2009) (converting motion to summary judgment, finding factual conflict on existing record, directing discovery under Rule 56(f) on exhaustion with leave to renew motion thereafter).

\textsuperscript{382} Dirig v. Wilson, 2013 WL 5701075, *3 (N.D.Ind., Oct. 18, 2013) (converting motion to summary judgment but granting plaintiff’s motion for a subpoena to obtain medical records needed to support his allegations); Stevens v. City of New York, 2012 WL 4948051, *6-7 (S.D.N.Y., Oct. 11, 2012) (converting motion to summary judgment, giving notice, directing discovery and a briefing schedule where plaintiff alleged grievance personnel told him “there was nothing else I could do” and he had been “running back and forth to grievance”); Kellogg v. New York State Dept. of Correctional Services, 2009 WL 2058560, *3 (S.D.N.Y., July 15, 2009) (converting motion to summary judgment, finding factual conflict on existing record, directing discovery under Rule 56(f) on exhaustion with leave to renew motion thereafter).

\textsuperscript{383} In McCoy v. Goord, 255 F.Supp.2d 233 (S.D.N.Y. 2003), the court stated that where non-exhaustion is not clear from the face of the complaint, a motion to dismiss should be converted to a motion for summary judgment “limited to the narrow issue of exhaustion and the relatively straightforward questions about the plaintiff’s efforts to exhaust, whether remedies were available, or whether exhaustion might be, in very limited circumstances, excused. . . .” 255 F.Supp.2d at 251.

jury if one has been requested, and several courts have so held, in some cases because affirmative defenses are usually for the jury, in others because factual disputes in general are usually viewed as the province of the jury.

However, a series of federal appellate decisions have departed from this usual practice (and overruling some of the cited cases) in various ways, all of them leading to the conclusion that exhaustion disputes are for court and not jury. The first of these was the Ninth Circuit’s holding that failure to exhaust is “a matter in abatement, which is subject to an unenumerated Rule 12(b) motion, rather than a motion for summary judgment,” since “summary judgment is on the merits, whereas dismissal for failure to exhaust” is not. As a “matter in abatement,” the court said, exhaustion is not subject to the same rules as matters going to the merits, and courts may decide factual disputes concerning it on motion, subject only to the “clearly erroneous” standard of appellate review. To this end, “the court may look beyond the pleadings.”


Bailey v. Fortier, 2010 WL 4005258, *7 n.7 (N.D.N.Y., Aug. 30, 2010) (finding no “cogent basis . . . to distinguish failure to exhaust from other affirmative defenses including, for example, statute of limitations, which are often presented to juries or decided by the court based upon a jury’s resolution of critical fact disputes”), report and recommendation adopted, 2010 WL 3999629 (N.D.N.Y., Oct. 12, 2010); Maraglia v. Maloney, 499 F.Supp.2d 93, 94 (D.Mass. 2007) (noting that Jones v. Bock said to treat exhaustion like other affirmative defenses, and that these are usually jury issues); Lunney v. Brureton, 2007 WL 1544629, *10 n.4 (S.D.N.Y., May 29, 2007) (same), objections overruled, 2007 WL 2050301 (S.D.N.Y., July 18, 2007); see Finch v. Sverello, 2008 WL 4527758, *8 & n.5 (N.D.N.Y., Sept. 29, 2008) (denying summary judgment on sparse record, inviting renewed motion after discovery with briefing whether exhaustion is for the jury or the court).


Ritzo v. Int’l Longshoremen’s and Warehousemen’s Union, 837 F.2d 365, 369 (9th Cir. 1988) (per curiam), cited in Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied, 540 U.S. 810 (2003); see Wiseman v.
Despite this seemingly definitive pronouncement, the relationship of the “matter in abatement” approach to summary judgment, and to the ability of courts to resolve factual disputes remains unsettled. Some district courts applying the matter in abatement procedure have emphasized its similarity to summary judgment, stating that credibility issues cannot be decided on motion. Others have not hesitated to make credibility judgments.

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Akhtar v. Mesa, 698 F.3d 1202, 1209 (9th Cir. 2012) (citing Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.2003)) (holding district court should have considered grievance documentation submitted by plaintiff).


See, e.g., Coley v. Baca, 2013 WL 5773342, *5-6 (C.D.Cal., Oct. 23, 2013) (rejecting plaintiff’s testimony that he filed a grievance that was never responded to in the absence of corroboration and in light of evidence that jail officials responded when he complained to the ACLU; noting failure to submit a copy of the grievance undermined his credibility); Hughes v. City of Mariposa, 2012 WL 6651146, *5-6 (E.D.Cal., Dec. 20, 2012) (finding prison staff more credible than plaintiff on his claim that they threw his grievance away); DeVon v. Diaz, 2012 WL 4433318, *4 (E.D.Cal., Sept. 24, 2012) (finding plaintiff who timely signed his grievance incredible as to claim he mailed it timely); Adducci v. Harrington, 2010 WL 4977569, *5 (E.D.Cal., Dec. 2, 2010) (finding plaintiff incredible based on his prior statements in the administrative process); Tho Trong Le v. Resler, 2009 WL 5126124, *6 (S.D.Cal., 74
instances, courts have held evidentiary hearings to determine exhaustion questions, without indicating whether a hearing is required, or in what circumstances it might be.\textsuperscript{392} Interestingly, a recent unpublished Ninth Circuit decision in a factually contested exhaustion case holds that credibility may be decided without an evidentiary hearing only “[i]n rare instances—instances in which it is possible to ‘conclusively’ decide credibility based on documentary testimony and evidence in the record,” and that in the absence of such certainty, defendants should request an evidentiary hearing, and the court should hold one absent a request if it does not accept the plaintiff’s declaration.\textsuperscript{393} It is hard to see much daylight between this “conclusiveness” requirement and the summary judgment standard. The court did not refer to matters in abatement, and cited the leading case on that subject, \textit{Wyatt v. Terhune}, only in passing. Further, the same court has also held that a motion to dismiss for non-exhaustion is subject to the same rule as is a summary judgment motion requiring notice to \textit{pro se} prisoners of the nature and possible consequences of the motion and the need to respond with a factual presentation.\textsuperscript{394}

The matter in abatement approach rests on apparently idiosyncratic Ninth Circuit precedent, and for several years, courts outside the Ninth Circuit mostly rejected it or ignored it.\textsuperscript{395} Some district courts have articulated strong reasons to reject it. Thus, one court has pointed out that contrary to the \textit{Wyatt} opinion, summary judgment is not necessarily on the merits, and further, that the Federal Rules of Civil Procedure specify what defenses may be raised by motion, and do so exclusively, meaning that there is no such thing under the rules as an “unenumerated” Rule 12(b) motion.\textsuperscript{396} Another has added the observations that pleas in abatement were abolished in 1938 by the adoption of the Federal Rules of Civil Procedure, and that the most recent Sixth Circuit decision addressing a matter in abatement is more than 100 years old.\textsuperscript{397}

The Eleventh Circuit, however, has adopted the matter in abatement approach after some backing and filling. Several decisions in the Southern District of Georgia had previously held

\textsuperscript{392} See Morton v. Hall, 599 F.3d 942, 944 (9th Cir. 2010).
\textsuperscript{393} Hubbard v. Houghland, 471 Fed.Appx. 625, 626-27 (9th Cir. 2012). \textit{But see} Anderson v. McDonald, 2013 WL 211123, *8 (E.D.Cal., Jan. 18, 2013) (holding no hearing is required where decision does not turn on credibility, but on the inadequacy of the plaintiff’s allegations).
\textsuperscript{394} Stratton v. Buck, 697 F.3d 1004, 1008 (9th Cir. 2012) (noting that such a motion is “closely analogous to a motion for summary judgment”). The court further held that failure to provide the required notice “will be harmless only in an unusual case, such as where judicial notice of district court records establishes that the pro se prisoner plaintiff recently received a proper notice in a previous action or where the pro se prisoner plaintiff’s response to the motion to dismiss for failure to exhaust administrative remedies establishes that the plaintiff has a complete understanding of the notice described in this opinion . . . [or] if the plaintiff cannot prove any set of facts that would entitle him or her to relief.” 471 F.3d at 1009. \textit{Accord}, Akhtar v. Mesa, 698 F.3d 1202, 1214-15 (9th Cir. 2012) (enforcing \textit{Stratton} holding).
\textsuperscript{397} Frees v. Duby, 2010 WL 4923535, *3. \textit{But see} Williams v. Ferguson, 2012 WL 33055, *1 n.1 (E.D.Cal., Jan. 6, 2012) (suggesting that it is only the \textit{plea} in abatement that was abolished, and the proper terminology under the Federal Rules is the \textit{motion} with respect to a matter in abatement—which is of course alive and well in the Ninth Circuit, as noted in the text).
that “exhaustion constitutes a preliminary issue for which no jury trial right exists, and therefore judges can and should make credibility determinations on exhaustion-excusal issues.” These decisions were not precedent-based but rested on the court’s view of the policies underlying the PLRA, an approach to PLRA exhaustion subsequently rejected in Jones v. Bock. Post-Jones decisions in that district then adopted the matter in abatement approach to support their conclusion, emphasizing courts’ ability to decide disputed factual questions on papers, even as courts within the Ninth Circuit backed away from that aspect of the procedure. The Eleventh Circuit then rejected this approach entirely in an unreported, non-precedential opinion, insisting like most courts at the time that summary judgment rules govern when a court addresses matters outside the pleadings on motion.

A month later, however, the court issued a precedential opinion adopting the matter in abatement approach, in response to a petition for rehearing en banc filed by the plaintiff in a case where the court had affirmed judgment for the defendant under the usual summary judgment rules. Although the published opinion presented the matter in abatement procedure as civil procedure business as usual, mingling citations to Wright & Miller and Moore’s Federal Practice with citations to Ninth Circuit cases, the dissenting member of the panel pointed out that the Eleventh Circuit, unlike the Ninth, had previously treated affirmative defenses including exhaustion of administrative remedies consistently as summary judgment matters, and stated that the panel majority has disregarded Jones v. Bock’s instruction to follow the usual procedural practice in adjudicating PLRA exhaustion issues. Nonetheless the matter in abatement approach is now firmly established, and the Circuit has instructed district courts deciding exhaustion disputes first to consider the factual allegations in defendants’ motion to dismiss and

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404 Bryant, 530 F.3d at 1379-82 (citing Jones v. Bock, 549 U.S. 199, 127 S.Ct. 910, 919-20 (2007)). Interestingly, dissenting Judge Wilson had also been a member of the panel rejecting the Ninth Circuit rule in Singleton, as had been Judge Birch, who concurred in the published Bryant panel opinion.
The Seventh Circuit has rejected the Ninth Circuit matter in abatement approach, but has also departed from the usual litigation practice of summary judgment. It has held that whenever exhaustion “is contested,” the district court should conduct a hearing on exhaustion, allowing discovery limited to exhaustion, and decide the exhaustion question; only if the court finds the plaintiff has exhausted will the case proceed to discovery on the merits.\(^{410}\) The court did not explain whether “contested” means raised as a defense in the answer, raised by motion, or turning on a material issue of fact and therefore not susceptible to summary judgment.

The court reasoned that not every factual issue is triable to a jury, citing issues of subject matter jurisdiction, personal jurisdiction, venue, abstention, and relinquishment of supplemental jurisdiction.\(^{410}\) Its expressed concern was to avoid presentation of exhaustion to the jury. It stated that “juries do not decide what forum a dispute is to be resolved in. . . . Until the issue of exhaustion is resolved, the court cannot know whether it is to decide the case or the prison authorities are to.”\(^{411}\) Further, a jury finding of non-exhaustion may result in a new round of administrative proceedings followed by another jury trial at which exhaustion might again be at issue, threatening a further repetition. These points distinguish exhaustion from the statute of limitation defense, an affirmative defense which is decided by juries. “A statute of limitations defense if successfully interposed ends the litigation rather than shunting it to another forum.”\(^{412}\)

The \textit{Pavey} approach has not banished summary judgment as a means of resolving exhaustion questions where material facts are undisputed. Litigants still seek and are granted summary judgment in many cases,\(^{413}\) and upon the denial of summary judgment the court may hold a hearing.\(^{414}\) In factually disputed cases, hearings on exhaustion have become a regular practice,\(^{415}\) though some courts encourage litigants to proceed to the merits instead.\(^{416}\)

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\(^{411}\) Pavey v. Conley, 544 F.3d at 741.

\(^{412}\) Pavey, 544 F.3d at 741.


Pavey’s approach does not appear well founded. The premise that exhaustion is a “what forum?” question does not fit PLRA exhaustion, since the dispute resolved (or not resolved) in a prison grievance proceeding (usually, whether facility or departmental rules or procedures have been breached) is not the same as the dispute presented to a federal court, i.e., whether federal rights were violated and if so what judicial remedy is appropriate. This contrasts with the more usual administrative law judicial review situation, where the agency proceeding and the litigation ultimately address the same question, e.g. whether the plaintiff is entitled to certain benefits or not. In theory, there is more of a basis for the court’s concern that reserving exhaustion disputes for the jury means that a finding of non-exhaustion may set in motion a new cycle of administrative proceedings followed by a do-over of the litigation. In practice that is exceedingly unlikely, since a jury trial will never take place within the short time limits that characterize prison grievance systems. Further, the proposition that all discovery is postponed except for exhaustion-related discovery appears to run afoul of the Supreme Court’s warning that the exhaustion requirement does not displace usual litigation practices under the Federal Rules of Civil Procedure, and that its explicit provisions may not be enhanced based on judges’ policy views. The court does not address this holding of Jones v. Bock. Further, it contrives a seemingly unprecedented (at least it cites no precedent) means of addressing facts that are essential to the exhaustion decision but are also germane to the merits of the plaintiff’s claim: insofar as such an overlap exists, the jury will find the merits facts “without being bound by (or even informed of)” the district court’s determinations. Under this view, it is possible for two


Franklin v. Fewell, 2014 WL 505341, *5 (N.D.Ind., Feb. 7, 2014) (directing defendants to file a notice stating whether they wish to proceed to a Pavey hearing or waive the exhaustion defense); Hudson v. Francom, 2013 WL 1099802, *3 (S.D.Ind., Mar. 15, 2013) (stating court will schedule a Pavey hearing unless defendants withdraw the exhaustion defense); Williams v. Lovett, 2012 WL 2400465, *3 (S.D.Ind., June 22, 2012) (directing defendant either to drop claim of non-exhaustion or request a Pavey hearing); McLaughlin v. Freeman, 2010 WL 1049878, *5 (N.D.Ind., Mar. 16, 2010) (stating that where it denies summary judgment on non-exhaustion, “it is the practice of this court to give the defendants the opportunity to withdraw their exhaustion defense and proceed to the merits. . . .”); Henderson v. Brown, 2009 WL 2496559, *5 (N.D.Ill., Aug. 11, 2009) (denying summary judgment on exhaustion, advising the defendants that “should [they] choose to stand on this defense,” the court would hold an evidentiary hearing, but they might be better advised to move for summary judgment on the merits instead).

More recently, in another decision authored by the same judge, Judge Posner, the court enhanced its rationale for keeping PLRA exhaustion issues from the jury, reiterating the Pavey reasoning and then distinguishing PLRA exhaustion from the administrative charge-filing requirement of Title VII of the 1964 Civil Rights Act: “The distinction is not a technical one. It reflects the different goals of the Prison Litigation Reform Act and Title VII. The former is designed to keep prisoner grievances in prisons and out of courts, on the theory that the primary responsibility for prison regulation should lie with prison officials rather than with federal judges. Title VII, in contrast, is designed to provide a federal judicial forum, complete with jury if desired, for persons complaining about employment discrimination.” Begolli v. Home Depot U.S.A., Inc., 701 F.3d 1158, 1161 (7th Cir. 2012).

Jones v. Bock, 549 U.S. 199, 212 (2007) (rejecting treatment of PLRA exhaustion as a pleading requirement, requirement that all litigation defendants have been named in the administrative grievance, and the “total exhaustion” rule).

contradictory factual findings to coexist in the same case. This does not seem like a usual litigation practice.

The Fifth Circuit has taken a less obtrusive path to the same result as *Pavey*, holding that “the protections of Rule 56” are appropriate when courts consider evidence about exhaustion outside the pleadings, but that “exhaustion is a threshold issue that courts must address to determine whether litigation is being conducted in the right forum at the right time.” If summary judgment is denied, therefore, “the judge may resolve disputed facts concerning exhaustion, holding an evidentiary hearing if necessary.” Similarly to *Pavey*, the court added: “In many cases, the judge will be able to rule on exhaustion without allowing any discovery. However, in some cases, unique circumstances may arise that necessitate allowing some discovery prior to ruling, such as where the availability of administrative remedies is contested.”

The Second Circuit has taken an approach similar to *Pavey*’s, in a case presenting the question whether exhaustion is an issue for court or jury. The court noted the Supreme Court’s statement that administrative exhaustion “govern[s] the timing of federal-court decisionmaking” and adding that exhaustion is “a matter of judicial administration” going to the question whether the court or prison authorities are to decide the case. The jury trial right does not extend to “the ‘threshold issue[s] that courts must address to determine whether litigation is being conducted in the right forum at the right time.’” The court added: “To require a jury trial before it is certain that an inmate is entitled to be in federal court would seriously undercut the PLRA’s goals of encouraging the use of administrative steps, providing prisons with an opportunity to correct their errors, and reducing the quantity and improving the quality of prisoner suits.” It distinguished statutes of limitations, which provide a non-jurisdictional defense as to which there is a right to jury trial, on the ground that exhaustion “must be satisfied before the courts can act” on a prisoner’s claim, while a statute of limitations “represent[s] a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time’. In other words, one doctrine opens the courthouse door and the other closes it.” The court also rejected the argument that “a jury trial should be permitted if exhaustion is no longer possible, i.e., if a dismissal for failure to exhaust will ‘end litigation rather than shunting it to another forum.’” It stated: “The Seventh Amendment does not promise a jury trial on all issues that might, as a practical matter, finally dispose of a case. Rather, it guarantees the right to a jury’s resolution of the merits of the

420 Dillon v. Rogers, 596 F.3d 260, 272 (5th Cir. 2010).
422 Dillon, 596 F.3d at 273 n.4.
423 Dillon v. Goord, 652 F.3d 305, 308 (2d Cir. 2011) (quoting McCarthy v. Madigan, 503 U.S. 140, 144 (1992)).
424 Dillon v. Goord, id. (quoting *Pavey*, 544 F.3d at 741).
425 *Messa*, 652 F.3d at 309 (quoting Dillon, 596 F.3d at 272) (emphasis added).
426 *Messa*, 652 F.3d at 309 (citations omitted).
427 *Messa*, 652 F.3d at 309 (citations omitted).
428 *Messa*, 652 F.3d at 310 (quoting *Pavey*, 544 F.3d at 741).
ultimate dispute”—a proposition that fails to account for the jury right as to statutes of limitations.

The Second Circuit in *Messa* did not comment explicitly on the procedural ramifications of its holding, *e.g.*, on the circumstances when a hearing is required, or on the availability of discovery. It did, however, affirm a decision reached by the district court at an evidentiary hearing scheduled just before the trial was scheduled to begin and after it had denied summary judgment. In another case a few weeks later, however, it noted the existence of disputed facts concerning exhaustion, and stated: “On remand, the District Court may request additional discovery and briefing on this point in connection with a renewed dispositive motion, or proceed directly to trial.” Thus it appears that district courts in this circuit will retain some discretion in managing fact-finding concerning exhaustion.

Also, the *Messa* court began with the proposition that “[m]atters of judicial administration often require district judges to decide factual disputes that are *not bound up with the merits* of the underlying dispute,” and noted that in that case, the factual disputes about exhaustion were not “intertwined with the merits.” Where exhaustion and merits issues *are* intertwined, it appears that they must be reserved for the jury if one has been sought. That is the implication of *Messa*, which cited with approval an earlier decision in which a factual dispute that affected both jurisdiction and the merits was held to be reserved for the jury. Certainly, the *Messa* court said nothing about the Seventh Circuit’s approach in *Pavey*, described above, under which the court would make an initial determination that would then be kept secret from the jury if the claim survived.

Most recently, the Third Circuit has affirmed a district court’s decision of contested exhaustion facts after an evidentiary hearing, declaring that “we agree with the Second, Fifth, Seventh, Ninth, and Eleventh Circuits and hold that judges may resolve factual disputes relevant to the exhaustion issue without the participation of a jury.” It did not adopt the matter in abatement theory, mentioning it only in passing. It simply stated that exhaustion is a

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429 *Messa*, 652 F.3d at 310.
432 *Messa*, 652 F.3d at 309.
434 Alliance for Envtl. Renewal v. Pyramid Crossgates Co., 436 F.3d 82, 88 (2d Cir. 2006) (“If, however, the overlap in the evidence is such that fact-finding on the jurisdictional issue will adjudicate factual issues required by the Seventh Amendment to be resolved by a jury, then the Court must leave the jurisdictional issue for the trial. . . .”) (cited in *Messa*, 652 F.3d at 309). Jurisdiction, like exhaustion, is a precondition to the exercise of judicial power.
precondition for prisoner litigation, and therefore a threshold issue like subject matter jurisdiction, personal jurisdiction, and venue, which is for the court and not for the jury; it distinguished statutes of limitations, like exhaustion a non-jurisdictional affirmative defense but one triable to a jury, as did the Second Circuit in Messa. It added: “It would make sense from an efficiency standpoint that exhaustion determinations be made before discovery, or with only limited discovery.”

This conflict among the circuits’ approaches will have to be resolved by the Supreme Court, though it may not give much priority to hearing a conflict that is more significant in terms of theory than in its practical results.

Other circuits have either adhered without comment to the summary judgment framework or have departed from it also without comment. A number of district courts have held evidentiary hearings to resolve exhaustion issues with little or no theoretical discussion of why such a procedure is appropriate.

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436 Small, 728 F.3d at 269-70 & n.4.
437 Small, id., 728 F.3d at 271 n.5 (citing Pavey, 544 F.3d at 742).
438 The Court denied certiorari in all of the major circuit decisions under discussion in which certiorari was sought. Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008), cert. denied, 556 U.S. 1128 1620 (2009); Bryant v. Rich, 530 F.3d 1368 (11th Cir. 2008), cert. denied, 555 U.S. 1074 (2008); Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied, 540 U.S. 810 (2003). There was no petition for certiorari in Dillon v. Rogers or in Messa v. Goord.

Not all courts are impressed by the divergence among these decisions. In Butler v. Wards, 2008 WL 4643181, *7-8 (E.D.Ark., Oct. 16, 2008), the court cited Pavey. Wyatt, and Bryant, declared their reasoning sound (even though Pavey rejects the reasoning of Wyatt and presumably Bryant), and recommended denial of summary judgment, with leave to refile the summary judgment motion on the relevant claims and ask for an evidentiary hearing on exhaustion or proceed with development of the merits of those claims.

439 See n. 380, above.
440 The First Circuit has in two cases remanded to district courts for fact-finding on exhaustion, but has not explained the procedural basis for doing so or the appropriate response of a district court to disputed facts. See Cruz Berrios v. Gonzalez-Rosario, 630 F.3d 7, 11 (1st Cir. 2010) (remanding for fact-finding on exhaustion without explaining the procedural basis for this direction); Casanova v. Dubois, 289 F.3d 142, 147 (1st Cir. 2002), on remand, 2002 WL 1613715, *6 (D.Mass., July 22, 2002) (making findings after hearing), remanded on other grounds, 304 F.3d 75 (1st Cir. 2002). Cf. Starr v. Moore, 849 F.Supp.2d 205, 211 (D.N.H. 2012) (holding belated exhaustion defense could not be raised by motion in limine, but could be raised at trial).

Some district courts have pushed the envelope in order to dispose of exhaustion disputes on motions to dismiss, or to grant summary judgment in spite of factual disputes. A number of courts have taken a seemingly expansive view of their ability to consider grievance documentation on a motion to dismiss, though this view has been cogently rejected in other decisions. Other courts have granted summary judgment in contested cases, either declaring


One exception to the atheoretical character of decisions calling for evidentiary hearings is Middlebrook v. Tennessee Department of Correction, 2010 WL 3432687 (W.D.Tenn., Aug. 31, 2010), which asserts the highly dubious view that since the Sixth Circuit had adopted a heightened pleading rule for exhaustion to avoid “time-consuming evidentiary hearings,” and the Supreme Court rejected that rule in Jones v. Bock, the Supreme Court has implicitly called for evidentiary hearings. 2010 WL 3432687, *9 (citations omitted).

See, e.g., Spruill v. Gillis, 372 F.3d 218, 223 (3d Cir. 2004) (“indisputably authentic” documents may be considered without converting the motion to one for summary judgment); Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1212 (10th Cir. 2003) (holding court may consider documents attached to the complaint, or the defendants can submit them if they are not attached, or submit a declaration), cert. denied, 543 U.S. 925 (2004); Young v. Sposato, 2014 WL 109083, *6 n.7 (E.D.N.Y., Jan. 13, 2014) (stating grievances and grievance procedure attached to the complaint were “properly considered”); Lefebvre v. Pallito, 2012 WL 7198435, *5 n.9 (D.Vt., Dec. 17, 2012) (taking judicial notice of grievance policy, holding doing so obviates the need to convert motion to one for summary judgment), report and recommendation adopted in part, rejected in part, 2013 WL 682741 (D.Vt., Feb. 25, 2013); Richardson v. Folino, 2012 WL 6552916, *4 & n.3, 13 (W.D.Pa., Dec. 14, 2012) (holding grievance documents submitted by defendants can be considered because they are public records; plaintiff’s documents can be considered because they are attached to the complaint); Moorehead v. Keller, 845 F.Supp.2d 689, 693 & n.1 (W.D.N.C., Feb. 29, 2012) (granting judgment on the pleadings where defendants submitted a grievance decision that post-dated the complaint; “When a document attached to the pleadings contradicts the allegations of the complaint, the document controls in a Rule 12(b)(6) motion to dismiss.”), appeal dismissed (4th Cir., No. 12-6411, Mar. 23, 2012); Faust v. Cabral, 2011 WL 4529374, *4 (D.Mass., Sept. 27, 2011) (on motion to dismiss, directing defendants to file grievance documentation; court will then decide whether to hold an evidentiary hearing or call for more briefing; no explanation why summary judgment is not appropriate for this consideration of extrinsic material); Spruill v. Bailey, 2011 WL 577106, *3 (W.D.N.C., Feb. 8, 2011) (holding documents attached to defendants’ motion to dismiss were “integral to the Complaint” and made non-exhaustion “apparent”); see Appendix A for additional authority on this point.

443 Some courts have pointed out that since exhaustion is an affirmative defense, documents pertaining to it are not central or integral to the complaint, and are surplusage if attached to the complaint. See Adamson v. Poorter, 2007 WL 2900576, *2-3 (11th Cir. 2007) (unpublished) (holding Bureau of Prisons personnel’s affidavits were not documents “central” to the complaint and could not be considered without converting to summary judgment); Facey v. Dickhaut, 892 F.Supp.2d 347, 354 (D.Mass. 2012) (holding exhaustion was not “central” to the complaint and grievance documentation was not “merged” with the complaint); Hernandez v. Banulos, 2012 WL 3845885, *2 & n.2 (D.Colo., Sept. 2, 2012) (rejecting affidavit from custodian of records on motion to dismiss, converting to summary judgment); Taylor v. Hillis, 2011 WL 6341090, *3 (W.D.Mich., Nov. 28, 2011); Frees v. Doby, 2010 WL 4923535, *2 (W.D.Mich., Nov. 29, 2010) (holding grievance documentation cannot be considered as “integral to the complaint” because exhaustion is not a part of plaintiff’s claim; nor are “internal prison records whose accuracy is not susceptible of confirmation by public sources” public records amenable to judicial notice); see also Romano v. Rambosk, 2014 WL 103171, *6 (M.D.Fla., Jan. 9, 2014) (holding grievances submitted with and repeatedly referenced in the complaint could be considered on a motion to dismiss; defendants’ affidavits could not). Other courts have rejected the notion that grievance records are public records amenable to judicial notice. Taylor v. Hillis, supra, 2011 WL 6341090, *3; Davis v. Caruso, 2009 WL 877964, *6 n.6 (E.D.Mich., Mar. 30, 2009) (noting that only the existence of grievance records may be judicially noticed; facts contained in them cannot be considered on a motion to dismiss); Hicks v. Irvin, 2008 WL 2078000, *2 (N.D.Ill., May 15, 2008) (refusing to take judicial
the *pro se* plaintiffs’ representations too conclusory or insufficiently detailed to raise a dispute of material fact, rejecting prisoners’ statements for lack of corroboration, or simply finding the facts against the plaintiff. In some cases, as where prisoners’ claims are not only conclusory but also suspect because they contradict the prisoners’ pleadings or deposition testimony, skepticism may be justified. But in most cases, such deviation from the usual summary judgment practice under the Federal Rules is not consistent with the Supreme Court’s reasoning

notice of exhaustion documentation on motion to dismiss); Gabby v. Luy, 2006 WL 167673, *1 (E.D.Wis., Jan. 23, 2006) (rejecting “public record” argument, converting motion to dismiss supported by grievance documents into summary judgment motion).

444 See, e.g., Frazier v. Barker, 2013 WL 798240, *3 (D.Colo., Feb. 11, 2013) (rejecting as “conclusory and self-serving” plaintiff’s statement that he was told on a specified date “that he would be limited to just one grievance every 120 days . . . yet he was actually denied access to use of the grievance process completely from that day until his transfer out of the BCCF a year later”), report and recommendation adopted, 2013 WL 799681 (D.Colo., Mar. 5, 2013); Lowery v. Strome, 2012 WL 4433560, *4 (W.D.Ky., Sept. 25, 2012) (granting summary judgment against prisoner who said he was refused grievance forms but “fails . . . to describe the attempts, if any, he made to obtain a grievance form from Defendants or other officers within 48 hours of the incident and the circumstances surrounding their alleged denial/refusal”); De’lonta v. Johnson, 2012 WL 2921762, *5 (W.D.Va., July 17, 2012) (granting summary judgment against prisoner who said she could not appeal because she “was on strip-cell mental health status” and had no access to mail, noting that she did “not allege that she handed her appeal to a BUCC official for mailing or how any BUCC official refused to process her appeal”), order entered, 2012 WL 2921539 (W.D.Va., July 17, 2012), aff’d, 490 Fed.Appx. 579 (4th Cir. 2012); Smith v. U.S., 2011 WL 7414011, *9 (M.D.Pa., Nov. 18, 2011) (“We find that Plaintiff’s self-serving averment in his Declaration that he failed to receive notice of an extension does not sufficiently dispute Defendants’ evidence which indicates that Plaintiff did in fact receive notice of the extension.” Defendants’ evidence was a “P” on a form which they said meant notice was delivered); see *Appendix A for additional authority on this point*. Contra, Ojo v. Medic, 2012 WL 7150497, *6-7 (D.N.H., Dec. 17, 2012) (noting that plaintiff’s deposition was quite explicit as to details of obstruction of his exhaustion, even though he didn’t cite it in summary judgment motion), report and recommendation approved, 2013 WL 593485 (D.N.H., Feb. 14, 2013); Gayle v. Benware, 2009 WL 2223910, *5 (S.D.N.Y., July 27, 2009) (denying summary judgment where plaintiff alleged he was denied a grievance form and access to a grievance representative, and gave a grievance to staff for mailing that never arrived, though he did not name the staff members involved).


446 Kargbo v. Brown, 2013 WL 6533230, *3 (D.N.H., Dec. 13, 2013) (finding that plaintiff was not denied forms for a grievance because he had been able to file other grievances and that he “chose” not to file a grievance); Vinegar v. Beebe, 2013 WL 5663835, *3 (C.D.Ill., Oct. 17, 2013) (finding that plaintiff who said his grievance went unanswered “simply failed to submit a grievance” properly).

Certainly it seems a questionable practice to grant summary judgment against a pro se litigant (as are the vast majority of prisoner plaintiffs) for lack of detail and specificity or corroboration, rather than to allow discovery on exhaustion under Fed.R.Civ.P. 56(f) and allow the motion to be renewed after completion of discovery.\footnote{McDonald v. Dallas County, 2007 WL 2907824, *3 (N.D.Tex., Oct. 5, 2007) (citing Jones v. Bock, 549 U.S. 199, 212-13 (2007)). Under standard summary judgment doctrine, a sworn statement by the plaintiff that states he or she has done what is necessary to exhaust should be sufficient to defeat summary judgment. See, e.g., Roberts v. Neal, ___ F.3d ___, 2014 WL 929047, *1 (7th Cir. 2014) (rejecting summary judgment granted because “there was no evidence besides Roberts’s say-so” that he had filed a grievance; “A swearing contest requires an evidentiary hearing to resolve, and none was held.”); Abdul-Aziz v. Nwachukwu, 523 Fed.Appx. 128, 130 (3d Cir. 2013) (unpublished) (holding plaintiff’s claim that he had filed a grievance appeal and defendants’ denial that he had created a material issue of fact barring summary judgment); Cowart v. Ervin, 2013 WL 3970790, *5 (N.D.Tex., Aug. 2, 2013) (“Although Defendants are correct that Plaintiff’s claim of exhaustion ‘is an easy claim to make as it cannot be disproved,’ . . . the reason that it cannot be disproved at the summary judgment stage is because it is a disputed question of fact.”); Hernandez v. Donovan, 2013 WL 1246799, *3 (D.Del., Mar. 25, 2013) (holding affidavit stating plaintiff filed three grievances created a material issue of fact despite defendants’ affidavits stating their records showed he filed no grievances); Lopez v. Bushey, 2013 WL 1294477, *6-7 (N.D.N.Y., Mar. 4, 2013) (holding minor discrepancies in plaintiff’s evidence created credibility issues inappropriate for summary judgment), report and recommendation adopted, 2013 WL 1293819 (N.D.N.Y., Mar. 28, 2013); McClain v. Kale, 2012 WL 2192242, *5 (M.D.Pa., Apr. 23, 2012) (holding affidavit describing failed attempts to get grievances filed barred summary judgment), report and recommendation adopted, 2012 WL 2192271 (M.D.Pa., June 14, 2012); Lott v. Crawford, 2009 WL 2900259, *10 & n.21 (W.D.Mo., Sept. 3, 2009); Eads v. Castle, 2009 WL 2824774, *6-7 (S.D.W.Va., Aug. 28, 2009) (declaration stating that plaintiff appealed his grievance but his documentation had been lost in a transfer raised a factual issue barring summary judgment); Banks v. Cox, 2009 WL 1505579, *2 (W.D.Wis., May 28, 2009) (sworn statement that plaintiff mailed his appeal barred summary judgment despite argument that plaintiff must “state that the appeal was mailed in an envelope with adequate prepaid postage properly addressed to the CCE”); Short v. McKay, 2008 WL 753894, *3 (S.D.W.Va., Feb. 29, 2008) (plaintiff’s affidavit, without documentary support, was sufficient to raise a factual dispute barring summary judgment), report and recommendation adopted in part, rejected in part on other grounds, 2008 WL 748112 (S.D.W.Va., Mar. 19, 2008); Mitchell v. Department of Correction, 2008 WL 744041, *7 (N.D.N.Y., Feb. 20, 2008) (verified complaint stating that plaintiff filed a grievance at a particular jail on the subject matter of the complaint raised a factual dispute barring summary judgment), report and recommendation adopted as modified on other grounds, 2008 WL 744039 (S.D.N.Y., Mar. 19, 2008). See Harp v. Secretary of Corrections, 2013 WL 416645, *4 & n.7 (D.S.D., Jan. 31, 2013) (holding plaintiff’s statements about non-responsive grievance system were sufficient to raise a material issue of fact barring summary judgment; noting that if his account is true, documentation of his efforts would not be available to him); Kellogg v. New York State Dept. of Correctional Services, 2009 WL 2058560, *3 (S.D.N.Y., July 15, 2009).
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One decision characterized a failure to exhaust as a failure to prosecute, allowing the court to dismiss sua sponte,\footnote{Sanchez v. U.S., 2006 WL 1464789, *1 (S.D.Miss., Mar. 27, 2006), reconsideration denied, 2006 WL 1454752 (S.D.Miss., May 18, 2006).} a view that has little to recommend it but originality.

### 5. Appealing Exhaustion Decisions

The refusal to dismiss for non-exhaustion may not be appealed interlocutorily,\footnote{Langford v. Norris, 614 F.3d 445, 456-57 (8th Cir. 2010) (holding denial of summary judgment for non-exhaustion is not an appealable collateral order); Davis v. Streekstra, 227 F.3d 759, 762-63 (7th Cir. 2000) (same, for denial of motion to dismiss); see Fobbs v. Davis, 515 Fed.Appx. 330, 332 (5th Cir. 2013) (unpublished) (rejecting claim that denial of summary judgment for exhaustion could not be reviewed on appeal from a final judgment, citing Langford and Davis).} unless the district court certifies it for appeal.\footnote{Neal, ___ F.3d ___, 2014 WL 929047, *1 (7th Cir. 2014) (rejecting summary judgment granted because “there was no evidence besides Roberts’s say-so” that he had filed a grievance; “A swearing contest requires an evidentiary hearing to resolve, and none was held.”); Abdul-Aziz v. Nwachukwu, 523 Fed.Appx. 128, 130 (3d Cir. 2013) (unpublished) (holding plaintiff’s claim that he had filed a grievance appeal and defendants’ denial that he had created a material issue of fact barring summary judgment); Cowart v. Ervin, 2013 WL 3970790, *5 (N.D.Tex., Aug. 2, 2013) (“Although Defendants are correct that Plaintiff’s claim of exhaustion ‘is an easy claim to make as it cannot be disproved,’ . . . the reason that it cannot be disproved at the summary judgment stage is because it is a disputed question of fact.”); Hernandez v. Donovan, 2013 WL 1246799, *3 (D.Del., Mar. 25, 2013) (holding affidavit stating plaintiff filed three grievances created a material issue of fact despite defendants’ affidavits stating their records showed he filed no grievances); Lopez v. Bushey, 2013 WL 1294477, *6-7 (N.D.N.Y., Mar. 4, 2013) (holding minor discrepancies in plaintiff’s evidence created credibility issues inappropriate for summary judgment), report and recommendation adopted, 2013 WL 1293819 (N.D.N.Y., Mar. 28, 2013); McClain v. Kale, 2012 WL 2192242, *5 (M.D.Pa., Apr. 23, 2012) (holding affidavit describing failed attempts to get grievances filed barred summary judgment), report and recommendation adopted, 2012 WL 2192271 (M.D.Pa., June 14, 2012); Lott v. Crawford, 2009 WL 2900259, *10 & n.21 (W.D.Mo., Sept. 3, 2009); Eads v. Castle, 2009 WL 2824774, *6-7 (S.D.W.Va., Aug. 28, 2009) (declaration stating that plaintiff appealed his grievance but his documentation had been lost in a transfer raised a factual issue barring summary judgment); Banks v. Cox, 2009 WL 1505579, *2 (W.D.Wis., May 28, 2009) (sworn statement that plaintiff mailed his appeal barred summary judgment despite argument that plaintiff must “state that the appeal was mailed in an envelope with adequate prepaid postage properly addressed to the CCE”); Short v. McKay, 2008 WL 753894, *3 (S.D.W.Va., Feb. 29, 2008) (plaintiff’s affidavit, without documentary support, was sufficient to raise a factual dispute barring summary judgment), report and recommendation adopted in part, rejected in part on other grounds, 2008 WL 748112 (S.D.W.Va., Mar. 19, 2008); Mitchell v. Department of Correction, 2008 WL 744041, *7 (N.D.N.Y., Feb. 20, 2008) (verified complaint stating that plaintiff filed a grievance at a particular jail on the subject matter of the complaint raised a factual dispute barring summary judgment), report and recommendation adopted as modified on other grounds, 2008 WL 744039 (S.D.N.Y., Mar. 19, 2008).} Dismissal without prejudice, the usual mode of
dismission in exhaustion disputes, is appealable under some circuits’ law. In other circuits where the general rule is different, dismissal for non-exhaustion may still be appealable as a practical matter when the reason for dismissal cannot be cured, as when the time for filing a grievance has expired, the prisoner has been released and can no longer pursue prison grievances, or the statute of limitations has expired on the claim. At least one court has held that a partial dismissal for non-exhaustion should not be entered as an appealable final judgment because of the policy against piecemeal appeals. District courts’ rulings on whether a plaintiff has exhausted are reviewed de novo.

E. What Is Exhaustion?

Exhaustion under the PLRA means “proper exhaustion,” i.e., “compliance with an agency’s deadlines and other critical procedural rules.” It also means completing the administrative process by appealing an adverse decision to the highest level of the administrative system.

Having appealed, prisoners are obliged to wait to sue until the time for prison officials to render a final decision has expired. Most courts agree that “[a] prisoner’s administrative remedies are deemed exhausted when a valid grievance has been filed and the state’s time for


453 See nn. 272-275, above.

454 See, e.g., Salim Oleochemicals v. M/V SHROPSHIRE, 278 F.3d 90, 93 (2d Cir. 2002), cert. denied, 537 U.S. 1088 (2002).

455 See Al-Amin v. Shear, 218 Fed.Appx. 270, 273, 2007 WL 579762, *2 (4th Cir. 2007) (holding an exhaustion dismissal that could not be cured by amending the complaint was appealable).

456 Butler v. Adams, 397 F.3d 1181, 1183 (9th Cir. 2005); Mitchell v. Horn, 318 F.3d 523, 528-29 (3d Cir. 2003).

457 Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002).


461 Woodford v. Ngo, 548 U.S. 81, 90-91 (2006); see § IV.E.7, below, concerning the “proper exhaustion” rule.

462 “It is well established that to exhaust—literally, to draw out, to use up completely, see Oxford English Dictionary (2d ed. 1989)—‘a prisoner must grieve his complaint about prison conditions up through the highest level of administrative review’ before filing suit.” McCoy v. Goord, 255 F.Supp.2d 233, 246 (S.D.N.Y. 2003) (citations omitted); accord, Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001); White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997); Smith v. Stubblefield, 30 F.Supp.2d 1168, 1174 (E.D.Mo. 1998) and cases cited; see Dole v. Chandler, 438 F.3d 804, 811-12 (7th Cir. 2006) (holding that a prisoner who followed all required steps but whose grievance vanished, and who received no instructions what to do next, had exhausted). Failure to appeal some grievances is not a failure to exhaust as long as the grievances that were exhausted address the issues before the court. Greeno v. Daley, 414 F.3d 645, 652 (7th Cir. 2005); Tormasi v. Hayman, 2011 WL 463054, *3 (D.N.J., Feb. 4, 2011) (prisoner who did not appeal an initial grievance decision, but filed a later grievance about the same issue and completed the administrative process, exhausted). But see Jordan v. Adams County, 2012 WL 2029980, *2-3 (D.Colo., Jan. 17, 2012) (holding failure to appeal was not failure to exhaust where grievance policy seemed to say that grievance would be submitted to higher-level review without action by the prisoner), report and recommendation adopted, 2012 WL 2029970 (D.Colo., June 5, 2012), aff’d, 507 Fed.Appx. 752 (10th Cir. 2013), cert. denied, 133 S.Ct. 2742 (2013).
responding thereto has expired.” It is hard to see how the rule could be otherwise, since once the deadline is passed, a prisoner generally has no way of knowing whether a decision is actually forthcoming or whether the appeal has been lost or diverted in some fashion. Still, some courts have held that prisoners must wait longer—how long is not specified—than the prescribed time for decision. Such a rule unfairly disregards the need for a bright-line rule so prisoners

463 Powe v. Ennis, 177 F.3d 393, 394 (5th Cir. 1999); accord, Smith v. U.S., 432 Fed.Appx. 113, 117 (3rd Cir. 2011) (per curiam) (unpublished) (citing federal regulation providing prisoners may treat the absence of a timely response as a denial); Whittington v. Ortiz, 472 F.3d 804, 807-08 (10th Cir. 2007); Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998), cert. denied, 526 U.S. 1133 (1999); Lyons v. Leach, 2013 WL 6178578, *4 (E.D. Mich., Nov. 25, 2013) (same as Courts v. Smith; “To conclude otherwise would mean that a grievant who never received a Step III response would forever be unable to exhaust his or her administrative remedies.”); Courts v. Smith, 2013 WL 6047554, *7-8 (W.D.Mich., Nov. 14, 2013) (holding plaintiff exhausted when the 120-day period for completing the grievance process passed with no decision on final appeal); James v. Mehta, 2013 WL 5934397, *4 (E.D. Cal., Nov. 5, 2013) (holding the failure to provide a timely final response for months past the deadline made the remedy unavailable), report and recommendation adopted, 2014 WL 109502 (E.D. Cal., Jan. 9, 2014); Toscani v. Litton, 2013 WL 5144355, *6 (D.S.C., Sept. 12, 2013) (holding grievance exhausted where there was no timely decision as a result of staffing problems); Williams v. Reynolds, 2013 WL 4522574, *4 (D.S.C., Aug. 27, 2013) (“When a prisoner files a grievance and has not received a timely determination, the grievance may be considered exhausted under the PLRA.”); Wilder v. McCabe, 2012 WL 6935346, *5 (D.S.C., Oct. 19, 2012) (holding plaintiff who filed suit after not receiving timely final decisions raised factual issue “whether Defendant hindered Plaintiff's ability to exhaust his administrative remedies”), report and recommendation adopted, 2013 WL 300825 (D.S.C., Jan. 25, 2013); Rodgers v. Lewis, 2012 WL 4158506, *3-4 (M.D. La., Sept. 18, 2012) (holding plaintiff who filed suit over 100 days after filing his grievance, where final decision was supposed to be rendered in 90 days, sufficiently exhausted notwithstanding grievance office notification that a more detailed investigation was warranted); Hudson v. Wade, 2012 WL 4485607, *8-9 (E.D. Mich., Aug. 30, 2012) (holding plaintiff “did not pre-empt” the grievance process when he filed three weeks after the date the entire process should have been completed, though there was no specific deadline for a response at the final stage), report and recommendation adopted, 2012 WL 4475442 (E.D. Mich., Sept. 27, 2012); Rodgers v. Lewis, 2012 WL 4158506, *3 (M.D. La., Sept. 18, 2012) (holding plaintiff exhausted after waiting past the deadline for final response, even though officials notified him after the deadline’s expiration that “more detailed” investigation was needed); see Appendix A for additional authority on this point; see also Cottrell v. Wright, 2010 WL 4806910, *6 (E.D. Cal., Nov. 18, 2010) (where plaintiff’s second level appeal was subject to lengthy delay and third level appeal was rejected for lack of second-level decision, plaintiff had exhausted), report and recommendation adopted, 2011 WL 319080 (E.D. Cal., Jan. 28, 2011); Sims v. Rewerts, 2008 WL 2224132, *5-6 (E.D. Mich., May 29, 2008) (declining to dismiss where plaintiff filed before the expiration of a time limit that had been changed without notice); Lawyer v. Gatto, 2007 WL 549440, *8 (S.D.N.Y., Feb. 21, 2007) (prisoner whose grievance was referred to the Inspector General was not required to wait until the IG investigation was finished absent a rule to that effect in the policy). But see Mejia v. Goord, 2005 WL 2179422, *5 (N.D.N.Y., Aug. 16, 2005) (holding a prisoner who filed suit on the day his final appeal was decided did not exhaust). Cf. Petteay v. Avenal State Prison, 2008 WL 5246159, *2 (E.D. Cal., Dec. 15, 2008) (where delays in response at intermediate stages prolonged the grievance process, plaintiff was still required to wait until the final decision was issued before filing suit), report and recommendation adopted, 2009 WL 188151 (E.D. Cal., Jan. 26, 2009); Portugal v. Hopkins, 2008 WL 4712605, *1 (N.D. Cal., Oct. 21, 2008) (same).

One court has treated the filing of the final appeal as the effective date of exhaustion because the prison policy stated that exhaustion is completed upon filing. Hall v. Dormire, 2009 WL 648883, *3 (W.D. Mo., Mar. 10, 2009).

464 As discussed below, see nn. 495-496 et seq., it is not uncommon for prisoners to receive no response at all to their grievances or appeals.

465 See, e.g., Sweat v. Reynolds, 2013 WL 593660, *5 (D.S.C., Feb. 15, 2013) (stating the determination of whether the prisoner waited long enough after the filing and response of the grievance took place,” though declining summary judgment for non-exhaustion where plaintiff had waited 150 days for a response and the deadline was 70 days). In a similar vein, the court in Shepard v. Cohen, 2011 WL 284958, *3 (E.D. Cal., Jan. 25, 2011), stated: Administrative remedies are not “effectively unavailable” and a prisoner is not equitably excused from the exhaustion requirement under § 1997e(a) where a delay in a prisoner's administrative
may know when they can file suit, since dismissal for non-exhaustion at best results in considerable effort and expense to refile a claim that has received a grievance decision after filing, and complete uncertainty as to how to proceed if there still has been no decision. It may also result in a claim’s being time-barred if the limitations period has run. But a few decisions are worse, stating without qualification that exhaustion is not completed until the prisoner receives a final decision, without addressing what happens if that decision never comes.  

In Shepard, where the grievance appeal had been pending a year and the deadline was 60 days, the grievance authorities attributed the delay to “the large volume of appeals,” and the court said the situation did not appear to be one “where prison officials are exploiting the grievance process, nor does the delay prejudice Plaintiff in seeking a remedy for [his] one time [complaint].” Id. However, there is no indication that anyone communicated the reason for the delay to the plaintiff, or that he was given any indication of when he could expect a decision on his appeal. See also Jamison v. Franko, 2013 WL 5166626, *2-3 & n.3 (N.D.II., Sept. 13, 2013) (holding prisoner who filed suit less than two weeks after a decision was due did not exhaust; “Exactly where the line is between a late response and an unavailable process is unclear. What is clear, however, is that the prison’s delay and the inmate’s efforts must be far greater than in this case for the process to be deemed unavailable.”); Rupe v. Beard, 2013 WL 2458398, *16, 21 (E.D.Cal., June 6, 2013) (stating “the Court is not suggesting that a minor delay in processing inmate appeals will automatically excuse an inmate’s abandonment of the administrative grievance process . . . . But . . . after the inmate has waited a reasonable period of time and has received no response or notice of delay, the failure by prison officials to abide by inmate-grievance regulations must excuse the inmate’s failure to exhaust”; here, 20 days was a reasonable period); Williams v. Handmen, 2013 WL 342702, *1 (S.D.N.Y., Jan. 29, 2013) (dismissing for non-exhaustion where plaintiff filed before receiving final response, disregarding that the response was long overdue); King v. Hubbard, 2011 WL 3319708, *3 (E.D.Cal., July 29, 2011) (holding prisoner who filed suit a few days after expiration of the period for answer did not exhaust where officials notified him months later that a response would be forthcoming); Torres v. Carry, 672 F.Supp.2d 338, 345-46 (S.D.N.Y. 2009) (where plaintiff’s appeal had not been decided for four years, court directs defendants to bring it to the grievance body’s attention within 30 days and holds plaintiff may re-file if there is no decision within 30 days thereafter), reconsideration denied, 672 F.Supp.2d 346 (S.D.N.Y. 2009); Gomez v. Scribner, 2009 WL 2058537, *4 (E.D.Cal., July 14, 2009) (holding plaintiff didn’t exhaust when he filed suit a month after the deadline for final decision, but knew that officials were still working on his grievance); Ibanez v. Garza, 2007 WL 433185, *3 (S.D.Cal., Jan. 25, 2007); Wyatt v. Doe, 2006 WL 1407636, *1 (S.D.Tex., May 19, 2006) (holding a prisoner whose grievance had remained “under exhaust” for eight months after his appeal had been ignored “does not establish that the investigation has been delayed unreasonably”). Similarly, a decision dismissing for non-exhaustion where a prisoner’s grievance appeal had not been initially processed as a result of “administrative oversight” is probably erroneous, depending on how long the appeal was lost. See Mendez v. Artuz, 2002 WL 313796, *2 (S.D.N.Y., Feb. 27, 2002).  

Of course if a prisoner receives a late response before filing suit, the prisoner should appeal.\textsuperscript{468} However, if a prisoner files suit after the time limit for decision has passed, and then grievance authorities issue a late decision, most courts hold the prisoner has exhausted; the late response does not “un-exhaust” his claim.\textsuperscript{469} In some systems, the grievance policy provides that grievance officials may extend the deadline for decision, and such extensions are binding if the prisoner receives notice.\textsuperscript{470}

2009 (prisoner who never received second level appeal response until he filed suit still had remedies available; court does not address how he could have used them without a response);


\textsuperscript{469} Rupe v. Beard, 2013 WL 2458398, *15 n.13 (E.D.Cal., June 6, 2013) (stating “just as post-filing exhaustion does not excuse a plaintiff's failure to exhaust before bringing the claim, a subsequent untimely response by prison officials after suit has been filed cannot serve to ‘unexhaust’ the claim and justify dismissal”); Williams v. Jones, 2013 WL 1187028, *6 (D.S.C., Jan. 23, 2013) (declaring to dismiss for non-exhaustion where plaintiff filed suit after waiting 10 1/2 months for a first stage decision, which he received two months later), objections overruled, 2013 WL 1187042 (D.S.C., Mar. 20, 2013); Thomas v. Sheppard-Brooks, 2009 WL 3365872, *6 (E.D.Cal., Oct. 16, 2009) (“Plaintiff's actions in pursuing higher levels of appeal when he finally received a response after he initiated this lawsuit did not ‘un-exhaust’ his claims.”), report and recommendation adopted, 2009 WL 4042876 (E.D.Cal., Nov. 20, 2009); accord, Frierson v. Bell, 2010 WL 3878732, *5 (D.S.C., Sept. 28, 2010) (“Defendants cannot rectify their failure years after a plaintiff files a complaint with the federal court. Such a result might incentivize prison officials to delay their response to an inmate’s claims until after he filed a federal suit in order to provide another way to delay judicial review.”); Lino v. Small, 2010 WL 3075754, *3 (S.D.Cal., May 28, 2010) (declining to dismiss where prisoner submitted second-level appeal, received no response or explanation for the non-response, filed suit after four months, and received an invitation to appeal further four months after that), report and recommendation adopted, 2010 WL 3075751 (D.S.Cal., Aug. 5, 2010); Rouser v. White, 2010 WL 843764, *4 & n.5 (E.D.Cal., Mar. 10, 2010) (rejecting position that prisoners must wait until lateness of response is “exceptional” before filing suit); Wolfe v. Cooper, 2009 WL 2929442, *4 (D.S.C., May 20, 2009) (where plaintiff filed suit after waiting seven months for a response that had a 40-day deadline, and response was provided 15 months after grievance was filed, plaintiff deemed to have exhausted), report and recommendation rejected on other grounds, 2009 WL 2929438 (D.S.C., Sept. 2, 2009); see Appendix A for additional authority on this point; see also Cooper v. Beard, 2007 WL 1959300, *5 (M.D.Pa., July 2, 2007) (where Request for Religious Accommodation was a prerequisite for a grievance, and plaintiff did not get a timely response and went forward with a grievance before receiving a late response, he exhausted); Daker v. Ferrero, 2004 WL 5459957, *2 (N.D.Ga., Nov. 24, 2004) (prisoner who was prevented from appealing lack of decision at intermediate stage, filed suit, and was later afforded an opportunity to appeal had exhausted as of the time he was prevented from appealing). \textit{But see} Sergent v. Norris, 330 F.3d 1084, 1085-86 (8th Cir. 2003) (affirming dismissal for non-exhaustion where time for response had passed before suit was filed, but prisoner had not made that clear to the district court); Morris v. McGrath, 2006 WL 2228944, *4 (N.D.Cal., July 31, 2006) (dismissing for non-exhaustion where the final grievance decision was late, but the authorities had been in touch with the prisoner for more information and he knew they were working on his grievance); see also Rainey v. Ford, 2006 WL 3513687, *2, 4-5 (D.S.C., Dec. 5, 2006) (holding that where a prisoner’s grievance was not timely decided, he had exhausted; but where a decision was issued later and the prisoner indicated he did not wish to appeal, the case was moot). In \textit{Alex v. Stalder}, 2007 WL 4919781 (W.D.La., Dec. 3, 2007), the plaintiff did not receive a timely decision, filed suit, and then received a notice that grievance officials had given themselves more time. The court held that the plaintiff should have dismissed his complaint without prejudice and refiled it after the process was completed. The court said: “This may seem a bit harsh, considering the circumstances, but this court is besieged with unexhausted prisoner complaints.” 2007 WL 4919781, *4. By contrast, in \textit{Zoph v. Doe}, 2014 WL 459798, *4 (S.D.Ill., Feb. 4, 2014), the plaintiff received an appeal decision stating incorrectly that his appeal was untimely and the matter would not be considered further; he filed suit, and then the appeal body issued a decision on the merits. The court declined to dismiss for non-exhaustion.

\textsuperscript{470} Smith v. U.S., 2011 WL 7414011, *9 (M.D.Pa., Nov. 18, 2011); see Woods v. Carey, 2012 WL 6021371, *4 (E.D.Cal., Dec. 4, 2012) (holding plaintiff did not exhaust where second-level appeal decision was late, but officials advised plaintiff of the need for more time because the matter was complex, and plaintiff filed suit without waiting for the \textit{third} level decision). \textit{But see} Rodgers v. Lewis, 2012 WL 4158506, *3 (M.D.La., Sept. 18, 2012) (holding
Systems with no deadline for the final appeal present a more difficult problem, and courts have not resolved how long a prisoner must wait in the absence of a final deadline.\footnote{28 C.F.R. § 115.52(d)(1-3).} \footnote{See Woodard v. O'Brien, 2010 WL 148301, *15 (N.D.Iowa, Jan. 14, 2010); Campbell v. Johnson, 2008 WL 222691, *7 (N.D.Fla., Jan. 25, 2008); Artis-Bey v. District of Columbia, 884 A.2d 626, 634 (D.C. 2005). See Johnson v. Thying, 369 Fed.Appx. 144, 147-48 (1st Cir. 2010) (unpublished); Holmes v. St. Tammany Parish Sheriff's Office, 2013 WL 5530335, *5 n.7 (E.D.La., Oct. 7, 2013); Smith v. City of New York, 2013 WL 5434144, *10 (S.D.N.Y., Sept. 26, 2013); Contino v. City of New York, 2013 WL 4015816, *6-7 (S.D.N.Y., Aug. 7, 2013); Carter v. Bailey, 2012 WL 602201, *2-3 (C.D.Cal., Jan. 10, 2012), report and recommendation adopted, 2012 WL 602207 (C.D.Cal., Feb. 23, 2012); Green v. Cox, 2011 WL 5025145, *7 (D.Nev., Sept. 1, 2011); Leatherwood v. Cohen, 2011 WL 4435807, *3 n.4 (D.S.C., Sept. 23, 2011); Rhinehart v. Scott, 2011 WL 679699, *6 (E.D.Mich., Jan. 14, 2011) (stating “§ 1997e(a) does not require a prisoner to exhaust all ‘mandatory’ remedies; it requires him to exhaust all ‘available’ remedies), report and recommendation adopted, 2011 WL 674736 (E.D.Mich., Feb. 16, 2011); Tate v. Howes, 2010 WL 2231812, *2 (W.D.Mich., June 2, 2010) (“The procedural rule for exhaustion does not come from MDOC's internal policies, but rather from federal law, specifically, 42 U.S.C. § 1997e(a).”); Warren.} For sexual abuse complaints, the National Standards to Prevent, Detect, and Respond to Prison Rape, recently promulgated under the Prison Rape Elimination Act (PREA), require that final decisions be issued within 90 days of the grievance’s filing, excluding the time taken by prisoners in preparing their appeals, and providing for agencies to extend the time by up to 70 days with written notice to the prisoner.\footnote{The Seventh Circuit has held, in connection with a grievance system that called for appeals to be decided within 60 days “whenever possible,” that the remedy did not become “unavailable” because decision took six months. “Even six months is prompt compared with the time often required to exhaust appellate remedies from a conviction.” Ford v. Johnson, 362 F.3d 395, 400 (7th Cir. 2004). The analogy to judicial proceedings seems inapposite in connection with a grievance process in which the prisoner has none of the normal safeguards of the judicial process but is subject to forfeiture of claims based on failure to meet deadlines much shorter than those generally found in the judicial process. See § IV.E.7, below, concerning the “proper exhaustion” rule; see also Mlaska v. Shah, 428 Fed.Appx. 642, 645 (7th Cir. 2011) (unpublished) (following Ford v. Johnson where decision was due within two months if “reasonably feasible”); Gregory v. Santos, 2010 WL 750040, *1 (S.D.Ill., Mar. 3, 2010) (in case from same system as Ford, plaintiff who filed shortly after the six months had expired had not exhausted, since state courts had held the deadline directory rather than mandatory). Other courts that have considered similar delays have not found a failure to exhaust. See Hambrick v. Morton, 2009 WL 1759564, *1-2 (S.D.Ga., June 19, 2009) (where plaintiff’s grievance had been pending 21 months with no response and he alleged he had been refused an appeal form, defendants were not entitled to summary judgment for non-exhaustion); O’Neal v. Koerner, 2005 WL 238317, *2 (D.Or., Jan. 31, 2005) (holding prisoner who waited seven weeks after filing last appeal was not shown to have failed to exhaust); Thompson v. Koneny, 2005 WL 1378832, *5 (E.D.Mich., May 4, 2005) (holding that a decision delayed six and a half months was not “timely” and case could not be dismissed for non-exhaustion where prisoner filed after five and a half months); McNeal v. Cook County Sheriff’s Dept’,” 282 F.Supp.2d 865, 868 n.3 (N.D.Ill. 2003) (holding that 11 months is long enough, citing cases holding that seven months is long enough and one month is not); see Taylor v. Doctor McWeeney, 2005 WL 1378808 (S.D.Ohio, May 27, 2005) (holding that prisoner who waited a little over two months past a 30-day deadline for decision had waited a “reasonable” time and had exhausted). But see Woodruff v. Booth, 2007 WL 614001, *3 (M.D.Pa., Feb. 21, 2007) (holding four months was not “inordinate delay,” no reference to deadline for decision if any).} The prisoner need not complete the appellate stage before filing suit.\footnote{While these decisions are arguably supported by the proposition that complying with the grievance rules satisfies the exhaustion requirement, it is equally arguable that they are inconsistent with the fundamental obligation to exhaust, and by the meaning of that word, imposed by § 1997e(a). Other decisions so hold. The latter is probably the better argument; after all, seeking any sort of further review is not precluded.} A few decisions have held that where the obligation to appeal is framed in permissive terms, the prisoner need not complete the appellate stage before filing suit. The procedural rule for exhaustion does not come from MDOC’s internal policies, but rather from federal law, specifically, 42 U.S.C. § 1997e(a).
of remedy is generally optional, and an exception for permissively phrased appeal provisions would likely defeat the exhaustion requirement very widely. A different situation is presented by grievance systems which limit the circumstances under which appeal is appropriate; those restrictions govern under the “proper exhaustion” standard, and a prisoner need not take an appeal that is not authorized by the policy. 475

Most courts including the Second Circuit have held that exhaustion must be completed before suit is brought. 476 Exceptions to the exhaust-first requirement have on rare occasions been allowed based on individual circumstances. 477 The majority of courts have held that initial

v. Fort Dodge Correctional Facility, 2009 WL 1473955, *3 (N.D.Iowa, May 27, 2009), reconsideration denied, 2009 WL 2905544 (N.D.Iowa, Sept. 4, 2009), aff’d, 372 Fed.Appx. 685 (8th Cir. 2010); Wilks v. King County, 2008 WL 4681430, *1 (W.D.Wash., Oct. 20, 2008) (policy stating a prisoner “may” appeal does not make appeal permissible for PLRA purposes); see also Short v. Greene, 577 F.Supp.2d 790, 793 & n.4 (S.D.W.Va. 2008) (holding PLRA made filing a grievance mandatory even concerning subjects as to which state law made it optional); accord. Wade v. Spencer, 2014 WL 51235, *3 (N.D.W.Va., Jan. 7, 2014). Cf. Turner v. Burnside, 541 F.3d 1077, 1083-84 (11th Cir. 2008) (prisoner whose grievance was torn up by the warden was not required to re-file it or grieve the warden’s action, since the rules did not say so, and was not required to file an emergency grievance, since that procedure was an optional alternative to the regular process he had tried to use).

475 See Toomer v. BCD, 537 Fed.Appx. 204, 206 (4th Cir. 2013) (noting instructions with grievance decision said prisoner should appeal only if dissatisfied); Buck v. Hartman, 2013 WL 3421891, *3-4 (S.D.II., July 8, 2013) (noting appeal is appropriate under prison policy if “the offender still feels that the problem, complaint or grievance has not been resolved to his or her satisfaction”); Prochaska v. Heidorn, 2012 WL 359694, *7 (E.D.Wis., Feb. 2, 2012) (noting prisoners are obliged to appeal under grievance rules only if the decision is “adverse” or the prisoner is “dissatisfied”); Maeshack v. Avenal State Prison, 2011 WL 3439194, *5 (E.D.Cal., Aug. 4, 2011) (holding prisoner instructed that “if you are dissatisfied with this decision, you may appeal to the Second Formal Level” was not obliged to appeal if he was satisfied), report and recommendation adopted, 2011 WL 6780906 (E.D.Cal., Dec. 27, 2011); Sims v. VEAL, 2010 WL 3431803, *6 (E.D.Cal., Aug. 31, 2010) (noting “the applicable regulations provide that review beyond the First Level is reserved for appeals that were denied at the First Level”), report and recommendation adopted, 2010 WL 3853005 (E.D.Cal., Sept. 30, 2010); Manning v. Dolce, 2010 WL 3515718, *3 (E.D.Mich., July 12, 2010) (“The policy does not contemplate an appeal to Step II unless the grievant “is dissatisfied with the grievance response received at Step I or if he did not receive a timely response.”), report and recommendation adopted, 2010 WL 3515715 (E.D.Mich., Sept. 8, 2010); Wilks v. Stowers, 2010 WL 2104153, *2 (W.D.Wash., May 25, 2010) (where policy permitted appeals only if new facts arise or the facts are incorrect as stated, mere disagreement with a decision did not support an appeal); Roy v. Dominguez, 2010 WL 1588611, *3 (N.D.Ind., Apr. 16, 2010) (where policy said to appeal if dissatisfied with the initial response, and initial response was set to up a meeting with the warden, plaintiff was not obliged to appeal). 476 Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001); accord, Gonzalez v. Seal, 702 F.3d 785, 787-88 (5th Cir. 2012) (overruling contrary authority); Johnson v. Jones, 340 F.3d 624, 627-28 (8th Cir. 2003) (citing cases, overruling prior authority); Ellington v. Clark, 2010 WL 3063267, *3-4 (E.D.Cal., Aug. 3, 2010) (exhaustion after filing but before service of process is not adequate); see Christ v. Weiglen, 2013 WL 2360920, *3 (E.D.Cal., May 29, 2013) (holding exhaustion must precede filing in state court § 1983; exhaustion before removal to federal court is not adequate). If a prisoner files suit in a situation where remedies are not available, and then later exhausts when those circumstances no longer exist, the suit is not rendered retroactively unexhausted at filing. Jones v. Miami Correctional Facility, 2011 WL 1296755, *6 (N.D.Ind., Mar. 31, 2011).

non-exhaustion of a claim cannot generally be cured by reasserting it in an amended or supplemental complaint after exhaustion, despite the general rule that an amended complaint replaces the prior complaint for all purposes,\textsuperscript{478} though there are a few contrary decisions.\textsuperscript{479} A


2009); see Appendix A for additional authority on this point. In one case where the plaintiff alleged that his attempts to file grievances were “significantly thwarted,” the court directed that the plaintiff be allowed to file a grievance and that its processing be expedited and the results submitted to the court. Hause v. Smith, 2006 WL 2135537, *1-2 (W.D.Mo., July 31, 2006); see § IV.C, n. 254, above, for additional instances in which courts allowed exhaustion after filing, by staying the litigation pending exhaustion or otherwise; see § IV.H, below, concerning claims that a problem is too urgent to wait for exhaustion.

The Fifth Circuit has recently overruled its earlier holding that courts can excuse premature filing where “dismissal would be inefficient and would not further the interests of justice or the Congressional purposes behind the PLRA,” e.g., where exhaustion is completed by the time the court addresses the issue. See Underwood v. Wilson, 151 F.3d 292, 296 (5th Cir. 1998), overruled by Gonzalez v. Seal, 702 F.3d 785, 788 (5th Cir. 2012) (per curiam). Gonzalez relied on statements in the subsequent Supreme Court decisions Woodford v. Ngo and Jones v. Bock that unexhausted claims cannot be considered. Id. Overruled with Underwood is Collins v. Stalder, 335 Fed.Appx. 450, 453-54 n.11 (5th Cir. 2009) (unpublished) (declining to dismiss where case filed before exhaustion had been exhausted for 18 months by the time the magistrate judge decided it, noting that a contrary “would not only facilitate and encourage gamesmanship by defendants, who could wait until an inmate's statute of limitations has run before moving for dismissal, but would also contravene our practice of dismissing premature filings without prejudice to permit a plaintiff to exhaust.”). Shortly before Gonzalez, the court in Thorson v. Epps, 701 F.3d 444, 446 (5th Cir. 2012), cert. denied, 134 S.Ct. 53 (2013), held that the district court could reach the merits in an unexhausted case where the defendants sought (and obtained) summary judgment on the merits, stating that “the purposes of PLRA exhaustion would be confounded by requiring administrative exhaustion at this stage.” Id. Thorson did not rely on Underwood and probably remains good law.
few courts have held that an amended complaint filed after the plaintiff’s release, when the exhaustion requirement would not apply to a new complaint, cures non-exhaustion. However, the majority adheres to the view that the time of initial filing, and not of subsequent amended pleadings, determines whether a case was “brought . . . by a prisoner” under § 1997e(a), and therefore must have been exhausted. A prisoner who is released before the statute of limitations expires can seek to dismiss his case voluntarily and re-file after release, and thereby avoid the exhaustion requirement. 482

The weight of authority holds that suit is “brought” for this purpose when the complaint is first tendered to the clerk’s office, not when the formalities of filing are completed, which may take some time in a pro se case where the plaintiff seeks to proceed in forma pauperis. 483 If a case subject to the exhaustion requirement is filed in state court and removed to federal court, exhaustion must be completed before the state court filing and not just before removal to federal court. 484

Courts have differed over whether new claims added by amended or supplemental complaint (including claims involving newly joined parties) must have been exhausted before the filing of the original complaint, or whether they need only be exhausted before the plaintiff

reasserting them, need not be dismissed); Lawson v. McDonough, 2006 WL 3844474, *22 (N.D.Fla., Dec. 27, 2006) (noting that local rule prescribed that amended complaints completely replace prior complaints, so exhaustion will be considered from the date of the amended complaint). 480 See cases cited in n. 37, above.

481 See cases cited in n. 35, above.

482 See cases cited in n.40, above.

483 See Vaden v. Summerhill, 449 F.3d 1047, 1050-51 (9th Cir. 2006); Ford v. Johnson, 362 F.3d 395, 399-400 (7th Cir. 2004); Drake v. Berg, 2010 WL 309034, *3 (N.D.Cal., Jan. 26, 2010); Gillet v. Anderson, 577 F.Supp.2d 828, 833-34 (W.D.La. 2008) (case was “brought” for exhaustion purposes when complaint was first submitted, even though it was returned to plaintiff for submission on a required form). Contrary, Ellis v. Guarino, 2004 WL 1879834, *6 (S.D.N.Y., Aug. 24, 2004) (holding the plaintiff exhausted where the final step in the grievance process took place during the 11 months between submission of the complaint and the completion of processing in the pro se office; citing contrary cases). Under the “prison mailbox” rule, a prisoner’s complaint is generally deemed filed when it is placed in the prison mail system. See nn. 7, above, and 1561, below.

If a prisoner submits to court something other than a complaint, the action may be deemed to have been “brought,” or not, depending on how the court treated the nonconforming document. Compare Williams v. Walker, 2009 WL 981383, *1-2 (E.D.Cal., Apr. 10, 2009) (where court treated plaintiff’s letter as a complaint, with leave to submit an amended complaint, he did not exhaust because process was not complete at time of letter) with Skurdal v. Federal Detention Center, 2013 WL 5313192, *4 (W.D.Wash., May 21, 2013) (where plaintiff sent letter complaints to court while incarcerated, and court granted IFP status without directing service, action was not commenced for PLRA purposes until post-release when he submitted his “first cognizable legal complaint”—even though it was deemed an amended complaint), report and recommendation adopted as modified, 2013 WL 3897772 (W.D.Wash., July 29, 2013); Rouser v. Rutherford, 2008 WL 4283231, *2 (E.D.Cal., Sept. 15, 2008) (where plaintiff submitted a purported criminal complaint before exhaustion was complete, court ordered it disregarded and that the plaintiff file a proper complaint, and he submitted a civil complaint after exhaustion was completed, action was commenced after exhaustion), report and recommendation adopted, 2009 WL 54899 (E.D.Cal., Jan. 8, 2009). Cf. Walton v. California Dept. of Corrections and Rehabilitation, 2010 WL 503065, *2 (E.D.Cal., Feb. 4, 2010) (where plaintiff’s letter to court was clearly marked “Complaint” under § 1983 and other statutes, and stated his legal claims, it was clearly intended to be a civil complaint and exhaustion was assessed as of the filing date of that document).


seeks to add them to the case.\textsuperscript{486} Much of the authority for the first proposition was concentrated in a single judicial district, and has now been overruled.\textsuperscript{487}


Some courts in this circuit remained attached to the prior rule and have limited the Rhodes v. Robinson holding to new claims that could not have been exhausted before the original complaint was filed. See Garcia v. Rivera, 2012 WL 4050307, *4 (S.D.Cal., Aug. 7, 2012), report and recommendation adopted, 2012 WL 4050303, *1 (S.D.Cal., Sept. 13, 2012); Young v. California Dept. of Corrections and Rehabilitation, 2012 WL 691670, *4
The Ninth Circuit, which has explored this question most thoroughly, has explained that it must be approached

“in the larger context of the pleading framework established by the Federal Rules of Civil Procedure. As a general rule, when a plaintiff files an amended complaint, [t]he amended complaint supercedes the original, the latter being treated thereafter as non-existent. Nothing in the PLRA’s exhaustion requirement creates an exception to this basic premise of our jurisprudence on pleadings.” . . . Therefore, for purposes of the exhaustion requirement, the date of the [amended complaint’s] filing is the proper yardstick. 488

A different route to the same conclusion hews more closely to the plain language of § 1997e(a), which provides that “[n]o action shall be brought” without exhaustion, and by the Supreme Court’s holding that “action” is boilerplate when applied to multi-claim cases, and exhaustion should therefore be assessed claim by claim. 489 A prisoner who exhausts Claim A, and “brings” it by filing suit, and later exhausts Claim B, and “brings” it by amending or supplementing his complaint, has filed nothing without exhausting it, and has not violated the statute.

The contrary position, in addition to contravening the statutory language, abrogates prisoner-plaintiffs’ rights under Rule 15, Fed.R.Civ.P., concerning amendment and supplementation of pleadings. Some courts have said that the terms of this rule cannot prevail over the substantive requirements of the later-enacted § 1997e(a). 490 But the Supreme Court has said just the opposite: that the exhaustion requirement should not be read to overturn ordinary practice under the Federal Rules of Civil Procedure unless Congress so specified. 491 This holding suggests that the PLRA does not displace ordinary practice under Rule 15, which would allow amendment to add exhausted claims whether they pre-date or post-date the original filing. 492 Jones’s holding also suggests that if claims are appropriately brought in the same case


488 Cano v. Taylor, 739 F.3d 1214, 1220 (9th Cir. 2014) (quoting Rhodes v. Robinson, 621 F.3d 1002, 1005 (9th Cir. 2010)).
492 See Cano v. Taylor, 739 F.3d 1214, 1220 (9th Cir. 2014) (stating “a district court’s discretion to allow the addition of a new claim in an amended complaint should not be curtailed where it is not required by law or statute”; noting the PLRA does not justify deviating from the usual procedural practice in this regard); Brown v. Davis, 2013 WL 6405514, *3 (S.D.Ill., Dec. 6, 2013) (relying on Jones); Roundtree v. Adams, 2007 WL 1232173, *8-9
consistently with Rules 18 and 20, Fed.R.Civ.P., which govern joinder, the exhaustion requirement should not be interpreted to require that they be brought separately, as would be the case under a rule against adding later-exhausted claims.  

Requiring otherwise joinable claims to be litigated separately also does not advance the statute’s purpose to ease the burden of prison litigation on the judiciary.

What if the prisoner files a grievance and gets no response? The case law is replete with such instances.  

Failure to respond cannot mean failure to exhaust; otherwise prison officials

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493 See, e.g., Benyamini v. Sharp, 2009 WL 5205355, *1 (E.D.Cal., Apr. 25, 2007) (relying on Jones). Some decisions have focused on Rule 15(d), which permits supplemental complaints adding claims that arose only after the filing of the original complaint. Since those claims cannot be exhausted before the filing of the original complaint, barring their joinder would do away with supplemental complaints in prisoner cases. Rhodes v. Robinson, 621 F.3d 1002, 1006-07 (citing Jones v. Bock, supra); Murphy v. Grenier, 2009 WL 3816905, *19-20 (E.D.Mich., Apr. 20, 2009) (holding that barring the assertion of new claims under Rule 15(d) would be an impermissible repeal by implication of that Rule in prisoner cases). These cases’ reasoning should be equally applicable to new claims that did arise before the filing of the original complaint as long as they are exhausted before the plaintiff seeks to add them by amendment. To hold otherwise would be as inconsistent with Rule 15(a) as the barring of supplemental complaints is with Rule 15(d). See Lee v. Birkett, 2009 WL 3465210, *2 (E.D.Mich., Oct. 23, 2009) (noting claims initiated, or where any part of the exhaustion occurred, after the original filing are governed by Rule 15(d); claims arising or fully exhausted before the original filing are governed by Rule 15(a)).


495 See, e.g., Small v. Camden County, 728 F.3d 265, 273 (3d Cir. 2013) (noting that plaintiff received no response to multiple grievances); Raybon v. Totten, 2013 WL 3456968, *3 (E.D.Cal., July 9, 2013) (declining to dismiss for non-exhaustion where it was undisputed there was no response to plaintiff’s second and third level appeals), report and recommendation adopted, 2013 WL 4407268 (E.D.Cal., Aug. 14, 2013); Garcia v. Heath, 2013 WL 3237445, *5 (S.D.N.Y., June 25, 2013) (noting that plaintiff wrote repeated letters of inquiry about the failure to respond to his grievance); Hudson v. Francum, 2013 WL 5320997, *2 (S.D.Ind., Sept. 23, 2013) (requiring otherwise jointable claims to be litigated separately also does not advance the statute’s purpose to ease the burden of prison litigation on the judiciary).
could keep prisoners out of court by simply ignoring their grievances.\textsuperscript{496} Hence, as noted, once a prisoner has filed the final appeal and the deadline for a final response has passed, exhaustion is complete.\textsuperscript{497} At least one federal court has declined to grant injunctive relief requiring prison officials to process a grievance.\textsuperscript{498} State courts may take a different view.\textsuperscript{499}


\textsuperscript{496} Brown v. Koenigsmann, 2003 WL 22232884, *4 (S.D.N.Y., Sept. 29, 2003); accord, Peoples v. Fischer, 2012 WL 1575302, *6 (S.D.N.Y., May 3, 2012) (“When a prisoner ‘complie[s] with all of the administrative requirements and ma[kes] a good-faith effort to exhaust, he should not be denied the opportunity to pursue his grievance in federal court simply because the final administrative decision maker has ... neglected ... to issue a final administrative determination.’ (citation omitted)), on reconsideration in part, 2012 WL 2402593 (S.D.N.Y., June 26, 2012); Bruno v. Jonathan, 727 F.Supp.2d 195, 198-99 (W.D.N.Y. 2010) (where prisoner’s appeals were never decided despite his compliance with the rules, defendants were estopped and/or special circumstances excused non-exhaustion); Torres v. Carry, 672 F.Supp.2d 338, 344-45 (S.D.N.Y. 2009) (plaintiff who had waited four years for a final decision had not exhausted, but was entitled to an exception to the exhaustion requirement), reconsideration denied, 672 F.Supp.2d 346 (S.D.N.Y. 2009); Duke v. Hardin County, 2008 WL 918136, *2 (W.D.Ky., Mar. 31, 2008) (holding prisoner exhausted where he received a response stating the matter had been investigated and turned over to the Jailer, and the Jailer never responded); Levi v. Briley, 2006 WL 2161788, *3 (N.D.Ill., July 28, 2006) (possibly responsive to grievance was not a response triggering appeal obligation).

\textsuperscript{497} See n. 463, above.


Respond to Prison Rape, recently promulgated under the Prison Rape Elimination Act (PREA), require that grievance systems allow prisoners to treat non-response to sexual abuse complaints as a denial of the grievance. A prisoner who does appeal under these circumstances cannot be faulted for failing to wait for a decision that is long past the prison’s own deadline for response—though if a late decision arrives before suit is filed, the prisoner is obliged to appeal the decision rather than proceed to court. Some decisions say that if appealing a non-response is not mandatory under grievance rules, prisoners who did not appeal remain in the position of waiting for a very late decision. That presumably means they can appeal from the lack of a decision even after dismissal for non-exhaustion, and re-file upon completion of the process. However, if the prisoner cannot appeal without a decision that he does not receive, and is denied a decision, the prisoner has sufficiently exhausted “available” remedies.


One court has gone so far as to hold that a prisoner who did not get a timely response, but did not appeal the non-response, instead waiting for the late response and appealing from that, was properly found to have procedurally defaulted. Flores v. Lappin, 2013 WL 4711663, *2 (E.D.Tex., Aug. 29, 2013).

28 C.F.R. § 115.52(d)(4).

Risher v. Lappin, 639 F.3d 236, 241 (6th Cir. 2011) (holding prisoner who did not receive a response timely was entitled under the rules to appeal and was not obliged to track down the errant response; “When pro se inmates are required to follow agency procedures to the letter in order to preserve their federal claims, we see no reason to exempt the agency from similar compliance with its own rules.”); Kyles v. Mathy, 2010 WL 3025109, *4 (C.D.Ill., Aug. 2, 2010). But see Hull v. Cox, 2012 WL 3100600, *6, 8 (D.Nev., June 6, 2012) (holding long delay at intermediate stage did not justify filing suit before last step was completed; plaintiff could have appealed when responses became overdue), report and recommendation adopted, 2012 WL 3096476 (D.Nev., July 30, 2012).

In Ward v. Byars, 2013 WL 1403220, *6 (D.S.C., Mar. 11, 2013), report and recommendation adopted, 2013 WL 1404918 (D.S.C., Apr. 5, 2013), the plaintiff waited four and a half years for a Step 1 response and then filed suit immediately after filing a Step 2 appeal. The court declined to recommend dismissal for exhaustion, noting that grievances in that system were supposed to be advanced automatically to the next step without action by the prisoner; it held that the claim should be deemed exhausted at the end of the maximum time allowed for the grievance process.


Dole v. Chandler, 438 F.3d 804, 811-12 (7th Cir. 2006) (holding prisoner had exhausted when he did everything necessary to exhaust but his grievance simply disappeared, and he received no instructions as to what if anything to do about it); Brengtecy v. Horton, 423 F.3d 674, 682 (7th Cir. 2005) (holding prisoner who received no decision
Some courts have held that prisoners are obligated to make some effort to follow up when they receive no response to their grievances. This holding appears incorrect in light of Jones v. Bock in the absence of a prison rule instructing prisoners what to do in that situation.

had exhausted where the grievance policy did not say what to do absent a decision); Foulk v. Charrier, 262 F.3d 687, 698 (8th Cir. 2001); Brown v. Davis, 2013 WL 6405514, *3 (S.D.Ill., Dec. 6, 2013) (similar to Dole v. Chandler); McNeill v. Atchison, 2013 WL 6405778, *2 (S.D.Ill., Dec. 6, 2013) (similar to Dole v. Chandler); Gebo v. Thyg, 2012 WL 965097, *5 (D.N.H., Mar. 21, 2012) (holding remedies may be unavailable where staff member refuses to respond to “request slip” and prisoner cannot obtain a grievance form without the response); Wilson v. Hosey, 2012 WL 957488, *5-6 (N.D.Ill., Mar. 15, 2012); Cosme v. Furman, 769 F.Supp.2d 110, 114 (W.D.N.Y. 2011); Fortune v. Giorla, 2011 WL 6739470, *5 (E.D.Pa., Dec. 22, 2011) (declining to dismiss for non-exhaustion where defendants submitted no evidence of a means to appeal a non-response); see Appendix A for additional authority on this point; see also Perry v. Torres, 2009 WL 2957277, *3-4 (S.D.N.Y., Sept. 16, 2009) (where plaintiff received no decision, defendants had the burden of showing what he should have done; where appeal was supposed to be filed on the form bearing the decision plaintiff did not receive, defendants would be estopped from requiring use of the form); Reyes v. McGinnis, 2003 WL 23101781 (W.D.N.Y., Apr.10, 2003) (holding that plaintiff who alleged that he never received any response to his grievances, but appealed anyway, did not exhaust untimely because the time deadlines only started to run as of the response he didn’t receive). Contra, Murray v. Palmer, 2010 WL 1235591, *2 (D.N.Y., Mar. 31, 2010) (holding prisoner who was assigned no grievance number must nonetheless appeal). Cf. Lewis v. Federal Bureau of Prisons, 2013 WL 65412, *3 (N.D.W.Va., Jan. 3, 2013) (holding prisoner did not exhaust where he said he mailed his final grievance form to “central office,” which never answered, and he couldn’t prove he mailed it because his property was lost in transit; court says he never “successfully” filed his appeal form), aff’d, 539 Fed.Appx. 187 (4th Cir. 2013).

Norwood v. Johnson, 457 Fed.Appx. 74, 77 (3d Cir. 2012) (unpublished) (“Proper exhaustion means using all of the steps the agency holds out, . . . including, here, the unremarkable step of resubmitting a form the agency lost, or resubmitting a form to clarify for the agency the exact nature of one’s claim.”), cert. denied, 132 S.Ct. 1930 (2012); Williams v. LeClair, 128 Fed.Appx. 792, 793 (2d Cir. 2005) (unpublished) (affirming dismissal for non-exhaustion where the plaintiff alleged that an unidentified prison official had discarded his grievance, but failed to explain why he did not pursue the matter when he realized his grievance had not been filed); Goldsmith v. Zolecki, 2013 WL 5699302, *6 (N.D.Ill., Oct. 18, 2013) (same as Stallings v. Cook County); Willis v. Mohr, 2013 WL 5773932, *5 (S.D.Ohio, Oct. 24, 2013); Stallings v. Cook County, 2013 WL 3669623, *5 (N.D.Ill., July 12, 2013) (“Simply submitting a grievance and not receiving a response is insufficient to establish that the grievance process is unavailable.”); Mable v. Beard, 2013 WL 2435295, *18 (M.D.Pa., June 4, 2013) (holding prisoner who received no response “could have inquired or filed a request slip inquiring about the matter”; not explaining why filing a second grievance, which was rejected, did not satisfy his obligation in the absence of policy guidance); Taylor v. Cook County, 2013 WL 2285806, *4 (N.D.Ill., May 23, 2013) (“Simply submitting a grievance and not receiving a response is insufficient to establish that the grievance process is unavailable. . . . Rather, an inmate must attempt to follow up on the status of their grievance.”); Belile v. Griffin, 2013 WL 1776086, *8 (N.D.N.Y., Feb. 12, 2013) (where grievances disappeared, plaintiff should have given them directly to the grievance supervisor who toured the housing unit), report and recommendation adopted, 2013 WL 1291720 (N.D.N.Y., Mar. 27, 2013); Chestnut v. McClendon, 2012 WL 5497899, *4 (N.D.Fla., Oct. 24, 2012) (noting prisoner’s concession that he should have filed a second grievance when he did not get an answer to the first grievance), report and recommendation adopted, 2012 WL 5497880 (N.D.Fla., Nov. 13, 2012); see Appendix A for additional authority on this point; see also Atkins v. Haws, 2012 WL 1569606, *7-8 (C.D.Cal., Mar. 20, 2012) (holding plaintiff who waited seven months to follow up on unanswered grievance and upon receiving an explanation and invitation to resubmit, failed to do so, failed to exhaust), report and recommendation adopted, 2012 WL 1569596 (C.D.Cal., May 3, 2012), motion for relief from judgment denied, 2013 WL 828758 (C.D.Cal., Mar. 5, 2013).

See Small v. Camden County, 728 F.3d 265, 273 (3d Cir. 2013) (rejecting argument that prisoner should have appealed lack of response to grievances where the grievance policy did not provide for such appeals); Williams v. Ezell, 534 Fed.Appx. 699, 703 (10th Cir. 2013) (rejecting argument that plaintiff should have filed a grievance about defendants’ unresponsiveness to his grievances absent any policy to that effect); Davis v. Corrections Corp. of America, 463 Fed.Appx. 748, 750 (10th Cir. 2012) (unpublished) (rejecting argument that plaintiff should have taken additional measures when his informal grievances were not answered; “We will not impose a requirement that is never mentioned in the applicable written policies.”); Risher v. Lappin, 639 F.3d 236, 241 (6th Cir. 2011) (rejecting argument that prisoner who did not receive a timely response was obliged to track it down, rather than
If there is such a rule, of course, prisoners are obliged to follow it. At least one court has held that a policy saying only that non-response shall entitle the offender to move to the next stage of the process does not sufficiently instruct the prisoner what to do, so failure to appeal does not constitute non-exhaustion. Other courts have simply held that prisoners who grieve but do not get a response have satisfied the exhaustion requirement, usually without inquiring whether they were technically entitled to appeal the lack of response.

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appeal as the rules provided); Barghouti v. Pfister, 2014 WL 509328, *4 (S.D.Ill., Feb. 10, 2014) (rejecting argument that plaintiff whose grievance disappeared at the prison should have filed a grievance with the central Administrative Review Board; “Such an argument would place the burden on Plaintiff to ensure that the grievance process works, a burden which he cannot possibly shoulder.”); Lawson v. Youngblood, 2014 WL 273854, *3 (E.D.Cal., Jan. 23, 2014) (in system where verbal grievances were permitted, rejecting contention that plaintiff was required to “provide unspecified ‘follow-up’” not set out in policy), report and recommendation adopted, 2014 WL 669779 (E.D.Cal., Feb. 20, 2014); Cowart v. Erwin, 2013 WL 6188731, *5 (N.D.Tex., Nov. 26, 2013) (holding plaintiff was not obliged to take action when he did not receive interim response to his grievance because the rules did not specify any such action); Ransom v. Aquirre, 2013 WL 5923104, *8 (E.D.Cal., Nov. 1, 2013) (stating “there is no rule or regulation requiring Plaintiff to take further action. Once Plaintiff indicates that he has done what is required, Defendants cannot defeat his statements simply by contending that he should have done more.”), report and recommendation adopted, 2014 WL 994606 (E.D.Cal., Mar. 12, 2014); Cowart v. Erwin, 2013 WL 5970790, *4 (N.D.Tex., Aug. 2, 2013) (rejecting defendants’ claim that plaintiff should have filed a second grievance upon not receiving a receipt for the first, since “the Jail’s policy does not require any such action in order to exhaust remedies”); Facey v. Dickhaut, 892 F.Supp.2d 347, 353-54 (D.Mass. 2012) (declining to dismiss where plaintiff alleged he appealed non-response to grievance, received no response to his appeal, and regulations provided no further procedural steps in that situation); Thomas v. Wilber, 2012 WL 2358590, *3 (E.D.Cal., June 20, 2012) (stating “prisoners are not required to conceive of ways to work around the failure of prison officials to respond to properly submitted appeals”) (dicta), report and recommendation adopted, 2012 WL 3201778 (E.D.Cal., Aug. 3, 2012); Rodriguez v. Miramontes, 2012 WL 1983340, *7 (D.Ariz., June 4, 2012) (declining to require prisoners to file a grievance about the failure to decide a required Informal Resolution request, a response to which was necessary to file a grievance, though he pursued other inquiries; declining to require transferred prisoner to complain about lack of response to sending state where grievance procedure does not so provide); Stansbury v. U.S. Government, 2012 WL 1292505, *3 (E.D.Cal., Apr. 13, 2012) (holding “prisoners are not required to conceive of ways to work around the failure of prison officials to respond to properly submitted appeals, and in this Circuit, the failure to exhaust may be excused where the administrative remedies are rendered effectively unavailable”); Davitashvili v. Schomig, 2012 WL 12767, *5-6 (D.Ariz., Jan. 4, 2012) (declining to dismiss for non-exhaustion where plaintiff says he got no response to his informal grievance, and policy provided no instruction as to what to do in that situation; see Appendix A for additional authority on this point; see also Johnson v. Meier, 842 F.Supp.2d 1116, 1118-19 (E.D.Wis. 2012) (declining to require a prisoner to file another grievance where his initial grievance yielded a nonsensical but non-appealable response). But see Wiseman v. Sebok, 2012 WL 2361494, *6-8 (C.D.Cal., May 10, 2012) (dismissing for non-exhaustion where plaintiff’s initial grievance disappeared, he filed a grievance about the lack of a response, and then failed to follow instructions given in the response to that grievance as to how to proceed), report and recommendation adopted, 2012 WL 2194553 (C.D.Cal., June 15, 2012), aff’d, 543 Fed.Appx. 694 (9th Cir. 2013) (unpublished).


510 Boyd v. Corrections Corporation of America, 380 F.3d 989, 996 (6th Cir. 2004) (holding that “administrative remedies are exhausted when prison officials fail to timely respond to a properly filed grievance,” though distinguishing a case where the prisoner could proceed without a decision), cert. denied, 540 U.S. 920 (2005); Lewis
Prisoners whose grievances are rejected with no avenue of appeal available, *e.g.* by returning them unrecorded or “unprocessed,” have satisfied the exhaustion requirement.511 The same is true of prisoners who resort to an emergency or “sensitive” grievance procedure and have their grievances rejected as not being genuine emergencies, but with no instructions in the

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In Schoenlein v. Halawa Correctional Facility, 2008 WL 4761791, *5-6 (D.Haw., Oct. 29, 2008), the plaintiffs had filed suit before the grievance process was complete, and prison officials had terminated the grievance process as “moot.” Although plaintiffs’ premature resort to litigation required the dismissal of the complaint, the court disapproved the termination of the grievance process, suggesting that the plaintiffs had satisfied the exhaustion requirement for purposes of re-filing their case.
grievance policy as to what to do next.\footnote{Glick v. Walker, 385 Fed.Appx. 579, 583 (7th Cir. 2010); Thornton v. Snyder, 428 F.3d 690, 694 (7th Cir. 2005); Quigley v. Hardy, 2013 WL 5781737, *3-4 (N.D.Ill., Oct. 24, 2013) (following Glick and Thornton); Mims v. Hardy, 2013 WL 2451149, *6-7 (N.D.Ill., June 5, 2013) (following Glick and Thornton); Dixon v. Schaefer, 2013 WL 941971, *3 (N.D.Ill., Mar. 11, 2013) (following Glick and Thornton); Stansbury v. U.S. Government, 2012 WL 1292505, *3 (E.D.Cal., Apr. 13, 2012) (holding when plaintiff had submitted two “sensitive” grievances without response, defendants were obliged to show further remedies were available, and did not); Johnson v. Ghosh, 2011 WL 2604837, *4 (N.D.Ill., June 30, 2011); Haywood v. Hathaway, 2011 WL 1775734, *4-5 (S.D.Ill., Apr. 22, 2011), report and recommendation adopted, 2011 WL 1770821 (S.D.Ill., May 10, 2011). But see Boclar v. Illinois Dept. of Corrections, 2012 WL 463236, *4 (S.D.Ill., Jan. 24, 2012) (dismissing for failure to pursue rejected emergency grievance as regular grievance, ignoring just-cited authority), report and recommendation adopted, 2012 WL 878219, *3 n.3 (S.D.Ill., Mar. 14, 2012).} Conversely, if a grievance is rejected without decision, but there is some means to pursue it further, the prisoner must take advantage of it.\footnote{See Moore v. Bennette, 517 F.3d 717, 729-30 (4th Cir. 2008) (where rules allowed only one grievance at a time except for emergencies, and plaintiff labelled his second grievance an emergency but it did not meet the criteria in the grievance rules for an emergency and was dismissed, plaintiff’s failure to resubmit it when his first grievance was decided was a failure to exhaust). Several California decisions have held that where a grievance was “screened out” but the prisoner was advised of a means of challenging that decision, he was obliged to pursue it. See cases cited in n.749, below. But see Turner v. Burnside, 541 F.3d 1077, 1083-84 (11th Cir. 2008) (prisoner who alleged that the warden tore up his grievance was not obliged to resubmit it through the optional emergency grievance procedure); Devbrow v. Gallegos, 2011 WL 4709062, *1 (N.D.Ind., Oct. 4, 2011) (where grievance was “rejected” without possibility of appeal, and plaintiff directed to tort claim system, plaintiff had exhausted, since compliance with grievance system is what is required).} Courts have held that prisoners satisfied the exhaustion requirement in cases where they have failed to appeal because the grievance system or its personnel told them they could not appeal,\footnote{Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) (where appeal was screened out with a form stating the decision was not appealable, prisoner was not required to appeal further); Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (holding “a prisoner need not press on to exhaust further levels of review once he has . . . been reliably informed by an administrator that no remedies are available”); Miller v. Tanner, 196 F.3d 1190 (9th Cir. 1999) (holding that grievance decision that stated it was non-appealable need not have been appealed); Franklin v. Fewolf, 2014 WL 505341, *4 n.2 (N.D.Ind., Feb. 7, 2014) (holding plaintiff who was notified in writing “[p]er policy, you cannot appeal a rejected grievance” could not be penalized for failing to appeal); Spence v. Armor Correctional Health, 2013 WL 3189165, *2 (E.D.N.Y., June 18, 2013) (holding plaintiff’s allegation that a staff member told him he could not appeal barred granting of motion to dismiss); Baker v. Yates, 2013 WL 812388, *1 (E.D.Cal., Mar. 5, 2013) (holding where officials told prisoner his issue could not be appealed, non-exhaustion was excused); Morgan v. Tilton, 2012 WL 3862345, *3 (E.D.Cal., Sept. 5, 2012) (where grievance that was screened out with a notice stating “This screening decision may not be appealed,” plaintiff’s failure to follow up on it directly was not a failure to exhaust), report and recommendation adopted, 2012 WL 4482025 (E.D.Cal., Sept. 28, 2012); Rye v. Erie County Prison, 689 F.Supp.2d 770, 774 (W.D.Pa. 2009) (sworn statement that deputy warden told plaintiff there was no further appeal and his decision was final barred summary judgment as to availability of remedies); Harris v. Duc, 2008 WL 3850214, *5 (E.D.Cal., Aug. 15, 2008) (prisoner who was told his grievance would be investigated as a “staff complaint” and he would not be told the outcome reasonably concluded no further relief was available), report and recommendation adopted, 2008 WL 4463604 (E.D.Cal., Oct. 2, 2008); Jones v. Santos, 2008 WL 2077933, *5-6 (D.O., May 14, 2008) (prisoner who was told that his sexual assault complaint had been referred to the district attorney, and was directed to address further communications to that office, could reasonably conclude no further relief was available through the grievance system); Tinsley v. Giorla, 2008 WL 901697, *5 (E.D.Pa., Apr. 1, 2008) (if a prison official told a prisoner a decision could not be appealed, contrary to written grievance policy, the grievance procedure could be found unavailable); see Appendix A for additional authority on this point. Prisoners’ reliance on misinformation from prison staff is discussed further at nn. 1074-1076, below.} or gave other responses that proved to be misleading or confusing.\footnote{Gay v. Terrell, 2013 WL 5437045, *13 (E.D.N.Y., Sept. 27, 2013) (holding plaintiff could have reasonably believed a grievance request stating that “your rqst for treatment has been forwarded to the appropriate department for review” meant that his request was processed and he need not pursue remedies further); Lopez v. Swift, 2013 WL 515} The Second
Circuit has held that a prisoner who failed to appeal his property claim was justified by special circumstances in his failure to exhaust because he followed prison officials’ erroneous advice to pursue a grievance instead. 516 It has also held that a prisoner who did not appeal because he repeatedly received favorable grievance decisions that were not implemented, a failure which did not become apparent until after the appeal deadline had passed, had no further available remedies and had satisfied the exhaustion requirement. 517

Exhaustion must be done personally; except in class actions, a prisoner cannot rely on another prisoner’s exhaustion, 518 unless of course prison procedures so permit. 519 If officials

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516 Abney v. McGinnis, 380 F.3d 663, 669 (2d Cir. 2004). The Abney holding appears to be in substantial tension with those of Ruggiero v. County of Orange, 467 F.3d 170, 178-79 (2d Cir. 2006), and Braham v. Clancy, 425 F.3d 177 (2d Cir. 2005), which held that prisoners who received relief before commencing the formal grievance process were nonetheless required to pursue that process. These decisions are discussed in more detail in the next section.

consolidate several prisoners’ grievances and issue a joint response, they cannot thereafter obtain dismissal of individual grievants’ claims on the ground that a particular grievant did not initially raise all the issues in the consolidated grievance.\footnote{Patterson v. Stanley, ___ Fed.Appx. _____, 2013 WL 6044128, *2 (5th Cir. 2013) (unpublished) (holding plaintiff whose disciplinary conviction was reversed at Step 1, with no indication he could have gotten more relief at Step 2, had exhausted); Toomer v. BCDC, 537 Fed.Appx. 204, 206 (4th Cir. 2013) (“After receiving a favorable outcome on the merits of his grievance at a lower step in the process, Toomer was not obligated to pursue an administrative appeal to Step III in order to exhaust his administrative remedies.”); Diaz v. Palakovich, 2011 WL 4867549, *4 (3rd Cir., Oct. 14, 2011) (holding there is no need to appeal outcomes of “grievance resolved” or “uphold inmate”); Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (holding “a prisoner need not press on to exhaust further levels of review once he has either received all ‘available’ remedies at an intermediate level of review or been reliably informed by an administrator that no remedies are available”); Ross v. County of Bernalillo, 365 F.3d 1181, 1186-87 (10th Cir. 2004) (holding a prisoner who fell in the shower and then filed a Pre-Grievance Request Form asking that a mat be placed in the shower had exhausted when the prison put a mat in the shower, since no further relief was available); Hubbard v. Hougland, 2014 WL 530238, *6 (E.D.Cal., Feb. 7, 2014) (holding prisoner who grieved requesting to see the doctor and have his ribs x-rayed, and obtained both forms of relief, need not have appealed); Jackson v. Warren, 2014 WL 169882, *2 (E.D.Ark., Jan. 15, 2014) (stating a requirement to appeal favorable decisions “to be counterintuitive given the objectives of the administrative exhaustion requirement”); Buck v. Hartman, 2013 WL 3421891, *3-4 (S.D.Ill., July 8, 2013) (holding that a prisoner who received the medical attention he sought need not continue the grievance process since damages were not available); Martin v. Cook County Dept. of Corrections, 2013 WL 1181491, *5 (N.D.Ill., Mar. 20, 2013) (holding that a prisoner who filed a grievance seeking dental care and receive a response stating he had been referred for dental services in the near future need not continue the grievance process); Johnson v. Cantrell, 2012 WL 5398473, *1 (W.D.Okl., Sept. 17, 2012) (holding plaintiff who obtained medical and psychiatric treatment, an internal investigation, and instruction).}

1. What If the Prisoner Wins the Grievance?

Common sense and a large body of case law outside the Second Circuit hold that if the prisoner wins the grievance at an early stage (either by favorable decision or simply by getting the relief sought), it’s over and the prisoner has exhausted.\footnote{Pugh v. Goord, 571 F.Supp.2d 477, 491-93 (S.D.N.Y. 2008).} This is true \textit{a fortiori} where prison

\footnote{Ellis v. Schwarzenegger, 2010 WL 715721, *3 (E.D.Cal., Feb. 26, 2010).}

One recent decision reached the opposite conclusion, applying the concept of vicarious exhaustion, also known as the single-filing rule, to hold that if a single plaintiff in multi-plaintiff litigation has exhausted, that exhaustion suffices for the other plaintiffs as well, regardless of whether class certification has been granted or even sought. Jarboe v. Maryland Dept. of Public Safety and Correctional Services, 2013 WL 1010357, *11-15 (D.Md., Mar. 13, 2013).

\footnote{Clark v. Sherman, 2009 WL 57085, *7 (W.D.Pa., Jan. 8, 2009) (plaintiff could not rely on prior exhaustion by “recognized inmate organization” where the prior exhaustion organization was not recognized); Smith v. Tuggles, 2007 WL 685836, *3 (E.D.Cal., Mar. 5, 2007) (dismissing case where group grievance exhaustion was claimed, because grievance omitted required information on inmates’ housing locations), report and recommendation adopted, 2007 WL 1544712 (E.D.Cal., May 25, 2007); see also Ellis v. U.S., 2009 WL 440390, *7 n.5 (W.D.Pa., Feb. 23, 2009) (plaintiff could not rely on provision for exhaustion by “recognized inmate organization” where the organization was not recognized); Huber v. Hanczor, 2013 WL 3421891, *3-4 (S.D.Ill., July 8, 2013) (holding that a prisoner who received the medical attention he sought need not continue the grievance process since damages were not available); Martin v. Cook County Dept. of Corrections, 2013 WL 1181491, *5 (N.D.Ill., Mar. 20, 2013) (holding that a prisoner who filed a grievance seeking dental care and received a response stating he had been referred for dental services in the near future need not continue the grievance process); Johnson v. Cantrell, 2012 WL 5398473, *1 (W.D.Okl., Sept. 17, 2012) (holding plaintiff who obtained medical and psychiatric treatment, an internal investigation, and instruction).}

\footnote{Patterson v. Stanley, ___ Fed.Appx. _____, 2013 WL 6044128, *2 (5th Cir. 2013) (unpublished) (holding plaintiff whose disciplinary conviction was reversed at Step 1, with no indication he could have gotten more relief at Step 2, had exhausted); Toomer v. BCDC, 537 Fed.Appx. 204, 206 (4th Cir. 2013) (“After receiving a favorable outcome on the merits of his grievance at a lower step in the process, Toomer was not obligated to pursue an administrative appeal to Step III in order to exhaust his administrative remedies.”); Diaz v. Palakovich, 2011 WL 4867549, *4 (3rd Cir., Oct. 14, 2011) (holding there is no need to appeal outcomes of “grievance resolved” or “uphold inmate”); Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (holding “a prisoner need not press on to exhaust further levels of review once he has either received all ‘available’ remedies at an intermediate level of review or been reliably informed by an administrator that no remedies are available”); Ross v. County of Bernalillo, 365 F.3d 1181, 1186-87 (10th Cir. 2004) (holding a prisoner who fell in the shower and then filed a Pre-Grievance Request Form asking that a mat be placed in the shower had exhausted when the prison put a mat in the shower, since no further relief was available); Hubbard v. Hougland, 2014 WL 530238, *6 (E.D.Cal., Feb. 7, 2014) (holding prisoner who grieved requesting to see the doctor and have his ribs x-rayed, and obtained both forms of relief, need not have appealed); Jackson v. Warren, 2014 WL 169882, *2 (E.D.Ark., Jan. 15, 2014) (stating a requirement to appeal favorable decisions “to be counterintuitive given the objectives of the administrative exhaustion requirement”); Buck v. Hartman, 2013 WL 3421891, *3-4 (S.D.Ill., July 8, 2013) (holding that a prisoner who received the medical attention he sought need not continue the grievance process since damages were not available); Martin v. Cook County Dept. of Corrections, 2013 WL 1181491, *5 (N.D.Ill., Mar. 20, 2013) (holding that a prisoner who filed a grievance seeking dental care and received a response stating he had been referred for dental services in the near future need not continue the grievance process); Johnson v. Cantrell, 2012 WL 5398473, *1 (W.D.Okl., Sept. 17, 2012) (holding plaintiff who obtained medical and psychiatric treatment, an internal investigation, and instruction).}
officials refuse to process a grievance or appeal on the ground that the prisoner has already received the relief sought.\textsuperscript{522} Similarly, if a prisoner grieves and receives a favorable decision, but prison staff then ignore or fail to carry out the decision, the prisoner need not grieve the noncompliance, since otherwise “prison officials could keep prisoners out of court indefinitely by saying ‘yes’ to their grievances and ‘no’ in practice”\textsuperscript{523}—though decisions are not unanimous on this point.\textsuperscript{524}

of the officer in how to conduct a pat search after a preliminary complaint need not have filed a grievance where defendants failed to show any further relief was available; the policy excludes damages and discipline of staff, and he had already been transferred), \textit{report and recommendation adopted}, 2012 WL 5398469 (W.D.Okla., Nov. 2, 2012); Alcala v. Martel, 2011 WL 2671507, *6 (E.D.Cal., July 6, 2011) (holding a prisoner who sought medical care, and got it after filing an informal grievance, was not shown to have further remedies available), \textit{report and recommendation adopted}, 2011 WL 3319712 (E.D.Cal., July 29, 2011); Davis v. Correctional Medical Services, 760 F.Supp.2d 469, 477 (D.Del. 2011), aff’d, 436 Fed.Appx. 52 (3d Cir. 2011); see \textit{Appendix A for additional authority on this point}. Contra, Beard v. Bureau of Prisons, 2013 WL 5951160, *5 (N.D.Tex., Nov. 7, 2013) (dismissing for non-exhaustion where grievance response said “Resolved” and recounted that plaintiff had received medication that was helping with his medical problem, and plaintiff did not appeal further); Loyde v. Shelby County, 2013 WL 5604374, *5 (W.D.Tenn., Oct. 11, 2013) (holding prisoner who grieved denial of medication during first days of confinement, and received a response noting his acknowledgement that by then he was receiving it, did not exhaust because he did not appeal further); Logan v. Emerson, 2012 WL 3292829, *4 (N.D.Ill., Aug. 9, 2012) (holding receipt of medical care did not absolve plaintiff from appealing his grievance about denial of medical care); see also cases cited in nn. 526-527, below. \textit{Cf.} Hollis v. York, 2012 WL 5207583, *4 (E.D.Cal., Oct. 22, 2012) (holding grievance that plaintiff withdrew because he expected the problem to be resolved did not exhaust), \textit{report and recommendation adopted}, 2013 WL 1278419 (E.D.Cal., Mar. 26, 2013).

\textsuperscript{522} McIver v. MCI-H (DOC) CMS Inc., 2010 WL 457547, *3 (D.Md., Feb. 3, 2010) (declining to dismiss where grievance had been declared moot); Brooks v. Frank, 2009 WL 1227880, *4 (D.Hawai‘i, May 1, 2009) (grievance officials had declared the matter moot; “If prison officials expect a prisoner to pursue all steps of the grievance process, and intend to rely on a prisoner's failure to do so as a defense in court, they should not inform prisoners that they have no recourse to the grievance process when denying the grievances and appeals.”); James v. Davis, 2006 WL 2171082, *17 (D.S.C., July 31, 2006) (declining to dismiss for non-exhaustion where prison officials returned grievances as “unprocessed” and stated that the actions he requested had been accomplished, suggesting no need to appeal); Elkins v. Schrubbe, 2006 WL 1663779, *55 (E.D.Wis., June 15, 2006) (holding prisoner had no remaining “available” remedy where grievances were rejected as moot because the issue had already been resolved in his favor in that he received the requested relief).

Unfortunately this seemingly simple proposition has led to complications. Some courts have held that an administrative decision does not obviate the need for an appeal unless it is so completely favorable that no further relief is possible,\(^5\) and others have said that a plaintiff who

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\(^{524}\) See Dixon v. Page, 291 F.3d 485, 490 (7th Cir. 2002) (observing that “[r]equiring a prisoner who has won his grievance in principle to file another grievance to win in fact,” risking the prospect of a “never-ending cycle of grievances,” “could not be tolerated”; but accepting prison officials’ claim that the prisoner could have taken a further appeal to the Director if the situation had not been resolved after 30 days); Gore v. Bureau of Prisons, 2014 WL 533271, *2 (S.D.Ind., Feb. 7, 2014) (“If the BOP approved Gore's surgery and medication and he has not received it, he is still required to attempt to resolve this denial of care through the administrative remedy process prior to filing a complaint.”); Wardlow v. Neely, 2012 WL 2051102, *2 (W.D.N.C., June 7, 2012) (holding that a prisoner who won a grievance decision promising surgery but did not get it should have filed another grievance), aff’d, 482 Fed.Appx. 863 (4th Cir. 2012) (per curiam); McCullough v. Federal Bureau of Prisons, 2012 WL 718845, *3-4 (E.D.Cal., Mar. 5, 2012) (holding that a disciplinary appeal resulting in expungement of the conviction did not exhaust a complaint that the expungement was not carried out; plaintiff should have filed a grievance); Lewis v. Allen, 2011 WL 7121451, *5 (D.Nev., Dec. 16, 2011) (prisoner should have filed another grievance where favorable decision was not carried out), report and recommendation adopted, 2012 WL 275263 (D.Nev., Jan. 31, 2012), appeal dismissed, No. 12-15325 (9th Cir., June 20, 2012); Vasquez v. Oklahoma ex rel. Dept. of Corrections, 2011 WL 4588902, *4 (W.D.Okla., Aug. 30, 2011) (holding plaintiff did not exhaust despite his claim that his complaints were responded to for a while and then the failure to provide medication resumed; grievance rules prescribed filing another grievance), report and recommendation adopted, 2011 WL 4584782 (W.D.Okla., Sept. 30, 2011); Bonds v. Piper, 2007 WL 3038036, *3-4 (E.D.Mich., Oct. 18, 2007) (holding that prisoner was required to grieve a failure to obey an earlier grievance resolution). A particularly absurd and hyper-technical result appears in Stanfield v. Callaway, 2010 WL 234871 (E.D.Cal., Jan. 14, 2010), in which the plaintiff obtained relief through an informal appeal, then brought suit when the decision was ignored. The court said:

Had Plaintiff immediately filed suit after his grievance was granted, Plaintiff may have a valid claim for exhaustion. However, Plaintiff waited for the relief to be effectuated and discovered that the nurses were ignoring the doctor’s order he received when his informal grievance was granted. Thus, it was apparent to Plaintiff that further relief remained available because he could have pursued higher levels of appeal and notified higher prison administrators of his complaint.

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\(^{525}\) Ross v. County of Bernalillo, 365 F.3d 1181, 1186-87 (10th Cir. 2004) (“When there is no possibility of any further relief, the prisoner’s duty to exhaust available administrative remedies is complete.”) (emphasis supplied); see Rozenberg v. Knight, 542 Fed.Appx. 711, 713 (10th Cir. 2013) (holding prisoner removed from job he complained about by Inspector General did not thereby exhaust because he did not get relief on his grievance requests seeking reprimand of staff and reform of kitchen supervision); Johnson v. Gregoire, 2008 WL 5156428, *9-10 (W.D.Wash., Dec. 9, 2008) (holding plaintiff who did not appeal did not exhaust where his substantive problem was resolved but he did not receive relief on his complaint that a particular employee should have a better attitude); Coleman v. Los Angeles, 2008 WL 4449598, *3 (C.D.Cal., Sept. 30, 2008) (plaintiff who sought two hours a week in the law library but obtained only a vague promise of some additional time should have continued the process); Green v. Cahal, 2004 WL 1078988, *2-3 (D.Or., May 11, 2004) (holding that a prisoner whose complaint of medical care delay resulted in a decision that treatment was forthcoming should nonetheless have appealed); Rivera v. Pataki, 2003 WL 21511939, *7 (S.D.N.Y., July 1, 2003) (noting it “made sense” for a prisoner to appeal where an intermediate decision granted him some relief but did not change the challenged policy); see also Johnson v. Thynge, 369 Fed.Appx. 144, 148-49 (1st Cir. 2010) (unpublished) (holding prisoner who sought protective custody did not exhaust where his assailant was transferred as a result of his initial grievance, he did not appeal, but he continued to complain that other prisoners were threatening him); Galindo v. State of Cal., 2005 WL 3031100, *3 (E.D.Cal., Nov. 9, 2005) (holding that a complaint that was “granted” by referring it for investigation, which did not substantiate the complaint, did not exhaust where the plaintiff did not seek to appeal). In Ransom v. Sheehy, 2008
seeks judicial relief not obtained in the grievance process—including damages, which are almost never available administratively—must have followed the process to the end.\(^{526}\) Indeed, some courts have virtually turned the question into a tautology, stating that a plaintiff who is satisfied with an intermediate grievance result has no claim, and the fact of filing litigation shows that a plaintiff who did not take the process to the end did not exhaust.\(^{527}\)

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\(^{526}\) See King v. Iowa Dept. of Corrections, 598 F.3d 1051, 1053 (8th Cir. 2010) (where plaintiff received some relief in response to his workplace conditions complaint, but then sued for damages and for additional medical care, he had not exhausted), cert. denied, 131 S.Ct. 499 (2010); Salley v. PA Dept. of Corrections, 2006 WL 1410825, \(^*4\) (3d Cir., May 23, 2006) (unpublished) (holding prisoner who complained he was denied access to his legal mail, grieved, and was told the problem was corrected had not exhausted when he sued for damages); Williamson v. Wexford Health Sources, Inc., 131 Fed.Appx. 888, 890 (3d Cir. 2005) (unpublished) (holding plaintiff who grieved to get his medication, and got his medication, failed to exhaust because he didn’t appeal); O’Neal v. Dillard, 2010 WL 2735625, \(^*2\) (C.D.Cal., May 6, 2010) (similar to Covert, report and recommendation adopted, 2010 WL 2735627 (C.D.Cal., July 9, 2010); Covert v. Graham, 2010 WL 1292756, \(^*9\) (N.D.Cal., Mar. 31, 2010) (plaintiff who gets relief at an intermediate level but still wants damages must continue the administrative process to exhaust). Contra. Rosa v. Littles, 336 Fed.Appx. 424, 429 (5th Cir. 2009) (holding prisoner who got available relief at first stage need not further pursue damages where the grievance system did not provide them); Fields v. Masiel, 2012 WL 6692017, \(^*1-2\) (E.D.Cal., Dec. 21, 2012) (noting defendants conceded damages were not available through the grievance process); Johnson v. Canter, 2012 WL 5398473, \(^*1\) (W.D.Okla., Sept. 17, 2012) (holding where damages were not available and defendants did not identify any other remedy available in grievance process, plaintiff did not fail to exhaust), report and recommendation adopted, 2012 WL 5398469 (W.D.Okla., Nov. 2, 2012); Franklin v. Ward, 2012 WL 5499836, \(^*4\) (D.S.C., Sept. 11, 2012) (holding acceptance of first level grievance response without appeal exhausted where plaintiff received the relief sought; he could pursue damages in subsequent lawsuit), report and recommendation adopted, 2012 WL 5499830 (D.S.C., Nov. 13, 2012); Taylor v. Miller, 2010 WL 1292756, \(^*3\) (E.D.Ky., Sept. 22, 2010) (holding “if the inmate has received the remedy he requested through prison administrative procedures, he is not foreclosed from seeking money damages in federal court”). Most courts hold that when prisoners do complete the grievance process, they need not specifically request damages. See n. 706, below.

\(^{527}\) See Chioniere v. Citchen, 2010 WL 1064357, \(^*2\) (E.D.Mich., Mar. 22, 2010) (“To the extent that Plaintiff is satisfied with the resolution of any of his grievances, his claims are moot. To the extent that he seeks further relief, he is required to exhaust the available administrative remedies.”); accord, August v. Caruso, 2013 WL 5291577, \(^*5\) (E.D.Mich., Sept. 19, 2013) (dismissing for non-exhaustion where plaintiff grieved firing from job and was reinstated with backpay, but did not further appeal; “If Was somehow dissatisfied with the resolution of this grievance, she was required by the Policy to pursue the grievance through Step III.”), report and recommendation adopted, 2013 WL 6816472 (E.D.Mich., Dec. 24, 2013); Williams v. Hull, 2009 WL 1586832, \(^*7\) (W.D.Pa., June 4, 2009) (“Because there is no futility exception to the PLRA’s exhaustion requirement, Plaintiff is required to exhaust through all levels of the administrative process as to this issue even though he arguably won at the initial level of review.”) Prisoner who complained about interception of legal mail, and obtained his mail and an instruction to staff not to do it again, did not exhaust because he did not appeal.); Levy v. Washington State Dept. of Corrections, 2009 WL 1107698, \(^*7-8\) (W.D.Wash., Apr. 23, 2009) (holding that the fact plaintiff wished to bring legal action showed that he was not satisfied with the relief he had obtained and should therefore have continued the grievance process to seek discipline of the staff involved); Fagans v. Nooth, 2009 WL 1067047, \(^*2\) (D.Or., Apr. 17, 2009) (“Plaintiff [who obtained surgery midway through the grievance process] can not have it both ways. If he received the relief sought through the grievance process, he has no basis for a claim in this proceeding. If plaintiff’s claims are based on the same matters he grieved, he failed to exhaust the grievance process.”); Feliz v. Taylor, 2000 WL 1923506, \(^*2\) (E.D.Mich., Dec. 29, 2000) (“A prisoner’s alleged satisfaction with a Step I grievance does not constitute exhaustion of administrative remedies and does not form the predicate basis for a civil suit. To the contrary, if a prisoner is satisfied with the result of a Step I grievance, it can be presumed that the matter is settled and litigation is avoided.”).
The Ninth Circuit has moved in the opposite direction from these latter decisions. After initially holding that a prisoner need not exhaust further levels of review after receiving all “available” remedies at an intermediate stage or having been “reliably informed by an administrator that no remedies are available,” it has now broadened its view of exhaustion considerably, and in contradiction to its prior holding and that of other courts:

An inmate has no obligation to appeal from a grant of relief, or a partial grant that satisfies him, in order to exhaust his administrative remedies. . . .

That [the plaintiff] initially requested alternative forms of relief does not change our analysis. Once the prison officials purported to grant relief with which he was satisfied, his exhaustion obligation ended. His complaint had been resolved, or so he was led to believe, and he was not required to appeal the favorable decision. Were we to reach the contrary conclusion, any prisoner who expressed his willingness to accept more than one form of relief—demonstrating a flexibility that increases the likelihood of an outcome satisfactory to both the prisoner and the prison officials—would have no recourse when prison officials purported to

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This view might have some merit in an injunctive case. It has none if the claim is for damages for pain, suffering, disability, etc., up to the point the problem was resolved, unless the grievance system provided damages as a remedy. See also Carter v. Rojas, 2009 WL 256110, *3 (E.D.Cal., Feb. 4, 2009) (holding that plaintiff who did not take his final appeal because his problem had been solved did not exhaust, since he had also asked for a detailed description of the offending employee’s conduct, and he could also have received an apology or a change in rules and regulations), report and recommendation adopted, 2009 WL 813465 (E.D.Cal., Mar. 27, 2009).

Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005). Brown relied for this proposition both on Ross v. County of Bernalillo, cited above, and Abney v. McGinnis, discussed below. See Buckley v. Ritola, 2013 WL 4012784, *2 (E.D.Cal., Aug. 6, 2013) (rejecting “tentative conclusory statement” that some further relief “could” have been granted”); Horonzy v. Correctional Corp. of America, 2013 WL 3148674, *6-7 (D.Idaho, June 19, 2013) (holding defendants did not meet their burden to show that further remedies were available after plaintiff’s request for investigation was granted); Aubert v. Elijah, 2010 WL 3341915, *5-6 (E.D.Cal., Aug. 24, 2010) (prisoner who was told his grievance was partly granted, his complaint had been investigated, and no more information would be provided could reasonably conclude that no further remedies were available), report and recommendation adopted, 2010 WL 3825609 (E.D.Cal., Sept. 28, 2010); Chism v. Woodford, 2009 WL 734687, *2 (N.D.Cal., Mar. 18, 2009) (where prisoner who was told by the grievance reviewer to consider his appeal exhausted, he was reliably informed that no more remedies were available, and had exhausted); Schoenlein v. Halawa Correctional Facility, 2008 WL 4761791, *5 n.10 (D.Haw., Oct. 29, 2008) (grievance responses that said the prison was addressing the problem “effectively resolved Plaintiffs’ complaints”); see also Johnson v. Cantrall, 2012 WL 5398473, *1 (W.D.Okla., Sept. 17, 2012) (declining to dismiss for non-exhaustion where defendants did not identify any remedy available to plaintiff, since the grievance system did not provide for damages, the grievance policy excluded staff discipline as a remedy, the prisoner had already been transferred, and officials had authorized medical and psychiatric treatment, undertaken an internal investigation, and instructed the officer in how to conduct a pat search), report and recommendation adopted, 2012 WL 5398469 (W.D.Okla., Nov. 2, 2012); see Appendix A for additional authority on this point. Compare Williams v. Kuenzi, 2007 WL 1771479, *3-4 (N.D.Cal., June 18, 2007) (holding a prisoner who was twice assured in grievance responses that he would be seen by a dentist, but did not appeal, failed to exhaust, since he could have sought further relief—not specified by the court—by appealing); Rodriguez v. Ortiz, 2007 WL 1544770, *1 (E.D.Cal., May 25, 2007) (holding plaintiff who complained about being housed in a cell with blood and fecal matter left by an AIDS patient did not exhaust when he obtained only a medical appointment in his first stage grievance). In Glenn v. Thompson, 2008 WL 4107800, *6-7, 9 (E.D.Tex., Sept. 3, 2008), the court cited unpublished authority to conclude that the Fifth Circuit rejects the holding of Brown v. Valoff, cited above, and requires a prisoner who is informed that his complaint will be investigated to complete the grievance process anyway.
grant one of those alternative forms of relief, but then failed to implement their decision.\textsuperscript{529}

Even under this permissive standard, the question remains whether a seemingly favorable grievance decision actually has decided the issue the prisoner wishes to litigate; if not, the prisoner must continue rather than abandon the process.\textsuperscript{530}

The Second Circuit has taken a troublesome position on this point. Initially, it held that a prisoner who received repeated favorable non-final grievance decisions, which were then not implemented, had exhausted.\textsuperscript{531} It rejected as “impracticable” and “counter-intuitive” the State’s

\textsuperscript{529} Harvey v. Jordan, 605 F.3d 681, 685 (9th Cir. 2010). In Harvey, as noted, the grant of relief was not implemented, but the decision is not in terms limited to those circumstances; the Harvey court’s holding states a general standard for assessing whether exhaustion has been completed. Accord, Gastile v. Virga, 2013 WL 3731733, *7 (E.D.Cal., July 12, 2013) (informal complaint challenging double celling policy which elicited statement “Your concerns are duly noted” exhausted challenge to policy); Taylor v. Clark, 2010 WL 3069243, *6 (E.D.Cal., Aug. 4, 2010) (partial grant of relief sufficed to exhaust; citing Harvey), report and recommendation adopted, 2010 WL 5393533 (E.D.Cal., Dec. 22, 2010); Jones v. Pleasant Valley State Prison, 2010 WL 2197655, *4 (E.D.Cal., May 28, 2010) (same), report and recommendation adopted, 2010 WL 2736874 (E.D.Cal., July 12, 2010). Cf. Benitez v. Arpaio, 2013 WL 4478901, *4 (D.Ariz., Aug. 21, 2013) (holding a grievance that appeared resolved did not exhaust where the plaintiff declared it not resolved by filing another grievance, but then did not appeal).

Some district courts have missed or resisted Harvey’s holding. See Winffel v. Pomazal, 2013 WL 178188, *4 (E.D.Cal., Jan. 16, 2013) (refusing to apply Harvey to partial grant of relief requested); Romero v. Alonzo, 2012 WL 3689554, *4 (C.D.Cal., June 11, 2012) (refusing to apply Harvey holding where plaintiff was not satisfied in all respects with mid-level grievance decision), report and recommendation adopted, 2012 WL 3689519 (C.D.Cal., Aug. 24, 2012); Cunningham v. Ramos, 2011 WL 3419503, *3-4 (N.D.Cal., Aug. 4, 2011) (holding that decision granting confidential inquiry into allegations of misconduct, ultimately resolved against those allegations, did not exhaust under Harvey because it did not grant relief on the merits); Stansbury v. U.S. Government, 2011 WL 2553381, *3 (E.D.Cal., June 27, 2011) (“If Plaintiff could choose not to exhaust administrative remedies simply by declaring he was satisfied at an intermediate level, such an application would render the exhaustion requirement of the PLRA ‘into a largely useless appendage’ and frustrate the prison’s administrative review process.”); Walker v. Whitten, 2011 WL 587556, *3-4 (E.D.Cal., Feb. 9, 2011) (prisoner who withdrew his grievance because he was satisfied with informal resolution did not exhaust; court analogizes to voluntary dismissal of lawsuit) (dictum), report and recommendation adopted as modified, 2011 WL 1466882 (E.D.Cal., Apr. 18, 2011). Cf. Trevino v. Martel, 2013 WL 1283154, *3 (N.D.Cal., Mar. 26, 2013) (prisoner who obtained some relief, but not relief he had asked for, did not exhaust).

\textsuperscript{530} Jackson v. Fletcher, 2013 WL 3354457, *6 (E.D.Cal., July 3, 2013) (holding grievance seeking a medical specialist appointment did not exhaust a complaint about what the specialist subsequently did), report and recommendation adopted, 2013 WL 5946174 (E.D.Cal., Nov. 6, 2013); Bell v. Peery, 2012 WL 6562443, *6 (D.Nev., Nov. 28, 2012) (holding plaintiff did not exhaust where complaint asserted the same issues that were supposedly resolved in his grievances), report and recommendation adopted, 2012 WL 6562222 (D.Nev., Dec. 10, 2012); Coles v. Cate, 2011 WL 6260372, *3, 5 (E.D.Cal., Dec. 15, 2011) (holding response that “although conversion is not possible, you may continue to study and worship Judaism without fear of denial of your religious rights” did not exhaust plaintiff’s claim concerning conversion, or his other claims about specific infringements on religious practice); see Bey v. Napel, 2013 WL 5146504, *4 (W.D.Mich., Sept. 13, 2013) (holding prisoner who sought protective custody and brought suit about failure to provide it did not complete exhaustion when he received a decision removing him from general population and then transferring him to another prison).

\textsuperscript{531} Abney v. McGinnis, 380 F.3d 663, 666, 669 (2d Cir. 2004); see Antrobus v. Department of Corrections, 2009 WL 773277, *4 (S.D.N.Y., Mar. 24, 2009) (where a prisoner receives a favorable decision but there is no procedure governing its implementation, the prisoner has exhausted); Shaheen v. Hollins, 2005 WL 2179400, *4 (N.D.N.Y., Sept. 7, 2005) (holding that a prisoner who received a review of protective custody, but was not removed from it as he requested, “reasonably may not have believed that an appeal . . . was necessary due to the partially favorable decision from the Superintendent”), report and recommendation adopted, 2005 WL 2334387 (N.D.N.Y., Sept. 23, 2005). But see Pritchett v. Portuondo, 2005 WL 2179398, *3 (N.D.N.Y., Sept. 9, 2005) (holding prisoners who
argument that prisoners should file appeals of favorable decisions just in case they are not implemented.\textsuperscript{532} Later, however, it held that a prisoner who had used the prison’s informal procedure to seek a cell change to avoid assault, and who had received the cell change (though only after being assaulted), had not exhausted because he had not gone on to pursue the formal grievance procedure, since that process could have granted further relief such as changes in policy or discipline of staff.\textsuperscript{533} It is unclear why the same was not true of Abney, where the prisoner might have obtained such relief by appealing his favorable grievance decision. The court later reaffirmed this reasoning, holding that a prisoner who prevailed informally was required to exhaust the grievance process because of “the larger interests at stake,” i.e., that filing a grievance “still would have allowed prison officials to reconsider their policies and discipline any officer who had failed to follow existing policies.”\textsuperscript{534}

These decisions can be distinguished from other “favorable decision” cases in that these prisoners obtained the relief they sought without ever engaging the formal grievance process. However, the courts’ reasoning does not turn on that distinction, but seems instead to support an unlimited requirement, one with no basis in the grievance policies the prisoners relied upon, of appealing favorable administrative decisions to a level at which policies are reconsidered—presumably the highest level. These decisions do not acknowledge the same court’s prior rejection as “impracticable” and “counter-intuitive” of the argument that prisoners should appeal favorable decisions just to be safe.\textsuperscript{535} The notion that prisoners should pursue further administrative proceedings when they have already obtained the relief they sought, on the ground that higher officials might take broader action addressing “larger interests,” seems equally impracticable and counter-intuitive. The Seventh Circuit has acknowledged this point, holding that a prisoner who sought and obtained a transfer out of a dangerous cell had exhausted even though he didn’t appeal, and stating that “we do not think it [the prisoner’s] responsibility to notify persons higher in the chain when this notification would be solely for the benefit of the prison administration.”\textsuperscript{536} Further, the apparent holding of the Second Circuit decisions is

\textsuperscript{532} Abney v. McGinnis, 380 F.3d 663, 669 (2d Cir. 2004) (“Once Abney received a favorable ruling from the Superintendent on his IGP grievances, no further administrative proceedings were available to propel him out of stasis.”); see also Christian v. Goord, 2006 WL 1459805, *5 (N.D.N.Y., May 22, 2006) (holding that where a prisoner received a sufficiently favorable decision he was not obliged to appeal and had exhausted, even though he did file an appeal and then brought suit without waiting for a decision). In Abney, the failure to carry out the favorable grievance decisions occurred at a point where it was too late to appeal on that ground. Compare Carr v. Kaminsky, 2010 WL 2162597, *3 (N.D.Ind., May 26, 2010) (where plaintiff could have appealed the failure to implement, his failure to do so merited dismissal for non-exhaustion).

\textsuperscript{533} Braham v. Clancy, 425 F.3d 177, 182-83 (2d Cir. 2005). The court did acknowledge that having received the cell change might be the sort of “special circumstance” that would justify an uncounselled prisoner in thinking he had satisfied the exhaustion requirement. Id. at 182.

\textsuperscript{534} Ruggiero v. County of Orange, 467 F.3d 170, 178-79 (2d Cir. 2006).

\textsuperscript{535} Abney v. McGinnis, 380 F.3d 663, 669 (2d Cir. 2004). In Braham v. Clancy, the court characterized Abney as a case where “a disposition of a grievance provided the relief requested but was never implemented,” and dismissed it as inapposite without further discussion. 425 F.3d at 182-83.

\textsuperscript{536} Thornton v. Snyder, 428 F.3d 690, 696-97 (7th Cir. 2005), cert. denied, 547 U.S. 1192 (2006). The court further noted that appealing a favorable result risks reversal, which in turn “would tend to increase, not decrease, the number of inmate suits,” contrary to the PLRA’s policy “to reduce the quantity and improve the quality of prisoner suits.” Id. (citation omitted). It concluded that arguing that the plaintiff “should have appealed to higher channels
dangerously open-ended. Since no matter what relief the prisoner obtains, there will always be something else prison officials could do, it amounts to a holding that prisoners should always appeal favorable decisions to preserve their right to sue, notwithstanding its own prior rejection of that very point.

One court has held that if a grievance is resolved favorably, the only judicial relief that is available is damages for injuries pre-dating the resolution. That categorical holding goes too far, since (as in Abney), a favorable grievance decision may not be implemented; it is not apparent why the prisoner could not receive damages for a continuing violation of rights. Or, for example, a prisoner seeking to end a prison policy or practice prospectively might win a grievance relieving him or her on narrow grounds from the policy’s immediate application, but leaving the policy generally in place and the prisoner at risk of future application of it. Under those circumstances, the prisoner should be entitled to pursue injunctive relief if there is sufficient risk of recurrence to confer standing, and damages both for injuries suffered before the grievance resolution and for any actual recurrence of the challenged conduct afterwards.

2. Specificity of Grievances

The Supreme Court has said: “The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that defines the boundaries of proper exhaustion.”

Prison rules that require information that the prisoner cannot get may present a question of constitutionality.

At present, it appears that most prison grievance systems do not require great specificity—though that may change in light of Jones v. Bock as prison officials realize that making their systems more demanding may make it easier to get prisoners’ lawsuits dismissed. The New

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after receiving the relief he requested in his grievances is not only counter-intuitive, but it is not required by the PLRA, . . .” Id.

537 See Carter v. Rojas, 2009 WL 256110, *3 (E.D.Cal., Feb. 4, 2009) (holding that plaintiff who did not take his final appeal because his problem had been solved did not exhaust, since he had also asked for a detailed description of the offending employee’s conduct, and he could also have received an apology or a change in rules and regulations), report and recommendation adopted, 2009 WL 813465 (E.D.Cal., Mar. 27, 2009); see also cases cited in nn. 526-527, above.


539 See, e.g., Babbitt v. United Farm Workers National Union, 442 U.S. 289, 302 (1979) (holding that plaintiff has standing to challenge a criminal statute if the fear of prosecution is “not imaginary or wholly speculative”).


541 Maxwell v. Correctional Medical Services, Inc., 538 Fed.Appx. 682, 688-89 (6th Cir. 2013) (unpublished). Alternatively, such a requirement might merely be viewed as making the remedy unavailable. See Espinal v. Goord, 558 F.3d 119, 127 n. 6 (2d Cir. 2009); Brown v. Sikes, 212 F.3d 1205, 1207-08 (11th Cir. 2000) (stating “a grievance procedure that requires a prisoner to provide information he does not have and cannot reasonably obtain is not a remedy that is ‘available’ to the prisoner”). See nn. 656, 658, below, on this point.

542 The Michigan grievance system at issue in Jones required both that grievances “be as specific as possible” and that they be “brief and concise,” but contained no specific requirements for content. Jones, 549 U.S. at 218. Subsequently, the policy was amended to require “[d]ates, times, places and names of all those involved in the issue being grieved.” Michigan Dep’t of Corr. Policy Dir. No. 03.02.130 (Dec. 19, 2003).

In Illinois, after the Seventh Circuit held that the required level of specificity was prescribed by the prisons’ grievance policy and observed that there was no specificity requirement in the policy, see Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002), the prison system revised its policy to require “factual details regarding each aspect of the
York State prison system requires only that grievances “contain a concise, specific description of the problem and the action requested and indicate what actions the grievant has taken to resolve the complaint, i.e., specific persons/areas contacted and responses received.” The New York City jail grievance directive that was effective until March 2008 says nothing about specificity in its text; the grievance form itself says only “Please describe problem as briefly as possible” (with four and a half lines for the answer) and “Action requested by inmate” (two and three-quarters lines). The March 2008 revision borrows part of the New York State formulation: in addition to the prisoner’s identifying information, the grievance “must contain . . . a concise, specific description of the problem/complaint and the action requested.” It also retains the above quoted language on the grievance form itself. The September 2012 revision similarly requires “a description of the grievance or request [and] a specific action requested” in addition to

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offender’s complaint, including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint. This provision does not preclude an offender from filing a grievance when the names of individuals are not known, but the grievant must include as much descriptive information about the individual as possible.” 20 Ill.Admin. Code § 504.810(b); see Lipscomb v. Pfister, 2013 WL 4675813, *3 (C.D.Ill., Aug. 30, 2013) (holding grievance stating plaintiff was stripped and placed in a cell without items required by rules did not exhaust claim that he was “taken out of shackles in a degrading manner, placed in a position with his butt in the air while officers made lewd comments about his rectum, or made to walk naked to his cell after being stripped naked while inmates watched and made lewd and sexual comments.”); Winfrey v. Walker, 2011 WL 2199721, *5 (S.D.Ill., May 2, 2011) (holding grievance about back problems does not exhaust specific claim about denial of a back brace or cane under regulation), report and recommendation adopted, 2011 WL 2199720 (S.D.Ill., June 6, 2011); Nelson v. Miller, 2007 WL 294276, *5-6 (S.D.Ill., Jan. 30, 2007) (holding plaintiff’s complaint that as a Christian he was denied a Muslim bean pie and orange meal did not satisfy the new fact-pleading standard, though it might have passed muster under the older notice pleading standard; a claim about abstaining from all meat is not exhausted under the new standard by grievances about refusing to eat “the flesh meat of four-legged animals”). The regulations’s requirement of “factual particularity” is applied with absurd rigor in one case in which the prisoner was said to have failed to spell out “when [and] where” a supposed failure to investigate and sanctioning/condoning of abuses took place, without consideration of how a prisoner could know the answer, or indeed whether these events can be said to have had any location other than in administrators’ minds. Santiago v. Smithson, 2010 WL 1132564, *4-5 (S.D.Ill., Mar. 22, 2010), reconsideration denied, 2010 WL 4386477 (S.D.Ill., Oct. 29, 2010).

In California, where the rules formerly required prisoners only to “describe the problem and action requested,” a 2011 amendment requires them to identify by name and title or position each staff member alleged to be involved, along with the dates of each staff member’s involvement, or if unavailable, to provide any other available information that would assist in identifying the staff members, and describe all staff members’ involvement. Snowden v. Prada, 2013 WL 4804739, *7 (C.D.Cal., Sept. 9, 2013) (citing regulations).

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543 Appendix D, New York State Dep’t of Correctional Services, Directive 4040, Inmate Grievance Process at § 701.5(a)(2) (July 1, 2006). One court has further observed: “By its own terms, DOCS policy appears to favor a liberal reading of the scope of grievances, as the [grievance program] itself is ‘not intended to support an adversary process, but is designed to promote mediation and conflict resolution.’” Branch v. Brown, 2003 WL 21730709, *10 (S.D.N.Y., July 25, 2003), judgment granted on other grounds, 2003 WL 22439780 (S.D.N.Y., Oct. 28, 2003) (quoting New York State Dep’t of Correctional Services Directive 4040, Part I). The current version of the policy retains similar language. See Appendix D, Directive 4040 at § 701.1(b) (July 1, 2006); see also Appendices E and F (earlier versions). The Tenth Circuit, in refusing to dismiss a claim for non-exhaustion, emphasized similar language in the federal Administrative Remedy Program policy, noting that that system is an inquisitorial one in which officials are responsible for investigating grievances thoroughly. Kikumura v. Osagie, 461 F.3d 1269, 1284 (10th Cir. 2006).


546 Appendix G, id., at Attachment C.
identifying information, date of incident or indication that it is ongoing, and whether the prisoner has also complained to a court or other agency.\textsuperscript{547}

The Seventh Circuit, applying the same “proper exhaustion” requirement the Supreme Court has now adopted, has held: “When the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming.”\textsuperscript{548} That standard has been endorsed by the Second and Tenth Circuits as well,\textsuperscript{549} and in substance by the Ninth Circuit.\textsuperscript{550} General statements about specificity in a grievance policy that do not identify any particular content that a grievance must include will not overcome this default rule.\textsuperscript{551} Its leniency is shown by the Seventh Circuit’s holding that a prisoner


\textsuperscript{548} Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002).

The federal court notice pleading standard requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(a), Fed.R.Civ.P. Under that standard, pro se plaintiffs are held “to less stringent standards than formal pleadings drafted by lawyers.” Haines v. Kerners, 404 U.S. 519, 520 (1972).


The Second Circuit adopted this rule not as a default rule but on policy grounds, noting that the exhaustion requirement is designed to provide “time and opportunity to address complaints internally” before suit is filed, and they must therefore “provide enough information about the conduct of which they complain to alert the prison to the nature of the wrong for which redress is sought. As in a notice pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming.” Johnson v. Testman, 380 F.3d at 697 (quoting Porter v. Nussle, 534 U.S. at 524-25). It would appear that after Jones v. Bock, this rule is a default rule, valid to the extent that prison policy does not state a different standard of specificity.

\textsuperscript{550} Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009) (“A grievance need not include legal terminology or legal theories unless they are in some way needed to provide notice of the harm being grievances. A grievance also need not contain every fact necessary to prove each element of an eventual legal claim. The primary purpose of a grievance is to alert the prison to a problem and facilitate its resolution, not to lay groundwork for litigation.”). Griffin adopted the Strong v. David approach without citing the “object intelligibly” language. See James v. Mehta, 2013 WL 5934397, *3 (E.D.Cal., Nov. 5, 2013) (holding grievance mentioning lack of physical therapy exhausted complaint alleging lack of physical and occupational therapy; it “included sufficient detail to put prison officials on notice of plaintiff’s claim that he was receiving inadequate medical care for his ALS and wanted care consistent with a physician’s orders), report and recommendation adopted, 2014 WL 109502 (E.D.Cal., Jan. 9, 2014); Zepeda v. Tate, 2010 WL 4977596, *4 (E.D.Cal., Dec. 2, 2010) (holding complaint about pain possibly related to a digestive disorder did not fail to exhaust by reason of plaintiff’s failure to mention his esophagus); Ryles v. Felker, 2010 WL 2880177, *3 (E.D.Cal., July 21, 2010) (holding factual variations about staff assault between grievance and deposition testimony did not support non-exhaustion argument where suit and grievance both alleged an unprovoked assault); Sanders v. Williams, 2010 WL 1631767, *13 (D.N.M., Mar. 20, 2010) (holding that claim of prisoner assault was exhausted by grievance addressing the staff actions that put the plaintiff at risk without actually describing the assault and injuries).

\textsuperscript{551} Skinner v. Schriro, 2007 WL 2177326, *4 (D.Ariz., July 27, 2007) (holding grievance that stated “I was given no disciplinary report,” and cited the disciplinary policy, sufficiently grieved a claim that there is a “secret board that enacted its own policy in violation of ADC disciplinary procedures” and that the plaintiff was denied notice and a hearing, under a grievance policy directing prisoners to “state briefly but completely the problem on which you desire assistance. Provide as many details as possible.”) That approach is consistent with Jones v. Bock, which held that the Michigan grievance policy, which said to “be as specific as possible” but did not prescribe any specific content for grievances, did not require naming of defendants. Jones, 549 U.S. at 218. On remand, the district court cited the “as specific as possible language” and the arguably conflicting instruction on the mandatory grievance form to be “brief and concise,” and held that an the plaintiff’s complaint that he was forced to work beyond his
sufficiently exhausted a claim against prison staff that he was sexually assaulted through their deliberate indifference with a grievance that said: “[T]he administration don’t [sic] do there [sic] job. [A sexual assault] should’ve never [sic] happen again,” and asked that the assailant be criminally prosecuted\(^5\) (though the Second Circuit has required a surprising degree of specificity in one case applying it\(^6\)). The limits of this approach are illustrated in a recent decision in which the plaintiffs argued that their religious rights complaint “‘should not be read as asserting a claim for dismantling the sweat lodge; a separate claim for denying access to and/or use of tobacco; and a third separate and distinct claim for transferring [group religious] practitioners away from the prison . . . .’” rather Plaintiffs’ complaint should be read as a single claim ‘alleging an ongoing scheme of religious suppression, which utilized a variety of means to

\(^5\) Riccardo v. Rausch, 375 F.3d 521, 524 (7th Cir. 2004) (describing grievance as “at the border of intelligibility”), cert. denied, 544 U.S. 904 (2005); see also Westefer v. Snyder, 422 F.3d 570, 580-81 (7th Cir. 2005) (holding that plaintiffs sufficiently exhausted complaints about transfers to a high-security prison by listing “Transfer from Tamms” as a requested remedy, or by expressing concern about not being given a reason for the transfer, in grievances about the conditions at that prison); Barnes v. Briley, 420 F.3d 673, 678-79 (7th Cir. 2005) (holding a grievance “in regards to a request for [sic] medical test and treatment. I have requested several times to be tested for Tuberculosis, H.I.V., Hepatitis, etc. for the past few years” exhausted as to the past failure to respond to such requests by a doctor not named in the grievance and no longer employed at the prison); Standley v. Ryan, 2012 WL 3288728, *4 (D.Ariz., Aug. 13, 2012) (holding complaint that Step–Down Program is merely a “mockery” and not a viable means to exit administrative segregation sufficiently exhausted a complaint about indefinite confinement in segregation); Roland v. Smith, 907 F.Supp.2d 385, 390 (S.D.N.Y. 2012) (holding complaint that transfer to mental hospital was done to “cover up” beating at prison sufficiently exhausted the beating); Spotts v. Hock, 2011 WL 5024437, *4 (E.D.Ky., Oct. 19, 2011) (reading grievance to complain about officer’s course of conduct in labelling plaintiff a “snitch,” not just the recent incident emphasized; “While a grievance must be clear and specific enough to describe the subject matter, a high degree of particularity is not required—the point of the exhaustion requirement is to give the agency notice of the problem and a chance to fix it, not to litigate the issue.”); see Appendix A for additional authority on this point. But see Saleh v. Wiley, 2012 WL 4356219, *2 (D.Colo., Sept. 24, 2012) (general complaint of unsafe housing area did not exhaust specific claim of failure to protect prisoner at special risk because he had been labeled a snitch), judgment amended, 2013 WL 1751885 (D.Colo., Apr. 23, 2013); Johnson v. Vord, 2008 WL 2186381, *2-3 (E.D.Cal., May 23, 2008) (grievance holding failure to provide proper care for a rash caused by the shower water did not exhaust claim about the quality of the shower water), report and recommendation adopted, 2008 WL 2917188 (E.D.Cal., July 28, 2008); Jones v. Snyder, 2008 WL 786023, *5 (W.D.Mich., Mar. 20, 2008) (grievance seeking to discover why plaintiff’s kosher diet had not been approved did not exhaust complaint that defendant sabotaged his request by failing to submit his correct answers to the “Kosher test”); Maddox v. Berge, 2007 WL 2055199, *3-4 (W.D.Wis., July 16, 2007) (holding grievance that described deprivations at “supermax” prison, in context of challenging the disciplinary proceeding that sent plaintiff there, did not give notice that he was complaining about the conditions); Beltran v. O’Mara, 405 F.Supp.2d 140, 152 (D.N.H. 2005) (holding that allegations the plaintiff was “being punished for no reason” and isolated from other prisoners were “too vague” to allow officials to make any response), on reconsideration, 2006 WL 240558 (D.N.H., Jan. 31, 2006); Aguirre v. Feinerman, 2005 WL 1277860, *6 (S.D.Ill. May 10, 2005) (holding that a grievance that specifically mentioned physical therapy, but mentioned other medical care only generally, did not exhaust as to the failure to diagnose the plaintiff’s congestive heart failure; “While specifically identifying the ailment would not be required, there must be some indication as to what medical issues the plaintiff was complaining about.”); Ball v. McCaughtry, 2004 WL 1013362, *2 (W.D.Wis., May 6, 2004) (holding that a prisoner who complained about seized papers that he identified only as “gay materials,” even when asked for more information, was insufficiently specific to satisfy a grievance policy calling for sufficient facts to allow an examiner to investigate the complaint).\(^6\) See Brownell v. Krom, 446 F.3d 305, 310 (2d Cir. 2006), discussed later in this section.
do so.’ 554 The court made it clear that exhaustion would be assessed separately for each factual pattern alleged.

Decisions of other courts before Jones v. Bock were generally consistent with the notion of a notice pleading standard, 555 and those decisions remain good law where the administrative rules do not demand more. 556 Many decisions have taken a similar approach without much theoretical discussion. 557 One recent decision finds a “useful analog” in Title VII exhaustion law,

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555 One federal appeals court has stated that the prisoner should provide “as much relevant information . . . as the prisoner reasonably can provide.” Brown v. Sikes, 212 F.3d 1205, 1210 (11th Cir. 2000). But it is doubtful that prison officials really want grievances setting out “every known fact,” and a judicial exhaustion rule so requiring “might be completely unworkable or at least counter-productive,” since in almost all cases defendants could identify some omitted fact, leading to “fact-intensive litigation over exhaustion at the outset of nearly every prisoner case.” Curtis v. Solomon, 2006 WL 1653608, *3 (N.D.Fla., June 7, 2006). Further, Brown would appear to have been overruled by Jones v. Bock. See Wilsey v. Merrit, 2007 WL 2376074, *3 (N.D.Fla., Aug. 14, 2007) (noting apparent overruling of Brown; Florida regulations require only that the grievance form be legible, signed, and dated, that the facts be stated accurately, and only one issue be presented per grievance).
556 See Johnson v. Johnson, 385 F.3d 503, 517-18 (5th Cir. 2004) (agreeing that legal theories need not be presented in grievances; holding that a prisoner who complained of sexual assault, made repeated reference to his sexual orientation, and said nothing about his race had exhausted his sexual orientation discrimination claim but not his racial discrimination claim); Burton v. Jones, 321 F.3d 569, 575 (6th Cir. 2003) (holding grievance need not “allege a specific legal theory or facts that correspond to all the required elements of a particular legal theory”); Miller v. Wisconsin Dept. of Corrections, 2008 WL 4159192, *2-3 (W.D.Wis., Sept. 4, 2008) (where grievance policy said to confine grievance to one issue and “clearly identify” it, complaint that plaintiff was deprived of a cane and couldn’t walk around the prison without it exhausted his disability statute claim that he was excluded from programs and services); Parker v. Robinson, 2008 WL 2222040, *7 (D.Me., May 22, 2008) (point of exhaustion requirement “is not to make sure prisoners include their potential litigable civil rights claims early on but it is to give the correctional institution the opportunity to address (and hopefully resolve) the grievance of conduct/condition before the dispute moves to litigation. The administrative grievance process is not a dress rehearsal hurdle to civil litigation. . . .”); see Appendix A for additional authority on this point. But see Barrett v. Wallace, 2013 WL 4483063, *6 (W.D.Wis., Aug. 20, 2013) (holding that grievance stating “every time I act out due to my mental illness, I'm punished for it” did not exhaust specific claims about a cell extraction, conduct reports, placement in segregation, and extension of sentence; “these grievances are far too vague to put prison officials on notice of the nature of the specific wrongs at issue”); Morales v. Horel, 2007 WL 2212892, *3 (N.D.Cal., July 31, 2007) (holding prisoner who complained that some prisoners were allergic to the state-issued soap, but failed to say specifically that he was allergic, failed to exhaust); Davis v. Knowles, 2007 WL 214598, *2-3 (E.D.Cal., Jan. 25, 2007) (holding that prisoner’s complaint that he had been denied treatment for his finger at every prison he had been transferred to did not exhaust the claim that he had been denied access to an orthopedic surgeon on a particular date and then transferred, resulting in a denial of care), report and recommendation adopted, 2007 WL 1141583 (E.D.Cal., Apr. 17, 2007); Walker v. James, 2007 WL 210404, *6 (E.D.Pa., Jan. 23, 2007) (holding a grievance complaining about DNA sampling based on false classification as a sex offender did not exhaust the false classification complaint); Robins v. Atchue, 2006 WL 1283470, *3 (E.D.Cal., May 10, 2006) (holding that “incidental mention” of strip searches in grievances concerning inappropriate racial and harassing statements did not exhaust as to the strip searches), report and recommendation adopted, 2006 WL 1882940 (E.D.Cal., July 7, 2006).
In Pleasant v. Jenkins, 2005 WL 2250849 (E.D.Tex., Sept. 15, 2005), the court held that a prisoner’s failure to include certain details of his complaint in a Step 2 grievance was not a failure to exhaust because they had been included in the Step 1 grievance and the Step 2 decisionmaker would have had access to the information. 2005 WL 2250849, *3.
557 See Maxwell v. Correctional Medical Services, Inc., 538 Fed.Appx. 682, 688-89 (6th Cir. 2013) (unpublished) (holding complaint about denial of hip replacement surgery was not vague because of lack of information about the precise time and place where the decision was made); Jackson v. Ivens, 2007 WL 2261552, *4 (3d Cir., Aug. 8, 2007) (unpublished) (“As long as there is a shared factual basis between the two, perfect overlap between the grievance and a complaint is not required by the PLRA.”); Westefer v. Snyder, 422 F.3d 570, 580-81 (7th Cir. 2005) (holding that prisoners who mentioned concern with their transfers to a high-security prison in the course of
which holds that matters are exhausted “which can reasonably be expected to grow out of” or are “reasonably related” to the charges in the administrative filing. Of course if the grievance process actually addresses an issue, it should be deemed exhausted no matter how well or badly the prisoner set it out, since the purpose of exhaustion will clearly have been served.

The grievances complaining about the conditions there exhausted their claims about transfer); McAlphin v. Toney, 375 F.3d 753, 755 (8th Cir. 2004) (per curiam (treating claim that two defendants failed to treat plaintiff’s dental grievances as emergency matters and others refused to escort him to the infirmary for emergency treatment were both part of a single exhausted claim of denial of emergency dental treatment); Kikumura v. Hurley, 242 F.3d 950, 956 (10th Cir. 2001) (holding complaint sufficient to meet the exhaustion requirement where the plaintiff complained that he was denied Christian pastoral visits, though the defendants said his claim should be dismissed because he had not stated in the grievance process that his religious beliefs include elements of both the Buddhist and Christian religions); Morris v. Newberry Correctional Facility, 2013 WL 5966274, *3 (E.D.Mich., Nov. 8, 2013) (holding conclusory complaint about denial of proper medical treatment did not exhaust because it didn’t “state specifically what Quinlan, a nurse, did or when she did it”); Medina v. Nassau County Sherriff Dept., 2013 WL 4832803, *7 (E.D.N.Y., Sept. 10, 2013) (“Prison officials did not engage in misconduct by requesting more information from plaintiff when his grievance form stated that he was misdiagnosed ‘several times’ but did not list the specific medical conditions or dates for which he believed he received improper treatment.”); see Appendix A for additional authority on this point. But see Tester v. Hurm, 2009 WL 1424009, *3-4 (E.D.Ky., May 20, 2009) (holding inadequate a grievance demanding “a standard of medical care conforming with constitutional requirements,” and mentioning “continuous deliberate indifference, utilization of privileged knowledge of the inmates vulnerabilities to manipulate him into circumstances whereby punitive action is exacted toward the inmate, wanton infliction of pain, rebuffs to humiliate, dealing with the inmate untruthfully and indifferently, pain and suffering inflicted upon the inmate” without providing specific examples).

see Appendix A for additional authority on this point. But see Tester v. Hurm, 2009 WL 1424009, *3-4 (E.D.Ky., May 20, 2009) (holding inadequate a grievance demanding “a standard of medical care conforming with constitutional requirements,” and mentioning “continuous deliberate indifference, utilization of privileged knowledge of the inmates vulnerabilities to manipulate him into circumstances whereby punitive action is exacted toward the inmate, wanton infliction of pain, rebuffs to humiliate, dealing with the inmate untruthfully and indifferently, pain and suffering inflicted upon the inmate” without providing specific examples).

Flanagan v. Shipman, 2009 WL 4043063, *6 n.4 (N.D.Fla., Nov. 20, 2009) (holding that a grievance about failure to make arrangements for Native American religious services exhausted the subsequent failure to conduct the services and their removal from the schedule of services). A good example of this approach is Asberry v. Cate, 2013 WL 876289 (E.D.Cal., Mar. 7, 2013), report and recommendation adopted, 2013 WL 4647975 (E.D.Cal., Aug. 29, 2013), in which the plaintiff complained of assault by a cellmate who appeared to have a mental illness, and asked that his placement in a double cell with plaintiff be investigated. The court stated: “Liberally construed, plaintiff's factual allegations should have led prison officials to investigate inmate Wilson's classification for double cell housing, and, because plaintiff noted inmate Wilson's mental disorder, should also have led prison officials to review Wilson's psychiatrist's recommendation or evaluation concerning Wilson's double cell status, if any.” 2013 WL 876289, *7.

Patterson v. Stanley, ___ Fed.Appx. ____, 2013 WL 6044128, *2 (5th Cir. 2013) (unpublished) (holding claim exhausted where appeal decision acknowledged it and said it had been referred to Office of Professional Standards and plaintiff was scheduled for an ophthalmology exam); Espinal v. Goord, 558 F.3d 119, 128 (2d Cir. 2009) (medical care complaint not raised explicitly in grievance was exhausted where grievance decision addressed it; medical care complaint stated in very general terms was exhausted where grievance decision addressed plaintiff’s care with specificity); Riccardi v. Louis, 2013 WL 5770668, *4 (N.D.Fla., Oct. 24, 2013) (holding vague allegation of denial of medical treatment exhausted where grievance response showed that grievance staff investigated the right incident); Allen v. Shawney, 2013 WL 2480658, *16 (E.D.Mich., June 10, 2013) (holding that since plaintiff's hepatitis/liver complaints were addressed in grievance responses, they were exhausted); Furnace v. Nuckles, 2013 WL 1964927, *24 (N.D.Cal., May 10, 2013) (similar to Espinal); Mitchell v. Snowden, 2011 WL 846861, *3 (E.D.Cal., Mar. 7, 2011), report and recommendation adopted, 2011 WL 1675051 (E.D.Cal., May 2, 2011); Stolte v. Geringson, 2010 WL 1463517, *7 (E.D.Cal., Apr. 9, 2010), report and recommendation adopted, 2010 WL 2011590 (E.D.Cal., May 19, 2010); Braxton v. Nichols, 2010 WL 1010001, *12 (S.D.N.Y., Mar. 18, 2010) (the fact that the grievance appeal body advised the plaintiff to take up the issue of “pervasive” indoor smoking with security staff shows that they understood he was complaining about widespread violation of the no-smoking rule); Castro v. Terhune, 2010 WL 724683, *2 (N.D.Cal., Mar. 1, 2010) (grievance responses showed that prison officials understood that plaintiff was challenging his gang validation and not just the process at a hearing); Granger v. Kayira, 2009 WL 3824710, *7 (N.D.Ill., Nov. 12, 2009) (grievance must have been sufficiently detailed where issue was decided); Douglas v. Skellie, 2009 WL 935806, *7 (N.D.N.Y., Apr. 3, 2009); see Appendix A for additional authority on this point; see J.P. v. Taft, 439 F.Supp.2d 793, 826 (S.D.Ohio 2006) (holding defendants who said they...
converse is not true: if a prisoner adequately grieves an issue, the failure of the grievance decision to address it does not mean the prisoner failed to exhaust.\textsuperscript{560} Several courts have held grievances to have effectively exhausted despite grievance decisions stating that the grievances were insufficiently specific.\textsuperscript{561}

As noted above, courts have said that legal theories need not be exhausted.\textsuperscript{562} Despite the foregoing, some courts have insisted on what amounts to pleading of legal theories in certain

\begin{quote}
“consistently tried” to satisfy the juvenile plaintiff’s request for an attorney could not be heard to claim they were not sufficiently on notice from his grievance of his request for an attorney. “Defendants cannot have it both ways.”

This point is a variation of the principle that even under a procedural default standard, if the administrative body addresses the merits of a grievance, the prisoner has exhausted notwithstanding any procedural errors in the grievance process. See nn. 796–797, below.
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\textsuperscript{561} See Joseph v. Gorman, 2012 WL 4089012, *5 (N.D.Fla., Mar. 12, 2012) (holding prisoner whose grievance said he was injured by action of a staff member exhausted his claim despite failure to characterize action as abuse rather than negligence), report and recommendation adopted, 2012 WL 4088945 (N.D.Fla., Sept. 17, 2012); Shoucair v. Warren, 2008 WL 2033714, *7-8 (E.D.Mich., May 9, 2008) (rejecting claim of vagueness where prisoner provided enough information to investigate and grievance policy required investigation); Cordova v. Frank, 2007 WL 2188587, *7 (W.D.Wis., July 26, 2007) (rejecting grievance officials’ determination that grievance was not specific enough, despite rule in jurisdiction against revisiting prisons’ procedural determinations); Mayes v. University of TX Medical Branch, 2007 WL 1577670, *3 (W.D.Tex., Mar. 30, 2007) (refusing to be bound by dismissal for failing to name the medication plaintiff said he was being denied, where the court found that the information appeared in the response to the initial grievance). Concerning the general question whether courts are bound by the decisions of prison grievance bodies, see § IV.E.7, nn. 803-814, below.

\textsuperscript{562} Tennille v. Quintana, 443 Fed.Appx. 670, 672-73 (3rd Cir. 2011) (unpublished) (holding plaintiff exhausted even though he “did not cite the specific constitutional grounds on which his complaint is based”); McCollum v. California Dept. of Corrections and Rehabilitation, 647 F.3d 870, 877 (9th Cir. 2011) (holding grievance complaining of lack of paid Wiccan chaplain need not articulate underlying legal theory); Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009) (“A grievance need not include legal terminology or legal theories unless they are in some way needed to provide notice of the harm being griefed.”); Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2003) (holding grievance official’s failure to address the “nature of the wrong” in response to the initial grievance of Eighth Amendment rights’ or ‘Bivens action,’ Plaintiff’s descriptions are sufficient to put the Bureau of Prisons on notice of the ‘nature of the wrong’ that now forms the substance of the Complaint he has filed in this Court.”); Hewlett v. Gram, 2013 WL 868378, *5 (D.Minn., Feb. 12, 2013) (holding plaintiff exhausted his due process claim, though he did not use those words, where at each stage he “challenged his placement in the SHU, the prison staff's refusal to identify the BOP regulation of which he was accused, or his transfer”), report and recommendation adopted, 2013 WL 848779 (D.Minn., Mar. 7, 2013); Hall v. Leclaire, 2011 WL 832839, *3 (S.D.N.Y., Mar. 4, 2011) (grievance need not give notice that any of the named defendants were aware of risk from unsafe wheelchair and refused to act on it); Doe v. Wooten, 2010 WL 2821795, *2 (N.D.Ga., July 16, 2010) (prisoner who complained of being in a high security prison and expressed fear for his safety was not required to invoke the Constitution in his grievance); Meraz v. Reppond, 2010 WL 2672002, *3
kinds of grievances. In Brownell v. Krom, the plaintiff complained about loss of property including legal papers, and then brought suit alleging that the loss had resulted from intentional misconduct by prison staff, based on information that he did not have at the time of his grievance. The court held the grievance insufficient, stating that “the grievance may not be so vague as to preclude prison officials from taking appropriate measures to resolve the complaint internally,” and weighing heavily prison officials’ assertion that an allegation of intentional misconduct would trigger a different level of investigation than an ordinary property claim. This is a surprising holding—if the obligation is to “object intelligibly to some asserted shortcoming,” from the prisoner’s standpoint, the shortcoming visible to him was just that he didn’t have his property. The Brownell court tempered its holding by reversing the dismissal of the case on the ground that there were special circumstances excusing the plaintiff’s failure to exhaust properly, because the necessary information came to him long after the grievance deadline had passed and the grievance form did not inform him that late grievances could be allowed based on “mitigating circumstances,” leading to a reasonable belief he could not raise the new facts in another grievance. Still, the implication that prisoners ordinarily must file


446 F.3d 305 (2d Cir. 2006).

Brownell, 446 F.3d at 310-11.

A similar scenario is presented by an unreported Seventh Circuit case holding that a prisoner who complained in his grievance of missing property items, including his Bibles, failed to exhaust his Free Exercise Clause claim by failing to state that the Bibles’ loss was “infringing on his religious practice.” Dye v. Kingston, 130 Fed.Appx. 52, 56 (7th Cir. 2005) (unpublished); accord, Doss v. Maples, 2012 WL 3762452, *2-3 (E.D.Ark., Aug. 3, 2012) (prisoner who complained of deprivation of Bible Concordance did not exhaust First Amendment claim because she failed to mention that claim in her grievance), report and recommendation adopted, 2012 WL 3759018 (E.D.Ark., Aug. 29, 2012); Henderson v. Sebastian, 2004 WL 1946398 (W.D.Wis., Aug. 25, 2004), modification denied, 2004 WL 2110773 (W.D.Wis., Sept. 21, 2004). On its face, that holding appears inconsistent with an “object intelligibly” standard that does not require the grievant to articulate legal theories. The “perceived shortcoming” was that the prisoner didn’t have his Bibles, and that fact surely gave prison officials sufficient notice that they should find the Bibles or replace them; it is difficult to see how adding language about religious practice to the grievance would have assisted them in resolving his problem. Of course if the prison provided a separate complaint mechanism for complaints about religious practice, then the plaintiff would be obliged to identify his complaint as religious in nature. See Stuard v. Carlin, 2010 WL 4791739, *1-2 (D.Idaho, Nov. 16, 2010).

An example closer to the line is Ashker v. Schwarzenegger, 2007 WL 1725417, *8-9 (N.D.Cal., June 14, 2007), amended on reconsideration on other grounds, 2007 WL 2781273 (N.D.Cal., Sept. 20, 2007), in which the plaintiff’s grievance stated that defendants had presented him with a “Hobson’s choice” between informing about gangs and having program participation, and refusing to inform and remaining permanently in segregation. The court held that this grievance did not give officials sufficient notice of his legal claim that the demand violated his Fifth Amendment right against self-incrimination. See also Brown v. Mantel, 2007 WL 2349282, *2 (N.D.Cal., Aug. 14, 2007) (holding prisoner did not exhaust his claim of denial of court access resulting from deprivation of legal papers where his grievance referred to “personal property” without mentioning legal papers).

446 F.3d at 312-13.
multiple grievances about the same event as they learn new information about it, even though the grievance procedure does not provide for amended or supplementary grievances, is startling.

Some courts have similarly held that grieving a retaliatory act is not sufficient, and the prisoner must also allege retaliatory motive in the grievance, though others disagree, in some cases characterizing the presence of retaliatory motive as a legal theory that need not be


One decision has taken the converse position: that a prisoner who alleged retaliation could not subsequently press due process, equal protection, or Eighth Amendment claims. Council v. Nash, 2007 WL 1686512, *2-3 (D.N.J., June 8, 2007). In Council, however, the difference among claims was not just legal theories. The equal protection claim rested on an alleged difference in treatment between the plaintiff and Latino prisoners, and the Eighth Amendment claim alleged various medical consequences of defendants’ conduct.

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There is a similar disagreement over whether conspiracy claims must be explicitly
grieved or whether they too are legal theories that need not be specified. Most
decisions have held that claims of discrimination require the prisoner to have alleged
a retaliatory motive, in addition to describing the adverse conduct, in the administrative
process. The courts are

568 See Norwood v. Robinson, 436 Fed.Appx. 799, 800 (9th Cir. 2011) (unpublished) (“Although the grievance
did not advance the legal theory of retaliation, it gave the prison adequate notice of the harm being
describes the retaliatory act is sufficient to exhaust, treating retaliatory motive as a legal theory); Mitchell v.
Horn, 318 F.3d 523, 531 (3d Cir. 2003) (holding that a prisoner who claimed retaliatory discipline exhausted by
appealing the disciplinary decision to the highest level); Richardson v. Reyes, 2013 WL 5800769, *3 (N.D.Cal.,
Oct. 28, 2013) (holding a complaint that the prisoner was improperly denied medical care exhausted a
retaliation claim without specific reference to retaliation); Percelle v. S. Pearson, 2013 WL 3945022, *4 (N.D.Cal.,
July 29, 2013) (“Although the grievance did not mention the legal theory of retaliation, it nonetheless provided
enough information about the problem to allow prison officials to take appropriate responsive measures.

569 Siggers v. Campbell, 652 F.3d 681, 694-95 (6th Cir. 2011) (failure to mention alleged conspiracy in grievance
meant claim was not exhausted); Spencer v. City of Philadelphia, 2012 WL 1111141, *6 (W.D.Pa., Apr. 2, 2012)
(failure to allege conspiracy in initial grievance meant it was not exhausted), affirmed as modified, 543 Fed.Appx.
presence of an agreement meant plaintiff failed to give notice of the nature of his claims), report and
exhausted where grievance did not mention conspiracy), report and recommendation adopted, 2009 WL 498317
(M.D.Pa., Feb. 26, 2009), on reconsideration, 2009 WL 4937580 (M.D.Pa., Dec. 14, 2009); Means v. Lambert,
2007 WL 4591251, *3 (W.D.Okla., Dec. 28, 2007) (dismissing claim for failure to allege an agreement); Sisney v.

570 Espinal v. Goord, 558 F.3d 119, 127-28 (2d Cir. 2009) (holding that conspiracy is a legal theory which prisoners
need not grieve; it is sufficient to describe the alleged misconduct adequately); Hernandez-Arredondo v.
exhausted separately from the underlying facts), report and recommendation adopted, 2012 WL 3046006 (S.D.Ill.,
also have mentioned conspiracy in his grievance, since it was just a factual allegation supporting his retaliation
claim).

571 See Johnson v. Johnson, 385 F.3d 503, 518 (5th Cir. 2004) (holding that a prisoner who complained of sexual
assault, made repeated reference to his sexual orientation, but said nothing about his race had exhausted his sexual
orientation discrimination claim but not his racial discrimination claim); Waddy v. Sandstrom, 2012 WL 2023519,
*4 (W.D.Va., June 5, 2012) (holding racial discriminational claim unexhausted where plaintiff grieved a use of force but
did not mention the racial comments on which the claim was based), order entered, 2012 WL 2023543 (W.D.Va.,
grievance about shackling that did not mention race did not exhaust discrimination claim); Finch v. Lopez, 2011
WL 6135648, *3 (C.D.Cal., July 6, 2011) (allegation of failure to provide “extra care” for disabled prisoner per
prison policy did not exhaust claim of unequal treatment), report accepted in part, rejected in part on other
grounds, 2011 WL 6148660 (C.D.Cal., Dec. 6, 2011); see Appendix A for additional authority on this point. Cf.
Gay v. Cate, 2012 WL 3728014, *6 (N.D.Cal., Aug. 24, 2012) (holding plaintiff’s allegation that he did not get a single
bogged down in his medical condition but a person with mental illness would have received a single cell sufficiently
exhausted his equal protection claim); Reece v. Low, 2009 WL 2761923, *7 (W.D.Okla., Aug. 27, 2009) (Plaintiff
who “did not raise a claim of discrimination at every level, [but] included several allegations that the job transfer by
also divided over whether claims asserted under the Religious Land Use and Institutionalized Persons Act that were exhausted before that statute was enacted must be exhausted again.\textsuperscript{572} One court has held that a medical care complaint was not exhausted because the prisoner failed to allege in the grievance, as he did in his complaint, that his injury was related to the medical provider’s cost-cutting.\textsuperscript{573} All of these cases should arguably result in a finding of exhaustion under an “object intelligibly” standard. Perhaps more importantly, even if the prisoners’ omissions in these cases are considered to be defects, for the most part they are defects that the prisoner would be permitted to amend to correct in litigation—an option that is generally not available in the administrative process.\textsuperscript{574}

3. Exhausting All Issues

Each claim raised in a suit must have been exhausted in order to be heard.\textsuperscript{575} That is the case whether a claim is raised in the initial complaint or added by subsequent amendment.\textsuperscript{576} To

\textsuperscript{572} \textit{Compare} DeHart v. Horn, 390 F.3d 262, 273-74 (3d Cir. 2004) (holding that case exhausted under RFRA need not be exhausted again under RLUIPA because the standards are the same; thereby distinguishing \textit{Wilson v. Moore}, \textit{infra}); Orafan v. Goord, 2003 WL 21972735, *5 (N.D.N.Y., Aug. 11, 2003) (“In light of the relative informality of the inmate grievance system and the short limitations period, inmates cannot be prohibited from bringing a suit in federal court based on causes of action that became available only after the inmates pursued administrative remedies.”) with \textit{Wilson v. Moore}, 2002 WL 950062, *6 (N.D.Fla., Feb. 28, 2002) (“While a prisoner is not required to identify a formal legal theory in his grievance, the administrative resolution of the ‘problem’ cannot occur if the law governing the problem has yet to take effect.”) The Second Circuit’s adoption of the “object intelligibly” standard, discussed above, would seem to be consistent with the holding of \textit{Orafan} and not \textit{Moore}.


\textsuperscript{574} \textit{Jones v. Stalder}, 2007 WL 2164243, *2 (W.D.La., July 23, 2007) (noting that the plaintiff attempted to file a supplementary grievance to add information and was not allowed to do so); Davison v. MacLean, 2007 WL 1520892, *6-7 (E.D.Mich., May 22, 2007) (noting that prisoner initially grieved harassing acts, later grieved retaliatory motive for them, but later grievance was dismissed as untimely), \textit{reconsideration denied}, 2007 WL 1806204 (E.D.Mich., June 21, 2007). In some grievance systems, prisoners are required or permitted to refile grievances which have been rejected for procedural or formal defects.

be exhausted, claims must have been sufficiently recognizable in the grievance to give prison officials notice that the prisoner was complaining about them.\(^{576}\) One decision finds a “useful

\[\text{incidence did not exhaust claim that two different staff members shoved the plaintiff into a wall on the way to the medical unit afterwards; Sherman-Bey v. Marshall, 2010 WL 2949256, }^{*3} \text{(C.D.Cal., July 22, 2010) (grievance about denial of possession of fez did not exhaust complaints about limitation of fez-wearing to cell and religious services); Toy v. Hayman, 2009 WL 1209277, }^{*3} \text{(D.N.J., May 1, 2009) (request to find out the smoking policy and complaint about a smoking cellmate, resulting in a cell change, did not exhaust complaint of an inadequate smoking policy); Black v. Goord, 2007 WL 3076998, }^{*4} \text{(W.D.N.Y., Oct. 19, 2007) (holding grievances about the length of time the plaintiff was held in full restraints did not exhaust his complaint about pain and inability to exercise or about lack of due process in renewing the restraint orders); Hart v. Farwell, 2007 WL 2049845, }^{*5} \text{(D.Nev., July 12, 2007) (holding grievance about imposition of lockdowns, which mentioned consequences such as lack of access to law library, education, and other programs, failed to exhaust a claim that lockdown restrictions interfered with religious practice); see Appendix A for additional authority on this point.}\]

\(^{576}\) See nn. 485-480, above, concerning amendment of complaints and the exhaustion requirement.

\(^{577}\) Barnes v. Allred, 482 Fed.Appx. 308, 311-12 (10th Cir. 2012) (unpublished) (holding grievance seeking the cause of plaintiff’s abdominal pain did not exhaust a claim about the failure to order a timely liver biopsy and delaying treatment for hepatitis); McCollum v. California Dept. of Corrections and Rehabilitation, 647 F.3d 870, 876 (9th Cir. 2011) (holding various grievances about inadequate Wiccan religious accommodation did not exhaust challenge to lack of a paid Wiccan chaplain because they did not identify that practice as burdening religious exercise); Olivares v. U.S., 2011 WL 3489300, *2-3 (3d Cir. 2011) (unpublished) (holding grievance seeking medical furlough to obtain knee surgery did not exhaust request for a knee brace); Morton v. Hall, 599 F.3d 942, 945-46 (9th Cir. 2010) (holding grievance about being denied visits with his children because plaintiff was a sex offender did not give sufficient notice to exhaust his complaint of being assaulted because of the prison’s disclosure of his record to other prisoners); O’Guinn v. Lovelock Correctional Center, 502 F.3d 1056, 1062 (9th Cir. 2007) (holding requests for a lower bunk because of a prior brain injury do not exhaust a claim for mental health treatment); Hamilton v. Daniels, 2013 WL 6795008, *3 (E.D.N.C., Dec. 20, 2013) (holding grievances about lack of access to medical care did not exhaust complaints about failure to provide wheelchair, safety net, and assistance from inmate orderly); Norington v. Payne, 2013 WL 5963093, *1-2 (N.D.Ind., Nov. 6, 2013) (holding grievance complaining of placement on nutra-loaf despite a medical diet did not exhaust claims that the nutra-loaf was raw and there was not enough of it); Jones v. FCI Beckley Medical Employees, 2013 WL 5670858, *18-19 (S.D.W.Va., Oct. 15, 2013) (holding grievance that exhausted claim that a medical cart struck plaintiff and injured his arm did not exhaust his claim that staff did not stop and render aid and that he was not given an MRI); Ingram v. Hamkar, 2013 WL 3786715, *2, 5 (E.D.Cal., July 18, 2013) (holding claim about confiscation of knee brace was not exhausted by earlier grievance about failure to provide an adequate knee brace), report and recommendation adopted, 2013 WL 4496662 (E.D.Cal., Aug. 21, 2013); Gonzalez v. Mullen, 2013 WL 1333560, *4 (N.D.Cal., Mar. 29, 2013) (holding a grievance about denial of an earring did not exhaust a claim that male prisoners should be allowed all property items that women were allowed); LeFlore’El v. Bouchonville, 2013 WL 815985, *5 (E.D.Wis., Mar. 5, 2013) (holding grievance that stated it was about sexually offensive touching did not exhaust complaint about excessive force mentioned in passing as a “physical altercation”); Williamson v. Martinez, 2013 WL 211118, *3-4 (E.D.Cal., January 16, 2013) (holding grievance alleging excessive force and asking for relief against one officer did not exhaust complaint that a second officer also engaged in excessive force), report and recommendation adopted, 2013 WL 1309438 (E.D.Cal., Apr. 1, 2013); Miles v. Cate, 2012 WL 6738214, *4-5 (E.D.Cal., Dec. 28, 2012) (holding grievance requesting transfer away from danger of Rift Valley Fever did not exhaust complaint about failure to take protective measures at prison of residence); Escobar v. Smith, 2012 WL 5465889, *3-4 (E.D.Cal., Nov. 7, 2012) (holding grievance about denial of pain medication did not exhaust complaint about denial of surgery for the same condition), report and recommendation adopted, 2012 WL 6560741 (E.D.Cal., Dec. 14, 2012); Gregge v. Kate, 2012 WL 5210772, *3 (E.D.Cal., Oct. 22, 2012 (holding grievance complaining of transfer to prison where Rift Valley Fever was prevalent and asking for a transfer out did not exhaust claim about a departmental policy); Hallett v. Davis, 2012 WL 4378020, *4 (S.D.N.Y., Sept. 25, 2012) (holding claim of denial to plaintiff of a diabetic diet was unexhausted where plaintiff’s grievance did not say he was a diabetic and referred only to deprivations of diabetic meals to other diabetics); Gay v. Cate, 2012 WL 3728014, *5-6 (N.D.Cal., Aug. 24, 2012) (holding grievances about medical treatment for incontinence did not exhaust claims that prisoner was at risk of attack by others because of incontinence); Gaskins v. Whitehead, 2012 WL 3526671, *5 (D.Utah, Aug. 14, 2012) (holding grievances about medical care which mentioned use of force that caused injuries did not exhaust use of force claim);
analogue” in Title VII exhaustion law, which holds that matters are exhausted “which can reasonably be expected to grow out of” or are “reasonably related” to the charges in the administrative filing. Other courts have rejected the argument that grievance form and complaint must be identical: “As long as there is a shared factual basis between the two, perfect overlap between the grievance and a complaint are not required by the PLRA.”

Some courts formerly held that if any claim has not been exhausted, the entire case must be dismissed; the Supreme Court has now rejected this “total exhaustion” theory.

Exactly what constitutes a separate claim for exhaustion purposes is not clear. Some courts have defined them broadly in determining what has been exhausted. Others, however,
have treated as separate claims closely related issues that arise from the same transaction or occurrence. Thus, some decisions have held that a grievance about the actions of line prison staff fails to exhaust with respect to claims of supervisory liability for those actions. A similar problem may be presented where prison staff are sued for failing to intervene in the unconstitutional actions of other staff members. These propositions have at least been limited by the Supreme Court’s rejection of the argument that every person sued must have been named in the prisoner’s administrative complaint, and some courts have rejected them entirely. As

582 Kikumura v. Osagie, 461 F.3d 1269, 1285-86 (10th Cir. 2006) (claim of supervisory liability for failure to provide timely medical care was not exhausted by grievance requesting action to discipline persons who violated agency policy or to “introduce new policy so that the same wrong-doing won’t happen again”; this did not sufficiently alert prison officials that the injuries might have been caused by inadequate training and disciplinary programs); Kozohorsky v. Harmon, 332 F.3d 1141, 1143 (8th Cir. 2003) (holding that a prisoner who grieved about the officers who abused him, but did not raise in his grievance claims that their supervisor refused to take action against the officers, failed to train them, and retaliated against him for his complaints, had not exhausted his claim against the supervisor); accord, Davis v. Powell, 2013 WL 3339024, *4 (M.D.Ga., July 2, 2013) (dismissing supervisory liability claim based on policy of excessive force in the absence of a grievance against the supervisor raising that claim); Heaton v. Wray, 2010 WL 5387521, *2 (D.S.C., Dec. 22, 2010) (holding claims for failure to discipline staff must be grieved explicitly); Cottrell v. Wong, 2009 WL 3011250, *7 (E.D.Cal., Sept. 17, 2009), report and recommendation adopted, 2009 WL 5198091 (E.D.Cal., Dec. 22, 2009); Adams v. Bouchard, 591 F.Supp.2d 1191, 1196 (W.D.Okla. 2008) (holding supervisory liability claims are distinct claims that must be exhausted separately); Nichols v. Logan, 2004 WL 2851944, *8 (S.D.Cal., Nov. 23, 2004). This problem is also discussed at nn. 677-678, below.

583 Todd v. LaMarque, 2007 WL 1982789, *3 (N.D.Cal., July 2, 2007) (dismissing for non-exhaustion claims against bystanding officers at a use of force whose conduct was not described in the grievance). But see Moore v. Thomas, 653 F.Supp.2d 984, 1006 (N.D.Cal. 2009) (grievance alleging excessive force by one officer and referring to the presence of others exhausted as to their failure to intervene).

584 Jones v. Bock, 549 U.S. 199, 218 (2007); see Jensen v. Knowles, 2008 WL 5156694, *5 (E.D.Cal., Dec. 9, 2008) (citing Jones to reject argument that supervisory defendants must have been named in grievance to be sued).

585 Wisenbaker v. Crawford, 331 Fed.Appx. 494, 495 (9th Cir. 2009) (“By outlining the attack and resulting injuries he suffered and the correctional officers' purportedly deficient response, Wisenbaker's grievance placed the defendants on sufficient notice that he was grieving the existence and absence of policies and procedures that led to his injuries.”); Steece v. Corrections Corp. of America, Inc., 2012 WL 761923, *5 (D.Idaho, Mar. 8, 2012) (holding allegations of inadequate staffing, failure to train and discipline staff, failure adequately to investigate assaults and refer for prosecution, etc., were not claims requiring exhaustion, but factual indicia supporting plaintiff’s claim for liability for assault—though court emphasizes he was no seeking relief from them); Rebaldo v. Jenkins, 2011 WL 2293129, *3 (E.D.La., June 8, 2011) (holding failure to train and supervise “does not constitute a separate violation. . . . The legal theory espoused against Miller simply makes him potentially liable for a constitutional injury meted out by one of his inferior officers.” No additional constitutional injury or damages were attributable to the supervisor.); Sanders v. Williams, 2010 WL 1631767, *13 (D.N.M., Mar. 20, 2010) (holding supervisory liability is a legal theory that need not be grieved); see Appendix A for additional authority on this point; see also Etters v. Bennett, 2011 WL 976472, *7-8 (E.D.N.C., Mar. 16, 2011) (holding sexual abuse supervisory claims were exhausted by allegations that officials took no action after report and grievance were submitted, and that officials failed to report allegations or prevent the assaults from happening again, and that the institution should be held accountable for not fulfilling their job duties), appeal dismissed, 444 Fed.Appx. 686 (4th Cir. 2011); Taylor v. Clark, 2011 WL 917382, *23 (E.D.Cal., Feb. 16, 2011) (holding supervisory claims exhausted; “Plaintiff’s request that Defendant McKesson be counseled about his aggression, that Defendant McKesson immediately see a professional for his anger management, and that the matter be investigated were sufficient to alert the prison of the problem with Defendant McKesson's anger and use of force and Plaintiff's desires for Defendant McKesson's supervisors to take action. It matters not that Plaintiff did not use the words ‘train,’ ‘supervise,’ or ‘discipline.’ Plaintiff clearly requested action that could only be taken by those in positions of supervision over Defendant McKesson.”), report and recommendation adopted as modified, 2011 WL 904241 (E.D.Cal., Mar. 16, 2011); Hooks v. Rich, 2006 WL 595909, *6 (S.D.Ga., Mar. 7, 2006) (holding prisoner’s complaint of a long history of abusing
one recent decision put it in a case alleging systemic failure to protect from prisoner-prisoner violence, prisoners who have been assaulted

... cannot reasonably have been expected ... to know of more systemic failures at [the prison] that allegedly contributed to the incidents; instead, they reasonably perceived a small slice of what is now alleged to be symptomatic of a much wider problem. ... Issues such as inadequate staffing, a failure to train, a failure to discipline correctional officers and other prisoners, the lack of sufficient written findings when assaults occurred, and a pervasive “code of silence,” are not matters that an individual prisoner who has been beaten in one or two separate incidents can be expected to know without a full investigation that is beyond his capacity and authority to conduct. If these issues exist, a thorough investigation by prison officials into the failure to protect issues that were brought to their attention would presumably uncover them.\(^{586}\)

Nevertheless, defendants continue to argue, and some courts continue to hold, that the supervisory actions or omissions that allegedly caused or allowed the alleged misconduct must be explicitly grievances.\(^ {587}\) A variation of the same problem arises in connection with “name the defendant” rules, discussed in the next section.\(^ {588}\)

prisoners sufficiently alerted officials to problems of supervision and management without actually naming supervisors in the grievance).

\(^ {586}\) Riggs v. Valdez, 2010 WL 4117085, *13 (D.Idaho, Oct. 18, 2010), on reconsideration in part, 2010 WL 5391313 (D.Idaho, Dec. 22, 2010); accord. Nestor v. Director of Northeast Region Bureau of Prisons, 2012 WL 6691791, *8 (D.N.J., Dec. 20, 2012) (holding allegation in grievance of sexual assault “could reasonably be construed as stating a claim of deliberate indifference on the part of the officials who failed to protect Plaintiff from such an assault. Accordingly, the Bureau should have been on notice of a problem it may have had in keeping Plaintiff protected from violent attacks by other prisoners.”), order issued, 2012 WL 6697298 (D.N.J., Dec. 20, 2012); Conley v. Birch, 2012 WL 4202702, *4-5 (S.D.Ill., Sept. 19, 2012) (holding complaint of delayed medical care sufficiently exhausted against medical provider and as to relevant policies; grievance “alerted prison administrators to the alleged problem with scheduling medical treatment and procedures at Vienna and permitted prison administrators (who knew that Wexford was the healthcare contractor for the prison) to examine whether Wexford’s policies or practices had caused a delay in Conley’s treatment. Conley was not required to identify specific Wexford policies or grieve specific Wexford practices.”); Steece v. Corrections Corp. of America, Inc., 2012 WL 761923, *5 (D.Idaho, Mar. 8, 2012) (“[Failure to protect] was the problem as he perceived it from his vantage point, and to the extent that a broader pattern and practice of administrative failures may have fostered the environment that led to the harm, as Plaintiff now alleges, an investigation by ICC officials into his grievance should have reasonably uncovered them.”); Rebaldo v. Jenkins, 2011 WL 2293129, *3-4 (E.D.La., June 8, 2011) (holding grievance adequate to exhaust training and supervision claim where it “recounted the . . . incident in graphic detail, and prison officials were clearly armed with sufficient facts to thoroughly investigate the incident”) (emphasis supplied).

A recent appellate decision steers a middle course between a holding that supervisory issues must be explicitly grieved and one that a grievance reciting what happened to the plaintiff exhausts all issues of policy and supervision underlying that event. In a case seeking injunctive relief for an unreasonable risk of sexual abuse by staff, which plaintiffs alleged resulted from deficiencies in screening, assigning, training, and supervising male staff, and the staff generally, about sexual misconduct; reporting and investigatory mechanisms; and investigating and responding to complaints of sexual misconduct, the court held that it was sufficient for the prisoner simply to complain of a failure to protect, without specifying the precise nature of policy or supervisory failings.

The issue is whether a claim of a failure to protect is sufficient exhaustion with regard to litigation seeking systemic relief. The issue, in our view, is whether a reasonable corrections official would recognize a complaint alleging a failure to protect a female inmate from a sexual assault by a male officer as raising issues regarding DOCs policies and procedures. We believe that it would. To be sure, a “grievance may not be so vague as to preclude prison officials from taking appropriate measures to resolve the complaint internally.” . . . However, a failure to protect involves conduct by officials superior to the officer accused of the misconduct and suggests the need for policy and procedural reform. While the complaint asks for a result—protection—rather than specifying the means used to reach that result, the need for the result is clearly articulated and the appropriate means are far more within the expertise of DOCs than the individual prisoner.

sexual abuse did not exhaust claim against supervisors for inadequate training and supervision), report and recommendation adopted, 2008 WL 5411932 (E.D.Cal., Dec. 24, 2008); Edwards v. Dwyer, 2008 WL 243943, *6-7 (E.D.Mo., Jan. 25, 2008) (grievance about officer’s sexual harassment did not exhaust claim of inadequate training and supervision), motion to amend denied, 2008 WL 687419 (E.D.Mo., Mar. 11, 2008); Alls v. Friedman, 2007 WL 806515, *3 (N.D.Cal., Mar. 15, 2007) (holding plaintiff’s grievance alleging bad medical care exhausted his claim against the doctors, but not his claim that it was caused by budget problems for which higher-ups were responsible). In Brown v. Grove, 647 F.Supp.2d 1178, 1184 (C.D.Cal. 2009), the court ruled that it sufficiently exhausted a supervisory claim to name the supervisor and state that he directed a use of force; it was not necessary to say that he had failed to train and supervise the officers. The court acknowledged Jones v. Bock but did not address its holding that naming of defendants is not necessary unless the grievance policy requires it. But see Riker v. Gibbons, 2009 WL 910971, *6 (D.Nev., Mar. 31, 2009) (rejecting argument that grievance about plaintiff’s medical treatment failed to exhaust as to inadequacy of medical care policies).

See n. 677 et seq., below.


Amador, 655 F.3d at 104 (citation omitted). One prisoner was found to have satisfied the exhaustion requirement with a grievance stating that she had been harassed for three months, retaliated against, and sexually assaulted by an officer, and that “This officer is still working on this unit and its not right. I feel that [the officer] should seek counseling [and be] removed. . . , fired and any other [precaution] that is there.” Amador, 655 F.3d at 103-04. Another wrote: “I am seeking monetary damages for the reason that the State had a duty to protect me and failed to do so, thus rendering their misactions as a ‘Failure to Protect’, a most serious dereliction of their duty to provide for my care, custody and control.” Amador, id. A third complained that “sexual abuse was a problem affecting other inmates and that no one kept track of what the officers were doing. We believe that this complaint sufficiently raises systemic issues relating to policies and procedures regarding the prevention of sexual abuse. To be sure, she did not ask for the precise relief sought in this action, but she adequately alerted the authorities as to her claim of systemic issues.” Amador, 655 F.3d at 102, 104. Similarly, in a damages case, the Seventh Circuit held that a grievance that said “the administration don’t [sic] do there [sic] job. [A sexual assault] should’ve never [sic] happen again” sufficiently alerted prison officials to the need for “better steps ex ante to separate potential aggressors from potential victims.” Riccardo v. Rausch, 375 F.3d 521, 524 (7th Cir. 2004), cert. denied, 544 U.S. 904 (2005).
Supervisory liability aside, some “exhaust all claims” decisions, in effect, require uncounseled prisoners to make fine distinctions that many lawyers would miss.\footnote{See, e.g., Perry v. Dickinson, 2012 WL 2559426, *3 (E.D.Cal., June 29, 2012) (holding grievance about the risk of assault did not exhaust as to the actual assault two months later); Johnson v. Thaler, 2012 WL 1202138, *5 (S.D.Tex., Apr. 9, 2012) (holding that grievance which said a prison staff member fell asleep while driving a vehicle did not exhaust deliberate indifference claim about driving because the grievance mainly focused on getting medical care for the resulting injuries), \textit{aff’d}, 507 Fed.Appx. 370 (5th Cir. 2013) (unpublished); Williams v. Kuenzi, 2007 WL 1771479, *4-5 (N.D.Cal., June 18, 2007) (holding plaintiff’s grievance complaining that he was kept in restraints for a medical examination and seeking an examination without restraints did not exhaust his complaint that correctional staff improperly kept him in restraints for the test); Monsalve v. Parks, 2001 WL 823871 (S.D.N.Y., July 19, 2001) (holding that even if the plaintiff exhausted concerning his 45-day disciplinary detention, he had to exhaust again with respect to his retention in administrative detention for the same alleged misconduct).} As one court has pointed out, this approach would permit prison officials to “obstruct legal remedies to unconstitutional actions by subdividing the grievances, arguing, \textit{e.g.}, that the Christians, Muslims, and Jews must each grieve denial of access to their own communal services,”\footnote{Lewis v. Washington, 197 F.R.D. 611, 614 (N.D.Ill. 2000) (construing grievances about placement in “unapproved protective custody” status as encompassing complaints about conditions in that unit). \textit{But see} English v. Redding, 2003 WL 881000, *4 (N.D.II., Mar. 6, 2003) (refusing to apply \textit{Lewis v. Washington} holding where prisoner had grieved being removed from protective custody at a different prison, and being disciplined for the fight in which he was injured, but not the injury he was suing about).} though courts have generally rejected extreme attempts to manufacture non-exhaustion by subdividing prisoners’ complaints.\footnote{See, e.g., Goldtooth v. Szoke, 2014 WL 183910, *3 (S.D.III., Jan. 16, 2014) (where plaintiff grieved inadequate medical care for testicle, leg, and side pain, which proved to stem from a lower back problem, rejecting argument that plaintiff was obliged to grieve the back problem); Griffith v. Clark, 2013 WL 600913, *2-3 (E.D.N.C., Nov. 12, 2013) (rejecting claim of non-exhaustion asserting that “plaintiff’s complaint alleges that defendants ordered him to leave the dining hall because he refused to remain seated while awaiting his meal tray, whereas, grievance number 4880–Blue–0030 merely states that he was given a choice to either sit, while waiting for his tray, or return to his cell”); Foster v. Statti, 2013 WL 5348098, *3-4 (E.D.Cal., Sept. 23, 2013) (rejecting argument that, in addition to grieving individual instances of deprivation of yard time, plaintiff must also file a grievance about the cumulative effect of those deprivations in order to pursue his Eighth Amendment claim). \textit{report and recommendation adopted}, 2014 WL 931830 (E.D.Cal., Mar. 7, 2014); Furnace v. Nuckles, 2013 WL 1964927, *24 (N.D.Cal., May 10, 2013) (rejecting defendants’ attempt to divide use of force complaint into two complaints, because plaintiff was beaten in two different rooms; noting highest-level decision acknowledged events in second room); Young v. Moreno, 2012 WL 1836088, *3 (C.D.Cal., May 8, 2012) (holding that the prisoner asserted a single retaliation claim manifested in two incidents, and not two separate unexhausted retaliation claims), \textit{report and recommendation adopted}, 2012 WL 1835631 (C.D.Cal., May 17, 2012); Tolliver v. Collins, 2012 WL 1537603, *6 (S.D.Ohio, April 30, 2012) (rejecting argument that plaintiff complaining of ongoing exposure to tobacco smoke had not timely exhausted each instance of exposure he described), \textit{report and recommendation adopted}, 2012 WL 1940635 (S.D.Ohio, May 29, 2012); Frederick v. California Dept. of Corrections and Rehabilitation, 2012 WL 1143826, *5 (N.D.Cal., Mar. 30, 2012) (rejecting argument that grievance exhausted only the failure to clear the plaintiff medically for firecamp, not the failure to place him there); Johnson v. Yancey, 2005 WL 2290253 (E.D.Ark., Sept. 16, 2005), in which the plaintiff complained that the jail regularly served him food he believed was not kosher and could not eat. Defendants asserted that he really had three claims: that the food wasn’t kosher, that the defendants lied about whether it was kosher, and that he had missed meals. The court held that this reading “defies logic.” 2005 WL 2290253, *2. Similarly, in \textit{Underwood v. Mendez}, 2005 WL 2300361 (M.D.Pa., Sept. 9, 2005), \textit{report and recommendation adopted}, 2006 WL 860142 (M.D.Pa., Mar. 31, 2006), the plaintiff alleged that he had been transferred for retaliatory and racial reasons, and the defendants argued that his assertions that defendants falsified his progress report and conspired against him had to be specifically exhausted. The court said these were “integrally related” to his exhausted claim and rejected the argument. 2005 WL 2300361, *3; see \textit{Alcala v. Martel}, 2011 WL 2671507, *7 (E.D.Cal., July 6, 2011) (rejecting supposed distinction between need for medical care raised in plaintiff’s grievance and question of deliberate indifference of prison staff). \textit{report and recommendation adopted}, 2011 WL 3319712 (E.D.Cal., July 29, 2011); Allah v. Virginia, 2011 WL 251214, *3-4 (W.D.Va., Jan. 25, 2011) (rejecting argument...).} Other decisions have dismissed claims because, even though the facts...
(e.g., loss of property, improper discipline) were grieved, other allegations underlying a particular legal claim (e.g., discriminatory or retaliatory intent) were not raised in the grievance. Such decisions are arguably contrary to the holding of the Second Circuit and other courts that prisoners need only “object intelligibly to some asserted shortcoming” and need not plead legal theories in their grievances to satisfy the exhaustion requirement.

These decisions are also arguably inconsistent with the Supreme Court’s holding that “issue exhaustion”—by which it appeared to mean presentation in the administrative process of all arguments why a challenged decision is wrong—is not required in appeals to the Social Security Appeals Council, since the relevant statute does not explicitly require it, and the arguments for issue exhaustion are weakest when administrative proceedings are not adversarial in character.

Four Justices then observed that Social Security proceedings are inquisitorial rather than adversarial, with the ALJ responsible for developing the issues, and with no separate representative advocating the Commissioner’s position before the ALJ; that the regulations characterize review as done in an “informal, nonadversary manner”; and that many Social Security claimants are unrepresented or represented by non-attorneys. For these reasons, they said, issue exhaustion is not required.

Prison grievance systems, too, generally operate in an informal, nonadversarial manner without representation by counsel. For example, the New York State prison grievance procedure states that it is “not intended to support an adversary process, but is designed to promote mediation and conflict reduction.” The federal prison grievance system similarly is intended “to solve problems and be responsive to issues inmates raise.”

Thus the Sims plurality analysis would seem applicable to them and to imply that as long as the basic facts affecting the prisoner are stated in a grievance, and the grievance policy contains no greater specificity requirements, the prisoner should be able to raise in litigation any legal argument arising from those facts. On the other hand, Sims involved an administrative appellate process and did not

that plaintiff who requested recognition of Five Percenters, then filed a grievance about the lack of a response, grieved only the non-response and not the underlying issue of recognition; Caldwell v. Correctional Medical Services, 2010 WL 4959859, *4 (E.D.Ark., Nov. 12, 2010) (rejecting argument that plaintiff had failed to exhaust his rectal bleeding problem, since he repeatedly exhausted the failure to give him Metafiber, the treatment for his rectal bleeding), report and recommendation adopted, 2010 WL 4955873 (E.D.Ark., Dec. 1, 2010); Knowlin v. Raemisch, 2009 WL 1850697, *1 (W.D.Wis., June 26, 2009) (rejecting attempt to separate claim about failure to protect from assault into claims about failure to protect from four named individuals and failure to protect him against others); Sullivan v. Caruso, 2008 WL 356878, *9 (W.D.Mich., Feb. 7, 2008) (rejecting argument that plaintiff’s grievance about failure to process his demand for a religious diet did not exhaust his First Amendment claim for failure to provide a religious diet); Lindell v. Schneiter, 531 F.Supp.2d 1005, 1013 (W.D.Wis., Jan. 7, 2008) (holding that grievance seeking “daily sun-exposure,” filed when there was no outdoor exercise yard, exhausted present situation where prisoners had some, but not daily, sun exposure in a new yard), motion to amend denied on other grounds, 2008 WL 4280396 (W.D.Wis., May 5, 2008); Mark v. Imberg, 2005 WL 3201115, *7 (W.D.Wis., Nov. 28, 2005) (holding that grievance about the removal of Wiccan magic seals from cell walls and doors exhausted a claim about their destruction, since the gist of both was interference with religious exercise by denial of the seals).

594 See nn. 567-571, above.
595 See Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004); see nn. 548-553, 562, for further discussion of these propositions.
597 Id. at 110-12. (Justice O’Connor joined the plurality on narrower grounds. Id. at 112-14.)
598 Appendix D, New York State Dep’t of Correctional Services Directive No. 4040, Inmate Grievance Program § 701.1(b) (July 1, 2006).
599 Kikumura v. Osagie, 461 F.3d 1269, 1284 (10th Cir. 2006) (quoting policy).
address what might be required of the complainant at the initial stage. Relatively few courts have considered what effect *Sims* might have on PLRA exhaustion questions, though two circuits cited it in support of the view (later adopted in *Jones v. Bock*) that prisoners need not have named all defendants in their grievances in order to sue them later.\footnote{Kikumura v. Osagie, 461 F.3d 1269, 1284-85 (10th Cir. 2006); Thomas v. Woolum, 337 F.3d 720, 734-35 (6th Cir. 2003) (dictum; acknowledging that circuit precedent bound it to a contrary holding). Cf. Woodford v. Ngo, 548 U.S. 81, 91 n.2 (2006) (declaring *Sims* irrelevant to the question before it, the meaning of "exhausted").}

Further, decisions which have the practical effect of freezing the prisoner’s legal claims as of the filing of the administrative grievance are arguably contrary to the Federal Rules of Civil Procedure’s direction that leave to amend complaints shall be "freely given."\footnote{Rule 15(a), Fed.R.Civ.P.} There is no indication that Congress intended to repeal that provision *sub silentio* for prisoners, and the Supreme Court has cautioned that the PLRA should not be construed as overturning the usual rules of litigation except where Congress has so stated.\footnote{Jones v. Bock, 549 U.S. 199, 212-16, 221-24 (2007).} At a minimum, those concerns counsel a liberal construction of what was exhausted by a particular grievance.

A related question is whether a prisoner who has grieved a particular type or course of conduct must separately grieve all new incidents of that conduct. The answer is that courts disagree and context makes a difference. The Second Circuit has held, in a case involving persistent failure to provide adequate medical care, that once the prisoner had received a favorable grievance decision on the subject, he had exhausted, even though the denial of treatment continued: "A prisoner who has not received promised relief is not required to file a new grievance where doing so may result in a never-ending cycle of exhaustion."\footnote{Abney v. McGinnis, 380 F.3d 663, 669 (2d Cir. 2004); see Rodenhurst v. State of Hawaii, 2009 WL 2365433, *5 (D.Hawai'i, July 30, 2009) (declining to require a new grievance unless defendants show that such a requirement was in effect and communicated to the plaintiff). But see Pritchett v. Portouno, 2005 WL 2179398, *3 (N.D.N.Y., Sept. 9, 2005) (holding prisoners who successfully grieved denial of programs and received back pay did not exhaust as to the amount of back pay because they did not separately grieve that issue), report and recommendation adopted, 2005 WL 2437024 (N.D.N.Y., Sept. 30, 2005).}

This narrow holding does not address the situation where the prisoner does not receive a favorable decision. However, its logic would seem equally applicable to cases where the prisoner has exhausted unsuccessfully. Though a few courts seem to reject the proposition that a grievance can ever exhaust with respect to post-grievance events,\footnote{Abney v. McGinnis, 380 F.3d 663, 669 (2d Cir. 2004); see Rodenhurst v. State of Hawaii, 2009 WL 2365433, *5 (D.Hawai'i, July 30, 2009) (declining to require a new grievance unless defendants show that such a requirement was in effect and communicated to the plaintiff). But see Pritchett v. Portouno, 2005 WL 2179398, *3 (N.D.N.Y., Sept. 9, 2005) (holding prisoners who successfully grieved denial of programs and received back pay did not exhaust as to the amount of back pay because they did not separately grieve that issue), report and recommendation adopted, 2005 WL 2437024 (N.D.N.Y., Sept. 30, 2005).} the more common—and

more sensible—view is that a single grievance should suffice for ongoing problems such as a
course of inadequate medical care for a single disease or injury, such that every new occurrence
or new consequence of the lack of care need not be the subject of a new grievance, 605 within
reason. 606 The same should be true for complaints about other sorts of ongoing violations.

605 See Parzyck v. Prison Health Services Inc., 627 F.3d 1215, 1219 (11th Cir. 2010) (each new denial of an
orthopedic consultation need not be grieved separately, even if they support claims against new defendants);
recounting incidents during four-month period was not limited to that period where the plaintiff alleged his problems
resulted from a corporate policy of saving money by refusing to refer to specialists, a continuing violation); Schultz
“ongoing and accumulating” pain was not limited to time period up to filing of grievance); Hoddenback v. Chandler,
2013 WL 1285806, *4 (N.D.Ill., Mar. 27, 2013) (declining to dismiss claim of ongoing medical problem as to doctor
who examined plaintiff in response to his grievance); McNeil v. Hayes, 2012 WL 5989356, *4 (E.D.Cal., Nov. 29,
2012) (similar to Parzyck; claim involves 35-day denial of medication), report and recommendation adopted,
(similar to Parzyck; claim involves denial of medication), report and recommendation adopted, 2012 WL 6053628
supra; claim involves denial of medication), report and recommendation adopted, 2012 WL 4207306 (E.D.Cal.,
exhausted the denial of interferon therapy, subsequent reaffirmation of that decision was exhausted), report and
recommendation adopted, 2012 WL 3042386 (N.D.Ala., July 25, 2012); Johnson v. Florida Dept. of Corrections,
826 F Supp.2d 1319, 1322-24 (N.D.Fla. 2011) (plaintiff who exhausted at one prison need not re-exhaust failure to
accommodate hearing impairment after transfer where the problem was not fundamentally altered at the new prison;
exhaustion of ongoing inadequate medical care is not required.”), report and recommendation adopted, 2011 WL
3665021 (E.D.Cal., Aug. 19, 2011); Rowe v. Department of Corrections, 2010 WL 5071015, *1 (E.D.Cal., Dec. 7,
2010) (similar to Parzyck); Olivarez v. Albrite, 2010 WL 5059616, *6 (E.D.Cal., Dec. 6, 2010) (complaint was
exhausted with respect to a defendant who became involved only after plaintiff’s grievances were filed), report and
recommendation adopted, 2011 WL 127113 (E.D.Cal., Jan. 14, 2011); see Appendix A for further authority on this
point; see also Ellis v. Vadlamudi, 568 F Supp.2d 778, 783-84 (E.D.Mich. 2008) (treating course of treatment for a
chronic condition as a continuing violation for purpose of assessing timeliness); Marshall v. Hubbard, 2007 WL
1627534, *4 (E.D.Ark., June 4, 2007) (rejecting doctor’s argument that he had not treated the plaintiff at the time his
grievance was filed; noting that plaintiff mentioned this doctor’s treatment in his appeals, so officials knew of the
two doctors unexhausted where grievance was filed before they treated plaintiff and did not reference them or their
as to two doctors who were not mentioned in the grievance and whose conduct postdated the events described in it),

In Tillis v. Lamarque, 2006 WL 644876 (N.D.Ohio, Mar. 9, 2006), the court rejected the argument that a
prisoner who sought injunctive relief in a medical care case, but was transferred after he had grieved the issue, had
to start over at the new prison because those officials had not yet had the opportunity to review his medical situation;
such a rule “would allow prison officials to indefinitely delay an inmate’s suit seeking medical care by transferring
him to a new facility when he has exhausted his prison appeals and suit it imminent. . . .” 2006 WL 644876, *6.
WL 1307733, *3 (E.D.Cal., Dec. 5, 2006) (same holding as to plaintiff transferred in the course of the grievance
to assert injunctive medical care claim after transfer because it was not exhausted at the new prison); Maeshack v.
rendered by one doctor did not exhaust against another doctor who saw the plaintiff after transfer), report and

606 Where the line should be drawn will probably have to be determined ad hoc. In Perry v. Geo Group, Inc., 2009
WL 3698473, *8-9 (W.D.Okla., Nov. 4, 2009), the plaintiff had last grieved his medical problems four years
previously, and three days before he filed suit a prison doctor had requested another appointment for the plaintiff
with an orthopedic specialist. Reasonably enough, the court found his claim insufficiently exhausted, since there
Courts have applied this principle when the basis for liability of one or more defendants is their failure to correct the violation in the course of the grievance process. The Fifth Circuit has also taken this approach, while indicating its limits, in a decision in which the plaintiff alleged an ongoing course of failure to protect him from sexual assault. The court held he had not exhausted as to any incidents that occurred more than 15 days before his first grievance (15 days being the grievance time limit), but once he had alerted prison officials to the repeated assaults, he had exhausted as long as they continued. But, the court cautioned, a grievance would not exhaust as to future incidents of a more discrete nature (e.g., a month apart).

A similar analysis should apply to challenges to prison policies: once a prisoner has grieved a prison policy, courts have held he can challenge new applications or consequences of


Bailey v. Correctional Corp. of America, LLC, 2014 WL 693330, *3-4 (D.Idaho, Feb. 21, 2014) (holding plaintiff need not grieve the inadequacy of the grievance process to seek liability for the underlying claim based on grievance personnel’s nonfeasance); Gay v. Cate, 2012 WL 3728014, *6 (N.D.Cal., Aug. 24, 2012) (“Defendants’ argument, if accepted in this case, would mean that prisoners would have to pursue multiple rounds of grievances challenging the denial of rounds of grievances. This is an unduly burdensome expansion of the exhaustion requirement.”); Fuller v. California Dept. of Corrections, 2008 WL 619159, *8 (E.D.Cal., Mar. 4, 2008), report and recommendation adopted, 2008 WL 883244 (E.D.Cal., Mar. 31, 2008); Davis v. Knowles, 2007 WL 2288317, *2 (E.D.Cal., Aug. 8, 2007) (noting that those involved “were put on notice of plaintiff’s claims by virtue of their positions”), report and recommendation adopted, 2007 WL 2711220 (E.D.Cal., Sept. 14, 2007). In such a case, the claim is not that denying a grievance in itself violates rights, but that the consequence of the denial (here, lack of a single cell) does so. Id. In a “name the defendant” system, the opposite outcome would obtain. See Doss v. Maples, 2012 WL 3762452, *3 (E.D.Ark., Aug. 3, 2012), report and recommendation adopted, 2012 WL 3759018 (E.D.Ark., Aug. 29, 2012). Some grievance systems will not address allegations added during the course of the grievance process and require that relevant personnel be named at the initial stage of the process. See cases cited in nn. 620, 670, 672, below concerning other aspects of this problem.

Johnson v. Johnson, 385 F.3d 503, 521 (5th Cir. 2004) (“As a practical matter, Johnson could not have been expected to file a new grievance every fifteen days, or each time he was assaulted. . . . Further, the TCDJ rules specifically direct prisoners not to file repetitive grievances about the same issue and hold out the threat of sanctions for excessive use of the grievance process.”); accord, Howard v. Waide, 2008 WL 2814821, *15-16 (10th Cir. 2008) (prisoner who had grieved the risk of assault and rape by gang members was not required to file another grievance when he actually was raped); see Hixon v. MCSP Admin. Office, 2007 WL 2390417, *4 (E.D.Cal., Aug. 20, 2007) (holding complaint of sexual and verbal harassment because of sexual orientation exhausted as to conduct “related” to the actions he had grieved; “Regardless of the exact details of the harassment, the prison was put on notice that such harassment could in fact be occurring.”), report and recommendation adopted, 2007 WL 2793272 (E.D.Cal., Sept. 26, 2007).

the policy without further exhaustion. This view should apply to instances where the plaintiff is transferred to a different prison or unit but remains subject to the same policy.

Such holdings may not extend to more discrete or factually dissimilar incidents. For example, one court has held that a grievance complaining generally of censorship procedures does not exhaust with respect to each item censored under the procedures, since publications

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611 Turley v. Rednour, 729 F.3d 645, 6503 (7th Cir. 2013) (holding challenge to lockout policy was not limited to specific lockout cited in plaintiff’s grievance; “In order to exhaust their remedies, prisoners need not file multiple, successive grievances raising the same issue (such as prison conditions or policies) if the objectionable condition is continuing.”); Johnson v. Killian, 680 F.3d 234, 238-39 (2d Cir. 2012) (holding a 2005 grievance about a policy sufficiently exhausted where the policy was changed but then reinstated in 2007; warning that holding does not extend to “generalized complaints regarding the conditions of confinement” but is “necessarily limited to cases in which a prior grievance identifies a specific and continuing complaint that ultimately becomes the basis for a lawsuit.”); Sousa v. Wegman, 2014 WL 334596, *6-7 (E.D.Cal., Jan. 29, 2014) (holding a 2009 grievance exhausted a 2011 claim of ongoing religious deprivation notwithstanding that the plaintiff had received partial relief in 2009, which was later terminated; “A prisoner who has not received promised relief is not required to file a new grievance where doing so may result in a never-ending cycle of exhaustion.” (quoting Abney v. McGinnis, 380 F.3d 663, 669 (2d Cir.2004))); report and recommendation adopted, 2014 WL 806943 (E.D.Cal., Feb. 28, 2014); Mitchell v. Felker, 2012 WL 2521827, *5 (E.D.Cal., June 28, 2012) (holding grievance about lockouts at a particular time did not exhaust as to earlier ones, but did exhaust as to later ones since no further remedy was available once plaintiff’s central complaint was rejected), report and recommendation adopted, 2012 WL 3070084 (E.D.Cal., July 27, 2012); Holley v. Swarthout, 2012 WL 639452, *6-7 (E.D.Cal., Feb. 27, 2012) (prisoner who grieved policy of race-based lockouts and got decision upholding the policy need not grieve subsequent lockouts; “If the Department’s written statements are to be taken seriously, it is pointless for this inmate to return for another round of exhaustion over the same issue of race based lockouts.”), report and recommendation adopted, 2012 WL 1130706 (E.D.Cal., Mar. 29, 2012); see Appendix A for additional authority on this point. But see Parthemore v. Knipp, 2013 WL 3941996, *4 (E.D.Cal., July 30, 2013) (holding grievance about restraint policy could not exhaust claims about particular instances of restraint against different officers), report and recommendation adopted, 2013 WL 5567996 (E.D.Cal., Oct. 9, 2013).

612 Florer v. Johnson, 2007 WL 2900179, *4-5 (W.D.Wash., Oct. 2, 2007) (holding grievance at one prison about lack of kosher diet exhausted the issue at another prison where officials had said the decision was made at the state level and would not change by location); Mohammad v. Kelchner, 2005 WL 1138468, *6 (M.D.Pa., Apr. 27, 2005) (holding prisoner who had exhausted his complaint of denial of a prayer rug in the “Special Management Unit” need not exhaust again after being transferred to the “Long Term Segregation Unit” where he was subjected to the same policy). In Crump v. Michigan Dept. of Corrections, 2011 WL 7627252, *3-4 (E.D.Mich., Nov. 14, 2011) report and recommendation adopted, 2012 WL 1019616 (E.D.Mich., Mar. 26, 2012), which arose in a system that, as noted elsewhere, has a “name the defendant” grievance policy, see nn. 542, above, and 659, below, the court held that a grievance at the sending prison about a policy governing religious practice did not exhaust with respect to staff’s actions at the receiving prison, but it held that plaintiff had raised a material factual issue with regard to exhaustion of his claim against the Commissioner and another statewide official. But see Pinson v. St. John, 2013 WL 765639, *1 (N.D.Ala., Feb. 25, 2013) (holding that a 2008 grievance re policy of opening legal mail outside prisoner’s presence did not exhaust as to 2009-10 incidents under the same policy at another prison).

613 See Avery v. Elia, 2012 WL 6738312, *5 (E.D.Cal., Dec. 28, 2012) (holding a successful grievance seeking reinstatement to Kosher meal program did not exhaust a later incident of revocation of Kosher privileges), report and recommendation adopted, 2013 WL 1281769 (E.D.Cal., Mar. 27, 2013); Bartholomew v. Solorzano, 2012 WL 6561743, *5 (E.D.Cal., Dec. 14, 2012) (holding grievance filed after one instance of harassment did not exhaust as to others, though one was allegedly in retaliation for the grievance); Wolfel v. Collins, 2011 WL 14457, *2 (S.D.Ohio, Jan. 4, 2011) (holding challenge to racial assignment policy in 2004 did not exhaust as to 2007 incident); Benjamin v. Commissioner N.Y. State Dept. of Correctional Services, 2007 WL 2319126, *11 (S.D.N.Y., Aug. 10, 2007) (holding grievance concerning double celling with a smoker, which resulted in plaintiff’s being moved to a single cell, did not exhaust his subsequent complaint that there was second-hand smoke in the unit where he was single-celled). But see Masterson v. Campbell, 2007 WL 2536934, *13-14 (E.D.Cal., Aug. 31, 2007) (holding plaintiff had exhausted his “broad retaliation claim” even though he did not identify all those responsible or describe each alleged instance).
may present different regulatory and constitutional issues depending on their content.\textsuperscript{614} Another has held similarly with respect to complaints of “rampant” mishandling of legal mail.\textsuperscript{615} However, another court held that a prisoner who grieved prison staff’s eavesdropping on his legal telephone calls exhausted as to calls made after as well as before the grievance decision.\textsuperscript{616}

A grievance challenging a policy does not exhaust as to a new and revised policy that substantially changes or eliminates the provisions at issue in the grievance.\textsuperscript{617} Conversely, a change in policy that does not eliminate the plaintiff’s objection to the prior version should not require the plaintiff to start exhaustion over. “The PLRA serves as a threshold; once it is met, a suit may not be dismissed so long as the claims remain the same.”\textsuperscript{618}

Some recent decisions hold that events which postdate the filing of the original grievance can be exhausted if they are raised in the grievance appeal process,\textsuperscript{619} assuming the grievance rules permit their consideration—which they often do not.\textsuperscript{620} As with other procedural issues, if

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\textsuperscript{618} Moussazadeh v. Texas Dept. of Criminal Justice, 703 F.3d 781, 789-90 (5th Cir. 2012) (where plaintiff grieved the failure to provide a kosher diet in the dining hall, defendants provided such a diet, but then transferred the plaintiff to a new prison where he could only obtain kosher food by purchasing it, he need not re-exhaust; plaintiff’s claim “relates to conduct that continues to occur”); Chapman v. Frank, 2007 WL 2220266, *5 (E.D.Wis., Aug. 1, 2007); Ayayd v. Gonzales, 2007 WL 324564, *6 (D.Colo., Jan. 30, 2007) (holding prisoner challenging “Special Administrative Measures” (SAMs) restricting his communications need not re-exhaust annually when those measures were renewed with slight modifications, since the result would be “an endless cycle of exhaustion regardless of the same issue. . .”). But see Hale v. Ashcroft, 683 F.Supp.2d 1189, 1193-94, 1200 (D.Colo. 2009) (where SAMs were lifted by Department of Justice, and Bureau of Prisons imposed similar but not identical restrictions, claim was moot and plaintiff must exhaust as to new restrictions).


the grievance body decides the merits of a grievance appeal raising new matter, rather than invoking its rules to reject it, the matter is exhausted.621

All of these comments, and the decisions underlying them, are of course limited by the Supreme Court’s holding that “it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.”622 But in the absence of a specific policy provision that each of a sequence of similar incidents must be explicitly grieved, the above cited case law should serve to establish the default rules.

Many of the cases that engage in close issue-parsing involve disciplinary appeals that are separate from the prison grievance procedure. Most courts have held that the validity of a disciplinary rule, the merits of conduct underlying disciplinary charges or related to them, and conditions of punitive confinement are not exhausted by a disciplinary appeal.623 A suit that attacks the conduct of the disciplinary hearing itself is clearly exhausted by a disciplinary appeal,624 unless the grievance rules provide otherwise.625 The next question is whether issues

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623 See Farid v. Ellen, 593 F.3d 233, 248 (2d Cir. 2010) (disciplinary appeal of contraband and smuggling charges did not exhaust claim of confiscation of papers and personal effects where confiscation was not a “constituent element of the disciplinary hearing”); Pryor v. Webb, 2013 WL 3270870, *4 (C.D.Cal., June 24, 2013) (holding successful defense of disciplinary proceeding did not exhaust claims of retaliation and deliberate indifference); Hayes v. Walsh, 2013 WL 2285365, *4 (M.D.Pa., May 23, 2013) (disciplinary appeal did not exhaust complaint about conditions in segregation); Franklin v. Nusbaum, 2012 WL 7148203, *5 (N.D.Ohio, Oct. 29, 2012) (disciplinary appeal did not exhaust plaintiff’s use of force claim), report and recommendation adopted, 2013 WL 587570 (N.D.Ohio, Feb. 13, 2013), motion for relief from judgment denied, 2014 WL 814912 (N.D.Ohio, Feb. 21, 2014); Clevenger v. Corrections Corp. of America, Inc., 2012 WL 761769, *5 (D.Idaho, Mar. 8, 2012) (disciplinary appeal disputing factual basis of charges did not exhaust claim of failure to protect); Armstrong v. Small, 2011 WL 5569641, *3 (S.D.Cal., Nov. 15, 2011) (dismissal of disciplinary report charging participation in riot did not exhaust plaintiff’s claims that correctional staff had known about the impending riot and failed to act to prevent it); Taylor v. Van Lanen, 2011 WL 4344233, *1 (E.D.Wis., Sept. 14, 2011) (“the purpose of disciplinary proceedings is to assess the conduct of the inmate, not that of the prison staff”; a grievance would have put plaintiff’s claim before the proper decision-makers); see Appendix A for additional authority on this point. Contra, Mitchell v. Horn, 318 F.3d 523, 531 (3d Cir. 2003) (holding that a prisoner who claimed retaliatory discipline exhausted by appealing the disciplinary decision to the highest level); Harper v. Harmonn, 2006 WL 2522409, *3–4 (E.D.Cal., Aug. 29, 2006) (holding that a disciplinary appeal exhausted the plaintiff’s claim that staff members falsified the charges against him); Samuels v. Selsky, 2002 WL 31040370, *8 (S.D.N.Y., Sept. 12, 2002) (holding that propriety of confiscation of religious materials had been exhausted via a disciplinary appeal from the resulting contraband and “demonstration” charges; “issues directly tied to the disciplinary hearing which have been directly appealed need not be appealed again collaterally through the Inmate Grievance Program”); see Hopkins v. Coplan, 2005 WL 615746, *2 (D.N.H., Mar. 16, 2005) (holding that a disciplinary appeal did not exhaust a claim of a staff-prompted inmate assault, which it did not focus on or set out in detail; stating in dictum that if the appeal had set out the claim in detail and identified the relevant parties and their wrongful conduct, the court might treat it as “the functional equivalent of an exhausted grievance”).
that are directly related to the disciplinary hearing or charges, but do not challenge the conduct of the hearing itself, can be exhausted by a disciplinary appeal. In theory that question is answered by the prisoners’ own designation of appropriate remedies under the Supreme Court’s “proper exhaustion” holding.\textsuperscript{626} In practice, prison systems do not necessarily give clear guidance on such questions. In a New York State case, the Second Circuit has held that a prisoner was

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\item Fortney v. Schultz, 2010 WL 376932, *2 (W.D.Wis., Jan. 27, 2010) (noting that disciplinary appeals in this prison system exhaust as to sufficiency of the evidence, but procedural errors must be challenged through a subsequent grievance).
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justified by special circumstances in filing only a disciplinary appeal, and not a grievance, based on a reasonable belief that his complaint about the retaliatory fabrication of evidence against him could only be pursued in that manner. Remarkably, New York has not clarified the distinction between grievances and appeals since that decision. Indeed, it has made in court precisely the opposite argument from that in Giano, arguing that a prisoner who did file a

627 In the Second Circuit such a finding means the prisoner is not deemed to have exhausted, but must seek to exhaust remedies if they remain available; if not, the prisoner may proceed with the litigation. Giano v. Goord, 380 F.3d 670, 680 (2d Cir. 2004); Hemphill v. New York, 380 F.3d 680, 690-91 (2d Cir. 2004); see Torres v. Carry, 672 F.Supp.2d 338, 345-46 (S.D.N.Y., Oct. 19, 2009) (where plaintiff’s appeal had not been decided for four years, court directs defendants to bring it to the grievance body’s attention within 30 days and holds plaintiff may re-file if there is no decision within 30 days thereafter), reconsideration denied, 672 F.Supp.2d 346 (S.D.N.Y. 2009).

628 Giano v. Goord, 380 F.3d 670, 679 (2d Cir. 2004) (stating that even if the plaintiff was wrong, “his interpretation was hardly unreasonable”; the regulations “do not differentiate clearly between grievable matters relating to disciplinary proceedings, and non-grievable issues concerning the ‘decisions or dispositions’ of such proceedings.”); accord, Farid v. Ellen, 593 F.3d 233, 248 (2d Cir. 2010) (stating when a civil rights claim is “so interrelated” to a challenge of a disciplinary hearing, that an inmate “could not be expected to distinguish them,” an appeal of the disciplinary hearing may be sufficient to exhaust the civil rights claim); Johnson v. Testman, 380 F.3d 691, 696-97 (2d Cir. 2004) (remanding claim that “because under BOP regulations the appellate process for disciplinary rulings and for grievances was one and the same, [plaintiff] reasonably believed that raising his complaints during his disciplinary appeal sufficed to exhaust his available administrative remedies,” since it “cannot be dismissed out of hand, especially since the district court has not had the opportunity to examine it.”); Lewis v. Havennack, 2013 WL 1294592, *2-3 (N.D.N.Y., Mar. 28, 2013) (similar to Giano); Pacheco v. Drown, 2010 WL 144400, *21 (N.D.N.Y., Jan. 11, 2010) (finding factual question as to special circumstances and estoppel where plaintiff’s grievance about SHU conditions was erroneously rejected and it was too late to file a disciplinary appeal); Branch v. Goord, 2006 WL 2807168, *3 (S.D.N.Y., Sept. 28, 2006) (finding plaintiff’s misunderstanding that all matters concerning disciplinary hearings were exempt from grievance process was “reasonable” under Giano); see Ray v. Kertes, 130 Fed.Appx. 541, 544 (3d Cir. 2005) (unpublished) (citing Giano); Woods v. Lozer, 2007 WL 173704, *3 (M.D.Tenn., Jan. 18, 2007) (holding a prisoner exhausted when he appealed a grievance decision that his use of force claim was not grievable because it was mistakenly said to seek review of disciplinary procedures and punishments); Harper v. Harmonn, 2006 WL 2522409, *3-4 (E.D.Cal., Aug. 29, 2006) (holding plaintiff exhausted where he raised his claim of falsified disciplinary charges in a disciplinary appeal and the conviction was thrown out); Parish v. Lee, 2004 WL 877103, *4 (E.D.La., Apr. 22, 2004) (“The inmates must be given the benefit of the doubt based on what appears to be the written policy to which they are bound.”); see Vasquez v. Hilbert, 2008 WL 2224394, *4 (W.D.Wis., May 28, 2008) (declining to dismiss where plaintiff exhausted his medical claim later because medical treatment was mentioned in a disciplinary report and the rules said a grievance raising “any issue related to the conduct report” must await completion of the disciplinary process; plaintiff acted reasonably in waiting).

In Braham v. Clancy, 425 F.3d 177 (2d Cir. 2005), the court directed the district court on remand to consider whether the prisoner’s informal requests, his argument about prison officials’ unresponsiveness presented in his disciplinary appeal, or some combination of the two, gave prison officials sufficient notice to allow them to take responsive measures, “thereby satisfying the exhaustion of administrative remedies requirement.” 425 F.3d at 183. To the extent Braham suggested that the disciplinary appeal might satisfy the exhaustion requirement, as opposed to merely justifying the failure to exhaust, the Second Circuit has now held it overruled by the “proper exhaustion” rule of Woodford v. Ngo, 548 U.S. 81 (2006), discussed in §§ IV.E.7-8, below. This holding appears to undermine subsequent district court decisions assuming that a disciplinary appeal can satisfy the exhaustion requirement with respect to issues other than the disciplinary proceeding itself as long as the appeal gives sufficient notice of those other issues. See Benjamin v. Commissioner New York State Dept. of Correctional Services, 2006 WL 783380, *2-3 (S.D.N.Y., Mar. 28, 2006); Allah v. Greiner, 2006 WL 357824, *5 (S.D.N.Y., Feb. 15, 2006).

629 It has, seemingly, attempted to shift the cost of unclear rules to the prisoners. The most recent revision to its grievance policy states: “Note: If an inmate is unsure whether an issue is grievable, he/she should file a grievance and the question will be decided through the grievance process in accordance with section 701.5, below.” Appendix D, New York State Dep’t of Correctional Services Directive 4040, Inmate Grievance Program at § 701.3(e) (July 1, 2006). This provision, however, does not deal with the situation addressed in Giano where the prisoner reasonably believes the issue is not grievable.
grievance about a claim of retaliatory false discipline should instead have pursued a disciplinary appeal.630

Unclarity in the rules distinguishing grievances and disciplinary appeals is by no means limited to the New York State prisons.631 There is also evidence that on some occasions, prison personnel have treated complaints as non-grievable, contrary to prison rules, simply because a disciplinary proceeding had been commenced concerning the same subject matter.632 On the other hand, in some prison systems, it is in fact the rule that any overlap with a disciplinary proceeding makes the matter non-grievable or not immediately grievable.633 In that situation, the prisoner may be obliged to raise the overlapping issue in the disciplinary process.634

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630 Larkins v. Selsky, 2006 WL 3548959, *9 (S.D.N.Y., Dec. 6, 2006) (stating that Giano “nearly mirrors this case on all fours”). Similarly, Michigan officials argued unsuccessfully in court that a prisoner who had requested a rehearing of his disciplinary proceeding was also required to file a grievance in order to exhaust; the prisoner showed that when he had done that in the past, they had rejected his grievance on the ground that the matter was non-grievable and rehearing of his disciplinary proceeding was the proper remedy. Siggers v. Campbell, 2008 WL 5188791, *4 (E.D.Mich., Dec. 10, 2008). Cf. Hoyt v. LeBlanc, 2014 WL 66484, *4 (M.D.La., Jan. 8, 2014) (excluding to dismiss for non-exhaustion where plaintiff’s grievance concerning failure to reclassify him pursuant to a successful disciplinary appeal had been held non-grievable).


632 Marsalis v. Cain, 2014 WL 51215, *3 (M.D.La., Jan. 7, 2014) (holding remedy was unavailable where plaintiff sought to grieve his extended confinement in lockdown, stating he was not challenging disciplinary or review board proceedings, but grievances were rejected as concerning non-grievable disciplinary or review proceedings anyway), report and recommendation adopted, 2014 WL 407457 (M.D.La., Jan. 31, 2014); Houston v. Torres, 2012 WL 5398794, *2, 5 (E.D.Cal., Nov. 2, 2012) (holding grievance was “improperly screen[ed]” where officials treated complaint about staff conduct as an appeal from the related disciplinary proceeding, and rejected it), report and recommendation adopted in part, rejected in part on other grounds, 2013 WL 500363 (E.D.Cal., Feb. 11, 2013); Smith v. Gagnard, 2012 WL 3016705, *4 (M.D.La., May 17, 2012) (denying summary judgment for non-exhaustion where plaintiff’s use of force grievance did not challenge any aspect of his disciplinary proceeding but was nonetheless dismissed as a “disciplinary matter”), report and recommendation adopted, 2012 WL 3011731 (M.D.La., July 23, 2012); Fobbs v. Davis, 2012 WL 3683523, *3 (M.D.La., Apr. 2, 2012) (similar to Smith v. Gagnard), report and recommendation approved, 2012 WL 3683500 (M.D.La., Aug. 24, 2012); Pacheco v. Drown, 2010 WL 144400, *21 (N.D.N.Y., Jan. 11, 2010) (declining to dismiss where prisoner’s grievance about SHU conditions was mistakenly rejected on the ground that disciplinary matters are non-grievable); Woods v. Lozer, 2007 WL 173704, *3 (M.D.Tenn., Jan. 18, 2007) (holding a prisoner exhausted when he appealed a decision that his use of force claim was not grievable because it was mistakenly said to seek review of disciplinary procedures and punishments); Livingston v. Piskor, 215 F.R.D. 84, 86-87 (W.D.N.Y. 2003) (holding that evidence that grievance personnel refused to process grievances where a disciplinary report had been filed covering the same events created a factual issue precluding summary judgment).

633 See Tedder v. Johnson, 527 Fed.Appx. 269, 275 (4th Cir. 2013) (unpublished) (reversing summary judgment for non-exhaustion where prisoner was told he could not file a disciplinary proceeding until it was finished, and then that his grievances were exhausted); Barrett v. Wallace, 2013 WL 4483063, *7 (W.D.Wis., Aug. 20, 2013)
In some cases, courts have held that disciplinary appeals do not exhaust as to issues ancillary to the conduct of the disciplinary hearing, but they have generally done so without closely examining the scope of review of disciplinary appeals. That question is now central under the proper exhaustion rule of Woodford v. Ngo: if the issue that the prisoner seeks to litigate is reasonably understood as within the prescribed scope of review of a disciplinary appeal, a disciplinary appeal exhausts it. That conclusion applies a fortiori where the grievance system restricts review of matters related to disciplinary proceedings. More generally, where prison policy provides insufficient guidance to prisoners as to which remedy to pursue, they should be deemed to have exhausted if they pursue either, since doing so will serve the statute’s purpose of giving prison officials “time and opportunity to address complaints internally before allowing the initiation of a federal case.” Raising an issue in a disciplinary appeal certainly creates that opportunity, whether prison officials choose to take advantage of it or not.

4. Exhausting Each Defendant

The Supreme Court has held that “exhaustion is not per se inadequate simply because an individual later sued was not named in the grievances,” overruling contrary decisions in

\[ \text{(declining to dismiss for non-exhaustion, citing rule relied on in Sanders and Vasquez, below); Sanders v. Lundmark, 2011 WL 4699139, *4 (W.D.Wis., Oct. 5, 2011) (holding retaliation claim had to be exhausted through disciplinary appeal before using the grievance system where grievance rules so stated for issues “related to” a conduct report); Vasquez v. Hilbert, 2008 WL 2224394, *4 (W.D.Wis., May 28, 2008) (citing rule that a grievance raising “any issue related to the conduct report” must await completion of the disciplinary process); James v. McCall, 2007 WL 752161, *5 (D.S.C., Mar. 8, 2007) (citing rule stating “[w]hen an inmate is involved in an incident that results in a disciplinary, that issue/complaint becomes non-grievable”); Lindell v. O’Donnell, 2005 WL 2740999, *27, 31 (W.D.Wis., Oct. 21, 2005) (rejecting argument that plaintiff should have filed an inmate complaint where the relevant policy forbade using inmate complaints for “any issue related to a conduct report.”); see also Rivera v. Lindmeier, 2013 WL 6806188, *2-4 (E.D.Wis., Dec. 20, 2013) (stating court’s belief that “any issue related to the conduct report” refers only to disciplinary hearing procedures, but reaching the merits because “it is conceivable” that plaintiff’s complaint about being restrained might be within the scope of the regulation); Shaw v. Jahnke, 607 F.Supp.2d 1005, 1008 (W.D.Wis. 2009) (ambiguous rules could be read to make non-grievable a use of force about which there was a disciplinary report). But see Rivera v. Nelson, 2006 WL 2038393, *1 (D.Col., July 17, 2006) (holding disciplinary appeal was exclusive only as to the disciplinary conviction and not as to due process claims related to it, and that these must be grieved based on a policy statement that the grievance procedure applies to “a broad range of complaints”).} \]

See McDonald v. Briggs, 2010 WL 727583, *10 (E.D.Mich., Feb. 24, 2010) (holding prisoner alleging retaliation in “minor misconduct hearing” which was not grievable was required to raise his claim in the hearing, though “major misconduct hearings” could be grieved). The McDonald decision does not discuss whether the plaintiff had notice from the prison policy that such issues did not directly related to the conduct of the hearing itself could be raised in the disciplinary proceeding.


One court has disagreed, stating that “policy concerns militate against” allowing disciplinary appeals to exhaust conditions of confinement claims because in the federal prison system, disciplinary appeals go directly to the Regional Director rather than to officials at the prisoner’s institution, and the purpose of letting officials correct their own mistakes would be thwarted. Laubach v. Scibana, 2008 WL 281545, *7 (W.D.Okla., Jan. 31, 2008), aff’d, 2008 WL 5169352 (10th Cir. 2008). The Supreme Court has in a different context cautioned lower courts against allowing their notions of policy to affect interpretation of the exhaustion requirement and has held that the requirements of the administrative system dictate what prisoners are required to do to exhaust. Jones v. Bock, 549 U.S. 199, 212-16, 221-24 (2007).


Jones v. Bock, 549 U.S. at 219 (quoting Johnson v. Johnson, 385 F.3d 503, 522 (5th Cir. 2004) (“We are mindful that the primary purpose of a grievance is to alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued; the grievance is not a summons and complaint that initiates adversarial litigation”)); accord, Schlemm v. Frank, 2013 WL 5442293, *1 (W.D.Wis., Sept. 30, 2013) (“The purpose of administrative exhaustion is not to protect the rights of correctional officers, but to give prison officials a chance to resolve the complaint without judicial intervention.”); Allen v. Shawney, 2013 WL 2480658, *15 (E.D.Mich., June 10, 2013); Castillo v. Ryan, 2012 WL 2590545, *5 (D.Ariz., July 5, 2012).


A novel variation on this theme was raised and rejected in Eichler v. Tilton, 2009 WL 188783 (E.D.Cal., Jan. 27, 2009), report and recommendation adopted, 2009 WL 697619 (E.D.Cal., Mar. 13, 2009), where defendant officials argued that they could not be held liable unless grievances had been submitted during their tenure in their respective positions. The court observed that this argument would imply “that if an administrator violates, or allows the violation of, a prisoner’s civil rights, they would be able to escape liability for their actions simply by transferring to another position and/or retiring prior to the prisoner filing an inmate grievance. The court does not find this scenario meets the spirit nor the requirements of the PLRA.” 2009 WL 188783, *3.

However, the Court also said that, as with other aspects of exhaustion, “it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.” Thus if the grievance system itself requires naming the responsible personnel, prisoners must comply in order to exhaust.

At present, the New York State and New York City grievance systems do not contain such requirements, nor do the majority of grievance procedures nationwide. Courts will not reach to infer a requirement of naming defendants from more general requirements in a grievance policy. Nor will they accept assertions of such a rule that is not supported by written policy. One federal appeals court has held that a policy that does require naming of defendants may not be enforceable where the grievance form does not reflect that requirement and instead calls only for a “brief summary” of the grievance. The fact that some defendants are named in a grievance in a system without a name the defendant rule does not mean that the plaintiff did not exhaust with respect to those whose names are omitted.

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642 Jones v. Bock, id.
643 Espinal v. Goord, 558 F.3d 119, 126 (2d Cir. 2009) (2d Cir. 2009) (naming defendants not required by New York State grievance policy that called for a “concise, specific description of the problem and the action requested” and what the grievant had done to resolve the problem); Appendix C, New York City Department of Correction, Directive 3375R, Inmate Grievance Resolution Program, at attachment (March 4, 1985); Appendix D, New York State Dep’t of Correctional Services, Directive 4040, Inmate Grievance Process at § 701.5(a)(2) (July 1, 2006); Appendix G, New York City Dep’t of Correctional Directives 3375R-A, Inmate Grievance Resolution Program at § IV.B.1.a and Attachment E (March 13, 2008); Appendix H, New York City Department of Correction, Directive 3376, Inmate Grievance and Request Program, § IV.D.1 and Attachment B (http://www.nyc.gov/html/doc/downloads/pdf/Directive_3376_Inmate_Grievance_Request_Program.pdf). But see Snyder v. Whittier, 2009 WL 691940, *8 (N.D.N.Y., Mar. 12, 2009) (where claims against two defendants were distinct, failure to name one of the defendants was a failure to exhaust).
644 Jones v. Bock, 549 U.S. at 219 (citing amicus survey of grievance policies); see Moore v. Bennette, 517 F.3d 717, 726 (4th Cir. 2008) (naming defendants was not required where grievance policy said only to fill out a form, which did not call for defendants’ names); Butler v. Adams, 397 F.3d 1181, 1183 (9th Cir. 2005) (same).
645 Espinal v. Goord, 558 F.3d 119, 126 (2d Cir. 2009) (rule that accused staff member is “direct party” to the grievance who has the right to be heard and to appeal is not an identification requirement); Doyle v. Broussard, 2010 WL 5663012, *6 (W.D.La., Dec. 7, 2010) (declining to infer a name the defendant rule from the word “who” in the grievance form instructions), report and recommendation adopted, 2011 WL 308901 (W.D.La., Jan. 28, 2011); Holloway v. Correctional Medical Services, 2007 WL 1445701, *3 (E.D.Mo., May 11, 2007) (grievance policy that said “the offender should provide whatever material/information is available to her/him” does not require naming defendants); Skinner v. Schriro, 2007 WL 2177326, *3 (D.Ariz., July 27, 2007) (grievance policy said “state briefly but completely the problem on which you desire assistance. Provide as many details as possible.”). But see Stuart-El v. Miller, 2013 WL 3456938, *2-3 (S.D.Tex., July 8, 2013) (finding name the defendant requirement in a grievance form that instructed “state who, what, when, where”).
646 In Johnson v. Dovey, 2010 WL 1957420, *3 (E.D.Cal., May 14, 2010), report and recommendation adopted, 2010 WL 2363970 (E.D.Cal., June 9, 2010), the court rejected the state grievance system supervisor’s declaration stating that policy required all relevant individuals to be identified, since the policy had been authoritatively construed to the contrary by the appellate court with jurisdiction. Accord, Chatman v. Felker, 2010 WL 3431806, *5 (E.D.Cal., Aug. 31, 2010), report and recommendation adopted, 2010 WL 3852834 (E.D.Cal., Sept. 29, 2010); see Butler v. Adams, 397 F.3d 1181, 1183 (9th Cir. 2005).
648 Graham v. Runnels, 2012 WL 3028007, *11 (E.D.Cal., July 24, 2012) (where there was no dispute that a defendant had authorized the plaintiff's cell extraction, omission of his name from a grievance that mentioned another participant did not mean he failed to exhaust against the former); Burke v. Enenoh, 2012 WL 2358595, *6 (E.D.Cal., June 20, 2012), report and recommendation adopted, 2012 WL 2995489 (E.D.Cal., July 23, 2012). The same issue has arisen in systems that do have a name the defendant rule, with courts disagreeing over the
Some systems do require naming of staff, 649 and some have added such requirements in recent years. 650 Even where grievance rules do not require identifying individual staff members, if the grievance does not address particular individuals’ conduct, courts may hold the claim against them is not exhausted, 651 though this requirement need not be exacting 652 and decisions on the point are far from unanimous. 653


Policy is not always clear about naming requirements. See Cutler v. Correctional Medical Services, 2010 WL 339760, *5 (D. Idaho, Jan. 22, 2010) (noting that requirement of names is listed in only one of four documents addressing grievance policy).

650 See n. 542, above, concerning revisions in Michigan, Illinois, and California grievance procedures.


652 Miles v. Rich, 2013 WL 1181454, *3 (E. D. Tex., Feb. 15, 2013) (complaints about deprivation of pain relief and delayed appointments resulting from inadequate security staff were adequately grieved because prison officials could investigate them without the prisoner naming names), report and recommendation adopted, 2013 WL...
Courts are generally in agreement that under a name-the-defendant policy, if an individual is not sufficiently identified in a grievance, that person cannot be sued. The more drastic view, that if any defendant was not identified the entire case must be dismissed, is ruled out by the Supreme Court’s rejection of the “total exhaustion” rule under which the presence of any unexhausted claim required dismissal of the entire case.

The more difficult question is what if the plaintiff did not know the individual defendant’s identity at the time a grievance had to be filed? It seems clear that a prisoner’s claim cannot be barred for failing to include in a grievance information he did not have. An identification requirement that did not allow for situations where the prisoner could not identify the responsible parties would raise the question “whether a state’s procedural rules could be so onerous or impractical as to render administrative remedies unavailable and PLRA exhaustion inapplicable”—a question that has been answered affirmatively in other contexts. One

1181453 (E.D.Tex., Mar. 18, 2013); Roland v. Smith, 907 F.Supp.2d 385, 390 (S.D.N.Y. 2012) (allegation that prisoner was transferred to a mental hospital to “cover up” an assault at a prison sufficiently exhausted, since prison officials could identify the officers involved); Reed v. Brackbill, 2008 WL 4155600, *4-5 (D.Nev., Sept. 5, 2008) (complaint against “Medical Department” about hemorrhoid treatment exhausted against person who disapproved surgery); Pierce v. Hillsborough County Dept. of Corrections, 2008 WL 215716, *5 (D.N.H., Jan. 24, 2008) (grievances indicating that identified officers, and others not identified, assaulted the plaintiff exhausted against all involved); see Espinal v. Goord, 558 F.3d 119, 126-27 (2d Cir. 2009) (“as long as the prisoner provides enough information about the alleged misconduct . . . the State will normally be able to identify any direct party to a grievance on its own through investigation”; where prisoner said he was beaten by two named officers and “countless” others, gave the date, time, and location, and stated he was beaten for retaliatory reasons, he had given enough information for prison officials to investigate and determine who was involved); Hill v. Arnold, 2011 WL 31193, *2-3 (N.D.Cal., Jan. 5, 2011) (holding a grievance alleging excessive force, focusing on one deputy, but mentioning that other staff were present, exhausted against the other staff; the grievance “provided enough information about the incident that a reasonable investigation of it would have uncovered (if true) that sergeant Sanchez was a participant”).

653 For example, several decisions hold that once a prisoner has grieved his medical care claim, he need not file repeated grievances as additional practitioners become involved. See n. 605, above. This problem is indistinguishable from the one discussed above in § IV.E.3 under the rubric “Exhausting All Issues.”

654 See, e.g., Josey v. Beard, 2009 WL 1858250, *5 (W.D.Pa., June 29, 2009); Walker v. Hofbauer, 2007 WL 2710823, *4 (W.D.Mich., Sept. 13, 2007) (holding defendants not named must be dismissed given Michigan’s revised grievance policy). There may also be a question of what it means to name the defendants. In McKinney v. Kelchner, 2007 WL 2852373, *4 (M.D.Pa., Sept. 27, 2007), the court held that a grievance stating it was “on” two staff members in a use of force case, but also named other involved staff, sufficiently identified the latter that they could be sued; the grievance system’s failure to acknowledge and decide the culpability of those persons was not a failure by the plaintiff to exhaust. In Spearman v. Smith, 2007 WL 2710097, *4 (E.D.Mich., Aug. 31, 2007), the court held that the plaintiff exhausted against L. Smith, notwithstanding misidentifying her as S. Smith, since the grievance process ruled on the merits of the claim.

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district court decision notes that under the federal court notice pleading standard, litigants are allowed to amend their complaints to identify the proper defendants; that the prisoner plaintiff was not in a position to identify them in his grievance because he did not have “personal knowledge of the decision making structure within the prison”; and that in order to have an unqualified name the defendant rule, prison officials would have to have a discovery-like system so inmates could obtain the correct names within the deadline for filing. Otherwise the requirement would likely be invalid as in conflict with the federal policy underlying § 1983.

The pre-Jones v. Bock court-made “name the defendant” rules presented the same problems for the courts as do current current prison-made rules. Some decisions applying them have been absurdly harsh, while others have attempted to strike a balance between the demands of the “proper exhaustion” rule and officials’ need for notice and what is reasonably possible for prisoners to understand and carry out.

Courts generally acknowledge that a prisoner cannot be required to provide information he or she does not possess. As the Seventh Circuit has colorfully put it in a case involving a

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657 See nn. 772-802, below, on the validity and enforceability of grievance rules; nn. 1055-1063, below, on whether grievance rules can make remedies unavailable in practice.
660 Brown v. Sikes, 212 F.3d 1205, 1207-08 (11th Cir. 2000); accord, Gravley v. Tretnik, 414 Fed.Appx. 391, 394 (3rd Cir. 2011) (unpublished) (holding plaintiff exhausted where he relied on mis-identification of defendant by another staff member); Davis v. Swallows, 2013 WL 5925805, *1, 3, 5 (S.D.II., Nov. 5, 2013) (declining to dismiss claim against author of policy for non-exhaustion where at the time of grieving the plaintiff did not know of the policy and simply griped what happened to him); Mable v. Beard, 2013 WL 2435295, *17-18 (M.D.Pa., June 4, 2013) (holding grievance about a policy was not procedurally defaulted by failure to name the policymakers, since there was no evidence the prisoner knew who they were); Victor v. SCI Smithfield, 2011 WL 3584781, *6-8 (M.D.Pa., Aug. 12, 2011) (holding requirement to name defendants “where practical” meant that only unexplained failure to name defendants constituted non-exhaustion; plaintiff did not know of one defendant’s name until final appeal was pending, videotape was missing that would have identified others, and the rules did not provide for a new grievance about the same incident based on new information; plaintiff’s grievance allegation of attack by multiple staff members and denial of medical care notified defendants about the nature of his complaint, and prison
classification decision and a cell assignment: “At the source of the decisions in question was a mystifying web of rules and procedures, and behind those an army of administrators; it would be unreasonable to expect that, for every set of facts, an inmate will be able to peel back layers of bureaucracy and match a disputed decision with the prison employee responsible for that decision.”

Some have held that a name the defendant requirement can be satisfied by a description of the defendant’s position or conduct, or by providing enough information that acknowledged the need to investigate the incident); Funk v. Stanish, 2011 WL 1304737, *9 (M.D.Pa., Mar. 31, 2011) (holding plaintiff exhausted where he relied on misinformation about defendant’s identity); Sanks v. Franklin, 2010 WL 234785, *6 (M.D.Ga., Jan. 13, 2010) (requiring information that “the prisoner can reasonably provide”; stating issue is “whether Plaintiff knew or reasonably should have known who was responsible” for the alleged deprivation; relying on Brown v. Sikes); Nelson v. Madan, 2005 WL 2416036, *2 (M.D.Fla., Sept. 30, 2005). But see Jones v. Hobbs, 2010 WL 3767741, *4 (E.D.Ark., Aug. 31, 2010) (dismissing argument that plaintiff did not know necessary identities when he filed his grievance, listing “other ADC employees whose identities [did] not know,” and that policy that did not permit amending grievances to add persons whose names became known), report and recommendation adopted, 2010 WL 3777829 (E.D.Ark., Sept. 21, 2010).

661 Glick v. Walker, 385 Fed.Appx. 579, 582 (7th Cir. 2010) (unpublished); accord, Sanders v. Beard, 2013 WL 1703582, *7 (M.D.Pa., Apr. 19, 2013) (holding it was not practical to expect prisoners to name persons responsible for maintenance at the prison), reconsideration denied, 2013 WL 2650215 (M.D.Pa., June 13, 2013), motion to vacate denied, 2013 WL 3353502 (M.D.Pa., July 2, 2013), appeal dismissed, No. 13-3215 (3d Cir., Sept. 26, 2013); Green v. Wexford Health Sources, 2013 WL 139883, *5 (N.D.Ill., Jan. 10, 2013) (holding that “where the plaintiff is claiming a systemic problem with food safety and a broad denial of treatment by the health care unit as a whole, he will not be found at fault for failing to name each, individual defendant in his grievances”); Harper v. Henton, 2012 WL 6595159, *6 (S.D.Ill., Nov. 30, 2012) (holding where prisoner “received sub-par care due in part to the manpower and financial issues in the healthcare unit,” officials were put on notice of a claim based on policy and procedures of the medical provider), report and recommendation adopted, 2012 WL 6594954 (S.D.Ill., Dec. 18, 2012); Wojtaszek v. Litherland, 2011 WL 4499692, *4 (S.D.Ill., Sept. 27, 2011) (so holding where prisoner requested and was denied the names of defendants, and where the responsibility of a private medical provider appeared in a contract which the plaintiff had no reason to know existed and was denied access to); Chencinski v. David, 2011 WL 916555, *4 (S.D.Ill., Feb. 25, 2011) (so holding where plaintiff named medical provider in grievance but had no way of knowing what individual made his treatment decisions), report and recommendation adopted, 2011 WL 938705 (S.D.Ill., Mar. 16, 2011); Dolis v. Loftus, 2010 WL 3834426, *12 (C.D.Ill., Sept. 20, 2010) (so holding where “[p]laintiff articulated that he needed to have some cavities filled; had been advised the dentist that he would receive dental service within 4-6 months; but later was told by someone there was a two-year waiting list. He provided the facts the prison officials could reasonably expect from a prisoner in his position.”).

grievance officials could figure out easily enough who was involved. Grievances that state the prisoner’s lack of knowledge of responsible persons but sufficiently describe the problem have been held adequate. Some courts have held that naming the relevant entity can sufficiently identify the proper individual defendant, and vice versa. Similarly, some courts have held

23, 2005) (holding reference to nurse and optometrist were sufficient to exhaust; defendants could have reviewed plaintiff’s medical records and learned their identities); Blackshear v. Messer, 2003 WL 21508190, *2 (N.D.Ill., June 30, 2003) (holding that prisoner who failed to identify the nurse he was complaining about had exhausted, since that person could be identified from other information in his grievance “with a little follow-up investigation by the Jail”). Contra, Kittle v. Squier, 2012 WL 5473142, *2 (W.D.Mich., Nov. 9, 2012) (holding reference to health care staff member “MP-4” did not sufficiently identify two defendants where plaintiff did not identify them by initials or position, allege he was complaining about the entire health department, ask for the defendants’ names in a way that would identify them, or make factual allegations pertaining to them); Gardner v. Outlaw, 2012 WL 4888466, *3 (E.D.Ark., Oct. 1, 2012) (naming “all administering staff” does not exhaust under name the defendant rule), report and recommendation adopted, 2012 WL 4866496 (E.D.Ark., Oct. 12, 2012); Harris v. LePlante, 2008 WL 822146, *3 (W.D.Mich., Mar. 26, 2008) (naming “unit staff” does not exhaust under a name the defendant rule); Peterson v. Riverside Correctional Facility, 2006 WL 753126, *2 (W.D.Mich., Mar. 23, 2006) (holding grievance referring to “kitchen staff [and] officers,” “food service,” and the “inspector’s office” did not sufficiently identify parties).


Wagle v. Skutt, 2011 WL 6004344, *3 (E.D.Mich., Nov. 7, 2011) (naming the medical providers exhausted against an individual doctor); Chimenti v. Mohadjerin, 2008 WL 2551603, *4-5 (M.D.Pa., June 24, 2008) (where the plaintiff did not know of the Secretary of Correction’s involvement, but he named the Department of Corrections as an entity and challenged a departmental policy or inaction, officials received adequate notice and it was not “practicable” for plaintiff to name the Secretary); Stevenson v. Michigan Dept. of Corrections, 2008 WL 623783,
that naming a department or functional unit that is generally responsible for the subject matter of the prisoner’s complaint is sufficient, and some have held that if the prisoner identifies the problem so the responsible department is obvious, the prisoner has exhausted. Indeed, one has

*11 (W.D.Mich., Mar. 4, 2008) (naming TriCounty Orthopedic was sufficient to exhaust against a doctor employed by it).


Harper v. Henton, 2012 WL 6595159, *6 (S.D.Ill., Nov. 30, 2012) (holding grievance describing medical problem and stating prisoner “received sub-par care due in part to the manpower and financial issues in the healthcare unit” sufficiently notified officials that he was complaining about policies or procedures of the private medical provider), report and recommendation adopted, 2012 WL 6594954 (S.D.Ill., Dec. 18, 2012); Reichart v. Prison Health Services, SCI-Camp Hill, 2012 WL 2411838, *2 (M.D.Pa., June 26, 2012) (“Although plaintiff does not specifically name PHS in his grievance papers . . . [he] is clearly questioning the medical care he is receiving for his eyes, including whether he should be referred to ophthalmic specialists other than Premiere Eye Care. Such matters would be in the discretion of the contract health-care providers at SCI-Camp Hill, which is PHS.”); Hall v. Raja, 2011 WL 7975464, *4 (E.D.Mich., October 7, 2011) (holding grievance about lack of access to a specialist
held that naming “the institution” was sufficient in a case that implicated conditions of the physical plant.669

Some courts have held that exhaustion is adequate where individuals have been named in appeals and not the initial stage,670 where the response to the prisoner’s grievance identifies a defendant or indicates that officials know his or her identity,671 or where the claim arises from

and a lack of diagnostic testing gave fair notice to prison officials of plaintiff’s claim against the medical provider CMS; stating name the defendant requirement “relaxed when the purpose of the grievance has been achieved (i.e., where the prisoner's grievance gives prison officials ‘fair notice of the alleged mistreatment or misconduct that forms the basis of the constitutional or statutory claim made against a defendant in a prisoner's complaint.’)” (quoting Bell v. Konteh, 450 F.3d 651, 654 (6th Cir. 2006) (internal quotation marks and citation omitted)), report and recommendation adopted, 2012 WL 1033417 (E.D.Mich., Mar. 27, 2012). Contra, Mitchell v. Correctional Medical Service, 2012 WL 3248192, *4 (E.D.Mich., May 23, 2012) (grievance that named a practitioner but did not name the corporate medical provider or cite a corporate policy did not exhaust against the provider), report and recommendation adopted, 2012 WL 3241270, *1-2 (E.D.Mich., Aug. 8, 2012).


the defendant’s role in processing the grievance. Others have held that naming of defendants is not required where the prisoner’s complaint concerns a policy and not the unauthorized conduct of staff, or where the prisoner’s complaint of a long history of abusing prisoners has sufficiently alerted officials to problems of supervision and management without actually naming supervisors in the grievance.

At least one prison system has adopted a requirement concerning claims against certain supervisory officials that appears designed to be impossible to meet. Grievances naming the warden or inspector of institutional services must show that those officials were “personally and knowingly involved in a violation of law, rule or policy, or personally and knowingly approved or condoned such a violation.”

The importance supervisory liability exhaustion rules cannot be overemphasized, given the personal involvement requirement of liability under 42 U.S.C. § 1983 and the notorious difficulties pro se prisoners have in identifying and naming all the proper defendants even within the statute of limitations for judicial proceedings. This concern is particularly

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Ohio Admin Code 5120-9–31, § M (2011) (quoted in Morgan v. Beightler, 2011 WL 2111082, *4 (N.D.Ohio May 26, 2011)). The Morgan court dismissed for non-exhaustion where the plaintiff failed to “state his grievance with particularity” against the Warden. Accord, Fletcher v. Sheets, 2011 WL 3206856, *6 (S.D.Ohio, June 10, 2011) (characterizing rule as “critical procedural rule”), report and recommendation adopted, 2011 WL 3206842 (S.D.Ohio, July 28, 2011). However, in Brown v. Parish, 2012 WL 27298, *3 (S.D.Ohio, Jan. 5, 2012), the court found the requirement satisfied by the plaintiff’s allegations “that the Warden must have been aware of the problem because of a class action which Mr. Brown filed in the Ohio Supreme Court”; although the defendants argued that this allegation was unsupported, the court pointed out that the requirement does not demand evidentiary support.


important in connection with claims of supervisory liability, which prisoners are especially unlikely to be aware of at the time they file a prison grievance. The case law is sharply divided between decisions holding that supervisors must have been identified in grievances to be sued and decisions holding, in substance, that if the prisoner grieves what happened to him or her, allowing prison officials to determine who was at fault, the plaintiff has exhausted. The latter view is more consistent with the statute’s central purpose of giving prison officials notice so they can solve problems before litigation is commenced, and with the impossibility or impracticability of requiring prisoners to make that determination in many cases.

argument that Lira must exhaust by filing a grievance naming the specific persons he ultimately seeks to sue goes too far, as an inmate may not know all the names of the defendants until after he files a civil action and conducts discovery, in which case, he would have to dismiss his action and file anew under defendants’ reasoning.”), reversed and remanded on other grounds, 427 F.3d 1164 (9th Cir. 2005), cert. denied, 549 U.S. 1204 (2007).

See Kozohorsky v. Harmon, 332 F.3d 1141, 1143 (8th Cir. 2003) (dismissing claims against supervisor for failure to control officers who abused the plaintiff because the supervisor was not named in the grievance); Holloway v. Hobbs, 2013 WL 5935625, *2 (E.D.Ark., Oct. 30, 2013) (dismissing claim of inadequate training where plaintiff did not name anyone who had failed to train defendant); Porter v. Beard, 2010 WL 2573878, *3-4 (W.D.Pa., May 12, 2010) (dismissing bystander and supervisory claims not raised in plaintiff’s grievance though he knew supervisors’ identity); report and recommendation adopted, 2010 WL 2541752 (W.D.Pa., June 21, 2010); Josey v. Beard, 2009 WL 1858250, *5 (W.D.Pa., June 29, 2009) (dismissing claims in counseled case against officials responsible for making and enforcing Hepatitis C treatment protocol and blocking plaintiff’s care where prisoner’s grievance named only his immediate treatment provider); Williams v. Forrest, 2005 WL 820551 (N.D.Tex., Apr. 6, 2005) (holding plaintiff was required to name supervisors of staff members who carried out a retaliatory transfer in order to sue the supervisors), report and recommendation adopted, 2005 WL 1163301 (N.D.Tex., May 9, 2005); see also Evans v. Correctional Medical Services, 2008 WL 1805375, *4 (E.D.Ark., Apr. 18, 2008) (holding prisoner did not exhaust his otherwise exhausted claim against a private medical provider because his grievances failed to “allege any facts that CMS directly participated in a constitutional violation, learned of an alleged constitutional violation and failed to act, created a policy or custom allowing or encouraging illegal acts, or managed its employees in a way that was grossly negligent”). See also nn. 582-587, above, concerning this issue.

In Kikumura v. Osagie, 461 F.3d 1269, 1285-86 (10th Cir. 2006), the court held that the plaintiff’s claim of supervisory liability for correctional staff’s failure to get him timely medical care was not exhausted because his grievance requesting action to discipline persons who violated agency policy or to “introduce new policy so that the same wrong-doing won’t happen again” did not sufficiently alert prison officials that the injuries might have been caused by inadequate training and disciplinary programs.

As one court put it, grievances that placed defendants on notice of line officers’ conduct “identified the core issue; from them, defendants could have discovered any possible wrongdoing related to [them], including their supervisor's failure to train them.” Czapiewski v. Bartow, 2008 WL 2622862, *1-2 (W.D.Wis., July 1, 2008) (declining to dismiss inadequate training claim for non-exhaustion; “Basic notions of fairness support the conclusion that an inmate need not identify responsible individuals or legal theories related to an incident in every case.”); accord, Cutler v. Correctional Medical Services, 2010 WL 339760, *6 (D.Idaho, Jan. 22, 2010) (“The simple and more prudent way to interpret the grievance process is that once an inmate has availed himself of all of the grievance procedures as to his problem, he is free to sue any state actor who could have liability under the provision of law governing his cause of action.”); Davis v. Rhoomes, 2009 WL 415628, *5, 6 (S.D.N.Y., Feb. 12, 2009) (plaintiff who exhausted underlying allegations of misconduct was not barred from pursuing supervisory liability against another defendant); Brown v. Runnels, 2006 WL 2849871, *4 (E.D.Cal., Oct. 3, 2006) (declining to dismiss for non-exhaustion based on failure specifically to grieve that supervisory defendants failed to rectify the problem). In Sacred Feather v. Merrill, 2008 WL 2510100, *3 n.7 (D.Md., June 19, 2008), report and recommendation adopted, 2008 WL 4791897 (D.Md., Oct. 29, 2008); the court cogently stated:

. . . [It] would be ludicrous to argue that the failure to name a warden (or a commissioner) in the grievance itself could defeat a claim against them vis-à-vis the issue complained of; it would basically require an inmate to anticipate that he was not going to get any relief through the grievance process and that a 42 U.S.C. § 1983 action was inevitable. That is not in keeping with the stated purpose of the prison's grievance policy or the 42 U.S.C. § 1997e(a) exhaustion
In this regard, the *Woodford/Jones v. Bock* holding that the requirements of the grievance policy are the measure of exhaustion is in considerable tension both with the statutory requirement that remedies be “available” to invoke the exhaustion requirement and with *Jones*’ own holding that the PLRA should not be construed to depart from the usual federal litigation practice unless Congress has said so. An integral part of the usual federal practice is that leave to amend complaints shall be “freely given,” a policy that allows for amendment not only based on newly discovered facts, but also based on a better understanding of the law and of the legal significance of already known facts. That point is true *a fortiori* for cases filed pro se in which counsel only appears later, often by court appointment based on the court’s perception of the merit of the case.

For that reason, an “exhaust each defendant” rule, whether made by courts or prison officials, undermines both the policy of Rule 15(a) and the purpose of appointing counsel by freezing the prisoner’s claims and theories of liability in place as of the uncounselled filing of a grievance within a few days or weeks of the incident complained of. There is nothing in the statute or its legislative history to suggest that Congress had any such intention.

One approach to this problem (though not, in my view, a very good one) is for prisoners to file new grievances naming persons they have newly discovered or recognized bear some requirement, which is meant to assure that the prison officials get the first crack at rectifying an alleged wrong.

*Accord,* Czapiewski v. Bartow, 2008 WL 2622862, *id.* (“In most instances, it is not necessary to identify the responsible parties in an inmate complaint to achieve the purpose of administrative exhaustion, which is to give prison officials a chance to resolve the complaint without judicial intervention.”).

See, e.g., Glick v. Walker, 385 Fed.Appx. 579, 582 (7th Cir. 2010) (unpublished) (noting unreasonableness of expecting prisoners to parse “mystifying web of rules and procedures” behind which was “an army of administrators”); Robinson v. Johnson, 343 Fed.Appx. 778, 781-82 (3d Cir. 2009) (unpublished) (declining to dismiss claims against commissioner and superintendent not named in grievance where policies they were responsible for and persons responsible for them were not made known to prisoners, and where the grievance response addressed policies anyway); Cutler v. Correctional Medical Services, 2010 WL 339760, *5* (D.Idaho, Jan. 22, 2010) (“If the inmate is grieving a general issue, there may not be any personnel involved, or perhaps the issue involves all personnel working at a facility if they are implementing the policy complained of. In such an instance, it would be impossible or impracticable to name the personnel involved.”).

See § IV.G, below, concerning availability of remedies, and § IV.E.7, below, concerning the prospect that officials may promulgate rules designed “for the purpose of tripping up all but the most skillful prisoners.”


Rule 15(a), Fed.R.Civ.P.

See Hodge v. Police Officers, 802 F.2d 58, 61 (2d Cir. 1986).

The Tenth Circuit has more comprehensively compiled the reasons an exhaust each defendant approach is inappropriate regardless of the requirements of prison policy: the undesirability of technicalities in a process that lay persons pursue pro se, the very short time limits for filing grievances, the limited space allowed on the forms for prisoners’ complaints, the inability of incarcerated persons to investigate their own claims, the lack of a procedural mechanism for amending a grievance to identify additional defendants or provide new information about their claims, the relevant regulations’ prohibition on raising new issues in administrative appeals, and the conflict between a requirement of naming defendants and the policy of keeping grievances simple for the sake of timeliness and efficiency. The court further noted the federal grievance system is an inquisitorial system in which prison officials are responsible for thoroughly investigating complaints. *Kikumura v. Osagie*, 461 F.3d 1269, 1284 (10th Cir. 2006).
Grievance systems generally do not seem to make provision for such supplemental filings, which is not surprising, since those systems were never designed as a rehearsal for litigation, but as quick and informal problem-solving mechanisms. In some systems, grievances adding new names to prior complaints have been dismissed as “duplicative,” and decisions are mixed as to whether such a grievance fails to exhaust. Other decisions seem to hold prisoners to a standard of procedural claimvoccasion, dismissing their cases for failing to take actions that do not seem to be prescribed in the grievance rules.


Eichler v. Tilton, 2009 WL 188783, *3 (E.D.Cal., Jan. 27, 2009) (“The administrative grievance system is less about future litigation and more about reaching an internal and speedy resolution of the prisoner's problems.”), report and recommendation adopted, 2009 WL 679519 (E.D.Cal., Mar. 13, 2009); Parker v. Robinson, 2008 WL 2222040, *7 (D.Me., May 22, 2008) (point of exhaustion requirement “is to give the correctional institution the opportunity to address (and hopefully resolve) the grievedy-of conduct/condition before the dispute moves to litigation. The administrative grievance process is not a dress-rehearsal hurdle to civil litigation.”).


In Dunbar v. Jones, 2007 WL 2022083, *8 (M.D.Pa., July 9, 2007), the court rejected the argument that the plaintiff should have amended his grievance to name a defendant whose identity he did not initially know, since the rules did not provide for such amended grievances, but dismissed the claim against that defendant because the
Courts have held that even under a name the defendant rule, a grievance that is decided on the merits exhausts with respect to all persons involved, whether they are named in the grievance or not, consistently with the general rule that procedural defaults are waived if the administrative body reaches the merits despite them.\(^690\) Previously, some Michigan district courts had credited the argument that if the plaintiff names any individuals, officials have no way of knowing during the grievance process whom the prisoner might later sue, so their first opportunity to address the failure to name them does not occur until litigation has commenced.\(^691\)

plaintiff didn’t add her name in his grievance appeals—without citing anything in the grievance policy that permits adding new material in grievance appeals. Another district court accepted the argument that the plaintiff was obliged to file a late and duplicative grievance upon learning who was responsible for the action he complained of, without any discussion of whether the rules provided for such a grievance. Fulgham v. Snyder, 2008 WL 785524, *3 (W.D.Mich., Mar. 21, 2008). The Second Circuit has addressed a similar problem—a prisoner who obtained new information, though not the identity of defendants—more fairly by holding that the prisoner should have filed a new grievance under the grievance system’s provision allowing late grievances based on “mitigating circumstances,” but declining to dismiss because that procedural option was not made sufficiently clear in the grievance rules. Brownell v. Krom, 446 F.3d 305, 313 (2d Cir. 2006). More reasonable still is the decision in Chencinski v. David, 2011 WL 916555, *5 (S.D.Ill., Feb. 25, 2011), report and recommendation adopted, 2011 WL 938705 (S.D.Ill., Mar. 16, 2011), which rejects the argument that a new grievance was required upon learning (from the initial grievance response) the responsible party’s identity, since the grievance rules made no provision for such grievances, and starting the process again would not serve the purpose of helping prison officials address shortcomings.


These decisions would seem to be overruled by the Sixth Circuit’s unqualified holding in *Reed-Bey v. Pramstaller* that a decision on the merits waives procedural errors. However, some courts have reasserted the argument even after *Reed-Bey*. In any case, since the point of the exhaustion requirement is not to give defendants a way to get claims dismissed, but to facilitate prison dispute resolution, arguably defendants should have to show that the failure to name defendants in the grievance demonstrably impaired officials’ ability to investigate and resolve the prisoner’s complaint—a difficult showing if they already have decided the grievance. There is a similar tension in the Eighth Circuit, where the court has adopted the general proposition that procedural defects are waived by a grievance decision on the merits, and has applied it to a “name the defendant” rule in unpublished decisions, but several district courts have pushed back against such application to the Arkansas name the defendant rule. Some have stated that the conflicting case law “can be harmonized by focusing on whether—despite the procedural flaw associated with the prisoner's failure to name a defendant in his grievances—demonstrably impaired their ability to investigate and resolve the prisoner’s complaint—a difficult showing if they already have decided the grievance. *See also* Binion v. Glover, 2008 WL 4155355, *11 (E.D.Mich., July 28, 2005) (stating that the argument “begs the question—is the requirement to name all those involved a ‘critical procedural’ requirement under *Woodford*?”).

*Christian v. Michigan Dept. of Corrections - Health Services, 2013 WL 5348832, *5 (E.D.Mich., Sept. 24, 2013) (holding “Reed–Bey should not be read to provide a ‘catch-all’ exception for prisoner grievances” when the merits are decided, but that a reference to “health services” along with references to prior “kites” specifying medical problems satisfied the name the defendants rule where the merits were decided); Kensu v. Rapelje, 2013 WL 1774637, *4 (E.D.Mich., Apr. 25, 2013) (holding “a plaintiff fails to exhaust administrative remedies as to a particular defendant not identified in the grievance if the plaintiff specifically identifies other defendants by name and nothing in the grievance would put the unnamed defendants on notice,” not mentioning *Reed-Bey*); Vandiver v. Vasbinder, 2012 WL 4358192, *3 (E.D.Mich., June 21, 2012) (adopting *Downing v. Correctional Medical Services* argument, holding *Reed-Bey* reliance misplaced where the plaintiff named some defendants), report and recommendation adopted, 2012 WL 4355536 (E.D.Mich., Sept. 24, 2012); see also Jackson v. Warner, 2013 WL 2002690, *3 & n.1 (E.D.Ark., May 2, 2013) (declining to dismiss where no defendants were named, distinguishing case where some were named), report and recommendation adopted, 2013 WL 1966237 (E.D.Ark. May 13, 2013).

*See Binion v. Glover, 2008 WL 4155355, *11 (E.D.Mich., July 28, 2005) (stating that the argument “begs the question—is the requirement to name all those involved a ‘critical procedural’ requirement under *Woodford*?”).

*Hammett v. Cofield, 681 F.3d 945, 947 (8th Cir.2012) (per curiam).


*Chance v. Burl, 2014 WL 198792, *5 (E.D.Ark., Jan. 15, 2014) (distinguishing *Bower and Hammett* because plaintiff named one defendant and others in his grievance, but not other defendants; claims against unexhausted defendants were not waived under those circumstances); Williams v. Marchbanks, 2014 WL 130492, *4 (E.D.Ark., Jan. 14, 2014) (refusing to apply *Hammett and Bower* where prisoner named one defendant but not the other); Vanzant v. Morris, 2013 WL 495598, *4 (E.D.Ark., Feb. 8, 2013) (declining to find waiver where the relevant conduct, as well as the defendants’ names, were omitted from the grievance; distinguishing *Hammett* on the ground that its rule did not serve PLRA policies in this situation); Burns v. Eaton, 2013 WL 357563, *3 (E.D.Ark., Jan.29, 2013) (similar to *Vanzant*). But see Butler v. Corizon, Inc., 2013 WL 5673587, *6 (E.D.Ark., Oct. 15, 2013) (noting *Hammett* decision, also noting that defendant not named in the grievance is referred to in documents attached to it and acknowledged her involvement in plaintiff’s medical care in a declaration); Jones v. Meinzer, 2013 WL 5676886, *4 (E.D.Ark., Aug. 30, 2013) (noting *Hammett*, finding exhaustion “especially” since two defendants were members of the Board of Correction and others were referred to as “John Does”), report and recommendation rejected on other grounds, 2013 WL 5676801 (E.D.Ark., Oct. 18, 2013).
prison officials proceed to reach and decide the merits of the specific claims asserted against each defendant.”

These holdings pose the question what is it that is to be exhausted: the prisoner’s problem, or the personal culpability of particular individuals for it? The Supreme Court’s exhaustion decisions strongly suggest that problem-solving is the primary aim. In Jones v. Bock, the Court stated: “We have identified the benefits of exhaustion to include allowing a prison to address complaints about the program it administers before being subjected to suit, reducing litigation to the extent complaints are satisfactorily resolved, and improving litigation that does occur by leading to the preparation of a useful record.” It also stated that notice to prison staff that they might be sued “has not been thought to be one of the leading purposes of the exhaustion requirement,” and quoted a Fifth Circuit case stating that “[w]e are mindful that the primary purpose of a grievance is to alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued; the grievance is not a summons and complaint that initiates adversarial litigation.”

It seems fair to conclude that if a grievance body can, and does, address the merits of a prisoner’s complaint despite the failure to identify individuals, a court should in effect take it at its word and deem the complaint exhausted and any defendant-naming requirement waived.

5. Exhausting Items of Relief

Courts have held that prisoners need not “demand particular relief” to exhaust administrative remedies, though courts have enforced grievance rules requiring prisoners to demand some relief in their grievances. The Supreme Court held in Booth v. Churner that the

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697 Scott v. Burl, 2013 WL 5522404, *3 n.5 (E.D.Ark., Oct. 1, 2013); accord, Waller v. Kelley, 956 F.Supp.2d 1007, 1013 (E.D.Ark., July 9, 2013) (stating “the Court's holding in Hammett only applies in cases where prison officials overlook or ignore procedural flaws in a prisoner’s grievances (which otherwise would have allowed them to deny the grievances) and reach and decide the merits of the specific claims asserted against specifically named individuals”; decision on merits of medical care grievance did not decide plaintiff’s claim that a defendant had failed to correct the inadequate medical care). Cf. Bryant v. Hobbs, 2014 WL 37802, *8 (E.D.Ark., Jan. 6, 2014) (declining to apply Hammett where the plaintiff not only failed to name all but one defendant, but failed to complain about the other defendants’ conduct).

698 Jones v. Bock, 549 U.S. 199, 219 (2007); see also Booth v. Churner, 532 U.S. 731, 737 (2001) (citing defendants’ argument that “requiring exhaustion in these circumstances would produce administrative results that would satisfy at least some inmates who start out asking for nothing but money, since the very fact of being heard and prompting administrative change can mollify passions even when nothing ends up in the pocket.”).

699 Jones, 549 U.S. at 923 (quoting Johnson v. Johnson, 385 F.3d 503, 522 (5th Cir. 2004)); see Eichler v. Tilton, 2009 WL 188783, *3 (E.D.Cal., Jan. 27, 2009) (“The administrative grievance system is less about future litigation and more about reaching an internal and speedy resolution of the prisoner's problems.”), report and recommendation adopted, 2009 WL 679519 (E.D.Cal., Mar. 13, 2009); Parker v. Robinson, 2008 WL 2222040, *7 (D.Me., May 22, 2008) (point of exhaustion requirement “is to give the correctional institution the opportunity to address (and hopefully resolve) the ignored-of conduct/condition before the dispute moves to litigation. The administrative grievance process is not a dress-rehearsal hurdle to civil litigation. . .”).

700 Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004) (quoting Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)).

applicability of the exhaustion requirement turns on whether the grievance system will address the prisoner’s complaint, not whether it provides the remedy that the prisoner prefers.\textsuperscript{702} The Seventh Circuit held that even under its procedural default rule, now adopted by the Supreme Court,\textsuperscript{703} “no administrative system may demand that the prisoner specify each remedy later sought in litigation—for \textit{Booth v. Churner} . . . holds that § 1997e(a) requires each prisoner to exhaust a process and not a remedy.”\textsuperscript{704} Once a prisoner’s claim is exhausted, therefore, “[a]ny claim for relief that is within the scope of the pleadings” may be litigated without further exhaustion.\textsuperscript{705}

In particular, prisoners’ damages claims are not barred for failure to ask for damages in grievance processes (which generally do not provide for damages anyway).\textsuperscript{706} This holding is

\begin{itemize}
  \item \textit{Booth}, 532 U.S. at 740-41.
  \item The suggestion to the contrary in \textit{Luckerson v. Goord}, 2002 WL 1628550, *2 (S.D.N.Y., July 22, 2002), is erroneous. In that case, where the plaintiff initially grieved and requested that asbestos tests be conducted, and then sued complaining of asbestos-related problems and seeking damages, medical monitoring, etc., the real issue is not the plaintiff’s failure to ask for particular remedies in the grievance system, but his failure to grieve a claim of actual exposure to asbestos as opposed to a request that the presence of asbestos be determined. Similarly, the holding in \textit{Saunders v. Goord}, 2002 WL 31159109, *4 (S.D.N.Y., Sept. 27, 2002), that the prisoner failed to exhaust in part because he failed to specify the action he wished taken, is erroneous under \textit{Booth}. A closer case is presented by \textit{Singh v. Goord}, 520 F.Supp.2d 487, 497-98 (S.D.N.Y., Oct. 9, 2007), which holds that a prisoner who prevailed in his disciplinary appeal did not exhaust his claim for an injunction against further discipline for refusing work assignments contrary to his religious beliefs; that relief would have required a separate grievance. In \textit{Miller v. Lawler}, 2012 WL 629280, *11 (M.D.Pa., Feb. 3, 2012), \textit{report and recommendation adopted}, 2012 WL 638796 (M.D.Pa., Feb. 27, 2012), \textit{vacated on reconsideration on other grounds}, 2012 WL 1340346 (M.D.Pa., Apr. 18, 2012), the court held that a grievance seeking medical care based on conditions of confinement did not exhaust a request to repair heat and hot water. Though framed in terms of relief (the grievance policy requires prisoners to state the relief sought), this seems to be a case where the plaintiff did not understandably raise his present complaint in the grievance process. Cf. \textit{Clark v. Williams}, 619 F.Supp.2d 95, 105 (D.Del., Mar. 31, 2009) (where grievance was declared non-grievable because plaintiff asked for an apology, the remedy was not available).
  \item Jones’El v. Berge, 172 F.Supp.2d 1128, 1134 (W.D.Wis. 2001); accord, Doe v. Wooten, 2010 WL 2821795, *3 (N.D.Ga., July 16, 2010) (“A prisoner is not required to exhaust a specific relief sought.”) A grievance stating that a prisoner was unsafe at one prison exhausted his demand for an order barring his return to that prison; Coleman v. Schwarzenegger, 2008 WL 4813371, *2-3 (E.D.Cal., Nov. 3, 2008) (where court had found unconstitutional medical and mental health care, request to reduce population so care could be provided required no new exhaustion); Muhammad v. Crosby, 2007 WL 2376050, *3 (N.D.Fla., Aug. 16, 2007) (holding that prisoner who had grieved the failure to provide a Halal diet sufficiently exhausted a motion for a preliminary injunction to provide such diet by means of bag lunches; the PLRA requires exhaustion of claims, not particular forms of relief).
  \item Buck v. Hartman, 2013 WL 3421891, *3-4 (S.D.Ill., July 8, 2013) (declining to require further exhaustion where plaintiff got the relief he sought at an intermediate stage and damages were not an available remedy); Del Rio v. Morgado, 2012 WL 2092401, *4 (C.D.Cal., May 1, 2012) (rejecting claim that prisoner whose grievance was granted at an intermediate stage failed to exhaust because he did not pursue claim for damages in his grievance), \textit{report and recommendation adopted}, 2012 WL 2106369 (C.D.Cal., June 11, 2012); Lopez v. Adams, 2009 WL
\end{itemize}
not unanimous; some courts have held the opposite, and some have held or suggested that prisoners must exhaust damages demands if the grievance policy so prescribes. But the argument to the contrary, stated above, is based on the central reasoning of the decision in Booth v. Churner, and it seems unlikely that the Court in promulgating its “proper exhaustion” rule overruled it in the absence of any statement by the Court to that effect.

6. “Total Exhaustion”

The Supreme Court has rejected the “total exhaustion” rule, which said that if a prisoner includes any unexhausted claims in a complaint, the whole case had to be dismissed. Under its decision, only the unexhausted claims need be dismissed. Before Jones v. Bock, the Ninth Circuit had held that when claims were “closely related and difficult to untangle,” the presence of unexhausted claims among them supported dismissal of the entire complaint, but otherwise 1575195, *2-3 (E.D.Cal., June 3, 2009) (requiring plaintiff to request damages in a grievance would be inconsistent with Booth), report and recommendation adopted, 2009 WL 2058540 (E.D.Cal., July 14, 2009); Woodson v. Rodriguez, 2009 WL 799403, *7 (N.D.Cal., Mar. 24, 2009) (plaintiff need not have requested damages in order for defendants to have notice of the problem he raised); Henderson v. Bettus, 2008 WL 899251, *4 (M.D.Fla., Mar. 31, 2008) (holding plaintiff need not have requested damages, noting grievance rules did not require specifying all relief requested); Chaidez v. Johnson, 2007 WL 4536599, *2 (S.D.Cal., Dec. 19, 2007) (failure to ask for damages in grievance was not a failure to exhaust); Roberson v. McShan, 2006 WL 2469368, *3 (S.D.Tex., Aug. 24, 2006) (holding plaintiff need not have presented his request for damages; citing Booth holding that prisoners must exhaust regardless of the type of relief sought).

Some courts have held that a prisoner who obtains relief at an intermediate stage of the grievance process, but who also seeks damages, must exhaust the remaining administrative steps even if damages are not available in the grievance system. See n. 526, above.

In some cases, grievances have been rejected because the prisoner asked for damages. Garcia v. Wright, 2013 WL 3381269, *2-3 (D.Colo., July 8, 2013) (dismissed for non-exhaustion where plaintiff persisted in asking only for damages even though remedies were limited by rule to “modification of facility policy” and “assurance that abuse will not recur”); see Smith v. Buss, 2011 WL 1118065, *9 (N.D.Ind., Feb. 18, 2011) (holding rejection based solely on asking for monetary compensation would be improper), report and recommendation adopted, 2011 WL 1085009 (N.D.Ind., Mar. 24, 2011).


King v. Iowa Dept. of Corrections, 598 F.3d 1051, 1053 (8th Cir. 2010) (“Where prison grievance procedures clearly require an inmate to state all the relief he seeks, even monetary relief that may be beyond the authority of grievance officials to grant, it is certainly arguable that ‘proper’ exhaustion requires compliance with that rule. . . .”), cert. denied, 131 S.Ct. 499 (2010); Sanders v. Beard, 2013 WL 1703582, *6 (M.D.Pa., Apr. 19, 2013) (noting grievance policy required prisoners to specify if they seek “compensation or other legal relief normally available from a court,” barring plaintiffs who failed to do so from pursuing damages claims), reconsideration denied, 2013 WL 2650215 (M.D.Pa., June 13, 2013), motion to vacate denied, 2013 WL 3355502 (M.D.Pa., July 2, 2013), appeal dismissed, No. 13-3215 (3d Cir., Sept. 26, 2013); Collins v. Walsh, 2012 WL 3536803, *3 (M.D.Pa., Aug. 15, 2012).

rejected total exhaustion.\textsuperscript{710} Some district courts have continued to use that analysis.\textsuperscript{711} In my view there is no support for preservation of the Lira exception in Jones v. Bock’s categorical rejection of total exhaustion.

7. The “Proper Exhaustion” Requirement

The Supreme Court, resolving a conflict among circuits,\textsuperscript{712} has held that the PLRA exhaustion requirement is governed by a procedural default rule, \textit{i.e.}, that if a prisoner’s administrative complaint is rejected for procedural reasons, a subsequent federal court suit will be barred for non-exhaustion.\textsuperscript{713} More precisely, it held that “the PLRA exhaustion requirement requires proper exhaustion,”\textsuperscript{714} which “demands compliance with an agency’s deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.”\textsuperscript{715} Conversely, compliance with grievance rules satisfies the statute: “it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.”\textsuperscript{716} (The National Standards to Prevent, Detect, and Respond to Prison Rape, recently promulgated under the Prison Rape Elimination Act, may limit this holding in some respects for sexual abuse complaints.\textsuperscript{717})

The Court dismissed the possibility that prisons might “create procedural requirements for the purpose of tripping up all but the most skillful prisoners,” since the case did not present that situation,\textsuperscript{718} notwithstanding the concern that numerous courts had previously (and have subsequently) expressed about this possibility.\textsuperscript{719} Several post-Woodford decisions have cited

\begin{footnotesize}
\begin{enumerate}
\item Lira v. Herrera, 427 F.3d at 1175-76.
\item Woodford, 548 U.S. at 106.
\item Woodford, 548 U.S. at 90-91; accord, Jones v. Bock, 549 U.S. 199, 218 (2007) (“Compliance with prison grievance procedures . . . is all that is required by the PLRA to ‘properly exhaust.’”).
\item Some courts have held that if grievance rules make exhaustion or appealing optional, then they are optional for PLRA purposes as well. See nn. 194, 473-475, above. This probably pushes the Jones v. Bock principle too far, \textit{i.e.}, to the point of conflict with the statute’s basic requirement. There is contrary authority in any case.
\item See § IV.E.7.i, below.
\item Woodford, 548 U.S. at 102-03 (dismissing concern about “procedural requirements that are designed to trap unwary prisoners and thus to defeat their claims”).
\end{enumerate}
\end{footnotesize}
that statement in holding that prisoners who didn’t fully comply with procedural requirements, but who were arguably “tripped up” by them, should not have their cases dismissed for non-exhaustion.\endnote{720}

The Court also dismissed the argument that


\endnote{720 See Timberlake v. Buss, 2007 WL 1280659, *2-3 (S.D.Ind., May 1, 2007) (declining to dismiss challenge to execution protocols where they were not disclosed to plaintiff and he had no reason to have known about them); Lampkins v. Roberts, 2007 WL 924746, *2-3 (S.D.Ind., Mar. 27, 2007) (declining to dismiss for missing a five-day deadline that was not shown to have been made known to prisoners); Brookins v. Vogel, 2006 WL 3437482, *3 (E.D.Cal., Nov. 28, 2006) (holding that a prisoner who filed a grievance, got no response, and was told it had never been received, and whose subsequent attempts were rejected as untimely, had exhausted under the pre-Woodford rule that exhaustion occurs when prison officials fail to respond to a grievance within the policy time limits; stating prisoner asserted without contradiction that he was “prevented from complying with the exhaustion requirement”), report and recommendation adopted, 2007 WL 433155 (E.D. Cal., Feb. 8, 2007); Parker v. Robinson, 2006 WL 2904780, *7-12 (D.Me., Oct. 10, 2006) (refusing to dismiss where the prisoner sent his appeal to the Commissioner who was supposed to decide it, not the person who was supposed to forward it to the Commissioner under the rules); Thomas v. Hickman, 2006 WL 2868967, *9 (E.D.Cal., Oct. 6, 2006) (declining to dismiss where the prisoner’s grievance was untimely but the prisoner did not know about the violation until long after the deadline had passed); see Henderson v. Phillips, 2010 WL 3894574, *3 (N.D.Ind., Sept. 29, 2010) (refusing to credit rejection of grievance for lack of a signature where there was no signature line; stating that is “the sort of maneuver that sandbags unsuspecting inmates, depriving them of their right to seek redress in federal court for violations of their constitutional rights”); Marshall v. Peterson, 2007 WL 925851, *3 n.4 (S.D.Cal., Mar. 14, 2007) (stating prisoner whose grievances were returned because he didn’t sign them, then ruled untimely when he signed and returned them, even though the rules did not authorize returning grievances for lack of signature, was victimized by a “trap for the unwary”); Flory v. Claussen, 2006 WL 3404779, *3-4 (W.D.Wash., Nov. 21, 2006) (holding Woodford did not authorize creating a “trap for the unwary”; prisoner who followed officials’ advice as to which remedy to use exhausted); see also Rosenblum v. Mule Creek State Prison Medical Officials, 2009 WL 2424558, *5 (E.D.Cal., Aug. 6, 2009) (citing “the undersigned's experience in considering an onslaught of motions to dismiss prisoner civil rights complaints for failure to exhaust administrative remedies. There would appear to be little doubt that appeals coordinators in California prisons of late are “screening out” prisoner grievances on procedural grounds in record number.”).}
requiring proper exhaustion is harsh for prisoners, who generally are untrained in the law and are often poorly educated. This argument overlooks the informality and relative simplicity of prison grievance systems like California’s, as well as the fact that prisoners who litigate in federal court generally proceed pro se and are forced to comply with numerous unforgiving deadlines and other procedural requirements.\footnote{Woodford, 548 U.S. at 103.}

This statement contrasts sharply with the Court’s prior statement that “technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process,”\footnote{Love v. Pullman, 404 U.S. 522, 526 (1972) (addressing Title VII administrative charge-filing requirement).} and with the leniency traditionally accorded to pro se litigants.\footnote{See, e.g., Hughes v. Rowe, 449 U.S. 5, 9 (1980) (noting “settled law” that pro se complaints are held to less stringent standards than those drafted by lawyers); Ortiz v. Cornetta, 867 F.2d 146, 148 (2d Cir. 1989) (“Once a pro se litigant has done everything possible to bring his action, he should not be penalized by strict rules which might otherwise apply if he were represented by counsel.”); see also Flory v. Claussen, 2006 WL 3404779, *3 4 (W.D.Wash., Nov. 21, 2006) (quoting Love v. Pullman in refusing to find non-exhaustion where plaintiff had followed officials’ advice as to which remedy to use).}

The Woodford Court presented its decision as an interpretation of the statutory term “exhausted,” which it said Congress intended “to mean what it means in administrative law, where exhaustion means proper exhaustion.”\footnote{Woodford, 548 U.S. at 93.} It also noted that the habeas corpus exhaustion doctrine is “substantively similar” to the administrative law of exhaustion.\footnote{Woodford, 548 U.S. at 92.} In response, Justice Breyer, concurring in the judgment, observed:

Administrative law, however, contains well established exceptions to exhaustion. See Sims v. Apfel, 530 U.S. 103, 115 (2000) (BREYER, J., joined by Rehnquist, C. J., and SCALIA and KENNEDY, JJ., dissenting) (constitutional claims); Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 13 (2000) (futility); McKart v. United States, 395 U.S. 185, 197-201 (1969) (hardship); McCarthy v. Madigan, 503 U.S. 140, 147-148 (1992) (inadequate or unavailable administrative remedies); see generally II R. Pierce, Administrative Law Treatise § 15 (4th ed.2002). Moreover, habeas corpus law, which contains an exhaustion requirement that is “substantively similar” to administrative law’s and which informs the Court’s opinion, ante, at 2386, also permits a number of exceptions. See post, at 2396, n. 5 (STEVENS, J., dissenting) (noting that habeas corpus law permits “petitioners to overcome procedural defaults if they can show that the procedural rule is not firmly established and regularly followed, if they can demonstrate cause and prejudice to overcome a procedural default, or if enforcing the procedural default rule would result in a miscarriage of justice” (citations omitted)).\footnote{Woodford, 548 U.S. at 103-04 (concurring opinion).}
The Woodford majority does not comment on these assertions. They are contrary at least in part to the observation in Booth v. Churner that the PLRA rendered inapplicable “traditional doctrines of administrative exhaustion, under which a litigant need not apply to an agency that has ‘no power to decree . . . relief,’ [citation omitted], or need not exhaust where doing so would otherwise be futile.”727 On the other hand, the Woodford majority’s assertion that exhaustion means the same thing under the PLRA that it does in administrative law appears equally inconsistent with the Booth observation. Several courts have cited Justice Breyer’s comments in allowing claims to go forward despite lack of complete compliance with grievance rules.728

The central question after Woodford is how absolute its “proper exhaustion” holding is.729 Wholly apart from the established exceptions to exhaustion rules in general administrative and habeas law cited by Justice Breyer—which had seemed to be ruled out by Booth v. Churner—a number of lower courts applying the PLRA had previously set out circumstances under which failure to exhaust according to prison procedures would not bar litigation.730 The Second Circuit had developed the most systematic approach to that question, which it summarized as follows:

First, the court must ask: whether administrative remedies were in fact “available” to the prisoner. [Second], [t]he court should also inquire . . . whether the defendants’ own actions inhibiting the inmate’s exhaustion of remedies may estop one or more of the defendants from raising the plaintiff’s failure to exhaust as a defense. [Third], [i]f the court finds that administrative remedies were available to the plaintiff, and that the defendants are not estopped and have not forfeited their non-exhaustion defense, but that the plaintiff nevertheless did not exhaust available remedies, the court should consider whether special circumstances have been plausibly alleged that justify the prisoner’s failure to comply with administrative procedural requirements. . . .

. . . What constitutes justification in the PLRA context “must be determined by looking at the circumstances which might understandably lead usually uncounseled prisoners to fail to grieve in the normally required way.”731

Post-Woodford decisions to date indicate that the Second Circuit analysis remains good law. The Second Circuit has not revisited it in a published opinion,732 though it has assumed the

729 One court’s proclamation that “In Ngo, the Supreme Court was emphatic that the PLRA requires punctiliously proper exhaustion of administrative remedies,” Andrade v. Maloney, 2006 WL 2381429, *8 (D.Mass., Aug. 16, 2006), clearly outruns Woodford’s language.
730 These lines of cases are addressed more comprehensively in § IV.G.2, below.
framework remains intact in non-precedential decisions, and in one such decision wrote: “Although Ngo requires that prisoners ‘properly’ exhaust the available remedies under the PLRA, it certainly does not abrogate the unavailability defense to nonexhaustion.” An early and typical post-Woodford district court decision stated that Woodford “appears to leave open the question of whether exhaustion applies in situations such as those identified in Hemphill and its companion cases where, for example, administrative remedies are not ‘available’ to the prisoner at the time of the grievable incident or where prison authorities actively interfere with an inmate’s ability to invoke such remedies” (though Woodford may not be compatible with the results of all the cases applying Hemphill); it specifically noted Justice Breyer’s approving citation of Giano v. Goord, which held that exhaustion is “mandatory” but subject to the “caveats” outlined in Hemphill v. New York. Subsequent district court decisions have generally made the same assumption, some explicitly noting Justice Breyer’s acknowledgment of Second Circuit caselaw. As one court put it:


735 Collins v. Goord, 438 F.Supp.2d 399, 411 n.13 (S.D.N.Y. 2006) (citing Giano v. Goord, 380 F.3d at 677-78). Justice Breyer urged district courts to continue to consider “any challenges that [the prisoner] may have concerning whether his case falls into a traditional exception that the [PLRA] implicitly incorporates.” Woodford, 548 U.S. at 104 (Breyer, J., concurring in judgment).


... [A] reading of *Woodford* that called *Hemphill* into question would fail to appreciate the significance of the Court's reliance on administrative and habeas corpus doctrine, overextend its policy reasoning, and undervalue its sensitivity to circumstances where malfeasance by prison administrators effectively destroys any chance of legal remedy. For these reasons, Justice Breyer's view that *Woodford* is compatible with precedent like *Hemphill* reflects not merely Justice Breyer's view, but the better reading of the Court's opinion in *Woodford*. Indeed, with a strict background rule like *Woodford*, decisions like *Hemphill* play an even more critical role in avoiding the potential for injustice wrought by a procedural regime that values efficiency, administrative review, and federalism over potentially meritorious claims that unsophisticated inmates seek in good faith to remedy through the grievance process.  

Another noteworthy New York district court decision applying the Second Circuit “special circumstances” rule also distinguished *Woodford* on the ground that the prisoner before it had not “bypass[ed] prison grievance procedures” or “attempt[ed] to circumvent the exhaustion requirements.”  

Rather, he had tried hard and in multiple ways to bring his complaint to the attention of responsible officials. “[A]lthough each of his efforts, alone, may not have fully complied, together his efforts sufficiently informed prison officials of his grievance and led to a thorough investigation of the grievance as to satisfy the purpose of the PLRA or to constitute ‘special circumstances’ [to] justify any failure to fully comply with DOCS’ exhaustion requirements.”

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In *Williams v. Hurley*, 2007 WL 1202723 (S.D.Ohio, Apr. 23, 2007), the plaintiff’s cancer was not diagnosed for two years; by the time he learned of it, he was receiving appropriate treatment, albeit too late. The court adopted the Second Circuit “special circumstances” analysis and held that “the nature of his illness, the number of years which passed since the Defendants’ alleged malfeasance, the seriousness of the Defendants’ alleged actions, and the inability of the prison to provide Plaintiff with any relief pertaining to his Complaint” comprised special circumstances. 2007 WL 1202723, *6. This unusual result appears mainly to reflect the seriousness of the injury to the plaintiff.

740 *Hairston*, 2006 WL 2309592, *8. Mr. Hairston, who complained of excessive force, did not file a grievance within the prescribed time frame. However, he had been placed in segregated housing, and stated that contrary to prison policy, he was unaware of any grievance staff making rounds in the SHU, creating a factual question whether the remedy was actually available to him or whether defendants should be estopped from relying on non-exhaustion. His wife wrote to the Superintendent requesting an investigation within the prescribed time period for grievances. While such a letter does not suffice to exhaust by itself, if it results in an Inspector General’s investigation, it may constitute “special circumstances” satisfying the PLRA’s purposes, and causes the same result as invoking the prison system’s expedited grievance procedure. Since the plaintiff never received notice of any decision on his complaint (he received the results of the Inspector General’s investigation only in discovery after filing suit), he had no opportunity to appeal it. Meanwhile, Mr. Hairston received a disciplinary hearing, and attempted to raise his claim of assault, but was not allowed to do so there; he raised it in his disciplinary appeal as well. Once he was released from SHU and advised by another prisoner to do so, he filed a grievance, which both rejected it on its merits and stated it was untimely; he did not appeal because he thought he could not appeal an untimely grievance,
Though as noted, the Second Circuit has not generally reviewed the status of its analysis post-Woodford, it has retreated from one extension of its analysis. In Braham v. Clancy, the court had held or suggested that if a prisoner’s informal complaints provide sufficient notice to prison officials to allow them to take appropriate responsive measures, the prisoner has exhausted. The Circuit has now held that aspect of Braham overruled by Woodford. It stated that the PLRA requires both “substantive exhaustion” (notice to officials) and “procedural exhaustion” (following the rules), and that “after Woodford notice alone is insufficient.” The court did not address its earlier holding, reiterated in Braham, that a prisoner’s reasonable interpretation of confusing grievance rules may justify the failure to follow procedural rules correctly.

The Second Circuit analysis has been followed in part by some other federal courts. The Seventh Circuit—the first circuit to adopt the procedural default rule later embraced by Woodford—has, after Woodford, adopted the Hemphill framework for determining when prison officials’ threats or intimidation make remedies “unavailable.” The Eleventh Circuit has done the same, citing the Seventh Circuit decision as well. Similarly, the Ninth Circuit, citing the Seventh and Eleventh Circuit decisions and a more recent statement of the Second Circuit standard, has held that a litigant’s failure of timely exhaustion was excused because he took “reasonable and appropriate steps to exhaust . . . and was precluded from exhausting, not through his own fault but by the Warden’s mistake.” It later added: “If prison officials screen out [reject] an inmate’s appeals for improper reasons, the inmate cannot pursue the necessary

which the court finds reasonable. Id., *9-11; see Pierre v. County of Broome, 2007 WL 625978, *4 (N.D.N.Y., Feb. 23, 2007) (holding the sensitive nature of plaintiff’s medical complaints, her wish to maintain privacy, and “most significantly, the lack of any response to her complaints” including repeated attempts to file a grievance, justified her failure to comply with the grievance process).

425 F.3d 177 (2d Cir. 2005).

Braham, 425 F.3d at 183 (quoting Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004)).

Macias v. Zenk, 495 F.3d 37, 43-44 (2d Cir. 2007).


Kaba v. Stepp, 458 F.3d 678, 684-86 (7th Cir. 2006).

Turner v. Burns, 541 F.3d 1077, 1084 (11th Cir. 2008) (“Remedies that rational inmates cannot be expected to use are not capable of accomplishing their purposes, and so are not available”; following Hemphill and Kaba). But see Cole v. Secretary Dept. of Corrections, 2011 WL 6184433, *1 (11th Cir., Dec. 14, 2011) (unpublished) (holding a continuing threat of unfounded disciplinary charges “would not deter a reasonable inmate from pursuing his grievance”). The Cole holding is contrary to decisions applying the same standard in First Amendment retaliation cases. See, e.g., Brown v. Crowley, 312 F.3d 782, 789 (6th Cir. 2002) (holding disciplinary charges that were dismissed were sufficiently adverse because they “subjected [plaintiff] to the risk of significant sanctions”); Lashley v. Wakefield, 367 F. Supp. 2d 461, 466–67 (W.D.N.Y. 2005) (repeated disciplinary charges that were dismissed but resulted in 20 days of pre-hearing confinement).

Nunez v. Duncan, 591 F.3d 1217, 1224 (9th Cir. 2010). In Nunez, the plaintiff did not file his final appeal timely because in an intermediate response, the Warden cited a Program Statement which the plaintiff believed in good faith he needed in order to appeal, and he spent months trying to obtain it. 591 F.3d at 1225-26. The dissenting judge said there was no reason the prisoner could not have appealed his claim of an improper strip search without a copy of the program statement. 591 F.3d at 1230.
sequence of appeals, and administrative remedies are therefore plainly unavailable.”

(Some subsequent decisions have held that a prisoner whose grievance is screened out improperly must administratively contest the screening decision if there is a means to do so.)

Other courts have been less willing to adopt the “special circumstances” prong of Second Circuit law, and at least one circuit has rejected it outright. Other circuits have adopted other formulations, though generally with less systematic analysis than the Second Circuit, and sometimes directed to a narrow set of facts.

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748 Sapp v. Kimbrell, 623 F.3d 813, 823 (9th Cir. 2010). The court continued: “To fall within this exception, a prisoner must show that he attempted to exhaust his administrative remedies but was thwarted by improper screening. In particular, the inmate must establish (1) that he actually filed a grievance or grievances that, if pursued through all levels of administrative appeals, would have sufficed to exhaust the claim that he seeks to pursue in federal court, and (2) that prison officials screened his grievance or grievances for reasons inconsistent with or unsupported by applicable regulations.” 623 F.3d at 823-24. However, it did not “foreclose the possibility that exhaustion might also be excused where repeated rejections of an inmate’s grievances at the screening stage give rise to a reasonable good faith belief that administrative remedies are effectively unavailable.” Id. at 826; see Simpson v. Feltsen, 2010 WL 5288181, *5 n.4 (E.D.Cal., Dec. 17, 2010) (holding Sapp does not shift burden to prisoner to show that screening was improper).


750 Dillon v. Rogers, 596 F.3d 260, 270 (5th Cir. 2010) (holding that “reprehensible” circumstances do not “grant[] us license to carve out new exceptions to the PLRA’s exhaustion requirement,” and that disruption in a grievance system should be addressed as a matter of availability of remedies). The Ninth Circuit acknowledged a prisoner’s claim that “special circumstances entitle him to an equitable exception to the PLRA’s exhaustion requirement” based on “his significant difficulty in following the grievance process, his reasonable belief that he could not pursue the grievance process any further, his limited education, and the fact that he did not deliberately bypass the administrative scheme. . . .” Sapp v. Kimbrell, 623 F.3d at 827. However, the court did not decide whether such a claim could be maintained, since it said the plaintiff would not have been entitled to it anyway. See Butala v. Gerlicher, 2014 WL 241865, *11 (D.Minn., Jan. 22, 2014) (noting the Eighth Circuit has not adopted the special circumstances rule).

751 See, e.g., Moore v. Bennette, 517 F.3d 717, 725 (4th Cir. 2008) (stating “an administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it”); Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008) (stating when “the failure to exhaust was innocent (as where prison officials prevent a prisoner from exhausting his remedies), . . . he must be given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he’s not just being given a runaround). . . .”), cert. denied, 556 U.S. 1128 (2009).

One formulation that has been repeated many times in the Third Circuit district courts is that:

This broad rule favoring full exhaustion admits of one, narrowly defined exception. If the actions of prison officials directly caused the inmate’s procedural default on a grievance, the inmate will not be held to strict compliance with this exhaustion requirement.


752 See, e.g., Toney v. Bledsoe, 427 Fed.Appx. 74, 78 (3d Cir. 2011) (unpublished) (noting prior holding that “erroneous instructions or other impediments to pursuing administrative relief may render those remedies ‘unavailable’ for the purposes of § 1997e(a)” (citing Brown v. Croak, 312 F.3d 109, 112–13 (3d Cir. 2002)), cert. denied, 132 S.Ct. 334 (2011); Braswell v. Corrections Corp. of America, 419 Fed.Appx. 622, 625 (6th Cir. 2011) (unpublished) (stating “a prisoner is required to exhaust only those procedures that he is reasonably capable of
More specific questions remaining after *Woodford*, some of them directly related to pre-existing Second Circuit law, include the following:

a) **What If Procedural Requirements Are Not Clear?**

Prison grievance systems are not all characterized by “relative simplicity” in all their aspects. The Second Circuit recognized this fact in *Giano v. Goord*, in which a prisoner pursued his complaint of retaliatory disciplinary charges and falsified evidence through a disciplinary appeal rather than a grievance. The court held that the prisoner’s interpretation might be wrong (a question it did not decide), but that prison rules “do not differentiate clearly between grievable matters relating to disciplinary proceedings, and non-grievable issues concerning the ‘decisions or dispositions’ of such proceedings,” and the prisoner had acted reasonably; the court noted that a “learned” district judge had interpreted the prison administrative rules in the same way as the plaintiff.

This lack of clarity in grievance systems–either in the written rules or in prison officials’ actions or instructions in particular cases—is a recurrent theme in prison exhaustion cases.

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A scenario similar to *Giano* but with an opposite result is presented in *Marshall v. Knight*, 2006 WL 3714713 (N.D.Ind., Dec. 14, 2006), in which a prisoner who alleged that he had been retaliated against in classification and disciplinary matters did not file a grievance because classification and disciplinary matters are excluded from the grievance system. The court held that he had failed to exhaust because retaliation claims might be grievable. 2006 WL 3714713, *1. Unlike *Giano*, the decision gave no consideration to the reasonableness of Mr. Marshall’s interpretation of the rules.

More recently, one court has held on policy grounds that prisoners should be required to exhaust even where the complaint is of doubtful grievability or even “where it appears not to be permitted” by the grievance system. *Ramos v. Flynn*, 2009 WL 2207191, *12 (D.Mass., July 22, 2009). The fairness or unfairness of expecting an uncounseled prisoner to appreciate the need to grieve a seemingly ungrievable complaint was not part of the court’s analysis. The court also did not consider whether its holding is consistent with the statutory language mandating exhaustion only of “available” remedies, and the Supreme Court’s definition of “available”: a remedy that does not lack “authority to provide any relief or to take any action whatsoever in response to a complaint,” *Booth v. Churner*, 532 U.S. 731, 736 (2001) (emphasis supplied). Under *Booth*, if a remedy lacks such authority, the prisoner cannot be required to exhaust it.

Thus, in *Brownell v. Krom*, the court cited prison officials’ erroneous advice that the plaintiff’s lost property was not the responsibility of the prison he had been transferred to, which resulted in a failure to investigate; a prison official’s advice to abandon his property claim and pursue a grievance instead, resulting in loss of the ability to appeal the property claim; and the lack of any apparent provision in the grievance system for raising newly discovered facts in a previously filed grievance. Such examples can be multiplied, in the Second Circuit and elsewhere. Thus, the Seventh Circuit—withstanding having adopted a procedural default standard well before *Woodford*—held that prison officials did not establish a failure to exhaust available remedies where their policies did not “clearly identif[y]” the proper remedy and there was no “clear route” for prisoners to challenge certain decisions. Similarly, there are many cases in the appeals coordinator did not clearly exclude giving it to other staff for forwarding; Perkins v. Farris, 2012 WL 2525651, *5 (N.D.Ill., June 28, 2012) (declining to dismiss for non-exhaustion where initial grievance elicited a response that the allegations were being investigated, which “would not necessarily warrant an appeal,” and subsequent grievances and attempts to appeal were rejected); Rahim v. Holden, 882 F.Supp.2d 638, 642-43 (D.Del., June 22, 2012) (declining to dismiss for non-exhaustion; “The instructions for submitting a ‘regular’ grievance specifically state that parole decisions are ‘non-grievable.’ Nonetheless, defendants expect plaintiff, who appears pro se, to submit a grievance based upon the legal distinction between procedural complaints against State defendants in the parole process and substantive complaints against the Board of Parole in making its parole decision.”); Lemons v. Dragmister, 2010 WL 530073, *2 (N.D.Ind., Feb. 9, 2010) (refusing to enforce rule requiring signing of grievances where grievance form did not have a signature line; to do otherwise “would effectively sand-bag unsuspecting inmates”); Cutler v. Correctional Medical Services, 2010 WL 339760, *5 (D.Idaho, Jan. 22, 2010) (noting that requirement to identify responsible staff members is listed in only one of four documents addressing grievance policy; “While lawyers and judges can print and lay out the policy, directive, form, and handout side by side for comparison and contrast, inmate laypersons would be able to do so only with significant difficulty.”); Woodard v. O’Brien, 2010 WL 148301, *15 (N.D.Iowa, Jan. 14, 2010) (finding plaintiff complied with procedure “to the best of his ability to understand it,” citing ambiguous appeal rule, the grievance officer’s failure to recognize his attempts at informal resolution, and officer’s failure to advise him what more he needed to do).

Particular note should be taken of *Abney v. McGinnis*, 380 F.3d 663, 668-69 (2d Cir. 2004) (noting the lack of instruction in the grievance rules as to what to do where a favorable grievance decision is not carried out); Johnson v. Testman, 380 F.3d 691, 696-97 (2d Cir. 2004) (holding the district court should consider the reasonableness of that a federal prisoner’s belief that he had adequately raised his inmate-inmate assault claim through an appeal of the disciplinary proceeding that arose from the incident); Hemphill v. New York, 380 F.3d 680, 689-90 (2d Cir. 2004) (holding that plaintiff’s arguments about lack of clarity in grievance regulations supported the reasonableness of his belief that he could exhaust by writing directly to the Superintendent); Torres v. Anderson, 674 F.Supp.2d 394, 400 (E.D.N.Y. 2009) (holding rule governing place of filing grievance after transfer was not clearly mandatory; “the failure to communicate with sufficient clarity that which defendants contend is a mandatory procedure is a ‘special circumstance’ that would excuse compliance”); Davis v. Rhoomes, 2009 WL 415628, *5 (S.D.N.Y., Feb. 12, 2009) (holding prisoner could reasonably have believed that post-grievance retaliatory actions could be raised in grievance appeal rather than in new grievance); Sumpter v. Skiff, 2008 WL 4518996, *6 (S.D.N.Y., Sept. 30, 2008) (finding special circumstances justifying failure to follow administrative appeal rules where administrative decision gave instructions that contradicted the rules); Bellamy v. Mount Vernon Hosp., 2008 WL 3152963, *5 (S.D.N.Y., Aug. 5, 2008) (where allowance for late grievances was limited to 45 days after an “alleged occurrence,” and the plaintiff thought the “occurrence” was his surgery and not his knowledge of its side-effects, he reasonably believed no remedy remained available to him); see Appendix A for additional authority on this point.

Westefer v. Snyder, 422 F.3d 570, 580 (7th Cir. 2005); accord, Vasquez v. Hilbert, 2008 WL 2224394, *4 (W.D.Wis., May 28, 2008) (holding plaintiff exhausted when he grieved his medical claim late because medical
which officials’ actions or instructions with respect to particular grievances create uncertainty as to how to proceed.\textsuperscript{760} In other cases, the prisoner’s knowledge of the facts does not permit timely compliance with the grievance rules.\textsuperscript{761} In some cases an unsettled legal situation

\textsuperscript{760} Turner v. Burnside, 541 F.3d 1077, 1083-84 (11th Cir. 2008) (holding a prisoner whose grievance was torn up by the warden was not required to file another one or grieve the warden’s action; “[n]othing in [the rules] requires an inmate to grieve a breakdown in the grievance process’’); Dole v. Chandler, 438 F.3d 804, 811-12 (7th Cir. 2006) (holding a prisoner had exhausted when he did everything necessary to exhaust but his grievance simply disappeared, and he received no instructions as to what if anything to do about it); Lee v. Willey, 2012 WL 666646, *4, 6 (E.D.Mich., Feb. 1, 2012) (declining to dismiss for failure to appeal where plaintiff could not get grievance forms and submitted his grievance three times on plain paper without receiving a response or instructions how to proceed; “A prisoner is required to comply with a prison’s grievance procedure to the extent it is available. He is not, however, required to make Herculean efforts when confronted with prison officials who attempt to thwart his efforts to comply with prison policy.’’), report and recommendation adopted, 2012 WL 662199 (E.D.Mich., Feb. 29, 2012); Joyner v. O’Neil, 2012 WL 560199, *6 & n.13 (E.D.Va., Feb. 21, 2012) (declining to dismiss for non-exhaustion where policy required prisoner to receive “a written response ... contain [ing] the reason for the decision’’ to appeal, but the response said only that complaint was referred to the Professional Standards Office; “The Court views the exhaustion requirement through the objective lens of the reasonable, similarly situated prisoner.’’); Oliverez v. Albirte, 2010 WL 5059616, *6 (E.D.Cal., Dec. 6, 2010) (“Plaintiff is not required to conceive of ways to work around the failure of the reviewer to respond to his properly submitted appeals. . . . The regulations governing the inmate appeals process apply with equal force to inmates and prison officials. If an inmate complies with the procedural rules, but staff members fail to respond to the appeal in compliance with applicable procedural rules or otherwise thwart the process, it becomes unavailable.’’), report and recommendation adopted, 2011 WL 127113 (E.D.Cal., Jan. 14, 2011); Kyles v. Mathy, 2010 WL 3025109, *4 (C.D.Ill., Aug. 2, 2010) (declining to dismiss for non-exhaustion where grievance decision was three months late, no one answered plaintiff’s inquiries, so he went ahead and appealed without a decision; “. . . [T]he defendants cannot ask the court to hold the plaintiff to a strict standard while asking the court to find that the nearly five month delay was reasonable for the defendants.’’); see Appendix A for additional authority on this point. But see Dade v. Gaudenzia DRC, Inc., 2014 WL 47766, *5 (E.D.Pa., Jan. 7, 2014) (holding that officials’ improper failure to to schedule a meeting to discuss plaintiff’s grievance did not excuse him from pursuing his effort to exhaust despite his resulting confusion); Weiser v. Castle, 2011 WL 322656, *3 (E.D.Ky., Jan. 31, 2011) (plaintiff who alleged that his grievance was torn up did not exhaust where he did not try to appeal the torn-up grievance or file another grievance about the destruction of his grievance); Williams v. McGrath, 2007 WL 3010577, *6 (N.D.Cal., Oct. 12, 2007) (holding a prisoner whose grievance was rejected for failure to provide necessary documentation, and who was then denied access to the documentation, should have resubmitted his appeal without the documentation, or should have filed a new grievance, despite prisoner’s concerns that his grievance had already been rejected once for lack of the documentation and that if he filed a second grievance he would be in violation of the rule against duplicative grievances), aff’d, 320 Fed.Appx. 728 (9th Cir. 2009) (unpublished).

\textsuperscript{761} Allard v. Anderson, 260 Fed.Appx. 711, 2007 WL 4561110, *2 (5th Cir., Dec. 28, 2007) (unpublished) (holding remedies unavailable for injuries plaintiff did not discover until he was out of the institution and not permitted to use the grievance system), cert. denied, 555 U.S. 858 (2008); Starnes v. Raminieni, 2009 WL 2016384, *4 (N.D.N.Y., July 7, 2009) (holding plaintiff who learned of medical condition and failure to address it after time limits had expired and he was at another prison might not have a remedy available); Thomas v. Maricopa County Bd. of Supervisors, 2007 WL 2995634, *4 (D.Ariz., Oct. 12, 2007) (declining to dismiss where the plaintiff did not have knowledge of the violation until after his release and the grievance policy did not provide for grievances after release); Thomas v. Hickman, 2006 WL 2868967, *9 (E.D.Cal., Oct. 6, 2006) (declining to dismiss where the prisoner’s grievance was untimely but the prisoner did not know about the violation until long after the deadline had
concerning the exhaustion requirement itself has been held to constitute special circumstances justifying failure to exhaust correctly.\textsuperscript{762} In one state, an exasperated court has noted that exhaustion controversies before it, which defendants often lose, are “a reflection of the negligent handling of prisoner grievances within the prison institutions . . . [I]t appears as if there is no documented system for tracking grievances as they make their way through the various phases of exhaustion.”\textsuperscript{763}

In my view the most sensible conclusion is that \textit{Woodford v. Ngo} does not address situations where the grievance system, on its face or as applied to a particular problem, is not characterized by “relative simplicity,” and that the Second Circuit’s “special circumstances” rule remains valid in such cases.\textsuperscript{764} Further, to the extent that lack of clarity in the grievance rules or their application makes the remedy unavailable, \textit{Woodford} has no effect, since it did not purport to address the statutory term “available.”

Frequently the actual practice in prison grievance systems diverges from the formal written procedure. The Seventh Circuit, applying a procedural default rule in anticipation of \textit{Woodford}, has held that a prisoner who complies with the informal practice has satisfied the
exhaustion requirement. Conversely, courts have refused to enforce compliance with supposed grievance rules that do not appear in the written policy or are not made clearly known to prisoners.

b) What If the Prisoner Is Misled or His Exhaustion Efforts Obstructed By Prison Staff?

Numerous cases hold that non-exhaustion caused by misinformation or obstructive actions by prison staff does not bar the prisoner from proceeding with a subsequent lawsuit.  

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765 Curtis v. Timberlake, 436 F.3d 709, 712 (7th Cir. 2005); accord, Greenup v. Lee, 2014 WL 471715, *5-6 (W.D.La., Feb. 5, 2014) (declining to hold plaintiff to time limits in state regulations where the prison warden made up his own procedures with different time limits); Smith v. Merline, 719 F.Supp.2d 438, 445 (D.N.J., June 15, 2010) (“Courts have recognized that an inmate may satisfy the exhaustion requirement where he follows an accepted grievance procedure, even where that procedure contradicts a written policy.”); see Marr v. Fields, 2008 WL 828788, *6 (W.D.Mich., Mar. 27, 2008) (if policy requiring administrative appeals rather than grievances in disciplinary cases was applied broadly in practice to related matters such as claims of retaliatory discipline, grievance process was not an available remedy for such complaints).

766 Jackson v. Ivens, 2007 WL 2261552, *4 (3d Cir. 2007) (unpublished) (“We will not condition exhaustion on unwritten or ‘implied’ requirements.”) (citing Spruill v. Gillis, 372 F.3d 218, 234 (3d Cir. 2004)); accord, Conley v. Anglin, 513 Fed.Appx. 598, 601-02 (7th Cir. 2013) (unpublished) (declining to enforce regulation requiring name or description of persons involved where the grievance form still called only for “Brief Summary of Grievance”; refusing to credit claim that adding additional facts to grievance appeal violated rules absent some evidence that such a rule existed), cert. denied, 134 S.Ct. 794 (2013); Hurst v. Hantke, 634 F.3d 409, 411 (7th Cir. 2011) (refusing to find non-exhaustion where prisoner violated apparent “secret supplement to the state’s administrative code, requiring that claims of good cause for an untimely filing be accompanied by evidence”), cert. denied, 132 S.Ct. 168 (2011); Glick v. Walker, 385 Fed.Appx. 579, 583 (7th Cir. 2010) (declining to hold plaintiff to a supposed grievance rule not found in the Administrative Code); Goebert v. Lee County, 510 F.3d 1312, 1322-23 (11th Cir. 2007) (holding grievance appeal was not an available remedy where prisoners were not informed of its existence and had no way to find out); LaPointe v. Bienovidas, 2013 WL 3439905, *5, 7 (D.Ariz., July 9, 2013) (declining to hold plaintiff to supposed rules that defendants did not show were in the grievance policy); James v. Cartwright, 2013 WL 3553922, *6 (S.D.Ill., July 3, 2013) (rejecting claim of rule against third parties submitting grievances where it could not be found in the grievance regulations); Mims v. Hardy, 2013 WL 2451149, *8 (N.D.Ill., June 5, 2013) (rejecting officials’ affidavits supporting grievance requirements not reflected in the administrative code); Jackson v. City of Philadelphia, 2012 WL 2135506, *7-8 (E.D.Pa., June 13, 2012) (declining to dismiss where plaintiff failed to use an appeal procedure not mentioned in the grievance policy; “[P]erhaps this is the way things actually work, but the practice described by Ms. Daniels is not reflected in any of the written polices and procedures provided to the Court. As such, we do not know how or when (or even if) prisoners are informed of this medical grievance appeal process.”), appeal dismissed, 535 Fed.Appx. 64 (3rd Cir. 2013) (unpublished); Rodriguez v. Miramontes, 2012 WL 1983340, *6 (D.Ariz., June 4, 2012) (declaring to credit officials’ statement that grievance should have been filed in grievance box where policy stated that it should be filed through facility mail or in person); Alexander v. Nevada, 2012 WL 2190837, *4-5 (D.Nev., Mar. 12, 2012) (declaring to dismiss where grievance appeal was rejected for not attaching the grievance decision appealed from, but the rules did not contain such a requirement and the plaintiff complied with everything actually in the rules), report and recommendation adopted, 2012 WL 2190810 (D.Nev., June 14, 2012); Calloway v. Byrd, 2011 WL 7172207, *4 (D.S.C., Oct. 18, 2011) (declaring to dismiss where defendants claimed that grievance was deemed abandoned because the plaintiff was masturbating when they sought to serve the response, absent a policy requiring such result, or a request and refusal to the plaintiff to stop and accept the response), report and recommendation adopted, 2012 WL 405691 (D.S.C., Feb. 8, 2012); see Appendix A for additional authority on this point. Cf. Turner v. Burnside, 541 F.3d 1077, 1083-84 (11th Cir. 2008) (where warden tore up prisoner’s grievance, he was not required to re-file his grievance or griev the warden’s action, neither of which were prescribed by grievance rules); Miller v. Berkebile, 2008 WL 635552, *7-9 (N.D.Tex., Mar. 10, 2008) (where official refused to process grievances contrary to policy, prisoners were not required to take steps not prescribed in the policy to get around him; PLRA law applied in § 2241 case); Crawford v. Berkebile, 2008 WL 323155, *7-8 (N.D.Tex., Feb. 6, 2008) (same).
No such fact pattern was before the Court in *Woodford*, and it did not purport to address the question. This body of law is therefore undisturbed by *Woodford*, especially insofar as many of the cases hold that under the circumstances, administrative remedies were not “available,” a statutory term *Woodford* did not address.

c) **What If the Prisoner Is Threatened or Intimidated by Prison Staff into Not Following the Grievance Procedure?**

The Second Circuit has held that threats or other intimidating conduct may make administrative remedies in general, or the usual grievance remedy in particular, unavailable to a prisoner; may estop the defendants from asserting the exhaustion defense; or may constitute justification for not exhausting or not exhausting consistently with the grievance rules. The court specifically observed that threats or other intimidation might deter prisoners from filing an internal grievance but not from appealing directly to persons in higher authority in the prison system or to external authority such as state or federal courts. Consequently the grievance remedy might be unavailable, or failure to use it justifiable, on a particular set of facts. Since no such claim was presented in *Woodford*, this body of law should be viewed as unaffected by it. Other circuits have, in fact, adopted the Second Circuit’s approach to such circumstances after *Woodford*.

d) **Is There Any Limit to the Procedural Rules That Can Be Enforced by Procedural Default?**

As noted, *Woodford* declined to address the possibility of rules created to trip prisoners up, though that concern had been expressed in numerous pre-*Woodford* decisions. The Seventh Circuit, the first circuit to adopt a procedural default rule, stated:

The only constraint is that no prison system may establish a requirement inconsistent with the federal policy underlying § 1983 and § 1997e(a). *See Robertson v. Wegmann*, 436 U.S. 584 (1978). Thus, for example, no administrative system may demand that the prisoner specify each remedy later sought in litigation—for *Booth v. Churner*, 532 U.S. 731 (2001), holds that § 1997e(a) requires each prisoner to exhaust a process and not a remedy.

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767 See nn. 1074-1078, below.
768 *Hemphill v. New York*, 380 F.3d at 686-90. In *Hemphill*, the plaintiff, who alleged he was threatened and physically assaulted to prevent him from complaining, wrote a letter to the Superintendent rather than filing a grievance. *See* nn. 1042-1052, below, for further comment on this subject.
769 *Hemphill*, 380 F.3d at 688, 690; *see Ziemba v. Wezner*, 366 F.3d 161, 164 (2d Cir. 2003) (directing district court to consider whether a complaint to the FBI and subsequent investigation could amount to exhaustion by a plaintiff subjected within the prison to threats, beatings, and denial of writing implements and grievance forms).
770 See n. 1044, below.
771 The National Standards to Prevent, Detect, and Respond to Prison Rape, recently promulgated under the Prison Rape Elimination Act, contain certain requirements and prohibitions for grievance systems in handling sexual abuse complaints. *See* § IV.E.7.h, below.
772 *Woodford*, 548 U.S. at 102-03.
773 See cases cited in n. 719, above.
774 *Strong v. David*, 297 F.3d 646, 649-50 (7th Cir. 2002).

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One would think that there are several federal policies, not necessarily limited to § 1983 and § 1997e(a), implicated by the Woodford procedural default rule, among them the policies of notice pleading and of leniency in construing the pleadings of pro se litigants, the policy that procedural rules should not be applied to set traps for unwary litigants, and the policy allowing complaints to be freely amended within and sometimes beyond the limitations period, all of which may be compromised by demanding rules and short deadlines in prison grievance systems.\textsuperscript{775} (Rules that are merely burdensome to comply with are enforced.\textsuperscript{776})

Woodford itself states that “[p]roper exhaustion demands compliance with an agency’s deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.”\textsuperscript{777} The implication is that there are some procedural rules whose violation is not “critical” and does not threaten the system’s functioning.\textsuperscript{778} This view is consistent with the earlier holding of the Third

\textsuperscript{775} See, respectively, §§ IV.E.2 and IV.E.4, above. In some grievance systems, prisoners who violate procedural rules are at least in some cases instructed to correct the mistake and resubmit their grievances. See n. 815, below.


\textsuperscript{777} Woodford, 548 U.S. at 90-91.

\textsuperscript{778} The Court does not suggest what these might be or how a lower court is to determine what is “critical.” So far there is little development of this issue in the lower courts. But see Mack v. Klopotoski, 540 Fed.Appx. 108, 112 n.4 (3d Cir., Sept. 16, 2013) (holding requirement of submission of photocopies of documents, rather than handwritten copies, to be critical); Davis v. Salinas, 2013 WL 3941024, *5 (E.D.Cal., July 30, 2013) (acknowledging that “the failure to provide a date may appear to be a minor technicality,” but “requiring such details allows prison officials to take appropriate responsive measures,” especially with prisoners like the plaintiff who file many grievances). One district court has held that a rule that could be read as permissive rather than mandatory, was buried in an unlikely location in a relatively obscure policy document, and did not say what would happen if it was not followed, was not critical. Torres v. Anderson, 674 F.Supp.2d 394, 400 (E.D.N.Y. 2009) (“If the procedure was critical, it would be explained more clearly, placed in a more prominent location, use mandatory language, and make clear the consequences of non-compliance.”). Another court has held that a prisoner’s failure to check a box on an appeal form that otherwise clearly stated his intention to appeal did not violate a critical procedural rule. Ortego v. Forcht Wade Correctional Center, 2010 WL 2995830, *5 (W.D.La., Apr. 29, 2010), report and recommendation adopted in part, rejected in part, 2010 WL 2990067 (W.D.La., July 27, 2010). Another court has said that a policy as to what issues were suitable for the grievance system must not be critical, since the determination of non-grievability is itself appealable. However, in that case the prisoner was following the rules as written and prison officials seemed to be misinterpreting their own rules or using unwritten rules at variance from those the prisoners relied on. See Woods v. Lozer, 2007 WL 173704, *3 (M.D.Tenn., Jan. 18, 2007). Another court, without using the word “critical,” excused a prisoner’s sending of his appeal directly to the appellate decision-maker rather than sending it via the designated recipient, noting that the latter received the appeal and had an opportunity to address the problem; the court mentions in the discussion officials’ belief that they have discretion in how strictly to apply their own time deadlines. Parker v. Robinson, 2006 WL 2904780, *11-12 (D.Me., Oct. 10, 2006). Similarly, a court held that a prisoner’s failure to attach to his appeal the original grievance and staff response as the rules required did not constitute non-exhaustion since he identified it by date and described the response; the court held that although the grievance “may have been technically deficient, I find that plaintiff submitted sufficient information to the Grievance Coordinator to enable him to process the appeal and that he should have done so.” Barker v. Belleque, 2011 WL 285228, *4 (D.Or., Jan. 26, 2011). One district court has suggested that if the administrative body reaches the merits despite the violation of a procedural rule, it must not have been critical. Jones v. Stewart, 457 F.Supp.2d 1131, 1136 (D.Nev. 2006).

An example of a rule one would think would be non-critical requires the grievance process to be commenced with an “informal inmate letter” which must begin with the formula “I am attempting to informally resolve the following problem.” See Lugo v. Ryan, 2006 WL 163534, *1 (D.Ariz., Jan. 19, 2006). Whether omitting that recitation is a procedural default remains to be determined. But see Terrell v. Medical Dept., 2009 WL 3271273, *3 (S.D.Miss., Oct. 9, 2009) (noting grievance dismissed for omitting the phrase “This is a Request for
Circuit that, even under a procedural default rule, compliance need only be “substantial,” an observation that it deemed equivalent to its later statement that procedural requirements “must . . . not be imposed in a way that offends the Federal Constitution or the federal policy embodied in § 1997e(a).” However, that court has not been explicit about what it means by these formulations. Other courts have generally rejected a substantial compliance standard, though as in the Third Circuit, it is not entirely clear what these courts mean by that term.

The risk posed by Woodford’s holding is that prison officials will reject prisoners’ grievances for the most trivial of rules violations, or will promulgate rules designed to trip administrative bodies actually considered his complaint); Caines v. Hendricks, 2007 WL 496876, *6 (D.N.J., Feb. 9, 2007) (finding substantial compliance where plaintiff who was “justifiably confused” by grievance rules substantially complied); Tormasi v. Hayman, 2011 WL 463054, *4 (D.N.J., Feb. 4, 2011) (holding prisoner who completed the grievance process would have substantially complied even if complaint to the Corrections Ombudsman in the Department of the Public Advocate was viewed as part of the grievance system); Hedgespeth v. Hendricks, 2007 WL 2769627, *5 (D.N.J., Sept. 21, 2007) (holding prisoner was in substantial compliance when he asked for grievance forms from the staff members designated for that purpose and was told there weren’t any); Bond v. Rhodes, 2007 WL 2752340, *3 (W.D.Pa., Sept. 19, 2007) (prisoner who asked for an extension of time and got it was not in substantial compliance where he then failed to complete the grievance process and supply requested documents, notwithstanding his claim that he did not receive the extension); Cooper v. Beard, 2007 WL 1959300, *5 (M.D.Pa., July 2, 2007) (finding substantial compliance where prisoner acted reasonably in the face of officials’ failing to follow their own rules, and the administrative bodies actually considered his complaint); Caines v. Hendricks, 2007 WL 496876, *6 (D.N.J., Feb. 9, 2007) (finding substantial compliance where plaintiff’s grievances inquired when he would get his MRI and complained about shoulder pain and lack of adequate treatment, without specifically alleging misconduct in not providing his MRI); Rodriguez v. Smith, 2006 WL 680965, *10 (E.D.Pa., Mar. 16, 2006) (holding that even if plaintiff’s letter to warden were considered a formal administrative remedy request, he didn’t appeal but only wrote letters to people outside the prison; this is not substantial compliance).

782 Fields v. Oklahoma State Penitentiary, 511 F.3d 1109, 1112 (10th Cir. 2007); Brock v. Kenton County, KY, 93 Fed.Appx. 793, 799 (6th Cir. 2004) (“We have allowed substantial compliance only in the limited circumstances where the events giving rise to the prisoner’s claim occurred prior to the effective date of the PLRA.”); Lewis v. Washington, 300 F.3d 829, 833-34 (7th Cir. 2002) (same as Brock).

783 There is no lack of recent examples of prisoners tripped up by trivial rules violations. See Mack v. Klopotoski, 540 Fed.Appx. 108, 112-13 (3d Cir. 2013) (unpublished) (holding the plaintiff procedurally defaulted by submitting with his appeal handwritten copies of prior appeals rather than photocopies, despite his claim that the photocopy was broken); Simpson v. Jones, 316 Fed.Appx. 807, 810 (10th Cir. 2009) (unpublished) (noting plaintiff’s grievance was dismissed inter alia because he had used red ink); Whitener v. Buss, 2008 WL 681814, *1 (7th Cir., Mar. 13, 2008) (dismissing claim of prisoner who missed a 48-hour grievance deadline because he needed the relevant officers’ names and it took a week to get them, and he didn’t ask for waiver of the time limit); Fischer v. Smith, 2011 WL 3876944, *2 (E.D.Wis., Aug. 31, 2011) (dismissing for non-exhaustion where grievance was rejected for using carbon copies rather than originals, and then for untimeliness when plaintiff submitted the originals); Hamilton v. Lara, 2011 WL 2457934, *3 (E.D.Cal., June 16, 2011) (grievance appeal rejected because plaintiff first sent it to the warden rather than the appeals coordinator, and later submission to appeals coordinator was untimely);
prisoners up,\textsuperscript{784} or having that effect.\textsuperscript{785} Another risk, little explored by the courts, is that grievance rules may make it impossible for prisoners to frame the claims that they wish to litigate. This issue has arisen repeatedly (though has not always been recognized) in connection with rules prohibiting grievances from raising “multiple issues,”\textsuperscript{786} among others.\textsuperscript{787} It has also arisen in connection with a prohibition on multiple prisoners raising the same grievance.\textsuperscript{788}

Thomas v. Parker, 2008 WL 2894842, *12 (W.D.Okla., July 25, 2008) (dismissing because prisoner submitted a “Statement under Penalty of Perjury” pursuant to state law rather than the notarized affidavit required by grievance policy); aff’d, 318 Fed.Appx. 626 (10th Cir. 2009), cert. denied, 558 U.S. 899 (2009); see Appendix A for additional authority on this point; see Elliott v. Jones, 2008 WL 420051, *3-4 (N.D.Fla., Feb. 12, 2008) (noting grievance rejected for “writing outside the boundaries of the form”); Ramsey v. McGee, 2007 WL 2744272, *2 (E.D.Okla., Sept. 19, 2007) (noting grievances denied because one was not signed, one was written in pink ink when blue or black was required, and one was partly written in pencil; court dismisses on merits and does not rule on adequacy of exhaustion); see also Rollings-Pleasant v. Deuel Vocational Ins., 2007 WL 2177832, *6 (E.D.Cal., July 27, 2007) (dismissing for non-exhaustion where grievance was “cancelled” for non-cooperation with investigation after prisoner argued about needing to make a phone call and asked about a different grievance; no finding that he refused to answer questions about the grievance at issue), report and recommendation adopted, 2007 WL 2900459 (E.D.Cal., Sept. 28, 2007). Cf. Love v. Pullman, 404 U.S. 522, 526 (1972) (stating “technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process”).\textsuperscript{789}

See n. 542, above, concerning recent grievance rule changes; see also Thomas v. Woolum, 337 F.3d 720, 732 n.4 (6th Cir. 2003) (suggesting that time deadlines will become shorter). One example of a rule that appears designed to trip prisoners up is Oklahoma’s rule that prisoners on “grievance restriction” must list in any grievance all their grievances or appeals during the grievance procedure.\textsuperscript{790} An example of a rule that appears designed to prevent prisoners from raising “multiple issues,”\textsuperscript{791} and thus to prevent them from making the case that their grievance was not properly exhausted. One court has upheld the application of the Bureau of Prisons’ regulation defining a grievance appeal as filed “in its entirety.”  The court upheld the dismissal of other claims for non-exhaustion where grievance was “cancelled” for non-cooperation with investigation after prisoner argued about needing to make a phone call and asked about a different grievance; no finding that he refused to answer questions about the grievance at issue, report and recommendation adopted, 2007 WL 2900459 (E.D.Cal., Sept. 28, 2007). Cf. Love v. Pullman, 404 U.S. 522, 526 (1972) (stating “technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process”).\textsuperscript{792}

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The court held that the plaintiff had properly exhausted, even though his grievance was rejected for including “more than one issue,” because his complaint was about “being punished in various ways for conduct he had never been informed of or charged with. Under these circumstances, requiring Moore to gripe each of the alleged components of his punishment separately would have prevented him from fairly presenting his claim in its entirety.” The court upheld the dismissal of other claims for which his grievance was dismissed for including more than one issue, despite the plaintiff’s claim that both issues were examples of a pattern of inadequate medical care. 517 F.3d at 729. “No multiple issues” rules are especially subject to manipulation, since what constitutes an “issue” may be a matter of interpretation. See Miller v. King, 2009 WL 3805568, *3-4 (S.D.Ga., Nov. 10, 2009) (plaintiff alleged disability discrimination, manifested in disparate treatment and retaliation, the failure to provide medical treatment and devices, the failure to provide wheelchair accommodating facilities, and “other related issues,” and grievance was dismissed for raising multiple

\textsuperscript{784} See n. 542, above, concerning recent grievance rule changes; see also Thomas v. Woolum, 337 F.3d 720, 732 n.4 (6th Cir. 2003) (suggesting that time deadlines will become shorter). One example of a rule that appears designed to trip prisoners up is Oklahoma’s rule that prisoners on “grievance restriction” must list in any grievance all their other grievances within the preceding calendar year, by grievance number, date, description, and disposition at each level. One prisoner’s complaint that he did not have that informat

\textsuperscript{785} In Moore v. Bennett, 517 F.3d 717, 722, 730 (4th Cir. 2008), the court held that the plaintiff had properly exhausted, even though his grievance was rejected for including “more than one issue,” because his complaint was about “being punished in various ways for conduct he had never been informed of or charged with. Under these circumstances, requiring Moore to gripe each of the alleged components of his punishment separately would have prevented him from fairly presenting his claim in its entirety.” The court upheld the dismissal of other claims for which his grievance was dismissed for including more than one issue, despite the plaintiff’s claim that both issues were examples of a pattern of inadequate medical care. 517 F.3d at 729. “No multiple issues” rules are especially subject to manipulation, since what constitutes an “issue” may be a matter of interpretation. See Miller v. King, 2009 WL 3805568, *3-4 (S.D.Ga., Nov. 10, 2009) (plaintiff alleged disability discrimination, manifested in disparate treatment and retaliation, the failure to provide medical treatment and devices, the failure to provide wheelchair accommodating facilities, and “other related issues,” and grievance was dismissed for raising multiple
This problem is discussed thoughtfully (despite the unsatisfactory result, later reversed) in a recent district court decision which adopts the proposition not addressed by Woodford about “tripping up” prisoners as a principle of PLRA application: “several courts have recognized the concern alluded to but not decided in Woodford: where excessively technical procedural requirements frustrate the proper exercise of that procedure by all but the most sophisticated

issues); Clayborne v. Epps, 2008 WL 4056293, *3-4 (S.D.Miss., Aug. 25, 2008) (plaintiff grieved failure to protect and cited several instances of assaults and threats; grievance was denied “because it requested a remedy for more than one incident”); Starks v. Lewis, 2008 WL 2570960, *5 (W.D.Okla., June 24, 2008) (plaintiff said he raised one issue, “Mr. Lewis calling me a snitch, placing my life in danger”; grievance staff said issues raised included “fired from OCI; inmate typing responses and inmates read response, placing life in danger,” even though plaintiff disclaimed any request to get his job back; dismissed for non-exhaustion), aff’d, 313 Fed.Appx. 163 (10th Cir. 2009); Simpson v. Greenwood, 2007 WL 5445538, *2-5 (W.D.Wis., Apr. 6, 2007) (dismissing for non-exhaustion where grievance was rejected for including two issues, officers in the medical examination room and officers distributing medication in segregation; plaintiff said he raised one issue, “breach of confidentiality of health information”).

In Lafountain v. Martin, 2008 WL 1923262, *19 (W.D.Mich., Apr. 28, 2008), vacated and remanded, 334 Fed.Appx. 738 (6th Cir. 2009) (per curiam) (unpublished), discussed further in the text below, the district court upheld the application of a multiple issues prohibition to a grievance which amalgamated incidents occurring over a six-month time period, stating that the plaintiff had ample opportunity to grieve each of the incidents separately. On appeal, however, the court said that the grievance did not raise multiple issues, but raised a single claim of retaliation; the other incidents were simply the results of the retaliation. Lafountain, 334 Fed.Appx. at 741. The appeals court rejected the argument that there was a factual dispute precluding summary judgment as to whether the grievance contained multiple issues, stating that “it is not a matter of factual disputes; rather, it is simply a matter of how one reads and interprets [the grievance]. We read it as containing one claim of retaliation.” 334 Fed.Appx. at 741 n.2. Accord, Reeves v. Salisbury, 2012 WL 3206399, *5-6 (E.D.Mich., Jan. 30, 2012) (applying Lafountain, holding retaliatory fabrication of charges was a single claim with multiple harms consisting of false disciplinary charges and false testimony), report and recommendation adopted in pertinent part, rejected in part on other grounds, 2012 WL 3151594 (E.D.Mich., Aug. 2, 2012).

A different permutation of the “multiple issues” problem arose in a case where the plaintiff, to avoid a prohibition on multiple issues in the same grievance, filed separate grievances about each staff member involved in an incident; prison officials then objected that he had violated a prohibition against multiple grievances about the same issue. The court declined to find that the latter rule was violated. LaPointe v. Bienovidas, 2013 WL 3439905, *7-8 (D.Ariz., July 9, 2013).

In Fratis v. Owens, 168 Fed.Appx. 865 (10th Cir. 2006), a prisoner’s grievance protesting a proposed transfer of women prisoners to a higher-security prison was rejected on the ground that the transfer had not happened yet and grievances can only be based on actions that happened to the prisoner personally. The court held that the prisoner had not exhausted, notwithstanding that the prison’s application of its rules meant that the prisoner could not exhaust a claim that may have been ripe for injunctive consideration in federal court. 168 Fed.Appx. at 867. Here the application of a procedural default standard barred from court a prisoner to whom remedies were, in fact, not available. Accord, Hebner v. O'Neill, 2008 WL 413731, *4 (N.D.Cal., Feb. 13, 2008) (dismissed for non-exhaustion because grievance was rejected as concerning an “anticipated action or decision”; no discussion of ripeness or whether plaintiff could have been eligible for injunctive relief). By contrast, in Church v. Oklahoma Correctional Industries, 2011 WL 4376222, *7 (W.D.Okla., Aug. 15, 2011), report and recommendation adopted, 2011 WL 4383225 (W.D.Okla., Sept. 20, 2011), the court held that grievance personnel’s refusal to accept a grievance without a date of incident, when the complaint was not about an incident but about an ongoing practice, made the remedy unavailable.

inmates, is the grievance procedure “available” within the meaning of the PRLA [sic].” The court then linked this point to the Supreme Court’s long-ago statement that “the creation of an additional procedural technicality . . . [is] particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.”

It then went on to analyze the issue before it—the rejection of plaintiff’s grievances under a rule prohibiting “multiple issues” in a single grievance—under the rule requiring restrictions on prisoners’ constitutional rights to be reasonably related to legitimate penological purposes. The plaintiff argued that the prison system “is creating and stringently applying excessively complicated rules and narrow time constraints, not for the purpose of improving the quality of the administrative record and affording a fair opportunity for the prison to address the complaint, but for the purpose of depriving prisoners of access to the administrative process and, therefore to the federal courts.” The court stated:

Were the Court to accept without scrutiny a prison's invocation of any manner of complicated procedural rules and excessively stringent application of those rules, Plaintiff's claim arguably would have force. Rubber-stamping unlimited administrative restrictions would permit state prisons to adopt grievance procedures solely for the purpose of requiring impossible compliance in order to terminate prisoners' access to the courts, in violation of the first prong of the Turner test. Id. at 90 (requiring the governmental objective to be both legitimate and neutral). Such uncritical acceptance of prison restrictions also would permit prisons to effectively eliminate all means for prisoners to exercise their rights to challenge prison conditions, in violation of the second prong of Turner. Id. (requiring that prison limitations on constitutional rights leave “alternative means of exercising the right [ ] open to prison inmates”).

The court held that the “no multiple issues” rule was not unconstitutional as applied to the plaintiff’s grievance, which amalgamated incidents occurring over a six-month time period; he had ample opportunity to grieve each of the incidents separately, and the rule served a useful purpose in simplifying the claims addressed in any given grievance proceeding. (On appeal, the court did not address the district court’s constitutional analysis, but rejected its reading of the grievance, finding as a matter of law that the grievance only raised one issue.)

Before Woodford, courts applying a procedural default rule held that if prison officials decide the merits of a grievance rather than rejecting it for procedural noncompliance, they

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790 Lafountain, id. (quoting Love v. Pullman Co., 404 U.S. 522, 526-27 (1972) (as quoted in Kikimura v. Osagie, 461 F.3d 1269, 1283-84 (10th Cir. 2006))); see Lafountain, 2008 WL 1923262, *19 (referring to “existing federal precedent limiting procedural requirements for exhaustion in the civil administrative context, see Love . . . (barring creation of excessive procedural technicalities in statutory schemes in which laymen initiate the process)).
793 Lafountain, id.
794 Lafountain, id.; id., *15 (“the requirements that grievances be submitted timely, raising one issue in sufficient detail, and not duplicate issues previously grieved are rationally related to legitimate penological interests.”) A “no multiple issues” rule can be applied so as to make remedies unavailable. See Moore v. Bennette, 517 F.3d 717, 722, 730 (4th Cir. 2008), discussed in n. 787, above.
cannot rely on that noncompliance to seek dismissal of subsequent litigation for non-exhaustion.\textsuperscript{796} Nothing in \textit{Woodford} is to the contrary of those holdings, and many post-\textit{Woodford} decisions are to the same effect.\textsuperscript{797} (Similarly, some recent decisions, responding to \textit{Woodford}’s statement that PLRA exhaustion has similarities to habeas corpus exhaustion, have pointed out that the habeas corpus procedural default rule looks to the \textit{last} decision of the state forum, so there is no procedural default for habeas purposes if the state court addresses the merits of the claim.\textsuperscript{798}) Some courts have said that the \textit{Woodford} opinion sets out a “merits test”

\textsuperscript{796} Gates v. Cook, 376 F.3d 323, 331 n.6 (5th Cir. 2004) (noting that the plaintiff sent a form to the Commissioner rather than the Legal Adjudicator but defendants did not reject it for noncompliance; in addition, the grievance was submitted by the prisoner’s lawyer and not by the prisoner as the rules specify); Spruill v. Gillis, 372 F.3d 218, 234 (3d Cir. 2004); Ross v. County of Bernalillo, 365 F.3d 1181, 1186 (10th Cir. 2004); Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir.), \textit{cert. denied}, 537 U.S. 949 (2002); see Barnes v. Briley, 420 F.3d 673, 679 (7th Cir. 2005) (holding claim was not procedurally defaulted where an initial grievance was rejected as untimely but plaintiff later “restated” the grievance process and received a decision on the merits); Gregory v. Ayers, 2006 WL 548444, *2-3 (E.D.Cal., Mar. 3, 2006) (holding that matters not initially exhausted which were addressed in a later grievance about threats arising from the first grievance were exhausted by the later grievance), \textit{report and recommendation adopted}, 2006 WL 845846 (E.D.Cal., Mar. 31, 2006); Shaheen v. Hollins, 2005 WL 2179400, *4 (N.D.N.Y., Sept. 7, 2005) (declining to dismiss where prisoner was told his complaint was non-grievable, appealed, and had his complaint referred to the correct decision-maker on appeal), \textit{report and recommendation adopted}, 2005 WL 2334387 (N.D.N.Y., Sept. 23, 2005); see also Tweed v. Schuetzle, 2007 WL 2050782, *7-8 (D.N.D., July 12, 2007) (holding warden’s response to plaintiffs’ non-grievance letter, addressing their claim and making no reference to procedural issues in the grievance, might waive such issues, especially in light of uncertainty whether the grievance system was available).

\textsuperscript{797} Hammett v. Cofield, 681 F.3d 945, 947 (8th Cir. 2012) (stating “all circuits that have addressed it have concluded that the PLRA’s exhaustion requirement is satisfied if prison officials decide a procedurally flawed grievance on the merits”); Maddox v. Love, 655 F.3d 709, 722 (7th Cir. 2011) (“Where prison officials address an inmate’s grievance on the merits without rejecting it on procedural grounds, the grievance has served its function of alerting the state and inviting corrective action, and defendants cannot rely on the failure to exhaust defense.”); Reed-Bey v. Pramstaller, 603 F.3d 322, 324-26 (6th Cir. 2010) (declining to dismiss claims against defendants not named in grievance where officials reached the merits despite noncompliance with “name the defendant” grievance rule); Robinson v. Johnson, 343 Fed.Appx. 778, 781-82 (3d Cir. 2009) (unpublished) (declining to dismiss claims against commissioner and superintendent not named in grievance where grievance response addressed policies they were responsible for); White v. Patel, 2013 WL 6572554, *8 (E.D.Cal., Dec. 13, 2013) (“While the Ninth Circuit has not decided this specific issue, district courts in the Ninth Circuit have followed the rule.”), \textit{report and recommendation adopted}, 2014 WL 1091226 (E.D.Cal., Mar. 18, 2014); Garcia v. Austin, 2012 WL 3941777, *5 (M.D.Fla., Sept. 10, 2012) (declining to dismiss based on “no multiple issues” rule where grievance body had not rejected the grievance for that reason); Lee v. Smith, 2010 WL 114876, *3 (S.D.Ga., Jan. 12, 2010) (declining to dismiss where plaintiff’s grievance was decided on the merits at the first level, and the rules did not appear to authorize rejection for procedural defects on appeal); Bradley v. Williams, 2009 WL 198014, *2 (D.Or., Jan. 23, 2009) (“Defendants should have notified plaintiff that his grievance was defective, thereby allowing him to correct it. Finding that plaintiff failed to exhaust administrative remedies would work an injustice and would open the grievance process to abuse by prison officials.”); Heggie v. Michigan Dept. of Corrections, 2008 WL 5459338, *5 (W.D.Mich., Nov. 26, 2008) (“the failure to comply with [any] procedural requirement constitutes a failure to properly exhaust only if prison officials reject the grievance because of the prisoner’s failure to comply with the procedural requirement in question”), \textit{report and recommendation adopted in pertinent part, rejected in part}, 2009 WL 366122 (W.D.Mich., Jan. 5, 2009); see Appendix A for additional authority on this point. This principle has been extended to the situation where a prisoner’s grievance is dismissed on procedural grounds but the complaint is referred to an internal affairs office, which addresses its merits. Garcia v. Correctional Corp. of America, 2010 WL 2253616, *4 (N.D.Ohio, June 2, 2010).

(did the agency address the merits up to the highest level?) and a “compliance test” (did the plaintiff follow the rules?), and “proper exhaustion” is satisfied by compliance with either. After all, if the administrative process dealt with the merits of the prisoner’s complaint, presumably the procedural errors were not “critical” and the system was able to “function effectively.”

This appears to be a different way of stating the more familiar proposition that if the grievance body decides the merits despite procedural noncompliance, that noncompliance is waived. One circuit has held that if both procedural issues and the merits are at issue on a grievance appeal, the court should not find procedural default unless the final grievance decision “clearly and expressly” states that the grievance is rejected on procedural grounds. If the


800 Woodford, 548 U.S. at 90-91; see Pasley v. Oliver, 2008 WL 4056552, *6 (W.D.Mich., Aug. 27, 2008) (“When an administrative agency addresses an inmate’s grievance on the merits, then the agency has found that the inmate satisfied the required critical procedural rules.”); Jones v. Stewart, 457 F.Supp.2d 1131, 1136 (D.Nev. 2006) (same). The rule is further supported by Woodford’s endorsement of the habeas corpus procedural default requirement as “substantively similar” to administrative law exhaustion rules applied to PLRA exhaustion. 548 U.S. at 92. One of the considerations in assessing procedural default in habeas is whether the last state court to rule on the claim “actually enforced the state procedural rule so as to bar that claim.” Lafortan t v. Martin, 2008 WL 1923262, *16 (W.D.Mich., Apr. 28, 2008), vacated and remarred on other grounds, 334 Fed.Appx. 738 (6th Cir. 2009) (per curiam), and cases cited.

There is a limit to this principle. If the prisoner does not use the grievance process or other designated remedy at all, the fact that prison officials respond to informal or non-standard complaints does not waive the non-exhaustion defense. Roth v. Larson, 2008 WL 4527831, *18 (D.Minn., Sept. 30, 2008).

801 Reynolds-Bey v. Harris, 428 Fed.Appx. 493, 502 (6th Cir. 2011) (unpublished). Earlier, the same court had held: “Where the grievance is denied alternatively on the merits and for failure to comply with critical grievance procedures, a later action will be subject to dismissal for failure to properly exhaust under Woodford.” Vandiver v. Correctional Medical Services, Inc., 326 Fed.Appx. 885, 889 (6th Cir. 2009) (unpublished). Reynolds-Bey relied on the intervening decision in Reed–Bey v. Pramstaller, 603 F.3d 322, 325 (6th Cir. 2010), which held that “[w]hen prison officials decline to enforce their own procedural requirements and opt to consider otherwise-defaulted claims on the merits, so as a general rule will we, and relied on the habeas corpus rule that “a procedural default does not bar consideration of a federal claim . . . unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar,’ or it is otherwise clear they did not evaluate the claim on the merits.” 603 F.3d at 325 (quoting Harris v. Reed, 489 U.S. 255, 263 (1989)). Although both Reynolds-Bey and Vandiver are unpublished, Reynolds-Bey should be regarded as more authoritative since it relies directly on post-Vandiver published authority. See Norris v. Warren County Regional Jail, 2012 WL 1637074, *3 (W.D.Ky., May 9, 2012) (dismissing for non-exhaustion where plaintiff’s appeal was rejected as late even though the grievance body also said it would have rejected his claim on the merits; Reed-Bey distinguished, Vandiver followed). But see Cook v. Caruso, 531 Fed.Appx. 554, 563 (6th Cir. 2013) (holding that a procedural dismissal that refers to the substantive issues does not exhaust; “Simply mentioning that the prison reviewed the record does not a merits-based response make.”).

purpose of the “proper exhaustion” rule is to preserve the system’s ability to “function effectively,” it would seem that a decision on the merits is a good indication that the system has functioned effectively, and dismissal serves no useful purpose.

e) To What Extent May Federal Courts Review a Grievance System’s Procedural Rejection of a Grievance?

In *Woodford*, this question was potentially presented: the prisoner had filed a second grievance arguing that his first grievance was timely under the state’s 15-day deadline, because he was challenging a continuing restriction on his religious activities, and the prison reiterated its finding of untimeliness. However, the *Woodford* majority did not acknowledge the issue, much less rule on it.

Some courts have suggested that they are without power to re-examine prison officials’ decisions rejecting grievances for procedural reasons, an approach which has led to extreme and unconscionable results. Other courts have stated standards that allow only a narrow scope


*Woodford*, 548 U.S. at 90.

A particularly extreme statement of this view appears in *Sides v. Abangdon*, 2010 WL 4537914, *4* (S.D.Miss., Nov. 2, 2010), which notes that the plaintiff had not received a Certificate of Completion for properly exhausting the grievance system, and states: “This Court will not monitor his compliance or non-compliance with ARP or the program’s diligence or effectiveness: the certificate is mandatory prior to filing suit in this Court.”

In *Lindell v. O’Donnell*, 2005 WL 2740999 (W.D.Wis., Oct. 21, 2005), the plaintiff alleged that he had not received notice that a letter had been confiscated until almost a year afterward; when he tried to grieve, his grievance was dismissed as time-barred, even though it was impossible for him to file timely because of the lack of notice. The court said that it could not review the administrative determination. 2005 WL 2740999, *18; see id., *22, *26 (finding additional claims defaulted). A later decision by the *Lindell* court involves a “one issue per grievance” rule. The plaintiff said he raised one issue, breach of confidentiality of health information, and stated two ways it was being violated. Grievance personnel said he had raised two issues, presence of officers in medical examination rooms and distribution of medication by officers in segregation. The court cited “the general rule . . . that agencies are granted deference in interpreting their own regulations, at least when the regulation is ambiguous,” and concluded that prison officials’ applications of grievance procedures are not “unreviewable”; the question is whether the prisoner had a meaningful opportunity to present his grievance. The court concluded that the rule was reasonable on its face, since it served to prevent unwieldy complaints that are hard to understand or process, and even though it might be too vague to understand, prisoners are not barred from trying again when a grievance is rejected; they can file a new grievance, even if untimely, for “good cause,” a standard which should be satisfied by a good faith but unsuccessful earlier grievance. Here, the prisoner had been told what he had to do to correct the problem, and the instructions were easily followed: file two grievances. So this plaintiff had a meaningful opportunity to be heard, he just didn’t take it. Simpson v. Greenwood, 2007 WL 5445538, *3-6* (W.D.Wis., Apr. 6, 2007); *accord*, Hohol v. Thurmer, 2010 WL 4941880, *6* (E.D.Wis., Nov. 30, 2010). *See Starks v. Lewis*, 2008 WL 2570960, *5* (W.D.Okla., June 24, 2008) (“Even when prison authorities are incorrect about the existence of the perceived deficiency, the inmate must follow the prescribed steps to cure it. . . . An inmate’s disagreement with prison officials as to the appropriateness of a particular procedure under the circumstances, or his belief that he should not have to correct a procedural deficiency does not excuse his obligation to comply with the available process. . . .”), *aff’d*, 313 Fed.Appx. 163 (10th Cir. 2009); *Jones v. Frank*, 2008 WL 4190322, *1, 3-4* (W.D.Wis., Apr. 14, 2008) (court must defer to complaint examiner’s determination that plaintiff did not “allege sufficient facts
of judicial review. One stringently held: “Only where the ‘procedural’ defect cited by the prison is so transparently without merit as to be arbitrary and capricious on its face, coupled with a grievance procedure that does not provide a reasonable opportunity for refiling of a procedurally-compliant grievance in the event of a procedural denial, will the Court consider whether the grievance procedure has been rendered unavailable." Another stated: “As long as the state’s application of its own procedural rules is not arbitrary or capricious, we will not substitute our judgment for the state’s.” Another court noted Woodford’s acknowledgment of the habeas corpus doctrine of procedural default, and suggested that that doctrine can be helpful in analyzing proper exhaustion questions. Specifically, it said that “the contours of the procedural default doctrine would require the Court to consider whether the last administrative decisionmaker relied on an established procedural rule and whether a reasonable reviewer could have determined that the prisoner actually violated the established rule.”

This last approach provides a plausible doctrinal basis for federal courts’ exercising independent judgment on the question whether the procedural rejection of a grievance necessarily constitutes a procedural default by the prisoner. However, it is not clear that courts need such a platform. The Supreme Court, interpreting this federal statute, has held that Congress meant § 1997e(a) to require “proper exhaustion,” and that “[c]ompliance with prison grievance procedures, therefore, is all that is required by the PLRA to ‘properly exhaust.’” It

upon which redress may be made”); Williams v. Burgos, 2007 WL 2331794, *3 (S.D.Ga., Aug. 13, 2007) (holding Bureau of Prisons regulation defining an appeal as filed only when it is logged as received would apply even if plaintiff’s assertion that he mailed his appeal timely was true); see also Roam v. Curry, 2009 WL 1308909, *1 (N.D.Cal., May 11, 2009) (denying amendment to complaint as futile without independent examination since officials had rejected the plaintiff’s grievance as “obscured by pointless verbiage or voluminous unrelated documentation”).

The court that asserted its inability to review administrative determinations has departed from that rule in some cases. One of them may be distinguishable on the ground that defendants disavowed the grievance decision once litigation was filed. In Vasquez v. Hilbert, 2008 WL 2224394 (W.D.Wis., May 28, 2008), grievance officials rejected plaintiff’s excessive force grievance on the erroneous ground that he was challenging the substance of a disciplinary decision. The court held that the plaintiff could not be penalized for an erroneous official interpretation, and described as “unreasonable, unfair and inconsistent with circuit precedent” defendants’ argument that the plaintiff should have done a better job of showing the officials that they were wrong. 2008 WL 2224394, *3. In Cordova v. Frank, 2007 WL 2188587 (W.D.Wis., July 26, 2007), the court stated that “[n]ormally” federal courts are not “free to revisit” procedural rejections of grievances, but in that case the rejection of the plaintiff’s very specific grievance for allegedly not being specific enough did not entitle defendants to dismissal for non-exhaustion, since “plaintiff put prison officials on notice of his claim and exhausted all administrative remedies legitimately available to him.” 2007 WL 2188587, *7. Perhaps the court did not consider the question of specificity a procedural issue. That was the case in Ammons v. Gerlinger, 2007 WL 5514719, *10-11 (W.D.Wis., Feb. 12, 2007), reconsideration denied, 2007 WL 5659413 (W.D.Wis., Mar. 12, 2007), in which the plaintiff’s grievance was rejected (the proper disposition for a procedurally defective grievance) for failing to assert sufficient facts to merit redress. The court said that this was a substantive and not a procedural determination, it was wrong, and the prisoner had done everything he could do to exhaust. But see Jones v. Frank, cited earlier in this footnote.

Muniz v. Kaspar, 2008 WL 3539270 at *5 n.5 (D.Colo., Aug. 12, 2008) (where plaintiff sought to exhaust so he could seek damages, which were not available from the grievance system, and grievance was rejected for failing to specify the relief sought, court rejected these “spurious procedural grounds”).


Lafountain v. Martin, 2008 WL 1923262, *16 (W.D.Mich., Apr. 28, 2008), vacated and remanded on other grounds, 334 Fed.Appx. 738 (6th Cir. 2009) (per curiam). This court further observed that instructions by grievance officials that are contrary to the relevant state regulations may make the remedy unavailable. Id.

would appear that whether a prisoner has exhausted is therefore a question of federal law for federal court determination.\textsuperscript{810}

That is the approach implicitly taken by the Ninth Circuit in addressing the California practice of “screening out” grievances deemed to violate procedural requirements. It held remedies unavailable if the prisoner filed a proper grievance but officials “screened his grievance or grievances for reasons inconsistent with or unsupported by applicable regulations.”\textsuperscript{811} It did not prescribe any particular deference to the grievance body in making this determination. The Tenth Circuit has simply held that a procedural dismissal was wrong under a “plain reading” of the grievance rules, and has characterized this situation as one “[w]here prison officials prevent, thwart, or hinder a prisoner’s efforts to avail himself of an administrative remedy, [and thereby] render that remedy ‘unavailable.’”\textsuperscript{812} This is in fact how most federal courts have proceeded, assessing the correctness of grievance decisions like any other factual or legal question, without theoretical discussion.\textsuperscript{813}

\textsuperscript{810} See Simpson v. Nickel, 2005 WL 2429805, *3 (W.D.Wis., Sept. 29, 2005) (holding that state law stating “a prisoner’s failure to raise an issue at an initial disciplinary hearing constitutes waiver of the issue on appeal” did not govern the federal question of compliance with § 1997e(a)).

\textsuperscript{811} Sapp v. Kimberl, 623 F.3d 813, 824 (9th Cir. 2010); see LaPointe v. Bienovidas, 2013 WL 3439905, *7-8 (D.Ariz., July 9, 2013) (holding improper screening made remedy unavailable; grievances were wrongly rejected as untimely and for failing to attach documents the rules did not require to be attached); Roberts v. Gonzalez, 2013 WL 4663882, *5-6 (C.D.Cal., Mar. 5, 2013) (rejecting conclusion that being pepper sprayed did not have a “material adverse effect” upon the grievant’s “health, safety, or welfare”), report and recommendation adopted, 2013 WL 4663551 (C.D.Cal., Aug. 29, 2013); Ortega v. Ruggiero, 2013 WL 268905, *6 (E.D.Cal., Jan. 23, 2013) (rejecting grievance official’s finding there was “no adverse effect” on the plaintiff, where his property including his telephone book had been improperly seized and he had been cursed at and threatened with an unsupported gang validation if he filed an inmate grievance); James v. Fagan, 2013 WL 687058, *4-5 (E.D.Cal., Feb. 25, 2013) (finding grievance improperly screened in light of plaintiff’s evidence of reasonable efforts to comply with requirements); Houston v. Torres, 2012 WL 5398794, *2, 5 (E.D.Cal., Nov. 2, 2012) (holding grievance was “improperly screen[ed]” where officials treated complaint about staff conduct as an appeal from the related disciplinary proceeding, and rejected it), report and recommendation adopted in part, rejected in part on other grounds, 2013 WL 500363 (E.D.Cal., Feb. 11, 2013); Vaught v. Clark, 2012 WL 530198, *2-4 (E.D.Cal., Feb. 17, 2012) (holding one grievance improperly screened out as untimely because grievance staff relied on the date of receipt rather than date of submission; holding another grievance improperly screened out as not demonstrating the prisoner was personally affected, though he plainly was), report and recommendation adopted, 2012 WL 1130682 (E.D.Cal., Mar. 29, 2012); Craver v. Hasty, 2012 WL 170148, *5 (E.D.Cal., Jan. 19, 2012) (holding screening out of grievance about unjustified tear-gassing for failing to state an “adverse impact” was unsupported by the record), report and recommendation adopted, 2012 WL 671938 (E.D.Cal., Feb. 28, 2012); Demerson v. Woodford, 2011 WL 5325253, *3 (E.D.Cal., Nov. 2, 2011) (declining to dismiss for non-exhaustion where grievance body’s decision was unsupported by applicable regulations), report and recommendation adopted, 2011 WL 6002606 (E.D.Cal., Nov. 30, 2011).

\textsuperscript{812} Little v. Jones, 607 F.3d 1245, 1250 (10th Cir. 2010). In Little, the grievance appellate body rejected plaintiff’s grievance on the ground that it raised multiple issues. The court pointed out that the rules permitted dismissal for that reason at the initial stage, but not on appeal. See Burnett v. Jones, 437 Fed. Appx. 736, 741 (10th Cir. 2011) (unpublished) (“[I]mproper rejection of a grievance appeal excuses the prisoner's failure to exhaust.”), cert. denied, 132 S.Ct. 1546 (2012).

\textsuperscript{813} In Moore v. Bennette, 517 F.3d 717, 722, 729, 730 (4th Cir. 2008), discussed above at n. 787, the court approved dismissal of some claims for non-exhaustion because the prisoner violated a rule against complaining about more than one incident in a grievance, but reversed dismissal of another claim where it said that requiring him to grieve each of multiple incidents separately “would have prevented him from fairly presenting his claim in its entirety.” See Hurst v. Hantke, 634 F.3d 409, 411-12 (7th Cir. 2011) (rejecting grievance body’s finding of no justification for untimely grievance), cert. denied, 132 S.Ct. 168 (2011); Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) (holding district court should have determined whether plaintiff’s grievance fell into an exception to the time limits, even though state officials had rejected it as untimely); LaFountain v. Martin, 334 Fed.Appx. 738, 741 (6th Cir.)
Several decisions have refused to dismiss for non-exhaustion where a prisoner’s grievance had been rejected as duplicative of an earlier grievance.814

2009) (per curiam) (holding that plaintiff’s grievance did not raise multiple issues as found by grievance officials, but one claim of retaliation; “it is simply a matter of how one reads and interprets” the grievance); LaPointe v. Bienovidas, 2013 WL 3439905, *7 (D.Ariz., July 9, 2013) (rejecting decision that grievances were duplicative where the prisoner filed separate grievances against multiple officers involved in the same incident, enumerating the separate conduct of each); Norwood v. Byers, 2013 WL 3330643, *10 (E.D.Cal., July 1, 2013) (rejecting decision that grievance was duplicative, since grievances addressed different medical evaluations, albeit for similar problems), report and recommendation adopted, 2013 WL 5156572 (E.D.Cal., Sept. 12, 2013); Talley v. Knop, 2013 WL 2232302, *4-5 (S.D.Ill., May 19, 2013) (rejecting decision that grievance was missing a crucial document where emergency grievances did not require that document; rejecting decision that it was filed in the wrong place, stating grievance body had misconstrued it); Smith v. Humphrey, 2013 WL 664894, *3-4 (M.D.Ga., Jan. 15, 2013) (refusing to credit the rejection of plaintiff’s grievance because he wrote “see informal” and attached the required informal grievance; no rule forbade doing so), report and recommendation adopted in part, rejected in part on other grounds, 2013 WL 656853 (M.D.Ga., Feb. 22, 2013), reconsideration denied, 2013 WL 950236 (M.D.Ga., Mar. 11, 2013); see Appendix A for additional authority on this point; see n. 838, below, for decisions on this point concerning time limits.

Where prison officials said the plaintiff only filed a “request” and not a “grievance,” the court said: “As long as the grievances fairly put the defendants on notice of the wrong the prisoner claims to have suffered and the sort of relief he seeks, so that the defendants have a fair opportunity to address and resolve the problem before the prisoner turns to federal court, the exhaustion requirement should be deemed satisfied.” Guillory v. Rupf, 2007 WL 2881954, *5 (N.D.Cal., Sept. 27, 2007). In effect, the court treated the matter as one of liberal construction of prisoner pleadings, and not as an issue of procedural compliance as did the defendants.814 This issue has come up repeatedly under the Michigan “name the defendants” rule, where officials have argued that a grievance naming new individuals involved in previously grievied incidents is duplicative; most courts have rejected this argument. See n. 688, above. It has also arisen in other circumstances. Some decisions have held that dismissal of a grievance as duplicative did not mean that the plaintiff had not exhausted, but suggested that he exhausted in an earlier grievance. Taylor v. Hubbard, 2013 WL 4776504, *7 (E.D.Cal., Sept. 4, 2013) (stating “that Plaintiff’s appeal was duplicative of another case in litigation suggests that Plaintiff likely exhausted his administrative remedies”); Meredith v. Overley, 2013 WL 3288546, *3 (E.D.Cal., June 28, 2013) (holding that the prison’s claim that the second grievance was duplicative must mean that the first grievance, which was decided at the highest level, exhausted), report and recommendation adopted, 2013 WL 4459634 (E.D.Cal., Aug. 16, 2013); Agnes v. Joseph, 2011 WL 4352843, *4 (E.D.Cal., Sept. 16, 2011) (screening-out as duplicative suggested the plaintiff had no further remedies), report and recommendation adopted, 2011 WL 5024443 (E.D.Cal., Oct. 20, 2011); Chatman v. Felker, 2011 WL 445685, *6 (E.D.Cal., Feb. 3, 2011) (holding rejection of second grievance as improper, after favorable decision on first grievance was not implemented, meant remedies were not available), report and recommendation adopted, 2011 WL 1118702 (E.D.Cal., Mar. 28, 2011); Taylor v. Higgins, 2009 WL 224953, *3 (N.D.Cal., Jan. 29, 2009) (holding dismissal of grievance naming a new defendant as duplicative implied claim had been exhausted in an earlier grievance); Garvins v. Burnett, 2009 WL 723888, *3 (W.D.Mich., Mar. 12, 2009); Bey v. Luoma, 2008 WL 4534427, *4 (W.D.Mich., Sept. 30, 2008); Neal v. Butts, 2008 WL 2704663, *5 (E.D.Mich., July 9, 2008); Broyles v. Correctional Medical Services, Inc., 2008 WL 1745554, *6 (W.D.Mich., Apr. 14, 2008); Houston v. Riley, 2008 WL 762114, *3 (W.D.Mich., Feb. 25, 2008). report and recommendation adopted, 2008 WL 4426599 (W.D.Mich., Sept. 26, 2008); Doyle v. Jones, 2007 WL 4052032, *8-9 (W.D.Mich., Nov. 15, 2007); see Schneider v. Hoffman, 2012 WL 3100550, *7-8 (D.Nev., June 25, 2012) (holding prisoner was given the “run-around” where his first grievance was improperly rejected and his second was rejected as duplicative; “This is not the first time the court has observed this type of conduct on behalf of NDOC.”), report and recommendation adopted, 2012 WL 3096429 (D.Nev., July 27, 2012); Martin v. Morris, 2012 WL 1229150, 5-6 (C.D.Cal., Mar. 7, 2012) (holding grievance was improperly screened as duplicative where defendants failed to show that there was a previous grievance that it duplicated), report and recommendation adopted, 2012 WL 1236497 (C.D.Cal., Apr. 10, 2012); see Francis v. Gill, 2013 WL 5672191, *3 (E.D.Cal., Oct. 17, 2013) (holding the refusal to exhaust a grievance because a pending grievance appeal allegedly addressed the same issue meant that the plaintiff had exhausted available remedies), report and recommendation adopted in part, rejected in part on other grounds, 2014 WL 1064982 (E.D.Cal., Mar. 14, 2014). In Gabby v. Lay, 2006 WL 1676773, *4 (E.D.Wis., Jan. 23, 2006), the prisoner had filed one grievance and failed to appeal, then filed a second grievance which was rejected on
Numerous decisions have held that a prisoner who disregards instructions by grievance personnel as to how to proceed fails to exhaust.815 However, some courts have refused to find non-exhaustion where the instructions or the grievance body’s dismissal were not supported by the written grievance policy816—though one decision is remarkably vociferous concerning the

the ground that the issue had been raised in the previous grievance. The court found exhaustion, implicitly rejecting defendants’ argument that if a prisoner tries to exhaust an issue and makes a procedural mistake, he is barred from trying again and doing it right even if the later grievance is otherwise proper. Contra, Rasheed v. Nevada Dept. of Corrections, 2012 WL 1810970, *3 (D.Nev., May 17, 2012) (holding where prisoner filed one grievance, failed to appeal, then filed a new grievance about the same matter, the second grievance was properly rejected as duplicative). In Gaitlin v. Nichols, 2007 WL 4219170, *2 (E.D.Cal., Nov. 29, 2007), report and recommendation adopted, 2008 WL 191989 (E.D.Cal., Jan. 23, 2008), the court simply found that grievance officials were wrong in finding plaintiff’s grievance duplicative, and held that the plaintiff exhausted. However, there are some decisions that seem to hold a grievance dismissed as duplicative cannot exhaust. Burnett v. Howard, 2010 WL 1286256, *2 (W.D.Mich., Mar. 30, 2010); Kimbrel v. Caruso, 2010 WL 1417746, *5 (W.D.Mich., Feb. 2, 2010), report and recommendation adopted, 2010 WL 1417741 (W.D.Mich., Mar. 31, 2010); see also Lawson v. Engelsjarid, 2010 WL 1626423, *2 (W.D.Mich., Apr. 21, 2010) (implying that a duplicative grievance cannot exhaust where the initial grievance was rejected as procedurally improper).


816 See Ekene v. Cash, 2013 WL 2468387, *4-5 (C.D.Cal., June 7, 2013) (declining to dismiss where grievance was rejected for failure to attach “medical chrono” for showers, since there is no requirement to obtain such a document to take a shower); Fisher v. Figueroa, 2013 WL 676170, *3-4 (W.D.Okla., Jan. 7, 2013) (holding remedies unavailable where the prisoner followed instructions and was told to refile his grievance after grievance staff gave him inconsistent instructions), report and recommendation adopted, 2013 WL 675386 (W.D.Okla., Feb. 22, 2013); Chavez v. Granadoz, 2013 WL 1749910, *2-4 (E.D.Cal., Apr. 23, 2013) (declining to dismiss for non-exhaustion where grievance personnel demanded the names of involved staff, which were not required by the rules, and denied plaintiff’s request for documentation that would include that information); Peterson v. Gore, 2012 WL 1669431, *5-
prisoner’s obligation to follow erroneous instructions. Where prisoners cannot complete the process because they are unable to comply with officials’ instructions, the remedy is unavailable.

**g) How Does the Proper Exhaustion/Procedural Default Rule Interact with the Statutory Requirement That Remedies Be “Available”?**

The rulings of a number of courts have created a procedural trap in addition to the procedural default requirement. Sometimes prisoners are not able to follow the rules for reasons outside their control—for example, they miss a deadline because they are out of the institution and have no access to the grievance process. One would think that such circumstances mean that the administrative remedy was not available for the affected prisoner. However, a number of courts have held that prisoners who are prevented from exhausting properly must try to exhaust

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6 (E.D.Cal., May 11, 2012) (declining to dismiss for non-exhaustion where defendants rejected plaintiff’s emergency grievance and told him to re-file it as a regular grievance, but policy required grievance officials to divert it into the regular grievance process or reject it and give reasons; holding grievance was improperly screened and remedy was therefore unavailable), report and recommendation adopted, 2012 WL 4038433 (E.D.Cal., Sept. 11, 2012); Andrews v. Cervantes, 2009 WL 800915, *6 (E.D.Cal., Mar. 25, 2009) (holding prisoner whose grievance was rejected because he refused to resubmit it without the word “moron” exhausted, since grievance policy did not support basis for rejection); Chizum v. Marandet, 2011 WL 611895, *4-5 (N.D.Ind., Feb. 15, 2011) (holding plaintiff who had contacted three staff members who failed to respond had satisfied the requirement of informal efforts to resolve the problem; plaintiff’s failure to follow an instruction to consult a fourth staff member was not non-exhaustion absent proof from defendants that the policy required such an effort); Young v. Hightower, 395 F.Supp.2d 583, 587, 2005 WL 2739243, *3-4 (E.D.Mich. 2005) (holding plaintiff’s alleged failure to supply requested documents was not a failure to exhaust where the grievance policy said grievances should not be denied for failure to provide documentation); Griffen v. Cook, 2005 WL 1113830, *7-8 (D.Or., May 10, 2005) (declining to dismiss for non-exhaustion where plaintiff’s grievances were returned unprocessed with instructions, but the grievance policy made no provision for returning grievances unprocessed), report and recommendation adopted as modified, 2005 WL 2314124 (D.Or., Sept. 21, 2005).

817 Starks v. Lewis, 2008 WL 2570960, *5 (W.D.Okla., June 24, 2008) (“Even when prison authorities are incorrect about the existence of the perceived deficiency, the inmate must follow the prescribed steps to cure it. . . . An inmate’s disagreement with prison officials as to the appropriateness of a particular procedure under the circumstances, or his belief that he should not have to correct a procedural deficiency does not excuse his obligation to comply with the available process. . . .”), aff’d, 313 Fed.Appx. 163 (10th Cir. 2009). Contra, Lafountain v. Martin, 2008 WL 1923262, *16 (W.D.Mich., Apr. 28, 2008) (suggesting that instructions by grievance personnel contrary to state regulations may make the remedy unavailable), vacated and remanded on other grounds, 334 Fed.Appx. 738 (6th Cir. 2009) (per curiam).

818 Patel v. Moron, 897 F.Supp.2d 389, 399 (E.D.N.C. 2012) (declining to dismiss for non-exhaustion where plaintiff alleged that each of two regional offices directed him to file his appeal with the other one); Mark v. Jackson, 2012 WL 1035879, *4-5 (W.D.Okla., Mar. 12, 2012) (failure to follow instructions did not imply non-exhaustion where the instructions were simply to read the policy and follow it, with no instruction on how to remedy the alleged deficiency), report and recommendation adopted, 2012 WL 1035761 (W.D.Okla., Mar. 28, 2012); Brown v. Darnold, 2010 WL 3702373, *5 (S.D.Ill., Aug. 17, 2010) (remedy was unavailable to a prisoner who was told to get a counselor and a grievance officer’s response, but the counselor never responded and the grievance officer said only that the grievance was untimely), report and recommendation adopted, 2010 WL 3613934 (S.D.Ill., Sept. 8, 2010); Woods v. Carey, 2008 WL 447553 (E.D.Cal., Feb. 15, 2008) (where grievance official directed plaintiff to the medical appeals analyst, but that person said plaintiff’s grievance must first be processed by the grievance office, plaintiff had exhausted; court refers to “runaround”); Bradley v. McVay, 2008 WL 495732, *3 (E.D.Cal., Feb. 21, 2008) (if prison officials required plaintiff to go to an interview room for an investigation, and he could not do so without the cane he had been deprived of, the grievance process would not be available to him), report and recommendation adopted, 2008 WL 669858 (E.D.Cal., Mar. 7, 2008).
improperly, notwithstanding the *Woodford* “proper exhaustion” requirement. Therefore, if they can’t file a timely grievance, they should file a late grievance when they can, or the court may not even consider their arguments why they couldn’t file timely.  

### h) National Standards to Prevent, Detect, and Respond to Prison Rape.

These standards, recently promulgated under the Prison Rape Elimination Act (PREA) and sometimes called the “PREA Standards,” contain several requirements about the handling of prison grievances concerning sexual abuse which would require changes in the grievance procedures of many prison and jail systems. The Standards provide:

- “The agency shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse.”  
- “The agency shall not require an inmate to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse.”  
- “The agency shall ensure that—
  - An inmate who alleges sexual abuse may submit a grievance without submitting it to a staff member who is the subject of the complaint, and
  - Such grievance is not referred to a staff member who is the subject of the complaint.”

- Final decisions on sexual abuse complaints must be issued within 90 days of their initial filing, not counting the time consumed by inmates in preparing any administrative appeal. Agencies can claim an extension of up to 70 days “if the normal time period for response is insufficient to make an appropriate decision” but must notify the prisoner in writing of any such extension and of the date by which a decision will be made.

- “At any level of the administrative process, including the final level, if the inmate does not receive a response within the time allotted for reply, including any properly noticed extension, the inmate may consider the absence of a response to be a denial at that level.”

- Third parties, including fellow inmates, staff members, family members, attorneys, and outside advocates, may help inmates file sexual abuse complaints and may also file them on behalf of inmates, though the prison may require that the inmate complainant agree to have a third party file the complaint and that the complainant personally pursue any subsequent steps (e.g. appeals).

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819 *See* cases cited in n. 847, below.

820 28 C.F.R. § 115.52(b)(1).

821 28 C.F.R. § 115.52(b)(3).

822 28 C.F.R. § 115.52(c).

823 28 C.F.R. § 115.52(d)(1-3).

824 28 C.F.R. § 115.52(d)(4).

825 28 C.F.R. § 115.52(e).
• “The agency shall establish procedures for the filing of an emergency grievance alleging that an inmate is subject to a substantial risk of imminent sexual abuse,” which the agency must immediately forward to “a level of review at which immediate corrective action may be taken.” There must be an initial response within 48 hours and a final agency decision within 5 calendar days; the decisions both “shall document the agency’s determination whether the inmate is in substantial risk of imminent sexual abuse and the action taken in response to the emergency grievance.”

• Disciplinary charges based on sexual abuse complaints are limited to cases “where the agency demonstrates that the inmate filed the grievance in bad faith.”

To date there seems to be no case law concerning the interpretation and enforceability of these standards, so it is unclear what would happen if a prisoner asserted the agency’s failure of compliance as a defense to non-exhaustion generally, or if the agency alleged non-exhaustion based on a prisoner’s failure to follow a particular grievance rule.

The Standards became effective August 20, 2012, but it is not clear whether they apply to incidents that occurred before that date in which administrative proceedings were pending on that date or were commenced after that date—an important question, since the Standards as noted forbid the imposition of time limits on sexual abuse grievances.

8. Compliance with Time Limits

The Supreme Court has held that § 1997e(a) requires “proper exhaustion,” which “demands compliance with an agency’s deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.” Thus a grievance rejected administratively as untimely does not suffice to exhaust. The Court was aware of, and apparently untroubled by, the very short deadlines of most prison grievance systems. The practical result of the “proper exhaustion”

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826 28 C.F.R. § 115.52(f).
827 28 C.F.R. § 115.52(g).
829 Woodford v. Ngo, 548 U.S. 81, 90-91 (2006). Cf. Hopkins v. Coplan, 2007 WL 2264597, *3-4 (D.N.H., Aug. 6, 2007) (holding that where there was no time limit when the plaintiff’s claim arose, but one was instituted later, the plaintiff was obliged to comply with that time limit as measured from the date it was promulgated).
830 See, e.g., Scott v. Ambani, 577 F.3d 642, 647 (6th Cir. 2009).
831 The plaintiff in Woodford had missed a 15-day deadline, and the Court noted that such deadlines are typically 14 to 30 days according to the United States and even shorter according to the plaintiff. Woodford, 548 U.S. at 95-96. The dissenting opinion cited a case from a juvenile facility involving a 48-hour time limit. Id. at 2403 (citing Minix v. Pazera, 2005 WL 1799538, *2 (N.D.Ind., July 27, 2005)); see Whitener v. Buss, 268 Fed.Appx. 477, 478-79 (7th Cir. 2008) (unpublished) (dismissing claim of prisoner who missed a 48-hour grievance deadline because he needed the relevant officers’ names and it took a week to get them, and he didn’t ask for waiver of the time limit). At least one grievance system has a 24-hour time limit. Franklin v. Beth, 2008 WL 4131629, * 4 (E.D.Wis., Sept. 4, 2008).
holding and short deadlines is that prisoners are unable to correct their administrative filings when they discover mistakes or simply develop a better understanding of what they must do.\textsuperscript{832} This problem may have been mitigated for sexual abuse complaints by the National Standards to Prevent, Detect, and Respond to Prison Rape, recently promulgated under the Prison Rape Elimination Act, which provide: “The agency shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse.”\textsuperscript{833} To date there seems to be no case law addressing the interpretation or enforceability of this provision.

The \textit{Woodford} Court based its holding on its view that Congress intended the statutory term “exhausted” to mean what it means in administrative law, and noted that habeas corpus exhaustion law was to similar effect.\textsuperscript{834} It did not make clear how absolute and inflexible its “proper exhaustion” rule is. Though relying on the understandings of exhaustion in administrative and habeas law, it did not address whether or to what extent it would also recognize administrative law and habeas exceptions to exhaustion requirements.\textsuperscript{835} Nor did it say to what extent federal courts are free to re-examine administrative determinations that a grievance is untimely. Lower courts are divided on this point, as to procedural determinations generally and not just time limits.\textsuperscript{836} Some courts have held that grievance bodies’ determinations are essentially unreviewable.\textsuperscript{837} Most, however, have independently assessed such determinations when they are disputed, finding in some cases that officials have violated their own rules, relied on supposed rules that do not appear in the policy, or have simply miscounted the time.\textsuperscript{838} As noted in the previous section, the cases exercising independent scrutiny have the better of the argument.

One court has rejected an argument that a five-day grievance filing deadline violates the “open court” provision of the state constitution. Brewer v. Corrections Corp. of America, 2010 WL 398979, *5 (E.D.Ky., Jan. 27, 2010), \textit{motion to amend denied}, 2010 WL 2464967 (E.D.Ky., June 15, 2010).\textsuperscript{839} For example, in \textit{Wilbert v. Quarterman}, 647 F.Supp.2d 760, 767-68 (S.D.Tex. 2009), the plaintiff was injured in a transportation van. His grievance noted that there were no seatbelts, but did not explicitly allege deliberate indifference; he requested only the accident report and continuing medical treatment. Some months later, he filed a grievance specifically articulating a deliberate indifference claim, which was rejected as untimely. The court held that his first grievance did not exhaust the deliberate indifference claim and the untimeliness of the second grievance mandated dismissal of his claim. \textit{See Williams v. Williams}, 2013 WL 6210642, *4 (S.D.Ga., Nov. 27, 2013) (where prisoner made errors in his informal grievance, which was returned to him only after the deadline for re-filing had expired, he was deemed to have procedurally defaulted); \textit{Crane v. Deluna}, 2009 WL 3126279, *3 (E.D.Cal., Sept. 23, 2009) (plaintiff sent his appeal to the wrong place and by the time he retrieved it and sent it to the right place, the deadline had expired).\textsuperscript{832, 833, 836, 837, 838, 839}

\textit{See} Wall v. Holt, 2007 WL 89000, *3-4 (M.D.Pa., Jan. 9, 2007) (holding timeliness is measured by when grievance appeal arrives under Bureau of Prisons’ regulation, notwithstanding “prison mailbox” rule and claim that the appeal was mailed in plenty of time); Lindell v. O’Donnell, 2005 WL 2740999, *18 (W.D.Wis., Oct. 21, 2005) (holding that the court could not review an administrative finding of untimeliness even though, the plaintiff alleged that he had not received notice that a letter had been confiscated until almost a year afterward, and it was impossible for him to file timely because of the lack of notice).\textsuperscript{837}

\textit{See} Bugge v. Roberts, 430 Fed.Appx. 753, 756 (11th Cir. 2011) (unpublished) (rejecting decision that appeal was late, where grievance body accepted a late grievance and decided the merits, and appeal was timely with respect to that decision); Hurst v. Hantke, 634 F.3d 409, 411-12 (7th Cir. 2011) (rejecting determination of lack of good cause to file late grievance), \textit{cert. denied}, 132 S.Ct. 168 (2011); Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) (holding district court should have determined whether plaintiff’s grievance fell into an exception to the time limits,
The Second Circuit has addressed compliance with time limits in the framework of its earlier decisions holding that failure to exhaust or to exhaust properly can be justified under “circumstances which might understandably lead usually uncounseled prisoners to fail to grieve in the normally required way,”839 such as prisoners’ misunderstanding of the exhaustion requirement840 or of the relevant prison regulations,841 though it noted that those were not even though state officials had rejected it as untimely); Williams v. Franklin, 302 Fed.Appx. 830, 832 (10th Cir. 2008) (rejecting determination of untimeliness that was obviously wrong); LaPointe v. Bienovidas, 2013 WL 3439905, *7 (D.Ariz., July 9, 2013) (noting that plaintiff’s grievances had been rejected as untimely, but were not); Jaros v. Illinois Department of Corrections, 2013 WL 5546189, *3 (S.D.Ill., Oct. 8, 2013) (holding prison officials were “demanding the prisoner do more than the administrative rules require” when they measured timeliness of an appeal by when it was received and not when it was sent, under a rule that said appeal must be “submitted” within 30 days); August v. Caruso, 2013 WL 5291577, *7 n.6 (E.D.Mich., Sept. 19, 2013) (rejecting officials’ time calculation, holding that computing a time limit from a date the plaintiff had no notice of is “would essentially require her to guess her Step III appeal’s due date, a result the Court will not countenance”), report and recommendation adopted, 2013 WL 6816472 (E.D.Mich., Dec. 24, 2013); Dewalt v. Pitts, 2013 WL 4051704, *1 (S.D.Ill., Aug. 11, 2013) (rejecting conclusion that grievance was submitted a day late); Talley v. Knop, 2013 WL 2232302, *5 (S.D.Ill., May 19, 2013) (rejecting decision that grievance was late, where prisoner had properly filed it as an original grievance and not an appeal); Faught v. CCA, 2013 WL 1729123, *2-*3 (D.Idaho, Apr. 22, 2013) (declining to dismiss for non-exhaustion where plaintiff’s grievance was mistakenly rejected as time-barred; rejecting argument that plaintiff should have filed a new grievance clarifying his claim, since the grievance policy did not require such action); Montoya v. Raman, 2012 WL 2358631, *4 (E.D.Cal., June 20, 2012) (rejecting administrative finding of untimely appeal where the plaintiff attested to appealing timely and nothing in the record contradicted his account), report and recommendation adopted, 2012 WL 2995491 (E.D.Mich., July 23, 2012); Joseph v. Michigan Dept. of Corrections, 2012 WL 395534, *5 (E.D.Mich., Feb. 7, 2012) (rejecting finding of untimeliness based on court’s review of documentation); Lemond v. Pienkos, 2011 WL 6012546, *3 (S.D.Ind., Nov. 30, 2011) (rejecting the defendants’ claim of laches and holding that equitable considerations weighed in plaintiff’s favor where he was incapacitated during the time for filing a grievance and was initially misinformed about his ability to file a late grievance); see Appendix A for further authority on this point; see also Miller v. Coning, 2014 WL 808023, *6 (D.Del., Feb. 28, 2014) (rejecting defense lawyers’ argument that timeliness of an assault claim should be measured from the time of the creation of the risk that led to the assault); Sims v. Piper, 2008 WL 3318746, *3-*4 (E.D.Mich., Aug. 8, 2008) (grievance rules said a grievance appeal is filed on the date sent by the prisoner, not the date received); Armitige v. Cherry, 2007 WL 1751738, *5 (S.D.Tex., May 30, 2007) (stating in dictum that a grievance’s timeliness is determined in the same way as courts determine when a claim accrues, based on when the prisoner should have known he had a claim (in this case that his broken leg had been misdiagnosed). In Merlino v. Westwood, 2007 WL 4326803, *4-*5 (E.D.Mich., Dec. 10, 2007), the court rejected defendants’ claim of untimeliness based on its own time calculation under defendants’ rules, but it is not clear whether the grievance was actually rejected as untimely. In Escobedo v. Miller, 2009 WL 2605260, *5 (C.D.Ill., Aug. 25, 2009), the grievance was decided on its merits though untimely at the initial stage, and then dismissed as untimely on appeal even though the appeal was timely; the court held that the dismissal was improper and plaintiff had exhausted. In Schreane v. Keffer, 2010 WL 4068782, *5-*6 (W.D.Da., Sept. 23, 2010), report and recommendation adopted, 2010 WL 4068773 (W.D.Da., Oct. 14, 2010), the court found a factual dispute barring summary judgment where the plaintiff alleged and supported that he had mailed an appeal, but the Bureau of Prisons had no record of it. This decision is at least implicitly in conflict with Wall v. Holt, cited in the previous note, which enforced a rule stating that an appeal is deemed filed when the BOP receives it. If the BOP never receives it, by the logic of Wall, it was never filed, and the plaintiff is out of luck.

One court has held that a grievance rule stating that a prisoner “should” file within 15 days, not that he “must” file within 15 days, is not a mandatory rule and failing to meet it does not render a grievance untimely. Edwards v. Dwyer, 2008 WL 243943, *8 (E.D.Mo., Jan. 25, 2008), motion to amend denied, 2008 WL 687419 (E.D.Mo., Mar. 11, 2008).

839 Williams v. Comstock, 425 F.3d 175, 176 (2d Cir. 2005) (per curiam). The court held that absent an explanation for more than a small part of the plaintiff’s two-year delay, “the failure to timely file the grievance in accordance with IGP rules amounted to a failure to exhaust administrative remedies in this case.” 425 F.3d at 177.

840 Williams, id. (citing Rodriguez v. Westchester County Jail Correctional Dep’t, 372 F.3d 485 (2d Cir. 2004)).
necessarily the only circumstances to justify failure to exhaust. For example, a reasonable if mistaken appreciation of the facts, not remedied until after the grievance deadline, may also justify non-exhaustion or result in unavailability of a remedy. As noted in the previous section, this framework appears to survive Woodford, since the kinds of fact patterns addressed in Second Circuit law were not addressed and were not before the Court in Woodford.

Regardless of the state of the justification/special circumstances rule, circumstances that prevent a prisoner from filing timely would mean that the grievance system was not an “available” remedy for purposes of the exhaustion rule; Woodford did not purport to construe

\footnote{Williams, id. (citing Giano v Goord, 380 F.3d 670, 677 (2d Cir. 2004)); see Bellamy v. Mount Vernon Hosp., 2008 WL 3152963, *5 (S.D.N.Y., Aug. 5, 2008) (where allowance for late grievances was limited to 45 days after an “alleged occurrence,” and the plaintiff thought the “occurrence” was his surgery and not his knowledge of its side-effects, he reasonably believed no remedy remained available to him); Sims v. Rewerts, 2008 WL 2224132, *5-6 (E.D.Mich., May 29, 2008) (declining to dismiss where plaintiff failed to comply with a time limit that had been changed without notice); Lampkins v. Roberts, 2007 WL 924746, *2-3 (S.D.Ind., Mar. 27, 2007) (refusing to dismiss for missing a five-day time deadline where it did not appear in the materials made available to prisoners).}

\footnote{Williams, 425 F.3d at 176. Indeed, one of the court’s other decisions holds that a prisoner who was deterred from exhausting timely by threats or other coercion by prison staff might also be justified in having failed to exhaust, or the court might find that remedies were unavailable to that prisoner, depending on the severity of the circumstances. Hemphill v. New York, 380 F.3d 680, 690-91 (2d Cir. 2004). Following Hemphill, recent district court decisions have held that prisoners who did not exhaust because of assaults and/or threats until after they had been transferred were justified in failing to exhaust timely. Lunney v. Bruner, 2007 WL 1544629, *9-10 (S.D.N.Y., May 29, 2007), objections overruled, 2007 WL 2050301 (S.D.N.Y., July 18, 2007); Thomas v. Cassleberry, 2007 WL 1231485, *2 (W.D.N.Y., Apr. 24, 2007).}

\footnote{In Borges v. Piatkowski, 337 F.Supp.2d 424, 427 & n.3 (W.D.N.Y. 2004), the court held that a prisoner who did not have reason to know he had a medical care claim until he had been transferred to another prison and the 14-day deadline had long expired had no available remedy, or alternatively was justified by special circumstances in not exhausting. Accord, Macahilas v. Taylor, 2008 WL 220364, * 4-5 (E.D.Cal., Jan. 25, 2008) (refusing to measure timeliness from earlier medical visits where prisoner said he did not know the extent of his problem until he was later hospitalized; relying on Borges), report and recommendation adopted, 2008 WL 506109 (E.D.Cal., Feb. 22, 2008); see Brazil v. Gomez, 2011 WL 7040709, *5 (C.D.Cal., Oct. 28, 2011) (declining to dismiss for non-exhaustion where plaintiff did not grieve an assault timely but tried to grieve it only when he learned of information withheld by prison authorities that his assailant had a long record of violent attacks), report and recommendation adopted, 2012 WL 122813 (C.D.Cal., Jan. 13, 2012). In Harbison v. Little, 2007 WL 6887552, *2 (M.D.Tenn., July 19, 2007), without invoking the notion of special circumstances, the court simply rejected the defendants’ interpretation of their time limit, holding that a challenge to the state’s lethal injection protocol was timely based on the date of its disclosure to plaintiff, rejecting the argument that it the time limit should be measured from the conclusion of direct review in the underlying criminal case, or the state’s adoption of lethal injection as its means of execution. But see Harvey v. Jordan, 605 F.3d 681, 684 (9th Cir. 2010) (holding time for filing grievance began to run when excessive force was used, not later when plaintiff discovered the seriousness of his injury, since he could have filed based on the use of force incident); Walker v. Bradly, 2010 WL 3037528, *2 (W.D.Mich., July 30, 2010) (similar to Harvey; court treats question as one of accrual of claim under federal law); Castro-Parra v. Corrections Corp. of America, 2009 WL 1178710, *6 (D.Ariz., Apr. 30, 2009) (plaintiff failed to exhaust a claim of inadequate medical treatment when he did not grieve until he did not grieve until he learned that his loss of vision was permanent); Lindell v. O’Donnell, 2005 WL 2740999, *18 (W.D.Wis., Oct. 21, 2005) (upholding finding of untimeliness even though the prisoner did not have notice of the violation until long after the time limit had passed).}

\footnote{Harvey v. Jordan, 605 F.3d 681, 684 (9th Cir. 2010) (where prisoner received favorable grievance decision which was not carried out, but appeal time limit had passed before non-compliance was apparent, plaintiff exhausted); Nunez v. Duncan, 591 F.3d 1217, 1226 (9th Cir. 2010) (holding remedy was unavailable and prisoner’s lack of timely exhaustion excused where Warden led plaintiff to believe he had to have a particular document to appeal, and he spent months trying to get it); Days v. Johnson, 322 F.3d 863, 867-68 (5th Cir. 2003) (holding remedy unavailable where prisoner was injured and unable to write during the prescribed time period for filing); Greenup v. Lee, 2014 WL 471715, *4 (W.D.La., Feb. 5, 2014) (holding remedy unavailable and time limit tolled during period of physical and mental incapacity); Booker v. South Carolina Dept. of Corrections, 2013 WL 5332993, *7 (D.S.C.,
the statutory term “available.” Nor did Woodford disturb the holdings of lower courts including the Second Circuit that under some circumstances prison officials may be estopped from raising a defense of non-exhaustion. However, there are traps here for unwary litigants. Courts have held that if the obstacle to filing a timely grievance is an inability fully to comply with grievance rules, the prisoner should file the non-compliant grievance and explain the reason for non-compliance. A number of courts have held that under those circumstances, a prisoner should file a grievance when the obstacle to exhaustion is removed—e.g., after transfer away from a threatening situation, or after recovery from a disabling medical condition. That is, the

Aug. 14, 2013) (declining to dismiss where plaintiff stated without contrary evidence that he timely placed his grievance in a grievance box as instructed, rather than personally delivering it), report and recommendation adopted in part, rejected in part on other grounds, 2013 WL 5332915 (D.S.C., Sept. 23, 2013); Ekene v. Cash, 2013 WL 3811725, *4-5 (C.D.Cal., July 19, 2013) (declining to dismiss where plaintiff missed the appeal time limit because the prison mail room delayed for ten days notifying plaintiff that he had not provided sufficient postage to mail it; prisoners had no means of knowing the correct postage themselves); Johnson v. Juvera, 2012 WL 4008942, *7 (D.Ariz., Sept. 12, 2012) (holding remedy unavailable where prisoner could not remember events because of his injuries and could not timely obtain necessary information from officials); Dodson v. Box, 2012 WL 2721914, *3 (N.D.Ind., July 9, 2012) (refusing to grant summary judgment for non-exhaustion where plaintiff’s grievance was late because of failure to provide forms timely); Lang Vo Tran v. Illinois Dept. of Corrections, 2011 WL 816630, *2, 7 (S.D.Ill., Mar. 1, 2011) (declining to dismiss where plaintiff submitted appeal timely but for unexplained reasons it arrived weeks late); see Appendix A for additional authority on this point; see also § IV.G.2, below.

Dominguez v. Rosas, 2011 WL 8614834, *5 (C.D.Cal., Nov. 3, 2011). But see Nunez v. Duncan, 591 F.3d 1217, 1226 (9th Cir. 2010) (holding remedy was unavailable and untimely grievance was excused where prisoner reasonably believed he could not appeal without a document it took him months to obtain).


prisoner should file an untimely grievance notwithstanding the holding of Woodford v. Ngo that an untimely grievance does not satisfy the exhaustion requirement.\footnote{This is the sort of counter-intuitive proposition that serves only to victimize unsophisticated litigants, and a number of courts have rejected it.\footnote{A particularly absurd example of this argument was rejected in}

transferred to the “safety” of another state); Patterson v. Goord, 2002 WL 31640585, *1 (S.D.N.Y., Nov. 21, 2002) (holding allegations of staff threats insufficient to justify late grievance where prisoner failed to submit grievance promptly upon transfer from prison where he was being threatened).


\footnote{Some grievance systems do explicitly address this situation by providing, e.g., that “[w]hen a grievance cannot be filed because of circumstances beyond the inmate’s control, the time will begin to start from the date in which such circumstances cease to exist.” Davitt v. Centric, 2010 WL 2926140, *3 (D.Nev., May 25, 2010) (quoting prison rules), report and recommendation adopted, 2010 WL 2926135 (D.Nev., July 19, 2010); see Perez v. Watts, 2013 WL 3367321, *4 (E.D.Tex., July 3, 2013) (holding prisoner who was transferred twice before he could file a grievance should have filed one at his final destination and requested that its lateness be excused), appeal dismissed, No. 13-40784 (5th Cir., Aug. 12, 2013); Morales v. Putnam, 2012 WL 2861436, *10 (M.D.Pa., June 7, 2012) (holding remedy cannot be deemed unavailable until grievance officials have denied request for late grievance), report and recommendation adopted, 2012 WL 2861592 (M.D.Pa., July 11, 2012).}

\footnote{Ollison v. Vargo, 2012 WL 5387354, *2-3 (D.Ore., Nov. 1, 2012) (holding remedy appeared “effectively unavailable” to prisoner who filed a grievance untimely because he was mentally and physically incapable of filing during the prescribed period and the grievance system did not allow late grievances); Peoples v. Corizon Health, Inc., 2012 WL 1854730, *3 (W.D.Mo., May 21, 2012) (declining to dismiss for non-exhaustion where prisoner was incapacitated during the period when a grievance would have been timely without a showing by defendants that a late grievance would have been accepted); Hunter v. Indiana Dept. of Corrections, 2009 WL 3199170, *4-6 (N.D. Ind., Sept. 29, 2009) (grievance deadline was lengthened but plaintiff did not know of the change; court declines to hold he should have filed a late grievance); Banks v. Lappin, 2009 WL 2486341, *5 (M.D.Pa., Aug. 10, 2009) (absent controlling precedent, and given evidence that plaintiff’s exhaustion was obstructed by prison personnel, “the court will not impose this added burden”); Cotton-Schrichte v. Peate, 2008 WL 3200775, *4 (W.D.Mo., Aug. 5, 2008) (prisoner who was raped by a staff member and threatened into silence “was not required to file a grievance after the threats were removed and outside of the time allowed for filing it, on the hope that an administrator would exercise discretion and process the grievance. For the court to dismiss a case for failure to exhaust under these circumstances would be inherently unjust.”); Bellamy v. Mount Vernon Hosp., 2008 WL 3152963, *5 (S.D.N.Y., Aug. 5, 2008) (declining to dismiss where prisoner reasonably believed his claim was time-barred before he had an opportunity to grieve); Rivera v. Management & Training Corp., 2008 WL 2397418, *3 (D.Ariz., June 10, 2008) (holding prisoner who could not initially grieve because he was transferred out of the prison system was not required to file an untimely grievance when he was returned months later); McManus v. Schilling, 2008 WL 682577, *8 (E.D.Va., Mar. 7, 2008) (holding prisoner whose appeal deadlines passed because grievances responses were not delivered to him untimely had no available remedy); Williams v. Hurley, 2007 WL 190}
**Goebert v. Lee County,*** in which the grievance appeal procedure was shown to be unknown to the prisoners; defendants argued that the plaintiff should have filed a grievance when she learned of the procedure through discovery in the litigation, three years after the expiration of the five-day appeal deadline. The court stated that “an administrative remedy that was not discovered, and which could not have been discovered through reasonable effort, until it was too late for it to be used is not an ‘available’ remedy.”

In *Woodford*, the challenged condition was ongoing, and one would think that the plaintiff’s grievance was timely insofar as it addressed the current and continuing state of affairs, as the prisoner argued in filing a second grievance challenging the administrative finding of untimeliness. The majority ignored this issue and the second grievance. A holding that an ongoing condition can be rendered immune to challenge by a procedural default at some earlier stage would deny access to courts in the most literal sense. It is therefore probably best to assume that *Woodford* simply did not rule on this issue and it remains open.

A number of courts have held, before and after *Woodford*, that a grievance about an ongoing complaint was necessarily timely. The most thorough examination of this issue is in

1202723, *6 (S.D.Ohio, Apr. 23, 2007) (holding that a prisoner whose cancer was not diagnosed until long after the 14-day grievance deadline had passed had no available remedy; no reference to any provision for filing untimely); see Sauder v. Green, 2011 WL 3608646, *5 (N.D.Fla., July 25, 2011) (holding prisoner who had been threatened, and then was transferred, sufficiently alleged unavailable remedies by reporting that he received additional threats after transfer), report and recommendation adopted, 2011 WL 3607667 (N.D.Fla., Aug. 16, 2011).

510 F.3d 1312 (11th Cir. 2007).

*Goebert*, 510 F.3d at 1324. The court added that exhaustion is to be assessed at the time the complaint is filed, and stated that a remedy “that is unavailable until after the lawsuit is filed is not an available remedy,” *id.*, leaving open the possibility that if the plaintiff had learned of the remedy at any time before suit was filed, the court might have expected her to use it.

*Woodford*, 548 U.S. at 120-21 (dissenting opinion).

a Michigan decision which held that a complaint about the treatment of a chronic medical condition was “‘ongoing,’ and a grievance that identifies the persistent failure to address that condition must be considered timely as long as the prison officials retain the power to do something about it.” The court rejected the analogy to Johnson v. Johnson, which held that a prisoner complaining of a series of sexual assaults could only sue about those that had occurred within the period encompassed by the grievance time limit. Distinguishing Johnson as addressing a series of discrete events, the Ellis court instead analogized to the treatment of complaints about chronic medical problems as “continuing violations” for limitations purposes. Other kinds of violations, of course, may be deemed to be discrete events as in Johnson, with the timeliness of each assessed separately.

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*continued confiscation of his legal material”) (emphasis supplied); Holloway v. Correctional Medical Services, 2007 WL 1445701, *5 (E.D.Mo., May 11, 2007) (holding grievance timely since plaintiff was grieving “the continual denial of information and treatment” that “continued to occur” when he filed his grievance and afterward); Abuhoran v. Morrison, 2005 WL 2140537, *6 (E.D.Pa., Sept. 1, 2005) (noting that finding of procedural default did not prevent plaintiffs from filing a new grievance challenging ongoing policy “at any time”); see also Parker v. Troutt, 2012 WL 2571322, *7-8 (W.D.Okla., May 31, 2012) (holding officials may have made remedy unavailable for ongoing grievance by instructing prisoner not to resubmit on grounds that it was untimely), report and recommendation adopted, 2012 WL 2571087 (W.D.Okla., July 2, 2012); Johnson v. Killian, 2009 WL 1787724, *1 (S.D.N.Y., June 23, 2009) (prior dismissals for non-exhaustion did not preclude prisoners from filing “timely grievances related to any ongoing conduct” and filing a new action); Richardson v. Raemisch, 2008 WL 5377872, *4 (W.D.Colo., Dec. 23, 2008) (where prisoner’s previous grievances were procedurally inadequate, those complaints did not necessarily bar a new grievance about an ongoing problem); Wilkerson v. Beitzel, 2005 WL 5280675, *3 n.4 (D.Md., Nov. 10, 2005) (holding plaintiff had exhausted, notwithstanding dismissal under rule that any complaint concerning a prison policy must be raised within 30 days of arrival at the prison, regardless of whether complaint is ongoing; court says policy “borders on sophistry”), aff’d, 184 Fed.Appx. 316 (4th Cir. 2006). Cf. Barker v. Belleque, 2011 WL 285228, *4 (D.Or., Jan. 26, 2011) (where prisoner said he had been constipated for 6½ weeks, timeliness of grievance should have been measured from more recent failures to respond to his medical care requests).


A few decisions have rejected any allowance for ongoing violations in applying grievance time limits.\textsuperscript{860} One has split the difference by holding that the prisoner must have

date before plaintiff learned of his medical treatment-related injury, though he had complained of the underlying problem earlier).

\textsuperscript{860} See Siggers v. Campbell, 652 F.3d 681, 693 (6th Cir. 2011) (distinguishing Johnson v. Johnson as involving a
“single government failure,” while this case involved several instances of interference with mail based on different prison rules); McCollum v. California Dept. of Corrections and Rehabilitation, 647 F.3d 870, 877 (9th Cir. 2011) (complaint of lack of chaplains' services in hospital did not exhaust subsequent complaints about these services
ongoing condition allowing the plaintiff to grieve the injury more than a year later); Bean v. Tribley, 2013 WL 3755768, *2 (W.D.Mich., July 16, 2013) (holding incidents of malfeasance with respect to meal service were
discrete events that could not be exhausted by an earlier grievance); Bailey v. Hobbs, 2012 WL 3038856, *5 (E.D.Ark., July 25, 2012) (holding reviews of administrative segregation were separate and discrete, and plaintiff
could not rely on later grievances to exhaust as to earlier reviews).

adopted, 2012 WL 553128 (D.Nev., Feb. 17, 2012), the plaintiff was denied protective custody in 2006 and 2007, and in 2009 was raped. The court held that his timely grievance about the rape was sufficient and it was not
necessary for him to have grieved the denials of PC at the time; “the focus of Plaintiff's deliberate indifference to a serious threat to his safety, starting in 2006, which culminated in the 2009 rape.” Id.

\textsuperscript{860} See Kimbro v. Huffman, 2013 WL 5936974, *5 (N.D.Cal., Nov. 4, 2013) (“A prisoner may not rely on a
continuing-violation theory to extend [the] deadline.”); Taylor v. Hubbard, 2013 WL 4776504, *7 (E.D.Cal., Sept. 4,
2013) (holding grievance untimely where it challenged regulations adopted ten months previously); Riego v.
Carroll, 893 F.Supp.2d 674, 679 (D.Del. 2012) (holding grievance about asbestos, mold, and other conditions was
untimely where plaintiff had been living in the unit for over two years); Payne v. Turley, 2012 WL 4024598, *4 (D.Utah, Sept. 12, 2012) (holding grievance about deprivation of religious visits time-barred though the deprivation
was ongoing); Garcia v. Lamarque, 2011 WL 3516144, *4 (N.D.Cal., Aug. 11, 2011) (stating time limit runs from
“the event or decision that [was] the subject of his complaint,” not “the time at which the prisoner felt the effects
of the event or discovered that he may have a viable legal claim”); Muwwakkil v. Johnson, 2010 WL 3585983, *3
(W.D.Va., Sept. 13, 2010) (holding grievance about policy change untimely measured from commencement of
case; no discussion of ongoing nature of problem), aff'd, 407 Fed.Appx. 685 (4th Cir. 2011) (unpublished);
the generalized complaint was somehow a continuing violation. To do so ‘would undermine the very pur
pose of the deadline, which is to limit the time to file a claim.’ . . . It would also be inconsistent with the policy judgments
underlying the Supreme Court's decision in [Woodford v.] Ngo.”) (citation omitted); Wallace v. Burbury, 2003 WL
21302947, *5 (N.D.Ohio, June 5, 2003) (declining to extend a 14-day deadline to reflect the five days of Passover
when the grievant was religiously prohibited from working; declining to treat religious infringement as a continuing
violation extending through Passover).

In some cases, the refusal to acknowledge ongoing violations is problematical because of the difficulty in
deciding when the time limit should be deemed to begin running. Thus, a prisoner su
who said he had been promised a motion for sentence reduction in return for his cooperation with an investigation of
staff corruption was held to have failed to exhaust because he did not file a grievance within 20 days of the time the
The court did not explain how a prisoner is supposed to know when prosecutorial inaction is "manifest." Similarly,
in Payne v. Turley, 2012 WL 4024598, *4 (D.Utah, Sept. 12, 2012), the court held that the seven-day grievance
time limit should be measured from “immediately after not hearing from Feland the second time.” When exactly was the
plaintiff to know that he would not hear from this individual? See also Kendrick v. Shaw, 2010 WL 3732085, *2
(N.D.Ill., Sept. 17, 2010) (holding prisoner who had been waiting for dental care for two years when he grieved did
medical grievance must be measured from date of denial of care, not beginning of medical problem, if there is a
deadline measured in days), report and recommendation adopted in part and remanded on other grounds, 2008 WL
grievance time limit runs from the beginning of a problem and not its end, so officials will have an opportunity to do

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requested relief from the condition, and been denied, within the relevant grievance deadline period.\textsuperscript{861}

Some grievance systems build in discretion to waive time limits; for example, the New York State grievance system permits late grievances for \textit{“mitigating circumstances,”}\textsuperscript{862} which include \textit{“e.g., attempts to resolve informally by the inmate,”} etc.\textsuperscript{863} Several courts have held that a prisoner may not rely on the existence of such discretion as an excuse for grieving untimely, or otherwise pursue a claim for which the plaintiff missed the grievance deadline, without actually having sought such a waiver.\textsuperscript{864} (Similarly, if there is an avenue of appeal or review of a

\textsuperscript{861} Hart v. Baldwin, 2009 WL 3055304, \textit{*16} (N.D.Iowa, Sept. 21, 2009) (\textit{“The court believes that prisoners are entitled to reset the applicable thirty day deadline with such a request. To find otherwise would, in effect, make the thirty day deadline into a thirty day statute of limitations, . . .”}), \textit{aff’d}, 372 Fed.Appx. 684 (8th Cir. 2010). \textit{Cf.} Barker v. Belleque, 2011 WL 285228, \textit{*4} (D.Or., Jan. 26, 2011) (holding timeliness of grievance should not have been assessed in relation to onset of medical condition but from denials of care within the grievance deadline period).

\textsuperscript{862} Graham v. Perez, 121 F.Supp.2d 317, 322 (S.D.N.Y. 2000) (quoting 7 N.Y.C.R.R. § 701.7(a)(1)). The current version of this provision appears in Appendix D, New York State Dep’t of Correctional Services Directive 4040, Inmate Grievance Program at § 701.6(g)(1)(i)(a) (July 1, 2006); \textit{see also} Appendices E and F (earlier versions). In this most recent revision, exceptions for mitigating circumstances must be requested no more than 45 days after an \textit{“alleged occurrence.”} Where a plaintiff misses the 45-day deadline for reasons that would otherwise excuse non-exhaustion, the remedy may be deemed unavailable. See Mandell v. Goord, 2009 WL 3123092, \textit{*11} (N.D.N.Y., Sept. 29, 2009) (plaintiff did not exhaust timely because of intimidation, and by the time he had been transferred to another prison the 45 days had expired); Bellamy v. Mount Vernon Hosp., 2008 WL 3152963, \textit{*5} (S.D.N.Y., Aug. 5, 2008) (allowing unexhausted grievance to go forward where ambiguity of \textit{“alleged occurrence”} where allowance for late grievances was limited to 45 days after an \textit{“alleged occurrence,”} and the plaintiff thought the \textit{“occurrence”} was his surgery and not his knowledge of its side-effects, he reasonably believed no remedy remained available to him).

\textsuperscript{863} Wallace v. Miller, 544 Fed.Appx. 40, 42 (3d Cir. 2013) (unpublished) (holding that remedy was not unavailable to prisoner whose grievance was untimely where the system provided options for an extension or for resubmission with explanation of the reason for delay); Patel v. Fleming, 415 F.3d 1105, 1110-11 (10th Cir. 2005) (holding that the existence of provisions for time extensions did not save the untimely grievance of a prisoner who never sought one); Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir.) (same as Patel), \textit{cert. denied}, 537 U.S. 949 (2002); Harper v. Jenkin, 179 F.3d 1311, 1312 (11th Cir. 1999) (holding that a prisoner whose grievance was dismissed as untimely was obliged to appeal, since the system provided for waiver of time limits for \textit{“good cause”}); Whitmore v. Jones, 2012 WL 4383888, \textit{*4} (W.D.Okla., July 16, 2012) (holding prisoner whose lateness in grieving was caused by staff delay failed to exhaust because he did not ask for an extension of time), \textit{report and recommendation adopted}, 2012 WL 4378129 (W.D.Okla., Sept. 25, 2012), \textit{aff’d}, 525 Fed.Appx. 865 (10th Cir. 2013); Porter v. Howard, 2012 WL 3194177, \textit{*6} (E.D.Mich., Jan. 6, 2012) (holding prisoner whose grievance was untimely, but who said he mailed it timely, “failed to provide any circumstance beyond his control as required by the prison’s policy”), \textit{report and recommendation adopted}, 2012 WL 3263778 (E.D.Mich., Aug. 9, 2012); Tafari v. Stein, 2008 WL 1991039, \textit{*6} (W.D.N.Y., May 5, 2008), \textit{reconsideration denied}, 2008 WL 3852150 (W.D.N.Y., Aug. 15, 2008); Cordova v. Frank, 2007 WL 2188587, \textit{*6} (W.D.Wis., July 26, 2007) (holding that a prisoner who clearly had good cause for his late grievance failed to exhaust because he didn’t explain the reason so officials could consider whether to excuse his lateness); Soto v. Belcher, 339 F.Supp.2d 592, 596 (S.D.N.Y. 2004) (holding that a prisoner who learned of his problem after the deadline passed should have sought to file a late grievance); Kaiser v. Bailey, 2003 WL 21500399, \textit{*6} (D.N.J., July 1, 2003) (holding that a prisoner who did not follow instructions to obtain verification that untimeliness was not his fault failed to exhaust); Roa v. Fowler, 2003 WL 21383264 (W.D.N.Y., Apr. 16, 2003); Steele v. New York State Dept. of Correctional Services, 2000 WL 777931 (S.D.N.Y., June 19, 2000), \textit{motion to vacate denied}, 2000 WL 1731337 (S.D.N.Y., Nov. 21, 2000); \textit{see} Whitener v. Buss, 268 Fed.Appx. 477, 478-79 (7th Cir. 2008) (dismissing claim of prisoner who missed a 48-hour grievance deadline because he needed the relevant officers’ names and it took a week to get them, and he didn’t ask for waiver of the time limit).
decision that a grievance is untimely, prisoners are obliged to use it to exhaust. However, if the grievance body decides an arguably out-of-time grievance, the court may construe the decision as granting the waiver. The next question is whether the court is bound by prison personnel’s disposition of such a request, and it is unsettled, as are other questions of courts’ ability to review prison officials’ application of their own procedures. One New York district court has held that since exhaustion is not jurisdictional, the court will decide whether late exhaustion is excused by mitigating circumstances such as transfer to another facility or the unavailability of grievance representatives to prisoners in a segregated unit. That approach is consistent with the Second Circuit’s observation, in finding a prisoner’s explanation for his late grievance inadequate, that “[w]e therefore do not find Williams’ justification persuasive” —implying that being persuaded of it could have made a difference in the outcome.

When a claim is dismissed for non-exhaustion, the deadline for administrative proceedings will almost always have passed. As noted, the Second Circuit has held that where

Contra, Ricketts v. AW of UNICOR, 2009 WL 2232467, *12 (M.D.Pa., July 24, 2009) (declining to dismiss for non-exhaustion where plaintiff, who did not seek an extension of time, had suffered catastrophic injuries and had included in his grievance the circumstances that would make clear the need for an extension).


See Smith v. Haag, 2011 WL 6012606, *5 (W.D.N.Y., Dec. 1, 2011) (rejecting argument that only conduct within the 21 days provided by the grievance deadline was exhausted, since grievance body decided merits of complaint of maltreatment going back more than a year). Many courts have reached the same result more simply by holding that a decision on the merits waives untimeliness, without reference to other rules for untimely grievances. See n. 879, below.

Graham, id. at 322 and n. 9; see O’Connor v. Featherston, 2002 WL 818085, *2 (S.D.N.Y., Apr. 29, 2002) (refusing to be bound by rejection of request to file a late grievance where the plaintiff had been kept in medical restriction for the 14 days in which he was required to file a timely grievance); Cardona v. Winn, 170 F.Supp.2d 131 (D.Mass. 2001) (holding that the grievance appeal deadline should be extended because the prisoner may have missed it out of “excusable confusion”); see also Lawyer v. Gatto, 2007 WL 549440, *7 (S.D.N.Y., Feb. 21, 2007) (holding that grievance supervisor’s rejection of claimed mitigating circumstances rendered the remedy unavailable, where earlier grievances had disappeared); Moore v. Louisiana Dept. of Public Safety and Corrections, 2002 WL 1791996, *4 (E.D.La., Aug. 5, 2002) (deciding to enforce 30-day time limit; declaring 30-day delay in filing complaint “not unreasonable” given that the plaintiff was a juvenile in state custody). But see Davis v. Rhoomes, 2009 WL 415628, *4, 6 (S.D.N.Y., Feb. 12, 2009) (treating administrative rejection of mitigating circumstances as conclusive); Cole v. Miraflor, 2006 WL 457817, *4 (S.D.N.Y., Feb. 23, 2006) (stating that prison officials’ determination regarding mitigating circumstances “is conclusive on the issue of exhaustion”); Patterson v. Goord, 2002 WL 31640585, *1 (S.D.N.Y., Nov. 21, 2002) (refusing to disturb finding of no mitigating circumstances where prisoner had waited six months after dismissal for non-exhaustion before filing a grievance); see also nn. 805-813, 837, above.

Williams v. Comstock, 425 F.3d 175, 176 (2d Cir. 2005) (per curiam) (emphasis supplied) (noting that the plaintiff’s grievance was two years late, and his explanation addressed only a short part of that time); accord, Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) (holding district court should have determined whether plaintiff’s grievance fell into an exception to the time limits, even though state officials had rejected it as untimely); Newman v. Duncan, 2007 WL 2847304, *3-4 (N.D.N.Y., Sept. 26, 2007) (upholding rejection of mitigating circumstances argument based on transfers, since the grievance program is available at all prisons, and since the plaintiff had a year without transfers before filing a grievance; holding mental and emotional effects of sexual assaults do not fall under Second Circuit’s “special circumstances” rule).

a failure to exhaust or to exhaust correctly was justified by special circumstances, the claim should be dismissed without prejudice if remedies remain available, but if not, the case should go forward (and if the case is dismissed and then remedies prove unavailable, it should be reinstated). That is, if the system will not entertain the plaintiff’s late grievance, the plaintiff need not exhaust. (The extent to which this special circumstances rule survives Woodford v. Ngo is, as stated, unclear.) The Seventh Circuit has adopted a similar rule. It is also unclear how readily prison systems will accept post-dismissal grievances under discretionary provisions for late filings. In New York, “referral back to the IGP from the courts” was once listed as an example of a “mitigating circumstance” justifying late filing, but that language was removed in a 2003 amendment. Some decisions, however, have simply directed that grievance officials consider grievances on their merits after dismissal for non-exhaustion.

The doctrine of equitable tolling, which several courts have held generally applicable to § 1997e(a), may excuse late grievance filings under some circumstances (though at least one court has said that equitable tolling is inapplicable to prison grievance procedures). In Gambina v. Dever, a prisoner had filed a grievance and been told that it had been referred to “the appropriate investigative authority,” at a time when his claim was not required to be grieved under that Circuit’s law. After the law changed in response to the Supreme Court decision in Booth v. Churner, and his case was dismissed for non-exhaustion, he promptly filed a new grievance, which was dismissed as untimely. The court held that the plaintiff, who “promptly and consistently made good faith efforts” to pursue his claims and was victimized by extraordinary circumstances, should have the benefit of equitable tolling, with the deadline for filing a grievance extended to 20 days (the grievance time limit) after he received the court’s decision dismissing his case. A similar equitable approach has been applied by one New York court to cases in which the defendants initially did not raise exhaustion in light of the case law at that time, then raised it after the Supreme Court decision in Porter v. Nussle. The court held that

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870 Brownell v. Krom, 446 F.3d 305, 313 (2d Cir. 2006); Giano v. Goord, 380 F.3d 670, 679-80 (2d Cir. 2004); Hemphill v. New York, 380 F.3d 680, 690-91 (2d Cir. 2004).
871 See Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008) (stating when “the failure to exhaust was innocent (as where prison officials prevent a prisoner from exhausting his remedies), . . . he must be given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround). . . .”), cert. denied, 556 U.S. 1128 (2009).
872 7 N.Y.C.R.R. § 701.7(a)(1); Appendix D at § 701.6(g)(1)(i)(a) (current version); see Appendices E and F (prior versions); Rivera v. Goord, 253 F.Supp.2d 753, 753 n.12 (S.D.N.Y. 2003) (quoting an earlier version of regulation). In Brownell v. Krom, 446 F.3d 305 (2d Cir. 2006), a prisoner attempted to exhaust his claim after dismissal for non-exhaustion in the district court, but his grievance was dismissed as untimely, despite facts that led the Second Circuit to find special circumstances justifying his initial failure to exhaust correctly.
873 See cases cited in nn. 266-271, above.
874 See nn. 202, above, and 1156-1157, below.
relieving the defendants of their procedural waiver of the exhaustion defense was conditioned on defendants’ permitting the plaintiff to exhaust late. 878

Even under a rule of strict compliance, untimely filing can be waived in the administrative process: a late filing that the system accepts and resolves on the merits satisfies the exhaustion requirement. 879 Results are mixed in cases where a decision addresses both timeliness and the merits, 880 and in cases found untimely and addressed on the merits at different stages of the process. 881 Rules that are not made known to the prisoners cannot be enforced to bar their suits, 882 a principle that should apply to time limits as well as other rules.

878 Rivera v. Goord, 253 F.Supp.2d 735, 753 (S.D.N.Y. 2003) (“In other words, DOCS cannot have it both ways.”). After dismissal, Mr. Rivera sought to exhaust, but his grievances were rejected as untimely. The court held that defendants were estopped from raising exhaustion under those circumstances and that the plaintiff showed special circumstances justifying his failure to exhaust. Rivera v. Pataki, 2005 WL 407710, *11-13 (S.D.N.Y., Feb. 7, 2005) (noting that “Rivera did the best he could to follow DOCS regulations while responding to an evolving legal framework”). Contra, Robertson v. Vandt, 2008 WL 752589, *8 (E.D.Cal., Mar. 19, 2008) (dismissing for non-exhaustion in situation like Rivera where prisoner’s grievance filed after change in law was dismissed as untimely).


In Jewkes v. Shackleton, 2012 WL 5332197 (D.Colo., Oct. 29, 2012), the court held timeliness had been forfeited by the grievance body, and that the individual employee defendant was bound by that forfeiture because the exhaustion requirement is designed to serve certain institutional purposes, and the grievance system at issue did not give individual employees a role in controlling the disposition of grievances. Jewkes, 2012 WL 5332197, *4-5. 880 Conyers v. Abitz, 416 F.3d 580, 585 (7th Cir. 2005) (holding claim exhausted where grievance was “principally rejected on the merits with an ambiguous secondary observation that it was untimely”). In Conyers, the court in dictum said that a claim “may” be procedurally barred if the grievance was rejected both on the merits and for untimeliness. Accord, Cobb v. Berghuis, 2007 WL 4557856, *1 (W.D.Mich., Dec. 21, 2007); see Scott v. Ambani, 2008 WL 597833, *2 (E.D.Mich., Feb. 29, 2008) (untimeliness was not waived where the merits were decided only at intermediate stages), aff’d in pertinent part, 577 F.3d 642 (6th Cir. 2009). But see Bugge v. Roberts, 430 Fed.Appx. 753, 756 (11th Cir. 2011) (unpublished) (where grievance body accepted a late informal grievance and decided the merits, and formal grievance was timely with respect to that decision, rejection of latter as late was erroneous); Kelley v. DeMasi, 2008 WL 4298475, *4 n.10 (E.D.Mich., Sept. 18, 2008) (final grievance appeal response citing untimeliness but also approving merits decisions at earlier stages waived timeliness issue); Cole v. Litscher, 343 F.Supp.2d 733, 741 (W.D.Wis. 2004) (holding that a grievance rejected on both grounds suffices to exhaust, since when the grievance process rules on an issue, the purpose of the exhaustion requirement is satisfied; the habeas rule is different because the purpose of habeas exhaustion is different), reconsideration denied, 2005 WL 318819 (W.D.Wis., Feb. 1, 2005).

One court has held that untimeliness was waived by prison officials where the grievance decision was not on the merits but on a different procedural ground (that the issue raised was disciplinary and therefore not grievable). Maraglia v. Maloney, 2006 WL 3741927, *7 (D.Mass., Dec. 18, 2006).

881 Compare Escobedo v. Miller, 2009 WL 2605260, *5 (C.D.Ill., Aug. 25, 2009) (where the grievance was decided on its merits though untimely at the initial stage, and then dismissed as untimely on appeal even though the appeal was timely, the dismissal was improper and plaintiff had exhausted) with Rogers v. Caruso, 2013 WL 1339684, *3
If a grievance system has no time limit, delay in filing cannot bar a prisoner’s claim for non-exhaustion,\footnote{Alexander v. Dickerson, 2008 WL 471715, *5-6 (W.D.La., Feb. 5, 2014) (holding grievance accepted at lower level but rejected as untimely at higher level did not exhaust), appeal dismissed, No. 13-1544 (6th Cir., Oct. 31, 2013); Gara v. Kelley, 2012 WL 3683556, *4 (S.D.Ill., Aug. 24, 2012) (same). See also Everett v. Ng, 473 Fed.Appx. 511, 513 (7th Cir. 2012) (holding that an untimely grievance decided on the merits did not exhaust where the plaintiff did not disclose how long he had actually had the basis for it; grievance personnel did not have fair notice of its lateness); Barnes v. Briley, 420 F.3d 673, 679 (7th Cir. 2005) (holding claim was not procedurally defaulted where an initial grievance was rejected as untimely but plaintiff later “restarted” the grievance process and received a decision on the merits); Cruz v. Tilton, 2009 WL 3126518, *3 n.3 (E.D.Cal., Sept. 24, 2009) (holding merits decision does not “automatically” waive timeliness defense; citing EEOC law but not PLRA law).} an unexhausted claim should be dismissed without prejudice, and the litigant will have the opportunity to seek to exhaust.\footnote{42 U.S.C. § 1997e(a). As to the meaning of “available,” see § IV.G, below.}

F. What Procedures Must Be Exhausted?

The PLRA requires the exhaustion of “such administrative remedies as are available.”\footnote{Freeman v. Snyder, 2001 WL 515258, *7 (D.Del., Apr. 10, 2001) (holding that the “vague, informal process described by the defendants is ‘hardly a grievance procedure’”). The Bayside court further held that a process that prison officials assert is optional and not mandatory and is not intended to modify or restrict access to the judicial process need not be exhausted. See nn. 194, 473-475, above, for additional authority on both sides of this question.} There is no particular degree of formality required of a grievance system; if it’s there and will address the prisoner’s problem, it must be exhausted.\footnote{Schonarth v. Robinson, 2008 WL 324292, *2 (W.D.Mich., Jan. 7, 2008).} Courts have, however, declined to require exhaustion of processes that do not appear organized or empowered to provide actual solutions to individual prisoners’ complaints; though they may be available, in effect, they are not remedies. Thus, one court has held that a process that has no authority over anything except to “‘make recommendations for change’ to administrative officials” need not be exhausted because that is not the type of “responsive action” envisioned in Booth.\footnote{In re Bayside Prison Litigation, 190 F.Supp.2d 755, 771-72 (D.N.J. 2002) (ruling on prison complaint and Ombudsman procedures); see Freeman v. Snyder, 2001 WL 515258, *7 (D.Del., Apr. 10, 2001) (holding that the “vague, informal process described by the defendants is ‘hardly a grievance procedure’”). The Bayside court further held that a process that prison officials assert is optional and not mandatory and is not intended to modify or restrict access to the judicial process need not be exhausted. See nn. 194, 473-475, above, for additional authority on both sides of this question.} Another has held that a prison transportation corporation failed to demonstrate an available remedy when its staff could give no coherent account of the processing of prisoner complaints by the company, and failed to...
show that remedies at the facilities to which they were transported could address problems in the company’s policies and procedures.\textsuperscript{888} Another has held that a “Warden’s Forum,” a body consisting of elected inmate representatives who alone have the right to raise issues there, was not an available remedy because the plaintiff did not have a “personal, direct right” to pursue a complaint before that body.\textsuperscript{889} These holdings only address gross structural characteristics of the supposed remedies;\textsuperscript{890} as previously noted, an argument that resort to a grievance system is futile is not cognizable under the PLRA.\textsuperscript{891} The prison’s rules will determine which remedy must be used if there is more than one.\textsuperscript{892}

Judicial remedies, including appeals from the agency to a court, need not be exhausted,\textsuperscript{893} though there has been a peculiar dispute about this point in South Carolina. In that state, there is


\textsuperscript{891} Thus, one court has held that a “Self-Initiated Progress Report” process, which permitted prisoners denied parole to seek reconsideration six months or more later and show that circumstances have changed, was not equivalent to a grievance system and need not be exhausted. Armstrong v. Beauclair, 2007 WL 1381790, *8-9 (D.Idaho, Mar. 29, 2007) (“It is clear that the SIPR is not a problem-solving mechanism. . . .”). (The court did not address the question whether the exhaustion requirement was even applicable to denial of parole, which arguably is not an issue of “prison conditions” subject to the exhaustion requirement. See § IV.B.2, above.) Similarly, a system that exists only on paper is not an available remedy. Thus, where it was alleged that “[t]here is no grievance committee here, your grievances are simply turned over to the person you file on and you get threatened,” the court could not dismiss for non-exhaustion. Martin v. Sizemore, 2005 WL 1491210, *1, *3 (E.D.Ky., June 22, 2005).

\textsuperscript{892} See n. 195, above.


\textsuperscript{894} Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir.) (“Exhaustion under § 1997e(a) is administrative only; a prisoner who uses all administrative options that the state offers need not also pursue judicial review in state court. . . .”), cert. denied, 537 U.S. 949 (2002); Jenkins v. Morton, 148 F.3d 257, 259-60 (3d Cir. 1998); Haskins v. Hawk, 2013 WL 1314194, *8 (D.Md., Mar. 29, 2013); Black v. Michigan Dept. of Corrections, 2012 WL 994768, *10
a line of cases holding that prisoners must appeal grievances to the state Administrative Law Court, and another line of cases holding the opposite, each one typically ignoring the contrary authority entirely. The relevant state statute describes this entity as “an agency and court of record within the executive branch” of the state. The cases requiring resort to the Administrative Law Court generally do not focus on the distinction between administrative and judicial remedies. The contrary cases, which do acknowledge the administrative/judicial distinction, have become much more numerous in recent years. Recent decisions ring new changes on the argument: “The South Carolina Administrative Law Court is a statutorily created hybrid. Under the APA, the Administrative Law Court is both a court of record and an executive branch agency.”

Therefore, the court held, prisoners must appeal to that court, but not further

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to the South Carolina Supreme Court. The court acknowledged that this court “performs quasi-judicial duties in a virtually identical manner to a traditional court,” but reasoned:

Although also a court, the Administrative Law Court is itself an administrative agency—one specifically created to provide impartial review of other agencies’ decisions. See S.C.Code Ann. § 1–23–600(A), (D) (describing the jurisdiction of the Administrative Law Court); see also Randolph R. Lowell, The Contested Case Before the ALC, in South Carolina Administrative Practice & Procedure 145, 148 (2d ed., S.C. Bar 2008) (discussing the mission of the Administrative Law Court). Thus, the Administrative Law Court is part of the available administrative remedies that an inmate must exhaust.

The flaw in this reasoning is that the question whether this court is part of the administrative remedy that § 1997e(a) requires prisoners to exhaust is ultimately a question of federal law, and there is no discussion of why requiring exhaustion of a court that has been placed in the executive branch is consistent with § 1997e(a)’s command to exhaust administrative remedies. One would think that the function of the court, which is acknowledged to remain “virtually identical” to that of a court, would carry more weight than its placement in the state’s governmental structure. To my knowledge there has been no substantial discussion of this question as one of federal law based on the PLRA’s purposes.

Other recent decisions hold that only disciplinary decisions must be appealed to the Administrative Law Court to exhaust. To complicate matters further, the state Supreme Court has now held that the Administrative Law Court lacks jurisdiction over disciplinary matters not involving the loss of good time, and other state courts have held that it lacks jurisdiction over facial challenges to prison policies, but claims outside these exceptions must be appealed to the court as a matter of state law.

Other legal rules unrelated to the PLRA may require exhaustion of judicial remedies in certain cases.

One court has held that where a prisoner does obtain judicial review of an administrative grievance decision, the judicial decision is not issue-preclusive in a subsequent federal action if the court applies a substantial evidence standard rather than de novo review.

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1. Prison and Non-Prison Remedies

The Supreme Court has said that the PLRA exhaustion requirement was designed to give “corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case,”903 and that “...compliance with prison grievance procedures, therefore, is all that is required by the PLRA to ‘properly exhaust.’”904 Though the question was not actually before the Supreme Court in these cases, lower courts have generally assumed or held that the PLRA requires, and is satisfied by, exhaustion of administrative remedies within prison systems and does not address remedies that may exist externally.905 (In theory, there could be a difference between the question whether exhaustion of internal remedies is necessary to satisfy the PLRA, and whether it is sufficient to do so, but since the discussion in the case law is about whether such remedies are within the scope of the exhaustion requirement at all, that distinction makes no difference for present purposes.) In some cases, there may be a question as to which prison’s internal remedies should be used. In most cases, the relevant remedy will be the one at the prison where the prisoner is held,906 though if the prisons’ rules specify otherwise, they will govern.

The most thorough explication of this point is in the Ninth Circuit’s holding in Rumbles v. Hill907 that administrative tort claims procedures need not be exhausted, and that nothing in the PLRA’s legislative history showed any intent by Congress to displace the prior understanding to that effect. It said:

The language of the PLRA, as well as the language of the pre-PLRA version of section 1997e, indicates that Congress had internal prison grievance procedures in mind when it passed the PLRA. That is, while Congress certainly intended to require prisoners to exhaust available prison administrative grievance procedures,

905 See O’Guinn v. Lovelock Correctional Center, 502 F.3d 1056, 1062-63 (9th Cir. 2007) (holding use of Department of Justice disability complaint process did not satisfy PLRA exhaustion requirement); Massey v. Helman, 196 F.3d 727, 733-34 (7th Cir. 1999), cert. denied, 532 U.S. 1065 (2001) (“if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, the prisoner must utilize that administrative system before filing a claim. . . . [C]ourts merely need to ask whether the institution has an internal grievance procedure. . . .”) (emphasis supplied); Alexander v. Hawk, 159 F.3d 1321, 1326 (11th Cir. 1998) (holding that “available” remedies under the PLRA refers to prison administrative remedy programs); see also Palmer v. Hatton, 2008 WL 142415, *6 (N.D.Cal., Jan. 14, 2008) (acquittal of a criminal charge did not exhaust as to disciplinary charge based on same events), motion to reopen denied, 2008 WL 2219889 (N.D.Cal., May 27, 2008).
906 Of course, the prisoner must use the administrative procedure of the institution or system where his or her problem arose. Acosta v. U.S. Marshals Service, 445 F.3d 509, 512-13 (1st Cir. 2006) (holding that a prisoner placed by the Marshals Service in several county jails and two federal prisons, but only used the Marshals’ complaint system, failed to exhaust either as to the jails or as to the Bureau of Prisons institutions); Benavidez v. Stansberry, 2008 WL 4279559, *2 (N.D.Ohio, Sept. 12, 2008) (federal prisoner in private prison must use that prison’s grievance system, not federal Bureau of Prisons system); Malik v. District of Columbia, 512 F.Supp.2d 28, 31 (D.D.C., Sept. 6, 2007) (noting prisoner complaining of conditions during transfer between two Corrections Corporation of America prisons was directed by CCA to the remedy of Transcor, which transported him). Concerning the U.S. Marshals Service, there appears to be considerable confusion over whether there exists an administrative remedy other than the Federal Tort Claims Act claims process. See n. 918, below.
there is no indication that it intended prisoners also to exhaust state tort claim procedures.\textsuperscript{908}

The court then cited the PLRA subsection immediately following the exhaustion requirement, noting that 42 U.S.C. § 1997e(b) “tellingly provides that ‘the failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action’ (emphasis added). ‘It thus appears that throughout § 1997e Congress is referring to institutional grievance processes and not state tort claims procedures.’”\textsuperscript{909} The decision continues:

Legislative history also suggests that the statutory phrase “administrative remedies” refers exclusively to prison grievance procedures. Senator Kyl, one of the co-sponsors of the PLRA, testified:

Mr. President, I join Senator Dole in introducing the Prison Litigation Reform Act of 1995. This bill will deter frivolous inmate lawsuits. . . . Section 7 will make the exhaustion of administrative remedies mandatory. Many prisoner cases seek relief for matters that are relatively minor and for which the prison grievance system would provide an adequate remedy.\textsuperscript{910}

This argument is further supported by the fact that the term “administrative remedies” clearly referred to internal prison remedies in the Civil Rights of Institutionalized Persons Act (CRIPA),\textsuperscript{911} predecessor to the PLRA,\textsuperscript{912} as shown by legislative history\textsuperscript{913} and judicial

\textsuperscript{908}Id. at 1069.
\textsuperscript{911}Under CRIPA, prisoners could be required to exhaust “administrative remedies” that were “plain, speedy, and effective” before proceeding with a § 1983 suit. 42 U.S.C. § 1997e(a)(1)(1990).
\textsuperscript{912}Intent and usage in predecessor statutes can be highly relevant in construing contemporary statutes. \textit{See}, e.g., Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169-83 (1963); U.S. v. Awadallah, 349 F.3d 42, 54 (2d Cir. 2003), \textit{cert. denied}, 543 U.S. 1056 (2005); Moretti v. C.I.R., 77 F.3d 637, 643 (2d Cir. 1996) (relying on judicial interpretation of term in predecessor statute where current statute used that same term).
interpretation. When enacting the PLRA, Congress must have been aware that courts had equated the term “administrative remedies” with internal prison grievance procedures and it gave no indication that the established judicial interpretation was contrary to its current intent.

In cases involving the Federal Tort Claims Act, courts have generally held, consistently with *Rumbles*, that an FTCA administrative filing is neither necessary nor sufficient to exhaust a *Bivens* claim against prison personnel, but also that exhaustion of the Bureau of Prisons Administrative Remedy Procedure is neither necessary nor sufficient to exhaust an FTCA claim even if it is arguably a “prison conditions” case. In effect, the FTCA and *Bivens* claims are treated as separate worlds for exhaustion purposes, without much theoretical discussion of why. An exception may or may not exist at the U.S. Marshals Service, where court decisions

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914 Farmer v. Brennan, 511 U.S. 825, 847 (1994) (referring, under CRIPA, to availability of “adequate prison procedures” and “internal prison procedures”) (emphasis added); McCarthy v. Madigan, 503 U.S. 140, 150 (1992) (stating that CRIPA “implies a limited exhaustion requirement . . . provided that the underlying state prison administrative remedy meets specified standards”) (emphasis added) Patsy v. Board of Regents of State of Fla., 457 U.S. 496, 509 (1982) (noting intent of Congress to “divert[ ] certain prisoner petitions back through state and local institutions, and also to encourage the States to develop appropriate grievance procedures”).

915 See, e.g., Lorillard v. Pons, 434 U.S. 575, 581 (1978) (“[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”) That presumption is strengthened where Congress shows a “willingness to depart” from other aspects of the earlier statute, *id.* at 581, as it the case with CRIPA and the PLRA.


appear to indicate that even the agency does not know what if any remedy exists for *Bivens* claims or whether the FTCA procedure is supposed to be used for them.\(^{918}\) If an Administrative Remedy Request underlying a *Bivens* claim is rejected with instructions to file a tort claim, that disposition is reasonably viewed as telling the prisoner no further relief is available and the *Bivens* claim is exhausted.\(^{919}\)

Courts have ruled consistently with *Rumbles* in connection with other non-prison administrative remedies, holding that the PLRA does not call for exhaustion of the impartial hearing requirement of the Individuals with Disabilities in Education Act,\(^ {920}\) a state statutory procedure for seeking a declaratory judgment from a state agency,\(^ {921}\) a state statutory “citizen’s complaint” procedure,\(^ {922}\) state medical malpractice administrative procedures,\(^ {923}\) dispute resolution procedures under the Interstate Corrections Compact,\(^ {924}\) or even an Office of the Corrections Ombudsman in the state Department of the Public Advocate, since that office is

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Bureau of Prisons, 2003 WL 1626674, *2 (N.D.Ill., Mar. 25, 2003) (stating that Federal Tort Claims Act administrative claim requirement is intended to give the government agency notice so it can investigate and prepare for settlement negotiations; the PLRA requirement is intended to curtail suits by giving prison officials an opportunity to solve the problem first); Alvarez v. U.S., 2000 WL 679009 (S.D.N.Y., May 24, 2000) (noting that federal grievance procedures exclude tort claims and refer prisoners to the Federal Tort Claims Act administrative claim procedure).

In *Banks v. One or More Unknown Named Confidential Informants of Federal Prison Camp Canaan*, 2008 WL 2563355, *4 (M.D.Pa., June 24, 2008), *reconsideration denied*, 2008 WL 2810156 (M.D.Pa., July 21, 2008), the court described FTCA exhaustion as “add[ing] an additional level of review” after PLRA exhaustion. This holding is unique to my knowledge.

\(^{918}\) In *Abrahams v. U.S. Marshals Services*, 2007 WL 3025073, *3 (D.V.I., Aug. 14, 2007), the government admitted that there were no other administrative remedies in the Marshals Service, argued that under those circumstances, the plaintiff was obliged to exhaust the FTCA process. The court disagreed. *See also* Perotti v. Medlin, 2009 WL 2424547, *8-11 (N.D.Ohio, Aug. 3, 2009) (denying summary judgment for non-exhaustion where the Marshals Service presented contradictory evidence whether a *Bivens* claim has its own administrative remedy or prisoners are expected to use the FTCA remedy). *But see* Acosta v. U.S. Marshals Service, 445 F.3d 509, 512-13 (1st Cir. 2006) (holding that a prisoner placed by the Marshals Service in several county jails and two federal prisons, but who only used the Marshals’ complaint system, failed to exhaust either as to the jails or as to the Bureau of Prisons institutions).


\(^{920}\) Handberry v. Thompson, 2003 WL 194205, *11 (S.D.N.Y., Jan. 28, 2003) (“In Porter v. Nussle[, the Court noted that Congress wished to afford corrections officials the opportunity to address complaints internally. . . . This observation is inconsistent with a rule requiring exhaustion of a remedy which is outside of the prison and which does not involve prison authorities.”), aff’d in part, vacated in part, and remanded on other grounds, 446 F.3d 335 (2d Cir. 2006). On appeal, the court did not address whether IDEA exhaustion was required by the PLRA, but held that if it was, the IDEA remedy was not “available” for purposes of plaintiffs’ claims. 446 F.3d at 344 n.3.


\(^{924}\) Oquendo v. Davis, 2010 WL 2465447, *2-3 (E.D.Cal., June 11, 2010) (Florida prisoner who needed California legal materials should have filed a grievance in Florida).
outside the corrections agency. The Prison Rape Elimination Act (PREA) does not substitute for, or exempt prisoners from, prison grievance procedures, although the National Standards to Prevent, Detect, and Respond to Prison Rape, recently promulgated pursuant to PREA, contain some requirements for the way grievance systems handle sexual abuse complaints.

Similarly, the Ninth Circuit has held that exhausting the U.S. Department of Justice’s disability complaint procedure does not exhaust for PLRA purposes, citing the Supreme Court’s characterization of the exhaustion requirement as addressing prison remedies, and not the *Rumbles v. Hill* holding. In doing so, it ignored (correctly, in my view) the dispute over this question in New York State, in which the New York State Department of Correctional Services raised, and then abandoned, the argument that prisoners with complaints under Title II of the Americans with Disabilities Act must exhaust the DOJ procedure in addition to the prison grievance system. The results in New York were mixed, with some courts requiring such exhaustion on the ground that the statute’s plain language requires resort to “such administrative remedies as are available,” rejecting the argument that that remedy need not be exhausted because it does not result in action but only in findings or advice, and that it does not even investigate most individual complaints submitted to it. Other courts, however, held that exhaustion of the DOJ remedy was not required. The question became moot as to the state Department of Correctional Services (DOCS) because, after one decision requiring DOJ

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927 See § IV.E.7.i, above.
928 O’Guinn v. Lovelock Correctional Center, 502 F.3d 1056, 1062-64 (9th Cir. 2007).
931 Burgess, 2004 WL 527053, *4. Plaintiff submitted letters to other prisoners from DOJ stating that because of limited resources and numerous complaints, it does not investigate individual prisoner complaints except as part of a review of the entire state prison system.

In *Sharif*, the court first addressed the PLRA exhaustion requirement and noted that the plaintiff had exhausted the prison grievance procedure, then rejected the argument that the plaintiff failed to exhaust remedies with respect to his ADA and Rehabilitation Act claims, holding that neither statute requires exhaustion of DOJ remedies. *Id.*, *3. Thus, *Sharif* holds, in substance, that the PLRA exhaustion requirement is satisfied by exhaustion of the internal prison grievance system, and that whether ADA and Rehabilitation Act remedies must be exhausted is determined by those statutory schemes and not by the PLRA.
exhaustion was appealed, DOCS repudiated the argument, in that and all other cases; but it has subsequently been asserted successfully by another New York State agency. Until recently it had not been addressed or even raised elsewhere, except in the above cited Ninth Circuit O’Guinn decision; however, some recent district court decisions hold that DOJ exhaustion is required.

One of the decisions holding that DOJ exhaustion was required in theory also held that the state prison system did not meet its burden of showing that the Department of Justice procedure was an “available remedy” in the absence of evidence that the procedure had been made known to prisoners by prison officials.

It is of course possible that a prison system could adopt an external remedy as part of its dispute resolution policy. The interaction between the PLRA’s “administrative remedy” language and its gloss, discussed above, and the Woodford v. Ngo requirement to follow the rules of exhaustion set by the prison system, has not been explored.

2. Prison Remedies Outside the Grievance System

Prison systems often create separate internal complaint or appeal systems for particular problems and exclude those matters from the main grievance system. For example, the New York State prison grievance directive states that:

(1) An individual decision or disposition of any current or subsequent program or procedure having a written appeal mechanism which extends review to outside the facility shall be considered non-grievable.

(2) An individual decision or disposition of the temporary release committee, time allowance committee, family reunion program or media review committee is not grievable. Likewise, an individual decision or disposition resulting from a disciplinary proceeding, inmate property claim (of any amount), central monitoring case review or records review (freedom of information request, expunction) is not grievable.

(3) The policies, rules, and procedures of any program or procedure, including those above, are grievable.

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937 Appendix D, New York State Dep’t of Correctional Services Directive 4040, Inmate Grievance Program at § 701.3(e). The directive adds: “Note: If an inmate is unsure whether an issue is grievable, he/she should file a grievance and the question will be decided through the grievance process . . .” Id.
In such non-grievable cases, the specialized system, rather than the inapplicable grievance system, must be exhausted, consistently with the general rule that prisoners must follow the prisons’ rules governing administrative remedies. A prisoner who exhausts the specialized complaint system for a problem need not also file a grievance about the same problem unless the prison’s rules so direct. If the administrative system gives the prisoner a choice among multiple remedies, exhausting one of the choices will satisfy the exhaustion requirement.


This issue arises frequently in connection with disciplinary appeals, discussed in § IV.E.3, nn. 623-637. It is often the case that specialized complaint systems provide a remedy only for actions or decisions in individual cases, leaving challenges to rules or policies for the grievance system. Examples of this distinction include the New York regulation quoted at the beginning of this section and some of the disciplinary cases cited in note 623.


Several Pennsylvania decisions have held that a complaint to the Office of Professional Responsibility exhausted where prison rules permitted abuse complaints to be pursued via that route or by grievance. McCain v.
One court has held that if a grievance once filed is referred to another complaint or investigative process, the prisoner must await the conclusion of that process to exhaust, assuming that he or she can find out when it is finished.\textsuperscript{942} That holding is potentially problematic, since internal affairs and inspector general’s offices do not necessarily notify the prisoner when an investigation is completed, and there may be protracted delays in resolution, especially in cases of serious misconduct where there are also criminal investigations or proceedings. There may be considerable ambiguity as to what the prisoner is required or permitted to do in order to exhaust when a matter is so referred.\textsuperscript{943} For example, that is the case with complaints of sexual abuse by


\textsuperscript{943} See Brown v. Croak, 312 F.3d 109, 112-13 (3d Cir. 2002) (holding that if security officials told the plaintiff to wait for completion of an investigation before grieving, and then never informed him of its completion, the grievance system was unavailable to him); Williams v. Gavins, 2013 WL 5408638, *6 (M.D.Pa., Sept. 25, 2013) (holding that if prison officials told plaintiff any resolution would have to come through a non-grievance investigation, his non-exhaustion could be excused); Rister v. Lamas, 2011 WL 2471486, *5-6 (M.D.Pa., June 21, 2011) (similar to Brown v. Croak); Andrews v. Cruz, 2010 WL 1141182, 5-6 (S.D.N.Y., Mar. 24, 2010) (referral to Inspector General constituted a favorable enough response that plaintiff was not required to appeal); Terrell v. Benfer, 2009 WL 3488559, *4 (M.D.Pa., Oct. 22, 2009) (denying summary judgment when informal grievance responses said issue was being “forwarded to the S.I.S. Office,” suggesting informal process was not yet completed); Monroe v. Beard, 2007 WL 2359833, *12-13 (E.D.Pa., Aug. 16, 2007) (holding the grievance process unavailable where prisoners were told to object to certain searches through an Unacceptable Correspondence Form, and they would be notified of the results of an investigation and then could file a grievance, but were not so notified), \textit{aff’d}, 536 F.3d 198, 205 n.6 (3d Cir. 2008); Lawyer v. Gatto, 2007 WL 549440, *8 (S.D.N.Y., Feb. 21, 2007) (holding prisoner whose grievance was referred to the Inspector General need not await IG investigation’s conclusion unless the grievance rules said so); Tyree v. Zenk, 2007 WL 527919, *9-10 (E.D.N.Y., Feb. 14, 2007) (refusing to dismiss based on untimeliness of plaintiff’s grievance where he was told his complaint was being investigated and it was not clear when he should appeal). \textit{But see} Morris v. Barra, 2012 WL 1059908, *8 (S.D.Cal., Mar. 28, 2012) (rejecting claim that lateness of grievance should be excused where plaintiff “summarily allege[d]” that a security officer told him he had to wait for the completion of the facility investigation; without “more facts and/or evidence to excuse his late filing,” plaintiff did not meet his burden).

This problem has been conspicuous in California, where as noted the Ninth Circuit held that when an appeal (grievance) was referred to the Internal Affairs “staff complaint” process, the plaintiff was not obliged to proceed further in the appeal process because at that point it had no further power to address his complaint. However, where an appeal involved other issues than those the staff complaint process addressed, the prisoner was obliged to continue the appeal process with regard to those issues. Brown v. Valoff, 422 F.3d 926, 936-42 (9th Cir. 2005). This holding appears to present considerable danger of prisoners’ losing meritorious claims through misunderstanding unless they are explicitly advised by prison personnel what issues are referred to the staff complaint process and what issues must be pursued in the appeal process. Later decisions suggest prisoners are given a \textit{pro forma} notice that they can appeal regardless of whether there are remaining issues to appeal or relief to be obtained. \textit{See, e.g.}, Walker v. Whitten, 2011 WL 1466882, *3-5 (E.D.Cal., Apr. 18, 2011) (holding second level grievance response that no further remedies were available, confirmed by highest level response, meant that plaintiff had exhausted regardless of defendants’ arguments about relief theoretically available); Lugo v. Williams, 2010 WL 4880657, *5-6 (E.D.Cal., Nov. 23, 2010) (where grievance was characterized as staff complaint and plaintiff

New York State prisoners, a problem compounded by a decision of the Second Circuit. However, when a complaint is referred to an internal affairs or similar body, and it does not appear that there is any further remedy for the prisoner, the prisoner has exhausted.

The distinctions among remedies are not always clear as applied to a particular case, and courts have held that prisoners are not to be victimized for legitimate misunderstandings. Thus, the Second Circuit has held that a prisoner complaining of a retaliatory disciplinary charge based on falsified evidence was justified in filing a disciplinary appeal rather than a grievance, since his interpretation of the rules was reasonable even if wrong. Prisoners are also entitled to rely on

received notice of appeal rights, but there was no apparent separate issue to appeal, plaintiff had exhausted), report and recommendation adopted, 2011 WL 346536 (E.D.Cal., Feb. 1, 2011); Cottrell v. Wright, 2010 WL 4806910, *5-6 (E.D.Cal., Nov. 18, 2010) (where staff complaint was investigated and plaintiff was told he could appeal further, but defendants did not identify to him or to the court any relief that remained available, plaintiff had exhausted), report and recommendation adopted, 2011 WL 319080 (E.D.Cal., Jan. 28, 2011).

In Amador v. Andrews, 655 F.3d 89 (2d Cir. 2011), the court stated that a grievance referred to the Inspector General—as all sexual abuse grievances are supposed to be—could be appealed to the Central Office Review Committee, the highest grievance appeal body, when the Inspector General’s determination was reported to and accepted by the Superintendent. Amador, 655 F.3d at 99. A sexual abuse grievance that also complains about prison policies “can be pursued on appeal from the IG or superintendent to CORC [though] it appears on this record that CORC does not entertain the claim for policy change unless the allegation of an act(s) of sexual abuse is upheld.” Id. In fact, there is no provision in New York’s grievance rules for an appeal from the Inspector General to CORC. Prisoners can appeal a referral to the Inspector General by the Superintendent or the Inmate Grievance Review Committee to CORC, and some of the Amador plaintiffs did so, though these appeals too are denied in deference to the IG. 655 F.3d at 103. Thus prisoners are required under the law of the Second Circuit to appeal to a body that will not actually address the merits of their complaints.

Rosa v. Littles, 336 Fed.Appx. 424, 428-29 (5th Cir. 2009) (prisoner had exhausted where no further relief was available after internal affairs referral); Joseph v. Gorman, 2012 WL 4089012, *6 (N.D.Fla., Mar. 12, 2012) (“A response that denies a grievance appeal because the matter is already under investigation, as opposed to returning it without action or finding it to be in non-compliance, must be considered exhaustion of administrative remedies.” Plaintiff filed a further grievance which was dismissed as repetitive), report and recommendation adopted, 2012 WL 4088945 (N.D.Fla., Sept. 17, 2012); Maloch v. Pollard, 2012 WL 780380, *9-12 (N.D.Ga., Mar. 7, 2012) (declining to dismiss where informal grievance was denied because it was being investigated by Internal Investigations Unit, but plaintiff was denied forms to file a formal grievance); Logan v. Chestnut, 2010 WL 3385026, *3 (M.D.Fla., Aug. 26, 2010) (where emergency grievance was not accepted as such, but was referred to Inspector General, court declines to dismiss; response to prisoner said: “Upon completion of this review, information will be provided to appropriate administrators for final determination and handling.”); Thomas v. Huff, 2010 WL 3001992, *3 (M.D., July 29, 2010) (stating that internal affairs investigation “appears to have taken this claim out of the typical administrative remedy process”); Thomas v. Bell, 2010 WL 2779308, *2 & n.2 (D.Md., July 7, 2010) (noting that prisoners are not permitted to pursue grievances for matters referred to Internal Investigation Unit).

Giano v. Goord, 380 F.3d 670, 678-79 (2d Cir. 2004) (noting that a “learned” district judge had adopted the same interpretation; see also Westefer v. Snyder, 422 F.3d 570, 580 (7th Cir. 2005) (holding defendants did not establish failure to exhaust available remedies where policies did not “clearly identif[y]” the proper remedy and there was no “clear route” for prisoners to challenge certain decisions); Wilson v. Budgeon, 2007 WL 464700, *5 (M.D.Pa., Feb. 13, 2007) (declining to dismiss for non-exhaustion where rules did not clearly instruct the prisoner whether to raise his retaliation claim in a disciplinary appeal or a grievance), appeal dismissed, 248 Fed.Appx. 348 (3d Cir. 2007); Woods v. Lozer, 2007 WL 173704, *3 (M.D.Tenn., Jan. 18, 2007) (holding a prisoner exhausted when he appealed a decision that his use of force claim was not grievable because it was mistakenly said to seek review of disciplinary procedures and punishments); Rand v. Simonds, 422 F.Supp.2d 318, 326 (D.N.H. 2006) (holding that an inmate handbook that says prisoners have the “right and opportunity” to submit grievances does not establish that grievances are the only way or correct way to complain; a prisoner and his lawyer who pursued other seemingly authorized avenues, and received responses, had exhausted); Beltran v. O’Marra, 405 F.Supp.2d 140, 154 (D.N.H. 2005) (holding a prisoner who was told he could not grieve incidents that were the subject of disciplinary proceedings sufficiently exhausted by raising his concerns in disciplinary proceedings), on reconsideration, 2006 WL 240558 (D.N.H., Jan. 31, 2006). But see Marshall v. Knight, 2006 WL 3714713, *1 (N.D.Ind., Dec. 14, 2006)
the instructions of prison personnel as to which remedy to use. 947 The Supreme Court’s adoption of a procedural default rule emphasized the “informality and relative simplicity of prison grievance systems” like the one before it, and did not address the consequences of procedural errors with respect to rules that are not clear. 948

3. Non-Standard Forms of Complaint

Numerous courts have held that other forms of complaint besides filing a grievance—most often, writing a letter to the prison superintendent or other highly placed official, 949 or cooperating in an internal investigation 950—will generally not meet the PLRA exhaustion requirement. 948

*(dismissing claim of a prisoner alleging retaliation in classification and disciplinary matters didn’t file a grievance because classification and discipline were not grievable; the court said retaliation might be grievable, and did not consider whether the prisoner had interpreted the rules reasonable). Issues concerning disciplinary appeals are discussed further at nn. 623-637, above.

947 Brownell v. Krom, 446 F.3d 305, 312 (2d Cir. 2006) (citing erroneous advice to abandon property loss claim and file a grievance in finding special circumstances excusing failure to exhaust correctly); Lietz v. Dittmann, 2013 WL 4829303, *6 (E.D.Wis., Sept. 10, 2013) (holding plaintiff whose grievance was rejected as non-grievable because it was related to a disciplinary proceeding exhausted, although written policy suggested it would actually have been grievable after the disciplinary proceeding was finished); Riggs v. Valdez, 2010 WL 4117085, *9-10 (D.Idaho, Oct. 18, 2010) (holding grievance system was unavailable where prison staff rebuffed grievances about issues that were also subject of disciplinary proceedings), on reconsideration in part, 2010 WL 5391313 (D.Idaho, Dec. 22, 2010); Barkey v. Reinke, 2010 WL 3893897, *6-7 (D.Idaho, Sept. 30, 2010) (holding sexual abuse complaint was exhausted where prisoner first used Prison Rape Elimination Act hotline and then, when she asked whom to speak to, was directed to an investigator and not the grievance process); Naseer v. Hill, 2010 WL 3472355, *4 (W.D.Wis., Sept. 3, 2010) (“When an inmate is told his complaint is outside the scope of the review system and should be raised in the disciplinary process, the relevant question for purposes of exhaustion is whether plaintiff raised the complaints in the disciplinary process and filed the applicable appeals. . . .”); Born v. Monmouth County Correctional Inst., 2008 WL 4056313, *4 (D.N.J., Aug. 28, 2008) (denying summary judgment in light of evidence that prisoner complained to Internal Affairs rather than filing a grievance); Ray v. Jones, 2007 WL 397084, *2 (W.D.Okla., Feb. 1, 2007) (declining to dismiss for failure to file a complaint in light of evidence that plaintiff was repeatedly advised that an internal affairs investigation would substitute for the grievance process); Flory v. Claussen, 2006 WL 3404779, *3-4 (W.D. Wash., Nov. 21, 2006) (holding prisoner who followed officials’ instruction to file an “appeal” to the Facility Risk Management Team about removal from his job, rather than a grievance, exhausted); see also cases cited in n. 1076, below, concerning prisoners’ reliance on prison personnel’s advice whether issues are grievable.

948 Woodford v. Ngo, 548 U.S. 81, 103 (2006); see § IV.E.7, above, for further discussion of this point.

949 See Small v. Camden County, 728 F.3d 265, 272-73 (3d Cir. 2013) (holding sick call requests and letters are not grievances and do not exhaust); Yousef v. Reno, 254 F.3d 1214, 1221-22 (10th Cir. 2001) (holding that a letter to the Attorney General was insufficient to exhaust as to actions that had been authorized by the Attorney General, despite the government’s lack of clarity as to what authority the administrative remedy procedure might have over the Attorney General’s decisions); Withrow v. Taylor, 2007 WL 3274858, *6-7 (N.D.N.Y., Nov. 5, 2007) (letters are not grievances and do not exhaust); Davis v. Farry, 2005 WL 3336493, *3 (W.D.Wis., Dec. 7, 2005) (“The requirement to exhaust entails following the procedures set forth in Wis. Admin. Code § DOC 310.04 for filing administrative complaints and appealing adverse decisions to the Corrections Complaint Examiner and the Secretary of the Department of Corrections. Sending letters to prison and state officials or anyone else regarding the alleged wrongdoing by mail room staff does not meet those requirements.”); see Chelette v. Harris, 229 F.3d 684, 688 (8th Cir. 2000) (dismissing case of a prisoner who was told by the warden that he would “take care” of a medical problem, and therefore did not grieve it; the prisoner’s subjective belief that he had done all he could did not meet the exhaustion requirement), cert. denied, 531 U.S. 1156 (2001); see Appendix A for additional authority on this point.

Older New York state prison cases involving exhaustion by letters of complaint present special problems in light of the state’s “expedited procedure” for certain kinds of complaints. See § IV.F.4, below.

950 Pavey v. Conley, 663 F.3d 899, 905 (7th Cir. 2011) (following Panaro and Thomas v. Woolum); Amador v. Andrews, 655 F.3d 89, 101-03 (2d Cir. 2011) (holding complaint to Inspector General did not exhaust because
Of course the provisions of a particular grievance system may lead to a different conclusion, as may the circumstances of a particular case.

prisoner did not appeal to highest grievance body, as rules allowed); Panaro v. City of North Las Vegas, 423 F.3d 949, 953 (9th Cir. 2005) (holding that participation in an internal affairs investigation did not exhaust because it did not provide a remedy for the prisoner, even though the officer was disciplined); Thomas v. Woolum, 337 F.3d 720, 734 (6th Cir. 2003); Freeman v. Francis, 196 F.3d 641, 644 (6th Cir. 1999) (holding that investigations by prison Use of Force Committee and Ohio State Highway Patrol did not substitute for grievance exhaustion even though criminal charges were brought against the officer); Godson v. City of Philadelphia, 2013 WL 5467816, *4-5 (E.D.Pa., Oct. 1, 2013) (following Panaro and Freeman); Starks v. Mitchell, 2013 WL 4029094, *6 (S.D.Ill., Aug. 8, 2013) (holding biased internal investigation did not satisfy or excuse exhaustion requirement); Blake v. Maynard, 2012 WL 1664107, *6-7 (D.Md., May 10, 2012) (holding internal affairs investigation did not satisfy exhaustion requirement), on reconsideration, 2012 WL 5568940 (D.Md., Nov. 14, 2012); Canady v. Davis, 2009 WL 1177081, *4 (N.D.Ill., Apr. 29, 2009) (similar to Panaro), vacated and remanded on other grounds, 376 Fed.Appx. 625 (7th Cir., May 26, 2010); see Appendix A for additional authority on this point; see also Rozenberg v. Knight, 2012 WL 7827998, *7-8 (D.Colo., Nov. 19, 2012) (holding Inspector General’s investigation could not constitute “informal exhaustion” because plaintiff did not get all the relief he sought), report and recommendation adopted, 2013 WL 1320779 (D.Colo., Mar. 29, 2013), aff’d, 542 Fed.Appx. 711 (10th Cir. 2013). But see Smith v. Beck, 2011 WL 65962, *5 (M.D.N.C., Jan. 10, 2011) (noting that plaintiff failed to exhaust, but that an internal investigation “appears to have taken the grievance out of the typical administrative remedy process”).


In Pavey v. Conley, 170 Fed.Appx. 4, 8, 2006 WL 509447, *4 (7th Cir., Mar. 3, 2006) (unpublished), the plaintiff alleged that prison staff had broken his arm and he couldn’t write, and the grievance rules said that prisoners who couldn’t write could be assisted by staff. The court held that any memorialization of his complaint by investigating prison staff might qualify as a grievance—and even if they did not write it down, he might have “reasonably believed that he had done all that was necessary to comply with” the policy. See also cases cited in n. 941, above; Jackson v. Gandy, 877 F.Supp.2d 159, 179 (D.N.J., June 29, 2012) (declining to dismiss where defendants did not “adequately address the role of the Special Investigations Division or whether the Special Investigations Division’s role overlaps with the established grievance procedures”); Grimes v. Warden, Baltimore City Detention Center, 2012 WL 2575373, *4 (D.Md., June 29, 2012) (noting that once the Internal Investigation Unit initiates an investigation, the grievance system is unavailable); Williams v. Marshall, 2010 WL 3291635, *8 (S.D.Ga., Apr. 26, 2010) (medical request form could exhaust where jail policy said grievances must be in writing, and must describe the specific factual basis and circumstances of the alleged incident, but did not otherwise specify a form to be used), report and recommendation adopted in part, rejected in part, 2010 WL 3291803 (S.D.Ga., Aug. 19, 2010); Carter v. Symmes, 2008 WL 341640, *3 (D.Mass., Feb. 4, 2008) (timely letter from counselor served to exhaust where grievance rules did not specify use of a form; letter considered as part of prisoners’ grievance raising other issues); Rand v. Simonds, 422 F.Supp.2d 318, 326 (D.N.H. 2006) (holding that a complaint that prisoners have the “right and opportunity” to file grievances “did not fairly suggest that the grievance procedure was the only way, or even the correct way, for inmates to complain about their treatment”); Shaheed-Muhammad v. Dippaolo, 393 F.Supp.2d 80, 96-97 (D.Mass. 2005) (concluding that letters to officials are considered grievances under state law).

In re Bayside Prison Litigation, 351 Fed.Appx. 679, 681-82 (3d Cir. 2009) (evidence that prison officials “converted” letter complaints about a particular incident and treated them identically to grievances raised a material factual question as to exhaustion); Brown v. Croak, 312 F.3d 109, 112-13 (3d Cir. 2002) (holding that if security officials told the plaintiff to wait for completion of an investigation before grieving, and then never informed him of its completion, the grievance system was unavailable to him); Winfield v. Bishop, 2013 WL 4736378, *6 (N.D.N.Y., Sept. 3, 2013) (declining to grant summary judgment for non-exhaustion where investigation was commenced in response to complaints, record did not indicate the results or whether plaintiff was notified of them; triable issue raised as to special circumstances exception to exhaustion); Rodriguez v. Sweeney, 2012 WL 7854312, *5-6 (N.D.N.Y., Feb. 10, 2012) (declining to dismiss where plaintiff’s informal complaints resulted in multiple interviews and an Inspector General’s report, plus two memos from the Superintendent to the plaintiff articulating conclusions, and there was no evidence the plaintiff knew or should have known about the grievance procedure), report and recommendation adopted, 2013 WL 1415066 (N.D.N.Y., Apr. 8, 2013); De’Lonta v. Pearson, 2011 WL
Other decisions have held that complaints that were in fact reviewed at the highest levels of the agency satisfy the exhaustion requirement even if they were not processed through the grievance system.\textsuperscript{954} Some of these are arguably overruled by the Supreme Court’s holding that the exhaustion requirement is governed by a procedural default standard,\textsuperscript{955} insofar as prison rules prescribe use of the grievance system or some other identified administrative system for particular kinds of complaints.\textsuperscript{956} The Second Circuit has taken this view in \textit{Macias v. Zenk,}\textsuperscript{957} 

\textsuperscript{954}Camp v. Brennan, 219 F.3d 279 (3d Cir. 2000) (holding that use of force allegation that was investigated and rejected by Secretary of Correction’s office need not be further exhausted); Thomas v. Middleton, 2010 WL 4781360, *3 (D.Md., Nov. 16, 2010) (denying motion to dismiss since ordering an internal investigation “appears to have taken this claim out of the typical administrative remedy process”); aff’d, 416 Fed.Appx. 235 (4th Cir. 2011); Franklin v. Oneida Correctional Facility, 2008 WL 2690243, *7 (N.D.N.Y., July 1, 2008) (denying summary judgment where prisoner’s letter to Commissioner prompted an investigation that might have made a grievance redundant); Baker v. Andes, 2005 WL 1140725, *7 (E.D.Ky., May 12, 2005) (holding that prisoner who cooperated with authorities and gave audio and video statements had sufficiently exhausted claim that he was gratuitously beaten by an officer who was fired as a result); Lewis v. Gagne, 281 F.Supp.2d 429, 434-35 (N.D.N.Y. 2003) (holding that juvenile detainee’s mother’s complaints to institutional officials and contacts with an attorney, family court, and the state Child Abuse and Maltreatment Register, which were known to the facility director and agency counsel, sufficed to exhaust; “Noting that an investigation into the incident did ensue, it is reasonable that plaintiffs believed that at least one effort they took accomplished the same result that filing through the formal process would have produced.”); O’Connor v. Featherston, 2003 WL 554752, *3 (S.D.N.Y., Feb. 27, 2003) (“An inmate should not be required to additionally complain through collateral administrative proceedings after his grievances have been apparently addressed and, by all appearance, rebuffed.”); Heath v. Saddlemire, 2002 WL 31242204, *4-5 (N.D.N.Y., Oct. 7, 2002) (following Perez v. Blot; Perez v. Blot, 195 F.Supp.2d 539, 542-46 (S.D.N.Y. 2002) (holding requirement might be satisfied where plaintiff alleged he complained to various prison officials and to Inspector General, whose investigation resulted in referral of officer for criminal prosecution); Noguera v. Hasty, 2000 WL 1011563, *11 (S.D.N.Y., July 21, 2000) (holding requirement satisfied where prisoner’s informal complaint of rape resulted in Internal Affairs investigation), report and recommendation adopted in part, 2001 WL 243535 (S.D.N.Y., Mar. 12, 2001); see Prendergast v. Janecka, 2001 WL 793251, *1 (E.D.Pa., July 10, 2001) (“Moreover, exhaustion may have occurred. Plaintiff claims to have notified several prison officials, including the warden, of his alleged lack of dental treatment.”)

In \textit{Lewis v. Gagne,} the court gave great weight to the fact that the facility’s own orientation handbook presented the grievance system as only one of several ways residents could assert their rights, and the facility’s own actions showed that it addressed and investigated problems that were not presented through the grievance system. 281 F.Supp.2d at 434; \textit{accord,} Molina v. New York, *6, 2011 WL 6010907 (N.D.N.Y., Dec. 1, 2011) (adopting reasoning and holding of \textit{Lewis v. Gagne}).

\textsuperscript{955}Woodford v. Ngo, 548 U.S. 81 (2006). \textit{But see} Houseknecht v. Doe, 653 F.Supp.2d 547, 560 (E.D.Pa. 2009) (citing \textit{Camp v. Brennan, supra,} and holding defendants have the burden of showing that a complaint that was investigated does not satisfy the prison policy).

\textsuperscript{956}In \textit{Rainge-El v. Moschetti,} 2006 WL 1980287 (D.Colo., July 12, 2006), on reconsideration of 2006 WL 1876632 (D.Colo., July 5, 2006), the court stated in dictum that \textit{Woodford} might compel reexamination of its prior holding that a prisoner’s letters to prison officials which, while not on the official grievance form, undisputedly provided the information required by the grievance forms (“a clear statement of the basis for the grievance and the relief requested”), and which elicited a response that “manifests an understanding of plaintiff’s contentions and provides a substantive and final response,” sufficed to exhaust. 2006 WL 1980287, *1; \textit{compare} 2006 WL 1876632, *2. However, the court also questioned whether \textit{Woodford} was applicable, since Mr. Rainge-El, unlike the \textit{Woodford} plaintiff, did not “entirely ignore” the prison’s administrative system. 2006 WL 1980287, *1.
which held that Woodford’s holding overruled the Circuit’s earlier suggestion that if a prisoner’s informal complaints provide sufficient notice to prison officials to allow them to take appropriate responsive measures, the prisoner has exhausted.\footnote{Macias stated that the PLRA requires both “substantive exhaustion” (notice to officials) and “procedural exhaustion” (following the rules), and that “after Woodford notice alone is insufficient.”\footnote{On the other hand, courts applying a procedural default standard have held that when an administrative system addresses the merits of an issue despite procedural noncompliance, the exhaustion requirement is satisfied and any procedural objection is waived.\footnote{Arguably the same principle should apply when prison officials, presented with a prisoner complaint outside the grievance system, address its merits rather than telling the prisoner he or she should have filed a grievance.\footnote{Further, Woodford and Macias notwithstanding, there may be particular circumstances where complaints made outside the formal grievance system may suffice to exhaust. The Second Circuit in Macias did not call into question its earlier holding that a prisoner’s reasonable interpretation of confusing grievance rules may justify the failure to follow procedural rules correctly,\footnote{or its widely followed decision in Hemphill v. New York,\footnote{where the plaintiff wrote to the Superintendent rather than filing a grievance concerning an alleged assault by staff. He said that he had been assaulted again and threatened if he complained in any fashion. The court held that the threats against him may have made the grievance procedure unavailable to him, but not the informal alternative of a letter to the Superintendent:}}}}}}

The test for deciding whether the ordinary grievance procedures were available must be an objective one: that is, would “a similarly situated individual of ordinary firmness” have deemed them available. Cf. Davis v. Goord, 320 F.3d 346, 353 (2d Cir. 2003) (articulating the “individual of ordinary firmness” standard in the context of a prisoner retaliation claim). Moreover it should be pointed out that threats or other intimidation by prison officials may well deter a prisoner of “ordinary firmness” from filing an internal grievance, but not from appealing directly to individuals in positions of greater authority within the prison system, or to external structures of authority such as state or federal courts. This may be so, if for no other reason, because seeking a criminal investigation or filing a civil rights complaint may enable an inmate to draw outside attention to

\footnote{Macias, 495 F.3d at 43 n.1 (citing Hemphill v. New York, 380 F.3d 680, 690 (2d Cir. 2004)); see Benjamin v. Commissioner N.Y. State Dept. of Correctional Services, 2007 WL 2319126, *14 (S.D.N.Y., Aug. 10, 2007) (following Macias, noting that plaintiff could not believe a disciplinary appeal was his only remedy for a use of force complaint). This problem is discussed further at nn. 753 et seq., 946, above.}

\footnote{380 F.3d 680 (2d Cir. 2004); see Macias, 495 F.3d at 44-45 (addressing Hemphill claim without addressing any effect of Woodford on the Hemphill holding).}
his complaints, thereby neutralizing threatened retaliatory conduct from prison employees.\footnote{Hemphill, id. at 688. The effect of threats and retaliation on exhaustion obligations is discussed further at nn. 1042-1052, 895-905, below.}

The \textit{Hemphill} court also held that the plaintiff’s fear of retaliation might constitute justification for having written to the Superintendent rather than having filed a grievance, a question also governed by the standard “whether ‘a similarly situated individual of ordinary firmness’ . . . would have been deterred from following regular procedures.”\footnote{Hemphill, id. at 690 (citation omitted). “Given [an officer’s] alleged warning of retaliation, it is arguable that Hemphill may have reasonably concluded that writing directly to the Superintendent involved an acceptable level of risk, whereas filing a level 1 grievance or notifying the immediate supervisors of his purported attackers was too fraught with danger.” Id.} Since justification for failure to exhaust does not automatically excuse exhaustion, but requires the plaintiff to exhaust if remedies are available, the court added in dictum: “It seems likely, therefore, that facts sufficient to support a conclusion that an inmate was ‘justified’ in not following ordinary procedures will be less powerful than those which would lead to a holding that those procedures were not available. Because we need not decide that question at this time, however, we do not do so.”\footnote{Hemphill, id. at 690 n.8.}

In adopting its procedural default rule requiring “proper exhaustion,” \textit{i.e.}, exhaustion compliant with the agency’s “critical procedural rules,”\footnote{Woodford v. Ngo, 548 U.S. 81, 90 (2006).} the Supreme Court did not have before it any of the circumstances that the Second Circuit has held might justify departure from the usual grievance procedures. A number of decisions have applied the Second Circuit framework after \textit{Woodford}.\footnote{See nn. 735-740, above.}

\textbf{4. The New York State “Expeditied Procedure”}

\textit{Hemphill} also bears on another dispute involving the New York state prisons over whether letters to the Superintendent or other supervisory officials can meet the exhaustion requirement. The issue is complicated by a change in state regulations. Until August 2003, the grievance policy provided two mechanisms: ordinary grievances, which must be filed with the Inmate Grievance Resolution Committee within 14 days of the relevant occurrence, and “harassment” grievances, designed to address “[e]mployee misconduct meant to annoy, intimidate, or harm an inmate.” The latter “expedited procedure” required the prisoner to report the alleged misconduct to the staff member’s supervisor, after which the Superintendent determined whether the matter was properly a harassment grievance. If so, the grievance remained on an expedited track; if not, it was referred to the Inmate Grievance Resolution Committee; if the Superintendent did not act, the prisoner “may”—not “must”—appeal directly to the highest level of the grievance system, the Central Office Review Committee.\footnote{This discussion is summarized from \textit{Morris v. Eversley}, 205 F.Supp.2d 234, 239-40 (S.D.N.Y. 2002), which cites the relevant state regulations then in effect, and still applicable to many pending cases.} Notwithstanding that “may” language, subsequent decisions have held that if the prisoner does not obtain a favorable resolution from the Superintendent, the prisoner must appeal in order to
exhaust—though this result is now in doubt in light of an unreported Second Circuit decision.\(^\text{970}\) However, it is not clear what constitutes a favorable decision in some cases, especially those where the Superintendent’s decision is to refer the matter to the Inspector General.\(^\text{971}\)

This expedited procedure has occasioned much controversy. In at least one case, prison authorities took the position that following their own harassment grievance procedure did not constitute exhaustion.\(^\text{972}\) District court decisions rejected that view.\(^\text{973}\) However, some courts held that harassment complaints did not sufficiently exhaust if they were sent to the Superintendent rather than to the employee’s immediate supervisor.\(^\text{974}\) In my view, poorly educated prisoners should not be penalized for not understanding the term of art “immediate

\(^{970}\) In *Stephenson v. Dunford*, 320 F.Supp.2d 44, 51 (W.D.N.Y. 2004), *vacated and remanded*, 2005 WL 1692703 (2d Cir. Jul. 13, 2005), the district court held that the prisoner’s failure to appeal after invoking the expedited procedure was a failure to exhaust. *Accord*, *Connor v. Hurley*, 2004 WL 885828, *2* (S.D.N.Y., Apr. 26, 2004); *Rivera v. Goord*, 2003 WL 1700518, *12* (S.D.N.Y., Mar. 28, 2003). On appeal, however, the State in *Stephenson* agreed that the case should be remanded to determine whether there were “special circumstances” justifying noncompliance, such as a reasonable belief by the prisoner that his actions sufficed to exhaust. *2005 WL 1692703, *1*.


*See* *Andrews v. Cruz*, 2010 WL 1141182, *3, *5-*6 (S.D.N.Y., Mar. 24, 2010) (plaintiff who received a transfer and had his complaint referred to the Inspector General had obtained sufficiently favorable relief he was not required to appeal); *Pagan v. Brown*, 2009 WL 2581572, *7-*8 (N.D.N.Y., Aug. 19, 2009) (question whether a prisoner whose complaint was referred by the Superintendent to the Inspector General’s office had any further remedy available from the IG’s decision precluded dismissal for non-exhaustion); *Lawyer v. Gatto*, 2007 WL 549440, *8* (S.D.N.Y., Feb. 21, 2007) (holding plaintiff had exhausted because the Superintendent had forwarded his expedited procedure grievance to the Inspector General, the only relief available under that procedure, and he had no reason to believe he needed to appeal).

*In *Houze v. Segarra*, 217 F.Supp.2d 394 (S.D.N.Y. 2002), a DOCS official submitted an affidavit stating that harassment complaints were not filed as grievances, given grievance numbers, or otherwise processed as grievances, and could not be appealed to the Central Office Review Committee. “Such a matter becomes a grievance, and therefore is appealable to CORC, only if the inmate files a grievance complaint in accordance with [the ordinary grievance procedures].” *Id. at 398. These claims appear to directly contradict the rules governing the harassment grievance procedure set forth in DOCS’ own policy and described in *Morris v. Eversley*, supra, as well as testimony from the DOCS grievance director in other proceedings. *Hemphill v. New York*, 380 F.3d 680, 690 n.7 (2d Cir. 2004); *see also* *Larry v. Byno*, 2003 WL 1797843 (N.D.N.Y., Apr. 4, 2003) (noting that letter to Superintendent was treated as a harassment grievance, assigned a grievance number, and investigated; claim dismissed because the prisoner did not appeal the failure to render a decision).


*In *Gadson*, prison officials did not record and treat the plaintiff’s harassment complaint according to the harassment grievance procedures, leading the court to observe: “Prison officials cannot have it both ways—they cannot obstruct an inmate’s pursuit of administrative remedies exhaustion by failing to comply with statutory procedure on the one hand, and then claim that the inmate did not properly exhaust these remedies on the other.” *2002 WL 982393, *3; *accord*, *Evans v. Jonathan*, 253 F.Supp.2d 505, 509 (W.D.N.Y. 2003).


supervisor” or not knowing who a particular staff member’s immediate supervisor is; it cannot be burdensome for a prison superintendent simply to forward such complaints to the proper staff member. In some cases, it appears, complaints to the Superintendent have indeed been treated as harassment grievances by prison officials.975

The harassment grievance controversy took a new turn in Hemphill, in which the plaintiff alleged that writing directly to the Superintendent “comported with DOCS procedural rules, or, at a minimum, reflected a reasonable interpretation of those regulations.”976 In August 2003, while Hemphill and its companion cases were being briefed, the Department of Correctional Services amended its grievance rules to provide, as the prior version had not, that a prisoner who files a harassment grievance must, in addition, file a regular grievance. The amendment allegedly “clarified” the regulation, which the plaintiff argued demonstrated the lack of clarity of the previous version. The court held his argument about lack of clarity “not manifestly meritless” and remanded for a determination whether the plaintiff was justified on that ground in not following normal grievance procedures.977 The same issue will be presented in any case in which the prisoner complained by letter to supervisory officials before the August 2003 revision of the grievance rules—and the operative date of the amendment, for purposes of what prisoners can be expected to understand, will depend on when and how prison officials gave notice to the prison population of the change.

5. Informal Exhaustion

Another variation of the “which remedy” problem involves prisoners who don’t file a grievance because they get their problems solved informally, without needing to file a grievance. In Marvin v. Goord,978 the Second Circuit stated that a prisoner who succeeded in resolving his complaint informally—in that case, by talking to members of the prison staff—had “likely” exhausted, since the relevant grievance policy says that the formal process was intended to supplement, not replace, informal methods.979 In effect, the court held, informal resolution had

975 See Larry v. Byno, 2003 WL 1797843 (N.D.N.Y., Apr. 4, 2003) (noting that a letter to the Superintendent was treated as a harassment grievance and given a grievance number); see generally § IV.E.7, above, concerning the effect of procedural errors in the grievance process.

There is considerable authority even under a procedural default standard that if prison officials address the merits of a procedurally improper grievance, they cannot subsequently claim that the procedural defect is a failure to exhaust. See nn. 796-797, above. On that view, if the Superintendent responds to the merits of a complaint, the prisoner has completed at least the first step of the expedited procedure. See Hairston v. LaMarche, 2006 WL 2309592, *9-11 (S.D.N.Y., Aug. 10, 2006) (finding special circumstances justifying a failure of technically correct exhaustion where the Superintendent referred a complaint to the Inspector General, who reached a decision but did not communicate it to the plaintiff; the court describes the referral itself as “partial favorable relief” and notes that without a decision from the Superintendent to the prisoner it was unclear how the prisoner could take the expedited process any further).

976 Hemphill, 380 F.3d at 689.

977 Hemphill, id. at 690. Subsequently, in Stephenson v. Dunford, 2005 WL 1692703, *1 (2d Cir., July 13, 2005), vacating and remanding 320 F.Supp.2d 44 (W.D.N.Y. 2004), the State agreed that a case in which the prisoner had written directly to the Superintendent must be remanded to determine whether there were “special circumstances” justifying failure to follow the rules, such as a reasonable belief that the prisoner’s actions complied with prison procedures.

978 255 F.3d 40 (2d Cir. 2001)

979 Marvin, 255 F.3d at 43 n.3 (“Resolution of the matter through informal channels satisfies the exhaustion requirement, as, under the administrative scheme applicable to New York prisoners, grieving through informal channels is an available remedy. See 7 N.Y.C.R.R. § 701.1 (stating that ‘the inmate grievance program (IGP) is

The \textit{Marvin} holding and the whole notion of informal exhaustion are in considerable tension with the widespread holding that letters to the warden, complaints to or cooperation with an internal affairs body, etc., do not exhaust.\footnote{425 F.3d 177 (2d Cir. 2005).} In fact, the Second Circuit appears to have abandoned its informal exhaustion holding. In \textit{Braham v. Clancy},\footnote{Braham, 425 F.3d at 183. However, the court declined to dismiss for non-exhaustion, holding that the plaintiff’s informal requests might have given prison officials sufficient notice of the problems “‘to allow them to take appropriate responsive measures,’ thereby satisfying the exhaustion of administrative remedies requirement,” \textit{id.} (citing Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004)), and that the prisoner might reasonably have concluded that receiving the cell change meant he had prevailed and need not proceed further administratively. 425 F.3d 184.} the court held that a prisoner who had made informal requests for a cell change, as required by prison rules before filing a formal grievance, without success, but then received the cell change after he had been assaulted, had not exhausted available remedies because he failed to file a formal grievance after the assault. The court reasoned that the grievance process could have provided other relief, such as changes in policies and procedures or discipline of staff, and therefore remedies remained available within the meaning of the statute.\footnote{467 F.3d 170, 177 (2d Cir. 2006).}

Later, in \textit{Ruggiero v. County of Orange},\footnote{467 F.3d 170, 177 (2d Cir. 2006).} the court held that a prisoner beaten in jail who complained to Sheriff’s Department investigators did not exhaust even though he got a
transfer out of the jail. The court said that *Marvin v. Goord* “does not imply that a prisoner has exhausted his administrative remedies every time he receives his desired relief through informal channels.” It said that the transfer did not provide all the available relief, and reiterated *Braham*’s assertion that a formal grievance might have resulted in “developing . . . policies and procedures pertaining to the grievance or disciplining the relevant officers.” In light of these decisions, there seems little room for *Marvin*’s acknowledgement of informal exhaustion to survive.

Other courts have held that if prison rules provide or suggest that an informal complaint is sufficient to complete the administrative process, a prisoner who does so has exhausted. If a plaintiff asserts that his informal complaint satisfies the prison rules without a formal grievance, defendants, who have the burden of establishing the defense, must show that a formal grievance is required under their policy. In some grievance systems there is a prescribed first stage that is labelled or mislabelled “informal,” and success at that stage will generally satisfy the exhaustion requirement. This point is not fundamentally different from the usual holding that a prisoner need not appeal a favorable decision at a non-final stage of the grievance process.

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985 *Ruggiero*, 467 F.3d at 177. For further discussion of *Braham* and *Ruggiero*, see nn. 533-535, above.
986 *Ruggiero*, 467 F.3d at 177 (quoting *Braham*, 425 F.3d at 183).
987 See, e.g., *Zafuto v. Okeefe*, 2014 WL 297102, *4 (W.D.N.Y., Jan. 27, 2014) (stating “although DOCCS’ regulations encourage inmates to pursue informal resolutions, if Zafuto wished to pursue this matter in federal court, ‘he was required by the [ ] grievance procedure to make a formal, or informal followed by formal, complaint of the prison officials’ acts of which he now complains’” (citations omitted).
991 In *Stephenson v. Dunford*, 320 F.Supp.2d 44, 51 (W.D.N.Y. 2004), vacated and remanded, 2005 WL 1692703 (2d Cir., July 13, 2005), the district court held that a prisoner who did not succeed in “informal” exhaustion and did not appeal failed to exhaust. The State agreed that the case must be remanded to determine whether special
G. “Available” Remedies

The statute requires exhaustion of remedies that are “available,” and under Booth v. Churner a remedy is presumptively available unless it “lacks authority to provide any relief or to take any action whatsoever in response to a complaint.” The Court added: “Without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust.” No particular circumstances such as the prisoner’s reasonable belief justified the prisoner’s failure to follow the rules. That case, however, did not actually involve “informal” exhaustion, but the “expedited procedure” explicitly provided for in the grievance rules. See § IV.F.4, above.

Such provisions are limited by the National Standards to Prevent, Detect, and Respond to Prison Rape, recently promulgated under the Prison Rape Elimination Act, which provide: “The agency shall not require an inmate to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse.” 28 C.F.R. § 115.52. To date there appears to be no case law addressing the interpretation or enforceability of that provision.

See § IV.E.1, above.

Booth v. Churner, 532 U.S. 731, 736 (2001) (emphasis supplied) (holding unavailability of damages did not make remedy unavailable); accord, Emmett v. Ebner, 423 Fed.Appx. 492, 494-95 (5th Cir. 2011) (unpublished) (holding remedy that did provide damages was available although plaintiff’s damages demand was much higher than damages limit); compare Kaemmerling v. Lappin, 553 F.3d 669, 675 (D.C.Cir. 2008) (“Requiring an inmate to exhaust an administrative grievance process that cannot address the subject of his or her complaint would serve none of the purposes of exhaustion of administrative remedies.”); Snider v. Melindez, 199 F.3d 108, 133 n.2 (2d Cir. 1999) (stating “the provision clearly does not require a prisoner to exhaust administrative remedies that do not address the subject matter of his complaint.”); Henderson v. Thomas, 2012 WL 3846439, *12 (M.D.Ala., Sept. 5, 2012) (holding that a “medical grievance process” was not an available remedy for complaints about the segregation of HIV-positive prisoners because there was no evidence that process had any authority over nonmedical issues or prison policy; directing prisoners to it would “bait-and-switch the plaintiffs”); see Brown v. Croak, 312 F.3d 109, 113 (3d Cir. 2002) (“‘Available’ means ‘capable of use; at hand.’ See Webster’s II, New Riverside University Dictionary 141 (1994 ed.); see also Black’s Law Dictionary 135 (6th ed.1990) (defining ‘available’ as ‘suitable; useable; accessible; obtainable; present or ready for immediate use. Having sufficient force or efficacy; effectual; valid.’”). But see Cowart v. Erwin, 2013 WL 6188731, *3 (N.D.Tex., Nov. 26, 2013) (holding the ability to refer a complaint to Internal Affairs is enough to make the remedy “available” under the statute).

In Braham v. Clancy, 425 F.3d 177 (2d Cir. 2005), the court held that a prisoner who sought a change of cellmate to avoid being assaulted, was assaulted after no action was taken, and was moved after the assault still had an available remedy via the grievance system; even though the action he had been seeking had been accomplished, the prison system could still have provided other relief, such as changing policies and procedures or disciplining staff. However, the court also held that receiving the cell change could be a “special circumstance” that might lead an uncounseled prisoner reasonably to conclude that he had satisfied the exhaustion requirement. See also Blankenship v. Owens, 2011 WL 610967, *4-5 (N.D.Ga., Feb. 15, 2011) (dismissing for non-exhaustion where complaint was grievable under policy, even though defendants responded to a grievance by stating “grievance for events that have not occurred is prohibited by policy”; court rejects argument that remedy was unavailable); Allen v. Hickman, 407 F.Supp.2d 1098, 1102-03 (N.D.Cal. 2005) (dismissing for non-exhaustion a request for a stay of execution pending receipt of medical care because the administrative system could provide relief concerning medical care, even if it couldn’t provide a stay of execution). But see Nooner v. Norris, 2006 WL 4958988, *3 (E.D.Ark., June 19, 2006) (holding grievance system was not available for challenge to lethal injection protocol where state statute gave the prison Director sole authority for determining it).

Booth v. Churner, 532 U.S. at 736 n.4.; see Johnson v. Cantrall, 2012 WL 5398473, *1 (W.D.Okla., Sept. 17, 2012) (declining to dismiss for non-exhaustion where defendants did not identify any remedy available to plaintiff, since the grievance system did not provide for damages, the grievance policy excluded staff discipline as a remedy, the prisoner had already been transferred, and officials had authorized medical and psychiatric treatment, undertaken an internal investigation, and instructed the officer in how to conduct a pat search). report and recommendation adopted, 2012 WL 5398469 (W.D.Okl., Nov. 2, 2012).
structure or degree of formality is required of a grievance system as long as it is constituted to act on individuals’ complaints—though there is an extreme of informality that courts will not credit. Remedies may be deemed unavailable if there is no “clear route” for challenging the conduct in question.

The Second Circuit has suggested that in deciding whether an unexhausted claim should nevertheless be allowed to go forward, any issue of availability of remedies should be considered first. That makes sense because it potentially leads to the simplest resolution. If remedies were unavailable at the time the complaint arose, the exhaustion requirement is simply inapplicable. If there is an estoppel issue, its resolution may differ according to the conduct of different defendants, and if there is an issue of justification for failure to exhaust, the disposition will depend on whether remedies remain available.

Availability of administrative remedies “is a question of law . . . [that] necessarily involves a factual inquiry.”

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994 See nn. 886-890, above.
995 Miller v. Shah, 2011 WL 2672257, *1-2, 4 (S.D.Ill., June 8, 2011), report and recommendation adopted, 2011 WL 2679091 (S.D.Ill., June 30, 2011). In Miller, the court held that defendants failed to meet their burden of proof where there were no identified steps or procedures for exhaustion beyond a single sentence in a 23-page rules and regulations document stating that the prisoner should put his complaint in writing and submit it to either the Jail Superintendent or the Sheriff, with no time limits for an inmate to file a grievance or for the Jail Superintendent or Sheriff to respond and no procedure for filing an appeal. Defendants claimed that they gave verbal instruction upon admission to the jail, but did not know whether that supposed procedure was written down and could not prove that anyone actually received the instruction. Cf. Castillo v. Bobelu, ___ F.Supp.2d ____, 2014 WL 798014, *18 (W.D.Okla., Feb. 27, 2014) (holding that evidence that prisoners were told “they should report any wrongdoing” did not show the prison “had a grievance procedure with which the inmates were required to comply”).
996 Westefer v. Snyder, 422 F.3d 570, 580 (7th Cir. 2005) (finding record “hopelessly unclear” whether particular decisions could be challenged through the grievance process); see nn. 628-631, 753-761, 946-948, above, and 1074, 1078, below, concerning the lack of clarity in prison remedies.
998 See nn. 205, 258-260, 516, 870, 965-966, above, and § IV.G.3, and n. 1157, below.
999 Small v. Camden County, 728 F.3d 265, 271 (3d Cir. 2013); accord, Dillon v. Rogers, 596 F.3d 260, 266 (5th Cir. 2010) (“[W]hile it is a question of law whether administrative remedies qualify as being ‘available’ under 42 U.S.C. § 1997e(a), availability may sometimes turn on questions of fact.”).

The Second Circuit has stated:

Whether an administrative remedy was available to a prisoner in a particular prison or prison system, and whether such remedy was applicable to the grievance underlying the prisoner's suit, are not questions of fact. They either are, or inevitably contain, questions of law. Where administrative remedies are created by statute or regulation affecting the governance of prisons, the existence of the administrative remedy is purely a question of law. The answer depends on the meaning of the relevant statute or regulation. Even where a grievance procedure is informally established by the warden of a prison and therefore not ascertainable by examination of statutes or regulations, the existence of the procedure may be a matter of fact, but whether it qualifies as an administrative remedy that must be exhausted under Section 1997e(a) is a question of law.

Snider v. Melindez, 199 F.3d 108, 113-14 (2d Cir. 1999). The essential point of this rather overstated formulation is that whether a remedy addresses the particular type of claim a prisoner asserts is a question of law. Subsequent decisions have made it clear that whether an applicable remedy is actually available to a prisoner may turn on factual questions. See, e.g., Messa v. Goord, 652 F.3d 305, 308-10 (2d Cir. 2011) (holding that factual disputes over exhaustion are for the court and not the jury).
1. Grievable and Non-Grievable Issues

The first question about the “availability” of an administrative remedy is whether it has authority to provide “some redress” for the kind of complaint that is at issue.\textsuperscript{1000} It is common for some issues not to be “grievable” in a particular grievance system because the system explicitly excludes them from coverage,\textsuperscript{1001} or because the informal practices of staff have the

\textsuperscript{1000} Marvin v. Goord, 255 F.3d 40, 43 (2d Cir. 2001); accord, Rahim v. Sheahan, 2001 WL 1263493, *6-7 and n.3 (N.D.II., Oct. 19, 2001) (holding defendants have the burden of “proving that there is an administrative process that would be able to take action in response to [the specific] complaints–action, that is, other than saying, ‘Sorry, we can’t do anything about it.’”); In Riley v. Brown, 2006 WL 1722622, *9 (D.N.J., June 21, 2006), where two of seven plaintiffs had filed grievances and had been told the prison didn’t have the authority to do anything about the problem, the court declined to dismiss the claims of the other plaintiffs since exhaustion would have been “futile.” In practice, this amounts to a holding that the remedy was not available.

In Reichart v. Prison Health Services, SCI-Camp Hill, 2013 WL 4855380, *6 (M.D.Pa., Sept. 5, 2013), the court rejected the plaintiff’s claim that he was told he couldn’t grieve medical issues, since the actual response was “a clinical outcome, therefore denied.” The decision appears to be erroneous; the implication of this response is that no redress was available for that kind of complaint, and that the remedy was therefore unavailable.

same effect. For example, the current New York City jail grievance directive lists the following “Submissions Not Subject to IGRP Process”:

1. “dispositions stemming from a program or procedure that has its own departmental administrative or investigative process” (e.g., disciplinary process and dispositions, requests for accommodation or complaints of discrimination based on disability, enhanced restraint status, and others);

2. “allegations of physical or sexual assault or harassment by either staff or inmates”;

3. requests for reassignment or disciplinary action against staff members;

4. “[g]rievances or requests concerning matters outside the Department’s jurisdiction, or over which the Department has no authority” (e.g., complaints about the actions of medical personnel, who work under the supervision of the Department of Health and Mental Hygiene).

1003 Appendix H, New York City Dep’t of Correction Directive 3376, Inmate Grievance and Request Program, § IV.B (September 10, 2012)
Unfortunately some district courts have failed to examine the actual City policy and have dismissed non-grievable claims for failure to grieve, an error condemned by the Second Circuit.\footnote{1004} Several other courts have dismissed New York City cases while erroneously citing the New York State prison grievance procedure.\footnote{1005}

As to New York City medical care claims, matters remain in some confusion because of the City’s inconsistent positions. In one unreported case, the City conceded that claims against employees of the jails’ private medical contractor were “outside the jurisdiction of the Department of Correction” and hence non-grievable, since jail health care is committed to the City Department of Health rather than Correction. However, it claimed without elaboration that there was a separate Health and Hospitals Corporation complaint procedure that prisoners should exhaust,\footnote{1006} a claim not further addressed in the case law. In another case, the City simply asserted that medical care claims are grievable, without addressing the “outside the jurisdiction” language in the grievance directive.\footnote{1007} In a third case, decided by the same judge on the same


day, the jail Grievance Coordinator submitted an affidavit stating that he told the plaintiff that to griev medical concerns “he would need written physician authorization for each request,” a requirement that did not and does not appear in the grievance policy. 1008

The fact that grievance systems may vary in the issues for which they provide redress underscores the importance of the Second Circuit’s holding that courts must “establish the availability of an administrative remedy from a legally sufficient source.”1009 Courts should require substantiation that an administrative procedure on its face affords relief for a particular type of claim before dismissing a prisoner’s claim for non-exhaustion.1010

In some instances, issues are not grievable because the prison system has relegated them to a different administrative remedy. In such cases, it is that remedy that must be exhausted; the grievance process is not available for that issue.1011 An issue that is not explicitly non-grievable, but over which the grievance process has no actual authority, should not require grievance exhaustion under Booth.1012 Prisoners will generally not be held to have failed to exhaust where they have relied on prison staff’s representations as to what issues are and are not grievable.1013

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1008 Kendall v. Kittles, 2004 WL 1752818, *2 (S.D.N.Y., Aug. 4, 2004); compare Appendix C, Dep’t of Correction Directive 3375R; see also Appendix G (updated Directive 3375R-A, also lacking such a provision) and Appendix H (substituted Directive 3376) at § V.A (also lacking such a provision).

1009 Snider v. Melindez, 199 F.3d 108, 114 (2d Cir. 1999); accord, Rahim v. Sheahan, 2001 WL 1263493, *6-7 and n.3 (N.D.III., Oct. 19, 2001) (holding defendants have the burden of “proving that there is an administrative process that would be able to take action in response to [the specific] complaints—action, that is, other than saying, ‘Sorry, we can’t do anything about it.’”) See Westefer v. Snyder, 422 F.3d 570, 580 (7th Cir. 2005) (holding prison officials had not established an available remedy where nothing “clearly identify[ed]” how to challenge certain decisions).

1010 See § IV.F.2, n. 938, above. In some cases, it is difficult to tell from the prison rules whether a particular complaint should be raised by grievance or some other procedure. The Second Circuit has held that a prisoner who relies on a reasonable interpretation of prison regulations that proves to be mistaken is justified in having failed to exhaust properly; if remedies remain available, the case should be dismissed so the prisoner may exhaust them. If remedies are no longer available, the suit may proceed. If the case is dismissed so the plaintiff can exhaust but remedies prove to be unavailable in fact, the suit can be reinstated. Giano v. Goord, 380 F.3d 670, 679-80 (2d Cir. 2004).

1011 See Kaemmerling v. Lappin, 553 F.3d 669, 676 (D.C.Cir. 2008) (Bureau of Prisons grievance system was not an available administrative remedy for statutorily mandated DNA testing, since Bureau of Prisons had no discretion not to collect DNA); Noonor v. Norris, 2006 WL 4958988, *3 (E.D.Ark., June 19, 2006) (holding that prisoner challenging lethal injection protocol need not exhaust the grievance process because it had no authority, since state law placed the subject entirely in the Director’s authority); Farnworth v. Craven, 2007 WL 793397, *5 (D.Idaho, Mar. 14, 2007) (holding prisoner seeking a new parole hearing need not exhaust the grievance system because it had no authority over the Parole Commission); Stevens v. Goord, 2003 WL 21396665, *5 (S.D.N.Y., June 16, 2003) (holding that private prison medical provider failed to meet its burden of showing that the prison grievance procedure would actually have authority over claims against it), adhered to on reargument, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003); Handberry v. Thompson, 92 F.Supp.2d 244, 247 (S.D.N.Y. 2000) (holding that prisoners need not griave failure to deliver educational services because the issues were out of Department of Correction’s control), aff’d in part, vacated in part, and remanded on other grounds, 446 F.3d 335 (2d Cir. 2006). The Handberry appeals court did not reach that issue. 446 F.3d at 342. In Arsberry v. Illinois, 244 F.3d 558 (7th Cir.), cert. denied, 534 U.S. 1062 (2001), the court reached the opposite result, stating: “The plaintiffs say they have no such remedies against exorbitant phone bills, but the cases we have cited reject a ‘futility’ exception to the requirement of exhaustion.” The Arsberry court unaccountably overlooked the distinction between an allegedly futile remedy and one that is not available, and in any case did not have the benefit of Booth’s holding, with which it appears inconsistent.

In Holka v. Napolitano, 2009 WL 536598, *5-6 (D.Ariz., Mar. 4, 2009), plaintiffs were held required to grieve complaints about deductions from their inmate accounts that were required by statute. The court avoided the
2. Unavailability Based on the Facts

A remedy may also be unavailable for reasons peculiar to a particular case. For example, one prisoner was held not to have had an available remedy because his hand was broken and he could not prepare a timely grievance, and was not allowed to file an untimely one when he was again able to write.\textsuperscript{1014} Courts have acknowledged other medical reasons making administrative remedies unavailable,\textsuperscript{1015} though in many cases they have not credited purported medical excuses.\textsuperscript{1016} A number of decisions have held, as Days implies, that prisoners who could not file

\textsuperscript{1013} See n. 1076, below.

\textsuperscript{1014} Days v. Johnson, 322 F.3d 863, 867 (5th Cir. 2003) (noting that “one’s personal ability to access the grievance system could render the system unavailable”).

\textsuperscript{1015} See Hurst v. Hantke, 634 F.3d 409, 411-12 (7th Cir. 2011) (holding remedy would be unavailable if prisoner was incapacitated by stroke during time when he was required to file grievance, and he was not allowed to file a late grievance), cert. denied, 132 S.Ct. 168 (2011); Pavey v. Conley, 170 Fed.Appx. 4, 9, 2006 WL 509447, *5 (7th Cir., Mar. 3, 2006) (unpublished) (holding grievance procedure might be unavailable to a prisoner who couldn’t write because of injury and was isolated from anyone who could help him); Franklin v. Fewell, 2014 WL 505341, *4 (N.D.Ind., Feb. 7, 2014) (rejecting defendants’ argument that plaintiff was capable of filing a grievance upon his return from an outside hospital after emergency surgery; court notes he spent nine days in the prison infirmary and was taking prescription pain medication; evidentiary hearing required to resolve the question); Greenup v. Lee, 2014 WL 471715, *4 (W.D.La., Feb. 5, 2014) (holding remedy unavailable during period of mental and physical incapacity); Perry v. Rupert, 2013 WL 6816795, *5 (N.D.N.Y., Dec. 20, 2013) (holding “repeated refusal of care, refusal of access to a Sergeant, wrongful transfer to the psychiatric ward, transfer by ambulance to Claxton Hepburn Medical Center for emergency consultation, transfer to multiple other hospitals for eight surgeries, hospitalization for a total of six months, release to a medical RNU, and finally a surgery to have the infected mesh removed fifteen months later” could constitute special circumstances excusing non-exhaustion); Ford v. Alexander, 2013 WL 66147, *4 (N.D.Ohio, Jan. 4, 2013) (holding remedy was not shown to be available to prisoner who was hospitalized, groggy from head injuries and medication, during the period when he should have filed a grievance); Richmond v. Dart, 2012 WL 6138751, *4-5 (N.D.Ill., Dec. 11, 2012) (denying summary judgment for non-exhaustion where prisoner was hospitalized, underwent several surgeries, and experienced short-term memory loss during the period for filing a grievance); Ollison v. Vargo, 2012 WL 5387354, *2-3 (D.Or., Nov. 1, 2012) (holding remedy appeared “effectively unavailable” to prisoner who was mentally and physically incapable of filing a grievance during the prescribed period where the grievance system did not allow late grievances; rejecting argument that Woodford v. Ngo undermined Days v. Johnson); Johnson v. Juvera, 2012 WL 4008942, *7 (D.Ariz., Sept. 12, 2012) (holding remedy unavailable where prisoner could not remember events because of his injuries and could not timely obtain necessary information from officials); see Appendix A for additional authority on this point.

\textsuperscript{1016} See Ferrington v. Louisiana Dept. of Corrections, 315 F.3d 529, 532 (5th Cir. 2002) (holding plaintiff’s near blindness did not exempt him from exhausting; after all, he managed to file this suit), cert. denied, 540 U.S. 883 (2003); Lopez v. Goodman, 2013 WL 3105550, *3 (W.D.N.Y., June 18, 2013) (holding prisoner was not excused from exhaustion by his hospitalization where the grievance system provided for extensions of time for mitigating circumstances), reconsideration denied, 2013 WL 5309747 (W.D.N.Y., Sept. 20, 2013); Miller v. Warden, 2013 WL 1003606, *2-3 (E.D.Cal., Mar. 13, 2013) (holding prisoner who alleged his wrist was broken and he couldn’t write failed to exhaust absent evidence that he requested assistance in filing but did not get it); Johnson v. Federal Bureau of Prisons, 2012 WL 5995731, *2 (C.D.Cal., Oct. 29, 2012) (similar to Ferrington), report and recommendation adopted, 2012 WL 5995726 (C.D.Cal., Nov. 30, 2012); Wallace v. Miller, 2012 WL 1106759, *13-14 (M.D.Pa., Mar. 6, 2012) (noting that plaintiff’s allegedly injured hand was able to file another grievance during the relevant time period), report and recommendation adopted, 2012 WL 1106779, *2 (M.D.Pa., Apr. 2, 2012), aff’d, 544 Fed.Appx. 40 (3d Cir. 2013); Lease v. Mitcheff, 2012 WL 1035528, *4 (N.D.Ind., Mar. 23, 2012) (holding statement that plaintiff was in pain and forgot to follow up on grievances was not a valid excuse for non-exhaustion); see Appendix A for additional authority on this point.
grievances when they would be timely were obliged to file them untimely, notwithstanding the governing “proper exhaustion” rule.\footnote{1017}

Courts have not taken any consistent approach to the question whether administrative remedies are available to prisoners who may lack the capacity to use them, by reason of disability,\footnote{1018} impaired literacy or lack of education,\footnote{1019} language barrier,\footnote{1020} or youth.\footnote{1021} The

\footnote{1017} See cases cited in nn. 847-849, above.
\footnote{1018} Hale v. Rao, 768 F.Supp.2d 367, 377 (N.D.N.Y., Mar. 8, 2011) (“Hale’s illiteracy and poor understanding of the IGP rendered the grievance procedure unavailable”; court mentions that plaintiff had a recorded IQ of 71; failure to exhaust is “excused”); Williams v. Hayman, 657 F.Supp.2d 488, 495-97 (D.N.J. 2008) (evidence of the deaf plaintiff’s inability to communicate in writing or with his counselor raised a factual issue concerning availability to him of the grievance remedy); Johnson-Ester v. Elyea, 2009 WL 632250, *6-8 (N.D.Ill., Mar. 9, 2009) (where prisoner could not write, ambulate, or make himself understood, and may have been irrational or delusional at times, he was not capable of pursuing a grievance; letters from his mother and lawyer about his condition put officials on notice that a prisoner who is hearing-impaired and has limited ability to read and write, and who did not have the assistance of a sign language interpreter, raised a factual issue concerning availability of remedies). But see Thomas v. Holder, 2010 WL 3260029, *3 (D.Md., Aug. 18, 2010) (dismissing claim of blind prisoner for non-exhaustion where he had filed 15 grievances in the preceding several years); Oliver v. Virginia Dept. of Corrections, 2010 WL 1417833, *6 (W.D.Va., Apr. 6, 2010) (dismissing claim of legally blind prisoner who had filed numerous complaints and grievances without inquiry into her access to the system for this grievance); Scott v. Stepp, 2009 WL 2855786, *14 (S.D.Fla., Sept. 1, 2009) (declining to excuse non-exhaustion by plaintiff who is blind, did not have the assistance of a law clerk, and lacked Braille versions of the grievance procedures, since he had repeatedly used the grievance process on other occasions); Elliott v. Monroe Correctional Complex, 2007 WL 208422, *3 (W.D.Wash., Jan. 23, 2007) (dismissing for non-exhaustion where plaintiff with cerebral palsy was provided with assistance and had filed numerous grievances, though he hadn’t actually exhausted any).

\footnote{1019} Robertson v. Dart, 2009 WL 2382527, *3 (N.D.Ill., Aug. 3, 2009) (denying summary judgment on exhaustion where the illiterate plaintiff alleged that a staff member gave him wrong information about how to mark a form to appeal his grievance decision); Langford v. Ifediora, 2007 WL 1427423, *3-4 (E.D.Ark., May 11, 2007) (holding plaintiff’s age, deteriorating health, and lack of general education, combined with failure to provide him assistance in preparing grievances, raised a factual issue concerning the availability of the remedy to him); Kuhajda v. Illinois Dept. of Corrections, 2006 WL 1662941, *1 (C.D.Ill., June 8, 2006) (holding that a prisoner who is hearing-impaired and has limited ability to read and write, and who did not have the assistance of a sign language interpreter, raised a factual issue concerning availability of remedies). But see Thomas v. Holder, 2010 WL 3260029, *3 (D.Md., Aug. 18, 2010) (dismissing claim of blind prisoner for non-exhaustion where he had filed 15 grievances in the preceding several years); Oliver v. Virginia Dept. of Corrections, 2010 WL 1417833, *6 (W.D.Va., Apr. 6, 2010) (dismissing claim of legally blind prisoner who had filed numerous complaints and grievances without inquiry into her access to the system for this grievance); Scott v. Stepp, 2009 WL 2855786, *14 (S.D.Fla., Sept. 1, 2009) (declining to excuse non-exhaustion by plaintiff who is blind, did not have the assistance of a law clerk, and lacked Braille versions of the grievance procedures, since he had repeatedly used the grievance process on other occasions); Elliott v. Monroe Correctional Complex, 2007 WL 208422, *3 (W.D.Wash., Jan. 23, 2007) (dismissing for non-exhaustion where plaintiff with cerebral palsy was provided with assistance and had filed numerous grievances, though he hadn’t actually exhausted any).

\footnote{1020} Several courts have denied summary judgment to prison officials where a monolingual Spanish-speaking plaintiff alleged he could not understand or follow the grievance procedures because he could not get them, or get help with them, in Spanish. See Beltran-Ojeda v. Doe, 2013 WL 6059242, *3 (D.Ariz., Nov. 18, 2013) (holding allegations of failure to provide an interpreter, to accept Spanish grievances, or to reply in a language other than
same is true of mental illness or developmental disability. Some courts have held that allegations or evidence of such disability may defeat claims of non-exhaustion, at least at early stages of the litigation. Others have rejected claims that mental disabilities prevented exhaustion,

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One appeals court has rejected the argument that a juvenile jail inmate complaining of excessive force should be excused from failure to use the grievance process in part because he was a juvenile. Brock v. Kenyon County, Ky., 2004 WL 603929, *4 (6th Cir., Mar. 23, 2004) (unpublished); see also Minix v. Pazer, 2005 WL 1799538, *4 (N.D.Ind., July 27, 2005) (holding that a juvenile’s mother’s repeated complaints to numerous officials did not exhaust her son’s complaint of being beaten and raped). By contrast, in Lewis v. Gagne, 281 F.Supp.2d 429, 433-35 (N.D.N.Y. 2003), the court held that a juvenile detainee’s mother, who had complained to facility staff and contacted an attorney, family court, and the state Child Abuse and Maltreatment Register, and whose complaints were known to the facility director and agency counsel, had made sufficient “reasonable efforts” to exhaust, without explicitly commenting on the juvenile detainee’s own status or capacity to follow administrative procedures. See Troy D. v. Mickens, 806 F.Supp.2d 758, 768-69 (D.N.J. 2011) (holding ombudsman procedure was exhausted by an attorney’s letter to juvenile institution superintendent, since it created an opportunity for investigation and resolution at the facility level); Molina v. New York, 2010 WL 812353, *3 (N.D.N.Y., Mar. 3, 2010) (denying summary judgment for non-exhaustion on present record “with due consideration to Plaintiff’s juvenile and pro se status”).

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See Beaton v. Tennis, 460 Fed.Appx. 111, 113-14 (3d Cir. 2012) (unpublished) (evidence that prison staff took advantage of plaintiff’s confused mental state arising from a skull fracture and post-concussion syndrome to make him withdraw his grievance raised a factual issue barring summary judgment for non-exhaustion); Peterson v. Hall, 2012 WL 3111632, *7-9 (E.D.Mich., July 2, 2012) (declining to dismiss for non-exhaustion where plaintiff’s grievance was rejected for being illegible and he said he was nearly illiterate and mentally ill and was refused assistance in pursuing his grievance when he sought it, contrary to the grievance policy), report and recommendation adopted, 2012 WL 3111629, *1-2 (E.D.Mich., July 31, 2012); Wimbush v. Booth-Moulden, 2012 WL 2575497, *7 (D.Md., June 28, 2012) (noting non-exhaustion, but reaching the merits because plaintiff was complaining of denial of mental health treatment); Michalek v. Lunsford, 2012 WL 1454162, *2-4 & n.5 (E.D.Ark., Apr. 5, 2012) (declining to dismiss for non-exhaustion where plaintiff was diagnosed with a psychotic disorder and found unfit to stand trial a few months before the incident, was later found fit but acquitted by reason of insanity, and was later transferred to a mental hospital, where his condition improved under medication), report and recommendation adopted, 2012 WL 3235781 (E.D.Ark., Apr. 24, 2012); see Appendix A for additional authority on this point; see also Macahilas v. Taylor, 2008 WL 220364, *4 (E.D.Cal., Jan. 25, 2008) (denying summary judgment to defendants based on alleged psychological evidence of a serious physical illness), report and recommendation adopted, 2008 WL 506109 (E.D.Cal., Feb. 22, 2008). In Johnson-Ester v. Elveya, 2007 WL 3046155, *2 (N.D.Ill., Oct. 10, 2007), the mother of a mentally incompetent prisoner said she had made repeated complaints about his medical care without success; the court rejected defendants’ argument that the case should be dismissed for non-exhaustion, citing the mother’s assertions that “she did what she could do” to solve the problem administratively, but it did not clarify what it thought the PLRA requires or permits in this sort of situation.

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though often on the ground that the plaintiff did not sufficiently plead or provide evidentiary support for the claim—a rather Catch-22ish approach to pro se litigants who assert that their mental disabilities prevented them from properly completing an administrative process that is supposed to be simpler than litigation.

The only appellate court that has addressed this issue in any depth—unfortunately, in an unpublished decision—has held that the defendants had the burden of proof as to whether a mentally disabled plaintiff “was actually capable of filing” a grievance, and noted that the prisoner before it raised a genuine issue as to whether he “even knew that he needed mental health treatment—much less that he needed to communicate that need to [prison] personnel,” whether he “was mentally capable of filing a grievance,” and whether he “sufficiently understood the detention facility's grievance system” and knew he had to fill out a form. The court also notes that to file a grievance, the plaintiff would have had to place a form in the grievance mail box, which he would have been unable to do because he refused to leave his cell. Though the district court had found in part for the plaintiff, the appeals court’s framing is more favorable to plaintiffs than the district court’s holding that mental illness renders remedies unavailing only if it renders the prisoner “unable to communicate in any intelligible form for a particular period,” “unable to comply with the grievance procedure,” and/or

1023 Lopez v. Swift, 2013 WL 4718972, *4 (E.D.Wash., Sept. 3, 2013) (holding plaintiff’s depression did not excuse non-exhaustion where he had filed other grievances during the same time period); Williams v. Crosby, 2013 WL 791253, *6-7 (E.D.N.C., Mar. 4, 2013) (rejecting mental-health related claim as “self-serving and conclusory” despite evidence of “paranoid ideation and hallucinatory delusions of conversations with God and sexual threats from inmates and staff” immediately preceding the incident, since he had previously used the grievance system); Marella v. Terhune, 2011 WL 4074865, *8 (S.D.Cal., Aug. 16, 2011) (rejecting claim that plaintiff was unable to grieve because of medication, shock, and pain, relying on expert opinion based on review of his medical records, and his ability to perform other tasks during the same time period); report and recommendation adopted, 2011 WL 4074750 (S.D.Cal., Sept. 13, 2011); Johnson v. District of Columbia, 869 F.Supp.2d 34, 39 (D.D.C. 2012) (following what court says is “the bulk of authority that has consistently held that individuals with disabilities or mental illness must nonetheless comply with the PLRA's exhaustion requirements”; court goes on to distinguish contrary cases and suggest plaintiff has not shown his disorder prevented him from exhausting); Grant v. Henderson, 2011 WL 902357, *4-6 (N.D.Fla., Feb. 7, 2011) (holding allegation that plaintiff was too highly medicated to understand his rights did not excuse non-exhaustion as a matter of law; also rejecting claim on facts), report and recommendation adopted, 2011 WL 902228 (N.D.Fla., Mar. 15, 2011); see Appendix A for additional authority on this point.

1024 See Crabtree v. Gephart, 2012 WL 1205814, *4-5 (D.Idaho, Apr. 11, 2012) (dismissing for non-exhaustion where plaintiff alleged he has “a mental illness,” is “borderline mentally retarded,” and is “bipolar”; “there is no evidence that Plaintiff's alleged mental illness difficulties prevented him from filing a grievance” and he had used the system before); Contino v. Hillsborough County Dept. of Corrections, 2011 WL 4406320, *6 (D.N.H., Sept. 21, 2011) (granting summary judgment because plaintiff failed to produce evidence to support claim that mental illness prevented his exhausting; noting he had followed the grievance procedure on another occasion); Calloway v. Grimshaw, 2011 WL 4345299, *5 (N.D.N.Y., Aug. 10, 2011) (dismissing for non-exhaustion where plaintiff said he was suffering from a psychotic episode, but “does not allege that any mental condition constituted a special circumstance that prevented him from exhausting his administrative remedies”), report and recommendation adopted, 2011 WL 4345296 (N.D.N.Y., Sept. 15, 2011); see Appendix A for additional authority on this point.

In one recent case, a federal appellate judge dissented from the affirmation of dismissal for non-exhaustion of a prisoner who alleged she had mental illness and that she had encountered obstruction in trying to exhaust. Ball v. SCI Muncy, 385 Fed.Appx. 211, 216 (3d Cir. 2010) (dissenting opinion) (“I do not believe that [Congress’s] intention was to bar judicial review when the inmate is incapable, because of mental disability, to understand and complete the prison grievance process. The plaintiff's claims arguably fall into this category and on the record here merit inquiry before dismissal.”), cert. denied, 131 S.Ct. 1006 (2011).


1026 Braswell, 419 Fed.Appx. at 626.
“completely unable to file a grievance,” and if “this is evidenced to the Court's satisfaction.”\textsuperscript{1027} While there is some overlap between the Circuit’s language and the district court’s, the latter’s phrase “unable to communicate in any intelligible form” seems to suggest that an extreme of disability is required; the Circuit’s specification of several questions to be explored is more expansive than the district court’s formulation; and the Circuit’s reference to the defendants’ burden of proof is absent from the district court decision. In that case there was ample evidence before the court of the prisoner’s condition. Whether the decision will benefit pro se litigants who are ill-equipped to make an adequate record will remain to be seen.\textsuperscript{1028}

Prisoners may also be unable to use a grievance system because they have been transferred or were otherwise absent from the institution or prison system when they should have filed a grievance.\textsuperscript{1029} However, transfer or absence will not automatically excuse non-

\textsuperscript{1027} Braswell v. Corrections Corp. of America, 2009 WL 2447614, *8 (M.D.Tenn., Aug. 10, 2009), rev’d, 419 Fed.Appx. 622 (6th Cir. 2011) (unpublished). In Braswell, the district court found that the plaintiff was unable to communicate except in gibberish for a period of some eight months, then regained his faculties sufficiently to communicate intelligibly. Though he didn’t file a grievance, he had been transferred by then and was not shown to have access to the sending prison’s grievance process. 2009 WL 2447614, *9.

\textsuperscript{1028} It did in the unusual case of Michalek v. Lunsford, 2012 WL 1454162, *2-4 & n.5 (E.D.Ark., Apr. 5, 2012), report and recommendation adopted, 2012 WL 3235781 (E.D.Ark., Apr. 24, 2012), in which the court sua sponte assembled a substantial record concerning the plaintiff’s psychiatric status by electronically accessing the records of his criminal proceeding. That decision underscores how unlikely it is that a prisoner with mental illness could effectively make such a case pro se.

\textsuperscript{1029} Johnston v. Maha, 460 Fed.Appx. 11, 15 (2d Cir. 2012) (unpublished) (“The PLRA does not require prisoners to reach across jurisdictional lines to take advantage of grievance systems that are no longer available to them.”); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) (holding allegation that transferred prisoner could not get grievance forms for transferring prison system sufficiently alleged exhaustion of available remedies); Lawson v. Youngblood, 2014 WL 273854, *3-4 (E.D.Cal., Jan. 23, 2014) (holding remedy unavailable where prisoner made a verbal complaint but was immediately transferred, and thereafter did not have access to the written complaint process), report and recommendation adopted, 2014 WL 669779 (E.D.Cal., Feb. 20, 2014); Johnson v. Schiff, 2013 WL 5465978, *9-10 (N.D.N.Y., Sept. 10, 2013) (denying dismissal for non-exhaustion where prisoner was transferred immediately and grievance policy did not contain provisions for filing once transferred), report and recommendation adopted, 2013 WL 5466638, *8-9 (N.D.N.Y., Sept. 30, 2013); Chaplin v. Maas, 2013 WL 1249173, *12 (W.D.Va., Feb. 1, 2013) (denying summary judgment for non-exhaustion where defendants had terminated prisoner’s grievance upon transfer and there was no evidence it remained available), report and recommendation adopted, 2013 WL 1249146 (W.D.Va., Mar. 26, 2013); Huspon v. Rains, 2013 WL 415609, *4 (S.D.Ind., Feb. 1, 2013) (finding remedy unavailable to prisoner removed from prison immediately after injury because policy allowed former prisoners to grieve only if they had commenced the process before transfer); Artis v. Adam, 2012 WL 4450019, *13 (N.D.N.Y., July 31, 2012) (holding jail remedy was not shown to be available to prisoner allegedly assaulted by staff as he was being transferred to state prison), report and recommendation adopted, 2012 WL 4380921 (N.D.N.Y., Sept. 25, 2012); Aziz v. Pittsylvania County Jail, 2012 WL 263393, *5-6 (W.D.Va., Jan. 30, 2012) (holding remedy was unavailable where policy made it impossible to continue a grievance after transfer; noting plaintiff was transferred so quickly he did not have time to exhaust first); Thomas v. Ulep, 2011 WL 864311, *4 (E.D.Va., Mar. 9, 2011) (finding dispute of material fact as to whether grievance system could grant relief after transfer); Hartry v. County of Suffolk, 755 F.Supp.2d 422, 433-34 (E.D.N.Y. 2010) (declining to dismiss where prisoner was transferred out of jail too quickly to have a meaningful opportunity to exhaust, and where rules provided to prisoners did not require grieving after leaving the jail); Rodriguez v. Mount Vernon Hosp., 2010 WL 3825736, *12-13 (S.D.N.Y., Sept. 7, 2010) (finding factual dispute with respect to prisoner’s ability to appeal a grievance during a temporary transfer), report and recommendation adopted, 2010 WL 3825715 (S.D.N.Y., Sept. 30, 2010), aff’d, 2010 WL 3959602 (S.D.N.Y., Oct. 5, 2010); see Appendix A for additional authority on this point; see also King v. Coleman, 2007 WL 2330767, *1-3 (E.D.Cal., Aug. 13, 2007) (holding prisoner injured in a jail van who was not a prisoner in that jail was not shown to have access to the jail’s grievance policy), report and recommendation adopted, 2007 WL 2893997 (E.D.Cal., Sept. 28, 2007).
exhaustion; courts have held exhaustion required if the grievance system makes provision for grievances to be filed and processed under such circumstances,\textsuperscript{1030} or if the prisoner had the opportunity to file before transfer.\textsuperscript{1031} Defendants have the burden of proof on this point as on other issues concerning exhaustion.\textsuperscript{1032} This determination can be difficult to make in some

\textsuperscript{1030}Anderson v. DeLeon, 2013 WL 5603855, *4-5 (C.D.Cal., Oct. 10, 2013) (dismissing for non-exhaustion where plaintiff could have used jail grievance system even after transfer to state prison), \textit{appeal dismissed}, No. 13-56890 (9th Cir., Dec. 5, 2013); Thompson v. Jones, 2012 WL 3686749, *5 (N.D.Ill., Aug. 24, 2012) (holding remedy was not unavailable after transfer where county jail policy provided for acceptance of grievances from state prison); Veenstra v. Corrections Corp. of America (CCA), 2011 WL 3566853, *2-3 (D.Idaho, Aug. 15, 2011) (transfer was no excuse where grievance policy provided for post-transfer grievances); Napier v. Laurel County, Ky., 2009 WL 2255767, *3-4 (E.D.Ky., July 29, 2009) (where post-transfer grievances were in fact processed, prisoner was obliged to submit one even though policy was unclear), \textit{aff’d}, 636 F.3d 218 (6th Cir. 2011); see \textit{Appendix A for additional authority on this point. Compare} Cowart v. Erwin, 2013 WL 6188731, *4-5 (N.D.Tex., Nov. 26, 2013) (finding jail grievance appeal unavailable to prisoner who had been transferred after filing because prisoners who have left the jail are not informed of the disposition of their grievances and are unable to appeal).

\textsuperscript{1031}Alonso-Prieto v. Pierce, 2014 WL 250342, *4 (E.D.Cal., Jan. 22, 2014) (holding jail prisoner transferred within two days, where the grievance policy had a 10-day time limit, was not shown to have had a meaningful opportunity to grieve), \textit{report and recommendation adopted}, 2014 WL 907205 (E.D.Cal., Mar. 7, 2014); Mitchell v. Hammons, 2013 WL 6189510, *3 (S.D.W.Va., Nov. 26, 2013) (dismissing for non-exhaustion where plaintiff remained at sending facility for almost two months before transfer but did not file a grievance); Evans v. Heidorn, 2013 WL 355822, *3 (E.D.Wis., Jan. 29, 2013) (stating there are “too many unknowns” about whether the plaintiff had an opportunity to exhaust before or after transfer to grant summary judgment), \textit{aff’d}, ___ Fed.Appx. ___, 2014 WL 687876 (7th Cir. 2014); Daniels v. Caldwell, 2013 WL 85165, *3 (E.D.Va., Jan. 7, 2013) (“Without more information about the Jail grievance procedure and the timing of Daniels’s transfer, the Court cannot assess whether Daniels’s transfer excuses any failure by Daniels to utilize the Jail grievance procedure.”) (footnote omitted); Morales v. Putnam, 2012 WL 2861436, *10 (M.D.Pa., June 7, 2012) (holding remedy was not unavailable to temporarily transferred inmate until grievance officials had denied request to file late grievance after return), \textit{report and recommendation adopted}, 2012 WL 2861592 (M.D.Pa., July 11, 2012); Jackson v. Gandy, 877 F.Supp.2d 159, 176-77 (D.N.J. 2012) (holding transfer was no excuse where prisoner pursued other grievances during the relevant period); Pauls v. Green, 816 F.Supp.2d 961, 967-68 (D.Idaho, Sept. 7, 2011) (“the analytical starting point is the transferor jail’s regulations”; noting regulations were silent, citing Sheriff’s testimony that system was not available after transfer; holding that prisoner did not have adequate opportunity to grieve at transferor jail where sexual assaults occurred from seven to two days before her transfer and the grievance system had no time limit for such complaints); Flowers v. City of New York (DOCS), 2009 WL 3415153, *3 (S.D.N.Y., Oct. 22, 2009) (transfer was no excuse where plaintiff remained in city jails for three months after his incident and did not exhaust); Hill v. U.S. Attorney’s Office, E.D.N.Y., 2009 WL 2524914, *5 (E.D.N.Y., Aug. 14, 2009) (plaintiff transferred to federal prison after 10 days had time to file a grievance at county jail); Napier v. Laurel County, Ky., 2009 WL 2255767, *3-4 (E.D.Ky., July 29, 2009) (where post-transfer grievances were in fact processed, prisoner was obliged to submit one even though policy was unclear), \textit{aff’d}, 636 F.3d 218 (6th Cir. 2011).

In \textit{Brownell v. Kron}, 446 F.3d 305, 312-13 (2d Cir. 2006), the court found special circumstances justifying the plaintiff’s failure to exhaust correctly where grievance regulations did prescribe the handling of grievances following a transfer, but prison staff did not follow their own rules.

\textsuperscript{1032}Wright v. Smith, 2013 WL 3787528, *7-8 (E.D.Cal., July 18, 2013) (declining to dismiss for non-exhaustion where federal prisoner was transferred to state prison, did not receive federal grievance decision, had no access to federal forms or process, and plaintiff could not get a response by writing to federal officials; court notes defendants’ burden of proof), \textit{report and recommendation adopted}, 2013 WL 5406870 (E.D.Cal., Sept. 25, 2013); Dubois v. Washoe County Jail, 2013 WL 100940, *2 (D.Nev., Jan. 7, 2013) (declining to dismiss for non-exhaustion where plaintiff was extradited the day after his complaint arose, but defendants failed to show he could have exhausted in a day or could have started the process from his new location); Ford v. Alexander, 2013 WL 66147, *4 (N.D.Ohio, Jan. 4, 2013) (noting defendants failed to explain whether and how a former jail inmate could exhaust
systems. In some cases courts have simply assumed that the grievance system was available to the absent prisoner without inquiring whether that was actually the case, rather than “establish[ing its] availability . . . from a legally sufficient source.” Thus, New York City has represented to the federal courts that its grievance system cannot be used by persons out of City custody (a point which has now been made explicit in its policy), but in at least one case a federal court has simply declared without support that the prisoner should have exhausted by mail. One recent appellate decision states that unless a grievance policy clearly precludes its


See Dillard v. Pierce County, 2011 WL 2530971, *4 (W.D.Wash., May 31, 2011) (citing lack of explicit prohibition of filing grievances from other facilities, not inquiring into actual practices), report and recommendation adopted, 2011 WL 2516388 (W.D.Wash. June 23, 2011); Blakey v. Beckstrom, 2007 WL 204005, *2 (E.D.Ky., Jan. 24, 2007) (holding without record support that transfer did not make grievance procedures unavailable); Hemingway v. Lantz, 2006 WL 1237010, *2 (D.N.H., May 5, 2006) (holding that prisoner who said he didn’t exhaust for fear of retaliation should have filed a grievance after his transfer to the “safety” of another state, without inquiring whether an out-of-state grievance would have been processed); Crump v. May, 2006 WL 626915, *3 (D.Del., Mar. 14, 2006) (asserting that a prisoner who was transferred after an incident still had five days of the seven-day time limit when he arrived at the new prison, without inquiring whether he could have filed a grievance at the new prison about events at the old prison); Paulino v. Amicucci, Warden Westchester County Jail, 2003 WL 174303 (S.D.N.Y., Jan. 27, 2003) (holding that transfer soon after the incident “does not relieve plaintiff of the obligation to exhaust his administrative remedies in the facility where the incident occurred”); Rodriguez v. Senkowski, 103 F.Supp.2d 131, 134 (N.D.N.Y. 2000) (holding that transferred inmate was obliged to exhaust about incident at prior facility); see also Moby v. O’Gara, 2006 WL 197185, *4 (E.D.N.Y., Jan. 23, 2006) (in a case brought by a prisoner who had filed a grievance, been released before exhaustion was completed, and was reincarcerated when he filed suit, assuming without support that remedies that would have been available for the earlier incident) (dictum).

Snider v. Melidez, 199 F.3d 108, 114 (2d Cir. 1999).


Exhibit H, New York City Dep’t of Correction Directive 3376 at § IV.I.c.ii (Sept 10, 2012) (“If the inmate has been discharged from Department custody, the inmate will no longer have access to the IGRP process.”).

use by a prisoner no longer in the relevant prison or system, the prisoner is obliged at least to try to follow the policy. In effect, the court reversed the burden of proof, stating that a policy will be presumed available in these circumstances unless the prisoner demonstrates its unavailability.

In a New York decision, the court dismissed for non-exhaustion because the plaintiff’s grievance had been rejected as untimely as a result of his having been out of the prison when the decision he had to appeal was issued. The court said that “being moved from one facility to another is not an uncommon aspect of prison life. This circumstance does not by itself automatically toll applicable regulatory filing deadlines, nor relieve the inmate of his obligation to keep informed of the status of any administrative proceeding he may have pending prior to transfer and to make diligent efforts to protect and preserve his rights from the new location to which he is moved or from the original facility promptly upon his return there.” The court does not explain (and there is no indication that it considered) exactly how a prisoner is supposed to keep informed of these matters when the means of giving the prisoner notice is to send a decision to a place where he is no longer held.

A remedy may be made unavailable by the acts or omissions of prison personnel. For example, there is a recurrent pattern in American prisons of threats and retaliation against

88 (2d Cir. 2004) (emphasis supplied). The court added: “We have no occasion to consider the exhaustion requirement in situations where only a brief interval elapses between the episode giving rise to the prisoner’s complaint and the prisoner’s transfer to the custody of another jurisdiction.” Id. at n.3.

1039 Napier v. Laurel County, Ky., 636 F.3d 218, 224 (6th Cir. 2011) (“We are not requiring that a prisoner utilize every conceivable channel to grieve their case, but even when a policy is vague, a prisoner must do what is required by the grievance policy. . . . Nothing in the LCDC policy explicitly prohibits inmates from filing grievances after they have been released from that facility.”) (citing Medina–Claudio v. Rodriguez–Mateo, 292 F.3d 31, 35 (1st Cir. 2002)). Arguably this discussion is dictum, since the court went on to cite evidence produced by the defendants that another prisoner had filed a grievance from another institution. 636 F.3d at 225. Contra, Pauls v. Green, 2011 WL 5520645, *4 (D.Idaho, Nov. 14, 2011) (“This [Napier’s] analysis confuses the burden of proof. It is the defendants who must first show that the administrative procedures are available. Only then does the issue of what [the plaintiff] did (or did not do) to utilize those procedures becomes relevant.”).


1041 Dole v. Chandler, 438 F.3d 804, 809, 812 (7th Cir. 2006) (“Prison officials may not take unfair advantage of the exhaustion requirement, . . . and a remedy becomes ‘unavailable’ if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting.”); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) (“We believe that a remedy that prison officials prevent a prisoner from ‘utilizin[ging]’ is not an ‘available’ remedy under § 1997e(a). . .”); Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998) (citing with approval pre-PLRA cases excusing exhaustion where irregularities in the process prevented it or prison officials ignore or interfere with the prisoner’s efforts), cert. denied, 526 U.S. 1133 (1999). A few decisions have taken an exceptionally restrictive view on this point. In one such case, the plaintiff alleged inter alia that prison staff did not give him a copy of a disciplinary decision that he required in order to file his appeal, and the court held that “refusal by prison staff to provide materials necessary to file administrative grievances does not excuse failure to exhaust when a plaintiff could have nonetheless made reasonable efforts to exhaust his administrative remedies.” Magassouba v. Cross, 2010 WL 1047662, *10 (S.D.N.Y., Mar. 1, 2010), report and recommendation adopted, 2010 WL 4908670 (S.D.N.Y., Nov. 30, 2010). The court did not say what the plaintiff could have done if denied materials required by the grievance rules. See Victor v. Lawler, 2011 WL 3584496, *8 (M.D.Pa., Feb. 25, 2011) (“This broad [exhaustion] rule admits of one, narrowly defined exception. If the actions of prison officials directly caused the inmate's procedural default on a grievance, the inmate will not be held to strict compliance with this exhaustion requirement.”), report and recommendation adopted in part, 2011 WL 3584781 (M.D.Pa., Aug. 12, 2011).
prisoners who file grievances, litigation, and other complaints. The Second Circuit has held that threats or assaults directed at preventing prisoners from complaining may make otherwise available remedies unavailable in fact if “a similarly situated individual of ordinary firmness’ [would] have deemed [the remedy] available,” which is the standard applied in First Amendment retaliation cases. Numerous other courts have adopted that holding or a similar formulation. Two circuits have qualified their holdings by requiring the plaintiff also to show

\[1042\] See, e.g., Pearson v. Welborn, 471 F.3d 732, 739-40 (7th Cir. 2006) (affirming jury verdict on claim of retaliation for complaints about conditions); Dannenberg v. Valadez, 338 F.3d 1070, 1071-72 (9th Cir. 2003) (noting jury verdict for plaintiff on claim of retaliation for assisting another prisoner with litigation); Walker v. Bain, 257 F.3d 660, 663-64 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances), cert. denied, 535 U.S. 1095 (2002); Gomez v. Vernon, 255 F.3d 1118 (9th Cir.) (affirming injunction protecting prisoners who were the subject of retaliation for filing grievances and for litigation), cert. denied, 534 U.S. 1066 (2001); Trobaugh v. Hall, 176 F.3d 1087 (8th Cir. 1999) (directing award of compensatory damages to prisoner placed in isolation for filing grievances); Hines v. Gomez, 108 F.3d 265 (9th Cir. 1997) (affirming jury verdict for plaintiff subjected to retaliation for filing grievances), cert. denied, 524 U.S. 936 (1998); Cassels v. Stalter, 342 F.Supp.2d 555, 564-67 (M.D.A. 2004) (striking down disciplinary conviction for “spreading rumors” of prisoner whose mother had publicized his medical care complaint on the Internet); Atkinson v. Way, 2004 WL 1631377 (D.Del., July 19, 2004) (upholding jury verdict for plaintiff subjected to retaliation for filing lawsuit); Tate v. Dragovich, 2003 WL 21978141 (E.D.Pa., Aug. 14, 2003) (upholding jury verdict against prison official who retaliated against plaintiff for filing grievances); Hunter v. Heath, 95 F.Supp.2d 1140 (D.Ori. 2000) (noting prisoner’s acknowledged firing from legal assistant job for sending “kyte” (officially sanctioned informal complaint) to the Superintendent of Security concerning the confiscation of a prisoner’s legal papers), rev’d on other grounds, 26 Fed.Appx. 754, 2002 WL 112564 (9th Cir. 2002); Maurer v. Patterson, 197 F.R.D. 244 (S.D.N.Y. 2000) (upholding jury verdict for plaintiff who was subjected to retaliatory disciplinary charge for complaining about operation of grievance program); Gaston v. Coughlin, 81 F.Supp.2d 381 (N.D.N.Y. 1999) (awarding damages for trumped-up disciplinary charge made in retaliation for prisoner’s complaining about state law violations in mess hall work hours), on reconsideration, 102 F.Supp.2d 81 (N.D.N.Y. 2000); Alnutt v. Clessy, 27 F.Supp.2d 395, 397-98 (W.D.N.Y. 1998) (noting jury verdict for plaintiff who was subject to verbal harassment, assault, and false disciplinary charges in retaliation for his work as an Inmate Grievance Resolution Committee representative).


\[1044\] Tuckel v. Grover, 660 F.3d 1249, 1252-54 (10th Cir. 2011) (following Turner, Hemphill, and Kaba); Verbanik v. Harlow, 441 Fed.Appx. 931, 933 (3d Cir. 2011) (unpublished) (same); Kincaid v. Sangamon County, 435 Fed.Appx. 533, 536-37 (7th Cir. 2011) (unpublished) (following Hemphill and Kaba; “The threat from the superintendent that Kincaid and his family needed to ‘shut the fuck up’ may have intimidated Kincaid and rendered the grievance process unavailable to him.”); Turner v. Burnside, 541 F.3d 1077, 1084 (11th Cir. 2008) (“Remedies that rational inmates cannot be expected to use are not capable of accomplishing their purposes, and so are not
that the threat or intimidation actually did deter the plaintiff from pursuing administrative remedies.\textsuperscript{1045} If a plaintiff establishes an intimidation defense to non-exhaustion, the existence of an emergency grievance procedure does not refute it.\textsuperscript{1046}

Some district courts have entirely rejected the view that threats or intimidation can excuse non-exhaustion.\textsuperscript{1047} Others have rejected such arguments on the narrower ground that the


\textsuperscript{1046} Tuckel, 660 F.3d at 1255; \textit{Turner}, 541 F.3d at 1083–84.

plaintiff’s factual allegations are insufficient to support the claim, or that the plaintiff’s filing of other complaints is inconsistent with it. The latter point is questionable in many cases. Hemphill noted that threats or intimidation “may well deter a prisoner of ‘ordinary firmness’ from filing an internal grievance, but not from appealing directly to individuals in positions of greater authority within the prison system, or to external structures of authority such as state or

1048 In one astonishing case, the court held that plaintiff’s allegations of retaliatory acts including being called “cry baby,” “paper pusher,” and “spic”; having the feeding slot on his cell “closed . . . using excessive pressure” while his hand was in it, causing him “to scream in pain”; being denied immediate medical attention for the pain in his hand; being placed in a cell where the toilet and shower were not working; and being threatened with transfer to a facility where “he might not survive” did not, “individually or in concert,” meet the “inmate of reasonable firmness” standard. Hernandez v. Banulos, 2012 WL 3845885, *4 (D.Colo., Sept. 2, 2012). Almost as remarkable is Fuentes v. Balcer, 2013 WL 276679 (W.D.N.Y., Jan. 24, 2013), in which the plaintiff alleged that he did not grieve his complaint that an officer kicked him as he lay on the floor in a pool of blood and urine because on an earlier occasion that officer had threatened him with bodily harm for reporting a previous assault of another prisoner to the Inspector General. The court noted he did not say he was threatened with bodily harm if he filed a grievance about his own mistreatment, 2013 WL 276679, *6, and dismissed for non-exhaustion. See Hurd v. Durrand, 2013 WL 1192351, *11 (S.D.Fla., Jan. 24, 2013) (holding fear of staff based on physical and other abuse did not excuse failure to exhaust where abuse was not explicitly directed at deterring filing of a grievance), report and recommendation adopted, 2013 WL 1192342 (S.D.Fla., Mar. 22, 2013).

Other decisions are mostly less extreme. See, e.g., Snyder v. Whittier, 428 Fed.Appx. 89, 91-92 (2d Cir. 2011) (unpublished) (rejecting claim of subjective fear as unsupported by other circumstances in case); Martin v. The Commonwealth of Pennsylvania Dept. of Corrections, 395 Fed.Appx. 885, 887 (3d Cir. 2010) (unpublished) (rejecting claim of threats causing fear of retaliation because plaintiff “does not provide any details as to the nature, content, or timing of those threats”); Boyd v. Corrections Corporation of America, 380 F.3d 989, 998 (6th Cir. 2004) (declining to decide whether fear of retaliation can excuse exhaustion, holding that the plaintiff’s failure to “describe with specificity” the factual basis for his fear required dismissal of his claim), cert. denied, 540 U.S. 920 (2005); Baldwin v. Kenny, 2013 WL 4517167, *3 (N.D.Ohio, Aug. 23, 2013) (“. . . Plaintiff provides no dates and times of threats and no specific actions or words of those making threats. Plaintiff fails to detail any particular encounters in which he was directly threatened or otherwise prohibited from using the grievance system.”); Ramos v. Gansheimer, 2013 WL 775353, *6 (N.D.Ohio, Feb. 26, 2013); Porter v. Baxter, 2012 WL 684803, *4-6 (N.D.Fla., Jan. 30, 2012) (holding prisoners must generally allege actual physical force as well as threats to excuse non-exhaustion), report and recommendation adopted, 2012 WL 760628 (N.D.Fla., Mar. 8, 2012); see Appendix A for additional authority on this point. But see Ward v. Rabideau, 732 F.Supp.2d 162, 171-72 (W.D.N.Y. 2010) (crediting plaintiffs’ fears of retaliatory conduct such as “unnecessary and harassing frisk searches, urine testing, misbehavior tickets and reports”). See also Schultz v. Pugh, 728 F.3d 619, 620 (7th Cir. 2013) (holding claim of fear of reprisal must be supported by evidence at the summary judgment stage).

1049 Dixon v. Correctional Corp. of America, Inc., 420 Fed.Appx. 766, 767 (9th Cir. 2011) (unpublished) (affirming finding that threats did not make remedy unavailable since plaintiff continued to file grievances); Madyun v. Cook, 204 Fed.Appx. 547, 548-49 (7th Cir. 2006) (unpublished) (acknowledging that threats can render a remedy unavailable, but finding plaintiff’s claim factually frivolous in light of all the other complaints he filed and the fact that he filed a complaint but failed to appeal it); Bacon v. Reyes, 2014 WL 298694, *5 (D.Nev., Jan. 24, 2014) (“This plaintiff is clearly not afraid of a ‘true threat’ of retaliation, as evidenced by the shear number grievances and lawsuits he has filed over the years, many of which have been against these same defendants.”); Arocha v. Sauceda, 2013 WL 6782843, *6 (E.D.Cal., Dec. 19, 2013) (noting that plaintiff filed two grievances during the time he claimed to have been threatened and made other complaints as well); Ramos v. Beard, 2012 WL 4972193, *11 (M.D.Pa., Sept. 7, 2012) (“That he was able to file so many grievances belies his suggestion that the administrative remedy process was not available to him.”), report and recommendation adopted, 2012 WL 4971235 (M.D.Pa., Oct. 17, 2012); Nelson v. Butte County Sheriff’s Dept., 2012 WL 812385, *9 (E.D.Cal., Mar. 9, 2012) (rejecting claim that plaintiff was intimidated by seeing others beaten for filing grievances where he had submitted several grievances), report and recommendation adopted, 2012 WL 1194839 (E.D.Cal., Apr. 10, 2012); see Appendix A for additional authority on this point.
federal courts.”

Thus the fact that a prisoner has, e.g., written a letter of complaint to the Superintendent (as in Hemphill) does not establish that he or she was not deterred from filing an ordinary grievance. Nor does the filing of grievances or complaints on one subject negate the possibility of intimidation as to others. As the Seventh Circuit observed in adopting and applying the Hemphill standard, “The ability to take advantage of administrative grievances is not an ‘either-or’ proposition.”

Other obstructive actions or circumstances may make remedies unavailable. A remedy may be unavailable because it simply is not functioning when or where the prisoner needs to file a grievance—though some courts have rejected vague and generalized claims of non-

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1050 Hemphill, 380 F.3d at 688. In Turner v. Burnside, 541 F.3d 1077, 1086 (11th Cir. 2008), the court quoted the above-quoted language from Hemphill and said “[t]hat makes sense to us,” but did not preclude the district court from considering that the plaintiff had filed a lawsuit in determining whether the threat deterred the plaintiff or would have deterred a reasonable prisoner of ordinary firmness.

Some prison systems provide a means for prisoners to make complaints to higher authority outside the prison, and courts may consider that fact in assessing claims of fear of retaliation. See Bigbee v. Sadowski, 2008 WL 4330566, *3 (W.D.Wis., Feb. 21, 2008).


Kaba v. Stepp, 458 F.3d 678, 685-86 (7th Cir. 2006) (holding that the plaintiff’s filing of other grievances did not show the remedy was available for grievances against the particular staff who were threatening him); accord, Hill v. O’Brien, 387 Fed.Appx. 396, 401 (4th Cir. 2010) (also noting that plaintiff’s filing of grievances at one prison was irrelevant to whether he was obstructed in filing at another prison); Ojo v. Medic, 2012 WL 7150497, *8-9 (D.N.H., Dec. 17, 2012) (filing of other grievances did not refute claim that plaintiff was obstructed as to the present one), report and recommendation approved, 2013 WL 593485 (D.N.H., Feb. 14, 2013); Hewlett v. Caraway, 2011 WL 1627168, *2 (D.Md., Apr. 27, 2011) (filing of other grievances did not affect claim that this grievance was obstructed).

This point is inadequately appreciated by some courts. For example, in Chiarappa v. Meyers, 2013 WL 6328478, *7 (W.D.N.Y., Dec. 5, 2013), the court stated that it credited the plaintiff’s statement that he didn’t file a timely grievance “because he was told by the SHU guards that he was on the ‘beat up’ list for complaining about a corrections officer,” but then appealed his disciplinary conviction and sent five letters to the Commissioner asserting his innocence but stating that he did not want to see any officers reprimanded or disciplined. The court then granted summary judgment to the defendants, stating that “no rational fact finder could determine that plaintiff was deterred from exhausting his administrative remedies by the actions of the defendants or any other DOCCS employee.” Id. This decision paid insufficient attention to the reasoning of Kaba v. Stepp.

1053 Frost v. McLaughtry, 215 F.3d 1329, 2000 WL 767841, *1 (7th Cir., June 12, 2000) (unpublished) (holding allegation that no grievance appeal was available to plaintiff because of ongoing administrative changes during the relevant time period raised a factual question as to availability); Smith v. City of New York, 2013 WL 5434144, *29 (S.D.N.Y., Sept. 26, 2013) (holding evidence that the grievance box where plaintiff placed his grievance was never emptied, and staff statements that the facility could not process all the grievances it receives, raised question whether remedy was available); Malik v. City of New York, 2012 WL 3345317, *8 (S.D.N.Y., Aug. 15, 2012) (holding allegation that grievance forms were unavailable and were not processed at jail sufficiently alleged plaintiff was prevented from exhausting), report and recommendation adopted, 2012 WL 4475156 (S.D.N.Y., Sept. 28, 2012); Gordon v. County of Rockland, 2011 WL 611860, *5 (S.D.N.Y., Feb. 18, 2011) (holding plaintiffs raised an issue of fact whether jail grievance system was a “nullity”); Johnson v. Pam, 2010 WL 2643556, *2-3 (D.Ariz., June 30, 2010) (refusing to dismiss where grievance program was not functioning during a lockdown); Taylor v. Zerillo, 2008 WL 4862690, *2 (E.D.N.Y., Nov. 10, 2008) (refusing to dismiss in light of allegation that plaintiff was transferred among prisons to prevent him from exhausting); Bowers v. City of Philadelphia, 2007 WL 219651, *16 (E.D.Pa., Jan. 25, 2007) (finding no meaningful access to grievance procedure in police custody and jail intake areas
functioning grievance systems.\textsuperscript{1054} Prison rules and procedures may make remedies unavailable. For example, a rule denying postage to indigents to mail a grievance appeal may make the remedy unavailable,\textsuperscript{1055} as may the absence of copying facilities where the rules require multiple copies of documents,\textsuperscript{1056} deprivation of writing materials or documentation to prisoners in a segregation unit or elsewhere,\textsuperscript{1057} or other situations that make prisoners unable to comply with grievance rules.\textsuperscript{1058} One recent decision found remedies unavailable to the plaintiff because the

\textsuperscript{1054} Where prisoners had no writing implements or paper and their oral complaints were ignored or dismissed; Martin v. Sizemore, 2005 WL 1491210, *1, *3 (E.D.Ky., June 22, 2005) (declining to dismiss where plaintiff alleged that “[t]here is no grievance committee here, your grievances are simply turned over to the person you file on and you get threatened”); Williams v. Hagen, 2005 WL 1204324, *2 (D.Neb., May 11, 2005) (declining to dismiss in light of plaintiff’s allegation of “total disarray . . . with regard to the grievance process”).

\textsuperscript{1055} Anderson v. McDonald, 2013 WL 211123, *7 (E.D.Cal., Jan. 18, 2013) (rejecting general allegations that system is “broken”; “Plaintiff’s allegations that other grievances were ignored or destroyed are both factually unsupported and inadequate to demonstrate the unavailability of administrative remedies.”)

\textsuperscript{1056} DeMartino v. Zenk, 2009 WL 2611308, *7-8 (E.D.N.Y., Aug. 25, 2009) (access of access to a copier in order to comply with the grievance procedure raised a material factual issue: estoppel theory), reconsideration denied, 2009 WL 4626647 (E.D.N.Y., Dec. 7, 2009); Iseley v. Beard, 2009 WL 1675731, *6 (M.D.Pa., June 15, 2009) (remedy was unavailable where copies of documents were required to appeal but there was no copier access in Restricted Housing Unit; grievance authorities said this is “not our problem”).


\textsuperscript{1058} See, e.g., Church v. Oklahoma Correctional Industries, 2011 WL 4376222, *7 (W.D.Okla., Aug. 15, 2011) (remedy was unavailable where grievance personnel refused to accept a grievance without a date of incident, when the complaint was not about an incident but about an ongoing practice), report and recommendation adopted, 2011
prison’s internal mail system “was effectively broken at the time he was attempting to exhaust his remedies.”

Sometimes prisoners in a particular status or situation are simply excluded from using the grievance system. Rules specifically designed to limit prisoners’ use of the grievance system may make the remedy unavailable for some prisoners, depending on the severity of the limit, though the majority of decisions involving such rules uphold claims of

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1060 Zueve v. Geffers, 2010 WL 3835138, *3-4 (E.D.Wis., Sept. 28, 2010) (declining to dismiss where prisoner was in program in which right to use the grievance system was suspended); Muhammad v. U.S. Marshal Service, 2009 WL 335189, *5 (W.D.Pa., Feb. 10, 2009) (finding material factual issue whether remedies were available to federal detainee held temporarily in local jail); Daker v. Ferrero, 2004 WL 5459957, *2-3 (N.D.Ga., Nov. 24, 2004) (prisoner placed in “sleeper” status, meaning he remained officially assigned to another prison and was not allowed to file grievances where he was actually located, lacked an available remedy); see Sease v. Phillips, 2008 WL 2901966, *5 (S.D.N.Y., July 24, 2008) (summary judgment denied where prisoner in “transient status” was told his grievance could not be processed, and when he filed one it was never processed); see also Sandlin v. Poole, 575 F.Supp.2d 484, 488 (W.D.N.Y. 2008) (refusal to make grievance deposit boxes available in segregation unit, requiring prisoners to rely on officers to pick up and forward them, supported claim of unavailable remedies).

If the available remedy is a disciplinary appeal, but the prisoner cannot appeal under prison rules because he pled guilty to the offense, the remedy is not available. Marr v. Fields, 2008 WL 828788, *5-7 (W.D.Mich., Mar. 27, 2008).

1061 Rules limiting prisoners to a certain number of grievances may make the remedy unavailable for prisoners who are over the limit. Lerajarearra-O-Kel-Ly v. Zmuda, 2012 WL 3904367, *3 (D.Idaho, Sept. 7, 2012) (“Should a prisoner have four legitimate grievances at roughly the same time, he will be able to pursue only three, and whether he can file the fourth in time is wholly dependent upon whether prison officials process the other three before the time for the filing of the fourth grievance expires. Here, the prison has chosen to make the grievance system unavailable to any prisoner who already has three pending grievances.”); Stine v. Federal Bureau of Prisons, 2012 WL 882421, *3 (D.Colo., Mar. 15, 2012) (“If a prisoner is pursuing a case that involves multiple claims, the Court could see how the BOP policy of only issuing one Informal Resolution form at a time could hinder the prisoner’s ability to exhaust his administrative remedies. This is especially true given the short time constraints typically associated with the prison grievance system.” But the plaintiff had only one complaint), motion to amend denied, 2012 WL 3155794 (D.Colo., Aug. 3, 2012), affirmed in part, reversed in part, 508 Fed.Appx. 727 (10th Cir. 2013); Miller v. King, 2009 WL 3805568, *3-4 (S.D.Ga., Nov. 10, 2009) (denying summary judgment on non-exhaustion where plaintiff was allowed to file only one grievance per week and to have two pending grievances at one time, grievances took a year to be resolved but had to be filed within 10 days of the relevant incident); Bailey v. Cogburn, 2009 WL 666955, *5 (W.D. Okla., Mar. 11, 2009) (denying summary judgment where grievance was denied because plaintiff had two grievances pending already and policy called for deciding excess grievances after previous grievances were decided); Rhodan v. Schofield, 2007 WL 1810147, *6 (N.D.Ga., June 19, 2007) (holding prisoner who said he was told he could not have two grievances pending at once raised a factual issue as to availability of remedies); Wood v. Idaho Dept. of Corrections, 2006 WL 694654, *6 (D.Idaho, Mar. 16, 2006) (holding that a
non-exhaustion.\textsuperscript{1062} A system of “modified grievance access,” which requires prior permission to file a grievance, makes the remedy unavailable if permission is not granted.\textsuperscript{1063}

Remedies may also be made unavailable by actions by supervisors or grievance staff with respect to particular grievances or grievants,\textsuperscript{1064} by purposeful misconduct,\textsuperscript{1065} or by neglect or

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\textsuperscript{1064} Sapp v. Kimbrell, 623 F.3d 813, 823 (9th Cir. 2010) (holding “improper screening of an inmate's administrative grievances renders administrative remedies 'effectively unavailable' such that exhaustion is not required under the PLRA’); Howard v. Hill, 156 Fed.Appx. 886, 2005 WL 3105832, *1 (9th Cir., Nov. 21, 2005) (unpublished) (holding that a prisoner who had been told he would not receive responses to his grievances had no remedy available); Bryant v. Hobbs, 2014 WL 37802, *7, 9 (E.D.Ark., Jan. 6, 2014) (declining to dismiss for non-exhaustion where the plaintiff received a grievance response after the appeal deadline had already passed); Lee v.
accident, \(^{1066}\) or events that are merely unexplained. \(^{1067}\) though courts are unlikely to credit vague or conclusory claims of obstruction. \(^{1068}\) Numerous decisions hold that the failure or refusal to

Sorrels, 2013 WL 6163938, \(^{*}9\) (W.D.Okla., Nov. 25, 2013) (declining to dismiss for non-exhaustion where grievance official said his appeal concerning a wheelchair should go to medical officer and medical officer said it was a property grievance); Jones v. Federal Bureau of Prisons, 2013 WL 5300721, \(^{*}8\) (E.D.N.Y., Sept. 19, 2013) (denying summary judgment for non-exhaustion “given [plaintiff’s] uncontested assertion that he made a reasonable effort to exhaust administrative remedies within the required time frame but his efforts were frustrated by prison staff”; he alleged refusal to respond to inmate resolution forms, refusal to provide forms, placement in SHU for demanding them); Scott v. McDonald, 2013 WL 978239, \(^{*}6\) (E.D.Cal., Mar. 12, 2013) (holding remedy unavailable where grievance was a staff complaint but grievance personnel improperly required informal review level not required for staff complaints), \(\text{report and recommendation adopted,}\) 2013 WL 1325366 (E.D.Cal., Mar. 29, 2013); James v. Fagan, 2013 WL 687058, \(^{*}3\)-\(^{4}\) (E.D.Cal., Feb. 25, 2013) (holding remedies unavailable where grievance personnel demanded plaintiff attach materials that were in their possession, not his); Travis v. Morridge, 2013 WL 227665, \(^{*}4\) (W.D.Mich., Jan. 22, 2013) (denying summary judgment for defendants where plaintiff submitted evidence that his grievance was not processed and he was refused appeal forms); Clemens v. Lockett, 2012 WL 6026136, \(^{*}5\) (W.D.Pa., Dec. 4, 2012) (holding prisoner who alleged “that he never received responses to his grievances, appeals, and letters to staff members inquiring into the status of grievances and appeals he had filed” sufficiently alleged that the remedy was unavailable); Ford v. Spears, 2012 WL 4481739, \(^{*}7\)-\(^{8}\) (E.D.N.Y., Sept. 27, 2012) (declining to grant summary judgment for non-exhaustion despite multiple procedural rejections of grievances where “plaintiff attempted to do that which he thought was required of him despite defendant-erected obstacles to proper exhaustion”); \(\text{see Appendix A for additional authority on this point; see n. 511, above, for additional cases where grievances or appeals were returned unprocessed. But see Howard v. Smith, 2008 WL 816685 (S.D.Ga., Feb. 28, 2008), report and recommendation rejected in pertinent part, 2008 WL 816684 (S.D.Ga., Mar. 26, 2008), on reconsideration on other grounds, 2008 WL 2316718 (S.D.Ga., June 4, 2008). In Howard, the prison system introduced a rule newly requiring an additional “informal” step in the grievance process, and plaintiff’s pending grievances were all canceled; the magistrate judge said he was deemed to have exhausted his claims, but the district judge rejected that conclusion without explanation.}^{1065}

\(^{1065}\) Keys v. Carroll, 2012 WL 4472020, \(^{*}8\) (M.D.Pa., Sept. 26, 2012) (holding assertion that officer destroyed plaintiff’s grievance in front of him raised factual question barring summary judgment as to availability of remedy), \(\text{reconsideration denied,}\) 2012 WL 6553620 (M.D.Pa., Dec. 14, 2012); Makdessi v. Clarke, 2012 WL 293155, \(^{*}3\) (W.D.Va., Jan. 31, 2012) (allegations that a staff member destroyed plaintiff’s grievances, ordered him not to file more, and threatened him raised a factual question barring summary judgment on exhaustion); Smith v. Pennsylvania Dept. of Corrections, 2011 WL 4573364, \(^{*}12\) (W.D.Pa., Sept. 30, 2011) (interference with the grievance process bars dismissal for non-exhaustion even if the the malefactors were not the defendants in the case); Dockery v. U.S. Dept. of Justice, 2010 WL 2079939, \(^{*}5\) (S.D.Tex., May 21, 2010) (non-exhaustion excused where warden erroneously refused to accept grievance and refused again even when directed by higher authority), \(\text{motion to amend denied,}\) 2010 WL 3521728 (S.D.Tex., Sept. 8, 2010); Sandlin v. Poole, 575 F.Supp.2d 484, 488 (W.D.N.Y. 2008) (refusal to accept or forward grievance appeals would make remedy unavailable); \(\text{see Appendix A for additional authority on this point.}\)

\(^{1066}\) Pavey v. Conley, 170 Fed.Appx. 4, 9, 2006 WL 509447, \(^{*}5\) (7th Cir., Mar. 3, 2006) (unpublished) (holding that isolating and failing to assist a prisoner who couldn’t write could render the remedy unavailable); Ford v. Fahim, 2013 WL 1728572, \(^{*}2\) (S.D.Ill., Mar. 26, 2013) (declining to dismiss where prisoner could not proceed without a response from a counselor, who did not provide it), \(\text{report and recommendation adopted,}\) 2013 WL 1728444 (S.D.Ill., Apr. 22, 2013); DeMartino v. Zenk, 2009 WL 2611308, \(^{*}7\)-\(^{8}\) (E.D.N.Y., Aug. 25, 2009) (holding inability to make required copies because law library was cancelled and copiers were not working raised a material factual issue; estoppel theory), \(\text{reconsideration denied,}\) 2009 WL 4626647 (E.D.N.Y., Dec. 7, 2009); Monroe v. Beard, 2007 WL 2359833, \(^{*}12\)-\(^{13}\) (E.D.Pa., Aug. 16, 2007) (holding the grievance process unavailable where prisoners were told to object to certain searches through an Unacceptable Correspondence Form, and they would be notified of the results of an investigation and then could file a grievance, but were not so notified), aff’d, 536 F.3d 198, 205 n.6 (3d Cir. 2008); Warren v. Purcell, 2004 WL 1970642, \(^{*}6\) (S.D.N.Y. Sept. 3, 2004) (holding “baffling” grievance response that left prisoner with no clue what to do next estopped defendants from claiming the defense and constituted special circumstances justifying failure to exhaust).

In Ouellette v. Maine State Prison, 2006 WL 173639, \(^{*}3\)-\(^{4}\) (D.Me., Jan. 23, 2006), aff’d, 2006 WL 348315 (D.Me., Feb. 14, 2006), the plaintiff wrote a letter of complaint and filed a formal grievance, and received a
provide necessary forms makes the remedy unavailable or otherwise excuses failure to exhaust, though obviously not in systems where forms are not required by the rules. (One

response to the letter but not to the grievance; he requested a formal response (by then overdue) to his grievance and filed suit when he did not promptly receive it. The court rejected the argument that he should have filed a grievance appeal treating the response to his letter as the grievance response, stating that on these facts he could have believed that he had no further remedies available, and expressing concern that the defendants insisted on strict compliance with procedure while staff were not strictly complying with their end of it.

Dole v. Chandler, 438 F.3d 804, 809, 812 (7th Cir. 2006) (holding prisoner whose properly filed grievance simply vanished, and who received no instructions what to do about it, did “all that was reasonable to exhaust”); Murphy v. Smith, 2013 WL 5312721, *2 (S.D.Ill., Sept. 20, 2013) (holding a prisoner held in a health care unit after surgery who reasonably relied on a nurse to file his grievance for him took reasonable steps to exhaust; declining to dismiss for non-exhaustion); Johnson v. Tedford, 616 F.Supp.2d 321, 326 (N.D.N.Y. 2007) (holding a prisoner whose grievance is not recorded or given a grievance number, so the lack of response cannot be appealed, may have exhausted) and cases cited, report and recommendation adopted in part, rejected in part, 616 F.Supp. 321 (N.D.N.Y. 2007); Burrows v. Gifford, 2007 WL 2827779, *2 (E.D.Cal., Sept. 27, 2007) (holding remedies would be unavailable to a prisoner who received a grievance decision too late to appeal it); Cain v. Dretke, 2006 WL 1663728, *3 (S.D.Tex., June 13, 2006) (holding remedies were unavailable where a grievance was returned unprocessed, marked “inappropriate” without explanation and for no discernible reason); see n. 511, above, concerning this type of problem.


One court has articulated an extraordinarily draconian standard for assessing claims of staff obstruction. The plaintiff alleged that an officer threatened him with physical harm and then “retaliated against Plaintiff in various ways including destroying mail and administrative remedy forms, calling Plaintiff derogatory names, denying access to the shower, denying food by not opening the food port, by not submitting Plaintiff’s canteen order, by denying Plaintiff a haircut, by threatening harm to Plaintiff and his family, and by disrupting Plaintiff’s cell by a search and seizing his television.” The court stated that plaintiff alleged nothing that “would have prevented Plaintiff access to the remedy process at every moment of every day [or] that Plaintiff was completely shut down from all means of communication at all times.” Smith v. Lagana, 2013 WL 1010297, *1, 3 (D.N.J., Mar. 12, 2013).

Stine v. U.S. Federal Bureau of Prisons, 508 Fed.Appx. 727, 729-30 (10th Cir. 2013) (holding prisoner affidavits confirming plaintiff’s claim he had been denied forms raised a material factual issue barring summary judgment); Dennis v. Westchester County Jail Correctional Dept., 485 Fed.Appx. 478, 480 (2d Cir. 2012) (unpublished) (rejecting claim that prisoner could have gotten forms from the law library based on Department of Justice report stating that was not the case); Peterson v. Cooper, 463 Fed.Appx. 528, 530 (6th Cir. 2012) (unpublished) (holding prisoner need not take actions to obtain forms beyond those set out in grievance policy); Dale v. Lappin, 376 F.3d 652, 654-56 (7th Cir. 2004) (per curiam); Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003) (noting defendants’ concession that denial of grievance forms, in a system that required using the form, made the remedy unavailable to the plaintiff); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001); Jones v. Federal Bureau of Prisons, 2013 WL 5300721, *8 (E.D.N.Y., Sept. 19, 2013) (denying summary judgment for non-exhaustion where plaintiff alleged that he was denied necessary forms and thrown in SHU for demanding them); Ervin v. Wilson, D.C., 2013 WL 4028631, *9 (D.Colo., Aug. 8, 2013) (denying summary judgment for non-exhaustion where plaintiff alleged that his counsel refused to give him a form to grieve an issue he had already won but the result had not been implemented); Stratton v. Karr, 2013 WL 2444212, *3 (W.D.Wash., May 9, 2013) (declining to dismiss where “[p]laintiff took reasonable steps to exhaust his claim and jail staff prevented him from obtaining a grievance form”), report and recommendation adopted as modified, 2013 WL 2444209 (W.D.Wash., June 4, 2013); Hale v.
court has found it necessary to order prison staff to make forms available to all prisoners as regulations require.\textsuperscript{1071} Some courts reject claims of denial of forms out of hand if they are not supported by considerable factual detail or evidence of effort to obtain the forms,\textsuperscript{1072} or if the prisoner filed other grievances around the same time.\textsuperscript{1073}

Cooper, 2013 WL 1987356, *2-3 (E.D.Mo., May 13, 2013) (declining to dismiss for late grievance where plaintiff alleged that he could not obtain the form timely); see Appendix A for additional authority on this point; see also Goebert v. Lee County, 510 F.3d 1312, 1324-25 (11th Cir. 2007) (rejecting argument that plaintiff didn’t exhaust because she used the wrong form, since there was no evidence that the right form even existed, much less that she had it or knew about it); Taghon v. Euler, 2012 WL 3109368, *4-5 (N.D.Ind., July 30, 2012) (declining to grant summary judgment for non-exhaustion where plaintiff said he was given the wrong form to appeal on and the record did not show the extent of plaintiffs’ knowledge of appeal requirements). But see Mackey v. Kemp, 2009 WL 2900036, *3 (S.D.Ga., July 27, 2009) (plaintiff who could not get a form should have filed an out-of-time grievance when forms became available), report and recommendation adopted, 2009 WL 2914317 (S.D.Ga., Aug. 31, 2009).

The Sixth Circuit and some of its district courts have held that a denial-of-forms complaint does not establish non-exhaustion unless the prisoner tries to pursue a non-compliant grievance on plain paper. Jones v. Smith, 266 F.3d 399 (6th Cir. 2011); Willis v. Mohr, 2013 WL 1281634, *3 (S.D. Ohio, Mar. 26, 2013) (“At a minimum, [the inmate] must attempt to file a grievance without a form.” (citation omitted)), report and recommendation adopted, 2013 WL 1829668 (S.D. Ohio, May 1, 2013), order withdrawn on other grounds, 2013 WL 5773932 (S.D. Ohio, Oct. 24, 2013); Lee v. Willey, 2012 WL 666646, *4 (E.D. Mich., Feb. 1, 2012) (stating “the law in this Circuit is that if a grievance form is not available to a prisoner, he must attempt to file one without the form or be deemed to have failed to exhaust his administrative remedies”; rejecting defendants’ argument that filing a grievance on plain paper did not exhaust where forms were unavailable), report and recommendation adopted, 2012 WL 662199 (E.D. Mich., Feb. 29, 2012). However, a later Sixth Circuit unpublished decision suggested, correctly in my view, that Jones v. Smith has been overruled by Jones v. Bock, 549 U.S. 199 (2007), with respect to “the imposition of prerequisites to exhaustion that are not specified in the grievance procedure itself,” and held that the plaintiff need not show that he had tried to exhaust without the required form.

Peterson v. Cooper, 463 Fed.Appx. 528, 530 (6th Cir. 2012); accord, Abraham v. Costello, 861 F.Supp.2d 430, 435 (D. Del., May 17, 2012) (rejecting argument that plaintiff should have used plain paper where the grievance policy required use of a form the plaintiff could not get).

Thompson v. Jones, 2012 WL 3686749, *4 (N.D.Ill., Aug. 24, 2012) (citing policy providing that if forms are not available grievances can be submitted on plain paper). In Scott v. Brown, 2013 WL 5492948, *5 (N.D.Ga., Sept. 9, 2013), the court declined to accept officials’ representations that grievance appeals would be accepted without the form where the grievance policy did not support the claim.

See Oleson v. Bureau of Prisons, 2012 WL 6697274, *15-16 (D. N.J., Dec. 21, 2012) (declining to vacate order where defendants’ own declaration showed that forms were not made available in all circumstances); see also U.S. v. Khan, 540 F.Supp.2d 344, 351 (E.D.N.Y. 2007) (rejecting the plaintiff’s complaint about lack of forms—but only after instructing the government to give him the forms). But see Landor v. Bledsoe, 2012 WL 1906176, *5 (M.D.Pa., May 25, 2012) (rejecting request to direct officials to provide grievance forms to the plaintiff; “we have no information as to why Mr. Landor may be unable to obtain grievance forms, and are unwilling to speculate on this matter or wade into issues of prison administration”).

A remedy may be deemed unavailable if prisoners are misinformed by prison personnel about its operation or availability\textsuperscript{1074}—though many such claims have been rejected, often because the officials’ statements were ambiguous and not directly false or misleading.\textsuperscript{1075} A


\textsuperscript{1075}See Huff v. Neal, \textit{___} Fed.Appx. \textit{___}, 2014 WL 274500, *4-5 (5th Cir. 2014) (affirming summary judgment for non-exhaustion where plaintiff alleged that a prison lieutenant told him to wait for completion of an investigation to file a grievance; citing the plaintiff’s knowledge of grievance system requirements); Stine v. U.S. Federal Bureau of Prisons, 508 Fed.Appx. 727, 731 (10th Cir. 2013) (holding official’s statement that they will “take care of it” did not excuse prisoner from exhausting); Lyon v. Vande Krol, 305 F.3d 806, 809 (8th Cir. 2002) (holding that warden’s statement that a decision about religious matters rested in the hands of “Jewish experts” did not excuse non-exhaustion, but was at most a prediction that the plaintiff would lose; courts will not consider inmates’ subjective beliefs in determining whether procedures are “available”); Jackson v. District of Columbia, 254 F.3d 262, 269-70
number of decisions have refused to dismiss for non-exhaustion where prisoners had relied on prison personnel’s representations that an issue was non-grievable\textsuperscript{1076} or a decision was non-appellable.\textsuperscript{1077}

\textsuperscript{1076} Smith v. City of New York, 2013 WL 5434144, *14-15 (S.D.N.Y., Sept. 26, 2013) (holding remedy unavailable, and special circumstances possibly present, where prisoner was told by prison staff, “We are not able to deal with this,” and to “Wait it out. See what comes. Calm down.”); Allen v. Prince, 2013 WL 5273300, *6 (D.Del., Sept. 17, 2013) (holding “once Plaintiff’s grievance was classified as non-grievable, there were no further administrative remedies available to Plaintiff”); Holley v. Corrections Corp. of America, 2013 WL 4536947, *3 (M.D.Tenn., Aug. 26, 2013) (“The Court finds that the Plaintiff did all that is required by the PLRA when he brought the matter to the attention of prison officials through a formal grievance and was informed by prison officials that the matter was non-grievable.”), report and recommendation adopted, 2013 WL 5376557 (M.D.Tenn., Sept. 25, 2013); Castillon v. Corrections Corp. of America, Inc., 2013 WL 2446480, *8-11 (D.Idaho, June 4, 2013) (holding plaintiffs reasonably relied on grievance official’s statement “If you would like to pursue [compensation], you can do so utilizing outside sources” as stating no more remedies were available and waiving the grievance appeal requirement; another prisoner could not rely on these responses not directed to him); Bredbenner v. Malloy, 925 F.Supp.2d 649, 658-59 (D.Del. 2013) (informal grievance stating plaintiff’s remedy was to write to the unit commander rather than pursuing a grievance established that there was no remedy available to him); Coley v. Harris, 2012 WL 171661, *4 (D.Md., Jan. 19, 2012) (declining to dismiss for non-exhaustion where plaintiff had been advised by the warden that his complaint could not be pursued); Chestang v. Westbrook, 2012 WL 2912736, *2 (E.D.Ark., June 15, 2012), report and recommendation adopted, 2012 WL 2903355 (E.D.Ark., July 16, 2012); Gilbeau v. Pallito, 2012 WL 2416719, *5 (D.Vt., May 22, 2012), report and recommendation adopted, 2012 WL 2416654 (D.Vt., June 26, 2012); Roberts v. Jones, 2012 WL 1072218, *4 (W.D.Okla., Feb. 29, 2012) (“Presumably Mr. Roberts did not appeal the decision because the grievance coordinator had told him that the complaint was not grievable.”), report and recommendation adopted, 2012 WL 1142514 (W.D.Okla., Mar. 30, 2012); see Appendix A for additional authority on this point; see also Kress v. CCA of Tenn., 2010 WL 2694986, *5 (S.D.Ind., July 2, 2010) (holding remedy unavailable where defendants said they would not consider the issue plaintiff raised); Matthews v. Thornhill, 2008 WL 2740323, *4 (W.D.Wash., May 21, 2008) (it is “disingenuous” for defendants to rely on published policies stating what is grievable when they have already rejected plaintiff’s grievances as raising non-grievable issues), report and recommendation adopted, 2008 WL 2544507 (W.D.Wash., June 24, 2008). But see Gibson v. Weber, 431 F.3d 339, 341 (8th Cir. 2005) (holding that general allegation that prison personnel “made it clear” they should make medical complaints informally did not excuse prisoners from using a grievance procedure they admitted having been informed of); Blankenship v. Owens, 2011 WL 610967, *5 (N.D.Ga., Feb. 15, 2011) (holding plaintiff was obliged to exhaust even though an informal grievance response said the matter was not grievable); Singh v. Goord, 520 F.Supp.2d 487, 496 (S.D.N.Y. 2007) (officials’ designating a particular staff member to deal with plaintiff’s concerns did not excuse non-exhaustion where he was not instructed not to file grievances); Fuentes-Ramos v. Arpaio, 2007 WL 1670142, *2 (D.Ariz., June 8, 2007) (refusing to credit “generalized allegations” that officers told plaintiff his issues were non-grievable); Herron v. Elkins, 2006 WL 3803946, *3 (E.D.Mo., Nov. 7, 2006) (dismissing where staff told plaintiff his claim was not grievable; his “subjective belief” based on those statements did not excuse non-exhaustion); Overton v. Davis, 460 F.Supp.2d 1008, 1010-11 (S.D.Iowa 2006) (holding prisoner failed to exhaust where he said he was told his property confiscation was non-grievable but the written policy said it was and also that written notice is given when a complaint is non-grievable); Owens v. Maricopa County Sheriff’s Office, 2006 WL 997205, *1 (D.Ariz., Apr. 14, 2006) (holding prisoner must appeal “non-grievable” determination, especially where policy does not support it); Mendez v. Herring, 2005 WL 3273555, *2 (D.Ariz., Nov. 29, 2005)
The failure to inform prisoners of remedies’ existence, or to make clear what remedy is applicable or what rules apply to it, may make remedies unavailable.\textsuperscript{1078} However, prisoners’ ignorance of the remedy does not excuse them from using it if it has been made known, \textit{e.g.}, in an inmate orientation handbook.\textsuperscript{1079} (If the administrative remedy is made known, prison

\textsuperscript{1078} See n. 514, above.

\textsuperscript{1079} Small v. Camden County, 728 F.3d 265, 271 (3d Cir. 2013) (noting plaintiff had received a handbook describing the grievance system); Napier v. Laurel County, Ky., 636 F.3d 218, 222 n.2 (6th Cir. 2011) (rejecting claim of ignorance where grievance policy was distributed in orientation manual, though stating generally: “A plaintiff's failure to exhaust cannot be excused by his ignorance of the law or the grievance policy.”); Gibson v. Weber, 431
officials are not obliged to educate prisoners about the exhaustion requirement itself.\textsuperscript{1080} Courts may also discount prisoners’ claims of ignorance or misunderstanding of remedies where the prisoners have a record of using them.\textsuperscript{1081} In some instances, a remedy may be made unavailable by officials’ nondisclosure of information necessary for the prisoner to know to make a complaint.\textsuperscript{1082}

At least, the foregoing is the central tendency of the case law. Some courts have (over)stated, e.g., “that inmates’ awareness of a prison’s grievance system is irrelevant when determining whether they satisfactorily exhausted the administrative remedies available to them.”\textsuperscript{1083} A recent Ninth Circuit decision—which appropriately is now under \textit{en banc} review—hardens this notion into the rather extreme proposition that lack of awareness of administrative remedies does not make them unavailable “unless the inmate meets his or her burden of proving the grievance procedure to be unknownable.”\textsuperscript{1084} though later in the opinion the court uses the phrase “reasonable, good-faith efforts to discover the appropriate procedure” to describe the

F.3d 339, 341 (8th Cir. 2005) (holding that prisoners who admitted receiving guide that explained the grievance procedure were not excused from using it by their allegations that prison personnel had “made it clear” that they should instead voice complaints informally to medical personnel); Boyd v. Corrections Corporation of America, 380 F.3d 989, 999 (6th Cir. 2004), cert. denied, 540 U.S. 920 (2005); Concepcion v. Morton, 306 F.3d 1347, 1354–55 (3rd Cir. 2002); Smith v. City of New York, 2013 WL 5434144, *10 (S.D.N.Y., Sept. 26, 2013) (rejecting ignorance argument where plaintiffs signed for an Inmate Handbook); Bruce v. Fenske, 2013 WL 1152031, *3 (W.D.Ark., Feb. 27, 2013) (rejecting ignorance argument where plaintiff filed a grievance but sued before the process was complete), \textit{report and recommendation adopted}, 2013 WL 1154364 (W.D.Ark., Mar. 19, 2013); Minor v. Brown, 2012 WL 5504860, *6 (S.D.Ga., Oct. 16, 2012) (rejecting argument that prisoner did not know transfers were grievable where it was in the policy that prisoners had access to; distinguishing \textit{Goebert v. Lee}), \textit{report and recommendation adopted}, 2012 WL 5500574 (S.D.Ga., Nov. 13, 2012); see Appendix A for additional authority on this point; see also Santiago v. Anderson, 2012 WL 3164293, *5 (7th Cir. 2012) (unpublished) (affirming non-exhaustion dismissal where prisoner sent grievance to the wrong prison but the instructions on the form told him where to send it), \textit{cert. denied}, 133 S.Ct. 769 (2012).

In an unreported case, the Second Circuit held that a prisoner would not be held to have constructive notice of the grievance procedures based on receiving an inmate manual describing them when the manual was taken away a few days later. The court declined to hold the plaintiff had a duty to ask for another one, since state law gave prison officials the duty of apprising prisoners of the procedures. Aponte v. Armstrong, 2005 WL 1527701, *2 (2d Cir., June 27, 2005) (unpublished). Similarly, in \textit{Reynolds v. Smith}, 2012 WL 293012, *3, 5 (S.D.Ohio, Feb. 1, 2012), the court declined to find non-exhaustion where the plaintiff had been given a prison handbook on admission but it had been taken from her shortly thereafter, and she reported a sexual assault and followed staff directions without ever being told that she was not following proper procedures.\textsuperscript{1080} Clark v. Forsythe, 2010 WL 1753130, *4 (W.D.Okla., Mar. 11, 2010), \textit{report and recommendation adopted}, 2010 WL 1753127 (W.D.Okla., Apr. 29, 2010); Regan v. Frank, 2008 WL 508067, *5 (D.Haw., Feb. 26, 2008) (holding prisons need not inform prisoners about the PLRA exhaustion requirement, even if they are required to inform them about their own grievance procedures).


In \textit{Timberlake v. Buss}, 2007 WL 1280659, *1-2 (S.D.Ind., May 1, 2007), the court declined to dismiss a challenge to lethal injection protocols where the record showed that the protocols were not confidential and would not have been disclosed to the plaintiff.\textsuperscript{1083}

Morgan v. City of Henderson Detention Center, 2012 WL 2884889, *6 (D.Nev., July 13, 2012); \textit{accord}, Twitty v. Mccoskey, 226 Fed.Appx. 594, 596 (7th Cir. 2007) (“A prisoner’s lack of awareness of a grievance procedure . . . does not excuse compliance.”); Gates v. Ball, 2011 WL 2745920, *3 (E.D.Ark., June 8, 2011) (stating “it is well settled that a prisoner’s subjective understanding of the prison grievance process is irrelevant to a determination of whether there has been proper exhaustion”).\textsuperscript{1084}

Albino v. Baca, 697 F.3d 1023, 1026 (9th Cir. 2012) (emphasis supplied), \textit{rehearing en banc granted}, 709 F.3d 994 (9th Cir. 2013).
prisoner’s burden. The court relies for the term “unknowable” on an Eleventh Circuit case in which defendants attempted to hold the prisoner plaintiff to compliance with a procedure which genuinely was unknowable to prisoners, since it was not made available to prisoners in any manner. However, it is not clear that the Eleventh Circuit meant “unknowable” to be the governing standard, as opposed to simply describing the facts before the court. A subsequent case from that court suggests a considerably lower threshold, rejecting dismissal for non-exhaustion where the record did not show that the prisoner “was aware or could readily become aware” of the procedure he had allegedly not followed. Further, in the Ninth Circuit Albino decision itself, the dissenting judge argues persuasively that the plaintiff did exert “reasonable, good-faith effort” to learn the available remedies, since he complained to several deputies about being repeatedly raped and assaulted and not being transferred to protective custody in response to any of those attacks, and none of them referred him to the grievance process or told him how to use it, and since there was no showing that the document in which the grievance policy appeared was made available to prisoners or that grievance forms or locked grievance boxes, allegedly available in housing areas, were “noticeable to or identifiable by the inmates.” In any case, the approach of the Ninth Circuit panel creates an exceptionally demanding requirement, enforced by forfeiture of the claim no matter how substantial, for persons many of whom are unsophisticated, uneducated, of little literacy or little English literacy (the Albino plaintiff was Spanish-speaking), learning-disabled, or burdened by mental illness, usually constrained by very short deadlines for an administrative filing.

Some courts have held that prisoners must “make some affirmative effort to comply with the administrative procedures” before claiming that prison staff’s actions have made them unavailable. As a matter of common sense, that holding is not valid in all circumstances, e.g., if the prisoner has been subjected to the threat of serious harm if he or she files a grievance. Some courts have held that even if a prisoner is temporarily obstructed from filing a grievance, that doesn’t excuse non-exhaustion; the prisoner is obliged to exhaust once the obstruction is out of the way, even if the grievance would be untimely.

There is an open question whether a remedy that is too slow to prevent irreparable harm is “available” for PLRA purposes.

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1085 Albino, 697 F.3d at 1035; see id., 1037 (“unknowable with reasonable effort”).
1086 Goebert v. Lee Cnty., 510 F.3d 1312, 1322 (11th Cir. 2007) (quoted in Albino, 697 F.3d at 1026, 1036.
1088 Albino, 697 F.3d at 1041 (dissenting opinion).
1089 Albino, 697 F.3d at 1041; see id. at 1042 (“In my view, once an inmate engages in a sincere effort to complain about the conditions of his confinement to someone with authority at the jail, that assertion should trigger on the part of the jail an obligation to inform the inmate about the proper procedure to pursue his complaint.”).
1092 See nn. 847-849, above.
1093 See § IV.H, below.
Courts have not fully explored the question whether obstruction of prisoners' use of the grievance system—a prerequisite to court filing—is also a denial of access to the courts.\(^\text{1094}\) Many courts have said no, on the ground that evidence of such conduct would show that the remedy was unavailable or that the prisoner was excused from completing exhaustion.\(^\text{1095}\) (One court has held that the exhaustion question is not before the court until the defendants seek dismissal claiming non-exhaustion.\(^\text{1096}\)) This argument is a bit simplistic in cases of purposeful obstruction by prison staff, since prisoners, who are mostly proceeding pro se and without the ability to engage in effective discovery, and whose credibility is impaired by their criminal records, are at a substantial disadvantage in seeking to discredit official claims that they failed to exhaust.\(^\text{1097}\)

\(^\text{1094}\) In Davis v. Milwaukee County, 225 F.Supp.2d 967, 976 (E.D.Wis. 2002), the court held that the plaintiff had been denied access to courts by defendants’ hindering his ability to exhaust, inter alia, by telling him that his complaint was “not a grievable situation.” See Crump v. Armstrong, 2011 WL 7768588, *1 (W.D.Mich., July 26, 2011) (holding plaintiff stated a claim where he alleged that of access to the grievance system and dismissal of one of his cases as a result); see also Hurt v. Flury, 2013 WL 5335711, * (D.Md., Sept. 20, 2013) (rejecting the plaintiff’s claim of court access violation by interference with grievances for lack of actual injury where his case was not dismissed for non-exhaustion). Several courts have held that punishment or retaliation for use of the grievance system can violate the right of access to courts. See Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995); Escobar v. Reid, 668 F.Supp.2d 1260, 1302-03 (D.Colo. 2009) (retaliation for filing grievances states both First Amendment and court access claims); Nelson v. Gowdy, 2006 WL 2604679, *2 (E.D.Mich., Sept. 11, 2006) (treatment claim of retaliation for a grievance as equivalent to one involving a lawsuit because exhaustion is required before litigation).


\(^\text{1097}\) For a rare case in which a pro se prisoner prevailed in such an evidentiary dispute, see Blount v. Fleming, 2006 WL 1805853, *2-4 (W.D.Va., June 29, 2006) (finding inter alia that defendants falsely claimed not to have received
3. Estoppel

Defendants may be estopped from raising a defense of non-exhaustion based on the same kinds of facts that support an argument of unavailability: obstruction or intimidation by prison staff, misleading of prisoners about the availability or requirements of remedies. Some courts, however, have said that claims of estoppel are limited to cases of affirmative misrepresentation or misconduct by officials. The Second Circuit has suggested that it is

plaintiff’s grievances). In recent years such cases have become more numerous in the Seventh Circuit as “Pavey hearings” have become frequent. See n. 415, above.

Hemphill v. New York, 380 F.3d 680, 689 (2d Cir. 2004) (remanding for consideration of estoppel argument of prisoner who alleged he was assaulted and threatened to keep him from complaining); Ziemb a v. Wezner, 366 F.3d 161, 163-64 (2d Cir. 2003); Gantt v. Lape, 2012 WL 4033729, *7 (N.D.N.Y., July 31, 2012) (holding prisoner’s claim that his grievance was not processed, but was given to the affected staff member, who screamed threats at the plaintiff, “just barely” supported a triable estoppel claim), report and recommendation adopted, 2012 WL 4033723, 8 (N.D.N.Y., Sept. 12, 2012); Perez v. Fischer, 2012 WL 1098423, *12 (N.D.N.Y., Mar. 1, 2012) (allegations of assault, threats, and reprisals, after which plaintiff stopped filing grievances and complaint letters until he was moved to another prison, sufficiently supported claims of unavailability), report and recommendation adopted, 2012 WL 1088486 (N.D.N.Y., Mar. 30, 2012); Trippl et v. Rendle, 2012 WL 913711, *5 (N.D.N.Y., Feb. 9, 2012) (keeping prisoner in observation unit without writing instrument until the grievance deadline passed raised triable estoppel issue), report and recommendation adopted, 2012 WL 913043 (N.D.N.Y., Mar. 16, 2012); Benitez v. Straley, 2006 WL 5400078 at 8 (S.D.N.Y., Feb. 16, 2006); Larry v. Byno, 2006 WL 131344, *4 (N.D.N.Y., May 11, 2006) (applying Hemphill); Martin v. Sizemore, 2005 WL 1491210, *3 (E.D.Ky., June 22, 2005) (holding defendants estopped where they “designed their ‘complaint’ system so that inmates were often allegedly dependent upon the very persons against whom they were registering a complaint to transport the complaint to the front office or to personally and independently of a committee resolve the matter”). In Ledbetter v. Emery, 2009 WL 1871922, *4-5 (C.D.Ill., June 20, 2009), the court held that an officer who had sexually harassed a female prisoner might be estopped to assert the defense, even though no defendants had actually threatened the plaintiff with respect to filing grievances.


See Brownell v. Krom, 446 F.3d 305, 312 (2d Cir. 2006) (citing erroneous advice to abandon property loss claim and file a grievance in finding special circumstances excusing failure to exhaust correctly); Pacheco v. Drown, 2010 WL 144400, *21 (N.D.N.Y., Jan. 11, 2010) (defendants arguably estopped where plaintiff’s grievance was incorrectly ruled non-grievable); Cabrera v. LeVierge, 2008 WL 215720, *6 (D.N.H., Jan. 24, 2008) (“Defendants' reliance upon undisclosed rules to reject plaintiff’s grievance form necessarily estops them from relying upon plaintiff’s failure to exhaust those remedies as a defense.”); see Appendix A for additional authority on this point. But see Dillon v. Rogers, 596 F.3d 260, 270 (5th Cir. 2010) (estoppel is not appropriate where plaintiff did not show reasonable reliance on other party’s conduct); Berry v. City of New York, 2002 WL 31045943, *8 (S.D.N.Y., June 11, 2002) (declining to credit estoppel claim where the plaintiff had used the grievance system successfully on other occasions).

Amador v. Andrews, 655 F.3d 89, 103 (2d Cir. 2011) (reiterating Ruggiero holding re need for affirmative conduct to support estoppel); Ruggiero v. County of Orange, 467 F.3d 170, 178 (2d Cir. 2006) (rejecting estoppel, noting that plaintiff “points to no affirmative act by prison officials that would have prevented him from pursuing administrative remedies”); Lewis v. Washington, 300 F.3d 829, 834-35 (7th Cir. 2002) (declining to apply equitable estoppel where the defendants did not affirmatively mislead the plaintiff but merely failed to respond to grievances); Wolfe v. Alameida, 2008 WL 4454053, *3-4 (E.D.Cal., Sept. 29, 2008); Abdulhaseeb v. Calbone, 2008 WL 904661, *15 (W.D.Okl., Apr. 2, 2008) (holding plaintiff would have to “demonstrate misrepresentation, reasonable reliance on the misrepresentation, and detriment”), aff’d in part, vacated in part, remanded, 600 F.3d 1301 (10th Cir. 2010), cert. denied, 131 S.Ct. 469 (2010), “).
better to consider arguments based on unavailability first, which makes sense because it is simpler and the effect of an estoppel argument in this context remains a bit murky.

Initially, the Second Circuit held that defendants’ actions “may... est op[] the State from asserting the exhaustion defense.” However, it has also said that where several defendants played different roles in the acts giving rise to estoppel, “it is possible that some individual defendants may be estopped, while others may not be.” Some courts have treated estoppel as a personal defense and have declined to apply it where the persons responsible for the stopping conduct were not the named defendants. Others, however, have held defendants estopped to claim non-exhaustion where the actions of grievance personnel, or other staff members who were not named defendants, unjustifiably prevented the prisoner from exhaustion. The latter result

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1102 Ziemba v. Wezner, 366 F.3d 161, 163 (2d Cir. 2004) (emphasis supplied); see Giano v. Goord, 380 F.3d 670, 675 (2d Cir. 2004) (stating Hemphill v. State of New York reads Ziemba to mean that threats may “estop the government from asserting the affirmative defense of non-exhaustion”) (emphasis supplied).

The court in Brown v. Koenigsmann said that if it was wrong in applying estoppel, the facts at issue—the failure of the grievance system to issue a final decision despite the plaintiff’s repeated inquiries—would also constitute special circumstances excusing non-exhaustion under Second Circuit authority. 2005 WL 1925649, *2.
makes sense. Regardless of the treatment of estoppel in other contexts, PLRA exhaustion is intended to protect the institutional interests of the prison system and not the personal interests of individual prison personnel,1106 even if it is the latter who assert it in litigation.

H. What If the Problem Is Too Urgent To Exhaust?

Most courts have held that there is no emergency exception to the exhaustion requirement,1107 consistently with the general principle that exhaustion must precede filing.1108 Courts have rejected requests for temporary restraining orders and preliminary injunctions because of non-exhaustion, sometimes stating that non-exhaustion means there is little likelihood of success on the merits.1109 There are a few decisions that have allowed cases to go forward


1106 “The purpose of administrative exhaustion is not to protect the rights of officers, but to give prison officials a chance to resolve the complaint without judicial intervention.” Freeman v. Berge, 2004 WL 1774737, *3 (W.D.Wis., July 28, 2004); accord, Jones v. Bock, 549 U.S. 199, 219 (2007) (stating that providing notice to persons who might later be sued “has not been thought to be one of the leading purposes of the exhaustion requirement.”); Porter v. Nussle, 534 U.S. 516, 524-25 (2002) (noting that “to reduce the quantity and improve the quality of prisoner suits . . . Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.”) (emphasis supplied); Johnson v. Johnson, 385 F.3d 503, 522 (5th Cir. 2004). This reasoning is supported in a different context by Jewkes v. Shackleston, 2012 WL 5332197 (D.Colo., Oct. 29, 2012), in which the grievance body decided the plaintiff’s grievance even though it was untimely. The court held that the exhaustion requirement is designed to serve certain institutional purposes, and the grievance system at issue did not give individual employees a role in controlling the disposition of grievances, so the employee was bound by the failure to enforce time limits. Jewkes, 2012 WL 5332197, *4-5.


1108 See § IV. E, above.

without exhaustion to avoid irreparable harm, but they mostly do not provide much legal justification for disregarding the exhaustion requirement.\footnote{See Salesky v. Balicki, 2010 WL 4973626, *2-3 (D.N.J., Nov. 29, 2010) (considering preliminary injunction motion based on apparent emergency despite non-exhaustion, admonishing plaintiff to exhaust, but not dismissing); Evans v. Saar, 412 F. Supp. 2d 519, 527 (D.Md. 2006) (declining to dismiss for non-exhaustion, given “shortness of time,” where plaintiff challenged the protocol for his impending execution and the grievance process was not complete); Howard v. Ashcroft, 248 F. Supp. 2d 518, 533–34 (M.D. La. 2003) (holding that prisoner fighting transfer from community corrections to a prison need not exhaust where appeal would take months and prison officials wanted to transfer her despite any pending appeal); Ferguson v. Ashcroft, 248 F. Supp. 2d 547, 563–64 (M.D. La. 2003) (same as Howard); Borgetti v. Bureau of Prisons, 2003 WL 743936, *2 n.2 (N.D. Ill. Feb. 14, 2003) (holding that “the court’s jurisdiction is secure” to decide a case in which the prisoner sought immediate injunctive relief and exhaustion would almost certainly take longer than the remainder of his sentence). One court has pointed out that most of these cases involve claims that would have been moot before they could be exhausted. Ung v. Lappin, 2007 WL 5465992, *4 (W.D.Wis., Jan. 29, 2007), reconsideration denied, 2007 WL 5490150 (W.D.Wis., Mar. 12, 2007).}

The Second Circuit once said the question was open whether there was an irreparable harm exception to PLRA exhaustion,\footnote{See Marvin v. Goord, 255 F.3d 40, 43 (2d Cir. 2001).} but apparently no lower court has granted relief based on such an exception, and courts have questioned whether it is consistent with Supreme Court decisions.\footnote{See Rivera v. Pataki, 2003 WL 21511939, *6 (S.D.N.Y. July 1, 2003).} In one case involving a prisoner with serious medical problems, the court initially stayed the action for slightly less than two months, rather than dismissing it, and directed the parties to “cooperate to conclude administrative resolution” within that deadline; however, on the government’s motion for reconsideration, it acknowledged it lacked the power to take that action.\footnote{McCaffery v. Winn, 2005 WL 2994370, *1 (D.Mass., Nov. 8, 2005), on reconsideration, 2006 WL 344961, *1 (D.Mass., Feb. 14, 2006). The court said on reconsideration that “[t]he statute does insist that administrative remedies be fully exhausted before the complaint is filed,” which is correct, and that the court “therefore [has] no choice but to allow the motion to dismiss,” which is debatable. See nn. 253-256, above.}

Two circuits have provided convincing rationales for bypassing exhaustion in urgent situations. The District of Columbia Circuit has held that there is no irreparable harm exception, but that courts retain their traditional equitable discretion to grant temporary relief to maintain the status quo pending exhaustion.\footnote{Jackson v. District of Columbia, 254 F.3d 262, 267–68 (D.C. Cir. 2001); accord, Simmons v. Stokes, 2010 WL 2165358, *4 (D.S.C., May 26, 2010); see Nickens v. District of Columbia, 694 F.Supp.2d 10, 14-15 (D.D.C. 2010) (Jackson holding authorizes interim relief but does not allow prisoners to bypass the administrative process entirely). At least one court has held that under the Jackson rule, a court must entertain preliminary injunction proceedings and enter an injunction if warranted as exhaustion is proceeding, and then dismiss and require the case to be re-filed. Stringham v. Bick, 2008 WL 4145473, *9 (E.D.Cal., Sept. 3, 2008), report and recommendation adopted, 2008 WL 4472954 (E.D.Cal., Sept. 30, 2008). Why such an exercise in wheel-spinning should be required once the court has already acted before exhaustion is completed is not clearly explained.}


\footnote{Evans v. Coachman, 2007 WL 5490150, *2 (D.N.J., Nov. 29, 2007) (same); Glick v. Montana Dept. of Corrections, 2007 WL 2359776, *2 (D.Mont., Aug. 14, 2007) (dismissing for non-exhaustion, ignoring plaintiff’s claim that he was seeking preliminary relief to avoid irreparable harm pending exhaustion; Jackson not cited).}
courts should not deviate from the usual practices of litigation unless the PLRA explicitly says so. 1116

The Seventh Circuit has framed the question in terms of availability: “If 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.” 1117 However, if the prison makes available an emergency grievance procedure that could provide timely relief, the prisoner is obliged to use it before bringing suit. 1118 Many prison systems have emergency grievance procedures, and the National Standards to Prevent, Detect, and Respond to Prison Rape, recently promulgated under the Prison Rape Elimination Act, require that such a procedure be available for sexual abuse complaints. 1119

The Fletcher decision uses the phrase “imminent danger of serious physical injury,” the language of the exception to the “three strikes” provision of the PLRA, 1120 because that was the issue presented to it. Whether its rationale would extend to any form of irreparable harm, or to any alleged violation of law that would be completed before the grievance process could correct it, is uncertain. 1121

Other decisions have held that an allegation of imminent danger of serious physical harm asserted for purposes of avoiding the three strikes provision 1122 does not except the prisoner from the exhaustion requirement. 1123 These decisions should be reevaluated in light of the holding in Fletcher.

I. Statutes of Limitations

Decisions to date mostly hold that the statute of limitations is tolled during administrative exhaustion. 1124 However, it is not certain whether that conclusion holds independently of state

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1117 Fletcher v. Menard Correctional Center, 623 F.3d 1171, 1173 (7th Cir. 2010). “If it takes two weeks to exhaust a complaint that the complainant is in danger of being killed tomorrow, there is no ‘possibility of some relief’ and so nothing for the prisoner to exhaust.” Id.


1119 28 C.F.R. § 115.52(f) (requiring emergency procedure for allegations of risk of imminent sexual abuse, with provision for protective action within 48 hours and final decision within five days).

1120 28 U.S.C. § 1915(g); see § VIII.D, below.

1121 See Smith v. N.C.D.O.C., 2007 WL 1200097 (W.D.N.C., Apr. 19, 2007), in which the plaintiff challenged the denial of Native American religious artifacts in segregation, and said that he had filed a grievance but he would be out of segregation before the process would be complete. The court rejected this “excuse for failing to following [sic] the administrative grievance process” and denied his motion for a preliminary injunction, 2007 WL 1200097, *2, even though plaintiff pled in substance that there was no available remedy at the relevant time.

1122 28 U.S.C. § 1915(g); see § VIII, below.


1124 Gonzalez v. Hasty, 651 F.3d 318, 322 (2d Cir. 2011) (“Our sister circuits that have squarely confronted the question presented here have answered in the affirmative, holding that tolling is applicable during the time period in which an inmate is actively exhausting his administrative remedies.”); Brown v. Valoff, 422 F.3d 926, 943 (9th Cir.
tolling rules. The first appellate decision on the point, and a number of others since, have relied explicitly on state tolling law,\textsuperscript{1125} and a few have held that the period is not tolled under a particular state’s law.\textsuperscript{1126} Other decisions have been unclear or equivocal on the basis for tolling during exhaustion.\textsuperscript{1127} A few decisions have stated directly, or strongly implied, that the PLRA

2005) (holding “we agree with the uniform holdings of the circuits that have considered the question that the applicable statute of limitations must be tolled while a prisoner completes the mandatory exhaustion process”); Drain v. McLeod, 2007 WL 172349, *5 (E.D.Pa., Jan. 19, 2007) (“courts have uniformly held that the statute of limitations on a § 1983 claim is tolled while a prisoner exhausts his available administrative remedies”).

There are a few ill-founded outliers. Thomas v. Henry, 2002 WL 922388, *2 (S.D.N.Y., May 7, 2002), relies on a statement in a Supreme Court case that “the pendency of a grievance . . . does not toll the running of the limitations periods.” Delaware State College v. Ricks, 449 U.S. 250, 261 (1980). But the employment grievance at issue in Ricks was not one which had to be exhausted before suit could be brought, so Ricks is not relevant to the question of tolling during exhaustion under the PLRA. In Bond v. Rhode, 2007 WL 2752340, *4 (W.D.Pa., Sept. 19, 2007), the court rejected the argument that the plaintiff’s claim accrued only upon completion of exhaustion, but failed to note the large body of law concerning tolling. Similarly, the court in Vantassel v. Roxum, 2009 WL 1833601, *2 (W.D.Pa., June 25, 2009), asserted that exhaustion does not toll the limitations period while ignoring all contrary authority.


itself requires tolling during exhaustion.'\textsuperscript{1128} (At least one decision takes a different approach, holding that the PLRA implies as a matter of federal law that the claim does not \textit{accrue} for limitations purposes until exhaustion is completed.\textsuperscript{1129})

If exhaustion tolls the limitations period, a prisoner complaint cannot be dismissed as time-barred on initial screening or on a motion to dismiss unless the complaint specifies the amount of time taken up in exhaustion.\textsuperscript{1130} It is necessary to know when exhaustion began as well as how long it took because the limitations period is tolled only during the actual period of exhaustion, not during the interval between the accrual of claims and the commencement of administrative proceedings.\textsuperscript{1131}

The limitations period is not further tolled during exhaustion of state judicial remedies, since the statute does not require judicial exhaustion.\textsuperscript{1132} Nor is it automatically tolled during the pendency of a suit dismissed for failure to exhaust,\textsuperscript{1133} though as noted below, equitable tolling may be appropriate in some such cases.

One court has held that the limitations period, if tolled for exhaustion, begins to run again when the prisoner is released, since the exhaustion requirement no longer applies, and the period is not tolled again upon reincarceration since the exhaustion requirement presumably is


[§ 1997e(a)] unambiguously requires exhaustion as a mandatory threshold requirement in prison litigation. Prisoners are therefore prevented from bringing suit in federal court for the period of time required to exhaust “such administrative remedies as are available.” For this reason, the statute of limitations which applied to Plaintiff’s civil rights action was tolled for the period during which his available state remedies were being exhausted.

2009 WL 4646954, *3; see Ballard v. Williams, 2010 WL 7809047, *5 (M.D.Pa., Dec. 9, 2010) (“Having mandated administrative exhaustion of inmate grievances as a prerequisite to bringing an action in federal court, principles of equity now require us to toll the statute of limitations while inmates complete this mandatory exhaustion process.”). \textit{But see} Johnson v. Rivera, 2002 WL 31012161, *4 (N.D.Ill., Sept. 6, 2002) (holding that even if limitations on federal claims are tolled pending exhaustion, they are not tolled on state claims that could have been brought in state court without delay).

\textsuperscript{1129} Fitzpatrick v. Georgia Dept. of Corrections, 2012 WL 5207472, *1 (S.D.Ga., Oct. 22, 2012). This rule is more advantageous to prisoners than tolling because the time before exhaustion is commenced is not tolled, as shown below. If the claim does not accrue until after exhaustion, the pre-exhaustion period cannot count against the prisoner.


not reinstated for issues from previous periods of incarceration—an assumption that courts have rejected in other contexts. Exhaustion is tolled for exhausting remedies while in prison even if the plaintiff does not file suit until after release.

If a prisoner is thwarted in his efforts to exhaust and only later is able to pursue a grievance, the limitations period is tolled for the earlier period of “active exhaustion.” One court has held that where a prisoner received no response to his grievances, the limitations period was tolled until his last attempt to get a response. Others have held that absent a response, the limitations period should be deemed to run again starting at the deadline (if any) for prison officials to resolve a grievance—i.e., at the time the prisoner is entitled to bring suit. If officials do respond, but the process takes longer than the grievance policy prescribes, at least one court has held that tolling extends through its completion. If several administrative proceedings arise from the subject matter of a lawsuit, tolling ends for each claim when the relevant proceeding is finished; the claims are not all tolled until the last proceeding concludes.

The limitations period is not tolled by an administrative proceeding that could not have remedied the problem of which the prisoner complains or that was not proper under the grievance rules. Exhaustion only tolls limitations for the same claim that is being

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1135 See n. 41, above.


1140 Vartinelli v. Pramstaller, 2010 WL 5330484, *2 (E.D.Mich., Dec. 21, 2010). This holding is based on the rejection of the argument that prisoners are free to bring suit if the grievance process is not completed within the prescribed period. A number of courts have held, correctly in my view, that once the deadline for the final appeal has passed without response, the prisoner has exhausted and is free to bring suit. See n. 463, above. The Vartinelli holding should be valid under this view as well. It is consistent with the PLRA’s policy of encouraging exhaustion to toll the limitations period for prisoners who are willing to stay with the administrative process even when it is in violation of its own time limits.


1142 Scott v. Freed, 2007 WL 674325, *7-8 (E.D.Mich., Feb. 28, 2007) (holding plaintiff had exhausted when he was denied permission to file a grievance, and limitations period was not tolled during subsequent pendence of disciplinary proceedings that could not have addressed the staff misconduct he now complained about), motion for relief from judgment denied, 2007 WL 1647874 (E.D.Mich., June 4, 2007).

Exhaustion does not toll (or revive) the limitations period if the period has already expired when the prisoner commences exhaustion. Similarly, some courts have held that an untimely attempt to exhaust does not toll the limitations period. Courts have disagreed whether tolling for exhaustion runs consecutively or concurrently with other tolling provisions that may apply.

In cases that are dismissed for non-exhaustion, the claim will usually be time-barred because the limitations period has expired during the delay occasioned in litigating exhaustion. The claim will generally be time-barred administratively because any renewed grievance would be grossly untimely unless the filing of a later grievance is allowed. These cases do not necessarily involve prisoners’ neglect of their legal duty to exhaust. Some of them may involve prisoners’ technical mistakes or misunderstandings in exhaustion, failure to exhaust because of threats or intimidation, or changes in the governing law of exhaustion after the prisoner has filed.

There are several possible ways to save meritorious claims dismissed for non-exhaustion after the limitations period has run. Some states have tolling provisions, which are applicable in federal court § 1983 actions, that give a litigant whose case is timely filed, but is then dismissed for reasons other than the merits, a certain period of time to re-file. That is the case in New

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1146 Winston v. Kelly, 2013 WL 593558, *2 (E.D.Ark., Feb. 15, 2013) (noting otherwise, prisoners could wait until the grievance deadline was past and then obtain tolling via late grievances that would not be addressed on the merits administratively); Washington v. Harris County, 2007 WL 2872457, *2 (S.D.Tex., Sept. 28, 2007). But see Brandon v. Bergh, 2009 WL 4646954, *3 (W.D.Mich., Dec. 8, 2009) (holding that an untimely grievance does toll the limitations period, but only until the point where the process should have been completed).
1149 The most significant of the last is the Supreme Court’s decision in Porter v. Nussle, 534 U.S. 516 (2002), which overruled the Second Circuit’s line of cases holding that exhaustion is only required in challenges to “conduct which was either clearly mandated by a prison policy or undertaken pursuant to a systematic practice.” See Marvin v. Goord, 255 F.3d 40, 42-43 (2d Cir. 2001). Instead, Porter held that exhaustion is required in “all inmate suits about prison life.” 534 U.S. at 532.
1150 See Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) (holding action timely because a state statute provides that a litigant who timely files and is dismissed has a year to commence a new action). The same result may follow.
York, where the State has represented to the Second Circuit (unfortunately in an unreported case) that under state law, claims dismissed for non-exhaustion can be reinstated within six months of dismissal,\(^{1151}\) and state law may further toll that six-month period during the pendency of renewed administrative proceedings.\(^{1152}\) However, not all state statutes of this type will benefit prisoners whose cases have been dismissed for non-exhaustion.\(^{1153}\)

A second approach is to hold the statute of limitations equitably tolled during the pendency of the dismissed action and any subsequent state administrative proceedings, as one appeals court has done.\(^{1154}\) That holding was made in a case where the plaintiff had been victimized by a change in law overruling several circuits’ holdings that damage claims need not be exhausted where grievance systems did not provide for damages,\(^{1155}\) but other decisions have held or suggested that equitable tolling may be applicable more generally.\(^{1156}\) The Second Circuit has held that a prisoner who was justified by special circumstances (e.g., a reasonable misunderstanding of the law or the prison’s administrative system, or actions by prison personnel) in failing to exhaust before suit should be required to exhaust, but should be allowed to proceed without exhaustion if administrative remedies have become unavailable.\(^{1157}\) It would

\(^{1151}\) This assertion appears in Villante v. Vandyke, 2004 WL 605290, *2 (2d Cir., Mar. 29, 2004); some district courts have made similar observations. See Rivera v. Pataki, 2003 WL 21511939, *9 and n.13 (S.D.N.Y., July 1, 2003); Richardson v. Romano, 2003 WL 1877955, *2 n.1 (N.D.N.Y., Mar. 31, 2003). The state statute, N.Y.C.P.L.R. § 205(a), provides that if an action timely commenced “is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits,” a new action may be filed within six months on the same transaction or occurrence or series of them.

\(^{1152}\) The relevant statute provides: “Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced.” N.Y.C.P.L.R. § 204(a). The Villante defendants’ argument, then—which appears correct—is that the PLRA exhaustion requirement is a “statutory prohibition” for purposes of § 204(a).

\(^{1153}\) For example, the relevant Indiana statute applies only if the case is dismissed for reasons other than negligence in prosecuting it. One court has held that failure to exhaust constitutes negligence, so the statute was not tolled and the claim was time barred in that case. Thomas v. Timko, 428 F. Supp. 2d 855, 857 (N.D. Ind. 2006).

\(^{1154}\) Wright v. Hollingsworth, 260 F.3d 357, 359 (5th Cir. 2001); accord, Clifford v. Gibbs, 298 F.3d 328, 333 (5th Cir. 2002); see nn. 202, 874-878, above, concerning equitable tolling.


\(^{1156}\) See Ransom v. Westphal, 2009 WL 3756354, *3-4 (E.D.Cal., Nov. 6, 2009) (applying equitable tolling under California law, noting dismissal for non-exhaustion may reflect “a pro se litigant traversing an unfamiliar technical path”); Wisenbaker v. Farwell, 341 F.Supp.2d 1160, 1166-68 (D.Nev. 2004) (applying equitable tolling where prisoner’s first suit was filed before he finished exhausting; citing his diligence in pursuing his claim, his pro se status, and his probable lack of understanding of exhaustion law); McCoy v. Goord, 255 F.Supp.2d 233, 253 (S.D.N.Y. 2003) (“Courts may combine a dismissal without prejudice with equitable tolling, when a judicial stay is not available, to extend the statute of limitations ‘as a matter of fairness where a plaintiff has . . . asserted his rights in the wrong forum.’”; suggesting in dictum that time spent in federal court may also be tolled) (citation omitted).

\(^{1157}\) Concerning the applicability of equitable tolling to grievance deadlines, see § IV.E.8, nn. 874-878, above.

\(^{1157}\) Brownell v. Krom, 446 F.3d 305, 313 (2d Cir. 2006); Giano v. Goord, 380 F.3d 670, 677-78 (2d Cir. 2004); Hemphill v. New York, 380 F.3d 680, 690-91 (2d Cir. 2004).
seem logical that equitable tolling as well should be applied in those circumstances, if not in all cases of dismissal followed by re-filing.

An alternative approach is for the court to decline to dismiss a case that would be time-barred and instead to grant a stay pending exhaustion. That option may be foreclosed by case law holding that stays are no longer permitted under the PLRA and that unexhausted claims must be dismissed. However, the courts have not explicitly addressed the question whether there may be an exception to the dismissal rule in order to save the meritorious claim of a plaintiff who has failed to exhaust but with limited culpability. Since a stay pending exhaustion is not much different in practical effect from dismissal without prejudice and subsequent reinstatement of suit, a limited exception to the dismissal rule will not do serious harm to the PLRA’s policies, unless one assumes that Congress intended to foster forfeitures of meritorious cases by manufacturing a new source of statute of limitations problems.

A fourth approach is for the plaintiff, after dismissal and subsequent exhaustion, to file a motion for relief from the judgment of dismissal under Rule 60(b) of the Federal Rules of Civil Procedure, rather than to file a new complaint. That Rule permits relief based inter alia upon “mistake, inadvertence, surprise, or excusable neglect,” an argument that it “is no longer equitable that the judgment should have prospective application,” or “any other reason justifying relief from the operation of the judgment.” It has been used as a procedural vehicle in a variety of circumstances to permit litigants who timely filed and diligently pursued their cases to revive suits that had become time-barred after dismissal. These circumstances include cases in which the plaintiff was victimized by a change or ambiguity in the law as well as cases where the plaintiff made an error of law. The fact that a case has not yet been heard on the merits

1158 See Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001); see nn. 253-256, above.
1159 See Cruz v. Jordan, 80 F.Supp.2d 109, 124 (S.D.N.Y. 1999) (“There is simply no evidence that Congress intended by section 1997e(a) to remove every aspect of the district court’s traditional equity jurisdiction” to grant stays). But see McCoy v. Goord, 255 F.Supp.2d 233, 254 (S.D.N.Y. 2003) (holding that the PLRA removed courts’ authority to grant stays even to avoid limitations problems).
1160 Compare Spruill v. Gillis, 372 F.3d 218, 230 (3d Cir. 2004) (“Congress wanted to erect any barrier it could to suits by prisoners in federal court, and a procedural default rule surely reduces caseloads (even though it may be a blunt instrument for doing so.”) (emphasis supplied) with Kane v. Winn, 319 F.Supp.2d 162, 220-21 (D.Mass. 2004) (“There is nothing in the PLRA’s legislative history to suggest that Congress intended to keep meritorious claims out of court. . . . Courts cannot lightly presume that Congress has an intent hostile to our legal system’s firmly embedded commitments to providing access to the courts to vindicate valid human rights claims, and interpreting the PLRA as a deliberate attempt to thwart such claims would obviously raise serious constitutional questions.”)
1161 Rule 60(b)(1),(5),(6), Fed.R.Civ.P.
1162 See North Carolina Alliance for Transp. Reform, Inc. v. U.S. Dept. of Transportation, 104 F.Supp.2d 599, 605-06 (M.D.N.C. 2000) (granting relief from judgment under Rule 60(b)(6) “catchall” provision so a plaintiff could file a timely attorneys’ fees motion after being misled by local rules about the time limit; in the alternative, equitably tolling the statutory limitations period); Allen v. Shalala, 835 F.Supp. 462, 464-65 (N.D.Ill. 1993) (granting relief from judgment under Rule 60(b)(6) to permit timely filing of fees motion rendered untimely by a change in the law); see also Bridgeway Corp. v. Citibank, N.A., 132 F.Supp.2d 297, 300-01, 303 (S.D.N.Y. 2001) (granting relief under Rule 60(b)(6) to reinstate claims of litigant whose foreign judgment on the same subject matter was ruled unenforceable; equitable tolling applied; “Equitable tolling permits a party to sue after the passing of the statute of limitations if the party has acted with reasonable care and diligence.”)
weighs heavily in favor of granting such relief. A prisoner who has relied on exhaustion law that was overruled in *Booth v. Churner* or *Porter v. Nussle*, or who did not anticipate them in a circuit where the question had not been decided when his or her complaint was filed, and whose claim may never be tried without relief, would seem to have a persuasive case under this body of law, as would a prisoner whose failure to exhaust was otherwise justified under the Second Circuit’s decisions. Although several courts have held that Rule 60(b) cannot be used to reinstate cases after a dismissal for non-exhaustion, these courts have not addressed this limitations issue.

It also would seem logical that a prisoner who has filed an action that will be dismissed for failure to exhaust or to exhaust properly should file a second action after non-exhaustion is cured but before the limitations period has run.

In addition to statute of limitations problems, the deadline for filing an administrative complaint will invariably have passed by the time of a dismissal for non-exhaustion. This problem is dealt with elsewhere.

A claim that is otherwise timely is not time-barred because exhaustion occurred outside the limitations period.

**J. Retroactivity**

The PLRA exhaustion requirement does not apply to actions or appeals filed before its enactment. It does apply to suits filed after enactment even if the events complained about occurred before enactment. However, if the time limit on the administrative remedy had passed when the exhaustion requirement was enacted, so the prisoner never had a chance to comply with it, exhaustion is not required.

Post-PLRA amendments to a pre-PLRA complaint need not satisfy the exhaustion requirement if they assert claims pertaining to conditions already alleged to be hazardous or inadequate in the original complaint, even if

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1165 See n.261, above.
1166 See § IV.E.8, above.
1168 Consequences of the retroactive application of Supreme Court decisions interpreting the PLRA are addressed in n. 878, above.
additional plaintiffs join in challenging them; conditions not raised before the PLRA cannot be raised in the same action without exhaustion. In class actions filed before the PLRA, the post-PLRA joinder of new plaintiffs relates back to the filing of the original complaint, so exhaustion is not required, even if class certification was not sought until after enactment. A post-PLRA motion to enforce a judgment in a case filed before enactment of the PLRA is not subject to the exhaustion requirement.

K. Exhaustion and Class Actions

In class actions, most decisions to date state that the PLRA requires only the named plaintiffs (and often a single named plaintiff), not unnamed class members, to exhaust in order for the action to go forward. Other courts have simply certified classes without inquiring into

1173 See cases cited in nn. 1206-1207, below.
1175 One court, finding administrative remedies unavailable in a class action, stated that it “need not address the broader issue of whether the PLRA’s exhaustion requirement applies to bona fide class actions in general.” Handberry v. Thompson, 92 F.Supp.2d 244, 248 (S.D.N.Y. 2000), aff’d in part, vacated in part, and remanded on other grounds, 446 F.3d 335 (2d Cir. 2006). There does not seem to be any room for a class action exception in the statutory mandate to exhaust in all actions brought by prisoners about prison conditions. See 42 U.S.C. § 1997e(a).

One court has said that class members can exhaust on behalf of a class “limited to claims for prospective injunctive relief.” Carvajal v. Lappin, 2007 WL 869011, *5 (N.D.Tex., Mar. 22, 2007). Carvajal relied on Gates v. Cook, 376 F.3d 323, 330 (5th Cir. 2004), which cites a treatise suggesting that this rule applies if prospective relief is “the primary remedy being sought.” Another court has suggested that the absence of information about whether unnamed class members have exhausted weighs against a finding of typicality for class certification purposes. Amador v. Superintendents of Dept. of Correctional Services, 2005 WL 2234050, *9 n.10 (S.D.N.Y., Sept. 13, 2005). The court does not explain why the exhaustion status of unnamed class members makes a difference. In Wilson v. County of Gloucester, 256 F.R.D. 479 (D.N.J. 2009), the court seemed to assume that individual class members in a 23(b)(3) class action would have to exhaust if they were prisoners when the case was begun, but held that common issues would still predominate over individual issues about non-exhaustion because the class included large numbers of persons who had been released from jail before the suit was filed. 256 F.R.D. at 489. Cf. Powers
exhaustion by anyone but the named plaintiffs, without commenting on the theoretical issue. These decisions are consistent with the general practice in class actions, which the PLRA does not purport to displace. There may be exceptions to the general practice for exhaustion requirements that are jurisdictional, as the PLRA’s is not, or that are found in statutory schemes that emphasize the need for maintaining case-by-case agency adjudication and in which the court’s role is limited to deferential review of an agency decision, but these concerns are generally inapplicable under the PLRA, since judicial review of prisoners’ civil rights complaints is de novo and not restricted to an administrative record or determination.

There may be a practical interaction between PLRA exhaustion and class certification considerations. One recent appellate decision holds that in determining whether the relation-back doctrine applies to preserve the claims of named plaintiffs who have been released from prison while awaiting class certification, the exhaustion requirement may be a significant factor weighing in favor of relation back. In that case, which sought injunctive relief against policies and procedures that exposed women prisoners to a risk of sexual abuse, the court noted:

While the entire class may be exposed to the risks caused by the constitutionally defective policies and procedures alleged, as noted, the grievance procedure may be triggered only by an inmate who has been a victim of sexual misconduct. Because the number of inmates subjected to acts of misconduct can be a small fraction of the total inmates at risk, the odds of an inmate being able to complete the grievance procedure and litigate a class action while still incarcerated are rather small.

There is an interesting question underlying this holding: if the requirements for pursuing a grievance about a prison practice or condition are more stringent than the requirements for standing in federal court, wouldn’t a litigant with standing who was not allowed to grieve have

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1179 A leading treatise states: “When exhaustion of administrative remedies is a precondition for suit, the satisfaction of this requirement by the class plaintiffs normally avoids the necessity for each class member to satisfy this requirement independently.” 5 Newberg on Class Actions at § 24.66 (3d ed., Supp. 2001).


1181 See § IV.A, n. 201, above.

no available remedy, and thus be entitled to file suit without exhaustion? As the issues were
framed, the court neither recognized nor pursued this question.1184

One court has held that class certification should be deferred until after exhaustion is
considered to determine whether proposed class representatives are subject to the “unique
defense” of non-exhaustion.1185 However, such a rule (asserted before the decision in Jones v.
Bock holding that exhaustion is an affirmative defense to be raised by defendants) would give
defendants control of when, and even whether, class certification would be considered.

One decision pointed out that prior authority involves Rule 23(b)(2) class actions, and
deployed to apply the “vicarious” exhaustion approach of Title VII law relied on in those cases in
a Rule 23(b)(3) class action seeking damages for all class members.1186 The court did not
explain why the Title VII approach is not equally appropriate under the PLRA, perhaps because
neither party argued that it was appropriate. The court avoided dealing directly with the
exhaustion requirement by defining the class narrowly to include only persons who were no
longer incarcerated at the time the suit was brought, and who were therefore not subject to the
exhaustion requirement.1187 Another court in a putative class damages suit noted that two of
several named plaintiffs had been released before suit was filed, and questioned whether other
class members were required to exhaust.1188 By contrast, a case involving a putative class
including both prisoners and non-prisoners, and seeking injunctive relief as well as damages, the
court questioned whether the vicarious exhaustion doctrine could be extended to allow non-
prisoners, who are not required to exhaust, to represent class members who had not exhausted,
since in that situation no one at all had exhausted.1189 On a closely related issue, courts have
squarely held that if named plaintiffs in a class action are no longer prisoners at the time of
filing, they are not subject to 42 U.S.C. § 1997e(e), the PLRA physical injury requirement, and
neither are absent class members even if they were incarcerated at filing, since the action was
“brought” by the named plaintiffs.1190 Since the physical injury requirement is triggered by
“brought by a prisoner” language similar to that in the exhaustion requirement, if these decisions
are correct, their holdings should be applicable to exhaustion as well.

1184 See nn. 786-787, above, for discussion of cases raising similar issues.
where prior litigation had shown there was no administrative remedy for the problem; noting experience and
evidence “suggest that it is the inmate who successfully shepherds his claims through the PPS’s dysfunctional
grievance procedures who would truly be unique”).
1187 Sanchez, id., *3-4.
1188 Phipps v. Sheriff of Cook County, 681 F.Supp.2d 899, 907-08, 917 n.11 (N.D.Ill. 2009). Since plaintiffs sought
only damages, there was no issue of released plaintiffs’ standing to seek injunctive relief.
class certification for other reasons and did not reach what it termed the “vicarious non-exhaustion” question, though
it did acknowledge plaintiffs’ argument that currently incarcerated class members need not exhaust because they had
not “brought” suit within the meaning of the PLRA. See Sutton v. Hopkins County, Ky., 2007 WL 119892, *9
(W.D.Ky., Jan. 11, 2007) (noting open question whether former prisoners can represent current prisoners in a class
action); see also Jones v. Swanson Services Corp., 2009 WL 2151300, *2 (M.D.Tenn., July 13, 2009) (holding
named plaintiff who had been released need not have exhausted, but at least one class member must have
exhausted).
1190 In re Nassau County Strip Search Cases, 2010 WL 3781563, *8-9 (E.D.N.Y., Sept. 22, 2010); Kelsey v. County
2009).
Once administrative remedies have been exhausted with respect to class claims, “[a]ny claim for relief that is within the scope of the pleadings may be litigated without further exhaustion.”\footnote{Jones’El v. Berge, 172 F.Supp.2d at 1132.} That holding remains applicable when plaintiffs in a class action seek preliminary relief benefiting individual unnamed class members.\footnote{Id. It does not, however, authorize prisoners to bring separate suits for damages without exhaustion merely because they are members of the class. Pozo v. Hompe, 2003 WL 23185882 (W.D.Wis., Apr. 8, 2003), \textit{amendment denied}, 2003 WL 23142268 (W.D.Wis., Apr. 17, 2003); Piscitello v. Berge, 2002 WL 32345410, *2 (W.D.Wis., Nov. 4, 2002), \textit{aff’d}, 94 Fed.Appx. 350, 2004 WL 635263 (7th Cir. 2004).} The PLRA does not disturb pre-existing principles of notice pleading and liberal construction, especially of \textit{pro se} pleadings,\footnote{See \textit{§§ IV.G, IV.G.1, above.}} and those principles are equally applicable in class actions.\footnote{Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004) (quoting Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)); see \textit{§ IV.E.5, above.}}

For these same reasons, it should be sufficient for prisoners to exhaust with respect to their individual experiences (“Officer Doe beat me up”), rather than the kinds of structural or systemic issues (inadequate or unlawful policies, deficient staff training and supervision, lack of investigation of complaints and discipline of staff who use excessive force) that are often raised in injunctive class litigation as matters both of liability and of remedy. As to remedy, this conclusion is also compelled by the logic of \textit{Booth v. Churner}, which holds that a prisoner’s obligation to exhaust does not depend on the relief sought and the relief available in the administrative system, but on whether that system can take any action concerning the prisoner’s complaint.\footnote{Any other rule would come into conflict with 18 U.S.C. § 3626(a), which requires adoption of the narrowest and least intrusive remedy necessary to cure the federal law violation, and does not make an exception if such remedy was not anticipated by the prisoner in his or her grievance.} Similarly, the Second Circuit and others have held that the grievant need not “demand particular relief” in order to exhaust.\footnote{Amador v. Andrews, 655 F.3d 89, 104 (2d Cir. 2011); \textit{accord}, Spaude v. Corrections Corp. of America, Inc., 2011 WL 5038922, *3-5 (D.Idaho, Oct. 21, 2011) (prisoner who alleged failure to protect from assault because of inadequate staffing and security, and recited what happened to him, exhausted and need not have recited all policies and practices he alleged in lawsuit). See nn. 589-590501-502, above, and surrounding text for further discussion of \textit{Amador} and related supervisory liability issues.} Once the named plaintiffs’ complaints about what happened to them have been exhausted, then, the court should be free to consider any remedy that appears necessary to cure whatever violation of law the record shows with respect to the class.\footnote{The court took a slightly different approach in \textit{Flynn v. Doyle}, 2007 WL 805788 (E.D.Wis., Mar. 14, 2007), in which plaintiffs alleged a pattern of deliberate indifference to serious medical needs, and defendants}
This last point is central and is a matter of common sense. Grievances are brought by prisoners on their own, under short deadlines, without the assistance of counsel. Prisoners as a class are relatively poorly educated and many of them are wholly or partially illiterate. Moreover, they are rarely in a position to investigate their keepers’ hiring, training, and supervision practices, or to assess administrative policies—especially since they may not even be allowed access to significant personnel- or security-related policies. It makes no sense to apply what is, in effect, an exacting pleading standard to complaints filed at this informal administrative level, and then use it as a constraint on the remedies that may be sought and the bases for liability that may be alleged in a subsequent judicial challenge, after counsel has been obtained, to the underlying conduct that was grieved.

argued that many of the allegations in the complaint had not been exhausted, such as the failure to take corrective action after negative reports by outside agency, and the failure of one named plaintiff to exhaust the termination of her psychotropic medication as of a certain date. The plaintiffs responded that in a case seeking only prospective injunctive relief, the specific allegations of the complaint were not “claims” requiring exhaustion but were instead merely “examples and evidence of defendants’ ongoing deliberate indifference to plaintiffs’ serious medical needs.” 2007 WL 805788, *9 (emphasis in original). The court then engaged in a two-page recitation of the numerous grievances filed by the named plaintiffs, which showed that “the plaintiffs have filed, and fully exhausted, a multitude of inmate complaints regarding deficient medical and mental health care,” and concluded that plaintiffs had exhausted “for the purposes of this class action lawsuit.” 2007 WL 805788, *13. The court did not connect this “multitude” of complaints to more specific allegations in the complaint.

As one court recently observed in a case alleging failure to protect from prisoner-prisoner violence:

- Issues such as inadequate staffing, a failure to train, a failure to discipline correctional officers and other prisoners, the lack of sufficient written findings when assaults occurred, and a pervasive “code of silence,” are not matters that an individual prisoner who has been beaten in one or two separate incidents can be expected to know without a full investigation that is beyond his capacity and authority to conduct.


For example, in Amador v. Superintendents of Dep’t of Correctional Services, 2007 WL 4326747 (S.D.N.Y., Dec. 4, 2007), which challenged inter alia the defendants’ investigative policies and practices in cases of sexual abuse of prisoners, defense counsel strongly asserted the position that those policies and practices cannot be disclosed to prisoners even if they can be obtained by members of the public outside prison. Letter, Daniel Schulze to Camille Rich et al., September 1, 2005, at 2. (As noted, on appeal the Second Circuit mitigated this concern by holding that prisoners who generally alleged a failure to protect sufficiently exhausted with regard to prison policies and procedures. Amador v. Andrews, 655 F.3d 89, 104 (2d Cir. 2011).) More generally, in the New York prison system, departmental policies and procedures are categorized as A distribution, provided to staff but not to inmate libraries; A&B distribution, to staff and to inmate libraries; and D distribution, to supervisory staff and other security personnel who must be familiar with them; otherwise they “shall be handled as confidential material and restricted from unauthorized access.” New York State Dep’t of Correctional Services, Directive 0001: Introduction to the Policy and Procedure Manual at 3 (April 7, 2000). “D” directives include items such as Use of Chemical Agents and Emergency Control Plans; “A” directives include Unusual Incident Report and Security Classification Guidelines. Id., Directive 0000: Table of Contents. Thus substantial bodies of prison policy are explicitly barred from disclosure to prisoners.

Pro se prisoners are not considered adequate class representatives and cannot obtain class certification unless they obtain counsel. See, e.g., Craig v. Cohn, 80 F.Supp.2d 944, 946 (N.D.Ind. 2000); Caputo v. Fauver, 800 F.Supp. 168, 170 (D.N.J. 1992) (“Every court that has considered the issue has held that a prisoner proceeding pro se is inadequate to represent the interests of his fellow inmates in a class action.”), aff’d, 995 F.2d 216 (3d Cir. 1993).

Pro se pleadings to plaintiffs’ grievances, holding that grievances about placement in “unapproved PC” status encompassed complaints about allegedly unconstitutional conditions in that status.)

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Title VII law takes a slightly different approach to this problem, holding that class claims need not be explicitly pled in an administrative complaint, and that courts will look to factors such as whether several instances of discrimination were pursued in the EEOC charge, or multiple similar EEOC charges were filed within a short period of time. In this instance, the Title VII rule appears to be too restrictive to be borrowed for the PLRA in light of the greater disadvantages experienced by prisoners with respect to their levels of education and literacy, their lack of freedom to investigate general practices at their institutions, the much shorter time limits for filing grievances than for EEOC complaints, and the fact that some prison grievance systems actively discourage the framing of grievances in class action terms and the citation of other prisoners’ experience.

In cases filed before the PLRA, the post-PLRA joinder of new plaintiffs relates back to the filing of the original complaint, so exhaustion is not required, even if class certification was not sought until after enactment. Nor is exhaustion required before moving to enforce an existing class action judgment.

When prison officials move to terminate a judgment under the PLRA, prisoners need not exhaust to contest the motion. One court observed: “[The intervening] Plaintiff did not ‘bring’ this action; he is defending it. Requiring the representative prisoner to exhaust his

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1204 See §IV.E.8, n. 831, above.


(b) **Grievances must be personal.** An inmate must be personally affected by the policy or issue he/she is grieving, or must show that he/she will be personally affected by that policy or issue unless some relief is granted or changes made. All grievances must be filed in an individual capacity.

(d) **Class actions not accepted.** Individuals personally affected by a matter which affects a class of inmates may only file a grievance on their own behalf. Grievances which are raised in terms of class actions should be referred to the Inmate Liaison Committee.

Appendix D, New York State Department of Correctional Services Directive 4040, Inmate Grievance Program, § 701.3 at 2 (July 1, 2006).

Since class action allegations are explicitly disapproved, a prisoner should not be disqualified from representing a class based on their absence from his or her grievance.


1209 See 18 U.S.C. § 3626(b); § III.B, above.
administrative remedies prior to defending a 3626(b) motion would produce an absurd result that is not contemplated by the statute.”

V. Mental or Emotional Injury

The PLRA says: “No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18, United States Code).” There is a similar provision amending the Federal Tort Claims Act (FTCA), which has generally been interpreted similarly to § 1997e(e), though there are two significant differences between them. The FTCA provision applies only to a person “convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence,” so federal misdemeanants and pre-trial detainees are not affected by it. Further, it is arguable that under this provision, physical injury is a pleading requirement, as I argue below is not the case for § 1997e(e).

There is probably more confusion about this badly written statute than about any other part of the PLRA. For starters, consider the statutory phrase “prior showing of physical injury.” Prior to what? The only grammatically sensible construction is “prior to the action’s being brought,” but obviously there is no provision or practice for pre-filing proceedings to determine the extent of a potential litigant’s injury. The courts have generally ignored this issue since there is nothing sensible that can be done with it.

1214 28 U.S.C. § 1346(b)(2). There is some ambiguity whether the statute’s scope is limited to persons awaiting sentence or serving a sentence for a felony, or whether it applies to persons with a prior felony conviction as well.

Some courts have invoked both statutes in Federal Tort Claims Act cases. See, e.g., Stanley v. U.S., 2013 WL 256023, *1 (N.D.W.Va., Jan. 23, 2013); Christensen v. U.S., 2013 WL 4521040, *7 (E.D.Ky., Aug. 26, 2013). If the general provision of § 1997e(e) were deemed to apply under the FTCA, it would pre-empt the more limited scope of 28 U.S.C. § 1346(b) and render it superfluous. For that reason, § 1997e(e) should not be so interpreted. See TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (internal quotation marks omitted)).
1215 See n. 1252, below.
1216 The court in Bustos v. U.S., 2010 WL 4256182 (D.Colo., Oct. 21, 2010), report and recommendation adopted, 2010 WL 5157325 (D.Colo., Dec. 14, 2010), noted the dearth of authority construing this phrase, and suggested it may mean that the mental or emotional injury must be alleged to stem from a physical injury. That view might be convincing if the statute read “showing of prior physical injury,” but it does not account for the actual “prior showing” language of the statute. Alternatively, Bustos suggested the phrase might simply mean that a showing of physical injury is required before recovery for a mental or emotional injury. 2010 WL 4256182, *3 n.3. That construction, of course, directly contradicts the opening language, which states “[n]o action shall be brought.”
The substantive scope of § 1997e(e), “injury suffered while in custody,” is broader than the “prison conditions” language of the PLRA exhaustion requirement.\textsuperscript{1217}

A person who has been released from prison is no longer a prisoner, so a suit filed after release is not “brought by a prisoner” and the provision is inapplicable.\textsuperscript{1218} Dismissal under § 1997e(e) should be without prejudice to refiling once the prisoner is no longer incarcerated.\textsuperscript{1219} In a class action, the provision is applicable only to the named plaintiffs, not unnamed class members.\textsuperscript{1220}

One circuit has held that the statute applies to a claim that arose before, and was unrelated to, the plaintiff’s present incarceration.\textsuperscript{1221}

The phrase “federal civil action” is not defined in the statute. One circuit has held that in a case removed from state court, § 1997e(e) does not apply to claims based solely on state law—implying, but not holding, that federal claims filed in state court are governed by the statute.\textsuperscript{1222} But language elsewhere in the PLRA suggests otherwise. In the PLRA exhaustion requirement, Congress referred to actions brought “under section 1983 of this title, or any other Federal law.”\textsuperscript{1223} Having used that explicit term in one part of the statute to denote all claims based on federal law, it is not likely that Congress would use a different and much vaguer term to convey the same idea in a different part of the PLRA.\textsuperscript{1224} It is more plausible that “federal civil action” rather than “no damages shall be recovered. . . .” but it is consistent with the prevailing construction of the statute as limiting damages rather than actions, described at the beginning of the next section.

\textsuperscript{1217} See Quinlan v. Personal Transport Services Co., 329 Fed.Appx. 246, 249 (11th Cir. 2009) ("[T]he custody requirement reflects not just imprisonment, but any situation in which a reasonable person would feel a restraint on his movement such that he would not feel free to leave.” Plaintiff was restrained and caged in a vehicle during extradition.) (unpublished); Ellison v. Logan, 2009 WL 1438254, *5 (M.D.Fla., May 18, 2009) (arrest is a form of custody, so § 1997e(e) applies to injuries sustained while under arrest).

\textsuperscript{1218} See § II, n. 29, above. As noted there, a few courts have held that § 1997e(e) applies to released prisoners notwithstanding its actual language, but most have rejected that view.


\textsuperscript{1221} Napier v. Preslicka, 314 F.3d 528, 532-34 (11th Cir. 2002), rehearing denied, 331 F.3d 1189 (11th Cir. 2003), cert. denied, 540 U.S. 1112 (2004). This interpretation sharply divided both the panel and the court as a whole. Id., 314 F.3d at 534-37; 331 F.3d at 1190-96.

\textsuperscript{1222} Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d 1309, 1315 (11th Cir. 2002); accord, Napier v. Preslicka, 314 F.3d 528, 532 (11th Cir.2002) ("[T]he phrase ‘Federal civil action’ means all federal claims, including constitutional claims.").

\textsuperscript{1223} 42 U.S.C. § 1997e(a).

\textsuperscript{1224} See Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n. 9 (2004) (citing the “usual rule that ‘when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.’”) (quoting 2A N. Singer, Statutes and Statutory Construction § 46:06, p. 194 (6th ed. 2000)); accord, United States v. Gonzales, 520 U.S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion’ ").
means actions in federal court, regardless of the underlying law, as several lower courts have held.\textsuperscript{1225}

Further, the statute says that “no Federal civil action\textsuperscript{1226} for mental or emotional injury without physical injury. In determining whether the statute applies to a case, courts have generally held that the phrase “may be brought” ties the statute’s applicability to the time when the case is filed.\textsuperscript{1227} If that is the case, a suit originally filed in state court is not a “Federal civil action” when brought, so § 1997e(e) should not be applicable to it under any circumstances–and certainly not when the case’s presence in federal court is procured by the adverse party through removal, whether the claims are based on federal or state law or both.

A. What Does the Statute Do?

The most obvious question on the face of § 1997e(e) is what is an “action . . . for mental or emotional injury” and what does a court do when it gets one? The federal appeals courts have consistently held that the statute is a limitation on damages, not on actions, despite its language. The Second Circuit has said that “the plaintiff cannot recover damages for mental or emotional injury for a constitutional violation in the absence of a showing of actual physical injury.”\textsuperscript{1228} Further: “Both in its text and in its caption, Section 1997e(e) purports only to limit recovery for emotional and mental injury, not entire lawsuits.”\textsuperscript{1229} The availability of injunctive and declaratory relief is not affected.\textsuperscript{1230} Most courts have held that the statute limits only compensatory damages, allowing recovery of nominal and punitive damages,\textsuperscript{1231} though some


\textsuperscript{1226} 42 U.S.C. § 1997e(e) (emphasis supplied).

\textsuperscript{1227} Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d at 1316; Harris v. Garner, 216 F.3d 970, 981-82 (11th Cir.2000) (en banc); Craig v. Eberly, 164 F.3d 490, 494-95 (10th Cir. 1998); Swan v. Banks, 160 F.3d 1258, 1259 (9th Cir. 1998). These holdings are consistent with general practice under other PLRA provisions, under which the statute’s applicability turns on the plaintiff’s status as a prisoner at the time the action is brought. See nn. 26-44, above.

\textsuperscript{1228} Thompson v. Carter, 284 F.3d 411, 417 (2d Cir. 2002).

\textsuperscript{1229} Thompson, 284 F.3d at 418. Not every district court appreciates this fundamental point. See, e.g., Brewster v. Nassau County, 349 F.Supp.2d 540, 552-53 (E.D.N.Y. 2004) (stating erroneously that an officer’s spreading rumors likely to cause a prisoner to be harmed by other prisoners ceased to state a cause of action because of § 1997e(e)).

\textsuperscript{1230} Thompson, 284 F.3d at 418.

\textsuperscript{1231} Hutchins v. McDaniels, 512 F.3d 193, 196-98 (5th Cir. 2007); Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004), cert. denied, 544 U.S. 1061 (2005); Calhoun v. DeTella, 319 F.3d 936, 943 (7th Cir. 2003) (noting that nominal damages “are awarded to vindicate rights, not to compensate for resulting injuries,” and that punitive damages “are designed to punish and deter wrongdoing for deprivations of constitutional rights, they are not compensation ‘for’ emotional and mental injury”); Oliver v. Keller, 289 F.3d 623, 629 (9th Cir. 2002); Thompson v. Carter, 284 F.3d at 418; Searles v. van Bebber, 251 F.3d 869, 878-80 (10th Cir. 2001); Allah v. Al-Hafeez, 226 F.3d
courts have held that punitive damages are barred as well, and some that the plaintiff must have pled a demand for nominal damages in some fashion in order to recover them. Despite the unanimity of circuit-level holdings that the statute limits damages and not actions, in practice this distinction has escaped many lower courts, which have sometimes simply dismissed claims they deem to involve only mental or emotional injury, without regard to the prisoner’s right to seek punitive and/or nominal damages, or have even held that the complaint does not state a claim for that reason.

Courts have justified their departure from the plain “[n]o action may be brought” language of the statute by simply asserting that theirs is a more logical reading, or by resort to the statute’s heading, “Limitation on Recovery,” despite the Supreme Court’s warning against relying on a statute’s title to limit its plain meaning. A more plausible concern is that the statute, read as a bar on actions and not on damages, would be an unconstitutional limitation on


An important corollary of these holdings is that in cases where compensatory damages are restricted by 42 U.S.C. § 1997e(e), notions of proportionality between compensatory and punitive awards cease to be applicable. Tate v. Dragovich, 2003 WL 21978141, *9 (E.D.Pa., Aug. 14, 2003); see Hayes v. Stephenson, 588 F.3d 1152, 1158-59 (8th Cir. 2009) (affirming $1.00 in compensatory damages and $2500 in punitive damages in prison retaliation case; PLRA not cited); Williams v. Kaufman County, 352 F.3d 994, 1016 (5th Cir. 2003) (holding that ratios between compensatory and punitive damages are less applicable in § 1983 suits than in other litigation because of the greater frequency of nominal awards under § 1983).


Thompson v. Carter, 284 F.3d at 418.

Thompson, 284 F.3d at 418.

judicial enforcement of constitutional rights if it did not allow for injunctive relief and contempt sanctions. One court has so held,\textsuperscript{1239} while other courts have reached the same conclusion about the statute’s reach without alluding to this constitutional problem.\textsuperscript{1240}

In my view the correct analysis of the statute would limit its application to cases in which mental or emotional injury is central to or an element of the claim and not merely a potential element of damages. This construction would give effect to the statutory term “action” while giving the ambiguous phrase “for mental or emotional injury” a meaning more consistent with its position as modifier of “action.” A few decisions have taken this view or a similar one.\textsuperscript{1241}

The applicability and effect of the statute are typically addressed on motions to dismiss and for summary judgment. The only reported circuit decision explicitly to address the procedural nature of the provision held that it creates an affirmative defense rather than a jurisdictional requirement, by analogy with the administrative exhaustion requirement of the PLRA.\textsuperscript{1242} On that view, the defense would be waived by failure to plead it.\textsuperscript{1243} This view is contrary to the routine and unexamined assumption in the case law that physical injury is a pleading requirement, and the resulting practice of dismissing cases or claims at initial screening or on motions to dismiss for failure to allege it.\textsuperscript{1244} In fact, some district courts within the Eleventh Circuit—and indeed, the Eleventh

\textsuperscript{1239} Zehner v. Trigg, 133 F.3d 459, 461-63 (7th Cir. 1997); see Johnson v. Patterson, 519 Fed.Appx. 610, 613 (11th Cir. 2013) (unpublished) (holding that § 1997e(e) imposes “only a limitation on recovery, within Congress’s power to legislate” (citing Harris v. Garner, 190 F.3d 1279, 1287–89 (11th Cir.), vacated, 197 F.3d 1059 (11th Cir.1999), reinstated in relevant part, 216 F.3d 970, 972, 985 (11th Cir. 2000) (en banc), cert. denied, 134 S.Ct. 914 (2014).)

\textsuperscript{1240} See, e.g., Harris v. Garner, 190 F.3d 1279, 1288-89 (11th Cir. 1999), reinstated in pertinent part, 216 F.3d 970, 972 (11th Cir. 2000) (en banc), cert. denied, 532 U.S. 1065 (2001); Davis v. District of Columbia, 158 F.3d 1342, 1347 (D.C.Cir. 1998); Mann v. Wilkinson, 2009 WL 1441721, *1-2 (S.D.Ohio, May 20, 2009) (granting injunctive relief while holding damages barred by § 1997e(e)); see also Thompson v. Carter, 284 F.3d at 419 (noting that “compensatory damages for actual injury, nominal, and punitive damages remain available,” and for that reason, it need not decide whether it is unconstitutional to deny all damages against defendants against whom injunctive claims are no longer available”).

\textsuperscript{1241} See Shaheed-Muhammad v. Dipaolo, 138 F.Supp.2d 99, 107 (D.Mass. 2001) (“Where the harm that is constitutionally actionable is physical or emotional injury occasioned by a violation of rights, § 1997e(e) applies. In contrast, where the harm that is constitutionally actionable is the violation of intangible rights—regardless of actual physical or emotional injury—§ 1997e(e) does not govern.”); Seaver v. Manduco, 178 F.Supp.2d 30, 37-38 (D. Mass. 2002) (applying Shaheed-Muhammad to a body cavity search case); Waters v. Andrews, 2000 WL 1611126, *4 (W.D.N.Y., Oct. 16, 2000) (holding that female prisoner’s Fourth Amendment and Eighth Amendment claims of being placed in a filthy punishment cell, kept in a soiled and bloody paper gown, denied a shower and other personal hygiene measures, and exposed to the view of male correctional staff and construction workers, were not subject to § 1997e(e) because mental or emotional distress is not an element of either claim); see also Shaheed-Muhammad v. Dipaolo, 393 F.Supp.2d 80, 107-08 (D.Mass. 2005) (adhering to previously stated view).


\textsuperscript{1244} See, e.g., Brazil v. Rice, 308 Fed.Appx. 186, 187 (9th Cir. 2009) (unpublished) (“The district court properly dismissed the Eighth Amendment claim because the amended complaint does not allege that Brazil suffered any physical injury.”); Harden–Bey v. Rutter, 524 F.3d 789, 795–96 (6th Cir.2008); Hampton v. Blanco, 299 Fed.Appx. 460, 461 (5th Cir. 2008) (plaintiff failed to allege that he ate unsafe food and thus cannot show physical harm);
Circuit itself in an unpublished decision—appear to be unaware of the holding that it is an affirmative defense.\textsuperscript{1245} If the statute creates an affirmative defense, the existence of a
physical injury need not be pled, but the district court should be free to dismiss if the complaint on its face shows that the plaintiff is a prisoner seeking damages for mental or emotional injury without physical injury. However, again by analogy to the exhaustion requirement, courts should not be able to dismiss where the plaintiff simply fails to plead a physical injury without otherwise characterizing his injury. In any case, consistently with the established understanding of § 1997e(e)’s operation, dismissal should be limited to claims for compensatory damages for mental or emotional injury, or compensatory or punitive damages in those jurisdictions where the statute is held to prohibit both absent physical injury.

My view is that both of these approaches are wrong, and the mental/emotional injury provision should be viewed as neither a defense nor a pleading requirement, but simply as a damages rule. As such, it should generally be an issue for the trier of fact, as several decisions have held or suggested. (On that view, a defense failure to object and preserve the


See Hayes v. Corrections Corp. of America, 2012 WL 4481212, *19 (D.Idaho, Sept. 28, 2012) (holding whether injury was de minimis was a triable issue where the extent of injury was disputed); Siggers v. Campbell, 2012 WL 4062503, *6-7 (E.D.Mich., June 13, 2012) (holding what damages can be recovered in a First Amendment case can be addressed on a motion in limine or a request for jury instruction), report and recommendation adopted, 2012 WL 4061356 (E.D.Mich., Sept. 14, 2012); Habeebullah v. Crawford, 2011 WL 2458060, *4-5 (W.D.Mo., June 17, 2011) (holding trier of fact was not pre-empted by plaintiff’s admission of lack of physical injury; record also indicated several suicide attempts in case alleging inadequate mental health care); McCoy v. Spidle, 2011 WL 1486560, *3 (E.D.Cal., Apr. 19, 2011) (holding that plaintiff can present argument and evidence at trial in support of damages for First Amendment retaliation claim); West v. Berge, 2010 WL 3835104, *8 (E.D.Wis., Sept. 29, 2010) (where case had to be retried anyway, and law was not clear, “more prudent course” than deciding on motion was to permit the jury to consider evidence of physical injury in the event it found a violation); Blake v. Holly, 2010 WL 3829197, *9
applicability of the physical injury requirement at the jury instruction stage waives the argument.\textsuperscript{1250}

\textit{Douglas} relied for its holding that § 1997e(e) creates an affirmative defense primarily on the presence of the “No action shall be brought” language, which is parallel to the exhaustion requirement’s language found to create an affirmative defense in \textit{Jones v. Bock}\.\textsuperscript{1251} However, the courts have already disregarded that linguistic similarity in holding, as described above, that § 1997e(e) imposes a limitation on remedies and not on actions or (as in \textit{Jones v. Bock}) claims. It therefore makes little sense to insist that the linguistic similarity is dispositive for procedural purposes. Rather, the statute should be given a procedural interpretation that fits its substantive function, which as the courts have agreed is to limit certain damages.

It is arguable that the parallel provision for Federal Tort Claims Act claims, unlike § 1997e(e), does establish a pleading requirement. The FTCA generally is a limited waiver of sovereign immunity, and federal courts lack jurisdiction over claims that do not fall within it, so it appears that where recovery is sought for mental or emotional injury, physical injury is a pleading requirement.\textsuperscript{1252}

\textsuperscript{1250} (W.D.Ark., Aug. 6, 2010) (declining to decide on summary judgment whether pain from aggravated back injury satisfied § 1997e(e), \textit{report and recommendation adopted}, 2010 WL 3829453 (W.D.Ark., Sept. 24, 2010); Johnson v. Raemisch, 557 F.Supp.2d 964, 975 (W.D.Wis. May 23, 2008) (stating that question of damages for censorship of newspaper was for trial, questioning whether substantial damages could be shown); Thompson v. Caruso, 2008 WL 559655, *1-2 (W.D.Mich., Feb. 27, 2008) (plaintiff in First Amendment case would be allowed to present proof and argue for recovery of nominal, compensatory, and punitive damages for all injuries except mental and emotional ones); Thomas v. Thomas, 2007 WL 2177066, *6 (S.D.Ga., July 25, 2007) (“The amount of damages Plaintiff may be entitled to recover is a determination reserved for the trier of fact, not the Court on a summary judgment motion.”).

In some cases, the court has weighed the fact that the case would be tried anyway because the plaintiff sought other forms of relief too. \textit{See Sanders v. McKinney, 2013 WL 6662267, *11 (N.D.Iowa, Dec. 17, 2013) (“The issue of whether he has adequately demonstrated a physical injury as a result of defendants' alleged deliberate indifference need not be addressed at this time [summary judgment] because he seeks relief other than compensatory damages.”), \textit{report and recommendation adopted}, 2014 WL 941624 (N.D.Iowa, Mar. 11, 2014); Abreu v. Nicholls, 2011 WL 1044373, *3-4 (S.D.N.Y., Mar. 22, 2011) (holding that since plaintiff’s claims could proceed for punitive and nominal damages, the question whether his injuries were more than \textit{de minimis} would be left for the trier of fact); Jolley v. Huskins, 2011 WL 971951, *12 (W.D.Ark., Mar. 17, 2011) (“As several of Jolley's claims will proceed, we decline at this point [summary judgment] to attempt to determine whether his claimed injuries of pain caused by the condition of his teeth, his back, and as a result of the ingestion of shamoo are sufficient to enable him to recover damages for his mental pain and suffering under § 1997e(e).”); \textit{see also} Scott v. Stone, 2009 WL 1518948, *1 (E.D.Mich., June 1, 2009) (jury instruction modified to exclude a possible award of damages for any physical, mental, or emotional injury in First Amendment retaliation case).


\textit{Douglas}, 535 F.3d at 1320-21 (\textit{citing Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 501 (1998) (“[S]imilar language contained within the same section of a statute must be accorded a consistent meaning.”)}).

In a multi-claim case, the presence of physical injury as a result of one claim does not protect other claims from dismissal for lack of physical injury.1253

B. What Is Mental or Emotional Injury?

The statutory phrase “mental or emotional injury” should not be difficult to interpret: “The term ‘mental or emotional injury’ has a well understood meaning as referring to such things as stress, fear, and depression, and other psychological impacts.”1254 Some courts accordingly have recognized a variety of constitutional and statutory injuries that are neither physical nor mental or emotional, and therefore are not affected by the statute.1255 Such as property loss,1256 denial of First Amendment rights,1257 loss of or exclusion from prison programs,1258 freedom


1254 Amaker v. Haponik, 1999 WL 76798, *7 (S.D.N.Y., Feb. 17, 1999) (also noting that requiring physical injury in all cases would make the term “mental or emotional injury” superfluous); accord, Robinson v. Page, 170 F.3d 747, 748 (7th Cir. 1999) (“The domain of the statute is limited to suits in which mental or emotional injury is claimed.”); see Smothers v. Root, 2008 WL 1944663, *1-2 (W.D.Ark., Apr. 18, 2008) (applying statute to allegation that correctional staff faked a letter from a court telling the plaintiff he would receive relief from his life sentence), report and recommendation adopted, 2008 WL 2008921 (W.D.Ark., May 2, 2008).


1255 See Aldridge v. John Does, 2005 WL 2428761, *3 (W.D.Ky., Sept. 30, 2005) (stating generally that “damages resulting from constitutional violations” are “separate categories of damages” from either physical or mental injuries in case where plaintiff alleged medical deprivations, protracted segregation, and denial of access to courts).

Other courts have addressed the question more equivocally. In Armstrong v. Drahos, 2002 WL 187502, *2 (N.D.Ill., Feb. 6, 2002), the court acknowledged that persons alleging Eighth Amendment violations “need show no injury other than the violation itself,” but stated, without explanation, that in such a case, only nominal damages may be recovered.


1257 See n. 1271, below.
from racial discrimination,\textsuperscript{1259} denial of access to courts,\textsuperscript{1260} disability discrimination,\textsuperscript{1261} and freedom from arrest and incarceration without probable cause.\textsuperscript{1262} At least one court has held that injury to reputation is not mental or emotional in nature.\textsuperscript{1263}

Other courts, however, have not recognized this distinction. There is in my view a deep confusion about the term mental or emotional injury and its application to intangible constitutional rights, with some courts seeming to categorize the violation of such rights as mental or emotional injury without any actual inquiry into the nature of the right or of the injury.\textsuperscript{1264} (Admittedly, the failure of litigants even to frame the issue properly has no doubt contributed to this failure.\textsuperscript{1265}) Worse, there is a persistent tendency in some courts to read mental or emotional injury out of the statute entirely, by declaring, e.g.: “[A] prisoner may not maintain an action for monetary damages against state officials based on an alleged constitutional violation absent some showing of a physical injury.”\textsuperscript{1266}

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\item King v. Zamiara, 2013 WL 2102655, *3-4 (W.D.Mich., May 14, 2013) (holding transfer that impaired plaintiff’s ability to document a legal claim was not a mental or emotional injury, but a compensable First Amendment violation; awarding “presumed damages” of $5.00 a day); Hawkinson v. Montoya, 479 F.Supp.2d 1164, 1169 (D.Colo. 2007); Lewis v. Sheahan, 35 F.Supp.2d 633, 637 n. 3 (N.D.Ill. 1999).
\item Grant v. Scott, 2013 WL 5567485, *1, 7 (D.Colo., Oct. 9, 2013) (holding ADA claim for termination from prison job and failure to provide strobe light fire alarms was not an action for mental or emotional injury), appeal dismissed, No. 13-1427 (10th Cir., Oct. 22, 2013).
\item Friedland v. Fauver, 6 F.Supp.2d 292, 310 (D.N.J. 1998). Cf. Clemmons v. Armontrout, 2005 WL 3088697, *4 n.1 (W.D.Mo., Nov. 17, 2005) (holding claim for 14 years’ confinement on death row by a person later exonerated was not barred by § 1997e(e), even though the court conceded (incorrectly, in my view) that the injury was mental or emotional).
\item See Tompkins v. Herron, 2013 WL 6843605, *3 (M.D.N.C., Dec. 26, 2013) (“Plaintiff does not allege that he suffered any physical injury, only an injury to his constitutional rights. Therefore, his claim for compensatory damages is barred.”)
\item A particularly absurd example is the application of § 1997e(e) to a claim that prison officials removed all the staples from the plaintiff’s paperwork and removed the protective coverings from his papers. Castillo v. Self, 2007 WL 1741852, *3 (E.D.La., June 14, 2007). However such injury is characterized, “mental or emotional” does not seem quite \textit{le mot juste}.
\item See, e.g., Geiger v. Jowers, 404 F.3d 371, 374 (5th Cir. 2005) (per curiam) (“In his First Amendment claim, Geiger contends that he suffered mental anguish, emotional distress, psychological harm, and insomnia as a result of this dispute [the deprivation of magazines] with prison officials. To the extent Geiger seeks compensation for injuries alleged to have resulted from a First Amendment violation, the district court properly determined that his claim is barred by the physical injury requirement of § 1997e(e).”) On the other hand, in \textit{Rieara v. Sweat}, 2006 WL 2327498, *2-3 (S.D.Ga., Aug. 9, 2006), where the plaintiff explicitly asserted that his claim was not limited to mental or emotional injury but included the deprivation of constitutional rights, the court declared that his claim was limited to mental or emotional injury.
A leading example of this conceptual confusion is Allah v. Al-Hafeez, cited with apparent approval in Thompson v. Carter, involving a claim of interference with access to religious services, in which the court simply assumed that the injury for which he sought compensation must be a mental or emotional one. Is not being able to go to church a mental or emotional injury? On its face it is a concrete deprivation that occurs in the real world and not in someone’s head, and characterizing it as a mental or emotional injury seems to miss the point of the constitutional protection, which is to protect people’s liberty—i.e., their ability to act in the world in particular ways—and not just to protect them from feeling bad. Nonetheless, there is now a legion of decisions holding or assuming that religious deprivations and other First Amendment violations are no more than mental or emotional injuries. While there are also a


On rare occasions courts err in the opposite direction. One court declined to dismiss damages claims for aggravation of PTSD since defendants had failed to establish it was de minimis, bypassing the question whether it was a mental or emotional injury. Sheridan v. Reinke, 2012 WL 1067079, *7 (D.Idaho, Mar. 28, 2012)

Allah, 226 F.3d at 250 (“Allah seeks substantial damages for the harm he suffered as a result of defendants’ alleged violation of his First Amendment right to free exercise of religion. As we read his complaint, the only actual injury that could form the basis for the award he seeks would be mental and/or emotional injury.”).

Sisney v. Reisch, 674 F.3d 839, 843 (8th Cir. 2012) (denial to Jewish prisoner of requests to eat meals in a succah); cert. denied, 133 S.Ct. 359 (2012); Carter v. Hubert, 2011 WL 5136747, *2 (5th Cir., Oct. 31, 2011) (applying § 1997e(e) to deprivation of religious literature); Fegans v. Norris, 537 F.3d 897, 908 (8th Cir. 2008) (applying § 1997e(e) to deprivation of religious diet, but affirming “nominal” award of $1500 ($1.44 per affected meal)); Mayfield v. Texas Dept. of Criminal Justice, 529 F.3d 599, 605-06 (5th Cir. 2008) (applying § 1997e(e) to claims of restricted religious exercise); Benton v. Yon, 2012 WL 6059210, *7 (N.D.Fla., Oct. 22, 2012) (“Because there is no physical injury to Plaintiff as a result of these alleged First Amendment violations, Plaintiff's request for monetary damages must necessarily be limited to nominal damages as required by 42 U.S.C. § 1997e(e). ...”),
number of decisions recognizing that deprivations of First Amendment rights may be cognizable and compensable independent of any mental or emotional effects that they may have,\(^\text{1271}\) most of them have not done much to explain why.\(^\text{1272}\) Several decisions have said that construing §

1997e(e) to bar compensatory awards for First Amendment violations would be constitutionally questionable, or outright unconstitutional.\footnote{1273}

Many courts have similarly assumed that other sorts of deprivations of liberty inflict only mental or emotional injury, including claims of unlawful arrest and confinement,\footnote{1274} deprivation of the right to marry,\footnote{1275} and racial discrimination\footnote{1276} among many others.\footnote{1277}

\footnote{1273} One court, after accepting the Ninth Circuit’s holding in \textit{Canell v. Lightner}, stated:

The Court is also mindful that seldom is the case when a prisoner will actually sustain a physical injury from a First Amendment deprivation. Rather, “the harms proscribed by the First Amendment, Due Process, or Equal Protection are assaults on individual freedom and personal liberty, even on spiritual autonomy, and not physical well being.” \textit{Shaheed-Muhammad v. Dipayo}, 138 F.Supp.2d 99, 101 (D.Mass.2001). To allow section 1997e(e) to effectively foreclose a prisoner’s First Amendment action would put that section on shaky constitutional ground.

Furthermore, a reading of section 1997e(e) in a way that prohibits First Amendment claims does not comport with the Act’s legislative history. Nothing in the legislative history of section 1997e(e) suggests Congress’ intent was “to prevent legitimate constitutional claims simply because the prisoner suffered no physical injury.” \textit{Royal}, 375 F.3d at 729 (Heaney, J., dissenting) (observing the Act was designed to limit non-meritorious or frivolous litigation to assure that legitimate claims receive due consideration). This Court is convinced that allowing prison officials to violate inmate First Amendment rights with impunity, resolute in the knowledge that a First Amendment physical injury will virtually never manifest itself within the meaning of section 1997e(e), is not what Congress intended when it passed the Act. “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” \textit{Turner v. Safley}, 482 U.S. 78, 84 (1987).


Demonstrating the same sort of confusion, some courts have held that complaints of placement in segregation or other restrictive confinement, or even of exposure to unconstitutional prison living conditions—those that deny the “minimal civilized measure of life’s necessities”—are barred or damages for them are restricted by § 1997e(e) absent allegations of physical injury. Such holdings appear inconsistent with Eighth Amendment doctrine set forth

Campbell v. Johnson, 2006 WL 3408177, *1 (N.D.Fla., Nov. 27, 2006) (refusal to accept paperwork and collateral for release on bond); see also .


See, e.g., Williams v. Hobbs, 662 F.3d 994, 1010-11 (8th Cir. 2011) (holding 14 years’ segregation did not inflict physical injury and plaintiff was limited to $1.00 nominal damages for each defective review hearing); Harden-Bey v. Rutter, 524 F.3d 789, 795 (6th Cir. 2008) (barring damages for three years in segregation); Harper v. Showers, 174 F.3d 716, 719-20 (5th Cir. 1999) (barring damage claims for placement in filthy cells formerly occupied by psychiatric patients and exposure to deranged behavior of those patients). Many other such claims have been held subject to § 1997e(e). See Moore v. Parker, 2013 WL 6590395, *4 (W.D.Ky., Dec. 16, 2013); Campbell v. Myers, 2013 WL 6330901, *1-2 (E.D.Tenn., Dec. 5, 2013) (holding allegations of gross overcrowding, prisoners sleeping on the floor, inadequate toilet access, exposed electrical wiring, no natural light, inadequate drinking water, no access to medical care barred absent allegations of physical injury); Clark v. Tucker, 2013 WL 5606560, *1-2 (M.D.Fla., Oct. 11, 2013) (holding prisoner subjected to four weeks’ confinement without clothing could not recover damages absent allegation of physical injury); Paulino v. Fischer, 2013 WL 5230264, *7 (N.D.N.Y., Sept. 16, 2013) (barring compensatory damages for 13 months in segregation where plaintiff had to eliminate in a pail but had no physical injury); Read v. Calabrese, 2013 WL 5506344, *11-12 (N.D.N.Y., Aug. 29, 2013); Aref v. Holder, 953 F.Supp.2d 133, 147-48 (D.D.C. 2013) (holding harm to “family relations” allegedly caused by confinement in Communications Management Units was indistinguishable from mental or emotional injury, and claim of loss of liberty was too abstract to support a damages award); Turner v. Cain, 2013 WL 2147220, *1, 3 (M.D.La., Apr. 29, 2013) (holding plaintiff reclassified to maximum security, losing desirable jobs and being transferred hundreds of miles from family, alleged only mental or emotional injury), report and recommendation adopted, 2013 WL 2147246 (M.D.La., May 15, 2013), appeal dismissed, No. 13-30646 (5th Cir., Aug. 13, 2013); Goforth v. Sumner County, 2013 WL 1943020, *2-3 (M.D.Tenn., May 9, 2013) (holding crowding, sleeping on the floor, the odor of feces were not actionable without an allegation of physical injury even if they increased the risk of disease); Watson v. Curley, 2012 WL 6019498, *4 (W.D.Mich., Dec. 3, 2012) (confinedment for 16 days in a cold cell); Green v. Division of Corrections, 2012 WL 4757923, *2 & n.3 (D.Md., Oct. 4, 2012) (confine naked in cell for 20
by the Supreme Court, under which it is the objective seriousness of the conditions, and not their effect on the prisoner, that determines their lawfulness.\textsuperscript{1280} It is questionable whether a claim alleging conditions that are \textit{objectively} intolerable is an “action for mental or emotional injury,” even if such injury (not surprisingly) results from them.\textsuperscript{1281} (There is a striking departure from

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  \item Wilson v. Seiter, 501 U.S. 294, 303 (1991); see Helling v. McKinney, 509 U.S. 25, 35-37 (1993) ( instructing as to objective assessment of environmental tobacco smoke exposure); see also Fields v. Ruiz, 2007 WL 1821469, *7 (E.D.Cal., June 25, 2007) (for Eighth Amendment claims, “the issue is the nature of the deprivation, not the injury”), report and recommendation adopted, 2007 WL 2688453 (E.D.Cal., Sept. 10, 2007); Armstrong v. Drahos, 2002 WL 187502, *2 (N.D.Ill., Nov. 8, 2002) (“Because the Eighth Amendment is understood to protect not only the individual, but the standards of society, the Eighth Amendment can be violated even when no pain is inflicted, if the punishment offends basic standards of human dignity.”)
  \item A few decisions make this sort of distinction. In Nelson v. CA Dept of Corrections, 2004 WL 569529 (N.D.Cal., Mar. 18, 2004), aff’d, 131 Fed.Appx. 549 (9th Cir. 2005), the plaintiff complained of being provided only boxer shorts and a T-shirt for outdoor exercise in cold weather. The court said: “Even if Nelson’s complaint does include a request for damages for mental and emotional injury, it also includes a claim for an Eighth Amendment violation as to which the § 1997e(e) requirement does not apply. In other words, damages would be available for a violation
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the usual holdings in a recent Sixth Circuit decision involving a prisoner with mental illness who was held under squalid conditions, which the court declares to constitute physical injury. It is discussed in the next section.)

In my view the right approach to such damages questions is that of the courts who say that “the violation of a constitutional right is an independent injury that is immediately cognizable and outside the purview of § 1997e(e),” completely separate from any mental or emotional injury. Some courts have said the same thing—that “damages resulting from constitutional violations” are “separate categories of damages” from physical or mental injuries—in cases about unconstitutional conditions of confinement or restrictive confinement without due process, though others have rejected that proposition.  

of his Eighth Amendment rights without regard to his ability to show physical injury.” Id., *7; see Pippin v. Frank, 2005 WL 756155, *1 (W.D.Wis., Mar. 30, 2005) (stating that § 1997e(e) precludes claims for mental or emotional injury but not a claim that plaintiff was “falsely confined” in segregation as a result of constitutional violations); see also Aldridge v. 4 John Does, 2005 WL 2428761, *3 (W.D.Ky., Sept. 30, 2005) (stating generally that “damages resulting from constitutional violations” are “separate categories of damages” from physical or mental injuries in case where plaintiff alleged medical deprivations, protracted segregation, and denial of access to courts).


Shaheed-Muhammad v. Dippolao, 393 F.Supp.2d 80, 108 (D.Mass. 2005); accord, Oliver v. Keller, 289 F.3d 623, 629 (9th Cir. 2002); Rowe v. Shake, 196 F.3d 778, 781-82 (7th Cir. 1999) (“A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained.”); Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998); Suggs v. Nelson, 2014 WL 413500, *2 (W.D.Mich., Feb. 4, 2014) (holding § 1997e(e) “is wholly inapplicable to claims for compensatory or punitive damages for constitutional deprivations”); Gunn v. California Dept. of Corrections and Rehabilitation, 2013 WL 5278954, *6 (E.D.Cal., Sept. 18, 2013) (“The Ninth Circuit’s reasoning in Canell is equally applicable to a claim alleging discrimination under the Equal Protection Clause. An equal protection violation, like a First Amendment violation, entitles a plaintiff to judicial relief wholly aside from any physical injury he can show or any mental or emotional injury he may have incurred.”); Alverto v. Department of Corrections, 2012 WL 6025617, *22 (W.D.Wash., Nov. 15, 2012) (“To the extent that appellant’s claims for compensatory, nominal or punitive damages are premised on alleged Fourteenth Amendment violations, and not on emotional or mental distress suffered as a result of those violations, § 1997e(e) is inapplicable and those claims are not barred.”), report and recommendation adopted, 2012 WL 6150043 (W.D.Wash., Dec. 11, 2012); Malik v. City of New York, 2012 WL 3345317, *6 (S.D.N.Y., Aug. 15, 2012) (holding “intangible deprivations of liberty and personal rights are distinct from claims for pain and suffering, mental anguish, and mental trauma. . . . Malik's religion and retaliation claims allege deprivations of personal rights under the First Amendment which do not fall under the PLRA’s physical injury requirement for compensatory damages.”), report and recommendation adopted, 2012 WL 4475156 (S.D.N.Y., Sept. 28, 2012); Patten v. Brown, 2012 WL 1669350, *6 (N.D.Cal., May 11, 2012) (applying Oliver v. Keller holding to strip search); Redmon v. Zavaras, 2011 WL 2728466, *9 (D.Colo., June 16, 2011) (holding § 1997e(e) was inapplicable where plaintiff raising court access and correspondence-related claims did not allege mental or emotional injury), report and recommendation adopted, 2011 WL 2729196 (D.Colo., July 13, 2011); see Appendix A for additional authority on this point. Contra, Al-Amin v. Smith, 2009 WL 4506571, *3 (S.D.Ga., Dec. 3, 2009) (stating that injuries from a retaliatory denial of visiting “constitute either mental or emotional injuries (i.e., ‘other . . . mental, and emotional injury’) or mere effects of the constitutional violation that do not necessarily involve a specific actual injury (i.e., ‘undermining and chilling [of] Mr. Al-Amin’s ability to exercise his free speech rights’).”)

That approach is consistent with the general background of tort law, the basis of the law of damages under 42 U.S.C. § 1983, which courts have unaccountably neglected in applying § 1997e(e). Tort principles support a narrow construction of the phrase “mental or emotional injury,” one which does not encompass intangible deprivations of liberty and personal rights. The leading nineteenth-century damages treatise divided damages into six classes: injuries to property, physical injuries, mental injuries, injuries to family relations, injuries to personal liberty, and injuries to reputation. Following this categorization, in defamation law, mental or emotional injury does not encompass other forms of intangible injury such as damage to reputation or alienation of associates, which are separately cognizable. Similarly, in false imprisonment cases, damages are awarded for the loss of liberty wholly apart from any mental or emotional distress, physical injury, or any other category of injury. The Second Circuit has

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1285 The Seventh Circuit had held in a pre-PLRA case that “[t]he loss of amenities within prison is a recoverable item of damages,” which can be proven by testimony concerning differences in physical conditions, daily routine, etc., with no reference to mental or emotional injury. Ustrak v. Fairman, 781 F.2d 573, 578 (7th Cir. 1986). That holding appeared consistent with the distinction made in the text. However, in a case involving a prisoner placed in supermax confinement for a year in retaliation for First Amendment-protected activity, that court has now held (unconvincingly in my view) that Ustrak does not support the proposed interpretation of the PLRA. Pearson v. Welborn, 471 F.3d 732, 744 45 (7th Cir. 2006) (stating plaintiff “fails to convincingly explain how damages to compensate him for the difference in conditions would be anything but recovery for ‘mental or emotional injury’ now barred by the PLRA); accord, Royal v. Kautzky, 375 F.3d 720, 724 (8th Cir. 2004) (declining to award a prisoner who spent 60 days in segregation “some indescribable and indefinite damage allegedly arising from a violation of his constitutional rights.”), cert. denied, 544 U.S. 1061 (2005); Smith v. Eyke, 2013 WL 3175986, *2 (W.D.Mich., June 21, 2013) (holding loss of liberty and loss of family relationships “are indescribable and indefinite injuries that are best characterized as emotional/mental injuries”; citing Royal v. Kautzky); King v. Zamiara, 2013 WL 2102655, *2 (W.D.Mich., May 14, 2013) (applying § 1997e(e) to complaint of transfer to a more restrictive prison; “To the extent King complains that the transfer resulted in a loss of personal freedom, the losses are a mental or emotional injury for which no damages are permitted” without physical injury); Edwards v. Horn, 2012 WL 760172, *22 (S.D.N.Y., Mar. 8, 2012) (rejecting “loss of amenity” and “limited liberty” because neither is a physical injury).


1287 The following discussion is based on research by Prof. Margo Schlanger of Washington University Law School.

1288 Arthur G. Sedgwick & Joseph H. Beale, Jr., 1 Sedgwick's Treatise on Damages 50-51 (8th ed. 1891). But see Aref v. Holder, 953 F.Supp.2d 133, 148 (D.D.C., July 12, 2013) (“Plaintiffs claim that their placement in the CMU has inflicted harm on their ‘family relations’ that is ‘a category of harm separate from mental and emotional distress,’ but their only support for this proposition is a treatise from the 19th century.”).

1289 See, e.g., Charles T. McCormick, Handbook on the Law of Damages 422 (1935) (separating out three components of “general” damages in defamation cases, “injury to reputation,” “loss of business,” and “wounded feelings and bodily suffering resulting therefrom.”); see also Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 65 (1966) (describing interests in libel cases as covering several categories of damages, “which may include general injury to reputation, consequent mental suffering, alienation of associates, [and] specific items of pecuniary loss”); Farmer v. United Broth. of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 302 (1977) (distinguishing between state interests in “protection from emotional distress caused by outrageous conduct,” interests in “protection from physical injury, . . . or damage to reputation . . . .”).

1290 See Sedgwick, supra, at 70-71 (“For an illegal restraint of the plaintiff’s personal liberty compensation may be recovered. This is something different from either the loss of time or the physical injury or mental suffering caused by the imprisonment.”); McCormick, supra, at 375 (“though only the wrongful detention be pleaded, without any
acknowledged this distinction in a non-prisoner decision in which the plaintiff prevailed both on his Fourth Amendment claims for unlawful seizure and his state law claims for false imprisonment: “The damages recoverable for loss of liberty for the period spent in a wrongful confinement are separable from damages recoverable for such injuries as physical harm, embarrassment, or emotional suffering; even absent such other injuries, an award of several thousand dollars may be appropriate simply for several hours’ loss of liberty.”

Applying this approach to 42 U.S.C. § 1997e(e) supports the conclusion that prisoners’ claims of deprivation of First Amendment or other intangible rights, confinement without due process in settings that drastically restrict the limited liberty of ordinary prison life, or placement under conditions that violate the Eighth Amendment, should be viewed in the first instance as claims of deprivation of personal liberty and not primarily as inflictions of mental or emotional injury. To the extent a particular plaintiff asserts mental or emotional injury resulting from such deprivation (e.g., claustrophobia or a stress disorder), damages for that additional injury are not recoverable without a showing of physical injury. This approach is illustrated by one pre-PLRA case in which the court found that the plaintiff had been placed in punitive segregation without due process, and awarded damages of $50 a day for the fact of the confinement itself. It treated the resulting emotional injury—“distress flowing from the fact of punitive segregation,” in the court’s terms—as a separate item of damages, awarding only nominal damages for it in the

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specification of injurious results, the plaintiff can recover for any harm of a sort usually inseparable from such restraint as ‘general’ damage.”); Dan B. Dobbs, Handbook on the Law of Remedies: Damages, Equity, Restitution 529 (1st ed. 1973) (“The general damages recoverable . . . do not require specific proof of emotional harm to the plaintiff . . . Thus general damages for assault or false imprisonment and like torts are not dependent upon actual proof of such harm.”), see also, e.g., Hamilton v. Smith, 39 Mich. 222 (1878) (distinguishing between available types of damages in a false imprisonment case, which include “the expense of, the plaintiff, if any, in and about the prosecution complained of to protect himself; his loss of time; his deprivation of liberty and the loss of the society of his family; the injury to his fame; personal mortification and the smart and injury of the malicious arts and acts and oppression of the parties”); accord, Beckwith v. Bean, 98 U.S. 266, 276 (1878) (adducing similar list).

Kerman v. City of New York, 374 F.3d 93, 125 (2d Cir. 2004). The court relied on an earlier case in which it had held that, although juries are properly instructed not to award “speculative damages,” the trial court “should have made it clear to the jury that it could award monetary damages—the amount necessarily arbitrary and unprovable—for the intangibles which we have referred to above.” Id. (quoting Raysor v. Port Authority of New York and New Jersey, 768 F.2d 34, 39 (2d Cir. 1985), cert. denied, 475 U.S. 1027 (1986)). Kerman also relied extensively on tort cases and did not distinguish between the federal Fourth Amendment claim and the state law false arrest claim in its discussion of damages.

Finally, a few district courts have connected these dots. Rosado v. Herard, 2013 WL 6170631, *10 (S.D.N.Y., Nov. 25, 2013) (“Herard's motion mistakenly assumes that, where no physical injury is alleged, the only injury that a plaintiff may suffer as a result of retaliation is mental or emotional harm. The Second Circuit has held, however, that intangible deprivations of liberty and personal rights are distinct from claims for pain and suffering, mental anguish, and mental trauma.” (citing Kerman); claim was for violation of privacy rights by disclosure of HIV status); Mendez v. Amato, 2013 WL 5236564, *20 (N.D.N.Y., Sept. 17, 2013) (holding claims based on confinement in Involuntary Protective Custody “involve the loss of such intangibles as liberty through a lack of due process and equal protection” and thus “fall outside of the physical harm requirement of the PLRA”; citing Kerman’s distinction between loss of liberty and emotional suffering); Malik v. City of New York, 2012 WL 3345317, *16-17 (S.D.N.Y., Aug. 15, 2012) (“The Defendants' motion mistakenly assumes that the only injury that a plaintiff may suffer without a physical injury is mental or emotional harm. The Second Circuit has held, however, that intangible deprivations of liberty and personal rights are distinct from claims for pain and suffering, mental anguish, and mental trauma. See Kerman . . . . Malik's religion and retaliation claims allege deprivations of personal rights under the First Amendment which do not fall under the PLRA's physical injury requirement for compensatory damages.”), report and recommendation adopted, 2012 WL 4475156 (S.D.N.Y., Sept. 28, 2012). As noted above at nn. 1271, 1281-1284, some other federal courts applying § 1997e(e) have also reached essentially this conclusion, though they have not grounded it in tort principles.
absence of record proof. Under this approach, there will still be a limited number of cases in which the deprivation consists entirely of the infliction of mental or emotional injury, e.g., the deprivation of psychiatric treatment not resulting in suicide or self-mutilation, and in which no compensatory damages may be recovered.

These conclusions are buttressed by another tort analogy. Section 1997e(e) essentially codifies the common law “physical impact” rule, under which negligence plaintiffs may recover for emotional distress only if it is accompanied by the negligent infliction of a physical impact. The concerns behind this rule include the view that mental suffering is relatively trivial in most cases, and that evidence of it is “easy to fabricate, hard to controvert.” Courts have recognized similar concerns underlying § 1997e(e). At common law, and in cases where the PLRA’s physical injury provision applies, the physical injury “in essence, vouch[es] for the asserted emotional injury.” But where a plaintiff has proven, and seeks damages for, a deprivation of liberty or subjection to intolerable conditions of constitutional magnitude, that injury requires no further vouching. In such a case, § 1997e(e) should have no application except to the extent the plaintiff explicitly seeks recovery for psychological injury caused by the constitutional deprivation.

The proper categorization of damages under § 1997e(e) remains an open question in the Second Circuit. Thompson v. Carter sheds little light on the matter. The alleged deprivation in

1295 See, e.g., Metro-North Commuter R.Co. v. Buckley, 521 U.S. 424, 430 (1997) (allowing recovery only if the impact “caused, or might have caused, immediate traumatic harm”); Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 546-547 (1994); Lee v. State Farm Mutual Insurance Co., 272 Ga. 583, 533 S.E.2d 82, 84 (2000) (“In a claim concerning negligent conduct, a recovery for emotional distress is allowed only where there is some impact on the plaintiff, and that impact must be a physical injury.”).
1296 Francis H. Bohlen, Right to Recover for Injury Resulting from Negligence Without Impact, 50 Am. L. Reg. 141, 142, 143, 146 (1902).
1297 See, e.g., Dawes v. Walker 239 F.3d 489, 496 (2d Cir. 2001) (Walker, J., special statement) (in structuring § 1997e(e) to preclude prisoners from “recovery” “for mental and emotional injury suffered while in custody without a prior showing of physical injury,” Congress looked to the common law of torts); Zehner v. Trigg, 952 F.Supp. 1318, 1325 (S.D.Ind.) (“[B]y enacting § 1997e(e), Congress took a page from the common law by limiting claims for mental and emotional injuries, which can easily be feigned or exaggerated, in the absence of physical injury.”), aff’d, 133 F.3d 459 (7th Cir. 1997); Cain v. Virginia, 982 F.Supp. 1132, 1135 (E.D.Va. 1997); Kerr v. Puckett, 967 F.Supp. 354 (E.D.Wis.1997), aff’d, 138 F.3d 321 (7th Cir. 1998).
1298 Dawes v. Walker, 239 F.3d at 495 (Walker, J., special statement).
1299 This approach is illustrated by the decision in Soto v. Lord, discussed in n. 1293, above, in which a prisoner unlawfully placed in segregation was compensated for the fact of his confinement but was denied further damages for “distress” in the absence of evidence supporting such an award. Under § 1997e(e), the plaintiff could not have received “distress” damages without evidence of physical injury, but his entitlement to damages for the confinement itself would not have been affected. See also Nelson v. CA Dep’t of Corrections, 2004 WL 569529, *7 (N.D.Cal., Mar. 18, 2004), aff’d, 131 Fed.Appx. 549 (9th Cir. 2005) (distinguishing between Eighth Amendment violation based on inadequate outdoor clothing and emotional injury resulting from those facts).
that case was confiscation of prescribed medication, and the court simply remanded to allow the plaintiff to amend his complaint and clarify what he was asking for. In doing so, it noted that the district court did not know whether the plaintiff sought “actual damages for his loss of property, nominal or punitive damages, damages for a physical injury, or damages solely for an emotional injury without any claim of physical injury.”

That comment cannot be construed as even suggesting a position on the deprivation of intangible rights, either deprivations of liberty such as alleged in *Allah v. al-Hafeez* or other First Amendment cases, or cases involving restrictive or oppressive conditions of confinement.

Thus Thompson’s statement that “Section 1997e(e) applies to claims in which a plaintiff alleges constitutional violations so that the plaintiff cannot recover damages for mental or emotional injury for a constitutional violation in the absence of a showing of actual physical injury,” does not resolve how it applies. That is, it doesn’t clarify whether prisoners can recover compensatory damages for injuries that are not readily categorizable as physical or as mental or emotional, such as deprivation of religious or other First Amendment rights, or the loss of freedom and quality of life resulting from placement in particularly restrictive or inhumane prison conditions. Subsequent case law, in the Second Circuit or elsewhere, has not advanced the state of judicial understanding on this point.

Given this confusion, it seems to me that plaintiffs should confront this issue head-on in their complaints by, for example, stating that they do not seek damages for mental or emotional injury, and enumerating in detail the concrete deprivations for which they seek recovery. After all, clarity on plaintiffs’ part can hardly make matters worse. For example, an *ad damnum* clause in a case seeking damages for confinement in segregation in violation of due process might read as follows:

WHEREFORE, plaintiff requests that the court grant the following relief:

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1300 284 F.3d at 419.
1301 284 F.3d at 417 (emphasis supplied).
1302 In this context, Thompson’s treatment of *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998), is interesting. Thompson rejects Canell’s statement that the statute “does not apply to First Amendment Claims regardless of the form of relief sought.” 284 F.3d at 417 (quoting Canell, citation omitted). However, that statement in Canell is preceded by the statement that the plaintiff “is not asserting a claim for ‘mental or emotional injury.’ He is asserting a claim for violation of his First Amendment rights. The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred.” 143 F.3d at 1213. Thompson’s holding that § 1997e(e) does apply to First Amendment claims insofar as they seek recovery for mental or emotional injury is not incompatible with a holding that First Amendment violations inflict injury that is neither physical nor mental or emotional. The Second Circuit has now explicitly recognized this possibility in *Toliver v. City of New York*, 530 Fed.Appx. 90, 93 n.2 (2d Cir. 2013) (unpublished) (holding “even if Toliver is unable to establish that any of the injuries complained of in this action stemmed from an incident in which he suffered physical injuries, Toliver may still recover damages for injuries to his First Amendment rights”).
1303 But see n.1292, above, concerning the district court cases that have connected the § 1997e(e) discussion with the Second Circuit’s decision in *Kerman v. City of New York*.

In *Calhoun v. DeTella*, 319 F.3d 936 (7th Cir. 2003), the plaintiff complained of a strip search conducted in the presence of staff members of the opposite sex. The court characterized the claim as one “for an Eighth Amendment violation involving no physical injury,” 319 F.3d at 941, but did not explain its apparent assumption that the injury involved was mental or emotional, even though it acknowledged that some injuries, such as First Amendment violations, are non-physical but not necessarily mental or emotional. *Id.* at 940-41.
A. Award compensatory damages against Hearing Officer Smith, by reason of the denials of procedural due process set out in ¶¶ ___, above, for:

1. The loss of privileges and quality of life attendant upon plaintiff’s confinement for twelve months in the restrictive conditions of the Special Housing Unit, and the exclusion from normal prison activities and privileges associated with that confinement, in that he was confined for 23 hours a day in a cell roughly 60 feet square, and deprived of most of his personal property as well as the ability to work, attend educational and vocational programs, watch television, associate with other prisoners, attend outdoor recreation in a congregate setting with the ability to engage in sports and other congregate recreational activities, attend meals with other prisoners, and attend religious services.

2. The economic loss resulting from plaintiff’s exclusion from paid employment in the prison during his Special Housing Unit confinement.

Consistently with 42 U.S.C. § 1997e(e), the plaintiff does not seek additional compensatory damages for mental or emotional injury resulting from the above described injuries.

B. Award punitive damages against Hearing Officer Smith for his willful and/or reckless conduct in denying plaintiff the due process of law at his disciplinary hearing.

C. Award nominal damages against Hearing Officer Smith for his violation of the plaintiff’s constitutional right to the due process of law.

Solving the § 1997e(e) problem is no guarantee of success; the problem of damages for intangible constitutional violations was difficult even before the PLRA, with many plaintiffs receiving only awards of nominal damages for substantial violations,1304 and the Supreme Court has cautioned that damage awards cannot be based on the “abstract ‘importance’ of a constitutional right.”1305 Some courts may continue to assume that the only basis for damages in such cases is mental or emotional injury. However, courts have made compensatory awards for violations of First Amendment and other intangible rights based on their particular circumstances and without reference to mental or emotional injury,1306 and § 1997e(e) should not be read to forbid such a result in prisoner cases.

1304 Williams v. Kaufman County, 352 F.3d 994, 1012 (5th Cir. 2003) (noting the frequency of nominal awards under § 1983); see, e.g., Carlo v. City of Chino, 105 F.3d 493 (9th Cir. 1997) (noting nominal award for denial of telephone access to overnight detainee), cert. denied, 523 U.S. 1036 (1998); Sockwell v. Phelps, 20 F.3d 187 (5th Cir. 1994) (noting nominal award for racial segregation).


1306 See, e.g., Sallier v. Brooks, 343 F.3d 868, 880 (6th Cir. 2003) (affirming jury award of $750 in compensatory damages for each instance of unlawful opening of legal mail); Goff v. Burton, 91 F.3d 1188, 1192 (8th Cir. 1996) (affirming $2250 award at $10 a day for lost privileges resulting from a retaliatory transfer to a higher security prison); Cornell v. Gubbles, 2010 WL 3928198, *2-3 (C.D.Ill., Sept. 29, 2010) (awarding $500 for opening plaintiff’s letters and reading them over the prison PA system); Lowrance v. Coughlin, 862 F.Supp. 1090, 1120 (S.D.N.Y. 1994) (awarding significant damages for repeated retaliatory prison transfers, segregation, cell searches); Vanscoy v. Hicks, 691 F.Supp. 1336 (M.D.Ala. 1988) (awarding $50 for pretextual exclusion from religious service, without evidence of mental anguish or suffering); see also Carr v. Whittenburg, 2006 WL 1207286, *3 (S.D.Ill., Apr. 28, 2006) (stating that specific First Amendment violations may be compensable through “general damages” or
C. What Is Physical Injury?

The PLRA does not define physical injury, and the courts have not helped much, mostly confining themselves to the bromide that physical injury “must be more than de minimis, but need not be significant” to satisfy § 1997(e). However, there is a square disagreement among courts as to where the de minimis threshold is to be found. One appeals court has said that injury need not be observable, diagnosable, or requiring treatment by a medical care professional to meet the § 1997(e) standard. More recently, that court has held that a complaint of constant cell illumination which caused migraine headaches, disorientation, and inability to sleep was not about mental or emotional injury but “various forms of physical injury and discomfort,” and thus was actionable notwithstanding § 1997(e).

But a much-cited district court decision holds that under § 1997(e) and the de minimis standard:

A physical injury is an observable or diagnosable medical condition requiring treatment by a medical care professional. It is not a sore muscle, an aching back, a scratch, an abrasion, a bruise, etc., which lasts even up to two or three weeks. . . . [It is] more than the types and kinds of bruises and abrasions about which the Plaintiff complain[s]. Injuries treatable at home and with over-the-counter drugs, heating pads, rest, etc., do not fall within the parameters of 1997(e).

“presumed damages” even without proof of injury, though damages cannot be recovered based on the abstract value or importance of the right.


There is also disagreement about where it comes from. One circuit purported to derive it from the Eighth Amendment analysis of use of force in Hudson v. McMillian, 503 U.S. 1 (1992); others have said that this approach misreads Hudson. See Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002) (summarizing controversy). The difference appears mainly relevant to interpretation of the Eighth Amendment rather than of § 1997(e). But see Stewart v. Cain, 2012 WL 3230442, *4-5 (M.D.La., July 6, 2012) (suggesting recent Supreme Court Eighth Amendment jurisprudence clarifying the de minimis standard may overrule decisions applying it to § 1997(e)), report and recommendation approved, 2012 WL 3230416 (M.D.La., Aug. 6, 2012).


In Lamb v. Hazel, supra, the court held that an allegation of physical injury sufficient to satisfy § 1997(e) does not put the plaintiff’s medical condition at issue so as to require production of his medical records (though failure to produce them may preclude him from arguing he sustained more than a de minimis injury). 2013 WL 1411239, *9.

Grenning v. Miller-Stout, 739 F.3d 1235, 1238 (9th Cir. 2014).

Not surprisingly given this divergence, a number of courts have dismissed identifiable traumatic injuries as de minimis, while others have held that relatively superficial traumatic injuries are actionable under § 1997e(e).

affirmed, No. 13-5925 (6th Cir., Jan. 8, 2014). But see Pierce v. County of Orange, 526 F.3d 1190, 1224 (9th Cir.) ("Our court has rejected as overly restrictive the standard for de minimis injuries espoused by the Northern District of Texas in Luong v. Hatt ... "); noting that bedsores and bladder infections resulting from inadequate accommodation of paraplegic’s disabilities met Luong standard), cert. denied, 555 U.S. 1031 (2008); accord, Moncel ova-Chavez v. McEachern, 2011 WL 39118, *6 (E.D.Cal., Jan. 5, 2011) (holding significant bruises, weakness and numbness in shoulder and aggravation of prior injuries were not de minimis under Pierce), report and recommendation adopted, 2011 WL 976476 (E.D.Cal., Mar. 17, 2011); Phipps v. Sheriff of Cook County, 681 F.Supp.2d 899, 910-11 (N.D.Ill. 2009) (bedsores, infections, and injuries from falls alleged by wheelchair-using plaintiffs were not rendered de minimis by the argument that such injuries are typical for wheelchair users in and out of jail).


Most courts to consider the question have held that self-inflicted injuries may also satisfy § 1997e(e).\(^{1314}\)

A *de minimis* standard does not address the qualitative question of what a physical injury *is*, resulting in a lack of general criteria for assessing borderline cases short of visible traumatic tissue damage. For example, what about sexual assault, which may not result in such injury?\(^{1315}\)

Most courts, including the Second Circuit, have found significant sexual abuse (i.e., more than groping or verbal conduct) to satisfy § 1997e(e), but few have done much to explain why,\(^{1316}\) and at least one court has reached the opposite conclusion.\(^{1317}\)

\(^{1314}\) Hinton v. Mark, 544 Fed.Appx. 75, 76 n.2 (3d Cir. 2013) (unpublished) (holding suicide attempt by overdose of pills resulting in two days’ hospitalization satisfied § 1997e(e)); Arauz v. Bell, 307 Fed.Appx. 923, 929 (6th Cir. 2009) (unpublished) (allegation of attempted suicide satisfies statute. “By definition, attempting suicide involves hurting oneself, and we can presume the existence of some physical injury from Arauz’s statement that he attempted to commit suicide.”); Proctor v. Felker, 2009 WL 4828739, *3 (E.D.Cal., Dec. 9, 2009) (same as Arauz); Scarver v. Litscher, 371 F.Supp.2d 986, 997-98 (W.D.Wis. 2005) (citing self-inflicted overdose of Thorazine and self-inflicted razor cut in holding prisoner with mental illness had alleged physical injury), *aff’d on other grounds*, 434 F.3d 972 (7th Cir. 2006). This proposition may appear self-evident, but some courts have held that risk of self-inflicted injury does not satisfy the “imminent danger of serious physical injury” requirement of 28 U.S.C. § 1915(g). See n. 1627, below. *Contra* Alajemba v. Rutherford County Adult Detention Center, 2012 WL 1514878, *7 (M.D.Tenn., May 1, 2012) (holding prisoner with mental illness who was placed in segregation and was injured “from cutting myself and smashing my head against concrete” failed to show “physical injuries caused by alleged wrongs committed by the defendant,” without explaining or citing authority for such a requirement).

\(^{1315}\) Some such assaults do cause injury, of course. See Brown v. Riley, 2010 WL 3069490, *10 (M.D.Fla., Aug. 4, 2010) (noting plaintiff “cleaned up the blood” afterwards, and assailant later physically attacked him again; holding § 1997e(e) inapplicable).

This question has now been pre-empted at least in large part by amendments to the Violence Against Women Act, which added the phrase “or the commission of a sexual act (as defined in section 2246 of title 18)” to the end of 42 U.S.C. § 1997e(a) and 28 U.S.C. § 1346(b). The incorporated definition is quite specific, defining sexual act as:

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; . . .

1318 Pub.L. No. 113-12, 127 Stat. 54, § 1101 (Sexual Abuse in Custodial Settings).
Thus, under the VAWA amendments, anal, vaginal and oral sex are actionable for compensatory damages. Manual or other non-penetrative sexual touching of another person, compelled or otherwise, is not, except for intentional, unclothred touching of persons under 16 years old; nor are acts involving the touching of breasts. Nor does the amendment include cases in which prisoners are compelled or persuaded to perform sexual acts or displays for the titillation of others, or are subjected to sexual displays by staff.

Since the VAWA amendments except certain sexual acts from the coverage of the mental/emotional injury provisions, presumably other sexual acts remain compensable in damages if they satisfy the physical injury requirement. (The statutory language does not support an argument that other sexual acts are excluded from compensation to a greater extent than under prior law.)

There are many other scenarios not involving visible tissue damage. Some, but not all, courts have found the requirement satisfied by:

- loss of consciousness;
- physiological disturbances resulting from medication withdrawal, overdose, or error.

The decision in Snow v. List, 2013 WL 3465276, *2 (C.D.Ill., July 10, 2013), erroneously states that the definition appears to include the “intentional touching . . . of the breast, . . . with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” That language appears in the statutory definition of sexual contact, 18 U.S.C.A. § 2246(3), rather than the definition of sexual act, found in 18 U.S.C.A. § 2246(2).

Martin v. Byars, 2014 WL 298682, *3 (D.S.C., Jan. 28, 2014) (holding allegations that staff members masturbated outside plaintiff’s cell did not satisfy § 1997e(e) since they amounted neither to a “sexual act” under the statute nor to physical injury).

Waggoner v. Comanche County Detention Center, 2007 WL 2068661, *4 (W.D.Okla., July 17, 2007) (holding plaintiff rendered unconscious by a shock shield after being pepper-sprayed, shaken, and punched sufficiently supported a claim of physical injury). But see Owens v. U.S., 2012 WL 6057126, *2, 6 (E.D.N.C., Dec. 6, 2012) (holding transitory episode of dizziness and general weakness, including loss of consciousness, following deprivation of blood pressure medication, was de minimis where plaintiff resumed normal activities including exercise the next day).

• the consequences of illness or failure to treat illness or injury, both immediate and longer-term or prospective;\textsuperscript{1324}

• denial of adequate or appropriate food,\textsuperscript{1325}

- food contamination or poisoning;\textsuperscript{1326}
- muscle atrophy from denial of exercise;\textsuperscript{1327}

\textsuperscript{1326} Carter v. U.S., 2012 WL 2115343, *2 (M.D.Pa., June 11, 2012) (holding allegation that plaintiff became “violently ill” and “suffered food poisoning resulting in gastritis, gastrudodenitis, and gastroenteritis,” and that he was confined to bed “for not-less-than three (3) days” satisfied Federal Tort Claims Act physical injury requirement), \textit{order vacated on other grounds}, 2013 WL 1149247 (M.D.Pa., Mar. 19, 2013); Bond v. Rhodes, 2012 WL 2269265 (S.D.Ohio, June 18, 2012); Gribben v. McDonough, 2012 WL 1463542, *4 (N.D.Fla., Apr. 26, 2012) (plaintiff’s weight loss “reflects simply a somatic manifestation of emotional distress”); Boyd v. Wright, 2011 WL 1790347, *2 (C.D.Ill., May 10, 2011) (complaint of cramps, diarrhea, fatigue, and constipation resulting from diet were speculative, and would be de minimis even if connection were shown); see Appendix A for additional authority on this point.

• exposure to harmful substances;\textsuperscript{1328}
• infliction of pain or illness through extreme conditions of confinement\textsuperscript{1329} or physical abuse;\textsuperscript{1330}


\textsuperscript{1329} Wagner v. Hartley, 2013 WL 1191231, *9 (D.Colo., March 22, 2013) (holding severe headaches resulting from exposure to toxic mold were \textit{de minimis}), aff’d, 251 Fed.Appx. 826 (4th Cir. 2007); see Appendix A for additional authority on this point; see also cases cited in nn. 1212, 1347, above, concerning asbestos exposure.

\textsuperscript{1330} Murray v. Edwards County Sheriff’s Dep’t, 248 F. App’x 993, 995 (10th Cir. 2007)); Ellis v. LeBlanc, 2012 WL 4483810, *3 (M.D.La., Sept. 10, 2012) (holding allegation that

In Calhoun v. Hargrove, 312 F.3d 730, 735 (5th Cir. 2002), the appeals court reversed the dismissal without a hearing of an allegation that being forced to perform medically contraindicated work caused high blood pressure at near-stroke levels and light-headedness, and directed the district court to determine factually whether physical injury had occurred. On remand, the court found it had not, and the appeals court affirmed. Calhoun v. Hargrove, 2003 WL 21946425 (5th Cir., Aug. 14, 2003).

Payne v. Parnell, 246 Fed.Appx. 884, 888-89, 2007 WL 2537839 (5th Cir. 2007) (unpublished) (holding that being jabbed with a cattle prod is not de minimis); Andrade v. Christ, 2009 WL 3004575, *4 (D.Colo., Sept. 18, 2009) (holding that pain resulting from failure to treat a previously inflicted traumatic injury satisfies § 1997e(e)); Malone v. Runnels, 2009 WL 2868686, *9 (E.D.Cal., Sept. 2, 2009) (testimony that plaintiff was in pain for three days after a blow to the head “describes an injury that is more than de minimis”), report and recommendation adopted, 2009 WL 3164868 (E.D.Cal., Sept. 29, 2009); Kettering v. Harris, 2009 WL 508348, *26 (D.Colo., Feb. 27, 2009) (testimony that after prolonged restraint in restraint chair, plaintiff’s legs did not work properly met the physical injury requirement), motion to amend denied, 2009 WL 1766805 (D.Colo., June 18, 2009); Lawson v. Hall, 2008 WL 793635, *5-7 (S.D.W.Va., Mar. 24, 2008) (declining to apply § 1997e(e) to allegation of “severe pain” from being kneed); Zamboroski v. Karr, 2007 WL 541921, *5 (E.D.Mich., Feb. 16, 2007) (holding severe pain resulting from lack of mobility during nine months in restraints, along with rashes and scarring on his arms and inability to raise his arms over his head when released, were not de minimis); Mansoori v. Shaw, 2002 WL 1400300, *3 (N.D.Ill., June 28, 2002) (holding alleged “tenderness and soreness,” for which plaintiff was taken to a hospital for treatment and received a diagnosis of “chest wall injury,” met the standard); Romaine v. Rawson, 140 F.Supp.2d 204, 214 (N.D.N.Y. 2001) (holding “minor” injuries–three slaps in the face–met the PLRA standard); see Teal v. Campbell, 2012 WL 4458387, *4 (M.D.Fla., Sept. 26, 2012) (while tasering can be de minimis, being tasered three or four times and having a taser surgically removed was not de minimis). But see Dixon v. Toole, 225 Fed.Appx. 797, 799, 2007 WL 986910, *1 (11th Cir. 2007) (per curiam) (unpublished) (holding “mere bruising” from 17.5 hours in restraints was de minimis; prisoner actually complained of “welts”). As noted below at n. 1334, a number of decisions have squarely held that pain by itself is not actionable under § 1997e(e).


Clifton v. Eubank, 418 F.Supp.2d 1243, 1245-51 (D.Colo. 2006). This decision treats losing one’s child and the pain attendant upon labor and stillbirth as separately meeting the physical injury standard.

• sustained deprivation of a hearing aid to a hearing-impaired prisoner. 1331
• stillbirth or miscarriage. 1332
As the footnotes indicate (i.e., those cases denoted with “But see”), there are numerous cases where allegations of non-trivial physiological disturbances are rejected as de minimis or as not constituting physical injury.\(^{1333}\) There are also decisions in which the alleged infliction of severe physical pain is held not to satisfy the statute by itself. Indeed, some courts say so explicitly,\(^{1334}\) or are careful to say that pain is actionable only in connection with other observable physical effects.\(^{1335}\) These decisions raise the prospect that torture may not be compensable as long as it is inflicted with sufficient care to leave no marks.\(^{1336}\) In some cases,


\(^{1336}\) That would be an apt characterization of Jarriett v. Wilson, 2005 WL 3839415 (6th Cir., July 7, 2005), in which a prisoner’s complaint that he was forced to stand in a two-and-a-half-foot square cage for about 13 hours, naked for the first eight to ten hours, unable to sit for more than 30 or 40 minutes of the total time, in acute pain, with clear, visible swelling in a portion of his leg that had previously been injured in a motorcycle accident, during which time he repeatedly asked to see a doctor. Id., *8 (dissenting opinion). The appeals court affirmed the dismissal of his claim as de minimis on the ground that the plaintiff did not complain about his leg upon release or shortly thereafter when he saw medical staff. Id., *4. The decision was initially published, but Westlaw has removed the opinion from its original citation and replaced it with a note stating that it was “erroneously published.” Jarriett v. Wilson,
courts have resolved factual issues on motion in declaring that injuries do not meet the statutory requirement. 1337

One recent appellate decision, unfortunately unpublished, represents a startling departure from prior approaches. In Braswell v. Corrections Corp. of America, 1338 a prisoner with mental illness was left under squalid conditions, and the court simply declared them to constitute physical injuries—taking the position, apparently, that physical conditions that violate the Eighth Amendment are by definition physical injuries. The court stated:

Taking the facts in the light most favorable to [plaintiff, the prisoner] sustained a number of nontrivial physical injuries as a result of CCA’s failure to forcibly remove him from his cell. According to Perry’s testimony, Horton was left in a disgusting unsanitary cell for nine consecutive months, without a shower or an opportunity to exercise. Perry testified that the cell was filthy, that there was mold growing in the toilet, that the cell floor was littered with food trays, and that the window in Horton’s cell was covered, blocking out all natural sunlight.

The physical injuries Braswell alleges are similar in kind and degree to other injuries that have been found to violate a prisoner’s Eighth Amendment rights— and a fortiori to satisfy the PLRA’s “more than de minimis” physical injury requirement. For example, this court has said that claims of excessive cold or dampness in a prison constitute Eighth Amendment violations, without even addressing whether such claims rise above the PLRA’s de minimis standard. . . . Likewise, a denial of exercise for an extended period of time has been held to constitute more than a de minimis physical injury. . . . Consistent with these cases, a claim that a prisoner has languished in a filthy and unsanitary cell for nine consecutive months asserts more than a de minimis physical injury. 1339

1337 See, e.g., Davis v. Dretke, 2008 WL 1867145, *6 (N.D.Tex., Apr. 23, 2008) (granting summary judgment where plaintiff alleged loss of sight in one eye and pain from tear gas, but defendants’ evidence showed no swelling or discoloration).


1339 Braswell, 419 Fed.Appx. at 626-27. Similarly, one district court has held that “to the extent that ‘the developing case law in this area reflects the view that’ the ‘predicate injury’ must be ‘consistent with Eighth Amendment jurisprudence,’ . . . having found that the Complaint adequately pleads a substantial risk of serious harm, the Court finds that it satisfies the physical injury requirement of Section 1997e(e) as well.” Greene v. Garcia, 2013 WL 1455029, *7 (S.D.N.Y., Mar. 26, 2013). The plaintiff’s complaint was that he was mistakenly classified as a member of the Bloods gang, exposing him to the risk of assault from other gangs, but no actual assault.

414 F.3d 634 (6th Cir. 2005). Similarly, in Quinlan v. Personal Transport Services Co., 329 Fed.Appx. 246, 249 (11th Cir. 2009), the plaintiff alleged that he was driven from Illinois to Florida in a transport van with no seatbelts and inadequate ventilation, initially handcuffed, waist-chained, and leg-shackled, then placed in a cage “smaller than a dog carrier” in which he was unable to move around or stretch; a smoky smell permeated the van, causing difficulty breathing, and he was denied the use of his asthma inhaler. The court characterized these allegations as “complaining of temporary chest pain, headache, and difficulty breathing while in the van; and . . . periodic episodes of back pain. But none of these things required immediate medical attention or evidence physical injury besides discomfort.” 329 F.Appx. at 249.

Jarriett contrasts with Payne v. Parnell, 246 Fed.Appx. 884, 888-89, 2007 WL 2537839 (5th Cir. 2007), in which the court, referring both to § 1997e(e) and the Eighth Amendment, held that being jabbed with a cattle prod was not de minimis, despite the lack of long-term damage, in part because it was “calculated to produce real physical harm.” 2007 WL 2537839, *4.

414 F.3d 634 (6th Cir. 2005).
Aside from Braswell, what is missing from these decisions is any attempt to state general principles, other than the relatively contentless “more than de minimis” rule, as to what the statutory term “physical injury” means. One exception is a district court decision, similar in approach to Braswell, which cited dictionary definitions of “physical” as “of or relating to the body,” and of “injury” as “an act that damages, harms, or hurts: an unjust or undeserved infliction of suffering or harm: wrong,” and held that a reasonable jury could find that the statute satisfied by exposure to noxious odors, including those of human wastes, and “dreadful” conditions of confinement (including inability to keep clean while menstruating, denial of clothing except for a paper gown, and exposure to prurient ogling by male prison staff and construction workers). This expansive approach outruns the rest of the case law, but other courts have so far failed to put forward any alternative approach that is helpful in assessing cases of physiological disturbances, disease processes, infliction of pain without visible trauma, etc.

There is an alternative statute-based approach which, if adopted, would significantly clarify the meaning of “physical injury” and help narrow the inconsistency in results under § 1997e(e). The basic federal criminal civil rights statute, 18 U.S.C. § 242, requires a showing of “bodily injury” in order to support a sanction of more than one year in prison. That term is not defined in the statute. However, several other federal criminal statutes define it as meaning “(A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary.” Several circuits have adopted that definition for

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1342 18 U.S.C. § 242 (providing “if bodily injury results from the acts committed in violation of this section . . . [the defendant] shall be fined under this title or imprisoned not more than ten years, or both”).
purposes of § 242 as well, and there is no apparent reason why it should not also be applied under § 1997e(a), especially given the similarity of purpose, distinguishing between injury and its lack for purposes of enforcing civil rights. Doing so would not eliminate all ambiguity from the definition of physical injury, but would resolve many borderline cases, such as those involving means of inflicting pain that leave no marks, or drug withdrawal or overdose that impairs physical or mental functioning.

Several courts have held that the physical manifestations of emotional distress are not physical injury for purposes of this provision, a result that seems unsupported by the statutory language, which directly implies that mental or emotional injury with physical injury should be

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1344 See U.S. v. Gonzales, 436 F.3d 560, 575 (5th Cir. 2006), cert. denied, 547 U.S. 1139 (2006); U.S. v. Bailey, 405 F.3d 102, 111 (1st Cir. 2005); U.S. v. Myers, 972 F.2d 1566, 1572 (11th Cir. 1992). Gonzales excepts use of force cases from this holding because of other Fifth Circuit principles concerning such cases. Gonzales, id.

1345 “When Congress uses, but does not define a particular word, it is presumed to have adopted that word’s established meaning.” U.S. v. Myers, 972 F.2d 1566, 1572 (11th Cir. 1992) (citing Davis v. Michigan Dep’t of Treasury, 489 U.S. 803, 813 (1989)). Although § 1997e(e) uses the word “physical” rather than “bodily,” it is hard to see what substantive difference that rhetorical difference could make.


In other areas of litigation, some courts have acknowledged that post-traumatic stress disorder (PTSD) can constitute “bodily injury” because it can result in actual changes to the brain. See Weaver v. Delta Airlines, Inc., 56 F.Supp.2d 1190, 1191-92 (D.Mont. 1999), vacated by agreement, 211 F.Supp.2d 1252 (D.Mont. 2002). Others have rejected this holding. See, e.g., Doe v. United Airlines, Inc., 73 Cal.Rptr.3d 541, 550-51, 160 Cal.App.4th 1500 (Cal.App. 2 Dist., Mar. 20, 2008).
Court decisions are split on the question whether the risk of future injury meets the § 1997e(e) standard.\footnote{Compare Smith v. Peters, 631 F.3d 418, 421 (7th Cir. 2011) (exposure to dangerous working conditions from which plaintiff was transferred before anything happened to him is not actionable); Zehner v. Trigg, 133 F.3d 459 (7th Cir. 1997) (holding exposure to asbestos without claim of damages for physical injury is not actionable); Mattox v. Edelman, 2013 WL 3936424, *10 (E.D.Mich., July 30, 2013) (“The possibility that future harm might befall plaintiff is neither itself a compensable injury, nor does it constitute ‘physical injury’ for purposes of § 1997e(e).”); Smith v. U.S., 2007 WL 2155651, *4 (D.Kan., July 26, 2007) (same as Zehner), reconsideration denied, 2007 WL 4570888 (D.Kan., Dec. 27, 2007), motion to amend denied, 2008 WL 1735190 (D.Kan., Apr. 10, 2008); Kutch v. Valdez, 2006 WL 3487657, *4 (N.D.Tex., Dec. 4, 2006) (holding potential future complications of untreated high blood pressure are not physical injury under statute) with West v. Walker, 2007 WL 2608789, *6 (N.D.II., Sept. 4, 2007) (holding prisoner may pursue claim of “documentably increased likelihood of future harm” from second-hand smoke); Pack v. Artuz, 348 F.Supp.2d 63, 74 n.12 (S.D.N.Y. 2004) (holding proof of asbestos exposure posing a serious risk of harm would establish an Eighth Amendment violation entitled the plaintiff to nominal damages regardless of present injury); Crawford v. Artuz, 1999 WL 435155 (S.D.N.Y., June 24, 1999) (holding that a claim for asbestos exposure without present physical injury was not barred by the statute because it did not assert mental or emotional injury); see Robinson v. Page, 170 F.3d 747, 749 (7th Cir. 1999) (leaving open question whether required physical injury “must be a palpable, current injury (such as lead poisoning) or a present condition not injurious in itself but likely to ripen eventually into a palpable physical injury.”).
}\footnote{Compare Phillips v. Steinbeck, 2008 WL 821789, *21 (D.Colo., Mar. 26, 2008) (plaintiff who alleged he was labelled an informant by staff and assaulted by inmates in retaliation for complaints about staff could seek damages for both Eighth Amendment and access to courts claims based on injuries from assault); Root v. Watkins, 2007 WL 5029118, *8 (D.Colo., Aug. 28, 2007) (plaintiff alleged that one defendant refused to do anything about loud prisoner conduct, and when he complained to another defendant, he was labelled a snitch and then attacked by other prisoners; he could seek damages against both defendants), objections overruled, 2008 WL 793513 (D.Colo., Mar. 19, 2008); Fogle v. Pierson, 2008 WL 821803, *9 (D.Colo., Mar. 26, 2008) (prisoner complaining of injury from protracted segregation could seek damages both for due process claim for segregation placement and claim of denial of access to courts which arguably prolonged the confinement); Noguera v. Hasty, 2001 WL 243553 (S.D.N.Y., Mar. 12, 2001) (holding that allegations of retaliation for reporting a rape by an officer were closely enough related to the rape that a separate physical injury need not be shown) with Purvis v. Johnson, 78 Fed.Appx., 2003 WL 22391226 (5th Cir. 2003) (unpublished) (holding that a prisoner alleging assault by a staff member could not also pursue a claim for obstruction of the post-assault investigation); Wallin v. Dycus, 2009 WL 798839, *13 (D.Colo., Feb. 25, 2009) (holding claim for disclosure of confidential information is barred by § 1997e(e) despite the presence of an excessive force claim; “the PLRA’s physical injury requirement is claim specific”), report and recommendation adopted, 2009 WL 2490127 (D.Colo., Aug. 13, 2009), aff’d, 381 Fed.Appx. 819 (10th Cir. 2010), cert. denied, 132 S.Ct. 171 (2011); Johnson v. Dallas County Sheriff Dept., 2008 WL 2378269, *3 (N.D.Tex., June 6, 2008) (alleged sexual assault was a physical injury, but conduct of officials after the assault did not inflict injury and was not actionable); Slusher v. Samu, 2006 WL 3371636, *13 (D.Colo., Nov. 21, 2006) (holding that a prisoner with multiple claims could only recover damages for the one claim as to which he alleged physical injury).
}\footnote{In Tate v. Alamance County Jail, 2007 WL 2156319 (M.D.N.C., July 26, 2007), the plaintiff alleged that defendants had denied him pain medication after surgery. The Court rejected defendants’ argument that the plaintiff “must allege that there was a physical injury which resulted from the failure to provide requested medication. However, the clear words of the statute only state that the mental or emotional injury must have a prior physical injury component to it, not that the mental or emotional injury resulted in a physical injury.” Here the “prior physical injury component” was the surgery. 2007 WL 2156319, *1. (The Court did not comment on the defendants’ assumption that pain is a mental or emotional injury, which appears incorrect.)
}\footnote{Al-Turki v. Ballard, 2013 WL 589174, *15 (D.Colo., Feb. 14, 2013) (holding pain caused by failure to treat kidney stones was actionable even though defendants did not cause the stones); May v. Williams, 2012 WL 302
Second Circuit has recently recognized that emotional injury may be viewed as part of an ongoing course of conduct and may be related to physical injury inflicted at an earlier date.\textsuperscript{1351}

VI. Attorneys’ Fees

In actions brought by prisoners,\textsuperscript{1352} the PLRA restricts fees awarded pursuant to 42 U.S.C. § 1988 to 150% of the rates “established” under the Criminal Justice Act.\textsuperscript{1353} The attorneys’ fees restrictions are not limited to cases involving prison conditions.\textsuperscript{1354} They apply to cases about juvenile institutions.\textsuperscript{1355}

Courts have disagreed whether the “established” CJA rate means the rate actually paid (\textit{i.e.}, as limited by available funding) under the CJA or the rate authorized by the Judicial Conference based on inflation.\textsuperscript{1356} The rate authorized by the Judicial Conference is not made available in any published or on-line source, and must be obtained via correspondence with the Administrative Office of the Courts (AOC). A request to AOC from a number of prisoner advocates to make the information more readily accessible to the public elicited a noncommittal response and no change in practice.\textsuperscript{1357} The current and recent CJA rates are $139 an hour for fiscal years 2011, 2012 and 2013, and $141 an hour commencing January 2014.\textsuperscript{1358}

\begin{footnotesize}
\begin{enumerate}
\item[1351] 1155390, *7 (D.Nev., Apr. 4, 2012) (holding the pain caused by an inguinal hernia and bowel obstruction was actionable since those conditions were physical injuries, even if defendants did not cause the hernia and obstruction); \textit{accord}, Karsten v. Davis, 2013 WL 2120635, *10 n.2 (D.Colo., Apr. 26, 2013) (holding year’s delay in repairing a hernia was compensable since the hernia was a physical injury), \textit{report and recommendation adopted}, 2013 WL 2120632 (D.Colo., May 15, 2013).
\item[1352] See § II, nn. 8-49, concerning the definition of “prisoner.” One thoughtful decision held that the attorneys’ fees restrictions are not applicable to a case filed by a prisoner who was released shortly after filing, citing the “absurdity exception” to the plain-meaning rule of statutory construction. Morris v. Eversley, 343 F.Supp.2d 234, 243-44 (S.D.N.Y. 2004). However, the decision on which it relied has been reversed on appeal, Robbins v. Chronister, 435 F.3d 1238 (10th Cir. 2006) (en banc), \textit{rev’g} Robbins v. Chronister, 2002 WL 356331 (D.Kan., Mar. 31, 2002), and more recently \textit{Morris} itself was overruled. Perez v. Westchester County Dep’t of Corrections, 587 F.3d 143, 154-55 (2d Cir. 2009). Defending a motion to terminate prospective relief brought by defendants is part of the original action brought by prisoners for PLRA fees purposes. Batchelder v. Geary, 2007 WL 2427989, *3-4 (N.D.Cal., Aug. 22, 2007).
\item[1353] 42 U.S.C. § 1997e(d)(3); 18 U.S.C. § 3006A; see Perez v. Cat€, 632 F.3d 553, 557-58 (9th Cir. 2011) (holding paralegals need not be paid less than the top PLRA rate); Reynolds v. Goord, 2001 WL 118564, *2 (S.D.N.Y., Feb. 13, 2001) (holding less experienced counsel need not be paid less than the statutory rate).
\item[1358] E-mail, Judy Gallant, Attorney Advisory, Defender Services Office of the Administrative Office of the Courts, Judy_Gallant@ao.uscourts.gov, to Bonnie Tenneriello of Prisoners’ Legal Services of Massachusetts (Jan. 13, 2004).
\end{enumerate}
\end{footnotesize}
Some courts have held that the PLRA rate may be enhanced for excellent results. As the most recent of these decisions explained:

[An enhancement] does not appear to run afoul of the plain language of § 1997e(d), which states only that “[n]o award of attorney’s fees . . . shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel.” 42 U.S.C. § 1997e(d)(3) (emphasis added). This suggests not that the average hourly rate of the final fee cannot exceed an overall cap, but rather that the initial lodestar calculation cannot use, or be “based on,” an hourly rate that starts above the PLRA cap. Where a fee award is multiplied upward to account for factors not subsumed in the lodestar calculation, it is still “based on” the initial lodestar fee rate; the fee is increased from that base point to ensure reasonable compensation of counsel in those very narrow circumstances when the lodestar undervalues counsel. To read the statute as setting an absolute maximum arguably eliminates the well-established enhancement framework in § 1988 litigation, a drastic step. The Court therefore finds no basis in the PLRA to categorically deny any enhancement multiplier.

The PLRA restrictions do not apply to fees sought on any basis other than 42 U.S.C. § 1988. In cases where fees are generally authorized by 42 U.S.C. § 1988, courts have disagreed whether fees awarded on other bases within the action are limited by the PLRA. Courts have also taken varying approaches in cases where different claims are governed by different fee statutes.


1361 See, e.g., Armstrong v. Davis, 318 F.3d 965, 973-74 (9th Cir. 2003) (holding that fees in suits enforcing the Americans with Disabilities Act and the Rehabilitation Act are not limited by the PLRA because these statutes have fee provisions separate from § 1988); Henderson v. Thomas, 2013 WL 5493197, *9 (M.D.Ala., Sept. 30, 2013) (same as Armstrong); Edwin G. v. Washington, 2001 WL 196760 (C.D.Ill., Jan. 26, 2001) (holding that fees sought as discovery sanctions were not subject to PLRA); Beckford v. Irvin, 60 F.Supp.2d 85 (W.D.N.Y. 1999) (holding that Americans with Disabilities Act fee provisions are not limited by PLRA).

1362 Compare Webb v. Ada County, 285 F.3d 829, 835 (9th Cir.) (holding fees for contempt and discovery motions governed by PLRA limitations, even though they were authorized by separate statute and rule, because they were “directly related” to the underlying § 1983 claims; Congress’s purpose was to reduce the cost to taxpayers of prisoner litigation), cert. denied, 537 U.S. 948 (2002); Norwood v. Vance, 2008 WL 686901, *1 (E.D.Cal., Mar. 12, 2008) (motion for sanctions governed by PLRA because it was directly related to the underlying § 1983 claims), vacated on other grounds, 591 F.3d 1062 (9th Cir. 2010), cert. denied, 131 S.Ct. 1465 (2011) with Edwin G. v. Washington, 2001 WL 196760 (C.D.Ill., Jan. 26, 2001) (holding that fees sought as discovery sanctions were not subject to PLRA).

1363 Compare LaPlante v. Superintendent Pepe, 307 F.Supp.2d 219, 225 (D.Mass. 2004) (holding that where a settlement agreement provided for fees for enforcement under § 1988 (i.e., at market rates), and an enforcement motion also raised an independent § 1983 claim, fees for the “intertwined” claims would be awarded at the higher rate) with Pierce v. County of Orange, 2012 WL 5906663, *12 (C.D.Cal., Mar. 2, 2012) (accepting that 50% of hours should be awarded at market rates under the ADA and 50% should be governed by PLRA based on specifics of the record in the case); Beckford v. Irvin, 60 F.Supp.2d 85, 88 (W.D.N.Y. 1999) (holding that 50% of fees should be limited to PLRA rates in case where ADA and § 1983 claims were “inextricably intertwined” and counsel
Fees at the pre-judgment stage must be “directly and reasonably incurred in proving an actual violation of the plaintiff’s rights” to be awarded under the PLRA. This apparently includes all hours spent in the course of litigation where an actual violation is shown as long as they are reasonable. Several courts have held that injunctive proceedings that are settled may support an award of fees if there are findings of legal violation or a record that supports such findings, but a recent appellate decision overrules one of these, noting it has authorized fees under the PLRA “only to those inmates who have affirmatively established violations of protected rights.” Whether a litigant can settle a case without such a record, but make the record in the course of a fee application and obtain fees on the ground it was proving that violation until the point of settlement, remains to be seen. However, one recent Second Circuit decision has upheld plaintiffs’ entitlement to fees for obtaining an enforceable settlement that “did not constitute an admission of liability,” without reference to any findings of legal violation—though it is clear that both the district court and the appeals court assumed that the

estimated they spent half their time on each claim. See also Armstrong v. Davis, 318 F.3d 965, 974-75 (9th Cir. 2003) (holding that district court had discretion to award all fees at market rates in ADA case where a due process § 1983 claim had been added belatedly, comprised a small part of the case, and heavily overlapped the ADA claim). 1364 42 U.S.C. § 1997e(d)(1)(A).


1366 See Laube v. Allen, 506 F.Supp.2d 969, 979-80 (M.D.Ala., Aug. 31, 2007) (holding that fees may be awarded for injunctive settlements to the extent they satisfy the PLRA’s “need-narrowness-intrusiveness” requirement and the fees were “directly and reasonably incurred” in obtaining it); Watts v. Director of Corrections, 2007 WL 1100611, *3 (E.D.Cal., Apr. 11, 2007) (awarding fees for “proving an actual violation” notwithstanding that case was settled), amended on reconsideration on other grounds, 2007 WL 1752519 (E.D.Cal., June 15, 2007); Lozeau v. Lake County, Mont., 98 F.Supp.2d 1157, 1168 n.1 and 1170 (D.Mont. 2000) (“Defendants cannot settle a case, promise reform or continued compliance, admit the previous existence of illegal conditions, admit that Plaintiffs’ legal action actually brought the illegal conditions to the attention of those in a position to change them and subsequently allege a failure of proof.”).

1367 Kimbrough v. California, 609 F.3d 1027, 1032 & n.7 (9th Cir. 2010) (overruling Ilick v. Miller, 68 F.Supp.2d 1169, 1173 n.1 (D.Nev. 1999)). Kimbrough also calls into question Watts and Lozeau, cited in the previous footnote, though these may be distinguishable.

1368 The argument is supported by the reasoning of Laube v. Allen, which points out that the statute refers to “proving” a violation rather than “having proved” one. 506 F.Supp.2d at 980.
challenged practice was unlawful.\textsuperscript{1369} Fees are probably not recoverable in cases that are favorably resolved but do not result in an enforceable judgment for the plaintiff.\textsuperscript{1370}

Fees awarded under the PLRA must be “proportionately related to the court ordered relief for the violation.”\textsuperscript{1371}

Alternatively, fees may be awarded if they are “directly and reasonably incurred in enforcing the relief ordered for the violation.”\textsuperscript{1372} One recent decision held that protecting class

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\textsuperscript{1369} Perez v. Westchester County Dep’t of Corrections, 587 F.3d 143, 148-53 (2d Cir. 2009). In that case, plaintiffs contended that the refusal to serve Kosher meat (which satisfies the requirements of Halal as well) to Muslims as well as Jews was unconstitutional. It is conceivable that the availability of fees under the PLRA was not before the court, since it is not specifically mentioned, but that is hard to believe, since the question whether plaintiffs were “prevailing parties” for fees purposes, and what rates they were entitled to under the PLRA, were raised and decided.\textsuperscript{1370} See Torres v. Walker, 356 F.3d 238, 243 (2d Cir. 2004) (holding that where a case was resolved by a stipulation that did not require the court’s approval and dismissed defendants’ liability, “it cannot be said that [plaintiff’s] attorneys’ fees were directly and reasonably incurred in proving an actual violation. . . .”); Siripongs v. Davis, 282 F.3d 755, 758 (9th Cir. 2002) (denying fees where district court had issued a temporary restraining order, found “serious questions” and a reasonable likelihood of success on the merits, but no finding or concession of liability was ever made and the court said the record didn’t support an independent conclusion to that effect); see also Perez v. Westchester County Dep’t of Corrections, 587 F.3d at 150-53 (upholding fee award where plaintiffs obtained an order that incorporated the substantive terms of settlement and the court had been extensively involved in resolving the case). But see Weaver v. Clarke, 933 F.Supp. 831, 836 (D.Neb. 1996), aff’d, 120 F.3d 852 (8th Cir. 1997), cert. denied, 522 U.S. 1098 (1998) (finding fees incurred in “proving an actual violation” where the plaintiff obtained a finding of likelihood of success on the merits but no actual preliminary injunction, and defendants then ended the challenged practice).

\textsuperscript{1371} 42 U.S.C. § 1997e(d)(1)(B)(i); see Dannenberg v. Valadez, 338 F.3d 1070, 1075-76 (9th Cir. 2003) (stating that this standard is equivalent to the analysis of degree of success governing non-prison attorneys’ fees proceedings). Courts have not held anything less than 150% of damages awarded to be disproportionate to the relief. See Farella v. Hockaday, 304 F.Supp.2d 1076, 1079 (C.D.Ill. 2004) (awarding $1500 in fees on a $1000 judgment; noting that “proportionately related” does not mean fees less than the judgment, and that the PLRA contemplates awards of up to 150% of the damages); Cole v. Lomax, 2001 WL 1906275, *2 (W.D.Tenn., Sept. 26, 2001) (awarding $38,000 in fees as proportionate to a $25,364 judgment, noting (erroneously) that it is within the 150% limit of the PLRA); Sutton v. Smith, 2001 WL 743201 (D.Md., June 26, 2001) (holding $9400 in fees proportionate to a $19,000 judgment in a use of force case); Morrison v. Davis, 88 F.Supp.2d 799, 810 (S.D. Ohio 2000) (holding $54,000 in fees was not disproportionate to a $15,000 jury award, though noting that the fee award was reduced under the 150% limit).

“Court-ordered relief” may be broadly defined; in one unreported case, the Ninth Circuit held that actions taken by prison officials that were not directly ordered, but were “ultimately required by the district court’s finding” on plaintiff’s legal claim, should be reflected in the attorneys’ fee award. Bruce v. Mueller, 66 Fed.Appx. 721, 2003 WL 21259784, *1 (9th Cir. 2003) (unreported).

\textsuperscript{1372} 42 U.S.C. § 1997e(d)(1)(B)(ii); see Balla v. Idaho, 677 F.3d 910, 919-20 (9th Cir. 2012) (holding prisoners who had previously obtained an injunction could recover fees for a contempt motion decided against them because the defendants had complied; stating “such losing motions . . . are a common and effective tool for bringing about conformity to the law”); El-Tabech v. Clarke, 616 F.3d 834, 842 (8th Cir. 2010) (disallowing fees for compliance monitoring, affirming fees for successful contempt motion); Cody v. Hillard, 304 F.3d 767, 776-77 (8th Cir. 2002) (holding compensable defense of motion to vacate and negotiation of settlement agreement in case with prior finding of violation); Webb v. Ada County, 285 F.3d 829, 834-35 & n.1 (9th Cir. 2002) (holding that postjudgment contempt and sanctions motions, monitoring compliance with the consent decree, opposing application of the PLRA to the fee requests, briefing the district court on the retroactive application of the PLRA, replying to objection to the fee award and motion to terminate the consent decree, and fees-on-fees were compensable without necessity of proving a new constitutional violation); Graves v. Arpaio, 633 F.Supp.2d 834, 845 (D.Ariz. 2009) (holding compensable fees for defending the relief in post-judgment proceedings), aff’d on other grounds, 623 F.3d 1043 (9th Cir. 2010); Lancaster v. Cate, 2008 WL 2774260, *4 (N.D.Cal., July 14, 2008) (litigant who proves fees “directly
representatives from retaliation is compensable under this provision because retaliation against them “directly impedes their ability to assist counsel in monitoring the injunctive relief.”

Up to 25% of money judgments must be used to satisfy attorneys’ fees claims. Courts have disagreed whether this provision gives courts discretion to apply less than 25%, and if so how to exercise that discretion (a point on which the statute gives no guidance). Defendants cannot be made to pay fees greater than 150% of a money judgment. There is a conflict

and reasonably incurred” in enforcement need not also show fees were proportionate to relief); Balla v. Idaho Bd. of Correction, 2007 WL 4531304, *2 (D.Idaho, Dec. 18, 2007) (fees incurred in response to defendants’ statement that they would file a termination motion were compensable as “directly and reasonably incurred” in enforcement even though the motion was never actually filed); Coleman v. Schwarzenegger, 2007 WL 2695344, *3-4 (E.D.Cal., Sept. 11, 2007) (holding that fees were recoverable for getting a three-judge court appointed to consider a prisoner release order and for obtaining an order protecting class members with mental illness from transfer out of state without provision for their mental health care, since both enforced prior relief), report and recommendations adopted, 2007 WL 2935840 (E.D.Cal., Oct. 5, 2007); Laube v. Allen, 506 F.Supp.2d 969, 995 (M.D.Ala. 2007) (holding monitoring is compensable only when it leads to enforcement activity).


1375 The only federal circuit to rule on the question has held that in deciding what proportion of an award to make the plaintiff pay, courts should consider the factors used to determine whether and to what extent a prevailing party should recover fees in ERISA cases, including “(1) the degree of the opposing parties’ culpability or bad faith, (2) the ability of the opposing parties to satisfy an award of attorneys’ fees, (3) whether an award of attorneys’ fees against the opposing parties could deter other persons acting under similar circumstances, and (4) the relative merits of the parties’ positions.” Kahle v. Leonard, 563 F.3d 736 (8th Cir. 2009) (citing Lawrence v. Westerhaus, 749 F.2d 494, 496 (8th Cir. 1984)). Previously, most courts including that one had held only that the district court retains discretion to apply less than 25%. See Boesing v. Spiess, 540 F.3d 886, 892 (8th Cir. 2008) (affirming district court’s application of 1% of $25,000 recovery); accord, Parker v. Conway, 581 F.3d 198, 205 (3d Cir. 2009) (following Boesing, affirming application of 18% of judgment to fees); Farella v. Hockaday, 304 F.Supp.2d 1076, 1081 (C.D.Ill. 2004) (“The section’s plain language sets forth 25% as the maximum, not the mandatory amount.”). The court in Farella explained that the 10% contribution it required was high enough to reflect the jury’s failure to award punitive damages but low enough to reflect the plaintiff’s pro se status, the fact that pro bono counsel was appointed, the seriousness of the constitutional violation, and the plaintiff’s significant injury. In Norwood v. Vance, 2008 WL 686901, *4 (E.D.Cal., Mar. 12, 2008), vacated on other grounds, 591 F.3d 1062 (9th Cir. 2010), cert. denied, 131 S.Ct. 1465 (2011), plaintiff received a punitive award of $39,000 and a nominal award of $11.00; the court required the plaintiff to pay only 25% of the nominal award. See Siggers-El v. Barlow, 433 F.Supp.2d 811, 822-23 (E.D.Mich. 2006) (applying $1.00 of the recovery to attorneys’ fees, noting that the jury found that defendants had lied about their conduct and awarded significant damages as punishment and deterrent); Edens v. Larson, 2006 WL 1457702, *2 (S.D.Ill., May 25, 2006) (asserting court has discretion, applying 25% of recovery to fees, not explaining exercise of discretion); Surprenant v. Rivas, 2004 WL 1858316, *5 (D.N.H., Aug.17, 2004) (requiring plaintiff to pay much less than 25%); Hutchinson v. McCabee, 2001 WL 930842, *8 n.11 (S.D.N.Y., Aug. 15, 2001) (holding that the court has discretion to apply less than 25% of plaintiff’s recovery); Morrison v. Davis, 88 F.Supp.2d 799, 811-13 (S.D.Ohio 2000) (applying only $1.00 of plaintiff’s judgment against recovery). Contra, Johnson v. Daley, 339 F.3d 582, 584-85 (7th Cir. 2003) (en banc) (holding that the first 25% of the recovery must be applied to attorneys’ fees, and only if that sum is inadequate to cover the fees do the defendants pay anything) (dictum), cert. denied, 541 U.S. 935 (2004); Keller v. County of Bucks, 2005 WL 1595748, *1 (E.D.Pa., July 5, 2005) (same as Johnson; stating “[t]he plain import of the statute is that plaintiffs who recover substantial damage awards are expected to pay their counsel themselves, using the proceeds of the award for that purpose.”); Jackson v. Austin, 267 F.Supp.2d 1059, 1071 (D.Kan. 2003) (holding that 25% of the plaintiff’s recovery must be applied to fees). But see Johnson v. Daley, 2003 WL 23274532, *1 (W.D.Wis., Sept. 26, 2003) (on remand, requiring plaintiff to pay only $200 of a $40,000 jury award despite appellate dictum).
between circuits over whether a successful plaintiff’s fees for defending a favorable judgment must be kept within the same 150% cap.\textsuperscript{1377} When the plaintiff obtains injunctive relief as well as damages, the 150% limit is either inapplicable or applicable only to those hours expended solely for the purpose of obtaining damages.\textsuperscript{1378} One decision holds the 150% limit applicable to a case in which the prisoner’s claim concerned events that antedated his incarceration.\textsuperscript{1379}

Courts have rejected arguments that the attorneys’ fees restrictions deny equal protection.\textsuperscript{1380}

VII. Filing Fees and Costs

Prisoners proceeding \textit{in forma pauperis} in civil actions or appeals are now required to pay filing fees in installments according to a statutory formula.\textsuperscript{1381}

\footnotesize{(holding that the 150% cap does not apply to a case resolved by a “so ordered” stipulation, since there is no “monetary judgment”); \textit{accord}, Romaine v. Rawson, 2004 WL 1013316, *3 (N.D.N.Y., May 6, 2004).
\textsuperscript{1377} Compare Riley v. Kurtz, 361 F.3d 906, 917 (6th Cir. 2004) (holding that plaintiff was not entitled to attorneys’ fees beyond the 150% cap for defending against an unsuccessful appeal), \textit{cert. denied}, 543 U.S. 892 (2004) with Woods v. Carey, 722 F.3d 1177, 1180-84 (9th Cir. 2013) (holding fees for defending an appeal are exempt from the cap).

\textsuperscript{1378} In \textit{Dannenberg v. Valadez}, 338 F.3d 1070, 1074-75 (9th Cir. 2003), the most extensive discussion of this subject, the court convincingly harmonized the 150% limit with the provision that fees must be “portionately related to the court ordered relief” by holding that the 150% limit applies only to the portion of total fees that was incurred solely in order to obtain money damages; fees incurred to obtain injunctive relief are compensable even if the plaintiff also obtained monetary relief. \textit{Accord}, Goodman v. Walker, 2007 WL 2907991, *1 (S.D.Ill., Oct. 1, 2007) and cases cited. \textit{See also} Walker v. Bain, 257 F.3d 660, 667 n.2 (6th Cir. 2001) (noting that 150% limit is inapplicable to cases involving injunctions), \textit{cert. denied}, 535 U.S. 1095 (2002); \textit{accord}, Boivin v. Black, 225 F.3d 36, 41 n.4 (1st Cir. 2001); Carbonell v. Acrish, 154 F.Supp.2d 552, 566 (S.D.N.Y. 2001). \textit{But see} Keup v. Hopkins, 596 F.3d 899, 905-06 (8th Cir. 2010) (where other equitable relief was moot, inferring declaratory judgment from court’s orders and judgments would not affect fees calculation since it would not affect defendants’ behavior).

\textsuperscript{1379} Robbins v. Chronister, 435 F.3d 1238, 1241-44 (10th Cir. 2006) (en banc).

\textsuperscript{1381} 28 U.S.C. § 1915(b)(1-2); \textit{see} Gillard v. Canfield, 2013 WL 5276546, *7 (W.D.N.Y., Sept. 17, 2013) (ordering refund to plaintiff where prison officials had erroneously sent entirety of fee at once rather than the 20% called for by statutory formula); Duncan v. Walker, 2009 WL 666425, *4 (S.D.Ill., Mar. 11, 2009) (fees are to be assessed from all deposits into prisoners’ account, regardless of source); \textit{see also} Brown v. Eppler, 725 F.3d 1221, 1228-31 (11th Cir. 2013) (holding that the obligation of 28 U.S.C. § 1915(b)(1) to pay filing fees in installments applies where the plaintiff was a prisoner at the time he appealed though not when he filed the action).

This provision applies to cases filed in federal court. In cases filed in state court and removed to federal court by defendants, the defendants pay the fees. Hairston v. Blackburn, 2010 WL 145793, *1 (S.D.Ill., Jan. 12, 2010). It applies only to civil actions and appeals. \textit{See} Garza v. Thaler, 585 F.3d 888, 889-90 (5th Cir. 2009) (district court did not have power under the PLRA or its discretion to require IFP litigant to pay appellate filing fee in installments in habeas corpus appeal).

One court has applied these provisions to a civilly committed sex offender, while acknowledging that he was not a prisoner, on the ground that courts have pre-existing authority to require partial payment of filing fees and
Once a prisoner files a complaint or notice of appeal, the court generally lacks authority to forgive or refund the fee,\textsuperscript{1382} though there are some variations in local practice that have that effect in some cases.\textsuperscript{1383} The filing fees provision has been upheld as constitutional; courts have

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Porter v. Dep't of the Treasury, 564 F.3d 176, 180 (3d Cir. 2009) (court had no authority to waive appellate filing fee in case governed by PLRA), cert. denied sub nom. Telfair v. Tandy, 558 U.S. 1028 (2009); In re Alea, 286 F.3d 378, 381–82 (6th Cir. 2002), cert. denied, 537 U.S. 895 (2002); Lebron v. Russo, 263 F.3d 38, 42 (2d Cir. 2001) (holding that prisoners must pay separately for each appeal and cannot obtain refunds for appeals made necessary by district court errors); Goins v. Decaro, 241 F.3d 264 (2d Cir. 2001) (holding fees may not be refunded or cancelled when a notice of appeal is withdrawn); Hatchet v. Nettles, 201 F.3d 651, 654 (5th Cir. 2000) (“A prisoner proceeding IFP in the district court is obligated to pay the full filing fee upon the filing of a complaint. § 1915(b)(1). No relief from an order directing payment of the filing fee should be granted for a voluntary dismissal.”); In re Tyler, 110 F.3d 528, 529–30 (8th Cir. 1997) (holding “the PLRA makes prisoners responsible for their filing fees the moment the prisoner brings a civil action or files an appeal”); Ellison v. Hodge, 2013 WL 2487762, *1 (S.D.Ill., June 10, 2013) (stating “a prisoner incurs the obligation to pay the filing fee for a lawsuit when the lawsuit is filed, and the obligation continues regardless of later developments in the lawsuit, such as denial of leave to proceed IFP or dismissal of the suit”); Grindling v. Martone, 2012 WL 4502954, *2 (D.Hawai‘i, Sept. 28, 2012) (“Title 28 U.S.C. § 1915 does not provide any authority or mechanism for the court to waive payment of a prisoner’s filing fee, or to return the filing fee after dismissal of an action.” This dismissal was voluntary.), reconsideration denied, 2012 WL 5187855 (D.Haw., Oct. 17, 2012); Reath v. Weber, 2012 WL 4068629, *4 (D.S.D., Sept. 14, 2012) (“The obligation to pay a filing fee accrues the moment a plaintiff files his Complaint with the Court, and it cannot be avoided merely because the case is eventually dismissed.”), report and recommendation adopted, 2012 WL 5995225 (D.S.D., Nov. 30, 2012); Vogel v. Roy, 2012 WL 2045963, *3 (D.Minn., June 6, 2012) (where dismissal was without prejudice because plaintiff said he would investigate and re-file after release, court lacked authority to excuse filing fee), report and recommendation adopted, 2012 WL 2045963 (D.Minn., June 6, 2012); see Appendix A for additional authority on this point.

In Wedington v. U.S. Federal Government, 2009 WL 2916860, *3 (D.Minn., Sept. 4, 2009), where the plaintiff had brought a civil action to obtain relief from a commitment order, the court said the plaintiff should not be charged the filing fee because ordinarily such relief can be sought through a motion that requires no filing fee. It appears that the court was concerned in part that the plaintiff appeared to be schizophrenic as well as pro se and indigent. The same court has subsequently recommended relieving another plaintiff from paying the filing fee, “as he appears to completely misapprehend the requisites of a cognizable claim.” Roach v. Sterns County, 2010 WL 2629407, *3 (D.Minn., June 11, 2010), report and recommendation adopted, 2010 WL 2629403 (D.Minn., June 28, 2010); see also Hansen v. Symmes, 2011 WL 1130450, *1 (D.Minn., Mar. 28, 2011) (returning filing fee for unspecified “good cause”). Similarly, in McCotter v. Repischak, 2012 WL 2160821, *3 (E.D.Wis., June 13, 2012), where the court dismissed without prejudice because the plaintiff’s claim was properly pursued via habeas corpus petition, the court declined to collect the remainder of the filing fee. In Jones v. California Medical Facility Custody Staff, 2012 WL 5187994, *4 (E.D.Cal., Oct. 17, 2012), vacated on other grounds, 2012 WL 5868772 (E.D.Cal., Nov. 19, 2012), the court initially declined to impose the filing fee “because plaintiff's complaint must be dismissed at the outset for failure to exhaust administrative remedies,” cautioning the plaintiff that if he sought to pursue this unexhausted action rather than file a new action after exhaustion, the court would grant IFP status, impose the filing fee, and again recommend dismissal for non-exhaustion. In Duncan v. Kaelin, 2014 WL 258649, *3 (S.D.Tex., Jan. 23, 2014), the court, “recognizing Plaintiff's frustration at the time he filed suit” with irregular outgoing mail pickup, excused him from paying the filing fee.


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relied on the “savings clause” of 28 U.S.C. § 1915(b)(4), which says that prisoners shall not be prevented from filing or appealing because of lack of funds. Courts may look behind claims of indigency where prisoners have had money and have spent it on other things.

Courts have disagreed about the apportionment of the fee obligation among multiple plaintiffs. One federal circuit has held that “each prisoner should be proportionally liable for any fees and costs that may be assessed. Thus, any fees and costs that the district court . . . may impose shall be equally divided among all the prisoners.” Another decision holds that “the...
filing fee obligation is joint and several. If the parties pay the entire fee, they may divide it up between them as they see fit and it is of no concern to the court. When the parties don’t pay the entire fee, all are obligated for the entire amount of the filing fee until it has been paid in full, even if the burden falls on a few of them unequally.”1387 Two circuits have held that each prisoner in multiple-plaintiff litigation must pay a full filing fee,1388 and one has gone further by holding that prisoners proceeding IFP cannot file jointly at all, but must each file a separate complaint.1389 This extraordinary holding that the PLRA overturns the joinder rules of

1387 Alcala v. Woodford, 2002 WL 1034080, *1 (N.D.Cal., May 21, 2002). Consistently with this view, another court held in a multi-plaintiff action that the lead plaintiff had three strikes and must pay the $350 filing fee up front, but observed that the other plaintiffs didn’t file IFP applications: “Presumably, the ten plaintiffs can pool their resources and pay the fees associated with this action.” Hartsfield v. Iowa Dept. of Corrections, 2007 WL 61858, *1 (N.D.Iowa, Jan. 3, 2007); see Stewart v. Missouri Dept. of Corrections, 2007 WL 2782529, *5 (W.D.Mo., Sept. 21, 2007) (assessing initial fees against each of multiple plaintiffs, noting that payment of those amounts would exceed the full amount of the filing fee, and directing payment of the full fee within 30 days). In Mills v. Fischer, 2010 WL 364457, *1 (W.D.N.Y., Feb. 1, 2010), where one of two incarcerated plaintiffs paid the entire fee, the court went forward with the other plaintiff’s IFP application, since there are other benefits of proceeding IFP, including service of process and appointment of counsel.

Fed.R.Civ.P. 20 is unsupported by statutory language or history and has been rejected by other circuits, which have stated that there is no reason to believe Congress intended in the PLRA to repeal the joinder rules. The latter point is supported by the Supreme Court’s holding that courts should not deviate from the usual procedural practices except to the extent that the PLRA actually says to do so. That holding would also seem to preclude the imposition of multiple filing fees in multi-party cases, since the relevant statute says that “the parties instituting any civil action, suit or proceeding in such court”—not “each party”—shall pay “a filing fee of $350,” not multiple fees, and nothing in the PLRA purports to address multi-party litigation. Further, interpreting the PLRA’s amendments to the IFP statutes in this manner would lead to the perverse result that groups of prisoners in a single action who can pay a filing fee up front, and do so, will pay only one fee, but those who cannot muster one fee at the outset will pay much more.

Courts have expressed more legitimate concerns about the joinder rules in connection with the PLRA, holding that the rules must be enforced scrupulously against prisoners lest they be able to pay a single filing fee to litigate claims that strictly speaking call for separate complaints and payments, or to circumvent the “three strikes” provision.

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1391 Hagan, 570 F.3d at 154-55; Boriboune, 391 F.3d at 854-55.
1393 28 U.S.C. § 1914(a) (emphasis supplied). The statute continues: “The clerk shall collect from the parties such additional fees only as are prescribed by the Judicial Conference of the United States.” 28 U.S.C. § 1914(b). That language seems to forbid the expansion of § 1914(a) by creative judicial interpretation.
1394 Hagan v. Rogers, decided after Jones v. Bock, did not address the language of 28 U.S.C. § 1914. Boriboune v. Berge did, acknowledging that § 1914(a) “implies that the [then] $150 fee is per case rather than per litigant; the parties’ pay $150.” Boriboune, 391 F.3d at 855. However, it asserted that Section 1915(b)(1), by contrast, specifies a per-litigant approach to fees.

A per-litigant approach is a natural concomitant to a system that makes permission to proceed in forma pauperis (and the amount and timing of payments) contingent on certain person-specific findings. . . .

Boriboune, 391 F.3d at 856. In fact, 28 U.S.C. § 1915(b)(1) refers only to the situation in which “a prisoner brings a civil action or files an appeal,” and the court’s view that a “per-litigant approach” is more “natural” in the system created by the PLRA appears to be precisely the kind of reasoning from “perceived policy concerns” rejected by the Supreme Court in favor of adhering to the usual litigation practice except where the PLRA states otherwise “in terms.” Jones v. Bock, 549 U.S. 199, 212-14 (2007).
Prisoners are required to provide certified statements of their prison accounts when they seek IFP status. A complaint should not be dismissed for prison officials’ failure to provide the necessary information, or without determining whether the prisoner has done what he or she can to follow the procedures and make required payments. In at least one case, the court has acknowledged familiarity with the fact that a jail did not generally provide statements, and accepted an official’s attestation that the plaintiff had no funds. Refusal by prison officials to

he was transferred to another prison. It is not clear why this course of conduct was not a “series of transactions or occurrences” within the meaning of Rule 20(a)(2), Fed.R.Civ.P.


In Wade v. Swiekatowski, 2010 WL 152073, *1-2 (E.D.Wis., Jan. 15, 2010), the plaintiff was held in a halfway house, which the court said made him a prisoner subject to the PLRA filing fees provisions. However, the halfway house did not keep trust accounts for its residents, so the court directed the plaintiff to provide a statement of account for the last six months he had been in prison. Contra, Doss v. Gilkey, 2007 WL 1810514, *1 (S.D. Ill., June 22, 2007) (citing practical problems in implementing fee provisions at a halfway house as supporting their non-applicability).

1398 McGore v. Wigglesworth, 114 F.3d 601, 607-08 (6th Cir. 1997); see Cole v. Sheriffs Office of Lafayette Parish, 2011 WL 1752086, *1 (W.D.La., Apr. 6, 2011) (granting IFP status where prisoner who had been granted IFP three times previously submitted a copy of a grievance requesting facility staff to act on his request for an account statement), report and recommendation adopted, 2011 WL 1789915 (W.D.La., May 9, 2011); Lawton v. Ortiz, 2006 WL 2689508, *1 (D.N.J., Sept. 19, 2006) (granting IFP status where prisoner said officials didn’t respond to his requests for other evidence and other evidence showed he was indigent); see also Williams v. Mestas, 355 Fed.Appx. 222, 226 n.2 (10th Cir. 2009) (unpublished) (noting plaintiff’s “specific and supported allegations” that officials had refused his requests to certify his trust fund account statement, not reaching question of effect of these allegations). But see Moore v. David L. Moss Criminal Justice Center, 2012 WL 3686284, *1 (N.D.Okla., Aug. 24, 2012) (admonishing prisoner who said he had “trouble” getting a certified statement to keep trying).

1399 Hatchett v. Nettles, 201 F.3d 651 (5th Cir. 2000); accord, Thomas v. Butts, ___ F.3d ____, 2014 WL 975403, *2 (7th Cir. 2014) (holding district court abused its discretion in dismissing for non-payment of initial partial fee without determining whether the plaintiff was at fault for non-payment); Redmond v. Gill, 352 F.3d 801, 803-04 (3d Cir. 2003) (vacating dismissal where prisoner failed to meet a 20-day deadline for authorizing deduction of fees from his prison account; it was not clear whether he received the order, or received it in time to comply); Cosby v. Meadows, 351 F.3d 1324, 1331-32 (10th Cir. 2003) (agreeing that courts must ascertain whether prisoners sought to comply with orders to authorize fee payments before dismissing, rejecting plaintiff’s claim on the merits), cert. denied, 541 U.S. 1035 (2004); see Massaro v. Balicki, 2013 WL 6230488, *2 (D.N.J., Nov. 26, 2013) (same as Jordan); Jordan v. Hastings, 2012 WL 1600429, *2 (D.N.J., May 7, 2012) (“To the extent Plaintiff asserts that correctional officials have refused to provide the certified account statement, any such assertion must be supported by an affidavit specifically detailing the circumstances of Plaintiff’s request for a certified institutional account statement and the correctional officials’ refusal to comply, including the dates of such events and the names of the individuals involved.”); Armstrong v. Mukasey, 2008 WL 5401606, *2 (D.N.J., Dec. 22, 2008) (same as Jordan). But see Baldauf v. Garoute, 2007 WL 2697445, *12-13 (D.Colo., Sept. 11, 2007) (dismissing for repeated failures to make required payments).

provide the required information would violate the right of access to courts. IFP status may be granted conditionally to prisoners without an IFP application on a showing of imminent physical harm.

Prisoners generally may not be prohibited from bringing an action because they owe fees on a prior action. However, one federal circuit has held that prisoners who seek dishonestly to evade payment of filing fees or fail to pay fees incurred because they are subject to the “three strikes” provision can be denied IFP status or barred from filing. The Second Circuit has held, contrary to some other courts, that no more than one fee, plus one award of costs, may actually be collected at one time. If the court remits too much in collecting a filing fee, the remedy is to abate the collection temporarily.

Assessed costs must be paid in full in the same manner as filing fees. However, courts retain their pre-PLRA discretion to assess or refrain from assessing costs against indigent prisoners.

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1403 Walp v. Scott, 115 F.3d 308 (5th Cir. 1997).
1404 28 U.S.C. § 1915(g); see next section for further discussion.
1405 Campbell v. Clarke, 481 F.3d 967, 969-70 (7th Cir. 2007); Sloan v. Lesza, 181 F.3d 857, 859 (7th Cir. 1999); see Pozo v. Herwig, 2008 WL 4836411, *1 (E.D.Wis., Nov. 6, 2008) (stating the Seventh Circuit rule does not allow “imminent danger” exception), reconsideration denied, 2008 WL 5046453 (E.D.Wis. Nov. 25, 2008). But see Miller v. Donald, 541 F.3d 1091, 1099 (11th Cir. 2008) (prisoner subject to three strikes provision who has not paid filing fees owed cannot be barred from filing under “imminent danger of serious physical injury” exception to three strikes statute).
1408 28 U.S.C. § 1915(f)(2); see Skinner v. Govorchin, 463 F.3d 518, 523-24 (6th Cir. 2006) (holding state’s taking of 100% of funds to satisfy a costs award was unauthorized by the statute); Whitfield v. Scully, 241 F.3d at 278 (holding that only one award of costs may be collected at one time). In Skinner, id., the court held that an injunction forbidding the state’s collection practice prospectively would not violate the Tenth or Eleventh Amendment.
1409 Whitfield v. Scully, 241 F.3d at 273; Feliciano v. Selsky, 205 F.3d 568, 572 (2d Cir. 2000). The Second Circuit has held that “[u]nless there is a specific direction by the court for the payment of costs by a prisoner proceeding in forma pauperis, no costs may be taxed by the prevailing party.” Feliciano, id. The Sixth Circuit has rejected this view. Skinner, 463 F.3d at 521-22.
If a case is dismissed for failure to exhaust administrative remedies and then is refiled after exhaustion, the plaintiff does not have to pay another filing fee, according to the only federal circuit to rule on the question; district court decisions are mixed.  

Most courts have held that prisoners who are released after filing are treated like other litigants and may seek in forma pauperis status after release on the same terms as any other litigant, though some have held that they must pay any fees that were already due before their release.

VIII. Three Strikes Provision

A prisoner who has brought three actions or appeals “while incarcerated or detained in any facility” that were dismissed as frivolous, malicious, or failing to state a claim for relief may not “bring a civil action or appeal a judgment in a civil action or proceeding under this section”—that is, file in forma pauperis—unless the prisoner is under imminent danger of serious physical injury.\(^\text{1413}\) Apart from that imminent danger exception, the statutory language is

\(^{1410}\) See n. 264.


\(^{1413}\) 28 U.S.C. § 1915(g); see Harris v. City of New York, 607 F.3d 18, 21-22 (2d Cir. 2010) (holding provision applies to suits filed while the plaintiff is in prison, even if he has been released at the time the court addresses the issue); Oliphant v. Villano, 2010 WL 363446, *2 (D.Conn., Jan. 25, 2010) (appeals filed from prison were “strikes” even though the actions were initially filed when plaintiff was out of prison).

Some courts have held that a prisoner with three strikes is barred from intervening in an already filed civil action. Holloway v. Magness, 2008 WL 2367235, *9 (E.D.Ark., June 6, 2008); accord, Pinson v. U.S. Department of Justice, F.Supp.2d __, 2013 WL 5423107, *7 (D.D.C. 2013) (“This Court will not allow Mr. Stine to circumvent the three-strike rule by attempting to join the Plaintiff's complaint through joinder.”). These decisions do not explain how the statutory language “bring a civil action or appeal a judgment in a civil action or proceeding” applies to intervention, which fits neither phrase. Another decision disapproves a three-strike prisoner’s practice of filing motions in closed cases as a means of avoiding paying the filing fee. Hearn v. Redman, 2009 WL 2762446, *3 (D.Del., Aug. 27, 2009).

The statute does not prevent a plaintiff from filing an amended complaint in a suit brought before he had three strikes. Elkins v. Schrubbe, 2005 WL 1154273, *1 (E.D.Wis., Apr. 20, 2005). However, courts have held that prisoners with three strikes may not avail itself of the statute’s terms by adding new claims to an already filed complaint that could be brought separately. Walck v. Dunkerson, 316 Fed.Appx. 608, 609, 2009 WL 535825 (9th Cir. 2009); Pauline v. Patel, 2009 WL 454653, *8 (D.Haw., Feb. 23, 2009), report and recommendation adopted, 2009 WL 750188 (D.Haw., Mar. 19, 2009). Similarly, a prisoner with three strikes may not amend a habeas petition (which is
mandatory and categorical. That means a prisoner who can’t pay the whole fee up front is out of court—though some courts have held that, having filed the action or appeal, they have to pay the filing fee even if they don’t get anything for their fee. One federal circuit has held

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1414 In exceedingly rare circumstances, courts have declined to impose a strike for a case within the statutory bounds. See Duncan v. Kaelin, 2014 WL 258649, *3 (S.D.Tex., Jan. 23, 2014) (“recognizing Plaintiff’s frustration at the time he filed suit” with irregular outgoing mail pickup” and stating the dismissal should not be characterized as a strike); Barnes v. Reveley, 2012 WL 9189296, *1 (E.D.Va., Nov. 30, 2012) (directing that dismissal should not be deemed a strike because at the time he filed the case, plaintiff had not received the direction dismissing a similar claim); Roach v. Sterns County, 2010 WL 2629407, *3 (D.Minn., June 11, 2010) (recommending relieving plaintiff of paying the filing fee, “as he appears to completely misapprehend the requisites of a cognizable claim”), report and recommendation adopted, 2010 WL 2629403 (D.Minn., June 28, 2010); Wedington v. U.S. Federal Government, 2009 WL 2916860, *2-3 (D.Minn., Sept. 4, 2009) (prisoner erroneously filed a civil action to vacate a commitment order; “[i]n light of his pro se status and his apparent schizophrenia, it would be wholly inappropriate for such a mistake to contribute to limiting Wedington’s future access to the justice system”); Dalvin v. Beshears, 943 F.Supp. 578 (D.Md. 1996) (court granted Rule 60(b) motion to relieve plaintiff of a strike where he had filed suit to obtain a copy of a standing order of the court because he was unable to get it any other way). In even rarer instances, courts have allowed litigators with three strikes and no imminent danger to go forward. See Robbins v. Jordan, 2011 WL 253637, *1 (M.D.Fla., Jan. 26, 2011) (“This Court prefers to resolve the case on the merits rather than dismiss the case based on the three-strikes provision when in effect Plaintiff would be barred from refiling and having the merits of his claim addressed in federal court.” Court cites “unique circumstances” of having appointed counsel because of hardships of pursuing the action.).

1415 One court has held that both appeals courts and district courts have the discretion to bypass the three strikes question and proceed to the merits, at least in “extraordinary circumstances.” Smith v. Veterans Admin., 636 F.3d 1306, 1309-10 (10th Cir. 2011) (quoting Garcia v. Silbert, 141 F.3d 1415, 1417 n. 1 (10th Cir. 1998)), cert. denied, 132 S.Ct. 381 (2011); see Dubuc v. Johnson, 314 F.3d 1205 (10th Cir. 2003) (presenting three separate opinions, two finding discretion in different sources and one rejecting discretion). Presumably this authority is generally limited to cases where the court can summarily rule on the merits against the plaintiff. See Dixon v. United States, 2014 WL 486608, *2 (Fed.Cl., Feb. 6, 2014) (stating “the court has decided to waive the filing fee for purposes of ruling on the government’s motion to dismiss”; dismissing for lack of jurisdiction).

Another decision says, notwithstanding the statutory language, that district courts have the discretion to allow a litigant with three strikes to pay fees over time. Dudley v. U.S., 61 Fed.Cl. 685, 688 (Fed.Cl. 2004). It is also the case that a timely notice of appeal confers appellate jurisdiction even if the filing fee is not tendered timely. Daly v. U.S., 109 Fed.Appx. 210, 212, 2004 WL 1701062, *2 (10th Cir. 2004) (unpublished), and cases cited. To what extent this may allow litigants with three strikes to make arrangements to pay the filing fee as and when they have the money has not been explored. However, a number of decisions have rejected requests for delayed or periodic payments because that is what the prisoner gets when in forma pauperis status is granted. Flemming v. Fischer, 2009 WL 2156906, *1 (N.D.N.Y., July 15, 2009) (rejecting offer to pay in seven installments of $50); Taylor v. Ayers, 2008 WL 5211002, *3 (N.D.Cal., Dec. 11, 2008); Hyder v. Board of Paroles, 2008 WL 5070151, *1 (S.D.Tex., Nov. 21, 2008), vacated in part on reconsideration, 2008 WL 5401528 (S.D.Tex., Dec. 23, 2008); Jones v. Federal Bureau of Prisons, 2008 WL 2512919, *1-2 (E.D.Tex., June 19, 2008).

that a prisoner with three strikes who seeks IFP status anyway can be barred from any future filings in federal court.\textsuperscript{1417}

Exclusion from IFP status under § 1915(g) does not only affect payment of the filing fee; it also bars prisoners from receiving transcripts on appeal at government expense, which may preclude effective review even if the prisoner can muster the filing fee.\textsuperscript{1418} Some courts have gone further and held that exclusion from IFP status means that the court cannot appoint counsel.\textsuperscript{1419} In my view, that holding is wrong because it is contrary to the relevant statutory language. The counsel appointment provision says: “The court may request an attorney to represent any person unable to afford counsel.”\textsuperscript{1420} Unlike § 1915(g), it does not refer to persons “bring[ing]” suit “under this section.” Further, it refers to persons “unable to afford counsel,” unlike the other provisions of the statute that excuse persons from prepayment of the filing fee if they are “unable to pay such fees or give security therefor.”\textsuperscript{1421} Inability to pay a $350 filing fee (now enhanced by a $50 “administrative fee” for those not granted IFP status\textsuperscript{1422}) or a $450 appellate fee is obviously not the same as inability to pay a lawyer to pursue a civil lawsuit of any substance. The provision for appointment of counsel involves a separate analysis from “bringing an action” IFP, even though it appears in the IFP statute.\textsuperscript{1423}

At least one court has directed the Marshals to serve process for a prisoner with three strikes who was not proceeding IFP, since he did not seem to be able to accomplish it himself.\textsuperscript{1424} Another court has rejected an argument by defendants that they were entitled to

\textsuperscript{1417} Campbell v. Clarke, 481 F.3d 967, 969-70 (7th Cir. 2007) (prisoner with three strikes who sought to file again without prepaying all fees could be barred from further filings even if he paid the fees); Sloan v. Lesza, 181 F.3d 857, 859 (7th Cir. 1999).

\textsuperscript{1418} Maus v. Baker, 729 F.3d 708, 709-10 (7th Cir. 2013) (Posner, J., sitting as motions judge). The court notes that holdings that a litigant who can pay the filing fee may still be sufficiently indigent to receive free transcripts do not apply to prisoners with three strikes.


The Third Circuit has mitigated the harshness of the Brightwell rule in some IFP cases by appointing “amicus counsel” to argue specified points on the prisoner litigant’s behalf. Ball v. Famiglio, 726 F.3d 448, 455 (3d Cir. 2013), \textit{pet. for cert. filed}, Nos. 13-8254, 13A434 (Jan. 13, 2014); Byrd v. Shannon, No. 11-1744 (Order, Jan. 12, 2012).

\textsuperscript{1420} 28 U.S.C. § 1915(e)(1) (emphasis supplied).

\textsuperscript{1421} 28 U.S.C. § 1915(a)(1).

\textsuperscript{1422} Judicial Conference Schedule of Fees, District Court Miscellaneous Fee Schedule, ¶ 14 (effective May 1, 2013).


ignore service waivers and require the plaintiff to bear the costs of service because he had three strikes.\(^{1425}\)

The statutory language requires that § 1915(g) does not provide for dismissal, but only for exclusion from \textit{in forma pauperis} status, so most courts have allowed litigants found to have three strikes an opportunity to pay the filing fee.\(^{1426}\) Two circuits have held otherwise.\(^{1427}\)


\(^{1426}\) See, e.g., Ball v. Famiglio, 726 F.3d 448, 471 (3d Cir. 2013) (14 days after judgment to pay the filing fee), \textit{pet. for cert. filed}, Nos. 13-8254, 13A434 (Jan. 13, 2014); Dubuc v. Johnson, 314 F.3d 1205, 1207 (10th Cir. 2003) (“We VACATE the district court’s grant of Plaintiff’s motion to proceed \textit{in forma pauperis} and direct Plaintiff to pay the full filing fee within thirty days” or the appeal will be dismissed; citing earlier circuit decision doing the same); In re Alea, 286 F.3d 378, 379 (6th Cir. 2002) (holding district court “properly applied the three-strikes provision in this action by assessing the full filing fee against the petitioner and giving him 30 days in which to pay that fee before dismissing the action”); Smith v. District of Columbia, 182 F.3d 25, 29 (D.C. Cir. 1999) (holding person barred from filing as a poor person has 14 days to pay filing fee so that his suit may proceed); Henderson v. Caskey, 1997 WL 33827110 (5th Cir.1997) (unpublished) (revoking IFP, allowing 30 days to pay the fee); Davis v. Upton, 2012 WL 1194308, *2 (W.D.Okla., Apr. 10, 2012) (allowing 17 days to pay the fee); Herrman v. Ferriter, 2012 WL 1081076, *1 (D.Mont., Mar. 28, 2012) (allowing 32 days to pay the fee), \textit{appeal dismissed}, No. 12-35272 (9th Cir., Aug. 13, 2012); Tierney v. Alo, 2012 WL 622238, *3 (D.Haw., Feb. 24, 2012) (allowing 30 days to pay the fee or show cause why the complaint should not be dismissed), \textit{appeal dismissed}, No. 12-15611 (9th Cir., Apr. 12, 2012); Reynolds v. Luckenbaugh, 2012 WL 592879, *3 (D.Colo., Feb. 23, 2012) (allowing 30 days to pay the fee); Cox v. Federal Atty. Gen., 2012 WL 379747, *1 D.S.C., Feb. 3, 2012) (allowing 21 days to pay the fee); Southerland v. Patterson, 2012 WL 208105, *2 (S.D.N.Y., Jan. 23, 2012) (allowing 30 days to pay the fee); see Appendix A for additional authority on this point.

\(^{1427}\) Dupree v. Palmer, 284 F.3d 1234, 1236 (11th Cir. 2002) (holding suit must be dismissed without prejudice and refiled, since statute says fee is to be paid at the initiation of suit); Sloan v. Lesza, 181 F.3d 857, 859 (7th Cir. 1999) (holding that a prisoner subject to § 1915(g) who seeks IFP status should have his case dismissed for committing “a fraud on the federal judiciary”); accord, Grandinetti v. Inverness Medical Co., 2012 WL 3883646, *2 (D.Haw., Sept. 5, 2012); Eddington v. Boyles, 2011 WL 3444232, *1 (N.D.W.Va., Aug. 8, 2011) (following Dupree); Sayre v. Seifert, 2011 WL 1258112, *1 (N.D.W.Va., Apr. 1, 2011); Barbour v. Sandstrom-Keeffee Comissary Services, 2010 WL 1278171, *1 (W.D.Va., Mar. 31, 2010). In \textit{Harris v. City of New York}, 607 F.3d 18, 24 (2d Cir. 2010), the court affirmed dismissal without discussing whether dismissal is required. Two California decisions, \textit{Miller v. Keating}, 2011 WL 285080, *1 (E.D.Cal., Jan. 25, 2011) and \textit{Dean v. Medieros}, 2010 WL 3943525, *1-2 (E.D.Cal., Oct. 1, 2010), using identical language, grossly overstate the extent to which federal courts have held that dismissal without an opportunity to appeal is the proper disposition where the plaintiff has three strikes. For that proposition, they cite two Ninth Circuit cases, one of which held that a case was “properly dismissed” by the district court under § 1915(g), \textit{Tierney v. Kapers}, 128 F.3d 1310, 1311 (9th Cir. 1998), and another which dismissed an appeal without an opportunity to pay the fee, though it dismissed without prejudice and stated that the appellant “may resume this appeal upon prepaying the filing fee.” Rodriguez v. Cook, 169 F.3d 1176, 1182 (9th Cir. 1999). Neither decision made reference to the appropriateness of immediate dismissal versus allowing an opportunity to pay the fee. They then stated: “This conclusion is consistent with the conclusions reached in at least three other circuits,” appropriately citing \textit{Dupree v. Palmer}, but then asserting that the Fifth and Sixth Circuit also “follow the same rule” requiring dismissal without an opportunity to pay the fee. \textit{Miller}, 2011 WL 285080, *1 (emphasis supplied); accord, \textit{Dean}, 2010 WL 3943525, *2. From the Fifth Circuit, they cited \textit{Adpegbu v. Hammons}, 103 F.3d 383 (5th Cir. 1996), which indeed dismissed the three-striker plaintiff’s appeal, but without discussing whether an opportunity to pay the filing fee was appropriate. 103 F.3d at 388. From the Sixth Circuit, they cited \textit{In re Alea}, 286 F.3d 378 (6th Cir. 2002), which stands for the precisely opposite proposition: “we conclude the district court properly applied the three-strikes provision in this action by assessing the full filing fee against the petitioner and giving him 30 days in which to pay that fee before dismissing the action.” 286 F.3d at 382 (emphasis supplied). The \textit{Miller} and \textit{Dean} decisions do not acknowledge contrary authority from other circuits and from their own district, cited in the preceding footnote. Other decisions in the same district have held similarly. See Williams v. Higgins, 2013 WL 310560, *1-2 (E.D.Cal., Jan. 25, 2013); Givens v. Knipp, 2012 WL 4755166, *1-2 (E.D.Cal., Oct. 4, 2012); McElroy v. Asad, 2012 WL 3839409, *1-2 (E.D.Cal., Sept. 4, 2012); Bell v. Dileo, 2011
Dismissal, whether directly or after failing to pay the filing fee as ordered, is without prejudice, so the plaintiff can re-file and use the ordinary civilian in forma pauperis procedures if released (i.e., no longer a prisoner) before the limitations period has run. However, that fact does not moot an appeal of the denial of IFP status if the plaintiff is released during its pendency.

This statute bars many litigants with substantial claims from litigating them. The limitations period is not tolled by three strikes status, so a prisoner cannot wait until after release to file suit if the limitations period expires while he is incarcerated. Further, the inclusion in the statutory criteria of failure to state a claim allows prisoners to be charged strikes for raising claims that are legitimately debatable and about which courts are divided. One court has held that a litigant with three strikes can be barred from filing any further papers in court until all previously incurred fees have been paid. However, that rule cannot be extended to bar in forma pauperis filings by prisoners whose cases satisfy the “imminent danger of serious physical injury” exception to § 1915(g).

One federal appeals court has held that the three strikes provision is not the exclusive basis for denying IFP status to prisoners perceived to have abused the privilege. A court may deny IFP status to a prisoner who does not have three strikes based on “the number, content, frequency, and disposition of [the litigant’s] previous filings to determine if there is a pattern of abusing the IFP privilege in his litigation history.” This power is said to be distinct from the courts’ power to enjoin the activities of abusive litigants, and requires a lesser showing of abuse, since the latter involves a direct restriction on the right of access to courts, and the denial of IFP status is merely the restriction of a privilege. Having held that it is not restricted in this area by the terms of the PLRA, the court then adopted the terms of the PLRA with respect to the “imminent danger of serious physical injury” exception, discussed below, stating that such an exception “would comport with the considered policy judgment of Congress as expressed in the

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1429 Moore v. Maricopa County Sheriff’s Office, 657 F.3d 890, 893 (9th Cir. 2011) (“When considering whether a case is moot, we ask whether we can grant any effective relief ‘within the confines of the case itself.’” (citations omitted)).
1431 James v. Branch, 2009 WL 4723139, *10-11 (E.D.La., Dec. 1, 2009) (“This provision did not prevent James from filing a timely suit, it only prohibited his ability to do so as a pauper, without pre-payment of the filing fee.”).
1432 Hudson v. Michigan Dept. of Corrections, 2009 WL 56759, *9 (W.D.Mich., Jan. 8, 2009) (holding challenge to restriction on Uniform Commercial Code materials does not state a claim, charging strike, after lengthy discussion which notes that other cases have held to the contrary).
1433 Sloan v. Lesza, 181 F.3d 857, 859 (7th Cir. 1999).
1434 Miller v. Donald, 541 F.3d 1091, 1099 (11th Cir. 2008).
1435 Butler v. Department of Justice, 492 F.3d 440, 446 (D.C.Cir. 2007).
1436 Butler, 492 F.3d at 446. Mr. Butler was found to be an abusive litigant and denied IFP status based on some ten appeals and at least 15 actions, all but one unsuccessful. Id.

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PLRA”—despite its willingness to depart from the policy judgment of Congress in the PLRA as to when to exclude prisoners from IFP status. This argument has commanded some respect in another circuit, fortunately only in a sideshow of a concurring opinion, and has been effectively refuted by the dissenting judge in that case, who pointed out that the more specific guidance of Congress in § 1915(g) regarding exclusion from IFP status surely governs the use of the more general pre-existing discretion to do so.

Some states have passed their own statutes intended to control frivolous litigation by prisoners or by all litigants. One such provision, the California “vexatious litigant” statute, has been invoked in federal court prison litigation on a number of occasions. However, some federal courts have held that state law provisions of this sort are redundant of § 1915(g)’s requirement to prepay the filing fee and in conflict with its exception for cases of imminent danger of serious physical injury, or are otherwise inappropriate for invocation by federal courts.

1. Strikes Defined

“ Strikes” comprise only actions dismissed for the reasons stated in the statute: frivolousness, maliciousness, or failure to state a claim. (An affirmative defense that is

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1437 Mitchell v. Federal Bureau of Prisons, 587 F.3d 415, 420 (D.C.Cir. 2009) (stating that the exception it adopted “mirrors the PLRA’s”).
1439 Blakely, 738 F.3d at 629 (Motz, J., dissenting) (“It is ‘a commonplace of statutory construction that the specific governs the general,’ and this command applies with particular force where, as here, the general clause (§ 1915(a)(1)) is a ‘relic’ of an earlier (pre-$1915(g)$ reign.” (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384, 385 (1992))).
1440 Cal.C.C.P. § 391.1 (Title 3A, part 2, of the California Code of Civil Procedure).
1444 O’Neal v. Price, 531 F.3d 1146, 1155, n. 9 (9th Cir. 2008) (observing that “actions dismissed for procedural defects are not necessarily strikes under § 1915(g), though they may constitute strikes under certain circumstances.”); Tafari v. Hues, 473 F.3d 440, 443 (2d Cir. 2007) (refusing to treat an appeal dismissed as premature as a strike, stating the PLRA “was designed to stem the tide of egregiously meritless lawsuits, not those temporarily infected with remediable procedural or jurisdictional flaws”); Heard v. Blagojevich, 216 Fed.Appx. 568, 570, 2007 WL 445007, *2 (7th Cir., Feb. 7, 2007) (unpublished) (holding dismissal for fraud was not a strike); Andrews v. King, 398 F.3d 1113, 1120 (9th Cir. 2005); Saunders v. Saunders, 2013 WL 4040766, *5 (E.D.Cal., Aug. 7, 2013) (holding dismissal for non-payment of filing fee was not a strike where there it was unclear whether there was an underlying finding of the enumerated factors); Williams v. Horner, 2012 WL 5298466, *2 (E.D.Ark., Oct. 18, 2012) (holding dismissal after an evidentiary hearing for failure to produce enough evidence to create a jury issue was not a strike), report and recommendation adopted, 2012 WL 5290273 (E.D.Ark., Oct. 25, 2012); Benyamini v. Ogbeide, 2012 WL 4364329, *1 (E.D.Cal., Sept. 21, 2012) (holding dismissal as “so vague and conclusory that the court is unable to determine whether the current action is frivolous or fails to state a claim for
apparent on the face of the complaint means that the complaint fails to state a claim and is a strike.\(^{1445}\)

A dismissal that invokes the correct statutory grounds and standard is a strike even if it cites other reasons for dismissal in addition.\(^{1446}\) Dismissals made on any of the specified grounds of § 1915(g) are strikes regardless of the statutory authority under which they are granted or the procedural posture of the case.\(^{1447}\) Dismissals that fit the statutory criteria are strikes regardless of age\(^{1448}\) and even if they occurred before enactment of § 1915(g).\(^{1449}\)

At least, the foregoing—which adds up to no more than interpreting the statute the way it is written—represents the central tendency of the case law. Some district courts seem determined to push the envelope and find ways to broaden the definition of strikes,\(^{1450}\) thereby

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\(^{1445}\) This is true of dismissals for non-exhaustion. See nn. 1523-1524 below, for further discussion of such dismissals. See also Smith v. Doe, 2011 WL 613556, *1 (N.D.Ill., Feb. 14, 2011) (holding case that was time-barred on the face of the complaint was a strike). The Smith case goes on to hold, questionably, that the plaintiff’s argument for equitable tolling could also be determined on a motion to dismiss, though the arguments against equitable tolling were not based on the complaint).

\(^{1446}\) See Tolbert v. Stevenson, 635 F.3d 646, 654 n.9 (4th Cir. 2011) (holding dismissal of entire case on motion for judgment on the pleadings is a strike); Hafed v. Federal Bureau of Prisons, 635 F.3d 1172, 1177 (10th Cir. 2011) (holding dismissals under 28 U.S.C. § 1915A are strikes, as well as dismissals under § 1915(e)(2)(B)); Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005) (holding dismissals under Rule 12(b)(6) are strikes).


\(^{1448}\) Ibrahim v. District of Columbia, 208 F.3d 1032, 1036 (D.C.Cir. 2000); Welch v. Galie, 207 F.3d 130, 132 (2d Cir. 2000) (citation cases).

\(^{1449}\) See, e.g., Gibson v. Harrington, 2013 WL 1703543, *3 (S.D.Ill., Apr. 19, 2013) (stating that if plaintiff does not pay the full filing fee within 35 days, the court will dismiss with prejudice and count the case as a strike, without basis in the statute); McKee v. McKenna, 2012 WL 4127732, *7 (W.D.Wash., Aug. 10, 2012) (“Congress outlined three situations in which an inmate may receive a ‘strike.’ . . . Courts have read related situations into § 1915(g)
hastening prisoners’ exclusion from the benefits of *in forma pauperis* status. In the following elaboration of three strikes law, many of the footnotes will end with a *But see* or *Contra* section, citing cases that reflect this tendency.

The weight of authority holds that cases not brought *in forma pauperis* can be strikes; courts have emphasized that the statutory phrase “action or appeal” is not in terms limited to IFP cases.1451 Some district courts have held to the contrary, on the ground that the purpose of § 1915(g) is to prevent abuse of IFP procedures and that it appears within the IFP statute,1452 and that the “action or appeal” language is “a shorthand form referring back to the earlier use of the phrase ‘a civil action or appeal . . . under this section’— i.e., an action or appeal brought under the IFP section,”1453 noting that the Second Circuit had in fact interpreted § 1915(g) in that manner in a different context.1454

There is a conflict between circuits on the question whether a decision that does not explicitly state it was on the enumerated grounds can be a strike if other aspects of the decision suggest that it is based on those grounds. One court has held that “the dismissal of a complaint as repetitive and an abuse of process constitutes a strike under § 1915(g), regardless of whether

when a claim is baseless, without merit, or an abuse of the judicial process. While these situations are not literally within § 1915(g), they are clearly associated with actions that are frivolous, malicious, or fail to state a claim upon which relief may be granted.” (citations omitted), *report and recommendation adopted*, 2012 WL 4117625 (W.D.Wash., Sept. 18, 2012); Benyamini v. Hommer, 2011 WL 5875787, *2 (E.D.Cal., Nov. 22, 2011) (counting as a strike a case in which the court said it could not tell whether the complaint stated a claim or was frivolous, and was then dismissed for failure to prosecute when the plaintiff failed to file an amended complaint, citing as authority a case in which the court did find that the complaint did not state a claim); Read v. Bill, 2011 WL 6148635, *2 (W.D.N.Y., Oct. 21, 2011); Hargrove v. Johnson, 2012 WL 3987585, *2 (M.D.Ga., Aug. 15, 2012) (stating appeals dismissed for lack of jurisdiction (failure to designate an order appealed from and attempt to appeal a non-appealable order) were “essentially found to be without legal merit” and were therefore frivolous), *report and recommendation adopted*, 2012 WL 3987632 (M.D.Ga., Sept. 11, 2012), *appeal dismissed*, No. 12-1487 (11th Cir., Dec. 10, 2012); Bridgeforth v. U.S. Navy Recruitment Office, 2011 WL 5881780, *3 n.3, 5 (N.D.N.Y., May 18, 2011) (holding partial dismissals on the enumerated grounds to be strikes, stating “the goal of the PLRA is to not only reduce frivolous prisoner litigation, but to further reduce the congestion on the court's docket. Such goals were obtained through this partial dismissal”; charging two strikes for a case which was partly dismissed on the enumerated grounds, and then after an amended complaint was entirely dismissed; charging a strike where the plaintiff was not a prisoner when he filed an appeal, but filed an amended notice of appeal after reincarcaraion), *report and recommendation adopted*, 2011 WL 5881778 (N.D.N.Y., Nov. 23, 2011).


1452 *Liner v. Fischer*, 2012 WL 2847910, *3 (S.D.N.Y., July 11, 2012) (holding non-IFP dismissals are not strikes; noting that the three strikes provision was intended “to limit the ability of prisoners to file numerous lawsuits without regard to the costs or the merits of their claims,” and that it is a subsection of the IFP statute and not other PLRA provisions), *report and recommendation adopted*, 2012 WL 4849130 (S.D.N.Y., Oct. 12, 2012).


1454 The court pointed out that in *Jones v. Smith*, 720 F.3d 142 (2d Cir.2013), in determining that dismissal of a habeas petition is not a strike, the Second Circuit held that “the most natural reading of the three strikes provision is that the term ‘action or appeal’ in the second half of the provision is simply an abbreviated reference to the term ‘civil action or appeal’” appearing earlier in the same sentence. 720 F.3d at 146. The *Jones v. Moorjani* court concluded: “If, as [Jones v. Smith] held, the second occurrence of ‘action or appeal’ necessarily imputes the adjective ‘civil’ from the first, the same logic calls for the modifying phrase ‘under this section’ to be carried over as well. 2013 WL 6569703, *9.
the district court used the words ‘frivolous’ or ‘malicious.’”¹⁴⁵⁵ In my view, such a rule is excessively broad. Cases can be repetitive for various reasons, such as confusion on the part of the plaintiff, or the existence of a genuine issue as to the extent to which the claims are precluded by prior judgments. “Abuse of process” is a broad and almost contentless phrase outside the context of the common law tort of that name. For either category, requiring that the district court actually make a judgment that the case was frivolous or malicious is important to keep the application of the statute within the bounds of its language. Arguably this entire discussion in the Childs opinion is dictum because in that case, the magistrate judge did use the word malicious, though the district judge did not do so when adopting the magistrate judge’s recommendation.¹⁴⁵⁶ However, it appears clear that the appeals court intended to announce a rule governing future litigation in that circuit.

Two days after Childs, the Third Circuit took the opposite approach, holding that a strike will accrue “only if the entire action or appeal is (1) dismissed explicitly because it is ‘frivolous,’ ‘malicious,’ or ‘fails to state a claim’ or (2) dismissed pursuant to a statutory provision or rule that is limited solely to dismissals for such reasons, including (but not necessarily limited to) 28 U.S.C. §§ 1915A(b)(1), 1915(e)(2)(B)(i), 1915(e)(2)(B)(ii), or Rule 12(b)(6) of the Federal Rules of Civil Procedure.”¹⁴⁵⁷ This decision, unusually, rejected on rehearing its own six-week-old prior opinion, which had held that a dismissal as “without merit” under 28 U.S.C. § 1915(e)(2)(B) that did not reference any of the language of § 1915(g) was a strike since the “without merit” characterization is often associated with frivolousness, and the entire appeal had been described as “without merit.”¹⁴⁵⁸ The court explained its turnaround and adoption of a bright-line rule on rehearing that “we are ultimately persuaded that the PLRA’s purpose is best served by taking an approach that does not open the door to more litigation surrounding § 1915(g).”¹⁴⁵⁹ The Seventh Circuit adopted a similar bright-line rule in holding that cases that were not dismissed on the statutory grounds are not strikes even if they could or should have been dismissed on those grounds.¹⁴⁶⁰

Failure to state a claim, for purposes of § 1915(g), is generally taken to have the same meaning as it has under Rule 12(b)(6), Fed.R.Civ.P.¹⁴⁶¹ However, some federal appeals courts have held that dismissals under Rule 8(a), which prescribes a “short and plain” statement of the

¹⁴⁵⁵ Childs v. Miller, 713 F.3d 1262, 1265-66 (10th Cir. 2013).
¹⁴⁵⁶ Childs v. Miller, 713 F.3d at 1266.
¹⁴⁵⁷ Byrd v. Shannon, 715 F.3d 117, 126 (3d Cir. 2013); accord, Everett v. Whaley, 504 Fed.Appx. 245, 246 (4th Cir. 2013) (unpublished) (holding dismissal is not a strike without “an explicit determination that Everett’s entire action failed to state a claim or was otherwise frivolous or malicious”).
¹⁴⁵⁸ Byrd v. Shannon, 709 F.3d 211 (3d Cir. 2013), rehearing granted and opinion vacated, 711 F.3d 370 (3rd Cir. 2013), on rehearing, 715 F.3d 117 (3d Cir. 2013).
¹⁴⁵⁹ Byrd v. Shannon, 715 F.3d at 126.
¹⁴⁶⁰ Paul v. Marberry, 658 F.3d 702, 706 (7th Cir. 2011) (holding dismissals for failure to prosecute that should have been dismissed as failing to state a claim were not strikes; “the plaintiff was entitled to take the previous dismissals at face value, and since none of them was based on any of the grounds specified in section 1915(g), to infer that he was not incurring strikes by the repeated dismissals”).
¹⁴⁶¹ Coleman v. Tollefson, 733 F.3d 175, 177 (6th Cir. 2013); Childs v. Miller, 713 F.3d 1262, 1266 (10th Cir. 2013); Moore v. Maricopa Cnty. Sheriff’s Office, 657 F.3d 890, 893 (9th Cir.2011) (citing past cases in jurisdiction); Haury v. Lemmon, 656 F.3d 521, 523 (7th Cir. 2011); Thompson v. DEA, 492 F.3d 428, 437–38 (D.C.Cir. 2007).
claim and the basis for jurisdiction, and a demand for the relief sought, may also be strikes if the plaintiff has repeatedly failed to amend to correct the violation.\footnote{1462}{Knapp v. Hogan, 738 F.3d 1106, 1110 (9th Cir. 2013) (“We hold that dismissals following the \textit{repeated} violation of Rule 8(a)’s ‘short and plain statement’ requirement, following leave to amend, are dismissals for failure to state a claim under § 1915(g). . . . When a litigant knowingly and repeatedly refuses to conform his pleadings to the requirements of the Federal Rules, it is reasonable to conclude that the litigant simply cannot state a claim.”); Paul v. Marberry, 726 F.3d 702, 705 (7th Cir. 2011) (holding that a complaint that is “irremediably unintelligible” gives rise to an inference that the plaintiff cannot state a claim).} Dismissal for suing an immune defendant is not listed in § 1915(g) as the basis for a strike, despite its presence in other PLRA sections pertaining to \textit{in forma pauperis} proceedings,\footnote{1463}{Compare 28 U.S.C. § 1915(e)(1)(B) (providing for dismissal of an \textit{in forma pauperis} claim that “(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief”); 28 U.S.C. § 1915A (providing for dismissal of prisoner cases against government defendants on same grounds); 42 U.S.C. § 1997e(c) (providing for dismissal of prisoner challenges to prison conditions on same grounds).} and most courts that have considered § 1915(g)’s language in context have drawn the obvious conclusion that Congress did not intend such dismissal automatically to constitute strikes.\footnote{1464}{Ball v. Famiglio, 726 F.3d 448, 461 (3d Cir. 2013) (“The text of the PLRA, however, treats dismissal for frivolousness as separate and distinct from dismissal on grounds of immunity. Like failure to state a claim, frivolousness is listed as a ground for prescreening dismissal, and it is listed separately and distinctly from dismissal due to immunity.”), \textit{pet. for cert. filed}, Nos. 13-8254, 13A434m 2014 WL 199634 (Mar. 24, 2014); Byrd v. Shammon, 715 F.3d 117, 126 (3d Cir. 2013) (holding citation to 28 U.S.C. § 1915(e)(2)(B) in dismissal did not establish a strike, since that statute is not limited to dismissals as frivolous, malicious, or failing to state a claim, but also provides in § 1915(e)(2)(B)(iii) for dismissals for suing an immune defendant); Perkins v. Lora, 2011 WL 1790460, *2 (E.D.Mich., May 10, 2011) (“The plain language of the statute, however, supports a finding that [immunity dismissal] should not constitute a strike. . . . That the immune-from-such-relief language is included in § 1915(e) (2) and excluded from § 1915(g) indicates that Congress did not intend a dismissal on immunity grounds to count as a strike.”); Finley v. Gonzales, 2009 WL 2581357, *3 (E.D.Cal., Aug. 20, 2009), \textit{report and recommendation adopted}, 2009 WL 3816907 (E.D.Cal., Nov. 13, 2009); Muqit v. Kitchens, 2009 WL 87429, *1 n.1 (D.S.C., Jan. 13, 2009); Searcy v. Federal Bureau of Prisons, 2007 WL 4322152, *5 (D.S.C., Dec. 6, 2007). There is contrary authority, but it mostly does not analyze the statutory language. \textit{See, e.g.,} Barnes v. Seymour, 2009 WL 6547636, *2 (D.S.C., Nov. 10, 2009), \textit{report and recommendation adopted}, 2010 WL 2293237 (D.S.C., June 4, 2010), \textit{aff’d in part, vacated in part on other grounds, remanded}, 416 Fed.Appx. 300 (4th Cir. 2011); Johnson v. Marshall, 2009 WL 4827383, *1 (M.D.Ala., Dec. 10, 2009); Lamb v. Kirkland Correctional Inst., 2009 WL 3378263, *2 (D.S.C., Oct. 14, 2009); Garland v. Armor Health Services, 2009 WL 3242290, *3 (S.D.Fla., Sept. 30, 2009); Rivera v. McNeil, 2009 WL 1154118, *2 (S.D.Fla., Apr. 24, 2009); Lamb v. Does, 2009 WL 982586, *7 (D.S.C., Apr. 9, 2009). Notwithstanding the above, if the defendant’s immunity is apparent on the face of the complaint, the complaint fails to state a claim or is frivolous. Ha\textit{fed} v. Federal Bureau of Prisons, 635 F.3d 1172, 1178 (10th Cir. 2011).} This holding is questionable, since it erases the distinction between § 1915’s omission of immunity dismissals and other PLRA provisions’ inclusion of them.\footnote{1465}{Similarly, the decision in \textit{Simpson} v. \textit{WCHS/Eyewitness News}, 2010 WL 4256185, *2 (S.D.W.Va., Oct. 21, 2010), holding that plaintiff has three strikes, based on decisions that he had failed to state a claim against judicial immunity is ‘frivolous’ for purposes of 28 U.S.C. § 1915(g).\textsuperscript{19} \textit{Hafed} v. Federal Bureau of Prisons, 635 F.3d 1172, 1178 (10th Cir. 2011).} At a minimum, a case-by-case analysis of whether the particular claim

was frivolous under the circumstances would seem to be required. The Second Circuit has acknowledged this point in connection with prosecutorial immunity.

Dismissals for lack of prosecution, lack of jurisdiction, improper venue, or expiration of the statute of limitations are not generally strikes unless there is also a finding officers entitled to absolute immunity, appears to gloss over the statutory distinction between strikes and immunity dismissals.

Collazo v. Pagano, 656 F.3d 132 (2d Cir. 2011) (applying Mills v. Fischer holding to claim of prosecutorial immunity). In Collazo, the court said:

We recognize that, unlike absolute judicial immunity, absolute prosecutorial immunity can be difficult to adjudicate. . . . We also recognize that a pro se plaintiff is unlikely to be able to distinguish between a meritorious and a frivolous case in many instances. We therefore limit our holding to dismissals for that readily distinguishable heartland of immune prosecutorial conduct that was spelled out by the Supreme Court twenty years ago in Burns [v. Reed]—conduct that is “intimately associated with the judicial phase of the criminal process.” . . . Accordingly, our holding does not extend to cases in which the claimed injury arises out of investigatory or other non-immune conduct by a prosecutor. . . . Neither does it extend to cases in which the complaint is not dismissed sua sponte pursuant to 28 U.S.C. § 1915(g).

Collazo, 656 F.3d at 134 n.2. Accord, Flagler v. Trainor, 663 F.3d 543, 551 (2d Cir. 2011) (concurring opinion) (emphasizing Collazo’s limits on holding dismissals for prosecutorial immunity frivolous, and noting some claims dismissed on grounds of prosecutorial immunity are not frivolous even if they lose).


Moore v. Maricopa County Sheriff’s Office, 657 F.3d 890, 893 (9th Cir. 2011) (adopting reasoning and holding of Thompson v. DEA); Haury v. Lemmon, 656 F.3d 521, 523 (7th Cir. 2011) (“We agree that a dismissal for lack of


\textsuperscript{1472} Myles v. U.S., 416 F.3d 551, 553 (7th Cir. 2005) (noting that dismissal based on limitations is not a strike since it is based on an affirmative defense); Daniels v. Woodford, 2008 WL 2079010, *6, 8 (C.D.Cal., May 13, 2008). In \textit{Ransom v. Gonzalez}, 2013 WL 5230040, *5 (E.D.Cal., Sept. 16, 2013), \textit{report and recommendation adopted in pertinent part}, 2013 WL 6331208 (E.D.Cal., Dec. 5, 2013) the court noted that a case may be dismissed as time-barred for reasons evident on the face of the complaint (which would constitute a strike), or by motion to dismiss if the defense is not facially evident, and that it could not determine which was the case without examining the order of dismissal as well as the docket entry.

\textsuperscript{1473} See Cohen v. Corrections Corp. of America, 439 Fed.Appx. 489, 491 (6\textsuperscript{th} Cir. 2011) (unpublished) (dismissal for lack of jurisdiction can be a strike where the invocation of federal jurisdiction was frivolous, \textit{i.e.}, there was no possible basis for asserting it); Ellison v. Kennelly, 2013 WL 1788511, *2 (S.D.II., Apr. 26, 2013) (“Dismissal for lack of subject matter jurisdiction in a situation such as this, where the assertion of jurisdiction is frivolous, constitutes as ‘strike’ for purposes of 28 U.S.C. § 1915(g),”); Burnett v. Fitzgerald, 2011 WL 2881302, *3 (W.D.Mich., May 31, 2011) (holding claim dismissed for lack of jurisdiction under Rooker-Feldman doctrine was frivolous and therefore a strike), \textit{report and recommendation adopted}, 2011 WL 2881249 (W.D.Mich., July 18, 2011).

\textsuperscript{1474} Moore v. Maricopa County Sheriff’s Office, 657 F.3d 890, 895 (9th Cir. 2011).

\textsuperscript{1475} Hafed v. Federal Bureau of Prisons, 635 F.3d 1172, 1178-79 (10th Cir. 2011) (dismissal for failure to pay the filing fee after finding of frivolousness and denial of IFP status was a strike); Thompson v. Drug Enforcement Admin., 492 F.3d 428, 433 (D.C.Cir. 2007) (holding case declared frivolous on appeal, with the plaintiff given 35 days to file for reconsideration and then dismissed for lack of prosecution, is a strike since the finding of frivolousness is the reason it is not going forward); Saunders v. Saunders, 2013 WL 4040766, *4 (E.D.Cal., Aug. 7, 2013) (similar to \textit{Hafed}); Thomas v. Yates, 2012 WL 2520924, *2-3 (E.D.Cal., June 27, 2012) (similar to \textit{Thompson}); Thomas v. Felker, 2012 WL 2116406, *3 (E.D.Cal., June 11, 2012) (similar to \textit{Hafed}).
district court does not used the word “dismissed.” However, courts have held that if a case is dismissed for failure to submit an amended complaint, or voluntarily dismissed in lieu of filing an amended complaint, it is not a strike. This holding makes sense because the three strikes provision “was designed to stem the tide of egregiously meritless lawsuits, not those temporarily infected with remediable procedural or jurisdictional flaws.”

One federal circuit has held that dismissal for abuse of the judicial system, as by disobeying a court order or misrepresenting facts to the court, is a strike. That is a

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1476 O’Neal v. Price, 531 F.3d 1146, 1152-53 (9th Cir. 2008).
1478 Tafari v. Hues, 473 F.3d 440, 443 (2d Cir. 2007).

A recent appellate decision holds that “the dismissal of a complaint as repetitive and an abuse of process constitutes a strike under § 1915(g), regardless of whether the district court used the words ‘frivolous’ or ‘malicious.’” Childs v. Miller, 713 F.3d 1262, 1265-66 (10th Cir. 2013). Whether the phrase “abuse of process” is coextensive with the “abuse of the judicial process” referenced by Rivera v. Allin is unclear; Childs involved repetitive claims. See nn. 1455-1456, above, for further discussion of the Childs decision.

questionable generalization; the statute refers to an “action or appeal . . . dismissed” as frivolous, malicious, or failing to state a claim, language which seems directed to the nature of the claims, and not to collateral misconduct that a prisoner may engage in during or before litigation.\textsuperscript{1480} Of course a court may declare a particular abuse of the judicial process to be malicious.\textsuperscript{1481}

A duplicative complaint is not a strike unless it is deemed malicious by the court.\textsuperscript{1482} One circuit has held that dismissal without prejudice for failure to state a claim is not a strike, since such dismissals include perfectly meritorious cases that were inadequately pled, though dismissal as frivolous is always a strike.\textsuperscript{1483} Other circuits have rejected this conclusion.\textsuperscript{1484} One district court stating that “no prisoner may maintain more than two (2) civil actions in forma pauperis at one time, unless the prisoner shows that he or she is under imminent danger of serious physical injury,” and states that if the plaintiff files any additional IFP complaints containing multiple causes of action, he should be assessed a strike for each separate claim. There is no discernible basis in the statute for this holding, and the cited standing order appears inconsistent with the in forma pauperis statutory scheme, of which the three strikes provision is a part.\textsuperscript{1480} See Hoskins v. Dart, 633 F.3d 541, 544 (7th Cir. 2011) (holding disobedience of a court order is not a strike, and not malicious absent a finding of intent to harass); Kalwasinski v. McCraken, 2009 WL 4042973, *5 (W.D.N.Y., Nov. 19, 2009) (dismissal for gross misconduct comprising threats to murder the defendants and their families was not a strike; “[a]s egregious as Plaintiff's conduct was in that case,” it does not fit the statutory criteria).

See, e.g., May v. Patterson, 2013 WL 4776345, *3 (S.D.Ala., Sept. 5, 2013) (holding “[a]n action is deemed malicious under § 1915(e)(2)(B)(i) when a prisoner plaintiff affirmatively misrepresents his prior litigation history on a complaint form requiring disclosure of such history and signs it under penalty of perjury, as such a complaint is an abuse of the judicial process that warrants the case's dismissal without prejudice”), motion for relief from judgment denied, 2013 WL 5634141 (S.D.Ala., Oct. 16, 2013). Compare O'Conner v. Carnahan, 2014 WL 293457, *3-4 (N.D.Fla., Jan. 27, 2014) (declining to find incomplete information on prior litigation malicious where the plaintiff disclosed all that he could remember and explained that he did not have his personal property which would have records of others).


McLean v. U.S., 566 F.3d 391, 396-99 (4th Cir. 2009). The earlier decision in Day v. Maynard, 200 F.3d 665, 667 (10th Cir. 1999) (per curiam), says otherwise, but as McLean points out, Day does not provide any reasoning to support its conclusion, and the cases Day relies on did not involve dismissals for failure to state a claim. McLean, 566 F.3d at 398. The Third Circuit has held that a “dismissal based on failure to exhaust, pursuant to Rule 12(b)(6), [must] be with prejudice” to be a strike, since 28 U.S.C. § 1915(g) uses the language of Rule 12(b)(6), and Rule
court has held that dismissal at initial screening is a strike, but dismissal resulting from a defendant’s Rule 12(b)(6) motion is not; this holding is not supported by the statutory language.\textsuperscript{1485} Certification that an appeal would not be taken in good faith does not make a dismissal a strike; “[i]t is the underlying disposition which matters.”\textsuperscript{1486} Cases need not be about prison conditions for their dismissal to constitute a strike.\textsuperscript{1487} An action consisting only of a preliminary injunction motion, with no complaint ever filed, is a strike if dismissed on the statutory grounds.\textsuperscript{1488}

If the basis of a dismissal cannot be determined, the dismissal cannot be counted as a strike.\textsuperscript{1489} Dismissals in state court are not strikes.\textsuperscript{1490} Voluntary dismissal is not a strike.\textsuperscript{1491}

\begin{itemize}
\item \textbf{12(b)(6) dismissals are on the merits unless specified to be without prejudice.} Ball v. Famiglio, 726 F.3d 448, 460 n.17 (3d Cir. 2013), \textit{pet. for cert. filed.}, Nos. 13-8254, 13A434, 2014 WL 199634 (Mar. 24, 2014). The holding is limited to dismissals for non-exhaustion, but the court’s rationale would seem to extend to all Rule 12(b)(6) dismissals—and, for that matter, to all other dismissals for failure to state a claim, \textit{e.g.}, under 28 U.S.C. § 1915(e)(2)(i), 28 U.S.C. § 1915A(b)(1), or 42 U.S.C. § 1997e(c)(1).\textsuperscript{1484}
\item Owens-Ali v. Pennell, 2010 WL 1225097, *3 (D.Del., Mar. 30, 2010). The court reasoned that the PLRA’s intent is to curb excessive frivolous filings and it does so by providing for \textit{spua sponte} dismissal at the outset, and the three strikes provision should therefore be applied only to dismissals at that procedural stage. It acknowledged that the statute includes language similar to that in Rule 12(b)(6), Fed.R.Civ.P., but said that the statute did not explicitly refer to Rule 12(b)(6)—an unconvincing decision, in my view. Numerous courts have held that the standard to be applied under § 1915(g) is the same as is applied on a motion under Rule 12(b)(6). \textit{See, e.g.}, Tafari v. Hues, 473 F.3d 440, 442 (2d Cir. 2007); Arambula v. Hedgpeth, 2010 WL 3749331, *3 (N.D.Cal., Sept. 23, 2010); Johnson v. Delgado, 2010 WL 2367389, *4 (S.D.Ill., June 11, 2010); Smith v. City of Milwaukee Police Dept., 2010 WL 1404351, *1 (E.D.Wis., Apr. 2, 2010) (dismissal without prejudice for failure to state a claim is on the merits and is a strike); Smith v. Milwaukee Secure Detention Facility, 2010 WL 960012, *2 (E.D.Wis., Mar. 12, 2010) (dismissal that did not say with prejudice, but found that the complaint failed to state a claim, was an adjudication on the merits and a strike).\textsuperscript{1485}
\end{itemize}
The denial of a temporary restraining order is not a strike.\textsuperscript{1492} Cases that were not filed while the plaintiff was a prisoner are not strikes.\textsuperscript{1493} Cases dismissed because the court disallowed multiple plaintiffs’ proceeding jointly are not strikes.\textsuperscript{1494}

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Most courts have held that a grant of summary judgment is not a strike.\textsuperscript{1495} That makes sense, since the question on summary judgment is whether material facts are in dispute, not whether the case is frivolous, malicious, or fails to state a claim. However, one recent Fourth Circuit decision has qualified that view, holding that “the fact that an action was dismissed as frivolous, malicious, or failing to state a claim, and not the case’s procedural posture at dismissal, determines whether the dismissal constitutes a strike under Section 1915(g).”\textsuperscript{1496} That is, “a summary judgment dismissal stating on its face that the dismissed action was frivolous, malicious, or failed to state a claim counts as a strike for purposes of the PLRA’s three-strikes provision.”\textsuperscript{1497} The court based its holding in large part on the fact that “dismiss” is defined in


\textsuperscript{1497} Blakely, 738 F.3d at 613 n.3 (emphasis supplied). The court further stressed the requirement of explicitness in a footnote: “Whether a court rings the PLRA bell in its opinion or judgment order is immaterial, so long as the summary judgment dismissal is explicitly predicated on one of the three ground enumerated in Section 1915(g).” Id., 738 F.3d at 613 n.3. Under this holding, district courts need not “parse summary judgment orders and their supporting documents’ to determine if the orders constituted strikes.” Id., 738 F.3d at 616 (quoting Tolbert, 635 F.3d 646, 653 n.7 (4th Cir. 2011)). The Blakely court distinguished much prior precedent from its own circuit and elsewhere on the ground that prior decisions did not involve purported strikes which actually made findings of frivolousness, malice, or failure to state a claim. Blakely, 738 F.3d at 613-15. Accord, Parks v. Samuels, 540 Fed.Appx. 146, 150 (3d Cir. 2014) (following Blakely, holding summary judgment decision in case which had previously been held to state a claim is not a strike).
various dictionaries as meaning to terminate without a trial.\textsuperscript{1498} It also held that its construction is consistent with the purpose of the statute to reduce the number of frivolous prisoner suits.\textsuperscript{1499}

This holding is troubling because it invites district courts granting summary judgment to adopt the three strikes language as boilerplate in cases they have determined should not go forward under a different standard, without requiring that they spell out their reasoning for making a three strikes finding in addition to the summary judgment finding that is sufficient to dispose of the case. This decision itself illustrates this concern, since the cases denoted as strikes state, \textit{e.g.}, that they should “be considered a ‘strike’ for purposes of the ‘three strikes’ rule set forth in 28 U.S.C. § 1915(g). This court holds that this case qualifies as a dismissal on the grounds that it is ‘frivolous, malicious, or fail [ ] to state a claim upon which relief may be granted[,]’ . . . .\textsuperscript{1500}

Where a court does not even identify which of the three separate bases for finding a strike it is relying on, in a case where a three strikes determination is surplusage anyway for purposes of deciding the case, it is difficult to be confident that its use of the three strikes language is reliable enough to be credited in deciding whether a litigant will have access to \textit{in forma pauperis} status in the future. The dissenting opinion points out that this problem undermines the majority’s promise that requiring an explicit finding of one of the enumerated factors in § 1915(g) will simplify the courts’ task:

This asserted limitation, however, runs into a different problem. It requires an appellate court inappropriately to acquiesce in a district court’s determination of an issue that the parties may not have had an opportunity to address and that is totally unnecessary to the court’s grant of summary judgment. . . . The majority’s view thus forces appellate courts into an untenable catch–22: rubberstamp district court decisions on issues not strictly before them or expend time and energy to decide these issues independently.\textsuperscript{1501}

The statute counts appeals as strikes only if they are “dismissed . . . [as] frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted.”\textsuperscript{1502} Mere affirmance of the district court’s dismissal is not a strike,\textsuperscript{1503} even summary affirmance,\textsuperscript{1504} nor is dismissal

\textsuperscript{1498} \textit{Blakely}, 738 F.3d at 611-12. The dissenting opinion responded: “But neither imprecise common usage nor an overbroad dictionary definition can eliminate a lesson learned in the first year of law school: dismissal and summary judgment differ in important respects. Both can terminate an action, but a case resolved by summary judgment is not ‘dismissed.’ ” 738 F.3d at 626 (Motz, J., dissenting).

\textsuperscript{1499} \textit{Blakely}, 738 F.3d at 612-13. The dissenting judge pointed out that reducing frivolous suits was “but a means to an end,” the end being “to reduce the burden on overworked courts,” and argued that counting summary judgments as strikes “would require courts to engage in a time-intensive, individualized inquiry” to determine which ones qualified. \textit{Id.}, 738 F.3d at 627 (dissenting opinion).

\textsuperscript{1500} \textit{Blakely}, 738 F.3d at 616 (record citation omitted).

\textsuperscript{1501} \textit{Blakely}, 738 F.3d at 628 (dissenting opinion).


\textsuperscript{1503} Ball v. Famiglio, 726 F.3d 448, 464 (3d Cir. 2013), \textit{pet. for cert. filed}, Nos. 13-8254, 13A434, 2014 WL 199634 (Mar. 24, 2014); Thompson v. Drug Enforcement Admin., 492 F.3d 428, 436 (D.C.Cir. 2007); Owens v. Isaac, 487 F.3d 561, 563 (8th Cir. 2007) (per curiam); Malek v. Reding, 195 Fed. Appx. 714, 716 (10th Cir. 2006); Jennings v.
of the appeal on grounds not specified in the statute. Two strikes are charged if the district court dismissal is a strike and the appeals court also dismisses on the statutory grounds.

Most courts have held that partial dismissal on the enumerated grounds is not a strike. One federal circuit held to the contrary, with little basis in my view. The result of this rule


Tafari v. Hues, 473 F.3d 440, 442-44 (2d Cir. 2007) (holding an appeal dismissed as premature was not a strike); Farley v. Virga, 2012 WL 3070632, *3 (E.D.Cal., July 26, 2012) (holding an appellate finding that issues are “insubstantial” and a summary affirmed are not the same as a finding of frivolousness; declining to charge a strike), report and recommendation adopted, 2012 WL 4468540 (E.D.Cal., Sept. 26, 2012).


See Byrd v. Shannon, 715 F.3d 117, 125 (3d Cir. 2013) (“We agree with the majority of our sister courts of appeals that § 1915(g) requires that a prisoner’s entire action or appeal be dismissed on enumerated grounds in order for the dismissal to count as a strike.”); Taylor v. Hull, 538 Fed.Appx. 734, 735 (8th Cir. 2013) (unpublished) (“The plain language in § 1915(g) requires that the entire action be dismissed on one or more of three enumerated grounds, i.e., as frivolous, malicious, or for failing to state a claim.”) (citing Tolbert v. Stevenson, infra); Taylor v. Phillips, 417 Fed.Appx. 607, 608 (8th Cir. 2011) (unpublished) (relying on Tolbert); Tolbert v. Stevenson, 635 F.3d 646, 651 (4th Cir. 2011) (holding “§ 1915(g) requires that a prisoner’s entire ‘action or appeal’ be dismissed on enumerated grounds in order to count as a strike”); describing Jones v. Bock’s use of “action” to mean “claim” anomalous, based only on boilerplate character of “no action shall be brought” language); Thompson v. Drug Enforcement Admin., 492 F.3d 428, 432 (D.C.Cir. 2007) (statute does not apply to actions “containing at least one claim falling within none of the three strike categories”); Mayfield v. Texas Dep’t of Criminal Justice, 529 F.3d 599, 617 (5th Cir. 2008) (holding case should not be a strike because some claims should have survived to summary judgment stage); Powells v. Minnehaha County Sheriff Dept., 198 F.3d 711, 713 (8th Cir. 1999); Jones v. Moorjani, 2013 WL 6569703, *6-8 (S.D.N.Y., Dec. 13, 2013) (noting that “action” was used to mean the entire case throughout the PLRA and in the Federal Rules of Civil Procedure), report and recommendation adopted, 2014 WL 351628 (S.D.N.Y., Jan. 31, 2014); Orraca v. Augustine, 2013 WL 5411703, *2 n.4 (W.D.N.Y., Sept. 17, 2013); McNair v. Kelly, 2013 WL 4574247, *2 (S.D.N.Y., Aug. 26, 2013); Jackson v. Fromm, 2012 WL 6853512, *2-3 (N.D.Fla., Dec. 27, 2012), report and recommendation adopted, 2013 WL 147627 (N.D.Fla., Jan. 14, 2013); Jennings v. Federal Bureau of Prisons, 2011 WL 6934764, *3-4 (E.D.N.Y., Nov. 17, 2011), report and recommendation adopted, 2011 WL 6936354 (E.D.N.Y., Dec. 30, 2011); Tafari v. Hues, 539 F.Supp.2d 694, 701-02 (S.D.N.Y. 2008) (extensive discussion and review of case law); Maree-Bey v. Williams, 2006 WL 463259, *1 (D.D.C., Feb. 24, 2006) (“Under the plain language of the statute, the dismissal of a claim in a pending action possibly triggers the so-called three-strikes bar.”); Juarez v. Frank, 2006 WL 47064, *5 (W.D.Wis., Jan. 6, 2006) (where state law claim was dismissed because court declined to exercise supplemental jurisdiction, case was not a strike); Fortson v. Kern, 2005 WL 3465843, *2 (E.D.Mich., Dec. 19, 2005) (holding that case deemed frivolous as to one defendant and otherwise dismissed for failure to pay the filing fee was not a strike); Boriboune v. Litscher, 2003 WL 23208940 (W.D.Wis., Feb. 24, 2003) (holding that dismissal was not a strike; though federal claim was dismissed for failure to state a claim, state law claim was not dismissed on the merits), aff’d, 91 Fed.Appx. 498, 2003 WL 23105329 (7th Cir. 2003); Barela v. Variz, 36 F.Supp.2d 1254, 1259 (S.D.Cal. 1999) (partial dismissal is not a strike); see also Orr v. Clements, 688 F.3d 463, 466 (8th Cir. 2012) (citing Tolbert for the proposition that “action” under § 1915(g) means “entire ‘case’ or ‘suit’ ”; issue was whether two suits about the same incident could be separate strikes). Contra, Williams v. Williams, 2012
was that prisoners proceeding *pro se* were, in effect, required to file perfect complaints to avoid being penalized, since the case was counted as a strike if *any* claim was dismissed on § 1915(g) grounds.\textsuperscript{1509} However, that court has now recognized the incongruity and lack of basis for that holding and has repudiated it, adopting the prevailing view that “a strike is incurred under § 1915(g) when an inmate’s case is dismissed *in its entirety* based on the grounds listed in § 1915(g).”\textsuperscript{1510}

Two circuits have held that strikes should be assessed for partial dismissals on the enumerated grounds under limited circumstances: “if a complaint is dismissed in part for failure

\textsuperscript{1508} In *Boriboune v. Berge*, 391 F.3d 852 (7th Cir. 2004), the court held that joint litigation by prisoners is permissible, but that each plaintiff should be assessed a full filing fee. En route to that conclusion, the court observed: “A prisoner litigating on his own behalf takes the risk that one or more of his claims . . . may count toward the limit of three weak forma pauperis claims allowed by § 1915(g). . . . [W]hen any claim in a complaint or appeal is ‘frivolous, malicious, or fails to state a claim upon which relief may be granted,’ all plaintiffs incur strikes.” 391 F.3d at 855-56. The court did not cite any authority for these statements and did not engage in any substantial statutory analysis. The court later reiterated its view that any frivolous claim in a complaint makes the complaint count as a strike, and cited that proposition as a reason why the joinder rules must be carefully enforced in prisoner cases—otherwise prisoners could lump unrelated claims and defendants into the same suit and minimize their exposure to the risk of three strikes. *George v. Smith*, 507 F.3d 605, 607-08 (7th Cir. 2007).

\textsuperscript{1509} See, e.g., *Hedgespeth v. Bartow*, 2009 WL 2432350, *2 (W.D.Wis., Aug. 6, 2009) (charging a strike where state law claim was dismissed but federal claim went forward); *Upthegrove v. Holm*, 2009 WL 1296969, *1-2 (W.D.Wis., May 7, 2009) (charging a strike for dismissal of equal protection claim based on same facts for which an Eighth Amendment claim was allowed to go forward); *Lee v. Charlebois*, 2008 WL 5210845, *2-3* (W.D.Wis., Dec. 12, 2008) (charging a strike in a case where plaintiff’s Fourth Amendment excessive force claim was allowed to go forward but his municipal liability claim was dismissed).

\textsuperscript{1510} *Turley v. Gaetz*, 625 F.3d 1005, 1012 (7th Cir. 2010) (emphasis in original). The court characterized this holding as “the obvious reading of the statute,” *id.* at 1008-09, described its prior statements to the contrary as dicta, and expressed its regret for the resulting “confusion among the district courts.” *Id.* at 1012. At least one district court has construed *Turley* directly contrary to its holding, stating that even in actions where some claims survive, if claims are improperly joined, “each improperly joined claim constitutes a separate action, and it is proper to assess a strike when such actions are dismissed.” *West v. Hallet*, 2011 WL 3273565, *1 (E.D.Wis., July 29, 2011). This court’s premise that “*Turley* does not change the application of *George v. Smith*, 507 F.3d 605 (7th Cir. 2007), and *Boriboune v. Berge*, 391 F.3d 852 (7th Cir. 2004), to prisoner complaints” is simply wrong. *Turley* states of *George* and *Boriboune*: “The references to § 1915(g) . . . are not essential to the outcome in either case.” 625 F.3d at 1011. *Turley’s* ultimate holding, quoted in the text, leaves no room for charging a strike when a case is not dismissed in its entirety.
to exhaust and in part for failure to state a claim or other grounds stated in § 1915(g), the dismissal is a strike, at least insofar as the new suit does not simply re-file previously non-exhausted claims.”\textsuperscript{1511} One district court has held that prisoners who join unrelated claims in an amended complaint, after being warned of the inappropriateness of doing so, will be charged strikes for all such claims, citing no basis in the statute or elsewhere for doing so.\textsuperscript{1512}

A dismissal in a habeas corpus action is not a strike.\textsuperscript{1513} Most courts have held that actions dismissed because they were improperly filed under 42 U.S.C. § 1983, but should have been filed as habeas petitions (mostly “Heck-barred”\textsuperscript{1514} actions), count as strikes,\textsuperscript{1515} though


\textsuperscript{1512} Pointer cautioned that dismissal for failure to plead exhaustion, under the now-abrogated rule under which exhaustion was treated as a pleading requirement, is not a strike. See Feathers v. McFaul, 274 Fed.Appx. 467, 469 (6th Cir. 2008) (unpublished) (applying Pointer holding); see also Banks v. U.S. Marshal, 274 Fed.Appx. 631, 635 n.2 (10th Cir. 2008) (unpublished) (holding that a dismissal in part with prejudice for failure to state a claim and in part without prejudice for lack of personal jurisdiction over a defendant was a strike; citing Pointer); Chavis v. Curlee, 2008 WL 508694, *4 & n.7 (N.D.N.Y., Feb. 21, 2008) (dismissals in part for failure to state a claim and in part for lack of standing are strikes).

Some district courts have characterized Pointer erroneously as holding more broadly that dismissals partially on the statutory grounds are strikes. See Gross v. Haute, 2013 WL 2941567, *2 (E.D.Mich., June 14, 2013) ( quoting Pointer selectively to hold generally that partial dismissals are strikes); Clay v. Ambriz, 2012 WL 1309197, *2 (S.D.Tex., Apr. 16, 2012) (holding that partial dismissal under § 1915(g) is a strike unless other claims survived and were “meritorious”), appeal dismissed, No. 12-40504 (5th Cir., June 7, 2012); Freeman v. Voorhies, 2011 WL 833337, *2 (S.D.Ohio, Mar. 3, 2011) (characterizing Pointer as “the first case holding that even a partial dismissal of case for failure to state a claim counts as a strike under § 1915(g)” ). One unpublished Tenth Circuit decision has characterized Thomas v. Parker, supra, similarly. See Barrett v. Workman, 2012 WL 2308674, *2 (10th Cir. 2012) (unpublished) (citing Thomas for the holding that “a mixed petition, dismissed in part for failure to state a claim, can count as a strike for purposes of the PLRA.”)


\textsuperscript{1514} Jones v. Smith, 720 F.3d 142, 147 (2d Cir. 2013) (holding dismissal of habeas petition or of appeal in a habeas proceeding is not a strike; expressing no view as to habeas petitions directed to conditions of confinement); Andrews v. King, 398 F.3d at 1122-23 & n.12; Jennings v. Natrona County Detention Center Med. Facility, 175 F.3d 775, 779 (10th Cir. 1999); Critten v. Donald, 2007 WL 3102161, *1 (S.D.Ga., Oct. 22, 2007). Andrews relied in part on that court’s earlier opinion in Naddi v. Hill, 106 F.3d 275, 277 (9th Cir. 1997), which stated generally: “A review of the language and intent of the PLRA reveals that Congress was focused on prisoner civil rights and conditions cases, and did not intend to include habeas proceedings in the scope of the Act, especially in light of the major revisions to habeas corpus law contained in the AEDPA, enacted just two days before the PLRA.”

\textsuperscript{1515} See Heck v. Humphrey, 512 U.S. 477, 485 (1994) (holding that prisoners cannot bring actions “that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement” without first getting the conviction or sentence overturned via a state court proceeding or via a federal court writ of habeas corpus).

decisions are not unanimous.\textsuperscript{1516} Dismissal of a mandamus petition can be a strike if the mandamus claim is analogous to prison conditions claims under § 1983.\textsuperscript{1517} One circuit has held that a complaint dismissed without prejudice is not a strike, and some district courts in that circuit have applied that rule to dismissals of cases required to be pursued via habeas corpus, while warning the plaintiff that a second attempt to pursue the claim without first getting the underlying judgment overturned would be frivolous and would be a strike for that reason.\textsuperscript{1518}

Similarly, a case that should have been filed under § 1983 but was filed as a habeas petition to avoid the three strikes provision may be counted as a strike.\textsuperscript{1519} In the past, courts have sometimes just treated habeas petitions that should have been filed under § 1983 as § 1983 cases and gone forward with them,\textsuperscript{1520} but courts are now reluctant to do for several PLRA-failure to state a claim.”); Alston v. F.B.I., 747 F.Supp.2d 28, 32 (D.D.C. 2010); Ransom v. Westphal, 2010 WL 1494557, *3 (E.D.Cal., Apr. 14, 2010) (Heck-barred claims are frivolous or fail to state a claim); Houston v. Schwarzenegger, 2009 WL 3487625, *4 (E.D.Cal., Oct. 23, 2009) (“Plaintiff’s claims were either premature because he had not yet achieved favorable termination, or Plaintiff’s claims were non-cognizable because Plaintiff failed to establish the required predicates for stating a claim. In either case, Plaintiff failed to state a claim.”), \textit{report and recommendation adopted}, 2010 WL 530154 (E.D.Cal., Feb. 9, 2010); Lewis v. Healy, 2008 WL 5157194, *4-5 (N.D.N.Y., Dec. 8, 2008); Bure v. Miami-Dade Police Dept., 2008 WL 2374149, *3 (S.D.Fla., June 6, 2008); Crawford v. Kershaw County DSS, 2007 WL 2934887, *5 (D.S.C., Oct. 5, 2007); Gattis v. Fuller, 2007 WL 2156697, *2 (D.S.C., July 26, 2007); Wells v. Caskey, 2006 WL 2805338, *2 (S.D.Miss., Sept. 25, 2006); Grant v. Sotelo, 1998 WL 740826, *1 (N.D.Tex., Oct. 17, 1998) (citing cases) (all holding § 1983 cases that should have been filed under habeas corpus are frivolous); \textit{see also Hamilton v. Lyons, 74 F.3d 99, 103 (5th Cir. 1996) (holding Heck-barred claim frivolous)}.


\textsuperscript{1517} Hamilton v. Tristan, 2012 WL 1438807, *1 (E.D.Cal., Apr. 25, 2012). This distinction is more or less the same as the law governing when a mandamus proceeding is considered a civil action under the PLRA. \textit{See n. 57, above.}\textsuperscript{1518} Stewart v. Tuck, 2009 WL 3614460, *3 n.2 (W.D.Va., Oct. 30, 2009); Wilson v. Cassell, 2009 WL 2207921, *2 n.1 (W.D.Va., July 23, 2009); \textit{see} McLean v. U.S.S., 566 F.3d 391, 396-99 (4th Cir. 2009).\textsuperscript{1519} Andrews v. King, 398 F.3d at 1123 n.12. If the prisoner is not attempting to evade the three strikes provision, a strike may be inappropriate. \textit{See} Neal v. U.S., 2013 WL 1801673, *3 (Fed.Cl., Apr. 29, 2013) (holding a strike inappropriate where there was no indication the plaintiff intentionally sought to evade § 1915(g)); Thomas v. Felker, 2012 WL 2116406, *3 (E.D.Cal., June 11, 2012) (declining to find a strike where the prior dismissal did not suggest bad faith but noted that the Supreme Court has not determined whether conditions claims can be brought via habeas).


Failure to satisfy the PLRA administrative exhaustion requirement is not a failure to state a claim unless non-exhaustion is apparent on the face of the complaint.\footnote{Jones v. Bock, 549 U.S. 199, 214-15 (2007). That is the case with respect to the PLRA exhaustion requirement, but other statutes may require that exhaustion be pled; in such a case, failure to plead exhaustion could be failure to state a claim. Thompson v. Drug Enforcement Admin., 492 F.3d 428, 438 (D.C.Cir. 2007).} That means dismissal for non-exhaustion should generally not be a strike.\footnote{Ball v. Famiglio, 726 F.3d 448, 460 (3d Cir. 2013) (holding “dismissal based on a prisoner's failure to exhaust administrative remedies does not constitute a PLRA strike, unless a court explicitly and correctly concludes that the complaint reveals the exhaustion defense on its face and the court then dismisses the unexhausted complaint for failure to state a claim”), pet. for cert. filed, Nos. 13-8254, 13A434, 2014 WL 996364 (Mar. 24, 2014); Turley v. Gaetz, 625 F.3d 1005, 1013 (7th Cir.2010) (stating “[a] prisoner's failure to exhaust administrative remedies is statutorily distinct from his failure to state a claim upon which relief may be granted”); Williams v. Tobiasz, 2013 WL 3929985, *3 (W.D.Wis., July 29, 2013); Williams v. Horner, 2012 WL 5298466, *3 (E.D.Ark., Oct. 18, 2012), report and recommendation adopted, 2012 WL 5290273 (E.D.Ark., Oct. 25, 2012); Finley v. Gonzales, 2009 WL 2581357, *2 (E.D.Cal., Aug. 20, 2009), report and recommendation adopted, 2009 WL 3816907 (E.D.Cal., Nov. 13, 2009); Harry v. Doe, 2009 WL 2152531, *2 (E.D.N.Y., July 17, 2009). Before Jones v. Bock, a number of courts had already so held. See Snider v. Melinede, 199 F.3d 108, 111 (2d Cir. 1999) (holding non-exhaustion is not failure to state a claim and is not a strike); Green v. Young, 454 F.3d 405, 408-09 (4th Cir. 2006) (same); Greene v. C.D.C., 2006 WL 2385150, *2 (E.D.Cal., Aug. 17, 2006), report and recommendation adopted, 2006 WL 2686992 (E.D.Cal., Sept. 19, 2006); Johnson v. Morales, 2006 WL 2168999, *1 (E.D.Cal., Aug. 1, 2006); Smith v. Duke, 296 F.Supp.2d 965, 965 66 (E.D.Ark. 2003); Henry v. Med. Dep't at SCI Dallas, 153 F.Supp.2d 553, 556 (M.D.Pa. 2001). Cf. Andrews v. Whitman, 2013 WL 4357592, *2-13 (S.D.Cal., Mar. 27, 2009) (courts are free to dismiss for non-exhaustion rather than reach the substantive merits in order to charge the prisoner a strike). Some courts have resisted this approach by applying the exhaustion requirement only when “the claim[s] are not necessarily based on administrative remedies.” One circuit had held that “[a] claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted” and may therefore be counted as a strike. Rivera v. Allin, 144 F.3d 719, 731 (11th Cir. 1998), cert. denied, 524 U.S. 978 (1998). After Jones v. Bock, such holdings appear clearly wrong, since Jones holds that prisoners are not required to allege exhaustion of remedies, and anyway the statute doesn’t authorize strikes for things a court considers “tantamount” to failing to state a claim. See Adamson v. De Poorter, 2008 WL 4382815, *4 (N.D.Fla., Sept. 25, 2008) (acknowledging overruling of Rivera by Bush v. Green, 533 U.S. 98, 101 (2001).} Some courts have resisted this approach by applying the exhaustion requirement only when “the claim[s] are not necessarily based on administrative remedies.” One circuit had held that “[a] claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted” and may therefore be counted as a strike. Rivera v. Allin, 144 F.3d 719, 731 (11th Cir. 1998), cert. denied, 524 U.S. 978 (1998). After Jones v. Bock, such holdings appear clearly wrong, since Jones holds that prisoners are not required to allege exhaustion of remedies, and anyway the statute doesn’t authorize strikes for things a court considers “tantamount” to failing to state a claim. See Adamson v. De Poorter, 2008 WL 4382815, *4 (N.D.Fla., Sept. 25, 2008) (acknowledging overruling of Rivera by Bush v. Green, 533 U.S. 98, 101 (2001).}
conclusion. The Eleventh Circuit had held before *Jones v. Bock* that “[a] claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted” and may therefore be counted as a strike. After *Jones v. Bock*, such holdings appear clearly wrong, since *Jones* holds that prisoners are not required to allege exhaustion of remedies, and anyway the statute doesn’t authorize strikes for things a court considers “tantamount” to failing to state a claim. Nonetheless, some decisions continue to assert that non-exhaustion dismissals are strikes, often in unexamined reliance on *Rivera*. At least one district court has acknowledged *Jones* but has nonetheless held “this Court must follow the Eleventh Circuit’s precedent in *Rivera*.”

Other courts have held that a dismissal for non-exhaustion is a strike because it seeks “relief to which [the plaintiff] is not entitled” and is therefore is frivolous. I think that is

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The statement in *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1213 (10th Cir. 2003), that dismissal based on lack of exhaustion “may constitute a strike for purposes of 28 U.S.C. § 1915(g)” also seems to be based on that court’s view that exhaustion must be pled in the prisoner’s complaint, which was rejected in *Jones v. Bock*. See also *Pointer v. Wilkinson*, 502 F.3d 369, 376 (6th Cir. 2007) (holding a case is a strike if it is dismissed in part for non-exhaustion and in part as frivolous, malicious, or failing to state a claim).


See *Adamson v. De Poorter*, 2008 WL 4382815, *4 (N.D.Fla., Sept. 25, 2008) (acknowledging overruling of *Rivera* by *Jones*; noting that case may be frivolous where brought with “full knowledge” that it is subject to dismissal for non-exhaustion, but “debatable” exhaustion claim is not a strike).


A more recent and creative argument that dismissal for non-exhaustion is a strike appears in *Robert v. Walls*, 2011 WL 1599652, *1 n.5 (W.D.Pa., Mar. 14, 2011), *report and recommendation adopted*, 2011 WL 1598972 (W.D.Pa., Apr. 27, 2011), which holds—relying on habeas corpus doctrine—that a case “not dismissed for a mere failure to exhaust, but rather because Plaintiff procedurally defaulted his claims, . . . was, in effect, a dismissal with prejudice . . . i.e., a determination that the suit is permanently barred.” However, this borrowing from
wrong; an unexhausted case does not necessarily fail to raise “an arguable question of law” or rest on an “indisputably meritless legal theory,” the definition of “frivolous” discussed above. Further, the Second Circuit has said in interpreting the three strikes provision that the PLRA “was designed to stem the tide of egregiously meritless lawsuits, not those temporarily infected with remediable procedural or jurisdictional flaws.” Certainly, if the prisoner put forward a colorable argument that he or she had exhausted, that no administrative remedy was available, or that there were reasons why the failure to exhaust should be excused, the fact that those arguments did not prevail does not render them frivolous.

Exhaustion dismissals present a retroactivity problem. In the past, some courts held that exhaustion was a pleading requirement, and many cases were dismissed for failure to state a claim because they did not adequately plead exhaustion. The Supreme Court’s decision to the contrary in Jones v. Bock eliminated the basis for those dismissals, and arguably they should not be counted as strikes. The usual rule that the basis for dismissals will not be re-examined in later litigation about strikes presumably should not apply when the legal basis of the dismissal has been completely undermined. However, one recent decision has purported to treat the question as governed by standard retroactivity doctrine and has held that only those cases pending on direct appeal at the time of Jones v. Bock are affected by its holding, and exhaustion-based dismissals for failure to state a claim that became final before Jones should continued to be habeas doctrine is contrary to § 1915(g), which does not make dismissal for procedural default a strike, and to Jones v. Bock, which spells out when an exhaustion dismissal can be treated as a dismissal for failure to state a claim. Booth v. Carril, 2007 WL 295236, *2-4 (E.D.Mich., Jan. 29, 2007) (holding that the meaning of frivolous as well as of failing to state a claim suggests that Congress intended to count as strikes only decisions on the merits). But see Galeas v. Previtire, 2012 WL 5985667, *4 (W.D.N.C., Nov. 28, 2012) (holding non-exhaustion dismissal malicious and therefore a strike because plaintiff alleged there was no grievance procedure despite having used it); Donley v. Fraker, 2012 WL 2395879, *5 (W.D.Wash., Apr. 30, 2012) (holding a non-exhaustion dismissal a strike in light of the “frivolous circumstances”: plaintiff filed suit immediately and did not wait for the grievance decision, which was favorable), report and recommendation adopted, 2012 WL 2390011 (W.D.Wash., June 25, 2012).

The assertion that unexhausted claims are “premature as a matter of law” and therefore strikes, Ostrander v. Dennis, 2004 WL 1047642, *1 (N.D.Tex., May 10, 2004), is contrary both to the statutory language, which does not authorize dismissals of “premature” claims, and to the above quoted language in Tafari. Presumably the converse is also true. See Holmberg v. Warner, 2013 WL 3421913, *7 (W.D.Wash., May 30, 2013) (holding frivolous the plaintiff’s claim that his issue was nongrievable, declaring strike), report and recommendation adopted, 2013 WL 3421951 (W.D.Wash., July 8, 2013); Reed v. CCA/Crossroads Correctional Center, 2012 WL 5830582, *3 (D.Mont., Oct. 25, 2012) (declaring strike because of the “frivolous circumstances” of the case’s filing and the court’s belief that non-exhaustion was “a deliberate and defiant refusal to gripe his disputes”), report and recommendation adopted, 2012 WL 5838694 (D.Mont., Nov. 16, 2012); Phillips v. Hussey, 2009 WL 3188432, *3-4 (E.D.Wash., Sept. 30, 2009) (holding non-exhaustion dismissal frivolous and therefore a strike where plaintiff, who was familiar with the exhaustion requirement from prior litigation, simply misrepresented that he had exhausted).

In one case where a strike had been found based on non-exhaustion, and the judgment affirmed, but the district court later vacated its dismissal in light of Jones v. Bock, the appellate judgment was not treated as a strike since its basis had ceased to exist. Howard v. Kraus, 2011 WL 5554012, *1 (M.D.Fla., Nov. 15, 2011). Similarly, in Thornton v. Deddeh, 2012 WL 124483, *1 n.1 (S.D.Cal., Jan. 17, 2012), appeal dismissed, No. 11CV2401 (9th Cir., June 19, 2012), though the plaintiff had been found in previous litigation to have three strikes, the court did not give effect to that prior finding in light of an intervening decision which clarified that dismissals are not strikes until all appeals, including certiorari, have been exhausted or waived. Similarly, one court in a circuit that has held that dismissals without prejudice are not strikes has held that such dismissals are no longer to be treated as strikes even if they had formerly been found to be strikes. Cox v. U.S., 2012 WL 1570081, *1 (D.S.C., Mar. 28, 2012), report and recommendation adopted, 2012 WL 1570075 (D.S.C., May 3, 2012).

See n. 1556, below.
counted as strikes. This application of retroactivity doctrine appears misplaced. Applying the rule of Jones v. Bock to decisions that became final before Jones does not reverse or vacate judgments formerly deemed to be strikes. Rather, it determines how a court is prospectively to apply the rule of § 1915(g) to determine the effect of those judgments on subsequent litigation.

This view is supported by considerable and seemingly unanimous authority among those courts that have actually considered the question that whether a dismissal is a strike should be determined at the point when it makes a difference, i.e., when the court must decide whether a prisoner is barred from proceeding in forma pauperis. If that is the case, surely that determination should be made on the basis of the law at the time of the decision. However, the practice is widespread of declaring a strike when an action or an appeal is dismissed, even in the circuits that have held to the contrary.

One court has held that in a multi-plaintiff lawsuit, each plaintiff’s claims must be treated as a separate “action,” and each plaintiff must be charged a strike for each plaintiff whose “action” is entirely dismissed—a result with little evident basis in statutory language or

1535 Strope v. Cummings, 653 F.3d 1271, 1274-75 (10th Cir. 2011).
1536 Vlasich v. S D Superior Ct., 325 Fed.Appx. 610 (9th Cir. 2009) (unpublished); Andrews v. King, 398 F.3d 1113, 1119 n.8 (9th Cir. 2005); Deleon v. Doe, 361 F.3d 93, 95 (2d Cir. 2004); Gleash v. Yuswak, 308 F.3d 758, 761-62 (7th Cir. 2002) (stating prior notation of strike is “no more than a housekeeping matter. . .; whether a prisoner is disqualified under § 1915(g) must be determined by the court in which the fourth action is filed”); Lucien v. Jockisch, 133 F.3d 464, 469 n. 8 (7th Cir. 1998) (holding prospective order barring plaintiff from proceeding IFP because of strikes was improper. “The time to tally up Lucien’s previous strikes is when the court to which § 1915(g) might apply.”); Ortiz v. Cox, 759 F.Supp.2d 1258, 1261-62 (D.Nev., Jan. 5, 2011) (holding summary judgment is not a strike even if the court entering it said it was assessing strikes for frivolous motions); Ortiz v. Kelly, 2010 WL 3748436, *2 (D.Nev., Sept. 20, 2010) (holding denial of a temporary restraining order is not a strike, even if the court that denied it said it was); Belton v. U.S., 2008 WL 2273272, *10 (E.D.Wis., June 2, 2008).
1539 Boriboune v. Berge, 2005 WL 1320345, *4-8 (W.D.Wis., June 1, 2005) (declaring that several plaintiffs received three strikes from this single multi-plaintiff lawsuit). The court does not purport to find the basis for its holding in the statutory language; rather, it says it is interpreting an earlier Seventh Circuit opinion remanding the case, and expresses hope that the court of appeals will clarify the matter. See Boriboune v. Berge, 391 F.3d 852 (7th Cir. 2004), discussed further in note 1508, above; see also Ross v. Hardy, 2013 WL 951164, *2 (N.D.Ill., Mar. 12, 2013) (warning plaintiffs of Boriboune interpretation); Ali v. Milwaukee County Jail, 2005 WL 2902489, *3 (W.D.Wis., Nov. 3, 2005) (applying Boriboune, charging two strikes each to four plaintiffs where two plaintiffs’ allegations did not state a claim), reconsideration denied, 2005 WL 3146880 (W.D.Wis., Nov. 17, 2005).
logic. In a class action, only the named plaintiffs are subject to the three strikes provision. Where a prisoner files multiple cases which are consolidated and dismissed together, each case is counted as a separate strike.

Most circuits have held that a dismissal should not be considered a strike until it is final—i.e., until the prisoner has exhausted or waived his appeals. Otherwise, a prisoner who received a third strike in the district court could not proceed in forma pauperis to seek appellate review of that decision under the statute’s literal language. Most courts have specifically held that IFP status should be available for an appeal of a third strike determination.

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1540 See Swenson v. MacDonald, 2006 WL 240233, *3-4 (D.Mont., Jan. 30, 2006). Swenson points out that Boriboune’s imposition of strikes based on the separate claims of individual plaintiffs contradicts the statute’s reference to “action[s]” rather than claims; that its view that each prisoner litigant is responsible under Rule 11 for statements made by other plaintiffs is inconsistent with the lack of authority of pro se litigants to make representations on behalf of anyone other than themselves and with pro se prisoners’ limited ability to investigate the merits of others’ claims; and that the practical difficulties of multi-plaintiff prisoner litigation does not lend itself to assuming one litigants’ responsibility for all actions and decisions in such litigation.

1541 Meisberger v. Donahue, 245 F.R.D. 627, 630 (S.D.Ind. 2007).


Some recent decisions have held that once a dismissal is final and deemed a strike, it is effective retroactively and can be used to revoke IFP status in any case filed after the dismissal was entered. Lowe v. Dollison, 2011 WL 7063334, *3 (E.D.Tex., Nov. 3, 2011) (strikes do not count until appeals are exhausted, but once strikes are affirmed, they are effective as of their decision date), report and recommendation adopted, 2012 WL 162026 (E.D.Tex., Jan. 18, 2012), reconsideration denied, 2012 WL 1554903 (E.D.Tex., Apr. 30, 2012), appeal dismissed, No. 12-41387 (5th Cir., Jan. 10, 2013); Knapp v. Arlitz, 2011 WL 4983628, *2 (E.D.Cal., Oct. 19, 2011); see also Kellat v. Jackson, 2013 WL 461044, *1 (S.D.Ca., Feb. 6, 2013) (holding dismissed case is a strike for purposes of a later filed case even if a post-judgment motion to reopen is later granted).

1544 Chavis v. Chappius, 618 F.3d 162, 169 (2d Cir. 2010) (“. . . [O]n a direct appeal, we cannot assume that a district court’s legal rulings are correct. Hence, when a district court has dismissed a suit in what could be a prisoner’s third strike, the presumption would seem to be for the reviewing court to give that dismissal no weight as of yet.”); Thompson v. Drug Enforcement Admin., 492 F.3d 428, 432 (D.C.Cir. 2007) (“A contrary rule would,
The Seventh Circuit has disagreed on a technical and procedural basis, holding that district courts should not grant IFP because prisoners have “a perfectly good remedy” for this problem in the appeals court itself: seek IFP status from the appeals court, which in the course of deciding whether the prisoner actually does have three strikes will review the correctness of the district court’s determination, at least to the extent of determining whether the appeal should be allowed to go forward.1545 This hyper-technical rule, while satisfying the court’s concern with formal compliance with the statute, will create a technical trap for un counselled and unsophisticated litigants while serving no actual useful purpose for the judicial system.1546

A recent Sixth Circuit decision rejects any requirement that a strike be final to take effect, holding that it is effective when decided.

Not only does this rule follow the plain meaning of the statute, but it is also consistent with how judgments are treated for purposes of res judicata. Under that doctrine, cases on appeal have preclusive effect until they are reversed or vacated.1547

This decision then defines the problem of appellate rights for the third strike out of existence, noting that the statute refers to dismissals on “prior occasions,” and stating: “A third strike that is on appeal is not a prior occasion for the purposes of that appeal, because it is the same occasion.”1548 The dissenting opinion rejects this supposed plain-language approach, pointing out that the phrase “prior occasion” is not free from ambiguity, since the statute does not address whether a prior dismissal must be final to be a strike, and in any case “prior occasion”

... “may refer to a single moment or to a continuing event: to an appeal, independent of the underlying action, or to the continuing claim, inclusive of both the action and its appeal.” Hence, there are as many as three possible readings of what counts as a strike: (1) a suit dismissed under § 1915(g); (2) a suit dismissed under § 1915(g) but only after an appeal of that ruling has been waived or exhausted; (3) an appeal dismissed as frivolous, regardless of the ruling below.

within those narrow set of cases in which the third strike is appealed, effectively eliminate our appellate function. Had Congress intended such an unusual result, we expect it would have clearly said so.”); Campbell v. Davenport Police Dept., 471 F.3d at 953; Jennings, 175 F.3d at 779-80; Adepegba, 103 F.3d at 387. The Ninth Circuit, in Silva v. Di Vittorio, based its conclusion that decisions must have become final to be counted as strikes in part on this concern to preserve the courts’ statutory appellate jurisdiction, citing the Supreme Court’s admonition that courts applying the PLRA should not depart from the usual procedural requirements without express statutory direction. 658 F.3d at 1098 (citing Jones v. Bock, 549 U.S. 199, 212 (2007). In Chandler v. Department of Justice, 2007 WL 7767876, *1 (D.C. Cir., Oct. 19, 2007), the court allowed plaintiff to proceed IFP on a mandamus petition seeking to proceed IFP in the district court. It stated: “The petition appears to be a true mandamus petition, seeking to compel a lawful exercise of the district court’s authority, rather than ‘an alternative device for obtaining the relief sought in civil actions that are covered by the [Prisoner Litigation Reform Act, 28 U.S.C. § 1915].’” Accord, In re Perea, 2008 WL 9001647, *1 (D.C.Cir., Nov. 21, 2008).

1545 Robinson v. Powell, 297 F.3d 540, 541 (7th Cir. 2002); see Boriboune v. Berge, 2005 WL 1378930 (W.D.Wis., June 9, 2005) (instructing plaintiff in how to use the prescribed procedure).

1546 See Thompson v. Drug Enforcement Admin., 492 F.3d 428, 433 (D.C.Cir. 2007) (quoting government brief noting that this approach “create[es] more work than is appropriate for either the courts or the litigants to resolve a request for IFP privileges”).

1547 Coleman v. Tollefson, 733 F.3d 175, 177-78 (6th Cir. 2013).

1548 Coleman v. Tollefson, 733 F.3d at 178.
Given this statutory ambiguity, it is proper for us to interpret the meaning of the statute in light of its history and purpose.\textsuperscript{1549} In any case, a non-final decision in a separate case that is pending on appeal would be a strike notwithstanding the possibility that it might be reversed. Thus the Sixth Circuit majority’s approach “could potentially bar the filing of meritorious claims and preserve district court errors by preventing prisoners from bringing claims in federal court while one or more of their first three dismissals were being reversed on appeal.”\textsuperscript{1550}

Of course, if a finding of frivolousness is reversed on appeal, the strike is eliminated.\textsuperscript{1551} But that might well be too late for revisiting dismissals of complaints or appeals dismissed while the case was pending on appeal.

2. Litigating Three Strikes Issues

The three strikes provision is not an affirmative defense that must be raised by defendants or waived; it can be raised \textit{sua sponte} by the court.\textsuperscript{1552} Once a \textit{prima facie} case has been made that the prisoner has three strikes, the burden shifts to the prisoner to show otherwise.\textsuperscript{1553} Merely producing docket entries showing dismissals is not sufficient to shift the burden if the entries do not show the reason for the dismissal; defendants or the court must establish that the dismissals were on the grounds prescribed by § 1915(g).\textsuperscript{1554} Thus, a docket entry showing dismissal based on the statute of limitations cannot establish a strike where it does not make clear whether the defense was apparent on the face of the complaint and the complaint therefore did not state a claim.\textsuperscript{1555} Plaintiffs may not revisit the correctness of prior dismissals for purposes of §

\textsuperscript{1549} Coleman, 733 F.3d at 180 (Daughtrey, J., dissenting) (quoting Henslee v. Keller, 681 F.3d 538, 543-44 (4th Cir. 2012) (internal punctuation adjusted)).
\textsuperscript{1550} Coleman, 733 F.3d at 180 (dissenting opinion).
\textsuperscript{1551} Jennings, 175 F.3d at 780; Adepegba, 103 F.3d at 387.
\textsuperscript{1552} Harris v. City of New York, 607 F.3d 18, 23 (2d Cir. 2010) (noting that the PLRA was intended “to give district courts greater power to protect their dockets from meritless lawsuits” as well as to protect prison systems); Thompson v. Drug Enforcement Admin., 492 F.3d 428, 435-36 (D.C.Cir. 2007); Andrews v. King, 398 F.3d 1113, 1120 (9th Cir. 2005); Owens-El v. U.S., 2006 WL 2252845, *1 n.3 (W.D.Okla., Aug. 7, 2006); see Pinson v. Pacheco, 2010 WL 2640474, *1 (D.Colo., June 30, 2010) (magistrate judge appropriately demanded information from plaintiff on the disposition of his numerous prior lawsuits).
\textsuperscript{1553} Andrews v. King, 398 F.3d at 1116, 1120 (9th Cir. 2005); accord, Thompson v. Drug Enforcement Admin., 492 F.3d at 435-36 (D.C.Cir. 2007); Green v. Morse, 2006 WL 2128609, *2-3 (W.D.N.Y., May 26, 2006). One court has held that prisoners are not entitled to notice and a hearing in connection with three strikes determinations because they have already had notice and an opportunity to be heard in connection with the litigation for which strikes are being charged. Clay v. Ambriz, 2012 WL 1309197, *3 (S.D.Tex., Apr. 16, 2012), appeal dismissed, No. 12-40504 (5th Cir., June 7, 2012).
\textsuperscript{1554} Harris v. City of New York, 607 F.3d at 23-24 (docket entries may be used if they show clearly the nature of the disposition); Andrews v. King, 398 F.3d at 1120; see Thompson v. Drug Enforcement Admin., 492 F.3d at 436; Rodriguez v. Goord, 2009 WL 3122951 (N.D.N.Y., Sept. 28, 2009); Harry v. Doe, 2009 WL 2152531, *1-2 (E.D.N.Y., July 17, 2009); Green v. Morse, 2006 WL 2927871, *4 (W.D.N.Y., Oct. 12, 2006) (all finding docket entries sufficient to establish strikes); see also Adams v. Carcy, 2009 WL 1212194, *2 (E.D.Cal., Apr. 29, 2009) (strike not charged because defendants did not show that the plaintiff was the same Ronald Adams as the present plaintiff). But see Lewis v. Healy, 2008 WL 5157194, *4 (N.D.N.Y., Dec. 8, 2008) (since “determination of whether a prior dismissal does in fact constitute a strike is dependent upon the precise nature of the dismissal and the grounds supporting it,” court obtained copies of actual orders of dismissal rather than relying on docket entries).
However, an error in classifying a dismissal as a strike should be subject to correction, consistently with the view that it is the court making the three strikes determination that ultimately decides what dismissals are strikes. This point is especially important because many prisoners were charged with strikes for dismissals for failure to exhaust administrative remedies in jurisdictions where exhaustion was considered a pleading requirement before the contrary Supreme Court decision in Jones v. Bock. Similarly, many prisoners in the Seventh Circuit were charged strikes for partial dismissals under the rule of George v. Smith before that decision was overruled in Turley v. Gaetz.

The three strikes provision cannot be applied to revoke in forma pauperis status in a case filed before the plaintiff had three strikes, since the statute is a limit on prisoners’ ability to “bring” suit, not on their ability to maintain suits previously brought. A case is “brought” for these purposes when the plaintiff tenders the complaint to the court, even if there is a significant time lag caused by the in forma pauperis and merits screening before it is filed. For the same reason, a case filed when the plaintiff was not a prisoner cannot be a strike even if the plaintiff becomes a prisoner later.

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1557 See n. 1536, above.

1558 See Feathers v. McFaul, 274 Fed.Appx. 467, 469 (6th Cir. 2008) (unpublished) (holding two prior dismissals were for failure to plead exhaustion and were not strikes). But see n. 1556, above.


1561 O’Neal v. Price, 531 F.3d 1146, 1151-52 (9th Cir. 2008). But see Perkins v. Napoli, 2012 WL 5464607, *3 (W.D.N.Y., Nov. 8, 2012) (holding case was not “properly filed” until in forma pauperis status was granted, allowing the court to count a recently dismissed case as a third strike). The weight of authority under various PLRA provisions is consistent with O’Neal. See nn. 7, 483 above.

1562 Cohen v. Corrections Corp. of America, 2009 WL 3259079, *2 (N.D.Ohio, Oct. 7, 2009) (holding case filed when the plaintiff was an immigration detainee was not a strike).
Courts have routinely revoked previously-granted IFP status when it has come to their attention that the plaintiff has three strikes, or new information is developed relevant to an “imminent danger” finding. Doing so is consistent with pre-PLRA practice under which “IFP status may be acquired or lost during the course of the litigation.” One court has rejected a laches defense to a belated request for a three strikes finding, on the ground that the prisoner invoking that equitable doctrine did not have “clean hands” because he failed to disclose the relevant litigation history. Another court has held that a motion to revoke IFP status based on § 1915(g) is appropriately treated as a motion under Rule 59(e), F.R.Civ.P., which must be brought within 28 days of the judgment, or Rule 60(b), which must be brought within a “reasonable time,” and that a motion to revoke filed over six years after the court granted IFP status was not timely. Neither of these rules appears apposite, since Rule 59(e) permits alteration or amendment of a “judgment,” and Rule 60(b) is addressed to a “final judgment, order, or proceeding,” neither of which describes a grant of IFP status.

Appellate review of the application of § 1915(g) is de novo. One court of appeals has held “in the order denying leave to proceed in forma pauperis the district court must cite specifically the case names, case docket numbers, districts in which the actions were filed, and the dates of the orders dismissing the actions.” However, another has held, rather self-defeatingly, that federal law does not require district courts to specify the dispositions on which their three-strikes findings rest, while noting that the failure to do so may result in remand for

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1564 See nn. 1606-1607, below.


1567 Wright v. Kupczyk, 2011 WL 167258, *2 (N.D.Ill., Jan. 18, 2011). In fact, the facially relevant provisions of Rule 60 would seem to be Rule 60(b)(1) (“mistake, inadvertence, surprise, or excusable neglect”) or 60(b)(2) (“newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)”). Such motions are governed by a one-year time limit. Rule 60(c)(1), Fed.R.Civ.P.

1568 Jones v. Smith, 720 F.3d 142, 145 (2d Cir. 2013); Taylor v. First Medical Management, 508 Fed.Appx. 488, 491 n.3 (6th Cir. 2012); Tolbert v. Stevenson, 635 F.3d 646, 649 (4th Cir. 2011); Chavis v. Chappius, 618 F.3d 162, 167 (2d Cir. 2010); Owens v. Isaac, 487 F.3d 561, 563 (8th Cir. 2007); Jackson v. Johnson, 475 F.3d 261, 265 (5th Cir. 2007); Andrews v. King, 398 F.3d 1113, 1118 (9th Cir. 2005); Ciarpaglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003); Dupree v. Palmer, 284 F.3d 1234, 1235 (11th Cir. 2002).

1569 Evans v. Ill. Dep't of Corr., 150 F.3d 810, 812 (7th Cir. 1998). See Muhammad v. Workman, 479 Fed.Appx. 871, 872 (10th Cir. 2012) (vacating and remanding three strikes finding where district court did not include opinions and judgments in the record for appellate review). Of course if the prisoner has previously been found to have three strikes, it is not necessary for a later court to identify the strikes. Nickerson v. Correctional Managed Care Providers, 2012 WL 5207594, *1 (S.D.Tex., Oct. 22, 2012).
further proceedings if the plaintiff disputes the existence of three strikes.\footnote{Gibson v. City Municipality of New York, 692 F.3d 198, 200 n.2 (2d Cir. 2012).} Yet another has stated that the “preferred practice” is not to rely on admissions by litigants in finding three strikes, but to “make a record of the prisoner's strikes, so that, if necessary, we can evaluate those strikes on appeal.”\footnote{Parks v. Samuels, 540 Fed.Appx. 146, 149 n.1 (3d Cir. 2014). The court does note that it can review the plaintiff’s strikes even if the district court did not identify them. \textit{Id.}}

Ordinarily, the denial of \textit{in forma pauperis} status is immediately appealable under the collateral order doctrine.\footnote{Roberts v. U.S. Dist. Court, 339 U.S. 844, 845 (1950); Andrews v. Cervantes, 493 F.3d 1047, 1052 (9th Cir. 2007).} However, one appeals court has held that when a litigant is denied IFP status under § 1915(g) and then pays the filing fee, the court lacks appellate jurisdiction since the plaintiff will be able to proceed in the district court and seek review of the IFP decision at the end of the case.\footnote{Burnett v. Miller, 507 Fed.Appx. 796, 798 (10th Cir. 2013) (unpublished).}

3. Actions Removed from State Courts

Removal from state to federal court\footnote{See Kotewa v. Corrections Corp. of America, 2010 WL 5156031, *2 (M.D.Tenn., Dec. 14, 2010); Olmsted v. Frank, 2008 WL 4104009, *1, 6 (W.D.Wis., Sept. 3, 2008); Olmsted v. Sherman, 2008 WL 3455300, *1 (W.D.Wis., Aug. 12, 2008); Farnsworth v. Washington State Department of Corrections, 2007 WL 1101497, *1–2 (W.D.Wash., Apr. 9, 2007). \textit{Contra}, Bryant v. Lovick, 2010 WL 1286791, *11 (W.D.Wash., Mar. 25, 2010) (case filed in state court and removed cannot be a strike).} presents two questions. First, can a case filed in state court, then removed to federal court by the defendants, be a strike? Some courts have charged the plaintiff a strike in that situation.\footnote{A defendant may remove a state court case to federal court if it is a case that could have been filed in federal court initially, 28 U.S.C. § 1441, or if it is against federal officers or agencies. 28 U.S.C. § 1442.} This appears to be wrong, since § 1915(g) applies to those who on three occasions “brought an action or appeal in a court of the United States” that was dismissed as frivolous, malicious, or failing to state a claim. A prisoner who files in state court does not bring the action in a court of the United States.\footnote{Heilman v. Ridge, 2014 WL 524045, *2 (S.D.Cal., Feb. 10, 2014); Townsel v. Washington State Dept. of Corrections, 2013 WL 5603467, *2 (E.D.Wash., Oct. 11, 2013) (“Because this case was originally filed in Walla Walla County Superior Court, the dismissal of Plaintiff's claims does not result in a strike under § 1915(g).”); Hollis v. Downing, 2010 WL 5115196, *3 (E.D.Cal., Dec. 9, 2010), \textit{report and recommendation adopted}, 2011 WL 590756 (E.D.Cal., Feb. 10, 2011). A state court is not a “court of the United States.” \textit{See} cases cited in n. 1490, above.}

Second, is a case filed in state court and removed affected by § 1915(g) if the plaintiff has three strikes? No, according to the statute: it applies to those who “bring a civil action or appeal a judgment in a civil action or proceeding \textit{under this section},” \textit{i.e.}, litigants who invoked the federal \textit{in forma pauperis} provisions when the case was “brought.”\footnote{As one court put it: The CDCR’s removal of this case, not any action by plaintiff, caused the action to be filed in federal court. . . . As a result of the CDCR’s removal, there was, and is, no need for plaintiff to seek leave to proceed without prepayment of the filing fee pursuant to Section 1915. In short, the removal of this action rendered plaintiff’s Three-Strikes status irrelevant for purposes of the filing fee that otherwise would have been required to be paid in this case. While the situation is a curious, and even troubling, one—namely, because a defendant elected to remove the plaintiff’s state case, that plaintiff who, under Section 1915(g), would have been denied leave to proceed
court is not subject to those provisions, but rather to the state court’s rules, which may or may not parallel federal rules.\textsuperscript{1578} When an action is removed, it is the defendants, not the plaintiff, who are responsible for paying the filing fee, and the plaintiff is not proceeding under the federal in forma pauperis statutes.\textsuperscript{1579}

Despite the plain statutory language, some courts have suggested that it is inappropriate, or even sanctionable, for prisoners with three strikes to file actions in forma pauperis in state court, which defendants then remove to federal court, allowing the prisoner to evade the three strikes bar.\textsuperscript{1580} This view seems unwarranted. Indeed, one federal appeals court has explicitly

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without prepayment of the full filing fee is able to proceed without payment of the filing fee in federal court—it is a situation that cannot be rectified by Section 1915(g).
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\textsuperscript{1578} See Blevins v. O'Malley, 2010 WL 4976729, *1 n.2 (N.D.Ind., Dec. 2, 2010) (noting three-strike plaintiff had obtained leave to proceed without payment of fees before removal); Pickett v. Hardy, 2010 WL 4103712, *2-3 (C.D.Ill., Oct. 18, 2010) (noting there was “no cause to consider the in forma pauperis statute” in removed case); Carrea v. California, 2010 WL 3984832, *8 (noting that state court IFP decision was governed by state law and federal court lacked power to revoke or modify it after removal); Lakes v. State, 333 S.C. 382, 387, 510 S.E.2d 228 (S.C.Ct.App. 1998) (holding prisoner could proceed IFP in state court, since South Carolina has no analogy to PLRA’s three strikes provision).


held that prisoners can “seek relief in state court, where limitations on filing I.F.P. may not be as strict,” as one of the grounds for upholding the constitutionality of § 1915(g). As noted, § 1915(g) applies only to persons with three strikes who “bring” an action under the federal in forma pauperis statute; if Congress had wished to forbid state court filings by such persons, it could have said so (though there would be questions about its power to do so), and if it did not wish for such cases to be removed to federal court, it could have amended the removal statute to that end. Litigants should hardly be penalized for reading statutes they way they are written, especially in view of the Supreme Court’s warning that courts should not expand the PLRA’s requirements according to their policy views.

Some courts have held that the three strikes provision cannot be applied to a removed case, but that the case must be remanded to state court if the plaintiff has three strikes—preserving the plaintiff’s right of court access and to appeal, but depriving the defendants of their statutory right to remove. These decisions, too, ignore the key proviso applying the statute only to those cases “brought” under the federal IFP statute. Recent appellate decisions have rejected that practice on the ground that the PLRA does not strip the courts of the jurisdiction conferred by the removal statute. (These decisions do not resolve whether the district court can simply dismiss the properly removed case or must entertain it.) Some courts have held

\[\text{References:}\]


2. This is not to deny that some litigants may abuse the structure of the statute. However, courts are limited by that structure in what they can do about it. Thus, in Crooker v. U.S., 2009 WL 6366792 (W.D.Pa., Nov. 20, 2009), the court noted its lack of power to act on the filing of vexatious federal claims in state court in the expectation of removal, barred him from seeking IFP status and entered a filing injunction in federal court (which would not affect his ability to continue filing in state court), and “as a courtesy to our sister courts” sent its decision to the state court judges within the district, presumably hoping that they would be able to curb the plaintiff’s filings in some fashion. In Chandler v. James, 783 F.Supp.2d 33, 39 (D.D.C., May 4, 2011), the court did not question the propriety of proceeding on the removed claims, but refused to allow the complaint’s amendment to assert new claims unrelated to the original claims.


6. Lisenby v. Lear, 674 F.3d at 263 n.3 (“Plaintiff argues that he did not ‘bring’ the action in federal court, and Defendants paid the filing fee upon removal, suggesting that, aside from his status as a ‘three strikes’ prisoner, the plain language of § 1915(g) is inapplicable to the situation presented here. That question, however, is not squarely before us here, and we properly leave it for the district court to determine in the first instance.’”); accord, Lloyd v. Benton, 686 F.3d at 1228 (following Lisenby).
that it is appropriate to require a litigant with three strikes to put up security for costs,

but at least one recent appellate decision has rejected that proposition on the ground that ordering a bond the plaintiff cannot pay is an abuse of discretion; the purpose of a bond is to ensure the plaintiff's assets to pay costs if he loses, not to sanction the plaintiff.\textsuperscript{1587}

4. The Imminent Danger Exception

A prisoner who is in “imminent danger of serious physical injury” may proceed in \textit{forma pauperis} notwithstanding the three strikes provision.\textsuperscript{1588} “Imminent danger” has been said to exist “[w]hen a threat or prison condition is real and proximate.”\textsuperscript{1589} The danger must exist at the time the complaint is filed.\textsuperscript{1590} Past danger does not constitute imminent danger unless there is reason to believe it will recur imminently.\textsuperscript{1591} Allocations of recent or ongoing physical abuse

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\item Gay v. Chandra, 682 F.3d 590, 593-94 (7th Cir. 2012).
\item 28 U.S.C. § 1915(g).
\item In \textit{Miller v. Donald}, 541 F.3d 1091, 1099 (11th Cir. 2008), the court rejected the district court’s practice of barring prisoners with three strikes from filing under “imminent danger of serious physical injury” exception if they had not paid filing fees owed from previous cases.
\item Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002); see U.S. v. Tokash, 282 F.3d 962, 971 (7th Cir.) (holding that “imminence” under the PLRA may not be as narrowly defined as in the context of a justification defense to criminal charges), \textit{cert. denied}, 535 U.S. 1119 (2002); see also Jones v. Morton, 409 Fed.Appx. 936, 937-38, *2 (7th Cir. 2010) (stating court is “inclined to agree” that the prospect of being returned in seven months to the prison where plaintiff was attacked constitutes imminent danger) (dictum).
\item Ibrahim v. District of Columbia, 463 F.3d 3, 6-7 (D.C.Cir. 2006) (holding deterioration from lack of treatment for Hepatitis C was “imminent danger”); Heimermann v. Litscher, 337 F.3d 781, 782 (7th Cir. 2003); Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003); Malik v. McGinnis, 293 F.3d 559, 562-63 (2d Cir. 2002); Abdul-Akbar v. McKelvie, 239 F.3d 307, 313-16 (3d Cir. 2000), \textit{cert. denied}, 533 U.S. 953 (2001); Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir. 1999) and cases cited; Banos v. O’Guin, 144 F.3d 883, 884-85 (5th Cir. 1998); see Vandiver v. Vashinder, 416 Fed.Appx. 560, 561-62 (6th Cir. 2011) (unpublished) (rejecting convoluted statutory construction argument to the contrary); Polanco v. Hopkins, 510 F.3d 152, 156 (2d Cir. 2007) (rejecting argument that time-of-filing rule denies court access to those who can’t get their claims in during the time they are in danger). The time of filing for this purpose is likely to be determined by using “the prison mailbox rule,” which deems the complaint filed when it is delivered to prison staff for mailing to the court. Levesque v. State Farm Ins., 2013 WL 2237827, *2 n.2 (N.D.N.Y., May 21, 2013).
\item Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003) (stating plaintiff alleging past injury must also allege “specific fact allegations of ongoing serious physical injury, or of a pattern of misconduct evidencing the likelihood of imminent serious physical injury”); Radford v. Tolister, 2014 WL 122620, *2-3 (W.D.Ark., Jan. 14, 2014) (holding allegation of past attacks by prisoners were insufficient absent “specific allegations detailing whether Plaintiff is still being housed with his attackers and allegations as to the likelihood of future injury from attacks by these inmates”); Parmelee v. Clark, 2013 WL 3777093, *1-2 (E.D.Wash., July 17, 2013) (holding substantial allegations of health-threatening food service over a period of time did not satisfy imminent danger exception since plaintiff did not state explicitly that they were currently ongoing), \textit{appeal dismissed}, No. 13-35792 (9th Cir., Feb. 26, 2014); Dye v. Grisdale, 2012 WL 6055021, *2 (W.D.Wis., Dec. 6, 2012) (holding possible renewal of denial of single-cell status, which had been restored to plaintiffs three months before suit was filed, was speculative and not imminent); Nickerson v. Correctional Managed Care Providers, 2012 WL 5207594, *4 (S.D.Tex., Oct. 22, 2012) (holding medical condition whose recurrence occurred without warning did not present imminent danger); Ransom v. Scribner, 2010 WL 3069249, *3 (E.D.Cal., Aug. 3, 2010) (rejecting argument that prisoner could not rely on risk
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and/or threats have been held sufficient by most courts, though not all. Courts typically hold that a prisoner complaining about problems at a prison from which he or she had been transferred at the time of filing fails to show imminent danger. Other actions by prison officials may also negate imminent danger. The risk of future injury can be sufficient to invoke the imminent danger exception.

of infection with Hepatitis C because he was already infected; he could become reinfected), report and recommendation adopted, 2010 WL 3565762 (E.D.Cal., Sept. 9, 2010); Francis v. Tilton, 2010 WL 235041, *2 (E.D.Cal., Jan. 21, 2010) (finding no imminent danger where plaintiff had been transferred away from prison where he said he was endangered; the possibility of gang leaders who might endanger him at the new prison was speculative); Henderson v. Anderson, 2007 WL 707336, *3 (E.D.Ark., Mar. 2, 2007) (holding prisoner who complained that his toe had to be amputated because of medical neglect did not show imminent danger after the fact); Flakes v. Department of Corrections and Corrections Corp. of America, 2006 WL 2009035, *2 (W.D.Wis., July 17, 2006) (holding allegations of past injury do not satisfy the requirement, but allegation of ongoing need for hip surgery might); see Nelson v. Moncrief, 2006 WL 3690933, *2-3 (E.D.Ark., Dec. 13, 2006) (rejecting argument that plaintiffs’ claim of deprivation of medication pre-dated complaint, reading plaintiff’s papers liberally and finding evidence of imminent harm).


1593 Palmer v. New York State Dept. of Corrections, 342 Fed.Appx. 654, 656 (2d Cir. 2009) (unpublished); Arnold v. Meisel, 2013 WL 2062360, *2 (E.D.Pa., May 15, 2013) (holding allegation that the Bloods had a contract on plaintiff did not constitute imminent danger where threats and assaults occurred in local jails and plaintiff was in state prison protective custody at the time of filing); Williams v. Heidorn, 2009 WL 77995, *3 (E.D.Wis., Jan. 9, 2009) (prisoner complaining of bad medical care at a previous prison for serious conditions did not show imminent danger); Reeves v. Wallington, 2007 WL 3037705, *3-4 (E.D.Mich., Oct. 17, 2007) (holding prisoner transferred away from the prison where he said he was assaulted, who had not been assaulted at the new prison, did not show imminent danger).

1594 Davidson v. Kasetta, 2009 WL 1444208, *2 (N.D.Fla., May 20, 2009) (plaintiff who alleged he had been raped and threatened with further rape by an officer did not show imminent danger where he had had no further contact with the officer, was held in close management and monitored, and the Secretary of Corrections had been notified of the allegation).
danger exception, though many such claims have been rejected as not imminent enough, or as too speculative. Conditions that are long-standing may be held not to constitute imminent danger, though it is not clear why that should be the case if a condition is both dangerous and

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1595 See Jones v. Morton, 2010 WL 4893794, *2 (7th Cir., Dec. 2, 2010) (stating court is “inclined to agree” that prospect of return in seven months to prison where plaintiff was previously attacked is imminent danger) (dictum) (unpublished); Ibrahim v. District of Columbia, 463 F.3d 3, 6–7 (D.C.Cir. 2006) (holding that deterioration from lack of treatment for Hepatitis C sufficiently pled imminent danger of serious physical injury); Brown v. Johnson, 387 F.3d 1344, 1350 (11th Cir. 2004) (similar to Ibrahim); McAlphin v. Toney, 281 F.3d 709, 711 (8th Cir. 2002) (holding that a prisoner who alleged that he was transferred to a prison without adequate dental facilities while in the midst of a course of dental treatment, and dental infection was spreading in his mouth, sufficiently pled imminent danger); Gibbs v. Cross, 160 F.3d 962, 967 (3d Cir. 1998) (relying on alleged environmental hazards in prison); Custard v. Allred, 2013 WL 6796531, *2 (D.Colo., Dec. 23, 2013) (holding allegation that staff members called the plaintiff “snitch” on an ongoing basis held to plead imminent danger in combination with allegation that he had been assaulted in an exercise cage and the prisoners who assaulted him continued to exercise nearby and are housed 20 feet from his cell).

1596 See Roberson v. Burl, 2013 WL 3491320, *2 (W.D.Ark., July 11, 2013) (rejecting claim based on “fear that some hypothetical future harm may come to him as a result of being incarcerated at a maximum security facility with ‘big timers’”); Spivey v. Smith, 2013 WL 1326521, *2 (S.D.Ill., Apr. 2, 2013) (holding allegation that defendants or their friends would attack plaintiff for filing this lawsuit, without more, did not establish imminent danger); Ransom v. Ortiz, 2012 WL 3639120, *3 (E.D.Cal., Aug. 23, 2012) (holding allegation about long-standing inadequate sanitation of barbering tools was not imminent); Allen v. Hart, 2012 WL 5205748, *2 (S.D.Ga., July 24, 2012) (holding prison official’s calling plaintiff “head snitch” in front of other prisoners did not create imminent danger), report and recommendation adopted, 2012 WL 5200113 (S.D.Ga., Oct. 22, 2012); Tierney v. Ato, 2012 WL 1409660, *2–3 (D.Haw., Apr. 20, 2012) (holding allegation of re-transfer to a prison where a guard and two other prisoners had assaulted plaintiff three years previously did not establish imminent danger absent allegations that those individuals again threatened him or were even still present in the prison), aff’d, 517 Fed.Appx. 560 (9th Cir. 2013) (unpublished); Robinson v. Mawer, 2008 WL 1986239, *2–3 (W.D.Mich., May 2, 2008) (holding claim that prisoner’s hand was broken and he couldn’t defend himself against assault did not allege imminent danger because there was no showing that he would imminently be assaulted); Brown v. Beard, 492 F.Supp.2d 474, 479 (E.D.Pa. 2007) (risk factors for heart disease were not sufficiently “imminent” to meet the requirement); Staley v. Yu, 2007 WL 1149874, *1 & n.2 (D.S.C., Apr. 11, 2007) (holding side effects of forced psychotropic medication might meet the standard except that plaintiff did not allege he was actually suffering from them); Coleman v. Granholm, 2007 WL 1011662, *1 (E.D.Mich., Mar. 29, 2007) (holding alleged failure to provide adequate toothpaste, which had led to several extractions and the risk of more, was “too attenuated and uncertain” to be “imminent danger”); Spencer v. Missouri Dept. of Corrections, 2007 WL 781210, *1 (E.D.Mo., Mar. 9, 2007) (holding claim that 17 months of tooth pain means “it is only a matter of time” before plaintiff gets an infection or “something worse” happens does not satisfy imminent danger standard), reconsideration denied, 2007 WL 1049339 (E.D.Mo., Apr. 5, 2007); Mayfield v. Geo Group Inc., 2007 WL 609778, *3 (N.D.Tex., Feb. 27, 2007) (holding allegation that rubbing of denture on gum and bone created a danger of infection did not satisfy imminent danger standard); Johnson v. Barney, 2005 WL 2173950, *1 (S.D.N.Y., Sept. 6, 2005) (holding a prisoner who had been beaten once at a particular prison did not face an “imminent danger” just because he might be at that prison again in the future).

after the case was filed, and is ongoing, can establish imminent danger, or whether a threshold finding of no imminent danger is binding regardless of subsequent events. Ongoing pain or other consequences from past injuries do not constitute imminent danger.

Most courts address the imminent danger exception on the pleadings, at least initially. If colorable allegations are disputed, the court may hold a hearing or rely on affidavits, depositions, etc., to resolve the question, though doing so is relatively uncommon. While allegations of original complaint had been mooted, report and recommendation adopted, 2013 WL 5979672 (E.D.Tex., Nov. 7, 2013), appeal dismissed, 13-41283 (5th Cir., Jan. 8, 2014).

See Pellegrino v. Weber, 2010 WL 1029536, *1 (D.S.D., Mar. 15, 2010) (plaintiff whose claim of imminent danger was initially rejected showed imminent danger based on new allegations of lack of follow-up medical treatment); White v. Saginaw County Jail, 2009 WL 6925218, *1 (E.D.Mich., Nov. 18, 2009) (plaintiff whose claim of imminent danger was initially rejected showed imminent danger based on new allegations of denial of diabetic snacks). As the White court pointed out: “Although this Court could deny Plaintiff’s motion to reconsider and force him to refile the same complaint alleging physical injury, this would only further delay these proceedings.” 2009 WL 6925218, *1 n.2.


Vandiver v. Vasbinder, 416 Fed.Appx. 560, 563 (6th Cir. 2011) (unpublished) (holding plaintiff “sufficiently alleged [imminent danger], and that is all that is required by § 1915(g)” (emphasis supplied); Jackson v. Jackson, 335 Fed.Appx. 14, 15 (11th Cir. 2009) (“Based on these allegations, which we must construe liberally, accept as true, and view as a whole, . . . we conclude that Jackson has sufficiently demonstrated that he was in imminent danger of serious physical injury when he filed suit.”); Andrews v. Cervantes, 493 F.3d 1047, 1050 (9th Cir. 2007) (courts must rely on complaint’s allegations; “the three-strikes rule is a screening device that does not judge the merits of prisoners’ lawsuits”); Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003) (requiring “specific fact allegations of ongoing serious physical injury, or of a pattern of misconduct evidencing the likelihood of imminent serious physical injury”); Ciapriglioni v. Saini, 352 F.3d 328, 330-31 (7th Cir. 2003) (describing standard as “amorphous,” disapproving extensive inquiry into seriousness of allegations at pleading stage); Gilmore v. Bostic, 636 F.Supp.2d 496, 514-15 (S.D.W.Va. 2009) (holding allegations of stomach and lower intestinal problems, headaches, cold sweats, rashes, nightmares, vomiting, and teeth grinding sufficient at the pleading stage; court premises they are “severe and continuous” at this point); Palacio v. New York State Div. of Parole, 2008 WL 4899255, *2 n.2 (N.D.N.Y., Nov. 12, 2008) and cases cited (imminent danger assessed based on “non-conclusory allegations” in complaint). But see Clay v. Doctor Zae Young Zeon, 2014 WL 204241, *2 (S.D.Tex., Jan. 17, 2014) (at initial screening, directing state Attorney General to produce report and medical records in order to assess presence of imminent danger); May v. Barber, 2013 WL 6228881, *4 & n.3 (S.D.Ala., Dec. 2, 2013) (rejecting claim based on lack of treatment for condition that frequently caused dangerously high blood pressure and was associated with aneurysms in about half the cases; complaint “fails to provide factually supported, specific allegations that he faces such imminent danger from his condition”).

Gibbs v. Roman, 116 F.3d 83, 86 (3d Cir. 1997); accord, Taylor v. Watkins, 623 F.3d 483, 485-86 (7th Cir. 2010) (holding “when a defendant contests a plaintiff’s claims of imminent danger, a court must act to resolve the conflict”; a hearing of properly limited scope is one means; citing Gibbs); White v. State of Colorado, 157 F.3d 1226, 1232 (10th Cir. 1998), cert. denied, 526 U.S. 1008 (1999); see Vance v. Klemm, 2014 WL 109101, *2
most determinations take place at initial screening or on a motion to dismiss, allegations that survive at the pleading stage may be found insufficient at summary judgment or another fact-based proceeding. One appeals court has held (though in an unpublished opinion, and questionably) that if the district court’s disposition of a case is inconsistent with the plaintiff’s assertion of imminent danger, the plaintiff should not be granted IFP status on appeal. Imminent danger is a question for the court, not a jury.
Courts have rejected numerous claims of imminent danger as incredible or insubstantial. Many courts seem simply to have made ad hoc judgments about the credibility of the prisoner’s claim based on no more than the pro se complaint’s allegations, sometimes supplemented by the prisoner’s response to an order to show appellate review of that decision to an indigent prisoner. In the arguably analogous context of district court holdings that if correct constitute the prisoner’s third strike, almost all courts to decide the question—except the Seventh Circuit—have held that the appeal should be allowed to go forward IFP. See nn. 1544-1545, above.

Taylor v. Watkins, 623 F.3d 483, 485 (7th Cir. 2010); Johnson v. Johnston, 2010 WL 3734121, *2 (N.D.Tex., Sept. 23, 2010) (holding “imminent danger of serious physical injury is another threshold issue which must be determined by a court and which calls for judicial resolution of factual issues without the participation of a jury”).


cause or objections to a magistrate judge’s report. Some courts have rejected seemingly substantial allegations of threat of injury. Courts have reached disparate results in seemingly similar situations, which may be distinguished only by the articulateness of the plaintiff in describing the risk. A number of decisions have noted the plaintiff’s citation of the same supposed risks invoked in previous cases in rejecting an imminent danger argument.

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1613 See Skillern v. Georgia Dept. of Corrections, 2006 WL 1843561, *3 (11th Cir., July 6, 2006) (unpublished) (holding that allegation of repeated transfers of prisoner with diagnosed cardiac condition did not meet the standard since defendants hospitalized him after each transfer to treat his dehydration, fatigue, angina pectoris, and syncope episodes); May v. Barber, 2013 WL 6228881, *4 & n.3 (S.D.Ala., Dec. 2, 2013) (rejecting imminent danger claim based on lack of treatment for Arterial Venous Malformation, a disorder which “frequently” causes dangerously high blood pressure, with aneurysms forming in about half the cases; complaint “fails to provide factually supported, specific allegations that he faces such imminent danger from his condition”); Lazor v. Gipson, 2013 WL 6009935, *1 (E.D.Cal., Nov. 13, 2013) (rejecting allegation that plaintiff “suffers from unspecified respiratory disease and hyper-sensitivity to environmental chemicals, the ventilation system in his cell triggers a reaction which causes chronic cough, and the cough damages his throat and voice and agitates cellmates so they want to attack him” as uncorroborated “paranoia and speculation” with no showing of a diagnosed medical condition), report and recommendation adopted, 2013 WL 6388655 (E.D.Cal., Dec. 6, 2013); Custard v. Belter, 2012 WL 1586740, *2-3 (D.Colo., May 7, 2012) (holding allegation that staff members repeatedly called plaintiff a snitch in front of other prisoners and repeatedly turned his lights off, leaving him in pitch dark conditions at risk of injury, did not sufficiently allege imminent danger); Hadley v. Homme, 2011 WL 2493761, *2 (E.D.Cal., June 22, 2011) (holding allegation that plaintiff was at risk of sudden death without timely recalibration of his “Implantable Cardioverter Defibrillator” device was conclusory); McCarthy v. Ete, 2010 WL 4866590, *3 (D.Mont., Oct. 25, 2010) (holding allegation of coughing up mucus with blood in it did not “rise to the level of imminent danger”), report and recommendation adopted, 2010 WL 4852648 (D.Mont., Nov. 22, 2010); Reeves v. Peters, 2008 WL 5381580, *1, 3 (E.D.Mich., Dec. 23, 2008) (holding claim of worsening vision with severe headaches and constant eye irritation did not show imminent danger); Escalera v. Graham, 2008 WL 4181741, *3 (N.D.N.Y., May 27, 2008) (rejecting claim of deprivation of medication for a seizure disorder because plaintiff didn’t allege that medical staff refused to see him, he hadn’t run out of it as of the filing of the complaint, and he did not allege it was necessary to prevent daily seizures), subsequent determination, 2008 WL 4200128 (N.D.N.Y., Sept. 8, 2008); see Appendix A for additional authority on this point.

1614 Compare Fuller v. Wilcox, 288 Fed.Appx. 509, 511, 2008 WL 2961388 (10th Cir. 2008) (denial of a wheelchair, meaning that plaintiff alleged he must crawl, and could not walk to the shower or lift himself to his bed, “could
To meet the “serious physical injury” requirement, injury need not be so serious as to violate the Eighth Amendment in itself, and need not entitle the plaintiff to a preliminary injunction—though at least one court has held that if the plaintiff has sufficiently alleged imminent injury, it should treat the complaint as requesting a preliminary injunction and proceed with a hearing. Other courts have held that the fact that a plaintiff seeks only money


Morefield v. Brewton, 2008 WL 5209984, *2-3 (S.D.Ga., Dec. 11, 2008); see also McDonald v. Shearing, 2013 WL 5346906, *2 (S.D.Ill., Sept. 23, 2013) (allowing plaintiff to proceed IFP on his complaint about treatment for peripheral artery disease, despite denial of TRO; stating “in denying a temporary restraining order, whether immediate intervention is necessary is a deciding factor. In contrast, the analysis under Section 1915(g) pertains only to ‘imminent danger of serious physical injury.’”). But see Ammons v. Hannula, 2009 WL 799670, *3 (W.D.Wis., Mar. 24, 2009) (a failure to show some likelihood of success on the merits may call into question whether there was imminent danger to begin with); Young v. Parks, 2009 WL 1371811, *2 (E.D.Cal., May 15, 2009) (“If plaintiff truly believed he was in imminent danger, he presumably would have sought an injunction.”), report and recommendation adopted, 2009 WL 6530051 (E.D.Cal., Aug. 4, 2009), adhered to on reconsideration, 2010 WL 2197418 (E.D.Cal., May 28, 2010).

damages, not an injunction, as relief “belie any representation that he might be under imminent danger,” a conclusion I believe is highly inappropriate to draw from a pro se complaint.

Successful claims of imminent danger most commonly involve allegations of failure to treat serious or potentially serious medical conditions, potentially injurious failure to accommodate disabilities, exposure to dangerous living conditions, or failure to protect

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from the risk of assault from other prisoners. In medical care cases, the question of imminent danger is sometimes conflated with the merits: IFP may be denied a prisoner with seemingly

2559443, *2 (E.D.Cal., June 27, 2011) (policy of rear-handcuffing mobility-impaired prisoners despite medical recommendations and taking their crutches and canes when moving them satisfied imminent danger standard); Williams v. Walker, 2011 WL 1807432, *1 (E.D.Cal., May 9, 2011) (prisoner with multiple mobility disabilities creating a risk of further injury unless he is placed in a bottom bunk sufficiently pled imminent danger); Wilson v. Tilton, 2010 WL 1539851, *2 (E.D.Cal., June 16, 2010) (prisoner with mental illness pled imminent danger from double-celling, in that it might result in self-harm), report and recommendation adopted, 2010 WL 2765592 (E.D.Cal., July 13, 2010); Brown v. Hubbard, 2009 WL 2407414, *2 (E.D.Cal., Aug. 3, 2009) (legally blind plaintiff satisfied imminent danger standard with allegations that prison officials ignored medical orders to provide assistance with grooming, dressing, and eating, to place him in a lower tier cell and lower bunk, with no stairs in his path); Brownlee v. Clayton, 2009 WL 1212271, *2 (E.D.Cal., May 5, 2009) (allegation that plaintiff with back problems was required to lie down when alarm sounded, resulting in pain and inability to get back up); Harris v. Beard, 2007 WL 404042, *2 (M.D.Pa., Feb. 1, 2007) (holding complaint of inadequate medical care for chronic back injury, plus deprivation of cane despite need to walk long distances and climb stairs, and deprivation of lower bunk status, met imminent danger standard); Miller v. Meadows, 2005 WL 1983838, *4 (M.D.Ga., Aug. 11, 2005) (holding paraplegic who alleged he was denied physical therapy and necessary medical devices and/or treatments and that this denial is “resulting in bed sores, serious atrophy, and deterioration of his spinal condition” sufficiently alleged imminent danger of serious physical injury).


Gibbs v. Roman, 116 F.3d at 85-86; Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) (alleging prison officials placed plaintiff in proximity with known enemies); Martin v. Gately, 2012 WL 384526, *2 (S.D.Ill., Feb. 6, 2012) (alleging officials failed to protect against ongoing threat of gang assault); Johnson v. Fischer, 2011 WL 6945706, *4 (N.D.N.Y., Dec. 22, 2011) (allegation that plaintiff “continually warned defendants about threats that both he and his family members were consistently receiving from enemy gang members, he was housed with such enemy gang members at Upstate, he continues to remain housed with enemy gang members and without protective custody in Upstate” sufficiently alleged imminent danger); Shawley v. Pennsylvania Dept. of Corrections, 2010 WL 3069584, *2 (M.D.Pa., Aug. 2, 2010) (allegation that plaintiff was subject to retaliation by staff for litigation through assaults by other prisoners); Rowe v. Morton, 2010 WL 2732712, *2 (N.D.Ind., July 7, 2010) (allegation of threats, assault, and ongoing risk from gangs, with no action from prison officials, satisfied imminent danger
serious medical problems who appears only to disagree with the nature or extent of the treatment and does not show deliberate indifference.\textsuperscript{1625}

Mental health conditions are outside the scope of the imminent danger exception unless they do in fact threaten serious \textit{physical} injury.\textsuperscript{1626} Some courts have held that self-inflicted injury cannot constitute imminent danger because, as one court put it, “[e]very prisoner would then avoid the three strikes provision by threatening suicide.”\textsuperscript{1627} This view is extreme and unwarranted, and several courts have rightly rejected it.\textsuperscript{1628} Many prison suicides, attempted

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\textsuperscript{1626} In Custard v. Allen, 2013 WL 6283962, *2 (D.Colo., Dec. 4, 2013), order clarified, 2013 WL 6796531 (D.Colo., Dec. 23, 2013), the court first observed: “An untreated psychological condition does not meet the imminent danger exception.” However, it held that the plaintiff’s condition did meet that standard in light of his additional allegation that the defendants’ practice of pounding on his cell door at night caused him to wake in a terrified state and harm himself. \textit{Id.}


suicides, and other acts of self-harm result directly from serious mental illness, and barring from court mentally ill prisoners seeking treatment for their mental illness or other measures to ameliorate its risks would be callous and life-threatening. However, a risk of self-inflicted injury may not be imminent under the circumstances.

There must be some relationship between the allegations of imminent danger and the substantive allegations in the complaint to fall within the exception. The Second Circuit has held that there must be some “nexus” between the complaint’s allegations and the danger of injury, and has analogized the matter to standing: “In deciding whether such a nexus exists, we will consider (1) whether the imminent danger of serious physical injury that a three-strikes litigant alleges is fairly traceable to unlawful conduct asserted in the complaint and (2) whether a favorable judicial outcome would redress that injury.” Several courts have held that the imminent danger exception was not satisfied because the case as framed would not cure the imminent danger alleged. Appellate courts, and some district courts, have held that if a plaintiff’s allegations of imminent danger meet the statutory standard, the case as a whole should be allowed to proceed in forma pauperis without being restricted to the claims to which the


See, e.g., Sanville v. McCaughtry, 266 F.3d 724 (7th Cir. 2001); Eng v. Smith, 849 F.2d 80 (2d Cir. 1988).

Pauline v. Mishner, 2009 WL 1505672, *2 (D.Haw., May 28, 2009) (plaintiff who said he might be suicidal, but had been moved to a medical unit and was under close observation, was not in imminent danger).

See Reynolds v. Luckenbaugh, 2012 WL 592879, *2-3 (D.Colo., Feb. 23, 2012) (allegations of assault in 2011 are not related to allegations based on events occurring in 1988); Morrison v. Watkins, 2010 WL 342248, *2 (N.D.Tex., Jan. 29, 2010) (complaints about prison conditions did not meet the imminent danger requirement where the substantive claims were against the prosecutor and about plaintiff’s criminal conviction); Fuller v. Johnson County Bd. of County Com’rs, 2007 WL 2316926, *1 (D.Kan., Aug. 8, 2007) (complaints about the ventilation system did not meet the imminent danger standard where the plaintiff’s claim addressed accessibility for the disabled); Barber v. Ohio University, 2007 WL 1831099, *2 (S.D.Ohio, June 25, 2007) (claim plaintiff was in danger from retaliation for filing this lawsuit was not closely enough related to claims in complaint to invoke imminent danger exception).


Thus, in Perry v. Boston Scientific Family, 2013 WL 6328760, *2 (D.Minn., Dec. 5, 2013), leave to file for reconsideration denied, 2014 WL 555208 (D.Minn., Feb. 12, 2014), the plaintiff complained that the defendant corporation had manufactured his defective pacemaker, but the court held he did not satisfy the imminent danger exception because his suit could not protect him from the resulting danger even if it were imminent because the court did not believe it could enjoin the manufacturer to remove it and provide treatment, since prison officials were responsible for his medical treatment, and the present action could yield nothing but a damages award. Accord, Brown v. U.S., 2013 WL 6583539, *2 (N.D.W.Va., Dec. 16, 2013) (declining to grant IFP status since plaintiff’s Federal Tort Claims Action would only provide damages and would not avert the alleged imminent danger); see cases cited in n. 1619, above.
imminent danger is related.  However, a number of district courts have restricted IFP status to the particular claims associated with imminent danger. A claim of imminent danger does not excuse the prisoner from the PLRA’s administrative exhaustion requirement. Some courts have also held that a complaint that satisfies the imminent danger exception cannot be amended to include claims that do not involve imminent danger.

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1634 Chavis v. Chappius, 618 F.3d 162, 171-72 (2d Cir. 2010) (“Nothing in the text of § 1915 provides any justification for dividing an action into individual claims and requiring a filing fee for those that do not relate to imminent danger.”); Andrews v. Cervantes, 493 F.3d 1047, 1052 (9th Cir. 2007) (“qualifying prisoners can file their entire complaint IFP; the exception does not operate on a claim-by-claim basis or apply to only certain types of relief”); Ciapriglioni v. Saini, 352 F.3d 328, 330 (7th Cir. 2003) (holding damages claim could go forward even though injunctive claim on which “imminent danger” allegation was based was moot); Gibbs v. Roman, 116 F.3d 83, 87 n.7 (3d Cir. 1997); Nelson v. Moncrief, 2006 WL 3690933, *2-3 (E.D.Ark., Dec. 13, 2006) (rejecting argument that damages claims should not go forward because they don’t serve the purpose of the imminent danger exception); Bond v. Aguinaldo, 228 F.Supp.2d 918, 919 (N.D.Ill. 2002) (allowing prisoner’s medical care claim to go forward, including allegations against defendants responsible for medical care at prisons from which he had been transferred); see Ibrahim v. District of Columbia, 463 F.3d 3, 5-7 (D.C.Cir. 2006) (granting IFP status based on imminent danger, noting “smorgasbord” of other claims but not excluding them from the grant); Hendon v. Rigg, 2013 WL 3940982, *2 (E.D.Cal., July 30, 2013) (declining to revoke IFP status where claim on which imminent harm finding was based was no longer in the case), report and recommendation adopted in part, rejected in part on other grounds, 2013 WL 5274354 (E.D.Cal., Sept. 17, 2013); Freeman v. Collins, 2011 WL 639687, *5 (S.D.Ohio, Dec. 19, 2011) (allowing entire complaint to go forward even though the particular claim involving imminent danger had been dismissed for lack of service; “the imminent-danger determination is based on the conditions as alleged at the time of the complaint, and subsequent events do not alter the imminent-danger analysis”).


1636 Fletcher v. Menard Correctional Center, 623 F.3d 1171, 1173 (7th Cir. 2010); McAlphin v. Toney, 375 F.3d 753, 755 (8th Cir. 2004); Cole v. Ellis, 2010 WL 5564632, *3 (N.D.Fla., Dec. 28, 2010), report and recommendation adopted, 2011 WL 91002 (N.D.Fla., Jan. 11, 2011), aff’d, 451 Fed.Appx. 827 (11th Cir. 2011); Jensen v. Knowles, 621 F.Supp.2d 921, 927 (E.D.Cal. 2008). The Fletcher decision holds that if the grievance system does not work quickly enough to avert imminent danger, it is not an available remedy for the prisoner’s problem; if there is an emergency grievance procedure that could work quickly enough, the prisoner must use it.

5. Constitutional Issues

Challenges to the constitutionality of the three strikes provision have been unsuccessful. District court decisions holding the provision unconstitutional have been reversed or overruled.

In my view the statute is unconstitutional. The appellate cases have ignored prior authority striking down overbroad restrictions on filing lawsuits, including denial of access to \textit{in forma pauperis} procedures, as violating the right of access to courts. The courts have also failed to address the statute’s constitutionality in light of standard First Amendment doctrine. The right of court access “is part of the right of petition protected by the First Amendment.” As such, it is “generally subject to the same constitutional analysis” as is the right to free speech. Because the three strikes provision addresses the conduct of litigation in court and not the internal operations of prisons, it is governed by the same First Amendment standards as other “free world” free speech claims. This body of law includes a principle of narrow tailoring.

Applying that narrow tailoring principle, the Supreme Court said that public officials could not recover damages for defamation unless the statements they sued about were knowingly false or made with reckless disregard for their truth; the First Amendment requires “breathing space,” and a margin for error is required for inadvertently false speech, or true speech will be deterred. This principle has also been applied in antitrust and labor law enforcement; sanctions may not be imposed under the relevant statutes against persons who bring litigation unless the litigation is both objectively and subjectively baseless.

Applied to the three strikes provision, the “breathing space” principle means that prisoners can only be sanctioned for knowing falsehood or intentional abuse of the judicial system—a category far narrower than the scope of § 1915(g). A sanction that penalizes lay

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1638 See, e.g., Polanco v. Hopkins, 510 F.3d 152, 156 (2d Cir. 2007); Lewis v. Sullivan, 279 F.3d at 528-31 (7th Cir. 2002); Higgins v. Carpenter, 258 F.3d 797, 801 (8th Cir. 2001), \textit{cert. denied}, 535 U.S. 1040 (2002); Rodriguez v. Cook, 169 F.3d 1176, 1178-82 (9th Cir. 1999); Conseillant v. Worle, 2013 WL 164242, *3-4 (W.D.N.Y., Jan. 15, 2013) (reviewing constitutional challenges); see also James v. Branch, 2009 WL 4723139, *2 (E.D.La., Dec. 1, 2009) (one-year limitations period did not deny prisoners with three strikes access to the courts).


1640 See DeLong v. Hennessey, 912 F.2d 1144, 1148 (9th Cir. 1990), \textit{cert. denied}, 498 U.S. 1001 (1990); Abdul-Akbar v. Watson, 901 F.2d 329, 332 (3d Cir. 1990); Matter of Davis, 878 F.2d 211, 212-13 (7th Cir. 1989); In re Powell, 851 F.2d 427, 431-34 (D.C.Cir. 1988); Abdullah v. Gatto, 773 F.2d 487, 488 (2d Cir. 1988).


persons proceeding pro se—and in some cases results in barring them from court—for honest mistakes of law will have the same inhibiting effect on meritorious claims that an overbroad law of defamation would have on true speech about public officials. This argument is equally applicable to other laws penalizing the filing of perceivedly frivolous litigation.\footnote{See, e.g., Carter v. Rednour, 2010 WL 3835777, *1-2 (S.D.Ill., Sept. 24, 2010) (applying Illinois statute making frivolous lawsuits disciplinary offenses; constitutional issues not discussed), certificate of appealability granted, 2010 WL 4735964 (S.D.Ill., Nov. 16, 2010).}

IX. Screening and Dismissal

Three overlapping provisions of the PLRA, taken together, extend the courts’ powers of summary dismissal by requiring the early screening of prisoner cases and extending the courts’ authority to dismiss cases \textit{sua sponte} to include cases that do not state a claim or that seek damages from an immune defendant, as well as those that are frivolous or malicious,\footnote{28 U.S.C. § 1915(e)(2); 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(c)(1); see Vanderberg v. Donaldson, 259 F.3d 1321 (11th Cir. 2001), cert. denied, 535 U.S. 976 (2002); Ray v. Evercom Systems, Inc., 2006 WL 2475264, *3-4 (D.S.C., Aug. 25, 2006) (holding fee-paid prisoner case raising antitrust claims rather than prison conditions, and joining governmental defendants, is subject to § 1915A screening), appeal dismissed on other grounds, 234 Fed.Appx. 248 (5th Cir. 2007).} regardless of whether they are \textit{in forma pauperis} or fee paid.\footnote{Plunk v. Givens, 234 F.3d 1128 (10th Cir. 2000).} This screening is a threshold requirement addressing the pleadings and does not impose on a court “an ongoing obligation to \textit{sua sponte} and continuously evaluate the sufficiency of an inmate’s action even after counsel has entered an appearance on behalf of the defendants.”\footnote{Wolfel v. Collins, 2011 WL 14457, *3 (S.D.Ohio, Jan. 4, 2011). In \textit{Wolfel}, defendants sought to rely on the screening provision to obtain dismissal of a claim as time-barred, though they had failed to plead limitations in their answer and the claim’s untimeliness was not apparent on the face of the complaint.\footnote{Wheeler v. Wexford Health Sources, Inc., 689 F.3d 680, 682 (7th Cir. 2012) (“Congress has the authority to require judges to expedite particular matters, . . . and § 1915A(a) exercises that authority. Ten months exceeds any understanding of ‘as soon as practicable’.”).} The screening requirement obligates district courts to proceed “as soon as practicable,” leading at least one appellate court to condemn delays of months in initial screening.\footnote{See Taylor v. Carter, 2013 WL 5754951, *2 (E.D.Cal., Oct. 23, 2013) (denying motion for preliminary injunction raising safety issues because plaintiff’s three-month-old case had not been screened; “Plaintiff is advised that the Court presently has a large number of cases awaiting preliminary screening.”); see also In re Brown, ___ Fed.Appx. ____, 2013 WL 5977550, *1-2 (3d Cir. 2013) (denying mandamus for eight-month delay in proceeding, citing 28 U.S.C. § 1915(e)(2) screening authority to justify no action until the case is screened).} However, it appears that substantial delays in screening exist in some jurisdictions.\footnote{Hairston v. Blackburn, 2010 WL 145793, *2-3 (S.D.Ill., Jan. 12, 2010); Crooker v. Burns, 544 F.Supp.2d 59, 67 (D.Mass., Apr. 10, 2008) and cases cited.}

The screening requirement applies to cases removed from state courts, at least under 28 U.S.C. § 1915A and 42 U.S.C. § 1997e(c), which are not limited to cases filed under the federal \textit{in forma pauperis} scheme.\footnote{Hairston v. Blackburn, 2010 WL 145793, *2-3 (S.D.Ill., Jan. 12, 2010); Crooker v. Burns, 544 F.Supp.2d 59, 67 (D.Mass., Apr. 10, 2008) and cases cited.} The Second Circuit has agreed with other circuits that dismissal under 28 U.S.C. § 1915A, which applies to all civil complaints filed by prisoners against governmental officials or entities regardless of whether they proceed \textit{in forma pauperis} can be with prejudice.\footnote{Shakur v. Selsky, 391 F.3d 106, 112 (2d Cir. 2004) and cases cited. Other circuits have held that dismissal under 28 U.S.C. § 1915, the \textit{in forma pauperis} statute, must be without prejudice, consistently with pre-PLRA law; the Second Circuit has not decided the question. \textit{Id.} (citing cases).} The Supreme Court has held that failure to exhaust administrative remedies is
not failure to state a claim for screening purposes unless non-exhaustion is apparent on the face of the complaint.\textsuperscript{1655} The same is true of dismissal based on other affirmative defenses.\textsuperscript{1656}

The Second Circuit, like all others, has held that under the PLRA, as under prior law, pro se litigants should be allowed to amend their complaints to avoid dismissal,\textsuperscript{1657} though one federal circuit has only recently abandoned the contrary view.\textsuperscript{1658} The PLRA also does not affect the rule that a court reviewing a complaint must accept as true all allegations of material fact and construe them in the light most favorable to the plaintiff, or the rule that courts must construe pro se pleadings liberally.\textsuperscript{1659}

The standard of appellate review under the PLRA screening provisions has not been decided in the Second Circuit.\textsuperscript{1660}

One court has held that the PLRA-dictated screening process is generally good cause for extending the 120-day time period for serving process.\textsuperscript{1661} Courts have disagreed over the effect of passing initial screening on defendants’ right to seek dismissal under Rule 12(b)(6).\textsuperscript{1662}

\textbf{X. Waiver of Reply}

The PLRA allows defendants in prisoner cases to “waive the right to reply” and provides that “[n]o relief shall be granted to the plaintiff unless a reply has been filed.” The court may

\begin{thebibliography}{1662}
\item Jones v. Bock, 549 U.S. 199, 214-15 (2007); see n. 295, above, for discussion of how non-exhaustion can, and cannot, be apparent on the face of the complaint.\textsuperscript{1655}
\item See Vasquez Arroyo v. Starks, 589 F.3d 1091, 1097 (10th Cir. 2009) (holding dismissal at screening as time-barred requires that the lack of meritorious tolling issues be clear from the face of the complaint, or else that the court has provided notice and an opportunity to be heard for the prisoner).\textsuperscript{1656}
\item LaFountain v. Harry, 716 F.3d 944, 951 (6th Cir. 2013), overruling McGore v. Wrigglesworth, 114 F.3d 601, 612 (6th Cir. 1997). LaFountain acknowledged that the former no-amendment rule was inconsistent with the Supreme Court’s holding that “the PLRA's screening requirement does not—explicitly or implicitly—justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself.” Jones v. Bock, 549 U.S. at 214.\textsuperscript{1658}
\item See Resnick v. Hayes, 213 F.3d 443, 446 (9th Cir. 2000); Gomez v. USAA Federal Savings Bank, 171 F.3d at 795-96.\textsuperscript{1659}
\item Fitzgerald v. First East Seventh Street Tenants Corp., 221 F.3d 362, 364 n. 2 (2d Cir. 2000); Cruz v. Gomez, 202 F.3d 593, 596 n. 4 (2d Cir. 2000) (noting most circuits use \textit{de novo} standard). \textit{But see} Bilal v. Driver, 251 F.3d 1346, 1348-49 (11th Cir.) (endorsing \textit{de novo} standard for dismissals that do not state a claim and abuse of discretion standard for dismissals as frivolous), \textit{cert. denied}, 534 U.S. 1044 (2001).\textsuperscript{1660}
\item Shabazz v. Franklin, 380 F.Supp.2d 793, 799-800 (N.D.Tex. 2005).\textsuperscript{1661}
\item Compare Harrison v. Cox, 2014 WL 411537, *1 n.2 (E.D.Cal., Feb. 3, 2014) (citing “Court's disfavor of 12(b)(6) motions for failure to state a claim where a reasoned screening decision exists”; court dismisses on other grounds); Shockley v. McCarty, 677 F.Supp.2d 741, 746 (D.Del. 2009) (holding a screening decision is the law of the case as to whether the complaint states a claim, and a motion to dismiss should be denied on that ground unless the complaint has been amended in the interim) \textit{with} Castle v. Eurofresh, Inc., 2010 WL 797138, *2 (D.Ariz., Mar. 8, 2010) (holding motion to dismiss appropriate because of the complexity of the claims, noting that at screening the court did not have the benefit of counsel's briefs), stay denied, 2010 WL 1657635 (D.Ariz., Apr. 21, 2010), \textit{leave to appeal denied}, 2010 WL 2035576 (D.Ariz., May 20, 2010).\textsuperscript{1662}
\end{thebibliography}

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require a reply “if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.”

“Reasonable opportunity to prevail” seems to mean no more than that the case has survived initial screening— i.e., the complaint states a claim, is not frivolous or malicious, and does not seek damages from an immune defendant. No default or default judgment can be entered if defendants have not been directed to answer the complaint. Some courts have gone further and held that prisoners cannot get a default judgment for failure to answer in a case filed from prison, though the question is not settled, and default judgments continue to be granted in some prison cases.

XI. Hearings by Telecommunication and at Prisons

The PLRA encourages the use of telecommunications to hold pre-trial proceedings without removing the prisoner from the prison, and authorizes arrangements to hold hearings in the same manner. This statute seems mainly to ratify pre-existing practice.

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1667 In McCurdy v. Johnson, 2012 WL 3135906, *2 (D.Nev., Aug. 1, 2012), the court held that a default judgment may be entered if the court has entered an order specifically based on 42 U.S.C. § 1997e(g)(2), which authorizes requiring a reply where the court has found a reasonable opportunity to prevail on the merits. McCurdy also holds that a prisoner must demonstrate exhaustion before obtaining a default judgment. 2012 WL 3135906, *3. The court does not explain why the plaintiff must negate an affirmative defense that the defendant has the burden of raising. See § IV.D.1, above.


It is not clear whether this PLRA provision extends to trials or other evidentiary proceedings. A non-PLRA decision authorizing psychiatric commitment hearings by video emphasized that (unlike trials) such decisions are generally based on expert testimony and do not depend much on either the witnesses’ demeanor or the “impression” made by the person being committed, and that the proceeding does not involve factfinding in the usual sense. This reasoning suggests the statute should not be viewed as extending to trials. Before the PLRA, courts had expressed a strong preference for having prisoner plaintiffs present in court for trial.

XII. Revocation of Earned Release Credit

The PLRA authorizes courts “[i]n any civil action brought by an adult convicted of a crime and confined in a Federal correctional facility” to deprive federal prisoners of all of their good time if they find that a prisoner has filed a claim for a malicious purpose or solely to harass the defendant, or that the prisoner has testified falsely or otherwise knowingly presented false evidence or information to the court. This action is available only in a civil action brought by the prisoner—not in a proceeding brought by the government referring to past civil actions. This provision is rarely invoked; the only reported applications of it, aside from the case referred to just above, appear to be in several cases in the District of South Carolina.

There is not a word in the statute about the procedural protections due the prisoner if this statute is invoked. In my view such action is analogous to criminal contempt, and the prisoner should be entitled to the protections of the criminal process for the reasons stated in International Union, United Mine Workers of America v. Bagwell.

1670 See, e.g., Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991) (noting telephone evidentiary hearing to assess frivolousness of claim); James v. Alfred, 835 F.2d 605, 606 (5th Cir.) (describing “Spears hearing” held in prison), cert. denied, 485 U.S. 1036 (1988).
1673 Hernandez v. Whiting, 881 F.2d 768, 770-72 (9th Cir. 1989); Muhammad v. Warden, Baltimore City Jail, 849 F.2d 107, 113 (4th Cir. 1988); Poole v. Lambert, 819 F.2d 1025, 1029 (11th Cir. 1987).
1677 512 U.S. 821, 828-34 (1994). In U.S. v. Williams, supra, where the prisoner alleged misconduct by his defense attorney which she denied, the court set the matter for an evidentiary hearing, then inferred the statutorily required findings from the prisoner’s withdrawing the motion before the hearing.
XIII. Diversion of Damage Awards

Compensatory damages awarded to prisoners in civil actions against correctional personnel are to be paid directly to satisfy outstanding restitution orders.\textsuperscript{1678} Reasonable efforts are to be made to notify the victims of the crime for which the prisoner was convicted and incarcerated of any pending payment of compensatory damages.\textsuperscript{1679} The statute does not say who is responsible for making the “reasonable efforts to notify the victims.” There has been almost no judicial construction of these statutes.\textsuperscript{1680} One very significant question is whether the phrase “compensatory damages awarded,” which appears in both, includes settlement of a damages claim. As a matter of plain English, it presumably does not, and so, apparently, holds the only relevant decision I am aware of.\textsuperscript{1681} In addition, as plaintiff’s counsel in that case argued, the statute applies only to compensatory damages, and settlements are not generally characterized as compensatory or punitive, so it cannot be determined what part, if any, of a settlement represents compensatory damages.

Some states, including New York, have passed statutes governing the disposition of damage awards received by prisoners. It is arguable that the PLRA provisions pre-empt such statutes insofar as they affect awards made in federal court in cases brought under federal law.\textsuperscript{1682}

\begin{footnotes}
\item[1680] In Loucony v. Kupec, 2000 WL 1050905 (D.Conn., Feb. 17, 2000), defendants sought early in the litigation to require the plaintiff to provide the name of the victim of his crime so he or she could be compensated from any award. However, the court ruled that since the plaintiff did not file suit until he was out of prison, he was not a “prisoner” subject to the statute.
\item[1681] In Dodd v. Robinson, Civil Action No. 03-F-571-N, Order, *1 (M.D.Ala., Mar. 26, 2004), in which a district attorney sought to satisfy a restitution order by moving in the court in which a case had been settled, the district court held that the PLRA provision concerning restitution orders “is not applicable in this case because the parties have reached a private settlement agreement.” The court expressed confidence that the District Attorney had ample means in state court to enforce the restitution order. Cf. Torres v. Walker, 356 F.3d 238, 243 (2d Cir. 2004) (holding that a “so ordered” stipulation settling a damage claim was not a money judgment).
\item[1682] Cf. Felder v. Casey, 487 U.S. 131 (1988) (holding that a state notice of claim requirement was pre-empted by federal law eschewing such a requirement in § 1983 cases, even when brought in state court); Hankins v. Finnel, 964 F.2d 853, 861 (8th Cir.) (holding that § 1983 pre-empts a state Incarceration Reimbursement Act and makes it unenforceable against a § 1983 damage judgment), cert. denied, 506 U.S. 1013 (1992).
\end{footnotes}
APPENDIX A

Additional Authority

To make the preceding text more presentable, I have removed some cumulative materials from some of the longer footnotes.

means of remedying his medical condition); Matthews v. Legrand, 2009 WL 3088325, *6 (D.Nev., Sept. 22, 2009) (stating that ordering a prison transfer would be more intrusive than reform of prison procedures); Cassini v. Lappin, 2009 WL 224147, *3 (E.D.Cal., Jan. 29, 2009) (transfer from private prison back to federal custody and expungement of disciplinary record would not correct plaintiff’s equal protection claim about denial of normal federal administrative review to federal prisoner in private facility); Johnson v. Sullivan, 2008 WL 5396614, *7-8 (E.D.Cal., Dec. 23, 2008) (requiring a one-hour telephone call weekly between plaintiff and his counsel pending trial; § 3626(a) cited but no analysis presented), reconsideration denied, 2009 WL 160250 (E.D.Cal., Jan. 21, 2009); Johnson v. Martin, 2005 WL 3312566, *8 (W.D.Mich., Dec. 7, 2005) (holding that enjoining a total prohibition on receipt of publications from a religious sect satisfied the PLRA’s requirements), reconsideration denied, 2006 WL 223108 (W.D.Mich., Jan. 30, 2006); Greybuffalo v. Frank, 2003 WL 2321161, *5 (W.D.Wis., Nov. 4, 2003) (“Generally, a prison transfer would be a much broader form of relief than that necessary to remedy a constitutional or statutory rights violation. . . . [T]he appropriate remedy would be to provide plaintiff with the item he requested or allow him to engage in the desired religious practice.”); Dodge v. County of Orange, 282 F.Supp.2d 41, 89 (S.D.N.Y. 2003) (enjoining jail officials from strip-searching new admissions without reasonable suspicion of contraband based on crime, characteristics of arrestee, or circumstances of arrest. “I cannot imagine an injunction that is narrower, less extensive, or less intrusive. . . . I am not mandating any specific actions defendants must take. Rather, I am telling defendants that they must adhere to the reasonable suspicion standard. . . .”), appeal dismissed, remanded on other grounds, 103 Fed.Appx. 688, 2004 WL 1567870 (2d Cir. 2004); Charles v. Verhagen, 2002 WL 32348353 (W.D.Wis., Dec. 19, 2002) (holding in RLUIPA case that the violation was in refusing to permit Muslims to possess any quantity of prayer oil, declining on PLRA grounds to require defendants to allow it other than in expensive one-ounce bottles).


Note 295: Lee v. Smith, 2010 WL 114876, *2 (S.D.Ga., Jan. 12, 2010) (statement that grievance was dismissed because plaintiff attached extra pages to it did not admit non-exhaustion where he also alleged that a staff member gave him permission to do so); Stewart v. Central Arizona Correction Facility, 2009 WL 3756504, *3 (D.Ariz., Nov. 9, 2009) (admission of non-exhaustion on the face of the complaint did not warrant dismissal where other allegations would support an argument that remedies were unavailable), reconsideration denied, 2009 WL 5184466 (D.Ariz., Dec. 22, 2009); Hernandez v. Ryan, 2009 WL 3462178, *2 (S.D.Fla., Oct. 22, 2009) (where grievances attached to the complaint did not show
exhaustion, court declines to dismiss, since those grievances may not tell the whole story and defendants have the burden of proof; Andrade v. Christ, 2009 WL 2848984, *8-9 (D.Colo., Sept. 1, 2009) (applying Aquilar Avellaveda; though non-exhaustion was apparent, whether plaintiff was misinformed about the remedy, and what the remedy was, were not apparent); Cruickshank v. Pierce County Jail, 2009 WL 2057043, *3 (W.D.Wash., July 15, 2009) (declining to dismiss, though complaint said plaintiff’s grievance was still pending after three months, where defendants provided no evidence about the grievance process); Leterski v. Kingfisher County Jail, 2007 WL 1039224, *2 (W.D.Okla., Apr. 3, 2007) (declining to dismiss where complaint followed grievance by only 17 days, since the complaint did not show what remedies were available, what effort plaintiff made to exhaust them, or whether those efforts were timely and in compliance with the rules), subsequent determination, 2007 WL 1683841 (W.D.Okla., June 8, 2007).

amend to allege exhaustion); Callegari v. Lee, 2009 WL 2258337, *4 (N.D.Cal., July 28, 2009) (where

*2 (N.D.Cal., Nov. 16, 2009) (where

dismisses with leave to amend to allege exhaustion.); Gram v. Napa State Hospital, 2009 WL 3837269,

available administrative remedies with respect to each claim." Absent exhaustion allegations, court

which must be answered before Plaintiff can proceed with his claims is whether Plaintiff has

exhaustion); Meneweather v. Evans, 2009 WL 3872032, *1-2 (N.D.Cal., Nov. 16, 2009) ("A question

which must be answered before Plaintiff can proceed with his claims is whether he has exhausted

available administrative remedies with respect to each claim.” Absent exhaustion allegations, court

dismisses with leave to amend to allege exhaustion.); Gram v. Napa State Hospital, 2009 WL 3837269,

*2 (N.D.Cal., Nov. 16, 2009) (where exhaustion allegations were unclear, court dismisses with leave
to amend to allege exhaustion); Callegari v. Lee, 2009 WL 2258337, *4 (N.D.Cal., July 28, 2009) (where

Note 323: Ethridge v. Childs, 2013 WL 1414645, *7 (E.D.Cal., Apr. 8, 2013) (same as Vasquez, below); Dews v. Kern Radiology Medical Group, Inc., 2013 WL 1152049, *3 (E.D.Cal., Mar. 19, 2013) (same as Vasquez, below), appeal dismissed, 2013 WL 6068589 (9th Cir. 2013), cert. denied, 134 S.Ct. 689 (2013); Vasquez v. County of Merced Correctional Facility, 2013 WL 593700, *3 (E.D.Cal., Feb. 14, 2013) (“If Plaintiff chooses to amend, he should allege facts showing he exhausted each level of appeal as to all named Defendants or that he was excepted from such exhaustion requirements.”); Wheeler v. Aliceson, 2013 WL 56960, *9 (E.D.Cal., Jan. 3, 2013) (similar to Swearington, below); Barger v. California State Prison, Corcoran, 2012 WL 6628965, *4 (E.D.Cal., Dec. 19, 2012) (similar to Swearington, below); Swearington v. California Dept. of Corrections and Rehabilitation, 2012 WL 5288812, *11 (E.D.Cal., Oct. 23, 2012) (noting failure to allege exhaustion, stating plaintiff should “allege facts supporting exhaustion at each level of prison appeal as to all named Defendants” if he amends); Evans v. Beck, 2012 WL 4747220, *6 (E.D.Cal., Oct. 4, 2012) (dismissing on merits with leave to amend, but directing plaintiff to plead exhaustion if he amends), reconsideration denied, 2012 WL 5866635 (E.D.Cal., Nov. 19, 2012); Lena v. Marin County, 2012 WL 4485625, *2 (N.D.Cal., Sept. 27, 2012) (titling section “Failure to Allege Exhaustion of Available Administrative Remedies”); Bolin v. Brown, 2012 WL 2933502, *4 (E.D.Cal., July 18, 2012) (finding non-exhaustion based on failure to plead exhaustion); Jenkins v. Bernatene, 2012 WL 2886678, *6-7 (E.D.Cal., July 13, 2012) (noting plaintiff’s failure to allege all stages of exhaustion, instructing plaintiff to do so in any amended complaint); Luna v. California Health Care Services, 2012 WL 1978391, *4-5 (E.D.Cal., June 1, 2012) (noting the plaintiff’s failure to allege exhaustion as to various defendants); McCollum v. Waddington, 2012 WL 262583, *2 (D.Kan., Jan. 30, 2012) (where plaintiff checked a box on the complaint form indicating exhaustion, but submitted only an initial grievance, court says the complaint shows non-exhaustion); Bahr v. Ratti, 2011 WL 2888049, *3 (N.D.Cal., July 19, 2011) (where plaintiff checked a box on the complaint form indicating he had presented the facts through the grievance procedure, but did not cite appeal numbers or dates or state that he had completed the last step, it “appears from the face of the complaint that he has not exhausted,” and court dismisses with leave to amend and allege exhaustion); Blorton v. Laney, 2011 WL 2357367, *4 (D.N.D., Mar. 14, 2011) (where plaintiff did not say he had exhausted or remedies were unavailable, court directs him to file an amended complaint specifically addressing exhaustion), report and recommendation adopted, 2011 WL 1672472 (D.N.D., May 3, 2011); Ortega v. Ritchie, 2011 WL 1667469, *3 (N.D.Cal., May 3, 2011) (where plaintiff said he tried to exhaust but “all issues were ignored or passed,” court said it was “unclear” whether he allowed enough time for the process, and therefore it appeared the claims were unexhausted, and plaintiff would have to amend to allege exhaustion); Taylor v. Qualls, 2011 WL 1624972, *1 (M.D.Tenn., Apr. 27, 2011) (where plaintiff’s claim was a disciplinary matter, dismissed for not pleading exhaustion of the disciplinary process); Kellogg v. California, 2011 WL 768691, *3 (N.D.Cal., Feb. 28, 2011) (where plaintiff wrote on complaint form about exhaustion, “They denied me due process, and passed the buck,” court holds “[i]t thus appears Plaintiff has not exhausted,” and dismisses subject to filing of amended complaint to “prove” exhaustion); Fisher v. Taylor, 2010 WL 3259821, *3 (D.N.J., Aug. 17, 2010) (requiring plaintiffs seeking to proceed jointly to provide information concerning their efforts to exhaust); Tufono v. Ortega, 2010 WL 3059180, *2 (N.D.Cal., Aug. 2, 2010) (expressing doubts about exhaustion, directing amended complaint alleging exhaustion and providing documentation, on pain of dismissal); Watford v. Balicki, 2010 WL 2985639, *3 (D.N.J., July 23, 2010) (similar to Fisher); Cook v. Cate, 2010 WL 1838706, *3 (N.D.Cal., May 5, 2010) (where allegations were unclear, prisoner’s claims “could be unexhausted”; complaint dismissed with leave to amend to show exhaustion of all claims against all defendants); Bey v. Shearin, 2009 WL 4728693, *1 (D.Md., Dec. 3, 2009) (dismissing at screening based on lack of information about exhaustion); Meneweather v. Evans, 2009 WL 3872032, *1-2 (N.D.Cal., Nov. 16, 2009) (“A question which must be answered before Plaintiff can proceed with his claims is whether he has exhausted available administrative remedies with respect to each claim.” Absent exhaustion allegations, court dismisses with leave to amend to allege exhaustion.); Gram v. Napa State Hospital, 2009 WL 3837269, *2 (N.D.Cal., Nov. 16, 2009) (where exhaustion allegations were unclear, court dismisses with leave to amend to allege exhaustion); Callegari v. Lee, 2009 WL 2258337, *4 (N.D.Cal., July 28, 2009) (where
plaintiff alleged he had grieved but not received a response, court directs him to file an amended complaint to allege additional detail concerning exhaustion and submit relevant documentation; Smith v. Hartshorn, 2009 WL 2195909, *2 (C.D.Ill., July 14, 2009) (noting screening conducted by telephone, finding non-exhaustion based on plaintiff’s credibility problems); Flowers v. Ahern, 650 F.Supp.2d 988, 992 (N.D.Cal. 2009) (characterizing lack of specificity about exhaustion and failure to attach grievance forms as non-exhaustion apparent on the face of the complaint; directing plaintiff to plead exhaustion in any amended complaint); Anderson v. Tilton, 2009 WL 210451, *2 (N.D.Cal., Jan. 26, 2009) (dismissing because inter alia “plaintiff does not allege he has exhausted his administrative remedies with respect to his claims”); Wilson v. San Francisco City & County, 2009 WL 112844, *2-3 (N.D.Cal., Jan. 15, 2009) (dismissing complaint at initial screening for lack of clarity on exhaustion, with leave to amend to allege exhaustion); Stelly v. Tootell, 2008 WL 5069749, *2 (N.D.Cal., Nov. 25, 2008) (plaintiff pled that he had filed grievances but didn’t say whether he exhausted; because he didn’t attach a final decision, the court states it appears from the face of the complaint he didn’t exhaust; so his complaint is dismissed with leave to amend); Phillips v. California, 2008 WL 5047676, *2 (N.D.Cal., Nov. 25, 2008) (where plaintiff said decisions were attached, but failed to attach them, court says non-exhaustion “appears from the face of the complaint” and dismisses with leave to amend and show exhaustion); Ferguson v. Cook County Dept. of Corr., 2008 WL 4844737, *1 (N.D.Ill., Nov. 5, 2008) (dismissing for lack of “showing” of exhaustion in complaint); Settle v. Bell, 2008 WL 3244959, *5 (M.D.Tenn., July 24, 2008) (stating plaintiff has the burden of showing exhaustion), report and recommendation adopted in part, rejected in part on other grounds, 2008 WL 3244933 (M.D.Tenn., Aug. 6, 2008); Hudson v. Jabe, 2008 WL 2271150, *4 (E.D.Va., June 2, 2008) (directing plaintiff to submit additional information about exhaustion at initial screening stage); Sanders v. Bassett, 2008 WL 1967503, *3 (W.D.Va., May 5, 2008) (dismissing for failure to allege or document exhaustion).

2011) (declining to dismiss where defendants submitted no actual evidence of particular prison’s remedy); Holston v. DeBranca, 2011 WL 666880, *4-5 (E.D.Cal., Feb. 11, 2011) (declining to dismiss where defendants did not show remedy was available to prisoner who was only briefly present in the jail, or that he could have pursued the remedy after transfer), report and recommendation adopted, 2011 WL 884864 (E.D.Cal., Mar. 10, 2011); Lute v. Johnson, 2011 WL 284491, *2-3 (D.Idaho, Jan. 26, 2011) (declining to dismiss where defendants submitted grievance policy from a later period than at issue in the case); Hastings v. May, 2010 WL 6560269, *3 (E.D.Ark., Nov. 26, 2010) (same as Dunmore); Williams v. Turner, 2010 WL 3724827, *2 (W.D.Ark., Sept. 17, 2010) (defendants failed to establish “what the grievance procedure is, or who responds to the grievances”); Parisi v. Arpaio, 2009 WL 4051077, *3 (D.Ariz., Nov. 20, 2009) (where plaintiff said he was told his issue was non-grievable, defendants failed to show otherwise, e.g., by showing that other prisoners had alleged that defendants did not show there was a remedy for plaintiff’s detainer problem); Burkett v. Marshall, 2009 WL 454133, *5-6 (S.D.Ga., Feb. 23, 2009) (defendants failed to show that appeal procedure not in the inmate handbook was actually available to prisoners); Main v. Martin, 2009 WL 215404, *6 (D.Colo., Jan. 22, 2009) (where prisoner had been denied a grievance form and told that his problem was non-grievable, defendants failed to show that he had an available remedy); Fernandez v. Morris, 2008 WL 2775638, *3 (S.D.Cal., July 16, 2008) (defendants who failed to show availability of remedies in segregation were not entitled to dismissal for non-exhaustion); Ayala v. C.M.S., 2008 WL 2676602, *3 (D.N.J., July 2, 2008) (defendants who failed to specify what procedures were available were not entitled to dismissal for non-exhaustion); Ammouri v. Adappt House, Inc., 2008 WL 2405762, *3 (E.D.Pa., June 12, 2008) (defendants who provided only “minimal explanation or proof” concerning the relevant grievance procedures did not establish non-exhaustion); Bryant v. Sacramento County Jail, 2008 WL 410608, *4-5 (E.D.Cal., Feb. 12, 2008) (defendants who showed there was a grievance system and plaintiff didn’t use it, but failed to show the plaintiff was notified of the grievance system, did not meet their burden on summary judgment), report and recommendation adopted, 2008 WL 780704 (E.D.Cal., Mar. 21, 2008); Martino v. Westchester County Dept. of Corrections, 2008 WL 144827, *2 (S.D.N.Y., Jan. 15, 2008) (defendants who failed to identify available remedies or show that they were available to the plaintiff did not establish non-exhaustion); McCray v. Peachey, 2007 WL 3274872, *4-5 (E.D.La., Nov. 6, 2007) (holding defendants failed to show that the grievance policy they relied on was in effect at the relevant time and the plaintiff was advised of it); Farrell v. Hunter, 2006 WL 4756454, *4 (M.D.Fla., Oct. 27, 2006) (holding defendants who failed to place their administrative procedures in the record had not met their burden of showing lack of exhaustion); Haggenmiller v. Klang, 2006 WL 2917177, *3 (D.Minn., Oct. 11, 2006) (“defendant has not established that an administrative complaint procedure exists” at the jail); Conner v. Martinez, 2006 WL 2668977, *2 (D.Ariz., Sept. 14, 2006) (“Defendant bears the burden of specifying what remedies were available to ‘Plaintiff.’”); Baker v. Allen, 2006 WL 1128712, *9 (D.N.J., Apr. 24, 2006) (denying motion to dismiss because medical provider failed to describe grievance procedures exist for its program), amended on reconsideration, 2006 WL 2226351 (D.N.J., Aug. 3, 2006); Monroe v. Fletcher, 2006 WL 1699701, *2 (W.D.Va., June 12, 2006) (holding defendants did not show the existence of a “specific, available remedy” against the U.S. Marshals Service); Worthy v. Dep’t of Corrections, 2006 WL 776791, *4-5 (D.N.J., Mar. 27, 2006) (holding that defendants’ submissions did not sufficiently establish available administrative remedies); Jordan v. Linn County Jail, 2006 WL 581254, *3 (N.D.Iowa, Mar. 10, 2006) (rejecting defendants’ argument that the plaintiff failed to appeal on the ground that the record did not establish the existence of an appeals process), report and recommendation adopted, 2006 WL 1071758 (N.D.Iowa, Apr. 20, 2006); Clavier v. Goodson, 2005 WL 3213914, *3 (E.D.Mo., Nov. 30, 2005) (holding that defendants seeking summary judgment must submit evidence establishing what grievance procedure was available); Goeber v. Lee, 2005 WL 1705485, *2 (M.D.Fla., July 19, 2005) (holding defendants who failed to submit the alleged jail grievance procedure failed to establish non-exhaustion of available remedies); Bafford v. Simmons, 2001 WL 1677574, *4 (D.Kan., Nov. 7, 2001) (holding that defendants moving for summary judgment “must identify the specific remedies and provide evidence that they were not exhausted”).
Note 343: Ferguson v. Bauers, 2013 WL 5295651, *6 (W.D.N.Y., Sept. 18, 2013) (holding defendants who had destroyed the grievance files and logs for the relevant year could not show non-exhaustion; lack of clerk’s signature or number on plaintiff’s grievance copy did not show non-exhaustion where plaintiff attested to his filing the grievance); Howard v. Memnon, 2013 WL 1175256, *11 (M.D.Fla., Feb. 12, 2013) (declining to dismiss for non-exhaustion where defendants produced some grievances, plaintiff produced additional grievances, and defendants did not submit an affidavit from the records custodian or other evidence establishing that all relevant grievances were before the court), report and recommendation adopted, 2013 WL 1175253 (M.D.Fla., Mar. 21, 2013); Alston v. Lewis, 2012 WL 3704934, *5 (E.D.N.C., Aug. 27, 2012) (noting that defendants’ evidence about plaintiff’s grievance appeals failed to identify the subjects of the appeals and covered only part of plaintiff’s stay in the prison); Mincy v. McConnell, 2011 WL 6337931, *7 (W.D.Pa., Nov. 22, 2011) (holding submission of documents inadequate absent certification that they were a complete and accurate record of plaintiffs’ grievance proceedings), report and recommendation adopted, 2011 WL 6337787 (W.D.Pa., Dec. 19, 2011); Smith v. Pennsylvania Dept. of Corrections, 2011 WL 4573364, *11 (W.D.Pa., Sept. 30, 2011) (declaration that discussed unexhausted grievances without stating whether these were all the grievances plaintiff filed did not support summary judgment for non-exhaustion); Gray v. Metropolitan Detention Center, 2011 WL 2847430, *9 (E.D.N.Y., July 15, 2011) (search of records of grievances filed while plaintiff was at a particular jail was not adequate where prisoner was transferred before grievance deadline had passed, and search would have missed grievances filed after transfer); Hightower v. Schwarzenegger, 2011 WL 2620376, *5 (E.D.Cal., June 30, 2011) (holding lists of grievances and appeals, without evidence of their content, and documents copied on one side only did not establish that the plaintiff had failed to exhaust the issues before the court), report and recommendation adopted, 2011 WL 3665021 (E.D.Cal., Aug. 19, 2011); Johnson v. Danberg, 2011 WL 780839, *3-4 (D.Del., Feb. 28, 2011) (noting defendants’ record search did not include time period when plaintiff said she filed her grievance); Urena v. Wolfson, 2010 WL 5057208, *6-7 (E.D.N.Y., Dec. 6, 2010) (noting that defendants’ record search did not include the period for which plaintiff submitted copies of grievances); Hendon v. Baroya, 2010 WL 2942655, *3 (E.D.Cal., July 23, 2010) (noting failure to search records for entire relevant period and possible failure to examine actual grievances rather than merely a tracking log), report and recommendation adopted, 2010 WL 3504865 (E.D.Cal., Sept. 7, 2010); Franklin v. Bearden, 2009 WL 3052613, *5 (D.S.C., Sept. 23, 2009) (affidavit stating no grievance had been filed against the present defendants did not establish non-exhaustion where there was no “name the defendant” rule and plaintiff had filed some grievances); Jackson v. Carroll, 643 F.Supp.2d 602, 615 (D.Del., Aug. 5, 2009) (defendants failed to present all of the grievances filed, the resolution of the grievances, or the pertinent policy regarding the appeal process); Cotton v. Runnels, 2009 WL 1158941, *6 (E.D.Cal., Apr. 29, 2009) (holding declaration of grievance coordinator that there was no record of plaintiff’s grievance did not meet defendants’ burden where he was not in the job at the relevant time, did not describe how records were searched, and did not address plaintiff’s allegation that he had filed a grievance and then asked about its status), report and recommendation adopted, 2009 WL 1606617 (E.D.Cal., June 8, 2009), aff’d on reconsideration, 2009 WL 1606644 (E.D.Cal., June 8, 2009); DeFranco v. Wolfe, 2007 WL 1704770, *4-5 (W.D.Pa., June 12, 2007) (holding declaration that showed only that the declarant had searched records in her own office did not show that plaintiff had failed to file a grievance), reconsideration denied on other grounds, 2007 WL 1810722 (W.D.Pa., June 21, 2007), vacated on other grounds, 2007 WL 1830770 (W.D.Pa., June 22, 2007); Gruenberg v. Maricopa County Sheriff’s Office, 2007 WL 809864, *2 (D.Ariz., Mar. 15, 2007) (refusing to dismiss for non-exhaustion where plaintiff said he had filed a grievance while under a different booking number than the one the defendants had used in searching their records); Woods v. Arpaio, 2006 WL 197149, *3 (D.Ariz., Jan. 24, 2006) (noting that affidavit concerning search of grievance records showed that affiant had searched under the wrong inmate number); Livingston v. Piskor, 215 F.R.D. 84, 85-86 (W.D.N.Y. 2003) (holding that defendants’ affidavits that they had no record of grievances and appeals by the plaintiff were adequate where they did not respond to his allegations that his grievances were not processed as policy required, and where they gave no detail as to “the nature of the searches . . ., their offices’ record retention policies, or other
facts indicating just how reliable or conclusive the results of those searches are”); Thomas v. New York State Dept. of Correctional Services, 2002 WL 31164546 (S.D.N.Y., Sept. 30, 2003) (similar to Livingston).

Note 347: Olivier v. Molina, 2011 WL 3607461, *2 (C.D.Cal., July 14, 2011) (defense representation that a jail official who would have been expected to receive the plaintiff’s grievance says he never refused to forward a complaint form was unpersuasive where he had no recollection of the plaintiff and interacted with hundreds or thousands of prisoners), report and recommendation adopted, 2011 WL 3607212 (C.D.Cal., Aug. 15, 2011); Hicks v. Irvin, 2011 WL 2213721, *8 (N.D.Ill., June 7, 2011) (holding absence of a log entry did not establish that plaintiff did not submit a grievance where officer admitted he didn’t always sign the log); Leyva v. Moreno, 2010 WL 2546073, *3-5 (E.D.Cal., June 23, 2010) (finding defendants’ evidentiary presentation incoherent and contradictory), report and recommendation adopted, 2010 WL 3431816 (E.D.Cal., Aug. 31, 2010); Dye v. Deangelo, 2010 WL 2898318, *3-4 (E.D.Mich., June 16, 2010) (holding failure to re-file grievance as instructed did not show failure to exhaust where prisoner denied having received such instruction and defendants’ documentation did not establish it had been delivered to him), report and recommendation adopted, 2010 WL 2898314 (E.D.Mich., July 22, 2010); Phipp v. Sheriff of Cook County, 681 F.Supp.2d 899, 907-08 (N.D.Ill. 2009) (holding defendants failed adequately to explain why they treated plaintiff’s filing as a non-appealable “request” rather than a grievance, since subsequent failure to follow the grievance procedure might not have been plaintiff’s fault); Bond v. Taylor, 2009 WL 2634627, *2-3 (D.N.J., Aug. 24, 2009) (defendants’ certification of non-exhaustion was not sworn or declared under penalty of perjury); Romeo v. Marshall, 2008 WL 4375776, *3 (C.D.Cal., Aug. 25, 2008) (defendants who failed to show when plaintiff received a grievance decision thereby failed to show his appeal from it was untimely); Franklin v. Butler, 2008 WL 4078797, *2 (E.D.Cal., Aug. 29, 2008) (declaration of prison grievance officer about lack of grievance was irrelevant where the grievance had allegedly been filed at a different prison; declaration of grievance appeals chief was irrelevant where plaintiff’s grievance would have been channeled into a separate “staff complaint” process), report and recommendation adopted, 2008 WL 4601081 (E.D.Cal., Oct. 15, 2008); Deemer v. Stalder, 2007 WL 4589799, *2 (W.D.La., Nov. 27, 2007) (declining to dismiss where defendants’ affidavit failed to explain source of much information); Tabarez v. Butler, 2007 WL 988040, *2-3 (E.D.Cal., Mar. 30, 2007) (holding defendants’ claim that prisoners “customarily” have access to grievance forms did not mean this plaintiff did, especially since he said only those who were “on good terms” with the guards could get forms), report and recommendation adopted, 2007 WL 1804968 (E.D.Cal., June 21, 2007); Johnson v. Crutchfield, 2007 WL 833303, *2 (E.D.Cal., Mar. 16, 2007) (holding that evidence plaintiff didn’t receive a decision at the highest level did not show non-exhaustion, since a favorable decision at an earlier point may obviate the need to appeal); Thixton v. Berge, 2006 WL 3761342, *3 (W.D.Wis., Dec. 19, 2006) (holding that defendants’ statement that there was no grievance appeal about lack of a working toilet and sink did not show lack of exhaustion, since plaintiff might have prevailed at the first stage and not have needed to appeal, and he might have filed a general grievance concerning conditions of his Behavior Management Program which encompassed the toilet/sink issue); Montgomery v. Johnson, 2006 WL 2403305, *11 (W.D.Va., Aug. 18, 2006) (crediting evidence that policies and practices were not followed and remedies were not in fact available to the plaintiff during the relevant time period), report and recommendation adopted, 2006 WL 3099651 (W.D.Va., Oct. 30, 2006); Wigfall v. Duval, 2006 WL 2381285 (D.Mass., Aug. 15, 2006) (citing “unacceptable lack of candor and completeness” in defendants’ presentation of evidence re exhaustion; they claimed to log all grievances, but evidence suggested use of force claims were not considered grievances); Blount v. Fleming, 2006 WL 1805853, *2-4 (W.D.Va., June 29, 2006) (finding that officials’ representation concerning non-exhaustion of certain claims was false); Simpson v. Nickel, 2005 WL 2429805, *3 (W.D.Wis., Sept. 29, 2005) (holding that defendants did not establish plaintiff’s failure to raise an issue in his disciplinary hearing where they failed to submit the statement of his advocate at the hearing); Paez v. Cambra, 2005 WL 1342843, *2 (E.D.Cal. May 27, 2005) (holding the lack of a record of a final level grievance did not establish non-exhaustion since the grant of relief at a lower level may
mean no further appeal is required); Perkins v. Obey, 2005 WL 433580, *4 (S.D.N.Y., Feb. 23, 2005) (holding the absence of a computer record did not establish non-exhaustion, since it could reflect the failure to make a record).

Note 350: Ellis v. Navarro, 2011 WL 845902, *3-4 (N.D.Cal., Mar. 8, 2011) (absence of a record of plaintiff’s grievance was not responsive to his evidence that it was misdirected to a higher level of the grievance system); Mauldin v. Nason, 2010 WL 3187047, *2 (E.D.Cal., Aug. 11, 2010) (“While the absence of evidence that a grievance was officially filed may indicate that a plaintiff never submitted the grievance, it may also indicate that the grievance was discarded or ignored by staff as Plaintiff contends here.”); Cherer v. Williams, 2010 WL 7697474, *6 (C.D.Cal., July 27, 2010) (declarations indicating no record of a grievance did not rebut allegation of lost or disregarded grievance); Sutherland v. Herrmann, 2010 WL 2303206, *5 (E.D.Cal., June 7, 2010) (noting that records of grievance appeals are not responsive to plaintiff’s claim that grievance was disregarded or lost), report and recommendation adopted, 2010 WL 3184294 (E.D.Cal., Aug. 6, 2010); Sanchez v. Stancliff, 2009 WL 2498257, *4 (E.D.Cal., Aug. 14, 2009) (“where Plaintiff submitted evidence that he attempted to properly utilize the appeals process, but received no response to his appeals, Defendants must do more than show an inability to locate an appeal. . . . [T]hey must address Plaintiff’s contention and demonstrate what remedies were available in such a situation.”); Stach v. Elfo, 2009 WL 1464282, *3-4 (W.D.Wash., May 19, 2009) (defendants’ evidence that there was no record of most of plaintiff’s claimed grievances ignored plaintiff’s allegations that he could not get grievance forms from staff and that he filed grievances on plain paper to which he received no response); Davis v. Barton, 2007 WL 2782366, *6 (E.D.Mo., Sept. 21, 2007) and 2007 WL 2782369, *3-4 (E.D.Mo., Sept. 21, 2007) (holding evidence that there was no record of plaintiff’s grievance was unresponsive to his allegation that officials refused to process it); Alden v. Smith, 2007 WL 776868, *7 (M.D.Pa., Mar. 12, 2007) (holding defendants’ lack of a record of plaintiff’s grievances does not show non-exhaustion, since he alleged that defendants failed to acknowledge and respond to his grievances); Ellis v. Albonico, 2007 WL 809804, *5 (E.D.Cal., Mar. 15, 2007) (holding evidence that grievance personnel had no record of plaintiff’s grievance being accepted did not refute his evidence that he had submitted it), report and recommendation adopted, 2007 WL 954727 (E.D.Cal., Mar. 29, 2007).


Cannon v. Mason, 2009 WL 1422016, *2 (E.D.Okla., May 20, 2009) (“In deciding a motion to dismiss based on nonexhaustion, the court can consider the administrative materials submitted by the parties.”), aff’d, 357 Fed.Appx. 969 (10th Cir., Dec. 22, 2009), cert. denied, 131 S.Ct. 178 (2010); Simpson v. Greenwood, 2007 WL 5445538, *1 (W.D.Wis., Apr. 6, 2007) (court can take judicial notice of the filing of grievances and responses, though not of the allegations in them); Mingues v. Nelson, 2004 WL 324898, *2 (S.D.N.Y., Feb. 20, 2004) (stating the court may consider documents “either in plaintiff’s possession or of which he has knowledge and relied on in bringing the action” on a motion to dismiss); Johnson v. Ingum, 2004 WL 253347, *1 (W.D.Wis., Feb. 4, 2004) (“I can consider the parties’ documents without converting the motion to dismiss into a motion for summary judgment because the documents of a prisoner’s use of the inmate complaint review system is a matter of public record.”); Nicholson v. Murphy, 2003 WL 22909876 (D.Conn., Sept. 19, 2003) (considering exhaustion on a motion to dismiss where the plaintiff received notice of the defendants’ argument, argued that the copies of grievance forms attached to the complaint showed exhaustion, and made no other relevant allegations).

judgment, citing lack of specificity in plaintiff’s statement that officers told him his issues were not grievable); Bane v. Virginia Dept. of Corrections, 2007 WL 1378523, *5 (W.D.Va., May 8, 2007) (acknowledging factual disputes but stating that the plaintiff’s affidavit “fails to describe the proceedings with adequate specificity”); Harris v. Austin, 2007 WL 1120540, *3 (M.D.Pa., Apr. 13, 2007) (granting summary judgment against plaintiff, though he and a witness said he handed his appeal to the mail clerk, absent evidence that he addressed it to the right place).

Note 463: Mario Sentelle Cavin, LLC v. Heyns, 2012 WL 5031503, *5-6 (W.D.Mich., July 30, 2012) (holding plaintiff who filed suit 131 days after submitting final appeal, which had a deadline for response of 120 days, exhausted, report and recommendation adopted, 2012 WL 5002292 (W.D.Mich., Oct. 17, 2012); Peoples v. Fischer, 2012 WL 1575302, *9 n.125 (S.D.N.Y., May 3, 2012) (“when an inmate has complied with all administrative requirements and waited for the response period to expire, he has exhausted all the administrative remedies that are available to him”), on reconsideration in part, 898 F.Supp.2d 618 (S.D.N.Y. 2012); Thomas v. Ricks, 2012 WL 681640, *5 n.8 (S.D.Ga., Jan. 31, 2012), report and recommendation adopted, 2012 WL 676234 (S.D.Ga., Feb. 29, 2012); Workman v. Reinke, 2011 WL 4431748, *5 n.1 (H.D.Idaho, Sept. 22, 2011) (holding “a prison cannot claim that the failure to complete a procedural step is a reason for dismissal when the prison did not process a grievance at that step in a timely manner according to its own policies”); Frierson v. Bell, 2010 WL 3878732, *5 (D.S.C., Sept. 28, 2010) (where response was delayed long past 180-day deadline, plaintiff had exhausted); Bryant v. Wright, 2010 WL 3629443, *5-6 (S.D.N.Y., Aug. 31, 2010) (where prisoner had taken all prescribed steps to appeal and his appeals were lost, he had exhausted), report and recommendation adopted, 2010 WL 3629426 (S.D.N.Y., Sept. 15, 2010); Almond v. Pollard, 2010 WL 3122553, *2 (W.D.Wis., Aug. 5, 2010) (where officials extended the time for decision, and plaintiff did not wait for the extended decision date, he did not exhaust); Pellum v. Burtt, 2008 WL 759084, *16 (D.S.C., Mar. 20, 2008) (where grievance system automatically advances grievances to the appellate level, plaintiff need only wait until the time limit for final action had passed), appeal dismissed, 294 Fed.Appx. 798 (4th Cir. 2008); Williams v. Cornell Corrections of Georgia, 2007 WL 2317633, *3 (S.D.Ga., Aug. 10, 2007) (noting grievance rules required nothing more of prisoner than filing the final appeal and waiting 90 days); Malik v. Sabree, 2007 WL 781640, *4 (D.S.C., Mar. 13, 2007) (where grievance system automatically advances grievances to the appellate level, plaintiff need only wait until the time limit for final action had passed); James v. McCall, 2007 WL 752161, *6 (D.S.C., Mar. 8, 2007) (rejecting argument that plaintiff didn’t exhaust because grievance was still pending, since decision was late); Mattress v. Taylor, 487 F.Supp.2d 665, 670-62 (D.S.C. 2007) (holding plaintiff had exhausted where the deadline for final decision was 180 days and the plaintiff had waited 11 months to file); Parker v. Stratton, 2006 WL 2620403, *2 (E.D.Cal., Sept. 12, 2006) (holding plaintiff who filed suit before deadline for grievance decision failed to exhaust, even though grievance decision was then months late); Tillis v. Lamarque, 2006 WL 644876, *5 (N.D.Cal., Mar. 9, 2006) (agreeing that “exhaustion occurs when prison officials fail to respond to an appeal within the time limit.”). The only question is ‘determining at what point prison officials have sufficiently thwarted the process so as to render it unavailable.’”); Page v. Breslin, 2004 WL 2713266, *5 (E.D.N.Y., Nov. 29, 2004) (holding plaintiff was justified in filing his complaint after the deadline for decision of the final appeal had passed); Malanez v. Stalder, 2003 WL 1733536 (E.D.La., Mar. 31, 2003) (dismissing where prisoner filed suit before time for a grievance response had expired); Jones v. Detella, 12 F.Supp.2d 824, 826 (N.D.Ill. 1998); Barry v. Ratelle, 985 F.Supp.1235, 1238 (S.D.Cal. 1997); see Akey v. Haag, 2007 WL 1266123, *4 (D.Vt., May 1, 2007) (declining to dismiss where policy requires waiting “a reasonable time” for a final response and “suggest[s]” 15 days, the plaintiff dated the complaint after 13 days, and it arrived at court after 17 days); Taylor v. Doctor McWeeny, 2005 WL 1378808 (S.D.Ohio, May 27, 2005) (holding that a prisoner who filed suit over two months after the decision deadline, and over one month after receiving a notice saying the decision-maker needed more time, had waited a “reasonable” time and had exhausted).

Note 469: Kons v. Longoria, 2009 WL 3246367, *4 (E.D.Cal., Oct. 6, 2009); Curtis v. Buckley,

Note 477: Barnhouse v. John Does, 2009 WL 1259040, *1 (W.D.Wash., May 5, 2009) (allowing plaintiff to complete exhaustion without dismissal if it can be done quickly); Tatmon v. Hartley, 2009 WL 1748861, *6 (E.D.Cal., June 18, 2009) (where prisoner had exhausted the substance of his complaint, the fact that he still had an additional grievance pending against one defendant was not a failure to exhaust), report and recommendation adopted, 2009 WL 2941472 (E.D.Cal., Sept. 10, 2009); Miles v. Daniels, 2004 WL 2110708, *3 (D.Or., Sept. 21, 2004) (declaring to dismiss for non-exhaustion where the plaintiff filed a habeas action without exhausting, then filed a Bivens complaint after exhausting, and the Bivens complaint was docketed as an amended complaint in the habeas action), report and recommendation adopted as modified, 2005 WL 708422 (D.Or., Mar. 28, 2005).


resubmit it.”); Riley v. Taylor, 2010 WL 1335877, *8 (D.Del., Mar. 31, 2010) (plaintiff was obliged to
grieve the failure to respond to his grievances); Cohea v. California Dept. of Corrections and
grievance and then resubmitted it “was familiar with the grievance process and could have sought further
administrative review to remedy any failure to respond”); Hookey v. Lomas, 2010 WL 936230, *5
(M.D.Pa., Mar. 15, 2010) (dismissing for non-exhaustion where appeal body said it had not received her
appeal and she did not re-file it), aff’d, 438 Fed.Appx. 110 (3d Cir. 2011); Allen v. Schmutzler, 2010 WL
618489, *5-7 (D.Colo., Feb. 18, 2010), appeal dismissed, 401 Fed.Appx. 355 (10th Cir. 2010); McClain,
WL 3080969, *3 (E.D.Cal., Nov. 15, 2005) (holding a prisoner informed that there was no record of his
appeal was obliged to take steps to pursue the appeal), report and recommendation adopted, 2006 WL
(holding prisoner failed to exhaust where he filed two grievances which disappeared, and was told he
could proceed to the next level but did not), report and recommendation adopted, 2006 WL 547921
(E.D.Cal., Mar. 3, 2006).

that plaintiff was obliged to grieve the failure to respond to a grievance); Oliverez v. Albitre, 2010 WL
5059616, *6 (E.D.Cal., Dec. 6, 2010) (“Plaintiff is not required to conceive of ways to work around the
failure of the reviewer to respond to his properly submitted appeals. . . . The regulations governing the
inmate appeals process apply with equal force to inmates and prison officials. If an inmate complies with
the procedural rules, but staff members fail to respond to the appeal in compliance with applicable
procedural rules or otherwise thwart the process, it becomes unavailable.”), report and recommendation
(S.D.N.Y., Aug. 31, 2010) (holding prisoner who had done everything the rules prescribed to appeal, but
whose appeals were lost, was not obliged to wait for answers to letters inquiring about their fate), report
and recommendation adopted, 2010 WL 3629426 (S.D.N.Y., Sept. 15, 2010); Maraglia v. Maloney, 499
F.Supp.2d 93, 97 (D.Mass. 2007) (holding that prisoner was not required to file a grievance about the
failure to respond to a grievance absent a regulation to that effect).

response at early stages means the prisoner has exhausted regardless of rules allowing appeal of non-
no decisions had “nothing from which to appeal”); Carter v. Morrison, 2007 WL 4233500, *7 (E.D.Pa.,
how one appeals from an absolute failure to respond.”); DeJesus v. Williams, 2007 WL 1201599, *3
(D.Del., Apr. 23, 2007) (declining to dismiss for non-exhaustion where plaintiff’s grievance took seven
months to get to the medical unit and he had filed suit in the interim); Pierre v. County of Broome, 2007
WL 625978, *4 (N.D.N.Y., Feb. 23, 2007) (holding lack of response to repeated attempts to grieve
justified plaintiff’s failure to comply with requirements); Rainey v. Ford, 2006 WL 3513687, *4-5
(D.S.C., Dec. 5, 2006) (holding lack of a timely grievance decision means the plaintiff has not exhausted
and the remedy is not available; grievance was “held in abeyance” pending decision by Division of
failure to respond; stating, “[h]aving failed to abide by the strictures of their own regulations, defendants
should not be allowed to claim plaintiff’s noncompliance as a bar.”); Rowe v. Corcoran State Prison,
to respond to a grievance within the policy time limits”), report and recommendation adopted, 2005 WL
2086044 (E.D.Cal., Aug. 26, 2005); Williams v. First Correctional Medical, 2004 WL 2434307, *1 n.4
(D.Del., Oct. 13, 2004) (“Defendants have presented insufficient evidence to show any response to the
grievance forms, as mandated by the grievance procedure itself. Thus, the court finds that plaintiff
exhausted his administrative remedies.”); Holland v. Correctional Medical Systems, 2004 WL 322905, *3
Andrews v. Whitman, 2008 WL 878466, *6 (S.D.Cal., Mar. 28, 2008) (“When official action ends a prisoner's administrative appeal rights, the Ninth Circuit has held administrative remedies are no longer ‘available.’” Plaintiff’s grievance was never processed); Woods v. Carey, 2007 WL 2254428, *3 (E.D.Cal., Aug. 3, 2007) (holding prisoner trying to appeal had exhausted where grievance official and medical appeals analyst each said he had to go to the other), vacated on other grounds, 2007 WL 2688819 (E.D.Cal., Sept. 13, 2007); Langford v. Ifediora, 2007 WL 1427423, *3-4 (E.D.Ark., May 11, 2007) (refusing to dismiss for non-exhaustion where grievances were returned labelled “no further action necessary”); Williams v. MacArthur, 2007 WL 1381764, *4 (D.Nev., May 8, 2007) (holding failure to appeal grievances dismissed as “improper,” which could have led to disciplinary sanctions, was not a failure to exhaust); Baylis v. Taylor, 475 F.Supp.2d 484, 488 (D.Del. 2007) (holding officials’ withdrawal of plaintiff’s grievances because of litigation meant that he had exhausted, since no further remedies were available); Hernandez v. Schriro, 2006 WL 2989030, *4 (D.Ariz., Oct. 18, 2006); Smith v. Baugh, 2006 WL 2771039, *5 (M.D.Tenn., Sept. 25, 2006) (holding that plaintiff satisfied the exhaustion requirement where his grievances were returned unprocessed because grievance personnel said he had previously filed a grievance); Fuller v. California Dept. of Corrections, 2006 WL 2385177, *3 (E.D.Cal., Aug. 17, 2006) (refusing to dismiss for non-exhaustion where a second-level appeal was returned for defects of form, without instructions whether to resubmit it or go to the next level if dissatisfied, and the plaintiff was not shown to have remedies remaining); James v. Davis, 2006 WL 2171082, *17 (D.S.C., July 31, 2006) (holding that return of grievances unprocessed, on the ground that the problems were taken care of and that damages claims could not be grieved, left him unable to exhaust); Bennett v. Douglas County, 2006 WL 1867031, *2 (D.Neb., June 30, 2006) (declining to dismiss for failure to appeal to the Chief Deputy of the jail where there was no Chief Deputy); Dukes v. S.H.U. C.O. John Doe No. 1, 2006 WL 1628487, *5 (S.D.N.Y., June 12, 2006) (noting that the failure to record and assign numbers to plaintiff’s grievances might have made appeal impossible); Wood v. Idaho Dept. of Corrections, 2006 WL 694654, *6 (D.Idaho, Mar. 16, 2006) (holding that a prisoner whose grievance was returned because he was only allowed to have three pending at one time had exhausted, since he had done what he could do); see Pascalli v. O’Grady, 2007 WL 3124709, *5 (D.N.J., Oct. 23, 2007) (noting it was unclear whether the prisoner was informed of grievance findings, or whether he could appeal if grievances were simply returned without findings).

where his first step grievance was referred for an Inspector General’s investigation and that was all the relief the process could provide for his complaint), amended and superseded on other grounds, 2008 WL 786466 (E.D.Tex., Mar. 19, 2008); Cahill v. Arpaio, 2006 WL 3201018, *3 (D.Ariz., Nov. 2, 2006) (holding plaintiff reasonably relied on grievance hearing officer told him that “(1) the matter was under investigation and he would not be notified of the results, (2) he could not appeal and would not be given a form, and (3) he should proceed to federal court,” notwithstanding that the preprinted decision form said it could be appealed); Clark v. Mason, 2005 WL 1189577, *8 (W.D.Wash., May 19, 2005) (holding that prisoner who made “significant attempts” to bring his concerns to prison officials, who responded that they would not consider the issues again, exhausted); Daker v. Ferrero, 2004 WL 5459957, *2 (N.D.Ga., Nov. 24, 2004) (prisoner who was not allowed to file appeal of intermediate stage grievance denial, filed suit, and was later afforded an opportunity to appeal had exhausted when he was prevented from appealing).

Note 521: Worthen v. Oklahoma Dept. of Corrections, 2010 WL 3295010, *6 (W.D.Okl., Aug. 4, 2010), report and recommendation adopted, 2010 WL 3294999 (W.D.Okl., Aug. 19, 2010); James v. Chamberlain, 2010 WL 2245564, *3 (W.D.Pa., Mar. 31, 2010), report and recommendation adopted, 2010 WL 2196267 (W.D.Pa., June 1, 2010); Patch v. Arpaio, 2010 WL 432354, *7-10 (D.Ariz., Feb. 2, 2010) (plaintiff who complained of spoiled food exhausted where jail authorities apologized, replaced the food, and gave instructions to prevent any recurrence); Barrett v. Maricopa County Sheriffs Office, 2010 WL 46786, *4-5 (D.Ariz., Jan. 4, 2010) (prisoner who got his medication, which was all he sought, through the pre-grievance informal process had exhausted); Gallegos v. Parsons, 2009 WL 3714629, *4 (S.D.Cal., Nov. 4, 2009) (denying summary judgment to defendants on exhaustion where they failed to refute plaintiff’s statement that he filed informal grievances which were granted); Brooks v. Frank, 2009 WL 1227880, *4 (D.Haw., May 1, 2009) (holding response to grievance about toxic fumes that said prison officials would take precautionary measures to prevent any recurrence meant plaintiff had exhausted, especially since grievance officials had insisted the matter was moot); Myers v. Rozum, 2009 WL 995606, *3 (W.D.Pa., Apr. 14, 2009); Smith v. Yarborough, 2008 WL 4877464, *10 (C.D.Cal., Nov. 7, 2008) (grievance alleging inability to exercise because of assignment to a yard with gang members was exhausted when plaintiff was assigned to exercise alone); Henderson v. Moore, 2008 WL 2704674, *4 (S.D.Tex., July 2, 2008); Henderson v. Bettus, 2008 WL 899251, *4 (M.D.Fla., Mar. 31, 2008) (holding favorable decision completed exhaustion where policy did not require appealing a grievance that was satisfactorily resolved); Redden v. Kearney, 2008 WL 440370, *7-8 (D.Del., Feb. 15, 2008) (plaintiff who received the relief sought exhausted; grievance rules said resolution at the first level ends the grievance process); Gill v. Myers, 2007 WL 2728344, *3 (N.D.Ind., Sept. 13, 2007) (dictum) (noting that grievance policy forbade continuing the process after a favorable resolution); Jackson v. Corrections Corp. of America, 2007 WL 1848014, *6 (D.D.C., June 27, 2007) (holding prisoner whose grievances about cell bunk assignment, medical treatment, and cell ventilation had been addressed had exhausted without appealing); Bivens v. Lisath, 2007 WL 2891416, *3, *6 (S.D.Ohio, Sept. 28, 2007) (citing grievance procedure’s instruction to “STOP” rather than file a grievance where informal procedures solved the problem; declining to dismiss for non-exhaustion where prisoner was “told that the situation would be handled to his satisfaction”); Roundtree v. Adams, 2007 WL 1232173 at *7-8 (E.D.Cal., Apr. 25, 2007) (holding prisoner who grieved and was told his mobility aids would be provided “when ready” had exhausted without further appeal); Harper v. Harmonn, 2006 WL 2522409, *3-4 (E.D.Cal., Aug. 29, 2006) (holding that a prisoner whose disciplinary conviction was thrown out at an intermediate stage need not have appealed further); Roberson v. McShan, 2006 WL 2469368, *3 (S.D.Tex., Aug. 24, 2006) (holding that a prisoner who filed a grievance complaining of sexual assault and asking for an investigation had exhausted when the first step response promised an investigation); Guy v. California Dept. of Corrections, 2006 WL 1376076, *2 (E.D.Cal., May 17, 2006) (holding prisoner who requested medical attention and received it as a result of his grievance need not have proceeded further; defendants “do not explain what further relief plaintiff could have obtained”); Brown v. Duncan, 2006 WL 1280914, *6 (D.Or., May 4, 2006) (holding prisoner who had received the medical treatment he sought had
exhausted where defendants failed to identify “any relief” he could have obtained through a further appeal); Trahan v. Reinken, 2006 WL 1169105, *5 (S.D.Tex., May 1, 2006) (declining to dismiss claim of a prisoner who had grieved, been promised he would see a vision specialist, and been released two and a half months later without seeing one); Gabby v. Meyer, 390 F.Supp.2d 801, 804 (E.D.Wis. 2005) (holding that prisoner who filed grievances seeking transfer to hospital and removal of sutures, and did not appeal because those actions were taken, had no further remedies available); Mullicane v. Marshall, 2005 WL 3299079, *3 (E.D.Cal., Dec. 1, 2005) (holding a prisoner who received a first level response stating “Granted” and that his requests would be met had exhausted all available remedies), report and recommendation adopted, 2006 WL 547929 (E.D.Cal., Mar. 3, 2006); Roundtree v. Adams, 2005 WL 1503926, *10 (E.D.Cal., June 23, 2005) (“Once an appeal is granted in full, the process ends.”); Nevels v. Pliler, 2005 WL 1383185 (E.D.Cal., June 7, 2005) (holding a prisoner who was told his grievance was granted need not appeal further; “Defendant fails to identify any remedy that remained available to plaintiff.”), report and recommendation adopted, 2005 WL 1561532 (E.D.Cal., June 30, 2005); Cotton v. Kingston, 2004 WL 2325053, *4 (W.D.Wis., Sept. 4, 2004); Bolton v. U.S., 347 F.Supp.2d 1218, 1220 (N.D.Fla. 2004) (holding a prisoner exhausted when she complained informally, the first step of the Federal Bureau of Prisons remedy, and the offending officer resigned when confronted; “When a prisoner wins in the administrative process, he or she need not continue to appeal the favorable ruling.”); Branch v. Brown, 2003 WL 21730709, *6, 12 (S.D.N.Y., July 25, 2003) (holding a prisoner who was told he would see a doctor soon and his medical status would be reviewed “arguably had nothing to appeal” and at least raised a factual question barring summary judgment concerning exhaustion), judgment granted on other grounds, 2003 WL 22439780 (S.D.N.Y., Oct. 28, 2003); Fogell v. Ryan, 2003 WL 21756096, *5 (D.Del., July 30, 2003) (holding grievance was “resolved informally” where plaintiff initiated the process and was then told by a prison official that “they had fired the doctor” and she should seek legal representation); Sulton v. Wright, 265 F.Supp.2d 292, 298-99 (S.D.N.Y. 2003); Dixon v. Goord, 224 F.Supp.2d 739, 749 (S.D.N.Y. 2002) (“The exhaustion requirement is satisfied by resolution of the matter, i.e., an inmate is not required to continue to complain after his grievances have been addressed.”); Gomez v. Winslow, 177 F.Supp.2d 977, 984-85 (N.D.Cal. 2001) (allowing damage claim to go forward where the prisoner had stopped pursuing the grievance system when he received all the relief it could give him); Brady v. Attygala, 196 F.Supp.2d 1016, 1020 (C.D.Cal. 2002) (holding plaintiff had exhausted where he grieved to see an ophthalmologist and was taken to see an ophthalmologist before the grievance process was completed); Nitz v. French, 2001 WL 747445, *3 (N.D.Ill., July 2, 2001) (holding that a prisoner who asked for separation from another prisoner and transfer, and got it, but never got a grievance decision, exhausted; “It would be a strange rule that an inmate who has received all he expects or reasonably can expect must nevertheless continue to appeal, even when there is nothing to appeal.”); McGrath v. Johnson, 67 F.Supp.2d 499, 510 (E.D.Pa. 1999), aff’d, 35 Fed.Appx. 357, 2002 WL 1271713 (3d Cir. 2002); see Marvin v. Goord, 255 F.3d 40, 43 n.3 (2d Cir. 2001) (holding that succeeding through informal channels without a grievance met the exhaustion requirement, since the grievance procedure states that it is “intended to supplement, not replace, existing formal or informal channels of problem resolution.”); Stevens v. Goord, 2003 WL 21396665, *4 (S.D.N.Y., June 16, 2003) (following Marvin), adhered to on reargument, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003).

Note 528: Sullivan v. Tolentino, 2009 WL 1774275, *9 (C.D.Cal., June 23, 2009) (similar to Ransom and Hendon below); Ransom v. Rojas, 2008 WL 4640619, *3 (E.D.Cal., Oct. 16, 2008) (where grievance response said “Granted” and that investigation had been conducted that would not be disclosed, and did not identify any further review available, plaintiff had exhausted; defendants’ claim that plaintiff could have obtained a formal apology, policy changes, a hearing, etc. was unsupported by evidence); Rosa v. Morvant, 2008 WL 347733, *5 (E.D.Tex., Feb. 6, 2008) (prisoner exhausted where his first step grievance was referred for an Inspector General’s investigation and that was all the relief the process could provide for his complaint), amended and superseded on other grounds, 2008 WL 786466 (E.D.Tex., Mar. 19, 2008); Black v. Tuggles, 2007 WL 2330765, *2 (E.D.Cal., Aug. 13, 2007) (prisoner whose grievance claiming kitchen workers were not provided protective equipment or training to work
with detergents was granted had exhausted); Hendon v. Ramsey, 2007 WL 1120375, *9-10 (S.D.Cal., Apr. 12, 2007) (holding plaintiff had exhausted where his appeal was partly granted and he was told that it was being referred for investigation and any finding of staff misconduct would be confidential and he would not be informed of it); Cahill v. Arpaio, 2006 WL 3201018, *3 (D.Ariz., Nov. 2, 2006) (holding plaintiff reasonably relied on grievance hearing officer telling him that “(1) the matter was under investigation and he would not be notified of the results, (2) he could not appeal and would not be given a form, and (3) he should proceed to federal court,” notwithstanding that the preprinted decision form said it could be appealed); Candler v. Woodford, 2007 WL 3232435, *4-5 (N.D.Cal., Nov. 1, 2007) (similar to Hendon and Cahill).

Note 552: Braxton v. Nichols, 2010 WL 1010001, *12 (S.D.N.Y., Mar. 18, 2010) (grievance complaining that indoor smoking is “pervasive” exhausted plaintiff’s claim of underenforcement of prison smoking ban); Mallory v. Marshall, 659 F.Supp.2d 231, 238 (D.Mass 2009) (holding plaintiff assaulted by another prisoner sufficiently exhausted, without identifying specific wrongful conduct by prison staff, where policy asked only for “a brief statement of facts” in addition to time, place, etc., where officials investigated the incident, and where plaintiff said he was seeking damages, which indicates fault on the part of prison staff); Holmes v. Kingston, 2008 WL 4610320, *3 (E.D.Wis., Oct. 15, 2008) (holding exhaustion of complaint about denial of a wheelchair also exhausted complaints about conditions resulting from that denial); Bouman v. Robinson, 2008 WL 2595180, *1 (W.D.Wis., June 27, 2008) (prisoner who grieved retaliation for his opinions, without saying what the opinions were, exhausted; “If prison administrators had wanted additional detail, they could have asked for it, but they did not.”); Cromer v. Borman, 2008 WL 907468, *12-13 (W.D.Mich., Mar. 31, 2008) (grievance stating a defendant was responsible for taking plaintiff’s property, either personally or through his “crew,” exhausted supervisory claim about failure to train subordinates in what was contraband; grievance stating that an officer “continues to harass” and “will go exaggerate a misconduct” were too vague to exhaust); Winburn v. Hadfield, 2008 WL 783580, *6 (W.D.Mich., Mar. 20, 2008) (claim that plaintiff was denied access to a toilet was exhausted despite failure to include in the grievance the fact that he had kidney stones and that the defendant officer had invented the “rule” forbidding him from toilet access); Smith v. Gibson, 2008 WL 717590, *3 (E.D.Ark., Mar. 14, 2008) (grievance stating an officer “grabe me and rush me and said, did I have what he said?” sufficiently exhausted plaintiff’s use of force claim); Holloway v. Correctional Medical Services, 2007 WL 1445701 *4 (E.D.Mo., May 11, 2007) (holding plaintiff’s failure to state that his claim was under the Americans with Disabilities Act was not a failure to exhaust absent a requirement to that effect in the policy); Tyson v. Grant County Sheriff, 2007 WL 1395563, *4 (N.D.Ind., May 9, 2007) (holding prisoners who alleged that the jail was crowded and caused tension and stress and dangerous conditions need not also have alleged that these violated the Constitution); Hendon v. Ramsey, 2007 WL 1120375, *5 (S.D.Cal., Apr. 12, 2007) (holding failure to state the dates of multiple similar incidents was not a failure to exhaust); Harris v. Schriro, 2007 WL 865390, *6 (D.Ariz., Mar. 20, 2007) (holding grievance seeking a modified kosher diet because of Crohn’s disease exhausted his claim for denial of kosher diet even though the grievance didn’t say his concern was religious; prisoner need not “list every nuance or theory of recovery he plans to raise in his § 1983 action”), reconsideration denied, 2007 WL 1219738 (D.Ariz., Apr. 24, 2007); Caines v. Hendricks, 2007 WL 496876, *6 (D.N.J., Feb. 9, 2007) (finding exhaustion where grievances inquired when plaintiff would get his MRI and complained about shoulder pain and lack of adequate treatment, without specifically alleging misconduct in not providing his MRI); Mark v. Imberg, 2005 WL 3201115, *7 (W.D.Wis., Nov. 28, 2005) (holding that a grievance stating the prisoner was required to remove Wiccan magical seals from his cell door and walls sufficiently exhausted a claim that the seals were taken and destroyed, since the gist of both versions was that not having the seals interfered with his religious exercise); Tyler v. Bett, 2005 WL 2428036, *6 (E.D.Wis., Sept. 30, 2005) (holding that grievance stating the plaintiff was not notified that he had a law library pass exhausted his claim that his pass was cancelled; “[d]efendants ask too much” in asserting non-exhaustion), reconsideration denied, 2005 WL 3132198 (E.D.Wis., Nov. 21, 2005); Freeman v. Berge, 2004 WL 1774737, *3 (W.D.Wis., July 28, 2004) (holding standard met by statement that plaintiff
was “denied food because I did not have my light on, etc. This is using food as punishment. I have never refused my meals.”

Notes 556-557: Norwood v. Byers, 2013 WL 3330643, *10-11 (E.D.Cal., July 1, 2013) (holding complaint about treatment of skin condition exhausted plaintiff’s claims that a nurse practitioner failed to follow the dermatologist’s instructions, misreported his medication compliance, and failed to refer him to a specialist), report and recommendation adopted, 2013 WL 5156572 (E.D.Cal., Sept. 12, 2013); Rhinehart v. Cate, 2013 WL 322533, *2 (N.D.Cal., Jan. 28, 2013) (“By complaining about lockdowns and ask[ing] that they cease, the administrative appeals provided sufficient notice to prison officials that Plaintiff was complaining about the conditions of the lockdowns, including not being allowed outdoors for exercise.”); Mitchell v. Felker, 2012 WL 2521827, *4 (E.D.Cal., June 28, 2012) (complaint about racially based lockdowns resulting in 24-hour, 7-day cell confinement for months, with no yard time, during which plaintiff “did not receive adequate outdoor exercise, exacerbated a leg injury, and experienced physical and psychological problems,” sufficiently exhausted Eighth and Fourteenth Amendment claims about lockdowns), report and recommendation adopted, 2012 WL 3070084 (E.D.Cal., July 27, 2012); Hall v. Leclaire, 2011 WL 832839, *3 (S.D.N.Y., Mar. 4, 2011) (complaint that wheelchair had broken and plaintiff had been injured, asking for compensation and a new wheelchair, need not “use key phrases like ‘fear of future injury’ or ‘unsafe wheelchair’ in light of the fact that such concerns were reasonably conveyed by the content of Plaintiff’s grievance”); Griffin v. Miller, 2010 WL 4919774, *4 (S.D.Ohio, Nov. 2, 2010) (complaint about lack of toothpaste exhausted claim about lack of dental care; “fair notice” standard applied), report and recommendation adopted, 2010 WL 4918771 (S.D.Ohio, Nov. 29, 2010); Bean v. Lucas, 2010 WL 817125, *5 (E.D.Tex., Mar. 3, 2010) (complaint of “inappropriate contact” gave sufficient notice of claim of excessive force); Newson v. Steele, 2010 WL 2384928, *9-10 (E.D.Mich., Jan. 14, 2010) (complaint that a defendant “interfered” with plaintiff’s medication exhausted a claim that he falsified plaintiff’s medical records and prevented a doctor from increasing the dosage; allegations in suit need not “precisely match, sentence for sentence, the details in the grievance”), objections overruled in pertinent part and sustained on other grounds, 2010 WL 2384924 (E.D.Mich., June 10, 2010); Lees v. Felker, 2009 WL 2824862, *4 (E.D.Cal., Sept. 1, 2009) (grievance stating plaintiff was assaulted by staff, a supervisor ordered others to destroy his property, and acted in reprisal gave sufficient notice to cover his claim that the supervisor assaulted him too); Green v. Gunn, 2009 WL 1809932, *4 (W.D.N.Y., June 24, 2009) (grievance stating that officer “grabbed” plaintiff sufficiently exhausted his use of force claim, even though his complaint alleged more serious force); Gause v. Diguglielmo, 2009 WL 116959, *6 (E.D.Pa., Jan. 15, 2009) (grievance stating “inhumane treatment and improper medical treatment here, which applies to my 3/29/06 accident in the main kitchen. On 4/7/06 Dr. Zora [Zaro] said I’m moving at 50% of my motion [b]ecause of the pain” exhausted medical care claim against Dr. Zaro), aff’d, 339 Fed.Appx. 132 (3d Cir. 2009); Bailey v. Shelton, 2009 WL 37615, *3 (D.Or., Jan. 6, 2009) (grievance about treatment of a skin condition causing pain and discomfort was not inadequate because it did not identify the condition as scabies); Evans v. Correctional Medical Services, 2008 WL 1805375, *3-4 (E.D.Ark., Apr. 18, 2008) (holding a grievance stating that he submitted “numerous sick calls” about his hemorrhoids but did not see a doctor, and discussed his medical needs with nurses and other staff members, and a correctional staff member said she “couldn’t do anything” about his inappropriate work assignment sufficiently exhausted concerning his medical care and work assignment); Thompson v. Stalder, 2008 WL 874138, *4 (M.D.La., Apr. 1, 2008) (holding a general statement that plaintiff was “unable to practice [his] religious beliefs” did not exhaust his specific claims to a meat-free diet and Rastafarian services and literature; it did not provide a fair opportunity to address the claims later asserted in his suit); Carter v. Symmes, 2008 WL 341640, *4 (D.Mass., Feb. 4, 2008) (adopting administrative law rule that “claims not enumerated in an initial grievance are allowed notwithstanding the exhaustion requirement if they ‘are like or reasonably related to the substance of charges timely brought before [the agency]’”); Masterson v. Campbell, 2007 WL 2536934, *13-14 (E.D.Cal., Aug. 31, 2007) (holding plaintiff had exhausted his “broad retaliation claim” even though he did not describe each alleged instance); Crawford v. Dretke, 2007 WL 172628, *7 (S.D.)
neda – sufficiently exhausted his claims of denial of access to courts

p.2d 814, 819 (E.D.Va. 2004) (holding a claim of inadequate

3 (E.D.Cal., Apr. 28, 2005) (holding that a complaint was

6 (E.D.Mich., June 11, 2003) (holding that

D.N.Y. 2003) (holding that a prisoner who complained of a retaliatory transfer need not also

2 (S.D.N.Y., July 29, 2002) (holding that a grievance that mentioned an alleged assault by staff

6 (E.D.Cal., Dec. 22, 2005) (holding that a grievance asserting that the plaintiff had a hernia and had not received necessary surgery sufficiently exhausted without detailing the acts or omissions of individual defendants), report and recommendation adopted, 2006 WL 354654 (E.D.Cal., Feb. 15, 2006); Pineda-Morales v. De Rosa, 2005 WL 1607276, *6 (D.N.J., June 7, 2005) (holding that a complaint seeking increased accommodation for his religion, and stating that it could not be accommodated by existing Protestant services and that their doctrines were incompatible, sufficiently exhausted his claim for official recognition of his Apostolic sect even though it did not mention the Religious Freedom Restoration Act or specifically request recognition); Lyerly v. Phillips, 2005 WL 1802972, *2 (S.D.N.Y., July 29, 2005) (holding that complaint of exposure to second-hand smoke sufficiently exhausted without detail of the plaintiff’s medical condition, the relief sought, or the names of the culprits); Parker v. Kramer, 2005 WL 1343853, *3 (E.D.Cal., Apr. 28, 2005) (holding inmates need not “draft grievances with the precision of an attorney, laying out every fact, identifying every defendant by name, and identifying which constitutional rights were violated by which actions or omissions”); Davis v. Stanford, 382 F.Supp.2d 814, 819 (E.D.Va. 2004) (holding a claim of inadequate medical care, “liberally construed,” was encompassed by a grievance concerning inadequate treatment for the resulting pain), aff’d, 127 Fed.Appx. 680, 2005 WL 1100818 (4th Cir. 2005) (unpublished); Cassels v. Stalder, 342 F.Supp.2d 555, 560 (M.D.La. 2004) (holding that disciplinary appeal from conviction for “spreading rumors,” in which the prisoner stated that he had placed an advertisement “in seek of legal help” and was “being retaliated against,” sufficiently exhausted his claims of denial of access to courts and the right to seek counsel, retaliation, and vagueness and overbreadth of the disciplinary rule); Hoffenberg v. Federal Bureau of Prisons, 2004 WL 2203479, *12 (D.Mass., Sept. 14, 2004) (holding that a prisoner’s complaint that restrictions on his legal telephone calls interfered with his efforts to pursue litigation to collect money owed him, so he could satisfy his restitution obligation, “comprehended” his access to courts claim, notwithstanding defendants’ “overly technical” argument to the contrary); Skundor v. Coleman, 2003 WL 22088342, *8 (S.D.W.Va., July 31, 2003) (holding that a grievance complaining that strip searches observed “by other prisoners and passersby” violated his privacy sufficiently exhausted a claim that opposite sex staff members observed the searches), report and recommendation adopted, 280 F.Supp.2d 524 (S.D.W.Va. 2003), aff’d, 98 Fed.Appx. 257, 2004 WL 1205718 (4th Cir.), vacated, 543 U.S. 1009 (2004); Casarez v. Mars, 2003 WL 21369255, *6 (E.D.Mich., June 11, 2003) (holding that discrepancies in dates between grievance and complaint did not mean a failure to exhaust, since it was clear that they referred to the same events); Sulton v. Wright, 265 F.Supp.2d 292, 298 (S.D.N.Y. 2003) (stating “[i]t would be illogical to impose a higher technical pleading standard in informal prison grievance proceedings than would be required in federal court”; “it is sufficient to present the “relevant factual circumstances giving rise to a potential claim”; noting that this rule “has particular application to the complex issues involved in medical care cases”); Baskerville v. Blot, 224 F.Supp.2d 723, 730 (S.D.N.Y. 2002) (holding that a grievance that mentioned an alleged assault by staff but asked for no relief for it, while focusing on alleged deprivation of medical care, sufficed to exhaust as to the alleged
assault); Gomez v. Winslow, 177 F.Supp.2d 977, 982 (N.D.Cal. 2001) (holding that allegations that defendants failed to notify the plaintiff that he had tested positive for hepatitis C antibodies, to begin his treatment timely, or to provide him with adequate information were “encompassed within Gomez’s claim of inadequate medical care”); Irvin v. Zamora, 161 F.Supp.2d 1125, 1135 (S.D.Cal. 2001) (holding that grievances that presented the facts giving rise to the claim, requested the identities of the responsible officials, and requested officials to investigate “were sufficient under the circumstances to put the prison on notice of the potential claims and to fulfill the basic purposes of the exhaustion requirement. As long as the basic purposes of exhaustion are fulfilled, there does not appear to be any reason to require a prisoner plaintiff to present fully developed legal and factual claims at the administrative level.”); Thomas v. Zinkel, 155 F.Supp.2d 408, 413 (E.D.Pa. 2001) (holding it was enough for the prisoner to mention all of his complaints at every stage of the proceeding, even if he was “more specific” about one claim than the others); Williams v. Wilkinson, 122 F.Supp.2d 894, 899 (S.D.Ohio 2000) (rejecting an argument by defendants that “each claim at each stage [of the grievance process] must parallel each and every claim in the federal complaint.”).


Note 568: Knapp v. Ali, 2009 WL 2591255, *6 (E.D.Cal., Aug. 21, 2009) (if underlying events are grieved, retaliation need not be pled because it is a legal theory), report and recommendation adopted in pertinent part, rejected in part on other grounds, 2009 WL 3013243 (E.D.Cal., Sept. 17, 2009); Barreto v. Smith, 2009 WL 1271984, *7 (E.D.Cal., Mar. 6, 2009) (“Plaintiff is not required to file a separate internal grievance to put prison officials on notice of every possible theory of recovery or every factual detail that he later discovers regarding the same incident.”), reconsideration denied, 2009 WL 1119513 (E.D.Cal., Apr. 24, 2009); Lugo v. Van Orden, 2008 WL 2884925, *2 (N.D.N.Y., July 23, 2008) (plaintiff exhausted despite not specifically mentioning retaliation where he “raised the identical fact pattern” in grievance and lawsuit); Cromer v. Braman, 2008 WL 907468, *13 (W.D.Mich., Mar. 31, 2008) (grievance alleging harassment that was considered on the merits need not have also alleged retaliation); Daher v. Kasper, 2008 WL 553644, *4 (N.D.Ind., Feb. 26, 2008); El-Shaddai v. Wheeler, 2008 WL 410711, *5 (E.D.Cal., Feb. 12, 2008) (where the grievance form merely directs prisoners to “describe the problem and the action requested,” the prisoner need not specify legal theories including whether the motive was retaliatory), report and recommendation adopted, 2008 WL 892900 (E.D.Cal., Mar. 31, 2008); Reeder v. Doe 5, 507 F.Supp.2d 468, 482 n.16 (D.Del. 2007) (rejecting argument that “plaintiff must submit a specific grievance complaining of retaliation. . . . There need be only a shared factual basis, not perfect overlap, between a grievance and the complaint.”); Davison v. MacLean, 2007 WL 1520892, *6 (E.D.Mich., May 22, 2007) (holding prisoner should include “known and obviously material facts” such as officer’s stated religious bias, but cannot be required to present information he does not have at the time), reconsideration denied, 2007 WL 1806204 (E.D.Mich., June 21, 2007); Varela v. Demmon, 491 F.Supp.2d 442, 448 (S.D.N.Y. 2007) (holding grievance need not include the word “retaliation” if it states facts from which retaliation can be inferred); Jennings v. Huizar, 2007 WL 2081200, *4 (D.Ariz., July 19, 2007) (holding prisoner need not have alleged retaliation in his grievance; alleging that act was done for an improper purpose was sufficient; plaintiff “not required to specifically identify . . . theories of recovery in his inmate grievance”), aff’d, 315 Fed.Appx. 633 (9th Cir. 2009) (unpublished).

rules could not litigate an equal protection claim that he was disciplined for discriminatory reasons, aff’d in part, vacated in part on other grounds, 67 Fed.Appx. 638, 2003 WL 21243302 (2d Cir. 2003).

Note 575: Lilly v. Smith, 2007 WL 1832040, *2 (C.D.Ill., June 25, 2007) (dismissing claim about placement in restraint chair which was not mentioned in plaintiff’s use of force grievance); Malik v. Sabree, 2007 WL 781640, *4 (D.S.C., Mar. 13, 2007) (holding grievance about Muslim feasts did not exhaust a claim about Muslim fasts); Purvis v. Crosby, 2006 WL 1836034, *11 (N.D.Fla., June 30, 2006) (holding that a grievance concerning the imposition and collection of liens on allegedly exempt funds did not exhaust the issue of the failure to provide notice and a hearing prior to deducting funds from the prisoner’s account); Belton v. Robinson, 2006 WL 231608, *3-4 (D.N.J., Jan. 30, 2006) (holding that an appeal of a disciplinary conviction did not exhaust a claim that the officer injured the plaintiff during the incident); Beltran v. O’Mara, 405 F.Supp.2d 140, 152 (D.N.H. 2005) (holding that complaints about specific segregation conditions, such as lack of toilet paper, did not exhaust as to conditions in general or conditions not mentioned in the grievances), on reconsideration, 2006 WL 240558 (D.N.H., Jan. 31, 2006); Henderson v. Sebastian, 2004 WL 1946398, *2-3 (W.D.Wis., Aug. 25, 2004) (holding that complaint that the Program Director selected a Christian TV channel exhausted the plaintiff’s Establishment Clause claim but not his Free Exercise claim that he was denied copies of Taoist books and forced to submit to a Christian behavior modification program), modification denied, 2004 WL 2110773 (W.D.Wis., Sept. 21, 2004); Murray v. Artz, 2002 WL 31906464 (N.D.Ill., Dec. 31, 2002) (holding that grievances about disciplinary conviction and excessive force, and later grievance about continuing medical problems, did not exhaust as to medical care at the time of the use of force); Petty v. Goord, 2002 WL 31458240, *4 (S.D.N.Y., Nov. 4, 2002) (holding that grievance could not exhaust as to actions subsequent to the filing of the grievance); Bey v. Pennsylvania Dept. of Corrections, 98 F.Supp.2d 650, 660 (E.D.Pa. 2000) (holding that appeal of disciplinary conviction did not exhaust as to medical care claim or administrative custody status claim even if they “flowed proximately” from the alleged misconduct incident); Cooper v. Garcia, 55 F.Supp.2d 1090, 1094-95 (S.D.Cal. 1999); Payton v. Horn, 49 F.Supp.2d 791, 796 (E.D.Pa. 1999) (exhaustion of disciplinary appeal did not exhaust as to separate decision to keep plaintiff in administrative segregation after the completion of the disciplinary penalty, or the unauthorized withdrawal of funds from his inmate account); Jenkins v. Toombs, 32 F.Supp.2d 955, 959 (W.D.Mich. 1999).

Note 577: Franklin v. Wedell, 2011 WL 4905736, *3 (E.D.Cal., Oct. 14, 2011) (holding grievance about esophageal diverticuli didn’t exhaust claims about intestinal problems); Spencer v. Beard, 2011 WL 1085697, *6-7 (M.D.Pa., Mar. 21, 2011) (holding a passing reference to placement in “stripped cell” did not exhaust complaint about cell conditions in grievance primarily about cell extraction and use of force); Miller v. Taylor, 2011 WL 1045564, *4-5 (D.Del., Mar. 15, 2011) (grievance that described assault by another prisoner but concluded with a request for “squashing of sick call cost” without referring to a failure to protect did not exhaust latter claim); Smith-Bey v. CCA/CTF, 703 F.Supp.2d 1, 6-7 (D.D.C. 2010) (complaint of two cockroaches in food did not exhaust broad claim of unsanitary kitchen conditions); Mauldin v. Nason, 2010 WL 3187047, *3 (E.D.Cal., Aug. 11, 2010) (holding grievance about disciplinary charge arising from assault did not exhaust claim that staff did not intervene in assault); Ross v. Thaler, 2010 WL 1064714, *1 (S.D.Tex., Mar. 18, 2010) (holding “grievances which may have alluded to the incident in question but failed to raise the specific ground for relief” failed to exhaust); Wilbert v. Quarterman, 647 F.Supp.2d 760, 766-67 (S.D.Tex. 2009) (where plaintiff’s timely grievance mentioned that there were no seatbelts on his transport van, but he didn’t allege a deliberate indifference claim and asked only for a copy of the accident report and continuing medical treatment, he did not exhaust a claim about the failure to provide seatbelts); Harrison v. Watts, 609 F.Supp.2d 561, 571 (E.D.Va. 2009) (grievance challenging restrictions on Five Percenters alleging they pursue a “way of life” did not exhaust claim that they are a religion), aff’d, 2009 WL 3634283 (4th Cir., Nov. 4, 2009), cert. denied, 130 S.Ct. 3521 (2010); Smith v. Yarborough, 2008 WL 4877464, *9 (C.D.Cal., Nov. 7, 2008) (grievance alleging denial of access to exercise yard did not exhaust claim of subsequent inability to use
yard because of presence of gang members); Sims v. Baker, 2008 WL 1946273, *2-3 (E.D.Cal., May 1, 2008) (grievance about an assault by another prisoner did not exhaust complaint that staff members set plaintiff up to be assaulted), report and recommendation adopted, 2008 WL 2544049 (E.D.Cal., June 23, 2008); McCollum v. California, 2007 WL 4390616, *1-2 (N.D.Cal., Dec. 13, 2007) (holding grievances about lack of access to a Wiccan chaplain did not exhaust a claim that the policy of not paying Wiccan chaplains was unconstitutional); Mobley v. Smith, 2007 WL 1650934, *4 (W.D.Mich., June 4, 2007) (holding a grievance about failure to provide a kosher diet did not exhaust Eighth Amendment claim that plaintiff lost weight as a result); Lunney v. Brureton, 2007 WL 1544629, *7 (S.D.N.Y., May 29, 2007) (holding grievances alleging SHU inmates received too little milk and “healthy food items” did not exhaust claims that the food was spoiled or otherwise posed a health risk), objections overruled, 2007 WL 2050301 (S.D.N.Y., July 18, 2007); Robinson v. Green, 2007 WL 1447871, *5 (D.S.C., May 11, 2007) (holding “an oblique reference to high blood sugar buried in a grievance concerning the flu” did not exhaust a claim that plaintiff was denied diabetic treatment); Slone v. Barklay, 2007 WL 505287, *3 (D.Ariz., Feb. 14, 2007) (complaint of inadequate medical care because of lack of staff gave sufficient notice that his claim involved a staffing or budget issue); Robins v. Atchue, 2006 WL 1283470, *3 (E.D.Cal., May 10, 2006) (holding the “incidental mention” of strip searches in grievances concerning inappropriate racial and harassing statements did not exhaust as to the searches), report and recommendation adopted, 2006 WL 845516 (E.D.Cal., Mar. 30, 2006); Branch v. Brown, 2003 WL 21730709, *12 (S.D.N.Y., July 25, 2003) (holding that although some aspects of plaintiff’s complaint might technically fall outside his grievance, dismissal for non-exhaustion was improper because the gravamen of his complaint is that defendants failed and continued to fail to acknowledge his medical restriction), judgment granted on other grounds, 2003 WL 22439780 (S.D.N.Y., Oct. 28, 2003); Sultan v. Wright, 265 F.Supp.2d 292, 298 (S.D.N.Y. 2003) (“Rigid ‘issue exhaustion’ appears inappropriate when the fundamental issue is one of medical care from the same injury”); Gomez v. Winslow, 177 F.Supp.2d 977, 981-82 (N.D.Cal. 2001) (refusing to break down complaint of inadequate medical treatment into separate claims of failure to timely diagnose, failure to timely treat, and failure to inform); Torrence v. Pelkey, 164 F.Supp.2d 264, 278-79 (D.Conn. 2001) (declining to require exhaustion of new issues disclosed in discovery that arose from the “same series of events” concerning his medical care that he had exhausted).


Note 605: Hoffman v. Khatri, 2010 WL 3063293, *7 (S.D.Cal., Aug. 3, 2010) (where plaintiff complained of inadequate care for back injury and asked for a cane, a specialist appointment, and pain medication, his grievance exhausted as to his back problem generally, and not just to those items of relief); McAdory v. Engelsgjerd, 2010 WL 1131484, *3 (E.D.Mich., Feb. 11, 2010) (where plaintiff grieved the failure to treat his skin condition, the later discovery that he had cancer which would have been discovered with proper treatment of the skin condition did not make his claim unexhausted; “That plaintiff has more fully alleged the consequences of that failure to treat” does not mean his claim is different.), report and recommendation adopted, 2010 WL 1132548 (E.D.Mich., Mar. 23, 2010); Voorhis v. Gaetz, 2009 WL 2230763, *2 (C.D.Ill., July 22, 2009) (“The plaintiff gave sufficient notice of the problem in his grievance—he needed medical treatment for hypoglycemia and was not getting it.” All defendants are sued about deliberate indifference to that medical problem.); Ketzner v. Douglas, 2009 WL 1655004, *12 (E.D.Mich., June 11, 2009) (“As a general rule, ‘claims relating to an ongoing medical condition arising before, as well as after, the relevant grievance was filed may be considered exhausted.’”) (citations omitted); Mehari v. Cox, 2009 WL 1405019, *4 (E.D.Cal., May 19, 2009) (“Prisoners are not required to file and exhaust a separate grievance each time they allegedly receive inadequate medical care for an ongoing condition.”); Thomas v. Ghosh, 2009 WL 910183, *4 (N.D.Ill., Mar. 31, 2009) (“the plaintiff did not have to continue filing grievances each time he perceived his need for medical care . . . met a new obstacle”); Martinez v. California, 2009 WL 649892, *16 (E.D.Cal., Mar. 11, 2009) (“The Court rejects Defendants’ argument that Plaintiff was required to grieve each fact at every turn in what were ongoing issues in order to satisfy the exhaustion requirement.” Plaintiff’s complaints addressed accommodation of his quadriplegia.); Young v. Good, 2008 WL 4816474, *4 (W.D.Pa., Nov. 4, 2008) (where plaintiff filed at least five grievances about persistent failure to provide a medically ordered diet, “[h]is failure to have filed a daily grievance” does not defeat his claim); Tatmon v. Hartley, 2009 WL 1748861, *6 (E.D.Cal., June 18, 2009) (similar to Lewis, infra), report and recommendation adopted, 2009 WL 2941472 (E.D.Cal., Sept. 10, 2009); Coley v. Cassim, 2008 WL 2073949, *4-5 (E.D.Cal., May 14, 2008) (similar to Lewis, infra; the “argument for repeat exhaustion of the same ongoing claim would require the court to impose on plaintiff a judicially-created rule similar to the ‘name-all-defendants’ rule rejected by the Supreme Court”; repeat exhaustion would not have increased defendants’ awareness of plaintiff’s complaint), report and recommendation adopted, 2008 WL 2629882 (E.D.Cal., July 3, 2008); Gordon v. Stalder, 2007 WL 4976050, *4-5 (W.D.La., Dec. 27, 2007) (grievance concerning Hepatitis B care exhausted as to matters occurring after the grievance involving additional members of medical staff); Lewis v. Naku, 2007 WL 3046013, *4-5 (E.D.Cal., Oct. 18, 2007) (holding grievances about ongoing medical problems exhausted even though they were filed before the current defendants had treated the plaintiff; “ . . . repeated exhaustion of the same grievance is unnecessary to satisfy the PLRA exhaustion requirement”); Fischer v. Federal Bureau of Prisons, 2007 WL 2702341, *6 (M.D.Fla., Sept. 14, 2007) (holding grievance concerning delayed and inadequate care for prostate and kidney problems sufficiently exhausted, despite plaintiff’s not having filed additional grievances about “current or future” issues); Basham v. Correctional Medical Services, Inc., 2007 WL 2481338, *9 (S.D.W.Va., Aug. 29, 2007) (holding a prisoner complaining of inadequate medical care leading to amputation of his leg need not have separately grieved the denial of post-amputation rehabilitative services); Hampton v. Sahota, 2007 WL 1449726, *6 & n.3 (E.D.Cal., May 15, 2007) (one grievance complaining of inadequate post-surgical follow-up sufficed to exhaust; “repeat exhaustion” was not required as plaintiff saw different practitioners); Allison v. Khoury, 2006 WL 1023426, *9 (E.D.Cal., Apr. 18, 2006) (“Plaintiff is not required to file additional grievances regarding an ongoing violation,” in this case problems arising from his dialysis shunt), report and recommendation adopted, 2006 WL 1775391 (E.D.Cal., June 26, 2006); Davis v. Hyden, 2005 WL 3116641 *2 (D.Alaska, Nov. 21, 2005) (holding that a grievance concerning “an ongoing situation involving a specific medical condition” may exhaust as to events after the grievance); Tyler v. Bett, 2005 WL 2428036, *7 (E.D.Wis., Sept. 30, 2005)
(holding that a prisoner who had exhausted once with respect to a complaint of insect infestation need not complete exhaustion of a second grievance to litigate the issue; “a prisoner is not required to exhaust consecutive complaints on the same issue as long as prison officials are sufficiently aware of the problem”), reconsideration denied, 2005 WL 3132198 (E.D.Wis., Nov. 21, 2005).

Note 611: Jackson v. CDCR, 2010 WL 1611096, *4 (E.D.Cal., Apr. 21, 2010) (prisoner who complained about policy of body searches by opposite sex staff exhausted as to similar post-grievance incidents), report and recommendation adopted, 2010 WL 2195998 (E.D.Cal., May 27, 2010); Flanagan v. Shipman, 2009 WL 4043063, *7 (N.D.Fla., Nov. 20, 2009) (where prisoner grieved failure to make arrangements for Native American religious services, the fact that services later did not occur and were taken off the schedule were to be expected and were encompassed by the grievance); Jefferson v. Naiman, 2006 WL 3780537, *1 (N.D.Fla., Dec. 19, 2006) (holding prisoner who had grieved the decision not to meet his religious diet requests did not have to grieve again when officials carried out their decision); Freeman v. Berge, 2004 WL 1774737, *5 (W.D.Wis., July 28, 2004) (“Enforcement of the [contrary] rule would make it impossible for prisoners to obtain full relief in cases involving ongoing constitutional violations without filing additional lawsuits each time a new violation occurred because § 1997e(a) requires prisoners to seek an administrative remedy before they file a complaint in federal court. . . . Such a result would be both wasteful and contrary to the policy behind § 1983 and § 1997e(a).”); Aiello v. Litscher, 104 F.Supp.2d 1068, 1074 (W.D.Wis. 2000) (holding prisoners who had exhausted concerning a regulation need not also exhaust with respect to each application of the regulation).


Note 758: Partee v. Grood, 2007 WL 2164529, *4 (S.D.N.Y., July 25, 2007) (declining to dismiss where prisoner was told his issue was “beyond the purview” of the grievance program; analogizing to the unclear rule in Giano), aff’d, 2009 WL 1582927 (2d Cir. 2009); Lawyer v. Gatto, 2007 WL 549440, *8 (S.D.N.Y., Feb. 21, 2007) (holding prisoner whose grievance was referred to the Inspector General’s office was not obliged to wait until the IG’s investigation was concluded since the rules did not say otherwise; it was the prison system’s responsibility to make such a requirement clear); Martinez v. Weir, 2006 WL 2884775, *2 (D.Conn., Oct. 10, 2006) (refusing to dismiss, noting that the plaintiff had exhausted twice in the face of a disappearing grievance and prison officials’ own procedural mistakes); Barad v. Comstock, 2005 WL 1579794, *7-8 (W.D.N.Y., June 30, 2005) (holding allegation that prison staff told plaintiff erroneously that his time to commence a grievance had lapsed while he was hospitalized and bedridden constituted special circumstances); Roque v. Armstrong, 392 F.Supp.2d 382, 391 (D.Conn. 2005) (denying summary judgment to defendants where it appeared that neither the prisoner nor the grievance system entirely followed the rules but the prisoner had received a response from the Commissioner, the final grievance authority); Warren v. Purcell, 2004 WL 1970642, *6 (S.D.N.Y. Sept. 3, 2004) (holding “baffling” grievance response that left prisoner with no clue what to do next was a special circumstance).

Note 760: Johnson v. Miller, 2009 WL 3763846, *3-4 (W.D.Okla., Nov. 10, 2009) (where grievance was referred to the warden, who never responded, plaintiff reasonably relied on that response and did not abandon the grievance process), aff’d, 387 Fed.Appx. 832 (10th Cir. 2010); Shaw v. Jahnke, 607 F.Supp.2d 1005, 1008-09 (W.D.Wis. 2009) (prisoner’s receipt of three contradictory decisions in three attempts to exhaust meant remedy was unavailable); Miller v. Berkebile, 2008 WL 635552, *7-9 (N.D.Tex., Mar. 10, 2008) (unjustified refusal to process initial grievances made remedy unavailable; court rejects argument that prisoners should have taken other steps not specified in the policy to get around the grievance officer’s misconduct; PLRA law applied in § 2241 case); Crawford v. Berkebile, 2008 WL 323155, *7-8 (N.D.Tex., Feb. 6, 2008) (same); Monroe v. Beard, 2007 WL 2359833, *12-13 (E.D.Pa., Aug. 16, 2007) (holding the grievance process unavailable where prisoners were told to object to certain searches through an Unacceptable Correspondence Form, and they would be notified of the results of an investigation and then could file a grievance, but were not so notified), aff’d, 536 F.3d 198, 205 n.6 (3d Cir. 2008); Woods v. Carey, 2007 WL 2254428, *3 (E.D.Cal., Aug. 3, 2007) (holding plaintiff exhausted where he could not complete the process because staff members refused to process his grievance on improper grounds), vacated on other grounds, 2007 WL 2688819 (E.D.Cal., Sept. 13, 2007); Cooper v. Beard, 2007 WL 1959300, *5 (M.D.Pa., July 2, 2007) (where Request for Religious Accommodation was a prerequisite for a grievance, and plaintiff did not get a timely response and had moved on to the grievance process by the time he received a late response, court excuses plaintiff’s procedural non-compliance in light of defendants’ noncompliance); Ray v. Jones, 2007 WL 397084, *10
(W.D.Okla., Feb. 1, 2007) (holding plaintiff exhausted where in response to his complaint he was repeatedly told that the matter had been turned over to Internal Affairs and where relief was granted in that process); Woods v. Lozer, 2007 WL 173704, *3 (M.D.Tenn., Jan. 18, 2007) (holding a prisoner exhausted when he appealed a decision that his use of force claim was not grievable because it was mistakenly said to seek review of disciplinary procedures and punishments); Hernandez v. Schriro, 2006 WL 2989030, *4 (D Ariz., Oct. 18, 2006) (finding special circumstances justifying failure to appeal rejection of grievance where it was returned unprocessed because defendants mischaracterized it); Kinzey v. Beard, 2006 WL 2829000, *10 (M.D. Pa. Sept. 1, 2006) (refusing to dismiss for non-exhaustion where the failure to exhaust was caused by prison officials’ failure to follow their own rules); Almond v. Tarver, 468 F.Supp.2d 886, 896-97 (E.D.Tex. 2006) (finding exhaustion where plaintiff’s grievance was delayed for investigation past his release date, he didn’t appeal once released, but filed suit after reincarceration; it would be “particularly inequitable” to dismiss under these circumstances); Brady v. Halawa Correctional Facility Medical Unit Staff, 2006 WL 2520607, *17-18 (D.Haw., Aug. 29, 2006) (holding prisoner transferred while his grievance was pending exhausted where he “was inadvertently thwarted by the two prisons’ confusion over the matter”); Scott v. California Supreme Court, 2006 WL 2460737, *7 (E.D.Cal., Aug. 23, 2006) (holding that a prisoner who had relied on officials’ misinformation and sought relief in state court had exhausted, notwithstanding officials’ subsequent issuance of an untimely decision which he did not appeal; “Prison officials cannot effectively thwart an inmate’s attempt to exhaust a claim by failing to follow their own regulations and then later require him to begin the exhaustion process again once they decide to follow the regulations.”); Fuller v. California Dept. of Corrections, 2006 WL 2385177, *3 (E.D.Cal., Aug. 17, 2006) (holding that a prisoner whose intermediate appeal was rejected for “excessive verbiage” and failure to complete documents correctly was not shown to have further available remedies because officials did not instruct him whether to resubmit a corrected appeal or appeal to the next level if he wished to pursue the matter); Ouellette v. Maine State Prison, 2006 WL 173639, *3-4 (D.Me., Jan. 23, 2006) (denying summary judgment to defendants where plaintiff’s failure to exhaust was attributable to grievance staff’s procedural deviations), aff’d, 2006 WL 348315 (D.Me., Feb. 14, 2006); Dunmire v. DePasqual, 2005 WL 4050175, *1 (W.D.Pa., Oct. 21, 2005) (denying motion to dismiss for non-exhaustion in light of plaintiff’s objections that prison officials had failed to comply with their own procedures); Shaheed Muhammad v. Dippolo, 393 F.Supp.2d 80, 97 (D.Mass. 2005) (“Having failed to abide by the strictures of their own regulations, defendants should not be allowed to claim plaintiff’s noncompliance as a bar.”).

Note 766: Cottrell v. Wright, 2010 WL 4806910, *6 (E.D.Cal., Nov. 18, 2010) (where plaintiff gave his appeal to a nurse for filing, defendants failed to show that this was contrary to grievance rules), report and recommendation adopted, 2011 WL 319080 (E.D.Cal., Jan. 28, 2011); Garner v. Richland Parish Detention Center, 2010 WL 5140704, *5-6 (W.D.La., Nov. 4, 2010) (refusing to enforce grievance requirements not in the written policy or any other place prisoners could be expected to see it), report and recommendation adopted, 2010 WL 5140790 (W.D.La., Dec. 13, 2010); Ferguson v. Bizzario, 2010 WL 4227298, *6 (S.D.N.Y., Oct. 19, 2010) (time limit that appeared in internal grievance policy but was shorter than the one in the inmate handbook could make the remedy unavailable to prisoners who relied on the handbook); Hall v. Berdanier, 2010 WL 2262045, *3 (M.D.Pa., June 1, 2010) (time limit that appeared in grievance policy but not in inmate handbook could not be enforced without evidence the policy was available to the plaintiff); Davis v. Williams, 2010 WL 2330358, *1-2 (S.D.Ill., May 12, 2010) (plaintiff exhausted when he completed the steps prescribed by policy, notwithstanding that the grievance body then “remanded” his grievance and a new decision was issued, where remand procedure did not exist in the policy and plaintiff received no instructions as to what he could or should do further), report and recommendation adopted, 2010 WL 2330354 (S.D.Ill., June 9, 2010); Reyes v. Ramos, 2010 WL 1241621, *3 (S.D.Ill., Mar. 23, 2010) (alleged grievance rule not found in the inmate orientation manual could not be enforced); Burkett v. Marshall, 2009 WL 454133, *5-6 (S.D.Ga., Feb. 23, 2009) (defendants failed to show that appeal procedure not in the inmate handbook was actually available to prisoners); Sims v. Rewerts, 2008 WL 2224132, *5-6 (E.D.Mich., May 29, 2008) (declining to dismiss
where plaintiff failed to comply with a time limit that had been changed without notice); Cabrera v. LeVierge, 2008 WL 215720, *5-6 (D.N.H., Jan. 24, 2008) (refusing to hold prisoners to rules and procedures not described in inmate handbook); Lampkins v. Roberts, 2007 WL 924746, *3 (S.D.Ind., Mar. 27, 2007) (refusing to dismiss for missing a five-day time deadline which was not made known in the materials made available to prisoners).


investigated regardless, the requirement to submit a first level grievance was waived), report and recommendation adopted, 2007 WL 954727 (E.D.Cal., Mar. 29, 2007); Strope v. Collins, 2006 WL 3390393, *3 (D.Kan., Nov. 22, 2006); Jones v. Stewart, 457 F.Supp.2d 1131, 1134-37 (D.Nev. 2006); Kretchmar v. Beard, 2006 WL 2038687, *5 (E.D.Pa., July 18, 2006) (“When the merits of a prisoner’s claim have been fully examined and ruled upon by the ultimate administrative authority, prison officials can no longer assert the defense of failure to exhaust, even if the inmate did not follow proper administrative procedure.”).

mailed his appeal, rejecting argument that plaintiff must “state that the appeal was mailed in an envelope with adequate prepaid postage properly addressed to the CCE”); Andrews v. Cervantes, 2009 WL 800915, *6 (E.D.Cal., Mar. 25, 2009) (holding rejection of grievance because it contained the word “moron” was improper under defendants’ grievance policy); Price v. Kozak, 569 F.Supp.2d 398, 407 (D.Del. 2008) (holding plaintiff’s grievances timely despite their rejection as late); Fosselman v. Evans, 2008 WL 4369984, *2 (N.D.Cal., Sept. 24, 2008) (rejecting decision that plaintiff failed to show there had been an adverse effect on his welfare; a prison memo restricted his privileges); Moton v. Cowart, 2008 WL 2117120, *6 (M.D.Fla., May 19, 2008) (rejecting decision that plaintiff’s complaint was not grievable, and an appeal decision that it must be re-commenced at the facility, as contrary to prison system’s own policy); Shoucair v. Warren, 2008 WL 2033714, *7-8 (E.D.Mich., May 9, 2008) (rejecting decision that grievance failed to identify a policy violation, since the grievance rules did not require it, and that decision was vague, since it set forth basic facts and defendants failed to follow their rules requiring investigation of such complaints); Johnson v. Correctional Medical Services, Inc., 2008 WL 878767, *5 (W.D.Mich., Mar. 3, 2008) (rejecting officials’ decision that grievance was duplicative); Elliott v. Jones, 2008 WL 420051, *4-5 (N.D.Fla., Feb. 12, 2008) (refusing to dismiss where defendants rejected plaintiff’s emergency grievance, which the court concludes meets the standards, and then rejected his regular grievance for no apparent reason, and rejected his appeal for writing outside the lines); Gatlin v. Nichols, 2007 WL 4219170, *2 (E.D.Cal., Nov. 29, 2007) (finding that plaintiff’s grievance was improperly screened out as duplicative, and plaintiff exhausted), report and recommendation adopted, 2008 WL 191989 (E.D.Cal., Jan. 23, 2008); Bates v. Elwood, 2007 WL 2809787, *7 (E.D.Ky., Sept. 25, 2007) (finding that plaintiff had exhausted where claim to the contrary resulted from Bureau of Prisons’ error); Rollins v. Magnusson, 2007 WL 2302141, *5 (D.Me., Aug. 9, 2007) (rejecting denial of grievance as untimely, since plaintiff was “clearly grieving the continued confiscation of his legal material”); Woods v. Carey, 2007 WL 2254428, *3 (E.D.Cal., Aug. 3, 2007) (holding grievance decision saying plaintiff had not complied with requirement to try to solve his problem informally was factually incorrect), vacated on other grounds, 2007 WL 2688819 (E.D.Cal., Sept. 13, 2007); Chatman v. Johnson, 2007 WL 2023544, *6 (E.D.Cal., July 11, 2007) (rejecting denial of grievance for failure to attempt informal resolution, since it fell into categories not requiring informal resolution), report and recommendation adopted, 2007 WL 2796575 (E.D.Cal., Sept. 25, 2007); Mayes v. University of TX Medical Branch, 2007 WL 1577670, *3 (W.D.Tex., May 30, 2007) (refusing to be bound by dismissal of grievance for failing to name the medication plaintiff said he was being denied, where the court found that the information appeared in the response to the initial grievance); Wade v. Nardolillo, 2007 WL 1575415, *3 (E.D.Pa., May 29, 2007) (holding grievance appeal timely despite its rejection on convoluted and hypertech grounds); Woods v. Lozer, 2007 WL 173704, *3 (M.D.Tenn., Jan. 18, 2007) (holding prison personnel had misapplied their rules in holding a use of force complaint non-grievable on the ground that it sought to challenge disciplinary procedures or outcomes); Neighbors v. Holtorf, 2007 WL 61008, *2 (E.D.Cal., Jan. 8, 2007) (holding prisoner had exhausted when grievance system erroneously refused to consider his grievance on the mistaken ground that it duplicated an earlier grievance), report and recommendation adopted, 2007 WL 956642 (E.D.Cal., Mar. 29, 2007); George v. Smith, 2006 WL 3751407, *5-6 (W.D.Wis., Dec. 12, 2006) (holding that timeliness of grievance appeals must be assessed based on when they were sent, not when they arrived, despite grievance body’s contrary interpretation of its own rule), aff’d, 507 F.3d 605 (7th Cir. 2007); Thomas v. Hickman, 2006 WL 2868967, *9-10 (E.D.Cal., Oct. 6, 2006) (allowing case to go forward even though grievance was untimely, since the prisoner did not know of her injury until long after the grievance deadline had passed); Winkler v. Beitzel, 2005 WL 5280675, *3 n.4 (D.Md., Nov. 10, 2005) (holding plaintiff exhausted despite rejection of his grievances on the ground that challenges to prison policy must be grieved within 30 days of arrival at the prison, even if the complaint is ongoing), aff’d, 184 Fed.Appx. 316 (4th Cir. 2006); O’Connor v. Featherston, 2002 WL 818085, *2 (S.D.N.Y., Apr. 29, 2002) (refusing to be bound by rejection of request to file a late grievance where the plaintiff had been kept in medical restriction for the 14 days in which he was required to file a timely grievance); Graham v. Perez, 121 F.Supp.2d 317, 322 & n.9 (S.D.N.Y. 2000) (holding that the court will independently determine whether a prisoner has presented “mitigating

medical provider’s decision about his care, the 10-day appeal deadline should run from that decision, despite grievance body’s finding of untimeliness); Paynes v. Runnels, 2008 WL 4078740, *7 (E.D.Cal., Aug. 29, 2008) (refusing to dismiss where highest-level dismissal as untimely was contrary to grievance rules in light of intermediate decision reaching the merits), report and recommendation adopted, 2008 WL 4464828 (E.D.Cal., Sept. 30, 2008); Harbison v. Little, 2007 WL 6887552, *2 (M.D.Tenn., July 19, 2007) (holding challenge to lethal injection protocol was timely based on date of its disclosure to plaintiff, rather than on earlier events before the plaintiff had access to the protocol); Ashker v. Schwarzenegger, 2007 WL 1725417, *6 (N.D.Cal., June 14, 2007) (denying summary judgment where defendants said plaintiff’s grievance was untimely but plaintiff said it was timely measured from his receipt of the decision at issue), amended on reconsideration on other grounds, 2007 WL 2781273 (N.D.Cal., Sept. 20, 2007); George v. Smith, 2006 WL 3751407, *5-6 (W.D.Wis., Dec. 12, 2006) (holding that timeliness of grievance appeals must be assessed based on when they were sent, not when they arrived, citing “prison mailbox” rule, despite grievance body’s contrary interpretation of its own rule), amended on reconsideration on other grounds, 2007 WL 2781273 (N.D.Cal., Sept. 20, 2007); Thomas v. Hickman, 2006 WL 2868967, *9-10 (E.D.Cal., Oct. 6, 2006) (holding that a prisoner had no available remedy where she did not know of the wrong within the 15-day time limit and officials dismissed her grievances as untimely).

Note 844: Ortega v. Felker, 2009 WL 1582850, *5 (E.D.Cal., June 4, 2009) (declining to dismiss for non-exhaustion where untimeliness of appeal resulted from the grievance decision’s being provided after the appeal deadline had expired), report and recommendation adopted, 2009 WL 2241804 (E.D.Cal., July 27, 2009); Petrucci v. Hasty, 605 F.Supp.2d 410, 421-22 (E.D.N.Y. 2009) (holding grievance about SHU placement was timely where defendants delayed in providing him both with grievance forms and with a statement of why he had been placed in SHU), reconsideration denied, 2010 WL 455002 (E.D.N.Y., Feb. 2, 2010); Kelley v. DeMasi, 2008 WL 4298475, *4 (E.D.Mich., Sept. 18, 2008) (grievance time limit should be tolled where plaintiff was fighting an infection leading to hospitalization and surgery); Plaster v. Kneal, 2008 WL 4090790, *3-4 (M.D.Pa., Aug. 29, 2008) (declining to dismiss where plaintiff missed a deadline after following prison staff’s erroneous advice about how to appeal); Moro v. Winsor, 2008 WL 718687, *4-5 (S.D.Ill., Mar. 14, 2008) (holding remedy unavailable to prisoner whose appeal was untimely because he could not get a timely answer at the first level in a system that required a response in order to appeal); Thorns v. Ryan, 2008 WL 544398, *3-4 (S.D.Cal., Feb. 26, 2008) (refusing to dismiss where grievance appeal was untimely because of delay in receiving the decision; appeal was timely measured from when plaintiff received it); Sanchez v. Penner, 2008 WL 544591, *6 (E.D.Cal., Feb. 26, 2008) (same as Thorns), report and recommendation adopted, 2008 WL 892760 (E.D.Cal., Mar. 31, 2008); Macahilas v. Taylor, 2008 WL 220364, * 4 (E.D.Cal., Jan. 25, 2008) (denying summary judgment where prisoner said “his mind was too clouded” by illness even to know he had a claim within the time limit), report and recommendation adopted, 2008 WL 506109 (E.D.Cal., Feb. 22, 2008); Cordova v. Frank, 2007 WL 2188587, *6 (W.D.Wis., July 26, 2007) (holding remedy unavailable where a prisoner’s appeal was late because he was indigent and prison rules forbade advancing him the postage to mail it); Kaufman v. Schneider, 474 F.Supp.2d 1014, 1032 (W.D.Wis. 2007) (stating same view as Cordova); Cruz v. Jordan, 80 F.Supp.2d 109, 124 (S.D.N.Y. 1999) (holding remedies were not available to a prisoner who was unconscious and hospitalized during the time period for filing a grievance, where prison officials rejected his later grievance as time-barred).

Note 847: Calloway v. Contra Costa County Jail Correctional Officers, 2007 WL 134581, *28 (N.D.Cal., Jan. 16, 2007) (holding prisoner removed from jail to prison and then returned to jail where claim arose should have filed a grievance upon return to jail), aff’d, 243 Fed.Appx. 320 (9th Cir. 2007) (unpublished); Bradley v. Washington, 441 F.Supp.2d 97, 101 (D.D.C. 2006) (holding a week’s deprivation of writing materials did not make remedies unavailable where the plaintiff had 15 days to file a grievance); Stanley v. Rich, 2006 WL 1549114, *3 (S.D.Ga., June 1, 2006) (holding a prisoner who complained of threats of retaliation should have filed a grievance when conditions changed, i.e., the administration was replaced and several officers were suspended and eventually terminated); Isaac v. Nix,
2006 WL 861642, *4 (N.D.Ga., Mar. 30, 2006) (holding prisoner who said he couldn’t get grievance forms within a five-day time limit should have filed a grievance within five days of getting the forms); Winstead v. Castellaw, 2005 WL 1081353, *2 (E.D.Va., May 6, 2005) (dismissing for non-exhaustion where prisoner claimed he could not get grievance forms in segregation but did not file a grievance once released from segregation).

Note 849: Green v. McBride, 2007 WL 2815444, *3 (S.D.W.Va., Sept. 25, 2007) (holding prisoner who was kept on suicide watch without necessary materials until past the grievance deadline should have filed a late grievance); Stephens v. Howerton, 2007 WL 1810242, *4 (S.D.Ga., June 21, 2007) (holding injured prisoner should have filed a grievance when he was able to write), aff’d, 270 Fed.Appx. 750 (11th Cir. 2008); Benfield v. Rushton, 2007 WL 30287, *4 (D.S.C., Jan. 4, 2007) (holding a hospitalized prisoner should have filed a grievance upon release from the hospital); Duvall v. Dallas County, Tex., 2006 WL 3487024, *4 5 (N.D.Tex., Dec. 1, 2006) (similar to Benfield); Washington v. Texas Dept. of Criminal Justice, 2006 WL 3245741, *4-5 (N.D.Tex., Nov. 5, 2006) (similar to Benfield; the prisoner was in intensive care with injuries causing memory loss during the period for filing a grievance); Haroon v. California Dept. of Corrections and Rehabilitation, 2006 WL 1097444, *3 (E.D.Cal., Apr. 26, 2006) (holding that a prisoner who was in a coma during the usual time limit should have filed afterwards), report and recommendation adopted, 2006 WL 1629123 (E.D.Cal., June 9, 2006); Brazier v. Maricopa County Sheriff’s Office, 2006 WL 753157, *4 (D.Ariz., Mar. 22, 2006) (holding that a prisoner who was physically traumatized and unable to file a grievance within the 48-hour time limit was required to exhaust later, even untimely), reconsideration denied, 2006 WL 1455569 (D.Ariz., May 22, 2006); Goldenberg v. St. Barnabas Hosp., 2005 WL 426701, *5 (S.D.N.Y., Feb. 23, 2005) (stating prisoner who was physically and mentally incapable of filing a grievance after the challenged conduct failed to explain why he didn’t exhaust later).


Note 945: Davis v. Rouse, 2009 WL 4728988, *2 (D.Md., Dec. 3, 2009) (holding plaintiff had exhausted where his grievance was referred to the internal investigation unit and he was told that he could not pursue the grievance for that reason), vacated in part on reconsideration on other grounds, 2010 WL 2025554 (D.Md., May 18, 2010); Lanier v. Smith, 2009 WL 1758904, *1 (M.D.Fla., June 19, 2009) (dismissal for non-exhaustion denied where prisoner was repeatedly told his grievance was referred to the Inspector General); Ricchio v. Robinson, 2008 WL 2568138, *6-7 (C.D.Cal., June 26, 2008) (refusing to dismiss where plaintiff repeatedly grieved sexual assault but grievances were rejected because they were being investigated, or had been investigated, by Internal Affairs, and appeals were rejected because of the lack of a first level decision, and plaintiff was told to direct her complaints to Internal Affairs); Hixon v. MCSP Admin. Office, 2007 WL 2390417, *3 (E.D.Cal., Aug. 20, 2007) (holding plaintiff exhausted when his grievance was referred as a “staff complaint” and he was not given the option of further appeals), report and recommendation adopted, 2007 WL 2793272 (E.D.Cal., Sept. 26, 2007); Hendon v. Ramsey, 2007 WL 1120375, *9-10 (S.D.Cal., Apr. 12, 2007) (declining to dismiss where grievance was partly granted and referred for a “supervisory fact-finding investigation,” and plaintiff was told would not be informed of the outcome and was not told that any further review was available); Cahill v. Arpaio, 2006 WL 3201018, *3 (D.Ariz., Nov. 2, 2006) (holding plaintiff reasonably relied on grievance hearing officer’s statement that “(1) the matter was under investigation and he would not be notified of the results, (2) he could not appeal and would not be given a form, and (3) he should proceed to federal court,” notwithstanding that the preprinted decision form said it could be appealed).


excused exhaustion; their claim that a grievance would have been “redirected” was not persuasive absent any explanation of what happens to non-grievable, redirected grievances); McGrath v. Johnson, 67 F.Supp.2d 499, 511 (E.D.Pa. 1999), aff’d, 35 Fed.Appx. 357, 2002 WL 1271713 (3d Cir. 2002); Davis v. Frazier, 1999 WL 395414, *3 (S.D.N.Y., June 15, 1999).

Note 1015: Jenkins v. Federal Bureau of Prisons, 2011 WL 4482074, *5 (D.S.C., Sept. 26, 2011) (holding procedure was unavailable to a prisoner who had been hospitalized with serious injuries requiring a skin graft to his hand, which was bandaged until two days before he filed his untimely grievance); Williams v. Hacker, 2010 WL 2507778, *3 (M.D.Tenn., June 3, 2010) (prisoner who was incapacitated by injury and surgery during grievance-filing period and whose late grievance was rejected was entitled to “Days exception” to exhaustion), report and recommendation adopted, 2010 WL 2507779 (M.D.Tenn., June 18, 2010); Ellington v. Wolfenbarger, 2010 WL 891278, *3 (E.D.Mich., Mar. 10, 2010) (claim of plaintiff who alleged remedies were not available to him because of his injuries could not be dismissed at the pleading stage); Childers v. Bates, 2010 WL 1268143, *6-7 (S.D.Tex., Jan. 14, 2010) (remedy that required identification of defendants was not “personally available” to prisoner who could not do so because of a head injury and memory loss), report and recommendation rejected on other grounds, 2010 WL 1268139 (S.D.Tex., Mar. 26, 2010); Jones v. Carroll, 628 F.Supp.2d 551, 558 (D.Del. 2009) (allegation that prisoner could not grieve because he was heavily medicated after surgery presented a jury question; “although plaintiff was described in the medical records as being oriented and ambulatory, a postsurgical patient's ability to follow directions from a nurse does not necessarily equate to the ability to independently perform new tasks”); Barretto v. Smith, 2009 WL 1271984, *6 (E.D.Cal., Mar. 6, 2009) (holding failure to pursue grievance timely was not dispositive where prisoner had been hospitalized and then in the prison infirmary in a condition of pain and discomfort during the relevant period), reconsideration denied, 2009 WL 1119513 (E.D.Cal., Apr. 24, 2009); Macahilas v. Taylor, 2008 WL 220364, *4 (E.D.Cal., Jan. 25, 2008) (denying summary judgment to defendants where prisoner said “his mind was too clouded” by a physical illness to grieve timely), report and recommendation adopted, 2008 WL 506109 (E.D.Cal., Feb. 22, 2008); Ricketts v. AW of Unicor, 2008 WL 1990897, *6 (D.D.C., May 6, 2008) (denying dismissal for non-exhaustion where prisoner said he was in the hospital paralyzed throughout the period for filing a grievance); Holcomb v. Director of Corr., 2006 WL 3302436, *6-7 (N.D.Cal., Nov. 14, 2006) (holding a prisoner rendered quadriplegic and never returned to prison after his injury did not have an opportunity to file timely); Muniz v. Goord, 2007 WL 2027912, *7 (N.D.N.Y., July 11, 2007) (holding allegation that plaintiff was too ill to file a grievance or seek a time extension sufficiently pled special circumstances excusing proper exhaustion).

Note 1016: Wright v. Langford, 2012 WL 1074508, *2 (M.D.Ga., Mar. 29, 2012) (holding allegation that head injury prevented plaintiff from grieving was not credible where grievance policy provided for seeking assistance from staff or other prisoners and plaintiff did not show he was unable to do this), reconsideration denied, 2012 WL 2989602 (M.D.Ga., July 20, 2012); Smith v. Sharp, 2010 WL 3609527, *4 (D.S.C., July 23, 2010) (holding injuries did not justify non-exhaustion where staff assistance was available for disabled prisoners, and physical inability to file was a recognized basis for allowing late filing), report and recommendation adopted, 2010 WL 3609492 (D.S.C., Sept. 13, 2010), aff’d, 409 Fed.Appx. 673 (4th Cir. 2011) (unpublished); Leaf v. Felker, 2010 WL 144357, *4 (E.D.Cal., Jan. 8, 2010) (holding injuries did not justify non-exhaustion where medical records indicated plaintiff was in good health, his injuries would not have interfered with thinking and communication, and he made other complaints during the same period); Hunter v. Indiana Dept. of Corrections, 2009 WL 3199170, *6 (N.D.Ind., Sept. 29, 2009) (holding physical and mental condition of prisoner just released from the hospital did not justify non-exhaustion where he made other complaints during the same time period); Lopez v. Smelosky, 2009 WL 3062342, *3 (S.D.Cal., Sept. 22, 2009) (rejecting claim of medical inability to file a grievance since plaintiff was not housed in a medical unit, he filed another grievance in the same time period, and he had been medically cleared for normal activity before the grievance deadline expired); Chavez v. Thorton, 2008 WL 2020319, *4-5 (D.Colo., May 9, 2008) (holding plaintiff who missed a five-
day grievance deadline while hospitalized for six days after a stabbing failed to exhaust; he had written other complaints about other subjects during that time); Haggenmiller v. Feneis, 2007 WL 2264707, *6 (D.Minn., Aug. 6, 2007) (rejecting claim that prisoner’s condition after an assault excused him from exhausting because he “has not shown that he was, in fact, physically or mentally incapable of pursuing his available administrative remedies before filing suit”); Harris v. Walker, 2006 WL 2669050, *3-4 (S.D.Miss., Sept. 18, 2006) (holding that prisoner who filed a grievance several weeks late after being stabbed and having a kidney removed in the hospital failed to exhaust; he was physically capable before the deadline and the law “does not allow for tolling or excuse prompt filing of prison administrative remedies because of mental or emotional injury.”); Garrett v. Partin, 2006 WL 2655980, *3-4 (E.D.Tex., Sept. 14, 2006) (holding plaintiff, who was unable to file a timely grievance because of his medical condition, failed to exhaust because he filed after 18 days but had filed another grievance after only 14 days), aff’d, 2007 WL 2809915 (5th Cir. 2007) (unpublished).


Note 1022: Cole v. Sobina, 2007 WL 4460617, *7 (W.D.Pa., Dec. 19, 2007) (refusing to dismiss for non-exhaustion where plaintiff alleged mental disabilities which could account for his noncompliance with grievance procedures); Whittington v. Sokol, 491 F.Supp.2d 1012, 1019 (D.Colo. 2007) (refusing to dismiss for non-exhaustion where plaintiff alleged he had no remedies because he was mentally incapacitated and was transferred to a mental institution shortly after the incident he sued about); Petty v. Goord, 2007 WL 724648, *8 (S.D.N.Y., Mar. 5, 2007) (refusing to dismiss for non-exhaustion where prisoner was transferred to a mental hospital after filing a grievance and missed the final deadline; the court notes there is no evidence before it of his mental state at the time, and holds that two months plus in a mental hospital constituted special circumstances); Ullrich v. Idaho, 2006 WL 288384, *3 (D.Idaho, Feb. 6, 2006) (dismissing for non-exhaustion, but directing prison officials to appoint someone to assist the plaintiff, who alleged mental illness and denial of psychiatric treatment, complete exhaustion); LaMarche v. Bell, 2005 WL 2998614, *3 (D.N.H., Nov. 8, 2005) (acknowledging that evidence of mental illness might support argument that late grievance should be deemed effective).

Note 1023: Walker v. Lovelle, 2009 WL 1313221, *2 (N.D.Cal., May 11, 2009) (rejecting claim of mental health problems where the prisoner had filed and appealed other grievances); Baker v. Schriro, 2008 WL 622020, *5-6 (D.Ariz., Mar. 4, 2008) (rejecting claim of inability to follow grievance procedure where plaintiff was representing himself in three criminal appeals and initiating three civil rights actions during the same time period), review denied, 2008 WL 2003757 (D.Ariz., May 8, 2008); Winters v. Shearin, 2011 WL 6300464, *2 n.7 (D.Md., Dec. 15, 2011) (“Given that this case involves delivery of psychological services to a prisoner with mental impairment, the court shall accept Winters's truncated pursuit of [a grievance] as a sufficient attempt to exhaust administrative remedies.”); Hilson v. Maltese, 2011 WL 767696, *2 (N.D.N.Y., Feb. 28, 2011) (where plaintiff alleged he didn’t exhaust because he “was mentally unstable at the time” and “had a mental break down,” non-exhaustion was not apparent on the face of the complaint and might be justified by special circumstances); Locke v. Sobina, 2011 WL 841368, *4 (W.D.Pa., Mar. 8, 2011) (where plaintiff complained of traumatic brain injury that impaired his cognitive abilities, court declines to rule on exhaustion on existing record and proceeds to the merits); Saggese v. Corrente, 2008 WL 474110, *5 & n.5 (D.N.J., Feb. 15, 2008) (rejecting prisoner’s claim that he was mentally ill and “in a blur” since his claims of overmedication and injury only cover two weeks and he could have exhausted after that); Williams v. Pettiford, 2007 WL 3119548, *2-3 (D.S.C., Oct. 22,
(rejecting argument that prisoner who was dyslexic and mentally ill was not required to exhaust),
(D.S.C., Sept. 20, 2007) (stating Woodford v. Ngo “appears to have foreclosed” argument that mental
illness excused plaintiff from exhausting), aff’d, 271 Fed.Appx. 337 (4th Cir. 2008) (unpublished); Bester
v. Dixon, 2007 WL 951558, *10 (N.D.N.Y., Mar. 27, 2007) (noting initial concern that prisoner had
been transferred to a psychiatric hospital because of a mental condition, but dismissing since he had
written complaints and spoken to investigators); Hall v. Cheshire County Dept. of Corrections, 2007 WL
951657, *1-2 (D.N.H., Mar. 27, 2007) (dismissing for non-exhaustion even though plaintiff’s claim was
failure to treat his mental illness resulting in conduct such as cutting himself repeatedly and swallowing
glass; no inquiry into whether his mental condition could have affected his ability to exhaust); Williams v.
know of the exhaustion requirement and a prior brain injury made it difficult for him to remember things);
medication doses were so high they “prohibited him from being of sound mind to draft a grievance”;
noting that he failed to submit a grievance after his medication was corrected, and he filed other
grievances during the relevant period).

neither come forward with evidence illustrating the nature and severity of those problems, nor has he
alleged facts showing precisely how his mental status was an issue in failing to exhaust.”); Rigsby v.
said that in 2007 he had been the victim of assaults in 2004 that resulted in brain swelling, partial memory
loss, depression, and PTSD; plaintiff “provides no specific information about how these injuries
prevented him from initiating, much less completing, the inmate grievance process”); Fleming v. Dettloff,
allegation of mental incompetence and his participation in the prison Mental Health Program, since he
presented “no evidence of mental incompetency beyond allegations and conclusory statements in the
90-day waiting period for psychiatric medications since the plaintiff did not allege facts indicating his
mental problems prevented him from understanding or using the grievance procedures), aff’d, 285
2410370, *2 (D.Ariz., Aug. 21, 2007) (refusing to exempt prisoner from exhaustion requirement based on
claim of mental illness since there is no “extenuating circumstances” exception, he provided no evidence
of his illness, and he had made complaints to authorities), subsequent determination, 2007 WL 2949007

allegation that prisoner returned from state to local custody did not actually have access to state grievance
(finding factual question whether prisoner transferred from jail to prison had opportunity to use jail
grievance system); Key v. Toussaint, 660 F.Supp.2d 518, 523-25 (S.D.N.Y. 2009) (noting transfer to a
federal facility renders prisoners unable to comply with state grievance process requirements;
distinguishing transfers within same prison system; notes that this prisoner had been transferred to
quickly he did not have time to exhaust first); Key v. Moscoso, 2009 WL 2901636, *5 (S.D.N.Y., Sept.
who was transferred from jail, wrote to the jail seeking to exhaust, and received no response satisfied the
grievance process was not available to prisoner transferred out three days after being assaulted; there was
no evidence the procedure could be completed in three days or was available to persons at other
locations), report and recommendation adopted, 2008 WL 4831710 (W.D.Va., Nov. 3, 2008); Williams
Oklahoma was not required to exhaust Vermont grievance procedure absent a rule to that effect in the private prison grievance process; Gomez v. Ficket, 2008 WL 4279596, *3 (W.D.Wash., Sept. 16, 2008) (where prisoner’s claim against county jail personnel did not accrue until he was in state prison, defendants failed to show the jail remedy was available); Ammouri v. Adappt House, Inc., 2008 WL 2405762, *3 (E.D.Pa., June 12, 2008) (noting that plaintiff was repeatedly told he could not grieve matters from his previous institution); Davis v. Kirk, 2007 WL 4353798, *7 (S.D.Tex., Dec. 11, 2007) (holding prisoner’s grievance appeal was moot on transfer); Thomas v. Maricopa County Bd. of Supervisors, 2007 WL 2995634, *4 (D.Ariz., Oct. 12, 2007) (declining to dismiss where the prisoner did not have knowledge of the violation until after his release and the grievance policy did not provide for grievances after release); Ray v. Hogg, 2007 WL 2713902, *12 (E.D.Mich., Sept. 18, 2007) (holding prisoner transferred out of jail had no access to jail grievance process); Basham v. Correctional Medical Services, Inc., 2007 WL 2481338, *5 (S.D.W.Va., Aug. 29, 2007) (holding defendants failed to show a grievance appeal was available to a hospitalized prisoner separated from his grievance documents); Knight v. Dutcher, 2007 WL 2407034, *12 (D.Neb., Aug. 20, 2007) (declaring to dismiss where plaintiff was transferred before he could grieve and defendants did not meet their burden of showing the remedy was available after transfer); Goldwater v. Arpaio, 2007 WL 1577891, *2 (D.Ariz., May 31, 2007) (declaring to dismiss for non-exhaustion where prisoner was transferred and grievance policy did not provide for post-transfer grievances); Mellender v. Dane County, 2006 WL 3113212, *3 (W.D. Wis., Oct. 27, 2006) (refusing to dismiss for non-exhaustion where prisoner transferred from jail to prison tried to mail a grievance to the jail and then tried to use the prison’s grievance system to complain about the jail); Szkup v. Arpaio, 2006 WL 2821685, *2 (D.Ariz., Sept. 29, 2006) (declaring to dismiss for non-exhaustion where defendants did not show that plaintiff could use the jail grievance process after being transferred from jail to prison); Almond v. Tarver, 468 F.Supp.2d 886, 896-97 (E.D.Tex., Aug. 15, 2006) (finding remedies were not “personally obtainable” to a prisoner whose grievance decision was delayed until he was released and who did not then appeal, and who filed suit only after reincarceration 11 months later); Bradley v. Washington, 441 F.Supp.2d 97, 102-03 (D.D.C. 2006) (holding D.C. remedies became unavailable upon prisoner’s transfer to federal medical facility, since D.C. procedures say they apply to facilities under authority, jurisdiction, or contract with D.C.); Lofton v. Sheahan, 2004 WL 2032100, *2 (N.D.Ill., Aug. 31, 2004) (holding remedies were likely unavailable where the prisoner was transferred two days after his medical problem appeared); Adamson v. De Poorter, 2006 WL 2724785, *2-3 (N.D.Fla., July 25, 2006) (holding federal prisoner transferred to a state prison was not excluded from federal administrative remedy despite regulation suggesting otherwise, and that he was obliged to try to seek federal forms and exhaust by mail or through the state prison grievance program), report and recommendation adopted, 2006 WL 2724639 (N.D.Fla., Sept. 21, 2006); Tabarez v. Butler, 2005 WL 1366445 (E.D.Cal., June 2, 2005) (holding prisoner who could not file a grievance within the required 15 days because of a transfer, but filed once settled at his new prison, had exhausted); Barnard v. District of Columbia, 223 F.Supp.2d 211, 214 (D.D.C. 2002) (holding that a prisoner who was first hospitalized, then involved in hearings, then transferred during the 15 days he had to file a grievance, may not have been able to use the grievance system); Lindsay v. Dunleavy, 177 F.Supp.2d 398, 401-02 (E.D.Pa. 2001) (declining to dismiss claim of transferred plaintiff where defendants provided no information on remedies available after his transfer); Flowers v. Velasco, 2000 WL 1644362, *2 (N.D.Ill., Oct. 19, 2000) (holding that a jail grievance system was not available to a prisoner held there for three weeks before transfer to state custody; his grievance would have been aborted by his transfer); Muller v. Stinson, 2000 WL 1466095, *2 (N.D.N.Y., Sept. 25, 2000) (excusing exhaustion by prisoner who had been transferred before the expiration of the time for filing a grievance about events at the sending prison); Watkins v. Khamu, 2000 WL 556614, *1 (N.D.Ill., May 3, 2000) (holding that an allegation that the jail grievance procedure is no longer available because plaintiff is in state prison system, and that he reported the incident to staff and had been “told they would handle the situation,” “suffices to allow him into the federal courthouse door as a threshold matter”); Mitchell v. Angelone, 82 F.Supp.2d 485, 490 (E.D.Va. 1999) (excusing exhaustion by prisoner who had been transferred so frequently he had never had time to exhaust).


Note 1048: Calloway v. Grimshaw, 2011 WL 4345299, *4-5 (N.D.N.Y., Aug. 10, 2011) (holding allegation that plaintiff was “surrounded by several Correctional Officer[s] and an [u]nknown [s]ergeant in D Block in the transitional Inmate Care Program” and was told that if he “didn't sign off on the grievance, they would set [him] up by placing a weapon in [his] cell and [ ] they could make it hard for [him] if [he] was transferred” was too conclusory because it did not identify the staff members and state the time of the incident), report and recommendation adopted, 2011 WL 4345296 (N.D.N. Sept. 15, 2011); Obama v. Sanderlin, 2011 WL 2292956, *1 (E.D.Ark., June 9, 2011) (plaintiff’s “allegations about retaliation are too vague to allow the conclusion that his administrative remedies were unavailable”); Champ v. Lafayette, 2011 WL 565648, *3 (M.D.Fla., Feb. 8, 2011) (conclusory allegations of threats without indication of who made them were insufficient); Bennett v. James, 737 F.Supp.2d 219, 226 (S.D.N.Y. 2010) (same as Champ); Cox v. Grayer, 2010 WL 1286837, *8-9 (N.D.Ga., Mar. 29, 2010) (rejecting fear of retaliation as not “objectively reasonable”); Brown v. Napoli, 687 F.Supp.2d 295, 297-98 (W.D.N.Y. 2009) (generalized fear of retaliation unsupported by factual allegations does not excuse non-exhaustion); Bogard v. Bernal, 2009 WL 2634483, *3 (E.D.Cal., Aug. 25, 2009) (“overall fear of retaliation” does not excuse exhaustion); Mauskar v. Lewis, 2009 WL 2351750, *2 (S.D.Tex., July 28, 2009) (claim of fear without actual retaliation does not excuse exhaustion); Ledbetter v. Emery, 2009 WL 1871922, *4-5 (C.D.Ill., June 20, 2009) (female prisoner’s general fear of retaliation for complaining about sexual harassment would not have deterred a “person of ordinary firmness”); Harrison v. Stallone, 2007 WL 2789473, *5-6 (N.D.N.Y., Sept. 24, 2007) (holding “reasonable fear” of retaliation may make remedies unavailable, but “general fear” does not; the fact that the present claim is for retaliation doesn’t necessarily create a reasonable fear of further retaliation); Monroe v. Fletcher, 2007 WL 853771, *2 (W.D.Va., Mar. 16, 2007) (holding placement in filthy, isolated medical segregation cell did not excuse failure to appeal grievance, since medical isolation was part of what the plaintiff had asked for), aff’d, 2007 WL 2710412 (4th Cir., Sept. 14, 2007); Mayo, Sr. v. Louisiana Dept. of Public Safety (WCI), 2006 WL 1985975, *3 (E.D.La., June 7, 2006) (rejecting claim of fear of retaliation where the plaintiff did not allege a threat was made to him and did not identify the officer he feared); Ketchens v. Rocha, 2006 WL 1652658, *2 (E.D.Cal., June 14, 2006) (holding allegation that defendants had threatened plaintiff with


Note 1058: Brown v. Runnels, 2006 WL 2849871, *5 (E.D.Cal., Oct. 3, 2006) (refusing to dismiss for non-exhaustion where grievances were rejected for failure to attach a document that the plaintiff had not yet received); Bennett v. Douglas County, 2006 WL 1867031, *2 (D.Neb., June 30, 2006) (declining to dismiss for failure to appeal to the Chief Deputy of the jail where there was no Chief Deputy); Howard v. City of New York, 2006 WL 2597857, *7 (S.D.N.Y., Sept. 6, 2006) (holding allegations that plaintiff asked to see the grievance officer but was never called, and when transferred was told he could not grieve a matter from the previous facility, did not support dismissal of the complaint); Dukes v. S.H.U. C.O. John Doe No. 1, 2006 WL 1628487, *5 (S.D.N.Y., June 12, 2006) (noting that the failure to record and assign numbers to plaintiff’s grievances might have made appeal impossible); Hause v. Smith, 2006 WL 2135537, *1-2 (W.D.Mo., July 31, 2006) (holding allegations that attempts to file grievances were “significantly thwarted” suffice at the pleading stage); Smith v. Briley, 2005 WL 2007230, *3 (N.D.Ill., Aug. 16, 2005) (holding sworn allegations that plaintiff was denied access to counselor for informal exhaustion purposes supported denial of summary judgment for non-exhaustion); Johnson v. True, 125 F.Supp.2d 186, 188-89 (W.D.Va. 2000) (holding allegation that efforts to exhaust were frustrated by prison officials raised an issue of material fact whether plaintiff exhausted “available” remedies), appeal dismissed, 32 Fed.Appx. 692, 2002 WL 596403 (4th Cir. 2002); Johnson v. Garraghty, 57 F.Supp.2d 321 (E.D.Va. 1999) (holding that factual conflict over whether the plaintiff had been prevented from exhausting “merits an evidentiary hearing.”).

Note 1062: Threadgill v. Moore, 2011 WL 4388832, *3 (S.D.Miss., July 25, 2011) (dismissing for non-exhaustion where prisoner’s grievance was “backlogged” because he already had a grievance pending), report and recommendation adopted, 2011 WL 4386460 (S.D.Miss., Sept. 20, 2011); Ridley v. Whitener, 2011 WL 3476472, *8 (W.D.N.C., Aug. 9, 2011) (holding “one at a time” grievance policy did not make the remedy unavailable where prisoners had a year to file a grievance and grievances were to be disposed of within 40 days; “The fact that Plaintiff's filings were so prolific that they may have interfered
with his ability to file all of his particular grievances within the one-year statute of limitations does not exempt him from complying with ARP rules.”) (footnote omitted); Canady v. Keller, 2010 WL 5452111, *1 (W.D.N.C., Dec. 28, 2010) (holding plaintiff failed to exhaust where system limited prisoners to one pending grievance at a time and plaintiff did not withdraw his earlier grievance); Escobar v. Brown, 2010 WL 5230877, *5 (D.Colo., Aug. 10, 2010) (holding in substance that restrictions preventing a prisoner from exhausting do not excuse the prisoner from exhausting), report and recommendation adopted, 2010 WL 5230874 (D.Colo., Dec. 16, 2010); Williams v. Central Prison, 2010 WL 3672252, *4-5 (E.D.N.C., Sept. 20, 2010) (same as Canady); Cummings v. Crumb, 2009 WL 3154446, *15 (3d Cir., Oct. 2, 2009) (restriction to no more than one grievance every 15 days did not prevent plaintiff from filing suit); White v. Epps, 2010 WL 2539659, *2-3 (S.D.Miss., Mar. 3, 2010) (similar to Clayborne, below), report and recommendation adopted, 2010 WL 2540113 (S.D.Miss., June 16, 2010); Harvey v. LeBlanc, 2010 WL 996435, *2 (W.D.La., Feb. 5, 2010) (dictum) (stating exhaustion defense was “potentially meritorious” where policy provided that only one grievance would be processed at a time and others were “backlogged”; plaintiff had 34 backlogged grievances), report and recommendation adopted, 2010 WL 996433 (W.D.La., Mar. 17, 2010), appeal dismissed, 394 Fed.Appx. 154 (5th Cir. 2010); Blach v. Kernan, 2008 WL 4447718, *2 (N.D.Cal., Sept. 29, 2008) (limit of one grievance a week did not prevent exhaustion where plaintiff had two years to get his grievance filed); Clayborne v. Epps, 2008 WL 4056293, *3-4 (S.D.Miss., Aug. 25, 2008) (plaintiff failed to exhaust where system limited prisoners to one pending grievance at a time and plaintiff did not withdraw his prior grievance); West v. Endicott, 2008 WL 906225, *3 (E.D.Wis., Mar. 31, 2008) (holding a system that allowed two grievances a week did not prevent the plaintiff from exhausting), reconsideration denied, 2008 WL 2078123 (W.D.Wis., May 14, 2008); McGrew v. Teer, 2008 WL 516547, *2 (M.D.La., Jan. 23, 2008) (dismissing for non-exhaustion where plaintiff’s grievance was not decided but was “placed on backlog” pending exhaustion of other previously filed grievances; he filed suit three and a half months after filing his grievance); Oestriecher v. Wallace, 2007 WL 4224929, *3 n.7 (E.D.La., Nov. 27, 2007) (dictum) (stating that a “backlog system” that deferred multiple grievances from the same prisoner is constitutionally permissible and does not excuse failure to exhaust); Edmond v. Lindsey, 2006 WL 3203755, *2 (S.D.Miss., Nov. 3, 2006) (holding that officials’ refusal to process grievances based on a rule allowing only 10 grievances to be pending at once did not excuse the plaintiff’s failure to exhaust); Hernandez v. Schriro, 2006 WL 2989030, *4 (D.Ariz., Oct. 18, 2006) (holding grievance process unavailable where grievance was mistakenly rejected pursuant to a rule that allowed only one conditions of confinement grievance and returned additional ones unprocessed and unappealable).

documents, denied grievances, and frustrated plaintiff’s attempts to exhaust his administrative remedies.

report and recommendation adopted, 2012 WL 590021 (D.Nev., Feb. 21, 2012); Schoenlein v. Halawa Correctional Facility, 2008 WL 4761791, *5-6 (D.Haw., Oct. 29, 2008) (officials should not have terminated plaintiffs’ grievances when they filed suit prematurely; though their suit had been dismissed, the issues had not been mooted, and exhaustion may be excused upon re-filing on these facts); Woods v. Carey, 2008 WL 447553 (E.D.Cal., Feb. 15, 2008) (where grievance official directed plaintiff to the medical appeals analyst, but that person said plaintiff’s grievance must first be processed by the grievance office, plaintiff had exhausted; court refers to “runaround”); Bradley v. McVay, 2008 WL 495732, *3 (E.D.Cal., Feb. 21, 2008) (if prison officials required plaintiff to go to an interview room for an investigation, and he could not do so without the cane he had been deprived of, the grievance process would not be available to him), report and recommendation adopted, 2008 WL 669858 (E.D.Cal., Mar. 7, 2008); Baylis v. Taylor, 475 F.Supp.2d 484, 488 (D.Del. 2007) (holding officials’ withdrawal of plaintiffs’ grievances because of litigation meant that he had exhausted, since no further remedies were available); Ray v. Jones, 2007 WL 397084, *2 (W.D.Okla., Feb. 1, 2007) (holding grievance process was not an available remedy because of ongoing internal affairs investigation); Marshall v. Knight, 2006 WL 3354700, *4 (N.D. Ind. Nov. 17, 2006) (holding that instructions to grievance personnel to respond to grievances about law library hours only by sending prisoners a copy of a memo deprived grievance staff of authority to act on those grievances and made the remedy unavailable); James v. Davis, 2006 WL 2171082, *17 (D.S.C., July 31, 2006) (holding that return of grievances unprocessed, on the ground that the problems were taken care of and that damages claims could not be grieved, thwarted plaintiff’s ability to exhaust); Rolllins v. Magnusson, 2004 WL 3007090, *1 (D.Me., Dec. 28, 2004) (refusing to dismiss for non-exhaustion where the prisoner’s right to file grievances had been suspended), adopted, 2005 WL 226218 (D.Me., Jan. 31, 2005); Labounty v. Johnson, 253 F.Supp.2d 496, 502-06 (W.D.N.Y. 2003) (denying summary judgment where grievance supervisor’s alleged failure to follow procedures prevented plaintiff’s appeal from going forward and where evidence showed that his grievance was consolidated with another prisoner’s, and the decision did not mention the issue he was concerned about, presenting a factual issue whether it was “reasonable for plaintiff to be confused under such circumstances”); Bullock v. Horn, 2000 WL 1839171, *2 (M.D.Pa., Oct. 31, 2000) (holding allegation that prison officials returned grievances unprocessed, without grievance numbers, making appeal impossible was sufficient to defeat a motion to dismiss).

Note 1065: Allen v. City of Saint Louis, 2008 WL 695393, *4-5 (E.D.Mo., Mar. 12, 2008) (finding remedies unavailable where plaintiff’s requests for forms and information about how to file were ignored, denied, or “pacified with promises” of an investigation, and he was improperly segregated to prevent access to the grievance procedure and third parties); Miller v. Berkebile, 2008 WL 635552, *7-9 (N.D.Tex., Mar. 10, 2008) (where official refused to process first-stage grievances contrary to policy, remedy was unavailable; prisoners need not take steps not prescribed in the policy to get around him; PLRA law applied in § 2241 case); Smith v. Westchester County Dept. of Corrections, 2008 WL 361130, *3 (S.D.N.Y., Feb. 7, 2008) (remedies were unavailable if supervisors refused to accept plaintiff’s grievance); Crawford v. Berkebile, 2008 WL 323155, *7-8 (N.D.Tex., Feb. 6, 2008) (counselor’s refusal to accept grievance forms made the remedy unavailable; prisoners were not required to go to other officials where it was the counselor’s job to receive grievances); Barndt v. Pucci, 2007 WL 1031509, *2-3 (M.D.Pa., Mar. 30, 2007) (denying summary judgment where prisoner alleged he could not grieve because he was deprived of writing materials and legal paperwork for four months); Lomako v. CSP Corcoran, 2010 WL 2698743, *7-8 (E.D.Cal., July 7, 2010) (holding remedies unavailable where plaintiff’s request for accommodation was returned for supplementation but made due on a date that was already past, and then mis-recorded as having been withdrawn by the plaintiff), report and recommendation adopted, 2010 WL 3502514 (E.D.Cal., Sept. 2, 2010); Kress v. CCA of Tenn., 2010 WL 2694986, *5 (S.D.Ind., July 2, 2010) (holding remedy unavailable where defendants said they would not consider the issue plaintiff raised); Exmundo v. Kane, 2010 WL 1904837, *5-6 (E.D.Cal., May 7, 2010) (where grievance coordinator directed prisoner to submit grievance to two other staff members, and they
did not reply, their violation of procedure would render remedies unavailable); Tuttle v. Boynton, 2009 WL 2134968, *4 (W.D.Mich., July 15, 2009) (holding that prisoner whose grievance was not answered timely and whose requests for an appeal form were denied or ignored had exhausted available remedies); Ortega v. Felker, 2009 WL 1582850, *5 (E.D.Cal., June 4, 2009) (declaring to dismiss for non-exhaustion where untimeliness of appeal resulted from the grievance decision’s being provided after the appeal deadline had expired), report and recommendation adopted, 2009 WL 2241804 (E.D.Cal., July 27, 2009); Antolin v. Halawa Correctional Facility, 2009 WL 855806, *4 n.6 (D.Haw., Mar. 31, 2009) (grievance response stating that other prisoners had filed litigation and no grievances would be processed on the subject “strongly suggests” no remedies were available); Blackburn v. South Carolina, 2009 WL 632542, *9 (D.S.C., Mar. 10, 2009) (declaring to dismiss where grievance official did not respond to plaintiffs’ grievance because of a backlog of grievances; “If the prison administrators do not or will not respond to a defendant attempting to administratively resolve his grievances, it would be fundamentally unjust for this court to deny such a party access to a remedy when they could get no response from prison officials.”); Alwood v. Randt, 2006 WL 2639887, *2 (N.D.Ind., Sept. 12, 2006) (denying summary judgment where prisoner’s sworn statement said that a prison official came to his cell and “ripped up his grievance, thereby refusing to allow it to be processed”); Collins v. Goord, 438 F.Supp.2d 399, 415 (S.D.N.Y. 2006) (holding allegations that facility personnel invented a screening procedure and did not allow him to file his grievance raised a material issue under “an exception to the PLRA’s exhaustion requirement where prison authorities actively obstruct an inmate’s ability to ‘properly’ file a prison grievance”); Blount v. Fleming, 2006 WL 1805853, *2-4 (W.D.Va., June 29, 2006) (stating “when prison officials prevent an inmate from access to or use of a prison inmate’s grievance system, an inmate’s failure to exhaust is excused because he had no ‘available’ administrative remedy”; finding inter alia that defendants falsely claimed not to have received plaintiff’s grievances); Carter v. Newland, 441 F.Supp.2d 208, 211 (D.Mass. 2006) (declining to dismiss for non-exhaustion in view of allegations that a prison counselor tore up the plaintiff’s grievances); Liggins v. Barnett, 2001 WL 737551 *14-15 (S.D.Iowa, May 15, 2001) (allegation that plaintiff filed grievances and prison staff destroyed them supported claim of substantial compliance; though “the question is close,” allegation that grievances were destroyed and grievance committee given a false report by staff member raised an inference that filing a grievance was an unavailable remedy).

2010); Wilson v. Collins, 2010 WL 785377, *14 (W.D.Va., Mar. 5, 2010), appeal dismissed, 382 Fed.Appx. 286 (4th Cir. 2010); Russo v. Honen, e755 F.Supp.2d 313, 315 (D.Mass. 2010); Beckhum v. Hirsch, 2010 WL 582095, *9 (D.Ariz., Feb. 17, 2010); Cipriani v. Schenectady County, 2009 WL 3111681, *11 (N.D.N.Y., Sept. 24, 2009); Perry v. Torres, 2009 WL 2957277, *4 (S.D.N.Y., Sept. 16, 2009) (if appeal had to be filed on the form bearing the grievance decision, and prisoner did not receive a decision, defendants would be estopped from insisting on the form); Hulvey v. Quigley, 2009 WL 2477308, *6 (W.D.Mich., Aug. 11, 2009) (denying summary judgment where plaintiff used the wrong forms because, he said, he couldn’t get the right ones); Kantamanto v. King, 651 F.Supp.2d 313, 323-24 (E.D.Pa. 2009) (plaintiffs’ account of being denied appeal forms raised a disputed factual issue barring summary judgment); Bertes v. Byers, 2007 WL 4224389, *8 (M.D.Pa., Nov. 28, 2007) (“plaintiff's statements under penalty of perjury in his complaint that he was not provided a grievance form are adequate to establish that it is in dispute whether he was reasonably able to exhaust”); Chatham v. Adcock, 2007 WL 2904117, *14 (N.D.Ga., Sept. 28, 2007) (“It would be an anomalous result, indeed, if prison officials could foreclose prison inmates from filing civil rights lawsuits in federal court simply by depriving them of the means to fulfill a mandatory prerequisite to doing so.”), aff’d, 334 Fed.Appx. 281 (11th Cir. 2009); Hedgespeth v. Hendricks, 2007 WL 2769627, *5 (D.N.J., Sept. 21, 2007) (refusing to dismiss where plaintiff alleged that he was told by housing officers there were no grievance forms, and inmate handbook said housing officers were the source of forms); Cody v. White, 2007 WL 1726583, *2 (D.N.D., June 13, 2007) (denying summary judgment where segregation prisoner said he couldn’t get forms from staff and rules did not seem to allow him to go to grievance office); Tabarez v. Butler, 2007 WL 988040, *2-3 (E.D.Cal., Mar. 30, 2007) (holding defendants’ claim that prisoners “customarily” have access to grievance forms did not mean this plaintiff didn’t, especially since he said only those who were “on good terms” with the guards could get forms), report and recommendation adopted, 2007 WL 1804968 (E.D.Cal., June 21, 2007); Bowers v. City of Philadelphia, 2007 WL 219651, *16 (E.D.Pa., Jan. 25, 2007) (holding grievance process unavailable where forms were not provided in police custody or jail intake area); Allen v. McMorris, 2007 WL 172564, *2 (E.D.Mo., Jan. 19, 2007) (holding allegation that prisoner could not get grievance policy or forms barred summary judgment for defendants); Wallace v. Williams, 2006 WL 3091435, *3 (S.D.Ga., Oct. 30, 2006) (refusing to dismiss for non-exhaustion where prisoner repeatedly requested forms without success); Enigwe v. Zenk, 2006 WL 2654985, *4 (E.D.N.Y., Sept. 15, 2006) (denying summary judgment to defendants where plaintiff asserted his repeated efforts to obtain forms were fruitless); Montgomery v. Johnson, 2006 WL 2403305, *11 (W.D.Va., Aug. 18, 2006) (crediting evidence that policies and practices were not followed and plaintiff was unable to obtain forms), report and recommendation adopted, 2006 WL 3099651 (W.D.Va. Oct. 30, 2006); Hollon v. Prison Health Services, 2006 WL 1131808, *2 (S.D.Ind., Apr. 25, 2006); McDonald v. Schuster, 2006 WL 411062, *5 (D.Ariz., Feb. 16, 2006) (“One way that prison officials can prevent an inmate from utilizing a remedy is by denying him access to the requisite grievance forms until the window for filing grievances has passed.”); Smith v. Briley, 2005 WL 2007230, *3 (N.D.Ill., Aug. 16, 2005) (denying summary judgment where plaintiff alleged that he was denied grievance forms and grievances he submitted on pieces torn from a paper bag were never answered); Ziemb a v. Armstrong, 343 F.Supp.2d 173 (D.Conn. 2004) (holding remedies unavailable where prisoner was denied forms and Warden wrote “We will make the decision which grievances are processed or responded to.”); Washington v. Proffit, 2005 WL 1176587, *2-3 (W.D.Va., May 17, 2005) (holding that a plaintiff who sought to exhaust after dismissal for non-exhaustion, and was told by the defendants’ lawyer to contact defendants only through her and then refused to provide him grievance forms, had been “thwarted” by defendants and his claim would not be dismissed for non-exhaustion), report and recommendation adopted, 2005 WL 1429312 (W.D.Va., June 17, 2005); Dudgeon v. Frank, 2004 WL 1196820, *1 (W.D.Wis., May 18, 2004); Arreola v. Choudry, 2004 WL 868374, *3 (N.D.Ill., Apr. 22, 2004) (same); Kendall v. Kittles, 2003 WL 22127135, *4 (S.D.N.Y., Sept. 15, 2003); Abney v. County of Nassau, 237 F.Supp.2d 278, 282 (E.D.N.Y. 2002) (holding that prisoner who could not get grievance forms, wrote grievance on plain paper, but never got a response had exhausted).
Note 1072: Taylor v. Thames, 2010 WL 3614189, *4-5 (N.D.N.Y., July 22, 2010) (similar to Robinson), report and recommendation adopted, 2010 WL 3614191 (N.D.N.Y., Sept. 8, 2010); Robinson v. Gordon, 2010 WL 1794701, *2-3 (D.N.H., May 5, 2010) (where one staff member declined to give plaintiff a grievance form, he should have asked another officer); Allen v. Jussila, 2010 WL 759870, *6 (D.Minn., Mar. 2, 2010) (rejecting claim where plaintiff “never described the forms he required, the efforts he made to try to obtain the forms, or whether he was actually denied access to the administrative remedy forms by the BOP”; conclusive statements were inadequate); Noland v. Garfield County Detention Center, 2009 WL 5067206, *6 (W.D.Okl., Dec. 15, 2009) (rejecting claim of denial of forms by a single staff member where the plaintiff did not explain why he didn’t try to get forms from someone else, and there was no time limit for grievances); Wall v. Black, 2009 WL 3215344, *6 (S.D.Miss., Sept. 30, 2009) (holding prisonier must provide “identification of the prison employee(s) from whom Plaintiff requested forms; identification of the specific form(s) requested; the date the alleged requests were made; evidence detailing the prison officials’ response(s) to his alleged request(s); and evidence detailing complaints of denial” (citation omitted); Medina v. Bahlamara, 2009 WL 2973097, *3-4 (W.D.Wash., Sept. 9, 2009) (rejecting claim that the duty officer and floor sergeant did not provide grievance forms where the policy said they should be provided by the housing officer); Carter v. Arpaio, 2009 WL 2509202, *3 (D.Ariz., Aug. 13, 2009) (citing failure to identify persons who denied him forms); Gomez v. Swanson, 2009 WL 1085274, *3 (E.D.Cal., Apr. 22, 2009) (citing failure to say when or to whom he made the request, whether he repeated the request or went to a supervisor about it); Lomas v. U.S., 2008 WL 819459, *3 (W.D.Okl., Mar. 25, 2008) (citing plaintiff’s failure to state “to whom or when the requests were made or to explain his access to certain forms and not others”); Dye v. Bartow, 2007 WL 3306771, *6 (E.D.Wis., Nov. 6, 2007) (citing plaintiff’s failure to identify the forms he requested and the date of request, to supply a copy of his request, or to submit evidence detailing officials’ response to his requests), aff’d, 282 Fed.Appx. 434 (7th Cir. 2008) (unpublished); Beasley v. Kontek, 2007 WL 3066373, *2 (N.D.Ohio, Nov. 5, 2007) (“A prisoner may not be excused from exhausting internal remedies if his failure resulted from a form not being provided to him, unless he alleges that there was no other source for the form or that he can prove that he made other attempts to ‘obtain a form or file a grievance.’” (quoting Jones v. Smith, 266 F.3d 399, 400 (6th Cir. 2001)).

Note 1074: Henderson v. Phillips, 2010 WL 3894574, *2 (N.D.Ind., Sept. 29, 2010) (holding remedies were unavailable where officials rejected plaintiff’s grievance and directed him to a process that by policy would not address his problem); Cooper v. Evans, 2010 WL 2219625, *6 (S.D.Ill., May 28, 2010) (declining to dismiss where plaintiff was told by the highest grievance authority to use a form that was in fact unavailable because reserved for prison staff), report and recommendation adopted, 2010 WL 3895702 (S.D.Ill., Sept. 29, 2010); Johnson v. Cannon, 2010 WL 936706, *4-5 (D.S.C., Mar. 15, 2010) (plaintiff who was directed to address his grievance to the Major, and did so without response, exhausted), aff’d, 390 Fed.Appx. 256 (4th Cir., Aug. 6, 2010); Randolph v. Kelly, 2010 WL 883747, *5 (E.D.Va., Mar. 9, 2010) (plaintiff who, inter alia, was repeatedly given contradictory information about where his grievances should be directed had no available remedy); Robertson v. Dart, 2009 WL 2382527, *3 (N.D.Ill., Aug. 3, 2009) (finding appeal unavailable where illiterate plaintiff was given wrong instructions how to fill out the appeal form); Shaw v. Jahnke, 607 F.Supp.2d 1005, 1008-09 (W.D.Wis. 2009) (finding no failure to exhaust where failure to complete the process resulted from misinformation in contradictory grievance decisions); Sumpter v. Skiff, 2008 WL 4518996, *6 (N.D.N.Y., Sept. 30, 2008) (finding special circumstances justifying failure to follow administrative appeal rules where administrative decision gave instructions that contradicted the rules); Plaster v. Kneal, 2008 WL 4090790, *3-4 (M.D.Pa., Aug. 29, 2008) (declining to dismiss where plaintiff missed a deadline after following erroneous advice from prison staff about how to appeal); Chinnici v. Edwards, 2008 WL 3851294, *5 (D.Vt., Aug. 12, 2008) (supervisor’s statement that sex abuse complaint did not require completing the grievance process could constitute estoppel or special circumstances excusing non-exhaustion); Spinney v. U.S., 2008 WL 1859810, *6 (W.D.Pa., Apr. 23, 2008) (if plaintiff delayed one grievance on advice of counselor, remedy may not have been available to him); McCray v. Peachey, 2007 WL 3274872, *6
(E.D.La., Nov. 6, 2007) (holding plaintiff who complied with the policy he was informed of exhausted, even if his grievance was rejected “solely on the basis that some other complaint process or policy was apparently in existence”); Ray v. Jones, 2007 WL 397084, *2 (W.D.Okla., Feb. 1, 2007) (declaring to dismiss for non-exhaustion where the plaintiff was repeatedly advised that an internal affairs investigation was a substitute for the grievance process); Flory v. Claussen, 2006 WL 3404779, *3-4 (W.D. Wash., Nov. 21, 2006) (holding prisoner who followed officials’ instruction to file an “appeal” to the Facility Risk Management Team about removal from his job, rather than a grievance, exhausted); Cahill v. Arpaio, 2006 WL 3201018, *3 (D.Ariz., Nov. 2, 2006) (holding plaintiff reasonably relied on grievance hearing officer’s statement that “(1) the matter was under investigation and he would not be notified of the results, (2) he could not appeal and would not be given a form, and (3) he should proceed to federal court,” notwithstanding that the preprinted decision form said it could be appealed); Scott v. California Supreme Court, 2006 WL 2460737, *7 (E.D.Cal., Aug. 23, 2006) (holding that a prisoner who had relied on officials’ misinformation and sought relief in state court had exhausted, notwithstanding officials’ subsequent issuance of an untimely decision which he did not appeal); Wheeler v. Goord, 2005 WL 2180451, *6 (N.D.N.Y., Aug. 29, 2005) (holding prisoner who was erroneously told to “write to Sergeant Coffee” to grieve raised an issue whether remedies were available); Croswell v. McCoy, 2003 WL 962534, *4 (N.D.N.Y., Mar. 11, 2003) (holding that a prisoner who relies on prison officials’ representations as to correct procedure has exhausted); O’Connor v. Featherston, 2003 WL 554752, *2-3 (S.D.N.Y., Feb. 27, 2003) (holding allegation that prison Superintendent told a prisoner to complain via the Inspector General rather than the grievance procedure presented triable factual issues); Heath v. Saddlemire, 2002 WL 31242204, *5 (N.D.N.Y., Oct. 7, 2002) (holding that a prisoner who was told by the Commission of Correction that notifying the Inspector General was the correct procedure was entitled to rely on that statement); Thomas v. New York State Dept. of Correctional Services, 2002 WL 31164546, *3 (S.D.N.Y., Sept. 30, 2002) (holding that a prisoner’s allegation that an officer told him he didn’t need to grieve because other prisoners had done so was sufficient to defeat summary judgment for non-exhaustion); Lee v. Walker, 2002 WL 980764, *2 (D.Kan., May 6, 2002) (holding that prisoner who sent his grievance appeal to the wrong place would be entitled to reconsideration of dismissal if he showed that the prison handbook said it was the right place); Hall v. Sheahan, 2001 WL 111019, *2 (N.D.Ill., Feb. 2, 2001) (holding that a prison officials’ statement to the plaintiff that she would have the toilet fixed, and he should stop asking her about it, might estop defendants from claiming non-exhaustion; it "raises the question whether Baker effectively represented (or misrepresented) to Hall that he had done all he needed to do, or that the grievance procedure was useless, i.e., ‘available,’ but not a ‘remedy.’"); Feliz v. Taylor, 2000 WL 1923506, *2-3 (E.D.Mich., Dec. 29, 2000) (holding that a plaintiff who was told his grievance was being investigated, then when he tried to appeal later was told it was untimely, had exhausted, since he had no reason to believe he had to appeal initially).

Note 1075: Boclar v. Illinois Dept. of Corrections, 2012 WL 463236, *4 (S.D.Ill., Jan. 24, 2012) (counselor’s statement that a grievance was unnecessary and internal affairs’ instruction “not to write crap (grievances) in again on staff” did not excuse failure to pursue grievance absent “affirmative misconduct” by staff or their representation that he had done all that was necessary), report and recommendation adopted, 2012 WL 878219, *3 n.3 (S.D.Ill., Mar. 14, 2012); Stuart v. Carbonelly, 2011 WL 7005724, *3 (N.D.Fla., Nov. 3, 2011) (“Prisoners cannot subvert the PLRA's exhaustion requirement merely by alleging prison officials told them an administrative process was futile or unnecessary because the prisoner sought monetary compensation unavailable through the administrative process.”), report and recommendation adopted, 2012 WL 94620 (N.D.Fla., Jan. 12, 2012), appeal dismissed, No. 12-11109 (11th Cir., July 13, 2012); Balorck v. Reece, 2007 WL 3120110, *4 (W.D.Ky., Oct. 23, 2007) (holding prisoner who was told by the Grievance Aide, the only means of filing a grievance, that his late grievance would not be accepted, could nonetheless have asked the Grievance Coordinator for an extension of time to file); Morgan v. Arizona, 2007 WL 2808477, *6 (D.Ariz., Sept. 27, 2007) (holding prisoner who was told he could not grieve an assault by his counselor, who refused to accept his grievance, was not excused from exhausting because he did not allege that he needed the counselor’s permission to file); Lopez
Gutierrez v. Maricopa County Sheriff’s Office, 2006 WL 2925666, *2 (D.Ariz., Oct. 11, 2006) (holding that unidentified officers said his “request did not warrant a grievance” did not make remedies unavailable); U.S. v. Ali, 396 F.Supp.2d 703, 707 (E.D.Va. 2005) (holding that a prisoner who received a response that “[a]s these issues are addressed by your attys [sic] and the government you will be informed” and did not appeal failed to exhaust); Thomas v. New York State Dep’t of Correctional Services, 2003 WL 22671540, *3-4 (S.D.N.Y., Nov. 10, 2003) (dismissing case where prison staff told the prisoner a grievance was not necessary; this was “bad advice, not prevention or obstruction,” and the prisoner did not make sufficient efforts to exhaust).

Note 1076: Stuart v. Taylor, 2012 WL 729220, *3 (W.D.Okla., Feb. 16, 2012) (declining to grant summary judgment for non-exhaustion of private corporation’s remedies which excluded complaints about contracting agencies’ policies or decisions), report and recommendation adopted, 2012 WL 729066 (W.D.Okla., Mar. 6, 2012); Walker v. McDonald, 2011 WL 5513446, *2 (E.D.Cal., Nov. 10, 2011) (holding plaintiff who received grievance response stating “The action or decision being appealed is not within the jurisdiction of the department” did not fail to exhaust; “plaintiff did what he was required to do and then was shut-out of the grievance process for a reason which appears to run afool of the regulations for the inmate grievance process.”); Złotorzynski v. Bozman, 2011 WL 5150854, *3 (D.Md., Oct. 27, 2011) (holding plaintiff was not obliged to appeal a grievance decision stating his request for protective custody was a non-grievable case management matter); Mclemore v. Cruz, 2011 WL 4101729, *3 (M.D.Fla., Sept. 14, 2011) (declining to dismiss in light of allegations that prison investigator told plaintiff a grievance would interfere with her investigation and was unnecessary); Weathington v. U.S., 2011 WL 1211509, *4 (W.D.Da., Mar. 3, 2011) (denying summary judgment where plaintiff who filed a grievance was told a damages claim should be pursued through an administrative tort claim), report and recommendation adopted, 2011 WL 1226046 (W.D.La., Mar. 30, 2011); Doner v. Mason, 2011 WL 915755,*6 (W.D.Pa., Feb. 25, 2011) (denying summary judgment where plaintiff was told that threats and harassment were not grievable issues), report and recommendation adopted in part, rejected in part on other grounds, 2011 WL 901008 (W.D.Pa., Mar. 15, 2011); James v. Hayden, 2010 WL 3341822, *10 (S.D.N.Y., Aug. 23, 2010), report and recommendation adopted in part, rejected in part on other grounds, 2010 WL 3703841 (S.D.N.Y., Sept. 21, 2010); Walker v. Shaw, 2010 WL 2541711, *14 (S.D.N.Y., June 23, 2010) (denying summary judgment where acts and statements of staff suggested “security risk group” classification was not grievable when plaintiff sought to grieve it); Davis v. Rouse, 2009 WL 4728988, *2 (D.Md., Dec. 3, 2009) (holding plaintiff had exhausted where his grievance was referred to the internal investigation unit and he was told that he could not pursue the grievance for that reason), vacated in part on reconsideration on other grounds, 2010 WL 2025554 (D.Md., May 18, 2010); Tolliver v. Ercole, 2009 WL 3094870, *5 (S.D.N.Y., Sept 9, 2009); Upthegrove v. Health Professionals, Ltd., 2009 WL 2244723, *5 (W.D.Wis., July 24, 2009) (holding plaintiff was entitled to rely on staff statements that grievance process could not overrule medical decisions), report and recommendation adopted, 2010 WL 1222053 (S.D.N.Y., Mar. 29, 2010); Johnson v. Van Boening, 2008 WL 4162901, *4 (W.D.Wash., Sept. 3, 2008) (plaintiff exhausted despite failure to appeal to third and final level where decisions at first two levels said complaint was non-grievable); Greene v. C.D.C., 2008 WL 413750, *2 (E.D.Cal., Feb. 8, 2008) (plaintiff exhausted without completing the grievance process where the response to his grievance said it was an abuse of the process and plaintiff should instead use a form for requesting an interview instead), report and recommendation adopted, 2008 WL 683551 (E.D.Cal., Mar. 13, 2008); Marr v. Fields, 2008 WL 828788, *6 (W.D.Mich., Mar. 27, 2008) (where prisoner was told by staff his disciplinary retaliation claim could not be grieved, dismissal for non-exhaustion was denied); Kelley v. Roberts, 2008 WL 714097, *2 (W.D.Wash., Mar. 14, 2008) (declining to dismiss claim of plaintiff who was advised through an “initial grievance” that his issue should be addressed through the classification process and not the grievance process, and did so); Bryant v. Sacramento County Jail, 2008 WL 410608, *5-6 (E.D.Cal., Feb. 12, 2008) (denying summary judgment where prisoner was directed to “citizen complaint” procedure rather than jail grievance procedure), report and recommendation adopted, 2008 WL 780704 (E.D.Cal., Mar. 21, 2008); Smith v. Westchester County Dept. of Corrections, 2008 WL 423
361130, *3 (S.D.N.Y., Feb. 7, 2008) (plaintiff reasonably believed his claim was not grievable where a Sergeant told him so); Riley v. Hawai Dept. of Public Safety, 2007 WL 3072777, *4-6 (D.Haw., Oct. 17, 2007) (holding sexual assault victims who completed the emergency grievance process as instructed, rather than the regular grievance process, had exhausted); Rasmussen v. Richards, 2007 WL 2677129, *2 (W.D.Wash., Sept. 7, 2007) (declaring to dismiss for non-exhaustion where prisoner challenging failure to release him on the proper date was told he could not file a grievance concerning his sentence); Lewis v. Cunningham, 2007 WL 2412258, *2 (S.D.N.Y., Aug. 23, 2007) (holding prisoner who was told by grievance official that his medical complaint should go to the Chief Medical Officer rather than the grievance system showed special circumstances excusing lack of proper exhaustion); Partee v. Grood, 2007 WL 2164529, *4 (S.D.N.Y., July 25, 2007) (prisoner whose grievance response said his issue is “beyond the purview” of the grievance process showed special circumstances justifying failure to appeal); Davis v. Williams, 495 F.Supp.2d 453, 457 (D.Del., July 19, 2007) (where grievance response said “not grievable” because “inmates cannot request or demand disciplinary action on staff,” plaintiff had no available remedy); Tweed v. Schuetze, 2007 WL 2050782, *8 (D.N.D., July 12, 2007) (declining to dismiss for not completing grievances where officials had advised that was not the correct procedure); Kounelis v. Shererr, 2005 WL 2175442, *7-8 (D.N.J., Sept. 6, 2005) (declining to dismiss for not appealing a grievance where prisoner was told he could not file a grievance because the issue belonged in the disciplinary process or in court); Beltran v. O’Mara, 405 F.Supp.2d 140, 154 (D.N.H. 2005) (holding, where a grievance was rejected on the ground that incidents which were the subject of disciplinary proceedings could not be grievable, “a reasonable inmate in [the plaintiff’s] position” would believe the grievance process was not an available remedy and his claims should be raised in the disciplinary process), on reconsideration, 2006 WL 240558 (D.N.H., Jan. 31, 2006); Martin v. Gold, 2005 WL 1862116, *8 (D.Vt., Aug. 4, 2005) (“an inmate who is told that a claim is not grievable is not required to appeal the investigator’s determination”); Willis v. Smith, 2005 WL 550528, *13 (N.D.Iowa, Feb. 28, 2005) (declining to dismiss where plaintiff relied on the statement of a prison official that the written grievance policy was unavailable); Lane v. Doan, 287 F.Supp.2d 210, 212 (W.D.N.Y. 2003) (holding that exhaustion is excused where the plaintiff is led to believe the complaint is not a grievance matter or would otherwise be investigated, or that administrative remedies are unavailable); Boomer v. Lanigan, 2002 WL 31413804, *8 (S.D.N.Y., Oct. 25, 2002); Simpson v. Gallant, 231 F.Supp.2d 341, 350 (D.Me. 2002); Simpson v. Gallant, 2002 WL 1380049 (D.Me., June 26, 2002); Boomer v. Lanigan, 2001 WL 1646725 (S.D.N.Y., Dec. 17, 2000); Freeman v. Snyder, 2001 WL 515258, *7-8 (D.Del., Apr. 10, 2001).

Note 1078: Martin v. Niagara County Jail, 2012 WL 3230435, *7 (W.D.N.Y., Aug. 6, 2012) (declining to grant summary judgment for non-exhaustion where prisoner attested that he had not received the handbook describing the grievance policy); Sees the Ground v. Corrections Corp. of America, 2012 WL 2878606, *2-3 (D.Mont., June 19, 2012) (declining to dismiss for non-exhaustion where prison handbook included only general information concerning the grievance process but did not describe the process, and defendants failed to show this information was made available otherwise to the plaintiff), report and recommendation adopted, 2012 WL 2878415 (D.Mont., July 13, 2012); Hood v. Perkins, 2012 WL 2861728, *4-5 (N.D.Ala., May 25, 2012) (declining to dismiss for non-exhaustion where there was a factual dispute whether plaintiff had received notice of rather informal grievance system whose existence was conveyed by word of mouth), report and recommendation adopted, 2012 WL 2861823 (N.D.Ala., July 6, 2012); Cowan v. Justus, 2011 WL 5914627, *3-4 (S.D.Ill., Nov. 2, 2011) (finding a jail had no “legitimate” grievance system where instructions to prisoners consisted of a single sentence in the prisoners’ handbook, which contradicted the directions on the grievance form, and where neither described an appeal procedure), report and recommendation adopted, 2011 WL 5914324 (S.D.Ill. Nov. 28, 2011); Troy D. v. Mickens, 806 F.Supp.2d 758, 767 (D.N.J. 2011) (declining to find state administrative code provision an available remedy “absent any evidence that juveniles at JJC-operated facilities were educated about this procedure or had access to the materials necessary to utilize it”); Miller v. Shah, 2011 WL 2672257, *4 (S.D.Ill., June 8, 2011) (noting defendants showed only that there was only a brief reference in a 23-page rulebook to complaint procedures, and no evidence of any further
instruction), report and recommendation adopted, 2011 WL 2679091 (S.D.III., June 30, 2011); Schneider v. Parker, 2011 WL 722759, *3 n.2 (M.D.Fla., Feb. 23, 2011) (declining to dismiss where prisoner stated he never received an inmate handbook or other information about the grievance system); Bush v. Horn, 2010 WL 1712024, *3-4 (S.D.N.Y., Mar. 2, 2010) (failure to provide grievance procedure is a special circumstance excusing non-exhaustion); Berry v. Peterman, 2010 WL 724391, *6 (E.D.Wis., Feb. 26, 2010) (refusing to dismiss where plaintiff denied receiving a copy of the grievance procedure and stated that he received misinformation when he asked about it); Torres v. Anderson, 674 F.Supp.2d 394, 400 (E.D.N.Y. 2009) (refusing to find lack of proper exhaustion in failure to comply with rule about grieving after a transfer that was neither in the regulations nor the internal procedures of the prisons involved, but was only in a Program Statement that was available in the law library but there was no indication why the prisoner should look at it); Peterson v. Anderson, 2009 WL 4506542, *2-3 (D.Mont., Dec. 2, 2009) (denying summary judgment to defendants based on evidence there was no inmate manual or posted policy describing a grievance procedure); Hunter v. Indiana Dept. of Corrections, 2009 WL 3199170, *4-6 (N.D.Ind., Sept. 29, 2009) (denying summary judgment where plaintiff missed a two-day deadline because he was hospitalized, learning later that the deadline had been extended but he had not been informed of the change); Upthegrove v. Health Professionals, Ltd., 2009 WL 2244723, *5 (W.D.Wis., July 24, 2009) (denying summary judgment absent evidence that plaintiff would have known of the need to appeal); Zimmerman v. Schaeffer, 654 F.Supp.2d 226, 233-34 (M.D.Pa. 2009) (denying summary judgment to defendants where policy was not in inmate handbook and was posted only intermittently in housing units, and staff responsible for enforcing it were not shown to have understood it); Reynolds v. Curry County Sheriff Dept. Employees, 2008 WL 5146122, *3 (D.Or., Dec. 4, 2008) (declining to dismiss where plaintiff denied receiving Inmate Manual or other information about grievance process); Sims v. Rewerts, 2008 WL 2224132, *5-6 (E.D.Mich., May 29, 2008) (refusing to dismiss where plaintiff failed to comply with a time limit that had been changed without notice); Cabrera v. LeVierge, 2008 WL 215720, *6 (D.N.H., Jan. 24, 2008) (“inmates cannot be expected to meet procedural requirements that are undisclosed”); Romanelli v. Suliene, 2008 WL 4587110, *6 (W.D.Wis., Jan. 10, 2008) (“If officials want to use § 1997e(a) to obtain dismissal of lawsuits filed without using the administrative remedy process, they must at least tell the prisoner what the process is.”); Lampkins v. Roberts, 2007 WL 924746, *3 (S.D.Ind., Mar. 27, 2007) (refusing to dismiss for missing a five-day time deadline which was not made known in the materials made available to prisoners); Allen v. McMorris, 2007 WL 172564, *2 (E.D.Mo., Jan. 19, 2007) (holding allegation that prisoner could not get grievance policy or forms barred summary judgment for defendants); Russell v. Unknown Cook County, Sheriff’s Officers, 2004 WL 2997503, *4-5 (N.D.Ill., Dec. 27, 2004) (holding where plaintiff alleged ignorance of the remedy, defendants must establish that they gave actual notice of it); Sadler v. Rowland, 2004 WL 2061518, *7 (D.Conn., Sept. 13, 2004) (refusing to dismiss claim of Connecticut prisoner transferred to Virginia who attempted to grieve in Virginia and was not told to file separate grievances in Connecticut); Burgess v. Garvin, 2004 WL 527053, *5 (S.D.N.Y., Mar. 16, 2004) (holding that “procedural channels . . . not made known to prisoners . . . are not an ‘available’ remedy in any meaningful sense. . . . [Congress] cannot have meant that prisoners would be expected to exhaust remedies of which they were kept entirely ignorant.”); Arnold v. Goetz, 2003 WL 256777, *6-7 (S.D.N.Y., Feb. 4, 2003) (holding defendants required to make a “reasonable, good faith effort to make the grievance procedure available to inmates”); Hall v. Sheahan, 2001 WL 111019, *2 (N.D.Ill., Feb. 2, 2001) (“An institution cannot keep inmates in ignorance of the grievance procedure and then fault them for not using it. A grievance procedure that is not made known to inmates is not an ‘available’ administrative remedy.”); Alvarez v. U.S., 2000 WL 557328, *2 (S.D.N.Y., May 8, 2000) (stating that a showing that prisoner was not “meaningfully informed” about administrative remedies could establish that they were not available), on reconsideration, 2000 WL 679009 (S.D.N.Y., May 24, 2000).


Note 1099: Tweed v. Schuetzle, 2007 WL 2050782, *8 (D.N.D., July 12, 2007) (officials might be estopped from claiming plaintiffs should have completed the grievance process where they had advised plaintiffs that was not the correct procedure); Snyder v. Goord, 2007 WL 957530, *10 (N.D.N.Y., Mar. 29, 2007) (holding grievance supervisor’s advice that if a problem had been brought “to some administration’s attention” it need not be grieved might estop the defendants); Lawyer v. Gatto, 2007 WL 549440, *7 (S.D.N.Y., Feb. 21, 2007) (holding defendants estopped from arguing plaintiff should have refiled his grievance citing mitigating circumstances for its lateness where the grievance supervisor had already rejected his mitigating circumstances); Rivera v. Goord, 2003 WL 1700518, *7 (S.D.N.Y., Mar. 28, 2003) (stating that prison officials may be estopped from asserting non-exhaustion where a prisoner has been told by officials that his complaint is not a “grievance matter” and is being otherwise investigated, or has been led to believe that administrative remedies are unavailable); Heath v. Saddlemire, 2002 WL 31242204, *5 (N.D.N.Y., Oct. 7, 2002) (holding that reliance on officials’ representations as to proper procedure estops prison officials from claiming non-exhaustion as to prisoner who followed the representations); Simpson v. Gallant, 223 F.Supp.2d 286, 292 (D.Me. 2002) (holding prison officials who said the plaintiff’s problem was not grievable were estopped from claiming non-exhaustion), aff’d, 62 Fed.Appx. 368, 2003 WL 21026723 (1st Cir. 2003); Hall v. Sheahan, 2001 WL 111019, *2 (N.D.Ill., Feb. 2, 2001) (holding that a prison official’s statement to the plaintiff that she would have the toilet fixed, and he should stop asking her about it, might estop defendants from claiming non-exhaustion); Davis v. Frazier, 1999 WL 395414, *4 (S.D.N.Y., June 15, 1999) (holding that an allegation that prisoners were told at orientation that “a grievance cannot be brought against Officers or
Staff" supports an estoppel defense to non-exhaustion).


Note 1312: Hejny v. Dallas County Jail, 2007 WL 426228, *2 (N.D.Tex., Feb. 5, 2007) (holding bruises, deep scratches, and sore neck from being slammed to the ground were de minimis); Green v. McBride, 2007 WL 295592, *4 (D.S.C., Jan. 29, 2007) (holding plaintiff who alleged that he was punched in the face and thrown on his face on the floor and sustained a bruised, swollen, and scraped cheek had only de minimis injuries); Geter v. Goode, 2006 WL 1129407, *2 (D.S.C., Apr. 25, 2006) (holding “superficial abrasions and scarred tissue” de minimis); Trevino v. Johnson, 2005 WL 3360252,
*5 (E.D.Tex., Dec. 8, 2005) (holding a prisoner who was struck twice in the face and had his fingers pulled back had de minimis injury where he sustained only an abrasion to the forehead); Rawls v. Payne, 2006 WL 2844563, *5 (S.D.Miss., Sept. 11, 2006) (holding “scratches, bruises, a busted lip, and a sprained ankle” resulting from an assault were de minimis); Gibson v. Galaza, 2006 WL 829120, *10 (E.D.Cal., Mar. 29, 2006) (holding multiple abrasions, a small cut on lip, and a bruised right knee are de minimis); Wallace v. Brazil, 2005 WL 4813518, *1 (N.D.Tex., Oct. 10, 2005) (holding a knot on the head allegedly inflicted by an officer with an iron bar was de minimis); Cuciak v. Hutler, 2005 WL 1140690, *2-3 (D.N.J., May 13, 2005) (dismissing allegation that defendant pushed plaintiff, stepped on his bare foot and broke his toenail; court notes that the plaintiff did not allege his injury required medical attention); Luong v. Hatt, 979 F.Supp. 481, 485-86 (N.D.Tex. 1997) (“A physical injury is an observable or diagnosable medical condition requiring treatment by a medical care professional”; holding abrasion of arm and chest, contusion and swelling of jaw did not meet that standard).


was *de minimis*); Garcia v. Watts, 2009 WL 2777085, *1, *20 (S.D.N.Y., Sept. 1, 2009) (allegation that staff member grabbed plaintiff’s buttocks and later rubbed his penis against them, combined with other non-physical mistreatment, did not allege physical injury); Garcia v. Watts, 2009 WL 2777085, *1, *20 (S.D.N.Y., Sept. 1, 2009) (allegation that staff member grabbed plaintiff’s buttocks and later rubbed his penis against them, combined with other non-physical mistreatment, did not allege physical injury); Wilson v. Longino, 2009 WL 1076684, *4 (W.D.La., Apr. 21, 2009) (holding male prisoner’s complaint of coerced sex with female staff member involved no physical injury); Marino v. Commissioner, Maine Dept. of Corrections, 2009 WL 1150104, *2 (D.Me., Apr. 28, 2009) (allegation that officers forced plaintiff to grab his genitals in a provocative position and walk down the hall in view of opposite sex staff; neither physical pain nor later panic attack were physical injuries), *report and recommendation adopted*, 2009 WL 1395164 (D.Me., May 18, 2009); Jones v. Gudmundson, 2009 WL 651994, *3 (D.Minn., Mar. 7, 2008) (holding male prisoner’s complaint of sexual relationship with female employee was precluded absent physical injury; nothing indicates the relationship was nonconsensual or the plaintiff suffered any non-physical harm); Cobb v. Kelly, 2007 WL 2159315, *1 (N.D.Miss., July 26, 2007) (holding male prisoner’s allegation that female officer “reached her hand between his legs and rubbed his genitals” was not a physical injury under § 1997e(e)); Smith v. Shady, 2006 WL 314514, *2 (M.D.Pa., Feb. 9, 2006) (holding allegation that officer grabbed prisoner’s penis and held it in her hand was *de minimis* under § 1997e(e)).


Note 1328: Ringgold v. Federal Bureau of Prisons, 2007 WL 2990690, *2, 4-5 (D.N.J., Oct. 5, 2007) (holding an injection that might have exposed the plaintiff to other people’s blood did not meet the injury threshold); Patrick v. Bobby, 2007 WL 2446574, *3 (N.D.Ohio, Aug. 23, 2007) (rejecting claim based on failure to remove plaintiff from a unit where smoking is permitted, since his medical records show no resulting physical injury); Muhammad v. Sherrer, 2007 WL 2021789, *5 (D.N.J., July 9, 2007) (holding claim prisoner was “overcome” by silicon fumes and suffered high blood pressure as a result was de minimis); Mayes v. Travis State Jail, 2007 WL 1888828, *4-5 (W.D.Tex., June 29, 2007) (sinus infection allegedly caused by black mold and diarrhea allegedly caused by spoiled food were de minimis); Cotter v. Dallas County Sheriff, 2006 WL 1652714, *3-4 (N.D.Tex., June 15, 2006) (holding exposure to welding dust and metal shaving allegedly resulting in an undiagnosed nervous condition did not constitute physical injury); Moore v. Bucher, 2006 WL 1451544, *2 (N.D.Fla., May 23, 2006) (holding prisoner who said he was subjected to smoke and fumes from construction and renovation for 10-12 hours a day for about ten days did not meet the physical injury standard because he complained only “that he has
asthma, suffered pain, and had to be treated with medication such as antibiotics and ibuprofen”); Gill v. Shoemate, 2006 WL 1285412, *5 (W.D.La., May 8, 2006) (holding headaches and eye and throat irritation resulting from exposure to mold, mildew, dust and fumes were de minimis); Reeves v. Jensen, 2005 WL 2090896, *1-2 (W.D.Mich., Aug. 30, 2005) (dismissing as de minimis a claim that plaintiff “became ill” after a chemical agent was used against another prisoner); Hogg v. Johnson, 2005 WL 139103, *1, *3 (N.D.Tex., Jan. 21, 2005) (dismissing allegation that plaintiff was “gassed three times for asking for a mattress and standing up for his rights” for lack of physical injury), report and recommendation adopted, 2005 WL 762137 (N.D.Tex., Apr. 1, 2005).


v. C.D.C., 2006 WL 2385150, *1 n.1 (E.D.Cal., Aug. 17, 2006) (noting that the statute says only that prisoners can’t proceed “under this section”—i.e., 28 U.S.C. § 1915, the in forma pauperis statute—if they have three strikes, while other provisions of § 1915 explicitly provide for dismissal), report and recommendation adopted, 2006 WL 2686992 (E.D.Cal., Sept. 19, 2006).

Note 1610: Tucker v. Dawkins, 2008 WL 510199, *2 (W.D.N.C., Feb. 22, 2008) (broad and unsupported allegation that superintendent had solicited prisoners to murder plaintiff does not meet imminent danger standard); Johnson v. Alabama Dept. of Corrections, 2008 WL 276577, *1 (M.D.Ala., Jan. 29, 2008) (discontinuance of hormone treatment for gender identity disorder, allegedly causing “excessive weight gain, complete body fat redistribution, dizzy spells, fainting spells, headaches, hot flashes, anxiety, severe depression, more depression than usual, . . . [and] the growth of first time facial hair,” did not meet the imminent danger standard); Gillilan v. Powell, 2007 WL 3286684, *2 (S.D.Ga., Nov. 6, 2007) (rejecting claim of great pain and risk of death from failure to remove gallbladder where records showed he had had gallstones for over a year and he didn’t specifically argue that his condition had worsened over that time); Leach v. Brownlee, 2007 WL 3025092, *2 (E.D.Ark., Oct. 15, 2007) (holding that prospect of being sent to a sex offender program and being housed with sex offenders who, the plaintiff said, might cut his throat was not specific enough to show imminent danger); Oluwa v. Bliesner, 2007 WL 2457510, *1 (N.D.Cal., Aug. 27, 2007) (holding lack of a Rastafarian diet did not meet the standard); Smith v. Harris, 2007 WL 710172, *4 (N.D.Fla., Mar. 6, 2007) (holding threats of bodily harm and death do not constitute imminent danger absent conduct or other evidence supporting their credibility; the fact that the plaintiff filed grievances and this lawsuit shows he didn’t take them seriously); Rodriguez v. Texas Dept. of Public Safety, 2007 WL 162830, *2-3 (E.D.Tex., Jan. 22, 2007) (stating, after a hearing where plaintiff reported a three-month-old threat to “bash his brains in” and his cell door having been left open on the night of a homicide, that plaintiff’s “subjective belie[f]” in danger was not supported by objective evidence); Skillern v. Jackson, 2006 WL 1687752, *2 (S.D.Ga., June 14, 2006) (rejecting allegation that denial of access to courts had and would continue to cause heart attacks).

Note 1612: Jones v. Epps, 2008 WL 907663, *1 (S.D.Miss., Apr. 2, 2008) (rejecting claim of imminent danger based on exposure to second-hand smoke and resulting asthma), certificate of appealability denied, 2008 WL 1932402 (S.D.Miss., Apr. 28, 2008); Pruden v. Mayer, 2008 WL 919554, *3 (M.D.Pa., Apr. 2, 2008) (concluding that prisoner’s medical care claims did not pose imminent danger because they had occurred over a long period of time); Porter v. Barfield, 2007 WL 4365449, *1 (M.D.Fla., Dec. 10, 2007) (rejecting claim of imminent danger based on alleged death threats by guards, on the ground that none of those guards were defendants, plaintiff had filed still-pending grievances concerning them, and he did not seek injunctive relief); Hickmon v. Florida Dept. of Corrections, 2007 WL 3023990, *2 (N.D.Fla., Oct. 16, 2007) (holding that prisoner’s complaint lacked sufficient detail to demonstrate imminent danger, and the fact that he had been placed in protective custody and then waited two months to file showed it was not imminent); Martinez v. Cosner, 2007 WL 2962733, *1 (D.Colo., Oct. 9, 2007) (holding that claim of gang attack did not meet standard where plaintiff had been placed in protective custody and did not say he was housed with gang members; claim of suicide risk did not meet standard because he waited almost a month before presenting his claims and did not seek injunctive relief); Gillilan v. Walkins, 2007 WL 2904129, *2 (S.D.Ga., Oct. 1, 2007) (holding plaintiff’s claim of suicide risk arising from his mental health problems did not present an imminent risk because he had a new mental health counselor); Perry v. Mills, 2007 WL 2821803, *3 (W.D.Va., Sept. 27, 2007) (holding plaintiff’s claim of nosebleeds and migraine headaches caused by lint and dust from the ventilation system did not show imminent danger without support for his allegation of causation and lack of specificity about their frequency); Reeves v. Alexander, 2007 WL 2792222, *2 n.1 (W.D.Mich., Sept. 24, 2007) (holding allegation that unsanitary environment causes asthmatic breathing difficulties, bleeding, and headaches as a result of allergies does not meet imminent danger standard, since plaintiff has been taken to the hospital by ambulance as needed); Gilmore v. Wright, 2007 WL 2564702, *2-3 (D.S.C., Aug. 14, 2007) (assuming complaint of inability to see an “HIV doctor” reflects only a desire to see a
doctor of plaintiff’s choice, holding internal bleeding does not pose imminent danger because it seems to have been a problem for two years), report and recommendation adopted, 2007 WL 2493569 (D.S.C., Aug. 29, 2007).

Note 1613: Palmer v. N.Y.S. Dept. of Correction Greenhaven, 2007 WL 4258230, *3 (S.D.N.Y., Dec. 4, 2007) (finding frivolous a prisoner’s allegation of imminent danger in that his toenails were turning black, yellow and green from an infection, and his fingernails were becoming swollen, and he was going to lose six toenails and a fingernail as a result), aff’d, 342 Fed.Appx. 654 (2d Cir. 2009); Censke v. Smith, 2007 WL 2594539, *2 (W.D.Mich., Sept. 4, 2007) (holding that a prisoner who alleged that he was routinely exposed to raw sewage flooding his cell and leaking from the ceiling, and who said he had experienced various illnesses as a result, did not meet the standard), reconsideration denied, 2007 WL 2904047 (W.D.Mich., Oct. 3, 2007); Fuller v. Johnson County Bd. of County Com’rs, 2007 WL 2316926, *1 n.3 (D.Kan., Aug. 8, 2007) (holding plaintiff’s claim that “emission of dust, lint, shower odor, and dead human skin caused him to suffer headaches, watery eyes, a change in voice, and increased mucus” did not satisfy the exception because he “did not as directly complain of breathing difficulties” as a prisoner in another case); Owens v. Filsinger, 2007 WL 844827, *2 (W.D.Mich., Mar. 19, 2007) (holding plaintiff complaining of lack of Hepatitis C treatment for years did not allege imminent danger absent non-conclusory claim of serious injury); Watley v. Collins, 2006 WL 3422996, *1-2 (S.D.Ohio, Nov. 28, 2006) (holding plaintiff failed to meet imminent danger standard despite allegations that he is mentally ill and has been placed in supermax conditions as a result of his misbehavior, which aggravates his mental illness and therefore his misbehavior; has attempted suicide; engages in deranged behavior disturbing other inmates, who throw urine and feces at him; and has been maced); Hamilton v. Blunt, 2006 WL 2714910, *1-2 (W.D.Mo., Sept. 22, 2006) (holding allegation that environmental tobacco smoke aggravated plaintiff’s preexisting asthma did not meet imminent danger standard); Jones v. Large, 2005 WL 2218420, *1 (W.D.Va., Sept. 13, 2005) (holding exception inapplicable despite prisoner’s allegation of verbal threats by staff, including to “whupp his ass” and to kill him).

APPENDIX B
The Prison Litigation Reform Act, as Codified

I. SCOPE AND APPLICABILITY OF THE STATUTE

From the prospective relief provisions:


* * *

(2) the term “civil action with respect to prison conditions” means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term “prisoner” means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

* * *

(5) the term “prison” means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

From the prisoner litigation provisions:


As used in this section, the term “prisoner” means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

28 U.S.C. § 1915A(c). Definition.--As used in this section, the term “prisoner” means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.
II. PROSPECTIVE RELIEF RESTRICTIONS

18 U.S.C. § 3626. Appropriate remedies with respect to prison conditions

(a) Requirements for relief.--

(1) Prospective relief.--(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless--

(i) Federal law requires such relief to be ordered in violation of State or local law;

(ii) the relief is necessary to correct the violation of a Federal right; and

(iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) Preliminary injunctive relief.--In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

(3) Prisoner release order.--(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless--

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court
orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may *sua sponte* request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that--

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

(b) Termination of relief.--

(1) Termination of prospective relief.--(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervenor--

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

(2) Immediate termination of prospective relief.--In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any
prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) Limitation.--Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

(4) Termination or modification of relief.--Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

(c) Settlements.--

(1) Consent decrees.--In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

(2) Private settlement agreements.--(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

(d) State law remedies.--The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

(e) Procedure for motions affecting prospective relief.--

(1) Generally.--The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

(2) Automatic stay.--Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period--

(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and
(B) ending on the date the court enters a final order ruling on the motion.

(3) Postponement of automatic stay.--The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court’s calendar.

(4) Order blocking the automatic stay.--Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

(f) Special masters.--

(1) In general.--(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

(2) Appointment.--(A) If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party’s list.

(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

(3) Interlocutory appeal.--Any party shall have the right to an interlocutory appeal of the judge’s selection of the special master under this subsection, on the ground of partiality.

(4) Compensation.--The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

(5) Regular review of appointment.--In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.
(6) Limitations on powers and duties.--A special master appointed under this subsection--

(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

(B) shall not make any findings or communications ex parte;

(C) may be authorized by a court to assist in the development of remedial plans; and

(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

(g) Definitions.--As used in this section--

(1) the term “consent decree” means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

(2) the term “civil action with respect to prison conditions” means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term “prisoner” means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term “prisoner release order” includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

(5) the term “prison” means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

(6) the term “private settlement agreement” means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term “prospective relief” means all relief other than compensatory monetary damages;

(8) the term “special master” means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and
(9) the term “relief” means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.

Amendment: Special Masters Appointed Prior to Apr. 26, 1996; Prohibition on Use of Funds

Pub.L. 104-208, Div. A, Title I, § 101(a) [Title III, § 306], Sept. 30, 1996, 110 Stat. 3009-45, provided that: “None of the funds available to the Judiciary in fiscal years 1996 and 1997 and hereafter shall be available for expenses authorized pursuant to section 802(a) of title VIII of section 101(a) of title I of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Public Law 104-134 [enacting this section], for costs related to the appointment of Special Masters prior to April 26, 1996.”

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES


No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

IV. MENTAL OR EMOTIONAL INJURY


No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).


* * *

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(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

As used in this chapter--:

*  *  *

(2) the term “sexual act” means--

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; . . .

V. ATTORNEYS’ FEES


(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney’s fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff’s rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the
violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant. If the award of attorney’s fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney’s fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney’s fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

VI. FILING FEES AND COSTS/SCREENING AND DISMISSAL


(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner’s account; or
(B) the average monthly balance in the prisoner’s account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month’s income credited to the prisoner’s account. The agency having custody of the prisoner shall forward payments from the prisoner’s account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

e)(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)(1) Judgment may be rendered for costs at the conclusion of the suit or action as in
other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term ‘prisoner’ means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

28 U.S.C. § 1915A. Screening

(a) Screening.--The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal.--On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

(c) Definition.--As used in this section, the term “prisoner” means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.


(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is
satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be
granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon
which relief can be granted, or seeks monetary relief from a defendant who is immune from such
relief, the court may dismiss the underlying claim without first requiring the exhaustion of
administrative remedies.

VII. THREE STRIKES PROVISION


In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or
proceeding under this section if the prisoner has, on 3 or more prior occasions, while
incarcerated or detained in any facility, brought an action or appeal in a court of the United
States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim
upon which relief may be granted, unless the prisoner is under imminent danger of serious
physical injury.


(3) In addition to the limitations of section 1915 of title 28, United States Code, in no
event shall a prisoner file a claim under a civil forfeiture statute or appeal a judgment in a civil
action or proceeding based on a civil forfeiture statute if the prisoner has, on three or more prior
occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of
the United States that was dismissed on the grounds that it is frivolous or malicious, unless the
prisoner shows extraordinary and exceptional circumstances.

IX. WAIVER OF REPLY

42 U.S.C. § 1997e(g).

(1) Any defendant may waive the right to reply to any action brought by a prisoner
confined in any jail, prison, or other correctional facility under section 1983 of this title or any
other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not
constitute an admission of the allegations contained in the complaint. No relief shall be granted
to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this
section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

X. HEARINGS BY TELECOMMUNICATION AND AT PRISONS


(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner’s participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

XI. REVOCATION OF EARNED RELEASE CREDIT


In any civil action brought by an adult convicted of a crime and confined in a Federal correctional facility, the court may order the revocation of such earned good time credit under section 3624(b) of title 18, United States Code, that has not yet vested, if, on its own motion or the motion of any party, the court finds that--

(1) the claim was filed for a malicious purpose;

(2) the claim was filed solely to harass the party against which it was filed; or

(3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court.

Note: There are two statutes numbered 28 U.S.C. § 1932. The other has nothing to do with prisoners or prison litigation.
XII. DIVERSION OF DAMAGE AWARDS (not codified)

A. Notice to Crime Victims of Pending Damage Award


Prior to payment of any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, reasonable efforts shall be made to notify the victims of the crime for which the prisoner was convicted and incarcerated concerning the pending amount of any such compensatory damages.

B. Payment of Damage Award in Satisfaction of Pending Restitution Orders


Any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, shall be paid directly to satisfy any outstanding restitution orders pending against the prisoner. The remainder of any such award after full payment of all pending restitution orders shall be forwarded to the prisoner.

XIII. BANKRUPTCY

11 U.S.C. § 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

* * *

(17) for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under section 1915(b) or (f) of of title 28 (or a similar non-Federal law), or the debtor’s status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law); . . .